THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2023-000649

Civil Action No.: 2023-CP-10-00665

Frank Holtham, as Trustee of the Holtham
SC Realty Trust, dated April 12, 2022 . . . . . Appellant,

v.

Glenn F. Keyes and Glenn Keyes Architects LLC. . . . . Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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July 6, 2023

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ARGUMENT

Appellant Frank Holtham, as Trustee of the Holtham SC Realty Trust, dated April 12, 2022 ("Holtham") offers the following arguments in reply to those in the brief of Glenn F. Keyes and Glenn Keyes Architects LLC (collectively, "Keyes").

I. KEYES CANNOT CREATE AN AMBIGUITY WHERE NONE EXISTS IN THE CONTRACT HE DRAFTED.

Keyes contends the lower court appropriately held the payment term in the contract ambiguous based upon allegations in his Verified Response and a course of dealing between the parties. Neither of those things creates an ambiguity in the contract.

Keyes contends "ample evidence" was submitted "that the engagement letter is capable of an interpretation other than that argued by Appellant." (Resp. Br. at 7.) In support, he points to allegations from his Verified Response that he had quoted Holtham a price of $300-$400 per square foot and estimated the home was approximately 5,000 square feet. Those things, Keyes argues, are evidence that the parties understood and intended the project would cost $1.5 Million to $2 Million and, in turn, that Holtham agreed and intended to pay Keyes a fee of between $150,000 and $200,000 (10% of the project *estimate*). Keyes argues, "The agreement can be interpreted in more than one way," and, therefore, the lower court's conclusion that the contract term is ambiguous should be affirmed. The record belies Keyes' argument.

The parties' contract contains no mention or reference to an estimated per square foot price. The language regarding payment, which Keyes drafted, plainly states "10% of the construction costs." That formula is clear. After the project was abandoned due to the excessive cost to

construct the project Keyes designed,[1] Keyes presented a different method to calculate his fee to avoid the effect of the original formula he wrote. In short, he began efforts to vary and contradict the contract terms. Keyes' $94,402 claim is based not on 10% of the construction costs but on a new formula he derived after the dispute arose.

In essence, Keyes contends the payment term is ambiguous because he wants to use a different formula now to calculate his fee. He argues it would be unfair to make him bear the risk of loss. However, the law does not allow that. He drafted the contract; the payment term is clear, and he's stuck with it. It is well established in South Carolina that courts are bound to apply and give legal effect to clear and explicit language in a contract. See, e.g., McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language."); Baugh v. Columbia Heart Clinic, P.A., 402 S.C. 1, 22, 738 S.E.2d 480, 492 (Ct. App. 2013) ("When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning."); Laser Supply & Servs. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 144 (Ct. App. 2009) ("A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully."); 7 S.C. Jur. Architects and Engineers § 34 ("As in any contract action, a design professional must prove the terms of the contract, his own performance, and failure of payment by the owner."). It is not uncommon for design professionals to include

[1] Keyes contends he told Holtham the project would cost $1.5 Million to $2 Million (based on $300-$400 per square foot and 5,000 square feet), and Holtham contends he told Keyes and the contractor there was a project cap of $1 Million. The first project estimate was for $2,152,792, well in excess of both parties' estimates, and that initial estimate was not a guaranteed maximum price because it included allowances for some items.

payment terms guaranteeing them payment sooner when a project like this requires more effort up front. See, e.g., Peteet v. Fogarty, 297 S.C. 226, 228, 375 S.E.2d 527, 528 (1988) (payment terms for architect's fee for residential construction project included "an immediate down payment of $1,000 with 40% due upon completion of the design phase, 80% due upon completion of the construction documents phase and 100% due upon completion of the construction administration phase."). Keyes was a seasoned professional, and he drafted the engagement letter. Keyes expressed no desire for such a payment schedule when he drafted his engagement letter, and the record contains no evidence the parties—when they entered the contract—intended for Keyes to be guaranteed 75% of his total project fee before a construction permit was issued. Had Keyes wanted a different payment schedule or fee calculation than "10% of the construction costs," he could have included that language and sought Holtham's assent to it. He did not, and he cannot now introduce testimony to contradict or vary the contract terms or to fashion an ambiguity in where none exists. See McGill, 381 S.C. at 188, 672 S.E.2d at 576 ("The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument . . . Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties.").

Keyes also contends the "course of dealing between these parties prior to the dispute is alone sufficient contrary evidence to create an issue of fact[.]" (Resp. Br. at 10.) He cites Keith v. River Consulting, Inc., 365 S.C. 500, 618 S.E.2d 302 (Ct. App.2005), for the rule that "[t]he parties' course of dealing may be used to ascertain their intent if a contract is silent or ambiguous as to a particular matter." (Resp. Br. at 7). That rule does not apply here because (i) the contract is not silent as to how Keyes' fee is to be calculated, and (ii) the parties had no course of dealing.

In contrast to Keith, here the parties' contract is not silent as to the calculation of Keyes' fee. The contract clearly addresses that issue and provides how to calculate the fee. With regard to the course of dealing, the Keith court relied on *prior* dealings between the parties' affiliates and representatives as evidence in the record of the contracting parties' intent, which created a triable issue about the parties' intent. 365 S.C. at 502–03, 618 S.E.2d at 303. That approach was consistent with the rules of contract interpretation focusing on the intent of the parties *at the time they entered the contract*. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007) ("In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered."). There are no such prior dealings between the parties here. Neither the parties nor any of their affiliates or representatives had any dealings prior to the engagement letter. Therefore, there is no course of dealing for a court to consider here, and the reasoning in Keith does not apply.

Indeed, proper application of the rules of contract interpretation and of the clear and explicit formula to which the parties agreed in the contract renders the conclusion that Keyes has been paid all sums he was owed. The lower court's order should be reversed.

II. THE RULE OF CONSTRUCTION INTERPRETING THE AMBIGUITY AGAINST DRAFTER IS MANDATORY.

Keyes argues the rule of contract interpretation construing contract ambiguities against the drafter is a rule for a jury to apply, not the circuit court. That is not the law. Rather, the longstanding and well-established law in South Carolina is that the ambiguity must be construed against the drafting party. Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010) ("Moreover, even if the language creates an ambiguity, a court *will* construe any doubts and ambiguities in an agreement against the drafter of the agreement.") (emphasis added); Duncan v. Little, 384 S.C. 420, 426, 682 S.E.2d 788, 791 (2009) ("In any event, were we to

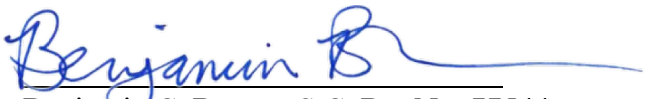
entertain the idea of an ambiguity, such ambiguity *would have to be construed* against the Bank which drafted the agreement.") (emphasis added); Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 175, 644 S.E.2d 718, 722 (2007) ("[A] court *will construe* any doubts and ambiguities in an agreement against the drafter of the agreement.") (emphasis added); S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) ("Ambiguous language in a contract, however, *should be* construed liberally and interpreted strongly in favor of the non-drafting party . . . After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings.") (internal quotations and citations omitted) (emphasis added); Williams v. Teran, Inc., 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) ("The rule of law is that where the contract is susceptible of more than one interpretation, a doubt *shall be* resolved against the party whose business it was to speak without ambiguity . . . We think it was incumbent on the authors of the agreement . . . to make it clear.") (emphasis added). The rule is mandatory; it is not discretionary. The lower court's conclusion that the payment term is ambiguous compelled the court to then address Holtham's argument that the mechanic's lien should be dissolved notwithstanding the finding of ambiguity because the ambiguity must be construed in Holtham's favor. Had the court applied that rule, it would have reached the inescapable conclusion that Keyes has been paid all sums due and has no claim for further payment. All work he performed was encompassed within the scope of the activities in his engagement letter, and he was paid more than he was owed under the contract for that work.

CONCLUSION

Keyes argues that the lower court correctly held the payment term in the contract is ambiguous and that he should be permitted to proceed with his $94,402 claim. However, the evidence upon which Keyes bases his argument is immaterial and cannot be used to create an

ambiguity or vary the terms of the contract because the payment term in the contract clearly and explicitly states his fee is to be calculated based upon 10% of the construction costs. Were this Court to agree that the payment term is ambiguous, the ambiguity must be construed against Keyes, rendering the conclusion that Keyes has no right to recover more money, let alone the $94,402 he is claiming. Thus, whether the contract is ambiguous or not, applying the rules of contract interpretation renders the conclusion that Keyes has no claim to recover more than 10% of the construction costs Holtham incurred. Having been paid that sum (and more), Keyes has no claim for additional sums and, therefore, has no valid mechanic's lien.

The lower court's conclusions and order should be reversed, Keyes' mechanic's lien should be dissolved, and the cash bond should be returned to Holtham.



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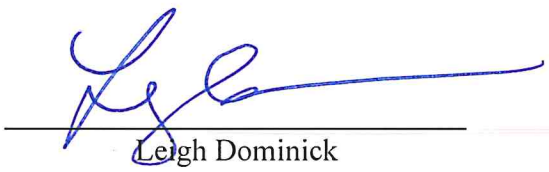
PROOF OF SERVICE

I, the undersigned attorney for Appellant, certify that I served a copy of the attached **Appellant's Initial Brief in Reply** by depositing a copy of it in the U.S. Mail, postage prepaid, on July 6, 2023, addressed to John A. Massalon, Esquire and Carissa Steichen Land, Esquire, Wills Massalon & Allen, LLC, P.O. Box 859, Charleston, SC 29402 and by e-mail to jmassalon@wmalawfirm.net and csteichen@wmalawfirm.net.

July 6, 2023



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Re: ***Frank Holtham, as Trustee of the Holtham SC Realty Trust, dated April 12, 2022 v. Glenn F. Keyes and Glenn Keyes Architects, LLC***
C/A No.: 2023-000649
BPWM File No. 113527.100

Dear Ms. Kitchings:

Enclosed herewith for filing, please find the Initial Reply Brief of Appellant in the above referenced matter, as well as a Proof of Service for the same. Please let me know if you have any questions or concerns.

Sincerely yours,

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Paralegal to Benjamin C. Bruner

/ld

cc: John A. Massalon, Esquire
Carissa Steichen Land, Esquire
Mr. Frank Holtham