

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)
 ARM Quality Builders LLC d/b/a,)
 ARM Quality Builders,)
)
 Plaintiff(s),)
)
 v.)
)
 Joseph A. Golson and Lycia B. Golson)
 and Branch Banking and Trust Company,)
)
 Defendants)
)
 _____)
 Joseph A. Golson and Lycia B. Golson,)
)
 Third-Party Plaintiffs)
)
 v.)
)
 Ahmad Mazloom,)
)
 Third-Party Defendant)
 _____)

IN THE COURT OF COMMON PLEAS

Case No.: 2017-CP-32-02204

**ORDER GRANTING MOTION TO
DISSOLVE MECHANIC'S LIEN AND
DISMISSAL OF MECHANIC'S LIEN
FORECLOSURE CAUSE OF ACTION**

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SC Court of Appeals

This case came before this Court on September 10, 2018 for a hearing on Defendants' motion to Dissolve Mechanic's Lien. Plaintiff has entered suit against Defendants for breach of contract and foreclosure of a mechanics' lien in connection with the construction of defendants Joseph Golson and Lycia Golson's home ("the Project"). Defendants moved to dissolve Plaintiffs' mechanic's lien and for an award of attorneys' fees on the grounds that (1) the Mechanic's Lien was filed after the expiration of the 90-day statutory filing period, and (2) Plaintiff failed to properly serve the Mechanic's Lien on Defendants as required by S.C. Code Ann § 29-5-90.

At the September 10, 2018 hearing, the Court considered excerpts of deposition testimony of Ahmad Mazloom, the filed and recorded Mechanic's Lien, the pleadings, an affidavit of

Plaintiff's process server dated September 10, 2018, Plaintiff's Brief filed September 10, 2018 and the materials attached thereto. The parties were also given an opportunity after the hearing to submit discovery relating to the February 16, 2017 Winnsupply invoice that Plaintiff offered at the hearing. The Court did not consider any argument or evidence related to the reasonableness of the attorney's fees requested.

Undisputed Facts

Plaintiff is a licensed residential contractor. Defendants hired Plaintiff to construct a new residence on their Property located at 207 Libby Airail Lane in Chapin, South Carolina ("the Home"). Plaintiff testified at his deposition, and Defendants affirmed in their own affidavits, that the Project was completed in January 2017 and that no additional work was performed by or on behalf of Plaintiff after January 2017. After Defendants moved into the Home in January 2017, Plaintiff presented Defendants with a final bill dated February 11, 2017 in the amount of \$55,085.52, which Defendants disputed Plaintiff was owed.

Defendants retained E. Wade Mullins for the purpose of facilitating a pre-litigation resolution between the parties. James Randall Davis represented Plaintiff. On April 17, 2017, Plaintiff voluntarily produced the invoices and receipts it claimed relate to the Project to Defendants. A Winnsupply invoice dated February 16, 2017 for various plumbing items, including bath and shower drains and pvc pipe fittings, was included in the documents. The invoice indicates the plumbing items were shipped on February 16, 2017, but it does not identify a delivery address or otherwise reference the Project.

On May 11, 2017, Plaintiff filed a Notice and Certificate of Mechanic's Lien against Defendant's property in the amount of \$55,085.52 along with an affidavit of non-service, which indicates an unsuccessful attempt was made to serve Defendants at the Home on May 9, 2017. The

process server attested in a subsequent affidavit that he taped a copy of the Lien to the front door of the Home on May 9, 2017.

On May 15, 2017, Plaintiff's counsel emailed a courtesy copy of the Lien to Defendants' counsel. The email did not include a request that Mr. Mullins accept service of the Lien on behalf of Defendants, and there is no evidence Mr. Mullins agreed to do so. Defendants stated in their respective affidavits that they never authorized Mr. Mullins, Ms. Heyward, or any other person or entity to accept service of the Lien on their behalf.

On June 15, 2017, Plaintiff filed the present suit to foreclose the Mechanic's Lien. Plaintiff successfully served a copy of the Summons and Complaint on Defendants at their Home on June 23, 2017. A copy of the Mechanic's Lien is not attached to the Complaint. Defendants were never personally served a copy of the Mechanic's Lien, and a copy was never mailed to Defendants via certified mail. Only one attempt was ever made to serve the Lien upon Defendants, which was unsuccessful.

Discussion

- I. **The Mechanic's Lien should be dissolved since Plaintiff failed to file and serve the lien as required by S.C. Code Ann § 29-5-90.**

"Because a mechanic's lien exists only by virtue of statute, one's right to a mechanic's lien is wholly dependent upon the language of the statute creating it." *Clo-Car Trucking Co., Inc. v. Cliffure Estates of South Carolina, Inc.*, 282 S.C. 573, 575, 320 S.E.2d 51, 53 (Ct. App. 1984). To be valid, a mechanics lien must be perfected and enforced in compliance with the Mechanic's Lien Statutes. In order to perfect and enforce a mechanic's lien, it must be both served on the owner of the property and filed within 90 days of the last date of work or it is dissolved, and a suit to foreclose a dissolved lien cannot be maintained:

Such a lien shall be dissolved unless the person desiring to avail himself thereof, **within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, serves upon the owner or, in the event the owner cannot be found, upon the person in possession and files** in the office of the register of deeds or clerk of court of the county in which the building or structure is situated a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien sufficiently accurate for identification, with the name of the owner of the property, if known, which certificate shall be subscribed and sworn to by the person claiming the lien or by someone in his behalf and shall be recorded in a book kept for the purpose by the register or clerk who shall be entitled to the same fees therefor as for recording mortgages of equal length. **Provided, that in the event neither the owner nor the person in possession can be located after diligent search, and this fact is verified by affidavit of the sheriff or his deputy, the lien may be preserved by filing the statement together with the affidavit.** The delivery on the register or clerk for filing, as provided in this section, shall be and constitute the delivery contemplated with regard to such liens in Title 30 of this Code.

S.C. Code Ann. § 29-5-90 (emphasis added). *See also Preferred Sav. & Loan Assn.*, 301 S.C. at 3-4, 389 S.E.2d at 854; *Franke Associates by Simmons v. Russell*, 295 S.C. 327, 329, 368 S.E.2d 462, 463 (1988); *Multiplex Bldg. Corp. v. Lyles*, 268 S.C. 577, 235 S.E.2d 133 (1977); *Crystal Pools, Inc. v. Old Claussen's Bakery Partners*, 303 S.C. 68, 399 S.E.2d 5 (Ct. App. 1990); *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985).

A. The Mechanic's Lien should be dissolved and the foreclosure action dismissed because the lien was filed after the expiration of the 90-day statutory filing period.

Where a statute creating a lien gives rise to a claim which does not exist under common law, strict compliance with the statute is required to be entitled to claim rights the lien. *Lyles*, 268 S.C. at 578, 235 S.E.2d at 134. *Multiplex Bldg. Corp. v. Lyles*, 268 S.C. 577, 235 S.E.2d 133 (1977) (holding that failure to file statutorily-required notice of pendency of mechanic's lien action mandated dismissal of action); *Muller v. Myrtle Beach Golf & Yacht Club*, 303 S.C. 137, 140-

41, 399 S.E.2d 430, 432 (Ct. App. 1990), *overruled on other grounds by Myrtle Beach Hosp, Inc. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000) ("A mechanic's lien is purely statutory. Therefore, the requirements of the statute must be strictly followed. If anyone of these requirements is not met, the lien against the property is dissolved").

A court does not have equitable powers to reform an erroneous filing to give a claimant rights under an improperly filed lien. Because lien statutes are in derogation of common law, they should be construed against lien claimants. Indeed, our courts have strictly enforced the 90-day statutory filing period. *See e.g. Franke Associates v. Russell*, 295 S.C. 327, 368 S.E.2d 462 (1988) (action to foreclose mechanic's lien dismissed and mechanic's lien dissolved where plaintiff filed mechanic's lien 19 days after the expiration of the 90-day statutory filing period required by S.C. Code § 29-5-90).

The precise date Plaintiff last supplied labor or materials to the Project is unknown. However, there is no evidence in the record that any labor or materials were provided or incorporated into the Project after January 2017. Mr. Mazloom, Plaintiff's 30(b)(6) witness, testified the last work performed on the Project was the backsplash installation in the in the kitchen. Mazloom also testified the Project was complete in early January 2017 and he presented a final bill to Defendants on February 11, 2017.¹ The Defendants affirmed in their affidavits that they obtained a certificate of occupancy and moved into the house in January 2017, and they also

¹ Plaintiff alleges in its unverified Complaint that the last date of work was February 11, 2017. Compl. ¶7. However, Plaintiff testified clearly and directly in his deposition that the last date of work was in January 2017 and that the February 11, 2017 date relates to the final bill. Plaintiff is required to produce sufficient evidence supporting the fact disputed and cannot rest on his allegations in the Complaint to overcome summary judgment. The only evidence before the Court indicates no work was completed after January 2017.

confirmed Mr. Mazloom's testimony that neither Plaintiff nor any of his subcontractors or suppliers performed any work on the Project after January 2017.

At the hearing, Plaintiff's counsel presented a Winnsupply invoice that indicates certain plumbing supplies ordered on Plaintiff's account were shipped on February 16, 2017. Plaintiff argued its 90-day filing period was not triggered until that date. However, the invoice is dated 5 days after Plaintiff's final bill, no delivery address is indicated, and there is no information on the invoice relating it to the Project. Moreover, the invoice relates to pvc pipes, drains, and plumbing kits, which are not items that could reasonably be used to install kitchen backsplash. Plaintiff's Mechanic's Lien is for \$55,085.52, the exact amount of Plaintiff's final bill. Plaintiff offered no explanation as to how an invoice that post-dates the final bill by nearly a week could reasonably be included in the amount claimed by Plaintiff.

Defendants stated in their affidavits that the bathrooms were finished and all plumbing work was completed by January 2017 at the latest. Plaintiff was unable to present any evidence connecting the February 16, 2017 invoice to the Project at issue other than the fact it was produced in response to discovery requests. There is no evidence upon which a jury could reasonably conclude Plaintiff's 90-day statutory deadline began to run any time after January 2017. As such, Plaintiff has not produced a scintilla of evidence sufficient to overcome summary judgment on this issue.

I find the Project was complete and no work was performed by or on behalf of Plaintiff after January 2017. Assuming January 31st, 2017 (the latest conceivable date Plaintiff could have performed any work on the Project) was the last date of work, Plaintiff should have filed and served its Notice of Mechanic's Lien on or before May 1, 2017. Construing the evidence in the light most favorable to Plaintiff, Plaintiff filed its Mechanic's Lien a minimum of 10 days after the expiration

of the 90-day deadline. I find Plaintiff's Mechanic's Lien is untimely and is therefore DISSOLVED in accordance with S.C. Code Ann. § 29-5-90. Defendants' Motion to Dissolve Mechanic's Lien is hereby GRANTED and Plaintiff's action to foreclose mechanic's lien is hereby DISMISSED as a matter of law.

B. Plaintiff failed to serve the Mechanic's Lien upon Defendants in accordance with § 29-5-90.

A lien claimant is required to serve a copy of the lien on the property owner or the lien is automatically dissolved. S. C. Code Ann. § 29-5-90; *see also Utilities Constr. Co. v. Wilson*, 321 S.C. 244, 468 S.E.2d 1 (Ct. App. 1996) (holding property owner was "prevailing party" and entitled to attorney fees where trial court directed a verdict in favor of property owner on construction company's mechanic's lien action on the ground company failed to timely serve notice of the mechanic's lien). There is only one exception to this rule: In the event neither the property owner nor the person in possession of the property can be located, service is affected upon (1) obtaining an affidavit from the sheriff or his deputy that, after 'diligent search,' neither the owner nor the person in possession of the property can be located, and (2) by filing the affidavit together with the claim of lien. *Id. See also* A. Bright Ariail & Calvin T. Vick, Jr., *South Carolina Construction Law Desk Book*, p. 411 (2013). The purpose of requiring service of notice of the mechanic's lien is to advise a property owner of the existence of the lien and to afford him or her an opportunity to investigate the claim and determine its validity.

Here, Defendants moved into their Home in January 2017. Only one attempt to serve Defendants was made on May 9, 2017, which was unsuccessful. According to an affidavit of the process server, a copy of the lien was taped to the front door of the house on May 9, 2017; however, Defendants denied they ever found a copy taped to the door or posted anywhere on the Home. On

May 11, 2017, Plaintiff filed the Lien with an affidavit of non-service. Plaintiff did not obtain or file an affidavit of diligent search from the Lexington County Sheriff.

On May 15, 2017, Plaintiff's counsel emailed a copy of the Lien to Mr. Mullins. Plaintiff filed suit to foreclose the lien on June 15, 2017, and a process server successfully served Defendants a copy of the Summons and Complaint at their Home on June 23, 2017. A copy of the Lien was not attached to the Complaint, and no other attempt was made to serve the Lien on Defendants.

At the hearing, Plaintiff argued service was affected when Mr. Davis emailed a copy of the lien to Mr. Mullins on May 15, 2017, citing SCRCF 5. However, Plaintiff cited no authority that provides the South Carolina Rules of Civil Procedure may supersede statutory notice and service requirements. Nevertheless, Rule 5 applies to 11 specific types of pleadings and other papers enumerated in SCRCF 5(a), and mechanic's liens are not among them. SCRCF 5(b) permits service of the pleadings enumerated in 5(a) on an attorney; however, implicit in the rule is that the attorney has made a formal appearance in a civil action. Here, no formal appearance was made on behalf of Defendants, there is no evidence Mr. Mullins was asked or agreed to accept service on their behalf, and there is no evidence Defendants authorized Mr. Mullins to do so.²

It is essential to adhere strictly to the statutory notice and service requirements. Taping a copy of the lien to the property will not cure a defect in the actual service of a notice of mechanic's lien claim as to perfect the lien. If the statute will allow a lien claimant to avoid service only after a diligent search and an affidavit from the Sheriff, then certainly taping a lien to the front door of

² Moreover, service on an attorney under Rule 5 requires hand delivery to the attorney's office or delivery by service by mail. Even assuming a mechanic's lien may properly be served on an owner's attorney pursuant to SCRCF 11, which it may not, service via email is improper even under the less stringent Rule 11(b).

a house does not comply with § 29-5-90.³ Plaintiff made only one attempt to serve Defendants at the Home and could have easily avoided this issue with a second attempt. It is clear Defendants could be found and served at the Home. Indeed, Plaintiff had no issue serving Defendants a copy of the Summons and Complaint a few weeks later.

I find that Defendants were required to be served a copy of the Mechanic's Lien in accordance with S.C. Code Ann. § 29-5-90. I find SCRCP 5 does not permit service of a Mechanic's Lien on an attorney on behalf of a person required to be served under S.C. Code Ann. § 29-5-90, and Rule 5 does not otherwise supersede the service and notice requirements of the Mechanic's Lien Statutes. Because Plaintiff failed to serve the Mechanic's Lien upon Defendants, Plaintiff's Lien is DISSOLVED and Plaintiff's action to foreclose is DISMISSED.

II. Defendants are entitled to an award of attorneys' fees.

A. An award of attorneys' fees in favor of Defendants is mandatory because Defendants are the prevailing party.

S.C. Code Ann. § 29-5-10(a) requires the court to award reasonable attorney's fees and costs to the party defending against the mechanic's lien if the defending party "prevails" in the action.⁴ *Keeney's Metal Roofing, Inc. v. Palmieri*, 345 S.C. 550, 553-54, 548 S.E.2d 900, 902 (Ct.

³ S.C. Code Ann. § 29-5-90 does not specify a manner of service; however, "[a] [mechanic's lien] statute requiring that notice be served on the owner contemplates personal service, and it is not sufficient that such notice is sent by registered mail or delivered to the residence of the owner." 53 Am. Jur. 2d Mechanics' Liens § 186. Whether an owner may be served a Mechanic's Lien by registered mail remains an open question in South Carolina; however, there is no evidence Plaintiffs attempted service by regular or certified mail and that issue is not before Court at this time.

⁴ S.C. Code Ann. § 29-5-10(a) provides in relevant part as follows: "A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate . . . shall have a lien upon the building or structure and upon the interest of the owner of the building or structure in the lot of land upon which it is situated to secure the payment of the debt due to him. The costs which may arise in

App. 2001); *Utilities Constr. Co. v. Wilson*, 321 S.C. 244, 248, 468 S.E.2d 1, 3 (Ct. App. 1996) ("[T]he Legislature ... intended to afford a property owner [the] remedy [of recovering attorney's fees and costs] where a mechanic attempts to enforce a defective or wrongful mechanic's lien.").

Importantly, whether to award attorney's fees is not discretionary. In other words, if a party defending the lien prevails, the Court must award the prevailing party costs of the action and reasonable attorney's fees regardless of the outcome of any remaining causes of action. *Trico Surveying v. Godley Auction Co.*, 314 S.C. 542, 545, 431 S.E.2d 565, 567 (1993). Once the Court determines a party has prevailed, the determination of what amounts to a reasonable fee is within the sound discretion of the Court.

Our courts have defined "prevailing party." *See Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990) (defining "prevailing party" as: "[T]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention ... the one in whose favor the decision or verdict is rendered and judgment entered."); *Seckinger v. Vessel Excalibur*, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997) (stating the defendant is entitled to an award of attorney's fees as the "prevailing party" if the trial court determines a mechanic's lien cannot be enforced against the defendant); *Cedar Creek Props. v. Cantelou Assocs., Inc.*, 320 S.C. 483, 486, 465 S.E.2d 774, 776 (Ct. App. 1995) (finding property owner was entitled to attorney's fees from contractor who filed a mechanic's lien against property owner, but ultimately cancelled it before the property owner's action to dissolve the lien was taken up by the Circuit Court); *Maddux Supply Co. v. Safhi, Inc.*, 316 S.C. 404, 450 S.E.2d 101 (Ct. App. 1994) (affirming the trial court's ruling that project owner

enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party." (emphasis added).

who won on the merits of a mechanic's lien foreclosure action was the "prevailing party" and entitled to recover attorney's fees and costs on behalf of contractor who obtained a surety bond and provided for project owner's legal defense).

Having found Plaintiff's Mechanic's Lien is dissolved because the time for enforcing the lien expired before it was filed and Plaintiff failed to serve the Lien upon Defendants in accordance with S.C. Code Ann. § 29-5-90, I find Defendants are entitled to an award of attorney's fees as the prevailing party.

B. Reasonableness of fees requested.

Defendants seek an award of attorney's fees in accordance with § 29-5-10(a) and submitted an affidavit of attorney's fees. At the hearing, the Court did not hear arguments from counsel or consider evidence regarding the reasonableness of the fees requested. Therefore, Defendants therefore shall have seven (7) days from the date of this order to supplement and produce any additional evidence in support of their claim for fees. Plaintiff shall have seven (7) days following Defendants' supplemental filing to supplement and produce any additional evidence in opposition of Defendants' claim for attorney's fees.

Conclusion

The time for enforcing Plaintiff's Mechanic's Lien expired before it was filed, and Plaintiff failed to serve the Lien upon Defendants in accordance with S.C. Code Ann. § 29-5-90. Defendants' Motion to Dissolve Mechanic's Lien is hereby GRANTED. Plaintiff's Mechanic's Lien is DISSOLVED and Plaintiff's action to foreclose the Mechanic's Lien is DISMISSED. Having successfully defended the Mechanic's Lien, Defendants are entitled to an award of attorney's fees as the prevailing party. Defendants are permitted seven (7) days following the entry of this Order to submit additional evidence and argument in support of their claim for fees.

Plaintiff shall have seven (7) days following Defendants' supplemental filing to supplement and produce any additional evidence in opposition of Defendants' claim for attorney's fees. Upon review of the additional submissions, the Court will issue an order awarding reasonable attorney's fees.

IT IS SO ORDERED.

The Honorable Clifton Newman
Presiding Judge, Eleventh Judicial Circuit

Columbia, South Carolina



Lexington Common Pleas

Case Caption: ARM Quality Builders LLC , plaintiff, et al VS Joseph A Golson
Case Number: 2017CP3202204
Type: Order/Other

So Ordered

s/ Clifton B. Newman, 2127