THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Trial Court Case No. 2009-CP-22-1045

APPELLATE CASE NO. 2013-001644

John Steven Goodwin, Louise C. Goodwin, Thomas L. Puckett and Brenda C. Puckett, Robert Nahama and Jeanne E. Nahama, Thomas Holland and Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewski, Richard N. Taylor, Robert K. Spillers (a/k/a Robert Spillers), and Deborah T. Spillers (a/k/a Deborah Spillers), Patrick A. DiAngelo and Deborah A. DiAngelo, Gary E. Owens and Joyce M. Owens, Fount L. Shults and Lynda M. Shults, and Dennis Ridgeway and Teresa Lynn Ridgeway, ... Appellants

v.

Landquest Development, LLC, Kyle V. Corkum, South Bay Properties, LLC, C. R. Thompson and Sons, LLC, Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton and Bayside Property, Inc., the City of Georgetown, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and National Land Sales, Inc., f/k/a Source One Communities, LLC, a/k/a South One Signature Communities ..... Respondents

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RESPONDENTS HARTFORD CASUALTY INSURANCE COMPANY'S AND HARTFORD FIRE INSURANCE COMPANY'S FINAL BRIEF

James Lynn Werner
Lawrence M. Hershon
Parker Poe Adams & Bernstein LLP
PO Box 1509
Columbia, SC 29201
(803) 255-8000
jimwerner@parkerpoe.com
lawrencehershon@parkerpoe.com

Attorneys for Respondents Hartford Casualty Insurance Company and Hartford Fire Insurance Company

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STATEMENT OF THE CASE

The Hartford Respondents adopt and incorporate the Statement of the Case provided in the Initial Brief of Respondents Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc. (the "Charlton Respondents").

ARGUMENT

I. IS THERE A TIME LIMIT FOR RESTORING CASES STRICKEN FROM THE DOCKET?

The Hartford Respondents adopt and endorse, without duplicating here, the arguments set forth in the Brief of the Charlton Respondents, and the opinions of the Circuit Court in its Order dismissing the lawsuit and denying the subsequent motion to reconsider. The Court should affirm the Circuit Court's Order based on the arguments set forth therein.

II. DID THE TRIAL JUDGE CORRECTLY APPLY RULE 40(J), SCRCP, TO THE FACTS OF THIS CASE?

The Hartford Respondents adopt and endorse, without duplicating here, the arguments set forth in the Brief of the Charlton Respondents, and the opinions of the Circuit Court in its Order dismissing the lawsuit and denying the subsequent motion to reconsider. The Court should affirm the Circuit Court's Order based on the arguments set forth therein.

III. DID THE TRIAL JUDGE CORRECTLY APPLY 11 U.S.C. § 108(C) TO THE FACTS OF THIS CASE?

The Hartford Respondents adopt and endorse, without duplicating here, the arguments set forth in the Brief of the Charlton Respondents, and the opinions of the Circuit Court in its Order dismissing the lawsuit and denying the subsequent motion to reconsider. The Court should affirm the Circuit Court's Order based on the arguments set forth therein.

IV. DID THE TRIAL JUDGE VIOLATE APPELLANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS?

The Hartford Respondents adopt and endorse, without duplicating here, the arguments set forth in the Brief of the Charlton Respondents, and the opinions of the Circuit Court in its Order dismissing the lawsuit and denying the subsequent motion to reconsider. The Court should affirm the Circuit Court's Order based on the arguments set forth therein.

V. DID RESPONDENTS WAIVE THE RIGHT TO ASSERT THE STATUTE OF LIMITATIONS IN OPPOSITION TO APPELLANTS' MOTION TO RESTORE THIS CASE TO THE DOCKET?

The Hartford Respondents adopt and endorse, without duplicating here, the arguments set forth in the Brief of the Charlton Respondents, and the opinions of the Circuit Court in its Order dismissing the lawsuit and denying the subsequent motion to reconsider. The Court should affirm the Circuit Court's Order based on the arguments set forth therein.

VI. THE APPELLANTS' SOLE CAUSE OF ACTION AGAINST HARTFORD IS NOW MOOT BY VIRTUE OF INTERVENING EVENTS SO THAT NO JUSTICIABLE CONTROVERSY EXISTS.

In the alternative to the arguments set forth by the Charlton Respondents, if the dismissal is not affirmed in full, the Court should dismiss the Hartford Respondents for the reasons set forth below.

Statement of Facts

In this case, Appellants have sued the Hartford Respondents on one claim for declaratory relief. Appellants allege that they are owners of various lots located in a subdivision situated in Georgetown County, South Carolina, known and designated as 'Harbor Club on Winyah Bay.' (R. p. 18, Complaint, ¶1) Hartford Casualty Insurance Company issued a Subdivision Performance Bond, dated July 17, 2007, in the penal sum of $7,882,359.00, on behalf of South Bay Properties, LLC, as Principal (the developer), in favor of the City of Georgetown, South Carolina, as Obligee. (R. p. 250-51, Subdivision Performance Bond) Plaintiffs admit that the scope of the Performance Bond "was to assure construction of the infrastructure (roads and utilities) in the Subdivision. (R. p. 31, Complaint, ¶48) Appellants' sole claim against Hartford is for a declaratory judgment as to Hartford Respondents' legal duties and obligations for Hartford to pay the Respondent City under the Subdivision Performance Bond for completion of the required improvements and site infrastructure under the City's Land Development Regulations. (R. p. 55, Complaint ¶129) Appellants further admit that such declaratory relief "will terminate the controversies among the parties to this action with respect to the required infrastructure and site improvements in the Subdivision and will remove the uncertainties with respect to these issues." (R. p. 55-56, Complaint ¶131)

Regardless of the lack of legal authority for Appellants to assert or maintain such claim, due to events that have transpired since the dismissal of the underlying lawsuit the claim against the Hartford Respondents is now moot.

On August 20, 2013, the City of Georgetown, as Obligee on the Bond, entered into an Agreement with Hartford Fire Insurance Company (the Surety per Rider to the Bond) whereby those parties to the Bond have agreed to have the improvements covered by the Bond constructed and installed. (R. p. 237-96, Hartford Agreement with City) On December 11, 2013, following completion of a bidding and contractor selection process, Hartford entered into a Construction Contract with R.H. Moore Company, Inc. ("R.H. Moore"), pursuant to the aforementioned Agreement between Hartford and the City, to install the site infrastructure and utilities pursuant to plans and specifications approved by the City of Georgetown. (R. p. 297-314, R.H. Moore Contract) Hartford issued a Notice to Proceed under the Construction Contract with R.H. Moore, effective January 13, 2014, and R.H. Moore has commenced and already performed much of the work on the Project to install the required site infrastructure (roads and utilities). (R. p. 315, Notice to Proceed)

Argument

South Carolina appellate courts may only consider cases presenting a justiciable controversy. Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006). A case is moot where "a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." Id. at 26, 630 S.E.2d at 477 (citing Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

An appellate court shall not pass judgment on moot and academic questions or make an adjudication where there remains no actual controversy. Id. Moot appeals result when

intervening events render a case non-judiciable. Mootness exists "when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." Matthis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E. 2d 713, 715 (1973).

"To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (citing Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985)). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." Graham, at 71, 459 S.E.2d at 845 (citing Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970)).

Hartford's Subdivision Performance Bond is a product of the State statutory scheme and a local regulatory scheme. The State Statute (S.C. CODE ANN. § 6-29-1180) provides that where the local land development regulations require the installation of "site improvements," then the Surety Bond must be in favor of the local government "to ensure that, in the event of default by the developer, funds will be used to install the required improvements at the expense of the developer." The City of Georgetown's Land Development Regulations Section 501 requires that "every subdivision developer shall be required to grade and improve streets and alleys, and to install curbs, monuments, sewers, storm water inlets, and water mains in accordance with the specifications established by the City of Georgetown Planning and Zoning Commission. (R. p. 194, Section 501, Land Development Regulations) If the subdivider has not completed all of the required improvements within the time specified in the Bond, "the governing authority may let or re-let the Contract and the subdivider and Performance Bond shall be severally and jointly liable for the cost thereof to the amount specified for such improvements in said Bond."

After the Developer defaulted on its obligation to install the required site improvements, and after the close of the Developer's Bankruptcy proceedings which affected any action related

to the property, Hartford and the City entered into an agreement to complete the construction of the site improvements required under the Subdivision Performance Bond. Because the City, as Obligee under the Bond, and Hartford, as Surety under the Bond, have executed an agreement for construction of the improvements covered by Hartford's Subdivision Performance Bond, at Hartford's expense as provided for in The City of Georgetown's Land Regulations, a justiciable controversy no longer exists. Appellants acknowledged in their Complaint that a declaration of Hartford's duties under the Bond to provide funds to the City to install the site infrastructure required by the Land Development Regulations would "terminate the controversies among the parties to this action... " (R. p. 55-56, Complaint, ¶131) Now, by virtue of the intervening agreement between the City and Hartford, no declaration is needed because the required site infrastructure is already being installed. A declaration by the Court would be meaningless. The claim for declaratory relief is moot by Appellants' own pleading.

Any adjudication by this Court on the issues raised on appeal will not settle any rights between Hartford and the Appellants, because the rights and obligations under the Bond run between Hartford and the City.[1] The parties to the Bond have already resolved any dispute

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[1] In South Carolina, it is beyond question that a surety's obligation on a performance bond is contractual, and such obligation cannot be extended beyond the terms of the bond and the intent of the parties expressed therein. South Carolina Public Service Comm'n v. Colonial Constr. Co., 274 S.C. 571, 266 S.E.2d 76 (1980); SOCAR, Inc. v. St. Paul Fire & Marine Ins., 288 S.C. 287, 341 S.E.2d 822 (Ct. App. 1986). When the language in the bond is plain and unambiguous, the bond must be interpreted in accordance with such language and terms. Employers Ins. of Wausau v. Construction Management Eng'g., 297 S.C. 354, 377 S.E.2d 119 (Ct. App. 1989).

Moreover, for a third party (one not a party to the bond) to enforce the provisions of, or to collect under a performance bond, the bond itself must manifest a clear right granted to such third party. See Richmond Shopping Center v. Wylie N. Jackson Co., 255 S.E.2d 518 (Va. 1979); Novak & Co., Inc. v. Travelers Indemnity Co., 392 N.Y.S.2d 901 (N.Y. App. Div. 1977).

In this case, the Subdivision Performance Bond specifically identified by Appellants in their Complaint as the basis of their claims against Hartford, clearly and unambiguously states:

> No right of action shall accrue hereunder to or for the use or benefit of anyone other than the obligee, and the obligee's right hereunder may not be assigned. . . .

(R. p. 250, Subdivision Performance Bond)

The Subdivision Performance Bond in issue, consistent with the underlying statutory authority for such bond in S.C. CODE ANN. §6-29-1180, expressly states that the Surety is bound under said Bond only to the City of Georgetown as the named Obligee.

related to the Bond and have agreed to complete the work covered under the Bond. Furthermore, as a result of the Agreement between the City and Hartford, there is no remaining issue with respect to the legal duties and obligations under the Bond and no remaining claim in the case requiring interpretation by the Court as to the Bond. By their Agreement, the City and Hartford have undertaken to provide and perform the work at issue in the claim for declaratory relief. The claim is now moot.

Because no justiciable controversy remains, as the agreement has been entered into for performance on the Bond, the appeal as to the Hartford Respondents should be dismissed.

CONCLUSION

In addition to the arguments stated herein, the Hartford Respondents further request that the Court affirm the judgment entered in this case on any other ground appearing in the record, pursuant to Rule 220(c), SCACR. For the reasons stated above, there is no reversible error by the Circuit Court, and the dismissal below should be affirmed.

It is clear that Appellants are not parties to the Hartford Subdivision Performance Bond, and they were not required, or intended to be, by the underlying statutes and regulations which govern such Bond. Since, for one who is not a party to the performance bond to enforce its provisions as a third-party beneficiary the bond itself must clearly grant such right, see Richmond Shopping Center, 255 S.E.2d 518; Novak & Co., 392 N.Y.S.2d 901, the express provision of the Bond undeniably negates any intended beneficiary assertions. The enforceable, express language of the Bond establishes that Appellants have no rights under the Bond, which is expressly for the use or benefit of only the named Obligee – the City, and no one else.

Respectfully submitted,

James Lynn Werner
Lawrence M. Hershon
Parker Poe Adams & Bernstein LLP
P. O. Box 1509
Columbia, SC 29202
Telephone: 803-255-8000
Facsimile: 803-255-8017
jimwerner@parkerpoe.com
lawrencehershon@parkerpoe.com

ATTORNEYS FOR RESPONDENTS HARTFORD CASUALTY INSURANCE COMPANY AND HARTFORD FIRE INSURANCE COMPANY

August 11, 2014
Columbia, South Carolina

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Brief of Respondents Hartford Casualty Insurance Company and Hartford Fire Insurance Company complies with Rule 211(b) SCACR.

James Lynn Werner
Lawrence M. Hershon
Parker Poe Adams & Bernstein LLP
P. O. Box 1509
Columbia, SC 29202
Telephone: 803-255-8000
Facsimile: 803-255-8017
jimwerner@parkerpoe.com
lawrencehershon@parkerpoe.com

ATTORNEYS FOR RESPONDENTS
HARTFORD CASUALTY INSURANCE COMPANY
AND HARTFORD FIRE INSURANCE COMPANY

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