

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 Petruzzelli, Third-Party Defendant

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ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in his opening brief, Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondents.¹

- I. *Respondent fails to address the plain meaning of the Guarantees that do not provide for liability of Cosman in the event the obligations of the Borrower are fully satisfied.*

Under South Carolina 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.

As at the hearing, in their brief, Respondent argues that the language of the guarantees are irrelevant as they are “typical, customary forms used and enforced for decades by lenders in our State.” South Carolina courts, however, have never enforced agreements based upon what the typical agreement contains. Rather, the Courts have uniformly enforced agreements by the very

¹ The Bank makes several factual assertions that are false, though not entirely relevant to this appeal. The Appellant would simply show that the Bank never gave notice to the Appellant of the actions it took after the closing of the original loan documents. Similarly, the Appellant has argued that he was not an owner of Hanover Homes of South Carolina, LLC and if he was, he was entitled to additional notice and his signature would have been required in the later deals made with the Bank.

terms contained therein. See *Gilstrap v. Culpepper*, 283 S.C. 83, 320 S.E.2d 445 (1984); *Alvarez*, 285 S.C. 97, 328 S.E.2d 334. There is no dispute as to the terms included in the Guarantees relating to the Banks ability to release or discharge the borrower. There is similarly no dispute that the Bank included language in the agreement to satisfy the Borrowers obligation that the agreement should not be construed as a waiver of any rights in regard to Cosman. The parties do not agree, however, that such provisions make the need for interpreting the remaining terms of the Guarantees irrelevant.

The sole, exclusive and only obligation guaranteed in the three guarantees (R. pp. 82-95) 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’s obligation is satisfied, just as the obligation of the Borrower to the Bank is satisfied.² 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 Respondent’s reliance on Article 2 of the First Guarantee is misplaced. The particular language cited in the Trial Courts Order (R. pp. 2-18) 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

² The Bank makes mention of being owed a great deal of money on several occasions in its brief. The Bank admits, however, 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. Any argument based upon the debt not being satisfied are incorrect.

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 Exhibit 2, ¶2 at p. 2. To read such language to stand for the premise that the Guarantor is obligated for the amount satisfied by Borrower 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. The more reasonable reading of this language would interpret the Guarantee to have the Guarantor agree that the Bank may release the Borrower of some of the Debt with the Borrower continuing to be liable on the remaining portion of the Debt without completely discharging the Guarantor of this same remaining portion of the Debt.

The development of the law since the decisions cited by the Respondent, 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. As previously argued in Appellant's initial brief, 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 contemporaneous consent of the guarantor. Contrary to Respondent's assertion that somehow the Appellant's arguments concerning this point are somehow reliant upon South Carolina law regarding negotiable instruments, the development is recognized in South Carolina's reference and 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. Under present law, the satisfaction of the Borrower's obligation to the Bank resulted in the satisfaction

of Cosman's obligation. Similarly, 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. The Respondent's argument that it included a reservation of rights against Cosman in its satisfaction of all of the obligations of the Borrower does nothing under the terms of the Guarantees and current law in South Carolina.

Further, the Respondent's reliance upon *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 478 S.E.2d 63 (Ct. App. 1996) is inappropriate. The court in *Cochran* considered guarantees with materially different terms than those before this court. Those Guarantees provided for the guarantee of "all losses, costs, attorney's fees or expenses which [bank] may suffer by reason of [borrower's] default." *Cochran*, 324 S.C. 290, 294, 478 S.E.2d 63, 65. By guarantying all losses suffered by reason of the borrower's default, the guarantor in *Cochran* guaranteed more than the obligations of the borrower. In *Cochran*, the obligation of the guarantor was contingent upon the **default** of the borrower. The Guarantees before this 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 Court in *Cochran* 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 Exhibit 2, ¶1 at p. 3 (R. p. 84); Guarantee Exhibit 6, ¶2 at p. 1 (R. p. 89) ; Guarantee Exhibit 10, ¶4 at p. 1 (R. p. 93). Thus, *Cochran* is clearly not applicable in this case because the theory espoused in *Cochran* and the guarantee in *Cochran* are very different than the satisfaction of all obligations of the Borrower that occurred in this case.

II. *Similarly, Respondent fails to address South Carolina caselaw that supports that the plain meaning of the Guarantees creates 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. The Respondent erroneously argues that enforcing a three year statute of limitation for a guarantee whose terms create a demand note is novel.³ The law regarding the statute of limitations and its application to contracts, however, is settled in South Carolina. *See Sollee & Warley v. Meugy*, 17 S.C.L. 620 (S.C.Ct. App. 1830). 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 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*

³ Respondent fails to discover the South Carolina case law cited in Appellant's initial brief which supports the finding that the statute of limitation runs from the date of execution. *See Meugy*, 17 S.C.L. 620; *see also Page's Estate*, 202 S.C. 486, 25 S.E.2d 559 and *Alert Cable TV, Inc.*, 316 S.C. 98, 447 S.E.2d 199.

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 were enforceable upon execution and thus, Respondent's action is barred under the statute of limitations.

Appellant maintains that the issue of whether the language of the Guarantees created demand notes was raised in the trial court, in pretrial motions and trial motions, and ruled upon by the trial judge, sufficient to preserve challenges to the enforcement of the Guarantees in light of the statute of limitation. In this regard, the Appellant very clearly articulated the argument that Respondent had filed its action outside of the statute of limitations. Appellants also clearly included the argument that the terms of the Guarantees created demand notes that could be enforceable upon execution. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the Appellate Court] with a platform for meaningful appellate review." *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 628 S.E.2d 902, 919 (Ct.App. 2006). The Trial Court had a fair opportunity to rule on the issues and this Court has a sufficient platform for meaningful appellate review.

The Respondent's argument relating to the perpetual nature of the Guarantees has been soundly rejected by the Supreme Court of South Carolina. The Court in *Dobyns v. S. Carolina Dep't of Parks, Recreation & Tourism*, 325 S.C. 97, 101, 480 S.E.2d 81, 83 (1997) held that the

argument that somehow the death of a party could serve as an implied termination date was not adequate. In *Dobyns*, a case involving a dispute regarding a lease by an individual, the tenant argued that the lease was intentionally perpetual and therefore not terminable at will. The Supreme Court upheld the appellate court's ruling that, under *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 102, 447 S.E.2d 199, 201 (1994), the lease terms would unintentionally create a perpetual lease, regardless of the inevitable death of the lessee. 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, regardless of his inevitable death. Thus, the Trial Court erred in not dismissing the Respondent's action as barred by the statute of limitations.

III. Finally, Respondent acknowledges that Appellant's defenses that remain against the Respondent's action for breach of contract may ultimately preclude any recovery under its action, thus creating reversible error by the trial court.

The Respondent again erroneously argues that the Appellant not arguing accord and satisfaction entitled the Bank to summary judgment.⁴ Such an argument clearly falls outside of South Carolina law. Hundreds of years of common law jurisprudence regarding affirmative defenses cannot be disregarded at the whim of the Bank. 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). In the Order granting summary judgment to the Respondent (R. pp. 2-18), 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.

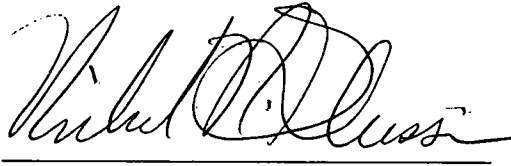
Respondent further acknowledges that judgment may be found in Cosman's favor as to his claims for breach of contract (R. pp. 31-32), and that such a finding would preclude recovery for the Bank. A holding that grants Cosman the ability to proceed on a defense against the Respondent's action must preclude summary judgment on Respondent's action. In essence, the Respondent argues and 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

Based on the foregoing, in addition to the arguments made in the opening brief, the Appellant respectfully submits that the trial court erred in granting the Respondent summary judgment as to its cause of action based upon the Guarantees as the plain meaning of the Guarantees did not provide for liability of Cosman in the event the obligations of the Borrower were fully satisfied and the guarantees created a separate demand note whose cause of action commenced upon the execution of the Guarantees. Finally, the trial court erred in granting 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. Wherefore, based on the foregoing, the Appellant respectfully requests that the judgment (R. pp. 2-18) be reversed and vacated.

⁴ The Respondent's brief states that "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."

By:

A handwritten signature in black ink, appearing to read "Richard R. Gleissner", written over a horizontal line.

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CERTIFICATE OF COUNSEL

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



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