THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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
Appellate 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., Appellants,

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION BY COUNSEL

This matter came before the South Carolina Court of Appeals pursuant to a notice of appeal filed by Petitioners. The Court of Appeals decided the case without oral argument and issued its *per curiam* unpublished opinion on July 24, 2019, 2019-UP-270. Petitioners filed a Petition for Rehearing on August 8, 2019. The Petition for Rehearing was denied by an order filed on September 19, 2019. Accordingly, the undersigned certifies that a petition for rehearing was filed with and finally ruled on by the Court of Appeals.

Keating L. Simons, III
Attorney for Petitioners

October 14, 2019
Charleston, SC

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

This action was brought to foreclose a mortgage on two parcels of real estate in Beaufort County. The property has been sold. Remaining for determination is whether Respondent, as assignee of the note and mortgage involved, is entitled to a deficiency judgment against the mortgagor, Petitioner Atlantic Private Equity Group, LLC, and two individual guarantors, Petitioners Terry L. Rohlfing and Jerry T. Caldwell.

This is not the first time the Court of Appeals has dealt with this matter. In 2013, following a hearing, the master in equity ordered that the property be sold and made factual findings concerning the amount of the debt due on the note. At the hearing Respondent sought to establish the amount due based upon information Respondent's witness said he received from the bank at the time of the assignment of the loan. Petitioners' objected on the ground that the testimony was inadmissible hearsay. The objections were overruled, resulting in Petitioners' first appeal.

The Court of Appeals, in a published decision, agreed with Petitioners that the testimony regarding the amount due on the debt was inadmissible hearsay. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015). Accordingly, the court affirmed the judgment of foreclosure, reversed the deficiency judgment, vacated the master's finding concerning the guarantors and remanded for further proceedings necessary for final judgment on all claims.

Remittitur to the court of common pleas was issued on July 6, 2015. The case was thereafter placed on the jury roster and ultimately again referred to the master by consent of the parties pursuant to an order entered on July 18, 2016. [R. p. 4]

On July 6, 2016, Respondent filed a motion for summary judgment against the alleged

guarantors, Petitioners Terry L. Rohlfing and Jerry T. Caldwell. [R. p. 85] The motion was supported by a memorandum and various exhibits attached thereto. [R. p. 87] Respondent also filed two affidavits on July 12, 2016, one from Scott Bynum, sole member of Respondent [R. p. 133] and another from Jamin M. Hujik, Executive Vice President of CresCom Bank, from which Respondent had acquired the note and mortgage by assignment. [R. p. 191]

Respondent's motion for summary judgment was heard by The Honorable Marvin H. Dukes, III on August 3, 2016 [R. p. 35] and thereafter granted by order entered August 23, 2016. [R. p. 11]

Petitioners timely filed their Motion to Reconsider Order Granting Summary Judgment on September 6, 2016, [R. p. 235] which was denied by an order entered and electronically filed on January 17, 2017. [R. p. 6]

Petitioners received written notice of entry of the Order Denying Defendants' Motion for Reconsideration via notice of electronic filing on January 17, 2017 and timely served Notice of Appeal on February 13, 2017. [R. p. 241]

The Court of Appeals decided the case without oral argument pursuant to an unpublished *per curiam* decision at 2019-UP-270. [App. p. 281] Petitioners filed a Petition for Rehearing on August 8, 2019 [App. p. 284] which was denied by an order filed on September 19, 2019. [App. p. 301]

The amounts involved in this appeal include: judgment entered against Terry L. Rohlfing individually in the amount of $457,314.17; judgment entered against Jerry T. Caldwell individually in the amount of $457,314.17; and, judgment entered against Terry L. Rohlfing and Jerry T. Caldwell jointly and severally in the amount of $37,869.34.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING SUMMARY JUDGMENT WHERE THE AFFIDAVITS FILED IN SUPPORT OF THE MOTION WERE NOT BASED ON PERSONAL KNOWLEDGE AS REQUIRED BY RULE 56(e), SCRCP.

II. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING INDIVIDUAL LIABILITY OF THE PERSONAL GUARANTORS WHERE THE COMPLAINT ALLEGED THE PERSONAL GUARANTORS WERE JOINTLY AND SEVERALLY LIABLE AND THE GUARANTEES UNAMBIGUOUSLY PROVIDED FOR JOINT AND SEVERAL LIABILITY OF THE GUARANTORS.

ARGUMENT

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE AFFIDAVITS OFFERED TO ESTABLISH THE AMOUNT OF THE DEBT WERE NOT BASED ON PERSONAL KNOWLEDGE AS REQUIRED BY RULE 56(e), SCRCP.

Petitioners respectfully submit that the Court of Appeals erred in failing to hold 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.

The Court of Appeals has required in other cases 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 requirement of personal knowledge has also been addressed by this Court. While holding that a verified complaint could meet the requirements of summary judgment, this 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 Petitioners' 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 Petitioners again made these arguments. [R. pp. 235-238] In the order denying Petitioners' 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 of Appeals erred, it is respectfully submitted, in failing to so hold.

Moreover, 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." The exhibits do not include and the affidavit does not refer to any 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 the Court of Appeals 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). The court further indicated that the witness "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). The Court of Appeals 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.

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 this 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 purporting to set forth such a summary should 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, Petitioners 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, Petitioners were entitled to rest on their pleadings. The burden did not shift to Petitioners 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 Petitioners 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), Petitioners 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 is no competent, admissible evidence 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 PROVIDED FOR IN THE PERSONAL GUARANTEES AND ALLEGED IN THE COMPLAINT.

Petitioners do not take issue with the correctness of the legal proposition, apparently relied upon by the Court of Appeals 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. *South Carolina Dept. of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008)(when a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense). However, Petitioners respectfully submit that the Court of Appeals erred in ignoring plain 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 Petitioners "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 in granting relief beyond that sought by Respondent for "joint and several" liability of the guarantors and, it is respectfully submitted, the Court of Appeals erred in not so holding.

CONCLUSION

When creditors seek to impose liability upon debtors and guarantors, evidence bearing upon the amount due, such as records concerning payments received and charges posted for fees, interest and other items, is often exclusively within the control of the creditor. Requiring the debtor or guarantor to come forth with evidence to challenge a creditor's conclusory assertions concerning amounts due is neither realistic nor in accord with court rules requiring the creditor to support a motion for summary judgment with admissible evidence. This Court should hold that debtors are entitled to rely on denials in their pleadings unless and until creditors support their claims for relief with evidence, not mere conclusions, concerning amounts allegedly due.

On the first appeal of this case the Court of Appeals correctly held that Respondent had failed to properly prove the amount owed on the debt and remanded the case to give Respondent another try. The nature and quality of the proof now before the Court is no better or different in any substantive way from that involved in the first appeal. The result should be the same.

Respectfully submitted,

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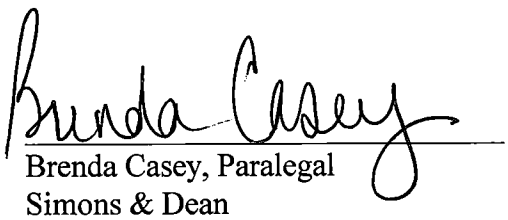
Of Whom Atlantic Private Equity Group, LLC, Terry L. Rohlfing, and Jerry T. Caldwell are the Appellants.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Respondent, Deep Keel, LLC by depositing a copy of it in the United States Mail, postage prepaid on October 16, 2019, addressed to their attorneys of record:

Charles S. Altman, Esquire The Law Offices of Charles S. Altman 575 King Street, Suite A Charleston, SC 29403	Meredith L. Coker, Esquire PO Box 176 Charleston, SC 29402	Patrick John Norton, Esquire 700 Daniel Ellis Drive Apt. # 10304 Charleston, SC 29412



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