PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Opinion No. 5880 (S.C. Ct. App. filed December 15, 2021)

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 .....Petitioner.

PETITIONERS' REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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I. *Res Judicata* presents a novel issue of South Carolina law.

In its Return, the Trust contends that *res judicata* operates as a bar because (1) the same subject matter is involved in the present action as in the prior foreclosure action, (2) the same parties are involved, and (3) the matter was actually adjudicated in the prior foreclosure action. This issue is novel under South Carolina law in the context of a foreclosure action and a subsequent action against a guarantor. The failure of any one of the Trust's arguments is fatal to the Trust. As discussed below, each of the three arguments fails.

A. Different subject matter is involved in the present action.

The Trust contends that the same subject matter is involved, namely the establishment of the debt against Springs North Augusta. However, the issue in the present case is not the debt against Springs North Augusta but instead is whether that debt may be enforced against the Guarantors pursuant to the terms of the Guaranty. The Guaranty agreement simply was not at issue in the foreclosure action. Nor did the court in the foreclosure action consider or rule upon whether the Deficiency/Bidding Statute was violated. This issue never was raised because the sole defendant, Springs North Augusta, was in default and therefore did not contest the foreclosure sale.

The Trust further contends that the Guarantors' concession (that the deficiency judgment is valid as against Springs North Augusta) is fatal to their position because the Guaranty agreements "absolutely and unconditionally" guarantee payment. However, this argument begs the question of what the

Guaranty requires and whether the violation of the Deficiency/Bidding Statute operates as a defense to payment under the Guaranty. The Trust argues that "[n]othing in the guaranty agreements allows the Guarantors to argue an alleged statutory violation during the foreclosure bidding process as a defense to their guaranty obligations." (Return at 11). However, this argument ignores the express language of the Guaranty, indicating (in bold, all caps) that "**THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT**," (R. p. 278, 281), which of course is a reference to the high bid in accordance with the Deficiency/Bidding Statute. Accordingly, the Guaranty expressly, or at the very least impliedly, required the Trust not to violate the statute. Alternatively, the doctrines of waiver, unlawful act, and/or unclean hands bar the Trust from enforcing the ill-gotten deficiency judgment by way of a separate action against the guarantors.[1]

The Trust also cites to language in the Guaranty that it contends waives any right to challenge the creation of the debt. However, the cited language merely indicates that the debt may be established without notice to the Guarantors without

[1] *See, e.g., Wachovia Bank, NA v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010), ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant."), *aff'd as modified*, 404 S.C. 421, 746 S.E.2d 35 (2013); *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928–29 (Ct. App. 1994) ("Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver."); *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276, 437 S.E.2d 168, 170 (Ct. App. 1993) ("It is a well-founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act.").

in any way indicating that the Guarantors waive the Trust's violation of South Carolina law.

The Trust also cites to language in the Guaranty that it contends waives any right to argue that the sale price was sufficient. However, Guarantors argument is not one of sufficiency of the sale price but instead is one of the implications of violating the Deficiency/Bidding Statute. Regardless, the cited language refers to the waiver of appraisal rights as opposed to the waiver of legal defenses.

The Trust also contends that the Guarantors have no rights under the Guaranty other than for the loan to be issued, citing to *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"); *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (explaining the implied covenant of good faith and fair dealing prohibits a party from doing anything "to impair the other's rights to receive benefits under the contract"). These cases support the Guarantors, not the Trust. The Trust did not do what it had a right to do when it violated the Deficiency/Bidding Statute, as there is no right to violate South Carolina law. In addition, the Trust impaired the Guarantors' rights to receive benefits under the Guaranty, namely the benefit of the entry of a high bid in accordance with South Carolina law. The Guarantors would not have agreed to waive appraisal rights without the fair consideration in return that the Trust would

enter a high bid in accordance with the Deficiency/Bidding Statute as required by both South Carolina law and the language in the Guaranty itself.

B. <u>The identity of the parties is not the same.</u>

The Guarantors were not named in the prior foreclosure action, and so the identity of the parties was not the same. The Trust therefore contends that the Guarantors are "privies" to the borrower, Springs North Augusta, because of their identical relation to the subject matter of the litigation, namely an interest in obtaining a smaller deficiency judgment. The Trust does not cite to any case holding that a guarantor and a borrower are privies on the basis that they both share an interest in obtaining a smaller deficiency judgment. Instead, the Trust cites to *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012), which addressed real estate title issues and determined that a later owner of property was barred from relitigating title issues that an earlier owner in the chain of title previously litigated. A bar against subsequent owners in the chain of title from relitigating title issues by their predecessors in title has no relation or bearing to the present circumstance, and so this case is inapposite.

C. <u>The foreclosure action did not adjudicate the enforceability of the Guaranty.</u>

Finally, the Trust contends that the validity and amount of the deficiency judgment was adjudicated in the foreclosure action. As noted above, the foreclosure action merely entered a default deficiency judgment that was enforceable against Springs North Augusta; but it did not adjudicate whether the Deficiency/Bidding Statute was violated, nor did it adjudicate whether such violation could serve as a

defense to enforcement of the Guaranties. Accordingly, the issues in the present action were not adjudicated in the prior action.

D. <u>The *res judicata* effect of a ruling against a borrower in relation to a subsequent action against a guarantor is a novel issue of South Carolina law.</u>

Moreover, the Trust does not cite to any authority holding that the entry of a deficiency judgment against a borrower in a foreclosure action is *res judicata* with respect to a subsequent action against a guarantor. This novel issue of law should be addressed by this Court.

II. Any requirement to show prejudice was met.

In its Return, the Trust contends that the winning bid of $7,160,000 by 2d Avenue Holdings proves that no party was willing to bid higher and therefore proves that there was no prejudice. However, this argument fails to recognize that the prejudice is inherent because the Trust itself never presented its highest and best bid as required by the Deficiency/Bidding Statute. Instead, its bid at the first sale was *less* than its highest bid, as demonstrated by the fact that its representative, 2d Avenue Holdings, bid a higher amount at the second sale. If a mortgagee could test the market for a highest bid by bidding at the second sale, there would be no need for two sales but only one. The obvious purpose of having two sales is to force the mortgagee to bid "blind" at the first sale and therefore be incentivized to make the highest bid possible—one that could be higher than it would make if other bidders were present.

It is unknown what amount the Trust would have bid at the first sale if it had made its true high bid. It follows that the Guarantors were prejudiced as a

matter of law. The Trust cites to a concurring opinion in *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Grp., Inc.*, 302 S.C. 223, 233 & n.1, 394 S.E.2d 849, 855 & n.1 (Ct. App. 1990), for the proposition that it must be assumed no one was interested in purchasing the property at a higher price than the lender when a third party did not buy the property. But this case has absolutely no bearing on the present issue because it involved a foreclosure sale where the lender made a single bid and where *there were no upset bidders*. Accordingly, it did not involve a violation of the Deficiency/Bidding Statute.

The Trust further contends, incorrectly, that "[t]he Guarantors . . . ask the courts to extinguish their debt on the hypothetical and illogical ground that a mortgagee would necessarily bid fair market value if it submits only one bid." This contention unfairly mischaracterizes the Guarantors' position. First, the Guarantors do not seek to extinguish the debt but instead seek to assert a defense to the enforcement of the Guaranty. Second, the Guarantors never contended that a mortgagee is required to bid fair market value or that it necessarily would do so if it were to comply with the statute and submit only one bid. Instead, the Guarantors contend that the design and purpose of the statute is to incentivize a mortgagee to make its highest and best bid by only allowing it to bid one time and to do so "blind" as to the presence of other bidders, which logically would have the result of maximizing such a bid and producing a higher likelihood of the bid approaching fair market value. The Guarantors were prejudiced because they were deprived of such a bid.

The Trust further contends that the Guarantors offered no evidence of other bidders at the second sale. But the Trust itself admitted there were other bidders in its opening statement at trial: "So Mr. Buchanan, on behalf of . . . Second Avenue Holdings . . . went to the second sale **and there were other bidders there and multiple bids were put in**. In the end, Second Avenue Holdings, LLC, won the bid and held the property." (R. p. 145 (emphasis added)).[2] Furthermore, if there were no other bidders, then there would have been no need for 2d Avenue Holdings to bid higher than the Trust and then assign its higher bid back to the Trust. (R. pp. 193-94, 285-86).

III. The additional sustaining grounds asserted by the Trust lack merit.

A. The plain language of the Guaranty supports the Guarantors argument.

The Trust contends that the plain language of the Guaranty contradicts their arguments. However, the plain language indicates that the "HIGH BID" under the Bidding/Deficiency Statute would be applied to the debt. (R. p. 278, 281). Accordingly, there is no contradiction. Moreover, it only makes sense to read the Guaranties as requiring the Trust to follow South Carolina law in a foreclosure proceeding, not to violate it.

The Trust further contends that a violation of the Deficiency/Bidding Statue cannot serve as a defense to the Guaranty because the Guaranty was an "absolute guaranty of payment" as opposed to a guaranty of collection. This distinction has no

[2] A party is bound by the admissions of counsel at opening statement. 88 C.J.S. Trial § 267.

relevance here because an absolute guaranty of payment simply means that an action could have been maintained against the Guarantors immediately upon default of the borrower. *See Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Grp., Inc.*, 300 S.C. 277, 281, 387 S.E.2d 672, 674 (1989). But in no way does it mean that the Trust had the right to violate the Deficiency/Bidding Statute if it chose to pursue an action against the borrower first. Indeed, the *Peoples* case (relied upon by the Trust) recognized that "[t]he guarantors [under an absolute guaranty of payment] are entitled to have the proceeds of foreclosure applied to reduce the debt owed by the guarantor. *See id.*." *Id.* Such an entitlement necessarily includes an entitlement to the mortgagee complying with the Deficiency/Bidding Statute that governs foreclosures and deficiencies. Simply put, a requirement that a lender comply with the Deficiency/Bidding Statute during the foreclosure process is consistent with the enforcement of an absolute guaranty of payment and necessarily a requisite of the lender's obligations under the Guaranty.

The Trust further contends that the master-in-equity approved the sale and entered a judgment in the foreclosure sale, but as noted above, the issue of whether the Trust complied with the Deficiency/Bidding Statute never was raised or ruled upon during the foreclosure action. The master-in-equity's entry of a deficiency judgment following a foreclosure sale when the borrower was in default was nothing more than a ministerial action and cannot be viewed as a ruling on whether the Trust complied with the Deficiency/Bidding Statute.

The Trust further contends that the Guarantors already received the benefit of the Guaranty agreements and that the Trust fully performed when it funded the loan. However, this argument fails to appreciate that the Guarantors did not receive the benefit of the Trust's high bid at the foreclosure sale as expressly provided within the Guaranty and as further provided by the Deficiency/Bidding Statue; nor does it appreciate that the Trust's performance under the Guaranty agreements not only included funding the loan but also included complying with the Deficiency/Bidding Statute.

The Trust further contends that Guarantors waived the right to argue the sale price was insufficient because they waived appraisal rights. However, the Guarantors are not arguing about the sufficiency of the price. Instead, they are arguing that the Trust violated the Deficiency/Bidding Statute and that such a violation may serve as a defense to the enforcement of the Guaranty.

The Trust further contends that the Guarantors waived the right to challenge the creation of the debt. Under this reasoning, the Guarantors could not challenge a fraudulently created note. Regardless, it is not the creation of the debt that is at issue; it is whether a violation of the Deficiency/Bidding Statute may serve as a defense to the enforcement of the Guaranty.

B. The Guarantors did not waive their defense by failing to defend the foreclosure action.

The Trust contends that the Guarantors waived a defense under the Deficiency/Bidding Statute by failing to defend the foreclosure action or challenge the foreclosure sale before the deficiency judgment was entered. But they were not

named in the foreclosure action, and the foreclosure sale occurred after the borrower was in default. The Trust cites to no legal precedent requiring a guarantor to appear in a foreclosure action and/or challenge a lender's violation of the Deficiency/Bidding Statute within the foreclosure action when the guarantor was not named in the action. These issues are nothing more than restatements of the *res judicata* argument, which is addressed above.

C. The Trust violated the Deficiency/Bidding Statute.

The Trust incorrectly contends that it did not violate the Deficiency/Bidding Statute, which ignores the trial court's assumption for purposes of granting a directed verdict that there was a violation: "If we're looking at the evidence in the light most favorable to the Defendants, there was a violation of Section 15-39-720, upset bid within thirty days on foreclosure or execution sale." (R. p. 225). Although the judge did state that he did not think the Trust violated the statute, he was clear that "there is more than one inference that can be drawn from parts of the testimony" but that "following the standard of directed verdict," he was "drawing that inference . . . in the light most favorable to the Defendant." (R. pp. 225-26). When asked for clarification for the record concerning the ruling, the judge clarified: "I assume there was a violation of the statute for purposes of my ruling." (R. p. 226) (emphasis added).

The Trust also argues that 2nd Avenue Holdings was not a representative of the Trust. This argument is irrelevant because the trial court's ruling was based upon the assumption that it was a representative and that there was a violation of the statute. To the extent this Court were to review the sufficiency of evidence in

the record for a jury to find that 2nd Avenue Holdings was a representative of the Trust, there is ample evidence supporting such a factual conclusion or inference, including the following:

- Mr. Buchanan was the sole owner of 2nd Avenue Holdings. (Tr. p. 111) (R. p. 204). Mr. Buchanan, acting on behalf of his wholly owned 2nd Avenue Holdings, "went to the second sale and there were other bidders there and multiple bids were put in" and "[i]n the end, Second Avenue Holdings, LLC, won the bid and held the property." (*Id*. p. 52) (R. p. 145). *Given that this was a single member LLC solely owned and controlled by Mr. Buchanan, 2nd Avenue Holdings should not be viewed as having interests distinct from Mr. Buchanan's interests. Thus, to the extent he was operating as a representative of the Trust, so was 2nd Avenue Holdings.*

- Mr. Buchanan falsely testified that 2nd Avenue Holdings was created three or four years prior to the foreclosure sale, when the Articles of Organization revealed that they were signed on September 4, 2012, and filed on September 6, 2012,[3] only a few days following the first sale. (Tr. p. 97 & Green Ex. 1) (R. pp. 190, 283-84). *A reasonable inference from the creation of the entity immediately following the first sale indicates that it was created to be used as an instrumentality in carrying out the unlawful violation of the Deficiency/Bidding statute. His false testimony impeaches any testimony he may have given contrary to the Guarantors' position.*

- Both the Trustee (Stephen Wilkinson) and Mr. Buchanan testified concerning Mr. Buchanan's keen interest and active role as a participant and advisor with respect to the Trust. Mr. Wilkinson testified that all of the assets held by the Trust have "all been put in there by Mr. Buchanan" for the benefit of "Mr. Buchanan's children." (*Id*. pp. 65-66) (R. pp. 158-59). He further explained that as Trustee he makes "distributions for the health, education and welfare" of the children and that the establishment of the Trust allows Mr. Buchanan to avoid estate taxes. (*Id*. pp. 65, 74) (R. pp. 158, 167). *This testimony shows that Mr. Buchanan often acted on behalf of the Trust, playing an active role as a participant and advisor with respect to the business of the Trust. This is evidence that he acted at the upset sale as a representative.*

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[3] "Unless a delayed effective date is specified, the existence of a limited liability company begins when the articles of organization are filed." S.C. Code Ann. § 33-44-202(b).

- Additionally, Mr. Buchanan testified that he set up the Trust and funded it out of his own assets, (Tr. pp. 93-94) (R. pp. 186-87); that he holds the title of "financial advisor" in the current structure of the Trust, (*Id*. p. 111) (R. p. 204); and that he routinely identifies properties to be put into the trust, (*id.* p. 110) (R. p. 203). He further conceded that he was the one who identified the loan opportunity at issue in this action and met with the Appellants on behalf of the Trust, without the Trustee, to initiate the transaction. (*Id*. p. 110) (R. p. 203). The Trustee also obtained Mr. Buchanan's consent before proceeding with the foreclosure action. (*Id*. p. 95) (R. p. 188). *This testimony shows that Mr. Buchanan often acted on behalf of the Trust, playing an active role as a participant and advisor with respect to the business of the Trust.*

- The Trustee, Mr. Wilkinson, agreed that Mr. Buchanan gives financial advice as needed, (*id*. p. 76) (R. p. 169), and that Mr. Buchanan makes recommendations about either buying property or selling property and brings most of the Trust's investments to the table. (*Id*. p. 78) (R. p. 171). Mr. Wilkinson agreed that he listens to Mr. Buchanan's advice and has never turned down one of his recommendations. (*Id*. p. 79) (R. p. 172). He testified that the genesis of the loan at issue was when "Mr. Buchanan was contacted by someone . . . [who] told him there was an opportunity" and that "if <u>he</u> wanted to loan some money, you know, there was an opportunity to make some money and we had done this on -- or they had done this on a previous property in Wyoming and it worked out well." (*Id*. pp. 66-67 (emphasis added)) (R. pp. 159-60). *This testimony shows that Mr. Buchanan often acted on behalf of the Trust, playing an active role as a participant and advisor with respect to the business of the Trust. And the Trust's own Trustee referred to Mr. Buchanan <u>himself</u> loaning money that was being loaned by the Trust.*

- In the opening statement, the Trust's counsel noted that the Trust bid $6.6 Million at the first sale but that afterwards Mr. Buchanan "was concerned that someone else might come in and take this property and leave the trust in a bad position, losing some money." (Tr. p. 52) (R. p. 145). *Mr. Buchanan's concern for the Trust losing money indicates that he was operating on its behalf in connection with the bidding.*

- Mr. Buchanan "decided that it would be better for one of his companies to own it rather than the -- rather than somebody other than the trust." (*Id*.) (R. p. 145). *This statement implicitly acknowledges that the interests of Mr. Buchanan and 2nd Avenue Holdings effectively were the same as the Trust and that they were operating for the benefit of the Trust in the bidding; and it further acknowledges that 2nd Avenue Holdings did not fall into the category of "somebody other than the trust" (i.e., it was a representative of the Trust).*

- 2nd Avenue Holdings assigned the bid to the Trust because "Mr. Buchanan after consulting with some others and the trustee decided that it would be better from a tax perspective and from his children's perspective for the trust to hold onto that property rather than Second Avenue Holdings, LLC." (*Id*. p. 53) (R. p. 146). *Mr. Buchanan's concern for taxes and for his children's interests demonstrates that he was acting on behalf of the Trust, which was established to avoid estate taxes and to benefit his children. Mr. Buchanan need not be acting for his own personal benefit in order to be a representative of the Trust.*

- 2nd Avenue Holdings deposited $500,000 toward its bid and, on October 24, 2012, assigned its bid to the Trust, with the deposit to be returned less the master-in-equity's commission and other court costs. (*Id*. p. 100 & Green Ex. 2) (R. pp. 193, 285). There was no consideration for the assignment other than a reimbursement of costs. (*Id*. p. 101) (R. p. 194). *An arm's length transaction necessarily would require substantial consideration for such a transaction, and the lack of consideration indicates that Mr. Buchanan was operating on behalf of the Trust.*

- The property was deeded from the master-in-equity to the Trust following 2nd Avenue Holdings' assignment of bid back to the Trust, and the Trust claimed an exemption from the deed recording fee on the basis that the mortgagee obtained the property pursuant to foreclosure proceedings. (Tr. pp. 71-72 & Pl. Ex. 3) (R. pp. 164-65, 252-62). *The fact that 2nd Avenue Holdings assigned its bid to the Trust is irrefutable evidence that it acted on behalf of the Trust. Further, the Trust could only claim the exemption if 2nd Avenue Holdings were deemed to be acting on its behalf.*

- An order in the foreclosure proceeding amending the interest amount of the Deficiency Judgment to 15% noted that 2nd Avenue Holdings "paid interest on its bid at the rate of $3,587.05 per day through the compliance date." (Tr. p. 72 & Pl. Ex. 4) (R. pp. 165, 263-64). *2nd Avenue Holdings paid interest on a bid that it ultimately assigned to the Trust, and this payment of interest benefitted only the Trust, which indicates that 2nd Avenue Holdings was acting on behalf of the Trust. In other words, 2nd Avenue Holdings spent money for the sole benefit of the Trust, necessarily showing that it was acting as a representative of the Trust.*

Under the standard for a directed verdict, the question is whether there was *any* evidence and/or reasonable inference that a jury might reasonably construe as establishing that 2nd Avenue Holdings acted as a representative for the Trust at

the upset sale. The evidence recited above establishes that there was ample evidence for a jury to conclude or infer that 2nd Avenue Holdings acted on behalf of the Trust at the upset sale. Indeed, given that 2d Avenue Holdings assigned its bid to the Trust without consideration, the court could have so concluded as a matter of law. Accordingly, this Court must reverse the ruling of the trial court granting the directed verdict and remand for a new trial or entry of judgment for Appellants.

CONCLUSION

This case warrants review because the Court of Appeals' decision incorrectly disposes of a novel issue of South Carolina law. Petitioners ask the Court to grant this petition for a writ of certiorari and clarify for South Carolina lenders and guarantors that a mortgagee's violation of Section § 15-39-720 in a prior foreclosure action against the borrower may serve as a defense in a subsequent action against a guarantor.

Respectfully submitted,

s/William M. Wilson III

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