THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III
Beaufort County
Trial Court Case No. 2011-CP-07-1933

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 Atlantic Private Equity Group, LLC, Terry L. Rohlfing, and Jerry T. Caldwell are the Appellants.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Whether the lower court erred in granting summary judgment in favor of Deep Keel where the affidavits filed in support failed to meet the requirements of Rule 56(e) such that the record lacked competent evidence to establish the amount of the debt due.

II. Whether the court erred in construing the bank's limited guaranty form to provide for individual liability of the guarantors for two separate limits of principal instead of joint liability for a single limit of principal.

STATEMENT OF THE CASE

This is an action commenced by Community First Bank on April 25, 2011. Two causes of action were stated, the first to foreclose a mortgage on two parcels of real estate in Beaufort County owned by Appellant Atlantic Private Equity Group, LLC, and the second for judgments against two alleged guarantors, Appellants Terry L. Rohlfing and Jerry T. Caldwell. A deficiency judgment was sought against all Appellants. [R. p. 22]

Appellants timely filed an answer by which, generally stated, they admitted that a loan was made, that it was secured by a mortgage and that it had not been repaid by the mortgagor or the alleged guarantors. Appellants did not admit the specific loan documents alleged and specifically denied the amount claimed to be due under the note. [R. p. 31]

In July of 2011, Community First Bank merged into CresCom Bank. There was no substitution of parties at that time.

In August of 2012, one of the two parcels was sold and released from the mortgage. The action continued as to the remaining parcel.

In September of 2012, CresCom Bank assigned the loan to Respondent Deep Keel, LLC.

On April 17, 2013, the circuit court entered an order referring the case to the master-in-equity for the purpose of adjudicating the mortgage foreclosure action. The order further provided

that "upon a resolution or disposition of the foreclosure action, this case is to be returned to the Circuit Court for final hearing and disposition as to any issues triable by jury as against Defendants Terry L. Rohlfing and Jerry T. Caldwell."

On April 17, 2013, the circuit court also entered an order substituting Respondent Deep Keel, LLC for Community First Bank as plaintiff in the action.

A non-jury foreclosure hearing was held on July 10, 2013, before The Honorable Marvin H. Dukes, III. Appellants appeared through counsel, but Messrs. Rohlfing and Caldwell were not in attendance. No one appeared as a witness to establish the execution of the note, mortgage and other loan documents by the Appellants. Instead, Deep Keel, LLC offered into evidence the alleged loan documents through its sole member, Scott Bynum. Appellants Atlantic Private Equity Group, LLC, Terry L. Rohlfing, and Jerry T. Caldwell objected to this on the grounds that the witness lacked personal knowledge sufficient to lay a proper foundation and was seeking to introduce inadmissible hearsay. The court overruled the objections and allowed the introduction of the documents.

Deep Keel, LLC also sought to establish the amount due on the loan through Mr. Bynum based on information the witness said he received from CresCom Bank at the time of the assignment of the loan. Appellants again objected on hearsay grounds, and the court again overruled the objection.

On July 29, 2013, the court entered its Master's Report and Judgment of Foreclosure and Sale (Deficiency Demanded). Appellants received written notice of the entry of this order on August 5, 2013 and filed a Motion to Reconsider on August 13, 2013. In the motion, Appellants pointed out that the order erroneously recited the court's having received written testimony and indicated "there were no objections." Appellants repeated the evidentiary objections made at the hearing and moved

that various factual findings enumerated in the motion, and any conclusions of law based thereon, be altered, amended, and vacated as without evidentiary support.

On September 5, 2013, the court entered its Amended Master's Report and Judgment of Foreclosure and Sale (Deficiency Demanded). This order included an additional paragraph addressing, though incompletely, Appellants' objections and stating the court's ruling with respect thereto.

Written notice of the entry of the amended order was received by Appellants' counsel on September 13, 2013. Appellants served notice of appeal on October 10, 2013.

The initial foreclosure auction was conducted on September 3, 2013. The high bid was made by Deep Keel, LLC in the amount of $900,000.00. The second auction was held on October 3, 2013. There being no other bidders the sale to Deep Keel, LLC became final. The court having found the debt to amount to $1,655,026.52, the amount involved in the appeal is $755,026.52 plus interest

Appellants timely appealed and this Court issued its decision on June 17, 2015. In summary, the court:

- Affirmed the master's admission into evidence of the loan documents;
- Found that the testimony regarding the amount due on the debt was inadmissible hearsay; and
- Found that the master acted outside the scope of the order of reference in making a finding bearing upon the liability of the alleged guarantors.

Accordingly, the court affirmed the judgment of foreclosure, reversed the deficiency judgment, vacated the master's finding concerning the guarantors and remanded for further proceedings necessary for final judgment on all claims. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015).

Remittitur to the court of common pleas was issued on July 6, 2015. The case was thereafter placed on the jury roster and ultimately again referred to the master by consent of the parties pursuant to an order entered on July 18, 2016. [R. p. 4]

On July 6, 2016, Deep Keel filed a motion for summary judgment against the alleged guarantors, Terry L. Rohlfing and Jerry T. Caldwell. [R. p. 85] The motion was supported by a memorandum and various exhibits attached thereto. [R. p. 87] In further support of its motion, Deep Keel filed two affidavits on July 12, 2016, one from Scott Bynum, sole member of Deep Keel [R. p. 133] and the other from Jamin M. Hujik, Executive Vice President of CresCom Bank. [R. p. 191]

Deep Keel's motion for summary judgment was heard by The Honorable Marvin H. Dukes, III on August 3, 2016 [R. p. 35] and thereafter granted by order entered August 23, 2016. [R. p. 11]

Appellants timely filed their Motion to Reconsider Order Granting Summary Judgment on September 6, 2016, [R. p. 235] which was denied by an order entered and electronically filed on January 17, 2017. [R. p. 6]

Appellants received written notice of entry of the Order Denying Defendants' Motion for Reconsideration via notice of electronic filing on January 17, 2017 and timely served Notice of Appeal on February 13, 2017. [R. p. 241]

The amounts involved in this appeal include: judgment entered against Terry L. Rohlfing individually in the amount of $457,314.17; judgment entered against Jerry T. Caldwell individually in the amount of $457,314.17; and, judgment entered against Terry L. Rohlfing and Jerry T. Caldwell jointly and severally in the amount of $37,869.34.

ARGUMENT

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE AFFIDAVITS OFFERED BY DEEP KEEL FAIL TO MEET THE REQUIREMENTS OF RULE 56(e) WITH RESPECT TO THE AMOUNT OF THE DEBT ALLEGEDLY DUE.

Plaintiff's motion for summary judgment was supported by two affidavits, one from an officer of CresCom Bank ("Hujik Affidavit") and one from the sole member of Deep Keel, LLC ("Bynum Affidavit"). The court determined that the affidavits demonstrated "sufficient competency, authority and personal knowledge to testify" concerning amounts due and owing on the loan. [R. p. 13] The court relied on the Hujik Affidavit to find the amount due at the time of the assignment of the loan to Deep Keel and relied on the Bynum Affidavit to find the amount due as of the date of the hearing. This was erroneous.

Rule 56(e), SCRCP requires that affidavits in support of a motion for summary judgment:

- Shall be made on personal knowledge
- Shall set forth such facts as would be admissible in evidence, and
- Shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Neither of the affidavits meets these requirements in regard to the amount allegedly due.

The Bynum Affidavit at Paragraph 9 expressly relies upon the Hujik Affidavit for the amount due at the time of the assignment and, therefore, for its conclusion as to the amount due at the time of hearing as set forth in Paragraph 11. There is nothing in the affidavit to demonstrate the affiant's personal knowledge of or competence to testify about the amount due at the time of the assignment. The court of appeals has already ruled this testimony of this affiant to be inadmissible hearsay. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 70, 773 S.E.2d 607, 614 (Ct. App.

2015). The affidavit includes no new facts upon which to base a different conclusion from that previously reached by this court. The Bynum Affidavit does not meet the requirements of Rule 56(e), and the court erred in accepting and relying upon it in its grant of summary judgment.

Paragraph 14 of the Hujik Affidavit summarized, as of September 28, 2012, a principal balance and various other charges and credits, and stated a conclusion as to the total amount due on that date. [R. p. 194] There in nothing in the affidavit to show the affiant's personal knowledge of the loan or competence to testify about it. The affidavit does not state that it is based on personal knowledge, must less include any factual statements to affirmatively demonstrate the affiant's personal knowledge or competence to offer the testimony. There is, for example, no evidence concerning how long the affiant was employed with the bank, whether he was employed with the bank when the loan was made or at the time the payments were made, or what his duties and responsibilities were generally or in respect to the subject loan. Mr. Hujik's conclusory statement concerning the amount allegedly due is not admissible evidence within the meaning of Rule 56(e), SCRCP and should not be considered. *Shupe v. Settle,* 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994)(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); *Hall v. Fedor,* 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002)(materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence).

Deep Keel argued at the hearing that the affiant's testimony was based on records maintained by the bank. [R. p. 64, lines 8-10] The affidavit does not say so. Even if it were to do so, the affiant's testimony from records not produced at the hearing would be inadmissible hearsay. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015). All the

affidavit shows is that the affiant is a vice-president of the bank. However, his status as a vice-president is not a sufficient substitute for personal knowledge. *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993). The Hujik Affidavit did not meet the requirements of Rule 56(e) and the court erred, it is respectfully submitted, in accepting and relying upon it in its grant of summary judgment.

Further, the conclusory summary of the alleged status of the loan as of a specific date as presented in the Hujik Affidavit is functionally no different from the summary statements offered by the plaintiff bank in *South Carolina Nat'l Bank v. Jones*, 302 S.C. 154, 394 S.E.2d 323 (1990). In that case the supreme court reversed a directed verdict in favor of the bank, ruling that summary statements on which it was based were not admissible under the Uniform Business Records as Evidence Act because there was no evidence showing that the entries on the statements were made at or near the time of the transactions. The testimony from a bank officer that the summaries were compiled from monthly statements issued to the debtor did not cure the defect. The present case does not involve the introduction of business records but the effect is the same. The court has granted judgment against the debtor based upon an unsupported, uncorroborated summary, offered not in the form of a record but included in testimony submitted by affidavit. If a written summary prepared by the bank would not be admissible, certainly an affidavit including testimony from or about such a summary would not be admissible either.

In its presentation of the amount allegedly due the Hujik Affidavit began with "Principal" of $1,980,734.28. [R. p. 194, ¶ 14] This amount is less than the $2,000,000.00 principal amount of the loan as set forth in Paragraph 2 and as stated in a 2nd Modification referenced in Paragraph 8. Therefore, there must have been payments made but there is no accounting of what payments were

made or when they were applied, nor were any records introduced concerning any payments. The presentation includes a credit described as resulting from the sale of one the parcels subject to the mortgage as referenced in Paragraph 11. There is evidence of the release of parcel 2 from the mortgage but no evidence to show that the correct amount, and not some greater number, was credited by the bank. Likewise, the presentation includes summary entries for "late charges" and unspecified "fees" with no records or other evidence as to what these entries were for or when they were made. Plaintiff cannot meet the evidentiary requirements of *South Carolina National Bank v. Jones* with a testamentary summary of the amount due.

In their Answer, at paragraph 17, Appellants denied the amount of the debt and demanded strict proof thereof. [R. pp. 32-33] A party against whom summary judgment is sought is entitled to rest on his pleadings unless and until "a motion for summary judgment is made and supported as provided in [Rule 56]." Rule 56(e), SCRCP. When faced with a motion for summary judgment "that is supported by evidence" the party opposing the motion must show the court the existence of a genuine issue of fact. *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). The papers supporting the movant are to be closely scrutinized. *Id; Spencer v. Miller*, 259 S.C. 453, 192 S.E.2d 863 (1972). The master conducted no such scrutiny or analysis, merely finding without explanation or elaboration:

> The affidavits filed in support of the Motion for Summary Judgment contain the amounts due Plaintiff as of the dates stated therein, including as of the date of the hearing on the Motion. The amounts as stated have not been contested. [R. p. 18]

In the order granting summary judgment the master did not address Appellants' arguments, made at the hearing on the motion, that the affidavits failed to meet the requirements of Rule 56(e), SCRCP. In their motion to reconsider Appellants again made these arguments. [R. pp. 235-238]

In the order denying Appellants' motion the master stated:

> 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. [R. p. 7]

Contrary to the court's order, the Hujik Affidavit contains no statement, specific or otherwise, concerning the affiant's reliance on records maintained by the bank in regard to the calculation of the amount owed at the time of the assignment to Deep Keel. Similarly, there is no factual support in the affidavit for the master's statement in its order denying reconsideration that Hujik:

> ... 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 [sic] Partners, L.P. v National Safe Corp.*, 335 S.C. 635, 518 S.E.2d 44 (1999). [R. p. 8]

The only statement about the bank's maintenance of records is in Paragraph 13 of the Hujik Affidavit, reciting simply that the exhibits attached to the affidavit were all "maintained in the official records of the Bank until the Assignment to Deep Keel, LLC." There is nothing in the affidavit referring to bank records concerning payments, charges, credits or amounts due on the loan. Not only does the affidavit fail to describe any such records, there is nothing in the affidavit to show that it includes information from a person with knowledge as to the amount due.

The master's reliance on Rule 803(6) and *Twelfth RMA Partners, L.P. v National Safe Corp.* 335 S.C. 635, 518 S.E.2d 44 (1999) was erroneous. As noted by this court in its opinion deciding the first appeal in this case, *Twelfth RMA Partners* permits a "qualified witness" to testify about a

business record. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 73, 773 S.E.2d 607, 615 (Ct. App. 2015). This court further indicated that the witness in that case, Scott Bynum, "appears to be a 'qualified witness' under Twelfth RMA because he studied the manner in which Community First and CresCom Bank maintained the records before he purchased the note." *Id.* Thus, "his testimony conveyed information from a person with knowledge at the time the records were created." *Id.* In the present case there is no evidence that Hujik studied or otherwise had any knowledge concerning any records regarding payments, charges and so forth, or the manner in which either bank maintained any such records. Hujik is not a "qualified witness" based on the record here.

Even if the affiant were deemed to be a "qualified witness" Deep Keel has not established a proper foundation for any business records concerning the amount allegedly due on the loan. *Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 565 S.E.2d 293 (2002). This court has previously held in this case:

> Because the business records exception applies only to the admission of business records themselves, the exception does not apply to Bynum's hearsay testimony.

Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 74, 773 S.E.2d 607, 615 (Ct. App. 2015).

Based on the record now before the court Hujik stands in no better position than did Bynum in the first appeal, and Hujik's unsupported, uncorroborated, naked conclusion concerning the amount due on the loan at the time of the assignment does not constitute admissible evidence. It is instead inadmissible hearsay not subject to any exception. Thus, the motion for summary judgment was not "made [or] supported" as required by Rule 56, SCRCP. Accordingly, the burden did not shift to Appellants to oppose the motion with affidavits or other evidence. *Dyer v. Moss*, 284 S.C.

208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). The master erroneously concluded otherwise:

> 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. [R. pp. 8-9]

The lower court erred by shifting the burden to Appellants merely because Deep Keel filed supporting affidavits, without scrutinizing the affidavits for admissible evidence as required by *Dyer v. Moss*, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985) and *Spencer v. Miller*, 259 S.C. 453, 192 S.E.2d 863 (1972).

Because the Hujik Affidavit included no admissible evidence concerning the amount due at the time of the assignment to Deep Keel and the Bynum Affidavit expressly relied on the Hujik Affidavit for its calculation concerning the total due, there is no competent, admissible evidence concerning the amount of the debt. The court's grant of summary judgment should be reversed. *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011) (when reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court). The case should be remanded for a trial at which Deep Keel is required to proffer records and/or witnesses subject to cross-examination by Appellants to establish by competent evidence the amounts properly due on the debt. *See Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999)(summary judgment is a drastic remedy which should be cautiously invoked so no person is improperly denied a trial on disputed factual questions); *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997)(summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law); *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008)(summary judgment should only be granted when plain, palpable and indisputable facts exist on which reasonable minds

cannot differ).

II. THE COURT ERRED IN CONSTRUING THE BANK'S LIMITED GUARANTY FORM TO PROVIDE FOR INDIVIDUAL LIABILITY OF THE GUARANTORS FOR TWO SEPARATE LIMITS OF PRINCIPAL INSTEAD OF JOINT LIABILITY FOR A SINGLE LIMIT OF PRINCIPAL.

In its order the court held that each Appellant is individually liable for $350,000 in principal for a total of $700,000 in principal, as opposed to joint and several liability of Appellants for a single limited amount of principal of $350,000. The construction and enforcement of an unambiguous contract presents a question of law for the court. *Southern Glass & Plastics Co., Inc. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012) *citing Hansen ex rel. Hansen v. United Servs. Auto. Ass'n*, 350 S.C. 62, 67, 565 S.E.2d 114, 116 (Ct. App. 2002). The master erred in his construction and application of the bank's guaranty form.

Under paragraph 4 of the guaranty: "The liability of the Undersigned hereunder shall be limited to a principal amount of $350,000.00." The capitalized term "Undersigned" is defined below the signature lines: "'Undersigned' shall refer to all persons who sign this guaranty, severally and jointly." Paragraph 13 of the bank's guaranty form states, in relevant part: "If there be more than one signer, all agreements and promises herein shall be construed to be, and are hereby declared to be, joint and several in each of [sic] every particular and shall be fully binding upon and enforceable against either, any or all the Undersigned." Consistent with these provisions, in its complaint at paragraph 28 Plaintiff alleges that Defendants "each guaranteed, jointly and severally, the payment and performance of each and every debt, liability and obligation of every type and description which Atlantic Private Equity Group, LLC owed Plaintiff up to a principal amount

of $350,000.00." [R. p. 28] The court erred in granting relief not prayed for in the complaint and which goes beyond the limited undertaking of the Appellants under the terms of the guaranty.

Here there were allegedly two signers and under the terms of the guaranty their liability would be joint and several for the single limited amount of principal of $350,000. That the signatures appeared on two different copies of the bank's form does not negate the fact that there was a single guaranty. The definition of "Undersigned" refers to "this guaranty," not to multiple copies of the same document. Nowhere does the form warn signers that if they sign different copies that they double their collective liability under the guaranty. Any ambiguity or uncertainty resulting on this point from the definition of "Undersigned" and other provisions concerning joint and several liability of the guarantors included in the bank's form should be construed against the bank as drafter of same. *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981).

CONCLUSION

Inasmuch as the record contains no competent, admissible evidence concerning the amount of the debt the order granting summary judgment should be reversed and the case remanded for trial. Further, the lower court's construction of the bank's guaranty form should also be reversed such that further proceedings may be conducted in light of a proper construction of the guaranty and Appellants' potential liability thereunder.

Respectfully submitted,

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