THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes III, Master in Equity
Beaufort County
Trial Case No. 2011-CP-07-01933

Case No. 2017-000487

Deep Keel, LLC, Respondent,

v.

Atlantic Private Equity Group, LLC, Terry L. Rohlfing, Jerry T. Caldwell, and Bluffton Village Town Center Property Owners' Association, Inc., Defendants,

Of Whom Terry L. Rohlfing, and Jerry T. Caldwell are the Appellants.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal arises from the breach of two guaranties given by the Appellants in relation to a commercial loan made by Community FirstBank to Atlantic Private Equity Group, LLC. Community FirstBank initially brought this matter against Atlantic Private Equity Group, LLC (hereinafter Debtor) for foreclosure of the Mortgage, and against Terry L. Rohlfing and Jerry T. Caldwell for breach of their respective guaranties. [R., Complaint]. Subsequent to the commencement of the suit, the debt (to include the guaranties) was purchased by and assigned to Deep Keel, LLC (Respondent) and Respondent substituted as Plaintiff by Order of the Court. [R., Order Substituting Plaintiff].

This action was commenced by Community FirstBank on April 25, 2011, to bring a cause of action for foreclosure against Atlantic Private Equity Group, LLC, and for breach of guaranties against Terry L. Rohlfing and Jerry T. Caldwell (hereinafter collectively Appellants).[1] [R., Summons and Complaint]. By Order entered April 17, 2013, and with the consent of the parties, the matter was referred to the Beaufort County Master-in-Equity, Marvin H. Dukes III, to hear the foreclosure action. Upon disposition of the foreclosure action, the case was to be returned to the Circuit Court for any issues triable by jury as against the individual Defendants Terry L. Rohlfing and Jerry T. Caldwell on their respective guaranties.

[1]Subsequent to the commencement of the suit, Community FirstBank merged with Crescent Bank, and the name of the surviving entity was changed to CresCom Bank (hereinafter referred to as the Bank). This merger is evidenced by the Articles of Merger filed on record with the South Carolina Secretary of State on July 29, 2011, and filed of record with, *inter alia*, the Office of Register of Deeds for Beaufort County, South Carolina, in Book 3098, page 1545, on November 15, 2011.

By further Order entered April 17, 2013, Respondent was substituted as Plaintiff, due to the assignment of all rights, title, and interests to the Note, Mortgage, and other loan documents, to include the individual Guaranties. [R., Order Substituting Plaintiff].

On July 10, 2013, the court below held the foreclosure hearing against Debtor. Neither the Debtor nor Appellants attended the foreclosure hearing, although counsel for the Appellants was present and participated in the hearing.

The Master-in-Equity issued the Master's Report and Judgment of Foreclosure and Sale on July 29, 2013. Appellants filed a Motion for Reconsideration, which Respondent opposed by Memorandum in Opposition filed August 22, 2013. Thereafter, the Master-in-Equity issued an Amended Master's Report and Judgment of Foreclosure and Sale, and the property at issue was sold at public auction without objection by Debtor or Appellants.

Subsequent to an appeal by Debtor, decided by this Court on June 17, 2015, this matter was remanded for hearing and judgment regarding the breach of the guaranties. The remaining matters were referred to the Master-in-Equity by Consent Order, entered on July 18, 2016.

Respondent filed a Motion for Summary Judgment on July 26, 2016, against Terry L. Rohlfing and Jerry T. Caldwell as to its cause of action for breach of the Guaranties. [R., Deep Keel Motion]. Respondent supported its Motion for Summary Judgment with a Memorandum; the Affidavit of Scott Bynum, the sole member of Respondent; and the Affidavit of Jamin M. Hujik, Executive Vice President of CresCom Bank, the prior owner of the loan and related loan documents. [R., Deep Keel Memo in Support, Affidavit of Bynum and Affidavit of Hujik]. Appellants did not file any affidavits or additional pleadings

in opposition to summary judgment. On August 3, 2016, a hearing on Respondent's Motion for Summary Judgment was held, after which an Order was entered on August 23, 2016, granting Respondent's Motion and entering judgment in favor of Respondent and against Appellants. [R., Order Granting Motion for Summary Judgment].

On September 6, 2016, Appellants filed a Motion to Reconsider Order Granting Summary Judgment, which was denied by Order entered on January 17, 2017. [R., Motion to Reconsider and Order Denying Motion to Reconsider]. Appellants then served Notice of Appeal on February 13, 2017. [R., Notice of Appeal].

ARGUMENT

I. Standard of Review

In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial court under Rule 56(c), SCRCP. Quail Hill, LLC v. County of Richland, 387 S.C. 223 at 234, 692 S.E.2d 499 at 505 (2010). Summary judgment is proper when viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; Quail Hill, 387 S.C. at 235, 692 S.E.2d at 505. Neither the trial court nor this Court, however, is "required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984).

Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct.App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife v. Hitachi Const. Machinery Co. Ltd., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct.App. 2005).

"The admission of evidence is within the trial court's discretion. The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." R & G Constr., Inc., v. Lowcountry Regional Trans. Authority, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct.App. 2000) (citations omitted). "[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

II. The lower Court properly granted summary judgment in favor of Respondent where the affidavits filed in support met the requirements of Rule 56(e), SCRCP, with respect to the amount of debt due.

Respondent is the assignee of the original lender, Community FirstBank, now known as CresCom Bank (the Bank). Respondent, a private investor, purchased the loan from the Bank in a negotiated, arms length transaction. There is no dispute or issue before this Court with regard to the assignment of the Bank's rights under the Loan Documents to Respondent, and Respondent was substituted as Plaintiff in this action without objection from Appellants. [R., Order Substituting Plaintiff]. "[I]t is well established that an 'assignee . . . stands in the in the shoes of its assignor . . . . When a contract is assigned, the assignee should have all

the same rights and privileges . . . as the assignor." Twelfth RMA Partners, LP v. National Safe Corporation, 335 S.C. 635, 639-40, 518 S.E.2d 44, 46 (Ct.App. 1999) (citations omitted).

In support of its Motion for Summary Judgment, Respondent submitted two affidavits relating to the obligations of Appellants under the respective guaranties. An affidavit is "[a] voluntary declaration of facts written down and sworn to by a declarant, usually before an officer authorized to administer oaths." Black's Law Dictionary (10th ed. 2014). Respondent introduced the Affidavit of Jamin M. Hujik (hereinafter "Hujik"). In Hujik's affidavit, he clearly states he is the Executive Vice President of CresCom Bank. He states material and substantial facts relating to the loan documents, the terms therein, and the calculations of the debt. [R., Hujik Affidavit]. The affidavit on its face evinces the personal knowledge and competence of Hujik to assert the facts therein. Hujik states further that the records and documents referenced within his affidavit were maintained in the official records of the Bank at all times relevant to the time period of his affidavit. [R., Hujik Affidavit, paragraph 13].

Appellants improperly rely on Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 433 S.E.2d 871 (Ct.App. 1993), which held an affidavit did not meet the requirements of 56(e), SCRCP, where the affiant stated a third party rejected construction materials due to "*alleged* defects," because the affiant failed to state the basis for any such knowledge. Different from the facts in Englert, Hujik's affidavit sets out the terms of the loan documents specifically, as well as the calculation of the amounts owed under the loan and guaranties while the Bank held the loan. As Executive Vice President of the Bank, he is competent to testify as to the documents, which were maintained at all times in the official records of the Bank. [R., Hujik

Affidavit]. Appellants also claim Hujik's affidavit contains conclusory statements regarding the amount due pursuant to the loan documents, and cites to Shupe v. Settle, 315 S.C.510, 445 S.E.2d 651 (Ct. App. 1994), stating, "[a] conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." In contrast to Shupe, Hujik's affidavit contained no conclusory statement and was offered in support of Respondent's Motion for Summary Judgment, not offered to create a genuine issue of fact for purposes of resisting summary judgment. For the above reasons, Hujik's affidavit clearly meets the requirements of Rule 56(e), SCRCP.

The second affidavit submitted in support of Respondent's Motion for Summary Judgment was that of Scott Bynum. It is uncontroverted that Scott Bynum is the sole member of Respondent and the party who reviewed and maintained the business records of Respondent. [R., Bynum Affidavit]. The evidence further shows that the loan made to Appellants was purchased by Respondent from the loan originator, Community FirstBank, now known as CresCom Bank. [R., Bynum Affidavit, paragraph 3]. Finally, the evidence shows that Respondent reviewed and kept the records prepared by CresCom Bank prior to the purchase of the loan and during pendency of the action on the loan subsequent to the purchase and thereafter. [R., Bynum Affidavit, paragraph 10].

The testimony of Bynum with regard to the amounts outstanding under the loan are clearly within the purview of the business records exception to the hearsay rule. Rule 803(6), SCRE, excludes business records from the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person

> with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness . . . .

Id.; see also S.C. Code § 19-5-510. Twelfth RMA is precisely on point. In that case, the holder of a promissory note and guarantee acquired through assignment from the RTC sued the guarantors. The original lender was closed by the United States Government, which appointed RTC as the receiver. The testifying witness for Twelfth RMA Partners was a portfolio manager for Twelfth RMA. Twelfth RMA, 335 S.C. 635, 639, 518 S.E.2d 44, 45-46. In Twelfth RMA,

> Ms. Every testified that the records about which she testified were part of her file that she maintained in Twelfth's regular course of business.
>
> + The Smiths argue, however, that she was not the custodian "at or near the time" the records were made. Here, Ms. Every's testimony merely conveyed information from a person "with knowledge" at the time the records were created, a situation expressly allowed under Rule 803(6).

Twelfth RMA at 642, 518 S.E.2d at 48. "Business records of an entity are admissible even though another entity made the records, and the rule does not require an employee of the entity that prepared the record to lay the foundation." Midfirst Bank v. C.W. Haynes & Company, Inc. et al., 893 F.Supp. 1304, 1310 (U.S.D.C., S.C., 1994) (citations omitted) (decision based on the Federal Rules of Evidence). "Moreover, Rule 803(6) does not require the testifying witness to have personally participated in the creation of the document or to know who actually recorded the information." Id. at 1311. Moreover, Respondent

submitted the Hujik affidavit with regard to all calculations and amounts at issue prior to Respondent's purchase of the loan debt and, as such, Hujik's statements were not hearsay.

Appellants provided no testimony and no evidence to the court below, much less any evidence to dispute, deny, or contradict the testimony and evidence of Respondent. Appellants merely rested on their allegations or denials contained in their initial pleadings. The Affidavits of Hujik and Bynum each provide specific and substantially detailed facts relating to the loan documents, the guaranties, and the amounts owing. Nothing therein can be construed as conclusory or unsupported by personal knowledge of the facts. See, e.g., Schmidt v. Courtney, et al., 357 S.C. 310, 321, 592 S.E.2d 326, 331 (Ct.App. 2003); S.C. Labor Ltd., LLC v. Eastern Tree Service, Inc., 362 S.C. 654, 657, 609 S.E.2d 305, 306 (Ct.App. 2005). The Master committed no error in admitting the documents and testimony of Respondent, and Appellants cannot meet their burden to show any error committed by the Master nor any prejudice resulting therefrom. The court below made no error in admitting the affidavits and relying upon the uncontroverted facts set forth therein to support a finding of summary judgment in favor of Respondent.

III. The lower Court correctly construed the Bank's Guaranty forms to provide for individual liability of each Guarantor for two separate principal amounts of $350,000.00.

A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity. AMA Management Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868 (Ct.App.1992). It is a personal obligation running directly from the guarantor to the creditor which is immediately enforceable against the guarantor upon default of the debtor. See Peoples Federal Savings and Loan Assoc. v. Myrtle Beach

Retirement Group, Inc., 300 S.C. 277, 387 S.E.2d 672 (1989). It is well-established in South Carolina that "[a] contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571, 575 (2009); Alexander's Land Company, L.L.C. v. M & M & K Corp., 390 S.C. 582, 703 S.E.2d 207 (2010).

Appellants Rohlfing and Caldwell each individually executed separate guaranties, containing one signature block and one signature each. Appellants' Answer admitted the documents were executed in connection with the loan, demand had been made on the Guarantors, and Guarantors had not made payment. [R., Answer]. Said guaranties made each, Appellant Rohlfing and Appellant Caldwell, individually liable for a principal amount of $350,000.00 plus accrued interest thereon and all attorney's fees, collection costs, and enforcement expenses.

Appellants claim the two guaranties were multiple copies of the same document, however this is incorrect. The two separate guaranties contain different signature blocks intended for different individuals, thus, are not copies of the same document. Appellants further claim the guaranties are ambiguous, referring to the definition of "Undersigned" in the guaranties. Not only is there clearly only one "Undersigned" to each of the two guaranties, but the guaranties are contracts which must be read as a whole. See McGill, 381 S.C. 179, 672 S.E.2d 571, 575 (2009). An ambiguity cannot be created by simply pointing to one sentence or clause, as discussed in McGill, let alone one single word. Appellants' contention that the two guaranties were merely copies of a single document is without merit, without any evidentiary support, and without logical basis. The loan at issue was in the

amount of Two Million Dollars, and was secured by multiple parcels of commercial property and the two limited guaranties of the Appellants Rolfing and Caldwell in the amount of $350,000.00 each. A single capped guaranty amount of $350,000.00 would be less than twenty percent of the loan amount. Moreover, Respondent was in possession of the original separate documents, and at the hearing counsel for Respondent made those available for review if desired. [R., Hearing Transcript, p. 4, ll. 8-11].[2] That the two guaranties were actually copies of one document, making Appellants Rohlfing and Caldwell jointly and severally liable for one amount of just $350,000.00 is illogical, as the guaranties serve to secure a loan in the amount of $2,000,000.00.

Respondent admits that each guaranty was limited in its maximum amount, to wit, a principal amount of no more than $350,000.00, plus interest, fees, and costs. The guaranties are clearly two separate contracts making Appellants Rohlfing and Caldwell each individually liable for a principal amount of $350,000.00 plus accrued interest thereon and all attorney's fees, collection costs, and enforcement expenses, and are not copies of the same document. Appellants concede it is within the Court's purview to determine the construction and enforcement of an unambiguous contract. The lower court did not err in doing so and in entering judgment against each guarantor with regard to his respective guaranty and breach thereof.

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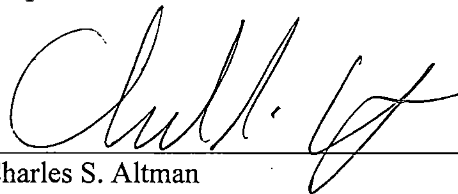
The original documents have been available for review by opposing counsel, Appellants, and the court at several times throughout the course of the litigation. [R., Hearing Transcript, p. 4, ll. 16-22; p. 9, ll. 10-12].

CONCLUSION

Appellants make no substantive argument with regard to either the facts set forth in the Respondent's affidavits, nor with regard to any defenses as to the breach of the guaranties. The Master-in-Equity properly granted summary judgment in favor of Respondent, as the affidavits in support met the requirements of Rule 56(e), SCRCP. Further, the Master-in-Equity correctly construed guaranties to provide for individual liability of Appellants Rohlfing and Caldwell for the amount set forth in each respective guaranty. For the reasons stated herein, Respondent respectfully requests this Honorable Court affirm the judgment of the Master-in-Equity, award costs to Respondent in its defense of the appeal, and for all other relief as this Court deems equitable and proper.

Respectfully submitted this 14th day of April, 2017.



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Of Whom Terry L. Rohlfing, and Jerry T. Caldwell are the Appellants.

PROOF OF SERVICE

I certify that I have served the Brief of Respondent on Appellants by depositing a copy of it in the United States Mail, postage prepaid, on April 14, 2017, addressed to their attorney of record, Keating L. Simons, III, Esq., Simons & Dean, 147 Wappoo Creek Drive, Suite 604, Charleston, SC 29412.

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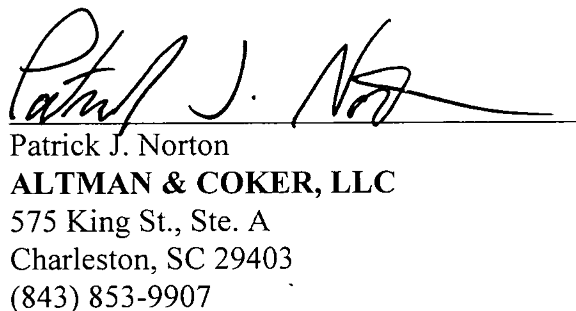

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Re: Deep Keel, LLC v. Atlantic Private Equity Group, LLC, et al.
SC Court of Appeals Case No.: 2017-000487

Dear Ms. Kitchings:

In connection with the above-referenced matter, enclosed please find an original and one copy of the Brief of Respondent, the Designation of Matter, and a Proof of Service for each.

Please have these documents filed with your office and return the file-stamped copies to us in the enclosed self-addressed, stamped envelope.

Thank you for your assistance and please feel free to contact us if you have any questions or concerns.

Very truly yours,

Patricia A. Schneider
Paralegal

/pas
Enclosures
c (w/encls.): Keating L. Simons, III, Esq.

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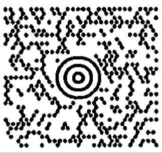

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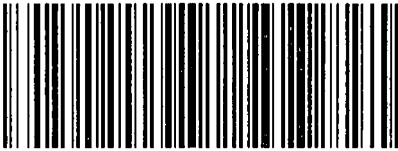

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