THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Fourteenth Judicial Circuit

Marvin H. Dukes, III, Master in Equity/Special Circuit Court Judge

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Appellate Case No. 2016-000537

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

v.

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

Of Whom

Black Diamond, LLC; J. Christopher
Lindgren; David A. Brosman are.....Appellants.

TD BANK, N.A.'S REPLY TO APPELLANTS' RETURN TO MOTION TO DISMISS APPEAL

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TD Bank N.A., Successor by Merger to Carolina First Bank, ("**TD Bank**") respectfully submits the following Reply to Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman's ("**Appellants**") Return to its Motion to Dismiss Appeal (the "**Motion**"), as follows:

INTRODUCTION

In their Return to TD Bank's Motion, Appellants attempt to muddy the water with lengthy discussions of the merits of their claims in this action. However, TD Bank's Motion is straight forward and procedural in nature, confined to the appealability of two Orders of the lower court:

1. First, the trial court's decision with regard to TD Bank's Motion to Strike Defendants' Jury Trial Demand is not immediately appealable because Appellants are not entitled to a jury trial as a matter of right.
2. Second, the trial court's decision with regard to TD Bank's Motion for Summary Judgment is not immediately appealable because it is not a final judgment such that this Court has jurisdiction prior to final adjudication of all claims in the action.

Appellants will ultimately have an opportunity to appeal these Orders. However, as set forth in TD Bank's Motion and this Reply, an appeal at this stage is improper, and to allow Appellants such a delay tactic would undoubtedly result in successive appeals on the same set of facts and substantive claims.

ARGUMENT

I. APPELLANTS ARE NOT ENTITLED TO A JURY TRIAL AS A MATTER OF RIGHT, THUS THE COURT'S GRANTING TD BANK'S MOTION TO STRIKE THE SAME IS NOT IMMEDIATELY APPEALABLE

A. THE SUPREME COURT'S DECISION IN CAROLINA FIRST BANK V. BADD, LLC IS CONTROLLING ON THE ISSUE OF APPELLANTS' JURY TRIAL DEMAND

The Supreme Court's decision in Carolina First Bank v. BADD, LLC, 414 S.C. 289, 778 S.E.2d 106 (2015), reh'g granted (Apr. 9, 2015), reh'g dismissed (Nov. 6, 2015), is on point and controlling as to the issue of Appellants' right to a jury trial in this action. First, Appellants have no right to a jury trial on TD Bank's equitable foreclosure claim. Id., at 293, 778 S.E.2d at 108 ("Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial."). Appellants likewise have no right to a jury trial on TD Bank's claim for a deficiency judgment, as "[t]he power to render a deficiency judgment is included within the jurisdiction of courts of equity," such that the collection of a deficiency "does not alter the equitable character of the action." Id., at 293-94, 778 S.E.2d at 108. Thus, consistent with S.C.Code Ann. § 29-3-660 (1976), "***the court*** [has] the power to adjudge a deficiency." Id., at 294, 778 S.E.2d at 109 (emphasis in original). Finally, Appellants' counterclaims are permissive in nature, as they lack "a 'logical relationship' [with] the enforceability of the guaranty agreement[s]" or other loan documents at issue in the case. Id. at 295, 778 S.E.2d at 109. Thus, Appellants waived their right to a jury trial by asserting such claims in this equitable foreclosure action. Id.

Appellants opt not to make an attempt to rebut the first two points addressed above, instead arguing only that the counterclaims at issue – despite being remarkably similar to those presented in BADD – are compulsory in nature, thus entitling them to a

jury trial. In support of this positon, Appellants apply a more generalized standard from a twenty-five year old declaratory judgment action in a dispute over a will, First-Citizens Bank & Trust Co. of S. Carolina v. Hucks, 305 S.C. 296, 408 S.E.2d 222 (1991). In that case, the court held that "the test for determining if counterclaims are permissive or compulsory is whether there is a logical relationship between the claim and the counterclaim." Id., at 298, 408 S.E.2d at 223 (citing Rule 13(a), SCRCP). Thus, Appellants claim, since a "sufficient nexus" exists between their counterclaims and the claims of TD Bank, the counterclaims are compulsory and demand a jury trial. (See Appellants' Return to Motion, p. 6.)

Like Hucks, the BADD decision also cites to Rule 13(a), SCRCP, for the general proposition that a "counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim." BADD, 295, 778 S.E.2d at 109. But the decision goes further, specifically addressing counterclaims in the context of a foreclosure action. "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. Applying this standard to the BADD defendant's counterclaims for conspiracy and breach of contract, the court found that they did "not arise out of that transaction or occurrence because [they bore] no logical relationship to ***either the execution or enforceability of the guaranty agreements***. . . . In other words, the [counterclaims] presume[] the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable." Id., at 295-96, 778 S.E.2d at 109 (emphasis added). Therefore, the court held that the defendant

"waived his right to a jury trial by asserting the . . . counterclaim[s] in a foreclosure action." Id., at 296, 778 S.E.2d at 109.

Like the guarantor's counterclaims in BADD, Lindgren and Brosman's counterclaims are permissive in nature and do not entitle them to a jury trial because they do not "affect the execution or enforceability" of the underlying loan documents. Id., at 296, 778 S.E.2d at 110. Instead, they are premised on events that occurred indisputably ***after*** the execution of those documents. (See Brosman Answer,[1] generally; Black Diamond/Lindgren Answer, generally.) Importantly, Lindgren and Brosman, in their Memorandum in Opposition to TD Bank's Motion for Summary Judgment, confirmed that their counterclaims are based on alleged events that occurred "***subsequent***" to the execution of the parties' loan documents. (See, e.g., Memorandum in Opposition, pp. 4-5.)

Accordingly, Appellants' counterclaims against TD Bank are permissive and do not entitle them to a jury trial.

B. ALTERNATIVELY, APPELLANTS CONTRACTUALLY WAIVED THEIR RIGHT TO A JURY TRIAL.

South Carolina courts have routinely enforced "jury trial waivers" that are "executed . . . knowingly and voluntarily." Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014), reh'g denied (Apr. 2, 2014). "[W]hen a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents. The law does not

[1] Capitalized terms shall have the same meaning as in TD Bank's Motion, and TD Bank herein incorporates by reference those definitions and exhibits set forth therein.

impose a duty on the bank to explain to an individual what he could learn from simply reading the document." Id., at 332-33, 755 S.E.2d at 443 (internal citations omitted). As set forth in TD Bank's Motion, ***all*** Appellants – Black Diamond, Lindgren and Brosman – each individually and knowingly waived their right to a trial by jury with regard to the subject matter of this lawsuit: Black Diamond did so in the $3,500,000 Note (see p. 2), which was executed first and subsequently cross-collateralized and cross defaulted with the $2,000,000.00 Note (see ¶ 10.); Lindgren did so both expressly in the Lindgren $3,500,000 Guaranty (see ¶ 10), as well as impliedly in the Lindgren $2,000,000 Guaranty (see ¶ 9(A)(8) (consenting to "any waiver" of Black Diamond)); finally, Brosman did so expressly in both the Brosman $3,500,000 Guaranty (see ¶ 17) and Brosman $2,000,000 Guaranty (see ¶ 17).[2]

Purportedly in support of their position that the jury trial waivers do not sufficiently encompass the claims at issue, Appellants cite to N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 416 S.E.2d 637 (1992), a case involving a jury trial waiver in a lease dispute involving a guarantor. However, the waiver in question in that case identified only the landlord and tenant, not the guarantor, who never signed the agreement. Id., at 534, 416 S.E.2d at 637-38. As set forth above,

[2] Appellants' argument that the waivers in the two Brosman guarantees are not sufficiently broad so as to encompass his claims against TD Bank because the guarantees are limited to "any action arising from or related to this guaranty," is without merit. (See Appellants' Return to Motion, p. 8.) The Brosman guarantees are the sole basis for both TD Bank's claims against him and his counterclaims against TD Bank. Thus, Brosman's counterclaims necessarily arise from and are related to the guarantees.

here, Appellants each executed a jury trial waiver encompassing the types of claims at issue. Appellants also cite to Fisher v. Stevens, 355 S.C. 290, 584 S.E.2d 149 (Ct.App.2003), however, this case involved an exculpatory agreement – not a jury trial waiver – which went so far as to waive "'responsibility and risk of bodily injury, death or property damages due to the negligence or gross negligence or 'releases' or otherwise,'" involving obvious public policy concerns not at play in the jury trial waivers at issue in the present action. Id., at 293, 584 S.E.2d at 151.

Accordingly, Appellants are not entitled to a jury trial as a matter of right, thus the Order granting TD Bank's Motion to Strike Defendants' Jury Trial Demand is not immediately appealable.

II. THE COURT'S PARTIAL GRANT OF SUMMARY JUDGMENT IS NOT A FINAL JUDGMENT SUCH THAT AN IMMEDIATE RIGHT TO APPEAL IS PROPER OR WARRANTED

Appellants insist that because the lower court granted summary judgment as to ***some*** of their counterclaims, "it clearly impacts on the merits of the case and is immediately appealable." (See Appellants' Return to Motion, p. 10.) However, the case cited by Appellants, Brown v. Cty. of Berkeley, 366 S.C. 354, 622 S.E.2d 533 (2005), fails to provide support for such a position. Brown involves a dispute between branches of Berkeley County Government, stemming from an auditor's concerns regarding the Clerk of Court's use of the county credit card, the reporting of interest earned on escrow accounts and instances of payments to employees. Id., at 357-58, 622 S.E.2d at 535. The County Council enacted a written request for the Clerk of Court to produce financial documentation regarding several bank and credit card accounts. Id., at 358, 622 S.E.2d at 536. In response, the Clerk of Court asserted that the County Council violated the

Freedom of Information Act by authorizing the request to produce in a closed executive session. Id. Following several months of discussions between the Clerk of Court's office and the County Council, the County Council enacted a resolution approving an expanded audit. Id. The Clerk of Court filed suit seeking, among other forms of relief, a preliminary injunction prohibiting the audit, in addition to damages against the County, the County Council and the individual council members for defamation, defamation per se and intentional infliction of emotional distress. Id. The trial court denied the Clerk of Court's motion for a preliminary injunction, also declining to grant a motion to dismiss filed by the individual council members. Id., at 358-59, 622 S.E.2d at 536. All parties appealed. Id.

Regarding the appeal of the court's denial of the council members' motion to dismiss, the court considered whether such an order was immediately appealable. "To involve the merits of a case, the order must finally determine some substantial matter forming the whole or a part of some cause of action or defense. To affect a substantial right, ***the order must determine the action and prevent a judgment from which an appeal might be taken or discontinue the action***." Id., at 361, 622 S.E.2d at 537 (emphasis added) (internal citation omitted). Applying this standard, the court concluded that "the denial of the individual council members' motion to dismiss is not presently reviewable." Id., at 362, 622 S.E.2d at 538.

Here, as addressed in TD Bank's Motion, the lower court's ***partial*** grant of TD Bank's Motion for Summary Judgment ***did not*** "determine the action and prevent a judgment from which an appeal might be taken," nor did it "discontinue the action." Quite the opposite, as the case will continue to trial on the same set of facts and

substantive claims, albeit under different legal theories. (See TD Bank's motion, pp. 14-15 (noting that the ***identical allegations are pled by incorporation in support of each counterclaim***).) Appellants attempt to deny this fact in their Return to TD Bank's Motion, but they cannot escape the reality of their own pleadings. (See Answers, ¶¶ 26-28 (breach of covenant of good faith and fair dealing); ¶¶ 29-30 (breach of contract); ¶¶ 31-32 (breach of fiduciary duty); ¶¶ 33-34 (negligent misrepresentation); ¶¶ 35-36 (duress); ¶¶ 37-38 (interference with prospective economic relations); ¶¶ 39-40 (unfair trade practices).)

Noticeably, Appellants did not even attempt to rebut or even discuss the relevant law discussed at length in TD Bank's Motion, Rule 54(b), SCRCP, and Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 570 S.E.2d 197 (Ct.App.2002). In Tommy L. Griffin Plumbing, the court outlined the three prerequisites that must be satisfied for an appellate court to obtain jurisdiction prior to adjudication of all claims in an action, precisely the situation that is before this Court. First, "[t]here must be multiple claims for relief or multiple parties." Id., at 466, 570 S.E.2d at 200 (citing Wright, Miller & Kane, Federal Practice and Procedure at § 2656). Second, "the judgment entered on the certified claim must be a final judgment." Id. Third, "the district court must expressly determine that there is no just reason for delay." Id. In explaining on the first prerequisite, the court made several points:

- Courts define "multiple claims" as separate claims with a view to avoiding double appellate review of the same issues.
- In determining whether a claim is separate, the court must consider whether separate recovery is possible on the claims; mere variations of legal theories do not constitute separate claims.
- Where there is a substantial factual overlap between the claim adjudged and the remaining claims, to take jurisdiction would

vitiate the most important purpose behind Rule 54(b)'s limitations to spare the court of appeals from relearning the facts of a case on successive appeals.

- If a judgment leaves some further act to be done by the court before the rights of the parties are determined, the judgment is not final

Id., at 466-67, 570 S.E.2d at 200-01 (internal citations omitted). As outlined above, "substantial factual overlap" exists between Appellants' adjudged claims and remaining claims, such that the causes of action are "mere variations of legal theories" rather than separate, distinct claims capable of separate recoveries. Id., at 469, 570 S.E.2d at 202. To allow appellate review at this intermediate stage would undoubtedly result in successive appeals to this Court, each based on the same set of facts and substantive claims.

Accordingly, the lower court's partial grant of TD Bank's Motion for Summary Judgment is not immediately appealable, and this appeal should be dismissed and the case remanded back to the lower court for final disposition.

CONCLUSION

For the reasons set forth herein, and for those reasons set forth in TD Bank's Motion, the Court should dismiss Appellants' appeal of the subject Orders because they are not immediately appealable.

This 9th day of May, 2016
Greenville, South Carolina

Michael J. Bogle, by
Beth T. Zeglen with
Mr. Bogle's express permission.

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PROOF OF SERVICE

I certify that on May 9, 2016, I have served TD Bank, N.A.'s Reply to Appellants' Return to Motion to Dismiss Appeal on Black Diamond, LLC, and J. Christopher Lindgren, by depositing a copy of it in the United States Mail, postage prepaid, addressed to their attorney of record, Keating L. Simmons, III, Esq., at Simons & Dean, 147 Wappoo Creek Drive, Suite 604, Charleston, SC 29412; and on David A. Brosman, addressed to his attorney, Ehrick K. Haight, Jr., Esq., at P.O. Box 6067, Hilton Head Island, SC 29938.

Michael J. Bogle by Beth S. Zeigler with express of Mr. Bogle

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