STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
IN RE SOUTHEASTERN EYE CENTER-PENDING MATTERS	15 CVS 1648
COUNTY OF GUILFORD	
IN RE SOUTHEASTERN EYE CENTER-JUDGMENTS	12 CVS 11322
IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY HISTORIC CASTLE MCCULLOCH, LLC DATED SEPTEMBER 30, 2004 AND RECORDED IN BOOK 6182, PAGE 2233 IN THE GUILFORD COUNTY PUBLIC REGISTRY, NORTH CAROLINA	23 SP 1872

SUBSTITUTE TRUSTEE: Jonathan W. Anderson

RECORD OWNER(S): HISTORIC CASTLE MCCULLOCH LLC

JDPW TRUST'S RESPONSE BRIEF REGARDING APPEAL BOND

JDPW Trust, by and through its Receiver Gerald A. Jeutter, Jr., and through counsel, hereby submits this response brief regarding the motion by the Castle McCulloch Defendants for the Court to set the amount of an appeal bond pursuant to

N.C.G.S. §1-292. In this response, the Receiver addresses first the language of the applicable statute, then the authorities addressing that language and finally application of that language to the factual scenario presented in this case.

I. The Applicable Statutory Language

The Castle McCulloch Defendants in their brief supporting their motion identify the applicable statutory language stating:

> … there is a specific statute that governs a stay pending the appeal of this Court's ruling allowing the foreclosure of the HCM Property. As acknowledged in *In re Foreclosure of the Nine Deeds of Trust of Marshall & Madeline Cornblum*, 220 N.C. App. 100, 104, 727 S.E.2d 338, 341 (2012), "[a]ppeal . . . from the superior court's ruling [on a power-of-sale foreclosure decision] does not stay the court's order; the appellant must execute a bond in order to stay the foreclosure sale," citing N.C. Gen. Stat. § 1-292.

Brief, ECF 82 at 2. N.C.G.S. §1-292 reads as follows:

> § 1-292. How judgment for real property stayed.
>
> If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of this deficiency. (C.C.P., s. 307; Code, s. 557; Rev., s. 601; C.S., s. 653.)

Parsing this language reveals that:

1) the statute applies to stay execution of judgments providing for the delivery or sale of real estate,
2) execution is not stayed unless an appeal bond is posted (i.e. the default rule is no stay),
3) the required bond is with one or more sureties (i.e. reliance for performance of the condition is on financially qualified sureties and not on the debtor),
4) the required bond is "to the effect that"
    a. no waste, and
    b. payment will be made if the judgment is affirmed for the "value of the use and occupation of the property" pending the appeal, and
5) the Court fixes a maximum amount for the bond which maximum is to be specified in the bond.

The stay is effective upon posting of the bond, requiring no order of the Court other than a determination specifying the maximum amount of the bond. *Currituck Associates Residential P'ship v. Hollowell*, 170 N.C. App. 399, 404 (2005)("In order for execution on the trial court's judgment to be stayed, a bond must be posted pursuant to N.C. Gen. Stat. §1–292"). "[T]he purpose of the bond is to protect the appellee from losses incurred during an appeal …." *Id*. The clear policy behind a Section 1-292 bond is to shift the risk of loss to real estate during an appeal off of the appellee and onto the appellant.

Thus, the issue presented by the statute for determination by the Court is "What is the maximum amount of the appeal bond in light of the facts and

circumstances of this case in order to protect the appellee from losses incurred during an appeal?" Addressing this issue raises the additional questions of a) what is the maximum amount of the loss that appellee could suffer during the appeal, and b) are there reasons why the appellee should bear a portion of this risk of loss during the pendency of appellant's appeal?

II. Determining the maximum amount of a Section 1-292 appeal bond.

The determination of the amount of a Section 1-292 appeal bond is within the discretion of the Court rendering such judgment based upon proper evidence of record.

> While the amount of the bond lies within the discretion of the trial court, …, we must determine whether the record contains evidence to support the trial court's decision.

Currituck Associates Residential P'ship v. Hollowell, 170 N.C. App. 399, 402 (2005). In making this discretionary determination, the Court must identify the losses to appellee against which the bond is intended to protect. The measure of damages on a Section 1-292 appeal bond following an unsuccessful appeal is the value of any waste plus the value of the use and occupancy of the property to appellee. *Matter of Simon*, 36 N.C. App. 51, 58 (1978)("It is obvious that the only proper measure of damages under … G.S. 1-292 would be waste plus the value of the use and occupation of the property"). "The accepted definition of waste is a spoil or destruction, done or permitted, with respect to lands …." *Norris v. Laws*, 150 N.C. 599 (1909). An appellee must elect between collecting on the bond or suing the debtor directly for the losses. *Matter of Simon*, 36 N.C. App. 51, 58 (1978)(recovery limited to amount of bond even

though losses exceeded the amount of the bond). Thus, an inadequate bond can leave an appellee without adequate recourse to cover all losses associated with an appeal.

As the Castle McCulloch Defendants note, the potential loss is measured with reference to the position of the appellee. *Hollowell*, 170 N.C. App. at 404. Because the statute applies to any order that "directs the sale or delivery of possession of real property," the position of an appellee can vary depending upon whether the order is one for specific performance of a contract to purchase real property, resolution of a contested estate involving title to real property, possession of real property pursuant to the terms of a lease or termination of such a lease or, as presented here, foreclosure on real property pledged as collateral for a loan.

These variations in factual scenarios require evaluation of the specific losses that a specific appellee could suffer during the pendency of an appeal. In *Hollowell*, for instance, the plaintiff was a developer of condominiums, and the dispute was over a contract for the sale of vacant property ("pads") to be developed by the plaintiff. Plaintiff's purpose in buying the property was to profit from building and selling condominiums. The potential loss then pending appeal was the loss of profits associated with the delay. Plaintiff endeavored to measure that loss with reference to increased construction costs. The Court of Appeals reversed the trial court because the affidavit evidence upon which the bond amount was based did not demonstrate personal knowledge as to likely increases in construction costs during the pendency of the appeal. Defendant sought a bond amount capped at $1.00 on the theory that the property was vacant land. The Court of Appeals rejected defendant's theory and

remanded the case for determination of a proper bond based upon actual evidence of potential lost profits to the plaintiff-appellee. *Id.* Notably, the appellee had not yet paid for the vacant land and retained the use of its money throughout the appeal. Accordingly, there was no risk of potential loss of that money and loss of interest on that money. Appellee was able to protect itself from those risks.

Foreclosures present a different risk of loss assessment. In a foreclosure the creditor-appellee does not have its money. The debtor does. The property then is the collateral for the debt. Delay in the sale of the collateral is delay in converting the collateral into money to be used to repay the debt. Destruction of the value of the collateral through waste or other unfortunate events such as fire or flood during the delay of an appeal destroys the value of the collateral to the creditor-appellee to the full extent of the lesser of the reduction in value or the full amount of the debt. In addition, because the creditor-appellee is not able to convert the collateral to money during the pendency of the appeal, it loses the use of that money including the ability to earn interest on the full outstanding balance of the money. Therefore, to place the risk of loss during appeal on the appellant as contemplated by Section 1-292 requires a bond equal to interest during the appeal on the full outstanding balance of the indebtedness (loss of use of the money) plus the lesser of the current value of the property or the current outstanding indebtedness.

Of course, a debtor might show mitigating factors that make a lesser bond appropriate. Less likely, a creditor might show unusual special enhancing factors that could make a larger bond appropriate under the statute. For example, in a

residential foreclosure scenario, a debtor might show that the loan due date is being accelerated and that a bond equal to the amount of the past due principal and interest payments and the payments that would come due during the pendency of the appeal but for the acceleration would put the creditor in the same position at the conclusion of the appeal as the creditor would have been in had the debtor performed as contemplated in the original loan. That debtor could persuasively argue that the creditor's risk of impaired collateral as to amounts that would not have been due yet had the creditor performed as promised is not a risk of delay during the appeal but instead was a risk of the loan from the beginning. Other potential mitigating factors to justify a lower bond amount in a foreclosure setting might include the availability of other resources against which the creditor could collect, specific actions such as insurance or reserve accounts implemented by the debtor to reduce the creditor's risk, inherent characteristics of the property that render it particularly resistant to waste or diminution in value, true financial hardship and other similar factors.

In *Matter of Foreclosure of a Deed of Tr. Executed by Coley Properties, Inc.*, 50 N.C. App. 413 (1981), the Court of Appeals addressed a foreclosure appeal in which the outstanding indebtedness was $938,000 and the trial court set a maximum bond amount of $500,000 to protect appellee from the risk of loss during the appeal. The Court affirmed the trial court's foreclosure decision, reversed an order that purported to dismiss the appeal for failure to post the appeal bond and left the bond determination undisturbed without discussion. Inherent in the trial court's bond determination was a conclusion that appellant should bear $500,000 (more than half)

of the risk that the delayed sale of the property would not cover the full indebtedness plus other losses (such as interest) during the delay with the appellee bearing the remainder of the risk.

The Castle McCulloch Defendants suggest in their brief that the statutory amount of the bond for appeal costs set forth in N.C.G.S. §1-285 is pertinent in determining the maximum amount required for a Section 1-292 undertaking. There is neither authority nor logic to support such an assertion. The Section 1-285 bond is to secure allocation of court costs on appeal. The Section 1-292 bond is to secure against the risk of financial loss to appellee arising from waste and loss of occupancy and use of real estate during the period of an appeal. These two statutory sections have nothing to do with each other.

III. The Maximum Amount of the Risk of Loss to JDPW

As the Castle McCulloch Defendants acknowledge, the outstanding principal balance on the Castle McCulloch Note ("CM Note") is $1,692,430.39. Motion, ECF 81 at ¶6; see also ECF 74 at ¶31. The CM Note provides for default interest at the rate of 15% or $705.18 per day on a 365/360 basis. CM Note, ECF 13.1; EX10A, ECF 1605.1. As of July 29, 2024, the outstanding balance was $4,946,979.32. Id. As of January 15, 2025, an additional 170 days have passed without any payments to JDPW. The accrued interest for that period is $705.18 times 170 or $119,880.60. The total due as of January 15, 2025 is $5,066,859.92. This amount is less than the estimated value of the Castle McCulloch collateral of $7,000,000.

Accordingly, were the collateral to be destroyed during the pendency of the appeal, the loss to JDPW would be $5,066,859.92 available now from the sale of the collateral. In addition, JDPW will have lost the use of this amount of money for the pendency of the appeal. Estimating two years for the appeal to reach full resolution, the interest to compensate for the loss of use of this money during the appeal would be $5,066,859.92 times 15% times 2 years or $1,520,057.98.

Shifting the full risk of the potential loss from waste and loss of occupancy and use during a two-year appeal would therefore require a bond amount of $6,586,917.90. Placing 75% of the risk on appellants results in a bond of $4,940,188.43. Sharing the risk equally would result in a bond of $3,293,458.95. Ignoring the potential for waste and bonding only for the loss of use of the money that appellee could collect if it had occupancy and use of the property would result in a bond of $1,520,057.98 placing 77% of the risk on appellee, JDPW and only 23% of the risk of loss on the Castle McCulloch Defendant-appellants. The Castle McCulloch Defendants' suggestion of a zero-dollar bond puts the full risk on appellee, JDPW.

IV. Mitigating Factors are absent.

The Castle McCulloch Defendants have not shown mitigating factors to support a lower bond amount. This is not a residential foreclosure. The note was not accelerated for early default. To the contrary the note is over ten years past due and the Court has documented the determined resistance of the Castle McCulloch Defendants to avoid and delay payment of this debt that they promised to pay. This is an event space with resulting risks from high traffic, drinking, partying, smoking,

rowdiness and the vagaries of multiple human failings that often are exhibited at or after events. The Castle McCulloch Defendants have presented no evidence that the property is properly insured, that JDPW is an insured on the policy or that the insurance in place is both adequate to cover the outstanding balance of the CM Note and broad enough in scope to address all known risks. To the contrary, the Castle McCulloch Defendants continue to diminish the interest JDPW has in being paid through foreclosure on the collateral these defendants committed to secure their promises. Their pitch is "trust us; we will not impair your interests; we promise." Given that the Castle McCulloch Defendants have breached every material promise they made regarding repayment of the CM Note, the record provides no basis to bond this appeal with "Richard Harris's word."

Conclusion

As this brief is written, Los Angeles burns and western North Carolina continues to claw its way back from the devastation of a weather disaster. In late July of 1980, the event space known as Graylyn in Winston-Salem, North Carolina burned and suffered a total loss while the Winston-Salem symphony was in concert on the Graylyn grounds, the result of an arsonist attracted by the presence of a crowd of people (undersigned counsel for JDPW was scheduled to hold the rehearsal dinner for his wedding there in August of 1980). In Rodanthe, North Carolina houses are falling into the ocean. Risks abound. Delay during an appeal carries real risks. N.C.G.S. §1-292 stands as the legislature's judgment that appellants should bear such risks during the pendency of an appeal from an order directing the sale of real

property. JDPW urges the Court to require a bond of $6,500,000 to shift the full risk of loss during the appeal onto the Castle McCulloch Defendant-appellants.

The undersigned certifies that this brief complies with BCR 7 in that it contains fewer than 7,500 words (less than 2,900) according to word processing software.

This the 15th day of January, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically filed with the North Carolina Business Court and served thereby to counsel and parties of record.

This the 15th day of January, 2025.

/s/Robert E. Fields III
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