

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, III, Master in Equity

Case No. 2014-CP-07-0052
Appellate Case No. 2019-001270

Lady Beaufort, LLC & Tideland Realty, Inc.,.....*Appellants,*

v.

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,

v.

James S. Kerr and Matt Trumps, Third-Party Defendants,

Of Which Hird Island Investments, Inc. and Sherwood N. Fender are the Respondents.

INITIAL BRIEF OF APPELLANTS

RECEIVED
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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in entering an order affecting the judgment while the judgment was on appeal in this Court.
2. Whether the trial court erred in permitting Defendants to post a bond to remove the judgment lien on Defendants' assets when:
 - a. the amount of the bond is calculated based on a reduced judgment amount and does not adequately protect Plaintiffs' interest;
 - b. the amount of the judgment is subject to increase on appeal because Appellants are contractually entitled to all of their attorneys' fees, which the trial court did not award;
 - c. the Defendants have already engaged in transfers of property bearing numerous badges of fraud, including on the day of trial and after trial;
 - d. the removal of the judgment lien would permit free transfers of these Defendants' assets, allowing Defendants to dispose of assets greater than the amount of the bond while restricting Appellants' recovery to the amount of the bond.

STATEMENT OF THE FACTS

On August 19, 2013, Respondent Hird Island, by and through its principal, Respondent Sherwood Fender (collectively, "Fender"), entered into a contract with Appellants Lady Beaufort and Tideland Realty (collectively, "Lady Beaufort") for the purchase of a 2.99-acre parcel of real estate located in Beaufort County. **Contract.** The contract provided for a "drop dead" date of closing of October 15, 2013.

The contract between Lady Beaufort and Fender contained an attorneys' fees provision:

If Seller defaults in the performance of any of the Seller's obligations under this Contract ("Default"), Buyer may: [. . .] (ii) Pursue any remedies available to Buyer at law or equity and (iii) Recover attorneys' fees and all other direct costs of litigation if Buyer prevails in any action against Seller.

Contract at 6, § 27(A).

On October 10, 2013, while the contract was still in force, Fender sold the property in question to a third party, Inverness. Lady Beaufort filed suit against Fender and Inverness. On

May 30, 2014, Lady Beaufort was able settle with Inverness and acquire the subject property for \$25,000.00 more than the price agreed with Fender. The lawsuit with Fender proceeded.

STATEMENT OF THE CASE

Prevailing at trial in March 2017, Lady Beaufort was awarded attorneys' fees associated with the lawsuit through the date of trial. **Order** (May 11, 2017). On reconsideration, however, the trial court held that the contract allowed recovery of attorneys' fees only until the date on which Lady Beaufort obtained the property from Inverness and reduced the award of attorneys' fees from \$53,924.41 to \$17,857.00. **Order** (Oct. 26, 2018), at 8.

While the motion for reconsideration was pending, Lady Beaufort learned of several transfers of real property by Mr. Sherwood Fender to family members or business partners without consideration. Lady Beaufort moved under the Statute of Elizabeth to set those transfers aside. That motion has been held in abeyance.

Both parties appealed the amended judgment (Appellate Case No. 2018-001969), Lady Beaufort on the grounds that the reduction in the award of attorneys' fees was error, and Fender on the ground that any award in favor of Lady Beaufort was error.

During the pendency of the appeals, an order was entered requiring Mr. Fender to give Lady Beaufort notice and an opportunity to be heard in court before encumbering or disposing of assets. **Order** (March 20, 2019). This order remains effective.

Subsequently, Fender moved to post a bond in satisfaction of the judgment. **Motion** (June 20, 2019). A hearing was held on the motion, and on July 30, 2019, the Master in Equity entered an order permitting Fender to post a bond, not in satisfaction of the judgment, but rather to which the judgment lien would attach. **Order** (July 30, 2019). That same day, Lady Beaufort

gave notice of its appeal of that order, which was timely filed on July 31, 2019, staying the effect of the order pursuant to Rule 241(a), S.C.A.C.R.

ARGUMENT

I. Standards of Review

Whether the trial court had jurisdiction to rule on Fender’s motion is a question of law, which this Court reviews *de novo*. *Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494 (2014) (“Questions of law are reviewed *de novo*.”).

The undersigned has not been able to find any decision of this Court setting forth the standard of review of regarding the amount of a bond of this nature.¹ To the extent the Court’s order raises issues of law, these are reviewed *de novo*, *Doe*, 407 S.C. at 134, 754 S.E.2d at 498. Appellate review of any factual findings is governed by the substantial evidence standard, and the trial court’s findings must be affirmed if supported by substantial evidence in the record. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006); *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005).

II. Rule 205, S.C.A.C.R. Divests the Trial Court of Jurisdiction to Enter an Order Affecting the Judgment While the Judgment Is on Appeal

Once a notice of appeal has been served, the trial court is divested of jurisdiction with regard to the order appealed and can proceed only with matters “not affected by the appeal.” Rule 205, S.C.A.C.R.; *Jackson v. Speed*, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997).

¹ Nor was any authority presented to or cited by the trial court demonstrating that such a bond of this kind is appropriate. The amount of a *supersedeas bond* has been held to be “a matter committed to the sound discretion” of the trial courts. *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 108, 413 S.E.2d 866, 870 (Ct. App. 1992). However, those bonds function to stay proceedings to enforce a judgment during the pendency of an appeal, a purpose different to that of the bond sought by Fender here.

Months after service of Lady Beaufort's notice of appeal, Fender filed a motion requested that the Court allow him to discharge the judgment by posting a bond. However, as the amount of the judgment is the subject of a pending appeal filed by Lady Beaufort, the trial court lacked jurisdiction to consider a motion to discharge or otherwise satisfy the judgment (i.e., "affect" the judgment) while it is being appealed.²

True, the trial court did not grant the precise relief requested by Fender; the judgment was not discharged. Rather, the judgment *lien* was transferred from Fender's assets to the bond. However, the effect is the same — it frees Fender's assets from the judgment, allowing the amended judgment to be effectively satisfied by the posting of a bond. As discussed *infra*, this limits or removes Lady Beaufort's ability to recover any increased judgment amount that this Court may award in the pending appeal. *See infra*.

Because the relief sought by Fender is directly related to an appeal pending before this Court and is affected by that appeal, the Master in Equity lacked jurisdiction to enter its Order of July 30, 2019. The order is subject to being vacated on this basis.³

III. The Amount of the Bond Authorized in the Order Is Too Low to Adequately Protect Lady Beaufort's Interests

The purpose of a bond is to protect the obligee's interest, not the obligor's. *Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 414, 556 S.E.2d 371, 376 (2001) ("The bond is designed to protect the obligee not the principal."). Lady Beaufort, the judgment creditor, is the obligee

² This was raised by counsel for Lady Beaufort at the hearing on Fender's motion to post a bond. **Hearing Tr.** (July 9, 2019) at 09:19-23.

³ However, as noted *infra*, Lady Beaufort would not object to this Court permitting a bond to be posted that would adequately protect Lady Beaufort's interest.

whose interests must be protected. For the reasons that follow, its interests are not adequately protected by the bond authorized in the Order.

A. The Amount of the Judgment is Subject to Increase on Appeal

The bond was ordered in an amount of \$123,461.28, representing 1.5 times the amount of the amended judgment currently on appeal in this Court. The amount of the judgment is subject to increase because the Master (i) erroneously interpreted a contract provision that broadly awards a prevailing party its attorneys' fees and (ii) awarded only a portion of those attorneys' fees.

The provision in question states:

If Seller defaults in the performance of any of the Seller's obligations under this Contract ("Default"), Buyer may: [. . .] (ii) Pursue *any remedies available to Buyer at law or equity* and (iii) Recover attorneys' fees and all other direct costs of litigation if Buyer prevails *in any action* against Seller.

Contract at 6, § 27(A) (emphases added). This language makes any amounts incurred in litigation stemming from Fender's default recoverable to a prevailing buyer, Lady Beaufort.⁴ Nevertheless, the amended judgment restricted attorneys' fees to those fees incurred up until the point Lady Beaufort acquired the subject property from Inverness; no legal or equitable basis was elucidated for this cutoff date or reduction in the fees.

This reduction in attorneys' fees is currently on appeal, and the judgment will increase substantially should Lady Beaufort prevail.

⁴ Under the broad language of this provision, post-trial and appellate fees are also recoverable.

B. Since the Inception of this Lawsuit, Fender has Transferred Various Properties to Family Members or Business Partners for No Consideration

Respondent has already engaged in multiple transfers of assets carrying badges of fraud. For example, on the very day of trial, he transferred a piece of property to his business partner for no consideration. **Deed** filed in Beaufort County RMC Book 3558, Page 2031 (Mar. 1, 2017). Two months later, he transferred a second piece of property to his son for no consideration. **Deed** filed in the Beaufort County RMC Book 3580, Page 2295 (May 30, 2017).

These transfers illustrate that Lady Beaufort's concern about there being assets from which to recover is not idle worry.

C. The Bond's Function vs. Its Effect

The function of the bond, as ordered by the trial court, would be to remove the judgment lien from Fender's assets and transfer it to the bond, guaranteeing a pool of funds from which Lady Beaufort can recover. However, because the bond is calculated based on a judgment amount that is subject to increase, the effect of the bond is to permit Mr. Fender to dispose of assets after posting the bond such that, should an increased judgment be awarded by this Court, there would be nothing for Lady Beaufort to recover above the amount of the bond.⁵

D. Appropriate Amount of a Bond

Lady Beaufort has incurred substantial attorneys' fees since the date of trial. These include fees relating to:

- preparing a proposed order after trial;
- responding to Fender's motion for reconsideration;
- attempting to execute on the judgment;

⁵ The order also improperly terminates the further accrual of post-judgment interest. No authority permitting this was provided to or cited by the trial court.

- discovering potentially fraudulent transfers and filing a motion to void fraudulent transfers in order to protect the judgment;
- amending the complaint by consent in aid of collection of the judgment, naming parties to the potentially fraudulent transfers so they could protect their interests;
- responding to motions to dismiss and for summary judgment following the amendment of the complaint;
- appearing at multiple hearings on Fender's motion for reconsideration, including travel from Charleston to Beaufort and back;
- appealing the reduction in attorneys' fees in the amended judgment;
- responding to Fender's appeal of the judgment;
- responding to Fender's motion to post a bond; and
- noticing the appeal of the order granting Fender's motion to post a bond.

The amount of the attorneys' fees and costs incurred by Lady Beaufort in the thirty (30) months since trial exceed \$100,000. Lady Beaufort submits these fees are recoverable pursuant to § 27(A) of the contract and that any bond must account for Lady Beaufort's entitlement to these amounts.⁶

Accordingly, the appropriate amount of the bond would be calculated as follows:

- \$64,450.52 in actual damages, prejudgment interest, and post-judgment interest through July 1, 2019);
- \$47,299.41 in attorneys' fees and costs incurred through the date of trial;
- \$103,409.92 in attorneys' fees and costs incurred since trial;
- \$15,000 in additional anticipated attorneys' fees relating to the appeals.

This yields an amount of \$230,089.85. Multiplied by 1.5, the appropriate amount of the bond would be \$345,134.78.

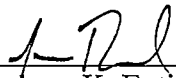
⁶ This question is before this Court in appellate case number 2018-001969.

CONCLUSION

The trial court lacked jurisdiction to enter an order affecting the judgment while that judgment was on appeal. Moreover, because the purpose of a bond is to protect the obligee, the trial court erred in permitting Fender to post a bond for an amount that is inadequate to serve that purpose. Lady Beaufort requests this Court (i) vacate the trial court's July 30, 2019 Order and, (ii) following resolution of the appeals in this case,⁷ remand the case for an evidentiary hearing to validate the amount of post-trial attorneys' fees incurred by Lady Beaufort, and for the determination of an appropriate bond amount that includes those fees.⁸

This 27th day of August, 2019
Charleston, South Carolina

Respectfully submitted:



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*ATTORNEYS FOR APPELLANTS LADY BEAUFORT
AND TIDELAND REALTY*

⁷ Lady Beaufort will file a motion to consolidate this appeal with Appellate Case No. 2018-001969).

⁸ See *supra* Part III.D.

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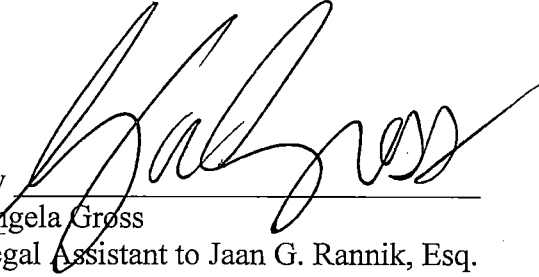
PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants and Appellants' Designation of Matter to be Included in the Record on Appeal by depositing a copy in the United States Mail, Postage prepaid, on August 27, 2019, and via email, addressed to Respondents' attorneys of record as follows:

H. Fred Kuhn, Jr., Esquire
P.O. Drawer 507
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[signature on following page]

By



Angela Gross

Legal Assistant to Jaan G. Rannik, Esq.

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August 27, 2019

The Honorable Jenny Abbott Kitchings
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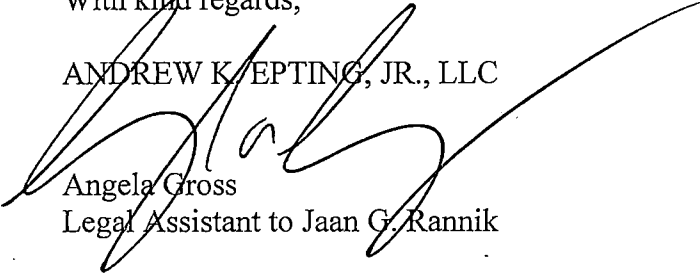
RE: *Lady Beaufort, LLC & Tidelands Realty, Inc. v. Hird Island Investments, Inc. and
Sherwood Fender*
Case No.: 2014-CP-07-0052
Appellate Case No.: 2019-001270

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Appellants and Appellants' Designation of Matter to be Included in the Record on Appeal together with a Proof of Service in the above-referenced matter. I would greatly appreciate your filing the originals and returning the file-stamped copies to me in the envelope provided.

With kind regards,

ANDREW K. EPTING, JR., LLC


Angela Gross
Legal Assistant to Jaan G. Rannik

/agg

Enclosures – as stated

cc: William M. Bowen, Esquire (w/enc.)
Fred H. Kuhn, Jr., Esquire (w/enc.)

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