

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable W. Jeffrey Young

Opinion No. 2015-UP-126 (S.C. Ct. App. Filed March 11, 2015)
Appellate Case No. 2015-001503

First National Bank of the South, Successor in interest to Carolina National Bank and
Trust Company,

.....Respondent,

v.

James T. Callihan a/k/a James Callihan; Edward L. Williams; Frank J. Pennisi a/k/a
Frank Pennisi; Dean J. Karavan a/k/a D.J. Karavan; Charles T. Walls, Jr. a/k/a Charles
Walls; Robert S. Guyton; and Jeffrey H. Skelley, Defendants,

Of Whom Frank J. Pennisi and Charles T. Walls are

.....Petitioners.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court issue a Writ of Certiorari to review the joint conclusion by both the Court of Appeals and the Trial Court that Petitioners were not released from their obligations as guarantors of the loan because the subsequent loan renewals and partial payment of the original note did not constitute a novation and where there are no exceptional circumstances warranting review and the conclusion is supported by the undisputed evidence and the law?
2. Should this Court issue a Writ of Certiorari to review the joint conclusion by both the Court of Appeals and the Trial Court that the case was prosecuted by a proper party and where there are no exceptional circumstances warranting review and the conclusion is supported by the undisputed evidence and the law?

COUNTER-STATEMENT OF THE CASE

This case is an action to collect payments of personal guaranty agreements signed by Petitioners and their co-defendants. On April 13, 2010, Respondent First National Bank of the South (“FNBS” or “Respondent”) filed its Complaint seeking damages of \$253,699.44, plus late fees, interest, and attorneys’ fees. Petitioners answered, denying Respondent’s claims and asserting numerous affirmative defenses. Judge W. Jeffrey Young conducted a non-jury trial on May 20, 2013. By Order filed June 29, 2013, the trial court ruled in favor of Respondent and entered judgment against Petitioners and their co-defendants in the amount of \$358,166.76.

Petitioners appealed the trial court’s Order to the Court of Appeals. On March 11, 2015, in a *per curiam* unpublished opinion, with all judges concurring, the Court of Appeals affirmed the trial court’s Order. Petitioner thereafter petitioned for rehearing *en banc*. The Court of Appeals filed its Order Denying Petition for Rehearing on June 19, 2015.

Petitioners thereafter sought this Petition for Writ of Certiorari. The Court of Appeals correctly affirmed the trial court’s findings that Petitioners were not released from their obligations as guarantors of the loan and the case was prosecuted by a proper party. Accordingly, there is no basis to award a writ of certiorari in this matter.

COUNTER-STATEMENT OF THE FACTS

Sand Dollar Cottage, LLC (the “Borrower”) made, executed, and delivered to Carolina National Bank and Trust Company (“Carolina National”) a written promissory note dated November 8, 2006, as amended, modified, and/or renewed by written instruments dated December 21, 2007, and April 30, 2008 (collectively hereinafter referred to as the “Note”). See R. p. 13, ¶ 9; pp. 210-16. Under the terms of the Note, the Borrower promised to pay to Respondent the original principal sum of \$400,000.00, together with interest on the outstanding principal balance payable upon the terms and conditions set forth in the Note. See R. p. 13, ¶ 9.

To secure repayment of the Note, each of the Defendants (the “Guarantors”), who are members of the Borrower, executed and delivered to Carolina National a separate Guaranty dated November 8, 2006 (each “Guaranty” and collectively, the “Guaranty Agreements”). See R. p. 13, ¶ 14; p. 14, ¶ 20; p. 15, ¶ 26; p. 16, ¶¶ 32, 38; p. 17, ¶ 44; p. 18, ¶ 50; pp. 217-30. The Guaranty Agreements were guaranties of payment and secured the repayment of the Note and any extensions, renewals, or replacements thereof and also inured to the benefit of Carolina National and its participants, successors, and assigns. See R. pp. 217-30.

The Borrower used the proceeds of the loan to purchase a waterfront house in the Commonwealth of the Bahamas. See R. p. 95, lines 10-15. The property was not pledged as collateral for the loan due to the complexities of securing real property in the Commonwealth of the Bahamas. See R. p. 3, ¶ 4.

As part of a loan renewal process in 2008, the Borrower made a principal reduction payment in the amount of \$100,000.00, thereby reducing the principal balance due and owing under the Note to \$300,000.00. See R. p. 92, lines 6-7; p. 231. Petitioners

Pennisi and Walls funded the principal payment reduction by making a loan and separate capital contributions to the Borrower. See R. p. 90, line 25-p. 91, line 2; p. 169, line 25-p. 170, line 3. Thereafter, the Borrower defaulted on its obligations under the Note by failing to make timely payments of principal and interest. See R. p. 14, ¶ 16. The Guarantors were advised of the Borrower's default and they failed to remit the sums due under the Note, as required by the Guaranty Agreements. See R. p. 4, ¶ 7. The entire balance of the Note became due and payable together with interest, attorneys' fees, and costs of this action. See R. p. 14, ¶ 17. Although demand was made on the Guarantors for the amount due under the Note, they failed and refused to pay the same. See R. p. 4, ¶ 7.

Prior to the commencement of this action, Carolina National merged with FNBS. See R. pp. 200-203. The merger was effective as of February 18, 2008, and FNBS became the owner and holder of the Note and Guaranty Agreements and was owner and holder thereof when the Note was renewed on April 30, 2008. See R. p. 77, lines 15-21; p. 79, lines 17-20.

During the pendency of this action, the Office of the Comptroller of the Currency closed FNBS and the Federal Deposit Insurance Corporation ("FDIC") was appointed as its Receiver. See R. p. 80, lines 19-24. NAFH National Bank ("NAFH") purchased and assumed certain assets of FNBS and became the owner and holder of the Note and Guaranty Agreements by assignment. See R. p. 81, lines 1-2; p. 210. On June 30, 2011, NAFH merged with Capital Bank, N.A., with the resulting bank title of Capital Bank, N.A. ("Capital Bank"). See R. pp. 204-205; see also R. p. 85, lines 4-17. The merger was effective as of June 30, 2011. See id. Accordingly, Capital Bank is the owner and

holder of the Note and Guaranty Agreements. See R. p. 5, ¶ 1.

ARGUMENTS

I. PETITIONERS' PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT DOES NOT MEET THE REQUIREMENTS OF RULE 242, SCACR.

In their Petition for Writ of Certiorari, Petitioners offer no special or important reasons why this Court should review the well-reasoned, unpublished *per curiam* decision of the South Carolina Court of Appeals in which all judges concurred. This case presents none of the considerations under Rule 242(b), SCACR, favoring a review.

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. “Only when exceptional circumstances exist will the writ be issued.” Jean H. Toal, et al, *Appellate Practice in South Carolina*, p. 275 (2d Ed. 2002).

None of the enumerated reasons listed under Rule 242(b), SCACR, or any of like character, are present in this case. First, there are no new or novel questions of law in this case. Second, the decision of the Court of Appeals was an unpublished *per curiam* decision with all judges concurring. Third, there is no conflict between the Court of Appeals' decision and prior precedent of this Court. Fourth, there are no constitutional issues presented in this case. Finally, there are no federal questions involved. Because Petitioners set forth no special or important reasons for review, this Court should deny the Petition for Certiorari.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S FINDING THAT PETITIONERS WERE NOT RELEASED FROM THEIR OBLIGATIONS AS GUARANTORS OF THE LOAN AND THERE ARE NO EXCEPTIONAL CIRCUMSTANCES WARRANTING REVIEW BY THIS COURT.

A. Standard of Review

A guaranty is a contract and should be construed based on the language used by the parties to express their intention. See Peoples Fed. Sav. & Loan Ass'n. v. Myrtle Beach Ret. Grp., Inc., 300 S.C. 277, 280, 387 S.E.2d 672, 673 (1989). An action to construe a contract is an action at law. See Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 590, 658 S.E.2d 539, 541 (Ct. App. 2008). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "The trial court's findings in a law action are equivalent to a jury's findings." Regions Bank v. Strawn, 399 S.C. 530, 537, 732 S.E.2d 230, 233 (Ct. App. 2012) (citing Chapman v. Allstate Ins. Co., 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975)). "Questions regarding credibility and the weight of the evidence are exclusively for the trial court." Id. (citing Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989)). The appellate court must construe the evidence presented to the trial court so as to support the trial court's decision wherever reasonably possible. See Sheek, 297 S.C. at 377, 377 S.E.2d at 133. The appellate court must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary. See id.

B. The Court of Appeals correctly determined that the third loan transaction was a renewal of the original Note.

Petitioners contend that the third loan transaction dated April 30, 2008, was not a renewal of the Original Note but, rather, was a “new transaction,” which had the effect of a novation. Petitioners’ Pet. p. 6. This argument is contrary to the plain language of the subsequent renewal notes. “[T]hese documents [a modifying note] are to be construed like other contracts, and to ascertain the intention of an instrument resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument.” Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973) (finding language appearing on the face of the “Modifying Agreement” was clear and unambiguous and negated an intention for there to be a novation).

Beginning with the original Note dated November 30, 2006, each of the notes was executed on identical “Universal Note” forms. See R. pp. 211-16. Each of the notes contains a block in the upper right-hand corner of the first page in which to indicate the loan number, origination date, maturity date, loan amount, and whether or not the loan is a renewal of an existing loan. See id. The original Note provides information for all of these fields except for the loan renewal field. See R. pp. 211-12. The subsequent notes each provide information for all of the fields, including the loan renewal field, wherein the original loan number is provided to show that the transaction is a renewal of loan number 400378400 (the loan number assigned to the original Note). See R. pp. 213-16. The “Renewal Of” field of the Universal Note form is what allows a bank to use the same form document for each loan and yet identify when the loan is a renewal of an existing note rather than a brand new note.

In addition to identifying the subsequent notes as renewals of the original Note, the subsequent notes also assign the same loan number to the renewal loans, showing continuity of the loan through each renewal. See id. Further, each of the subsequent notes identifies as “Additional Charges” a “renewal fee,” \$100.00 for the December 21, 2007 renewal and \$2,000.00 for the April 30, 2008 renewal. See id. “It has been held that a note may be a renewal note even if it involves a change in parties, an increase of security, or a change in interest rate.” 10 C.J.S. *Bills and Notes* § 109 (1995); see also Live Stock Nat’l Bank v. Minnehaha State Bank, 52 S.D. 172, 178-79, 217 N.W. 180, 183 (S.D. 1927) (holding the insertion of a new payee and the reduction of the principal amount of debt did not change the character of a renewal note); Rebel v. Nat’l City Bank, 598 N.E.2d 1108, 1110 (Ind. Ct. App. 1992) (holding a renewal still occurred when accompanied by a change in interest rate); United Bank of Lakewood Nat’l Ass’n. v. Jefferson Indus. Bank, 791 P.2d 1250, 1253 (Colo. Ct. App. 1990) (“Parties to a note secured by a mortgage may substitute a new note for the original without impairing the security, although the terms of the two notes are not identical, so long as the original secured debt remains unpaid and there is no increase in the debt.”). The security for this loan was the Guaranty Agreements, and at the time of the renewal notes, the original debt remained unpaid by the borrower. The language of the subsequent notes clearly identifies the intention of the parties that the notes were to be renewals of the original Note. Such language is plain and capable of legal construction. See Superior Auto., 261 S.C. at 263, 199 S.E.2d at 722.

C. The Court of Appeals correctly determined that there was no novation of the original Note and Guaranty Agreements.

Petitioners assert that their payment of \$100,000.00 and Respondent's issuance of a third note had the effect of terminating Petitioners' obligations under the Guaranty Agreements on the basis of the doctrine of novation. Petitioners' Pet. pp. 5-6. Petitioners' argument is without merit because no such novation was created.

"A novation is a mutual agreement between all parties concerned for the discharge of a valid existing obligation by the substitution of a new valid obligation on the part of the debtor." Superior Auto., 261 S.C. at 262, 199 S.E.2d at 722 (internal quotations omitted). "There can be no novation unless both parties so intend." Moore v. Weinberg, 373 S.C. 209, 218, 644 S.E.2d 740, 744 (Ct. App. 2007) (citing Adams v. B & D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989)). "In order to effectuate a novation by the substitution of a new obligation, both contracting parties must consent that the new agreement is to replace the old one and their consent must be apparent." Moore, 373 S.C. at 218, 644 S.E.2d at 744. "[A novation] is a mode of extinguishing one obligation by creating another; the substitution, *not of a new paper or note*, but of a new obligation in lieu of an old one, with the effect of paying, dissolving, or otherwise discharging it." Id. at 218, 644 S.E.2d at 745 (emphasis added). "The burden of proving novation is on the party asserting it." Wellman, Inc. v. Square D Co., 366 S.C. 61, 72, 620 S.E.2d 86, 92 (Ct. App. 2005) (quoting Wayne Dalton Corp. v. Acme Doors Inc., 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct. App. 1990)).

Petitioners have failed to present any evidence that Carolina National or Respondent intended for the third note renewal to serve as a novation of the original Note or the Guaranty Agreements. In their Petition, Petitioners point to changes to the

creditor, payment structure, interest rate, maturity date, loan amount, and Petitioners' payment of \$100,000.00 as evidence that new obligations were created under the third loan renewal and thus constituted a novation. See Petitioners' Pet. p. 6. Petitioners rely on the case of Wayne Dalton Corp. v. Acme Doors Inc. to support their argument. In Wayne, the evidence clearly supported that it was the intention of the parties to create a novation. 302 S.C. at 96, 394 S.E.2d at 7. In that case, the court held that there was a novation of the guaranties where the record contained evidence that the guarantor gave the lender separate consideration unrelated to the amount owed on the debt in order to be released from the guaranty, a letter confirming the new debt was to "supercede [sic] and replace any and all prior [debt]," the closing of the previous account and opening of a new account, and testimony from the creditor that the new note acted as a novation for the old account. Id.

Unlike Wayne, in this case, Petitioners presented no evidence to establish that the parties intended to create a novation. As explained in Part II.B. above, the language of the subsequent notes clearly identifies the intention of the parties that the notes were to be renewal notes. Accordingly, Petitioners have offered no evidence that the third note constituted a new obligation.¹ The obligation remained the same from the original Note through the last renewal note: the borrower accepted \$400,000.00 from the bank to purchase a house in the Bahamas. See R. p. 139, lines 19-25. The sole collateral for the loan was the Guaranty Agreements of Petitioners and their co-defendants. See generally

¹ Even if the Court determines that the third note was a new obligation and not a renewal, "[i]t is well settled that a guarantor's liability is an independent contractual obligation." Transouth Fin. Corp. v. Cochran, 324 S.C. 290, 295, 478 S.E.2d 63, 65 (Ct. App. 1996) ("The general rule in South Carolina . . . is that a guaranty of payment is an obligation separate and distinct from the original note."). Thus, the analysis of whether Petitioners' obligations under the Guaranty Agreements were discharged would depend on the construction of those agreements. See infra Part II.D.

R. pp. 12-19. The only repayment of any part of the \$400,000.00 in principal owed to the bank occurred with the \$100,000.00 pay down in conjunction with the April 30, 2008 renewal. See May 7, 2008 Sand Dollar Cottage, LLC Check and related General Ledger documents, R. p. 231. Thus, the same obligation remained owed to the bank throughout all of these transactions and was not discharged at any point in time. See Moore, 373 S.C. at 218, 644 S.E.2d at 745 (“[A novation] is a mode of extinguishing one obligation by creating another; the substitution, *not of a new paper or note*, but of a new obligation in lieu of an old one, with the effect of paying, dissolving, or otherwise discharging it.”) (emphasis added). As such, there was no novation of the Note or Guaranty Agreements, and Petitioners’ Writ of Certiorari should be denied.

D. THE COURT OF APPEALS PROPERLY HELD THAT THE BANK’S ACTIONS DID NOT RELEASE THE GUARANTORS.

Petitioners argue that the general laws of suretyship are applicable to this case as encompassed in the *Restatement of the Law, Third, Suretyship and Guaranty*, §§ 40, 41 (1996), although they admit that there is no South Carolina case law applying such rules to the facts of this case. See Petitioners’ Pet. p. 7. Accepting Petitioners’ assertion regarding the applicability of this Restatement to the facts of this case as true for the purposes of argument², Petitioners have failed to consider a key principle set forth in the Restatement: “Each rule in this Restatement stating the effect of suretyship status may be varied by contract between the parties subject to it.” *Restatement (Third) of Suretyship and Guaranty*, § 6 (1996).

² Respondent does not concede that this Restatement is binding or persuasive authority under South Carolina law but only accepts Petitioners’ assertion for the purposes of argument.

The plain language of the Guaranty Agreements provides for the survival of the guaranties through renewals, replacements, substitutions, extensions, and refinancing of the original Note, up and until the time a guarantor revokes his guaranty in a writing received by the bank, as stated in relevant part:

- [T]he Undersigned guarantees to Lender the payment and performance of the debt, liability, or obligation of Borrower to Lender evidenced or arising out of the following: Note Number 400378400 dated 11/08/2006 *and any renewals or replacements* thereof [defined as] . . . the “Indebtedness.” Guaranty Agreement p. 1, ¶ A (emphasis added).

- This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, *whether or not all Indebtedness is paid in full*, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to *any renewals, extensions and refinancings* thereof. Guaranty Agreement ¶ 2 (emphasis added).

- The liability of the Undersigned hereunder shall be limited to a principal amount of \$ UNLIMITED (if unlimited or no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount) . . . Indebtedness may be created *and continued* in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received *Such application of receipts shall not reduce, affect, or impair the liability of the Undersigned hereunder.* Guaranty Agreement ¶ 4 (emphasis added).

- Lender may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of Indebtedness, without any consent or approval by the Undersigned and without any notice to the Undersigned. The liability of the Undersigned shall not be affected or impaired by any of the following acts or things:

* * *

- (ii) any one or more *extensions or renewals* of Indebtedness (whether or not for longer than the original period) or any *modification* of the interest rates, maturities, or other contractual terms applicable to any Indebtedness;

* * *

(v) any discharge of any evidence of Indebtedness or the acceptance of any instrument in renewal thereof or *substitution* therefor. Guaranty Agreement ¶ 6 (emphasis added).

See generally R. pp. 217-30. Thus, by the principles of the Restatement, Petitioners' arguments related to discharge of their guaranty obligations through extension of time and substituted contract are inapplicable to the present facts because the provisions of the Guaranty Agreements supersede such principles.

“A guaranty is a contract and should be construed based on the language used by the parties to express their intention.” Transouth, 324 S.C. at 294, 478 S.E.2d at 65. “In determining the nature of a guaranty the first consideration is the written language.” Wayne, 302 S.C. at 95, 394 S.E.2d at 6 (citing Pee Dee State Bank v. Nat'l Fiber Corp., 287 S.C. 640, 340 S.E.2d 569 (Ct. App. 1986)). The Guaranty Agreements provide that they are binding upon the guarantors until they are revoked. See Guaranty Agreement ¶ 2, R. pp. 217-30. Respondent never received a revocation, and Petitioners admit they never revoked their Guaranty Agreements. See R. p. 90, lines 19-22; p. 169, lines 19-24. As such, Petitioners were not released from their Guaranties through either of the subsequent loan renewals.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE CASE WAS PROSECUTED BY A PROPER PARTY.

Petitioners argue that Respondent failed to prove it is the proper party to prosecute the case under Rule 25(c), SCRPC. See Petitioners' Pet. pp. 9-11. A plain reading of Rule 25(c), SCRPC, reveals that the rule applies, “[i]n case of *any transfer of interest . . .*” Rule 25(c), SCRPC (emphasis added). Petitioners cite to Bryant v. Waste Management, Inc., where the Court of Appeals stated that, “Rule 25(c) applies to the transfer of interest from one corporation to another with which the first merged.” Bryant

v. Waste Mgmt., Inc., 342 S.C. 159, 164, 536 S.E.2d 380, 383 (Ct. App. 2000).
Petitioners misconstrue the court's interpretation of the rule. First, the rule on its face does not restrict its application to cases of merger; rather, it is to be applied to *any transfer of interest*. Second, there is no precedent that establishes that the rule applies exclusively to cases of merger. The facts in Bryant merely happened to include a corporate merger. In the present case, the fact that Respondent did not merge with NAFH or Capital Bank does not preclude the application of Rule 25(c) because, as detailed above, there was a *transfer of interest* from Respondent to NAFH (through the FDIC receivership), and NAFH later merged with Capital Bank. Rule 25(c) is applicable to the facts of this case, and Respondent is a proper party to prosecute this action.

CONCLUSION

Accordingly, for the reasons set forth above, this Court should deny Petitioners' Petition for Writ of Certiorari in its entirety.

August 5, 2015

Respectfully submitted,



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Of Whom Frank J. Pennisi and Charles T. Walls are


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CERTIFICATE OF SERVICE

I certify that I am an employee of the law firm of Moore & Van Allen, PLLC, and that I have served a copy of the Return for Petition for Writ of Certiorari upon counsel for the Petitioners named below by depositing a copy of the same in the United State Mail, postage prepaid, on August 5th, 2015, addressed as follows:

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