

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Case No. 2019-CP-07-00223
Appellate Case No. 2020-001659

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SC Court of Appeals

Tracey Lee Lunenburg,

Respondent,

v.

Vincent J. Aiello, Jr.,

Atlantic Heritage Builders, Inc.,

Yuko Construction, Inc., d/b/a Advanced Roofing, Inc.,

Bismark Lara, Premium Stucco, and

Shaw Manufacturing's Wrought Iron Works, Inc.,

Defendants.

Vincent J. Aiello, Jr., and

Atlantic Heritage Builders, Inc.,

Third-Party Plaintiffs,

Palatial Homes, Inc., Palatial Homes, LLC,

Palatial Homes Design, LLC, and

Palatial Building Group, LLC,

Defendants,

Third-Party

Of whom Vincent J. Aiello, Jr., and

Atlantic Heritage Builders, Inc., are the

Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

- I. Respondent complied with the Notice requirements set forth in S.C. Code 40-59-830, 40-59-840 and 40-59-850 in both content and service and the Circuit Court properly lifted the stay.**

STATEMENT OF THE CASE

This appeal arises out of a construction defect lawsuit involving a single family residential dwelling located on Hilton Head Island. The Defendant, Atlantic Heritage Builders was the general contractor that constructed the residence and the Defendant Vincent J. Aiello was the license holder for Atlantic Heritage Builders. As such they were both responsible for the construction of the subject residence. The Town of Hilton Head Island issued a Certificate of Occupancy on the subject residence November 18, 2009. Defendants Vincent Aiello and his wife sold the subject residence to the Plaintiffs in 2012. Plaintiffs contacted the Defendant Aiello to repair leaks on numerous occasions between 2013 and 2017. After numerous attempts by Atlantic Heritage Builders to make satisfactory repairs, Defendant Aiello informed Plaintiff that Atlantic Heritage Builders was not capable of making the necessary repairs. Still experiencing leaks, sustaining damage to the residence and endangering contents of the home, Plaintiff retained another contractor to attempt repairs. (R. pp. 049-051).

On February 4, 2019, after determining that the damage and necessary repairs were considerably greater than anticipated, Plaintiff filed suit. Plaintiff arguably did not serve notice compliant with SC §40-59-810, S.C. Code on Defendants Atlantic Heritage Builders and Vincent Aiello prior to filing her lawsuit. However Plaintiff reasoned that the Defendants, Atlantic Heritage and Vincent J. Aiello, were well aware of the deficiencies in question and even attempted to repair them until finally conceding to Plaintiff that Atlantic Heritage Builders was

not equipped to make the necessary repairs.

After plaintiff filed her lawsuit against Atlantic Heritage Builders, Vincent J. Aiello and others, Appellants filed a motion to stay the case alleging Plaintiffs failure to comply with S.C. § 40-59-810. (R. pp. 047-048). On May 20, Judge D.L. Jefferson issued an Order staying the Plaintiff's case until Plaintiff complied with the provisions of S.C. § 40-59-810 et seq. Specifically, Judge Jefferson's Order stated; "Accordingly, pursuant to S.C. Code Ann. 40-59-830, this case is hereby stayed **until Plaintiff complies with the requirements of S.C. Code Ann. 40-59-840.**" [emphasis added] (R. pp. 084-086).

Plaintiff, attempting to comply with Judge Jefferson's Order, drafted a Notice and Right to Cure letter dated June 18, 2020. Plaintiff sent the right to cure letter via certified mail to Defendants Vincent J. Aiello and Atlantic Heritage Builders at the last known address for Atlantic Heritage Builders which was 443 William Hilton Parkway. (R. pp. 093-094).

This is also the address provided by Atlantic Heritage Builders to the South Carolina Secretary of State and on record with same. In addition, Plaintiff sent the same letter to Vincent J. Aiello at a Virginia company owned by Aiello called A&S Sales of Virginia, 7001 Newington Road Ste 1 Lorton, Virginia 22079. (R. pp. 095-096). Finally, Plaintiff sent a courtesy copy of the June 18th Right to Cure Letter to Appellant's counsel via email on June 25, 2020. (R. p. 105).

The letter sent to 443 William Hilton Parkway was not picked up and returned to sender. The letter sent to A&S Sales of Virginia was signed for by "K" or "T" Bolton as agent for Vincent J. Aiello on June 23, 2020 (R. p. 102).

Respondent's June 18, 2020 letter complies with the requirements set forth in S.C. Code 40-59-840 and was served on Appellants. (R. pp. 093-096). S.C. Code § 40-59-820 defines service as follows: "Serve" or "service" means personal service or delivery by certified mail to

the last known address of the addressee. Respondent more than complied with the service requirements by mailing the letter via certified mail to the last known address of Atlantic Heritage Builders as provided to the South Carolina Secretary of State (443 William Hilton Parkway Hilton Head Island S.C. 29926). Plaintiff also sent the June 18, 2020 letter to Vincent Aiello at his known active business address in Virginia. (A&S Sales of Virginia, 7001 Newington Road Ste 1 Lorton Virginia 22079). Finally, Respondent sent an email with the letter attached to Defendants' counsel on June 25, 2020.

S.C. Code 40-59-840 also sets forth what the recipient of a Notice of Claim must do upon receipt of a Notice of Claim. "The contractor or subcontractor shall advise the claimant within fifteen days of the receipt of the claim if the construction defect is not sufficiently stated and shall request clarification. S.C. Code 40-59-850 sets forth contractor's election of remedies." It specifically states: "Contractor's election to inspect, remedy, settle, or deny claim; inspection of construction defect; response to contractor's offer; admissibility. (A) The contractor or subcontractor has thirty days from service of the notice to inspect, offer to remedy, offer to settle with claimant or deny the claim regarding the defects. The claimant shall receive written notice of the contractor's or subcontractor's, as applicable, election under this section. The claimant shall allow inspection of the construction defect at an agreeable time to both parties, if requested under this section. The claimant shall give the contractor and any subcontractors reasonable access to the dwelling for inspection and if repairs have been agreed to by the party, reasonable access to affect repairs. Failure to respond within thirty days is deemed denial of the claim."

Appellants received Respondent's Notice of Claim by certified mail on June 23, 2020 as evidenced by the certified mail receipt signed on that date on behalf of Vincent J. Aiello (R. p. 102). In addition, Counsel for Appellants received a gratuitous copy of the June 18th letter on

June 25, 2020 (R. p. 105). Pursuant to S.C. Code 40-59-840 “the contractor or subcontractor shall advise the claimant within fifteen days of receipt of the claim if the construction defect is not sufficiently stated and shall request clarification.” This appears to be what Appellant’s counsel is attempting to do through his July 14, 2020 letter. Counsel acknowledges he is in receipt of letter sent to Vincent J. Aiello, Jr., and Atlantic Heritage Builders, Inc. Counsel for Appellants cites SC Code Ann. § 40-59-840 and requests clarifications of Plaintiff’s June 18th 2020 letter (R. pp. 097-099). Appellant’s letter, according to SC Code Ann. § 40-59-840, was due within fifteen days of receipt of Plaintiff’s June 18th 2020 letter received on June 23, 2020 and, at the latest, June 25, 2020.

Counsel for Respondent wrote to counsel for Appellants on July 16, 2020 and informed him that Appellants had fifteen days under the statute to request clarification. Counsel was also informed that under S.C. Code Ann. § 40-59-850, Appellant “has thirty days from service of the notice to inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects... Failure to respond within thirty days is deemed a denial of the claim.” Appellants July 14, 2020 letter was too late to request clarifications from Plaintiff under S.C. Code 40-59-840. In addition, Appellants never requested a mutually convenient time to inspect the premises (R. pp. 97-99). This is understandable since Plaintiff had previously granted Appellants access to the subject residence on May 8, 2019 with their experts

Vincent Aiello and Atlantic Heritage Builders, Inc., despite receiving a “right to cure” letter from Respondent’s counsel, did not provide a timely response. As such, Respondent has complied with the requirements of S.C. Code 40-59-830, 840 and 850 and Judge Jefferson’s Order of May 19, 2020. Pursuant to § 40-59-850(C) If the parties cannot settle the dispute

pursuant to this article, the claimant may proceed with a civil action or other remedy provided by contract or by law.

Respondent's motion to lift the stay imposed by Judge Jefferson's Order was heard by the Honorable Carmen T. Mullen on September 28, 2020. Respondent argued that she complied with Judge Jefferson's order and served Appellants with a Notice and Right to Cure letter. Respondent further argued that Appellants had fifteen days, if they so desired, to seek clarification of Respondent's right to cure letter. Appellants did not respond to Respondent's letter within fifteen days and did not seek to schedule a date for an inspection within thirty days. Upon reviewing the briefs of the parties and hearing oral argument Judge Mullen, on November 20, 2020 issued an Order granting Respondent's motion to lift the stay and allowed Respondents to proceed with her case (R. pp. 004-006). Appellants are now appealing Judge Mullen's Order dated November 20, 2020.

STANDARD OF REVIEW

The issue of interpretation of a statute is a question of law for the court. *Univ. of S. California v. Moran*, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005); Issues of law are reviewed without any particular deference to the lower court. *See, e.g., Duke Energy Corp. v. S.C. Dep (2016).t of Revenue*, 415 S.C. 351, 782 S.E.2d 59

ARGUMENT

- I. The circuit court did not err in granting Plaintiff's motion to lift the stay mandated by § 40-59-830 of the Right to Cure Act because Plaintiff had complied with the requirements of the Act.**

Appellants devote a large portion of their brief discussing the fact that Plaintiff initially failed to comply with the notice requirements of §40-59-820 et seq. Section 40-59-830 states that "if the claimant files an action in court before first complying with the requirements of this

article, on motion of a party to the action, the court shall stay the action until the claimant has complied with the requirements of this article.” Judge Jefferson’s order clearly addressed Plaintiff’s failure to provide notice by staying the case, and ordering that Plaintiff provide notice before the case could proceed. Plaintiff corrected her error and provided notice under the applicable statute. Any issues addressed by Appellants which occurred prior to Judge Jefferson’s order are irrelevant as Judge Jefferson’s order properly addressed those issues.

The focus of this appeal is Judge Mullen’s Order lifting the stay imposed by Judge Jefferson’s order. After Judge Jefferson issued her Order, Plaintiff was obligated to provide Defendants notice under the statute if she wanted to proceed with the lawsuit. An analysis of the requirements of §40-59-840 set forth precisely what Plaintiff was required to do to comply with the Statute and Judge Jefferson’s Order. §40-59-840 (A) states “In an action brought against a contractor or subcontractor, arising out of the construction of a dwelling, the claimant must, no later than ninety days before filing the action, serve a written notice of claim on the contractor. The notice of claim must contain the following:

- 1) a statement that the claimant asserts a construction defect;
- 2) a description of the claim or claims in reasonable detail sufficient to determine the general nature of the construction defect; and
- 3) A description of any results of the defect, if known.”

The section concludes stating: “The contractor or subcontractor shall advise the claimant within fifteen (15) days of receipt of the claim if the construction defect is not sufficiently stated and shall request clarification.”

After Judge Jefferson issued May 19, 2020 Order, Respondent provided Appellants with

notice under the applicable statute through her counsel's letter of June 18, 2020. This Court need only assess whether Respondent's June 18, 2020 letter complied with §40-59-840. The letter clearly makes a statement asserting a construction defect meeting the requirements of sub paragraph (1). The June 18th letter also clearly makes a description of the claim in reasonable detail sufficient to determine the general nature of the construction defect which complies with the requirements of sub paragraph (2). Finally the June 18th letter sets forth a description of any results of the defect, if known meeting the requirements of sub paragraph (3). Specifically, the letter states "the above defects have resulted in water intrusion, severe wood rot and decay, termite infestation and damage, and other physical damages." Respondent's June 18, 2020 letter clearly meets all the requirements set forth in §40-59-840 (R. pp. 093-096).

Respondent was required to serve the Notice and Right to Cure letter on the Appellants pursuant to §40-59-820(5) and §40-59-840(A). Section 40-59-820(5) defines "Serve or service means personal service or delivery by certified mail to the last known address of the addressee." Respondent mailed the June 18, 2020 letter via certified mail to the last known address of Atlantic Heritage Builders, the same address it listed with the South Carolina Secretary of State. That letter was never signed for and returned to counsel for Respondent. Respondent also sent the letter to the known business address of Vincent J. Aiello, Jr. which was A&S Sales of Virginia at 7001 Newington Road Ste 1 Lorton, Virginia 22079. The letter sent to A&S Sales of Virginia was signed for by "K" or "T" Bolton as agent for Vincent J. Aiello on June 23, 2020 (R. p. 102).

Finally, Plaintiff sent a courtesy copy of the June 18th Right to Cure Letter to Appellant's counsel via email on June 25, 2020 (R. p. 105). Respondent's Memo in Support of Motion to

Lift Stay contains as an Exhibit is the certified mail receipts showing the letter was sent to the last know address of Atlantic Heritage Builders. Also as an Exhibit is the certified mail receipt verifying the June 18, 2020 letter was sent to Vincent J. Aiello, Jr. at his business in Virginia and was, in fact, signed for by his agent. In addition counsel for the respondent sent a courtesy copy of the June 18, 2020 letter to Appellants counsel who acknowledged the receipt of same in his Jul 14, 2020 response to Respondent's Notice and Right to Cure letter. Judge Mullen reviewed Respondents Memo in Support of Lifting Stay and the exhibits attached thereto and determined that Respondent's Notice and Right to Cure letter dated June 18th was properly served on Appellants in accordance with the requirements of 40-59-820(5) and §40-59-840(A).

Based on the record, the June 18, 2020 letter was properly served on the Appellants. Section 40-59-840 provides guidance to the recipient of a Right to Cure Letter when it states: "The contractor or subcontractor shall advise the claimant within fifteen (15) days of receipt of the claim if the construction defect is not sufficiently stated and shall request clarification." In his July 14, 2020 letter, counsel for the Appellants states "I am in receipt of the letters you sent to Vincent J. Aiello, Jr.,; Atlantic Heritage Builders, Inc., and A&S Sales of Virginia pursuant to S.C. Code §40-59-810, et seq." Counsel does not say how he received these letters, nor does he question the means by which they were served (R. pp. 097-099). We know that one certified letter was signed for on June 23, 2020. We also know that counsel for the Respondent served all the letters via email on June 25, 2020 (R. p. 105). As such, the latest Appellants could have received the letters was June 25, 2020 although evidence suggests the letters were served and received earlier.

Counsel for Appellant's July 14, 2020 letter clearly states: "I am writing to you pursuant to S.C. Code Ann. §40-59-840 to request clarifications of your allegations." Counsel is very

specific as to the intent of his letter and the authority upon which he was relying. Section 40-59-840 requires that; “contractor or sub contractor shall advise claimant within fifteen (15) days of receipt of the claim if the construction defect is not sufficiently stated and shall request clarification.” Appellants did not provide their request for clarification within the fifteen days permitted by the statute and thus waived that remedy the statute provides.

S.C. Code 40-59-850 sets forth contractor’s election of remedies. It specifically states: The contractor or subcontractor has thirty days from service of the notice to inspect, offer to remedy, offer to settle with claimant or deny the claim regarding the defects. The claimant shall receive written notice of the contractor’s or subcontractor’s, as applicable, election under this section. The claimant shall allow inspection of the construction defect at an agreeable time to both parties, if requested under this section. The claimant shall give the contractor and any subcontractors reasonable access to the dwelling for inspection and if repairs have been agreed to by the parties, reasonable access to affect repairs. Failure to respond within thirty(30) days is deemed denial of the claim. The only request Appellant’s counsel made regarding an inspection is in the second to last sentence of the July 14, 2020 letter. It states: Once I have received the requested clarification I would like to schedule a time to inspect the alleged defects that still exist at the residence (R. pp. 097-099). Counsel clearly indicates that he will schedule a time to inspect after he receives clarifications which he was late requesting and not entitled to receive. Appellants made no other requests to inspect the property which stands to reason since Appellants’ counsel and their experts inspected the property on May 8, 2019.

CONCLUSION

For the foregoing reasons, Respondent asks this Honorable Court to affirm the circuit court Order lifting the stay.

Respectfully Submitted

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This 14th day of September 2021
Hilton Head Island, South Carolina

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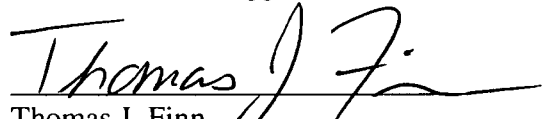
Of whom Vincent J. Aiello, Jr., and

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Appellants.

CERTIFICATE OF COMPLIANCE

This is to certify that counsel has complied with South Carolina Appellate Court Rule 211(b).


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September 14, 2021