

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS
THE HONORABLE DANIEL D. HALL
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2020-001068
CIVIL ACTION NO. 2020-CP-46-01641

RECEIVED

Oct 12 2020

SC Court of Appeals

Evolve Softworks, LLC,

APPELLANT,

versus

Anthony Burkett,

RESPONDENT.

INITIAL APPELLANT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. The Trial Court improperly dismissed Appellant Evolve Softworks' claim for breach of guaranty against Respondent Burkett based upon the expiration of the statute of limitations because the action was timely filed within three years of the debtor's default on the underlying obligations.

- II. The Complaint properly alleges the elements of a breach of guaranty claim, including sufficient consideration for the Guaranty in the form of actual forbearance at the request of Respondent Burkett as the guarantor; therefore, the Trial Court erred in dismissing the Complaint for failure to state a claim where Appellant Evolve Softworks alleges facts, which if true, would entitle it to relief.

- III. In the alternative to Issues I and II, the Trial Court improperly dismissed the Complaint with prejudice for failure to state a claim without providing an opportunity to amend.

STATEMENT OF THE CASE

This action arises out of Appellant Evolve Softworks, LLC's ("Evolve Softworks") effort to enforce the terms of and collect upon a guaranty given by Respondent Anthony Burkett.

On May 26, 2020, Evolve Softworks filed a Complaint against Burkett in the Court of Common Pleas for York County for breach of guaranty. [R.pp. ___; Compl.] In the Complaint, Evolve Softworks alleges that between 2014 and July 2015, R. Dean Harrell ("Harrell") loaned to 3 Guys Investments, LLC ("3 Guys") a total of \$2,084,790.58 at an 8% rate of interest. [R.p. ___; *Id.* at ¶ 4.] By October 2016, 3 Guys was in default pursuant the loans' terms. [R.p. ___; *Id.* at ¶ 5.]

In consideration for Harrell¹ not enforcing the terms of the loans after 3 Guys went into default, on October 25, 2016, Burkett executed a Guaranty Agreement given to Harrell wherein he agreed to personally guarantee the debt owed by 3 Guys to Harrell not to exceed the principal amount of \$2,600,000.00 plus accrued interest, attorneys' fees, and costs (the "Guaranty"). [R.p. ___; *Id.* at ¶ 6.] More specifically, the Guaranty, which is attached as Exhibit A to the Complaint, provides:

This Guaranty is given by the Guarantor [Burkett] to induce the Creditor [Harrell] not to call the Promissory Note from the Debtor [3 Guys] to the Creditor in the principal amount of \$2,600,000.00 ("Note"), and in consideration of the Creditor doing so, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged

[R.p. ___; Guaranty, § I.]

¹ The Complaint contains a scrivener's error which states that "[i]n consideration for 3 Guys not enforcing the terms of the [loans]" but the context of the Complaint makes clear that this refers to *Harrell* as the lender. [R.p. ___; Compl., ¶ 6.]

The Guaranty further provides that it is a continuing guaranty which shall not be revoked by Burkett and which will remain effective until all obligations guaranteed by the Guaranty are completely discharged. [R.p. ___; Id. at § III.] Pursuant to the Guaranty, Burkett acknowledged that the Creditor intended to rely upon the Guaranty and further guaranteed prompt payment when due of all:

payments and liabilities of the Debtor to the Creditor including without limitation all amounts due and payable pursuant to the Note and all uncollected amounts of any award or judgment in favor of Creditor against the Debtor and/or Burkett . . . whether *now existing or hereafter incurred* (it being understood and agree that this Guaranty is a continuing one)

[R.p. ___; Id. at § I (emphasis added).]

Burkett further guaranteed the prompt payment of such above-referenced obligations “regardless of whether recovery upon any such obligations may be or hereafter become barred” [R.p. ___; Id.]

Under the terms of the Guaranty, the Creditor is required to notify Burkett of a default by the Debtor before proceeding against Burkett under the Guaranty. [R.p. ___; Id. at § IV.] The Creditor can seek to enforce the Guaranty and collect against Burkett without first seeking recovery from the Debtor. [R.p. ___; Id. at § V.] The Guaranty is subject to assignment and further provides it is governed by the laws of the State of North Carolina. [R.p. ___; Id. at §§ VI., XIII.]

On March 29, 2018, Harrell assigned his rights in and to the underlying debt and attendant instruments, including the Guaranty, to Evolve Softworks. [R.pp. ___; ___; Compl., ¶ 8; Assignment Agreement attached as Exhibit B to the Complaint.]

The Complaint alleges that 3 Guys subsequently defaulted on its obligations a second time after Harrell assigned his rights to Evolve Softworks. [R.p. ___; Compl., ¶

9.] On April 30, 2020, Evolve Softworks provided notice of 3 Guys' default to Burkett and demanded payment in full pursuant to the terms of the Guaranty. [R.pp. ___; ___; Id. at ¶ 10; Notices attached as Exhibit C to the Complaint.] Burkett failed to fulfill his obligations under the Guaranty; therefore, Evolve Softworks brought this action for breach of guaranty seeking damages in the amount of \$2,197,354.86 as well as pre-judgment and post-judgment interest, reasonable attorneys' fees, and costs. [R.pp. ___; Compl., pp. 3-4.]

Burkett filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6), SCRCPC on May 29, 2020 for failure to state facts sufficient to constitute a cause of action, arguing the Complaint should be dismissed because (1) the statute of limitations had expired on Evolve Softworks' claim for breach of guaranty; and (2) the Guaranty was not supported by consideration and thus unenforceable. [R.pp. ___; Mtn.] Burkett filed his Memorandum in Support of the Motion to Dismiss on June 16, 2020. [R.pp. ___; Memo.]

More particularly, Burkett contended the three-year statute of limitations applicable to the breach of guaranty claim began to run in October 2016 when 3 Guys initially defaulted on its obligations even though Burkett had not yet executed the Guaranty. Therefore, Burkett argued that this action filed on May 26, 2020 was filed more than three years from the date of default and thus barred by the statute of limitations. [R.pp. ___; Id. at pp. 2-4.] Burkett further argued that the Guaranty failed for lack of consideration because the Guaranty did not contain any specific time period for which the lender agreed to forbear against collection of 3 Guys' obligations. [R.pp. ___; Id. at pp. 4-5.]

On June 18, 2020, Evolve Softworks filed its Response in Opposition to the Motion to Dismiss. [R.pp. ____; Response.] It argued that the statute of limitations on the breach of guaranty claim could not begin to run prior to the execution of the Guaranty, but rather ran from the second default of 3 Guys which occurred subsequent to the Guaranty's execution. Evolve Softworks further argued that the Guaranty was supported by consideration because the lender agreed to delay collection efforts in exchange for Burkett's execution of the Guaranty. From the face of the Complaint, it is apparent that the lender did forbear for a significant period of time where Evolve Softworks did not attempt collection efforts until April 2020, more than three years after the execution of the Guaranty. [Id.]

The Honorable Daniel D. Hall heard the Motion to Dismiss on June 22, 2020. [R.pp. ____; Hearing Tr.] Following the hearing, the Trial Court issued a Form 4 Order on June 25, 2020 granting Burkett's Motion to Dismiss for failure to state facts sufficient to constitute a cause of action. [R.pp. ____; Form 4 Order.]

The Form 4 Order did not indicate if the dismissal was with or without prejudice. [R.p. ____; Id.] Therefore, on July 2, 2020, Evolve Softworks filed a Motion for Clarification and to Amend Judgment pursuant to Rules 52(b) and 59(e), SCRCF requesting the Trial Court to clarify if its Order dismissed the action with or without prejudice. [R.pp. ____; Mtn.] Evolve Softworks argued that a trial court should not dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) unless the plaintiff is given a meaningful opportunity to amend the complaint. [R.pp. ____; Id.] The Trial Court issued its Order on the Motion for Clarification and to Amend Judgment via

e-mail on July 6, 2020, affirming its prior ruling granting Burkett’s Motion to Dismiss and specifying that the dismissal was with prejudice. [R.p. ____; E-mail Order.]

Evolve Softworks timely filed and served its Notice of Appeal on July 31, 2020.

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a plaintiff’s complaint based on a failure to state facts sufficient to constitute a cause of action. Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003). “On appeal from the dismissal of a case pursuant Rule 12(b)(6), an appellate court applies the same standard of review as the trial court.” Ryde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). The appellate court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and reasonably deducible inferences in the complaint would entitle the plaintiff to relief on any theory of the case. Id.

“Rule 12(b)(6) permits the trial court to address the sufficiency of a pleading stating a claim; it is not a vehicle for addressing the underlying merits of the claim.” Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 180, 826 S.E.2d 585, 587 (2019). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). At the Rule 12(b)(6) stage, “the first decision for the trial court is to decide only whether the pleading states a claim.” Skydive Myrtle Beach, 426 S.C. at 180, 826 S.E.2d at 588.

ARGUMENT

I. The Trial Court improperly dismissed Appellant Evolve Softworks’ claim for breach of guaranty against Respondent Burkett based upon the expiration of the statute of limitations because the action was timely filed within three years of the debtor’s default on the underlying obligations.

The Trial Court erred in dismissing Evolve Softworks’ action against Burkett for breach of guaranty because Evolve Softworks timely filed the action within the applicable statute of limitations. The Complaint alleges that 3 Guys defaulted on its obligations after Harrell assigned his rights under the Guaranty to Evolve Softworks in March 2018. [R.pp. ___; ___; Compl., ¶¶ 8-9; Assignment Agreement.] Evolve Softworks provided notice to Burkett of 3 Guys’ default on April 30, 2020 and demanded payment in full pursuant to the terms of the Guaranty. [R.pp. ___; ___; Compl., ¶ 10; Notices.] Evolve Softworks subsequently filed this action against Burkett on May 26, 2020. [R.pp. ___; Compl.]

The Guaranty states that the laws of North Carolina apply. [R.p. ___; Guaranty, § XIII.] This action, however, was filed in South Carolina. Under the applicable South Carolina choice of law rule, *lex fori*, South Carolina generally applies its own statute of limitations even if the law of another state governs the existence of a cause of action and the substantive rights of the parties. See State v. So. Farm Bureau Life Ins. Co., 265 S.C. 402, 412, 219 S.E.2d 80, 85 (1975); see also Gattis v. Chavez, 413 F. Supp. 33, 35 (D.S.C. 1976).

Under both North Carolina and South Carolina law, a “guaranty is a contract, obligation or liability . . . whereby the promisor, or guarantor, undertakes to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself . . . liable to such payment or performance.” Trippes Rests.

of North Carolina, Inc. v. Showtime Enters., Inc., 595 S.E.2d 765, 767 (N.C. Ct. App. 2004) (internal citation omitted); see also CoastalStates Bank v. Hanover Homes of South Carolina, LLC, 408 S.C. 510, 518-19, 759 S.E.2d 152, 157 (Ct. App. 2014) (“A guaranty is a contract” and “[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”) (internal citations omitted).

Under South Carolina law, an action for breach of contract must be commenced within three years. S.C. CODE ANN. § 15–3–530(1). Under “the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered.” Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). “The discovery rule applies to breach of contract actions.” Prince v. Liberty Life Ins. Co., 390 S.C. 166, 169, 700 S.E.2d 280, 282 (Ct. App. 2010). “Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence.” Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).

“[T]he statute of limitations on an action on an absolute guaranty, which is conditioned only on the debtor's default, begins to run when the obligation matures and the debtor defaults.” CoastalStates Bank, 408 S.C. at 517, 759 S.E.2d at 156 (internal citation omitted). Accordingly, so long as the default of 3 Guys for which Evolve Softworks seeks payment from Burkett under the Guaranty did not occur prior to May 26, 2017, the action filed on May 26, 2020 against Burkett for breach of guaranty is timely.

As noted in the Complaint, Burkett gave a Guaranty on October 25, 2016 to Harrell to induce him to forbear against collection of the obligations owed by 3 Guys which at the time were in default. Harrell assigned his rights under the Guaranty to Evolve Softworks on March 29, 2018. Evolve Softworks alleges in the Complaint that sometime after the assignment, 3 Guys defaulted on its obligations. Evolve Softworks sent notice of 3 Guys' default to Burkett and demanded full payment under the Guaranty on April 30, 2020. [R.pp. ___; ___; ___; ___; Compl., ¶¶ 5-10; Guaranty; Assignment Agreement; Notices.]

It is clear from the allegations of the Complaint that Evolve Softworks timely brought this action within the three-year statute of limitations. The default by 3 Guys for which Evolve Softworks seeks payment from Burkett under the Guaranty occurred after March 29, 2018 when Evolve Softworks acquired its rights under the Guaranty. The action brought by Evolve Softworks on May 26, 2020 for breach of guaranty is well within the three-year statute of limitations.

The same result would be reached under North Carolina law which also holds that a breach of guaranty action falls under North Carolina's three-year statute of limitations for breach of contract claims. See N.C GEN. STAT. § 1-52(1); see also Anton A. Vreede, M.D., P.C. v. Koch, 380 S.E.2d 615, 617 (N.C. Ct. App. 1989) (“[T]he statute of limitations for a guaranty not under seal is three years from the breach triggering the obligation of the guarantors.”); Cities Serv. Oil Co. v. Howell Oil Co., 237 S.E.2d 921, 924-25 (N.C. Ct. App. 1977). The action for breach of guaranty also accrues under North Carolina law upon the failure of the principal debtors to make further payments on the obligations secured by the guaranty. Cities Serv. Oil Co., 237 S.E.2d at 924-25; see also

Gillespie v. DeWitt, 280 S.E.2d 736, 741 (N.C. Ct. App. 1981) (“A guarantor’s liability arises at the time of the default of the principal debtor on the obligation or obligations which the guaranty covers.”)

At the Trial Court below, Burkett argued that the three-year statute of limitations on Evolve Softworks’ claim for breach of guaranty expired because the action was filed more than three years after the first default by 3 Guys in October 2016. Burkett’s argument is misguided and misunderstands the fundamental nature of the transaction.

While 3 Guys was initially in default on its obligations in October 2016, this default was cured when Burkett executed the Guaranty on October 25, 2016 in consideration for Harrell’s forbearance of the debt owed by 3 Guys. It was not until later after Evolve Softworks became the assignee of the Guaranty in March 2018 that 3 Guys defaulted a second time. It is this second default of 3 Guys for which Evolve Softworks seeks to enforce the terms of the Guaranty against Burkett.

This is not unlike a situation wherein a debtor is in default but acknowledges or reaffirms the debt owed with a partial payment and a new promise to pay. In such a case, the statute of limitations does not accrue from the original default but is rather renewed following the new agreement and will not begin to run until a second default under the new agreement. See Wolfe v. Brannon, 211 S.C. 282, 286, 44 S.E.2d 833, 835 (1947); Park v. Brooks, 38 S. C. 300, 17 S. E. 22 (1893) (finding a payment proved to have been made by the maker of a promissory note after it had become barred by the statute of limitations is equivalent to a promise in writing by the maker to pay the debt; therefore, an action could be brought at any time within the limitations period after such a payment); see also Penley v. Penley, 332 S.E.2d 51, 62 (N.C. 1985) (“A new promise to

pay fixes a new date from which the statute runs.”); Whitley’s Elec. Serv., Inc. v. Sherrod, 238 S.E.2d 607, 615 (N.C. 1977) (“[W]here plaintiff sues on a current account, a part payment which constitutes an acknowledgment begins the statute running anew as to the entire amount that is acknowledged and not merely those items which accrued within three years of the payment.”).

If Burkett’s argument that the statute of limitations began to run upon 3 Guys’ initial default in October 2016 were accepted as true, it would lead to the illogical result that the statute of limitations would have begun to accrue before Burkett even executed the Guaranty on October 25, 2016 and before the creditor or its assignee had any rights against Burkett as Guarantor. “In no event can a statute of limitation begin to run until plaintiff is entitled to institute action.” Penley, 332 S.E.2d at 62; see also Brown v. Finger, 240 S.C. 102, 111, 124 S.E.2d 781, 785 (1962) (“The fundamental test . . . in determining whether a cause of action has accrued, is whether the party asserting the claim can maintain an action to enforce it. A cause of action accrues at the moment when the plaintiff has a legal right to sue on it.”).

This Court has further observed that it would be inconsistent with South Carolina law to hold that the statute of limitations begins to run upon the execution of a guaranty. Such a ruling could result “in virtually no guarantee ever being enforceable” because the debtor, whose obligations are covered by the guaranty, might not default on the underlying obligations until after the statute of limitations has expired on the guarantee. CoastalStates Bank, 408 S.C. at 518, 759 S.E.2d at 156. Therefore, the more sound principle of law is that the statute of limitations for a breach of guaranty action will not accrue until the principal debtor defaults on the underlying obligations covered by the

guaranty. This will ensure that that guaranty remains effective throughout the duration of the principal debtor's obligations to the creditor.

Here, the Complaint alleges and shows a default by 3 Guys which occurred within three years prior to Evolve Softworks' filing of the action on May 26, 2020. The inferences deduced from the Complaint show that the statute of limitations has not expired. See Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) ("The [12(b)(6)] motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case.").

At a minimum, the Complaint raises an issue of fact as to when the three-year statute of limitations began to accrue on Evolve Softworks' breach of guaranty claim against Burkett. See Finger, 240 S.C. at 113, 124 S.E.2d at 786 ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide."). Accordingly, the Trial Court erred by dismissing Evolve Softworks' action against Burkett for breach of guaranty under Rule 12(b)(6) for failure to state a claim.

II. The Complaint properly alleges the elements of a breach of guaranty claim, including sufficient consideration for the Guaranty in the form of actual forbearance at the request of Respondent Burkett as the guarantor; therefore, the Trial Court erred in dismissing the Complaint for failure to state a claim where Appellant Evolve Softworks alleges facts, which if true, would entitle it to relief.

The Trial Court further erred in dismissing Evolve Softworks' breach of guaranty action against Burkett under Rule 12(b)(6) for failure to state a claim because the Complaint sufficiently alleges that the Guaranty is supported by consideration. The Complaint specifically asserts that Burkett executed the Guaranty in October 2016 in

consideration for Harrell as the creditor not enforcing the collection of the obligations owed by 3 Guys. [R.p. ___; Compl., ¶ 6.] The language of the Guaranty expressly states that the “Guaranty is given by the Guarantor to induce the Creditor not to call the Promissory Note from the Debtor to the Creditor in the principal amount of \$2,600,000.00.” [R.p. ___; Guaranty, § I.] The allegations of the Complaint further show that there was actual forbearance because Evolve Softworks, as the assignee of Harrell, did not attempt to enforce the obligations of 3 Guys until April 2020. [R.pp. ___; ___; ___; Compl., ¶¶ 9-10; Assignment; Notices.]

Under North Carolina law², “in order for a contract [such as a guaranty] to be enforceable it must be supported by consideration.” Inv. Props. of Asheville, Inc. v. Norburn, 188 S.E.2d 342, 345 (N.C. 1972). “It is unnecessary that the consideration be full or adequate. Any legal consideration will be sufficient to support the guaranty.” Gillespie v. DeWitt, 280 S.E.2d 736, 742 (N.C. Ct. App. 1981); see also Hope Petty Motors of Columbia, Inc. v. Hyatt, 310 S.C. 171, 178, 425 S.E.2d 786, 791 (Ct. App. 1992). (“A guaranty must be supported by sufficient legal consideration, either a benefit to the principal obligor or guarantor on the one hand, or some detriment to the obligee on the other.”).

Consideration exists if “the promisee, in return for the promise, ... refrains from doing anything which he has a right to do.” Inv. Props., 188 S.E.2d at 345 (citing Stonestreet v. Oil Co., 37 S.E.2d 676, 677 (1946)). “Forbearance or a promise to forbear

² The Guaranty provides that it is governed by North Carolina law, and the parties do not dispute that the substantive issues regarding the Guaranty should be resolved under North Carolina law. A different result would not be reached, however, under South Carolina law and therefore, Evolve Softworks also cites to the law of South Carolina in support of its argument.

the exercise of a legal right is a sufficient consideration for a promise made on account of it” Duncan v. Duncan, 553 S.E.2d 925, 927 (N.C. Ct. App. 2001) (holding promise to refrain from objecting to will was sufficient consideration for agreement not to revoke will); see also McPeters v. Yeargin Constr. Co., 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986) (“Valuable consideration may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.”).

A creditor's promise to forbear from enforcing an existing legal right against a third party debtor is sufficient consideration to support a guaranty. See Union Bank of Bavaria v. Belk, 510 F. Supp. 1117, 1119-20 (W.D.N.C. 1981) (ruling the guarantor's affirmative defense that there was no consideration for his guaranty was patently without merit, since the forbearance in collecting a \$2,000,000 loan to the corporation provided sufficient consideration for the guarantee executed by the president, director and 50% shareholder of the corporation); Kellogg v. Food Serv. Supplies, Inc., 541 S.E.2d 683, 684 (Ga. Ct. App. 2000) (applying South Carolina law) (“Under South Carolina law, forbearance is sufficient consideration to support a promise to guarantee an existing debt.”); Branch Banking and Trust Co. of South Carolina v. Carolina Crank & Core, Inc., 362 S.C. 647, 654, 608 S.E.2d 896, 900 (Ct. App. 2005) (observing bank’s forbearance of the remedies available to it at the time of the guaranty constituted sufficient consideration for the guaranty).

As previously noted, the Guaranty here was supported by adequate consideration because it was given in consideration for the creditor’s agreement to not enforce collection of the obligations owed by 3 Guys. The allegations of the Complaint

furthermore show actual forbearance for a significant period of time where Evolve Softworks did not attempt collection efforts until April 2020, more than three years after the execution of the Guaranty on October 25, 2016. [R.pp. ___; ___; ___; Compl., ¶¶ 6, 9-10; Guaranty, ¶ I; Notices.]

Given that a court should construe the allegations of a complaint in the light most favorable to the nonmovant and deduce all reasonable inferences from the alleged facts when evaluating a motion to dismiss for failure to state a claim, the Trial Court should have concluded that Evolve Softworks had sufficiently stated a claim for breach of guaranty where the Complaint alleges the existence of a valid guaranty supported by consideration and the breach of the same. Grimsley v. South Carolina Law Enforcement Div., 396 S.C. 276, 721 S.E.2d 423 (2012).

Nevertheless, and despite what should have been a clear cut application of the law to the facts alleged in the Complaint, Burkett argued before the Trial Court that the breach of guaranty claim failed because there was no consideration to support the Guaranty. Specifically, Burkett contended that the Complaint failed to show the existence of an agreement that would have prevented the creditor from bringing suit earlier and further claimed that the lack of a definite period of agreed forbearance voided the Guaranty. [R.pp. ___; Memo., pp. 4-5.]

In support of his argument, Burkett relied upon the case of Klingstubbins Southeast, Inc. v. 301 Hillsborough St. Partners, LLC, 721 S.E.2d 749 (N.C. Ct. App. 2012), aff'd 736 S.E.2d 485 (N.C. 2012). This case, however, in which the North Carolina Court of Appeals reversed a trial court's grant of a motion to dismiss a breach of

guaranty action, overwhelmingly illustrates the gravity of the Trial Court's error in dismissing Evolve Softworks' breach of guaranty claim.

In Klingstubbins, the plaintiff filed a complaint against defendants requesting payment for architectural services which the plaintiff performed for the design of a building for defendant 301 Hillsborough Street Partners, LLC ("Hillsborough"). The plaintiff further alleged a claim against defendant Theodore Reynolds as guarantor of Hillsborough's obligations to the plaintiff. The plaintiff attached two letters from Reynolds to the complaint. Both letters from Reynolds acknowledged the debt owed by the defendants to the plaintiff and in both letters, Reynolds expressed his intent to satisfy the amounts due and owing. Id. at 750.

Defendant Reynolds filed a motion to dismiss the plaintiff's complaint for breach of guaranty which the trial court granted. The plaintiff appealed, arguing that "when a party promises to answer for the debt of another in writing, that person is bound to the debt if consideration supports the promise." Id. The plaintiff further asserted that the letters from Reynolds to the plaintiff contained promises to pay the plaintiff and in reliance on Reynolds' promises, the plaintiff took no action against the parties to collect the debt. The plaintiff cited the law that consideration resulting from the forbearance to file a lawsuit is adequate consideration to support a contract and thus argued that the letters from Reynolds were legally enforceable guaranties. Id. at 750-51.

Reynolds, on the other hand, claimed that his letters failed to show that the plaintiff had threatened legal action and thus Reynolds had not sought to induce forbearance by the plaintiff. Therefore, Reynolds argued that his letters did not show an agreement to forbear which constituted valid consideration. Id. at 751.

In analyzing whether the trial court erred in dismissing the plaintiff's action for breach of guaranty, the North Carolina Court of Appeals cited to and relied upon the case of Standard Supply Co. v. Finch, 70 S.E. 745 (N.C. 1911). In Standard Supply, the plaintiff had an account for goods, sold and delivered, against two defendants and sought to charge Defendant Person as the guarantor for a portion of the account. Defendant Person initially wrote a letter to the plaintiff stating he would no longer be responsible for the account. The plaintiff responded in writing that his extension of credit had been based on Defendant Person's assurances to be responsible for the account. Defendant Person then wrote a subsequent letter to the plaintiff that he would see that the plaintiff's bill would be paid as soon as the defendants' dry-kiln became operational. The plaintiff then responded and accepted Defendant Person's assurances of payment. Id. at 745-46.

Based upon the evidence presented by the parties in Standard Supply, the North Carolina Supreme Court concluded judgment should be entered in favor of the plaintiff. In doing so, the North Carolina Supreme Court indicated there are two ways that forbearance by the promisee can result in an enforceable guaranty contract to the promisor. Id. at 747.

First, there can be an express agreement: “[I]t is very generally held that a binding contract to forbear suit on a valid claim for a definite time or expressed in language that the law would interpret as a reasonable time constitutes a sufficient consideration for a guaranty. And an agreement with the promisor to forbear, followed by forbearance, for such time, would uphold the contract.” Id.

Second, there may also be something less than express agreement which can constitute adequate consideration for a guaranty: “And by the weight of authority actual

forbearance for such time without express agreement, but at the instance or request of the promisor, is sufficient.” Id.

In Standard Supply, the North Carolina Supreme Court held the evidence presented by the plaintiff established that there was actual forbearance by the plaintiff to not sue the debtors and that this was done at the instance and request of the guarantor, Defendant Person. Id. Therefore, even though none of the letters between the plaintiff and Defendant Person specifically referenced a forbearance to sue, the North Carolina Supreme Court concluded that the plaintiff “had forborne from suing based upon [Defendant Person’s] request to forbear taking legal action and his promise to pay.” Id.; see also Klingstubbins, 721 S.E.2d at 752.

Relying upon Standard Supply and the principle that a complaint must be liberally construed for purposes of a motion to dismiss, the North Carolina Court of Appeals in Klingstubbins determined that the plaintiff sufficiently pled a claim against Reynolds, the guarantor, upon the guaranty. While the Court of Appeals found that Reynolds’ letters to the plaintiff did not contain any specific requests to forbear, the letters nevertheless supported the specific allegations of the plaintiff’s complaint that Reynolds had requested forbearance and that the plaintiff did actually forebear from collection in reliance upon Reynold’s promise to pay. Klingstubbins, 721 S.E.2d at 752-53.

The Court of Appeals observed that Reynolds’ letters, which unequivocally promised that the indebtedness would be paid, could be interpreted as a request for the plaintiff to forbear from taking legal action and that based upon this, the plaintiff did in fact forbear. The Court of Appeals further determined that if Reynolds contested that he did not intend his letters to be a request for forbearance, “the questions of his actual intent

at the time of the letters and plaintiff's understanding of the letters [were] material facts which [could not] be resolved under Rule 12(b)(6).” Therefore, the Court of Appeals concluded the plaintiff had stated a claim for breach of guaranty upon which relief may be granted. Id. at 753.

Key in both the Standard Supply and Klingstubbins decisions is that there is no requirement that for consideration to be adequate, there must be a specific or definite period of time agreed upon for the forbearance. Rather, only a request for forbearance by the guarantor coupled with actual forbearance by the creditor is needed to establish adequate consideration for a guaranty. In neither Standard Supply nor Klingstubbins did the letters relied upon to establish the guaranty expressly reference a specific time period for which the creditor would agree to forbear. Instead, evidence demonstrating the guarantor's request for forbearance as well as evidence demonstrating the creditor's forbearance for a reasonable time sufficiently showed the presence of adequate consideration. Standard Supply, 70 S.E. at 745-47; Klingstubbins, 721 S.E.2d at 750, 752-53.

Other jurisdictions have also held that a creditor's promise to forbear from enforcing a legal right is sufficient consideration to support a guaranty, and the agreement to forbear need not be in express terms or for an exact time period. In Thomas v. Croft, 31 S.C.L. 113, 115-16 (2 Rich. 1845), the court held, under South Carolina law, that forbearance to sue on a debt is a sufficient consideration for the promise of a third person to pay it, even though there is no agreement to forbear for any definite time, when the creditor thereafter makes no demand for payment until after a reasonable time. For

consideration to exist, it is not necessary that, at the time of the promise, there should be an express stipulation by the creditor to forbear for a definite time. Id.

A promise to forbear and give further time for payment of debt, although no specific time is designated, if followed by actual forbearance for reasonable time, is valid and sufficient consideration for a promise guaranteeing its payment. Hammel v. Ziegler Fin. Corp., 334 N.W.2d 913, 917 (Wis. Ct. App. 1983). “It is generally said that a request for forbearance which does not specify the time for which forbearance is requested will be interpreted as requesting forbearance for a reasonable time.” Id.; see also Grant v. Southtrust Bank of Baldwin Cnty., 512 So.2d 914, 916 (Ala. 1987) (“The extension of time [to forbear] need not be for a definite period; if the duration thereof is not expressed, and the creditor forbears for a reasonable time, a guaranty of the debt is based on a sufficient consideration.”) (quoting 38 Am.Jur.2d, *Guaranty* § 47); Town & Country Bank of Quincy v. E. & D. Bancshares, Inc., 527 N.E.2d 637, 642 (Ill. App. Ct. 1988) (“In order to constitute consideration for a contract of guaranty, an agreement to forbear need not be in express terms or for an exact period of time.”).

In this action, Evolve Softworks has alleged and shown that Burkett executed the Guaranty on October 25, 2016 with Harrell in exchange for Harrell’s agreement not to call the debt owed by 3 Guys. The terms of the Guaranty expressly reference the agreement to forbear. The allegations of the Complaint further show that Evolve Softworks, as the assignee of the Guaranty, actually did forbear because it did not undertake efforts to collect until April 2020, more than three years after the Guaranty was executed. That the Guaranty did not expressly state a specific time period for forbearance does not defeat the breach of guaranty claim. The allegation that Harrell/Evolve

Softworks did forbear for a reasonable amount of time following Burkett's request for forbearance sufficiently shows the presence of adequate consideration. Accordingly, the Trial Court erred in dismissing Evolve Softworks' breach of guaranty claim because the Complaint properly alleges consideration for the Guaranty to withstand a motion to dismiss.

Further, not only is the Guaranty supported by the consideration of forbearance, it is also supported by consideration because it is a Guaranty of both present and future indebtedness. The terms of the Guaranty provide that Burkett guarantees prompt payment when due of all present and future indebtedness:

payments and liabilities of the Debtor to the Creditor including without limitation all amounts due and payable pursuant to the Note and all uncollected amounts of any award or judgment in favor of Creditor against the Debtor and/or Burkett . . . whether *now existing or hereafter incurred* (it being understood and agree that this Guaranty is a continuing one)

[R.p. ___; Guaranty, § I (emphasis added).] The Guaranty is specifically denoted as a "continuing Guaranty." [R.p. ___; *Id.* at § III.] A continuing guaranty is "defined to be a guaranty the object of which is to enable the principal debtor to have credit over an extended time and to cover successive transactions." Amoco Oil Co. v. Griffin, 338 S.E.2d 601, 603 (N.C. Ct. App. 1986) (citing Hickory Novelty Co. v. Andrews, 123 S.E. 314, 317 (N.C. 1924)); see also Furst & Thomas v. Moore, 129 S.C. 223, 123 S.E. 825, 826 (1924) (finding contract entered into by the parties for an indefinite time and for a future course of dealings between the parties was to be construed as a continuing guaranty).

It is well-established under North Carolina law that when a guaranty is executed as a part of a transaction which created the guaranteed debt, the guaranty does not have to

be supported by additional consideration. When the guaranty is independent of the transaction in which the principal debt was created, it must be supported by additional consideration independent of the principal debt. Gillespie v. DeWitt, 280 S.E.2d 736, 742 (N.C. Ct. App. 1981).

When, however, the “guaranty which is separate from the original indebtedness covers future as well as existing indebtedness, there is consideration for the guaranty apart from the principal indebtedness which was previously in existence.” Id. In Gillespie, the North Carolina Court of Appeals concluded that a subsequent guaranty, which guaranteed the payment of “any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor to said Bank, and every balance and part thereof, whether now owing or due, or which may hereafter, from time to time, be owing or due, and howsoever heretofore or hereafter created or arising or evidenced” was based on adequate consideration. Id. at 742-43. Similarly, in Int’l Harvester Credit Corp. v. Bowman, 316 S.E.2d 619, 621-22 (N.C. Ct. App. 1984), the North Carolina Court of Appeals, citing Gillespie, held that a guaranty which extended to all obligations for which the debtor “is now or may hereafter become liable” was supported by adequate consideration. The Guaranty at issue in this action likewise secures future obligations incurred and is also thus supported by adequate consideration.

Finally, Burkett argued below that while the Guaranty references a certain promissory note, the Complaint references loans made between 2014 and 2015 to 3 Guys. Burkett implies that Evolve Softworks is not attempting to collect debt secured by the Guaranty. Further, Burkett contends that the promissory note referenced by the Guaranty does not exist. [R.p. ___; Memo., p. 5.]

These arguments by Burkett have no bearing upon whether Evolve Softworks properly pled a claim for breach of guaranty to survive a motion to dismiss for failure to state a claim. Evolve Softworks has alleged the elements of a breach of guaranty claim: (1) the existence of the Guaranty; (2) its breach by Burkett; and (3) damages. See Martinez v. Univ. of North Carolina, 741 S.E.2d 330, 332-33 (N.C. Ct. App. 2012) (“The elements of breach of contract are (1) the existence of a valid contract and (2) breach of the terms of the contract.”) (internal citation omitted); Johnson v. Little, 426 S.C. 423, 428, 827 S.E.2d 207, 210 (Ct. App. 2019) (“The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach.”) (internal citation omitted).

Evolve Softworks has stated facts in its Complaint which, if true, would entitle it to relief. Therefore, the Trial Court should not have granted Burkett’s motion to dismiss for failure to state a claim. Brazell v. Windsor, 384 S.C. 512, 519, 682 S.E.2d 824, 828 (2009) (holding because plaintiffs have stated facts which, if true, would entitle them to relief, the trial court erred in granting the defendant’s motion to dismiss the remedy of rescission). Any dispute over the scope of the Guaranty and the debt it secures relates to the merits of the action and should not be resolved at the motion to dismiss stage. Dye v. Gainey, 320 S.C. 65, 68 n.2, 463 S.E.2d 97, 99 n. 2 (Ct. App. 1995) (“Since a decision on a Rule 12(b)(6) motion is confined to the four corners of the complaint, the trial judge erred in considering a potential defense.”)

Evolve Softworks properly pled the elements of a breach of guaranty cause of action, including the existence of adequate consideration supporting the Guaranty. The consideration of forbearance does not require the specification of a definite time period

for the forbearance. Any defenses by Burkett as to the validity of the Guaranty or its scope are material facts which should not be resolved under Rule 12(b)(6). Therefore, this Court should reverse the Trial Court's grant of Burkett's motion to dismiss for failure to state a cause of action for breach of guaranty.

III. In the alternative to Issues I and II, the Trial Court improperly dismissed the Complaint with prejudice for failure to state a claim without providing an opportunity to amend.

The Trial Court further erred by dismissing the Complaint pursuant to Rule 12(b)(6) without providing an opportunity for Evolve Softworks to amend. Following the hearing on Burkett's Motion to Dismiss, the Trial Court issued a Form 4 Order dismissing the action. [R.p. ___; Form 4.] The Form 4 Order, however, did not specify whether the dismissal was with or without prejudice. [R.p. ___; *Id.*] Therefore, Evolve Softworks filed a Motion for Clarification and to Amend Judgment requesting the Trial Court to clarify whether its Order dismissing the Complaint was with or without prejudice and grant leave for Evolve Softworks to re-file its Complaint to the extent insufficiently pled. [R.pp. ___; Mtn.] The Trial Court subsequently ruled that its initial Order dismissing the Complaint was with prejudice. [R.p. ___; E-mail Order.]

While Evolve Softworks believes, as argued in Sections I and II hereof, that its Complaint as pled sufficiently states a claim for breach of guaranty, to the extent there are any deficiencies in the Complaint relating to the accrual of the cause of action or consideration for the Guaranty, the Trial Court should have allowed Evolve Softworks to amend the Complaint prior to dismissing the action with prejudice.

“When a trial court finds a complaint fails ‘to state facts sufficient to constitute a cause of action’ under Rule 12(b)(6), the court should give the plaintiff an opportunity to

amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal.” Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 179, 826 S.E.2d 585, 587 (2019). Leave to amend should be “freely given.” Id.

In this case, the Trial Court dismissed Evolve Softworks’ Complaint with prejudice without providing any opportunity for Evolve Softworks to cure any perceived deficiencies with the Complaint. After Evolve Softworks requested the opportunity to amend, the Trial Court still refused to allow Evolve Softworks to do so and did not conduct any analysis as to whether an amended complaint would be futile. This State’s Supreme Court, in holding that a trial court erred in dismissing a complaint with prejudice for failure to state a claim without at least considering whether to allow leave to amend, emphatically stated: “We cannot imagine a circumstance in which a trial court should refuse to allow an amendment on the ground of futility without seeing what the amendment would look like.” Id. at 183, 826 S.E.2d at 589.

Yet, the Trial Court did as much here and refused to permit Evolve Softworks to amend the Complaint after indicating that its initial Order was in fact with prejudice. “A circuit court does not have ‘discretion’ to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) without at least considering whether to allow leave to amend under Rule 15(a). Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted.” Skydive Myrtle Beach, 426 S.C. at 189, 826 S.E.2d at 592.

The Trial Court had no discretion to dismiss the Complaint with prejudice for failure to state a claim without providing Evolve Softworks a meaningful opportunity to correct any deficiencies as to the stated date of the accrual of its claim or to make further allegations regarding the consideration supporting the Guaranty. Accordingly, to the extent this Court finds that the original Complaint did not sufficiently allege a breach of guaranty cause of action, it should remand the case to the Trial Court to permit Evolve Softworks to submit an amended pleading for the Trial Court's review.

CONCLUSION

For the reasons set forth herein, Appellant Evolve Softworks, LLC respectfully requests this Court to reverse the Trial Court's grant of the Rule 12(b)(6) motion for failure to state a claim and hold that the Complaint sufficiently alleges a claim for breach of guaranty. In the alternative, Evolve Softworks requests this Court to reverse the Trial Court's grant of the Rule 12(b)(6) motion with instructions that the Trial Court allow Evolve Softworks to submit an amended complaint for review and consideration.

Respectfully submitted,

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October 12, 2020.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellant, Evolve Softworks, LLC, do hereby certify that I have this date served the foregoing Initial Appellant’s Brief, dated October 12, 2020, by personally serving the same pursuant to Section (g)(3) of the Supreme Court’s Amended Order dated May 29, 2020, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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**ATTORNEYS FOR RESPONDENT
ANTHONY BURKETT**

A copy of the sent email is enclosed with this Certificate of Service.

RECEIVED
Oct 12 2020
SC Court of Appeals


/s Carmen V. Ganjehsani
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Date: October 12, 2020.

Carmen Ganjehsani

From: Carmen Ganjehsani
Sent: Monday, October 12, 2020 2:40 PM
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Cc: Francesca Macchiaverna (FMacchiaverna@huntermaclean.com); Justin Kaplan (jkaplan@dfkfirm.com); William Freeman (william@freemanfreemanlaw.com)
Subject: 2020-001068 Evolve Softworks, LLC v. Burkett
Attachments: 2020-001068 Initial Appellant's Brief (Evolve Softworks v. Burkett).pdf; 2020-001068 Designations (Evolve Softworks v. Burkett).pdf

Please find served upon you in the above-referenced matter the Initial Appellant's Brief and Designation of Matter to be Included in the Record on Appeal of Evolve Softworks, LLC.

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