THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No: 2011-CP-07-5059
Court Of Appeals Number:

CoastalStates Bank, Respondent,

v.

Hanover Homes of South Carolina, LLC; Hanover Homes, Inc.; George Cosman, Defendant,

Of Whom George Cosman is the Appellant.

George Cosman, Third-Party Plaintiff,

v.

Phillip Petruzzelli, Third-Party Defendant

FINAL BRIEF OF APPELLANT

Richard R. Gleissner
Gleissner Law Firm, LLC
1237 Gadsden Street, Suite 200A
Columbia, South Carolina 29201
(803) 787-0505
Attorneys for Appellants

Russell P. Patterson
P.O. Drawer 8047
Hilton Head Island, SC 29938
(843) 341-9300
Attorneys for Respondents

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(803) 787-0505
Attorneys for Appellants

Russell P. Patterson
P.O. Drawer 8047
Hilton Head Island, SC 29938
(843) 341-9300
Attorneys for Respondents

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STATEMENT OF ISSUES ON APPEAL

I. Whether the language of the Guarantees provided for liability of Cosman when the obligations of the Borrower were fully satisfied?

II. Whether the language of the Guarantees created a separate demand note and, thus, caused the statute of limitations for the cause of action to begin to run upon the execution of the Guarantees and to expire three years after the execution?

III. Whether a court may grant the Respondent summary judgment on an action for breach of contract and also find a material issue of fact as to whether the Respondent breached that same contract?

STATEMENT OF THE CASE

Coastal State Bank (the "Respondent" or the "Bank") brought this action seeking payment on three Guarantees (the "Guarantees") signed by George Cosman ("Cosman" or "Appellant"), which were executed contemporaneous with the execution of three Notes (the "Notes") from Hanover Homes of South Carolina, LLC (the "Borrower") to the Bank. (R. p. 19). On or around June 26, 2012, the Bank moved for summary judgment on its action and the defenses and counterclaims of Cosman (R. pp. 96-111). This motion was supplemented on July 27, 2012 (R. pp. 117-120). Similarly, Cosman moved for summary judgment on the Banks action and the Cosman's defense of the statute of limitations on July 16, 2012 (R. p. 56)

On October 1, 2012, Appellant received notice of an order denying his motion and granting the Bank's motion in part. *See September 17, 2012 Order on Cross Motions for Summary Judgment, p. 1.* This appeal was filed on October 12, 2012 (R. pp. 312-330). The Appellant filed an Amended Notice of Appeal on December 5, 2012 (R. pp. 331-349) pursuant to the request of the South Carolina Court of Appeals, correcting the caption of the initial appeal.

STANDARD OF REVIEW

When reviewing the granting of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose,* 350 S.C. 488, 567 S.E.2d 857 (2002); *Ferguson v. Charleston Lincoln Mercury, Inc.,* 349 S.C. 558, 564 S.E.2d 94 (2002). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Faile v. South Carolina Dep't of Juvenile Justice,* 350 S.C. 315, 566 S.E.2d 536 (2002); *McNair v. Rainsford,* 330 S.C. 332, 499 S.E.2d 488 (Ct.App.1998). If triable issues exist, those issues must go to the jury. *Young v. South Carolina Dep't of Corrections,* 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.,* 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Bayle v. South Carolina Dep't of Transp.,* 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Hall v. Fedor,* 349 S.C. 169, 561 S.E.2d 654 (Ct.App.2002). Moreover, summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Lanham v. Blue Cross and Blue Shield,* 349 S.C. 356, 563 S.E.2d 331 (2002); *Trivelas v. South Carolina Dep't of Transp.,* 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001).

FACTS

In or around 2007 Cosman entered into a series of business deals with Philip Petruzzelli ("Petruzzelli"). (R. pp. 122-23). These business deals entailed the development of several properties in Florida and South Carolina (the "Sites"), in which Petruzzelli and his companies, as general contractors for the Sites, would hire Cosman in some role to act as the builder of homes on the Sites. (R. p. 123 ¶ 10). In consideration for Cosman's role as builder at the Sites, Petruzzelli promised Cosman a 50% share in the profits of the business endeavors. Cosman had no experience in developing property and spent most of his life building and selling property. (R. p. 123 ¶ 10). In order to fund the development of the Sites, Petruzzelli and his companies approached several lending institutions including the Bank. (R. p. 122 ¶ 6). Petruzzelli and several of his good friends that worked for the Bank were able to reach a deal regarding financing the project site located in South Carolina. Plaintiff's Complaint (R. pp. 19-24); (R. p. 122 ¶ 6); and Deposition of George Cosman, (R. p. 179). After Petruzzelli and the Bank determined the terms of the agreement, the Bank and Petruzzelli had Cosman execute the Guarantees on or around July 23, 2007. Plaintiff's Complaint (R. pp. 19-24); Affidavit of George Cosman (R. p. 2 ¶ 6); and Deposition of George Cosman (R. p. 179). Cosman's motivation for entering into the agreement to guarantee the debt was based solely upon representations by Petruzzelli that he would indemnify Cosman and representations by the Bank that the property had a value that far exceeded the loan amount. (R. p 123 ¶ 11) and (R. pp. 135-139); Affidavit of George Cosman (R. p. 123 ¶ 11).

In this case, Appellant signed three guarantee agreements: one relating to the

development loan (the "First Guarantee") and two guarantees relating to the construction of two spec houses (the "Other Two Guarantees"). The First Guarantee states that the Appellant has guaranteed certain liabilities defined as the "Guaranteed Obligations". Guarantee (R. p. 82 at ¶1). The Guaranteed Obligations are defined as:

> " (a) all ***liabilities and obligations of the Borrower*** to the Bank [...]
> (b) all renewals, extensions, modifications and revivals of such obligations and liabilities;
> (c) all interest on such obligations [...]
> (d) all reasonable attorney fees and costs and expenses incurred by the Bank in collecting or attempting to collect the obligations and liabilities [...]"

Guarantee (R. p. 82 at ¶1). Similarly, under the Other Two Guarantees, the Guarantor guarantees certain "Specific and Future Debt." Guarantee (R. p. 89 ¶2); Guarantee (R. p. 93 ¶2). "Debt" is defined as

> "the payment and performance of each and every debt, of every type, purpose and description that the Borrower either individually, amount all or a portion of themselves, or with others, may now or at any time in the future owes [the Bank], including, but not limited to the following described Debt(s) [...]
>
> A promissory note or other agreement [...] from [Borrower] to [the Bank][...]
>
> In addition, Debt refers to debts, liabilities, and obligations of the Borrower [...] whether now existing, created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction [...]"

Guarantee (R. pp. 88-91 ¶2); Guarantee (R. pp. 92-95 ¶2).

Thus, by their terms, all three Guarantees are contingent on the underlying liability and obligations of the Borrower whether defined as "Debt" or defined as "Guaranteed Obligations". Nowhere in any of the three Guarantees does the Guarantor guarantee any other obligation. The sole, exclusive and only obligation being guaranteed is "all liabilities and obligations of the

Borrower to the Bank."

According to the terms the Guarantees, the agreement is contingent upon the existence of an obligation from the Borrower to the Bank. When that obligation was satisfied, Cosman argued that this satisfaction in turn satisfied the obligation of Cosman to the Bank. The parties agree that the Borrower has fully satisfied all obligations to the Bank. See (R. pp.62-65) and (R. pp. 66-69). Cosman was not a party to this agreement and in no way consented to continue to be liable for any obligation after the obligation of the Borrower was satisfied. Id. Further, Cosman never reaffirmed any obligations after the satisfaction and has never made a payment on any obligation.

After the loan defaulted, in the summer of 2010, it was discovered that the Bank and Petruzzelli began to conspire in an effort to harm Cosman. Affidavit of George Cosman (R. p. 124). During this period Cosman was not contacted by the Bank, but instead was told by Petruzzelli that he was working out an agreement with the Bank for them both to be released from all liability. Thus, the Bank never contradicted and never even attempted to contradict anything that Petruzzelli was telling Cosman. (R. p. 124). Attached to Cosman's Affidavit as Exhibit 5 (R. p. 141) is a copy of an email from Mr. Lawson dated July 20, 2010. In this email, Lawson provides information about a discussion he had with Petruzzelli in which they discussed selling the property of HHSC without Cosman's consent or knowledge. Cosman believes that this is the beginning of the conspiracy. Cosman did not know about this email or the conspiracy until this litigation. (R. p. 124 ¶16).

Attached to George Cosman's Affidavit as Exhibit 6 (R. pp. 142-144) is a copy of an email exchange between Mr. Lawson and Steve Clayton, another officer at the Bank, dated

October 4, 2010. In this email, Mr. Lawson and Mr. Clayton discuss their knowledge that Petruzzelli transferred his assets and committed fraud. In a follow up email on October 4, 2010, Mr. Clayton informs additional officers at the Bank that Petruzzelli transferred assets offshore. Basically, the Bank acknowledged that they knew Petruzzelli was committing fraud. Nevertheless, Mr. Clayton recommends that they should join with Petruzzelli in reaching a deal to sell the property of HHSC, without Cosman's consent or knowledge, and with the clear intent of harming Cosman. Affidavit of George Cosman, (R. p. 124 ¶17).

Attached to George Cosman's Affidavit as Exhibit 7 (R. pp. 145-146) is a copy of an email from Mr. Clayton dated January 7, 2011. In this email, Mr. Clayton is celebrating the consummation of the Bank's conspiracy with Petruzzelli and actually indicates that "the fun will begin as we proceed to collect the deficiency from" George Cosman. Affidavit of George Cosman, (R. pp. 124-125 ¶18).

Clearly, Cosman provided sufficient evidence to create a genuine issue of material fact as to his counterclaim that the Bank engaged in this conspiracy with the intent to harm him, just to have "fun." Further, Cosman provided sufficient evidence to create a genuine issue of material fact that the bank engaged in a breach of the covenant of good faith and fair dealing that is incorporated into all three of the guarantee agreements.

Further, attached to George Cosman's affidavit as Exhibit 8 (R. pp. 147-149) is a copy of a Settlement Statement relating to the sale of the undeveloped property that was owned by HHSC. Pursuant to this Settlement Statement, the Bank, with Petruzzelli's help, sold the $4,300,000 worth of property for $630,000. They never informed Cosman about this sale, never asked Cosman if he would pay more, and never gave Cosman the chance to object to this sale.

Further, in reviewing the Statement it shows the lender for this loan is the Plaintiff. Thus, the Plaintiff controlled the purchase price for this property by determining how much it would lend the new purchasers. Affidavit of George Cosman, (R. p. 125).

As stated in Cosman's affidavit, the only inference he could draw from this conduct is that "the Bank joined with their good friend Petruzzelli, knowing he was a crook, in an effort to harm me and commit a fraud upon me." Affidavit of George Cosman, (R. p. 125 ¶20). Further, as stated in the affidavit of George Cosman, in engaging in this conduct, there was created a genuine issue of material fact as to whether "the Bank acted in good faith" and "fairly dealt" with George Cosman. Affidavit of George Cosman, (R. p. 125 ¶21).

Based upon these facts, George Cosman answered, raised these facts as affirmative defenses and raised these facts as counterclaims.

Cosman moved for summary judgment based upon the fact that the only obligations that had been guaranteed were satisfied. The Bank moved for summary judgment claiming that even though the obligations of the borrower were satisfied, Cosman should still be liable to the Bank.

The Court while finding that genuine issues of material fact remained as to the Cosman's affirmative defenses and counterclaims, nevertheless granted a monetary judgment to the Bank against Cosman on the issues of his liability under the three guarantee agreements and on his affirmative defense of the statute of limitations. This appeal followed.

LEGAL ARGUMENT

I. *The plain meaning of the Guarantees did not provide for liability of Cosman in the event the obligations of the Borrower were fully satisfied.*

Under South Carolina contract law, the Guarantees, when read in favor of Cosman, create

an obligation on Cosman which has been satisfied. Under South Carolina law, when a contract is plain and capable of legal construction, the language of the contract determines the full force and effect of the document. *Conner v. Alvarez*, 285 S.C. 97, 328 S.E.2d 334 (1985). South Carolina courts have held that ambiguity in a contract must be construed against the party who prepared it. *Duke Power Co. v. S.C. Public Serv. Comm'n.*, 284 S.C. 81, 326 S.E.2d 395 (1985). Similarly, South Carolina law has evolved to provide additional protections to guarantors. See Code Ann. §36-3-101 et seq. and S.C. Code Ann. §36-4-101 et seq. A reading of the terms of the Guarantees before the Court in a light most favorable to Cosman should not have resulted in the Trial Court granting summary judgment to the Bank. Instead, the terms of the Guarantees should dictate the Trial Court granting summary judgment to Cosman.

Since the 1980's, the law has evolved and as a result the documents that created guarantee obligations have changed. South Carolina law holds that a prototypical guarantee of payment is an absolute or unconditional promise to pay a particular obligation. *AMA Management Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868 (Ct.App.1992). Further, the rights of the parties must be measured by the contract which the parties themselves made, regardless of its wisdom, reasonableness, or failure of the parties to guard their rights carefully. *Conner v. Alvarez*, supra; *Gilstrap v. Culpepper*, 283 S.C. 83, 320 S.E.2d 445 (1984). Thus, the Court is only able to enforce the Guarantees as they are written, no matter the result to the Bank. South Carolina law has developed so that a guarantor may be discharged under certain circumstances if modifications of the obligations between the bank and the borrower are made without the consent of the guarantor. The written guarantees have been written to accommodate and be consistent with these developments in the law.

The sole, exclusive and only obligation guaranteed in the three guarantees is the guarantee of "all liabilities and obligations of the Borrower to the Bank." Giving these terms their plain and ordinary meaning, the Trial Court should have found that the obligations of Cosman are contingent on the obligation of the Borrower to the Bank. Without an obligation between the Borrower and the Bank, Cosman is discharged of any obligation under the Guarantees. The Bank admits that it entered into an agreement with the Borrower that satisfied any and all liabilities and obligations of the Borrower to the Bank. Thus, the Guaranteed Obligations and the Debt were satisfied by the Borrower. The plain meaning of such an agreement was to reduce the liabilities and obligations of the Borrower to nothing. A reading of the terms of the Guarantees finds that the obligation of Cosman to the Bank is nothing.

The Trial Court's Order and the Respondent argue that Article 2 of the First Guarantee creates some obligation separate and apart from the obligation of the borrower. But, a careful reading of Article 2 establishes that this section does not create an obligation separate and apart from the sole, exclusive and only obligation being guaranteed, "all liabilities and obligations of the Borrower to the Bank." In Article 2 Cosman "acknowledges and understands that nothing except the full and final payment of the [obligations between Borrower and Bank] shall release and discharge [Cosman]." This language only supports Cosman's interpretation of the Guarantees. The obligations of the Borrower to the Bank are the only obligations that he is guaranteeing. As argued before the trial court, reading the contract in favor of Cosman, the best argument that the Bank could offer is that there remains, at least, a genuine issue of material fact as to whether the Plaintiff may enforce an obligation against Cosman of a debt which was satisfied.

The Respondent's reliance on Article 2 of the First Guarantee is misplaced. The particular language cited in the Trial Courts Order and extensively by Respondent reads as follows:

> "Guarantor agrees that the Bank may take any or all of the following actions without diminishing, impairing, limiting, or abridging the Guarantor's obligation hereunder; [...]
> iii. any release or discharge by the Bank of the Borrower [...] including without limitation any other guarantor; [...]
> iv. [...] any settlement made, with the Borrower, or any co-maker, [...] or any other guarantor or with respect to the Guaranteed Obligations"

Guarantee (R. p. 83 ¶2). To read such language to stand for the premise that the Guarantor is obligated for the amount satisfied would lead to the ridiculous outcome of having Cosman agreeing to pay the full amount of the notes, regardless of any payments made by the Borrower to the Bank. Such a reading cannot be considered reasonable. A reasonable reading of this language would interpret the section of the First Guarantee to have the guarantor agree that the Bank may release the Borrower of some of the Debt without completely discharging the guarantor of the remaining debt. Reading the Guarantees as the Bank would argue would result in guarantors being forever obligated to current and future debts created by a bank and borrower that may have been immediately forgiven by the bank. Such a reading would lead to the provision being unconscionable. *Fanning v. Fritz's Pontiac-Cadillac-Buick Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996) (holding unconscionability is characterized by the "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them."). The Banks interpretation as adopted by the Trial Court is improper.

Under the previously reviewed prototypical guarantees, the Courts have found an absolute guaranty of payment that the creditor may maintain an action against the guarantor upon default

of the debtor. *Peoples Federal S & L v. Myrtle Beach Retirement Group*, 300 S.C. 277, 387 S.E.2d 672 (1989). The development of the law since this decision, as found in the Restatement of the Law, Third, Suretyship and Guaranty (1996), changed the understanding of the prototypical guarantee. Similarly, the guarantee documents drafted in the 1980's are different than the guarantee documents involved in this case. The law developed so that a guarantor may be discharged under certain circumstances if modifications of the obligations between the bank and the borrower are made without the consent of the guarantor. This development is recognized in South Carolina when the legislature enacted the current version of Articles 3 and 4 of the UCC found in S.C. Code Ann. §36-3-101 et seq. and S.C. Code Ann. §36-4-101 et seq. In many section of the Articles 3 and 4, reference is made, with approval, to the Restatement of the Law, Third, Suretyship and Guaranty (1996) and specifically to Sections 37, 38, and 41 that provide several protections to guarantors. In examining these sections, one court stated "it is an elementary proposition of suretyship that where a principal is released by the creditor, the surety, whose obligation is accessory to the main obligation, is also discharged." *U.S. v. Sentry, Ins.*, 21 Ct. Int'l Trade 1073, 980 F.Supp. 481 (1996) aff'd, 194 F.3d 1328 (Fed. Cir. 1999); *see also, Dressler Properties, Inc. v. Ohio Heart Care, Inc.*, 2005-Ohio-1069, 56 U.C.C. Rep. Serv. 2d 716 (Ohio Ct. App. 5th Dist. Stark County 2005) ("[I]f the obligee ... releases the principal from liability, the surety is likewise released").

Under present law, the satisfaction of the Borrower's obligation to the Bank resulted in the satisfaction of Cosman's obligation. The Plaintiff may argue that it included a reservation of rights against Cosman in its satisfaction of all of the obligations of the Borrower. But, the development of the law provides unquestionably that such a reservation of rights does nothing.

The Restatement provides for protections of a guarantor even when a discharge agreement between the bank and borrower provides for a reservation of a right of action against the guarantor. Specifically, notwithstanding language in a release that seeks to prevent the discharge of the guarantor, the Restatement provides for discharge of the guarantor when the creditor fails to take additional steps to prevent a loss to the guarantor. The purpose for this section, as stated in the official comments, is to prevent the undue risk of opportunistic behavior by the bank and borrower by permitting releases to be negotiated between the borrower and the person entitled to enforce the instrument without regard to the consequences to the guarantor. *See* S.C. Code Ann. § 36-3-605 (Official Comment Paragraph 2). In this case, the Bank did nothing to prevent loss to Cosman. In fact, the Bank did not even consult with Cosman concerning the satisfaction of the Borrower's obligations. See Section 38 of the Restatement (the guarantor's liability is discharged when the creditor fails to take steps necessary preserve the guarantor's rights against the borrower). The Bank has fully discharged all obligations of the Borrower, as admitted by Bank, without taking some action to preserve the Cosman's rights against the Borrower. Thus, Cosman has been discharged of his obligations.

The Trial Court erred in holding those cases which considered guarantees with materially different terms than those before the court were controlling. Had the Guarantees provided for the guarantee of "all losses, costs, attorney's fees or expenses which [bank] may suffer by reason of [borrower's] default" as stated in *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 294, 478 S.E.2d 63, 65 (Ct. App. 1996), this matter would have a different result. By guarantying all losses suffered by reason of the borrower's default, the guarantor in *Cochran* guaranteed more than the obligations of the borrower. The obligation of the guarantor was contingent upon the

default of the borrower. The Guarantees before the court do not guarantee losses which the Bank may suffer by reason of the borrower's default. The language only guarantees the ***obligations*** of the borrower. The Guarantees simply do not provide for an obligation separate and apart from the Borrower's obligation.

Further, the Trial Court is only able to enforce the contracts as written and not some general understanding of guarantees. See *Culpepper*, 283 S.C. 83, 320 S.E.2d 445. In the present Guarantees, the absolute obligation is contingent on the "obligations of the borrower." As such, the decisions rendered by South Carolina courts regarding guarantees with differing language are not applicable. The Courts of South Carolina hold that contract interpretation dictate the effect of the Borrower's satisfaction on the obligation of Cosman. See *Citizens and Southern Nat. Bank of South Carolina v. Lanford*, 313 S.C. 540, 443 S.E.2d 549 (1994). Specifically, in *Lanford*, the court held that the guaranty agreement in that case "unambiguously places all guarantors, jointly and severally, under liability for 100% of the contract debt." In the present case, the contract debt is satisfied and, thus, $0.00. Accordingly, as held in *Lanford*, there can be no remaining liability for Cosman. Therefore, the Trial Court erred in not enforcing the plain meaning of the contract before it and instead considering a prototypical guarantee agreement.

Likewise, the Trial Court's reliance and interpretation of *Cochran* was misplaced. The Trial Court held that *Cochran* supported the proposition that a release of the borrower would not affect the independent obligation of a guarantor. The Supreme Court in *Cochran*, however, held that a debt against a borrower that was ***no longer enforceable or released by operation of law*** would not affect the duties of the guarantor. *Supra*. Thus, while no longer enforceable, the debt guaranteed remained and in accordance with the guaranty agreement, so did the obligation of

guarantor of that debt. In the present action, however, Cosman has not argued that the underlying debt is no longer enforceable, but in fact the underlying debt is satisfied. The Guarantees have separate and distinct provisions regarding an event of the underlying debt being unenforceable by operation of law. Guarantee (R. p. 84); Guarantee (R. p. 89); Guarantee (R. p. 93). Accordingly, the Trial Court erred in granting the Bank summary judgment and ruling that there remained no genuine issues of material fact regarding the obligations of Cosman under the terms of the Guarantees. In the light most favorable to the Cosman, the satisfaction of the Borrower's debt has, according to the Guarantees, reduced Cosman's obligation to the Bank to nothing.

II. *The plain meaning of the language of the Guarantees, similarly, created a separate demand note whose cause of action commenced upon the execution of the Guarantees.*

The Bank is barred from bringing this action against Cosman by South Carolina law. Under South Carolina law, the Guarantees between Cosman and the Bank had a three year statute of limitations which began to run upon execution and acceptance of the agreement by the parties. By Respondent's admission, this action was brought more than three years from the execution and acceptance. Thus, the Respondent's action against Cosman is barred. The Trial Court erred in not granting Cosman summary judgment.

The law regarding the statute of limitations and its application to contracts is settled in South Carolina. *See Sollee & Warley v. Meugy*, 17 S.C.L. 620 (S.C.Ct. App. 1830). The period of time for commencing an action involving contracts is prescribed by S.C. Code Ann. § 15-3-530. It provides for a three-year statute of limitations for a cause of action accruing on or after April 5, 1988. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to

human affairs. *See Anonymous Taxpayer v. South Carolina Dept. of Revenue*, 377 S.C. 425, 661 S.E.2d 73 (2008). Thus, a cause of action based upon a contract claim is barred if it is not brought within the appropriate three year period.

South Carolina law holds that the statute of limitations begins to run at the time the cause of action accrues. *Harvey v. S.C. Dep't. of Corr.*, 338 S.C. 500, 527 S.E.2d 765 (S.C. Ct. App. 2000). The fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it. Id. Thus, a particular cause of action accrues "at the moment when the plaintiff has a legal right to sue on it." Id. at 508, 769. Under contract law, the terms of the agreement determines the moment the plaintiff has a legal right to sue. *See State v. McClinton*, 369 S.C. 167, 631 S.E.2d 895 (2006)(The court held that a breach of contract action *usually* accrues at the time a contract is breached or broken). Thus, a court looks to the contract terms in determining when the cause of action accrues. Id.

The court uses the same analysis when determining the accruing of a cause of action for notes payable on demand as is the case with the Guarantees. The law is well settled that a promissory note payable on demand is due immediately, and, thus, the statute of limitations runs in favor of the maker from the date of the execution of the instrument. *Coleman v. Page's Estate*, 202 S.C. 486, 25 S.E.2d 559, 559-60 (1943), *See also Cammer v. Harrison*, 1822 WL 1826, 13 S.C.L. 246 (Nov. 99, 1822). The same rule has been applied to due bills and guarantees payable on demand. *See Guignard v. Parr*, 1850 WL 2765, 38 S.C.L. 184 (Nov. 99, 1850)(holding that plaintiff's right to sue under due bills accrued from the time of execution regardless of future due payments), and *Meugy*, Supra at 623(held that guarantee agreement accepted by plaintiff more than four years prior to the bringing of the action was barred). Thus, contracts that are

enforceable upon acceptance or execution of the parties accrue from the time they are accepted or executed.

The Guarantees in dispute in this matter was enforceable upon execution and thus, Respondent's action is barred under the statute of limitations. The Guarantees in dispute in the Respondent's action states that the obligations of Cosman were "absolute and unconditional". Further, the Guarantees state that it creates a "direct and primary obligation of [Cosman] to the Bank ***without regard to any other guarantor or obligor to the Bank***." Guarantee (R. p. 83 ¶2). Further, the Guarantees provide that the obligation of Cosman is absolute irrespective of any lack of validity or enforceability of the underlying note. Guarantee (R. p. 84 ¶1); Guarantee R. p. 89 ¶4); Guarantee (R. p. 93 ¶4). The plain meaning of these terms is that from the day the guarantee is executed, the Bank has the right to bring an action against the Guarantor. The guarantor's obligation is independent of any default on the part of any other party.

While guarantees of the past provided for the creation of obligations upon the event of the borrower's default, the Guarantees in dispute here explicitly states that Cosman is directly and primarily liable and obligated to pay "if and when called upon to do so." The terms of the Guarantees provide for the Bank to accelerate the debt and in no way limit Cosman's liability under the contract to an event of default by the Borrower. Thus, under South Carolina law, the statute of limitations runs from the date of the execution, July 19, 2007, and Respondent is barred from bringing this action against Cosman more than three years later.

A further reading of the Guarantees or the Notes would result in the determination that such contracts are perpetual and, thus, under South Carolina law, in the very nature of a demand note. The Supreme Court in *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 102,

447 S.E.2d 199, 201 (1994) held that contracts without expressed expirations are not favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract. The court held that

> "[w]here the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually. In such a case the courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other." *(internal citations omitted).*

Alert Cable TV, Inc., 316 S.C. 98, 102, 447 S.E.2d 199, 201. The provisions within the Guarantees and the underlying notes provides for obligations from Borrower to the Bank that "may now or at any time in the future" and "renewals, extensions, modifications and revivals of such obligations and liabilities." Guarantee (R. p. 82 ¶1); Guarantee (R. p. 89 ¶2); Guarantee (R. p. 93 ¶2). The language and nature of the Guarantees and the circumstances surrounding them, would unreasonably impute to Cosman an intention to make the Guarantees binding perpetually. Under South Carolina law, the Guarantees may be terminated at any time and are therefore enforceable upon demand. *Alert Cable TV, Inc.*, 316 S.C. 98, 102, 447 S.E.2d 199, 201. The Court is only allowed to enforce the contract before it, regardless of how poorly the Bank drafted the contract. *Conner v. Alvarez*, supra. The language of the Guarantees creates a primary obligation that is unconditional and creates a perpetual obligation of Cosman that may be enforced upon execution. Therefore, the Trial Court erred in not dismissing the Respondent's action as barred by the statute of limitations.

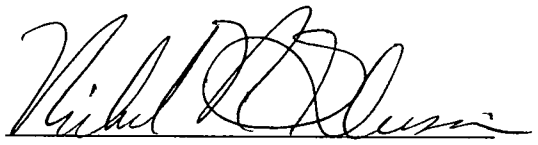
III. *A court may not grant summary judgment on an action for breach of contract while also finding a genuine issue of material fact as to defenses to the same breach of contract claim.*

The Trial Court erred in finding there remained no genuine issue of material fact as to the Respondent's action while conversely holding that the Cosman's defenses to Respondent's action did create issues of material fact. South Carolina law is well settled. Summary judgment is appropriate when it is clear there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Café Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991). Summary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusions to be drawn therefrom. *MacFarlane v. Manly*, 274 S.C. 392, 264 S.E.2d 838 (1980). In the Order granting summary judgment to the Respondent, the Trial court found genuine issues of material fact as to the Cosman's defenses to Respondent's action. Such a finding, by its very nature, is inconsistent with a holding that there is no issue of material fact as to the initial claim. A holding that grants Cosman the ability to proceed on a defense against the Respondent's action must preclude summary judgment on Respondent's action. In essence, the Trial Court has held that the Respondent has a right to enforce its contract against Cosman, though that contract may later be held unenforceable. Under South Carolina law, the Trial Court's order reached this conclusion in error and must be reversed.

CONCLUSION

The Trial Court erred in granting the Respondent summary judgment as to its cause of action based upon the Guarantees. The plain meaning of the Guarantees did not provide for liability of Cosman in the event the obligations of the Borrower were fully satisfied. Similarly, the plain meaning of the Guarantees created a separate demand note whose cause of action

commenced upon the execution of the Guarantees. Finally, a court may not grant summary judgment on an action for breach of contract while also finding a genuine issue of material fact as to defenses to the same breach of contract claim. Thus, the Trial Court has made errors in its granting summary judgment to Respondent that must be reversed.

By: 

Richard R. Gleissner
Gleissner Law Firm, LLC
1237 Gadsden Street, Suite 200A
Columbia, South Carolina 29201
(803) 787-0505
Attorneys for Appellant

Columbia, South Carolina
h 8, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No: 2011-CP-07-5059
Court of Appeals Number: 2012-213154

CoastalStates Bank, Respondent,

v.

Hanover Homes of South Carolina, LLC; Hanover Homes, Inc.; George Cosman, Defendant,

Of Whom George Cosman is the Appellant.

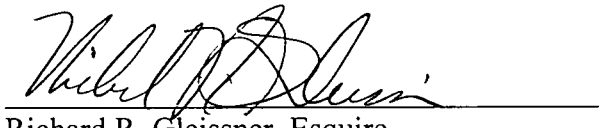
George Cosman, Third-Party Plaintiff,

v.

Phillip Petrozzelli, Third-Party Defendant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b) of the SC Appellate Rules.



Richard R. Gleissner, Esquire
Gleissner Law Firm, LLC
1237 Gadsden Street, Suite 200A
Columbia, South Carolina 29201
(803) 787-0505
Attorneys for Appellants

July 17, 2013