THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-In-Equity

Appellate Case No.: 2012-213558

SCBT, N.A. ....Respondent,

v.

Sand Dollar 31, LLC; Rhonda Meisner,
of whom Rhonda Meisner is..Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER MEISNER MAY ARGUE THE EFFECT OF THE MOTION TO VACATE THE JUDICIAL SALE WHEN THE MASTER IN EQUITY HAS NOT HEARD OR RULED ON THE MOTION TO VACATE THE JUDICIAL SALE?

2. WHETHER THE MASTER-IN-EQUITY PROPERLY DENIED THE MOTION TO ALTER AND AMEND THE JUDGMENT?

3. WHETHER THE MASTER IN EQUITY PROPERLY AWARDED ATTORNEYS FEES?

STATEMENT OF THE CASE

This case arises from Respondent SCBT N.A.'s filing of a foreclosure action against Sand Dollar 31, LLC and Appellant Rhonda Meisner. (R. p. 21-47). SCBT sought to foreclose on its mortgages and enforce Meisner's guaranties.

Sand Dollar 31, LLC and Meisner filed an Answer and Counterclaim in which they requested a declaratory judgment as to the responsibilities and obligations of each of the parties under the Note, Mortgage and Guarantee Agreements associated with the properties involved in the foreclosure. (R. pp. 50-55).

On April 25, 2012, a final foreclosure hearing was held. (R. pp. 60-77). The court granted SCBT's causes of action for foreclosure and enforcement of the guaranties. (R. p. 4). A Judgment of Foreclosure and Sale was filed on May 16, 2012. (R. p. 4).

The subject properties were sold on June 4, 2012. Because SCBT demanded a deficiency judgment, the property was scheduled for a second sale on July 5, 2012.

Subsequently thereafter, a motion to alter or amend was filed on June 7, 2012. (R. p. 126). On or about June 27, 2012, SCBT filed a return to the motion to alter or amend. (R. p. 171).

On July 18, 2012, a hearing was held on Sand Dollar 31, LLC and Rhonda Meisner's motion to alter or amend. (R. p. 85) Counsel for each party was heard and supporting memorandum was provided to the court. On November 6, 2012, the court denied Sand Dollar 31, LLC's and Rhonda Meisner's motion to alter or amend. (R. p. 1).

Thereafter, SCBT filed a motion to vacate the judicial sale on September 6, 2012. (R. p. 260). This motion has never been heard or ruled on by the master in equity.

Meisner filed her Notice of Appeal on SCBT on December 6, 2012.

FACTS

This case arises from SCBT's efforts to collect amounts due under two mortgage loans that were made to Sand Dollar 31, LLC. On or about July 24, 2006, Sand Dollar 31, LLC delivered a promissory note to SCBT in the amount of $36,000.00 to finance the purchase of a rental property. (R. p. 26). On or about July 24, 2006 Sand Dollar, 31, LLC delivered a second promissory note to SCBT in the amount of $31,140.00 to finance the purchase of a second rental property. Each note was secured by a mortgage on the respective properties. As additional security for the notes, Meisner executed personal guaranties. On September 22, 2011, SCBT filed these foreclosure actions against Sand Dollar 31, LLC asserting the notes were in default and requesting the mortgages be foreclosed. (R. p. 21). On or about September 27, 2011, an amended summons and complaint was filed. In its amended complaint, SCBT further sought a judgment against Meisner on her guarantee of the debts of Sand Dollar 31, LLC. Sand Dollar 31, LLC and Meisner timely filed an Answer and Counterclaim. (R. p. 50-55). In their Answer and Counterclaim, Sand Dollar 31, LLC and Meisner counterclaimed for a declaratory judgment as to the responsibilities and obligations of each of the parties under the Note, Mortgage and Guarantee Agreements associated with the properties involved in the foreclosure. SCBT timely filed a Reply to the counterclaim. Both cases were heard on April 25, 2012. A representative of SCBT appeared and testified. (R. p. 62, line 18-p.72, line 5). The court also heard testimony from Ms. Meisner. (R. p. 73, line 17-p. 81, line 18). Following the hearing, a judgment of foreclosure and sale was filed on May 16, 2012. (R. p. 14).

On June 7, 2012, Sand Dollar, LLC and Meisner filed a motion to alter or amend. (R. p. 126). In their motion to alter or amend, Meisner raised the issue of the limitation on her personal

liability for the first time. (R. p. 128-130). On or about June 27, 2012, SCBT filed a return to the motion to alter or amend. On July 18, 2012, a hearing was held on Sand Dollar 31, LLC and Rhonda Meisner's motion to alter or amend. (R. p. 85). Counsel for each party was heard and supporting memorandum was provided to the court. (R. p. 171). On November 6, 2012, the court denied Sand Dollar 31, LLC's and Rhonda Meisner's motion to alter or amend. (R. p. 1).

Meisner, now proceeding pro se, filed this appeal on December 6, 2012.

STANDARD OF REVIEW

In an action in equity referred to a master for final judgment, the Court may find facts in accordance with its own view of the preponderance of the evidence. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 231, 662 S.E.2d 452, 455 (Ct. App. 2008) (citing *Van Blarcum v. North Myrtle Beach*, 337 S.C. 446, 523 S.E.2d 486 (Ct. App. 1999)). This broad scope of review does not require the Court to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. *Id.* at 232, 662 S.E.2d at 455 (citing *Plott v. Justin Enters.*, 374 S.C. 504, 649 S.E.2d 92 (Ct. App. 2007)).

ARGUMENT

I. Meisner's Appeal from the Motion to Vacate the Sale is Interlocutory and Not Immediately Appealable

On or about September 6, 2012, SCBT filed a motion to vacate the judicial sale. Meisner devotes much of her brief arguing the merits of the motion to vacate the sale and its impact on her personal liability. "The right of appeal arises from and is controlled by statutory law." *Hagood v. Sommerville,* 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). "An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Id. See also* Rule 201(a), SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order, or decision."); Rule 72, SCRCP ("Appeal may be taken, as provided by law, from any final judgment or appealable order."). "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330." *Hagood* at 195, 607 S.E.2d at 708. "An order generally must fall into one of several categories set forth in that statute in order to be immediately appealable." *Id.; Baldwin Constr. Co., Inc. v. Graham,* 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004). The provisions of § 14-3-330 "have

been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed." *Hagood* at 196, 607 S.E.2d at 709.

In the present case, the Master in Equity has yet to hear or rule on the motion to vacate the judicial sale. Therefore, there is no order from which an appeal may be taken. Accordingly, Meisner's appeal on that issue is interlocutory and is not immediately appealable.

II. The Master in Equity Properly Denied Meisner's Motion to Alter or Amend

A. Meisner's appeal of the issue of a limited guaranty or that the judgment to be awarded by the court could not exceed a certain amount was not properly preserved for appeal where it was raised for the first time by way of a Rule 59(e) Motion

Meisner failed to preserve for the appeal the issue of whether her liability was limited under the terms of the guarantees. "A party cannot raise an issue for the first time in a Rule 59(e), SCRCP motion which could have been raised at trial." *MailSource, LLC v. M.A. Bailey & Associate, Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003). *See also C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268, 270 (1993) ("a party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not.")

Meisner raised her challenge to the guaranties for the first time in her Rule 59(e) motion after failing to raise it at the trial. Therefore, this issue is not properly preserved for appeal. This Court should affirm the Master's Order on this ground.

B. Even if Meisner had preserved this issue for review, the Master in Equity properly denied her motion to alter or amend.

However, even if the issue had been raised at trial, it is still without merit, as the principal amount stated in the Judgment of Foreclosure does not exceed the principal amount stated in the guaranty.

SCBT and Meisner agree that: (1) all of the guaranties signed by Meisner are "pre-printed forms and are identical with the exception of the dates and dollar amounts," (2) guaranty agreements are contracts and their interpretation is governed by the same contract law principles as any other contract; and (3) when interpreting a contract, the contract must be read as a whole and that a certain provision cannot be used to determine the entire contract's meaning. *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009). However, Meisner, in her appeal, asks this Court to do just that.

First, Meisner misstates that there are only two (2) guaranties, when Meisner is fully aware and acknowledge that she executed three (3) guaranties. The first two (2) guaranties were executed on July 24, 2006: one refers to a "Note Dated 07-24-2006 in the amount of $36,000.00 in the name of Sand Dollar 31, LLC" (R. p. 222) and another refers to a "Note Dated 07-24-2006 in the amount of $31,140.00 in the name of Sand Dollar 31, LLC" (R. p. 224). The third guaranty was executed on July 31, 2007- when the $31,140 Note was renewed and increased from $31,140 to $50,000- and refers to a "Note Dated 07-31-2007" I/A/O $50,000.00 I/N/O Sand Dollar 31, LLC" (R. p. 226). It is clear by even a cursory reading of Meisner's guaranties that the date and dollar amount shown on each guaranty corresponds with a Note of the same date and dollar amount.

Importantly, SCBT does not contend that Meisner's guaranties were "unlimited" as she argues in her brief. SCBT acknowledges that the guaranty's language states unambiguously in Paragraph A that it is limited to a particular indebtedness and in Paragraph 4 that the liability shall be limited to the principal amount of that indebtedness plus interest, fees and costs. It is Paragraph B, which was not checked in any of the three (3) Meisner guaranties, that would have made Meisner's liability unlimited because "Indebtedness" in Paragraph B is defined, not as a

single Note as in Paragraph A, but as "each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender...." (R. p. 222; p. 224; p. 226).

Meisner raises three grounds to support her argument that her liability was limited under the terms of the guaranties. Meisner first argues, "the Guaranty Agreements specifically state the maximum dollar amount in paragraph A". However, Meisner misrepresent what Paragraph A says. Nowhere in Paragraph A is the word "maximum" used, nor is there any mention of limiting liability. Paragraph A states:

> ...the Undersigned hereby absolutely and unconditionally guarantees to Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise of the debts, liabilities and obligations described as follows:
>
> A. If this [X] is checked, the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: NOTE DATED 07-31-2007 I/A/O $50,000 I/N/O SAND DOLLAR 31, LLC and any extensions, renewals or replacements thereof (hereinafter referred to as the "Indebtedness").*

*NOTE: Each of the three (3) guaranties has a different Note listed in the blank. This is an excerpt from one of the guaranties at issue. (R. p. 222; p. 224; p. 226).

Not only does Paragraph A not mention a maximum liability as Meisner claims, it actually says the opposite, stating the guarantor "absolutely and unconditionally guarantees to Lender the full and prompt payment of...the debts, liabilities and obligations described as follows:" at which point it describes the guaranteed "Indebtedness" as a particular Note, by referencing that Note's date and amount.

Paragraph 4 likewise limits the guarantor's liability to the principal amount of the particular indebtedness, which is consistent with the description of the indebtedness in Paragraph

A. However, in Meisner's brief, she hones in on a limited portion of Paragraph 4, in contravention of their assertion of the well-established rule of law that the Court must look at the guaranty contract in its totality, but fail to refer to the pivotal language that follows it. The following is Paragraph 4 as stated in the Guaranty:

> "4. The liability of the Undersigned hereunder shall be limited to a principal amount of $50,000.00 (if unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all other costs, fees, and expenses agreed to be paid under all agreements evidencing the Indebtedness and securing the payment of the Indebtedness, and all attorneys' fees, collection costs and enforcement expenses referable thereto."*

*NOTE: Each of the guaranties has a different amount listed in the blank that corresponds to the Note listed therein that is being guaranteed. This is an excerpt. (R. p. 222; p. 224; p. 226).

To read Paragraph 4 as saying Meisner's liability "is limited to those amounts" listed in that paragraph without mentioning that the adjacent phrase adds "plus accrued interest thereon and all other costs, fees, and expenses...and all attorney's fees, collection costs and enforcement expenses referable thereto...." is disingenuous and is contrary to the relevant case law.

Furthermore, Meisner claims that Paragraph A and Paragraph 4 are in conflict and an ambiguity exists. For the reasons set forth above, this is clearly not the case. The dollar amount listed in Paragraph A is the exact dollar amount listed in Paragraph 4 in all three (3) guaranties, so there is no conflict there. Paragraph A guarantees the full and prompt payment of the Indebtedness and Paragraph 4 requires payment of the principal amount of the indebtedness plus accrued interest, fees and costs, so there is no conflict there. (R. p. 222; p. 224; p. 226).

Meisner asks this Court to ignore the "cardinal rule of contract interpretation", *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003), which is to "'ascertain and give effect to the intentions of the parties. To determine the intention

of the parties, the court must first look at the language of the contract." *S.C. Dep't of Transp. v. M & T Enters. of Mount Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 12 (Ct. App. 2008) (citation omitted). "Where the language of a contract is clear and unambiguous, it alone determines the contract's force and effect. 'This [c]ourt must give policy language its plain, ordinary and popular meaning.'" *BMW of North America, LLC, v. Complete Auto Recon Services, Inc.*, 399 S.C. 444, 731 S.E.2d 902 (Ct. App. 2012); *See also B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327 (1999).

Here, the language in Paragraph 4, referring to a "limitation" of the guaranty does not have a "period" punctuation after the dollar amount listed therein. The sentence continues and is followed by the word "plus." The plain, ordinary and popular meaning of the word "plus" is "increased by" or "used when adding something." The language is clear that the dollar amount listed in Paragraph 4 was not *the* limit of liability because it is "increased by" accrued interest thereon and all other costs, fees and expenses...and attorney's fees, collection costs and enforcement expenses..." which follow it. As the court is "constrained by the plain and unambiguous language", *Jones v. SCDOT*, 360 S.C. 149, 154, 600 S.E.2d 543, 546 (Ct. App. 2004), of the guaranty contract, it is bound to interpret the phrase found in the guaranty as not limiting the guarantor's liability just to the principal amount but also the accrued interest, fees and costs. It is well-established that "the rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument." *Palmetto Dunes Resort, Div. of Greenwood Dev. Corp. v. Brown,* 287 S.C. 1, 6, 336 S.E.2d 15, 18-19 (Ct. App. 1985). The obvious purpose of a guaranty is for the lender to be repaid the sums they loaned. The amounts loaned are undisputed, as is the fact that neither the borrower nor the guarantor has repaid those sums.

Furthermore, Meisner admitted in her Answer (R. p. 51, lines 16 – 17; p. 56, lines 13-14) that she guaranteed the debt and at trial it was stipulated by all parties that the only matter before the court was to determine the amount owed. At no time did she raise any issue about the guaranties or any limitations thereto and therefore, cannot now. Meisner is unable to point to any language in the entire 2-page guaranty that says her liability cannot exceed a fixed dollar amount because there is nowhere in the guaranty where it does. If it was the true intent of the parties to set a fixed maximum dollar amount of liability for the guaranty, they certainly could have but did not. For these reasons, the Master's Order should be affirmed.

III. The Master in Equity Properly Awarded Attorney's Fees

Meisner incorrectly argues Plaintiff has not provided affidavits of attorney fees. These affidavits of attorney's fees were not only available to all parties at the foreclosure hearing, they were also mailed to Meisner's counsel and the Court pursuant to an agreement at the hearing on the Motion to Alter or Amend on July 18, 2012. Meisner now attempts to raise this issue for the first time on appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. " *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

Further, with regard to the attorney's fees awarded to Plaintiff, Meisner compares this heavily contested foreclosure to the prior foreclosure but fails to disclose that the previous foreclosure was uncontested and that there were no post-sale motions or petitions. Clearly, the distinctions between these two (2) actions explain the difference in attorney's fees awarded and which continue to accrue.

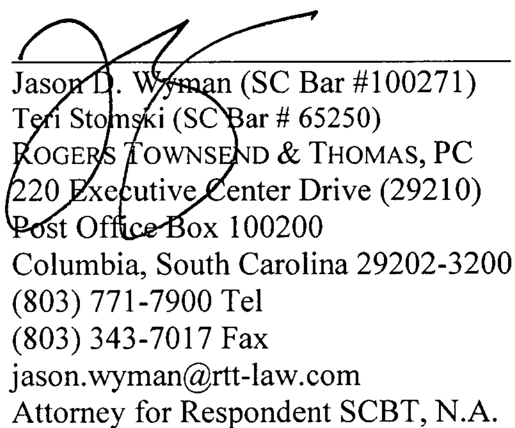
As for the other grounds of the Meisner's appeal that the amount listed in the Form 4 (R. 12) is incorrect, the final amount of the judgment will be determined after the second sale and

that amount will be shown on a Form 4 and indexed in the judgment roll and therefore, there is no prejudice to the Defendants.

CONCLUSION

Based on the foregoing and any additional sustaining grounds appearing in the record, SCBT would respectfully submit that the Master-in-Equity's Order on November 6, 2012, denying the motion to alter or amend should be affirmed.

Respectfully submitted,



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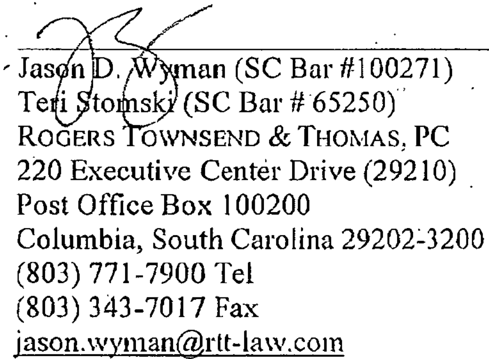
CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.



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