

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

RECEIVED
OCT 09 2019
SC Court of Appeals

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.

REPLY BRIEF OF APPELLANTS

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Appellants, Lady Beaufort, LLC and Tideland Realty, Inc. (hereinafter, “Lady Beaufort”),¹ file this reply to the Initial Brief of Respondents, Hird Island Investments, Inc. and Sherwood N. Fender (hereinafter, “Mr. Fender”), as follows.

I. The Bond Sought by Mr. Fender

Mr. Fender’s brief conflates the bond he seeks with a supersedeas bond. The two are not the same.

A supersedeas bond has the effect of staying execution on a judgment during the pendency of an appeal. So, should Mr. Fender wish to prevent Lady Beaufort from executing on the judgment as it stands, he would have to post such a bond in 1.5 times the amount of the judgment.

The bond he seeks, however, goes further. Mr. Fender seeks a bond that would release all of his assets from the judgment lien. Mr. Fender does not dispute that there is no precedent for such a bond. *See* 5 Am. Jur. 2d Appellate Review § 512 (2016) (when a respondent “fails to respond to an issue in its brief, the [appellate] court may treat the failure to respond as a confession that the appellant’s position is correct”); *First Union Nat. Bank of S.C. v. FCVS Comms.*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (noting the same), *rev’d in part on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

The danger to Lady Beaufort from such a bond is apparent: should the attorneys’ fee provision be applied by this Court as written and the judgment amount increased, Mr. Fender could nonetheless succeed in capping the amount he can be forced to pay. The bond would

¹ As in Appellants’ initial brief, the use of “Lady Beaufort” in this brief refers to both Appellants. Accordingly, Mr. Fender’s argument that Tideland Realty does not contest the amount of the bond is erroneous. *See Respondents’ Initial Brief* at 6 n.2.

enable him to do this by freeing his assets from the judgment lien, allowing him to dispose freely of those assets and ensure there is nothing left against which to recover any additional amounts awarded by this Court.² Lady Beaufort—though not against the concept of an adequate bond—disagrees that it “should be delighted” by this procedural maneuvering.³ **Respondents’ Initial Brief** at 7.

II. Lady Beaufort’s Attorneys’ Fees Are of Mr. Fender’s Making

Mr. Fender argues that the amount of the attorneys’ fees is unreasonable considering the amount of the fees relative to the actual damages awarded by the trial court. **Respondents’ Initial Brief** at 8. Lady Beaufort certainly wishes it had not been forced to incur such extensive fees in order to recover amounts it is contractually entitled to. The fees are of Mr. Fender’s making as the defaulting party and as a result of his seeking to move assets beyond Lady Beaufort’s reach as judgment creditor. Mr. Fender’s actions required substantial work by Lady Beaufort’s counsel to reverse fraudulent transfers and preserve what assets may exist from which Lady Beaufort can recover its judgment.⁴ *See Appellants’ Initial Brief* at 6–7.

² Yes, such actions would violate the Statute of Elizabeth and would be invalid; however, Lady Beaufort seeks to avoid the necessity of trying to undo any additional fraudulent transfers.

³ As stated before the trial court (**Plaintiffs’ Response to Defendants’ Motion to Post Bond in Satisfaction of Judgment** at 1; **Hearing Tr. (July 9, 2019)** at 11:14-19) and in Lady Beaufort’s initial brief (**Respondents’ Initial Brief** at 4, n.3), Lady Beaufort views the posting of a bond favorably, but the bond must adequately protect Lady Beaufort’s interest.

⁴ Fender argues that the deeds and fraudulent transfers referenced in Appellants’ brief were not before the trial court. They were referenced during the hearing before the trial court (**Hearing Tr. (Jul. 9, 2019)** 19:22–20:1) and, as they are a part of the record before that court, the Court and the parties understood that they were before the Court in making its determination of whether to allow a bond and in what amount. *Cf. Bailey v. Int’l Bhd. of Boilermakers, Blacksmiths, Forgers, & Helpers, Local 374*, 175 F.3d 526, 529–30 (7th Cir. 1999) (a “skeletal argument below” may be “fleshed out and emphasized on appeal”).

Mr. Fender argues the transactions they evidence are not fraudulent, that one was to an entity in which he has no interest for \$120,000 and the other was simply “not fraudulent.” **Respondents’**

Moreover, the contract entitles Lady Beaufort to *all* its attorneys' fees.⁵ This is not an unreasonable or unusual provision; parties regularly include an attorneys' fee provision that entitles a prevailing party to its fees related to a contractual dispute. The purpose of these provisions is to further discourage a breach of the contract by a guarantee that the non-defaulting party will be made whole following the other party's breach of the contract. It would be illogical if this did not include the fees incurred in establishing an entitlement to damages and collecting those damages.

Even if the attorneys' fees provision *were* unreasonable or unusual, it is not the function of the courts to substitute their own wisdom for that of the contracting parties. *See Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."); *Gordon Farms, Inc. v. Carolina Cinema Corp.*, 294 S.C. 158, 160, 363 S.E.2d 235, 236 (Ct. App. 1987) ("Parties to a contract have a right to make their own contracts, and when the contracts they make are capable of clear interpretation, the court's province is confined to the enforcement of the contract as written; the court cannot exercise its discretion as to the contents of the contract or substitute its own construction for an agreement clearly entered into between the parties.").

Initial Brief. at 7 n.3. As to the former, Lady Beaufort understands it was a transfer to a company controlled by a former law partner of his and he has not received payment for it. If he has received payment, that payment is subject to Lady Beaufort's judgment. As to the second transfer, it was to his son for no consideration. There may be an as-yet-undisclosed explanation for these transfers; but for the moment, they bear the badges of fraud and give rise to the concerns raised in this appeal about recovering whatever amount this court deems Lady Beaufort is entitled to.

⁵ "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).

Indeed, “where an agreement is clear and capable of legal construction, the courts [*sic*] only function is to interpret its lawful meaning and the intent of the parties as found within the agreement.” *Messer v. Messer*, 359 S.C. 614, 628, 598 S.E.2d 310, 317 (Ct. App. 2004); *see also Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (noting that where the language of the contract is clear and unambiguous, the court must construe the contract according to the terms the parties used as understood in their plain, ordinary, and popular sense). “In the enforcement of an agreement, the court does not have the authority to modify terms that are clear and unambiguous on their face.” *Messer*, 359 S.C. at 621, 598 S.E.2d at 314; *Ebert v. Ebert*, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995).

Lady Beaufort’s fees are reasonable and must be awarded under the parties’ unambiguous contract.

III. Jurisdiction

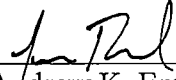
The bond that is the subject of the trial court’s order would cause the judgment lien to be removed from Fender’s assets. This “affects” the judgment as it allows the judgment to be effectively satisfied while that very judgment is being appealed to this Court. Moreover, the bond would likely be used to frustrate Lady Beaufort’s ability to recover any increased judgment amount ordered by this Court. Therefore, the bond “affects” the judgment, and the trial court lacked jurisdiction to consider Mr. Fender’s motion to bond off the judgment. pursuant to Rule 205, S.C.A.C.R. *See also Jackson v. Speed*, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997).

Mr. Fender refers to this concern of Lady Beaufort’s as “absurd” and seeks to portray Lady Beaufort as arguing that its future interest is “equivalent to a judgment.” **Respondents’ Initial Brief** at 7. Mr. Fender overlooks, however, that it is *he* who seeks a novel use for a bond, a use that is not based upon any precedent from this State. Further, the purpose of a bond is to

protect the interest of the *obligee*. *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 is the obligee and asks this Court to protect its interest, including its entitlement to attorneys’ fees.

This 7th day of October, 2019
Charleston, South Carolina

Respectfully submitted:



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AND TIDELAND REALTY*

THE STATE OF SOUTH CAROLINA
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The Honorable Marvin H. Dukes, III, Master in Equity

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AND

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

PROOF OF SERVICE

I certify that I have served the Reply 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 October 7, 2019, and via email, addressed to Respondents' attorney of record as follows:

H. Fred Kuhn, Jr., Esquire
P.O. Drawer 507
Beaufort, SC 29901
fred@mossandkuhn.com

[signature on following page]

A handwritten signature in black ink, appearing to read "Angela Gross", written over a horizontal line.

By Angela Gross
Legal Assistant to Jaan G. Rannik, Esq.
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SC Court of Appeals

October 7, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
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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 for filing please find the original and one copy of the Reply Brief of Appellants, Appellants' Designation of Matter to be Included in the Record on Appeal, and a Proof of Service in the above-referenced appeal. By copy of this letter, I am serving Respondents' counsel of record with a copy of same.

With kind regards,

ANDREW K. EPTING, JR., LLC

Angela Gross
Legal Assistant to Jaan G. Rannik

/agg

Enclosures – as stated

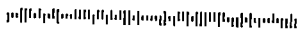
cc: Fred H. Kuhn, Jr., Esquire (w/enc.)



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