

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN) C/A No. 2009-CP-02-000958

ELITE CONSTRUCTION, INC.)
Plaintiff)

vs.)

DORIS E. TUMMILLO,)
First Defendant)

And)

GEORGIA BANK AND TRUST)
COMPANY OF AUGUSTA,)
Second Defendant.)

AMENDED ORDER OF JUDGMENT

RECEIVED

JUL 25 2013

SC Court of Appeals

7-22-13
Liz Adair
Arita Knoepfle
Deputy Clerk

This is an action to foreclose on a mechanic's lien arising from a contract to build a pole barn intended to house thoroughbred horses. Defendant Doris Tummillo counterclaimed for breach of contract, alleging plaintiff had abandoned the job. The matter was referred to me by agreement of the parties pursuant to Rule 53, South Carolina Rules of Civil Procedure. Trial was held in Aiken on July 12, 2012. Plaintiff and Defendant Tummillo stipulated that the mortgage lien of Defendant Georgia Bank and Trust Company of Augusta had priority over Plaintiff's claim, after which I heard testimony of Chris Key and J. D. Cooper on behalf of Plaintiff, and Doris Tummillo, Robert D. Sidener and Mike Tummillo on behalf of Defendant. Based on the evidence in the record, I make the following findings of fact:

1. Elite Construction, Inc. [hereafter sometimes referred to as "Elite"] is a corporation organized and existing under and by virtue of the laws of the State of South Carolina.

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Adair #1

2. Doris E. Tummillo is a resident of Aiken County, South Carolina who owns real property located in the County of Aiken, State of South Carolina, commonly known as 4201 Shiloh Church Road, Aiken, South Carolina, 29801, and as more fully described as follows:

All that certain piece, parcel or tract of land, situate, lying and being in the County of Aiken, State of South Carolina, containing 123.559 acres, more or less, and being more particularly described upon a plat prepared by W. J. Webb, PLS, for Doris E. Tummillo, dated June 20, 2008 and recorded on October 28, 2008 in Plat Book 54, at page 229, in the Office of the RMC for Aiken County, South Carolina. Reference being made hereby to aforementioned plat for a more complete and accurate description as to metes, boundaries, and location of subject property.

This being a portion of the same property conveyed to Doris E. Tummillo by quitclaim deed of Tummekki, LLC dated November 27, 2008 and recorded on December 3, 2008 in Record Book 4231, at page 2080, in the Office of the RMC for Aiken County, South Carolina.

Aiken County Tax Parcel No.: 101-00-02-002 (portion of)

3. Defendant Georgia Bank and Trust Company of Augusta is a banking institution organized and existing under the laws of one of the United States of America and transacts business in Aiken County, South Carolina. Defendant holds a mortgage over the real property in question given by Tummillo dated January 9, 2009, recorded in Mortgage Book 4236, Page 1820, Office of the Register of Mesne Conveyance for Aiken County, South Carolina.

4. On July 16, 2008 Elite and Tummillo entered into a contract under which Elite agreed to construct a pole barn on the subject property, including labor and materials for the sum of \$358,379.00. The barn was designed to contain 45 horse stalls. The contract was reduced to writing [hereafter sometimes referred to as "the Document"]. [Plf. Ex.1] While the Document does not specifically state the dimensions of the stalls, the configuration of the building called for a main central section measuring 64 feet wide by 204 feet long, and three wings measuring 72 feet long by 24 feet wide. The central wing was eliminated when the parties agreed to reduce the total number of stalls to 40, consequentially reducing the contract price to \$319,668.00.

5. The Document contains Tummillo's agreement to provide for site preparation work and the building permit. No completion date was specified in the Document. In spite of the absence of any language to the effect in the Document, at its execution Tummillo claims she informed Elite that time was of the essence in the construction, that the horse stalls in the barn

Elite #2

were to be rented, and that if the project was not completed in a timely fashion, Tummillo would lose revenues due to her inability to rent the stalls for the 2008-9 season. Tummillo had the site work done in September and purchased the building permit on October 2, 2008. [Plf. Ex. 3]. Elite began work when the building permit was issued.

6. Drawings for the barn confirm the barn's exterior dimensions but are silent on the interior dimensions. [Plf. Ex. 2] It is not difficult to ascertain the interior dimensions by referring to Exhibits 1 and 2. The drawings provide for 10 groups of three stalls each in the main section, separated by 4 interior aisles allowing access to the stalls, with 2 aisles on each end. Two aisles run the length of the main structure. Building Specifications attached to Ex. 1 provide the aisle-ways to be 14 feet in width. Six total short aisles on the main section at 14 feet each amounts to 84 feet, leaving 120 feet to account for the 10 stalls [120 feet ÷ 10 stalls = 12 feet/stall]. Two long aisles of 14 feet each on the main section amounts to 28 feet, leaving 36 feet to account for the rows of 3 stalls [36 feet ÷ 3 stalls = 12 feet/stall]. I accept as credible and consistent with the plans Chris Key's explanation that the posts of each stall were placed at 12 feet on center and that interior dimensions of each would necessarily be smaller due to the diameter of the support posts and the thickness of the material used to construct the interior walls. I find Defendant Tummillo's expectancy of 144 interior square feet for each stall to be inconsistent with and contrary to the contract and plans.

7. Tummillo agreed to pay Elite the contract sum in four installments, or "draws": 30% due at signing; 30% due on completion of the roof; 30% due after completion of the exterior walls and; the balance "due when the job is completed, and be paid within 10 days of completion."

8. Tummillo paid Elite \$107,513.70 shortly after the contract was signed on July 24 and \$84,000 on November 24, 2008, for the first two draws, the latter taking into account the parties' amendment of the contract price.

9. In late December, 2008, Elite submitted a request for the third draw, informing Tumillo the exterior walls were completed. While photographic evidence is arguably contradictory on this issue, Chris Key's testimony on this issue is more credible than Mike Tummillo's. I find that the exterior walls were completed sufficiently to warrant a request for draw. To the extent that the walls were not fully completed, that which was to have been completed was so minor that it was of a "punch list" nature, which is taken into account

Smith #3

hereinbelow. Tummillo refused to pay the third draw, citing several perceived problems with the construction, to-wit: the stalls in the barn were not built according to the contract and the exterior walls were not complete.

10. With the third draw not forthcoming, on January 5, 2009, Elite suspended work on the barn and informed Tumillo it would not complete work until the third draw was paid. Elite admits the job was 85% complete when it left the site. Since the draw was to have been based upon 90% completion, I find this more than accounts for the exterior walls.

11. Tummillo did not complain about the size of the stalls until after January 5. Only then did she assert that the interior measurements were not 12 feet x 12 feet.

12. With the exception of grill work and stall doors, all material, labor and skills itemized by Elite were furnished for and actually used in the construction of defendant's barn. Elite mitigated its damages by returning the stall doors for credit. Elite was unable to return the grill work and remains responsible for payment.

13. On the 13th day of February 2009, within ninety (90) days after the last labor was provided to Tummillo, Elite filed a Notice of Mechanic's Lien seeking \$126,160.37 in the Office of the Clerk of Court for Aiken County. The claim for lien was verified by oath of the plaintiff before a notary public in and for said State of South Carolina, and that the verification under the hand and seal of the notary public was attached to and filed with mechanic's lien.

14. Elite filed its Summons, Complaint and Lis Pendens six (6) months within the expiration of time limited by law for filing plaintiff's claim for lien.

15. In spite of the filing of the Notice of Mechanic's Lien and service of the verified statement of account as required by law, Tummillo failed to pay Elite's claim and plaintiff seeks foreclosure of its mechanic's lien against defendants' property according to law.

16. Elite has retained the services of legal counsel and has incurred expenses amounting to \$13,650.18 in the pursuit of this matter.

CONCLUSIONS OF LAW

This Court has jurisdiction over the parties and subject matter of this action.

Tummillo breached her contract with Elite by failing to pay the third draw, or any portion thereof, as agreed upon in the Document, and as a result of the breach I conclude that Elite is entitled to damages; however, the sum claimed is the mechanics' lien is excessive.

Smith # 4

The initial contract amount was \$358,379 reduced to \$319,668 when the parties eliminated five stalls. Based upon Elite's admission that it had only completed 85% of the contract on January 5, 2009, the total amount Elite should have collected would have been \$271,717.80 [$\$319,668 \times 85\%$]. Since Elite had received \$191,513.70, the balance due on its claim is \$80,204.10. I conclude that Elite is not entitled to the 10% retainage, or lost profit or overhead. Zepa Construction, Inc. v. Radazzo, 357 S.C. 32, 591 S.E.2d 29 (Ct.App.2003). Interest shall accrue at the per diem rate allowed by law from the entry of judgment.

Tummillo argues Elite's leaving the job before completion is a breach, that Elite performed the contract in a deficient manner, and that the delay resulted in damages. Elite's departure from the job site before completion of the contract does not preclude it from recovering under the mechanic's lien statutes. *Id.*

Tummillo claims her damages from Elite's delay are due to Elite's late start of the contract and its failure to complete. Tummillo's position is based upon her assertion that the Document does not completely express the parties' intent.

A Court considering a case involving a contract must give effect to the intent of the parties as expressed by their written memorandum of their agreement. When a contract document is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. C.A.N. v. South Carolina Health and Human Services, 296 S.C. 373, 373 S.E.2d 584 (1988).

The Document is clear in its terms. A combined reading of the Document, with its attached Specifications and the plans, indicates the stalls were to be built as 12 feet on center, not on interior dimensions. Had the parties intended for the stalls to have interior dimensions of 12 feet, the exterior perimeter would of necessity have had to measure larger than the Document provided.

Tummillo argues that even if the stall size was based upon center to center measurements, Elite's delay still made her lose money. When the contract does not include a provision that "time is of the essence," the law implies that it is to be done within a reasonable time. Faulkner v. Millar, 319 S.C. 216, 219, 460 S.E.2d 378, 380 (1995). Nothing within the four corners of the Document alludes to a completion date, nor is there a statement contained therein that states that time is of the essence. To the extent there was a delay, I conclude it was

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reasonable. Elite's commencement of construction was predicated on Tummillo's completion of site preparation and obtaining the building permit. Elite began construction as soon as it was legally able.

Elite claims Tummillo owes it \$23,590 for change orders and \$6,007.66 in late fees to the contract. There is no evidence that the change orders were approved by Dr. Tumillo. The vast majority of the work provided for in the change orders was not performed. Elite seeks recovery for these under the guise that it is its policy to bill for changes orders in advance. There is no support for any such recovery, and this portion of Elite's claim has no merit.

Since Elite did not finish the job, Elite is not entitled to the 10% retainage. Tumillo's claims for damage due to incomplete work, defective roof and other "punch list" items [Plf. Ex. 15] are covered by this discounted value and her claims for roof repairs and costs of completion cannot be recognized twice. I further conclude that Tummillo's claims for lost profits are unsupported by credible evidence, and are speculative, at best. Even so, the party who breaches first bears the liability for nonperformance. Silver v Aabstract Pools & Spas, Inc., 376 S.C. 585, 658 S.E.2d 539 (Ct.App.2008).

"The crucial requirement in lost profits determinations is that they be "established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative." Drews Co., Inc. v. Ledwith-Wolfe Associates, Inc., 296 S.C. 207, 213, 371 S.E.2d 532, 535-6 (1988); quoting South Carolina Finance Corp. V. West Side Finance Co., 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960). "The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." Id.

Tummillo argues Elite's claim for a Five (5%) Percent late charge is spurious, relying upon language on the first page of the Document that provides for a late fee "if the amount due is not paid within ten days of completion". Tummillo argues that because the job was not complete, the late fee is not due. I agree and deny the claim for late fees.

I conclude, therefore that Elite should have judgment of foreclosure of the mechanic's lien in the sum of \$80,204.10 and the property subject to the mechanic's lien described hereinabove should be ordered sold at public auction after due advertisement.

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The question then turns to whether either side is entitled to recover their attorneys' fees. Tummillo's obligation to pay attorneys' is not just established by statute, it is also contractual. In either event, however, the determination of the amount of attorneys' fees that should be awarded is vested in the sound discretion of the Court. Keeneys Metals Roofing, Inc. vs. Palmieri, 345 S.C.550, 548 S.E.2d 900 (ClApp. 2001).

The court must take into account six (6) factors: (1) Nature and extent and difficulty of the case; (2) Time necessarily devoted to the case; (3) Professional standing of the counsel; (4) The contingency of compensation; (5) Beneficial results obtained; and (6) Customary legal fees for similar services. Regardless of the outcome, the Court has discretion in this regard.

In determining the award for attorneys' fees under SC Code, Ann. §29-5-110(a), an additional issue to consider is identifying the "prevailing party." This decision is based upon the verdict in the action. The party whose offer is closer to the verdict is deemed to be the prevailing party. Where no written offer of settlement is made, the amount prayed for in the complaint is considered Elite's offer of settlement. While Tummillo has pursued a counterclaim, no amount is pled in the pleading. Elite's has claimed a lien in the amount of \$126,160.37 and has been awarded \$80,204.10 – a difference of \$45,956.27. Defendant's claim for lost revenue is \$12,000 per month for 3 months and has been awarded nothing. I conclude that Elite is the prevailing party; however, I am unable to award fees and costs without further information.

Elite's counsel's affidavit does not specify the number of hours devoted to the pursuit of the case. Likewise, there is insufficient evidence in the record that allows me to consider the contingency of compensation or the customary legal fees charged on matters of this nature by other members of the Aiken County Bar. I therefore reserve making an award pending a full submission by counsel of the items necessary for me to make a decision supported by the law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. There is due to the Plaintiff on its mechanic's lien the sum of \$80,204.10 representing the total debt due Plaintiff, plus attorneys' fees and costs to be determined after notice to all parties and an opportunity to be heard.
2. The total amount due in the preceding paragraph shall constitute the total judgment debt due the Plaintiff and shall bear interest hereafter at the legal rate.
3. That the Defendant liable for the aforesaid mechanic lien debt shall on or before the date of sale of the property hereinafter described, pay to the Plaintiff, or Plaintiff's attorney,

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the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

4. That on default of payment at or before the time herein indicated, the premises described in the Complaint, as hereinafter set forth, be sold by the undersigned Special Referee for Aiken County at Public Auction in the Master in Equity Courtroom at the Aiken County Courthouse, Aiken, South Carolina, on some convenient Sales Day hereafter (and should be the regular day of judicial sales fall on a legal holiday, then in such event, the Sales Day shall be on the Tuesday next succeeding such holiday), on the following terms, that is to say:
 - a. **FOR CASH:** The undersigned Special Referee will require a deposit of five percent (5%) on the amount of the bid (in cash or equivalent) same to be applied on the purchase price upon compliance with the bid, but in case of non-compliance within twenty (20) days same to be forfeited and applied to the costs and Plaintiff's debt.
 - b. The same shall be subject to the mortgage lien of Georgia Bank and Trust Company of Augusta, Georgia, taxes and assessments, existing easements and restriction, easement and restrictions of record, and any other senior encumbrances. Proceeds of sale shall not be paid to the prior lienholder.
 - c. Purchaser to pay for deed stamps and costs of recording the deed.
5. If Plaintiff is the successful bidder at the said sale, for a sum not exceeding the amount of costs, expenses, and the indebtedness of Plaintiff's indebtedness.
6. That the undersigned Special Referee will by advertisement according to law, give notice of the time and place of sale, and the terms thereof; and will execute to the Purchaser, or Purchasers, a deed to the premises sold. The Plaintiff, or any other party to this action, may become a Purchaser at such sale, and that is, upon such sale being made, the Purchaser, or Purchasers should fail to comply with the terms thereof within twenty (20) days after date of sale, then the undersigned Special Referee may advertise the said premises for sale on the next, or some other subsequent Sales Day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.
7. That the undersigned Special Referee will apply the proceeds of sale as follows:

Ant #8

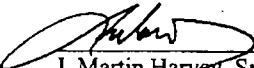
FIRST: to the payment of the amount of the costs and expenses of this action including any Guardian ad Litem fee or fees of attorneys appointed under Order of Court;

SECOND: to the payment to the Plaintiff's or Plaintiff's attorney, of the amount of Plaintiff's debt and interest or so much thereof as the purchase money will pay on same;

NEXT: any surplus will be held pending further Order of this Court.

8. It is further **ORDERED, ADJUDGED AND DECREED** that in the event the successful bidder is other than the Defendant in possession herein, the Sheriff of Aiken County is ordered and directed to eject and remove from the premises the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in such peaceable possession.
9. And it is further **ORDERED, ADJUDGED AND DECREED** that the Defendant named herein and all persons whosever claiming under him, her, them or it including but not limited to any title holder acquiring title subsequent to the filing of the Lis Pendens in this matter whether a party to this action or not be forever barred and foreclosed of all right, title, interest, and equity in redemption in the said premises so sold, or any part thereof.
10. **IT IS FURTHER ORDERED** that, pursuant to SC Code Ann. Section 30-9-31 (Supp. 1987), the deed of conveyance made pursuant to this sale shall be indexed in the grantor index by the Register of Mesne Conveyances in the name of the owner of record of subject property immediately prior to the execution of the deed, as well as in the name of the Special Referee for Aiken County, who executes such a deed as Grantor.
11. The undersigned Special Referee will retain jurisdiction to do all the necessary acts incident to this foreclosure, including but not limited to, the issuance of a Writ of Assistance and disposing of any surplus funds pursuant to Rule 71(c), SCRPC.

AND IT IS SO ORDERED.



J. Martin Harvey, Special Referee

Barnwell, South Carolina

~~September 2012~~

July 15 2013

H9

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-02-958

ELITE CONSTRUCTION, INC.

DORIS E. TUMMILLO

PLAINTIFF(S)

GEORGIA BANK AND TRUST COMPANY OF AUGUSTA
DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Pursuant to Rule 60(a), the undersigned has discovered a clerical error in Item 14 in the Findings of Fact made in the Order entered in this matter dated September 5, 2012, and the attached Amended Order of Judgment is submitted in substitution.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : MECHANIC'S LIEN FORECLOSURE

7.22.13
[Signature]
 SC.P.C. & S.
[Signature]
 Deputy Clerk

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
ELITE CONSTRUCTION INC.	DORIS E. TUMMILLO	\$99,998.50
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:
4201 SHILOH CHURCH RD AIKEN SC TMS 101-00-02-002

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature]
 Circuit Court Judge
 SCRPC Form 4C (10/2011)

Judge Code

July 15 2013
 Date

For Clerk of Court Office Use Only

This judgment was entered on the 22 day of July ^{ASK} 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 22 day of July ^{ASK} 2013 to attorneys of record or to parties (when appearing pro se) as follows:

CLARKE W. MCCANTS, III
P. O. BOX 2881
AIKEN SC 29802
ATTORNEY(S) FOR THE PLAINTIFF(S)

NEAL W. DICKERT
P O BOX 1564
AUGUSTA GA 30903
ATTORNEY(S) FOR THE DEFENDANT(S)
As Noted by Clerk of Court
CLERK OF COURT

Court Reporter:

HARVEY & KULMALA, LLC

*Attorneys at Law
110 Main Street
Post Office Box 705
Barnwell, South Carolina 29812*

**J. Martin Harvey
Pete Kulmala**

**(803) 259-5531
Fax: 259-5414**

July 15, 2013

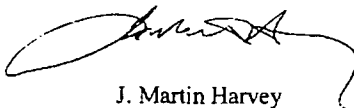
Hon. Liz Godard
Clerk of Court Aiken County
P.O. Box 583
Aiken, SC 29802

Re: Elite Construction, Inc vs. Doris E. Tummillo and Georgia Bank and Trust
Company of Augusta
Case No.: 2009-CP-02-958

Dear Liz:

I am enclosing for filing an Amended Order of Judgment that I have prepared pursuant to Rule 60(a), South Carolina Rules of Civil Procedure, along with a Form 4. Please forward certified copies of the Order to the parties of record.

Sincerely,



J. Martin Harvey

JMH/

Enclosures

cc: Clarke W. McCants, III, Esq.
Neal W. Dickert, Esq.