

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Fourteenth Judicial Circuit

Marvin H. Dukes, III, Master in Equity/Special Circuit Court Judge

Appellate Case No. 2016-000537

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

v.

Black Diamond, LLC; J. Christopher
Lindgren; David A. Brosman;
Julie H. King; and The Greenery, Inc.....Defendants,

Of Whom

Black Diamond, LLC; J. Christopher
Lindgren; David A. Brosman are.....Appellants.

FINAL BRIEF OF RESPONDENT

Michael J. Bogle (S.C. Bar No. 71125)

Email: mbogle@wcsr.com

Clayton M. Custer (S.C. Bar No. 68495)

Email: ccuster@wcsr.com

Catherine Wrenn (S.C. Bar No. 76042)

Email: cwrenn@wcsr.com

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

550 South Main Street

Suite 400

Greenville, SC 29601

Telephone: (864) 255-5400

*Attorneys for Respondent TD Bank N.A.,
Successor by Merger to Carolina First Bank*

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Email: ccuster@wcsr.com

Catherine Wrenn (S.C. Bar No. 76042)

Email: cwrenn@wcsr.com

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

550 South Main Street

Suite 400

Greenville, SC 29601

Telephone: (864) 255-5400

*Attorneys for Respondent TD Bank N.A.,
Successor by Merger to Carolina First Bank*

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STATEMENT OF THE FACTS

This is a commercial foreclosure action involving two loans totaling \$5.5 million made by TD Bank N.A., Successor by Merger to Carolina First Bank, ("TD Bank") for the benefit of Black Diamond, LLC ("Black Diamond"), secured by two parcels of commercial property located in Beaufort County, South Carolina. The first loan is in the principal amount of \$3,500,000.00, as evidenced by a January 25, 2008 promissory note (the "\$3,500,000 Note", Complaint, Ex. B, R. pp. 47-48), mortgage (the "\$3,500,000 Mortgage", Complaint, Ex. J, R. pp. 96-111) and assignment of leases and rents (the "\$3,500,000 Assignment of Leases and Rents", Complaint, Ex. L, R. pp. 129-33). The second loan is in the principal amount of \$2,000,000.00, as evidenced by a July 25, 2008 promissory note (the "\$2,000,000 Note", Complaint, Ex. D, R. pp. 58-62), December 9, 2003 mortgage (the "\$2,000,000 Mortgage", Complaint, Ex. K, R. pp. 113-27) and May 21, 2007 assignment of leases and rents (the "\$2,000,000 Assignment of Leases and Rents", Complaint, Ex. M, R. pp. 135-43). Both the \$3,500,000 Note and the \$2,000,000 Note (collectively, the "Notes") were originally secured by personal guaranty agreements executed by J. Christopher Lindgren ("Lindgren") and Herb G. King ("King"). (Lindgren Guaranty Agreement corresponding to the \$2,000,000 Note (the "Lindgren \$2,000,000 Guaranty", Complaint, Ex. F, R. pp. 72-75; Lindgren Guaranty Agreement corresponding to the \$3,500,000 Note (the "Lindgren \$3,500,000 Guaranty", Complaint, Ex. G, R. pp. 77-80.)) Following the death of King, David A. Brosman ("Brosman") was substituted as the second guarantor of the two loans. (Brosman Guaranty Agreement corresponding to the \$2,000,000 Note (the "Brosman \$2,000,000 Guaranty", Complaint, Ex. I, R. pp. 89-94; Brosman Guaranty Agreement corresponding to the \$3,500,000 Note (the "Brosman 3,500,000 Guaranty", Complaint, Ex. H, R. pp. 82-87.))

As of July 2010, both Notes were in default due to payment defaults and the death of one of the guarantors (King). (Forbearance Agreements, p. 1, R. pp. 50, 58; Lindgren Deposition, pp. 97, line 19–p. 98, line 2, R. pp. 263-64.) As such, two forbearance agreements were entered into by the parties on July 28, 2010 (the “3,500,000 Forbearance Agreement”, Complaint, Ex. C, R. pp. 50-56; and the “2,000,000 Forbearance Agreement”, Complaint, Ex. E, R. pp. 64-70; collectively the “Forbearance Agreements”), whereby TD Bank agreed to, among other things: (1) forbear from exercising its default rights and remedies under the loan documents; (2) release the Estate of King from the personal guaranty agreements executed by King; and (3) accept certain modifications of the Notes, including the transfer of King’s membership interest in Black Diamond to Lindgren and the subsequent transfer of a fifty percent membership interest in Black Diamond from Lindgren to Brosman. (Forbearance Agreements,¹ p. 1, R. pp. 50, 58.) In return, Black Diamond and both guarantors agreed to, among other things: (1) maintain a payment reserve account equal to two months of principal and interest payments; (2) enter into a management agreement whereby the management of Black Diamond shall be turned over to a manager to be designated by TD Bank and having all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to TD Bank of all debt service requirements and the day-to-day management of Black Diamond and the property encumbered by the \$3,500,000 Mortgage and \$2,000,000 Mortgage (collectively, the “Mortgages”); and (3) a

¹ As the terms of the \$3,500,000 Forbearance Agreement and \$2,000,000 Forbearance Agreement are almost identical, citations to the “Forbearance Agreements” will refer to that page or paragraph of both the Forbearance Agreements.

representation that they have no claims, defenses, counterclaims or rights of setoff or recoupment against TD Bank related to the loans. (Id., pp. 4-5, R. pp. 53-54, 67-68.) Black Diamond was represented by counsel, The McNair Law Firm, in the negotiation and execution of the Forbearance Agreements. (See, eg., TD Bank's Motion for Summary Judgment, Ex. 2, R. pp. 270-73.)

Several months after the execution of the Forbearance Agreements, Ceagull Investments, LLC ("Ceagull") and Black Diamond entered into a "non-binding term sheet" relating to a portion of the property secured by the \$2,000,000 Mortgage. (TD Bank's Motion for Summary Judgment, Ex. 3, R. pp. 275-77.) The gross purchase price was \$1,325,000. (Id., p. 1, R. p. 275.) At that time, roughly \$5,000,000 was owed on the cross-collateralized property, roughly \$1,857,000 on the parcel of property that was the subject of the non-binding term sheet, and \$3,145,000 on the other cross-collateralized parcel. (Forbearance Agreements, ¶ 2, R. pp. 51, 65.) Appellants requested that TD Bank partition the subject property and release its mortgage for the net proceeds of the potential sale, which were unknown at the time and are not specified in the non-binding term sheet. TD Bank responded that it would consider such a request when presented with a signed contract, as it later did in the eventual sale of the same parcel in August 2015. (Depo. Lindgren, Bates # BD000346-47, R. pp. 608-09.) Ceagull's principal, Joseph Bacon Fraser, III, testified that TD Bank eventually approved the sale and release of its mortgage, conditioned on the loan-to-value ratio of the remaining collateral not falling below a benchmark. (Fraser Deposition, p. 10, lines 12-17, R. p. 398.) Ceagull opted not to reduce the non-binding term sheet to a contract. (Id., lines 18-22, R. p. 398.)

The \$2,000,000 Note matured on July 25, 2011 and demand for payment was made by letter dated August 10, 2011. (Complaint, Ex. R, R. pp. 162-63.) The failure of Black Diamond to pay its obligations under the \$2,000,000 Note constituted an event of default under the Notes. (See \$2,000,000 Note, ¶ 10, R. p. 59.) Notice of default and demand for payment of the \$3,500,000 Note was made by letter dated September 13, 2011. (Complaint, Ex. S, R. pp. 165-66.) To date, Black Diamond has failed to make payment to TD Bank in accordance with the terms of both Notes. (Complaint, ¶ 33, R. p. 27; Lindgren Deposition, p. 108, lines 9-25, R. p. 266 (acknowledging default under the Notes and guaranty agreements).)

Black Diamond's default triggered TD Bank's rights under the \$2,000,000 Assignment of Leases and Rents and \$3,500,000 Assignment of Leases and Rents (collectively, the "Assignment of Leases and Rents"). This authorized TD Bank to, among other things, communicate with tenants directly or through a third party about a number of issues, namely the payment of rent:

This assignment by the Assignor in favor of the Lender is absolute and unconditional, and is effective regardless of to whom the rents, revenues and lease payments of the Property are payable. The Assignor hereby authorizes the Lender or its agents to collect all rents, revenues and lease payments, and hereby authorizes and directs any tenant to pay such rent directly to the Lender. . . . [A]fter notice of default, all rents, revenues and lease payments shall be due and payable solely to the Lender. Lender shall also have the right, power, and privilege (but shall be under no duty) to take possession of the Property and have, hold, manage, lease and operate the same on such terms and for such period of time as Lender may deem proper and Lender may apply any rents and other sums of money received hereunder to the payment in such order as Lender may determine of (a) all expenses of managing the Property, including without being limited thereto, the salaries, fees and wages of a managing agent and such other employees

as Lender may deem necessary or desirable and all expenses of operating and maintaining the Property, including without being limited thereto, all taxes, assessments, charges, claims, utility costs, and premiums for insurance, and the cost of all alterations, renovations, repairs or replacements, and all expenses incident to taking and retaining possessions of the Property and/or collecting the rents and other sums of money due and payable under the leases; and (b) the Note secured by the Mortgage in such order as the Lender in its sole discretion may determine.

\$3,500,000 Assignment of Leases and Rents, ¶ 1, R. p. 129; see also id., ¶ 4(F), R. p. 131; \$2,000,000 Assignment of Leases and Rents, ¶¶ 3-6, 15(F-G), R. pp. 136, 140.) TD Bank was further authorized to apply rent proceeds to a broad range of expenses, including those associated with the management of the property, inspections or efforts to preserve the property, as well as environmental inspections. (\$2,000,000 Assignment of Leases and Rents, ¶¶ 6, 7(G-J), R. pp. 136-37; see also \$3,500,000 Assignment of Leases and Rents, ¶ 1, R. p. 129.)

TD Bank filed the present action on or about March 2, 2012, seeking to foreclosure on the subject property and a deficiency claim against Appellants. On April 23, 2012, Black Diamond and Lindgren filed an Answer and Counterclaim, asserting counterclaims against TD Bank for breach of covenant of good faith and fair dealing, breach of contract, breach of fiduciary duty, negligent misrepresentation, duress, interference with prospective economic relations and unfair trade practices (the “Black Diamond/Lindgren Answer”, R. pp. 173-80). On May 18, 2012, Brosman filed an Answer and Counterclaim, identical in substance to that filed by Black Diamond and Lindgren (the “Brosman Answer”, R. pp. 181-89).

Upon motion of TD Bank, the trial court struck Appellants’ jury trial demand and granted partial summary judgment on some, but not all, of Appellants’ counterclaims.

(See Order granting TD Bank's Motion to Strike Defendants' Jury Trial Demand, R. pp. 1-7; Order granting, in part, TD Bank's Motion for Summary Judgment, R. pp. 8-17.) For those reasons set forth herein, the trial court's Orders should be affirmed.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED TD BANK'S MOTION TO STRIKE APPELLANTS' JURY TRIAL DEMAND

The trial court was correct in granting TD Bank's Motion to Strike Appellants' Jury Trial Demand, and this Court should affirm the same. As set forth below, Appellants are not entitled to a jury trial on TD Bank's foreclosure and deficiency claims, nor are they so entitled on their counterclaims against TD Bank. Appellants have furthermore waived the right to a trial by jury in this matter by way of jury trial waivers in the loan documents.

A. Appellants Are Not Entitled to a Jury Trial on TD Bank's Equitable Foreclosure and Deficiency Claims Against Them

Foreclosure actions, like this one, are equitable, and, as a result, parties to such an action are "not entitled, as a matter of right, to a jury trial." Carolina First Bank v. BADD, LLC, 414 S.C. 289, 293, 778 S.E.2d 106, 108 (2015), reh'g granted (Apr. 9, 2015), reh'g dismissed (Nov. 6, 2015); see also Rule 71(a), SCRPC ("Actions to foreclose liens or obtain partition of real property *shall be tried by the court*, and shall ordinarily be referred to a master pursuant to Rule 53") (emphasis added). In BADD, the South Carolina Supreme Court confirmed that guarantors, who are parties to a foreclosure action "for the purpose of collecting a deficiency," are not entitled to a jury trial on that claim because deficiency judgments are "incidental to the relief sought in a foreclosure action." Id., at 294, 778 S.E.2d at 108 (internal citations omitted). In so holding, the BADD court relied on S.C.Code Ann. § 29-3-660 (1976), which specifically

permits *a court* to award a deficiency judgment against a guarantor in a foreclosure action. Section 29-3-660 provides:

In actions to foreclose mortgages[,] . . . if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and *the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.*

S.C.Code Ann. § 29-3-660 (1976) (emphasis added).

As noted above, this lawsuit is a *foreclosure* action, which is equitable in nature and in which TD Bank seeks to: (1) foreclose on the mortgages that Black Diamond executed in its favor and (2) recover any deficiency after the foreclosure sale from the guarantors, Lindgren and Brosman. As a result, Black Diamond is not entitled to a jury trial on TD Bank's foreclosure action against it, and the guarantors, whom "the Bank included . . . as [parties] to its foreclosure action only for the purpose of collecting a deficiency should one be adjudged," are likewise not entitled to a jury trial because "a party does not have a right to a jury trial" on a deficiency claim. BADD, at 294, 778 S.E.2d at 108.

B. In this Equitable Action, Appellants Are Not Entitled to a Jury Trial on Their Permissive Counterclaims Against TD Bank

A defendant is "entitled to a jury trial on his counterclaims in an equitable action," like this one, "only if the counterclaims are legal and compulsory." Id., at 295, 778 S.E.2d at 109. "A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, *when there is a 'logical relationship' between the counterclaim and the enforceability of the guaranty*

agreement.” Id. (emphasis added). As a result, in BADD, a foreclosure action in which the bank sought a deficiency against a guarantor, the Supreme Court held that a guarantor who asserted counterclaims that lacked a logical relationship with the *guaranty agreement’s enforceability* was not entitled to a jury trial on those claims.

The BADD guarantor asserted breach of contract and civil conspiracy legal counterclaims against the bank. In analyzing whether the counterclaims were compulsory or permissive, the BADD court found that — as in the present action — “*the execution of the guaranty agreements* was the ‘transaction or occurrence’ that gave rise to [the guarantor’s] inclusion in the Bank’s foreclosure complaint.” Id. (emphasis added). Thus, in order to be compulsory, the guarantor’s counterclaims had to have a logical relationship with the *guaranty agreement’s execution or enforceability*. The BADD court found that the guarantor’s counterclaims were based on “an alleged conspiracy between the Bank” and a third party to “*induce [the debtor’s] default*” on the *underlying notes* and the Bank’s alleged breach of the covenant of good faith and fair dealing, which was “implied in the note, mortgage, and guaranty agreements.” Id., at 295-96, 778 S.E.2d at 109-10 (emphasis added). The court held that the counterclaims did not have a “logical relationship to either the *execution or enforceability of the guaranty agreements*,” noting that the claims instead “presume[d] the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable.” Id., at 295, 778 S.E.2d at 109 (emphasis added). As a result, the counterclaims were deemed permissive and did not entitle the guarantor to a jury trial.

Like the BADD guarantor’s counterclaims, those of Appellants are permissive in nature and do not entitle them to a jury trial because they bear no “logical relationship”

with the transaction that gave rise to TD Bank's deficiency action against them — the execution of the notes, mortgages and guaranty agreements. Lindgren and Brosman have asserted the following counterclaims against TD Bank: breach of the covenant of good faith and fair dealing, breach of contract, breach of fiduciary duty, duress, interference with prospective economic relations and unfair trade practices. Like the BADD counterclaims, none of these legal counterclaims "affect the execution or enforceability" of the underlying loan documents. Instead, they are premised on events that occurred *after* the execution of those documents. (See, e.g., Brosman Answer, ¶¶ 26-40, R. pp. 184-87; Black Diamond/Lindgren Answer, ¶¶ 26-40, R. pp. 176-79.) Importantly, Appellants, in their Memorandum in Opposition to TD Bank's Motion for Summary Judgment, confirmed that their counterclaims are based on alleged events that occurred "*subsequent*" to the execution of the subject loan documents. (See, e.g., Memorandum in Opposition, pp. 4-5, R. pp. 354-55 (stating that the purported breach of contract was "subsequent to" and "after" the execution of the forbearance agreements).)

In support of their position, Appellants cite to a twenty-five year old declaratory judgment action in a dispute over a trust, First-Citizens Bank & Trust Co. of S. Carolina v. Hucks, 305 S.C. 296, 408 S.E.2d 222 (1991). In that case, as in BADD, the court begins its analysis by stating that "the test for determining if counterclaims are permissive or compulsory is whether there is a logical relationship between the claim and the counterclaim." Id., at 298, 408 S.E.2d at 223 (citing Rule 13(a), SCRCP). Applying that standard, the court found a "logical relationship" to exist between the plaintiff's declaration of rights arising in the administration of a trust agreement and the defendant's counterclaim alleging a breach of that same contractual agreement. Id. As set forth

above, however, like those claims at issue in BADD, Appellants' counterclaims lack such a logical relationship. The test is not whether the counterclaims relate to the borrower-lender relationship, generally, as Appellants' suggest, but rather the execution or enforceability of the documents giving rise to the claims — in the present case, the subject loan documents. See BADD, at 295, 778 S.E.2d at 109. Counterclaims based on acts or occurrences taking place after the execution of those documents — a fact admitted by Appellants in their own pleadings, see Memorandum in Opposition, pp. 4-5 — do not constitute a sufficient logical relationship, as set forth in BADD.

Consequently, Appellants are not entitled to a jury trial on their legal counterclaims against TD Bank.

C. Appellants Further Contractually Waived Their Right to a Jury Trial

Appellants contractually waived their right to a jury trial when they executed the loan documents at issue in the case. Under South Carolina law, “[a] party may waive the right to a jury trial by contract.” Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct.App.2002). Further, South Carolina courts have routinely enforced “jury trial waivers” that are “executed . . . knowingly and voluntarily.” Wachovia Bank, Nat. Ass’n v. Blackburn, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014), reh’g denied (Apr. 2, 2014). “[W]hen a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents. The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document.” Id., at 332-33, 755 S.E.2d at 443 (internal citations omitted).

Here, *all* Appellants — Black Diamond, Lindgren and Brosman — each individually and knowingly waived their right to a trial by jury with regard to the subject

matter of this lawsuit. The \$3,500,000 Note, cross-collateralized with the \$2,000,000 Note, in capital letters conspicuously located directly above the signature line, unambiguously states that Black Diamond:

WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, THE RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER IN CONTRACT, TORT OR OTHERWISE, RELATING DIRECTLY OR INDIRECTLY TO THE LOAN EVIDENCED BY THIS NOTE, . . . THE SECURITY INSTRUMENT, THE LOAN AGREEMENT OR THE OTHER SECURITY DOCUMENTS OR **ANY ACTS OR OMISSIONS OF LENDER OR BORROWER.**

(\$3,500,000 Note, p. 2, R. p. 48 (emphasis added).) As discussed herein, the claims and counterclaims at issue in this action relate directly to certain alleged “acts or omissions” of TD Bank and Appellants. Therefore, pursuant the plain, ordinary meaning of the \$3,500,000 Note’s language, Black Diamond waived any right to a jury trial in this lawsuit.

Like Black Diamond, Lindgren and Brosman similarly contractually waived any right to a jury trial in this case, as the subject guaranty agreements clearly, and in conspicuous, capitalized language directly above or near the signature lines, provide that the guarantors unequivocally waived such a right. For example, the Lindgren Guaranty Agreement corresponding to the \$3,500,000 Note states:

TO THE EXTENT NOW OR HEREAFTER PERMITTED BY LAW, THE GUARANTOR AND ANY OTHER GUARANTOR WAIVES TRIAL BY JURY WITH RESPECT TO **ANY ACTION, CLAIM, SUIT OR PROCEEDING ON OR ARISING OUT OF THE LOANS, THE OBLIGATIONS, THE CONDUCT OF THE RELATIONSHIP BETWEEN THE LENDER AND THE BORROWER, AND/OR THE CONDUCT OF THE RELATIONSHIP BETWEEN THE LENDER AND ANY GUARANTOR.**

(Lindgren \$3,500,000 Guaranty, ¶ 21, R. p. 80 (emphasis added); see, e.g., Brosman \$2,000,000 Guaranty, ¶ 17, R. p. 93; Brosman \$3,500,000 Guaranty, ¶ 17, R. p. 86.²) Pursuant to the simple construction of the guaranty agreements' language, Lindgren and Brosman waived any right to a jury trial in this matter, which indisputably "arise[s] out of the loans, the obligations, the conduct [or] the relationship between [TD Bank and Black Diamond] and/or [Black Diamond and the guarantors]." (Id.)

In support of their position that the subject jury trial waivers do not sufficiently encompass the claims at issue, Appellants cite to N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 416 S.E.2d 637 (1992), a case involving a jury trial waiver within a commercial lease. However, in that case, the party against whom the plaintiff sought to enforce the waiver (a guarantor of the lease) was not a party to, nor did he ever sign, the document. Id., at 534, 416 S.E.2d at 637-38. As set forth above, here, there is no question that *all* Appellants executed a jury trial waiver encompassing the types of claims at issue.

Appellants also cite to Fisher v. Stevens, 355 S.C. 290, 584 S.E.2d 149 (Ct.App.2003), however, that case involved an exculpatory agreement — not a jury trial waiver — which went so far as to waive "responsibility and risk of bodily injury, death or property damages due to the negligence or gross negligence or 'releases' or

² Lindgren's Guaranty Agreement corresponding to the \$2,000,000 Note further provides that Lindgren consents to "any waiver" of Black Diamond, which as noted above, includes a waiver of a jury trial in this matter. (Lindgren \$2,000,000 Guaranty, ¶ 9, R. p. 73.)

otherwise,”” involving obvious public policy concerns not at play in the jury trial waivers at issue in the present action. *Id.*, at 293, 584 S.E.2d at 151.

Accordingly, as Appellants contractually waived any right to a jury trial, the lower court’s decision should be affirmed.

II. THE TRIAL COURT PROPERLY GRANTED, IN PART, TD BANK’S MOTION FOR SUMMARY JUDGMENT

TD Bank moved for summary judgment on all of Appellants’ counterclaims in this action. The trial court granted summary judgment on Appellants’ claims for breach of fiduciary duty, duress and unfair trade practices, also granting partial summary judgment on Appellants’ claim for breach of contract and of the covenant of good faith and fair dealing to the extent that claim is based on the cross-collateralization of the loans and TD Bank’s decision not to agree to a proposed short sale. (Order, p. 9, R. p. 16.) Summary judgment was denied as to those counterclaims for negligent misrepresentation, interference with prospective economic relations and breach of contract and of the covenant of good faith and fair dealing to the extent such a claim is not based on the cross-collateralization of the loans or the Bank’s decision not to consent to the proposed short sale. (*Id.*, pp. 9-10, R. pp. 16-17.)

For those reasons set forth below, the trial court’s Order should be affirmed.

A. The Trial Court Properly Granted Summary Judgment on Appellants’ Counterclaim for Breach of Covenant of Good Faith and Fair Dealing

In its Order, the trial court granted partial summary judgment on Appellants’ counterclaims for breach of contract and of the covenant of good faith and fair dealing “to the extent that claim is based on the cross-collateralization of the loans and the Bank’s decision not to agree to a proposed short sale.” (Order, p. 9, R. p. 16.) In their

Brief, Appellants challenge only the court's ruling as to a claim premised on the Bank's decision not to agree to a proposed short sale, not addressing the cross-collateralization of the loans. (Appellants' Brief, pp. 6-9.)

Appellants begin their argument by taking issue with TD Bank's characterization of their request that TD Bank partition the property secured by the \$2,000,000 Mortgage and release its mortgage, to accommodate a September 2010 non-binding term sheet between Ceagull and Black Diamond. Without getting into a semantic argument about the definition of the term "short sale,"³ it should be noted that the non-binding term sheet was in the gross amount of \$1,325,000 — with some unknown lesser amount to be paid to TD Bank after deducting buyer and seller broker commissions and attorneys' fees). (TD Bank's Motion for Summary Judgment, Ex. 3, R. pp. 275-77.) At that time, roughly \$5,000,000 was owed on the cross-collateralized property, roughly \$1,857,000 on the parcel of property that was the subject of the non-binding term sheet, and \$3,145,000 on the other cross-collateralized parcel. (Forbearance Agreements, ¶ 2, R. pp. 51, 65.) Thus, notwithstanding of terminology used, the result of this transaction would have been the release of TD Bank's mortgage on a substantial portion of its collateral for an amount far less than the amount owed both on that particular parcel as well as the collective, cross-collateralized parcels.

³ A short sale has been defined as when "the mortgagor secures the agreement of the mortgagee to release the mortgage upon a bona fide sale to a third party for an agreed upon price below the mortgage loan balance." 2 Michael T. Madison, Jeffry R. Dwyer & Steven W. Bender, Law of Real Estate Financing § 12:10.

Regardless, Appellants' counterclaim is dependent upon the false premise that TD Bank had some underlying duty to not only consider, but ultimately accept, a loss mitigation/short sale proposal (if a non-binding term sheet can even be construed as such). There is simply no contractual agreement between the parties to support such a premise, nor is there any cognizable legal duty to consider or approve loss mitigation or loan modification requests.⁴ As the United States District Court for the Western District of North Carolina explained:

Plaintiffs' second argument, that Defendant had a legally recognized duty to modify the terms of the loan, amounts to a request that the Court re-write the terms of the loan. See Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc., 872 P.2d 1359, 1363 (Colo.Ct.App.1994) (holding that the duty to act in good faith "does not obligate a party to accept a material change in the terms of the contract or to assume obligations that vary or contradict the contract's express provisions," nor does the duty of good faith "inject substantive terms into the parties' contract"); see also General Aviation, Inc. v. Cessna Aircraft Co., 915 F.2d 1038, 1041-42 (6th Cir. 1990); Serfecz v. Jewel Food Stores, 1994 U.S. Dist. LEXIS 12239 (N.D.Ill. Aug. 30, 1994) ("Where the disputed issue in a contract is governed by express terms, however, there is no gap to be filled, and the parties' behavior is assessed according to the express provisions, without resort to an implied covenant of good faith and fair dealing"); Barnes v. St. Joseph's Hosp., 601 N.W.2d 587, 591 (N.D.1999); Amoco Oil Co. v. Ervin, 908 P.2d 493, 498 (Colo.1995); Idaho First National Bank v. Bliss Valley Foods, Inc., 121 Idaho 266, 824 P.2d 841, 863 (Idaho1991); East Penn Sanitation, Inc. v. Grinnell Haulers, Inc., 294 N.J.Super. 158, 682 A.2d 1207, 1213.

⁴ Appellants cite to the Supreme Court's May 2, 2011 Administrative Order, acknowledging that it only applied to residential, "Owner-Occupied dwellings." Notably, the court has elected not to issue such an Order that would apply to commercial foreclosure actions like the present.

(N.J.Super.Ct.App.Div.1996); Badgett v. Security State Bank, 116 Wash.2d 563, 807 P.2d 356, 360 (Wash.1991); 17A Am.Jur.2d Contracts § 370. Applying these legal principles, the undersigned concludes that Defendant had no duty to forgo its rights under the terms of the loan to foreclose on the property.

James v. Vanderbilt Mortgage, 2012 WL 441170 at *4 (W.D.N.C. Jan. 23, 2012) (magistrate judge's memorandum and recommendation), affirmed and adopted, 2012 WL 440355 (W.D.N.C. Feb. 10, 2012).

In their Brief, Appellants cite two federal court cases purportedly in support of their position that the duty of good faith and fair dealing obligates a lender to accede to the demands of a borrower to partition collateral and release it from a mortgage in the context of loss mitigation. However, neither case involves a commercial foreclosure, nor do they hold as Appellants suggest. In Mudge v. Bank of Am., N.A., No. 13-CV-421-JD, 2013 WL 6095561 (D.N.H. Nov. 20, 2013), the plaintiffs brought suit against their lender for failing to respond to a short sale request, asserting claims for breach of contract, breach of the covenant of good faith and fair dealing and negligent misrepresentation. Upon the lender's motion, the court dismissed all claims. Notably, regarding the claim for breach of the covenant of good faith and fair dealing, the court held:

[E]ven if the complaint had alleged that the second mortgage agreement gave TD Bank the discretion to permit a short sale and that TD Bank had exercised that discretion unreasonably, the claim for breach of the implied covenant of good faith and fair dealing would still be dismissed. As TD Bank points out in its motion to dismiss, a short sale in real estate, where a lender accepts less than it is owed to secure its note, necessarily rewrites the terms of the parties' mortgage agreement. "[T]he covenant of good faith and fair dealing in a loan agreement cannot be used to require the lender to modify or restructure the loan." Moore, 848 F.Supp.2d at 130; see also Douglas, 2013 WL 1890728, at *6 ("[I]t is undisputed that the Douglasses got their loan, which means, necessarily, that they received the full value

of their agreement. That the Douglasses later found themselves unable to repay their loan, and may have benefitted from a loan modification, does nothing to undermine the fact that, in the first instance, they received the loan they bargained for, which was the full value of their agreement.”).

Mudge, at *3 (internal citations omitted). The court in the second case cited by Appellants, Ruivo v. Wells Fargo Bank, N.A., No. 11-CV-466-PB, 2012 WL 5845452 (D.N.H. Nov. 19, 2012), aff’d, 766 F.3d 87 (1st Cir. 2014), held similarly that:

Parties are bound by the agreements they enter into and the court will not use the implied covenant of good faith and fair dealing to force a party to rewrite a contract so as to avoid a harsh or inequitable result. Moore v. Mortg. Elec. Registration Sys., Inc., 848 F.Supp.2d 107, 130; Olbres v. Hampton Co-op. Bank, 142 N.H. 227, 233 (1997); Mills v. Nashua Fed. Savs. & Loan Assoc., 121 N.H. 722, 726 (1981). Accordingly, “[c]ourts have generally concluded that the covenant of good faith and fair dealing in a loan agreement cannot be used to require the lender to modify or restructure the loan.” Moore, 848 F.Supp.2d at 130 (citing FAMM Steel, Inc. v. Sovereign Bank, 571 F.3d 93, 100-01 (1st Cir. 2009)).

Id., at *4.

As creditor and debtor, the parties’ relative rights and obligations are defined by the provisions of the loan documents, under which TD Bank was not contractually obligated to consider or approve Appellants’ loss mitigation/short sale proposals. Accordingly, TD Bank’s decision not to partition its collateral and release its mortgage cannot give rise to a claim against TD Bank in the present action, and the decision of the trial court should be upheld.

B. The Relationship Between TD Bank and Appellants Is One of Creditor-Debtor, Thus the Trial Court Properly Granted Summary Judgment as to Appellants' Counterclaim for Breach of Fiduciary Duty

To establish a claim for breach of fiduciary duty, Appellants must prove: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damages proximately resulting from the wrongful conduct. See generally, Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct.App.2004) (discussing the elements of a breach of fiduciary duty claim). “A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). Furthermore, “as a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed on him.” Regions Bank v. Schmauch, 354 S.C. 648, 670-71, 582 S.E.2d 432, 444 (Ct.App.2003). Appellants bear the burden of establishing a prima facie case as to each element of the breach of fiduciary duty cause of action. See generally, Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991).

South Carolina courts have similarly held that, absent a fiduciary duty, a bank has no duty of care to its customer. As the Court of Appeals held in Schmauch, “South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature.” 354 S.C. at 671, 582 S.E.2d at 444. Because of this presumption, Appellants bear the burden of marshalling evidence showing the relationship between them and TD Bank was something other than a standard arm’s length relationship. Schmauch at 670-71, 582 S.E.2d at 444. To this end, Appellants

assert that TD Bank's communications with a property manager somehow converted the normal banking relationship into one of a fiduciary.

At the outset, it is worth noting that Appellants make this admittedly creative argument — that any bank communicating with a property manager about its collateral, or which seeks to appoint a receiver to manage the same, becomes its borrower's fiduciary — without citing to a case so holding. Regardless, the appointment of a property manager is specifically identified in the Forbearance Agreements as a condition precedent to TD Bank's agreement to forbear from exercising its default rights and remedies under the loan documents:

Lender, Borrower, Mr. Lindgren and the Substitute Guarantor shall enter into a management agreement whereby the management of Borrower shall be turned over to a manager to be designated by Lender, and which manager shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered by the Mortgage (the "Management Agreement"). The Management Agreement shall be subject to the approval of Lender as to both form and substance, and any default by Borrower, Mr. Lindgren the Substitute Guarantor or any other party with respect to such Management Agreement shall be a default under the Loan Documents and shall entitle Lender to pursue all rights and remedies of Lender set forth therein. All fees and expenses of such manager shall be paid by Borrower.

(Forbearance Agreements, ¶ 6(F), R. pp. 53, 67.) Contemporaneous with the execution of the Forbearance Agreements, Appellants were in default due to payment defaults and the death of one of the guarantors (King). (Forbearance Agreements, p. 1, R. pp. 50, 64; Lindgren Deposition, pp. 97, line 19–p. 98, line 11, R. pp. 263-64.) Appellants admit to executing the Forbearance Agreements. (Lindgren Deposition, p. 96, lines 4-17, R. p.

263.) Appellants were represented by counsel in the negotiation and execution of the Forbearance Agreements. (TD Bank's Motion for Summary Judgment, Ex. 2, R. pp. 270-73.) The Forbearance Agreements contained an integration clause, specifically providing that:

This Agreement constitutes the entire agreement of the parties concerning the matters set forth herein and supersedes all prior and contemporaneous agreements, written or oral, concerning such matters. This Agreement may not be modified orally, and any modification must be in writing, signed by the party to be bound.

(Forbearance Agreements, ¶ 12, R. pp. 55, 69.) Finally, in the Forbearance Agreements, Appellants confirmed, reaffirmed and ratified their respective obligations set forth in the loan documents and, as a condition precedent to TD Bank's agreement to forbear, represented that they "have no claims, defenses, counterclaims or rights of setoff or recoupment against Lender under the Loan Documents or otherwise and hereby waive any such claims, defenses, counterclaims or rights of setoff or recoupment." (Forbearance Agreements, ¶ 7, R. pp. 53-54, 67-68.)

As to the purported communications between TD Bank and the property manager, Appellants claim that TD Bank treated the property manager like a receiver, listing as examples: directing the payment of Black Diamond's bills, collecting rents, authorizing the eviction of tenants and accessing rental income statements. (Appellants' Brief, p. 5.) First, the Forbearance Agreements explicitly state that the appointed property manager "shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered by the Mortgage." (Forbearance Agreements, ¶ 12, R. pp. 55, 69.) Second, the actions of TD

Bank complained of by Appellants *all occurred after Black Diamond was in default of its obligations under the subject loans*, and are all specifically authorized by the Assignments of Leases and Rents, which — as set forth therein and discussed at length in the Statement of Facts — permit TD Bank, at its option, to communicate with tenants directly or through a third party about a number of issues, namely the payment of rent, upon the default of the borrower. (\$2,000,000 Assignment of Leases and Rents, ¶¶ 3-6, 15(F-G), R. pp. 136, 140; \$3,500,000 Assignment of Leases and Rents, ¶¶ 1, 4(F), R. pp. 129, 131.) The Assignments of Leases and Rents further authorize TD Bank to apply rent proceeds to a broad range of expenses, including those associated with the management of the property, inspections or efforts to preserve the property, as well as environmental inspections.⁵ (\$2,000,000 Assignment of Leases and Rents, ¶¶ 6, 7(G-J), R. pp. 136-37; \$3,500,000 Assignment of Leases and Rents, ¶ 1, R. p. 129.) Finally, Appellants have failed to put forth any evidence suggesting that they ever “placed a special trust” or “confidence” in TD Bank in relation to any of the above-described instances. See Schmauch, at 670-71, 582 S.E.2d at 444 (noting that “a fiduciary relationship cannot be established by the unilateral action of one party”).

Accordingly, as the relationship between TD Bank and Appellants was one of creditor-debtor rather than fiduciary in nature, the trial court properly granted summary judgment on Appellants’ breach of fiduciary duty counterclaim.

⁵ The document referenced by Appellants (Memorandum in Opposition to Summary Judgment, Ex. D at Bates # 7032) specifically mentions the fact that the environmental assessment was performed pursuant to the Assignments of Leases and Rents.

C. **The Lower Court Properly Applied the Applicable Statute of Limitations to Appellants' Counterclaims for Breach of Contract and of the Covenant of Good Faith and Fair Dealing**

In its Order, the trial court granted partial summary judgment on Appellants' counterclaim for breach of contract and of the covenant of good faith and fair dealing only "to the extent that claim is based on the cross-collateralization of the loans and the Bank's decision not to agree to a proposed short sale." (Order, p. 9, R. p. 16.) As to the cross-collateralization of the two loans *only*, as one of several grounds for summary judgment, the court found that particular claim time barred by the applicable three-year statute of limitations. See S.C.Code Ann. § 15-3-530 (1976).⁶ Importantly, this was never part of the trial court's decision with regard to counterclaims based on the Bank's decision not to agree to a proposed short sale. (See Order, pp. 3-4, R. pp. 10-11 (only discussing the statute of limitations in the context of the cross-collateralization of the loans).)

⁶ The cross-collateralization of the loans is specifically set forth in the \$2,000,000 Note executed by Black Diamond on July 25, 2008. (\$2,000,000 Note, ¶ 10, R. p. 59.) Because the cross-collateralization of the two loans took place more than three years prior to the date of Appellants' counterclaims (filed in 2012), a claim based on the same is barred by the applicable statute of limitation set forth in S.C.Code Ann. § 15-3-530. (See Lindgren Deposition, p. 50, line 22–p. 51, line 14, R. p. 259; p. 111, lines 13-21, R. p. 267 (acknowledging the loans were cross-collateralized in July 2008).)

D. Duress Is Not a Recognized Claim Under South Carolina Law; Regardless, Appellants Have Failed to Establish Any Actionable Basis to Assert Such a Claim

While acknowledging that duress is not recognized as a cause of action under South Carolina law, see Troutman v. Facetglas, Inc., 281 S.C. 598, 603, 316 S.E.2d 424, 427 (Ct.App.1984) (“We see no compelling reason under the facts and circumstances of this case to extend the law of intentional torts in South Carolina to embrace economic duress.”), Appellants nevertheless ask this Court to create such a claim. Even if the Court were so inclined, however, Appellants have failed to establish any actionable basis to maintain this cause of action.

Looking to the Wisconsin decision discussed but not adopted by the court in Troutman, in order to establish a claim for economic duress, a party “must show that (1) a person used his superior bargaining position unreasonably or unjustifiably, (2) by wrongful conduct, generally threats, (3) the conduct or threats caused the injury, (4) the victim would not have acquiesced in the absence of wrongful threats, (5) resultant damages, and (6) the victim had no adequate legal remedy available to protect his interests at the time it was threatened.” Id. (citing Wurtz v. Fleischman, 278 N.W.2d 266 (Wis.App.1979), rev’d on other grounds, 293 N.W.2d 155 (1980)). The only instances of “duress” or “coercion” identified by Appellants were the cross-collateralization of the loans in the \$2,000,000 Note and the requirement of the retention of a property manager in the Forbearance Agreements. (Lindgren Deposition, p. 50, line 13–p. 53, line 12, R. p. 259; p. 104, line 7–p. 107, line 16, R. pp. 265-66; p. 111, lines 3-21, R. p. 267.)

At the outset, Appellants cite to no authority standing for the proposition that either the cross-collateralization of loans or execution of a forbearance agreement is in

any way wrongful or amounts to coercive conduct. Both practices are standard throughout the loan industry. Regardless, as set forth above, the cross-collateralization of the loans took place in July 2008, more than three years prior to Appellants' counterclaims in this litigation (filed in 2012), thus a claim based on the same is barred by the applicable statute of limitation set forth in S.C. Code Ann. § 15-3-530. (See Lindgren Deposition, p. 50, line 22–p. 51, line 14, R. p. 259; p. 111, lines 3-21, R. p. 267 (acknowledging the loans were cross-collateralized in July 2008).) Furthermore, the Forbearance Agreements were executed by the parties while the loan was in default (Forbearance Agreements, p. 1, R. pp. 50, 64; Lindgren Deposition, p. 97, line 2–p. 98, line 11, R. pp. 263-64 (acknowledging that, at the time of the Forbearance Agreements, the loans were in default due to missed payments)); Appellants admit to executing the Forbearance Agreements (Lindgren Deposition, p. 96, lines 4-17, R. p. 263); Appellants were represented by counsel in the negotiation of the Forbearance Agreements (TD Bank's Motion for Summary Judgment, Ex. 2, R. pp. 270-73); the Forbearance Agreements contained an integration clause (Forbearance Agreements, ¶ 12, R. pp. 55, 69); and in the Forbearance Agreements, Appellants confirmed, reaffirmed and ratified their respective obligations set forth in the loan documents and, as a condition precedent to TD Bank's agreement to forbear, represented that they "have no claims, defenses, counterclaims or rights of setoff or recoupment against Lender under the Loan Documents or otherwise and hereby waive any such claims, defenses, counterclaims or rights of setoff or recoupment" (Forbearance Agreements, ¶ 7, R. pp. 53-54, 67-68).

Accordingly, even if the Court were inclined to create the cause of action of duress in South Carolina, Appellants have failed to present any evidence to support such a claim, thus summary judgment is appropriate.

E. The Trial Court Properly Granted Summary Judgment as to Appellants' Unfair Trade Practices Counterclaim

Appellants' unfair trade practices claim fails because the South Carolina Unfair Trade Practices Act ("UTPA") does not apply to private transactions where there is no evidence of adverse effect on the public interest. Our courts have refused to provide a test to determine what constitutes an "impact upon the public interest," but that requirement is most commonly met by demonstrating that acts or practices have the potential for repetition. See Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct.App.1986); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct.App.1998). "The potential for repetition may be shown in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). A mere breach of contract cannot constitute a violation of the UTPA. See Key Co., Inc. v. Fameco Distr., Inc., 292 SC 524, 357 S.E.2d 476 (Ct.App.1987). Moreover, "*conduct which only affects the parties to the transaction provides no basis for a UTPA claim . . .*" Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct.App.1994) (emphasis added).

Here, we have nothing more than a dispute between two parties to a private commercial loan transaction. The sole act or practice of TD Bank identified by

Appellants as purportedly affecting the public interest was TD Bank's decision not to partition its collateral and release its mortgage to accommodate the potential sale set forth in the Ceagull non-binding term sheet. Such a decision is dependent on a number of unique factors, including the property in question, the value of the same, the terms of the subject loan documents and the amounts owed on the notes secured by the property, and is thus a matter solely and uniquely between TD Bank and Appellants, not affecting the public interest.⁷ See, e.g., Drs. Steuer & Latham, P.A. v. Nat'l Med. Enterprises, Inc., 672 F.Supp. 1489, 1522 (D.S.C. 1987) aff'd, 846 F.2d 70 (4th Cir. 1988) (granting summary judgment based on absence of a showing of harm to the public interest); Jefferies, at 527-28, 451 S.E.2d at 23 ("To be actionable under the UTPA, an unfair or deceptive practice or act must adversely affect the public interest. Therefore, conduct which only affects the parties to the transaction provides no basis for a UTPA claim. This adverse effect on the public must be proved by specific facts. . . . Jefferies introduced no evidence of specific facts which show any member of the public was adversely affected by this transaction. Without this showing, Phillips' conduct cannot be said to affect anyone other than the parties to this controversy, in which case the conduct falls outside the scope of the UTPA.").

⁷ When questioned, Appellants claimed the conduct of Plaintiff (not releasing its mortgage) was at issue in another matter, TD Bank, N.A. v. Atlantic Private Equity Group, LLC, Civil Action No. 2011-CP-07-00588. (Lindgren Deposition, p. 126, line 5–p. 127, line 23, R. p. 268.) However, such an issue was never raised in that litigation, noticeably absent from the borrower and guarantors' counterclaims against the bank. (TD Bank's Motion for Summary Judgment, Ex. 6, R. pp. 345-50.)

Accordingly, summary judgment was proper as to Appellants' unfair trade practices counterclaim and should be affirmed.

CONCLUSION

For the reasons set forth herein, this Court should affirm the trial court's Order granting TD Bank's Motion to Strike Defendants' Jury Trial Demand and Order granting, in part, TD Bank's Motion for Summary Judgment.

This 5th day of October 2016
Greenville, South Carolina



Michael J. Bogle (S.C. Bar No. 71125)

Email: mbogle@wcsr.com

Clayton M. Custer (S.C. Bar No. 68495)

Email: csuster@wcsr.com

Catherine Wrenn (S.C. Bar No. 76042)

Email: cwrenn@wcsr.com

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

550 South Main Street

Suite 400

Greenville, SC 29601

Telephone: (864) 255-5400

*Attorneys for Respondent TD Bank N.A.,
Successor by Merger to Carolina First Bank*

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Fourteenth Judicial Circuit

Marvin H. Dukes, III, Master in Equity/Special Circuit Court Judge

Appellate Case No. 2016-000537

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

v.

Black Diamond, LLC; J. Christopher
Lindgren; David A. Brosman;
Julie H. King; and The Greenery, Inc.....Defendants,

Of Whom

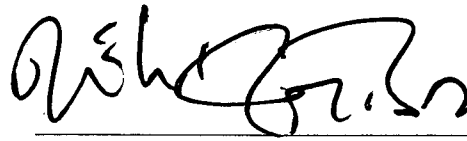
Black Diamond, LLC; J. Christopher
Lindgren; David A. Brosman are.....Appellants.

CERTIFICATE OF COUNSEL

The below-signed counsel certifies that this Brief complies with Rule 211(b),
SCACR.

Respectfully submitted,

This 5th day of October 2016
Greenville, South Carolina



Michael J. Bogle (S.C. Bar No. 71125)

Email: mbogle@wcsr.com

Clayton M. Custer (S.C. Bar No. 68495)

Email: csuster@wcsr.com

Catherine Wrenn (S.C. Bar No. 76042)

Email: cwrenn@wcsr.com

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

550 South Main Street

Suite 400

Greenville, SC 29601

Telephone: (864) 255-5400

*Attorneys for Respondent TD Bank N.A.,
Successor by Merger to Carolina First Bank*