

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Special Circuit Court Judge

Case No. 10-CP-23-10047

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SC COURT OF APPEALS

TD Bank National Association,
Successor by Merger to Carolina
First Bank Respondent

v.

Copper Lakes, LLC f/k/a Tall Pines
Investments, LLC; Grande Dunes
Development Company, and Silver
Real Estate Fund I, L.P., ... Defendants,

of whom

Silver Real Estate Fund I, L.P. is Appellant.

BRIEF OF APPELLANT

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Questions Presented

1. Should the Order of Reference be vacated because improper procedure was applied in referring the matter to the Master-in-Equity?
2. Should the Order of Reference be vacated because Appellant is entitled to a jury trial?

STATEMENT OF FACTS

This case involves a loan from Appellant to Copper Lakes, LLC (“Copper Lakes”) on July 24, 2007. [R.p.17] Grande Dunes Development Company (“Grande Dunes”) and Appellant Silver Real Estate are guarantors of a note for the loan. [R.p. 53] In 2008, Respondent and Copper Lakes entered into a Loan Modification Agreement. [R.p. 12, 90, 96] On August 27, 2010, Respondent sent a demand letter to Copper Lakes (but not Appellant or the other guarantor), asserting that the note had matured and that the outstanding principal and interest were due. Respondent then filed suit in December 2010. [R.p. 111]

The Complaint seeks foreclosure as to Copper Lakes. [R.p. 10] As to Appellant Silver Real Estate (one of the guarantors), Respondent purportedly seeks a deficiency judgment. [R.p. 15] The Complaint also purportedly seeks a deficiency judgment against Grande Dunes, the other guarantor. [Id.]

On October 12, 2011 Respondent filed a Motion to Refer the action to the Greenville County Master-in-Equity. [R.p. 154] The proposed Order submitted by Respondent stated that Respondent had alleged that “this was a foreclosure action.” [R.p. 157] The Respondent did not indicate that it also sought a deficiency judgment from the guarantors. [R.p. 154] The proposed Order was signed by the Clerk of Court *ex parte*, with no opportunity for the guarantors to be heard, and filed on October 17, 2011. [R.p. 1] The matter was then transferred to the Master-in-Equity. [R.p. 1]

On November 4, 2011, Appellant filed a motion to vacate the order of reference. [R.p. 163] On February 10, 2012, the lower court denied the motion to vacate. [R.p. 6] Appellant

filed a motion to reconsider, alter or amend that order, which was denied on March 2, 2012. [R.p. 167] This appeal followed.

STANDARD OF REVIEW

The interpretation of a statute is a matter of law. *Eldridge v. City of Greenwood*, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998). “In interpreting the language of a court rule, [the court applies] the same rules of construction used in interpreting statutes.” *Green By & Through Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). Appellate courts “review questions of law de novo” with no particular deference to the lower court. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012); *Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012). Here, the only issue is the interpretation of the court rule on orders of reference. Thus, the applicable scope of review is *de novo*. *Id.*

ARGUMENT

I. The lower court erred in failing to vacate the Order of Reference which did not follow proper procedure.

The lower court found that Rule 53, SCRCP, allowed “a Clerk of Court to refer a case, without consent of a mortgagor, to a master-in-equity or special referee.” [R.p. 7] The lower court also found that such a reference “includes any right of mortgagee to seek a deficiency judgment against the mortgagor.” In doing so, the lower court’s ruling improperly exceeded the authority granted by Rule 53.

Rule 53(b), SCRCP, states: “In an action where the parties consent, in a default case, or an action for foreclosure, some of all of the causes of action may be referred to a master or special referee by order of a circuit court judge or the clerk of court.” A master has no power

or authority except that which is granted by the order of reference. *Bunkum v. Manor Properties*, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996).

Where an order of reference is sought *ex parte*, the court must narrowly construe the rule allowing an *ex parte* order. *See also, e.g., Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974)(circumstances justifying the issuance of an *ex parte* order are extremely limited).¹ “Strict construction of reference statutes is supported by the rationale that the validity of the referee system depends upon strict compliance with the statute, so that a trial referee does not encroach upon, or unconstitutionally compete with other constitutional courts.” 66 Am.Jur.2d References § 6, citing *Great Country Bank v. Pastore*, 241 Conn. 423, 696 A.2d 1254 (1997). Here, the rule only provides that “an action for foreclosure” can be referred, not an action for foreclosure and deficiency judgment. See Rule 53(b), SCRCP. Under the required standard of narrow construction, only a “pure” foreclosure -- i.e., one without a request for a deficiency judgment or other relief-- can be unilaterally or *ex parte* referred to a master.

In this case, the claims go beyond a “pure” foreclosure and seek a deficiency judgment against the guarantor, Appellant Silver Real Estate; thus, the matter cannot be unilaterally

¹The Supreme Court in that case noted that the restrictions on *ex parte* orders (in that case, a TRO) reflected “ the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute.” *Id.* at 438-39, 94 S.Ct. 1113 (internal citation omitted). *See also, Martin's Herend Imports, Inc. v. Diamond & Gem Trading USA, Co.*, 112 F.3d 1296, 1306 (5th Cir. 1997)(“Given the draconian nature of this *ex parte* remedy, providing for the seizure of defendant's wares and records without prior notice to the defendant and with the assistance of law enforcement officers, we believe that it should be narrowly construed.”)

sent to the Master without Appellant's consent. Therefore, the lower court erred in refusing to vacate the improper Order of Reference.

II. The lower court should have vacated the order of reference because Appellant has a right to a jury trial.

The Order of Reference must also be vacated because Appellant Silver Real Estate is entitled to a jury trial. The lower court found that there was no right to a jury trial because Appellant had not "pled any legal claims against TD Bank or any other party that would allow or necessitate a trial by jury." [R.p. 1] However, the South Carolina Constitution art. I, § 14 provides "[t]he right to a trial by jury shall be preserved inviolate." This guarantee preserves the right to a jury trial in those cases where jury trials were allowed at the time of the adoption of the Constitution in 1868. *Medlock v. 1985 Ford F-150 Pick Up*, 308 S.C. 68, 417 S.E.2d 85 (1992). Under the common law, legal actions for the recovery of money were triable by a jury. *Collier v. Green*, 244 S.C. 367, 137 S.E.2d 277 (1964) ("To the Court belongs all issues of law and chancery, and to the jury all questions of fact in cases at law for the recovery of money or any specific real or personal property"); *Bell v. Atlantic Coast Line R. Co.*, 202 S.C. 160, 24 S.E.2d 177 (1943) Cf., *Cooper v. Poston*, 326 S.C. 46, 483 S.E.2d 750, 751 (1997) (jury trial for money damages pursuant to auto accident was constitutionally protected right). In addition, Rule 38, SCRCF states that issues of fact for the recovery of money must be tried by a jury.

In a recent decision, this Court addressed the very issue presented here. See, *Carolina First Bank v. BADD, LLC*, 400 S.C. 343, 733 S.E.2d 619 (Ct. App. 2011). In that case, a

third-party guarantor argued that the circuit court erred in referring the bank's claim on a guaranty to the master.² *Id.* This Court found that:

in instances where legal and equitable issues or rights are asserted in the same complaint, the legal issues are for determination by a jury and the equitable issues are to be decided by the court.

Id. at 346, 733 S.E.2d at 621. The Court continued:

we hold the circuit court erred in referring Carolina First's claim against McKown arising from the Guaranties to the master. **This claim was separate and distinct from the foreclosure and was legal in nature. Accordingly McKown was entitled to a jury trial on this claim** and we reverse the circuit court's order referring this claim to the master.

Id. at 347, 733 S.E.2d at 621-22. (emphasis added).

In this case, Appellant is not the mortgagor; thus, it is not the party being foreclosed upon. The only claim against Appellant is for the recovery of money based on the separate contractual obligation of the guaranty, just like the claim against the guarantor in *BADD, LLC*, *supra*. In other words, while both equitable and legal claims are asserted against the mortgagor (Copper Lakes), there is only a legal claim asserted against Appellant, the guarantor. Although it may be proper for the foreclosure claim against Copper Lakes to proceed before the master, the guarantor is entitled to a trial by jury. "A right to a jury trial exists where it is sought to obtain a personal judgment against one other than the mortgagor." 1450A C.J.S. Juries § 83. A party in a foreclosure action is entitled to a jury trial on legal issues that are independent of the foreclosure suit. *State ex rel. McAdams v. District Court*, 105 N.M. 95, 96, 728 P.2d 1364, 1365 (1986), *BADD, LLC, supra*. Whether a party is liable

²The circuit court found that the main purpose of the action --i.e., the foreclosure-- was equitable in nature and referred both the foreclosure and the guaranty claims to the master and the plaintiff appealed.

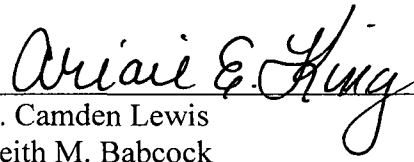
as a guarantor is a legal issue independent of the foreclosure action that entitles the party to a jury trial. *Id.* at 97, 728 P.2d at 1366. *Sunwest Bank of Clovis, N.A. v. Garrett*, 113 N.M. 112, 115, 823 P.2d 912, 915 (1992).

Here, Appellant only guaranteed performance of Copper Lakes' obligations on the Note.³ It is well settled that a guarantor's liability is an independent contractual obligation. *Citizens and Southern Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 543-45, 443 S.E.2d 549, 551 (1994) ("The general rule in South Carolina ... is that a guaranty of payment is an obligation separate and distinct from the original note."). Thus, Appellant's liability on the guaranty is a separate obligation that arises in law, for the recovery of money, thereby triggering the right to a jury trial: "To the Court belongs all issues of law and chancery, and to the jury all questions of fact in cases at law for the recovery of money or any specific real or personal property." *Collier v. Green*, 244 S.C. 367 (1964); *Carolina First Bank v. BADD, LLC*, *supra*.

CONCLUSION

As set forth herein, Rule 53, SCRCP, only allows an *ex parte* referral to the master in pure foreclosures. Furthermore, Appellant, as third-party guarantor, against which only legal claims are asserted, is entitled to a trial by jury. Thus, the Order of Reference must be vacated.

³Respondent acknowledges that Appellant's obligations are limited to the Note: "...Silver gave to Plaintiff its Guaranty Agreement in which it unconditionally guaranteed to the Plaintiff punctual payment and performance of the obligations of Copper Lakes evidenced the Note." [R.p. 12]



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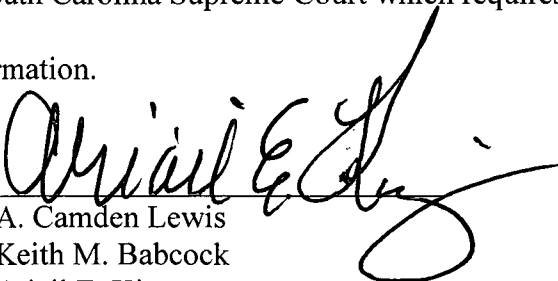
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief complies with Rule 242, SCACR,
and with the August 13, 2007 Order of the South Carolina Supreme Court which requires
redaction of certain personal identifying information.



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