THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III
Beaufort County
Trial Court Case No. 2011-CP-07-1933

Case No. 2017-000487

Deep Keel, LLC, Respondent,

v.

Atlantic Private Equity Group, LLC, Terry L. Rohlfing, Jerry T. Caldwell, and Bluffton Village Town Center Property Owners' Association, Inc., Defendants,

Of Whom Atlantic Private Equity Group, LLC, Terry L. Rohlfing, and Jerry T. Caldwell are the Appellants.

APPELLANTS' PETITION FOR REHEARING

Keating L. Simons, III
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
843-762-9132
Attorneys for Appellants

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellants petition the Court for rehearing of this case. The Court decided the case without oral argument and issued its *per curiam* unpublished opinion on July 24, 2019. Appellants respectfully submit that the Court overlooked or misapprehended material points of fact or law in its opinion upon consideration of which the Court should reverse its decision.

As addressed in greater detail in the accompanying memorandum, in its decision the Court referenced Appellants' argument that the affidavits submitted in support of the motion for summary judgment failed to meet the requirements of Rule 56(e), SCRCP. However, the Court did not discuss this issue in its opinion and the cases cited by the Court as authorities upon which the Court's decision were based do not address sufficiency of affidavits under Rule 56(e). Based on the cases cited by the Court, it appears that the Court determined that because affidavits had been filed the burden shifted to Appellants to "come forward with specific facts showing there is a genuine issue for trial," and because Appellants did not do so, Respondent was entitled to summary judgment. Appellants respectfully submit this was erroneous in that this burden shifting only occurs when a summary judgment motion is supported by affidavits that meet the personal knowledge requirements of Rule 56(e), a point overlooked, or at least not addressed by, the Court in its decision. Because the affidavits in this case were not based on personal knowledge they did not comply with Rule 56(e), Appellants were under no obligation to come forward with evidence and Respondent had simply failed to establish that it was entitled to judgment as a matter of law.

In its decision the Court also referenced Appellants argument that the personal guarantees imposed joint and several liability not personal liability upon the guarantors. Based upon the cases cited by the Court, it appears the Court decided the case on the ground that unambiguous contracts

are to be construed and enforced in accordance with the plain meaning of the language used by the parties. Appellants do not take issue with this as a correct statement of the law. However, the Court overlooked, or at least did not address, the language of the guarantees providing for joint and several liability or the allegations of Respondent's complaint that the guarantors "each guaranteed, jointly and severally" the payment of the debt.

Appellants arguments are stated more fully in the accompanying memorandum. Appellants respectfully request that the Court grant this Petition for Rehearing, vacate its prior decision, set the case for oral argument and consider Appellants' arguments made hereby.

Respectfully submitted,

Keating L. Simons, III
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
843-762-9132
Attorneys for Appellants

August 8, 2019
Charleston, SC

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Of Whom Atlantic Private Equity Group, LLC, Terry L. Rohlfing, and Jerry T. Caldwell are the Appellants.

APPELLANTS' MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

Keating L. Simons, III
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
843-762-9132
Attorneys for Appellants

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

ARGUMENT

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE AFFIDAVITS OFFERED BY DEEP KEEL FAIL TO MEET THE REQUIREMENTS OF RULE 56(e) WITH RESPECT TO THE AMOUNT OF THE DEBT ALLEGEDLY DUE.

As summarized in Appellants' Petition for Rehearing, Appellants respectfully submit that the Court overlooked or misapprehended the fact that the affidavits in support of the motion for summary judgment were not based upon personal knowledge as required by Rule 56(e), SCRCP and that for that reason the master erred in granting summary judgment to Respondent.

Rule 56(e), SCRCP requires that affidavits in support of a motion for summary judgment:

- Shall be made on personal knowledge
- Shall set forth such facts as would be admissible in evidence, and
- Shall show affirmatively that the affiant is competent to testify to the matters stated therein.

This Court has required that affidavits be based upon personal knowledge. *S.C. Labor Ltd., LLC v. Eastern Tree Service, Inc.*, 362 S.C. 654, 609 S.E.2d 305 (Ct.App. 2005)(affidavits based on personal knowledge could be considered); *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 433 S.E.2d 871 (Ct.App. 1993)(affidavit insufficient where affiant did not assert that he knew materials were defective).

The Supreme Court has also addressed the issue. While holding that a verified complaint could meet the requirements of summary judgment, the Supreme Court further held that allegations based upon information and belief did not meet the personal knowledge requirement of the rule.

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003).

In this case the master's determination of the amount due was based on an affidavit from an officer of CresCom Bank ("Hujik Affidavit"). Paragraph 14 of the Hujik Affidavit summarized a principal balance and various other charges and credits, and stated a conclusion as to the total amount due when the debt was assigned to Respondent. [R. p. 194] There in nothing in the affidavit to show the affiant's personal knowledge of the loan or competence to testify about it. The affidavit does not state that it is based on personal knowledge, must less include any factual statements to affirmatively demonstrate the affiant's personal knowledge or competence to offer the testimony.

In the order granting summary judgment the master did not address Appellants' arguments, made at the hearing on the motion, that the affidavits failed to meet the requirements of Rule 56(e), SCRCP. In their motion to reconsider Appellants again made these arguments. [R. pp. 235-238] In the order denying Appellants' motion the master stated:

> Mr. Hujik specifically states in his affidavit he is an Executive Vice President of the Bank and has relied on the records maintained by the Bank up to the time of the assignment of the loan to Plaintiff in setting forth the facts contained in the affidavit, including the calculation of the amount owed at the time of the assignment to Plaintiff. [R. p. 7]

Contrary to the master's order, the Hujik Affidavit contains no statement, specific or otherwise, concerning the affiant's reliance on records maintained by the bank in regard to the calculation of the amount owed at the time of the assignment to Respondent. The only mention in the record of the affiant's alleged reliance on bank records is a statement to that effect from Respondent's counsel at the hearing. [R. p. 64, lines 8-10] But factual statements or arguments made by an attorney are not evidence and ordinarily may not be considered by the court considering

summary judgment. *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct.App. 1997).

Again, the affidavit includes no averment that the testimony concerning the amount of the debt due was based on business records maintained by the bank. Even if it were to do so, the affiant's testimony from records not produced at the hearing would be inadmissible hearsay. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 773 S.E.2d 607 (Ct.App. 2015). All the affidavit shows is that the affiant is a vice-president of the bank. However, his status as a vice-president is not a sufficient substitute for personal knowledge. *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993). The Hujik Affidavit did not meet the requirements of Rule 56(e) and the court erred, it is respectfully submitted, in accepting and relying upon it in its grant of summary judgment.

There is no factual support in the record for the master's statement in his order denying reconsideration that Hujik:

> ... provided the information in his affidavit based on bank records kept in the ordinary course of business. Mr. Hujik's affidavit conveys information from a person with knowledge at the time the records were created, a situation specifically allowed under Rule 803(6), SCRE. *Twelfth RMS [sic]Partners, L.P. v National Safe Corp.*, 335 S.C. 635, 518 S.E.2d 44 (1999). [R. p. 8]

The only statement about the bank's maintenance of records is in Paragraph 13 of the Hujik Affidavit, reciting simply that the exhibits attached to the affidavit were all "maintained in the official records of the Bank until the Assignment to Deep Keel, LLC." (emphasis added) There is nothing in the affidavit referring to bank records concerning payments, charges, credits or amounts due on the loan. Not only does the affidavit fail to describe any such records, there is nothing in the

affidavit to show that it includes information from a person with knowledge as to the amount due.

The master's reliance on Rule 803(6) and *Twelfth RMA Partners, L.P. v National Safe Corp.* 335 S.C. 635, 518 S.E.2d 44 (1999) was also erroneous. As noted by this Court in its opinion deciding the first appeal in this case, *Twelfth RMA Partners* permits a "qualified witness" to testify about a business record. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 73, 773 S.E.2d 607, 615 (Ct. App. 2015). This Court further indicated that the witness in that case, Scott Bynum, "appears to be a 'qualified witness' under Twelfth RMA because he studied the manner in which Community First and CresCom Bank maintained the records before he purchased the note." *Id.* Thus, "his testimony conveyed information from a person with knowledge at the time the records were created." *Id.* In the present case there is no evidence that Hujik studied or otherwise had any knowledge concerning any records regarding payments, charges and so forth, or the manner in which either bank maintained any such records. Hujik is not a "qualified witness" based on the record here.

Even if the affiant were deemed to be a "qualified witness," Respondent has not established a proper foundation for any business records, nor did Respondent seek to introduce any business records, concerning the amount allegedly due on the loan. *Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 565 S.E.2d 293 (2002). This court has previously held in this case:

> Because the business records exception applies only to the admission of business records themselves, the exception does not apply to Bynum's hearsay testimony.

Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 74, 773 S.E.2d 607, 615 (Ct. App. 2015).

Based on the record now before the Court, Hujik stands in no better position than did Bynum in the first appeal, and Hujik's unsupported, uncorroborated, naked conclusion concerning the

amount due on the loan at the time of the assignment does not constitute admissible evidence. It is instead inadmissible hearsay not subject to any exception. Thus, the motion for summary judgment was not "made [or] supported" as required by Rule 56, SCRCP.

Morever, the conclusory summary of the alleged status of the loan as of a specific date as presented in the Hujik Affidavit is functionally no different from the summary statements offered by the plaintiff bank in *South Carolina Nat'l Bank v. Jones*, 302 S.C. 154, 394 S.E.2d 323 (1990). In that case the Supreme Court reversed a directed verdict in favor of the bank, ruling that summary statements on which it was based were not admissible under the Uniform Business Records as Evidence Act because there was no evidence showing that the entries on the statements were made at or near the time of the transactions. The testimony from a bank officer that the summaries were compiled from monthly statements issued to the debtor did not cure the defect. The present case does not involve the introduction of business records but the effect is the same. The court has granted judgment against the debtor based upon an unsupported, uncorroborated summary, offered not in the form of a record but included in testimony submitted by affidavit. If a written summary prepared by the bank would not be admissible, certainly an affidavit presenting testimony equivalent to a written summary would not be admissible either.

The Hujik Affidavit should be seen as what it is: a statement from a bank officer that based upon bank records or information received from other bank employees (on this record we cannot know how the affiant acquired the information) he is informed and believes that the principal balance and other charges owed total to the figure given. The information and belief set forth in the affidavit, which is all that is provided in regard to the amount of the debt, is simply insufficient support for Respondent's summary judgment motion. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

In their Answer, at paragraph 17, Appellants denied the amount of the debt and demanded strict proof thereof. [R. pp. 32-33] A party against whom summary judgment is sought is entitled to rest on his pleadings unless and until "a motion for summary judgment is made and supported as provided in [Rule 56]." Rule 56(e), SCRCP. When faced with a motion for summary judgment "that is supported by evidence" the party opposing the motion must show the court the existence of a genuine issue of fact. *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). The papers supporting the movant are to be closely scrutinized. *Id; Spencer v. Miller*, 259 S.C. 453, 192 S.E.2d 863 (1972). Because the motion for summary judgment was not supported by admissible evidence, that is to say, testimony from a witness with personal knowledge, Appellants were entitled to rest on their pleadings. The burden did not shift to Appellants to oppose the motion with affidavits or other evidence. *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). The master erroneously concluded otherwise:

> If the Motion for Summary Judgment is supported by affidavits, the party opposing the Motion may not rely on their pleadings, but they must respond by affidavit or other testimony with specific facts evincing a genuine issue for trial. [R. pp. 8-9]

The master erred by shifting the burden to Appellants merely because Respondent filed supporting affidavits, without first scrutinizing the affidavits for admissible evidence as required by *Dyer v. Moss*, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985) and *Spencer v. Miller*, 259 S.C. 453, 192 S.E.2d 863 (1972).

Summary judgment should not be granted unless the movant establishes that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP (emphasis added) It is only when a motion for summary judgment is

"made and supported as provided in this rule" that "an adverse party may not rest upon the mere allegations or denials of his pleading." Rule 56(e), SCRCP. Here the Respondent's motion was not supported as required by Rule 56(e), Appellants were not required to come forward with evidence showing a genuine issue of fact and Respondent failed to establish, by admissible evidence, that it was entitled to judgment as a matter of law. Because the Hujik Affidavit included no admissible evidence concerning the amount due at the time of the assignment to Respondent and the Bynum Affidavit expressly relied on the Hujik Affidavit for its calculation concerning the total due, there was no competent, admissible evidence presented to the master concerning the amount of the debt. The master's grant of summary judgment should be reversed. *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011) (when reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court).

II. THE COURT ERRED IN CONSTRUING THE BANK'S LIMITED GUARANTY FORM TO PROVIDE FOR INDIVIDUAL LIABILITY OF THE GUARANTORS FOR TWO SEPARATE LIMITS OF PRINCIPAL INSTEAD OF JOINT LIABILITY FOR A SINGLE LIMIT OF PRINCIPAL.

As summarized in Appellants' Petition for Rehearing, Appellants do not take issue with the correctness of the legal proposition, apparently relied on by the Court in its disposition of this case, that unambiguous contracts are to be construed and enforced in accordance with the plain meaning of the language used by the parties. However, Appellants respectfully submit that the Court overlooked or misapprehended the language of the guarantees providing for joint and several liability and the allegations of Respondent's complaint that the guarantors "each guaranteed, jointly and severally" the payment of the debt.

In the Complaint, at paragraph 28, plaintiff alleges that Defendants "each guaranteed, jointly

and severally, the payment and performance of each and every debt, liability and obligation of every type and description which Atlantic Private Equity Group, LLC owed Plaintiff up to a principal amount of $350,000.00." [R. p. 28] In the prayer for relief, at item 3, plaintiff sought judgment against Appellants "jointly and severally, in the amount found to be due." [R. p. 29]

The guarantee forms are in the record as exhibits to Respondent's motion for summary judgment. [R. pp. 109, 111] Under paragraph 4 of the guaranty: "The liability of the Undersigned hereunder shall be limited to a principal amount of $350,000.00." The capitalized term "Undersigned" is defined below the signature lines: "'Undersigned' shall refer to all persons who sign this guaranty, severally and jointly." Paragraph 13 of the bank's guaranty form states, in relevant part: "If there be more than one signer, all agreements and promises herein shall be construed to be, and are hereby declared to be, joint and several in each of [sic] every particular and shall be fully binding upon and enforceable against either, any or all the Undersigned."

Here there were two signers and under the terms of the guaranty their liability would be joint and several for the single limited amount of principal of $350,000. That the signatures appeared on two different copies of the bank's form does not negate the fact that there was a single guaranty. The definition of "Undersigned" refers to "this guaranty," not to multiple copies of the same document. Nowhere does the bank's form provide that if guarantors do not sign the same form their liability becomes individual not joint and several and if they sign different copies that they effectively double their collective liability under the guaranty. This could not have been the intent of the parties in light of the clear language: "If there be more than one signer, all agreements and promises herein shall be construed to be, and are hereby declared to be, joint and several."

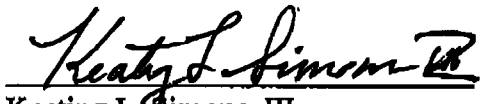
The master erred, it is respectfully submitted, in his construction of the guarantee forms and

his granting relief beyond that sought by Respondent for "joint and several" liability of the guarantors.

CONCLUSION

On the first appeal of this case this Court correctly held, based on the record at that time, that Respondent had failed to properly prove the amount owed on the debt and remanded the case to give Respondent another try. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015). The nature and quality of the proof subsequently presented to the master by Respondent and now before the Court in this case is no better or different in any substantive way from that involved in the first appeal. The result should be the same.

Respectfully submitted,



Keating L. Simons, III
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
843-762-9132
Attorneys for Appellants

August 8, 2019
Charleston, SC

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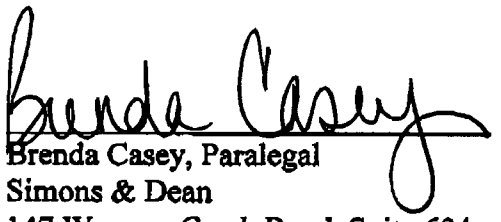
PROOF OF SERVICE

I certify that I have served Appellants' Petition for Rehearing and Appellant's Memorandum in Support of Petition for Rehearing on Deep Keel, LLC by depositing a copy of it in the United States Mail, postage prepaid on August 8, 2019, addressed to their attorneys of record, Charles S. Altman, Esquire, Meredith L. Coker, Esquire and Patrick John Norton, Esquire, Altman & Coker, LLC, 575 King Street, Suite A, Charleston, South Carolina 29403, Attorneys for Respondent.



Brenda Casey, Paralegal
Simons & Dean
147 Wappoo Creek Road, Suite 604
Charleston, South Carolina 29412
(843) 762-9132
Attorneys for Appellants

August 8, 2019
Charleston, S.C.

SIMONS & DEAN
ATTORNEYS AT LAW

147 WAPPOO CREEK DRIVE, SUITE 604 | CHARLESTON, SC 29412 | 843.762.9132 | FAX: 843.406.9913

Keating L. Simons, III klsimons@simonsanddean.com
Derek F. Dean dfdean@simonsanddean.com
I. Sonja Taylor istaylor@simonsanddean.com

Date: August 8, 2019
To: The Honorable Jenny Abbott Kitchings
Fax #: 803-734-1839
Re: Deep Keel, LLC v. Atlantic Private Equity Group, LLC, et al. / Petition for Rehearing
Case #: 2017-000487
Pgs.: 19 *(includes fax cover sheet)*

Please see the attached from Keating L. Simons, III, Esquire.

Thank you,
Brenda Casey

Brenda Casey
Paralegal
SIMONS & DEAN
147 WAPPOO CREEK DRIVE
SUITE 604
CHARLESTON, SC 29412
843-762-9132/843-406-9913 *FACSIMILE*
BRENDA@SIMONSANDDEAN.COM

SIMONS & DEAN
ATTORNEYS AT LAW

147 WAPPOO CREEK DRIVE, SUITE 604 | CHARLESTON, SC 29412 | 843.762.9132 | FAX: 843.406.9913

Keating L. Simons, III klsimons@simonsanddean.com
Derek F. Dean dfdean@simonsanddean.com
I. Sonja Taylor istaylor@simonsanddean.com

August 8, 2019

VIA FACSIMILE & US MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *Deep Keel, LLC v. Atlantic Private Equity Group, LLC, et al.*
Appellate Case No.: 2017-000487

Dear Ms. Kitchings:

Enclosed is the original and six (6) copies of Appellants' Petition for Rehearing; Appellant's Memorandum in Support of Petition for Rehearing and Proof of Service in the above case along with a check in the amount of $50.00 for the filing fee.

By copy of this letter, I am serving Respondent's counsel with a copy of the aforementioned Appellants' Petition for Rehearing; Appellant's Memorandum in Support of Petition for Rehearing and Proof of Service.

With kind regards, I remain

Yours very truly,

Keating L. Simons, III

KLS/bdc
Enclosures
cc: Charles S. Altman, Esquire (*via email and US mail*)
Meredith L. Coker, Esquire (*via email and US mail*)
Patrick John Norton, Esquire (*via email and US mail*)