

RECEIVED

Jan 16 2024

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 WCDC'S RESPONSE

Walker H. Willcox #72608
Willcox, Buyck & Williams, P.A.
PO Box 1909
Florence, S C 29503-1909
(843) 662-3258 - Tel.
(843) 662-1342 - Fax
Email: wwillcox@willcoxlaw.com
Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities ii

Argument and Citation of Authority1

I. WCDC’S Preservation Arguments are without merit1

II. WCDC Repeats Misstatements of Facts1

III. WCDC introduces a new theory on Appeal.....4

IV. WCDC knew or should have known of its claims in 20184

V. WCDC is not an innocent party, had adequate remedies
at law and is not entitled to equitable relief6

VI. WCDC was, at best, an indirect beneficiary of the
Conditional Commitment and Guarantee7

TABLE OF AUTHORITIES

CASES

Beverly v. Grand Strand Reg’l Med. Ctr., 435 S.C. 594, 597,
869 S.E.2d 812, 814 (2022)8

Carolina First Bank v. BADD, LLC, 414 S.C. 289, 293,
778 S.E.2d 106, 108 (2015)6

Carolina Park Assocs., LLC v. Marino, 400 S.C. 1,
732 S.E.2d 876, 879 (S.C. 2012)6

Dominick v. Rhodes, 202 S.C. 139,
24 S.E.2d 168, 172-173 (S.C. 1943).....6

Fabian v. Lindsay, 410 S.C. 475, 490, 765 S.E.2d 132, 140 (2014).....8

Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Golf & Yacht Club,
310 S.C. 132, 151, 425 S.E.2d 764, 776 (Ct. App. 1992).....7

Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 577,
762 S.E.2d 696, 701 (2014)1

Windsor Green Owners Ass’n v. Allied Signal, Inc., 362 S.C. 12, 17,
605 S.E.2d 750, 752 (Ct. App. 2004).....8

STATUTES

S.C. Code § 15-3-530.....4

OTHER

Rule 15, SCRCP.....5

Rule 30, SCRCP.....5

Rule 32, SCRCP.....2

7 C.F.R. 4279.1(a).....9

7 C.F.R. 5001.1213, 9

ARGUMENT AND CITATION OF AUTHORITY

I. WCDC'S PRESERVATION ARGUMENTS ARE WITHOUT MERIT

WCDC repeats the same preservation and abandonment arguments it made in earlier pleadings. The Bank of Newington incorporates its arguments in its Response to WCDC's appeal and Response to HBC's appeal.

II. WCDC REPEATS MISSTATEMENT OF FACTS

WCDC implies that it did not receive \$250,000 in cash for the purchase of the property at closing (See WCDC Response Brief, p. 22) and that LHSC pledged its shares to WCDC as security for a debt. However, the purchase agreement between LHSC and WCDC provided that LHSC pay \$250,000 in cash, which it paid to WCDC, and 250 shares of its stock, which it conveyed to WCDC. (Exhibit 7, Settlement Statement; R____ and Exhibit, Purchase Agreement, ¶ 2(b); R____.)

WCDC attempts to misconstrue the written and clear Purchase Agreement through citations in its brief to testimony of Gillian Frieson, who as WCDC admits was not executive director when the purchase occurred. Such evidence is not allowed to vary the agreement. Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 577, 762 S.E.2d 696, 701 (2014). There is no mention of a five-year payment plan in the purchase agreement, Schedule I to the Purchase Agreement or the Subscription Agreement between LHSC and WCDC. (Exhibit, Purchase Agreement, Subscription Agreement; R____). The Purchase Agreement and Subscription Agreement contain a warning to WCDC that the shares it acquired represent a speculative and risky investment with no assurance as to the success of LHSC. (Ex. Purchase Agreement, Subscription Agreement, ¶ 13; R____).

WCDC again mischaracterizes the Bank of Newington's appeal filed and served on August 23, 2023, as an amended appeal. The August notice appealed the Trial Court's July 25, 2023, Order requiring disbursement of the Escrow Proceeds and awarding interest to HBC and WCDC. (See The Bank of Newington's August 23, 2023, Appeal; R____). The Bank of Newington suspects that WCDC prefers the "amended" label through its attempt to save its late filed cross-appeal.

The Bank of Newington submitted deposition excerpts from Jim Moore on January 19, 2023, prior to trial pursuant to Rule 32(a)(5), SCRPC. The notice was sent by email to the Trial Court on January 19, 2023, and counsel for WCDC was copied on the email. (Email to Trial Court dated January 19, 2023; R____).

In addition, the check for the U.T.C. grant to LHSC was drafted on an account owned by Williamsburg County and the cover letter delivering the grant money to the Bank of Newington was from Williamsburg County, not WCDC. (WCDC Exhibit 8, Letter and Check from Williamsburg County; R____ and Trial Transcript Volume III, Testimony of Gilleon Frieson, p. 648, ll. 16-p. 649, ll. 16; R____.) Jim Moore confirmed this during his deposition. (Deposition Excerpts of Jim Moore, P. 40, ll. 24-25, p. 41, ll. 1-25 and p. 42, ll. 1-13; R____).

Understanding the problem this creates, WCDC now for the first time in its response brief claims it and Williamsburg County are one in the same. However, WCDC is a separate non-profit organization entity with its own governing board. (Trial Transcript Volume III, Testimony of Gilleon Frieson, p. 593, ll. 10-13; R____). WCDC presented no evidence at trial and the Order makes no finding that WCDC is an alter ego or agent of Williamsburg County. If that was the case, surely there would have been a vote by County Council to loan LHSC \$80,000 in February 2018 and issue a grant to LHSC with no strings attached.

Regardless, Santee Electric paid the money to Williamsburg County as a U.T.C. grant. The use was limited to infrastructure work and could only be issued for reimbursement of completed work. Hudson was required to provide proof that the infrastructure work had been completed and paid for to receive the grant money. When Hudson provided such proof with paid invoices, the U.T.C. grant was issued. The grant money had no performance agreement, was not paid by WCDC, was reimbursement for paid work, and does not represent any damages to WCDC.

WCDC misstates that the Bank of Newington allowed disbursement without receipts or invoices.¹ The Bank of Newington received invoices and written requests from LHSC to its satisfaction for every disbursement, and it provided a detailed list of these disbursements in May 2019. (Trial Exhibit 56 Distribution of Loan Funds; R____ and Trial Exhibit 57, Document Production for Disbursements; R____).² WCDC is unclear about this because it did not participate in the case until November 21, 2022.

Working capital and contingency was a category included in the budget. WCDC incorrectly states that working capital and contingency is only permitted for use after a company starts operation. That is incorrect and is not supported by any of the documents or testimony. Working capital is the catch all category for business expenses not otherwise specifically listed, and it is not limited for use after the project is complete. (Trial Transcript, Volume I, Testimony of Tripp Sheppard, p. 36, l. 23-p. 37, l. 9; R____).

¹ Fickling vetted the disbursement to Maritime Communications, and he was told the payment was necessary to obtain approval of the sprinkler system plans. (Trial Transcript, Volume II, Trial Testimony of Blake Fickling, p. 479, l. 11-p. 482, l. 10; R____).

² The Bank of Newington received 10% of the interest paid and not the entire amount as alleged by WCDC. Interest is commonly charged and received from the outset of a loan, and to be sure, interest payments are expressly allowed from guaranteed loan funds in Business and Industry loans. 7 C.F.R. 5001.121(c)(11).

III. WCDC introduces a new theory on appeal.

As a new and significant shift in litigation strategy, WCDC now claims on appeal that Viking did not complete the sprinkler system based on non-payment, which caused the project to fail. (WCDC Response Brief, p. 6, 10-13). However, this new allegation contradicts the source of liability against the Bank of Newington, which is aiding and abetting LHSC in not paying the final construction payment application. The allegation also serves as an admission by WCDC, who has joined with HBC in most parts of the litigation, that HBC did not complete its work despite its misrepresentation under oath in the final payment application. The Bank of Newington correctly did not force pay the final payment application. WCDC's new theory and allegation confirms the Bank of Newington's decision, and they also call into question Hudson's credibility as he testified that Viking completed its work in November. (Test. of Hudson, p. 871, ll. 4-14; R____).³

IV. WCDC knew or should have known of its claims in 2018

WCDC's award was based on the claim that the Bank of Newington did not force pay the final construction draw and authorized disbursement of the loan proceeds to LHSC. The Trial Court awarded relief based on a third-party breach of contract claim. The applicable statute of limitations for this breach of contract claim against the Bank of Newington is three years. S.C. Code § 15-3-530(1).

In February 2018, WCDC knew the project was underfunded and by the spring of 2018, it knew the project was a failure. Frieson testified when he began in 2019, he knew the project was

³ HBC had not completed its work when it submitted the November 28, 2017, final payment application. It represented that it had obtained Certificate of Occupancy. However, the inspection report from Williamsburg County revealed numerous items needed to obtain a certificate. (Exhibit 30, November 9, 2017, Inspection Report; R____). HBC did not obtain a certificate of completion until January 18, 2018. (Id. at p. 12; R____).

a non-starter. (Trial Transcript Volume III, Testimony of Gilleon Frieson, p. 753, ll. 16-p. 754, l. 1). Frieson admitted that WCDC knew the project was in trouble when it provided the \$80,000 loan. (Test of Frieson, p. 758, l. 25-p. 759, l. 19).

WCDC was a defendant to the Mechanic's Lien Action which noticed payment problems. WCDC was a defendant to the Foreclosure Action, and it received HBC's counterclaim in June 2019, which raised improper disbursement claims against the Bank of Newington. Had WCDC been interested, it would have received the Disbursement Sheet which identifies the vendor, date and reason for disbursements from the loan in May 2019. (Ex. 56; R____). The disbursements in this exhibit identify the alleged improper disbursements cited in the Order. (Id.).

WCDC chose to ignore the information and did nothing to assert any rights. WCDC filed its motion to amend on November 21, 2022, before the Rule 30(b)(6) deposition on December 1, which is the time cited in the Order for the reason to toll the statute of limitation. Obviously, WCDC knew about the claims before the deposition. The spreadsheet was produced years before the 30(b)(6) deposition, and the underlying data in the spreadsheet was produced in May 2019. The spreadsheet itself was produced in December 2019.⁴ (Exhibits 57; R____). WCDC knew about the internal spreadsheet and alleged improper disbursements well before the deposition. HBC took the lead in discovery and was sharing information with WCDC. If WCDC did not actually know, it should have known. The reasoning offered to toll the statute of limitations is illogical and wrong.

In addition, the relation back rule in Rule 15(c), SCRCF, does not help WCDC. WCDC's claims do not arise out of the same transaction and occurrence as the foreclosure claim. This is

⁴ The spreadsheet was an internal document maintained by the Bank of Newington and it was updated after litigation began.

consistent with the decision in Carolina First Bank v. BADD, LLC and is consistent with the decision of Judge Curtis who struck HBC's demand for a jury trial. 414 S.C. 289, 293, 778 S.E.2d 106, 108 (2015). Consequently, the amendment does not relate back. Regardless, WCDC did not request relation back in its motion to amend.

V. WCDC is not an innocent party, had adequate remedies at law, and was not entitled to equitable relief.

The Trial Court granted WCDC relief based on a third-party breach of contract allegation and then granted WCDC priority to recover its second loan and investments into the project. The Trial Court did not grant relief based on constructive trust, lien subordination or unjust enrichment, and the Order does not attempt to run through the required elements of these claims. To prevail on a constructive trust claim, the claimant must demonstrate through a heightened burden of proof of evidence that is clear, definite, and unequivocal, fraud, bad faith, abuse of confidence, or violation of a fiduciary duty. Dominick v. Rhodes, 202 S.C. 139, 24 S.E.2d 168, 172-173 (S.C. 1943) and Carolina Park Assocs., LLC v. Marino, 400 S.C. 1, 732 S.E.2d 876, 879 (S.C. 2012). WCDC did not prove and the Trial Court made no determination that WCDC proved its claims through clear and definite evidence.

Moreover, the undisputed evidence is that the Bank of Newington did not make a promise or agreement to safeguard the Property or Escrow Proceeds for the benefit of WCDC and HBC. The improper conduct alleged against the Bank of Newington was that it allowed disbursements of loan money to its borrower and did not force pay the final payment application by HBC.

The Bank of Newington did not obtain its primary lien in the Property and thus Escrow

Proceeds through fraud or any unjust means.⁵ The Property is the Bank of Newington's source of collection on the debt owed to it by LHSC. The debt owed by LHSC far exceeds the Escrow Proceeds, and subordinating the Bank of Newington's lien on the proceeds is essentially taking money from the Bank of Newington. Consequently, the Bank of Newington is entitled to recover on its purchase money lien. Equity cannot strip it of this right. Prejudice is real and present in this case.

In addition, WCDC gave money to LHSC knowing it either had no security, in the case of the alleged grant contribution, or was behind the Bank of Newington's first lien, in the case of WCDC's second mortgage. "Ordinarily, one who accepts a mortgage with a provision that it is subordinate to a prior mortgage is estopped to deny the superiority of the prior mortgage." Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 151, 425 S.E.2d 764, 776 (Ct. App. 1992). WCDC is estopped from denying the Bank of Newington's first priority mortgage.

WCDC did not send a notice of loan default, ask LHSC to sign a performance agreement or demand repayment of the grant. WCDC did not attempt to recover against LHSC. WCDC is not innocent, chose not to pursue any remedy at law, and is second in priority to the Bank of Newington. To hold otherwise would turn foreclosure proceedings to a balancing of the equities instead of enforcing well-established legal rights.

⁵ The Escrow Account was created by the Order of the Trial Court and through foreclosure of the Property. (Foreclosure Decree, ¶ I; R___). The foreclosure and deposit of proceeds into the Escrow Account was not to prejudice the rights, claims or defenses of any of the parties. (Id.)

VI. WCDC was, at best, an indirect beneficiary to the Conditional Commitment and Guarantee

To prevail on a third-party beneficiary claim, the plaintiff must prove that the parties to a contract intended to create a direct, rather than an incidental or consequential, benefit to the plaintiff. Windsor Green Owners Ass'n v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). The third-party beneficiary should be a defined, narrow class of beneficiaries. Fabian v. Lindsay, 410 S.C. 475, 490, 765 S.E.2d 132, 140 (2014).

Beverly v. Grand Strand Reg'l Med. Ctr. provides third-party beneficiary status to a defined group of plan members whose only defense to a claim by the hospital was the clear benefit defined in the subject agreement. 435 S.C. 594, 597, 869 S.E.2d 812, 814 (2022). The agreement provided a direct benefit to the group members, which the direct benefits were a discount and a primary payor. Id.

WCDC cannot point to any direct benefit that the Bank of Newington or the USDA agreed to give it. The function and benefit of the Conditional Commitment was to issue the Guarantee. Mr. Frieson did not dispute this notion during his testimony. (Trial Transcript Volume III, Testimony of Gilleon Frieson, p. 691, l. 16-p. 692, l. 15; R___). If the Bank of Newington did not comply with the Conditional Commitment, then the USDA does not issue the Guarantee. The Conditional Commitment was performed, and the USDA issued the Guarantee.

Similarly, the function and benefit of the Guarantee was for the USDA to pay the guaranteed loss to a holder. If the Bank of Newington did not comply with the Guarantee, then the USDA has a potential remedy against the Bank of Newington to recover on the loss amount paid by the USDA. The Guarantee does not purport to provide protection for WCDC.

Moreover, Williamsburg County did not provide the grant money with any requirement of strict compliance with the Conditional Commitment or the Guarantee. Williamsburg County did

not provide any terms or conditions to the grant. Rather, it only remitted the grant when it was convinced through proof from Hudson that it was paying for services completed and paid.

The Order interpreted the grant as an equity investment. The Conditional Commitment expressly subordinates any equity investment to the loan. (Exhibit 6, Conditional Commitment, 9(h); R ____). There is no protection afforded in either document to WCDC, Williamsburg County, HBC or the citizens of Williamsburg County as is argued by WCDC. The opposite is true. The Conditional Commitment sought protection for the USDA and its collateral position ahead of any equity investment.

The regulations cited by WCDC are inapplicable to the subject Conditional Commitment. 7 C.F.R. 4279.1(a). The applicable regulations are in Part 5001. Id. Regardless, the regulations cited provide the same general purpose of the Business and Industry loans, and they do not purport to create a class of direct beneficiaries. Neither the citizens of Williamsburg County nor WCDC are direct third-party beneficiaries to the Conditional Commitment or the Guarantee.⁶

January 15, 2023

s/ Walker H. Willcox
Walker H. Willcox #72608
Willcox, Buyck & Williams, P.A.
PO Box 1909
Florence, S C 29503-1909
(843) 664-3373 - Tel.
(843) 662-1342 - Fax
Email: wwillcox@willcoxlaw.com
Attorney for the Bank of Newington

⁶ The Bank of Newington did not admit that WCDC was a direct beneficiary of the Conditional Commitment or Guarantee. Mr. Sheppard was not asked to differentiate between an incidental beneficiary and direct beneficiary. He understood the questioning to refer to the grant allegedly facilitated by Williamsburg County. (Trial Transcript Volume I, Testimony of Tripp Sheppard, p. 151, l. 4-p. 152, l. 7; R____). Under questioning from HBC's counsel, Mr. Sheppard was asked and agreed that Williamsburg County was a secondary beneficiary. (Trial Transcript Volume II, Test. of Tripp Sheppard, p. 317, ll. 11-19; R____).

RECEIVED

Jan 16 2024

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-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-Appellant,

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, 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.

PROOF OF SERVICE

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

billy@jenkinsonlaw.com

W.E. Jenkinson, III

Jenkinson, Jarrett & Kellahan, P.A.

P.O. Drawer 669

Kingstree, SC 29556

Attorney for Williamsburg County Development Corporation

wes@wesleyfew.com

Wesley D. Few

Wesley D. Few, LLC

P.O. Box 9398

Greenville, SC 29604

Attorney for HBC, Inc.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: s/ Walker H. Willcox

Walker H. Willcox I.D. No. 72608

PO Box 1909

Florence, SC 29503-1909

(843) 664-3373 - Tel - (843) 662-1342 - Fax

Attorney for Bank of Newington

January 15, 2024