THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2022-CP-42-03123
Appellate Case No. 2023-001752

MECO, Inc. of Augusta…….
Appellant,

v.

Alex Sayed a/k/a Arshad M. Sayed a/k/a Arshed Sayed; NEPA Ventures LLC; NEPA Trading & Investments, LLC……...
Respondents.

FINAL BRIEF OF RESPONDENTS

Respectfully submitted,

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August 21, 2024
Greenville, South Carolina

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2. Did Appellant preserve its argument for equitable tolling the applicable statute of limitations for appeal?

3. Did the lower court err when it found that the UCC's six-year statute of limitation does not apply to appellant's breach of contract claim?

STATEMENT OF THE CASE

This litigation commenced when the contractor, MECO, Inc. of Augusta ("MECO") filed a breach of contract action against the owner of the Westar Travel Plaza, Alex Sayed ("Sayed") and his companies, NEPA Ventures, LLC and NEPA Trading & Investments, LLC (collectively "Respondents") on August 23, 2022. On August 25, 2022, MECO filed an amended complaint against Respondents alleging four causes of action for breach of contract, quantum meruit, promissory estoppel and "recovery of costs of collection & attorneys' fees." R. pp. 24-30. On September 30, 2022, Respondents filed their answer with three counterclaims against MECO for breach of contract, breach of implied warranty of workmanlike services, and breach of express and implied warranties. R. pp. 31-39.

On August 22, 2023, Respondents filed a motion seeking summary judgment pursuant to Rule 56, SCRCP. Mot., filed Aug. 22, 2023. R. pp. 74-77. After the parties submitted memoranda, a hearing on Respondents' motion was held on September 14, 2023. R. pp. 8-16. On November 2, 2023, the trial court issued a Form 4 Order (the "Form 4 Order") setting forth its reasons for granting Respondents' motion and instructing Respondents' counsel to draft a formal order. R. pp. 2-7. After submission of the proposed order, the trial court issued a formal order granting Respondents' motion for summary judgment on November 27, 2023 (the "Order"). R. pp. 8-16.

Five days after the Form 4 Order, Appellant filed a notice of appeal. R. pp. 202-203. Seven days after the Order, Appellant filed an amended notice of appeal. R. pp. 211-212. Appellant did not file a motion seeking to alter or amend the Order pursuant to Rule 59(e), SCRCP prior to the notice of appeal.

STATEMENT OF FACTS

This action arises from agreements for the construction of improvements to real property commonly known as the "Westar Travel Plaza" which is located at 175 Truck Stop Road, Cowpens, South Carolina 29330 (hereinafter the "Property"). R. p. 26, ¶ 9. On or about May 8, 2018, Respondent Sayed entered into a written contract (the "Contract") with MECO for improvements to the Property (the "Project"). Id., ¶ 11; see also R. pp. 78-84. The Contract provided that MECO would furnish Sayed with invoices for the value of materials stored and/or for work completed as the Project progressed. Sayed agreed to pay such invoices within thirty (30) days of the invoice date or completion of the project. Id., ¶ 13; see also R. pp. 78-84. Work on the Project began in August 2018 following payment of an initial deposit by Sayed to MECO. *See* R. pp. 78-84. On February 13, 2019, Sayed was informed by his financing company, Patriot Capital, that it had been notified by MECO "that they have fully completed the work at your 175 Truck Stop Road, Cowpens, SC 29330." See R. p. 86; see also R. p. 26, ¶ 15. On February 15, 2019, Sayed made a second, final payment of $70,000 to MECO and has made no further payments to MECO since that time. See R. p. 89; see also R. p. 263, lines 13-15.

At some point, a dispute arose between MECO and Sayed regarding the amount owed on the Project. On July 17, 2019, MECO sent a list of all invoices it claimed were owed by Sayed. See R. pp. 94-119. MECO alleged that Respondents were "month and months and months past

due" under all of their obligations to MECO. See R. p. 264, lines 6-25; see also R. p. 265, lines 1-8.

On August 7, 2019, William Burke[1] sent an email to Sayed providing an invoice spreadsheet and stated:

> I have attached spreadsheets with contract amounts, invoices, payments made and outstanding invoices. I have attached the contracts and what you agreed to. I have attached service tickets that have not been paid and all finance charges **for breach of contract**. I don't want to go to court over this. I want payment made **by the end of business tomorrow 8-8-19 through wire transfer for the full amount owed or you will hear from my lawyer on Friday**.

See R. p. 196 (the "Spreadsheet"). The "attached" Spreadsheet is broken into four parts. R. pp. 120-121. The first part shows the invoices sent by MECO to Sayed with the invoice number, date, description of the work performed, the total owed, and any remaining balance. Id. The second part shows finance charges owed on past due invoices, each reflecting the internal code "FC" plus the invoice number. Id. The third part shows invoices for additional services on those service invoices. Id. Finally, the Spreadsheet shows three codes for "Credit," which are credits MECO received from returning unused materials order for the Project. Id.

A review of the Spreadsheet reveals three undisputed facts. First, the latest invoice for work performed on the Project is dated July 2, 2019. Id. This was further confirmed on July 17, 2019, when Roger Carpenter, a sales representative of MECO, emailed Sayed invoices which need to be resolved. See R. pp. 94-118. Second, MECO has received no payments from Sayed on any of these outstanding invoices. See R. pp. 120-121. Finally, MECO knew that it had a cause of action for breach of contract, as the final line of the Spreadsheet showing the total owed states in all bold, all caps:

TOTAL DUE BY 8/8/19 OR LAWYERS WILL TAKE OVER FROM HERE

[1] Mr. William Bradley Burke, CEO of MECO, appeared as MECO's 30(b)(6) designee on June 7, 2023.

Id (emphasis in original).

MECO testified that all amounts claimed in this lawsuit were past due as of August 8, 2019. MECO testified that it received no payment from Sayed, or anyone acting on his behalf, after February 2019. Finally, MECO confirmed that in its last conversation with Sayed, it received no promises to pay or other assurance of payment. MECO did not file its lawsuit until August 23, 2022, more than three years after it sent its final invoice on the Contract and more than three years after demanding payment for all sums due in this lawsuit. When it finally did bring its lawsuit, it brought actions for breach of contract, quantum meruit, promissory estoppel, and "recovery of costs of collections and attorneys' fees," which is not a cause of action recognized by South Carolina law. All three causes of action are time-barred.

STANDARD OF REVIEW

On appeal from a grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court. Hawkins v. City of Greenville, 358 S.C. 280, 289 S.E.2d 557, 562 (Ct. App. 2004). The proper "standard [under Rule 56(s)] is the genuine issue of material fact standard." Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 892 S.E.2d 297 (2023) (rejecting the "mere scintilla" standard for summary judgment). The Court is required to view the evidence and all inferences which can be reasonably drawn therefrom in the light most favorable to the nonmoving party. Hawkins, 358 S.C. at 288, 594 S.E.2d at 561.

ARGUMENT

With respect to the Appellant's claims against Respondents, the instant appeal presents the following questions: (i) whether the lower court correctly determined that the applicable statute of limitations bars Appellant's three claims against Respondents for breach of contact, quantum meruit, and promissory estoppel (ii) whether the Appellant's argument for equitable tolling the

applicable statute of limitations period was preserved for appeal; and (iii) whether the lower court correctly determined that the Contract was not controlled by the UCC.

I. THE LOWER COURT CORRECTLY HELD THAT THE STATUTE OF LIMITATIONS BARS APPELLANT'S CLAIMS AGAINST RESPONDENT FOR BREACH OF CONTRACT, QUANTUM MERUIT AND PROMISSORY ESTOPPEL

Appellant's causes of action arise out of either an express contract (breach of contract) or an implied contract (quantum meruit and promissory estoppel), and a 3-year statute of limitations governs. See S.C. Code Ann. § 15-3-530(1) (breach of contract), *see also* Wells Fargo Bank v. Carter, Co. CV 9:14-127-SC, 2014 WL 11034776, at *2 (D.S.C. July 22, 2014) (noting that S.C. Code Ann. § 15-3-530's three-year statute of limitations applies for unjust enrichment and quantum meruit).

A. The Lower Court Correctly Held that More than Three Years had Passed since Appellant's Causes of Action Accrued

A statute of limitations reduces the interval between the accrual and commencement of a right of action to a fixed period, thereby putting to rest claims after the passage of time. See 51 Am.Jur.2d Limitations on Actions 15 (1970); Nowlin v. General Tel. Co., 310 S.C. 183, 426 S.E.2d 114 (Ct. App. 1992), aff'd, 314 S.C. 352, 444 S.E.2d 508 (1994). Unless an action is commenced before expiration of the limitations period, the plaintiff's claim is normally barred. See McLain v. Ingram, 314 S.C. 359, 444 S.E.2d 512 (1994). "[S]tatutes are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs." State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413–14 (2000).

In South Carolina, an action is barred unless it is "commenced" within the period set forth in statute. S.C. Code Ann. § 15-3-20(a). In order to commence a civil action, the action must be

filed and served either within the applicable statute of limitations or 120 days after the statute of limitations expires. Rule 3, SCRCP; see also S.C. Code Ann. § 15-3-20(b). South Carolina's statute of limitations requires "very little to start the clock." Maher v. Tietex Corp., 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998). "The fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain [a cause of] action to enforce it." Matthews v. City of Greenwood, 305 S.C. 267, 269, 407 S.E.2d 668, 669 (Ct. App. 1991). South Carolina applies the discovery rule to breach of contract actions, which provides that an action accrues on the date the aggrieved party either discovered or could or should have discovered the breach through exercise of reasonable diligence. Maher, 331 S.C. at 376-377, 500 S.E.2d at 207 (Ct. App. 1998). See also Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1999) ("According to the discovery rule, the statute of limitations begins to run… from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct."); State v. McClinton, 369, S.C. 167, 173, 631 S.E.2d 895, 898 (2006) (a breach of contract action generally accrues at the time the contract is breached).

Here, the Appellant failed to "commence" any action against Respondents within the 3-year statute of limitations. Pursuant to the Contract, payment was net 30, meaning that Respondents were required to make payment on each invoice thirty (30) days after it was submitted. The trial court held that Appellant filed its suit "more than three years after it sent its final invoice on the contract and more than three years after demanding payment for all sums due in this lawsuit," which occurred on February 15, 2019, and on August 8, 2019, respectively. See R. p. 11. Appellant's counsel agreed, "Mr. Burke did testify that he was ready to move in early August 2019." See R. p. 230, lines 21-22.

Appellant argues that two service work invoices from September 26, 2019, for subsequent work push back the accrual date on all prior invoices. Appellant concedes, however, that it was "aware of Sayed's position" that he owed no further sums on the Contract before sending these invoices which are dated after Appellant threatened legal action for breach of contract if all prior invoices were not paid. See Appellant's Amended Initial Brief p. 10. A party cannot revive the statute of limitations for past due invoices by sending new invoices for minor remedial work performed after the Contract was breached.

There are two ways to revive a time-barred claim for breach of contract, neither of which apply here. First, a claim can be revived by a "new promise to pay the debt." Cross v. Stackhouse, 212 S.C. 100, 46 S.E.2d 668, 670 (1948). Appellant testified at length that it has not spoken to Respondents since around the time of the August 7, 2019 email and that conversation ended without any promise by Respondents to pay the debt. Second, a claim can be revived by partial payment on the debt. Zaks v. Elliot, 106 F.2d 425, 427 (4th Cir. 1939)(applying South Carolina law). Here, Appellant confirmed it has not received any payment on the debt since February 2019. See R. p. 264, lines 6-25; see also R. p. 265, lines 1-8.

Appellant also contends that a jury could determine that it could only demand payment once the Contract was complete by citing to Respondents' counterclaim that Appellant's work was incomplete and to testimony and evidence that this Court struck from the record on appeal.[2] South Carolina's discovery rule accrues on the date that the *aggrieved party* discovered the breach. Maher, 331 S.C. at 376-377, 500 S.E.2d at 207 (Ct. App. 1998) (emphasis added). Appellant does

[2] Appellant defies this Court's March 28, 2024, Order by continuing to cite to evidence of future work orders and testimony of Respondent Sayed which had been stricken from inclusion in the record on appeal because it was not presented to the lower court. See Appellant's Amended Initial Brief p. 11 & fn. 3; see also Order filed March 28, 2024.

not dispute the Spreadsheet demands payment and threatens legal action for amounts that were "months and months and months past due" and owing as of August 8, 2019. See Appellant's Amended Initial Brief p. 14; see R. p. 264, lines 6-25; see also R. p. 265, lines 1-8. Appellant cannot deny that they knew Respondent owed a legally enforceable debt as of that date.

Appellant's position – that a jury "could" determine no sums were due until the work was complete - is an effort by Appellant to save a time barred action. Appellant would have certainly been surprised to learn in 2019 that not only were no sums due as of August 8, 2019, all sums already paid by Respondents were premature and should be refunded. The absurdity of this position can be illustrated by considering what accepting it would mean for this entire lawsuit. Respondents' position remains that Appellant did not properly complete its work. Thus, according to the interpretation of the Contract that Appellant is using for the purpose of appeal, this means no sums are due yet. But if no sums are due yet, the lawsuit is frivolous and should be dismissed. Said differently, accepting Appellant's argument that it could only demand payment at the Contract's completion, means that all of Appellant's invoices prior to August 8, 2019, including all invoices for which it was paid, were improperly submitted. Appellant's brand-new position for purposes of appeal contradicts its own conduct as it regularly submitted invoices as the project progressed and expected payment within 30 days of each invoice, as evidenced by payment and demands for payment.

In sum, Appellant requested payment for the completion of its work on February 13, 2019, it threatened Respondents with legal action on August 7, 2019, it claimed amounts owed as of August 8, 2019 were "month and months past due," and it still chose to wait more than three years after all of these dates to commence an action. See R. pp. 85-93; see R. pp. 193-197; see also R. pp. 120-121. The trial court correctly determined that Appellant's lawsuit is time barred.

II. EQUITABLE TOLLING DOES NOT APPLY

A. Appellant Failed to Preserve Their Arguments as to Equitable Tolling

Having disposed of the claims against Respondents as untimely under the statute of limitations, the Order makes no mention of Appellant's claims for equitable tolling. See R. pp. 8-16. Appellant dedicates pages 17-20 of their amended initial brief to issues that were never decided by the lower court – namely Respondents absences from South Carolina and whether this tolled the applicable limitations period. The Order neither makes a ruling nor does it undertake any analysis of whether Respondents' absence from South Carolina support equitable tolling of the applicable statute of limitations. See R. pp. 8-16. Appellant opted to forgo a motion under Rule 59(e) and instead filed the instant notice of appeal the same day as the court's Form 4 Order.

South Carolina's appellate courts, with very limited exceptions, have "consistently refused to apply the plain error rule. ... Instead, it is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 306-07, 486 S.E.2d 750, 759 (1997)(citation omitted). A party must raise his issues and arguments in the trial court and obtain a ruling. When a party raises an issue and the judge does not rule on it, the party must file a Rule 59(e), SCRCP, motion in order to preserve the issue for appellate review. See, e.g. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (noting the "important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling"); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Summer v. Carpenter, 328 S.C. 36, 43, 492 S.E.2d 55, 58 (1997) (where trial judge did not rule on issue at trial and party did not make Rule 59(e) motion for a ruling, issue is not preserved for review); Rule 210(c), SCACR (record on

appeal shall not include matter which was not presented to lower court). Appellant did not seek a ruling from the trial court on its claims of equitable tolling and these arguments are not preserved.

B. Equitable Tolling does not Apply

In the event that this Court finds Appellant preserved the issue of equitable tolling for appeal, the lower court was correct in its finding that Appellant's claims against Respondents be dismissed.

While South Carolina law provides for tolling of the limitations period where a party is located out of state in some circumstances, our Supreme Court explained the "tolling statute is inapplicable when the nonresident defendant is amenable to personal service of process and the defendant can be brought within the personal jurisdiction of our courts." Meyer v. Paschal, 330 SC 175, 184, 498 S.E.2d 635, 639 (1998) (limiting its holding to situations in which the name and location of the defendant is known to the plaintiff). In Tiralango v. Balry, the Court construed the language "known to the plaintiff" in Meyer as requiring "an objective test of knowledge, i.e., the statute is tolled when the plaintiff did not, and could not reasonably have known the whereabouts of the defendant." Tiralango v. Balfry, 335 S.C. 359, 363, 517 S.E.2d 430, 432 (1999).

Here, there can be no dispute that Appellant knew the whereabouts of the Respondents. Appellant provided detailed testimony that it communicated with Respondents for more than a year without difficulty and sent invoices to Respondents without issue. See R. p. 264, lines 6-25; see R. p. 265, lines 1-8; see also R. p. 271, lines 11-23. Appellant attempts to rely on an affidavit submitted by its prior counsel six (6) days before the hearing on Respondents' Motion for Summary Judgment to contradict the sworn testimony of its 30(b)(6) designee, Appellant's CEO William Bradley Burke. See R. pp. 152-153. Our courts have held that they may disregard a subsequent affidavit as a "sham," that is, as not creating an issue of fact for purposes of summary

judgment when the subsequent affidavit contradicts that party's own prior sworn testimony. Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004).

Appellant did not claim an inability to locate Respondents until confronted with the fact its claims are time barred due to its own lack of diligence. Appellant then relies on arguments which are directly contradicted by the record. For example, Appellant argues that it could not serve Alex Sayed because they did not know his "real" name. Appellant executed the Contract with Respondent Sayed, who signed his real name in his individual capacity. See R. pp. 78-84. Also, in a February 13, 2019, email from Patriot Capital[3] to Respondent Sayed and Appellant for release of payment to Appellant, Patriot Capital begins it email with "Hello Arshed Sayed." See R. p. 86. Typical of many individuals who have a seemingly foreign name in America, Respondent Sayed shortened his name to Alex for convenience.

Further, Appellant sent invoices to Respondent Sayed's home address in Pennsylvania on April 18, 2019. See R. pp. 111-112, 114. The address on these invoices was the correct home address for Respondent Sayed as of the date the Contract was signed and until he moved in February 2020. Thus, Appellant knew both Sayed's real name and his home address years before it allowed the statute to lapse. This information is more than many litigants have when they file suit in South Carolina courts.

Appellant also argues that NEPA Ventures was the owner of the property and, because it was not registered in South Carolina, it could not have known who NEPA Ventures was. Appellant's claim is false as shown by a mechanics lien it filed on the Property on December 18, 2019. See R. pp. 176-181. This mechanics lien correctly identified the owner of the property, NEPA Ventures, as a Pennsylvania Limited Liability Company. NEPA Ventures is registered

[3] Patriot Capital was the investment company responsible for distributing the payments for this Project.

through the Pennsylvania Security of State. Appellant knew exactly who NEPA Ventures was and could easily determine where it was located.

In the alternative, accepting Appellant's argument, S.C. Code Ann § 15-9-245 provides that the Secretary of State is designated as NEPA Ventures' agent upon whom process against it may be served in any action or proceeding arising in any court in South Carolina. Thus, if Appellant truly was confused, it could have served NEPA Ventures through the Secretary of State.

Finally, Appellant claims it did not know the identity of NEPA Trading & Investments, LLC. Appellant's claim is again belied by the record. In the February 13, 2019, email from Patriot Capital, the subject line is listed as "NEPA Trading & Investments LLC, DBA Westar Travel Plaza – Final Deposit." See R. p. 86. Appellant is copied on the email. Appellant also emailed its Spreadsheet of invoices to Respondent Sayed back on August 7, 2019. See R. p. 196. Within Appellant's Spreadsheet are invoices under the header of "Customer:Job" for "WESTAR TRUCK PLAZA: NEPA TRADING & INVESTMENTS" dated as early as June 21, 2018. See R. pp. 120-121. And again, if Appellant truly was confused, it could have served its lawsuit on the Secretary of State. S.C. Code Ann. § 15-9-245 (2023).

Finally, even if one were to ignore the evidence that Appellant possessed sufficient information to serve Respondents, Appellant offers no excuse for their three-year delay in filing a lawsuit. Appellant has never explained why it properly filed and served a mechanics lien months after demanding payment on past due invoices but then waited more than three years to file a lawsuit. If Appellant's arguments were sincere, one would assume Appellant would have filed its lawsuit well within the statute of limitations but then been delayed as it searched for the location of the Respondents for service. Instead, neither filing nor service occurred within the statute of

limitations. This is because Appellant's argument is not sincere but instead is an effort to grasp an inapplicable legal doctrine to excuse its own lack of diligence.

II. THE LOWER COURT CORRECTLY DETERMINED THAT THE SIX-YEAR STATUTE OF LIMITATIONS UNDER THE SOUTH CAROLINA UNIFORM COMMERCIAL CODE DOES NOT APPLY

Each of Appellant's causes of action arise from the Contract between MECO and Sayed. Contract actions in South Carolina are subject to a three-year statute of limitations. In general, South Carolina has two statutes that must be examined to determine the length of time a plaintiff has to bring a claim for breach of contract. The first is found in S.C. Code § 15-3-530 and provides a three-year statute of limitations for nearly all contract claims. The second is found in the South Carolina Uniform Commercial Code (the "UCC") at S.C. Code § 36-2-725 and applies only to contracts for the sale of goods. Goods are defined by the UCC as "all things…which are movable at the time of identification to the contract for sale…"

South Carolina applies the "predominant factor" test to determine whether a contract that calls for the sale of both goods and services is subject to the UCC. See Ranger Const. Co. v. Dixie Floor Co., Inc., 433 F. Supp. 442 (D.S.C. 1977) (cited with approval by Plantation Shutter Co. v. Ezell, 328 S.C. 475, 478, 492 S.E.2d 404, 406 (Ct. App. 1997)). In determining the predominant factor of the contract, courts are directed to look at a variety of factors, including "(1) the language of the contract, (2) the nature of the business of the supplier, and (3) the intrinsic worth of the materials involved." Grimes v. Young Life, Inc., No. CV 8:16-1410-HMH, 2017 WL 5634239, at *3–4 (D.S.C. Feb. 17, 2017), aff'd sub nom. Grimes v. Inner Quest Inc., 731 F. App'x 249 (4th Cir. 2018) (quoting Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456, 460 (4th Cir. 1983)).

In Ranger Construction, the court examined whether or not a contract for the installation of floors was subject to the UCC. In determining that it was not, the court noted that the contract was a "construction contract" as evidenced by the fact that the seller was referred to throughout the contract as "contractor" rather than "materialman." Ranger Const., 433 F. Supp. at 445. Further, the court noted that the plaintiff was not "contracting for materials" but rather for performance of a contract. Id. The court further noted that the defendant did not "operate as a supplier or maintain a supply house for flooring materials and supplies." Id. Further, the court found relevant that for the particular job the "defendant planned to purchase the materials completely from an independent dealer." Id.

The United States District Court for the District of South Carolina examined similar factors in reaching the same conclusion in Grimes to determine that a contract for construction of a swing at a Young Life facility was one for services. In Grimes the court began by discussing the factors the court may consider, including whether the contract at issue contains "language primarily associated with the sale of goods, such as "buyer," "seller," "terms of sale," "customer," and "sales representative." Grimes 2017 WL 5634239, at *3–4 (citing Plantation Shutter, 492 S.E.2d at 406). In finding that the contract was for services, not goods, the court found that the contract did not use these terms and provided only a summary list of the materials to be provided.

Here, the contract is one for services, not goods. Starting with the contract language, the contract uses language typical of a construction services contract to identify the parties to the contract, referring to Sayed as "Owner" and to MECO as "Contractor." See R. pp.78-84. The Contract states explicitly why Sayed is paying MECO: "Owner shall pay the Contractor **for the performance of the work**," language typically used in a construction services contract. Id at 79. (emphasis added).

The Contract also makes clear that its subject is "work," not "goods" throughout. For example, it describes what is being provided by MECO as "Work" in paragraph 3 of the Contract, refers to a "Scope of Work," and then states that "Seller (a) will install the Equipment… [and] (b) Will install all safety equipment…" Id at 80. The word "goods" does not appear anywhere in the Contract, whereas the word "work" appears twenty-two (22) times. Id at 79-84. Similarly, the Contract refers to itself as an "Installation Agreement" in paragraphs 2 and 3. Id at 82. The Contract also contains other provisions typical of a construction services contract, dealing with issues such as "Performance Bonds," "Workers Compensation Insurance," "Contractor's Liability Insurance," terms related to "Digging and Excavating," "Environmental Indemnity," and "Permits." Id at 79-84. None of these provisions would have any applicability to a contract for the sale of goods. Even where it does address "Materials," it makes clear that these are incidental to the contract stating explicitly: "Any materials or equipment **incidental** to the installation or to be installed as part of this contract…" Id at 81.

The second factor also shows that this was a services contract. MECO admits that they are in the business of "supplying materials and installing them" not manufacturing or distributing equipment. R. p. 129. In fact, MECO's 30(b)(6) representative testified to this explicitly when asked:

> Q: Getting back to – so I want to – I want to get back to some more general questions about MECO. What does MECO do?
> A: We are a sales, service, and installation company for petroleum equipment products.
> Q: Okay. So do you all manufacture any petroleum equipment products?
> A: No, sir
> Q: Okay. So you don't do any manufacturing; is that correct?
> A: Correct.
> Q: So – so MECO's role is to purchase from third parties and then you handle the installation; is that correct?
> A: Correct.
> Q: So sort of like a contractor for a house; is that accurate?

A: Correct
Q: Where the contractor – he's not cutting the wood or, you know, forging the doorknob, he is supplying the materials and then what he's doing is the service of putting all together; is that accurate?
A: Yes sir, that is.
Q: That's what MECO does, correct?
A: Correct.
Q: Is that what MECO did on this project, correct?
A: Correct.

(R. p. 241, lines 4-25; R. p. 242, lines 1-4)

MECO's own representative compared MECO to a contractor building a house, not to a merchant selling goods. No South Carolina court has ever found that a homebuilder is a "merchant" selling goods, even though the material costs of every house far exceed the costs of contractor's services. Similarly, here, Sayed was renovating and expanding his travel plaza, not buying machines. His contract with MECO was a construction contract, not a contract for goods, and the UCC does not apply.

CONCLUSION

For the reasons stated above, this Court should affirm the order of the lower court issued November 27, 2023, granting Respondents Alex Sayed a/k/a Arshad M. Sayed a/k/a Arshed Sayed, NEPA Ventures LLC, NEPA Trading & Investments, LLC's motion pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

Signature page follows

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