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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 REPLY BRIEF OF APPELLANT/RESPONDENT

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INTRODUCTION

Respondent/Appellant Construction Resource Group, Inc. (“CRG”) does not dispute that Appellant/Respondent Fast Formliners Company (“Formliners”) is a “Prevailing Party” within the meaning of the attorney’s fee provision of the parties’ contract and the mandatory cost provisions of the South Carolina Rules of Civil Procedure Rule 54(d) and S.C. Code Ann. § 15-37-10, or that the verdict in favor of Plaintiff was a liquidated sum that would entitle Formliners to pre-judgment interest. Instead, CRG’s brief engages in revisionist history by arguing that Formliners has waived its rights to fees, costs, and interest. Specifically, CRG claims for the first time at any stage of the proceedings that Appellant/Respondent Fast Formliners Company (“Formliners”) waived its claim to attorney’s fees because the jury did not make a finding on the fee issue and that Formliners failed to timely preserve the interest and cost issues in its Rule 59 Motion. The fatal flaw in these arguments is that the parties agreed to handle these damages in post-trial motions rather than submit them to the jury. This was a valid and binding stipulation regarding the conduct of trial under Rule 43(k) and was noted on the record by trial counsel for CRG and counsel for Formliners

This process was used to mirror that used in South Carolina courts for how to assess fees when authorized by statute, including motions for fees in mechanic’s lien cases, SC Code § 29-5-10. The same process is also used in other statutory fee provisions in this state, such as motions for fees under the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-140. Formliners followed the parties’ agreement post-trial, as CRG would certainly have done if it had prevailed, by timely filing its motion for fees, interest, and costs on August 26, 2022. This filing was within ten days of the verdict being entered by the Court on August 17, 2022. CRG

did not raise a waiver argument in response to the motion for fees, costs and interests, since trial counsel had agreed to that method of presenting the issue to the Court.

Only when Formliners' motion for fees, costs, and interest was summarily denied by the Court through the entry of a Form 4 Order on September 22, 2022, with no explanation for the grounds of the denial, did Formliners timely file a Rule 59 motion on October 3, 2022 seeking clarification of the basis of the Court's ruling. That Rule 59 motion was also summarily denied in a Form 4 Order entered on February 23, 2023, and this appeal timely followed. At every step, Formliners complied with the parties' agreement regarding the conduct of trial and the applicable rules of this Court and the trial Court.

ADDITIONAL FACTS

This case arises from CRG's failure to pay Formliners for polyurethane liner used to make concrete sound panels for a highway project. The contract at issue in this case provides that a prevailing party in a dispute between Formliners and CRG may recover its fees. During the trial of this matter, the parties agreed to submit their direct damages claims, including Formliners' claims for damages in the Complaint¹ and CRG's counterclaims, to the jury while having the Court decide the other damages arising from the jury's verdict on post-trial motions. This agreement was noted on the record by both parties. CRG's counsel informed the Court that CRG "do[es] not have additional damages outside the replacement costs of the form liners themselves and shipping costs, and, obviously, the contract allows for attorney's fees, **which we would reserve for a later time.**" Aug. 17, 2022 Tr. at p.23, emphasis added. Similarly, counsel for Formliners noted the same agreement on the record: "Your Honor, just – just the issue of attorney's fees, **which we reserve, but nothing with the jury,** Your Honor." *Id.* at 376,

¹ Formliners sought legal fees, costs, and pre-judgment interest in the Complaint. CRG similarly sought legal fees and pre-judgment interest in its Counterclaim.

emphasis added. This agreement was again referenced on the record by counsel for Formliners after the verdict was entered in favor of Formliners:

[FORMLINERS COUNSEL]: Your Honor, we'll submit a written motion on the prevailing party attorney's fees issue.

THE COURT: All right. Anything further or for the record from the defense?

[CRG COUNSEL]: No, Your Honor. We just – you know, the objections we have are already on the record.

Id. at 378. None of the objections referenced by CRG's counsel in that colloquy dealt with the issue of additional damages available to Formliners as the prevailing party that are raised by this appeal.

Consistent with the parties' agreement, Formliners timely filed its motion for fees, cost, and pre-judgment interest after judgment was entered in its favor and timely filed its Rule 59 motion when the Court summarily denied its post-trial motion for fees, interest and cost. This appeal was timely filed following the denial of its Rule 59 motion.

ARGUMENT

CRG and Formliners at trial agreed that the issue of damages arising from whichever party prevailed in the jury verdict would be addressed by the Court through post-trial motions practice. This agreement was noted on the record by counsel for both parties, who expressly reserved that issue without objection from either party. Yet CRG now ignores that agreement and impermissibly argues that Formliners waived its right to seek attorney's fees and other damages as the prevailing party at trial.

Under Rule 43(k), agreements of counsel as to the conduct of trial are binding upon the parties upon being put upon the record in open court. The purpose of Rule 43(k) is "to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of

determining such disputes, which it has been said are often more perplexing than the case itself.” *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 495, 458 S.E.2d 533, 535 (1995) (quoting 83 C.J.S. *Stipulation* § 4 (1953)).

When communicating with the Court about the claims in this case, both parties informed the Court that while the jury would of course need to decide the actual damages arising from the underlying conduct of the parties, that both Formliners and CRG were reserving the issue of prevailing party damages for post-trial motions. This agreement to handle those damages in post-trial motions was first discussed in chambers with the trial judge and then noted on the record by counsel for each party. As such, this is a valid stipulation regarding the conduct of trial. The existence of this agreement and the representations to the trial court about it explains why CRG’s trial counsel did not make the waiver argument in opposing Formliner’s initial motion for fees and costs and only now makes the argument for the first time on appeal.

Just as South Carolina law enforces agreements on the conduct of trial noted in open court, it also 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 trial court made no findings on these factors in denying the initial motion for fees and costs. As such, issue preservation rules required that Formliners submit the Rule 59 motion filed on October 3, 2022 seeking a ruling as to the basis for denying the post-trial motion for fees, costs, and interest. *See I’On, L.L.C. v. Town of*

Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding that, if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a Rule 59(e) motion to alter or amend the judgment in order to preserve the issue for appellate review). As such, Formliners was required to file its October 3, 2022 Rule 59 motion to preserve its arguments for appeal, and CRG's revisionist waiver arguments are without basis.

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