

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Morgan, Circuit Court Judge

Common Pleas Case No.: 2020-CP-23-05229

Appellate Case No. 2024-001849

Boyce Street, LLC,

v.

Appellant,

David Smith Company, LLC,

Respondent.

Reply in Opposition to Respondent’s Motion to Dismiss

Appellant Boyce Street, LLC, (“Appellant”) hereby submits this Opposition to the Respondent’s Motion to Dismiss.

TRULUCK THOMASON, LLC

s/Devon M. Puriefoy
Devon M. Puriefoy
SC Bar No.: 102097
3 Boyce Avenue
Greenville, SC 29601
T: 864-331-1751
devon@truluckthomason.com

Attorney for Appellant

TABLE OF CONTENTS

Table of Contents	ii
Table of Authorities	iii
Statement of the Case	4
Argument	5
Conclusion	5

TABLE OF AUTHORITIES

Cases

Ex parte Travelers Home & Marine Ins. Co., 427 S.C. 238, 242, 830 S.E.2d 718, 720 (Ct. App. 2019).. 1

Rules

R. 59, SCRCP.....7

COMES NOW Boyce St., LLC (“Appellant”) and would respectfully show the Court as follows in reply in support of its Motion to Dismiss.

STATEMENT OF THE CASE¹

On or about March 23, 2021 Appellant filed with the Greenville County Court of Common Pleas an Amended Complaint alleging, *inter alia*, certain construction defects resulting from Respondent’s construction of a commercial space located at 3 Boyce Avenue, Greenville South Carolina. [App. 1].

Between August 26 and August 28, 2024, the Greenville County Court of Common Pleas held a jury trial at which time Appellant and Respondent were given an opportunity to present witnesses and evidence in support of the averments contained in their respective pleadings. At the conclusion of Defendant’s case, Appellant moved for directed verdict on its breach of contract and breach of express and implied warranty claims.² The Court granted Appellant’s directed verdict motion as to those two claims, and Respondents moved for a verdict form to limit the Court’s grant of directed verdict only as to the HVAC allegations. Appellant opposed the same arguing the jury would be confused and that a simple jury instruction that Defendants have been found liable for breach of contract and breach of express/implied warranties was proper.

The Court rejected Appellant’s position and issued the verdict form to the jury. [App. 14]. The jury returned a verdict for Appellant in the amount of \$50,000.00. Within ten (10) days of the jury being discharged, Appellant filed a motion for new trial. Following the trial court’s denial of

¹ Because the Record on Appeal has not yet been prepared, the documents relevant to this Motion are included in the concurrently filed Appendix, which is cited as “App._____”.

² Citation to the transcript is not possible at this time due to the unavailability of the same.

the same, and within thirty (30) days of its issuance of the denial, an appeal was filed.

Respondent's Motion to Dismiss followed.

ARGUMENT

Simply put, Appellant does not disagree to Respondent's citation to Ex parte Travelers Home & Marine Ins. Co., 427 S.C. 238, 242, 830 S.E.2d 718, 720 (Ct. App. 2019). Appellant would, however – acknowledging the factual distinction between the instant matter and the facts set forth in Ex parte Travelers Home & Marine Ins. – point to the Court's holding that “the purpose of the rule [Rule 59] is to promote finality of judgments by requiring parties to move for a new trial promptly after they learn of an adverse verdict.” *Ex parte Travelers Home & Marine Ins. Co.*, 427 S.C. 238, 242, 830 S.E.2d 718, 720 (Ct. App. 2019). “The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter.” R. 59(b). Appellant filed its Rule 59 motion within the (10) days permitted under the rule and Respondent has not identified any cognizable prejudice it would suffer if it had to defend this appeal on the merits.

CONCLUSION

This Court should therefore deny Respondent's Motion to Dismiss and allow this appeal to continue on the merits.

Dated this 16th day of December 2024.

Signature on following page

s/Devon M. Puriefoy
Devon M. Puriefoy
SC Bar No. 102097
Counsel for Appellant

LAW OFFICES OF
TRULUCK THOMASON, LLC
3 Boyce Avenue
Greenville, SC 29601
devon@truluckthomason.com
864-331-1751

PROOF OF SERVICE

I, the undersigned, served a copy of this Reply to Motion Dismiss on the following counsel to record this 16th day of December 2024 by email and U.S. mail to the following addressed of record:

Tom Dudley
KENISON, DUDLEY & CRAWFORD, LLC
325 W. McBee Avenue Suite 301
Greenville, SC 29601
dudley@conlaw.com

Sarah Timmons
TIMMONS BROGDON LAW FIRM
25 Delano Drive, Suite E
Greenville, SC 29601
sarah@timmonsbrogdon.com

TRULUCK THOMASON, LLC

s/Devon M. Puriefoy
Devon M. Puriefoy
SC Bar No.: 102097
3 Boyce Ave
Greenville, SC 29601
devon@truluckthomason.com

Counsel for Appellant

THE STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
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Common Pleas Case No.: 2020-CP-23-05229

Appellate Case No.

Boyce Street, LLC,

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v.

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Appendix to Reply in Opposition to Respondent's Motion to Dismiss

TRULUCK THOMASON, LLC

s/Devon M. Puriefoy

Devon M. Puriefoy

SC Bar No.: 102097

3 Boyce Avenue

Greenville, SC 29601

T: 864-331-1751

devon@truluckthomason.com

Attorney for Appellant

TABLE OF CONTENTS TO APPENDIX

Amended Summons and Complaint[Filed March 23, 2021].....1
Verdict Form[Issued August 28, 2024].....14

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT
C.A. No.: 2020-CP-23-05229

Boyce Street, LLC.,

Plaintiff,

v.

David Smith Company LLC; David Smith;
Construction Science and Engineering, Inc.;
and Jason L. Smith.

Defendants.

AMENDED SUMMONS

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to respond to the Plaintiff **COMPLAINT** filed in the above action, a copy of which is herewith served upon you, and to serve a copy of your response upon the subscriber at his office located at 3 Boyce Avenue, Greenville, South Carolina, 29601, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to appropriately respond hereto within that time period, the Plaintiff herein will apply to the Court for the relief demanded in the attached **COMPLAINT** and a Judgment by Default will be rendered against you for the relief demanded in the attached **COMPLAINT**.

Respectfully Submitted this 23rd
day of March, 2021

TRULUCK THOMASON, LLC

s/ Devon Puriefoy
Devon Puriefoy
Bar No.: 102097
3 Boyce Avenue
Greenville, SC 29601
Phone: (864) 331-1751
Fax: (864) 568-3893
devon@truluckthomason.com
Attorney for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT
C.A. No.: 2020-CP-23-05229

Boyce Street, LLC.,

Plaintiff,

v.

David Smith Company LLC; David Smith;
Construction Science and Engineering, Inc.;
and Jason L. Smith.

Defendant.

AMENDED COMPLAINT
(Jury Trial Demanded)

Plaintiff complaining of Defendant, respectfully shows unto the Court as follows:

PARTIES, JURISDICTION, AND VENUE

1. Boyce Street LLC. (“Plaintiff”) is a company existing under the laws of the State of South Carolina. Plaintiff regularly conducts business and maintains its principal place of business in Greenville County, South Carolina.

2. David Smith Company LLC. (“DSC”) is, upon information and belief, a corporation existing under the laws of the State of South Carolina. Defendant regularly conducts business in, and maintains its principal place of business in, Greenville County, South Carolina.

3. David Smith (“Smith”) is, upon information and belief, a citizen and resident of Greenville County, South Carolina and principal of DSC.

4. Jason L. Smith (“Mr. Smith”) is, upon information and belief, a citizen and resident of Westminster, South Carolina and an employee of Construction Science and Engineering, Inc.

5. Construction Science and Engineering, Inc. is, upon information and belief, a South Carolina corporation that maintains its principal place of business in Oconee County, South Carolina and regularly conducts business in Greenville County, South Carolina.

6. Pursuant to S.C. Ann. § 15-7-30, venue for this case properly lies in Greenville County, South Carolina as all, or substantially all, of the complained of acts and/or damages occurred in Greenville County, South Carolina.

7. For the foregoing reasons, jurisdiction and venue are proper in Greenville County, South Carolina.

FACTS

8. Dan Simmons, on behalf of Plaintiff, initiated discussions with Defendants regarding the construction of the subject property in or around August of 2017. More specifically, Plaintiff engaged in preliminary discussions with Smith, DSC’s owner, regarding the potential design and construction of a multi-level commercial space in the Pettigru Historic District of Greenville, South Carolina. Plaintiff explained the substantial pre-construction costs, including but not limited to permitting, demolition, and grading, that would be required in advance of the construction of the building itself. During the same time period Plaintiff impressed upon Smith the importance of being able to deliver a high-quality space within an allotted period of time that would be suitable for use by legal professionals.

9. Armed with this information Smith assured Plaintiff of his ability to deliver. Based on these representations Plaintiff entered into a Contract for Design and Construction Services

(the “Agreement”) with DSC, through its representative Dan Simmons, on or about November 9, 2018. Pursuant to the Agreement, Defendant was to act as the design build contractor on the custom commercial office space to be located at 3 Boyce Ave, Greenville, South Carolina (the “Building”).

10. Rather than presenting a proposed budget, DSC and Plaintiff engaged in prolonged and detail-oriented discussions concerning the expectations of, not only the Plaintiff, but also of the tenants for whom the Building was being constructed. These conversations served to allow DSC to provide Plaintiff with an accurate cost of construction based on Plaintiff’s and tenants’ expectations and needs.

11. Tenants input during this time was an integral part of the design phase which necessitated tenant’s participation in protracted design meetings with Defendants DSC and Smith to ensure all parties had a full and complete understanding of what tenants needed with their commercial space.

12. The driving force behind Plaintiff’s election to forgo a definitive budget was to allow DSC flexibility to consider these wants and needs and use its expertise to provide Plaintiff with a reasonably accurate cost of construction in light of these specific discussions throughout the planning process. It is important to note that at no time during the design or construction phase was DSC ever given a fixed budget. However, that is not to say Plaintiff did not seek to get the highest quality materials and labor for reasonable prices.

13. One of the focal points of Plaintiff’s and tenants’ conversations with DSC was tenants’ privacy needs which called for the Building to be designed with the suitable sound attenuation materials.

14. In fact, Plaintiff, tenants, and DSC had very pointed discussions around the importance of ensuring the discussions taking place between tenant and its clients remained confidential, a luxury tenants were not afforded at the tenants then current location.

15. At every phase of the project DSC assured Plaintiff it could deliver a building that not only met industry standards but would meet the Plaintiff's expectations and needs, representations Plaintiff continued to rely on.

16. The pre-construction and early construction phases of the project came and went without any issues of note.

17. As the project progressed Plaintiff and tenants remained heavily involved in the construction process and provided direction, when requested, concerning their expectations. Despite this continued involvement, Plaintiff and tenants relied exclusively on DSC's professional recommendations concerning certain design elements of the construction to ensure the final product conformed with Plaintiff's needs.

18. On or about November 9, 2019 tenants took possession of what appeared on its face to be a completed commercial space, however, Plaintiff quickly noted problems that were believed to be the result of rushed work and a lack of attention to detail.

19. By way of example and not limitation, Plaintiff noted the poor workmanship and aesthetically unpleasant design of the drainage pipe and retaining wall on the premises.

20. Tenants very quickly noted unpainted handrails leading from the first floor to the second story, unfinished trim work, warped window shutters, plumbing concerns, HVAC inconsistencies, and sound transmission issues, just to name a few.

21. Of the above noted deficiencies/defects, the HVAC issues and apparent lack of sound barriers between walls and between the upper and lower levels proved to be the most problematic and troubling.

22. It was at this time that Defendants made clear they would not be taking responsibility for their subpar work and material misrepresentations. Defendants informed tenants that an architect, Jason Lynn Smith of Construction Science and Engineering, Inc., a division of REI Engineers Company, was actually responsible for the design of the building.

23. Plaintiff and tenants were wholly unaware of this fact, as Smith represented throughout the entirety of the project that *he* was the acting architect. Relying on these representations, Plaintiff and tenants never deemed it necessary or appropriate to discuss the design of the building with any third parties and were unaware that a third party existed.

24. Even after this troubling revelation, Plaintiff attempted on numerous occasions, dating back to February of 2020, to resolve the various deficiencies and defects, each time to no avail.

25. Despite these attempts at resolution, Defendants continued to inform Plaintiff that the building was designed and constructed in accordance with industry standards and no corrective measures would be taken without further payment.

26. Given Defendants' unwavering position, Plaintiff had no choice but to retain a forensic architectural and engineering firm to more thoroughly and accurately investigate the complained of construction deficiencies/defects. Plaintiff ultimately retained The Fuller Group, LLC ("Fuller") to inspect the building and provide expert opinion regarding failures and/or other performance problems.

27. Fuller conducted a thorough investigation of the building and noted several key deficiencies, including, but not limited to, deviations from industry standards and South Carolina regulations (see attached Exhibit “A” – Ross Clements’ Supporting Affidavit”).

28. The deficiencies and defects set forth in Fuller report dated July 1, 2020, are incorporated herein and include, but are not limited to the following:

- a. Sound transmission between walls and floors is well below industry standards and completely unacceptable for the specific design and use of the building;

29. Since the creation of this report, Plaintiff has discovered additional deficiencies including:

- a. HVAC issues that arise from potential engineering/ design flaws that result in drastic temperature fluctuations between specific areas of the building;
- b. Various other issues including but not limited to problems with shutters, siding, doors, kitchen sinks, toilet paper holders, retention walls, and drainage pipes.

30. In accordance with the South Carolina nonresidential construction statute, Defendants were provided a copy of this report along with a notice and opportunity to cure demand dated July 20, 2020.

31. On August 31, 2020 Defendants responded to the aforementioned notice and in no uncertain terms denied any past, present, or future liability stemming from the construction and made their unwillingness to provide any remedial work very clear.

32. To date, Defendants have failed and refused to correct the defects and deficiencies in the design and construction of the Plaintiff’s building.

33. More than ninety (90) days have passed since Defendants’ receipt of Plaintiff’s original notice and opportunity to cure, therefore this suit is statutorily compliant.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

34. Plaintiff re-alleges all paragraphs above as set forth verbatim herein.

35. Smith and/or DSC breached the November 9, 2018 Agreement with the Plaintiff in many aspects in addition to those heretofore alleged, including but not limited to, the following:

- a. In failing to properly construct the commercial space in accordance with the plans and specifications and by failing to employ practices and methods of construction conforming with applicable building codes, accepted industry standards; and/or using defective materials; and/or installing materials not in accordance with the plans and specifications, or in violation of manufacturers' instructions;
- b. In failing to properly supervise architects and subcontractors and/or other trades in order to ensure that all work proceeded in accordance with the plans and specifications, applicable building codes, was in conformity with the customary and ordinary standards of the construction industry, and in accordance with manufactures' instructions;
- c. In using, supplying and/or accepting non-conforming, substandard or defective materials;
- d. In accepting deficient and/or defective workmanship and/or materials, without proper inspection to ensure the work was correct and in conformity with applicable building codes, industry standards and in accordance with the plans and specifications and/or in accordance with the manufacturers' instructions;
- e. In providing and/or allowing deficient or defective workmanship and/or materials, without proper inspections to ensure the work was correct and in accordance with applicable building codes, conformity with the customary industry standards, in accordance with the plans and specifications and in accordance with the manufacturers' instructions; and
- f. In such other manners as may be discovered prior to trial.

36. As a direct and proximate result of the Smith's and/or DSC's numerous breaches Plaintiff has suffered, and will continue to suffer, damages and losses as heretofore alleged.

37. Plaintiff is entitled to a judgment against smith and/or DSC for their actual, consequential, compensatory and special damages in an amount to be proven at trial.

FOR A SECOND CAUSE OF ACTION
(Negligence against all Defendants)

38. Plaintiff re-alleges all paragraphs above as set forth verbatim herein.

39. Defendants, as a general contractor and/or architects owed duties to Plaintiff to exercise that degree of skill necessary to design, construct, supervise and inspect, and review the design of the Building and otherwise deliver the Building free of construction defects and designed and built in conformity with generally accepted ordinary standards of the building and construction industry.

40. The deficiencies and defects that exist at the Building are the proximate and direct result of the negligence and/or gross negligence, willfulness and wantonness of Defendants, as the general contractor and/or architects, as heretofore alleged.

41. As a direct and proximate result of the negligence of Defendant, Plaintiff has suffered, and will continue to suffer, damages and losses as heretofore alleged.

42. Plaintiff is entitled to a judgment against Defendants based on Defendants' negligence, gross negligence, willfulness and wantonness and in addition to consequential, special, punitive and compensatory damages in an amount to be proven at trial.

FOR A THIRD CAUSE OF ACTION
(Breach of Express and Implied Warranties against DSC and Smith)

43. Plaintiff re-alleges all paragraphs above as set forth verbatim herein.

44. Defendant DSC, as a general contractor of the building, made express warranties in connection with the construction of the Properties that the work would be free of construction defects and deficiencies.

45. Smith and DSC, as a general contractor, also impliedly warranted that the Building would be constructed in a careful, diligent and workman-like manner, free of construction defects and in accordance with accepted industry and construction standards.

46. Smith and/or DSC breached its express warranties and implied warranties of workmanlike service as heretofore alleged.

47. As a direct and proximate result and consequence of Defendant's breaches of its express and implied warranties, the Plaintiff has suffered, and will continue to suffer damages and losses as heretofore alleged.

48. Plaintiff is entitled to a judgment against Defendant for their actual, consequential, compensatory and special damages in an amount to be proven at trial.

FOR A FOURTH CAUSE OF ACTION

(Breach of Contract Accompanied by a Fraudulent Act against DSC and Smith)

49. Plaintiff re-alleges all paragraphs above as set forth verbatim herein.

50. Defendant has breached its contract with the Plaintiff as above described.

51. In addition, Defendant represented that the work complied with the contract documents, and that the Building as constructed complied with industry standards.

52. Defendant's representations were false when made, and Defendant knew the representations to be false. These representations are directly related to the previously referenced breaches of contract, and, upon information and belief, were dishonest in fact and designed to unlawfully appropriate the balance of the funds purportedly due for the completion of the Building.

53. Upon information and belief, Defendant intended to deceive the Plaintiff with its representations; or, made such representations with a reckless disregard for their truthfulness or falsity.

54. As a direct and proximate result of these breaches of contract accompanied by fraudulent acts, Plaintiff has suffered, and will continue to suffer, damages and losses as heretofore alleged.

55. Plaintiff is entitled to a judgment against Defendant, in such an amount as will be proved at trial including actual, consequential, special, punitive and compensatory damages in an amount to be proven at trial.

FOR A FIFTH CAUSE OF ACTION

(Negligent Misrepresentation against DSC and Smith)

56. Plaintiff re-alleges all paragraphs above as set forth verbatim herein.

57. Defendant owed a duty to the Plaintiff to exercise reasonable care in representing the standards by which the construction had been constructed, its compliance with the contract documents and applicable building codes, the quality of the materials incorporated into the Building and the probability or improbability of water intrusion problems.

58. Defendant made the following false representations to the Plaintiff at the time Defendant's tendered the Building as complete:

- a. The Building was constructed in a workmanlike manner in accordance with the customary and ordinary standards of the construction and building industry; and,
- b. That the workmanship and materials incorporated into the Building was free from defects.

59. Plaintiff reasonably relied upon these representations, to its detriment.

60. As a direct and proximate result of these negligent misrepresentations, Plaintiff has suffered, and will continue to suffer, damages and losses as heretofore alleged.

61. Plaintiff is entitled to a judgment against Defendant, in such an amount as will be proved at trial including actual, consequential, special, punitive and compensatory damages in an amount to be proven at trial.

FOR A SIXTH CAUSE OF ACTION
(Code of Professional Ethics against all Defendants)

62. Plaintiff re-alleges all paragraphs above as set forth verbatim herein.

63. Defendants failed to report to Plaintiff that Defendant hired the architect of record, Jason Lynn Smith (“Mr. Smith”) to serve as the primary design architect.

64. Mr. Smith, the architect of record and representative of Construction Science and Engineering, Inc., and DSC and Smith did not report to the permitting authority or to Plaintiff that Mr. Smith had been hired as the architect of record and would not be providing minimum construction administration services.

65. Upon information and belief, Defendant willfully or knowingly committed these acts.

66. Defendant acts constitute a violation of S.C. Code Ann. § 40-3-60 (1976) and S.C. Code Ann. § 40-1-70 (1976).

FOR A FINAL CAUSE OF ACTION
(Preservation of Right to Amend Complaint)

67. Plaintiff re-alleges all paragraphs above as set forth verbatim herein.

68. Plaintiff may have other causes of action against Defendant and, therefore, reserves the right to assert such causes of action in a timely fashion after the facts to assert such claims become known to him and to request amendments to this Complaint to conform to the evidence.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests the following relief:

- a. Actual, special, consequential, compensatory and punitive damages;
- b. Attorney's fees and costs of court;
- c. Such additional and appropriate relief to which Defendant are entitled.

Respectfully Submitted this 23rd
day of March 2021

TRULUCK THOMASON, LLC

s/ Kimberly Thomason

Kimberly Thomason
SC Bar. 79179

/s/ Devon Puriefoy

Devon M. Puriefoy
Bar No. 10209

3 Boyce Avenue

Greenville, SC 29601

Phone: (864) 331-1751

Email: devon@truluckthomason.com

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Boyce Street, LLC,

Plaintiff,

v.

David Smith Company, LLC.

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL
C.A. No.: 2020-CP-23-05229

VERDICT FORM

24 AUG 29 PM 2:17
BRIAN BARRATT, CLERK, S.C.

1. Do you find that the Defendant breached the contract as to the other alleged acts of the Defendant?

_____ YES

✓ _____ NO

2. Do you find that the Defendant's breach of contract proximately caused the Plaintiff damages?

_____ YES

✓ _____ NO

3. Do you find that the Defendant breached the express warranty or implied warranty as to the other alleged acts of the Defendant?

✓ _____ YES

_____ NO

4. Do you find that its breach of the express or implied warranty proximately caused the Plaintiff's injuries?

 ✓ YES

 NO

5. If you answered YES to question numbers 2 or 4, or both, please state the total amount of damages, if any, sustained by the Plaintiff.

Total Amount of Damages: \$ 50,000.00

Stephanie Cochran

JUROR # 44, FOREPERSON

WHEN YOU HAVE COMPLETED THE QUESTIONNAIRE,
NOTIFY THE BAILIFF.

August 28, 2024