

NO. 2004-C-1299

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

FILMORE PARC APARTMENTS

VERSUS

PAMELA HOWARD

IN RE: PAMELA HOWARD

APPLYING FOR: SUPERVISORY WRIT, EMERGENCY WRIT, MOTION
FOR STAY, EXPEDITED CONSIDERATION REQUEST

DIRECTED TO: HONORABLE ANGELIQUE REED, JUDGE
FIRST CITY COURT OF NEW ORLEANS
SECTION "B", 04-03977

WRIT GRANTED; ORDER VACATED; REMANDED

We find that the trial court erred in limiting the suspensive appeal bond requirement to a cash bond only. La. C.C. P. art 4735 provides in pertinent part:

The amount of the suspensive appeal bond shall be determined by the court in an amount sufficient to protect the appellee against all such damage as he may sustain as a result of the appeal.

It is within the jurisdiction of the trial court to determine the sufficiency of the appeal bond once it has been set. La. C.C.P. article 2088 provides in pertinent part:

[T]he trial court has jurisdiction in the case only over those matters not reviewable under the appeal, including the right to:

(5) Test the solvency of the surety on the appeal bond as of the date of its filing or subsequently, consider objections to the form, substance, and sufficiency of the appeal bond, and permit the curing thereof...

La. C.C.P. art 2088 provides that the trial court has the jurisdiction to "consider objections to the form." La. C.C.P. art 2088 (5), use of the term "form" applies to the form which gives rise to the surety, when a suspensive appeal is secured by a

surety. However, in the case at bar, the trial court mandated the type of appeal bond and denied the motion to modify the suspensive appeal bond to allow for a surety bond to be posted in lieu of the cash bond. The trial court is vested with the jurisdiction to test the solvency of the surety, the substance, and sufficiency of the appeal bond; however we do not find that the trial court is vested with the discretions of mandating the type of the appeal bond.

In accordance with La. C.C.P. art. 5121, when a party ...is required by law or order to furnish security, *any bond so furnished* shall be made payable to the clerk of the trial court in which the proceeding was brought." *Emphasis added.*

The order of the trial court limiting the suspensive appeal bond requirement to a cash bond only, is vacated and the trial court is ordered to set a surety bond in an amount that complies with La. C.C.P. art 5181. Further, the trial court is ordered to grant the appellant 24 hours from the fixing of the surety bond to post said bond.

New Orleans, Louisiana this _____ day of ^{JUL 30 2004} _____,



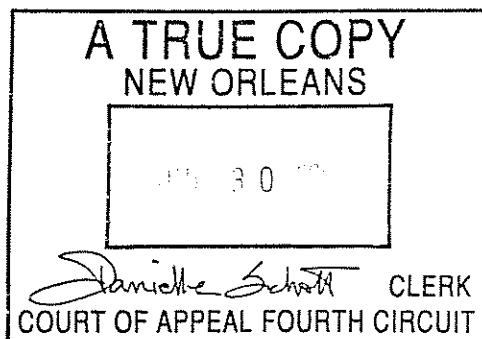
JUDGE TERRI F. LOVE

McKay, J. Dissents

JUDGE JAMES F. MCKAY III



JUDGE MICHAEL E. KIRBY



FILMORE PARC
APARTMENTS

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PAMELA HOWARD

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COURT OF APPEAL

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FOURTH CIRCUIT

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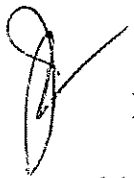
STATE OF LOUISIANA

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MCKAY, J. DISSENTS



I respectfully dissent from the majority's decision to grant this writ and would affirm the trial court's ruling setting a cash bond. I do not believe that this Court has jurisdiction to consider the form, substance and sufficiency of an appeal bond. *See* La. C.C.P. art 2088 and Mason v. State Farm Mutual Automobile Ins. Co., 312 So.2d 175 (La.App. 1 Cir. 1975). I believe that the setting of the form, substance and sufficiency of an appeal bond is discretionary with the trial court.