

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2007-CP-04-4113

RECEIVED

JUN 27 2013

S.C. Supreme Court

Action Concrete Contractors, Inc.Respondent,

v.

Elvira Chappellear, Craig Chappellear,
Premier Southern Homes, LLC, Henry
G. Beal, Jr., Wells Fargo Bank, N.A.,
First Citizens Bank and Trust Co., Inc., of
whom Elvira Chappellear and Craig Chappellear,..... Appellants.

PETITION FOR REHEARING

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STATEMENT OF THE CASE

This is a Petition for Rehearing pursuant to Rule 221 that the Court reconsider Opinion No. 27268 filed June 12, 2013 (“Opinion”) in this matter.

ISSUES PRESENTED IN PETITION

- I. The date used in the Opinion for the calculation of whether the Chappellears possessed a payment defense is not consistent with South Carolina precedent.
- II. The Opinion misapprehends the Chappellears’ argument in regards to payments made directly to the subcontractors.
- III. There existed evidence of “abandonment” damages.

ARGUMENT

- I. The date used in the Opinion for the calculation of whether the Chappellears possessed a payment defense is not consistent with South Carolina precedent.**

In the Opinion, the Court stated that the percentage of the contracted-for work completed “is determined as of the last day the general contractor worked on the job.” This is not consistent with South Carolina precedent.

We take no exception to the formula used by the Court to determine whether the Chappellears possessed a payment defense—comparing the value of the labor and materials furnished by the general contractor to the sum paid by the owner to the general contractor. However, that comparison should take place as of the day the owner receives notice of the subcontractor’s lien, not the day the general contractor stops work on the project.

The relevant date for calculating the payment defense is well settled in South Carolina. In *Stoudenmire Heating & Air Conditioning Co. v. Craig Bldg. P’ship*, the South Carolina Court of Appeals held that “[t]he owner’s liability under the lien is

limited to the balance due by him to the prime contractor *at the time the owner receives the notice from the subcontractor.*” *Stoudenmire Heating & Air Conditioning Co.*, 308 S.C. 298, 302, 417 S.E.2d 634, 637 (citing *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E.2d 855 (1956) (emphasis added)). Moreover, South Carolina Supreme Court opinions have held the same. *See, e.g., Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 630, 93 S.E.2d 855, 860 (1956) (“liability under the lien is limited to the balance due by [the owner] to the prime contractor *at the time he receives the notice*” (emphases added)); *Wood v. Hardy*, 235 S.C. 131, 145, 110 S.E.2d 157, 164 (1959) (“an owner’s liability under a mechanic’s lien is limited to the balance due by him to the prime contractor *at the time he receives the notice.*” (citing *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E.2d 855 (1956) (emphasis added))). In short, the amount of time the general contractor remains on the project has no effect on the calculation of the owner’s payment defense.

The Opinion as it stands represents a severe shift in mechanic’s lien law and completely changes the outcome of this case. Specifically, calculating the payment defense on the date the general contractor stopped working renders May 2, 2008 as the relevant date for determining the value of the labor and materials furnished by the general contractor. However, under South Carolina precedent, the calculation should use September 25, 2007 as the relevant date, the date the Chappellears’ received notice of Action Concrete’s mechanic’s lien.¹ As of September 25, 2007, the evidence on record is that the value of Premier’s furnished labor and materials *did not exceed* the sum paid by

¹ Note that the Opinion correctly identified September 25, 2007 as the date the Chappellears received notice of Action Concrete’s lien, but then later incorrectly identified September 27, 2007 as the date notice was received.

the Chappellears to Premier. (R. pp. 372:7-11; 476 and 477.) In fact, the Chappellears had *overpaid* Premier. (R. pp. 372:7-11, 476-477 and 472-474.)

Thus, under the payment defense calculation set out in precedent, the Chappellears possess a full payment defense. This, at the very least, represents a question of material fact such that the lower court's grant of summary judgment was improper.²

II. The Opinion misapprehends the Chappellears' argument in regards to payments made directly to the subcontractors.

The Opinion states that the Chappellears contended "that the trial court erred when it gave them credit only for the \$135,740 they paid to Premier before receiving notice of Subcontractor's lien." The Chappellears did not make this argument.

The Chappellears argued that, pursuant to S.C. Code Ann. § 29-5-50 and *Stoudenmire*, they were able to make payments directly to the subcontractors without being in violation of S.C. Code Ann. § 29-5-50. The Chappellears have no need to argue that they should be given credit for any money paid after notice was received because, as explained above, the Chappellears possessed a full payment defense when they received notice of Action Concrete's lien on September 25, 2007.

III. There existed evidence of "abandonment" damages.

In regards to "abandonment" damages, the Opinion states that summary judgment was appropriate because there was no "evidence that the Owners incurred any 'abandonment' damages."

The Chappellears entered into a \$300,000 lump sum contract with Premier. (R. pp. 452-455.) Henry G. Beal, Jr., the owner of Premier, told the Chappellears that by constructing the project as a model home, he would be able to build it for a lower price

² Under the current Opinion, if an owner allowed a general contractor to finish a project, then the owner would never be entitled to a payment defense.

and still be able to showcase his work. (R. pp. 154:25–155:9.) This was true because, even though the Chappelears expended a total of at least \$254,671.83 before they sold the property, the estimated amount of money to complete the Project as existed was between \$290,000 – \$320,000 plus a 10% allowance. (R. p. 475.) Thus, the cost to complete the project per the contract documents, including the plans and specifications, was between \$573,671.83 and \$606,671.83. In other words the only evidence of record is that the Chappelears would have to spend between \$273,671.83 and \$306,671.83 more to complete the project than if Premier had fully and properly performed the contract. This is evidence of the “abandonment” damages suffered by the Chappelears as a result of Premier’s breach of contract.

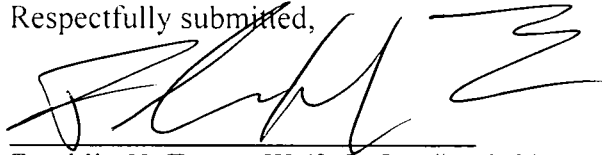
Hence, the Chappelears are entitled to have its damages considered when calculating its payment defense. *See Stoudenmire Heating & Air Conditioning Co.*, 308 S.C. at 303, 417 S.E.2d at 638; *see also Wood v. Hardy*, 235 S.C. 131, 147, 110 S.E.2d 157, 164 (1959) (in trying to determine the amount owed to the general contractor by the owner, the South Carolina Supreme Court recognized the owner potentially incurred damages as a result of the failure of the general contractor to erect the dwelling according to plans).³

CONCLUSION

For the reasons stated above, the Petitioner requests that this Court grant its Petition for Rehearing and reverse the lower court’s Order.

³ Given that Premier failed to complete the project, there can be no argument that Premier built the project according to plans.

Respectfully submitted,



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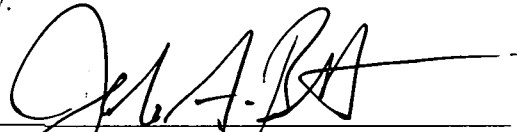
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PROOF OF SERVICE

I certify that I have served the **Petition for Rehearing** on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on June 27, 2103, addressed to its attorney of record as listed below.



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