

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2020-000320
Trial Court Case No. 2018-CP-23-05208

Associated Receivables Funding, Inc., Respondent,

vs.

Dunlap, Inc.; James Stephen Dunlap, an Individual; Dunlap Industrial
Coating Services, Inc.; Dunlap Industrial Services, Inc.; Classic Industrial
Services, Inc.; and Mark Beuerle, an Individual, Defendants,

Of Which, Classic Industrial Services, Inc. is Appellant.

**RETURN OF APPELLANT TO RESPONDENT'S PETITION
FOR THE IMPOSITION OF A SUPERSEDEAS BOND OR,
IN THE ALTERNATIVE, LIFT OF STAY**

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Attorney for Appellant

Classic Industrial Services, Inc., Appellant, by and through its undersigned counsel, respectfully submits this Return to Respondent's Petition for the Imposition of a Supersedeas Bond or, in the Alternative, Lift of Stay. It is Appellant's position that Respondent's Petition ought to be dismissed for failure to observe the procedures established by Rule 241, SCACR. Alternatively, if the Court is inclined to consider the merits of Respondent's Petition, then on the merits, the Petition should be denied.

I. ANALYSIS OF RESPONDENT'S ARGUMENT

Respondent plainly states that it is proceeding under the mechanism established by Rule 241(d)(7), SCACR, (Respondent's Pet. at pp. 1 & 2), which provides that "[a]ny party aggrieved by the decision of the lower court, the administrative tribunal, or an individual judge or justice may petition under this Rule for a review of that decision." The phrase "this Rule" relates to Rule 241 generally, which is entitled "Stay and Supersedeas in Civil Actions." And certainly, the underlying action from which this appeal is taken is a civil matter.

The grievance of which Respondent complains, and which forms the substance of its Petition, arises from the fact that the trial court entered an order staying any execution of the judgment entered in Respondent's favor pending the outcome of these appellate proceedings. This is problematic, according to Respondent, because: (i) the judge who entered the order of stay (the Honorable Alex Kinlaw, Jr.) was not the trial judge (the Honorable Edward W. Miller); and consequently, because he was not the trial judge, (ii) Judge Kinlaw was obligated to require Appellant to post a supersedeas bond in connection with the order granting a stay.

To be clear, it seems that Respondent does not dispute the proposition that Judge Kinlaw—as a colleague of Judge Miller—had the authority to grant a stay of execution in favor of Appellant. (See Respondent's Rule 59(e) Mot. at p. 2, attached to the Petition as Exhibit D ("A non-presiding

judge, therefore, who orders a stay of execution, must impose a supersedeas bond for the judgment amount.”.) Instead, Respondent’s position appears to be narrowly targeted at whether Judge Kinlaw had the discretion to impose a bond in connection with granting a stay, or whether he was under an obligation to do so.

II. THE PROPER PROCEDURE IS SUPPLIED BY RULE 241, SCACR, NOT RULE 62, SCRCR.

The critical flaw with Respondent’s analysis is that it fails to appreciate, now that the case is pending on appeal, the more complete procedure established by Rule 241, SCACR. Specifically:

- (i) Rule 241(c)(1), SCACR: “After service of a notice of appeal, . . . [and] [i]n a case subject to an exception [to the general rule that the filing of a notice of appeal acts to automatically stay matters decided in the judgment on appeal], any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal.”
- (ii) Rule 241(d)(1), SCACR: “[A]n application for an order . . . for supersedeas must first be made to the lower court . . . which entered the order or decision on appeal.” In the instant case, the following procedural facts are pertinent: (1) the judgment from which this appeal is taken was entered on January 31, 2020; (2) Appellant filed and served its notice of appeal on February 21, 2020; (3) Appellant filed its Motion to Stay the Execution of Judgment on March 3, 2020;¹ and (4) Judge Kinlaw’s order granting a stay of execution was entered on March 5, 2020.

¹ By way of further background, Appellant’s decision to file a Motion to Stay Execution of Judgment was prompted by the fact that, on March 3, 2020, Respondent filed a Motion and Order for Levy against Appellant’s bank account, in an effort to enforce its judgment. (See Respondent’s Pet., Ex. A.) Despite the fact that Respondent’s attempt to enforce its judgment was procedurally improper, (see generally S.C. Code § 15-39-10 *et seq.* (establishing the procedure for execution of judgments); see also *Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 459 S.E.2d 900 (Ct. App. 1995) (holding that a judgment-debtor’s bank account could be levied only pursuant to an order arising

(iii) Rule 241(c)(3), SCACR: “The granting of supersedeas . . . under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court . . . may deem appropriate.” Appellant’s Motion to Stay the Execution of Judgment offered to tender a supersedeas bond. (See Respondent’s Pet., Att. B (Appellant’s Motion to Stay the Execution of Judgment) at p. 2.) The proposed order that Appellant submitted in connection with its Motion had space for Judge Kinlaw to supply a supersedeas bond amount. (See Respondent’s Pet., Att. C (Order Granting Stay).) That space was left blank. (Id.) In response to Respondent’s Rule 59(e) motion, on November 9, 2020, Judge Kinlaw entered a Form 4 denying reconsideration, holding very simply that “[Respondent’s] motion to amend the Court’s order dated March 5, 2020 to require the imposition of a supersedeas bond by [Appellant] is denied.”

Appellant contends that Rule 241 is quite clear in disposing of the grievances raised by Respondent’s Petition. Once an appeal is filed, Rule 241 authorizes any judge of the lower court from which an appeal is taken to consider whether to issue a supersedeas; and, if a supersedeas is issued, the judge who issued the supersedeas has the discretion—not the obligation—to determine whether a bond or some other condition of security is required.

Accordingly, consistent with the text of Rule 241, Respondent’s Petition ought to be denied on its merits.

III. RESPONDENT’S PETITION IS PROCEDURALLY INADEQUATE.

Rule 241(d)(2), SCACR, provides that, “[a]fter the lower court . . . has ruled [on a motion for supersedeas], any party may petition the appellate court where the appeal is pending . . . for

from supplemental proceedings)), an Order granting the relief requested by Respondent was issued on an *ex parte* basis that same day. (Id.) Appellant filed its Motion to Stay Execution within the hour. (See Respondent’s Pet., Ex. B.)

review of this order.” Rule 241(d)(4), SCACR, establishes the contents required of the petition. For the immediate purposes of this filing, it is only important to note that:

- (i) Rule 241(d)(4)(A), SCACR, requires the submission of affidavits to support the veracity of any facts that are in dispute. Respondent’s Petition was not accompanied by any such sworn statements.
- (ii) Rule 241(d)(4)(C), SCACR, requires “a showing that an application for [the relief requested in the Petition] was made to the lower court . . . and was unjustifiably denied” Respondent’s Petition has not asserted any legally cognizable basis to establish that its request for relief—the imposition of any amount of supersedeas bond—was denied on any unjustifiable basis.
- (iii) Rule 241(d)(4)(C), SCACR, also requires the petition be accompanied by “[a] certified copy of the lower court’s” ruling. Although Respondent included copies of Judge Kinlaw’s decisions, those copies are not certified.

Accordingly, on this procedural basis alone, Appellant would encourage the Court to deny further review of Respondent’s Petition.

IV. THE APPLICABLE STANDARD OF REVIEW IS ABUSE OF DISCRETION.

In the event that the Court is inclined to reach the merits of Respondent’s Petition, the applicable standard of review would seem to be “abuse of discretion.” Authority for this proposition is found in the plain text of Rule 241. For example, as discussed above, Rule 241(c)(3), SCACR, explains that the lower court’s “granting of a supersedeas . . . may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court . . . may deem appropriate.” This is echoed by Rule 241(d)(4)(C), which requires the petitioner to

show how the denial of the relief requested—here, the imposition of a supersedeas bond—was “unjustifiable.”

Framing the standard of review with regard to supersedeas as “abuse of discretion” has also been recognized by our appellate courts. *See, e.g., Spartanburg City v. Belk’s Dep’t Store*, 199 S.C. 458, 480-81, 20 S.E.2d 157 (1942); *see also Carolina Water Serv., Inc. v. Lexington County Joint Municipal Water & Sewer Comm’n*, 367 S.C. 141, 148, 625 S.E.2d 227 (Ct. App. 2005) (citations omitted). “An abuse of discretion arises where the [lower] court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support.” *Steinke v. South Carolina Dep’t of Labor, Licensing & Regulation*, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999) (citation omitted).

V. THE ORDER GRANTING A STAY OF EXECUTION WAS NOT AN ABUSE OF DISCRETION.

As discussed above, and consistent with Rule 241, SCACR, Judge Kinlaw was not under an obligation to impose any amount of bond on Appellant in connection with the granting of an order staying execution of judgment pending appeal. Accordingly, it cannot be said that Judge Kinlaw’s decision constitutes an “error of law.”

This leaves only one avenue for consideration: whether Judge Kinlaw’s decision was based on factual conclusions without any evidentiary support. There is no merit to this contention. Appellant’s counsel represented to the lower court—in its Motion to Stay Execution of Judgment, (Respondent’s Pet., Ex. B)—that: (i) Appellant is a going concern; (ii) that it has been authorized to do business in South Carolina since 1988; (iii) that, if this appeal is ultimately unsuccessful, Appellant has sufficient assets to fully satisfy the judgment from which appeal is taken; and (iv) that Appellant was prepared to post a supersedeas bond if required. These facts were affirmed by the affidavit of Appellant’s president, Michael Landes; that affidavit was filed with the lower court,

and is attached hereto as **Attachment A**. Respondent did not dispute any of these facts in its Rule 59(e) motion. (See Respondent’s Pet., Ex. D.) Nor are these facts disputed in the Petition presently before the Court.

In short, there is presently no basis for the Court to discern any impropriety with the decision reached by Judge Kinlaw.

VI. THERE IS NO LEGALLY COGNIZABLE BASIS ON WHICH TO LIFT THE STAY.

As an alternative form of relief, Respondent has asked the Court to lift the stay granted by Judge Kinlaw. This demand for relief is not properly before the Court. As explained previously, Rule 241(d)(4), SCACR, establishes the necessary contents of a petition for relief regarding supersedeas. Furthermore, because Respondent has asked for affirmative relief in the form of lifting the stay of execution, Respondent must also satisfy the requirements of Rule 241(d)(3), SCACR. Those include: (i) the submission of a verification from Respondent’s client to affirm the contents of its petition; (ii) the filing of a certified copy of the decision targeted by the petition; and (iii) a copy of the notice of appeal.

Few of the prerequisites established by Rule 241(d)(4) have been met, and none of those established by Rule 241(d)(3). Accordingly, Respondent’s request for alternative relief—lifting the stay—should be denied on nothing more than procedural grounds.

CONCLUDING STATEMENT

For the foregoing reasons, Appellant respectfully requests the Court to dismiss Respondent’s Petition, or deny the relief requested therein, and to make provision for such other and further relief as the Court deems just and proper.

Respectfully,

s/ Steven Edward Buckingham

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Greenville, South Carolina
February 4, 2021

ATTACHMENT A

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Associate Receivables Funding, Inc.,)
)
)
 Plaintiff,)
)
 v.)
)
 Dunlap, Inc., James Stephen Dunlap, an)
 Individual, Dunlap Industrial Coating)
 Services, Inc., Dunlap Industrial)
 Services, Inc., Classic Industrial)
 Services, Inc., and Mark Beuerle, an)
 Individual,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

C.A. NO. 2018-CP-23-05208


**AFFIDAVIT IN SUPPORT
 OF MOTION TO STAY THE
 EXECUTION OF JUDGMENT**

PERSONALLY appeared before me, the undersigned, who being duly sworn does depose and state as follows:

1. My name is Michael Landes, I am over the age of 21, am of sound mind and have personal knowledge of the matters set forth below.
2. I am the President of Classic Industrial Services, Inc., which is located at 456 Highlandia Drive, in Baton Rouge, Louisiana.
3. Classic is a Delaware Corporation, and is a going concern in continuous operation since April 11, 1988.
4. Moreover, Classic has been and authorized to conduct business in the State of South Carolina since April 11, 1988.
5. Classic has gross sales in excess of \$36,000,000 in 2019, and has sufficient assets to satisfy the judgment, if it is ultimately found liable for the debt of Dunlap, Inc., after the final decision of appeal.

6. Classic does not believe a supersedes bond is necessary given its longevity and financial strength.


FURTHER DEPONENT SAYETH NOT.



Michael Landes

Sworn to before me this

18th day of March, 2020.



Notary Public for Louisiana

My Commission Expires: Death

M. Brent Hicks, Notary Public
LA Bar Roll No.: 23778
Commissioned for East Baton Rouge, Louisiana
Qualified to act Statewide
My Commission is for Life.

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Services, Inc.; and Mark Beuerle, an Individual, Defendants,

Of Which, Classic Industrial Services, Inc. is Appellant.

PROOF OF SERVICE

The undersigned counsel for Appellant hereby certifies, subject to penalty of perjury, that the following document(s) was/were served upon the following counsel of record by the following means as of the date identified below.

Document(s): Appellant's Return in Opposition to Respondent's Petition for a Supersedeas Bond or, in the Alternative, Lift of Stay

Counsel Served: For Respondent
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Courts Served: Office of the Clerk of the Court of Appeals
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Means of Delivery: *Via Email Only*

Date: February 4, 2021

Respectfully,

s/ Steven Edward Buckingham

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