THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes, III, Special Circuit Court Judge

Appellate Case No. 2015-000035
Lower Case No. 2013-CP-07-00610

First South Bank ..... Respondent,

v.

John E. Rosenberg and Phillip J. Brust ..... Defendants,

Of Whom The Estate of Phillip J. Brust is ..... Appellant.

INITIAL REPLY BRIEF OF APPELLANT THE ESTATE OF PHILLIP J. BRUST

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Appellant The Estate of Phillip J. Brust ("Brust") submits this reply to the Initial Brief of Respondent First South Bank ("First South").

ARGUMENT

I. FIRST SOUTH IGNORES THE PRINCIPLES THAT A SPECIAL POWER OF ATTORNEY MUST BE STRICTLY CONSTRUED AND EXPRESSLY INCLUDE THE POWER TO EXECUTE A GUARANTY.

As set forth in Brust's Initial Brief, the trial court improperly ruled that the POA unambiguously authorized Rosenberg to execute the Guaranty where the POA contained no express grant of such authority.[1] In its response, First South completely ignores the standard for determining whether a special power of attorney grants an agent the authority to execute a guaranty on behalf of the principal. This standard, as established by the authorities cited in Brust's Initial Brief (*see* Brust Initial Br. pp. 11-12), holds that a power of attorney must contain a specific, express authorization before a finding can be made that an agent has authority to bind his principal in a guaranty agreement. In the absence of such a grant of authority, the POA fails to authorize Rosenberg's execution of the Guaranty. As a result, the trial court's award of summary judgment on the ground that the POA granted Rosenberg actual authority to execute the Guaranty was improper.

First South argues that the POA unambiguously granted such power to Rosenberg because it gave him "all authority needed and necessary to accomplish" the closing of the loan and because it contains no exceptions, exclusions, caveats, or qualifications with regards to the type of documents Rosenberg was authorized to execute regarding the loan. (First South Initial Br. p. 19.) The first flaw in First South's argument is that it ignores the well-established principle that a special power of attorney must be strictly construed.

[1] The capitalized and abbreviated terms in this Reply Brief have the same meanings as those terms have in Brust's Initial Brief.

It is noteworthy that First South recognizes this principle generally and cites to *Martin v. U.S.*, 249 F.Supp 204, 208 (D.S.C. 1966), in its Initial Brief. First South's quote of that case, however, is incomplete and misleading. In fact, *Martin* states, "A special power of attorney is to be strictly construed, to carry out, instead of defeating the purpose of appointment, *but so as to sanction only such acts are clearly within its terms*." *Id.* (*citing Holladay v. Daily*, 86 U.S. 606 (1984)) (emphasis added). In the present case, the POA does not "clearly" authorize any power with respect to a guaranty agreement. Applying *Martin*, it strains credibility for First South to contend that the POA unambiguously authorized the execution of the Guaranty.

The second flaw in First South's argument is that if the authority in dispute is not expressly granted and must be inferred, then the POA is necessarily ambiguous. The POA contains no reference to a guaranty, and the Guaranty can only be covered by the scope of documents which Rosenberg was authorized to execute if it was necessary to the closing. It is impossible to determine from the four corners of the POA what documents were necessary to accomplish the closing of the loan, and thus, it is improper to conclude, as the trial court did, that the POA gave Rosenberg actual authority to execute the Guaranty. Accordingly, the POA is ambiguous in this regard, and First South's conclusory arguments to the contrary do not change this fact.

II. THE TRIAL COURT IMPROPERLY WEIGHED THE EVIDENCE IN CONCLUDING THAT THE POA AUTHORIZED ROSENBERG TO EXECUTE THE GUARANTY.

Alternatively, First South argues that even if the POA is ambiguous, the evidence clearly establishes that the POA gave Rosenberg the actual authority to execute the Guaranty. In so doing, First South focuses on the evidence that weighs in its favor and

minimizes the evidence suggesting that Brust did not intend to give Rosenberg such authority. First South's argument fails because the evidence must be construed in the light most favorable to Brust on a summary judgment motion. *See Bass v. Gopal, Inc.*, 395 S.C. 129, 133-34, 716 S.E.2d 910, 912 (2011) (when determining whether any genuine issues of fact exist on a summary judgment motion, "the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party").

First South dismisses the evidence suggesting that Brust intentionally omitted the term guaranty from the POA. In an earlier power of attorney that he executed in relation to another loan, Brust expressly included a guaranty as a document that his agent could execute on his behalf. (Finger Dep. 30:5-34:4, Def. Ex. 1.) That express authorization was omitted from the later POA. (Finger Dep. 30:5-34:4; Wright Dep. Ex. 9.) Significantly, the two powers of attorney are nearly identical in all material ways except for the fact that the earlier power of attorney identified a guaranty as a document the agent was authorized to execute while the newer POA does not. (Finger Dep. 30:5-34:4, Def. Ex. 1; Wright Dep. Ex. 9.) The differences in the two documents suggest that the omission of the term "guaranty" could be intentional. A reasonable inference to draw from the omission of "guaranty" in the POA when it was included in a prior power of attorney is that Brust intentionally omitted the term so that Rosenberg would not have authority to bind him under a guaranty. *See Reyner v. Stephens*, 289 S.C. 575, 579, 349 S.E.2d 878, 881 (1986) (stating that grantor's subsequent omissions of setback restrictions in deeds where such setbacks were included in previous deeds was evidence of an intent not to restrict the transferred lands with setbacks). When viewed in the light

most favorable to Brust, the omission constitutes a scintilla of evidence that Brust did not intend for Rosenberg to sign the Guaranty.

While First South dismisses this argument in conclusory fashion as pure speculation and conjecture, the summary judgment standard does not permit the evidence supporting Brust's argument to be disregarded so easily. Instead, the standard requires the trial court to make all reasonable inferences in favor of Brust and to avoid making factual determinations by weighing the evidence. *See Clary v. Borrell*, 398 S.C. 287, 296, 727 S.E.2d 773, 777 (Ct. App. 2012) ("A court considering summary judgment neither makes factual determinations, nor considers the merits of competing testimony."). The trial court erred by not construing this evidence in Brust's favor. Therefore, there is a genuine issue of fact regarding Brust's intent under the POA, which precludes summary judgment on this issue.

First South also disregards the undisputed fact that the unlimited, continuing Guaranty executed by Rosenberg was not a document required for the closing of the loan by misconstruing the nature of Brust's argument. According to First South, Brust attempts to create an issue of fact regarding the necessity of the unlimited, continuing Guaranty "by showing that [First South] breached an alleged duty owed to Brust." (First South Initial Br. p. 22.) To be clear, this is not Brust's position. Whether First South breached any duty to Brust or failed to comply with its own policies by presenting an overly broad guaranty to Rosenberg is irrelevant to Brust's intent under the POA. Rather, Brust's argument is that to the extent a guaranty from Brust was necessary to close the loan, such guaranty was only required to be limited and non-continuing. First South's Rule 30(b)(6), SCRCP, representative, Patrick Wright, admitted that an unlimited and

continuing guaranty was not required (Wright Dep. 85:13-93:15); therefore, First South cannot deny the fact that the Guaranty was broader than necessary to close the loan. The existence of this fact presents a scintilla of evidence that Brust did not intend to authorize Rosenberg to execute the Guaranty, which was not necessary to the loan closing.

III. FIRST SOUTH FAILS TO ESTABLISH REASONABLE RELIANCE ON THE POA, WHICH IS REQUIRED TO PROVE THAT ROSENBERG HAD APPARENT AUTHORITY TO EXECUTE THE GUARANTY.

The trial court erred in concluding that Rosenberg had apparent authority to execute the Guaranty based on a mistaken finding that First South relied on the POA to close the loan. As argued in Brust's Initial Brief, any purported reliance on the POA by First South was impossible because (1) no one attended the closing on behalf of First South (Wright Dep. 81:18-24, 96:12-24); (2) First South was unaware that Brust would not be attending the closing or that Rosenberg would be executing the Guaranty on Brust's behalf pursuant to a power of attorney (Wright Dep. 83:7-24); and (3) First South was not aware of the POA until days after the loan closed (Wright Dep. 95:21-96:11, 97:6-10).

First South responds to this contention by arguing that it relied on the POA as evidenced by "the fact [First South] funded and disbursed the Loan after it received" the POA and Guaranty. (First South Initial Br. p. 25.) First South's position is not supported by the evidence in the record, and First South fails to cite any evidence in the summary judgment record to support its position that it disbursed the loan funding in reliance on the POA. To the contrary, a reasonable inference to draw from Wright's testimony that First South did not receive the POA until days after the loan closing (Wright Dep. 95:21-96:11, 97:6-10), is that First South did not receive the POA until after the loan proceeds

were disbursed. Because there is no evidence to support First South's argument, it cannot prove reliance on the POA, especially considering that the loan closed prior to First South discovering the existence of the POA and Rosenberg's execution of the Guaranty pursuant thereto.

Even if First South could demonstrate reliance on the POA to fund and disburse the loan, though, the trial court erred in finding that its reliance was reasonable. First South admits in its brief that it had a legal duty to inquire into the scope of Rosenberg's authority under the POA. According to First South:

> The legal principle of apparent authority also requires that a person dealing with an agent under a power of attorney has a duty to inform himself as to the character and extent of that authority. 2A C.J.S. *Agency* § 150. The duty to ascertain the scope of an agent's authority requires the third party to exercise reasonable diligence to discover the nature and scope of the agent's powers by making an inquiry addressed to the principal. 2A C.J.S. *Agency* § 150-151.

(First South Initial Br. pp. 24-25.) Nevertheless, First South fails to present any evidence demonstrating that it made any effort to ascertain the scope of Rosenberg's authority under the POA. As such, there is no evidence that First South complied with this duty or that its purported reliance on the POA was reasonable.

In contrast, Brust has demonstrated that it would have been impossible for First South to inform itself of the character and extent of Rosenberg's authority under the POA when it was unaware of the POA and that Brust would not be attending the closing. (*See* Brust Initial Br. pp. 20-21.) Moreover, any possible inquiry First South could have made would not have been reasonable because it failed to follow standard banking practices and its own policies regarding the acceptance of a guaranty executed pursuant to a power of attorney. (*See* Brust Initial Br. p. 22.) Accordingly, there are genuine issues of fact

regarding whether First South relied on the POA and whether such reliance was reasonable. The trial court's granting of summary judgment on these issues of agency under the theory of apparent authority was in error because such questions of agency should not be resolved by summary judgment. *See Reid v. Kelly & Play Air, Inc.*, 274 S.C. 171, 174, 262 S.E.2d 24, 26 (1980).

IV. FIRST SOUTH FAILS TO ESTABLISH THAT BRUST HAD FULL KNOWLEDGE OF THE GUARANTY AND THAT BRUST AFFIRMATIVELY ADOPTED ROSENBERG'S EXECUTION OF THE GUARANTY, WHICH ARE REQUIRED TO PROVE RATIFICATION.

First South attempts to justify the trial court's conclusion that Brust ratified Rosenberg's execution of the Guaranty by selectively emphasizing the facts that support its position and making inferences in First South's favor. The summary judgment standard does not permit a court to consider the evidence in the manner advanced by First South.

To support its position, First South infers that Brust had "full" knowledge of the facts surrounding Rosenberg's execution of the Guaranty based on a few pieces of evidence suggesting that Brust had some knowledge regarding the circumstances surrounding the Guaranty. To reach this conclusion, however, one must view the evidence in the light most favorable to First South. For example, First South argues that Brust's alleged knowledge of the commitment letter demonstrates that he knew he was required to act as guarantor on the loan (First South Initial Br. p. 27.), but this conclusion disregards facts showing that the commitment letter expired before the loan, that First South did not enforce other purported "conditions" contained in the commitment letter, and that First South never discussed the commitment letter with Brust (Wright Dep. 53:21-57:22, 81:11-20, 183:7-20, Ex. 4). Moreover, First South admitted that the

Guaranty exceeded the requirements of what the commitment letter provided. (Wright Dep. 84:10-22, 90:5-93:15.) Thus, there are genuine issues of fact as to whether Brust's purported knowledge of the commitment letter constitutes full knowledge of Rosenberg's later acts.

First South also attempts to discount Brust's argument that the evidence reveals that First South failed to inform Brust of the full nature of the circumstances surrounding the Guaranty and its execution by claiming that this evidence only shows what First South knew and not what Brust knew. This argument fails because there is no other evidence in the record of what Brust knew about the Guaranty beyond what First South purports to have done to inform him of the guaranty requirement. Brust was incapacitated during the course of this litigation and died shortly before the appeal, and consequently, there is limited evidence regarding Brust's knowledge. While First South could have engaged in other discovery to obtain evidence regarding Brust's knowledge, such as deposing Rosenberg, it failed to do so. Accordingly, First South is forced to rely on speculation about what Brust knew based on testimony of its own employee who admittedly did little, if anything, to inform Brust of the nature and extent of the Guaranty. First South's speculation is insufficient to establish that Brust had full knowledge of the facts at the summary judgment phase.

Because of the difficulty that First South has in establishing that Brust had "full knowledge" of facts surrounding the execution of the Guaranty, it attempts to circumvent its burden of proving ratification by imposing Rosenberg's knowledge onto Brust. According to First South, "Rosenberg's knowledge of the execution of the Brust Guaranty and the terms thereof are imputable to Brust considering Rosenberg was acting

as Brust's agent under the POA when he executed same." (First South Initial Br. p. 27.)[2] First South's argument places the cart before the horse by assuming an agency relationship and that the purported agent was acting within the scope of his authority in order to prove ratification. However, there is no need to prove ratification if the purported agent is in fact an agent of the principal and acting within the scope of his authority. This circular logic behind First South's argument is specious and should be rejected. If the second element of ratification can be established merely through imputation of the agent's knowledge to the principal, then that element will be rendered meaningless because the agent will always have full knowledge of the facts surrounding his or her unauthorized acts. Adopting First South's legal argument would be an unprecedented deviation from the well-established law regarding ratification, and the Court should refuse to do so.

Similarly, First South asks the Court to find that the trial court properly found that the third element of ratification was met in derogation of the settled principle that mere silence or failure of a principle to repudiate the unauthorized act of an agent does not constitute ratification unless such silence or acquiescence cannot be explained by another theory. *See Stiltner v. USAA Cas. Ins. Co.*, 395 S.C. 183, 191, 717 S.E.2d 74, 78 (Ct. App. 2011). Although First South does not deny that this principle applies, it effectively asks the Court to disregard it by arguing that Brust made an affirmative election to adopt Rosenberg's execution of the Guaranty based on "the fact that Brust made no complaint, inquiry, or repudiation, written or otherwise, of the Brust Guaranty" until six years after it

[2] To support this argument, First South cites the case of *Bankers Trust of South Carolina v. Bruce*, 283 S.C. 408, 323 S.E.2d 523 (Ct. App. 1984). *Bruce* does not support the proposition that an agent's knowledge can be imputed to the principal for the purposes of establishing ratification. In fact, the case does not involve ratification in any manner.

was executed. Clearly, the failure to complain or repudiate the guaranty, without more, constitutes silence or acquiescence. Viewing the evidence in the light most favorable to Brust, his silence could be due to his ignorance of the Guaranty or, at least, to the scope and extent of the Guaranty. Either explanation would preclude summary judgment.

The resolution of the conflicting evidence regarding ratification in favor of First South demonstrates that the trial court erred in weighing the evidence and making factual determinations against Brust, who is entitled to have all reasonable inferences from the evidence drawn in his favor. Additionally, the resolution of these facts on a summary judgment motion also contravenes the well-established legal principle that whether or not "there has been a ratification of an unauthorized act . . . is usually a question of fact for the jury and not one for the court" unless there is an admission by the principle that he ratified the agent's unauthorized act. *Stiltner*, 395 S.C. at 191, 717 S.E.2d at 78. Brust did not admit to the ratification of Rosenberg's act of executing the Guaranty, and there is conflicting evidence as to whether Brust had full knowledge of the facts surrounding Rosenberg's execution of the Guaranty and whether he made an affirmative election to adopt such execution. Therefore, summary judgment on ratification was improper.

V. *RES JUDICATA* AND COLLATERAL ESTOPPEL APPLY TO SUCCESSIVE LITIGATION AND DO NOT CONTROL THE COURT'S RULING ON THE MOTION TO AMEND.

In his Initial Brief, Brust argues that the trial court erroneously denied his Motion to Amend under the doctrine of *res judicata* because that doctrine only applies to successive litigation and not to issues or claims raised in the same proceeding. First South does not acknowledge this argument, much less rebut it or prevent countervailing authorities. The Court should consider First South's refusal to engage with this argument as a recognition

of the argument's merits and reverse the trial court's ruling on this issue. *See First Union Nat'l Bank v. FVCS Communs.*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (stating that if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct).

Instead of directly confronting Brust's arguments, First South offers for the first time an alternative argument that Brust's Motion to Amend is barred under the doctrine of collateral estoppel. (First South Initial Br. pp. 37-41.) This argument, however, suffers from the same fatal flaw that plagues its *res judicata* argument, which is that the doctrine applies in successive litigation and not to issues and claims raised in the same proceeding.

The conclusion that the doctrine of collateral estoppel does not apply in the same proceeding is made clear by its elements, which are: (1) that the issue sought to be precluded is identical to one previously litigated; (2) that the issue was actually determined in a *prior proceeding*; (3) that the issue's determination was a critical and necessary part of the decision in the *prior proceeding*; (4) that the *prior judgment is final* and valid; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue. *In re Crews*, 389 S.C. 322, 698 S.E.2d 785 (2010) (emphasis added). As these elements make clear, collateral estoppel arises from issues determined in a prior proceeding where there is a final judgment – not the same proceeding.[3] *See United States v. Sherman*, 912 F.2d 907, 909 (7th Cir. 1990) (stating

[3] Even if the doctrine of collateral estoppel could apply in the same proceeding, it would not be applicable in this case because there is not a final and valid judgment because the issues decided on summary judgment are subject to this appeal. First South states that *McMahan v. Int'l Assoc. of Bridge, Structural & Ornamental Iron Workers*, 858 F. Supp. 529 (D.S.C. 1994), supports its position that a summary judgment motion is final for the purposes of collateral estoppel. First South's reliance on *McMahan* is misplaced. That case did not involve collateral estoppel. Although it did involve the doctrine of *res judicata*, the court *(continued on next page)*

that "collateral estoppel requires separate actions"), *citing Montana v. United States*, 440 U.S. 147, 153 (1979) ("Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive *in subsequent suits based on a different cause of action* involving a party to the prior litigation.") (Emphasis added).

VI. BRUST DID NOT DELAY IN FILING THE MOTION TO AMEND.

First South alternatively seeks to justify the trial court's denial of Brust's Motion to Amend under Rule 15, SCRCP, by claiming Brust delayed asserting the counterclaims under the proposed amendment and that it would be prejudiced as a result. This argument is meritless. Brust's counterclaims are based on the deposition testimony of Wright, First South's Rule 30(b)(6) deponent, and Brust promptly filed the Motion to Amend to add counterclaims two days after receiving Wright's deposition transcript. (Brust Mot. Amend p. 1.)

Moreover, First South does not identify any prejudice that would justify a denial of a proposed amendment under Rule 15, SCRCP. The only prejudice First South claims will result is that the amendment "will result in the continuation of extensive discovery undertaken by both parties and [First South] having to unnecessarily examine [Brust's expert witness] through the taking of his deposition and to hire a rebuttal expert to rebut same." (First South Initial Br. p. 43.) First South's vague, unspecified claim of "extensive discovery" is not sufficient to demonstrate actual prejudice, and the hiring of

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ruled that the doctrine applied to a summary judgment motion in a previous case – not the same case. *Id.* at 551 ("The doctrine of *res judicata* bars any subsequent action where a final judgment on the merits has been rendered in a **previous case**.") (Emphasis added.) So *McMahan* actually supports Brust's position that *res judicata* does not apply in the same proceeding.

an expert and the deposition of Brust's expert is not so onerous to warrant denial of the Motion to Amend, especially considering that the Motion to Amend was filed before discovery was complete and the case had not been set for trial. *See A-C Reorganization Trust v. E.I. DuPont de Nemours & Co.*, 968 F. Supp. 423, 432 (E.D. Wisc. 1997) (ruling that "vague and general allegations of additional discovery requirements . . . are not specific enough to demonstrate actual prejudice" resulting from a proposed amendment); *Hill v. Equitable Bank, N.A.*, 109 F.R.D. 109, 113 (D. Del. 1985) (finding no prejudice resulting from amendment where discovery is ongoing and trial had not been scheduled).[4] Accordingly, there is no basis for denial of Brust's Motion to Amend under Rule 15(a), and the trial court's denial of the Motion should be reversed.

CONCLUSION

For the foregoing reasons, Brust Estate requests that the Court reverse both the Summary Judgment Order and the Amendment Order, grant Brust's Motion to Amend, and remand the case to the trial court for further proceedings.

[4] Although these cases cited for determining prejudice are analyzed under Rule 15 of the Federal Rules of Civil Procedure, they are nevertheless persuasive because South Carolina courts interpret the South Carolina Rules of Civil Procedure consistently with the federal rules. *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 331, 404 S.E.2d 200, 201 (S.C. 1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure").

Respectfully submitted,

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August 20, 2015

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PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the foregoing ***Initial Reply Brief of Appellant*** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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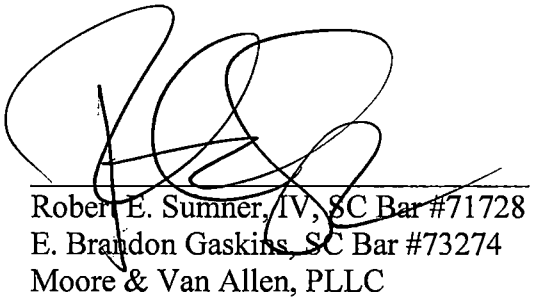

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