

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-37-0415

Jerry Holtzclaw, d/b/a Green Thumb Landscape &
Irrigation..... Respondent,

v.

Dennis Waldrep..... Appellant

INITIAL BRIEF OF RESPONDENT

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MAY 28 2013

SC Court of Appeals

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TABLE OF CONTENTS

Statement of the Case.....1

Arguments

I. THE TRIAL JUDGE’S FINDINGS SHOULD NOT BE DISTURBED ON APPEAL IF REASONABLY SUPPORTED BY THE EVIDENCE.....2

II. THERE IS EVIDENCE WHICH REASONABLY SUPPORTS THE TRIAL JUDGE’S FINDINGS AWARDDING RESPONDENT JUDGMENT IN THE AMOUNT OF \$46,088.98 AND DISMISSING THE COUNTERCLAIM.....2

III. THE RECORDS DISCLOSES NO ERRORS OF LAW.....5

IV. ALLEGED INADEQUATE REPRESENTATION BY APPELLANT’S TRIAL COUNSEL GIVES NO GROUNDS FOR REVERSAL OR A NEW TRIAL.....6

Conclusion.....7

TABLE OF AUTHORITIES

Carolina Mechanical Contractors, Inc. v. Yeargin Constuction Co., 261 S.C. 1, 198 S.E.2d 224, (1973).....2

Crary v. Djebelli, 329 S.C. 385, 496 S.E.2d 21 (1998).....6

Koutsogiannis v. BB&T, 365 S.C. 145, 616 S.E.2d 425 (2005).....6

Lazer Construction Company v. Long, 296 S.C. 127, 370 S.E.2d 900 (S.C.App 1988).....6

Motley v. Williams, 374 S.C. 107, 647 S.E.2d 244 (S.C.App 2007).....6

Roberts v. Gaskins, 327 S.C. 478, 456 S.E.2d 771 (S.C.App 1997).....2

Stearns Bank v. Glennwood Falls, L.P., 373 S.C. 331, 644 S.E.2d 793 (S.C.App 2007).....6

Sterling Development Co. v. Collins, 309 S.C. 237, 421 S.E.2d 402 (1992).....2

Townes Associates, Ltd. V. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).....2

STATEMENT OF THE CASE

Respondent Jerry Holtzclaw, d/b/a Green Thumb Landscape and Irrigation, commenced this action by filing a Summons and Complaint on April 8, 2008, in the Court of Common Pleas for Oconee County. The Complaint sought judgment for money alleged to be owed by Appellant Dennis Waldrep for certain landscaping work done by Respondent at Appellant's residence on Lake Keowee. Appellant filed an Answer denying that any money was due Respondent; seeking a credit or setoff for certain labor and materials he allegedly paid from his own funds; and a counterclaim alleging breach of implied warranty of good and workmanlike service. A Reply filed June 10, 2008, denied the allegations of the counterclaim.

The matter came for trial before the Honorable R. Lawton McIntosh, Circuit Court Judge, on June 7-8, 2011, without a jury. An Order and Judgment was entered on July 22, 2011, granting Respondent judgment against Appellant in the amount of \$46,088.98 and dismissing the counterclaim. Appellant thereafter filed a Motion pursuant to Rules 52 and 59(e), SCRPC, seeking reconsideration of the Court's Order or, in the alternative, seeking to amend the findings of fact or to alter and amend the judgment. By Order filed February 21, 2012 the Court denied such Motion. Appellant served notice of intent to appeal on February 8, 2012. Respondent believes that Appellant learned from his counsel that the Court was denying his Motion for reconsideration and that he filed his notice of appeal before the Court's formal Order denying the Motion was filed.

ARGUMENTS

I. THE TRAIL JUDGE'S FINDINGS SHOULD NOT BE DISTURBED ON APPEAL IF REASONABLY SUPPORTED BY EVIDENCE.

An action for breach of contract seeking money damages is an action at law. Sterling Development Company v. Collins, 309 S.C. 237, 421 S.E.2d 402 (1992). Roberts v. Gaskins, 327 S.C. 478, 456 S.E.2d 771 (S.C.App 1997). In an action at law on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed unless found to be without evidence which reasonably supports the judge's findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). The appellate Court will review the record only to see if there is any competent evidence to support the findings of the judge. Carolina Mechanical Contractors, Inc. v. Yeargin Construction Co., 261 S.C. 1, 198 S.E.2d 224 (1973).

II. THERE IS EVIDENCE WHICH REASONABLY SUPPORTS THE TRIAL JUDGE'S FINDINGS AWARDED RESPONDENT JUDGMENT IN THE AMOUNT OF \$46,088.98 AND DISMISSING THE COUNTERCLAIM.

Respondent had owned and operated a landscaping business for a number of years and performed landscape maintenance on Appellant's home at Lake Keowee (T.7, 1.12-T.9, 1. 7). While doing maintenance at the Waldrep home he was approached by Appellant about making some improvements to the yard, including a retaining wall, sodding, and drainage improvements

to make the yard more attractive and functional (T.9, l. 25-T.11, l.18). As a result, Respondent made a proposal to Appellant for the work requested at a cost of \$15,485.40 (T.12, l. 20-T.13, l. 2). The proposal was accepted with little question. (T.20, l 5-T.21, l. 2; Pl. Ex. 1). Also, a contract was signed by the parties with reference to the proposal (Tr. 21, ll. 4-24; Pl. Ex. 2). No other written agreements were made between the parties (T.21, l. 25-Tr.22, l. 4). The work commenced in September, 2006 (T. 2, ll. 20-23). Shortly afterward, the scope of the job began to expand substantially as Appellant requested numerous additions (T.22, l. 24- T.38, l. 2; T.148, l. 2- T.149, l. 9). Once the scope of the original proposal changed, Respondent began periodically accounting to Appellant for his actual cost for materials and labor and received payments based on those accountings. These payments did not include any amounts for overhead, labor, profit or other compensation for Respondent, but only Respondent's out of pocket expenses (T.37, l. 21 – T.42, l. 22; Pl. Ex. 4). The job was completed in May, 2007 (T. 43, ll. 13-17). During that period, Respondent had no complaints with the work being done nor with the amount charged for the cost of labor and material incurred by the Respondent (T.42, l. 18- Tr. 43, l. 4). Respondent maintained receipts upon which he based the charges he made to Appellant for the costs incurred (T.45, l.19-Tr.46, l. 25). Respondent prepared a final statement for presentation to Appellant showing amounts paid totaling \$65,500.00 and a balance due of \$52,988.98 (P. Ex. 13). Respondent testified extensively as to the manner in which the statement was computed and prepared (T.47, l. 5 – T.67, l. 23). Respondent met with Appellant to present the statement and Appellant requested some time to look it over (T.68, l. 2- T.69, l. 9). At a subsequent meeting, Appellant indicated some issue with the hours charged on minor parts of the job and offered to pay Respondent \$20,000, a figure for which he gave no basis. (T.69, l. 10- T.70, l. 9). Respondent declined to accept that amount (T.70, l. 20-T.71, l. 8). After making

some adjustments to the amount claimed due by Respondent, including a \$3000 payment erroneously not credited to Appellant (T. 424, l. 1-T.425, l. 13) and some other specified adjustments, the trial judge found Respondent entitled to recover the sum of \$46,088.98. (Order, p.6). There is ample evidence, as cited herein, to support this finding.

With respect to the second defense set forth in the Answer, Appellant alleged he had directly paid for certain labor and materials from his own funds and should be credited for such payments (Answer, pp 1-2). However, Respondent testified that none of those expenses paid by Appellant had been included in his statement for the job (T.73, l. 3-T.75, l. 8), and there is no evidence of record to the contrary.

The Answer also asserted a counterclaim for damages arising from alleged defective irrigation work (Answer, pp 2-3). Respondent refuted those allegations in his testimony and stated that the irrigation system was tested and in good working order upon completion (T. 75, l. 9-T.78, l. 6). Ben Thrasher, who primarily did the irrigation work, also testified it was installed properly and was tested upon completion (T.149, l. 15-T.150, l. 6). The trial judge found that Appellant did not establish any defects in the irrigation and that most of the irrigation expense claimed by Appellant was related to maintenance. (Order, P. 5). There is ample evidence in the record to support this finding and dismissal of the counterclaim.

Appellant also sought to avoid the amount claimed due by Respondent by alleging that the walls constructed by Respondent were defective. Appellant submitted testimony from Henry Chandler a civil engineer. With respect to a wall abutting the house, Chandler testified he did not do a full scale evaluation other than it needed to be torn down and evaluated because it did not look like it was built to code (T.205, l. 15-T.206, l. 17). As to a larger wall, he testified that

based on information provided him by Appellant he concluded the wall was in “failure mode” and did not meet manufacturer’s specifications (T.208, l. 24- T. 209, l.12).

On cross-examination, Chandler testified he “didn’t do any investigation” of the walls and only took some photos so he could do a proposal (T.225, l. 23-T.22, l. 7). In testifying that the walls did not meet manufacturer’s specifications, he did not specifically cite or quote any certain specification, but he referred to the manufacturer’s website (T.243, ll. 6-8). On reply, Respondent introduced into evidence a copy of specifications from the manufacturer’s website (Pl. Ex. 17; T.450, ll. 21-24). Testimony of Ben Thrasher concerning the physical condition of the primary wall (which Chandler had opined was in “failure mode”) indicated that it was, contrary to the testimony Chandler, within the manufacturer’s specifications (T.451, l. 13-T.456, l. 24). The trial judge found that Chandler’s testimony was not credible and found the evidence did not establish any violation of the manufacturer’s specifications (Order, pp. 4-6). There is ample evidence of record to support such finding.

III. THE RECORD DISCLOSES NO ERRORS OF LAW.

In an action at law, tried without a jury, appellate review extends merely to the correction of errors of law. (Crary v. Djebelli, 329 SC. 385, 496 S.E.2d 21 (1998)). Appellant’s brief appears to argue that the trial judge committed error in finding Respondent to be entitled to compensation beyond the amount of the initial agreement because the written agreement of the parties required any modifications to be in writing.

However, it has been held that a written contract may be orally amended even when it explicitly provides that changes must be in writing, and this rule has been held to apply to

building and construction contracts. Lazer Construction Company v. Long 296 S.C. 127, 370 S.E.2d. 900 (S.C.App1988). In the present case, as in Lazer, supra., there is no allegation that any of the changes or additions were unauthorized. Instead, the evidence shows that the changes were requested by Appellant (T.22, l. 24-T.38, l. 2) and that he actually paid Respondent amounts well in excess of the original agreed cost (T.65, ll.10-12)

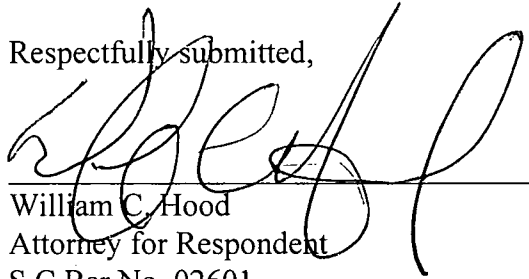
IV. ALLEGED INADEQUATE REPRESENTATION BY APPELLANT'S TRIAL COUNSEL GIVES NO GROUNDS FOR REVERSAL OR A NEW TRIAL.

Acts of an attorney are directly attributable to and binding upon the client. Motley v. Williams, 374 S.C. 107, 647 S.E.2d 244 (S.C.App 2007). Clients are generally bound by their attorneys' acts or omissions during the course of legal representation. Koutsogiannis v. BB&T, 365 S.C. 145, 616 S.E.2d 425 (2005). The rule that a client cannot rely upon his attorney's negligence as a ground for opening or vacating a judgment does not necessarily apply in the event of the attorney's abandonment or withdrawal. Stearns Bank v. Glenwood Fall, L.P., 373 S.C. 331, 644 S.E.2d 793, (S.C.App 2007). In the present case, there was clearly no abandonment or withdrawal by Appellant's trial counsel. The case was tried for two days, and post-trial motions were filed and argued by Appellant's counsel. (Order Denying Reconsideration).

CONCLUSION

There is ample evidence of record to support the trial judge's findings and money judgment in favor of Respondent, and Appellant has failed to establish any errors of law. Accordingly, the judgment of the trial court should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. C. Hood', written over a horizontal line.

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May 23, 2013

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v.

Dennis Waldrep..... Appellant

RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON
APPEAL

Respondent proposes the following to be included in the Record on Appeal:

1. Order and Judgment dated July 19, 2011.
2. Order Denying Defendant's Motion for Reconsideration dated February 16, 2012.
3. Complaint
4. Answer to the Complaint and Counterclaim
5. Reply
6. The following portions of the Trial Transcript:
 - P.5, l. 20-P.80, l. 1
 - P.143, l. 23-P.155, l. 7
 - P.182, l. 24-P.188, l. 11
 - P.203, l. 22-P.209, l. 12
 - P.222, l. 17-P.242, l. 19
 - P.246, l. 21-P.258, l. 24
 - P.350, l. 23-P.363, l. 23
 - P.402, l. 9-P.418, l. 22
 - P.428, l. 19-P.457, l. 24
 - P.468, l. 22-P.472, l. 8

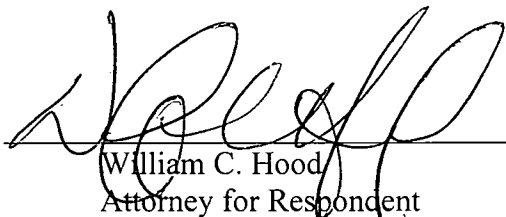
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7. Plaintiff's Exhibits 1, 2, 3, 4, 13, 14(photos 92 and 103 only), and 17.

I certify that this Designation contains no matter irrelevant to this appeal.

A handwritten signature in black ink, appearing to read 'W. Hood', is written over a horizontal line.

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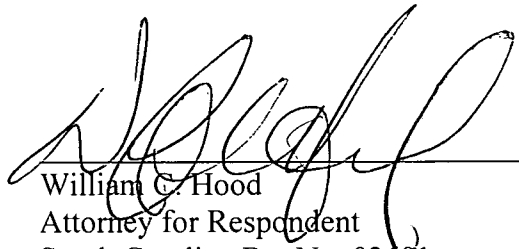
v.

Dennis Waldrep.....Appellant.

PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief, Designation of Matter to be Included in the Record on Appeal and Proof of Service on Appellant by depositing a copy of each in the United States Mail, postage prepaid, on May 23, 2013, addressed to Appellant at 209 Amethyst Way, Seneca, SC 29672.

May 23, 2013



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