

12-0522

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, WA

2012 MAR 27 PM 1:24

JERRY LEE RHODES and  
BONNIE M. COCHRAN

CATHY S. SANDERLENK  
KANAWHA COUNTY CIRCUIT COURT

Plaintiffs,

v.

CIVIL ACTION NO. 10-C-592  
JUDGE JAMES C. STUCKY

HARTFORD FIRE INSURANCE COMPANY,

Defendant.

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT REGARDING  
HARTFORD FIRE INSURANCE COMPANY BOND**

The court has before it a motion for summary judgment filed by the plaintiffs herein, Jerry Lee Rhodes and Bonnie M. Cochran. The motion addresses the plaintiffs' claim against the defendant, Hartford Fire Insurance Company (hereafter "Hartford"). The issues have been fully briefed. On March 7, 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 plaintiffs' motion is hereby GRANTED. The court now enters the following order setting forth findings of fact and conclusions of law:

**Findings of Fact**

1. Equity South Mortgage, LLC ("Equity") 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, Equity purchased a bond, i.e., Bond No.

83BSBCGF8676, from the defendant, Hartford Fire Insurance Company (hereinafter "Hartford").

3. The bond guaranteed payment, up to \$50,000, of any judgment entered against Equity 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 [Equity], 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 [Equity] 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 be come 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 force and effect. If any person shall be aggrieved by the misconduct of the principal, he may upon recovering judgment against such principal issue execution of such judgment 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.

5. West Virginia Code § 31-17-17(c) 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.<sup>1</sup>

6. The plaintiffs filed a complaint in the Circuit Court of Putnam County against

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<sup>1</sup> W. Va. Code § 31-17-17 (c) provides: "Any residential mortgage loan transaction in violation of this article shall be subject to an action, which may be brought in a circuit court having jurisdiction, by the borrower seeking damages, reasonable attorneys fees and costs."

Equity, among others, seeking damages for Equity's conduct with regard to arranging and financing a home improvement loan.

7. It was alleged in the complaint that Equity obtained an inflated appraisal of the home and, in fact, that the home had no market value. It was further alleged that Equity misrepresented critical facts in writing the loan 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. Equity failed to answer or otherwise respond to the plaintiffs' complaint. Thereafter, the plaintiffs moved for default judgment.

9. On October 14, 2008, judgment was entered against Equity in the amount of \$50,000, plus interest. Equity has failed to satisfy that judgment.

10. The plaintiffs presented a claim to Hartford for payment under the bond it issued to Equity. However, Hartford refused to pay the same.

11. On March 29, 2010, the plaintiffs filed this complaint directly against Hartford seeking to recover the full amount of the judgment recovered against Equity, i.e., \$50,000.

12. On August 4, 2010, the plaintiffs reached a settlement with some of the remaining tortfeasors in the underlying case. Thus, the settlement was reached over 19 months after the default judgment was entered against Equity. The amount of the settlement was influenced, at least in part, by the existence of the default judgment.

#### 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, in part, *Riffe v. Horie Finders*

*Assocs., Inc.*, 205 W.Va. 216, 517 S.E.2d 313 (1999) (“[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination . . .”).

2. A motion for summary judgment should 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 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). Where, as here, the only issue to be determined is an issue of law, summary judgment is appropriate.

3. Any bond issued pursuant to the requirements of W. Va. Code § 31-17-4 is available to satisfy the enforcement of the plaintiffs’ rights as conferred by W. Va. Code 31-17-17(c) and W. Va. Code 31-17-18(b).

4. West Virginia strictly construes the obligations under a bond against the surety. *Elkins Manor Associates v. Eleanor Concrete Works, Inc.*, 183 W.Va. 501, 508, 396 S.E.2d 463, 470 (1990) (where “the surety is a corporation and supplies bonds for a consideration, the courts will construe the obligations of the bond most strongly against the surety.”); *City of Mullens v. Davidson*, 133 W.Va. 557, 566, 57 S.E.2d 1, 7 (1949) (“[A]s a bond executed by a surety for compensation is usually expressed in terms prescribed by the surety, it will for that reason be strictly construed in favor of the obligee.”).

5. 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.

6. Even though Hartford argues now that the plaintiffs were required to provide

notice and an opportunity to defend the underlying case against Equity, the court concludes this is inconsistent with Hartford's argument in *Stayer v. Litton Loan Servicing, LP*, Civil Action No. 08-C-3157. In *Stayer*, Hartford argued that the plaintiff had no standing to sue on the bond until he first obtained a judgment against the principal.

7. From all of the foregoing the court concludes that the bond issued by the defendant, Hartford, is clearly a judgment bond.

8. Under West Virginia law, a surety on a judgment bond is conclusively obligated to pay any judgment rendered against the principal. *State vs. Myers*, 74 W.Va. 488, 82 S.E. 270 (1914).

9. 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.

10. 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.3d 423, 427 (Tex. Ct. App. 2007) ("When a surety has contracted to be bound by a particular judgment that may be rendered against the principal, the judgment is conclusive against the surety even if the surety was not a party to the suit where the judgment was obtained. Also, a surety on a judgment bond is bound by a default judgment against the principal even if the surety did not have notice of the prior suit against the principal. A default judgment against the principal is conclusive of the surety's liability, unless there is evidence of fraud, collusion, or that the default judgment altered the terms of the bond.") (internal citations omitted); *Old Republic Sur. Co.*, 172 S.W.3d at 214, ("[I]f the bond is a

judgment bond, . . . a surety is bound by the default judgment against the principal even if the surety did not have notice of the prior suit against the principal absent proof of collusion or fraud.”); *First Mobile Home Corp. v. Little*, 298 So.2d 676, 682-83 (Miss. 1974) (“[A] default judgment against a principal is conclusive against his surety, unless it is shown that the default judgment was obtained through consent of the debtor, or collusion so as to be a fraud upon the rights of the surety.”).

11. With respect to Hartford’s argument that it is entitled to a dollar-for-dollar setoff for any settlement funds paid by other parties, the court concludes that *Board of Education of McDowell County vs. Zando, Martin & Milstead*, 182 W.Va. 597, 390 S.E.2d 796 (1990) is controlling.

12. West Virginia law does not permit setoffs against judgments. Instead, under *Zando*, the right to a setoff only applies to verdicts. Specifically, *Zando* provides that a setoff may only be performed after a verdict is returned and *before* a judgment is entered.

13. 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.

14. With respect to Hartford’s argument that consent from the banking commissioner is a condition precedent to any proceeding on the bond, the court concludes that such consent was, in fact, obtained.

15. The plaintiffs produced a letter dated November 17, 2011 wherein the banking commissioner formally advised that he consented to the plaintiffs “filing...a claim against the surety bond that was in effect at the time the incidents giving rise to plaintiffs’ causes of action against [Equity] occurred.” Hartford produced no proof to the

contrary.

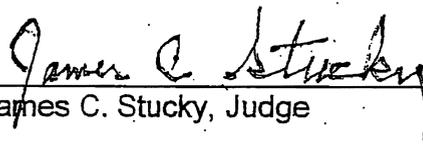
16. Thus, to the extent consent is required, the plaintiffs obtained consent from the appropriate governmental authority.

For the reasons recited herein, the plaintiffs' motion for summary judgment is hereby GRANTED.

It is accordingly ORDERED, ADJUDGED, and DECREED that judgment be entered in favor of the plaintiffs, Jerry Lee Rhodes and Bonnie M. Cochran, and against the defendant, Harford Fire Insurance Company, in the amount of \$50,000, together with prejudgment interest at the statutory rate from October 14, 2008 to the date hereof, and postjudgment interest at the statutory rate from the date hereof until fully satisfied.

The objections of all parties to all adverse rulings are hereby preserved. It is so ORDERED.

Enter this Order the 26<sup>th</sup> day of March, 2012.

  
James C. Stucky, Judge

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 28<sup>th</sup>  
DAY OF MARCH 2012.  
  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA