

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

RECEIVED

Aug 31 2022

SC Court of Appeals

PALMETTO CONSTRUCTION
GROUP, LLC

Plaintiff,

v.

RESTORATION SPECIALISTS, LLC,
REUBEN MARK WARD, and
LYNNETTE PENNINGTON WARD,

Defendants.

Case No. 2016-CP-10-01143

ORDER DENYING DEFENDANTS'
MOTION TO DISMISS

- and -

ENTERING DEFAULT JUDGMENT

This matter came before the Court on January 31, 2022, for a default damages hearing and on Defendants' motion to dismiss. The matter had previously been scheduled for a default damages hearing on October 4, 2016, but was delayed by an appeal. That interlocutory appeal having been dismissed and the case remitted to this Court, I now rule as follows.

I. Motion to Dismiss

Defendants Restoration Specialists, Inc., Mark Ward, and Lynette Ward ("Restoration") moved for a dismissal of this action on April 21, 2021, contending that Plaintiff Palmetto Construction Group, LLC ("Palmetto") had been terminated and therefore lacked the ability to pursue this action.¹ Articles of termination were filed as to Palmetto by Joanne Eaddy on March 22, 2019. It appears from the evidence before me, however, that the termination (i) was not filed by Palmetto or anyone with authority to bind Palmetto, (ii) was filed in error by a third-party who believed they were terminating the ability of a dissolved Delaware entity to perform business (*see Eaddy Affidavit*), and (iii) Palmetto has been reinstated by the Secretary of State

¹ The Court assumes that this motion was properly brought despite (i) the default status of the movant and (ii) the filing of the motion prior to remittitur from the appellate courts. As this appears to be a question of subject matter jurisdiction, the Court addresses it herein.

retroactive to its original creation date (October 30, 2000) with the filing of Articles of Correction by Palmetto on December 8, 2021, notably with a name change to Palmetto Construction Group of SC, LLC. Moreover, as there is no record from the Secretary of State that Palmetto was ever dissolved as an entity, which is a pre-requisite for termination (*see* S.C. Code § 33-44-805(a) (“At any time *after dissolution* and winding up, a limited liability company may terminate its existence”)), the termination would be improper on that ground also. But this does not end the Court’s inquiry.

The Court has also considered whether a termination is irreversible, and whether Restoration can rely on the termination and estop Palmetto from contesting its motion. I find the answer in both cases to be no. S.C. Code § 33-44-207 permits a filed record to be corrected “if the record contains a false or erroneous statement or was defectively signed.” In this case, both are true, and the filer of the articles of termination erroneously stated that she was a fiduciary of Palmetto and signed as a fiduciary. The articles of correction are effective retroactively to the date of the record being corrected “except as to persons relying on the uncorrected record and adversely affected by the correction.” It is not clear to the Court that Restoration was entitled to rely on the filing given the pendency of this litigation (stayed while on appeal) and the absence of articles of dissolution, nor that it was adversely affected by the correction of the erroneous filing. But regardless, the correction would at the very least be retroactive to the December 8, 2021 date of the filing. As this motion was heard by the Court after that date, there is no basis for the Court to hold Palmetto as a terminated entity for purposes of this motion.

The Motion to Dismiss is **DENIED**.

II. Damages and Judgment

Palmetto requests \$2,618,508.55 in damages in the following categories (i) amounts due under the subcontract, (ii) share of profits due to Palmetto, (iii) amounts owed as indemnity from claims by surety, (iv) lost profits, (v) attorneys' fees incurred as a consequence of Restoration's conduct unrelated to the fees and costs of this action, and (vi) prejudgment interest.

At the January 31, 2022 damages hearing, Palmetto's witness, Mrs. Kassy Peterson,² presented testimony and evidence that this Court found highly credible and reliable, establishing the damage to Palmetto. Counsel for Defendants was afforded the opportunity to cross-examine Palmetto's witness and object to evidence per *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978).

After the hearing, Defendants filed a Motion to Exclude or Strike Evidence submitted to the Court; the Defendants' objection however was not contemporaneously made as the evidence was offered and therefore is waived. In any event, the Court finds the evidence to be relevant and admissible. See *State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (S.C. Ct. App. 2004).

Having fully considered the testimony and documentary evidence presented to the Court, Palmetto is awarded damages of **\$2,338,958.64** as detailed below.

A. **Background**

On November 28, 2011, Palmetto entered into a teaming agreement with Restoration Specialists, LLC, hoping to be awarded the contract for the construction of a parking garage for the VA Hospital in Augusta, Georgia. **Tab 2.**³ Restoration lacked the ability to obtain the

² Palmetto's controller of many years, including during the VA parking garage project.

³ The "Tab" numbers referenced in this Order correspond with the tabs of the binder of exhibits offered by Plaintiff during the damages hearing and filed with the Court.

requisite performance and payment bonds to be awarded the project, and so teamed with Palmetto who could obtain the bonds. In exchange for obtaining the bonds, Palmetto would receive a share of the project profits, estimated at around \$500,000-600,000. Restoration Specialists were to administer the project and interface with the federal government; Palmetto was to manage the construction. Subsequently, on September 10, 2014, Palmetto and Restoration Specialists entered into a subcontract agreement relating to concrete work for the project and memorializing the 50-50 profit share agreement. **Tab 3**.

As the job neared completion, Restoration Specialists stopped paying the subcontractors, despite having received payment from the federal government. The subcontractors then made claims against the payment bond (issued by The Hanover Insurance Group, **Tab 4**) in excess of \$1,000,000, and the surety then sought reimbursement from the guarantors, namely Palmetto, Restoration Specialists, the owners of Palmetto (John Kendle and Jay Handegan), Mr. Handegan's wife, and Defendants Mark and Lynnette Ward.

Palmetto filed suit against Restoration on March 7, 2016. Defendants were all personally served on March 14, 2016 and were placed in default on April 21, 2016 after failing to timely answer the complaint, and the case was referred to this Court for a damages hearing. A damages hearing was scheduled for June 6, 2016, but Defendants filed a motion for a continuance of the damages hearing as well as a motion to be relieved from default on June 3, 2016. In granting Defendants' motion for a continuance, the Court instructed Defendants' counsel to provide financial and banking records to Plaintiff sufficient to show what funds Defendants received from the VA and how those funds were used. Defendants produced certain financial records, but Plaintiff states, and the Court accepts, that no materials have been provided that demonstrate what amounts were received by Defendants from the VA and how those amounts were disposed

of. On July 11, 2016, Defendants filed a motion to compel arbitration.

Restoration's motion to be relieved from default was denied July 20, 2016. A damages hearing was then scheduled for October 4, 2016. Prior to the hearing, Defendants noticed an appeal of the order denying the motion to be relieved from default and the court's refusal to compel arbitration given Defendants' default status. The matter was then on appeal until remittitur to this Court on April 26, 2021.

Ultimately, Palmetto lacked the financial strength to pay on the guaranty; and, after claims were made on the bond, Palmetto could no longer obtain bonding and lost the majority of its work. Palmetto was forced out of business and its owners invested their personal assets into the company so it could finish the remaining projects it had started.

B. Amount Due on Subcontract

Palmetto claims amounts as due and owing for subcontract work Palmetto performed on the project, work for which Palmetto was never paid. Mrs. Peterson testified that this amounted to \$184,858.69 and was due as of September 15, 2015. Her testimony was supported by business records of Palmetto demonstrating that its total compensable costs were \$1,281,427.88, and it was paid only \$1,096,858.69. **Tab 8.** The Court finds this evidence credible and reliable and based on personal knowledge.

Restoration argues that the subcontract did not provide for payments to Palmetto above the original subcontract amount of \$1,082,342.10; however, that amounts were due under the subcontract was alleged in Palmetto's complaint, was admitted when Defendants went into default, and cannot now be contested. Further, the Court finds that the parties conduct indicates an agreement that Palmetto was due its total costs of the work. Accordingly, the Court awards Palmetto the balance of **\$184,858.69** due under the subcontract.

C. Share of Profits

The subcontract between Palmetto and Restoration includes a page entitled “PCG Subcontract Breakdown,”⁴ establishing that Palmetto would be entitled to 50% of the profits earned by the project. The testimony during the hearing established that the initial estimated profit on the job was in the \$500,000-600,000 range, because of changes in the work that expanded the scope of the work and increased the contract sum by over \$2,000,000, the estimated profit grew to around \$1,000,000.

Palmetto, using the records produced by Restoration in this action (**Tab 7A**), calculated a total job cost to be \$7,748,504.34. **Tab 7.** Palmetto used two separate approaches to calculate the job cost, both methods arriving at the same cost to the cent. *Id.* The Court finds Palmetto’s methods and calculation credible and reliable and based on both personal knowledge and Defendants’ own records. Further, the Court finds the calculation of job cost to be conservative (*i.e.*, erring on the side of greater cost and therefore less profit), because in reaching this number, Palmetto included \$531,980.80 of costs Restoration claimed it incurred, despite the absence of any evidence that Restoration actually paid those costs or that those costs related to this project.

Defendants’ counsel cross-examined the witness and objected to Plaintiff’s evidence and, during summation, argued that the lack of specificity about the amount of damages in the complaint was an obstacle to this Court awarding the requested damages. However, Mrs. Peterson testified that Defendants refused to provide accounting records during or after the job from which Palmetto could determine the financial status of the job or of Defendants. It is hard for this Court to imagine penalizing Palmetto when documents that were ordered produced were

⁴ Section 16.1.4.2.1 of the subcontract establishes that the “PCG Subcontract Breakdown” formed part of the subcontract itself.

not produced, and when any uncertainty about the job's profitability stems from the failure to produce those documents in compliance with the Court order and a lack of discovery given Defendants' default status. Defendants cannot now benefit from this uncertainty. *See Champion v. Whaley*, 280 S.C. 116, 121–22, 311 S.E.2d 404, 407 (1984) (“The defendant cannot take advantage of the uncertainty created by his own wrongdoing.”).

The Court therefore finds as follows: the total contract price for the job was \$8,199,283.96. **Tab 7B**, page 2. Subtracting the job costs of \$7,748,504.34 yields a profit of \$450,779.62. Palmetto is awarded 50% of that profit, or **\$225,389.81**.

D. Indemnity From Claims by the Surety

The Indemnity Agreement signed by the bond guarantors states that “[p]ayment shall be made to the Surety by the Indemnitors *as soon as liability exists or is asserted against the Surety, whether or not the Surety shall have made any payment therefor.*” (emphasis added). Palmetto alleged an entitlement to legal and equitable relief as a result of the myriad subcontractor claims against the surety bond in its complaint.

Plaintiff introduced into the record two letters sent to it by the surety, one from September 30, 2016, and another from January 24, 2022, demanding payment from the indemnitors. **Tab 9**. The Court finds this evidence credible and reliable. As of the September 30, 2016 letter, the surety had paid \$1,186,501.71 in claims; as of the January 24, 2022 letter, that amount had grown to \$1,307,978.71.

The Court awards Palmetto **\$1,307,978.71**.

E. Lost Profits

Palmetto requests \$250,000 in lost profits (other than on this project) as a result of being forced out of business by the conduct of Restoration. Mrs. Peterson testified that Palmetto lost

profits as the natural consequence of Restoration's conduct, and that the requested amount of lost profits was extremely conservative, because (i) Palmetto lost out on over \$500,000 in profits on three specific projects in 2016-2017, projects Palmetto did or would have won outright in the bid market but, because it could not get a bond following Restoration's failure to pay subcontractors, had to team with other contractors and share the profits with them; (ii) Palmetto, whose overhead was that of a company doing approximately \$20mm in annual business but could obtain bonds only up to \$17mm in 2016, was poised to break into the \$20mm-23mm bonding range, which would not require an increase in overhead and therefore would significantly increase profits; and (iii) the construction market in Charleston, South Carolina has boomed since 2016, whereas it was still in recovery in the years 2014-2016. Instead of asking for lost profits based on these factors, however, Palmetto instead requested a smaller amount, representing the average of its 2014 and 2015 profits (approximately \$50,000, **Tab 11**) for each of the last five years, or \$250,000.

The Court finds that the calculation of lost profits is too speculative and finds insufficient evidence in the record regarding the timing and other potential causes for the failure of Palmetto's business. Accordingly, the Court declines to award these lost profits.

F. Consequential Legal Costs

Palmetto requests \$29,564.91 in attorneys' fees and costs in matters unrelated to this one stemming from its failure as a business as a result of Restoration's conduct. **Tab 10**. For the same reasons as stated above regarding lost profits, the Court declines to award these damages.

G. Interest

Palmetto requests prejudgment interest on only two categories of its damages, as follows: \$83,674.28 as to the amounts due on the subcontract, and \$537,057.15 on the amount to

indemnify Palmetto from claims by the surety. **Tab 12.** The Court finds Palmetto is entitled to these amounts, which are both conservative calculations of interest due on sums that were demandable and certain for at least the five-and-a-half years since the date of the original scheduled damages hearing.⁵

As to the subcontract, the Court finds that Palmetto was owed \$184,858.69 as of September 15, 2015, with payment being late after October 15, 2015. However, Palmetto asks for interest beginning only as of the date of the original damages hearing, set for October 4, 2016 and using the current rate of judgment interest in South Carolina of 7.25%. The Court finds the amount due on the subcontract was a sum certain, demandable as of at least October 4, 2016. Palmetto is therefore awarded **\$83,674.28** in interest relating to the amount due under the subcontract.

The Court also finds that, as of September 30, 2016, the Surety demanded \$1,425,122 from its indemnitors and had paid claims in the amount of \$1,186,501.71. (**Tab 9**). Palmetto requests interest on this latter amount from the date of the original damages hearing. The Court finds the amount paid by the surety as of October 4, 2016 was a sum certain, demandable as of at least October 4, 2016. Palmetto is awarded **\$537,057.15** in interest relating to the amount owed to indemnify Palmetto for claims by the surety.

III. Summary

Accordingly, the Court awards Palmetto the following sums:

- \$184,858.69 owing under the subcontract;
- \$225,389.81 owing in share of the project profit;

⁵ A hearing delayed by Defendants' filing of multiple notices of appeal of an Interlocutory Order divested this Court of jurisdiction.

- \$1,307,978.71 owing in indemnity from claims by the surety; and
- \$620,731.43 in interest on the subcontract amount and indemnity from claims by the surety.

Palmetto is awarded a total of **\$2,338,958.64**, and judgment shall be and hereby is entered in that amount. **IT IS SO ORDERED.**

This ___ day of _____, 2022

The Hon. Mikell R. Scarborough
Master in Equity, Charleston County



Charleston Common Pleas

Case Caption: Palmetto Construction Group LLC VS Restoration Specialists LLC ,
defendant, et al
Case Number: 2016CP1001143
Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062

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