THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, Master in Equity

Appellate Case No. 2014-002290

JMT Capitol Holdings, LLC, Plaintiff,

v.

VDM/T Land Company, LLC and
Daufuskie Island Properties, LLC, Defendants.

And

Daufuskie Island Properties, LLC,
and its successor in interest, Ace
Basin Investments, LLC, Appellant,

v.

Raymond Travaglione, Respondent.

FINAL BRIEF OF RESPONDENT

Tara E. Nauful
Dawn M. Hardesty
ADAMS AND REESE LLP
1501 Main Street, 5th Floor
Columbia, SC 29201
(803) 254-4190

Attorneys for Respondent Raymond Travaglione

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STATEMENT OF THE ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT CORRECTLY DISMISSED THE THIRD-PARTY COMPLAINT AS TIME-BARRED.

STATEMENT OF THE CASE

On February 19, 2014, JMT Capitol Holdings, LLC ("JMT") commenced a foreclosure action (the "Foreclosure Action"), seeking to foreclose a mortgage executed and delivered to it by VDM/T Land Company, LLC ("VDM/T") on two parcels of real property that are described in the mortgage. (R. p. 13, ¶¶ 19, 20; R. pp. 3-4). JMT's Complaint (the "Complaint") does not seek a deficiency against VDM/T, but merely seeks foreclosure of the mortgage lien. (R. p. 9; R. p. 4). Appellant Daufuskie Island Properties, LLC ("Appellant") is named in the foreclosure action by virtue of its status as a lienholder on the properties. (R. p. 11, ¶ 12, p. 15, ¶¶ 24, 25, p. 16, ¶ 35; R. p. 4).

On April 16, 2014, Appellant answered the Complaint. (R. pp. 73-85; R. p. 4). In addition to responding to the allegations of the Complaint, Appellant asserted a third-party claim against respondent Raymond Travaglione ("Respondent"), seeking a monetary judgment against Respondent for his alleged breach of a guaranty. (R. pp. 78-80; R. p. 4).

Respondent responded to Appellant's claims by filing a Motion to Dismiss on July 8, 2014 (the "Motion to Dismiss"). (R. pp. 86-90; R. p. 2). A hearing on the Motion was scheduled for August 11, 2014. (R. p. 2). Respondent filed a memorandum in support of the Motion to Dismiss on August 6, 2014. (R. pp. 99-131; R. p. 2). Appellant filed a memorandum in opposition to the Motion to Dismiss on August 8, 2014. (R. pp. 91-98).

On August 11, 2014, a hearing was held on the Motion to Dismiss. (R. p. 2). After considering arguments, the Court took the motion under advisement, and scheduled a telephonic status conference for September 5, 2014. (R. pp. 2-3).

On September 4, 2014, counsel for Appellant submitted a supplemental memorandum in opposition to the Motion to Dismiss. (R. p. 3). On September 5, 2014, counsel for Respondent responded to the supplemental memorandum. *(Id.).*

The telephonic status hearing was held on September 5, 2014. (R. pp. 2-3). After hearing further arguments made by counsel for both parties, the Court again took the matter under advisement. (R. p. 3).

On September 25, 2014, the trial court entered its Order granting Respondent's Motion to Dismiss, finding that the Third-Party Complaint was time-barred because it was filed more than three years after the running of the statute of limitations of S.C. Code Ann. § 15-3-530. (R. pp. 5-8).

Appellant filed and served its Notice of Appeal on or about October 23, 2014.[1] Thereafter, Appellant filed a Motion to Stay Appeal, asking the Appellate Court to stay this appeal until the Foreclosure Action was completed.[2] Respondent objected to the Motion to Stay Appeal.[3] This Court denied the Motion to Stay Appeal on January 16, 2015.[4] Appellant filed its initial brief on or about February 16, 2015.[5]

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[1] *See* Notice of Appeal dated October 23, 2014 (hereinafter the "Notice of Appeal").

[2] *See* Motion to Stay Appeal Pending the Disposition of the Underlying Action, dated November 20, 2014 (hereinafter the "Motion to Stay Appeal").

[3] *See* Objection to Appellant's Motion to Stay Appeal Pending the Disposition of the Underlying Action, dated December 8, 2014.

[4] *See* Order dated January 16, 2015.

[5] *See* Brief of Appellant, dated February 16, 2015.

STATEMENT OF FACTS

On or about June 2, 2006, VDM/T executed and delivered to Appellant two promissory notes in the amounts of $400,000.00 and $100,000.00 (the "Notes") for the purchase of two parcels of real property (the "Properties"), sold to VDM/T by Appellant. (R. p. 4). As security for the Notes and the debt evidenced thereby, VDM/T executed and delivered to Appellant a mortgage on each of the Properties (the "Mortgages"). *(Id.)*. As additional security for the Notes and the debt evidenced thereby, on June 2, 2006, Respondent executed and delivered to Appellant a guaranty of payment for the Notes (the "Guaranty"). *(Id.)*.

Also on June 2, 2006, VDM/T executed and delivered to First Federal Savings & Loan Association of Charleston ("Bank") a promissory note in the original principal amount of $1,100,000.00. (R. p. 13, ¶ 19). To secure the note, VDM/T executed and delivered to Bank a mortgage, pursuant to which VDM/T granted Bank a mortgage on the Properties. (R. p. 4, n. 1). Bank subsequently assigned its note and mortgage to VFC Partners 15, LLC ("VFC"), who later assigned the note (the "JMT Note") and mortgage (the "JMT Mortgage") to JMT. (*Id.*).

In connection with the foregoing transaction, also on June 2, 2006, Appellant, Respondent, and Bank entered into Partial Release and Subordination Agreements (the "Subordination Agreements"). (R. p. 4, n. 2). The Subordination Agreements provide that Appellant would provide purchase money financing for VDM/T's purchase of the Properties and would, in turn, agree to subordinate its debt to any construction financing obtained by VDM/T for the Properties. (*Id.*).

Appellant filed bankruptcy on January 20, 2009. (R. p. 101). Appellant's initial bankruptcy schedules, filed on January 20, 2009, as well as its amended bankruptcy schedules, filed on March 6, 2009, list as assets of the bankruptcy estate potential claims for foreclosure against VDM/T arising under the Notes. (*Id.*). Neither the initial bankruptcy schedules nor the amended bankruptcy schedules list any claims against Respondent. (*Id.*).

VDM/T defaulted on the JMT Note, and JMT commenced the Foreclosure Action. (R. p. 101). In the Foreclosure Action, JMT waived any deficiency against VDM/T, and sought merely to foreclose its lien.[6] (R. p. 9).

No claims for damages are asserted against Appellant in the Complaint. (R. pp. 9-72). Appellant is named as a defendant solely as a junior lien holder on the Properties. (R. p. 4).

Appellant filed its Third-Party Complaint on April 16, 2014, claiming it held a first mortgage lien on the Properties and asserting a third-party claim against Respondent for judgment on the Guaranty. (R. pp. 73-80).

The Guaranty is attached as Exhibit 1 to the Third-Party Complaint. (R. pp. 82-85). No other documents or exhibits are attached to the Third-Party Complaint. (R. pp. 73-85).

The Guaranty is a standard form commercial guaranty of payment. Although the Guaranty purports to be secured by certain intangible "Collateral" (as defined in the Guaranty).[7] The Collateral described in the Guaranty does not include any real property.

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[6] The Complaint also seeks a declaratory judgment that the JMT Mortgage is a first mortgage lien on the Properties. (R. p. 15, ¶ 26—p. 16, ¶31).

[7] The Guaranty states, in relevant part:

(R. p. 83). The Guaranty makes no mention of the Mortgages.[8] (R. pp. 82-85). The Guaranty bears no raised seal, and is not notarized. (R. pp. 82-85). The Guaranty's signature block reads as follows: "IN WITNESS WHEREOF, this instrument has been duly executed by the undersigned this 2 day of June, 2006." (R. p. 85; R. p. 4). The phrase "L.S." does not appear on the signature line. (R. p. 85). The only mention of the word "seal" in the Guaranty appears in the boilerplate above the witnesses' signature block: "SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:."[9] (R. p. 85; R. pp. 4-5).

ARGUMENT AND CITATION OF LAW IN SUPPORT

I. The trial court correctly dismissed the Third-Party Complaint as time-barred.

The law is well-settled in South Carolina that a guaranty[10] is a separate and

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> As security for the amount guaranteed by the undersigned, the Guarantor hereby grants to Lender a security interest in, a general lien upon and/or right of setoff of, the following ("Collateral"): the balance of every deposit account, now or hereafter existing, of the undersigned with Lender and all money, instruments, securities, documents, chattel paper, credits, claims, demands and any other property, rights and interest of the undersigned now or hereafter existing, which at any time shall come into the possession or custody or under the control of Lender or any of its agents, associates or correspondents, for any purpose, and shall include the proceeds, products and accessions of and to any thereof.

(R. p. 83). The record is devoid of any evidence that any of the aforementioned Collateral is or was ever in existence. The record is further devoid of any evidence that Appellant perfected its lien on the Collateral. In reality, the Guaranty is unsecured.

[8] Likewise, the Mortgages contain no reference to the Guaranty. (R. pp. 31-45).

[9] *See* Guaranty (R. pp. 82-85); Order (R. pp. 3-4).

[10] In its brief, Appellant repeatedly states that the Guaranty was an "absolute guaranty of repayment." This is incorrect. The Guaranty, by its express terms, is a guaranty of payment. In the event of default by a borrower, in addition to suing the borrower under the note, the holder of a guaranty of payment can look to the guarantor for payment of the debt. However, a "guaranty of payment" is not an absolute guaranty that the holder will be repaid in full by the guarantor, nor does it mean that the guarantor has no defenses to the claim brought by the holder under the guaranty.

distinct obligation from the note. *First Sav. Bank, FSB v. Capital Investors*, 318 S.C. 555, 557, 459 S.E.2d 307, 308 (1995) (citing *Citizens and S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 443 S.E.2d 549 (1994)); *see also Williams v. Sandman*, 187 F.3d 379, 382 (4th Cir. 1999) ("[T]he general rule in South Carolina 'is that a guaranty of payment is an obligation separate and distinct from the original note. . . . We adhere to the principle that the guaranty of payment and the promissory note are two separate contracts.' . . . [T]he rights and duties of guarantors, even those who guarantee payment, are distinct from the rights and duties of makers."); *In re Southco, Inc.*, 168 B.R. 95, 101 (Bankr. D.S.C. 1994) ("The contract of guaranty is a separate undertaking.").

The South Carolina Supreme Court has stated:

> The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter; and the responsibilities which are imposed by the contract of guaranty differ from those which are created by the contract to which the guaranty is collateral. The fact that both contracts are written on the same paper or instrument does not affect the independence or separateness of one from the other.

Lanford, 313 S.C. at 544, 443 S.E.2d at 551 (quoting 38 Am.Jur.2d, *Guaranty*, § 4).

A guaranty is a contract and, like all contracts, its contents must be construed according to their "plain, ordinary and popular meaning." *See CoastalStates Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 518, 759 S.E.2d 152, 157 (Ct. App. 2014) (citations omitted); *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 294, 478 S.E.2d 63, 65 (Ct. App. 1996) (citing *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Group, Inc.*, 300 S.C. 277, 387 S.E.2d 672 (1989)). "'If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.'" *CoastalStates Bank*,

408 S.C. at 518, 759 S.E.2d at 157 (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004)).

As evidenced by its arguments, Appellant misunderstands the transaction before the Court. The Guaranty is not secured by the Mortgages, and the Mortgages are not secured by the Guaranty.[11] The Guaranty, Notes, and Mortgages are separate, stand-alone documents, each giving rise to related, but discrete, rights and obligations. The Notes were executed and delivered by VDM/T to Appellant as evidence of the loans made by Appellant to VDM/T in connection with VDM/T's purchase of the Properties. The Mortgages and the Guaranty were given by VDM/T and Respondent, respectively, as security for the debt evidenced by the Notes. The Mortgages grant Appellant a lien on the Properties. The Guaranty provided another possible source of payment for the Notes. The Guaranty, a separate contract between Appellant and Respondent, does not secure the priority of Appellant's Mortgages, nor is the Guaranty secured by the Mortgages. The Guaranty merely serves as additional security for the Notes, subject to any and all defenses that might be available to Respondent in connection with any attempt to sue on the Guaranty. That the Guaranty was executed contemporaneously with the Notes and Mortgages is irrelevant. The Guaranty is a separate, stand-alone contract. *See TranSouth Fin. Corp.*, 324 S.C. at 295, 478 S.E.2d at 65 ("It is well settled that a guarantor's liability is an independent contractual obligation.").

As a contract, the time period within which to bring an action to collect on the Guaranty is set forth in S.C. Code Ann. § 15-3-530. Section 15-3-530 provides that "an action upon a contract, obligation, or liability, express or implied, excepting those

[11] *See, e.g.*, Brief of Appellant, p. 8 ("In this case, the Guaranty is a written, absolute guaranty of repayment of the debt obligations, evidenced by the two Notes and secured by the Mortgages against two parcels of real property.").

provided for in Section 15-3-520" must be commenced within three years. S.C. Code Ann. § 15-3-530. As recognized by the trial court, "The South Carolina Court of Appeals has found that the statute of limitations for an action on a guaranty begins to run upon default of the obligor." (R. p. 7).[12]

In the case at bar, it is clear that Appellant's claim against Respondent on the Guaranty arose substantially more than three years before the filing of the Third-Party Complaint. As found by the trial court, Appellant's claim against VDM/T for default under the Notes was ripe in January, 2009. (R. p. 7). Yet, Appellant did not attempt to bring suit on the Guaranty until April 16, 2014, well over three years after the cause of action accrued. As a result, the three-year statute of limitations on Appellant's Third-Party Complaint has expired, and the trial court properly found that the Third-Party Complaint is time-barred and must be dismissed.

Appellant attempts to distinguish the holding of *CoastalStates Bank v. Hanover Homes of South Carolina, LLC, supra*, by arguing alleged factual distinctions between it and this case. Specifically, Appellant claims that a distinction must be drawn because the *Hanover Homes* debt was unsecured. This is not correct.

First, contrary to Appellant's argument that the *Hanover Homes* loans were unsecured, the *Hanover Homes* opinion indicates that a portion of debt owed on the underlying loans was paid from the proceeds resulting from short sales. *See Hanover Homes,* 408 S.C. at 514, 759 S.E.2d at 155. Thus, in fact, the Hanover loans were undersecured.

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[12] (citing *CoastalStates Bank v. Hanover Homes of S.C., LLC*, 759 S.E.2d 152 (Ct. App. 2014)).

Second, and more importantly, even if the *Hanover Homes* loans were unsecured, this distinction is immaterial. The *Hanover Homes* opinion stands for the proposition that the statute of limitations for a suit on a guaranty begins to run, whether or not the guaranty is collateralized, "when the obligation [guaranteed] matures and the debtor defaults." *Hanover Homes*, 408 S.C. at 517, 759 S.E.2d at 156 (quoting 38 Am.Jur.2d *Guaranty* § 96, at 1040 (2010)).

Just as in *Hanover Homes*, the Guaranty is a completely separate contract from the Notes. The Guaranty is an unambiguous document that must be construed according to the ordinary meaning of the express language contained therein. When VDM/T defaulted on the Notes, the statute of limitations on the Guaranty began to run. The three-year statute of limitations in S.C. Code Ann. § 15-3-530 applies, and has expired. The trial court's dismissal of the Third-Party Complaint was correct. The trial court should be affirmed.

II. The Guaranty is not a sealed instrument.

In an attempt to circumvent the limitations issue, Appellant argues that the Guaranty is a sealed instrument and therefore, the twenty-year statute of limitations of S.C. Code Ann. § 15-3-520(b) applies. Appellant is incorrect.

Historically, "the presence of a seal rendered the document to which it was affixed indisputable as to the terms of the underlying obligation thereby dispensing with the necessity of witnesses to the transaction." 68 Am.Jur.2d, *Seals* § 2. However, in modern times, the "primary legal significance [of a sealed instrument] is the application of a longer statute of limitations to actions brought on sealed instruments." *Id.* Documents such as conveyances of land and penal bonds are the types of instruments that

are generally sealed, while promissory notes are instruments which are "familiarly used without a seal." *O'Cain v. O'Cain*, 32 S.C.L. (1 Strob.) 402, 1847 WL 2133, at *2 (S.C. App. Law 1847).

Traditionally, "in South Carolina, whatever may be adopted by a party as a seal, *is his seal*, but there must be some evidence of its adoption." *O'Cain*, 1847 WL 2133, at *1 (S.C. App. Law. 1847) (emphasis original). Thus, while an actual raised seal is not required to create a sealed instrument, to find that a document was signed under seal, it is necessary that the parties' intention to create a sealed document be established by the language or notations in the document. *See* S.C. Code Ann. § 19-1-160 ("Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.").

Several recent South Carolina cases have considered the issue of whether a document is a sealed instrument. The South Carolina case law on sealed instruments is varied; however, an examination of the cases, together, provides some indication of what is necessary in South Carolina in order to create a sealed instrument.

In *South Carolina Department of Social Services v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984), the documents at issue (contracts for skilled nursing care services) contained both an attestation clause with the language "the parties hereto have set their hands and seals," as well as the notation "L.S." after the signatures of the parties to be charged. The court determined that these contracts were

sealed instruments, stating simply, "Clearly, the two contracts are sealed instruments." *Winyah Nursing Homes*, 282 S.C. at 561, 320 S.E.2d at 467 (citations omitted).

In *Treadaway v. Smith*, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996), the document before the court, a settlement agreement between divorcing spouses, contained the following language: "IN WITNESS WHEREOF, the parties have hereunto set their respective Hands and Seals in quadruplicate as of the day and year first above written," (emphasis added), as well as language stating, "SIGNED SEALED AND DELIVERED IN THE PRESENCE OF" before the parties' signatures. *Treadaway*, 325 S.C. at 378, 479 S.E.2d at 855. Relying on the decision in *Winyah Nursing Homes*, the court found that this language was sufficient to establish the parties' intent to create a sealed instrument. *Treadaway*, 325 S.C. at 378, 479 S.E.2d at 855.

In contrast, in *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 172, 609 S.E.2d 548, 550 (Ct. App. 2005), the court found that a contract for the lease of commercial real property which contained only an attestation clause stating, "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals" did not contain sufficient evidence of the parties' intent to create a sealed instrument. The court stated:

> The sophisticated parties to this lease arrangement could have easily manifested an intent to create a sealed instrument if they were so inclined. . . . We further recognize, [ ] that such generic language is common in non-sealed contracts of all types. Were we to construe this boilerplate attestation clause, *by itself*, as requiring a finding of intent to create a sealed instrument in an otherwise non-sealed instrument, we would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state.

Carolina Marine Handling, 363 S.C. at 174-75, 609 S.E.2d at 551-52.

Likewise, in *Clifton, LLC v. Tadlock*, C/A No. 4:11-cv-01234-RBH, 2012 WL 909826 (D.S.C. Mar. 16, 2012), *aff'd* 513 Fed. Appx. 255 (4th Cir. Mar. 1, 2013), the Fourth Circuit Court of Appeals found that a document in which the only indication of an intent to create a sealed document was the phrase "Signed, sealed and delivered" was not a sealed instrument. *Clifton*, 2012 WL 909826, at *5. The *Clifton* court also noted:

> Although "[t]he sophisticated parties to th[e] [L]ease [ ] could have easily manifested an intent to create a sealed instrument if they were so inclined," . . . they failed to do so in this instance. As an initial matter, the body of the Lease lacks any express language indicating that it is to be treated as a sealed instrument.

Id. at *5 (internal citations omitted).

The holdings in the foregoing cases appear to turn on whether the signer of the document in question, the party to be charged, evidenced his intent, in the body of the document, in the signature block, or both, that his signature be sealed. No case has found such an intent when the only reference to "seal" appears in boilerplate above the witness' signatures. It is the intent of the signatory that is determinative; that of the witnesses is irrelevant.

In the present case, the Guaranty contains the following attestation clause:

> "IN WITNESS WHEREOF, this instrument has been duly executed by the undersigned this 2 day of June, 2006."

(R. p. 85). The Guaranty also contains the boilerplate "Signed, Sealed and Delivered in the Presence of" language directly above the witness' signature block. (*Id.*). The phrase "L.S." does not appear on the signature line. (*Id.*). The Guaranty is not notarized, nor does it have either a raised or stamped seal or embossment, or any other type of notation. (*Id.*). Other than as previously stated, the Guaranty contains no reference to a seal. Like

the contracts in *Clifton* and *Carolina Marine*, *supra*, the Guaranty lacks any express language indicating Respondent's intent that it is to be treated as a sealed instrument.

Despite the clear absence of intent to create a sealed instrument, Appellant argues that the trial court erred in not applying *Treadaway*. Appellant's analysis is incorrect. In *Treadaway*, the parties' settlement agreement stated:

> IN WITNESS WHEREOF, the parties have hereunto set their respective Hands and Seals in quadruplicate as of the date and year first above written.
>
> SIGNED SEALED AND DELIVERED IN THE PRESENCE OF
>
> [signatures of parties and witnesses][13]

Treadaway, 325 S.C. at 378, 479 S.E.2d at 855 (emphasis added).

In contrast, the Guaranty does not evidence Respondent's intent that the Guaranty be sealed. The Guaranty simply states, "this instrument has been duly executed by the undersigned . . . ." (R. p. 85). Thus, unlike the *Treadaway* clause, the Guaranty's attestation clause contains no reference to and no language regarding a seal.

Under South Carolina law, *supra*, the inclusion of the phrase "Signed, Sealed and Delivered in the presence of," above the witness' signature in the Guaranty, without more, is woefully insufficient to create a sealed instrument. As evidenced by the complexity of the documents, the parties to this commercial transaction were sophisticated businessmen engaged in a complex commercial transaction. The parties were capable of making their intent clear if they wished to create a sealed document. They failed to undertake any of the steps required or recognized by the law for sealed instruments. The trial court correctly found that the Guaranty was not a sealed instrument and that therefore S.C. Code Ann. § 15-3-520(b) was not applicable.

[13] Emphasis added.

III. Appellant's remaining arguments are without merit.

In addition to the arguments discussed above, for the first time on appeal, Appellant argues that the twenty-year statute of limitations under S.C. Code Ann. § 15-3-520(a) should apply to its Third-Party Complaint because § 15-3-520 is a more specific statute of limitations than the three-year statute of limitations of S.C. Code Ann. § 15-3-530. In support of its argument, Appellant cites *State v. Life Insurance Co. of Georgia*, 254 S.C. 286, 175 S.E.2d 203 (1970), for the proposition that, when there is doubt as to what statute of limitations applies, the longer of the statutes should be used.

At the outset, Respondent notes that Appellant failed to raise this issue below, so it is not preserved for appeal. *Hill v. S.C. Dept. of Health and Environ. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998)). Setting aside this fact, Appellant's argument must fail because, in this case, no doubt exists regarding which statute applies.

South Carolina Code Ann. § 15-3-530 states that the statute of limitations for a suit on a contract is three years. The Guaranty is a contract. It is not secured by a mortgage on real property. It is not secured by any collateral. The Guaranty is not a sealed instrument. As a matter of law, neither S.C. Code § 15-3-520(a) nor S.C. Code § 15-3-520(b) is applicable to the Guaranty. It is clear that the three-year statute of limitations set forth in S.C. Code Ann. § 15-3-530 applies, and that § 15-3-530 is the only statute of limitations that can apply. Appellant's argument should be rejected.

IV. Alternate sustaining grounds exist to affirm the dismissal of the Third-Party Complaint.

Rule 220(c), SCACR, provides, "The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal." In

the event the Court finds the trial court erred in its analysis, alternate sustaining grounds exist to affirm the Order.

Respondent moved to dismiss the Third-Party Complaint on the grounds that: (1) the applicable statute of limitations had expired, and (2) the claims asserted in the Third-Party Complaint were not derivative and therefore, the pleading itself was not a proper third-party complaint. The trial court's Order only addressed the statute of limitations. However, additional grounds exist to affirm the dismissal of the Third-Party Complaint.

South Carolina Rule of Civil Procedure 14(a) states, "At any time after commencement of the action a defending party, [a defendant] as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

In analyzing Rule 14, the South Carolina Supreme Court has stated:

> Under Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability. The outcome of the principal claim must impact the third-party defendant's liability; however, no right exists to implead a third-party defendant who is *directly* liable to the plaintiff.

First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) (citing Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1446) (emphasis added) (italics original).

As set forth above, the Complaint does not assert any claims against Appellant, and Appellant has no liability to JMT under the Complaint. The Complaint seeks foreclosure of the JMT Mortgage on the Properties. Appellant is named as a defendant simply because Appellant has junior liens on the Properties. JMT seeks only to foreclose

its mortgage and to wipe out any junior liens. Under no scenario would Appellant have any liability to JMT.

Appellant's Third-Party Complaint asserts that Respondent "is and will be liable to Third-Party Plaintiff for all or part of plaintiff's complaint." (R. p. 78, ¶ 27). This allegation is false. Since Appellant has no liability to JMT, Respondent cannot be liable to Appellant for anything asserted in JMT's Complaint.

Appellant's Third-Party Complaint is not founded upon derivative liability, which is required by South Carolina Rule of Civil Procedure 14. As a result, the Third-Party Complaint is not a proper third-party complaint. Thus, even if this Court disagrees with the trial court's ruling, the dismissal of the Third-Party Complaint should be affirmed, pursuant to Rule 220(c), SCACR.

CONCLUSION

For the reasons set forth above, the trial court's Order granting Respondent's Motion to Dismiss and dismissing Appellant's Third-Party Complaint was proper, and should be affirmed.

ADAMS AND REESE LLP

By: Tara E. Nauful

Tara E. Nauful, SC Bar No. 65358
Dawn M. Hardesty, SC Bar No. 80144
1501 Main Street, 5th Floor
Columbia, SC 29201
(803) 254-4190 Tel
(803) 779-4749 Fax
tara.nauful@arlaw.com
dawn.hardesty@arlaw.com

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Attorneys for Respondent Raymond Travaglione