THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge
Trial Court Case No. 2016-CP-40-00164

Appellate Case No. 2017-001522

The Kitchen Planners, LLC, Appellant

v.

Samuel E. Friedman and Jane Breyer Friedman
and Branch Banking and Trust, Respondents

RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING

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Upon the request of this Court in its letter dated August 18, 2020, Respondents, Sam and Jane Friedman, file this Return to Appellant's Petition for Rehearing. The Respondents would contend that this Court did not err in its opinion denying Appellant's request for relief from the trial court's granting of summary judgment. The Respondent would agree with the findings of this Court and reaffirm the arguments and evidence the Respondent provided this Court in its Final Brief and in oral argument.

In its Petition, Appellant attempts to distract the Court by winding through various side arguments (some never raised before the Petition was filed) and fails to address the overriding issue before the Court which was whether or not there was any question of fact that Appellant failed to timely file and serve its mechanic's lien in accordance with S.C. Code Ann. §29-5-90. The trial court found, and this Court confirmed, that they had not. This finding, in and of itself, eliminates most of Appellant's arguments.

South Carolina Code Ann. Title §29-5-90 states:

> Such a lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure**, serves upon** the owner or, in the event the owner cannot be found, upon the person in possession **and files** in the office of the register of deeds or clerk of court of the county in which the building or structure is situated a statement of a just and true account of the amount due (emphasis added).

The trial Court held, and this Court confirmed, that there was no evidence sufficient to contest the Freidman's assertion that August 18, 2015 was the last possible date that could be used for the furnishing of labor and material. This date came from the date on the mechanic's lien and in Appellant's Complaint. Quite frankly, the evidence shows that the last date that the Appellant provided materials to the Friedman's home was long before August 18, 2015. Ms. Comose testified that she provided no materials to the Freidman's home after June 18, 2015. (R. p 214, lines 12-20).

This Court and the trial court established the August 18, 2015 timeline without any reference to the affidavit of Mr. Friedman (to which Appellant has made such an objection) and while also taking into account Ms. Comose's affidavit which attempts to manufacture a date contradictory to all other evidence:

> "she continued to work with Derek Tackett, the manufacturer's representative for Crystal Cabinets through November 2015 when Crystal was taken off the job too. For example, on September 29, 201 5 I reordered drawer boxes for the island in the kitchen, and paid $550.61."
>
> (R.p.96 paragraph 4)

This Court rightly held that this statement did not create any question of fact in that it did not establish any new date upon which materials or labor were actually delivered and installed in the home. The affidavit discusses ordering and paying for drawers, but never delivering and installing them, as required by the statute. Further Ms. Comose's deposition testimony clearly established that the time set forth in the affidavit is patently false.

> Q. All right. So as of August 18th Derrick's off the job?
>
> A. That's what it looks like
>
> Q. And are you aware of anything more that Derrick might have done after August 18th at the house? Do you have any knowledge, information?
>
> A. I don't have any direct knowledge of that. (R.p.216, lines 7-13)

In order to establish a mechanic's lien, first it is required it is generally necessary that the labor performed go into something which has attached to and become a part of the real estate, adding to the value thereof." *Tenny v. Anderson Water, Light & Power Co.*, 67 S.C. 11, 17, 45 S.E. 111, 113 (1903). Appellant was contracted to provide, but not install, kitchen cabinets. Thus, Appellant, by its own admission is simply a material

supplier. The underlying public policy for the mechanic's lien statute is that a person providing materials that get attached and incorporated into real estate become a part of that real estate. A supplier cannot simply go back in and remove the materials once they are nailed into walls and roofs and the like (although Ms. Comose could have done so at any time as the cabinets she provided are still in the Friedman's garage (R.p.273 Line 17)). In this case, incorrect cabinets were ordered and never installed.

This Court confirmed, and it is undisputed, that the last time Appellant delivered materials to the Friedman home was June 18, 2015. This information comes from the deposition testimony of Ms. Comose. Any later date established in the lien and pleadings by Appellant was by bootstrapping on the materials provided by others, namely Derrick Tackett. But even looking at the allegations of the lien, the pleadings, the depositions, and the affidavit of the Appellant in the light most favorable to the Appellant, there still is no fact to dispute the Friedman's contention that the lien was untimely served.

In the Petition, Appellant continues to push the idea that the Appellant's affidavit establishes a question of fact to defeat summary judgment. This Court, as did the trial court, addressed the factual realities of this claim through a thorough review and analysis of the evidence. Appellant now puts forth for the first time a new fallacy that given more time, she could have provided a counter affidavit from Derrick Tackett showing that she continued to work through the fall. This would be an interesting trick given that the record is clear that Ms. Comose was fired in June of 2015 and Mr. Tackett was fired by August 18, 2015 (thus the date in the lien). If they were both fired from the job, how could either do any work at the home? Even if this argument had been raised before it would fail for two reasons. First, South Carolina Code Ann. Title §29-5-90 requires that

the claimant provide materials by agreement or consent of the owner. By her own testimony, by August 18, 2015 both Ms. Comose and Mr. Tackett were off the job. Once she and Mr. Tackett were fired from the job, they could not have consent from the Friedmans to continue ordering materials. Second, Ms. Comose's affidavit attempts to create that question of fact, but fails. The affidavit states that she ordered drawer boxes but never indicates that they were ever delivered. This is because she had already testified that she provided no material after June 8, 2015 and had no knowledge of anything Derrick Tackett might have done after August 18, 2015.

> Q. All right. So as of August 18th Derrick's off the job?
>
> A. That's what it looks like
>
> Q. And are you aware of anything more that Derrick might have done after August 18th at the house? Do you have any knowledge, information?
>
> A. I don't have any direct knowledge of that
>
> (Dep. of Comose, p. 114, lines 7-13)

What appellant fails to comprehend is that both the trial court and this Court reviewed all of the evidence and testimony, including the late affidavit of Appellant, and looking at the evidence in the light most favorable to Appellant still found that the lien was not timely filed. Even if you assume every fact presented by Appellant is correct and accurate, there is no question that the lien was not timely filed.

I. Conversion of Motion to Dismiss to Summary Judgment

Appellant argues that this Court misapprehended and overlooked the error of the Circuit Court Judge in converting a motion to dismiss to a motion for summary judgment. As this Court determined, this was never a motion filed pursuant to 12(b)6. The Motion was sought pursuant to Rule 56. Appellant, in its Motion to Strike, at the hearing and in

the appeal continued to treat the motion as if it was filed pursuant to Rule 12(b)6 ignoring the fact that all of the documents repeatedly made reference to Rule 56 and the summary judgment standard. At the hearing, attorney for the Respondent also clarified this point to Appellant. Yet their Petition for Rehearing Appellant continues along this track.

The only affidavit that was objected to at the trial court +hearing was Dr. Friedman's affidavit. Appellant failed to raise any objection as to any other affidavit and as such the trial Court did not address them. This Court was correct in ruling that this issue was not preserved on appeal.

II. Grounds Argued Were Different Than Motion

Appellant argues that this Court misapprehended and overlooked that the grounds of Respondent's Motion to Dismiss were different than that argued in the Memorandum of Law. Appellant improperly raises this issue for the first time in its Petition for Rehearing. There is nothing on this matter in Appellant's brief, and nothing in this Court's Order regarding this. To the extent that the issue had been raised, Appellant again bases its argument on the premise that the motion was filed pursuant to SCRCP 12(b)(6) and that it was thereafter converted to a Rule 56 Motion, which this Court indicated was not the case.

In addition, not only was Appellant given the Memorandum of Law outlining the basis for the arguments, but Appellant also filed the affidavit of Ms. Comose in an attempt to counteract the basis of the law cited in the Memorandum. At the hearing, counsel for Appellant indicated that she was "not worried" about the argument that the lien was not filed timely because "our affidavit, as well as what I submitted to you today, as well as my client's deposition establishes facts work well within the mechanic's lien

statute" (R p 63). As this issue was not raised in the Appellant's brief and the Court did not rule on this issue, it is improper to raise it here for the first time.

III. Circuit Court Should Have Struck the Affidavit of Mr. Friedman

Appellant argues that this Court misapprehended and overlooked the proper procedure and notice requirements of SCRC 56 by refusing to strike the untimely affidavits. Respondents would agree with the Court's ruling and rely upon that and the arguments previously made by Respondent in their Brief and this Return. Additionally, Appellant again improperly raises issues and arguments not previously raised in the appeal.

IV. Appellant is Bound by the Dates in its Pleadings

Appellant argues that this Court misapprehended and overlooked the provisions of Section 29-05-180 and SCRCP 15 in holding that Appellant is bound by its pleadings. It is axiomatic that a party is bound by its pleadings. In this case, the Respondents would agree that the Appellant is bound by the dates in the lien and in its pleadings. Respondent would also agree that Appellant made no attempt to amend the dates on the pleadings or in the lien and never raised this issue to the trial Court and as such is not preserved for appeal.

However, given the facts before this Court and the trial Court, even an amendment to conform to the evidence would not have established a new date. In this case, this Court and the trial court did not look solely to the dates in the pleadings, but also looked at all the evidence including Ms. Comose's deposition and affidavit. This Court held that looking at the facts in the light most favorable to the Appellant that there

was no evidence sufficient to contest the Freidman's assertion that the lien was not timely filed and served. In fact, using the date found in the pleadings actually gave the Appellant the best and latest possible date for establishing the delivery of materials. Every other piece of evidence indicated a much earlier date. Ms. Comose's deposition testimony established that she provided no materials after June 18, 2015. Ms. Comose's affidavit never mentions delivering material to the home or providing work at the home. Thus, not only was this issue not timely raised and preserved on appeal, even if properly raised, an amendment to the pleadings would have been futile given the evidence in this case.

V. The Court Overlooked the Improper Finding of Credibility of the Trial Court

Appellant argues that this Court overlooked the improper finding of credibility by the trial Court, but Respondent would disagree with this assertion. This Court addressed this concern in the Order. In addition, the Trial Court's order, while discussing the credibility of the affidavit, did not rely upon credibility in making its findings. The trial court's Order Denying Plaintiff's Motion to Alter or Amend stated:

> Even if Ms. Comose's affidavit were credible its contents fail to change the filing date for the Lien. Title §29-5-90 requires that a mechanic's lien be filed and served within 90 days after the materials are **furnished.** Ms. Comose's affidavit merely states that materials were ordered and paid for, but never indicated that they were ever delivered to the Friedman residence. That the materials be actually delivered and used in the structure is essential to a contractor's right to a lien under the statute. (R.p. 9)

Thus, the Trial Court gave the contents of the affidavit full weight and still found it lacking.

Appellant then goes on to chide this Court for providing Appellant with the same full analysis of the evidence. By looking at the evidence, including the affidavit of Ms. Comose, in the light most favorable to the Appellant this Court found that the statements in the affidavit did not create a question of fact to extend the date beyond August 18, 2015. This Court properly held that there was no evidence in Ms. Comose's affidavit or testimony that indicated that the drawers allegedly ordered and paid for in September were ever delivered and installed in the home. Thus, the review of the trial Court's comments about credibility need not be addressed.

In support of establishing some question of fact linked to the affidavit of Ms. Comose, Appellant now brings forth a new argument not previously raised in her Appeal. In her Petition, Appellant cites the deposition testimony of Ms. Comose at R. p212 line 21- p213, line 7 for the proposition that the drawers allegedly ordered in September were delivered to the Friedmans. This is disingenuous at best. The testimony quoted by Appellant refers to lazy susan cabinets that were ordered earlier in the year before both Appellant and Tackett were fired from the job and paid for by the Friedmans. The testimony cited does not refer to the drawers that were allegedly reordered under the affidavit. This Court was correct in that the actual testimony relevant to the reorder of the drawers indicated that Ms. Comose could not account for the date on the check and that she never delivered the drawers as she testified "I still have those by the way" (R p.164 line 24).

Appellant, then provides another new argument not raised in the Appeal, but which was raised at oral argument. Appellant contends that the labor involved in writing a check is labor intended to be attached to real estate in accordance with the mechanic's lien statute. This is an absurd premise. The idea that writing a check

amounts to labor would allow a contractor to extend his time for filing a lien *ad infinitum* simply by delaying payment for materials and writing checks at a later date. Or, as in this case, a contractor fired in July could secretly order drawers and pay for them months later in order to extend the time to file a lien.

Appellant reasserts various other arguments on whether or not there is a question of fact that any of the materials provided by Appellant were installed in the Friedman's home. Respondents would agree with the Court's analysis on this matter and would also point out that this argument is moot if the lien was not timely filed.

The Appellant seems to be misguided as to the public purpose and law behind the enforcement of mechanic's liens. This misunderstanding may be at the heart of her inability to comprehend why the dates of delivery and installation of materials are so important. Her misunderstanding can be summed up by quoting the last line of her Petition which states "a jury would need to decide as to whether or not the Respondents, who are in possession of $50,000 worth of Crystal Custom cabinets, which are unfit to be utilized by anyone other than respondents in their own kitchen, can void a mechanic's lien **by merely electing not to install them**" (emphasis added). It is quite possible that one could not make a statement more contrary to the language and purpose of the mechanic's lien statute. The installation and attachment to real property is one of the necessary requirements in establishing a lien on real property under the statute. Respondent would state that the attachment to real estate is one of the main reasons for the statute. Appellant has now admitted that the lien was improper. Appellant's argument here might be valid if this action had been brought for breach of contract, but under the strict interpretation of the mechanic's lien statue, it simply carries no weight.

CONCLUSION

This Court did not err in is Order. The Lien filed by Appellant was improper because: 1) The Lien was not timely filed; and 2) The Lien was for materials that were never installed and never became affixed to Respondents' real estate. The trial court did not err in failing to strike the affidavit of Sam Friedman or affirming the award of attorney fees. As such, the Petition for rehearing should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served Respondents' Return To Appellant's Petition For Rehearing, by depositing a copy of it in the United States Mail, postage prepaid, on September 11, 2020, addressed to their attorney of record, Jean P. Derrick, Esquire, Post Office Box 929, Lexington, SC 29071.

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