

STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)
)
)

IN THE COURT OF COMMON PLEAS
3RD JUDICIAL CIRCUIT

Case Nos.: 2018-CP-45-00258 and
2019-CP-45-00193

Bank of Newington,)
)
 Plaintiff,)
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 vs.)
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)
)
 LHSC, Inc.; Williamsburg County Development)
 Corporation; Viking Fire Protection, Inc. of the)
 Southeast; and HBC, Inc.,)
 Defendants.)

RECEIVED
Jul 27 2023
SC Court of Appeals

HBC, Inc.)
)
 Cross-Claimant,)
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 vs.)
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)
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 LHSC, Inc.)
 Cross-Claim Defendant.)

ORDER

HBC, Inc.,)
)
 3rd Party Plaintiff,)
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 vs.)
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)
 Louis Hornick, II, and Blake Fickling,)
 3rd Party Defendants.)

Williamsburg County Development Corporation,)
 Cross-Claimant,)
)
 vs.)
)
)
)
 LHSC, Inc.,)
 Cross-claim Defendant.)

Williamsburg County Development Corporation,)
 3rd Party Plaintiff,)
)
 vs.)
)
)
)
 Louis Hornick, II, and Blake Fickling,)
 3rd Party Defendants.)

These matters came before me for a non-jury trial on January 23 through 25, 2023. The Bank of Newington (“**BON**”) and Blake Fickling (“**Mr. Fickling**”) were represented by Walker H. Willcox, Esquire. Williamsburg County Development Corporation (“**WCDC**”) was represented by W.E. Jenkinson, III, Esquire. HBC, Inc. (“**HBC**”) was represented by Wesley D. Few, Esquire. LHSC, Inc. (“**LHSC**”) and Louis Hornick II (“**Mr. Hornick**”) were neither present nor represented by counsel. Viking Fire Protection,

Inc. of the Southeast (“**Viking**”) appeared only at the start of the trial, Monday, Jan. 23, 2023, and was represented by Jeffrey Payne, Esquire. Prior to trial, on or about December 9, 2022, Viking accepted a monetary settlement from BON, and, thus, it presented no evidence at trial of the remaining parties’ claims.

The Court carefully listened to the evidence at trial and reviewed the parties’ pleadings, briefs, prior orders, and voluminous evidence, and, finds, concludes and orders, as follows:

PROCEDURAL BACKGROUND

Two actions were consolidated for trial by agreement of all parties on May 18, 2022, these being Viking’s **Mechanics Lien Action** (2018-CP-45-00258), filed June 8, 2018, and BON’s Commercial Foreclosure Action (2019-CP-45-00193), filed April 4, 2019. HBC filed its mechanics lien claims in the Mechanics Lien Action on August 22, 2018.

LHSC has without representation in the Mechanics Lien Action since April 16, 2021, but BON timely responded, and claimed that HBC did not have an actionable mechanic’s lien.

The procedural posture of the Foreclosure Action is more complex. It began with BON’s April 4, 2019 Complaint and *lis pendens*, against defaulting borrower/mortgagor LHSC, second mortgage holder WCDC, and mechanics lienholders Viking and HBC. Viking filed its Answer April 24, 2019. WCDC filed its Answer April 29, 2019. HBC filed its Answer and Third-Party Complaint June 3, 2019, stating counterclaims against BON, crossclaims against LHSC and WCDC, and third-party claims against Mr. Hornick and Mr. Fickling.

BON filed its Reply to HBC’s Counterclaims June 28, 2019. WCDC filed its Answer to HBC’s crossclaim July 8, 2019. Mr. Fickling filed his Answer to HBC’s third-party claims July 30, 2019.

As noted above, Viking settled with BON on or about Dec. 9, 2022. HBC and WCDC were not consulted or made parties to this settlement.

The Court permitted WCDC to file its amended Answer, Counterclaim, Crossclaim and Third-Party Claim December 12, 2022, against BON, LHSC, Mr. Hornick, and Mr. Fickling. BON and Mr. Fickling filed their Answer on that same date.

LHSC and Mr. Hornick never appeared or took part in defense of any claims against them in the Foreclosure Action.

The parties engaged in discovery, and BON and HBC moved to compel discovery from each other. The Court ordered them both to respond and produce documents and/or information November 19, 2020. BON failed to comply with this order, which resulted in HBC's second motion to compel, and the Court's September 22, 2022 order compelling BON to comply. This resulted in production of voluminous documents and information from BON on October 7, 2022, consisting of 978 MB of data and more than 5,600 pages of documents.

Discovery disputes continued, and BON subsequently produced an updated version of its loan disbursements, including amounts disbursed through September 9, 2019. BON created this version in the middle of its December 1, 2022 Rule 30(b)(6) deposition. (HBC Exhibit 10; WCDC Exhibit 33).

Trial of both cases was continued several times, due in large part to COVID-19-related court closures.

On January 7, 2022, BON moved for summary judgment on its foreclosure claim. The Court heard this motion February 7, 2022 and entered its Foreclosure Decree March 10, 2022. The Special Referee appointed in the Foreclosure Decree sold the property at a public sale. The Bank of Newington was the successful bidder. The amount in the escrow account through September 30, 2022, was \$1,989,837.34.

The Court found that LHSC was served with the Complaint May 3, 2019, but was in default; that on February 24, 2017, LHSC had executed and delivered a Promissory Note and Mortgage against the real property purchased in the BON loan, located at 77 Commerce Dr., Kingtree, SC 29556. LHSC agreed to pay BON principal of \$3,535,535.00, with adjustable interest at the (then current) rate of 6%. The Court found that LHSC defaulted on the Note and Mortgage and that BON was entitled to recover attorney fees and costs in addition to the entire unpaid loan (\$3,535,535.00), plus interest and bank non-attorney costs accrued (\$960,116.88) totaling \$4,495,651.88, plus attorney fees. (The USDA's Conditional Commitment and Guarantee featured prominently at trial and is discussed at length herein, but it was not the subject of any findings in the Foreclosure Decree.)

The Court also found that Viking claimed a mechanics lien on the property in the amount of \$181,479.00 (the particulars of which were no longer relevant by the time of trial, because it had settled with BON). And it found that WCDC claimed a recorded mortgage lien in the amount of \$80,000.00 (Book 493, Page 65); and that HBC claimed a recorded mechanics lien of \$271,679.00 (Book 508, Pages 89-92, Lis Pendens No. 2018-LP-45-048, and Case No. 2018-CP-45-00258, filed by HBC August 22, 2018, seeking foreclosure on its Mechanics Lien).

The Foreclosure Decree appointed G. Wells Dickson, Jr. to act as Special Referee in the public sale of the property. BON, WCDC, Viking and HBC agreed, and the Court ordered that, if a third-party purchaser were the successful bidder, the proceeds would be held by the Court, and distributed among BON, HBC, Viking, and WCDC pursuant to a separate agreement or decree; and, that none of their claims were compromised or waived by the Foreclosure Decree.

The public sale was held and a third-party was the successful bidder. The Court now holds \$1,992,025.83 in proceeds, for distribution as determined by this Court.

Shortly before trial, BON settled with Viking and paid Viking \$181,500.00 directly (as opposed to waiting for distribution from foreclosure proceeds).

The focus at trial was on a determination of the priority of lienholders and the amounts to be distributed to BON, WCDC and HBC.

FINDINGS OF FACT

1. Based on the USDA Conditional Commitment and Loan Note Guarantee (BON Exhibit 6; HBC Exhibit 1) (hereafter “Guarantee” or “USDA Guarantee”), the Note, and other documents comprising the BON Loan and the testimony of BON President, Tripp Sheppard (“Mr. Sheppard”), I find that on February 24, 2027, BON entered into a commercial purchase-money Loan to LHSC, Inc. for \$3,535,535.00. Mr. Hornick, LHSC’s owner, personally guaranteed the Loan, but did not contribute any funds to the financing of the enterprise for which the Loan was made. An agency of the federal government (referred to herein as the “USDA”) guaranteed repayment of the Loan up to 90%, under conditions stated in its “Conditional Commitment” (“USDA Guarantee”), which LHSC (via Mr. Hornick) and BON accepted.

2. I find and conclude that the conditions in the USDA Guarantee are clear and unambiguous, and that BON was contractually bound to comply with all conditions in the USDA Guarantee.

3. The USDA Guarantee states the purpose of the Loan as:

LOAN PURPOSE

The purpose of the loan is to provide long-term financing for the start-up of a curtain/drapery manufacturing business at a commercial property located at 77 Commerce Dr., Kingstree, SC 29556, to be used as a manufacturing facility. Funds will be used for real estate acquisition (\$250,000), real estate improvements (\$1,250,000), machinery & equipment (\$805,050), inventory (\$223,535), working capital & contingency (\$637,530) and fees & costs associated with this loan (\$369,420). These funds are to be matched with grant contributions from Williamsburg County of approximately \$100,000, South Carolina Department of Department Commerce of approximately \$150,000 and Palmetto Development Group of approximately \$100,000. Upon final disbursement of loan funds, a copy of the lender's detailed loan settlement must be provided to Rural Development as evidence that all funds were disbursed in amounts and for purposes outlined above.

(BON Exhibit 6, USDA Guarantee, VIKING v. BON000469).

4. The above stated Loan Purpose in the USDA Guarantee reflects the USDA's intent and BON's intent that the Loan would be made for the overall benefit of the citizens of Williamsburg County, and the County's long term economic development and growth, through the purchase, construction and start-up operation of the drapery manufacturing plant to be constructed and outfitted through the use of the Loan funds.

5. I find that the Loan Purpose stated in the USDA Guarantee and other conditions stated therein, which are discussed below, intentionally provided direct substantial benefit to WCDC and Williamsburg County residents.

6. Evidence showed that the State of South Carolina projected that the drapery manufacturing plant would bring economic benefits to the County and its citizens in the amount of \$88,000,000.00 over the course of ten years. (WCDC Exhibit 19).

7. Other USDA Guarantee conditions, discussed at length below, required BON to act as a prudent lender in servicing the Loan, and to ensure that professional standards and practices were maintained in the construction of the Project and also in budgeting and paying for the Project, in accord with the contractors' documents. HBC contract documents included material terms of price, timing, and

conditions of payment. (HBC Exhibit 2). I find that the USDA Guarantee conditions are contractual duties placed on BON, intended to provide significant direct benefits to the contractor, HBC, pursuant to its contract terms of price, timing and conditions of payment.

8. The USDA Guarantee conditions imposed the contractual duty on BON to ensure that costs were estimated by an independent professional using accepted practices in accord with contract documents:

The lender must ensure that all project facilities are designed, and costs estimated, by an independent professional utilizing accepted architectural, engineering and design practices and conform to applicable Federal, State, and local codes and to approved plans, specifications, and contract documents.

(BON Exhibit 6, USDA Guarantee, VIKING v. BON000472).

9. I find that BON hired an independent professional engineering firm to oversee the construction of the Project. That company (“Partner”) is referred to variously as “Partner,” “Partner Engineering and Science, Inc.” and “Partner Assessment Corp.” on BON’s disbursement spreadsheet (WCDC Exhibit 33). However, I find that BON failed to follow accepted practices, and it incorrectly and negligently attributed many disbursements as having been made to Partner, which in actuality were made to HBC, and which should have been attributed to HBC and allocated to the category of “Improvements” to real property, pursuant to the USDA Guarantee:

\$80,000.00, March 3, 2017 (VIKING v. BON000494);
\$255,208.00, March 24, 2017 (VIKING v. BON000504);
\$449,312.00, April 20, 2017 (VIKING v. BON000519-520);
\$146,680.00, May 9, 2017 (VIKING v. BON000527-528);
\$8,078.96, June 3, 2017 incorrectly attributed to “Working Capital & Contingencies” (WCDC Exhibits 33, 35) (VIKING v. BON000555);
\$190,712.50, June 6, 2017 (VIKING v. BON000537);
\$69,487.50, July 13, 2017 (VIKING v. BON000557; 558), but HBC actually received only \$68,087.50 (HBC Exhibit 35);
\$74,080.00, July 28, 2017 (VIKING v. BON000568),
\$84,620.00, September 19, 2017 (VIKING v. BON000584), but HBC received only \$83,220.00 of these funds. (HBC Exhibit 35).

These amounts roughly correspond to HBC’s evidence showing that it received payments totaling \$1,347,300.00 from March 3, 2017 to August 31, 2017. (HBC Exhibit 35)

10. I find that BON breached the USDA requirement of independent cost estimates in conformity with contract documents, on and after December 22, 2017, when BON failed to pay HBC

\$262,496.50 as recommended by Partner, for work HBC completed November 28, 2017, and instead, BON allowed Mr. Hornick to interfere with the contractual obligation to pay HBC. On that date, Partner submitted its recommendation, which stated in part:

On December 4, 2017 Partner visited the job site to review Application Number 8. HBC, INC has requested \$262,496.50 for the work performed through November 28, 2017. Based on review of Application Number 8 and our observations at the site, Partner recommends funding \$262,496.50.

...

The project is now complete.

...

The owner has authorized \$126,000.00 to pay Viking, the subcontractor.

Per the owner, Viking has agreed to a \$20,000.00 deduction due to the delays.

(WCDC Exhibit 25, HBC Exhibit 14; VIKING v. BON000053; 56; and 59)

11. I find that BON breached the USDA requirement to have pre-arranged “construction contingencies,” agreed upon by the Borrower:

CONSTRUCTION

...

Prior to disbursement of construction funds, [BON] must have: ... Contingencies in place to handle unforeseen cost overruns without seeking additional guaranteed assistance. These are to be agreed to by the borrower.

(WCDC Exhibit 12) (VIKING v. BON000472-473). BON witnesses testified that the borrower, LHSC, via its owner Mr. Hornick, refused to agree to pay any funds from the Working Capital & Contingencies funds on hand in the amount of \$200,000.000. (HBC Exhibit 3, pages 2-6; 8-11; VIKING v BON000507; 526; 533; 536; 543; 556; 566; 570; and 573).

12. Evidence showed that Mr. Hornick, improperly and without justification, attempted to renegotiate Viking’s subcontract price with HBC twice; and that Mr. Hornick did so with HBC twice, both times after HBC had fully performed. And I find that BON participated in or condoned these attempts, by refusing to pay as Partner recommended on December 22, 2017. (HBC Exhibits 14, 15, 16, 22, 33, 34 and 42).

13. No evidence was presented to show that BON had any authority to delay payment to HBC; nor to pay HBC’s subcontractor, Viking, directly as “the owner” Mr. Hornick had authorized; nor to interfere with or renegotiate the contract price set by Viking for its services; nor to allow LHSC, via Mr.

Hornick, to so interfere. And I find that these actions, and BON's failure to pay HBC \$262,496.50 on and continuously after December 22, 2017, breached BON's duties described herein; interfered with the completion of the Project within available funds; and prevented the drapery manufacturing plant from ever becoming operational.

14. The USDA Guarantee conditions imposed the contractual duty on BON to ensure project completion and start-up of the drapery manufacturing plant within available funds:

The lender will also ensure that the project will be completed with available funds and, once completed, will be used for its intended purpose and produce products in the quality and quantity proposed in the completed application approved by the Agency.

(BON Exhibit 6, USDA Guarantee, VIKING v. BON000472).

15. Available funds are stated in the USDA Guarantee as the Loan of \$3,535,535.00, plus expected grants totaling \$350,000.00 ("from Williamsburg County of approximately \$100,000, South Carolina Department of Department Commerce of approximately \$150,000 and Palmetto Development Group of approximately \$100,000"). (BON Exhibit 6, USDA Guarantee, VIKING v. BON000467 and 469). The total amount of available funds from which BON was required to ensure Project completion, as stated in the USDA Guarantee, is \$3,885,535.00.

16. In actuality, WCDC contributed County grant funds of \$200,000.00 for "infrastructure and construction" and "upfit" of the existing building (WCDC Exhibits 10; 23; & Exhibit HBC-1), and WCDC facilitated additional grant funds from the State of South Carolina in the amount of \$150,000.00 (but, WCDC does not seek repayment of the State grant). And, on February 7, 2018, when construction and "upfit" were otherwise complete, WCDC loaned an additional \$80,000.00 to LHSC of \$80,000.00 (HBC Exhibit 10), to pay for the fire suppression system. (See also, Mr. Sheppard's testimony and WCDC Exhibits 26, 27, and 28). These grants and additional loan totaled \$430,000.00 and all of these public funds were included in Project funds administered by BON, pursuant to the USDA Guarantee. Available Project funds included the BON Loan of \$3,535,535.00, plus \$430,000.00 in grants and additional loan, and, thus, total available Project funds were \$3,965,535.00 (less insignificant costs of obtaining the grants and loan.)

17. HBC was the general contractor for the Project. Its contract amount totaled \$1,600,000.00. (HBC Exhibits 2, 26). This amount is well within amounts allocated in the USDA Guarantee for “real estate improvements (\$1,250,000)” and “contingency (\$637,530.00).” (BON Exhibit 6, USDA Guarantee, VIKING v. BON000469). No evidence suggested that the Project could not have been completed within the available funds of \$3,965,535.00.

18. The USDA Guarantee allocated \$805,050.00 to machinery & equipment (BON Exhibit 6, USDA Guarantee, VIKING v. BON000469) based on an August 26, 2016 Order Confirmation (DSI-001 to 11) and the February 17, 2017 itemized invoice provided by Diversified Systems, Inc. (“Diversified”) for that amount. (BON Exhibits 6, 36 and 38, VIKING v. BON000469 & 597; HBC Exhibit 20 (DSI 0012 to 0023)).

19. Less than two weeks after the Loan closed, Diversified was to receive 75% (\$603,787.50) of its invoiced amount, prior to shipping and delivery. On March 1, 2017, BON paid Mr. Hornick \$603,787.00 at his request, on his assurance that he would then pay Diversified that amount. (VIKING v. BON000486, 487, 507). On cross-examination, BON President, Mr. Sheppard, admitted that, soon after this disbursement, BON became aware that Mr. Hornick paid Diversified only \$500,000.00 and Mr. Hornick retained \$103,787.00, without justification for doing so. There was no evidence that Diversified was ever paid the balance owed to it for that initial 75% (\$103,787.00), nor that BON ever sought the return from Mr. Hornick of the \$103,787.00 he had wrongfully retained. And there was no evidence that any equipment was ever delivered to the property by Diversified.

20. BON’s disbursement of \$603,787.00 to Mr. Hornick, instead of to Diversified, at the outset of the Project, and its failure to seek to recover the amount Mr. Hornick wrongfully retained (\$103,787.00) were not consistent with prudent loan servicing practices and they constitute gross mismanagement of Project funds. This gross mismanagement prevented completion of the Project within available funds and prevented the drapery manufacturing plant from ever becoming operational, in violation of the numerous duties imposed on BON by the USDA Guarantee conditions, discussed herein.

21. On and after March 1, 2017, Mr. Hornick's unjustified retention of \$103,787.00 put BON on notice that BON needed to obtain verification of any and all payment or disbursement requests coming from Mr. Hornick, including proof of claimed expenses and purchases for which he sought reimbursement. I find that BON did not obtain verification or other proof from Mr. Hornick at any time after March 1, 2017, and this failure caused the Project to become incapable of completion within available funds; it caused the Project to be abandoned; it caused the drapery manufacturing plant to never become operational; it caused LHSC to be incapable of paying the balance owed to WCDC for the real estate purchase (\$250,000.00), WCDC Grants (\$200,000.00), and WCDC post-construction loan (\$80,000.00); and it caused LHSC to be incapable of paying HBC the balance owed to it under its contract (\$271,679.00).

22. The USDA Guarantee conditions imposed the contractual duty on BON to monitor, review and inspect construction, and to ensure that Loan proceeds were used for eligible Project costs:

The lender must have a construction-monitoring plan acceptable to the Agency and undertake the added responsibilities set forth in this paragraph. The lender will monitor the progress of construction and undertake the reviews and inspections necessary to ensure that construction conforms to applicable Federal, State, and local code requirements; proceeds are used in accordance with the approved plans, specifications, and contract documents; and that funds are used for eligible project costs. The lender must expeditiously report any problems in project development to the Agency.

(BON Exhibit 6, USDA Guarantee, VIKING v. BON000473).

23. Eligible Project costs were listed in the USDA Guarantee as “(\$250,000), real estate improvements (\$1,250,000), machinery & equipment (\$805,050), inventory (\$223,535), working capital & contingency (\$637,530), and fees & costs associated with this loan (\$369,420).” (BON Exhibit 6, USDA Guarantee, VIKING v. BON000469). These amounts total \$3,535,535, which is less than the total of Project funds which were actually available, \$3,965,535.00. The evidence shows that BON and the USDA knew the \$350,000.00 in grant funds had to be allocated to "real estate improvements" to make up the difference between the above-identified \$1,250,000.00 and HBC's original contract amount of \$1,600,000.00. (HBC Exhibits 2, 3, 10, 26 and 43). HBC's total contract charges were in an amount of \$1,621,275.00. (HBC Exhibits 14, 34 and 35). Still further, within the USDA's category of “working capital & contingency” in an amount of \$637,530.00, the USDA required BON to set aside \$200,000.00 as a “Construction

Contingency (holdback),” as is shown on BON’s own loan disbursement spreadsheet. (HBC Exhibits 3, 10, 27 and 43). Therefore, I find that BON had \$1,800,000.00 of the Project’s available funds specifically allocated to pay HBC for improvements to the property.

24. I find that BON breached its duty to ensure that funds were used for eligible Project costs in accordance with contract documents, on March 1, 2017, by disbursing funds, earmarked for Diversified (equipment), to Mr. Hornick; and it breached that duty thereafter by failing to seek return of the amount of \$103,787.00, wrongfully retained by Mr. Hornick from those earmarked funds. I find BON breached this same provision again December 7, 2017, when BON disbursed an additional 10% payment on the “equipment” in the amount of \$80,505.00, directly to Mr. Hornick. (WCDC Exhibit 35, VIKING v Evidence showed that Diversified put BON on notice that Mr. Hornick had wrongfully retained this disbursement, because Diversified never received any of this \$80,505.00. (HBC Exhibit 37). No evidence suggested that BON ever sought return of this amount from Mr. Hornick.

25. The USDA Guarantee conditions imposed the contractual duty on BON to follow a detailed timetable and corresponding budget of costs before disbursements:

Prior to disbursement of construction funds, the lender must have: ... (ii) A detailed timetable for the project with a corresponding budget of costs, setting forth the parties responsible for payment.

(BON Exhibit 6, USDA Guarantee, VIKING v. BON000473).

26. I find that BON breached its duty to follow a detailed timetable and corresponding budget of costs beginning on March 1, 2017 when it disbursed funds earmarked for Diversified equipment to Mr. Hornick; and it breached that duty thereafter by failing to seek return of the amount of \$103,787.00 retained by Mr. Hornick from those earmarked funds. It breached this duty repeatedly thereafter, when it paid Mr. Hornick unsupported monthly salary advances and unverified expense reimbursements (discussed below); and it did so again on December 22, 2017 and thereafter, when it allowed Mr. Hornick to interfere with Partner’s recommended payment to HBC, and to interfere with Viking’s subcontract (also discussed below).

27. The USDA Guarantee conditions imposed the contractual duty on BON to obtain the USDA’s written consent before amending or waiving any of its conditions:

By signing this Conditional Commitment, the lender and borrower certify that they understand and accept the conditions outlined herein. No provision stated herein shall be amended or waived without the prior written consent of the lender and Rural Development.

(BON Exhibit 6, USDA Guarantee, VIKING v. BON000475).

28. I find that BON breached its duty to obtain USDA written consent before amending or waiving any of the USDA conditions on March 1, 2017 when it disbursed to Mr. Hornick \$603,787.00 in funds earmarked for Diversified equipment. It breached this duty repeatedly, when it paid Mr. Hornick unsupported monthly salary advances and unverified expense reimbursements and when it allowed Mr. Hornick to interfere with Partner's recommended payment to HBC, and to interfere with Viking's subcontract with HBC (discussed below).

29. The USDA Guarantee conditions imposed the contractual duty on BON to act as a reasonably prudent lender would act, with regard to its unguaranteed loans:

The Loan Note Guarantee constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which Lender or any Holder has actual knowledge ... or which Lender or any Holder participates in or condones. The Loan Note Guarantee will be unenforceable to the extent that any loss is occasioned by ... use of loan proceeds for unauthorized purposes, ... [or] negligent Loan servicing. ... Any losses occasioned will be unenforceable to the extent that loan funds are used for purposes other than those specifically approved by USDA in its Conditional Commitment or amendment thereof. Negligent loan origination/negligent loan servicing is the failure to perform those services which a reasonably prudent lender would perform in processing or servicing ... its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act but also not acting in a timely manner or acting in a manner contrary to the manner in which a reasonably prudent lender would act[.]

(BON Exhibit 6, USDA Guarantee, VIKING v. BON000477).

30. I find that BON breached its duty to service the Loan as a reasonably prudent lender, on March 1, 2017, when it disbursed to Mr. Hornick \$603,787.00 earmarked for Diversified equipment. It breached this duty repeatedly, when it failed to recoup \$103,787.00 Mr. Hornick had retained from the Diversified equipment funds; and when it paid Mr. Hornick unsupported monthly salary advances and unverified expense reimbursements; and on December 22, 2017, and thereafter, when it allowed Mr. Hornick to interfere with Partner's recommended payment to HBC, and to interfere with Viking's subcontract with HBC (discussed below).

31. BON breached its above-mentioned duties by approving loan distributions for exorbitant travel expenses submitted by Mr. Hornick, without receipts or other verification that any travel took place or that the expenses were otherwise legitimate (WCDC Exhibits 33, 34 and 35):

April 7, 2017 Travel Expense (\$13,500.00);
May 22, 2017 -Travel Expense (\$12,259.68);
June 4, 2017-Travel (\$8600.00);
July 24, 2017- Travel (\$12,089.00);
August 29, 2017 -August Travel & Business Expense (\$16,850.00);
February 1, 2018- Travel Expense (\$12,598.52); and
March 23, 2018 - Travel Expense (\$13,400.00).

These unverified travel expenses total \$89,297.20. (WCDC Exhibit 33 and 34). These disbursements prevented completion of the Project within available funds and prevented the drapery manufacturing plant from ever becoming operational.

32. The USDA Guarantee imposed the contractual duty on BON to limit owner compensation from Project funds so as to avoid impairing LHSC's ability to repay the Loan:

Dividend payments and compensation of officers and owners will be limited to an amount that, when taken, will not adversely affect the repayment ability of the borrower.

(BON Exhibit 6; VIKING V BON000471).

33. BON breached the above-mentioned duty by approving disbursements for monthly advances of Mr. Hornick's salary for 7 consecutive months, from March 2017 through September 2017, for a total of \$116,666.69 in direct owner compensation. (HBC Exhibits 3, 8, 9 and 10) (VIKING v BON000488-489; 506-509; 523-526; 544-546; 556; 564-567; 580-582). There was no evidence of legitimate services provided by Mr. Hornick. But there was evidence that Mr. Hornick improperly interfered with Viking's subcontract and HBC's general contract. Jeff Hudson and Blake Fickling testified to Mr. Hornick's attempts to force HBC and Viking to accept discounts or reductions from their contract prices, in order to receive payment for work already completed. They testified to Mr. Hornick's attempts to obtain a second round of reductions thereafter. And they testified that BON, via its agent, Mr. Fickling, participated in or condoned Mr. Hornick's wrongful interference with HBC and Viking contracts, and took no action to stop this interference. (HBC Exhibits 12, 13, 14, 15, 16, 21, 22, 33, 34, and 42). I find that BON's

disbursements of \$116,666.69 in direct owner compensation prevented completion of the Project within available funds and prevented the drapery manufacturing plant from ever becoming operational.

34. BON also breached its contractual duties on October 17, 2017, when it reimbursed Mr. Hornick for \$30,000.00 on an unsupported invoice for an “engineering consulting fee,” from Alexia Cortez, manager of a company identified in the invoice as Maritime Communications, LLC. (WCDC Exhibit 35, VIKING v. BON000588 to 590). At that time, and for the entire life of the Loan, BON had hired Partner to act as the independent engineering and consulting firm overseeing construction and disbursements to contractors. BON admitted on cross-examination that it was never documented as to the nature of the engineering services, nor when they were received, nor what was determined by these services. I find that this unverified disbursement was inconsistent with prudent loan servicing; it violated BON’s duty to ensure Project completion within available funds; it prevented Project completion within available funds; and it prevented the drapery manufacturing plant from ever becoming operational.

35. BON also breached its contractual duties by making the following disbursements to Mr. Hornick based on his unverified purchases of “inventory” and “equipment”:

April 4, 2017 - Fabric PO# 022016 (Deposit) (\$54,433.75);
May 9, 2017 - Invoice -Asmara Home Products (\$80,315.18);
May 22, 2017- Asmara Inventory (\$68,000.00);
June 29, 2017- Firefend Inventory PO (\$18,225.00);
July 13, 2017 - Working Capital (\$26,000.00);
August 3, 2017 - New Product Inventory (\$31,050.00);
December 7, 2017 - 10% Equipment Cost (\$80,505.00);
March 5, 2018 - Firefend Material (\$34,950.00);
March 29, 2018 - Fill Sales Order (31,000.00);
April 6, 2018 - 50% of Swatch Book Invoice (\$32,202.00);
April 19, 2018 - Swatch Books Completed and JoAnne Fabrics (\$43,618.58).

(WCDC Exhibit 33, 34 and 35). BON never determined whether Mr. Hornick actually made these purchases, nor did it determine the whereabouts of any inventory and equipment.

36. The above unverified inventory and equipment disbursements total **\$500,299.51**, paid to Mr. Hornick, all of which were made after BON knew that Mr. Hornick had skimmed \$103,787.00 from the original disbursement to Mr. Hornick in funds earmarked for Diversified, March 1, 2017. I find that the above disbursements constitute gross negligence and gross mismanagement of Project funds, and that they

breached BON's contractual duties under the USDA Guarantee to act as a reasonably prudent lender in servicing the Loan; to ensure Project completion within available funds; to ensure that Loan proceeds were used for eligible Project costs; to follow a detailed timetable and corresponding budget of costs; and, to obtain the USDA's written consent before amending or waiving any of these conditions.

37. As stated above, BON allowed Mr. Hornick to retain \$103,787.00 in funds earmarked for Diversified; and it paid Mr. Hornick \$500,299.51 for equipment/inventory purchases; \$116,666.69 in salary; and \$89,297.20 for travel, in the total staggering sum of \$810,050.40 in unverified and otherwise unjustified disbursements to Mr. Hornick. This amount constitutes more than one-fifth of the total available Project funds of \$3,965,535.00. I find that these disbursements constitute grossly negligent loan servicing by BON, which prevented the Project from being completed within available funds; prevented the drapery manufacturing plant from ever becoming operational; and prevented Williamsburg County citizens from reaping the expected \$88,000,000.00 in long-term economic benefits the Project represented.

38. No evidence suggested that either WCDC or HBC failed to comply with any of their contractual obligations, and I find that they fully complied with their obligations.

39. HBC filed its initial Notice of Mechanic's Lien June 6, 2018, and its Amended Notice of Mechanic's Lien July 6, 2018 (HBC Exhibits 39 and 40). HBC sub-contractors performed work at the property at least until April 9, 2018. (HBC Exhibit 38). HBC made related payments to LDR Site Services April 15, 2018. (BON Exhibit 35, at page 12 of 16). I find that HBC complied with S.C. Code Ann. § 29-5-10 and it holds a valid mechanic's lien in the amount of the wrongfully withheld final payment due to HBC, in the amount of \$262,496.50.

40. BON disbursed to itself 13 monthly interest payments on the Loan:

March 24, 2017 (\$21,258.39);
April 24, 2017 (\$23,601.37);
May 30, 2017 (\$23,135.19);
June 23, 2017 (\$23,797.79);
July 24, 2017 (\$23,699.59);
August 29, 2017 (\$24,588.92);
September 28, 2017 (\$24,588.92);
October 30, 2017 (\$23,871.45);
November (undated) 2017 (\$24,558.92);

December 29, 2017 (\$23,871.45);
January (undated) 2018 (\$25,664.83);
March 8, 2018 (February payment) (\$25,861.24);
April 5, 2018 (March payment) (\$32,202.22); and,
After all other disbursements ended and BON had placed the Loan in default, it retained the amount remaining in Project funds – (\$85,632.20).

(WCDC Exhibits 33, 34 and 35). These amounts total \$406,332.48. In each of these 13 interest payments as identified in BON documents (HBC Exhibits 7 and 10), the Bank's President testified that \$3,247.80 was applied to cover escrows ($13 * \$3,247.80 = \$42,221.40$). Therefore, of this \$406,332.48, the amounts paid to the Bank and its investors was at least \$364,111.08.

41. BON's disbursements to itself the total amount of \$406,332.48 substantially exceeds the total amount it would have been entitled to from Project funds pursuant to the USDA Guarantee, which allowed for "fees & costs associated with the Loan (\$369,420)." (VIKING v BON000469). I find BON was unjustly enriched by the difference, \$36,942.48, to the detriment of HBC, WCDC and Williamsburg County.

42. BON received additional profit in the amount of \$448,659.40, March 8, 2017, when it sold the 90% guaranteed portion of the Loan on the secondary market. (HBC Exhibits 3, 4, 5 and 11).

43. After BON unjustifiably withheld payment to HBC of \$262,496.50 on December 22, 2017, BON paid itself a total of \$193,231.94 (December 29, 2017 (\$23,871.45); January 2018 (\$25,664.83); March 8, 2018 (\$25,861.24); April 5, 2018 (\$32,202.22); and, retained balance amount (\$85,632.20)). I find BON was unjustly enriched by these payments totaling \$193,231.94, to the detriment of HBC, WCDC and Williamsburg County.

44. Of the many improper, unverified inventory disbursements to Mr. Hornick, BON paid the last four after it knowingly withheld payment to HBC on December 22, 2017 (March 5, 2018 (\$34,950.00); March 29, 2018 (\$31,000.00); April 6, 2018 (\$30,000.00); April 19, 2018 (\$43,618.58) (WCDC Exhibits 33, 34 and 35)). These amounts total \$139,568.50, which could have gone a long way toward paying the amount owed to HBC, \$262,496.50.

45. Of the improper travel expense reimbursements to Mr. Hornick, BON paid the last two after it withheld payment to HBC on December 22, 2017 (February 1, 2018 (\$12,598.52); March 23, 2018 (\$13,400.00) (WCDC Exhibit 33)). These amounts total \$25,998.52.

46. The combined improper disbursements made after December 22, 2017, total \$358,798.96 (\$193,231.94 interest plus amount retained by BON; \$139,568.50 unverified inventory/equipment reimbursements to Mr. Hornick; and \$25,998.52 unverified travel reimbursements to Mr. Hornick). This amount of \$358,798.96, alone, would have more than covered the amount of HBC's lien, \$271,679.00. Had BON paid HBC instead of making these improper disbursements after December 22, 2017, the Project could still have been completed within available funds, despite all the improper disbursements made prior to December 22, 2017. This litigation could have been avoided, and the drapery manufacturing plant could have been up and running today, to the substantial benefit of Williamsburg County and its citizens. Notably, Gilleon Frieson, WCDC Executive Director, testified that it was reasonable to expect that LHSC would have been able to pay the \$250,000.00 balance owed on the real property purchase price, if LHSC had opened its facility.

47. WCDC evidence showed that its Note and Mortgage on the real property, which is the subject of BON's foreclosure action, are in default. As of January 9, 2023, WCDC was owed a balance of \$101,882.02 with interest accruing daily at \$13.29, plus attorney fees and costs. (WCDC Exhibit 29, Amended Affidavit of Gilleon Frieson).

48. W. E. Jenkinson, III, Esquire, attorney for WCDC, submitted into evidence his Affidavit of Attorney Fees. (WCDC Exhibit 30). I have carefully reviewed the affidavit and work experience of Mr. Jenkinson, with which this Court is very familiar, and I find that the hourly billing rate and description of the services rendered in this matter since 2019 are fair and reasonable, as to attorney's fees, as well as costs. I find that WCDC is a prevailing party entitled to attorney's fees and costs of \$71,561.84 from BON as of January 25, 2023.

49. HBC claims its Mechanics Lien amount on the premises, which were the subject of the Mechanics Lien Action. As of January 23, 2023, HBC's lien amount of \$271,679.00 accrued daily interest

pursuant to S.C. Code Ann. § 34-31-20, in the amount of \$65,128.53, over a total of 1,820 days from January 18, 2018 to January 23, 2023, in the amount of \$118,533.92, and the total amount due as of January 23, 2023 is \$390,212.92. (HBC Exhibit 40).

50. Wesley D. Few, Esquire, attorney for HBC, submitted his Affidavit of Attorney Fees. (HBC Exhibit 23). I have carefully reviewed the affidavit and work experience of Mr. Few, with which this Court is now familiar, and I find that the hourly billing rate and description of the services rendered are fair and reasonable, as to attorney's fees, as well as costs pursuant to S.C. Code Ann. § 29-5-10 and 20. I find that HBC is a prevailing party and is entitled to attorney's fees and costs of \$229,937.22 from BON as of January 19, 2023.

CONCLUSIONS OF LAW

1. WCDC is an intended third-party beneficiary of the USDA Guarantee, because that contract stated that the Loan Purpose was to provide long-term substantial economic benefit to Williamsburg County and its citizens (\$88,000,000.00), and because it allocated \$250,000.00 from Loan funds to pay a portion of the amount owed for purchase of the real property from WCDC. (BON Exhibit 6, USDA Guarantee, VIKING v. BON000469). These terms show that the parties to the USDA Guarantee (LHSC, Mr. Hornick and BON) intended to provide substantial direct benefit to WCDC. "[W]hen the parties to a contract clearly intend to provide a third party a direct benefit, the legal conclusion that flows from their intent is that the third party achieves the status of third-party beneficiary." *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 435 S.C. 594, 603, 869 S.E.2d 812, 817 (2022) (citations omitted).

2. Likewise, HBC is an intended third-party beneficiary of the USDA Guarantee, because it explicitly required BON to ensure Project completion within available funds; to ensure that an independent professional estimated costs using accepted practices in accord with contract documents; to monitor, review and inspect construction, and to ensure that Loan proceeds were used for eligible Project costs: to follow a detailed timetable and corresponding budget of costs; to obtain the USDA's written consent before amending or waiving any of these conditions: and to act as a reasonably prudent lender in servicing the Loan; and also because it allocated \$1,800,000.00 in funds specifically to the construction work HBC and

its subcontractors performed (“real estate improvements (\$1,250,000)”); \$350,000.00 in grant funds; and the required “Construction Contingency (holdback)” of \$200,000.00. (HBC Exhibits 3, 10, 26, 27 and 43; BON Exhibit 6, USDA Guarantee, VIKING v. BON000469). These terms show that the parties to the USDA Guarantee (LHSC, Mr. Hornick and BON) intended to provide substantial direct benefit to the general contractor on the Project, namely, HBC. *See Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 869 S.E.2d at 817 (citations omitted).

3. As intended third-party beneficiaries of the USDA Guarantee, WCDC and HBC have legal standing to sue BON for its breaches of the USDA Guarantee contract and related torts. *See Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 869 S.E.2d at 815) (“Ordinarily, a person who is not a party to a contract may not enforce the contract in a civil action. We have long recognized, however, that when the parties intentionally provide in the terms of the contract a direct benefit to a third party, the third party may enforce the contract.”).

4. BON breached the contractual duties imposed on it by the USDA Guarantee, to ensure that costs were estimated by an independent professional using accepted practices in accord with contract documents; to ensure Project completion and start-up of the drapery manufacturing plant within available funds; to ensure that Loan proceeds were used for eligible Project costs itemized therein as real estate acquisition (\$250,000), real estate improvements (\$1,250,000), machinery & equipment (\$805,050), inventory (\$223,535), working capital & contingency (\$637,530) and fees & costs associated with the Loan (\$369,420); to follow a detailed timetable and corresponding budget of costs before making disbursements; to obtain the USDA’s written consent before amending or waiving any of its conditions; and, to act as a reasonably prudent lender would act, with regard to its unguaranteed loans. (BON Exhibit 6, USDA Guarantee, VIKING v. BON000469; 472; & 473).

5. BON’s actions constituted gross negligence and gross mismanagement of Project funds, including WCDC’s grant of \$200,000.00, and loan of \$80,000.00; and those actions caused LHSC to become incapable of paying the remaining \$250,000.00 owed to WCDC, for the real estate purchase, represented by LHSC’s now worthless stock pledge.

6. WCDC and HBC are entitled to recover their damages resulting from BON's breaches of the above duties, grossly negligent loan servicing, and gross mismanagement of Project funds. Mr. Hornick misappropriated Project funds, but BON was responsible for disbursement of those funds, and it was BON who could have prevented Mr. Hornick's acts from causing harm. See, *Myrtle Beach Lumber Co. v. Willoughby*, 276 S.C. 3, 6, 274 S.E.2d 423, 425 (1981) (holding, when one of two innocent parties must suffer, the brunt should fall upon the one most responsible for the problem); *Ex parte Dort*, 238 S.C. 506, 511, 121 S.E.2d 1, 3 (1961) (if one of two innocent persons must suffer by the fraud of another, the one whose negligence makes the fraud possible must bear the loss); *City Lumber Co. v. Nat'l Sur. Corp.*, 229 S.C. 115, 121, 92 S.E.2d 128, 131 (1956) (where one of two innocent parties must suffer a loss, it must be borne by that one of them, who, by his conduct, has rendered the injury possible.").

7. BON's gross mismanagement of Project funds proximately caused the Project to fail; it caused LHSC to default on the Loan; it caused LHSC to become defunct and incapable of repaying WCDC's \$200,000.00 grant, WCDC's \$250,000.00 balance on the real property, and WCDC's \$80,000.00 post-construction loan and interest accrued thereon, plus attorney fees and costs.

8. BON's gross mismanagement of Project funds proximately caused LHSC to breach its contract with HBC by allowing Mr. Hornick to interfere with its contract and prevent the last payment due to HBC pursuant to its contract price, on and after December 22, 2017, plus attorney fees and costs.

9. BON's mortgage foreclosure action is one in equity. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 440–41(2014) (citation omitted). "Courts of equity do not sit for the purpose of relieving parties ... who refuse to exercise a reasonable diligence or discretion." *New v. Collins*, 126 S.C. 294, 119 S.E. 835, 836 (1923) (citation omitted). BON failed to act with reasonable diligence or discretion, and it will not be rewarded for its gross mismanagement of the Project funds, from which it has already profited and been unjustly enriched as detailed herein.

10. WCDC's and HBC's equitable lien subordination actions are also in equity and the Court has discretion to subordinate BON's lien, to award damages, and to award attorney's fees in order to balance the equities and make an effective result. "Where a court of equity has assumed jurisdiction of a cause it will retain such jurisdiction to dispose of all issues within the scope of the pleadings, including the granting of whatever relief may be required to render the judgment of the court effective." *Bramlett v. Young*, 229 S.C. 519, 535, 93 S.E.2d 873, 881 (1956) (citations omitted). "Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 252, 715 S.E.2d 348, 354 (2011) (citations omitted).

11. As a result of the above Findings of Fact and Conclusions of Law, BON loses its first priority position relative to the foreclosure proceeds from the sale of the real property, which are now in escrow, and the new order of priority is (1) WCDC, (2) HBC, (3) BON.

12. WCDC is a prevailing party entitled to recover from the foreclosure sale proceeds a total of \$621,404.66 in damages. This figure represents \$99,842.82 for payment of the outstanding mortgage balance owed by LHSC to WCDC with interest as of January 9, 2023; \$200,000.00 for WCDC grant funds provided to LHSC and included in Project funds disbursed by BON; and \$250,000.00 for payment of the balance owed for the real property purchase, currently represented by worthless LHSC stock; and \$71,561.84 for payment of WCDC attorney fees and costs incurred in the prosecution of their claim as of January 25, 2023.

13. HBC holds a valid mechanics lien, and is the prevailing party under the Mechanics Lien statute, S.C. Code Ann. §§'s 29-5-10 and 20. Accordingly, HBC is entitled to recover from the foreclosure sale proceeds a total of \$620,150.14. This figure represents \$390,212.92 for the mechanics lien plus interest up to January 23, 2023, and \$229,937.22 for attorneys' fees and costs, as set forth above.

WHEREFORE it is hereby **ORDERED, ADJUDGED, and DECREED:**

1. Judgment shall be entered in favor of Williamsburg County Development Corp. and HBC, Inc. on their respective causes of action for mechanics lien, breaches of contract and equitable lien subordination, as set forth below.

2. The Bank of Newington loses its first priority position relative to the foreclosure proceeds from the sale of the real property located at 77 Commerce Dr., Kingstree, SC 29556, which funds are now in escrow with the Court.

3. The new order of lien priority relative to the foreclosure proceeds is (1) Williamsburg County Development Corp.; (2) HBC, Inc.; and, (3) The Bank of Newington.

4. Escrowed foreclosure proceeds shall first be released to Williamsburg County Development Corp. in the amount of \$621,404.66, plus interest from and after entry of this order and judgment at the statutory rate.

5. Escrowed foreclosure proceeds shall thereafter be released to HBC, Inc. in the amount of \$620,150.14, plus interest from and after entry of this order and judgment at the statutory rate. However, this amount is to be offset in the amount of \$181,479.00 for the Viking Fire Protection, Inc. of the Southeast judgement, plus interest from and after entry of this order and judgment at the statutory rate, which was purchased by The Bank of Newington on or about December 9, 2022.

6. Costs of this action are taxed against The Bank of Newington, and escrowed funds shall be released to pay them.

7. Upon payment in full to Williamsburg County Development Corp. and HBC, Inc., the amounts stated above, as well as payment of costs taxed to The Bank of Newington, the balance of any remaining foreclosure proceeds in escrow shall be released to the Bank of Newington as full and final satisfaction of its claims in this matter.

8. The Williamsburg County Clerk of Court is instructed to make the payments in the order stated above, to the respective parties, from the proceeds held in escrow from the foreclosure sale in this action.

AND IT IS SO ORDERED.

March ____, 2023

Manning, South Carolina

The Honorable R. Ferrell Cothran, Jr.
Chief Administrative Judge, 3rd Judicial Circuit



Williamsburg Common Pleas

Case Caption: Bank Of Newington VS Lhsc, Inc. , defendant, et al

Case Number: 2019CP4500193

Type: Order/Judgment and Form 4

So Ordered

R. Ferrell Cothran, Jr.