

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

) NINTH JUDICIAL CIRCUIT

) CASE NO.: 2019-CP-10-01108

Balfour Beatty Construction, LLC,

)

)

)

Plaintiff,

)

)

v.

)

)

Library Associates, LLC; and Metropolitan Life Insurance Company, a New York Corporation.

)

)

)

)

)

)

Defendants.

)

)

)

)

)

Library Associates, LLC,

)

)

Third-Party Plaintiff,

)

)

v.

)

)

Lithko Contracting, LLC, Guy M. Beaty, Inc., Bernard MCC, 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, Lowcountry Case & Millwork, Inc., Quantum Coatings, LLC, Balfour Beatty Construction Group, Inc.

)

)

)

)

)

)

)

)

)

)

)

)

)

Third-Party Defendants.

)

)

)

)

**PROPOSED ORDER GRANTING
PREMIER EXTERIORS, LLC'S
MOTION FOR SUMMARY
JUDGMENT AGAINST
BALFOUR BEATTY
CONSTRUCTION, LLC**

**(FINAL JUDGMENT AS TO PREMIER
EXTERIORS, LLC PURSUANT TO
SCRPC 54(b))**



Before this Court is Premier Exteriors, LLC (“Premier”)’s Motion for Summary Judgment Against Balfour Beatty Construction, LLC (“BBC”). A hearing on this matter was held on August

31, 2021. Present at this hearing were Robert C. Hughes, III, attorney for Premier; Thomas C. Hildebrand, Jr. and Robert C. Byrd, attorneys for BBC; and Walter H. Bundy, Jr. and M. Brent McDonald, attorneys for Library Associates, LLC (“Library”). Having now heard the oral arguments of counsel and having read and reviewed the briefs, the submissions of counsel, the pleadings and the evidence of record, this Court hereby **GRANTS** Premier’s Motion for Summary Judgment in the principal amount of \$104,703.51 plus prejudgment interest, attorney’s fees and costs for the reasons set forth below.

BACKGROUND AND PROCEDURAL HISTORY

This case arises out of the construction of the Hotel Bennett, a luxury hotel in downtown Charleston owned by Library. [Premier’s Notice of Motion for Summary Judgment and Supporting Memorandum, p. 2]. Library contracted with BBC to serve as the general contractor for the project. *Id.* In turn, Premier subcontracted with BBC to install the exterior stucco cladding on the hotel. *Id.* After construction of the hotel was substantially complete, BBC, Premier and various other subcontractors filed mechanic’s liens. *See id.* at 2-3. Multiple lawsuits subsequently ensued among the parties. *Id.* at 3.

On July 15, 2019, Premier filed a Complaint seeking to foreclose its mechanic’s lien and alleging, *inter alia*, that BBC breached its contract with Premier by failing to pay the principal balance due for its work in the amount of \$104,703.51. [*See* Premier’s Complaint dated July 15, 2019]. Premier’s Complaint included an alternative count against BBC and Library under quantum meruit/unjust enrichment theory. *Id.* That case was originally assigned Civil Action No. 2019-CP-10-3727, but it was later consolidated into the above-styled action along with multiple other cases. *Id.* Premier ultimately elected to dismiss its claims against Library with prejudice (including its mechanic’s lien claim) and proceed solely against BBC. [*See* Order of Dismissal

With Prejudice as to Claims Between Premier and Library]. In an effort to fully extract itself from this litigation through summary judgment, Premier moved to dismiss its remaining causes of action against BBC. [See Premier's Motion to Dismiss Certain of Its Claims dated September 14, 2021].

A. Premier's Motion for Summary Judgment

On August 20, 2021, Premier moved for summary judgment against BBC on its breach of contract and quantum meruit/unjust enrichment claims. [See generally Premier's Notice of Motion for Summary Judgment and Supporting Memorandum]. Premier seeks judgment against BBC in the principal amount of \$104,703.51, plus prejudgment interest, attorney's fees and costs. *Id.* In support of its motion, Premier submitted the Affidavit of William J. Bremer, IV dated August 20, 2021. *Id.* at Exhibit 1. Attached as exhibits to that affidavit are a copy of Premier's subcontract with BBC; photographs of Premier's completed stucco on the hotel; and certain of Premier's time and material invoices signed by BBC representatives. [See generally Aff. of Bremer, Exhibits A, B and C respectively]. Premier also submitted an excerpt of deposition testimony from Jim Clements and a portion of BBC's construction contract with Library which contains a provision designating Mr. Clements as "Owner's Representative" on the project. [See generally Premier's Notice of Motion for Summary Judgment and Supporting Memorandum, Exhibits 2 and 3].

1. Affidavit of William J. Bremer, IV

In his affidavit, Mr. Bremer averred that at all relevant times, he served as Premier's General Superintendent for the Hotel Bennett project. [Aff. of Bremer, ¶ 5]. In such capacity, he has personal knowledge of: (a) Premier's subcontract with BBC; (b) Premier's performance of its work pursuant to its subcontract with BBC; (c) the cost of Premier's work on the project; (d) the outstanding balance due from BBC to Premier for its work; and (e) Premier's efforts to collect the balance owed to it. *Id.* Mr. Bremer further averred, in pertinent part, as follows:

- Premier satisfactorily and timely completed all of its work on the project in accordance with the terms of its subcontract with BBC;
- At no time did Premier ever receive any notice of default from BBC on the project;
- Premier's work was accepted by BBC;
- As of January 17, 2019, the principal balance of \$104,703.51 was due from BBC to Premier under the parties' subcontract;
- All conditions precedent to Premier's receipt of payment of the \$104,703.51 balance owed under the subcontract have occurred or were waived or excused;
- Premier repeatedly requested payment of the \$104,703.51 balance from BBC, but no payment was received;
- The only explanation that BBC provided to Premier for its nonpayment of the \$104,703.51 balance is Library's withholding of payment from BBC;
- Neither BBC nor Library have ever complained to Premier about the quality of Premier's completed work;
- At no time has any claim been made under Premier's labor warranty or the stucco manufacturer's product warranty for the project;
- Premier is unaware of any claim by either BBC or Library that Premier's work on the project is defective;
- Premier is unaware of any claim by either BBC or Library that Premier caused or contributed to any delays on the project;
- Notwithstanding the foregoing, the \$104,703.51 subcontract balance remains outstanding.

Id. at ¶¶ 6-7, 9; 11, 14, 15-16, 26, 27-31.

2. Deposition Testimony of Jim Clements

Jim Clements, who served as Library's "Owner's Representative" pursuant to its contract with BBC, testified that Premier "did a great job." [Depo. of Clements at p. 205; *see also* excerpt of Contract between Library and BBC attached as Exhibit 3 to Aff. of Bremer]. Further, Clements confirmed that there were no workmanship deficiencies, manpower concerns or delays on the project that were attributable to Premier. [Depo. of Clements; pp. 205-207]. Moreover, he testified that he is unaware of any reason that Premier should not be paid in full for its work on the project. *Id.* at 207.

B. BBC's Response in Opposition to Premier's Motion

On August 27, 2021, BBC filed a Brief in Opposition to Premier's Motion. [*See generally* BBC's Opposition Brief]. BBC did not submit any affidavits or deposition testimony to counter the Affidavit of Mr. Bremer or the deposition testimony of Mr. Clements. *Id.* Instead, BBC submitted a report from Library's scheduling expert, Mark Boe, along with Library's Responses to Requests for Admission which include a denial of a request pertaining to Premier's work. *Id.* at Exhibits A and B. BBC contends that those two items constitute evidence that Library intends to argue that Premier caused or contributed to delays or deficiencies for which Library is seeking to recover damages against BBC. *Id.* at pp. 4-6. As such, BBC claims it is entitled to withhold payment from Premier pursuant to the default provision in the parties' subcontract, which provides for the right of setoff in the event of Premier's default. *Id.* However, in its brief, BBC concedes that it does not actually believe that Premier caused any delays or deficiencies on the project. [*Id.* at p. 8].

1. Expert Report of Mark Boe Dated December 15, 2020

In his report, Boe generally opines that there were “significant delays throughout the project caused by subcontractors’ failure to provide the level of manpower need to complete on time, and significant quality deficiencies that led to rework by critical trades.” [Boe Report, p. 4, attached as Exhibit A to BBC’s Opposition Brief]. Boe’s report specifically addresses the problematic work of certain subcontractors, but Premier is not one of them. *See generally id.* In its brief, BBC concedes that Boe’s report does not actually mention Premier but argues that his report nevertheless “suggests there were also other delays caused by [BBC’s] subcontractors other than the instances specifically listed in his report.” [BBC’s Opposition Brief, p. 5].

2. Library’s Denial of Request for Admission

BBC served requests for admission to Library concerning the work of the various subcontractors. [*See generally* Library’s Responses to BBC’s Requests for Admission, attached as Exhibit B to BBC’s Opposition Brief]. With respect to Premier, Library was asked to admit that

it 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 Premier caused or contributed in any many to the Claims and Damages as defined above.

Library denied this request on July 20, 2021. *Id.* Identical requests for admission relating to the other subcontractors were likewise denied by Library in their entirety. *Id.*

C. Premier’s Reply Brief

On August 30, 2021, Premier filed a Reply Brief along with an excerpt of a transcript from Mark Boe’s May 3, 2021 deposition. [*See generally* Premier’s Reply]. In its brief, Premier argues that BBC failed to establish a question of fact as to whether Premier defaulted under the subcontract, thereby triggering a right of setoff. *Id.* In that regard, Premier contends that BBC’s reliance on Boe’s expert report as potential evidence of a Premier default is misplaced, because

Boe subsequently testified that he has no opinions that are critical of Premier's work. [*Id.*, see also Depo. of Boe, pp. 159-160, attached as Exhibit 2 to Premier's Reply]. Premier further argues that Library's denial of the request to admit is insufficient to create a question of fact as to a default by Premier because it does nothing more than suggest that Library may possibly assert some unknown claim concerning Premier's work in the future. *Id.*

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. *Summer 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).

ANALYSIS

Mr. Bremer's Affidavit, including its attachments, and Mr. Clements' deposition testimony evidence Premier's entitlement to payment from BBC under the subcontract in the principal amount of \$104,703.51. Significantly, BBC has offered no evidence to counter Mr. Bremer's Affidavit or Mr. Clements' testimony. Rather than contesting facts germane to Premier's claims,

BBC argues that the default provision in the parties' subcontract gives it a right of "setoff" in the event of Premier's default. However, BBC fails to establish a question of fact as to whether Premier actually defaulted under the subcontract, thereby triggering BBC's right of setoff.

To that end, it is noted that the only submissions that BBC included with its brief were Boe's expert report and Library's Responses to Requests for Admission. As to the first item, BBC's speculative claim that Boe's report suggests he might someday offer opinions critical of Premier's work is countered by his subsequent sworn testimony on the matter. In fact, Boe testified that he holds no negative opinions concerning Premier's work whatsoever. As such, Boe's report is insufficient to create a genuine issue of fact as to a default on the part of Premier.

BBC's reliance on Library's responses to requests for admission is also misplaced. To begin with, Rule 56 of the South Carolina Rules of Civil Procedure contemplates only use of "admissions on file" for summary judgment purposes, not denials. The Court is unaware of any authority for the proposition that one party's denial of a request for admission can be used as "evidence" against another unrelated party to defeat that party's motion for summary judgment. Even assuming that such denial is admissible for such purpose, Library's denial upon which BBC relies is insufficient to achieve that objective. At best, the denial simply suggests that Library could potentially assert some unknown claim concerning Premier's work in the future. It does nothing to evidence or substantiate actual defects or delays that would support an existing claim involving Premier's work.

Here, BBC has only established a potential right of setoff. BBC has failed to establish a question of fact as to whether its right of setoff has been triggered by virtue of a Premier default. Under South Carolina law, "the mere existence of [a] potential right of setoff does not create a genuine issue of material fact." *Wachovia Bank, N.A. v. Winona Grain Co., Inc.*, 2004 WL

6334915 (S.C. Ct. App. Sep. 20, 2004)(unpublished *per curiam* opinion). Accordingly, Premier is entitled to judgment as a matter of law against BBC in the principal amount of \$104,703.51 plus prejudgment interest at the legal rate accrued since January 17, 2019, the date the obligation became due.

Moreover, Article 10.D of the subcontract entitles Premier as the prevailing party to recover its attorney's fees and court costs incurred with regard to this litigation. [See Subcontract, attached as Exhibit "A" to Affidavit of Bremer]. Specifically, the pertinent language states as follows:

[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. The Court has reviewed the Affidavit of Robert C. Hughes, III, Esq. setting forth Premier's fees and court costs in pursuing this recovery. [See generally Affidavit of Hughes dated September 16, 2021]. Having presided over multiple hearings from the outset of this matter, this Court is familiar with the contentiousness of the case, the complexity of the underlying project, and the time and energy that the parties and counsel have been and are investing in completing discovery and preparing for trial. This Court has also had an opportunity to review the affidavits of record filed by other attorneys seeking awards of attorney's fees and costs in connection with summary judgment. Considering: (1) the nature, extent and difficulty of the case; (2) the time necessarily devoted to the case by counsel; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; (6) the customary legal fees for similar services and the evidence before me regarding the same, the Court finds that the fees and

court costs incurred by Premier as averred by Mr. Hughes are reasonable and thus awards Premier \$73,050.00 in attorneys' fees and \$200.00 in court costs. *See, e.g., Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997).

FINDINGS OF FACT

The Court finds, based on the factual record before it, that there is no genuine dispute as to the following material facts:

- (1) Premier timely and satisfactorily performed its work on the project in compliance with its subcontract with BBC;
- (2) As of January 17, 2019, BBC owed Premier the principal balance of \$104,703.51 pursuant to the subcontract;
- (3) All conditions precedent to BBC's payment of the \$104,703.51 subcontract balance have occurred or were waived or excused;
- (4) BBC has failed to pay the \$104,703.51 due to Premier under the subcontract.

CONCLUSIONS OF LAW

The Court makes the following conclusions of law:

- (1) BBC breached its subcontract with Premier;
- (2) Premier is entitled to an award of damages against BBC in the principal amount due under the subcontract of \$104,703.51;
- (3) Because the Court concludes that the principal balance of \$104,703.51 is due from BBC to Premier under the parties' subcontract, the issue of quantum meruit/unjust interest is moot;

- (4) Premier is entitled to prejudgment interest at the legal rate of 8.75% on the principal balance of \$104,703.51 accrued from January 17, 2019 through August 31, 2021, the date this Court orally granted summary judgment, totaling \$24,020.85;
- (5) Premier is the prevailing party in this action; thus the subcontract entitles Premier to an award of reasonable attorney's fees in the amount of \$73,050.00 and court costs in the amount of \$200.00.
- (6) BBC is entitled to post judgment interest accruing from the date of this judgment.

AWARD OF JUDGMENT

The Court hereby enters judgment in favor of Premier against BBC in the principal amount of **\$104,703.51** plus prejudgment interest in the amount of **\$24,020.85**, attorney's fees in the amount of **\$73,050.00** and court costs in the amount of **\$200.00**. Post judgment shall accrue on the judgment amount of **\$201,974.36** at the rate of 7.25%, compounded annually, until the entire judgment is paid by BBC in full. *See Parker v. Shecut*, 359 S.C. 143, 597 S.E.2d 793 (2004)(award of attorney's fees is considered part of a monetary judgment and draws post-judgment interest).

DETERMINATION OF NO JUST REASON FOR DELAY OF FINAL JUDGMENT UNDER SCRPC 54(b)

Because this Order resolves all of Premier's remaining claims against any party in the above-styled action and Civil Action No. 2019-CP-10-3727, and there are no claims currently pending against Premier in either case, the Court finds that there is no just reason for delay in entering this Order as a final judgment as to Premier in both actions pursuant to Rule 54(b) of the South Carolina Rules of Civil Procedure. Accordingly, the Clerk is hereby directed to enter this Order as a final judgment with respect to Premier in the above-styled action and Civil Action No. 2019-CP-10-3727, and the cases are hereby ended as to Premier.

IT IS SO ORDERED!

_____, 2021
Charleston, South Carolina

Honorable Mikell R. Scarborough
Charleston County Master-In-Equity



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