No. COA11-1601

Judicial District 29B

NORTH CAROLINA COURT OF APPEALS

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THE COUNTY OF HENDERSON Crossclaimant & Defendant – Appellee vs. LEXON INSURANCE COMPANY, Crossclaim Defendant & Defendant & Third-Party Plaintiff – Appellant and SYNOVUS BANK, Plaintiff and SEVEN FALLS, LLC, WAIGHTSTILL MOUNTAIN, LLC, MOUNTAIN JET SERVICES, LLC, KEITH VINSON and PAULA VINSON. Third Party Defendants.	)	From Henderson County No. 10-CVS-1008

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BRIEF OF CROSSCLAIMANT & DEFENDANT – APPELLEE COUNTY OF HENDERSON

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BRIEF OF CROSSCLAIMANT & DEFENDANT – APPELLEE COUNTY OF HENDERSON

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STATEMENT OF FACTS

In May, 2008, Crossclaimant and Defendant-Appellee County of Henderson and Third Party Defendant Seven Falls, LLC ("the Developer") entered into a Development Agreement (R pp 43-69), granting the Developer permission to develop a subdivision of 700 single home lots, 164 townhomes, 24 "lodge and Inn rooms" and 36 condominiums, the "Seven Falls Golf & River Club". (R p 44). This ended a process which had begun by at least April of 2007. (R p 44). The Development Agreement was done pursuant to N.C. Gen. Stat. §153A-349.1 et seq., and vested certain rights in the Developer under the County's Zoning and Subdivision Ordinance in effect April 2, 2007.

In July, 2008, the Developer sought the County's approval of its proposed Final Plat for Phase I (including both Phases I(a) and I(b)) and Phase II(a) of the development, and permission to record the same and lawfully begin the sale of lots in those phases. The Developer sought this even though certain of the improvements required in the Development Agreement were not yet complete in July 2008. These ("the infrastructure improvements") included the following:

> clearing and grubbing, roadway grading, roadway paving and roadway stone base, all stormwater drainage improvements, seeding, all erosion control measures, construction of bridges, installation of the water distribution system including the water storage tank and installation of the sewer distribution system including the wastewater treatment plant as shown in the

> attached cost estimates prepared by Mr. William Lapsley signed and sealed on July 14, 2008, as shown on the latest version of the Phase I Development Plan originally approved by the Planning Board on June 21, 2007 and the Phase II Development Plan approved by the Planning Department on September 21, 2007 and as shown on the attached Master Plan. The required improvements will be done to any and all local, state, federal standards. Henderson County staff may inspect improvements as appropriate.

(R p 131). Nonetheless, pursuant to N.C. Gen. Stat. §153A-331(c), and pursuant to the County's Land Development Ordinance, the County permitted the recordation of the plat on the condition that the County received a guarantee (to its benefit and to that of any purchasers of lots in the included Phases) that the infrastructure improvements would be accomplished in a timely fashion within one year (June 1, 2009). As a guarantee solely from the developer would be insufficient (as is recognized in §153A-331(c)), the County also required the posting of a surety bond, in this case in the amount of "at least $5,926,374.00". (R p 131, paragraph 2). The Defendant-Third Party Plaintiff, Lexon Insurance Company, posted the surety bond, in the amount of $6,000,000.00. (R p 103).

When the infrastructure improvements were not completed by June 1, 2009, the Developer and Lexon obtained an extension for an additional year of the guarantee and the bond. Lexon, as a condition for extended its bond for an additional year, obtained

a letter of credit from the Plaintiff, Synovus Bank, for $3,240,000.00, to cover more than half of its potential exposure. (R p 3).

When the time covered by the year's extension passed, the infrastructure improvements still were not done. The County made demand against the surety bond.

Synovus brought interpleader action, citing its letter of credit. Both the County and Lexon claimed the right to the letter of credit, and the County crossclaimed against Lexon for the balance (over and above the letter of credit) of Lexon's bond. Lexon made a third party claim against the Developer and related third parties.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the trial court's grant of summary judgment *de novo*. Craig v. New Hanover Co. Bd. of Ed., 363 N.C. 334, 337, 678 S.E.2d 351, 355 (2009). Summary judgment is appropriate when "'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" Dixon v. Hill, 174 N.C. App. 252, 261, 620 S.E.2d 715, 721 (2005) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003)), disc. review denied, 360 N.C. 289, 627 S.E.2d 619, cert. denied, 548 U.S. 906, 165 L. Ed. 2d 954 (2006)).

> The party moving for summary judgment has the burden of establishing the lack of any triable issue. Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial."

Id. (internal citation omitted) (quoting Collingwood v. G.E. Real Estate Equities, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

II. A. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AS TO DEFAULT BECAUSE LEXON ADMITTED THE FAILURE OF ITS PRINCIPAL TO COMPLY WITH THE TERMS OF THE UNDERLYING CONTRACT

Lexon argues that, as a surety of a performance bond, it it liable only to the extent that its principal is liable. But the pleadings in this action establish conclusively that there is no issue of fact as to the underlying agreement, or the Developer's failure to comply.

The following facts are uncontroverted: (1) the Developer executed an Improvement Guarantee, and later a one-year extension thereof, promising to complete certain work within Seven Falls subdivision by not later than 1 June 2010 (R p 131); (2) performance of the requirements of the Improvement Guarantee was secured by a Surety Bond issued by Lexon (R p 16); and, (3) the work required by the Improvement Guarantee has not been performed. In the County's crossclaim, the following was alleged:

> 10. Seven Falls, LLC, the principal described in the Performance Bond and the Continuance Certificate, failed to complete construction of the infrastructure improvements, including roads, water, sewer and drainage, in the Seven Falls Golf and River Club subdivision by June 1, 2010.

(R p 10). The response: "Lexon admits the allegations of Paragraph 10 of the Crossclaim." (R p 86). Had any substantive defense of the Developer existed (other than the purported defense of the Permit Extension Act of 2009, as amended, discussed infra), Lexon could have raised the same in their

answer to the County's crossclaim. Lexon did not do so, as none existed. Lexon admitted, as in County of Brunswick v. Lexon Ins. Co., 425 Fed. Appx. 190, 2011 U.S. App. LEXIS 8375 (4th Cir. N.C. 2011, unpublished, attached), that it issued the bond and that the Developer did not perform its obligations guaranteed by the bond. Clearly no material facts are in dispute as to Lexon's obligation and the Developer's default under the contract.

B. THERE IS NO DEFENSE TO THE FAILURE TO COMPLETE THE IMPROVEMENTS GUARANTEED AVAILABLE EITHER TO THE PRINCIPAL-DEVELOPER OR TO LEXON BECAUSE OF THE PERMIT EXTENSION ACT.

Lexon claims that the Developer (and therefore Lexon) was excused from the timely performance of its agreement with County because of the provisions of the Permit Extension Act, as amended. (See 2009 N.C. Sess. Laws 406, 2009 N.C. Sess. Laws 572, and 2010 N.C. Sess. Laws 177.) Under the Permit Extension Act, "[f]or any *development approval* that is current and valid at any point during the period beginning January 1, 2008, and ending December 31, 2010, the running of the period of the development approval and any associated vested right under G.S. 153A-344.1 or G.S. 160A-385.1 is suspended during the period beginning January 1, 2008, and ending December 31, 2011." 2010 N.C. Sess. Laws 177 (emphasis supplied).

The County does not contest that *if* the Developer's performance of its obligations to timely complete the required infrastructure on the subdivision was excused (or the time for the same was extended) by the Permit Extension Act, then Lexon could rely on the same in defending this suit. However, it is clear that this is not so.

The Permit Extension Act is careful to define a "development approval":

> SECTION 3. Definitions. -- As used in this act, the following definitions apply:
> (1) Development approval. -- Any of the following approvals issued by the State, any agency or subdivision of the State, or any unit of local government, regardless of the form of the approval, that are for the development of land or for the provision of water or wastewater services by a government entity:
>
> . . .
>
> l. Any approval by a county of sketch plans, preliminary plats, plats regarding a subdivision of land, a site specific development plan or a phased development plan, a development permit, a development agreement, or a building permit under Article 18 of Chapter 153A of the General Statutes. . . .

2009 N.C. Sess. Laws 406. And as it became amended, the Permit Extension Act contains the following in Section 5:

> This act shall not be construed or implemented to:
>
> . . .

> (8) Modify any person's obligations or impair the rights of any party under contract, including bond or other similar undertaking.

2010 N.C. Sess. Laws 177.

The plain language of the Permit Extension Act as amended provides that it cannot be applied to modify a person's obligations under a bond or impair the rights of a party to a bond.

> Where the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 574-75, 573 S.E.2d 118, 121 (2002) (internal citations and quotation marks omitted).

> If the Legislature has used language of clear import, the court should not indulge in speculation or conjecture for its meaning. . . . Courts are not permitted to assume that the lawmaker has used words ignorantly or without meaning[.]

Nance v. R.R., 149 N.C. 366, 371, 63 S.E. 116, 118 (1908).

"Nothing else appearing, the legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning." Wood v. Stevens & Co., 297 N.C. 636, 643, 256 S.E.2d

692, 697 (1979). See also In re the Release of the Silk Plant Forest Review Committee's Report and Appendices v. Barker et al., ___ N.C. App ____, _____, _____ S.E.2d ____, ____, 2011 Lexis 2142 (4 October 2011), disc. rev. denied ___ N.C. ____, ___ S.E.2d ___, 2012 N.C. Lexis 58 (January 26, 2012).

The guarantee of the Developer, for which Lexon provided a performance bond, was not a development approval. Rather, it was a contract, as designed by N.C. Gen. Stat. §153A-331(c), to allow the Developer to immediately commence with lot sales before completing infrastructure required by the County's subdivision ordinance while insuring that such infrastructure improvements would be timely completed for lot purchasers. Subdivision or other development approval was not at issue. The Development Agreement and plat approval under the ordinance by the County's Planning Board accomplished that. Indeed, the breach of an infrastructure performance guarantee agreement such as that here will not revoke approval of the subdivision; it will merely affect the Developer's right to sell lots in it prior to the completion of the infrastructure required by the subdivision ordinance.

Only one North Carolina state appellate case has thus far construed the Permit Extension Act. In Cambridge Southport, LLC v. Southeast Brunswick Sanitary District, ___ N.C. App. ___, ___ S.E. 2d ___, 2012 N.C. App. LEXIS 49 (January 17, 2012), the

Sanitary District tried to maintain that despite performance of all obligations by the Developer, the mere passage of time (during a period covered by the Permit Extension Act) caused a permit (which *neither party* contended was *not* a "development permit") to expire.

The identical fact pattern to the case at bar, however, also involving Lexon, was addressed by the Fourth Circuit in the County of Brunswick case, supra. There, as here, Lexon argued that it was excused from any liability whatsoever under its bond as an indirect consequence of the Permit Extension Act. As noted by the Circuit Court,

> ". . . the Permit Extension Act specifically does not apply to bond obligations. See 2010 N.C. Sess. Laws 177 Section 5(8). . . . Therefore, Lexon's argument that its obligations under the Bonds should be extended fails because the Permit Extension Act, on its face, is inapplicable to the Bonds."

425 Fed. Appx. at 194. To hold otherwise would be to not only "modify" Lexon's obligations under its bond, as prohibited by Section 5(8) of the Permit Extension Act, but would indeed *completely release* Lexon from any responsibility for its bond contract (for which it presumably received a substantial premium payment), as it is clear that the Permit Extension Act does not extend the liability of bond issuers. Such a reading of the Permit Extension Act would render the contractual protections

afforded the County (and those sold lots in the subdivision by the Developer) by N.C. Gen. Stat. §153A-331(c) a nullity. To do so would retrospectively divest the County of a contractual right held prior to the adoption of the Permit Extension Act, an action "founded on unconstitutional principals and consequently void." Bank of Pinehurst v. Derby, 218 N.C. 653, 12 S.E.2d 260, 264 (1940). "In interpreting a statute if 'one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted.' In re Arthur, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977)." Nelson v. Battle Forest Friends Meeting, 335 N.C. 133, 137, 436 S.E.2d 122 (1993).

The County contends that no reasonable interpretation of the Permit Extension Act suggests that it was intended to benefit surety bond companies, such as Lexon. Lexon seeks to shift the risk of the Developer's non-performance, which it contractually undertook, to the County and to purchasers of lots within the subdivision.

III. THERE WAS NO ISSUE OF FACT AS TO THE AMOUNT OF THE COUNTY'S DAMAGES, AS THE SOLE EVIDENCE BEFORE THE COURT WAS THAT THE COST OF COMPLETION EXCEEDED THE TOTAL OF THE BOND

The County presented with its Motion for a Summary Judgment the affidavit of William G. Lapsley. (R p 128-129). Lapsley is a local licensed engineer, who in addition to reviewing the work

left to be done on the infrastructure improvements for the County had been the original project engineer who had designed the development. Lapsley "has worked in Western North Carolina for over thirty seven (37) years and is very familiar with the Western North Carolina construction market, prices, vendors, and unit costs." Lapsley also is "very familiar with the particular obstacles to land planning and development in Western North Carolina such as steep slopes, waterways, and land that is inappropriate for wells or septic systems." (R p 128, paragraph 5). In order to prepare his affidavit, Lapsley "had reviewed the Performance Guarantee Agreement" and was "familiar with the work required" under its terms. (R p 128, paragraph 12). Lapsley visited the property during the pendency of this action to prepare a cost estimate. Lapsley estimated that the cost of completing the infrastructure improvements "will exceed $6,000,000.00". (R p 129, paragraph 14).

In its response to the County's summary judgment motion (and Lapsley's affidavit), Lexon presented the affidavit of engineer Lovick Evans, who, on balance, admitted that he was unable to make an estimate of the cost of completion. (R p 307).

Lexon also attempts to rely on the affidavit of Keith Vinson, the manager of the Developer. However, Vinson's affidavit on its face indicates either a lack of knowledge of or

failure to acknowledge the degradation of the site resulting from the passage of time without the completion required by the guarantee of infrastructure improvements. Vinson nowhere indicates knowledge of the then-current status (pointed out in Lapsley's affidavit) of the site or infrastructure improvements. This lack of claimed knowledge is important here, as nowhere in his affidavit does Vinson acknowledge the degradation of the infrastructure (primarily erosion) that occurred on the site since the Developer ceased work. Rather, Vinson evidently relies on his "belief" that Lapsley "would agree" (contrary to his sworn affidavit) that Lapsley's calculations were "overstated". (R p 223, paragraph 17).

Lexon attempts to make much that Lapsley's original estimate for the cost of completion (at the time the bond was issued) was for less than $6,000,000.00. To do so completely ignores the degradation of the site (noted in Lapsley's affidavit) resulting from the Developer's complete failure to act to fulfill its guarantee of infrastructure improvements. (R p 128-129).

In opposing a motion for summary judgment, the nonmoving party "'may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'" Dixon, 174 N.C. App

at 261-62, 620 S.E.2d at 721 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e)(2003)).

In this case the County presented the only competent evidence of the cost of the completion of the required infrastructure improvements. The only competent evidence shows that the cost of completion of the guaranteed infrastructure improvements is substantial – in excess of the amount of Lexon's bond. It was not error that the trial court found no issue of fact in this regard.

IV. THE COURT WAS CORRECT TO GRANT PREJUDGMENT INTEREST ON LEXON'S OBLIGATION

The County made demand on Lexon in June of 2010. (R p 76). Lexon has to date failed to offer to allow letter of credit to be used to commence with the infrastructure improvements. Lexon has never acted to remedy the deficit.

Lexon attempts to claim that the County prevented it from the use of Synovus' $3,240,000.00. While the County clearly admits that it did not acquiesce in the unrestricted payment of this sum to Lexon at a time when Lexon had taken no action toward rectifying the damage intended to be avoided by the letter of credit, nowhere in the record (or otherwise) is there evidence of any attempt by Lexon to take action entitling it to this sum. Lexon has refused to perform or arrangement for performance of the work covered by its bond. Lexon's actions

alone prevented the County from having access to funds to begin to remedy the non-performance of the Developer and Lexon. The County was denied, as were purchasers of lots in the subdivision, of the benefit of timely performance by Lexon's acts, and should be compensated by the award of interest as granted by the trial court.

The Supreme Court has sanctioned the award of interest on surety bonds in Interstate Equip. Co. v. Smith, 292 N.C. 592, 234 S.E.2d 599 (1977). The entire purpose of such bonds is one of compensation, not penalty. The County is unable to use any portion of Lexon's $6,000,000.00 bond to this day. The precise reason North Carolina has allowed the County to require this bond is to protect it (and the purchasers of lots from the Developer) "from the loss it would have to bear as a result of a defaulting contractor's failure to meet all obligations." U.S. v. American Manufacturers Mut. Cas. Co., 901 F.2d 370, 373 (1990). Lexon should be required to bear the burden of its wrongful refusal to honor the bonds, and the trial court's award of interest was proper.

CONCLUSION

For the reasons stated above, the Crossclaimant Defendant-Appellee County of Henderson respectfully requests that the Court affirm summary judgment on its surety bond claim.

Respectfully submitted, this the 9th day of March, 2012.

OFFICE OF THE COUNTY ATTORNEY
OF HENDERSON COUNTY

Electronically Submitted
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Attorneys for the Crossclaimant Defendant-Appellee, County of Henderson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused to be served a copy of the foregoing BRIEF OF CROSSCLAIMANT & DEFENDANT – APPELLEE COUNTY OF HENDERSON on counsel for the Crossclaim Defendant and Defendant-Appellant, Lexon Insurance Company, by depositing a copy of the same, contained in a first-class postage-prepaid wrapper, into a depository under the exclusive care and custody of the United States Postal Services, addressed to:

Mr. Daniel R. Hansen
Shumaker, Loop & Kendrick, LLP
128 S. Tryon St., Ste. 1800
Charlotte, NC 28202

This the 9th day of March, 2012.

/s/ Charles Russell Burrell
Charles Russell Burrell, electronically submitted

COUNTY OF BRUNSWICK, Plaintiff - Appellee, v. LEXON INSURANCE COMPANY, Defendant - Appellant.

No. 10-1613

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

425 Fed. Appx. 190*; *2011 U.S. App. LEXIS 8375

March 22, 2011, Argued
April 21, 2011, Decided

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. (7:09-cv-00060-BO). Terrence W. Boyle, District Judge. *County of Brunswick v. Lexon Ins. Co., 710 F. Supp. 2d 520, 2010 U.S. Dist. LEXIS 46371 (E.D.N.C., 2010)*

DISPOSITION: AFFIRMED.

COUNSEL: Matthew Elliott Cox, SMITH, CURRIE & HANCOCK, LLP, Charlotte, North Carolina, for Appellant.

Matthew Hilton Mall, Charles Carpenter Meeker, PARKER, POE, ADAMS & BERNSTEIN, LLP, Raleigh, North Carolina, for Appellee.

JUDGES: Before SHEDD and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

OPINION

[*191] PER CURIAM:

Lexon Insurance Company ("Lexon") appeals the district court's order granting summary judgment in favor of the County of Brunswick ("the County"). For the reasons set forth below, we affirm.

I.

We view the evidence in the light most favorable to Lexon, the non-moving party. *Laber v. Harvey, 438 F.3d 404, 415 (4th Cir. 2006)* (en banc). On May 10, 2006, the County gave Town & Country Developers ("TCD") approval to develop the Avalon of the Carolinas subdivision ("Avalon"). As a condition of that approval, TCD executed an Improvement Guarantee Agreement with the County requiring completion of certain infrastructure improvements by April 1, 2009. Additionally, TCD acquired two performance bonds ("the Bonds") from Lexon that provided [**2] an initial financial guarantee of $5,658,743.44. After completion of a certain portion of the improvements, the Bonds provided a guarantee of $3,584,875.44.

On June 17, 2008, the County sent a letter to TCD and Lexon stating that progress was not being made on

Avalon's infrastructure improvements and that if work did not resume by the end of the month, the County would declare TCD in default. On October 7, 2008, creditors foreclosed on Avalon. Subsequently, the County sent a formal notice of default to TCD on October 22, 2008. On April 1, 2009, when performance of the infrastructure improvements were due to be completed, the County passed a resolution calling upon Lexon to either complete the infrastructure improvements or make a payment to the County as called for in the Bonds.

When Lexon refused to make such a payment, the County brought this action to [*192] recover the amount due under the Bonds. The district court granted the County's motion for summary judgment because the performance secured by the Bonds had not been completed, and Lexon asserted that it could not complete performance. Therefore, the court entered judgment in favor of the County in the amount due under the Bonds, $3,584,875.44, [**3] plus interest.

II.

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. If the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case," the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. We review the district court's order granting summary judgment de novo. *Jennings v. Univ. of N.C., 482 F.3d 686, 694 (4th Cir. 2007)* (en banc).

A.

First, Lexon argues that the district court erred in granting summary judgment in favor of the County because Lexon is excused from liability on the Bonds. Lexon asserts that the County had a duty to declare TCD in default, and the County's failure to make that declaration prior to Avalon's foreclosure materially altered Lexon's bonded risk, thus excusing it from liability. We find that Lexon's argument fails on both prongs of its analysis.

First, the County did not have an obligation to declare TCD in default. Under North Carolina [**4] law, which the parties agree controls, "a public performance bond is a contract, governed by the law of contracts. Parties entering into public performance bond are free to contract for any terms they so desire." *Town of Pineville v. Atkinson/Dyer/Watson, Architects P.A., 114 N.C. App. 497, 442 S.E.2d 73, 74 (N.C. App. 1994)*. Therefore, the contractual terms of the Bonds are controlling, and the Bonds do not require the County to make a declaration of default. See J.A. 12, 19.

Second, the County's decision to declare TCD in default only after Avalon's foreclosure did not prevent Lexon from completing TCD's performance obligations. As the district court noted, TCD's conduct, not the County's conduct, deprived Lexon of the option to complete performance, because TCD allowed Avalon to fall into foreclosure. See, *Hunt Constr. Group, Inc. v. Nat'l Wrecking Corp., 542 F. Supp. 2d 87 (D.D.C. 2008)* (relieving a surety of liability where the obligee's unreasonable conduct deprived surety of its contractual option to complete performance). Furthermore, Avalon's foreclosure did not materially alter Lexon's contractual risk. Foreclosure is a risk that Lexon freely could contract and exact premiums for in bonding [**5] TCD's performance. See *Interstate Equip. Co. v. Smith, 292*

N.C. 592, 234 S.E.2d 599, 601 (N.C. 1977) ("[I]n entering into the contract the surety is chargeable with notice . . . [of all] factors to be considered in determining the risk, and upon which the surety fixes the premiums exacted for executing the bond.") (internal citations omitted).

B.

Lexon also argues that this action should be stayed pursuant to North Carolina's Permit Extension Act of 2009. However, the Permit Extension Act specifically does not apply to bond obligations. See 2010 N.C. Sess. Laws 177 Section 5(8) ("This act shall not be construed or implemented to . . . [m]odify any person's obligations or impair the rights of any party [*193] under contract, including bond or other similar undertaking."). Therefore, Lexon's argument that its obligations under the Bonds should be extended fails because the Permit Extension Act, on its face, is inapplicable to the Bonds.

C.

In its final argument, Lexon maintains that the district court erred in awarding prejudgment interest to the County. Lexon did not raise this issue before the district court. "[I]ssues raised for the first time on appeal generally will not be considered . . . [except] in very [**6] limited circumstances, such as where refusal to consider the newly-raised issue would be plain error or would result in a fundamental miscarriage of justice." *Muth v. United States, 1 F.3d 246, 250 (4th Cir. 1993)* (internal citations omitted). We find that the district court did not plainly err in relying on controlling North Carolina law to award prejudgment interest. See *N.C. Gen. Stat. Ann. § 24-5* ("In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach."); *Interstate Equip. Co., 234 S.E.2d at 601* (charging surety with prejudgment interest because "[t]he trend in North Carolina is . . . toward allowing interest in almost all cases involving breach of contract, and where the amount of damages can be ascertained from the contract, interest is allowed from the date of the breach").

III.

For the foregoing reasons, we affirm the order granting summary judgment in favor of the County.

AFFIRMED