THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Appellate Case No. 2019-001740

Deep Keel, LLC — Respondent,

v.

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

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

Charles S. Altman, SC Bar No. 0351
LAW OFFICES OF CHARLES S. ALTMAN, LLC.
575 King Street, Suite A
Charleston, SC 29403
Tel: (843) 853-99072
Fax: (843) 722-5702
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

QUESTIONS PRESENTED FOR REVIEW

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE MASTER-IN-EQUITY'S ORDER AS THE AFFIDAVITS FILED IN SUPPORT MET THE REQUIREMENTS OF RULE 56(e), SCRCP, WITH RESPECT TO THE AMOUNT OF DEBT DUE.

II. THE COURT OF APPEALS CORRETLY AFFIRMED THE MASTER-IN-EQUITY'S ORDER THAT THE BANK GUARANTEE FORMS PROVIDE FOR INDIVIDUAL LIABILITY OF EACH GUARANTOR FOR TWO SEPARATE PRINCIPAL AMOUNTS OF $350,000.00

COUNTER STATEMENT OF THE CASE

This appeal arises from the breach of two guaranties given by the Appellants, Terry L. Rohlfing and Jerry T. Caldwell, in connection to a commercial loan made by Community FirstBank to Atlantic Private Equity Group, LLC, also an Appellant. On April 25, 2011, Community FirstBank brought this matter against Atlantic Private Equity Group, LLC for foreclosure of a Mortgage and against Rohlfing and Caldwell for breach of their respective guaranties[1]. (R.p.20). Subsequent to the commencement of the suit, the debt, including the guaranties, was purchased by and assigned to Respondent, Deep Keel, LLC. By Order of the Court filed on April 13, 2017, Deep Keel was substituted as the Plaintiff due to the assignment of all rights, title, and interests to the Note, Mortgage, and other loan documents, including the guaranties. (R.p.2). Also, on April 17, 2013, with the consent of the parties, the matter was referred to the Beaufort County Master-In-Equity, Marvin H. Dukes, III, to hear the foreclosure action.

On July 10, 2013, the Master-In Equity held the foreclosure hearing against Atlantic Private Equity Group, LLC. The Appellants did not attend the foreclosure hearing, however, counsel for the Appellants was present and participated in the hearing. The Master-In-Equity issued the Master's Report and Judgment of Foreclosure and Sale on July 29, 2013. Appellants field a motion for reconsideration,

[1] Shortly after the suit was filed, Community FirstBank merged with Crescent Bank, and the name of the surviving entity was changed to CresCom Bank, (hereinafter "the Bank"). The merger is evidenced by the Article of Merger filed on record with the South Carolina Secretary of State on July 29, 2011, and filed with *inter alia*, the Office of Register of Deeds for Beaufort County, South Carolina, in Book 3098, page 1545, On November 12, 2011.

which Respondent opposed by Memorandum in Opposition filed August 22, 2013. Thereafter, the Master-In-Equity issued an Amended Master's Report and Judgment of Foreclosure and Sale and the property at issue was sold at public auction without objection by Appellants.

Following an appeal by Appellants, which was decided by the Court of Appeals on June 17, 2015, this matter was remanded for a hearing and judgment regarding the breaches of the guaranties. See *Deep Keel, LLC v. Atl Private Equity Grp., LLC*, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015). Again, the matter was referred to the Master-In-Equity by Consent Order, entered on July 18, 2016.

On July 26, 2016, Respondent Deep Keel, filed a Motion for Summary Judgment against Appellants Rohlfing and Caldwell. (R.p.85). The motion was supported by a Memorandum, the Affidavit of Scott Bynum, the sole member of Respondent Deep Keel, and the Affidavit of Jamin M. Hujik, Executive Vice President of CresCom Bank, the prior owner of the loan and related loan documents. (R.pp.87, 133, 191). Appellants did not file any affidavits or additional pleadings in opposition to the motion for summary judgment.

On August 3, 2016, a hearing on Respondent Deep Keel's motion for summary judgment was held at which time the Master-In-Equity heard arguments from both sides. (R.p.36). On August 23, 2016, the Master entered an order granting Respondent Deep Keel's motion for summary judgment. The Master found that pursuant to the personal guarantees signed by Petitioners Rohlfing and Caldwell, they were each individually liable for a limited principal amount of $350,000.00, plus

accrued interest thereon, and all attorney's fees, collection costs, and enforcement expenses. (R.p.18-19). The Appellant's motion for reconsideration was denied. Appellants filed a Notice of Appeal on February 13, 2017. (R.pp.6, 235, 241).

On July 24, 2019, the Court of Appeals issued a Per Curium Opinion affirming the Master-In-Equity's order. (*Deep Keel, LLC v. Atlantic Private Equity Group, LLC et al* Unpublished Opinion No. 2019-UP-270 (Ct. App. July 24, 2019)[2]. Respondents' petition for rehearing was denied on September 19, 2019. Appellants then filed this Petition for Certiorari.

AGRUMENT

"A Writ of Certiorari is not a matter of right, but one of sound judicial discretion." Rule 242(b), SCACR. Generally, when deciding to grant review, the Court will consider, whether there is a novel question of law; whether there is a dissent in the decision of the Court of Appeals; whether the decision is in conflict with a prior decision of the Supreme Court; whether substantial constitutional issues are directly involved; whether a federal question is involved and the Court of Appeals' decision conflicts with a decision of the United States Supreme Court. *Id.*

At the onset, it should be noted that in this case, none of the factors generally considered by the Court when deciding to grant review are present. This matter arose from an action to collect a deficiency judgment, not a novel issue of law; it was decided by a per curium the Court of Appeals; there is not a substantial constitutional issue;

[2] The Court of Appeals decided the case without oral argument pursuant to Rule 215, SCACR.

and the Court of Appeals opinion does not conflict with any decisions of this Court or the United States Supreme Court.

Not with standing this fact, the Court of Appeals did not err in affirming the Master's Order granting summary judgment and holding that the affidavits submitted met the requirements of Rule 56(e), SCRCP and that the Personal Guaranty forms provided for individual liability for each Appellants.

I. Standard of Review

In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial court under Rule 56(c), SCRCP. *Quail Hill, LLC v. County of Richland,* 387 S.C. 223 at 234, 692 S.E.2d 499 at 505 (2010). Summary judgment is proper if when viewing the evidence and inferences to be drawn therefore in a light most favorable to the nonmoving party, the pleadings, and depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Id,* Rule 56(c), SCRCP. Neither the trial court nor the appellate court is "required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." *Main v. Corley,* 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984).

Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Regions*

Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct.App. 2003). Rather the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *Rife v. Hitachi Const. Machinery Co. Ltd.*, 363 S.C. 209, 241, 609 S.E.2d 565 (Ct.App. 2005).

"The admission of evidence is within the trial court's discretion. The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." *R&G Constr. Inc. v. Lowcountry Regional Trans. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000) (citations omitted). "To Warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." *Fields v. Regional Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2015).

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE LOWER COURT'S ORDER GRANTING SUMMARY JUDGMENT AS THE TWO AFFIDAVITS SUBMITTED IN SUPPORT MET THE REQUIREMENTS OF RULE 56(e), SCRCP, WITH RESPECT TO THE AMOUNT DUE.

As stated above, Respondent is the assignee of the original lender, Community FirstBank, now known as CresCom Bank, ("the Bank"). Respondent, a private investor, purchased the loan from the Bank in a negotiated, arms-length transaction. There is and there has never been a dispute or issue before the court with regard to the assignment of the Bank's rights under the Loan Documents to Respondent. Moreover, the Respondent was substituted as the plaintiff in this action without objection from Appellants. [R.p.2]. See *Twelfth RMA Partners, LP v. National Safe Corp.*, 335 S.C. 635, 639-40, 518 S.E.2d 44,46 (Ct.App. 1999) ("it is well established

that an assignee . . . stands in the shoes of its assignor . . . . When a contract is assigned, the assignee should have all the same rights and privileges . . . as the assignor.").

Respondent, with all the same rights and privileges as the Bank, submitted two affidavits relating to the obligations of Appellants under the respective guaranties. An affidavit is "[a] voluntary declaration of facts written down and sworn to by a declarant, usually before an officer authorized to administer oaths." *Black's Law Dictionary* (10th ed. 2014). Rule 56(e) of the South Carolina Rules of Civil Procedure requires in pertinent part, "supporting and opposing affidavits 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."

Accordingly, the Respondent introduced the affidavits of Scott Bynum, the sole member of Respondent, Deep Keel, LLC., and Jamin M. Hujik (hereinafter "Hujik"), Executive Vice President of the assignor, CresCom Bank. (R.p.191). Mr. Hujik's affidavit clearly states his position with the Bank, and states material and specific facts relating to the loan documents, the terms therein, and the calculations of the debt at the time the debt was assigned to Respondent. (R.p.191). The affidavit also contains as exhibits the specific documents referenced there in, all of which were all admitted into evidence and included in the record on appeal to the Court of Appeals. The affidavit on its face, evidences personal knowledge and the competence of Hujik to assert the facts therein. Hujik furthers states that the records and documents

referenced within his affidavit were maintained as official records of the Bank at all times relevant to the time period of his affidavit. (R.p.191, paragraph 13).

Neither the case law or the record on appeal support Petitioners primary contention that Hujik's affidavit is defective in that it is not based on personal knowledge, contains inadmissible hearsay, and is conclusory[3].

With regard to the personal knowledge requirement, Petitioners rely on *Englert, Inc., v. Netherlands Ins. Co.*, 315 S.C. 300, 433 S.E.2d 871 (Ct.App. 1993) and *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2013). However, both cases are distinguishable from the facts at hand. In *Englert,* the Court of Appeals held that an affidavit did not meet the "personal knowledge" requirement because the affiant stated a third party rejected construction materials due to 'alleged defects.' In reviewing the affidavit, the *Englert* court held, "Nowhere does the affidavit assert that the affiant knows or believes the materials were defective, or the basis for any such belief or knowledge. The only admissible fact appearing in this statement is that the [third party] believes or alleges the materials are defective." *Englert, Inc. v. Neth. Ins. Co.*, 315 S.C. 300, 303, 433 S.E.2d 871, 873 (Ct. App. 1993).

In *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2013), this Court addressed whether a verified pleading may be a sufficient substitute for an affidavit at the summary judgment phase, if the pleading meets the requirements of Rule 56(e), SCRCP. *Id* at 69, 580 S.E.2d 433, 438. However, upon examination of the verified

[3] Petitioners Question Presented for Review alleges that both affidavits submitted to the Master-In-Equity in support of the Motion for Summary Judgment were improper. However, Petitioners only argument regarding the Bynum affidavit is a single sentence that it relied on the Hujik affidavit.

complaint at issue in the case, the Court held that allegations made "upon information and belief" do not meet the personal knowledge requirements of Rule 56(e), SCRCP. *Id.*

In the present case, and unlike *Englert* or *Dawkins,* Hujik's affidavit relies on his own knowledge, the records kept in the ordinary course of business of his bank, makes no reference to the beliefs or knowledge of third parties and does not make any statements or allegations "upon information and belief." Hujik's affidavit sets out the terms of the loan specifically, as well as the calculation of the amounts owed under the loan and guaranties while the Bank held the loan and at the time the Bank assigned the debt and lien to Respondent. As Executive Vice President of the Bank, Hujik is competent to testify as to the documents which were maintained at all times as official records of the Bank.

Petitioners next attempt to apply the Court of Appeals previous opinion in this case to support their contention that Mr. Hujik's affidavit is improper because it the amount due is inadmissible hearsay. Petitioners, however, misapprehend the issue. In the first appeal, the Court of Appeals held that the portion of Mr. Bynum's testimony regarding his calculations as to the current total amount due was hearsay. The Court of Appeals based this holding on the fact that no evidence regarding the amount due at the time of the assignment from the Bank to the Respondent had been presented and "Bynum had no personal knowledge of any transactions with [Petitioners] before he purchased the note." *Deep Keel* at 71, 773 S.E.2d 607, 614.

In the present case, Hujik's affidavit provides the specific knowledge of the terms of the loan and the transactions between the Bank and Petitioner prior to the assignment, including the calculation of the amounts owed under the loan and guaranties while the Bank held the loan and at the time the Bank assigned the debt and lien to Respondent. As stated previously, as Executive Vice President, Hujik is competent to testify as to documents which were maintained at all times as official records of the Bank. The Affidavit of Bynum, (the sole member of the Respondent), provides information personally known to him on and following September 28, 2012, the day the Bank assigned the Debt and Lien to Petition. (R.p.133). Neither, Hujik's nor Bynum's affidavit contains inadmissible hearsay and both were properly admitted by the Master.

While Petitioners contend throughout their Petition that the Hujik affidavit contains conclusory statements, they have provided no legal basis for the assertion other than to cite a case involving the introduction of business records. See *South Carolina Nat'l Bank v. Jones,* 302 S.C. 154, 394 S.E.2d 323 (1990). An issue, by their own admission, which is not applicable to the case at hand. (Petition for Certiorari p.8).

The Petitioners provided no evidence to the Master-In-Equity to dispute, deny, or contradict the evidence presented by the Respondent in support of its motion for summary judgment. Rather, the Petitioners merely rested on the denials contained in their pleadings. The affidavits of Hujik and Bynum meet the requirements of Rule 56(e), and accordingly, the Court of Appeals correctly affirmed that they were

properly admitted. *See R&G Constr. Inc. v. Lowcountry Regional Trans. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000) (holding that the admission of evidence is within the trial court's discretion and that the trial court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law).

III. THE COURT OF APPEALS CORRECTLY CONSTRUED THE BANK'S GUARANTEE FORMS TO PROVIDE FOR INDIVIDUAL LIABILITY OF EACH GAURANTOR FOR TWO SEPARATE PRINCIPAL AMOUNTS.

A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity. *AMA Management Corp. v. Strasburger*, 309 S.C. 213, 420 S.E. 2nd (Ct. App.1992). It is a personal obligation running directly from the guarantor to the creditor which is immediately enforceable against the guarantor upon default of the debtor. *See Peoples Federal Savings and Loan Assoc. v. Myrtle Beach Retirement Group.*, 300 S.C. 277, 387 S.E.2d 672 (1989). It is well established in South Carolina that "[a] contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. *McGill v. Moore*, 381 S.C. 179, 672 S.E.2d 571 575 (2009); *Alexander's Land Co., LLC v. M&M&K Corp.*, 390 S.C. 582, 703 S.E.2d 207 (2010).

The Petitioners, Rohlfing and Caldwell, each individually executed separate guaranties containing one signature block and one signature each. (R.p.109-112). The Petitioners' Answer admitted the documents were executed in connection with the loan, that demand had been made on the guarantors, and that the guarantors had not made payment. (R.p.131). The guarantees made Petitioners Rohlfing and

Caldwell each individually liable for a principal amount of $350,000.00 plus accrued interest thereon and all attorney's fees, collection costs, and enforcement expenses. (R.p.109-112).

The Petitioners argument that the guarantees are merely multiple copies of the same document and therefore a single guarantee is without merit, without evidentiary support, and without logical basis. The separate guaranties contain different signature blocks for different individuals and are not copies of the same document.

Appellants further claim that the guaranties are ambiguous, referring to the definition of "Undersigned" in the guaranties. Not only is there clearly only one "Undersigned" to each of the two guarantees, but the guaranties are contracts which must be read as a whole. *See McGill*, 381 S.C. 179, 672 S.E.2d 571, 575 (2009). An ambiguity cannot be created by simply pointing to a single sentence or clause, as discussed in *McGill*, let alone one single word. The loan at issue was in the amount of Two Million Dollars, and was secured by multiple parcels of commercial property and the two limited guaranties of Petitioners Rohlfing and Caldwell in the amount of $350,000.00 each. A single capped guaranty amount of $350,000.00, as advanced by Petitioners, would be less than twenty percent of the loan amount. This interpretation is illogical and would lead to absurd results. *See McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005)(common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be so construed as to avoid an absurd result).

Respondent admits that each guaranty was limited in its maximum amount. That is, a principal amount of no more that $350,000.00 plus, interest, fees, and costs. The guaranties are two separate contracts making Petitioners Rohlfing and Caldwell each individually liable for a principal amount of $350,000.00 plus accrued interest thereon, and all attorney's fees, collection costs, and enforcement expenses. When the language is plain and unambiguous, the construction of a contract is a question of law for the court. *See First-Citizens Bank & Tr. Co. v. Conway Nat'l Bank*, 282 S.C. 303, 317 S.E.2d 776 (Ct. App.1984). In the present case, the language is plain and unambiguous, and the Court of Appeals correctly affirmed the Master's entry of judgment against each guarantor with regard to his respective guaranty and breach thereof.

CONCLUSION

The Petition for a Writ of Certiorari does not meet the general considerations used by the Court to determine whether review should be granted. *See* Rule 242(b), SCACR. Moreover, as discussed above, the Petitioners failed to present any material fact or principal of law that was overlooked or disregarded by the Court of Appeals. The affidavits submitted in support of Respondent's summary judgment motion met the requirements of Rule 56(e), SCRCP, and were properly admitted by the Master-In-Equity. Petitioners presented no evidence of specific facts showing there was a genuine issue of material fact for trial. Therefore, summary judgment was proper and the Court of Appeals properly affirmed. Likewise, the interpretation of a plain and unambiguous contract is a question of law for the court. As such, the Court of

Appeals properly affirmed the Master's entry of judgment against each Petitioner/ guarantor with regard to his respective guaranty and breech thereof. Accordingly, the Petition for Certiorari should be denied.

Respectfully submitted,

Charles S. Altman
LAW OFFICES OF CHARLES S. ALTMAN, LLC
575 King Street, Suite A
Charleston, SC 29403
Tel: (843) 853-9907
Fax: (843) 722-5702
Attorney for Respondent

December 4, 2019

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Case No. 2019-001740
Appellate Case No. 2019-001740

Deep Keel, LLC, Respondent,

v.

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

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

CERTIFICATE OF SERVICE

I certify that I have served the **Return to Petition for Writ of Certiorari** on Defendants, Atlantic Private Equity Group, LLC, Terry L. Rohlfing, Jerry T. Caldwell, and Bluffton Village Town Center Property Owners' Association, Inc., by depositing a copy of it in the United States Mail, postage prepaid on December 4, 2019, addressed to their attorney of record:

Keating L. Simons, III, Bar No. 5111
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
(843) 762-9132
Attorneys for Petitioners

A'Riel Tianna Brown

A'Riel Brown, Paralegal
Law Offices of Charles S. Altman, LLC
575 King Street, Suite A
Charleston, SC 29403
(843) 853-9907
Attorneys for the Respondent

December 4, 2019
Charleston, SC 29403