THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas, 3rd Judicial 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.

APPELLANT-RESPONDENT HBC, INC.'S REPLY BRIEF

Wesley D. Few (S.C. Bar # 15565)
Wesley D. Few, LLC
Post Office Box 9398
Greenville, SC 29604
(864) 527-5906 | wes@wesleyfew.com

Attorney for Appellant-Respondent HBC, Inc.

January 23, 2024

Greenville, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Treatises

STATEMENT OF ISSUES

I. DID THE TRIAL COURT COMMIT ERROR BY NOT RULING ON HBC'S CLAIMS FOR INTERFERENCE WITH CONTRACT AND PUNITIVEDAMAGES WITH RESPECT TO BANK OF NEWINGTON AND BLAKEFICKLING, IN VIEW OF ITS EXTENSIVE FINDINGS OF FACT IN SUPPORTOF THE SAME.

   i. Respondent Bank of Newington ("BON") argues against this point in its Initial Brief at Section III, pages 16-19.

II. DID THE TRIAL COURT COMMIT ERROR IN ITS JUNE 2, 2023 ORDER INGRANTING WINDFALL TO THE BANK OF NEWINGTON IN SETTING OFF HBC'S JUDGMENT AMOUNT BY SUBSTANTIALLY MORE THAN THEBANK OF NEWINGTON PAID VIKING TO GET VIKING OUT OF THE CASE, AS PART OF ITS 11TH HOUR TRIAL STRATEGY TO PORTRAY VIKING ASTHE "ONLY INNOCENT" PARTY ?

   i. Respondent BON argues against this point in its Initial Brief at Section II, pages 13-16.

III. DID THE TRIAL COURT COMMIT ERROR IN ITS JULY 25, 2023 ORDER BYAMENDING THE JUDGMENT ENTERED JUNE 2, 2023 AS IT RELATED TO THE DATE AT WHICH POST-JUDGMENT INTEREST WAS OWED TO HBC EVEN THOUGH NO ISSUES WERE RAISED RELATED TO HBC AFTERENTRY OF THE JUNE 2, 2023 ORDER, AND (SIMILARLY) BY NOT RULING ON HBC'S RULE 59 MOTION, FILED AUGUST 2, 2023, AS IT RELATED TO SAID CHANGES TO THE JUNE 2, 2023 ORDER?

   i. Respondent BON argues against this point in its Initial Brief at Sections I and IV, pages 12-13 and 19-20.

REPLY

Undecided Claims[1]

In *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 576-577, 698 S.E.2d 856, 861 (Ct. App. 2010), this Court stated, "an appeal from a decision adjudicating a portion of the case must be dismissed." *Id.* (citing 10 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 2660 (3d ed. 2010)).[2]

Rule 54(b), SCRCP, provides:

> In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Id.

BON critiques HBC's Initial Brief for its reliance on *Dawkins v. Union Hosp. Dist.*, 758 S.E.2d 501 (2014), as merely a motion to dismiss case under Rule 12. The concept is the same, however, and raises issues of due process. A parties' substantive rights cannot be ignored by the failure to address all the pending claims in an action. The existence of the fields in the trial court's Form 4C show the importance of the Clerk's Office, as well as the parties, being made aware if an order "ends the case" or not. (*Id.*). Certainly, the trial court may have believed its orders dated March 13, 2023, June 2, 2023, and July 25, 2023 would have effectively ended the case, however, such an "ending" is not possible without a written decision on all pending claims.

---

[1] The BON's arguments against this issue are set forth in Section II of its Initial Brief, at pp. 13-16.

[2] In *Ashenfelder*, the Court further stated, "Federal Rule 54(b) is substantially similar to the South Carolina rule. []. Under the federal rule, "[a]bsent a certification under Rule 54(b) any order in a . . . multiple[]claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory." *Id.* (citing Federal Practice and Procedure, § 2654).

While the net result of a decision on all pending claims may only require HBC and / or WCDC to elect remedies, whether in equity or at law, for example, to avoid a double recovery, a decision must be rendered on all claims.

Form 4C is consistent with the provisions of Rule 54(b), SCRCP. There is no entry of a Form 4 as is provided for at sccourts.gov as Form No. 4C in this case. This "form" document includes fields for the trial court to state, for example, whether or not an order "ends the case," as follows:

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

Id., available at https://www.sccourts.org/forms/searchFormTitle.cfm (emphasis added).

BON argues in its Initial Brief that the trial court's email dated Feb. 7, 2023 decided all claims. (*Id.* at 16). However, it did not. It simply set forth which claims HBC and WCDC prevailed upon as it related to the priority of lines on the escrowed funds. The trial court's Findings of Fact and Conclusions of Law cannot be reconciled with a finding that BON and

Fickling did not, for example, interfere with HBC's contract with LHSC, and / or with HBC's contract with Viking, and caused HBC damages.

BON cites several cases in its Initial Brief. (*Id.* at 16-18). None of which address the issue before the Court. For example, BON cites *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 345 S.E.2d 740 (Ct. App. 1986) for the proposition that "a decision on the merits is a final adjudication on what was decided and what might have been decided." (*Id.* at 16). However, upon review, *Nunnery* was a breach of contract dispute between a subcontractor (plaintiff) versus the contractor (defendant). The contractor also brought a counterclaim. The counterclaim was basically a defense to the claim for payment by the subcontractor. *Id.* at 743, 289 S.C. at 210 (stating, "[t]he fact that Brantley by its counterclaim in the first action chose not to request all the damages it suffered because of Nunnery's breach of the roofing contract does not prevent *res judicata* from operating to bar Brantley's prosecution of the second action," after the entire action had been dismissed with prejudice). The parties in *Nunnery* also argued about whether or not to arbitrate, however, none of that mattered because the parties later voluntarily settled the case and each agreed to dismiss it with prejudice. *Id.* at 742, 289 S.C. at 208 (stating, months later, "Nunnery and Brantley settled the action, [and it] was dismissed 'with prejudice' by a consent order."). Accordingly, *Nunnery* has nothing to do with the situation presented here, wherein claims were still pending and have not been ruled upon at any stage by the trial court.

Next, BON cites *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1990) for the proposition that "an issue not presented and ruled on by the trial court is waived on appeal." HBC agrees because the trial court here never "ruled on" HBC's interference with contract or other tort claims at law. The *Wilder* case is also of no use to this Court. *Wilder* involves an analysis of disputes as to when interest should accrue, not whether or not certain claims remained

unresolved by a trial court's orders. *Id.* (stating, the "Court of Appeals affirmed the master's order except on four points."). Those four points included: (i) whether or not "interest began to accrue on the loan from the date of signing," (ii) did the "master err[] in applying Buyer's first payment entirely toward principal," (iii) did the "master incorrectly [give] Buyer credit for 180 payments when the evidence supported only 179 payments," and (iv) did the "Buyer's amortization schedule [properly give] credit for the federal court judgment ..." *Id.*

Next, BON cites *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) for the proposition that HBC somehow "abandoned" its interference with contract and other tort claims. (*Id.* at 17). *McLean* was a decision in a foreclosure action relating to a motion for reconsideration. It involved a holding of "abandonment" of an issue, not an entire claim. *Id.* (stating, "Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue.").

BON next cites two cases for its position that a Bank "generally" does not owe a duty to a third-party. These cases, even if they stand for the proposition(s) stated, have nothing to do with whether nor not HBC is entitled to a written decision on its other pending claims, consistent with the trial court's existing Findings of Fact. The same is true of the other cases cited by the BON on pages 17 and 18.

Finally, on page 18, BON recites the elements of a tortious interference with contract claim and states, "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." (*Id.*). This is argumentative and irrelevant to the need of the trial court to address all pending claims. Even so, evidence presented and relied upon by the trial court showed that, by refusing to pay HBC and its sub-contractor (Viking), BON continued to pay itself and its investors interest payments, thus

depleting the funds available to pay HBC (and Viking). (Amended Order, dated June 2, 2023, at ¶¶'s 40-41 and 43-46). BON's mismanagement of the loan funds created multiple motivating factors for it to attempt to cover up what they had done and to hope and pray Viking or HBC would not file a lawsuit to get paid for their work. (*See e.g.*, June 2, 2023, Amended Order at 9, ¶ 20, referencing BON's "gross mismanagement of Project funds.").

Rule 58(a), SCRCP, sets forth provisions for a Clerk of Court to enter judgment. While the Williamsburg County trial court's online docket "judgment" tab indicates judgment was entered for WCDC and HBC, this information is from the March 13, 2023 order. There is no "judgment" entered of record by the Clerk in a filed document, whether by Form 4 or otherwise. The only documents that could form a judgment are the orders that have been appealed in this appeal, namely the March 13, 2023, June 2, 2023 and July 25, 2023 orders.

Rule 52(a), SCRCP, states, "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58." *Id.* There is no dispute that the orders that are the subject of this appeal do not address numerous claims of HBC. HBC cannot appeal the denial of a claim, nor can BON appeal an unfavorable decision, if the claims have not been decided by the trial court. Since that has not occurred, the case should be remanded to the trial court for a decision on all pending claims, so this appeal can move forward addressing all pending claims, and to avoid the necessity of multiple appeals.

Setoff[3]

[3] The BON's arguments against this issue are set forth in Section II of its Initial Brief, at pp. 13-16.

BON argues it is entitled to a full setoff of the judgment it procured from Viking[4] as part of its 11th hour strategy to settle with Viking, at a discount, after litigating for over 4.5 years and "abandoning" its prior "blame Viking" strategy. (HBC Trial Exhibits 18 and 19). BON still has not agreed to satisfy the judgment for which it has since been awarded setoff. (Case No. 2022-CP-02-01957 (transcribed to Aiken County) and Case No. 2018-CP-45-00258).

HBC does not contest that BON is entitled to setoff. Instead, HBC contests that the setoff was not applied consistently with the "equitable" principles recently set forth in the ***Green v. Bauerle***, 2023 S.C. App. Lexis 122, *6, App. Case No. 2020-000046 (Oct. 4, 2023). BON fails to cite to or address ***Bauerle*** in its Initial Brief. As set forth in HBC's Initial Brief, BON set this unfortunate series of events in motion in December 2017 when it pretended it would assist in getting HBC and Viking (HBC's sprinkler sub-contractor) paid. As part of this ruse, BON advised that unless the WCDC would loan / contribute an additional $80,000.00, stating in an email dated Dec. 8, 2017 to LHSC, "Viking, HBC and any of their vendors or suppliers … will only be paid if County loan funds come available." (HBC Trial Ex. 15).

Had BON done as it promised it would in Dec. 2017 (HBC Trial Ex. 15) and pay Viking and HBC with the additional $80,000.00 in loan funds from the WCDC, then Viking could have avoided the need to file suit and incur legal fees from Dec. 2017 to Dec. 2022. Viking also would have had the $181,479.00 it was owed in 2017 over the last 6 plus years.[5] Instead, due to the deceptive actions of BON, both Viking and HBC were required to file suit to get the monies they

[4] Viking Fire Protection, Inc., of the Southeast ("Viking"), was HBC's sprinkler subcontractor. Viking was owed approximately 2/3 of the final invoice submitted by HBC (Pay App. No. 8), or $181,479.00.

[5] Viking's settlement with BON precluded an award of attorneys' fees to Viking on its mechanics lien claim.

were owed from the LHSC loan proceeds, which were controlled exclusively by Fickling and the BON.

Likewise, if HBC had the liquidity to pay Viking in Dec. 2022, the amount that the BON paid Viking (to avoid the new direct claims coming against BON from Viking), then HBC could have reaped the same "discount" as the BON. Viking's judgment against HBC, as of August 2022, was in an amount of $257,538.00. In contrast, BON "purchased" this judgment, along with getting released from Viking's amended complaint for $181,500.00. The benefit to BON without even considering interest accrual, was at least $76,038.00. At a minimum, the record must reflect these facts as required for a proper and thorough equitable analysis, and BON ought not be entitled to the entire windfall of interest it did not pay Viking for, as well as avoidance of Viking's attorneys' fee claim under its mechanics lien against the property. If a lender is permitted to conduct its affairs in this manner in a publicly available decision, one must expect similar conduct from lenders in the future.

BON cites *Watts v. Copeland*, 170 S.E. 780, 783 (1933). *Watts* fails to address legal concepts put into practice since 1933, such as whether or not a holder of a note or a judgment is a "holder in due course." S.C. Code Ann. § 36-3-302. Under Section 36-3-302(a)(2), the BON as the "the [new] holder took the instrument (i) for [discounted] value, (ii) in [bad] faith, (iii) [and] with [~~out~~] notice that the instrument [was] overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series …" The default in paying Viking was created by the BON. Now it seeks to benefit from such conduct.

HBC should be entitled to receive the same "deal" BON made with Viking, as it was BON's breaches and bad-faith interference that prevented HBC from having funds to pay Viking in 2017 and going forward. The equitable principles laid out in ***Bauerle*** require this.

Final Judgments / Accrual of Interest[6]

BON argues in its Initial Brief the WCDC's Motion to Alter or Amend the Amended Order entered on June 2, 2023 (motion filed June 12, 2023) was only for purposes of correcting a "scrivener's error" under Rule 60(a). (*Id.* at 12). A review of the motion, however, shows it was filed under "Rules 59(e) and 60(a)." (WCDC Motion to Alter or Amend, filed June 12, 2023).

As set forth in HBC's Initial Brief in this matter, as of June 12, 2023, once no motion to alter or amend was filed by the BON or HBC of the trial court's Amended Order dated June 2, 2023, the trial court lacked jurisdiction to revise that order as it related to HBC and BON. As of June 2, 2023, the BON had already filed its motion to delay interest accumulation in favor of HBC and the WCDC. That motion, however, had not been directly ruled upon by the trial court. On July 25, 2023, the trial court altered the Amended Order filed June 2, 2023 with respect to both WCDC and HBC. In its order dated July 25, 2023, the trial court made it abundantly clear, "The Bank of Newington's ("BON") Motion for Stay Enforcement (filed March 13, 2023)," was denied. (*Id.* at 1-2).

HBC contends the trial court was without authority under *Overland v. Nance* to alter that decision as to HBC. Under the BON's theory of Rules 59 and 60, BON was required to file its own Rule 59 motion regarding accrual of interest on the June 2, 2023 Amended Order. However, BON had already done that in its motion to alter or amend on March 22, 2023. BON's theory

[6] The BON's argues against this issue in Sections I and IV of its Initial Brief, at pp. 12-13 and 19-20.

would require a party to continue to ask the trial court to revisit issues it has already been asked to revisit and had rejected. This is similar to the confusion created by the trial court's not addressing (and ruling upon) all of the HBC's claims in the case, as set forth in Section I above.

Each of the trial court's orders dated March 13, 2023 and June 2, 2023 were clear in the requirement that WCDC and HBC were to receive interest on their judgment amounts, stating, as follows, "Escrowed foreclosure proceeds shall thereafter be released to HBC, Inc. in the amount of [X for WCDC, Y for HBC], plus interest from and after entry of this order and judgment at the statutory rate." (March 13, 2023 Order at p. 22, ¶¶'s 4, 5; *see also* June 2, 2023 Amended Order at p. 24, ¶¶'s 4, 5).

It is worth noting again the funds in escrow, if any, to be distributed to BON were subject to a 90 % claim from the USDA, which chose not to get involved in this action. Accordingly, the BON was asking the trial court (and now this Court) to let it use the United States's money to secure payment of an adverse judgment it incurred while it appealed the case. BON also wanted all the money tied up indefinitely, with no accrual of interest.

The trial court heard these arguments from BON and rejected all of them. *Russo v. Sutton* is not useful to this Court's analysis for numerous reasons. First, in *Russo*, the funds were paid into the trial court by the actual judgment debtor, not a third-party. Also, the funds there were not the by-product of a consent foreclosure sale to a third-party by all claimants to the land. Finally, in *Russo*, the funds were unilaterally placed into the clerk's office and there was no motion or order to approve those funds for the purpose of stopping accrual of interest. *Russo v. Sutton*, 317 S.C. 441, 445, 454 S.E.2d 895, 897 (1995) (stating, "we hold Sutton's unilateral deposit of the funds insufficient to stop accrual of the interest mandated by § 34-31-20."). Similarly, here, the

BON has no order under Rule 62, SCRCP, or any other authority precluding the accrual of interest. Such an order was sought by BON and denied.

For at least these reasons, HBC respectfully submits the trial court's June 2, 2023 Amended Order was a final order as it related to HBC's rights to receive monies from the escrowed proceeds and was not subject to changes by the trial court. *Nance*, 815 S.E.2d at 433 (stating, the "trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served.").

CONCLUSION

This Court should remand the case to the trial court for a written decision on all pending claims in the case. This Court should remand the case to the trial court for a written decision applying the equitable principle of setoff consistent with *Bauerle* as set forth herein. Finally, with respect to the judgment in favor of HBC on its mechanic's lien and equitable lien subordination claims, this Court should remand to the trial court to award interest from June 2, 2023, as was previously ordered and is not subject to any Rule 59 motion.

[signature on next page]

WESLEY D. FEW, LLC

/s/Wesley D. Few_____
S.C. Bar Id. No. 015565
P.O. Box 9398
Greenville, South Carolina 29604
wes@wesleyfew.com | 864-527-5906

ATTORNEYS FOR APPELLANT-
RESPONDENT HBC, INC.

January 23, 2024
Greenville, South Carolina