1977 S.C. Op. Atty. Gen. 106 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-125, 1977 WL 24467

Office of the Attorney General

State of South Carolina
Opinion No. 77-125
April 28, 1977

***1** Mr. John W. Tucker, Jr.
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Fifth Judicial Circuit
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Dear John,
In reference to your letter of April 5, 1977, in which you asked the opinion of this Office as to whether the obligation of two sureties who were not approved by the Court as to their qualification, although a third one was, remained as to any estreatment on a bond, the question has never been decided conclusively in South Carolina and therefore no definite answer can be given. Section 17–300(a), Code of Laws of South Carolina, 1962, as amended, refers to the release of a person charged with a non-triable offense on an appearance bond in a specified amount with good and sufficient sureties. It notes that these sureties are to be approved by the Court.

The South Carolina Supreme Court in State v. Edens, 88 S.C. 302, 70 S.E. 609 (1911), concluded that where the condition of a recognizance had been breached by Defendant's failure to appear, where that was the condition, there was forfeiture of the recognizance and the appellant-surety's liability became fixed, and such liability could be relieved only by court action. The Court stated that:
'The recognizance is itself as instrument, 'in the nature of a conditional judgment of record which may be discharged by the performance of the conditions stated'.' 88 S.C. at 306.

Upon the breach of the condition, as in this situation by the failure of Defendant to appear, there is a forfeiture of the recognizance and all that is necessary to make it binding is to provide an opportunity for the parties to it to disclose any irregularities or defects. A clear determination as to just what irregularities or defects would prevent such binding is not entirely evident. See also Pride v. Anders, 266 S.C. 338, 223 S.E.2d 184 (1976).

'Mere technical defects in form, or omissions, or additions, however, which are not material in any way and from which no injury is shown to have resulted, will not affect the validity of a bail bond, or recognizance'. 8 C.J.S., Bail, § 55. In association with this, the South Carolina Supreme Court in State v. Harrelson, 211 S.C. 11, 43 S.E.2d 593, held that a check posted as bond for appearance of an accused in criminal court is valid as a common law bond and this was held despite the fact that the language of the Statute governing bonds was not in evidence since the Defendant did not sign a recognizance or any other instrument. This would seem to indicate that the statutes governing bond procedures are directory and not mandatory.

In regard to any proceedings in which the sufficiency of sureties is investigated and determined, 'the examination of sureties, however, is not a part of their contract . . ..' 8 C.J.S., Bail, § 60. In a footnote to this statement there was reference to the California case, People v. Fidelity and Deposit Company of Maryland, 289 P. 896. In upholding the sureties' obligation, the Court stated that '. . . the examination of sureties or formal approval of bond is not a part of the contract entered into by the sureties.' 289 P. at 897.

***2** California courts have ruled thus that approval of a bail bond is not part of the bail contract and any irregularities preliminary to the taking of bail are considered waived by the surety when he assumes his obligation under the terms of the contract. People v. Fidelity and Deposit Company of Maryland, 289 P. 896 (1930); Western Surety Company v. Municipal Court, City of Los Angeles, Los Angeles County, 66 P.2d 236 (1937). See also West, et al. v. State, 78 S. 285 (1918), (Florida).

However, in reading these cases closely it would seem that the actual matter leading to the Court's consideration was whether a particular authority had jurisdiction to accept a bond. Moreover, there are a considerable number of cases which hold that a bail bond or recognizance taken without approval by the authority with the jurisdiction to approve is void and binds neither the principal nor the sureties and is not enforceable as a common law obligation. See 34 ALR 614. However, obviously, this is not the situation you referred to in your letter.

The three cases noted in the previous paragraph do hold that statutes relating to taking and approving bail bonds are directory and not mandatory and that approval of a bail bond and justification of sureties is not a part of the bail contract. The Louisiana Supreme Court in State v. Myers, 59 So.2d 111 (1952), held that statutory provisions relative to the essentials of the oath required of sureties on bail bonds which related to certain ownership of property were enacted to protect the State and appellant was not injured by any alleged insufficiency of an affidavit and '. . . was estopped from denying either 'the irregularity of the bond or of the proceedings under which it was allowed.''

Based on my review, it would appear to me that the sureties even though they did not qualify would remain liable. The only case law that I have found that does not uphold a sureties liability on a bail bond as a common law obligation was where there was a lack of authority of the Court or officer who assumed to take or require the bond. However, as previously stated South Carolina courts apparently have not decided the matter so a clear determination cannot be made.

If there are any further questions, please do not hesitate to contact me.
Very truly yours,

Charles H. Richardson
Staff Attorney

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