

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

HONORABLE MARVIN H. DUKES, III
BEAUFORT COUNTY MASTER-IN-EQUITY AND
SPECIAL CIRCUIT COURT JUDGE

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SFP 30 2019

CASE NO.: 2014-CP-07-0052
APPELLATE CASE NO.: 2019-0001270

SC Court of Appeals

Lady Beaufort, LLC &
Tideland Realty, Inc.

Appellants,

vs.

Hird Island Investments, Inc., Sherwood N. Fender, Addison D. Fender,
Martha B. Fender, William B. Bowen, Lady Kemmerlin, LLC,
Brickyard Holdings, Inc. and A&K Holding Co., LLC,

Defendants,

AND

William M. Bowen,

Third-Party Plaintiff,

v.

James S. Kerr and Matt Trumps,

Third-Party Defendants,

Of Which Sherwood N. Fender is

Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

This action arises out of the alleged breach of an Agreement to Buy and Sell Real Estate dated August 19, 2013 wherein Lady Beaufort, LLC (“Lady Beaufort”) contracted to buy and Hird Island Investments, Inc. (“Hird Island”) contracted to sell a 2.99 acre parcel of unimproved real property located in Beaufort County, South Carolina (the “Property”).

This action was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas on January 7, 2014. The Complaint was filed on behalf of Lady Beaufort and Tideland Realty, Inc. (“Tideland Realty”) against Hird Island and Inverness, LLC (“Inverness”). The Complaint contains four (4) causes of action. The first cause of action is for breach of contract against Hird Island, in which Lady Beaufort seeks damages for the alleged breach of contract and Tideland Realty seeks the payment of a real estate commission on the aborted sale. The second cause of action is against Inverness only, alleging intentional interference with the contract between Lady Beaufort and Hird Island. The third cause of action seeks to set aside the deed between Hird Island and Inverness. The fourth cause of action seeks specific performance of the contract between Lady Beaufort and Hird Island.

On May 11, 2014 Hird Island and Inverness filed their Answers and Counterclaims. In these responsive pleadings both Lady Beaufort and Inverness denied the material allegations of the Complaint.

On May 29, 2014 Lady Beaufort filed an Amended Complaint. The Amended Complaint adds allegations of fraud as part of the cause of action to set aside the deed. On June 11, 2014 Hird Island filed its Answer and Counterclaim to the Amended Complaint, again denying the material allegations of the Complaint.

On November 24, 2014 Lady Beaufort filed its Second Amended Complaint, in which Inverness was dropped as a defendant and the Respondent Sherwood N. Fender ("Fender") was added as a new defendant.

On November 13, 2014 Hird Island and Fender jointly filed their Answer to the Second Amended Complaint, denying the material allegations of the Second Amended Complaint, as well as a Counterclaim alleging that Lady Beaufort breached the contract.

On November 25, 2014 this matter as referred to the Honorable Marvin H. Dukes, III, Master in Equity for Beaufort County, South Carolina, for final determination.

On March 1, 2014 this matter was tried non-jury before Judge Dukes and on May 11, 2017 Judge Dukes entered an Order Granting Judgment against Hird Island and Fender in favor of Lady Beaufort in the amount of \$87,578.56 and entering judgment against Hird Island and Fender in favor of Tideland Realty in the amount of \$17,500.17.

On May 19, 2017 Hird Island and Fender filed their Motion to Reconsider the Order dated May 11, 2017.

On February 14, 2018 Judge Dukes filed his Order Granting in Part and Denying in Part the Motion to Reconsider. In accordance with this Order, a hearing was held before Judge Dukes on July 23, 2018, at which time testimony was taken regarding the attorney's fees claimed by Lady Beaufort. As a result of that hearing, on October 26, 2018 Judge Dukes filed his Order amending his previous judgment, in which he reduced the prior judgment against Hird Island and Fender in favor of Lady Beaufort from \$87,578.56 to \$51,511.15.

On November 6, 2018 Hird Island and Fender filed their Notice of Appeal to the South Carolina Court of Appeals.

On November 15, 2018, Lady Beaufort filed its Notice of Appeal and cross-appealed the

amended judgment's reduction in attorney's fees.

The foregoing appeals are currently pending before the South Carolina Court of Appeals and have been assigned Appellate Case Number 2018-0001969.

Hird Island and Fender filed their Final Briefs and the Record on Appeal on May 20, 2019.

On June 20, 2019 Fender filed a Motion to Post Bond in satisfaction of the judgments. It is this motion which is the subject of this appeal.

On June 25, 2019 Lady Beaufort and Tideland Realty filed their response to the Motion to Post Bond.

On July 9, 2019 a hearing was held before Judge Dukes on the Motion to Post Bond.

On July 30, 2019 Judge Dukes filed his Order allowing Fender to post a cash bond in the amount of 1-½ times the amount of the judgments entered against him in this action in favor of Lady Beaufort and Tideland Realty, and ordered that upon posting such a bond the judgment lien would be transferred from the assets of Fender to the bond.

On July 31, 2019 Lady Beaufort and Tideland Realty filed their Notice of Appeal to the South Carolina Court of Appeals.

B. FACTUAL SUMMARY

For the purposes of this appeal, the facts in this case are very straight forward.¹

On October 26, 2018 the Beaufort County Court of Common Pleas entered a judgment against Fender in favor of Hird Island and Tideland Realty in the amounts of \$51,511.15 and \$17,500.17, respectively. That Order is currently on appeal by both Fender and Hird Island with the South Carolina Court of Appeals.

¹ For a detailed recitation of the facts underlying the judgments please see Appellants' Final Brief of Appellants-Respondents, pp. 3-9 in the primary appeal, Appellate Case No. 2018-001969.

On July 30, 2019, the Beaufort County Court of Common Pleas granted Fender's request that he be allowed to post a bond, in an amount equal to 1- ½ times these judgments, transferring the judgment lien from all of Fender's assets generally to the bond.

C. STANDARD OF REVIEW

The amount of an appeal bond is a matter committed to the sound discretion of the Trial Court. *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 108, 413 S.E.2d 866, 870 (Ct.App. 1992), citing 5A CJS Appeal in Error Section 633, at 187-88 (1958) and 5B CJS Appeal in Error Section 1816, at 152 (1958).

“An abuse of discretion occurs when the conclusions of the Circuit Court are either controlled by an error of law or are based on unsupported factual conclusions.” *Belle Hall Plantation Homeowners Association, Inc. v. Murray*, 419 S.C. 605, 615, 799 S.E.2d 310, 315 (Ct. App. 2017).

Abuse of discretion means that the ruling of the Trial Court was without reasonable factual support, resulted in prejudice to the rights of a party, and therefore, in the circumstances, amounted to an error of law. *Bridges v. Wyandotte Worsted Company*, 239 S.C. 37, 40, 121 S.E.d 300, 302 (1961).

I. RULE 205 OF THE SOUTH CAROLINA APPELLATE COURT RULES DID NOT DIVEST THE TRIAL COURT OF JURISIDCTION TO ENTER THE SUBJECT ORDER ALLOWING FENDER TO POST A BOND AS SECURITY.

The Appellants argue that Rule 205 of the South Carolina Appellate Court Rules divested the Trial Court of jurisdiction to enter the Order allowing Fender to post bond as security for the judgment lien. Appellants' Brief, pp. 3-4. Rule 205 provides as follows:

“Upon the service of the Notice of Appeal, the Appellate Court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writ of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.”

Rule 205, SCACR.

Rule 205 expressly does not prohibit the lower court from proceeding with “matters not affected by the appeal.” *Id.* The Order issued by Judge Dukes in the instant case in no way affects the appeal. Judge Dukes' Order simply transfers the judgment lien from all of Fender's property in general to a cash bond. The judgment remains fully viable and in full force and effect. Indeed, Judge Dukes' Order actually benefits the judgment holder since, once the bond is posted, the judgment holder does not have to chase down various assets, but rather, has cash sitting at the courthouse waiting for him to pick up in the event his judgment is sustained.

In short, the judgment is not affected in the least by transferring the lien from general assets to a specific cash asset, and the appeal itself is not affected in the least by the posting of a cash bond.

II. THE AMOUNT OF THE BOND IS ADEQUATE TO PROTECT LADY BEAUFORT'S INTERESTS.

The Beaufort County Master in Equity ordered that the amount of the bond must be 1- ½ times the amount of the judgements. The Appellant Lady Beaufort argues that this amount is too low to adequately protect Lady Beaufort's interests.² Appellants' Brief, pp. 4-7. The Appellant Lady Beaufort argues that the amount of the bond is too low for a number of reasons, each addressed in turn below.

A. THE AMOUNT OF THE JUDGMENT IS SUBJECT TO INCREASE ON APPEAL.

The Appellant Lady Beaufort argues that the amount of the bond is inadequate because the amount of the judgment held by Lady Beaufort is subject to increase on appeal. Appellants' Brief, pg. 5.

In the primary appeal, Appellate Case No. 2018-001969, the Appellant Lady Beaufort asserts that the Beaufort County Master in Equity erred in failing to award to Lady Beaufort all of the attorney's fees to which it was entitled. If the South Carolina Court of Appeals were to agree, then it is possible that the amount of the judgment entered against Fender in favor of Lady Beaufort could increase. Based upon this possibility, the Appellant Lady Beaufort now argues that the amount of the bond should be based not on the amount of the judgment it currently holds, but upon the amount of a currently **nonexistent** judgment that it might **possibly** obtain at some **future** date.

This argument by Lady Beaufort overlooks the fact that the purpose and effect of Judge Dukes' Order allowing Fender to post a bond is to simply transfer the currently existing judgment lien from all of Fender's assets to a cash bond. Lady Beaufort's argument takes the rather novel position that a litigant should be required to post a cash bond to secure payment of

² The Appellant Tideland Realty does not challenge the amount of the bond with respect to the judgment held by the Appellant Tideland Realty.

an unproven allegation. The Appellant Lady Beaufort argues that an unproven claim which has been rejected by the Trial Court is the equivalent of a judgment, and a mere allegation is entitled to the same lien status and rights as a judgment. This, of course, is absurd.

The simple fact is that Lady Beaufort currently holds a judgment lien for a certain amount, and this is the only lien that can be transferred to a cash bond. There is no justification, either in law or in equity, requiring a Defendant to post a cash bond in whatever amount the opposing litigant may claim to be due, particularly where that claim has already been rejected on its merits by the Trial Court.

B. FENDER HAS NOT ENGAGED IN FRAUDULENT TRANSFERS.

The Appellant Lady Beaufort argues that the amount of the bond is inadequate because Fender has “already engaged in multiple transfers of assets carrying badges of fraud.” Appellants’ Brief, pg. 6.

The short response to this argument is that it is not based upon any facts, is unsupported by the record, and has no basis in the record. The two (2) deeds referenced in Appellants’ Brief, *Id.*, pg. 6, are not part of the record in this case.³

Appellant Lady Beaufort argues that these alleged fraudulent transfers “illustrate that Lady Beaufort’s concern about their being assets from which to recover is not idle worry.” If this is true, then the fact that Fender desires to post cash at the courthouse should ease Lady Beaufort’s concern. In short, Lady Beaufort should be delighted to have a cash bond waiting for it in the event that its judgment is sustained.

³ If these Deeds had been mentioned in any form or fashion during the hearing on Fender’s Motion to Post a Bond, he could have refuted these allegations easily. For example, the Deed filed in Beaufort County Register of Deeds Book 3558 at Page 2031 is not “to his business partner” but to an entity in which he has no interest, and was for fair market value of \$120,000.00. Likewise, the alleged transfer to his son was not fraudulent. In any event, none of this was ever raised during the hearing on the Motion to Post an Appellate Bond.

C. THE BOND'S FUNCTION VERSES ITS EFFECT

The Appellant Lady Beaufort's argument under this subsection of its brief is difficult to understand. Appellants' Brief, pg. 6. The Appellant is absolutely correct in noting that the effect of the bond would be to allow the Respondent Fender to get on with his life and transact business during the years that will elapse before the primary appeal is finally resolved, yet at the same time will absolutely guarantee that if Lady Beaufort's judgment against Fender stands it will be paid in full to the penny. As the Appellant Lady Beaufort correctly notes, the Order removing the judgment lien from all of Fender's assets globally and transferring it to a cash bond has the effect of "**guaranteeing** a pool of funds for which Lady Beaufort can recover." Appellants' Brief, pg. 6.

D. APPROPRIATE AMOUNT OF A BOND

As an initial matter, it should be noted that the Appellant Lady Beaufort's statement of damages is somewhat misleading. Lady Beaufort suffered actual damages in the liquidated amount of \$25,000.00. At trial, Lady Beaufort was awarded \$17,857.00 in attorney's fees and costs. Once pre-judgment interest on the liquidated damages was included, the total judgment in favor of Lady Beaufort against Fender amounted to \$51,511.15. Order filed October 26, 2018.

The Appellant Lady Beaufort now argues that in a case where its client suffered a total of \$25,000.00 in liquidated damages, it should recover, in addition to the \$17,857.00 already awarded, an additional \$165,709.33 in attorney's fees and costs which it either has incurred or expects to incur at some undefined point in the future. Appellants' Brief, pg. 7.

Ignoring the unreasonableness of requesting \$165,709.33 in attorney's fees, in addition to the \$17,857.00 already awarded, on a liquidated claim for \$25,000.00 in damages, the essence of Lady Beaufort's argument is that the Trial Court erred in not requiring Fender to post a bond for

an amount of money in satisfaction of a lien that **does not exist** for an anticipated judgment that **does not exist** based solely upon Lady Beaufort's allegation that it should be entitled to more attorney's fees, some of which have **not yet even been incurred**. The absurdity of this argument is obvious.

CONCLUSION

One would expect that a judgment creditor would be delighted to discover that the judgment debtor stands ready, willing and able to post a cash bond in 1-½ times the amount of the judgment owed, thereby facilitating collection on the judgment in the event the judgment is sustained.

It is respectfully submitted that the Master in Equity had jurisdiction to enter an Order authorizing the transfer of the judgment lien from all of Respondent Fender's assets in general to a cash bond, as this Order does not affect the primary appeal. Likewise, the amount of the bond is reasonable and more than adequate to satisfy the judgment in the event it should be affirmed on appeal.

The Beaufort County Master in Equity did not abuse his discretion and it is, accordingly, respectfully requested that his Order filed July 31, 2019 be affirmed.

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Beaufort, South Carolina
September 27, 2019

Attorneys for the Respondents

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

HONORABLE MARVIN H. DUKES, III
BEAUFORT COUNTY MASTER-IN-EQUITY AND
SPECIAL CIRCUIT COURT JUDGE

CASE NO.: 2014-CP-07-0052
APPELLATE CASE NO.: 2018-001969

Lady Beaufort, LLC &
Tideland Realty, Inc.

Appellants,

vs.

Hird Island Investments, Inc., Sherwood N. Fender,
Addison D. Fender, Martha B. Fender, William B. Bowen,
Lady Kemmerlin, LLC, Brickyard Holdings, Inc. and
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Third-Party Plaintiff,

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Of Which Sherwood N. Fender is

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SC Court of Appeals

CERTIFICATE OF SERVICE

Undersigned certifies that the **Respondent's Initial Brief** to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

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in a post office or official depository under the exclusive care and custody of the United States Postal Service, on September 27, 2019.

By: 
Sue Radford

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September 27, 2019

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SC Court of Appeals

The Honorable Jenny Abbot 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 (1) copy of the Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal together with a Certificate of Service regarding the above-referenced matter. I would appreciate your filing the originals and returning the file-stamped copies to me in the envelope provided.

With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.



H. Fred Kuhn, Jr.

HFKjr:sr
Enclosures

cc: Andrew K. Epting, Esquire (w/enc.)
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