

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

Hon. Roger M. Young, Circuit Court Judge SFP 08 2016

SC Court of Appeals

Appellate Case No. 2015-001809

Skywaves I Corporation,Appellant/Respondent,

v.

Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T,
and James Edahl..... Defendants

Of which Branch Banking & Trust Company, successor in
merger to Branch Banking and Trust Company of SC, a/k/a
BB&T is the Respondent/Appellant

AND

Of whom James Edahl is the Respondent

FINAL APPELLANT'S BRIEF OF RESPONDENT/APPELLANT

Kirsten E. Small
Julio E. Mendoza, Jr.
Molly Hughes Cherry
Nexsen Pruet, LLC
Post Office Drawer 10648
Greenville, SC 29603
(864) 370-2211

*Attorneys for Respondent/Appellant Branch
Banking and Trust Company, Successor in
Merger to Branch Banking and Trust
Company of SC, a/k/a BB&T*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE	2
I. INTRODUCTION.....	2
II. FACTS	2
A. 2005: BB&T Agrees to Factor Invoices for Skywaves.	3
B. 2006: The Factoring Agreement is Renewed and Modified; BB&T Accommodates Skywaves by Agreeing to Advance Funds for Purchase Orders.....	6
C. 2007: BB&T Continues its Commitment to Skywaves; Skywaves' Finances Deteriorate.	7
1. Renewal of the Factoring Agreement.	7
2. Skywaves' Unrealized Projections and Financial Losses.	8
3. Advancement of Funds on Site Plans.	11
D. 2008: Skywaves' Default under the Factoring Agreement.	12
E. Skywaves' Bankruptcy and This Lawsuit.	15
ARGUMENT.....	17
I. THIS COURT HAS JURISDICTION OVER BB&T'S CROSS- APPEAL.....	17
II. BB&T IS ENTITLED TO SUMMARY JUDGMENT ON SKYWAVES' BREACH OF CONTRACT CLAIM.	19
A. Standard of Review and Applicable Law	19
B. BB&T performed its obligations under the Factoring Agreement.	21
C. BB&T had ample grounds for declaring a default under the plain terms of the Factoring Agreement.	21
1. Skywaves failed to remit payments to BB&T.	22
2. Skywaves could not pay its debts as they came due in the ordinary course of business.	23
3. BB&T had a good faith belief that it was insecure.	24
III. BB&T IS ENTITLED TO SUMMARY JUDGMENT ON SKYWAVES' CLAIM FOR BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT.	27
CONCLUSION.....	30

TABLE OF AUTHORITIES

Cases

<i>Baughman v. AT&T Co.</i> , 306 S.C. 101, 410 S.E.2d 537 (1991)	27
<i>Capitol Radiology, LLC v. Sandy Spring Bank</i> , 439 Fed. Appx. 222 (4th Cir. 2011)	29
<i>Conner v. City of Forest Acres</i> , 348 S.C. 454, 560 S.E.2d 606 (2002)	27
<i>Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte</i> , 289 N.C. 620, 224 S.E.2d 580 (1976)	22
<i>D.R. Horton, Inc. v. Wescott Land. Co.</i> , 398 S.C. 528, 730 S.E.2d 340 (Ct. App. 2012)	28
<i>Davis v. Lunceford</i> , 287 S.C. 242, 335 S.E.2d 798 (1985)	17
<i>First State Bank of Or. v. Hoehnke Nursery Co.</i> , 667 P.2d 1022 (Or. Ct. App. 1983)	26
<i>Floyd v. County Squire Mobile Homes, Inc.</i> , 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985)	27
<i>Grimsley v. SC Law Enf. Div.</i> , ___ S.E.2d ___, 2015 WL 9315569 (S.C. Dec. 23, 2015)	19, 20
<i>Hartford Accident & Indem. Co. v. Hood</i> , 226 N.C. 706, 40 S.E.2d 198 (1946)	20
<i>Kerr v. Branch Banking & Trust Co.</i> , 408 S.C. 328, 759 S.E.2d 724 (2014)	18
<i>Lister v. NationsBank of Delaware, N.A.</i> , 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997)	27
<i>Long v. Long</i> , 160 N.C. App. 664, 588 S.E.2d 1 (2003)	20
<i>Martin v. Hamilton State Bank</i> , 723 S.E.2d 726 (Ga. Ct. App. 2012)	28
<i>McNair v. Rainsford</i> , 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998)	29
<i>Minter v. GOCT, Inc.</i> , 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996)	29
<i>Morris v. Anderson County</i> , 349 S.C. 607, 564 S.E.2d 649 (2002)	17

<i>Olson v. Faculty House of Carolina, Inc.</i> , 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001)	17
<i>PAF Invs., LLC v. General Dynamics Land Sys., Inc.</i> , 2011 WL 2669742 (D.S.C. July 7, 2011)	3
<i>Pitts v. Jackson Nat'l Life Ins. Co.</i> , 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002)	18
<i>Quail Hill, LLC v. County of Richland</i> , 387 S.C. 223, 692 S.E.2d 499 (2010)	19
<i>Roberts v. Recovery Bureau, Inc.</i> , 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994)	17
<i>S.C. Nat'l Bank v. S. Polymers, Inc.</i> , 313 S.C. 246, 437 S.E.2d 148 (Ct. App. 1993)	25
<i>Silverman v. Campbell</i> , 326 S.C. 208, 486 S.E.2d 1 (1997)	17
<hr/>	
<i>Team IA, Inc. v. Lucas</i> , 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2001)	20
<i>Town of Hollywood v. Floyd</i> , 403 S.C. 466, 744 S.E.2d 161 (2013)	20
<i>Weaver v. St. Joseph of the Pines, Inc.</i> , 187 N.C. App. 198, 652 S.E.2d 701 (2007)	20
Statutes	
N.C. Gen. Stat. Ann. § 25-1-201(b)(20)	26
N.C. Gen. Stat. Ann. § 25-1-309	26
S.C. Code Ann. § 36-1-309	26

STATEMENT OF ISSUE ON APPEAL

Did the Circuit Court err in denying BB&T's motion for summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act?

STATEMENT OF THE CASE

I. INTRODUCTION

Numbers do not lie, and in this case, the numbers showed a startup company in dire financial straits, despite BB&T's financing and efforts to assist the company, including numerous accommodations and forbearance. Ultimately, however, Skywaves' precarious financial condition created an unacceptably high risk of non-payment, leading BB&T to the conclusion that it could not continue its relationship with Skywaves. In doing so, BB&T acted prudently and appropriately. Most importantly, it acted within its rights under the agreement between it and Skywaves, the terms of which are clear and undisputed.

II. FACTS

BB&T is a banking institution with branches in North and South Carolina. Skywaves was a startup company that manufactured structures for sheltering equipment at the base of cell phone towers. (R. p. 330, Konersmann Dep. 51:9-14). Ronald Konersmann, an experienced businessman who has been involved in manufacturing infrastructure for the telecommunications industry since 1982, was Skywaves' founder and CEO. (R. p. 483, Konersmann CV; R. pp. 952-956, Konersmann Dep. 27:17-44:2). John Voytko, a licensed CPA, was the company's CFO. (R. pp. 372-373, Voytko Dep. 36:23-37:4).

Like many startup companies, Skywaves needed cash to fund its operations and to purchase construction materials for the shelters. (R. p. 386, Voytko Dep. 151:5-12). To provide working capital, in March 2005 Skywaves entered into a number of written agreements with BB&T, including the Factoring Agreement at issue in this litigation. (R. pp. 404-417, Factoring Agreement).

A. 2005: BB&T Agrees to Factor Invoices for Skywaves.

“Generally speaking, factoring is a form of commercial finance whereby a business sells its accounts receivable to a financing company in exchange for immediate payment of some portion of those receivables.” *PAF Invs., LLC v. General Dynamics Land Sys., Inc.*, 2011 WL 2669742, at *1 (D.S.C. July 7, 2011). The Factoring Agreement between Skywaves and BB&T, as initially executed in March 2005, provided that BB&T would purchase Skywaves’ accounts receivable for 80 percent of the face value of the invoice, up to a maximum of \$1.5 million. (R. pp. 404-406, Factoring Agreement ¶ 1(a) (“Advance Percentage”; “Maximum Credit Amount”). By executing the Factoring Agreement, Skywaves acknowledged that the Agreement set forth “the entire understanding between the parties ... supersed[ing] all prior and contemporaneous agreements and understandings, inducements and conditions, whether express or implied, oral or written.” (R. p. 416, Factoring Agreement ¶ 24). Skywaves further recognized that the written Agreement “control[led] and supersede[d] any course of performance and/or usage of the trade inconsistent with any of the terms hereof.” (*Id.*).

Once Skywaves sold a receivable to BB&T under the Factoring Agreement, BB&T became vested with all of Skywaves’ rights in the account, including the right of payment. (R. p. 408, Factoring Agreement ¶ 2). Accordingly, every factored invoice was required to “state plainly on the face thereof that the Account ... has been assigned and sold to, and is owned by and is payable to BB&T only.” (R. p. 411, Factoring Agreement ¶ 10). In the event that a customer mistakenly sent payment on a factored invoice to Skywaves instead of to BB&T, Skywaves was

required to hold the funds “as the property of BB&T, without commingling [them] with any funds or property of [Skywaves],” and immediately turn the funds over to BB&T. (R. p. 410, Factoring Agreement ¶ 8).

Although Skywaves made arrangements for some of its customers to pay factored invoices directly to BB&T, it contends that some of its customers were unable or unwilling to accommodate a second address in their systems for remitting payments on factored invoices to BB&T. (R. p. 376, Voytko Dep. 63:19-66:15; R. pp. 349-350, Konersmann Dep. 191:13-192:18). Skywaves contends that it informed BB&T of this difficulty from the outset and that BB&T accepted—not in writing, but in a “verbal conversation”—that payments on such invoices would flow through Skywaves. (R. p. 377, Voytko Dep. 64:15-20). Skywaves further contends that it could delay remittance of such payments to BB&T for up to 60 days, despite the written requirement that they be immediately forwarded to BB&T, because immediate remittance would not “work” for Skywaves. (R. p. 342, Konersmann Dep. 152:16-18; *see* R. p. 381, Voytko Dep. 69:17-23). However, there is nothing in writing reflecting these alleged modifications to the Factoring Agreement. In fact, BB&T repeatedly admonished Skywaves to put the required notification on factored invoices and expressed concern regarding overdue payments on factored invoices. (R. p. 430, Email from Castlen Morris to John Voytko (Feb. 15, 2006); R. p. 431, email from Castlen Morris to John Voytko (June 5, 2006); R. p. 432, email from Castlen Morris to John Voytko (Feb. 14, 2007)).¹

¹ In the June 5, 2006 email, BB&T noted that “over \$150,000 is 30+ days past due” on factored invoices to Cingular and Nextel and emphasized how important it was for BB&T to be able to contact Skywaves’ customers directly regarding overdue

Skywaves never segregated misdirected payments on factored invoices, although the Factoring Agreement required it to do so. (R. p. 384, Voytko Dep. 86:3-6). Rather, as CFO Voytko readily admitted, Skywaves used BB&T's funds for operating purposes and to manage cash flow. (R. pp. 991-992, Voytko Dep. 81:10-82:1). Effectively, Skywaves used misdirected payments on factored invoices as short-term, interest-free loans.

To mitigate the risk inherent in providing financing to a startup company like Skywaves, BB&T required Skywaves to make certain covenants and warranties regarding its financial status, including its ability to its debts as they matured in the ordinary course of business, the accuracy of financial statements provided to BB&T, and the non-occurrence of any material adverse change in Skywaves' financial status since the most recent financial statement. (R. pp. 409-410, Factoring Agreement ¶ 7). The Agreement made clear that these covenants and warranties were continuing in nature. (*Id.*) To enable BB&T to monitor Skywaves' financial condition, the Agreement required submission of monthly financial statements, prepared in accordance with Generally Accepted Accounting Principles (GAAP), within 30 days of month-end. (R. p. 415, Factoring Agreement ¶ 21(b)). Skywaves frequently missed this deadline, but it does not contend that the reporting requirement was ever amended. (R. p. 374, Voytko Dep. 55:7-17).

BB&T's obligation to factor invoices for Skywaves was not perpetual. The Factoring Agreement was for a one-year term, subject to automatic renewal if not terminated by BB&T or Skywaves. (R. p. 414, Factoring Agreement ¶ 19). Further,

factored invoices, and warned that its inability to do so could make the factoring arrangement untenable.

BB&T was entitled to terminate the Agreement at any time upon 60 days' written notice, and could terminate the Agreement "forthwith and without notice upon or after the occurrence of any Event of Default." (*Id.*) As relevant to this litigation, the Agreement defined "Event of Default" to include violation of the financial covenants, including Skywaves' inability to pay its debts as they came due in the ordinary course of business; Skywaves' failure to comply with its obligations under the Factoring Agreement; and BB&T "for any other reason deem[ing] itself insecure or the Collateral impaired." (R. p. 412, Factoring Agreement ¶ 12).

Although it entered into the Factoring Agreement in March 2005, Skywaves did not begin factoring invoices until late that year. (R. p. 375, Voytko Dep. 59:11-16). In light of this delay, BB&T voluntarily reduced the minimum monthly commission owed under the Factoring Agreement in June 2005. (R. p. 419, Letter from Castlen Morris to Ronald Konersmann and John Voytko (June 1, 2005)).

B. 2006: The Factoring Agreement is Renewed and Modified; BB&T Accommodates Skywaves by Agreeing to Advance Funds for Purchase Orders.

In March 2006, the Factoring Agreement was automatically renewed for a second year. (R. p. 414, Factoring Agreement ¶ 19). In May of that year, the parties executed a written modification of the Agreement, increasing Skywaves' maximum credit by \$250,000, to \$1.75 million, and cutting the minimum monthly commission in half—both changes favoring Skywaves. (R. p. 421, Amendment, May 11, 2006).

Skywaves was not profitable in 2006 (R. p. 351, Konersmann Dep. 221:5-7), and it continued to be short on cash. At some point in early 2006, BB&T began advancing money to Skywaves based on purchase orders received from Nextel, one

of Skywaves' customers. (R. pp. 435-436, Email from Castlen Morris to John Voytko (Mar. 25, 2006)). In other words, rather than purchasing an invoice reflecting money actually owed for a shelter that had already been built, BB&T agreed to advanced funds to Skywaves on the basis of a customer's order for a shelter yet to be built. Skywaves received a lower percentage of the face value of purchase orders sold to BB&T—initially 60 percent, later increased to 65 percent. (R. p. 997, Voytko Dep. 118:2-14; R. p. 425, Letter from Edahl to Voytko (Mar. 14, 2007)). If and when the shelter was built and the purchase order became an invoice, BB&T paid Skywaves the difference between the advance rate for purchase orders (60 or 65 percent) and the rate for invoices (80 or 85 percent).² (R. p. 996, Voytko Dep. 115:14-25).

C. 2007: BB&T Continues its Commitment to Skywaves; Skywaves' Finances Deteriorate.

1. Renewal of the Factoring Agreement.

The Factoring Agreement was renewed again in March 2007. (R. p. 423, Letter from Edahl to Voytko (Mar. 2, 2007)). At that time, the Agreement was again modified in ways favorable to Skywaves:

- The maximum credit amount was increased to \$3.5 million with a sublimit of \$2 million for purchase orders;
- The advance rate was set at 85 percent for invoices and 65 percent for purchase orders;
- BB&T's commission rate was reduced to .45 percent of each invoice, with a monthly cap of \$3,000; and

² For example, if Skywaves submitted a purchase order for a \$100,000 shelter in March 2006, BB&T would have advanced 60 percent of the purchase price, or \$60,000. Upon completion of the shelter, Skywaves would assign the invoice to BB&T, and BB&T would pay Skywaves the difference between the amount previously advanced and the amount owed for the invoice under the Factoring Agreement—at that time, 80 percent of face value, or \$20,000.

- Skywaves was permitted to make interest-only payments on its outstanding balance, with the principal due in April 2008, the end of the one-year term.

(R. pp. 423 and 425, Letters from Edahl to Voytko (Mar. 2 and 14, 2007)). BB&T also agreed to advance funds on purchase orders from any Skywaves customer. (R. p. 423, Letter from Edahl to Voytko (Mar. 2, 2007)).

The March 2, 2007 renewal letter closed by stating that BB&T “look[ed] forward to continuing to assist” Skywaves in growing its business, and noting that the bank would consider additional modifications of the Agreement “[a]ssuming Skywaves 2007 budget previously submitted to BB&T is achieved.” (*Id.* (emphasis added)). As it turned out, however, Skywaves came nowhere close to meeting its 2007 projection of total net income of \$1.4 million. (R. p. S-5, 2007 Projected Financials). Instead, Skywaves finished 2007 with a *loss* of \$1.4 million. (R. p. 447, 2007 year-end financial statement). Thus, by the end of 2007 Skywaves was deeply unprofitable, and the company’s management had missed its projections by wide margins.

2. Skywaves’ Unrealized Projections and Financial Losses.

Skywaves’ 2007 projected financials, provided to BB&T in October 2006, predicted modest but steady profits throughout the year, ranging from a minimum net profit of \$98,835 in each month of the first quarter, to a maximum of \$139,835 in July. (R. p.S-5, 2007 Projected Financials). The reality was much different: With the exception of January (during which Skywaves showed a net income of profit of \$46,658, less than half of what it had predicted), Skywaves *lost* money in every single month of 2007. (R. p. 447, 2007 year-end financials).

Skywaves provided its first-quarter financials to BB&T on May 8, 2007—

more than a week after they were due. (R. p. 443, Email from Voytko to Morris (May 8, 2007); R. pp. S-10-14). The numbers showed that Skywaves had fallen far short of its first-quarter projections. In January, for example, Skywaves showed a net income of \$46,658³—far less than its projected net income of \$98,835. Skywaves predicted a net income of 98,835 for February, but in fact showed a net *loss* of (\$31,227). The trend continued in March: instead of a net income of \$98,835, Skywaves showed a net *loss* of (\$35,250). Skywaves explained these numbers as the result of a delay in a large project in New York. (R. p. 443, Email from Voytko to Morris (May 8, 2007)). Skywaves assured BB&T that the project would be back on track by July and that “the 2007 production forecast will be completed in the 3rd and 4th quarters of 2007.” (*Id.*)

In mid-September, Skywaves provided BB&T with revised projections for the remainder of 2007. (R. p. S-18-19, Revised 2007 Projections). The revised projections abandoned Skywaves’ previous goal of \$1.4 million in net income in 2007, instead predicting a net *loss* of (\$120,532). Skywaves also predicted that it would have net losses of (\$117,900), (114,600), and (\$79,970) in July, August, and September, respectively. Skywaves attributed these dismal projections to additional delays in the General Dynamics project (forecasted revenue decreased by \$800,000), as well as delays in projects for AT&T (forecasted revenue decreased by \$700,000), Sprint/Nextel (forecasted revenue decreased by \$1.5 million), and Verizon (forecasted revenue decreased by \$400,000). Skywaves also noted that “government

³ This figure was calculated as \$47,629.47 in the quarterly financials produced to BB&T on May 8, 2007, but was adjusted to \$46,658 in the 2007 year-end financials. Whenever there is a difference between the 2007 quarterly reports and the 2007 year-end report, the number from the year-end report is used.

related business ... has been slow to develop” (forecasted revenue decreased by \$400,000) but that Skywaves had submitted proposals for business worth \$1.5 million and was “waiting to get results of the bid process.” (R. p. S-19, Revised 2007 Projections).

The revised forecast included actual financials for the second quarter of 2007, and the results were far from encouraging. In April, Skywaves did not achieve its projected net income of \$116,835, but instead suffered a net *loss* of (\$94,919). The losses continued in May (net *loss* of (\$117,245), compared to projected net income of \$116,835) and June (net *loss* of (\$121,200), compared to projected net income of \$134,835). In sum, while Skywaves had predicted total net income of \$665,010 for the first half of 2007, it ended that period with a net *loss* of (\$355,749)—more than \$1 million *less* than predicted.

Despite this disheartening reality, Skywaves predicted dramatic increases in net income during the remainder of 2007. According to the revised 2007 projections, losses would continue in the third quarter but would be countered by swiftly rising profits during the fourth quarter, resulting in total net income of \$235,220 in the second half of 2007.⁴

Even the lowered expectations of the revised 2007 projections proved impossible for Skywaves to meet. When Skywaves sent its third-quarter financials to BB&T on November 5, 2007, not only did they show losses greater than those

⁴ Interestingly, Skywaves’ original predictions for 2007 showed a slight decrease in net income from November to December (a time when poor weather and the holiday season would likely dampen construction of cell phone towers), but its revised 2007 projections showed a substantial *increase* in net income for November and December.

predicted in the revised 2007 projections, the monthly losses were *increasing*, not decreasing. Specifically, the actual net loss for July 2007 was (\$147,973) (compared to a predicted net loss of (\$117,900)); the actual net loss for August was (\$146,508) (compared to a predicted net loss of (\$114,600)); and the actual net loss for September was (\$149,942) (compared to a predicted net loss of (\$79,970)). Altogether, during the third quarter of 2007 Skywaves showed a total net loss (\$444,423), substantially more than the predicted net loss of (\$312,470).

3. Advancement of Funds on Site Plans.

Skywaves' financial projections for 2007 were based, in part, on expected revenues from a large project involving General Dynamics, which had a contract with the State of New York for a multi-year homeland security initiative. (R. p. 87, Am. Compl. ¶ 12). Skywaves had entered into a master contract with General Dynamics regarding the specifications for the shelters, but as of mid-2007, General Dynamics had not actually submitted any purchase orders to Skywaves. (R. pp. 359-360, Konersmann Dep. 303:9-304:2). In need of additional funding from BB&T, Skywaves went to General Dynamics and asked for purchase orders. (R. p. 361, Konersmann Dep. 310:1-23). Unable to provide purchase orders because of Homeland Security regulations, General Dynamics instead gave Skywaves site plans showing where it anticipated locating shelters when (and if) it eventually ordered them. (*Id.*) In July 2007, Skywaves asked BB&T to advance funds on the basis of the site plans. Unlike BB&T's written agreement to provide financing on the basis of purchase orders, nothing in writing reflects any formal agreement by BB&T to provide financing on the basis of site plans. Nevertheless, BB&T indulged Skywaves'

request and, during the second half of 2007, advanced funds to Skywaves on the basis of the General Dynamics site plans, under the same terms applicable to purchase orders.

D. 2008: Skywaves' Default under the Factoring Agreement.

Michael Burke replaced Castlen Morris as the account executive for Skywaves' factoring line in late November 2007. (R. pp. 1039-1040, Burke Dep. 21:22-25). On January 17, 2008, Edahl and Burke visited Skywaves' warehouse, where Skywaves gave a presentation to familiarize Burke with its business. (R. pp. 391-392, Voytko Dep. 169:15-170:1; R. p. 362, Konersmann Dep. 337:1-16). During that visit, Skywaves provided BB&T its year-end actual financial statements for 2007. (R. p. 393, Voytko Dep. 173:10-17).

The year-end financial statements showed that Skywaves' downward spiral had continued—in fact, had worsened—during the fourth quarter of 2007. Instead of rapidly rising income, as predicted in the revised 2007 financials, Skywaves showed huge losses in every month of the fourth quarter. In October, the net loss was (\$143,295) (compared to predicted net income of \$66,780); in November, the net loss was (\$251,889) (compared to predicted net income of \$217,180); in December, the net loss was (\$197,238) (compared to predicted net income of \$263,730). All told, the numbers revealed a vast, \$1.1 million chasm between Skywaves' projection for the fourth quarter (net income of \$547,690) and its actual results (net *loss* of (\$592,422)).

Thus, in January 2008, BB&T knew that Skywaves was losing large amounts of money month after month, had not had a profitable month since January 2007, and had failed to meet its projected income in every single month in 2007, despite

having revised its projections mid-year. BB&T also knew that Skywaves had closed 2007 with a total net *loss* of \$1.4 million—a disastrous mirror-image of its original forecast of total net *income* of \$1.4 million.

Also during the January 17 meeting, Burke inquired about “a number of items that looked like purchase orders we had advanced on that we were not getting invoices on.” (R. p. 1042, Burke Dep. 32:25-33:3).

It was a large block that ... had been financed between July and I want to say October. ... I saw other purchase orders previous to these being paid, other purchase orders after being paid. This one block never seemed to go away. That was my concern that I brought up in the meeting on January 17th[.]

(R. p. 1044, Burke Dep. 50:22-51:9). After repeated questions from Burke, Konersmann and Voytko eventually admitted that the items were not purchase orders, although at that time Burke did not understand that BB&T had advanced funds against site plans. (R. p. 1042, Burke Dep. 33:3-6).

This was not Burke’s only concern going into the January 17 meeting, however. He was also concerned that no money was coming in to reduce the amount owed under the Factoring Agreement. (R. p. 1045, Burke Dep. 60:19-25). Additionally, a field exam conducted in January revealed that Skywaves had received \$340,000 from Verizon on factored invoices but had not turned that money over to BB&T. (R. p. 1047, Burke Dep. 66:17-24).

Faced with Skywaves’ ever-deteriorating financial condition, BB&T concluded that it had to take action. On January 25, 2008, BB&T notified Skywaves that it was in default of the Factoring Agreement. (R. pp. 454-455, Default Letter). The default letter identified three events of default, all based on the January field audit

and each an independently sufficient basis for a default under the terms of the Agreement:

1. ... in violation of Paragraph 8 of the Agreement, [Skywaves] has received payment of Accounts (as defined in the Agreement) and has failed to immediately turn those payments over to BB&T as required by the Agreement;
2. ... Skywaves may not be paying its debts as they mature in the ordinary course of business (with approximately 37% of its payables over 60 days);
3. ... BB&T has a good faith belief that the prospects of payment to it or performance of the Obligations (as defined in the Agreement) is impaired.

(*Id.*). BB&T further informed Skywaves that:

At this time, as a result of the default and/or in exercise of rights granted to it in the Agreement (regardless of the existence of a default), BB&T will make no further Advances (as defined in the Agreement). Additionally, BB&T is hereby demanding payment of the Obligations due under the Agreement (including any Advances outstanding).

You are further advised that, at the present time, BB&T is exercising its right to terminate its further performance under the Agreement. This action, together with BB&T's election to provide [sic] further Advances, for the present time, terminates any obligation that BB&T might have to provide any additional funding to Skywaves.

(*Id.*). BB&T did not declare Skywaves in default on the basis of the site-plan financing, which it had agreed to and actually provided.

Skywaves acknowledged, ultimately, that the Factoring Agreement "is protecting the bank, which is fine, you know, it's their money and we are borrowing it." (R. pp. 346-347, Konersmann Dep. 169:24-170:2). Skywaves further admitted that the Factoring Agreement set forth the actions BB&T was entitled to take in the event of a default. (R. p. 347, Konersmann Dep. 170:14-22).

E. Skywaves' Bankruptcy and This Lawsuit.

Instead of refuting or attempting to cure the defaults identified by BB&T in the January 25 letter, Skywaves enlisted a third party, Earle Hewlette, to express Skywaves' "sincere appreciation and regret for the mistakes made in the past dealing with the bank" and to propose a "rescue plan." (R. pp. 457-458, Email from Hewlette to Edahl (Feb. 8, 2008)). Hewlette's "rescue plan" was for BB&T to extend \$2.1 million of *additional* credit to Skywaves, to be accomplished by "recategorization" of the \$1.6 million in site-plan advances "together with a new advance of \$500k[,] as a separate commercial loan outside of the line of credit" under the Factoring Agreement. (*Id.*). In other words, Hewlette's plan was to give Skywaves \$2.1 million in borrowing ability under the Factoring Agreement by moving that amount into an unsecured loan.

BB&T was not willing to agree to these terms, nor could the parties reach any other agreement. Ultimately, Skywaves declared bankruptcy. Blaming its bankruptcy on BB&T, Skywaves filed this action against BB&T in late 2009. Skywaves' First Amended Complaint asserted claims against BB&T for (1) breach of contract; (2) breach of contract accompanied by fraudulent acts; (3) promissory estoppel; (4) breach of covenant of good faith and fair dealing; (5) negligent misrepresentation; and (6) negligence.⁵

On July 27, 2015, the circuit court granted in part and denied in part BB&T's motion for summary judgment. (R. pp. 58-71). The court granted summary judgment

⁵ Skywaves also asserted claims for fraudulent misrepresentation and violation of the South Carolina Unfair Trade Practices Act. These claims were dismissed by the circuit court under Rule 12(b)(6), SCRCP. (R. pp. 35-43, Order (Nov. 8, 2011); R. pp. 44-49, Order (June 15, 2012)).

to BB&T on Skywaves' claims for promissory estoppel, breach of the covenant of good faith and fair dealing, negligent misrepresentation, and negligence. However, the circuit court denied summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act.

Skywaves timely appealed the portion of the circuit court's order granting summary judgment to BB&T. BB&T then timely cross-appealed the portion of the circuit court's order denying BB&T's motion for summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER BB&T'S CROSS-APPEAL.

BB&T's cross-appeal asks the Court to reverse the denial of summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act, and to remand with instructions to enter summary judgment in BB&T's favor on those claims. Ordinarily, a denial of summary judgment is not directly appealable. *See Silverman v. Campbell*, 326 S.C. 208, 211, 486 S.E.2d 1, 2 (1997). "The appellate courts have discretion, however, to consider an unappealable order if an appealable issue is before the court and a ruling on appeal will avoid unnecessary litigation." *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 495 n.2, 450 S.E.2d 616, 618 n.2 (Ct. App. 1994); *see Morris v. Anderson County*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (same). "Specifically, the courts have made a practice of accepting appeals of denials of interlocutory orders ... when these appeals are companion to issues that are reviewable." *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 216, 544 S.E.2d 38, 49 (Ct. App. 2001).

This is an appropriate case for the Court to exercise its discretion and accept BB&T's appeal. First, reviewing the denial of summary judgment is proper when doing so may speed the resolution of protracted litigation. *See Davis v. Lunceford*, 287 S.C. 242, 243, 335 S.E.2d 798, 799 (1985) (accepting appeal of denial of summary judgment "[b]ecause of the need for final resolution" in a medical malpractice action that was on appeal for the third time). The events giving rise to this litigation occurred in 2007 and early 2008, and the case has been pending for six years, since December 2009. The circuit court granted summary judgment to Defendants on all

claims except those for breach of contract and breach of contract accompanied by a fraudulent act. As explained herein, however, those claims also fail as a matter of law. Therefore, reviewing—and reversing—the denial of summary judgment on those claims will fully resolve this litigation.

The exercise of discretion is also appropriate because the denial of summary judgment is “closely connected” to the issues raised in Skywaves’ appeal. *Pitts v. Jackson Nat’l Life Ins. Co.*, 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002). As our Supreme Court recognized in a related case, “at its core, this case revolves around the contractual relationship between BB&T and its customer, Skywaves.” *Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014). And, as the circuit court recognized in its summary judgment order, all of Skywaves’ claims allege a single wrong committed by BB&T: a failure “to honor its obligations to capitalize [Skywaves’] needs.” (R. p. 58, Order). In granting summary judgment on Skywaves’ claims for negligence and negligent misrepresentation, the circuit court found no evidence that BB&T lied or that Skywaves justifiably relied on BB&T’s alleged representations. These same allegations are central to Skywaves’ contract claims.

Finally, the merits of the denial of summary judgment will be fully briefed by the parties. In filing this brief, BB&T will present its arguments in support of summary judgment, and Skywaves will have a full and fair opportunity to oppose these arguments in its response brief. The parties’ submission of briefs on the merits of the denial of summary judgment supports review. *See Pitts*, 352 S.C. at 339, 574 S.E.2d at 512.

II. BB&T IS ENTITLED TO SUMMARY JUDGMENT ON SKYWAVES' BREACH OF CONTRACT CLAIM.

Skywaves' breach of contract claim alleges that the contract between it and BB&T was a "modified factoring agreement," in which BB&T agreed "to provide capital infusions based on invoices, purchase orders, contracts and site plans." (R. p. 89, Am. Compl. ¶ 28). Skywaves claims BB&T breached this agreement by "failing to perform its obligations ... and by terminating the parties' agreement without cause." (*Id.* ¶ 31) BB&T is entitled to summary judgment on this claim. First, BB&T performed its obligations under the agreement: BB&T agreed to advance funds on the basis of purchase orders and site plans, and there is no dispute that it did, in fact, advance those funds. Second, BB&T properly exercised its right to declare a default under the clear written terms of the Factoring Agreement.

A. Standard of Review and Applicable Law

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRPC." *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). Under Rule 56(c), summary judgment is appropriate if "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Rule 56(c), SCRPC. "In determining whether any triable issue of fact exists, the evidence and all inferences which can *reasonably* be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Grimsley v. SC Law Enf. Div.*, ___ S.E.2d ___, 2015 WL 9315569, at *3 (S.C. Dec. 23, 2015) (internal quotation marks omitted; emphasis in original). "Even though courts are required to view the facts in the light most

favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" *Id.* (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)).

Skywaves' breach of contract claim is governed by North Carolina law. The Factoring Agreement provides that "[a]ll acts, transactions, rights and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina." (R. p. 416, Factoring Agreement ¶ 25). Choice-of-law clauses are honored in South Carolina unless application of the designated state's law would result in a violation of South Carolina public policy. *See Team IA, Inc. v. Lucas*, 395 S.C. 237, 249, 717 S.E.2d 103, 108-09 (Ct. App. 2001).

The elements for a breach of contract claim under North Carolina law are: (1) the existence of a valid contract, and (2) breach of the contract's terms. *See Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003). In North Carolina, the construction of a contract with clear and unambiguous language is a matter of law for the court. *See Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 207, 652 S.E.2d 701, 709 (2007). "Thus, '[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.'" *Id.* (quoting *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946)).

B. BB&T performed its obligations under the Factoring Agreement.

As noted above, Skywaves' breach of contract claim rests in part on its allegation that BB&T failed to live up to its obligation to provide funding under the Factoring Agreement and in particular, the agreement to provide financing on the basis of site plans. But, the undisputed facts are that BB&T *did* provide funding on the basis of site plans, to the tune of \$1.6 million.

C. BB&T had ample grounds for declaring a default under the plain terms of the Factoring Agreement.

Paragraph 12 of the Factoring Agreement provided, "An Event of Default shall be deemed to have occurred under this Agreement, and BB&T shall be entitled to take such action as is elsewhere provided herein, if any one or more" of several listed events should occur. (R. p. 412, Factoring Agreement ¶ 12). As is relevant to this litigation, the listed events included the following:

- "[A]ny breach, violation or default in the performance of any covenant, warranty or undertaking in this Agreement";
- "BB&T shall for any ... reason deem itself insecure or the Collateral impaired."

(*Id.*) The Factoring Agreement further provided:

Upon and after the occurrence of any Event of Default, (a) BB&T may, at its option *and without notice or demand of any kind (all of which are hereby expressly waived by Client)*, declare all of the Obligations to be ... immediately due and payable ... [and] (b) BB&T shall be authorized to terminate further performance by it under this Agreement[.]

(*Id.* ¶ 13 (emphasis added)).

In the January 25, 2008 default letter, BB&T identified three events of default "[i]n particular, but not by way of limitation." (R. pp. 454-455, Default Letter). First, in violation of ¶ 8, Skywaves had repeatedly failed to immediately turn over to

BB&T all payments on factored invoices. Second, in violation of the representations, covenants, and warranties set forth in ¶ 7, Skywaves was not paying its debts as they came due. (R. pp. 409-410, Factoring Agreement ¶ 7 (warranting that Skywaves “is able to pay, does pay and will continue to pay its debts as they mature in the Ordinary Course of Business”)). Third, BB&T stated that “[b]ased upon the most recent audit, BB&T currently has a good faith belief that the prospects of payment to it or the performance of the Obligations (as defined in the Agreement) is impaired.” (R. p. 454, Default Letter).

1. Skywaves failed to remit payments to BB&T.

The Factoring Agreement clearly stated that if any payments on factored invoices were sent to Skywaves, Skywaves was required to keep those funds separate from its operating accounts and remit them “immediately” to BB&T. (R. p. 410, Factoring Agreement ¶ 8). This requirement is not surprising, given that money paid on factored invoices *belonged to BB&T* as the owner of those invoices. Nevertheless, Skywaves never attempted to keep payments on factored invoices (BB&T’s money) separate from Skywaves’ money, but instead commingled all money that came in. (R. p. 384, Voytko Dep. 86:3-9).

The evidence also shows—and Skywaves has never denied—that it did not remit these funds to BB&T immediately, or anything close to it. Skywaves simply asserts, without a shred of documentary evidence, that it had 60 days from the time it received payment on a factored invoice to turn the money over to BB&T. (R. pp. 380-381, Voytko Dep. 68:20-69:23; R. pp. 336-337, Konersmann Dep. 124:20-125:10). Nothing, beyond the say-so of Skywaves’ officers, supports this claim. *See*

Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte, 289 N.C. 620, 631, 224 S.E.2d 580, 588 (1976) (“Where the terms of the contract are not ambiguous, the express language of the contract controls in determining its meaning and *not what either party thought the agreement to be.*” (emphasis added)).

Skywaves does admit, however, that holding payments on factored invoices for more than 60 days would violate the Factoring Agreement. (R. p. 338, Konersmann Dep. 138:1-10). Notably, in August 2007, BB&T contacted Skywaves to find out why it had been holding payments on factored invoices to Verizon for *six weeks*. (R. p. 385, Voytko Dep. 150:21-151:24; R. p. 449, Sept. 2007 Notes). In response to Skywaves’ explanation that it had retained the payments because money was a little tighter than usual, BB&T reminded the company that holding the payments “was a violation of the Factoring Agreement.” (R. p. 449, Sept. 2007 Notes). In a subsequent conversation, BB&T “reiterated that the payments received cannot be held and it could result in a cancellation of the contract.” (*Id.*)

In addition to the six-week delay in August 2007, as of February 11, 2008, BB&T had identified at least eight payments on factored invoices that had been received by Skywaves but not immediately remitted to BB&T. (R. pp. 469-470, Feb. 11, 2008 letter). Skywaves had been holding two of these payments for more than 60 days.

2. Skywaves could not pay its debts as they came due in the ordinary course of business.

In ¶ 7 of the Factoring Agreement, Skywaves represented, covenanted, and warranted that it was “able to pay, does pay, and will continue to pay” its debts as they came due in the ordinary course of business. (R. pp. 409-410, Factoring

Agreement ¶ 7). Skywaves does not contend that this provision of the Factoring Agreement was ever modified. Furthermore, Skywaves does not dispute that as of January 25, 2008, 37 percent of its payables were more than 60 days past due and thus had not been paid in the ordinary course of Skywaves' business. (R. pp. 454-455, Default Letter).

Instead, Skywaves contends that its inability to pay its debts was not a default because most of the overdue payables were owed to a single creditor, StructurTech, owned by Franz Meier, who was also an investor in Skywaves. Skywaves admits that its payables to StructurTech were "technically late," but that this did not constitute a default because Meier had agreed to give Skywaves an extension of time to pay. (R. pp. 399-400, Voytko Dep. 194:15-195:2; R. pp. 363-364, Konersmann Dep. 342:16-343:21). A corporate insider's alleged willingness to forbear on collecting Skywaves' debts is irrelevant, because such forbearance is not in the ordinary course of business. Indeed, the fact that Skywaves needed Meier to extend its credit is itself proof that Skywaves was unable to pay, and was not paying, its debts as they came due.

Moreover, the amounts owed to StructurTech accounted for only 25 percent of Skywaves' payables. Skywaves *admits* that 12 percent of its payables were overdue and were owed to other creditors. This is hardly a *de minimis* amount. On this basis alone, BB&T was entitled to declare Skywaves in default.

3. BB&T had a good faith belief that it was insecure.

In addition to the specific Events of Default listed in ¶ 12, the Factoring Agreement also entitled BB&T to declare a default if it "for any other reason

deem[ed] itself insecure.” (R. p. 412, Factoring Agreement ¶ 12). North Carolina imposes a statutory requirement that when a lender invokes a clause entitling it to deem itself insecure, it “has the power to do so only if [the lender] in good faith believes that the prospect of payment or performance is impaired.” N.C. Gen. Stat. Ann. § 25-1-309; *see* S.C. Code Ann. § 36-1-309 (same). “‘Good faith’ ... means honesty in fact and the observance of commercially reasonable standards of dealing.” N.C. Gen. Stat. Ann. § 25-1-201(b)(20). BB&T invoked this ground for default in the January 25, 2008 letter, stating, “Based on the most recent audit, BB&T currently has a good faith belief that the prospects of payment to it or performance of the Obligations ... is impaired.” (R. pp. 454-455, Default Letter).

BB&T unquestionably had a good faith basis for deeming itself insecure. As of January 25, 2008, the following conditions existed:

- Skywaves had reached the \$3.5 million maximum factoring allowed under the Factoring Agreement, which included a sublimit of \$2 million for purchase orders, such that no further advances could be made, or, if some availability existed, the amount would be limited and insufficient to fund Skywaves’ operations;
- Instead of achieving net income of \$1.4 million in 2007 as it originally projected, Skywaves lost approximately \$1.4 million in 2007;
- The revised 2007 forecast given by Skywaves to BB&T in September 2007, which projected a year-end loss of (\$120,532), proved to be alarmingly wrong, in that it underestimated the year-end loss by nearly \$1.2 million;
- Skywaves’ payments due to its vendors, including StucturTech, were not current;
- Skywaves was not immediately remitting payments it received on factored invoices to BB&T, or even segregating such payments, but instead was comingling such payments with other funds; and
- The Factoring Agreement was set to expire in less than 90 days, on April 5, 2008, at which time all indebtedness due to BB&T under the Factoring Agreement would mature and become due for

payment.

In light of these facts, there cannot possibly be a genuine issue of fact as to whether BB&T could have a good faith belief that it was insecure. *See S.C. Nat'l Bank v. S. Polymers, Inc.*, 313 S.C. 246, 249, 437 S.E.2d 148, 149 (Ct. App. 1993) (holding bank entitled to summary judgment on borrower's breach of contract claim "[u]nless the evidence was susceptible to the inference that the Bank was without reasonable grounds for insecurity or that it did not make an honest judgment with respect to the facts known to it").

Skywaves seems to suggest that BB&T should not have felt insecure because "at that time [we were bringing in] two or three million dollars of work, our purchase orders were going up and that would allow the cash flow to catch up on some of this." (R. p. 365, Konersmann Dep. 345:4-8). Skywaves cannot explain, however, how the incoming work would allow it to meet a looming repayment obligation of at least \$3.5 million by early April—a mere nine weeks away. Moreover, Skywaves admitted that it had no idea how long it would take to improve its cash flow, and even then Skywaves would need to establish a payment plan with BB&T. (R. p. 365, Konersmann Dep. 345:15-25). In view of Skywaves' indisputably dire financial condition, BB&T's duty to act in good faith did not require it to blindly accept Skywaves' predictions that success was just around the corner. *See First State Bank of Or. v. Hoehnke Nursery Co.*, 667 P.2d 1022, 1025 (Or. Ct. App. 1983) (holding that borrower's assurances that its financial condition would improve in the near future did not preclude lender from declaring default under the terms of the parties' agreement).

III. BB&T IS ENTITLED TO SUMMARY JUDGMENT ON SKYWAVES' CLAIM FOR BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT.

The circuit court also erred in denying BB&T's motion for summary judgment on Skywaves' claim for breach of contract accompanied by a fraudulent act. This claim is governed by South Carolina law. *See Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 143, 494 S.E.2d 449, 454 (Ct. App. 1997). Accordingly, to succeed on this claim Skywaves must prove (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *See Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002).

As an initial matter, and as discussed above, Skywaves cannot prevail on its claim for breach of contract. Necessarily, then, Skywaves cannot prove the first element of a claim for breach of contract accompanied by a fraudulent act. This, alone, is a sufficient basis for granting summary judgment in BB&T's favor. *See Baughman v. AT&T Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991) (“[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.” (internal quotation marks omitted)).

In addition to its inability to prove a breach of the Factoring Agreement, Skywaves cannot point to evidence creating a genuine issue of material fact on the elements of fraudulent intent and a fraudulent act. *See Floyd v. County Squire Mobile Homes, Inc.*, 287 S.C. 51, 53, 336 S.E.2d 502, 503 (Ct. App. 1985) (“[M]ere breach of a contract, even if willful or with fraudulent purpose, is not sufficient to entitle a plaintiff to go to the jury on the issue of punitive damages.”).

In its First Amended Complaint, Skywaves contended that “[t]he justification advanced by BB&T” for declaring a default “was pretextual, if not outright false,” and that the declaration of default was truly motivated by BB&T’s desire to “renegotiate” the terms of the Factoring Agreement. (R. pp. 89-90, Am. Compl. ¶ 35). Skywaves further articulated its allegations in its Opposition to BB&T’s Motion for Summary Judgment, where it claimed that BB&T “formally” declared a default during the meeting on January 17, 2008, and then, on January 25, “attempted to amend its declaration of default” by identifying three different events of default. (R. pp. 728-729, Skywaves Opp. to Mot. for Summ. J.).

While there is no doubt that BB&T was concerned about the site plan financing, nothing in the record supports Skywaves’ claim that BB&T declared a default, formally or otherwise, on January 17. But even if it had done so, the fact that the January 25 default letter identified different events of default does not support a claim for breach of contract accompanied by a fraudulent act. *See D.R. Horton, Inc. v. Wescott Land. Co.*, 398 S.C. 528, 556, 730 S.E.2d 340, 354-55 (Ct. App. 2012) (holding that the counterclaim defendant’s “shifting reasons for refusing to close” a real estate transaction might demonstrate fraudulent intent but “they are not evidence of an independent fraudulent act which accompanied the breach”). Because the unambiguous terms of the Factoring Agreement entitled BB&T to declare a default for each of the reasons identified in the January 25 letter, its declaration of default necessarily was not a fraudulent act. *Cf. Martin v. Hamilton State Bank*, 723 S.E.2d 726, 727 (Ga. Ct. App. 2012) (holding that there is no bad faith “where a party to a contract has done what the provisions of the contract expressly give him

the right to do” (internal quotation marks omitted)).

Skywaves makes much of the fact that Jim Edahl denied knowledge of the site plan financing when the issue arose during the meeting at Skywaves on January 17, 2008, and that he admitted during the course of these proceedings that he had, in fact, approved advances on the basis of site plans. This information, however, does not help Skywaves prove its claim for breach of contract accompanied by a fraudulent act. Edahl told Skywaves that BB&T would provide financing on the basis of site plans, and BB&T, in fact, provided site-plan financing from July 2007 until the end of the year.⁶ Skywaves does not explain (because it cannot) how making a promise and fulfilling it constitutes either fraudulent intent or a fraudulent act. *See McNair v. Rainsford*, 330 S.C. 332, 358-59, 499 S.E.2d 488, 502 (Ct. App. 1998) (affirming summary judgment where plaintiff did not allege fraud with particularity and failed to offer evidence of any fraudulent act); *Minter v. GOCT, Inc.*, 322 S.C. 525, 529-30, 473 S.E.2d 67, 70-71 (Ct. App. 1996) (affirming directed verdict in the defendant’s favor because evidence of fraudulent intent “is not evidence of an independent fraudulent act which accompanied the breach” of contract).

More importantly, BB&T did not declare a default on the basis of site-plan financing but rather on the three grounds identified in the default letter, each of which was a wholly separate, independently adequate basis for declaring default. *See Capitol Radiology, LLC v. Sandy Spring Bank*, 439 Fed. Appx. 222, 226-27 (4th Cir. 2011) (holding that dispute regarding validity of one ground of default did not

⁶ At that point, Skywaves was effectively maxed out on the credit available to it under the Factoring Agreement. Thus, even if BB&T had not declared a default for other reasons, Skywaves could not have obtained additional site-plan financing.

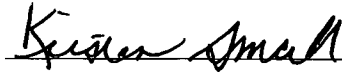
preclude summary judgment because the default also rested on another, “wholly separate” ground).

In summary, the evidence is insufficient to establish a genuine issue of fact for trial as to Skywaves’ claim for breach of contract accompanied by a fraudulent act. The circuit court therefore erred in denying BB&T’s motion for summary judgment.

CONCLUSION

For the reasons set forth herein, BB&T respectfully asks the Court to exercise its discretion to review the circuit court’s denial of BB&T’s motion for summary judgment on Skywaves’ claims for breach of contract and breach of contract accompanied by a fraudulent act. Further, the Court should reverse the circuit court and remand with instructions for the circuit court to enter summary judgment in BB&T’s favor on those claims.

Respectfully submitted,



Kirsten E. Small, Esquire
NEXSEN PRUET, LLC
55 E. Camperdown Way, 4th Floor (29601)
Post Office Drawer 10648
Greenville, SC 29603
Telephone: 864.370.2211
Email: ksmall@nexsenpruet.com

Julio E. Mendoza, Jr., Esquire
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
Telephone: 803.540.2026
Email: rmendoza@nexsenpruet.com

Molly Hughes Cherry, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
Post Office Box 486
Charleston, SC 29402
Telephone: 843.577.9440
Email: mcherry@nexsenpruet.com

*Attorneys for Respondent / Appellant Branch Banking
and Trust Company, Successor in Merger to Branch
Banking and Trust Company of SC, a/k/a BB&T*

Greenville, South Carolina
September 6, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

Appellate Case No. 2015-001809

RECEIVED
SEP 08 2016
SC Court of Appeals

Skywaves I Corporation, Appellant/Respondent,

v.

Branch Banking and Trust Company,
Successor in Merger to Branch Banking and Trust
Company of SC, a/k/a BB&T, Respondent/Appellant,

And

James Edahl, Respondent,

CERTIFICATION OF COMPLIANCE

Undersigned counsel hereby certifies that the foregoing FINAL APPELLANT'S
BRIEF OF RESPONDENT/APPELLANT complies with Rule 211(b), SCACR.


Kirsten E. Small
NEXSEN PRUET, LLC
55 E. Camperdown Way (29601)
P. O. Drawer 10648
Greenville, SC 29603
Telephone: 864.370.2211
E-mail: ksmall@nexsenpruet.com

*Attorneys for Respondent/Appellant Branch Banking
and Trust Company, Successor in Merger to Branch
Banking and Trust Company of SC, a/k/a BB&T*