

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

LADY BEAUFORT, LLC &)
TIDELANDREALTY, INC.,)

Plaintiffs,)

vs.)

HIRD ISLAND INVESTMENTS, INC.,)
SHERWOOD N. FENDER, ADDISON D.)
FENDER, MARTHA B. FENDER,)
WILLIAM B. BOWEN, LADY)
KEMMERLIN, LLC, BRICKYARD)
HOLDINGS, INC. AND A&K HOLDING)
CO., LLC,)

Defendants.)

AND)

WILLIAM M. BOWEN,)

Third Party Plaintiff,)

vs.)

JAMES S. KERR and MATT TRUMPS,)

Third Party Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-07-0052

ORDER AMENDING JUDGMENT

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SC Court of Appeals

This matter comes before me pursuant to a Motion to Reconsider filed on behalf of the Defendants requesting that I reconsider, among other things, that portion of my Order filed May 11, 2017 awarding attorney's fees and costs totaling \$53,924.41 against the Defendants Hird Island Investments, Inc. and Sherwood N. Fender in favor of the Plaintiff Lady Beaufort, LLC. This matter came to be heard before me in the Beaufort County Court of Common Pleas on July 23, 2018. Present at the hearing and appearing on behalf of the Plaintiff Lady Beaufort, LLC was its attorney, Jann G. Rannik, Esquire. Appearing on behalf of the Defendants Hird Island

Investments, Inc. and Sherwood N. Fender was their attorney, H. Fred Kuhn, Jr., Esquire. The Defendant Sherwood N. Fender was also present. Testimony was taken from Andrew K. Epting, Jr., Esquire, and various documents were placed into evidence. For the reasons set forth herein, I find and conclude that the attorney's fees and costs awarded to the Plaintiff Lady Beaufort, LLC in my Order filed May 11, 2017 should be reduced from \$53,924.41 to \$17,857.00, and my judgment amended accordingly.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On August 19, 2013, Lady Beaufort, LLC ("Lady Beaufort") and Hird Island Investments, Inc. ("Hird Island") entered into a Contract whereby Hird Island was to sell to Lady Beaufort a 2.99 acre parcel of real estate located in Beaufort County at 9 Sams Point Road ("the Property").

2. The Contract provided that the closing was to occur seven (7) days after the expiration of the Due Diligence Period, with a provision allowing for an automatic extension of five (5) business days in the event of unsatisfied contingencies. Accordingly, the final closing date of the Contract was October 15, 2013.

3. Hird Island sold the Property to a third party, Inverness, LLC on October 10, 2013, while its Contract with Lady Beaufort was still in full force and effect.

4. On October 15, 2013 Lady Beaufort filed a lis pendens on the Property and on January 7, 2014 it filed this lawsuit, initially against Hird Island only, but subsequently adding its principal Sherwood Fender, alleging causes of action for breach of contract, negligent misrepresentation, and breach of contract accompanied by a fraudulent act.

5. Lady Beaufort resolved its dispute with Inverness by way of a settlement agreement that authorized Lady Beaufort to purchase the property from Inverness for \$25,000.00

more than Lady Beaufort's contract with Hird Island.

6. As a result of a trial held before me on March 1, 2017 I filed an Order on May 11, 2017 entering judgment in favor of Lady Beaufort against both Hird Island and Sherwood Fender in the amount of \$87,578.56.¹

7. I calculated the amount of the judgment entered in favor of Lady Beaufort by adding together the increase in the purchase price that Lady Beaufort had to pay to Inverness in order to obtain the Property and the attorney's fees and costs spent by Lady Beaufort to obtain the Property. More specifically:

"As a result of the Defendant's conduct, Lady Beaufort had to file suit in order to obtain the property that it was entitled to pursuant to its contract with Hird Island. Lady Beaufort filed suit against Hird Island and its principal Sherwood Fender as well as the third party that purchased the property from Hird Island, Inverness. Lady Beaufort was able to reach a settlement with Inverness. Pursuant to the settlement, Lady Beaufort paid Inverness \$285,000.00 to obtain the property. This represents a \$25,000.00 increase from Lady Beaufort's contract with Hird Island. Lady Beaufort has also expended \$53,924.41 in attorney's fees and costs in order to obtain the property it lost because of the Defendants' conduct. Attorney's fees are provided for in the contract."

Order of May 11, 2017, pg. 8 (citations omitted and emphasis added).

8. I added prejudgment interest to the \$25,000.00 increase in the purchase price to arrive at the total judgment of \$87,578.56.

9. On May 19, 2017 the Defendants filed a Motion to Reconsider the May 11, 2017 Order. Among other things, the Defendants contended that the amount of attorney's fees and costs awarded to Lady Beaufort was excessive and the Court did not make any findings of fact as to the factors mandated in determining an award of attorney's fees, citing *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993) ("There are six (6) factors to consider in

¹ I also awarded judgment in favor of the Plaintiff Tideland Realty, Inc. against Hird Island and Sherwood Fender in the amount of \$17,500.17, representing actual damages and prejudgment interest on the real estate commission due on the Contract. This judgment in favor of Tideland Realty, Inc. is neither affected by, nor the subject of, this Order.

determining an award of attorney's fees: (1) Nature, extent, and difficulty of the legal services rendered; (2) Time and labor devoted to the case; (3) Professional standing of counsel; (4) Contingency of compensation; (5) Fee customarily charged in the locality for similar services; and (6) Beneficial results obtained.").

10. On February 14, 2018 I issued my Order granting in part and denying in part the Defendant's Motion to Reconsider. In this Order, I found that the foregoing ground had merit and concluded "that the appropriate remedy is to reopen the record so as to allow the parties to submit evidence in support of, or in opposition to, the claimed attorney's fees and costs of \$53,924.41 and the foregoing factors." Order of February 14, 2018, pg. 3. Accordingly, I ordered as follows:

"My Order of May 17, 2017 (sic, May 11, 2017) is reconsidered and amended so as to change the final sentence of the second paragraph of the section entitled "III. Damages," found on page 8 of the aforesaid Order to read as follows:

"In addition to the foregoing, Lady Beaufort also claims damages in the amount of \$53,924.41 in attorney's fees and costs which it claims it expended on account of Defendant's default. Attorney's fees are provided for in the contract. In order to award attorney's fees and costs I must consider the six (6) factors enumerated in *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). There is currently an insufficient evidentiary basis upon which I can consider the *Blumberg v. Nealco* factors. It is accordingly ordered that the record in this case should be reopened and the hearing reconvened, limited to the issue of that element of damages claimed by the Plaintiff Lady Beaufort consisting of attorney's fees and costs in the amount of \$53,942.41."

Order of February 14, 2018, pg. 4.

In accordance with my Order, the hearing was reconvened on July 23, 2018.

11. My finding in my May 17, 2017 Order that Lady Beaufort had expended \$53,924.41 in attorney's fees and costs in order to obtain the property it lost because of the Defendants' conduct was based upon the testimony of James J. Kerr, Sr., the sole owner of Lady

Beaufort. Mr. Kerr testified that he had actually paid this amount in attorney's fees and costs. Tr., pg. 31, lines 21 – 24. Of this sum, Mr. Kerr testified that he paid \$7,857.00 to D. Carlyle Rogers, Jr., P.C. (the "Rogers Firm") and \$46,067.41 to Andrew K. Epting, Jr., LLC (the "Epting Firm").

12. At the re-convened hearing held on July 23, 2018 the only witness to testify was Andrew K. Epting, Jr., Esquire, the principal attorney of the Epting Law Firm. Mr. Epting testified that Lady Beaufort had not paid a total of \$53,924.41 in attorney's fees and costs in order to obtain the property it lost because of the Defendants' conduct. His testimony on this point was corroborated by his firm's itemized billings, which were introduced into evidence. I find and conclude that Mr. Epting's testimony on this issue is credible.

13. Lady Beaufort obtained the subject property from Inverness pursuant to a closing which took place on May 30, 2014. I find and conclude that the attorney's fees and costs charged by the Epting Firm to Lady Beaufort up through that point in time were reasonably necessary in order to obtain the property Lady Beaufort lost because of the Defendants' conduct. The attorney's fees totaled \$15,560.00, while the costs totaled \$1,065.00, resulting in total attorney's fees and costs of \$16,625.00. I reviewed the itemized invoice for these attorney's fees and costs and I find them to be reasonable. The attorney's fees were earned by Attorney Michelle Nicole Endemann and Andrew K. Epting of the Epting Firm. Ms. Endemann spent 27.5 hours and charged a rate of \$250.00 per hour. She was a new attorney and I find her rate to be reasonable and consistent with that charged by attorneys of similar experience in the area. Mr. Epting spent 19.3 hours on the case charging a rate of \$450.00. Mr. Epting is a highly experienced and highly regarded attorney. I find his rate to be reasonable considering his experience and standing in the legal community.

14. Mr. Epting testified that Mr. Kerr and his various business entities were good clients of his firm and he voluntarily reduced his firm's bill by \$6,625.00, thereby charging Mr. Kerr only the balance of \$10,000.00, which Mr. Kerr paid on June 6, 2014.

15. Accordingly, with respect to the Epting Law Firm, Lady Beaufort incurred \$10,000.00 in attorney's fees and costs in order to obtain the Property it lost because of the Defendants' conduct.

16. In addition to the Epting Firm, Lady Beaufort also incurred attorney's fees and costs with the Rogers Firm. No witness testified with respect to the Rogers Firm nor were any of the firm's billings placed into evidence. At the original hearing, however, an Affidavit from D. Carlyle Rogers, Jr., Esquire the principal attorney of the firm, was introduced into evidence. From this Affidavit it appears that Mr. Rogers represented Lady Beaufort in the attempted closing with Hird Island, as well as the successful closing of the transaction between Lady Beaufort and Inverness. He also assisted Lady Beaufort with the filing of a Lis Pendens on the property, as well as with putting the Defendant on notice of its default under its contract with Lady Beaufort. The total attorney's fees and costs associated with the aforementioned legal services was \$7,857.00.

17. There are six factors to consider in determining an award of attorney's fees: (1) Nature, extent and difficulty of the legal services rendered; (2) Time and labor devoted to the case; (3) Professional standing of counsel; (4) Contingency of compensation; (5) Fee customarily charged in the locality for similar services; and (6) Beneficial results obtained. *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993).

18. With respect to the nature, extent, and difficulty of the legal services rendered, these services included preparing for the attempted closing with Hird Island, the successful

closing with Inverness, the filing of a lis pendens, putting the Defendant on notice of its default, and filing and pursuing litigation in order to obtain to the Property which is the subject of this litigation.

19. With respect to the time and labor devoted to the case, I find that the 19.3 hours spent by Mr. Epting and the 27.5 spent by Mrs. Endemann were reasonably necessary in order to obtain the subject property. While I do not know precisely the amount of time spent by Mr. Rogers, nor his hourly billing rate, considering the nature of the services he performed I find that the total attorney's fees and costs billed by him was reasonably necessary.

20. As previously noted, Mr. Epting is highly experienced and highly regarded in the legal community. Ms. Endemann was a new attorney. She was the principal trial attorney for the Plaintiff during the trial of this action and I found her to be professional and competent. With respect to Mr. Rogers, Mr. Epting testified that he is a highly competent and experienced real estate attorney, and I so find.

21. There is no contingency of compensation in this case.

22. These charges by the attorneys involved in this case on behalf of the Plaintiff are in line with the fees customarily charged in this locale for similar services.

23. The Plaintiff's attorneys have obtained a beneficial result for their client, having obtained the Property which is the subject of this action for their client.

24. I find and conclude that Lady Beaufort is entitled to recover from the Defendant the \$10,000.00 in costs and attorney's fees which it paid to the Epting Firm in order to obtain the Property which is the subject of this action.

25. Although there is no testimony that Lady Beaufort actually paid any part of the \$7,857.00 in attorney's fees and costs claimed by the Rogers Firm, there is no reason to believe

that it is not due and owing, or that any portion was forgiven. I accordingly find and conclude that Lady Beaufort is entitled to recover from the Defendant \$7,857.00 in attorney's fees and costs either paid or owed to the Rogers Firm. .

26. I find and conclude that the Plaintiff has expended or incurred \$17,857.00 in attorney's fees and costs in order to obtain the property it lost because of the Defendants' conduct, and the Order filed on May 11, 2017 should be amended accordingly.

IT IS, THEREFORE, ORDERED:

a. Page 8 of the Order filed on May 11, 2017 shall be and is hereby amended so as to delete the sentence "Lady Beaufort has also expended \$53,924.41 in attorney's fees and costs in order to obtain the property it lost because of the Defendant's conduct." which shall be replaced with the sentence "Lady Beaufort has also expended or incurred \$17,857.00 in attorney's fees and costs in order to obtain the property it lost because of the Defendant's conduct."

b. Page 9 of the Order filed on May 11, 2017 shall be and is hereby amended so as to delete the sentence "I further award judgment against Hird Island and Sherwood Fender in the amount of \$87,578.56, representing actual damages and prejudgment interest as described above in favor of Lady of Beaufort." which shall be replaced with the sentence "I further award judgment against Hird Island and Sherwood Fender in the amount of \$51,511.15, representing actual damages and prejudgment interest as described above in favor of Lady Beaufort."

AND IT IS SO ORDERED.

Honorable Marvin H. Dukes, III
Master in Equity and Special Circuit Court
Judge for the Beaufort County Court of
Common Pleas

_____, 2018
Beaufort, South Carolina

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SC Court of Appeals

FORM 4

JUDGMENT IN A CIVIL CASE

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

CASE NO. 2014 CP-07-0052

Lady Beaufort, LLC &

Hird Island Investments, Inc.

Tideland Realty, Inc.
PLAINTIFF(S)

Sherwood Fender, et al.
DEFENDANT(S)

Submitted by: H. Fred Kuhn, Jr.

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

This Order amends the Judgment amount against Hird Island and Sherwood Fender that was issued in the order filed May 11th, 2017.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Lady Beaufort	Hird Island and Sherwood Fender	\$51,511.15
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

ELECTRONICALLY FILED - 2018 Oct 26 2:01 PM - BEAUFORT - COMMON PLEAS - CASE#2014CP0700052

[Empty rectangular box]

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Jaan G. Rannik, Esquire

H. Fred Kuhn, Jr., Esquire

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Beaufort Common Pleas

Case Caption: Lady Beaufort Llc , plaintiff, et al VS Inverness Llc , defendant, et al
Case Number: 2014CP0700052
Type: Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2018-10-26 11:32:46 page 12 of 12

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