

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Hilts Construction, LLC,

Plaintiff,

v.

Fredric C. Worix and Melissa Worix,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-26-01706

FINAL ORDER

RECEIVED
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SC Court of Appeals

This case was tried before me without a jury on March 17, 2022. At this hearing, Plaintiff Hilts Construction, LLC was represented by Charles B. Jordan, Jr., Esquire of Myrtle Beach, South Carolina. Defendants Fredric C. Worix and Melissa Worix were represented by Austin Thomas, Esquire of Myrtle Beach, South Carolina.

This matter concerns the foreclosure of a mechanic's lien, breach of contract, and quantum meruit for work claimed to be performed by Plaintiff at Defendant's residence. Defendants' claimed various set-off's from Plaintiff's claims and brought counterclaims for breach of contract, breach of warranty, and violations of the Unfair Trade Practises Act found in S.C. Code §39-5-10, et.seq. Both sides also requested attorneys' fees under the Mechanic's Lien Statute (S.C. Code §29-5-10.) Plaintiff and Defendants presented testimony on their respective behalf.

FINDINGS OF FACT

This Court finds the following facts by a preponderance of the evidence.

1. At all times relevant herein, Defendants were the owners of that residential property located at 700 Elm Street, Conway, South Carolina and more particularly described as:

All and singular that certain piece, parcel, or lot of land, together with the improvements thereon, located in Conway, Horry County, South Carolina, and being shown and designated as Lot 3; at the northeast corner of Elm Street and

7th Avenue, on the plat prepared by S.D. Cox recorded in Plat Book 1 at Page 890, records Horry County. PIN: 338-13-04-0054. (the "Property").

2. Plaintiff is a South Carolina limited liability company and a licensed residential builder.

3. On September 19, 2018, the parties entered into a written agreement ("Agreement") whereby Plaintiff agreed to build a detached garage for Defendants. This Agreement was entered into evidence as Plaintiff's exhibit 1. The Agreement sets forth the general scope of work to be performed by Plaintiff on the Property. The Agreement also sets forth a draw schedule under which Defendants were to make periodic payments to Plaintiff.

4. Plaintiff, with the consent and permission of Defendants, timely began work on the detached garage. Plaintiff performed all of its work through the electrical rough-in stage. Defendants paid Plaintiff the initial deposit and Draw #1 under the Agreement. Defendants, however, did not pay Plaintiff Draws #2 in the amount of \$11,000, Draw #3 in the amount of \$7,000, and Draw #4 in the amount of \$7,000. Under the Agreement, Defendants owe Plaintiff these three draws totaling \$25,000.00

5. In addition to the scope of work set forth in the Agreement, Plaintiff also performed additional work for Defendants. This additional work is set forth in those documents entered as Change Order #1, Change Order #2, Change Order #3, Change Order #5, Change Order #9, and Change Order #10. The Agreement does provide that all increases to the cost of the work shall only be by a written authorization signed by Defendants. This court finds that although these change orders are not signed by Defendants, Defendants nonetheless knew of and consented to these changes orders.

6. Although Plaintiff did perform the work specified in the above changes orders, this Court finds that Plaintiff did not perform a portion of this work in a workmanlike manner and

therefore Defendants cannot be responsible for the payment of the same. Specifically, this court finds that the work performed under Change Order #3 (Plumbing), Change Order #9 (Electrical), and Change Order #10 (Electrical) was deficient. Therefore, the only change orders for which Plaintiff is entitled to compensation are Change Order #1 (demolition of wooden shed) in the amount of \$1,785.00, Change Order #2 (exterior door) in the amount of \$244.00, and Change Order #5 (front and rear eyebrows) in the amount of \$2,615.00. The total amount owed from Defendants to Plaintiff for the change orders is \$4,644.00.

7. In performing its work, Plaintiff damaged the public sidewalk in front of the Property. Defendants had this damage repaired at a cost of \$625.

8. On or about December 9, 2018, Defendants instructed Plaintiff to cease work on the Property and to no longer perform any work under the Agreement or otherwise. Plaintiff last performed work on the Property and under the Agreement on or about December 9, 2018.

9. Defendants subsequently hired 1st Source Solution, LLC to complete the work under the Agreement and to perform additional work for Defendants.

10. Plaintiff timely filed and served its notice of mechanic's lien in the amount of \$39,250.15 on January 31, 2019, with the Horry County Register of Deeds in Mechanics' Lien Book 262 at Page 291.

11. Plaintiff filed its complaint in this matter to, among other things, foreclose its mechanic's lien on March 19, 2019.

12. On September 24, 2020, the parties entered into an "Escrow Agreement and Disbursal of Funds" whereby Plaintiff agreed that Defendants could deposit one and one-third times the amount of the mechanic's lien with an escrow agent pursuant to S.C. Code Ann. § 29-5-110 and in return Plaintiff would release the mechanic's lien to allow Defendants to sale the

Property. Defendants made the required deposit, and Plaintiff released the Property from the mechanic's lien on October 6, 2020. Pursuant to that Order Granting Defendants Motion to Deposit Funds into Trust Account filed on May 19, 2021, these funds totaling \$52,333.53 are being held in the trust account of Defendants' attorney, J. Austin Thomas, and are to remain in trust until ordered by the Court.

13. On February 24, 2021, Defendants timely filed an Offer of Settlement pursuant to S.C. Code Ann. § 29-5-20(C) in the amount of \$12,000.

14. On July 1, 2021, Plaintiff timely filed an Offer of Settlement pursuant to S.C. Code Ann. § 29-5-20(C) in the amount of \$25,000.

15. On February 18, 2022, Defendants timely filed an Offer of Settlement pursuant to S.C. Code Ann. § 29-5-20(C) in the amount of \$14,000.

16. On March 4, 2022, Plaintiff untimely filed an Offer of Settlement pursuant to S.C. Code Ann. § 29-5-20(C) in the amount of \$22,400.

CONCLUSIONS OF LAW

This Court, therefore, finds and concludes as follows:

Mechanic's Lien:

Plaintiff brought a Mechanic's Lien action pursuant to S.C. Code Ann. § 29-5-10. In order to prevail on this cause of action, Plaintiff must show that it performed labor and provided materials that were actually used in the erection, alteration, or repair of a building or structure upon real estate for which it has not been compensated. S.C. Code Ann. § 29-5-10. I find that Plaintiff has a valid mechanic's lien and that this lien has attached to the escrowed funds pursuant to S.C. Code Ann. § 29-5-110.

I find that Plaintiff has performed that labor and provided those materials through Draws Requests #'s 2, 3, and 4 and Change Orders #'s 1, 2, and 5. I further find that Defendants are entitled to a set-off or credit for \$625 expended by Defendants to fix the sidewalk damaged by Plaintiff. Therefore, I find that Plaintiff is entitled to the enforcement of a mechanic's lien in the amount of \$29,019.00.

Defendants argue that a portion of Plaintiff's lien contains profit and overhead expenses which are not recoverable under *Zepa Construction v. Randazzo*, 357 S.C. 32, 591 S.E.2d 29 (Ct.App.2003). Plaintiff admits that it charges 17% profit and overhead on all labor performed and material provided in the construction. *Zepa* is not controlling in this matter. In *Zepa*, the contractor sought to recover lost profits and overhead as a specific separate item apart from the actual labor and materials furnished for the project at issue. The Court of Appeals did not allow this recovery. In this case, Plaintiff is not seeking to recover profit and overhead as a separate measure of damages separate from the labor and material provided to the Property.

The rule in South Carolina is that overhead and profit are recoverable under a mechanic's lien action "when they are included in a contract price or are reflected in the reasonable value of labor or materials furnished." *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 352, 338 S.E.2d 631, 634 (1985). Here, the overhead and profit sought by Plaintiff are not separate items but are part of the reasonable value of the labor and materials furnished by Plaintiff and are thereby recoverable.

For these reasons, I find that Plaintiff has established its mechanic's lien in the amount of \$29,019.00.

Breach of Contract:

In order to prevail on a claim for breach of contract, the plaintiff must allege and prove: (1) a binding contract entered into by both parties, (2) the breach of or unjustifiable failure to perform the contract by the defendant, and (3) damages suffered by plaintiff as a direct and proximate result of the breach. *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962). A party who seeks to recover damages for breach of a contract must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready, and willing to perform it. *Mozingo & Wallace Architects, L.L.P. v. Patricia Grand, Ltd. P'ship*, 379 S.C. 478, 484, 666 S.E.2d 267, 270 (Ct.App.2008). The proper measure of damages in a breach of contract case is to place the non-breaching party in the position he would have been had the breach not occurred. *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct.App.1996).

Both parties concede that the signed Agreement is a valid and binding contract. However, I conclude that both parties have breached this contract, and, as a result, neither party is entitled to an award of damages.

Pre-judgment Interest:

Plaintiff has requested pre-judgment interest on the full amount of the award. Defendant argues that the sums found to be due to Plaintiff are not certain enough to be awarded interest. Section 34-21-20(A) of the South Carolina Code provides that “In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum.” “The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions

existing at the time the claim arose." *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006).

This Court finds that the amount of the three unpaid draws totaling \$25,000 is sufficiently ascertainable to draw prejudgment interest under S.C. Code Ann. § 34-21-20(A). This Court further finds that the uncertainty associated with the change orders, and particularly the lack of Defendants' express agreement as to the amount of the change orders as required under the Agreement, renders any award based upon the changes orders to be sufficiently uncertain so as to deny the request for prejudgment interest. Therefore, based upon Plaintiff's Affidavit of Interest dated March 16, 2022, this Court awards prejudgment interest only upon the three Draw Requests for \$7,018.23.

Attorney's Fees and Costs:

Plaintiff has also requested that this Court award attorneys fees in the amount of \$22,471.22. S.C. Code Ann § 29-5-10(a) states, "The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party. The fee must be determined by the court in which the action is brought but the fee and the court costs may not exceed the amount of the lien." The statute further provides that any party may serve and file an Offer of Settlement on the opposing party specifying the amount, exclusive of interest and costs, which the party serving the offer is willing to agree constitutes a settlement of the lien and the party whose offer is closer to the verdict reached is considered the prevailing party in the action. On July 1, 2021, Plaintiff timely filed an Offer of Settlement pursuant to S.C. Code Ann. § 29-5-20(C) in the amount of \$25,000. (Plaintiff's Offer of Settlement filed on March 4, 2022, was untimely and not considered by this court.) Defendants' filed their most recent Offer of Settlement on February 18, 2022, in the amount of \$14,000. This

Court's award of \$29,019.00 is closest to Plaintiff's Offer and therefore, Plaintiff is the prevailing party.

Having determined that Plaintiff is the prevailing party, the award of attorney's fees under the statute is mandatory. *T.W. Morton Builders v. Von Buedingen*, 316 S.C. 388, 450 S.E. 2d 87 (Ct.App.1994). However, the amount of the award is left to the sound discretion of the trial judge. See *Keeney's Metal Roofing, Inc. v. Palmieri*, 345 S.C. 550, 553 S.E.2d 900 (Ct. App. 2001).

At trial, Plaintiff sought total damages under the mechanic's lien statute in the amount of \$34,966 and total fees and costs of \$23,597.72. However, this Court only granted judgment in favor of Plaintiff in the amount of \$29,019. This Court determines that Plaintiff's recovery of its fees and costs should be reduced proportionately to \$19,584.23.

Defendants' Counterclaims:

Defendant brought counterclaims for breach of contract, breach of warranty, and violation of the unfair trade practices act. Except as otherwise set forth above, this court denies any relief to Defendants under these causes of action. This Court has determined that both parties breached the contract and that neither is entitled to any damages for breach of contract. As to breach of warranty, this Court has declined to allow Plaintiff to recover for the defective work it performed related to the plumbing and electrical change orders. No other defective work was cited by Defendant at trial. Finally, as Defendants' claim for violation of the Unfair Trade Practise Act, Defendant has not carried its burden of proof.

THEREFORE IT IS HEREBY ORDERED:

A. Plaintiff is awarded judgment against Defendants on its claim for mechanic's lien in the principal sum of \$29,019;

B. Plaintiff is awarded prejudgment interest against Defendants in the sum of \$7,018.23;

C. Plaintiff is awarded attorneys fees and costs against Defendants in the sum of \$19,584.23;

D. All other causes of action by either party are denied; and

E. Within fifteen days of the filing of this order, Defendants' attorney, J. Austin Thomas, shall pay over to Plaintiff in partial satisfaction of this judgment those funds being held by him pursuant to the Order Granting Defendants Motion to Deposit Funds into Trust Account.

AND IT IS SO ORDERED.

Entered this ____ day of _____, 2022.

The Honorable H. Steven DeBerry



Horry Common Pleas

Case Caption: Hiltz Construction LLC VS Fredric C Worlax , defendant, et al

Case Number: 2019CP2601706

Type: Order/Other

H. Steven DeBerry, IV

Circuit Court Judge 2771