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 APPELLANTS

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August 26, 2024
Augusta, Georgia

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STATEMENT OF ISSUES ON APPEAL

The three issues in this appeal are straightforward:

(1) Are MECO's breach of contract claims barred by the three-year statute of limitation even though MECO filed its lawsuit less than three years after the last date MECO performed work under the Contract?

(2) If MECO's claims would otherwise be barred, was the applicable limitations period tolled because Respondents were absent from the State and could not be located by MECO's former counsel?

(3) Could the UCC's six-year statute of limitation apply to prevent dismissal here?

STATEMENT OF THE CASE

This case is about a dispute over a contract between Appellant MECO, Inc. of Augusta ("MECO")[1] and Respondent Alex Sayed ("Sayed")[2] for MECO to provide and install gas station equipment at the Westar Travel Plaza. (See R. pp. 139-151 ("Contract").) Westar Travel Plaza was controlled by Sayed but owned by Respondent NEPA Ventures LLC ("NEPA Ventures"); yet another Sayed entity, Respondent NEPA Trading & Investments, LLC ("NEPA Trading"), financed the improvements. (See R. pp. 86-87 (email from Patriot Capital to alex@fuelonpa.com, addressed to "Arshed Sayed" and concerning "NEPA Trading & Investments LLC., DBA Westar Travel Plaza") & R. pp. 91-93 (email to DHEC referencing replacement of equipment "at the subject NEPA Ventures facility"); see also R. pp. 63 ("All three entities are either Mr. Sayed or owned by Mr. Sayed.").) MECO performed its work under the Contract through at least September 21, 2019, but was not paid the balance it was owed.

[1] For the Court's information, MECO is pronounced "Mekko."

[2] As noted *infra* and in the caption of the case, Sayed's correct name was not clear to MECO before it filed the Complaint. The affidavit of MECO's former counsel, Brad Brodie, details MECO's efforts to properly identify Sayed. During litigation, Sayed testified that his legal name is "Arshed Sayed" though he goes by "Alex." (R. p. 234.)

MECO filed its Complaint on August 23, 2022, alleging claims for breach of contract, quantum meruit, and promissory estoppel. Respondents moved for summary judgment, arguing that MECO's claims were time-barred. The trial court heard argument from counsel and entered a Form 4 Order granting summary judgment on November 2, 2023. Later, the court entered a more detailed Order, prepared by Respondents' counsel, dismissing MECO's claims. In granting summary judgment, the trial court found that MECO sent its last invoice under the Contract in February 2019 and demanded all sums due in this lawsuit on August 8, 2019. (See R. pp. 11, 14.)

Because the trial court overlooked evidence that MECO was performing work under the Contract in September 2019, granting summary judgment was error. The trial court also disregarded evidence that the statute of limitations should be tolled because Respondents were absent from the state and could not be located. Lastly, since the Contract price was mostly allocated to purchasing goods the trial court erred by refusing to apply the UCC's six-year statute of limitations.

MECO timely filed its Notice of Appeal on November 7, 2023, and filed an Amended Notice of Appeal on December 4, 2023, following entry of the Court's November 27, 2023 Order. This Amended Initial Brief is timely submitted following this Court's Order granting Respondents' Motion to Strike.

STANDARD OF REVIEW

In this case, the trial court granted summary judgment based on its erroneous conclusion that MECO did not initiate this action within the three-year limitation period provided in S.C. Code § 15-3-530. (See R. p. 12.) This Court should reverse because there is, at minimum, a genuine dispute of material fact about whether MECO's Complaint was filed within the limitations period.

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Allwin v. Russ Cooper Associates, Inc., 426 S.C. 1, 11, 825 S.E.2d 707, 712 (Ct. App. 2019) (citing Turner v. Milliman, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011)). Under South Carolina law, a moving party is entitled to summary judgment "if the evidence before the court shows 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." Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 459, 892 S.E.2d 297, 299 (2023) (internal punctuation omitted) (citing Rule 56(c), SCRCP).

"At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." Allwin, 426 S.C. at 11, 825 S.E.2d at 712 (citing S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001)). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) (internal citation omitted). Thus, "[s]ummary judgment is not appropriate when further inquiry into the facts is desirable to clarify the application of law." McKnight v. S.C. Dept. of Corrections, 385 S.C. 380, 386 (Ct. App. 2009) .

STATEMENT OF FACTS

This case involves contract and equitable claims. At issue is whether MECO filed its suit within South Carolina's three-year limitations period. See S.C. Code § 15-3-530. MECO filed its Complaint on August 23, 2022. (R., pp. 17-23.) Because MECO performed work under the

Contract until at least September 2019, its suit was filed within the three-year statute of limitations. In any case, the limitations period should be tolled because Respondents were outside the State and MECO could not determine Sayed's true name or the NEPA entities' location. NEPA Ventures owned the real estate at issue and did business in South Carolina, but failed to properly register with the Secretary of State and did not maintain a registered agent as required by law. The trial court erred by ignoring these facts and dismissing MECO's claims. It also failed to acknowledge that the UCC's six-year statute of limitations should apply, because the price of goods was 2.5 times greater than the price of installation services under the Contract. As explained below, this Court should reverse the erroneous entry of summary judgment and remand this case for a jury trial to resolve the disputed issues of material fact that exist.

1. The Contract, MECO's work, and Respondents' refusal to pay.

MECO is a sales, service, and installation company for petroleum equipment products. (R. p. 241, lines 4-7.) It has offices in Greenville, South Carolina, and in Augusta, Georgia. (See R. pp. 243-244, lines 15-9.)

On or about May 8, 2018, MECO and Sayed entered a written contract for MECO to provide and install fuel tanks, pumps, and associated equipment at the Westar Travel Plaza in Cowpens, South Carolina. (See generally R. pp. 24-30; see also Contract (R. pp. 139-151); R. pp. 245-247.) The initial contract sum was $378,000.16. (See R. pp. 139-151.) The cost of equipment under the Contract was $257,923.61—more than 2.5 times greater than the installation cost of $99,308.82. (See id.) While Sayed signed the contract with MECO (see id.), NEPA Ventures owned the real estate where the Westar Travel Plaza is located, and NEPA Trading obtained financing to pay MECO for the improvements. (See, e.g., R. pp. 86-87 (email from Patriot Capital to alex@fuelonpa.com, addressed to "Arshed Sayed" and concerning "NEPA Trading &

Investments LLC., DBA Westar Travel Plaza") & R. pp. 91-93 (email to DHEC referencing replacement of equipment "at the subject NEPA Ventures facility"); R. pp. 63 ("All three entities are either Mr. Sayed or owned by Mr. Sayed.").)

The price of equipment—approximately $257,000—was paid up front. (R. pp. 258-259; see also, R. pp. 139-151.) As the job progressed, MECO was to send invoices weekly for the value of materials stored and the value of work completed. (See R. pp. 139-151.) Invoices were to be paid "within 30 days of invoice date or completion of project." (Id.)

During construction, Sayed requested that MECO perform additional work at Westar that was not covered under the Contract. (R. pp. 260-262 (describing various work MECO performed and accompanying invoices that were unrelated to the Contract).) This included (1) adding upgrade kits for gas-side dispensers; (2) a piping job to connect front diesel pumps directly to diesel tanks; and (3) a concrete repair job—using change orders. (R. pp. 250-252, p. 259, lines 9–17.) As would be expected, extra work and other factors like weather and holidays impacted the time required to complete performance under the Contract. (R. pp. 250-253.) Sayed was dissatisfied with delays and claimed he could withhold payment to MECO under the Contract as a result. (See, e.g., R. pp. 194-197 (p. 194) ("i think u r over reacting, till date the job u had undertaken is incomplete."); R. p. 36, ¶¶ 55-58 (claiming that MECO breached the Contract by failing to timely perform work before Defendants' refusal to pay).)

By September 12, 2019, Sayed was refusing to authorize his financing company to pay MECO, claiming MECO's work was not complete. (See R. pp. 270-271 (explaining that Sayed would not authorize payment of remaining contract balance in September 2019, because "the job was not up to satisfaction").) At bottom, Sayed refused to pay MECO when he did not believe that MECO had performed under the contract. (Id.; see also R. p. 36, ¶¶ 55-58.)

In moving for summary judgment, Respondents relied on an August 7, 2019 email and spreadsheet from MECO President Brad Burke to Sayed, outlining the amounts MECO claimed Sayed owed at that time. (See R. pp. 225-226; R. p. 196; see also R. p. 76, ¶¶ 15-18 & R. pp. 119-121.) They argued that since Burke believed MECO should have been paid by August 8, 2019, the statute of limitations began to run on that date. (See id.) But Sayed contended *on the same date* that MECO's work was incomplete, and that no final payment was owed until the work was done. (See R. p. 194. ("i think u r over reacting, till date the job u had undertaken is incomplete.")) In fact, Sayed maintains that MECO "fail[ed] to fully perform the work under the Contract." (R. p. 36, ¶ 55.)

Aware of Sayed's position and still not having been paid in full, MECO continued to perform work under the Contract into September 2019 to leave no doubt that the balance was owed because the job was, in fact, complete. (See, e.g., R. pp. 266-267, lines 14-1.) For instance, MECO issued Invoice Nos. 27487 & 27488 on September 26, 2019, for work it performed that day or in the few days before. (See, e.g., R. pp. 154-155.) Also, MECO received a notice issued by South Carolina DHEC on September 11, 2019, identifying problems with the fuel equipment discovered in an inspection at the Westar Travel Plaza. (R. pp. 268-270.) Though MECO pointed out that some issues noted in DHEC's inspection were not its responsibility, some were related to MECO's work under the Contract and, as to those issues, MECO "went back out there and fixed it." (Id.) MECO's work to fix those issues must have been performed after DHEC issued notice on September 11, 2019. Moreover, considering Sayed's contention that final payment was not owed until the work was complete (see, e.g., R. pp. 194-197), MECO's claims could not have arisen (and the statute of limitations accrued) until after that date in September 2019.

In its Notice of Mechanic's Lien filed in December 2019, MECO asserted that it performed work under the Contract until at least September 21, 2019. (See R. p. 177.) Evidence available to the trial court—but that has been stricken from inclusion in the record on appeal—also showed that MECO addressed work orders at the property as late as November 19, 2019. And Sayed testified that work performed in November 2019 was not warranty work, but work required for MECO to complete its performance under the Contract and that he never breached the contract because MECO did not complete its work.[3]

In other words, construed in MECO's favor, the evidence shows that MECO continued working and did not substantially complete its performance under the Contract until September, or as late as November 2019. MECO's Complaint, filed on August 23, 2022, was well within the three-year limitations period. The trial court simply failed to recognize that this evidence created a genuine issue of material fact. The trial court's order granting summary judgment was erroneous and should be reversed.

2. Sayed and the NEPA entities' absence from the State equitably tolled the limitations period.

Neither Sayed nor the NEPA entities are South Carolina residents, and the NEPA entities have never registered to do business in South Carolina. (See generally R. pp. 152-153 ("Brodie Aff."); R. pp. 200 & 201; see also R. pp. 157-160.) All are Pennsylvania residents. (R. p. 235, lines 20-21.)

Despite his correct first name being Arshed, Sayed goes by the name "Alex." (R. p. 234, lines 6-12.) He has several apparent aliases, at least one of which was used in another legal

[3] Any deposition excerpts that were not filed in the trial court have been stricken from Appellant's Designation of Matter here, even though the "court may consider unfiled depositions when portions of the deposition were presented at the hearing." Alston v. Blue Ridge Transfer Co., 308 S.C. 292, 294–95, 417 S.E.2d 631, 633 (Ct. App. 1992). At minimum, this is a case where "[s]ummary judgment is not appropriate" because "further inquiry into the facts is desirable to clarify the application of law." McKnight, 385 S.C. at 386.

proceeding. (See R. pp. 152-153; see also R. p. 160 (Case No. 2018CV4210109141 reflecting last name "Sayedtol"), R. pp. 168 & 169 (Mortgage from NEPA Ventures stating name "Arshad Sayed") & R. p. 176 (Aff. of Service of Not. of Mech. Lien reflecting name "Alex Sod").) Sayed's multiple aliases and residence outside of South Carolina hampered MECO's former attorney, Brad Brodie ("Brodie")'s, ability to locate him. Beginning in September 2019, Brodie attempted to determine Sayed's legal name for a potential lawsuit but was unable to reliably do so. (See R. pp. 152-153.) Brodie instead discovered multiple aliases for Sayed, noted above. In fact, Brodie remains unsure of Sayed's correct legal name. (See id.)

As to NEPA Ventures and NEPA Trading, neither has ever registered to do business with the South Carolina Secretary of State or maintained a registered agent for service in South Carolina. (See R. pp. 152-153; see also R. pp. 156-160 (Screenshots from Sec. of State Search for NEPA Defendants).) Notwithstanding Sayed's naked assertion that NEPA Ventures properly registered with the Secretary of State, certificates from the Secretary of State confirm beyond dispute that neither of the NEPA entities were properly registered even though both did business here. (R. pp. 200 & 201.) Because Respondents were absent from South Carolina and not properly identified as required by law, the statute of limitations for MECO's claims against them should be tolled.

ARGUMENT & CITATION OF AUTHORITY

The trial court erred in granting summary judgment to Respondents. MECO's Complaint was filed less than three years after MECO's causes of action accrued and was, therefore, timely. S.C. Code Ann. § 15-3-530(1) provides that contract actions must be commenced within three years. MECO filed its Complaint on August 23, 2022, so the dispositive issue in this case is whether MECO's claim accrued on or after August 23, 2019. "[A] breach of contract action

accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) (citation omitted))

Determining when an action accrues is ordinarily a question of fact. See Logan v. Cherokee Landscaping & Grading Co., 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) (citation omitted) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury."); Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) (citation omitted) ("Whether a claimant knew or should have known that they had a cause of action is question for the jury.") Because the trial court overlooked or ignored evidence that MECO's claims accrued after August 23, 2019, it erroneously granted summary judgment to Respondents even though the statute of limitations had not expired when MECO filed suit.

1. MECO's Complaint was timely because its cause(s) of action accrued less than three years before the Complaint was filed.

Here, the trial court's November 27, 2023 Order found that MECO's claims accrued no later than August 8, 2019. (See R. pp. 9-11.) The trial court held that MECO 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 in February 2019 and on August 8, 2019, respectively. (See R. p. 11.) These factual findings overlook or ignore record evidence tending to show that MECO's cause of action accrued in September or November 2019.

First, the Contract, by its terms, provides that invoices are due either 30 days after issuance, or upon completion of the project. Thus, a jury could determine that MECO could only legitimately demand payment once the Contract was complete.

Sayed essentially claims MECO could/should have sued him any time he refused to pay. Of course, this contradicts the position Sayed took during the parties' course of dealing. (See R. pp. 270-271 (explaining that Sayed would not authorize payment of remaining contract balance in September 2019, because "the job was not up to satisfaction"); R. p. 194 ("i think u r over reacting, till date the job u had undertaken is incomplete."); R. p. 36 ¶¶ 55 (claiming that MECO breached the Contract by "failing to fully perform the work under the Contract").)

In any case, MECO's August 8, 2019 demand for payment is not dispositive. The general rule is that "one who seeks to recover damages for breach of a contract must demonstrate that he has performed his part of the contract." Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C. 635, 652, 780 S.E.2d 263, 272–73 (Ct. App. 2015). In other words, MECO's breach of contract claims could not accrue until MECO finished its own work under the Contract.

Respondents have the burden of proving their statute of limitations defense. See, e.g., Gattis v. Chavez, 413 F. Supp. 33, 35 (D.S.C. 1976). Because they pleaded that MECO "fail[ed] to fully perform the work under the Contract," (R. p. 36 ¶ 55), Respondents have admitted that the statute of limitation did not begin to run on MECO's breach of contract claims. See Hamilton v. Reg'l Med. Ctr., 440 S.C. 605, 636, 891 S.E.2d 682, 699 (Ct. App. 2023), reh'g denied (Sept. 21, 2023) ("[j]udicial admissions ... 'are "not evidence at all but rather have the effect of withdrawing a fact from contention."). In any case, construing all facts and inferences in MECO's favor, a jury could find that MECO's cause of action did not accrue until at least September 2019 when, evidence shows, MECO was still performing under the Contract.

It is error to rely only on a portion of a plaintiff's testimony—to the exclusion of other evidence—in fixing the limitation accrual date, as the trial court did here. The Court of Appeals' decision in McAlhany v. Carter, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015), aff'd, 2016-000405,

2017 WL 4873655 (S.C. May 3, 2017), neatly illustrates this point. In McAlhany, the plaintiff brought claims resulting from termite and water damage to a home he bought in 2007. Id. at 63. McAlhany testified that he discovered black mold when he first moved into the home in October 2007, but later testified he first discovered mold in August 2009 and that he first learned of flooding problems in June 2008. Id. at 64, 781 S.E.2d at 111. The trial court granted summary judgment for the defendants based on McAlhany's testimony that he discovered mold in 2007. Id. at 61, 781 S.E.2d at 109. But the Court of Appeals reversed, holding that the plaintiff's own conflicting testimony on when he discovered mold gave rise to a factual dispute that precluded summary judgment. Id. at 66, 781 S.E.2d at 112.

The same is true here. Similar to the varying testimony about when mold was discovered in McAlhany, there is an obvious issue of fact arising from several evidentiary sources including MECO's August 8, 2019 demand, Sayed's testimony and judicial admissions in his Counterclaim, Burke's testimony on behalf of MECO, and MECO's sworn Mechanic's Lien. It follows that "[v]iewing the evidence in the light most favorable to [MECO], [] the trial court erred in finding the statute of limitations barred [its] claim." Id. at 63.

Finally, Respondents contend this case involves a construction contract. (See R. pp. 227-229; R. pp. 188-190.) "In cases involving construction contracts, the statute of limitations generally begins to run when the work is completed." Republic Contracting Corp. v. S.C. Dep't of Highways & Pub. Transp., 332 S.C. 197, 212, 503 S.E.2d 761, 769 (Ct. App. 1998). "Only in rare circumstances does it run against a contractor's claim for payment before completion of the contract." Id.

Considering the law here, Burke testified on behalf of MECO that a project is complete when "everything is up and running and they are pumping fuel and taking transactions." (R. p.

257, lines 15-19.) According to Respondents' judicial admissions in their Counterclaim, the work was never completed. (See R. p. 36 ¶ 55.) Here, a jury could determine that the project at issue was not complete until at least September 2019 when MECO responded to DHEC's post-inspection request that certain work be done at the Westar Travel Plaza. MECO's Mechanic's Lien, which states under oath that MECO's work was not complete until September 21, 2019, underscores this point.

South Carolina law requires that a jury resolve the factual dispute about when MECO completed its work under the contract at issue, thus triggering the statute of limitations. The evidence cited above shows the trial court had ample evidence that the work was not complete until late September 2019, and the statute of limitations could not, therefore, have expired when this action was filed in August 2022. The trial court's ruling should be reversed so that a jury can decide the disputed issue of when the statute of limitations began to run.

2. Sayed and the NEPA entities' absence from South Carolina equitably tolled the limitations period.

South Carolina law provides for tolling of the limitations period where a party is located out-of-state:

> If when a cause of action shall accrue against any person he shall be out of the State, such action may be commenced within the terms in this chapter respectively limited after the return of such person into this State. And if, after such cause of action shall have accrued, such person shall depart from and reside out of this State or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

S.C. Code Ann. § 15-3-30. The General Assembly "enacted this tolling provision in 1870 [] to protect its residents from defendants who were not amenable to personal service of process because the defendants were out of state." Meyer v. Paschal, 330 S.C. 175, 178 – 179, 498 S.E.2d 635, 637 (1998). And the South Carolina Supreme Court has declared this statute applies to both

residents who have departed the State and non-residents. Id. Here, Respondents are all out-of-state residents. (See generally R. p. 152-153; see also R. pp. 235-236.) While the Meyer court recognized that long-arm jurisdiction or substitute service may obviate the provisions of § 15-3-30, that is true only when "the name and location of the defendant is known to the plaintiff." Meyer, 330 S.C. at 183–184, 498 S.E.2d at 639. Tolling still occurs if the plaintiff does not know the name and location of the defendant, and whether the plaintiff should have that information is a question of *fact*. Id. at 184, 498 S.E.2d at 639.

That is precisely the situation here. As MECO's former counsel detailed in his affidavit, MECO was unsure of Sayed's correct legal name until August 2022.[4] (See generally R. pp. 152-153.) MECO's former counsel, Brodie, began with the name which Sayed signed on the Contract—Alex Sayed. (See R. pp. 139; see also R. pp. 152-153.) Then, he searched Spartanburg County's real estate records which revealed that NEPA Ventures owned the Westar property. The South Carolina Secretary of State's office had no records for NEPA Ventures or the financing entity for this project at Westar, NEPA Trading. (See R. pp. 152-153; see also R. pp. 156-160.) Next, Brodie found a Spartanburg County judgment against "Alex Sayedtol." (See R. pp. 152-153; see also R. p. 161.)

Searching further, Brodie found a mortgage related to the Westar Travel Plaza executed by an "Arshad Sayed" which revealed a potential address in the Commonwealth of Pennsylvania. (See R. pp. 152-153; see also R. pp. 162 & 169.) This led Brodie to serve NEPA Ventures with MECO's Statement and Notice of Mechanic's Lien at its Pennsylvania-registered address. (See R. p. 153; see also R. p. 176) A gentleman claiming to be "Alex Sod" presented himself as the Office

[4] Even then, as reflected by the multiple "A/K/A" designations in the caption, MECO was not certain of Sayed's correct legal name.

Manager authorized to accept service for NEPA Ventures. (See id.) Brodie could not determine either the legal name of the contracting party, or a personal address for Alex/Arshad Sayed in South Carolina or Pennsylvania. (See R. pp. 153.) While Respondents may contend that MECO should have known their true identities or locations, "[w]hether the plaintiff had such knowledge could conceivably be a question of fact," not a question of law that may be determined at summary judgment. Meyer, 330 S.C. at 184, 498 S.E.2d at 639.

Similarly, NEPA Ventures and NEPA Trading flouted the law by neither registering with the South Carolina Secretary of State nor maintaining a registered agent in South Carolina. (See R. pp. 200 & 201; R. pp. 152-153.; see also R. pp. 156-160 (Screenshots from Sec. of State Search for NEPA Defendants).)

"Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). In Hooper, the South Carolina Supreme Court held the defendant's "failure to properly list its registered agent for service with the Secretary of State as required by state law hindered [the plaintiff's] pursuit of service." 386 S.C. at 117–18, 687 S.E.2d at 33–34. So, the appropriate remedy was to equitably toll the statute of limitations.

The facts of Hooper show why tolling is appropriate here. Even though alternative means of service may have been available, the Hooper court pointed out "the obvious fact that the need for alternative means of service was caused by [the defendant's] own failure to supply the [] information regarding its agent to the Secretary of State." Id. The outcome should be no different here, since the NEPA Respondents likewise failed to register with the Secretary of State or designate registered agents, despite doing business here and NEPA Ventures owning the real property Westar occupied.

Like the plaintiff in Hooper, MECO was "entitled to rely on the public records" to locate the NEPA entities—but those records provided nothing to aid MECO's search. See id. at 118, 687 S.E.2d at 34; (see R. pp. 200 & 201; R. pp. 152-153.; see also R. pp. 156-160.) Respondents cannot seek refuge in one provision of South Carolina law—the statute of limitations—when they have not complied with the law themselves. As the Hooper court observed: "The statute of limitations' purpose of protecting defendants from stale claims ***must give way*** to the public's interest in being able to rely on public records required by law." Hooper, 386 S.C. at 119, 687 S.E.2d at 34 (emphasis supplied). At minimum, there are genuine disputes of material fact about whether the statute of limitations should have been tolled during Brodie's investigation into the identities and locations of Sayed, NEPA Ventures, and NEPA Trading, thus rendering MECO's Complaint timely.

3. MECO's Complaint was filed well within the limitations period under the UCC.

While MECO's Complaint was timely filed under the three-year statute of limitation, there is no doubt it was filed within the UCC's six-year limitation period applicable to contracts for the sale of goods. See S.C. Code Ann. §§ 36-2-725, 36-2-106 (providing 6-year statute of limitations for breach of contracts for sale & defining "contract for sale" as including a present sale of goods and a contract to sell goods at a future time) & 36-2-102 (Title 36, Chapter 2 applies to "transactions in goods"). "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Title 36, Chapter 8) and things in action." S.C. Code Ann. 36-2-105(1). Here, the Contract provided for goods to be delivered and installation services to be performed by MECO at the Westar Travel Plaza. (See R. p. 139.)

When determining whether a contract involving goods and services should be treated as a "sale of goods" under the UCC, courts employ a simple test—"whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom)." Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (citations omitted); see also Ranger Const. Co. v. Dixie Floor Co., 433 F. Supp. 442, 444 (D.S.C. 1977) (citing Bonebrake as "[t]he leading case on the UCC's applicability to [mixed contracts]"). In Bonebrake, the Eighth Circuit characterized a contract for replacement of bowling-lane equipment that had been destroyed by a fire as a contract for the sale of goods under the UCC. 499 F.2d at 957–960. Similarly, the Contract here called for MECO to deliver and replace fuel equipment at the Westar Travel Plaza. The cost of equipment under the Contract was $257,923.61, more than 2.5 times the installation price of $99,308.82.[5] (See R. p. 139.) Basic arithmetic shows the predominant factor in the Contract was MECO's sale and provision of equipment.

Like the contract for bowling lane equipment in Bonebrake—which fell within the UCC's purview—Sayed hired MECO to ***provide*** and replace the following ***equipment***: (1) Westar's payment & communication systems; (2) Westar's old tanks; (3) Westar's old gas dispensers; and (4) Westar's small DEF tank. (R. pp. 245-247.) And like the supplier of bowling lane equipment in Bonebrake, here MECO held all the equipment required to perform under the Contract in one of its warehouses, except for one DEF tank. (R. p. 248, lines 12–20, R. p. 249, lines 13–24.) The parties' Contract and agreements for additional jobs at Westar are much more like the "installation

[5] MECO is a "sales, service, and installation company for petroleum equipment *products*." (R. p. 241, lines 4-7) (emphasis added.)

of a water heater in a bathroom" than entering a "contract with artist for [a] painting." Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (citations omitted). Thus, the UCC's six-year statute of limitation should apply, and MECO's action is no doubt timely.

CONCLUSION

Based on the genuine disputes of fact surrounding when MECO completed its work under the Contract, a jury must decide when MECO's cause of action accrued and whether MECO's claims are time-barred. Moreover, Respondents' absence from the state warrants equitable tolling of the statute of limitation. Finally, because more than two-thirds of the contract price was for equipment, the six-year statute of limitations applicable to UCC contracts should apply. For all these reasons, this Court should REVERSE the trial court's erroneous entry of summary judgment and REMAND this case for a jury to perform its fact-finding duty.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing "FINAL BRIEF OF APPELLANTS" was served electronically via E-Mail upon the following counsel of record, this 26th day of August, 2024. I further certify that this Final Brief complies with Rule 211, SCACR.

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