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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2024-000753
Case No.: 2019-CP-10-01108

Balfour Beatty Construction, LLC,
Appellant,

v.

Library Associates, LLC; and Metropolitan Life Insurance Company, a New York Corporation,
Defendants,

And

Library Associates, LLC
Third-Party, Plaintiff

v.

Lithko Contracting, LLC, Guy M. Beaty, Inc., Bernard MMC, LLC, Gulf Stream Construction Company, Inc., Precision Walls, Inc., Palmetto Automatic Sprinkler Company, Inc., Cook & Boardman, LLC, Strong Tower Construction, LLC d/b/a Koch Corporation, Watson Electrical Construction Co., LLC, Trimark Foodcraft, LLC, Pleasant Places, Inc., David Allen Company, Inc., Premier Exteriors, LLC, Warco Construction, Inc., Old North State Masonry, LLC, Tom Rochester & Associates d/b/a Southeastern Architectural Systems, Forton Company, LLC, Low Country Case & Millwork, Inc., Quantum Coatings, LLC, Balfour Beatty Construction Group, Inc.,

Third-Party Defendants.

Of which Strong Tower Construction, LLC d/b/a Koch Corporation and Watson Electrical Construction Co., LLC are the Respondents.

RESPONDENT WATSON'S INTIAL BRIEF

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. **THE MASTER PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT ON WATSON ELECTRICAL'S MOTION FOR SUMMARY JUDGMENT ON ITS BREACH OF CONTRACT CLAIM AGAINST BALFOUR BECAUSE PARTIAL SUMMARY JUDGMENT IS AUTHORIZED BY RULE 56, SCRPC.**
- II. **THE MASTER PROPERLY AWARDED ATTORNEYS' FEES TO WATSON ELECTRICAL BECAUSE A CONTRACT PROVISION AUTHORIZED AWARDING SUCH ATTORNEYS' FEES.**

STATEMENT OF THE CASE

This appeal arises out of the construction of the Hotel Bennett ("Project") in Charleston, South Carolina owned by Library Associates, LLC ("Owner"). Balfour Beatty Construction, LLC ("Balfour") was the construction manager for the Project pursuant to an agreement with Owner, which agreement included a cost-plus with a guaranteed maximum price. (October 6, 2023, Order p. 3). Balfour entered into a subcontract with Watson Electrical Construction, Co., LLC ("Watson"), pursuant to which Watson furnished labor, materials and services relating to certain electrical systems for the Project ("Subcontract"). (September 13, 2021, Order p. 2).

On March 5, 2019, Balfour commenced this action, C.A. No. 2019-CP-10-01108, against Owner asserting various causes of action, including a foreclosure of mechanic's lien action. (R. ____). In response to Balfour's Complaint, Owner filed an Answer and Counterclaims. (R. ____). On May 15, 2019, Owner filed a Second Amended Answer, Counterclaims and Third-Party Complaint. (R. ____). Owner's Counterclaims against Balfour included claims, among others, of: (a) breach of contract, (b) breach of contract accompanied by fraudulent act, and (c) civil conspiracy. (R. ____). Owner's Third-Party Complaint included claims against numerous subcontractors, including Watson, for declaratory judgment and civil conspiracy. (R. ____).

On June 27, 2019, Watson filed an Answer to Owner's Third-Party Complaint, asserted Crossclaims against Balfour, and asserted Counterclaims against Owner. (R. ____). Watson's

Crossclaims against Balfour included, among other claims, a breach of contract claim based on Balfour's failure to pay Watson. (R. __). Watson's Counterclaims against Library included mechanic's lien foreclosure, quantum meruit, and negligence claims. (R. __).

On November 18, 2019, the circuit court entered an order consolidating various subcontractor cases with Balfour's case against Owner, and referring the case to the Charleston County Master-In-Equity, the Honorable Mikell R. Scarborough (the "Master") (R. __).

On August 20, 2021, Watson filed a Motion for Summary Judgment and Alternative Motion for Partial Summary Judgment. (Watson Motion for Summary Judgment). In its Motion, Watson sought summary judgment, or alternatively partial summary judgment, against Balfour for breach of the Subcontract for failing to pay Watson amounts owed including retainage. (Id. at 1). In support of its Motion, Watson relied on an affidavit, Rule 30(b)(6) deposition testimony of Balfour, Rule 30(b)(6) deposition testimony of Owner, and deposition testimony of Timothy Spano. (Id. at pp. 2-4). In opposition to Watson's Motion, Balfour "argued that genuine issues of material fact exist because the Owner's representatives and experts might, at trial, allege damages for delays or for defective construction that should be passed through [Balfour] to Watson, therefore this Court cannot arrive at a figure owed to Watson." (Balfour's Memorandum in Opposition to Summary Judgment p. 5).

On September 13, 2021, the Master granted partial summary judgment to Watson against Balfour in the amount of \$921,671.39, plus attorneys' fees and costs of \$253,189.30, and interest of \$185,375.89, for a total of \$1,360,236.58. (September 13, 2021, Order p. 8). The Master's Order stated in part,

The completion of the Project was delayed. [Balfour] blames the Owner for Project delays. The Owner blames [Balfour] for the Project delays. Despite the Owner blaming [Balfour] for Project delays, ... Watson did not delay completion of the Project. Additionally, [Balfour] did not blame Watson for the Project delays. [Balfour] failed to offer any facts

through affidavit, deposition testimony or otherwise in opposition to Watson's motion that would show this court that there is a genuine issue of material fact about whether Watson delayed completion of the Project. (Id. at 2-3.)

Watson sought damages in the amount of \$1,859,359, [Balfour] failed to pay Watson for the labor, materials and services Watson performed at the Project.... [Balfour] did not show any facts, which could create a genuine issue of material [] fact, in opposition to Watson's damages amount. (Id. at 3).

It is ... undisputed that [Balfour] failed to pay Watson ... It is similarly undisputed that Watson did not delay the completion of the Project. Watson presented this Court with an affidavit to show that [Balfour] owes Watson \$1,859,359, and [Balfour] did not present anything to show that the amount Watson claims is incorrect. (Id. at 3-4).

Despite the extensive discovery in this case, including the depositions of the Owner and all its experts, [Balfour] was unable to offer any competent evidence that could show that Watson delayed the completion of the Project, failed to complete its work, or performed defective work. If evidence exists that could show this Court that [] there is a genuine issue of material fact about whether Watson delayed the Project, or whether Watson performed defective work, [Balfour] failed to show this Court. (Id. at 4).

Article 10.D of Watson's subcontract with [Balfour], which addresses disputes resolved by litigation, states, 'The prevailing party will be entitled to recover reasonable attorneys' fees and court costs in connection with any such litigation. This Court, therefore, finds that the contract contains a provision entitling Watson to an award of attorneys' fees. (Id. at 5-6).

On September 8, 2021, Watson filed a Motion for Entry of Judgment against Owner asking the Master to grant judgment to Watson under S.C. Code Ann. § 29-5-20 because Watson accepted Owner's offer of settlement under the same statute. (September 8, 2021, Motion). On September 14, 2021, the Master granted Watson's motion for judgment against the Owner, ending Watson's mechanic's lien foreclosure action against the Owner. (September 14, 2021, Order).

On September 23, 2021, Balfour filed a motion to reconsider the Order granting partial summary judgment to Watson. (Balfour Motion to Reconsider). Balfour’s motion to reconsider included only two arguments: (1) Watson’s claims arise under Article 10.B of the Subcontract; and (2) Balfour is entitled to withhold payment from Watson because a setoff against Watson may result should the Court conclude that Watson caused delay that results in damages against Balfour in favor of Owner. (Id. at 2-5). On March 7, 2024, Balfour filed a memorandum in support of its motion for reconsideration. (Balfour Memorandum in Support of Motion to Reconsider). On April 12, 2024, the Master issued an Order denying Balfour’s motion for reconsideration of the Order granting Watson partial summary judgment. (April 12, 2024, Order).

On December 1, 2021, during trial, and before Watson’s case in chief, Balfour and Watson stipulated to a “dismissal without prejudice of Watson’s Remaining Claims against Balfour ... Remaining claims means all claims not already decided by summary judgment.” (December 1, 2021, Stipulation of Dismissal). The dismissal also states, “This stipulation does not affect Watson’s judgment against Balfour, which was granted and ordered by this Court on Watson’s Motion for Partial Summary Judgment.” (Id. at 2).

On November 22, 2021, after trial started, but before the trial was completed, “Balfour issued payment to Watson in the amount of \$208,188.73 (Balfour trial Exhibit No. 351).” (Apr 22, 2024, Balfour Motion for Reconsideration of Order Denying Motion for Reconsideration p. 2). Balfour made the payment to Watson because Balfour had received the funds from the Owner during construction, many months earlier, for work performed by Watson on the Project, but had never paid the funds to Watson. (Trial Trans. 4387:11 – 4390:16).

At trial, after Watson’s and Balfour’s stipulation of dismissal, Watson’s only remaining claim was a negligence claim against Owner. (R. __). The Master granted Owner directed verdict on Watson’s negligence claim. (R. __).

On October 6, 2023, after trail, the Master issued his Order and Judgment against Balfour. (October 6, 2023, Order). In the Master’s October 6, 2023 Order, the Master found in part:

[Balfour] is NOT contractually entitled to recover for any of the [Requests for Change Orders,] RCOs, contained in Plaintiff’s Ex. 12. I further find that [Balfour] submitted forty-one (41) requests for change orders, totaling in excess of \$2.3 million, for which it had no entitlement due to its failure to follow the Contract terms. (Id. at 29).

Balfour failed to put up a single subcontractor witness.... (Id.)

[Balfour] came into this Court and sought to recover amounts it had previously been paid by Owner, but had not in turn paid to subcontractors as it certified that it had paid. (Id.)

[Balfour] NEVER submitted a final payment request or documentation required pursuant to [the Prime Contract] prior to commencement of the trial.” (Id. at 14).

[P]rior to the award of any set off amounts for liquidated or other damages, there remains a ‘delta’ or maximum balance potentially owed to [Balfour] of \$419,425.00. (Id. at 16).

Due and owing to the fact that [Balfour] is not owed any amounts under the Contract, it follows that [Balfour’s] foreclosure [and breach of contract actions] must be dismissed. (Id. at 37).

STANDARD OF REVIEW

“When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCF summary judgment is proper when

there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Coker v. Cummings*, 381 S.C. 45, 51, 671 S.E.2d 383, 386 (2008). To defeat a motion for summary judgment, the opposing party must show the court more than a “mere scintilla” of evidence. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 465, 892 S.E.2d 297, 301 (2023). To defeat summary judgment, “it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” (*Id.*)

ARGUMENT

I. THE MASTER PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT ON WATSON ELECTRICAL’S MOTON FOR SUMMARY JUDGMENT ON ITS BREACH OF CONTRACT CLAIM AGAINST BALFOUR BECAUSE PARTIAL SUMMARY JUDGMENT IS AUTHORIZED BY RULE 56, SCRPC.

The Master properly granted partial summary judgment to Watson. Balfour argues that because the Master’s Order did not completely resolve Watson’s breach of contract cause of action, entry of partial summary judgment was improper. Balfour’s argument fails for multiple reasons. First, Balfour failed to preserve this argument for appeal by raising it at the trial court level. As a result of Balfour’s failure to present this argument to the trial court, the Court of Appeals cannot consider this argument now for the first time on appeal. Second, and contrary to Balfour’s argument, South Carolina law permits partial summary judgment as to a portion of a claim. Finally, after the trial court’s ruling, Watson dismissed the remaining portion of its breach of contract claim against Balfour, so nothing remains to be decided, and Balfour’s argument is therefore not only legally wrong, but moot.

A. Balfour Failed to Preserve This Argument for Appeal.

In Balfour’s August 27, 2021 Memorandum in Opposition to Watson’s Motion for Summary Judgment, and at the hearing on the Motion, Balfour never raised the issue it is now raising for the first time on appeal: that summary judgment as to a portion of a claim is improper

as a matter of law. This is the case even though Balfour expressly recognized during the summary judgment proceedings that Watson was seeking summary judgment as to part of its breach of contract claim. (Balfour Memorandum in Opposition to Summary Judgment by Watson, p. 3) (“Additionally, Watson is not entitled to partial summary judgment as to any portion of its claimed damages.”)

Balfour’s failure to raise this argument at the trial court precludes consideration of the issue on appeal. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”) citing *Creech v. South Carolina Wildlife and Marine Resources Dep’t*, 328 S.C. 24, 33-34, 491 S.E.2d 571, 575-576 (1997)). (See also *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Accordingly, this Court should affirm the Master’s Order granting partial summary judgment to Watson.

B. South Carolina Law Allows for Partial Summary Judgment as to Part of a Claim.

Even if the Court were to consider Balfour’s argument for the first time on appeal, Balfour’s argument that Rule 56, SCRCF, does not authorize judgment on a portion of a claim ignores the plain language of Rule 56, ignores South Carolina case law expressly permitting summary judgment as to a portion of a claim, and fails to acknowledge that there is a split of federal authority on this issue.

Balfour’s argument conveniently ignores the plain language of Rule 56(a), which provides that:

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. See SCRCF, Rule 56(a) (emphasis added).

The plain language of Rule 56(a) expressly permits a party to seek summary judgment on all or any part of a claim.

Furthermore, nothing in Rule 56(d), which is heavily cited by Balfour, precludes that which is expressly permitted by Rule 56(a). Part (d) simply provides that if a trial is necessary on any issues, the court may, if practicable, make an order specifying the facts that appear without controversy and direct further proceedings that are just. The language of Rule 56(d), which by its express terms is merely an option for the trial court to consider, does not modify or control the express language of part (a) permitting summary judgment on any part of a claim.

Further to this point, parts (a) and (d) can and should be read in harmony with each other, giving effect to every word of each provision. Balfour's argument, however, would render part (a)'s "or any part thereof" language meaningless. See *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (the court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless).

Balfour relies on *Chambers v. Pingree*, 334 S.C. 349, 356, 513 S.E.2d 369, 373 (Ct. App. 1999) to support its position, but Balfour's reliance on *Chambers* is misplaced. In *Chambers*, the Court of Appeals determined that summary judgment on a promissory note was improper because there was a genuine issue of material fact concerning whether any monies were owed. *Id.* at 354-55, 513 S.E.2d at 373. The ruling was predicated on the fact that a promissory note is a promise to pay a *sum certain* in money. "By definition then, a party cannot establish a right to recover on a promissory note yet need a damages hearing to ascertain if any amount is due unless the maker acknowledges that some amount is due." (*Id.*) This Court then limited its holding in *Chambers* by stating, "[i]n these circumstances, partial summary judgment is simply illogical." *Id.*

In *Chambers*, this Court also criticized the trial court's failure to determine whether a genuine issue of fact existed and failure to make any findings of fact, which failures required the underlying facts to be re-litigated at a subsequent trial – a practice that would be antithetic to summary judgment. *Id.* at 356, 513 S.E.2d at 373.

Balfour's selective quotes from *Chambers* are inapplicable to the present case. This case does not involve a promissory note, and the Master's order does not require the parties to re-litigate any facts at trial. Instead, in this case, the only question left for determination after partial summary judgment was, is Watson entitled to more money. More broadly, *Chambers* does not even address the general propriety of granting partial summary judgment as to a portion of a claim. Other South Carolina cases, however, expressly permit partial summary judgment as to a portion of a claim.

For example, in *Bank of America v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013), this Court affirmed summary judgment as to only a portion of the bank's claim for damages in a foreclosure action. The appellants argued that the master erred in granting the bank's motion for summary judgment because there were competing affidavits on damages that created a question of fact. This Court agreed as to part of the claimed damages, but affirmed summary judgment as to the remaining portion of the bank's damages, stating:

“There is a material question of fact but only in regards to the charges in the affidavit that occurred after September 9, 2011, for inspections and lawn cutting. Those charges totaled \$375 for lawn cutting and \$170 for inspections, amounting to \$545. Henrikson lived in the house at the time of the charges and his affidavit indicating those inspections and lawn cutting did not occur raised an issue of material fact. However, because Appellants have not provided any evidence to dispute the other charges, this does not raise an issue of credibility to the entire amount of charges. Accordingly, the master's grant of summary judgment as to only this part is reversed and remanded for a decision on the charges for grass cutting and inspections after September 9, 2011.” *Id.* at 224-25, 746 S.E.2d. at 483.

In other words, summary judgment was appropriate as to only a portion of the bank's claimed damages, and the remaining portion of damages (those occurring after September 9, 2011), would be determined at a subsequent trial.

Here, as in *Draper*, the Master granted summary judgment as to a portion of Watson's claimed contract damages, but determined that a trial would be necessary as to the remaining portion of Watson's damages. The Master's ruling on Watson's contract damages in this case is substantially similar to the *Draper* case, which expressly authorized summary judgment as to only a portion of the bank's claimed damages. Accordingly, the Master's decision is not, as Balfour contends, legally improper and it should be affirmed. See also *Thornton v. South Carolina Elec. & Gas Corp.*, 391 S.C. 297, 705 S.E.2d 475 (2011) (An order granting partial summary judgment involves the merits of a case for purposes of interlocutory appeal when it finally determines a substantial matter forming the whole or a part of some cause of action or defense).

While Respondent is not aware of any decisions of the Supreme Court of South Carolina addressing this issue under modern Rule 56, the Supreme Court expressly permitted summary judgment as to a portion of a claim under former Rule 44 of the Circuit Court Rules, which is substantially the same as Rule 56, except for Rule 56's addition of part (d). See Editor's and Revisor's Notes for SCRCR, Rule 56; *Hossenlopp v. Cannon*, 285 S.C. 367, 441, 329 S.E.2d 438 (1985) (superseded by statute on unrelated issue); *Nauful v. Milligan*, 258 S.C. 139, 143, 187 S.E.2d 511, 512-13 (1972) (a party may move for summary judgment in his favor upon all or any part of a claim, counterclaim or cross claim).

Finally, because South Carolina law expressly permits partial summary judgment as to all or part of any claim, this Court need not consider federal decisions as persuasive authority. Even if the Court considers federal decisions, however, there is a split of authority on this issue among

federal courts, and some federal courts, including the Fourth Circuit, permit partial summary judgment as to a portion of a claim. See, e.g., *Capps v. Long*, No. 20-6789, 2021 WL 4843568, *1 - *2 (4th Circuit, October 18, 2021) (summary judgment proper as to portion of a Fourth Amendment claim challenging the decision to initiate an investigatory stop); *Gasden v. Fripp*, 330 F.2d 545, 547 (4th Cir. 1964) (“If it appears on the motion for summary judgment that there is no triable issue with respect to a portion of the claim while there are triable issues with respect to the remainder, the Court, in its discretion, may enter a partial summary judgment, but is not authorized to foreclose a trial of the remaining triable issues.”). See also *DeJesus v. Malloy*, 531 F. Supp. 3d 650, 660 (W.D. N.Y. 2021) (it bears noting that ‘[s]ummary judgment is not an all-or nothing proposition.’ A party may move pursuant to Rule 56(a) for summary judgment as to an entire claim or defense, as well as ‘part of a claim or defense.’); *Rotorex Co., Inc. v. Kingsbury Corp.*, 42 F. Supp. 2d 563, 570 (D. Md. 1999) (and cases cited); *In re Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 682, 691-92 (E.D. Mich. 2000) (partial summary judgment appropriate where, as here, resolution of the issue would narrow the scope of discovery, streamline issues to be tried and serve the interests of judicial economy). Accordingly, even if this Court considers federal decisions, federal decisions, including Fourth Circuit decisions, do not support Balfour’s argument, and Watson’s partial summary judgment should be affirmed.

C. Watson Dismissed Its Remaining Claims Against Balfour, Making Balfour’s Argument Moot

During trial, and before Watson presented any evidence at trial, Watson voluntarily dismissed its remaining claims against Balfour. As a result of the dismissal, all of the issues raised in Watson’s breach of contract claim have been resolved and nothing remains to be decided. The summary judgment entered by the Master is therefore no longer partial summary judgment, but is completely dispositive of Watson’s breach of contract claim against Balfour. Accordingly,

Balfour's argument that partial summary judgment was improper has been rendered moot by the subsequent dismissal of the remaining portions of Watson's claim.

II. THE MASTER PROPERLY AWARDED ATTORNEYS' FEES TO WATSON BECAUSE A CONTRACT PROVISION AUTHORIZED AWARDED ATTORNEYS' FEES.

The Master properly awarded attorneys' fees and costs to Watson because Article 10.D of the Subcontract authorized the Master to award attorneys' fees to Watson for disputes between Watson and Balfour. Balfour's argument that the Master erred by determining that the Subcontract entitles Watson to attorneys' fees and costs ignores that there is no genuine issue of material facts exists about whether Watson's claim involved the conduct of the Owner or the Contract Documents.

At the trial level, Balfour's argument against Watson's Motion was that Balfour should have the right to withhold payment to Watson because the trial court might conclude that Balfour is liable to the Owner, and accordingly Watson might be liable to Balfour. In other words, Balfour's argument in defense to Watson's motion for summary judgment is that Balfour might have right of set off against Watson. Balfour's argument about what might happen did not establish an issue of material fact, because the issue raised by Balfour was not genuine.

Also at the trial level, Balfour, for the first time in its Motion for Reconsideration, argued that Watson's claim involved the conduct of the Owner of the Contract Documents. Even assuming that this Court considers Balfour's new arguments, the Master's order granting attorneys' fees and costs to Watson should be affirmed because Watson's breach of contract claim against Balfour did not involve the conduct of the Owner or the Contract Documents.

A. The Subcontract Provisions Regarding Attorneys' Fees and Costs

Balfour's incorrectly argues that the attorneys' fee provision in the Subcontract does not authorize the award of attorneys' fees to Watson. The Subcontract includes four Articles that are relevant to the issue of attorneys' fees. Article 10.A states in part,

Any dispute between Subcontractor and Contractor not involving the conduct of the Owner or the Contract Documents will, at the election of Contractor, be settled by arbitration ... The prevailing party will be entitled to attorneys fees for the arbitration only to the extent that such fees are required by law, or to the extent that the arbitrator findings that it is equitable and just to award some or all such fees because (R. __).

Article 10.B states in part,

If disputes between Contractor and Subcontractor involve the conduct of the Owner or an interpretation or requirement of the Contract Documents, then the Subcontractor must follow all claim, notice and disputes procedures and requirements of the Contract Documents, ... Contractor will, at is option: (i) present to the Owner in Contractor's name or (ii) authorize Subcontractor to present to the Owner in Contractor's name, all of Subcontractor's claims, and answer the Owner's claims involving the Subcontractor's Work. (R. __).

Article 10.C states,

If Contractor or its surety notifies Subcontractor in good faith that any arbitration or lawsuit brought under Article 10.A involves a controversy within the scope of Article 10.B, then dispute process under Article 10.A must be stayed until the procedures under Article 10.B are completed. (R. __).

Article 10.D states in part,

If Contractor elects not to invoke the arbitration procedures set forth in Article 10.A, then all claims, disputes and other matters in controversy between Contractor and Subcontractor arising out of or relating to the Subcontract and covered by Article 10.A will be resolved through litigation ... The prevailing party will be entitled to recover its reasonable attorneys' fees and court costs in connection with any such litigation. (R. __).

Articles 10.A and 10.D relate to claims between Watson and Balfour that do not involve the conduct of the Owner or the Contract Documents. If a claim under Article 10A. is not arbitrated, it becomes an Article 10.D. claim. Article 10.B. relates to claims between Watson and Balfour that "involve the conduct of the Owner or an interpretation or requirement of the Contract Documents."

Articles 10.A and 10.D. both include clauses allowing the award of attorneys' fees.¹ Article 10.B does not expressly mention attorneys' fees, but does not expressly state that attorneys' fees may not be awarded. The fact that Watson's breach of contract claim against Balfour was litigated instead of arbitrated, and was not stayed under Article 10.C., means that Watson's breach of contract claim against Balfour falls under either 10.B. or 10.D. Determining whether Watson's breach of contract claim falls under Article 10.B. or 10.D. requires determination about whether Watson's claim "involves the conduct of the Owner or the Contract Documents.

a. The Contract Documents

Determining whether Watson's breach of contract claim against Balfour involves the Contract Documents requires a relatively simple analysis. The Subcontract states in part,

The 'SUBCONTRACT Documents' include this Subcontract form, the Subcontract Terms and Conditions, and all other applicable Exhibits including:
Exhibit A – Contract Documents. (R. __).

The Subcontract also states,

Subcontractor will fully perform and timely complete, as an independent contractor, all work (Work) in accordance with the Subcontract, including the documents identified on Exhibit A (Contract Documents). (R. __).

Therefore, the Subcontract identifies the "Contract Documents" as a part of a larger body of documents, the "SUBCONTRACT Documents," thereby creating two distinct sets of documents with only the Contract Documents relevant to the Court's inquiry regarding award of attorneys' fees and costs. Despite the fact that the Subcontract refers to Exhibit A, with Exhibit A identified as listing the "Contract Documents," Exhibit A is not attached to the Subcontract. (R. __, Trail Transcript 4635:20-4636:7, 4613:22-25.) Because Exhibit A is not attached to the Subcontract, the "Contract Documents" are not identified in the Subcontract.

¹ Balfour incorrectly states in its initial brief that, "There is no attorney fee award provision in Article 10.A." (Balfour's Initial Brief p. 20).

Notably, Balfour did not put Exhibit A to the Subcontract before the Master at summary judgment, not only because it does not exist and because Balfour did not argue at the summary judgment stage that Watson's breach of contract claim involved the "Contract Documents," but because Balfour did not argue that a genuine issue of material of fact exists regarding whether Watson's claim involved the Contract Documents.

b. The Conduct of the Owner

Watson's breach of contract claims against Balfour does not involve the Owner's conduct because Watson's claim against Balfour is based on Balfour's failure to pay Watson.

Determining if Watson's breach of contract claim against Balfour involves the "conduct of the Owner" is also a simple analysis. If you take away the owner's conduct, you reach the same conclusion. That Balfour had an independent obligation to pay Watson which is unaffected by the Owner's conduct.

The Owner's conduct is inapplicable to Watson's breach of contract claim against Balfour, and the language of section 10.B belies Balfour's contention otherwise. Section 10.B states in part:

Contractor will, at its option: (i) present to the Owner in Contractor's name or (ii) authorize Subcontractor to present to the Owner in Contractor's name, *all of* Subcontractor's claims, and answer the Owner's claims involving subcontractor's work, whenever Contractor is permitted to do so by the terms of the Contract Documents." (*emphasis added*)

Accordingly, all claims falling under Section 10.B must be submitted to the Owner in Balfour's name. Section 10.B could never apply to Watson's breach of contract claim against Balfour, because Watson does not have breach of contract claim against the Owner for Balfour to pursue against the Owner, or for Balfour to authorize Watson to pursue against the Owner in Balfour's name. Furthermore, Section 10.B requires Balfour to make an election regarding how Watson's

breach of contract claim is to be presented against the Owner. The election requires that either Balfour pursue Watson's breach of contract claim against Balfour in Balfour's name, or to allow Watson to pursue its breach of contract claim in Balfour's name against the Owner. The election is a triggering mechanism that notifies Watson that Balfour contends that Watson's claim involves the conduct of the Owner. Not only did Balfour not notify the Master of its election at the summary judgment stage, Balfour did not pursue Watson's breach of contract claim, or give Watson authority to pursue its breach of contract claim against Balfour in Balfour's name.² Because Balfour never made the election, Balfour clearly understood that Watson's breach of contract claim against Balfour did not involve the conduct of the Owner or the Contract Documents, and section 10.B of the Subcontract was never triggered, meaning that only Section 10.D of the Subcontract applied because Balfour did not elect arbitration under Section 10.A.

Oddly, instead of pointing this Court to facts that it presented to the Master at the summary judgment stage to show that there is a genuine issue of material fact about whether Watson's claim involves the conduct of the Owner, Balfour now argues for the first time that this Court should look to Watson's allegations, and to damages not awarded to Watson by the Master.

As previously discussed, Balfour's argument at the summary judgment stage was that summary judgment should be denied because "Balfour could be entitled to a setoff." (Balfour

² The concept of Balfour pursuing Watson's breach of contract claim against Balfour against the Owner, or allowing Watson to pursue the claim against the Owner in Balfour's name, could never work for Balfour because Balfour would have to attempt to prove to the Master that Balfour breached the contract between it and Watson by failing to pay Watson, thereby expressly admitted that Balfour breached the Subcontract. By proving to the Master that Balfour breached its contract with Watson, Balfour would be admitting to: (a) breaching the contract between it and the Owner which required Balfour to pay subcontractors; (b) violating South Carolina Code sections requiring payment to subcontractors; and (c) that Balfour filed an excessive mechanic's lien on the Owner's property. These admissions by Balfour would not only undermine Balfour's claims against the Owner, but the admissions would also necessarily result in judgment for the Owner. Ultimately, the Owner prevailed on its breach of contract claim against Balfour, in part because Balfour failed to pay Watson funds that the Owner had paid Balfour for Watson's work before the Project was completed and before Watson's mechanic's lien was filed.

Memorandum in Opposition to Summary Judgment by Watson p. 3). In support of Balfour's argument, Balfour relied on one of the Owner's expert's reports. (Id. at 2-3). The Owner's expert's report related to defeating Balfour's claims against the Owner, and supporting the Owner's claims against Balfour. The Owner's expert's report did not show the Master a genuine issue of material fact about whether Watson's breach of contract claim against Balfour involved the conduct of the Owner or the Contract Documents. In contrast to Balfour's argument, Watson relied on Balfour's and the Owner's Rule 30(b)(6) deposition testimony to which they are each bound. Because at the summary judgment stage Balfour and the Owner are bound by their Rule 30(b)(6) deposition testimony, the Owner's expert's opinion, even if contrary to the facts to which Balfour and the Owner are bound, is insufficient to create a genuine issue of material fact to defeat summary judgment.³

Watson was granted partial summary judgment only on its breach of contract claim against Balfour. The Master, and this Court, need only look to the Subcontract, limited undisputed facts, and South Carolina statutes to determine if Balfour breached the Subcontract, and determine that the conduct of the Owner is irrelevant to such determination.

Watson's motion for summary judgment sought a determination that Balfour breached the Subcontract by failing to pay Watson for work that Watson properly performed on the Project.

Article 2.A of the Subcontract states in part,

Contractor will make progress payments to Subcontractor within ten (10) days after Contractor's receipt of payment from Owner for Subcontractor's Work (including changes to the Work paid by the Owner) (R. ____).

³ To be clear, the Owner's expert's testimony was not inconsistent with the Owner's Rule 30(b)(6) testimony or Balfour's Rule 30(b)(6) testimony, but even if the Owner's expert's testimony were inconsistent with the Owner's or Balfour's Rule 30(b)(6) testimony, the Owner and Balfour would still be bound by their own Rule 30(b)(6) testimony for the purposes of summary judgment.

While at first glance, it appears that Article 2.A relates to the Owner's conduct, South Carolina law does not support such an interpretation. S.C. Code § 29-6-230 provides,

Notwithstanding any other provision of law, performance by a construction subcontractor in accordance with the provisions of its contract entitles the subcontractor to payment from the party with whom it contracts. The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor. Any agreement to the contrary is not enforceable.

“By its plain language, section 29-6-230 expressly prohibits parties from conditioning payment to the subcontractor upon the owner's payment to the general contractor and further provides that any agreement to the contrary is unenforceable.” *J&H Grading & Paving, Inc. v. Clayton Constr. Co.*, 441 S.C. 272, 278, 892 S.E.2d 558, 561 (Ct. App. 2023). Therefore, South Carolina law makes the Owner's conduct, payment in this case, irrelevant to Balfour's obligation to make payment to Watson. Based on § 29-6-230 and *J&H Grading & Paving*, the Subcontract required Balfour to make payment to Watson regardless of the Owner's conduct, and all clauses in the Subcontract making the Owner's payment a condition precedent to Balfour's obligation to pay Watson are invalid.

Considering the law, application of the undisputed facts are simple. The undisputed facts that required the Master to grant partial summary judgment to Watson are: (1) Watson and Balfour entered into a written Subcontract; (2) The Subcontract required Balfour to pay Watson for work properly performed; (3) Watson properly performed all the work required by the Subcontract; and (4) Balfour did not pay Watson the sum of \$921,671.39 that is owed to Watson. Balfour's failure to pay Watson is Balfour's obligation that, as a matter of law, cannot be conditioned on the Owner's conduct. Accordingly, Balfour's failure to pay Watson was a breach of the Subcontract that entitled Watson to summary judgment regardless of the Owner's conduct.

Because the Owner's conduct has no bearing on Watson's breach of contract claim against Balfour, the Master properly determined Watson's breach of contract claim under Article 10.D. of the Subcontract, which entitles Watson to an award of attorneys' fees and costs, and the Master's Order should be affirmed.

B. Determining Whether Watson's Claim Involves the Conduct of the Owner Occurs at the Summary Judgment Stage

Balfour argues, "[i]t is axiomatic that the issue of whether the dispute between the Subcontractor and Contractor involves the conduct of the Owner or the Contract Documents is a threshold determination to be made at the commencement of the suit." (Balfour's Initial Brief p. 21). Balfour fails to support its argument by citing to any authority, and instead attempts to misdirect this Court by citing to the allegations in Watson's crossclaims and counterclaims. Fundamentally, Balfour's argument fails because it opposes the standard of review on an appeal of a motion for summary judgment. This Court's standard of review of an appeal of a motion for summary judgment is de novo review. De novo review means that this Court makes its determination from the record that was before the Master when the Master decided the motion for summary judgment. The de novo standard of review defeats Balfour's argument because the Master, like this Court, had to consider the undisputed facts, not allegations.

Even assuming that Balfour's argument regarding Watson's allegations is correct, which it is not, most of the allegations to which Balfour cites were plead by Watson to support claims other than Watson's breach of contract claim against Balfour. The allegations that support Watson's breach of contract claim against Balfour are:

- 39. Watson satisfactorily performed all work required by the Subcontract;
- 47. Balfour's failure to pay Watson is a breach of contract;

48. As a direct and proximate cause of Balfour's breach(es) of contract, as well as Balfour's other acts and omissions, Watson has been damaged in an amount to be proven at trial, plus interest, costs and attorney's fees.⁴ (Watson Motion for Summary Judgment pp. 1-2).

While ignoring that Watson's summary judgment for breach of contract against Balfour related solely to Balfour's failure to pay Watson, Balfour also argues that this Court should consider allegations that Watson made either upon information and belief, or that are related to other causes of action asserted by Watson. Balfour's reliance on allegations Watson made upon information and belief, and in support of other causes of action, is misplaced.

Balfour's argument also requires this Court to give more meaning to allegations than they are due. The allegations associated with a claim are not proof of the facts alleged. Instead, South Carolina law makes clear that at summary judgment a party cannot rely on mere allegations. *Skywaves I Corporations v. Branch Banking and Trust Company*, 423 S.C. 432, 453, 814 S.E.2d 643, 654 (Ct. App. 2018). "In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial." *Id.* Balfour did not come forward with any facts showing genuine issues necessitate trial.

Balfour's argument regarding allegations also ignores that Balfour is also appealing the Master's Order denying Balfour's Motion for Reconsideration of Watson's partial summary judgment. With de novo review, this Court views the evidence that was before the Master at the time Balfour's motion for summary judgment was decided. However, Balfour's motion for reconsideration was decided after trial and after post-trial motions. Therefore, at the time that the Master decided Balfour's motion for reconsideration, the Master had seen evidence presented during weeks of a bench trial where Balfour unsuccessfully attempted to assert claims against the

⁴ Watson also alleged "Upon information and belief, Library Associates has not paid Balfour", but Watson did not allege such conduct by Library was wrongful, was the reason that Balfour did not pay Watson, or that Library Associates even owed the funds to Balfour. Nothing about this allegation by Watson changes Watson's claim for breach of contract against Balfour.

Owner, and the Master had access to his findings of fact after trial, his conclusions of law after trial, and numerous orders and judgments that the Master issued after trial. While the Master could not consider the trial evidence when deciding Balfour motion for reconsideration, even with the vast amount of evidence before the Master at the time the Master decided Balfour's motion for reconsideration, Balfour still failed to point the Master to any evidence that showed a genuine issue of material fact exists about whether Watson's breach of contract claim involved the conduct of the Owner or the Contract Documents. Instead, the Masters findings of fact at trial make clear that the Owner did not breach the Prime Contract, but that Balfour breached the Subcontract by failing to pay Watson.

Furthermore, the Master specifically stated in his Order granting partial summary judgment to Watson, "[i]f evidence exists that could show this Court that ... there is a genuine issue of material fact about whether Watson delayed the Project, or whether Watson performed defective work, [Balfour] failed to show this Court." (September 13, 2021, Order p. 4). There is simply no evidence in the record that Watson's breach of contract claim against Balfour involves the conduct of the Owner or the Contract Documents.

Watson's breach of contract claim against Balfour is a "dispute between the Subcontractor and Contractor not involving the conduct of the owner." Accordingly, the Master properly awarded attorneys' fees and costs to Watson and the Master's decision should be affirmed.

Balfour's final two points in support of its argument that Watson's breach of contract claim involves the Owner's conduct also miss the mark. First, Balfour argues that various portions of Watson's breach of contract claim involves the conduct of the owner because Watson alleges that the Owner delayed the Project. Balfour points to various amounts that Watson sought as a result of Owner caused delays. Balfour's argument is as best a Hail Mary that falls short because the

Master denied the portion of Waston's motion for summary judgment for delay damages. Because the Master did not grant summary judgment to Watson for the portions of its claims that Balfour points to as involving the conduct of the Owner, such claims are entirely irrelevant to this Court's decision about whether the partial summary judgment the Master granted involves the conduct of the Owner.

Balfour's final argument, that Watson's claim of \$62,091.77 for additional work performed pursuant to change orders involves the conduct of the Owner because the Subcontract includes an unenforceable pay-if-paid provision, also falls short, and is more akin to a fumble than an incomplete pass. First, Balfour's argument fails because it is based on an unenforceable pay-if-paid Subcontract provision as previously discussed. Second, Balfour argument fails because it ignores the plain language of the Subcontract, which Balfour summarizes as, "Balfour's liability for work performed pursuant to a change order *issued by Library* is limited to the amounts Balfour recovers from Library, and payment will only be made to Watson to the extent Balfour receives payment from Library" (*emphasis added*). (Balfour's Brief p. 27). Even assuming the pay-if-paid provision Balfour relies upon is enforceable, which it is not, the Subcontract clause referred to by Balfour relates to "a change order issued by Library." There is no evidence in the record that Library issued change orders for which Watson was granted partial summary judgment. The Subcontract under which Watson was granted summary judgment was between Watson and Balfour, not change orders issued by the Owner. At the summary judgment stage Balfour could have offered evidence to show the Master that Watson's claim was related to change orders issued by the Owner, thus attempting to implicate the Owner's conduct, but Balfour did not offer any such evidence. Now, without citing to any evidence in the record, Balfour asks this Court to determine that the claim for which Watson was granted partial summary judgment involved the

conduct of the Owner, because, if the Owner issued the change order, Balfour may avoid paying Watson under an unenforceable pay-if-paid provision. This final argument by Balfour perfectly demonstrates Balfour's positions now, and Balfour's positions at the time of summary judgment, which are - Balfour asserts it can rely on an unenforceable pay-if-paid clause, and this Court should find that Watson's claim involves the conduct of the Owner, because Balfour might eventually get around to showing the Court some evidence to show an issue of material fact exists.

C. The Master Considered Everything

To the extent Balfour's contention is that the Master did not rule on an issue or make a specific finding, this is error, as the Court's granting of summary judgment after considering Balfour's arguments constitutes a rejection of Balfour's arguments. See, e.g., *Church v. McGee*, 391 S.C. 334, 347, 705 S.E.2d 481, 488 (Ct. App. 2011) (finding an implicit ruling obviating the need for a motion to reconsider when "the circuit court's ruling that Church was entitled to prejudgment interest implied by necessity that she met the standard for an award of prejudgment interest").

D. Other Considerations

Based on Balfour's witnesses admissions at trial, the Master found that Balfour had already been paid by the Owner for a portion of the funds Watson was seeking from Balfour through its breach of contract claim. Because Balfour had already received funds from the Owner that were due to Watson, but had not paid those funds to Watson, the Owner's conduct was completely irrelevant to Watson's claim against Balfour.

The Master's findings of fact after trial also weigh heavily in favor of this Court determining that Watson's claims do not involve the Owner's conduct. Specifically, the Master found, "prior to the award of any set off amounts for liquidated or other damages, there remains a

‘delta’ or maximum balance potentially owed to [Balfour] of \$419,425.00.” Because the amount Balfour owes Watson exceeds the greatest amount that Balfour could collect from the Owner, even assuming that the entire \$419,425 due to Balfour were for Watson, the most the Owner could owe Balfour is less than the amount Balfour owes Watson. In other words, even if all of the \$419,425 that the Owner owes Balfour were for work performed by Watson, \$502,246.39 of the amount that Balfour owes Watson is completely unrelated to payment due from the Owner. Accordingly, Balfour failure to pay at least \$502,246.39 to Watson cannot involve the conduct of the Owner.

CONCLUSION

The Master’s order granting partial summary judgment to Watson should be AFFIRMED because partial summary judgment is appropriate, because Balfour failed to show the existence of a genuine issue of material fact, and because Watson was entitled to summary judgment as a matter of law.

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