THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2018-001388

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001, ... Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC, Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson, and L. Cliff Redd,..... Defendants,

Of which Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd are..... Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly granted directed verdict in favor of the Trust on the ground that the alleged violation of the deficiency statute in a prior foreclosure proceeding is not a defense to the Guarantors' obligations under the guaranty agreements.

II. The trial court properly determined the Trust did not violate S.C. Code Ann. § 15-39-720.

III. The Guarantors are barred from challenging the foreclosure judgment in this subsequent action.

STATEMENT OF THE CASE

This appeal arises out of a foreclosure deficiency judgment involving two guaranty agreements. The Trust seeks to enforce the guaranty agreements. In the foreclosure action, the Trustee of the George B. Buchanan, Jr. Irrevocable Family Trust, dated the 15th Day of July, 2001 (the "Trust"),[1] foreclosed on a mortgage securing a loan the Trust made to Springs North Augusta, LLC in 2009. (Foreclosure J., R. 229). At the conclusion of the foreclosure action, the master in equity sold the property in September 2012. (R. 265). Because the property sold for less than the total amount of the debt, the master entered a deficiency judgment against Springs North Augusta. (Deficiency J., R. 251).

The Trust filed this action on March 5, 2013, against Redd Green Investments, LLC; Anderson North Augusta, LLC; Herbert Anderson, Jr.; A. Bruce Green; William Otha Bodie;[2] Herbert Keith Anderson; and L. Cliff Redd. (Compl. at 1, R. 16). The appellants in this case are Redd Green Investments, LLC; A. Bruce Green; and L. Cliff Redd (the "Guarantors"). In the complaint, the Trust alleged the Guarantors and other defendants breached two guaranty agreements they entered into with the Trust in which they guaranteed the loan that was the subject of the foreclosure action. *See generally* (Compl., R. 16–21). The Guarantors filed counterclaims for civil conspiracy, constructive fraud, and fraud and deceit, alleging the Trust violated South Carolina Code section 15-39-720 (the "bidding statute")[3] when 2nd Avenue Holdings, LLC

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[1] When the Trust filed the complaint, the Trustee was Harry P. Sakellaris. (Compl., R. 16). The caption in the case was amended on March 1, 2016, after the current Trustee, Stephen Wilkinson, replaced Sakellaris. (Or. Amending Caption and Substituting Counsel, R. 1).

[2] William Otha Bodie never answered the complaint and eventually was removed from the caption.

[3] Section 15-39-720 provides,

submitted the winning bid at the foreclosure sale because Buchanan is the owner of 2nd Avenue Holdings. *See* (Ans. & Counterclaim at 3–5, R. 89–91).

On April 15, 2014, the Trust moved for summary judgment on its claims and the Guarantors' counterclaims. (Mot. for Summ. J., R. 310). The Trust submitted affidavits from Stephen Wilkinson, Harry Sakellaris, and 2nd Avenue Holdings asserting that Buchanan did not have control over or represent the Trust and, therefore, his winning bid at the foreclosure sale did not violate the bidding statute. (Aff. of Wilkinson, R. 312–14; Aff. of Sakellaris, R. 322–24; Aff. of 2nd Avenue Holdings, R. 325–26). Cliff Redd and Bruce Green submitted affidavits in opposition to the Trust's summary judgment motion on October 19, 2015, asserting that Buchanan controlled the decisions of the Trust and used 2nd Avenue Holdings to bid at the foreclosure sale and circumvent the requirements of the bidding statute. (Aff. of Redd, R. 327–29; Aff. of Green, R. 330–32). The circuit court denied the Trust's summary judgment motion on March 1, 2016,

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> In all judicial sales of real estate for the foreclosure of mortgages and sales in execution the bidding shall not be closed upon the day of sale but shall remain open until the thirtieth day after such sale, exclusive of the day of sale. Within such thirty day period any person other than the highest bidder at the sale or any representative thereof in foreclosure and execution suits may enter a higher bid upon complying with the terms of sale by making any necessary deposit as a guaranty of his good faith, and thereafter within such period any person, other than such highest bidder at the sale or any representative thereof, in foreclosure suits may in like manner raise the last highest bid, and the successful purchaser shall be deemed to be the person who submitted the last highest bid within such period and made the necessary deposit or guaranty. But the mortgagee or his representative shall enter such bid as he desires at the time the sale is made, and he and all persons acting in his behalf shall be precluded from entering any other bid in any amount at any other time except the single or last bid made by him or in his behalf at the sale.

S.C. Code Ann. § 15-39-720.

and ordered that the issues may be raised at the directed verdict stage. (Mar. 1, 2016 Or. Denying Summ. J., R. 6).

On March 1, 2017, the Trust moved to dismiss the Guarantors' counterclaims for lack of subject matter jurisdiction, arguing the trial court did not have jurisdiction to entertain a collateral attack on the master in equity's order granting a deficiency judgment in the foreclosure action. (Mot. to Dismiss, R. 333; Memo in Supp. of Mot. to Dismiss, R. 335). The trial court denied the Trust's motion on June 2, 2017. (June 2, 2017 Or. Denying Mot. to Dismiss, R. 7–9).

The case proceeded to trial on September 5, 2017. (Trial Tr. 1, R. 94). At the close of all the evidence, the Trust moved for directed verdict on the grounds that the Guarantors cannot collaterally attack the foreclosure orders, that the bidding statute was not violated as a matter of law, and that any violation of the bidding statute was not a material breach of the guaranty agreements because the Guarantors received the benefit of the loan. (Trial Tr. 124–27, R. 217–20). The trial court granted the Trust's motion on the grounds that a violation of the bidding statute is not a defense on a guaranty of a debt and no violation of the bidding statute occurred. (Trial Tr. 132–33, R. 225–26).

The Guarantors moved for a new trial on September 18, 2017, and amended their motion on September 19, 2017. (Mot. for New Trial, R. 291; Am. Mot. for New Trial, R. 294). The other defendants did not challenge the trial court's ruling and are not appellants in this case. The Guarantors submitted a memorandum in support of their motion for a new trial on May 29, 2018. (Memo. in Supp. of Mot. for New Trial, R. 302). The Trust filed a memorandum in opposition, (Plaintiff's Opp. to Mot. for New Trial, R. 297), and the trial court denied the motion in a Form 4 order issued on June 29, 2018, (June 29, 2018 Form 4 Or., R. 12). The Guarantors appealed the order granting directed verdict and the order denying their motion for a new trial.

STATEMENT OF THE FACTS

I. The Underlying Loan

In November 2009, the Trust and Springs North Augusta, LLC executed a promissory note for a $7,590,000 loan from the Trust to Springs North Augusta. *See* (Promissory Note, R. 266–72). Springs North Augusta was owned by Redd Green Investments, LLC and Anderson North Augusta, LLC. (Promissory Note, R. 266; Trial Tr. 84, R. 177). Those owners formed Springs North Augusta for the purpose of holding title to 1,420 acres of commercial real estate in Aiken County, South Carolina. (Trial Tr. 85, R. 178). The individual appellants in this case, Bruce Green and Cliff Redd, owned Redd Green Investments, LLC, which they formed solely to hold their ownership interest in Springs North Augusta. (Trial Tr. 84, R. 177). The loan was secured by a mortgage on the 1,420 acres of commercial real estate, which the Guarantors intended to sell "and pay the note off and hopefully make some money off it." (Trial Tr. 85, R. 178).

As consideration for the Trust to loan the money, the Guarantors executed two guaranty agreements—one signed by Redd Green Investments, LLC and Anderson North Augusta, LLC; and the other signed by appellants Bruce Green, Cliff Redd, and the other individual defendants. *See* (Guaranty Agrs., R. 276, 279). The two guaranty agreements contained identical terms. *See* (*id.*). All parties executed another agreement (the "Loan Agreement") memorializing additional aspects of their relationships. (Loan Agr., R. 22).

In November 2010, the parties amended the Loan Agreement and promissory note. *See* (Nov. 16, 2010 Mod. to Promissory Note, R. 273–75; Trial Tr. 67–68, R. 160–61). The amendments extended the maturity date by one year and added the capitalized interest to the principal, making the new principal amount $8,728,500. (*Id.*). The guaranty agreements remained unchanged.

II. The Foreclosure Action

After Springs North Augusta defaulted on the loan, the Trust filed an action to foreclose on the mortgage. (Trial Tr. 86–87, R. 179–80). The Trust named Springs North Augusta—the only other party to the mortgage[4]—as the sole defendant in the foreclosure action. *See* (Foreclosure J. at 1, R. 229). Springs North Augusta failed to answer, and the master in equity entered a default judgment in favor of the Trust and ordered the property to be sold at auction with the proceeds to be applied to the debt, which then totaled $9,450,662.50. (Foreclosure J. at 4, R. 232). The Trust bid $6,600,000 at the initial foreclosure sale. (Trial Tr. 96, R. 189). Pursuant to section 15-39-720, the master in equity held the sale open for thirty days to receive additional bids (sometimes referred to as "upset" bids). At the close of the thirty days, 2nd Avenue Holdings, LLC submitted a winning bid of $7,160,000. (Master's Report on Sale, R. 265). Subsequently, 2nd Avenue Holdings assigned its winning bid to the Trust. (*Id.*). On March 20, 2013, the master issued his report memorializing that 2nd Avenue Holdings assigned its bid to the Trust and that the master conveyed the property to the Trust. (*Id.*) The Guarantors never sought to intervene in the foreclosure action and never objected to the foreclosure sale or the master's conveyance of the property to the Trust pursuant to the assignment of bid from 2nd Avenue Holdings.

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[4] The mortgage is a public record and can be found as Exhibit D to the complaint in the foreclosure action, Civil Action No. 2012-CP-02-00173 (Aiken County), which was filed on January 20, 2012. The first paragraph of the mortgage reads as follows:

> **THIS MORTGAGE AND SECURITY AGREEMENT (this "Mortgage") is made and entered into as of November 18, 2009, by and among SPRINGS NORTH AUGUSTA, LLC, a South Carolina limited liability company (hereinafter referred to as "Mortgagor") whose address is 133 Joe Bernat Drive, Greenwood, SC 29649 and D. RICHARD CRUMPLER, AS TRUSTEE OF THE GEORGE B. BUCHANAN, JR. IRREVOCABLE FAMILY TRUST, DATED THE 15TH DAY OF JULY, 2001 (hereinafter referred to as "Mortgagee") whose address is 4728 Jenn Drive, Myrtle Beach, SC 29577.**

Because the property sold for less than the amount of the debt, the master entered a deficiency judgment against Springs North Augusta in the amount of $2,484,163.95, which it later amended to $2,753,192.70, plus 15% annual interest. (Or. Amending Foreclosure J. and Deficiency J., R. 263–64). At the time of trial on the guaranty agreements and deficiency judgment, the Trust still owned the property and had not received any written offers to purchase the property. (Trial Tr. 78, R. 171). Nor had the Guarantors satisfied the deficiency. (*Id.*).

III. The Guaranty Action

The Trust filed this action to collect the deficiency judgment from the Guarantors. *See generally* (Compl., R. 16–21). The Guarantors asserted they are not obligated to pay the deficiency judgment because 2nd Avenue Holdings is a representative of the Trust and was therefore prohibited from bidding at the upset sale pursuant to South Carolina Code section 15-39-720. *See* (Ans. & Counterclaim at 4, R. 90; Aff. of Redd, R. 327–29; Aff. of Green, R. 330–32). Although the Guarantors initially asserted counterclaims against the Trust, they withdrew those counterclaims at trial "as counterclaims, but not as the factual basis for the defenses." (Trial Tr. 81, R. 174). However, they maintained that the bidding statute and the implied covenant of good faith and fair dealing required the Trust to submit a bid of at least fair market value for the property at the initial foreclosure sale. *See, e.g.*, (Memo. in Supp. of Mot. for New Trial, R. 303–04).

At trial, the Trustee testified that he is responsible for managing the Trust, which Buchanan established "for the health, education[,] and welfare" of his children. (Trial Tr. 65, R. 158). The trustee testified that Buchanan has contributed all the assets of the Trust but cannot take assets out of the Trust nor receive any disbursements from the Trust. (*Id.*). Finally, the Trustee established the existence of the debt and the guaranty agreements. (Trial Tr. 66–73, R. 159–66).

The Guarantors presented three witnesses: Bruce Green, Cliff Redd, and George Buchanan. (Trial Tr. 62–122, R. 155–215). Bruce Green testified that, pursuant to the loan documents, the Trust advanced approximately $6,000,000 in cash to Springs North Augusta. (Trial Tr. 86, R. 179); *see also* (Trial Tr. 94, R. 187). The $7,590,000 figure represented in the promissory note included the $6,000,000 cash outlay, plus prepaid interest and additional amounts. (*Id.*). Bruce Green also testified that, although he was a guarantor of the loan, he thought "that never seemed to be a problem" because he believed the property was worth several times more than the loan. (Trial Tr. 86, R. 179). Bruce Green further testified as to his knowledge of various events in the foreclosure process, including his assumption that the Trust would not pursue the guaranty agreements because it did not name the Guarantors as defendants in the foreclosure action. (Trial Tr. 87–88, R. 180–81). Finally, Bruce Green acknowledged that he would have been liable for the debt as a guarantor, but he believed he did not have to pay the deficiency judgment because "it was acquired the way it was." (Trial Tr. 90, R. 183). Cliff Redd testified that his answers would be identical to those offered by Bruce Green. (Trial Tr. 92, R. 185). Neither Bruce Green nor Cliff Redd testified that any other party attempted to bid at the foreclosure sale. The Guarantors presented no evidence that 2nd Avenue Holdings' participation in the sale thwarted any other party's attempt to participate.

At the close of all the evidence, the trial court granted a directed verdict in favor of the Trust on the grounds that (1) any violation of the bidding statute is not a defense to the Guarantors' performance pursuant to the guaranty agreements, and (2) no violation of the bidding statute occurred. (Trial Tr. 132–33, R. 225–26).

STANDARD OF REVIEW

A directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability. *Guffey v. Columbia/Colleton Reg'l Hosp., Inc.*, 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). In ruling on a motion for directed verdict, the trial court must view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the nonmoving party. *Steinke v. S.C. Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

"The grant or denial of [a] new trial motion[] rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625, 628–29 (Ct. App. 1999), *aff'd*, 342 S.C. 47, 536 S.E.2d 663 (2000).

ARGUMENT

The guaranty agreements signed by the Guarantors exist for two reasons—to induce the Trust to make the loan and to insure that the debt to the Trust is paid. In consideration for that assurance, the Trust made the $7,590,000 loan to Springs North Augusta in 2009. Thus, both sides received a benefit. The Guarantors received the money for their commercial real estate investment, and the Trust received interest on the loan plus a guaranty that it would be repaid regardless of whether the real estate investment succeeded. The Guarantors now ask the courts to rewrite the agreements. They seek a ruling that the agreements included additional benefits for them in the form of an implied covenant that the Guarantors would not suffer any loss because they would either not have to repay the debt or would obtain title to the property—which they believe they could resell for more than the amount of the debt—if Springs North Augusta defaulted on the loan. To avoid paying the debt they guaranteed, the Guarantors ask the court to (1) add new, implied

terms to the guaranty agreements—via the implied covenant of good faith and fair dealing—providing that if the Trust forecloses on the mortgage, the foreclosure sale must obtain either fair market value for the property or the value of the remaining debt; and (2) create a new law that guarantors must be added as defendants to a foreclosure action, or the failure to obtain fair market value through the foreclosure sale will extinguish the guarantors' obligation.

Nothing in the guaranty agreements contemplates the Guarantors' desired result. Instead, the plain language of the guaranty agreements provides that the Trust would loan $7,590,000 to Springs North Augusta, and the debt to the Trust would be repaid in full, regardless of the source or sources of the money. The Trust performed its obligation under the guaranty agreements. The Guarantors have not performed theirs. This court should reject the Guarantors' arguments and affirm the directed verdict and denial of the Guarantors' motion for a new trial.

I. The plain language of the guaranty agreements precludes the Guarantors from asserting an alleged prior violation of the deficiency statute as a defense.

The guaranty agreements are contracts subject to standard rules of contract interpretation. *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 294, 478 S.E.2d 63, 65 (Ct. App. 1996) ("A guaranty is a contract and should be construed based on the language used by the parties to express their intention."). Therefore, the question whether a violation of the bidding statute constitutes a defense to payment on the guaranty agreements is an issue of contract interpretation. When a contract's language is unambiguous, the court must interpret the contract based on the language alone. *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (citing *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 615, 732 S.E.2d 626, 628 (2012)). The court must read contractual terms in the context of the whole contract and "may not create an ambiguity by pointing out a single sentence or clause." *Id.* (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). "This court's duty is to enforce the contract made by the parties

regardless of the parties' failure to carefully guard their rights." *Id.* The guaranty agreements are unambiguous, and their plain language precludes the Guarantors from asserting a prior violation of the bidding statute as a defense in this case.

The guaranty agreements are personal obligations running directly from the Guarantors to the Trust and were immediately enforceable against the Guarantors upon default of the borrower, if the Trust chose to enforce them. *TranSouth Fin. Corp.*, 324 S.C. at 295, 478 S.E.2d at 66. The Guarantors' rights are determined solely by the terms of the guaranty agreements, and the guaranty agreements do not support their position. *See Citizens & S. Nat. Bank of S.C. v. Lanford*, 313 S.C. 540, 544, 443 S.E.2d 549, 551 (1994) ("We adhere to the principle that the guaranty of payment and the promissory note are two separate contracts. We conclude that [the guarantor] is not a party to the note and cannot avail himself of defenses based on impairment of collateral under S.C. Code Ann. § 36-3-606 (1976)."). The Guarantors ask this court to add implied terms that contradict the plain, express terms of the guaranty agreements. This court cannot rewrite the guaranty agreements.

A. The guaranty agreements are guaranties of payment, and the agreements unambiguously do not include the requirements that the Guarantors are seeking to add.

The guaranty agreements are absolute guaranties or guaranties of *payment*; they are not guaranties of *collection*. *See Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Grp., Inc.*, 300 S.C. 277, 281, 387 S.E.2d 672, 674 (1989) ("Under an absolute guaranty of payment, the creditor may maintain an action against the guarantor immediately upon default of the debtor. A guaranty of collection conditions liability of the guarantor upon prosecution of the primary debtor without success." (citations omitted)); *see also* (Guaranty Agrs. at 1, R. 276, 279) ("providing the guaranty agreements are guarantees "of payment and not of collection"). As guaranties of payment, the

Trust is not obligated to take any particular action or accomplish any requirement before demanding that the Guarantors pay the debt.

The express terms of the guaranty agreements provide (1) the Trust is not required to foreclose on the mortgage prior to pursuing payment from the Guarantors; (2) the loan is not conditional on the Trust taking *any* particular steps related to the mortgage prior to seeking payment of the remaining debt from the Guarantors; and (3) the Guarantors have no right of subrogation unless and until the borrower's debt is paid in full. (Guaranty Agrs. at 1, R. 276, 279) (providing the Guarantors' obligation is "payable immediately upon demand without recourse having been had by [the Trust] against the Borrower or any other guarantor, person, firm, or corporation, and without first resorting to any property held by [the Trust] as collateral security"). The guaranty agreements clearly provide that the Trust was making a loan in consideration for an unconditional guarantee of payment by the Guarantors. (*Id.*) (providing the guaranty is "an inducement" to the Trust to make the loan and was "in consideration thereof").

i. The Guarantors have no right in the collateral because the debt has not been paid in full.

The Guarantors argue to this court that the Trust was required to obtain a higher sale price at the foreclosure sale and that "the Guarantors have [the] right to pay the debt and then seek recourse from the collateral." (App. Br. 23). The express terms of the guaranty agreements contradict the Guarantors' position. The provision the Guarantors rely upon states,

> [T]he undersigned further agrees that none of the undersigned shall have any right of subrogation, reimbursement or indemnity whatsoever, nor any right of recourse to security for the debts and obligations of the Borrower or Lender unless and until all of the debts and obligations of the Borrower to Lender have been paid in full.

(Guaranty Agrs. at 2, R. 277, 280). The guaranty agreements allow the Guarantors recourse only against Springs North Augusta and only after the debt has been fully satisfied. (*Id.*). The Guarantors now seek to cast this provision as an agreement that "the Guarantors have [the] right to pay the debt and then seek recourse from the collateral." (App. Br. 23). The guaranty agreements grant the Guarantors no such rights. The agreements are simple—if the Trust cannot obtain full satisfaction of the debt, it can demand payment of whatever remains from the Guarantors. It is, as its name plainly indicates, a guarantee that the Trust will receive payment of the debt in full. The agreements do not exist to grant the Guarantors any rights in the collateral, and they expressly do not grant the Guarantors the right to pay the debt and sell off the collateral:

> Nothing herein contained is intended or shall be construed to give the undersigned any right of subrogation in or under the Loan Documents or any right to participate in any way therein, or in the right, title or interest of Lender in or to any collateral for the Loan, notwithstanding any payments made by the Guarantor under this Guaranty, until the actual and irrevocable receipt by Lender of payment in full of all the debt owed to it under or in connection with the Loan Documents.

(Guaranty Agrs. at 2, R. 277, 280). After the Guarantors have satisfied the remaining debt, they are subrogated to the rights of the Trust—namely, a deficiency judgment now worth more than $4,700,000—and may seek to enforce those rights against the borrower, Springs North Augusta. The fact that the Guarantors are the owners of the borrower and may not be able to enforce their subrogated rights against it does not entitle them to new contractual terms—and new law—allowing them to pursue remedies not contemplated by the guaranty agreements. The Guarantors were undoubtedly aware of this potential problem when they agreed to guarantee the debt of a company they owned. *Rosenberg*, 418 S.C. at 180, 790 S.E.2d at 925 ("This court's duty is to enforce the contract made by the parties regardless of the parties' failure to carefully guard their

rights."). The debt has not been paid in full, and the Guarantors are therefore liable for what remains.

ii. The Trust had discretion to foreclose on the property before enforcing the guaranty agreements.

The guaranty agreements allow the Trust discretion to foreclose on the property first and to pursue the Guarantors if the debt still has not been fully satisfied after the foreclosure. The Guarantors cannot escape the plain terms of the guaranty agreements. *See Lanford*, 313 S.C. at 543, 443 S.E.2d at 551 (finding a guaranty agreement imposed no obligation on the lender to pursue or exhaust the collateral and, instead, "unambiguously places all guarantors, jointly and severally, under liability for 100% of the contract debt"). Consequently, they ask this court to rewrite the agreements by adding implied terms that contradict the express terms of the agreements. The implied covenant of good faith and fair dealing cannot require the Trust to comply with the requirements of the bidding statute before enforcing a deficiency judgment against the Guarantors when the Trust is not required to pursue foreclosure or a deficiency judgment at all. *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (explaining there is no breach of the implied covenant "where a party to a contract has done what provisions of the contract expressly gave him the right to do").

iii. The Guarantors received the benefit for which they bargained.

The Guarantors have already received the benefit of the guaranty agreements. The first sentence of the agreements provides that the Guarantors "absolutely and unconditionally" guarantee payment of the loan "[a]s an inducement to [the Trust] to extend credit to and to otherwise deal with **SPRINGS NORTH AUGUSTA, LLC** . . . and in consideration thereof." (Guaranty Agrs. at 1, R. 276, 279). There is no dispute that the Trust extended credit to Springs North Augusta. Thus, the Trust performed under the agreements in 2009, and the Guarantors

received the benefit for which they bargained. The Trust's alleged actions in enforcing its own rights pursuant to the express terms of the guaranty agreements, long after it performed its obligation, cannot be a breach of the implied covenant of good faith and fair dealing. *Adams*, 320 S.C. at 277, 465 S.E.2d at 85 ("[T]here is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do."); *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (explaining the implied covenant of good faith and fair dealing prohibits a party from doing anything "to impair the other's rights to receive benefits under the contract"). Similarly, the Guarantors' miscalculation of the risk does not excuse them from their contractual obligations. *See* (Trial Tr. 86, R. 179) (explaining the Guarantors thought they would never have to pay under the guaranty agreements because they believed the property was worth more than the amount of the loan); *see also Rosenberg*, 418 S.C. at 180, 790 S.E.2d at 925.

B. The terms in the guaranty agreements relied upon by the Guarantors do not support their position.

The Guarantors rely on several provisions of the guaranty agreements in support of their arguments. *See* (App. Br. 23). However, those provisions do not entitle them to relief. First, their argument that the Trust may only "'compromise' collateral 'with reasonable notice to the undersigned'" is unpreserved. The Guarantors never argued to the trial court that the Trust violated that term by failing to notify them it would seek recourse against the collateral. Therefore, this argument is not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Nonetheless, the Guarantors are the owners of Springs North Augusta, and they cannot reasonably deny receiving notice of the foreclosure action. *See* (Trial Tr. 87–89, R. 180–82) (describing the Guarantors' knowledge of the foreclosure proceedings while those proceedings occurred).

Second, as explained above, the Guarantors' argument that they have a "'right of recourse to security for the debts and obligations of the Borrower to Lender' if and when they pay the Borrower's obligations" is a misreading of the plain language of the guaranty agreements. *See* (App. Br. 23); *see also* (Guaranty Agrs. at 2, R. 277, 280). That clause provides that the Guarantors have no right of subrogation or recourse against the collateral until all debts and obligations have been paid in full. The debt has not been paid.

Finally, the Guarantors rely on part of a clause at the end of the agreements to argue that the agreements "focus[] on the importance of the high bid at any foreclosure sale" and that the Guarantors were "relying upon a fair bidding process in accordance with law in order to produce the highest possible high bid." (App. Br. 24). That provision states, in full,

> Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. **TO THE FULLEST EXTENT PERMITTED BY LAW AND AS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN, GUARANTOR HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.**

(Guaranty Agrs. at 3, R. 278, 281). The Guarantors ask this court to interpret that provision as an agreement that the Trust will insure the highest possible bid at a foreclosure sale. To the contrary, the provision—read in context—expressly provides that, as an inducement for the Trust to make the loan, the winning bid at any foreclosure sale is final and the Guarantors do not have the right to assert that the bid should be higher. Regardless, as explained below in Part II.B, the Guarantors

presented no evidence to support a finding that the high bid at the foreclosure sale was not the highest possible bid.

The plain language of the guaranty agreements does not include any requirement that the property sell for the full amount of the debt at a foreclosure sale or for fair market value before the Trust may pursue recovery from the Guarantors. The Guarantors ask this court to create new law and add new, implied terms to the guaranty agreements providing them with greater rights than those for which they contracted. Courts cannot rewrite contracts to change the parties' agreement, and this court should affirm the directed verdict and denial of the motion for a new trial.

C. No law supports the relief sought by the Guarantors.

The Guarantors have not cited any law supporting their requested relief. The primary case they rely upon is inapplicable to this issue. *See Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 147 S.E.2d 481 (1966). To the extent the contract at issue in *Nelson Motors* was a guaranty, it was a guaranty of collection. The court considered the contractual relationship between two parties—"including the relationship of the parties and their past dealings"—and found Commercial Credit Corporation was required to pursue collection of certain accounts before demanding payment from Nelson Motors. *Id.* at 369, 147 S.E.2d at 485. Importantly, the contract contained no provision addressing the issue. *Id.* at 369, 147 S.E.2d at 485. However, the parties' relationship preexisted the contract at issue, and Commercial Credit had always sought to collect with diligence before demanding payment from Nelson Motors. *Id.* at 364–65, 147 S.E.2d at 482–83. Therefore, the court found an implied obligation to collect. *Id.* In contrast, the Trust and the Guarantors had no prior contractual relationship related to the guaranty agreements, and the guaranty agreements expressly provide that they are *not* guaranties of collection and that the Trust

is *not* required to attempt collection before pursuing the Guarantors. (Guaranty Agrs. at 1–2, R. 276–77, 279–80).

The Guarantors also assert that the prohibitions on impairment of collateral in Article 3 of the Uniform Commercial Code ("UCC"), *see* S.C. Code Ann. § 36-3-605, and the Restatement (Third) of Suretyship & Guaranty apply to this case. (App. Br. 17–19). The Guarantors misinterpret South Carolina law.

First, Article 3 of the UCC does not apply to this case. The UCC rules apply to negotiable instruments, but the Guarantors are not parties to a negotiable instrument. *See Sunrise Sav. & Loan Ass'n v. Mariner's Cay Dev. Corp.*, 295 S.C. 208, 210–11, 367 S.E.2d 696, 697–98 (1988); *see also* (Promissory Note, R. 266). In fact, the comments to section 36-3-605—which the Guarantors rely upon—plainly state that it does not apply to the guaranty agreements at issue in this case. *See* S.C. Code Ann. § 36-3-605 cmt. 2 (explaining there are three ways to consummate a guaranty agreement, one of which "is that the Borrower would use an instrument governed by this Article to evidence its repayment obligation, but Backer's [i.e., the guarantor's] obligation would be created in some way other than by becoming party to that instrument. In that case Backer's rights are determined by suretyship and guaranty law rather than by this Article"). The Guarantors are not parties to the promissory note; they are parties only to the separate guaranty agreements. (Promissory Note at 1, R. 266; Guaranty Agrs., R. 276, 279). Thus, Article 3 of the UCC—including section 36-3-605—does not apply to this case. *Id.*; *see also Sunrise Sav. & Loan Ass'n*, 295 S.C. at 210–11, 367 S.E.2d at 697–98 (finding a contract of guaranty "does not satisfy the requirements of a negotiable instrument. Accordingly, [the guarantor] is not a 'party to the instrument' and cannot assert an impairment of collateral defense" provided by the UCC); *see also Tri-S. Mortg. Inv'rs v. Fountain*, 266 S.C. 141, 145, 221 S.E.2d 861, 863 (1976) (finding the

incorporation of a guaranty into a note and other loan documents did not alter the obvious intent that the guaranty agreement be absolute as a guaranty of payment rather than collection), *overruled on other grounds by SCN Mortg. Corp. v. White*, 312 S.C. 384, 440 S.E.2d 868 (1994).

Second, contrary to the Guarantors' assertions, this court did not apply Restatement (Third) of Suretyship & Guaranty protections in *CoastalStates Bank v. Hanover Homes of South Carolina, LLC*, 408 S.C. 510, 759 S.E.2d 152 (Ct. App. 2014). The "acknowledgement" of the guarantor's argument cited by the Guarantors was simply the court's recitation of the parties' arguments in that case. *See id.* at 519–20, 759 S.E.2d at 157–58. The court never indicated its agreement with those arguments, and it did not adopt the Restatement's "impairment of collateral" defense as the law in South Carolina. *See generally id.* at 518–23, 759 S.E.2d at 157–59 (reciting the parties' arguments in extensive detail). To the contrary, the court decided the case based on the terms of the agreements between the parties. *Id.* at 523, 759 S.E.2d at 159 ("Under our reading of the relevant authorities, we must review the terms of the guaranty and the Agreement to determine if Cosman was released from liability with the release of Borrower."). The court reversed the granting of summary judgment because it found the guaranties at issue could "reasonably be read" to support the appellant's position. *Id.* at 524, 759 S.E.2d at 160. Thus, *CoastalStates* does not support the Guarantors' argument that this court must add an implied term to the guaranty agreements that extinguishes the debt if the Trust is found to have impaired the collateral.

Unlike the guaranties in *CoastalStates*, the guaranty agreements in this case are unambiguous and cannot be "reasonably read" to require the Trust to bid fair market value or comply with the bidding statute in a prior foreclosure action before it may enforce the guaranty agreements. The Guarantors are liable for the amount of the deficiency judgment.

Although the Trust disputes the allegation that it violated the bidding statute, any violation is irrelevant to whether the Guarantors are obligated to pay the remaining debt. The Guarantors' argument would convert the guaranty agreements into guaranties of *collection*, not of *payment*, and would alter the express language of the guaranty agreements. Contrary to their arguments, there is no requirement that the Trust must bid the fair market value of the property. The guaranty agreements are *absolute* guaranties, and the Guarantors are liable for whatever the borrower failed to pay.

II. The trial court properly determined the Trust did not violate section 15-39-720.

A. No violation of the deficiency statute occurred.

This court should affirm the trial court's finding that no violation of the bidding statute occurred. Although the trial court stated that it assumed for purposes of its directed verdict ruling that a violation of the statute occurred, it also found that 2nd Avenue Holdings is not a representative of the Trust. If 2nd Avenue Holdings is not a representative of the Trust, no violation of the statute occurred, and if no violation of the statute occurred, the Guarantors have no defense to payment of the deficiency judgment.

Section 15-39-720 provides that a foreclosure sale shall remain open for thirty days after the initial sale. S.C. Code Ann. § 15-39-720. Within that thirty-day period,

> any person other than the highest bidder at the sale or any representative thereof in foreclosure and execution suits may enter a higher bid . . . , and thereafter within such period any person, other than such highest bidder at the sale or any representative thereof, in foreclosure suits may in like manner raise the last highest bid, and the successful purchaser shall be deemed to be the person who submitted the last highest bid within such period and made the necessary deposit or guaranty. But the mortgagee or his representative shall enter such bid as he desires at the time the sale is made, and he and all persons acting in his behalf shall be precluded from entering any other bid in any amount at any other

> time except the single or last bid made by him or in his behalf at the sale.

S.C. Code Ann. § 15-39-720. To prove a violation of the statute, the Guarantors must prove that the winning bid of $7,160,000 was entered by a representative of the Trust. The winning bid at the upset sale was submitted by 2nd Avenue Holdings, LLC. (Trial Tr. 69, R. 162). The Trust does not dispute that Buchanan is the sole owner of 2nd Avenue Holdings. However, there is no legal relationship between 2nd Avenue Holdings and the Trust. Moreover, the Trust is an irrevocable trust set up for the benefit of Buchanan's children, and Buchanan has no legal right to make decisions for the Trust. (Trial Tr. 65–66, 76–78, R. 158–59, 169–71). The $7,160,000 bid came from 2nd Avenue Holdings, which is not a representative of the Trust as a matter of law. Therefore, no violation of the statute occurred, and the Guarantors are obligated to pay the deficiency judgment.

B. There is no evidence that the Guarantors suffered any prejudice from Buchanan's or 2nd Avenue Holdings' actions at the foreclosure sale.

The Guarantors cannot prove that they were harmed. The Guarantors can only be relieved of their obligation to perform under the guaranty agreements if they can show that the sale price would have been higher but for Buchanan's actions. They failed to do so. The fact that the winning bid was $7,160,000 definitively proves that no party was willing to bid more than $7,160,000, and the Guarantors suffered no prejudice from 2nd Avenue Holdings' purchase because they would be in no better position if a third party had purchased the property. *See Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Grp., Inc.*, 302 S.C. 223, 233 & n.1, 394 S.E.2d 849, 855 & n.1 (Ct. App. 1990) (Cureton, J., concurring) ("[T]he developers here are not prejudiced by allowing the lender the discount because they would have been in no better position if a third party had purchased the property at the judicial sale. . . . *Indeed, it is assumed that because a third party did*

not buy the property at the foreclosure sale no one else was interested in purchasing the property at the price paid by the lender." (emphasis added)). The Guarantors instead ask the courts to extinguish their debt on the purely hypothetical ground that a third party would have bid either the full amount of the debt or fair market value—or that the Guarantors would have done so—if 2nd Avenue Holdings had not bid. No provision of South Carolina law supports such a remedy, and no evidence presented at trial supports the Guarantors' hypothetical. Moreover, the Guarantors benefitted from the Trust's use of the foreclosure process. They are liable for approximately $4,700,000, instead of the total debt of approximately $9,600,000.

As to the propriety of the amount obtained at the foreclosure sale, the $7,160,000 sale price was 94% of the original loan amount. The South Carolina Supreme Court has noted that although a foreclosure sale may be set aside if the inadequacy of the sale price "is so gross as to shock the conscience," a sale price of 47% of the original amount of the mortgage did not meet that test. *Am. Gen. Fin. Servs., Inc. v. Brown*, 376 S.C. 580, 584 n.2, 658 S.E.2d 99, 101 n.2 (2008). If a sale price of 47% of the original debt is not sufficiently inadequate to set aside a foreclosure sale, the Guarantors' argument that the foreclosure sale must obtain the amount of the debt or the fair market value of the property is invalid.

III. The Guarantors cannot challenge the deficiency judgment in a subsequent action to enforce the guaranty agreements.

This case is not the proper vehicle for the Guarantors to challenge the foreclosure proceedings. The Guarantors have repeated throughout trial and their brief that the Trust did not name them as defendants in the foreclosure action. The implication of the Guarantors' argument is that the Trust's decision not to name them as defendants was unlawful or inequitable. To the contrary, as the Guarantors' counsel conceded in his closing argument, (Trial Tr. 128, R. 221) ("They certainly didn't have to and that's their decision . . . ."), the Trust was not required to name

the Guarantors as defendants in the foreclosure action. *See* S.C. Code Ann. § 29-3-660 (providing "if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff *may* make such person a party to the action" (emphasis added)); *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 292–93, 778 S.E.2d 106, 108 (2015) (referring to a lender's "statutory right to join a guarantor as a party to a foreclosure action"); *see also* 27 S.C. Jur. *Mortgages* § 108 ("Guarantors or persons obligated on a note other than the mortgagor *can* be made parties and a judgment obtained against them for the unsatisfied debt." (emphasis added)). The Trust had the right to name the Guarantors as defendants in the foreclosure obligation, but it was not obligated to do so by either law or contract.

A. The Guarantors' defense is barred by res judicata.

The Guarantors' attempt to challenge the amount of the deficiency judgment is barred by the res judicata doctrine. Res judicata "defines the effect a valid judgment may have on subsequent litigation between the same parties *and their privies*." *Duckett v. Goforth*, 374 S.C. 446, 464–65, 649 S.E.2d 72, 81–82 (Ct. App. 2007) (emphasis added). It "ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Id.* The party seeking to establish res judicata must prove three elements: (1) identity of the parties, (2) identity of the subject matter, and (3) adjudication of the issue in the former suit. *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108–09 (1999).

Res judicata bars subsequent actions by the same parties or their privies "when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Id.* (citing *Sub–Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992)). Under the res judicata doctrine, "[a] litigant is barred from raising any issues which were adjudicated in the former suit *and any issues which might have been raised in the former suit*." *Id.*

(emphasis added) (quoting *Hilton Head Center of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)).

All three elements of res judicata are present in this case, and the Guarantors' defense is therefore barred. First, the subject matter of the foreclosure action and this action—Springs North Augusta's debt to the Trust and the foreclosure sale—are the same. The Guarantors' obligation to pay Springs North Augusta's debt, along with their alleged contractual defenses, arose out of the same transaction as the debt itself and the mortgage on which the Trust foreclosed. *See* (Guaranty Agrs., R. 276, 279; Loan Agr., R. 22).

Second, the Guarantors are privies with Springs North Augusta. For purposes of res judicata, privity depends not on the relationship between the parties asserting it but instead on each party's relationship to the subject matter of the litigation. *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). The Guarantors and Springs North Augusta had an identical interest in obtaining a smaller deficiency judgment because the Guarantors were obligated to pay the deficiency judgment if Springs North Augusta could not do so.

Finally, the master in equity adjudicated the amount of Springs North Augusta's remaining debt to the Trust when he entered the deficiency judgment. The master also was aware of 2nd Avenue Holdings' assignment to the Trust, and he approved of that assignment when he conveyed the property to the Trust. (Assignment of Bid, R. 285–86; Master's Report on Sale, R. 265). It cannot be disputed that the Guarantors are required by contract to pay Springs North Augusta's debt to the Trust. Rather than perform their contractual obligation, they argue the amount of the debt should be lower based on the actions of 2nd Avenue Holdings at the foreclosure sale. The amount of the remaining debt (i.e., the deficiency judgment) was adjudicated by the master in equity. The Guarantors cannot assert that the deficiency judgment should have been smaller in

this subsequent action. They could have asserted their rights in the foreclosure action and raised the issue of 2nd Avenue Holdings' participation in the sale, but they chose not to do so. Their defense is now barred by res judicata.

B. The Guarantors waived their defense by failing to protect their rights prior to the master in equity's entry of the deficiency judgment.

The Guarantors also waived their defenses by failing to assert them in the foreclosure action. If the Guarantors wished to participate in the foreclosure action or the public sale at the conclusion of the foreclosure action, they could have done so. The Guarantors are all direct or indirect owners of the borrower, Springs North Augusta. As the owners of Springs North Augusta, the Guarantors had notice of the foreclosure action. *See* (Trial Tr. 87–89, R. 180–82) (explaining the Guarantors' knowledge and assumptions at various points in the foreclosure process). Springs North Augusta could have appeared and defended the foreclosure action. Its owners, the Guarantors, chose not to do so. Instead, they decided to default. They cannot be awarded a second chance. The Guarantors could have also requested to intervene in the foreclosure action to protect their rights. *See* Rule 24, SCRCP (providing criteria for intervention). Moreover, the sale in this case was publicly noticed. *See* (Master's Report on Sale, R. 265). If the Guarantors wished to purchase the property, they were free to bid.

Rather than defend the foreclosure, intervene, or object to the conduct of the sale when the master in equity could have resolved any alleged issues in the sale process, the Guarantors chose not to participate in the foreclosure proceedings and launched a collateral attack when the Trust attempted to collect the deficiency judgment. Although the Guarantors carefully avoid describing their defense as a collateral attack on the deficiency judgment, there is no other description for the defense. If the deficiency judgment is valid, it is enforceable by the Trust against the Guarantors. The Guarantors unreasonably delayed in objecting to the conduct of the foreclosure sale and now

seek to use that delay to the prejudice of the Trust by avoiding their obligations under the guaranty agreements. The Guarantors waived their defenses. *See Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 114, 276 S.E.2d 296, 297 (1981) ("Waiver is defined as an intentional relinquishment of a known right."). This court should affirm the trial court's directed verdict and denial of the Guarantors' motion for a new trial.

CONCLUSION

This court should not create new law and add implied terms to a contract based on the Guarantors' hypothetical—and illogical—assertion that their debt would have been extinguished if 2nd Avenue Holdings did not bid at the upset sale. The terms of the guaranty agreements are plain and unambiguous: the Guarantors are required to pay the deficiency judgment. Accordingly, this court should affirm the directed verdict and denial of the Guarantors' motion for a new trial.

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Columbia, South Carolina

March 12, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2018-001388

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001, ... Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC, Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson, and L. Cliff Redd,..... Defendants,

Of which Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd are..... Appellants.

CERTIFICATE OF COUNSEL

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

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