

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

TD Bank, N.A., Successor by Merger to Carolina
First Bank,

Plaintiff,

v.

Black Diamond, LLC; J. Christopher Lindgren;
David A. Brosman; Julie H. King; and The
Greenery, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

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C.A. No. 2012-CP-07-0944

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SC Court of Appeals

ORDER GRANTING TD BANK'S
MOTION TO STRIKE DEFENDANTS'
JURY TRIAL DEMAND

In this foreclosure action, TD Bank, N.A., Successor by Merger to Carolina First Bank, ("TD Bank" or "the Bank") has moved the Court to strike the jury trial demand of Defendants Black Diamond, LLC, J. Christopher Lindgren, and David A. Brosman¹ (collectively, "Defendants"), asserting that Defendants are not entitled to and/or waived any right to a jury trial in this case. On March 24, 2015, the Court held a hearing on the Bank's Motion. After review of the Bank's Motion and its supporting Memorandum, Defendant David A. Brosman's Memorandum in Opposition to that Motion, and hearing arguments from counsel, the Court GRANTS TD Bank's Motion for the reasons set forth below:

BACKGROUND:

This is a commercial foreclosure action involving:

- Two promissory notes that Defendant Black Diamond, LLC ("Black Diamond") executed in favor of the Bank: (1) a Promissory Note for \$3.5 Million ("the \$3.5 Million Note"), and (2) a Promissory Note for \$2 Million ("the \$2 Million Note") (collectively, "the Notes");

¹ The remaining defendants in this case, Julie H. King and The Greenery, Inc., have not demanded a jury trial.

- Mortgages on two parcels of Beaufort County, South Carolina real property that Black Diamond provided to the Bank to secure the Notes (“**the Mortgages**”); and
- Guaranty Agreements that Defendants J. Christopher Lindgren and David A. Brosman (collectively, “**the Guarantors**”) executed in favor of the Bank and which guaranteed Black Diamond’s payment of the Notes.

TD Bank alleges that Black Diamond is in default under the Notes, and it seeks to foreclose on the Mortgages that Black Diamond executed in its favor and recover any deficiency after the foreclosure sale from the Guarantors, who guaranteed Black Diamond’s debts to the Bank. Compl.

In response to the Complaint, Black Diamond and the Guarantors filed the following counterclaims against the Bank: breach of the covenant of good faith and fair dealing; breach of contract; breach of fiduciary duty; duress; interference with prospective economic relations; and unfair trade practices. Black Diamond and the Guarantors have requested a jury trial of all the claims and counterclaims in this matter.

FINDINGS:

I. Defendants Are Not Entitled to a Jury Trial on the Bank’s Equitable Foreclosure and Deficiency Claims Against Them.

Foreclosure actions, like this one, are equitable, and, as a result, parties to such an action are “not entitled, as a matter of right, to a jury trial.” Carolina First Bank v. BADD, LLC, No. 2013-000107, 2015 WL 340791, *1 (Jan. 28, 2015). See also S.C. R. Civ. P. Rule 71(a) (“Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53”). In BADD, the South Carolina Supreme Court recently confirmed that guarantors, who are parties to a foreclosure action “for the purpose of collecting a deficiency,” are not entitled to a jury trial on that claim because deficiency judgments are “incidental to the main relief sought” in a foreclosure action. BADD,

at *2. In so holding, the BADD court relied on S.C. Code Ann. § 29-3-660,² which specifically grants a court the ability to award a deficiency judgment against a guarantor in a foreclosure action.

As noted above, this is a foreclosure action, which is equitable in nature and in which TD Bank seeks to: (1) foreclose on the mortgages that Black Diamond executed in its favor and (2) recover any deficiency after the foreclosure sale from the Guarantors. See Compl. As a result, Black Diamond is not entitled to a jury trial on the Bank's foreclosure action against it, BADD, at *1, and the Guarantors, whom "the Bank included . . . as [parties] to its foreclosure action only for the purpose of collecting a deficiency should one be adjudged," are not entitled to a jury trial on the Bank's claim against them because "a party does not have a right to a jury trial" on a deficiency claim, id., at *2.

II. Furthermore, Defendants Are Not Entitled to a Jury Trial on Their Permissive Counterclaims against the Bank.

The Court finds that, because Defendants asserted *permissive* counterclaims against the Bank in this equitable action, they are not entitled to a jury trial on those claims. A defendant is "entitled to a jury trial on his counterclaims in an equitable action," like this one, "only if the counterclaims are legal and compulsory." Id., at *3. "A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a 'logical relationship' between the counterclaim and the enforceability of the guaranty agreement." Id. As a result, in BADD, a foreclosure action in which the bank sought a

² S.C. Code Ann. § 29-3-660 provides: "In actions to foreclose mortgages[,] . . . if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases."

deficiency against a guarantor, the South Carolina Supreme Court held that a guarantor who asserted counterclaims that lacked a logical relationship with the guaranty agreement's enforceability was not entitled to a jury trial on those claims.

The BADD guarantor asserted breach of contract and civil conspiracy legal counterclaims against the bank. In analyzing whether the counterclaims were compulsory or permissive, the BADD court found that "the execution of the guaranty agreements was the 'transaction or occurrence' that gave rise to [the guarantor's] inclusion in the Bank's foreclosure complaint." Id. (emphasis added). Thus, in order to be compulsory, the guarantor's counterclaims had to have a logical relationship with the guaranty agreement's execution or enforceability. The BADD court found that the guarantor's counterclaims were based on "an alleged conspiracy between the Bank" and a third party to "induce [the debtor's] default" on the underlying notes and the Bank's alleged breach of the covenant of good faith and fair dealing, which were "implied in the note, mortgage, and guaranty agreements," by virtue of the "purported conspiracy." Id., at *3. The Court held that the counterclaims did not have a "logical relationship to either the execution or enforceability of the guaranty agreements," and it noted that the claims instead "presume[d] the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable." Id. As a result, the counterclaims were permissive and did not entitle the BADD guarantor to a jury trial.

Like the BADD guarantor's counterclaims, Defendants' legal counterclaims against TD Bank are permissive in nature and do not entitle Defendants to a jury trial because they bear no "logical relationship" with the transaction that gave rise to the Bank's foreclosure and deficiency action against them — the execution of the notes, mortgages, and guaranty agreements. Defendants have asserted the following counterclaims against the Bank: breach of the covenant

of good faith and fair dealing; breach of contract; breach of fiduciary duty; duress; interference with prospective economic relations; and unfair trade practices. As with the BADD counterclaims, none of Defendants' legal counterclaims "affect the execution or enforceability" of the loan documents. Instead, they are premised on events that occurred after the execution of those documents, such as the Bank's refusal to accept a short sale of one of the mortgaged commercial properties. See, e.g., Brosman Answer and Counterclaim, at ¶ 27; Black Diamond and Lindgren Answer and Counterclaim, at ¶ 27. Importantly, Defendants, in Brosman's Memorandum in Opposition to the Bank's Summary Judgment Motion, confirmed that their counterclaims are based on alleged events that occurred "subsequent" to the execution of the parties' loan documents." See e.g., Def's Memo in Opp., at 4-5 (Alleging that the purported breach of contract was "subsequent to" and "after" the execution of the forbearance agreements.") Consequently, the Court finds that Defendants' legal counterclaims against the Bank are permissive and do not entitle Defendants to a jury trial.

Because Defendants are not entitled to a jury trial on the Bank's foreclosure claims against them or on their counterclaims against the Bank, the Court grants the Bank's motion to strike Defendants' demand for a jury trial.

III. Alternatively, the Court Also Finds that Black Diamond Contractually Waived Its Right to a Jury Trial.

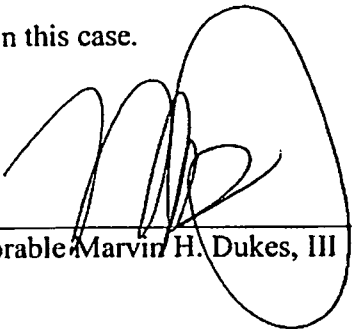
As an alternative ground for granting the Bank's motion to strike Defendants' jury trial demand, the Court also finds that Black Diamond contractually waived any right to a jury trial when it executed the \$3.5 Million Note. Under South Carolina law, "[a] party may waive the right to a jury trial by contract." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002). In this case, the \$3.5 Million Note, in capital letters conspicuously located directly above the signature line, unambiguously states that Black Diamond:

WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, THE RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER IN CONTRACT, TORT OR OTHERWISE, RELATING DIRECTLY OR INDIRECTLY TO THE LOAN EVIDENCED BY THIS NOTE, . . . THE SECURITY INSTRUMENT, THE LOAN AGREEMENT OR THE OTHER SECURITY DOCUMENTS OR ANY ACTS OR OMISSIONS OF LENDER OR BORROWER.

\$3.5 Million Note (emphasis added). As noted above, the claims and counterclaims at issue in this action relate directly to the \$3.5 Million Note, which the Bank asserts that Black Diamond is in default under, and the alleged “acts or omissions” of the Bank and Black Diamond. Therefore, per the plain, ordinary meaning of the \$3.5 Million Note’s language, Black Diamond waived any right to a jury trial in this lawsuit.³

WHEREFORE, the Court **GRANTS** TD Bank’s Motion to Strike Defendants’ request for a jury trial on all claims and counterclaims in this case.

This 17 day of June 2015
Beaufort, South Carolina



The Honorable Marvin H. Dukes, III

³ The Court also finds that the Guarantors waived any right to a jury trial because the Guaranty Agreements clearly, and in conspicuous, capitalized language directly above or near the signature lines, provide that the Guarantors unequivocally waived such a right in “any action,” like this one, regarding the Notes and/or the “relationship between” the Bank and Black Diamond. See, e.g., Lindgren Guaranty of \$3.5 Million Note, at ¶ 21; Brosman Guaranty of \$3.5 Million Note, at ¶ 17; Brosman Guaranty of \$2 Million Note, at ¶ 17. See also Lindgren Guaranty of \$2 Million Note, at ¶ 9 (providing that Lindgren consents to “any waiver” of Black Diamond, which as noted above, includes a waiver of a jury trial in this matter).