IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID E. FLEISHER	APPELLANT
VERSUS	NO. 2010-CA-01594
SOUTHERN AGCREDIT, FLCA	APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
STONE COUNTY, MISSISSIPPI
CIVIL ACTION NO. 2009-0027

REPLY BRIEF IN SUPPORT OF CROSS APPEAL OF APPELLEE

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REPLY ARGUMENT

THE ONLY QUESTION IN NEED OF RESOLUTION ON THIS CROSS APPEAL IS WHETHER THE TRIAL COURT SHOULD HAVE ENTERED A JUDGMENT IN FAVOR OF SOUTHERN AG FOR FLEISHER'S BREACH OF HIS MISSISSIPPI INVESTORS VIII GUARANTY

Regardless of Fleisher's attempt in his Response to get the Court to engage in a *de novo* review of the Mississippi Investors VIII guaranty, Southern Ag has not appealed the trial court's ruling that the guaranty was unambiguous and enforceable against Fleisher. Fleisher did not appeal this ruling by the trial court either. Therefore, the singular question in need of resolution by this Court of Southern Ag's Cross Appeal is whether the trial court should have, as a matter of law, awarded Southern Ag a judgment against Fleisher for his failure to pay upon demand after default as he promised to do in the guaranty.

Southern Ag submits that the trial court should have awarded it a judgment against Fleisher in at least the minimum Guaranteed Indebtedness admitted by Fleisher and set forth in the guaranty.

Fleisher promised that

> in the event of default by Borrower in payment of the entire or any part of the Guaranteed Indebtedness when the Guaranteed Indebtedness becomes due, either by its terms or as a result of the exercise of any power to accelerate, Guarantor will, on demand and without further notice of any kind, pay Guarantor's Specified Percentage of the amount due to Creditor, and it will not be necessary for Creditor, in order to enforce such payment by Guarantor, first to institute suit or exhaust its remedies against Borrower or others liable on such indebtedness, or to enforce its rights against any security that shall ever have been given to secure the Guaranteed Indebtedness.

(SA-R.E.10). Concerning the applicable percentage or guaranteed indebtedness, Southern Ag called to the trial court's attention at the summary judgment stage that Fleisher testified in his

deposition:

> Q. . . . But can you tell me in your words if you deny that you're liable for the amounts that are set forth in the guaranties? Can you tell me in your own words why you think you're not liable for them?
> A. Well, I would want to explore the transfer of the membership interest that had the underlying collateral with it. . . . If that had any impact on these personal guaranties when the membership interest was transferred . . . the impact that that would or wouldn't have on these guaranties.
> Q. . . . I think what you're telling me is, yes, you dispute that you're liable for the amounts in those guaranties.
> A. . . . my answer would be, yes, based on that sale, not predicated on the fact that I don't think Land Bank South is owed the money . . . I don't dispute any money is owed to Land Bank South clearly. And I'm not—I signed the personal guaranty, and it was in the deal.
>
> (R. at 469).
>
> Q.—with the exception to the amount. And on this one, would you agree with me that you at least initially guaranteed a bottom line amount of $3,150,000? A. Yes. (emphasis added)

(R. at 472). Fleisher's testimony was exactly the same for the amounts of the Guaranteed Indebtedness in the three other guaranties which mirrored the language in the Mississippi Investors VIII guaranty. Fleisher agreed and did not dispute that he "understood at the time [he] signed [the guaranty, he was] guaranteeing at least up front, not any future expenses or anything else, but at least a minimum [amount]." (R. at 472). Based upon the foregoing, the trial court ruled that Fleisher was liable under the Mississippi Investors VIII guaranty and there was no dispute by Fleisher as to the minimum, bottom line amount he guaranteed and that amount was $3,150,000.00.

Thus, regardless of what Fleisher now attempts to argue in Response to the Cross Appeal, he admitted that he was at least liable under the guaranty for the $3,150,000.00 and should not be allowed to deny it when convenient in Response to this Cross Appeal. Furthermore, because Southern Ag could not foreclose on the collateral for the Mississippi Investors VIII loan, Fleisher

could not make the same *Hartman* arguments regarding fair market values. Thus, Fleisher was left to only ask the trial court to refrain from granting Southern Ag's motion for summary judgment out of "equity" (SA-R.E.14, pg. 27), because Southern Ag had the potential to eventually foreclose on the collateral. Fleisher renewed his request at trial for the court to "put off a decision" based upon the potential to foreclose. (SA-R.E.16, pg. 353-354).

Southern Ag respectfully submits that the trial court abused its discretion in "putting off" a judgment based upon the potential for Southern Ag to foreclose on collateral or because of potential adequate protection payments from Mississippi Investors VIII through the bankruptcy court. The trial court's reluctance to award a judgment for the unambiguous guaranteed amount, which was agreed to by Fleisher, after default and upon demand, impermissibly added a condition to the guaranty agreement which directly contradicted the express language in the guaranty that it would not be released, diminished, impaired, reduced or affected by the bankruptcy of Mississippi Investors VIII or the inability or refusal of Southern Ag to foreclose upon the collateral securing the loan.

ALTERNATIVELY, SHOULD THE COURT ACCEPT FLEISHER'S POSITION IN RESPONSE TO THE CROSS APPEAL, THEN SOUTHERN AG IS STILL ENTITLED TO A JUDGMENT AGAINST HIM FOR HIS GUARANTY OF THE LOAN TO MISSISSIPPI INVESTORS VIII

In the event that the Court disagrees with Southern Ag that Fleisher is liable for the full $3,150,000.00 and that it is entitled to a judgment against Fleisher in that amount, then alternatively Southern Ag submits that it is entitled to the judgment against Fleisher in the amount he acknowledges in his Response to this Cross Appeal. Fleisher emphasized evidence that the principal loan balance was at least $8,799,499.44, excluding interest and attorneys' fees incurred due to the default. (Fleisher Response at pg. 6-7) (See also Fleisher's Trial Exhibits 19, 21, 28).

Fleisher then submits that he would only be liable for 140% of 25% of the $8,799,499.44 debt. Accepting Fleisher's position, he would be at least liable to Southern Ag in the amount of $3,079,824.80.

THE LAW OF THE CASE DOCTRINE APPLIES TO THE TRIAL COURT'S PARTIAL GRANT OF SOUTHERN AG'S MOTION FOR SUMMARY JUDGMENT AGAINST FLEISHER FOR HIS GUARANTY OF THE MISSISSIPPI INVESTORS VIII NOTE

As Southern Ag emphasized in its Cross Appeal Brief, prior to the bench trial in this matter, the trial court entered an Order Granting Partial Summary Judgment With Findings of Fact and Conclusions of Law in favor of Southern Ag. (R. at 1204-1214). In this order, the trial court ruled, as a matter of law, that (1) Fleisher was obligated under the personal guaranty for the loan to Mississippi Investors VIII, LLC, (2) that the guaranty was unambiguous, (3) that the guaranty was enforceable against Fleisher, (4) that the initial Guaranteed Indebtedness was $9,000,000.00; (5) that Fleisher guaranteed, at a minimum, $3,150,000.00, (6) Mississippi Investors VIII, LLC defaulted on its loan and (7) that the bankruptcy of Mississippi Investors VIII, LLC did not prevent Southern Ag from proceeding against Fleisher. (R. at 1204-1214).

The trial court's findings of fact and conclusions of law notably stated that "the Guaranty specifically permits recovery against Fleisher regardless of whether Southern AgCredit has exhausted its remedies against Mississippi Investors VIII or enforced its rights against the security for the loan, i.e. the real property." (R. at 1211). Based upon the foregoing, the trial court "ORDERED that Southern AgCredit, FLCA's Motion for Summary Judgment be and it is hereby granted as to the four (4) Guaranties signed by David E. Fleisher and David E. Fleisher is bound by those Guaranties and liable to Southern AgCredit, FLCA pursuant to those Guaranties." (R. at 1213). Therefore, under the law of the case doctrine, Southern Ag should have been awarded a judgment in the amount of $3,150,000.00 and Southern Ag was not required to put on any

additional evidence at trial to obtain a judgment against Fleisher for this guaranty. The law of the case doctrine is a doctrine of law similar to a former adjudication, relates entirely to questions of law, and is confined to subsequent proceedings in the same case. *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So.2d 991, 1019 (Miss. 1997). Whatever is once established as the controlling legal rule of decision between the same parties in the same case continues to be the law of the case. *Id.*

Despite this, the trial court refrained from awarding Southern Ag a judgment based upon Fleisher's plea for equity. (SA – R.E. 14 pp. 27-30). Thus, with the law of the case applying, the case went to trial with the court requiring Southern Ag to put on proof of fair market values and bid prices for the Mississippi Investors VII, X and IV loans / foreclosures to resolve the questions of fact the court opined were remaining after summary judgment.

As to Mississippi Investors VIII, Southern Ag renewed its request for a judgment in the amount of $3,150,000.00. Under the law of the case doctrine, the trial court's prior ruling, and the unambiguous guaranty, there was no need for Southern Ag to put on any additional evidence at trial to establish the amount of Fleisher's liability for his breach of the personal guaranty for the Mississippi Investors VIII loan. However and as a matter of caution, Southern Ag once again presented evidence of the loan amount, the default, the demand and the failure to pay on demand by Fleisher for the Mississippi Investors VIII guaranty.

CONCLUSION

Because it created a non-existent condition precedent and essentially re-wrote the guaranty agreement signed by Fleisher through its prematurity ruling, the trial court abused its discretion and erred as a matter of law. Fleisher agreed to the amount he guaranteed and promised to pay upon default by Mississippi Investors VIII and there was never any dispute that

he did not pay as agreed upon default. Fleisher simply asked the trial court to defer a judgment in an effort to first require Southern Ag to foreclose on the collateral. However, Fleisher agreed in the guaranty that Southern Ag did not have to first foreclose on any collateral prior to his obligation arising. Moreover, the guaranty expressly and unequivocally stated that Fleisher's obligations would not be impacted in anyway by a failure or inability to foreclose. Thus, Southern Ag was and is entitled to a judgment against Fleisher in at least the amount of $3,150,000.00 for his guaranty of the Mississippi Investors VIII loan.

This the 22nd day of July, 2011.

Respectfully submitted,
SOUTHERN AGCREDIT, FLCA

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CERTIFICATE OF SERVICE

I, JEFFREY M. WILLIAMS, do hereby certify that I have this date caused to be served via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing REPLY BRIEF IN SUPPORT OF CROSS APPEAL OF APPELLEE to the following:

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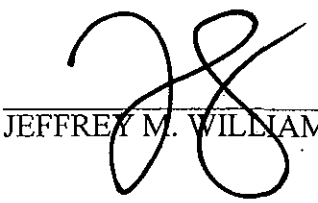
This the 22nd day of July 2011.



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