THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh Circuit (10th) Court Judge

RECEIVED
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SC Court of Appeals

Case No: 2012-207852

JERRY HOLTZCLAW, d/b/a
GREEN THUMB LANDSCAPING
AND IRRIGATION
Respondent

V

DENNIS WALDREP Appellant

APPELLANT'S REPLY BRIEF TO RESPONDENT'S BRIEF

Dennis Waldrep
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Seneca, SC 29672
Proceeding Pro Se

INTRODUCTION

This reply brief is submitted pursuant to South Carolina Appellate Rule 208 (b)(3). The Appellant filed the within Appeal on February 8, 2012 and the Respondent filed a reply brief on May 24, 2013. This is the Reply brief submitted to Respondent's reply. The Respondent correctly indicates that the underlying matter stems from a complaint filed by the Plaintiff Mr. Holtzclaw against the Defendant/Appellant Mr. Waldrep for money damages for work allegedly performed at the Waldrep residence. There are several remarks that stray from that issues,specifically that the damages are the reimbursement for the expenses incurred by the Plaintiff, but that flies in the face of the breach of contract action upon which this matter is predicated.

At trial of this matter reversible error occurred when the Judge entered judgment in favor of Mr Holtzclaw and dismissing the counterclaim of the Defendant. Simply stated, the work performed by the Plaintiff was, in breach of the agreement between the parties, inadequate, substandard and not in compliance with applicable building codes or standard relative to the materials used in the construction as set forth by the manufacturer of said materials. The Defendant's counterclaim was also improperly denied by the trial court.

The Respondent is the owner/proprietor of Green Thumb Landscape & Irrigation and entered into a written agreement with the Appellant Waldrep to perform services at his property. Specifically, the Plaintiff was to build a wall at the Defendant's property pursuant to the terms and conditions of the agreement between the parties. The work was governed by a contract drafted by the Plaintiff and signed by the Parties. The contract

also required that any changes or additions be in writing and signed by the parties. There were no addendum or changes to the contract signed by the parties as required.

1. RESPONSE TO THE RESPONDENT'S FIRST POINT THE "THE TRIAL JUDGE'S FINDINGS SHOULD NOT BE DISTURBED ON APPEAL IF REASONABLY SUPPORTED BY EVIDENCE.

The Respondent asserts that the action for breach of contract is an action at law, but the Respondent clearly fails to adequately analyze or describe the nature of the contract that is the subject of this litigation. In order for an action for a breach of contract to stand there must be a valid contract. The Respondent is relying on the contract that he drafted and Mr Waldrep performed all of his duties therein and it is the Respondent that failed to perform as set forth by failing to build the wall properly or by charging the amount set forth in the document.

The contract in this case was drafted by the Plaintiff and executed by the parties on August 19, 2006 (attached hereto) This contract states in pertinent part that "In regards to any changes and/or additions to the section contract, the landscape contractor has the right to be paid for the amount stated on the contract before proceeding with any extra work. A change order form must be signed by the owner or representative (to be determined in writing by the owner) which will state the additional costs." There were no change orders, no additions signed by the parties and no additional contracts of any type.

Another interesting aspect of the contract is that there is a handwritten annotation in the "Notes": section that suggests that the price of the Irrigation repairs (sic) needs to be

reviewed as it seems to much to relocate…." Obviously, other issues were contemplated by the parties and added to this document. Next, the contract on page four has a section entitled "Scope of Work". In this section there are twelve tasks listed that are to be done by the Plaintiff per the contract. This section contains that list of work the Plaintiff is to perform on the Waldrep property. Interestingly, there is another section on this page that is entitled "Additional Items": There are four lines in this section where presumably additional items that the parties contemplate and agree upon would be added to the contract. There are no entries on these lines and they remain blank. If the Plaintiff had things to add to the contract why did he not add them to this section and have the parties sign accordingly.

This case relies on basic contract law. The contract that was drafted by the Plaintiff is signed by both parties and sets forth the work to be done. The contract also indicates that additional work must be agreed to in writing by the parties. If the contract is ambiguous then any ambiguity is to be construed against the drafter, Mr Holtzclaw and not Mr. Waldrep. There were never any additions to the contract, no change orders or addendum executed by the parties. Mr Waldrep complied with the terms and conditions of the original contract and the Plaintiff sought to be compensated for items that were NEVER a part of the original agreement. If he (the Plaintiff) neglected to include items in the initial contract or made errors in pricing then those errors are the responsibility of the Plaintiff and not the responsibility of Mr. Waldrep. The contract is clear, was never modified and Mr. Waldrep fully complied and performed the terms thereof.

The Respondent contends (page 3 of their response brief) that "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", this representation is patently inaccurate. When did the scope of the original proposal change? At no time were any change orders, new contracts or signed changes prepared in this matter. The Plaintiff never "accounted" to the Defendant for additional work. Is it Plaintiff's contention that these illusive "accountings" constitute an additional contract? Even if there were such accountings they would not qualify as additional to the contract unless they were signed by the parties. There was never any indication in writing or otherwise that the scope of work had changed. The scope of work was still the items contained on page four of the contract. The Plaintiff never advised that there would be a change to the scope of work or that there would be an additional bill at the end of the job. The Plaintiff at no time, ever, advised Waldrep that he was accumulating additional charges until approximately 90 days after the job was almost completed. Holtzclaw never modified the initial contract or suggested that the initial contract be modified. He never presented Waldrep with proposed modifications. He led Waldrep to believe that he had complied with the terms and conditions of the contract and that these "additional costs" were being fully paid for by Waldrep. At the end of the job, without any addendum to the contract, Holtzclaw claimed that he was entitled to more money. He made a mistake and now wanted Waldrep to pay for it.

Any "final statement", was not agreed to by Waldrep nor was it signed by the Parties as required by the initial contract. This statement was not received by the Appellant until ninety days after the work was completed. It is apparent that one of two things happened. Either Holtzclaw decided unilaterally to do additional work and bill Waldrep at the end of the job without properly modifying the initial contract the he drafted. Or, Holtzclaw

made errors when he priced the initial job and when he realized the nature of his error he failed to notify Waldrep and secure a written change order to the original contract. Then at the end of the job, he tendered a bill which has allegedly been claimed to be the expenses incurred by the Plaintiff. Could he really have performed a job without realizing he had over $50,000 in unaccounted for expenses. This is somewhat challenging to believe.

I. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR EVIDENCED BY STATEMENTS MADE DURING TRIAL.

The trial judge made remarks during the course of the trial that amount to reversible error. At one point the Judge indicated that the County Engineer should be consulted to ascertain the quality of the work that was done by the Plaintiff. Unfortunately, the county engineer was never consulted to ascertain the quality of the work performed by the Defendant. This consultation never took place. However, the mere fact that the Judge made this statement underscores the fact that there was a suspicion that the work performed by the Plaintiff was not up to Par. This comment goes to the potential breach of contract by the Plaintiff and as such supports the counterclaim of the Defendant not the claim made by the Plaintiff.

Waldrep is now faced with a wall that has been improperly constructed, is failing and in need of repair. A judgment that was improperly entered on a contract on which he fully performed. The error in this case is that Waldrep has not been compensated for the cost

of repairing the improper work that was performed by the Plaintiff. The breach of contract was by the Plaintiff Holtzclaw and not Waldrep.

Next, during the trial the Judge asked the Plaintiff if he had ever done this type of job before. The Plaintiff indicated that this was his "first and his last" the judge then said he would not get everything he was asking for. Does this mean the judge had already decided the case without giving Waldrep a full opportunity to be heard.?

The Plaintiff clearly did not have the requisite skills to price and bid a job of this type. He admitted to the trial judge that it was his first job of this type. Next, the contractor did not have a License or Permit or the skills to prepare a contract that would address any contingencies that may arise due to his lack of experience. Also, he did not create any addendum or change orders to address any alleged changes that were needed. Ultimately, when the job was done, improperly as to require repair, the Plaintiff sued the Defendant for payment for services for sums he claimed were owed. The Defendant did not contract for any services other than what were contained on page four of the contract. Why were the prices so disparate unless the Plaintiff made an error. The Plaintiff also made specific claims that the Additional Bill was for reimbursement for expenses or some other equally dubious items. Is it reasonable to assume that a contractor who drafts a xxxxx contract does not include the costs for materials that will be used? Further, is it reasonable that a contractor, upon learning that the job would cost more that was contained in the original contract would fail to notify the homeowner and create and addendum to the original contract that was required by the original contract the he drafted. Instead, the Plaintiff elected to continue with the work until he sprung the bill on the Defendant at the end of

the job when it came as a complete surprise. Then when the Defendant objected he was sued.

During the course of the trial the trial Judge made remarks that indicated that the court had strayed from the contract issue and was perhaps endeavoring to use hindsight to impart some sort of equity to this transaction. First, the trial judge remarked that the objections of Waldrep were a result of "buyer's remorse" Page 471 Lines 12-17. This remark is troubling for several reasons. Initially, it is challenging to determine what the Judge meant by calling the actions of a litigant trying to protect his rights "buyers remorse" especially when he complied fully with the terms and conditions of the contract he signed and appears to have been fraudulently induced to enter into the agreement. This remark also suggests that the court had already decided against Waldrep and in favor of the Plaintiff before all the evidence and arguments had been heard. Does this not abridge the litigant's rights and essentially deny him a full and fair hearing?

Another statement made by the trial Judge that is cause for alarm surrounds the damages claimed by the Plaintiff. The judge remarked that the Plaintiff "may not get all that he has claimed". This statement can be interpreted to mean that the judge had already decided to award the Plaintiff payment from Waldrep based on fraudulent, unsigned, and improperly constructed documents. This is another error because it essentially denies Waldrep the opportunity to a full and fair hearing. As this case was heard without a jury, the Judge is the finder of fact and appears to have made a decision before all the facts were presented and considered.

Next, the trial judge held an in chambers conference that obviously caused confusion and resulted in incorrect action by Defense counsel. Without this opportunity as

promised, there was essentially no chance whatsoever for Waldrep to refute the erroneous information that had been presented to the court. Therefore the court relied on this erroneous information in making an award in favor of the Plaintiff again depriving Waldrep of a full and fair hearing. This exchange also suggests another problem that occurred during the course of this trial. As previously indicated, the in chambers conference between the lawyers and the Judge left Counsel for the Defendant Waldrep with the impression there was an opportunity to Amend Pleadings. Following this conference that the judge had set out the opportunity for Waldrep to produce evidence to enable the court to consider all the evidence available to make a decision. When counsel endeavored to comply with this directive the trial Judge advised that he did not say that. Clearly, there was confusion somewhere in this exchange and this confusion deprived Waldrep of the opportunity to produce necessary evidence and fully make his case to refute the erroneous materials entered by the Plaintiff and prove his damages. At a minimum the judge should have clarified the exchange and perhaps entered a mistrial because the obvious confusion was to such an extent that it again deprived Waldrep of a full and fair hearing on such an extreme problem existing at his residence and essentially enabled the Plaintiff to succeed either in his fraud or negligent behavior.

II. THE EVIDENCE DOES NOT SUPPORT THE VERDICT IN FAVOR OF THE PLAINTIFF.

The verdict of the trial court is not supported by the evidence. The case is a simple breach of contract. A contract was presented by Mr. Holtzclaw to Mr Waldrep. It was

executed by the Parties and Mr Waldrep fully performed. There was never any addendum in writing or change orders pursuant to the terms of contract. It wasn't until 90 days after the completion of the work that Mr Waldrep received a document that he allegedly owed the Plaintiff in excess of $52,000. This was not part of the initial contract, nor was it part of any addendum or change order or other contract which was executed by Mr Waldrep. The Plaintiff did not sue on a quantum meruit basis because the work performed did not exceed the work that was described in the initial contract. It is clear the the Plaintiff made errors either in pricing or the drafting of the contract. Now he wants Mr Waldrep to pay for his error. If he had done things properly, he would had drafted an addendum and had both parties sign the document. Perhaps he did not do this because he was afraid that Mr Waldrep would object to the addendum or change orders and the work would be halted. Instead, the Plaintiff surreptitiously continued work as outlined in the initial contract and then submitted an outrageous bill some 90 days after the conclusion of the work. Maybe he though he had not made enough money and wanted Mr Waldrep to pay and figured once the job was done he would have no choice. Whatever the case, he did not comply with the contract that he drafted. It is well settled that any ambiguity in a contract is construed against the drafter and Mr Holtzclaw drafted the contract. He cannot now surprise this error on the Mr. Waldrep and demand money for his mistake.

Why didn't Plaintiff notify or otherwise present to Waldrep that a change order was required in accordance with the contract? At that point Waldrep had complied with all the terms and conditions of the contract and had no reason to assume that Plaintiff would not do the same. Would Waldrep have agreed to have the work continued if the estimate

for work had been higher by $52,998.98 or 80% above what had been paid already? Was this a bait and switch by the Plaintiff? Obviously, this proposal would have been rejected. This begs the questions as to whether the Plaintiff was simply negligent in preparing the original estimate and bill or if he fraudulently induced Waldrep to enter into the agreement by providing an artificially low number and once the work had begun he would try to collect another way. One instance that leads us to believe that fraud may have been at work is the price charged for removing wood from the Waldrep property. The Plaintiff charged Waldrep $2,000 for cutting and stacking a cord (1) of wood. As the court may be aware a cord of wood is a stack 4 feet by 4 feet by 8 feet in length. Two thousand dollars for this service is so clearly excessive that it begs the question that makes one wonder if this is how the Plaintiff planned on recouping his money from his artificially low bid designed to induce Waldrep to enter into the agreement. The wall that was constructed by the Plaintiff (who was an unlicensed contractor) and admitted that he had never performed this work before was improperly constructed and has resulted in defendant being required to remove and replace this wall at significant expense.

III. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR

It is important to note that the work done in this case was by an unlicensed contractor and not only improper from a billing, contractual and billing perspective but has already caused significant damage to Waldrep's property. It stands to reason that the Plaintiff also did not know how to properly price or contract a job of this nature. He made errors in the actual performance of the work, and effectively breached the contract,

and made errors in the drafting of the contract and in failing to properly add any relevant addendum to the contract signed by the parties.

CONCLUSION

The Appellant submits that there is insufficient evidence to support an action for breach of contract by the Plaintiff. In point of fact, the breach of contract was by the Plaintiff on several counts. First, he failed to perform the work properly, second, he failed to make any changes to the contract in writing signed by the parties. It is well settled that any ambiguities in the contract are construed against the drafter.

The Appellant performed all duties in accordance with the terms and conditions set forth in the original contract. There were no additional items that were requested by the Defendant other than those set forth on page four of the contract thereby making a quantum meruit action irrelevant. It seems obvious that what happened is that the Plaintiff, an unlicensed contractor did not know how to properly bid and/or price the job to be done for the Defendant and did not possess the requisite skills to perform the work. Ultimately, the problems of Plaintiff came to light and he dumped a bill on the Defendant without ever creating a new contract or addendum that would be signed by the parties. He simple pressed forward and tried to extract the money from the Defendant at the end of the job without complying with the terms and conditions of the contract he drafted.

The Defendant contracted for certain services by Plaintiff which the Plaintiff performed incorrectly. The Defendant fully performed and the Plaintiff breached the contract and now is trying to force Defendant to pay for his mistakes. The plaintiff is not entitled to recover for any ambiguities that may result from the contract. There is

insufficient evidence to support the verdict on behalf of the Plaintiff. The Defendant respectfully requests that the judgment of the trial court be vacated and a judgment entered on his counterclaim.

Respectfully Submitted,

DENNIS WALDREP, APPELLANT/DEFENDANT

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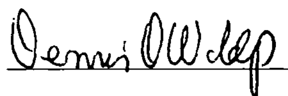
Dennis D. Waldrep, — Appellant.

PROOF OF SERVICE

I certify that I have served the Reply Brief by USPS to the Attorney of record, William C. Hood, 505 N. McDuffie Street, Anderson, South Carolina 29621

June 6, 2013



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