THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Appellate Case No. 2012-213563

The Greens of Rock Hill, LLC; GRH 2011, LLC,

Respondents,

v.

Rizon Commercial Contracting, Inc., Road Machinery and Supplies, Co., Defendants, of whom

Rizon Commercial Contracting, Inc. is the Appellant.

INITIAL BRIEF OF THE APPEALLANT

June 24, 2013

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2. DID THE TRIAL COURT ERR IN FAILING TO FIND THAT THE APPELLANT MADE A PRIMA FACIE CASE THAT IT WAS A PERSON ENTITLED TO A MECHANICS LIEN AS A LABORER WHO PROVIDED MATERIAL FOR THE IMPROVEMENT OF THE REAL ESTATE AS DEFINED UNDER THE STATUTE?

STATEMENT OF THE CASE

The action was commenced by the filing of a petition and motion to discharge mechanic's liens and for sanctions on May 18, 2012 (Petition). The Plaintiffs sought to have the court discharge the mechanic's lien alleging the existence of a written contract and that the Defendants were not entitled to file a lien on the property, asserting that they had not provided labor, material of supplies for the improvement of the property and were not entitled to a lien. The Plaintiffs also asserted that the Defendants' liens were frivolous. (Exhibit to Complaint). Plaintiff listed the various liens which the two Defendants had filed against the property located in York County, South Carolina. On June 19, 2012, the Defendant Rizon filed a verified answer and counterclaim seeking to foreclose on the mechanic's lien which was filed and served pursuant to statute. The Defendant attached to its pleadings a description of the property and statement of account which had been properly and timely served on the Plaintiffs (Answer). The Plaintiffs filed a reply to the answer and counterclaim, admitting that the crushed concrete which the defendant Rizon produced was used to improve the property (Reply).

The Plaintiff's motion came before the court originally on June 21, 2012. The defendants objected to the process and procedure of the court, asserting that it had begun foreclosure proceedings and that the Plaintiff had failed to file a verified petition and had not timely filed any affidavits. The Court was going to treat the motion as a summary judgment motion. The court

continued the hearing. The court also denied the Defendant's requests to conduct discovery and ordered the parties to provide and exchange affidavits in support of their various positions and rescheduled the hearing. The court stated that the issue was not how much (crushed rock) was used but whether it was actually used in the improvement of real estate. (Transcript of June 21, 2013 hearing, pp 15 – 17) The Plaintiff then filed an amended Affidavit of Dave Williams and the Defendants filed the affidavit of Robert Phillips (president of Rizon) and Stephanie Phillips (vice president). The Affidavits of the Phillips centered on what the court instructed, whether the crushed rock was actually used in the improvement of the real estate. Attached to Stephanie Phillips affidavit were emails from the city inspector verifying that the crushed rock was used in the development in the roads sidewalks and the Veladrome. (Affidavits of Robert Phillips and Stephanie Phillips) The court held a hearing on August 16, 2012 and issued an order dated September 7, 2012 and filed September 12, 2012. (Order) The court dismissed the mechanics lien foreclosure and released the lis pendens. The court in doing so, released the bond as the Platinfiff had bonded the lien off the land.

The Defendants filed a timely Notice of Motion and Motion to Alter or Amend on September 14, 2012. Again the Defendant requested the court to reverse the dismissal arguing that the parties had not had the opportunity to engage in discovery and as well as referenced the court to various statutory code sections to support the fact that the court erred in its decision. The Defendant attached to the motion sections from the South Carolina statutes. (Motion) The court held a hearing on the motions on September 20, 2012 and issued its decision on November 2, 2012. (Transcript and Order Denying the Motion to Alter or Amend) The Defendant Rizon filed a timely appeal of the courts orders.

STATEMENT OF FACTS

Plaintiffs, as owners of property known as Riverwalk, hired Celriver Services to demolish a large manufacturing facility, to grade the site and to build roads and infrastructure for the development of the property. The demolition of the manufacturing facility resulted in a large amount of scrap concrete. Celriver hired the appellant to crush the scrap concrete and produce various types of stone which was then used in the building of the roads, sidewalks, parking lots and Velodrome. The roads, sidewalks, parking lots and Veladrome were the projects being constructed on the Plaintiff's property. (Affidavit of Robert Phillips and Stephanie Phillips with attachments.) The Appellant Rizon rented the equipment from Road Machinery and Supplies, Inc. and Appellant Rizon provided the operators and fuel for the machinery. The crushed concrete was transported to various locations at the Riverwalk site for use as a base in the roads and sidewalks, etc. (Order of September 7, 2012). The crushed concrete was used to improve the property. (Reply, paragraph 7). The Appellant Rizon was initially hired in 2010 and completed its original contract in 2010. The Appellant Rizon was hired again in 2011 for purposes of crushing additional concrete. (Affidavit of Robert Phillips) The contract which the respondents have attached to their petition had expired and the payment and performance bonds attached to that contract were expired as well. Appellant manufactured the stone by recycling and crushing the waste concrete from the old manufacturing facility into different size particles consistent with state standards for different types of rock. The material (crushed rock) was manufactured to the stated specifications for the City of Rock Hill and the inspector for the city advised when and where the material was used relating to the roads, sidewalk, parking lots, etc. (Robert Phillips Affidavit) The City officials directed where the rock was placed and in various emails confirmed the use of the rock which Appellant manufactured. (Affidavit of Stephanie Phillips)

Appellant rented the equipment from Road Machinery. Appellant hired and paid its employees, paid for the fuel to operate the equipment and oversaw the process of manufacturing the stone everyday when the crushing activities were ongoing. Appellant provided labor, services and the equipment for the production of the stone used to improve the property. (Affidavit of Robert Phillips) After not being paid, Appellant filed a mechanics lien upon the property for the amount of $295,591.01, which included the amounts due and wing for the rental of the equipment from Road Machinery. (Mechanic's Lien) The Plaintiffs bonded the lien off the property and posted a bond with the Clerk of Court pursuant to statute.

The owners filed this suit (pursuant to **Sea Pines Company v. Kiawah Island, Inc** 268 S.C. 153, 232 S.E.2d 501 (1977)) to discharge the lien alleging that the Court should dissolve the lien as it had been wrongfully filed. Appellant objected to the court proceeding under the **Sea Pines** analysis as Appellant had filed a counterclaim and a separate suit to foreclose on its mechanics lien. Appellant also objected and requested discovery but the Court declined to allow discovery and directed the parties to prepare affidavits for the Court's analysis of this issue, stating that the issue was not how much but whether the material was used to improve the property.

The Court held a hearing and on September 7, 2012 issued an order dissolving the mechanic's lien, releasing the lis pendens and dismissing the foreclosure of the mechanic's lien with prejudice. The court in its decision stated that Appellant "did not provide or do anything to improve the real estate. It provided a service directly to Celriver under a contract not related to Owners' contract with Celriver." (Order) The courts decision was somewhat different that the analysis for which affidavits had been provided and since discovery was nto allowed, there was no way to present or ascertain what the Owners' contract with Celriver covered, despite the fact

that the crushed rock was being used to improve the owners property pursuant to Celrivier's stated obligtions of site development.

The Appellant filed a Motion to Alter or Amend, referring to various statutes which the court had not considered. The Appellant also again submitted that the court should have allowed discovery to develop the issues relating ot the contract, scope of work and use of the material. The court declined to alter or amend decision and left this case dismissed with prejudice as to the mechanics in foreclosure. The Appellant filed a timely appeal of this matter.

ARGUMENT

I. The trial court erred in ordering the parties to submit this issue to the Court for determination based on affidavits and not allowing discovery.

Discovery is permissible pursuant to the South Carolina Rules of Civil Procedure, rules 26 through 37. At the initial hearing on June 21, 2012, appellant requested discovery and to be allowed to exchange discovery. The court declined and at the end of the hearing on June 21, 2012, advised the parties that it would decide the issues based upon affidavits alone. The court advised it was following the procedure set forth in the **Sea Pines** case. The court was treating the motion as one for summary judgment. The problem with the Court's methodology in proceeding in this fashion is that the Court made findings of fact based upon affidavits and yet those affidavits demonstrated clear questions of fact exist. The court also made findings of fact that are not supported in the record and upon which it based its decsions, such as the statement that the service the appellant provided to Celriver was under a contract not related to the Owners' contract with Celriver. Questions of fact exist as to the existence of a written contract, the terms of the contract, the scope of the work, the necessity of maintaining the construction debris on site, the use of the material, how the property owners played into the development process. Appellant asserts that the original contract had expired. Celriver asserts that the contract from

2010 was governing the relationship. The court made findings of fact as to appellant's activities of crushing rock, where Appellant was crushing rock, why it was crushing rock, and the process of crushing rock. The transcript from the hearing of September 20, 2012 further demonstrates issues of fact exist as to how the statutes really apply to the facts in this case.

The law is well settled that summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. The nonmoving party must demonstrate a likelihood that further discovery will uncover additional relevant evidence and that the parties are not merely engaged in a fishing expedition. **Dawkins v. Fields,** 354 S.C. 58, 580 S.E.2d 433 (2003) **Rehearing Denied**. In the case at hand, Appellant requested discovery and the court declined to allow any discovery. (June 21, 2012 transcript), Clearly, discovery in this action would have benefited the court as well as this appellate court in the analysis of Appellant's work, how Appellant's work improved the land and how appellant's work should be viewed in light of the various mechanics lien statutes. Discovery would have demonstrated the relationship between Celriver and property owners, Celriver's obligations as far as disposal of the material from the demolished Celanese plant. Discovery would have further enabled the parties to flesh out the relationship between the owner, contractor and the appellant. (September 20 transcript, pp 25 – 29). The Appellant requested to be allowed to conduct discovery and when the court denied it, the Appellant came to Court with the affidavit as directed. However, the court indicated in the June hearing that the issue was whether the material was used in the improvement of the real estate and that is what the affidavits focused upon. At the hearing and the courts analysis centered not on whether the crushed rock was used but whether the act of crushing and producing the rock was covered under the statute and whether the Celrivers contract with the Owner was in any way related to the contract Celriver had with

the Appellant. Had discovery been allowed, these issues could have been developed and the actual contracts and scope of work and other issues relate dot the scope of work could have been ascertained. For instance, if the material had to be kept on site or removed to a classified land fill, then the Owners contract with Celriver very well may be directly tied to the project and the crushing activities.

In the Motion to Alter or Amend, appellant again argued that to dismiss this action was premature without discovery. The Court again declined to alter or amend its decision. (September hearing)

The Court erred in not allowing any discovery and the appellant objected to the court proceeding as it did without discovery. The trial court made findings of fact and conclusions of law relating to contractual issues and applied the statutes to the facts without the benefit of a fully developed record or any developed record. The parties affidavits demonstrated conflict and disagreement even as to whether there was a written contract and the terms of the contract.

The law is clear that in cases applying the preponderance of evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. **Rosen v. University of South Carolina**, 398 S.C. 703, 731 SE.2d 298 (Ct. App. 2011). An example of findings of fact the court made that are not supported by the record is the courts determination that "there is no indication that Celriver's contract with the owners required crushing of the concrete in order that it could be used in the building of roads and sidewalks, and , as indicted above, Celriver did not purchase the crushed stone from Rizon. While crushing the concrete may have been a benefit to Celriver, the work involved in crushing the concret did not improve the real property." No one knows what the owners required as we did not have the contract between Celriver and the owners. Discovery would

have enabled this issue to be developed. In addition, the owners admitted that the crushed concrete was used to improve the property. (Reply paragraph 7) Therefore, the courts finding of fact is in conflict with the pleading.

Furthermore, the court relied upon the contract and reviewed the contract the Respondents provided with their affidavit. The Appellant did not admit that the contract covered this job. Even if it did, the contract provided that the Appellant was a subcontractor of Celriver on the job and yet the court found that the Appellant was not a subcontractor because there was no indication that Celriver's contract with the Owners required crushing of the concrete in order that it could be used in building roads and sidewalks. The problem with the courts analysis is that there is no indication either way because Appellant was not allowed discovery and this in itself becomes a question of fact. (Contract and Court Order of September 7, 2012).

In the case at hand, the trial court treated the Plaintiff's motion as a motion for summary judgment. As the exchange between the court and Appellant's counsel at the September 20, 2012 hearing demonstrates, questions of fact exist as to how Appellant's work related to the scope of the mechanics lien statue. (Transcript in its entirety). As will be seen in the below argument, the scope of the Appellant's work, how and whether it fell within the statutory scheme was not something that should have been ruled upon without discovery, especially in light of the relatively new statutes addressing the scope of work for which a subcontractor is entitled to a mechanic's lien. Therefore, Appellant submits that the trial court erred in dismissing this action and in refusing to allow discovery before considering and ruling on the motion.

II. The Appellant's work provided material that improved the property and Appellant is a laborer as defined under the statue, both of which entitle the Appellant to a Mechanics Lien under S.C. Code Section 29-2-20.

In order to understand why Appellant is entitled to a mechanics lien and why the trial court erred in dismissing the lien, it is necessary to have the language of the applicable statutes and to understand the applicable statutes. South Carolina Code Section 29-5-20 provides as follows:

Every labor, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon, subject to existing liens of which he has actual or constructive notice, to the value of the labor or material so furnished, including the costs of the action...

In addition, S.C. Code Section 29-5-22, which is also applicable, provides:

Any person who supplies tools, appliances, machinery or equipment used as provided in Section 29-5-10(a) is considered to have furnish material for the improvement of real estate in the meaning of Sections 29-5-20 and 29-5-40 to the extent of the reasonable rental value of the tools, appliances, machinery or equipment for the period of actual use.

The additional statues which are applicable to the analysis of whether the Appellant is entitled to the benefits of the mechanics lien statutes is S.C. Code Section 29-5-27 which references 44-96-40(6) as well.

Any person providing construction and demolition debris disposal services, as defined in section 44-96-40 (6), including, but not limited to final disposal services provided by construction and demolition landfill, is a labor within the meaning of sections 29-5-20 and 29-5-40. "Person" as used in this section means any individual, corporation, partnership, proprietorship, firm, enterprise, franchise, Association, organization or other entity. (S.C. Code Section 29-5-27)

"Construction and demolition debris" means this card it solid waste resulting from construction, remodeling, repair and demolition of structures, road building and land clearing. The wastes include, but are not limited to, bricks, concrete and other masonry materials, soil, rock, lumber, road spoils, paving material, and tree and brush stumps, but does not include solid waste from agricultural or silvicultural operations. "S.C. Code Section 44-96-40(6).

As the trial court set forth "a mechanic's lien is a creature of statute. The right to a mechanics lien is wholly dependent on the language of the statute creating the right." **Skiba v.**

Gressnor, 374 S.C. 208, 648 S.E.2d 605 (2007); **Clo-Car Trucking Co., Inc. v. Clifflure Estates of South Carolina, Inc**, 282 S.C. 573, 320 S.E.2d 51 (Ct. App. 1984). In South Carolina, however, the courts have found that mechanic's liens, being remedial in nature, should be given liberal construction. **Clo-Car Trucking Co., Inc. v. Clifflure Estates of South Carolina, Inc**, 282 S.C. 573, 575 320 S.E.2d 51, 53 (Ct. App. 1984). In the case at hand, the trial court did not construe the statutes liberally at all but construed them very conservatively.

As S.C. Code Section 29-5-20 set forth, to have a right to a mechanics lien, the party claiming the lien must be either a "laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner." The laborer is further expansively defined in South Carolina code section 29-5-27 to specifically include individuals providing construction and demolition debris disposal services as defined under S.C. 44-96-40(6). The reason all of this is relevant is that the Court, in its order of September 7, 2012, specifically found that the Plaintiffs hired Celriver to demolish an existing large manufacturing facility. The court went on to find that in order to make the scrap concrete usable in the project, Celriver contracted with Appellant to crush the scrap concrete. Appellant rented equipment and provided all the labor and fuel and supervision to perform the crushing. The language of the Court's original order in characterizing Appellant's conduct supports the fact that the activities and services the Appellant provided fall squarely within the statutory scheme which grants it a right to a mechanic's lien under 29-5-20.

A further analysis of the statutes demonstrates that construction and demolition debris is defined as solid waste resulting from construction, remodeling, repair and demolition of structures. The trial court found that Celriver hired Appellant to make the scrap concrete usable. The Court found that the concrete was a result of the demolition of a building. By the plain

language of the statute, appellant is a labor under section 29-5-20. The Appellant specifically pointed this out to the trial court in the motion to alter or amend and it arguments. (Motion and Transcript September, 2012, pp 2 – 18). The fact that the staging occurred on other property is irrelevant. The appellant was involved in the demolition of construction debris from the property that the owners were developing as Riverwalk. In fact, the statute defining labor gives the construction and demolition landfill rights to a mechanic's lien. Appellant submits that certainly it should have and has a right to a mechanic's lien upon the properties in this case because its services not only provided for the demolition of the manufacturing facility but also the demolished material went directly back into the project. Not only does the appellant have lien based upon the definition of labor, it also has a lien right as an individual who furnished material for the improvement of real estate as was admitted by the respondents in their reply. "Plaintiffs (respondents) admit that the concrete crushed by Defendant (Appellant) was used to improve the property" (Reply, paragraph 7) The Appellant supplied the material to the extent that it provided the means, fuel, labor and equipment for the purpose of crushing the chuncks of concrete and transforming it into usuable stone in the development of Riverwalk.

The trial court made a distinction in asserting that the crushed concrete was never owned by Rizon nor supplied by Rizon. Although it is true that Rizon did not own the concrete as that was material that had been demolished on site, it is also clear that Celriver had the responsibility of removing the demolished facility and as opposed to hauling it to a construction and demolition land fill, Celrivier hired Appellant to dispose of the demolition debris through a process whereby Celrivier and the owners were able to reuse the material as opposed to taking it to a landfill. The Appellant was clearly a person providing construction and demolition debris disposal services within the statutory scheme which would entitle it to a lien. To find that the Appellant is not

protected and at the same time for the statue on its face to give a land fill a lien is inconsistent and illogical.

The court relied upon **Sea Pines** in performing an analysis and proceeding to address this situation prior to any discovery and without testimony. However, the Appellate court in **Sea Pines** reversed the trail court's decision to vacate the mechanics lien and the lis pendens. The court specifically found "The facts are disputed and reasonable men may disagree as to whether Sea Pines has been paid for all of the labor and material furnished and used as contemplated by the mechanic's lien statute, **A prima facie case for the filing of the mechanic's lien was mde to the court and we thing the court erred in vacating and discharging the lien**" (Emphasis added) **Sea Pines Company v. Kiawah Island, Inc** 268 S.C. 153, 160, 232 S.E.2d 501, 504 (1977) The court noted that the lien claimant made a prima facie showing that it was entitled to a lien. Appellant submits that it has made a prima facie showing that it is entitled to a mechanics lien under the statue and that the trail judge erred in vacating the lien and dismissing the suit.

CONCLUSION

The Appellant submits that the trial court erred and it should be reversed with the case being remanded so that the parties can engage in discovery and proceed on to trial Appellant submits that the court should also rule that the Appellant is an individual who is entitled to a lien under the statue as it is a laborer as defined under the mechanics lien statutory scheme.

York, South Carolina

June 21 2012

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DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Defendants propose the following be included in the Record on Appeal:

1. Hearing transcript of June 21, 2012 and September 20, 2012;
2. Petition of May 18, 2012;
3. Answer and Counterclaim of June 19, 2012;
4. Reply of July 19, 2012;
5. Motion to Alter or Amend of September 14, 2012;
6. Amended Affidavit of Dave Williams of July 20, 2012;
7. Affidavit of Robert Phillips of June 21, 2012;
8. Affidavit of Stephanie Phillips of June 29, 2012;
9. Order of September 7, 2012;
10. Order of November 2, 2012.

I certify that this designation contains no matter which is irrelevant to this appeal.

June 24, 2013

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PROOF OF SERVICE

I certify that I served the Initial Brief of Appellant and Designation of Matters to be included on Appeal on the respondent by depositing a copy of it in the United States mail, correctly addressed, postage prepaid, on June 24, 2013, addressed to

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