THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Ellis B. Drew, Jr., Master-In-Equity

Case No. 2007-CP-04-2785
(Appellate Case No. 2012-213225)

Moorhead Construction, Inc., ... Respondent,

v.

Pendleton Station, LLC, Enterprise Bank of South Carolina, and Angelo Penza..... Defendants

Of whom Enterprise Bank of South Carolina is the ..... Appellant.

RESPONDENT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Secondary Sources

STATEMENT OF ISSUES ON APPEAL

I. The Master did not err in finding that the Respondent's last date of work on the real property was March 6, 2007, when evidence and testimony supports that Respondent and his sub-contractors were on site performing necessary work on said date.

II. The Master did not err in determining the amount to be awarded Respondent as the evidence and testimony presented at trial supported said finding.

III. The Master did not err in determining that the Respondent was entitled to pre-judgment interest as the measure of recovery was a liquidated amount capable of calculation despite the Appellant's dispute regarding the amount.

IV. The Master did not err in finding that Appellant accepted the deed-in-lieu of foreclosure and that the doctrine of merger applied as the same was a necessary finding regarding a) whether the recording statutes barred enforcement of the lien and b) was necessary to determine priority of the foreclosure of the mechanic's lien.

V. The Master did not err in finding that the Respondent was the prevailing party for determination of an award of attorney's fees as the principal amount awarded to Respondent in conjunction with the amount granted to Respondent's sub-contractors was greater than the mid-point between the amount claimed by Respondent and zero.

VI. The Master did not err in finding that the Appellant was not entitled to a set off for fees incurred in having the lien dissolved as to one parcel out of four when the one verdict by the Court at trial determined that Respondent was the prevailing party.

VII. The Master did not err in determining the amount of fees when said issue was not objected to and ruled upon by the Master at the hearing, and when said amount was less than one-half of the fees incurred by the Appellant.

VIII. The Master did not err in issuing a judgment against Appellant, as opposed to ordering foreclosure, when said issue was beneficial to Appellant, when there were still title issues to determine regarding Defendant Angelo Penza and where Appellant admitted that Respondent performed the work, Appellant admitted to being benefitted by the work and where the evidence supported that Respondent had not been paid for the same.

STATEMENT OF THE CASE

Respondent Moorhead Construction, Inc. (hereinafter Moorhead), filed its Summons and Complaint on August 31, 2007, seeking, *inter alia*, foreclosure of its mechanic's lien[1], breach of contract and equitable relief under the theory of *quantum meruit*. [R. pp. 85-100]. Relevant to this appeal, Appellant Enterprise Bank of South Carolina (hereinafter Enterprise Bank) filed its Answer generally denying the requested relief and offering affirmative defenses to the same. [R. pp. 196-202]. This matter was referred to the Master-In-Equity by way of Consent Order. [R. pp. 49-52].

The trial in this matter occurred on December 8, 2011. By agreement, it was tried at the same time as two other related cases; *Miller Construction Company, LLC v. Enterprise Bank of South Carolina, et al,* and *Craft Construction Company, LLC, of Starr v. Enterprise Bank of South Carolina, et al.* Enterprise Bank has appealed the decisions of the trial court as to those two (2) cases as well. The respective appellate case numbers are 2012-213227 (Craft) and 2012-213318 (Miller). The above-referenced trial resulted in a Final Order filed on June 7, 2012. The Order found in favor of Moorhead on his claims in the principal amount of $66,627.81, pre-judgment interest in the amount of $26,234.70 and attorney's fees and costs in the amount of $39,791.66. [R. pp. 5-18]. Additionally, the Court found in favor of Moorhead's subcontractors in those cases for the amounts that Moorhead would have owed to the subcontractors for work they performed. [R. pp. 8-14; pp. 19-33; pp. 34-48].

Following the issuance of the Final Order in this matter, Enterprise Bank filed a Motion to Reconsider. [R. pp. 336-340]. That motion was denied. [R. pp. 1-3]. This appeal was then filed.

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[1] Respondent filed its mechanic's lien on April 17, 2007, alleging an amount owed of $401,729.

SEPARATE STATEMENT OF FACTS

The Pendleton Station project (hereinafter referred to as 'the project') was a real estate development project originally started by a group of investment developers who formed Pendleton Station, LLC (hereinafter Developers). [R. p. 8]. The project consisted of 4 separate tracts of real property located outside the Town of Pendleton in Anderson County. [R. pp. 5-18].

Prior to March 2, 2007, the 4 separate tracts were owned as follows: 1) a 2 acre tract owned by Developers; 2) Tract A consisting of 31.31 acres owned by Developers; 3) Tract B consisting of 31.31 acres owned by a group called the Diana L. Zellner Revocable Trust UAD[2]; and 4) a 38 acre tract of land[3] owned by Developers.

Initially, Enterprise Bank loaned the Developers $3,000,000 secured by a mortgage on Tract A. [R. pp. 642-653]. This note was co-signed by an individual named Ervin Mathias. [R. p. 368, lines 7-10]. Mr. Mathias was involved with the Developers in that they had an agreement that he would receive a percentage of profits in the future from the project. [R. p. 368, lines 13-18]. Additionally, Mr. Mathias was instrumental in obtaining the loan for Developers from Enterprise Bank in that he was to be the 'eyes and ears' on the project for Enterprise Bank. [R. p. 368, line 19 - p. 369, line 23]. Mr. Mathias only went on-site on one occasion to check the progress, despite having access to check on the project at anytime. [R. p. 369, line 24 - p. 370, line 12; compare to R. p. 366, lines 2-12].

Subsequently, although the project was behind schedule, Enterprise Bank loaned an additional $2,000,000 to the Developers. [R. p. 507, lines 6-17]. A third (3rd) note and

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2 Enterprise Bank was later conveyed Tract B and assumed all defenses of the Zellner Trust. Tract B had a mortgage on the property in favor of an individual named Angelo Penza, who was an alleged investor in the project.

3 The 38 acre tract was released from the liens by virtue of an Order granting partial summary judgment during the pendency of this action.

mortgage was given by Enterprise Bank to Developers in the amount $500,000. [R. p. 8]. As a result of the above two notes, an additional mortgage was given on the 38 acre tract of land and the 2 acre tract of land. The total amount loaned to Developers was 5.5 million dollars.

Moorhead Construction, Inc., was the general contractor for what is commonly referred to as 'horizontal construction.' Moorhead had a contract with the Developers. [R. p. 8; pp. 605-609]. Moorhead had two sub-contractors: Craft Construction Company, Inc. of Starr (hereinafter Craft) and Miller Construction Company, LLC (hereinafter Miller). [R. p. 8].

By early 2007, there was significant monetary issues going on with the project. [R. p. 358, line 13- p. 359, line 6]. Contractors and sub-contractors were not getting paid. [R. p. 358, lines 18-14].

On March 2, 2007, a deed-in-lieu of foreclosure was issued by the Developers to Enterprise Bank conveying its interest in Tract A (31.31 acres) and the 38 acre tract of property to Enterprise Bank. [R. pp. 661-664]. This deed was recorded in the Anderson County Register of Deeds Office on March 5, 2007.

The site manager for both the Developers and later Enterprise Bank, Charles Kernaghan, testified that he was sure Enterprise Bank was aware of numerous unpaid contractors on the project prior to the issuance of the deed-in-lieu of foreclosure. [R. p. 365, lines 14-23]. A day or two after the issuance of the deed-in-lieu of foreclosure, Ervin Mathias showed up at the project in order to pay unpaid contractors with Enterprise Bank funds. [R. p. 359, lines 7-23]. The amount Enterprise Bank paid to unpaid contractors just days after issuance of the deed-in-lieu of foreclosure was approximately $1,200,000.00. [R. p. 373, lines 4-25]. By virtue of accepting the deed-in-lieu and paying many unpaid

contractors even Enterprise Bank admitted that it was now in the development business. [R. p. 377, lines 2-21]. All unpaid contractors were paid by Enterprise Bank with the exception of Moorhead and his subcontractors; Craft and Miller. [R. p. 359, line 24- p. 360, line 19].

On April 17, 2007, Moorhead Construction, Inc., filed its mechanic's lien claiming an amount owed of $401,729.00. [R. pp. 67-72.]. This amount included the unpaid work performed by Craft and Miller. [R. p. 463, lines 5-15; pp. 610-615; pp. 616-626; pp. 627-636].

After the liens were filed, the 2 acre tract was conveyed to Enterprise Bank on July 24, 2007. [R. p. 9]. Additionally, on February 11, 2008, Tract B was conveyed to Enterprise Bank. [R. p. 9].

Approximately one year after accepting the deed-in-lieu, Enterprise Bank began reconstruction work on the project. [R. p. 387, lines 5-18]. Enterprise Bank admits that it 'reaped the benefits' of any work performed by Moorhead and his sub-contractors. [R. p. 511, lines 9-14]. Despite this admission, Enterprise Bank continued to refuse to pay Moorhead the amount it was owed. However, it did pay Mr. Mathias nearly $600,000 (at $15,000 per month) over the span of less than 4 years to oversee the reconstruction even though he was personally obligated on the original 3 million dollar note, and despite him failing to be the Bank's 'eyes and ears' on the project before Enterprise Bank accepted the deed-in-lieu. [R. p. 374, lines 5-25].

The Master found that Moorhead was entitled to a principal balance of $66,627.81 in direct damages owed for work directly performed by Moorhead. [R. p. 14]. This figure was the total of unpaid retainage for work performed and lost bond premiums paid. Additionally, the Master found that Moorhead was entitled to pre-judgment interest and its attorney's fees and costs. [R. p.16]. Lastly, the Master also ruled in favor of Craft in the

amount of $70,000 plus prejudgment interest and attorneys fees, and found in favor of Miller in the amount of $111,103.13 plus prejudgment interest and attorney's fees. [R. pp. 19-33; pp. 34-48]. These amounts would have been amounts that Moorhead owes to his subcontractors, and was taken into consideration by the Master on the issue of prevailing party for purposes of an award of attorney's fees and costs. [R. p. 14].

The Master issued an Order of Judgment on all three (3) cases as opposed to immediately ordering foreclosure. In large part, this was due to the nature of other proceedings pending. [R. p. 579, line 1- p. 582, line 12]. In large part, the order was issued as such to assist Enterprise Bank in the event it appealed so that it would not have to post a bond in an attempt to stop the foreclosure process. [R. p. 581, line 10 - p. 582, line 12].

Enterprise Bank filed its Motion to Reconsider, which was summarily denied. [R. pp. 336-340; pp. 1-3] It then filed this appeal.

ARGUMENT

STANDARD OF REVIEW

"An action to foreclose a mechanic's lien is a law case in South Carolina. In an action at law, tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support. His findings are equivalent to those of a jury in an action at law[4]." *Zepsa Const., Inc v. Randazzo*, 357 S.C. 32, 35-36, 591 S.E.2d 29, 30 (Ct. App. 2004) (internal citations omitted).

Last Date of Work
(Issue #1)

"In South Carolina, any person to whom a debt is due for labor performed or materials furnished in the erection, alteration or repair of a building or structure upon real estate is given a lien on the property to secure payment of the debt. The lien arises, inchoate, when the labor is performed." *Shelley Construction Company, Inc. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 25, 336 S.E.2d 488, 489 (1985); S.C. Code Ann. §29-5-10 (as amended). The mechanic's lien that arises at the time work is performed dissolves if the contractor fails to file the notice of the mechanic's lien as prescribed in the statutes within ninety (90) days of its last date of work on the real property. S.C. Code Ann. §29-5-90 (as amended). A foreclosure action must then be filed within six (6) months of the last date of work. *Id.*

In this case, the Master found that Moorhead's last date of work was March 6, 2007, when it was providing work in assisting to correct a silt fence and detention pond that was failing and casting water into a protected wetlands area. [R. p. 3]. Moorhead's subcotractor, Miller, was also present to correct this significant issue. [R. p. 9]. Craft, another of

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[4] "In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775 (1976) (emphasis added).

Moorhead's subcontractors, was performing work on a force main essential to providing sewer services. [R. p. 9]. This finding was supported by the substantial testimony and evidence presented. [R. p. 456, line 18 - p. 461, line 17; p. 403, line 16 - p. 405, line 9; p. 423, line 2 - p. 425, line 2; p. 431, line 19 - p. 433, line 1; p. 448, line 15 - p. 449, line 21]. The Respondent, through cross-examination, attempted to refute the testimony of Moorhead, Miller and Craft. However, the Master found the testimony of Moorhead, Miller and Craft as credible.

Enterprise Bank argues that Moorhead's work was gratuitous, not performed at the request of the owners and only performed to revive Moorhead's lien rights. See *Butler Contracting, Inc. v. Court St., LLC,* 369 S.C. 121, 631 S.E.2d 252 (2006). Moorhead and Miller were the ones who built the pond and the silt fence. It was failing and casting water into a protected wetlands area. This is a serious problem, and a problem that DHEC would have addressed with either Moorhead, Miller or the owners. [R. p. 423, line 2 - p. 425, line 2; p. 431, line 19 - p. 433, line 1; p. 448, line 15 - p. 449, line 21]. Had Moorhead and Miller not alleviated this issue they believed they would have likely been fined by DHEC. [R. p. 431, line 19 - p. 433, line 1]. Had DHEC not fined Moorhead and Miller and instead fined the then owners of the property, Enterprise Bank, it would have no doubt passed that loss on to Moorhead and Miller who built the fence and the pond. Moorhead and Miller did not charge anyone for this corrective work and found it to be necessary corrective work under their contract. [R. p. 448, line 15 - p. 449, line 21].

There was no evidence presented to indicate that this work was performed to revive lien rights. Additionally, given the severity and seriousness of the issue, the work can not be considered gratuitous. Accordingly, Moorhead contends that the Master's finding should

be affirmed as to the issue of the last date of work as there is sufficient evidence and testimony to support the finding.

Amount Awarded
(Issue #2)

In its lien, Moorhead claimed that it was owed approximately $401,000.00 for unpaid work on the project. This amount included unpaid retainage for work performed directly by Moorhead, lost bond premiums, lost overhead and profits, amounts owed to Miller and amounts owed to Craft. [R. p. 405, line 10 - p. 408, line 1; p. 403, lines 11-15; pp. 610-615; pp. 616-626; pp. 627-636]. The Master did not allow the claim for lost overhead and profits, but allowed the remaining amounts owed as damages. [R. p. 13]. With the exception of the claim for lost overhead and profits, the remaining amounts went largely unchallenged by Enterprise Bank at trial.

Enterprise Bank asserts that lost bond premiums are not a recoverable item of damages in a mechanic's lien action. Moorhead's bond was set at the amount of a contract price that never occurred. In fact, had the bond been set at the amount of the work actually performed, Moorhead would not have had to pay the bond premium claimed as damages. [R. p. 407, lines 11-19]. This was money that Moorhead lost and actually paid as a result of the project being stopped, and not performing any further work.

Prejudgment Interest
(Issue #3)

"The law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty." *Smith–Hunter Constr. Co. v. Hopson,* 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005). "Stated another way, prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or

capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties." *Babb v. Rothrock,* 310 S.C. 350, 426 S.E.2d 789, 791 (1993).

"The fact that the amount due is disputed by the opposing party does not render the claim unliquidated for the purposes of an award of prejudgment interest. The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Butler Contracting, Inc. v. Court St., LLC,* 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006).

This is a liquidated damages case asserting, *inter alia*, a claim for an amount for unpaid work for improvement and construction services on real property. The fact that Enterprise Bank disputes the amount does not change the measure of recovery. Moorhead contends that its type of claim falls directly in line with the type of claim upon which pre-judgment interest may be granted.

Effect of Acceptance of Deed-In-Lieu
(Issue #4)

Generally, the recording statutes protect a bona fide purchaser for value without notice of prior claims against the enforcement of a mechanic's lien claim when the mechanic's lien is filed subsequent to the conveyance. *The Lite House, Inc. v. J.C. Roy Co., Inc.,* 309 S.C. 50, 419 S.E.2d 817 (Ct. App. 1992). However, in order to qualify as a bona fide purchaser for value, without notice of claim or defect in title, the purchaser must show:

> (1) he has actually paid in full the purchase money (giving security for the payment is not sufficient, **nor is past indebtedness a sufficient consideration**); (2) he purchased and acquired legal title, or the best right to it; **and** (3) he purchased bona fide, *i.e.* in good faith and with integrity of dealing, without notice of a lien or defect.
>
> *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874-875 (2006)(emphasis added).

Acceptance of deed-in-lieu does not qualify one as a bona fide purchaser. *Id.* Additionally, there is significant evidence in the record that Enterprise Bank was aware of unpaid contractors at and before the time the deed-in-lieu was issued. [R. p. 362, line 24 - p. 365, line 13; p. 505, line 25 - p. 507, line 14; p. 376, line 1 - p. 378, line 17]. Further, Enterprise Bank immediately paid approximately 1.2 million dollars to unpaid contractors upon receiving the deed-in-lieu of foreclosure. [R. p. 384, line 2 - p. 385, line 10; p. 359, lines 4-23; p. 373, lines 4-25]. It had a duty and was on inquiry notice to perform a further investigation of possible unpaid contractors prior to accepting the deed-in-lieu.

Enterprise Bank never filed an action to set aside the deed-in-lieu of foreclosure even after being served with the mechanic's liens. [R. p. 383, lines 12-22]. Enterprise Bank also never filed a formal foreclosure action. [R. p. 384, lines 15-18]. Approximately nine months to a year later, Enterprise Bank then began reconstruction on the project. [R. p. 384, line 19- p. 385, line 19]. Enterprise Bank agrees that it benefitted from the work provided by Moorhead and its subcontractors. [R. p. 511, lines 9-14].

When one holds an equitable interest (such as a mortgage) and the becomes the legal title owner, the legal and equitable titles merge and the equitable encumbrance ceases to exist. *First Federal Sav. & Loan Ass'n of S.C. v. Finn,* 300 S.C. 228, 387 S.E.2d 253 (1998). The doctrine of merger is a well settled tenant of real property law. "It must be taken to be settled in that state by a long line of adjudications, both in law and equity, 'that a mortgagee who buys the estate under mortgage not under process of foreclosure, extinguishes the debt or claim with him on the property." *Bleckley v. Branyon*, 26 S.C. 424, 2 S.E.2d 319, 321 (1887). Accordingly, by virtue of the doctrine of merger, Enterprise Bank no longer held an interest as a mortgagee, but rather became the fee simple owner but not as a bona fide purchaser for value without notice of prior claims. The purpose of this finding in the Final

Order is important. Enterprise Bank still asserts that its mortgage has priority over lien claims of Moorhead. This finding is essential for the future foreclosure process that was ordered by the Master.

The acceptance of a deed-in-lieu has advantages and disadvantages. However, one inherent risk of acceptance of a deed-in-lieu is when a mortgagee accepts such a deed it is running the risk that there may be unpaid contractors who's ninety day time frame from their last date of work has not yet run. *Real Estate Law, 2nd Ed.,* Gibson, Karp & Klayman, page 494 (1987) and discussion of facts in *Kirkman v. Parex, Inc.,*, 369 S.C. 477, 632 S.E.2d 854 (2006)[5]. Enterprise Bank was mindful of this risk. Upon receipt of the deed-in-lieu, Mr. Mathias was immediately dispatched to the project with an Enterprise Bank checkbook. He paid approximately 1.2 million dollars to unpaid contractors[6]. [R. p. 373, lines 4-25]. Further, Enterprise Bank believed it was now in the development business as taking over the project. [R. p. 376, line 17 - p. 377, line 9]. At that time it was performing an investigation of unpaid contractors and paying them what was owed in order to alleviate future filings of mechanic's liens. However, it decided to not pay Moorhead and its subcontractors thereby necessitating the filing of said liens.

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5 In *Kirkman,* the builder had a contract for the sale and construction of the Kirkman's home. When the builder began experiencing financial problems, the lender who financed the builder's construction contemplated foreclosure. Initially, the parties agreed to hold off on foreclosing as it appeared the purchaser, Kirkmans', payment would extinguish the lender's debt. "It later became apparent that foreclosure was necessary because of junior liens on the property, which would not have been satisfied by the Kirkmans' payment." Then lender then filed formal foreclosure, purchased the home at foreclosure sale and finished the project. *Kirkman,* 369 S.C. at 480-81, 632 S.E.2d at 855-56.

6 Enterprise Bank additionally paid Ervin Mathias approximately $600,000 during the span of nearly 4 years following taking over the project to help oversee the reconstruction. [R., p. 374, line 15 - p. 375, line 18]. Mr. Mathias was personally liable on the first note for $3,000,000.

Accordingly, Moorhead contends and the record supports, the finding by the Master regarding acceptance of the deed-in-lieu, the doctrine of merger, and the effect the same has regarding this particular case.

Attorney's Fees & Costs
(Issues #5, 6, 7)

S.C. Code Ann. §29-5-10 (as amended) provides in relevant part that the prevailing party in a mechanic's lien action is entitled to its attorney's fees and costs. By virtue of the Master's ruling, Moorhead was clearly the prevailing party at trial in this matter. "For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. One verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims." S.C. Code Ann. §29-5-10 (as amended).

Our supreme court has defined a "prevailing party" as

> [O]ne who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered. In a mechanic's lien action the defendant is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic's lien cannot be enforced against it.
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> *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006)

In this case, no written offers were made pursuant to S.C. Code Ann. §29-5-10. Accordingly, the Plaintiff's offer was approximately $401,000. Enterprise Bank's offer would be the value of its counterclaims, or if no counterclaims were made $0.

Enterprise Bank has made the argument that it is the prevailing party because the amount awarded directly to Moorhead is less than half of the difference between $401,000 and $0. This argument ignores the fact that Miller and Craft (Moorhead's subcontractors) were awarded approximately $111,000 and $70,000 respectively on the principal balance of

their damages. This makes Moorhead's ultimate recovery approximately $247,000. This amount is much greater than the mid-point between $401,000 and $0. The Master's Order even addresses this issue, and indicates that Miller's and Craft's recovery were considered on the issue of whether or not Moorhead was a prevailing party[7]. See *Lauro v. Visnapuu*, 351 S.C. 507, 570 S.E.2d 551 (Ct. App. 2002).

Enterprise Bank alternatively argues that it is entitled to an offset for an amount of attorney's fees due to the grant of summary judgment on one tract of land out of the four tracts that were originally involved in this case. As referenced above, S.C. Code Ann. §29-5-10 states in relevant party that the award of attorney's fees goes to the prevailing party based on one verdict in the action. (Emphasis added). The term prevailing party has been defined as the 'the one who successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention.' *Keeney's Metal Roofing, Inc., v. Palmieri*, 345 S.C. 550, 554, 548 S.E.2d 900, 902 (Ct. App. 2001)(internal citations omitted). Further, the statute does not provide an exception for the language of one verdict in the action. In this case, there was one verdict, and it was in favor of Moorhead in the amount of $66,627 plus pre-judgment interest. Additionally, Moorhead's subcontractors received judgments totaling approximately $181,000 in addition to the amount awarded directly to Moorhead. This amount totals to greater than $247,000, or substantially more than the midpoint between the amount claimed and $0.

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7 Enterprise Bank argues that at no point were the cases ever considered as one case as a whole. However, see page 7, line 1 through page 8, line 14 of the transcript from the fee hearing. Further, Enterprise Bank makes the speculative argument that was never raised at trial that had it sought to 'bond off' the liens it would have had to 'bond off' the total of all 3 liens. First, that issue never arose. Secondly, had it arose this case would have been placed in a different posture and certainly the Plaintiffs in all 3 cases would have only required a bond on the total amount alleged to be owed by all 3 Plaintiffs combined.

Enterprise Bank asserts that it was error for the Master to award $39,000 in attorney's fees and $791.66 in costs to Craft. S.C. Code Ann. §29-5-10 provides that a reasonable attorney fee must be determined by the Court to the prevailing party. The only statutory limitation on this amount is that the fee can not exceed the amount of the lien.

After finding that Moorhead was the prevailing party, the Master determined that $39,000 in attorney's fees was a reasonable amount. Enterprise Bank did not object to this finding at the hearing. At no time during the course of the hearing did Enterprise Bank assert that testimony need be taken regarding the reasonableness of the fee award[8]. The losing party generally must present his issues and argument to the lower court and obtain a ruling before an appellate court will review those issues and arguments. *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). If the losing party raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue. *Id.*

In this particular case, the first time the issue was raised regarding reasonableness or the manner in which the Master determined the fee was in Enterprise Bank's Motion to alter or amend. [R. pp. 336-340]. Of important note, at the fee hearing, Enterprise Bank submitted a fee affidavit in the Moorhead matter evidencing total fees of $68,031.55 in the that particular case. [R. pp. 333-385]. The Master awarded Moorhead slightly more than one-half of that amount. [R. pp. 8-9].

Order of Judgment vs. Foreclosure Order
(Issue #8)

First of all, the Master struggled with this issue at trial. [R. p. 579, line 1- p. 582, line 12]. However, the Order is beneficial to Enterprise Bank in that the Master could (and likely

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[8] Moorhead was present as was Moorhead's expert ready to proceed with this facet of the case.

should) have issued an immediate foreclosure decree to the benefit of Moorhead. [R. p. 581, line 10- p. 582, line 6]. The obvious solution to this issue at the appellate level is to order the immediate foreclosure of the properties as the statute provides.

Enterprise Bank unequivocally agrees that work was performed by Moorhead and his subcontractors, and that said work benefitted Enterprise Bank. [R. p. 387, lines 12-25; p. 511, lines 9-14]. Additionally, Charles Kernaghan testified that he believed Moorhead and his subcontractors were owed monies on the project in excess of at least $125,000. [R. p. 360, lines 12-19]. Had the Master ordered a foreclosure of the liens at the time of trial, Enterprise Bank would have been required to post a bond prior to filing its appeal. By virtue of asserting its appeal rights before said foreclosure was filed they did not have to post such a bond. The Master foresaw this issue, and as such issued the ruling that he did in anticipation of an appeal. [R. p. 581, line 10- p. 582, line 6]

CONCLUSION

Enterprise Bank agrees that constructive services were provided on a project that it accepted by virtue of a deed-in-lieu of foreclosure. It further admits that it benefitted from the worked performed. Lastly, the evidence was clear that Moorhead and its subcontractors had not been paid for said work. However, despite paying approximately 1.2 million dollars to unpaid contractors just days after accepting the deed-in-lieu, it denies that it owes Moorhead or any of Moorhead's subcontractors any monies whatsoever.

It took the legal position that a deed-in-lieu gave the same protections as a formal foreclosure action despite not filing the same. It knew even at that time, that such a position was not a viable position in admitting that by virtue of accepting the deed-in-lieu it then became a 'developer.' Ultimately, it stepped into the shoes of the Developers and voluntarily decided, for whatever reason, that financially it would be better off by accepting the deed-in-

lieu[9]. It did so while Mr. Mathias owed millions to it, but yet paid him more than all three (3) liens (Craft, Miller and Moorhead) combined to 'oversee' the reconstruction project for thousands of dollars per month in income.

At the end of the day, Enterprise Bank could have done what it did with numerous other unpaid contractors and pay Moorhead and its subcontractors what was owed for the work it performed and for which Enterprise Bank benefitted. However, it decided not to do so. That was its decision, and it clearly understood the ramifications of its decision by virtue of its actions in paying numerous other unpaid contractors after accepting the deed-in-lieu.

Not only was there evidence to support Moorhead's claims (the standard of review in this type of case), there was significant evidence to support the claims and very little evidence to refute the claims. At different times throughout its brief, Enterprise Bank asserts the argument that Moorhead held the property hostage; however, Enterprise Bank held its own property hostage. It originally understood that it had to pay unpaid contractors, why it stopped with these three contractors from the Upstate is known only to Enterprise Bank.

Had Enterprise Bank filed formal foreclosure proceedings, the outcome of this case would have been dramatically different. However, Enterprise Bank voluntarily decided to accept the deed-in-lieu, and finish the project. Enterprise Bank clearly understood the risk of accepting the deed-in-lieu, and did so for a number of reasons both financial and non-financial. [R. p. 507, line 24 - p. 508, line 5]. It stepped into the shoes of the Developers and reaped the benefits of the work performed by Moorhead and its subcontractors, but refuse to pay for said work. [R. p. 511, lines 9-17].

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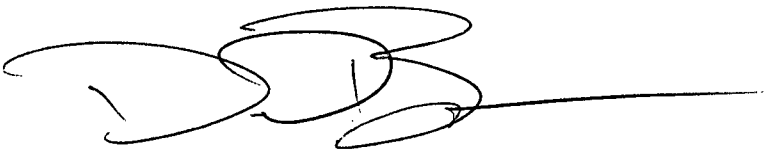
[9] Enterprise Bank has raised certain issues, both factual and legal, for the first time on appeal. There were essentially 2 issues at trial, 1) whether the last date of work alleged was accurate; and 2) the amount owed. Those two issues, of course, interplay with the issues of pre-judgment interest and attorney's fees to the prevailing party. As just one example, Enterprise Bank includes in its Statement of the Case that a judge pressured it in chambers to refer the case to the Master-In-Equity.

For those reasons, and for further reasons as this Court may find pursuant to Rule 220(c) of the Appellate Court Rules, Respondent contends that the decision of the Master should be affirmed.

Respectfully Submitted,



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June 17, 2013.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Ellis B. Drew, Jr., Master-In-Equity

Case No. 2007-CP-04-2785
(Appellate Case No. 2012-213225

Moorhead Construction, Inc., ... Respondent,

v.

Pendleton Station, LLC, Enterprise Bank of South Carolina, and
Angelo Penza..... Defendants

Of whom Enterprise Bank of South Carolina is the ..... Appellant.

PROOF OF SERVICE

I certify that I have served the Respondents's Final Brief and Certificate of Counsel in the above-referenced case has been served on all parties of record by mailing a copy of the same in the Unites States mail, postage prepaid this 20th day of June, 2013, addressed as follows:

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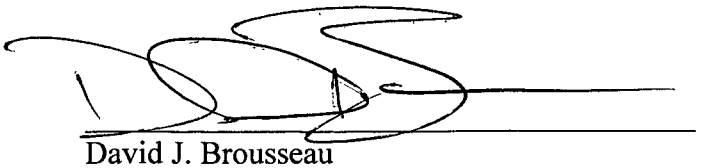

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Final Brief complies with Rule 211(b) of the *South Carolina Appellate Court Rules*.

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