

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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OCT 12 2018

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

SC Court of Appeals

The Honorable Charles B. Simmons, Jr., Master in Equity

Case No. 2015-CP-23-05935

Jeanne A. Burton, Trustee, .....Appellant,

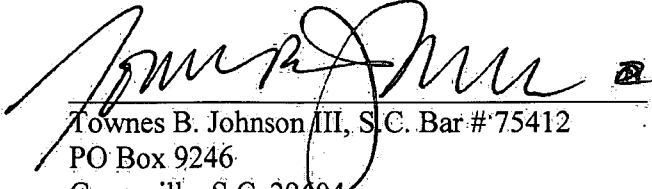
v.

Triad Grading, LLC .....Respondent.

**NOTICE OF APPEAL**

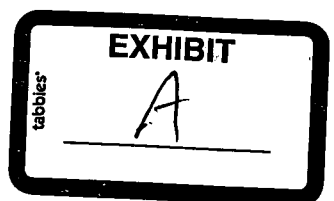
Jeanne A. Burton, Trustee, appeals the decision of the Honorable Charles B. Simmons, Jr on September 12, 2018. Appellant received notice of the September 12, 2018 decision on September 12, 2018.

TOWNES B. JOHNSON III, LLC



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*Attorneys for the Appellant*

September 12, 2018  
Greenville, South Carolina



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**Attorneys for the Respondent**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master in Equity

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SC Court of Appeals

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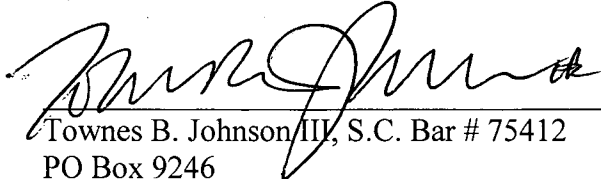
v.

Triad Grading, LLC .....Respondent.

**PROOF OF SERVICE**

I certify that the Notice of Appeal, attached hereto as “**Exhibit A**”, was filed with the Court of Common Pleas for Greenville County on September 13, 2018.

TOWNES B. JOHNSON III, LLC



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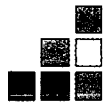
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October 8, 2018

Townes B. Johnson III  
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Via Regular Mail and Facsimile

The Honorable Jenny Abbott Kitchens  
Clerk, The South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RECEIVED  
OCT 12 2018  
SC Court of Appeals

RE: **Jeanne A. Burton, Trustee v. Triad Grading, LLC**  
**Appellate Case No. 2018-001687**

Dear Ms. Kitchens:

This letter is in response to your correspondence dated September 25, 2018, which was received on September 28, 2018.

Enclosed, please find a Proof of Service that the Notice of Appeal has been filed with the lower court.

Please be advised that there is not an order or judgment being challenged on appeal which has been reduced to writing, but rather an oral ruling made in open court by the Honorable Charles B. Simmons, Jr. and a proposed order for Judge's Simmons reflecting that ruling. A copy of the proposed order is attached. As is further addressed in the motion and application for a preliminary injunction, this Notice of Appeal was filed prior to the order being reduced to writing in order to preserve the *status quo* pending the appeal.

Should you need anything further, please do not hesitate to let me know.

Sincerely,

Townes B. Johnson III, S.C. Bar # 75412

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Attorney for Appellant

cc: John R. Devlin, Jr.  
Devlin & Parkinson, P. A.  
Post Office Box 10387  
Greenville, SC 29603  
Attorney for Respondent

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Jeanee A. Burton, Trustee, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Triad Grading, LLC, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C.A. NO.: 2015-CP-23-05935

**ORDER ON SUPPLEMENTAL  
 PROCEEDINGS**

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 SC Court of Appeals

**I. BACKGROUND**

This matter came to be heard before me on September 12, 2018 on Judgment Creditor Jeanee A. Burton (“Trustee”)’s previously filed Rule to Show Cause. Trustee appeared through its attorney Townes B. Johnson, III. Judgment Debtor Triad Grading, LLC ( “Triad”) appeared through its attorney, John R. Devlin, Jr. of Devlin & Parkinson.

As a result of previous hearings, this Court entered an order on April 26, 2018 that effectively froze a Triad account containing funds equal to or in excess of the original judgment amount ( “ Frozen Funds”). Thereafter, the parties appeared before the Court in an effort to resolve the issues presented and to address the impact of that Order on Triad’s ability to continue its regular business operations.

**II. LEGAL ISSUES**

Trustee has urged the Court to comply with its reading of S.C. Code 15-39-410, and to order all Frozen Funds released in satisfaction of its judgment. That statute reads in full as follows:

*The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person or due to the*

*judgment debtor, to be applied toward the satisfaction of the judgment, except that the earnings of the debtor for his personal services cannot be so applied.*

Triad contends that the above statute grants discretion to the Court to issue such orders, and pointed out to the Court that, because its only income was derived from grading projects, its funds were subject to a first lien in favors of laborers, subcontractors, suppliers, and materialmen. That position is supported by S. C. Code 29-7-10, which states as follows:

***Any contractor or subcontractor in the erection, alteration, or repairing of buildings in this State shall pay all laborers, subcontractors, and materialmen for their lawful services and material furnished out of the money received for the erection, alteration, or repairs of buildings upon which such laborers, subcontractors, and materialmen are employed or interested and such laborers, as well as all subcontractors and persons who shall furnish material for any such building, shall have a first lien on the money received by such contractor...***

(emphasis added)

### III. TESTIMONY

At the September 12 hearing, Triad offered testimony from its construction manager Scott Clement, and from CPA Pete Tiffany. Clement testified that as a result of the loss of access to the Frozen Funds, Triad had been forced to rely on loans and deferred payment plans with vendors in order to maintain its cash flow. He further testified that Triad had 36 employees, and that its ability to remain open and continue to employ those individuals would be severely jeopardized by the loss of the Frozen Funds. He further testified that Triad's profit margin was in the range of 15% to 18% in a good year, but that as a result of a downturn in its workload, the company had not made a profit in 2018.

Clement further testified that prior to the hearing, Triad had sought to negotiate a resolution to the judgment by offering a \$50,000 initial payment with ten subsequent monthly payments of \$10,000. That offer was rejected by Trustee and payment in full of the judgment's principal balance was demanded.

Tiffany was offered as, and stipulated to be, an expert in business valuation and forensic accounting. He testified that he had reviewed the books and records of Triad, and presented summaries to the Court of a comparison of Triad's income statements and balance sheets for 2017 and 2018. Those documents supported Triad's contention that its survival would be severely jeopardized by the immediate loss of the Frozen Funds. Tiffany further testified that his review of the records showed a gross profit margin of 18%.

Trustee offered no testimony.

#### **IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court finds that Triad, while subject to a final judgment against it, is not a wrongdoer as are the vast majority of judgment debtors. It breached no contracts. It committed no torts. Instead, it worked for, billed, and was paid by a contractor who subsequently went into bankruptcy. The fact that the payment it received was claimed by the Bankruptcy Court as a preferential payment casts no shadow of wrong on Triad. It would thus be inequitable to allow the Trustee's collection efforts to force Triad to close its doors when equitable alternatives exist.

The Court further finds that the testimony presented by Triad's witnesses, both at the September hearing and at earlier hearings, was credible and worthy of serious consideration.

The Court further finds that Triad has diligently sought to resolve this matter with Trustee, but was consistently rebuffed. In Equity Court, those efforts by Triad carry weight, as do the Trustee's refusal to negotiate.

The Court concludes that the Frozen Funds, as funds received by Triad in the ordinary course of business are impressed with a first lien to the extent they do not represent Triad's gross profit.

The Court further concludes that pursuant to S.C. Code 15-39-410, it has the discretion to take into account the matters presented to it by a judgment debtor in determining what part of the Frozen Funds are to be applied to the judgment. In this case, it is the Court's determination that 18% of that amount should be so applied. That sum is \$31,500.00.

The Court further concludes that inasmuch as Triad has indicated a willingness to pay down the balance of the judgment at the rate of \$10,000 per month, it should do so, beginning on the 15<sup>th</sup> of the first month following the payment of the \$31,500 set forth above, and continuing thereafter on the 15<sup>th</sup> of each month, or the first business day thereafter.

The Court further concludes that South State Bank, as holder of the Frozen Funds, shall, upon presentation to it of this Order, remit the sum of \$31,500 to Trustee by check payable as directed by Trustee's counsel, and shall immediately thereafter release the funds to the unfettered use of Triad.

AND IT IS SO ORDERED.

**JUDGE'S ELECTRONIC SIGNATURE ON PAGE TO FOLLOW.**

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PO BOX 9246  
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The Honorable Jenny Abbot Kitchens  
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Columbia SC 29211-1629

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