

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2010-CP-32-05481

RECEIVED

APR 27 2012

S.C. Supreme Court

Hook Point, LLC,

Respondent

v.

Branch Banking and Trust Company, First
Reliance Bank, and Allan Risinger,

Defendants,

Of Whom Branch Banking and Trust
Company is,

Appellant.

RETURN TO PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure, appellant Branch Banking and Trust Company (“BB&T”) submits this return to the Petition for Rehearing (“Petition”) filed by respondent Hook Point, LLC (“Hook Point”). The Petition fails to show that the court’s decision overlooked or misapprehended any matters relevant to its ruling. In fact, the points argued in the Petition either mischaracterize the record, rehash matters addressed by the court or misstate the applicable law.

The Petition for Rehearing Mischaracterizes the Letter of Credit.

The first argument presented in the Petition is that the court overlooked the fact that BB&T committed fraud when it submitted a draw for \$1,500,000 instead of the \$70,000 in

interest that was due at the time the draw was requested. Petition, pp. 3-4. The argument asserts that the request was fraudulent because the letter of credit was only available for overdue interest.

Apparently recognizing that the “interest-only” argument was explicitly rejected by the court’s opinion, Hook Point offers a convoluted analysis suggesting that BB&T’s draw request should be governed by the “Loan Documents,” a term that Hook Point argues includes the commitment letter.¹ That argument fails, among other reasons, because of the plain terms of the letter of credit. The letter of credit requires that draw requests be supported by a sworn statement from BB&T that “[t]he Borrower has failed to perform its obligations to the Beneficiary under the Loan Agreement and Promissory Note dated November 16, 2007” and that the “amount of the draft does not exceed the amount due under the obligations.” ROA p. 48 (emphasis added). The letter of credit makes no reference to the term “Loan Documents.” The validity of the draft is to be determined by whether Hook Point failed to meet its obligations under two specific documents both signed on November 16, 2007. As described in the court’s opinion, it is undisputed that Hook Point violated various obligations under those documents and that BB&T had the right to accelerate the loan. Hook Point’s interest-only argument based on the term “Loan Documents” provides no basis for the court to rehear this case.

There Was Substantial Evidence In the Record Showing That the Letter of Credit Was Not Restricted to Interest.

The Petition makes the curious argument that the only evidence before the lower court was that the letter of credit could only be used to cover interest. Petition, pp. 5-6. Hook Point cites the after-the-fact statements of two of its principals and suggests that this evidence was undisputed. The problem with this argument is that it ignores the fact that the letter of credit

¹ Even if the term “Loan Documents” was relevant, it is clear from the Commitment Letter itself that it is not included in that term. Numbered paragraph 24 of the Commitment Letter states that if there is any conflict between it and the Loan Documents then the Loan Documents take priority. ROA. P. 31.

itself was in evidence as was the Loan Agreement and other loan documents. BB&T relied on the contractual documents signed by the parties and submitted to the lower court in connection with the injunction hearing. In South Carolina it is well established that the first place a court will look to determine the force and effect of a contract is the written document itself and that only where the contract is ambiguous will other evidence even be considered. Alexander's Land Company, LLC v. M&M&K Corporation et al, 390 SC 582, 703 S.E.2d 207 (2010); McGill v. Moore, 381 SC 179, 672 S.E.2d 571 (2009). There is no ambiguity in the letter of credit, and the document itself is ample evidence to support this court's conclusion that BB&T's draw request for the full \$1.5 million was not fraudulent. Hook Point's argument that no evidence was submitted on that point is wrong and provides no basis for a rehearing.

**Hook Point's Argument on the Application of the Independence Principle
Misconstrues the Law.**

In its Petition Hook Point argues that the independence principle does not apply to its argument that BB&T submitted a fraudulent draw request because it requested payment of the entire \$1.5 million instead of the \$70,000 in overdue interest. This argument misconstrues the independence principle as it applies to the material fraud provision of S.C. Code Section 36-5-109(b). As the court's opinion explains, the independence principle is fundamental to all aspects of the law of letters of credit. With respect to the material fraud exception that allows payments to be enjoined, it is the independence principle that requires the exception to be applied narrowly. That requirement applies without regard to the type of fraud that is alleged. Hook Point's attempt to differentiate between fraud claims simply finds no support in logic or in any legal authority. The only case cited by Hook Point in the argument on the independence principle is Intraworld Industries, Inc. v. Girard Trust Bank, 336 A.2d 316 (Pa. 1975). That case strongly endorses the independence principle in a way that is completely consistent with this

court's opinion in this case. It certainly provides no basis for an argument that the independence principle does not apply to certain of the claims of Hook Point.

Conclusion.

The Petition should be denied. Hook Point has failed to show that this court misapprehended or overlooked any relevant aspect of this case. The case was properly decided and there is no need for a rehearing.



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April 27, 2012

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CERTIFICATE OF SERVICE

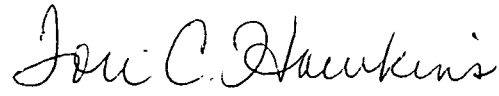
This is to certify that I, Toni Hawkins, paralegal with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Return to Petition for Rehearing** in the foregoing matter as follows:

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(VIA HAND DELIVERY)
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Dated at Columbia, South Carolina, this 27th day of April, 2012.

A handwritten signature in cursive script that reads "Toni C. Hawkins". The signature is written in black ink and is positioned above a horizontal line.

Toni C. Hawkins