

RECEIVED

Sep 05 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Judge

Case No. 2006-CP-42-3337
Appellate Case No. 2023- 000572

Fast Formliners Company,Appellant/Respondent,

v.

Construction Resource Group, Inc.....Respondent/Appellant.

INITIAL BRIEF OF APPELLANT/RESPONDENT

Thomas H. Coker, Jr., Esquire
Christopher B. Major, Esquire
Haynsworth Sinkler Boyd, PA
ONE North Main, 2nd Floor (29601)
P.O. Box 2048
Greenville, SC 29602
O: (864) 240-3200
F: (864) 240-3300

*Attorneys for Attorneys for Appellant/Respondent
Fast Formliners Company*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
FACTS	3
STANDARD OF REVIEW	5
ARGUMENT	6
CONCLUSION.....	10

TABLE OF AUTHORITIES

	Page
Cases	
<i>Ballington v. Paxton</i> , 327 S.C. 372, 383, 488 S.E.2d 882, 888 (Ct. App. 1997)	9
<i>Blumberg v. Nealco, Inc.</i> , 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993).....	6
<i>Butler Contracting, Inc. v. Ct. St., LLC</i> , 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006).....	9
<i>Calhoun v. Calhoun</i> , 339 S.C. 96, 102, 529 S.E.2d 14, 18 (2000).....	8
<i>Dedes v. Strickland</i> , 307 S.C. 155, 414 S.E.2d 134 (1992).....	6,7
<i>Hardaway Concrete Co., Inc. v. Hall Contracting Corp.</i> , 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007).....	6,7
<i>Historic Charleston Holdings, LLC v. Mallon</i> , 381 S.C. 417, 435, 673 S.E.2d 448, 457-58 (2009)	5
<i>Laser Supply & Servs., Inc. v. Orchard Park Assocs.</i> , 382 S.C. 326, 340, 676 S.E.2d 139, 147 (Ct. App. 2009).....	5
<i>Lee v. Thermal Eng'g Corp.</i> , 352 S.C. 81, 90, 572 S.E.2d 298, 303 (Ct. App. 2002).....	8
<i>Raynor v. Byers</i> , 422 S.C. 128, 131, 810 S.E.2d 430, 432 (Ct. App. 2017).....	5
Statutes	
S.C. Code Ann. § 15-37-10.....	1,9,10
S.C. Code Ann. § 34-31-20.....	8
S.C. Code Ann. § 15-37-20.....	9
S.C. Code Ann. § 15-37-40.....	10
Court Rules	
Rule 54, SCRCPC.....	1,9,10

STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN FAILING TO AWARD FAST FORMLINERS COMPANY ITS ATTORNEYS' FEES IN DEFENDING THIS MATTER PURSUANT TO THE PARTIES' CONTRACT AS FAST FORMLINERS COMPANY WAS THE PREVAILING PARTY AT TRIAL?
- II. DID THE TRIAL COURT ERR IN FAILING TO AWARD FAST FORMLINERS COMPANY PREJUDGMENT INTEREST ON THE AMOUNT AWARDED TO FAST FORMLINERS COMPANY BY THE JURY, AS THE AWARD WAS A LIQUIDATED SUM CONSISTING OF UNPAID INVOICES OWED BY CONSTRUCTION RESOURCE GROUP, INC. TO FAST FORMLINERS COMPANY?
- III. DID THE TRIAL COURT ERR IN FAILING TO AWARD FAST FORMLINERS COMPANY STATUTORY COSTS PURSUANT TO S.C. CODE ANN. § 15-37-10, *ET SEQ.* and RULE 54(d) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE AS A PREVAILING PARTY AT TRIAL?

STATEMENT OF THE CASE

This is a contract dispute between Plaintiff/Appellant Fast Formliners Company (“Formliners”), a manufacturer of urethane form liners, and Defendant/Respondent Construction Resource Group, Inc. (“CRG”), a contractor, in regard to a contract for Formliners to supply CRG with urethane liners for the construction of concrete sound panels for a highway project in North Carolina. Formliners provided the urethane panels to CRG but was not paid for the material provided. (Purchase Order, Plaintiff’s Trial Exhibit 1).

In August 2022, this matter was tried for three days before a jury in Union County. Formliners obtained a verdict of \$112,792.60, which was the balance owed by CRG on the unpaid invoices. (Purchase Orders, Plaintiff’s Trial Exhibit 5; Aug. 17, 2022 Tr. at p. 376). The jury awarded CRG no damages on CRG’s counterclaim. The party’s contract contains language entitling a prevailing party to an award of attorneys’ fees. (Plaintiff’s Trial Exhibit 1).

Within ten days of the judgment, Formliners filed a motion with the trial court asking for an award of attorneys’ fees pursuant to the prevailing party provision of the parties’ contract, as well as requesting prejudgment interest and statutory costs. (Plaintiff’s Motion for Fees, Costs, and Interest). On September 26, 2022, the trial court issued a Form 4 Order denying the motion in its entirety with no explanation or findings.

On October 3, 2022, Formliners filed a Rule 59 motion to reconsider the denial of the motion for fees and costs. (Plaintiff’s Motion to Reconsider). That motion was denied by a Form 4 Order dated February 23, 2023, again with no explanation or findings. Formliners received written notice of the order on February 23, 2023. As the 30th day from the receipt of the February 23 Order fell on a Saturday, the Notice of Appeal was filed on March 27, 2023 pursuant to Rule 263, SCRAP.

FACTS

Formliners filed suit against CRG for breach of the Purchase Order due to Defendant's refusal to pay Formliners' invoices totaling \$112,792.60 for urethane form liners supplied to Defendant for use in making concrete sound walls for the I-77 Hot Lanes project (the "Project"). In response, Defendant filed an Answer and Counterclaim denying any obligation to pay Formliners, alleging defects in the liners provided and asserting a right to recover \$971,840.63 in damages for lost revenues and the costs for obtaining replacement materials. (Answer and Counterclaim ¶ 48).

Trial on the claims in Formliners' Complaint and CRG's Counterclaim took place in this case between August 15, 2022 and August 17, 2022. Plaintiff prevailed in all respects at trial. (Aug. 17, 2022 Tr. at p. 376). The jury awarded Plaintiff \$112,792.60, *id.*, which is 100 percent of the balance of its unpaid invoices. (Plaintiff's Trial Exhibit 5). The jury further found that Plaintiff did not breach the contract with CRG and awarded CRG nothing on its Counterclaim. The parties' contract contained a provision that "In the event either Party institutes suit against the other Party...in connection with any dispute or matter arising under this Purchase Order, the prevailing party shall be entitled to recover a reasonable attorney's fee in addition to any other relief granted." (Plaintiff's Trial Exhibit 1).

The Affidavit of John T. Crawford, Jr., filed with the Motion, adequately outlines the reasonableness of the attorneys' fees and costs incurred in this action. Even before the lawsuit was filed in Union County, Formliners incurred fees determining legal issues such as whether it had a bond claim against the project or what jurisdiction was appropriate, given that the Project was in North Carolina, CRG is located in South Carolina, Formliners is headquartered in California and shipped the liners from a facility in Missouri.

Plaintiff had to not only prosecute its own claim for breach of contract, it also had to defend against Defendant's counterclaim seeking nearly a million dollars in damages from Plaintiff. (Answer and Counterclaim ¶ 48). This effort involved FOIA requests to the NCDOT for its records on the scope of work awarded to Defendant and a subpoena for records to the general contractor on the Project. (September 16, 2022 Tr. at p. 5). In addition to several depositions being taken, the case involved a trial by jury stretching from August 15 until August 17, 2022. All told, this case extended for nearly four years from the time Formliners first reached out to the undersigned for help in recovering its debt due to the delays associated with the COVID-19 pandemic. Given these factors, Plaintiff incurred a total of \$112,600 in legal fees. (Crawford Affidavit).

STANDARD OF REVIEW

“The review of attorney fees awarded pursuant to a contract is governed by an abuse of discretion standard.” *Raynor v. Byers*, 422 S.C. 128, 131, 810 S.E.2d 430, 432 (Ct. App. 2017) (quoting *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 340, 676 S.E.2d 139, 147 (Ct. App. 2009)). Similarly, the award of prejudgment interest is subject to an abuse of discretion standard. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457-58 (2009)

ARGUMENT

I. FORMLINERS IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES PURSUANT TO SOUTH CAROLINA LAW AND THE PARTIES' AGREEMENT.

South Carolina law enforces prevailing party fee provisions in private contracts. *See Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) (noting the general rule that attorneys' fees are not recoverable in a civil action unless authorized by contract or statute). South Carolina "case law and court rules make clear that when a contract or statute authorizes an award of attorney's fees, the trial court must make specific findings of fact on the record for each of the required factors to be considered." *Hardaway Concrete Co., Inc. v. Hall Contracting Corp.*, 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007). The factors to be considered by the trial court in making a determination as to attorneys' fees are: (1) the nature, extent and difficulty or the legal services rendered; (2) time and labor necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar legal services; and (6) beneficial results obtained. *Dedes v. Strickland*, 307 S.C. 155, 414 S.E.2d 134 (1992). If the court makes an award "[w]here the contract provides for 'reasonable' attorneys fees without specifying a rate or amount, the issue of attorneys fees is left to the discretion of the trial judge and will not be reversed on appeal unless there is a showing of abuse of discretion." *Id.* at 161, 414 S.E.2d at 137.

In this case, the court declined to award attorneys' fees although it is beyond dispute that Formliners is a prevailing party, given that it recovered 100 percent of the unpaid amounts sought at trial and CRG recovered nothing on its counterclaim. Indeed, CRG concedes that Formliners is a prevailing party in its memorandum in opposition to Formliners' motion for fees

and costs. (CRG Memorandum Opposing Motion for Fees, Cost and Interest P.4). The court did not in making its ruling make any findings on any of the factors required under *Dedes*.

It is the duty of the court to enforce the terms of the contract at issue here, which grant reasonable attorneys' fees to the prevailing party. The trial court erred in declining to award fees to Formliners and failing to make findings of fact as to the factors relevant to an attorneys' fee award. Formliners submitted proof of its attorneys' fees and provided sufficient information for the court to make a determination as to the reasonableness of its fees, according to the well-established factors utilized to evaluate the reasonableness of attorneys' fees. *See Hardaway; Dedes*.

Here, a fee award is more than justified. This case was tried before a jury from August 15 to August 17, 2022. However, the history of the dispute goes back much further in time. The materials shipped by Formliners to CRG were provided in 2017 and invoiced between May and July 2017. (Plaintiff's Trial Exhibit 5). Formliners engaged counsel to pursue the amounts owed by CRG and awarded by the jury and incurred costs in assessing a number of jurisdictional and legal issues. There were fees related to determining if Formliners could make a bond claim. There were fees incurred in analyzing what jurisdiction to bring the case in. The Formliners' plant from which the material was shipped is in Missouri. CRG's facility is in Union, South Carolina while the project was located in North Carolina.

Even once these issues were addressed and the suit was filed in South Carolina in January 2019, CRG filed a counterclaim seeking \$971,840.63 in supposed damages for defective materials, costs of obtaining replacement materials and lost revenues to CRG. (Answer and Counterclaim ¶ 48). This Counterclaim required Formliners to not only prove its right to payment but defend itself from essentially a million-dollar counterclaim. Meanwhile, the

COVID-19 pandemic brought the court system to a halt and caused substantial delays, which is why it took approximately three and a half years to get from the Complaint to the trial.

During the time this case was pending, Formliners reviewed documents produced by CRG and by numerous third parties, including the NCDOT and the general contractor on the road project for which the liners were to be used. Formliners also interviewed and obtained documents from the vendor CRG identified as having provided replacement material for the project. Formliners also had to take CRG's 30(b)(6) deposition twice, since its designated witness was either unprepared to answer or refused to answer certain questions at the first deposition. All of these efforts, including the multi-day trial, resulted in a complete victory for Formliners. The jury awarded Formliners 100 percent of the invoices presented into evidence and CRG recovered nothing on its counterclaim.

Given these issues and that it is beyond dispute a prevailing party under the terms of the parties' contract, Formliners respectfully requests that the Court remand this case to the lower court on the limited issue of attorneys' fees, and instruct the court to award attorneys' fees to Formliners based on the Affidavit provided by Formliners following the trial of this case.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING FORMLINERS' REQUEST FOR PRE-JUDGMENT INTEREST BECAUSE THE JURY AWARD WAS A LIQUIDATED AMOUNT.

S.C. Code Ann. § 34-31-20 (A) provides that "In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum," (emphasis added). "[P]re-judgment interest is mandatory under the statute...." *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 90, 572 S.E.2d 298, 303 (Ct. App. 2002). If a claim for pre-judgment interest is pled, the award of such interest becomes mandatory. *Calhoun v.*

Calhoun, 339 S.C. 96, 102, 529 S.E.2d 14, 18 (2000) (“Use of the word ‘shall’ in a statutory provision indicates the provision is mandatory.”). The test for whether pre-judgment interest is applicable is whether the “sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties.” *Butler Contracting, Inc. v. Ct. St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006).

In this case, the jury clearly awarded a liquidated amount to Formliners. The verdict amount of \$112,792.60 is easily capable of mathematical calculation, as it is simply the sum total of the unpaid invoices entered into evidence at trial. (*See* Plaintiff’s Trial Exhibit 5). As such, Formliners submits that pre-judgment was mandatory under the statute and that the lower court committed an abuse of discretion in failing to award pre-judgment interest as damages.

III. AS A PREVAILING PARTY AT TRIAL, FORMLINERS WAS ENTITLED TO RECOVER COSTS PURSUANT TO RULE 54(D) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE AND S.C. CODE ANN. § 15-37-10, ET SEQ.

Rule 54(d) of the South Carolina Rules of Civil Procedure provides that “costs **shall be allowed** as of course to the prevailing party unless the court otherwise directs.” (Emphasis added); *See also Ballington v. Paxton*, 327 S.C. 372, 383, 488 S.E.2d 882, 888 (Ct. App. 1997). Similarly, S.C. Code Ann. § 15-37-10 provides that “In every civil action commenced or prosecuted in the courts of record in this State, except cases in chancery, the attorneys for the plaintiff or defendant **shall be entitled to recover costs**... to be inserted in the judgment against the losing party. (Emphasis added). S.C. Code Ann. § 15-37-20 makes clear that costs are recoverable only by a successful or prevailing party.

As the mandatory language of Rule 54 and § 15-37-10, *et seq.*, make clear, a prevailing litigant is entitled to recover costs for the categories of expenses enumerated in either Rule 54 or the cost statute. Here, Plaintiff has limited its request to those enumerated categories. Plaintiff

seeks clerk's fees (allowed under Rule 54(2)) and subpoena domestication fees (allowed under Rule 54(4)) totaling \$526.96. Plaintiff also seeks \$2,242.02 in "fees of officers allowed by law, the fees of witnesses, the reasonable **compensation of commissioners in taking depositions**" as allowed in § 15-37-40 (Emphasis added). Given that all of the costs sought were authorized by statute and the award of costs is mandatory to a prevailing party, Plaintiff submits that the denial of the motion for costs constitutes reversible error.

CONCLUSION

For all of these reasons set forth herein, Formliners respectfully requests that this Court reverse the lower court on the issue of attorneys' fees, pre-judgment interest, and costs, and remand to the trial court with instructions to enter a judgment for Formliners' reasonable attorneys' fees, as established by John Crawford's Affidavit of Attorney's Fees, pre-judgment interest, prevailing party costs, plus all fees and costs to which Formliners is entitled to in connection with the present appeal.

HAYNSWORTH SINKLER BOYD, P.A.

/s/ Christopher B. Major

Thomas H. Coker, Jr., Esquire (S.C. Bar No. 1312)
Christopher B. Major, Esquire (S.C. Bar No. 72872)
Haynsworth Sinkler Boyd, PA
ONE North Main, 2nd Floor (29601)
P.O. Box 2048
Greenville, SC 29602
O: (864) 240-3200
F: (864) 240-3300

tcoker@hsblawfirm.com
cmajor@hsblawfirm.com

*Attorneys for Appellant/Respondent Fast
Formliners Company*

September 5, 2023