THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Earnest 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, Defendants,

Of Whom George Cosman is the Appellant.

George Cosman, Third-Party Plaintiff,

v.

Phillip Petruzzelli, Third-Party Defendant.

FINAL BRIEF OF RESPONDENT

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STANDARD OF REVIEW

In reviewing the granting of Summary Judgment by the Trial Judge, this Court applies the same rules and standards under Rule 56(c) SCRCP. Nexsen V. Haddock, 353 S.C. 74, 576 S.E.2d 183 (Ct.App. 2003). As there are no disputed facts essential to the determination of this appeal, this ". . . Court is free to review whether the trial court properly applied the law to those facts." WPW Prop. V. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000).

LEGAL ARGUMENT

On or about July 19, 2007, CoastalStates Bank ("Bank") made a series of three (3) loans totaling $3,632,000 to Hanover Homes of South Carolina, Inc. ("Borrower") in connection with the development of real estate in Beaufort County. The loans were guaranteed by the two 50% members of the Borrower, Cosman, his partner, Phillip Petruzzelli ("Petruzzelli"), as well as by Hanover Homes, Inc. ("Hanover Homes"). The three loans can be summarized as follows:

	Date	Amount	Borrower	Guarantors	Real Estate Collateral
1.	7/19/07	$2,600,000	Hanover Homes of South Carolina, Inc. (R.pp. 208-213)	Cosman; Petruzzelli; Hanover Homes (R.pp. 214-219; 351-356)	21 vacant lots at the Traditions
2.	7/19/07	$520,000	Hanover Homes of South Carolina, Inc. (R.pp. 221-223)	Cosman; Petruzzelli; Hanover Homes (R.pp. 224-226; 357-360)	Model home to be constructed on Lot B–48 Traditions
3.	7/19/07	$512,000	Hanover Homes of South Carolina, Inc. (R.pp. 228-231)	Cosman; Petruzzelli; Hanover Homes (R.pp. 232-234; 361-364)	Model home to be constructed on Lot B–47

On September 17, 2010 the completed model house on Lot B-48 funded with the $520,000 loan was sold by Borrower to a third party for $259,000. $220,386 of the sales proceeds was applied to the loan. (R.p. 249, Ex. 56 line 504; pp. 150-151, § 4(B))

On October 22, 2010, the Bank, Borrower and Petruzzelli reached an agreement ("Petruzzelli Agreement" – R.pp. 250-252) whereby the Borrower agreed to sell the 21 lots securing the $2,600,000 loan to a third party in exchange for Bank agreeing to release the Borrower and Petruzzelli from their obligations under all three (3) loans. The Petruzzelli Settlement expressly provided in Section 5 that the Bank reserved its rights, and was not releasing the remaining guarantor, Cosman. Said language states as follows:

> "5. **No Release of Other Guarantors**. Lender does not release or discharge any obligations, liabilities or guaranties of any other guarantor of the Notes and nothing provided for in this Agreement shall be construed as a waiver of any of Lender's rights and remedies with regard to any other guarantor of the Notes."

The 21 lots eventually closed on October 31, 2011 and the net proceeds of $604,295 were applied to the Bank's debt (R.pp. 258-261, Ex. 62 line 514; R.pp. 150-151 § 4(A)). The last model home on Lot B-47 was sold by Borrower to a third party on April 29, 2011. The net sales proceeds of $181,667 were applied to the loan balance (R.pp. 253-257, Ex. 61 line 517;

R.pp. 150-151 § 4(C)). After applying the proceeds from these three voluntary sales by Borrower to its loans, the Bank was still owed over $3,228,000, which is the subject of this action by the Bank against the remaining guarantor, Cosman. (R.pp. 150-151 § 4)

The primary issue raised by Cosman on appeal is whether he was released as a matter of law as a result of the release by the Bank of the Borrower and the guarantor, Petruzzelli, under the Petruzzelli Agreement. It is the Bank's position that such a result is inconsistent with the terms and provisions of the guarantee agreements signed by Cosman, the Petruzzelli Agreement, and South Carolina law.

ARGUMENT

I. The 2010 Petruzzelli Agreement with Borrower did not Release Cosman from his Personal Guarantees.

A. The express provisions of the Cosman Guarantees provide for continued liability of Cosman.

The Trial Court Order set forth a thorough, complete and proper analysis of the continuing liability of Cosman under his personal guarantees in this case. As is discussed below, Cosman's position is primarily based upon his interpretation of where South Carolina law may be heading, evolving, or simply should be. The Trial Court's decision deals with the reality of what the law is today, which was succinctly stated by Judge Kinard as "**a promise made is a promise kept.**"

Under South Carolina law, a guaranty is treated just like any other contract. The Court's goal in interpreting such a contract is to enforce the terms and conditions of the agreement reached between the parties. The intention of the parties, as expressed in the guaranty, should guide the Court. Peoples Federal Savings and Loan Association v. Myrtle Beach Retirement Group, Inc., 300 S.C. 277, 387 S.E.2d 672 (1989).

The three Cosman guarantee agreements (R.pp. 214-219; 224-226; 232-234), are the typical, customary guarantee forms used and enforced for decades by lenders in our State. Our courts have consistently found that such agreements are an absolute or unconditional promise to pay a debt if it is not paid at maturity. Citizens and Southern National Bank of South Carolina v. Lanford, 313 S.C. 540, 544, 443 S.E.2d 549, 551; AMA Management Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868 (1992). Further, such agreements have been construed to be a guaranty of payment, and an obligation separate and distant from the original note or obligation. Rock Hill National Bank v. Honeycutt, 289 S.C. 98, 344 S.E.2d 875 (1986); Lanford; Carolina First Bank v. Badd, 400 S.C. 343, 733 S.E.2d 619 (2012). The Court in Lanford, quoted 38 AmJur 2d, Guaranty, § 4, as follows:

> "The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter; and the responsibilities which are imposed by the contract of guaranty differ from those which are created by the contract to which the guaranty is collateral."

The terms and provisions of the subject guarantee agreements expressly provide the obligations under the guarantee are separate and distinct obligations of Cosman, separate and apart from the obligations of Borrower. The Guaranty on the $2,600,000 debt (R.pp. 214-216) reads as follows:

> §2 "**Absolute and Unconditional Guaranty; Waiver of Defenses**. This Guaranty is an absolute and unconditional guaranty of payment and not of collection and is in addition to any other Guaranty given by Guarantor to the Bank. **This Guarantee creates a direct and primary obligation of the Guarantor to the Bank without regard to any other guarantor or obligor to the Bank or the value of any security or collateral held by the Bank**. Without limiting the generality of the foregoing, the Guarantor's obligations hereunder may be enforced with or without joinder of the Borrower or any other guarantor and without proceeding against the Borrower, or any other guarantor or against collateral held by the Bank." (emphasis added)

It is difficult to imagine a clearer stated intention. Similar language is found in the remaining two guarantee agreements (R.pp. 224-226, § 4; 232-234, § 4). It is undisputed that the three loans were never paid in full (R.pp. 150-151, § 4). The Bank under the Petruzzelli Agreement, in an effort to liquidate the 21 vacant lots in an orderly fashion, agreed to release the Borrower and Petruzzelli, one of the guarantors, from any further liability, expressly reserving in § 5 of said agreement its rights against the remaining guarantor, Cosman. This specific scenario, a release by the Bank of the Borrower and another guarantor, was expressly permitted and agreed upon by Cosman in the guarantee of the $2,600,000 loan (R.pp. 214-219), as noted below.

> §2(a) ". . . 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 . . . :
>
> (i) the exchange, release, dissipation or surrender by the Bank of any collateral security, whether real or personal . . . ;
>
> (ii) the granting by the Bank of any waiver, release, or subordination, in whole, or in part, of . . . any mortgage . . . now or hereafter held by the Bank as collateral security for any liability or obligation of the Borrower;
>
> (iii) **any release or discharge by the Bank of the Borrower . . . including without limitation any other guarantor**; (emphasis added)
>
> (v) . . . any settlement made with the Borrower, or any co-maker . . . or any other guarantor or with respect to the Guaranteed Obligations;

Similar language is found in § 2(c) of said guarantee agreement.

> §2(c) ". . . Without limiting the generality of the foregoing agreements, consents and waivers by the Guarantor, the Guarantor expressly consents to and agrees that the Guarantor shall not be discharged by, any of the following:
>
> (ii) **the release or discharge without express reservation of rights of any one or more parties liable with respect to the Guaranteed Obligations**; (emphasis added)
>
> (iv) . . . the release of any property in which the Bank has any interest securing the Guaranteed Obligations;

In § 3 of the Cosman guarantee, Cosman again agrees the Bank can release the Borrower and Petruzzelli without notice to him, as follows:

> 3. **Waiver of Notices; Additional Waivers.** ". . . Guarantor hereby expressly waives all notices and defenses whatsoever with respect to this Guaranty or with respect to the Guaranteed Obligations, including but not limited to: . . . (d) **notice of the obtaining or release of any guaranty or surety agreement . . . mortgage . . . or other security for any Guaranteed Obligations**." (emphasis added)

Cosman also expressly waived any claimed right to receive notice of the sale of the real estate collateral to a third party, sold by Borrower, a limited liability company in which he was a 50% owner, under § 3, as follows:

> "Guarantor expressly waives . . . (m) notice of the disposition of any collateral held to secure the Guaranteed Obligations."

Finally, Cosman waived any right he held to assert an appraisal action in the event the properties were foreclosed (R.pp. 180, lines 4-25; p. 183, line 23 to p. 184, line 16; p. 188, lines 12-14; p. 190, lines 21-23; 206, 207, 220, 227). This latter right never arose since the Borrower voluntarily sold all of the real estate to third parties.

The remaining two guarantee agreements for the other two loans contain essentially identical provisions (R.pp. 224-226; 232-234; separate and distinct liability § 2; consent to sale, without notice §§ 5, 7, 9(A); release of Borrower or other guarantor § 9(A)(2)).

The Bank, in entering into the Petruzzelli Agreement with the Borrower and Petruzzelli in October 2010, unquestionably acted within the express terms and conditions of the three Cosman guarantees. The Courts are without authority to re-write the parties' agreement and conclude, as Cosman now asserts, that the very actions expressly provided for in the agreements of the parties result in Cosman being released with over $3,200,000 still unpaid to the Bank. Mailsource, LLC v. M. A. Bailey & Assoc., 356 S.C. 363, 369, 588 S.E.2d 635, 639 (Ct.App.

2003) Cosman would have this Court simply ignore all of the above provisions to reach his goal of being released from the three guarantee agreements.

As noted by the Trial Judge, our courts have already addressed the precise issue of a lender releasing a borrower or obligor and still pursuing a guarantor, interpreting a guaranty agreement with very similar language to the instant case. In Transouth Fin. Corp. v. Cochran, 324 S.C. 290, 478 S.E.2d 63 (Ct.App. 1996), Cochran, as guarantor, was sued under a personal, unconditional guarantee for a car dealership's ("Auto Sales") obligations. The guaranty provided the lender ("Transouth") could release any obligation or collateral and still pursue Cochran, the same language in the subject guaranty agreements. The Court held that Cochran's obligation was separate and distinct from that of the dealership and remained enforceable, even if the lender had released the dealership, stating as follows at p. 294:

> "The terms of the guaranty provided that Cochran's obligation to TranSouth would be unaffected if TranSouth decided to release Auto Sale's obligation. The expiration of the confession of judgment amounted to a release of Auto Sales, but did not relieve Cochran's liability to TranSouth."

Although Cosman cites no South Carolina cases in support of his argument he is released as a result of the Petruzzelli Agreement, he does rely on two foreign cases, neither of which are controlling or applicable. U.S. v. Sentry Ins., 980 F.Supp. 481 (1996), aff'd, 194 F.3d 1328 (Fed.Cir. 1994) involved a suit by the United States government on a bond filed by an insurance carrier for repairs to a shipping vessel. The repairs had been paid in full and the government filed a notice of satisfaction of the claim. The Court held the carrier had no further liability under the terms of the bond since the underlying debt was completely paid and a satisfaction issued. In this case, the Bank is still owed over $3,200,000 and never satisfied the debt (R.pp. 150-151, § 4). In addition, under § 5 of the Petruzzelli Settlement, the Bank expressly reserved its rights against Cosman.

Dressler Properties, Inc. v. Ohio Heart Care, Inc., 56 UCC Rep.Serv.2d 716, 2005-Ohio 1969 (Ohio App. 5 Dist. Mar 07, 2005), also relied on by Cosman, involved the enforcement of a lease guaranty under Ohio state law. A landlord filed an action for monetary damages against its tenant and a guarantor of the lease. Landlord thereafter signed a new lease and dismissed its suit against the original tenant, but still pursued the guarantor. The Ohio court held the landlord could not pursue the original guarantor under the first lease, based on Ohio surety law holding that the release of the primary obligor released the guaranty. In Dressler, there was no specific language in the lease guaranty that expressly authorized the lender to proceed against the guarantor, notwithstanding its release or settlement with the tenant or any other guarantor. Such language is clearly present in this case. In addition, the Bank expressly reserved its rights against Cosman in the Petruzzelli Agreement. No such reservation was present in the various lease agreements in Dressler.

The Ohio court in Stump Hill Farm, Inc. v. PFC Lamont Hill Mem. Army Garrison 2003, 2012-Ohio-4475 (Ohio App. 5 Dist Sept 24, 2012), later distinguishes its holding in Dressler. In this landlord-tenant dispute, the Court held the guarantor was still liable after the release of the tenant since the settlement agreement with the tenant expressly reserved the landlord's rights against the remaining guarantors. This is the same type of reservation of rights retained by the Bank in § 5 of the Petruzzelli Agreement. Thus, the Ohio Court would also hold Cosman liable under his three (3) guarantees.

This is a simple matter for the Court to enforce the parties' agreement. Under TranSouth, the continuing liability of Cosman is absolutely clear.

B. S.C. Code Ann. § 36-3-605 (1976) provides no Defense to Cosman.

Cosman asserts that the discharge of the Borrower under the 2008 amendments to S.C. Code Ann. § 36-3-605 (1976) bar Bank's claims. The Trial Court's Order sets forth in detail

why there is no basis for such a position. First, § 36-3-605(a) only applies to an "instrument," as defined under § 36-3-104. The three Cosman guarantees clearly do not meet the required elements of an instrument, as they are not for a sum certain, are not an unconditional promise to pay and Cosman was not a party to the original three notes. Our Courts have held under such circumstances a guarantee is thus not an instrument under § 36-3-104. Sunrise Savings and Loan Association v. Mariner's Cay Development Corp., 295 S.C. 208, 367 S.E.2d 696 (1998). This fact is expressly stated in the Reporter's Comments to § 605(a) – "This provision does not apply to the obligation of a guarantor under a separate agreement guaranteeing a maker's obligation on a note." See Also: 5A Lary Lawrence, Lawrence's Anderson on the Uniform Commercial Code, § 3-104:34 – "A continuing guaranty is not a negotiable instrument and therefore is not governed by Article 3 of the Code."

As noted by the Trial Judge, even if the Cosman guarantees were instruments, § 36-3-605 provides no relief to Cosman. § 36-3-605(2) expressly provides there is no release of the guarantor if the terms of the release provide for the retention of the rights against the other guarantors.

> "(2) Unless the terms of the release provide that the person entitled to enforce the instrument retains the right to enforce the instrument against the secondary obligor, the secondary obligor is discharged to the same extent as the principal obligor from any unperformed portion of its obligation on the instrument."

As discussed above, the Petruzzelli Agreement contains just such a retention of rights against Cosman. Section 5 reads as follows:

> "5. **No Release of Other Guarantors**. Lender does not release or discharge any obligations, liabilities or guaranties of any other guarantor of the Notes and nothing provided for in this Agreement shall be construed as a waiver of any of Lender's rights and remedies with regard to any other guarantor of the Notes."

There simply is no question that the exception under 36-3-605(2) applies and no release of Cosman occurred as a result of the Petruzzelli Agreement.

A third reason Cosman's assertion that § 36-3-605 provides a defense fails is that under Section 605(f), there is no discharge of a guarantor if the guarantor has waived defenses based on suretyship or impairment of collateral. Said provision reads as follows:

> "(f) A secondary obligor is not discharged under this section if . . . the instrument or a separate agreement of the party provides for waiver of discharge under this section specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral."

All three guarantee agreements signed by Cosman contain express waivers of said defenses. Said language in § 2 in the guarantee for the $2,600,000 loan reads as follows (R.pp. 214-219):

> "Guarantor expressly waives, to the fullest extent permitted by applicable law, each and every defense which under principles of guaranty or suretyship would otherwise operate to impair or diminish the Guarantor's direct and primary liability and obligation to pay the Guaranteed Obligations if and when called to do so."

Similar language is found in the other two Cosman guarantee agreements (R.pp. 224-226; 232-234, § 9(A)). As set forth in Official Comment 9 to this code section, the release of a guarantor under § 3-605 will occur only in an "occasional case," since the waiver of such defenses is found in most guarantee agreements. Such a waiver is clearly found in all three Cosman guarantees.

While Cosman makes passing reference in his brief to the Restatement of the Law, Third, Suretyship and Guaranty (1996), § 38, South Carolina did not adopt all of said provisions in 2008, but only certain specific provisions. The law as applicable in this case is clearly set forth in § 36-3-605 and TranSouth, which provides no relief to Cosman for the reasons discussed above.

II. The Bank Filed Suit Within the Three (3) Year Statute of Limitations.

Cosman asserts the Bank failed to file suit under his guarantees within three (3) years, apparently relying on S.C. Code Ann. § 15-3-530(1). It is not disputed the loans matured on

April 1, 2010 (R.pp. 235-238, § 7; 239-242, § 7; 243-246, § 7; 247-248, § 3(B)) and that litigation was commended on December 1, 2011, within nineteen (19) months of the maturity date of each loan. Cosman argues the novel position the start of the three (3) year period commenced on the date the guarantee agreements were signed (July 19, 2007) – not when the loans went into default or matured. Cosman has cited no South Carolina cases, or cases from any other jurisdiction, in support of his position which would represent a paradigm shift in the enforceability of guarantees used in thousands of transactions for decades in our State.

It is well established the statute of limitations begins to run on the date a cause of action accrues. With a contract, such as a guarantee, this occurs when there is a breach. State v. McClinton, 369 S.C. 167, 173, 631 S.E.2d 895, 898 (2006). Obviously there was no default under the loans by Borrower subject to the three Cosman guarantees when they were signed or when they were thereafter renewed. If the Bank attempted to enforce the guarantees when they were not in default, Cosman would easily have obtained a dismissal of said action, as well as sanctions under Rule 11 SCRCP, and possibly other remedies.

The Cosman Guarantees simply provide Cosman guarantees payment to the Bank of the subject loans ". . . when and as due upon maturity." (R.pp. 214-219, § 1) or "when allowed by law that may become due . . . ." (R.pp. 224-226; 232-234, § 2) Until there is a default under the Note, triggering acceleration of the debt, or the Note matures, the Bank cannot file suit under the Cosman guarantees or any of the notes. The evidence in the record confirms the loans matured on April 1, 2010 and litigation was commenced within the three (3) year statute.

III. The Guarantee Agreements are not Unenforceable Perpetual Agreements.

Cosman asserts in its brief on appeal for the first time in this litigation his guarantees are unenforceable since they are perpetual agreements under Carolina Cable Network v. Alert Cable

TV, Inc., 316 S.C. 98, 447 S.E.2d 199 (1994). It is well established that an appellant cannot raise arguments or defenses not presented to the Trial Judge below for the first time on appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Thus, this issue is clearly not preserved for appeal and should be dismissed without further discussion.

Even if such a position were available on appeal, it is clear the subject guarantees are not perpetual agreements under Carolina Cable. The Bank is enforcing personal guarantees against Cosman, and thus they are only enforceable during the life of the guarantor, Cosman. There is no prohibition under Carolina Cable, or any other case, that restricts or limits the liability of an obligor during his or her life. While Cosman may be in very good health, it is not expected he will live forever.

IV. The Trial Court Properly Granted Summary Judgment as to the Monies Admittedly Due.

As discussed above, under the terms of the three Cosman guarantees and existing South Carolina law, there was no release by the Bank of Cosman as a result of the Petruzzelli Settlement. Cosman did not dispute that the monies claimed by the Borrower had not been paid and thus it was appropriate for the Trial Judge to grant summary judgment as to the issue of his liability under the guarantees.

The counterclaims asserted by Cosman for conspiracy and breach of contract accompanied by fraudulent acts were not dismissed by the Trial Judge, and thus these claims are still available to Cosman. If he is successful at trial on said claims, any judgment in his favor would be set-off from the judgment rendered in the Bank's favor on the guarantee claim. There is no prejudice or harm to Cosman.

CONCLUSION

The Trial Judge properly interpreted and enforced the terms and conditions of three Cosman guarantee agreements. Said documents expressly provided the Bank could release the Borrower and all other guarantors, and still pursue Cosman. Such a course of conduct is not prohibited by any applicable South Carolina statute or case. This is exactly what the Bank did in this case. As Judge Kinard stated, "a promise made is a promise kept." Cosman is bound by his agreements and the Court is bound to enforce same.

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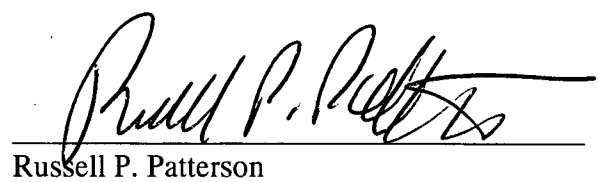

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RULE 211(b) CERTIFICATE

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Counsel for the Respondent, CoastalStates Bank, hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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