

12-0037

CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

MICAH A. CURTIS and
ANGELA L. CURTIS,

Plaintiffs,

v.

Civil Action No. 08-C-157

HSBC MORTGAGE SERVICES, INC.,

CALUSA INVESTMENTS, LLC,

JOHN DOE HOLDER

and

HARTFORD FIRE INSURANCE COMPANY,

Defendants.

FINAL JUDGMENT ORDER REGARDING COUNT IV OF THE COMPLAINT

On this day came Defendant Hartford Fire Insurance Company ("Hartford"), by counsel, and the Plaintiffs, Micah A. Curtis and Angela L. Curtis, by counsel, on Hartford's Motion for Entry of Final Judgment on Count IV of the Complaint or, in the Alternative, to Modify the July 11, 2011 Order Granting Partial Summary Judgment on Count IV of the Complaint, and in consideration thereof, and on the representations of counsel, the Court makes the following recitations and findings:

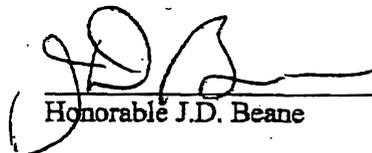
On July 11, 2011, the Court granted Plaintiffs' Motion for Partial Summary Judgment against Hartford and in doing so ruled that the statutory mortgage lender bond issued by Hartford on Count IV of the Complaint is a judgment bond that requires Hartford to pay any judgment rendered against its principal, that West Virginia Code § 45-1-3 does not apply to such a bond, and that Hartford is obligated to satisfy the default judgment previously entered against Calusa Investments, LLC, on December 10, 2008 in

the amount of \$99,795.05 plus post-judgment interest. On August 8, 2011, Hartford filed its motion requesting (1) the entry of a supplemental order granting final judgment consistent with the July 11, 2011 Order granting partial summary judgment in favor of the plaintiffs, and stating that there is no just reason for delay, or, in the alternative, (2) modification of the July 11, 2011 Order to satisfy the requirements for immediate appealability under Rule 54(b) of the *West Virginia Rules of Civil Procedure*. Hartford desires the Court to render the rulings in its July 11, 2011 Order immediately appealable to the Supreme Court of Appeals of West Virginia in accordance with Rule 54(b). The matter was noticed to be heard by the Court on November 17, 2011, at 2:00 p.m. However, the Court, having read and considered the Motion and Memorandum in Support filed by Hartford, and having been advised that the Plaintiffs have no objection to the relief requested, hereby rules as follows without the need for a hearing.

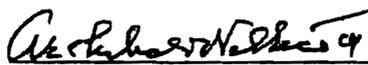
The Court ORDERS:

1. Hartford's Motion for Entry of Final Judgment or, in the Alternative, to Modify the July 11, 2011 Order Granting Partial Summary Judgment on Count IV of the Complaint, is GRANTED;
2. Final judgment is hereby expressly ENTERED in favor of Plaintiffs Micah A. Curtis and Angela L. Curtis against Defendant Hartford Fire Insurance Company, with regard to Count IV of the Complaint only, in the amount of \$99,795.05, plus statutory interest accrued;
3. In accordance with Rule 54(b) of the *West Virginia Rules of Civil Procedure*, the Court expressly determines that there is no just reason for delaying the entry of final judgment against Hartford until the final resolution of all claims against all defendants in this case;
4. The rulings of the July 11, 2011 Order, and the final judgment rendered herein, shall be immediately appealable to the Supreme Court of Appeals of West Virginia upon the entry of this Order; and
5. The Clerk of the Court is directed to deliver a copy of this Order to the parties or their respective counsel of record.

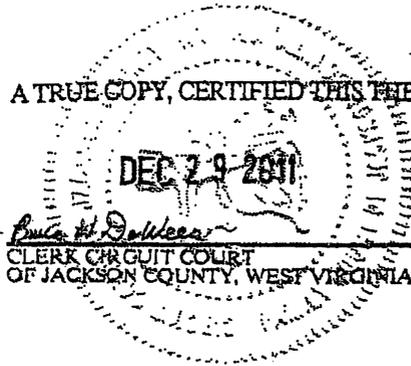
ENTER this 2nd day of December 2011:


Honorable J.D. Beane

We ask for this, while reserving all objections to the rulings in the Court's July 11, 2011 Order granting summary judgment:


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Counsel for Hartford

A TRUE COPY, CERTIFIED THIS FILE


DEC 29 2011

CLERK CIRCUIT COURT
OF JACKSON COUNTY, WEST VIRGINIA

and

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RECORDED
2011-12-29 10:30 AM

Seen and agreed:

Scott S. Blass by
Archibald W. Hedges, *with permission granted*
telephonically on 11/29/11
 Scott S. Blass, Esquire
 BORDAS & BORDAS PLLC
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Counsel for Plaintiffs

and

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 1031 Quarrier Street, Suite 200
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Counsel for Plaintiffs

meaning that Hartford is bound, as the surety, to satisfy any judgment rendered against Calusa, in the absence of fraud or collusion in obtaining the judgment.

Hartford issued the Bond in the amount of \$100,000 and named Calusa as principal. A default judgment was entered against Calusa on December 10, 2008, on the claims that Calusa engaged in conduct which violated Article 17, Chapter 31 of the West Virginia Code. To date, Calusa has failed to satisfy the December 10, 2008, judgment. On January 12, 2009, Plaintiffs provided notice of the claim to Hartford and requested payment of the judgment. Plaintiffs assert that the Bond is a judgment bond meaning that Hartford is bound, as the surety, to satisfy any judgment rendered against Calusa, in the absence of fraud or collusion in obtaining the judgment. Conversely, Hartford asserts that the Bond is not a judgment bond and instead that it should be afforded the rights provided by West Virginia Code § 45-1-3 because, at least in part, it was not given notice of the action against Calusa.

The relevant language of the Bond provides,

~~THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT;~~
WHEREAS, the above bound principal [Calusa], in pursuance of the provisions of Article 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 Lender business.

NOW, THEREFORE, if the said principal CALUSA INVESTMENTS, LLC shall conform to and abide by the provisions of said Act and of all rules and orders lawfully made or issued by the Commissioner 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 Commission 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 fore and effect. If any person shall be aggrieved by the misconduct of the principal, he may upon recovering judgement [sic] against such principal issue execution of such judgement [sic] and maintain an action upon the bond of the principal in any court having jurisdiction of the amount claimed, provided the Commissioner of Banking assents thereto.

A motion for summary judgment is appropriate 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 application of

the law.” Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Therefore, as the only issue in this case is interpretation of a contract, an issue of law, summary judgment is appropriate.

Plaintiffs’ principal argument is that the Bond is a judgment bond because the plain and unambiguous language of the Bond indicates that Hartford contracted to pay any and all moneys awarded in a judgment against Calusa arising from conduct which violates Article 17, Chapter 31 of the West Virginia Code and that the Bond does not provide to Hartford any duty to defend Calusa or to notice of such an action against Calusa. As it is a judgment bond and Hartford has contracted to pay any judgment against Calusa, the only obligation that Hartford has is to pay the judgment and, therefore, the default judgment in this case is not subject to West Virginia Code § 45-1-3. See *State v. Myers*, 74 W.Va. 488, 82 S.E. 270, 271-72 (1914). Hartford essentially argues that *Myers* provides only a narrow exception to West Virginia Code § 45-1-3 and that the Bond does not fit into that narrow exception.

A review of the language of the Bond, specifically, “If any person shall be aggrieved by the misconduct of the principal, he may upon recovering judgement [sic] against such principal issue execution of such judgement [sic] and maintain an action upon the bond of the principal in any court having jurisdiction of the amount claimed, . . .” clearly establishes that the condition that the Plaintiffs needed to satisfy in this case is a judgment against Calusa involving conduct violating the provisions of Article 17, Chapter 31 of the West Virginia Code. There is no other language in the Bond to indicate that the Plaintiffs should first be required to try their case against Calusa, determine if Calusa will pay any judgment obtained, and then, upon Calusa’s failure to pay such a judgment, try their case a second time against Hartford. Instead, the Bond provides that once the Plaintiffs obtain a judgment against Calusa, they can proceed against the Bond and Hartford, as surety on the bond, is obligated to pay the judgment as it contracted. The Court also notes that of interest is Hartford’s position taken in a similar case in Kanawha County

Circuit Court that a plaintiff, in an action against a similar bond, would not even have standing to bring an action against Hartford on the bond until and unless that plaintiff obtained a judgment against the principal. (See Exhibit A to Plaintiffs' Reply). This position seems in direct conflict with Hartford's position in this case that it should have been provided notice and an opportunity to defend from the outset even though the express language of the bond requires a plaintiff to obtain a judgment against a principal prior to executing and maintaining an action upon the bond of the principal.

Finally, it appears to the Court that a default judgment is just as binding upon a surety issuing a judgment bond as it is upon a surety where judgment is rendered after a trial. See *Axess Intern., Ltd. V. Intercargo Ins. Co.*, 183 F.3d 935, 940 (9th Cir. 1999).

Based upon the foregoing and review of the language of the Bond and applicable law as discussed above, the Court finds and concludes that the Bond is a judgment bond within the exception to West Virginia Code § 45-1-3 enumerated in *Myers* and, therefore, pursuant to the terms of the Bond, Hartford is obligated to satisfy the default judgment entered against Calusa in the amount of \$99,795.05, plus statutory interest accrued. Plaintiffs' Motion for Partial Summary Judgment Regarding Hartford Fire Insurance Company Bond is GRANTED.

Accordingly, the Court ORDERS:

1. Plaintiffs' Motion for Partial Summary Judgment Regarding Hartford Fire Insurance Company Bond is **GRANTED**;
2. Hartford Fire Insurance Company is obligated to satisfy the default judgment previously entered against Calusa Investments, LLC, on December 10, 2008; and
3. The Clerk of the Court is directed to deliver a copy of this Order to the parties or their respective counsel of record.

ENTER this 11th day of July 2011:
ENTERED THE 13th DAY OF
July 2011
ORDER BOOK 106 PAGE

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Bruce W. DeBee


Honorable J.D. Beane

A TRUE COPY, CERTIFIED THIS THE

JUL 13 2011

Bruce W. DeBee
CLERK CIRCUIT COURT
OF JACKSON COUNTY, WEST VIRGINIA

CERTIFICATION

I, Archibald Wallace, III, hereby certify that on December 29, 2011, Stacy Harlow, the court reporter in that case styled Curtis v. Hartford Fire Insurance Company, et al., Jackson County Circuit Court, Case No. 08-C-157, agreed via telephone to waive advance payment for the preparation of the transcript of the June 6, 2011 hearing on Plaintiffs' Motion for Partial Summary Judgment before the Honorable J.D. Beane.

December 30, 2011
Date

Archibald Wallace, III
Archibald Wallace, III