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SC Court of Appeals

VIA EMAIL: ctappfilings@sccourts.org

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Paint Design, LLC v. Westgate Myrtle Beach, LLC a/k/a Westgate Resorts, Ltd.
And RNR Construction
Civil Action No: 2023-CP-26-00053
Appellate Case No: 2024-000137

Dear Ms. Kitchings:

Appellant's counsel received the full transcript that was requested in the above-referenced appeal on March 18, 2024 (a copy of which is attached), and respectfully requests that the Court start the time limits to file the Initial Brief of Appellant and Designation of Matter.

If you have questions or need additional information, please do not hesitate to contact me.

Sincerely,

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.

Tina L. Bashline, Paralegal to
Howell V. Bellamy, III, Esquire

/tlb

Enclosure

cc: Don R. Terry, Esq. (w/enclosure)

1 STATE OF SOUTH CAROLINA * COURT OF COMMON PLEAS
 *
 2 COUNTY OF HORRY * TRANSCRIPT OF RECORD
 *
 3 -----X
 PAINT DESIGN, LLC, *
 *
 4 Plaintiff, *
 *
 5 vs. * Case No. 2023-CP-26-00053
 *
 6 WESTGATE MYRTLE BEACH, LLC, *
 7 a/k/a WESTGATE RESORTS, *
 LTD., and RNR CONSTRUCTION, *
 8 LLC, *
 *
 9 Defendants. *
 -----X

August 14, 2023

B E F O R E:

The Honorable William H. Seals, Jr., Presiding Judge

A P P E A R A N C E S:

Howell Bellamy, III, Esq.
Attorney for the Plaintiff

Don Terry, Esq.
Attorney for the Defendant

Recorded by: Webex Recording

Transcribed by: Bobbi Fisher, RPR
SC Official Court Reporter III

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E X H I B I T S

(None.)

COURT REPORTER LEGEND

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
(ph)	Indicates phonetic word
[Verbatim]	Indicates the word is said as written
(Indiscernible)	[Transcription] Indicates word(s) is not known due to audio recording quality

P R O C E E D I N G S

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THE COURT: I am ready whenever you two are.

MR. BELLAMY: Your Honor -- ready to proceed, Your Honor?

THE COURT: Yes, sir.

MR. BELLAMY: The plaintiff has filed a motion to amend its complaint to assert the equitable claims of quantum meruit, unjust enrichment. And the defendant's contention is, as long as they have a legal cause of action, they're barred from bringing a claim for quantum meruit, which, I think is not the law in South Carolina.

The law in South Carolina specifically provides that, if you're a subcontractor and you bring a claim, let's say, for even a breach of contract, unjust enrichment -- or let's say unjust enrichment or quantum meruit along with a mechanic's lien and you fail to perfect your mechanic's lien, you can still bring your claims for quantum meruit and unjust enrichment as long as they are pled in the alternative.

And simply in the Court's order, it provides, on Section 2, Conclusions of Law, "Despite the fact that a claim for unjust enrichment and quantum meruit must fail where there exists a valid and enforceable contract, courts allow quantum meruit claims to continue if pled in the alternative to a claim for breach of contract.

1 Plaintiffs did not plead quantum meruit and unjust
2 enrichment claims in the alternative; therefore,
3 Plaintiff's claims for quantum meruit and unjust
4 enrichment must be and hereby are dismissed without
5 prejudice."

6 In our amended complaint, Your Honor, we do plead
7 in the alternative. And one of the things I want to also
8 bring up, in the plaintiff's memorandum in opposition to
9 our motion to amend, he states -- and this is on page --
10 it's not numbered, but it's -- give me one second, Your
11 Honor. It would be -- this is Westgate's memorandum in
12 opposition to Plaintiff's motion to amend its amended
13 complaint, and it's on the third page, Your Honor. And
14 it's -- I would say it's the third paragraph down, and it
15 says -- and I'm reading from the second sentence -- it
16 says, "The fact that Plaintiff's legal remedy was barred
17 by the statute of limitations is no ground itself for
18 allowing the plaintiff to seek equitable relief."

19 Now, Your Honor, our legal remedy was never barred
20 by the statute of limitations. That's an incorrect
21 assertion on the part of the defendant, Westgate. We just
22 failed to perfect our mechanic's lien, and, obviously,
23 they're totally distinguishable.

24 Then it goes on to say, "In fact, instead of timely
25 pursuing legal remedies against Westgate, Plaintiffs

1 slumbered on its rights and it's not proper for Plaintiff
2 to seek equitable relief, and furthermore, there exists no
3 basis for this Court to exercise powers giving relief to
4 the plaintiff."

5 It goes on to say, "Furthermore, Plaintiff is
6 pursuing a breach of contract remedy against Defendant,
7 RNR, is inaccurate under the law because the plaintiff has
8 an equitable remedy at law and equity is not available to
9 the plaintiff and just -- and justice does not require the
10 Court to allow the plaintiff to amend its complaint to
11 pursue privileged, equitable claims against Westgate."

12 Your Honor, that is not the law in South Carolina.
13 As long as -- as your order provides, as long as the --
14 where it's a subcontractor material matter, if they fail
15 to protect -- if they fail to perfect their mechanic's
16 lien, they still have the right to bring equitable claims
17 against the owner based upon the fact if they plead in the
18 alternative.

19 Now, in our first lawsuit that we brought -- amended
20 lawsuit, Your Honor, we did not say in the alternative.
21 In our amended complaint, we did argue in the alternative.

22 And the other thing I wanted to point out is, is
23 that -- is that right here -- I want to read this right
24 here, "So the Court concluded that the focus on whether
25 the enrichment to the owner and to the" -- let me read

1 this part right here.

2 The other thing I want to point out, Your Honor, is
3 that to the extent that Westgate -- Westgate argues that
4 the Court should ignore the law set forth by the Supreme
5 Court in Columbia Wholesale, and instead, interpret Nutt
6 Corporation's con- -- is contrary to law controlling. The
7 plaintiff points to Article 5, Section 9 of the
8 Constitution of the State of South Carolina which states,
9 "The decisions of the Supreme Court shall bind the Court
10 of Appeals as precedent," in South Carolina Constitution
11 Article 5, 6, and 9.

12 So, Your Honor, what I'm saying is, is the Nutt
13 Corporation is a Court of Appeals case that was issued in
14 2011. The Columbia Wholesale vs. Scudder May N.V., Franke
15 Associates by Simmons vs. Russell, which is a 1988 Supreme
16 Court case, and the Columbia Wholesale is a 1994 Supreme
17 Court case, and then Williams Carpet, which is a 2012
18 Court of Appeals case, they all stand for the proposition
19 that, if a plaintiff fails to perfect his mechanic's lien
20 by abandoning it or failing to perfect it from a time
21 standpoint, it still has the right to bring equitable
22 claims as long as they're pled in the alternative. And
23 that is the law in South Carolina, and I think that's the
24 controlling law.

25 But Nutt Corporation essentially is a claim where

1 Nutt Corporation, an engineering company, brought a claim
2 against Howell Road, the landowner, for failure to pay as
3 far as fees in the case that were owed to Howell -- owed
4 to the Nutt Corporation.

5 And then, at some point, the engineering from the
6 Nutt Corporation abandoned its breach of contract claim
7 and began to pursue declaratory judgment relief, and at
8 some point, the Court found out -- the Court argued -- at
9 least the Court held that the -- that the breach of
10 contract claim was barred by the statute of limitations.

11 In that particular case, Your Honor, it's unclear
12 whether the Nutt Corporation pled in the alternative. The
13 opinion doesn't specifically address it, but it doesn't
14 indicate -- it doesn't address it one way or another
15 whether its claims -- equitable claims were pled in the
16 alternative.

17 And I think, for those reasons, that our case, the
18 client failed to perfect the mechanic's lien -- my
19 fault -- and that -- and the Nutt Corporation is a statute
20 of limitations issue, which is not the issue in this
21 particular case.

22 And as Your Honor -- as your order basically
23 provides, as long as we, you know, plead in the
24 alternative, we have the right to bring equitable claims.
25 And, Your Honor, that would be, obviously, the plaintiff's

1 showing, and we would ask that you grant our amended
2 complaint to assert equitable claims in the alternative.

3 The defendant, Westgate, cannot claim any prejudice
4 because, when we brought the complaint, we asserted claims
5 for quantum meruit and unjust enrichment, and -- even
6 though we didn't plead in the alternative.

7 And, Your Honor, based on just without arguing the
8 merits of the case, I believe that we have at least made a
9 prima facie showing to allow us to amend our pleadings
10 under Rule 15, South Carolina Rules of Evidence. And,
11 Your Honor, for those reasons, we respectfully request
12 that you grant our motion to amend. Thank you.

13 THE COURT: Thank you.

14 All right. Mr. Terry?

15 MR. TERRY: Good morning, Your Honor. Again, I'm
16 Don Terry. I represent Westgate Myrtle Beach, LLC. And I
17 want to remind you, there's two motions to be heard here:
18 First, Plaintiff's motion for leave to amend the amended
19 complaint and Westgate's motion for attorney -- or costs
20 including attorney's fees.

21 And I'll start with -- let me ask you, Your Honor.
22 Do you want me to cover both before I finish, or do you
23 want me to stop at the end of the motion for leave to
24 amend and answer any questions you may have?

25 THE COURT: Go ahead and just cover the motion to

1 amend to begin with, and then we'll move on to the --

2 MR. TERRY: Thank you, Your Honor.

3 As I'm sure you know, Your Honor, I want to give you
4 a little bit of background. You have heard the motion to
5 dismiss and decided that. There was, prior to this, a
6 motion to dismiss in which you dismissed all of
7 Plaintiff's claims against Westgate. Then there was a
8 motion for reconsideration, which has been denied.

9 Now, to grant motion to leave -- or for leave to
10 amend, the Court has to determine first that justice
11 requires it and then also that Westgate will not be
12 prejudiced.

13 And here, Your Honor, I covered the prejudice in our
14 memorandum, so I'm going to avoid that for now and talk
15 about justice requiring it. There's a few issues that you
16 have to -- or there's an issue that you have to decide,
17 Your Honor, and that is: Can the plaintiff, Paint Design,
18 recover on a quantum meruit claim in this case?

19 And I just kind of went back and looked at it as we
20 did in law school, Your Honor. There's a few rules that
21 apply. The first rule that applies is that, if there is
22 an expressed contract, there is no quantum meruit claim or
23 recovery available. The second rule is that, if the
24 plaintiff does not pursue his legal remedy, equity is not
25 going to step in to help the plaintiff. And then the

1 third one is that, to plead in the alternative, you must
2 be unsure about what cause of action the evidence will
3 support.

4 And we covered this our memorandum of law in
5 opposition to the motion for reconsideration. Now, in the
6 verified amended complaint, we're at the second
7 complaint -- second amended complaint at this stage, Your
8 Honor, but in the verified amended complaint, Plaintiff
9 pled the existence of an expressed contract between it and
10 RNR Construction. RNR has not answered, and, as a result,
11 has admitted the existence of that contract.

12 Plaintiff pled in the verified amended complaint
13 that a true and accurate copy of that contract was
14 attached, and it is, in fact, an exhibit to the complaint.

15 So there's no question, Your Honor, whether there is
16 a contract or not, but that's a question of fact for
17 trial. But the plaintiff can't change its position going
18 forward on what that fact -- what those facts are.

19 Now, I learned a great deal about pleading in the
20 alternative in this case, Your Honor, because, in the
21 past, what I have done is exactly what Plaintiff did. I
22 just simply used the words "in the alternative," but
23 that's not what the law requires, Your Honor.

24 What the law requires is that the facts must be pled
25 such that it is clear that the plaintiff is unsure which

1 cause of action the evidence will establish. And there
2 are two cases that I cited in a prior memorandum in this
3 case, Your Honor. The first one is Harmon and Bore, Inc.
4 V. Jenkins. The second one is HG Haul Construction v.
5 JEP. The Harmon and Bore v. Jenkins is at 282 S.C. 189.
6 And in that case, here's what the Court says. The Court
7 held that "The plaintiff need not elect, between a remedy
8 under quantum meruit, expressed contract because the two
9 actions are included because of an obvious uncertainty as
10 to which cause of action Harmon would be able to prove or
11 recover on. In determining whether a plaintiff" -- they
12 didn't talk about whether a plaintiff can -- has to
13 choose -- elect a remedy before trial, and the Court says
14 that the plaintiff is required to elect between cause of
15 actions prior to trial if the complaint states distinct
16 causes of action which are so inherently repugnant that
17 the assertion of one necessarily constitutes an election
18 and precludes an assertion of the other.

19 In this case, Your Honor, the law is clear: When
20 there's an expressed contract, the quantum meruit claim
21 is -- or the facts required for quantum meruit claim are
22 repugnant to the existence of that expressed required
23 contract.

24 And so, Your Honor, in this case, for Plaintiff to
25 plead in the alternative, Plaintiff would have to plead

1 that he's unsure whether there's an expressed contract.

2 Now, I guess that it's possible that Plaintiff could
3 plead the existence of an expressed contract and the
4 defendant could deny the existence of that contract, and
5 then there would be a situation where we're unsure what
6 facts -- or what causes of action the evidence would
7 support.

8 But, in this case, we don't have that situation,
9 Your Honor. We have a verified complaint with an
10 admitted, expressed contract, and we have the defendant,
11 RNR, the other party to that contract, hasn't denied it,
12 and, in fact, is in default for not answering, despite the
13 fact that Plaintiff hasn't pursued that default.

14 And so, Your Honor, in this case, there's no
15 uncertainty about what the evidence is going to show. The
16 evidence is going to show there's an expressed contract,
17 and, therefore, in this state, the law does not allow
18 Plaintiff to pursue a quantum meruit claim even in the
19 alternative.

20 Now, Your Honor, in their memorandum of law in
21 support of this motion, the plaintiff argued that there's
22 no privity of contract between Westgate and the plaintiff.
23 And, frankly, Your Honor, that's completely irrelevant.
24 Whether Plaintiff has a legal remedy is a question as to
25 whether equity will step in. It's not a question of

1 whether Plaintiff has a legal remedy against one defendant
2 or another. The question is: Does plaintiff have a legal
3 remedy? And, in this case, Plaintiff does, in fact, have
4 a legal remedy against the party which it's contracted,
5 and that's RNR Construction. And so equity should not
6 step in.

7 Now, the issue of the mechanic's lien is a different
8 situation, but it's certainly a legal claim that Plaintiff
9 failed to pursue. And we can argue about whether --
10 semantics over whether there's a statute of limitations
11 issue here, Your Honor. My belief is that Plaintiff
12 failed to pursue its mechanic's lien claim within the
13 six-month statute of limitations stated in the mechanic's
14 lien contract.

15 We can call that something other than a statute of
16 limitations if we want, but, in the end, it is a statute
17 of limitations which bars Plaintiff from recovering after
18 that six-month period.

19 And so, Your Honor, we ask that you deny Plaintiff's
20 motion for leave to amend on the grounds that Plaintiff
21 has not and cannot, in this case, plead a quantum meruit
22 claim in the alternative.

23 THE COURT: Any reply to that, Mr. Bellamy?

24 MR. BELLAMY: Yes, Your Honor.

25 Yeah, Your Honor, I wanted to cite, as far as what

1 legal counsel is saying for Westgate, basically, what he's
2 essentially asking the Court to do is ignore Columbia
3 Wholesale Company, Inc., vs. Scudder May N.V., which is a
4 1994 Supreme Court case. He's asking the Court to ignore
5 Franke Associates by Simmons v. Russell, which is a 1980
6 Supreme Court case. He's asking the Court also to ignore
7 Williams Carpet Contractors, Inc., vs. Skully, which is a
8 1912 -- 2012 Court of Appeals case.

9 And what the holding is is this: In Columbia
10 Wholesale, the Supreme Court examined cases from across
11 the country addressing the issue of whether a
12 subcontractor can recover against an owner in quantum
13 meruit. The Court concluded the focus is on whether the
14 enrichment to the owner is unjust and found out the
15 failure to pursue a mechanic's lien was not a bar to
16 recovery for unjust enrichment.

17 So, Your Honor, the question is -- what it really
18 boils down to: Can the owner -- can our clients show that
19 the -- Westgate was unjustly enriched by the services,
20 labor and materials that were provided to -- as far as its
21 work on the condominium or I would say on the timeshare
22 condominium complex work that it did on the building.

23 And, to me, is that in the order -- Your Honor's
24 order, it clearly states that -- and your order states
25 again, "Despite the fact the claim for unjust enrichment

1 and quantum meruit failed where there exists a valid and
2 enforceable contract, Courts allow quantum meruit claims
3 to continue if plead in the alternative to a claim for
4 breach of contract. Plaintiff did not plead as quantum
5 meruit nor unjust enrichment claims in the alternative;
6 therefore, Plaintiff's claims for quantum meruit and
7 unjust enrichment must be and hereby are dismissed without
8 prejudice."

9 Your Honor, our burden is to establish that the
10 owner, Westgate, which we do not have -- we're not in
11 direct privity, which we do not have a contract -- was
12 unjustly enriched by the service and labor and materials
13 that my client provided to Westgate, you know, as far as
14 buildings and, you know, upgrade of their buildings that
15 they were using for timeshare purposes.

16 So that's the issue in the case is whether they were
17 unjustly enriched. And if -- as far as opposing counsel's
18 legal argument is, he would ask the Court to ignore, you
19 know, the cases cited by the -- I have cited -- there are
20 three or four different opinions cited by the Supreme
21 Court and Court of Appeals that basically say, if owner
22 fails to perfect its mechanic's lien, it is not barred by
23 the statute of limitations -- is not barred by -- to seek
24 alternative remedies if it pleads in the alternative
25 equitable relief and unjust enrichment.

1 Your Honor, that would be our showing, Your Honor.

2 THE COURT: All right. Mr. Terry, let me hear your
3 second motion.

4 MR. TERRY: May I respond to that really quickly,
5 Your Honor?

6 THE COURT: Sure.

7 MR. TERRY: We're not -- we're -- Westgate is not
8 suggesting to the Court that it should ignore the Columbia
9 Wholesale case or any of the other cases, Your Honor.
10 Certainly, if Plaintiff -- if the facts existed or were
11 pled properly for Plaintiff to plead that he is uncertain
12 which of two or more grounds of recovery he'll be able to
13 prove, he could plead in the alternative.

14 The question here, Your Honor, is he's just -- the
15 issue here, Your Honor, is that hasn't happened, and, in
16 fact, at this point, cannot happen. He cannot plead in
17 the alternative because the law requires more than just
18 using the words "in the alternative," which I have already
19 explained, but that -- the Columbia Wholesale case doesn't
20 discuss this issue at all. These issues are discussed in
21 the two cases I have cited: Harmon v. Bore vs. Jenkins
22 and HG Hall Construction v. JEP Enterprises.

23 MR. BELLAMY: Your Honor, I would like to say one
24 thing. We are -- when we plead in the alternative, we're
25 seeking the same relief as far as our equitable reliefs

1 that we're seeking as far as under the breach of
2 contract -- as far as breach of contract with RNR
3 Construction. We're seeking the same relief against the
4 owner that we sought against RNR Construction and also
5 under mechanic's lien.

6 So we are -- our theory is consistent in the
7 alternative. We're trying to -- they're not inconsistent
8 legal theories where basically we're asking the same
9 relief in all of our claims. So they are in the
10 alternative, Your Honor. They're not inconsistent legal
11 theories. We're asking for different amounts of money
12 based upon whether it's a breach of contract or whether
13 it's a quantum meruit or whether it's a mechanic's lien.

14 In this particular case, we're asking for the same
15 relief in all of our claims, so it is truly in the
16 alternative. Thank you, Your Honor.

17 THE COURT: All right. Let me hear your motion for
18 attorney's fees.

19 MR. TERRY: Yes, Your Honor. Your Honor, as we have
20 already discussed, Plaintiff's mechanic's lien claim in
21 this case was dismissed by you and the basis for that was
22 that Plaintiff failed to file its mechanic's lien
23 enforcement foreclosure cause of action within six months
24 of its last day of work.

25 Under Section 29-5-20 of South Carolina Code

1 requires an award of costs and attorney's fees to the
2 prevailing party on a mechanic's lien claim. Now, to be
3 clear, Your Honor, the statute says "may," "may award
4 attorney's fees," but the Supreme Court has said that the
5 award of attorney's fees is mandatory. It says that, in
6 T.W. Morton v. von Buedingen, which is at 316 S.C. 388,
7 and at D.A. Davis Construction v. Palmetto Properties,
8 which is at 281 S.C. 415.

9 With our motion for attorney's fees, Your Honor, we
10 have submitted an affidavit of attorney's fees and costs,
11 and Plaintiff has -- I'm sorry, Westgate has spent, on
12 defending the mechanic's lien caution of action, \$6,995.
13 Overall, Westgate has spent on this case \$19,728.79, but
14 the Court -- or the Supreme Court says that you can't
15 recover for defending all causes of action; you can only
16 recover for defending a mechanic's lien claim.

17 Because Westgate -- I'm sorry, because Paint
18 Designs' mechanic's lien claim was dismissed with
19 prejudice, Westgate is the prevailing party and is
20 entitled to attorney's fees and costs, which I have laid
21 out in detail in the affidavit. And so we request that
22 you award attorney's fees and costs of \$6,995 to Westgate.

23 THE COURT: Mr. Bellamy?

24 MR. BELLAMY: Your Honor, I think Don is entitled to
25 attorney's fees. I would just say that, based upon the

1 motions that were filed in the first lawsuit, the motion
2 to dismiss in the first and second lawsuits, I would just
3 ask that maybe, you know, maybe less than 6,000, Your
4 Honor, but it seems to me that's a little high, but, Your
5 Honor, you know, obviously, I won't ever question an
6 attorney regarding his fees, but that would be my only
7 objection, Your Honor.

8 THE COURT: Thank you.

9 Any other motions or does that cover it?

10 MR. BELLAMY: That covers it, Your Honor.

11 THE COURT: All right. Let me take it under
12 advisement, and I'll let you know something this week.

13 MR. TERRY: Thank you, Your Honor.

14 THE COURT: Thank you. Y'all have a good day.

15 (The above matter concluded.)
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CERTIFICATE OF TRANSCRIBER

CASE NAME/NUMBER: Paint Design v. Westgate MB

2023-CP-26-00053

DATE OF HEARING: 8/14/23

COURT REPORTER/MONITOR: Webex Recording

I, Bobbi Fisher, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information, and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

Bobbi Fisher

/s/ Bobbi Fisher_____

Bobbi Fisher, RPR and Certified Transcriber

Date Submitted: 3/3/24

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