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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph F. Strickland, Master in Equity Judge

2018-000251

SOUTH STATE BANK,

Respondent,

v.

Sand Dollar 31, LLC; Rhonda Meisner, of whom Rhonda Meisner is the

Appellant.

PETITION FOR RE-HEARING AND REHEARING EN-BANC

July 5, 2021

Rhonda Meisner
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Appellant

The appellant received written notice of the entry of the Order on June 23, 2021. This Petition for re-hearing is filed within 10 days of receiving written notice of the Order by U.S. mail with consideration of the Holidays and the Rules for receipt.

STATEMENT OF ISSUES FOR THE PETITION FOR RE-HEARING

1. Did the Master in Equity err in determining the deficiency amount owed by appellant Meisner ?

2. Did the Master in Equity err by lifting the automatic stay that allowed the BANK to enter the appraisals which were completed in 2012 accompanied by the 2018 letter of opinion?

3. Did the Master in Equity err in denying the appellants motion to amend the counter claims against the BANK?

Further Development of the Appellant's arguments that the Master in Equity Erred in determining the deficiency amount against Appellant Meisner; The Master in Equity erred by allowing the 2012 appraisals in 2018, but not allowing amendment of the Counterclaims in 2017 by the appellant.

This Honorable Court ruled " We find the master did not err in his determination of the deficiency judgment" and "he ordered SSB to file the Return of the Appraisers with the clerk of Court" and "we find the master did not abuse his discretion by denying Meisner's motion to amend her counterclaims."

The appellant, Rhonda Meisner, respectfully requests this Honorable Court to review the preponderance of the evidence related to the valuation of the Properties by both South State Bank and Appellant Meisner, in effect all relevant parties to the appeal and the Supreme Court's decision in .

The appellant urges this Court to review how the Bank valued the properties throughout the stages of the relationship, including the litigation.

At the grant, the initial phase, the Bank valued the properties based on the loan to value of the properties which determined the mortgage amount available to Sand Dollar 31, LLC. Because the loan was commercial, the Bank valued the property *more* than the amount of the mortgage. This Court and the Supreme Court has *always* determined that the amount of the mortgage is a "fair determination of the value of the property."

The BANK *filed suit* on the amount loaned or an amount *lower* than the amount of the mortgage and lower than the amount the BANK argued in the motion to vacate the sale. The BANK alleged the appellant "engaged in a deceptive scheme to extinguish [SSB's] lien on the property by purchasing the property at the foreclosure sale through an undisclosed agent for an amount [Meisner] averred is significantly below appraised value." However, it was the BANK whose bid was upset! As such, the winning bid was more than the BANK's bid. It is an incredulous accusation that a party can pay more than another party in a judicial sale and attempt to defraud the original bidder e.g.: the BANK.

The deficiency statute *requires* the BANK to enter its *best bid.* The appellant interprets the Legislative intent to mean that for the BANK to be awarded a deficiency, it should put its best foot forward or succumb to a market analysis. Here, the appraiser who was regularly engaged as an appraiser for the BANK was precluded from offering an appraisal as argued by the appellant.

As such, the argument by the BANK, in its motion to vacate the sale, in effect evidences its "best foot forward" and its accurate portrayal of value. As a result, it is *not* only the judicial estoppel argument alone, but the deficiency statute, the Bank's previous arguments as to value and the appellant's argument that the mortgage amount is the right and correct amount of value that the appellant avers this Court should adopt. The value a party submits as accurate to a court of equity should be accepted as opposed to an amount that party can benefit from.

The appellant bid $1 more than the BANK, so how on earth, can the appellant be fraudulent when the BANK bids less than the appellant. The BANK gets to write off the debt on its books and then gain a windfall, in the deficiency judgment, Balderdash. As such, it is a ridiculous claim that it was

Meisner that was "gaming the system" which is the most likely reason the motion to set aside the sale was withdrawn by the BANK. The most troubling part of this whole situation is the fact the master scheduled a hearing at a time the Court Reporter was not available. Nevertheless, While the BANK may have had an argument of fraud *had they bid the amount of the mortgage* then the appellant argued for the appraisal statute stating the value was insufficient, but the BANK valued the property significantly less and then cried foul after a bid greater than the BANK placed was accepted.

Here, even though the motion to vacate the sale was withdrawn by the BANK, prior to the Master ruling on the motion; the Appellant urges this Honorable Court to evaluate the preponderance of the evidence and adopt the mortgage amount as the "fair gauge of the value of the property" as put forth in the 1. Loan amount by the BANK; 2. The Loan amount accepted by the Defendant Sand Dollar 31, LLC; 3. The value as proposed by the BANK in its Motion to Vacate the Sale and 4. The amount the appellant said a fair gauge of the value of the property is in the hearing on remand. Additionally, the master accepted the appraisal and the letter; however, the testimony as to the letter and appraisal was by the attorney for the BANK. As such, this hearsay evidence should not have been accepted by the master. Instead, this Court has consistently said the owner of property can speak to its value. As can the guarantor of the note.

The party subject to the foreclosure, the declaratory judgment action, the guaranty agreement, and the appraisals statutes was Sand Dollar 31, LLC (Sand Dollar). The party subject to the declaratory judgment action, the guaranty agreement, and the appraisal statutes was the appellant, Rhonda Meisner (Meisner).

On July 5, 2012, the court held the deficiency sale and South Carolina Operating Room Equipment, LLC (SCORE) bid $1.00 more that the BANK's June bid. **(R. VOL. II. Pp. 654-658)** On July 31, 2012, within 30 days of the deficiency sale, the appellant filed a verified petition for application of the appraisal statute based on S.C. Code Ann. §29-3-680. **(R. VOL. II. pp.521-528)** On August 8, 2012, the court entered a deficiency against Sand Dollar and the appellant that

deducted the foreclosure proceeds from the deficiency but did not include the party's valuation opinions. On August 13, 2012, the Court held a status conference and extended the time for the Plaintiff to respond to the petition for appraisal until August 20, 2012. **(R. VOL. I. p. 435:20-23)** The BANK filed a motion on September 6, 2012, to vacate the July 5, 2012, deficiency sale. **(R. VOL. II. Pp. 581-591)** The BANK submitted to the Court that a fair gauge of the property's value was the amount of the mortgage. **(R. VOL. II. P. 583 ¶ 4)** The appellant and Sand Dollar accepted the BANK's value of the properties as the amount of the respective mortgages in writing on November 2, 1012. **(R. VOL. II p. 638 n. 1)** South Carolina Operating Room Equipment, LLC entered a notice of appearance of Richard Gleasner as its attorney on October 1, 2018. **(R. VOL. II. P. 644)** On October 18, 2012, the court ordered a hearing scheduled for November 6, 2012. **(R.VOL. I. p.35)** At the hearing, the court signed an order denying the appellant and Sand Dollar motion to alter and amend that was filed on June 7, 2012. **(R. VOL. I. pp. 36-7)** The first appeal followed. This Honorable Court previously ruled the attorney's fees attributed to the judgments could not be determined because the respondents failed to file the affidavit of attorney's fees. **(R. VOL. I. 286:3-16)** The review of the deficiency judgments, the declaratory judgment, the guaranty agreements, and the judicial estoppel arguments are now before this Honorable Court of Appeals.

The BANK did not explain, argue, or enter evidence how appellant Meisner owed the attorney's fees attributed to Sand Dollar. **(R. VOL. I. pp.483:5-25;484:1-21)** The BANK argued that "the amount of the mortgage was a fair gauge of the property's value". **(R. VOL. II. P. 583 ¶ 4)** Also, the BANK acknowledged the attorney's fees were not filed until November of 2016 which was well beyond the date of the remand hearing for the attorney's fees. **(R. VOL.II. pp. 605-621).** Additionally, pursuant to the statute, the BANK's

appraiser did not comply with the statute because he routinely worked for the BANK with the intent of the fair market value of the properties. **(R. VOL. II. P. 692)** See Black's Law Dictionary (Westlaw 9th ed. 2009) (defining "fair market value" as "[t]he prices that a seller is willing to accept, and a buyer is willing to pay on the open market and in an arm's-length transaction")

The valuation opinion of the BANK that "a fair gauge of the value of the property is the amount of the mortgage" was entered into the record and accepted by Sand Dollar and Meisner who requested the court use this valuation for a determination of the value of the properties. **(R. VOL. I. p. 363:20-24; 364:18-25)**

The purpose of the appraisal statute is to protect mortgagors and guarantors from a financial institution from selling the property at a sacrifice at the foreclosure sale only to then demand the difference in the amount owed by the defendants. **(R. VOL. II p. 522)** In essence the appraisal statute offers relief for defendants, like appellant Meisner when a deficiency is demanded if the property is not sold for an amount that covers the deficiency by allowing an appraisal process. **(R. VOL.I. pp.243:8-25; 244:1-13;245:2-25;247:2-25 . VOL. II p. 522)** This fail safe, or appraisal process is not required *when the parties agree to the valuation of the properties* such as in this case because there is agreement between the parties. This Honorable Court has always accepted the notion that the owner of the property is in a good position to determine the value of the property. Likewise, the BANK that loaned money on the property is also in a good position to value the property.

The appraisal statute also requires that the appraisal submitted are the market value of the properties and not a demised amount. **(R. VOL. II. pp.521-528)**

The Court entered final deficiency judgments for both Sand Dollar and the appellant in 2017. **(R. VOL. I. pp7;19)** However, based on the Supreme Court's Ruling in Dutch Fork Properties v. SEL. The master was required to make separate and distinct rulings that Rhonda a Meisner was responsible for Sand Dollar 31, LLC's debts and not just assume this the was case. As such, the BANK never took testimony as to Meisner's capacity in signing the guaranty agreements.

Evidence of liability of Meisner for Sand Dollar's debts during the trial.

The BANK attached two guaranty agreements signed by Meisner to the amended complaint and entered the two agreements into evidence in 2012 during the trial. **(R. VOL. I. pp.73;85)** In the answer and counter claim of appellant Meisner, she denied liability under the guaranty agreement and requested the Court interpret the guaranty agreements *to establish the deficiency* against her if any. **(R. VOL.I. pp.155-168)** The deficiency was decided in 2017; however, the BANK failed to offer evidence during the foreclosure hearing or thereafter how appellant Meisner owed the amounts identical to Sand Dollar. **(R. VOL. I. pp. 483:3-18;484: 1-13)** The BANK failed to provide evidence or testimony from appellant Meisner or its own witness at trial that appellant Meisner signed the guarantees in her individual capacity instead of on behalf of Sand Dollar. In fact, the BANK's witness testified Meisner signed the guaranty on behalf of Sand Dollar. **(R.VOL. I. pp. 483:9-18; 484:1-13)** Meisner's signature also appears on the mortgage; however, there is no dispute that Meisner does not owe money under the mortgage to Sand Dollar. **(R VOL. I p. 484:2-3)**

The plaintiff BANK limited the testimony during the trial to the amount of the debt owed by Sand Dollar and did not prosecute the claims against appellant Meisner for her personal liability either during the trial or in post- trial deficiency proceedings. "There are certain matters that the plaintiff and the defendant agree are not in controversy *at this point* and the only thing we'll be taking testimony on is the amount of the debt and the foreclosure itself, and I believe those are the only matters that are outstanding." **(R.VOL. I. p.477:6-14)** (emphasis added by appellant).

Because appellant Meisner requested a declaratory judgment in the answer and counterclaim to determine her deficiency, if any, based on an interpretation of the guaranty agreements in evidence, a review of the guaranty agreements is in order. **(R. VOL. I. pp. 194:7-24) (R. VOL. II. pp. 646-651)** The deficiency for both Sand Dollar and appellant Meisner was determined in 2017 and not prior to or during the initial appeal because the motion to alter and amend the judgments was filed prior to the assessments of any deficiencies. **(R. VOL. II. Pp. 592-600)** As such, the appellant argues the guaranty agreement, the appraisals, and the declaratory judgment action are appropriate for appellate review.

The BANK agreed that both parties were entitled to their respective appraisal rights in 2012. **(R.VOL. I p. 498:1-2).** Glenn Bowens in open court told the court the appraiser hired by Sand Dollar and Meisner was Angela Buckley. **(R. VOL. I. p. 436:1-5)** In 2018, the BANK objected to the fact that Meisner filed the application for appraisal; however, Glenn Bowens the attorney for Sand Dollar also requested the Court adopt the valuation of the properties for Sand Dollar. **(R. VOL. II. P. 895 ¶ 2).** The Court, during a 2012 hearing agreed with Sand Dollar and Meisner that the final determinations of each party's liability would be held after the deficiency sale and the application of

the appraisals. **(R. VOL. I. p. 450:16-25)** However, the BANK never entered the appraisals in 2012, instead they filed a motion to vacate the sale and argued a fair value of the properties was the amount of the mortgage which all parties adopted. **(R. VOL. II. Pp581-600)**

A. The BANK's testimony at trial on April 25, 2012.

Wendy Wolfson Vice President of BANK testified to the debt owed by Sand Dollar and to the fact the BANK paid attorney's fees. **(R. VOL. I. p. 482:6-25;483-484:1-21)** This testimony was necessary to prove the Sand Dollar debt prior to the foreclosure proceedings against Sand Dollar. **(R.VOL. I.p.470: 9-20)** However, Ms. Wolfson did not testify how appellant Meisner, in her individual or personal capacity owed the identical debts to the Bank **(R. VOL. I. pp. 477-485).** Wolfson if fact testified that Meisner signed the guaranty agreement *on behalf* of Sand Dollar but did not testify as to Meisner's capacity when she signed the agreements. **(R. VOL. I. pp. 483:5-25; 484:1-21).** Meisner's only testimony was that she was the member of Sand Dollar 31 LLC. **(R. VOL. I. p. 488:18-23)** In the answer to the complaint, Meisner does not admit personal liability but instead asks the Court to interpret the guaranty agreement and mortgage documents via a declaratory judgment action to determine the deficiency, as to the rights and responsibilities of the parties. **(R. VOL. I. 155-165).** The BANK did not submit any evidence before trial or during trial that Meisner acted in her personal capacity. The agreement is silent as to the capacity of appellant Meisner. **(R. VOL.I. pp.155-168)**

B. The Guaranty agreement does not indicate Meisner's legal status. Prior to and during the trial, held on April 25, 2012, the BANK presented two Guaranty Agreements executed by Meisner that guaranteed payment of the two promissory

notes between the BANK and Sand Dollar. **(R. VOL.I. pp.155-168)** The guaranty agreements are limited to a maximum liability for a deficiency judgment to $31,140.00 for the loan in 11-CP-40-6317(R) and $36,000.00 for the loan in 11-CP-40-6318.**(R. VOL.I. pp. 98-9;124-5)** A review of the guaranty agreements in question offers no evidence of whether Meisner was acting in her personal capacity or as a member of Sand dollar **(R. VOL. I. pp. 98;124)** There are no words such as "Personal Guaranty" or "Jointly and Severally" or "individually and "corporately" or "acting as a member on behalf of Sand Dollar."

In fact, without acknowledgement from Meisner, a reader of the guaranty could not determine if Meisner was signing in her capacity as the single member of Sand Dollar or as an individual. The BANK' s witness, Wendy Wolfson never testified to the capacity of appellant Meisner. **(R. VOL.I.pp.483:5-25;484:1-21)** It is at all times the responsibility of the plaintiff to prove its case against all defendants. Additionally, the "articles of instruction" for members or "articles of organization" required as part of the loan for Sand Dollar were not attached or entered into evidence to prove that Meisner had the authority to act or enter into agreements as a Member of Sand Dollar. **(R. VOL. I. p. 476)**

Since none of the LLC documents are attached to the loan, it is not unreasonable to read the Guaranty agreement as an authority to serve the function of providing a "right to act" agreement on behalf of the LLC by Meisner as part of the loan processing. **(R. VOL. I. pp. 98-9;124-5)** As such, an independent reader would not recognize without additional information whether the guarantees were executed in Meisner's personal capacity or

in the capacity of "member" Sand Dollar 31, LLC. It is always the plaintiff's responsibility to prove its case.

C. Declaratory Judgment answer of appellant and Sand Dollar.

In the Appellant's answer, there was no indication or admission as to the personal capacity by which the appellant signed the guaranty agreement. **(R. VOL. I. pp.161-165)** The BANK entered two guaranty agreements that were attached to the amended complaint by the BANK. **(R. VOL. I. pp. 98-9;124-5)** It is undisputed the guaranty agreement was drafted by the BANK. **(R. VOL. I. pp. 98-9;124-5)** The appellant specifically requested the Court interpret the rights and responsibilities of the parties in the Counter claim regarding the two guaranty agreements *in establishing the deficiency.* **(R. VOL. I. pp.158-9; 164-5).** The Court did not establish the deficiency in 2012, it established the deficiency in 2017. **(R. VOL. I. p. 282:21-5)** The Court did not rule on the declaratory judgment action or the capacity of appellant Meisner prior to the previous appeal **(R. VOL. I. pp. 9-18; 21-30).**

All plaintiffs in any legal proceeding must prove their case against each defendant. Here, the original appeal asked this Court to review the *propriety* of the BANK entering judgment amounts prior to the application foreclosure sale proceeds and the appraisal of the properties and contrary to the Supreme Court's instructions in filling out the form 4 in deficiency cases because the judgments, as filed, affected other properties owned by the appellant. The S. C. R. Civ. P. Rule 59 (e) that was appealed was filed on June 7, 2012 which was before the deficiency sale date, the appraisal, the guaranty arguments, or the final deficiency which occurred in 2017.

The Master in Equity, in the 2012 motion to amend hearing, agreed that the declaratory judgment action, the guaranty arguments, the appraisals, and the final deficiency would be

decided after the appraisals and the deficiency sale of the properties. (**R. VOL. I.** p. 450:16-25). The Court also requested the parties brief the guaranty agreements at the motion to alter and amend hearing; however, like the deficiency for the parties, the court did not rule on the guaranty agreement in 2012. (**R. VOL. I. pp. 36-7**).

Therefore, the Court's decision on the guaranty agreement was not included in the previous appeal because the final deficiency judgments were not determined, and the declaratory judgment applied to the deficiency. Appellant Meisner was not implicated in the foreclosure as a defendant only Sand Dollar.

In 2012 the judgments that were appealed were the judgments of foreclosure that were entered by the BANK against Sand Dollar and appellant Meisner. The parties agreed the amount of the judgments would change once the sales were completed, the appraisals were completed, and the instruments interpreted. **(R. VOL. I. P.450:16-25)**

The Master in Equity; in its Order stated the issue of the guaranty agreement was already resolved; however, at the motion to alter and amend hearing in 2012 prior to the determination of the deficiency, he asked for the parties to brief the issue and the final determination of liability of the parties would be determined after the deficiency sale and application of the appraisals which occurred long after the motion to amend hearing. **(R. VOL. I. p. 450:1-25; 471:5-23; 473:10-25).**

Here, the BANK, during the trial on April 13, 2012, or in pre-trial submissions of evidence, presented no evidence that appellant Meisner guaranteed the debts of Sand Dollar, personally or separately from Sand Dollar. In fact, the BANK's own witness Wendy Wolfson testified appellant Meisner signed the guaranty agreement on behalf of Sand Dollar. **(R.VOL. I. pp. 483:5-25; 484:1-18)**

Appellant Meisner argues that the purpose of the Guaranty Agreements and the intent of the parties was to guarantee the Plaintiff received $31,140.00 for the loan in 11-CP-40-6317 and $36,000.00 for the loan in 11-CP-40-6318 should Sand Dollar default. These amounts represent the money loaned by the BANK to Sand Dollar that were presented during the trial. Appellant Meisner also claims that if the high bid at the foreclosure sale *or the appraised value was equal to or exceeded* those amounts, then liability under the Guaranty Agreements will be satisfied as the Plaintiff will have received the guaranteed amounts provided in those agreements. **(R. VOL. II. Pp.650:5-14).**

Limitation of the Guaranty agreements

Meisner bases her claim that the Guaranty Agreements limits liability to $36,000.00 and $31,140.00 on three basic grounds.

First, the Guaranty Agreements *specifically states* the maximum dollar amount in paragraph A.

Second, paragraph 4 provides that the guarantor is liable for "all indebtedness, without limitation as to amount" *if* "no amount is stated." However, since the guaranty agreements entered into evidence specifically stated the amounts of $31,140.00 and $36,000.00, then the guaranty is limited to those amounts. **(R. VOL. II. P. 650:13-17)**

Third, this was the understanding of the parties at the time the Guaranty Agreements were made, based on representations made by the Bank to the effect that the amount guaranteed was the dollar amount stated in the agreement.

The BANK's interpretation of paragraph 4 of the guaranty 4 conflicts with paragraph A. **(R. VOL. II. P. 647 ¶ 3)** The Bank's interpretation of Paragraph 4 reveals an inherent ambiguity between paragraph 4 and paragraph A.

Guaranty agreements are contracts, and their interpretation are governed by the same contract law principles as any other contract. The South Carolina Court of Appeals has held: A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation.

The uncertainty in interpretation can arise from the words of the instrument, *or in the application of the words* to the object they describe. (Emphasis by appellant).

Whether a contract is ambiguous must be determined from the entire contract and not from any isolated clause of the agreement. Pee Dee Stores. Inc. v. Doyle. 381 S.C. 234, 672 S.E.2d 799 (Ct.App.2009) (internal citations omitted) When a contract is susceptible of more than one interpretation, the non-drafting party is given the benefit of the ambiguity. Transouth Financial Corp. v. Cockran 324 S.C. 290, 478 S.E.2d 63 (Ct. App. 1996).

The South Carolina Supreme Court has held:

> It is generally held that an ambiguity in a written contract should be construed most strongly against the drafters. We quote, with approval, the following from 17A C.J.S. Contracts § 324:
> "(A)mbiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage. The reason for the rule of strict construction against the party preparing the contract is that one who speaks, or writes can, by exactness of expression, more easily prevent mistakes in meaning more than one with whom he is dealing, and that he who has brought the

agreement into existence and is thus primarily responsible for its inadequacy should justly suffer for its shortcomings."
Myrtle Beach Lumber Company. Inc. v. Willoughby, 276 S.C. 3, 274 S.E.2d 423 (S.C. 1981).

There is no dispute that the Guaranty Agreements were drafted and prepared by the Bank. Based on the Supreme Court's holding, the ambiguity must be resolved in,, favor of Meisner. The parties' conflicting interpretations requires the Court to interpret the agreement and issue a declaratory judgment. When a written contract is ambiguous extrinsic evidence may be admitted determining the parties' intent. *Duncan v. Little.* 384 S.C. 420, 682, S.E.2d 788 (2009). Here, the only testimony from the BANK of the party's capacity was from Wendy Wolfson, the BANK's witness when she testified appellant Meisner signed "on behalf' of Sand Dollar. **(R.VOL. I. p. 483:17-22)**

The Guaranty Agreements in the two cases are pre-printed forms and are identical except for the dates and dollar amounts. Both Guaranty Agreements contain two options, Paragraph A and B, with a box beside each paragraph, one of which is to be marked with an "X". Paragraph A was marked in both 11-CP-40-6317 and 11-CP-40-6318. Importantly, Paragraph A limited the amount guaranteed to $31,140.00 (11-CP-40-6317) and $36,000.00 (11-CP-40-6318) respectively. On the other hand, Paragraph B, which was *not checked,* required payment by the guarantor of:

...each and every debt, liability and obligation *of every type and description* which Borrower may now or at any time hereafter owe to lender *(whether such debt, liability or obligation now exists or is hereafter created or incurred,* and whether it is or may be direct or indirect, due or to become

due, *absolute or contingent,* primary or secondary, liquidated or unliquidated, or joint, several or joint and several; all such debts, liabilities and obligations being hereinafter collective referred to as the "indebtedness"). (Emphasis added) The Bank claimed, and the Court ruled that Meisner is liable for payment of Sand Dollar's debts beyond the $31,140.00 and $36,000.00 stated in the guaranty which are exactly the type of debts contemplated by Paragraph B; at the time the Guaranty Agreement was executed these other debts:

(1) did not exist.

(2) they were neither created nor incurred.

(3) were indirect and secondary to the amount borrowed.

(4) were contingent and had not yet become due.

The Bank wants to focus just on paragraph 4 which itself is ambiguous; however, when interpreting a contract, the contract must be read, without focusing on any single provision to determine the contract's meaning. *Pee Dee Stores*, at 242. Paragraph 4 must be interpreted considering paragraphs A and B. The Bank's argument that paragraphs 4 makes Meisner liable for these additional debts would make more sense if Paragraph B had been checked; however, the parties did not check Paragraph B. Even under the Bank's interpretation that the specific dollar amount stated in the Guaranty Agreement referred to the amount of "principal" guaranteed, the Plaintiff still claims $48,698.20 is due in principle in 11-CP-40-6317(Appellate Case 213558), when the Guaranty Agreement only provided for $31,140.00, which is over $17,000.00

more in principal than the Bank is allowed under its own interpretation of the agreement.

The question before the Court is whether the Guaranty Agreements place a monetary limitation on liability (as claimed by appellant Meisner) or whether liability is unlimited (as claimed by the Bank). The South Carolina Court of Appeals has held:

> Although not yet decided in South Carolina, in the absence of an express limitation of an amount of a guaranty as a general rule the amount of the liability, or, in other words, the measure of damages, on a default by the principal obligor is that amount of loss which the guarantee has sustained by reason of such default *PPG Industries, Inc. v. Orangeburg Paint Center. Inc.* 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988)

The Guaranty Agreements in these cases do place "an express limitation of an amount" e.g., $36,000.00, and $31,140.00. If the parties intended for her liability to extend beyond the stated dollar amounts, then paragraph B would have been marked. Based on the holding in *PPG Industries*, and *Myrtle Beach Lumber Company,* the ambiguity created by paragraph 4 and paragraph A must be resolved in Meisner's favor. Additionally, the Bank has valued the property at the mortgage amount of the property which effectively satisfies the guaranty agreement.

II. Whether the respondents are judicially estopped from valuing the property lower than when all parties agreed that the property should be valued at the amount of the mortgage.

In the initial appeal, this Honorable Court ruled:

" As to whether the Bank is estopped from valuing the properties less than the amount stated in its motion to vacate: Cowburn v. Leventis, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct. App. 2005) ("In order for an issue to be preserved for appellate review, . . . it must be raised and ruled upon by the trial [court].")

At the time of the initial interlocutory appeal, the S.C.R. Civ. P. Rule 59 (e) motion was filed *before* the deficiency sale, the appraisal, and the BANK's admitted valuation in its motion to vacate the sale.

As such, the judicial estoppel argument had not been presented to the lower court for a ruling when the first Rule 59 (e) was filed that was the subject of the initial appeal. Now, however, the Court ruled on judicial estoppel argument on July 27, 2017:

" Because the plaintiff withdrew its motion to vacate the judicial sale before it was heard, the Court rejects Meisner's argument the plaintiff should be judicially estopped from taking a position that differs from its position in that motion."

First, the Court's Order conflicts with the facts of this case. The BANK made a motion to vacate the sale, filed the motion with the clerk of court, paid the motion fee, and submitted a memorandum in support of the motion. **(R. VOL.I. p. 173;175 VOL. II. Pp. 581-591;642-3)**

The court ordered a hearing on the BANK's motion to vacate the sale in September of 2012, which was held on November 6, 2012. **(R. VOL.I. p. 173;175 VOL R. VOL. II. Pp.642, 643)** The Court absolutely heard the judicial estoppel argument during the November 6, 2017, hearing and received the BANK's written memorandum in support of the motion to consider. **(R. VOL. II. Pp.642,643)** The parties appeared on November 6, 2017, and the BANK advanced its argument that the sale should be vacated for the reasons submitted in its

memorandum in support of its motion to vacate the sale. **(R. VOL. II. Pp.642,643)** There was not a court reporter present due to the presidential election. **(R. VOL. II. Pp.642,643)** Whether the hearing was memorialized by a court reporter or not, this fact does not change the fact the court heard the arguments advanced by the BANK. Now the Court has ruled against judicial estoppel for the BANK's valuation of the properties based on the fact the court did not hear the motion, which is clearly erroneous. The court heard the arguments, and it was not until 2014 that the BANK withdrew the motion to vacate the sale. **(R. VOL. II. pp. 631-2)** The withdrawal of the motion does not withdraw the argument. **(R.VOL. I. pp. 281:7-25; 288:10-21; 290:22-25;291:293:4-25;294-5:1-13).**

The Court's Order seems to suggest if there is not a court reporter present then the hearing did not occur at all even though the Master in Equity was present at the hearing. **(R. VOL. II. pp. 642-3**)

The BANK came to a Court of Equity with conflicting positions. **(R.VOL. I. pp. 281:7-25; 288:10-21; 290:22-25;291-293:4-25;294-5:1-13).**

First, the BANK filed a foreclosure proceeding against Sand Dollar and requested the Court to declare that the Sand Dollar defendant owed the BANK an amount of money in excess of the money loaned. **(R. VOL. I. pp. 50-99)** The Bank presumably had an appraisal done prior to loaning money that the BANK relied on to loan the money to Sand Dollar in 2008. **(R. VOL. I. P 272:17-21)** The BANK inadvertently admitted in 2017 the properties were entitled to a greater loan than the loan was given based on the BANK's appraisals. **(R. VOL. I. pp. 272:17-21)** This gives insight to the value of the property from the BANK's perspective. **(R. VOL. I. pp. 274:2-25)** Importantly, because these were commercial loans, the amount loaned was only 70 percent of the value of the property. **(R. VOL. I. p. 274:8-12)** This means at the time of the loan the BANK determined the property to be valued 30 percent more than the money loaned.

Then the BANK sent a representative to bid on the property at the June 4, 2012 sale for a price the BANK conceded provided equity to the buyer. **(R. VOL. II. P.634 ¶1).**According to the deficiency statute, the BANK is required to place its highest and best bid at this sale and is prohibited from bidding at the deficiency sale. **(R. VOL. II. P.637 ¶ 2)**

Then the BANK hired an appraiser that was prohibited under the appraisal statute because he routinely does work for the BANK on the commercial side of the business. **(R. VOL. I. p. 294:7-25; 295:1-17)** This disqualified appraiser entered an opinion of the value of the property less than one of the properties previously sold for at a previous foreclosure sale. **(R. VOL. II. P. 692.)** He also used as comparable foreclosure properties. **(R. VOL. II. P. 692).** The BANK admitted the appraiser worked on the commercial side of the business but offered that it was impossible for them to find an appraiser that did not have ties to the BANK. **(R. VOL.)** The BANK in it filed a motion to vacate the sale argued that the purchaser South Carolina Operating Room Equipment, LLC (SCORE) gained equity via the purchase and because appellant Meisner is the single member of the LLC, the sale should be vacated.

There is no prohibition that the BANK or the mortgagor can purchase the property at the deficiency sale, so there certainly is no prohibition for a third party like SCORE to purchase the property. **(R VOL. II. P. 638 ¶3)** In fact had the BANK bid the property's actual value or the value the BANK asserted during the Motion to Vacate the sale; SCORE would not have been able to purchase the property. It was because the BANK bid so little that SCORE could receive a loan and purchase the property.

Additionally, the BANK is required to offer its highest and best bid at the

sale and is prohibited from rebidding at the deficiency sale **(R. VOL. II p. 637 ¶ 2).** SCORE's bid was more than the BANK's bid at the deficiency sale, so the BANK was not prejudiced by the bid. **(R VOL. II p. 634 ¶ 4).**

The Court orally ordered the BANK to designate their appraiser and ordered both parties to complete the appraisal process in 2012. **(R VOL. I. P. 471:1-23)** The fact the BANK's appraisal was complete in 2012 indicates the BANK perceived this to be the Order of Appraisal it was looking for in 2012. **(R VOL. II. P. 805-892)**

However, instead of submitting the appraisal, the BANK filed a motion to set aside the sale and submitted to the court that the basis of the filed Motion to Vacate the Foreclosure Sale, was the fact that Meisner was the single member of SCORE, LLC and that Meisner had filed a Certified Petition as outlined in the Appraisal Statute for the valuation of the properties. The Bank named both Meisner and Sand Dollar as Defendants in the Motion to Vacate the Judicial Sale but did not name SCORE, LLC as a defendant in the Motion to Vacate the Judicial Sale. The Court scheduled a status conference for November 6, 2012, to hear the Motion to Vacate and to hear arguments on the memorandums regarding the Motion to Vacate the Sale which were previously submitted to the Court regarding' the valuation of the properties. At the hearing, Judge Strickland apologized that due to the Presidential election there would not be a court reporter available to make a record. The parties agreed to proceed with the judicial estoppel arguments and the BANK's motion to vacate the sale with the caveat that if necessary another hearing would be held to create a record. After an update on the submitted memorandums,

the order to deny the Motion to Alter and Amend the judgment that was filed in May of 2012 was ruled on by the Court at the November 6, 2012, hearing; however, the motion only included those facts and arguments presented prior to the filed motion in May of 2012.

III. Did the Master in Equity err in lifting the automatic stay so that the BANK could enter its evidence after the notice of appeal was filed.

The only evidence of the value of the property was the agreement by all the parties, at the suggestion by the BANK, "that a fair gauge of the property's value was the amount of the mortgage." **(R. VOL. II. Pp 581-600)** The BANK elected not to submit its 2012 appraisal and *instead sought to vacate the deficiency sale*.

The BANK failed to enter the letter of opinion as to valuation of the properties of the BANK's appraiser in 2018.

The BANK also failed to enter the BANK's appraisals into evidence in 2012, 2013, 2014, 2015, 2016, or 2017 which were completed in 2012. It is unclear if the BANK did not file the appraisals due to the objections of the appraiser in 2012 as being disqualified under the statute or the pursuit of the motion to vacate the sale, either way the BANK advanced the mortgage amount valuation. **(R. VOL. I. pp. 210:5-25; 211:12-22)** In 2012 the BANK filed a motion to vacate the deficiency sale and argued a fair value of the properties is found in the amount of the mortgage. **(R.)** Sand Dollar and appellant Meisner agreed with the BANK's valuation of the properties as the amount of the mortgage and requested the court enter the mortgage amount pursuant to the appraisal statutes as the agreed upon value. **(R)** Sand Dollar and Meisner accepted the valuation.

In 2018, The BANK filed a motion to lift the automatic stay once it realized it failed to enter the letter and the appraisals into evidence that the Court could consider determining the value of the property. While the BANK categorized the submission of the appraisals and the opinion letter of Eugene Garvin to the Court as ministerial in nature, the appellant avers the failure is substantive in nature because the 2018 letter referenced the 2012 appraisals which were not entered into evidence until 2018. The only valuation of the properties before the Court is when the BANK valued the property in its motion to vacate the sale as the amount of the mortgage which Sand Dollar and Meisner accepted. **(R. VOL.I. pp. 211:12-22;271:12- VOL. II. Pp. 634 ¶2; 635:5-8;638:1-3 n. 1).** Because the Court used the appraisals from 2012 and the letter from 2018 to base its final deficiency against appellant Meisner, the submissions were substantive. The appellant and the BANK had previously agreed to the BANK's valuation in its motion to vacate the sale which the attorney for Sand Dollar and for the appellant previously accepted in writing at the trial level.

The notice of appeal was filed in February of 2018. The only evidence of the value of the properties that fits within the statutory confines of the appraisal statute is the agreed upon value of the amount of the mortgages for the two properties by the BANK and the appellant.

The appellant, Rhonda Meisner as the guarantor offered that the amount of the mortgage was a fair gauge of the value of the properties. Additionally. Ms. Meisner testified she is a broker in charge in real estate.

Mr. Garvin was objected to as not falling with the statutory guidelines in 2012 and cannot be accepted now. Additionally, his 2012 report was never entered into evidence and the appellant argues, it cannot be entered now.

IV. Did the Master in Equity err in denying the appellants motion to amend the counter claims against the BANK?

The Master in Equity erred in denying the appellant's motion to amend the counterclaims in this case.

S.C. Rules of Civ. P. Rule 15. Rule 15 specifically allows amendment to the pleadings, even after entry of judgment. The tort of abuse of process provides a legal remedy for one damaged by another's perversion of the legal processes which are not intended by the procedure. *Huggins v. Winn-Dixie Greenville, Inc.* 249 S.C. 206, 210, 153 S.E. 2d 693, 695 (1967) ("[A]n abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect -- the improper use of a regularly issued process."); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 121 at 897 (5th ed. 1984) ("[T]he gist of the tort is . . . misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish."). The purpose does not have to be illegitimate to complete the tort of abuse of process. The abuse occurs when the process is used in a manner it was not intended. See Fowler W. Harper et al., *The Law of Torts* § 4.9 (3d ed. 1996). Here, the BANK employed an appraiser that the BANK knew was disqualified per the statute as the BANK asked the court to ensure the appellant's appraiser had not worked for the appellant previously. **(R. VOL. II. p. 436:6-20)** Nevertheless, the BANK hired an appraiser that routinely worked for the BANK on the commercial side of the business. **(R.VOL. I. p. 219:8-11;17-25; 220:1-4)** The BANK argued the BANK could not find an appraiser so removed because the BANK is a regional BANK. **(R**

) Had the appellant not discovered his relationship with the BANK during a conversation, she would not have had reason to request his disqualification. It is the intentional

act of hiring someone to complete an appraisal known to be disqualified that abuses the appraisal process.

Second, the BANK knew it was allowed by law for the BANK or the mortgagor to purchase the property at the deficiency sale as well as any third party because it was written in the Order of foreclosure. **(R. VOL. II. Pp. 500-541)** Nevertheless, the BANK filed the motion to vacate the sale which required appellant Meisner as a member of SCORE to hire an attorney to represent the interests of SCORE. **(R. VOL. II. P. 644)** The BANK's actions caused appellant Meisner and SCORE to spend additional money on attorney's fees and costs. The BANK did not have a good faith basis to file the motion to vacate and did not have a good faith basis to hire an appraiser that routinely works for the BANK in violation of the appraisal statute. The BANK's actions have abused the process of the appraisal statute and abused the process of the deficiency statute and should not be allowed to pervert these protective statutes with impunity. The BANK's actions have caused appellant Meisner to spend additional time, effort, and money in the form of additional attorney's fees, parking costs, copying and motion costs. The Master in Equity should have allowed amendment to the cross claims by appellant Meisner.

Finally, this Honorable Court determined that submitting the appraisals was ministerial in nature; however, the entry of the appraisals formed the basis for the valuation of the properties as opposed to any other evidence. As such, this entry, in the opinion of the appellant was substantive because this Court ruled the appellant's motion to amend was prejudicial to the BANK because the motion was made in 2016; likewise, the motion to lift the automatic stay in 2017, the appellant avers was prejudicial to her. As such, the entry of the appraisals was substantive and prejudicial, if the 2016, motion to amend was prejudicial.

CONCLUSION

For the above reasons and references to the record. The appellant respectfully requests this Honorable Court to:

GRANT THE PETITION FOR RE-HEARING AND/OR THE PETITION EN BANC for reasons of equity.

To determine that the value of the properties should be set at the amount of the mortgage based on the preponderance of evidence and the fact the appraiser was not qualified pursuant to the appraisal statutes as argued on remand because he routinely worked for the BANK. Determine that Rhonda Meisner submitted the amount of the mortgage as the value of the properties as argued in the remand hearing. Rule the BANK did not determine that Meisner owed Sand dollar's debts based on *Dutch Fork v SEL Properties* where the South Carolina Supreme Court determined that when there are two distinct entities closely related, the Plaintiff must determine the roles and responsibilities of each party by the articles of organization and other corporate documents as it relates to the roles and responsibilities of the individual and the single member limited liability corporation. The acceptance of the 2012 appraisals by the master upon motion from the BANK was prejudicial to the appellant because he did not allow amendment of the pleadings by the appellant in 2017 because both were post- trial motions.

7/5/2021

Respectfully Submitted,

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RECEIVED
Jul 06 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph F. Strickland, Master in Equity Judge

2018-000251

SOUTH STATE BANK,

Respondent,

v.

Sand Dollar 31, LLC; Rhonda Meisner, of whom Rhonda Meisner is the

Appellant.

PETITION FOR RE-HEARING AND REHEARING EN-BANC

July 5, 2021

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Appellant

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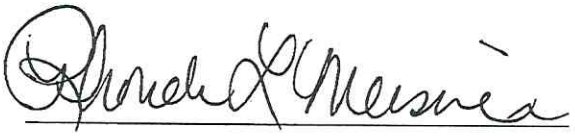
PROOF OF SERVICE PETITION FOR RE-HEARING AND REHEARING EN-BANC-The appellant certifies she has caused a copy to be served on all parties submitting a brief by emailing a copy of the Petition for re-hearing and re-hearing en banc to sean foerster at sean. foerster@rogerstownsend.com.



July 5, 2021