

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT

DEEP KEEL, LLC,)
)
Plaintiff,)

CIVIL ACTION NO. 2011-CP-07-01933

vs.)

RECEIVED

ATLANTIC PRIVATE EQUITY GROUP,)
LLC, TERRY L. ROHLFING, JERRY T.)
CALDWELL, and BLUFFTON VILLAGE)
TOWN CENTER PROPERTY OWNERS')
ASSOCIATION, INC.,)

FEB 23 2017
SC Court of Appeals

Defendants.)

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

This matter is before the Court on the Motion for Reconsideration of Defendants Terry L. Rohlffings and Jerry T. Caldwell, (the "Defendants"), of the Court's Order, filed August 23, 2016, granting summary judgment as against said Defendants. A hearing on the Motion was held on December 12, 2016. For the reasons set forth below, the Motion is denied.

The Defendants raise two (2) issues in their Motion. First, they assert the affidavits presented by Plaintiff were not sufficient. Second, they contend that even though they each executed separate Guaranties, they should be treated to have both executed the same Guaranty.

The record in this matter shows Plaintiff's Motion for Summary Judgment and Memorandum in support thereof were filed on July 6, 2016. Thereafter, Plaintiff filed and served the Affidavits of Jamin M. Hujik, Executive Vice President of CresCom Bank as successor to the original lender, Community FirstBank, and of Scott Bynum, sole member of Plaintiff.

AFFIDAVITS

The standard for granting a Motion for Summary Judgment is set forth in Rule 56, SCRCP.

It provides in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Plaintiff's Motion for Summary Judgment was accompanied by affidavits of Jamin M. Hujik, Executive Vice President of CresCom Bank, the original lender on the loan and guaranties which are the subject of this matter, and of Scott Bynum, the sole member of Plaintiff, the current owner of the loan and holder of the Guaranties. Mr. Hujik specifically states in his affidavit he is an Executive Vice President of the Bank and has relied on the records maintained by the Bank up to the time of the assignment of the loan to Plaintiff in setting forth the facts contained in the affidavit, including the calculation of the amount owed at the time of the assignment to Plaintiff.

Mr. Bynum specifically states in his affidavit that he is the sole member of the Plaintiff. He sets forth the calculation of the amount due based on the balance due at the time of the assignment to Plaintiff and provides a detailed calculation of the balance due. The affidavits of Mr. Hujik and Mr. Bynum included copies of the guaranties executed by the Defendants respectively and the promissory note guaranteed thereby and executed by the borrower, Atlantic Private Equity, LLC.

In response to Plaintiff's Motion, Defendants did not file or serve affidavits, nor any memoranda setting forth any disputed facts. Defendants' counsel orally argued at the hearing that Plaintiff's affidavits are deficient as they are not based on personal knowledge of each affiant, and further that the Bynum affidavit is based solely on the information from Mr. Hujik.

Mr. Hujik, as Executive Vice President of CresCom Bank, provided the information in his affidavit based on bank records kept in the ordinary course of business. Mr. Hujik's affidavit conveys information from a person with knowledge at the time the records were created, a situation specifically allowed under Rule 803(6), SCRE. *Twelfth RMS Partners, L.P. v National Safe Corp.* (335 S.C. 635, 518 S.E.2d 44 (1999)). The affidavit does not reflect any personal opinions of Mr. Hujik. It solely reflects the records of the Bank.

Mr. Bynum, as the sole member of Plaintiff, provided the information in his affidavit based on the records kept in the ordinary course of business by CresCom Bank, and the records he thereafter maintained as the sole member of Plaintiff. *Twelfth RMS Partners, L.P. v National Safe Corp. supra.*

Defendants have not contested the facts contained in either of the affidavits presented by Plaintiff. Instead, they assert the affidavits are not sufficient because the affiants were not involved in the creation of the documents and records. Defendants are incorrect. The facts contained in the affidavits are based on facts and information kept in the ordinary course of business by Plaintiff and its predecessor and are therefore sufficient to support Plaintiff's Motion pursuant to Rule 803(6), SCRE.

Defendants assert that in paragraph 17 of their Answer to the Complaint, they denied the amount claimed to be due in the Complaint. The Answer states: "They [the Defendants] lack knowledge or information sufficient to truthfully admit or deny the allegations of paragraph 25, therefore deny the same and demand strict proof thereof." *Answer*, June 17, 2011, at ¶ 17. Rule 56(e), SCRCP, is clear. If the Motion for Summary Judgment is supported by affidavits, the party opposing the Motion may not rely on their pleadings, but they must respond by affidavit or other

testimony with specific facts evincing a genuine issue for trial. Defendants filed nothing to meet their burden.

AMOUNT DUE

On or about January 8, 2008, Atlantic Private Equity Group executed a Promissory Note in the amount of Two Million Dollars (\$2,000,000.00). Thereafter, Defendants each executed and delivered to the lender a Guaranty, which set forth that the Guarantor would be liable to the lender for a principal amount not to exceed \$350,000.00, plus interest and costs, to include attorneys' fees. Defendants argue that, despite the fact each of them executed a separate Guaranty, Defendants should be entitled jointly to a single exposure limit of \$350,000.00, rather than each being individually liable. Each Defendant executed a separate Guaranty. Each Guarantor agreed to a potential liability amount of \$350,000.00, plus interest, costs and attorneys' fees. Defendants point to the language of paragraph 13 of the respective Guaranties to support their contention that the two (2) Guaranties should be deemed one. Said Paragraph clearly sets forth that, if more than one person executed the same Guaranty document, each signer would be liable for the amount stated in that specific Guaranty. In the present case, each of the Defendants executed a separate Guaranty, and each Guaranty limited its respective executor to a liability limit of \$350,000.00, plus interest and costs, to include attorneys' fees.

For the reasons set forth, the Motion of Defendants for Reconsideration is denied.

AND IT IS SO ORDERED.

Marvin H. Dukes, III
Master-in-Equity for Beaufort County

Beaufort, SC

Dated: _____, 2017



Beaufort Common Pleas

Case Caption: Deep Keel LLC , plaintiff, et al VS Atlantic Private Equity Group Llc
, defendant, et al
Case Number: 2011CP0701933
Type: Order/Other

So Ordered:

s/Marvin H. Dukes III #3069