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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

September 25, 2012

Rory L. Perry, II, Clerk
West Virginia Supreme Court of Appeals
State Capitol, Room E-317
Charleston, WV 25305-0831

Re: Hartford Fire Insurance Company v. Micah A. Curtis and Angela L. Curtis
No. 12-0037

Dear Mr. Perry:

I am writing this letter pursuant to Rule 10(i) of the Rules of Appellate Procedure to provide notice of additional authority.

On September 18, 2012, Judge Stucky entered a summary judgment order in *Donna R. Jack, Plaintiff, vs River City's Mortgage Group, Inc., et al., Defendants*, Civil Action No. 10-C-1727. *Jack* presented issues nearly identical to those presented in the *Curtis* Appeal. Specifically, a mortgage broker was sued for predatory lending practices and failed to answer. Thereafter, a default judgment was obtained. The plaintiff then sued the defendant, Hartford, which had issued a mortgage broker bond. Judge Stucky granted judgment against Hartford for the full amount of the bond.

Judge Stucky's order is significant for two reasons.

First, the plaintiffs noted in their initial brief that circuit judges in three different cases have reached this exact same result. *Jack* is now the *fourth* case to do so. Thus, as the plaintiffs stated before, the issues raised herein present a "straightforward application of settled law" which may be disposed of by memorandum decision. RESPONDENT'S BRIEF, AT 8.

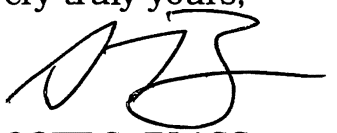
Second, *Jack* confirms that Hartford has taken inconsistent positions regarding the nature of the lender and broker bonds it issues. Throughout its appellate brief, Hartford argues that it is entitled to notice of any default judgment proceedings and an opportunity to

A.M.D.G.

defend. See, e.g., PETITIONER'S BRIEF, AT 26-28. But, in *Jack*, Hartford was actually given notice of the plaintiff's default judgment motion. Nevertheless, Hartford failed to oppose the motion or take any other steps to defend the broker's interest. Judge Stucky correctly found that Hartford could not attempt to assert defenses "after sitting idly by and watching judgment being entered against its principal." CONCLUSION OF LAW, AT PARA. 7.

Please advise me if the court desires any further briefing in light of the *Jack* order.

Very truly yours,



SCOTT S. BLASS

SSB:ekw

Enclosure
cc: Archibald Wallace, III, Esq.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
2012 SEP 18 PM 3:26
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

DONNA R. JACK,

Plaintiff,

v. Civil Action No. 10-C-1727

RIVER CITIES MORTGAGE GROUP, INC.,
HARTFORD FIRE INSURANCE COMPANY,
JACK SKIDMORE d/b/a FOUR SEASONS
APPRAISAL SERVICE, CHASE HOME FINANCE, LLC,
and DEUTSCHE BANK NATIONAL TRUST COMPANY,

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pending before this Court is a motion for summary judgment filed by Defendant Hartford Fire Insurance Company. The motion requests summary judgment to be granted to Defendant and against Plaintiffs on Counts IV, V, VI, VII, and VIII of Plaintiff's Complaint. The issues have been fully briefed. On August 23, 2012, all of the parties appeared, by their respective counsel, for a hearing at which the Court entertained oral argument. Upon consideration of all of the foregoing, the Defendant's motion is hereby DENIED. The Court now enters the following Order setting forth findings of fact and conclusions of law:

Findings of Fact

1. River Cities Mortgage Group, Inc., ("River Cities") was a residential mortgage broker who obtained a license to conduct a mortgage brokering business in the State of West Virginia.

2. To obtain this license, River Cities purchased a bond, i.e. W. Va. Div. of Banking Bond No. 14BSBAL9966, from Defendant Hartford Fire Insurance Company (hereinafter "Hartford").

3. The bond guaranteed payment, up to $25,000, of any judgment entered against River Cities arising from misconduct in violation of Article 17, Chapter 31 of the West Virginia Code.

4. Specifically, the bond provides:

> THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT, WHEREAS, the above bound principal, in pursuance of the provisions of Aricile 17, Chapter 31, of the Code of West Virginia, as amended (hereinafter the "Act") has obtained, or is about to obtain, from the Commissioner of Banking of the State of West Virginia, a license to conduct a Mortgage Broker business.
>
> NOW, THEREFORE, if the said principal RIVER CITIES MORTGAGE GROUP, INC. shall conform to and abide by the provisions of said Act and of all rules and orders lawfully made or issued by the Commssioner of Banking thereunder, and shall pay to the State and shall pay to any such person or persons properly designated by the State any and all moneys that may become due or owing to the State or to such person or persons from said obligor in a suit brought by the Commissioner or on their behalf under and by virtue of the provisions of said Act, then this obligation shall be void, otherwise it shall remain in full force and effect. If any person shall be aggrieved by the misconduct of the principal, he may upon recovering judgement against such principal issue execution of such judgement and maintain an action up on the bond of the principal in any court having jurisdiction of the amount claimed, provided the Commissioner of Banking assents thereto.

5. Section 31-17-17(c) of the West Virginia Code specifically authorizes a borrower of a residential mortgage loan transaction made in violation of the provisions of Article 17, Chapter 31 of the West Virginia Code to bring an action for damages in a circuit court having jurisdiction.

6. Plaintiff filed her Complaint on September 27, 2010, against River Cities and Hartford, among others, seeking damages for River Cities' conduct with regard to arranging the refinancing of Plaintiff's home mortgage.

7. The Complaint alleges that River Cities obtained an inflated appraisal of the home, misrepresented to Plaintiff that it was providing her with a fixed interest rate, misrepresented to Plaintiff that it would refinance her after two years, and engaged in other improper, predatory lending

practices. These wrongful acts and omissions, as specifically alleged therein, constitute violations of Chapter 31, Article 17 of the West Virginia Code.

8. River Cities failed to answer or otherwise respond to the Plaintiff's complaint.

9. In April 2011, Plaintiff filed a motion for default judgment against Defendant River Cities.

10. Plaintiff served the motion on all parties, including Defendant Hartford.

11. Defendant Hartford did not oppose the motion, and the Court granted default judgment against Defendant River Cities.

12. Thereafter, Plaintiff presented the claim to Defendant Hartford, which was, in any event, party to the suit in which the judgment was entered.

13. On February 16, 2012, nearly one year after judgment was entered against River Cities, Hartford filed the pending motion for summary judgment regarding the substance of the legal claims.

Conclusions of Law

1. Interpretation of a contract, such as the bond issued by the defendant Hartford, is a question of law. See, e.g., syl. pt. 2, Riffe v. Home Finders Assocs., Inc., 205 W. Va. 216, 517 S.E.2d 313 (1999).

2. A motion for summary judgment should only be granted where "it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law." Syl. pt. 3, Aetna Cas. & Surety Co. v. Fed. Ins. Co. of N.Y., 148 W. Va. 160, 133 S.E.2d 770 (1963).

3. This Court has previously addressed the legal effect of a default judgment entered

against a mortgage broker on the broker's surety in Rhodes v. Hartford Fire Insurance Company, No. 10-C-592 (Cir. Ct. Kan. Cty., W. Va. Mar. 26, 2012). In that case, this Court held:

> Under the plain language of the bond, the only condition that must be met by the plaintiffs is a judgment against the principal, equity, involving conduct violating the provisions of Article 17, Chapter 31 of the West Virginia Code. . . .
> [T]he court concludes that the bond issued by the defendant, Hartford, is clearly a judgment bond.
>
> Under West Virginia law, a surety on a judgment bond is conclusively obligated to pay any judgment rendered against the principal. State v. Myers, 74 W. Va. 488, 82 S.E. 270 (1914).
>
> The law does not distinguish between a default judgment and a judgment on the merits when determining a surety's payment obligations under a judgment bond.
>
> A default judgment is just as binding upon a surety issuing a judgment bond as it is upon a surety where judgment arises from an adjudication on the merits. Axess Intern., Ltd. v. Intercargo Ins. Co., 183 F.3d 935, 940 (9th Cir. 1999); Southern Ins. Co. v. ADESA Austin, 239 S.W. 423, 427 (Tex. Ct. App. 2007); Old Rep. Sur. Co., 172 S.W.3d at 214; First Mobile Home Corp. v. Little, 298 So. 2d 676, 682-83 (Miss. 1974).
>
> . . .
>
> The judgment here against Equity is a valid final, enforceable judgment. It is fully enforceable against the defendant, Equity—and, accordingly, it is fully enforceable against Hartford as surety.

Id. ¶¶ 5, 7-10, 13.

4. In the instant case, Hartford was a party to the action in which the default judgment was granted. "[T]he general rule that has emerged is that a surety is bound by any judgment against its principal, default or otherwise, when the surety had full knowledge of the action against the principal and an opportunity to defend." Drill S., Inc. v. Int'l Fid. Ins. Co., 234 F.3d 1232, 1235 (11th Cir. 2000) (citing, among other cases, Lake County ex rel. Baxley v. Massachusetts Bonding & Ins. Co., 75 F.2d 6, 8 (5th Cir.1935); United States ex rel. Vigilanti v. Pfeiffer–Neumeyer Const.

Corp., 25 F.Supp. 403, 404 (E.D.N.Y.1938)); see also Frederick v. United States, 386 F.2d 481, 485 n. 6 (5th Cir.1967); Lake County v. Massachusetts Bonding & Ins. Co., 75 F.2d 6, 8 (5th Cir. 1935); Am. Safety Cas. Ins. Co. v. C.G. Mitchell Const., Inc., 601 S.E.2d 633, 639 (Va. 2004); First Mobile Home Corp. v. Little, 298 So.2d 676, 682-83 (Miss.1974); Mass. Bonding & Ins. Co. v. Central Finance Corp., 237 P.2d 1079, 1081 (Colo. 1951); Tolliver v. First Nat. Bank, 64 P.2d 1215, 1216 (Okla. 1937); Von Engineering Co. v. R.W. Roberts Constr. Co., 457 So.2d 1080, 1082 (Fla. Dist. Ct. App.1984).

5. The bond issued by Hartford in the instant matter is identical to the bond issued by Hartford in the Rhodes matter. Under West Virginia law, the bond at issue is a judgment bond and Hartford, as surety, is obligated for the principal's obligations under the default judgment. See Rhodes, No. 10-C-592; State, to Use of Beard v. Abbott, 63 W. Va. 189, 61 S.E. 369, 370 (1907); State v. Nutter, 44 W. Va. 385, 30 S.E. 67 (1898).

6. In the Rhodes matter, Defendant Hartford asserted that the default judgment could not be enforced upon it because it was not given notice and an opportunity to defend the underlying case against the principal, Equity. Rhodes, No. 10-C-592 ¶ 6. In the instant matter, Plaintiff provided Hartford with notice and an opportunity to defend against the default judgment, and Hartford chose not to avail itself of that opportunity..

7. Hartford may not now, after sitting idly by and watching judgment being entered against its principal, assert affirmative defenses and arguments regarding the underlying claims asserted against its principal and, by extension, itself.

8. The judgment here against River Cities is a valid final, enforceable judgment. It is fully enforceable against the defendant, River Cities—and, accordingly, it is fully enforceable against

Hartford as surety.

9. Hartford's arguments pursued in its motion for summary judgment are untimely and have been waived by Hartford because a binding judgment has already been entered in regards to this Defendant.

10. Thus, the Court denies Hartford's motion for summary judgment.

For the reasons recited herein, Defendant Hartford's motion for summary judgment is hereby DENIED.

The objections of all parties to all adverse rulings are hereby preserved.

The Clerk is directed to mail a copy of this Order to all parties or their counsel of record.

It is so ORDERED.

Enter this 18th day of September, 2012.

James C. Stucky

James C. Stucky, Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 19th DAY OF September 2012
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY WEST VIRGINIA