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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2018-001388

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001, ... Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC, Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson, and L. Cliff Redd,..... Defendants,

Of which Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd are…….. Appellants.

RETURN TO PETITION FOR REHEARING

This Court should deny the petition for rehearing filed by Appellants Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd (collectively, "the Guarantors"). The Court correctly affirmed the trial court's directed verdict on the grounds that the Guarantors are barred from challenging the deficiency judgment and that the Guarantors failed to present any evidence that they suffered prejudice as a result of the alleged violation of the bidding statute.[1] The Guarantors have not identified any point of law or fact overlooked or misapprehended by this Court. The Court should deny the petition for rehearing.

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[1] *See* S.C. Code Ann. § 15-39-720.

ARGUMENT

The Guarantors continue to seek an escape from their agreement to guarantee payment of the debt Springs North Augusta, LLC owes to the George B. Buchanan, Jr. Irrevocable Family Trust, dated the 15th day of July, 2001 (the "Trust"). After failing to defend Springs North Augusta or intervene to protect their own rights in the foreclosure action, the Guarantors attempted a collateral attack on the deficiency judgment held by the Trust as a defense to their obligation to pay. This Court properly found the Guarantors are barred by res judicata from collaterally attacking the deficiency judgment.

Having failed in their collateral attack, the Guarantors attempt a different strategy. They now concede the deficiency judgment is valid and enforceable against Springs North Augusta. Yet, they simultaneously continue to argue the deficiency judgment was somehow obtained in bad faith, at least to the extent they are obligated to pay it. The Guarantors cannot have it both ways. Their collateral attack is barred by res judicata. If the deficiency judgment is valid as they now concede, however, they are obligated to pay it pursuant to their guaranties that the Trust receives full payment of the debt.

Regardless of whether they are barred from challenging the deficiency judgment, the Guarantors still cannot identify any evidence showing the deficiency judgment would be smaller (or nonexistent) if the Trust had not allegedly violated the bidding statute. Although the Guarantors wish the Trust or a third party had bid either the full amount of the debt or the unidentified fair market value of the property at the foreclosure sale, the law did not require the Trust to do so and the Guarantors presented no evidence that any third party would have bid more than $7,160,000—the highest bid submitted at the public auction—if 2nd Avenue Holdings, LLC did not bid.

This Court properly found the Guarantors' attempted collateral attack is barred by res judicata and the record contains no evidence that the Guarantors suffered any prejudice from the conduct of the foreclosure sale. This Court did not overlook or misapprehend any facts or issues, and it should therefore deny the Guarantors' petition for rehearing.

I. The Court correctly recognized the Guarantors presented no evidence that the winning bid would have been higher but for the alleged violation of the bidding statute.

The Guarantors argue they presented evidence from which a reasonable juror could find the fair market value of the property exceeded 2nd Avenue Holdings' $7,160,000 bid. (Petition at 7–8). The Guarantors miss the point. The question is not whether the fair market value of the property exceeded the winning bid. The only question related to prejudice is whether, but for the alleged violation of the bidding statute, the winning bid would have been higher than $7,160,000. This Court answered the correct question and properly found "[e]ven assuming the Trust violated the statute, Guarantors failed to demonstrate ***the sale price would have been higher but for Second Avenue's actions*** and thus failed to show the alleged violation prejudiced them." *Stephen Wilkinson v. Redd Green Invs., LLC*, Op. No. 5880 (S.C. Ct. App. filed Dec. 15, 2021) (Howard Adv. Sh. No. 44 at 35–36) (emphasis added). The Court did not overlook or misapprehend any points related to the Guarantors' failure to present evidence of prejudice. Critically, the Court did not find any violation of the statute in any event, and there was no violation. The Court went further, to say even if a violation occurred, the failure to show prejudice was dispositive. This all remains true now.

First, the Guarantors' focus on the fair market value of the property is misplaced. The fair market value is immaterial. No rule exists—and the Guarantors fail to cite any—requiring the winning bid to exceed fair market value. *See* (Petition at 4, 7–8). Instead, the Guarantors ask this

Court to invent such a rule. (*Id.*). The Court should not do so, particularly in the absence of any supporting authority. Moreover, the Guarantors' argument is inconsistent with the arguments in their briefs, in which they admitted "it is not the Guarantors' position that the Trust had an obligation to ensure the highest possible bid ***or that the property must sell for fair market value or for the amount of the debt***" because "[s]uch a position would be unreasonable." (Reply Br. 8) (alteration in original) (second emphasis added). The plain language of the statute also undermines the Guarantors' position. They have not challenged the statute, nor could they do so at this stage as such an attack would be untimely. Nor have the Guarantors ever requested to argue against precedent.

Notwithstanding whether the fair market value of the property is material, the Court properly found the Guarantors presented no evidence of the fair market value at the time of the foreclosure sale. Op. No. 5880 (Howard Adv. Sh. No. 44 at 35). Although Mr. Green testified the property was worth $30,000,000 in 2009, his self-serving testimony that he did not think he would have to perform under his guaranty agreement because he thought the property was worth some unidentified value greater than the total debt is not evidence a reasonable juror could rely upon to determine the fair market value of the property—much less that the winning bid would have been higher than $7,160,000 but for the alleged bidding statute violation. (*Id.*); (R. 178) (testifying "at one time [the property] was worth over $30 million . . . when we initially owned it"). Moreover, the cases the Guarantors rely upon primarily address the admissibility of a property owner's testimony as to the diminution in value caused by damages to his property. *See Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 594–95, 493 S.E.2d 875, 880 (Ct. App. 1997); *Waites v. S.C. Windstorm & Hail Underwriting Ass'n*, 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983); *see also Hill v. City of Hanahan*, 281 S.C. 527, 531–32, 316 S.E.2d 681, 684 (Ct. App. 1984)

(addressing the admissibility of testimony as to the value of land in a takings case). The admissibility of Mr. Green's testimony is not at issue.

Second, the flaw in the Guarantors' argument about the effect of 2nd Avenue Holdings' bid is self-evident. No entity or individual was willing to bid more than $7,160,000 for the property. That fact is proven by the public auction resulting in a sale to the highest bidder for $7,160,000. (R. 265). Although the Guarantors claim they were "absolutely deprived of the Trust's high bid," they concede that they cannot prove the Trust's purported "high bid" would have been higher than $7,160,000. (Petition at 6) ("[W]e can never know what the Trust's high bid would have been."). Their assumption that the Trust would have bid fair market value if not for its alleged violation of the statute, *see* (App. Br. 19–20), is speculation unsupported by any evidence. The Guarantors presented no evidence and cite no evidence as to the critical question whether the winning bid would have been higher but for the alleged bidding statute violation. This Court properly found the Guarantors failed to show they were prejudiced by the conduct of the foreclosure sale. Op. No. 5880 (Howard Adv. Sh. No. 44 at 35–36).

Third, the Guarantors contracted away their appraisal rights and agreed to have the winning bid apply, regardless of whether the bid exceeded fair market value. (R. 278, 281). The guaranty agreements acknowledged that South Carolina law provides,

> that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgage property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction.

(*Id.*); *see also* S.C. Code Ann. §§ 29-3-680 through -740 (providing a deficiency judgment may be reduced or extinguished by an appraisal). However, the guaranty agreements also provided that each Guarantor "hereby waives and relinquishes the statutory appraisal rights which means the

high bid at the judicial foreclosure sale will be applied to the debt regardless of any appraised value of the mortgaged property." (R. 278, 281). The Guarantors now ask the Court to rewrite the guaranties and require the foreclosure auction to result in a sale for fair market value or higher. The Court cannot and should not rewrite a contract to require the opposite of the parties' agreement.

Finally, the Guarantors also argue that, because the bidding statute does not speak of prejudice, they are not required to show prejudice. (Petition at 5). However, the bidding statute also does not provide a remedy or suggest a violation may be asserted as a defense to a guarantor's contractual obligation to pay a debt. *See* S.C. Code Ann. § 15-39-720. In fact, the statute does not address guaranty agreements or the rights of guarantors in any manner. *Id.* It is an inappropriate logical leap to assume the absence of the word "prejudice" from the bidding statute means the statute—which only explains the required process for the conduct of foreclosure sales—somehow provides that a guarantor is relieved of his separate, contractual obligation to pay the debt if the mortgagee breaches the requirement that it bid only once at a foreclosure sale. Moreover, the statute says nothing about the amount a mortgagee is required to bid, much less that a mortgagee is required to bid at least fair market value, as the Guarantors now suggest. *Id.*

This Court did not overlook or misapprehend any issues in holding the Guarantors failed to show they were prejudiced by the alleged bidding statute violation. The Court should deny the Guarantors' petition for rehearing.

II. The Court properly found the Guarantors' collateral attack on the deficiency judgment is barred by res judicata.

The Guarantors raise the same arguments as to the elements of res judicata that they raised in their reply brief. *See* (Petition at 1–4); *see also* (Reply Br. 20–23). The Court therefore already considered and rejected the arguments, and it did not overlook or misapprehend any issues.

In an effort to avoid the Court's res judicata ruling and distinguish the subject matter of the foreclosure action from the subject matter of this action, the Guarantors now concede a valid, enforceable deficiency judgment exists against Springs North Augusta but contend they should be relieved of their agreement to pay the judgment. (Petition at 1) (conceding the deficiency judgment "stands and may be pursued by the Trust" and is "enforceable against [Springs North Augusta]"). The Guarantors' concession is fatal to their arguments. The Guarantors agreed to guaranty the payment of any debt owed to the Trust by Springs North Augusta. (R. 276–81). Thus, if a valid deficiency judgment exists against Springs North Augusta, then Springs North Augusta owes a debt to the Trust, and the Guarantors are required to pay the debt. (*Id.*). The Guarantors cannot concede the validity of the deficiency judgment as to Springs North Augusta—thus conceding the Trust did not breach the implied covenant of good faith and fair dealing in the loan agreement with Springs North Augusta—yet challenge whether it was obtained in good faith when the Trust demands they satisfy the judgment. Either they are challenging the existence and validity of the deficiency judgment, and their defense is therefore barred by res judicata, or they concede the validity of the judgment and are therebefore obligated under the guaranty agreements to pay the judgment. The Court properly found the subject matter of both actions is the same—Springs North Augusta's debt to the Trust, which the Guarantors and Springs North Augusta are each independently obligated to pay. Op. No. 5880 (Howard Adv. Sh. No. 44 at 34).

Contrary to the Guarantors' arguments, they are privies with Springs North Augusta under the facts of this case for res judicata purposes. The cases that the Guarantors rely upon do not compel a different conclusion. Those cases make clear that whether parties are privies for purposes of res judicata depends on the facts of each case. *H.G. Hall Constr. Co. v. J.E.P. Enters.*, 283 S.C. 196, 205, 321 S.E.2d 267, 272 (Ct. App. 1984) ("***On the facts of this case*** common ownership is

not enough to establish privity for the purposes of res judicata." (emphasis added)); *E.A. Prince & Son, Inc. v. Selective Ins. Co. of Se.*, 818 F. Supp. 910, 915 (D.S.C. 1993) ("***Under the facts before the court***, the theory of *res judicata* does not apply and is not a bar to this action." (emphasis added)). The cases also provide "[t]he term 'privy' when applied to a judgment or decree, ***means one so identified in interest with another that he represents the same legal right***." *H.G. Hall Constr. Co.*, 283 S.C. at 204, 321 S.E.2d at 271 (emphasis added). The Guarantors and Springs North Augusta shared an identical interest and legal right in the foreclosure action. Each is independently obligated to pay any deficiency judgment. Therefore, the Guarantors and Springs North Augusta had the same interest in obtaining the smallest deficiency judgment possible. Accordingly, under the facts of this case, the Guarantors and Springs North Augusta are "so identified in interest with [one] another that [they] represent[] the same legal right" and are therefore privies for purposes of res judicata. *See H.G. Hall Constr. Co.*, 283 S.C. at 204, 321 S.E.2d at 271.

The Guarantors cited no authority in their reply brief supporting their argument that a default judgment is not an adjudication on the merits for purposes of res judicata. *See* (Reply Br. 23). Consequently, the Guarantors abandoned the argument and cannot resurrect it in their petition for rehearing. *S.C. Dep't of Soc. Servs. v. Mother ex rel. Minor Child*, 375 S.C. 276, 283, 651 S.E.2d 622, 626 (Ct. App. 2007) ("[W]e note this issue is abandoned because Mother makes a conclusory argument without citation of any authority to support her claim."). Moreover, the Guarantors' attempt to avoid this result is barred by laches and waiver. They controlled Springs North Augusta. (R. 177–78). They cannot allow Springs North Augusta to go into default, watch idly as the foreclosure action proceeds to a sale and deficiency judgment while taking no action to protect their rights, then assert in this action that they are not bound by the outcome of the

foreclosure action because Springs North Augusta did not contest the action. *See Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994) ("Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay suffers his adversary to incur expenses or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce these rights."); *Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 114, 276 S.E.2d 296, 297 (1981) ("Waiver is defined as an intentional relinquishment of a known right."). Such an outcome is inequitable and would reward the Guarantors for failing to defend their own interests. The Court should reject the Guarantors' arguments and deny the Guarantors' petition for rehearing.

III. Additional sustaining grounds support a denial of the Guarantors' petition for rehearing.

The Court should deny the Guarantors' petition for rehearing for several additional reasons. First, the Trust did not violate the bidding statute. The winning bid at the upset sale was submitted by 2nd Avenue Holdings. (R. 162, 265). There is no legal relationship between 2nd Avenue Holdings and the Trust and, therefore, 2nd Avenue Holdings is not a representative of the Trust as a matter of law. *See* (R. 158–59, 169–71). Accordingly, the Trust did not violate the bidding statute.

Second, the implied covenant of good faith and fair dealing cannot require the Trust to comply with the requirements of the bidding statute before enforcing a deficiency judgment against the Guarantors when the plain language of the guaranty agreements does not require the Trust to pursue foreclosure or a deficiency judgment at all. *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (explaining there is no breach of the implied covenant "where a party to a contract has done what provisions of the contract expressly gave him the right to do."). Moreover, the master-in-equity approved the sale and entered a judgment in the foreclosure action.

It cannot be an act of bad faith to do something with the permission and approval of a court. The Guarantors also now concede the deficiency judgment is valid and enforceable against Springs North Augusta. Therefore, the deficiency judgment was necessarily procured in good faith.

Third, the Guarantors received the benefit for which they bargained. The guaranty agreements provided that the Guarantors "absolutely and unconditionally" guarantee payment of the loan "[a]s an inducement to [the Trust] to extend credit to and to otherwise deal with **SPRINGS NORTH AUGUSTA, LLC** . . . and in consideration thereof." (R. 276, 279). The Trust performed its obligations and made the loan to Springs North Augusta. *See* (R. 266–72). The Guarantors therefore received the benefit for which they bargained, and they cannot escape their own obligations to perform under the agreements. *See, e.g.*, *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) ("This court's duty is to enforce the contract made by the parties regardless of the parties' failure to carefully guard their rights."). This Court should deny the Guarantors' petition for rehearing.

Finally, the Guarantors contracted away any rights to challenge the creation of Springs North Augusta's debts:

> It is understood that any such notes, drafts, debts, obligations and liabilities may be accepted or created by or with [the Trust] at any time and from time to time without notice to the [Guarantors], and the [Guarantors] hereby expressly waive[] presentment, demand, protest, and notice of dishonor of any such notes, drafts, debts, obligations and liabilities or other evidences of any such indebtedness, obligation or liability.

(R. 276, 279). By the plain language of the guaranty agreements, the Guarantors must pay the deficiency judgment—a debt of Springs North Augusta—regardless of how it was created and cannot avoid their obligations on the ground that the deficiency judgment resulted from an alleged violation of the bidding statute. The Court should therefore deny the Guarantors' petition for

rehearing. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

CONCLUSION

The Court did not overlook or misapprehend any facts or issues. It properly held the Guarantors' collateral attack on the deficiency judgment is barred by res judicata and, regardless, the record contains no evidence that the Guarantors suffered any prejudice. Accordingly, the Court should deny the petition for rehearing.

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Columbia, South Carolina

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Of which Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd are..... Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001, do hereby certify that I have served all counsel and/or parties in this action with a copy of the pleading(s) hereinbelow by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Pleading(s): Return to Petition for Rehearing

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Attachments: Return to Petition for Rehearing.pdf

Counsel,

Attached for service upon you in the above matter please find Respondent's Return to Petition for Rehearing**.** Service is made via email pursuant to the Supreme Court Order 2021-08-25-02.

Thank you.

NELSON MULLINS

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