

STATE OF SOUTH CAROLINA )  
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COUNTY OF GREENVILLE )  
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Jeanee A. Burton, Trustee, )  
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Petitioner, )  
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vs. )  
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Triad Grading, LLC, )  
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Respondent. )  
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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 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.

This is a collection case of a judgment arising out of a bankruptcy action in the State of Tennessee. At the first of several hearings in this matter, Triad, a local grading contractor, was allowed by the Court to proceed *pro se* in an effort to resolve the matter. Following a hearing, an Order was filed April 26, 2018 which froze most of Triad’s assets (“Frozen Funds”), including its primary operating account, and allowed the parties time to attempt to resolve the matter. That Order noted that any Frozen Funds “**may** ultimately be applied toward” the judgment. See, Order at p. 2. (emphasis added). The parties soon thereafter appeared before the Court again concerning the impact of the April 26 Order on the ability of Triad to continue its business and based upon Triad’s having filed a motion in the Bankruptcy Court in Tennessee attempting to set aside the original order in Bankruptcy Court. In an Order filed June 18, 2018, the Court allowed Triad the option to post a surety bond or pledge real property in order to allow Triad access to the funds in

its operating account. The Order also lifted the other provisions of the Order of April 26, 2018. Then, by Consent Order filed June 29, 2018, the parties agreed that the \$175,000.00 in Triad's operating account at South Sate Bank would stay frozen until further order of the Court. Following this Order, the Court directed that Triad would be required to retain local counsel. At that point, Mr. Devlin was retained by Triad.

The parties appeared before the Court yet again on September 12, 2018 in an effort to resolve the issues presented and to address the impact of the above Orders on Triad's ability to continue its regular business operations.<sup>1</sup>

## II. LEGAL ISSUES

Petitioner Trustee argues that S.C. Code 15-39-410, requires that the Court order all Frozen Funds be immediately released to Petitioner 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.*

(emphasis added)

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 and were otherwise obligated to operating expenses such as payroll, taxes, etc. As relates to the "first lien" argument, Triad contends that position is supported by S. C. Code 29-7-10, which states as follows:

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<sup>1</sup> The Court issued its oral Order from the Bench on September 12, 2018. Prior to a written Order being filed, Plaintiff filed an appeal. Pursuant to Defendant's motion to dismiss, the South Carolina Court of Appeals dismissed the appeal on October 31, 2018. This Order addresses the issues raised in the hearing held September 12, 2018.

***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 has been jeopardized by the earlier Orders and would be even more severely jeopardized by the loss of all 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 immediate payment in full of the judgment's full balance was demanded. The Court also notes that, throughout these proceedings and while proceeding *pro se*, Triad has made multiple good-faith attempts to settle the matter with Petitioner, several of which involved a substantial initial payment followed by significant monthly payments.

Tiffany was offered as an expert in business valuation and forensic accounting. Tiffany, who has outstanding qualifications and stated that he has testified as an expert on many occasions, was retained by Triad's counsel as an independent expert to perform a forensic review of Triad's records and current business status and viability both with and without access to the Frozen Funds. 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. In his expert opinion, the documents and business records he examined and reviewed supported Triad's contention that its survival has been and will continue to be severely and significantly jeopardized by the loss of the Frozen Funds. Tiffany further testified that his review of the records showed a gross profit margin of 18%. In other words, that only 18% of the funds in the operating account were gross profit belonging to Triad and that the remaining 82% were funds belonging to suppliers, sub-contractors, employee wages, taxes, etc.

Trustee offered no testimony or evidence.

#### **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 from that contractor was later claimed by the Bankruptcy Court as a preferential payment casts no shadow of wrong on Triad. Rather, it was the first domino to fall that ultimately led to the Tennessee judgment and the collection efforts herein. 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, has been credible and worthy of serious consideration. Triad's agents and principals appear to have been forthright at every hearing and have attempted in many ways to resolve the matter and still remain in business. Petitioner's response appears to have consistently been "pay in full and pay right now."

The Court concludes that the Frozen Funds, as funds received by Triad in the ordinary course of business and held in its general operating account, are impressed with a first lien as noted above and are otherwise payable as employee wages, taxes, etc. The evidence established that at least 82% of the Frozen Funds do not represent Triad's gross profit or funds it is otherwise entitled to. Thus, the Court finds that except for the 18% noted above, the other 82% of the funds in the operating account should not and cannot be properly considered as "property of the judgment debtor". See, 15-39-410. The uncontroverted evidence presented establishes this fact and supports this conclusion.

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 \$10,000.00 per month, it should do so, beginning on the 15<sup>th</sup> of the first month following the payment of the \$31,500.00 set forth above, and continuing thereafter on the 15<sup>th</sup> of each month, or the first business day thereafter. Candidly, and as argued by Petitioner, there is some degree in risk that, due to business reasons beyond its control, Triad may not ultimately be able to pay the full judgment amount. From all evidence

reviewed by the Court, this risk is minimal. However, the greater risk is that the full and immediate payment of the judgment amount to Petitioner from the Frozen Funds will likely result in the closure of Triad and the loss of employment by 39 employees. In this balancing of the competing interests, the scale tips clearly and persuasively in favor of the result the Court is reaching.

The Court further concludes that South State Bank, as holder of the Frozen Funds, shall, upon presentation to it of this Order, promptly remit the sum of \$31,500.00 to Trustee by check payable as directed by Trustee's counsel, and shall immediately thereafter release the remaining funds to the unfettered use of Triad.

AND IT IS SO ORDERED.

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



Greenville Common Pleas

**Case Caption:** Jeanne A Trustee Burton vs. Triad Grading LLC

**Case Number:** 2015CP2305935

**Type:** Order/Supplemental Proceedings Order

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)