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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 REPLY BRIEF TO HBC, INC.'S RESPONSE

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I. The Bank of Newington did not owe a duty to HBC to make sure it was paid, and its refusal to force LHSC to pay HBC did not cause the project to fail.

A. The Bank of Newington did not owe HBC a duty

To prevail on its claims against the Bank of Newington, HBC was required to establish that the Bank of Newington owed it a duty to safeguard funds or that it agreed to pay HBC. There is no dispute that the Bank of Newington did not promise or agree to pay HBC. Therefore, HBC is required to provide some explanation imposing a duty on the Bank of Newington to safeguard funds and pay HBC. It cites no authority to support such a claim.

A lender typically does not owe a non-customer a duty to safeguard a customer's assets to make sure the third-party is 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). The only exceptions to this rule found by the undersigned are when the lender is deemed a partner in a project or when the lender promises or agrees to pay the debt. 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).

There was no finding or holding of common interest in the Order. HBC normally attempts to impose liability on the Bank of Newington for not exerting enough control over LHSC, but now on appeal, HBC claims that the assignment of contract and brief sharing of legal representation demonstrated a common interest and too much control. The assignment was produced to HBC years prior to the trial in discovery. The assignment of contract is an additional source of security for the Bank of Newington which would allow it to exercise LHSC's rights under the construction contract with HBC if necessary. (Exhibit 9, Assignment and Construction Agreement; R___).

HBC was not a party to the assignment, and the assignment expressly states that the Bank of Newington has no obligation for the payments due HBC under the construction contract. (Id. § 5; R____). HBC, according to its brief, did not know about the assignment, and it could not have acted in reliance of the document. The assignment is not evidence of a joint venture.

The Bank of Newington and LHSC shared an attorney to defend the Mechanic's lien action before LHSC was held in default of the loan. Sharing the attorney for this period provides no indicia of control or joint venture in the project.

HBC implies in its response brief that Fickling negotiated with HBC and requested additional funds from WCDC. This is not true and was not a finding in the Order. Fickling did not request any amount from WCDC and no evidence was offered at trial to support this allegation. (Trial Transcript, Volume II, Testimony of Blake Fickling, p. 513, ll. 2-9; R___).

Moreover, Fickling did not negotiate with HBC to reduce the amount paid to Viking. Hudson had told Fickling that Viking and Skinner caused the delay in construction. (Test. of Fickling, p. 447, l. 24-p. 448, l. 13; R___). HBC had misrepresented to Partner and the Bank of Newington that it had paid Viking $20,000 before April 2017. (Trial Transcript, Volume II, Testimony of Blake Fickling, p. 446, l. 6-22; R___ and Exhibit 15, Pay App 3 42017). Fickling asked Hudson in the email to confirm the amount owed to Viking, and Fickling reminded the parties that the Bank of Newington needed lien waivers. [1],[2]

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[1] Fickling reported to the USDA about the construction progress relying on the misrepresentation he received from HBC that it had obtained a certificate of occupancy in November. (Trial Transcript, Volume II, Testimony of Blake Fickling, p. 475, l. 12-p. 476, l. 20; R___).

[2] The other email cited by HBC to support the notion that Fickling negotiated with HBC was an email from Fickling to Hornick and not to Hudson or WCDC.

B. The Bank of Newington did not cause any damages to HBC

HBC claims in its brief that construction was "undeniably complete" on November 28, 2017. (HBC Response Brief, p. 16). Conversely, WCDC claims in its response brief that the Bank of Newington's decision not to force pay HBC's final pay application caused Viking to refuse completion of the sprinkler system which led to the failure of the project. WCDC argues this for the first time on appeal as an attempt to establish causation. On the other hand, HBC argues in its brief, as it must, that construction was complete when it submitted its sworn application for final payment on November 28, 2017. (Trial Exhibit 20 and Test. of Hudson, p. 871, ll. 4-14; R___). Both factual positions cannot be true.

The truth is that both WCDC and HBC are wrong. HBC misrepresented to Partner that construction was complete in November and that it had obtained a certificate of occupancy. However, on November 9, 2017, Williamsburg County inspected and refused to issue a certificate of occupancy, and it noted numerous items that required completion before issuing a certificate. (Exhibit 18, Williamsburg County Inspection Report; R___). These items were not complete until January 18, 2018, two months after HBC attempted to receive final payment on the project. (Id at Certificate of Completion; R___). WCDC apparently has adopted the position that construction was not complete.

The Bank of Newington's decision not to force pay HBC for its final payment in December, more than a month before completion, was correct and had nothing to do with the success of the project. The argument that WCDC and HBC desperately rely on to establish causation is that the Bank of Newington's refusal to force pay final payment caused the project to fail. However, if construction was timely completed, then whether HBC received final payment or not would not impact the success of the project. The opposite factual arguments made by HBC and WCDC on

appeal demonstrate the fallacy of the causation finding.

HBC failed to establish that the Bank of Newington owed it a duty to force LHSC to pay the final application, and the Bank of Newington's refusal did not cause the project to fail.

II. The setoff applied against the amount awarded to HBC was the minimum required.

HBC argues that it should receive and keep the amount of retainage it was allegedly owed plus the amount owed to Viking. This result violates the Mechanic's Lien Statute, logic and Hudson's testimony at trial. The Mechanic's Lien statute prohibits HBC from collecting on Viking's work, and it precludes attorneys' fees that are more than its lien. S.C. Code § 29-5-10. HBC does not respond to this argument, and it does not respond to any arguments related to its Mechanic's Lien claim, including that its lien is unenforceable against the Bank of Newington's prior recorded mortgage.[3] S.C. Code § 29-5-70.

Moreover, the Trial Court improperly awarded to HBC the amount owed to Viking's plus interest, and then the Trial Court only set off Viking's judgment amount as of August 16, 2022, ten months before the Order. No rational argument supports the notion that HBC is entitled to Viking's work plus interest. The set off should have, at a minimum, included interest from August 16, 2022. Hudson testified at trial that he was going to pay Viking, but predictably HBC wants to keep the money and enjoy the windfall. This would add to the $500,000 profit that HBC made on the project. (Trial Exhibit 35; R___).

[3] HBC cites its offer of judgment made on January 17, 2023, which was less than 7 days before trial. An offer must be made 15 days before the term of court which the trial is set. S.C. Code § 29-5-10(b). HBC's offer was untimely. Also, HBC's offer included the amount owed to Viking, which it did not ultimately receive in the Order. Consequently, had the offer been timely, the Bank of Newington would have been the prevailing party under that provision and entitled to attorneys' fees against HBC. Id.

In addition, HBC did not produce any quotes or invoices from Viking during discovery, despite a Court Order requiring it to do so. The Bank of Newington discovered during Viking's 30(b)(6) deposition that Viking warned HBC's superintendent, Steven Skinner, that a pump was probably needed in December 2016, two months before construction began. (Exhibit 13; R___). However, HBC ignored this warning and decided against the pump, which was beneficial to its fixed cost pricing. The undeniable improper and illegal conduct was committed by HBC through its refusal to pay Viking until HBC was paid. HBC denied liability to Viking until August 4, 2022, almost five years after its debt to Viking accrued.

Furthermore, HBC misrepresented to Partner in April that it paid Viking $20,000 for work completed on the sprinkler system. HBC instead put this money in its pocket and never paid Viking a dime. Hudson's explanation was that his plan was to pay Viking from another budget item. (Test. of Hudson, p. 856, l. 20-p. 858, l. 5 and Exhibit 15, April Pay App; R___). This is precisely the same alleged misconduct that is pinned on the Bank of Newington. However, HBC demands not only that it escape with impunity but to profit from its decision not to pay Viking. The Trial Court did not err by setting off the award to HBC. The error was not a full set off including interest and attorneys' fees to the Bank of Newington.[4]

III. The Trial Court should not have accrued interest against the Bank of Newington while WCDC and HBC contested and refused to comply with the Orders.

The Trial Court had the discretion whether to stay enforcement of the Order. Rule 62, SCRCP. The only definitive way for the Bank of Newington to stop the accrual of interest, which was significant, was to indicate its conditional consent to lift the stay after the Trial Court amended

[4] HBC repeats the misstatement that the Bank of Newington netted a gain on this failed loan. Before application of attorneys' fees and interest, the Bank of Newington lost almost sixty thousand dollars on the loan. (Pretrial Brief Second Supplement; R____).

the Order. This was the most prudent decision. The Bank of Newington lost the motion to stay, but it did not waive its challenge that the money should have remained in the Escrow Account pending appeal and interest should not have accrued against it while WCDC and HBC stopped disbursement.

On July 25, 2023, the Court ordered the parties to disburse the Escrow Proceeds, and the Bank of Newington was not willing to disobey the Order, such as was done by WCDC and HBC. By signing the Escrow Instructions, the Bank of Newington was complying with the Trial Court's Order. The instructions waive claims against the Escrow Agent and not against HBC and WCDC.

The general rule is an automatic stay applies on the service of notice of appeal. Rule 241(a), SCACR. The Order was not a money judgment. The unusual circumstances in this case are not found in any of the exceptions set out in Rule 241(b), and the stay should have remained in place. Moreover, no interest should have accrued against the Bank of Newington while the money was in the Court created and controlled Escrow Account. Russo v. Sutton, 317 S.C. 441, 444, 454 S.E.2d 895, 896 (1995).

IV. HBC's Mechanic's Lien is untimely

In the affidavit supporting its Mechanic's Lien, Hudson claims under oath that HBC last performed work on the project on March 29, 2018. The amended lien was not filed until July 2, 2018, more than 90 days after the last day that work was furnished. On its face, the lien was untimely. S.C. Code § 29-5-90.

HBC changed its story during trial and presented evidence, which was produced for the first time in January 2023, of work done in April. However, Hudson also admitted that LHSC did not request that HBC do this work. (Test of Hudson, p. 884, l. 16-p. 885, l. 14; R___). Moreover, Hudson represented on November 28, 2017, that construction was finished, and it requested final

payment, including retainage. HBC's entire claim against the Bank of Newington is premised on the allegation that work was completed on November 28, 2017 and final payment should have been made. HBC cannot have it both ways.

January 15, 2024

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PROOF OF SERVICE

I certify that on January 15, 2024, I served the Bank of Newington's Initial Reply Brief to HBC's Response on the below parties, through their attorneys of record, by electronic mail to:

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