

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Henry W. Brown
Special Referee

Appellate Case Number 2019-000513

Brown Contractors, LLC, under S.C. Residential Builders License No. 20378, ...
.....Appellant/Respondent,

v.

Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin and Amy Salzhauer, ...
.....Respondents/Appellants.

And

Andrew McMarlin and Amy Salzhauer, ...Respondents/Appellants,

v.

James Brown, IV and Brown-Meihaus Construction Co., LLC, ...Third-Party Defendants.

**APPELLANTS' FINAL REPLY BRIEF
OF RESPONDENTS/APPELLANTS**

Robert T. Lyles, Jr. (SC Bar # 10299)
Lyles & Associates, LLC
1037 Chuck Dawley Blvd., Suite G-100
Mt. Pleasant, SC 29464
843.577.7730
rtl@lylesfirm.com
Attorneys for Respondents/Appellants

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STATEMENT OF THE CASE

This action was instituted by Jay Brown, and his company Brown Contractors, LLC (collectively “Brown”, Appellants/Respondents), with the wrongful filing of a mechanics lien against the property of Amy and Andy McMarlin, Respondents/Appellants (R. pp. 656-659). Brown asserted claims for foreclosure of a mechanic’s lien and breach of contract, alleging an entitlement to payment for work he performed on the McMarlin’s home on Sullivans Island, SC (the “Home”). Brown claimed a total of \$206,428.59.

The McMarlins answered (Amended Answer, R. pp. 33-47), denying any liability to Brown, alleging that the lien was defective because Brown was not properly licensed and counterclaimed for overpayment and for the costs associated with the completion of the Home and for the repairs to defectively performed work. Ultimately, the McMarlins claimed damages totaling \$727,361.56.

The parties submitted the claim to a Special Referee by Order dated June 21, 2016 (R. pp. 1-2). The matter was tried before the Special Referee from November 7 to 10, 2017 and December 13, 2017 and the Special Referee issued an Order dated May 1, 2018 (R. pp. 3-19). In that Order, he found that Brown was not properly licensed and that his ostensible “qualifier,” Vuong Nuguyn, was not an employee of Brown Construction, LLC or in responsible charge of construction. Therefore, the Special Referee found the mechanic’s lien to be invalid and he denied Brown’s claim. He found in favor of the McMarlins as to their counterclaim and awarded damages totaling \$346,693.00.

The parties subsequently filed motions pursuant to Rule 59, filed May 11, 2018 (R. pp. 71-96, pp. 97-103). The McMarlins also filed an affidavit of attorneys’ fees (R. pp. 104-110). On

February 25, 2019, the Special Referee denied the parties Rule 59 motions and awarded the McMarlins attorneys' fees totaling \$133,161.00 by Order filed February 25, 2019 (R. pp. 22-25).

This appeal follows and the parties filed notices of appeal dated March 27, 2019 and March 29, 2019. Both parties filed Initial Briefs and Designations of Matter on June 24, 2019. Respondents/Appellants submit this initial brief in reply to Appellant/Respondent's Initial Brief.

STANDARD OF REVIEW

"When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law, and the appellate court will not disturb the special referee's findings of fact as long as they are reasonably supported by the evidence." *Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 649, 748 S.E.2d 801, 804 (Ct. App. 2013) (internal quotation marks omitted).

ARGUMENT.

I. Brown Misapplies *16 Jade Street, LLC V. r. Design Constr. Co.*, 405 S.C. 384, 747 S.E.2d 770 (2013).

In his Initial Brief, Brown makes a number of arguments but in sum, he argues that A) the Special Referee erred in holding that the licensing requirements of the LLR were relevant and controlling; B) that Brown was properly licensed in that he had a valid qualifier and a valid Certificate of Authorization. Each of those essential arguments are addressed herein.

A. Brown misapplies *16 Jade Street*, which is irrelevant to the issue of whether Brown was properly licensed and, therefore, entitled to payment. *16 Jade Street* concerns whether LLR regulations confer a private right of action. The issue addressed by the Special Referee was the McMarlins' *defense* to Brown's claim for payment based on the fact that Brown was not properly licensed, not whether or not the McMarlins had a claim against Brown because he was improperly licensed.

The law of South Carolina is crystal clear that a contractor who is not properly licensed when he performs a job has no right to be paid. Section § 40-59-30, *S.C. Code, Ann.*, prohibits an unlicensed residential builder from filing a mechanic's lien. The statute provides, in relevant part, as follows:

(B) Notwithstanding Section 29-5-10, or another provision of law, a person or firm who first has not procured a license or registered with the commission and is required to do so by law may not file a mechanics' lien or bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the person or firm entered into in violation of this chapter.

This is also clearly expressed in numerous cases. See, *Lenz v. Walsh*, 362 S.C. 603, 607, 608 S.E.2d 471, 473 (Ct. App. 2005) ("South Carolina courts have held that, pursuant to the statute, a builder who is not licensed at the time he enters into a contract for residential construction may not bring an action to enforce the provisions of the contract); and *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 57, 742 S.E.2d 359, 361 (2013). *16 Jade Street* did not change that law and is irrelevant with respect to that issue. The Special Referee's finding that Brown was not "properly licensed" is fully supported by the facts and should not be disturbed.

Here, Brown was not properly licensed. Brown had no license that would have enabled him to pull the permit or perform the work he contracted with the McMarlins to perform (and was actually paid to perform because Brown did not disclose that he was not licensed to the McMarlins). The only way to have become "properly licensed" was for Brown to have *honestly* followed the requirements of the LLR to use the license of a qualifier. The evidence supports the Special Referee's finding that Brown failed to do that.

The statutory regulations for use of a qualifying license are clear. The qualifier (here, Vuong Ngyuen or "Ngyuen") has to either be 1) an owner or member of the contracting firm; or 2) an employee in responsible charge of construction. Section § 40-59-410, authorizes an

individual residential home builder or specialty contractor to practice through a firm¹ offering those residential building services. However, to become “properly licensed” in this way requires that the following conditions be met:

(1) one or more of the corporate officers in the case of a corporation, or one or more of the *principal owners in the case of a firm, or one or more employees are designated as the resident licensee in responsible charge* of each principal or branch office for the building services regulated by the commission and are licensed under the provisions of this chapter;

(2) the firm has obtained an executed surety bond approved by the commission in the sum of fifteen thousand dollars initially and as subsequently provided by regulation; **and**

(3) the firm has been issued a residential business certificate of authorization by the commission. Nothing in this section may be construed to mean that a license or registration to practice residential home building, residential specialty contracting, or home inspecting may be held by a firm.

Ngyuen was not an owner, as Brown was the sole member of Brown Contractors, LLC. Ngyuen was also not an “employee” and was not in “responsible charge of construction”. Ngyuen was a subcontractor and was paid as a subcontractor for Brown and billed the McMarlins as a subcontractor, even including overhead and profit for himself on the McMarlin job. (Jay Brown Trial Testimony, R. pp. 169-172, p. 175). Further, Ngyuen was not in responsible charge of construction. Brown admitted that he was in charge of construction and that he had the right to hire and fire Ngyuen at will (Jay Brown Trial Testimony, R. p. 134, lines 23-24).

As found by the Special Referee, Brown was not properly licensed and was therefore not entitled to payment and his claim was properly denied.

B.

¹ “Firm” means a business entity functioning as a sole proprietorship, partnership, limited liability partnership, professional association, professional corporation, business corporation, limited liability company, joint venture, or other legally constituted organization which offers or provides building services through licensed residential builders, residential specialty contractors, or home inspectors. § 40-59-400.

1. Since the evidence was clear that Ngyuen does not fit the statutory requirements of a qualifier under the applicable statute, Brown resorts to other, inapplicable statutes and argue that under those statutes, Ngyuen would be considered an “employee,” and would then satisfy the requirements of the LLR qualifier statute. (LLR documentation, R. pp. 640-683)

To make that argument, Brown is curiously forced to argue now that since Ngyuen could be fired by Brown, he would thus be an “employee” for workers compensation and other purposes, and thus fits the statutory requirement for a qualifier to enable Brown to use the Certificate of Authority. That argument actually supports the McMarlins’ case and is a basis to affirm, not reverse, the Special Referee.

The point of the Certificate of Authority requirements is to ensure that the person whose license is used to pull the permit is *in charge* of construction for the company for whom the qualifier is employed. Here, the person *in charge* at all times was Jay Brown, who was unlicensed. The fact that the person who is licensed, Nyguen, is actually being controlled and could be fired by the unlicensed person, is what the qualifier statute seeks to avoid, not encourage.

Nyguen was not an employee or in responsible charge of construction for Brown and does not satisfy the statutory requirement to be a qualifier. It is irrelevant whether the Workers Compensation Commission or the IRS may deem him an employee for their purposes.

2. Furthermore, as explicitly found by the Special Referee, even if Brown’s Certificate of Authorization were somehow valid, it was not timely since it was not obtained until *after* Brown offered contractor’s services to the McMarlins and began the McMarlin job, meaning he was in violation of the statute. Specially, the Special Referee found as follows:

The application submitted to the state office of Labor License and Regulation in support of Brown’s request for a certificate of authorization is Defendant’s Exhibit

5. *In that exhibit, Brown and the license holder, Mr. Nguyen, both attest that Mr. Nguyen is an employee of Brown Contractors, LLC [which as noted above is not true]. The application lists license number 20738 (Nguyen's license) as the qualifying license, and the application is dated June 6, 2012. The COA was first issued in January 2013. Defendants' Exhibit 3 is a COA with an issue date of April 16, 2014 (R. p. 652). There is no suggestion that Brown Contractors, LLC had been issued a COA at the time work commenced on the McMarlin home, no later than August 2012. On Brown's pay applications (R. pp. 845, 902-903, 905-906) the contract date is stated to be January 23, 2012, five (5) months before an application for a COA was submitted to the state's licensing board.*

The Special Referee's findings in this regard are fully supported by the evidence.

CONCLUSION

For the reasons set forth above, the findings of the Special Referee with respect to the Brown's failure to be properly licensed and the resulting denial of his claims is fully supported by the evidence and should be affirmed.

s/Robert T. Lyles, Jr.

Robert T. Lyles, Jr. (SC Bar # 10299)
Lyles & Associates, LLC
1037 Chuck Dawley Blvd., Suite G-100
Mt. Pleasant, SC 29464
843.577.7730
rtl@lylesfirm.com
Attorneys for Respondents/Appellants

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