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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, 3<sup>RD</sup> Circuit

R. Ferrell Cothran, Jr., Circuit Court Judge

COMMON PLEAS CASE NOS.: 2018-CP-45-00258 and 2019-CP-45-00193

Appellate Case No. 2023-001087

Bank of Newington, Appellant-Respondent,

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-Appellants,

AND

HBC, Inc., Cross-Claimant, Respondent-Appellant,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

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

v.

Louis Hornick, II, Bank of Newington, and Blake Fickling,  
3rd Party Defendants,

AND

Williamsburg County Development Corporation, Cross- Claimant, Respondent-

Appellant,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

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

v.

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

**BRIEF OF RESPONDENT-APPELLANT HBC, INC.  
(IN RESPONSE TO INITIAL BRIEF OF APPELLANT-  
RESPONDENT BANK OF NEWINGTON)**

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December 6, 2023

Greenville, South Carolina

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## STATEMENT OF ISSUES

- I. Did BON's<sup>1</sup> Rule 59 motion fail to preserve its issues on appeal?
- II. Did the trial court properly find and conclude that HBC and WCDC were intended third-party beneficiaries of the USDA Conditional Commitment and Guarantee, and related contractual / closing documents? (*Corresponds to BON Statement of Issues No. I*)
- III. Did BON fail to preserve its contention that the trial court found and held that BON "had a duty to WCDC and HBC to regulate and control its borrower"? (*Corresponds to BON Statement of Issues No. II*)
- IV. Did the trial court act within its discretion in equity when it subordinated BON's lien to those of HBC and WCDC? (*Corresponds to BON Statement of Issues No. III*)
- V. Were HBC's claims and Mechanics Lien claim timely filed? (*Corresponds to BON Statement of Issues No. V*)
- VI. Did the trial court act within its discretion in denying BON's motion to stay? (*Corresponds to BON Statement of Issues No. VI*)
  - a. Did BON waive its right to challenge the denial of its stay motion when it consented to the release of the funds from escrow and, therefore, make that issue moot under Rule 241(c)(2), SCACR? (*Corresponds to BON Statement of Issues No. VI*)
- VII. Did the trial court exercise appropriate discretion in applying a much larger setoff amount to the benefit of BON for its receipt of an assignment of Viking's judgment as against HBC than it paid to Viking as part of its 11<sup>th</sup> hour trial strategy to paint Viking as the "only innocent party"? (*Corresponds to BON Statement of Issues No. IV, and HBC Statement of Issues No. II in its Initial Brief filed Nov. 6, 2023*)

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<sup>1</sup> For the convenience of the reader and for purposes of brevity, HBC will respectfully refer to the parties to this appeal throughout this brief, as follows: (1) Appellant Respondent Bank of Newington ("**BON**"); (2) Respondent-Appellant Williamsburg County Development Corporation ("**WCDC**"); and (3) Respondent-Appellant HBC, Inc. ("**HBC**").

## **STATEMENT OF CASE<sup>2</sup>**

### *Procedural History*

#### *Viking Mechanics Lien Action (2018-CP-45-00258)*

On June 8, 2018 Viking Fire Protection, Inc., of the Southeast (“Viking”), filed its Mechanics Lien action (2018-CP-45-00258) against the property known as 77 Commerce Drive, Kingstree, South Carolina 29556 (the “Property”). Viking was a sub-contractor to Respondent - Appellant HBC, Inc. (“HBC”). Viking joined the following parties in its ‘258 action: (i) LHSC, Inc. (property owner, hereafter “LHSC”); (ii) HBC, Inc. (general contractor); (iii) Bank of Newington (lender and construction loan servicer pursuant to USDA Business and Industry Guaranteed Loan No. 46-045-\*\*\*-\*\*-5705, hereafter “BON”); and (iv) Williamsburg County Development Corporation (2<sup>nd</sup> mortgage holder and seller of the subject property to LHSC, hereafter “WCDC”). On July 10, 2018, LHSC and Bank of Newington filed their Answer, Cross-Claim, and Counter-Claim of Defendants LHSC, Inc. and Bank of Newington, seeking “indemnity” against HBC for Viking’s claims against LHSC.

On June 8, 2018, HBC filed and served its Notice of Mechanics Lien and Statement of Account, which was received and file stamped as Instrument No. 201800001372 OR, and recorded in Book 508 at Page 39. (HBC Trial Exhibit Nos. 39 and 41). On June 11, 2018, HBC mailed and served its Amended Notice of Mechanics Lien and Statement of Account, which was received and file stamped on July 2, 2018, as Instrument No. 201800001582, and recorded in Book 511 at Pages 223 to 226. (HBC Trial Exhibit No. 40).

On July 31, 2018, Viking filed its Summons and Amended Complaint in the ‘258 Mechanics Lien action. HBC filed its mechanics lien claims in the pending ‘258 Mechanics Lien

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<sup>2</sup> HBC, Inc. does not concur / agree with the Statement of Facts provided by BON, and, therefore, is providing its own Statement of Facts. Rule 208(b)(2) SCACR.

Action on August 22, 2018 as part of its Answer to Defendant LHSC, Inc.’s Cross-Claim and HBC, Inc.’s Counterclaim For Foreclosure of Mechanics Lien.

On August 17, 2022, Viking<sup>3</sup> obtained summary judgment against HBC on its claim for breach of contract for failure to pay Viking for its work on the sprinkler system at the Property. HBC conceded at a hearing on August 4, 2022 on Viking’s Motion for Summary Judgment (filed Dec. 12, 2021), it had no direct defenses to the claim. On August 17, 2022, Viking obtained an order granting it judgment against HBC in an amount of \$257,538.00, consisting of \$181,479.00 in principal / contract balance and pre-judgment interest in an amount of \$76,059.00. Viking recorded its Transcript of Judgment in an amount of \$257,538.00 on August 22, 2022.

On September 22, 2022, the trial court entered its order on HBC’s Motion to Reconsider, filed July 7, 2022, and ordered the BON to provide additional discovery. The discovery order included the identities of the investors in the 90 % guaranteed portion of the USDA Loan, communications and documents related to the USDA, and privilege logs. BON provided an additional 5,000 pages of documents and information in October 2022. The parties conducted a 30(b)(6) deposition of the BON on Dec. 1, 2022.

*Bank of Newington Foreclosure Action (2019-CP-45-00193)*

On June 8, 2019, Bank of Newington filed its foreclosure action (2019-CP-45-00193) naming the following defendants: LHSC, Inc. (property owner), Williamsburg County Development Corporation (seller and 2<sup>nd</sup> mortgage holder), Viking Fire Protection, Inc. of the

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<sup>3</sup> Throughout this brief, HBC will refer to the parties to the trial court actions that are not parties to this appeal as follows: (i) “**Viking**” is Viking Fire Protection, Inc., of the Southeast (Viking was HBC’s sub-contractor for the sprinkler system work done at the Property); (ii) LHSC, Inc. as “**LHSC**” (LHSC was the single-purpose entity formed for the purpose of acquiring the land pursuant to the USDA’s Conditional Commitment and Guaranteed Loan, and operating the business that never opened its doors); and (iii) “**Hornick**” will refer to the principal and guarantor of the BON note and mortgage given by LHSC, Louis Hornick, II.

Southeast (sprinkler system sub-contractor), and HBC, Inc. (general contractor). On June 3, 2019, HBC filed its Answer, Cross Claims and 3<sup>rd</sup> Party Claims. HBC brought eleven (11) claims as follows: (1) Lien Subordination (in Equity against BON and WCDC); (2) Intentional Interference with Contract (against BON, Louis Hornick, II and Blake Fickling); (3) Breach of Contract Accompanied by Fraud (against LHSC and Hornick); (4) Breach of Contract - Covenant of Good Faith Fair Dealing (against LHSC, Fickling, and BON); (5) Veil Piercing (in Equity against LHSC and Hornick); (6) Unjust Enrichment (in Equity against BON, LHSC and Hornick); (7) Alter Ego (in Equity against BON, LHSC, Hornick and Fickling); (8) Civil Conspiracy (against Hornick and Fickling); (9) Conversion (against Hornick and Fickling); (10) Fraud (against Hornick and LHSC); and (11) Promissory Estoppel (against Hornick and LHSC).

On Nov. 21, 2022, WCDC filed its Motion to Amend in the '193 case to add claims against BON, as follows: (i) Lien Subordination (In Equity against BON and LHSC); (ii) Breach of Contract Accompanied by Fraud (against BON, Hornick and LHSC); (iii) Veil Piercing (in Equity versus BON, LHSC and Hornick); (iv) Unjust Enrichment (in Equity versus BON, LHSC and Hornick); (v) Fraud and Misrepresentation (versus BON, LHSC and Hornick); (vi) Constructive Trust (in Equity versus BON, LHSC and Hornick); (vii) Conversion (versus BON, LHSC, Fickling and Hornick); and (viii) Tortious Interference with Contract (versus BON, Fickling, LHSC and Hornick).

*Bank of Newington Settles with Viking*

On Dec. 2, 2022, Viking filed its Motion to Amend in the '193 case to add claims against BON, as follows: (i) Lien Subordination (In Equity against Bank of Newington); and (ii) Negligent Loan Servicing. On Dec. 9, 2022, the trial court entered its order allowing Viking and WCDC to amend their answers to assert counterclaims against the BON. On Dec. 9, 2022,

Viking accepted a settlement whereby it received \$181,500.00 from BON in exchange for dismissal of its proposed Amended Answer and Counterclaims, and also agreed to assign its judgment against HBC to BON. On Dec. 21, 2022, BON recorded its Notice of Assignment of Judgment in Williamsburg (2018-CP-45-00258) and Aiken Counties (2022-CP-02-01957). BON has not released or satisfied the judgment.

*HBC's Offer of Settlement Under S.C. Code Ann. § 29-5-10*

On Jan. 17, 2023, HBC filed its Offer of Settlement under S.C. Code Ann. § 29-5-10(b) in an amount of \$262,496.50 in the Consolidated Cases.

*Non-Jury Consolidated Trial, Jan. 23-25, 2023*

Beginning on Monday, Jan. 23, 2023, HBC, Viking and BON began a bench trial before The Honorable R. Ferrell Cothran, Jr., in Williamsburg County. Counsel to Viking appeared at the start of the trial and advised the trial court of its settlement with BON. No witnesses were called to testify at trial from Viking, but BON did offer some deposition testimony from Viking employee(s). Following conclusion of the testimony at trial, on Jan. 25, 2023, Judge Cothran asked the parties to each submit their Post-Trial Memoranda on Damages Amounts. HBC submitted its Post-Trial Memoranda on Damages Amounts on Jan. 30, 2023.

On Feb. 7, 2023, Judge Cothran instructed counsel to WCDC to prepare an initial draft of the order. That email stated, "HBC is entitled to recover a total of \$620,150.15. This figure represents \$390,212.92 for the mechanics lien plus interest, and \$229,937.22 for attorneys' fees and costs." On March 13, 2023, the trial court entered its order awarding HBC in summary, as follows:

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.

*Id.* at p. 22 of 24.

On March 22, 2023, BON and Blake Fickling filed their Motion to Amend for a New Trial and to Reconsider. On May 12, 2023, a hearing was held on the BON's Motion to reconsider filed March 22, 2023. On June 2, 2023, The trial court entered its Amended Order increasing the offset of the Viking judgment against HBC from \$181,479.00 to \$257,538.00, thereby also reducing the amount HBC was to receive from the escrowed funds from \$438,671.14 with interest from March 13, 2023 to \$362,612.14 with interest from June 2, 2023. Neither HBC nor BON challenged the June 2, 2023 order by way of any timely filed Motion under Rule 59. WCDC filed its Motion to Alter/Amend Judgment on June 12, 2023.

On July 25, 2023, the trial court entered its order Denying (1) Bank of Newington's Motion for Stay of Enforcement of Order, and (2) Williamsburg County Development Corporation's Motion to Alter/Amend Judgment, and to Disburse all Funds in Escrow. In its July 25, 2023 order, the trial court changed the date at which interest would accrue by 53 days for HBC from June 2, 2023 to July 25, 2023. On August 2, 2023, HBC filed its Motion to Alter or Amend, seeking redress of the changed interest accrual date in the July 25, 2023 order.

### Undecided Claims Remain in Trial Court

As of the filing of this Initial Brief, the trial court has yet to rule on ten of HBC's eleven claims set forth above in the '193 action. The trial court has also yet to rule on seven of WCDC's eight claims above in the '193 action. The only claims that have been resolved by the trial court are the Lien Subordination claims of HBC and WCDC.

### Defaults and Judgments

The BON obtained a judgment against Louis Hornick, II on the USDA Guaranty on Sept. 25, 2019 in an amount of \$3,932,124.68 (2019-CP-45-00325).

Hornick and LHSC are in default on all claims in the '193 action, including all claims brought by HBC in its pleading dated June 3, 2019, and styled as Answer, Counterclaim, Cross-Claim, and 3rd Party Claim of HBC, Inc.

### Appeals

Appellant-Respondent Bank of Newington filed its first notice of appeal on June 29, 2023, identifying the trial court's March 13, 2023 and June 2, 2023 orders.

Respondent-Appellant HBC filed its notice of appeal on July 26, 2023, identifying the trial court's March 13, 2023, June 2, 2023, and July 25, 2023 orders.

Respondent-Appellant WCDC filed its notice of appeal on July 27, 2023, identifying the trial court's March 13, 2023, June 2, 2023, and July 25, 2023 orders.

### Background Facts / Project Timeline

LHSC obtained a Conditional Commitment from the USDA on Feb. 1, 2017, for a 90 % guaranteed loan in an amount of \$3,535,535.00. The loan was to be funded by the BON. On Feb.

2, 2017, HBC and LHSC entered into a contract for HBC to provide construction services in an amount of \$1,600,000.00. (HBC Trial Exhibit 2). On Feb. 24, 2017, the BON, and representatives of LHSC met in Columbia to close on the USDA guaranteed loan. (HBC Trial Exhibit 3, at p. 1 of 11). As a part of the loan closing on Feb. 24, 2017, BON and LHSC entered in to that certain “Assignment of [LHSC’s] Construction Contract [with HBC].” (BON Trial Exhibit 9, LHSC\_0351 to 0353).

Prior to closing on the loan on Feb. 24, 2017, the BON arranged for a sale of the 90 % guaranteed portion to approximately 6 other financial institutions. (HBC Trial Exhibits 4, 5, 6, and 11). The sale of the 90 % portion closed financially on March 8, 2017, resulting in the BON receiving approximately \$3,630,640.90 in exchange for a 90 % share of the loan, or \$3,181,981.50. (HBC Trial Exhibit 5). This represented a net gain to the BON in an amount of \$448,659.40. (HBC Trial Exhibit 11). At that point in time, the BON still had a 10 % share in the USDA loan, or \$353,535.00, and had received a 1 % origination fee at closing in an amount of \$35,353.50. Over the course of servicing the loan pursuant to the USDA required provisions from Feb. 2017 to approximately April 2018, when it declared the loan in default, the BON received its 10 % share of the interest payments made from the Borrower’s loaned funds in an amount of approximately \$25,472.32. (*See e.g.*, HBC Trial Ex. 24, BON April 20, 2018 letter to USDA).

On March 27, 2018, BON proposed to HBC to send a letter apparently drafted by BON, LHSC, Hornick and the Haynesworth Sinkler Boyd law firm (HBC Trial Exhibit 18) to Viking. HBC refused to do so. (HBC Trial Exhibit 19).

On June 68, 2017, Hornick finally approved the change order needed to get the Viking contract finalized so Viking could then begin the design and installation process for the sprinkler system. (HBC Trial Exhibit 29).

On or about July 28, 2017, the WCDC representative sent a check to the BON in an amount of \$350,000.00 representing grant funds as set forth in the USDA's Conditional Commitment as follows: (i) \$150,000.00 from the S.C. Dept. of Commerce, and \$200,000.00<sup>4</sup> from the WCDC. (HBC Trial Exhibit 31).

HBC completed the construction in November 2017 to the point that the Williamsburg County Building Inspector advised all that he needed to do was verify that the installed sprinkler system would adequately cover the manufacturing equipment to be installed once paid for from the Bank's funds. (HBC Trial Exhibit 21). The equipment was never installed, and the manufacturer eventually sued LHSC and Louis Hornick, II in Greenville County and obtained judgment in an amount of \$291,858.19 (2020-CP-23-02080).

In late 2017, the BON withheld payment to HBC on an invoice it initially submitted on Nov. 28, 2017, and then amended at the Bank's and Hornick's request on Dec. 15, 2017. (HBC Trial Exhibit 14, at pp, 11-12 of 36). During that time period, the BON advised HBC and Viking there were not enough funds in the USDA loan account to pay HBC and Viking for their completed and approved sprinkler work. (HBC Trial Exhibits 15 and 16). Everyone knew Viking was owed roughly 2/3 of the amount of HBC's Invoice no. 8 in an amount of \$273,975.00, revised down per inducement of BON and Hornick to \$262,496.50. Negotiations transpired as to

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<sup>4</sup> According to the Feb. 1, 2017 Conditional Commitment from the USDA, \$100,000.00 of this \$350,000.00 was to come from an entity identified as Palmetto Development Group, however, testimony established that WCDC paid that amount instead of the Palmetto Development Group.

how to get the contractors paid. (HBC Trial Exhibits 15 and 16). It was agreed that the WCDC would fund an additional amount of \$80,000.00 to pay HBC and its sub-contractor, Viking. The WCDC provided those loan funds in early 2018. BON's documents show a net credit to the LHSC Control Account for the USDA loan in an amount of \$79,855.00 in Feb. 2018. Neither HBC nor Viking ever received any of those additional WCDC funds.

On April 9, 2018, HBC's principal, Jeff Hudson met with representative of a third-party dumpster service company at the subject Property (77 Commerce Drive, Kingstree, South Carolina). (HBC Trial Exhibit No. 38). In addition, as of April 9, 2018 and thereafter, HBC was obligated under its contract with LHSC (HBC Trial Exhibit No. 2) to be available to finish installation of the equipment that was never delivered to the Property, and thereby obtain a finalized and unconditional Certificate of Occupancy.

HBC and Viking remained unpaid until Dec. 9, 2022, when the BON settled with Viking as described above. Viking served its Notice of Lien on March 14, 2018. In response, on March 27, 2018, the BON and LHSC, who were each represented by the Haynesworth Sinkler Boyd Law Firm at the time, sent a proposed letter to HBC, asking HBC to advocate on behalf of LHSC and BON in laying the blame for the failed project on Viking. (HBC Trial Exhibit No. 18). HBC refused. (HBC Trial Exhibit No. 19). The litigations as set forth above ensued.

### **STANDARD OF REVIEW**

“In an action in equity, tried by the judge alone, without a reference, on appeal the Supreme Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence.” *Townes Assoc., Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) (citing *Crowder v. Crowder*, 246 S.C. 299, 143 S.E.2d 580 (1965)). “However, an appellate

court still affords a degree of deference to the trial court because it was in the best position to judge the witnesses' credibility." Sullivan v. Brown (In re Estate of Kay), 423 S.C. 476, 480, 816 S.E.2d 542, 544-545 (2018) (citing Lewis v. Lewis, 392 S.C. 381, 391, 709 S.E.2d 650, 655 (2011)).

"In an action at law, 'we will affirm the master's factual findings if there is any evidence in the record which reasonably supports them.'" Johnson v. Little, 426 S.C. 423, 428, 827 S.E.2d 207, 210 (Ct. App. 2019) (citing Query v. Burgess, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006)). "An action seeking damages for breach of contract is also an action at law and the trial judge's findings of fact will be upheld unless without support." Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 589, 538 S.E.2d 15, 20 (Ct. App. 2000) (citing Brown v. Allstate Ins. Co., 337 S.C. 499, 523 S.E.2d 807 (Ct. App. 1999)).

The "jurisdiction of the court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties." Green v. Bauerle, 2023 S.C. App. LEXIS 122\*; 2023 WL 6450954 (Oct. 4, 2019) (citing Riley v. Ford Motor Co., 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015) (quoting Rookard v. Atlanta & Charlotte Air Line Ry. Co., 89 S.C. 371, 71 S.E. 992, 995 (1911)).

"This Court reviews questions of law *de novo*." Santoro v. Schulthess, 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct. App. 2009) (citing Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008)). "In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court." Id. (citing Hunt v. Forestry Commission, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004)).

## SUMMARY OF ARGUMENT

- I. BON failed to preserve numerous issues which it seeks now to appeal.
- II. The trial court properly concluded HBC, WCDC, and other similarly situated third-parties were intended third-party beneficiaries of the USDA Conditional Commitment and Guarantee.
- III. BON failed to preserve any argument or contention the trial court found and held that BON “had a duty to WCDC and HBC to regulate and control its borrower.”
- IV. The trial court acted within its discretion in subordinating BON’s lien.
- V. HBC’s claims and Mechanics Lien were timely filed.
- VI. The trial court acted within its discretion to deny BON’s motion to stay.
  - a. The BON waived it’s right to challenge on appeal the denial of its stay motion when it consented to the release of the funds from escrow.
- VII. The trial court improperly exercised its discretion in applying a larger setoff amount to the benefit of BON for assignment of Judgment from Viking.

## ARGUMENT

### **I. BON failed to preserve numerous issues which it seeks now to appeal.**

Pursuant to Rule 208(b)(6), HBC hereby respectfully incorporates by reference all those arguments made and proposed standard of review offered by Respondent-Appellant WCDC in its brief filed today under the heading, “I. BON’s Rule 59 Motion Failed to Preserve Issues on Appeal.”

### **II. The trial court properly concluded HBC, WCDC, and other similarly situated third-parties were intended third-party beneficiaries of the USDA Conditional Commitment and Guarantee.**

Pursuant to Rule 208(b)(6), HBC hereby respectfully incorporates by reference all those arguments made and proposed standard of review offered by Respondent-Appellant WCDC in its brief filed today under the heading, “II. The Trial Court Properly Found and Concluded WCDC

[and HBC were] Intended Third-Party Beneficiaries of the USDA Conditional Commitment and Guarantee.”

In addition, HBC did not need to be declared a third-party beneficiary for the trial court to find its lien superior to the BON mortgage because of its status as a Mechanics Lien holder.

**III. BON failed to preserve any argument or contention the trial court found and held that BON “had a duty to WCDC and HBC to regulate and control its borrower”**

would note due to its status as Mechanic’s Lien holder, it is not necessary, “III. BON [also] Failed to Preserve any error as to any Finding or Holding that BON Had a Duty to HBC and WCDC to Regulate and Control Its Borrower.”

Further in support of this argument, HBC would direct the Court’s attention to BON’s Trial Exhibit 9, entitled “Assignment of Construction Contract,” which was produced by LHSC in discovery as LHSC\_0351 to 0353. As is shown in this document, for which HBC was never advised of its existence, BON had complete control over LHSC and had actually granted a license back to LHSC to oversee and “act” as the owner under the subject AIA Contract with HBC. (HBC Trial Exhibit 2). Still further, the evidence at trial showed that BON exercised this same control as provided for in the Assignment of Construction Contract, but they did not give notice to HBC of such official exercise, as was required under Sections 4 and 5(b) of the Contract, which stated, “Lender may, at Lender's option, upon written notice to the Borrower and the Contractor and during the continuance of the Event of Default, terminate the license granted in Section 1 hereof as to the contract in default.” (BON’s Trial Exhibit 9, underline emphasis added).

This Assignment of Construction Contract is but one example of the “common interests” of BON and LHSC as adverse to HBC and WCDC from the outset of the closing of the loan on Feb. 24, 2017. Further evidence of such “common interest” was shown when the Haynesworth Sinkler Boyd law firm was advising BON, LHSC and Hornick in late 2017 and into 2018, including but not limited to on July 10, 2018, when they filed a single pleading on behalf of BON and LHSC, styled as follows: “Answer, Cross-Claim, and Counter-Claim of Defendants LHSC, Inc. and Bank of Newington.”

A still further example of the “common interests” of BON and LHSC as adverse to HBC, Viking and WCDC is the way in which the BON doled out the remaining funds in the LHSC Control Account in late 2017 and in 2018. (*See e.g.*, HBC Trial Exhibits 7, 10 and 43). These, at a minimum, reckless disbursements were made by BON after it knew it was obligated to pay HBC’s Pay Application No. 8, as approved by the BON’s third-party construction review company, Partner. (HBC Trial Exhibit 14, dated Dec. 22, 2017; *see also* Findings of Fact Nos. 9, 12, 26, 28, 30 and 34, Amended Order, June 2, 2023).

As is also shown by Blake Fickling’s email to Shannon Legree at the USDA on Dec. 1, 2017, BON knew all that was left to be done for the construction to be completed was to move in the equipment. (HBC Trial Exhibit No. 22, Dec. 1, 2017 email, stating, *inter alia*, “The last remaining item to be completed before receiving the Final CO is the installation of the equipment, so that the Fire Marshall can sign off on the fully completed space as it will function.”). The equipment was never delivered. This is because BON did not have funds remaining in the LHSC Control Account to pay for that either. This was all due to the fact that after Dec. 1, 2017 (HBC Trial Exhibit No. 22), BON continued to pay itself and its investors interest from the LHSC Control Account (HBC Trial Exhibits 3, 10 and 43), and also continued

to pay Mr. Hornick a \$16,666.67 a month salary to operate a business that never even opened, despite the use of almost \$4,000,000.00 in USDA, S.C. Department of Commerce and Williamsburg County's public funds. (*See e.g.*, FOF's 26, 28, 30, 33, and 37, June 2, 2023 Amended Order; *see also* HBC Trial Exhibits 10 and 43).

The record shows the BON had sufficient funds to pay HBC's Pay Application No. 8 (submitted Nov. 28, 2017) in their LHSC Control Account for the subject USDA loan in Dec. 2017. (HBC Trial Exhibit 10).<sup>5</sup> However, instead of paying the amounts due and approved by their 3<sup>rd</sup> party review company, Partner (HBC Trial Ex. 14), the BON and its former employee, Blake Fickling,<sup>6</sup> actively feigned good-faith negotiations with HBC and Viking, including tricking WCDC to loan an additional \$80,000.00 to the project. This additional \$80,000.00, bringing the WCDC's total cash contributions to the project up to \$280,000.00, was for the sole purpose of paying HBC and Viking, allegedly without violating the terms of the USDA Conditional Commitment. HBC and Viking received none of those additional funds. Instead, the BON and Fickling squandered the remaining funds in the LHSC Control Account on matters clearly outside the scope of the USDA's allegedly sacred Conditional Commitment categories. (HBC Trial Exs. 1, 7, 10 and 43; *see e.g.*, FOF 35, Amended Order, June 2, 2023, at pp. 14 of 26).

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<sup>5</sup> Showing \$389,518.88 in the LHSC Control Account as of deposit of the \$80,000.00 loan from WCDC in 2018. Also showing \$457,889.82 after BON paid itself November interest in 2017.

<sup>6</sup> Evidence at trial and in discovery revealed Blake Fickling had resigned from the BON in late 2016, before the subject LHSC loan was approved by the USDA on Feb. 1, 2017, or closed on Feb. 24, 2017. As of 2017 and going forward, Fickling and BON had no formal employment arrangement, whether as an employee or an Independent Contractor. Instead, Fickling working pursuant to a "gentlemen's agreement" with his former brother-in-law, Bank CEO, Tripp Sheppard. Per their "gentlemen's agreement," Fickling was to be paid \$10,000.00 upon the completion of the LHSC loan. He was never paid that amount.

By March 8, 2017, BON had received gross revenues on this USDA loan in an amount of at least \$484,012.90, and still owned a 10 % share in the loan (HBC Trial Exhibits 4, 5, 6, 7, 8, 9, 10, and 11), valued at \$353,535.00. Instead of paying the contractors for the work that was undeniably complete as far as they could take it without equipment delivery. BON continued to pay itself and its “investors” interest from the same pool of funds needed to pay HBC. (HBC Trial Exhibits 7, 10 and 43).<sup>7</sup> In addition, the BON inexplicably continued to pay Louis Hornick, II his \$200,000.00 annual salary from the LHSC Control Account, necessarily depleting the funds that were previously available to pay HBC (and Viking). (*See e.g.*, FOF’s 26, 28, 30, 33 and 37, March 13, 2023 order). The BON also paid out Hornick’s continued expense requests, even though it knew the equipment was not paid for and was not going to ever be delivered. (*See e.g.*, FOF 31, 35 and 36, June 2, 2023 Amended Order; *see also* HBC Trial Exhibits 7, 10, and 43).

#### **IV. The trial court acted within its discretion in subordinating BON’s lien.**

Pursuant to Rule 208(b)(6), HBC hereby respectfully incorporates by reference all those arguments made and standard of review proposed by Respondent-Appellant WCDC in its brief filed today under the heading, “IV. The Trial Court Acted within its Discretion when it Subordinated BON’S Lien.”

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<sup>7</sup> These spreadsheets show beyond a shadow of a doubt that BON was tracking exactly the amount of remaining funds in the LHSC Control Account (HBC Trial Exhibits 8 and 9) for each of the respective categories identified by the USDA in its Conditional Commitment. These categories were as follows: (i) Business Acquisition (\$250,000.00), (ii) Improvements (\$1,250,000.00 + \$350,00.00 in required grant funds), (iii) Machinery and Equipment (\$805,050.00), (iv) Inventory (\$223,535.00), (v) Capital and Contingencies (\$637,530.00), and (vi) Closing (\$369,420.00). Despite this detailed tracking of outgoing funds by category, BON continued to pay themselves and their investors and Mr. Hornick, further depleting the remaining funds available to pay HBC and its sub-contractor, Viking.

**V. HBC's claims and Mechanics Lien were timely filed.**

The standard of review of this aspect of the appeal is *de novo*, as there are no facts in dispute as to when the relevant events occurred or did not occur (as in the delivery of the equipment). In addition, this aspect of the appeal should be decided as a matter of law, not in equity.

As is set forth entirely in the record of publicly filed documents,<sup>8</sup> HBC timely gave notice of and filed and served its Mechanics Lien action. BON has already made this argument once at summary judgment, in its motion filed Jan. 7, 2022, and it has been denied.

Further, as has been noted, the equipment was never delivered and it was well known and obvious that HBC's duties continued until the final and unconditional Certificate of Occupancy was obtained. (HBC Trial Exhibits 21 and 22; *see also* Williamsburg County Certificate of Completion, Building Permit #: 17WBC-BLD00010, dated Jan. 18, 2028, produced by WCDC and bates labeled as WMSBG\_CTY\_0013).

**VI. The trial court acted within its discretion to deny BON's motion to stay**

Pursuant to Rule 208(b)(6), HBC hereby respectfully incorporates by reference all those arguments made and standard of review proposed by Respondent-Appellant WCDC in its brief filed today under the heading, "VI. The Trial Court Acted Within its Discretion in Denying Bon's Motion to Stay."

In addition, HBC would note and argue BON waived its right to challenge the denial of the stay when it failed seek relief by way of supersedeas under Rule 241, SCACR. Further by its

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<sup>8</sup> See *supra*, at pages 2-3, recounting the filings of HBC in relation to its Mechanics Lien claim.

consent to the disbursement of the funds from escrow, BON had already waived its rights to challenge the denial of the stay order. BON received approximately \$1,244,283.48,<sup>9</sup> as per the August 9, 2023, fully executed “Escrow Account Disbursement Instructions,” providing for disbursement of escrow funds as follows:

1. \$376,991.19 to WCDC, as of August 9, 2023;<sup>10</sup>
2. \$368,286.00 to HBC, as of August 9, 2023;
3. All remaining funds to the Bank of Newington

Id.

Still further, with respect to the motion for stay, BON sought to have the funds in escrow held indefinitely pending an appeal, yet those funds did not belong to BON. Instead, approximately 90 % of the net funds to BON must be paid to the USDA for its paying off the investors BON secured in February and March of 2017, after BON’s actions caused the loan to go into default, without even paying for the equipment or the contractors. (HBC Trial Exhibits 4, 5, 6, 8, 9, 11, and 24).

Not only has BON waived its right to contest the denial of the stay order, their actions described above have made moot the issue of preservation of the escrow funds. Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) (noting “[a] moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.”).

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<sup>9</sup> On information and belief, the amount of funds initially deposited in to the interest bearing escrow account in 2022 was \$1,989,560.67. Accordingly, BON received at least \$1,244,283.48 in August 2023.

<sup>10</sup> The amounts disbursed to HBC and WCDC each included 15 days of interest at the 2023 post-judgment rate of 11.5%.

**VII. The trial court improperly exercised its discretion in applying a larger setoff amount to the benefit of BON for the assignment of Judgment from Viking**

Pursuant to Rule 208(b)(6), HBC hereby respectfully incorporates by reference all those arguments made and standard of review proposed by Respondent-Appellant HBC its Initial Brief filed with this Court on November 7, 2023, under the heading, “II. Did The Trial Court Commit Error in its June 2, 2023 Order by Granting a Windfall to the Bank of Newington in Setting Off HBC’s Judgment Amount by Substantially More Than BON Paid Viking, as Part of BON’s 11th Hour Trial Strategy to Portray Viking as the “Only Innocent” Party?”

In addition, to emphasize the point made in HBC’s Initial Brief, the net result of an approximate \$80,000.00 windfall to BON, the party that created and caused this entire controversy, is grossly unfair to HBC, particularly in comparison to the benefits reaped by BON. (HBC Trial Exhibit 11). And, by settling with Viking, BON flip-flopped on its prior assertion that Viking was responsible for the failure of the entire project. (HBC Trial Exhibit 18, BON’s Fickling stating, *inter alia*, on March 27, 2018, “Viking Fire Protection appears to have contributed significantly to the approximately 6 month delay of Substantial Completion.”).

A principal aspect of the SCRCF regarding discovery is that parties must admit certain facts and, therefore, eliminate or (at least) minimize issues required to be addressed at trial. The benefits of such a policy are undeniable. For example, narrowing the issues so that a jury trial, or a bench trial, can be completed in a one-week term of court. Here, however, BON duplicitous conduct has greatly exacerbated and frustrated all notions of judicial efficiency. For, example consider the trial court’s order dated Sept. 22, 2022, wherein HBC’s Motion to Reconsider was granted and, *voila*, the BON produces over 5,000 pages of documents in October of 2022, and

reluctantly discloses HBC's Trial Exhibit 10, on Dec. 1, 2022, in the midst of a discovery dispute occurring during in BON's 30(b)(6) deposition.

HBC would also direct the Court's attention to those FOF of the trial court regarding BON's allowing interference with HBC's contract with LHSC, including specifically at FOF Nos. 8, 10, 13, 26, 28, 30 and 33. (Amended Order, June 2, 2023).

Yet, here, BON has kept the money owed to HBC (and Viking) for five years, after attempting to pit the two against each other in March 2018 (HBC Trial Exhibits 18 and 19), and then later claiming Viking was "innocent" when it was convenient for BON to do so (*i.e.*, after BON settled with Viking).

HBC respectfully requests the Court either remand the setoff issue with specific instructions to the trial court, or remand with instructions to reconsider in view of Bauerle and the arguments presented by HBC in this appeal.

### **CONCLUSION**

This Court should dismiss those portions of BON's appeal that were not properly preserved as set forth in Sections I and II above, and affirm the trial court on issues II, IV, V,<sup>11</sup> VI, and VII, including a remand of issue VII as set forth immediately above.

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<sup>11</sup> Of the issues to be decided, all are in equity with the exception of Issue V regarding the statute of limitations for HBC's claims, including its Mechanics Lien claim.

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