

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM Horry COUNTY  
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No.: 2009-CP-26-5549

 Hotel & Motel Holdings, LLC,

Respondent

v.

Harvey L. Jones,

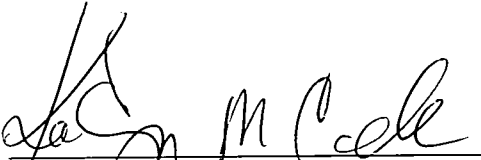
Appellant

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MAY 15 2012  
SC Court of Appeals

NOTICE OF APPEAL

Harvey L. Jones appeals the Order of the Honorable D. Craig Brown signed February 6, 2012, enrolled by the Horry County Clerk of Court on February 8, 2012, and received on February 10, 2012, and the Order of the Honorable D. Craig Brown signed March 16, 2012, and enrolled by the Horry County Clerk of Court on March 19, 2012. Appellant received written notice of the entered Order on May 4, 2012.

May 14, 2012

  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

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Case No.: 2009-CP-26-5549

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Hotel & Motel Holdings, LLC, Respondent

v.

Harvey L. Jones, Appellant

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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal and Applicable Order on all parties by depositing a copy of the same in the United States Mail, postage prepaid, on May 14, 2012, addressed to their attorneys of record, to the following:

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May 14, 2012

Jenny Abbott Kitchings, Clerk  
Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

Re: Hotel & Motel Holdings, LLC v. Harvey L. Jones  
Case No.: 2009-CP-26-5549  
Cook & Roy File No.: 7283.10.0575

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SC Court of Appeals

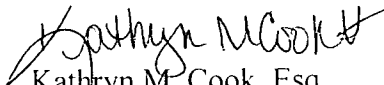
Dear Ms. Kitchings:

Enclosed please find Appellant Harvey L. Jones' Notice of Appeal, applicable Orders, and Proof of Service along with a copy of each and this firm's check in the amount of \$100.00. I would ask that you please file the original Notice of Appeal and Proof of Service and returned clocked copies to me in the enclosed, self-addressed envelope.

If you have any questions with regard to this matter, please do not hesitate to contact me. Thank you for your cooperation.

Sincerely,

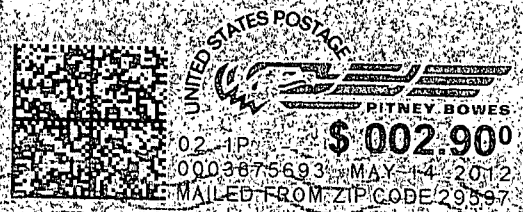
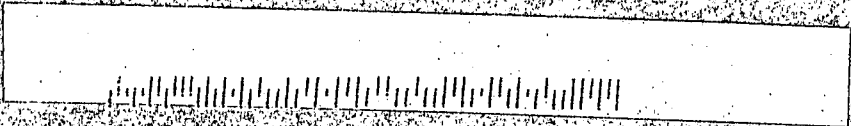
Cook & Roy, LLC

  
Kathryn M. Cook, Esq.

KMC:tl

Enclosures

CC(w/enclosures): R. Wayne Byrd and Audra M. Byrd, Esq.  
Melanie Huggins-Ward, Horry County Clerk of Court  
Harvey Jones



**COOK & ROY, LLC**

P.O. Box 4086  
North Myrtle Beach, South Carolina 29597

Jenny Abbott Kitchings, Clerk  
Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211



IT IS SO ORDERED.



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The Honorable D. Craig Brown  
Presiding Circuit Court Judge,  
Fifteenth Judicial Circuit

March 16, 2012  
Florence, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 HOTEL & MOTEL HOLDINGS, LLC, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HARVEY L. JONES, )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 Civil Action Number: 2009-CP-26-05549

**ORDER GRANTING PLAINTIFF  
 MOTION FOR DIRECTED VERDICT**

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The issues in the above-captioned lawsuit were tried before the Honorable D. Craig Brown, Circuit Court Judge, and a jury on November 1 – 3, 2011, at the Horry County Court of Common Pleas in Conway, South Carolina. Present and participating in the trial were the Plaintiff, Hotel & Motel Holdings, LLC (“H & M”) through its representatives, Donald Godwin, Audra M. Byrd and R. Wayne Byrd of Turner Padgett Graham & Laney, P.A., as well as Harvey L. Jones, Defendant in this case, who was represented by attorneys Kathryn M. Cook and James Lewis of Cook & Roy, LLC. Kathryn M. Cook and her firm were retained to represent Harvey Jones on or about September 10, 2010, after the death of Harvey Jones’ first attorney.

Prior to jury selection, Defense counsel moved for a continuance arguing that a key witness, Jack Jones, was in the hospital and was therefore not available for trial. Defense counsel also moved for consolidation of this action with the action of Hotel and Motel Holdings, LLC (C/A No.: 2009-CP-26-5550). Upon further inquiry by the court, it was learned that Jack Jones had been deposed in other pending actions that arose out of the same facts and circumstances as the instant case. The court denied defense counsel’s Motion to Continue and ordered that Jack Jones deposition be used during trial as allowed by Rule 32, SCRCP. The

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court also denied defense counsel's Motion to Consolidate on that grounds that such request was untimely. Jury selection then took place and the trial was commenced on or about November 1, 2011.

After the close of all evidence in this case, H & M moved for a directed verdict pursuant to Rule 50(a) of the South Carolina Rules of Civil Procedure on the grounds that it had presented uncontroverted evidence establishing its cause of action for breach of contract and that Defendant Jones had failed to present any evidence of a viable defense to its claim. Having heard all evidence presented and viewing the evidence in the light most favorable to the Defendant, this Court finds that only one reasonable inference may be drawn from the evidence, and there are no issues for the jury's consideration. On that basis and as set forth more fully below, Plaintiff's Motion is hereby **GRANTED**, and judgment is entered in its favor on the cause of action stated in the Amended Complaint.

#### **RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

This is a breach of contract action based upon a personal guaranty executed in connection with a commercial loan made to BJC Enterprises, LLC ("BJC") for the acquisition of an oceanfront, three-story motel known as the Emerald Shores Motel. The initial members of BJC were Wendy J. Bellamy, Harvey L. Jones, and Henry C. Coan, III. All three members executed personal guaranties in connection with the loan. The initial loan was made by First Palmetto Savings Bank, FSB ("First Palmetto") in January of 2005, in the principal amount of \$5,580,000.00. Under the terms of the initial Note, BJC was to make twenty-three monthly interest payments and a final balloon payment of approximately \$5.6 million in January 2007. Prior to the maturity date, BJC renewed its loan with First Palmetto in January of 2007. The 2007 renewal called for eleven monthly interest payments and a balloon payment in January

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2008. However, again in January of 2008, First Palmetto renewed the BJC loan. Under the final renewal, BJC was required to make eleven monthly payments of principal and interest, with a balloon payment of \$5.5 million due in January 2009. Each time the loan was renewed, the guarantors executed personal guaranties in which they guaranteed payment and performance of the debt, liability and obligation of BJC; the guaranties were "absolute, unconditional and continuing." [Guaranty at ¶ 2].

BJC defaulted on its loan in late 2008, and the company did not make the required balloon payment on January 17, 2009. First Palmetto initiated a foreclosure action on February 2, 2009. Thereafter, BJC and its members negotiated a payment deferral with First Palmetto, whereby First Palmetto agreed to forbear from exercising its legal rights under the terms of the loan through May 31, 2009. First Palmetto voluntarily dismissed its foreclosure action. However, BJC again failed to make the balloon payment in May 2009, and the present breach of contract action was filed by First Palmetto on June 5, 2009. The Summons and Complaint were served on Defendant Jones on June 12, 2009. Defendant served his Answer to the Complaint on July 3, 2009.

Thereafter, on June 30, 2009, H & M purchased the BJC loan documents from First Palmetto, including the personal guaranty of Defendant Jones. After its purchase of the loan documents, H & M filed a Motion with this Court seeking an Order allowing its substitution as the Plaintiff. After a hearing, the Court granted the Motion, and H & M was substituted as Plaintiff in this action. The Amended Summons and Complaint (which were attached to and filed with the Motion) were served on Defendant Jones on December 23, 2009. However, Defendant Jones did not respond to the Amended Summons and Complaint by way of an Answer or other responsive pleading.

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Prior to the start of the trial of this case and at the request of counsel for H & M, this Court held Defendant Jones in default as to the allegations in the Amended Complaint to which he had not previously denied or otherwise responded. Thus, Defendant Jones was deemed to have admitted the allegations contained in Paragraphs 1, 2, 9, 10 and 11 of the Amended Complaint. The remaining Paragraphs of the Amended Complaint were denied by Defendant Jones, and this Court allowed his original Answer, including the defenses raised therein, to stand for purposes of trial.

There is no dispute regarding the validity of the original loan documents, the subsequent renewals of the loan and the related documents (including the personal guaranty which is the subject of this case), or the failure of BJC to make payments as required under the terms of the loan documents. Further, the parties do not dispute that the loan is currently in default, the maturity date has elapsed and no payments have been made on the loan since February of 2009.

However, in his Answer, Defendant Jones raised the following affirmative defenses: (1) Failure to State a Claim; (2) Waiver, Estoppel and Laches; (3) Waiver of Strict Performance; (4) Failure to Join Necessary Parties; (5) Acts of Others; (6) Failure to Mitigate Damages; and (7) Reservation of Additional Defenses. At the close of Plaintiff's case in chief, the Court ordered stricken the defenses of Failure to State a Claim, Laches, Failure to Join Necessary Parties, and Reservation of Additional Defenses.

At trial, H & M presented testimony from Mr. Brent Hutto, the Senior Vice President of Commercial Lending for First Palmetto. Mr. Hutto identified the 2005, 2007 and 2008 loan documents, including the personal guaranties executed by Defendant Jones. These documents were admitted into evidence without objection. Mr. Hutto testified as to the terms of the loan documents, the various defaults of BJC, and the current amount of the debt owed by BJC under

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the terms of the loan documents. Mr. Hutto presented the Court with a written summary of the debt owed by BJC and explained how this amount was calculated; the summary was admitted into evidence without objection. Thereafter, H & M rested its case.

In his defense, Defendant Jones presented his own testimony regarding the loan and the default of BJC under the terms of the loan documents. Defendant Jones called three additional witnesses: Mr. Robert Wilder (former Vice President of First Palmetto), Mr. Samuel R. Small (President and Chief Executive Officer of First Palmetto), and Mr. Bhupendra Patel. Further, Defendant Jones presented excerpts from two depositions taken of Mr. Jack Jones (a member of H & M).

### LEGAL STANDARD

To establish a breach of contract, the Plaintiff must prove the following three elements: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the Plaintiff as a direct and proximate result of the breach. *Fuller v. Eastern Fire & Casualty Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). In a breach of contract action, the burden is on the Plaintiff to establish the requisite elements by a preponderance of the evidence. Likewise, the Defendant has the burden of establishing his affirmative defenses by the preponderance or greater weight of the evidence. *W. T. Rawleigh Co. v. Wilson*, 141 S.C. 182, 139 S.E. 395 (1927).

In passing upon a motion for a directed verdict, it is the duty of the Court to view the evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the nonmoving party. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 489, 649 S.E.2d 494, 497 (Ct. App. 2007). "The trial court must deny the motions

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when the evidence yields more than one inference or its inference is in doubt." *Collins Entm't, Inc. v. White*, 363 S.C. 546, 555, 611 S.E.2d 262, 266 (Ct. App. 2005) (quoting *Steinke v. South Carolina Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999)).

"However, where the only reasonable inference from the evidence is that there has been a failure of proof as to a material element of the Plaintiff's cause of action, it becomes the duty of the Court to resolve the issue against the party having the burden of proof by directing a verdict." *Horton v. Greyhound Corp.*, 241 S.C. 430, 438, 128 S.E.2d 776, 780-81 (1962). Whether more than one reasonable inference can be drawn is, necessarily, for the court to determine, and when only one reasonable inference can be deduced from the evidence, a directed verdict in favor of the moving party is proper. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 476-77, 514 S.E.2d 126, 130 (1999). Otherwise, verdicts would be allowed to rest on conjecture and speculation, which is prohibited. *Ecclesiastes Prod.* at 489, 649 S.E.2d at 497 ("verdicts may not be permitted to rest upon surmise, conjecture or speculation").

### DISCUSSION AND ANALYSIS

**A. The Defendant Is In Default As To The Allegations Contained In The Amended Complaint To Which He Did Not Respond, And Those Allegations Are Deemed Admitted For Purposes Of Trial.**

As set forth above, Defendant Jones failed to respond or otherwise plead in response to the Amended Summons and Complaint, which were properly served upon him in accordance with Rule 5(b)(1), SCRCPP, on December 23, 2009. Pursuant to Rule 55(a), SCRCPP, the Defendant's failure to respond to the Amended Complaint was "made to appear" to the Court by counsel for H & M, both orally and in writing through the Pretrial Brief of H & M, submitted prior to trial. Therefore, this Court finds Defendant Jones in default as to Paragraphs 1, 2, 9, 10

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and 11 of the Amended Complaint for his failure to deny or otherwise respond to these Paragraphs. As a result, for purposes of trial, the following allegations are taken as true and deemed admitted by Defendant Jones:

1. This is a cause of action for the enforcement of a Guaranty.
2. Plaintiff Hotel & Motel Holdings, LLC, is a Limited Liability Corporation organized and existing pursuant to the laws of the State of South Carolina.
3. That Hotel & Motel Holdings, LLC is the owner and holder of the note and security instruments securing same including the guaranty subject to this action by virtue of that Assignment of Mortgage dated June 30, 2009, and recorded on June 30, 2009, in the Horry County Register of Deeds Office in Mortgage Book 5183 at Page 3147, and in Deed Book 3408 at Page 300.
4. That Hotel & Motel Holdings, LLC is the owner and holder of the note and security instruments securing same including the guaranty subject to this action by virtue of that Assignment of Mortgage dated June 30, 2009, in the Horry County Register of Deeds Office in Mortgage Book 5183 at Page 3149, and Deed Book 3408 at Page 302.
5. That Hotel & Motel Holdings, LLC is the owner and holder of the note and security instruments securing same including the guaranty subject to this action by virtue of that Assignment of Mortgage dated June 30, 2009, and recorded on June 30, 2009, in the Horry County Register of Deeds Office in Mortgage Book 5183 at Page 3151, and Deed Book 3408 at Page 304.

Despite Defendant Jones' default, the Court allowed the Answer previously submitted by Defendant Jones in response to the original Complaint to stand, and for purposes of trial, the

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Plaintiff was required to prove the allegations originally denied by Defendant in his Answer. The Court's ruling on these matters is further supported by Rule 8(d), SCRCF, which provides in relevant part: "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

**B. The Only Reasonable Inference To Be Drawn From The Evidence Is That Defendant Has Breached His Contract, And Plaintiff Is Entitled To Judgment As A Matter Of Law.**

It is undisputed that Defendant Jones executed personal guaranties in 2005, 2007 and 2008, whereby he unconditionally and absolutely guaranteed repayment of the debts of BJC. Defendant Jones admitted that he signed the personal guaranties, and he has not challenged the validity or enforceability of the personal guaranties. Thus, H & M has established the existence of a binding contract.

Similarly, H & M has established a breach of the contract by Defendant Jones through evidence and testimony that BJC defaulted on its loan, the BJC loan has matured, and the debt owed by BJC has not been repaid. Defendant Jones has offered no evidence to contradict this evidence and testimony. Finally, through the testimony of Mr. Hutto and the written computation of damages prepared by Mr. Hutto and admitted into evidence, H & M has established the damages it has incurred as a direct and proximate result of the breach. Significantly, the Defendant has offered no evidence to dispute or contradict the damages proven by H & M. Thus, as a matter of law, H & M has carried its burden of proof and established its breach of contract claim by a preponderance of the evidence.

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**C. The Only Reasonable Inference To Be Drawn From The Evidence Is That Defendant Has No Viable Defense, And Plaintiff Is Entitled To Judgment As A Matter Of Law.**

In his Answer to the original Complaint, Defendant Jones raised the following affirmative defenses: (1) Failure to State a Claim; (2) Waiver, Estoppel and Laches; (3) Waiver of Strict Performance; (4) Failure to Join Necessary Parties; (5) Acts of Others; (6) Failure to Mitigate Damages; and (7) Reservation of Additional Defenses. As noted above, the Court ordered stricken the defenses of Failure to State a Claim, Laches, Failure to Join Necessary Parties, and Reservation of Additional Defenses. Defendant's remaining defenses are analyzed below.

1. Waiver and Waiver of Strict Performance

Defendant Jones alleges that H & M waived its right to enforce the contract. Waiver implicates the intentional relinquishment of a known right. *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992). Stated differently, "waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Id.* Waiver may be express or implied from circumstances indicating an intent to waive. *Id.* Waiver is an affirmative defense, and the burden of proof is upon the party asserting it. "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all material facts upon which those rights depended." *Heritage Fed. Sav. & Loan Ass'n v. Eagle Lake & Golf Condo.*, 318 S.C. 535, 545, 458 S.E.2d 561, 567 (Ct. App. 1995). For the reasons discussed below and based on the unambiguous terms of the personal guaranty at issue in this case, H & M is entitled to judgment as a matter of law on the defenses of waiver and waiver of strict performance.

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In relevant part, the personal guaranty signed by Defendant Jones provides: “[t]he liability of the undersigned shall not be affected or impaired by any . . . waiver, adjustment, forbearance, compromise or indulgence granted to Borrower.” [Guaranty at ¶ 6]. Thus, the plain and unambiguous terms of the contract negate any perceived waiver by First Palmetto or H & M. The contract specifically authorizes the lender to make concessions and adjustments to the borrower without affecting a waiver. Therefore, as a matter of law, Defendant Jones has failed to establish waiver on the part of H & M.

More significantly, in his personal guaranty, Defendant Jones expressly waived his right to assert the defense of waiver. On this issue, the contract provides as follows: “The Undersigned waives any and all defenses, claims, and discharges of Borrower . . . pertaining to the Indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the Undersigned will not assert, plead or enforce against Lender any defense of waiver.” [Guaranty at ¶ 7]. Thus, Defendant Jones cannot assert waiver as a defense in this action under the unmistakable terms of the contract.

“The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties. . . .” *Friarsgate, Inc. v. First Fed. Sav. & Loan Ass’n of S.C.*, 317 S.C. 452, 457, 454 S.E.2d 901, 905 (Ct. App. 1995). “Where an agreement is clear and capable of legal construction, the court’s only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it.” *Ebert v. Ebert*, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). In this case, the clear and unambiguous terms of the personal guaranty dictate a finding that Defendant Jones has failed to establish, and indeed cannot establish, the defense of waiver. Therefore, H & M is entitled to judgment as a matter of law as to the defenses of Waiver and Waiver of Strict Performance.

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2. Estoppel

To establish the defense of estoppel, the Defendant must present proof of the following elements as to the party to be estopped: "(1) conduct that amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that facts are otherwise than and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts." *Heritage Fed. Sav. & Loan Ass'n* at 544-45, 458 S.E.2d at 566-67. In addition, as the party claiming estoppel, Defendant must also establish the following: (1) Defendant's lack of knowledge and of the means of knowledge of the truth as to the facts; (2) Defendant's reliance upon the misleading conduct of the Plaintiff; and (3) Defendant's prejudicial change in position. *Id.*

Here, Defendant Jones has failed to present any evidence that H & M acted in any way or made any representation that would amount to a false representation or concealment of a material fact. The only statement cited by Defendant Jones in his testimony, was an alleged statement by Jack Jones (a principal of H & M) to the effect that he would not let the property go into foreclosure. However, assuming this statement was made by Jack Jones, it was made after the loan was in default and prior to the formation of H & M. Thus, the statement cannot be attributed to H & M since that entity was not in existence until June of 2009, after BJC defaulted on the loan. More importantly, Defendant Jones has failed to present any evidence that this purported statement caused him in any way to change prejudicially his position in reliance upon the statement. Therefore, the doctrine of estoppel has no application in this case, and H & M is entitled to judgment as a matter of law.

3. Acts of Others

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Defendant Jones asserts the acts of others as a defense in this breach of contract case. Specifically, Defendant Jones avers in his Answer that "Plaintiff's claims are barred, in whole or in part, because Plaintiff's damages, if any, were caused by the acts or omissions of persons other than this Defendant." [Answer at ¶ 16]. However, defense counsel has been unable to provide this Court with any case law which would support such a defense, and it is the ruling of this Court that "acts of others" is not a proper defense to a breach of contract claim.

To the extent Defendant's "acts of others" defense is actually a defense of impossibility, Defendant Jones has presented no evidence to this Court which would support a defense based on impossibility. Defendant has made no showing that any party made it impossible to repay the debt owed by BJC.

4. Failure to Mitigate Damages

In his Answer, Defendant Jones alleges that H & M failed to mitigate its damages by failing to apply the proceeds of a Certificate of Deposit pledged as collateral for the BJC loan. However, the parties concede and the testimony at trial reveals that the Certificate of Deposit was liquidated and the proceeds were applied to the debt. Thus, Defendant Jones has been given proper credit on the amount of debt owed after this collateral was liquidated.

**D. AWARD OF ATTORNEYS' FEES AND COSTS.**

In its Amended Complaint, H & M requests attorneys' fees and costs pursuant to the terms of the personal guaranty executed by Defendant Jones. After the Court orally granted the motion of H & M for a directed verdict, the Court allowed the parties ten days in which to submit briefs and affidavits on the issue of attorneys' fees. Counsel for H & M submitted affidavits of attorneys' fees, setting forth the amount requested and facts supporting an award of fees and costs. Thereafter, Defendant Jones submitted a legal memorandum in opposition to the

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requested award of attorneys' fees and costs. H & M also submitted a legal memorandum in support of the award of fees and costs. With its memorandum, H & M presented the Court with an engagement letter executed by H & M, as well as detailed and itemized statements of account for work performed and billed by counsel for H & M. After considering the briefs and affidavits submitted by the parties, the Court held a hearing on the issue of attorneys' fees and costs on January 27, 2012. Counsel for both parties appeared and presented arguments to the Court.

A. Standard of Review

An award of attorneys' fees is within the sound discretion of the Court and, absent an abuse of discretion, will not be disturbed on appeal. *Patel v. Patel*, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004); *Bowen v. Bowen*, 327 S.C. 561, 563, 490 S.E.2d 271, 272, (Ct. App. 1997). In determining the reasonable amount of attorney's fees to award, the Court must take into account the following six factors:

- (1) the nature, extent, and difficulty of the services rendered,
- (2) the time and labor necessarily devoted to the case,
- (3) counsel's professional standing,
- (4) the contingency of compensation,
- (5) the customary legal fees for similar services in the locality, and
- (6) the beneficial results obtained.

*Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 384-85, 377 S.E.2d 296, 297 (1989).

"Consideration should be given to all six criteria in establishing reasonable attorney's fees; none of these six factors is controlling." *Id.* at 384, 377 S.E.2d at 297. The Court considers each factor below.

B. The Terms of the Personal Guaranty

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Under the terms of the personal guaranty at issue in this case, Defendant Jones agreed to be liable for all indebtedness of BJC, as well as any costs, fees, and expenses as provided under the loan documents evidencing the debt. Defendant Jones argued that there was a distinction between paragraphs 4 and 5 of the guaranty and that the Plaintiffs had not "incurred" any fees or costs in the litigation and therefore Plaintiffs was not entitled to attorney fees and costs.

However, the court finds that Defendant Jones guaranteed payment of the debt of BJC, which by its definition includes costs and attorneys' fees associated with the enforcement or collection of BJC's debt. In relevant part, paragraph 4 of the Guaranty executed by Defendant Jones provides:

The liability of the Undersigned hereunder shall be limited to the principal amount of \$ UNLIMITED (if unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon *and all other costs, fees, and expenses agreed to be paid under all agreements evidencing the Indebtedness and securing payment of the Indebtedness, and all attorneys' fees, collection costs and enforcement expenses referable thereto.*

[Guaranty at ¶ 4. (emphasis added)]. Thus, under the unambiguous terms of the agreement, Defendant Jones is required to pay all attorneys' fees attributable to the collection and enforcement of the debt. This amount includes costs and fees incurred in prosecuting the foreclosure action, and any litigation relating to the enforcement of the loan documents. In this case, the recovery of attorneys' fees and costs is a matter of contract law, and the contract unambiguously provides that Defendant Jones is responsible for payment.<sup>1</sup>

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<sup>1</sup> In addition to asserting that the Defendant did not owe any fees or costs to Plaintiff based upon the argument that Plaintiff had not "incurred" any fees and costs, Defendant also asserted that if the court found Defendant liable for such fees and costs, then they only owed those fees and costs directly related to this action. The court finds that such limitation does not exist in the personal guaranty and that the Plaintiff would be entitled to collect all such fees and costs under the terms of the guaranty.

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B. Analysis of the Baron Data Systems Factors

(1) *The Nature, Extent and Difficulty of the Legal Services Rendered.*

Upon its evaluation of the nature, extent and difficulty of the legal services rendered, this Court determines that H & M's counsel had to expend considerably more time and effort on this matter because the Defendant and the other debtors have transformed a simple collection action into complex litigation. While it appears on the surface that this matter is a straightforward breach of contract action, the case has been complicated by numerous defenses asserted by Defendant Jones, which he has an absolute right to assert. Nonetheless, as a result, the Court dedicated two and one-half days to the trial of these defenses. Notably, this case has been in litigation for over two and one-half years, and the Court finds that the length of the litigation is indicative of the complex nature of this action. A simple breach of contract claim would almost certainly not continue this long.

Moreover, the Court believes that this action, the foreclosure action, and the other guaranty actions have a common core set of facts, and the actions are inextricably linked such that it is impossible to segregate the work of counsel by case caption. This is so because all of the work done by counsel for H & M was for the same purpose – collection of the debt owed. Certainly, Defendant Jones benefited from and used the work done in the other cases to present his defense in this matter. More significantly, as stated above, the terms of the agreement require payment of attorneys' fees and costs incurred in the enforcement or collection of the debt.

The South Carolina Supreme Court has considered similar facts in a case where guarantors contested an award of attorneys' fees when the fees were incurred in defense of another guarantor's counterclaims. Amer. Fed. Bank, FSB v. Number One Main Joint Venture,

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321 S.C. 169, 467 S.E.2d 439 (1996). The Court reasoned that “[u]nless the instrument otherwise specifies, persons who sign as maker and as a part of the same transaction are jointly and severally liable. Further, the issues presented in the counterclaim were intertwined with the issue of Bank's ability to proceed on the note.” *Id.* at 175, 467 S.E.2d at 443. Likewise, the issues presented in this case, the foreclosure suit, and the remaining guaranty actions are so closely intertwined that segregation of the fees incurred by caption or case number would be impossible. More importantly, Defendant Jones is jointly and severally liable for the indebtedness of BJC. According to the express terms of the Guaranty that Defendant Jones signed, the indebtedness of BJC includes attorneys’ fees. As such, Defendant Jones is liable for all of the attorneys’ fees and costs.

(2) *The Time and Labor Necessarily Devoted to the Case.*

The Court has meticulously reviewed the affidavits of H & M’s counsel and the detailed billing statements submitted to the Court. These documents indicate clearly that the time and labor spent in this case were reasonable and not duplicative. As previously noted, this case has been in litigation for over two and one-half years, and seven attorneys from the law firm of Turner Padgett Graham & Laney P.A. have worked in some capacity on this matter. From the affidavits and itemized billing reports filed by H & M’s counsel, it appears that there have been approximately fifteen depositions taken and numerous rounds of mediation. In total, excluding the time devoted to this Court’s consideration of attorneys’ fees, counsel for H & M has spent approximately 1147.2 hours in the prosecution of this case and the related foreclosure and guaranty actions.

(3) *The Professional Standing of Counsel.*

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Based upon the affidavits of counsel and the Court's own experience and knowledge, the Court finds that counsel for H & M are experienced and skilled trial attorneys of high professional standing in the community. Counsel for Defendant Jones does not dispute this finding.

(4) *The Contingency of Compensation.*

~~Both parties concede that the fourth factor set forth in *Baron Data Systems* is not applicable since this matter was not a contingency case.~~

(5) *The Fee Customarily Charged in the Locality for Similar Legal Services.*

Based upon a review of the affidavits of counsel and its familiarity with attorneys' fees customarily charged in this legal community, the Court finds that the rates of H & M's counsel are appropriate. The rate charged by Attorney Wayne Byrd for his work on this file is \$375.00 per hour, and the rate of Attorney Audra Byrd is \$250.00. The Court notes that the South Carolina Supreme Court has approved rates much higher than those charged by Attorney Wayne Byrd in this case for services rendered by attorneys with similar experience and professional standing. *See Layman v. State*, 376 S.C. 434, 460, 658 S.E.2d 320, 334 (2008) (allowing attorneys' fees at rates of \$600.00 and \$500.00 per hour). The Court reiterates that this is not a simple collection action, and it finds that the fees charged by counsel for H & M are not unordinary or unexpected for similar legal services in the locality.

(6) *The Beneficial Results Obtained.*

The total benefit obtained by counsel for H & M includes a sizeable judgment in excess of \$6,500,000.00 and the potential avoidance of further litigation should H & M collect the judgment awarded. The fact that the Court, rather than the jury, made the decision in this case

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does not affect the Court's analysis. H & M received a favorable verdict for a significant amount.

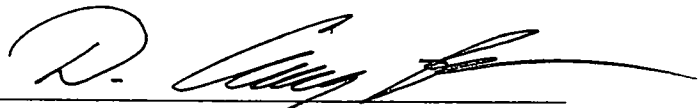
Under the facts of this case, the Court finds that an award of costs and attorneys' fees to H & M is proper. The Court has determined the reasonableness of the requested fees, considering the complex nature of the issues in this case and the time necessarily devoted to prosecuting this matter. Based on the findings set forth above, the request of H & M for costs and attorneys' fees is granted in the amount of \$343,036.59.<sup>2</sup>

### CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Directed Verdict is hereby GRANTED.

IT IS FURTHER ORDERED that judgment in the amount of \$6,890,244.43 be entered against Defendant Harvey L. Jones and in favor of Plaintiff Hotel & Motel Holdings, LLC, which includes attorneys' fees and costs as permitted under the terms of the contract;

AND IT IS SO ORDERED.

  
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THE HONORABLE D. CRAIG BROWN  
Presiding Circuit Court Judge for the  
Fifteenth Judicial Circuit

Feb. 6, 2012

Florence, South Carolina

<sup>2</sup> John K. Dubose, III, initially represented First Palmetto Savings Bank, F.S.B. in this foreclosure and collection action. Mr. Dubose submitted affidavits for attorney fees and Defense counsel objected to the amounts in the affidavits stating that the amount of fees claimed by Attorney Dubose was higher than his rate of \$75.00 per hour as set forth in his affidavits. The court has reviewed the affidavits and reduced Mr. Dubose's fees to a total of \$11,632.50 which is \$1,353.00 less than his original claim for fees. Mr. Dubose's costs of \$1,520.05 is awarded as part of the total fees and costs referenced above.

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
Civil Action No. 2009-CP-26-5549


HOTEL & MOTEL HOLDINGS, LLC, )  
 )  
Plaintiff, )  
 )  
vs. )

**CERTIFICATE OF SERVICE**

HARVEY L. JONES, )  
 )  
Defendant. )  
 )

I hereby certify that on this 9th day of February, 2012, the foregoing ORDER GRANTING PLAINTIFF'S MOTION FOR DIRECTED VERDICT has been served upon counsel of record, by depositing copies in the United States mail, postage prepaid and properly addressed as follows:

Kathryn M. Cook, Esquire  
Cook & Roy, LLC  
Post Office Box 4086  
North Myrtle Beach, SC 29597

  
\_\_\_\_\_  
Audra M. Byrd