THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jun 21 2022

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Henry W. Brown
Special Referee

Unpublished Opinion No. 2022-UP-175
Filed April 20, 2022
Petition for Rehearing Denied May 19, 2022

Appellate Court Case No. 2019-000513
Trial Court Case No. 2014-CP-10-3881

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, LLC,

.....Third-Party Defendants.

BROWN CONTRACTORS' PETITION FOR CERTIORARI

The Appellant/Respondent Brown Contractors, LLC ("Petitioner" or "Brown Contractors") submits this petition for rehearing pursuant to Rule 242(a), South Carolina Appellate Court Rules ("SCACR").

CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, the undersigned counsel for Petitioner certifies that a *Motion for Rehearing* was made and ruled upon by the South Carolina Court of Appeals on May 19, 2022.

QUESTIONS FOR REVIEW

1. Did the Court of Appeals err in not considering, applying or distinguishing the Supreme Court's opinion in *16 Jade Street, LLC v. R. Design Constr. Co.,* 405 S.C. 384, 747 S.E.2d 770 (2013) in its decision, in contravention of S.C. Const. Art. V, § 9?

2. Did the Court of Appeals err in allowing the Respondents to preserve their damages claim, even though the Court of Appeals held that the Respondents never complied with S.C. Code § 49-59-810 (*The South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act).*

3. Did the Court of Appeals err in awarding attorneys' fees to Respondents?

4. Did the Court of Appeals err in not considering the Petitioners' other arguments made to the Court?

ARGUMEMT

1.

The Special Referee determined that at the time the "contract" was entered between Petitioner and the Respondents, that the Petitioner Brown Contractors was unlicensed pursuant to S.C. Code Ann. §§ 40-59-30 and -20. Therefore, he found that Petitioner was *not* entitled to pursue a claim for damages or a mechanic's lien under S.C. Code Ann. § 29-5-10. [R. 006-009].

The Special Referee made this finding based on the Petitioner's June 6, 2012, ***application*** for licensure, submitted to the LLR's Residential Builders Commission well

in advance of Petitioner requesting the August 28, 2012 building permit [R. pp. 640-643, 0654]:

(i) First, the Special Referee held that Vuong Nguyen – the qualifier for Brown Contractors[1] – was listed on the application as an employee of Brown Contractors (which both James L. Brown IV and Nyguen attested to that fact on the application [R. 009]). The Special Referee however, said that: (a) Brown testified that Nguyen was a '1099 independent contractor' [*Id*.] and; (b) Brown's bookkeeper, Deborah Winner, testified that Brown Contractors had no employees [Order, p. 8]. Thus, the Special Referee found that the testimony established that "Ngyuen was not an employee of Brown, LLC [sic] within the intent of the statute." [R. 010].

(ii) The Special Referee also found that Nguyen did not meet the definition of the "role of resident licensee in responsible charge" as set out in Sections 40-59-400(5) and (6), because the qualifying party "may be in responsible charge of only one place of business at a given time," but Nguyen "was using one license for two places of business and this is in clear violation of the statute." [R. 010]. The Special Referee also found that "Brown not Mr. Nyguen was directing the building services to a successful completion and Brown, not Mr. Nyguen, was the person in responsible charge." [R. 009-010].

(iii) Thus, the Special Referee held that the COA was "issued in response to misrepresentations and false statements of fact" [Order, p. 8] and, accordingly, "Brown was not properly licensed at any time during the solicitation or performance of the McMarlin job." [R. 011].

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[1] Mr. Nguyen is a duly licensed South Carolina residential builder since 2004. James Brown did not hold a South Carolina residential building license and needed Mr. Nguyen as a qualifier.

The Petitioner appealed and argued to the Court of Appeals that this finding directly violates the provisions of the South Carolina Residential Homebuilders Act and further contradicts the clear and plain holding of *16 Jade Street, LLC v. R. Design Constr. Co*., 405 S.C. 384, 747 S.E.2d 770 (2013). to which the Court of Appeals must follow.

In *16 Jade Street*, the South Carolina Supreme Court expressly **rejected** the notion that Section 40-59-410 of the Residential Home Builders Act creates any legal benefit for private parties in circuit court. *Id*., 405 S.C. at 389-390, 747 S.E.2d at 773. In her opinion, Justice Hearn wrote:

> Based on this language, the circuit court concluded that as a resident licensee, Aten assumed professional responsibility for the project and, furthermore, that the use of the term professional responsibility "is broad enough to include civil liability."
>
> We reject this construction of the statute. Nothing in the language of the statute evinces a legislative intent to create such a legal duty**, nor was this statute enacted for the benefit of a private party**. The provisions in question concern the issuance of certificates of authorization for a company engaging in residential home-building, specialty contracting, or home inspection and serve essentially to define terms used within a subsection the Residential Home Builders Act. Section 40–59–410 of the South Carolina Code (2005) requires the company to identify a resident licensee in "responsible charge" of each principal or branch office. § 40–59–410(B)(1), (D), & (H). The statute therefore requires at least one person in each office of the company to be licensed and assume professional responsibility for the project. However, we disagree with the court's conclusion that professional responsibility is tantamount to civil liability. **The only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court.** *See* S.C. Code Ann. § 40–1–110(1) (2005) (listing the acts for which the licensing board can sanction a licensee, including when he "lacks the professional or ethical competence to practice the profession"); § 40–59–110 (2005) (stating additional grounds for which a residential contractor, specialty contractor, or home inspector can be sanctioned)).

Id. (emphasis added).

While *16 Jade Street* directly concerned whether a plaintiff could use § 40-59-410 to sue a resident licensee (i.e., qualifier) in tort, the principles in the opinion that the statute

was not "enacted for the benefit of a private party" and "the only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court" are directly applicable in the instant case. *Id*.

In spite of *16 Jade Street's* clear holding that the Residential Home Builders Act was "not enacted for the benefit of a private party" and that Residential Home Builders Act, the Special Referee nevertheless ignored it. He found that "*Jade Street* did not repeal the provisions of the licensing statute." [R. 011]. But this is a straw-man argument; the case specifically says that the statute was not "enacted for the benefit of a private party." 405 S.C. at 389-390, 747 S.E.2d at 773.

The Special Referee also held that "the delicts related to the use of the license are a matter to be dealt with by the licensing body, unless there are omissions by the individual license holder that would subject the licensee to liability for claims by the firm's wrongful conduct, independent of the license held." [R. 011]. This reasoning is included nowhere in *16 Jade Street*; to allow it to stand as the ruling of the circuit court would fundamentally do violence to the case's clear reasoning, which disagrees with the position that "professional responsibility is tantamount to civil liability." *Id*.

Finally, the Special Referee held that "[w]hile the qualifier may not be personally liable solely because he or she is the qualifier, the firm remains unable to enforce its contract or assert equitable claims if the firm fails to comply with the licensing statute." [Order, p. 9]. Once again, the Special Referee was driving a huge hole through the heart of *16 Jade Street's* blanket prohibition against the circuit court making findings of licensure, <u>when that function is clearly reserved to the licensure board</u>. 405 S.C. at 389-390, 747 S.E.2d at 773.

Each of these deficiencies by the Special Referee were pointed out to the Court of Appeals, saying that such any penalty for these findings **are to be meted out specifically by the appropriate licensing board, not a civil court.**

But rather than tackle *16 Jade Street's* holding head-on, however, in its opinion the Court of Appeals completely ignored *16 Jade Street*. Instead, the Court of Appeals went off in a completely different direction (than either the Special Referee had found, or the Petitioner argued); it said instead that "we are not persuaded by Brown's arguments that the solicitation was on behalf of Brown-Meihaus, a duly licensed builder." [2]

This begs the question – why did the Court of Appeals ignore this case, especially when the Special Referee was making his decisions based on the Petitioner's application – which under *16 Jade Street* is clearly for the Residential Builder Commission only? Either *16 Jade Street* controls – or it does not – but either way the Court of Appeals owed it to Petitioner to come down on one side or the other, and not avoiding the question altogether.

2.

The Court of Appeals also ruled that "Brown waived its right to notice and opportunity to cure by failing to make a motion to stay" under S.C. Code Ann. § 40-49-830 ("The South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act., also known as the "*Right to Cure Act*").

In doing so, the Court of Appeals relied on *Grazia v. S.C. State Plastering Co.,* LLC, 390 S.C. 562, 569-572, 703 S.E.2d 197, 200-202 (2010). Thus, the Court of Appeals

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[2] Brown-Meihaus was a previous company that James L. Brown was a member of; it was under the Brown-Meihaus license that James L. Brown met the Respondents to 'solicit' their business; and a Brown-Meihaus contract was sent to the Respondents (which was not signed).

held that Petitioner's "failure" allows the McMarlins to keep their damages, despite failing to comply with the Right to Cure Act (further notwithstanding the fact the McMarlins did not even bother to outline this position – or any position for that matter – in their Initial Response Brief to Petitioner's analysis of the Act in its Initial Brief).

In this case, a motion to stay would have made no difference, since the McMarlins proceeded to go ahead and do the work anyway. A similar incident was the principal basis for the holding in *Andrew and Kimberly McIntyre v. Seaquest Development Co*., 2016-CP-10-1833 (Charleston Court of Common Pleas, 2017) (Toal, J), cited by Petitoner—which the Court of Appeals did not reaching in 2017-001270 when it ruled on the arbitration issue instead.

In that decision, former Chief Justice Jean Toal held that any notice or stay under the Act must be obtained before the claimants engage in work; thus, any failure to take corrective action without the homeowners giving formal notice (and the right to inspect under the Act) means that the homeowners violated the Act. Consequently, the action of commencing repairs before notice is sent/received overcomes any need to make a motion stay by the builder. Again, this is what happened here. Does the Act apply strictly, or do the Builder and homeowner each have to do things? How long must the Builder file a motion to stay? The holding of *McIntyre v. Seaquest Development Co.* deserves to be examined by the Supreme Court.

Second, *Grazia* does not explicitly state that a builder "waives" its rights under the Act when it does not move to stay" particularly when the homeowners proceed with fixing the issues that should have been disclosed under the Act. Where is this "waiver" written into the General Assembly's Right to Cure Act? Why should it be the duty of the builder to rectify the homeowner's failures under the Right to Cure Act when case is now closed,

on appeal, and the homeowners fixed the problems during the pendency of the litigation? Why is the Right to Cure Act analyzed so loosely to find a waiver that isn't in the text of the Act?

3. & 4.

Not to belabor the point, but if the Supreme Court does accept *certiorari,* and if it then reverses the Court of Appeals as to the first ground argued supra, then the Court of Appeals' finding as to attorneys' fees must also change.

Moreover, the Court of Appeals did not rule on issues 3, 4 and 5 of the appeal, to which the Respondents did not argue against in their brief. For this reason, the Supreme Court should grant certiorari based on the grounds advanced in the Appellant's briefs.

Respectfully submitted,

/s Robert B. Varnado

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