

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Joseph L. Strickland, Master-in-Equity

RECEIVED

SEP 08 2015

Appellate Case No. 2015-001717

SC Court of Appeals

Branch Banking and Trust Company

.....Respondent,

v.

Richard Brady a/k/a Rick Brady; First Community Bank; County of Richland; and East Richland County Public Service District, Defendants,

Of whom Richard Brady a/k/a Rick Brady is

.....Appellant.

RESPONDENT'S RETURN TO APPELLANT'S VERIFIED PETITION FOR ORDER GRANTING WRIT OF SUPERSEDEAS AND REQUEST FOR EX PARTE RELIEF OR EMERGENCY HEARING

TO: THE COURT AND ALL PARTIES

YOU WILL PLEASE TAKE NOTICE that Respondent Branch Banking and Trust Company ("BB&T") submits this return to Appellant Richard Brady a/k/a Rick Brady's ("Brady") Verified Petition for Order Granting Writ of Supersedeas and Request for Ex Parte Relief or Emergency Hearing.

The underlying matter under appeal is an action to foreclose real property located in Richland County, South Carolina. On or about August 11, 2015, Brady filed a Notice of Appeal as to the Master's grant of summary judgment to BB&T and the Master's subsequent denial of Brady's Motion to Reconsider. Thereafter, Brady filed a motion on August 18, 2015, which requested that the Master set an appellate bond and stay the sale of the property pending the outcome of the appeal.¹

On or about August 27, 2015, the Master-in-Equity held a hearing on Brady's Motion. At hearing, Brady presented an Appeal Bond to the Master, a copy of which is attached hereto as *Exhibit A*. Brady had not previously filed the Appeal Bond with the Clerk of Court's Office or served it on any party. The Appeal Bond names as sureties two individuals who upon information and belief are the relatives of Brady.

At hearing, BB&T objected to the sufficiency of the sureties to the Appeal Bond. The Master, after reviewing the Appeal Bond, made an oral ruling concluding that the Appeal Bond did not present adequate evidence as to the sufficiency of the sureties. A proposed order has been submitted to the Master, but as of the date of this return no written order has yet been received by the parties.

On August 28, 2015, the next day following the hearing on Brady's motion, BB&T filed its exception to the Appeal Bond, a copy of which is attached hereto as *Exhibit B*.

¹ At the time of Brady's Motion there was a pending foreclosure sale scheduled for September 7, 2015. Pursuant to this Court's Order of September 1, 2015, BB&T has informed the Master that the sale must be postponed pending the outcome of the instant petition.

ARGUMENT

In considering Brady's Petition, it is instructive to review South Carolina's statutes concerning the setting of appellate bonds. First, it is a settled proposition that a judgment directing the sale of real property is not immediately stayed by the filing of a Notice of Appeal. Rule 241(b)(3), SCACR. This appellate court rule cites and follows S.C. CODE ANN. 18-9-170, which states in part:

"If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which shall be specified in the undertaking."

The undertakings prescribed by Section 18-9-170 "must be served on the adverse party with the notice of appeal unless a deposit is made as provided in Section 15-1-250, and notice thereof given." S.C. CODE ANN. § 18-9-200. The undertaking must further be filed with the clerk with whom the judgment or order appealed from was entered. S.C. CODE ANN. § 18-9-230.

S.C. CODE ANN. § 18-9-210 contains further provisions regarding the sufficiency and justification of sureties:

"An undertaking upon an appeal shall be of no effect, unless it be accompanied by the affidavit of the sureties that they are each worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties within ten days after receipt of the notice of appeal; and unless they or other

sureties justify before a judge or clerk of the court below, as prescribed by Sections 15-17-270 and 15-17-280, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given.”

This statute therefore provides that a respondent has a right to make an exception to the sufficiency of the sureties and that if the sureties do not justify before a judge or clerk within 10 days, the respondent shall be able to proceed with sale as if no undertaking has been given. Therefore, pursuant to the statute, Brady has no right to rely upon mere allegations in either of the surety’s affidavit of his financial ability to meet the undertaking of the bond. At present, no justification has been made before the Court or the Clerk of Clerk. Under the circumstances, BB&T should be allowed to proceed to a sale of the Property.

If the Court of Appeal should determine to intercede in the setting of an Appeal Bond in this matter, it should either remand the matter to the Master with instructions to set a bond and make further findings as to the sufficiency of the sureties as deemed necessary. However, if the Court of Appeals should determine to determine these matters itself, BB&T would state that a bond should be set in an amount twice the value of the foreclosure judgment.

While Brady asserts that the value of the property itself is adequate security for BB&T during the pendency of its appeal, the statutory framework cited above provides that BB&T is entitled under law to a bond posted by adequate sureties. The bond, according to the statute, is supposed to protect respondent from potential of waste to the real property and compensate it for the reasonable value of the appellant’s use of the property during the pendency of the appeal. The bond therefore strives to protect the

respondent from suffering damages it would not suffer but for the delay caused by the appeal.

While Brady may assert that the property is worth well more than the lien today, any evidence of the value, if any, he submitted was in the form of unauthenticated appraisals, which would be inadmissible as hearsay. Further, if the intent of an appeal bond is in part to protect a respondent from any diminution in value of the property during the pendency of appeal, then an appraisal of its current value does not make an appeal bond unnecessary and does not suggest that the bond should only be set for a very small amount. The bond's purpose is at least in part to protect BB&T from unknown and unforeseen events that might decrease the property's value during appeal. It would compensate BB&T for additional costs and judgment interest incurred through the pendency of the appeal. It would compensate BB&T for its lost use of the property.

If Brady is correct and it does turn out following the conclusion of the appeal that the Property turns out to fully secure the judgment debt, then BB&T will not be entitled to make a claim against the sureties. The sureties are intended only to protect BB&T from the circumstance where it turns out that BB&T is not fully secured.

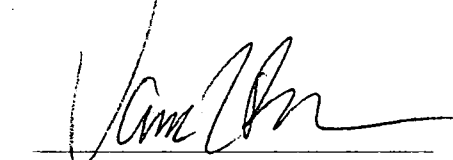
BB&T therefore respectfully requests that the Court deny Brady's Petition for Writ of Supersedeas. As a first ground for denial, the Appeal Bond submitted by Brady is untimely because it was not filed and served with the Notice of Appeal as required by S.C. Code Ann. § 18-9-200. Further, Brady has not complied with S.C. Code Ann. § 18-9-230, which requires that the Appeal Bond be filed with the Clerk of Court for Richland County. Finally, BB&T has excepted to the sufficiency of the sureties pursuant to S.C.

Code Ann. 18-9-210, and Brady has presented no justification to the lower court. Respondent respectfully requests that the Court deny the petition and allow the property to be foreclosed at the next sale in Richland County.

However, in the event that the Court should determine to set an appellate bond in this matter, Respondent requests that bond be set at \$269,203.62, which is twice the amount of the judgment debt. Respondent believes that such a figure is reasonable and necessary to insure that it is adequately protected during the pendency of this appeal. Respondent finds support for this contention in S.C. Code Ann. § 18-9-130, which requires such an undertaking when the collateral up for sale is personal property.

WHEREFORE, Respondent requests that Appellant's Petition for Writ of Supersedeas be denied and that the Court permit the foreclosure sale to proceed at the next available sales date in Richland County.

RESPECTFULLY SUBMITTED



Vance L. Brabham, III, Esquire
SCOTT & CORLEY, P.A.
Post Office Box 2065
Columbia, SC 29202
(803) 252-3340
Attorney for Respondent

September 8, 2015

EXHIBIT "A"

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2014-CP-40-5244

Branch Banking and Trust Company,)
)
Plaintiff,)

vs.)

APPEAL BOND

Richard Brady a/k/a Rick Brady; First)
Community Bank; County of Richland; and)
East Richland County Public Service)
District,)
)
Defendants.)

A Master in Equity's Order Granting Summary Judgment and Decree of Foreclosure and Sale was filed herein on July 17, 2015, and an Order Granting Motion to Stay Sale and Denying Motion to Reconsider was filed herein on August 5, 2015 (collectively the "Judgment").

The Judgment directs the foreclosure sale of the residence of the Defendant, Richard Brady ("Defendant"), known as 3240 Dreher Shoals Road, Irmo, South Carolina (the "Property").

The said Defendant, as Appellant, timely filed a Notice of Appeal of the Judgment in the Office of the Court of Appeals for South Carolina on August 12, 2015.

The Defendant/Appellant desires to suspend the enforcement of the Judgment pending the determination of the appeal.

COMMITMENT BY APPELLANT

The undersigned Defendant/Appellant commits that, during his possession hereafter of the Property, he will continue to maintain homeowner's insurance on the Property and will not commit or suffer to be committed any waste on the Property and that, if the Judgment is affirmed, he will pay to the Plaintiff the value of the use and occupation of the Property hereafter, such obligation

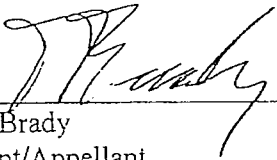
to be not in excess of the amount of the Plaintiff's judgment debt, if any, which remains unpaid after receipt by the Plaintiff of the proceeds of the foreclosure sale of the Property.

PROMISE TO PAY

The undersigned sureties jointly and severally promise to pay to the Plaintiff the amount required to pay for any waste to the Property committed hereafter and the value of the use and occupation of the Property hereafter, such obligation to be not in excess of the amount of the Plaintiff's judgment debt, if any, which remains unpaid after receipt by the Plaintiff of the proceeds of the foreclosure sale of the Property.

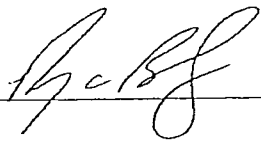
The foregoing promise to pay shall only apply if the Judgment so appealed is, in all respects, affirmed.

If the undersigned shall faithfully fulfill the conditions set forth above, this obligation is void; otherwise it is to remain in full force and effect until declared void by a court of competent jurisdiction.



Richard Brady
Defendant/Appellant

William P. Brady
Address: PO Box 9286
Columbia SC 29290



Address: 536 Suttalee Ln
Irmo, S.C. 29063

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2014-CP-40-5244

Branch Banking and Trust Company,)
)
Plaintiff,)

vs.)

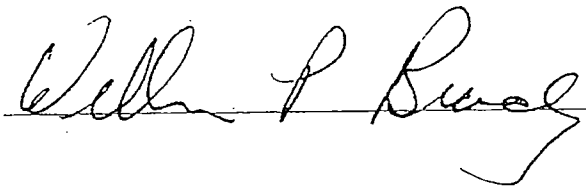
Richard Brady a/k/a Rick Brady; First)
Community Bank; County of Richland; and)
East Richland County Public Service)
District,)
)
Defendants.)

AFFIDAVIT OF SURETY

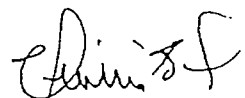
PERSONALLY APPEARED before me the undersigned, who, upon being duly sworn, states and affirms as follows:

1. I, as surety, executed the Appeal Bond to be submitted in connection with the appeal by the Defendant, Richard Brady, of the Judgment entered in this case, the purpose of which Appeal Bond being to suspend the involuntary sale of Mr. Brady's residence.

2. I am worth at least double the amount of the obligation specified in the Appeal Bond.



SWORN to and subscribed before me
this 26 day of August, 2015

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 4/14/21

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2014-CP-40-5244

Branch Banking and Trust Company,)
)
Plaintiff,)

vs.)

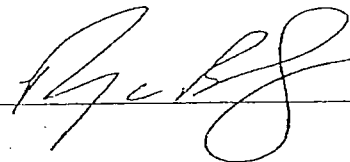
Richard Brady a/k/a Rick Brady; First)
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East Richland County Public Service)
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Appeal Bond being to suspend the involuntary sale of Mr. Brady's residence.

2. I am worth at least double the amount of the obligation specified in the Appeal
Bond.



SWORN to and subscribed before me
this 20th day of August, 2015

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 1-6-2020

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Branch Banking and Trust Company,

PLAINTIFF,

VS.

Richard Brady a/k/a Rick Brady; First
Community Bank; County of Richland; and
East Richland County Public Service District,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS

CASE NO. 2014-CP-40-5244

PLAINTIFF'S EXCEPTION TO APPEAL
BOND

(141008.01016)

Pursuant to S.C. Code Ann. §18-9-210, Plaintiff hereby makes formal notice of its exception to the Appeal Bond presented to the Court by Defendant Richard Brady at the hearing before the Honorable Joseph Strickland, Master-in-Equity for Richland County on August 27, 2015.

In making this exception, Plaintiff would state that the Appeal Bond was not filed with the Notice of Appeal and was therefore is not timely under S.C. Code Ann. § 18-9-200. Plaintiff is uncertain as to whether the Appeal Bond was filed with the Clerk of Court.

To the extent that the Appeal Bond may be considered by the Court, Plaintiff asserts that it was not served with the Appeal Bond until August 27, 2015, and that its exception should therefore be considered as timely as it is made within ten days of receipt.

The ground for Plaintiff's exception is that the appeal bond does not contain information sufficient to assure Plaintiff as to the financial ability of the sureties offered to cover the obligations of the Appeal Bond. Further the Bond does not specify a specific amount to which the sureties are obligating themselves, which Plaintiff is informed and believes should be set at

amount worth twice the value of the amount of the total judgment. Plaintiff therefore does not believe that its interests are being adequately protected pursuant to S.C. Code Ann. § 18-9-170.

Respectfully Submitted:

SCOTT AND CORLEY, P.A.

By: 

Ronald C. Scott, SC Bar #4996

Reginald P. Corley, SC Bar #69453

Angella J. Grant, SC Bar #78334

Vance L. Brabham, III, SC Bar #71250

William S. Koehler, SC Bar #74935

J. Harrison Rushton, SC Bar #100406

Andrew M. Wilson, SC Bar #72553

Andrew M. Sullivan, SC Bar #100464

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Joseph L. Strickland, Master-in-Equity

Branch Banking & Trust Company v. Richard Brady, et al.

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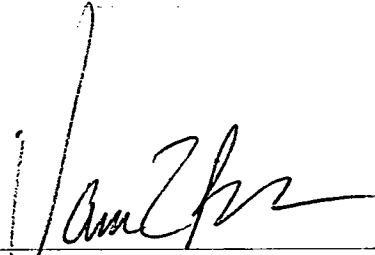
CERTIFICATE OF MAILING

I, Vance L. Brabham, III, attorney for the Respondent Branch Banking and Trust Company, hereby certify that on September 8, 2015, I served copies of the Respondents' Return to Appellant's Verified Petition for Order Granting Writ of Supersedeas upon Leonard R. Jordan, Jr., Esquire, attorney for the Respondent, and upon Jeffrey L. Silver, Esquire, attorney for First Community Bank, and upon Lauren Sutton Hogan, Esquire, attorney for the County of Richland, by mailing copies thereof, postage prepaid, to the said counsel at the addressed indicated below:

Leonard R. Jordan, Jr., Esquire
4500 Fort Jackson Boulevard
Columbia, SC 29209

Jeffrey L. Silver, Esquire
Post Office Box 11656
Columbia, SC 29211-1656

Lauren Sutton Hogan, Esquire
Post Office Box 192
Columbia, SC 29202



Vance L. Brabham, III
Attorney for Respondent