THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2010-CP-32-05481

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.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court commit error by issuing a temporary injunction where plaintiff failed to show: (1) that it would be irreparably harmed if the injunction was not granted; (2) that it was likely to be successful on the merits of its claims; and (3) that it did not have an adequate remedy at law?

STATEMENT OF THE CASE

This is an appeal from an order of the circuit court entered January 14, 2011 (ROA p. ____) granting plaintiff Hook Point, LLC ("Hook Point") a temporary injunction preventing defendant First Reliance Bank ("First Reliance") from honoring a draft presented by defendant Branch Banking and Trust Company ("BB&T") for $1.5 million from a standby letter of credit issued by First Reliance. The action was commenced by the filing of a summons and complaint on December 23, 2010 (ROA p. ___). The summons and complaint alleges seven causes of action relating to a real estate project owned by Hook Point and financed by BB&T. On the same day that the action was filed Hook Point obtained an *ex parte* temporary restraining order pursuant to Rule 65 (b) of the South Carolina Rules of Civil Procedure.

The motion of Hook Point for a temporary injunction was heard by the Honorable William P. Keesley on January 4, 2011. Hook Point submitted affidavits, exhibits and testimony in support of its motion; BB&T submitted an affidavit and exhibits in opposition. Judge Keesley notified the parties of his ruling on January 4th and signed the order under appeal on January 7th. The order was entered and sent to the parties on January 14, 2011. BB&T filed and served its notice of appeal on February 11, 2011(ROA p. _____).

STATEMENT OF THE FACTS

Panama Pointe and the Loan Agreement

This action arises out of a failed real estate development near Lake Murray in Lexington County. The development is called "Panama Pointe" and is owned by Hook Point. It was financed by BB&T pursuant to a Loan Agreement dated November 16, 2007 ("Loan Agreement") (Complaint, Ex. B (ROA p. ___). Under the terms of the Loan Agreement BB&T made an initial development loan to Hook Point in the amount of $5.1 million. The note ("Note 1") associated with that loan was executed on November 16, 2007 at the same time as the Loan Agreement. Layden affidavit ¶3 (ROA p.____). The Loan Agreement also provided for a line of credit of up to $2 million to fund the construction of homes. In August 2008 funds were extended by BB&T under the line of credit and a separate note was executed by Hook Point. ("Note 2"). Layden affidavit ¶3 (ROA p. ____).

The Loan Agreement is secured by a first mortgage on the property, guarantees of the four principals of Hook Point and a $1.5 million standby letter of credit issued by First Reliance to Hook Point with BB&T named as the beneficiary. The Loan Agreement was preceded by a commitment letter dated September 6, 2007 that set out the general terms of the arrangement subsequently detailed in the November 2007 Loan Agreement and related documents.

The Panama Pointe project has been recently appraised for BB&T at a value of $1.8 million. Layden affidavit ¶6 (ROA, p____). The four principals of Hook Point are Albert Dooley, Ron Vaughn, Clifford Wingard and Tom Wingard. Each executed an

unconditional personal guarantee by which they jointly and severally secured all amounts owed by Hook Point to BB&T. Layden affidavit, Exhibits F, G, H and I (ROA, pp. ___).

Default by Hook Point

Hook Point has not sold any homes or lots in Panama Pointe. Layden affidavit ¶6 (ROA, p. ___). According to Hook Point's complaint: "After completion of the infrastructure work, Hook Point began construction on the first home. During the construction, it became apparent that the market for large upscale homes had evaporated." Complaint ¶11 (emphasis added) (ROA, p._____).

Hook Point has committed numerous acts of default as defined in the Loan Agreement, including failing to pay 2009 real estate taxes and failure to make required payments under Notes 1 and 2. Layden affidavit ¶¶3 and 4 (ROA, p. _____). BB&T gave notice of default to Hook Point on September 29, 2010 and again on December 21, 2010. Layden affidavit ¶4, Exhibits C and D (ROA, p. ____). At the hearing on January 4th counsel for Hook Point acknowledged that Hook Point was in default. Transcript pp. 10, 11 (interest in "arrears" in the amount of $70,000) (ROA, p. ___, lines ____). The Loan Agreement has a standard acceleration provision that allows BB&T to declare the entire amount of the loans due upon default. Loan Agreement, Exhibit A to Layden affidavit, §9.01 (ROA, p.____). BB&T exercised its rights to accelerate the loans on December 21, 2010. See Exhibit C to Layden affidavit (ROA, p.____). Thus it is undisputed that Hook Point is in default and currently owes BB&T approximately $5.1 million.

The First Reliance Letter of Credit

As required under the Loan Agreement, Hook Point applied to First Reliance for an irrevocable letter of credit in favor of BB&T. Exhibit D to Layden affidavit (ROA, p.____). Although BB&T as the beneficiary had the right to approve the letter of credit (see Section 1, p. 2 of Loan Agreement, Exhibit A to Layden affidavit (ROA, p. ____), Hook Point applied for the letter of credit (Hook Point is referred to as "Borrower" in the letter of credit) and it was issued by First Reliance. Exhibit D to Layden affidavit (ROA, p.___). The $1.5 million letter of credit obligated First Reliance to honor a draft from BB&T that included this language:

> DRAFT TERMS AND CONDITIONS. Lender shall honor drafts submitted by Beneficiary under the following terms and conditions: DRAFT MUST BE ACCOMPANIED BY: 1) The original letter of credit. 2) A notarized, sworn statement by the beneficiary, or an officer thereof, that: a) The Borrower has failed to perform its obligations to the Beneficiary under the Loan Agreement and Promissory Note dated November 16, 2007, executed by and between Hook Point, LLC as Borrower and Branch Banking and Trust Company as Lender; b) The amount of the draft does not exceed the amount due to the Beneficiary under the obligations; and c) The signer has the authority to act for the Beneficiary with regard to the Letter of Credit. All drafts must be wired directly into the Beneficiary's account at BB&T into account #0005221067241 ABA #053201607.

Exhibit D to Layden affidavit (ROA, p.___).

On December 21, 2010, after declaring the loans in default and exercising its rights under the acceleration provision, BB&T delivered the required documents to First Reliance with a draft for $1.5 million. Layden affidavit ¶5 (ROA, p. ____) and Exhibit 5 to Layden affidavit (ROA, p. ____). On December 23, 2010 Hook Point filed this action and obtained an ex parte TRO preventing First Reliance from honoring the draft.

Subsequently, on January 4, 2011 Judge Keesley determined to keep the injunction in place and then issued the order under appeal.

ARGUMENT

THE ORDER GRANTING HOOK POINT'S MOTION FOR A TEMPORARY INJUNCTION MUST BE REVERSED BECAUSE: (1) HOOK POINT FAILED TO SHOW THAT IT WOULD SUFFER IRREPARABLE HARM WITHOUT THE INJUNCTION; (2) HOOK POINT FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIMS; AND (3) HOOK POINT HAS AN ADEQUATE REMEDY AT LAW.

Introduction

In Poynter Investments, Inc. v. Century Builders, 387 S.C. 583, 694 S.E.2d 15 (2010) the Supreme Court clarified that preliminary injunctive relief should be granted "...only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law."[1] Poynter, 387 S.C. at 586-587, 694 S.E.2d at 17. The Court has emphasized that a preliminary injunction is a "drastic remedy" and that a failure of the moving party to show any of the three required elements means that the injunction should not be issued. See Scratch Golf v. Dunes West, 361 S.C. 117, 121, 603 S.E.2d 905, 907-908 (2004). In this case Hook Point failed to make the required showing on any of the three elements.

[1] The order under appeal analyzes the motion for injunction under Section 36-5-109(b) of the South Carolina Code of Laws. See Order at 4-5. Section 36-5-109(b) provides for injunctive relief relating to letters of credit but in subsection (b)(3) it requires that an injunction against payment of a letter of credit may only issue if "all of the conditions to entitle a person to the relief under the law of this State have been met." Accordingly, §36-5-109(b) does not relieve Hook Point from having to show irreparable harm, likelihood of success and the absence of an adequate remedy at law.

1. Hook Point Failed to Show That It Would Suffer Irreparable Injury Without the Temporary Injunction.

In support of its motion for temporary injunction preventing payment of the letter of credit, on December 23, 2010, Hook Point submitted the affidavit of managing member Thomas Wingard ("Wingard affidavit 1") (ROA, p.___). That affidavit states the following about irreparable harm: "Any payment by First Reliance in excess of $70,000 will cause Hook Point, and Dooley, Vaughn, Wingard and Wingard irreparable harm, for which it has no adequate remedy at law." Wingard affidavit 1 ¶10 (ROA, p. ____). Apparently recognizing the weakness of its initial showing of irreparable harm, Hook Point filed, on the eve of the January 4th hearing, a supplemental affidavit signed by Wingard ("Wingard affidavit 2") (ROA, p. ____). The thrust of the argument presented in the second affidavit is that Hook Point will be harmed if First Reliance honors the $1.5 million letter of credit because then Hook Point will owe First Reliance $1.5 million. See Wingard affidavit 2 ¶2(b) and (c) (ROA, p.____). The affidavit also discusses the fact that the principals of Hook Point are guarantors of the obligation to First Reliance and that they will suffer harm along with their company. Wingard affidavit 2, ¶2(c) and (d) (ROA, p. _____).

The fundamental problem with the analysis presented by Hook Point to try to meet its burden of showing irreparable injury is a math problem. As described in the Statement of Facts, because Hook Point is in default and because BB&T has accelerated the amounts due under the Loan Agreement, Hook Point today owes BB&T approximately $5.1 million. If the injunction is dissolved and First Reliance is allowed to honor the letter of credit by paying BB&T $1.5 million then Hook Point will owe BB&T $3.6 million and First Reliance $1.5 million. Hook Point will owe exactly the same

amount; it will just owe two banks instead of one. In other words, if BB&T is allowed to recover on the letter of credit according to its terms Hook Point will not suffer any irreparable injury and in fact will be in the same financial position as before the letter of credit is paid.

It is the obligation of Hook Point to demonstrate that it – the LLC – will suffer irreparable injury without the injunction. The argument advanced in the Wingard affidavit about harm to the Hook Point principals because they are guarantors of the debt to First Reliance is really irrelevant to the question of whether the injunction should have been issued. Nevertheless, it is clear that, like Hook Point, the guarantors' financial position would not change if the letter of credit were honored: the same people have guaranteed both loans. The only difference is to which bank they are going to owe money; payment of the full amount of the letter of credit will not affect the amount they owe.

2. Hook Point Has Failed to Show a Likelihood of Success on the Merits.

It is significant that the relief sought by Hook Point is to prevent payment by First Reliance of an irrevocable letter of credit issued in favor of BB&T. Under the law governing letters of credit the grounds for refusing to honor a letter of credit are exceedingly narrow and Hook Point has not alleged any ground that would provide a basis for First Reliance to dishonor the letter of credit.

The statutory law governing letters of credit in South Carolina is Chapter 5 of the Uniform Commercial Code as codified in Chapter 5 of Title 36 of the South Carolina Code of Laws. The application of those provisions was considered by the Fourth Circuit

Court of Appeals in Amwest Surety Insurance Company v. Republic National Bank, 977 F.2d 122 (4th Cir. 1992).

> Letters of credit have long been used to facilitate the financing of commercial transactions between buyers and sellers by providing a certain and reliable means to ensure payment for goods delivered or services rendered. As elsewhere, in South Carolina, whose law governs this diversity case, a letter of credit is a tripartite arrangement under which one party establishes a credit, usually at a bank, on which it authorizes a third party to draw, provided certain conditions are met. The bank, as a mere stakeholder of the credit, issues a letter to the third party (known as the beneficiary) confirming the credit and stating the conditions for any draw to be made against it. In essence, the bank's promise to pay the beneficiary upon the beneficiary's timely presentation to the bank of documents conforming to the conditions delimited in the letter replaces the promise of the party which established the credit.
>
> The virtues of letters of credit are their simplicity, reliability, and predictability, all of which depend upon the limitation of the issuer's duties to the ministerial application of a letter's terms. Thus under the Uniform Commercial Code, which South Carolina has adopted, in addition to the ordinary duties of a bank, an issuer is only obliged (1) to examine carefully documents presented by the beneficiary for compliance with the terms of the letter of credit and, absent a facial defect, (2) **to honor the draft if the documents do comply-regardless of whether the underlying contract between beneficiary and customer has, in fact, been performed,** and without assuming any liability if the documents wrongly assert that it has.

Amwest Surety Company v. Republic National Bank, 977 F.2d at 125-126 (internal citations omitted) (emphasis supplied).[2]

This discussion makes it clear that the law of South Carolina on letters of credit, like that of other jurisdictions, makes payment dependent only on the presentation of specified documents and not on the facts and circumstances of the underlying transaction. First Reliance must pay according to the written terms of the letter of credit alone and

[2] The White and Summers treatise on the U.C.C. puts it this way: "Bankers sometimes make the same point by describing the transaction between the bank and the beneficiary as a 'paper transaction.' By that they mean the issuer's agent should be able to sit in a business suit at a desk in a bank, and by looking at papers that are presented, determine whether the bank is obliged to make payment or not. She is not obligated and, indeed, is foreclosed from putting on overalls and going into the field to determine whether the underlying contract has been performed." 3 White & Summers, Uniform Commercial Code § 26-2 (5th ed.), 3WS-UCC §26-5.

without reference to any dispute between Hook Point and BB&T. None of the causes of action alleged in the Hook Point complaint raise any issue with regard to BB&T's compliance with the written terms of the letter of credit. Layden's affidavit and Exhibits E and F to the affidavit make it clear that BB&T has met its obligations under the letter of credit. Layden affidavit ¶ 5 (ROA, p____). Accordingly, Hook Point has no likelihood of success on the merits with respect to preventing payment on the letter of credit.

Although Hook Point's original motion for a temporary injunction presented no argument under the U.C.C., at the hearing on its motion Hook Point made an argument based on S.C. Code § 36-5-109 and it was this provision that was principally relied upon by the circuit court in granting the injunction. Hook Point relies on subsection (b) of §36-5-109:

> (b) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons ...

The argument made by Hook Point is that BB&T is attempting to use the letter of credit to "facilitate a material fraud" because in the September 2007 commitment letter BB&T allegedly agreed to a condition being placed on the letter of credit that was not actually incorporated in the letter of credit. More specifically Hook Point bases its argument on the fact that the commitment letter included a provision that states: "Letter of credit to be used as last resort for interest carry." See Exhibit A to Complaint, ROA, p. ____. No such provision was included in the letter of credit itself: as discussed above, it requires only a showing that Hook Point is in default on the November 16, 2007 Loan

Agreement – there is no mention of an "interest carry." In addition, the Loan Agreement has no provision limiting the letter of credit to payment of interest.

Accordingly, in order to show that it is likely to succeed on the merits of its claim asserted under the §36-5-109(b) material fraud provision, Hook Point must show that somehow BB&T caused the letter of credit – applied for by Hook Point and issued by First Reliance - to be issued missing a material term. This fraud theory is a stretch under any circumstance but it fails miserably when evaluated in the context of cases applying this provision of the U.C.C. In Itek Corporation v. First Bank of Boston, 730 F2d. 19 (1st Circuit 1984) Judge (now Justice) Breyer had occasion to consider the application of an earlier (but not substantively different) version of the "material fraud" provision of §36-5-109. The opinion notes the strong need to interpret the fraud provision narrowly:

> We answer this question fully aware of the need to interpret the "fraud" provision narrowly. The very object of a letter of credit is to provide a near foolproof method of placing money in its beneficiary's hands when he complies with the terms contained in the letter itself-when he presents, for example, a shipping document that the letter calls for or (as here) a simple written demand for payment. Parties to a contract may use a letter of credit in order to make certain that contractual disputes wend their way towards resolution with money in the beneficiary's pocket rather than in the pocket of the contracting party. Thus, courts typically have asserted that such letters of credit are "independent" of the underlying contract. And they have recognized that examining the rights and wrongs of a contract dispute to determine whether a letter of credit should be paid risks depriving its beneficiary of the very advantage for which he bargained, namely that the dispute would be resolved while he is in possession of the money.

Itek Corporation v. First National Bank of Boston, 730 F2d. at 24. (internal citations omitted). The opinion goes on to acknowledge that there is a need for the fraud exception to address those occasions when strict application of the terms of a letter of credit is not appropriate.

> Despite these reasons for hesitating to enjoin payment of a letter of credit, the need for an exception is apparent. Suppose the document for which a letter calls has been forged. Or suppose that the beneficiary has knowingly failed to comply with an important term contained in the underlying contract-a term that the parties intended as a precondition for the beneficiary's exercise of his right to call the letter. Courts have not hesitated to examine the documents that the letter calls for to see if they show fraud. And courts have also enjoined payment where there was relevant fraud in the underlying transaction. Thus, in a leading case, a seller, contractually committed to ship bristles to a buyer, shipped rubbish instead. The court refused to allow the seller to call the letter, put the money in his pocket, and let the buyer sue him, for in the court's view, the seller did not even have a colorable claim that he had done what the contract called for as a precondition to obtaining the money, namely, ship the bristles.

Itek Corporation v. First National Bank of Boston, 730 F2d. at 24. (internal citations omitted). In the Itek case the First Circuit applied the fraud exception where the party calling the letter of credit knew that the underlying contract – to ship high tech, defense-related goods to Iran after the 1979 overthrow of the Shah – would never be performed.

In Airline Reporting Corp. v. First National Bank of Holly Hill, (4th Cir. 1987) the Fourth Circuit Court of Appeals took a similar approach to the fraud exception in a case applying South Carolina law. The Airline Reporting case cites the Itek case approvingly and states that the fraud "exception is construed narrowly and applies only in circumstances so egregious in nature as to vitiate the entire underlying transaction so that the 'legitimate purposes of the independence of the issuer's obligation would no longer be served.' Airline Reporting Corp. v. First National Bank of Holly Hill, 832 F2d. at 828, citing Roman Ceramics Corp. v. Peoples National Bank, 714 F2d. 1207 (3rd Cir. 1983). In applying the fraud exception in the Airline Reporting case the court noted that there was a significant dispute between the parties to the underlying transaction but found that dispute did not involve intentional misrepresentation so egregious as to vitiate the

entire underlying transaction. See Airline Reporting v. First National Bank of Holly Hill, 832 F2d. at 829-830. It therefore enforced the payment of the letter of credit.

Applying the approach of these cases to the material fraud exception of §36-5-109(b) is straightforward. There is no dispute regarding these facts:

- BB&T loaned Hook Point $5.1 million;
- Hook Point is in default on the Loan Agreement and it owes BB&T the $5.1 million;
- The letter of credit was issued by First Reliance and by its terms it only requires an affirmation that Hook Point is in default on the November 16, 2007 Loan Agreement;
- The letter of credit includes no reference to being limited to the payment of interest;
- BB&T made a proper presentation of all documents required by the letter of credit.

On these facts there is absolutely no basis for finding that Hook Point is likely to succeed on the merits of its claim that payment of the full amount of the First Reliance letter of credit would "facilitate a material fraud."

3. Hook Point has an Adequate Remedy at Law.

In addition to showing irreparable injury and likelihood of success on the merits Hook Point must show that it doesn't have an adequate remedy at law for its claims. Hook Point can make no such showing because, even if it is successful on its claims, it has an adequate remedy at law in the form of money damages. See Milliken & Co. v. Morin, 386 S.C. 1, 685 S.E.2d 828 (Ct. App. 2009) (jury award of damages adequate remedy precluding grant of injunctive relief); Scratch Golf v. Dunes West Residential Golf Properties, Inc., 361 S.C. 117, 603 S.E.2d 905 (2004) (preliminary injunction inappropriate where the legal remedy of attachment was available).

In the present case Hook Point's causes of action allege claims for lost profits that it would have received if its development was successful. Putting aside the factual

difficulties facing such claims with respect to a development for a market that has "evaporated," it is clear that a claim for lost profits is a claim for money damages. To the extent that Hook Point can prove some type of claim for damages against BB&T those damages will be set off against the $5.1 million that Hook Point owes BB&T. This analysis underscores the fact that this case is about money and is a completely inappropriate case for injunctive relief. Because Hook Point's claims are the type that result in money damages, Hook Point has not stated a claim for injunctive relief and it has not made the required showing to obtain injunctive relief.

CONCLUSION

The order granting Hook Point's motion for a temporary injunction should be reversed. Hook Point failed to make the showing necessary to support preliminary injunctive relief: (1) Hook Point will not suffer irreparable harm if the letter of credit is paid in full: the additional debt it will have to First Reliance will be directly set off by the reduction in what it owes BB&T; (2) Hook Point has not made a showing that it is likely to be successful on its claim to rewrite the letter of credit: its argument under the material fraud provision of §36-5-109(b) conflicts with the correct interpretation of that provision; and (3) Hook Point's claims are for money damages and it therefore has an adequate remedy at law and is not eligible for injunctive relief.

Dated this 6th day of April, 2011.

By: _____

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