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

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SC Court of Appeals

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

Evolve Softworks, LLC,

APPELLANT,

versus

Anthony Burkett,

RESPONDENT.

INITIAL REPLY BRIEF

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STATEMENT OF ISSUES IN REPLY

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.

ARGUMENT

Rule 8 of the South Carolina Rules of Civil Procedure only requires that pleadings contain "a short and plain statement of the facts showing that the pleader is entitled to relief." A "complaint is sufficient if it informs the defendant of the ultimate facts supporting each element of the cause of action; there is no necessity that the complaint state all the evidence to be presented upon the trial of the case." "A litigant is required to plead ultimate facts—the facts which evidence upon trial will prove—not the evidence necessary to prove these facts." Moore v. City of Columbia, 284 S.C. 278, 283, 326 S.E.2d 157, 160 (Ct. App. 1985).

Moreover, pleadings "must be liberally construed in favor of the pleader so that substantial justice between the parties is done." Id. at 282, 326 S.E.2d at 160; Rule 8(f), SCRCP ("All pleadings shall be so construed as to do substantial justice to all parties."). Any inference of law or conclusions of fact that may properly arise from the allegations in the complaint are to be regarded as embraced in the averment. Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). A motion to dismiss under Rule 12(b)(6), SCRCP for failure to state a claim may not be granted by a trial court "if the facts alleged in the complaint *and the inferences drawn therefrom* would entitle the

plaintiff to relief under any theory." Charleston Cnty. Sch. Dist. v. Harrell, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011) (emphasis added).

The Complaint filed by Appellant Evolve Softworks, LLC ("Evolve Softworks") against Respondent Anthony Burkett ("Burkett") meets the pleading requirements in South Carolina and sufficiently sets forth a claim for breach of guaranty. The Complaint alleges the existence of the Guaranty Agreement which Burkett executed on October 25, 2016 to personally guarantee certain debt owed by 3 Guys Investments, LLC ("3 Guys") to R. Dean Harrell ("Harrell") for which 3 Guys was in default. [R.pp. ___; ___; Compl., ¶¶ 4-7; Guaranty Agreement.]

The Complaint further alleges that that the Guaranty Agreement was supported by the consideration of forbearance which was expressly referenced in the Agreement. [R.pp. ___; Compl., ¶ 6; Guaranty Agreement, § I.]

The Complaint states that after Harrell assigned his rights in the underlying debt and Guaranty Agreement to Evolve Softworks in March 2018, 3 Guys then defaulted on the underlying debt which Harrell had agreed to previously forbear collection of in exchange for Burkett's promise to guarantee such debt. [R.pp. ___; Compl., ¶¶ 8-9; Assignment.] Finally, the Complaint avers that after Evolve Softworks provided notice of 3 Guys' default to Burkett on April 30, 2020, Burkett refused to satisfy his obligations under the Guaranty Agreement. [R.pp. ___; Compl., ¶¶ 10-14.] Evolve Softworks timely filed this action for breach of guaranty on May 26, 2020, within three years of 3 Guys' default which occurred after March 2018.

The Complaint properly sets forth a claim for breach of guaranty. Resolving every pled fact and inference therefrom in Evolve Softworks' favor, as required in

analyzing a Rule 12(b)(6) motion to dismiss, shows that Evolve Softworks would be entitled to judgment in its favor if the facts are proven as true at trial. See Russell, 305 S.C. at 89, 406 S.E.2d at 339 ("[A] complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever."). Therefore, the Trial Court erred in dismissing the Complaint for the alleged expiration of the statute of limitations and lack of consideration because the allegations from the face of the Complaint show that there is at a minimum an issue of fact as to these two issues which should be resolved on the merits. By dismissing the Complaint, the Trial Court thwarted Rule 8's requirement that pleadings be construed to effect substantial justice. Evolve Softworks is entitled to have its breach of guaranty claim heard on the merits.

In its Respondent's Brief, Burkett continues to advance arguments which ignore both the requirement that pleadings be liberally construed and the applicable case law. Burkett disputes each pertinent fact alleged in the Complaint relating to the statute of limitations and the issue of consideration and takes a rigid instead of liberal view of the Complaint's allegations. Burkett's arguments are nothing more than defenses on the merits which are not to be considered on a Rule 12(b)(6) motion to dismiss. "A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it *does not* resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 180, 826 S.E.2d 585, 588 (2019) (quoting Republican Party of N. Carolina v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)) (emphasis added).

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.

With respect to the statute of limitations, Burkett continues to take the position that the statute began to accrue in October 2016 when 3 Guys was in default prior to Burkett's execution of the Guaranty Agreement. He argues that 3 Guys never cured its initial default when Burkett executed the Guaranty Agreement and that there was accordingly no second default by 3 Guys which triggered the accrual of the breach of guaranty claim.

Burkett's argument as to when the statute began to accrue disregards what is alleged in the Complaint. The allegations of Complaint and the inferences therefrom clearly show that 3 Guys were initially in default in October 2016 which was cured when Burkett executed the Guaranty Agreement in exchange for Harrell's forbearance in pursuing the obligations owed by 3 Guys. The Complaint then alleges that 3 Guys defaulted again after Harrell assigned his rights in the Guaranty Agreement to Evolve Softworks in March 2018. The facts of the Complaint are alleged in chronological order. It is clear that Paragraph 9 of the Complaint which states "3 Guys defaulted on its Debt" occurred after the allegations that Harrell assigned his rights to Evolve Softworks in March 2018. [R.pp. ___; ___; Compl., ¶¶ 8-9; Assignment.]

It is this second default which triggers the running of the statute of limitations. CoastalStates Bank v. Hanover Homes of South Carolina, LLC, 408 S.C. 510, 517, 759 S.E.2d 152, 156 (Ct. App. 2014) ("[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."); 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.").

Burkett may dispute the date of 3 Guys' default, but that is a dispute properly reserved for the merits of the case. Brown v. Finger, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("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."). The face of the Complaint demonstrates that Evolve Softworks brought a breach of guaranty claim within the applicable three-year statute of limitations. The Trial Court had no authority to dismiss a Complaint which on its face meets the statute of limitations. See Doe v. Greenville Cnty. Sch. Dist., 375 S.C. 63, 66, 651 S.E.2d 305, 307 (2007) ("[I]n considering a Rule 12(b)(6), SCRCP, motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.").

Burkett also disputes that the first default by 3 Guys was cured by Burkett's execution of the Guaranty Agreement but again, that is a factual dispute not properly resolved on a motion to dismiss. It is illogical though that Burkett's execution of the Guaranty Agreement in exchange for Harrell's forbearance of collection would not cure the October 2016 default by 3 Guys. The terms of the Guaranty Agreement require the creditor to give notice of 3 Guys' default to Burkett prior to collection. [R.p. ___; Guaranty Agreement, § IV.] If the execution of the Guaranty Agreement did not cure the initial default by 3 Guys, there would be no reason to give notice of a default. The execution of the Guaranty Agreement did, however, cure the initial default and therefore

the creditor was required to notify Burkett of any additional default of 3 Guys, which Evolve Softworks did on April 30, 2020. [R.pp. ___; Notices.]

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. 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.

Burkett also continues to argue that the Guaranty Agreement lacks consideration because no specific time for forbearance was referenced in the Agreement. Once more, Burkett entirely disregards the controlling law of North Carolina on the sufficiency of consideration in the form of forbearance.

Consideration is present and valid under North Carolina law where there has been a request for forbearance followed by actual forbearance. That no specific time was included in the written agreement to forbear is irrelevant as to the validity of the consideration of forbearance. See 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); see also Standard Supply Co. v. Finch, 70 S.E. 745, 747 (N.C. 1911).

Here, the Complaint alleges that the Guaranty Agreement expressly referenced Harrell's forbearance in collecting the obligations owed by 3 Guys in exchange for Burkett's execution of the Agreement. [R.pp. ___; ___; Compl., ¶ 6; Agreement, § I.] While Burkett contends that he did not request forbearance, certainly an acceptable

inference from the allegations of the Complaint is that Burkett requested the forbearance referenced in the terms of the Guaranty Agreement which he signed. The North Carolina Court of Appeals found in Klingstubbins that a guarantor's promise that the underlying indebtedness would be paid could be interpreted as a request to forbear. This allegation made by the creditor in Klingstubbins was sufficient to survive a motion to dismiss, and the Court of Appeals held that if the guarantor disputed this fact, such was a material fact that could not be resolved under a motion to dismiss. Klingstubbins, 721 S.E.2d at 752-53.

The Complaint additionally alleges actual forbearance because Evolve Softworks did not seek to collect until April 2020, more than three years after the Guaranty Agreement was executed. The face of the Complaint alleges the presence of adequate consideration in the form of forbearance.

Burkett does not address Klingstubbins and continues to assert without authority that the Guaranty Agreement fails because it did not specify a specific period of time for the forbearance. Burkett also relies upon the case of Carolina Eastern, Inc. v. Benson Agri Supply, Inc., 310 S.E.2d 393 (N.C. Ct. App. 1984). In this case, a seller of goods brought an action against a corporate buyer and the personal guarantors to recover on a debt for goods that had been sold to the corporate buyer. The guarantors signed guaranty agreements based upon the extension of credit to the corporate buyer. After the guaranty agreements were executed, the corporate buyer made no further payments to the seller and the seller extended no further credit to the corporate buyer. Id. at 394.

The trial court heard the seller's evidence against the personal guarantors and at the conclusion of the seller's evidence, the trial court granted a directed verdict to the

personal guarantors. Id. The motion for directed verdict was granted by the trial court because the guaranty agreements lacked valid consideration. Id. at 394-95. The guaranty agreements stipulated that the consideration was the extension of credit; however, the court found no credit was extended. Id. at 395.

The seller attempted to argue, in the alternative, that forbearance in bringing suit supplied the necessary consideration. The trial court, after hearing the seller's evidence, determined that the seller had not proved any agreement to forbear was made by the seller at the time the guaranty agreements were executed. Id.

Key is that the trial court in Carolina Eastern decided the issue of consideration on a motion for directed verdict which "tests the legal sufficiency of [the] plaintiff's evidence." Id. The procedural posture is different in this case because the Trial Court here decided the issue of consideration on a motion to dismiss which only tests the sufficiency of the allegations of the complaint. As explained herein and in the Appellant's Brief, the allegations of the Complaint sufficiently allege valid consideration. Burkett may later challenge the evidence proving the validity of the consideration during the merits of this case; however, he may not obtain a dismissal where the Complaint alleges the existence of legally sufficient consideration.

Burkett also argues throughout his brief that the loans referred to in the Complaint are not covered by the Guaranty Agreement, but any argument regarding the scope of the Guaranty Agreement is a factual dispute which should be decided on the merits. It is improper to grant a Rule 12(b)(6) motion based upon such a defense on the merits. 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.").

The Trial Court erred in granting Burkett's motion to dismiss for failure to state a cause of action for breach of guaranty. Evolve Softworks properly pled the elements for breach of guaranty, including the existence of adequate consideration. The consideration of forbearance does not require the specification of a definite time period to forbear. 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 the motion to dismiss and allow Evolve Softworks' claim to be heard on the merits.

CONCLUSION

For the reasons set forth herein and in the Appellant's Brief, 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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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 Reply Brief, dated November 19, 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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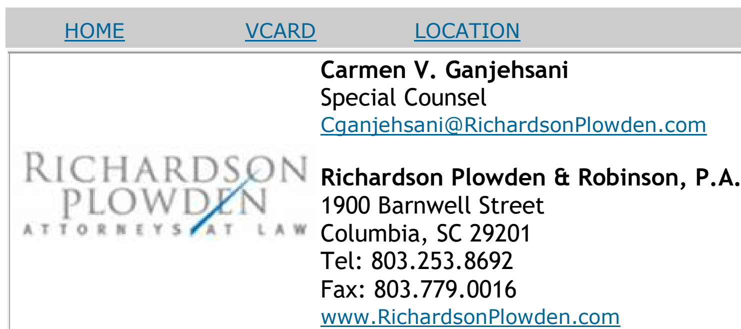

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