

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

**RECEIVED**  
NOV 28 2018  
SC Court of Appeals

Appellate Case No. 2018-002052  
Case No. 2015-CP-23-05935

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

v.

Triad Grading, LLC .....Respondent.

**MOTION AND PETITION FOR SUPERSEDEAS  
AND  
MOTION AND APPLICATION FOR A PRELIMINARY INJUNCTION**

To the Honorable James E. Lockemy, Chief Justice of the South Carolina  
Supreme Court:

Pursuant to Rules 240 and 241, SCACR, the Appellant, Jeanne A. Burton, Trustee  
("Appellant"), respectfully requests the issuance of a supersedeas suspending that certain  
November 21, 2018 Order of the Honorable Charles B. Simmons, Jr. and/or a preliminary  
injunction to preserve the status quo pending resolution of the appeal filed by Appellant,  
by prohibiting the lower court from releasing certain funds of Respondent Triad Grading,  
LLC ("Respondent") being held at South State Bank.

## **Background**

On or about April 15, 2015, an Order of Judgment by Default was entered by the United States Bankruptcy Court for the Middle District of Tennessee against Respondent in the amount of \$170,654.42 (inclusive of pre-judgment interest) and post-judgment interest at the rate allowed by law. On or about September 30, 2015, Order of Judgment by Default was enrolled in the Court of Common Pleas for Greenville County, South Carolina under Judgment Roll No.: 2015CP2305935. On or about February 7, 2017 an Execution was issued against Respondent and that Execution was returned Nulla Bona on or about May 24, 2017.

On or about January 24, 2018, upon petition from Appellant, the Honorable Charles B. Simmons, Jr. ordered supplemental proceedings in accordance with the provisions of §15-39-310, et seq., Code of Laws of South Carolina, 1976, as amended. On or about April 11, 2018 Supplemental Proceedings were held and on April 26, 2018, the Court issued an order finding that Respondent had monies, not exempt from execution, in four (4) separate accounts with financial institutions and found that Respondent had certain property not exempt from execution. The Court's April 26, 2018 order ordered that:

- 1) Respondent was forbidden from transferring, disposing or otherwise interfering its assets (including the Accounts and Property listed herein) in accordance with South Carolina Code Ann. § 15-39-440;
- 2) that Respondent's four (4) accounts and property may ultimately be applied toward the satisfaction of Petitioner's judgment against Respondent in accordance with South Carolina Code Ann. § 15-39-410 and the Petitioner is

entitled to levy against the Accounts and Property. However, prior to such time, the Court has directed the parties to engage in substantive settlement discussions; and

- 3) the appointment of an investigative receiver for Respondent's assets, in accordance with South Carolina Code Ann. § 15-39- 430, is appropriate, but such receiver shall be named in a subsequent order from this Court upon Petitioner's submission of same

The Court's April 26, 2018 was thereafter served on South State Bank and South State Bank froze at least \$170,654.42 in Respondent's account with South State Bank. Following a hearing on June 6, 2018, the Court issued an order dated June 18, 2018 wherein the Court lifted and set aside its April 26, 2018 Order upon Respondent's posting cash, a sufficient surety bond or pledging real property located in this County with the Greenville County Clerk of Court in an amount or unencumbered value of not less than the judgment amount of \$170,654.42. Thereafter, Appellant and Respondent agreed that it would be sufficient collateral for \$175,000.00 to be frozen in an account at South State Bank on the condition that the frozen funds not be released until subsequent order from the Court. \$175,000.00 (the 'Frozen Funds') was thereafter from in an account with South State Bank.

After a hearing regarding the Frozen Funds was held on September 12, 2018, the Honorable Charles B. Simmons, Jr., by Order dated, held that, in an effort to keep Respondent a going concern, Appellant was immediately entitled to only 18% of the Frozen Funds, representing Respondent's profit margin, and that Respondent was to pay Appellant the sum of \$10,000 on the 15<sup>th</sup> of each month until Appellant's judgment was

satisfied. The Court further ordered that the remaining 82% of the Frozen Funds be given back to Respondent, that Appellant was not entitled to any collateral or security to secure its judgment against Respondent and that Appellant was subject to the risk of not being able to collect in the future should Respondent not remain a going concern. Appellant filed its Notice of Appeal that same day.

On November 6, 2018, Respondent filed a Motion to Lift the Automatic Stay in accordance with to Rule 241, SCACR. After a hearing concerning same on November 14, 2018, the Honorable Charles B. Simmons, Jr., by Order dated November 21, 2018, held that Appellant entitled to 18% of the Frozen Funds and Respondent was entitled to unfettered use of the remaining funds. A true and correct copy of the Honorable Charles B. Simmons, Jr.'s November 21, 2018 Order is attached hereto as "**Exhibit A**".

#### **Discussion**

Pursuant to Rule 241(c)(2), SCACR, the lower Court was to "consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot" in determining whether lift the automatic stay of Rule 241, SCACR. Should the Honorable Charles B. Simmons, Jr.'s November 21, 2018 Order stand and the Frozen Funds be disbursed in accordance therewith, the Appellant's entire appeal – seeking the Court of Appeals to determine whether the continued viability of a judgment debtor, such as Respondent, is a greater right that than of a judgment creditor to collect on a valid judgment against a judgment debtor's non-exempt property in accordance with South Carolina Code Ann. § 15-39-410 – is rendered moot. Accordingly, the Appellant respectfully asks that this Court suspend the proceedings of the lower court and re-institute the automatic stay of Rule 241, SCACR.

Furthermore, Courts traditionally consider four factors in determining whether to issue a preliminary injunction: “probability of success on the merits,” “the risk of irreparable harm, the balance of the equities, and the public interest.” *E.g.*, *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 670 (2003).

First, Appellant is highly probable to succeed on the merits. Appellant has a valid, uncontestable judgment against Respondent which deserves full faith and credit under Article 4, Section 1 of the United States Constitution. Further, Appellant has found, through Supplemental Proceedings, non-exempt property, specifically the \$175,000 being held at South State Bank, which is able to be levied upon and is being held as collateral for Appellant’s judgment.

Second, Appellant will be irreparably harmed if it is not able to levy upon the \$175,000 being held at South State Bank and those funds are not longer being held as collateral for Appellant’s judgment. South Carolina Code Ann. § 15-39-410 allows for the execution and levy against non-exempt property of the judgment debtor, such as Respondent, and if the monies are released to Respondent as the Court has decided, the likelihood that Appellant will ever be able to satisfy its judgment is in doubt.

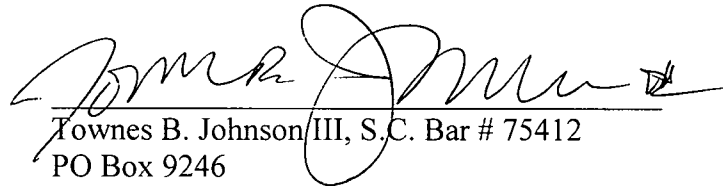
Finally, the Court’s place is not to pick winners and losers; but rather, the Court is required to sit impartially and discharge its duties in accordance with the law. It is well known that equity follows the law. *Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007). Accordingly, it is an abuse of the Court’s discretion to set a precedent wherein the Court decides that the continued viability of a judgment debtor,

such as Respondent, is a greater right than that of a judgment creditor to collect on a valid judgment against a judgment debtor's non-exempt property in accordance with South Carolina Code Ann. § 15-39-410. Such a precedent renders judgments worthless and is against the public interest.

### **Discussion**

For the foregoing reasons, Appellant respectfully requests the issuance of a supersedeas suspending that certain November 21, 2018 Order of the Honorable Charles B. Simmons, Jr. or a preliminary injunction enjoining the Court from releasing the Frozen Funds, thereby preserving the status quo pending resolution of the related appeal filed by Appellant contemporaneously with this application.

TOWNES B. JOHNSON III, LLC



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

PO Box 9246

Greenville, S.C. 29604

(864)-757-4899

[tjohnson@sc.legal](mailto:tjohnson@sc.legal)

*Attorneys for the Appellant*

November 24, 2018  
Greenville, South Carolina

Ex A

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
COUNTY OF GREENVILLE ) C.A. NO.: 2015-CP-23-05935

Jeanee A. Burton, Trustee, )  
 )  
Plaintiff, )

**ORDER LIFTING AUTOMATIC STAY**

vs. )

Triad Grading, LLC, )  
 )  
Defendant. )

The Defendant Triad Grading, LLC’s Motion to Lift Automatic Stay came to be heard on November 14, 2018. For the reasons set forth herein, the relief requested is granted.

**FACTUAL BACKGROUND**

This matter has a long and tortured history. Triad Grading, LLC (“Triad”) is a grading contractor which received a payment for work performed from an entity which subsequently went into bankruptcy in Tennessee. When the bankruptcy trustee brought a claim for an alleged preferential payment, Triad failed to respond, and a judgment was entered against it. That judgment was subsequently domesticated in South Carolina, and supplemental proceedings commenced. On April 26, 2018, this Court issued an order which allowed Plaintiff/Appellant (“Trustee”) to freeze certain funds of Triad (the “Frozen Funds”).

On September 12, 2018, this Court took testimony on this matter as to the disposition of the Frozen Funds. Triad contended that the majority of its funds were subject to the lien rights of their suppliers, subcontractors, and materialmen, who under S.C. Code §29-7-10 possess a first lien right on monies paid to a general contractor. An accountant on behalf of Triad testified that a review of the Triad financial records indicated a gross profit margin of 18%. 82% of the Frozen Funds were thus subject to lien claims.

Triad further argued that the loss of the Frozen Funds would jeopardize its ability to remain open through the slow winter months, and that its 36 employees would lose their livelihood if it had to suspend operations.

Triad further provided testimony to the Court that it had made a number of offers to Trustee to resolve the matter, but was rebuffed.

Trustee offered no testimony to rebut the risk of Triad's closing, and did not dispute that Triad's subcontractors, suppliers and materialmen were entitled to a first lien on proceeds held by a general contractor.

It was this Court's ruling that the holder of the Frozen Funds was to remit 18% of the amount held, (approximately \$31,500) to Trustee, and to thereupon release the remaining funds to the unfettered use of Triad. The Court further ordered Triad, as if had offered to the Court to do, to make substantial monthly payments to Trustee in reduction of the judgment.

Following the Court's ruling in favor of Triad, but before a written order could be issued, Trustee filed a Notice of Appeal and Motion for Preliminary Injunction. Although the Court of Appeals advised Trustee that the appeal was premature in the absence of a written order, Trustee would not dismiss the appeal. Triad filed a motion to dismiss the appeal, to which Trustee filed no response. Seven weeks after the Notice of Appeal was filed, the Court of Appeals dismissed it. Thus, Trustee's premature filing prevented enforcement of the court's order for almost two months.

Following dismissal of Trustee's appeal, a written order was signed by the Court on November 5, 2018. Trustee filed a new Notice of Appeal that same day. Triad's motion to lift the automatic stay followed.

### APPLICABLE LAW

This Court's ruling, both from the bench in September, and in its written order of November 5, is premised in part on S. C. Code §15-39-410, which, by its plain meaning, gives the Court discretion in how to resolve such situations:

*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)

In this matter, it is clear that Trustee believes the Court has no such discretion, and that the word "may" in that statute can only mean "shall". This Court, however, took into account the terrible impact a mechanical application of the statute would have, and in its capacity as a Court of Equity, exercised its discretion in ruling that of the Frozen Funds, only 18% were to be released to the Trustee.

Under SCACR 241(a), it is the general rule that, except under certain circumstances, the service of a notice of appeal stays the relief ordered in the appealed order. SCACR 241(c)(2), however, allows for such an automatic stay to be lifted in order to prevent a contested issue from becoming moot. The Court's ruling specifically intended to prevent Trustee from forcing Triad to, in effect, starve to death during the slow winter months. If a stay of enforcement of the Court's order is not lifted, Trustee, by its delay and its filing of an appeal, will have accomplished precisely what the Court sought to prevent. If Triad has to go out of business while the appeal is pending, the issue contested by the parties will be moot, and Trustee, which has yet to seek to do equity, will have forced an inequitable result into being. This Court can prevent that.

**HOLDING**

It is this Court's order that the automatic stay applicable to appealed judgments of this type should not be enforced against its November 5 order, so as to avoid the risk of the relief granted therein becoming moot. Failure to grant such relief, according to the only testimony in front of the Court and as more fully set forth in previous orders, is likely tantamount to a judicial closure of Triad. It is therefore ruled as follows:

1. Any previous order of this Court allowing funds of Triad Grading, LLC to be frozen are hereby lifted and of no further force and effect;
2. Upon presentation of this order to South State Bank, said bank shall within 24 hours of said presentation, remit 18% of the Frozen Funds to Trustee. Trustee shall enter a Partial Satisfaction of Judgment in each court in which the judgment may have been entered.
3. South State Bank shall immediately thereafter release the remaining funds to the unfettered use of Triad. Any failure to comply with this Order shall be treated as contempt of court.

AND IT IS SO ORDERED.

**ELECTRONIC SIGNATURE PAGE TO FOLLOW**



Greenville Common Pleas

**Case Caption:** Jeanne A Trustee Burton vs. Triad Grading LLC  
**Case Number:** 2015CP2305935  
**Type:** Order/Lift Automatic Stay

And It Is So Ordered!

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

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

Appellate Case No. 2018-002052  
Case No. 2015-CP-23-05935

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

Triad Grading, LLC.....Respondent,

PROOF OF SERVICE

I certify that I have served the Appellant’s Motion and Petition for Supersedeas and Motion and Application for a Preliminary Injunction with Exhibit A on the following by depositing a copy of it in the United States Mail, postage prepaid, on November 26, 2018, addressed as follows:

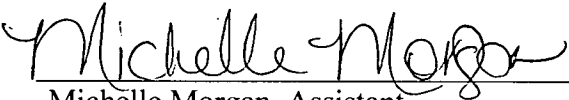
**Via Regular Mail**

Triad Grading, LLC  
c/o John R. Devlin, Jr. and  
Christopher R. Antley  
Devlin & Parkinson, P. A.  
Post Office Box 10387  
Greenville, SC 29603

**Via Regular Mail**

South State Bank  
200 E Broad St #100  
Greenville, SC 29601

Sincerely,



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Michelle Morgan, Assistant

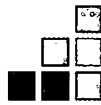
TOWNES B. JOHNSON III, LLC

PO Box 9246

Greenville, South Carolina 29604

PH: (864) 757-4899

[tjohnson@sc.legal](mailto:tjohnson@sc.legal)



November 24, 2018

88390

Townes B. Johnson III  
(864) 757-4899  
tjohnson@sc.legal

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

RECEIVED

NOV 28 2018

SC Court of Appeals

RE: **Jeanne A. Burton, Trustee v. Triad Grading, LLC**  
**Appellate Case No. 2018-002052**

Dear Ms. Kitchens:

Enclosed, in response to your correspondence dated November 21, 2018, which was received on November 24, 2018, please find:

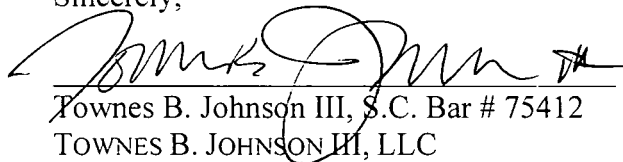
- 1) the filing fee in the amount of \$250; and
- 2) a Proof of Service that the Notice of Appeal has been filed with the lower court.

Additionally enclosed, please find:

- 1) the original and six copies of the Appellant's Motion and Petition for Supersedeas and Motion and Application for a Preliminary Injunction;
- 2) the filing fee in the amount of \$50; and
- 3) a Proof of Service for same.

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

Sincerely,



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

TOWNES B. JOHNSON III, LLC

PO Box 9246

Greenville, S.C. 29604

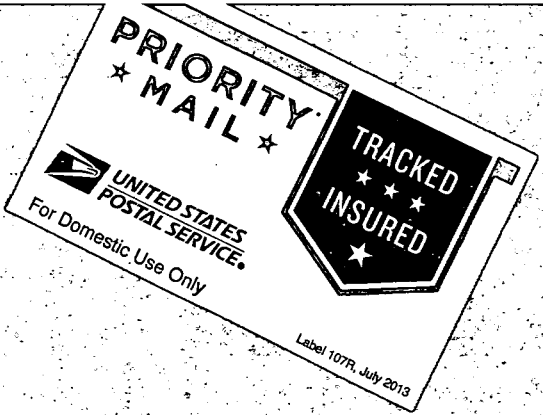
(864)-757-4899

[tjohnson@sc.legal](mailto:tjohnson@sc.legal)

Attorney for Appellant

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

BS  
Box 9246  
Columbia SC 29211



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