

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

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

RECEIVED
NOV 30 2018
SC Court of Appeals

Jeanne A. Burton, Trustee.....Appellant,
v.
Triad Grading, LLC,Respondent.

**RESPONDENT’S RETURN TO MOTION FOR SUPERSEDEAS
AND PRELIMINARY INJUNCTION**

The Respondent Triad Grading, LLC., (“Triad” or “Respondent”) herewith files its Return to the Appellant’s Motion for Supersedeas and Preliminary Injunction as follows:¹

BACKGROUND

Triad is a grading contractor located in Greenville County, South Carolina. In 2015, it failed to respond to an adversarial action brought by Appellant (“Trustee”) seeking the return of funds paid to Triad by the bankrupt party prior to declaring bankruptcy. Judgment was entered against Triad in Tennessee for \$170,654.42. That judgment was subsequently domesticated in South Carolina, and after a delay by Appellant, supplemental proceedings were begun. On April

¹ Triad recognizes that the Court will not have a complete Record on Appeal at this early stage of the appellate process. In an effort to address that concern, an appendix of relevant filings is attached hereto Exhibit “A”.

26, 2018, this Court issued an order which allowed 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.

The 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.

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, the trustee’s premature and legally defective filing prevented enforcement of the court’s order for almost two months.

Following dismissal of the Trustee's appeal, a written order was signed by the Court. Trustee then filed a new Notice of Appeal. That same day, Respondent filed a motion to lift the automatic stay imposed by Appellant's Notice of Appeal of the same date. As required by SCACR 241(d)(1), that motion was made to the lower court. At a hearing held on November 14, 2018, Judge Charles B. Simmons, Jr. again exercised his discretion and ordered the stay lifted. Appellant requested no protective terms at that hearing, and when Judge Simmons issued his order on November 21, filed no motion for reconsideration as to any such request for relief. Instead, it filed yet another Notice of Appeal, and shortly thereafter, the motions to which this Return is made.

DISCUSSION

1. APPELLANT'S MOTION FOR SUPERSEDEAS IS PROCEDURALLY DEFICIENT AND SHOULD BE DENIED.

Under SCACR 241(d), a movant for a writ of supersedeas is obligated to provide the appellate court with specific information:

- a. A verification from client (SCACR 241(d)(3));
- b. A certified copy of the order (id.);
- c. A copy of the Notice of Appeal (id.); and
- d. A showing that the application for relief was made to the lower court (SCACR 241(d)((4)(C)).

None of these matters were filed with the Court. For that reason alone, Appellant's supersedeas motion should be denied.

2. APPELLANT'S MOTION FOR SUPERSEDEAS IS SUBSTANTIVELY DEFICIENT AND SHOULD BE DENIED.

To the extent that Appellant intends her motion as a request for a writ of supersedeas rather than for review of Judge Simmons' order lifting the automatic stay, it is fatally defective. The procedure set forth in SCACR 241 obligates Appellant, in the absence of extraordinary

circumstances, to make such a motion to the lower court, as Respondent in fact did. Appellant does not even attempt to make a claim of extraordinary circumstances in her brief, but instead presents a stew of stream of consciousness arguments, some apparently related to a supersedeas motion, some to an unmade petition for review of the lower court's order lifting the stay, and some to the requirements for a preliminary injunction. Because it filed no request for a writ to the lower court, and made no claim that extraordinary circumstances made that step unnecessary, the motion for supersedeas must fail.

Appellant's motion is also fatally flawed in its very nature: a supersedeas motion is only available in cases not involving the general rule that the filing of a Notice of Appeal triggers an automatic stay. Respondent points to no statute, no court rule, and no case law that would support its unstated contention that the lower court's most recent order is not in fact subject to stay and could have been enforced. This is significant primarily in that when Appellant served the bank holding the Frozen Funds with the Notice of Appeal on November 21, 2018, counsel for Appellant contended that the automatic stay applied, doubtless in an effort to prevent the bank from complying with that order.² While it is difficult to parse out the reasoning behind these inconsistent positions, it is clear that Appellant is deeply offended by, and complains bitterly about, the lower's court willingness to use its statutorily mandated discretion to "pick a winner", unless; presumably, the court picks Appellant.

² Appellant's counsel's email to Bank's counsel is attached hereto as Exhibit "B" and reads in pertinent part as follows: "Pursuant to Rule 241 of the SCACR, the matters decided in the order and the relief ordered therein are automatically stayed".

3. APPELLANT SHOULD HAVE FILED A PETITION FOR REVIEW OF THE COURT'S ORDER LIFTING STAY, NOT A NOTICE OF APPEAL.

Appellant's filing of a Notice of Appeal in response to an order lifting the automatic stay is equally problematic. Were that the correct procedure in response to either an order lifting stay or granting supersedeas, then the aggrieved party would then have to file a request, again with the lower court, for relief in order to comply with SCACR 241(d)(1). The next step would be yet another Notice of Appeal, and another trip to the lower court. The parties would never be able to progress to an appellate review of the lower court's order.

The procedure which should have been followed is clear. SCACR 241(d)(1) requires the initial filing with the lower court. SCACR 241(d)(2) progresses logically: "After the lower court has ruled, any party may petition the appellate court... for review of this order." If it were the intent of the appellate rules for that ruling to trigger a Notice of Appeal, it would have been simple for it to so state. Had Appellant filed a petition for review, instead of filing a Notice of Appeal, she might not have fallen into the procedural abyss in which she now finds herself.

4. HAD APPELLANT FOLLOWED THE CORRECT PROCEDURE BY FILING A PETITION FOR REVIEW OF THE COURT'S ORDER LIFTING STAY, THAT PETITION SHOULD HAVE BEEN DENIED.

Substantively, what does Appellant argue Judge Simmons did wrong in lifting the automatic stay? In effect, she claims that he decided that the continued viability of a judgment debtor is a greater right than the collection of a judgment. In so arguing Appellant significantly, and intentionally, misstates Judge Simmons' rationale and ruling. Even a cursory review of the November 5 Order makes it clear that Judge Simmons was seeking to balance the competing interests presented by the parties, and to bring about a just result. A review of his ruling makes it clear that, in the absence of any willingness whatsoever on the part of Appellant to negotiate, Judge Simmons was crafting a means by which not only would Appellant's judgment be paid, but by

which that could be accomplished without the needless destruction of Respondent's business. The statute upon which Appellant relies, S.C. Code §15-39-410, plainly gives the court discretion to make such a decision:

"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)

Judge Simmons was well aware that one of the factors to be considered in lifting the automatic stay was the possibility that a contested issue would become moot without such an order.

His ruling expressly addresses the issues of possible mootness:

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. (November 21, 2018 Order Lifting Automatic Stay, p. 3)

Appellant's reframing of the mootness issue does not withstand scrutiny. She claims that the disbursement of the funds would render moot her desire to learn the answer to whether her the court could rule that a judgment debtor's continued viability is superior to a judgment creditor's right to collect that judgment. That contention ignores the fact that the Court's ruling in requiring periodic payments by Respondent allows for both the survival of the debtor and the payment of the creditor. A slight reframing of the issue sets it in correct perspective, and resolves the issue of mootness: Does the Court's ruling render moot Appellant's ability to collect its judgment? The answer is a resounding no.

5. APPELLANT'S MOTION FOR PRELIMINARY INJUNCTION IS MERITLESS AND SHOULD BE DENIED.

Appellant's effort to argue her right to a preliminary injunction is, at best, muddled, probably because of the inapplicability of such pretrial motions to this post-trial matter. Before addressing the merits of the motion itself, Respondent would first contend that no such argument is necessary, simply because if the Appellant's request for supersedeas or review of Judge Simmons' November 21, 2018 order is granted, she will effectively have the relief an injunction would otherwise provide. Nonetheless, a brief review of the several reasons an injunction is inappropriate must be undertaken.

First, is the Appellant "highly probable" to succeed on the merits, as she claims? In the usual application of requests for injunctive relief, no hearing on the merits of the movant's claim has yet to be held, so some prediction of success must be offered. In this case, however, the Appellant argues against a carefully considered ruling of a respected South Carolina judge with almost thirty years on the bench. Judge Simmons heard the testimony, judged the credibility of the witnesses, and considered and rejected each legal argument made by Appellant. As is appropriate for a Master in Equity, he then balanced the equities in crafting an order which would seek to address the concerns of both sides. For Appellant to contend that she is highly likely to succeed, she must argue that the statutory basis for Judge Simmons' ruling, S.C. Code §15-39-410, supra., eliminates any use of discretion. Since the operative verb in that statute is "may", not "shall", that argument seems somewhat less than highly probable.

Second, Appellant has no chance of showing the existence of irreparable harm sufficient to meet the stringent requirements of South Carolina law. Its entire argument on that critical topic is "if the monies are released to Respondent, the likelihood that Appellant will ever be able to satisfy its judgment is in doubt." (Appellant's Motion for Supersedeas, p. 5). If the best argument

Appellant has on irreparable harm is that its ability to get paid is “in doubt”, Respondent sees little need for further discussion on this topic.

Third, if the Court accepts that Appellant has shown the likelihood of irreparable harm, the next step is for the Court to balance the likelihood of irreparable harm to the movant against the likelihood of harm to the non-moving party. See Rockford Mfg, Ltd. v. Bennett, 296 F.Supp. 681 (D.S.C. 2003). How does that scale tip in this case? Respondent has provided the lower court with sworn testimony that without the funds in question, it lacks the ability to survive the slow winter months. What testimony has Appellant presented as to the irreparable harm she will suffer? None. No testimony, no affidavit, not a single morsel of evidence has been presented by her either to the lower court or in support of this motion that would allow such a balancing to be conducted. Instead, Appellant seemingly argues that it is entitled to a zero-sum application of the law, and that its right to collect a judgment is far superior to the Respondent’s right to operate. In the harsher world of, say, Tennessee bankruptcy practice, such cruel calculations may be commonplace. When, however, Appellant enters a process in which equities are balanced, such a calculation must fail miserably.³

³ One overlooked relevant fact in both the calculation of irreparable harm and the balancing of the respective harms is contained in one of the seminal documents in this matter. In 2016, the Appellant asked the Tennessee Bankruptcy Court to approve the hiring of a Tennessee firm to collect foreign default judgments, and authorized a contingency fee of 60% if litigation was required. Yes, 60%. That the Appellant could request such a grossly excessive fee for its counsel, and then claim that its right to collect the judgment is superior to a company’s continued viability is ample evidence that (1) she is perfectly willing to risk monies flowing to the bankruptcy estate by seeking to pay excessive fees to counsel, and (2) any Trustee who will seek such exorbitant fees to be paid at the expense of the creditors to the bankruptcy estate has no basis for seeking equitable relief that would primarily benefit an attorney not even handling the litigation. See Order to Employ Counsel, attached hereto as Exhibit “C”.

6. APPELLANT SHOULD BE REQUIRED TO POST A SUPERSEDEAS BOND IN THE EVENT ANY RELIEF IS GRANTED.

Respondent has consistently maintained that lack of access to the funds in question would cause the ultimate irreparable harm: the destruction of its business. It is thus difficult to suggest a specific amount of a surety bond which would compensate Respondent should the Court grant Appellant's request for relief. Respondent suggests nonetheless that any relief in favor of Respondent be conditioned upon the provision of a surety bond of no less than three times the amount of the judgment in question, and that the bond be payable to Respondent or its Liquidating Trustee.

CONCLUSION

Respondent seeks, overtly, the destruction of Appellant, largely for the benefit of its Tennessee counsel. It sought to do so at the lower court and was rebuffed. On appeal, it seeks that destruction again, with arguments flawed both procedurally and substantively. All of the relief requested should be denied.

Respectfully submitted,

DEVLIN & PARKINSON, P.A.

BY: 

John R. Devlin, Jr., S.C. Bar No. 1667
Christopher R. Antley, S.C. Bar No. 13631
P.O. Box 10387
Greenville, South Carolina
(864) 242-4050 (phone number)
(864) 242-427 (facsimile number)
john.devlin@devlinparkinson.com
crantley@devlinparkinson.com

Attorneys for the Respondent

Date: November 28, 2018
Greenville, SC

EXHIBIT "A"

APPENDIX OF SELECTED FILINGS

1. Order on Supplemental Pleadings filed November 5, 2018;
2. Trustee's Notice of Appeal filed November 5, 2018;
3. Triad's Motion to Lift Stay and for Expedited Hearing filed November 5, 2018; and
4. Order lifting Automatic Stay.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE	)	C.A. NO.: 2015-CP-23-05935
)	
Jeanee A. Burton, Trustee,)	
)	
Petitioner,)	
	)	ORDER ON SUPPLEMENTAL
vs.	)	PROCEEDINGS
)	
Triad Grading, LLC,)	
)	
Respondent.)	
_____)	

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.¹

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:

¹ 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 15th of the first month following the payment of the \$31,500.00 set forth above, and continuing thereafter on the 15th 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)

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

Case No. 2015-CP-23-05935

RECEIVED
NOV 19 2018
SC Court of Appeals

Jeanne A. Burton, Trustee,Appellant,

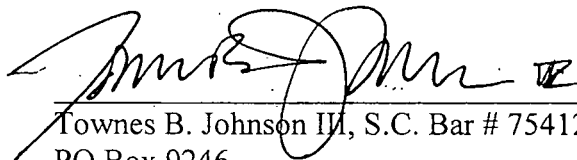
v.

Triad Grading, LLCRespondent.

NOTICE OF APPEAL

Jeanne A. Burton, Trustee, appeals the decision of the Honorable Charles B. Simmons, Jr on November 5, 2018. Appellant received notice of the November 5, 2018 decision on November 5, 2018.

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

Attorneys for the Appellant

November 5, 2018
Greenville, South Carolina

Other Counsel of Record:

John R. Devlin, Jr.
Devlin & Parkinson, P. A.
Post Office Box 10387
Greenville, SC 29603
864-242-4050-office
864-242-4277-fax
john.devlin@devlinparkinson.com
Attorneys for the Respondent

RECEIVED

NOV 19 2018

SC Court of Appeals

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

Case No. 2015-CP-23-05935

Jeanne A. Burton, Trustee,Appellant,

v.

Triad Grading, LLCRespondent.

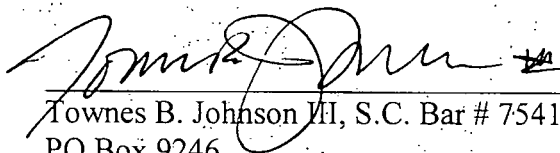
PROOF OF SERVICE

I certify that I have served the foregoing Notice of Appeal on the above named Respondent
by hand delivery on November 5, 2018, addressed to counsel of record as follows.

John R. Devlin, Jr.
Christopher R. Antley
Devlin & Parkinson, P. A.
Post Office Box 10387
Greenville, SC 29603
864-242-4050-office
864-242-4277-fax
john.devlin@devlinparkinson.com
Attorneys for the Respondent

(signature page to follow)

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

Attorneys for the Appellant

Greenville, South Carolina

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,)	
	)	MOTION FOR (A) LIFTING OF
vs.	)	AUTOMATIC STAY AND
	)	MEMORANDUM IN SUPPORT; AND
Triad Grading, LLC,	)	(B) FOR EXPEDITED HEARING
)	
Defendant.)	
_____)	

TO: TOWNES B. JOHNSON, III., ESQ., Attorney for the Plaintiff:

YOU WILL HEREBY TAKE NOTICE that the Defendant/Respondent (“Triad”), by and through its undersigned counsel, will move on the first available date before the Honorable Charles B. Simmons, Jr., for an order lifting the automatic stay of the Court’s order of November 5, 2018.

Both motions are based on the following:

FACTUAL BACKGROUND

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.

The 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.

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, the trustee's premature and legally defective filing prevented enforcement of the court's order for almost two months.

Following dismissal of the Trustee's appeal, a written order was signed by the Court. Trustee then filed a new Notice of Appeal. This motion followed.

LEGAL ARGUMENT

S. C. Code §15-39-410, by its plain meaning, gives the Court discretion in how to resolve such situations. 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". The 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.

As to Triad's request for an expedited hearing, the power to grant such relief is set forth in SCRCP 6(d). Triad contends that every day burned up by the normal pace of litigation brings it a day closer to having to close its doors, and seeks the Court's assistance in avoiding that result.

DEVLIN & PARKINSON, P.A.

BY: s/John R. Devlin, Jr.
 John R. Devlin, Jr., S.C. Bar No. 1667
 P.O. Box 10387
 Greenville, South Carolina
 Phone: (864) 242-4050/ Fax: (864) 242-4277
John.devlin@devlinparkinson.com

Attorneys for the Defendant

Date: November 5, 2018
 Greenville, South Carolina

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)

Electronically signed on 2018-11-21 11:17:33 page 5 of 5

Laura Kirwan

From: Townes Johnson <tjohnson@sc.legal>
Sent: Wednesday, November 21, 2018 1:11 PM
To: marshall.minton@southstatebank.com
Cc: Pete McKenna; David Cañas; Jeanne; Kimberly Hamilton; Chris Antley; John Devlin; Michelle Morgan
Subject: Re: Triad Grading Hold
Attachments: 11.21 NOA.pdf

Marshall -


Please be advised that Plaintiff Jeanne A. Burton, Trustee is appealing Judge Simmons' order of today wherein the automatic stay of the prior appeal was lifted. The Notice of Appeal has already been filed and is being served locally on the Bank.

Pursuant to Rule 241 of the SCACR, the matters decided in the order and the relief ordered therein are again automatically stayed.

Regards,

Townes Johnson

Townes B. Johnson III

 TOWNES B. JOHNSON III, LLC

ATTORNEY AT LAW
(O) [864-757-4899](tel:864-757-4899) | (C) [864-325-2528](tel:864-325-2528) | (E) tjohnson@sc.legal

Mailing: PO Box 9246 | Greenville, SC 29604

Physical: [Bank of America Building, Suite 302](#)

[Website](#) | [Blog](#) | [vCard](#)

PRIVILEGED AND CONFIDENTIAL: This electronic message (including any attachments) is intended only for the use of the individual or entity to which it is addressed and may contain information that is attorney-client privileged, may be confidential work product, or may be exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is wrongful, is strictly prohibited, and may subject you to civil liability. If you have received this communication in error, please immediately notify us by telephone at [864-757-4899](tel:864-757-4899) or by return e-mail, and destroy any copies (electronic, paper, or otherwise) that you may have of this communication.

DEBT COLLECTOR: This firm collects debts for mortgage lenders and other creditors. Any information obtained will be used for that purpose. However, if you have previously received a discharge in bankruptcy, this message is not and should not be construed as an attempt to collect a debt, but only as an attempt to enforce a lien.

IRS CIRCULAR 230 NOTICE: Any statements regarding tax matters made herein, including any attachments, are not formal tax opinions by this firm, cannot be relied upon or used by any person to avoid tax penalties, and are not intended to be used or referred to in any marketing or promotional materials. Moreover, any tax advice contained in this e-mail or any attachment hereto is not intended to be used, and cannot be used, to avoid penalties posed under the Internal Revenue Code.

Keith M. Lundin

Keith M. Lundin
U.S. Bankruptcy Judge

Dated: 5/10/2016



IN THE UNITED STATES BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

IN RE:)	
	)	Case No: 3:12-07918
WT DUBOIS CONSTRUCTION, INC.,	)	Chapter 7
	)	Judge Lundin
Debtor.)	

ORDER TO EMPLOY COUNSEL

Upon consideration of the notice and motion of Jeanne A. Burton, Trustee, for authority to employ Thompson Burton, PLLC in connection with the above-styled matter (the "Motion"), and it appearing that David P. Cañas, Justin Campbell and all members in the firm of Thompson Burton, PLLC, are duly admitted to practice in this Court, and represent no interest adverse to this estate, and no objections having been filed;

And it appearing to the Court that employment of counsel in this matter is necessary; It is hereby

ORDERED that Jeanne A. Burton, Trustee, is authorized to employ Thompson Burton, PLLC to represent her in the administration of the above-styled estate.

IT IS FURTHER ORDERED that The Trustee is authorized to retain Thompson Burton, PLLC's services related to the collection on the default judgments on a contingency basis as follows: (i) collection of default judgments against Tennessee entities or individuals on a one-third contingency without litigation, 40% contingency of a negotiated court-approved compromise and settlement, or 50% contingency after litigation in state or federal court and (ii) collection of default judgments against entities or individuals outside Tennessee on a 50% contingency without litigation, 55% contingency of a negotiated court-approved compromise and settlement, or 60% contingency after litigation in state or federal court. The Trustee authorized to remit to Thompson Burton, PLLC the described contingency fee at the time of payment of any default judgment.

Counsel for the Trustee will make application to the Court for approval of all other fees.

This Order was signed and entered electronically as indicated at the top of the first page.

APPROVED FOR ENTRY:

/s/ Jeanne A. Burton
Jeanne A. Burton, Trustee
95 White Bridge Road
Suite 512
Nashville, TN 37205
Telephone: 615-678-6960
Fax: 615-678-6961
jeanne.burton@comcast.net

This Order has been electronically signed. The Judge's signature and Court's seal appear at the top of the first page.
United States Bankruptcy Court.

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

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

RECEIVED
NOV 30 2018
SC Court of Appeals

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

v.

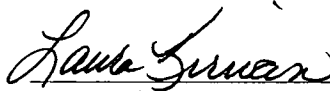
Triad Grading, LLC, Respondent.

CERTIFICATE OF SERVICE

I certify that on November 28, 2018, I have served the following with a copy of the **Respondent's Return to Motion for Supersedeas and Preliminary Injunction** by depositing same in the United States Mail, postage prepaid and properly addressed as follows:

Townes B. Johnson, III, Esq.
Townes B. Johnson, III, LLC
P. O. Box 9246
Greenville, SC 29604

Attorney for Appellant



Laura Kirwan
Legal Assistant to John R. Devlin, Jr.
Devlin & Parkinson, P.A.
P. O. Box 10387
Greenville, SC 29603

DEVLIN & PARKINSON, P.A.

ATTORNEYS AT LAW

JOHN R. DEVLIN, JR.
E. BROWN PARKINSON, JR.
CHRISTOPHER R. ANTLEY
LORI E. JOLLY*

POST OFFICE BOX 10387
GREENVILLE, SOUTH CAROLINA 29603-0387
www.devlinparkinson.com

PHONE (864) 242-4050
FAX (864) 242-4277

STREET ADDRESS:
27 CLEVELAND STREET
SUITE 201
GREENVILLE, SC 29601

*ALSO ADMITTED IN GEORGIA

November 28, 2018

The Honorable Jenny Abbott Kitchings
Clerk, Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

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

RECEIVED
NOV 30 2018
SC Court of Appeals


Dear Ms. Kitchings:

Please find enclosed Respondent's Return to the Appellant's Motion for Supersedeas and Preliminary Injunction that we would appreciate you filing with the Court in connection with the above matter.

I would also appreciate it if you would return a clocked-in copy of the same to our office in the enclosed envelope.

Should you have any questions, please give me a call.

Sincerely,



John R. Devlin, Jr.

JRDJr\llk

Enclosures

cc: Townes B. Johnson, III, Esq. (w/enclosures)



UNITED WE STAND

PRIORITY MAIL



PRIME BROWES
US POSTAGE
02 1P \$ 007.250
0001160694 NOV 28 2018
MAILED FROM ZIP CODE 29601

DEVLIN & PARKINSON, P.A.

ATTORNEYS AT LAW

POST OFFICE BOX 10387

GREENVILLE, SOUTH CAROLINA 29603-0387

TO:

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

RECEIVED
NOV 30 2018
SC Court of Appeals

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

52

53

54

55

56

57

58

59

60

61

62

63

64

65

66

67

68

69

70

71

72

73

74

75

76

77

78

79

80

81

82

83

84

85

86

87

88

89

90

91

92

93

94

95

96

97

98

99

100

101

102

103

104

105

106

107

108

109

110

111

112

113

114

115

116

117

118

119

120

121

122

123

124

125

126

127

128

129

130

131

132

133

134

135

136

137

138

139

140

141

142

143

144

145

146

147

148

149

150

151

152

153

154

155

156

157

158

159

160

161

162

163

164

165

166

167

168

169

170

171

172

173

174

175

176

177

178

179

180

181

182

183

184

185

186

187

188

189

190

191

192

193

194

195

196

197

198

199

200

201

202

203

204

205

206

207

208

209

210

211

212

213

214

215

216

217

218

219

220

221

222

223

224

225

226

227

228

229

230

231

232

233

234

235

236

237

238

239

240

241

242

243

244

245

246

247

248

249

250

251

252

253

254

255

256

257

258

259

260

261

262

263

264

265

266

267

268

269

270

271

272

273

274

275

276

277

278

279

280

281

282

283

284

285

286

287

288

289

290

291

292

293

294

295

296

297

298

299

300

301

302

303

304

305

306

307

308

309

310

311

312

313

314

315

316

317

318

319

320

321

322

323

324

325

326

327

328

329

330

331

332

333

334

335

336

337

338

339

340

341

342

343

344

345

346

347

348

349

350

351

352

353

354

355

356

357

358

359

360

361

362

363

364

365

366

367

368

369

370

371

372

373

374

375

376

377

378

379

380

381

382

383

384

385

386

387

388

389

390

391

392

393

394

395

396

397

398

399

400

401

402

403

404

405

406

407

408

409

410

411

412

413

414

415

416

417

418

419

420

421

422

423

424

425

426

427

428

429

430

431

432

433

434

435

436

437

438

439

440

441

442

443

444

445

446

447

448

449

450

451

452

453

454

455

456

457

458

459

460

461

462

463

464

465

466

467

468

469

470

471

472

473

474

475

476

477

478

479

480

481

482

483

484

485

486

487

488

489

490

491

492

493

494

495

496

497

498

499

500

501

502

503

504

505

506

507

508

509

510

511

512

513

514

515

516

517

518

519

520

521

522

523

524

525

526

527

528

529

530

531

532

533

534

535

536

537

538

539

540

541

542

543

544

545

546

547

548

549

550

551

552

553

554

555

556

557

558

559

560

561

562

563

564

565

566

567

568

569

570

571

572

573

574

575

576

577

578

579

580

581

582

583

584

585

586

587

588

589

590

591

592

593

594

595

596

597

598

599

600

601

602

603

604

605

606

607

608

609

610

611

612

613

614

615

616

617

618

619

620

621

622

623

624

625

626

627

628

629

630

631

632

633

634

635

636

637

638

639

640

641

642

643

644

645

646

647

648

649

650

651

652

653

654

655

656

657

658

659

660

661

662

663

664

665

666

667

668

669

670

671

672

673

674

675

676

677

678

679

680

681

682

683

684

685

686

687

688

689

690

691

692

693

694

695

696

697

698

699

700

701

702

703

704

705

706

707

708

709

710

711

712

713

714

715

716

717

718

719

720

721

722

723

724

725

726

727

728

729

730

731

732

733

734

735

736

737

738

739

740

741

742

743

744

745

746

747

748

749

750

751

752

753

754

755

756

757

758

759

760

761

762

763

764

765

766

767

768

769

770

771

772

773

774

775

776

777

778

779

780

781

782

783

784

785

786

787

788

789

790

791

792

793

794

795

796

797

798

799

800

801

802

803

804

805

806

807

808

809

810

811

812

813

814

815

816

817

818

819

820

821

822

823

824

825

826

827

828

829

830

831

832

833

834

835

836

837

838

839

840

841

842

843

844

845

846

847

848

849

850

851

852

853

854

855

856

857

858

859

860

861

862

863

864

865

866

867

868

869

870

871

872

873

874

875

876

877

878

879

880

881

882

883

884

885

886

887

888

889

890

891

892

893

894

895

896

897

898

899

900

901

902

903

904

905

906

907

908

909

910

911

912

913

914

915

916

917

918

919

920

921

922

923

924

925

926

927

928

929

930

931

932

933

934

935

936

937

938

939

940

941

942

943

944

945

946

947

948

949

950

951

952

953

954

955

956

957

958

959

960

961

962

963

964

965

966

967

968

969

970

971

972

973

974

975

976

977

978

979

980

981

982

983

984

985

986

987

988

989

990

991

992

993

994

995

996

997

998

999

1000