IN 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 RESPONDENT FIRST SOUTH BANK

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STATEMENT OF THE CASE

Respondent is satisfied with Appellant's Statement of the Case to the extent same conforms to and is consistent with the hereinbelow Procedural History and Statement of Facts.

I. Procedural History

Respondent initiated this action on March 8, 2013 by filing a Summons and Complaint ("Complaint") against Defendant John E. Rosenberg ("Rosenberg") and Defendant Philip J. Brust ("Brust") n/k/a Estate of Philip J. Brust ("Appellant") in the Court of Common Pleas for the County of Beaufort, State of South Carolina seeking to enforce its rights under separate loan guaranties executed by Rosenberg and Brust. (R. pp. 38-63) After due and proper service, Rosenberg and Brust each filed separate Motions to Dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), SCRCP. (R pp. 64-65.) The Motion to Dismiss filed by Rosenberg was resolved by Consent Order entered into by Respondent, Rosenberg, and the Honorable Marvin H. Dukes, III, Special Circuit Court Judge for Beaufort County ("Judge Dukes"), and the Motion to Dismiss filed by Brust was dismissed by Order of Judge Dukes. (R. p. 1-3.)

On September 9, 2013, Brust filed Defendant Philip J. Brust's Answer to Plaintiff's Complaint and Crossclaims Against Defendant John E. Rosenberg ("Brust Answer"). (R. pp. 82-96.) In the Brust Answer, he denied the material allegations of the Summons and Complaint

and/or craved reference to the documents referenced therein. (R. pp. 82-84.) Additionally, Brust alleged as an affirmative defense, that the guaranty agreement related to him was invalid as Rosenberg did not have the actual or apparent authority to sign the guaranty agreement on his behalf ("Second Defense"). (R. p. 84, ¶15) The Brust Answer also included allegations that Respondent's claim was barred as the result of its failure to follow its own policies and procedures and negligence in the underwriting, approval and administration of the loan in question ("Seventh Defense"), that various modifications to the loan release Brust of his obligations under the guaranty agreement ("Ninth Defense"), and that Respondent knew or should have known Rosenberg deceived Brust regarding the loan and guaranty in question and that Respondent breached its duty of good faith and fair dealing to Brust as a result ("Tenth Defense"). (R. p. 85 ¶¶ 20, 22; p.86 ¶23.)

Soon thereafter, Respondent filed its Motion for Summary Judgment ("MSJ") and the Affidavit of Patrick Wright in Support Thereof on October 28, 2013 on the basis there are no genuine issues of material fact and conclusions of law as to Respondent's claim against Brust. (R. pp. 96-102) The hearing on the MSJ was continued several times to allow the parties to conduct and complete written discovery, and on May 23, 2014, Brust took the deposition of Patrick Wright, Respondent's Rule 30(b)(6) representative. (R. pp. 474-658.)

On May 30, 2014, four days before the hearing on the MSJ, Respondent received the Affidavit of William Barksdale ("Barksdale Affidavit") and Appellant's Motion to Amend Answer and Cross-claims Against Defendant Rosenberg ("Motion to Amend"). (R. pp. 144-166; R. pp. 743-749.) Attached to the Motion to Amend was the proposed Amended Answer and Cross-claims of Defendant Rosenberg and Counterclaim against Plaintiff First South Bank ("Amended Answer"). (R. p. 147-166.) In the Amended Answer, Brust sought to assert

counterclaims against Respondent for its alleged negligence resulting from its alleged failure to follow its own policies and procedures in the underwriting, approval and administration of the loan ("First Counterclaim") and for its alleged breach of the covenant of good faith and fair dealing ("Second Counterclaim"). (R. pp. 162-166.) From the body of the Motion to Amend, same was filed in response to the Wright Deposition and to insert allegations in the Amended Answer derived from the opinions contained in the Barksdale Affidavit. (R. pp. 144-145; R. pp. 743-749.)

The trial court heard the MSJ on June 3, 2014. During the MSJ hearing Brust relied on the Barksdale Affidavit to support the Seventh Defense. He also used various examples from the Wright Deposition. (R. p. 404, line 2-p. 405, line 20; p. 409, line 5-p. 410, line 25; R. p. 419, lines 3-10.) On August 5, 2014, the trial court issued its Order for Summary Judgment against Phillip J. Brust ("Summary Judgment Order") wherein the trial court dismissed the Second Defense, Seventh Defense, Ninth Defense, and Tenth Defense. (R. pp. 15-28.) In response to the Summary Judgment Order, Brust filed a Motion for Reconsideration that was denied by Judge Dukes on December 18, 2014 (R. pp. 204-236; 36-37.) Judge Dukes also denied Brust's Motion to Amend on December 10, 2014 (R. pp. 29-35.)

Respondent received Brust's Notice of Appeal on January 9, 2015. (R. p. 336-337.)

II. Statement of Facts

In or around October or early November, 2005, Ecological Investments, LLC ("Ecological"), of which Rosenberg is the managing member and of which Brust was a member, entered into negotiations with Respondent for the purpose of obtaining a loan in the amount of Two Million Six Hundred Thousand and 00/100 ($2,600,000.00) Dollars (the "Loan"). (R. p. 506, line 12- p. 507, line 25.) At the time, Ecological was seeking to refinance a pre-existing loan

that was being serviced by another financial institution. (R. p. 506, lines 12-23.) Negotiations began when Ecological, through Rosenberg, approached Respondent about the Loan. (R. p. 506, lines 12-23.)

During negotiations, Respondent became informed that Ecological was organized to construct and operate a tourist attraction that was to be devoted to butterfly and natural science education called "Butterfly Kingdom". (R. p. 507, lines 9-25.) Butterfly Kingdom was to be located on 82.6 acres in and around Beaufort and Jasper Counties, South Carolina near I-95 ("Property"). (R. pp. 915-919.) It was also revealed to Respondent that the Property constituted Ecological's primary asset, and Ecological's members constituted its primary source of financial strength and liquidity. (R., pp. 915-919) Further, Rosenberg communicated to Respondent that Ecological was in discussions with various third parties for the sale of the Property, a transaction that never materialized. (R., p. 509, lines 1-21; p. 510, lines 3-25.)

The negotiations resulted in Respondent issuing a commitment letter to Ecological dated January 9, 2006 ("Commitment Letter"). The Commitment Letter outlined the terms by which Respondent would agree to issue the Loan ("Commitment Letter"). (R. pp. 909-911.) As for the terms of repayment, the Commitment Letter stated payments would be interest-only and the Loan would mature in two (2) years. Id. The Commitment Letter also stated the Loan would be secured by a first mortgage security interest on the Property. The Loan was also required to be unconditionally guaranteed, jointly and severally, by Rosenberg and Brust. Id.

The Commitment Letter further required Ecological, Brust and Rosenberg to furnish Respondent annual personal balance sheets and income information on Respondent's standard personal financial statement and complete and provide to Respondent personal income tax returns during the term of repayment. Id. The Commitment Letter also stated that any

inconsistencies between any term of a note, security document, or any loan agreement and any term of the Commitment Letter would be resolved in favor of the terms of the note, settlement documents and loan agreement. Id. Ecological, Brust and Rosenberg signed the Commitment Letter to signify their acceptance of same. Id. The Commitment Letter by its terms was set to expire after January 31, 2006. Id. After the issuance of the Commitment Letter, Respondent had no further communication with Brust prior to the closing of the Loan. (R. p. 512, lines 24-p. 521, lines 15l.)

Respondent closed the Loan on February 6, 2006 and Rosenberg and Terry Finger, Esq., attorney for Ecological, attended same. (R. p. 555, lines 18-20; p. 569, lines 12-24.) The closing of the Loan was not attended by Respondent, a representative thereof, or Brust. (R. pp.555-556, lines 21-7.) Prior to the closing of the Loan, Respondent was unaware that Brust would not be attending same. (R. p. 557, lines 7-23.) It was only after Respondent received the closing documents that it learned of Brust's absence. (R. p. 557, lines 7-23.)

According to the documents executed at closing, Ecological, through Rosenberg, signed a Promissory Note wherein it promised to repay the Loan and that interest on same would accrue at a rate of seven percent (7%) until the maturity date of the Loan, February 2, 2008 ("Promissory Note"). (R. pp. 42-44.) Respondent also received a signed original Unlimited Guaranty executed by Rosenberg. (R. pp. 60-61.) Respondent additionally received a signed original Unlimited Guaranty executed by Rosenberg as attorney in fact for Brust ("Brust Guaranty") pursuant to a Specific Limited Power of Attorney dated January 25, 2006 ("POA"). (R. pp. 62-63.) The POA was filed in the Office of the Register of Deeds for Jasper County on February 6, 2006 in Book 339 at Page 219 ("POA"). (R. pp. 922-923.) The POA, which was

unknown to Respondent at the time of the closing, was sent to Respondent with the Brust Guaranty. (R. p. 569, line 21-p. 572, line 4.)

By its terms, the POA states, "I, Phillip J. Brust, of Cornelius, North Carolina do hereby make, constitute and appoint...John E. Rosenberg, of Hilton Head Island, South Carolina, as my true and lawful attorney, to appear for me, and in my name, place and stead to execute any and all documents...including, but not necessarily limited to, the power to execute as my act and deed any document, instrument, contract, Note, Mortgage, agreement, assignment, affidavit, disclosure, etc. and to pay sums on my account, or 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.) The POA also states, "I hereby vest my Attorney in Fact with all authority needed and necessary to accomplish the above-captioned purpose, with full power of substitution, as fully as if I might do the same in my own capacity at any time subsequent to the date hereof and prior to my revocation." Id. Additionally, the POA states that, "I hereby declare that any act or deed lawfully performed by my Attorney in Fact pursuant to the within Specific Limited Power of Attorney shall be binding upon me and my heirs, legal and personal representatives and assigns." Id.

With regard to the Brust Guaranty, it states that it, "...is an absolute, unconditional and continuing guaranty of payment of the indebtedness and shall continue to be in force and binding upon the Undersigned, whether or not all indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, or as to any renewals, extensions and refinancing's thereof." (R. pp. 920-922.) The Guaranty additionally provides Brust, "....guarantees to Lender 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 owe

to Lender." (R. pp. 920-922.) The Guaranty further states that, "Lender may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of indebtedness, without any consent or approval by the Undersigned and without any notice of the Undersigned.", and that "The liability of the Undersigned shall not be affected or impaired by any of the following acts or things (which Lender is expressly authorized to do, omit or suffer from time to time, both before and after revocation of this guaranty, without notice to or approval by the Undersigned):...(ii) any one or more extensions or renewals of indebtedness or any modification of the interest rates, maturities or other contractual terms applicable to any indebtedness..." (R. pp. 920-922.) During the initial of period repayment, Respondent received no complaint, inquiry and/or repudiation, written or oral, from Brust concerning the Brust Guaranty or Rosenberg's execution thereof. (R. pp. 735-738; R. p. 652, lines 13-25.)

Prior to the maturity date of February 2, 2006, Ecological, through Rosenberg, executed a Commercial Debt Modification Agreement ("Debt Modification Agreement") on January 14, 2008 that altered the terms of the Promissory Note. (R. p. 45.) The Debt Modification Agreement altered the terms of repayment and extended the maturity date of the Promissory Note from February 2, 2008 to April 30, 2008, and it did not alter and/or amend Brust's obligations under the Brust Guaranty as a result. (R. p. 45; p. 583, line 20-p. 584, line 10.) As a result, Respondent did not contact Brust about obtaining a new guaranty agreement. (R. pp. 584, line 11-p. 585, line 1.) It also did not contact him concerning the Debt Modification Agreement as it was doing business with Ecological's managing member, Rosenberg. Id. At that time, Respondent received no complaint, written or oral, from Brust concerning the execution of the Debt Modification Agreement or Rosenberg's execution of the Brust Guaranty. (R. pp. 735-738; R. p. 652, lines 13-25.)

Soon thereafter, Ecological, through Rosenberg, executed three (3) separate renewal promissory notes that extended the maturity date of the Loan and modified the repayment terms of same ("2008 Renewal Notes"). Id. The 2008 Renewal Notes were executed in May, 2008 ("May, 2008 Renewal Note"), August, 2008, and October, 2008 ("October, 2008 Renewal Note"). (R. p. 586 line 1-p.591 line 12.) The 2008 Renewal Notes did not alter and/or amend Brust's obligations under the Brust Guaranty, and as a result, Respondent did not obtain a new guaranty agreement related to same nor did it contact Brust regarding the execution of the 2008 Renewal Notes. Id. At the time of the execution of each of the 2008 Renewal Notes, Respondent received no complaint, inquiry, or repuidation, of the Brust Guaranty or Rosenberg's execution of same. (R. pp. 735-737 R. p. 652, lines 13-25.)

In connection with the October, 2008 Renewal Note, Ecological, through Rosenberg, obtained an additional loan from Respondent in the amount of Two Hundred Seventy Five Thousand and 00/100 ($275,000.00) Dollars and executed a promissory note evidencing same ("$275,000.00 Loan"). (R. p. 592, line 2; p. 594, line 1.) Respondent did not obtain a new guaranty agreement from Brust related to the $275,000.00 Loan, as it did not affect, alter, or amend the terms of the Brust Guaranty. (R. p. 594, lines 2-17.) Relatedly, Ecological sold an easement over the Property in January, 2009 and obtained approximately Five Hundred Thousand and 00/100 ($500,000.00) Dollars as a result. (R. p. 592, line 13-p. 593, line 21.) Respondent, at the direction of Rosenberg, as managing member of Ecological, satisfied the $275,000.00 Loan with part of the proceeds from the sale of the easement. (R. p. 593, line 13-p. 596, line 6.) Respondent received no complaint, inquiry, or repudiation from Brust concerning the Guaranty or Rosenberg's execution of same at the time Ecological entered into $275,000.00 Loan. (R. pp. 735-737; R. p. 652, lines 13-25.)

In connection with the 2008 Renewals and $275,000.00 Loan, several facts are worthy of mention. The first fact is that Brust provided Respondent with a personal financial statement contemporaneously with the execution of the May 2008 Renewal. (R. p. 932) The second fact is that Brust provided Respondent a personal financial statement in 2009. (R. pp. 933-935.) The third fact is that during this time period, Respondent received no documentation of any complaint, inquiry, or repudiation, written or oral, from Brust, concerning the Brust Guaranty or Rosenberg's execution of the same. (R. pp. 735-737; R. p. 652, lines 13-25.)

Respondent and Ecological entered into two additional modifications and/or renewals of the Loan that restructured the terms of repayment of the Loan and extended the maturity date of same. The modifications and/or renewals took place on January 21, 2010 and November 30, 2010 respectively ("2010 Renewals") (the 2008 Renewals and 2010 Renewals are sometimes referred to herein as "Renewals"). (R. pp. 57-59.) Brust did not sign any documents in connection with the 2010 Renewals and Respondent did not obtain a new guaranty agreement from Brust related to same as the 2010 Renewals did not alter Brust's obligations under the Brust Guaranty. (R. p. 597, line 7-p. 598, line 25; p. 599, line 6-600, line 1.) At the time the 2010 Renewals were executed, Respondent received no complaint, inquiry, or repudiation, written or oral, concerning the 2010 Renewals, the Brust Guaranty, or Rosenberg's execution thereof. (R. pp. 735-738.) However, Brust provided Respondent with a personal financial statement dated April 30, 2010. (R. pp. 936-939.)

Ecological did not repay the Loan upon maturity, Brust, after written demand, did not make payment under the Guaranty, and Respondent brought this action on March 8, 2013.

ARGUMENTS

For the reasons set forth below, the trial court properly granted Respondent's MSJ as Appellant has failed to show a genuine issue of material fact. Also, Appellant has failed to show that the trial court's denial of the Motion to Amend was an abuse of discretion.

I. THE TRIAL COURT'S ORDER FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED AS THE APPELLANT HAS FAILED TO SHOW ANY GENUINE ISSUE OF MATERIAL FACT AND THAT RESPONDENT IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

STANDARD OF REVIEW

"In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial court under Rule 56(c), SCRCP." Woodson v. DLI Properties, LLC, 406 S.C. 517, 528, 753 S.E. 2d 428, 434 (2014) (citing Quail Hill, L.L.C. v. Cnty of Richland, 387 S.C. 223, 234, 692 S.E. 2d 499, 505 (2010)).

Under Rule 56(c), [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on the mere allegations contained in the pleadings, but rather must come forward with specific facts showing there is a genuine issue for trial. Singleton v. Sherer, 659 S.E. 2d 196, 377 S.C. 185 (S.C. Ct. App. 2008).

"In ruling on motions for summary judgment, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party." Id. (emphasis added) 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." Id.

However, "[t]o survive summary judgment, the evidence must amount to more than mere speculation and conjecture." Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 701 S.E. 2d 742, 754, 390 S.C. 275 (2010) (Hearn, J., concurring) (citing McKinight v. S.C. Dept't of Corrs., 385 S.C. 380, 390, 684 S.E. 2d 588, 571 (S.C. Ct. App. 2009)).

A. The trial court properly granted Respondent summary judgment because the POA properly granted Rosenberg the actual authority to execute the Brust Guaranty and same is not susceptible to more than one interpretation.

The trial court properly found and concluded 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. 23, ¶ 12.) Relatedly, the trial court properly found "Rosenberg had actual authority to execute the Guaranty and Brust is bound by same." (R, 23, ¶ 13.) Appellant contends these findings and conclusion are in error. However, Appellant has failed to show any evidence or produce any document that Brust did not intend Rosenberg to execute the Brust Guaranty pursuant to the POA. Also, to accept Appellant's argument would violate well-established principles of South Carolina and would result in the creation of an ambiguity in the POA where one does not exist.

As argued to the trial court below, "[w]hen a principal's manifestation of an agent's authority is stated in a power of attorney, interpretation of the power is generally subject to contractual rules of interpretation, including the principle that any single provision of the

instrument should be read in the context of the entire instrument. Restatement (Third) of Agency §3.01 rpt's. note b. (2006) (citing Schmitz v. Firstar Bank, 658 N.W. 2d 442, 448-9 (Wisc. 2003)). As such, powers of attorney, "should be construed in accordance with the rules of interpreting written instruments. Villanueva v. Brown, 103 F. 3d 1128-1136 (3rd Cir. 1997) (citing Heine v. Newman, et. al., 856 F. Supp. 190 (S.D.N.Y. 1994), aff'd 50 F. 3d 2 (2nd Cir. 1995)).

Accordingly, the cardinal rule of contract interpretation is to ascertain and give effect to the parties' intentions as determined by the contract language. Middleton v. Eubank, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (S.C. Ct. App. 2010) (citing McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). Where the written instrument's language is clear and unambiguous, the language alone determines its force and effect. Davis v. KB Home of South Carolina, Inc., 394 S.C. 119, 127, 713 S.E.2d 799, 805 (S.C. Ct. App. 2011). If a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms, and it is ambiguous only when it may fairly and reasonably be understood in more ways than one. Watson v. Underwood, 756 S.E. 2d 155, 161, 407 S.C. 443, 455 (Ct. App. 2014) (internal citations omitted).

The court is without authority to alter an unambiguous contract or to make new contracts for the parties. Id. at 162. "The [c]ourt's duty is to enforce the contract made by the parties regardless of its wisdom, folly, and apparent unreasonableness of the parties' failure to guard their rights carefully." Id. These rules are consistent with the proposition that a special power of attorney is to be strictly construed to carry out, instead of defeating the purpose of appointment, but so as to only sanction such acts that are clearly within its terms. Martin v. U.S., 249 F. Supp. 204, 208 (1966).

As applied to this matter, the court properly found and concluded that the POA was unambiguous and that Rosenberg had actual authority to execute the Brust Guaranty under same. (R. 23, ¶ 12.) As set forth above, the POA states that Brust appointed Rosenberg as his "true and lawful attorney, to appear for him, and in his name, place and stead, to execute any and all documents, and to perform any lawful act or to execute or amend any documents instrument or thing, which may be involved in the financing of the real property located in the County and State aforesaid known as 82.68 acres, Sgt. Jasper State Park, Jasper County, South Carolina..." (R. 922) The POA contains a non-exclusive list of documents, including various security instruments, that Rosenberg was authorized to sign on Brust's behalf. Id. The POA also vested Rosenberg with, "all authority needed and necessary to accomplish the above captioned purpose", said purpose being to close the Loan. Id. The POA also states Brust agreed to be bound by Rosenberg's actions. Id. As argued to the trial court, the POA contains no exceptions, exclusions, caveats, or qualifications with regard to the type of documents Rosenberg was authorized to execute with regard to the Loan and financing of the Property. Id. In light of these terms, it is clear the POA gave Rosenberg express and actual authority to execute the Brust Guaranty. This is the unambiguous meaning of the POA, and it is the only way to strictly construe same.

To rule otherwise would be to alter the terms of the POA, carve out an exclusion where one does not exist, and create an ambiguity where one does not exist. Silver v. Abstract Pools and Spas, Inc., 658 S.E. 585, 591, 376 S.C. 585 (S.C. Ct. App. 2008) (internal citations omitted). It would also allow Appellant to reinterpret the POA because he is disappointed with Rosenberg's actions six years later. Id at 593. It would further force the court to single out a

single particular term of the POA and defeat the stated purpose of same. These are actions that the Court cannot do. Watson, 407 S.C. 443, 455 (Ct. App. 2014) (internal citations omitted).

Therefore, the trial court strictly construed the POA, properly ruled that Rosenberg had the actual authority to execute the Brust Guaranty and found that Appellant failed to show a genuine issue of material fact related to same. (R. pp. 17-28.)

B. To the extent the POA is ambiguous, the evidence shows the POA gave Rosenberg authority to execute the Guaranty, and Appellant has failed to make any showing otherwise.

To the extent the court determines that the POA is ambiguous, the evidence is clear that the POA gave Rosenberg actual authority to execute the Burst Guaranty and Appellant has failed to present a scintilla of evidence otherwise. Singleton v. Sherer, 377 S.C. 185 (S.C. Ct. App. 2008).

The first way Rosenberg's actual authority is seen is through the Commitment Letter. (R. pp. 909-911.) As set forth above, the Commitment Letter informed Brust that he would be required to execute a guaranty agreement in connection with the Loan. Id. Brust signed the Commitment Letter signifying his acceptance of this condition of the Loan. Id. Brust's guaranty of the Loan was one of the two conditions of the Loan that applied and/or concerned him. Id.

The second way Rosenberg's actual authority is seen is through Brust's execution of the POA. (R. 922.) As set forth above, the POA granted Rosenberg authority to execute any and all documents involved in the financing of the Property. Id. It also grants Rosenberg all authority needed and necessary to accomplish this purpose. Id. It additionally includes a non-exclusive list of security instruments Rosenberg was allowed to execute regarding same. Id.

The third way Rosenberg's actual authority is seen is through Brust's provision of personal financial information during the period of repayment, an act required by the Commitment Letter and an act for which Appellant provides no other explanation. (R. 924-939.) It is also worth noting that Brust's provision of his personal financial information satisfies the second condition imposed on Brust by the Commitment Letter. (R. 909-911; 924-939.)

The fourth way Rosenberg's actual authority is seen is through Brust's silence during the period of repayment. (R. 652, lines 13-25; R. 735-737.)

When all these facts are viewed in conjunction one with another, and even when viewed in a light most favorable to Brust, it is clear that Rosenberg had actual authority to execute the Brust Guaranty.

To rebut this conclusion, Appellant argues that the trial court ignored evidence that tends to show Brust did not authorize Rosenberg to execute the Brust Guaranty, said evidence being that Brust intentionally omitted the term "guarantee" from the POA, that the Brust Guaranty was not necessary to close the Loan, and that Respondent allegedly breached its internal policies and procedures with regard to Brust. (Br. Of Appellant p. 14-5.)

With regard to Brust's intentional omission of the term "guarantee" in the POA, Appellant refers to a Power of Attorney that was executed by Brust in connection with a loan Ecological received in 2001 ("2001 Power of Attorney"), and the fact that the 2001 Power of Attorney and POA are similar except for the POA's failure to list the term "guarantee". Id. Appellant also points out that Ecological's attorney, Terry Finger, Esquire, testified that it was possible Brust could have modified the POA and intentionally removed the term "guarantee" from same. (R. p. 460, lines 6-13; Br. Of Appellant p. 15.) Appellant maintains this constitutes a scintilla of evidence that Brust did not authorize Rosenberg to execute the Brust Guaranty, and the trial

court should have relied on this evidence and made a reasonable inference in Brust's favor. (Br. Of Appellant 15.) However, this argument holds no merit as it is, at best, pure speculation and conjecture on the part of Ecological's attorney. Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 701 S.E. 2d 742, 754, 390 S.C. 275 (2010). It is also a mischaracterization of the testimony of Ecological's attorney. (R. 460, lines 8-13; Br. Of Appellant p. 15.) Therefore, this assumption fails to create a genuine issue of material fact or even scintilla of same from which the Court would infer or weigh in Appellant's favor.

The fact that the Brust Guaranty is continuing and unlimited as opposed to non-continuing and limited also fails to create a genuine issue of material fact as well. Appellant argues the distinction creates a scintilla of evidence because it makes the Brust Guaranty unnecessary to close the Loan and that it increased Brust's obligation to Respondent beyond the amount of the Loan. (Br. Of Appellant p. 15.) Appellant also points out that Respondent did not provide Brust with a copy of the Brust Guaranty and it erred in drafting same. (Br. Of Appellant p. 16; R. p. 502 line 39-p.403 line 19; R. p. 565 line 8-p. 567 line 15; R. 635, lines 10-20.) Viewed together, Appellant argues these actions violate Respondent's various internal policies and procedures concerning the underwriting, approval and administration of the Loan and that these violations bar Plaintiff's claim. (R. pp. 224-227.) In other words, Appellant attempts to create a genuine issue of fact by showing that Respondent breached an alleged duty owed to Brust. (R. p. 85, ¶20.)

This argument holds no merit. This is seen in the fact that the relationship between Brust and Respondent was a creditor/debtor relationship. Burwell v. South Carolina Nat. Bank, 340 S.E.2d 786, 288 S.C. 34 (1986). There has been no showing of any other relationship whatsoever. Also, the South Carolina Supreme Court has squarely rejected the contention that a bank's policy

manual creates a duty by the bank to a borrower absent a fiduciary relationship that has not been shown or alleged here. See Citizens and Southern National Bank of South Carolina v. Lanford, 540 S.E.2d 549, 313 S.C. 443 (S.C. 1994). Therefore, the law does not impose a duty on Respondent to explain to Brust what he could have learned simply from reading the Brust Guaranty, and to his failure to do so, which Appellant seems to argue, does not void the effect of the Brust Guaranty. (Br. Of Appellant p. 23-24.); Regions Bank v. Schmauch, 582 S.E.2d 432, 440, 354 S.C. 648, 664 (S.C. Ct. App. 2003) (citing Citizens v. N. Nat'l Bank of South Carolina v. Lanford, 443 S.E. 2d 549, 551, 313 S.C. 540, 545 (1994)). Accordingly, Respondent's alleged error in drafting the POA and supervising the execution of same does not create a genuine issue of fact that can be viewed in a light most favorable to Appellant. If Brust took issue with the documents executed by Rosenberg, he should have expressed and communicated same to Respondent, which he, by his own admission, did not do. (R. p. 652, lines 3-25; R. 735-737.)

Additionally, it is worth noting that this action only relates to the Loan and no other additional obligations. (R. p. 415, lines 1-9.)

Accordingly, the evidence referred to by Appellant related to the construction of the POA and Rosenberg's actual authority under same fails to create a genuine issue of fact that would preclude the trial court granting Respondent summary judgment.

C. The trial court properly found that Rosenberg had apparent authority to execute the POA and Appellant has failed show a genuine issue of fact otherwise.

If the Court determines that Rosenberg did not have actual authority to execute the Brust Guaranty, the trial court properly considered Rosenberg had apparent authority to execute same and Appellant has failed to show any genuine issue of fact that states otherwise. Accordingly,

the trial court properly found that Brust/Appellant is estopped from denying Rosenberg's authority. (R. p. 23, ¶14-p. 24, ¶15.)

Under South Carolina law "an agency relationship between the principal and his purported agent can be established under the theory of apparent authority." Charleston, S.C. Registry for Golf & Tourism v. Young, Clement Rivers & Tisdale, LLP, 598 S.E.2d 717, 721, 359 S.C. 635, 642-3 (S.C. Ct. App. 2004) (citing R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 450 S.E.2d 113, 343 S.C. 433 (S.C. Ct. App. 2000)).

Apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds his agent out as possessing. Id. 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 Const., Inc. v. Lowcountry Reg'l Transp. Auth., 450 S.E.2d 113, 118 343 S.C. 424, 433 (S.C. Ct. App. 2000) The legal principle of apparent authority also requires that a 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.

As found and concluded by the trial court, Rosenberg had apparent authority to execute the Brust Guaranty. (R. p. 23, ¶14.) As to the first element, it is clear that Brust consciously and/or impliedly represented Rosenberg to be his agent. This is seen in the fact that Brust signed and executed the POA. (R. pp. 922-923.) It is also seen in the fact Brust did not make any complaint, inquiry, or repudiation, written or oral, concerning the Brust Guaranty or Rosenberg's execution of the same until his default under same and the institution of the present action. (R. p. 652, lines 13-25; R. pp. 735-737.) Therefore, the first element is satisfied.

As to the second element, the evidence shows that Respondent relied on Brust's representations in the POA and Brust Guaranty. This is seen in the fact Respondent funded and disbursed the Loan after it received same. (R. p. 569, line 22-p. 570, lines 11.) In other words, Respondent was satisfied that the conditions set forth in the Commitment Letter described above were met and felt comfortable fulfilling its conditions under same. (R. p. 572, line 12-p. 575, lines 2.)

In response to this argument, Appellant points out neither Respondent, nor an agent thereof, attended the closing; that Respondent was unaware that Brust would not be attending the closing, and that Respondent did not discover that Rosenberg signed the Brust Guaranty pursuant to the POA until after the closing. (R. p. 555, line 21-556, line 7; R. p. 557, line 7-23.) Appellant also points out that Respondent failed to ascertain the scope of Rosenberg's authority

under the POA because it did not direct any inquiry to Brust as to Rosenberg's authority under same; and, therefore, Respondent could not have relied on the POA. (R. p. 573, line 24- p. 574, line 20.) In other words, Appellant argues Respondent had a duty to investigate the scope of Rosenberg's authority under the POA. See Anheuser-Bush, Inc. v. Grovier-Star Produce Co., 128 F.2d 146-152 (5th Cir. 1942). However, this duty arises when the relying party knows or has reason to know that the agent is exceeding the scope of his authority. Id. In this case, there has been no evidence produced showing that Respondent knew or should have known that Rosenberg was exceeding his authority under the POA.

As to the third element, it is satisfied Respondent changed its position based on Brust's representations in the POA and Brust Guaranty as it funded the Loan and gave same to Ecological. (R. p. 573, line 24- p. 574, line 20.; R. pp. 909-911, 922-923.)

Accordingly, the trial court properly found Rosenberg had apparent authority to execute the Brust Guaranty and Appellant has failed to show a genuine issue of material fact otherwise.

D. The trial court properly found and concluded that Brust ratified the Guaranty.

As an alternative ground for summary judgment, the trial court properly found that Brust ratified Rosenberg's execution of the Brust Guaranty. (R. p. 23, ¶¶ 9, 16.) Appellant argues this conclusion was in error; however Respondent has failed to present a genuine issue of material fact otherwise.

Ratification is the adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent. Lincoln v. Aetna Cas. & Sur. Co., 386 S.E. 2d 801, 300 S.C. 188 (S.C. Ct. App. 1989). Under South Carolina law, a party asserting ratification must establish the following three elements: (1)

acceptance by the principle 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 arrangement. Stiltner v. USAA Cas. Ins. Co., 717 S.E. 2d 74, 78, 395 S.C. 183, 191 (S.C. Ct. App. 2011). Mere silence or failure of a principal to repudiate the unauthorized act of an agent does not necessarily constitute ratification, unless silence or acquiescence in question cannot be explained on any other theory than ratification. Id. Also, a principal will be held to have ratified the unauthorized acts of his agent unless he disaffirms same within a reasonable time. Foxworth v. Murchison Nat. Bank, 134 S.E. 428, 136 S.C. 458 (1928).

With regard to the first element, it is clear Brust accepted the benefits of Rosenberg's executing the Brust Guaranty. This is seen in the fact that Respondent funded the Loan to Ecological, of which Brust was a member. (R. p. 573, line 24-p. 594, line 20; R. pp. 909-911, 922-923.)

As to the second element, the only evidence produced shows Brust had full knowledge of the facts. This is seen in the fact that the Commitment Letter informed Brust that he was required to act as guarantor of the Loan. (R. pp. 909-911.) This is true despite the difference between the terms of the Commitment Letter and Brust Guaranty. It is also seen in the fact that Brust provided Respondent with his personal financial information from 2005 through 2010 in compliance with the Commitment Letter. (R. pp. 924-939.) Appellant has provided no other explanation for these actions outside of assumptions and speculation. (Br. Of Appellant pp. 26-27.) Furthermore, Rosenberg's knowledge of the execution of the Brust Guaranty and the terms thereof are imputable to Brust considering Rosenberg was acting as Brust's agent under the POA when he executed same. See Bankers Trust of South Carolina v. Bruce, 323 S.E.2d 523, 532,

283 S.C. 408, 423 (S.C. Ct. App. 1984). All of the above is in addition to Brust's failure to make a complaint, inquiry, or repudiation, oral or written, of the terms of the Brust Guaranty or Rosenberg's execution thereof. (R. p. 652, lines 13-25; R. pp. 735-737.) Considering these facts, the only conclusion that can be deduced is that Brust had full knowledge of the facts and therefore the second element is satisfied.

To rebut this conclusion, Appellant points to the Wright deposition and the fact that Wright did not know whether Brust saw or read the Brust Guaranty. (R. pp. 221-224.) However, this evidence only extends to what Wright knew and goes no further. It does not raise an issue of fact as to what Brust knew, and any inference drawn therefrom would be speculation and/or conjecture. Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 701 S.E. 2d 742, 754, 390 S.C. 275 (2010) (Hearn, J., concurring) (citing McKinight v. S.C. Dept't of Corrs., 385 S.C. 380, 390, 684 S.E. 2d 588, 571 (S.C. Ct. App. 2009)).

The third element is also satisfied as the circumstances show Brust's affirmation elected an intent to adopt Rosenberg's execution of the Brust Guaranty. This intent is seen in the fact that Brust made no complaint, inquiry, or repudiation, written or otherwise, of the Brust Guaranty until the institution of this action over six (6) years after execution of the Brust Guaranty. (R. p. 652, lines 13-25; R. pp. 735-737.) He also provided Respondent with his personal financial information during the repayment term of the Loan. (R. pp. 924-939.) Appellant has provided no evidence to rebut this conclusion. As such, the third element is satisfied.

Accordingly, the trial court properly concluded Brust ratified Rosenberg's execution of the Brust Guaranty.

E. The trial court properly found that Brust's silence constitutes a ratification of the Brust Guaranty.

As indicated above, South Carolina law states that, "Mere silence or failure of a principal to repudiate the unauthorized act of an agent does not necessarily constitute ratification, unless silence or acquiescence in question cannot be explained on any other theory than ratification." Stiltner, 395 S.C. at 191, 717 S.E. 2d at 78. With this principle in mind the trial court properly found Brust, "affirmatively elected an intention to adopt Rosenberg's acts by making no written repudiation of the Guaranty during the term of repayment of the Note and Renewals." (R. p. 24 ¶16.)

This is a proper conclusion considering Brust, by his own admission, failed to make any complaint, inquiry, or repudiation, written or oral, concerning the Brust Guaranty or Rosenberg's execution thereof, sent Respondent his personal financial information during the six (6) year repayment period, and Rosenberg's knowledge of the terms of the Brust Guaranty and the imputation of that knowledge to Brust (R. p. 652, lines 13-25; R. pp. 735-737.). Appellant has failed to present any other theory as to why these actions occurred other than speculation and conjecture that does not create a genuine issue or material fact. Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 701 S.E. 2d 742, 754, 390 S.C. 275 (2010) (Hearn, J., concurring).

Therefore, summary judgment on this basis was proper.

F. The trial court properly found that the subsequent modifications to the Loan did not release Brust from his obligations under the Guaranty.

The trial court also correctly found and concluded that the Renewals did not relieve Brust of his liability under the Brust Guaranty as same relates to the Loan, and he agreed to repay same under the clear and unambiguous terms of the Brust Guaranty.

As set forth above, the cardinal rule of contract interpretation is to ascertain and give effect to the parties' intentions as determined by the contract language. Middleton, 694 S.E.2d 31, 34, 388 S.C. 8, 14 (S.C. Ct. App. 2010). Where the written instrument's language is clear and unambiguous, the language alone determines its force and effect. Davis, 713 S.E.2d 799, 805, 394 S.C. 119, 127 (S.C. Ct. App. 2011); U.S. Bank Trust Nat. Ass'n v. Bell, 684 S.E.2d 199, 385 S.C. 364 (S.C. Ct. App. 2009). If a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms, and it is ambiguous only when it may fairly and reasonably be understood in more ways than one. Watson, 756 S.E. 2d 155, 161, 407 S.C. 443, 455 (S.C. Ct. App. 2014).

In this case, the Brust Guaranty provides that it "...is an absolute, unconditional and continuing guaranty of payment of the indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to indebtedness existing or committed for at the time of actual receipt of such notice by the lender, or as to any renewals, extensions and refinancings thereof." (R. pp. 920, ¶2.) These are clear and unambiguous terms and therefore the Court must construe it according to its ordinary and popular meaning, said meaning being that Brust agreed that the Brust Guaranty would be in full force and effect absent revocation in writing received by the Respondent. This includes the subsequent Renewals entered into by Ecological, of which Brust is a member. The Guaranty also provides, "The liability of the Undersigned shall not be affected or impaired by any of the following acts or things....(ii) any one or more extensions or renewals or any modifications of the interest rates, maturity, or other contractual terms applicable to any indebtedness." (R. p. 921, ¶6.) Also, the fact that Respondent allegedly violated its internal

policies and procedures with regard to the execution of the Renewals as they provide no relief as Respondent's policies and procedures create no duty between Brust and Respondent, and therefore there is not evidence of any breach of a duty to Brust other than those set forth in the Brust Guaranty. See Citizens and Southern National Bank of South Carolina v. Lanford, 540 S.E.2d 549, 313 S.C. 443 (S.C. 1994).

Accordingly, the trial court properly found that Renewals did not relieve Brust of his obligations under the Guaranty.

G. Trial court properly found that Brust's pending counterclaims were the same as his affirmative defenses under Rule 8, SCRCP.

Appellant argues that the trial court improperly found that Brust's Seventh Defense and Tenth Defense were counterclaims under Rule 8, SCRCP, and they were the same as the First Counterclaim and Second Counterclaim. However, as set forth in the Order for Summary Judgment, the Seventh Defense and Tenth Defense are counterclaims that were misidentified as affirmative defenses, and they are identical to the First Counterclaim and Second Counterclaim. (R. p. 25, ¶¶27-29; R. pp. 29-35.)

Under Rule 8, SCRCP, "[a] pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement on the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short plain statement of facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled. Rule 8(a), SCRCP. Also, "[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 designation. Rule 8(c), SCRCP. "The aim is to

avoid the 'surprise' defenses permissible under the old general denial answer, and require the defendant also to stick to 'fact' pleading. Rule 8 SCRCP, cmt.

As applied to this matter, the Seventh Defense is, in reality, a counterclaim under Rule 8, SCRCP. As to the first element, the trial court already had jurisdiction to hear the issues asserted in the Seventh Defense. (R. pp. 1-3; R. pp. 82-95.) The second element is also satisfied as the Seventh Defense contains a short plain statement of facts showing Brust is entitled to relief, mainly, that Respondent violated its own policies and procedures and was negligent as a result. (R. p. 85, ¶20.) Furthermore, the third element is satisfied as the Seventh Defense contains a prayer for relief, said prayer being that Respondent's claim is barred in whole or in part. Id. As a practical matter, the Seventh Defense, if proved, would result in a reduction of Respondent's damages and a set-off to Brust. Accordingly, the Seventh Defense is a counterclaim under Rule 8, SCRCP and same was mistakenly identified by Brust as an affirmative defense.

The Tenth Defense is also a counterclaim under Rule 8, SCRCP under the same analysis. As to the first element, the trial court already had jurisdiction to hear matters related to the Tenth Defense. (R. pp. 1-3; R. pp. 82-95.) As to the second element, the Tenth Defense contains a short plain statement showing Brust was entitled to relief with regard to the Tenth Defense, the statement that Respondent allegedly breached its duty of good faith and fair dealing to Brust. (R. p. 86, ¶23.) The third element is also satisfied as the Tenth Defense alleges entitlement to relief, said relief being that Respondent's claim is barred in whole or in part. Id. As with the Seventh Defense, the Tenth Defense would result in a set-off to the amounts owed under the Brust Guaranty. Therefore, the Tenth Defense is a counterclaim under Rule 8, SCRCP, and same was mistakenly identified as an affirmative defense.

With this framework in mind, the Seventh Defense and Tenth Defense are the same as the First Counterclaim and Second Counterclaim respectively. (R. pp. 29-35.) In particular, the First Counterclaim alleges Respondent owed Brust a duty to act reasonably and to comply with standard banking practices in the underwriting, closing, and administration of the Loan in question, that Respondent breached its duty to Brust, and that Brust suffered damages as a result. (R. p. 162, ¶88- p. 164, ¶91.) In other words, Brust alleged that Respondent was negligent. Id. These are the same allegations set forth in the Seventh Defense, the only difference being the inclusion of factual allegations extracted from the Wright Deposition and opinions derived from the Barksdale Affidavit. (R. p. 82, ¶20; R. pp. 144-145.) Brust used these allegations and opinions to support the Seventh Defense, a fact admitted at the hearing on the Motion for Summary Judgment. (R. p. 419, line 3-p. 420, line 7.) Accordingly, the Seventh Defense and the First Proposed Counterclaim are the same. (R. p. 32, ¶7.)

Similarly, the Tenth Defense and Second Counterclaim are the same. (R. p. 32, ¶8.) In particular, the Second Counterclaim alleges Respondent breached the covenant of good and fair dealing inherent in every contract by failing to adhere to specific contractual obligations set forth in the Guaranty and by engaging in conduct set forth in the Amended Answer, including the conduct set forth in the Barksdale Affidavit and the Wright Deposition. (R. p. 164, ¶92-p. 165, ¶97.) These are the same facts and allegations contained in and used to support the Tenth Defense. (R. p. 86, ¶23; R. p. 164, ¶92-p. 165, ¶97.) Therefore, the Second Proposed Counterclaim and Tenth Defense are the same.

Accordingly, the trial court's conclusions regarding the proposed counterclaims and affirmative defenses was proper and Respondent has failed to show any genuine issue of material fact otherwise.

II. THE TRIAL COURT PROPERLY DENIED BRUST'S MOTION TO AMEND AND RESPONDENT HAS FAILED SHOW AN ABUSE OF DISCRETION CONCERNING SAME.

As set forth above, the trial court properly granted the MSJ, and as part of same concluded that the affirmative defenses in the Answer were counterclaims and disposed of same as being without merit. (R. p. 25, ¶¶ 27-29.) The trial court also properly found that the Seventh Defense and Tenth Defense were the same as the First Counterclaim and Second Counterclaim. (R. p. 32 ¶¶5-8.)

Accordingly, the trial court properly found that the First Counterclaim and Second Counterclaim were barred by *res judicata*. (R. p. 32, ¶9- p. 33, ¶18.) To the extent the First Counterclaim and Second Counterclaim are not barred by *res judicata*, they are barred by collateral estoppel and the prejudice contemplated under Rule 15, SCRCP.[1] Therefore, the Motion to Amend was properly denied.

STANDARD OF REVIEW

A motion to amend is addressed to the sound discretion of a trial court, and the party opposing the motion has the burden of establishing prejudice. Holland ex rel. Knox v. Morbark, Inc., 754 S.E. 2d 714, 719, 407 S.C. 227, 235 (S.C. Ct. App) (citing Foggie v. CSX Transport., Inc., 313 S.C. 98, 102, 431 S.E. 2d 587, 590 (1993)). Courts have wide latitude in amending pleadings, and "[w]hile this power should 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, 599 S.E. 2d 462, 465, 360 S.C. 225, 233

[1] At the hearing on the Motion to Amend, Respondent did not argue that the First Counterclaim and Second Counterclaim are barred by collateral estoppel. Respondent also did not argue that it would suffer the type of prejudice contemplated by Appellant. Respondent makes these arguments on appeal as alternative grounds for the denial of the Motion to Amend pursuant to Rule 220(c), SCACR and I'on L.L.C. v. Town of Mt. Pleaseant, 526 S.E. 2d 716, 338, 406 (2000).

(S.C. Ct. App. 2004) (internal citations omitted). Accordingly, the trial court's decision will not be disturbed on appeal unless there is an abuse of discretion on the part of the trial judge. See Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry, 743 S.E. 2d 808, 403 S.C. 623 (2013).

Under Rule 15(a), 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., 363 S.E. 2d 398, 399, 294 S.C. 183, 186 (S.C. Ct. App. 1987). It is the responsibility of the opposing party to establish prejudice by affidavit or by other means. H. Lightsey & J. Flanagan, South Carolina Civil Procedure 288 (1985).

A. Brust's Motion to Amend sought to include the First Counterclaim and Second Counterclaim, which are barred by *res judicata*.

In this case, the trial court did not abuse its discretion in issuing the Order to Amend as it had already ruled on the First Counterclaim and Second Counterclaim, which were originally asserted in the Answer as the Seventh Defense and Tenth Defense. Therefore, the Order Denying Motion to Amend should be affirmed.

As argued to the trial court, *res judicata* is the branch of law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privy, and it ends litigation, promotes judicial economy, and avoids the harassment of relitigation of the same issues. Pharmacists Mut. Ins. Co. v. Cincinnati Isn. Co., 658 F. Supp. 2d 745 (D.S.C. 2009). It flows from the principle that the public interest requires an end to litigation and no one should be sued twice for the same cause of action. S.C. Pub. Interest Found. V. Greenville County., 401

S.C. 377, 737 S.E. 2d 502 (S.C. Ct. App. 2013). *Res judicata* requires proof of three elements: 1) that a final, valid judgment was entered on the merits; 2) the parties to both suits are the same; and 3) the subsequent action involves matters properly included in the first action. Judy v. Judy, 383 S.C. 1, 677 S.E. 2d 213 (S.C. Ct. App. 2009). A different remedy does not alter the fact that the claims are identical. Id. Relatedly, a party may not evade a final judgment by dismissing his claim by dressing up the same claim in different legal terms or recasting it according to a new legal theory. McMahan v. International Ass'n. of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529 (D.S.C. 1994). In this matter, the trial court properly issued the Order Denying the Motion to Amend under the principle of *res judicata* as the trial court previously ruled on the First Counterclaim and Second Counterclaim in the Order for Summary Judgment. (R. pp. 29-35.)

As to the first element, the Order for Summary Judgment is considered final and on the merits for purposes of *res judicata*. Id. This is seen in the trial court's conclusion that the Seventh Defense and Tenth Defense are actually counterclaims under Rule 8, SCRCP and that same are dismissed as being without merit. (R. p. 25, ¶¶ 27-29.) To vacate the Order Denying the Motion to Amend would allow Appellant to bypass the Order for Summary Judgment as it would force Respondent to relitigate the issues of the Seventh Defense and Tenth Defense. While Respondent is aware that the Order for Summary Judgment did not end the matter in its entirety, it did end the matter with regard to Respondent and Brust as to his obligations under the Brust Guaranty.

As to the second element, it is satisfied as the parties that are the subject of the Seventh Defense and Tenth Defense are identical to the parties that are the subject of the First

Counterclaim and Second Counterclaim as Respondent and Brust are the subject of both. (R. pp. 82-96; R. pp. 147-166.)

As to the third element, the subject matter of the First Counterclaim and Second Counterclaim are properly disposed of by the Order for Summary Judgment. This is seen in the fact the Seventh Defense and Tenth Defense arise out of the closing of the Loan, Rosenberg's execution of the Brust Guaranty, and Plaintiff's underwriting, approval and administration of the Loan. (R. p. 85, ¶¶20, 23; R. pp. 159-166.) Specifically, Brust alleged in the Seventh Defense and Tenth Defense that Plaintiff was negligent towards Brust and breached its duty of good faith and fair dealing towards same. Id. As a result, Brust alleged Plaintiff's claims were barred in whole or in part. (R. p. 85, ¶¶20, 23.) As noted above, the Seventh Defense and Tenth Defense, if proven, would have resulted in a reduction in the damages Brust owed Respondent or a set-off. These are the same allegations and relief sought in the First Counterclaim and Second Counterclaim. (R. p. 85, ¶¶20, 23; R. pp. 159-166.) The only difference, to which Brust's counsel admitted at the hearing on the Order for Summary Judgment, being the inclusion of factual allegations and opinions derived directly from the Wright Deposition and Barksdale Affidavit, both of which were used to support the Seventh Defense and Tenth Defense. (R. p. 85, ¶¶20, 23; R. pp. 159-166. R. p. 419, line 16-p. 420, line 7; R. pp. 743-748.) Accordingly, the subject matter of the First Counterclaim and Second Counterclaim were properly disposed of by the Order for Summary Judgment, and the third element is satisfied.

Based on the above and as admitted by Appellant's counsel at the hearing on the Motion for Summary Judgment, the Motion to Amend was filed solely to restyle the Seventh Defense and Tenth Defense as counterclaims, and therefore the trial court properly issued the Order Denying the Motion to Amend. (R. p. 419, line 16-p. 420, line 7; R. pp. 29-35.)

B. As an alternative grounds, Brust's Motion to Amend should be denied under the doctrine of collateral estoppel.

Assuming, *arguendo*, that the Court determines that the trial court abused its discretion in denying the Motion to Amend on the grounds of *res judicata*, the Order Denying the Motion to Amend should be affirmed on the grounds of collateral estoppel.

Similar to *res judicata*, collateral estoppel exists to reduce litigation and conserve the resources of the court and litigants, and it is based on the notion that it is unfair to permit a party to relitigate an issue that has already been decided. Nelson v. QHG of South Carolina, Inc., 354 S.C. 290, 580 S.E. 2d 171 (S.C. Ct. App. 2003). It furthers the judicial interest in the economical resolution of disputes, although never to the point where a litigant is denied his or her full and fair opportunity to present his case to a competent fact finder. In re Hoffman Associates, Inc., 194 B.R. 943 (Bankr. D.S.C. 1995).

A party relying on the doctrine of collateral estoppels is obliged to establish five elements: (1) that the issue sought to be precluded is identical to one previously litigated; (2) that the issue was actually determined in a prior proceeding; (3) that the issue determination was a critical and necessary part of the decision in the prior proceeding; (4) that the prior judgment is final and valid; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue. In re Crews, 389 S.C. 322, 698 S.E. 2d 785 (2010). However, the doctrine of collateral estoppel should not be rigidly or mechanically applied and a court may refuse to apply it if unfairness or injustice results. See Carolina Renewal, Inc. v. South Carolina Dept. of Transp., 385 S. C. 550, 684 S.E. 2d 779 (S.C. Ct. App. 2009).

i. The issue of Respondent's alleged negligence that forms the basis of the First Counterclaim is barred by collateral estoppel.

As applied to this matter, the issue of Respondent's alleged negligence with regard to the underwriting, approval, and administration of the Loan that forms the basis of the First Counterclaim is barred by collateral estoppel.

As to the first element, the issue of Respondent's alleged negligence in the First Counterclaim is identical to the issue alleged in the Seventh Defense which the trial court found to be without merit. (R. p. 85, ¶20; R. p. 162, ¶88-p. 164, ¶91; R. pp.24-25.) The only difference between Brust's Answer and the proposed Amended Answer is the inclusion of factual allegations from the Wright Affidavit and the opinions derived from the Barksdale Affidavit, both of which were used to support Brust's Seventh Defense. (R. pp. 144-145.) Put another way, Brust filed the Motion to Amend to reclassify its affirmative defenses as counterclaims. (R. p. 419, line 16-p. 420, line 7.) This is an action Brust cannot do.

The second element is also satisfied as the issue of Respondent's alleged negligence in the underwriting, approval, and administration of the Loan was decided in the Order for Summary Judgment. (R. p. 24, ¶¶ 18-21.) This is evidenced by the fact that the Order for Summary Judgment explicitly found that Plaintiff's policies, procedures, and manuals do not create a duty between Respondent and Brust. Id. The Order for Summary Judgment also explicitly stated that any alleged failure by Respondent to comply with its own policies, procedures, and standard does not constitute a breach of any duty which Plaintiff owed Brust. Id. Accordingly, Respondent could not have been negligent to Brust, a conclusion that the First Counterclaim seeks.

As to the third element, the issue of Respondent's alleged negligence was critical and necessary to the Order for Summary Judgment as the trial court's finding concerning the Seventh Defense helped bring about an end to the this matter and the final disposition of same as it relates to the Brust Guaranty.

As to the fourth element, the Order for Summary Judgment and the issues adjudicated therein are final for purposes of collateral estoppel. McMahan, 858 F. Supp. 529 (D.S.C. 1994).

As to the fifth element, Brust had a full and fair opportunity to litigate the issues related to Respondent's alleged negligence or at least show a genuine issue of material fact related to same during the hearing on the MSJ. Brust failed to do so. (R. p. 24, ¶¶ 18-21.)

Accordingly, the issue of Respondent's alleged negligence is the underwriting, approval, and administration of the Loan, which forms the basis of the proposed First Counterclaim, is barred by collateral estoppel.

ii. The issue of Respondent's alleged breach of the duty of good faith and fair dealing that forms the basis of the Second Counterclaim is barred by collateral estoppel.

Concerning the Second Counterclaim, it is also barred by collateral estoppel as the Order for Summary Judgment found that Respondent did not breach its duty of good faith and fair dealing to Brust. (R. p. 24, ¶22- p. 25, ¶25.)

As to the first element, the issue of whether Respondent breached its duty of good faith and fair dealing to Brust raised in the Second Counterclaim is identical to the issue of Respondent's alleged breach of the duty of good faith and fair dealing is raised in the Tenth Defense. This is seen in the fact that the allegations in the Tenth Defense allege that Respondent breached its duty of good faith and fair dealing to Brust, that Respondent knew or had reason to know of same, and Respondent's claim should be barred in whole or in part, to the extent that it

knew Rosenberg deceived or was deceiving Brust. (R. p. 86, ¶10.) This is the same issue that Brust attempts to raise in the Second Counterclaim. (R. p. 164, ¶¶ 92-97.) The only difference being the inclusion of factual allegations and opinions that were drawn from the Wright Deposition and Barksdale Affidavit that were used to support the Tenth Defense. (R. pp. 144-145; R. p. 419, line 16-p. 420, line 7.)

The second element is also satisfied as the issue of Respondent's alleged breach of the duty of good faith and fair dealing was actually determined in the Order for Summary Judgment. (R. p. 24, ¶ 22-p. 25 ¶ 25.) This is seen in the fact that the trial court found and concluded in the Order for Summary Judgment that Respondent did not breach a duty of good faith and fair dealing to Brust as Brust had an affirmative duty to protect his interests, which he failed to do. (R. p. 25, ¶ 25.)

The third element is satisfied as the trial court's findings contained in the Order for Summary Judgment related to Respondent's alleged breach of the duty of good faith and fair dealing was critical and necessary to dismiss the Tenth Defense and bring about a resolution of this matter to the extent it relates to the Brust Guaranty. Id.

The fourth element is also satisfied as the Order for Summary Judgment is final for purposes of collateral estoppel. McMahan, 858 F. Supp. 529 (D.S.C. 1994).

As to the fifth element, it is satisfied as Brust had a full and fair opportunity to litigate the issues related to Respondent's alleged breach of the duty of good faith and fair dealing or at least show a genuine issue of material fact related to same at the hearing on the MSJ, and he failed to do same. (R. p. 25, ¶ 25.)

Accordingly, proposed Second Counterclaim is barred by collateral estoppel.

C. Aside from *res judiciata* and collateral estoppel, granting Brust's Motion to Amend would result in the type of prejudice advocated for by Appellant.

As argued by Appellant, "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." City of North Myrtle Beach v. Lewis-Davis, 599 S.E. 2d 462, 465, 360, S.C. 225, 233 (S.C. Ct. App.) [I]t is the responsibility of the opposing party to establish prejudice by affidavit or other means. Id.

A motion to amend should be contested by procedural argument, not the substance or merits of the counterclaims presented. H. Lightsey & J. Flanagan, South Carolina Civil Procedure 288 (1985). 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 a trial judge should generally not consider these substantive arguments at the mere amendment stage. Collins v. Sigmon, 385 S.E. 2d 835, 836, 299 S.C. 464, 466 (1989) (emphasis added).

However, the denial of a motion to amend is proper and not an abuse of discretion where the party seeking amendment was in possession of information that would have alerted him to the potential of a claim and he delays in bringing same. See Holland ex rel Knox v. Morbark, Inc., 745 S.E. 2d 714, 407 S.C. 227 (2014). In this matter, it is apparent Brust was in possession of the information that alerted him to assert the First Counterclaim and Second Counterclaim he sought to assert in the Amended Answer; however, he chose not to bring same. (R. p. 85, ¶20; R. p. 86, ¶23.) To allow the amendment Appellant seeks would result in prejudice to Respondent.

As set forth above, Respondent initiated this action on March 8, 2013 seeking to enforce its rights and seek any and all sums due under the Brust Guaranty. (R. pp. 38-63.) In response to

the allegations contained therein, Brust filed the Brust Answer on September 6, 2013 in which he asserted the Seventh Defense and Tenth Defense, which alleged that Respondent was negligent in the underwriting, approval, and administration of the Loan and that Respondent breached its duty of good faith and fair dealing to Brust. (R. pp. 82-95.) These are the same legal theories asserted in the First Counterclaim and Second Counterclaim in the Amended Answer, which was filed on May 30, 2014 after the parties had conducted extensive discovery and immediately prior to the hearing on the MSJ. (R. pp. 144-166.) The only difference between the Answer and Amended Answer is the inclusion of the factual allegations and opinions drawn from the Wright Deposition and Barksdale Affidavit, both of which were used to support the Seventh Defense and Tenth Defense. (R. pp. 144-145; R. p. 419, line 16-p. 420-7.) Accordingly, Brust was aware and on notice to assert the First Counterclaim and Second Counterclaim as he alleged them as affirmative defenses in the form of the Seventh Defense and Tenth Defense, but he waited approximately nine (9) months before choosing to recast same. See Holland, 745 S.E. 2d 714, 407 S.C. 227 (2014).

Considering the trial court's grant of the Order for Summary Judgment, vacation the Order Denying Brust's Motion to Amend would result in the continuation of extensive discovery undertaken by both parties and Respondent having to unnecessarily examine Mr. Barksdale through the taking of his deposition and to hire an expert to rebut same. Id.

Considering trial court's ruling on the Seventh Defense and Tenth Defense, allowing the Motion to Amend would result in the prejudice that is contemplated in Rule 15(a), SCRCP. Therefore, the Order Denying the Motion to Amend should be affirmed as the trial court did not abuse its discretion in issuing same.

CONCLUSION

For the reasons set forth above the Order for Summary Judgment should be affirmed. Appellant has failed to show that there are any genuine issues of material fact that would result in the remand of same.

Also, the First Counterclaim and Second Counterclaim contained in the Amended Answer were disposed of by the Order for Summary Judgment. Accordingly, the First Counterclaim and Second Counterclaim are barred by the doctrines of *res judicata*, collateral estoppel, and the prejudice under Rule 15(a), SCRCP argued for by Appellant as he already litigated same or had notice of them and chose to delay in bringing same. Therefore, the trial court did not abuse its discretion and the Order Denying the Motion to Amend should also be affirmed.

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October 7, 2015
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SC Court of Appeals

IN 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.....PLAINTIFF/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 certified that this Final Brief complies with Rule 211(b), SCACR.

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