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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2019-001950

Clayton Construction Company, Inc..... Appellant,

v.

J&H Grading & Paving, Inc,.....Respondent.

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING EN BANC

Pursuant to Rules 219(b) and 221(a) SCACR, Appellant Clayton Construction Company, Inc. hereby petitions this Court for rehearing of its August 30, 2023 Opinion further suggests for rehearing en banc.

GROUNDS FOR REHEARING

I. THE PURPOSE OF THE SUBCONTRACTORS' AND SUPPLIERS' PAYMENT PROTECTION ACT WAS TO MAKE "PAY IF PAID" PROVISIONS UNENFORCEABLE, NOT "PAY WHEN PAID" PROVISIONS.

In 1976, the South Carolina Supreme Court determined that "pay when paid" provisions, such as the provision at issue in this matter, do not create conditions precedent. *See e.g. Elk & Jacobs Drywall v. Town Contractors, Inc.,* 267 S.C. 412, 229 S.E.2d 260 (1976) (*reversing and remanding the Circuit Court's ruling that the a "pay when paid" provision created a conditions*

precedent). In 2000, the South Carolina legislature enacted the Subcontractors' and Suppliers' Payment Protection Act which deemed conditions precedent in subcontracts unenforceable. *See South Carolina Code Ann.* § 29-6-230 (*The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor. Any agreement to the contrary is not enforceable.*) The South Carolina legislature, therefore, knowing that "pay when paid" provisions were not conditions precedent, enacted the Subcontractors' and Suppliers' Payment Protection Act to definitively outlaw "pay if paid" provisions, which do create condition precedents. *See Exhibit 1: South Carolina Construction Law Desk Book, Chapter VIII, "Payments", Section C.* Accordingly, the Court's finding that the enactment of Section 29-6-230 would be a "futile act" without making "pay when paid" provisions unenforceable is erroneous.

The Court is correct, though, in saying that a "pay if paid" scenario ("[allowing] the general contractor to avoid paying the subcontractor indefinitely, depending on when – **and if** – it received payment from the owner" (emphasis added)), "is precisely the scenario section 29-6-230 prohibits". *Opinion*, Pg. 7 *citing Elk* at 417, 229 S.E.2d at 262. That scenario, however, as determined by the South Carolina Supreme Court, is not the scenario in *Elk* and not the scenario in the matter at hand[1]. The Court, accordingly, in its misapprehension of *Elk* and Section 29-6-230, has erroneously found that Section 29-6-230 supplants the holding in *Elk* and, thereby, erroneously determined that "pay when paid" provisions are unenforceable because they create conditions precedent. Instead, the Court's Opinion improperly overturns the finding in *Elk* that "pay when paid" provisions do not create conditions precedent to determine that "pay when paid" provisions do create conditions precedent and are, therefore, unenforceable.

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[1] As the Court notes: "[t]he facts of Elk are similar to this case. *Opinion*, Pg. 6

Accordingly, similar to the Supreme Court in *Elk*, Clayton asks this Court to find that "pay when paid" provisions do not create conditions precedent.

II. CLAYTON DID NOT REFUSE TO PAY J&H; NOTHING WAS CONTRACTUALLY DUE TO J&H "AT THE TIME".

In its misapprehension of *Elk* and Section 29-6-230 and in erroneously finding that "pay when paid" provisions create conditions precedent, the Court repeatedly misapprehends that Clayton refused to pay J&H when Clayton was, instead, relying on the "pay when paid" provision and the standing black letter law precedent from *Elk* that nothing was due "at the time". *Opinion*, Pg. 3. Clayton, accordingly, did not refuse to pay J&H, but instead correctly stated that nothing was then due under the contract between the parties. The Court further erroneously finds that Clayton "did not dispute the amount of J&H's demand" when the facts clearly show that Clayton stated that there were "no amounts due and owing to J&H [on March 9, 2018]", when it responded to J&H's Section 27-1-15 demand. Likewise, Clayton did not unreasonably refuse to pay the claim, because there was nothing that was owed.

Clayton performed a reasonable and fair investigation of the merits of J&H's claim, accurately determined (pursuant to *then* South Carolina precedent) that nothing was owed at the time, and timely responded to J&H's Section 27-1-15 demand. The Court, accordingly, in its misapprehension of *Elk* and Section 29-6-230, has erroneously found that Clayton failed to comply with the requirements of Section 27-1-15.

III. THE COURT CONFUSES THE REASONABLENESS OF THE TIME TO PAY UNDER ELK WITH THE REQUIREMENTS OF SECTION 27-1-15.

The reasonableness of the time to pay derives from the holding in *Elk* that "pay when paid" provisions do not create conditions precedent to payment. The Court's opinion, making all "pay when paid" provisions unenforceable, overturns *Elk* so an evaluation of reasonableness of the time

to pay thereunder is futile. Section 27-1-15, on the other hand, requires payment of any undisputed balance within 45 days and is distinctly different than the contractual requirement to pay. The Court's misapprehension and conflation of these distinctly different requirements creates an illogical opinion wherein the Court considers actions that occurred prior to J&H's Section 27-1-15 demand to determine Clayton's later liability under Section 27-1-15.

IV. NINETY DAYS IS NOT A REASONABLE TIME SO AS TO AFFORD A GENERAL CONTRACTOR AN OPPORTUNITY TO OBTAIN FUNDS FROM AN OWNER AND THE COURT'S DEPARTURE FROM ELK IS ERRONEOUS.

Assuming, *arguendo*, that "pay when paid" provisions are enforceable and the reasonableness of the time to pay is relevant, the Court's rationale in determining that "a delay beyond ninety days was unreasonable" does not follow the Supreme Court's precedent in *Elk* that a general contractor be given a reasonable time so as to afford it an opportunity to obtain funds from the owner before being required to pay its subcontractor. *See e.g. Elk* 267 S.C. 412, 229 S.E.2d 260 (1976) (*finding that payment delayed by sixteen months was not per se unreasonable*). Instead, the Court's opinion erroneously focuses on the timing of J&H's collection efforts against Clayton, not the timing of Clayton's collection efforts against Herlong. In the matter at hand, the record clearly reflects that Clayton had diligently pursued collecting against Herlong and had already filed its lien and was in litigation at the time J&H filed their lien to collect the monies owed to Clayton and its subcontractors, including J&H. A general contractor, such as Clayton, who has seized all opportunities with the South Carolina court system to collect from an owner, cannot be deemed to be unreasonable in seeking its opportunity to obtain funds from an owner when it is at the mercy of timing of that same legal system; especially when that general contractor is seeking payment on its subcontractors behalf as well as its own.

Accordingly, to the extent that "pay when paid" provisions are enforceable and the reasonableness of the time to pay is relevant, the Court's departure from the precedent of *Elk* to analyze reasonableness and to, thereby, conclude that a delay beyond ninety days was unreasonable is patently erroneous.

V. THE COURT'S OVERTURNING OF ELK SHOULD BE PROSPECTIVE, NOT RETROSPECTIVE.

As set forth in Section I, above, the Court's Opinion overturned the finding in *Elk* that "pay when paid" provisions do not create conditions precedent. The Court's current determination to overturn *Elk,* finding that "pay when paid" provisions create conditions precedent and/or that a delay beyond ninety days was unreasonable, should not be retroactively punitive to Clayton who: i) rightly relied on the *then* precedent of the South Carolina Supreme Court to performed a reasonable and fair investigation of the merits of J&H's claim; ii) accurately determined (pursuant to that precedent) that nothing was owed to J&H at the time; and iii) timely responded to J&H's Section 27-1-15 demand. Should the Court decide to now make "pay when paid" provisions unenforceable, they should unenforceable prospectively, not retrospectively as here. Accordingly, the Court should find that Clayton is not liable to J&H under Section 27-1-15 for attorneys' fees.

CONCLUSION

For the foregoing reasons, Clayton Construction Co., Inc. respectfully asks that the Court rehear this matter and respectfully suggests that the rehearing be en banc.

Respectfully submitted,

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September 14, 2023
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EXHIBIT 1

South Carolina Construction Law Desk Book

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C. Payments to Contractors, Subcontractors, and Suppliers

In 2000—ten (10) years after the enactment of the statutory provisions related to "Payments to Contractors, Subcontractors, and Suppliers"—the legislature enacted the "Subcontractors' and Suppliers' Payment Protection Act" ("SPPA").[21]

1. Pay-if-Paid Provisions Definitively Outlawed in South Carolina

As the SPPA's title implies, it is intended to protect subcontractors and suppliers by ensuring they are paid when they have performed according to the terms of their contracts. S.C. Code Ann. § 29-6-230 (2011) states:

> Notwithstanding any other provision of law, performance by a construction subcontractor in accordance with the provisions of its contract entitles the subcontractor to payment from the party with whom it contracts. *The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor.* Any agreement to the contrary is not enforceable.[22]

The import of S.C. Code Ann. § 29-6-230 (2011) is clear: If a subcontractor performs in accordance with the terms of his contract with the contractor, he is entitled to payment from the party with whom he has contracted, usually the contractor. Payment by the owner to the contractor, or payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the subcontractor. In other words, payment to the subcontractor by the contractor is not conditioned upon payment to the contractor from the owner. Importantly, the parties cannot contract around this. The effect is clear—pay-if-paid provisions are illegal in South Carolina.

2. Bond Provisions of the SPPA

S.C. Code Ann. §§ 29-6-250 (2011) and 29-6-270 (2011) of the SPPA relate to bonding requirements of governmental bodies and are beyond the scope of this Payments chapter. However, S.C. Code Ann. § 29-6-290 (2011) provides, "[a] provision in a contract for the improvement of real property in the State must not operate to derogate the rights of a construction contractor, subcontractor, supplier,

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[21] *See* S.C. Code Ann. § 29-6-210, *et seq.* (2011).

[22] *Id.* (emphasis added).

or other proper claimant against a payment bond or other form of payment security or protection established by law."[23] This provision makes it clear that parties may not contract to lessen the rights of a proper claimant, including contractors, subcontractors, and suppliers, against a payment bond or other form of payment security or other protection established by law.

3. Ambiguity of Exemptions from SPPA

In 1990, the legislature enacted S.C. Code Ann. § 29-6-60, which made certain exemptions to the chapter. The specific nature of these exemptions is discussed above in the "Payments to Contractors, Subcontractors, and Suppliers" section. When the legislature enacted the SPPA in 2000, it was as a part of the same chapter as the "Payments to Contractors, Subcontractors, and Suppliers" Act, which includes the exemptions provision of S.C. Code Ann. § 29-6-60. As such, a strict reading of the statute indicates that the exemptions of S.C. Code Ann. § 29-6-60 apply to the SPPA. The legislature did not resolve the issue one way or the other, and did not modify S.C. Code Ann. § 29-6-60 in 2000. The issue of whether the exemptions of S.C. Code Ann. § 29-6-60 apply to the SPPA has not been judicially resolved.

D. Liens of Laborers and Others on Contract Price

1. Entitlement to Payment from Monies Received

S.C. Code Ann. § 29-7-10 (2011) requires that contractors and subcontractors pay their laborers, subcontractors, and materialmen for their lawful services and material furnished out of money received from the owner for the work of those laborers, subcontractors, and materialmen. The section also provides that such laborers, subcontractors, and materialmen, "shall have a first lien on the money received by such contractor for the erection, alteration, or repair of such building in proportion to the amount of their respective claims."[24] As such, in essence, the law is a *de facto* trust fund statute. The statute is clear that it does not "make the owner of the building responsible in any way" and "contractor[s] or subcontractor[s] [are not prevented] from borrowing money on any such contract."[25]

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[23] S.C. Code Ann. § 29-6-250 (2011).

[24] S.C. Code Ann. § 29-7-10 (2011).

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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of Clayton Construction Company, Inc.'s **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC** in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 14 day of September 2023, addressed as follows:

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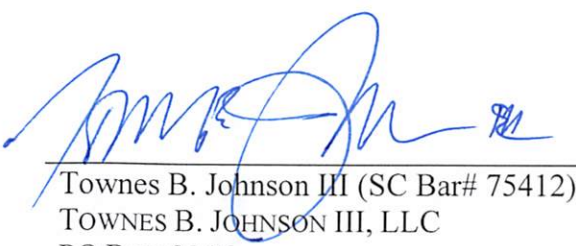

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