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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2023-001087
Case Nos. 2018-CP-45-00258 and 2019-CP-45-00193

Bank of Newington, Appellant,

v.

LHSC, Inc., Williamsburg County Development Corporation, Viking Fire Protection, Inc. of the Southeast, and HBC, Inc., Defendants, of which Williamsburg County Development Corporation and HBC, Inc. are the Respondents,

AND

HBC, Inc., Cross-Claimant, Respondent,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

HBC, Inc., 3rd Party Plaintiff, Respondent,

v.

Louis Hornick, II, and Blake Fickling, 3rd Party Defendants,

AND

Williamsburg County Development Corporation, Cross-Claimant, Respondent,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

Williamsburg County Development Corporation, 3rd Party Plaintiff, Respondent,

v.

Louis Hornick, II, and Blake Fickling, 3rd Party Defendants.

THE BANK OF NEWINGTON'S INITIAL RESPONSE BRIEF TO HBC'S APPEAL

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issue on Appeal1

Statement of the Case.....2

Statement of the Facts8

Argument and Citation of Authority12

 I. Motions made to amend based on a scrivener’s error do not
 toll the time to appeal and HBC’s Appeal is untimely.12

 II. The Bank of Newington’s Judgment against HBC properly
 served as an offset against the award to HBC.13

 A. Legal considerations required an offset.13

 B. Equitable considerations required an offset.15

 III. The Trial Court’s final decision on the merits represented a
 full and final adjudication of the claims that were presented
 or could have been presented at trial.16

 IV. The Trial Court correctly stopped accrual of Post-Judgment
 interest against the Bank of Newington while the Judgment
 amount was held in a court ordered and protected Escrow
 Account and the other parties unsuccessfully challenged the
 Judgment.19

Conclusion20

TABLE OF AUTHORITIES

CASES

Dawkins v. Union Hosp. Dist., 408 S.C. 171,
758 S.E.2d 501 (2014)16, 17

First Sav. Bank v. McLean, 314 S.C. 361, 363,
444 S.E.2d 513, (1994).17

First Federal Savings & Loan Association v. Dangerfield, 307 S.C. 260, 265,
414 S.E.2d 590, 593 (Ct. App. 1992)17

Forester v. Forester, 226 S.C. 311,
85 S.E.2d 187, 188 (1954).12

Gecy v. S.C. Bank & Trust, 422 S.C. 509, 520,
812 S.E.2d 750, 756 (Ct. App. 2017).....18

Historic Charleston Holdings, LLC v. Mallon,365 S.C. 524, 533,
617 S.E.2d 388, 392 (Ct. App. 2005)12

Kerr v. Branch Banking & Trust Co., 408 S.C. 328, 331,
759 S.E.2d 724 (2014)17

Nunnery v. Brantley Constr. Co., 289 S.C. 205,
345 S.E.2d 740, (Ct. App. 1986))16

Otten v. Otten, 287 S.C. 166, 167,
337 S.E.2d 207, 208 (1985)12, 13

Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Golf & Yacht Club,
310 S.C. 132, 142, 425 S.E.2d 764, 770-771 (Ct. App. 1992)..18

Regions Bank v. Schumauch, 354 S.C. 648, 670,
582 S.E.2d 432, 444 (Ct. App. 2003)17

Riley v. Ford Motor Co., 414 S.C. 185, 195,
777 S.E.2d 824, 830 (2015)15

Russo v. Sutton, 317 S.C. 441, 444,
454 S.E.2d 895, 896 (1995).19

Sears v. Fowler, 293 S.C. 43, 45,
358 S.E.2d 574, 575 (1987)19

<u>Smith v. Tiffany</u> , 419 S.C. 548, 560 (2017)	18
<u>Standard Fed. Sav. & Loan Ass'n v. Mungo</u> , 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991).....	12
<u>Watts v. Copeland</u> , 170 S.C. 449, 456, 170 S.E. 2d 780, 783 (1933)	13, 14
<u>Wilder Corp. v. Wilke</u> , 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1990)	17

STATUTES

S.C. Code § 29-5-20.....	14
S.C. Code § 29-5-60.....	14
S.C. Code § 34-31-20.....	19

OTHER

Rule 12, SCRCF.....	17
Rule 14, SCRCF.....	18
Rule 50, SCRCF.....	12
Rule 52, SCRCF.....	7, 12
Rule 59, SCRCF.....	7, 12, 13
Rule 60, SCRCF.....	7, 12, 13
Rule 62, SCRCF.....	20
Rule 67, SCRCF.....	19
Rule 203, SCACR.....	12, 13

STATEMENT OF ISSUES ON APPEAL

- I. Did WCDC's motion claiming a scrivener's error toll the time for HBC to appeal?
- II. Was the Bank of Newington's Judgment against HBC properly used as an offset of the award to HBC?
- III. Did the Trial Court's final decision on the merits represent a full and final adjudication of the claims that were presented or could have been presented at trial?
- IV. Did the Trial Court correctly stop accrual of Post-Trial Judgment Interest against the Bank of Newington while the Judgment amount was held in a court protected and created escrow account and the other parties unsuccessfully challenged the Judgment?

STATEMENT OF THE CASE

On February 24, 2017, the Bank of Newington loaned LHSC, Inc. (“LHSC”) \$3,535,535.00 to purchase property, upfit a building and start a textile manufacturing business in Williamsburg County, South Carolina. The loan was a USDA guaranteed, business and industry loan. LHSC granted the Bank of Newington a purchase money mortgage to secure the loan. The principal of LHSC was Louis Hornick, II (“Hornick”). LHSC purchased the property and an empty speculative building from the Williamsburg County Development Corporation (“WCDC”) for \$500,000.00. The consideration for the purchase was \$250,000.00 in cash and WCDC’s receipt of 250 shares of preferred stock in LHSC.

LHSC hired HBC, Inc. (“HBC”) to upfit the building for a total construction cost of \$1,600,000.00. HBC hired Viking Fire Protection Inc. of the Southeast (“Viking”) to install the sprinkler system for the building. Blake Fickling (“Fickling”) supervised and monitored the loan for the Bank of Newington.

HBC applied for its final draw on November 28, 2017, which was the amount it owed to Viking and its retainage. LHSC refused to pay the draw amount. On February 7, 2018, WCDC issued an \$80,000.00 loan to LHSC, and on February 14, 2018, LHSC granted WCDC a second mortgage to secure the loan. LHSC continued to refuse full payment to Viking and HBC. The project failed.

On March 14, 2018, Viking filed a mechanic’s lien in the amount of \$181,479.00, and on June 8, 2018, Viking filed a lawsuit against LHSC, HBC, the Bank of Newington, and WCDC. The case number of the first case was 2018-CP-45-00258 and it is referred to as the “Mechanic’s Lien Action.” Viking raised a foreclosure of mechanic’s lien against LHSC, breach of contract claim against HBC, claim for violation of S.C. Code § 27-1-15 against HBC, and quantum meruit

claim against LHSC. Viking named the Bank of Newington and WCDC by virtue of their recorded mortgages against the property. All parties answered. HBC and LHSC asserted counterclaims and cross claims.

On July 2, 2018, HBC filed a notice of mechanic's lien claiming \$271,679.00, which included the amount owed to Viking. On November 15, 2018, HBC filed a motion to stay the mechanic's lien action pursuant to an arbitration clause in the construction agreement between it and LHSC. The motion remained pending until June 3, 2019, when HBC withdrew it.

LHSC defaulted on the loan, and on April 4, 2019, the Bank of Newington, filed a foreclosure action against LHSC, WCDC, HBC and Viking. The case number for the second case is 2019-CP-45-00193 and it is referred to as the "Foreclosure Action." Hornick had signed a personal guaranty to help secure the loan, and the Bank of Newington obtained a default judgment against him personally in a separate action. Bank of Newington v. Louis Hornick, II, Case No.: 2019-45-00325. This was not an action on the USDA guaranty as is alleged in HBC's Statement of the Case. The Bank of Newington has not collected any money on the Judgment against Hornick.

HBC answered, counter-claimed, cross-claimed and filed third-party claim against Fickling and Hornick in response to the Foreclosure Action. HBC's claims against the Bank of Newington were: (1) lien subordination, (2) intentional interference with a contract, (3) breach of covenant of good faith and fair dealing, (4) unjust enrichment, and (5) alter ego. HBC third party claims against Fickling were: (1) intentional interference with a contract, (2) alter ego, (3) breach of covenant of good faith and fair dealing, (4) civil conspiracy and (5) conversion. HBC requested a jury trial in its answer.

Discovery disputes arose between the Bank of Newington and HBC starting in January 2020. Both filed motions to compel, and the Honorable Kristi F. Curtis (“Judge Curtis”) partially granted HBC’s motion and granted the Bank of Newington’s motion.

In September 2021, a potential buyer expressed interest in purchasing the building and property. The Bank of Newington and buyer entered into an agreement for the buyer to purchase the property for \$2,000,000 subject to the Bank of Newington acquiring title by foreclosure. The parties agreed to allow the property to go through foreclosure and deposit the proceeds in an escrow account that would effectively substitute the account for the property.

The Bank of Newington filed a motion for various relief, which included a request to strike HBC’s demand for jury trial and consolidate the Mechanic’s Lien Action and Foreclosure Action, and it filed a motion for summary judgment against HBC and Viking. Viking also filed a motion for summary judgment against HBC. HBC filed another motion to compel against the Bank of Newington and a motion to dismiss against the Bank of Newington.

On March 10, 2022, after a hearing on February 9, 2022, the Honorable R. Ferrell Cothran, Jr. (“Judge Cothran”) issued a Foreclosure Decree. The Decree granted the Bank of Newington’s claim for foreclosure and established the debt owed by LHSC.

On May 19, 2022, Judge Curtis heard the Bank of Newington’s motion for various relief and motion for summary judgment. She also heard HBC’s motion to compel and motion to dismiss. On June 28, 2022, Judge Curtis denied HBC’s motion to compel by a Form 4 Order. HBC filed a motion to reconsider this order.

A public sale was held on June 6, 2022, and the Bank of Newington was the successful

bidder.¹ After the Special Referee conveyed title to the Bank of Newington, it completed the sale to the buyer. The Decree required the sales proceeds placed in an escrow account but a dispute arose over the execution of an escrow agreement, and the Bank of Newington filed a motion to enforce the decree against HBC. On June 28, 2022, Judge Cothran filed an Order requiring the HBC and Viking to enter into an Escrow Agreement pursuant to the Decree.

After this Order was signed and filed, the net proceeds from the sale were deposited into the Escrow Account. The Escrow Account was substituted for the Property for all purposes and with no prejudice to any parties equitable or legal claims. One Million Nine Hundred Eighty-Nine Thousand Five Hundred Sixty and 67/100 Dollars (\$1,989,560.67) was deposited into the Escrow Account. G. Wells Dickson, Jr., who also served as the Special Referee to conduct the public sale, served as Escrow Agent.

On August 4, 2022, the Honorable R. Kirk Griffin (“Judge Griffin”) heard Viking’s motion for summary judgment, and on August 17, 2022, Judge Griffin filed an Order granting summary judgment to Viking in the amount of \$257,538 against HBC plus post judgment interest.

On August 18, 2022, Judge Curtis denied the Bank of Newington’s motion for summary judgment and HBC’s motion to dismiss. She granted the Bank of Newington’s motion to strike HBC’s jury demand and to consolidate the two cases. On September 22, 2022, Judge Curtis partially granted HBC’s motion to reconsider and ordered the Bank of Newington to produce information regarding the identity of investors.²

¹ No money was generated at the public sale. The Bank of Newington was the only bidder and then it sold the Property to the third-party. WCDC’s initial brief incorrectly states that a Third-Party was the successful bidder.

² The Bank of Newington produced all USDA documents, again, and investor information in compliance with the September 22, Order in October. The Bank of Newington had produced a privilege log almost a year before the motion.

On November 21, 2022, WCDC filed a motion to amend its answer and assert counterclaims and third party claims against the Bank of Newington and Fickling. WCDC proposed to add the following claims: (1) breach of contract accompanied by fraud, (2) breach of contract, covenant of good faith and fair dealing, (3) veil piercing in equity, (4) unjust enrichment, (5) fraud and misrepresentation, (6) constructive trust, (7) conversion, and (8) tortious interference with contract. Viking also filed a motion to amend its answer in the Foreclosure Action and raise the same claims. The Court granted the motions on December 9, 2022.

Viking and the Bank of Newington settled Viking's claims. As part of the settlement, Viking assigned its Judgment and other claims to the Bank of Newington. On January 23, 24 and 25th, Judge Cothran conducted the non-jury trial of the remaining claims. At the end of the trial, Judge Cothran took the matter under advisement. He requested that the parties submit supplemental memorandum explaining damages they were claiming and the allegation of the revenue that the Bank of Newington received from the loan.

On February 7, 2023, Judge Cothran circulated an email to counsel outlining his decision to award relief to HBC and WCDC. He instructed counsel for WCDC to draft a proposed order, which he signed and filed on March 13, 2023. The Order awarded WCDC \$621,404.66, which represented grant money it claimed it paid, shares of stock it claimed it owned, attorneys' fees and prejudgment interest. The Order awarded HBC \$620,150.14 which included prejudgment interest, the lien amount it claimed including the amount owed Viking, and attorneys' fees. HBC's award was offset by the amount of Viking's lien without interest or attorneys' fees, which was \$181,479.00. WCDC was given first priority and HBC given second priority over the funds in the Escrow Account. The Bank of Newington's priority was reduced to third, and it would get the balance of the Escrow Account.

On March 13, 2023, the Bank of Newington filed a motion to stay enforcement of the Order, which the Court granted until it heard and decided the motion. On March 22, 2023, the Bank of Newington filed a Motion pursuant to Rules 52(b), 59(a) and (e), SCRPC, requesting the Court amend its Order or order a new trial. The Court heard the motion and motion to stay on May 12, 2023.

On June 2, 2023, the Court issued an Amended Order reducing the amount awarded to WCDC by its \$250,000 stock investment into LHSC and reducing HBC's award by the full Judgment to Viking as of August 22, 2022, which was \$257,538.00. On June 12, 2023, WCDC filed a motion to amend pursuant to Rules 59 and 60, SCRPC. Judge Cothran held another hearing on June 29, 2023, to decide the Bank of Newington's motion to stay and WCDC's motion to amend. Also on June 29, 2023, the Bank of Newington filed a notice of appeal of the June 2, 2023, Order.

On July 25, 2023, Judge Cothran denied the motion to stay and denied the motion to amend. The Order directed the Escrow Agent to disburse the amounts set forth in the Order. However, HBC and WCDC refused to sign instructions that did not provide per diem interest, and the Bank of Newington filed a motion to enforce the Order. The Court indicated an intent to grant the Bank of Newington's motion, but as of this date, it has not signed and filed an order.

On July 26, 2023, HBC and WCDC filed notices of appeal of the July 25th, 2023 Order and notices of cross appeals against the Bank of Newington's appeal. On August 23, 2023, the Bank of Newington filed a notice of appeal of the Court's Order on the motion to stay. The appeals were consolidated into the instant action. The parties signed Escrow Instructions on August 9, 2023, which disbursed disputed amounts to WCDC of \$376,991.19 and HBC of \$368,286.00. The rest of the money in the Escrow Account was disbursed to the Bank of Newington. The Escrow

Account has been closed.

STATEMENT OF FACTS^{3,4}

At some unknown point in the past, as HBC produced nothing in discovery or during testimony, HBC and LHSC agreed for HBC to upfit a speculative, shell commercial building that LHSC was purchasing from WCDC. (Trial Transcript Volume III, Testimony of Jeff Hudson, p. 837, l. 19-, l. 13-p.838, l. 12; R____). Stephen Skinner (“Skinner”) was HBC’s superintendent on the job, and he obtained a quote from Viking to install the sprinkler system for the building. (Id. at p. 842, l. 13-p. 843, l. 1; R____ and Plaintiff’s Exhibit 13, Viking Proposal; R____). Viking’s original quote included a pump for the sprinklers. (Ex. 13; R____). However, HBC or LHSC struck the pump from the contract, presumably in an effort to save money and add profit to its fixed price contract, and Skinner on behalf of HBC signed a revised quote on March 9, 2017. (Ex. 13; R____; see also Viking Deposition Excerpt, p. 27, ll. 14-18; R____).⁵

HBC and LHSC entered into a fixed cost contract requiring HBC to achieve substantial completion of the project within 120 days. (Exhibit 11, Construction Agreement, Article 3.3; R____; Plaintiff Exhibit 9, Assignment of Construction Contract, Construction Timeline; R____

³ During the trial, the Plaintiff presented a binder with several exhibits in it. The Court advised the parties that if it took the notebook, it would consider every exhibit in it. (Trial Transcript, p. 744, l. 16-p. 748, l. 23; R____). The Court took the notebook and no party requested that any exhibits in it be struck. Consequently, the Bank of Newington includes the entire notebook with the record on appeal.

⁴ The Bank of Newington asserts and incorporates by reference the Statement of Facts from its initial brief. In the interest of brevity, it will not restate them in this response brief.

⁵ The Bank of Newington noticed and submitted the deposition excerpts to the Court. HBC objected but the Court did not rule on the objection. The Court told the litigants at the end of the trial that he was considering everything given to him which presumptively includes the deposition excerpts meaning the objection was overruled. The objection was not renewed at the end of the trial.

and Trial Transcript, Vol. II, Testimony of Blake Fickling, p. 432, l. 7-p. 434, l. 1; R____). The pump was needed, and the sprinkler was not installed until October, 2017, 300 days after commencement of the contract. (Test. of Hudson, p. 871, ll. 4-14; R____).

HBC asked for a final inspection in early November, and it failed the inspection. (Test. of Hudson, p. 871, l. 12-p. 872, l. 3; R____ and Plaintiff Exhibit 18, WC Inspection Report; R____). Despite failing the inspection, HBC applied for final payment on November 28, 2017 misrepresenting to Partner, that a certificate of occupancy had been issued. (Exhibit 20, Partner Report, Application and Certification for Payment and Section 4.1; R____ and Exhibit 19, HBC Rep of C.O.; R____). When he submitted the final pay application, Hudson knew trouble was coming and he had not even received a punch list yet. (Test. of Hudson, p. 875, ll. 9-24; R____).⁶

The final payment request was for \$262,496.50, which consisted of a reduced amount of \$170,000 to Viking and \$92,496.50 to HBC for its retainage. (Id.). However, Hornick refused to authorize the payment based on his contention that Viking caused the delay in construction. (Id. at Funds Control Owner's Certification & Authorization for Disbursement; R____). Hornick demanded that Viking accept a \$50,000 reduction to the amount it was owed. (Id.).

Viking refused to accept a reduction. It also refused the notion of signing a conditional lien waiver based on the mistaken assertion that the property was governmental property and no lien waiver was necessary. (Exhibit 22, Email December 2017; R____ and Test. of Hudson, p. 878, l. 22-p. 880, l. 5; R____). Based on LHSC's refusal to authorize payment, incompleteness of the project and Viking's refusal to sign a conditional lien waiver, the Bank of Newington would not and could not force a payment from the control account. (Test. of Sheppard, p. 80, l. 9-81, l.

⁶ HBC misrepresents in its brief that DSI was never paid. HBC, Initial Brief, p. 7. However, the position taken by HBC at trial was that DSI had been partially paid. DSI was paid most of its contract price.

7; R____ and Test. of Fickling, p. 497, l. 4-p. 500, l. 9; R____).⁷

The project dragged on, and HBC finally received a certificate of completion on January 18, 2018 almost a year after commencement. (Test. of Hudson, p. 882, ll. 4-12;R____). LHSC continued its refusal to pay Viking and the final draw request, and although HBC admits it was responsible to pay Viking, HBC would not pay Viking until it was paid. (Test. of Hudson, p. 851, ll. 10-12, 872, l. 24-p. 873, l. 15; R____). After not receiving payment, Viking filed a mechanic's lien on March 14, 2018 for \$181,479.00. (Exhibit 32, Viking's Mechanic's Lien; R____). HBC followed by filing its own lien effectively on July 2, 2018, for \$271,679.00 which included the amount owed to Viking. (Exhibit 34, HBC Amended Mechanic's Lien; R____).⁸

Viking commenced a mechanic's lien action, and HBC contested that it owed Viking any money. (HBC Answer to Amended Complaint; R____). More than four years later, Viking finally obtained summary judgment against HBC on August 17, 2022. (Order granting Viking Motion for Summary Judgment; R____ and Plaintiff's Exhibit 27, Transcript of Judgment; R____). After Viking obtained the Judgment, it and the Bank of Newington settled. (Plaintiff's Exhibit 29, Fully Executed Settlement Agreement, ¶¶ 3 and 4; R____). As part of the settlement, Viking assigned its Judgment and claims to the Bank of Newington. (Id.).

The Trial Court conducted a non-jury trial of the two consolidated actions on January 23, 24 and 25th, 2023.⁹ During Trial, HBC and WCDC attempted to show that the Bank of Newington

⁷ HBC states in its brief that WCDC paid grant funds. However, the grant funds were paid by Williamsburg County and not WCDC.

⁸ HBC had to amend its lien based on its mistaken use of Viking's license number on the original lien. (Test. of Hudson, p. 794, ll. 2-13; R____).

⁹ HBC submitted an offer of settlement pursuant to S.C. Code § 29-5-10 on January 17, 2023. However, an offer of settlement must be presented 15 days before trial. S.C. Code § 29-5-10(b). HBC's offer of settlement was submitted seven days before trial, and it was untimely and ineffective.

received large amounts of profit on the loan. However, the Bank of Newington received some fees and a small portion of the interest paid on the loan, but these revenue receipts were erased by the portion of the loan that the Bank of Newington retained and lost and the fees it paid out. (Second Supplemental Trial Brief; R____). HBC did not make any attempt to articulate its position that Fickling was somehow liable to HBC on a third-party claim for its business dealings with LHSC.

On February 7, 2023, Judge Cothran delivered an email to the parties outlining his decision to award relief to WCDC and HBC based on breach of contract of the USDA Conditional Commitment and Guaranty, and on HBC's mechanic's lien. (February 7, 2023 Email; R____). Judge Cothran directed counsel for WCDC to draft an Order. (Id.). On March 13, 2023, the Court filed the initial Order and issued an Order staying enforcement in response to the Bank of Newington's motion to stay. (Order Staying; R____). The Trial Court subsequently amended the Order on June 2, 2023, to provide a setoff to the Bank of Newington for the face amount of the Viking Judgment but excluding post-judgment interest.

On June 12, 2023, WCDC moved to amend based on a claim of scrivener's error. (June 12, 2023, Motion to Amend; R____). The Court heard this motion along with the pending motion to stay on June 29, 2023. Also on June 29, 2023, the Bank of Newington filed a notice of appeal of the June 2, 2023 Order. Judge Cothran issued an Order denying WCDC's motion to amend and motion to stay on July 25, 2023. (July 25, 2023, Order; R____). The Order required disbursement in express amounts from the Court ordered and protected Escrow Account. (Id.).

HBC filed this cross-appeal on July 26, 2023. Despite the order from the Trial Court, HBC and WCDC refused to consent to disbursement, requiring the Bank of Newington to file a motion to compel enforcement of the Order. (Motion to Compel Enforcement of the Order; R____ and

Emails sent to Judge Cothran on his request; R____). Judge Cothran delivered an email to the parties indicating his intent to grant the Bank of Newington’s second motion to compel enforcement of an order in this litigation and not charge any additional interest against the Bank of Newington based on actions of HBC and WCDC. (Email from Judge Cothran dated August 16, 2023; R____).

ARGUMENT AND CITATION OF AUTHORITY

STANDARD OF REVIEW

A foreclosure action is an action in equity. Historic Charleston Holdings, LLC v. Mallon, 365 S.C. 524, 533, 617 S.E.2d 388, 392 (Ct. App. 2005). In an equity case, the appellate court may view the evidence, find facts, and reverse a finding of fact based on its own view of the preponderance of the evidence. Id; *see also* Forester v. Forester, 226 S.C. 311, 85 S.E.2d 187, 188 (1954).

ANALYSIS

I. A motion claiming a scrivener’s error did not toll the time to appeal, and HBC’s appeal is untimely.

A notice of appeal must be served on all respondents within thirty days after receipt of written notice of the order or judgment. Rule 203(b)(1), SCACR. Only timely motions made for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP) or a motion for a new trial (Rule 59, SCRCP) toll the time to file an appeal. Id.

“Rule 60(a), allows the correction of clerical mistakes in judgments. A motion made under this provision does not toll the running of the time for appeal.” Otten v. Otten, 287 S.C. 166, 167, 337 S.E.2d 207, 208 (1985). A court should treat a motion based on the substance of the relief sought regardless of the form in which the request for relief was framed. Standard Fed. Sav. & Loan Ass’n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991).

HBC relies on WCDC's motion filed on June 12, 2023, to toll its time to appeal the Court's June 2, 2023, Order. Consequently, unless WCDC filed a motion that tolls the time to appeal, HBC's appeal was due within 30 days or 5 days after the Bank of Newington's appeal, whichever is later. Rule 203(c), SCACR.

On June 12, 2023, WCDC, filed a motion it framed as under Rule 59(e) and Rule 60(a), SCRCP. However, the ground WCDC asserted to support its motion demonstrate the substance of the motion is a claim of a clerical mistake. (WCDC, June 12, 2023, Motion to Alter/Amend Judgment, p. 2; R___). A claim for relief based on a clerical mistake is in substance a motion under Rule 60(a), SCRCP. Rule 60(a), SCRCP and Otten, 287 S.C. at 167, 337 S.E.2d at 208.

WCDC's motion is one under Rule 60(a), SCRCP, and the motion did not toll the time to file an appeal of the June 2, 2023, Order. HBC filed its cross-appeal on July 26, 2023, 53 days after it received the June 2, 2023, Order. Consequently, HBC's appeal is untimely and must be dismissed.

II. The Bank of Newington's Judgment against HBC properly served as an offset of the award to HBC.

A. Legal considerations require enforcement of the Judgment

The assignment of a judgment is valid and enforceable, and when the assignment of the judgment is absolute, the assignment carries with it the cause of action that it is based on as well as all the beneficial interests of the assignor. Watts v. Copeland, 170 S.C. 449, 456, 170 S.E. 2d 780, 783 (1933)¹⁰. Viking assigned its judgment in absolute, which included all claims and liens that Viking possessed. (Exhibit 29, Fully Executed Settlement Agreement; R___ and Exhibit 27, Transcript of Judgment; R___).

¹⁰ No argument has been made that the assignment of Judgment was invalid.

The face value of the Judgment as of August 22, 2022, was \$257,538.00, and post-judgment interest accrued on the Judgment. (Ex. 27, Transcript of Judgment; R___). The Bank of Newington has a vested property right in the Judgment and all beneficial interests incidental to the judgment. Watts, 170 S.C. at 456, 170 S.E.2d at 783.

HBC was awarded \$620,150.14, which includes the amount owed to Viking and interest on that amount. Viking assigned this amount to the Bank of Newington, and the Bank of Newington is entitled to collect on the Judgment against HBC. Regardless, Viking's amount should not include part of an award to HBC. Hudson testified that he intended to pay the Viking Judgment if HBC was paid. (Trial Transcript, Vol. III, Testimony of Jeff Hudson, p. 891, ll. 17-20; R___). No valid reason exists not to give effect to the Bank of Newington's Judgment against HBC.

In addition, Viking filed its lien on March 14, 2018, for \$181,479.00. Exhibit 32, Viking Mechanic's Lien. Four months later, HBC filed a mechanic's lien for \$271,679.00 that included the lien amount owed to Viking. (Exhibit 34, HBC Amended Mechanic's Lien; R___). Although LHSC allegedly owed a total of \$271,679 on the general contract, liens in the amount of \$453,158.00 were filed against the property.

The aggregate amount of liens may not exceed the amount the owner owes on the contract. S.C. Code § 29-5-20(b). The amount allegedly owed on the contract with HBC minus the amount owed Viking was \$90,200. This is the maximum amount of the lien that HBC could have properly filed. Furthermore, the contractor is required to pay the subcontractor lienor. S.C. Code § 29-5-60(b). The Mechanic's Lien statutes required the Court to deduct the amount owed Viking from HBC's award.

B. Equitable considerations required setoff

The right to a setoff is well established, and it is equitable in nature. Riley v. Ford Motor Co., 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015). Allowing a setoff prevents a party from obtaining a double recovery. Id. Reducing the amount awarded to HBC by the Judgment prevented, at least partially, HBC from obtaining a double recovery based on Viking's work.

In addition, the South Carolina Supreme Court cited favorably the following approach to providing credit for settlements:

A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Id. at 197 and 831.

HBC admitted it was responsible for paying Viking and it did not do so based on its regular approach of only paying subcontractors when HBC is paid. (Test. of Hudson, p. 851, ll. 10-12, 872, l. 24-p. 873, l. 15; R____). Moreover, HBC made more than a \$500,000 profit on the project, even without receiving the final payment. (Plaintiff Exhibit 35, HBC Cost Detail; R___ and Test of Hudson, p. 851, ll. 10-12, p. 872, l. 24-p. 873, l. 15 and p. 888, ll. 7-13; R___). HBC should have paid Viking, and then pursued a mechanic's lien claim against LHSC.

Instead, HBC denied in its answer that it owed Viking, and Viking finally obtained summary judgment against HBC four years later, on August 17, 2022. (Order dated August 17,

2022; R____). HBC's illegal policy of waiting to pay subcontractors until it was paid caused this litigation and, following the logic in the Order, caused the project to fail.¹¹

Furthermore, Viking's initial quote to HBC's unlicensed foreman included a pump. HBC directed Viking to remove the pump, which incidentally increased profit to HBC in its fixed cost contract. HBC could have avoided delay had it agreed to the pump at project commencement. Equity demands that Viking's Judgment is given full effect against HBC, who is no innocent party.

HBC's complaint that the Bank of Newington gained an advantage over it by settling with Viking is without merit and does not work to reduce the setoff that the Bank of Newington is entitled to as assignee of Viking's judgment and claims.

III. The Trial Court's final decision on the merits represented a full and final adjudication of all the claims that were presented or could have been presented at trial.

On February 7, 2022, Judge Cothran delivered a summary decision on the trial and asked counsel for WCDC to draft a proposed order. (February 7, 2022, Email; R____). The email granted relief based on WCDC's third-party contract claim and HBC's mechanic's lien claim. (*Id.*) Judge Cothran did not grant HBC's tort claims and it did not award punitive damages. The proposed order drafted by WCDC and HBC did not, as instructed, include such relief. The Trial Court issued a final decision after a non-jury trial on the merits. By issuing its final decision, the Trial Court denied the other causes of action that were raised or could have been raised. *See Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 345 S.E.2d 740, (Ct. App. 1986) (a decision on the merits is a final adjudication on what was decided and what might have been decided).¹²

¹¹ HBC alleges without any citation to the record that Fickling negotiated with HBC and WCDC. This is not true. Hudson admitted that the Bank of Newington did make any promises or agreement to pay HBC. The same is true for WCDC, and there was no evidence presented at trial that the Bank of Newington or Fickling persuaded WCDC to make a loan to LHSC.

¹² The only authority cited by HBC for its proposition that the Trial Court did not finally decide the pending issues in this matter is *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 758 S.E.2d 501

HBC now claims on appeal that the Trial Court did not rule on its other tort claims and punitive damages claim requiring a remand. However, an issue not presented and ruled on by the trial court is waived on appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1990). HBC's admits through its argument that it did not preserve the issue for appellate review. The issue cannot be raised for the first time on appeal.

In addition, the Trial Court correctly denied the tort claims and claim for punitive damages. HBC provides no substantive argument or authority to support its claim that the Trial Court incorrectly denied its claims. Any claim otherwise is now abandoned. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, (1994).

Regardless, the evidence presented at Trial, which is not contradicted by the Order, demonstrates that the Bank of Newington is not liable for tort claims or punitive damages. South Carolina appellate courts generally hold that a bank does not owe a duty to third parties to protect them, disburse to the proper party, safeguard funds or ensure they are paid. First Federal Savings & Loan Association v. Dangerfield, 307 S.C. 260, 265, 414 S.E.2d 590, 593 (Ct. App. 1992); *see also* Regions Bank v. Schumauch, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003) (no duty extended to guarantor of a loan that was in default).

A possible exception that is sometimes extended to a bank's customer or borrower is if the bank undertakes to create reliance on a service that the bank provides. Kerr v. Branch Banking & Trust Co., 408 S.C. 328, 331, 759 S.E.2d 724 (2014). Another limited exception that may extend an obligation to a third party is when a bank represents to the third party and that third party acts in reasonable reliance that the bank is a partner or essentially guaranties payment to a third party.

(2014). However, in Dawkins, the South Carolina Supreme Court reversed a decision dismissing an action pursuant to a Rule 12(b)(6) motion. Id. at 179 and 505. The decision does not purport to upend established law on the finality and effect of final orders on the merits.

See Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 142, 425 S.E.2d 764, 770-771 (Ct. App. 1992).

Hudson testified that neither the Bank of Newington nor Fickling promised to pay HBC the amount it claimed was owed to it. (Test. of Hudson, p. 851, l. 10-p. 852, l. 8 and 891, l. 24-p. 892, l. 7; R___). HBC did not ask for any security on the project such as a bond or line of credit to secure payment when it began work. (Test. of Hudson, p. 851, l. 10-p. 852, l. 8.; R___). None of the limited exceptions to extend duties to a lender apply in this case.¹³

In addition, to establish a cause of action for tortious interference with contractual relations, a plaintiff must show: 1) existence of a contract; 2) knowledge of the contract; 3) intentional procurement of its breach; 4) the absence of justification; and 5) resulting damages. Gecy v. S.C. Bank & Trust, 422 S.C. 509, 520, 812 S.E.2d 750, 756 (Ct. App. 2017). A bank is justified and within its rights to set its own lending policies. Id.

No explanation is offered to reasonably support an improper motive the Bank of Newington had to intentionally procure LHSC to breach its contract with HBC. Conversely, multiple justifiable business reasons supported the Bank of Newington's decision not to force pay HBC's final payment application. First, LHSC refused to authorize payment. Second, Viking, who had threatened to file a lien, refused to sign a conditional lien waiver upon receipt of payment.

¹³ The claims against Fickling were asserted as third-party claims pursuant to Rule 14, SCRPC. Rule 14 allows a defending party to cause a summons and complaint served on a person not a party **"who is or may be liable to him for all or part of the plaintiff's claim against him."** Rule 14, SCRPC (emphasis added). "Consequently, a non-party is subject to impleader only if there is a basis to assert he is liable to the named defendant for all or part of the plaintiff's claim." Smith v. Tiffany, 419 S.C. 548, 560 (2017). The Bank of Newington is the plaintiff in the Foreclosure action and Fickling is not liable to HBC for the foreclosure action filed by the Bank of Newington. HBC did not assert a proper third party claim against Fickling and the Trial Court correctly dismissed the claims.

Third, HBC misrepresented that it had obtained a certificate of occupancy, and the Bank of Newington reasonably and correctly believed that HBC's work was not finished.

The Bank of Newington's decision not to force pay LHSC's loan funds against LHSC's will to HBC, who had lied about getting a certificate of occupancy, so that HBC could pay Viking, who refused to sign a lien waiver, was not only a justifiable business reason but the correct and required reason.

IV. The Trial Court correctly stopped accrual of Post-Judgment interest against the Bank of Newington while the Judgment amount was held in a court ordered and protected Escrow Account and the other parties unsuccessfully challenged the Judgment

“All money decrees and judgments of courts enrolled or entered shall draw interest according to law....” S.C. Code 34-31-20(B). “Despite the mandatory tenor of the statutory language, the statute does not automatically apply in every case.” Sears v. Fowler, 293 S.C. 43, 45, 358 S.E.2d 574, 575 (1987). For example, a judgment creditor is not entitled to post-judgment interest when the creditor filed an unsuccessful appeal. Id. In such a case, the creditor caused the delay in payment. Id. Moreover, the purpose of the post-judgment interest is to penalize a judgment debtor who maintains the use of a judgment creditor's money. Id.

Post-judgment interest does not accrue on money deposited into the court pursuant to Rule 67, SCRPC. This is the case when a judgment debtor deposits money into the court and files an appeal. Russo v. Sutton, 317 S.C. 441, 444, 454 S.E.2d 895, 896 (1995). The rule encourages the debtor to pay the judgment and assures the judgment creditors the funds are available. Id.

The judgment money in this case was deposited into a court ordered and protected interest-bearing account. This alone prevented accrual of post-judgment interest. Moreover, WCDC prevented the disbursement of the Escrow Proceeds when it filed an unsuccessful motion to amend. Then, HBC and WCDC delayed disbursement each by resisting the disbursement of the Escrow

Proceeds. The Bank of Newington should not be penalized for money it did not possess and actions to delay disbursement taken by HBC and WCDC. This was the reasoning of the Trial Court and is correct. (Email dated August 16, 2023; R____).

Trial Courts have inherent power to enforce judgments, even to judgments on appeal. *See* Rule 62, SCRPC. Judge Cothran correctly applied the principles set forth in the Rules of Civil Procedure and appellate case law to prevent HBC and WCDC from refusing to take their money while earning above market interest rates at the Bank of Newington's expense.

CONCLUSION

The Bank of Newington requests that the South Carolina Court of Appeals dismiss HBC's appeal as untimely or deny the appeal and affirm, for the purpose of this cross-appeal, the Trial Court's decision regarding the offset of Viking's Judgment, dismissal of the other claims and limitation of post-judgment interest.¹⁴

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¹⁴ The Bank of Newington reserves the rights and claims asserted in its appeal that the offset should be more.