

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF CHARLESTON)

CASE NO.: 2019-CP-10-1108)

Balfour Beatty Construction, LLC,)

Plaintiff,)

v.)

Library Associates, LLC and Metropolitan)
Life Insurance Company,)

Defendants.)

Library Associates, Inc.,)

Third-Party Plaintiff,)

v.)

Lithko Contracting, LLC f/k/a Lithko Contracting,)
Inc., Guy M. Beaty, Inc., Bernard MMC, LLC, Gulf)
Stream Construction Company, Inc., Palmetto)
Automatic Sprinkler Company, Inc., Cook &)
Boardman, LLC, Strong Tower Construction, LLC)
d/b/a Koch Corporation, Watson Electrical)
Construction Co., LLC, Trimark Foodcraft, LLC,)
Pleasant Places, Inc., David Allen Company, Inc.,)
Premier Exteriors, LLC, Warco Construction, Inc.,)
Old North State Masonry, LLC, Tom Rochester &)
Associates d/b/a Southeastern Architectural)
Systems, Lowcountry Case & Millwork, Inc.,)
Quantum Coatings, LLC, and Balfour Beatty)
Construction Group, Inc.,)

Third-Party Defendants.)

RECEIVED

May 06 2024

SC Court of Appeals

ORDER GRANTING STRONG)
TOWER CONSTRUCTION, LLC D/B/A)
KOCH CORPORATION'S MOTION)
FOR PARTIAL SUMMARY)
JUDGMENT)

downtown Charleston, owned by Library Associates, LLC (the “Owner”). BBC acted as the general contractor for the project, and, under a subcontract with BBC, Koch was a subcontractor responsible for the installation of the ground level, storefront bronze windows and doors. (see Koch Mot. Summ. J., Oct. 19, 2020, Ex. A, Koch subcontract). After nonpayment of alleged contractually owed sums, Koch filed Case No. 2019-CP-10-2868 on May 30, 2019, asserting claims for breach of contract against BBC, for foreclosure of a mechanic’s lien and constructive trust against the Owner, and for quantum meruit against both BBC and the Owner. By that time, Case No. 2019-CP-10-1108 had been filed by BBC, with Koch being named as a third-party defendant on May 15, 2019. (see Third-Party Summons and Compl.). These two cases were consolidated, as were many other cases brought separately by other third-party defendants, who were mainly subcontractors on the project and who were plaintiffs in their respective actions.

On or about October 19, 2020, Koch moved for summary judgment against BBC on its breach of contract action. (see Koch Mot. Summ. J., Oct. 19, 2020, and Exhibits). At the time, Koch sought the same amount it now seeks, \$82,859.21, and it relied on the testimony of the Owner’s representatives, Kim Brown and Jim Clements, to establish that the Owner was not asserting delays or damages associated with Koch’s work, thus BBC had no reason to withhold contractually owed sums. (Id.). Koch arrived at \$82,859.21 by using BBC’s responses to Koch’s discover requests. (Id.). BBC responded to Koch’s requests, stating that it valued Koch’s work at \$104,859.21 and that it was claiming the amount from the Owner for work performed by Koch; however, BBC indicated in a subsequent response that it had a valid \$22,000 back charge against Koch. (Id.). Therefore, to arrive at an undisputed figure, Koch gave credit to BBC for the back charge and requested the net amount, \$82,859.21. (Id.). A day before the hearing on Koch’s first motion, BBC filed a memo in opposition, arguing that issues

of material fact existed because the two Owner's representatives, Brown and Clements, were not experts, and it was unknown how the Owner's experts might testify about delays or damages associated with Koch's work. (BBC Memo, January 5, 2021). This Court agreed that more discovery was needed to determine if any of the Owner's experts would testify about Koch's work, and, as such, it denied Koch's motion.

On or about May 6, 2021, Koch brought the instant motion, again requesting \$82,859.21, and, this time, relying on the following depositions: On April 22, 2021, Jim Clements was deposed a second time, as a person named as an expert by the Owner in the areas of scheduling, supervision, sequencing, coordination, management and construction; On April 28 and 29, 2021, Kim Brown was deposed a second time, as the Rule 30(b)(6), SCRCPP, deponent for the Owner; On May 3, 2021, Mark Boe, Capital Project Management, Inc., the Owner's rebuttal scheduling, management and construction expert, was deposed; on May 5 and May 6, 2021, Sam Hadley, Cotton & Company, the Owner's cost and lost profits expert, was deposed; and on June 23, 2021, Grady W. Query, a potential scheduling and delays expert identified by the Owner, was deposed. (Mot. for Summ. J., May 6, 2021; Memo, Aug. 9, 2021). Koch argued that BBC could no longer rely on the absence of discovery or the absence of testimony concerning delay or damages because the Owner and all of its named experts had been deposed, and none of them took issue with Koch or could identify any damage attributable to Koch; therefore, nothing else would serve to reduce the amount claimed by Koch. (Id.). Koch argued that, with no risk of damages associated with Koch's work, BBC should be required to pay undisputed contractual sums. 1

Again, a day before a hearing on the instant motion, BBC filed a memorandum in

1 BBC has maintained throughout this litigation that it and its experts take the position that neither BBC nor its subcontractors delayed the project; it simply did not know what the Owner or Owner's experts might say.

opposition, this time relying on a single request for admission that it sent to the Owner in which it asked, “[a]dmit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Strong Tower Construction, LLC d/b/a Koch Corporation cause or contributed in any manner to the Claims and Damages as defined above.” (BBC Memo, Aug. 16, 2021). The Owner denied the request, and BBC argued that, contrary to the testimony of everyone - the Owner and its experts - the Owner was leaving the door open for damages attributable to Koch’s work; therefore, BBC might later have damages that it has to pass on to Koch, further reducing the figure that Koch sought in its motion. For this reason, BBC contended that genuine issues of material fact existed. At oral arguments, BBC attempted to rely on the request for admission, despite contrary testimony from all of the Owner’s representatives and experts. Counsel for the Owner weighed in on the issue and cleared up any confusion about the merits of BBC’s argument, when he stated that the request for admission was so broad that the Owner could not possibly admit it. And counsel reiterated that a denial of a broad request for admission should not supplant the clear testimony its own representatives and experts. At that point, this Court verbally granted Koch’s motion and requested a written order from the parties.

STANDARD OF REVIEW

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; see also *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997).

In determining whether any triable issues of fact exist, the evidence and all reasonable

inferences therefrom must be viewed in the light most favorable to the non-moving party. *Sumner v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Hamiter v. Retirement Div. of South Carolina*, 326 S.C. 93, 484 S.E.2d 586 (1997); *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747 (1996). However, the party opposing summary judgment cannot simply rest on mere allegations or denials contained in the pleadings. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *George v. Empire Fire & Marine Ins. Co.*, 344 S.C. 582, 545 S.E.2d 500 (2001). A party opposing summary judgment “must set forth or point to specific facts showing that there is a genuine issue of material fact.” *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 661 (Ct.App.1994) (quoting *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct.App.1991)). See also *Humana Hosp.-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) (“Where a [a party] relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by [the moving party], he was entitled to judgment as a matter of law.”).

LEGAL DISCUSSION

- I. There exist no genuine issues of material fact as to at least \$82,859.21 owed by BBC to Koch under the parties’ contract, entitling Koch to summary judgment on that amount under its breach of contract cause of action.**

Koch has presented this Court with evidence that BBC owes it \$82,859.21, and BBC has not presented any genuine issues of fact as to that amount. In responding to discovery requests, BBC valued Koch’s work at \$104,859.21, subject to a \$22,000 back charge, resulting in a total amount of \$82,859.21 due under BBC’s contract with Koch. (Mot. Summ. J., May 6, 2021; Mot. Summ. J., Oct. 19, 2020). In other words, to get to an undisputed figure, Koch gave credit

to BBC for its alleged back charge, and requested the net amount, \$82,859.21. (Id.). Notably, BBC has not taken issue with this calculation or the approach for arriving at a minimum amount it owes Koch. It did not argue that the calculation was flawed or not based on work performed by Koch. Instead, BBC has simply continued to argue that genuine issues of fact exist because the Owner's representatives and experts might, at trial, allege damages for delays or for defective construction that should be passed through BBC to Koch, thus reducing Koch's damages. According to BBC, this Court cannot, therefore, arrive at a final figure, because it does not know yet what certain witnesses might say about Koch's work. This Court disagrees.

BBC has not presented this Court with anything tangible that would (1) substantiate its speculative argument about future testimony at trial or, more importantly, (2) meet the requirements of Rule 56, SCRCP, which mandates that BBC "set forth or point to specific facts showing that there is a genuine issue of material fact." *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 661 (Ct.App.1994) (quoting *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct.App.1991)).

In reality, the representatives and experts of the Owner have all taken a position completely contrary to BBC's position and have consistently maintained that they take no issue with Koch's work. (see Facts *supra*; Mot. Summ. J., May 6, 2021; Memo, Aug. 9, 2021; Mot. Summ. J., Oct. 19, 2020).

In an attempt to establish a genuine issue of material, BBC relied solely on the Owner's denial of a request to admit, which BBC argues was aimed at eliminating any ability by the Owner to claim damages associated with Koch's work. (BBC Memo, Aug. 16, 2021). Because the Owner was unwilling to admit the request, BBC claims that the Owner left open the possibility of proving damages at trial associated with Koch's work. (Id.). Therefore, the exact amount to which Koch is entitled to under its contract with BBC might be further reduced.

(*Id.*). In effect, BBC is claiming that more discovery is needed. This case is in excess of two years old, and it is beyond the discovery deadline. (see Order extending deadlines, May 10, 2021). All of the Owner's representatives and experts have been deposed, and none take issue with Koch's work. (Facts *supra*). BBC has had the opportunity to flesh out these alleged issues of facts in the numerous depositions of the people who may take a position with respect to Koch. Koch attended these depositions, asked the relevant questions about its work, and eliminated an issue about their testimony. (Koch Memo, Aug. 9, 2021). Any doubts about the Owner's position were laid to rest when, at oral arguments on Koch's motion, counsel for the Owner stood up and stated that the requests for admission were (1) simply too broad to admit and (2) should not replace the testimony on record in this case.

For all of the above reasons, BBC has failed to present a genuine issue of material fact as to a partial summary judgment award of \$82,859.21, and Koch is entitled to judgment as a matter of law against BBC in the amount of \$82,859.21 on its breach of contract claim.

II. Koch is entitled to prejudgment and post-judgment interest on \$82,859.21.

As to prejudgment interest, Koch is entitled to prejudgment interest at the statutory rate of 8.75% per year. S.C. Code Ann. 34-31-20(A). "The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain or capable of being reduced to certainty." *Smith-Hunter Const. Co., Inc. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005) (citing *Babb v. Rothrock*, 310 S.C. 350, 426 S.E.2d 789 (1993)). "The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest." *Id.* "The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Id.*

The amount Koch seeks was capable of being reduced to certainty, and it was in fact reduced to certainty. Both Koch and BBC ultimately made claims in these actions for damages associated with work on a highly sophisticated construction project. As general contractor, BBC's role was to account for sums it owed its subcontractors and amounts it was owed by the Owner. And in responding to interrogatories, BBC identified the exact amount at which it valued Koch's work - \$104,859.21 minus a \$22,000 back charge, totaling \$82,859.21. In other words, the "measure of recovery" was "fixed by conditions existing at the time the claim arose." *Id.* Further, BBC's arguments concerning potential setoffs at trial do not impact an award of prejudgment interest. *Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 135, 631 S.E.2d 252, 259 (2006) (finding that a contractor's claim to "an offset does not prevent an award of prejudgment interest because it is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable.").

The earlier of the above consolidated actions was filed by BBC on March 5, 2019, with Koch being named as a third-party defendant on May 15, 2019. This Court, therefore, awards prejudgment interest at the rate of 8.75%, on \$82,859.21, from May 15, 2019, to the date that this Court verbally awarded Koch summary judgment, August 16, 2021, totaling \$16,367.53. ²

As to post-judgment interest, the rate is set annually by the South Carolina Supreme Court. S.C. Code Ann. § 34-31-20(B). "[F]or the period January 15, 2021, through January 14, 2022, the legal rate of interest for judgments and money decrees is 7.25% compounded annually." S.C. Supreme Court Order 2021-01-04-01. Therefore, Koch will be entitled to post-judgment interest on \$82,859.21 at the rate of 7.25%, compounded annually, beginning on the date this Order is issued and continuing to accrue at that rate until the judgment is paid in

² Arguably, prejudgment interest should run from an earlier date, when this amount became due; however, for the purposes of summary judgment, it cannot be disputed that the date of Koch's involvement in the above actions sets the latest possible date on which claims arose. In effect, this amount is lower than it could have been.

full.

III. Koch is entitled to an award of its attorneys' fees and costs.

“The general rule is that attorney's fees are not recoverable unless authorized by contract or statute.” *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993) (citing *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989); *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978); *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961). “When there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown.” *Id.*

Article 10 of Koch's subcontract with BBC contains multiple provisions with respect to how claims are to be prosecuted. Article 10.A contains an arbitration provision for disputes between Koch and BBC. (see Koch Mot. Summ. J., Oct. 19, 2020, Ex. A, Koch subcontract, Article 10, pp.9-10). Article 10.A contains a mechanism to award fees in an arbitration setting. (*Id.*). Article 10.B considers a separate claims process for disputes involving the Owner. (*Id.*). Article 10.C allows for BBC to stay claims between it and Koch, if Koch brings suit on claims that are subject to Article 10.A or 10.B. (*Id.*). In these cases, BBC brought its case, and Koch was named as a third-party defendant. Koch also brought a separate action for its claims. Both the cases are captioned above. At no point did BBC seek to compel arbitration or attempt to stay these actions based on Articles 10.A through 10.C. They were consolidated, referred to this Court and proceeded with litigation under our civil procedure rules. Conveniently, Article 10 of the contract contains a fourth provision, 10.D, that is a catch-all provision, covering situations in which claims simply proceed to litigation. It states, “[i]f Contractor elects not to invoke the arbitration procedures set forth in Article 10.A, then all claims, disputes and other matters in controversy between Contractor and Subcontractor arising out of or relating to the Subcontract and covered by Article 10.A will be resolved through litigation in the state court in the County of

the Project or in the federal court closest to the location of the Project. The prevailing party will be entitled to recover its reasonable attorneys' fees and court costs in connection with any such litigation." (Id.). This Court, therefore, finds that the contract contains a provision allowing for the award of attorneys' fees in situations such as this, when the parties elected to proceed with prosecuting their claims in litigation.

To award attorneys' fees, this Court must look to the following "six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained." *Blumberg* at 494, 660.

Because these cases were consolidated and referred to this Court, it has had the opportunity to observe all filings and hearings, as opposed to cases on the general docket, which could be heard by numerous judges over the life of a litigation. As stated above, this Court understands the complexity of this project and these cases. Based on this Courts' knowledge and the affidavit of counsel for Koch, this Court finds that, guided by the six factors set forth in *Blumberg*, Koch is entitled to an award of attorneys' fees in the amount of \$64,927.50 and costs in the amount of \$404.88.

As to the first and second factors, again, this Court is keenly familiar with these actions, which involve the construction of a luxury hotel over the course of several years. The cases were originally filed individually, along with individual cases from many of the other subcontractors. In addition to the above-captioned cases, Koch was named in two additional cases, Case No. 2019-CP-10-3005 and Case No. 2019-CP-10-3727. Just to get the cases off the ground, Koch was required to file pleadings in four cases and attend several hearings concerning consolidation and referral to this Court. Needless to say, there has been a considerable effort

keeping tabs on the status of parties and the various cases which were consolidated. After consolidation and referral to this Court, it has been established through motions and oral arguments at a multitude of hearings that the cases have required the exchange of hundreds of thousands, if not millions, of documents in discovery; the taking of approximately forty depositions; the involvement of experts in fields ranging from cost analysis and delays to contract interpretation and lost profits; the filings of dozens and dozens of motions on almost all facets of the rules of procedure; the difficult task of scheduling depositions and hearings among dozens of attorneys and firm staff; and the exchange of communications between attorneys and the court regarding all of the above. And this is just what the Court sees, which does not consider the time and effort that all attorneys, including Koch's attorneys, have expended in wading through the project in an effort to pare down the facts and position for a potential trial. The trial itself is currently expended to run four weeks, which is an indication of the complexity of these cases. In his affidavit, Koch's counsel indicated that his firm expended 272.25 hours on these cases. Based on this Court's understanding of these cases, that figure is very reasonable. For example, if those hours were averaged over the 29 months these cases have been pending, counsel for Koch has worked, on average, less than 10 hours per month on the cases. As counsel for Koch stated in his affidavit, "the challenge of being involved in a case like this, with a relatively small claim, is having to strategically pick and choose involvement, while still ensuring that my client's rights have been protected." (Koch's Affidavit of Attorneys' Fees). The Court agrees with that assessment of this case and finds the time and labor expended by Koch's attorney is reasonable in relationship to the complexity and nature of the cases.

As to the third factor, Koch's attorneys are part of a firm that specializes in mechanics' liens and construction contract cases. Members of their firm appear frequently before this Court. They have a good reputation with this Court and in the Charleston area. In general, and

in this case, this Court always finds Koch's attorneys to be well-prepared and strong advocates for their client.

The fourth factor is not relevant to this discussion, as the affidavit provided by counsel for Koch does not indicate that fees are contingent on success in these actions.

As to the fifth factor, the affidavit of counsel for Koch states that the hourly rate for the attorneys on these cases is \$250 per hour for attorneys and \$140 per hour for paralegals. This Court routinely hears requests for fees and is very familiar with the rates charged by lawyers in the Charleston area. \$250 per hour for attorneys and \$140 for paralegals are very reasonable rates and are actually below average for this region.

Lastly, with respect to the sixth factor, Koch's counsel was able to achieve a judgment prior to trial, which, as stated above, could last up to four weeks. Koch's counsel made a previous motion for summary judgment and, reacting to the Court's reasoning for denial of that motion, took the necessary steps to position its client for another motion. Further, Koch was able to achieve a judgment for approximately 80 percent of the value of work identified by BBC (\$82,859.21/104,859.21). Obtaining a judgment on summary judgment and, depending on what Koch elects to do with respect to the remainder of its claim, potentially avoiding a month-long trial is a beneficial result.

Based on the contractual language, the Court's knowledge of these actions, the affidavit submitted by counsel for Koch, the complexity of these actions, the time that Koch had to invest to get this result, and the successful result achieved by Koch's counsel, the Court finds that the *Blumberg* factors weigh in favor of awarding attorneys' fees in the amount of \$64,927.50 and costs in the amount of \$404.88, as sworn to in the affidavit. In light of the *Blumberg* factors, these fees are reasonable. It should be noted that the contractual provision calls for fees to be awarded to the "prevailing party." These actions were initiated, in part, as mechanic's liens

actions, with tens of millions of dollars in liens on the project. The Court would be remiss if it did not look to the mechanics' statute for some level of guidance. For the purpose of awarding fees, South Carolina's mechanics' lien statutes consider the prevailing party as the party who obtains a verdict closer to the amount he claims in the actions, considering counterclaims and offers of settlements prior to trial. S.C. Code Ann. § 29-5-10 and 29-5-20. And attorneys' fees can be awarded up to the value of the lien. *Id.* Koch obtained a judgment on nearly 80% of the value BBC placed on its work and nearly 67% of its original lien amount (\$82,859.21/\$124,080.21). Under either calculation, Koch would be awarded attorneys' fees under the lien statutes, and the fees sought do not exceed lien amounts or value calculations by BBC.

For all these reasons, this Court awards attorneys' fees to Koch in the amount of \$64,927.50 and costs in the amount of \$404.88.

CONCLUSION AND AWARDS

Based on the absence of genuine issues of material fact with respect to at least \$82,859.21, Koch is entitled to judgment as a matter of law on that amount against BBC on Koch's breach of contract claim.

Based on the contractual attorneys' fees provision, this Court awards Koch attorneys' fees in the amount of \$64,927.50 and costs in the amount of \$404.88.

Further, the Court awards Koch prejudgment interest in the amount of \$16,367.53 against BBC.

Lastly, this Court awards Koch post-judgment on \$82,859.21 at the rate of 7.25%, compounded annually, accruing from the date this order is issued until the judgment is paid in full by BBC.

This Order shall be entered as a judgment in both of the above cases.

IT IS SO ORDERED!



Charleston Common Pleas

Case Caption: Balfour Beatty Construction LLC VS Library Associates LLC ,
defendant, et al
Case Number: 2019CP1001108
Type: Order/Summary Judgment

So Ordered

s/Mikell R. Scarborough 3062