THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes, III, Special Circuit Court Judge



---

Appellate Case No. 2015-000035
Lower Case No. 2013-CP-07-00610

---

First South Bank ..... Respondent,

v.

John E. Rosenberg and Phillip J. Brust ..... Defendants,

Of Whom The Estate of Phillip J. Brust is ..... Appellant.

---

# FINAL BRIEF OF APPELLANT THE ESTATE OF PHILLIP J. BRUST

---

Robert E. Sumner, IV, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen, PLLC
78 Wentworth Street
Post Office Box 22828
Charleston, SC 29413-2828
Telephone: (843) 579-7000
*Attorneys for Appellant*

Jeffrey L. Silver, Esquire
Tyler, Cassell, Jackson, Peace & Silver, LLC
1331 Elmwood Avenue, Suite 300
P.O. Box 11656
Columbia, SC 29211
Telephone: (803) 779-4997
*Attorneys for Respondent*

Taylor A. Peace, Esquire

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

## STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in granting summary judgment in favor of First South Bank by ignoring questions of fact regarding the scope of authority granted under the Specific Limited Power of Attorney, Brust's knowledge of the scope of the Guaranty, the effect of subsequent modifications of the Loan, and the proposed counterclaims asserted against First South Bank?

II. Did the trial court err in denying Brust's Motion to Amend by mistakenly relying on the doctrine of *res judicata* rather than deciding the motion under Rule 15, SCRCP?

## STATEMENT OF THE CASE

1. Procedural history.

On March 8, 2013, Respondent First South Bank ("First South") filed a complaint against Phillip J. Brust[1] and John E. Rosenberg in the Court of Commons Pleas for Beaufort County, South Carolina, seeking to collect under loan guaranties signed by Rosenburg on behalf of himself and as attorney-in-fact for Brust under a power of attorney. Brust answered the complaint, denying all claims and raising affirmative defenses. Brust's affirmative defenses included that Rosenberg did not have actual or apparent authority under the power of attorney to sign the guaranty on his behalf, and consequently the guaranty was invalid and unenforceable. In addition, Brust argued that he was released from any obligations under the guaranty because the underlying obligation had been modified several times without First South renewing the guaranty.

On October 23, 2013, First South Bank filed a Motion for Summary Judgment against Brust (the "Motion for Summary Judgment"), which was continued several times

[1] Brust suffered a stroke shortly before First South initiated this action and died during its pendency. As a result, The Estate of Phillip J. Brust has been substituted as a party and is the appellant in this action. Brust and The Estate of Phillip J. Brust are referred to collectively in this brief as "Brust."

to allow the Parties to conduct discovery. On May 23, 2014, Brust took the deposition of Patrick Wright, First South's Rule 30(b)(6) representative. Brust received the transcript on May 28, 2014. On May 30, 2014, Brust filed a Motion to Amend Answer and Cross-claims Against Defendant Rosenburg (the "Motion to Amend") seeking to assert counterclaims against First South for negligence and breach of contract based on the deposition testimony of Wright.

On June 3, 2014, the trial court conducted a hearing on First South's Motion for Summary Judgment. On August 5, 2014, the trial court entered an Order Granting First South's Motion for Summary Judgment against Brust (the "Summary Judgment Order"), and on August 18, 2014, Brust timely filed a Motion for Reconsideration of the Summary Judgment Order. On December 10, 2014, the trial court entered an Order Denying Brust's Motion to Amend (the "Amendment Order"). On December 18, the trial court entered an Order Denying Brust's Motion for Reconsideration of the Order Granting First South's Motion for Summary Judgment against Brust. Following receipt of the Order Denying Brust's Motion for Reconsideration, Brust timely filed and served its Notice of Appeal as to both the Summary Judgment Order and Amendment Order on January 9, 2015.

2. The statement of the facts.

Ecological Investments, LLC ("Ecological") is a South Carolina limited liability company which was organized to construct and operate a tourist attraction in or around Beaufort and Jasper Counties devoted to butterfly conservation and natural science education, which was to be called "Butterfly Kingdom." John E. Rosenberg and Phillip J. Brust, among other investors, were members of Ecological, and Rosenberg served as

its managing member. Ecological owns approximately 82.68 acres in Jasper County, South Carolina, which at one time was intended to serve as the location for Butterfly Kingdom (the "Property").

In late 2005, Patrick Wright, the area manager for First South's branch in Bluffton, South Carolina, approached Rosenberg about refinancing an existing loan Ecological had with another bank, which was secured by the Property. (R. p. 489, lines 11-16; R. p. 505, line 7-p. 507, line 8) (Wright Dep. 15:11-16:8, 31:7-33:8). First South offered to provide Ecological with a $2.6 million interest-only loan with a two-year term. (R. p. 909-911) (Wright Dep. Ex. 4). According to Wright, First South conditioned the refinancing upon receiving personal guaranties of the loan from Rosenberg and Brust, among other terms and conditions. (R. p. 527, lines 4-20) (Wright Dep. 53:4-20). In deciding to offer Ecological a loan, First South violated several of its internal loan underwriting policies, including:

- Failing to perform a credit approval summary;
- Failing to obtain financial information from Ecological, Rosenberg, and Brust to determine their creditworthiness and ability to repay the loan;
- Basing repayment of the loan on a speculative repayment source, specifically the sale of the Property;
- Structuring the loan as a balloon loan without regular amortization.

(R. p. 627, line 15-p. 629, line 13; R. p. 630, line 4-p. 632, line 25; R. p. 639, line 17-p. 641, line 9) (Wright Dep. 153:15-155:13, 156:4-158:25, 165:17-167:9).

Wright memorialized the proposed terms of the loan in a commitment letter dated January 9, 2006 (the "Commitment Letter"). (R. pp. 909-911) (Wright Dep. Ex. 4). The Commitment Letter stated that the "[p]ayment of the Loan shall be unconditionally guaranteed, jointly and severally, by John E. Rosenberg and Philip J. Brust," and "Loan"

was specifically defined in the Commitment Letter to pertain only to the loan for $2.6 million. (*Id.*) The Commitment Letter also contained other terms such as requiring Rosenberg and Brust to maintain a primary deposit relationship with First South and requiring Ecological's counsel to provide an opinion letter to First South as to the validity and enforceability of loan documents and other matters that First South required. (*Id.*) The Commitment Letter provided that it would expire if the loan was not closed by January 31, 2006, and neither First South nor Ecological was obligated under the Commitment Letter if the loan was not closed by that date. (*Id.*) Although First South maintained a policy that required its loan officers to clearly explain guaranty obligations to guarantors, First South had no further contact with Brust prior to the Loan closing about the guaranty requirements after sending the Commitment Letter. (R. pp. 557 line 22-p. 559, line 12; R. pp. 634 line 15-p. 635, line 20) (Wright Dep. 83:22-85:12, 160:15-161:20).

On February 2, 2006, after the Commitment Letter had expired, Ecological and First South closed on Loan Number 8033303 in the amount of $2.6 million, and Ecological executed a promissory note to First South (the "Loan"). (R. p. 555; R. pp. 42-59) (Wright Dep. 81; Compl. Ex. A). The purpose of the Loan was to pay off the existing loan on the Property in the amount of $2.2 million, pay property taxes on the Property, pay the required interest payments for the interest-only Loan, and provide additional cash to Ecological. (*Id.*) Pursuant to the promissory note, the term of the Loan was two years, and the maturity date was February 2, 2008. (R. pp. 42-59) (Compl. Ex. A). The Loan accrued interest at the rate of seven percent (7%) and payment was

structured with monthly interest-only payments followed by a final principal payment on the date of maturity. (*Id.*)

At the closing of the Loan, Rosenberg signed a personal guaranty on his own behalf and a separate guaranty on behalf of Brust (the "Guaranty"). (R. pp. 920-921) (Wright Dep. Ex. 8). Rosenberg signed the Guaranty on behalf of Brust pursuant to a power of attorney dated January 25, 2006 (the "POA"). (R. pp. 922-923) (Wright Dep. Ex. 9). The POA was entitled "SPECIFIC LIMITED POWER OF ATTORNEY" and authorized Rosenberg to sign certain documents involved in the financing of the Property. (*Id.*) Although Rosenberg signed the Guaranty, the POA did not expressly list a "guaranty" as a document that Rosenberg was empowered to execute. (*Id.*) Rather, the POA stated that Rosenberg was authorized to execute "any document, instrument, contract, Note, Mortgage, agreement, assignment, affidavit, disclosure, etc. and to pay sums on my account, or to execute any such other documents as may be necessary to close the loan with First South Bank in the original principal sum of $2,600,000.00." (*Id.*)

The POA was substantially similar to a separate power of attorney that Brust executed in association with financing of the Property in 2001. (R. pp. 445, line 5-p. 459, line 4; R. p. 749) (Finger Dep. 30:5-34:4; Def. Ex. 1). However, the 2001 power of attorney signed by Brust expressly listed a "guarantee" as one of the documents that the agent was authorized to execute in connection with that loan. (*Id.*) In 2006, "guarantee" was omitted from the POA. (R. pp. 922-923) (Wright Dep. Ex. 9).

The Guaranty signed by Rosenberg on behalf of Brust was completed on First South's form for guaranty agreements. (R. pp. 559, line 13-p.560, line 3) (Wright Dep.

85:13-86:3). The guaranty agreement form used by First South contains two options: (1) Box A, which indicates that the guaranty is limited to a specific loan and is not continuing; and (2) Box B, which indicates the guaranty is continuing and unlimited. (R. pp. 561, line 4-p. 564, line 24; R. pp. 920-921) (Wright Dep. 87:4-90:24, Ex. 8). Specifically, Box B states that the guarantor "guarantees to [First South] the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owed to [First South]." (*Id.*) Additionally, the form has a blank for First South to insert the amount of the principal repayment obligation under the guaranty. (*Id.*)

First South admits that it did not disclose the guaranty form to Brust either prior to, during, or after the closing and that First South did not discuss with Brust whether the guaranty would be of a continuing and unlimited nature. (R. p. 557, line 24-p.559, line 12; R. p. 565, line 22-p. 566, line 1) (Wright Dep. 83:24-85:12, 91:22-92:1). Although those issues were never discussed with Brust, First South checked Box B and inserted "UNLIMITED" in the principal amount. (R. p. 561, line 4-p. 566, line1) (Wright Dep. 87:4-92:1). In the Rule 30(b)(6) deposition of First South, Wright admitted that First South improperly made the Guaranty continuing and unlimited. (R. p. 559, line 13-p. 567, line 15) (Wright Dep. 85:13-93:15). Instead of being continuing and unlimited, First South should have checked Box A to make it a non-continuing guaranty and should have written $2.6 million as the principal repayment amount instead of "UNLIMITED." (*Id.*)

The continuing, unlimited Guaranty was signed by Rosenberg at the Loan closing on February 2, 2006. Neither Wright nor any other employee of First South attended the closing. Wright was unaware that Brust would not be attending the closing or that

Rosenberg would be executing the Guaranty on Brust's behalf pursuant to a power of attorney. (R. pp. 555, lines 18-24; pp. 570, lines 12-24) (Wright Dep. 81:18-24, 96:12-24). Wright did not discover that Rosenberg signed Brust's Guaranty pursuant to the POA until the closing documents had been returned to First South after the closing. (R. p. 569, line 24-p. 570, line 11) (Wright Dep. 95:24-96:11). Although First South had a policy that required its loan officers to confirm the validity of the signatures of guarantors, Wright did nothing to confirm the validity of such signatures on either the Guaranty or the POA or inquire into the scope of Rosenberg's authority under the POA. (R. p. 574, line 2-p. 575, line 4; R. p. 635, line 21-p. 637, line 14) (Wright Dep. 100:2-104:4, 161:21-163:14). In fact, First South did not even require that closing counsel issue an attorney opinion letter attesting to the proper execution and enforceability of the closing documents. (R. p. 574, lines 12-14) (Wright Dep. 100:12-14).

On January 14, 2008, First South and Ecological entered into a Commercial Debt Modification Agreement for Loan Number 8033303, which extended the Loan's maturity date to April 30, 2008. (R. p. 583, line 13-p. 584, line 7; R. pp. 42-59) (Wright Dep. 109:13-110:7; Compl. Ex. A). At the time, First South had a policy requiring it to obtain new guaranty agreements from guarantors for all renewals, extensions, modifications, and other changes in the terms of a loan. (R. p. 637, line 15–p. 638, line 6) (Wright Dep. 163:15-164:6). The policy provided:

> It is the policy of First South Bank to obtain the signatures of all obligors on renewal notes before the existing note is released. The agreement of all parties to be obtained prior to any extension, change in terms, release, substitution of collateral, et cetera. Failure to do so could release obligors from their liability to First South Bank.

(R. p. 637, line 15-p. 638, line 6; R. pp. 751-908) (Wright Dep. 163:15-164:6, Ex. 2). First South did not obtain a new guaranty from Rosenberg or Brust in connection with the January 14, 2008 modification, and Brust did not sign any documents related to the January 14, 2008 modification. (R. p. 583, line 11-p. 585, line 18) (Wright Dep. 109:11-111:18).

After the Loan was modified in January 2008, First South and Ecological entered into three separate notes modifying the Loan in May, August, and October of 2008. The new notes extended the Loan's maturity dates and modified the repayment terms. (R. p. 585, line 23-p. 590, line 14; R. pp. 42-59) (Wright Dep. 111:23-116:14; Compl. Ex. A). First South did not obtain a new guaranty from Rosenberg or Brust in connection with the three Loan modifications and extensions in May, August, and October of 2008, and Brust did not sign any documents related to such modifications and extensions. (R. p. 587, line 4-p. 590, line 14) (Wright Dep. 113:4-116:14).

In addition to modifying the Loan, on October 15, 2008, Ecological obtained a new loan from First South in the amount of $275,000.00 (the "$275,000 Loan") and executed a promissory note for the $275,000 Loan on that same date. (R. p. 592, line 25-p. 594, line 7) (Wright Dep. 118:25-120:7). First South did not obtain a new guaranty from Rosenberg or Brust in connection with the $275,000 Loan, and Brust did not sign any documents related to the $275,000 Loan. (*Id.*)

In January 2009, Ecological obtained approximately $500,000.00 from the sale of an easement on the Property. At the instruction of Rosenberg and without consulting Brust, First South allocated these proceeds to satisfy the $275,000 Loan. (R. p. 611, line 6-p. 616, line 25) (Wright Dep. 137:6-142:25).

On January 21, 2010, First South and Ecological entered into a another modification of the Loan, in which the parties restructured the payment terms to require interest-only payments on a monthly basis with a final principal payment of $1,831,022.53 due by the new maturity date of October 14, 2012. (R. pp. 42-59) (Compl. Ex. A). First South did not obtain a new guaranty from Rosenberg or Brust in connection with the January 21, 2010 modification, and Brust did not sign any documents related to such modification. (R. p. 597, line 76-p. 598, line 9) (Wright Dep. 123:7-124:9).

On November 30, 2010, First South and Ecological again modified the Loan by entering into a new promissory note. (R. p. 598, line 106-p. 599, line 10; R. pp. 42-59) (Wright Dep. 124:10-125:10; Compl. Ex. A). Under the November 30, 2010 note, the new term of the Loan was two years from the date of execution. (R. pp. 42-59) (Compl. Ex. A). The loan was assigned a new interest rate of 5.25%, and the repayment terms were restructured to require monthly principal and interest payments, followed by a final principal payment in the amount of $1,615,269.50 by the new maturity date of November 30, 2012. (*Id.*) First South did not obtain a new guaranty from Rosenberg or Brust in connection with the November 30, 2010 note, and Brust did not sign any documents related to that note. (R. p. 599, lines 11-23) (Wright Dep. 125:11-23).

Ecological did not make the balloon payment due by November 30, 2012. Thereafter, on March 8, 2013, First South sued Brust and Rosenberg for collection under the Guaranties signed by Rosenberg on February 2, 2006.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF FIRST SOUTH BANK.

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). "In ruling on motions for summary judgment, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party." *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993). "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *Lanier Constr. Co. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 278, 681 S.E.2d 909, 911 (Ct. App. 2009). "Summary judgment is appropriate only when the pleadings, depositions, interrogatory answers, admissions, and affidavits, [if any] show that there is no genuine issue of material fact." *Shuler v. Tuomey Regional Medical Center, Inc.*, 313 S.C. 225, 227, 437 S.E.2d 128, 130 (Ct. App. 1993). To withstand a motion for summary judgment "in cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous. *Wallace v. Day*, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App. 2010). A trial court "is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed. Construction of an ambiguous contract is a question of fact to be decided by the trier of fact." *Id.* (internal citations omitted).

**A. The trial court erred in granting summary judgment because the POA did not expressly grant Rosenberg the power to execute a "guaranty" and the language in the POA is susceptible to more than one interpretation.**

The trial court granted summary judgment on the erroneous conclusion that the POA unambiguously authorized Rosenberg to execute the Guaranty on behalf of Brust. The trial court ruled that the "Power of Attorney is clear and unambiguous as it is susceptible to only one meaning and represents Brust's intention, namely, to give Rosenberg the authority to execute, on his behalf, any and all documents and to perform any act related to the closing of the Loan, including the execution of the Guaranty, and to be bound by same." (R. p. 23) (Order Mot. Summ. J., Conclusions of Law ¶12). As a result, the trial court concluded, "Rosenberg had actual authority to execute the Guaranty and Brust is bound by the terms of same." (R. p. 23) (Order Mot. Summ. J., Conclusions of Law ¶13). In reaching these conclusions, the trial court misinterpreted the POA by refusing to recognize that the POA is susceptible to more than one interpretation of whether it authorized the execution of the Guaranty in contravention of the well-established principle of contractual interpretation that a power of attorney must be strictly construed and by looking beyond the four-corners of the POA to determine Brust's intent thereunder.

In construing the POA, the trial court correctly noted that a power of attorney is subject to the rules of contractual interpretation, but it failed to apply the applicable rules of contractual interpretation in determining that the POA was unambiguous. A contract is ambiguous when its terms are reasonably susceptible to more than one interpretation. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). Because courts are mindful that powers of attorney are of special and

limited nature and authority, a "special power of attorney is to be strictly construed . . . so as to sanction only such acts as are clearly within its terms." *Martin v. United States,* 249 F. Supp. 204, 208 (D.S.C. 1966) (citing *Holladay v. Daily*, 86 U.S. 606 (1874); *see also,* 2A C.J.S. *Agency* § 157 ("Where the authority is contained in a power of attorney, such power is to be strictly construed . . . and does not empower the agent to make contracts of any different sort than that specified in the writing.")).

Consistent with the principle that powers of attorney must be strictly construed, general principles of agency hold that "[w]hen power to lend or borrow money is conferred upon an agent, whether expressly or impliedly, it is to be carefully pursued and exercised only within the limits prescribed; burdens assumed by the agent, but not authorized by the principal, do not bind or affect the latter." 2A C.J.S. *Agency* § 176. Moreover, "the authority to give security instruments cannot be inferred from the authority of an agent to borrow." 2A C.J.S. *Agency* § 177; *see also, Kenneally v. First Nat'l Bank*, 400 F.2d 838, 842 (8th Cir. 1968) ("The authority to give security instruments cannot be inferred from the authority to borrow."); Restatement 2d of Agency § 75, Comment b.

Courts have been especially cautious in recognizing an agent's ability to bind a principle under a guaranty agreement. "The power to make a contract of guaranty may be specifically given to an agent, but authority to make such a contract generally exists only if it is expressly conferred." 2A C.J.S. *Agency* § 166. Courts applying this principle have held that powers of attorney must not be construed to convey the authority to the agent to guaranty the debt of another unless such power has been expressly granted in the power of attorney. For example, in *Amcore Bank v. Hahnaman-Albrecht, Inc.*, 326 Ill.

App. 3d 126, 136, 759 N.E.2d 174, 182 (Ill. Ct. App. 2001), the court concluded that a "broad grant of agency" in a power of attorney is subject to the "long-standing principle of agency law: that a general grant of agency does not carry with it the power to execute guaranties." *Id.* at 136, 759 N.E.2d at 182. The court further declared that a "third person may not assume from the mere fact of agency, either limited or general, that [the agent] has authority to make a contract of guaranty." *Id.* Similarly, in *Nevis v. Fidelity New York, F.A.*, 104 Nev. 576, 578, 763 P.2d 345, 346 (Nev. 1988), the court held that a power of attorney must contain "specific authorization before finding that an agent has authority to bind his principal in a guaranty agreement." *See also, Chicago Title Ins. Co. v. Progressive Housing, Inc.*, 453 F. Supp. 1103, 1106 (D. Colo. 1978) (since the "powers of attorney lacked a specific grant of authority to bind his principals to a guaranty agreement, [the agent] lacked actual authority to effectuate the guaranty").

For the POA to unambiguously authorize the execution of the Guaranty under these principles, the POA must contain an express or specific grant of such authority. However, any express or specific grant of authority to Rosenberg to execute the Guaranty is lacking in this case, and it is undisputed that the term "guaranty" is completely omitted from the POA. Therefore, the trial court erroneously concluded that the POA unambiguously authorized Rosenberg to execute the POA, which must be strictly construed.

As the POA involved in this case does not expressly grant Rosenberg the authority to execute the Guaranty, any such authority must derive from the POA's catchall provision that provides Rosenberg with the authority "to execute any such other documents as may be necessary to close the loan with First South Bank in the original

principal sum of $2,600,000.00." (R. pp. 922-923) (Wright Dep. Ex. 9). Although this catchall provision could arguably provide Rosenberg with the authority to execute a guaranty if it was necessary to close the Loan, this provision is ambiguous because it is reasonably susceptible to more than one interpretation of whether the Guaranty was necessary to close the Loan. The POA does not define or provide any basis for determining which documents were "necessary to close the loan." As such, it is impossible to determine on the face of the POA whether the "Guaranty" was necessary to the closing.

Because it is impossible to determine whether the Guaranty was a document necessary for the Loan closing based on the plain language of the POA, the trial court was required to look outside the four corners of the POA to determine whether Brust intended to authorize Rosenberg to execute the Guaranty. The trial court's conclusions of law and findings of fact demonstrate that it did exactly that to resolve the meaning of the POA. For example, in its findings of fact, the trial court made several findings regarding the guaranty obligations referenced in the Commitment Letter and whether Brust was informed of such obligations. (R. p. 23) (Order Mot. Summ. J., Findings of Fact ¶¶ 11-13). The clear purpose of such findings is to decipher Brust's intent in executing the POA based on his purported knowledge of First South's alleged guaranty requirements. Accordingly, because it is necessary to look outside of the four corners of the POA to determine Brust's intent and whether the Guaranty was necessary to the Loan closing, the trial court erred in ruling that the POA was unambiguous. *See Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) (ruling that summary

judgment was improper where the contract in question was "ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument").

Even if the trial court was permitted to look beyond the four corners of the POA to determine whether there is an issue of fact regarding Brust's intent under the POA, the trial court erred by resolving that question against Brust, the non-moving party, over ample evidence suggesting that Brust did not intend to authorize Rosenberg to execute the Guaranty. Thus, the trial court improperly granted summary judgment to First South by weighing the evidence regarding Brust's intent as to Rosenberg's authority under the POA and failing to make reasonable inferences in favor of Brust.

First, the Court disregarded evidence suggesting that the express authority for Rosenberg to execute a guaranty on Brust's behalf was intentionally omitted from the POA. In 2001, Ecological borrowed money in connection with the Property, and Brust executed a power of attorney in connection with that loan. The 2001 power of attorney expressly granted Terry Finger, Ecological's Attorney, the authority to execute on Brust's behalf "any document, instrument, contract, assignment, affidavit, disclosure, deed, note, mortgage, guarantee, etc." (R. pp. 749-750) (Finger Dep. Def. Ex. 1) (emphasis added). Thus, the 2001 power of attorney expressly included the power to execute a guaranty agreement in connection with the 2001 loan.

The 2006 POA is substantially similar to the 2001 power of attorney with a few important exceptions. The most significant difference between the two powers of attorney is that the term "guarantee" is not contained in the 2006 POA. This omission is important because it suggests that Brust intended that the term "guarantee" be removed from the POA, thereby removing any express authority that Rosenberg could claim to

execute the Guaranty. In his deposition, Finger testified that he believed his office prepared the 2006 POA, but he could not explain how or why the term "guarantee" was omitted. (R. p. 441, lines 1-8; p. 458, line 2-p. 460, line 25) (Finger Dep. 16:1-8; 33:2-35:25). Finger admitted that it was possible that Brust could have modified the 2001 power of attorney for the 2006 Loan by intentionally removing the express authority for his agent to execute a guaranty. (R. 460, lines 10-13) (Finger Dep. 35:10-13). In any case, the omission of the term "guarantee" from the 2006 POA, when it was included in the 2001 power of attorney, presents at least a scintilla of evidence that Brust did not authorize Rosenberg to execute the Guaranty on his behalf, which is all that was required to defeat First South's motion for summary judgment. The trial court should have relied on this evidence to make a reasonable inference that Brust did not authorize Rosenberg to execute the Guaranty, and its failure to do was in error.

Second, even if the POA could be construed to authorize Rosenberg to execute a non-continuing, limited guaranty, the POA should not be construed at the summary judgment stage to authorize Rosenburg to execute the Guaranty, which is continuing and unlimited. The distinction between a non-continuing, limited and a continuing, unlimited guaranty is significant because the continuing, unlimited Guaranty increased Brust's potential liability beyond the Loan to cover all other debts incurred by Ecological, including the $275,000 Loan.

The undisputed evidence reveals that the continuing, unlimited Guaranty was not "necessary for the closing of the" Loan under the catchall provision of the POA:

- The POA was a "Specific Limited Power of Attorney" and its subject matter was limited to "clos[ing] the loan with First South Bank in the original principal sum of $2,600,000.00." (R. pp 922-923) (Wright Dep.

Ex. 9). It did not envision any other transactions with First South. (R. p. 575, lines 10-17) (Wright Dep. 101:10-17).

- The Commitment Letter defined the Loan and its purposes to be limited to the refinancing of debt on the Property and for certain expenses related thereto for a total of $2,600,000. (R. pp. 909-911) (Wright Dep. Ex. 4). The guaranty requirement as stated in the Commitment Letter was specifically limited to the "[p]ayment of the Loan." (*Id.*) The Commitment Letter did not require Brust to execute a continuing, unlimited guaranty for all debts incurred by Ecological from First South. (R. p. 527, lines 4-20) (Wright Dep. 53:4-20).

- First South did not provide Brust with a copy of the Guaranty, which included the language stating that it was a continuing, unlimited guaranty obligation. (R. p. 557, line 24-p. 559, line 12; p. 565, line 22-p. 566, line 1) (Wright Dep. 83:24-85:12, 91:22-92:1).

- First South did not inform Brust that the nature of the Guaranty was continuing and unlimited prior to or after the closing. (R. p. 557, line 24-p. 559, line 12; p. 565, line 22-p. 566, line 1) (Wright Dep. 83:24-85:12, 91:22-92:1).

- Brust did not review the Guaranty or have reason to know that First South required a continuing, unlimited guaranty prior to or after the closing.

This evidence demonstrates that: (a) First South never informed Brust that it required a continuing, unlimited guaranty; (b) the Commitment Letter specifically provided for guaranty of only the payment of the Loan; and (c) the POA was specifically limited to the Loan.

Additionally, Wright testified that the Guaranty signed by Rosenberg on behalf of Brust should not have been continuing or unlimited and that it exceeded what was necessary to close the Loan. The guaranty agreement form used by First South contains two options: (1) Box A, which indicates that the guaranty is limited to a specific loan and is not continuing; and (2) Box B, which indicates the guaranty is continuing and unlimited. Additionally, the form contains a blank for First South to insert the amount of the principal repayment obligation under the guaranty. In this case, First South checked

Box B and inserted "UNLIMITED" in the principal amount for Brust's Guaranty without ever discussing it with Brust. However, in his deposition, Wright admitted that Box A should have been checked and that the principal repayment amount should have been $2.6 million instead of "UNLIMITED." (R. p. 559, line 13-p. 567, line 15) (Wright Dep. 85:13-93:15).

Despite these facts showing that any guaranty required of Brust was to be limited, First South drafted the Guaranty to provide that it was continuing and unlimited. In other words, the Guaranty provided that Brust was not only guaranteeing the Loan for $2.6 million plus interest and collection costs but that he was also guaranteeing "each and every debt, liability and obligation of every type and description which [Ecological] may now or at any time hereafter owed to [First South]" for an "UNLIMITED" amount. (R. pp. 920-921) (Wright Dep. Ex. 8). Moreover, First South, through the testimony of Wright, admitted that the continuing, unlimited Guaranty was not necessary for the Loan and that it only required a specific, limited guaranty.

The evidence shows that the Guaranty does not fall within the "catchall" provision that authorized Rosenberg to execute "any such other documents as may be necessary to close the loan with First South Bank in the original principal sum of $2,600,000.00." Therefore, there is at least a scintilla of evidence suggesting that Rosenberg did not have actual authority to execute the continuing, unlimited Guaranty, and summary judgment should be reversed accordingly. *See Chicago Title Ins. Co.*, 453 F. Supp. at 1106-1107 (agent acting under power of attorney could not bind principals to guaranty of which principals were not aware).

**B. The trial court erred in concluding that Rosenberg had apparent authority to execute the Guaranty because there are questions of material fact regarding the scope of authority granted under the POA and First South's reliance on the POA.**

The trial court concluded that "Rosenberg had apparent authority to execute the Guaranty on Brust's behalf as Brust represented to [First South] that Rosenberg had authority to execute the Guaranty pursuant to the POA, [First South] relied on the same in the consummation of the Loan and execution of the Note and Renewals, and [First South], in good faith, relied on Brust's representations when it closed the Loan." (R. pp. 23-24) (Order Mot. Summ. J., Conclusions of Law ¶ 14). As a result, the trial court ruled that "Brust is estopped from denying Rosenberg's apparent authority." (R. p. 24) (Order Mot. Summ. J., Conclusions of Law ¶ 15). These conclusions are erroneous because they are based on findings of fact that are contradicted by the evidence in the record and are the result of an incorrect application of the governing law on apparent authority.

Under South Carolina law, an agency relationship between the principal and his purported agent can be established under the theory of apparent authority. *Charleston Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). As First South seeks to establish that Rosenberg had the apparent authority to execute the Guaranty on behalf of Brust, First South bears the burden of proving the existence and scope of the agency relationship between Rosenberg and Brust under that theory. *See Paramount Fund, Inc. v. Cusaac*, 282 S.C. 497, 499, 319 S.E.2d 354, 355 (Ct. App. 1984) (stating that "a party asserting agency as a basis of liability must prove the existence of the agency").

"Agency is a question of fact. . . . If there are any facts tending to prove the relationship of agency, it then becomes a question for the jury." *Gathers v. Harris Teeter*

*Supermarkets, Inc.*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984). Furthermore, agency must be "clearly established by the facts." *Paramount Fund*, 282 S.C. at 499, 319 S.E.2d at 355-56. Questions of agency ordinarily should not be resolved by summary judgment. *Reid v. Kelly*, 274 S.C. 171, 174, 262 S.E.2d 24 (1980).

"[A]pparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing." *Charleston Registry for Golf & Tourism,* 359 S.C. at 642, 598 S.E.2d at 721. The doctrine of apparent authority holds that:

> the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption. Thus, the concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal.

*Id.*

Based on these principles, South Carolina courts have required the following three elements to prove apparent authority: (1) the principal "consciously or impliedly represented another to be his agent;" (2) "there was reliance upon the representation;" and (3) "there was a change of position to the relying party's detriment." *Id.* at 643. As to the second element, the party asserting apparent authority must demonstrate that its reliance on the representations of authority by the purported principal was "in good faith and in the exercise of reasonable prudence." *R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000). The legal principles of apparent authority require that a third person dealing with an agent under a power of attorney has a duty to inform himself as to the character and extent of that

authority. 2A C.J.S. *Agency* § 150. The duty to ascertain the scope of an agent's authority requires the third party to exercise reasonable diligence to discover the nature and scope of the agent's powers by making an inquiry addressed to the principal. 2A C.J.S. *Agency* §§ 150-151.

In this case, it is undisputed that Brust represented Rosenberg to be his agent under the POA. However, there are material issues of disputed facts regarding whether First South can establish that it relied on any conscious or implied representations of agency by Brust in making the Loan. Although the trial court found that First South "accepted the Guaranty based on the representations in the POA and relied on same" (R. p. 19) (Order Mot. Summ. J., Findings of Fact ¶ 20), this finding is directly contradicted by the testimony of Wright, First South's Rule 30(b)(6) deponent, who testified that:

- Neither he nor any other employee of First South attended the closing of the Loan on February 2, 2006. (R. p. 555, lines 18-24; p. 570, lines 12-24) (Wright Dep. 81:18-24, 96:12-24).
- First South was unaware that Brust would not be attending the closing or that Rosenberg would be executing the Guaranty on Brust's behalf pursuant to a power of attorney. (R. p. 555, lines 18-24; p. 570, lines 12-24) (Wright Dep. 81:18-24, 96:12-24).
- First South did not discover that Rosenberg signed Brust's Guaranty pursuant to the POA until after the closing documents had been returned to First South after the closing. (R. p. 569, line 24-p. 570, line 11) (Wright Dep. 95:24-96:11).

Thus, the undisputed testimony reveals that it would have been impossible for First South to accept and rely on the Guaranty based on representations in the POA because First South did not know it existed at the time the Loan was closed, making the trial court's Finding of Fact in error. In fact, Wright did not learn of the POA until after the Loan closed, and there is no contemporaneous copy of the POA maintained in First South's Loan file. (R. p. 577, line 9-p. 579, line 25) (Wright Dep. 103:9-105:25). In light of

these facts, First South could not have relied on the POA in making the Loan to Ecological, and therefore, the conclusion that Rosenberg had apparent authority based on First South's reliance on the POA is incorrect. At the very least, if these facts are construed in the light most favorable to Brust, there is at least an issue of fact as to whether First South can prove it relied on the POA, which is an essential element of its claim of apparent authority.

The trial court's granting summary judgment under a theory of apparent authority is also improper because there is evidence showing that First South failed to ascertain the scope of Rosenberg's authority under the POA and that First Bank's reliance on Brust's representations of authority was not reasonable under the circumstances. First, summary judgment is improper on apparent authority because the evidence construed in Brust's favor suggests that First South should not have relied on the POA because it did not ascertain the scope of Rosenberg's authority under the POA. Wright admitted this fact and expressly denied directing any inquiry to Brust about the POA. (R. p. 573, line 24-p. 574, line 18) (Wright Dep.99:24-100:18). The trial court should have construed this admission in the light most favorable to Brust and ruled that First South could not prevail on a theory of actual or implied authority at the summary judgment stage when it did nothing to ascertain the scope of Rosenberg's authority under the POA. *See Anheuser-Busch, Inc. v. Grovier-Starr Produce Co.*, 128 F.2d 146, 152 (10th Cir. 1942) ("If the third party knows, or has good reason for believing, that the acts exceed the agent's powers, or if such reasonable inquiry as he is under duty to make, would result in a discovery of the true state of the powers, and he fails to fulfill that duty, he cannot assert an apparent authority effective against the principal.")

The evidence further indicates that any reliance by First South on the POA was not reasonable. The reasonableness of any purported reliance of the apparent or implied authority of Rosenberg by First South under the POA is a question of fact because there is evidence that First South was negligent and failed to follow standard banking practices in closing the Loan. (R. p. 574, lines 2-16; p. 627, line 15-p. 629, line 13; p. 630, line 4-p. 632, line 25; p. 639, line 17-p. 641, line 9; R. pp 743-748) (Wright Dep. 100:2-16, 153:15-155:13, 156:4-158:25, 165:17-167:9; Barksdale Aff. ¶ 5). For example, First South disregarded its own policy requiring its loan officers to confirm the validity of the signatures of guarantors by neglecting to confirm the validity of the signatures on either the Guaranty or the POA or inquire into the scope of Rosenberg's authority under the POA. (R. p. 574, line 2-p. 575, line 4; R. p. 635, line 21-p. 637, line 14) (Wright Dep. 100:2-101:4; 161:21-163:14). Also, First South did not even require that closing counsel issue an attorney opinion letter attesting to the proper execution and enforceability of the closing documents. (R. p. 574, lines 12-14) (Wright Dep. 100:12-14). This evidence raises questions regarding whether First South acted with reasonable prudence in purportedly relying on Brust's alleged representations of apparent authority. Accordingly, the issues of apparent authority are questions of fact that should not be resolved on summary judgment, and the trial court's decision to the contrary should be reversed.

### C. The trial court erred in concluding that Brust ratified the Guaranty because there are questions of material fact about whether Brust had full knowledge of the scope of the Guaranty.

As an alternative ground for issuing summary judgment, the trial court ruled that Brust ratified the Guaranty after Rosenberg executed it on his behalf under the POA. Specifically, the trial court concluded, "Brust also ratified the execution of the Guaranty

as he enjoyed the benefits of the Loan as a member of Ecological, had full knowledge of the facts as he provided his personal information from 2005 through 2010 and signed the Commitment Letter, and he affirmatively elected an intention to adopt Rosenberg's acts by making no written repudiation or revocation of the Guaranty during the term of repayment of the Note and Renewals." (R. p. 24) (Order Mot. Summ. J., Conclusions of Law ¶ 16). This ruling was in error because the trial court ignored conflicting evidence to reach this conclusion and misapplied the relevant law regarding ratification.

Under South Carolina law, the party asserting ratification must establish the following three elements: (1) acceptance by the principal of the benefits of the agent's acts; (2) the principal's full knowledge of the facts; and (3) circumstances of an affirmative election demonstrating the principal's intent to accept the unauthorized arrangements. *Stiltner v. USAA Cas. Ins. Co.*, 395 S.C. 183, 191, 717 S.E.2d 74, 78 (Ct. App. 2011). "[M]ere silence or failure of a principal to repudiate the unauthorized act of an agent does not necessarily constitute a ratification, unless silence or acquiescence in question cannot be explained on any other theory than that of ratification." *Id.* Absent an admission by the principle that he ratified the agent's unauthorized act, "[w]hether or not there has been a ratification of an unauthorized act by acceptance or retention of benefits thereof is usually a question of fact for the jury and not one of law for the court." *Id.* Under these principles, the trial court's ruling regarding ratification is clearly in error at the summary judgment stage.

**1. Brust presented evidence suggesting that he did not have full knowledge of the scope of the Guaranty.**

In order to determine that Brust ratified the Guaranty, the trial court weighed the evidence and made inferences against Brust regarding the second element of ratification,

which is whether he had "full knowledge of the facts" relating to the Guaranty. There is an abundance of evidence indicating that Brust had little knowledge, if any, about the terms and conditions of the Guaranty. First South admits that it failed to discuss the Guaranty with Brust or disclose its contents to him prior to its execution. After Rosenberg signed the Guaranty, First South failed to verify with Brust that Rosenberg was authorized to sign it on his behalf, despite the fact that the Guaranty exceeded the requirements that First South had previously communicated to Brust in the Commitment Letter. In fact, First South admits that it cannot confirm that Brust saw the Guaranty at any time prior to this litigation, as evidenced by its Rule 30(b)(6) deposition testimony provided by Wright:

> Q. You were just reading from the guaranty in paragraph two. You don't know if Mr. Brust ever read that language, do you?
>
> A. I don't know.
>
> Q. You never presented it to him?
>
> A. No.
>
> Q. So you don't have any idea whether Mr. Brust has ever seen this document or not?
>
> A. No.
>
> Q. So he wouldn't know what to revoke even if he wanted to, would he?
>
> A. I don't know.

(R. p. 657, lines 7-20) (Wright Dep. 183:7-20). First South's own admissions show that there is evidence that Brust did not have any knowledge about the terms and conditions of the Guaranty – much less full knowledge. This evidence alone precludes summary judgment because the trial court could not have established whether Brust was fully

aware of any purported obligations under the Guaranty without weighing other evidence against these facts.

However, the trial court ignored these facts and instead relied on only two pieces of evidence to conclude that Brust had full knowledge of Rosenberg's acts: (1) Brust's execution of the Commitment Letter; and (2) Brust's provision of personal financial statements to First South. These examples do not establish that Brust had full knowledge of Rosenberg's acts; at the most, they create genuine issues of fact about the extent of Brust's knowledge regarding such acts.

Brust's execution of the Commitment Letter prior to the Loan closing does not establish that he was fully aware that Rosenberg later signed a continuing, unlimited Guaranty. The Commitment Letter suggests that First South informed Brust that it considered a guaranty to be a condition of the Loan. However, there were other purported "conditions" of the Loan contained in the Commitment Letter that Respondent failed to require. For example, the Commitment Letter stated that it required Brust to establish a primary deposit relationship with First South as a condition of the Loan; however, First South did not enforce this condition. As such, First South's failure to require strict compliance with the terms of the Commitment Letter creates an issue of fact about whether Brust had full knowledge that First South required the Guaranty or that Rosenberg would be required to execute one on his behalf.

More importantly, the Commitment Letter's terms only required Brust to execute a non-continuing, limited guaranty; however, First South exceeded the requirements of the Commitment Letter by preparing the continuing, unlimited Guaranty and presenting it to Rosenberg to sign on behalf of Brust without explaining its continuing and unlimited

nature to Brust. First South admits that the Guaranty should not have been continuing or unlimited, and it is undisputed that First South never informed Brust of the terms of the Guaranty. Thus, there are genuine issues of fact about whether Brust had full knowledge that Rosenberg had executed the continuing, unlimited Guaranty on his behalf.

Similarly, as noted above, Brust's provision of personal financial statements during the course of Ecological's relationship with First South does not establish that he was fully aware of the continuing, unlimited scope of the Guaranty signed by Rosenberg. In fact, there is no evidence demonstrating that Brust was aware that Rosenberg had attempted to make him personally responsible for every single debt that First South issued to Ecological.

In sum, the trial court improperly weighed the evidence and determined that Brust had full knowledge of the circumstances regarding the Guaranty despite the evidence to the contrary. The trial court should have considered this evidence in the light most favorable Brust and drawn the reasonable inference that Brust did not have full knowledge.

**2. Brust's silence, alone, does not constitute a ratification of the Guaranty.**

The trial court misconstrued the applicable law by holding that Brust's failure to make a written repudiation or revocation of the Guaranty constitutes an affirmative election of an intention to adopt Rosenberg's act. As stated above, the trial court concluded that Brust "affirmatively elected an intention to adopt Rosenberg's acts by making no written repudiation or revocation of the Guaranty during the term of repayment of the Note and Renewals." (R. p. 24) (Order Mot. Summ. J., Conclusions of Law ¶ 16). This conclusion of law cannot be reconciled with the applicable legal

principle that "mere silence or failure of a principal to repudiate the unauthorized act of an agent does not necessarily constitute a ratification, unless silence or acquiescence in question cannot be explained on any other theory than that of ratification." *Stiltner,* 395 S.C. at 191, 717 S.E.2d at 78. The trial court ignored this legal principle of ratification and based its ruling of an affirmative election solely on Brust's purported silence and acquiescence. This evidence alone is insufficient to support the trial court's ruling on ratification especially where Brust's alleged silence can be reasonably explained by the evidence indicating that he was not fully aware of the circumstances surrounding the Guaranty. Accordingly, the trial court's conclusions regarding ratification are not consistent with the evidence in the record or the applicable law, and summary judgment was improper.

**D. The trial court erred in finding that subsequent modifications of the Loan did not release Brust from liability under the Guaranty despite evidence of material changes in the Loan and the fact that First South never communicated the changes to Brust.**

The trial court erroneously dismissed Brust's affirmative defense that he was released from the obligations of the Guaranty because the Loan was subject to numerous renewals, extensions, and modifications for which First South failed to obtain new guaranties from Brust. According to the trial court, the "Renewals also do not relieve Brust of his liability under the Guaranty as same relate to the Loan, and he agreed to repay same under the clear and unambiguous terms of the Guaranty." (R. p. 25) (Order Mot. Summ. J., Conclusions of Law ¶ 26). The trial court's conclusion on this issue is incorrect as a matter of law.

Contrary to the trial court's conclusion, the applicable law provides that "a guarantor will be released from his undertaking by any material alteration of the original

obligation or duty to which the guaranty relates." 38A C.J.S. *Guaranty* § 86. Furthermore, "it is a well settled rule that a valid agreement between the parties to the principal obligation, without the consent or subsequent ratification of the guarantor, for an extension of time for payment or performance by the principal obligor, for a definite period, operates to release the guarantor from further liability under the guaranty." *Id.* at § 89.[2] Moreover, under applicable South Carolina law, a "guarantor will be discharged from his obligation to pay the debt of another by contract when any change is made in the contract without his consent, waiving the effect upon him of any such change in the contract." *Yeager v. Rawls*, 41 S.C. 331, 334-35, 19 S.E. 649, 650 (1894). "[C]onsent to modification cannot be inferred from the mere fact that [the guarantor] had knowledge of it, or that he did not dissent therefrom." 39 C.J.S. *Guaranty* § 87.

Instead of relying on the applicable law stated above, the trial court cited the cases of *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011), and *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009), to support its conclusion that the numerous renewals, extensions, and modifications did not release Brust from the obligations under the Guaranty. However, the trial court erred in relying on *Davis* and *Bell* because those cases have no application to the issue of whether a guarantor has continuing obligations to guaranty renewals, extensions, or modifications of the principal borrower's debt. *Davis* is inapplicable to this case because it involves the

---

[2] First South's policy recognizes this principle of law insofar as it requires First South "to obtain the signatures of all obligors on renewal notes before the existing note is released. The agreement of all parties to be obtained prior to any extension, change in terms, release, substitution of collateral, et cetera." (R. p. 637, line 15-p. 638, line 6; pp. 751-908) (Wright Dep. 163:15-164:6, Ex. 2). In fact, First South's policy states that its failure to comply with this policy and obtain "the signatures of all obligors . . . could release obligors from their liability to" First South. (*Id.*)

issue of whether an arbitration agreement between an employer and employee was enforceable under South Carolina law. As a result, the trial court mistakenly relied on *Davis*. Similarly, *Bell* does not support the trial court's conclusion that Brust was not released from the Guaranty obligations. While *Bell* does involve a loan between a bank and borrower, it does not involve a guaranty agreement. Furthermore, the issue of continuing obligations under a guaranty in which the original loan has been renewed, extended, or modified are not involved in *Bell* in any manner.

In this case, it is undisputed that First South materially changed the terms of the Loan by extending the time of payment, modifying the payments between installment and balloon payments, and changing the interest rates under the Loan no less than six times over the course of six years. The changes in the Loan represented significant, material changes to the obligations upon which the Guaranty was given. And while the changes had obvious benefits to the borrower, First South also obtained substantial benefits from the creation of these new agreements. It is further undisputed that First South never discussed with Brust the renewals, modifications, and extensions, in clear violation of First South's policy. Therefore, there is at least a scintilla of evidence in the record supporting Brust's position that First South's renewals, extensions, and modifications of the Loan released Brust from any obligations as a guarantor under the applicable law. Thus, the trial court's conclusion that Brust was not released from the obligations of the Guaranty as a result of First South repeatedly renewing, extending, and modifying the original obligation of Ecological over a period of six years is based on a mistaken application of law and is in error. The trial court's ruling on this issue should be reversed accordingly.

### E. The trial court erred in treating Brust's proposed counterclaims as affirmative defenses despite the fact that the counterclaims were based on specific information discovered from First South during the course of discovery.

The trial court mistakenly treated Brust's pending counterclaims as affirmative defenses under Rule 8(c), SCRCP, which provides that "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper delegation." Rule 8(c), SCRCP. According to the trial court, the "counterclaims in the Amended Answer contain the same material allegations as those set forth as defenses in Brust's Answer." *Id.* The trial court's findings and conclusions effectively prevented Brust from asserting his counterclaims against First South under his Motion to Amend, which is discussed in more detail below.

The trial court's findings and conclusions are in error because they cannot be reconciled with any reading of the affirmative defenses and the proposed counterclaims. While there may be some overlap in the allegations and evidence supporting the affirmative defenses and counterclaims, the counterclaims are based on evidence discovered during the Rule 30(b)(6) deposition of First South, which disclosed several facts which were not previously known, and on the expert opinion offered by Brust's banking practices expert, William C. Barksdale. The facts supporting the counterclaim allegations are significantly more detailed than those asserted in support of the affirmative defenses and extend into issues which are not covered by the affirmative defenses. Even more problematic, the trial court made this finding of fact on the

proposed counterclaims while the Motion to Amend to add the counterclaims was pending and prior to any hearing or argument on them.

Even if the counterclaims contain or are based on the same allegations as those supporting the affirmative defenses, it was inappropriate for the trial court to treat Brust's pending counterclaims as affirmative defenses. Rule 8(c) does not prohibit affirmative defenses and counterclaims from being supported by shared allegations. Rather, it is routine for a defendant to assert affirmative defenses based on certain allegations and rely on those same allegations to support counterclaims. Therefore, the trial court's findings and conclusions that Brust's pending counterclaims should be treated as affirmative defenses are improper.

## II. THE TRIAL COURT ERRED IN DENYING BRUST'S MOTION TO AMEND.

Brust's Motion to Amend sought, based upon facts disclosed in the deposition testimony of Wright, to amend Brust's Answer in order to assert counterclaims against First South for (a) negligence and (b) breach of covenant of good faith and fair dealing. In denying Brust's Motion to Amend, the trial court found Brust's proposed counterclaims to be the same as his affirmative defenses, which the trial court rejected in the Summary Judgment Order. The trial court thus held that the counterclaims were barred under the doctrine of *res judicata*. (R. pp. 32-33) (Amendment Order, Conclusions of Law ¶¶ 7-18). For the reasons that follow, the trial court erroneously denied the Motion to Amend, and the Amendment Order should be reversed or vacated.

### A. The trial court improperly denied Brust's Motion to Amend based on the mistaken application of *res judicata*.

The trial court erred in rejecting Brust's Motion to Amend under the doctrine of *res judicata*. The theory of *res judicata* requires proof of three elements: (1) a final, valid judgment entered on the merits; (2) the same parties; and (3) the subsequent action involving matters properly included in the first action. *Judy v. Judy*, 383 S.C. 1, 8, 677 S.E.2d 213, 218 (Ct. App. 2009).

The trial court erroneously applied *res judicata* to bar Brust's counterclaims because the doctrine only applies to successive litigation and not to issues or claims raised in the same proceeding. South Carolina courts have effectively established this principle under the third element of *res judicata*, which requires a "first action" and a "subsequent action." Thus, *res judicata* may apply in successive litigation but the doctrine has no application when it is raised in the same proceeding, as the trial court did in denying the Motion to Amend.

The conclusion that *res judicata* does not apply in the same proceeding is consistent with authority from numerous other jurisdictions. *See, e.g., Alba v. Hayden*, 148 N.M. 465, 467, 237 P.3d 767, 769 (Ct. App. 2010) ("*Res judicata* and collateral estoppel, however, only apply to successive litigation and not to issues or claims raised in the same proceeding."); *Benitez v. KFC Nat'l Mgmt. Co.*, 305 Ill. App. 3d 1027, 714 N.E.2d 1002, 1010 (2nd Dist. Ill. Ct. App. 1999) (stating that *res judicata* was inapplicable in same proceeding); *Ireland v. Zoning Bd. of Appeals*, 606 N.Y.S.2d 843, 845, 195 A.D.2d 155, 158 (Sup. Ct. N.Y. 1994) (ruling that the principles of *res judicata* are not applicable when the two determinations arise in the same proceeding); *Jenkins v. Cameron & Hornbostel*, 91 Md. App. 316, 335, 604 A.2d 506, 515 (1991) (declaring that

*res judicata* was inapplicable because claims arose "within the same proceeding, and the doctrine may be invoked only when there are similar claims raised in two separate proceedings"). These cases help illustrate that the trial court improperly applied the doctrine of *res judicata* in the same proceeding, and therefore, its denial of the Motion to Amend under that doctrine is in error.

Even if *res judicata* could conceivably apply in this case despite the lack of a previous action, the doctrine cannot preclude Brust's counterclaims in this instance because it is based on the trial court's improper issuance of summary judgment. As argued above, the trial court erred in granting summary judgment, and that decision should be reversed. The reversal of the Summary Judgment Order will nullify the first element required for *res judicata* and thus the trial court's basis for denial of the Motion to Amend.

**B. Brust's Motion to Amend should be granted under Rule 15, SCRCP.**

Rather than deny Brust's Motion to Amend under *res judicata*, the trial court should have analyzed the Motion to Amend under Rule 15, SCRCP. Rule 15(a) states "a party may amend his pleading ... by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." *Jarrell v. Seaboard Systems R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987).

> It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice. Courts have wide latitude in amending pleadings and "[w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court..."

*City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 233, 599 S.E.2d 462, 465, (Ct. App. 2004) (internal citations omitted). "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Id.* at 232. "[I]t is the responsibility of the opposing party to establish prejudice by affidavit or other means." H. Lightsey & J. Flanagan, *South Carolina Civil Procedure* 288 (1985).

Furthermore, a motion to amend should be contested by procedural arguments, not the substance or merits of the counterclaims presented. "Arguments going to the legal merits of a proposed defense or counterclaim are better taken up in the context of a Rule 12(b) motion to dismiss or a Rule 56 motion for summary judgment. It follows that the trial judge should generally not consider these substantive arguments at the mere amendment stage." *Collins v. Sigmon*, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989) (finding error and reversing the trial judge's denial of a motion to amend based on the substance of the proposed counterclaims); *see also Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998).

In this case, First South did not allege it was prejudiced in any way from the Motion to Amend or Brust's proposed counterclaims. Also, there is no evidence that Brust delayed the filing of the Motion to Amend. In fact, Brust filed the Motion within two days of receiving Wright's deposition transcript, which serves as the basis for the counterclaims asserted. During his deposition, Wright admitted numerous instances of misconduct and negligence that serve as the basis of Brust's claims of negligence and breach of covenant of good faith and fair dealing, including:

- First South violated several of its internal loan underwriting policies, including:
    - Failing to perform a credit approval summary;

- Failing to obtain the recommended financial information from Ecological, Rosenberg, and Brust to determine their creditworthiness and ability to repay the loan;
- Basing repayment of the loan on a speculative repayment source, specifically the sale of the Property subject of the loan;
- Structuring the loan as a balloon loan without regular amortization.

(R. p. 627, line 15-p. 629, line 13; p. 630, line 4-p. 632, line 25; p. 639, line 17-p. 641, line 9) (Wright Dep. 153:15-155:13, 156:4-158:25, 165:17-167:9).

- Although First South maintained a policy that required its loan officers to clearly explain guaranty obligations to guarantors, First South had no contact with Brust about the guaranty requirements after sending the Commitment Letter. (R. p. 557, line 22-p. 559, line 12; p. 634, line 15-p. 635, line 20) (Wright Dep. 83:22-85:12, 160:15-161:20).
- The Commitment Letter did not require Brust to execute a continuing, unlimited guaranty for all debt incurred by Ecological from First South. (R. p. 527, lines 4-20) (Wright Dep. 53:4-20). Wright admitted that First South improperly made the Guaranty continuing and unlimited. (R. p. 559, line 13-p. 567, line 15) (Wright Dep. 85:13-93:15). Instead of being continuing and unlimited, First South should have checked Box A to make it a non-continuing guaranty and inserted $2.6 million as the principal repayment amount instead of "UNLIMITED." (*Id.*)
- First South did not disclose the guaranty form to Brust either prior to or after the closing and that First South did not discuss with Brust whether the guaranty would be of a continuing and unlimited nature. (R. p. 557, line 24-p. 559, line 12; p. 565, line 22-p. 566, line 1) (Wright Dep. 83:24-85:12, 91:22-92:1).
- Neither Wright nor any other employee of First South attended the closing. Wright was not aware that Brust would not be attending the closing or that Rosenberg would be executing the Guaranty on Brust's behalf pursuant to a power of attorney. (R. p. 555, lines 18-24; p. 570, lines 12-24) (Wright Dep. 81:18-24, 96:12-24).
- Wright did not discover that Rosenberg signed Brust's Guaranty pursuant to the POA until after the closing documents had been returned to First South after the closing. (R. p. 569, line 24-p. 570, line 11) (Wright Dep. 95:24-96:11).
- Although First South had a policy that required its loan officers to confirm the validity of the signatures of guarantors, Wright did nothing to confirm

the validity of such signatures on either the Guaranty or the POA or inquire into the scope of Rosenberg's authority under the POA. R. p. 574, line 2-p. 575, line 4; R. p. 635, line 21-p. 637, line 14 (Wright Dep. 100:2-101:4, 161:21-163:14).

- First South did not require that closing counsel issue an attorney opinion letter attesting to the proper execution and enforceability of the closing documents. (R. p. 574, lines 12-14) (Wright Dep. 100:12-14).

- First South had a policy that required it to obtain new guaranty agreements from guarantors for all renewals, extensions, modifications, and other changes in the terms of a loan. (R. p. 637, line 15-p. 638, line 6) (Wright Dep. 163:15:164:6). Although First South either renewed, extended, or modified the Loan on several occasions, it consistently failed to comply with this policy by neglecting to have Brust execute new guaranties each time it renewed, extended, or modified the Loan. (R. p. 583, line 11-p. 585, line 18; p. 587, line 4-p. 590, line 14; p. 592, line 25-p. 594, line 7; p. 637, line 15-p. 638, line 6; pp. 751-908) (Wright Dep. 109:11-111:18, 113:4-116:14, 118:25-120:7, 163:15-164:6, Ex. 2).

- In January 2009, Ecological obtained approximately $500,000.00 in connection with an easement on the Property. These proceeds were used to satisfy the $275,000 Loan. First South did not make Brust aware of the payment made in January of 2009 to satisfy the $275,000 Loan. (R. p. 611, line 6-p. 616, line 25) (Wright Dep. 137:6-142:25).

- First South has a policy, which provides that the loan officer responsible for a loan must "discuss the nature of the guaranty/endorsement with the prospective [guarantor], clearly explaining the responsibility being incurred for repaying the loan. Each is to be given a copy of the note." (R. p. 634, line 15-p. 635, line 9) (Wright Dep. 160:15-161:9). Wright admitted that he did not comply with this policy with regards to Brust's Guaranty. (R. p. 161, lines 10-20) (Wright Dep. 161:10-20).

- First South did nothing to ascertain the scope of Rosenberg's authority under the POA and expressly denies directing any inquiry to Brust about the POA. (R. p. 573, line 24-p. 574, line 18) (Wright Dep.99:24-100:18).

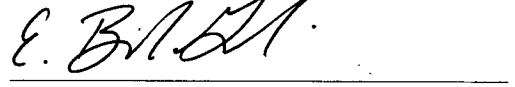
It is upon the testimony of Wright, set forth herein, and the bank documents produced by First South in May of 2014 that Brust bases the proposed counterclaims. Immediately after conferring with Brust's expert, Barksdale, regarding Wright's testimony and the documents produced, Brust determined that he had viable claims against First South. In light of the timing of these events, there is no evidence of any

delay on the part of Brust or evidence of prejudice to First South. As a result, the trial court erred in denying Brust's Motion to Amend. *See Potomac Leasing Co. v. Bone*, 294 S.C. 494, 366 S.E.2d 26 (Ct. App. 1988) (ruling that "delay alone, regardless of its length, is not enough to bar [a proposed amendment] if the other party is not prejudiced") (citing J. MOORE, 3 MOORE's FEDERAL PRACTICE 15.08[4] at 15-76 (2d ed. 1987)).

## CONCLUSION

As set forth above, the trial court made numerous erroneous findings of fact and conclusions of law in the Summary Judgment Order, including improperly weighing the evidence, construing the same against Brust, and drawing the conclusions of law in contravention of established principles of applicable law. Because the trial court erred, the Summary Judgment Order should be reversed and the case should be remanded to the trial court for further proceedings. Moreover, because the trial court's denial of the Motion to Amend was improperly based on *res judicata* rather than Rule 15, SCRCP, the Amendment Order should also be reversed and Brust's Motion to Amend should be granted.

Respectfully submitted,



Robert E. Sumner, IV, SC Bar #71728
E. Brandon Gaskins, SC Bar #73274
Moore & Van Allen, PLLC
78 Wentworth Street
Post Office Box 22828
Charleston, SC 29413-2828
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
robertsumner@mvalaw.com
brandongaskins@mvalaw.com

*Attorneys for Appellant Phillip J. Brust*

October 8, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals



---

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes, III, Special Circuit Court Judge

---

Appellate Case No. 2015-000035
Lower Case No. 2013-CP-07-00610

---

First South Bank ..... Respondent,

v.

John E. Rosenberg and Phillip J. Brust ..... Defendants,

Of Whom The Estate of Phillip J. Brust is ..... Appellant.

---

## CERTIFICATE OF COUNSEL

---

The undersigned certifies that **Appellant's Final Initial Brief** and **Final Reply Brief** comply with Rule 211(b), SCACR.

Robert E. Sumner, IV, SC Bar #71728
E. Brandon Gaskins, SC Bar #73274
Moore & Van Allen, PLLC
78 Wentworth Street
Post Office Box 22828
Charleston, SC 29413-2828
Telephone: (843) 579-7000

*Attorneys for Appellant*
*The Estate of Phillip J. Brust*

October 8, 2015

Charleston, South Carolina