

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge
McDonald, Short, and Geathers; Court of Appeals Judges

Supreme Court Case No. 2016-002336
Appellate Case No. 2014-000821

THE WINTHROP UNIVERSITY TRUSTEES
FOR THE STATE OF SOUTH CAROLINA,

Respondent,

v.

PICKENS ROOFING AND SHEET METALS, INC.,

Petitioner.

RETURN TO PICKENS ROOFING AND SHEET METALS, INC.'S
VERIFIED PETITION FOR SUPERSEDEAS

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S.C. SUPREME COURT

Pursuant to Rule 241(d) of the South Carolina Appellate Court Rules, this serves as Respondent's, The Winthrop University Trustees for the State of South Carolina, Return to Pickens Roofing and Sheet Metals, Inc.'s Petition for Supersedeas to stay execution of judgment upon posting of an appeal bond in the amount of \$6,000,000.00. In its Petition for Supersedeas, Pickens claims that the lower court erred and "set the appeal bond at an illegal level" of \$6,000,000.00, and moves the Court to reset the bond to \$1,000,000.00.

At best, Pickens misstates the undisputed facts upon which the lower court ruled. At worst, Pickens is disingenuous and knowingly ignores the record below.

FACTS

This matter involves the March 6, 2010 fire at Winthrop University. Plaintiff filed its action against Defendant, Pickens Roofing and Sheet Metals, Inc., alleging breach of contract and negligence. The case was tried before a jury in York County on March 17, 2014. On March 20, 2014, the jury returned a verdict for the Plaintiff in the amount of \$7,223,343.14. On April 21, 2014, Pickens filed its Notice of Appeal. On August 3, 2016, the Court of Appeals affirmed the verdict of the trial court. On October 3, 2016, Defendant filed its Motion to Stay Execution of Judgment During Appeal.¹

On November 17, 2016, oral argument was heard in the lower court. At oral argument, Petitioner provided an affidavit of Bert Pickens, an employee of Pickens Roofing and Sheet Metals, Inc., in support of its motion.² On November 18, 2016, the lower court granted Pickens' Motion for Stay and required Pickens to post a bond in the amount of \$6,000,000.00.

¹ Winthrop agreed not to execute on the judgment while the appeal was pending before the Court of Appeals. After the Court of Appeals affirmed the trial verdict, Winthrop advised Pickens of its intention to execute in the absence of a stay and Pickens posting of an appeal bond in the amount of the judgment.

² Plaintiff consented to the late filing of Bert Pickens' affidavit.

STANDARD OF REVIEW

There is no dispute that pursuant to Rule 241 of the South Carolina Appellate Court Rules a trial court has discretion, in cases where a money judgment is entered, to issue a stay and to determine the amount, if any, of any bond to be posted to protect the judgment.

Rule 241(D)(3) further provides “a person seeking an order lifting an automatic stay or granting a Writ of Supersedeas must file a written petition verified by the client.” The Rule further states:

The petition shall contain:

A. The factual background necessary for an understanding of the petition. If the facts are subject to dispute, the petition shall be supported by affidavits or other sworn statements.

ARGUMENT

The facts are not subject to dispute in this case and Pickens’ attempt to file a post-order affidavit is not supported. The sole support for Petitioner’s Motion to Stay was the affidavit of Bert Pickens.³ Exhibit 1. The lower court found Bert Pickens’ affidavit was lacking. First, Bert Pickens is an employee, not an officer or an agent of Pickens and not competent to speak or act on behalf of the corporation. SCR Rule 11; 1 S. C. Jur. Affidavits §17. See also *Barfield v. Dillon Motor Sales, Inc.*, 233 S.C. 26, 39, 103 S.E.2d. 416, 422 (1958) (“Corporation must speak and act through its officers.”). Second, Bert Pickens’ affidavit consists of conclusory statements. Specifically, it sets forth the bald allegation that Pickens had less than 50 employees and less than \$5,000,000.00 in revenues between January 1, 2013 and December 31, 2015. Bert Pickens did not aver that he reviewed any documents or even consulted with any officers of the corporation to support his affidavit. Further, Pickens Roofing and Sheet Metals, Inc. did not

³ Bert Pickens’ affidavit was not attached to the original filing of Petitioner’s Writ for Supersedeas. It is Respondent’s understanding it has since been filed with this Court. However, to avoid any confusion, it is attached hereto.

attach any financial documents, such as payroll records, income statements, or balance sheets to support its motion.

Based on the obvious inadequacies of Bert Pickens' affidavit, the only evidence before it, the lower court found the affidavit lacking and, using its discretionary power, granted the stay and ordered a bond in the amount of \$6,000,000.00.

In addition, it is important to note in both Bert Pickens' affidavit, as well as the affidavit of James Pickens attached as Exhibit B to Petitioner's Writ for Supersedeas, both affiants claim that there would be irreparable harm if a stay was not granted pending the appeal. Both affiants also averred that "the judgment entered against Pickens Roofing . . . exceeds Pickens Roofing's insurance coverage by more than \$1,000,000.00." However, neither of the affiants disclosed to this Court that Pickens has \$6,000,000.00 in liability coverage. Exhibit 2 is a copy of Pickens' liability insurance policy produced in the underlying matter. The lower court set bond in an amount equal to Pickens' liability insurance coverage. By conditioning the stay upon the posting of the bond, the lower court, acting within its discretionary power, achieved two goals. First, Winthrop University's judgment was protected to the extent of Pickens' liability insurance coverage. Second, by issuing the stay it ensured there was no threat of irreparable harm to Pickens. In short, there is simply no dispute as to the facts submitted by Pickens to support its motion to execute stay.

The late filed affidavit of James Pickens, attached to Pickens' Petition for Writ of Supersedeas, should not be considered by this Court because the facts that were before the lower court are not disputed. The lower court considered all the evidence submitted by the Petitioner, including the affidavit of Bert Pickens. Rule 241(D)(3). Even if the Court considers James Pickens' affidavit, it too is lacking. First, as previously noted, it is not timely and Pickens should

not be allowed to rewrite the record upon which the lower court ruled when it used its discretionary power to issue a stay and set the amount of the bond. Any such attempt is an abuse of process and would serve to support the dilatory tactics employed by Pickens. (Of note, in its Petition, Pickens does not address in any substantive fashion, the deficiencies in Bert Pickens' affidavit submitted to support its Motion to Stay.)

Second, the affidavit submitted by James M. Pickens contradicts the affidavit of Bert Pickens. Specifically, Bert Pickens averred that at no time from January 1, 2013 to December 31, 2015, did Pickens Roofing's gross revenues exceed \$5,000,000.00. To the contrary, James Pickens averred that Pickens' gross revenues in 2014 was \$8,141,891.00 and \$9,456,730.00 in 2015. Pickens either has two sets of financial documents or Bert Pickens or James Pickens misstated the financial condition of the company. Further, James Pickens avers that Pickens Roofing had 43 employees in 2013 and 40 employees in both 2014 and 2015, when Pickens' revenues more than doubled. Pickens Roofing and Sheet Metals, Inc., as its name suggests, installs roofing systems. It relies on roofing crews to install roofs. James Pickens declined to attach any financial information to support his affidavit and instead offered the conclusory statement that the documents he reviewed "are commercially sensitive." It is difficult to conceive how a business that relies on roofing crews to install roofs more than doubled its revenue while reducing the number of employees. Without supporting documentation and depositions, it is impossible to determine how Pickens classifies the workers it employs to install roofs.

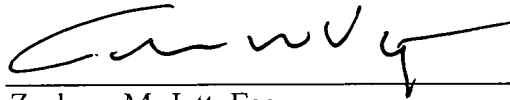
In short, James M. Pickens' affidavit is also inadequate and does not support the Motion for Stay or the Petition for Writ of Supersedeas.

CONCLUSION

The lower court properly ruled on Pickens' Motion to Stay when it ordered the stay and required Pickens to post a \$6,000,000.00 bond. The facts considered by the lower court are not in dispute. The affidavit attached to Pickens' Petition is not timely and conclusory. Pickens' Petition for Supersedeas is ill-founded and unsupported and should be denied in every respect.

This the 28th day of December, 2016.

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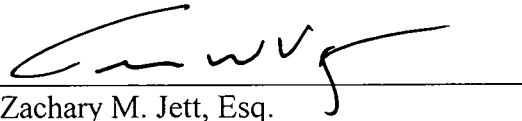
Petitioner.

PROOF OF SERVICE

I certify that I have served Respondent's Return to Pickens Roofing and Sheet Metals, Inc.'s Verified Petition for Supersedeas on Pickens Roofing and Sheet Metals, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on December 28th, 2016, addressed to its attorneys of record, Kirby D. Shealy III, Esquire and Lyndey Ritz Zwingelberg, Esquire, at 1501 Main Street, Fifth Floor, Columbia, South Carolina 29201.

[SIGNATURE BLOCK ON NEXT PAGE]

This 28th day of December, 2016.



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