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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy
Circuit Court Judge
Case No.: 2016-CP-10-03468

Appellate Case No. 2021-001510

Charles Blanchard Construction Corp, Inc., Respondent,

v.

480 King Street, LLC, Defendant,

And

480 King Street, LLC Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

Glick/Boehm & Associates, Inc. is the Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN GRANTING RESPONDENT GLICK/BOEHM & ASSOCIATE, INC’S MOTION TO DISMISS WHERE RESPONDENT HAD PREVIOUSLY FAILED TO CONTEST THE SUFFICIENCY OF THE EXPERT WITNESS AFFIDAVIT WITHIN THE TIME FRAME SPECIFIED BY THE COURT?
- II. DID THE CIRCUIT COURT ERR IN FINDING THAT APPELLANT’S CLAIMS AGAINST RESPONDENT GLICK/BOEHM AND ASSOCIATES, INC. ARE ALL BASED UPON RESPONDENT’S ALLEGED NEGLIGENT PERFORMANCE OF PROFESSIONAL SERVICES AS AN ARCHITECT?
- III. DID THE CIRCUIT COURT ERR IN HOLDING THAT APPELLANT FAILED TO FILE A PROPER AFFIDAVIT IN SUPPORT OF ITS CLAIMS PURSUANT TO S.C. CODE ANN. § 15-36-100(B).

STATEMENT OF THE CASE

This is an appeal of the circuit court's order granting Respondent Glick/Boehm & Associates, Inc.'s Motion to Dismiss on December 16, 2021.

On July 6, 2016, general contractor Charles Blanchard Construction Corp., Inc. ("CBC") filed a lawsuit against Appellant 480 King Street, LLC ("480 King") asserting claims of non-payment related to certain construction services provided by CBC ("CBC Lawsuit"). (R. p. 4). On August 4, 2016, 480 King filed an Answer and Counterclaim asserting, *inter alia*, claims for cost overruns and construction defects associated with CBC's work, which entailed the construction of a new stair tower behind certain commercial property located in downtown Charleston, South Carolina ("the Subject Project"). (R. p. 44).

On June 26, 2017, 480 King filed a separate lawsuit against Respondent Glick/Boehm & Associates, Inc. ("GBA") asserting separate claims for Breach of Contract, Breach of Warranty, and Negligence relating to construction contract administration services that GBA provided during construction of the Subject Project ("GBA Lawsuit"). (R. p. 70). GBA is a multi-disciplinary firm that heralds itself as specializing, *inter alia*, in architecture, planning, and interior design.¹ The CBC Lawsuit and GBA Lawsuit were later consolidated via Form 4 Order, entered on August 24, 2018 following 480 King's Motion to Consolidate (Order, R. p. 91; Motion, R. p. 187).

¹ See <http://www.gbaarchitecture.com/history>, stating "Glick/Boehm & Associates was founded in 1981 as a multi-disciplinary firm specializing in Architecture, Planning and Interior Design," and noting that "[C]lients now benefit from over 100 years of combined principal experience in programming, planning, architectural design, interior design **and** construction contract administration services." [Emphasis added].

On August 10, 2017, 480 King filed a Motion for an Extension of Time pursuant to S.C. Code § 15-36-100(c)(1), wherein it requested an extension of time, for good cause, to file the requisite expert witness affidavit as to its *professional negligence* claim against GBA.² (R. p. 97). 480 King asserted that good cause for an extension existed because, *inter alia*, its expert witness had not yet had an opportunity to review over eight thousand (8,000) documents relating to the commercial project and because the statute of limitation loomed at the time the Complaint was filed. (R. p. 98; p. 268, line 24 to p. 269, line 16).

Thereafter, on August 29, 2017, GBA filed its Answer, generally denying all three claims asserted against it, along with a Motion to Dismiss 480 King's Complaint, contending that 480 King had "failed to file an affidavit from an 'expert' setting forth specific allegations of professional negligence against GBA" and that no good cause existed to allow the filing of the affidavit after the Summons and Complaint. (Answer, R. p. 81; Motion to Dismiss, R. p. 100).

On September 7, 2017, 480 King's trial counsel emailed GBA's trial counsel a copy of the Affidavit of professional engineer Louis Hackney, P.E., REWC, RRC, CDT, LEED AP, and informed him that the Affidavit would be filed pending the Court's ruling on the Motion for Extension of Time. (Email, R. p. 234; Affidavit, R. p. 301)

On November 17, 2017, the Honorable J.C. Nicholson, Jr., heard 480 King's Motion for Extension of Time and GBA's Motion to Dismiss. (Transcript, R. p. 266). The Court found that good cause existed to allow 480 King extra time to procure and file its expert witness affidavit, noting, *inter alia*, the voluminous number of records that had been provided to the expert. (Order, R. p. 88). The Court also found no prejudice to GBA in granting the motion. (Order, R. p. 89). In addition, the Order stated that "Defendant will then have thirty days from the date of

² 480 King's Breach of Contract and Breach of Warranty claims, notably, do not require an affidavit under S.C. Code § 15-36-100, which is specifically titled, Complaint in actions for damages alleging *professional negligence*; contemporaneous affidavit of expert specifying *negligent* act or omission. [Emphasis added]

the filing of the Affidavit to file any motion contesting the sufficiency of the Affidavit.” (R. p. 90). [Emphasis added]. Notably, the language providing GBA a thirty-day period to contest the sufficiency of the affidavit had been incorporated into the Order at the request of GBA’s trial counsel. (Email, R. pp. 247- 253). GBA did not appeal this Order and did not file a motion contesting the sufficiency of the Affidavit within thirty days of 480 King’s timely-filed Affidavit as required by the Order. (Affidavit, R p. 301).

On September 17, 2020—two years and nine months *after* the circuit court’s thirty (30) day deadline had expired—GBA filed a Request for Leave to File Motion to Dismiss and Motion to File Sanctions, attacking the sufficiency of the Mr. Hackney’s Affidavit. (Request for Leave, R. p. 189). GBA did not, however, formally request a hearing on its Request for Leave. Instead, GBA waited *another* nine months and simply filed its Motion to Dismiss and Motion for Sanctions on June 28, 2021, having failed to obtain leave in the interim.

On November 19, 2021, 480 King filed a Memorandum in Opposition to GBA’s Motion to Dismiss and Motion for Sanctions, asserting that GBA’s Motion should be denied because, *inter alia*, (1) GBA was time-barred from contesting the sufficiency of the affidavit because it had failed to do so within the thirty-day time period specified in Judge Nicholson’s order, (2) Mr. Hackney, a professional engineer, meets the criteria for serving as an expert witness under S.C. Code § 15-36-100(A)(3), and is qualified to offer an expert opinion as to GBA’s performance of contract administration services, possessing the necessary scientific, technical, or specialized knowledge, and having performed the same type of services himself, and (3) the Complaint asserts separate claims for Breach of Contract and Breach of Warranty, neither of which require an Affidavit from an expert witness in order to survive a Motion to Dismiss. (Memo, R. p. 225).

On November 19, 2021, GBA filed a Memorandum in Support of its Motions. (R. p. 219). GBA’s Motion argued that, “although Glick/Boehm questioned *then* [in November of

2017] whether an Engineer (and particularly this Engineer, Mr. Hackney) is qualified to express an opinion concerning the standard of care of an architect,” GBA “did not contest [the affidavit’s] ‘sufficiency’ by filing a further motion to dismiss” within the time period afforded by the Court because it “appeared” from Mr. Mr. Hackney’s affidavit that he was providing an opinion as to the standard of care for an architect. (Motion to Dismiss, R. p. 197).

A hearing on GBA’s Motions were held on December 2, 2021 before the Honorable Jennifer B. McCoy, wherein Judge McCoy granted GBA’s Motion to Dismiss 480 King’s Complaint—dismissing all three causes of action brought against GBA, including those that do not require an Affidavit under the subject statute—and denying GBA’s Motion for Sanctions. (Transcript, R. p. 278). A corresponding Order on GBA’s motions was entered on December 16, 2021. (Order, R. p. 92). This appeal follows.

STANDARD OF REVIEW

“On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court.” *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). “That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.” *Id.* (internal quotations omitted). The Court may sustain the dismissal when “the facts alleged in the complaint do not support relief under any theory of law.” *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App., 2003). See also, *Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 763 S.E.2d 200 (2014).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT GLICK/BOEHM & ASSOCIATE, INC'S MOTION TO DISMISS BECAUSE RESPONDENT WAS TIME-BARRED FROM CONTESTING THE SUFFICIENCY OF THE AFFIDAVIT UNDER THE CIRCUIT COURT'S PRIOR DECEMBER 17, 2017 ORDER.

As a preliminary matter, Respondent GBA failed to file a motion contesting the sufficiency of Mr. Hackney's affidavit within the thirty-day period set forth in the circuit court's December 17, 2017 Order. (Order, R. p. 90). As noted, *supra*, the circuit court heard 480 King's Motion for Extension of Time and GBA's Motion to Dismiss on November 17, 2017. (Transcript, R. p. 266). Judge Nicholson granted 480 King's Motion, holding that good cause existed to allow 480 King extra time to procure its expert witness affidavit as to its professional negligence claim against GBA. (Order, R. p. 88). Judge Nicholson also denied GBA's Motion to Dismiss, without prejudice, holding that GBA would then "have thirty days from the date of the filing of the Affidavit to file any motion contesting the sufficiency of the Affidavit." (Order at R. p. 90; Transcript, R. p. 275, lines 18-22). This language, specifically providing GBA thirty days to contest the sufficiency of the affidavit, was notably incorporated into the Order at the request of GBA's own trial counsel. (See Motion in Opposition at Exhibit # 3, R. pp. 247 – 253).

GBA did not appeal the circuit court's December 17, 2017 Order. GBA also did not file a motion contesting the sufficiency of the Affidavit within the time period mandated by the Court despite now admitting that GBA had "questioned *then* [i.e. back in November 2017] whether an Engineer (and particularly this Engineer, Mr. Hackney) is qualified to present an opinion concerning the standard of care of an architect." [Emphasis added] (Motion to Dismiss, R. p. 197).

In a strained effort to justify its three-and-one-half-year delay in contesting the sufficiency of Mr. Hackney's September 7, 2017 affidavit, GBA now contends that it had no way of knowing in 2017, or several ensuing years, that Mr. Hackney did not intend to offer an

opinion as to the standard of care for an architect.

GBA's argument for failing to timely contest the sufficiency of Appellant's affidavit is unavailing. First, GBA was made aware by the September 7, 2017 affidavit that Mr. Hackney was a licensed professional engineer with specialized knowledge and experience in providing construction contract administration services, and not an architect. (Memo in Opposition at R. pp. 227-232; and Hackney Affidavit, R. p. 301). Mr. Hackney's opinion as to GBA's performance of contract administration services is relevant and necessary to this action because Appellant's Complaint specifically asserts that "GBA agreed to make periodic visits to the stair tower during construction and perform other contract administration services to observe, among other things, whether construction was being completed in accordance with the plans and specification and all applicable building codes and regulation." (Complaint, R. p. 77).

Second, as noted, *supra*, GBA specifically acknowledged that after reading Mr. Hackney's affidavit in November of 2017, it questioned whether Mr. Hackney was qualified to present an expert opinion in this case. (Motion to Dismiss, R. p. 197). GBA's further acknowledged that it had "some questions as to the sufficiency of the affidavit [even] prior to Mr. Hackney's [Deposition] testimony." (R. p. 201). Despite purporting to have said doubts and/or questions in November of 2017, GBA failed to contest the sufficiency of the affidavit within the time period afforded by the circuit court. GBA did not even bother to hold Mr. Hackney's first deposition until over a year later in January of 2019 (R. p. 197 at footnote 1). Thereafter, GBA waited over one more year to file its Request for Leave to file a Motion to Dismiss on September 17, 2020. (R. p. 189). It then waited an additional nine months to file its Motion to Dismiss on June 28, 2021, having failed to obtain leave in the interim. (R. p. 195).

Based on the forgoing, Appellant submits that the circuit court erred in granting GBA's Motion to Dismiss. The motion should have been denied by the circuit court because GBA

failed to contest the sufficiency of Mr. Hackney's affidavit within the thirty-day period mandated by the Circuit Court's December 17, 2017 Order, which, again, GBA requested in the first place. Accordingly, Appellant respectfully requests that the circuit court's order granting GBA's Motion to Dismiss be reversed and that this case be remanded for a trial on the merits.

II. THE CIRCUIT COURT ERRED IN FINDING THAT APPELLANT'S CLAIMS AGAINST RESPONDENT GLICK/BOEHM AND ASSOCIATES, INC. ARE ALL BASED UPON RESPONDENT'S ALLEGED NEGLIGENT PERFORMANCE OF PROFESSIONAL SERVICES AS AN ARCHITECT.

A. Appellant's Complaint asserts three separate and distinct claims.

A review of Appellant's Complaint demonstrates that its claims against Respondent GMA are not all based upon Respondent's negligent performance of professional services as an architect. Specifically, Appellant's Complaint asserts three (3) separate and distinct causes of action against GMA. (Complaint, R. p. 70). Appellant's first cause of action against GMA is a claim for Breach of Contract. (R. p. 71). Appellant's second cause of action is a claim for Breach of Warranties. (R. p. 74). Finally, Appellant's third cause of action, involves a a claim for Professional Negligence. (R. p. 76). These are separate and distinct, non-derivative categories of law.

B. Appellant's Breach of Contract and Breach of Warranty Claims do not require a supporting affidavit under S.C. Code § 15-36-100.

The circuit court's order fails to provide any factual or legal basis for finding that Appellant's Breach of Contract and Breach of Warranty claims must be accompanied by an expert witness affidavit. (Order, R. p. 92). S.C. Code § 15-36-100 is specifically titled, "Complaint in actions for damages alleging *professional negligence*; contemporaneous affidavit of expert specifying *negligent act* or omission. The statute does not encompass actions for breach of contract or breach of warranty. Accordingly, it was error for the circuit court to dismiss Appellant's actions for Breach of Contract and Breach of Warranty where no such affidavit is statutorily required. (Appellant's Memo in Opposition, R. p. 232).

C. Appellant's Professional Negligence Claim specifically involves GBA's performance of Construction Contract Administration Services, and not merely Architectural Design Services.

The Circuit Court's order ignores that Appellant's Negligence Claim asserts that GBA provided both architectural and engineering services for the design and construction: "GBA agreed to provide professional architectural and **engineering** services for the construction of the state tower, specifically including, but not limited to, the issuance of plans and specifications for construction. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, building codes, regulations, statutes, and industry standards." [Emphasis added]. (Complaint at R. p. 76, ¶ 24).

Further, the Complaint specifically asserts that GBA performed construction contract administration services, and not merely architectural design services: "GBA agreed to make periodic visits to the stair tower during construction and perform other contract administration services to observe, among other things, whether construction was being completed in accordance with the plans and specification and all applicable building codes and regulation." (Complaint, at R. p. 71). It was, therefore, error for the circuit court to hold that "the claims asserted against [GBA] by Plaintiff are all based upon [GBA's] alleged negligent performance of professional services as an Architect." [Emphasis added] (Order, R. p. 93). It was also error for the circuit court to find that Plaintiff had failed to file a proper Affidavit in support of all its claims as required by S.C. Code Ann. §15- 36- 100(B), where two of the three claims did not even involve professional negligence and where the professional negligence claim alleged that GBA had provided engineering and contract administration services and not merely architectural design services.

III. THE CIRCUIT COURT ERRED IN HOLDING THAT APPELLANT FAILED TO FILE A PROPER AFFIDAVIT IN SUPPORT OF ITS CLAIMS PURSUANT TO S.C. CODE ANN. § 15-36-100(B).

As set forth in Appellant's Memorandum in Opposition to GBA's Motion to Dismiss, Mr. Hackney, a professional engineer, meets the criteria for serving as an expert witness under S.C. Code § 15-36-100(A)(3), and is qualified to offer an expert opinion as to GBA's performance of contract administration services, possessing the necessary scientific, technical, or specialized knowledge, and having performed the same type of services himself. (Memo in Opposition, R. p. 225; Affidavit, R. p. 301).

Contrary to GBA's contention and the circuit court's unsubstantiated holding, South Carolina does not require that one must have an affidavit from an architect in order to sue an architect for professional negligence. (Memo in Opposition, R. pp. 229-232). Rather, one simply needs to file an affidavit from a party that meets the criteria for "expert witness" under the catch-all provision contained § 15-36-100(a)(3), which states:

SECTION 15-36-100. Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.

(A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:

(1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and

(2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; **or**

(b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;

(ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational

institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

(iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion;

(3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert's credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert's credentials pursuant to subsection (E).

[Emphasis Added]

In the present case, Mr. Hackney satisfies the criteria for an “expert witness” under SC Code §15-36-100(A)(3). To qualify under this provision, an affidavit filed by a proposed expert witness must contain an explanation of the expert's credentials and *their relevance to the case* (as the statute states).

The information contained in Mr. Hackney’s Affidavit is clearly sufficient to satisfy this provision. The affidavit lists Mr. Hackney’s experience and qualification in performing **contract administration services** and then critiques GBA’s performance of those very services. Mr. Hackney also states that it is his, “opinion that there was information missing from the plans that resulted in construction errors, additional cost and delays.” (Affidavit, R. p. 302, ¶8). Mr. Hackney then states that, “Based upon my investigation and analysis to date, it is my opinion that there was incorrect information contained within the project specifications that resulted in construction errors, additional cost, and delays.” (Affidavit, R. p. 302, ¶ 9). Lastly, Mr. Hackney forms his specific opinion as to the architect GBA’s role in failing to perform construction administration services:

10. Based on the information that I have received and reviewed to date, it is my professional opinion, to a reasonable degree of professional certainty, that the Architect deviated from the standard of care in failing to properly complete contract administration services as part of its contractual duties so as to prevent the aforementioned improper and code violating construction methods to occur and this deviation from the standard of care caused damage to 480 King Street, LLC in that it will have to expend funds to repair these items, or incurred damages from past remediations and associated delay costs.

(Affidavit, R. p. 302, ¶ 10).

In the instant case, the Affidavit clearly satisfies SC Code §15-36-100(A)(3). Mr. Hackney satisfies the criteria for an “expert witness” under the statute as he can testify regarding the architect GBA’s performance of contract administration services. It was error for the circuit court to hold that Appellant failed to file a proper affidavit in support of its claims pursuant to the statute.

CONCLUSION

For those reasons set forth above, Appellant 480 King Street, LLC respectfully requests that this Court reverse the circuit court’s order granting GBA’s Motion to dismiss and remand this case for a trial on the merits.

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Of Whom 480 King Street, LLC is the Appellant,

And

Glick/Boehm & Associates, Inc. is the Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b),
SCACR.

[Signature on following page]

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