THE STATE OF SOUTH CAROLINA

In The Court of Appeals

ORIGINAL

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.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant Branch Banking and Trust Company ("BB&T") has appealed from an order granting a temporary injunction preventing it from recovering $1.5 million on a standby letter of credit. The injunction was obtained by Respondent Hook Point, LLC ("Hook Point") the entity that borrowed $5.1 million from BB&T secured in part by the letter of credit. In its appellant's brief BB&T argued that the injunction should not have been issued because Hook Point: (1) failed to show irreparable injury; (2) failed to show a likelihood of success on the merits; and (3) failed to show that it did not have an adequate remedy at law. Hook Point has now filed its respondent's brief and BB&T files this reply to address arguments made by Hook Point regarding irreparable injury and likelihood of success on the merits.

In its brief Hook Point fails to acknowledge or address the true situation presented in this case.

- This is not a dispute over $70,000 in interest due on a loan as suggested by the Hook Point brief at page 4. Hook Point is in default and owes BB&T the amount of $5.1 million. That amount has been due and payable since BB&T made demand for it in December 2010.
- Hook Point has never contested the facts that its development has failed and that it is in default on its loan.

- Hook Point's primary argument is that the $1.5 million letter of credit only covers interest but it bases that argument wholly on one ambiguous sentence in a preliminary commitment letter and never addresses the fact that the formal loan documents – including the letter of credit itself – contain no language that limits the letter of credit to the payment of interest.

II. Argument.

Hook Point Cannot Show Irreparable Injury

In its brief Hook Point offers three arguments to meet its burden of showing that it would suffer irreparable injury without the injunction. None of the three meet the standard necessary to justify the drastic remedy of a temporary injunction. See Poynter Investments, Inc. v. Century Builders, 387 S.C. 583, 694 S.E.2d 15 (2010).

The first argument that Hook Point advances is that it will be put out of business if the letter of credit is enforced according to its terms. However, Hook Point never explains how it plans to stay in business given the fact that it is in default on a $5.1 million loan and hasn't sold a single lot or home in its development. See Layden affidavit ¶¶ 4 and 6 (ROA pp. 78-79). Instead Hook Point argues that it would be put out of business without explaining how it will deal with the default or what business it intends to try to continue. This argument fails as a matter of law to show irreparable harm.

The second argument Hook Point makes is that if BB&T is allowed to enforce the letter of credit according to its terms then First Reliance will proceed against collateral owned by other people, specifically the principals of Hook Point who individually guaranteed the First Reliance letter of credit. See Hook Point brief pp. 9-10. In the first place those same individuals are guarantors of the $5.1 million debt to BB&T. See Layden affidavit ¶ 8 (ROA pp. 79-80). They either owe one bank or both. More fundamentally, it is Hook Point's burden to show irreparable injury to it, not to individuals who are not parties to the litigation. Hook Point's second argument also fails as a matter of law.

The third argument advanced in the Hook Point brief is that BB&T failed to show how it would be harmed by the granting of the temporary injunction. See Hook Point brief p. 10. In making that argument Hook Point is taking the approach specifically rejected by the Supreme Court in Poynter. In that case the Court held that South Carolina has not adopted the "balancing of harms" test that includes consideration of harm to the non-moving party in deciding whether to grant a temporary injunction. See Poynter v. Century Builders, 387 S.C. at 587, 694 S.E.2d at 17. There is no balancing of equities in South Carolina and Hook Point's argument is misplaced and irrelevant. That argument also ignores the fact that, in making the loan to Hook Point, BB&T bargained for the security of a letter of credit, which is intended to provide swift, certain and secure recovery in the event of default. See Amwest Surety Insurance Company v. Republic National Bank, 977 F.2d 122 (4th Cir. 1992) (applying South Carolina law). The temporary injunction preventing BB&T from exercising its rights under the letter of credit robs BB&T of the benefit of its bargain and undercuts the value of letters of credit generally.

Hook Point Has Failed to Make a Sufficient Showing of Likelihood of Success

In its brief Hook Point's argument on the likelihood of success issue is confined to its contention that BB&T can only use the letter of credit for interest owed by Hook Point. Hook Point cites one case in its brief to support its argument that an injunction was appropriate to stop payment of the letter of credit. That case is Mid-America Tire, Inc. v. PTZ Trading Ltd., 768 N.E.2d 619 (Ohio 2002) and it provides a helpful comparison with the case before this Court. The Mid-America Tire opinion reviews the cases in which various courts have issued injunctions to prevent letters of credit from being used to perpetuate fraud and notes that the fraud in such situations has been egregious: "[t]hus we hold that the 'material fraud' under R.C. 1305.08(B) means fraud that has so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation can no longer be served." Mid-America Tire Inc. v. PTZ Trading, 768 N.E.2d at 640. In affirming the grant of an injunction the Mid-America decision found that the party seeking payment under the letter of credit had deliberately shipped non-conforming goods and sought payment for them from a letter of credit, bringing that case directly in line with the small group of cases in which the fraud is so outrageous that an injunction is appropriate to prevent payment of a letter of credit.

> Under these facts, it can truly be said that the LC in this case was being used by PTZ as a vehicle for fraud and that PTZ's actions effectively deprived appellants of any benefit in the underlying arrangement. In this sense, PTZ's conduct is comparable to the shipment of cow hair in *Sztejn,* 177 Misc. 719, 31 N.Y.S.2d 631, the shipment of old, ripped, and mildewed boxing gloves in *Cambridge Sporting Goods,* 41 N.Y.2d 254, 392 N.Y.S.2d 265, 360 N.E.2d 943, and the failure to disclose nonconforming performance specifications for the stereo receivers in *NMC Ent., Inc.,* 14 U.C.C. Rep.Serv. 1427.

Mid-America Tire Inc. v. PTZ Trading, Ltd., 768 N.E.2d at 642.[1]

The case before this Court clearly fails to approach the type of fraud that will support an injunction. First, and most importantly, the letter of credit that Hook Point obtained from First Reliance makes no mention of being limited to interest. By its express terms it only required a showing that Hook Point was in default on the loan agreement dated November 17, 2007. As discussed above, Hook Point is clearly in default and owes BB&T far more than the $1.5 million represented by the letter of credit.

Hook Point faces another insurmountable obstacle to showing that it should be able to enjoin payment of the letter of credit. Its argument is that the letter of credit was inconsistent with a preliminary commitment letter from BB&T and therefore wording of the letter of credit represents fraud by BB&T. The problem is that Hook Point itself obtained the letter of credit from First Reliance pursuant to a complex loan transaction by which the principals of Hook Point put up sufficient collateral to persuade First Reliance to issue the letter of credit. See Hook Point Supplemental Affidavit, ¶ 2(a) (ROA pp. 128-129). Hook Point has no basis for a claim against BB&T for fraud in the issuance of the letter of credit and it certainly has not made the showing of likelihood of success necessary to justify an injunction preventing payment according to the plain terms of the letter.

[1] Like the Mid-America Tire, case the cases cited by it all recognize that the "material fraud" provision for stopping payment of a letter of credit should be rarely used. This issue was discussed at some length in BB&T's appellants brief.

III. CONCLUSION

The temporary injunction that was issued in this case should not have been issued. BB&T lent Hook Point $5.1 million so that Hook Point could engage in a speculative real estate development. In order to induce BB&T to make the loan Hook Point provided certain collateral including obtaining an irrevocable, standby letter of credit in the amount of $1.5 million. The development has failed. Hook Point owes BB&T $5.1 million. BB&T has every right to collect on the letter of credit according to its terms and the order granting the injunction should be reversed.

Dated this 19th day of July, 2011.

By: _____

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RULE 211(b) CERTIFICATE

I hereby certify that Appellant's Brief and Reply Brief being filed contemporaneously herewith comply with Rule 211(b) of the SC Appellate Court Rules.

Dated this 19th day of July, 2011.

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CERTIFICATE OF SERVICE

This is to certify that I, Leslie Allen, legal assistant with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Appellant's Brief, Reply Brief, Rule 211(b) Certificate** in the foregoing matter by placing copies of same in the United States Mail, postage prepaid, in envelopes addressed as:

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