THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
14th Judicial Circuit

Marvin H. Dukes, III, Master In Equity

Appellate Case No. 2016-000537

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

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; and David A. Brosman are

Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

On March 6, 2012, Respondent, TD Bank, N.A., successor by merger to Carolina First Bank ("TD Bank"), brought this foreclosure action against its borrower and mortgagee, Appellant Black Diamond, LLC ("Black Diamond"). Appellants David A. Brosman ("Brosman") and J. Christopher Lindgren ("Lindgren") were additionally named Defendants by virtue of their respective guarantees (collectively, Black Diamond, Brosman and Lindgren are hereinafter referred to as "Appellants").

Appellants counterclaimed, alleging among other claims, that TD Bank had breached certain Forbearance Agreements it had entered into with Black Diamond on July 28, 2010, ("Forbearance Agreements"). Appellants further alleged TD Bank had violated its duty of good faith and fair dealing. TD Bank brought a Motion to Strike Defendants' Jury Trial Demand and a Motion for Summary Judgment. Both motions were heard on March 24, 2015. TD Bank's Motion to Strike was granted by Order dated June 10, 2015 ("Jury Strike Order"). TD Bank's Motion for Summary Judgment was

granted in part and denied in part by Order dated September 11, 2015 ("Summ. Jmt. Order").

Appellants filed a Motion for Reconsideration of the Jury Strike Order on July 7, 2015. Appellants also filed a Motion for Reconsideration of the Summ. Jmt. Order, with a Memorandum in Support thereof, on September 22, 2015. In these Motions, Appellants raised the issues now on appeal (Motions for Recon.; Memo. Supp. Motion for Recon.). Appellants' Motions were denied by issuance of a Form 4 Order dated February 11, 2016. On March 9, 2016, Appellants timely filed and served their Notice of Appeal on TD Bank.

FACTS

On December 9, 2003, Black Diamond entered into a loan with TD Bank in the original principal amount of $1,460,000 and later increased to $2,000,000. The loan was secured by a mortgage on 4.51 acres of property in what would become part of the 1188 Centre Horizontal Property Regime, a commercial/retail development.[1] (Complaint, ¶20). The collateral was initially divided into three (3) parcels, Units R, T and CC. The first two units were released from the $2M Mortgage upon their sale, thereby reducing the outstanding balance due (Complaint, ¶27, Ex. O & P). The remaining collateral, Unit CC, contained approximately 61,500 sq. feet of undeveloped land and an approximately 14,550 sq. foot unfinished commercial/retail building (the "Shell Building").[2]

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[1]For purposes of this Brief and unless context otherwise requires, the $2,000,000 note shall be referred to as the "$2M Note". The mortgage securing same shall be referenced as the "$2M Mortgage" and the property secured thereby shall be referred to as "Unit CC". References shall include all amendments to the respective documents unless otherwise noted.

[2]The parcels comprising 1188 Centre are depicted in Exhibit 2 to Joe Fraser's Deposition, a copy of which is attached to Appellant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment as Exhibit B. The Shell Building is referred to thereon as the Subject Property. Unit CC also included the two Build to Suit sites adjacent to the Shell Building. The Tire Kingdom and Mattress Firm sites, Units R and T, were sold and released from the $2M Mortgage.

On January 25, 2008, Black Diamond sought and obtained additional financing from TD Bank for the Black Diamond Business Park, a separate venture. It executed a note in favor of TD Bank in the principal amount of $3,500,000.00, secured by a mortgage on 9.945 acres.[3] (Complaint, ¶9, 19).

Initially, the foregoing Notes and Mortgages were independent of each other. However, when Black Diamond sought to renew the $2M Note in August of 2008, TD Bank required that the two loans be cross collateralized and cross defaulted, placing language to that effect in the Renewal Note and in the Modification of Mortgage. (Complaint, Ex. D at ¶10 and Ex. K at ¶5). As part of the foregoing modification transaction, Lindgren and his business partner, Herb G. King, also were required to execute personal guaranties for the payment of both obligations. (Complaint, ¶15, Ex. E, p.1).

In the thick of the escalating real estate crisis, Herb G. King passed away and the loss of his investment capital placed financial hardship on Black Diamond causing it to default in its obligations to TD Bank. In exchange for certain concessions by Black Diamond, including the securing of an additional investor willing to personally guaranty the obligations, TD Bank agreed to forbear in exercising its rights and remedies under the Notes and Mortgages. On July 28, 2010, Black Diamond, the Estate of Herb G. King and TD Bank executed two Forbearance Agreements (the "Forbearance Agreements"). (Complaint, Ex. C and E). The additional investor/guarantor, Brosman, signed personal

[3]For purposes of this Brief and unless context otherwise requires, the $3,500,000 note shall be referred to as the "$3.5M Note". The mortgage securing same shall be referenced as the "$3.5M Mortgage" and the property secured thereby shall be referred to as the "Business Park". References shall include all amendments to the respective documents unless otherwise noted. When both loans are being referenced in the collective, they shall be referred to as the Loan(s), Notes and/or Mortgages as the context may dictate.

guaranties for both Loans on July 30, 2010. (Complaint, Ex. H and I). At the time the Forbearance Agreements were executed, the outstanding balances on the Notes were roughly $3,145,000 and $1,857,000 respectively (Complaint, Ex. C, ¶2 and E, ¶2). The Forbearance Agreements further required Black Diamond to turn over the management of the Business Park and Unit CC to a manager to be designated by TD Bank. (Complaint, Ex. C, ¶6F and Ex. E, ¶6F). In accordance with the Forbearance Agreements, Black Diamond retained the services of William Bosley, CCIM, CPM ("Bosley").

Black Diamond continued to actively market the Shell Building for sale or lease with the knowledge of both Bosley and TD Bank. On September 2, 2010, less than two months after the execution of the Forbearance Agreements, Black Diamond received a bona fide offer from Ceagull Investments, LLC for the purchase of the Shell Building in the amount of $1,325,000 (the "Offer"). The offer was contingent upon TD Bank's approval of the partition and sale. (Mem. Opp. to Summ. Jmt, Black Diamond, Bates #005879). **To be clear, this was not a request for a short sale**. Had it approved the partition and sale of the Shell Building, TD Bank would have retained the undeveloped portion of Unit CC as collateral (nearly one-half of the total acreage then securing the $2M Mortgage). TD Bank also remained secured by the Business Park via the cross collateralization of the Loans.

The prior dealings of the parties show that partial releases had been permitted for the portions of the collateral designated as Units R and T, and therefore, Black Diamond had every reason to expect that TD Bank would not unreasonably withhold permission to partition Unit CC. Yet despite communicating the Offer to TD Bank (Mem. Opp. to

Summ. Jmt., Ex. D at Bates #6711 - 16), and following up several times (*Id.* at Bates #6597, 5846 and 5877), Black Diamond received no response from TD Bank. (*Id.* at Ex. A, Depo. Lindgren, pp. 58-59, Bates #5877). There is no documentation in the record to support that TD Bank gave any consideration to the Offer at all. To the contrary, the evidence shows TD Bank was secretly soliciting offers on the property from others. (*Id.* at Bates #5899-5890). In furtherance of that effort, and again without disclosure to Black Diamond, TD Bank was also utilizing Bosley's services directly for its own self-serving purposes. (*Id.* at Ex. A, Depo. Lindgren, pp. 118, ln. 1- pp. 120, ln. 21, illustrating that TD Bank was arranging for appraisals and environmental reports at Black Diamond's expense through Bosley).

The unreasonableness of TD Bank's failure to even give consideration to a partition of Unit CC, coupled with its self serving interference with Black Diamond's contractual relationship with Bosley is at the heart of this case. The record indicates, for example, that TD Bank directed the payment of Black Diamond's bills (*Id.* at Bates #7032, 8504); collected rents (*Id.* at Bates #9446); and authorized the eviction of tenants (*Id.* at Bates #9448). In fact, TD Bank internally regarded Bosley as its receiver and treated him as such. (*Id.* at Bates #6699). Bosley in turn rendered "confidential" reports to TD Bank casting Black Diamond, the property owner (to whom Bosley owed fiduciary duties) in a negative light and urged it to formally take over control of the property, (*Id* at Bates #6397 & 9600), all the while furthering his own business interests with TD Bank. (*Id.* at Bates #9668). The entirety of Unit CC was later sold in August, 2015, to a third party for $125,000 less than the Offer on the Shell Building alone. (*Id.* p. 8).

Appellants maintain that TD Bank breached its covenant of good faith and fair dealing under both the $2M Mortgage and the Forbearance Agreements by failing to give reasonable consideration to Black Diamond's request for partition of Unit CC and a partial release of the Shell Building. (Answers, ¶26, 27, & 28; Memo. Opp. to. Summ. Jmt., Ex. A, Depo Lindren, p. 59, ln. 22 - p. 62, ln. 21). It is not in dispute that under the terms of the $2M Mortgage, approval of a partition of the property was at TD Bank's discretion. (Complaint, Ex. K-1, ¶11). Nor do the parties dispute that at the time the Offer was received, Black Diamond was in compliance with the terms and provisions of the Forbearance Agreements. Appellants further assert that TD Bank's direct involvement in the operation and management of the property and the degree of control it exercised over Bosley, as the property manager, created a fiduciary relationship between it and Black Diamond. Appellants further contend that TD Bank breached this fiduciary duty through the interference and self-serving actions of its loan officer, Mike Rose. (Answers, ¶31-32; Memo. Opp. to Summ. Jmt., pp. 6-7). .

ARGUMENTS

I. A COVENANT OF GOOD FAITH AND FAIR DEALING AND A DUTY TO MITIGATE DAMAGES EXISTS IN EVERY CONTRACT. SUMMARY JUDGMENT WAS INAPPROPRIATE TO THE EXTENT THE TRIAL COURT FOUND THAT TD BANK DID NOT OWE A DUTY TO GIVE REASONABLE CONSIDERATION TO BLACK DIAMOND'S REQUEST FOR PARTITION AND PARTIAL RELEASE OF ITS MORTGAGE.

In finding TD Bank did not have a duty to mitigate its damages and did not breach its covenant of good faith and fair dealing, the trial court dispensed with fundamental and generally accepted principles of contract law. "[T]here exists in every contract an implied covenant of good faith and fair dealing." *Hotel and Motel Holdings,*

LLC v. BJC Enterprises, LLC, 414 S.C. 635, 780 S.E.2d 263 (Ct. App. 2015) (internal quotation marks and citations omitted); see also *Time Warner Cable v. Condo Services, Inc.,* 381 S.C. 275, 285, 672 S.E. 2d 816, 820 (Ct.App. 2009)(internal quotation marks and citations omitted). There is no carve out for mortgage contracts. In fact, our Supreme Court has recognized, at least with respect to home loans, that mortgagees do owe borrowers a duty to treat in good faith. See e.g. S.C. Sup. Ct. Adm. Order, Mortgage Foreclosure Actions (2011-05-02-01).

Our courts have also held that the duty to mitigate losses applies to all contracts and that the reasonableness of a party's actions to mitigate damages is a question of fact which cannot be decided as a matter of law when there is conflicting evidence. *Cisson Constr., Inc. v. Reynolds & Assocs., Inc.,* 311 S.C. 499, 503, 429 S.E.2d 847, 849 (Ct.App. 1993)(internal quotation marks and citations omitted).

The trial court relied upon foreign authority for the proposition that a mortgagee does not owe a mortgagor any duty to accept a "short sale." (Summ. Jmt. Order, pp. 4-5). However, even if our South Carolina courts were to adopt this position, a mortgagee's duty to mitigate or deal in good faith with respect to **a "short sale" is not what is before the court**. What is at issue is whether TD Bank had an obligation to give reasonable consideration to a **partition** of Unit CC in order to permit a sale of a portion of the collateral. This is a very important distinction because the $2M Mortgage expressly placed approval of such partition at the discretion of TD Bank. Specifically, it contains the following provision: "Mortgagor will not partition or subdivide the Property without Lender's prior written consent." (Complaint, Ex. K-1, ¶11). When an agreement grants a contracting party discretion in performing its duties and an unreasonable exercise of that

party's discretion causes harm to the other party, the duty of good faith and fair dealing is invoked. *Mudge v. Bank of America, N.A.,* 2013 WL 6095561, at 2 (2013 D.N.H 159); *Ruivo v. Wells Fargo Bank, N.A.,* 2012 WL 5845452, at 3 (D.N.H.).

This grant of discretion created an obligation on the part of TD Bank to give Black Diamond's request to partition and sell the Shell Building reasonable consideration. The Appellants submitted testimony from three witnesses establishing that TD Bank never even responded to the request. (Memo. Opp. to Summ. Jmt., Ex. A, Depo. Lindgren, pp. 58-59, Bates #5877). There was no evidence that TD Bank's loan officer even presented the Offer for consideration, much less that it was actually evaluated on its merits. In fact, the evidence indicates TD Bank's loan officer was secretly attempting to broker a deal with others for the development of the property without disclosure to Appellants. (*Id.* at Bates #5899-5900).

Our courts have recognized that an implied covenant of good faith or a duty to mitigate will not prevent a lender from doing that which provisions of its contract expressly give it the right to do. *Hotel, Supra* at 653, 273 (holding Lender had the express contractual right to sell or assign its mortgage); and *Cisson, Supra* at 503, 849 (holding lender did not have to move against the collateral before pursuing a guarantor). However, TD Bank was not asked to forego a remedy to which it was entitled or to modify or restructure the loan as in *Hotel* and *Cisson.* In those cases, the borrowers were in default and the bank was within its rights to pursue the remedies or actions in question. Not only was Black Diamond in full compliance with the Forbearance Agreements at the time the Offer was received, it had every reason to expect that its request for the partition and sale of the Shell Building would be granted based on the parties' prior course of

dealings. TD Bank's unreasonable refusal to consider the Offer not only frustrated Appellants' justified expectations, it caused them to incur substantial financial losses and forced them into default of the Forbearance Agreements.

II. WHEN TD BANK ENTERED INTO FORBEARANCE AGREEMENTS AND EXERCISED DIRECTION AND CONTROL OVER APPELLANTS' PROPERTY MANAGER FOR ITS OWN BENEFIT AND TO THE DETRIMENT OF THE APPELLANTS, ITS ACTIONS EXCEEDED THE NORMAL BANK/CUSTOMER RELATIONSHIP AND THE TRIAL COURT ERRED IN HOLDING THAT AS A MATTER OF LAW, NO FIDUCIARY RELATIONSHIP EXISTED.

While the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature, a fiduciary duty may be created in certain circumstances. See e.g. *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34,40, 340 S.E.2d 786, 790 (1986) (fiduciary duty owed when bank advises a depositor as part of services the bank offers). Appellants contend, and the record supports, that TD Bank did alter its normal banking relationship with Appellant Black Diamond when it undertook management of Black Diamond's Business Park through its hand-picked agent, Bosley.

As a threshold matter, "questions of agency ordinarily should not be resolved by summary judgment where there are any facts giving rise to an inference of an agency relationship." *Fernander v. Thigpen*, 278 S.C. 140, 142, 293 S.E.2d 424, 425 (1982) (internal quotation marks omitted). "If there are any facts tending to prove the relationship of agency, it then becomes a question for the jury[,]" and the grant of summary judgment is inappropriate. *Gathers v. Harris Teeter Supermarket*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct.App. 1984).

The Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006), defines agency as "the fiduciary relationship that arises when one person (a 'principal') manifests assent

to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." That Bosley assented to act on behalf of TD Bank and was under its control is clear from the record. TD Bank even went so far as to consider Bosley its receiver, giving rise to Appellants' claims that he was serving in a dual agency role. As such, any fiduciary duty Bosley owed to Appellant Black Diamond can and should be ascribed to TD Bank, including a duty to disclose material facts that may have affected its interests and a duty against self-dealing. *Burwell, Supra* 40–41, 790.

III. THE STATUTE OF LIMITATIONS DID NOT PRECLUDE A COUNTER CLAIM FOR BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING.

TD Bank breached its implied covenant of good faith and fair dealing when it failed to give consideration to the Offer as outlined above. The Offer was received on September 2, 2010, and conveyed to TD Bank shortly thereafter. (Memo. Opp. to Summ. Jmt., Ex. D, Bates# 6712). Therefore, the breaches that are alleged to have occurred date from late 2010. The suit was brought in 2012. Under S.C. Code Ann. § 15-3-530(1), an action upon a contract, obligation, or liability, express or implied, must be brought within three (3) years. Furthermore, the implied covenant at issue arises from the $2M Mortgage and under S.C. Code §15-3-520, the statute of limitations on a sealed instrument is twenty (20) years.

IV. THE TRIAL COURT ERRED IN DENYING APPELLANTS A JURY TRIAL. THEIR COUNTERCLAIMS ARE LEGAL, NOT EQUITABLE, AND ARISE OUT OF TD BANKS' OBLIGATIONS UNDER THE NOTES, MORTGAGES AND FORBEARANCE AGREEMENTS.

It is undisputed that the underlying complaint in this action is equitable. Therefore, to warrant a jury trial, Appellants' counterclaims must be both legal and compulsory. *Wachovia v. Blackburn*, 407 S.C. 321, 329, 755 S.E.2d 437, 441 (2014). The legal analysis applied by our Supreme Court in *First-Citizens Bank and Trust Co. of South Carolina v. Hucks*, 305 S.C. 296, 408 S.E.2d 222 (1991), is illustrative, as the counterclaims are similar to those in this case. In *First-Citizens*, a bank had brought an equitable action for declaratory judgment regarding the administration of a trust. The defendant brought counterclaims for breach of fiduciary duty and breach of contract, alleging monetary damages.[4] Finding that those counterclaims were undisputedly legal in nature, the Supreme Court next addressed the crucial question of whether the counterclaims were compulsory or permissive. *Id.* 298, 223.

By definition, a counterclaim is compulsory if it arises out of the same transaction or occurrence as the opposing party's claim. Rule 13(a), SCRCP. Finding that the counterclaims bore a logical relationship to the underlying trust which was the subject of the bank's equitable claim, the court in *First-Citizens* determined them to be compulsory in nature and not subject to the jurisdiction of the master-in-equity. Here, as in *First-Citizens*, the Appellants' legal counterclaims also bear a close logical relationship to the

[4]Appellants counterclaims for breach of duty of good faith and fair dealing, breach of contract, breach of fiduciary duty, duress and violation of S.C. Code Ann. §39-5-10 et seq., the South Carolina Unfair Trade Practices Act (hereinafter "SCUTPA") all seek monetary damages and are therefore legal in nature.

underlying documents on which the complaint is based as the facts enumerated below clearly support.

It is not in dispute that the Forbearance Agreements served to modify the Notes. (See Complaint, ¶10 & 12). Importantly, the Appellants were not in default under the Forbearance Agreements at the time of TD Bank's alleged breaches. (See Complaint, Ex. R and S). Indeed, the TD Bank's actions materially impaired Black Diamond's ability to honor the terms of the Forbearance Agreements, resulting in this foreclosure action. (Memo Opp. Summ. Jmt., Ex. A, Depo. Lindgren, p.54, ln. 10-25 - p. 55, ln. 1-13). The facts further show that at the time the Forbearance Agreements were executed, TD Bank knew the Shell Building and the undeveloped pad sites were being marketed for sale and that TD Bank previously permitted the partition and partial release of other portions of the collateral securing the Notes and Mortgages. (Complaint, ¶27, Ex. O). Ergo, TD Bank was aware of the need for, and by its prior course of dealing sanctioned, partial releases of the collateral. Based on the foregoing, it was reasonable for Black Diamond to rely upon TD Bank to give due consideration to its request to partition and sell off the Shell Building. The evidence suggests, however, that TD Bank gave the Offer no consideration at all and may have clandestinely pursued opportunities to develop the property on its own behalf, ordering appraisals, environmental assessments and broker's opinion of value, all at Appellant Black Diamond's expense.

Despite the foregoing the trial court, relying upon *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 778 S.E.2d 106 (2015), determined that Appellants' counterclaims bore no "logical relationship" to the execution of the notes, mortgages, and guaranty

agreements. (Jury Strike Order, p. 4). However, the facts of this case are readily distinguishable from those in *BADD*.

In *BADD,* the bank's alleged breach of its implied covenant of good faith took place, if at all, two years after the guarantees had been executed. As a result, the court determined the claims did not "arise out of the underlying transaction or occurrence" or "affect the execution or enforceability of the guaranty agreements." *Id.* at 296, 110. TD Bank's breach on the other hand, occurred a few weeks after it required Appellants to execute the Forbearance Agreements. At minimum, there is a sufficient nexus between the breach of good faith and the enforceability of the Forbearance Agreements and the Guaranties to render the counterclaims compulsory. In fact, the overlapping legal and contractual obligations would likely bar a subsequent suit on Appellants' counterclaims if they were not brought in connection with this action under theories of res judicata and/or issue preclusion.

When a complaint raises both legal and equitable issues and rights, the legal issues are determined by a jury while equitable issues are for the judge. *Floyd v. Floyd*, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991). Furthermore, either party may demand a trial by jury of any issue triable by jury. See Rule 38(b), SCRCP. In light thereof, the trial court should have either ordered separate trials of the legal and equitable claims, or ordered the claims be tried before a jury in a single proceeding. Rule 42(b), SCRCP; *Wachovia, Id* 329, 441.

V. TO THE EXTENT APPELLANTS CONTRACTUALLY AGREED TO WAIVE THEIR RIGHT TO A JURY TRIAL, SUCH WAIVERS DO NOT EXTEND TO APPELLANTS' COUNTERCLAIMS.

It is undisputed that the $3.5M Note contains a broad and, as argued below excessive, jury waiver provision ($3.5M Note, p. 2), as does Appellant Lindgren's Guaranty thereof.[5] However, the purported waiver language in Brosman's Guaranties are more limited, stating that he "...waives any right to a trial by jury in any action arising from or relating to this guaranty." Lindgren's Guaranty of the $2M Note, the Mortgages, and the Forbearance Agreements do not contain a waiver of jury trial provision at all. Without addressing these distinctions or discussing how the absence of the waiver in the $2M Note and Mortgage impact upon the liabilities in this case, the trial court simply ruled that Appellants had waived their right to a jury trial lock, stock and barrel. (Jury Strike Order, Footnote 3).

Recognizing that the right to a trial by jury is a substantial right, our courts give such provisions rigorous scrutiny. *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.,* 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992). Strictly construing the waiver provisions and resolving all doubt in favor of the Appellants, it is clear that Appellants did not waive their right to a jury trial with respect to the $2M Note, the $2M Mortgage, or the Forbearance Agreements, where no such provision can be found. Nor was it the intent of Brosman to waive his right to a jury trial for claims arising under documents other than his Guaranties. The trial court therefore erred to the extent it implied a waiver to the counterclaims are based on breach of the $2M Note and

[5]See e.g.: Lindgren Guaranty of $3.5M Note at ¶21.

Mortgage. See *Sunamerica Financial Corp. v. Equi-Data, Inc.*, 299 S.C. 175, 179, 383 S.E.2d 8, 10 (Ct. App. 1989) (citing 47 Am.Jur.2d Jury § 81 at 696 (1969) (waiver of a jury trial must be the result of an intentional act and the intention to waive the right must plainly appear); 50 C.J.S. Juries § 90 at 797 (1947) ("Waiver of a jury trial, however, will not be implied in doubtful cases, and, in order to create a waiver by implication, unequivocal acts are necessary; further, it has been held that the waiver must of necessity be an intentional act.").

As to Appellants Black Diamond and Lindgren, even if the waiver language in the $3.5M Note and Lindgren's Guaranty thereof could be read this broadly, it should not operate as a waiver as to claims arising from the Forbearance Agreements, which were executed years later. Such an interpretation would violate public policy. In *Fisher v. Stevens,* 355 S.C. 290, 297, 584 S.E.2d 149, 153 (Ct. App. 2003), this Court recognized that an exculpatory agreement could contravene public policy if it were excessively broad. In *Fisher*, the court was faced with an exculpatory clause that purported to absolve the defendant from any injury to the plaintiff. *Id.* Extending the jury waiver provision in $3.5M Note, to effectively waive the right to a jury in claims arising out of TD Bank's intentional bad acts, such as breaches of: contract, fiduciary duty, covenant of good faith and fair dealing, and duty to mitigate, is equally egregious.

VI. APPELLANTS' COUNTERCLAIM FOR DURESS IS PERMISSIBLE UNDER THE *TROUTMAN* DECISION.

Does South Carolina recognize a separate cause of action for duress arising out of a breach of contract action? Appellants maintain that although our Supreme Court denied the claim for economic duress in *Troutman v. Facetglas, Inc.,* 281 S.C. 598, 316

S.E. 2d 424 (Ct. App. 1984), it left the door open for future claims by acknowledging the elements of the cause of action. Those elements are enumerated as follows: (1) a person used his superior bargaining position unreasonably or unjustifiably, (2) by wrongful conduct, generally threats, (3) the conduct or threats caused the injury, (4) the victim would not have acquiesced in the absence of wrongful threats, (5) resultant damages, and (6) the victim had no adequate legal remedy available to protect his interests at the time it was threatened. *Troutman, Supra* at 603. The trial court, however, was unpersuaded and ruled that under *Troutman* there could be no cause of action for duress.

There is authority for Appellants' position however. In *Johnson v. City of Columbia, S.C.,* 949 F.2d 127 (Ct.App. 1991), the U.S. Court of Appeals upheld the district court's finding that actions by the City of Columbia constituted duress under South Carolina law. *Id* at 131. Specifically, the court cited *Troutman* as establishing the elements of economic duress. *Id* at 132. The U.S. District Court, Florence Division followed suit by affirmatively citing *Troutman* in support of the doctrine of economic duress. See e.g. *Hooters of America, Inc. v. Phillips,* 39 F.Supp.2d 582, 628 (1998); and also *Callan v. Singletary,* C.A. No. 4:08-1928-TLW-TER, slip op. at 4 (D.S.C., filed Sept. 14, 2009), WL2997001 (2009)(setting forth the five factors for economic duress outlined in *Troutman).*[6]

If the evidence is presumed to be true, as it must be for purposes of summary judgment, the Appellants' claim satisfies the necessary elements established in *Troutman.* Appellants had absolutely no choice but to accede to TD Bank's demands or

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[6]However, see *Payne v. FMC Corp.,* No. 1:90-882-6 (D.S.C., filed July 12, 1991), 1991 WL 352415, in which the U.S. District Court, Aiken Division cites to *Troutman* for the proposition that South Carolina law does not recognize a cause of action for tortious breach of contract.

face financial ruin. It is also abundantly clear that Appellants suffered great financial harm as a result of TD Bank's actions. As to whether or not Plaintiff's wrongful conduct constituted a general threat, that is a question of fact for the jury.

VII. THE TRIAL COURT ERRED IN FINDING TD BANK EXEMPT FROM THE PROVISIONS OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

In *Ward v. Dick Dyer and Associates, Inc.,* 304 S.C. 152, 156, 403 S.E.2d 310, 312 (1991), our Supreme Court made clear that only those activities specifically authorized by regulation or other statute are exempt under the SCUTPA. In so doing, it overruled *Anderson v. Citizens Bank,* 365 S.E.2d 26 (Ct. App. 1987), which stood for the proposition that banking practices were exempt from the provisions of the SCUTPA. Despite clear authority to the contrary, the trial court resurrected this exemption by relying upon an alternative basis for exemption iterated within one of the footnotes in *Anderson*, which TD Bank argues was not overturned by *Ward.* (Summ. Jmt. Order, pp. 8-9). Appellants maintain that banks are subject to the SCUTPA when the actions complained of are not required by law, or otherwise allowed under other statutes or regulations. *Ward, Supra* at 156, 312.

Indeed, since the *Ward* decision, SCUTPA claims have been brought against banking institutions in South Carolina. See *Robertson v. First Union Nat. Bank,* 350 S.C. 339, 565 S.E.2d 309 (2002)(recognizing cause of action under the SCUTPA against bank but finding no evidence of violation); and *Washington Mut. Bank, FA v. Hiott,* 2006 WL 7286775 (2006).[7] TD Bank cannot cite to any authority that would require or permit it to

[7]Appellants cite to this unpublished opinion solely for the purpose of illustrating that SCUTPA claims against banks are being entertained by our courts in the wake of *Ward, Supra.* The case is not being relied upon as legal precedent.

engage in the type of self-dealing and bad faith alleged in this case and therefore, it is not exempt from the SCUTPA's purview.

VIII. BECAUSE TD BANK'S ACTIONS ARE CAPABLE OF REPETITION, THE TRIAL COURT ERRED IN GRANTING IT SUMMARY JUDGMENT ON APPELLANTS' COUNTERCLAIM UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

The requirement under the SCUTPA that the behavior complained of must impact upon the public interest, is most commonly met by demonstrating that the practices have the potential for repetition. See*: Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.,* 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986)*; Global Protection Corp. v. Halbersberg*, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998). "The potential for repetition may be shown in two ways: (1) by showing the same kind of actions occurred in the part, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Crary v. Djebelli,* 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). TD Bank's failure to give reasonable consideration to a request for partition and sale; its interference with tenant relationships; its control over the property manager and self-dealing are all capable of being repeating. Indeed, the evidence supports that TD Bank had been accused of similar dealings in another case. (Memo. Supp. Summ. Jmt., Ex.1, Depo. Lindgren, p. 125, ln. 19 - p. 128, ln. 14).

Despite this testimony, the trial court granted summary judgment on Appellants' SCUTPA claim, finding there was "no evidence of adverse effect on the public interest." The trial court further stated that the sole practice purportedly affecting the public interest was TD Bank's "decision not to accommodate the September 2010 proposed short sale." (Summ. Jmt. Order, p.8). Once again, the trial court's judgment was clouded by its

myopic view of the transaction. Appellant Black Diamond's request for partition and partial release of the Shell Building **was not a "short sale"**.

CONCLUSION

Under the summary judgment standard, the trial court was obligated to give every benefit of the doubt to the non-moving party. *Watters v. Terminix Service, Inc.*, 376 S.C. 632, 635, 658 S.E.2d 110, 111 (Ct. App. 2008). Clearly the trial court's mischaracterization of the request for partial release as a short sale colored its decision to grant TD Bank summary judgment on Appellants' counterclaims. At bare minimum, this issue should be remanded for further consideration consistent with the facts. This misapprehension, coupled with the trial court's misapplication of the law regarding the applicable statute of limitations, duress, and scope of the SCUTPA have substantially prejudiced the Appellants. For the foregoing reasons, Appellants appeal of the summary judgment should be granted and the matter remanded for a jury trial on their counterclaims.

Respectfully submitted,

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