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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 REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
REPLY TO RESPONDENT’S FACTUAL AND PROCEDURAL REPRESENTATIONS.....	2
I. APPELLANT’S ARGUMENTS ARE CLEARLY PRESERVED, HAVING BEEN RAISED AND RULED UPON BY THE CIRCUIT COURT.....	4
II. APPELLANT’S EXPERT MEETS THE STATUTORY REQUIREMENT FOR PROVIDING A CONTEMPORANEOUS AFFIDAVIT PURSUANT TO S.C. CODE §15-36-100(A)(3).....	6
III. ENGINEERS ARE STATUTORILY QUALIFIED TO REVIEW AND TESTIFY AS TO THE WORK OF ARCHITECTS PURSUANT TO S.C. CODE § 40-22-20.....	9
CONCLUSION.....	10
CERTIFICATE OF COMPLIANCE.....	12

TABLE OF AUTHORITIES

Cases

Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 763 S.E.2d 200 (2014).....6

Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413, (Ct. App., 2003).....6

Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000).....5

Rydde v. Morris, 381 S.C. 643, 675 S.E.2d 431 (2009).....6

Statutes

S.C. Code § 15-36-100.....5

S.C. Code § 15-36-100(A)(3).....2, 4, 6, 7, 8, 9, 10, 11

S.C. Code § 15-36-100(B).....5

S.C. Code § 15-36-100(C)(2)..... 6

S.C. CODE § 40-22-20.....9

S.C. CODE § 40-22-20(7).....9

S.C. CODE § 40-22-20(11).....9

S.C. CODE § 40-22-20(25).....10

Reply to Respondent's Factual and Procedural Representations

Respondent's Brief, and particularly the statements set forth in the "Statement of the Case," contain representations that are not supported by the record and are otherwise misleading. First, Respondent misrepresents Appellant's Complaint as one "founded upon" or "rooted" solely in negligence. (Respondent's Brief, p. 1 and 14). This is incorrect. Even a cursory review of Appellant's Complaint establishes that Appellant's asserted three (3) separate and distinct causes of action, asserting claims against Respondent for Breach of Contract, Breach of Warranty, and Professional Negligence. (Complaint, R. p. 70).

Second, Respondent attempts to misconstrue Appellant's Professional Negligence claim by limiting its application to the performance of architectural design services, whereas the Complaint *specifically* asserts that Respondent was negligent in performing construction contract administration services, and not merely architectural design services. (R. pp. 71 and 76). Appellant's expert witness, a professional engineer, meets the criteria for serving as an expert witness under S.C. Code § 15-36-100(A)(3), because he is qualified to offer an expert opinion as to Respondent's performance of *construction contract administration services*, and possesses the necessary scientific, technical, and/or specialized knowledge, having performed the same type of services himself. (MIO to Motion to Dismiss, R. p. 231; Affidavit, ¶ 10, R. p. 302; See also Hearing Transcript, R. p. 292, line 24 to p. 296, line 4, addressing Mr. Hackney's qualifications under the statute). As noted in Respondent's own Return Brief, Mr. Hackney testified, "I feel comfortable talking about the standard of care that a professional would provide in either giving or completing construction administration services, whether that be an architect or an engineer. Those services are similar across the board of professionals, and I feel confident and comfortable talking about them." (Respondent's Brief, p. 5).

Third, Respondent misrepresents the procedural history of this case, speciously claiming that “Appellant consented to Respondent filing a renewed Motion to Dismiss without the necessity of court leave.” (Respondent’s Brief, p. 5). To the contrary, Appellant’s trial counsel stated that Appellant would challenge any such relief, “To be clear, your request for ‘leave of court,’ is a motion seeking court relief—and—it will be opposed.” (MIO to Motion to Dismiss, Exh. 4, Email dated March 23, 2021, R. p. 260). While Appellant’s counsel acknowledged that Respondent’s counsel could *file* whatever motion he pleased without leave of court, he absolutely did not consent to the relief sought in Respondent’s motion. (December 2, 2021 Hearing Transcript, R. p. 296, line 4 to p. 297, line 8). Respondent’s contention that “Appellant has waived any argument that Respondent missed the court-created deadline to object to Appellant’s Affidavit” is a strained and misguided effort to justify its three-and-one-half year delay in contesting the sufficiency of Mr. Hackney’s September 7, 2017 affidavit. Respondent also notably fails to cite any law or applicable equitable principle in support of its waiver argument.

Fourth, Respondent contention that it “acted promptly” and had no way of knowing in 2017, or several ensuing years, that Mr. Hackney “was not stating an opinion as to an architect’s standard of care” is directly contradicted by the record and Respondent’s own admissions. (Respondent’s Brief, p. 5). As noted in Appellant’s Brief, Respondent 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. (See 480 King’s Memo in Opposition; R. pp. 225-231; and Hackney Affidavit, R. pp. 301-302). Further, Respondent specifically alleged 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). Respondent further

alleged that it had “some questions as to the sufficiency of the affidavit [even] prior to Mr. Hackney’s [Deposition] testimony.” (Motion to Dismiss, R. p. 201, ¶ 11). Despite purporting to have said doubts and/or questions in November of 2017, Respondent failed to contest the sufficiency of the affidavit within the time period afforded by the circuit court. As noted in Appellant’s Brief, Respondent did not even bother to hold Mr. Hackney’s first deposition until over a year later in January of 2019 (See Motion to Dismiss, R. p. 197, at footnote 1). Thereafter, Respondent 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). There is absolutely no reason for Respondent’s three-and-one-half year delay in contesting the sufficiency of Mr. Hackney’s affidavit, which as discussed in Appellant’s Brief and hereinabove, clearly meets the criteria set forth under S.C. Code § 15-36-100(A)(3).

Having addressed the factual and procedural allegations contained in Respondent’s “Statement of the Case” and Respondent’s Waiver argument, Appellant now turns to the other enumerated arguments in Respondent’s Return Brief.

I. APPELLANT’S ARGUMENTS ARE CLEARLY PRESERVED, HAVING BEEN RAISED TO AND RULED UPON BY THE CIRCUIT COURT.

Despite Respondent’s contention, Appellant clearly argued that its Breach of Contract and Breach of Warranty Claims do not require an expert affidavit in order to survive Respondent’s Motion to Dismiss, noting that “[Respondent] Glick’s motion made no mention that [Appellant] 480 King has lodged **breach of contract and warranty claims** against [Respondent] Glick as [Appellant] 480 King and [Respondent] Glick were operating under a contract to perform contract administration services.” Emphasis added. (Memorandum in Opposition to Motion to Dismiss, R. p. 232). Appellant specifically argued that “an Affidavit of an expert witness is not needed to make a breach of contract or warranty claim,” and that

“[Appellant] 480 King has Contractual Claims pending against [Respondent] Glick that warrant a jury trial irrespective of its Negligence claim against [Respondent] Glick.” (Memorandum in Opposition, R. p. 232).

The Court, in turn, ruled upon these arguments, stating, “The Court read and considered all of these written submissions and thereafter, on December 2, 2021, heard oral argument from counsel for both parties,” and further finding, “In its Motion Defendant contends that the *claims* asserted against it by Plaintiff are *all* based upon its alleged negligent performance of professional services as an Architect, and that Plaintiff failed to file a proper Affidavit in support of *those* claims as required by S.C. Code Ann. §15- 36- 100(B). The Court agrees with those and other arguments presented by Counsel for Defendant and, as a result, grants the Motion.” Emphasis added. (Order, R. pp. 92-93). The record is clear that Appellant raised its argument to the circuit court, and the Court ruled upon it. Having done so, this argument is preserved. See *Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000), cited in Respondent’s own brief, and noting the well-settled principal that an issue or argument must have been raised to and ruled upon by the trial court in order to be preserved.

Further, as noted in Appellant’s Brief, 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. 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.” (Emphasis added). The statute does not encompass actions for breach of contract or breach of warranty. In fact, the statute specifically limits application of the contemporaneous affidavit requirement to *professional negligence* claims that require specialized learning, noting, “The contemporaneous filing requirement of subsection (B) is *not required* to support a pleaded specification of negligence involving subject

matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.” Emphasis added. S.C. Code § 15-36-100(C)(2). Here, Appellant’s Breach of Contract and Breach of Warranty claims are separate and distinct causes of action asserted against Respondent. Given that the statute does not require a contemporaneous affidavit for *regular* Negligence claims, it certainly does not require a contemporaneous affidavit for Breach of Contract and Breach of Warranty claims—causes of action that are not even addressed by the statute.

“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). Accordingly, it was error for the circuit court to dismiss Appellant’s actions for Breach of Contract and Breach of Warranty, theories of law where a contemporaneous affidavit is not statutorily required. (See Appellant’s Memo in Opposition, R. p. 232).

II. APPELLANT’S EXPERT MEETS THE STATUTORY REQUIREMENT FOR PROVIDING A CONTEMPORANEOUS AFFIDAVIT PURSUANT TO S.C. CODE § 15-36-100(A)(3).

As set forth in Appellant’s Brief and Memorandum in Opposition to Respondent 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. (Appellant's Brief, pp. 10-12; Memo in Opposition, R. pp. 229-232; Affidavit, R. pp. 301-302).

Contrary to Respondent'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 Respondent’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). Further, as noted in Appellant’s Brief, Mr. Hackney forms his specific opinion as to the Respondent’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, ¶ 10, R. p. 302).

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 Respondent’s performance of contract administration services. (See also Hearing Transcript, R. p. 292, line 24 to p. 296, line 4, addressing Mr. Hackney’s qualifications under the statute). While Respondent can certainly try to attack Mr. Hackney’s qualification at trial, he has met the threshold requirement set forth by the statute. 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.

III. ENGINEERS ARE STATUTORILY QUALIFIED TO REVIEW AND TESTIFY AS TO THE WORK OF ARCHITECTS PURSUANT TO S.C. CODE § 40-22-20.

Lastly, Respondent’s contention that Mr. Hackney, a professional engineer, is not qualified to opine as to construction administration services performed by an architect is contradicted by the very statutory definitions for “Engineer” and “Design Coordination”. Specifically, pursuant to S.C. Code §40-22-20(11), “Engineer” means a professional engineer as defined in this section.” Pursuant to S.C. Code § 40-22-20(7), “‘Design coordination’ includes the review and coordination of those technical submissions prepared by others, including as

appropriate and without limitation, consulting engineers, architects, landscape architects, surveyors, and other professionals working under the direction of the engineer.” (Emphasis added).

S.C. Code § 40-22-20(25) further defines “Practice of engineering” and specifically incorporates “Design coordination” and “the review of construction for the purpose of monitoring compliance with drawings and specification” (i.e. construction contract administration services) in said definition:

“Practice of engineering” means any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as commissioning, consultation, investigation, expert technical testimony, evaluation, design and design coordination of engineering works and systems, design for development and use of land and water, performing engineering surveys and studies, and the review of construction for the purpose of monitoring compliance with drawings and specifications, any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems projects, and industrial or consumer products or equipment of control systems, chemical, communications, mechanical, electrical, environmental, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property, and including such other professional services as may be necessary to the planning, progress, and completion of any engineering services. The mere execution, as a contractor, of work designed by a professional engineer or supervision of the construction of such work as a foreman or superintendent is not considered the practice of engineering. A person must be construed to practice or offer to practice engineering, within the meaning and intent of this chapter who: (a) practices any branch of the profession or discipline of engineering;

Accordingly, Respondents contentions regarding legislative intent are directly contradicted by the very definition adopted by the legislature as to Engineering. As evidenced by his affidavit and testimony, Mr. Hackney is more than qualified to offer an opinion as to Respondent’s construction administration services.

CONCLUSION

For those reasons set forth above, and in Appellant’ Brief, Appellant 480 King Street, LLC respectfully requests that this Court reverse the circuit court’s order granting Respondent’s

Motion to dismiss and remand this case for a trial on the merits. The order should be reversed because 1) Respondent was time-barred from contesting the sufficiency of the affidavit under the circuit court's prior December 17, 2017 Order, 2) Appellant's Complaint asserts three separate and distinct claims, including claims for Breach of Contract and Breach of Warranties, which do not require a contemporaneous affidavit under the statute, 3) Appellant's Professional Negligence Claim involves Respondent's performance of Construction Contract Administration Services, and not merely architectural design services, 4) 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 Respondent's performance of Contract Administration Services, possessing the necessary scientific, technical, and/or specialized knowledge, and having performed the same type of services himself. Further, contrary to Respondent's contention, Appellant's arguments are clearly preserved, having been raised and ruled upon by the circuit court. And lastly, Respondent's contention that Mr. Hackney, a professional engineer is not qualified to opine as to construction administration services performed by an architect is contradicted by the very definitions for Engineer and Design Coordination.

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CERTIFICATE OF COMPLIANCE

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

[Signature on following page]

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