THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 14 2016
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Alison Renee Lee, Circuit Court Judge

Case No. 2012-CP-40-6074; Appellate Case No. 2015-000730

TD Bank, N.A., successor by merger with Carolina First Bank, ... Respondent,

v.

David H. Jacobs, ... Appellant.

Case No. 2012-CP-40-7540

TD Bank, N.A., successor by merger with Carolina First Bank, ... Respondent,

v.

David H. Jacobs and James A. McFarland, ... Defendants,

Of Whom David H. Jacobs is ..... Appellant.

FINAL BRIEF OF RESPONDENT TD BANK, N.A.

NELSON MULLINS RILEY & SCARBOROUGH LLP

John T. Moore
Jody A. Bedenbaugh
Paul T. Collins
A. Mattison Bogan
1320 Main Street / 17th Floor
Post Office Box 11070 (29211)
Columbia, SC 29201
(803) 799-2000

Attorneys for TD Bank, N.A.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Alison Renee Lee, Circuit Court Judge

Case No. 2012-CP-40-6074; Appellate Case No. 2015-000730

TD Bank, N.A., successor by merger with Carolina First Bank, ... Respondent,

v.

David H. Jacobs, ... Appellant.

Case No. 2012-CP-40-7540

TD Bank, N.A., successor by merger with Carolina First Bank, ... Respondent,

v.

David H. Jacobs and James A. McFarland, ... Defendants,

Of Whom David H. Jacobs is ..... Appellant.

FINAL BRIEF OF RESPONDENT TD BANK, N.A.

NELSON MULLINS RILEY & SCARBOROUGH LLP

John T. Moore
Jody A. Bedenbaugh
Paul T. Collins
A. Mattison Bogan
1320 Main Street / 17th Floor
Post Office Box 11070 (29211)
Columbia, SC 29201
(803) 799-2000

Attorneys for TD Bank, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

COUNTER-STATEMENT OF THE CASE 2

A. TD Bank v. David Jacobs (Newberry Atrium), Civil Action No. 2012-CP-40-6074 2

B. TD Bank v. David Jacobs and James McFarland (Atrium at Middle Sound Land), Civil Action No. 2012-CP-40-7540 3

C. TD Bank's Motions for Summary Judgment 5

D. Appellant's Supplemental Answer and Late-identified Witnesses 5

E. TD Bank's Motion in Limine 5

F. August 12, 2015 Proffer of Challenged Evidence 6

G. Trial on October 6 – 7, 2014 9

H. Motion for New Trial 9

STATEMENT OF FACTS 10

A. Newberry Atrium Loan and Appellant's Guaranty 10

B. Atrium at Middle Sound Loan and Appellant's Guaranty 11

C. Suit on Guarantees 11

D. Appellant's Net Worth and Transfers to Family Members 13

STANDARD OF REVIEW 14

ARGUMENT 15

I. The trial court correctly ruled that TARP and the government bailout were inadmissible 15

II. The trial court properly excluded evidence of an unrelated note sale 19

III. The Order on Motion in Limine did not exclude any evidence based on the arguments previously raised in the Motions for Summary Judgment 22

IV. The trial court's decision on directed verdict and the jury's verdicts are the law of the case 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Busillo v. City of North Charleston,
404 S.C. 604, 745 S.E.2d 142 (Ct. App. 2013) 15

Clark v. Cantrell,
339 S.C. 369, 529 S.E.2d 528 (2000) 15

Davis v. Traylor,
340 S.C. 150, 530 S.E.2d 385 (Ct. App. 2000) 15

Masters Group Int'l, Inc. v. Comerica Bank,
352 P.3d 1101 (Mont. 2015) 17

Ex parte Morris,
367 S.C. 56, 624 S.E.2d 649 (2006) 24

State v. Adams,
354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003) 14, 15, 18

State v. Hamilton,
344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) 15

State v. Jennings,
394 S.C. 473, 716 S.E.2d 91 (2011) 14

Toyota of Florence, Inc. v. Lynch,
314 S.C. 257, 442 S.E.2d 611 (1994) 24

Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund,
389 S.C. 422, 699 S.E.2d 687 (2010) 24

Wachovia Bank, N.A. v. Lone Pine, Inc.,
2011 U.S. Dist. LEXIS 59808 (N.D. Ga. June 15, 2010) 18

Wilder Corp. v. Wilke,
330 S.C. 71, 497 S.E.2d 731 (1998) 23

Rules

SCRCP 43(l) 22

SCRE 103 18

SCRE 103(a)(1)(2) 20

SCRE 401 ..... 15, 16

SCRE 403 ..... 15, 16

SCRE 602 19

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court properly exercise its discretion in excluding Appellant's proffered evidence regarding TARP and the government bailout of certain financial institutions?

II. Did the trial court properly exercise its discretion in excluding the Appellant's proffered evidence regarding TD Bank's sale of an unrelated note?

III. Did the trial court's rulings on TD Bank's Motion for Summary Judgment preclude any of TD Bank's arguments in its Motion in Limine?

COUNTER-STATEMENT OF THE CASE

A. TD Bank v. David Jacobs (Newberry Atrium), Civil Action No. 2012-CP-40-6074

On September 7, 2012, Respondent TD Bank, N.A. ("TD Bank") filed Civil Action No. 2012-CP-40-6074 against Appellant David Jacobs to collect on a Guaranty ("Newberry Guaranty") given by Appellant in consideration for a commercial note dated February 20, 2007 in the amount of $7,141,000 to Newberry Atrium Professional Center, LLC ("Newberry Atrium"), which was secured by a mortgage on commercial real estate owned by Newberry Atrium.

On November 21, 2012, Appellant filed his answer admitting signing the note on behalf of Newberry Atrium, admitting that he signed an unconditional guaranty, admitting that the maturity date on the note was August 8, 2012, and admitting that the balance due on the loan had not been paid. (R. p. 97, Answer ¶¶ 1-3.) Appellant also alleged in his answer that TD Bank breached the duty of good faith and fair dealing by failing to provide permanent financing and by suing him solely on the guaranty and not foreclosing the mortgage. (R. pp. 99-100, Answer ¶¶ 16, 18, 21.) Based on these allegations, Appellant sought to void the guaranty. (R. pp. 99-100, Answer ¶¶ 19 & 24.) On July 11, 2014, Appellant filed a supplemental answer raising one additional ground for the breach of good faith and fair dealing defense: that TD Bank had sold other notes and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who have special or personal relationships with the officers of TD Bank, will be released from liability. (R. p. 101, Supp. Answer ¶ 30.)

Through discovery, Appellant admitted signing the Newberry Atrium Guaranty individually as well as signing the Note and other loan documents on behalf of Newberry Atrium. In addition, Appellant admitted the loan to Newberry Atrium had matured, that TD Bank demanded payment, that he and Newberry Atrium failed to pay the balance due, and that he and Newberry Atrium were indebted to TD Bank under the terms of the loan documents. (R. p. 326, Aff. of David Jacobs ¶¶ 41 & 42, Ex. C to TD Bank's Motion in Limine; R. pp. 347, 351, Dep. Tr. of David Jacobs, 82:1-3; 99:18-20, Ex. D to TD Bank's Motion in Limine.)

B. TD Bank v. David Jacobs and James McFarland (Atrium at Middle Sound Land), Civil Action No. 2012-CP-40-7540

On November 7, 2012, TD Bank filed Civil Action No. 2012-CP-40-7540 against Appellant David Jacobs and James McFarland to collect on Guarantees given by Appellant and Defendant James McFarland[1] in consideration for a commercial note dated November 19, 2004 in the amount of $3,000,000 to Atrium at Middle Sound Land, LLC ("Atrium at Middle Sound"), which was secured by a mortgage on commercial real estate owned by Atrium at Middle Sound.

On April 8, 2013, Appellant filed his answer admitting signing the note on behalf of Atrium at Middle Sound, admitting that he signed an unconditional guaranty, admitting that the maturity date on the note was April 4, 2012, and admitting that the balance due on the loan has not been paid. (R. p. 93, Answer ¶¶ 1-4.) Appellant also alleged in his answer that TD Bank breached the duty of good faith and fair dealing by suing him on solely on the guaranty and not foreclosing the mortgage. (R. p. 95,

[1] Defendant McFarland is not a party to this appeal.

Answer ¶¶ 17 & 20.) Based on these allegations, Appellant sought to void the guaranty. (R. p. 96, Answer ¶ 24.)

On July 11, 2014, Appellant filed a supplemental answer raising one additional ground for the breach of good faith and fair dealing defense: that TD Bank has sold other notes and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who have special or personal relationships with the officers of TD Bank, will be released from liability. (R. p. 106, Supp. Answer ¶ 27.)

Appellant admitted, by way of an affidavit and deposition testimony, signing the Atrium at Middle Sound Guaranty individually as well as signing the Note and other loan documents on behalf of Atrium at Middle Sound, that the loan to Atrium had matured, that TD Bank demanded payment, that he failed to pay the balance due, and that he is indebted to TD Bank under the terms of the loan documents. (R. p. 326, Aff. of David Jacobs ¶¶ 41-42, Ex. C to TD Bank's Motion in Limine; R. p. 353, Dep. Tr. of David Jacobs, 107:3-108:9, Ex. D to TD Bank's Motion in Limine.)

C. TD Bank's Motions for Summary Judgment

On May 24, 2013, TD Bank filed a motion for summary judgment in both cases. On August 16, 2013, Appellant Jacobs filed an affidavit in opposition to TD Bank's motions for summary judgment against him in both cases.[2] In his affidavit, Appellant Jacobs admitted that when "he made the Newberry Atrium and Middle Sound loans, [he] fully understood that [he] was liable to the bank, if either project was unsuccessful for any loss that the bank incurred." (R. p. 326, Jacobs' Aff. ¶ 41.) On March 24, 2014, Judge Strickland entered a Form-4 order denying the motions for summary judgment. On April 3, 2014, TD Bank filed a motion to reconsider, which was denied by short form order filed on April 23, 2014 that did not include any explanation or discussion for the denial.

D. Appellant's Supplemental Answer and Late-identified Witnesses

Following the denial of summary judgment, Appellant Jacobs identified two new witnesses on June 29, 2014, Tom Wingard and David Hilburn. Appellant also filed the Supplemental Answers referenced above on July 11, 2014. Appellant identified three additional new witnesses on August 7, 2014, Joe Hawk, John Hilton, and Andrew Syrett.

E. TD Bank's Motion in Limine

On August 7, 2014, TD Bank filed a motion in limine in both cases seeking to exclude the following testimony and evidence:

---

[2] Defendant Jacobs' Affidavit was attached as Exhibit C to TD Bank's Motion in Limine.

(1) any reference or evidence regarding an alleged breach by TD Bank of the implied duty of good faith and fair dealing or alleged breach of fiduciary duty because this evidence is irrelevant, would tend to confuse the jury, and is highly and unfairly prejudicial to TD Bank since there can be no breach of the implied duty of good faith and fair dealing for doing what a contract expressly allows or a of fiduciary duty to explain to an individual what he could learn from reading the parties' contract;

(2) any reference or evidence on the government's bailout to the banking industry and the Troubled Asset Relief Program ("TARP") because such evidence is irrelevant, would likely confuse the jury, and would be highly and unfairly prejudicial to TD Bank, especially since TD Bank did not receive a bailout;

(3) any reference or evidence regarding any unrelated note sales by TD Bank, including but not limited to the sale of a note from Heron Lakes I, LLC ("Heron Lakes I") to Sea Ducks, LLC (who subsequently assigned its right to purchase the note to Cypress Cove Properties, LLC ("Cypress Cove Properties")), because the evidence is irrelevant, would likely confuse the jury, and is highly and unfairly prejudicial to TD Bank; and

(4) any testimony or other evidence from Tom Wingard, Joe Hawk, John Hilton, and Andrew Syrett, which were not properly or timely disclosed through discovery.

(R. pp. 299-300, Motion in Limine.)

F. August 12, 2015 Proffer of Challenged Evidence

The cases were set for trial beginning on August 12, 2015. Prior to trial, the trial court heard TD Bank's Motion in Limine. Since the Defendants would have to proffer all of the excluded testimony and evidence, the trial court determined the best course of action, to ensure inadmissible evidence was not presented to the jury, was to allow Defendants to proffer all testimony and evidence TD Bank challenged, so the court could determine the issues based on the evidence rather than purely on TD Bank's Motion in Limine and the argument of counsel. The trial court then gave Appellant the opportunity to proffer all of the challenged evidence, and any challenged evidence not

proffered would be excluded. (R. p. 10, Order dated October 3, 2014 (hereinafter, "Order on Motion in Limine," at 7.)

Appellant proffered the following testimony and evidence: (1) the testimony of TD Bank witness Roper Jenkins; (2) the testimony of appraiser Tom Wingard as to the value of the Newberry Atrium real estate collateral; (3) testimony of Appellant; and (4) the testimony of defense witness David Hilburn as to the Sea Ducks I note sale. Defendants also proffered the following documents: (1) Articles of Merger for Carolina First Bank and TD Bank dated September 30, 2010; (2) Document entitled "TD Bank Financial Group to Acquire The South Financial Group"; (3) July 9, 2012 letter from Defendant Jacobs to Roper Jenkins; (4) Loan Sale Agreement between TD Bank and Sea Ducks, LLC related to Heron Lakes I; (5) Loan Closing Statement related to Heron Lakes I; (6) Email from Roper Jenkins indicating payoff balance of the Heron Lakes I loan; and (7) Appraisal Report of Thomas Wingard dated April 29, 2013. The Defendants did not proffer Joe Hawk, John Hilton, or Andrew Syrett.

On October 3, 2014, the trial court issued the Order on Motion in Limine which granted in part and denied in part TD Bank's Motion in Limine. The trial court denied TD Bank's motion in limine regarding exclusion of Appellant's breach of the implied duty of good faith and fair dealing and breach of fiduciary duty defenses, finding that the issue may be revisited again on directed verdict. (R. p. 11, Order on Motion in Limine at 8.) The trial court granted the Motion with respect to exclusion of all evidence, testimony, or reference to TARP and government bailouts, finding that it "was clear to the Court based on the very limited proffered testimony and evidence on this issue that the receipt of TARP money by Carolina First Bank [TD Bank's

predecessor] is wholly irrelevant as to whether Defendants must pay their guaranty obligations." (R. p. 11, Order on Motion in Limine at 8.) The trial court further found that "[t]his testimony, if allowed to be presented to the jury, would likely confuse the jury, and result in a verdict based on improper motives rather than current law." (R. p. 12, Order on Motion in Limine at 9.)

In addition, the trial court found that the proffered evidence regarding the sale of the Heron Lakes I note to another party at a discount should also be excluded. The trial court found, *inter alia*, that "[i]t is of no consequence that TD Bank may have sold another note for another party at a discount since that note is wholly unrelated to the parties in this action, wholly unrelated to the note, mortgage, and guaranties in this case, and wholly unrelated to any claim in this action. Further, event if this Court were to determine the testimony and evidence regarding Heron Lakes I had some marginal reference to this case, the proffered testimony does not support the allegations." (R. p. 13, Order on Motion in Limine at 9.) The court found that the testimony of Mr. Jenkins, the TD Bank witness, refuted the Appellant's allegations and was uncontested. Moreover, the other witness proffered by Appellant regarding the Heron Lakes I note, David Hilburn, lacked personal knowledge as to the allegations. (R. p. 13, Order on Motion in Limine at 10.)

The trial court denied TD Bank's motion in limine to exclude Defendant Jacobs' appraiser, Tom Wingard, but granted TD Bank's motion in limine to exclude witnesses John Hilton, Joe Hawk, and Andrew Syrett (who were not proffered), and David Hilburn (who, as mentioned above, was proffered to provide testimony on the Heron Lakes I note sale).

G. Trial on October 6 – 7, 2014

On October 6 and 7, 2014, the consolidated cases were tried before a jury. Following the close of TD Bank's case in chief, TD Bank moved for a directed verdict on its claims, seeking to have Appellant's defenses dismissed as a matter of law. The trial court denied TD Bank's motion in part, but granted the motion on the narrow issue of whether TD Bank could sue Appellant on the guarantees without first foreclosing on the property securing the notes, which the Court determined TD Bank could do under South Carolina law and the terms of the parties' loan documents. (R. p. 851, lines 6-16, Trial Tr. 237:6-16.) Following the close of all evidence, TD Bank again moved for a directed verdict on its claims, seeking to have the Defendants' defenses dismissed as a matter of law. The trial court again denied TD Bank's motion and allowed the defenses to be submitted to the jury. (R. p. 933, lines 8-17, Trial Tr. 319:8-17.) The jury then returned verdicts in TD Bank's favor in the amounts alleged to be due under the guarantees: (1) a $1,557,363.29 verdict against Appellant Jacobs and Defendant McFarland in case -07540; and (2) a $2,867,277.14 verdict against Appellant Jacobs in case -06074. (R. pp. 20-21, Jury Verdicts.) In finding for TD Bank on its causes of action against the Defendants, the jury rejected Appellant's breach of fiduciary duty and breach of implied covenant of good faith and fair dealing defenses.

H. Motion for New Trial

On October 17, 2014, Appellant filed a Motion for New Trial seeking a new trial on the grounds that the trial court's exclusion of (i) evidence related to TARP and government bailouts, (ii) evidence related to the Heron Lakes I note sale, and (iii) the

testimony of David Hilburn "unfairly tied the hands of this Defendant in proving the alleged breach by the Plaintiff of the covenant of good faith and fair dealing with this Defendant." (R. p. 468, Motion for New Trial, ¶ 25.)

By Order entered on March 2, 2015, the trial court addressed each of these arguments and denied Appellant's Motion for a New Trial. (R. pp. 22-26, Order entered Mar. 2, 2015.) Appellant appeals the Order denying his Motion for a New Trial.

STATEMENT OF FACTS

A. Newberry Atrium Loan and Appellant's Guaranty

On February 20, 2007, Newberry Atrium executed a Promissory Note in the principal amount of $7,141,000 in favor of TD Bank's predecessor, Carolina First Bank ("Carolina First"),[3] which was secured by a mortgage on certain real property owned by Newberry Atrium. (R. pp. 1038-1041, Newberry Atrium Note, Pl.'s Ex. 1.) The Newberry Atrium loan was a loan to fund a two-story medical office building in Newberry. (R. p. 671, lines 9-11, Trial Tr. 57:9-11.) In consideration of the Promissory Note, Appellant executed an Unconditional Guaranty in favor of Carolina First on February 20, 2007. (R. pp. 1042-1048, Unconditional Guaranty of David Jacobs, Pl.'s Ex. 2.) The Promissory Note initially matured on February 28, 2009, however, Carolina First and TD Bank agreed to a total of eight extensions and renewals. (R. p. 679, lines 19-23, Trial Tr. 65: 19-23; R. pp. 1049-1072, Pl.'s Ex. 3.)

[3] TD Bank acquired the Newberry Atrium loan and the Atrium at Middle Sound loan when it merged with Carolina First in 2010. (R. p. 671, lines 2-7, Trial Tr. 57:2-7; R. pp. 1198-1208, Articles of Merger, Def.'s Ex. 1.)

Ultimately, the Newberry Atrium loan matured on August 8, 2012, Newberry Atrium and Appellant failed to pay the balance due and defaulted on the loan. (R. p. 686, line 19–p. 687, line 3, Trial Tr. 72:19-73:3.)

B. Atrium at Middle Sound Loan and Appellant's Guaranty

On April 4, 2011, Atrium at Middle Sound executed a Promissory Note in the principal amount of $1,310,495.33 in favor of TD Bank, which was a renewal note and secured by a mortgage on certain real property owned by Atrium at Middle Sound. (R. pp. 1074-1077, Atrium at Middle Sound Note, Pl.'s Ex. 5.) The Atrium at Middle Sound loan was made to fund the purchase and development of vacant real property. (R. p. 692, lines 6-9, Trial Tr. 78:6-9.) In consideration for the Promissory Note to Atrium and Middle Sound, Appellant and James McFarland executed Guarantees in favor of Carolina First on April 4, 2011. (R. pp. 1078-1081, Guaranty of David Jacobs, Pl.'s Ex. 6; R. pp. 1082-1085, Guaranty of James McFarland, Pl.'s Ex. 7.) Like the Newberry Atrium loan, Carolina First and TD Bank agreed to eight extensions of the original maturity date. (R. p. 696, lines 14-22, Trial Tr. 82:14-22; R. pp. 1086-1118, Pl.'s Ex. 8.) The Atrium at Middle Sound loan eventually matured on July 4, 2012, Atrium at Middle Sound, Appellant, and Mr. McFarland failed to pay the balance due and defaulted on the loan. (R. p. 700, line 3, p. 86, line 23 – p. 87, line 6, Trial Tr. 86:3, 86:23-87:6.)

C. Suit on Guarantees

Under the terms of the at-issue Guarantees, as well as the Newberry Atrium Promissory Note, TD Bank was not required to seek recovery of any collateral before

filing suit on the Guarantees – the bank could proceed directly against any borrower or guarantor. (See R. p. 1040, Promissory Note at p. 3, Pl.'s Ex. 1 ("Lender is not required to rely on the collateral for the payment of the Note in the event of default by the Borrower, but may proceed directly against the Borrower and Guarantor or endorsers in such a manner as it deems desirable."); R. pp. 1042-1043, Unconditional Guaranty of David Jacobs at ¶ 1, Pl.'s Ex. 2 ("Guarantor hereby expressly waives any right to require Lender to bring any action against Borrower or any other person or require that resort be had to any security. . . . Without limiting the foregoing, Guarantor expressly waives any rights Guarantor otherwise might have under provisions of South Carolina or other applicable law to require Lender to attempt to recover against Borrower and/or to realize upon any securities or collateral security which Lender holds for the obligation evidenced or secured hereby."); R. p. 1078, Guaranty of David Jacobs at ¶ 4, Pl.'s Ex. 6 ("I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt.")

TD Bank's workout officer, Mr. Roper Jenkins, testified that the bank made the decision to sue Appellant on the guarantees rather than first foreclosing[4] the mortgages because the guarantors were high net worth individuals and had sufficient assets sufficient to satisfy the debt owed. (R. p. 703, line 24 – p. 704, line 24, Trial Tr.

[4] By the time of trial, TD Bank had proceeded with the foreclosure of the mortgage securing the Newberry Atrium loan. (R. p. 709, lines 15-18, Trial Tr. 95:15-18.)

89:24-90:24; R. p. 551, line 15 – p. 552, line 3, Tr. of Aug. 12, 2014 Hearing 74:15-75:3.) In addition, Mr. Jenkins testified that the fact that the Newberry Atrium property was a medical office building with confidential records and did not appear to be generating enough income to pay its expenses factored into its decision to wait before proceeding with foreclosure of that property. (R. p. 704, lines 3-8, lines 20-24, p. 705, line 18 – p. 706, line 14, Trial Tr. 90:3-8, 90:20-24, 91:18-92:14.) Also, TD Bank believed allowing the Appellant and Mr. McFarland additional time to sell the properties themselves was beneficial to them. (R. p. 704, line 25 – p. 705, line 17, Trial Tr. 90:25-91:17; R. p. 553, lines 10-22, Tr. of Aug. 12, 2014 Hearing 76:10-22.) Furthermore, Newberry Atrium delayed the foreclosure of its property by filing for protection under the Bankruptcy Code. (R. p. 706, lines 15-20, Trial Tr. 92:15-20.) Mr. Jenkins also testified that one of the reasons the Bank elected to proceed with suit was that Mr. Jacobs did not provide financial information that was requested by the Bank. (R. p. 726, lines 2-16, Trial Tr. 114:2-16; R. p. 549, line 21 – p. 550, line 18, Tr. of Aug. 12, 2014 Hearing 72:21-73:18.)

D. Appellant's Net Worth and Transfers to Family Members

Mr. Jenkins stressed during both his proffered testimony on August 12, 2014 and his testimony at trial that Appellant's high net worth was one of the main reasons the TD Bank elected to first sue him on his guaranty. Appellant's financial statements were proffered at the August 12, 2014 hearing and entered into evidence at trial. (See R. pp. 1148-1197, Pl.'s Exs. 12-16.) In 2004, Appellant had a net worth in excess of $36 million. (R. p. 1148, Pl.'s Ex. 12.) This increased to over $42 million in 2008.

(R. p. 1159, Pl.'s Ex. 13.) It decreased over the ensuing years, but in June 2012 Appellant's net worth was still in excess of $21 million according to his financial statements. (R. p. 1190, Pl.'s Ex. 16.) Mr. Jenkins testified that the decrease in Appellant's net worth was a cause for concern. (R. p. 727, line 16 – p. 728, line 1, Trial Tr. 113:16-114:1.) This led TD Bank to request additional financial information from the Appellant, which he refused to provide and, again, was one reason TD Bank proceeded with suit. (R. p. 728, lines 2-16, Trial Tr. 114:2-16.) As Mr. Jenkins testified, the refusal to provide financial information was a concern because it indicates a borrower may be hiding something. (R. p. 728, lines 8-16, Trial Tr. 114:8-16.)

TD Bank's concern was justified, as it later learned that Appellant had transferred property to family members "in the millions of dollars." (R. p. 728, lines 17-25, Trial Tr. 114:17-25.) His financial statements show transfers of ownership interests in various entities, with the transferred interests having a total value of over $5 million. (R. p. 729, line 2 – p. p. 733, line 3, Trial Tr. 115:2-119:3.) Appellant did not deny transferring millions of dollars to his wife and family. (R. p. 814, line 14 – p. 816, line 2, p. 816, line 3 – p. 817, line 24, Trial Tr. 200:14-202:2, 202:3-203:24.)

STANDARD OF REVIEW

The sole basis of Appellant's challenge to the trial court's ruling is the exclusion of certain evidence pursuant to the Order on Motion in Limine. The "admission or exclusion of evidence is left to the sound discretion of the trial judge." State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (citations omitted). Consequently, a "court's ruling on the admissibility of evidence will not be reversed on

appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." Id. (citations omitted). An abuse of discretion "occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

Where, as here, a trial court's decision regarding the comparative probative value and prejudicial effect of evidence is under review, it "should be reversed only in exceptional circumstances." Adams, 354 S.C. at 378, 580 S.E.2d at 794 (citing State v. Hamilton, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct. App. 2001)). The trial court has "wide discretion" in determining the relevancy of evidence. Busillo v. City of North Charleston, 404 S.C. 604, 610, 745 S.E.2d 142, 146 (Ct. App. 2013) (quoting Davis v. Traylor, 340 S.C. 150, 155, 530 S.E.2d 385, 387 (Ct. App. 2000)). Thus, appellate courts are "obligated to give great deference to a trial court's judgment [in a decision under Rule 403, SCRE]." Adams, 354 S.C. at 378, 580 S.E.2d at 794 (citing Hamilton, 344 S.C. at 358, 543 S.E.2d at 593)).

ARGUMENT

I. The trial court correctly ruled that TARP and the government bailout were inadmissible.

Appellant first assigns error to the trial court's ruling that the proffered evidence regarding TARP and the government bailout of the banking industry was inadmissible. (Appellant's Br. at 24.) The Court should affirm the trial court.

In its Motion in Limine, TD Bank moved to exclude this evidence under Rules 401-403 of the South Carolina Rules of Evidence because it is irrelevant to the claims in this case and, even if it is marginally relevant, its low probative value is outweighed by the risk of undue prejudice caused by Appellant's attempt to use the public's perceived bias against a "taxpayer bailout" to influence the jury's decision. (R. p. 305, Mot. in Limine at 7.) Under Rule 401 of the South Carolina Rules of Evidence, in order for evidence to be relevant, it must have a "tendency to make any fact that is of consequence to the determination of the action more probable or less probable." Rule 401, SCRE. Even where it is relevant, evidence is not admissible if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE. The trial court agreed with the TD Bank, finding that Carolina First's receipt of TARP funds before its merger with TD Bank is irrelevant, would likely confuse the jury, and would result in a verdict based on improper motives or biases rather than current law. (R. p. 12, Order on Motion in Limine at 9.) The trial court later found no error in this ruling in denying Appellant's Motion for a New Trial. (R. p. 25, Order entered Mar. 2, 2015 at 4.)

The trial court did not abuse its discretion in excluding evidence of TARP and the government bailout. Tellingly, in his brief the Appellant does not cite to the record containing his proffered evidence regarding TARP. Rather, he refers to an article in *Forbes* regarding Canadian banks and then makes general, unsupported statements regarding TARP and its goals. (Appellant's Brief 26.) The *Forbes* article was not

presented to the trial court.[5] The sole evidence proffered by the Appellant relating to TARP was a single exhibit, a page from TD Bank's website describing the terms of the merger, which stated, among other things, that the United States Department of Treasury was selling its $347 million of preferred stock in Carolina First's parent company to TD Bank as part of the merger for cash consideration totaling $130.6 million. (R. p. 503, line 10 – p. 504, line 14, Tr. of Aug. 12, 2014 Hearing 26:10-27:14 (discussing Def.'s Ex. 2 at proffer hearing).) That was the extent of the proffered evidence from Appellant allegedly concerning TARP. The Appellant did not proffer any evidence showing any relationship between TARP and the at-issue loans or any of TD Bank's alleged actions in these cases. As the trial court found in its Order on Motion in Limine, the "very limited proffered testimony and evidence" shows that the receipt of TARP money "is wholly irrelevant to whether Defendants must repay their guaranty obligations." (R. p. 11, Order on Motion in Limine at 8.)

Appellant has not identified any cases in which a court found TARP or the government bailout to be relevant to a suit between a lender and a borrower. On the other hand, in Masters Group Int'l, Inc. v. Comerica Bank, the Supreme Court of Montana found that TARP evidence was irrelevant and a trial court abused its discretion in admitting it. 352 P.3d 1101, 1123 (Mont. 2015). Unlike the instant case, the plaintiff-borrower in Masters Group offered evidence that the defendant-lender made inaccurate statements to the borrower about the availability of TARP funds. Even with those alleged statements, the court found that "TARP evidence does not bear on the existence" of any facts of consequence to the borrower's claims for breach of

[5] Issues not raised to the trial court are not preserved for appellate review.

contract and implied covenant of good faith and fair dealing claims (i.e., whether there was a contract to forbear or the lender breached that contract). Id. at 1122; see also Wachovia Bank, N.A. v. Lone Pine, Inc., 2011 U.S. Dist. LEXIS 59808, *4 (N.D. Ga. June 15, 2010) (stating "the court has located no case which funds that a bank's receipt of funds under TARP is even relevant to a claim raised by a borrower against the bank").

Moreover, even if the proffered TARP evidence was somehow relevant, the Appellant has not demonstrated the exclusion of the evidence was prejudicial. In order for a trial court's ruling to be reversed on appeal, it must be prejudicial to the party seeking admission. See Adams, 354 S.C. at 377, 580 S.E.2d at 793; see also Rule 103, SCRE (stating that an error may not be predicated upon a ruling admitting or excluding evidence unless it affects a "substantial right" of the party). Appellant argues the trial court ruling prevented him from proving the actions of Carolina First were not "typical bank behavior" or that TD Bank allegedly acted in contravention of the "goals" of TARP, however, he did not proffer any evidence on these issues. Moreover, the Appellant admits that it is "common knowledge that Banks were assisted by the federal government in the recent economic recession and bank crisis." (Appellant's Brief at 26.) If the government bailout is indeed "common knowledge," the Appellant cannot show he was prejudiced by the trial court's decision to exclude the very limited evidence he proffered on this issue, in any event.

In sum, the trial court did not abuse its discretion in excluding Appellant's proffered evidence – a portion of a new release from a website – concerning the receipt of TARP funds by Carolina First. Further, the Appellant has not shown how he was

prejudiced by this ruling. As a consequence, the Court should affirm the trial court's decision excluding evidence related to TARP and the government bailout of the banking industry.

II. The trial court properly excluded evidence of an unrelated note sale.

Appellant contends the trial court erred in excluding the proffered testimony of David Hilburn and other evidence concerning TD Bank's sale of a note by an unrelated borrower, Heron Lakes I. The trial court properly exercised its discretion in excluding the evidence.

Again, rather than quote or cite to the record, Appellants makes general allegations about what this purported evidence shows which are inconsistent with the actual proffered testimony. In the actual proffered testimony, Appellant called witness David Hilburn, who was a loan broker that got involved in the Heron Lakes I transaction *after* the negotiations had mostly been completed. (R. p. 611, lines 6-12, Tr. of Aug. 12, 2014 Hearing 134:6-12.) In fact, in the following exchange from his proffered testimony he admitted he had no personal knowledge on the key fact that Appellant hoped to establish (i.e., that TD Bank sold the note at a discount and mandated the release of a guarantor because of a personal relationship between the guarantor and the loan officer):

> Q: You don't know anything about TD Bank's decision-making related to the Heron Lakes One note sale?
>
> A: Not at all.
>
> Q: Okay. And to the extent there was an agreement that the guarantors would be released as part of the note sale,

you don't know where that agreement came from at all, do you.

A: No, sir.

(R. p. 612, lines 8-16, Tr. of Aug. 12, 2014 Hearing 135:8-16.) Without personal knowledge, Mr. Hilburn was not even competent to testify regarding the alleged agreement to release a guarantor. Rule 602, SCRE.

The only other witness proffered by the Appellant regarding the Heron Lakes I note sale was TD Bank's workout officer, Roper Jenkins.[6] Mr. Jenkins testified there was no agreement or stipulation by TD Bank to release the Heron Lakes I guarantor in connection with the note sale. (R. p. 514, line 13 – p. 515, line 8, Tr. of Aug. 12, 2014 Hearing 37:13-38:8.) In addition, he testified that the relationship with the guarantor was strictly lender-borrower and he had no personal relationship with him. (R. p. 521, line 18 – p. 522, line 20, p. 511, line 23 – p. 512, line 1, Tr. of Aug. 12, 2014 Hearing 44:18-45:20, 34:23-35:1.) Finally, he discussed one, critical difference between the Heron Lakes I loan and the loans which are at-issue in this case: the Appellant had a $20 million net worth, while the guarantors in the Heron Lakes I loan demonstrated that they did not have the ability to pay. (R. p. 518, lines 1-12, Tr. of Aug. 12, 2014 Hearing 41:1-12 (further testifying that of the two guarantors for the Heron Lakes I loan, one was deceased and his estate was valued at negative $14

[6] The Appellant also references John Hilton in his Brief. (Appellant's Brief at 33.) Presumably, this is a typo, as the Appellant did not proffer Mr. Hilton's testimony. As set forth in the Order on Motion in Limine, the trial court ordered and the parties agreed that any challenged evidence which was not proffered would be excluded. (R. p. 10, Order on Motion in Limine at 7.) Further, absent a proffer, there is an insufficient record for this Court to review the ruling excluding the evidence. See Rule 103(a)(1)(2), SCRE.

million, while the other guarantor was borrowing funds from his mother for living expenses).)

Based on this proffer, the trial court correctly found in its Order on Motion in Limine that this evidence is "wholly irrelevant to the issues in this case," stating "it is of no consequence that TD Bank may have sold another note for another borrower at a discount since that note is wholly unrelated to the parties in this action, wholly unrelated to the note, mortgage, and guaranties at issue in this case, and wholly unrelated to any claim in this case." (R. pp. 12-13, Order on Motion in Limine at 9-10.) The Appellant simply failed to show any relationship between the Heron Lakes I loan and the parties or alleged actions in this case.

Further, the Appellant cannot show that he was prejudiced by the exclusion of this evidence because it does not support his defenses. As the trial court held in its Order on Motion in Limine that, even if the Heron Lakes I evidence were somehow relevant, "the proffered testimony does not support the [Appellant's] allegations." (R. p. 13, Order on Motion in Limine at 10.) The Appellant argues that the evidence of the Heron Lakes I note sale is important to show a breach of a fiduciary duty or covenant of good faith and fair dealing "when other customers got more favorable treatment." (Appellant's Brief at 33.) However, the court during the proffer and the jury at trial heard substantial, uncontested evidence regarding Appellant's large net worth, the eight extensions previously granted to him, and his transfers of millions of dollars to family members during the terms of the extensions. Consequently, even if the Heron Lakes I evidence was admitted, there was more than sufficient evidence for the jury to conclude that Appellant's circumstances were vastly different from the Heron Lakes I parties.

Accordingly, the trial court did not abuse its discretion in excluding the testimony of David Hilburn and other evidence relating to the Heron Lakes I note sale.

III. The Order on Motion in Limine did not exclude any evidence based on the arguments previously raised in the Motions for Summary Judgment.

In the third basis of Appellant's appeal, Appellant attempts to bar TD Bank from arguing against the exclusion of evidence based on a prior order denying TD Bank's Motions for Summary Judgment. An order denying summary judgment does not give rise to the law of the case or have any preclusive effect. Moreover, the Court can easily dispense with this argument because the trial court *denied* TD Bank's Motion in Limine regarding exclusion of Appellant's breach of the implied duty of good faith and fair dealing and breach of fiduciary duty defenses. In its Order on Motion in Limine, the trial court held the testimony and evidence regarding the defenses of breach of implied duty of good faith and fair dealing and breach of fiduciary duty "may be admitted and the issue may be revisited again on directed verdict." (R. p. 11, Order on Motion in Limine at 8.) Thus, even if the TD Bank attempted to re-argue its Motion for Summary Judgment in the Motion Limine, which is denied,[7] it was not successful. (See R. p. 25, Order entered Mar. 2, 2015 at 4 (stating, "Even if Defendant Jacobs is correct that Plaintiff made the same arguments in the subsequent motion in limine as it

[7] Appellant relies on Rule 43(l) of the South Carolina Rules of Civil Procedure. TD Bank disputes that Rule 43(l) has any application to its Motion in Limine. For one, the argument on summary judgment – whether judgment is appropriate based on the evidence – is distinct from the issue of whether particular evidence is admissible. Further, between the time of the Motion for Summary Judgment and the Motion in Limine, the Appellant supplemented his Answer with an additional basis for his defenses and identified new witnesses and documents in support of his claims, all of which was not before the court when it heard the Motion for Summary Judgment.

did in the motions for summary judgment, Judge Manning denied Plaintiff's motion in limine as it related to the exclusion of the breach of fiduciary duty and breach of the implied duty of good faith and fair dealings defenses, and those defenses were submitted to the jury for consideration at trial."))[8] Thus, the Order on Motion in Limine did not exclude any evidence, and the Appellant did not suffer any prejudice, as a result of any argument which was previously raised in TD Bank's Motion for Summary Judgment.

IV. The trial court's decision on directed verdict and the jury's verdicts are the law of the case.

Appellant's Motion for New Trial only raised the three alleged errors in the Order on Motion in Limine discussed above, and the denial of his Motion for New Trial is the sole basis of this appeal. Nonetheless, the Appellant devotes a substantial part of his Brief to a discussion of TD Bank's decision to not give him yet another extension of the loans, TD Bank as an alleged fiduciary and its "special relationship" with Appellant, the nature of a fiduciary relationship, the duties of a fiduciary, and TD Bank's alleged breaches of fiduciary duty and duty of good faith and fair dealing. The Appellant has not contested the other rulings in the Order on Motion in Limine and at trial, the rulings on directed verdict, or the jury's verdict. Therefore, these issues are not preserved for appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on

[8] The trial court did grant TD Bank's motion for directed verdict on the issue of whether it was required to foreclose collateral prior to suing to collect on the guarantees. (R. p. 851, lines 6-16, Trial Tr. 237:6-16.) The Appellant did not appeal this ruling.

appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellant review.") (citations omitted).

Moreover, as already noted, the trial court granted TD Bank's motion for directed verdict on the issue of whether it had the right to sue on the guarantees without first foreclosing, and this ruling was not appealed. All of the other claims and defenses were submitted to the jury, who found in favor of TD Bank. The Appellant also did not appeal the jury's verdict or the appeal the instructions given to the jury on the law of fiduciary duty and the duty of good faith and fair dealing or anything else. These issues were neither raised nor ruled upon by way of the Appellant's Motion for New Trial. Consequently, the trial court's partial grant of direct verdict to TD Bank and the jury's verdicts are the law of the case. See, e.g., Ex parte Morris, 367 S.C. 56, 65, 624 S.E.2d 649, 653-54 (2006) (though trial court erred in rejecting custodian's request for evidentiary hearing, order dismissing custodian was law of case because that ruling was unappealed); Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance."); Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 266, 442 S.E.2d 611, 616 (1994) (jury charges without objection were law of the case). As a result, the jury's verdicts should not be disturbed on appeal.

CONCLUSION

For the reasons set forth above, the trial court's ruling on the Motion in Limine and the Motion for New Trial was a proper exercise of its discretion and should be

affirmed. In addition, the trial court's partial grant of summary judgment and the jury's verdicts are unappealed and, consequently, are the law of the case.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By A. Mattison Bogan

John T. Moore
SC Bar No. 004056
Email: john.moore@nelsonmullins.com
Jody A. Bedenbaugh
SC Bar No. 71176
E-Mail: jody.bedenbaugh@nelsonmullins.com
Paul T. Collins
SC Bar No. 70336
E-Mail: paul.collins@nelsonmullins.com
A. Mattison Bogan
matt.bogan@nelsonmullins.com
SC Bar No. 72629
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for TD Bank, N.A., successor by merger with Carolina First Bank

Columbia, South Carolina
March 14, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 14 2016
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

Case No. 2012-CP-40-6074; Appellate Case No. 2015-000730

TD Bank, N.A., successor by merger with Carolina First Bank,,..... Respondent,

v.

David H. Jacobs, ... Appellant.

Case No. 2012-CP-40-7540

TD Bank, N.A., successor by merger with Carolina First Bank,,..... Respondent,

v.

David H. Jacobs and James A. McFarland, ... Defendants,

Of Whom David H. Jacobs is, ... Appellant.

CERTIFICATE OF COMPLIANCE

I the undersigned hereby certify that this Final Brief complies with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: A. Mattison Bogan

A. Mattison Bogan
Post Office Box 11070
Columbia, SC 29211-1070
(803) 799-2000

Attorneys for Respondent TD Bank, N.A.

March 14, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 14 2016
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

Case No. 2012-CP-40-6074
Appellate Case No. 2015-000730

TD Bank, N.A., successor by merger with Carolina First Bank,,..... Respondent,

v.

David H. Jacobs, ... Appellant.

Case No. 2012-CP-40-7540

TD Bank, N.A., successor by merger with Carolina First Bank,,..... Respondent,

v.

David H. Jacobs and James A. McFarland, ... Defendants,

Of Whom David H. Jacobs is, ... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for TD Bank, N.A., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Final Brief of Respondent TD Bank, N.A.

Counsel Served:

Gerald D. Jowers, Esquire
Post Office Box 514
Columbia, SC 29202

Charles E. Carpenter, Jr., Esquire
4825 Portobello Road
Columbia, SC 29206

Lisa P Whitehurst

Lisa Whitehurst
Administrative Assistant

March 14, 2016