

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Ellis B. Drew, Jr., Master-in-Equity

Case No. 2007-CP-04-2786
Case No. 2007-CP-04-2785
Case No. 2007-CP-04-2784
(Appellate Case No. 2012-213318)

Moorhead Construction, Inc., Craft Construction Company, Inc. of Starr, and
Miller Construction Company, Inc.,Respondents,

v.

Pendleton Station, LLC, Enterprise Bank of South Carolina, and
Angelo Penza.....Defendants,

Of whom Enterprise Bank of South Carolina is the.....Appellant.

RETURN OF APPELLANT
TO RESPONDENTS' PETITION FOR REHEARING

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MAY 21 2014

SC COURT OF APPEALS

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(1962).....1

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STATUTES

S.C. Code § 18-9-1302, 3

S.C. Code § 18-9-2102

S.C. Code § 29-5-1102, 3

FACTS

This Court issued an Opinion on April 16, 2014 vacating the lower court's order and remanding the case "for the master to reconsider the parties' arguments as to all disputed issues and make the necessary findings of fact and conclusions of law on the record before deciding whether to order foreclosure." The dissent stated that "the bank bonded off the property; therefore, there is no longer a claim for foreclosure." The dissent further stated that "the master correctly determined the Respondents' mechanic's liens were filed in accordance with South Carolina law, and the master correctly determined the amounts due to Respondent at that time under the mechanic's liens."

The Respondent's Petition for Rehearing (the "Petition") "request[s] that this Court adopt Judge Short's dissent as its opinion in this matter." The Petition states that:

[i]n January of 2014, a bond was issued by Appellant substituting the bond for the real property in this matter. ... Foreclosure of the real property is no longer an issue because Appellant issued irrevocable letters of credit substituting the real property. ... many of the issues presented by Appellant deal with issues relating to the property. Those issues are no longer applicable. This leaves essentially two (2) issues: a) whether the liens were timely filed and, if so, b) how much was due to the Respondents. As noted by the dissent, Respondents contend that the Master correctly determined that the liens were properly filed and correctly determined the amounts due to Respondents at that time.

Petition, p. 2.

The 'bond' is not part of the record on appeal¹. Notwithstanding the fact that the 'bond' is not part of the record on this appeal and without Appellant waiving any of its rights associated therewith, the "Order Stay Execution" issued by the lower court is

¹ "A question in respect to a point based on alleged facts not shown in the transcript of record cannot be considered. ... This Court will not consider any fact which does not appear in the transcript of record nor will any fact stated in an exception be considered unless it appears from the record that it is true." *S. Carolina State Highway Dep't v. Meredith*, 241 S.C. 306, 311, 128 S.E.2d 179, 181 (1962); *Tunstall v. Lerner Shops, Ins.*, 160 S.C. 557, 159 S.E. 386.

attached hereto as **Exhibit A**. The plain and unambiguous terms of said Order make clear that:

[the Appellant] submitted an undertaking pursuant to S.C. Code § 18-9-130(a)(1) by way of an Irrevocable Letter of Credit in favor of [Respondents] in the amount of the judgment ... Pursuant to S.C. Code § 18-9-210, [Appellant's] undertaking, by way of the attached Irrevocable Letter of Credit to [Respondents], **will operate as security for payment of the judgment**, plus accrued post judgment interest, **if it is affirmed**.

Order Stay Execution, p. 1 (emphasis added).

ARGUMENT

With all due respect, there appears to be a fundamental misunderstanding of both the Respondents and the dissent regarding: (1) what kind of undertaking was posted by the Appellant; (2) the effect of the undertaking filed by Appellant; and (3) the purpose and effect of an undertaking filed pursuant to S.C. Code § 29-5-110.

As evidenced by the specific South Carolina Statutes referenced in the lower court's "Order Stay Execution" (and as equally evidenced by the title of same), the *post-judgment* undertaking filed by Appellant was for the purpose of releasing the property *from the previous judgment* of the lower court, and payable only upon affirmation of such judgment. *Order Stay Execution*.

Whereas, per the plain language of S.C. Code § 29-5-110, a bond filed pursuant to S.C. Code § 29-5-110 discharges the property *from a mechanic's lien*, and "take[s] the place of the property upon which the lien existed **and shall be subject to the lien.**" S.C. Code § 29-5-110 (*emphasis added*).

Clearly, here, the undertaking filed by the Appellant was not pursuant to S.C. Code § 29-5-110; rather, it was filed pursuant to S.C. Code § 18-9-130.

In either event, the (mechanic's lien) law in dispute still applies. *See S.C. Code Ann. §§ 29-5-110 and 18-9-130.* So, neither the 18-9-130 post-judgment undertaking nor the incorrectly referenced 29-5-110 bond has any effect on the law that applies to the ongoing dispute. *Id.* The primary effect of each is that: (1) in the case of a 29-5-110 bond, there is no foreclosure sale; rather, the bond immediately pays out whatever debt is found due in accordance with a ruling on the mechanic's lien law in dispute; and (2) in the case of a 18-9-130 bond, there is no execution efforts required; rather, the bond immediately pays out whatever judgment debt is found due in accordance with a ruling on the law in dispute on appeal. *Id.* In other words, contrary to the position of the dissent and Respondents, neither the post-judgment undertaking filed by Appellant nor the incorrectly referenced mechanic's lien bond does anything to lessen the application of the law in dispute. *Id.*

Therefore, all of the issues on appeal raised by Appellant remain applicable and the undertaking previously posted by Appellant does nothing to change that fact.

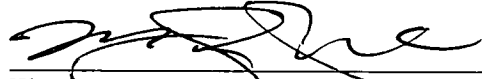
With respect to the Respondents' (and the dissent's) remaining positions regarding the timeliness and amounts of the mechanic's liens, the Appellant contends that the lower court's order on each of the issues clearly demonstrate: an abuse of discretion as the findings of fact are wholly unsupported by the evidence; and/or a misapplication of, or complete failure to apply, the controlling law. *See Appellant's Final Brief.*

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court deny the Respondents' Petition for Rehearing; or, in the alternative, reverse the lower court and remand the case back to the lower court for a determination of an amount of attorneys' fees and costs owing to Appellant as the prevailing party.

May 19, 2014
Greenville, SC

Respectfully submitted,



Thomas E. Dudley, III (SC Bar# 66154)

M. Stokely Holder (SC Bar# 73892)

KENISON, DUDLEY & CRAWFORD, LLC

704 East McBee Avenue

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(864) 242-4899

Attorneys for Appellant

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS

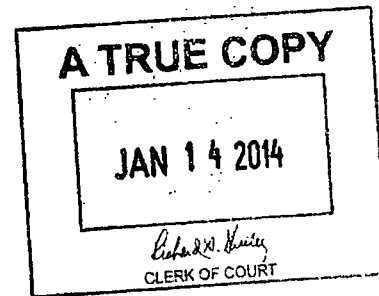
Craft Construction Company, Inc. of)
Starr,)
)
Plaintiff,)

C.A. No. 2007-CP-04-2784

v.)

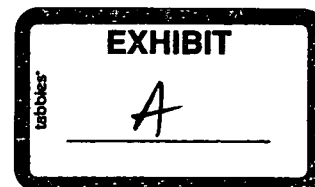
ORDER STAY OF EXECUTION

Pendleton Station, LLC, Enterprise Bank)
of South Carolina, Diane L. Zellner, Trustee)
for the Diana L. Zellner Revocable Trust)
UAD, Angelo Penza, Bobby Bryant,)
Ursula Lesser, Roger Rowe and Benjamin)
L. Daniel, Sr.,)
)
Defendants.)



Defendant Enterprise Bank of South Carolina (“Enterprise Bank”), by and through its undersigned counsel, submits this Order to Stay Execution, with Enterprise Bank providing an undertaking to substitute for the real property of interest in the litigation.

Enterprise Bank, having filed a Notice of Appeal in this action, moved the Court for a stay of execution pursuant to S.C. Code § 18-9-130. Enterprise Bank has submitted an undertaking pursuant to S.C. Code § 18-9-130(a)(1) by way of an Irrevocable Letter of Credit in favor of Plaintiff in the amount of the judgment and an Affidavit of David L. Johns, the Executive Vice President of Enterprise Bank. Pursuant to S.C. Code § 18-9-210, Enterprise Bank’s undertaking, by way of the attached Irrevocable Letter of Credit to judgment creditor, will operate as security for payment of the judgment, plus accrued post judgment interest, if it is affirmed. This undertaking operates as a substitute of the real property that is the subject to the underlying case and removes this judgment from the property. Judgment Creditor (Craft Construction Company, Inc. of Starr) will be able to satisfy whatever final judgment is obtained,



plus post judgment interest out of the Irrevocable Letter of Credit given herein. The judgment no longer is attached to the real estate that is the subject of this litigation.

Enterprise Bank's undertaking to Stay Execution is GRANTED.

IT IS SO ORDERED.



Judge Ellis B. Drew, Jr.

JAN 13
December 13, 2014
Anderson, SC

MOTION FEE PAID

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

Miller Construction Company, LLC,)

Plaintiff,)

v.)

Pendleton Station, LLC, Enterprise Bank)

of South Carolina, Diane L. Zellner,)

Trustee for the Diana L. Zellner)

Revocable Trust UAD, Angelo Penza,)

Bobby Bryant, Ursula Lesser, Roger)

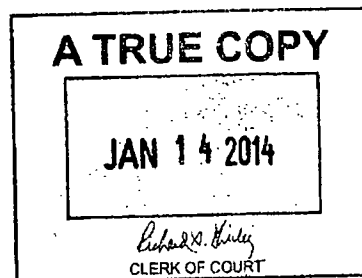
Rowe and Benjamin L. Daniel, Sr.,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2007-CP-04-2786

ORDER STAY OF EXECUTION



Defendant Enterprise Bank of South Carolina (“Enterprise Bank”), by and through its undersigned counsel, submits this Order to Stay Execution, with Enterprise Bank providing an undertaking to substitute for the real property of interest in the litigation.

Enterprise Bank, having filed a Notice of Appeal in this action, moved the Court for a stay of execution pursuant to S.C. Code § 18-9-130. Enterprise Bank has submitted an undertaking pursuant to S.C. Code § 18-9-130(a)(1) by way of an Irrevocable Letter of Credit in favor of Plaintiff in the amount of the judgment and an Affidavit of David Johns, the Executive Vice President of Enterprise Bank. Pursuant to S.C. Code § 18-9-210, Enterprise Bank’s undertaking, by way of the attached Irrevocable Letter of Credit to judgment creditor, will operate as security for payment of the judgment, plus accrued post judgment interest, if it is affirmed. This undertaking operates as a substitute of the real property that is the subject to the underlying case and removes this judgment from the property. Judgment Creditor (Miller Construction Company, LLC) will be able to satisfy whatever final judgment is obtained, plus

post judgment interest out of the Irrevocable Letter of Credit given herein. The judgment no longer is attached to the real estate that is the subject of this litigation.

Enterprise Bank's undertaking to Stay Execution is GRANTED.

IT IS SO ORDERED.



Judge Ellis B. Drew, Jr.

~~December~~ Jan 13, 2014
Anderson, SC

MOTION FEE PAID

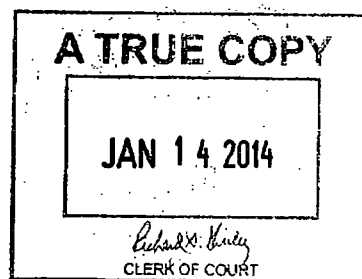
STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

Moorhead Construction, Inc.,)
)
) Plaintiff,)
v.)
)
Pendleton Station, LLC, Enterprise Bank)
of South Carolina, Diane L. Zellner,)
Trustee for the Diana L. Zellner)
Revocable Trust UAD, Angelo Penza,)
Bobby Bryant, Ursula Lesser, Roger)
Rowe and Benjamin L. Daniel, Sr.,)
)
) Defendants.)
_____)

IN THE COURT OF COMMON PLEAS

C.A. No. 2007-CP-04-2785

ORDER STAY OF EXECUTION




Defendant Enterprise Bank of South Carolina (“Enterprise Bank”), by and through its undersigned counsel, submits this Order to Stay Execution, with Enterprise Bank providing an undertaking to substitute for the real property of interest in the litigation.

Enterprise Bank, having filed a Notice of Appeal in this action, moved the Court for a stay of execution pursuant to S.C. Code § 18-9-130. Enterprise Bank has submitted an undertaking pursuant to S.C. Code § 18-9-130(a)(1) by way of an Irrevocable Letter of Credit in favor of Plaintiff in the amount of the judgment and an Affidavit of David L. Johns, the Executive Vice President of Enterprise Bank. Pursuant to S.C. Code § 18-9-210, Enterprise Bank’s undertaking, by way of the attached Irrevocable Letter of Credit to judgment creditor, will operate as security for payment of the judgment, plus accrued post judgment interest, if it is affirmed. This undertaking operates as a substitute of the real property that is the subject to the underlying case and removes this judgment from the property. Judgment Creditor (Moorhead Construction, Inc.) will be able to satisfy whatever final judgment is obtained, plus post judgment

interest out of the Irrevocable Letter of Credit given herein. The judgment no longer is attached to the real estate that is the subject of this litigation.

Enterprise Bank's undertaking to Stay Execution is GRANTED.

IT IS SO ORDERED.



Judge Ellis B. Drew, Jr.

~~December~~ *Jan. 13*, 2014
Anderson, SC

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
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The Honorable Ellis B. Drew, Jr., Master-in-Equity

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SC Court of Appeals

Case No. 2007-CP-04-2786
Case No. 2007-CP-04-2785
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(Appellate Case No. 2012-213318)

Moorhead Construction, Inc., Craft Construction Company, Inc. of Starr, and
Miller Construction Company, Inc.,Respondents,

v.

Pendleton Station, LLC, Enterprise Bank of South Carolina, and
Angelo Penza.....Defendants,

Of whom Enterprise Bank of South Carolina is the.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Return of Appellant to
Respondents' Petition for Rehearing in the above-referenced case has been served on all parties
of record by mailing a copy of same in the United States mail, postage prepaid this 19th day of
May, 2014, addressed as follows:

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Practicing Attorney in South Carolina

TOWNES B. JOHNSON, III

Practicing Attorney in South Carolina

F. LEE PRICKETT, III

Practicing Attorney in South Carolina

May 19, 2014

Hon. Jenny Abbott Kitchings
Clerk of Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

Re: *Moorhead Construction, Inc., Craft Construction Company, Inc. of Starr, Miller Construction Company, LLC vs. Pendleton Station, LLC, et al. Of Whom Enterprise Bank of South Carolina is the Appellant Appeal from Anderson County Case Nos.: 2007-CP-04-2786, 2007-CP-04-2785 and 2007-CP-04-2784 Appellate Case No.: 2012-213318*

To Whom It May Concern:

Please find enclosed the original and six (6) copies of the Return of Appellant to Respondents' Petition for Rehearing, with Proof of Service in the above referenced matter.

By copy of this letter, we are serving one copy of each upon all counsel of record. Thank you for your assistance in this matter and please do not hesitate to contact our office if you have any questions.

Very truly yours,

KENISON, DUDLEY & CRAWFORD, LLC



Laurie Warren
Legal Assistant

/lkw

Enclosures

cc: David J. Brousseau, Esq.
James W. Logan, Jr., Esq.
C. Nicholas Lavery, Esq.
David Johns

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SC COURT OF APPEALS

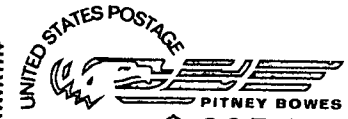
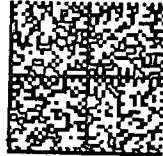
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