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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge
Case No. 2016-CP-10-03468

Appellate Case No. 2024-001403

Charles Blanchard Construction Corp. Inc.……Plaintiff

v.

480 King Street, LLC ….…… Defendant

---

480 King Street, LLC……Third-Party Plaintiff, Respondent

v.

Glick/Boehm & Associates, Inc. ……Third-Party Defendant, Petitioner

---

AMENDED APPENDIX[1]

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[1] Counsel for 480 King does not object to the filing of this Amended Appendix.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2021-001510

Charles Blanchard Construction Corp, Inc., Respondent,

v.

480 King Street, LLC, Defendant,

And

480 King Street, LLC Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

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

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Charles Blanchard construction Corp., Inc.

vs.

480 King Street, LLC, and TD Bank N.A., NQ,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
2016-CP-10-3468

COMPLAINT
(Debt Collection, Foreclosure of Liens)
(Jury Trial Demanded)

FILED
2016 JUL -6 PM 1:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Plaintiff above named, complaining of the Defendants herein, would show unto this Honorable Court as follows:

JURISDICTION AND PARTIES

1. The Plaintiff is a corporation organized under and operating pursuant to the laws of the State of South Carolina, and maintaining an office in the City of North Charleston and doing business in the City and County of Charleston.

2. Upon information and belief, the Defendant 480 King Street, LLC, is a limited liability corporation organized and existing under the laws of the State of South Carolina and operating in the County of Charleston, South Carolina (hereafter "Defendant Owner") and at all times herein was the owner of the real property which is the subject of this action.

3. Defendant T.D. Bank, N.A., NQ, upon information and belief, is a National Banking Organization, organized and existing under the laws of the United States and the State of South Carolina, doing business in the County of Charleston South Carolina (hereafter "Bank") and is

made a party hereto because it may have an interest in the real property that is the subject of this action.

4. The real property at issue herein is described on the Exhibit A attached hereto and made a part hereof and known hereafter as the Real Property, is located in the City and County of Charleston, state of South Carolina.

5. The parties, property and issues herein all are within the jurisdiction of this Honorable Court.

FACTS

6. Plaintiff reasserts and realleges all facts and claims of the preceding paragraphs of this Complaint as if set forth verbatim herein.

7. On June 26, 2014, Plaintiff entered into a construction contract with Defendant Owner by and through its manager, Mary Ann Kanters, for labor, materials, equipment and services in connection with the building located on the real property owned by Defendant Owner (hereafter the "Contract").

8. On or about June 27, 2014, Plaintiff began work pursuant to the Contract, furnishing the agreed upon labor and materials and making applications for payment as specified therein.

9. Almost immediately after signing the contract, delays occurred affecting the ultimate completion date of the contract.

10. Mere hours after execution of the contract, Plaintiff discovered that the Defendant Owner's architectural plans for the elevator were incorrect, requiring an additional one foot of depth for the elevator equipment selected by the Defendant Owner and drawn by Defendant Owner's architect.

11. While under the original contract the Plaintiff was responsible for providing the elevator in accordance with Defendant Owner's plans and specifications, the improper design by Defendant Owner's architect necessitated a change order whereby the Defendant Owner was then to be responsible for providing a re-design of the elevator shaft or acquiring a different elevator that would fit within the previously designed elevator shaft.

12. The delay caused by the incorrect elevator design was neither the fault of nor the responsibility of the Plaintiff.

13. At the time of placing rebar and pouring the elevator pit and foundation slab, the Defendant Owner put a hold on the work to add sewer/storm drainage that was outside the scope of the project, anticipating that the drainage would run beneath the foundation of the stairtower.

14. The Defendant Owner hired an engineer to design the placement of the future sewer/storm drainage, and requested three quotes for pricing of the design.

15. Upon receipt of the quotes for the cost of the storm drainage, the Defendant Owner decided not to install the drainage.

16. The delay caused by the Defendant Owner's hold to design and quote the cost to install sewer/storm drainage pipes was neither the fault of nor the responsibility of the Plaintiff.

17. Many months before the project started and again early in the project, the Plaintiff advised the Defendant Owner in writing that the site needed a civil engineering plan to deal with site elevation and water run off, telling the owner that he was "afraid that the area behind 480 will be a pond."

18. Nonetheless, the Defendant Owner did not retain a civil engineer to review the site

elevations or to design a water run off plan until June 29, 2015, after the water run off at the site caused water intrusion in the elevator shaft and first floor of the stair tower.

19. In July of 2015, the Defendant Owner alleged that the water intrusion in the building's exterior walls was the result of the Plaintiff's failure to properly waterproof the exterior walls according to the design specifications.

20. The Defendant Owner claimed this failure was a construction deficiency and that the water intrusion was the result of both this construction deficiency and of the Plaintiff's failure to properly maintain and supervise the site to prevent this damage.

21. The Plaintiff informed Defendant Owner in writing that the building's perimeter walls were installed with the designated weather barrier required by the plans and specifications, which was designed only to shed water and was not a waterproofing material.

22. Defendant Owner's architect confirmed in writing to Plaintiff and Defendant Owner that the building's perimeter walls were lined with the appropriate material as called for in the plans.

23. The grade and site elevations were the responsibility of the Defendant Owner pursuant to the Contract.

24. The Defendant Owner failed to address the grade and site elevations prior to the water intrusion, no civil engineer had been retained by the Defendant Owner to draw plans addressing the site grade or elevation prior to the water intrusion, and no site grade or elevation plans had been given by the Defendant Owner to the Plaintiff to address the potential flooding.

25. The delay caused by the water intrusion and damage to the elevator shaft and first floor of

the stair tower resulting from the Defendant Owner's failure to retain a civil engineer to review the site elevations or design a water run off plan was neither the fault of nor the responsibility of the Plaintiff.

26. Prior to the signing of the contract, the Defendant Owner met with the Plaintiff and Plaintiff's subcontractors to value engineer portions of the job but did not invite the architect to all of the meeting(s).

27. Prior to the signing of the contract, the Defendant Owner met with building officials about the project and did not invite the Plaintiff or the architect to the meeting(s).

28. The Defendant Owner met with AT&T and would not let the Plaintiff attend the meeting(s).

29. The Defendant Owner's architect and electrical engineer were not present the meetings where the Defendant Owner chose less expensive light fixtures for the project, and the Defendant Owner neglected to tell the architect or electrical engineer that she had chosen less expensive light fixtures for many months.

30. Had the Defendant Owner invited the architect and engineer to these meetings or informed them of decisions made therein, several issues that caused delays would have been avoided.

31. On August 12, 2014, the Plaintiff submitted the light fixtures chosen by the Defendant Owner to the electrical engineer for approval.

32. By September 29, 2014, when the electrical engineer rejected the light fixture submittals as not being the original specified fixtures, the Defendant Owner still had not informed the electrical engineer that she had selected different fixtures for the project.

33. The Plaintiff's submittal of the light fixtures chosen by the Defendant Owner was finally approved by the Defendant Owner's electrical engineer on February 16, 2015, six months from its initial submittal date.

34. The lighting submittal delays caused late delivery of the light fixtures, as they could not be ordered until they were approved.

35. The delay caused by the Defendant Owner's failure to inform her architect and engineer of changes she had made to the light fixtures was neither the fault of nor the responsibility of the Plaintiff.

36. The Defendant Owner also had multiple electrical re-designs after the contract was signed, but did not provide them to the Plaintiff.

37. On August 12, 2014, the Plaintiff submitted to the Defendant Owner's electrical engineer electrical gear that met the original Contract's April 22, 2014 electrical drawings and specifications.

38. The Defendant Owner's electrical engineer rejected the submittal because it did not meet the most recent re-design specifications from drawings dated October 6, 2014, which were not part of the original contract.

39. The Defendant Owner did not provide the Plaintiff with updated electrical plans until October 14, 2014, and because of ongoing changes with the elevator requiring the Defendant Owners electrical engineer to continue to modify the necessary gear, the electrical gear submittal was not accepted until May 5, 2015.

40. The Defendant Owner's electrical engineer's insistence that the gear be changed to that

required in the most recent re-design necessitated a change order to the Contract, Change Order 4.

41. The Defendant Owner disputed Change Order 4, which further delayed the electrical gear.

42. The delays in the electrical gear prevented the installation of the elevator.

43. The delays caused by the electrical submittal issues were neither the fault of nor the responsibility of the Plaintiff.

44. Throughout the project, attempts to discuss problems and issues with the Defendant Owner so that the project could continue to move forward were ignored or stymied by Defendant Owner.

45. Many Change Order proposals sent to the Defendant Owner by the Plaintiff were modified by the Defendant Owner and then disputed by the parties, causing delays on the project.

46. The Contract requires the Defendant Owner to issue a Construction Change Directive to the Plaintiff contractor in the event of a dispute over a change order, and the Construction Change Directive allows work to continue on the contract without waiving any rights to dispute time or cost of the change order until the end of the contract.

47. The Plaintiff first requested in writing that the Defendant Owner sign a Construction Change Directive on April 3, 2015, to avoid cessation of work on the project when Change Order 4 was disputed.

48. The April 3, 2015 email to the Defendant Owner cited § 7.3.2 of the Contract, which

states: A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

49. The Defendant Owner refused to issue a Construction Change Directive.

50. The Plaintiff requested the Construction Change Directive in writing, multiple times between April and July of 2015.

51. On May 11, May 14, and July 10 of 2015, the Defendant Owner was again sent the language from § 7.3.2 of the Contract, stating that "A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order."

52. On June 29, 2015, during the continued dispute over the terms of Change Order 4, the Defendant Owner emailed the Plaintiff, saying the Plaintiff was "attempting to use the change order process as a blackmail device which is unacceptable under the contract. . . you continue to terrorize and harass me and frankly I think your behavior is reprehensible and entirely unprofessional."

53. In response to that email, the Plaintiff replied in writing that far from being unprofessional or attempting to harass the Defendant Owner, the issuance of a Construction Change Directive in the absence of agreement on all terms of a change order was a required and normal part of the AIA contracts.

54. The Plaintiff explained, in writing, more than once, that the word "shall" in § 7.3.2 means "must" and that the Defendant Owner was required by the Contract to issue a Construction Change Directive in the absence of agreement on a Change Order.

55. On June 30, 2015, the Plaintiff notified the Defendant Owner in writing that the

electrician would be demobilized in the absence of a Construction Change Directive by close of business the following day, as the electrician had no further work that could be performed without such authorization.

56. On July 8, 2015, the Plaintiff notified the Defendant Owner by email that the continued failure to issue a Construction Change Directive constituted a breach of the contract.

57. On July 10, 2015, the Defendant Owner demanded that notice from the Plaintiff regarding the alleged breach of the contract or any claims be given pursuant to the notice requirements of the contract and not by email, and therefore there was no notice of breach.

58. The Defendant Owner continued to refuse to issue a Construction Change Directive.

59. The Defendant Owner's failure to issue a Construction Change Directive as required by the Contract caused delays, and these delays resulted in inefficiency in production due to out-of-sequence work, stopping and starting segments while awaiting authorization, erratic staffing and eventual trade stacking.

60. These delays and the resulting inefficiency of production caused by the Defendant Owner's refusal to issue a Construction Change Directive were neither the fault of nor the responsibility of the Plaintiff.

61. The Plaintiff sent Construction Change Directive 1 to the Defendant Owner on July 30, 2015.

62. Despite the clear purpose of the Construction Change Directive as spelled out in the Contract, the Defendant Owner wrote comments on the Construction Change Directive attempting to have the Plaintiff waive all rights in connection with the disputed change order and be responsible for daily damages for the completion of the contract.

63. The Plaintiff did not sign the revised Construction Change Directive, as allowed by the Contract, and continued to perform work under the Directive and Contract, although the Defendant Owner refused to pay in full the pay applications.

64. In addition to the Construction Change Directive, the Contract provided for mediation and arbitration to resolve disputes during the pendency of the project and avoid delay and disruption.

65. Pursuant to the Defendant Owner's request on July 10, 2015, all notice regarding alleged breaches of contract and claims under the contract had to be given in accordance with the notice requirements of the Contract.

66. Section 13.2.3 of the Contract provides: "Written notice shall be deemed to have been duly served if delivered in person to the individual ...or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to the last business address known to the party giving notice."

67. Section 15.3 of the contract provided for mediation of claims, disputes, or other matters in controversy arising out of or relating to the contract as a condition precedent to binding arbitration.

68. On July 15, 2015, the Plaintiff delivered to Defendant Owner and Defendant Owner's architect, in person, a request for mediation under 15.3.1 of the contract.

69. Defendant Owner did not respond to this request.

70. On July 24, 2015, the Plaintiff sent correspondence and the renewed request for mediation by certified mail to the office address provided in the contract, however the Defendant Owner refused to pick it up at the post office.

71. On or about July 24, 2015, the Defendant Owner hired Rick Newcomb, as its project manager, to supervise the construction.

72. The Plaintiff delivered the July 24 letter requesting mediation to Rick Newcomb, the Defendant Owner's project manager, at the job site.

73. The Defendant Owner refused to acknowledge its receipt or respond.

74. On July 31, 2015, the Plaintiff sent an additional letter again requesting mediation, along with the previous correspondence and documents, by certified mail to the office address provided in the contract, however the Defendant Owner refused to pick it up at the post office.

75. The July 31 letter and its attachments were also emailed to the Defendant Owner.

76. The July 31 letter and its attachments were also delivered personally to Rick Newcomb, the Defendant Owner's project manager on the jobsite.

77. The Defendant Owner refused to acknowledge its receipt or respond.

78. On September 3, 2015, the Plaintiff sent a second request for mediation, along with previous correspondence and documents to the Defendant Owner by Federal Express to the office at the address for notice provided in the contract, however the office was closed and there was no one there during the three times Federal Express attempted to deliver it.

79. The September 3 correspondence and attachments were personally delivered to the Defendant Owner's project manager, Rick Newcomb.

80. The Defendant Owner refused to acknowledge its receipt or respond.

81. On September 28, 2015, the Plaintiff attempted, through his job supervisor, to deliver the

second request for mediation and supporting documents to the Defendant Owner in person by handing it to her when she came to the job site, but Defendant Owner refused to accept it, put her hands behind her, and left saying it needed to be sent to her office.

82. On December 1, 2015, Plaintiff had a process server in Ohio personally deliver the Plaintiff's third request for mediation to the office address provided in the contract.

83. Although this third mediation request was also sent by email and personally delivered to the Defendant Owner's project manager, Rick Newcomb, the Defendant Owner refused to acknowledge receipt or respond.

84. The Defendant Owner refused to participate in the contractually mandated dispute resolution process.

85. The Defendant Owner required the Plaintiff to provide documentation of each receipt, bill for material and the timesheet for each worker throughout the job, even though the Contract was bid as a fixed price contract rather than a time and materials contract.

86. The Defendant Owner refused to process any application for payment from the Plaintiff until all documentation was received, even though the Contract was a fixed price contract rather than a time and materials contract.

87. The fixed price Contract dictates that Applications for Payment are to be based on a percentage of completion for each line item.

88. The Plaintiff complied with this request to provide all documentation of each receipt, bill for material and the timesheet for each worker, although it placed an onerous administrative burden on the Plaintiff that was not and should not have been contemplated as part of the fixed price Contract.

89. None of the Plaintiff's subcontractors complained to the Defendant Owner that that they had not been paid by the Plaintiff.

90. None of the Plaintiff's subcontractors filed a lien on the Defendant Owner's property to insure payment based on work done as subcontractor to the Plaintiff.

91. All of Plaintiff's subcontractors were paid by the Plaintiff for amounts due under their subcontract with the Plaintiff, even though Defendant Owner did not pay the Plaintiff the full amounts of pay applications under the main Contract.

92. All of the job materials for the subject property were paid for by the Plaintiff even though the contract required their installation on the property prior to reimbursement from the Defendant Owner, because the materials needed to be ready to install at the appropriate time.

93. Although all of the subcontractors had been paid, Defendant Owner attempted to pay portions of the Plaintiff's pay applications by issuing joint checks to Plaintiff and subcontractors.

94. Plaintiff negotiated those joint checks that were possible due to the location and availability of the subcontractor, however some of the subcontractors who had been previously paid by the Plaintiff were not local and it was impossible to appear with them in person as requested by the bank to negotiate the checks.

95. These checks were then voided and returned to Defendant Owner along with an explanation, citing that the subcontractor and materials had been paid previously and that the amount on the application was reimbursement to the Plaintiff.

96. On or about September 17, 2015, the Plaintiff's materials supplier, Miller Clapperton, informed the Defendant Owner in writing that the balance of their subcontract was $3,674.20 for retainage.

97. On that same date, Miller Clapperton provided the Defendant Owner with lien waivers for the total amount of their subcontract, less the $3,674.20 retainage, and shortly thereafter, provided Defendant Owner with a lien waiver for the retainage.

98. Miller Clapperton is a Georgia company, with offices in Austell, Georgia, many hours from Charleston.

99. After being advised in writing by the subcontractor of the balance due on the subcontract, and receiving lien waivers from the subcontractor for all amounts due on the subcontract except the $3,674.20 retainage, on or about September 21, 2015, the Defendant Owner issued a joint check to Miller Clapperton and the Plaintiff in the amount of $16,309.95.

100. On or about September 21, 2015, the Defendant Owner issued a second joint check to Miller Clapperton and the Plaintiff in the amount of $1,016.50.

101. The amounts of these two joint checks exceeded the retainage due to the subcontractor by $13,652.50.

102. The Defendant Owner knew the subcontractor had already been paid everything but retainage and that these funds were due to the Plaintiff solely.

103. The Plaintiff voided these joint checks and returned them to the Defendant Owner.

104. On or about November 16, 2015, the Plaintiff informed the Defendant Owner in writing that the Plaintiff itself had performed all the work reflected in line 22 of the Application for Payment 15, installation of the steel lintels and closure angle plates.

105. After being informed that the Plaintiff, not the subcontractor Accu Welding, had installed the steel lintels and closure angle plates, on or about November 30, 2015, the Defendant Owner issued a joint check to Accu Welding and the Plaintiff in the amount of $270.39.

106. The Defendant Owner knew at the time of the issuance of the check that the subcontractor Accu Welding was not due these funds and that they were due to the Plaintiff solely.

107. Plaintiff voided the joint check and returned it to the Defendant Owner however the Defendant Owner refused to re-issue the check solely to the Plaintiff.

108. More joint checks followed, including one to subcontractor Pleasant Places and the Plaintiff, for which the Defendant Owner had already received a lien waiver but wrote a joint check for more than was owed to the subcontractor.

109. On April 21, 2015, the Plaintiff purchased materials for the wire trellis system for the Defendant Owner's project from SECO South, an online materials supplier, using a company VISA card, and forwarded the back-up documentation of this purchase to the Defendant Owner in May of 2015.

110. Seven months later, on December 30, 2015, the Defendant Owner wrote a joint check to SECO South and Plaintiff knowing that these materials had been purchased by the Plaintiff and the funds were due solely to the Plaintiff.

111. This joint check was voided and returned to the Defendant Owner, but Defendant Owner refused to re-issue the check solely to the Plaintiff.

112. The Defendant owner wrote two joint checks to Plaintiff's subcontractor, Allphase Electrical on or about January 9, 2016, which exceeded the amount due to Allphase under its subcontract with the Plaintiff, including retainage, by $12,232.31.

113. The remainder of the funds paid to Allphase by the Defendant Owner were due to Plaintiff as reimbursement for amounts Plaintiff had already paid to Allphase for materials.

114. There was never a time when the Defendant Owner issued a joint check that was returned by the Plaintiff because the amount was insufficient to cover the amount due to a subcontractor under its subcontract with the Plaintiff.

115. The Plaintiff attempted to deal with the Defendant Owner's improperly issued joint checks for significantly more than the subcontractor was due, however this placed an undue administrative burden on the Plaintiff in a fixed price Contract.

116. Several times, the Plaintiff returned a voided joint check to the Defendant Owner with an explanation, and whether the Defendant Owner had received written confirmation of the amount due from the subcontractor, had received lien waivers, or both, the Defendant Owner refused to re-issue the check solely to the Plaintiff.

117. The few times prior to November of 2015 when the Plaintiff did re-issue a voided joint check solely to the Plaintiff, payment was delayed by several weeks.

118. The Defendant Owner requested in writing that the Plaintiff provide the amounts each subcontractor was due.

119. The Defendant Owner made clear that it was only paying the subcontractors and not any amounts billed or claimed due to the Plaintiff.

120. Application for Payment 15, for work done through October 30, 2015, was sent to the Defendant Owner on November 9, 2015.

121. The Defendant Owner did not pay any amounts due solely to the Plaintiff from this Application for Payment.

122. The Defendant Owner did not pay $9,888.13 of Application for Payment 15 by December 31, 2015.

123. The $9,888.13 owing for Application for Payment 15 as of the end of December does not include the joint check made out to the Plaintiff and the trellis materials supplier, SECO South, for which the Defendant Owner had received documentation of the credit card charge in May and knew was for reimbursement to the Plaintiff for materials purchased for the Defendant Owner's project.

124. The $9,888.13 owing for Application for Payment 15 as of the end of December does not include the $2,608.09 due and owing from previous Applications for Payment, for which the Plaintiff filed a Mechanic's Lien on December 17, 2015.

125. The Defendant Owner was sent Application for Payment 16, for work done through November 30, 2015, on December 9, 2015.

126. The Defendant Owner did not pay any amounts due on Application for Payment 16, whether by joint check or otherwise.

127. The amounts due to the Plaintiff for the joint checks that the Defendant Owner refused to re-issue solely to the Plaintiff were only a small percentage of what was due and owing to the Plaintiff under the Contract; the remaining amounts were simply not paid at all by the Defendant Owner.

128. On December 30, 2015, the Plaintiff mailed notice to the Defendant Owner of its intent to demobilize in 7 days pursuant to the Contract provisions if it did not receive payment for amounts due under the applications for payment.

129. On January 2, 2016, the Plaintiff emailed the December 30 letter to the Defendant Owner along with the proof of delivery of the letter to Defendant Owner's office address.

130. The Defendant Owner did not acknowledge or respond to this correspondence.

131. The Plaintiff continued to perform work pursuant to the Contract through January 12, 2016, despite the Defendant Owner's continued failure to pay in full all applications for payment.

132. The Plaintiff notified the Defendant Owner by email on January 12, 2016, that they had demobilized and removed all equipment from the jobsite in accordance with the Contract provisions as set forth in the December 30 letter.

133. The Defendant Owner responded by claiming the Plaintiff had breached the contract in a variety of ways and stating that if the Plaintiff did not resume work within 7 days, the Defendant Owner was terminating the contract for cause.

134. The Plaintiff did not resume work under the contract.

135. The Plaintiff duly and timely filed a Notice and Certificate of Mechanics Lien with the Office of the RMC for the County of Charleston at Book 0524, Page 038, on December 17, 2015, as of which date, the amount due and unpaid by Defendant under the contract was Two Thousand Six Hundred Eight and 09/100 Dollars ($2,608.09), plus interest as provided under the Contract, plus attorneys' fees, a copy of which is attached hereto as Exhibit B (hereafter "the first Lien").

136. The Plaintiff duly and timely filed a Notice and Certificate of Mechanics Lien with the Office of the RMC for the County of Charleston at Book 0542, Page 405, on March 22, 2016, as of which date, the amount due and unpaid by Defendant under the contract, not including the amount for the first Lien set forth above, was Twenty Nine Thousand Five Hundred Twenty One and 28/100 (29,521.28), plus interest as provided under the Contract, plus attorneys' fees, a copy of which is attached hereto as Exhibit C (hereafter "the second Lien").

137. The Plaintiff duly and timely filed a Notice and Certificate of Mechanics Lien with the Office of the RMC for the County of Charleston at Book 0546, Page 296, on April 11, 2016, as of which date, the amount due and unpaid by Defendant under the contract, not including the amount of the first Lien and second Lien set forth above, was Fifty Two Thousand Eight Hundred Sixty Eight and 78/100 Dollars ($52,868.78), plus interest as provided under the Contract, plus attorneys' fees, a copy of which is attached hereto as Exhibit D (hereafter "the third Lien").

138. The Defendant Owner has failed to pay in full the amount of the first, second and third Liens.

AS A FIRST CAUSE OF ACTION
Foreclosure of Mechanics Liens

139. Plaintiff reasserts and re-alleges all facts and claims of the preceding paragraphs of this Complaint as if set forth verbatim herein.

140. Plaintiff has commenced this action within six months of the last date it provided labor and materials on the Real Property.

141. Plaintiff is entitled to an Order of Foreclosure of its first, second and third Mechanic's Liens on the Real Property, requiring that the Real Property be sold and that the proceeds of sale, after deducting all lawful charges and expenses, be paid to Plaintiff to be applied to the amount owed pursuant to the Lien, including interest, plus attorneys' fees and the costs of this action.

AS A SECOND CAUSE OF ACTION
(Breach of Contract)

142. Plaintiff reasserts and re-alleges all facts and claims of the preceding paragraphs of

this Complaint as if set forth verbatim herein.

143. The Defendant Owner willfully breached the contract with the Plaintiff in multiple ways, including but not limited to the following:

a. Failing to pay for labor and materials furnished and billed under the Contract between Defendant Owner and the Plaintiff;

b. Improperly issuing joint checks when Defendant Owner was informed by the subcontractor of the amount due and was provided lien waivers;

c. Improperly issuing joint checks when Defendant Owner was provided lien waivers;

d. Improperly issuing joint checks to Plaintiff and materials suppliers when Defendant Owner was provided proof of payment for materials;

e. Refusing to re-issue improperly issued joint checks solely to the Plaintiff;

f. Providing an unattended address for service of notice under the contract;

g. Refusing to accept notice under the contract;

h. Refusing to participate in contractually mandated alternative dispute resolution;

i. Refusing to issue Construction Change Directives to keep the job moving forward in the event of a dispute over a Change Order as required by the Contract, despite multiple requests by the Plaintiff;

j. Wrongfully terminating the Contract for cause claiming Plaintiff was in breach.

144. As a result of the breach of contract by Defendant Owner, the Plaintiff has been damaged in the amounts owed; plus interest as provided under the contract; or in the event of willful breach, interest as provided by statute, contract damages for costs, overhead and profit for

the unfinished work, increased project administration and project management costs, and increased reimbursable project costs caused by delays; attorneys' fees; and the costs of this action, for which amounts Defendant is responsible.

AS A THIRD CAUSE OF ACTION
(Quasi-Contract/Unjust Enrichment)

145. Plaintiff reasserts and re-alleges all facts and claims of the preceding paragraphs of this Complaint as if set forth verbatim herein.

146. The Defendant Owner and Bank have had the use and benefit of the materials and labor furnished by the Plaintiff and are unjustly retaining the benefit of the materials and labor without paying Plaintiff in full for them.

147. The Defendant Owner and Bank are liable to Plaintiff for the reasonable value of the labor and materials for which it has not paid in full, plus prejudgment interest from the date such labor and materials were supplied.

WHEREFORE, the Plaintiff prays for judgment as follows:

A) On its First Cause of Action, Plaintiff demands that Plaintiff's Mechanic's Lien be foreclosed, that due notice of said foreclosure be given all proper parties, that the priorities of the Plaintiff and the Bank be determined, that the Real Estate be sold and that the proceeds used to satisfy the amounts due Plaintiff on its Liens and for the costs incurred in prosecuting this action, including attorneys' fees, with any deficiency remaining a debt of the Defendant Owner to the Plaintiff.

B) On its Second Cause of Action, Plaintiff demands judgment against Defendant Owner for Breach of Contract in the amount of all unpaid balance, plus prejudgment interest, costs and attorneys' fees; and in the event of willful breach, interest as provided by statute, contract

damages for costs, overhead and profit for the unfinished work, increased project administration and project management costs, and increased reimbursable project costs caused by delays, attorneys' fees, and the costs of this action.

C) On its Third Cause of Action, Plaintiff prays for judgment against Defendant Bank and Defendant Owner, jointly and severally, in the amount of all labor and materials supplied by Plaintiff but not paid for by Defendants, plus prejudgment interest from the date such labor and materials were provided, and for the costs herein expended.

D) Plus such other and further relief that this Court deems just, equitable, and proper.

Charleston, S. C.

07.06, 2016

TAYLOR & BOWLEY, LLC

D. LYNN BOWLEY
State Bar # 66669
P.O. Box 1059
Charleston, SC 29402
(843) 723-4020; fax (843) 723-4021

EXHIBIT A

All that piece or parcel of land, together with the building and improvements located thereon, situate, lying and being on the East side King Street, between Ann and Mary Streets, in the City of Charleston, and the State aforesaid. MEASURING AND CONTAINING on the front of King Street and on the East or back thirty seven (37') feet, and on the North and South lines one hundred fifty-nine (159') feet and six (6") inches, being the dimensions more or less. BUTTING AND BOUNDING to the North on the lands now or formerly of the South Carolina Railway Company, to the South on lands now or late of the Estate of William Schneider, and to the West of King Street aforesaid.

The premises herein described is known as No. 480 in the present numbering system of King Street, and being more fully described on a play of the said No. 480 King Street by Joseph Needle, G.E., dated December 13, 1939 and recorded in the RMC Office for Charleston County in Plat Book F, Page 49.

TMS No. 460-12-02-028

BEING the same property conveyed to 480 King Street, LLC by Warranty Deed of GLR King Street Property, LLC, dated April 15, 2013 and recorded on April 18, 2013, in the RMC Office for Charleston County in Book 0324, Page 189.

EXHIBIT B

BP0524038 # PGS: 6

STATE OF SOUTH CAROLINA	)	IN THE OFFICE OF THE RMC FOR
	)	THE COUNTY OF CHARLESTON
COUNTY OF CHARLESTON	)	
	)	
Charles Blanchard Construction Corp.,	)	
	)	
Petitioner	)	
	)	NOTICE AND CERTIFICATE OF
vs.	)	MECHANIC'S LIEN
	)	
480 King Street, LLC,	)	
Respondent.	)	
	)	

The Petitioner above named claims a lien in the amount set forth below and established by the sworn statement (Exhibit A), which is a true and just account of the amount due to the Plaintiff with all just credits given for labor and materials furnished and actually used in the erection, alteration, or repair of buildings or structures situated on the real estate described in Exhibit B, by virtue of its contract and consent of the Defendant property owner, by Mary Ann Kanters, the manager of its agent, 480 King Street, LLC, for its property 480 King Street

The value of the labor and materials furnished is the sum of Two Thousand, Six Hundred- Eight and 69/100 ($2,608.69) Dollars, as is evidenced by the sworn statement of account attached hereto as Exhibit "A", and labor and materials were furnished to the after-described real estate less than ninety (90) days prior to date of the filing and service of this Mechanic's Lien.

That by virtue of the aforesaid labor and materials furnished to the after-described property, and by the service and filing of this Mechanic's lien, Petitioner, has and claims a Mechanic's Lien for the payment of the indebtedness aforesaid and the cost of enforcing said lien upon the following described real estate, attached hereto as Exhibit "B":

WHEREFORE, Petitioner claims a Mechanic's Lien in the sum of Two Thousand, Six Hundred-Eight and 69/100 ($2,608.69) Dollars, plus interest, a reasonable attorney's fee as prescribed by statute, and for the costs and disbursements of this action.

RESPECTFULLY SUBMITTED:

TAYLOR, BOWLEY & BYRD, LLC by:

D. Lynn Bowley
39 Broad St., Suite 101
Charleston, SC 29401
843-723-4020
Attorneys for Petitioner

Dated 12/17/15
Charleston, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	
CHARLES BLANCHARD CONSTRUCTION CORPORATION Petitioner vs. 480 King Street, LLC Respondents	IN THE OFFICE OF THE RMC: COUNTY OF CHARLESTON AFFIDAVIT OF MIKE BLANCHARD

Personally appeared before me the undersigned Mike Blanchard who first being duly sworn, states and deposes as follows:

1. That I am the principal of Charles Blanchard Construction Corporation, and my Contractor's License number is G11461.

2. That Charles Blanchard Construction Corporation contracted for construction work on the premises located at 480 King Street owned, upon information and belief, by 480 King Street, LLC

3. That this work commenced on or around June 4, 2010, and meaningful work on this property was ongoing less than ninety (90) days from the filing of this Mechanic's Lien.

4. That payment for this work in the amount of $2,608.69 is due and owing as of this date.

FURTHER THIS AFFIANT SAYETH NOT.

EXHIBIT B

All that piece or parcel of land, together with the building and improvements located thereon, situate, lying and being on the East side King Street, between Ann and Mary Streets, in the City of Charleston, and the State aforesaid. MEASURING AND CONTAINING on the front of King Street and on the East or back thirty seven (37') feet, and on the North and South lines one hundred fifty-nine (159') feet and six (6") inches, being the dimensions more or less. BUTTING AND BOUNDING to the North on the lands now or formerly of the South Carolina Railway Company, to the South on lands now or late of the Estate of William Schneider, and to the West of King Street aforesaid.

The premises herein described is known as No. 480 in the present numbering system of King Street, and being more fully described on a play of the said No. 480 King Street by Joseph Needle, G.E., dated December 13, 1939 and recorded in the RMC Office for Charleston County in Plat Book F, Page 49.

TMS No. 460-12-02-028

BEING the same property conveyed to 480 King Street, LLC by Warranty Deed of GLR King Street Property, LLC, dated April 15, 2013 and recorded on April 18, 2013, in the RMC Office for Charleston County in Book 0324, Page 189.

EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE OFFICE OF THE RMC FOR THE COUNTY OF CHARLESTON
COUNTY OF CHARLESTON	)	
Charles Blanchard Construction Corp.,	)	BP0542405 # PGS: 6
Petitioner	)	
vs.	)	NOTICE AND CERTIFICATE OF MECHANIC'S LIEN
480 King Street, LLC,	)	
Respondent.	)	

The Petitioner above named claims a lien in the amount set forth below and established by the sworn statement (Exhibit A), which is a true and just account of the amount due to the Plaintiff with all just credits given for labor and materials furnished and actually used in the erection, alteration, or repair of buildings or structures situated on the real estate described in Exhibit B, by virtue of its contract and consent of the Defendant property owner, by Mary Ann Kanters, the manager of its agent, 480 King Street, LLC, for its property 480 King Street

The value of the labor and materials furnished is the sum of Twenty Nine Thousand Five Hundred Twenty One and 28/100 ($29,521.28) Dollars, as is evidenced by the sworn statement of account attached hereto as Exhibit "A", and labor and materials were furnished to the after-described real estate less than ninety (90) days prior to date of the filing and service of this Mechanic's Lien.

That by virtue of the aforesaid labor and materials furnished to the after-described property, and by the service and filing of this Mechanic's lien, Petitioner, has and claims a Mechanic's Lien for the payment of the indebtedness aforesaid and the cost of enforcing said lien upon the following described real estate, attached hereto as Exhibit "B":

WHEREFORE, Petitioner claims a Mechanic's Lien in the sum of Twenty Nine Thousand Five Hundred Twenty One and 28/100 ($29,521.28) Dollars, plus interest, a reasonable attorney's fee as prescribed by statute, and for the costs and disbursements of this action.

RESPECTFULLY SUBMITTED:

TAYLOR, BOWLEY & BYRD, LLC by:

D. Lynn Bowley
P.O. Bo 1059
Charleston, SC 29402
843-723-4020
Attorneys for Petitioner

Dated 03.22.16
Charleston, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	
CHARLES BLANCHARD CONSTRUCTION CORPORATION	)	IN THE OFFICE OF THE RMC: COUNTY OF CHARLESTON
Petitioner	)	AFFIDAVIT OF MIKE BLANCHARD
vs.	)	
480 King Street, LLC	)	
Respondents	)	

Personally appeared before me the undersigned Mike Blanchard who first being duly sworn, states and deposes as follows:

1. That I am the principal of Charles Blanchard Construction Corporation, and my Contractor's License number is G11461.

2. That Charles Blanchard Construction Corporation contracted for construction work on the premises located at 480 King Street owned, upon information and belief, by 480 King Street, LLC.

3. That this work commenced on or around June of 2014, and meaningful work on this property was ongoing less than ninety (90) days from the filing of this Mechanic's Lien.

4. That payment for this work in the amount of $ 29,521.28 is due and owing as of this date. This amount is in addition to the $2,608.69 for which a previous lien was filed with the Charleston County RMC at Book 0524, page 038.

[Signature block on following page]

FURTHER THIS AFFIANT SAYETH NOT.

Mike Blanchard

Sworn to before me this 18th day of March 2014

Notary Public for South Carolina
My commission expires Nov 3, 2024.

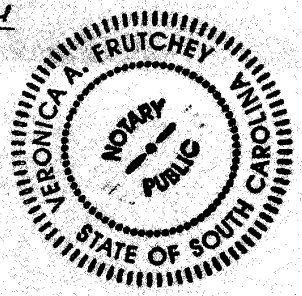


EXHIBIT B

All that piece or parcel of land, together with the building and improvements located thereon, situate, lying and being on the East side King Street, between Ann and Mary Streets, in the City of Charleston, and the State aforesaid. MEASURING AND CONTAINING on the front of King Street and on the East or back thirty seven (37') feet, and on the North and South lines one hundred fifty-nine (159') feet and six (6") inches, being the dimensions more or less. BUTTING AND BOUNDING to the North on the lands now or formerly of the South Carolina Railway Company, to the South on lands now or late of the Estate of William Schneider, and to the West of King Street aforesaid.

The premises herein described is known as No. 480 in the present numbering system of King Street, and being more fully described on a play of the said No. 480 King Street by Joseph Needle, G.E., dated December 13, 1939 and recorded in the RMC Office for Charleston County in Plat Book F, Page 49.

TMS No. 460-12-02-028

BEING the same property conveyed to 480 King Street, LLC by Warranty Deed of GLR King Street Property, LLC, dated April 15, 2013 and recorded on April 18, 2013, in the RMC Office for Charleston County in Book 0324, Page 189.

EXHIBIT D

BP0546296 #PGS: 6

STATE OF SOUTH CAROLINA	)	IN THE OFFICE OF THE RMC FOR
	)	THE COUNTY OF CHARLESTON
COUNTY OF CHARLESTON	)	
	)	
Charles Blanchard Construction Corp.,	)	
	)	
Petitioner	)	
	)	NOTICE AND CERTIFICATE OF
vs.	)	MECHANIC'S LIEN
	)	
480 King Street, LLC,	)	
Respondent.	)	
	)	

The Petitioner above named claims a lien in the amount set forth below and established by the sworn statement (Exhibit A), which is a true and just account of the amount due to the Plaintiff with all just credits given for labor and materials furnished and actually used in the erection, alteration, or repair of buildings or structures situated on the real estate described in Exhibit B, by virtue of its contract and consent of the Defendant property owner, by Mary Ann Kanters, the manager of its agent, 480 King Street, LLC, for its property 480 King Street

The value of the labor and materials furnished is the sum of Fifty Two Thousand Eight Hundred Sixty Eight and 78/100 ($52,868.78) Dollars, as is evidenced by the sworn statement of account attached hereto as Exhibit "A", and labor and materials were furnished to the after-described real estate less than ninety (90) days prior to date of the filing and service of this Mechanic's Lien.

That by virtue of the aforesaid labor and materials furnished to the after-described property, and by the service and filing of this Mechanic's lien, Petitioner, has and claims a Mechanic's Lien for the payment of the indebtedness aforesaid and the cost of enforcing said lien upon the following described real estate, attached hereto as Exhibit "B":

EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	
CHARLES BLANCHARD CONSTRUCTION CORPORATION	)	IN THE OFFICE OF THE RMC: COUNTY OF CHARLESTON
Petitioner	)	
vs.	)	AFFIDAVIT OF MIKE BLANCHARD
480 King Street, LLC	)	
Respondents	)	

Personally appeared before me the undersigned Mike Blanchard who first being duly sworn, states and deposes as follows:

1. That I am the principal of Charles Blanchard Construction Corporation, and my Contractor's License number is G11461.

2. That Charles Blanchard Construction Corporation contracted for construction work on the premises located at 480 King Street owned, upon information and belief, by 480 King Street, LLC.

3. That this work commenced on or around June of 2014, and meaningful work on this property was ongoing less than ninety (90) days from the filing of this Mechanic's Lien.

4. That payment for this work in the amount of $52,868.78 is due and owing as of this date. This amount is in addition to the $2,608.69 for which a previous lien was filed with the Charleston County RMC on December 17, 2015 at Book 0524, page 038. This amount is also in addition to the $29,521.28 for which a previous lien was filed with the Charleston County RMC on March 22, 2016 at Book 0542, page 405.

FURTHER THIS AFFIANT SAYETH NOT.

Mike Blanchard

Sworn to before me this 11th day of April 2019

Notary Public for South Carolina

My commission expires Nov 3, 2024

VERONICA A. FRUTCHEY NOTARY PUBLIC STATE OF SOUTH CAROLINA

EXHIBIT B

All that piece or parcel of land, together with the building and improvements located thereon, situate, lying and being on the East side King Street, between Ann and Mary Streets, in the City of Charleston, and the State aforesaid. MEASURING AND CONTAINING on the front of King Street and on the East or back thirty seven (37') feet, and on the North and South lines one hundred fifty-nine (159') feet and six (6") inches, being the dimensions more or less. BUTTING AND BOUNDING to the North on the lands now or formerly of the South Carolina Railway Company, to the South on lands now or late of the Estate of William Schneider, and to the West of King Street aforesaid.

The premises herein described is known as No. 480 in the present numbering system of King Street, and being more fully described on a play of the said No. 480 King Street by Joseph Needle, G.E., dated December 13, 1939 and recorded in the RMC Office for Charleston County in Plat Book F, Page 49.

TMS No. 460-12-02-028

BEING the same property conveyed to 480 King Street, LLC by Warranty Deed of GLR King Street Property, LLC, dated April 15, 2013 and recorded on April 18, 2013, in the RMC Office for Charleston County in Book 0324, Page 189.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO. 2016-CP-10-3468
CHARLES BLANCHARD CONSTRUCTION CORP., INC.,	)	
Plaintiff,	)	**ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**
vs.	)	(Jury Trial Demanded)
480 KING STREET, LLC et.al.	)	
Defendant.	)	

FILED
2016 AUG -4 PM 3:0
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Comes now Defendant, 480 King Street, LLC (hereinafter, "Defendant" or "Owner"), by and through its undersigned attorneys and Answers the allegations of Plaintiff's Complaint, asserts certain Affirmative Defenses and Counterclaims and states the following:

FOR A FIRST DEFENSE

(Qualified Denial)

1. Except as otherwise admitted, qualified, or explained hereinafter, Defendant denies each and every allegation contained in the Complaint and demands strict proof thereof.

2. Defendant admits the allegations of paragraph 1 only inasmuch as the defendant is a Corporation organized and operating under the laws of South Carolina. Defendant denies the remaining allegations of paragraph 1 of the Plaintiff's Complaint and demands strict proof thereof.

3. Defendant admits the allegations of paragraph 2 only inasmuch as the Defendant is a Corporation organized and existing under the laws of South Carolina. Defendant denies the remaining allegations of paragraph 2 of the Plaintiff's Complaint and demands strict proof thereof.

4. Defendant admits the allegations of paragraph 3 only inasmuch as the Defendant, TD Bank, N.A., NQ is a National Banking Organization, organized and existing under the laws of the United States and the State of South Carolina. Defendant denies the remaining allegations of paragraph 3 of the Plaintiff's Complaint and demands strict proof thereof.

5. Defendant admits the allegations of paragraph 4 of the Plaintiff's Complaint.

6. Defendant admits the allegations of paragraph 5 of the Plaintiff's Complaint.

7. Answering paragraph 6 of the Plaintiff's Complaint, Defendant repeats and realleges its Answer to paragraphs 1 through 6 as fully as if repeated herein verbatim.

8. Defendant denies for lack of knowledge the allegations of paragraph 7 of the Plaintiff's Complaint and demands strict proof thereof.

9. Defendant denies for lack of knowledge the allegations of paragraph 8 of the Plaintiff's Complaint and demands strict proof thereof.

10. Defendant admits the allegations of paragraph 9 insomuch as there were delays. Defendant denies the remaining allegations of paragraph 9 and demands strict proof thereof.

11. Defendant admits the allegations of paragraph 10 insomuch as the Plaintiff' after reviewing the plans of the project for the contracted work ordered the wrong elevator for the project. Defendant denies the remaining allegations of paragraph 10 and demands strict proof thereof.

12. Defendant admits the allegations of paragraph 11 insomuch as the Plaintiff was responsible for providing the elevator. Defendant denies the remainder of the allegations of paragraph 11 and demands strict proof thereof.

13. Defendant denies the allegations of paragraph 12 and demands strict proof thereof.

14. Defendant denies the allegations of paragraph 13 inasmuch as there was a hold placed on that portion of the work on the project. There was plenty of other work that could have continued to be done on the project, but Plaintiff decided to use this as a 'complete stop" of work. Defendant denies the remaining allegations of paragraph 13 and demands strict proof thereof.

15. Defendant admits the allegations of paragraph 14 inasmuch as the engineers determined that it was not needed.

16. Defendant denies the allegations of paragraph 15 of the Plaintiff's Complaint and demands strict proof thereof.

17. Defendant denies the allegations of paragraph 16 of Plaintiff's Complaint and demands strict proof thereof.

18. Defendant denies the allegations of paragraphs 17 and 18 and demands strict proof thereof.

19. Defendant denies the allegations of paragraph 19 and demands

strict proof thereof.

20. Defendant denies the allegations of paragraphs 19, 20, 21, 22, 23 24, 25 and demands strict proof thereof, as no work was being performed by Charles Blanchard Construction or any of its subcontractors from May 4, 2015 through most of July, 2015.

21. Defendant admits to the allegations of paragraph 26 inasmuch as there were meetings regarding the value engineer portions of the job. Plaintiff stated that value engineering could be handled by Plaintiff. Architect and Engineers were involved when requested by Plaintiff. Plaintiff had free access to Architect and Engineer and on numerous occasions communicated with Architect and Engineer without Owners knowledge. Defendant denies the remaining allegations of paragraph 26 and demands strict proof thereof.

22. Defendant denies the allegations of paragraph 27 and demands strict proof thereof.

23. Defendant admits the allegations of paragraph 28 inasmuch as the Defendant did have a meeting with AT&T. Defendant denies the remaining allegations of paragraph 28 and demands strict proof thereof.

24. Defendant denies the allegations of paragraphs 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and demands strict proof thereof.

25. Defendant denies the allegations of paragraph 44 and demands strict proof thereof.

26. Defendant admits the allegations of paragraph 45 inasmuch that Plaintiff submitted change orders Defendant denies the remaining allegations of

paragraph 45 and demands strict proof thereof.

27. Defendant denies the allegations of paragraph 46 of Plaintiff's Complaint and demands strict proof thereof.

28. Defendant admits that the contractor emailed the owner but denies the remainder of the allegations of paragraph 47 of Plaintiff's Complaint and demands strict proof thereof.

29. Defendant denies the allegations of paragraph 48 of Plaintiff's Complaint and demands strict proof thereof.

30. Defendant denies the allegations of paragraph 49 of Plaintiff's Complaint and demands strict proof thereof.

31. Defendant denies the allegations of paragraph 50 of Plaintiff's Complaint and demands strict proof thereof.

32. Defendant admits the allegations of paragraph 51 of Plaintiff's Complaint insomuch as received email. Defendant denies the remaining allegations of paragraph 51 and demands strict proof thereof.

33. Defendant admits the allegations of paragraph 52 of Plaintiff's Complaint.

34. Defendant denies the allegations of paragraph 53 of the Plaintiff's Complaint and demands strict proof thereof.

35. Defendant denies the allegations of paragraph 54 of the Plaintiff's Complaint and demands strict proof thereof.

36. Defendant admits the allegations of paragraph 55 of Plaintiff's Complaint

insomuch as the Plaintiff gave instructions to the election to demobilize despite the fact that there was plenty of other work that could have been done. Defendant denies the remainder of the allegations of paragraph 55 of Plaintiff's Complaint and demands strict proof thereof.

37. Defendant admits the allegations of paragraph 56 inasmuch as receiving email. Defendant denies the remainder of the allegations of paragraph 56 of Plaintiff's Complaint and demands strict proof thereof.

38. Defendant admits the allegations of paragraph 57 of Plaintiff's Complaint.

39. Defendant denies the allegations of paragraph 58 of Plaintiff's Complaint and demands strict proof thereof.

40. Defendant denies the allegations of paragraph 59 of Plaintiff's Complaint and demands strict proof thereof.

41. Defendant denies the allegations of paragraph 60 of Plaintiff's Complaint and demands strict proof thereof.

42. Defendant admits the allegations of paragraph 61 of Plaintiff's Complaint.

43. Defendant denies the allegations of paragraph 62 of Plaintiff's Complaint and demands strict proof thereof.

44. Defendant admits the allegations of paragraph 63 insomuch as Plaintiff did not sign the Construction Change Order. Defendant denies the remaining allegations of paragraph 63 and demands strict proof thereof.

45. Defendant admits the allegations of paragraph 64 insomuch that

the Contract provided for mediation and arbitration to resolve disputes. Defendant denies the remainder of the allegations of paragraph 64 and demands strict proof thereof.

46. Defendant denies the allegations of paragraph 65 of Plaintiff's Complaint. The method of notice is clearly defined in the contract and the Plaintiff failed to confirm notice to the terms and conditions of the contract.

General Conditions of the Contract Section 13.3 Written Notice: "Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice."

Addendum reads: "This Addendum and its provisions supersede the original body of the Agreement, A201, all exhibits, attachments and all its references in its entirety, and whenever there may be a conflict between the Addendum and the Agreement and/or A201, this Addendum shall be the controlling document."

47. Defendant admits the allegations of paragraph 66 of Plaintiff's Complaint.

48. Defendant denies the allegation of paragraph 67 of Plaintiff's Complaint and demands strict proof thereof.

49. Defendant denies the allegations of paragraph 68 of Plaintiff's Complaint and demands strict proof thereof.

Addendum reads: "This Addendum and its provisions supersede the original body of the Agreement, A201, all exhibits, attachments and all its references in its entirety, and whenever there may be a conflict between the Addendum and the Agreement and/or A201, this Addendum shall be the controlling document."

50. Defendant denies the allegations of paragraph 69 of Plaintiff's Complaint and demands strict proof thereof.

51. Defendant denies the allegations of paragraph 70 of Plaintiff's Complaint and demands strict proof thereof.

52. Defendant denies the allegations of paragraph 71 of Plaintiff's Complaint and demands strict proof thereof.

53. Defendant denies the allegations of paragraph 72 of Plaintiff's Complaint and demands strict proof thereof.

54. Defendant denies the allegations of paragraph 73 of Plaintiff's Complaint and demands strict proof thereof.

55. Defendant denies the allegations of paragraph 74 of Plaintiff's Complaint and demands strict proof thereof.

55. Defendant denies the allegations of paragraph 75 of Plaintiff's Complaint and demands strict proof thereof.

56. Defendant denies the allegations of paragraph 76 of Plaintiff's Complaint and demands strict proof thereof.

57. Defendant denies the allegations of paragraph 77 of Plaintiff's Complaint and demands strict proof thereof.

58. Defendant denies the allegations of paragraph 78 of Plaintiff's Complaint and demands strict proof thereof.

59. Defendant denies the allegations of paragraph 79 of Plaintiff's Complaint and demands strict proof thereof.

60. Defendant denies the allegations of paragraph 80 of Plaintiff's Complaint and demands strict proof thereof.

61. Defendant denies the allegations of paragraph 81 of Plaintiff's Complaint and demands strict proof thereof.

62. Defendant denies the allegations of paragraph 82 of Plaintiff's Complaint and demands strict proof thereof.

63. Defendant denies the allegations of paragraph 83 of Plaintiff's Complaint and demands strict proof thereof.

64. Defendant denies the allegations of paragraph 84 of Plaintiff's Complaint and demands strict proof thereof.

65. Defendant denies the allegations of paragraph 85 of Plaintiff's Complaint and demands strict proof thereof.

66. Defendant denies the allegations of paragraph 86 of Plaintiff's Complaint and demands strict proof thereof.

67. Defendant denies the allegations of paragraph 87 of Plaintiff's Complaint and demands strict proof thereof.

68. Defendant denies the allegations of paragraph 88 of Plaintiff's Complaint and demands strict proof thereof.

69. Defendant denies the allegations of paragraph 89 of Plaintiff's

Complaint and demands strict proof thereof.

70. Defendant admits the allegations of paragraph 90 of Plaintiff's Complaint.

71. Defendant denies the allegations of paragraph 91 of Plaintiff's Complaint and demands strict proof thereof.

72. Defendant denies the allegations of paragraph 92 of Plaintiff's Complaint and demands strict proof thereof.

73. Defendant denies the allegations of paragraph 93 of Plaintiff's Complaint and demands strict proof thereof.

74. Defendant denies the allegations of paragraph 94 of Plaintiff's Complaint and demands strict proof thereof.

75. Defendant denies the allegations of paragraph 95 of Plaintiff's Complaint and demands strict proof thereof.

76. Defendant admits the allegations of paragraph 96 insomuch as that on September 17, 2015 the Plaintiff's material supplier, Miller Clapperton did contact Defendant. Defendant denies the remainder of the allegations of paragraph 96 of Plaintiff's Complaint and demands strict proof thereof.

77. Defendant denies the allegations of paragraph 97 of Plaintiff's Complaint and demands strict proof thereof.

78. Defendants admit the allegations of paragraph 98 of plaintiff's Complaint insomuch as Miller Clapperton is a Georgia company with offices in Austell Georgia. Defendant denies the remaining allegations of paragraph 98 of Plaintiff's Complaint and demands strict proof thereof.

79. Defendant admits the allegations of paragraph 99 of Plaintiff's Complaint insomuch as Defendant did issue a joint check the Miller Clapperton and the Plaintiff. Defendant denies the remainder of the allegations contained in paragraph 99 and demands strict proof thereof.

80. Defendant admits the allegations of paragraph 100 of the Plaintiff's Complaint.

81. Defendant denies the allegations of paragraph 101 of Plaintiff's Complaint and demands strict proof thereof.

82. Defendant denies the allegations of paragraph 102 of Plaintiff's Complaint and demands strict proof thereof.

83. Defendant admits the allegations of paragraph 103 of Plaintiff's Complaint.

84. Defendant denies the allegations of paragraph 104 of Plaintiff's Complaint and demands strict proof thereof.

85. Defendant admits the allegations of paragraph 105 of Plaintiff's Complaint insomuch as Defendant did issue a joint check to Accu Welding and the Plaintiff in the amount of $270.30. Defendant denies the remainder of the allegations of paragraph 105 of Plaintiff's Complaint and demands strict proof thereof.

86. Defendant denies the allegations of paragraph 106 of Plaintiff's Complaint and demands strict proof thereof.

87. Defendant denies the allegations of paragraph 107 of Plaintiff's Complaint and demands strict proof thereof.

88. Defendant denies the allegations of paragraph 108 of Plaintiff's Complaint and demands strict proof thereof.

89. Defendant denies the allegations of paragraph 109 of Plaintiff's Complaint and demands strict proof thereof.

90. Defendant denies the allegations of paragraph 110 of Plaintiff's Complaint and demands strict proof thereof.

91. Defendant denies the allegations of paragraph 111 of Plaintiff's Complaint and demands strict proof thereof.

92. Defendant admits the allegations of paragraph 112 of Plaintiff's Complaint insomuch as Defendant wrote two joint checks to Plaintiff subcontractor. Defendant denies the remainder of the allegations of paragraph 112 of Plaintiff's Complaint and demands strict proof thereof.

93. Defendant denies the allegations of paragraph 113 of Plaintiff's Complaint and demands strict proof thereof.

94. Defendant denies for lack of knowledge the allegations of paragraph 114 of Plaintiff's Complaint and demands strict proof thereof.

95. Defendant denies the allegations of paragraph 115 of Plaintiff's Complaint and demands strict proof thereof.

96. Defendant denies the allegations of paragraph 116 of Plaintiff's Complaint and demands strict proof thereof.

97. Defendant denies the allegations of paragraph 117 of Plaintiff's Complaint and demands strict proof thereof.

98. Defendant admits the allegations of paragraph 118 of Plaintiff's

Complaint.

99. Defendant denies the allegations of paragraph 119 of Plaintiff's Complaint and Demands strict proof thereof.

100. Defendant admits the allegations of paragraph 120 of Plaintiff's Complaint.

101. Defendants admits the allegations of paragraph 121 of Plaintiff's Complaint. Defendant did not issue payment solely to Plaintiff due to The fact that there were numerous deficiencies in this Application for Payment #15 that Defendant notified Plaintiff of in Defendant's cover letter enclosing partial payment sent on November 30, 2015.

102. Defendant admits the allegations of paragraph 122 of Plaintiff's Complaint. Defendant did not pay the $9,888.13 of Application for Payment #15 by December 31, 2015 because the deficiencies noticed to Plaintiff of Application for Payment #15 were not cured by December 15, 2015.

103. Defendant denies for lack of knowledge the allegations of paragraph 123 of Plaintiff's Complaint and demands strict proof thereof.

104. Defendant denies for lack of knowledge the allegations of paragraph 124 of Plaintiff's Complaint and demands strict proof thereof.

105. Defendant admits the allegations of para graph 125 of Plaintiff's Complaint.

106. Defendant denies the allegations of paragraph 126 of Plaintiff's Complaint as Defendant did make payment on this Application for Payment #16 on December 30, 2015 sent via Fed Ex.

107. Defendant denies the allegations of paragraph 127 of Plaintiff's Complaint and demands strict proof thereof. Defendant denies the allegations of paragraph 128 of Plaintiff's Complaint and demands strict proof thereof.

108. Defendant denies for lack of knowledge the allegations of paragraphs 129 and paragraph 130 of Plaintiff's Complaint and demands strict proof thereof.

109. Defendant denies the allegations of paragraph 131 of Plaintiff's Complaint and demands strict proof thereof.

110. Defendant admits the allegations of paragraph 132 insomuch as Plaintiff did notice Defendant. Defendant denies the remainder of the allegations of paragraph 132 and demands strict proof thereof.

111. Defendant admits the allegations of paragraph 133 insomuch as Plaintiff did notice Defendant. Defendant denies the remainder of the allegations of paragraph 133 and demands strict proof thereof.

112. Defendant admits the allegations of paragraph 134 of Plaintiff's Complaint.

113. Defendant admits the allegations of paragraph 135 insomuch as Plaintiff attempted to file a Notice and Certificate of Mechanic's Lien on December 17, 2015. Defendant denies that the lien is justified or enforceable or that Defendant was properly served. Defendant denies the remainder of the allegations of paragraph 135 as stated herein and demands strict proof thereof.

114. Defendant admits the allegations of paragraph 136 of Plaintiff's Complaint insomuch as Plaintiff attempted to file a Notice and Certificate of

Mechanics Lien on March 22, 2016. Defendant denies that the Lien is justified or enforceable, or that Defendant was properly served. Defendant denies the remainder of the allegations of paragraph 136 of Plaintiff's Complaint as stated herein and demands strict proof thereof.

115. Defendant denies for lack of knowledge the allegations of paragraph 137 of Plaintiff's Complaint and demands strict proof thereof.

116. Defendant denies the allegations of paragraph 138 of Plaintiff's Complaint and demands strict proof thereof, however, the contract has been paid in full.

117. Answering paragraph 139 of Plaintiff's Complaint, Defendant repeats and realleges its answers to paragraphs 1 through 138 of the Plaintiff's Complaint as fully as if repeated herein verbatim.

118. Defendant denies the allegations of paragraph 140 of Plaintiff's Complaint and demands strict proof thereof.

119. Defendant denies the allegations of paragraph 141 of Plaintiff's Complaint and demands strict proof thereof.

120. Answering paragraph 142 of Plaintiff's Complaint, Defendant repeats and realleges its answers to paragraphs 1 through 141 of the Plaintiff's Complaint as fully as if repeated herein verbatim.

121. Defendant denies the allegations of paragraph 143 of Plaintiff's Complaint and demands strict proof thereof.

122. Defendant denies the allegations of paragraph 144 of Plaintiff's Complaint and demands strict proof thereof.

123. Answering paragraph 145 of Plaintiff's Complaint, Defendant repeats and realleges its answers to paragraphs 1 through 144 of the Plaintiff's Complaint as fully as if repeated herein verbatim.

124. Defendant denies the allegations of paragraph 146 of Plaintiff's Complaint and demands strict proof thereof.

125. Defendant denies the allegations of paragraph 147 of Plaintiff's Complaint and demands strict proof thereof.

126. Defendants deny that the Plaintiff is entitled to any of the relief requested in the prayer for relief.

FOR A SECOND DEFENSE

(Failure to State a Claim)

127. The Complaint, in whole or in part, should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim against the Defendant. The facts as alleged in the Complaint do not state an actionable claim or support a theory of recovery against the Defendants as a matter of law. In particular, Plaintiff's claim for lien foreclosure fails as a matter of law. Pursuant to S.C. Code § 29-5-15 (A), a contractor is required to state his contractor license number on the lien document when the lien is filed. Plaintiff did not place his license number on the lien document, and instead placed it on an affidavit. . In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *See* First Baptist Church of Mauldin v. City of Mauldin 308 S.C. 226, 229, 417 S.E.2d 592, 593

(1992). A mechanic's lien is purely statutory. Therefore, the requirements of the statute must be strictly followed. *See* Ferguson Fire and Fabrication, Inc. v. Preferred Fire Protection, LLC 397 S.C. 379, 384, 725 S.E.2d 495, 498 (S.C. App. 2012). A mechanic's lien exists only by virtue of statute; therefore, one's right to a mechanic's lien is wholly dependent upon the language of the statute creating it and the court is not at liberty to depart from the plain meaning of the mechanic lien's statutory language. *See* Skiba v. Gessner, 374 S.C. 208, 212, 648 S.E.2d 605, 607 (2007).

FOR A THIRD DEFENSE

(Breach of Contract/Breach of Covenant of Good Faith & Fair Dealing)

128. Any failure on the part of the Defendant to perform as agreed under any contract with the Plaintiff, although specifically denied, was excused because of the Plaintiff's breaches of the parties' Contract and Addendum and Plaintiff's breaches of the express or implied covenant of good faith and fair dealing in such particulars as the evidence will show.

FOR A FOURTH DEFENSE

(First Material Breach)

129. Plaintiff's claims are barred in whole or part because the Plaintiff was the first to materially breach the Contract in such particulars as the evidence will show.

FOR A FIFTH DEFENSE

(Unclean Hands)

130. Plaintiff's claims are barred in whole or part by the doctrine of unclean hands.

FOR A SIXTH DEFENSE

(Waiver)

131. Plaintiff's claims are barred in whole or part by the doctrine of waiver due to its own failures to perform, comply with, and/or conform with the terms of the parties' Contract and Addendum in such particulars as the evidence will show.

FOR A SEVENTH DEFENSE

(Estoppel)

132. Plaintiff s claims are barred in whole or part by the doctrine of estoppel due to their own failures to perform, comply with, and/or conform with the terms of the parties' Contract and Addendums in such particulars as the evidence will show.

FOR AN EIGHTH DEFENSE

(Set-Off /Recoupment)

133. To the extent that the Defendant is found liable to the Plaintiff, which liability is expressly denied, the claims alleged in the Complaint should be reduced under the doctrines of set-off, and/or recoupment for monies owed by the Plaintiff to the Defendant.

FOR A NINTH DEFENSE

(Reservation of Additional and Further Defenses)

134. Defendant reserves any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner that is consistent with the South Carolina Rules of Civil Procedure.

FOR AN TENTH DEFENSE AND BY WAY OF A FIRST COUNTERCLAIM AGAINST THE PLAINTIFF

(Breach of Contract)

135. Defendant repeats, alleges, and incorporates by reference as if fully set forth herein its answers to the allegations contained in the Complaint and its allegations in paragraphs 1 through 134 herein-above.

136. The Plaintiff and the Defendant entered into a Contract.

137. The Contract and Addendum contain mutually dependent obligations by and between Contractor and Owner. Each party's performance of its obligations under the terms of the Contract and Addendum is a condition precedent to that party's enforcement of the terms and provisions of the Contract and Addendum.

138. Notwithstanding the above-referenced Contract and Addendum, and the full and continued performance on the part of Defendant Owner, Plaintiff has materially breached the terms and provisions of the parties' Contract and Addendum as stated herein by, *inter alia,* having failed to complete the project according to the Contract, implementing cost over-runs, caused forseeable lost profits to Owner, and caused Owner to pay others to fix Plaintiff's defective work.

139. As a direct and proximate result of the Plaintiff's breaches of the Contract and Addendum, Owener has been damaged in an amount to be determined by the trier of fact.

140. Defendant is entitled to compensation from Plaintiff for its actual, compensatory, consequential, special, and incidental damages, together with prejudgment interest at the rate of 8.75% per annum pursuant to S.C. Code Ann. § 34-31-20(A), as well as costs, expenses and attorney's fees incurred in bringing this action, all in an amount to be determined by the trier of fact.

FOR A ELEVENTH DEFENSE AND BY WAY OF A SECOND COUNTERCLAIM AGAINST THE PLAINTIFF
(Negligence/Gross Negligence as to Plaintiff Builder)

141. Defendant hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

142. Defendant is the owner of the premise described in Plaintiff's Complaint.

143. At all times relevant hereto, Plaintiff was engaged in the practice of designing, developing, constructing and selling buildings in Charleston County.

144. Upon information and belief, Michael Blanchard is or was the qualifying license holder for Charles Blanchard Construction Corp., Inc (hereinafter, "Plaintiff Builder").

145. The Plaintiff Builder obtained the necessary building permits which allowed the building to be constructed. As such, Plaintiff Builder owed a duty to the Plaintiffs to construct the Residence free from defects, in a good and

workmanlike manner and in accordance with applicable building codes and industry standards.

146. Defendant, due to recent investigations, has determined that the building is and has been extensively damaged, which damage was proximately caused by the Plaintiff, their agents, servants, employees, and/or subcontractors. As a direct and proximate result of the Plaintiff's actions, Defendant has spent and will continue to expend substantial sums of money in order to renovate and restore the building to make it safe and habitable, and in addition thereto, the building has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Defendant will be required to expend substantial sums which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Defendant's damage in an amount to be determined. As a result of the conduct referenced herein, Defendant is entitled to punitive damages in an amount to be determined.

147. Notwithstanding that Defendant has properly maintained the building, the construction defects set forth herein have caused occurrences in the form of leaks, air infiltration, defects, and failures within the building envelope which are not readily apparent to one examining the exterior surface thereof.

148. The latent construction defects have resulted in repeated exposure to the same generally harmful conditions over time and have resulted in consequential damages. Such repeated exposure to the same generally harmful conditions constitutes "occurrences" and compensable damage. Further, the

negligence of each Defendant herein has resulted in damage to the work of the other subcontractors and trades, damage to non-defective components of the work, damage to the building, the Defendant's property (real and personal), and the Defendant's use and enjoyment of the Residence.

149. Upon information and belief, the Plaintiff Builder, either with their own employees or through the use of subcontractors, designed, constructed and sold the building.

150. Upon information and belief, Defendant Michael Blanchard is the holder of a South Carolina Commercial Builder's license and was the qualifying license holder for Charles Blanchard Construction Corp., Inc.

151. As a licensed commercial builder, Plaintiff Builder owed a duty to the Defendant to exercise due care in the construction of the building and to construct the building free from defects and in conformity with applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner.

152. The Plaintiff Builder and their agents, servants, employees, and/or subcontractors were negligent, careless, reckless, willful and wanton in failing to design and/or construct the building in accordance with the applicable building and dwelling codes, and in a careful, diligent, and workmanlike manner, thereby breaching the above-referenced duty by, but not limited to, the following particulars:

a. In failing to construct the building so as to make the exterior building envelope water tight and thereby violating the building code in effect at the time the work was performed;

b. In failing to install, or properly an appropriate secondary weather resistant barrier on the exterior wall sheathing;

c. In failing to install, or properly install, flashing at windows and/or doors;

d. In failing to properly protect the rough openings from moisture intrusion;

e. In installing a roof covering that allows water intrusion into the interior of the building, causing damage to other components of the building besides the roof;

f. In failing to ensure appropriate grading at the premises;

g. In failing to investigate the subcontractors to determine if they were competent and capable of performing their work in accordance with good construction practices and in accordance with the manufacturer's specifications;

h. In failing to adequately supervise the work of their subcontractors and/or employees;

i. In failing to properly sequence the work;

j. In failing to discover defects in the work performed by their subcontractors and/or employees;

k. In failing to correct defective work;

l. In designing and constructing the building in a defective manner;

m. In failing to design and construct the building in accordance with applicable building codes and industry standards; and

n. In such other failures that will be shown during the discovery of this case and at trial.

153. As a direct, foreseeable and proximate result of the negligence and gross negligence of the Plaintiff Builder, the Defendant has suffered significant

physical damage to the building as well as diminution in its value and loss of use. The Defendant has further been damaged in that they have spent, and will continue to expend, large sums of money in order to determine the extent of the damage to the structure and to repair it.

154. The violation of applicable building codes constitutes negligence *per se*.

155. The breach of duty, code violations, and deviations from industry standards on the part of the Plaintiff constitute gross negligence, entitling Defendant to an award of all actual, consequential, and punitive damages.

FOR A TWELFTH DEFENSE AND BY WAY OF A THIRD COUNTERCLAIM AGAINST THE PLAINTIFF
(Breach of Implied Warranties as to Plaintiff Builder)

156. Defendant hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

157. By operation of law, Plaintiff Builder impliedly warranted that their work would be performed using the utmost skill and attention and would be of a good and workmanlike quality free from all defects.

158. Plaintiff Builder breached the implied warranty of workmanlike service by performing defective work as set forth above.

159. In selling the building or otherwise placing the building into the stream of commerce, Plaintiff Builder, by operation of law, impliedly warranted that the building would be habitable and free from all defects.

160. Plaintiff Builder has breached the implied warranty of habitability by constructing and selling a defective building as set forth above.

161. As a direct, foreseeable and proximate result of the Plaintiff's breach of warranties, the Defendant has suffered significant physical damage to the buidling, as well as diminution in its value and loss of use. The Defendant has further been damaged in that they have spent, and will continue to expend, large sums of money in order to determine the extent of the damage to the structure and to repair it.

FOR A THIRTEENTH DEFENSE AND BY WAY OF A FOURTH COUNTERCLAIM AGAINST THE PLAINTIFF
(Breach of Express Warranty as to Plaintiff Builder)

162. Defendant hereby incorporates the allegations of the foregoing Paragraphs as if fully restated herein.

163. Plaintiff Builder expressly warranted all workmanship performed and materials furnished would be of good and workmanlike quality.

164. Plaintiff Builder expressly warranted that their work would be free from all defects.

165. Plaintiff Builder breached this express warranty by designing and constructing the building in a defective manner as set forth above, which has, among other things, resulted in actual property damage to the buidling beyond the work product itself.

166. As a direct, foreseeable and proximate result of the Plaintiff's breach of express warranties, the Defendant has suffered significant physical damage to the building, as well as diminution in its value and loss of use. The Defendant has further been damaged in that they have spent, and will continue to expend, large sums of money in order to determine the extent of the damage to the structure and

to repair it.

WHEREFORE, the Defendant pray this Honorable Court inquire into the matters set forth herein and award judgment in favor of the Defendant against the Defendant, as follows:

1. For all actual and consequential damages against the Plaintiff, in an amount to be shown at trial;

2. For punitive damages in an amount to be determined by the trier of fact;

3. For prejudgment interest;

4. For all attorneys fees and costs associated with investigating and prosecuting this action; and

5. For all other relief this Honorable Court deems just and proper.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: _____

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Attorneys for the Plaintiff

8/4, 2016.
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10-3267
480 KING STREET, LLC	)	
	)	
Plaintiff,	)	
	)	COMPLAINT
vs.	)	
	)	(Jury Trial Demanded)
	)	
	)	
GLICK/BOEHM & ASSOCIATES, INC.	)	
	)	
Defendant.	)	

FILED
2017 JUN 26 PM 3:12
JULIE J. ARMSTRONG
CLERK OF COURT

COMES NOW THE PLAINTIFF, 480 King Street, LLC, (hereinafter, "480 King") by and through their undersigned counsel, complaining of the Defendant herein, Glick / Boehm & Associates, Inc. (hereinafter, "GBA") and allege unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Plaintiff, 480 King is a limited liability company organized and doing business in the State of South Carolina.

2. Defendant, GBA, is a corporation organized and existing under the laws of the State of South Carolina, and is doing business in Charleston County as GBA.

3. Upon information and belief, GBA served as the architect of record for the stair tower located at 480 King Street, Charleston, South Carolina, agreeing to provide professional architectural services for the design of the stair tower, specifically including, but not limited to, the issuance of the plans and specifications for the construction of the stair tower. These documents and/or instruments of service were required to be in

compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, GBA agreed to make periodic visits to the stair tower during construction, and otherwise perform contract administration services during construction to observe whether the construction was being completed in accordance with the plans and specifications (itself created) and all applicable building codes.

4. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum pursuant to §15-7-30 (E)(1).

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

5. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

6. On or about October 16, 2013, 480 King and GBA entered in to a Contract for GBA to provide design and construction administration services for a for a stair tower that Charles Blanchard Construction Corporation (hereinafter, "CBCC") later constructed at 480 King Street, Charleston, South Carolina 29403, for the contract sum of $706,878.84.

7. The contract called for GBA to design the stair tower and, inter-alia, to act as 480 King's agent to interpret the contract documents, visit the site, review the Contractor's submittals, reject non-conforming work, keep 480 King informed about the progress and quality of the work as and when completed, and to report to 480 King known deviations from the Contract documents.

8. Pursuant to the Contract, substantial completion of the project was to be achieved within 150 days from the date of commencement. The date of project commencement was dated June 30, 2014, therefore, the stair tower should have been substantially completed by November 27, 2014, and in no event later than December 15,

2014 pursuant to the Contract Addendum. CBCC and 480 King agreed that time was of the essence.

9. GBA breached their contractual duties set forth above in the following and particular and herein described manners:

a) Failing to properly design and prepare specifications for the stair tower which were compliant with all applicable building codes and professional standards;

b) Failing to specify products that were in compliance with all applicable building codes;

c) Failing to design and specify the correct elevator system, shaft, and component parts for the stair tower;

d) Failing to properly administer, observe and inspect the construction of the stair tower for compliance with the plans and specifications an applicable building codes;

e) Failing to act as a reasonably prudent design professional would act under similar circumstances

f) Failing to detect non-code compliant work completed by CBCC including the following: (i) failure of CBCC to construct the building so that the exterior of the building envelope was water tight; (ii) failure of CBCC to install or properly install an appropriate secondary weather resistant barrier on the exterior wall sheathing; (iii) failure of CBCC to install or properly install flashing at windows and doors; (iv) failure of CBCC to properly protect the rough openings from moisture intrusion; (v) failure

of CBCC to install a roof covering that allows water intrusion into the interior of the building, causing damage to other components of the building besides the roof; and (vi) failure of CBCC to properly grade the premises.

g) Specifying the incorrect travel length of the stair tower elevator;

h) Improperly designed elevator and electrical chase;

i) Improperly designed electrical conduit;

j) Improperly designed HVAC unit header;

k) Improperly designed soffit/header;

l) Improperly designing windows, flashing and connections resulting in water penetration and damage;

m) Improperly designed stairs;

n) Failing to discover defects in the work performed by CBCC and its subcontractors;

o) Other breaches that may be determined to be shown at the trial of this matter;

10. The deviations in what was called for in the Contract documents, versus what was supplied and rendered by CBCC was not rejected by GBA as non-conforming, nor reported to 480 King as deviations in the Contract documents. At a minimum, GBA was under a contractual duty to inform 480 King as to the above referenced errors, omissions and deviations in the quality of the project, and GBA never did.

11. The acts described above are plain breaches GBA's contractual duties by reviewing and approving items of work at the project that were either not performed, or

were performed in derogation of the Contract documents. These breaches were material and deprived 480 King of the benefit of their bargain, as the project was a value engineered building, and was designed to be built with specific requirements that were largely ignored. GBA's complete supervision of all work, design, submittals, RFI's, and ASI's rendered the product contracted for of significantly diminished value in the eyes of 480 King and prospective third-party purchasers and constitute actual, special damages as plead herein. This loss may reasonably be construed to have been in the contemplation of the parties at the time the contract was formed as the plans were unique. Pursuant to South Carolina law, 480 King is entitled to be placed in as good a position as if the contract had been correctly, thus giving them the benefit of their bargain, in addition to remediation costs, replacement costs, loss of use, loss of revenue, delay costs, consequential damages, extra expenses, and loss of time.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty as to GBA)

12. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

13. Upon information and belief, GBA, pursuant to its contract with the Plaintiff, expressly warranted that its plans, specifications, and other instruments of service would be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards.

14. GBA warranted the sufficiency of the designs, plans, and specifications for the stair tower.

15. On August 25, 2014, CBCC stated that the problems with the elevator were design errors by GBA.

16. On May 12, 2015, CBCC stated that design issues regarding the electrical chase were causing delays.

17. In August, 2014, Mr. Myles Glick of GBA admitted GBA specified the incorrect travel length for the elevator.

18. On June 23, 2015, CBCC stated that the contract drawings did not show a chase, and permit drawings showed a rated wall.

19. Plaintiff is a beneficiary of the express and implied warranties provided by GBA.

20. The contemporaneous filing requirement of § 15-36-100 subsection (B) does not apply in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, an affidavit of an expert could not be prepared. Upon information and belief, the first date upon which Plaintiff was aware, or could have been aware of a potential issue and/or claim as to GBA was June 27, 2014, one day after the project commenced when CBCC notified owner of major problem with the elevator which would require a change order. Upon information and belief, GBA breached their express and implied warranties by failing to design the stair tower free from defects and in compliance with applicable building codes and industry standards.

21. Plaintiff has been proximately damaged by GBA's breach of their express and implied warranties in that Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the stair tower. In addition thereto, the insufficiency of the designs, plans, and specifications caused defects and damages, including, but not limited to, cost overruns, delay costs, loss of rental income, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct and indirect damages all to Plaintiff's damage in an amount to be determined.

22. As a result of GBA's breach of express and implied warranties, the Plaintiff is entitled to a judgment against GBA for all actual, direct, indirect, resulting and consequential damages in an amount to be proven at trial.

FOR A THIRD CAUSE OF ACTION
(Negligence as to GBA)

23. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

24. GBA agreed to provide professional architectural and engineering services for the design and construction of the stair tower, specifically including, but not limited to, the issuance of the plans and specifications for construction. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, building codes, regulations, statutes, and industry standards.

25. Upon information and belief, GBA agreed to make periodic visits to the stair tower during construction and perform other contract administration services to observe, among other things, whether construction was being completed in accordance with the plans and specifications and all applicable building codes and regulations.

26. It was foreseeable that Plaintiff would be damaged if GBA breached the above-referenced duties. As such, GBA owed a duty of care to the Plaintiff. In fact, GBA owed a heightened degree of care to Plaintiff as GBA designed the plans and specifications, and was also retained to oversee implementation of the same plans it created.

27. The contemporaneous filing requirement of § 15-36-100 subsection (B) does not apply in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, an affidavit of an expert could not be prepared. Upon information and belief, the first date upon which Plaintiff was aware, or could have been aware of a potential issue and/or claim as to GBA was June 27, 2014, one day after the project commenced when CBCC notified owner of change order request for the elevator. Upon information and belief, GBA breached their duty of care in the following particulars, including but not limited to:

a) Failing to properly design and prepare specifications for the stair tower which were compliant with all applicable building codes and professional standards;
b) Failing to specify products that were in compliance with all applicable building codes;

c) Failing to design and specify the correct elevator system, shaft, and component parts for the stair tower;

d) Failing to properly administer, observe and inspect the construction of the stair tower for compliance with the plans and specifications an applicable building codes;

e) Failing to act as a reasonably prudent design professional would act under similar circumstances

f) Failing to detect non-code compliant work completed by CBCC including the following: (i) failure of CBCC to construct the building so that the exterior of the building envelope was water tight; (ii) failure of CBCC to install or properly install an appropriate secondary weather resistant barrier on the exterior wall sheathing; (iii) failure of CBCC to install or properly install flashing at windows and doors; (iv) failure of CBCC to properly protect the rough openings from moisture intrusion; (v) failure of CBCC to install a roof covering that allows water intrusion into the interior of the building, causing damage to other components of the building besides the roof; and (vi) failure of CBCC to properly grade the premises.

g) Specifying the incorrect travel length of the stair tower elevator;

h) Improperly designed elevator and electrical chase;

i) Improperly designed electrical conduit;

j) Improperly designed HVAC unit header;

k) Improperly designed soffit/header;

l) Improperly designing windows, flashing and connections resulting in water penetration and damage;

m) Improperly designed stairs;

n) Failing to discover defects in the work performed by CBCC and its subcontractors

o) Other breaches that may be determined to be shown at the trial of this matter;

28. As a direct, foreseeable and proximate result of the negligence, design defects and resulting property damage, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the stair tower. In addition thereto, the insufficiency of the designs, plans, and specifications caused defects and damages, including, but not limited to, cost overruns, delay costs, loss of rental income, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct and indirect damages all to Plaintiff's damage in an amount to be determined.

29. As a result of GBA's negligence, the Plaintiff is entitled to a judgment against GBA for all actual, direct, indirect, resulting and consequential damages in an amount to be proven at trial.

WHEREFORE, the Plaintiff prays this Honorable Court inquire into the matters set forth herein and award judgment in favor of 480 King and against GBA, as follows:

1. For all actual, direct, indirect, compensatory, resulting, consequectial and special damages against the Defendant, in an amount to be shown at trial;
2. For all costs associated with investigating and prosecuting this action; and

3. For all other relief this Honorable Court deems just and proper.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: _____

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Email: brent@halversenlaw.com
Attorneys for the Plaintiff

6/26, 2017.
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) THE NINTH JUDICIAL DISTRICT
COUNTY OF CHARLESTON	)
	) CASE NO.: 2017-CP-10-03267
480 KING STREET, LLC,	)
	)
Plaintiff,	)
	)
vs.	) **GLICK/BOEHM & ASSOCIATES, INC.'S**
	) **ANSWER TO PLAINTIFF'S COMPLAINT**
GLICK/BOEHM & ASSOCIATES, INC.	)
	)
Defendant.	)
	)

COMES NOW Defendants Glick/Boehm & Associates, Inc., (hereinafter "GBA") by and through their undersigned attorneys, hereby answers the Complaint of Plaintiff 480 King Street, LLC ("Plaintiff") as follows:

2017 AUG 29 PM 1:17
JULIE J. ARMSTRONG
CLERK OF COURT
BY

FOR A FIRST DEFENSE

Plaintiff fails to state a cause of action upon which relief may be granted.

FOR A SECOND DEFENSE

Some or all of Plaintiff's claims are or may be barred by the Statute of Limitations and/or Statute of Repose.

FOR A THIRD DEFENSE

Some or all of Plaintiff's claims are or may be barred by the doctrines of waiver, laches, and/or estoppel.

FOR A FOURTH DEFENSE

Some or all of Plaintiff's claims are or may be the result of the acts and/or omissions of some party or parties other than GBA, with a result that Plaintiff cannot recover from GBA.

FOR A FIFTH DEFENSE

Some or all of Plaintiff's claims are or may be barred by Plaintiff's failure to mitigate any damages.

FOR A SIXTH DEFENSE

The work and services provided by GBA (if any) were at all times applicable to the subject project in conformity with the professional standards for that time.

FOR A SEVENTH DEFENSE

Any award of punitive damages for Plaintiff would violate constitutional safeguards provided to GBA by the United States and South Carolina Constitutions.

FOR AN EIGHTH DEFENSE

Plaintiff may not have a contract or may not be in privity with GBA.

FOR A NINTH DEFENSE

The allegations of the Complaint fail to state a claim for which any prejudgment interest, attorneys' fees, or other litigation expenses may be granted.

FOR A TENTH DEFENSE

Some or all of Plaintiff's claims are or may be barred, or in the alternative, reduced to the extent of comparative negligence of Plaintiff.

FOR AN ELEVENTH DEFENSE

To the extent that GBA has not been afforded the opportunity to inspect and examine the alleged defects and deficiencies at the subject project and to the extent that the subject project has been modified, repaired, or destructively tested without affording GBA the opportunity to

inspect or examine, such actions constitute a spoliation of evidence and act as a complete bar to recovery against GBA and/or an adverse inference against Plaintiff.

FOR A TWELFTH DEFENSE

Some or all of Plaintiff's claims may fail for lack of standing.

FOR A THIRTEENTH DEFENSE

Plaintiff's claims may be barred in whole or in part by the doctrine of assumption of the risk.

FOR A FOURTEENTH DEFENSE

Plaintiff's claims are or may be barred by the intervening and superseding negligent acts and/or omissions on behalf of persons or entities other than GBA, which act as a complete bar to recovery against GBA, or alternatively, a reduction in recovery against GBA.

FOR A FIFTEENTH DEFENSE

Any claims alleged by Plaintiff for breach of warranty should be barred to the extent that Plaintiff failed to give proper notice of any alleged breach of any warranty.

FOR A SIXTEENTH DEFENSE

The conditions and deficiencies alleged to exist in Plaintiff's pleadings may not be within the scope of services (if any) which were requested of GBA, and GBA's responsibility (if any) is limited only to those conditions and deficiencies (if any) which are within the scope of services agreed to (if any); and such constitutes a complete defense to the claims alleged.

FOR A SEVENTEENTH DEFENSE

The final completion and acceptance of work undertaken by GBA (if any) constitutes a complete defense to all of Plaintiff's claims.

FOR AN EIGHTEENTH DEFENSE

Plaintiff's claims may be barred by Plaintiff's failure to join as a party to this action a party or parties in whose absence complete relief cannot be accorded among those already parties, consequently subjecting GBA to the risk of incurring double, multiple, or otherwise inconsistent obligations.

FOR A NINETEENTH DEFENSE

Plaintiff's claims must be dismissed in whole or in part based upon Plaintiff's failure to comply with the requirements of S.C. Code Ann. § 15-36-100.

FOR A TWENTIETH DEFENSE

GBA has not had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding the circumstances of the Plaintiff's allegations. GBA intends to act as best it can to inform itself of the pertinent facts and prevailing circumstances surrounding any reported injury or damage to Plaintiff as alleged in the Complaint, and gives notice of its intent to assert any further affirmative defense that its information-gathering process may indicate is supported by fact and law. GBA reserves the right to amend this Answer and assert such defenses.

FOR A TWENTY-FIRST DEFENSE

Each allegation of the Complaint not specifically admitted herein is denied. GBA responds to the individually numbered paragraphs of the Complaint as follows:

1. Responding to Paragraph 1 of Plaintiff's Complaint, GBA is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in these paragraphs and, therefore, denies the same and demands strict proof thereof.

2. Responding to Paragraph 2 of Plaintiff's Complaint, GBA admits the allegations contained therein.

3. Responding to Paragraph 3 of Plaintiff's Complaint, GBA denies the allegations as stated therein and demands strict proof thereof.

4. Responding to Paragraph 4 of Plaintiff's Complaint, this Paragraph sets forth a legal conclusion to which no response is required.

5. Responding to Paragraph 5 of Plaintiff's Complaint, GBA incorporates all previous responses as if fully restated herein.

6. Responding to Paragraphs 6 through 11 of Plaintiff's Complaint, including all subparts, GBA denies the allegations and demands strict proof thereof.

7. Responding to Paragraph 12 of Plaintiff's Complaint, GBA incorporates all previous responses as if fully restated herein.

8. Responding to Paragraphs 13 through 22 of Plaintiff's Complaint, GBA denies the allegations and demands strict proof thereof.

9. Responding to Paragraph 23 of Plaintiff's Complaint, GBA incorporates all previous responses as if fully restated herein.

10. Responding to Paragraph 24 of Plaintiff's Complaint, GBA denies the allegations as stated and demands strict proof thereof.

11. Responding to Paragraphs 25 through 26 of Plaintiff's Complaint, GBA denies the allegations and demands strict proof thereof.

12. Responding to Paragraph 27 of Plaintiff's Complaint, including all subparts, GBA denies the allegations contained therein and demands strict proof thereof. Further answering, GBA craves specific reference to its Motion to Dismiss for Plaintiff's failure to comply with the requirements of Section 15-36-100.

13. Responding to Paragraphs 28 through 29 of Plaintiff's Complaint, GBA denies the allegations contained therein and demands strict proof thereof.

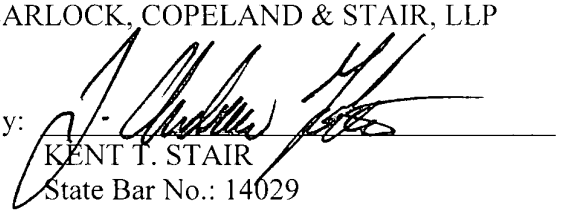
14. Responding to the unnumbered paragraph beginning with "WHEREFORE," following Paragraph 29 of Plaintiff's Complaint, and including all subparts, this paragraph contains Plaintiff's prayer for relief and requires no response of GBA. To the extent a response is required, GBA denies the allegations contained in this paragraph, including all subparts, and demands strict proof thereof.

WHEREFORE, having fully answered the allegations contained in Plaintiff's Complaint, GBA prays for judgment in its favor and against Plaintiff, and for all expenses of this litigation, including interest, as well as any further relief that this Court deems just and proper.

SIGNATURE BLOCK TO FOLLOW

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: 

KENT T. STAIR
State Bar No.: 14029

PAUL E. SPERRY
State Bar No.: 68441

J. ANDREW YOHO
State Bar No.: 100803

Attorneys for Glick/Boehm & Associates, Inc.

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
843-727-0307

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10-3267
480 KING STREET, LLC	)	
Plaintiff,	)	
vs.	)	ORDER
GLICK/BOEHM & ASSOCIATES, INC.	)	
Defendant.	)	

FILED
2017 DEC -7 AM 9:00
JULIE J. ARMSTRONG
CLERK OF COURT

THIS CAUSE comes before the Court on Plaintiff 480 King Street, LLC's Motion for Extension of Time filed with this Court on August 10, 2017, and Defendant's Motion to Dismiss filed on August 29, 2017. The Court heard the arguments of counsel regarding the motions on November 17, 2017. Brent Halversen, Esq. appeared on behalf of the Plaintiff 480 King Street, LLC, and Kent Stair, Esq. appeared on behalf of the Defendant, Glick/Boehm & Associates, Inc.

Plaintiff filed its Complaint in the matter on June 27, 2017. One of the causes of action was for professional negligence against the Defendant. Pursuant to S.C. Code § 15-36-100(B), the Plaintiff is required to file the affidavit of an expert witness which must specify at least one negligent act or omission. Plaintiff alleged in its Complaint that it could not prepare an affidavit of an expert because of time constraints. Forty-five days after filing the Complaint, the Plaintiff filed a motion to extend the time period for filing the affidavit with this Court. South Carolina law allows for an affidavit to be filed within 45 days after the Complaint is filed, or, the Court may extend this period upon motion after a showing of good cause.

The statute states:

> The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires.

S.C. Code § 15-36-100(C)(1).

Plaintiff filed a motion to extend the 45 day period with this Court on August 10, 2017. Plaintiff sought leave of Court to file the affidavit late because it's expert, Louis Hackney P.E., REWC, RRC, CDT, LEED AP, was not able to complete review of the approximately 8,000 documents that had been sent to him prior to expiration of the 45 day period. Mr. Hackney, was able to complete his review of the 8,000 documents and prepared his affidavit on September 7, 2017. According to counsel for Plaintiff, Mr. Halversen, the affidavit was sent to counsel for Defendant, Mr. Stair, the same day it was prepared on September 7, 2017. Plaintiff now seeks leave of Court to file the September 7, 2017 affidavit of Mr. Hackney outside the 45 day period.

The Court finds that good cause exists for Plaintiff to request and be granted extra time to file its affidavit based upon the voluminous amount of documents that had been provided to its expert within the 45 day period referenced in the statute. It appears that it only took Mr. Hackney less than 30 days to prepare and execute his affidavit after Plaintiff filed its motion for extension of time at the end of the 45 day statutory period on August 10, 2017. The Court believes that the request for an extension, given the quantity of materials that had been sent to him, is not an unreasonable request under these circumstances. The Court also finds no prejudice to the Defendant in granting this motion.

Plaintiff may file the September 7, 2017 affidavit of Louis Hackney P.E., REWC, RRC, CDT, LEED AP within ten days of the date of this Order, to wit, November 27, 2017. Upon filing of the affidavit by this date, the Plaintiff will have been deemed to be in compliance with the requirements of SC Code § 15-36-100(B). Defendant will then have 30 days from the date of the filing of the Affidavit to file any motion contesting the sufficiency of the Affidavit.

Defendant's Motion to Dismiss was premised on the Plaintiff's failure to file the affidavit in accordance with S.C. Code § 15-36-100(B). That Motion is rendered moot at this point due to the grant of Plaintiff's Motion for Extension of Time.

Given the foregoing findings of the Court, **IT IS THEREFORE ORDERED** that Plaintiff's Motion for Extension of Time is **GRANTED**, as stated herein, and **IT IS FURTHER ORDERED** that Defendant's Motion to Dismiss is **DENIED**.

Hon. J.C. Nicholson, Jr.
Circuit Court Judge, Ninth Judicial Circuit

November 27, 2017
Charleston, South Carolina

COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

CASE NO. 2017CP1003267

480 King Street LLC
PLAINTIFF(S)

Glick Boehm & Associates Inc.
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2018 AUG 24 PM 4:31
JULIE J. ARMSTRONG
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This order ☐ ends ☑ does not end the case.
Additional Information for the Clerk :

Motion/Consolidation by Plaintiff – Granted

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount to be Enrolled (List amount(s) below)
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge | 2159 Judge Code | Date

FORM 4

STATE OF SOUTH CAROLINA **JUDGMENT IN A CIVIL CASE**

ELECTRONICALLY FILED - 2021 Dec 16 9:11 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

THE STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) THE NINTH JUDICIAL DISTRICT
COUNTY OF CHARLESTON	)
	) CASE NO.: 2016-CP-10-03468
CHARLES BLANCHARD CONSTRUCTION CORP., INC.,	)
Plaintiff,	)
vs.	) **ORDER ON GLICK/BOEHM & ASSOCIATES, INC.'S MOTION TO DISMISS AND MOTION FOR SANCTIONS**
480 KING STREET, LLC	)
Defendant.	)
480 KING STREET, LLC,	)
Plaintiff,	)
vs.	)
GLICK/BOEHM & ASSOCIATES, INC.	)
Defendant.	)

FACTS

Defendant Glick/Boehm & Associates, Inc. ("Defendant") filed a Motion to Dismiss the Complaint of Plaintiff 480 King Street, LLC ("480 King" or "Plaintiff"), pursuant to Rule 12(b)(6), SCRCP and a Motion for Sanctions against 480 King pursuant to Rule 11, SCRCP. Plaintiff filed a Memorandum in response and opposition to both Motions and Defendant thereafter filed a responsive Memorandum. The Court read and considered all of these written submissions and thereafter, on December 2, 2021, heard oral argument from counsel for both parties. At the close of that hearing, the Court announced it would grant Defendant's Motion to Dismiss and deny the Motion for Sanctions. This written Order will formally memorialize those rulings.

ELECTRONICALLY FILED - 2021 Dec 16 9:11 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

MOTION TO DISMISS

In its Motion, Defendant contends that the claims asserted against it by Plaintiff are all based upon its alleged negligent performance of professional services as an Architect, and that Plaintiff failed to file a proper Affidavit in support of those claims as required by S.C. Code Ann. §15- 36-100(B). The Court agrees with those and other arguments presented by Counsel for Defendant and, as a result, grants the Motion.

Defendant is an Architect, and not a Professional Engineer. Architects are one of the 22 professional groups specifically afforded protection in actions for damages alleging professional negligence under S.C. Code Ann. § 15-36-100(G) (2015). The sole Affiant presented by Plaintiff in support of its Complaint, Louis Hackney, is a Professional Engineer and not an Architect. Professional Engineers are a different and separate group covered by the same statute. Architects and Professional Engineers receive different educational degrees, are licensed and regulated by separate registration boards, and otherwise are, simply stated, different professions.

The initial provision of the Act defines "expert witness" as "an expert who is qualified as to the acceptable conduct of *the professional whose conduct is at issue*." S.C. Code Ann. § 15-36-100 (A) (emphasis added). The "expert witness must specify at least one negligent act of omission claimed to exist," keeping in mind that negligence in that context is the failure of an accused professional to abide by the standard of care applicable to the profession against whom the negligence is alleged. S.C. Code Ann. § 15-36-100 (B). As previously noted, the Defendant in this case is an Architect and its services must be judged against the standard of care of an Architect. Given Mr. Hackney's acknowledgement that he is not an Architect; the statement in his affidavit that his experience has been "[a]s a Professional Engineer," with no corresponding expression of any experience "as an Architect;" his failure to express any opinion against the Defendant in terms

ELECTRONICALLY FILED - 2021 Dec 16 9:11 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

of the standard of care of an Architect and his deposition testimony stating that, "[b]y signing the Affidavit, (he) did not intend to offer an opinion about the standard of care of an Architect," and that he does "not intend in this case to offer a professional opinion about the standard of care of an Architect," this Court concludes that Plaintiff has failed to present an affidavit in support of the claims against this Defendant, as required by n S.C. Code Ann. §15- 36-100, et. seq. As a result, Defendant's Motion to Dismiss must be granted, and Defendant Glick/Boehm & Associates, Inc. is hereby dismissed with prejudice.

MOTION FOR SANCTIONS

While the Court disagrees with the arguments asserted by Plaintiff's counsel pertaining to the merits for Defendant's dismissal, it cannot be said that those arguments are specious or of any nature giving rise to an award of sanctions in favor of Defendant. Therefore, that portion of Defendant's Motion is denied.

ORDER

ORDERED for the reasons set forth above and otherwise under this Court's interpretation of the legal principles applicable, that Defendant's Motion to Dismiss is **GRANTED**, and the case against Defendant is dismissed with prejudice.

ORDERED for the reasons set forth above and otherwise under this Court's interpretation of the legal principles applicable, that Defendant's Motion for Sanctions is **DENIED**.

AND IT IS SO ORDERED.

_____
The Honorable Jennifer B. McCoy
Circuit Court Judge

Charleston, South Carolina

This _____ day of _____, 2021.

ELECTRONICALLY FILED - 2021 Dec 16 9:11 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

ELECTRONICALLY FILED - 2021 Dec 16 9:11 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

Charleston Common Pleas

Case Caption: Charles Blanchard Construction Corp Inc VS 480 King Street LLC , defendant, et al

Case Number: 2016CP1003468

Type: Order/Other

So Ordered

s/Jennifer B. McCoy #2764

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10-3267
480 KING STREET, LLC	)	
Plaintiff,	)	MOTION FOR EXTENSION OF TIME
vs.	)	
GLICK/BOEHM & ASSOCIATES, INC.	)	
Defendant.	)	

FILED
2017 AUG 10 PM 3:13
JULIE J. ARMSTRONG
CLERK OF COURT
BY DS

COMES NOW THE PLAINTIFF, 480 King Street, LLC, (hereinafter, "Plaintiff") by and through their undersigned counsel, and files this motion for extension of time and states the following in support therefor:

1. On June 26, 2017 Plaintiff filed a Summons and Complaint against the Defendant asserting claims for breach of contract, breach of warranty, and negligence.

2. As averred in Plaintiff's Complaint, the first date upon which Plaintiff could have been aware of a potential issue or claim as to Defendant was on June 27, 2014. Accordingly, Plaintiff timely filed its Summons and Complaint against Defendant on June 26, 2017.

3. The contemporaneous affidavit filing requirement of § 15-36-100 subsection (B) does not apply in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, an affidavit of an expert could not be prepared.

In such case, the statute allows for an affidavit to be filed 45 days after the Complaint is filed or the Court may extend the period upon motion after a showing of good cause. The statute states:

> The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires.

SC Code § 15-36-100(C)(1)

4. In this case good cause exists as Plaintiff just filed its Complaint on June 26, 2017 and has not had adequate time to have an expert review all attendant documents in order to render an expert opinion to support Plaintiff's non-contractual claims.

5. Plaintiff initially contacted an expert Louis Hackney P.E., REWC, RRC, CDT, LEED AP in June, 2017 prior to filing its Complaint, and formally retained Mr. Hackney on July 19, 2017.

6. After retention, Mr. Hackney has been sent approximately 8,000 documents, and it was not possible for Mr. Hackney to review all of the documents necessary within the 45 days after filing the Complaint to form an opinion reducible to affidavit form by August 10, 2017- which is 45 days after filing.

7. Due the nature of the case, Mr. Hackney's schedule, and the volume of materials that exist necessary for review, Plaintiff believes good cause exists for the Court to extend the time for filing the affidavit, as is allowable upon the showing of good cause.

WHERFORE, Plaintiff requests this Court extend the time for filing an affidavit pursuant to SC Code § 15-36-100(C)(1) for reasons stated herein and presented to the Court in the premises.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: _____

Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com
Attorneys for the Plaintiff

August 10, 2017.
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) THE NINTH JUDICIAL DISTRICT
COUNTY OF CHARLESTON	)
	) CASE NO.: 2017-CP-10-03267
480 KING STREET, LLC,	)
	)
Plaintiff,	)
	)
vs.	) **GLICK/BOEHM & ASSOCIATES, INC.'S**
	) **MOTION TO DISMISS PLAINTIFF'S**
GLICK/BOEHM & ASSOCIATES, INC.	) **COMPLAINT**
	)
Defendant.	)
	)

FILED
2017 AUG 29 PM 1:26
JULIE J. ARMSTRONG
CLERK OF COURT

TO ATTORNEY FOR PLAINTIFF:

Defendant Glick/Boehm & Associates (hereinafter "GBA"), by and through the undersigned attorneys, hereby moves for dismissal of the Complaint pursuant to S.C. Code Ann. § 15-36-100 (2016) on the grounds that Plaintiff has failed to file an affidavit from an "expert" setting forth specific allegations of professional negligence against GBA.

LEGAL AUTHORITY

This case involves professional negligence allegations concerning the alleged provision of architectural services by GBA in connection with a stair tower located at 480 King Street in Charleston.

Architects and Engineers are two of the 22 professional groups specifically identified in S.C. Code Ann. § 15-36-100(G) (2015). Pursuant to that statute, an affidavit from an expert *must* be filed contemporaneously with any complaint alleging damages arising from alleged professional negligence of an architect, engineer, or surveyor. The affidavit "must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." S.C. Code Ann. § 15-36-100(B) (2015). If a proper affidavit "is not filed . . . and the defendant against whom an affidavit should

have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim." S.C. Code Ann. § 15-36-100(C)(1) (2015).

The statute, however, provides an exception to the contemporaneous filing requirement in instances where the "period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared." S.C. Code Ann. § 15-36-100(C)(1) (2015). In such a scenario, the statute grants Plaintiff an additional forty-five days to comply with the affidavit requirement. Id. In addition, in the event an additional forty-five days is an insufficient amount of time, a plaintiff may move for additional time to procure an affidavit. Id The court, after a hearing and for good cause, may grant additional time as justice so requires. Id.

In the case at hand, Plaintiff has alleged in its Complaint that the statute of limitations may have been triggered on June 27, 2014, and thus, the Complaint filed on June 26, 2017 was well within the exception to the contemporaneous filing requirement.[1] Plaintiff specifically alleges in the Complaint that an affidavit of an expert could not be prepared. On day forty-five of the forty-five day extension granted by the statute, Plaintiff moved for an extension of time to supply the requisite affidavit of an expert.[2] In the motion, Plaintiff has alleged that despite retaining an expert approximately a week prior to filing the Complaint, the expert has been unable to form an opinion and reduce it to affidavit form. Plaintiff contends that as a result, good cause exists to extend the time for the filing of the affidavit.

The expert affidavit requirement is a part of the South Carolina Frivolous Civil Proceedings Sanctions Act; its purpose is to guard against frivolous lawsuits involving

[1] See Plaintiff's Complaint page 8, Paragraph 27 attached hereto as Exhibit A.

[2] Attached as Exhibit B.

professionals. Steinmetz v. Cooper (In re Steinmetz), Nos. 07-00628, 07-00579, 10-80177, 2011 Bankr. LEXIS 3830, at 8 (U.S. Bankr. D.S.C. Mar. 18, 2011) The expert witness affidavit serves to ensure that claims of professional negligence "have some validity before filing and alerts the professional to the merits of the claim." Id. There is no language in the statute that indicates the filing of an affidavit is optional. Id.

In the case hand, the matter has been pending against GBA since June 26, 2017. Although the claim was filed on the eve of the expiration of the statute of limitations, this matter has been well known to Plaintiff for some time. As noted in the Complaint, this claim arose as early as June 27, 2014.[3] Furthermore, Plaintiff was named a defendant in a separate action on July 6, 2016 concerning the construction of the very property that is the subject of this action, and upon information and belief, involved the identical stairwell shaft at issue in the present matter.[4] Moreover, per the attached affidavit, Mr. Myles Glick contacted Plaintiff's counsel directly after receiving the lawsuit to inquire concerning the same and was told, despite counsel's best efforts to dissuade Plaintiff from bring the action for over two months, the lawsuit was initiated against GBA.[5]

It is Defendant's position that Plaintiff has not adhered to the statutory requirement for supplying an expert affidavit and the Complaint should be dismissed with prejudice. Section 15-36-100 does not require a full vetted or comprehensive affidavit. Rather, the statute mandates only that the affidavit "specify *at least one* negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." S.C. Code Ann. § 15-36-100 (B) (emphasis added). According to Plaintiff's own filings, it has had over three years and forty-five days to obtain an affidavit that sets forth only

[3] See Ex. A.

[4] See Complaint in matter of Charles Blanchard Construction Corp. v. 480 King Street, LLC, et al. 2016-CP-10-3468, attached hereto as Exhibit C.

[5] See Affidavit of Myles Glick attached hereto as Exhibit D.

one instance of professional negligence and the factual basis for the claim, but has yet to do so. While the statute provides leeway for plaintiffs who are filing at or near the expiration of the statute of limitations, it is not intended to present plaintiffs with an option to evade the affidavit requirement by presuming additional time will be made available. Plaintiff has had ample opportunity to provide the requisite affidavit yet has failed to do so. Therefore, Plaintiff's need for additional time to procure an affidavit is the result of Plaintiff's own actions which does not constitute good cause under the statute.

Moreover, the result of the delay in providing an expert affidavit presents the very scenario the Frivolous Proceedings Act is meant to prevent. GBA is now a defendant to a lawsuit alleging professional negligence without the benefit knowing the merits of the claim or whether the claim has any validity. As a result of Plaintiff's failure to adhere to the requirements of the affidavit requirement, Plaintiff's Complaint should be dismissed with prejudice.

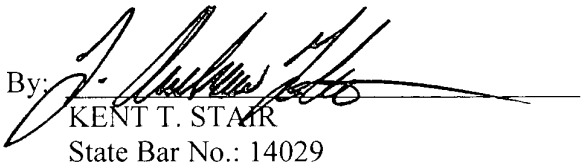
CONCLUSION

For all of the preceding reasons, GBA is entitled to an Order dismissing the Complaint. This Motion is based on South Carolina law, the pleadings filed in this case, and any supporting documents to be submitted hereafter.

SIGNATURE PAGE TO FOLLOW

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: 

KENT T. STAIR
State Bar No.: 14029

PAUL E. SPERRY
State Bar No.: 68441

J. ANDREW YOHO
State Bar No.: 100803

Attorneys for Glick/Boehm & Associates, Inc.

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
843-727-0307

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10-3267
480 KING STREET, LLC	)	
Plaintiff,	)	
vs.	)	COMPLAINT
	)	(Jury Trial Demanded)
GLICK/BOEHM & ASSOCIATES, INC.	)	
Defendant.	)	

FILED
2017 JUN 26 PM 3:13
JULIE J. ARMSTRONG
CLERK OF COURT

COMES NOW THE PLAINTIFF, 480 King Street, LLC, (hereinafter, "480 King") by and through their undersigned counsel, complaining of the Defendant herein, Glick / Boehm & Associates, Inc. (hereinafter, "GBA") and allege unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Plaintiff, 480 King is a limited liability company organized and doing business in the State of South Carolina.

2. Defendant, GBA, is a corporation organized and existing under the laws of the State of South Carolina, and is doing business in Charleston County as GBA.

3. Upon information and belief, GBA served as the architect of record for the stair tower located at 480 King Street, Charleston, South Carolina, agreeing to provide professional architectural services for the design of the stair tower, specifically including, but not limited to, the issuance of the plans and specifications for the construction of the stair tower. These documents and/or instruments of service were required to be in

EXHIBIT
A

compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, GBA agreed to make periodic visits to the stair tower during construction, and otherwise perform contract administration services during construction to observe whether the construction was being completed in accordance with the plans and specifications (itself created) and all applicable building codes.

4. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum pursuant to §15-7-30 (E)(1).

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

5. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

6. On or about October 16, 2013, 480 King and GBA entered in to a Contract for GBA to provide design and construction administration services for a for a stair tower that Charles Blanchard Construction Corporation (hereinafter, "CBCC") later constructed at 480 King Street, Charleston, South Carolina 29403, for the contract sum of $706,878.84.

7. The contract called for GBA to design the stair tower and, inter-alia, to act as 480 King's agent to interpret the contract documents, visit the site, review the Contractor's submittals, reject non-conforming work, keep 480 King informed about the progress and quality of the work as and when completed, and to report to 480 King known deviations from the Contract documents.

8. Pursuant to the Contract, substantial completion of the project was to be achieved within 150 days from the date of commencement. The date of project commencement was dated June 30, 2014, therefore, the stair tower should have been substantially completed by November 27, 2014, and in no event later than December 15,

2014 pursuant to the Contract Addendum. CBCC and 480 King agreed that time was of the essence.

9. GBA breached their contractual duties set forth above in the following and particular and herein described manners:

a) Failing to properly design and prepare specifications for the stair tower which were compliant with all applicable building codes and professional standards;

b) Failing to specify products that were in compliance with all applicable building codes;

c) Failing to design and specify the correct elevator system, shaft, and component parts for the stair tower;

d) Failing to properly administer, observe and inspect the construction of the stair tower for compliance with the plans and specifications an applicable building codes;

e) Failing to act as a reasonably prudent design professional would act under similar circumstances

f) Failing to detect non-code compliant work completed by CBCC including the following: (i) failure of CBCC to construct the building so that the exterior of the building envelope was water tight; (ii) failure of CBCC to install or properly install an appropriate secondary weather resistant barrier on the exterior wall sheathing; (iii) failure of CBCC to install or properly install flashing at windows and doors; (iv) failure of CBCC to properly protect the rough openings from moisture intrusion; (v) failure

of CBCC to install a roof covering that allows water intrusion into the interior of the building, causing damage to other components of the building besides the roof; and (vi) failure of CBCC to properly grade the premises.

g) Specifying the incorrect travel length of the stair tower elevator;

h) Improperly designed elevator and electrical chase;

i) Improperly designed electrical conduit;

j) Improperly designed HVAC unit header;

k) Improperly designed soffit/header;

l) Improperly designing windows, flashing and connections resulting in water penetration and damage;

m) Improperly designed stairs;

n) Failing to discover defects in the work performed by CBCC and its subcontractors;

o) Other breaches that may be determined to be shown at the trial of this matter;

10. The deviations in what was called for in the Contract documents, versus what was supplied and rendered by CBCC was not rejected by GBA as non-conforming, nor reported to 480 King as deviations in the Contract documents. At a minimum, GBA was under a contractual duty to inform 480 King as to the above referenced errors, omissions and deviations in the quality of the project, and GBA never did.

11. The acts described above are plain breaches GBA's contractual duties by reviewing and approving items of work at the project that were either not performed, or

were performed in derogation of the Contract documents. These breaches were material and deprived 480 King of the benefit of their bargain, as the project was a value engineered building, and was designed to be built with specific requirements that were largely ignored. GBA's complete supervision of all work, design, submittals, RFI's, and ASI's rendered the product contracted for of significantly diminished value in the eyes of 480 King and prospective third-party purchasers and constitute actual, special damages as plead herein. This loss may reasonably be construed to have been in the contemplation of the parties at the time the contract was formed as the plans were unique. Pursuant to South Carolina law, 480 King is entitled to be placed in as good a position as if the contract had been correctly, thus giving them the benefit of their bargain, in addition to remediation costs, replacement costs, loss of use, loss of revenue, delay costs, consequential damages, extra expenses, and loss of time.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty as to GBA)

12. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

13. Upon information and belief, GBA, pursuant to its contract with the Plaintiff, expressly warranted that its plans, specifications, and other instruments of service would be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards.

14. GBA warranted the sufficiency of the designs, plans, and specifications for the stair tower.

15. On August 25, 2014, CBCC stated that the problems with the elevator were design errors by GBA.

16. On May 12, 2015, CBCC stated that design issues regarding the electrical chase were causing delays.

17. In August, 2014, Mr. Myles Glick of GBA admitted GBA specified the incorrect travel length for the elevator.

18. On June 23, 2015, CBCC stated that the contract drawings did not show a chase, and permit drawings showed a rated wall.

19. Plaintiff is a beneficiary of the express and implied warranties provided by GBA.

20. The contemporaneous filing requirement of § 15-36-100 subsection (B) does not apply in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, an affidavit of an expert could not be prepared. Upon information and belief, the first date upon which Plaintiff was aware, or could have been aware of a potential issue and/or claim as to GBA was June 27, 2014, one day after the project commenced when CBCC notified owner of major problem with the elevator which would require a change order. Upon information and belief, GBA breached their express and implied warranties by failing to design the stair tower free from defects and in compliance with applicable building codes and industry standards.

21. Plaintiff has been proximately damaged by GBA's breach of their express and implied warranties in that Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the stair tower. In addition thereto, the insufficiency of the designs, plans, and specifications caused defects and damages, including, but not limited to, cost overruns, delay costs, loss of rental income, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct and indirect damages all to Plaintiff's damage in an amount to be determined.

22. As a result of GBA's breach of express and implied warranties, the Plaintiff is entitled to a judgment against GBA for all actual, direct, indirect, resulting and consequential damages in an amount to be proven at trial.

FOR A THIRD CAUSE OF ACTION
(Negligence as to GBA)

23. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

24. GBA agreed to provide professional architectural and engineering services for the design and construction of the stair tower, specifically including, but not limited to, the issuance of the plans and specifications for construction. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, building codes, regulations, statutes, and industry standards.

25. Upon information and belief, GBA agreed to make periodic visits to the stair tower during construction and perform other contract administration services to observe, among other things, whether construction was being completed in accordance with the plans and specifications and all applicable building codes and regulations.

26. It was foreseeable that Plaintiff would be damaged if GBA breached the above-referenced duties. As such, GBA owed a duty of care to the Plaintiff. In fact, GBA owed a heightened degree of care to Plaintiff as GBA designed the plans and specifications, and was also retained to oversee implementation of the same plans it created.

27. The contemporaneous filing requirement of § 15-36-100 subsection (B) does not apply in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, an affidavit of an expert could not be prepared. Upon information and belief, the first date upon which Plaintiff was aware, or could have been aware of a potential issue and/or claim as to GBA was June 27, 2014, one day after the project commenced when CBCC notified owner of change order request for the elevator. Upon information and belief, GBA breached their duty of care in the following particulars, including but not limited to:

a) Failing to properly design and prepare specifications for the stair tower which were compliant with all applicable building codes and professional standards;
b) Failing to specify products that were in compliance with all applicable building codes;

c) Failing to design and specify the correct elevator system, shaft, and component parts for the stair tower;

d) Failing to properly administer, observe and inspect the construction of the stair tower for compliance with the plans and specifications an applicable building codes;

e) Failing to act as a reasonably prudent design professional would act under similar circumstances

f) Failing to detect non-code compliant work completed by CBCC including the following: (i) failure of CBCC to construct the building so that the exterior of the building envelope was water tight; (ii) failure of CBCC to install or properly install an appropriate secondary weather resistant barrier on the exterior wall sheathing; (iii) failure of CBCC to install or properly install flashing at windows and doors; (iv) failure of CBCC to properly protect the rough openings from moisture intrusion; (v) failure of CBCC to install a roof covering that allows water intrusion into the interior of the building, causing damage to other components of the building besides the roof; and (vi) failure of CBCC to properly grade the premises.

g) Specifying the incorrect travel length of the stair tower elevator;

h) Improperly designed elevator and electrical chase;

i) Improperly designed electrical conduit;

j) Improperly designed HVAC unit header;

k) Improperly designed soffit/header;

l) Improperly designing windows, flashing and connections resulting in water penetration and damage;

m) Improperly designed stairs;

n) Failing to discover defects in the work performed by CBCC and its subcontractors

o) Other breaches that may be determined to be shown at the trial of this matter;

28. As a direct, foreseeable and proximate result of the negligence, design defects and resulting property damage, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the stair tower. In addition thereto, the insufficiency of the designs, plans, and specifications caused defects and damages, including, but not limited to, cost overruns, delay costs, loss of rental income, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct and indirect damages all to Plaintiff's damage in an amount to be determined.

29. As a result of GBA's negligence, the Plaintiff is entitled to a judgment against GBA for all actual, direct, indirect, resulting and consequential damages in an amount to be proven at trial.

WHEREFORE, the Plaintiff prays this Honorable Court inquire into the matters set forth herein and award judgment in favor of 480 King and against GBA, as follows:

1. For all actual, direct, indirect, compensatory, resulting, consequectial and special damages against the Defendant, in an amount to be shown at trial;
2. For all costs associated with investigating and prosecuting this action; and

3. For all other relief this Honorable Court deems just and proper.

Respectfully submitted,

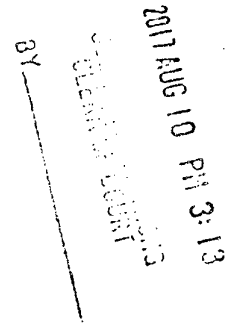
HALVERSEN & ASSOCIATES, LLC

By: _____

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171 Church Street, Suite 330
Charleston, SC 29401
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Email: brent@halversenlaw.com
Attorneys for the Plaintiff

6/26, 2017.
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10-3267
480 KING STREET, LLC	)	
Plaintiff,	)	MOTION FOR EXTENSION OF TIME
vs.	)	
GLICK/BOEHM & ASSOCIATES, INC.	)	
Defendant.	)	



COMES NOW THE PLAINTIFF, 480 King Street, LLC, (hereinafter, "Plaintiff") by and through their undersigned counsel, and files this motion for extension of time and states the following in support therefor:

1. On June 26, 2017 Plaintiff filed a Summons and Complaint against the Defendant asserting claims for breach of contract, breach of warranty, and negligence.

2. As averred in Plaintiff's Complaint, the first date upon which Plaintiff could have been aware of a potential issue or claim as to Defendant was on June 27, 2014. Accordingly, Plaintiff timely filed its Summons and Complaint against Defendant on June 26, 2017.

3. The contemporaneous affidavit filing requirement of § 15-36-100 subsection (B) does not apply in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, an affidavit of an expert could not be prepared.

EXHIBIT
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B

In such case, the statute allows for an affidavit to be filed 45 days after the Complaint is filed or the Court may extend the period upon motion after a showing of good cause. The statute states:

> The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires.

SC Code § 15-36-100(C)(1)

4. In this case good cause exists as Plaintiff just filed its Complaint on June 26, 2017 and has not had adequate time to have an expert review all attendant documents in order to render an expert opinion to support Plaintiff's non-contractual claims.

5. Plaintiff initially contacted an expert Louis Hackney P.E., REWC, RRC, CDT, LEED AP in June, 2017 prior to filing its Complaint, and formally retained Mr. Hackney on July 19, 2017.

6. After retention, Mr. Hackney has been sent approximately 8,000 documents, and it was not possible for Mr. Hackney to review all of the documents necessary within the 45 days after filing the Complaint to form an opinion reducible to affidavit form by August 10, 2017- which is 45 days after filing.

7. Due the nature of the case, Mr. Hackney's schedule, and the volume of materials that exist necessary for review, Plaintiff believes good cause exists for the Court to extend the time for filing the affidavit, as is allowable upon the showing of good cause.

WHERFORE, Plaintiff requests this Court extend the time for filing an affidavit pursuant to SC Code § 15-36-100(C)(1) for reasons stated herein and presented to the Court in the premises.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: _____

Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com
Attorneys for the Plaintiff

August 10th, 2017.
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion via U.S. Mail and process server with postage prepaid on this 10 day of August, 2017.

HALVERSEN & ASSOCIATES, LLC

By: _____

Brent S. Halversen
171 Church Street, Suite 330
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Attorneys for the Plaintiff

August 10, 2017.
Charleston, South Carolina

2017 AUG 10 PM 3:15
BY

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Charles Blanchard construction Corp., Inc.

vs.

480 King Street, LLC, and TD Bank N.A., NQ,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
2016-CP-10-3468

COMPLAINT
(Debt Collection, Foreclosure of Liens)
(Jury Trial Demanded)

FILED
2016 JUL -6 PM 1:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Plaintiff above named, complaining of the Defendants herein, would show unto this Honorable Court as follows:

JURISDICTION AND PARTIES

1. The Plaintiff is a corporation organized under and operating pursuant to the laws of the State of South Carolina, and maintaining an office in the City of North Charleston and doing business in the City and County of Charleston.

2. Upon information and belief, the Defendant 480 King Street, LLC, is a limited liability corporation organized and existing under the laws of the State of South Carolina and operating in the County of Charleston, South Carolina (hereafter "Defendant Owner") and at all times herein was the owner of the real property which is the subject of this action.

3. Defendant T.D. Bank, N.A., NQ, upon information and belief, is a National Banking Organization, organized and existing under the laws of the United States and the State of South Carolina, doing business in the County of Charleston South Carolina (hereafter "Bank") and is

EXHIBIT
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made a party hereto because it may have an interest in the real property that is the subject of this action.

4. The real property at issue herein is described on the Exhibit A attached hereto and made a part hereof and known hereafter as the Real Property, is located in the City and County of Charleston, state of South Carolina.

5. The parties, property and issues herein all are within the jurisdiction of this Honorable Court.

FACTS

6. Plaintiff reasserts and realleges all facts and claims of the preceding paragraphs of this Complaint as if set forth verbatim herein.

7. On June 26, 2014, Plaintiff entered into a construction contract with Defendant Owner by and through its manager, Mary Ann Kanters, for labor, materials, equipment and services in connection with the building located on the real property owned by Defendant Owner (hereafter the "Contract").

8. On or about June 27, 2014, Plaintiff began work pursuant to the Contract, furnishing the agreed upon labor and materials and making applications for payment as specified therein.

9. Almost immediately after signing the contract, delays occurred affecting the ultimate completion date of the contract.

10. Mere hours after execution of the contract, Plaintiff discovered that the Defendant Owner's architectural plans for the elevator were incorrect, requiring an additional one foot of depth for the elevator equipment selected by the Defendant Owner and drawn by Defendant Owner's architect.

11. While under the original contract the Plaintiff was responsible for providing the elevator in accordance with Defendant Owner's plans and specifications, the improper design by Defendant Owner's architect necessitated a change order whereby the Defendant Owner was then to be responsible for providing a re-design of the elevator shaft or acquiring a different elevator that would fit within the previously designed elevator shaft.

12. The delay caused by the incorrect elevator design was neither the fault of nor the responsibility of the Plaintiff.

13. At the time of placing rebar and pouring the elevator pit and foundation slab, the Defendant Owner put a hold on the work to add sewer/storm drainage that was outside the scope of the project, anticipating that the drainage would run beneath the foundation of the stairtower.

14. The Defendant Owner hired an engineer to design the placement of the future sewer/storm drainage, and requested three quotes for pricing of the design.

15. Upon receipt of the quotes for the cost of the storm drainage, the Defendant Owner decided not to install the drainage.

16. The delay caused by the Defendant Owner's hold to design and quote the cost to install sewer/storm drainage pipes was neither the fault of nor the responsibility of the Plaintiff.

17. Many months before the project started and again early in the project, the Plaintiff advised the Defendant Owner in writing that the site needed a civil engineering plan to deal with site elevation and water run off, telling the owner that he was "afraid that the area behind 480 will be a pond."

18. Nonetheless, the Defendant Owner did not retain a civil engineer to review the site

elevations or to design a water run off plan until June 29, 2015, after the water run off at the site caused water intrusion in the elevator shaft and first floor of the stair tower.

19. In July of 2015, the Defendant Owner alleged that the water intrusion in the building's exterior walls was the result of the Plaintiff's failure to properly waterproof the exterior walls according to the design specifications.

20. The Defendant Owner claimed this failure was a construction deficiency and that the water intrusion was the result of both this construction deficiency and of the Plaintiff's failure to properly maintain and supervise the site to prevent this damage.

21. The Plaintiff informed Defendant Owner in writing that the building's perimeter walls were installed with the designated weather barrier required by the plans and specifications, which was designed only to shed water and was not a waterproofing material.

22. Defendant Owner's architect confirmed in writing to Plaintiff and Defendant Owner that the building's perimeter walls were lined with the appropriate material as called for in the plans.

23. The grade and site elevations were the responsibility of the Defendant Owner pursuant to the Contract.

24. The Defendant Owner failed to address the grade and site elevations prior to the water intrusion, no civil engineer had been retained by the Defendant Owner to draw plans addressing the site grade or elevation prior to the water intrusion, and no site grade or elevation plans had been given by the Defendant Owner to the Plaintiff to address the potential flooding.

25. The delay caused by the water intrusion and damage to the elevator shaft and first floor of

the stair tower resulting from the Defendant Owner's failure to retain a civil engineer to review the site elevations or design a water run off plan was neither the fault of nor the responsibility of the Plaintiff.

26. Prior to the signing of the contract, the Defendant Owner met with the Plaintiff and Plaintiff's subcontractors to value engineer portions of the job but did not invite the architect to all of the meeting(s).

27. Prior to the signing of the contract, the Defendant Owner met with building officials about the project and did not invite the Plaintiff or the architect to the meeting(s).

28. The Defendant Owner met with AT&T and would not let the Plaintiff attend the meeting(s).

29. The Defendant Owner's architect and electrical engineer were not present the meetings where the Defendant Owner chose less expensive light fixtures for the project, and the Defendant Owner neglected to tell the architect or electrical engineer that she had chosen less expensive light fixtures for many months.

30. Had the Defendant Owner invited the architect and engineer to these meetings or informed them of decisions made therein, several issues that caused delays would have been avoided.

31. On August 12, 2014, the Plaintiff submitted the light fixtures chosen by the Defendant Owner to the electrical engineer for approval.

32. By September 29, 2014, when the electrical engineer rejected the light fixture submittals as not being the original specified fixtures, the Defendant Owner still had not informed the electrical engineer that she had selected different fixtures for the project.

33. The Plaintiff's submittal of the light fixtures chosen by the Defendant Owner was finally approved by the Defendant Owner's electrical engineer on February 16, 2015, six months from its initial submittal date.

34. The lighting submittal delays caused late delivery of the light fixtures, as they could not be ordered until they were approved.

35. The delay caused by the Defendant Owner's failure to inform her architect and engineer of changes she had made to the light fixtures was neither the fault of nor the responsibility of the Plaintiff.

36. The Defendant Owner also had multiple electrical re-designs after the contract was signed, but did not provide them to the Plaintiff.

37. On August 12, 2014, the Plaintiff submitted to the Defendant Owner's electrical engineer electrical gear that met the original Contract's April 22, 2014 electrical drawings and specifications.

38. The Defendant Owner's electrical engineer rejected the submittal because it did not meet the most recent re-design specifications from drawings dated October 6, 2014, which were not part of the original contract.

39. The Defendant Owner did not provide the Plaintiff with updated electrical plans until October 14, 2014, and because of ongoing changes with the elevator requiring the Defendant Owners electrical engineer to continue to modify the necessary gear, the electrical gear submittal was not accepted until May 5, 2015.

40. The Defendant Owner's electrical engineer's insistence that the gear be changed to that

required in the most recent re-design necessitated a change order to the Contract, Change Order 4.

41. The Defendant Owner disputed Change Order 4, which further delayed the electrical gear.

42. The delays in the electrical gear prevented the installation of the elevator.

43. The delays caused by the electrical submittal issues were neither the fault of nor the responsibility of the Plaintiff.

44. Throughout the project, attempts to discuss problems and issues with the Defendant Owner so that the project could continue to move forward were ignored or stymied by Defendant Owner.

45. Many Change Order proposals sent to the Defendant Owner by the Plaintiff were modified by the Defendant Owner and then disputed by the parties, causing delays on the project.

46. The Contract requires the Defendant Owner to issue a Construction Change Directive to the Plaintiff contractor in the event of a dispute over a change order, and the Construction Change Directive allows work to continue on the contract without waiving any rights to dispute time or cost of the change order until the end of the contract.

47. The Plaintiff first requested in writing that the Defendant Owner sign a Construction Change Directive on April 3, 2015, to avoid cessation of work on the project when Change Order 4 was disputed.

48. The April 3, 2015 email to the Defendant Owner cited § 7.3.2 of the Contract, which

states: A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

49. The Defendant Owner refused to issue a Construction Change Directive.

50. The Plaintiff requested the Construction Change Directive in writing, multiple times between April and July of 2015.

51. On May 11, May 14, and July 10 of 2015, the Defendant Owner was again sent the language from § 7.3.2 of the Contract, stating that "A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order."

52. On June 29, 2015, during the continued dispute over the terms of Change Order 4, the Defendant Owner emailed the Plaintiff, saying the Plaintiff was "attempting to use the change order process as a blackmail device which is unacceptable under the contract. . . you continue to terrorize and harass me and frankly I think your behavior is reprehensible and entirely unprofessional."

53. In response to that email, the Plaintiff replied in writing that far from being unprofessional or attempting to harass the Defendant Owner, the issuance of a Construction Change Directive in the absence of agreement on all terms of a change order was a required and normal part of the AIA contracts.

54. The Plaintiff explained, in writing, more than once, that the word "shall" in § 7.3.2 means "must" and that the Defendant Owner was required by the Contract to issue a Construction Change Directive in the absence of agreement on a Change Order.

55. On June 30, 2015, the Plaintiff notified the Defendant Owner in writing that the

electrician would be demobilized in the absence of a Construction Change Directive by close of business the following day, as the electrician had no further work that could be performed without such authorization.

56. On July 8, 2015, the Plaintiff notified the Defendant Owner by email that the continued failure to issue a Construction Change Directive constituted a breach of the contract.

57. On July 10, 2015, the Defendant Owner demanded that notice from the Plaintiff regarding the alleged breach of the contract or any claims be given pursuant to the notice requirements of the contract and not by email, and therefore there was no notice of breach.

58. The Defendant Owner continued to refuse to issue a Construction Change Directive.

59. The Defendant Owner's failure to issue a Construction Change Directive as required by the Contract caused delays, and these delays resulted in inefficiency in production due to out-of-sequence work, stopping and starting segments while awaiting authorization, erratic staffing and eventual trade stacking.

60. These delays and the resulting inefficiency of production caused by the Defendant Owner's refusal to issue a Construction Change Directive were neither the fault of nor the responsibility of the Plaintiff.

61. The Plaintiff sent Construction Change Directive 1 to the Defendant Owner on July 30, 2015.

62. Despite the clear purpose of the Construction Change Directive as spelled out in the Contract, the Defendant Owner wrote comments on the Construction Change Directive attempting to have the Plaintiff waive all rights in connection with the disputed change order and be responsible for daily damages for the completion of the contract.

63. The Plaintiff did not sign the revised Construction Change Directive, as allowed by the Contract, and continued to perform work under the Directive and Contract, although the Defendant Owner refused to pay in full the pay applications.

64. In addition to the Construction Change Directive, the Contract provided for mediation and arbitration to resolve disputes during the pendency of the project and avoid delay and disruption.

65. Pursuant to the Defendant Owner's request on July 10, 2015, all notice regarding alleged breaches of contract and claims under the contract had to be given in accordance with the notice requirements of the Contract.

66. Section 13.2.3 of the Contract provides: "Written notice shall be deemed to have been duly served if delivered in person to the individual ...or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to the last business address known to the party giving notice."

67. Section 15.3 of the contract provided for mediation of claims, disputes, or other matters in controversy arising out of or relating to the contract as a condition precedent to binding arbitration.

68. On July 15, 2015, the Plaintiff delivered to Defendant Owner and Defendant Owner's architect, in person, a request for mediation under 15.3.1 of the contract.

69. Defendant Owner did not respond to this request.

70. On July 24, 2015, the Plaintiff sent correspondence and the renewed request for mediation by certified mail to the office address provided in the contract, however the Defendant Owner refused to pick it up at the post office.

71. On or about July 24, 2015, the Defendant Owner hired Rick Newcomb, as its project manager, to supervise the construction.

72. The Plaintiff delivered the July 24 letter requesting mediation to Rick Newcomb, the Defendant Owner's project manager, at the job site.

73. The Defendant Owner refused to acknowledge its receipt or respond.

74. On July 31, 2015, the Plaintiff sent an additional letter again requesting mediation, along with the previous correspondence and documents, by certified mail to the office address provided in the contract, however the Defendant Owner refused to pick it up at the post office.

75. The July 31 letter and its attachments were also emailed to the Defendant Owner.

76. The July 31 letter and its attachments were also delivered personally to Rick Newcomb, the Defendant Owner's project manager on the jobsite.

77. The Defendant Owner refused to acknowledge its receipt or respond.

78. On September 3, 2015, the Plaintiff sent a second request for mediation, along with previous correspondence and documents to the Defendant Owner by Federal Express to the office at the address for notice provided in the contract, however the office was closed and there was no one there during the three times Federal Express attempted to deliver it.

79. The September 3 correspondence and attachments were personally delivered to the Defendant Owner's project manager, Rick Newcomb.

80. The Defendant Owner refused to acknowledge its receipt or respond.

81. On September 28, 2015, the Plaintiff attempted, through his job supervisor, to deliver the

second request for mediation and supporting documents to the Defendant Owner in person by handing it to her when she came to the job site, but Defendant Owner refused to accept it, put her hands behind her, and left saying it needed to be sent to her office.

82. On December 1, 2015, Plaintiff had a process server in Ohio personally deliver the Plaintiff's third request for mediation to the office address provided in the contract.

83. Although this third mediation request was also sent by email and personally delivered to the Defendant Owner's project manager, Rick Newcomb, the Defendant Owner refused to acknowledge receipt or respond.

84. The Defendant Owner refused to participate in the contractually mandated dispute resolution process.

85. The Defendant Owner required the Plaintiff to provide documentation of each receipt, bill for material and the timesheet for each worker throughout the job, even though the Contract was bid as a fixed price contract rather than a time and materials contract.

86. The Defendant Owner refused to process any application for payment from the Plaintiff until all documentation was received, even though the Contract was a fixed price contract rather than a time and materials contract.

87. The fixed price Contract dictates that Applications for Payment are to be based on a percentage of completion for each line item.

88. The Plaintiff complied with this request to provide all documentation of each receipt, bill for material and the timesheet for each worker, although it placed an onerous administrative burden on the Plaintiff that was not and should not have been contemplated as part of the fixed price Contract.

89. None of the Plaintiff's subcontractors complained to the Defendant Owner that that they had not been paid by the Plaintiff.

90. None of the Plaintiff's subcontractors filed a lien on the Defendant Owner's property to insure payment based on work done as subcontractor to the Plaintiff.

91. All of Plaintiff's subcontractors were paid by the Plaintiff for amounts due under their subcontract with the Plaintiff, even though Defendant Owner did not pay the Plaintiff the full amounts of pay applications under the main Contract.

92. All of the job materials for the subject property were paid for by the Plaintiff even though the contract required their installation on the property prior to reimbursement from the Defendant Owner, because the materials needed to be ready to install at the appropriate time.

93. Although all of the subcontractors had been paid, Defendant Owner attempted to pay portions of the Plaintiff's pay applications by issuing joint checks to Plaintiff and subcontractors.

94. Plaintiff negotiated those joint checks that were possible due to the location and availability of the subcontractor, however some of the subcontractors who had been previously paid by the Plaintiff were not local and it was impossible to appear with them in person as requested by the bank to negotiate the checks.

95. These checks were then voided and returned to Defendant Owner along with an explanation, citing that the subcontractor and materials had been paid previously and that the amount on the application was reimbursement to the Plaintiff.

96. On or about September 17, 2015, the Plaintiff's materials supplier, Miller Clapperton, informed the Defendant Owner in writing that the balance of their subcontract was $3,674.20 for retainage.

97. On that same date, Miller Clapperton provided the Defendant Owner with lien waivers for the total amount of their subcontract, less the $3,674.20 retainage, and shortly thereafter, provided Defendant Owner with a lien waiver for the retainage.

98. Miller Clapperton is a Georgia company, with offices in Austell, Georgia, many hours from Charleston.

99. After being advised in writing by the subcontractor of the balance due on the subcontract, and receiving lien waivers from the subcontractor for all amounts due on the subcontract except the $3,674.20 retainage, on or about September 21, 2015, the Defendant Owner issued a joint check to Miller Clapperton and the Plaintiff in the amount of $16,309.95.

100. On or about September 21, 2015, the Defendant Owner issued a second joint check to Miller Clapperton and the Plaintiff in the amount of $1,016.50.

101. The amounts of these two joint checks exceeded the retainage due to the subcontractor by $13,652.50.

102. The Defendant Owner knew the subcontractor had already been paid everything but retainage and that these funds were due to the Plaintiff solely.

103. The Plaintiff voided these joint checks and returned them to the Defendant Owner.

104. On or about November 16, 2015, the Plaintiff informed the Defendant Owner in writing that the Plaintiff itself had performed all the work reflected in line 22 of the Application for Payment 15, installation of the steel lintels and closure angle plates.

105. After being informed that the Plaintiff, not the subcontractor Accu Welding, had installed the steel lintels and closure angle plates, on or about November 30, 2015, the Defendant Owner issued a joint check to Accu Welding and the Plaintiff in the amount of $270.39.

106. The Defendant Owner knew at the time of the issuance of the check that the subcontractor Accu Welding was not due these funds and that they were due to the Plaintiff solely.

107. Plaintiff voided the joint check and returned it to the Defendant Owner however the Defendant Owner refused to re-issue the check solely to the Plaintiff.

108. More joint checks followed, including one to subcontractor Pleasant Places and the Plaintiff, for which the Defendant Owner had already received a lien waiver but wrote a joint check for more than was owed to the subcontractor.

109. On April 21, 2015, the Plaintiff purchased materials for the wire trellis system for the Defendant Owner's project from SECO South, an online materials supplier, using a company VISA card, and forwarded the back-up documentation of this purchase to the Defendant Owner in May of 2015.

110. Seven months later, on December 30, 2015, the Defendant Owner wrote a joint check to SECO South and Plaintiff knowing that these materials had been purchased by the Plaintiff and the funds were due solely to the Plaintiff.

111. This joint check was voided and returned to the Defendant Owner, but Defendant Owner refused to re-issue the check solely to the Plaintiff.

112. The Defendant owner wrote two joint checks to Plaintiff's subcontractor, Allphase Electrical on or about January 9, 2016, which exceeded the amount due to Allphase under its subcontract with the Plaintiff, including retainage, by $12,232.31.

113. The remainder of the funds paid to Allphase by the Defendant Owner were due to Plaintiff as reimbursement for amounts Plaintiff had already paid to Allphase for materials.

114. There was never a time when the Defendant Owner issued a joint check that was returned by the Plaintiff because the amount was insufficient to cover the amount due to a subcontractor under its subcontract with the Plaintiff.

115. The Plaintiff attempted to deal with the Defendant Owner's improperly issued joint checks for significantly more than the subcontractor was due, however this placed an undue administrative burden on the Plaintiff in a fixed price Contract.

116. Several times, the Plaintiff returned a voided joint check to the Defendant Owner with an explanation, and whether the Defendant Owner had received written confirmation of the amount due from the subcontractor, had received lien waivers, or both, the Defendant Owner refused to re-issue the check solely to the Plaintiff.

117. The few times prior to November of 2015 when the Plaintiff did re-issue a voided joint check solely to the Plaintiff, payment was delayed by several weeks.

118. The Defendant Owner requested in writing that the Plaintiff provide the amounts each subcontractor was due.

119. The Defendant Owner made clear that it was only paying the subcontractors and not any amounts billed or claimed due to the Plaintiff.

120. Application for Payment 15, for work done through October 30, 2015, was sent to the Defendant Owner on November 9, 2015.

121. The Defendant Owner did not pay any amounts due solely to the Plaintiff from this Application for Payment.

122. The Defendant Owner did not pay $9,888.13 of Application for Payment 15 by December 31, 2015.

123. The $9,888.13 owing for Application for Payment 15 as of the end of December does not include the joint check made out to the Plaintiff and the trellis materials supplier, SECO South, for which the Defendant Owner had received documentation of the credit card charge in May and knew was for reimbursement to the Plaintiff for materials purchased for the Defendant Owner's project.

124. The $9,888.13 owing for Application for Payment 15 as of the end of December does not include the $2,608.09 due and owing from previous Applications for Payment, for which the Plaintiff filed a Mechanic's Lien on December 17, 2015.

125. The Defendant Owner was sent Application for Payment 16, for work done through November 30, 2015, on December 9, 2015.

126. The Defendant Owner did not pay any amounts due on Application for Payment 16, whether by joint check or otherwise.

127. The amounts due to the Plaintiff for the joint checks that the Defendant Owner refused to re-issue solely to the Plaintiff were only a small percentage of what was due and owing to the Plaintiff under the Contract; the remaining amounts were simply not paid at all by the Defendant Owner.

128. On December 30, 2015, the Plaintiff mailed notice to the Defendant Owner of its intent to demobilize in 7 days pursuant to the Contract provisions if it did not receive payment for amounts due under the applications for payment.

129. On January 2, 2016, the Plaintiff emailed the December 30 letter to the Defendant Owner along with the proof of delivery of the letter to Defendant Owner's office address.

130. The Defendant Owner did not acknowledge or respond to this correspondence.

131. The Plaintiff continued to perform work pursuant to the Contract through January 12, 2016, despite the Defendant Owner's continued failure to pay in full all applications for payment.

132. The Plaintiff notified the Defendant Owner by email on January 12, 2016, that they had demobilized and removed all equipment from the jobsite in accordance with the Contract provisions as set forth in the December 30 letter.

133. The Defendant Owner responded by claiming the Plaintiff had breached the contract in a variety of ways and stating that if the Plaintiff did not resume work within 7 days, the Defendant Owner was terminating the contract for cause.

134. The Plaintiff did not resume work under the contract.

135. The Plaintiff duly and timely filed a Notice and Certificate of Mechanics Lien with the Office of the RMC for the County of Charleston at Book 0524, Page 038, on December 17, 2015, as of which date, the amount due and unpaid by Defendant under the contract was Two Thousand Six Hundred Eight and 09/100 Dollars ($2,608.09), plus interest as provided under the Contract, plus attorneys' fees, a copy of which is attached hereto as Exhibit B (hereafter "the first Lien").

136. The Plaintiff duly and timely filed a Notice and Certificate of Mechanics Lien with the Office of the RMC for the County of Charleston at Book 0542, Page 405, on March 22, 2016, as of which date, the amount due and unpaid by Defendant under the contract, not including the amount for the first Lien set forth above, was Twenty Nine Thousand Five Hundred Twenty One and 28/100 (29,521.28), plus interest as provided under the Contract, plus attorneys' fees, a copy of which is attached hereto as Exhibit C (hereafter "the second Lien").

137. The Plaintiff duly and timely filed a Notice and Certificate of Mechanics Lien with the Office of the RMC for the County of Charleston at Book 0546, Page 296, on April 11, 2016, as of which date, the amount due and unpaid by Defendant under the contract, not including the amount of the first Lien and second Lien set forth above, was Fifty Two Thousand Eight Hundred Sixty Eight and 78/100 Dollars ($52,868.78), plus interest as provided under the Contract, plus attorneys' fees, a copy of which is attached hereto as Exhibit D (hereafter "the third Lien").

138. The Defendant Owner has failed to pay in full the amount of the first, second and third Liens.

AS A FIRST CAUSE OF ACTION
Foreclosure of Mechanics Liens

139. Plaintiff reasserts and re-alleges all facts and claims of the preceding paragraphs of this Complaint as if set forth verbatim herein.

140. Plaintiff has commenced this action within six months of the last date it provided labor and materials on the Real Property.

141. Plaintiff is entitled to an Order of Foreclosure of its first, second and third Mechanic's Liens on the Real Property, requiring that the Real Property be sold and that the proceeds of sale, after deducting all lawful charges and expenses, be paid to Plaintiff to be applied to the amount owed pursuant to the Lien, including interest, plus attorneys' fees and the costs of this action.

AS A SECOND CAUSE OF ACTION
(Breach of Contract)

142. Plaintiff reasserts and re-alleges all facts and claims of the preceding paragraphs of

this Complaint as if set forth verbatim herein.

143. The Defendant Owner willfully breached the contract with the Plaintiff in multiple ways, including but not limited to the following:

a. Failing to pay for labor and materials furnished and billed under the Contract between Defendant Owner and the Plaintiff;

b. Improperly issuing joint checks when Defendant Owner was informed by the subcontractor of the amount due and was provided lien waivers;

c. Improperly issuing joint checks when Defendant Owner was provided lien waivers;

d. Improperly issuing joint checks to Plaintiff and materials suppliers when Defendant Owner was provided proof of payment for materials;

e. Refusing to re-issue improperly issued joint checks solely to the Plaintiff;

f. Providing an unattended address for service of notice under the contract;

g. Refusing to accept notice under the contract;

h. Refusing to participate in contractually mandated alternative dispute resolution;

i. Refusing to issue Construction Change Directives to keep the job moving forward in the event of a dispute over a Change Order as required by the Contract, despite multiple requests by the Plaintiff;

j. Wrongfully terminating the Contract for cause claiming Plaintiff was in breach.

144. As a result of the breach of contract by Defendant Owner, the Plaintiff has been damaged in the amounts owed; plus interest as provided under the contract; or in the event of willful breach, interest as provided by statute, contract damages for costs, overhead and profit for

the unfinished work, increased project administration and project management costs, and increased reimbursable project costs caused by delays; attorneys' fees; and the costs of this action, for which amounts Defendant is responsible.

AS A THIRD CAUSE OF ACTION
(Quasi-Contract/Unjust Enrichment)

145. Plaintiff reasserts and re-alleges all facts and claims of the preceding paragraphs of this Complaint as if set forth verbatim herein.

146. The Defendant Owner and Bank have had the use and benefit of the materials and labor furnished by the Plaintiff and are unjustly retaining the benefit of the materials and labor without paying Plaintiff in full for them.

147. The Defendant Owner and Bank are liable to Plaintiff for the reasonable value of the labor and materials for which it has not paid in full, plus prejudgment interest from the date such labor and materials were supplied.

WHEREFORE, the Plaintiff prays for judgment as follows:

A) On its First Cause of Action, Plaintiff demands that Plaintiff's Mechanic's Lien be foreclosed, that due notice of said foreclosure be given all proper parties, that the priorities of the Plaintiff and the Bank be determined, that the Real Estate be sold and that the proceeds used to satisfy the amounts due Plaintiff on its Liens and for the costs incurred in prosecuting this action, including attorneys' fees, with any deficiency remaining a debt of the Defendant Owner to the Plaintiff.

B) On its Second Cause of Action, Plaintiff demands judgment against Defendant Owner for Breach of Contract in the amount of all unpaid balance, plus prejudgment interest, costs and attorneys' fees; and in the event of willful breach, interest as provided by statute, contract

damages for costs, overhead and profit for the unfinished work, increased project administration and project management costs, and increased reimbursable project costs caused by delays, attorneys' fees, and the costs of this action.

C) On its Third Cause of Action, Plaintiff prays for judgment against Defendant Bank and Defendant Owner, jointly and severally, in the amount of all labor and materials supplied by Plaintiff but not paid for by Defendants, plus prejudgment interest from the date such labor and materials were provided, and for the costs herein expended.

D) Plus such other and further relief that this Court deems just, equitable, and proper.

Charleston, S. C.

07.06, 2016

TAYLOR & BOWLEY, LLC

D. LYNN BOWLEY
State Bar # 66669
P.O. Box 1059
Charleston, SC 29402
(843) 723-4020; fax (843) 723-4021

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT OF MYLES I. GLICK, AIA

Personally appeared before me Myles I. Glick, AIA LEED AP, who first being duly sworn, deposes and states as follows:

1. I am a licensed architect in the State of South Carolina.

2. I am the President of Glick/Boehm & Associates, Inc.

3. Glick/Boehm & Associates, Inc. has been named a Defendant in a lawsuit filed by 480 King Street, LLC bearing the case number 2017-CP-10-3267.

4. Upon receiving a copy of the Complaint I spoke to Mr. Brent Halversen, the attorney for Plaintiff, the week of August 14, 2017. In response to my question of why Glick/Boehm was being sued, Mr. Halversen responded that he tried to talk Ms. Mary Ann Kantor – the owner of 480 King Street, LLC – out of suing Glick/Boehm & Associates, Inc. for over two months. Unfortunately, he was not successful and Glick/Boehm & Associates, Inc. was sued right before the statute deadline.

5. As of the date of this Affidavit, I have not been provided a copy of an expert affidavit detailing the professional allegations alleged against Glick/Boehm.

FURTHER AFFIANT SAYETH NOT.

By: _____
Myles I. Glick, AIA

SWORN to and subscribed before me
This 25th day of August, 2017.

_____
Notary Public for South Carolina
My Commission Expires: June 4, 2025

EXHIBIT
D

THE STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	) THE NINTH JUDICIAL DISTRICT
480 KING STREET, LLC,	) CASE NO.: 2017-CP-10-03267
Plaintiff,	)
vs.	) **GLICK/BOEHM & ASSOCIATES, INC.'S**
GLICK/BOEHM & ASSOCIATES, INC.	) **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR EXTENSION OF TIME**
Defendant.	)

2017 SEP -1 AM 11:37
CLERK OF COURT
BY

Defendant Glick/Boehm & Associates (hereinafter "GBA"), by and through the undersigned attorneys, respectfully submits this Memorandum in Opposition to Plaintiff's Motion for Extension of Time to comply with the affidavit requirement prescribed by S.C. Code Ann. § 15-36-100 (2016).

BACKGROUND

This case involves claims of professional negligence concerning the alleged provision of architectural services by GBA in connection with a stair tower located at 480 King Street in Charleston. Plaintiff did not file an expert affidavit contemporaneously with its Complaint and despite the expiration of forty-five days has yet to comply with the statutory mandate of supplying an expert affidavit. Plaintiff now requests additional time to comply with the statute, but additional time in this instance is unwarranted and in violation of the relevant statute.

LEGAL AUTHORITY

Architects and Engineers are two of the 22 professional groups specifically identified in S.C. Code Ann. § 15-36-100(G) (2015). Pursuant to that statute, an affidavit from an expert *must* be filed contemporaneously with any complaint alleging damages arising from alleged professional negligence of an architect, engineer, or surveyor. The affidavit "must specify at

least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." S.C. Code Ann. § 15-36-100(B) (2015). If a proper affidavit "is not filed . . . and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim." S.C. Code Ann. § 15-36-100(C)(1) (2015).

The statute, however, provides an exception to the contemporaneous filing requirement in instances where the "period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared." S.C. Code Ann. § 15-36-100(C)(1) (2015). In such a scenario, the statute grants Plaintiff an additional forty-five days to comply with the affidavit requirement. Id. In addition, in the event an additional forty-five days is an insufficient amount of time, a plaintiff may move for additional time to procure an affidavit. Id The court, after a hearing and for good cause, may grant additional time as justice so requires. Id.

ARGUMENT

Plaintiff's failure to obtain the required affidavit does not warrant additional time under section 15-36-100 as there is no good cause to justify the extension of time and doing so would not further the ends of justice. In the case at hand, Plaintiff alleged in its Complaint that the statute of limitations may have been triggered on June 27, 2014, and thus, the Complaint filed on June 26, 2017 was well within the exception to the contemporaneous filing requirement.[1] Plaintiff specifically alleges in the Complaint that an affidavit of an expert could not be prepared. On day forty-five of the forty-five day extension granted by the statute, Plaintiff moved for an

[1] See Plaintiff's Complaint page 8, Paragraph 27 attached hereto as Exhibit A.

extension of time to supply the requisite affidavit.[2] In its motion, Plaintiff has alleged that despite retaining an expert approximately a week prior to filing the Complaint, the expert has been unable to form an opinion and reduce it to affidavit form. Plaintiff contends that as a result, good cause exists to extend the time for the filing of the affidavit.

The expert affidavit requirement is a part of the South Carolina Frivolous Civil Proceedings Sanctions Act; its purpose is to guard against frivolous lawsuits involving professionals. Steinmetz v. Cooper (In re Steinmetz), Nos. 07-00628, 07-00579, 10-80177, 2011 Bankr. LEXIS 3830, at 8 (U.S. Bankr. D.S.C. Mar. 18, 2011) The expert witness affidavit serves to ensure that claims of professional negligence "have some validity before filing and alerts the professional to the merits of the claim." Id. There is no language in the statute that indicates the filing of an affidavit is optional. Id.

In the case hand, the matter has been pending against GBA since June 26, 2017. Although the claim was filed on the eve of the expiration of the statute of limitations, this matter has been well known to Plaintiff for some time. As noted in the Complaint, this claim arose as early as June 27, 2014.[3] Furthermore, Plaintiff was named a defendant in a separate action on July 6, 2016 concerning the construction of the very property that is the subject of this action, and upon information and belief, involved the identical stairwell shaft at issue in the present matter.[4] Moreover, per the attached affidavit, Mr. Myles Glick contacted Plaintiff's counsel directly after receiving the lawsuit to inquire concerning the same and was told, despite counsel's best efforts to dissuade Plaintiff from bring the action for over two months, the lawsuit was initiated against GBA.[5]

---

[2] Attached as Exhibit B.
[3] See Ex. A.

[4] See Complaint in matter of Charles Blanchard Construction Corp. v. 480 King Street, LLC, et al. 2016-CP-10-3468, attached hereto as Exhibit C.

[5] See Affidavit of Myles Glick attached hereto as Exhibit D.

It is Defendant's position that Plaintiff has not adhered to the statutory requirement for supplying an expert affidavit and the Complaint should be dismissed with prejudice. Section 15-36-100 does not require a full vetted or comprehensive affidavit. Rather, the statute mandates only that the affidavit "specify *at least one* negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." S.C. Code Ann. § 15-36-100 (B) (emphasis added). According to Plaintiff's own filings, it has had over three years and forty-five days to obtain an affidavit that sets forth only *one* instance of professional negligence and the factual basis for the claim, but has yet to do so. While the statute provides leeway for plaintiffs who are filing at or near the expiration of the statute of limitations, it is not intended to present plaintiffs with an option to evade the affidavit requirement by presuming additional time will be made available. Plaintiff has had ample opportunity to provide the requisite affidavit yet has failed to do so. Therefore, Plaintiff's need for additional time to procure an affidavit is the result of Plaintiff's own actions and does not constitute good cause under the statute.

Moreover, the result of the delay in providing an expert affidavit presents the very scenario the Frivolous Proceedings Act is meant to prevent. GBA is now a defendant to a lawsuit alleging professional negligence without the benefit of knowing the merits of the claim or whether the claim has any validity. Plaintiff's request for additional time to procure an affidavit would not further the ends of justice as the statute contemplates, but would instead reward Plaintiff for its failure to act timely in supporting its claims against GBA with the necessary affidavit.

CONCLUSION

For all of the preceding reasons, as a result of Plaintiff's failure to adhere to the requirements of the affidavit requirement and lack of good cause for additional time, Plaintiff's request should be denied and the case should be dismissed with prejudice under section 15-36-

100. This Motion is based on South Carolina law, the pleadings filed in this case, and any supporting documents to be submitted hereafter.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: _____
KENT T. STAIR
State Bar No.: 14029

PAUL E. SPERRY
State Bar No.: 68441

J. ANDREW YOHO
State Bar No.: 100803

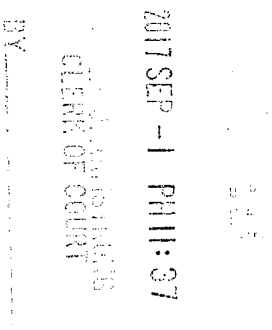
Attorneys for Glick/Boehm & Associates, Inc.

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
843-727-0307

THE STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) THE NINTH JUDICIAL DISTRICT
COUNTY OF CHARLESTON	)
	) CASE NO.: 2017-CP-10-03267
480 KING STREET, LLC,	)
	)
Plaintiff,	)
	)
vs.	) **CERTIFICATE OF SERVICE**
	)
GLICK/BOEHM & ASSOCIATES, INC.	)
	)
Defendant.	)
	)

I hereby certify that I have this day served a copy of the within and foregoing ***Glick/Boehm & Associates, Inc.'s Memorandum In Opposition To Plaintiff's Motion For Extension Of Time*** upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Brent S. Halversen, Esq.
Halversen & Associates, LLC
171 Church Street, Suite 330
Charleston, SC 29401
Attorney for Plaintiff



This 30th day of August, 2017.

Miriam A. Peeler
Legal Secretary to Kent T. Stair

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10-32607
480 KING STREET, LLC	)	
	)	
Plaintiff,	)	
	)	COMPLAINT
vs.	)	
	)	(Jury Trial Demanded)
	)	
	)	
GLICK/BOEHM & ASSOCIATES, INC.	)	
	)	
Defendant.	)	

FILED
2017 JUN 26 PM 3:13
JULIE J. ARMSTRONG
CLERK OF COURT

COMES NOW THE PLAINTIFF, 480 King Street, LLC, (hereinafter, "480 King") by and through their undersigned counsel, complaining of the Defendant herein, Glick / Boehm & Associates, Inc. (hereinafter, "GBA") and allege unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Plaintiff, 480 King is a limited liability company organized and doing business in the State of South Carolina.

2. Defendant, GBA, is a corporation organized and existing under the laws of the State of South Carolina, and is doing business in Charleston County as GBA.

3. Upon information and belief, GBA served as the architect of record for the stair tower located at 480 King Street, Charleston, South Carolina, agreeing to provide professional architectural services for the design of the stair tower, specifically including, but not limited to, the issuance of the plans and specifications for the construction of the stair tower. These documents and/or instruments of service were required to be in

EXHIBIT
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compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, GBA agreed to make periodic visits to the stair tower during construction, and otherwise perform contract administration services during construction to observe whether the construction was being completed in accordance with the plans and specifications (itself created) and all applicable building codes.

4. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum pursuant to §15-7-30 (E)(1).

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

5. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

6. On or about October 16, 2013, 480 King and GBA entered in to a Contract for GBA to provide design and construction administration services for a for a stair tower that Charles Blanchard Construction Corporation (hereinafter, "CBCC") later constructed at 480 King Street, Charleston, South Carolina 29403, for the contract sum of $706,878.84.

7. The contract called for GBA to design the stair tower and, inter-alia, to act as 480 King's agent to interpret the contract documents, visit the site, review the Contractor's submittals, reject non-conforming work, keep 480 King informed about the progress and quality of the work as and when completed, and to report to 480 King known deviations from the Contract documents.

8. Pursuant to the Contract, substantial completion of the project was to be achieved within 150 days from the date of commencement. The date of project commencement was dated June 30, 2014, therefore, the stair tower should have been substantially completed by November 27, 2014, and in no event later than December 15,

2014 pursuant to the Contract Addendum. CBCC and 480 King agreed that time was of the essence.

9. GBA breached their contractual duties set forth above in the following and particular and herein described manners:

a) Failing to properly design and prepare specifications for the stair tower which were compliant with all applicable building codes and professional standards;

b) Failing to specify products that were in compliance with all applicable building codes;

c) Failing to design and specify the correct elevator system, shaft, and component parts for the stair tower;

d) Failing to properly administer, observe and inspect the construction of the stair tower for compliance with the plans and specifications an applicable building codes;

e) Failing to act as a reasonably prudent design professional would act under similar circumstances

f) Failing to detect non-code compliant work completed by CBCC including the following: (i) failure of CBCC to construct the building so that the exterior of the building envelope was water tight; (ii) failure of CBCC to install or properly install an appropriate secondary weather resistant barrier on the exterior wall sheathing; (iii) failure of CBCC to install or properly install flashing at windows and doors; (iv) failure of CBCC to properly protect the rough openings from moisture intrusion; (v) failure

of CBCC to install a roof covering that allows water intrusion into the interior of the building, causing damage to other components of the building besides the roof; and (vi) failure of CBCC to properly grade the premises.

g) Specifying the incorrect travel length of the stair tower elevator;

h) Improperly designed elevator and electrical chase;

i) Improperly designed electrical conduit;

j) Improperly designed HVAC unit header;

k) Improperly designed soffit/header;

l) Improperly designing windows, flashing and connections resulting in water penetration and damage;

m) Improperly designed stairs;

n) Failing to discover defects in the work performed by CBCC and its subcontractors;

o) Other breaches that may be determined to be shown at the trial of this matter;

10. The deviations in what was called for in the Contract documents, versus what was supplied and rendered by CBCC was not rejected by GBA as non-conforming, nor reported to 480 King as deviations in the Contract documents. At a minimum, GBA was under a contractual duty to inform 480 King as to the above referenced errors, omissions and deviations in the quality of the project, and GBA never did.

11. The acts described above are plain breaches GBA's contractual duties by reviewing and approving items of work at the project that were either not performed, or

were performed in derogation of the Contract documents. These breaches were material and deprived 480 King of the benefit of their bargain, as the project was a value engineered building, and was designed to be built with specific requirements that were largely ignored. GBA's complete supervision of all work, design, submittals, RFI's, and ASI's rendered the product contracted for of significantly diminished value in the eyes of 480 King and prospective third-party purchasers and constitute actual, special damages as plead herein. This loss may reasonably be construed to have been in the contemplation of the parties at the time the contract was formed as the plans were unique. Pursuant to South Carolina law, 480 King is entitled to be placed in as good a position as if the contract had been correctly, thus giving them the benefit of their bargain, in addition to remediation costs, replacement costs, loss of use, loss of revenue, delay costs, consequential damages, extra expenses, and loss of time.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty as to GBA)

12. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

13. Upon information and belief, GBA, pursuant to its contract with the Plaintiff, expressly warranted that its plans, specifications, and other instruments of service would be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards.

14. GBA warranted the sufficiency of the designs, plans, and specifications for the stair tower.

15. On August 25, 2014, CBCC stated that the problems with the elevator were design errors by GBA.

16. On May 12, 2015, CBCC stated that design issues regarding the electrical chase were causing delays.

17. In August, 2014, Mr. Myles Glick of GBA admitted GBA specified the incorrect travel length for the elevator.

18. On June 23, 2015, CBCC stated that the contract drawings did not show a chase, and permit drawings showed a rated wall.

19. Plaintiff is a beneficiary of the express and implied warranties provided by GBA.

20. The contemporaneous filing requirement of § 15-36-100 subsection (B) does not apply in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, an affidavit of an expert could not be prepared. Upon information and belief, the first date upon which Plaintiff was aware, or could have been aware of a potential issue and/or claim as to GBA was June 27, 2014, one day after the project commenced when CBCC notified owner of major problem with the elevator which would require a change order. Upon information and belief, GBA breached their express and implied warranties by failing to design the stair tower free from defects and in compliance with applicable building codes and industry standards.

21. Plaintiff has been proximately damaged by GBA's breach of their express and implied warranties in that Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the stair tower. In addition thereto, the insufficiency of the designs, plans, and specifications caused defects and damages, including, but not limited to, cost overruns, delay costs, loss of rental income, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct and indirect damages all to Plaintiff's damage in an amount to be determined.

22. As a result of GBA's breach of express and implied warranties, the Plaintiff is entitled to a judgment against GBA for all actual, direct, indirect, resulting and consequential damages in an amount to be proven at trial.

FOR A THIRD CAUSE OF ACTION
(Negligence as to GBA)

23. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

24. GBA agreed to provide professional architectural and engineering services for the design and construction of the stair tower, specifically including, but not limited to, the issuance of the plans and specifications for construction. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, building codes, regulations, statutes, and industry standards.

25. Upon information and belief, GBA agreed to make periodic visits to the stair tower during construction and perform other contract administration services to observe, among other things, whether construction was being completed in accordance with the plans and specifications and all applicable building codes and regulations.

26. It was foreseeable that Plaintiff would be damaged if GBA breached the above-referenced duties. As such, GBA owed a duty of care to the Plaintiff. In fact, GBA owed a heightened degree of care to Plaintiff as GBA designed the plans and specifications, and was also retained to oversee implementation of the same plans it created.

27. The contemporaneous filing requirement of § 15-36-100 subsection (B) does not apply in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, an affidavit of an expert could not be prepared. Upon information and belief, the first date upon which Plaintiff was aware, or could have been aware of a potential issue and/or claim as to GBA was June 27, 2014, one day after the project commenced when CBCC notified owner of change order request for the elevator. Upon information and belief, GBA breached their duty of care in the following particulars, including but not limited to:

a) Failing to properly design and prepare specifications for the stair tower which were compliant with all applicable building codes and professional standards;
b) Failing to specify products that were in compliance with all applicable building codes;

c) Failing to design and specify the correct elevator system, shaft, and component parts for the stair tower;

d) Failing to properly administer, observe and inspect the construction of the stair tower for compliance with the plans and specifications an applicable building codes;

e) Failing to act as a reasonably prudent design professional would act under similar circumstances

f) Failing to detect non-code compliant work completed by CBCC including the following: (i) failure of CBCC to construct the building so that the exterior of the building envelope was water tight; (ii) failure of CBCC to install or properly install an appropriate secondary weather resistant barrier on the exterior wall sheathing; (iii) failure of CBCC to install or properly install flashing at windows and doors; (iv) failure of CBCC to properly protect the rough openings from moisture intrusion; (v) failure of CBCC to install a roof covering that allows water intrusion into the interior of the building, causing damage to other components of the building besides the roof; and (vi) failure of CBCC to properly grade the premises.

g) Specifying the incorrect travel length of the stair tower elevator;

h) Improperly designed elevator and electrical chase;

i) Improperly designed electrical conduit;

j) Improperly designed HVAC unit header;

k) Improperly designed soffit/header;

l) Improperly designing windows, flashing and connections resulting in water penetration and damage;

m) Improperly designed stairs;

n) Failing to discover defects in the work performed by CBCC and its subcontractors

o) Other breaches that may be determined to be shown at the trial of this matter;

28. As a direct, foreseeable and proximate result of the negligence, design defects and resulting property damage, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the stair tower. In addition thereto, the insufficiency of the designs, plans, and specifications caused defects and damages, including, but not limited to, cost overruns, delay costs, loss of rental income, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct and indirect damages all to Plaintiff's damage in an amount to be determined.

29. As a result of GBA's negligence, the Plaintiff is entitled to a judgment against GBA for all actual, direct, indirect, resulting and consequential damages in an amount to be proven at trial.

WHEREFORE, the Plaintiff prays this Honorable Court inquire into the matters set forth herein and award judgment in favor of 480 King and against GBA, as follows:

1. For all actual, direct, indirect, compensatory, resulting, consequectial and special damages against the Defendant, in an amount to be shown at trial;
2. For all costs associated with investigating and prosecuting this action; and

3. For all other relief this Honorable Court deems just and proper.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: _____

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171 Church Street, Suite 330
Charleston, SC 29401
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Email: brent@halversenlaw.com
Attorneys for the Plaintiff

6/26, 2017.
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10-3267
480 KING STREET, LLC	)	
Plaintiff,	)	MOTION FOR EXTENSION OF TIME
vs.	)	
GLICK/BOEHM & ASSOCIATES, INC.	)	
Defendant.	)	

2017 AUG 10 PM 3:13
BY

COMES NOW THE PLAINTIFF, 480 King Street, LLC, (hereinafter, "Plaintiff") by and through their undersigned counsel, and files this motion for extension of time and states the following in support therefor:

1. On June 26, 2017 Plaintiff filed a Summons and Complaint against the Defendant asserting claims for breach of contract, breach of warranty, and negligence.

2. As averred in Plaintiff's Complaint, the first date upon which Plaintiff could have been aware of a potential issue or claim as to Defendant was on June 27, 2014. Accordingly, Plaintiff timely filed its Summons and Complaint against Defendant on June 26, 2017.

3. The contemporaneous affidavit filing requirement of § 15-36-100 subsection (B) does not apply in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, an affidavit of an expert could not be prepared.

EXHIBIT
tabbies
B

In such case, the statute allows for an affidavit to be filed 45 days after the Complaint is filed or the Court may extend the period upon motion after a showing of good cause. The statute states:

> The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires.

SC Code § 15-36-100(C)(1)

4. In this case good cause exists as Plaintiff just filed its Complaint on June 26, 2017 and has not had adequate time to have an expert review all attendant documents in order to render an expert opinion to support Plaintiff's non-contractual claims.

5. Plaintiff initially contacted an expert Louis Hackney P.E., REWC, RRC, CDT, LEED AP in June, 2017 prior to filing its Complaint, and formally retained Mr. Hackney on July 19, 2017.

6. After retention, Mr. Hackney has been sent approximately 8,000 documents, and it was not possible for Mr. Hackney to review all of the documents necessary within the 45 days after filing the Complaint to form an opinion reducible to affidavit form by August 10, 2017- which is 45 days after filing.

7. Due the nature of the case, Mr. Hackney's schedule, and the volume of materials that exist necessary for review, Plaintiff believes good cause exists for the Court to extend the time for filing the affidavit, as is allowable upon the showing of good cause.

WHERFORE, Plaintiff requests this Court extend the time for filing an affidavit pursuant to SC Code § 15-36-100(C)(1) for reasons stated herein and presented to the Court in the premises.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: _____

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171 Church Street, Suite 330
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F: 864-326-4844
Email: brent@halversenlaw.com
Attorneys for the Plaintiff

August 10, 2017.
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion via U.S. Mail and process server with postage prepaid on this 10th day of August, 2017.

HALVERSEN & ASSOCIATES, LLC

By: _____

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Attorneys for the Plaintiff

August 10, 2017.
Charleston, South Carolina

2017 AUG 10 PM 3:12

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Charles Blanchard construction Corp., Inc.

vs.

480 King Street, LLC, and TD Bank N.A., NQ,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
2016-CP-10-3468

COMPLAINT
(Debt Collection, Foreclosure of Liens)
(Jury Trial Demanded)

FILED
2016 JUL -6 PM 1:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Plaintiff above named, complaining of the Defendants herein, would show unto this Honorable Court as follows:

JURISDICTION AND PARTIES

1. The Plaintiff is a corporation organized under and operating pursuant to the laws of the State of South Carolina, and maintaining an office in the City of North Charleston and doing business in the City and County of Charleston.

2. Upon information and belief, the Defendant 480 King Street, LLC, is a limited liability corporation organized and existing under the laws of the State of South Carolina and operating in the County of Charleston, South Carolina (hereafter "Defendant Owner") and at all times herein was the owner of the real property which is the subject of this action.

3. Defendant T.D. Bank, N.A., NQ, upon information and belief, is a National Banking Organization, organized and existing under the laws of the United States and the State of South Carolina, doing business in the County of Charleston South Carolina (hereafter "Bank") and is

EXHIBIT
tabbies
C

made a party hereto because it may have an interest in the real property that is the subject of this action.

4. The real property at issue herein is described on the Exhibit A attached hereto and made a part hereof and known hereafter as the Real Property, is located in the City and County of Charleston, state of South Carolina.

5. The parties, property and issues herein all are within the jurisdiction of this Honorable Court.

FACTS

6. Plaintiff reasserts and realleges all facts and claims of the preceding paragraphs of this Complaint as if set forth verbatim herein.

7. On June 26, 2014, Plaintiff entered into a construction contract with Defendant Owner by and through its manager, Mary Ann Kanters, for labor, materials, equipment and services in connection with the building located on the real property owned by Defendant Owner (hereafter the "Contract").

8. On or about June 27, 2014, Plaintiff began work pursuant to the Contract, furnishing the agreed upon labor and materials and making applications for payment as specified therein.

9. Almost immediately after signing the contract, delays occurred affecting the ultimate completion date of the contract.

10. Mere hours after execution of the contract, Plaintiff discovered that the Defendant Owner's architectural plans for the elevator were incorrect, requiring an additional one foot of depth for the elevator equipment selected by the Defendant Owner and drawn by Defendant Owner's architect.

11. While under the original contract the Plaintiff was responsible for providing the elevator in accordance with Defendant Owner's plans and specifications, the improper design by Defendant Owner's architect necessitated a change order whereby the Defendant Owner was then to be responsible for providing a re-design of the elevator shaft or acquiring a different elevator that would fit within the previously designed elevator shaft.

12. The delay caused by the incorrect elevator design was neither the fault of nor the responsibility of the Plaintiff.

13. At the time of placing rebar and pouring the elevator pit and foundation slab, the Defendant Owner put a hold on the work to add sewer/storm drainage that was outside the scope of the project, anticipating that the drainage would run beneath the foundation of the stairtower.

14. The Defendant Owner hired an engineer to design the placement of the future sewer/storm drainage, and requested three quotes for pricing of the design.

15. Upon receipt of the quotes for the cost of the storm drainage, the Defendant Owner decided not to install the drainage.

16. The delay caused by the Defendant Owner's hold to design and quote the cost to install sewer/storm drainage pipes was neither the fault of nor the responsibility of the Plaintiff.

17. Many months before the project started and again early in the project, the Plaintiff advised the Defendant Owner in writing that the site needed a civil engineering plan to deal with site elevation and water run off, telling the owner that he was "afraid that the area behind 480 will be a pond."

18. Nonetheless, the Defendant Owner did not retain a civil engineer to review the site

elevations or to design a water run off plan until June 29, 2015, after the water run off at the site caused water intrusion in the elevator shaft and first floor of the stair tower.

19. In July of 2015, the Defendant Owner alleged that the water intrusion in the building's exterior walls was the result of the Plaintiff's failure to properly waterproof the exterior walls according to the design specifications.

20. The Defendant Owner claimed this failure was a construction deficiency and that the water intrusion was the result of both this construction deficiency and of the Plaintiff's failure to properly maintain and supervise the site to prevent this damage.

21. The Plaintiff informed Defendant Owner in writing that the building's perimeter walls were installed with the designated weather barrier required by the plans and specifications, which was designed only to shed water and was not a waterproofing material.

22. Defendant Owner's architect confirmed in writing to Plaintiff and Defendant Owner that the building's perimeter walls were lined with the appropriate material as called for in the plans.

23. The grade and site elevations were the responsibility of the Defendant Owner pursuant to the Contract.

24. The Defendant Owner failed to address the grade and site elevations prior to the water intrusion, no civil engineer had been retained by the Defendant Owner to draw plans addressing the site grade or elevation prior to the water intrusion, and no site grade or elevation plans had been given by the Defendant Owner to the Plaintiff to address the potential flooding.

25. The delay caused by the water intrusion and damage to the elevator shaft and first floor of

the stair tower resulting from the Defendant Owner's failure to retain a civil engineer to review the site elevations or design a water run off plan was neither the fault of nor the responsibility of the Plaintiff.

26. Prior to the signing of the contract, the Defendant Owner met with the Plaintiff and Plaintiff's subcontractors to value engineer portions of the job but did not invite the architect to all of the meeting(s).

27. Prior to the signing of the contract, the Defendant Owner met with building officials about the project and did not invite the Plaintiff or the architect to the meeting(s).

28. The Defendant Owner met with AT&T and would not let the Plaintiff attend the meeting(s).

29. The Defendant Owner's architect and electrical engineer were not present the meetings where the Defendant Owner chose less expensive light fixtures for the project, and the Defendant Owner neglected to tell the architect or electrical engineer that she had chosen less expensive light fixtures for many months.

30. Had the Defendant Owner invited the architect and engineer to these meetings or informed them of decisions made therein, several issues that caused delays would have been avoided.

31. On August 12, 2014, the Plaintiff submitted the light fixtures chosen by the Defendant Owner to the electrical engineer for approval.

32. By September 29, 2014, when the electrical engineer rejected the light fixture submittals as not being the original specified fixtures, the Defendant Owner still had not informed the electrical engineer that she had selected different fixtures for the project.

33. The Plaintiff's submittal of the light fixtures chosen by the Defendant Owner was finally approved by the Defendant Owner's electrical engineer on February 16, 2015, six months from its initial submittal date.

34. The lighting submittal delays caused late delivery of the light fixtures, as they could not be ordered until they were approved.

35. The delay caused by the Defendant Owner's failure to inform her architect and engineer of changes she had made to the light fixtures was neither the fault of nor the responsibility of the Plaintiff.

36. The Defendant Owner also had multiple electrical re-designs after the contract was signed, but did not provide them to the Plaintiff.

37. On August 12, 2014, the Plaintiff submitted to the Defendant Owner's electrical engineer electrical gear that met the original Contract's April 22, 2014 electrical drawings and specifications.

38. The Defendant Owner's electrical engineer rejected the submittal because it did not meet the most recent re-design specifications from drawings dated October 6, 2014, which were not part of the original contract.

39. The Defendant Owner did not provide the Plaintiff with updated electrical plans until October 14, 2014, and because of ongoing changes with the elevator requiring the Defendant Owners electrical engineer to continue to modify the necessary gear, the electrical gear submittal was not accepted until May 5, 2015.

40. The Defendant Owner's electrical engineer's insistence that the gear be changed to that

required in the most recent re-design necessitated a change order to the Contract, Change Order 4.

41. The Defendant Owner disputed Change Order 4, which further delayed the electrical gear.

42. The delays in the electrical gear prevented the installation of the elevator.

43. The delays caused by the electrical submittal issues were neither the fault of nor the responsibility of the Plaintiff.

44. Throughout the project, attempts to discuss problems and issues with the Defendant Owner so that the project could continue to move forward were ignored or stymied by Defendant Owner.

45. Many Change Order proposals sent to the Defendant Owner by the Plaintiff were modified by the Defendant Owner and then disputed by the parties, causing delays on the project.

46. The Contract requires the Defendant Owner to issue a Construction Change Directive to the Plaintiff contractor in the event of a dispute over a change order, and the Construction Change Directive allows work to continue on the contract without waiving any rights to dispute time or cost of the change order until the end of the contract.

47. The Plaintiff first requested in writing that the Defendant Owner sign a Construction Change Directive on April 3, 2015, to avoid cessation of work on the project when Change Order 4 was disputed.

48. The April 3, 2015 email to the Defendant Owner cited § 7.3.2 of the Contract, which

states: A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

49. The Defendant Owner refused to issue a Construction Change Directive.

50. The Plaintiff requested the Construction Change Directive in writing, multiple times between April and July of 2015.

51. On May 11, May 14, and July 10 of 2015, the Defendant Owner was again sent the language from § 7.3.2 of the Contract, stating that "A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order."

52. On June 29, 2015, during the continued dispute over the terms of Change Order 4, the Defendant Owner emailed the Plaintiff, saying the Plaintiff was "attempting to use the change order process as a blackmail device which is unacceptable under the contract. . . you continue to terrorize and harass me and frankly I think your behavior is reprehensible and entirely unprofessional."

53. In response to that email, the Plaintiff replied in writing that far from being unprofessional or attempting to harass the Defendant Owner, the issuance of a Construction Change Directive in the absence of agreement on all terms of a change order was a required and normal part of the AIA contracts.

54. The Plaintiff explained, in writing, more than once, that the word "shall" in § 7.3.2 means "must" and that the Defendant Owner was required by the Contract to issue a Construction Change Directive in the absence of agreement on a Change Order.

55. On June 30, 2015, the Plaintiff notified the Defendant Owner in writing that the

electrician would be demobilized in the absence of a Construction Change Directive by close of business the following day, as the electrician had no further work that could be performed without such authorization.

56. On July 8, 2015, the Plaintiff notified the Defendant Owner by email that the continued failure to issue a Construction Change Directive constituted a breach of the contract.

57. On July 10, 2015, the Defendant Owner demanded that notice from the Plaintiff regarding the alleged breach of the contract or any claims be given pursuant to the notice requirements of the contract and not by email, and therefore there was no notice of breach.

58. The Defendant Owner continued to refuse to issue a Construction Change Directive.

59. The Defendant Owner's failure to issue a Construction Change Directive as required by the Contract caused delays, and these delays resulted in inefficiency in production due to out-of-sequence work, stopping and starting segments while awaiting authorization, erratic staffing and eventual trade stacking.

60. These delays and the resulting inefficiency of production caused by the Defendant Owner's refusal to issue a Construction Change Directive were neither the fault of nor the responsibility of the Plaintiff.

61. The Plaintiff sent Construction Change Directive 1 to the Defendant Owner on July 30, 2015.

62. Despite the clear purpose of the Construction Change Directive as spelled out in the Contract, the Defendant Owner wrote comments on the Construction Change Directive attempting to have the Plaintiff waive all rights in connection with the disputed change order and be responsible for daily damages for the completion of the contract.

63. The Plaintiff did not sign the revised Construction Change Directive, as allowed by the Contract, and continued to perform work under the Directive and Contract, although the Defendant Owner refused to pay in full the pay applications.

64. In addition to the Construction Change Directive, the Contract provided for mediation and arbitration to resolve disputes during the pendency of the project and avoid delay and disruption.

65. Pursuant to the Defendant Owner's request on July 10, 2015, all notice regarding alleged breaches of contract and claims under the contract had to be given in accordance with the notice requirements of the Contract.

66. Section 13.2.3 of the Contract provides: "Written notice shall be deemed to have been duly served if delivered in person to the individual ...or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to the last business address known to the party giving notice."

67. Section 15.3 of the contract provided for mediation of claims, disputes, or other matters in controversy arising out of or relating to the contract as a condition precedent to binding arbitration.

68. On July 15, 2015, the Plaintiff delivered to Defendant Owner and Defendant Owner's architect, in person, a request for mediation under 15.3.1 of the contract.

69. Defendant Owner did not respond to this request.

70. On July 24, 2015, the Plaintiff sent correspondence and the renewed request for mediation by certified mail to the office address provided in the contract, however the Defendant Owner refused to pick it up at the post office.

71. On or about July 24, 2015, the Defendant Owner hired Rick Newcomb, as its project manager, to supervise the construction.

72. The Plaintiff delivered the July 24 letter requesting mediation to Rick Newcomb, the Defendant Owner's project manager, at the job site.

73. The Defendant Owner refused to acknowledge its receipt or respond.

74. On July 31, 2015, the Plaintiff sent an additional letter again requesting mediation, along with the previous correspondence and documents, by certified mail to the office address provided in the contract, however the Defendant Owner refused to pick it up at the post office.

75. The July 31 letter and its attachments were also emailed to the Defendant Owner.

76. The July 31 letter and its attachments were also delivered personally to Rick Newcomb, the Defendant Owner's project manager on the jobsite.

77. The Defendant Owner refused to acknowledge its receipt or respond.

78. On September 3, 2015, the Plaintiff sent a second request for mediation, along with previous correspondence and documents to the Defendant Owner by Federal Express to the office at the address for notice provided in the contract, however the office was closed and there was no one there during the three times Federal Express attempted to deliver it.

79. The September 3 correspondence and attachments were personally delivered to the Defendant Owner's project manager, Rick Newcomb.

80. The Defendant Owner refused to acknowledge its receipt or respond.

81. On September 28, 2015, the Plaintiff attempted, through his job supervisor, to deliver the

second request for mediation and supporting documents to the Defendant Owner in person by handing it to her when she came to the job site, but Defendant Owner refused to accept it, put her hands behind her, and left saying it needed to be sent to her office.

82. On December 1, 2015, Plaintiff had a process server in Ohio personally deliver the Plaintiff's third request for mediation to the office address provided in the contract.

83. Although this third mediation request was also sent by email and personally delivered to the Defendant Owner's project manager, Rick Newcomb, the Defendant Owner refused to acknowledge receipt or respond.

84. The Defendant Owner refused to participate in the contractually mandated dispute resolution process.

85. The Defendant Owner required the Plaintiff to provide documentation of each receipt, bill for material and the timesheet for each worker throughout the job, even though the Contract was bid as a fixed price contract rather than a time and materials contract.

86. The Defendant Owner refused to process any application for payment from the Plaintiff until all documentation was received, even though the Contract was a fixed price contract rather than a time and materials contract.

87. The fixed price Contract dictates that Applications for Payment are to be based on a percentage of completion for each line item.

88. The Plaintiff complied with this request to provide all documentation of each receipt, bill for material and the timesheet for each worker, although it placed an onerous administrative burden on the Plaintiff that was not and should not have been contemplated as part of the fixed price Contract.

89. None of the Plaintiff's subcontractors complained to the Defendant Owner that that they had not been paid by the Plaintiff.

90. None of the Plaintiff's subcontractors filed a lien on the Defendant Owner's property to insure payment based on work done as subcontractor to the Plaintiff.

91. All of Plaintiff's subcontractors were paid by the Plaintiff for amounts due under their subcontract with the Plaintiff, even though Defendant Owner did not pay the Plaintiff the full amounts of pay applications under the main Contract.

92. All of the job materials for the subject property were paid for by the Plaintiff even though the contract required their installation on the property prior to reimbursement from the Defendant Owner, because the materials needed to be ready to install at the appropriate time.

93. Although all of the subcontractors had been paid, Defendant Owner attempted to pay portions of the Plaintiff's pay applications by issuing joint checks to Plaintiff and subcontractors.

94. Plaintiff negotiated those joint checks that were possible due to the location and availability of the subcontractor, however some of the subcontractors who had been previously paid by the Plaintiff were not local and it was impossible to appear with them in person as requested by the bank to negotiate the checks.

95. These checks were then voided and returned to Defendant Owner along with an explanation, citing that the subcontractor and materials had been paid previously and that the amount on the application was reimbursement to the Plaintiff.

96. On or about September 17, 2015, the Plaintiff's materials supplier, Miller Clapperton, informed the Defendant Owner in writing that the balance of their subcontract was $3,674.20 for retainage.

97. On that same date, Miller Clapperton provided the Defendant Owner with lien waivers for the total amount of their subcontract, less the $3,674.20 retainage, and shortly thereafter, provided Defendant Owner with a lien waiver for the retainage.

98. Miller Clapperton is a Georgia company, with offices in Austell, Georgia, many hours from Charleston.

99. After being advised in writing by the subcontractor of the balance due on the subcontract, and receiving lien waivers from the subcontractor for all amounts due on the subcontract except the $3,674.20 retainage, on or about September 21, 2015, the Defendant Owner issued a joint check to Miller Clapperton and the Plaintiff in the amount of $16,309.95.

100. On or about September 21, 2015, the Defendant Owner issued a second joint check to Miller Clapperton and the Plaintiff in the amount of $1,016.50.

101. The amounts of these two joint checks exceeded the retainage due to the subcontractor by $13,652.50.

102. The Defendant Owner knew the subcontractor had already been paid everything but retainage and that these funds were due to the Plaintiff solely.

103. The Plaintiff voided these joint checks and returned them to the Defendant Owner.

104. On or about November 16, 2015, the Plaintiff informed the Defendant Owner in writing that the Plaintiff itself had performed all the work reflected in line 22 of the Application for Payment 15, installation of the steel lintels and closure angle plates.

105. After being informed that the Plaintiff, not the subcontractor Accu Welding, had installed the steel lintels and closure angle plates, on or about November 30, 2015, the Defendant Owner issued a joint check to Accu Welding and the Plaintiff in the amount of $270.39.

106. The Defendant Owner knew at the time of the issuance of the check that the subcontractor Accu Welding was not due these funds and that they were due to the Plaintiff solely.

107. Plaintiff voided the joint check and returned it to the Defendant Owner however the Defendant Owner refused to re-issue the check solely to the Plaintiff.

108. More joint checks followed, including one to subcontractor Pleasant Places and the Plaintiff, for which the Defendant Owner had already received a lien waiver but wrote a joint check for more than was owed to the subcontractor.

109. On April 21, 2015, the Plaintiff purchased materials for the wire trellis system for the Defendant Owner's project from SECO South, an online materials supplier, using a company VISA card, and forwarded the back-up documentation of this purchase to the Defendant Owner in May of 2015.

110. Seven months later, on December 30, 2015, the Defendant Owner wrote a joint check to SECO South and Plaintiff knowing that these materials had been purchased by the Plaintiff and the funds were due solely to the Plaintiff.

111. This joint check was voided and returned to the Defendant Owner, but Defendant Owner refused to re-issue the check solely to the Plaintiff.

112. The Defendant owner wrote two joint checks to Plaintiff's subcontractor, Allphase Electrical on or about January 9, 2016, which exceeded the amount due to Allphase under its subcontract with the Plaintiff, including retainage, by $12,232.31.

113. The remainder of the funds paid to Allphase by the Defendant Owner were due to Plaintiff as reimbursement for amounts Plaintiff had already paid to Allphase for materials.

114. There was never a time when the Defendant Owner issued a joint check that was returned by the Plaintiff because the amount was insufficient to cover the amount due to a subcontractor under its subcontract with the Plaintiff.

115. The Plaintiff attempted to deal with the Defendant Owner's improperly issued joint checks for significantly more than the subcontractor was due, however this placed an undue administrative burden on the Plaintiff in a fixed price Contract.

116. Several times, the Plaintiff returned a voided joint check to the Defendant Owner with an explanation, and whether the Defendant Owner had received written confirmation of the amount due from the subcontractor, had received lien waivers, or both, the Defendant Owner refused to re-issue the check solely to the Plaintiff.

117. The few times prior to November of 2015 when the Plaintiff did re-issue a voided joint check solely to the Plaintiff, payment was delayed by several weeks.

118. The Defendant Owner requested in writing that the Plaintiff provide the amounts each subcontractor was due.

119. The Defendant Owner made clear that it was only paying the subcontractors and not any amounts billed or claimed due to the Plaintiff.

120. Application for Payment 15, for work done through October 30, 2015, was sent to the Defendant Owner on November 9, 2015.

121. The Defendant Owner did not pay any amounts due solely to the Plaintiff from this Application for Payment.

122. The Defendant Owner did not pay $9,888.13 of Application for Payment 15 by December 31, 2015.

123. The $9,888.13 owing for Application for Payment 15 as of the end of December does not include the joint check made out to the Plaintiff and the trellis materials supplier, SECO South, for which the Defendant Owner had received documentation of the credit card charge in May and knew was for reimbursement to the Plaintiff for materials purchased for the Defendant Owner's project.

124. The $9,888.13 owing for Application for Payment 15 as of the end of December does not include the $2,608.09 due and owing from previous Applications for Payment, for which the Plaintiff filed a Mechanic's Lien on December 17, 2015.

125. The Defendant Owner was sent Application for Payment 16, for work done through November 30, 2015, on December 9, 2015.

126. The Defendant Owner did not pay any amounts due on Application for Payment 16, whether by joint check or otherwise.

127. The amounts due to the Plaintiff for the joint checks that the Defendant Owner refused to re-issue solely to the Plaintiff were only a small percentage of what was due and owing to the Plaintiff under the Contract; the remaining amounts were simply not paid at all by the Defendant Owner.

128. On December 30, 2015, the Plaintiff mailed notice to the Defendant Owner of its intent to demobilize in 7 days pursuant to the Contract provisions if it did not receive payment for amounts due under the applications for payment.

129. On January 2, 2016, the Plaintiff emailed the December 30 letter to the Defendant Owner along with the proof of delivery of the letter to Defendant Owner's office address.

130. The Defendant Owner did not acknowledge or respond to this correspondence.

131. The Plaintiff continued to perform work pursuant to the Contract through January 12, 2016, despite the Defendant Owner's continued failure to pay in full all applications for payment.

132. The Plaintiff notified the Defendant Owner by email on January 12, 2016, that they had demobilized and removed all equipment from the jobsite in accordance with the Contract provisions as set forth in the December 30 letter.

133. The Defendant Owner responded by claiming the Plaintiff had breached the contract in a variety of ways and stating that if the Plaintiff did not resume work within 7 days, the Defendant Owner was terminating the contract for cause.

134. The Plaintiff did not resume work under the contract.

135. The Plaintiff duly and timely filed a Notice and Certificate of Mechanics Lien with the Office of the RMC for the County of Charleston at Book 0524, Page 038, on December 17, 2015, as of which date, the amount due and unpaid by Defendant under the contract was Two Thousand Six Hundred Eight and 09/100 Dollars ($2,608.09), plus interest as provided under the Contract, plus attorneys' fees, a copy of which is attached hereto as Exhibit B (hereafter "the first Lien").

136. The Plaintiff duly and timely filed a Notice and Certificate of Mechanics Lien with the Office of the RMC for the County of Charleston at Book 0542, Page 405, on March 22, 2016, as of which date, the amount due and unpaid by Defendant under the contract, not including the amount for the first Lien set forth above, was Twenty Nine Thousand Five Hundred Twenty One and 28/100 (29,521.28), plus interest as provided under the Contract, plus attorneys' fees, a copy of which is attached hereto as Exhibit C (hereafter "the second Lien").

137. The Plaintiff duly and timely filed a Notice and Certificate of Mechanics Lien with the Office of the RMC for the County of Charleston at Book 0546, Page 296, on April 11, 2016, as of which date, the amount due and unpaid by Defendant under the contract, not including the amount of the first Lien and second Lien set forth above, was Fifty Two Thousand Eight Hundred Sixty Eight and 78/100 Dollars ($52,868.78), plus interest as provided under the Contract, plus attorneys' fees, a copy of which is attached hereto as Exhibit D (hereafter "the third Lien").

138. The Defendant Owner has failed to pay in full the amount of the first, second and third Liens.

AS A FIRST CAUSE OF ACTION
Foreclosure of Mechanics Liens

139. Plaintiff reasserts and re-alleges all facts and claims of the preceding paragraphs of this Complaint as if set forth verbatim herein.

140. Plaintiff has commenced this action within six months of the last date it provided labor and materials on the Real Property.

141. Plaintiff is entitled to an Order of Foreclosure of its first, second and third Mechanic's Liens on the Real Property, requiring that the Real Property be sold and that the proceeds of sale, after deducting all lawful charges and expenses, be paid to Plaintiff to be applied to the amount owed pursuant to the Lien, including interest, plus attorneys' fees and the costs of this action.

AS A SECOND CAUSE OF ACTION
(Breach of Contract)

142. Plaintiff reasserts and re-alleges all facts and claims of the preceding paragraphs of

this Complaint as if set forth verbatim herein.

143. The Defendant Owner willfully breached the contract with the Plaintiff in multiple ways, including but not limited to the following:

a. Failing to pay for labor and materials furnished and billed under the Contract between Defendant Owner and the Plaintiff;

b. Improperly issuing joint checks when Defendant Owner was informed by the subcontractor of the amount due and was provided lien waivers;

c. Improperly issuing joint checks when Defendant Owner was provided lien waivers;

d. Improperly issuing joint checks to Plaintiff and materials suppliers when Defendant Owner was provided proof of payment for materials;

e. Refusing to re-issue improperly issued joint checks solely to the Plaintiff;

f. Providing an unattended address for service of notice under the contract;

g. Refusing to accept notice under the contract;

h. Refusing to participate in contractually mandated alternative dispute resolution;

i. Refusing to issue Construction Change Directives to keep the job moving forward in the event of a dispute over a Change Order as required by the Contract, despite multiple requests by the Plaintiff;

j. Wrongfully terminating the Contract for cause claiming Plaintiff was in breach.

144. As a result of the breach of contract by Defendant Owner, the Plaintiff has been damaged in the amounts owed; plus interest as provided under the contract; or in the event of willful breach, interest as provided by statute, contract damages for costs, overhead and profit for

the unfinished work, increased project administration and project management costs, and increased reimbursable project costs caused by delays; attorneys' fees; and the costs of this action, for which amounts Defendant is responsible.

AS A THIRD CAUSE OF ACTION
(Quasi-Contract/Unjust Enrichment)

145. Plaintiff reasserts and re-alleges all facts and claims of the preceding paragraphs of this Complaint as if set forth verbatim herein.

146. The Defendant Owner and Bank have had the use and benefit of the materials and labor furnished by the Plaintiff and are unjustly retaining the benefit of the materials and labor without paying Plaintiff in full for them.

147. The Defendant Owner and Bank are liable to Plaintiff for the reasonable value of the labor and materials for which it has not paid in full, plus prejudgment interest from the date such labor and materials were supplied.

WHEREFORE, the Plaintiff prays for judgment as follows:

A) On its First Cause of Action, Plaintiff demands that Plaintiff's Mechanic's Lien be foreclosed, that due notice of said foreclosure be given all proper parties, that the priorities of the Plaintiff and the Bank be determined, that the Real Estate be sold and that the proceeds used to satisfy the amounts due Plaintiff on its Liens and for the costs incurred in prosecuting this action, including attorneys' fees, with any deficiency remaining a debt of the Defendant Owner to the Plaintiff.

B) On its Second Cause of Action, Plaintiff demands judgment against Defendant Owner for Breach of Contract in the amount of all unpaid balance, plus prejudgment interest, costs and attorneys' fees; and in the event of willful breach, interest as provided by statute, contract

damages for costs, overhead and profit for the unfinished work, increased project administration and project management costs, and increased reimbursable project costs caused by delays, attorneys' fees, and the costs of this action.

C) On its Third Cause of Action, Plaintiff prays for judgment against Defendant Bank and Defendant Owner, jointly and severally, in the amount of all labor and materials supplied by Plaintiff but not paid for by Defendants, plus prejudgment interest from the date such labor and materials were provided, and for the costs herein expended.

D) Plus such other and further relief that this Court deems just, equitable, and proper.

Charleston, S. C.

07.06, 2016

TAYLOR & BOWLEY, LLC

D. LYNN BOWLEY
State Bar # 66669
P.O. Box 1059
Charleston, SC 29402
(843) 723-4020; fax (843) 723-4021

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT OF MYLES I. GLICK, AIA

Personally appeared before me Myles I. Glick, AIA LEED AP, who first being duly sworn, deposes and states as follows:

1. I am a licensed architect in the State of South Carolina.

2. I am the President of Glick/Boehm & Associates, Inc.

3. Glick/Boehm & Associates, Inc. has been named a Defendant in a lawsuit filed by 480 King Street, LLC bearing the case number 2017-CP-10-3267.

4. Upon receiving a copy of the Complaint I spoke to Mr. Brent Halversen, the attorney for Plaintiff, the week of August 14, 2017. In response to my question of why Glick/Boehm was being sued, Mr. Halversen responded that he tried to talk Ms. Mary Ann Kantor – the owner of 480 King Street, LLC – out of suing Glick/Boehm & Associates, Inc. for over two months. Unfortunately, he was not successful and Glick/Boehm & Associates, Inc. was sued right before the statute deadline.

5. As of the date of this Affidavit, I have not been provided a copy of an expert affidavit detailing the professional allegations alleged against Glick/Boehm.

FURTHER AFFIANT SAYETH NOT.

By: _____
Myles I. Glick, AIA

SWORN to and subscribed before me
This 25th day of August, 2017.

_____
Notary Public for South Carolina
My Commission Expires: June 4, 2025

5746900v.1

EXHIBIT
tabbies
D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10-3267
480 KING STREET, LLC	)	
Plaintiff,	)	MOTION FOR CONSOLIDATION
vs.	)	
GLICK/BOEHM & ASSOCIATES, INC.	)	
Defendant.	)	

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CLERK OF COURT

Pursuant to Rule 42(a) of the South Carolina Rules of Civil Procedure, Plaintiff, 480 King Street, LLC (hereinafter, "480 King") moves for an order consolidating this matter with *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, Case Number 2016-CP-10-3468. The grounds for the motion is that both cases involve common questions of fact, liability and damages regarding the construction of a stair tower. Pursuant to Rule 11, the undersigned counsel certifies communication with opposing counsel however no consent has been made as of today's date precipitating the filing of this motion.

WHEREFORE, 480 King respectfully requests that the Court order consolidate this case with Case Number 2016-CP-10-3468 and issue any and all other relief as deemed just and appropriate.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: _____

Brent S. Halversen
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Charleston, SC 29401
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Email: brent@halversenlaw.com

Attorney for the Plaintiff

5/2, 2018.
Charleston, South Carolina

ELECTRONICALLY FILED - 2020 Sep 17 10:29 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE NINTH JUDICIAL DISTRICT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2016-CP-10-03468
CHARLES BLANCHARD CONSTRUCTION CORP., INC.,	)	
Plaintiff,	)	
vs.	)	**GLICK/BOEHM & ASSOCIATES, INC.'S REQUEST FOR LEAVE TO FILE MOTION TO DISMISS AND MOTION FOR SANCTIONS**
480 KING STREET, LLC	)	
Defendant.	)	
480 KING STREET, LLC,	)	
Plaintiff,	)	
vs.	)	
GLICK/BOEHM & ASSOCIATES, INC.	)	
Defendant.	)	

COMES NOW Defendant Glick/Boehm & Associates, Inc. ("Glick/Boehm"), by and through undersigned counsel, and hereby respectfully submits this Request for Leave to File a Motion to Dismiss the Complaint of Plaintiff 480 King Street, LLC ("480 King") and Motion for Sanctions against 480 King. The grounds for this Request are as follows:

1. Glick/Boehm is an Architect and pursuant to S.C. Code Ann. § 15-36-100(B), the plaintiff was required to file a timely affidavit of a qualified expert specifying at least one negligent act or omission committed by this defendant ("Affidavit").

2. The record in this case reflects that:

   a. Plaintiff's Complaint was filed on June 27, 2017 without a supporting Affidavit;

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b. On August 10, 2017 Plaintiff filed a Motion for Extension of Time, requesting additional time to file the required Affidavit;

c. By reason of Plaintiff's failure to file the required Affidavit, Glick/Boehm filed a Motion to Dismiss on August 29, 2017;

d. On November 17, 2017, the Hon. J.C. Nicholson, Jr, conducted a hearing on these cross motions, resulting in an Order signed on November 27, 2017 granting Plaintiff's Motion for Extension of Time and denying Defendant's Motion to Dismiss;

e. In his Order, Judge Nicholson allowed Plaintiff to "file the September 7, 2017 affidavit of Louis Hackney, P.E., REWC, RRC, CDT, LEED AP within ten days of the date this Order" and further provided that "Upon the filing of the affidavit by this date, the Plaintiff will have been deemed to be in compliance with the requirements of S.C. Code § 15-36-100(B) (and) Defendant will then have 30 days from the date of the filing of the Affidavit to file any motion contesting the sufficiency of the Affidavit."

f. Plaintiff filed the Hackney Affidavit on November 20, 2017, opining that "it is my professional opinion, to a reasonable degree of professional certainty, that the **Architect** deviated from the standard of care in failing to properly complete contract administration services as a part of its contractual duties so as to prevent the aforementioned improper and code violating construction methods to occur and this deviation for the standard of care caused damage to (Plaintiff)….." (emphasis added)

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3. Glick/Boehm questioned then, as it will continue to question going forward, whether an Engineer (and particularly this Engineer) is qualified to express an opinion of this type concerning the standard of care of an **Architect**. The opinion given by Mr. Hackney in his Affidavit, however, appeared on its face to express such an opinion and, as a result, Glick/Boehm did not then contest its "sufficiency" by filing any further Motion to Dismiss.

4. Glick/Boehm (and the co-defendant) recently concluded Mr. Hackney's deposition and the testimony he gave concerning his opinions as to the standard of care of an **"Architect"** give rise to this request that Glick/Boehm be granted leave to now file a Motion to Dismiss contesting the sufficiency of that Affidavit. The final version of the transcript has not been prepared, but the "Rough Draft" of the transcript of the portion of the deposition taken on August 27, 2020 accurately reflects, among other things, the following testimony:

Q You do not intend in this case to offer a professional opinion about the standard of care of an architect, do you?

A No.

Q That's something that would be beyond your qualifications?

A I don't believe so, but I have never done it in the past. I've looked at enough buildings, I have looked at enough plans, and seen enough issues to feel like I could provide an opinion about that but I have -- to this point, I have not provided one.

Q And you don't intend to start in this case?

A No, not at this time.

(Louis A. Hackney, P.E. Deposition Vol. II, page 208, lines 15-25, page-209, lines 1-2; emphasis added)

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5. The "Rough Draft" of the conclusion of Mr. Hackney's deposition (September 4, 2020) reflects, among other things, these follow up questions on that line of testimony:

Q Do you recall telling me when we were together last that you were not going to offer an opinion about the standard of care of the architect in this case?

A Yes.

Q Does that remain your intention?

A Yes. I feel comfortable talking about individual details if questioned about them, and I feel comfortable talking about construction phase services, but not specifically about the architect's standard of care.

Q In relation to either of those things, correct?

A Correct. I'll talk about -- I feel comfortable as a design professional talking about details specifically and/or lack of details as a design professional but not specifically to the standard of care of an architect.

Q And, in fact, without addressing the standard of care of the architect in this case, right?

A Correct.

(Louis A. Hackney, P.E. Deposition Vol. III, page 278, lines 18-25, page 279, lines 1-13; emphasis added))

Q When he asked you to sign the affidavit, did you tell him that you would not offer an opinion about the standard of care of an architect in the case?

A I don't recall the specific conversations about standard of care at that point in time.

Q By signing the affidavit, though, you did not intend to offer an opinion about the standard of care of an architect, did you?

A No. The affidavit says, and I talked about it before, that pertaining to the construction phase services and construction administration services that were provided.

Q But when you talked about those things in your affidavit, you did not intend to state an opinion about the standard of care of an architect performing those services, did you?

A A better word there than a professional performing -- a design professional performing the role of a -- during construction phase services.

Q You are an engineer?

A I am.

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Q Mr. Glick is an architect?

A Correct.

Q Glick/Boehm are architects and not engineers?

A Correct.

Q Getting back to question then is: You did not intend this affidavit to contradict your intention against offering an opinion of the standard of care related to the architect, did you?

A My intent -- again, I know we're parsing words a little bit. My intent is that I feel comfortable talking about the standard of care that a professional would provide in either giving or completing construction administration services, whether that be an architect or an engineer. Those services are similar across the board of professionals, and I feel confident and comfortable in talking about them.

Q So your intention is to state an opinion of the standard of care of a professional but not an architect, correct?

A That's probably a better way to say it. Yes.

(Louis A. Hackney, P.E. Deposition Vol. III, page 282, line 25, page 283, lines 1-25, page 284, lines 1-16; emphasis added)

6. "Architects" and "Engineers" are separately trained, licensed and regulated professionals under the laws of South Carolina (and everywhere else) and while both of those professions might be generally/collectively/casually referred to as "Design Professionals", there are no educational degrees, licensing or regulation of that generically described group of people. It is *now* apparent from Mr. Hackney's deposition testimony that he did not express, nor did he intend to express, an opinion as to the standard of care of an ***Architect***, as his Affidavit would indicate he did and as the law would require him to do. Given these recent revelations, Glick/Boehm would now like to formally contest the sufficiency of the affidavit given in support of Plaintiff's Complaint, but in deference to the prior Order of Judge Nicholson, counsel for this Defendant believes it appropriate to request leave of this Court to do so.

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7. Given the fact that the Affidavit expressing a materially misstated opinion has caused Glick/Boehm to participate in this lawsuit at great cost in many ways, and the Plaintiff's refusal to mitigate those costs by now voluntarily dismissing this action against Glick/Boehm, this Defendant feels it would be appropriate to include a request for sanctions in its Motion to Dismiss and similarly requests leave of Court to do so.

8. Counsel for Glick/Boehm will raise these issues and make this request at today's Status Conference and thought that this historical background would be of benefit in connection with the discussion of these requests.

Wherefore, Glick/Boehm respectfully asks the Court to consider this Request for Leave to File its Motion to Dismiss and For Sanctions at the Status Conference and to either provide such leave or give other direction as to how the request should be pursued.

Respectfully submitted,

COPELAND, STAIR, KINGMA & LOVELL, LLP

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By: *s/ Kent T. Stair*
KENT T. STAIR
State Bar No.: 14029

PAUL E. SPERRY
State Bar No.: 68441

C. ROBIN SCHMIDT
State Bar No.: 78911

Counsel for Glick/Boehm & Associates, Inc.

ELECTRONICALLY FILED - 2021 Jun 28 2:47 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

THE STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	) IN THE COURT OF COMMON PLEAS) THE NINTH JUDICIAL DISTRICT) CASE NO.: 2016-CP-10-03468
CHARLES BLANCHARD CONSTRUCTION CORP., INC., Plaintiff, vs. 480 KING STREET, LLC Defendant.	**GLICK/BOEHM & ASSOCIATES, INC.'S MOTION TO DISMISS AND MOTION FOR SANCTIONS**
480 KING STREET, LLC, Plaintiff, vs. GLICK/BOEHM & ASSOCIATES, INC. Defendant.	

COMES NOW Defendant Glick/Boehm & Associates, Inc. ("Glick/Boehm"), by and through undersigned counsel, and hereby respectfully submits this Motion to Dismiss the Complaint of Plaintiff 480 King Street, LLC ("480 King" or "Plaintiff"), pursuant to Rule 12(b)(6), SCRCP and Motion for Sanctions against 480 King pursuant to Rule 11, SCRCP. The grounds for these Motions are as follows:

1. Glick/Boehm is an Architect named as a defendant in the above-captioned matter. Plaintiff's claims against Glick/Boehm in this action arise solely out of Glick/Boehm's performance of its professional services as an architect, and pursuant to S.C. Code Ann. §15-36-100(B), Plaintiff was required to file a timely affidavit of a qualified expert specifying at least one negligent act or omission committed by Glick/Boehm to support its Complaint. If a plaintiff fails to file an

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affidavit sufficient to meet the requirements of this statute, the complaint "is subject to dismissal for failure to state a claim." §15-36-100(E).

2. The record in this case reflects that:

a. Plaintiff's Complaint was filed on June 27, 2017 without a supporting Affidavit;

b. On August 10, 2017 Plaintiff filed a Motion for Extension of Time, requesting additional time to file the required Affidavit;

c. By reason of Plaintiff's failure to file the required Affidavit, Glick/Boehm filed a Motion to Dismiss on August 29, 2017;

d. On November 17, 2017, the Hon. J.C. Nicholson, Jr, conducted a hearing on these cross motions, resulting in an Order signed on November 27, 2017 granting Plaintiff's Motion for Extension of Time and denying Defendant's Motion to Dismiss (*Nov. 17, 2017 Order attached as Exhibit 1*);

e. In his Order, Judge Nicholson allowed Plaintiff to "file the September 7, 2017 Affidavit of Louis Hackney, P.E., REWC, RRC, CDT, LEED AP within ten days of the date this Order" and further provided that "[u]pon the filing of the Affidavit by this date, the Plaintiff will have been deemed to be in compliance with the requirements of S.C. Code §15-36-100(B). Defendant will then have 30 days from the date of the filing of the Affidavit to file any motion contesting the sufficiency of the Affidavit." (*See Exhibit 1, page 3*);

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f. Plaintiff filed the Hackney Affidavit on November 20, 2017, opining that "it is my professional opinion, to a reasonable degree of professional certainty, that the **Architect** deviated from the standard of care in failing to properly complete contract administration services as a part of its contractual duties so as to prevent the aforementioned improper and code violating construction methods to occur and this deviation for the standard of care caused damage to (Plaintiff)….." (*See Hackney Affidavit attached as Exhibit 2*) (emphasis added).

3. Glick/Boehm questioned then whether an Engineer (and particularly this Engineer, Mr. Hackney) is qualified to express an opinion of this type concerning the standard of care of an **Architect**. The opinion given by Mr. Hackney in his Affidavit, however, appeared on its face to express such an opinion. As a result, Glick/Boehm did not then contest its "sufficiency" by filing any further Motion to Dismiss.

4. Since that time, Glick/Boehm (and the co-defendant) concluded Mr. Hackney's deposition, taken over the course of three days, and the testimony he gave concerning his opinions as to the standard of care of an **"Architect"** give rise to this Motion to Dismiss.[1] Specifically, Glick/Boehm contests the sufficiency of the Affidavit on the basis that Mr. Hackney – as set forth in his own testimony – is not qualified to provide an opinion as to the standard of care of an architect. Without the support of a timely affidavit of a *qualified* expert, Plaintiff's Complaint against Glick/Boehm fails as a matter of law.

[1] Hackney Depo. Vol. I, taken January 28, 2019; Hackney Depo. Vol. II, taken August 27, 2020; and Hackney Depo. Vol. III, taken September 4, 2020.

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5. In support of Glick/Boehm's Motion to Dismiss, the transcripts of Mr. Hackney's deposition testimony reflect, among other things, the following:

Q You do not intend in this case to offer a professional opinion about the standard of care of an architect, do you?

A No.

Q That's something that would be beyond your qualifications?

A I don't believe so, but I have never done it in the past. I've looked at enough buildings, I have looked at enough plans, and seen enough issues to feel like I could provide an opinion about that but I have -- to this point, I have not provided one.

Q And you don't intend to start in this case?

A No, not at this time.

(See Exhibit 3, Louis A. Hackney, P.E. Deposition Vol. II, page 208, lines 15-25, page-209, lines 1-2; emphasis added)

6. The final transcript of the conclusion of Mr. Hackney's deposition (taken on September 4, 2020) reflects, among other things, these questions in follow-up to that line of testimony:

Q Do you recall telling me when we were together last that you were not going to offer an opinion about the standard of care of the architect in this case?

A Yes.

Q Does that remain your intention?

A Yes. I feel comfortable talking about individual details if questioned about them, and I feel comfortable talking about construction phase services, but not specifically about the architect's standard of care.

Q In relation to either of those things, correct?

A Correct. I'll talk about -- I feel comfortable as a design professional talking about details specifically and/or lack of details as a design professional but not specifically to the standard of care of an architect.

Q And, in fact, without addressing the standard of care of the architect in this case, right?

A Correct.

(See Exhibit 4, Louis A. Hackney, PE Deposition Vol. III, page 278, lines 17-25, page 279, lines 1-12; emphasis added))

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Q When he asked you to sign the Affidavit, did you tell him that you would not offer an opinion about the standard of care of an architect in the case?

A I don't recall the specific conversations about standard of care at that point in time.

Q By signing the Affidavit, though, you did not intend to offer an opinion about the standard of care of an architect, did you?

A No. The Affidavit says, and I talked about it before, that pertaining to the construction phase services and construction administration services that were provided.

Q But when you talked about those things in your Affidavit, you did not intend to state an opinion about the standard of care of an architect performing those services, did you?

A A better word there than a professional performing -- a design professional performing the role of a -- during construction phase services.

Q You are an engineer?

A I am.

Q Mr. Glick is an architect?

A Correct.

Q Glick/Boehm are architects and not engineers?

A Correct.

Q Getting back to question then is: You did not intend this Affidavit to contradict your intention against offering an opinion of the standard of care related to the architect, did you?

A My intent -- again, I know we're parsing words a little bit. My intent is that I feel comfortable talking about the standard of care that a professional would provide in either giving or completing construction administration services, whether that be an architect or an engineer. Those services are similar across the board of professionals, and I feel confident and comfortable in talking about them.

Q So your intention is to state an opinion of the standard of care of a professional but not an architect, correct?

A That's probably a better way to say it. Yes.

(See Exhibit 5, Louis A. Hackney, PE Deposition Vol. III, page 282, lines 22-25, page 283, lines 1-25, page 284, lines 1-13; emphasis added)

7. "Architects" and "Engineers" are separately trained, licensed and regulated professionals under the laws of South Carolina (and everywhere else). While both

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of those professions might be generally or casually referred to as "design professionals," there are no educational degrees, licensing or regulation of that generically described group of people. It is *now* apparent from Mr. Hackney's deposition testimony that he did not express, nor did he intend to express, an opinion as to the standard of care of an ***Architect***, as his Affidavit would indicate he did and as the law would require him to do. Given these revelations, Glick/Boehm now formally contests the sufficiency of the Affidavit given in support of Plaintiff's Complaint and presents this Motion to Dismiss.

8. Counsel for Glick/Boehm was going to seek Leave of Court to file this Motion at the most recent Status Conference, but consent to do so was given by Plaintiff's counsel prior to the hearing.

9. Further, given the fact that the Affidavit expressing a materially misstated opinion has caused Glick/Boehm to participate in this lawsuit at great cost in many ways, and the Plaintiff's refusal to mitigate those costs by now voluntarily dismissing this action against Glick/Boehm, this Defendant now moves for an award of sanctions against Plaintiff.

10. Pursuant to Rule 11, SCRCP, the filing of a pleading signed by an attorney or party "constitutes a certificate by him that . . . to the best of his knowledge, information and belief there is good ground to support it." Id. "If a pleading . . . is in violation of this Rule, the court . . . may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, . . . including a reasonable attorney's fee." Id.

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11. Following the conclusion of Mr. Hackney's deposition testimony, it is clear that Mr. Hackney does not intend to testify as to the standard of care applicable to Glick/Boehm as the architect of record in this case and moreover that he cannot testify to that standard of care. While there may have been some question as to the sufficiency of the Affidavit prior to Mr. Hackney's testimony, none now remains. It is now undisputed that the Affidavit does not contain the opinions of an expert qualified to testify as to the standard of care of an architect; therefore, the Affidavit filed in support of the Complaint against Glick/Boehm is on its face insufficient. Thus, Plaintiff's Complaint against Glick/Boehm does not meet the threshold requirements of SC Code §15-36-100 and must be dismissed as a matter of law.

12. Further, following the completion of Mr. Hackney's deposition testimony, counsel for Glick/Boehm conferred with Plaintiff's counsel regarding the deficiencies of the Affidavit and to request that Plaintiff withdraw its claims against Glick/Boehm. Plaintiff has refused to do so. Therefore, Glick/Boehm moves for sanctions against Plaintiff, including but not limited to the costs and attorneys' fees incurred in defending this action.

Wherefore, Glick/Boehm respectfully asks the Court to grant its Motion to Dismiss and Motion for Sanctions and for any further relief this Court may find just and proper. This Motion may be further supported by applicable case law, statutory law, memoranda and arguments of counsel.

SIGNATURE PAGE TO FOLLOW

Respectfully submitted,

COPELAND, STAIR, KINGMA & LOVELL, LLP

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By: *s/ Kent T. Stair*
KENT T. STAIR
State Bar No.: 14029

PAUL E. SPERRY
State Bar No.: 68441

C. ROBIN SCHMIDT
State Bar No.: 78911

Counsel for Glick/Boehm & Associates, Inc.

ELECTRONICALLY FILED - 2021 Jun 28 2:47 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10-3267
480 KING STREET, LLC	)	
Plaintiff,	)	
vs.	)	ORDER
GLICK/BOEHM & ASSOCIATES, INC.	)	
Defendant.	)	

FILED
2017 DEC -7 AM 9:00
JULIE J. ARMSTRONG
CLERK OF COURT

THIS CAUSE comes before the Court on Plaintiff 480 King Street, LLC's Motion for Extension of Time filed with this Court on August 10, 2017, and Defendant's Motion to Dismiss filed on August 29, 2017. The Court heard the arguments of counsel regarding the motions on November 17, 2017. Brent Halversen, Esq. appeared on behalf of the Plaintiff 480 King Street, LLC, and Kent Stair, Esq. appeared on behalf of the Defendant, Glick/Boehm & Associates, Inc.

Plaintiff filed its Complaint in the matter on June 27, 2017. One of the causes of action was for professional negligence against the Defendant. Pursuant to S.C. Code § 15-36-100(B), the Plaintiff is required to file the affidavit of an expert witness which must specify at least one negligent act or omission. Plaintiff alleged in its Complaint that it could not prepare an affidavit of an expert because of time constraints. Forty-five days after filing the Complaint, the Plaintiff filed a motion to extend the time period for filing the affidavit with this Court. South Carolina law allows for an affidavit to be filed within 45 days after the Complaint is filed, or, the Court may extend this period upon motion after a showing of good cause.

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The statute states:

> The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires.

S.C. Code § 15-36-100(C)(1).

Plaintiff filed a motion to extend the 45 day period with this Court on August 10, 2017. Plaintiff sought leave of Court to file the affidavit late because it's expert, Louis Hackney P.E., REWC, RRC, CDT, LEED AP, was not able to complete review of the approximately 8,000 documents that had been sent to him prior to expiration of the 45 day period. Mr. Hackney, was able to complete his review of the 8,000 documents and prepared his affidavit on September 7, 2017. According to counsel for Plaintiff, Mr. Halversen, the affidavit was sent to counsel for Defendant, Mr. Stair, the same day it was prepared on September 7, 2017. Plaintiff now seeks leave of Court to file the September 7, 2017 affidavit of Mr. Hackney outside the 45 day period.

The Court finds that good cause exists for Plaintiff to request and be granted extra time to file its affidavit based upon the voluminous amount of documents that had been provided to its expert within the 45 day period referenced in the statute. It appears that it only took Mr. Hackney less than 30 days to prepare and execute his affidavit after Plaintiff filed its motion for extension of time at the end of the 45 day statutory period on August 10, 2017. The Court believes that the request for an extension, given the quantity of materials that had been sent to him, is not an unreasonable request under these circumstances. The Court also finds no prejudice to the Defendant in granting this motion.

Plaintiff may file the September 7, 2017 affidavit of Louis Hackney P.E., REWC, RRC, CDT, LEED AP within ten days of the date of this Order, to wit, November 27, 2017. Upon filing of the affidavit by this date, the Plaintiff will have been deemed to be in compliance with the requirements of SC Code § 15-36-100(B). Defendant will then have 30 days from the date of the filing of the Affidavit to file any motion contesting the sufficiency of the Affidavit.

Defendant's Motion to Dismiss was premised on the Plaintiff's failure to file the affidavit in accordance with S.C. Code § 15-36-100(B). That Motion is rendered moot at this point due to the grant of Plaintiff's Motion for Extension of Time.

Given the foregoing findings of the Court, **IT IS THEREFORE ORDERED** that Plaintiff's Motion for Extension of Time is **GRANTED**, as stated herein, and **IT IS FURTHER ORDERED** that Defendant's Motion to Dismiss is **DENIED**.

Hon. J.C. Nicholson, Jr.
Circuit Court Judge, Ninth Judicial Circuit

November 27, 2017
Charleston, South Carolina

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2017-CP-10-3267

STATE OF NORTH CAROLINA)
) AFFIDAVIT OF LOUIS A. HACKNEY
COUNTY OF MECKLENBURG)

PERSONALLY APPEARED BEFORE ME, Louis A. Hackney, P.E., REWC, RRC, CDT, LEED AP, who being duly sworn does state as follows:

FILED
2017 NOV 20 PM 3:05
JULIE J. ARMSTRONG
CLERK OF COURT
BY

1. I am over eighteen years of age and in all other respects am competent to execute this Affidavit.

2. The matters set forth in this Affidavit are based on my personal knowledge and observations, as well as my professional education, training, and experience as an engineer.

3. I am a Professional Engineer and am registered in the State of South Carolina. I also hold registrations as a Professional Engineer in North Carolina, Florida, Louisiana, Ohio and Mississippi.

4. As a Professional Engineer, I am routinely responsible for property condition assessments, structural and nonstructural failure analysis, building envelope evaluations, damage assessments, and engineering investigations of both new and existing construction involving numerous types of structures. I also have experience preforming contract administration services and preparing planning reports, designs, specifications, cost opinions, and contract documents for new construction and repair projects.

5. I have experience investigating and assessing the design and construction of commercial buildings in Charleston, South Carolina and my investigation of the 480 King Stair Tower is ongoing. I have examined the plans and construction documents of the 480 King Stair Tower building to investigate the nature of the construction and the deficiencies and damage associated therewith. I further reviewed the architectural drawings for the 480 King Stair Tower prepared by Glick/Boehm & Associates, Inc.

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("Architect") in addition to the Architect's contract with 480 King Street, LLC, which included contract administration services.

6. Based on my investigation and analysis to date, it is my opinion that elements of the building's envelope has been compromised by design and construction deficiencies.

7. Specifically, there are numerous construction deficiencies that require repair including, but not limited to:

a. Water intrusion through the building envelope which is/was occurring at the slab on grade level;

b. Water intrusion through the building envelope which is/was occurring through the roof system;

c. Water intrusion through the building enevelope which is/was occurring through the window systems;

d. Water intrusion through missing or inadequate building envelope flashings;

8. Based on my investigation and analysis to date, it is my opinion that that there was information missing from the plans that resulted in construction errors, additional cost, and delays.

9. Based on my investigation and analysis to date, it is my opinion that there was incorrect information contained within the project specifications that resulted in construction errors, additional cost, and delays.

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

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11. I reserve the right to supplement or amend this Affidavit and I or my professional opinion upon receipt of additional documents or information pertaining to this matter.

FURTHER AFFIANT SAYETH NOT.

By: Louis Hackney
Louis A. Hackney

SWORN to before me this
7th day of September, 2017

Notary Public for Mecklenburg County, NC
My Commission Expires: March 20, 2021

REGINA M OENBRINK
NOTARY
PUBLIC
MECKLENBURG COUNTY, NC

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In the Matter Of:

BLANCHARD CONSTRUCTION vs 480 KING STREET

2016-CP-10-3468

LOUIS A. HACKNEY, P.E.

August 27, 2020

VOLUME II

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of those things and understanding how a project construction phase services was completed throughout the course of the project, and I have reviewed numerous, numerous building envelope projects in that kind of capacity.

Q I fully understand your desire to extend my question or limit it, if you will, to building envelope issues, and I want to get beyond that and just look at the totality of a new building going up and being the design professional responsible for the totality of contract administration services related to that, that is not something that you have ever done, correct?

A I have not.

Q You do not intend in this case to offer a professional opinion about the standard of care of an architect, do you?

A No.

Q That's something that would be beyond your qualifications?

A I don't believe so, but I have never done it in the past. I've looked at enough buildings, I have looked at enough plans, and seen enough issues to feel like I could provide an opinion about that but I have -- to this point, I have not provided one.

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Q And you don't intend to start in this case?
A No, not at this time.
Q As it relates to the process of developing and producing a building like this one that is a new construction, does the term developer have any meaning to you?
A Yes.
Q What in this process -- how would you define developer in relation to this process of new construction of a building?
A The developer is, generally, the individual that is going to pay for the initial process, which includes the design, the purchase of the land, and the building construction, and they generally have the original concept for what the building will be, and that developer can then either become an owner where they use that building as it was intended or they can sell the property, so I have seen it both ways.
Q As it relates to the particular project that we're here about today, do you consider Ms. Kanters and/or Dr. Cook to be developers in addition to being the owner?
A I have kind of classified them as the developer/owner because they did intend to own the property. It's my understanding that they still do

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In the Matter Of:

CHARLES BLANCHARD CONSTRUCTION vs 480 KING STREET

2016-CP-10-3468

LOUIS A. HACKNEY, P.E.

September 04, 2020

Vol. III

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Q As we attempt to place you in the closest proximity to the situation that was involved in this case, in this project, which was a totally new building coming out of the ground, that is a project in which you have never been involved as an engineer, correct?

A From the standpoint of building envelope consulting, yes. I have been asked to look at building envelope components while a building was under construction to assess details to do testing on that building and to provide recommendations to both the architect and the contractor. So, yes, I have been involved from that capacity. But, like I said, I'm not -- again, and I have said it before, I'm not an architect, so I have not designed a building from the ground up.

Q Do you recall telling me when we were together last that you were not going to offer an opinion about the standard of care of the architect in this case?

A Yes.

Q Does that remain your intention?

A Yes. I feel comfortable talking about individual details if questioned about them, and I feel comfortable talking about construction phase

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services, but not specifically about the architect's standard of care.

Q In relation to either of those things, correct?

A Correct. I'll talk about -- I feel comfortable as a design professional talking about details specifically and/or lack of details as a design professional but not specifically to the standard of care of an architect.

Q And, in fact, without addressing the standard of care of the architect in this case, right?

A Correct.

Q So I told everyone we're going to try something new that is a first-time experience for me, so let's see how it works.

You've given an Affidavit -- actually given two affidavits in this case. Do you recall those?

A Yes. I haven't reviewed them recently, but I have given two affidavits.

Q When you were asked to give the Affidavit, or either of them, what did you understand your purpose to be in giving them?

A The first Affidavit, which was November 13th, 2017, was just -- was a request by Mr. Halversen because there were a significant number of documents,

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In the Matter Of:

CHARLES BLANCHARD CONSTRUCTION vs 480 KING STREET

2016-CP-10-3468

LOUIS A. HACKNEY, P.E.

September 04, 2020

Vol. III

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added some stuff, maybe subtracted some stuff, I can't remember, until it was where I liked it.

Q Okay. So we have been given as a part of the production the original draft that he gave you and the red lines that you -- red lining that you did to complete it.

When I say "red lining," do you know what I'm talking about?

A I do.

Q All right. And that's in your file, so that's where I got it. Do you recall the specific changes you made to the draft that he gave you?

A No. In fact, I don't even know if I have that version.

Q Okay. We must have got it from him. But in any event, we've got it. As it relates, though, to the Affidavit that you signed as Exhibit 5, what did you understand the purpose of that Affidavit to be in relation to this litigation?

A Just to set out the issues and facts in the case that we were aware of at the time.

Q When he asked you to sign the Affidavit, did you tell him that you would not offer an opinion about the standard of care of an architect in the case?

A I don't recall the specific conversations

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about standard of care at that point in time.

Q By signing the Affidavit, though, you did not intend to offer an opinion about the standard of care of an architect, did you?

A No. The Affidavit says, and I talked about it before, pertaining to the construction phase services and construction administration services that were provided.

Q But when you talked about those things in your Affidavit, you did not intend to state an opinion about the standard of care of an architect performing those services, did you?

A A better word may have been a professional performing -- a design professional performing the role of a -- during construction phase services.

Q You are an engineer?

A I am.

Q Mr. Glick is an architect?

A Correct.

Q Glick/Boehm are architects and not engineers?

A Correct.

Q Getting back to question then is: You did not intend this Affidavit to contradict your intention against offering an opinion of the standard of care related to the architect, did you?

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A My intent -- again, I know we're parsing words a little bit. My intent is that I feel comfortable talking about the standard of care that a professional would provide in either giving or completing construction administration services, whether that be an architect or an engineer. Those services are similar across the board of professionals, and I feel confident and comfortable in talking about them.

Q So your intention is to state an opinion of the standard of care of a professional but not an architect, correct?

A That's probably a better way to say it. Yes.

Q Okay. And in your Affidavit, I think we can look down as it relates to your opinion, the only one you state is in Paragraph 10. And read the others before we get to that, and tell me if that is a correct statement.

A I'm sorry, could you repeat your question again?

Q Yes, sir. If we start at the top of your Affidavit, you note, of course, in Paragraph 2 that you give this Affidavit based on your professional education, training, and experience as an engineer, highlighting your status as an engineer as distinct

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ELECTRONICALLY FILED - 2021 Nov 19 4:02 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

THE STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	) IN THE COURT OF COMMON PLEAS) THE NINTH JUDICIAL DISTRICT) CASE NO.: 2016-CP-10-03468
CHARLES BLANCHARD CONSTRUCTION CORP., INC., Plaintiff, vs. 480 KING STREET, LLC Defendant.	**GLICK/BOEHM & ASSOCIATES, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND MOTION FOR SANCTIONS AND IN RESPONSE TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION**
480 KING STREET, LLC, Plaintiff, vs. GLICK/BOEHM & ASSOCIATES, INC. Defendant.	

Defendant Glick/Boehm & Associates (hereinafter "Glick/Boehm"), by and through their undersigned attorneys, respectfully submits this Memorandum in Support of its Motion to Dismiss the Complaint of Plaintiff 480 King Street, LLC ("480 King" or "Plaintiff"), pursuant to Rule 12(b)(6), SCRCP and Motion for Sanctions against 480 King pursuant to Rule 11, SCRCP, and in response to Plaintiff's Memorandum in Opposition to these motions.

BACKGROUND

The factual and legal basis for Defendant's Motions are generally set forth in the body of the motions, and will be incorporated but not expressly repeated herein.

In short, because 480 King's claims against Glick/Boehm arise solely out of Glick/Boehm's performance of its professional services as an *architect*, pursuant to S.C. Code

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Ann. §15-36-100(B), 480 King was required to file in support of its Complaint a timely affidavit of a qualified expert specifying at least one negligent act or omission committed by Glick/Boehm.. The basis for the motion is that 480 King failed to meet the requirements of the statute, and the Complaint is, therefore, subject to dismissal for failure to state a claim." §15-36-100(E).

The Motion should be heard and resolved on its merits.

In its Memorandum in Opposition, 480 King understandably seeks to avoid the dispositive, fundamental issue being addressed by this Court, saying that the reasons Glick/Boehm's counsel has given for failing to file it within 30 days of Judge Nicholson's Order are "suspect and specious," or just an "excuse for his neglect." The undersigned assures the Court that none of those things are the case. As stated by the undersigned in the Paragraph 3 of the Motion:

> Glick/Boehm questioned then whether an Engineer (and particularly this Engineer, Mr. Hackney) is qualified to express an opinion of this type concerning the standard of care of an **Architect**. The opinion given by Mr. Hackney in his Affidavit, however, appeared on its face to express such an opinion. As a result, Glick/Boehm did not then contest its "sufficiency" by filing any further Motion to Dismiss. (bold as appears in Motion; underline added)

Of note, in a different way, Plaintiff's counsel makes a similar observation in his Memo:

> "…. the Affidavit on its face satisfies SC Code §15-36-100(A)(3) and Mr. Hackney is an 'expert witness' under SC Code §15-36-100(A)(3), and can testify regarding the architect Glick's performance of contract administration services."

The problem that misled Counsel for Glick/Boehm is that when the "expert" appeared to testify under oath about what he had said under oath in the Affidavit, it was clear that his statements were not the same—and that he was not going to testify about the standard of care *of an architect*. When the truth of Mr. Hackney's testimony became known, it became clear that the "face of the affidavit" drafted by Plaintiff's counsel and the mouth of the expert testifying on this own behalf were saying two materially different things. To suggest, as Plaintiff's counsel does, that "a review of (Hackney's) Affidavit and his deposition testimony shows that they are in perfect harmony" is

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to demonstrate an ear that has not heard what the witness sang at his deposition and/or is not attuned to the critical distinctions between the recognized and licensed profession of "architecture" and the generically used term of "design professional." Simply stated, Mr. Hackney's affidavit spoke in terms of the standard of care of an "architect" and his deposition testimony did not.

Given the circumstances above and as otherwise set forth in Defendant's Motion, leave was sought and received (with consent of Plaintiff's counsel) to file the Motion outside the 30-day time period referenced in Judge Nicholson's Order. As much as Plaintiff's counsel would prefer to have the merits of Defendant's arguments addressed, they should be heard by this Court.

The Motion should be granted as to all claims.

Architects are one of the 22 professional groups specifically afforded protection in actions for damages alleging professional negligence under S.C. Code Ann. § 15-36-100(G) (2015). Engineers are a different and separate group covered by the same statute. Critically, "Design Professionals" are not included as a protected group in the statute, most likely because there is no such "profession" recognized by law.

Pursuant to that statute, an affidavit from an expert *must* be filed contemporaneously with any complaint alleging damages arising from alleged professional negligence of an architect. *See* S.C. Code Ann. § 15-36-100(B). The affidavit "must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." S.C. Code Ann. § 15-36-100(B). If a proper affidavit "is not filed… and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim." S.C. Code Ann. § 15-36-100(C)(1).

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"[T]he standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices ***in his profession***." *Doe v. Am. Red Cross Blood Servs.,* 297 S.C. 430, 435, 377 S.E .2d 323, 326 (1989) (emphasis added). While the affidavit filed by 480 King in support of its case against Glick/Boehm appears to do so "on its face," the discovery cross-examination of the Affiant demonstrated clearly that his reference to "architectural standard of care" was misplaced and that he was not intending to express an opinion about *that* standard of care, but instead was expressing his opinion about some standard of care applicable to a group he labeled as "design professional." The effect, in the end, was to rule out the affidavit testimony concerning the standard of care of an architect—thus leaving 480 King without a proper affidavit in support of its Complaint for architectural malpractice. Since the affidavit filed by 480 King is insufficient to support its Complaint against Glick/Boehm, 480 King's Complaint against Glick/Boehm does not meet the threshold requirements of S.C. Code Ann. §15-36-100, *et. seq.* and must be dismissed as a matter of law.

Any other claims against Glick/Boehm, no matter how denominated, are derivative of the negligence claims that 480 King has failed to properly assert. Additionally, claims for Breach of Implied Warranty under South Carolina law are limited to design activities and would have no application to contract administration services. For these and other reasons, the Plaintiff's Complaint should be dismissed in its entirety.

Motion for Sanctions

In conjunction with its Motion to Dismiss, Glick/Boehm moves for sanctions against 480 King. Under Rule 11(a), SCRCP, a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. *See Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996). The party and/or attorney may also be sanctioned

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for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it. *See id.* The sanction may include an order to pay the reasonable costs and attorney fees incurred by the party or parties defending against the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future frivolous action or action in bad faith. *See id.* Further, if appropriate under the facts of the case, the court may order a party and/or the party's attorney to pay a reasonable monetary penalty to the party or parties defending against the frivolous action or action brought in bad faith. *See id.*

Further, pursuant to Rule 11, SCRCP, the filing of a pleading signed by an attorney or party "constitutes a certificate by him that . . . to the best of his knowledge, information and belief there is good ground to support it." *Id.* "If a pleading . . . is in violation of this Rule, the court . . . may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, . . . including a reasonable attorney's fee." *Id.*

Following the completion of Mr. Hackney's incontrovertible deposition testimony, undersigned counsel conferred with Plaintiff's counsel regarding 480 King's inability to meet the requirements of S.C. Code Ann. §15-36-100, *et. seq.* Undersigned counsel repeated deficiencies of Mr. Hackney's Affidavit and requested that Plaintiff withdraw its claims against Glick/Boehm.480 King has refused to oblige Glick/Boehm's request. Therefore, Glick/Boehm moves for sanctions against 480 King, including but not limited to the costs and attorneys' fees incurred in defending this action. It is clear that 480 King cannot support the claims it has asserted

against Glick/Boehm under South Carolina law and, thus, 480 King's Complaint is a mere, frivolous pleading as it relates to Glick/Boehm.

CONCLUSION

As a result of Plaintiff 480 King's failure to provide a sufficient affidavit establishing the required standard of care for *Architect* Glick/Boehm relative to the Project at issue in this matter, the claims against Glick/Boehm should be dismissed with prejudice under § 15-36-100, *et. seq.* and sanctions, including but not limited to the costs and attorneys' fees incurred in defending this action, should be awarded under Rule 11, SCRCP. This Motion is based on applicable South Carolina law, the pleadings filed in this case, and any supporting documents to be submitted hereafter.

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Respectfully submitted,

COPELAND, STAIR, KINGMA & LOVELL, LLP

By: *s/ Kent T. Stair*
KENT T. STAIR
State Bar No.: 14029

Counsel for Glick/Boehm & Associates, Inc.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO. 2016-CP-10-3468
CHARLES BLANCHARD CONSTRUCTION CORP., INC.,	)	
Plaintiff,	)	**MEMORANDUM IN OPPOSITION TO GLICK/BOEHM & ASSOCIATES, INC.'S MOTION TO DISMISS AND MOTION FOR SANCTIONS**
vs.	)	
480 KING STREET, LLC et.al.	)	
Defendant.	)	

Comes now Defendant 480 King Street LLC and files this Memorandum in Opposition to Glick/Boehm & Associates, Inc.'s Motion to Dismiss and Motion for Sanctions and states the following:

I. Procedural Background.

The Plaintiff, general contractor, filed this lawsuit for non-payment claims on July 6, 2016. 480 King Street, LLC (hereinafter, "480 King") counterclaimed for cost over runs and construction defects associated with the Plaintiff's work- a brand new stair tower located on King Street behind Charleston Beer Works. On June 26, 2016, 480 King filed a separate action against Glick/Boehm & Associates, Inc.- the architect on the project that did design work and contract administration services (hereinafter, "Glick"). 480 King sued Glick for Breach of Contract, Breach of Warranty, and Negligence. Because 480 King could not procure an affidavit timely, 480 King moved for an extension of time to file same in accordance with statute on August 10, 2017, asserting there was

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good cause for an extension because 480 King's expert had not yet had a chance to review the 8,000 + pages from the commercial project.. On August 29, 2017, Glick answered and filed a Motion to Dismiss asserting that 480 King, 'failed to file an affidavit from an "expert" setting forth specific allegations of professional negligence against GBA," and asserted that no good cause existed to allow the filing after the summons and complaint. (See Motion filed of record, August 29, 2017). On September 7, 2017, the undersigned emailed Glick's lawyer the Affidavit of expert Louis Hackney P.E., REWC, RRC, CDT, LEED AP, which the undersigned planned to fiel pending a ruling on the Motion for Extension of Time (See Email, Exhibit # 1 and December 7, 2017 Order).

On November 17, 2017 Judge Nicholson heard 480 King's Motion for Extension of Time and found good cause did exist to allow 480 King extra time to procure and file the Affidavit of Mr. Hackney, and allowed 480 King 10 days after the hearing to file it in the Court record. Importantly, as Mr. Stair already had the Affidavit of Mr. Hackney in hand at the hearing, Mr. Stair informed Judge Nicholson that he planned to challenge the Affidavit, which the Court had no issue with:

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THE COURT: All right. Once he gets the file [sic], I'll
just dismiss your motion to dismiss without prejudice, so
you can bring it again after the pleadings have joined.

MR. STAIR: That will be fine, 'cause we may want to
pick on the affidavit once it's filed, but we'll do that.
```

November 17, 2017 Hearing Transcript. (Exhibit #2)

After the ruling, the undersigned prepared a proposed order for Judge Nicholson, to which Mr. Stair made proposed redline changes to, evidencing his earlier statement in Court that he planned

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to challenge (or "pick on") the Affidavit. In particular, Mr. Stair added to the proposed Order the following language in the final sentence:

> Defendant will then have 30 days from the date of the filing of the Affidavit to file any motion contesting the sufficiency of the Affidavit.

(Exhibit #3).

The undersigned had no objections to Mr. Stair's inclusion of this provision, and Judge Nicholson signed the Order as modified by Mr. Stair. Despite Mr. Stair requesting 30 days to "contest the sufficiency of the Affidavit," for unknown reasons, Mr. Stair failed to file a motion to contest the sufficiency of the Affidavit by the December 30, 2017, the Court ordered deadline to file such motion. Mr. Stair filed this motion to dismiss- contesting the sufficiency of the Affidavit- on June 28, 2021- three and half years after the Court ordered deadline[1].

II. Glick's Motion to Dismiss is barred by the plain language of Judge Nicholson's Order that Glick had 30 days from the date of the filing of the Affidavit to file "any motion contesting the sufficiency of the Affidavit."

As referenced above, Mr. Stair specifically requested the language be included in Judge Nicholson's Order to allow Glick 30 days to challenge the sufficiency of the Affidavit. Mr. Stair does not follow the language that he requested to be in the Order (which was incorporated in this

[1] Mr. Stair's explanation for the delay is suspect and specious. Mr. Stair concedes he could have challenged the Affidavit from when he first received it. See " ¶ 3 of Motion to Dismiss, "Glick/Boehm questioned then whether an Engineer (and particularly this Engineer, Mr. Hackney) is qualified to express an opinion of this type concerning the standard of care of an Architect. The opinion given by Mr. Hackney in his Affidavit, however, appeared on its face to express such an opinion. As a result, Glick/Boehm did not then contest its "sufficiency" by filing any further Motion to Dismiss. See also ¶ 11 of Motion to Dismiss, "While there may have been some question as to the sufficiency of the Affidavit prior to Mr. Hackney's testimony…."

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Court's November 17, 2017 Order). Accordingly, Glick has no right to now file a motion to dismiss to contest the sufficiency of the Affidavit[2].

Moreover, South Carolina law supports that Glick could only challenge the sufficiency of the Affidavit at the onset of the case, once the Affidavit was filed. Glick states in Paragraph 1 of his motion that the Complaint is subject to dismissal pursuant to SC Code § 15-36-100(E). That provision states:

(E) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, **by motion to dismiss filed contemporaneously with its initial responsive pleading**, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing an amendment or response to the motion, or both, as the trial court determines justice requires. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(Emphasis added).

Glick's previous motion to dismiss filed August 29, 2017 was specifically denied *without* prejudice by the Court so that Glick could, "pick on the Affidavit," to use Mr. Stair's words. Mr. Stair requested and received thirty days to challenge the sufficiency of the Affidavit, as set forth in Judge Nicholson's Order, and never filed the motion in the time period prescribed, nor has Glick provided any logical explanation to the Court why he should be now be allowed to by-pass the mandatory deadline of Judge Nicholson's December 7, 2017 Order, or the time requirements enunciated in SC Code § 15-36-100(E). Instead, Glick has manufactured an argument that Mr. Hackney's deposition testimony was incongruous with his Affidavit, which is demonstrably false.

[2] 480 King anticipates Glick will attempt to argue that 480 King consented to the relief sought in this motion to dismiss. Such an argument is misplaced. The undersigned told Mr. Stair he could file whatever motion he wanted to, however, 480 King informed Mr. Stair at the time that it never agreed to the relief sought in Glick's motion to dismiss, the substance of the motion, or that it was timely filed according to Judge Nicholson's Order. (Exhibit #4).

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A review of his Affidavit and his deposition testimony shows that they are in perfect harmony, as set forth below.

II. Even if Glick's Motion to Dismiss was not in violation of Judge Nicholson's Order (which it is), Glick's substantive arguments concerning the insufficiency of the Affidavit are incorrect.

Glick attempts to argue in his motion that he cannot be sued -because he is an architect- and in order to sue an architect- you must have an affidavit- from an architect. That is simply not true under South Carolina law. In furtherance of this argument, Glick's motion alleges categorically and without legal support that:

> "Without the support of a timely affidavit of a *qualified* expert, Plaintiff's Complaint against Glick/Boehm fails as a matter of law."

¶ 4, Glick Motion to Dismiss

***

> "Architects" and "Engineers" are separately trained, licensed and regulated professionals under the laws of South Carolina (and everywhere else).

¶ 7, Glick Motion to Dismiss

***

> "….the Affidavit does not contain the opinions of an expert qualified to testify as to the standard of care of an architect; therefore, the Affidavit filed in support of the Complaint against Glick/Boehm is on its face insufficient. Thus, Plaintiff's Complaint against Glick/Boehm does not meet the threshold requirements of SC Code §15-36-100"

¶ 11, Glick Motion to Dismiss.

All that is required in South Carolina to sue an architect (or any other professional) is to be an "expert witness" if the requirements of the catch-all provision of (A)(3) is followed. That provision

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was completely fulfilled in this case. The statue is clear regarding who can testify as an "expert witness":

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

> **(A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:**
>
> (1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and
>
> (2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; **or**
>
> (b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
>
> (i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;
>
> (ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or
>
> (iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion;
>
> **(3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert's credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert's credentials pursuant to subsection (E).**

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(Emphasis added).

In this case, Mr. Hackney qualifies as an "expert witness" under SC Code §15-36-100(A)(3). To qualify under this provision, an affidavit filed by a proposed expert witness must contain an explanation of the expert's credentials and their relevance to the case (as the statute states). The information contained in Mr. Hackney's Affidavit is clearly sufficient to satisfy this provision. The affidavit lists Mr. Hackney's experience and qualification in performing contract administration services and then critiques Glick's performance of those services. Mr. Hackney then states that it is his, "opinion that there was information missing from the plans that resulted in construction errors, additional cost and delays." (Affidavit, ¶8). Mr. Hackney then states that, "Based upon my investigation and analysis to date, it is my opinion that there was incorrect information contained within the project specifications that resulted in construction errors, additional cost, and delays." (Affidavit, ¶ 9). Then Mr. Hackney forms his specific opinion as to the architect Glick's role in failing to perform construction administration services:

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

Affidavit, ¶ 10.

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Accordingly, the Affidavit on its face satisfies SC Code §15-36-100(A)(3) and Mr. Hackney is an "expert witness" under SC Code §15-36-100(A)(3), and can testify regarding the architect Glick's performance of contract administration services.

Moreover, nowhere in Mr. Hackney's Affidavit did he assert that Glick fell below the standard of care as an architect in preparing design work, of such type that perhaps only an architect is required to be critical of. Mr. Hackney very clearly testified (in the deposition selections cited in Glick's Motion to Dismiss) and in the Affidavit as well, that he was only testifying that the architect Glick fell below the standard of care for performing contract administration services. Mr. Stair did not need to take Mr. Hackney's deposition to confirm that: it is entirely consistent and clear from the face of the Affidavit which Mr. Stair has had in his possession since September 7, 2017. More likely, Mr. Stair is contorting what the Affidavit does not say as an excuse for his neglect to file the motion to challenge the sufficiency of the Affidavit in the 30 days that he requested.

III. 480 King Has Contractual Claims Pending Against Glick that Warrant a Jury Trial Irrespective of its Negligence claim Against Glick.

Finally, Glick's motion made no mention that 480 King has lodged breach of contract and warranty claims against Glick as 480 King and Glick were operating under a contract to perform contract administration services. The Court needs no authority for the proposition that an Affidavit of an expert witness is not needed to make a breach of contract or warranty claim. Accordingly, there is absolutely no basis to dismiss these counts either.

WHEREFORE, Plaintiff respectfully requests that the Court deny Glick's Motion to Dismiss and for Sanctions for the reasons contained herein.

S/ Brent S. Halversen
Brent S. Halversen
Brent Souther Halversen, LLC
751 Johnnie Dodds Blvd, Suite 200
Mt. Pleasant, South Carolina 29464
Phone: 843-284-5790
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Attorneys for Plaintiff

November 19, 2021

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Exhibit #1

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From: Brent Halversen
To: Stair, Kent T.; Sperry, Paul E.; Yoho, J. Andrew
Cc: Ashley King; Muller, Megan
Subject: Fwd: 480 King v. Glick/Boehm 2017-CP-10-3267
Date: Tuesday, November 21, 2017 4:34:33 PM
Attachments: Notice of filing Hackney.pdf

Attached is the Affidavit of Louis Hackney which was filed today.

Brent

Get Outlook for iOS

From: Ashley King
Sent: Tuesday, November 21, 2017 3:38:12 PM
To: Brent Halversen
Subject: 480 King v. Glick/Boehm 2017-CP-10-3267

Ashley M. King
Paralegal for Brent Halversen, Esq.
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Exhibit #2

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE CIRCUIT COURT 2017-CP-10-3267
480 KING STREET, LLC,	)	
PLAINTIFF,	)	MOTION HEARING
vs.	)	TRANSCRIPT OF RECORD
GLICK BOEHM & ASSOCIATES, INC.,	)	
DEFENDANT.	)	

Friday, November 17, 2017
Charleston, South Carolina

B E F O R E:

The Honorable J.C. Nicholson, Jr.

A P P E A R A N C E S:

Brent Souther Halversen, Esquire
Attorney for Plaintiff

Kent Taylor Stair, Esquire
Attorney for Defendant

Maria Dempsey, RPR
Official Court Reporter
Charleston County Circuit Court
Ninth Judicial Circuit
Charleston, South Carolina

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E X H I B I T S

(No Exhibits Proffered.)

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THE COURT: All right. Who's here for the plaintiff?

MR. HALVERSEN: Brent Halversen here on behalf of 480 King Street, LLC.

THE COURT: Mr. Halversen.

MR. HALVERSEN: Yes.

THE COURT: And who's here for the defendant?

MR. STAIR: Kent Stair, defendants, sir.

THE COURT: Okay. What is it a motion for, a motion for the defendant or a motion for the plaintiff?

MR. HALVERSEN: Yes, Your Honor. I filed a motion for extension of time, and the defendants have filed a motion -- or defendant has filed a motion to dismiss.

MR. STAIR: Flip flops to the motion --

THE COURT: What time do you want to extend it?

MR. HALVERSEN: Your Honor, this is for -- I filed a motion to extend the time to file an affidavit for professional negligence in the case. The motion for extension of time, if you grant it, is going to decide the motion to dismiss.

THE COURT: So you want an extension and time to file an affidavit?

MR. HALVERSEN: Yes, Your Honor.

THE COURT: Why do you need the extension?

MR. HALVERSEN: So, Your Honor, this is a -- I represent the plaintiff, who owns a building, and in a

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different lawsuit a year ago, the contractor sued my client on a nonpayment plan; that was last year. So, and that case has progressed, and we've now sued in this case the architect that designed and contract administration. So there was a potential statute issue, a claim or a defense, arguably, that could have come up this summer on July 27 -- or June 27th.

Okay. So we filed the summons and complaint against the defendant architect in this case, timely, on June 26th, the day before the statute. I had contacted an expert, and so based on those conversations, I felt I could proceed with the case against the defendant. I did not have the affidavit yet. The statute says you can get -- you don't have to file the affidavit with -- you can have 45 days after it's filed or you can petition the Court for showing a good cause.

THE COURT: July, August, September, October, it's been four months. How long does it take to get the affidavit?

MR. HALVERSEN: I have the affidavit, Your Honor.

THE COURT: Oh, you have the affidavit.

MR. HALVERSEN: Yeah, I did, yes, Your Honor. So the 45 days expired on August 10th. On August 10th, I filed this motion. Just for whatever reason, it didn't come up until now, but on August 19th, I filed the motion for an extension, and then I actually got the affidavit from my

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expert on September 7th, so, three weeks later.

THE COURT: What's the defendant's position on allowing -- basically, he's allowed asking the Court to extend the time so he can go ahead and file it, since he has it in his possession.

MR. STAIR: I understand the rules, of course, but there's a history of that I think is important, and in our motion to dismiss, we lay it out, and actually, we could pull their complaint. It might be helpful if I could show the Court our motion, and I think you'll see some of the chronology involved, because it's a chronology that I think bears on the question of constraints of times as he has a -- refers to in cause for extension. And what it shows in their complaint that they filed, they allege on Page 6 of their complaint, which is two to eight to our motion, that they were told by the contractor on August 25, 2014, that the plaintiff had a negative design, and that they were told in May of 2015, that the designs were causing problems. So there's been a long history about it. And so they got to the time of the June 17 --

THE COURT: And this is the companion, this other lawsuit you're talking about?

MR. HALVERSEN: Yeah.

MR. STAIR: Yes, the other lawsuit, and just otherwise new information. The point being is that they knew about it

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for two and some years by the plaintiff's -- the contractor's contention to do a ledge design, and it didn't get within the period of time, within 10 days of this period running, and they filed the affidavit, or filed the complaint without the affidavit, and my client, Mr. Glick, called him upon receipt of the affidavit, upon receipt of the complaint, and has put in his motion that affidavit that speaks to the issue. He says that, just a deed to our motion says, upon receipt of the complaint, I spoke to Mr. Halversen, this is my client, he called before he called me. The attorney to the plaintiff, the week of August 14, in response to my question of why Glick Boehm was sued. Mr. Halversen responded that he had tried to talk to Mary Ann Kanters, the owner of 480 King Street, out of suing Glick Boehm for over two months. Unfortunately, he was not successful, and Glick Boehm was sued right before the deadline.

And so this is a long period of time where they could've gotten an affidavit, had he chosen to do. They waited until the end, and then decided not to file it and to file a complaint, and then they asked for -- tried to take advantage of 45 days. In the 45 days, they did not then get it within that either. And so we have opposed that. And they did put an affidavit in recently where their expert explains that he was retained on July the 17th of 2017,

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which was 22 days after the period the statute would have run. And it looks like he was able to get his preliminary affidavit together within 51 days when he was retained, and I think probably must have gotten the documents, he could have done it quicker, had he chosen to do so. So it's a lot of times when you got a client who has been alleged with professional malpractice, and he's understandably upset with it.

And so the motion requires two things. The motion requires that the inability to file the affidavit originally was because of constraint of time. And I understand that if someone calls a lawyer within 10 days and they can't get an affidavit, I think it's a constraint of time that's envisioned, as distinguished from knowing about something for a good couple of years, not doing anything about it, and deciding at the last minute to file, and then saying I can't get an affidavit.

And then the next thing is the extension. They give you 45 days, and have to give the advantage of that. It has to be given for good cause, and I think the affidavit to the facts is going to sustain a good cause. And so that's the basis for our position to both motions; both the affidavit, firstly, there not being any extension.

THE COURT: Okay. Mr. Halversen.

MR. HALVERSEN: Your Honor, the case that was filed

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last year, we've been working, I've been working diligently to find an affidavit. I could not find a local expert that wanted to oppose this company. It took me some time. This is why it took me some time into -- from last year to now. The statute, the possible statute running on this summer was just the first time they could ever possibly make a statute argument. It wasn't some outer killer deadline.

Just to be bulletproof of my client, I wanted to know, when is the possible last day we need to file this? It happens to be June 26, so that's when we artificially set that as the time frame. So I've been working, trying to find an architect. I met an expert, I eventually found one in June. Before I filed the lawsuit, I contacted him in June, and felt comfortable enough to file the lawsuit at that point. I did not yet have the affidavit. The statute allows for 45 days, so I got him everything. Unfortunately, it was 8,000 documents, Your Honor, that he was provided within that 45 days.

THE COURT: Eight thousand documents?

MR. HALVERSEN: Eight thousand documents. It's a commercial project, Your Honor. So I can't read a 600-page book over a summer. This, he was tasked with 8,000 documents to read in that 45-day-time period. He contacted me before the end of the 45 days. He said, I can't get through all this, and I said, I understand. The statute

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allows me to petition the Court for an extension of time based on good cause. I think this is good cause. He signed an affidavit saying, yes, I couldn't get through it. I also wanted to see the project physically. He had to travel from Charlotte. He eventually did that in August. So we have been working diligently towards that, and just couldn't come together.

And Your Honor, I've got the affidavit. It just so happened that it was three weeks after August 10th on September 7th. The day I got it, I sent it to defense counsel. All I'm asking for is permission now to file it, and they can have need, then, to file an amended pleading. And the irony, Your Honor, is there's no prejudice to granting this motion. They had this affidavit in the time period of which they still could have filed an answer to the complaint.

I served the defendant on August 14th. They immediately filed a motion to dismiss. They still had until September 13th, technically, if they waited until the end to file an answer, and they would've already had my affidavit. So there's no prejudice to them in this situation. They could have actually filed an amended answer without needing Court stipulation 30 days after the deadline to answer the complaint. So there's no prejudice, Your Honor.

THE COURT: All right. Considering the fact of the

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8,000 pages, I think that's good cause for the architect to take over a 45-day time period, I find it's good cause, and I'll grant the extension of time requested by the plaintiff, and we'll continue the motion to dismiss by the defendant, if you want to continue, or I assume it's a motion stating that -- I hadn't looked at it, but I assume it's a motion filed, there's a affidavit that asked for it to be dismissed?

MR. STAIR: We have not yet -- we filed it because of their failure to file the affidavit, so...

THE COURT: You want to withdraw that in light of granting him the time to file the affidavit?

MR. STAIR: If you --

THE COURT: I'll give him 10 days to file it.

MR. STAIR: Yeah, if you give him the 10 days to file it, subject to our reception, we might have appellate purpose of, I don't see coming back arguing after that.

THE COURT: All right. Once he gets the file, I'll just dismiss your motion to dismiss without prejudice, so you can bring it again after the pleadings have joined.

MR. STAIR: That will be fine, 'cause we may want to pick on the affidavit once it's filed, but we'll do that.

THE COURT: I'll do it without prejudice to give you opportunity to do whatever you deem appropriate, okay?

MR. STAIR: Totally understand. Thank you, Your Honor.

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THE COURT: Let me see you second on something out of Isle of Palms, I'm going to ask you about a few --

MR. STAIR: Would you like him to prepare the order, that would be fine.

THE COURT: I'll get him to do the order.

MR. STAIR: Very good. Thank you.

(END OF TRANSCRIPT OF RECORD.)

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CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Charleston)

I, Maria Dempsey, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 17th day of November 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 8, 2021

_____

Maria Dempsey, RPR
Official Court Reporter
Charleston County Circuit Court
Ninth Judicial Circuit
Charleston, South Carolina

Exhibit #3

From: Stair, Kent T. <kstair@carlockcopeland.com>

Sent: Tuesday, November 21, 2017 12:28 PM

To: Brent Halversen; Nicholson, J. C. Law Clerk (Jonathan Arndt)

Cc: Sperry, Paul E.; Yoho, J. Andrew; Muller, Megan

Subject:RE: Motion "MENLGT-Motion For Extension of Time by plaintiff, crt/srv" for Case "2017CP1003267- 480 King Street LLC VS Glick Boehm & Associates Inc" was added to a Motions Roster for 11/17/2017 at 10:00 AM

Attachments: Order on Motion for Extension of Time (52.docx

Mr. Arndt,

I have (in the attached) revised the proposed Order in a couple of relatively minor ways. With those revisions, I think the Order accurately reflects the outcome of the hearing.

Thanks, Kent

Kent T. Stair

Partner

Carlock, Copeland & Stair, LLP

843.266.8224 | f: 843.727.2995 | kstair@carlockcopeland.com

40 Calhoun Street, Suite 400, Charleston, South Carolina 29401

-----Original Message-----

From: Brent Halversen [mailto:Brent@halversenlaw.com]

Sent: Tuesday, November 21, 2017 9:48 AM

To: Nicholson, J. C. Law Clerk (Jonathan Arndt)

Cc: Sperry, Paul E.; Stair, Kent T.; Yoho, J. Andrew

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Subject: RE: Motion "MENLGT-Motion For Extension of Time by plaintiff, crt/srv" for Case "2017CP1003267- 480 King Street LLC VS Glick Boehm & Associates Inc" was added to a Motions Roster for 11/17/2017 at 10:00 AM

Mr. Arndt,

Judge Nicholson asked me to prepare a proposed Order on Friday on the Plaintiff's Motion for Extension of Time. It is attached to this email. I sent same to counsel for Defendants on Friday and as of this writing they have voiced no objections to the form or content of the Order.

Brent

Brent Souther Halversen, Esq.
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Charleston, South Carolina 29401
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(864) 326-4844 fax.
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10-3267
480 KING STREET, LLC	)	
	)	
	)	
Plaintiff,	)	ORDER
	)	
vs.	)	
	)	
	)	
	)	
GLICK/BOEHM & ASSOCIATES, INC.	)	
	)	
	)	
Defendant.	)	

THIS CAUSE comes before the Court on Plaintiff 480 King Street, LLC's Motion for Extension of Time filed with this Court on August 10, 2017. The Court heard the arguments of counsel regarding the motion on November 17, 2017 at 10:00 AM. Brent Halversen, Esq. appeared on behalf of the Plaintiff 480 King Street, LLC, and Kent Stair, Esq. appeared on behalf of the Defendant, Glick/Boehm & Associates, Inc.

Plaintiff filed its Complaint in the matter on June 27, 2017. One of the causes of action was for professional negligence against the Defendant. Pursuant to SC Code § 15-36-100(B), the Plaintiff is required to file the affidavit of an expert witness which must specify at least one negligent act or omission. Plaintiff alleged in its Complaint that it could not prepare an affidavit of an expert because of time constraints. Forty-five days after filing the Complaint, the Plaintiff filed a motion to extend the time period for filing the affidavit with this Court. South Carolina law allows for an affidavit to be filed within

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45 days after the Complaint is filed, or, the Court may extend this period upon motion after a showing of good cause. The statute states:

> The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires.

SC Code § 15-36-100(C)(1)

Plaintiff filed a motion to extend the 45 day period with this Court on August 10, 2017. Plaintiff sought leave of Court to file the affidavit late because it's expert, Louis Hackney P.E., REWC, RRC, CDT, LEED AP, was not able to complete review of the approximately 8,000 documents that had been sent to him prior to expiration of the 45 day period. Mr. Hackney, was able to complete his review of the 8,000 documents and prepared his affidavit on September 7, 2017. According to counsel for Plaintiff, Mr. Halversen, the affidavit was sent to counsel for Defendant, Mr. Stair, the same day it was prepared on September 7, 2017. Plaintiff now seeks leave of Court to file the September 7, 2017 affidavit of Mr. Hackney outside the 45 day period.

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The Court finds that good cause exists for Plaintiff to request and be granted extra time to file its affidavit based upon the voluminous amount of documents that had been provided to its expert within the 45 day period referenced in the statute. It appears that it only took Mr. Hackney less than 30 days to prepare and execute his affidavit after Plaintiff filed its motion for extension of time at the end of the 45 day statutory period on August 10, 2017. The Court believes that the request for an extension, given the quantity of materials that had been sent to him, is not an unreasonable request under these circumstances.

The Court finds no prejudice to the Defendant in granting this motion.- The only argument presented to the Court by Defendant that might bear on that point would be ~~none has can be found in the record or was presented to the Court at the hearing of this matter~~Defendant's contention that it was prejudiced by the Plaintiff's filing of the Complaint without the required supporting Affidavit and the Court does not find that argument to give it cause to deny Plaintiff's request. -

Plaintiff may file the September 7, 2017 affidavit of Louis Hackney P.E., REWC, RRC, CDT, LEED AP within ten days of the date of this Order, to wit, November 27, 2017. Upon filing of the affidavit by this date, the Plaintiff will have been deemed to be in compliance with the requirements of SC Code § 15-36-100(B). Defendant will then have 30 days from the date of the filing of the Affidavit to file any motion contesting the sufficiency of the Affidavit.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Extension of Time is **GRANTED**, as stated herein.

This ___day of November, 2017 at Charleston, South Carolina.

_____

Hon. J.C. Nicholson, Jr.
Circuit Court Judge, Ninth Judicial Circuit

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Exhibit #4

From: Brent Halversen
To: Stair, Kent T.
Subject: RE: 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC
Date: Tuesday, March 23, 2021 7:20:00 PM

Kent,

You are free to file your motion. You do not need "Court permission" to file a motion. Happy to discuss further.

Brent

From: Stair, Kent T. <KStair@cskl.law>
Sent: Tuesday, March 23, 2021 7:14 PM
To: Brent Halversen <Brent@halversenlaw.com>; 'Young, Roger Law Clerk (Michael Monastra)' <ryounglc@sccourts.org>; Janet Segell <jsegell@barnwell-whaley.com>
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<mbarfield@barnwell-whaley.com>; Sperry, Paul E. <psperry@cskl.law>; Schmidt, Robin <rschmidt@cskl.law>; D. Summers Clarke, II <sclarke@barnwell-whaley.com>; Susan B. Hatch <shatch@barnwell-whaley.com>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
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Call in Access code: **129 724 3394 #**
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The link may be found on the court's website https://sccourts.org/calendar/.

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

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Subject: FW: [EXT] 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

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Morning, Michael. Are we going forward with the status conference tomorrow at 10:00 AM?

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Sent: Thursday, March 11, 2021 2:41 PM
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Subject: RE: [EXT] 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

I am available at that time.

Thanks.

Michael

From: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Sent: Thursday, March 11, 2021 2:40 PM
To: K. Michael Barfield <mbarfield@barnwell-whaley.com>
Cc: Brent Halversen <Brent@halversenlaw.com>; mark@kmlawsc.com; Stair, Kent T. <KStair@cskl.law>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: [EXT] 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

Thank you, Mr. Barfield. Judge Young is available for a status conference via WebEx Wednesday, March 24, 2021 at 10:00 am. Does that work for all parties?

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
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Cc: Brent Halversen <Brent@halversenlaw.com>; mark@kmlawsc.com; Stair, Kent T. <KStair@cskl.law>
Subject: Case 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC , defendant, et al added to Court Roster for period 2021-03-15 through 2021-03-19.

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Mr. Monastra,

This case arises out of the construction of a building on upper King Street. I represent the plaintiff, Blanchard Construction, who was the general contractor. The case began with the filing of a mechanic's lien by Blanchard against the owner, 480 King Street, LLC. 480 King then counter claimed, alleging deficiencies with the construction. 480 King sued the project architect, Glick Boehm and Associates in a separate action, but the two case have sense been completely consolidated.

The managing member of 480 King splits her time between Charleston and Ohio. However, at last word, she has spent the entire pandemic in Ohio. I will let her counsel, Brent Halverson, address how this may impact the logistics of bringing this case to trial.

The discovery process is nearly complete. However, the depositions of several witnesses have proven to be multi-day affairs. At this time, there are at least two key depositions that must be scheduled and completed before trial.

For my part, I believe a status conference would be beneficial to all to determine a timetable for bringing this matter to its conclusion.

Thank you.

Michael

K. MICHAEL BARFIELD

BW EST. 1938

MBARFIELD@BARNWELL-WHALEY.COM
843-577-7700
BARNWELL-WHALEY.COM

BARNWELL WHALEY PATTERSON & HELMS LLC
211 KING STREET, SUITE 300
CHARLESTON, SC 29401

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To:	Stair, Kent T.; "Young, Roger Law Clerk (Michael Monastra)"; Janet Segell
Cc:	aimee@kmlawsc.com; brandon@kmlawsc.com; Canaday, Jenifer L.; mark@kmlawsc.com; K. Michael Barfield; Sperry, Paul E.; Schmidt, Robin; D. Summers Clarke, II; Susan B. Hatch; Caroline Crisler. Leonard
Subject:	RE: 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC
Date:	Tuesday, March 23, 2021 7:17:00 PM

To be clear, your request "for leave of court," is a motion seeking court relief- and – it will be opposed. Again, any request of the court should come in proper channels through regular motion practice – not in tomorrow's status conference.

Brent

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Cc: Brent Halversen <Brent@halversenlaw.com>; mark@kmlawsc.com; Stair, Kent T. <KStair@cskl.law>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: [EXT] 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

Thank you, Mr. Barfield. Judge Young is available for a status conference via WebEx Wednesday, March 24, 2021 at 10:00 am. Does that work for all parties?

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

ELECTRONICALLY FILED - 2021 Nov 19 11:47 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

From: K. Michael Barfield <mbarfield@barnwell-whaley.com>
Sent: Thursday, March 11, 2021 2:05 PM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: Brent Halversen <Brent@halversenlaw.com>; mark@kmlawsc.com; Stair, Kent T. <KStair@cskl.law>
Subject: Case 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC , defendant, et al added to Court Roster for period 2021-03-15 through 2021-03-19.

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Mr. Monastra,

This case arises out of the construction of a building on upper King Street. I represent the plaintiff, Blanchard Construction, who was the general contractor. The case began with the filing of a mechanic's lien by Blanchard against the owner, 480 King Street, LLC. 480 King then counter claimed, alleging deficiencies with the construction. 480 King sued the project architect, Glick Boehm and Associates in a separate action, but the two case have sense been completely consolidated.

The managing member of 480 King splits her time between Charleston and Ohio. However, at last word, she has spent the entire pandemic in Ohio. I will let her counsel, Brent Halverson, address how this may impact the logistics of bringing this case to trial.

The discovery process is nearly complete. However, the depositions of several witnesses have proven to be multi-day affairs. At this time, there are at least two key depositions that must be scheduled and completed before trial.

For my part, I believe a status conference would be beneficial to all to determine a timetable for bringing this matter to its conclusion.

Thank you.

Michael

K. MICHAEL BARFIELD

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ELECTRONICALLY FILED - 2021 Nov 19 11:47 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468
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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE CIRCUIT COURT 2017-CP-10-3267
480 KING STREET, LLC,	)	
PLAINTIFF,	)	MOTION HEARING
vs.	)	TRANSCRIPT OF RECORD
GLICK BOEHM & ASSOCIATES, INC.,	)	
DEFENDANT.	)	

Friday, November 17, 2017
Charleston, South Carolina

B E F O R E:

The Honorable J.C. Nicholson, Jr.

A P P E A R A N C E S:

Brent Souther Halversen, Esquire
Attorney for Plaintiff

Kent Taylor Stair, Esquire
Attorney for Defendant

Maria Dempsey, RPR
Official Court Reporter
Charleston County Circuit Court
Ninth Judicial Circuit
Charleston, South Carolina

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E X H I B I T S

(No Exhibits Proffered.)

THE COURT: All right. Who's here for the plaintiff?

MR. HALVERSEN: Brent Halversen here on behalf of 480 King Street, LLC.

THE COURT: Mr. Halversen.

MR. HALVERSEN: Yes.

THE COURT: And who's here for the defendant?

MR. STAIR: Kent Stair, defendants, sir.

THE COURT: Okay. What is it a motion for, a motion for the defendant or a motion for the plaintiff?

MR. HALVERSEN: Yes, Your Honor. I filed a motion for extension of time, and the defendants have filed a motion -- or defendant has filed a motion to dismiss.

MR. STAIR: Flip flops to the motion --

THE COURT: What time do you want to extend it?

MR. HALVERSEN: Your Honor, this is for -- I filed a motion to extend the time to file an affidavit for professional negligence in the case. The motion for extension of time, if you grant it, is going to decide the motion to dismiss.

THE COURT: So you want an extension and time to file an affidavit?

MR. HALVERSEN: Yes, Your Honor.

THE COURT: Why do you need the extension?

MR. HALVERSEN: So, Your Honor, this is a -- I represent the plaintiff, who owns a building, and in a

different lawsuit a year ago, the contractor sued my client on a nonpayment plan; that was last year. So, and that case has progressed, and we've now sued in this case the architect that designed and contract administration. So there was a potential statute issue, a claim or a defense, arguably, that could have come up this summer on July 27 -- or June 27th.

Okay. So we filed the summons and complaint against the defendant architect in this case, timely, on June 26th, the day before the statute. I had contacted an expert, and so based on those conversations, I felt I could proceed with the case against the defendant. I did not have the affidavit yet. The statute says you can get -- you don't have to file the affidavit with -- you can have 45 days after it's filed or you can petition the Court for showing a good cause.

THE COURT: July, August, September, October, it's been four months. How long does it take to get the affidavit?

MR. HALVERSEN: I have the affidavit, Your Honor.

THE COURT: Oh, you have the affidavit.

MR. HALVERSEN: Yeah, I did, yes, Your Honor. So the 45 days expired on August 10th. On August 10th, I filed this motion. Just for whatever reason, it didn't come up until now, but on August 19th, I filed the motion for an extension, and then I actually got the affidavit from my

expert on September 7th, so, three weeks later.

THE COURT: What's the defendant's position on allowing -- basically, he's allowed asking the Court to extend the time so he can go ahead and file it, since he has it in his possession.

MR. STAIR: I understand the rules, of course, but there's a history of that I think is important, and in our motion to dismiss, we lay it out, and actually, we could pull their complaint. It might be helpful if I could show the Court our motion, and I think you'll see some of the chronology involved, because it's a chronology that I think bears on the question of constraints of times as he has a -- refers to in cause for extension. And what it shows in their complaint that they filed, they allege on Page 6 of their complaint, which is two to eight to our motion, that they were told by the contractor on August 25, 2014, that the plaintiff had a negative design, and that they were told in May of 2015, that the designs were causing problems. So there's been a long history about it. And so they got to the time of the June 17 --

THE COURT: And this is the companion, this other lawsuit you're talking about?

MR. HALVERSEN: Yeah.

MR. STAIR: Yes, the other lawsuit, and just otherwise new information. The point being is that they knew about it

for two and some years by the plaintiff's -- the contractor's contention to do a ledge design, and it didn't get within the period of time, within 10 days of this period running, and they filed the affidavit, or filed the complaint without the affidavit, and my client, Mr. Glick, called him upon receipt of the affidavit, upon receipt of the complaint, and has put in his motion that affidavit that speaks to the issue. He says that, just a deed to our motion says, upon receipt of the complaint, I spoke to Mr. Halversen, this is my client, he called before he called me. The attorney to the plaintiff, the week of August 14, in response to my question of why Glick Boehm was sued. Mr. Halversen responded that he had tried to talk to Mary Ann Kanters, the owner of 480 King Street, out of suing Glick Boehm for over two months. Unfortunately, he was not successful, and Glick Boehm was sued right before the deadline.

And so this is a long period of time where they could've gotten an affidavit, had he chosen to do. They waited until the end, and then decided not to file it and to file a complaint, and then they asked for -- tried to take advantage of 45 days. In the 45 days, they did not then get it within that either. And so we have opposed that. And they did put an affidavit in recently where their expert explains that he was retained on July the 17th of 2017,

which was 22 days after the period the statute would have run. And it looks like he was able to get his preliminary affidavit together within 51 days when he was retained, and I think probably must have gotten the documents, he could have done it quicker, had he chosen to do so. So it's a lot of times when you got a client who has been alleged with professional malpractice, and he's understandably upset with it.

And so the motion requires two things. The motion requires that the inability to file the affidavit originally was because of constraint of time. And I understand that if someone calls a lawyer within 10 days and they can't get an affidavit, I think it's a constraint of time that's envisioned, as distinguished from knowing about something for a good couple of years, not doing anything about it, and deciding at the last minute to file, and then saying I can't get an affidavit.

And then the next thing is the extension. They give you 45 days, and have to give the advantage of that. It has to be given for good cause, and I think the affidavit to the facts is going to sustain a good cause. And so that's the basis for our position to both motions; both the affidavit, firstly, there not being any extension.

THE COURT: Okay. Mr. Halversen.

MR. HALVERSEN: Your Honor, the case that was filed

last year, we've been working, I've been working diligently to find an affidavit. I could not find a local expert that wanted to oppose this company. It took me some time. This is why it took me some time into -- from last year to now. The statute, the possible statute running on this summer was just the first time they could ever possibly make a statute argument. It wasn't some outer killer deadline.

Just to be bulletproof of my client, I wanted to know, when is the possible last day we need to file this? It happens to be June 26, so that's when we artificially set that as the time frame. So I've been working, trying to find an architect. I met an expert, I eventually found one in June. Before I filed the lawsuit, I contacted him in June, and felt comfortable enough to file the lawsuit at that point. I did not yet have the affidavit. The statute allows for 45 days, so I got him everything. Unfortunately, it was 8,000 documents, Your Honor, that he was provided within that 45 days.

THE COURT: Eight thousand documents?

MR. HALVERSEN: Eight thousand documents. It's a commercial project, Your Honor. So I can't read a 600-page book over a summer. This, he was tasked with 8,000 documents to read in that 45-day-time period. He contacted me before the end of the 45 days. He said, I can't get through all this, and I said, I understand. The statute

allows me to petition the Court for an extension of time based on good cause. I think this is good cause. He signed an affidavit saying, yes, I couldn't get through it. I also wanted to see the project physically. He had to travel from Charlotte. He eventually did that in August. So we have been working diligently towards that, and just couldn't come together.

And Your Honor, I've got the affidavit. It just so happened that it was three weeks after August 10th on September 7th. The day I got it, I sent it to defense counsel. All I'm asking for is permission now to file it, and they can have need, then, to file an amended pleading. And the irony, Your Honor, is there's no prejudice to granting this motion. They had this affidavit in the time period of which they still could have filed an answer to the complaint.

I served the defendant on August 14th. They immediately filed a motion to dismiss. They still had until September 13th, technically, if they waited until the end to file an answer, and they would've already had my affidavit. So there's no prejudice to them in this situation. They could have actually filed an amended answer without needing Court stipulation 30 days after the deadline to answer the complaint. So there's no prejudice, Your Honor.

THE COURT: All right. Considering the fact of the

8,000 pages, I think that's good cause for the architect to take over a 45-day time period, I find it's good cause, and I'll grant the extension of time requested by the plaintiff, and we'll continue the motion to dismiss by the defendant, if you want to continue, or I assume it's a motion stating that -- I hadn't looked at it, but I assume it's a motion filed, there's a affidavit that asked for it to be dismissed?

MR. STAIR: We have not yet -- we filed it because of their failure to file the affidavit, so...

THE COURT: You want to withdraw that in light of granting him the time to file the affidavit?

MR. STAIR: If you --

THE COURT: I'll give him 10 days to file it.

MR. STAIR: Yeah, if you give him the 10 days to file it, subject to our reception, we might have appellate purpose of, I don't see coming back arguing after that.

THE COURT: All right. Once he gets the file, I'll just dismiss your motion to dismiss without prejudice, so you can bring it again after the pleadings have joined.

MR. STAIR: That will be fine, 'cause we may want to pick on the affidavit once it's filed, but we'll do that.

THE COURT: I'll do it without prejudice to give you opportunity to do whatever you deem appropriate, okay?

MR. STAIR: Totally understand. Thank you, Your Honor.

THE COURT: Let me see you second on something out of Isle of Palms, I'm going to ask you about a few --

MR. STAIR: Would you like him to prepare the order, that would be fine.

THE COURT: I'll get him to do the order.

MR. STAIR: Very good. Thank you.

(END OF TRANSCRIPT OF RECORD.)

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Charleston)

I, Maria Dempsey, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 17th day of November 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 8, 2021

_____

Maria Dempsey, RPR
Official Court Reporter
Charleston County Circuit Court
Ninth Judicial Circuit
Charleston, South Carolina

State of South Carolina) In Circuit Court of the
) Ninth Judicial Circuit
County of Charleston) 2016-CP-10-03468

CHARLES BLANCHARD CONSTRUCTION CORP., INC.,

Plaintiff,

vs.

480 KING STREET, LLC,

Defendants.

480 KING STREET, LLC

Plaintiff,

vs.

GLICK/BOEHM & ASSOCIATES, INC.

Defendant.

Transcript of Record

Charleston, South Carolina
December 2, 2021
Webex

B E F O R E:

The Honorable Jennifer B. McCoy

A P P E A R A N C E S:

Mr. Ken Stair, Esquire
Attorney for Appellant

Mr. Brent Halverson, Esquire
Attorney for Respondent Glick/Boehm & Associates, Inc.

DCRP
Court Reporter

Transcribed by:
Lisa Carter

I N D E X

WITNESSES PAGE

(NO WITNESSES INTRODUCED DURING HEARING)

(NO EXHIBITS INTRODUCED DURING HEARING)

THE COURT: Okay. I think this is your motion Mr. Stair I've taken an opportunity to review it, as well as your memoranda prior to the hearing today. Happy to hear from you first.

MR. STAIR: All right. Very good. Judge, what I'd like to do is just give you kind of an overview and if you've read it, I'll try not to beat it to death, but the case has some history to it. It was filed as a an architectural malpractice case, and it was filed without an affidavit and we moved to dismiss because of that reason. And they were in a period of time where they needed to file a motion to leave, for a request to leave to amend and file their affidavit. They filed that motion. It was heard and that was granted. And in the order granting it, it has been noted in documents there is an indication that we would have 30 days in which to contest sufficiency of it and we chose to do so at that time. And so we got it and when we got it we looked at it and we concluded that the affidavit appeared to be addressing the standard of care of an architect. And while I have some questions, very serious question about whether an engineer can state an expert opinion against an architect because he stated on his face with the affidavit an apparent intention to do so. We left that for another day at that time. We then took the engineer's deposition and in the deposition he made it very

clear he was not stating an opinion against the architect utilizing the architectural standard of care. And I was really surprised, if you will, to hear the experts say that and I'll review his testimony in a minute on that point. But he repeated himself and said that he was not stating an opinion as to the standard of care of an architect. And of course, this case is against nobody but an architect. And I think under that circumstance I rethought where we were and I felt it was appropriate at this time then to file this motion. Realizing the judge had said there was a 30 day period in which I should do that if I wanted to contest it. When the case came up on the status conference, I filed a request for leave to file the motion. I did not file the motion. And I certainly recognize what the order said. And so what I wanted to do is go to the court at that time and say, here's why I want to do it now recognizing what the court order says I don't want to fly at the base of it and disregard the court order, but because of the changing circumstance of the testimony that had intervened well after the 30 days period of time had occurred, I wanted to do that and we were going to hear that in front of Judge Young and I was going to explain why I was doing it now and did not do it earlier. But necessity was taken away when Mr. Halverson sent it to my filing the motion and said we could go ahead and file it. Now, I do not contend by

consenting, he was consenting at all to the merits of the motion. I will say, though, I was surprised when he filed his response to my motion and indicated that we were out of time to do so. That was what the whole purpose of having it addressed at the status conference was. And I think it really is a motion that could and should, it should be heard by this court. I would have addressed it earlier at the status conference had I been given the opportunity to so, there was not. And so I think we are in time to argue this motion and it's an important motion because of the facts subsequent to the 30 day period have shown that what is shown on the face of the affidavit is not what comes out of the mouth of the affiant where the affiant is put under oath to testify. And so that's the basis of it. And once that was done I then, I contacted plaintiff's counsel and said your expert, it states in his affidavit, he's stating an opinion about the architect, states in his deposition he has no intention of stating a standard of care opinion against an architect, I think you should dismiss the motion and dismiss the case. They chose not to and so in addition to the motion to dismiss we are asking for sanctions. So that's the overview of it. And what I will do is look at some of the papers that have been filed to try to put a little meat on the bones, but I'll try to not make it too fat. And so if someone here will help me figure out how to

show something other than my face on the screen and so documents I'll move to that ---

(Whereupon, someone was talking to Mr. Stair)

MR. STAIR: Okay. Sharing permission, I am told has to be turned on by somebody other than me.

THE COURT: My clerk will do that so let's -- she can do that.

(Whereupon, the clerk is trying to share documents on Webex)

MR. STAIR: So this is not per se in the papers, but I just start out the motion, obviously, comes from the statute that was intended to control, if you will, frivolous proceedings as a part of the Tort Reform Act and some years ago. And the first part I highlighted this, but I understand it didn't come off of it but put this of bracketed out here, but the point to start with Mr. Halverson actually quotes this part in his brief too, "the expert witness means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue." And so what that tells me and I think should tell anyone thinking sensibly about the statute is whatever the expert says the expert must say it about the conduct of the professional whose conduct is at issue and in this case, the professional is an architect. And so I think built into this is a clear indication that when the expert

witness speaks it needs to speak in terms of the architectural standard of care, since that is the one that's an issue. Let's see this statute, of course, this part of it is the one that says, "if you don't do it your case is dismissed." So there's nothing greatly enlightening about that, other than you have to show it again, a negligent act against professional, against who negligence is charged and that necessarily assumes and requires a standard of care opinion as to that professional, not to some other group of people.

Section G is where the people who get the benefit of this statute is laid out, and it lists them in alphabetical order. And the first group are architects. Architects are people, who as you know, are licensed and registered under a set of laws that deal with architects, standards deal with architects. They don't deal with attorneys, they don't deal with accountants, they don't deal with chiropractors. And I put a line here because a group they don't deal with is design professionals, which is what in the end, Mr., the expert attempted to try to say that's really what he was talking about, but there is no such group as design professionals. There is a group of architects and there's a group of engineers. And so an architect who is being sued needs to have someone qualified, state an opinion as to the standard of care for the architect, not a medical doctor,

not a pharmacist, not an engineer or a design professional. It needs to be in terms of the standard of care of an architect. But here comes our motion and I'll, again, not repeated all, I'll go straight to the exhibit and this is the affidavit of Mr. Hackney. And, of course, he knows he's an engineer and he's not an architect, but he states in the beginning he is an engineer. And then he has a variety of thoughts about all that went wrong out there but then he gets to, as Mr. Halverson and his paper said is that really the opinion, he state and it says, "based on the information I've received and reviewed, so forth, it is my professional opinion to a reasonable degree of professional certainty that the architect deviated from the standard of care in failing to properly complete contract administration services." Again, when I read that, I was not unaware, of course, that Mr. Hackney was an engineer, but he was stating an opinion as I read it about the architectural standard of care because he says the architect is the person that violates the standard of care and I naturally assumed that he was talking about the standard of care applicable to the architect. We took his deposition and it was, by covid, was delayed to some degree and other circumstance, but we finally got it. And so in the course of the questioning, I asked him the question, and based on what I had heard to this point, felt

somewhat competent in stating it in this fairly aggressive way, if you will, asserted point, you do not intend in this case to offer a professional opinion about the standard of care of an architect, do you? And he said, no. And that, of course, is the only standard of care that is important in this case and the expert witness who opined in an affidavit is now stating he does not intend to state an opinion as to the standard of care of an architect. We ran out of time that day. And we came back giving him a chance to see if he changed his mind. I asked him I said, "Do you recall telling me when we were together last that you were not going to offer an opinion about the standard of care of the architect in this case?" And he said, "Yes." "I said does that remain during your intention?" And he said, "Yes." And then on down, "I said, when he said when he, Mr. Halverson, the plaintiff's lawyer, when he asked you to sign the affidavit, did you tell him that you would not offer an opinion about the standard of care of an architect in the?" And he said, "I don't recall the specific conversations about the standard of care at that point in time." I said, "by signing the affidavit, though, you did not intend to offer an opinion about the standard of care of an architect, did you?" And he said, "No." And then he went on to explain that what he really meant to say was something with standard of care of a designed professional,

and so forth. And so, again, the point is that there is no such thing as a designed professional recognized by law. That is a generic term that people use to folks who design things maybe, but it's not someone who is entitled to a specific standard of care to be applied against him as distinguished from an architect. "And, of course, Mr. Glick is an architect?" "Correct." "You're an engineer?" I am", and so forth. And so back to our motion, our motion is it's now apparent, but it was not apparent within that 30 day period that he did not express nor does he intend to express an opinion about the standard of care of an architect, which is the only standard of care that matters and so forth.

Given these, we now formally contest the sufficiency of the affidavit. And I noted in the thing, we were going to seek leave, going to file it, but we, it was consented. And then, as we say, given the fact that the affidavit expressly purely stated in the opinion that's caused us to participate in the lawsuit at a great cost and their refusal to dismiss it now we'd move for sanctions. And so that's the essence of the motion. And I think the rest of is just the repetition of the same. And so we asked that it be dismissed. And we asked that we've been given sanctions, attorneys fees in the like for having to do something when in the beginning there was a misstatement as

to the intention of the affidavit that has caused us to incur a lot of expense.

They filed an opposition which I'm sure Mr. Halverson will address and I'll just thumb through it quickly and see if there's anything that hasn't been discussed. They do say here that, in a footnote, that they anticipate we will attempt to argue that they have consented to the relief sought in this motion to dismiss. Well, I do not attempt or intend to argue. They have consented to the relief sought.

THE COURT: Mmm, hmm.

MR. STAIR: I do intent to say, though, that they have consented to the motion being filed and heard on the merits because there was a time and a place where we were to address, is it untimely to do it? And they did not, at that time, contest that and I do think they have consented to the filing of the motion without this discussion of whether it is timely or not. After I was telling Judge Young's clerk what our intention at the hearing would be that was all rendered moot when Mr. Halverson said you are free to file your motion. You do not need the court's permission to file a motion. I'm happy to discuss further. And that's all I wanted to hear. Can I file this motion without being burdened by having to show you now Exhibit 4 in this footnote and try to argue why we should be arguing

what I think is something that not only should be argued it should be granted if the case should be dismissed.

Let's see. Then -- let's see, so, again, here's where Mr. Halverson is saying that Mr. Hackney gets around to finally stating his opinion. And it's the one I stated and again and again, th problem is, is the architect. It's certainly led me to believe that they were stating an opinion as to the standard of care of an architect and that's what kept us from filing the motion now, um, then that we have filed that.

Let's see - and I beat that one to death. Let's see, we came back and file something and I'm not going to beat that one to death again since you read it. But again, as I stated, the problem is that we were misled when the expert appeared to state in his affidavit an intention to state a standard of care of an architect. And then when the truth became known, he expressly said he was not going to express and he said that on two occasions having time to sleep about it and in between it think about it. And so I just cited this case which is not an architectural case, it's a professional case, but it stands for the simple and I think, obvious, the standard, that the standard of care the plaintiff must prove is it professional failed to conform to the generally recognized accepted practices in his profession. So that's the critical thing. It's not in some

made up group of people who are not protected by license laws or governed by licensing and registration laws is an architect is judged by architectural standard of care, an engineered is judged by engineering standard of care, podiatrist are judged by their standard of care and that's what's missing here. We now know the affidavit that was required to get this case to the courthouse does not state an opinion that the architect being accused of negligence violated the standard of care applicable to an architect. And I think that brings me to my conclusion, we think the motion should be granted, obviously, we think it should be heard. We think it should be granted and we are not at all embarrassed to be asking for motions for sanctions and so forth with the attorneys fees we've incurred fighting against the case that really never should have made it out of blocks.

And so that's our motion and we very much appreciate the court's consideration.

THE COURT: Sure. All right. Mr. Halverson, I'll be happy to hear from you.

MR. HALVERSON: Thank you, judge. Did you receive our memorandum and responses Mr. Stair's motion?

THE COURT: I did. I reviewed yours as well prior to the hearing that I have ---

MR. HALVERSON: Okay ---

THE COURT: --- it on my screen too.

THE COURT: I couldn't hear, judge.

THE COURT: I have right in front of me on my screen. If I make funny faces don't take it personally. I think I make faces when I read. So, yeah, I have it right here on my screen. MR. HALVERSON: Oh, okay. I just couldn't hear you.

MR. STAIR: Can I ask a question? Was there a second -- did you file a second one, Brent or just the first one?

MR. HALVERSON: No, just one memo.

MR. STAIR: Okay. Okay. Okay. I got it, then.

MR. HALVERSON: Yeah.

MR. STAIR: I'm sorry.

MR. HALVERSON: So, judge, I would just -- I'm not going to belabor the points I've made in the memo, but I will just start off with saying, a big picture view of what Mr. Stair has presented to you and what I interpret the statutes to say which I'll walk through very quickly. But the big picture view is my expert is an engineer. He is now required to be an architect in order to be critical of the services that the architect render. And the services that this architect rendered that are at issue in this case, our construction based services and contract administration services. Nowhere in Mr. Hackney's affidavit did he ever

say, and he's very careful when what he testified or put in his affidavit, which was that he was critical only of Mr. Glick, who is an architect, of his construction based services and his contracts or administration services. Nowhere in the affidavit does he said that he was critical of the architectural standards of care or, for instances, having a design defect. That's not in his affidavit. It was never in his deposition testimony. The affidavit ---

THE COURT: Let me stop you right there. Let me ask you a question. Just playing devil's advocate, under that logic, could I have a nurse file an affidavit against the doctor as it would pertained to, I don't know, his administrative duties?

MR. HALVERSON: That’s a great question, Your Honor. So if you look at 15-36-100 Sub (B), it says, “except as provided in Section 15-79- 125,” and so that's the medical malpractice statute ---

THE COURT: Okay. Well, I picked a bad example. All right, let's say something else, you know -- you know, what I'm talking about, I mean, there’s a reason the legislature laid out specific professions for which you must submit an affidavit stating the deviation of the standard of care from that particular profession.

MR. HALVERSON: That's right, Your Honor. So I'll walk through that and the statutory regime addresses it. In (B)

it says, "you have to have an affidavit of an expert witness that must specify one act, one act of negligence." Then you move to the definition of expert witness, which is in Subsection (A), that says, "expert witness means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue" and then it jumps to "and who" and then it says, "someone is licensed by an appropriate regulatory agency to practice his profession and the location in which the expert practices or teaches" that would mean that Mr. Hackney in this incident would have to be a licensed professional. And then it says, "and too, is board certified in the area of practice or specialties in which the opinion on the standard of care is offered." That would mean he would have to be an architect which he is not and that -- Sub (D) it says, "so you can be board certified as an architect or be engaged in the practice of architectural capacity, three of the last five years." So that is, you have to be in the same subject arena as the, as the field you're giving your opinion. In Subsections (A)(1) or (A)(2), (A)(3) is the catch all, (A)(3) says, "an individual who is not covered by (A)(1) or (A)(2) that has scientific, technical or other specialized knowledge, which may assist the trier of fact in understanding the evidence and determining a fact or issue in a case by reason of the individual's study, experience,

or both. However, an affidavit filed pursuant to Subsection (B) by an expert qualified under this subsection must contain an explanation of the expert's credentials and why the expert is qualified to conduct the review required by Subsection (B). So this is the subsection that applies to Mr. Hackney. So Subsection (3) requires two things: the first question is, does he have scientific, technical or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case by reason of the individual's study experience or both? Second requirement is, that you have, the expert has to put that information in the affidavit, an explanation of his credential and why the expert is qualified to conduct the review. And if you look at Mr. Hackney's affidavit, Paragraph 4 and Paragraph 5, he says, What is science, scientific, technical or other specialized knowledge, basically specialized knowledge in this case, that he has and how his credentials give him the opportunity to render an opinion on this subject. And so he says in, of course, Paragraph 4 and 5, what his experience is ---

(Whereupon, interruption my WebEx)

MR. HALVERSON: --- contract administration services, and then his opinion is very clear. He says in Paragraph 5, I've reviewed all this stuff, all the drawings and he says,

"in addition to an architect's contract with 480 King Street it included contract administration services. And then in Paragraph 10, his opinion is that the architect deviated from the standard of care, not in doing design, Your Honor, not in doing design work, possibly, which could implicate the need for having an architect to be critical of another architect, but under Subsection (A)(3) he is giving the opinion only as the construction based services. Your honor, and Mr. Hackney was very clear. He testified as an architect, they can perform contract administration services, an engineer can perform contract administration services. Mr. Hackney has qualification as to -- so does Mr. Glick. So Mr. Glick can sign an affidavit, as I'm sure he has, saying that an engineer deviated from the standard of care in performing construction administration services. Mr. Stair's argument is solely focused on the word architect. It is not about the title of the person that's giving the opinion it's about as Subsection (A) says in the statute, it says - the definition of an expert witness - it says, "an expert witness means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue. And the acceptable conduct of a professional, he happens to be an architect, that's true. But the services that were provided that Mr. Hackney ---

(Whereupon, interruption my WebEx)

MR. HALVERSON: --- is the contract administration. So we believe under Section (A)(3) the affidavit on its face qualifies, and Mr. Hackney was very careful in putting in his affidavit the requirements of (A)(3). Now, I would just briefly like to address the procedural argument about what Mr. Stair represented to you about why wasn't, why he didn't attack this affidavit in the 30 days? He requested in his affidavit, in the order that Judge Nicholson signed, Mr. Stair requested 30 days to contest the sufficiency of the affidavit. That was his request. I didn't have any problems with it. He put it in there and there was no challenge to it at all, until we were about to have a status conference with Judge Young, and I think it might have actually been before you or there were a couple of status conferences that got continued, but Mr. Stair said, hey, I want to file, you know, this motion and he wanted to request leave at a status conference to file this motion. And I said, I don't consent to the relief you're talking about and it's not proper to be on the status conference and asking a Judge Cole (ph), who is again not gonna have any idea about what this case is about and not have any briefs whether he can file a motion. And the reason why Judge Nicholson put in his order that it had to filed in 30 days from, in 2017. So, of course, as Mr. Stair had gone on a status conferences and said to, Your Honor, judge I'd

like permission to file a motion. And I said, no, I object, Your Honor, I won't let him do that. You'd look at me like I had three heads on. So I said, Ken you can file whatever motion you want. Okay. I don't consent to the relief you're talking about. And, obviously, violative of Judge Nicholson's order. So I don't even think I can consent to changing what's in Judge Nicholson's order which was mandatory that he had to file this in 30 days. And Mr. Stair says the reason why is because when I looked at the affidavit, it looked to me like he was criticizing an architect. That's not what it says. If you look closely and read it closely Mr. Hackney is very careful in his word selection that he is only criticizing Mr. Glick, who happens to be an architect, about the services he provided and doing the contract administration. So that's how we got to -- and so then three and half years later he files a motion saying, "Why I didn't know until I took the deposition." But what he said his deposition was perfectly consistent. It's cited in, um, Mr. Mr. Stair's memo on Page 5, he says, um, he says, "I feel comfortable talking about the standard of care that a professional would provide in either giving or completing construction administration services, whether that be an architect or an engineer. Those services are similar across the board of professionals and I feel confident and comfortable talking

about it." So just because one professional performs the same service doesn't mean you have to be in that profession in order to be critical of it. So, Your Honor, that's our position. We believe ---

THE COURT: I disagree. I disagree with you. I understand your, your logic. But respectfully, I have to go back to the statute. I have to go back to legislative intent. I don't get to, you know, legislate from the bench, I have to go by what's in the black and white statute.

MR. STAIR: And, we, Your Honor, we ---

THE COURT: It clearly delineate, let me talk, it clearly delineates profession. And from there under that professional umbrella, then someone can speak to whether or not someone deviated the standard of care. You know, I understand that sometimes, you know, duties overlap between professions. I understand your argument completely. Okay. I'm not saying that it's not a cogent argument. I just don't find it comports with our law in South Carolina. Okay. So respectfully, you know, I'm happy to hear something else -- again, I've read all of your briefs are. They are all fully incorporated for purposes of the record. I'm granting the motion to dismiss. I think that allowing him to testify as to whether or not an architect reaches standard of care, with any job that architect reformed, it's frankly flies in the face of the statute. Now, I'm

not going to grant the second part of the motions which is for sanctions because, you know, whether or not it's drug out whose fault that was I don't find that to be clear and convincing to that. So I'm not going to grant sanctions. I will grant the motion to dismiss. I'm gonna ask Mr. Stair to draft a formal proposed order within the next 10 days and get that e-filed. All right.

MR. STAIR: I will do that. Thank you, Judge.

THE COURT: Thank y'all very much. Have a great afternoon.

MR. HALVERSON: Thank you for your time.

THE COURT: Yep.

(CONCLUSION OF THE HEARING ON DECEMBER 2, 2021)

CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Ninth Circuit of the Circuit Court for Charleston County, South Carolina, on the 2nd day of December, 2021. DCRP monitored this hearing.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

s/ *Lisa S. Carter*

Lisa S. Carter

Circuit Court Reporter

January 29, 2021

2017-CP-10-3267

STATE OF NORTH CAROLINA)
) AFFIDAVIT OF LOUIS A. HACKNEY
COUNTY OF MECKLENBURG)

PERSONALLY APPEARED BEFORE ME, Louis A. Hackney, P.E., REWC, RRC, CDT, LEED AP, who being duly sworn does state as follows:

FILED
2017 NOV 20 PM 3:05
JULIE A. ARMSTRONG
CLERK OF COURT
BY

1. I am over eighteen years of age and in all other respects am competent to execute this Affidavit.

2. The matters set forth in this Affidavit are based on my personal knowledge and observations, as well as my professional education, training, and experience as an engineer.

3. I am a Professional Engineer and am registered in the State of South Carolina. I also hold registrations as a Professional Engineer in North Carolina, Florida, Louisiana, Ohio and Mississippi.

4. As a Professional Engineer, I am routinely responsible for property condition assessments, structural and nonstructural failure analysis, building envelope evaluations, damage assessments, and engineering investigations of both new and existing construction involving numerous types of structures. I also have experience preforming contract administration services and preparing planning reports, designs, specifications, cost opinions, and contract documents for new construction and repair projects.

5. I have experience investigating and assessing the design and construction of commercial buildings in Charleston, South Carolina and my investigation of the 480 King Stair Tower is ongoing. I have examined the plans and construction documents of the 480 King Stair Tower building to investigate the nature of the construction and the deficiencies and damage associated therewith. I further reviewed the architectural drawings for the 480 King Stair Tower prepared by Glick/Boehm & Associates, Inc.

("Architect") in addition to the Architect's contract with 480 King Street, LLC, which included contract administration services.

6. Based on my investigation and analysis to date, it is my opinion that elements of the building's envelope has been compromised by design and construction deficiencies.

7. Specifically, there are numerous construction deficiencies that require repair including, but not limited to:

a. Water intrusion through the building envelope which is/was occurring at the slab on grade level;

b. Water intrusion through the building envelope which is/was occurring through the roof system;

c. Water intrusion through the building enevelope which is/was occurring through the window systems;

d. Water intrusion through missing or inadequate building envelope flashings;

8. Based on my investigation and analysis to date, it is my opinion that that there was information missing from the plans that resulted in construction errors, additional cost, and delays.

9. Based on my investigation and analysis to date, it is my opinion that there was incorrect information contained within the project specifications that resulted in construction errors, additional cost, and delays.

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

11. I reserve the right to supplement or amend this Affidavit and I or my professional opinion upon receipt of additional documents or information pertaining to this matter.

FURTHER AFFIANT SAYETH NOT.

By: Louis Hackney
Louis A. Hackney

SWORN to before me this
7th day of September, 2017

Notary Public for Mecklenburg County, NC
My Commission Expires: March 20, 2021

REGINA M OENBRINK
NOTARY
PUBLIC
MECKLENBURG COUNTY, NC

Exhibit #4

ELECTRONICALLY FILED - 2021 Nov 19 11:47 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

From: Brent Halversen
To: Stair, Kent T.
Subject: RE: 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC
Date: Tuesday, March 23, 2021 7:20:00 PM

Kent,

You are free to file your motion. You do not need "Court permission" to file a motion. Happy to discuss further.

Brent

From: Stair, Kent T. <KStair@cskl.law>
Sent: Tuesday, March 23, 2021 7:14 PM
To: Brent Halversen <Brent@halversenlaw.com>; 'Young, Roger Law Clerk (Michael Monastra)' <ryounglc@sccourts.org>; Janet Segell <jsegell@barnwell-whaley.com>
Cc: aimee@kmlawsc.com; brandon@kmlawsc.com; Canaday, Jenifer L. <jcanaday@cskl.law>; mark@kmlawsc.com; K. Michael Barfield <mbarfield@barnwell-whaley.com>; Sperry, Paul E. <psperry@cskl.law>; Schmidt, Robin <rschmidt@cskl.law>; D. Summers Clarke, II <sclarke@barnwell-whaley.com>; Susan B. Hatch <shatch@barnwell-whaley.com>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: RE: 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

To be very clear, **I do not have a motion pending** that I will seek to argue tomorrow or upon which I expect there to be any "adjudication". **I am simply seeking leave of Court to file a motion** that will be heard, in due course and under conventional circumstances, at a later time. The reason(s) I am requesting leave to file the motion rather than just going ahead and filing it, are set forth in the "Request" I previously filed and sent to the Court. The only "ruling" I will seek tomorrow will be whether or not I can file the motion. If the answer is "yes", I will file a motion to be heard at a later date; if the answer is "no", I won't file anything further.

Thanks,
Kent

From: Brent Halversen <Brent@halversenlaw.com>
Sent: Tuesday, March 23, 2021 6:07 PM
To: Stair, Kent T. <KStair@cskl.law>; 'Young, Roger Law Clerk (Michael Monastra)' <ryounglc@sccourts.org>; Janet Segell <jsegell@barnwell-whaley.com>
Cc: aimee@kmlawsc.com; brandon@kmlawsc.com; Canaday, Jenifer L. <jcanaday@cskl.law>; mark@kmlawsc.com; K. Michael Barfield <mbarfield@barnwell-whaley.com>; Sperry, Paul E. <psperry@cskl.law>; Schmidt, Robin <rschmidt@cskl.law>; D. Summers Clarke, II <sclarke@barnwell-whaley.com>; Susan B. Hatch <shatch@barnwell-whaley.com>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: RE: 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

ELECTRONICALLY FILED - 2021 Nov 19 11:47 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

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I am not prepared to argue/defend Mr. Stair's motion tomorrow. Of course, he is free to discuss pending motions, I just for the record am saying that no adjudication of Mr. Stair's motion should be decided tomorrow since we are just convening on this status conference. See everyone tomorrow.

Brent

From: Stair, Kent T. <KStair@cskl.law>
Sent: Tuesday, March 23, 2021 5:05 PM
To: 'Young, Roger Law Clerk (Michael Monastra)' <ryounglc@sccourts.org>; Janet Segell <jsegell@barnwell-whaley.com>
Cc: aimee@kmlawsc.com; brandon@kmlawsc.com; Brent Halversen <Brent@halversenlaw.com>; Canaday, Jenifer L. <jcanaday@cskl.law>; mark@kmlawsc.com; K. Michael Barfield <mbarfield@barnwell-whaley.com>; Sperry, Paul E. <psperry@cskl.law>; Schmidt, Robin <rschmidt@cskl.law>; D. Summers Clarke, II <sclarke@barnwell-whaley.com>; Susan B. Hatch <shatch@barnwell-whaley.com>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: RE: 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

I look forward to discussing all of the issues below with everyone at tomorrow's hearing. In advance of the hearing, I thought it would be helpful to bring two things to everyone's attention:

1. Prior to the prior status conference in this case (held 9/17/20), I filed and was prepared to discuss the attached Request for Leave to file Motion to Dismiss and Motion for Sanctions, but the Court's agenda that day did not include addressing such things. I would like to discuss it tomorrow and I wanted to alert everyone to that desire. Also, given the somewhat unusual nature of the "Request", I thought it worthwhile to provide the Court with a courtesy copy.
2. The second question raised below reminded me that I have not sought protection for my long-standing family vacation planned for September 11 – 21, 2021. I'm in the process of preparing a formal request for protection for this and other cases, but wanted to provide those dates to everyone to determine whether anyone will have an any objection to my protection during that period of time.

I will, of course, also be ready to discuss the other issues as they arise tomorrow. Again, I look forward to "seeing" everyone.

Kent Stair (counsel for Defendant, Glick/Boehm & Associates, Inc.)

From: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Sent: Tuesday, March 23, 2021 3:09 PM
To: Janet Segell <jsegell@barnwell-whaley.com>
Cc: aimee@kmlawsc.com; brandon@kmlawsc.com; brent@halversenlaw.com; Canaday, Jenifer L. <jcanaday@cskl.law>; Stair, Kent T. <KStair@cskl.law>; mark@kmlawsc.com; K. Michael Barfield

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<mbarfield@barnwell-whaley.com>; Sperry, Paul E. <psperry@cskl.law>; Schmidt, Robin <rschmidt@cskl.law>; D. Summers Clarke, II <sclarke@barnwell-whaley.com>; Susan B. Hatch <shatch@barnwell-whaley.com>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

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Good Afternoon,

In preparation for the status conference tomorrow, please be prepared to discuss the following topics:

Are there any Pending motions?
Do any parties have dates of protection?
Has the case been mediated?
Is Discovery complete?
Are you requesting a date certain?
Is the case ready for trial?
If no, why not?

The videoconference hearing in the above referenced matter is scheduled for Wednesday, March 24, 2021 at 10:00 am via WebEx Events virtual courtroom. Click the link listed below to access the hearing. You will be prompted to enter your first name, last name and email address. Once the information is entered, the microphone will be muted and you will enter the videoconference. If you would like to appear on screen and/or participate, click the Participants icon at the bottom of your screen. Then click the hand icon at the bottom right to "Raise" or "Lower" your hand. This will notify the court you wish to appear on screen. The courtroom will be open thirty minutes before the hearing. If you have questions and/or issues accessing the virtual courtroom please contact Cisco WebEx support: 1-866-229-3239.

Call in number for audio only United States Toll **+1-408-418-9388**
Call in Access code: **129 724 3394 #**
Call in Attendee ID number is issued when you **JOIN**
You can test your Webex connection here anytime: TEST YOUR WEBEX
SCJB Virtual Court User Guides: Attorney Guide **and** General Public Guide

The link may be found on the court's website https://sccourts.org/calendar/.

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

ELECTRONICALLY FILED - 2021 Nov 19 11:47 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

From: Janet Segell <jsegell@barnwell-whaley.com>
Sent: Tuesday, March 23, 2021 11:41 AM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: aimee@kmlawsc.com; brandon@kmlawsc.com; brent@halversenlaw.com; jcanaday@cskl.law; Janet Segell <jsegell@barnwell-whaley.com>; kstair@cskl.law; mark@kmlawsc.com; K. Michael Barfield <mbarfield@barnwell-whaley.com>; psperry@cskl.law; rschmidt@cskl.law; D. Summers Clarke, II <sclarke@barnwell-whaley.com>; Susan B. Hatch <shatch@barnwell-whaley.com>
Subject: FW: [EXT] 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

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Morning, Michael. Are we going forward with the status conference tomorrow at 10:00 AM?

From: K. Michael Barfield <mbarfield@barnwell-whaley.com>
Sent: Thursday, March 11, 2021 2:41 PM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: Brent Halversen <Brent@halversenlaw.com>; mark@kmlawsc.com; Stair, Kent T. <KStair@cskl.law>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: RE: [EXT] 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

I am available at that time.

Thanks.

Michael

From: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Sent: Thursday, March 11, 2021 2:40 PM
To: K. Michael Barfield <mbarfield@barnwell-whaley.com>
Cc: Brent Halversen <Brent@halversenlaw.com>; mark@kmlawsc.com; Stair, Kent T. <KStair@cskl.law>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: [EXT] 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

Thank you, Mr. Barfield. Judge Young is available for a status conference via WebEx Wednesday, March 24, 2021 at 10:00 am. Does that work for all parties?

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

ELECTRONICALLY FILED - 2021 Nov 19 11:47 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003468

From: K. Michael Barfield <mbarfield@barnwell-whaley.com>
Sent: Thursday, March 11, 2021 2:05 PM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: Brent Halversen <Brent@halversenlaw.com>; mark@kmlawsc.com; Stair, Kent T. <KStair@cskl.law>
Subject: Case 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC , defendant, et al added to Court Roster for period 2021-03-15 through 2021-03-19.

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Mr. Monastra,

This case arises out of the construction of a building on upper King Street. I represent the plaintiff, Blanchard Construction, who was the general contractor. The case began with the filing of a mechanic's lien by Blanchard against the owner, 480 King Street, LLC. 480 King then counter claimed, alleging deficiencies with the construction. 480 King sued the project architect, Glick Boehm and Associates in a separate action, but the two case have sense been completely consolidated.

The managing member of 480 King splits her time between Charleston and Ohio. However, at last word, she has spent the entire pandemic in Ohio. I will let her counsel, Brent Halverson, address how this may impact the logistics of bringing this case to trial.

The discovery process is nearly complete. However, the depositions of several witnesses have proven to be multi-day affairs. At this time, there are at least two key depositions that must be scheduled and completed before trial.

For my part, I believe a status conference would be beneficial to all to determine a timetable for bringing this matter to its conclusion.

Thank you.

Michael

K. MICHAEL BARFIELD

BW EST. 1938

MBARFIELD@BARNWELL-WHALEY.COM
843-577-7700
BARNWELL-WHALEY.COM

BARNWELL WHALEY PATTERSON & HELMS LLC
211 KING STREET, SUITE 300
CHARLESTON, SC 29401

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From: Brent Halversen
To: Stair, Kent T.; "Young, Roger Law Clerk (Michael Monastra)"; Janet Segell
Cc: aimee@kmlawsc.com; brandon@kmlawsc.com; Canaday, Jenifer L.; mark@kmlawsc.com; K. Michael Barfield; Sperry, Paul E.; Schmidt, Robin; D. Summers Clarke, II; Susan B. Hatch; Caroline Crisler. Leonard
Subject: RE: 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC
Date: Tuesday, March 23, 2021 7:17:00 PM

To be clear, your request "for leave of court," is a motion seeking court relief- and – it will be opposed. Again, any request of the court should come in proper channels through regular motion practice – not in tomorrow's status conference.

Brent

From: Stair, Kent T. <KStair@cskl.law>
Sent: Tuesday, March 23, 2021 7:14 PM
To: Brent Halversen <Brent@halversenlaw.com>; 'Young, Roger Law Clerk (Michael Monastra)' <ryounglc@sccourts.org>; Janet Segell <jsegell@barnwell-whaley.com>
Cc: aimee@kmlawsc.com; brandon@kmlawsc.com; Canaday, Jenifer L. <jcanaday@cskl.law>; mark@kmlawsc.com; K. Michael Barfield <mbarfield@barnwell-whaley.com>; Sperry, Paul E. <psperry@cskl.law>; Schmidt, Robin <rschmidt@cskl.law>; D. Summers Clarke, II <sclarke@barnwell-whaley.com>; Susan B. Hatch <shatch@barnwell-whaley.com>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: RE: 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

To be very clear, **I do not have a motion pending** that I will seek to argue tomorrow or upon which I expect there to be any "adjudication". **I am simply seeking leave of Court to file a motion** that will be heard, in due course and under conventional circumstances, at a later time. The reason(s) I am requesting leave to file the motion rather than just going ahead and filing it, are set forth in the "Request" I previously filed and sent to the Court. The only "ruling" I will seek tomorrow will be whether or not I can file the motion. If the answer is "yes", I will file a motion to be heard at a later date; if the answer is "no", I won't file anything further.

Thanks,
Kent

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Sent: Tuesday, March 23, 2021 6:07 PM
To: Stair, Kent T. <KStair@cskl.law>; 'Young, Roger Law Clerk (Michael Monastra)' <ryounglc@sccourts.org>; Janet Segell <jsegell@barnwell-whaley.com>
Cc: aimee@kmlawsc.com; brandon@kmlawsc.com; Canaday, Jenifer L. <jcanaday@cskl.law>; mark@kmlawsc.com; K. Michael Barfield <mbarfield@barnwell-whaley.com>; Sperry, Paul E. <psperry@cskl.law>; Schmidt, Robin <rschmidt@cskl.law>; D. Summers Clarke, II <sclarke@barnwell-whaley.com>; Susan B. Hatch <shatch@barnwell-whaley.com>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: RE: 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

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I am not prepared to argue/defend Mr. Stair's motion tomorrow. Of course, he is free to discuss pending motions, I just for the record am saying that no adjudication of Mr. Stair's motion should be decided tomorrow since we are just convening on this status conference. See everyone tomorrow.

Brent

From: Stair, Kent T. <KStair@cskl.law>
Sent: Tuesday, March 23, 2021 5:05 PM
To: 'Young, Roger Law Clerk (Michael Monastra)' <ryounglc@sccourts.org>; Janet Segell <jsegell@barnwell-whaley.com>
Cc: aimee@kmlawsc.com; brandon@kmlawsc.com; Brent Halversen <Brent@halversenlaw.com>; Canaday, Jenifer L. <jcanaday@cskl.law>; mark@kmlawsc.com; K. Michael Barfield <mbarfield@barnwell-whaley.com>; Sperry, Paul E. <psperry@cskl.law>; Schmidt, Robin <rschmidt@cskl.law>; D. Summers Clarke, II <sclarke@barnwell-whaley.com>; Susan B. Hatch <shatch@barnwell-whaley.com>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: RE: 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

I look forward to discussing all of the issues below with everyone at tomorrow's hearing. In advance of the hearing, I thought it would be helpful to bring two things to everyone's attention:

1. Prior to the prior status conference in this case (held 9/17/20), I filed and was prepared to discuss the attached Request for Leave to file Motion to Dismiss and Motion for Sanctions, but the Court's agenda that day did not include addressing such things. I would like to discuss it tomorrow and I wanted to alert everyone to that desire. Also, given the somewhat unusual nature of the "Request", I thought it worthwhile to provide the Court with a courtesy copy.
2. The second question raised below reminded me that I have not sought protection for my long-standing family vacation planned for September 11 – 21, 2021. I'm in the process of preparing a formal request for protection for this and other cases, but wanted to provide those dates to everyone to determine whether anyone will have an any objection to my protection during that period of time.

I will, of course, also be ready to discuss the other issues as they arise tomorrow. Again, I look forward to "seeing" everyone.

Kent Stair (counsel for Defendant, Glick/Boehm & Associates, Inc.)

From: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Sent: Tuesday, March 23, 2021 3:09 PM
To: Janet Segell <jsegell@barnwell-whaley.com>
Cc: aimee@kmlawsc.com; brandon@kmlawsc.com; brent@halversenlaw.com; Canaday, Jenifer L. <jcanaday@cskl.law>; Stair, Kent T. <KStair@cskl.law>; mark@kmlawsc.com; K. Michael Barfield

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<mbarfield@barnwell-whaley.com>; Sperry, Paul E. <psperry@cskl.law>; Schmidt, Robin <rschmidt@cskl.law>; D. Summers Clarke, II <sclarke@barnwell-whaley.com>; Susan B. Hatch <shatch@barnwell-whaley.com>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

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Good Afternoon,

In preparation for the status conference tomorrow, please be prepared to discuss the following topics:

Are there any Pending motions?
Do any parties have dates of protection?
Has the case been mediated?
Is Discovery complete?
Are you requesting a date certain?
Is the case ready for trial?
If no, why not?

The videoconference hearing in the above referenced matter is scheduled for Wednesday, March 24, 2021 at 10:00 am via WebEx Events virtual courtroom. Click the link listed below to access the hearing. You will be prompted to enter your first name, last name and email address. Once the information is entered, the microphone will be muted and you will enter the videoconference. If you would like to appear on screen and/or participate, click the Participants icon at the bottom of your screen. Then click the hand icon at the bottom right to "Raise" or "Lower" your hand. This will notify the court you wish to appear on screen. The courtroom will be open thirty minutes before the hearing. If you have questions and/or issues accessing the virtual courtroom please contact Cisco WebEx support: 1-866-229-3239.

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SCJB Virtual Court User Guides: Attorney Guide **and** General Public Guide

The link may be found on the court's website https://sccourts.org/calendar/.

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

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From: Janet Segell <jsegell@barnwell-whaley.com>
Sent: Tuesday, March 23, 2021 11:41 AM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: aimee@kmlawsc.com; brandon@kmlawsc.com; brent@halversenlaw.com; jcanaday@cskl.law; Janet Segell <jsegell@barnwell-whaley.com>; kstair@cskl.law; mark@kmlawsc.com; K. Michael Barfield <mbarfield@barnwell-whaley.com>; psperry@cskl.law; rschmidt@cskl.law; D. Summers Clarke, II <sclarke@barnwell-whaley.com>; Susan B. Hatch <shatch@barnwell-whaley.com>
Subject: FW: [EXT] 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

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Morning, Michael. Are we going forward with the status conference tomorrow at 10:00 AM?

From: K. Michael Barfield <mbarfield@barnwell-whaley.com>
Sent: Thursday, March 11, 2021 2:41 PM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: Brent Halversen <Brent@halversenlaw.com>; mark@kmlawsc.com; Stair, Kent T. <KStair@cskl.law>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: RE: [EXT] 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

I am available at that time.

Thanks.

Michael

From: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Sent: Thursday, March 11, 2021 2:40 PM
To: K. Michael Barfield <mbarfield@barnwell-whaley.com>
Cc: Brent Halversen <Brent@halversenlaw.com>; mark@kmlawsc.com; Stair, Kent T. <KStair@cskl.law>; Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: [EXT] 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC

Thank you, Mr. Barfield. Judge Young is available for a status conference via WebEx Wednesday, March 24, 2021 at 10:00 am. Does that work for all parties?

Michael A. Monastra
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From: K. Michael Barfield <mbarfield@barnwell-whaley.com>
Sent: Thursday, March 11, 2021 2:05 PM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: Brent Halversen <Brent@halversenlaw.com>; mark@kmlawsc.com; Stair, Kent T. <KStair@cskl.law>
Subject: Case 2016CP1003468- Charles Blanchard Construction Corp Inc VS 480 King Street LLC , defendant, et al added to Court Roster for period 2021-03-15 through 2021-03-19.

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Mr. Monastra,

This case arises out of the construction of a building on upper King Street. I represent the plaintiff, Blanchard Construction, who was the general contractor. The case began with the filing of a mechanic's lien by Blanchard against the owner, 480 King Street, LLC. 480 King then counter claimed, alleging deficiencies with the construction. 480 King sued the project architect, Glick Boehm and Associates in a separate action, but the two case have sense been completely consolidated.

The managing member of 480 King splits her time between Charleston and Ohio. However, at last word, she has spent the entire pandemic in Ohio. I will let her counsel, Brent Halverson, address how this may impact the logistics of bringing this case to trial.

The discovery process is nearly complete. However, the depositions of several witnesses have proven to be multi-day affairs. At this time, there are at least two key depositions that must be scheduled and completed before trial.

For my part, I believe a status conference would be beneficial to all to determine a timetable for bringing this matter to its conclusion.

Thank you.

Michael

K. MICHAEL BARFIELD

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

s/Jesse Sanchez
Jesse Sanchez (SC Bar No. 101906)
The Law Office of Jesse Sanchez, LLC 98
1⁄2 Broad Street, Suite B
Charleston, South Carolina 29401
(843) 814-8181
Attorney for Appellant

July 6, 2022
Charleston, South Carolina

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2021-001510

Charles Blanchard Construction Corp, Inc., Respondent,

v.

480 King Street, LLC, Defendant,

And

480 King Street, LLC Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

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

FINAL BRIEF OF APPELLANT

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez
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Attorney for the Appellant

Charleston, South Carolina
July 12, 2022

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN GRANTING RESPONDENT GLICK/BOEHM & ASSOCIATE, INC'S MOTION TO DISMISS WHERE RESPONDENT HAD PREVIOUSLY FAILED TO CONTEST THE SUFFICIENCY OF THE EXPERT WITNESS AFFIDAVIT WITHIN THE TIME FRAME SPECIFIED BY THE COURT?

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

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

STATEMENT OF THE CASE

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

opinion as to the standard of care for an architect.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> SECTION 15-36-100. Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.
> (**A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who**:
>
> (1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and
>
> (2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; **or**
>
> (b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
>
> (i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;
>
> (ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational

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

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

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

[Emphasis Added]

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

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

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

(Affidavit, R. p. 302, ¶ 10).

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

CONCLUSION

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

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Charles Blanchard Construction Corp, Inc., Respondent,

v.

480 King Street, LLC, Defendant,

And

480 King Street, LLC Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

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

CERTIFICATE OF COMPLIANCE

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

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And

480 King Street, LLC Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

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

FINAL REPLY BRIEF OF APPELLANT

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Reply to Respondent's Factual and Procedural Representations

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

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

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

Fourth, Respondent contention that it "acted promptly" and had no way of knowing in 2017, or several ensuing years, that Mr. Hackney "was not stating an opinion as to an architect's standard of care" is directly contradicted by the record and Respondent's own admissions. (Respondent's Brief, p. 5). As noted in Appellant's Brief, Respondent was made aware by the September 7, 2017 affidavit that Mr. Hackney was a licensed professional engineer with specialized knowledge and experience in providing *construction contract administration services*, and not an architect. (See 480 King's Memo in Opposition; R. pp. 225-231; and Hackney Affidavit, R. pp. 301-302). Further, Respondent specifically alleged that after reading Mr. Hackney's affidavit in November of 2017, it questioned whether Mr. Hackney was qualified to present an expert opinion in this case. (Motion to Dismiss, R. p. 197). Respondent further

alleged that it had "some questions as to the sufficiency of the affidavit [even] prior to Mr. Hackney's [Deposition] testimony." (Motion to Dismiss, R. p. 201, ¶ 11). Despite purporting to have said doubts and/or questions in November of 2017, Respondent failed to contest the sufficiency of the affidavit within the time period afforded by the circuit court. As noted in Appellant's Brief, Respondent did not even bother to hold Mr. Hackney's first deposition until over a year later in January of 2019 (See Motion to Dismiss, R. p. 197, at footnote 1). Thereafter, Respondent waited over one more year to file its Request for Leave to file a Motion to Dismiss on September 17, 2020. (R. p. 189). It then waited an additional nine months to file its Motion to Dismiss on June 28, 2021, having failed to obtain leave in the interim. (R. p. 195). There is absolutely no reason for Respondent's three-and-one-half year delay in contesting the sufficiency of Mr. Hackney's affidavit, which as discussed in Appellant's Brief and hereinabove, clearly meets the criteria set forth under S.C. Code § 15-36-100(A)(3).

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

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

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

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

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

Further, as noted in Appellant's Brief, the circuit court's order fails to provide any factual or legal basis for finding that Appellant's Breach of Contract and Breach of Warranty claims must be accompanied by an expert witness affidavit. S.C. Code § 15-36-100 is specifically titled, "Complaint in actions for damages alleging ***professional negligence***; contemporaneous affidavit of expert specifying ***negligent act*** or omission." (Emphasis added). The statute does not encompass actions for breach of contract or breach of warranty. In fact, the statute specifically limits application of the contemporaneous affidavit requirement to *professional negligence* claims that require specialized learning, noting, "The contemporaneous filing requirement of subsection (B) is ***not required*** to support a pleaded specification of negligence involving subject

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

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Id. (internal quotations omitted). The Court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App., 2003). See also, *Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 763 S.E.2d 200 (2014). Accordingly, it was error for the circuit court to dismiss Appellant's actions for Breach of Contract and Breach of Warranty, theories of law where a contemporaneous affidavit is not statutorily required. (See Appellant's Memo in Opposition, R. p. 232).

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

As set forth in Appellant's Brief and Memorandum in Opposition to Respondent GBA's Motion to Dismiss, Mr. Hackney, a professional engineer, meets the criteria for serving as an expert witness under S.C. Code § 15-36-100(A)(3), and is qualified to offer an expert opinion as

to GBA's performance of contract administration services, possessing the necessary scientific, technical, or specialized knowledge, and having performed the same type of services himself. (Appellant's Brief, pp. 10-12; Memo in Opposition, R. pp. 229-232; Affidavit, R. pp. 301-302).

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

> SECTION 15-36-100. Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.
>
> (**A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who**:
>
> (1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and
>
> (2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; **or**
>
> (b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
>
> (i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;
>
> (ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or
>
> (iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion;
>
> (**3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of**

> **the individual's study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert's credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert's credentials pursuant to subsection (E).**
>
> [Emphasis Added]

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

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

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

(Affidavit, ¶ 10, R. p. 302).

In the instant case, the Affidavit clearly satisfies SC Code §15-36-100(A)(3). Mr. Hackney satisfies the criteria for an "expert witness" under the statute as he can testify regarding the Respondent's performance of contract administration services. (See also Hearing Transcript, R. p. 292, line 24 to p. 296, line 4, addressing Mr. Hackney's qualifications under the statute). While Respondent can certainly try to attack Mr. Hackney's qualification at trial, he has met the threshold requirement set forth by the statute. It was error for the circuit court to hold that Appellant failed to file a proper affidavit in support of its claims pursuant to the statute.

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

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

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

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

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

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

CONCLUSION

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

Motion to dismiss and remand this case for a trial on the merits. The order should be reversed because 1) Respondent was time-barred from contesting the sufficiency of the affidavit under the circuit court's prior December 17, 2017 Order, 2) Appellant's Complaint asserts three separate and distinct claims, including claims for Breach of Contract and Breach of Warranties, which do not require a contemporaneous affidavit under the statute, 3) Appellant's Professional Negligence Claim involves Respondent's performance of Construction Contract Administration Services, and not merely architectural design services, 4) Mr. Hackney, a professional engineer, meets the criteria for serving as an expert witness under S.C. Code § 15-36-100(A)(3), and is qualified to offer an expert opinion as to Respondent's performance of Contract Administration Services, possessing the necessary scientific, technical, and/or specialized knowledge, and having performed the same type of services himself. Further, contrary to Respondent's contention, Appellant's arguments are clearly preserved, having been raised and ruled upon by the circuit court. And lastly, Respondent's contention that Mr. Hackney, a professional engineer is not qualified to opine as to construction administration services performed by an architect is contradicted by the very definitions for Engineer and Design Coordination.

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CERTIFICATE OF COMPLIANCE

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

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Glick/Boehm & Associates, Inc. is the Respondent

PROOF OF SERVICE

I, the undersigned, certify that I have served both the Final Brief of Appellant and the Final Reply Brief of Appellant on behalf of 480 King Street, LLC, this 12th day of July 2022 on all counsel of record via their AIS-designated email at the below email addresses. Pursuant to Rule 262(C)(3),

SCACR, and the Order of The Supreme Court of South Carolina, RE: Methods of Electronic Filing Under Rule 262 of the South Carolina Appellate Court Rules (as Amended May 6, 2022), a copy of the email to counsel is attached.

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CONSTRUCTION CORP., INC.

From: **Jesse Sanchez** jesse@jessesanchezlaw.com
Subject: Re: Charles Blanchard v. 480 King Street, LLC, Appellate Case No. 2021-001510
Date: July 12, 2022 at 1:27 PM
To: kstair@csvl.law, psperry@csvl.law, vgrosso@csvl.law
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Counsel,

For service, please find the attached Cover Letter, Final Brief of Appellant, and Final Reply Brief of Appellant for the above matter. All documents are being filed momentarily with the South Carolina Court of Appeals via U.S. Mail and OneDrive Electronic Submission.

Regards,

Jesse

On Wed, Jul 6, 2022 at 9:21 AM Jesse Sanchez <jesse@jessesanchezlaw.com> wrote:

> Counsel,
>
> For service, please find the attached Cover Letter and Record on Appeal for the above matter. All documents are being filed momentarily with the South Carolina Court of Appeals via U.S. Mail and OneDrive Electronic Submission.
>
> Regards,
>
> Jesse
>
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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
The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2021-001510
Case No. 2016-CP-10-03468

Charles Blanchard Construction Corp.,Inc., Respondent,

v.

480 King Street, LLC, Defendant,

And

480 King Street, LLC, Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

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

FINAL BRIEF OF RESPONDENT GLICK/BOEHM & ASSOCIATES, INC.

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July 26, 2022

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the Circuit Court erred in considering Respondent's Motion to Dismiss beyond a Court imposed filing deadline when Respondent promptly sought leave to file its Motion when it became necessary and Appellant consented to Respondent's filing beyond the deadline.**

2. **Whether the Circuit Court erred in dismissing all causes of action brought against Respondent when they each resound in Respondent's performance as an architect.**

3. **Whether the Circuit Court erred in finding Appellant's expert affidavit insufficient under Section 15-36-100 of the South Carolina Code, which permits experts to opine only as to the standard of care of a professional in their specific field.**

STATEMENT OF THE CASE

This case involves the design and construction of a stair tower (the "tower") located at 480 King Street, in Charleston, South Carolina, which provides elevator access to tenants of two apartment buildings. 480 King Street, LLC ("Appellant"), the building's owner, engaged the architectural firm of Glick/Boehm & Associates, Inc. ("Respondent") to serve as the "architect of record" for the construction of the stair tower. (Compl. at ¶ 3, R. at p. 70). Charles Blanchard Construction Corp., Inc ("Blanchard") constructed the stair tower. (Compl. at ¶ 6, R. at p. 71). Following numerous delays and issues with the construction of the tower, on July 6, 2016, Blanchard filed suit against Appellant, asserting claims related to non-payment. (App. Br. at p. 2). Appellant then asserted counterclaims against Blanchard, alleging Blanchard's work was defective. (App. Br. at p. 2). On June 26, 2017, Appellant filed a separate case against Respondent,[1] including Breach of Contract, Breach of Warranty, and Negligence, all of which were founded upon the Architect's alleged negligent performance of services under its Professional Services Agreement with Appellant. (Compl. at ¶¶ 5-29, R. at pp. 71-79).

In actions for damages alleging negligence against certain professionals, including Architects, the Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, et. seq. (the "Act") applies. *See* S.C. Code Ann. §§ 15-36-100(B) & -100(G)(6) & (17). Here, because Respondent is an architectural firm organized and licensed under the laws of South Carolina, "the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act and the factual basis for each claim . . . ." S.C. Code Ann. § 15-36-100(B).

[1] Following a Motion to Consolidate, filed by Appellant, the two separate cases were consolidated via Form 4 Order on August 24, 2018. (Order dated August 24, 2018, R. at p. 91).

If a plaintiff fails to comply with the Act's affidavit requirement, the complaint "is subject to dismissal for failure to state a claim." S.C. Code Ann. § 15-36-100(C)(1). Appellant did not submit an affidavit with the initial Complaint filed against Respondent. Apparently realizing this critical omission, on August 10, 2017, Appellant filed a Motion for Extension of Time to file the required Affidavit by representing that Appellant's retained expert was unable to review sufficient documents prior to filing the Complaint to properly furnish an affidavit. (Mot. dated Aug. 10, 2017, R. at p. 97). Respondent in turn filed a timely Motion to Dismiss for failure to comply with the affidavit requirement on August 29, 2017. (Mot. dated August 29, 2017, R. at p. 100). On November 17, 2017, the Honorable J.C. Nicholson, Jr., conducted a hearing on these motions and thereafter issued an Order on December 7, 2017,[2] granting Appellant's Motion for Extension of Time and denying Respondent's Motion to Dismiss. (Order dated Dec. 7, 2017, R. at p. 88). In his Order, Judge Nicholson allowed Appellant to "file [a supporting affidavit] within ten days of the date of this Order," and further provided that "[u]pon the filing of the Affidavit by this date, the Appellant will have been deemed to be in compliance with the requirements of S.C. Code §15-36-100(B). Respondent will then have 30 days from the date of the filing of the Affidavit to file any motion contesting the sufficiency of the Affidavit." (Order dated Dec. 7, 2017 at p. 3, R. at p. 90).

On November 20, 2017, Appellant filed an affidavit from Louis Hackney, P.E., REWC, RRC, CDT, LEED AP, Appellant's prior-retained expert (the "Affidavit"). In the Affidavit, Mr. Hackney suggested he was qualified to testify as to an Architect's "standard of care," stating: "I have experience investigating and assessing the design and construction of commercial buildings in Charleston, South Carolina and my investigation of the 480 King Stair Tower is ongoing . . . I

[2] While the Circuit Court's Order was entered on December 7, 2017, it is dated November 27, 2017.

further reviewed the architectural drawings . . . prepared by [Respondent].” (Aff. of Hackney at p. 1, R. at p. 301). Mr. Hackney proceeded to opine that Respondent breached the “standard of care” of an Architect, further stating: “. . . it is my professional opinion, to a reasonable degree of professional certainty that the Architect [Respondent] deviated from the standard of care ….” (Aff. of Hackney at p. 2, R. at p. 302). On its face, through Mr. Hackney’s representations, the Affidavit appeared to meet the requirements of the Act, and absent any information indicating otherwise, Respondent did not immediately contest the Affidavit’s contents.

As the case progressed, Mr. Hackney was deposed three times, January 28, 2019, August 27, 2020, and September 4, 2020, and on these occasions, Counsel questioned Mr. Hackney twice regarding his qualifications. During Mr. Hackney’s August 27, 2020 deposition, the following exchange occurred:

> Q ***You do not intend in this case to offer a professional opinion about the standard of care of an architect, do you?***
>
> A ***No.***
>
> Q That’s something that would be beyond your qualifications?
>
> A I don’t believe so, but I have never done it in the past. I’ve looked at enough buildings, I have looked at enough plans, and seen enough issues to feel like I could provide an opinion about that but I have -- to this point, I have not provided one.
>
> Q *And you don’t intend to start in this case?*
>
> A *No*, not at this time.

(Mot. dated Jun. 28, 2021, Ex. 3 at pp. 208-09 ll. 15-2, R. at pp. 210-211) (emphasis added).

When further queried in his September 4, 2020 deposition, as to whether he would be offering an opinion as to the Architect’s standard of his care, Mr. Hackney testified:

> Q ***Do you recall telling me when we were together last that you were not going to offer an opinion about the standard of care of the architect in this case?***

A ***Yes.***

Q ***Does that remain your intention?***

A ***Yes***. I feel comfortable talking about individual details if questioned about them, and I feel comfortable talking about construction phase services, but *not specifically about the architect's standard of care.*

Q In relation to either of those things, correct?

A Correct. I'll talk about -- I feel comfortable as a design professional talking about details specifically and/or lack of details as a design professional but *not specifically to the standard of care of an architect.*

Q And, in fact, *without addressing the standard of care of the architect* in this case, right?

A *Correct.*

***

Q. When he asked you to sign the Affidavit, did you tell him that you would *not offer an opinion about the standard of care of an architect in the case?*

A *I don't recall the specific conversations about standard of care* at that point in time.

Q ***By signing the Affidavit, though, you did not intend to offer an opinion about the standard of care of an architect, did you?***

A ***No.*** The Affidavit says, and I talked about it before, that pertaining to the construction phase services and construction administration services that were provided.

Q But when you talked about those things in your Affidavit, *you did not intend to state an opinion about the standard of care of an architect performing those services, did you?*

A A *better word there* than a professional performing -- *a design professional* performing the role of a -- during construction phase services.

Q You are an engineer?

A I am.

Q Mr. Glick is an architect?

A Correct.

Q *Glick/Boehm are architects and not engineers?*

A *Correct.*

Q Getting back to question then is: *You did not intend this Affidavit to contradict your intention against offering an opinion of the standard of care related to the architect, did you?*

A My intent -- again, I know we're parsing words a little bit. My intent is that I feel comfortable talking about the standard of care that a professional would provide in either giving or completing construction administration services, whether that be an architect or an engineer. Those services are similar across the board of professionals, and I feel confident and comfortable in talking about them.

Q ***So your intention is to state an opinion of the standard of care of a professional but not an architect, correct?***

A ***That's probably a better way to say it. Yes.***

(Mot. dated Jun. 28, 2021, Ex. 4 at pp. 278-79 ll. 17-12; Ex. 5 at pp. 282-84 ll. 22-13, R. at pp. 213-214; R. at pp. 216-218) (emphasis added). In sum, Mr. Hackney admitted on multiple occasions that he was not intending to state, nor was he stating, any opinions that Respondent Architect had violated the Architect's standard of care, and that he was not qualified to express an opinion as to the standard of care of an architectural firm, thereby contradicting his Affidavit.

Once Respondent became aware that Mr. Hackney was not stating an opinion as to an Architect's standard of care as previously represented, Respondent promptly requested leave to file a renewed Motion to Dismiss. (Req. for Leave to File Mot. to Dismiss dated Sept. 17, 2020, R. at p. 189). Respondent's Request remained pending until a status conference was scheduled for March 24, 2021. One day prior to the Circuit Court's March 24, 2021 status conference, counsel for Appellant consented to Respondent filing a renewed Motion to Dismiss without the necessity of leave of court. (E-mail from Stair to Circuit Court and All Counsel of Record dated March 23, 2021, R. at p. 304). Therefore, with Appellant's consent, on June 28, 2021, Respondent filed a

second Motion to Dismiss on the basis that Appellant failed to file a proper expert affidavit; Respondent now had clear confirmation from Mr. Hackney's testimony that he could not and would not opine as to the standard of care of an Architect. (Motion dated Jun. 28, 2021, R. at p. 195). Appellant filed a response in opposition on November 19, 2021. (Resp. in Opp., R. at p. 225).

The Circuit Court held a hearing on Respondent's Motion on December 2, 2021. The Circuit Court heard arguments from both Appellant and Respondent. The Circuit Court stated:

> I mean, there's a reason the legislature laid out specific professions for which you must submit an affidavit stating the deviation from the standard of care **from that particular profession**.
>
> ***
>
> . . . respectfully, I have to go back to legislative intent. I don't get to, you know, legislate from the bench, I have to go by what's in the black and white statute.
>
> ***
>
> . . . [the Act] clearly delineates profession. And from there under that professional umbrella, then someone can speak to whether or not someone deviated the standard of care.
>
> ***
>
> I'm granting the motion to dismiss. I think that allowing [Mr. Hackney] to testify as to whether or not an architect reaches the standard of care, with any job that architect reformed, it's [sic] frankly flies in the face of the statute.

(Hearing Tr. dated Dec. 2, 2021 at p.15, ll. 20-23; p. 21 ll. 5-9; 11-14; 22-25; R. at p. 292; R. at p. 298) (emphasis added).

Via written Order (the "Order") dated December 16, 2021, the Circuit Court granted Respondent's Motion to Dismiss. (Order dated Dec. 16, 2021, R. at p. 92). The Circuit Court held that because Respondent is an architectural firm and Mr. Hackney's experience mostly lies in professional engineering, not architecture, Mr. Hackney was not qualified to opine as to

Respondent's performance in this matter, and therefore Appellant failed to satisfy the Act's affidavit requirement. (Order dated Dec. 16, 2021 at pp. 2-3, R. at pp. 93-94) ("[T]he Defendant in this case is an architect and its services must be judged against the standard of care of an Architect."). Accordingly, the Circuit Court dismissed all of Appellant's claims against Respondent, not just Appellant's claim for professional negligence, with prejudice. Appellant did not file a motion under South Carolina Rule of Civil Procedure Rule 59(e) contesting the Circuit Court's ruling. This appeal followed.

STANDARD OF REVIEW

The sound ruling of the trial court will not be overturned on appeal unless the trial court abused its discretion in rendering its ruling. *Blue Star Rental & Sales, Inc. v. Ridge Env't, LLC,* No. 2014-MO-048, 2014 WL 6977616, at *1 (S.C. Dec. 10, 2014) ("The decision to dismiss a case is within the purview of the trial court and will not be disturbed absent an abuse of discretion.") Generally, "[a]n abuse of discretion occurs where the trial court is controlled by an error of law or where the trial court's order is based on factual conclusions without evidentiary support." *Zabinski v. Bright Acres Assocs*., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). Specifically, as to questions about expert witnesses, "[t]he qualification of expert witnesses and the admissibility of their testimony is largely within the discretion of the trial court." *Walker v. The Bluffs Apartments*, 324 S.C. 350, 353, 477 S.E.2d 472, 473 (Ct. App. 1996).

ARGUMENT

I. WHETHER THE CIRCUIT COURT ERRED IN CONSIDERING RESPONDENT'S MOTION TO DISMISS BEYOND A COURT IMPOSED FILING DEADLINE WHEN RESPONDENT PROMPTLY SOUGHT LEAVE TO FILE ITS MOTION WHEN IT BECAME NECESSARY AND APPELLANT CONSENTED TO RESPONDENT'S FILING BEYOND THE DEADLINE.

Appellant asserts that Respondent was "time-barred" from challenging the sufficiency of Mr. Hackney's affidavit due to a court-imposed deadline. However, good cause existed for Respondent to seek leave to file a second Motion beyond that deadline in light of Mr. Hackney's testimony which effectively rendered his Affidavit invalid. Furthermore, Appellant consented to the post-deadline filing.

Respondent learned during Mr. Hackney's deposition that Appellant's sole expert tapped to opine as to the standard of care of an Architect was unqualified despite the representations in the Affidavit to the contrary and that, in any event, the expert expressly acknowledged that he was not stating any opinion as to the standard of care of an Architect. (Mot. dated Jun. 28, 2021 at pp. 4-5, R. at pp. 198-199). Unfortunately, Mr. Hackney's deposition occurred almost three years after the court-imposed deadline passed. Notwithstanding, Respondent acted promptly and filed its Request for Leave to file its second Motion to Dismiss just three weeks after Mr. Hackney's final deposition concluded. Prior to the court granting Respondent's requested leave, Appellant's counsel acquiesced to Respondent filing a second Motion to Dismiss. (E-mail from Stair to Circuit Court and All Counsel of Record dated March 23, 2021, R. at p. 304). Counsel for Appellant even addressed this consent at the hearing on Respondent's Motion to Dismiss, stating: "You'd look at me like I had three heads on. So I said, Ken [sic] you can file whatever motion you want. Okay. [But] I don't consent to the relief you're talking about." (Hearing Tr. dated Dec. 2, 2021 at p. 20 ll. 2-5, R. at p. 297). As such, Appellant has waived any argument that Respondent missed the court-created deadline to object to Appellant's Affidavit.

Furthermore, Respondent should have the right to contest the substance of Mr. Hackney's Affidavit as a matter of public policy. "South Carolina's policy favor[s] the disposition of issues their merits rather than on technicalities." *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506,

511, 548 S.E.2d 223, 226 (Ct. App. 2001); *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986) ("We favor trial of issues on merit over securing judgment by slight technicalities."); *Smith v. Kelso*, No. 2:20-CV-0180-DCN, 2020 WL 3964806, at *4 (D.S.C. July 13, 2020) ("[T]he court encourages the parties to resolve the issue of service amicably, understanding that technicality-driven arguments devoid of substantive meaning will win no favor with this court."). It is important to note that § 15-36-100 is contained within South Carolina's Frivolous Proceedings Act, and the affidavit requirement is an important way to keep such frivolous proceedings out of our courts. The Circuit Court's evaluation of the merits of Mr. Hackney's affidavit is also consistent with its role as gatekeeper and evaluators of expert qualifications. *Walker*, 324 S.C. at 353, 477 S.E.2d at 473. It is also well-settled that parties may challenge the qualifications of expert witnesses and their affidavits. *See*, *e.g.*, *Ranucci v. Crain*, 409 S.C. 493, 508, 769 S.E.2d 189, 196 (2014) (stating that a party may challenge the sufficiency of an expert affidavit where there is a "factual basis in the record" to contest the expert's qualifications of the content of the affidavit); *State v. Franks*, 432 S.C. 58, 75, 849 S.E.2d 580, 589 (2020)("Courts are often presented with challenges [to experts'] qualifications and reliability.").

Finally, and perhaps most importantly, Appellant does not show, or even suggest, the existence of a statutory deadline or any time-barring rule established by any appellate court. Instead, Appellant quotes from a trial court Order that was permissive, but not prohibitive, in nature. Significantly, it was the *same* Court in the *same* case (albeit different judges) which entertained - and rejected - Appellant's argument that Respondent's Motion should be time-barred. The Circuit Court did not abuse its discretion in deciding Respondent's second Motion on the merits at the moment in litigation in which it did. The Circuit Court's Order was therefore based on the

substance of Respondent's argument, and resulted in a meaningful, fair, and informed decision, which should be upheld on appeal.

II. WHETHER THE CIRCUIT COURT ERRED IN DISMISSING ALL CAUSES OF ACTION BROUGHT AGAINST RESPONDENT WHEN THEY EACH RESOUND IN RESPONDENT'S PERFORMANCE AS AN ARCHITECT.

Appellant asserts that the Circuit Court erred in dismissing all "non-negligence based" causes of action against Respondent because the Act only applies to situations where professional negligence is alleged. Much of Appellant's argument, including the dismissal of all claims against the Respondent, is predicated on unpreserved issues. For an issue or an argument to be properly preserved for appellate review, it is well settled that it must have been raised to and ruled upon by the trial court. *See Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). Simply, "[a]n issue that was not preserved for review should not be addressed by the Court of Appeals …." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Furthermore, in situations where it is not clear whether issues were raised or ruled upon, courts will find that those issues are not preserved. *See Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("At a minimum, issue preservation requires that an issue be raised and ruled upon by the trial judge. The issue must be sufficiently clear to being into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.") (internal citations omitted); *Carolina First Bank v. Ashley Tower, LP*, 2005 WL 7084806 at *2 (Ct. App. Nov. 21, 2005) ("[T]here is no way for this court to determine if the issues asserted on appeal have been raised to and ruled upon by the trial court. As such, we find none of the issues are preserved for our review.").

Appellant states that the Circuit Court erred in "finding that Appellant's claims against Respondent . . . are all based upon Respondent's alleged negligent performance . . . ." (App. Br. at p. 8). In its Response in Opposition to Respondent's Motion to Dismiss, Appellant stated:

> Finally, [Respondent's] motion made no mention that [Appellant] has lodged breach of contract and warranty claims against [Respondent] as [Appellant] and [Respondent] were operating under a contract to perform contract administration services. The Court needs no authority for the proposition that an Affidavit of an expert witness is not needed to make a breach of contract or warranty claim. Accordingly, there is absolutely no basis to dismiss these counts either.

(Resp. in Opp. to Motion to Dismiss at p. 9, R. at p. 232). Notably, Appellant failed to argue with any legal support or thought that it would be error to dismiss Appellant's other claims against Respondent on the premise that they also fall within the Act's requirements of a supporting Affidavit. In the Circuit Court's Order granting Respondent's Motion to Dismiss, the Circuit Court briefly decided this issue: "[i]n its Motion, [Respondent] contends that the claims asserted against it by Plaintiff are all based upon its alleged negligent performance of professional services as an Architect and that Plaintiff failed to file a proper Affidavit in support of those claims … the Court agrees … and … grants the Motion." (Order dated Dec. 16, 2021 at p. 2, R. at p. 93). Appellant did not file a Rule 59(e) motion challenging this finding.

In addition to Appellant's negligence claim, Appellant brought claims of Breach of Contract and Breach of Warranty. Appellant asserts that those are separate claims which do not require a supporting affidavit. (App. Br. at pp. 8-9). Nonetheless, Appellant did not clearly raise the issue of whether issues and claims falling under the umbrella of, and arising out of a negligence cause of action, should not fall under the Act's purview, and accordingly whether they should not be dismissed. Because Appellant did not clearly raise this issue to the Circuit Court, either in its Response or in a Rule 59 motion, this Court cannot consider Appellant's arguments to that effect.

Even assuming Appellant's unpreserved arguments were maintained for appeal, Appellant's arguments would nonetheless fail. Based on the plain language of the Act, failure to file an expert affidavit with the Complaint necessitates dismissal of the Complaint as a whole. The

Act dictates that "if an affidavit is not filed . . . and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, ***the complaint*** *is subject to dismissal for failure to state a claim.*" S.C. Code § 15-36-100(C)(1) (emphasis added).

Here, it is undisputed that Appellant brought a negligence claim against Respondent along with claims for Breach of Contract and Breach of Warranty that were each based upon the same alleged negligent performance of professional architectural services. The Act provides the sanction of dismissal of "*the complaint*" when there is non-compliance with its terms. The Act's choice of words here is notable – the Act does not reference dismissal of just negligence causes of action, and instead chooses to reference the "complaint" as a whole. The Act's text conveys clear meaning and must be respected. As the Supreme Court has explained:

> Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature."

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (internal citations omitted). Section 15-36-100's meaning is clear and must be respected, and the Complaint must be dismissed as a whole.

Additionally, all of Appellant's causes of action against Respondent are *rooted* in allegations that Respondent was negligent in the performance of its duties as an architectural firm and as the "architect of record," even if Appellant did not caption its allegations as such or now attempts to characterize Respondent's work on the tower as not being that of an Architect. The Circuit Court explicitly found that Respondent is an Architect and Mr. Hackney is a Professional

Engineer and that those two professions are distinct and that Respondent's work must "be judged against the standard of care of an architect." (Order dated Dec. 16, 2021 at p. 2, R. at p. 93). These important findings of the Circuit Court cannot be disturbed now on appeal. *See City of Chester v. Addison*, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981) ("[A]ppellate courts will be bound by such findings where there has been conflicting evidence or where the findings are supported by evidence and not clearly wrong or controlled by error of law.").

South Carolina courts routinely hold that claims arising under professional negligence, while not plead explicitly as "professional negligence," still fall under § 15-36-100's purview. *See, e.g., H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.*, 405 S.C. 469, 748 S.E.2d 72 (Ct. App. 2013) (finding that a plaintiff's claim for breach of contract against its closing attorney was actually a claim for professional negligence and that plaintiff was required to comply with 15-36-100, even though it did not explicitly plead professional negligence); *see also David v. Savage*, No. 2:19-CV-3139-SAL, 2020 WL 12618896, at *7 (D.S.C. July 6, 2020) (applying South Carolina law) ("Because this court concludes *that all of Plaintiff's claims stem from and relate to the same factual allegations of legal malpractice,* it must determine whether the affidavit requirement in S.C. Code Ann. § 15-36-100 applies to the negligence claim. It finds that it does.") (emphasis added); *In re Steinmetz*, No. ADV 10-80177, 2011 WL 4543894 at *7 (Bankr. D.S.C. Mar. 18, 2011) (applying South Carolina law) ("Since *the **essence** of Plaintiffs' Fifth Cause of Action is a claim for professional negligence* against a professional licensed by the state of South Carolina, South Carolina law requires that Plaintiffs file an affidavit of an expert witness.") (emphasis added).

Appellant asserted that Respondent breached its contract with Appellant by failing to "properly design and prepare specifications for the stair tower." (Compl. at ¶ 9, R. at pp. 72-73).

Additionally, Appellant alleges that Respondent breached its contract by "[f]ailing to act as a reasonably prudent design professional would act under similar circumstances." (Compl. at ¶ 9,R. at pp. 72-73). Regarding Appellant's claim for Breach of Warranty, Appellant posits that Respondent "breached [its] express and implied warranties by failing to design the stair tower free from defects and in compliance with applicable building codes and industry standards." (Compl. at ¶ 20, R. at p. 75). Whether Respondent failed to act as a "reasonably prudent design professional," whether Respondent "properly" created specifications, and whether Respondent furnished plans "free from defects," necessarily hinges on whether Respondent's architectural scope of work met the professional standard of care. It is axiomatic that an Architect's breach of contract or breach of an implied warranty requires a showing of how an Architect failed in the performance of his or her duties. Therefore, though stated in different ways in an attempt to fit the framework of multiple causes of action, both Appellant's claims for Breach of Contract and Breach of Warranty nonetheless require the support of an expert affidavit under the Act.

Furthermore, Appellant attempts to circumvent the substantive affidavit requirement by asserting that Respondent, an architectural firm, "agreed to provide professional architectural and ***engineering*** services" and "performed construction contract administration services, and not merely architectural design services." (App. Br. at p. 9) (emphasis in original). However, this is not consistent with Appellant's previous characterizations of Respondent and its work on the project subject to this appeal. For instance, in Appellant's Complaint, Appellant states that Respondent "served as the ***architect of record*** for the stair tower located at 480 King Street … agreeing to ***provide professional architectural services*** for the design of the stair tower, specifically including, but not limited to, the issuance of plans and specifications for the construction of the stair tower." (Compl. at ¶ 3, R. at p. 70) (emphasis added).

Accordingly, the Circuit Court was correct in dismissing Appellant's Complaint against Respondent in its entirety, as each of Appellant's causes of action against Respondent are integrally related to Respondent's duties as an Architect and fit squarely within the Act's purview.

III. WHETHER THE CIRCUIT COURT ERRED IN FINDING APPELLANT'S EXPERT AFFIDAVIT INSUFFICIENT UNDER SECTION 15-36-100 OF THE SOUTH CAROLINA CODE, WHICH PERMITS EXPERTS TO OPINE ONLY AS TO THE STANDARD OF CARE OF A PROFESSIONAL IN THEIR SPECIFIC FIELD.

Appellant again attempts to circumvent the Act's affidavit requirement by stating that "South Carolina does not require that one must have an affidavit from *an architect* in order *to sue an architect*" and instead appears to argue that any professional with experience relevant "to the case" in general would suffice. (App. Br. at pp. 10-11) (emphasis added). To the contrary, law in this State clearly provides that in order to satisfy the affidavit filing requirement in the Act, an expert must provide relevant testimony on the performance of an allegedly negligent professional in their *specific* field. The Act provides parameters for what experts are qualified to opine:

> (A) As used in this section, "expert witness" means an expert *who is qualified as to the acceptable conduct of the professional whose conduct is at issue* and who:
>
> > (1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and
> >
> > (2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or
> >
> > (b) has actual professional knowledge and experience *in the area of practice or specialty in which the opinion is to be given* as the result of having been regularly engaged in . . . .

§15-36-100(A)(1-2(b)). Additionally, courts in this State overwhelmingly agree that relevant professionals must opine as to the alleged negligence of other professionals. *See e.g., Doe v. Am. Red Cross Blood Servs.,* 297 S.C. 430, 435, 377 S.E .2d 323, 326 (1989) ("[T]he standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices ***in his profession***.") (emphasis added); *Pittman v. Stevens*, 364 S.C. 337, 613 S.E.2d 378 (2005) (citing *Doe*); 18 S.C. Jur. Negligence § 58 ("In a professional negligence cause of action, the standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices in his profession, and if the plaintiff is unable to demonstrate that the professional failed to conform to the generally recognized and accepted practices in his profession, then the professional cannot be found liable as a matter of law."); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 474, 570 S.E.2d 197, 204 (Ct. App. 2002) ("Without expert testimony, a jury cannot determine whether [defendant] was negligent when it relied on [] studies in designing the project, because there is no way for a jury to compare [defendant's] actions *with the actions other similarly situated engineering firms* would have taken when confronted with the situation.") (emphasis added); *Walker*, 324 S.C. at 354, 477 S.E.2d at 473 ("Although [a licensed residential builder] may be versed in building codes and in the inspection of buildings, ***there is no evidence in the record that she has any architectural experience or training . . . [t]he trial court did not abuse its discretion, therefore, in finding that Lain could not properly testify as to an architect's standard of care.***) (emphasis added).

Because this case involves the performance of the "architect of record," it follows that the only expert qualified to opine as to an Architect's performance would be an Architect, as only an Architect would have "actual professional knowledge and experience *in the area of practice or*

specialty in which the opinion is to be given." S.C. Code Ann. § 15-36-100(A)(2)(b). Mr. Hackney, Appellant's sole affiant to offer an opinion on Respondent's standard of care, admitted that he is a Professional Engineer and not an Architect in his deposition testimony. (Mot. dated Jun. 28, 2021 Ex. 5 at pp. 282-84 ll. 22-13, R. at pp. 216-218). Mr. Hackney also refers to himself as a "design professional." (Mot. dated Jun. 28, 2021, Ex. 4 at pp. 278-79 ll. 17-12, R. at pp. 213-214). The universal term "design professional" is not referenced in the Act; instead, the Act carefully distinguishes types of professionals by practice area, including Architects. Furthermore, Professional Engineers are also covered by Act, but are distinguished as separate professionals. Architects and Professional Engineers receive different educational degrees, are licensed and regulated by separate registration boards, and otherwise are, simply stated, different professions. Therefore, the Circuit Court was correct in holding that the Affidavit was insufficient as it was not prepared by a professional architect.

Finally, beyond the fact that the expert was not a member of the profession he sought to criticize, this particular "expert" expressly stated, on multiple occasions, that he did not intend to express, nor was he expressing, an opinion concerning the standard of care of the profession he sought to criticize. For this reason and the reasons noted above, the trial judge was not in error in dismissing this Complaint.

CONCLUSION

South Carolina Code Section 15-36-100 requires that when bringing negligence causes of action against specific professionals, including Architects, the claimant must furnish a supporting affidavit from an expert in that same field detailing at least one allegation of professional negligence – necessarily utilizing the standard of care applicable to the professional field of the defendant being sued. Failure to comply with this requirement can result in dismissal of the

claimant's complaint as a whole. Distilled down to its purest form, Appellant did not furnish an affidavit of an Architect with its Complaint, which details allegations of professional negligence against Respondent, an architectural firm. Accordingly, the decision of the Circuit Court must be affirmed.

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Charleston, South Carolina
July 26, 2022

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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
The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2021-001510
Case No. 2016-CP-10-03468

Charles Blanchard Construction Corp. Inc., Respondent,

v.

480 King Street, LLC, Defendant,

And

480 King Street, LLC, Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

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

CERTIFICATE OF COMPLIANCE

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

[Signature page to follow]

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Charles Blanchard Construction Corp., Inc., Respondent,

v.

480 King Street, LLC, Defendant,

And

480 King Street, LLC, Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

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

PROOF OF SERVICE

I, Kent T. Stair, certify that I have served *Respondent's Final Brief* on Appellant 480 King Street, LLC, by e-mailing a copy to their attorney of record, Jesse Sanchez, at jesse@jessesanchezlaw.com on July 26, 2022.

[Signature page to follow]

Charleston, South Carolina
July 26, 2022

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The South Carolina Court of Appeals

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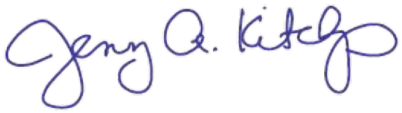
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Re: Charles Blanchard v. 480 King Street, LLC
Appellate Case No. 2021-001510

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,



CLERK

cc: The Honorable Jennifer B. McCoy

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles Blanchard Construction Corp., Inc., Respondent,

v.

480 King Street, LLC, Defendant,

And

480 King Street, LLC, Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

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

Appellate Case No. 2021-001510

Appeal From Charleston County
Jennifer B. McCoy, Circuit Court Judge

Opinion No. 6060
Heard December 5, 2023 – Filed May 22, 2024

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jesse Sanchez, of The Law Office of Jesse Sanchez, of

Mount Pleasant, and Brent Souther Halversen, of Halversen & Halversen, LLC, of Mount Pleasant, both for Appellant.

Kent Taylor Stair, Paul Eliot Sperry, and Jordan N. Teich, all of Copeland, Stair, Valz & Lovell, LLP, of Charleston, for Respondent.

LOCKEMY, A.J.: 480 King Street, LLC (480 King), appeals a circuit court order dismissing its action against Glick/Boehm & Associates, Inc. (GBA) with prejudice on the ground that 480 King failed to provide an affidavit in support of its claims as required by section 15-36-100 of the South Carolina Code (Supp. 2023). We affirm in part, reverse in part, and remand.

On June 26, 2017, 480 King filed an action against GBA, the architect of record for a construction project on property owned by 480 King. In its complaint, 480 King alleged claims for breach of contract, breach of warranty, and negligence arising from GBA's performance. Pursuant to section 15-36-100(B), 480 King was required to file with its complaint "an affidavit of an expert witness . . . specify[ing] at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." 480 King did not submit such an affidavit either with its complaint or within the forty-five-day grace period provided in section 15-36-100(C)(1). Nevertheless, on November 17, 2017, Circuit Court Judge J. C. Nicholson signed an order extending the deadline for 480 King to file the required affidavit to November 27, 2017, and further stated that "[u]pon filing of the affidavit by this date, [480 King] will have been deemed to be in compliance with the requirements of [section 15-36-100(B)]." Judge Nicholson also gave GBA thirty days from the date of the filing of the affidavit to file a motion contesting its sufficiency.

480 King filed an affidavit from its retained expert on November 20, 2017, and GBA did not move to challenge its sufficiency within thirty days of its filing. In his affidavit, 480 King's expert stated he was a professional engineer; he held registrations in South Carolina, North Carolina, Florida, Louisiana, Ohio, and Mississippi; and he was actively investigating the project giving rise to 480 King's action against GBA.

As discovery in the case progressed, the expert gave multiple depositions. In these depositions, he indicated he did not intend to offer a professional opinion about the

standard of care applicable to architects and did not feel "comfortable" talking "specifically about the architect's standard of care." He testified he felt "comfortable talking about the standard of care that a professional would provide in either giving or completing construction administration services, whether that be an architect or an engineer" and explained "[t]hose services are similar across the board of professionals."

On June 28, 2021, GBA moved to dismiss 480 King's lawsuit pursuant to Rule 12(b)(6), SCRCP, on the ground that 480 King's retained expert was not qualified to give an opinion about the standard of care applicable to an architect. In its written opposition and at the hearing before Circuit Court Judge Jennifer B. McCoy, 480 King argued GBA's motion was untimely pursuant to the terms of Judge Nicholson's order. 480 King clarified that the expert stated that he could discuss the standard of care applicable to construction administration services provided by either a professional engineer or architect because of similarities between the two professions. Judge McCoy stated that, although she understood 480 King's "logic," she had "to go back to [the] legislative intent" behind section 15-36-100. Judge McCoy stated she believed allowing the expert to testify "as to whether or not an architect [breaches a] standard of care" would "fl[y] in the face of the statute." She explained she understood "sometimes duties overlap between professions" but that allowing this expert to testify would not comport with South Carolina law.

On December 16, 2021, the circuit court dismissed 480 King's action against GBA, finding 480 King failed to present an affidavit in support of its claims as required by section 15-36-100. The circuit court ruled the expert's "failure to express any opinion against [GBA] in terms of the standard of care of an [a]rchitect" and his acknowledgment that he did not intend to offer an opinion, professional or otherwise, about the standard of care of an architect, warranted a finding that 480 King "failed to present an affidavit in support of the claims against [GBA] as required by [section 15-36-100]"; therefore, GBA's motion to dismiss "must be granted."

480 King argues Judge McCoy's order ignores that 480 King's complaint asserts causes of action against GBA in both tort and in contract, and thus some of its claims were exempt from the affidavit requirement of 15-36-100. 480 King asserts the circuit court erred in holding all of its causes of action were based on GBA's allegedly negligent performance of professional services as an architect. We find that if all of the claims included in the complaint were grounded in professional negligence and the affidavit failed to meet the requirements of section 15-36-100,

the circuit court would not have erred in dismissing the entire complaint. *See e.g., H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co*., 405 S.C. 469, 748 S.E.2d 72 (Ct. App. 2013) (holding circuit court properly granted summary judgment on behalf of a closing attorney being sued by a plaintiff claiming breach of contract because professional negligence claims were subject to section 15-36-100's affidavit requirement; however, triable issues of fact remained as to existence of oral contract related to title insurance). But 480 King raised breach of contract and warranty claims arguably not subject to the contemporaneous affidavit filing requirement of section 15-36-100. Based on the language of 480 King's complaint and the record before us, we are unable to agree that the breach of contract and breach of warranty claims were properly dismissed at this stage of the litigation.

480 King also argues that the thirty-day period Judge Nicholson's order provided for GBA to contest the sufficiency of the expert's affidavit operated as a bar against GBA's belated motion to dismiss. We disagree with 480 King's contention that Judge McCoy overruled Judge Nicholson's order. There was good cause for GBA to contest the sufficiency of the expert's affidavit after further information was uncovered in his three depositions; therefore, Judge McCoy did not err in allowing GBA to make the motion.[1] *See* S.C. Code Ann. § 15-36-100(E). ("The trial court may, in the exercise of its discretion, extend the time for filing an amendment or response to the motion, or both, as the trial court determines justice requires.").

Nevertheless, based on our view of the record, we hold the circuit court erred in dismissing the entirety of 480 King's action. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 (2014) ("When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court."). Under subsection (E) of section 15-36-100, an allegedly defective affidavit can be grounds to dismiss the corresponding complaint "for failure to state a claim." Dismissal is improper "[i]f the facts alleged and inferences reasonably deducible therefrom, *viewed in the light most favorable to the plaintiff*, would entitle the plaintiff to relief on *any* theory." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (emphasis added). "Questions of law may be decided with no particular deference to the trial court." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).

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[1] Discovery had proceeded for years with much information disclosed by both sides. Therefore, GBA could have raised its objection to the sufficiency of the affidavit through a motion to exclude and for summary judgment. In any event, GBA's filing here is not controlled by Judge Nicholson's November 2017 order.

Under section 15-36-100(A), an "expert witness" means "an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue . . . ." Although this subsection includes numerous additional requirements, none specify that the expert witness must be a professional in the same field as the defendant. Section 15-36-100(A)(3) allows the submission of an affidavit from an individual who "has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both." Additionally, the statutory definitions of the "Practice of engineering" and "Design coordination" further clarify the expert's ability to satisfy the affidavit requirement for an expert witness pursuant to section 15-36-100. *See* S.C. Code § 40-22-20 (Supp. 2023) (defining the "Practice of engineering" as requiring education, training, and experience in "design and design coordination" and "the review of construction for the purpose of monitoring compliance with drawings and specifications" and "Design coordination" as including "the review and coordination of those technical submissions prepared by others, including . . . architects").

At oral argument, 480 King's appellate counsel noted architectural and engineering services at times overlap, particularly in the area of contract administration. In his depositions, 480 King's expert testified as to his experience as an engineer providing construction contract administration services. Thus, to the extent the circuit court dismissed 480 King's claims relating to contract administration services for which an engineer may be properly qualified, we reverse. However, we affirm the dismissal of 480 King's negligent design and supervision claims to the extent they require testimony by an expert qualified to address an architect's standard of care.[2]

Therefore, we affirm in part, reverse in part, and remand this matter to the circuit court for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[2] We recognize it may be difficult to delineate the engineering and architectural categories. A properly supported motion for summary judgment may be required to aid this sorting process; the parties will also likely need to address whether 480 King's breach of contract and warranty claims are truly disguised claims for architectural negligence or claims about which a non-architect engineer may properly testify.

MCDONALD and VINSON, JJ. concur.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2021-001510
Case No. 2016-CP-10-03468

Charles Blanchard Construction Corp. Inc.……Plaintiff

v.

480 King Street, LLC ….…… Defendant

---

480 King Street, LLC……Third-Party Plaintiff, Appellant

v.

Glick/Boehm & Associates, Inc. ……Third-Party Defendant, Respondent

---

RESPONDENT'S PETITION FOR REHEARING

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Respondent, by and through its undersigned attorneys, petitions this Court, pursuant to Rule 221 and 240, SCACR, for rehearing with respect to this Court's decision in 480 King Street, LLC, Appellant v. Glick/Boehm & Associates, Inc., Respondent, Opinion No. 6060 filed May 22, 2024, which affirmed in part, reversed in part, and remanded the Circuit Court's ruling in this case. Respondent suggests the Court overlooked or misapprehended the following points in affirming, reversing, and remanding the Circuit Court's decision. In the alternative, Respondent requests this Court clarify its Order.

I. The Court of Appeals incorrectly considered an Argument not preserved by Appellant upon Appeal in its finding that the lower court erred in dismissing the entirety of Appellant's action.

This Court held that the Circuit Court erred in dismissing the entirety of Appellant's action against Respondent. However, this Court overlooked the fact that Appellant's argument, including the dismissal of all claims against the Respondent, is predicated on unpreserved issues and, therefore, should not have even been addressed by this Court. Appellant failed to clearly raise the issue of whether its contract and warranty claims should not fall under the Act's purview and, therefore, this Court cannot consider any of Appellant's argument to that effect.

For an issue or an argument to be properly preserved for appellate review, it is well settled that it must have been raised to and ruled upon by the trial court. *See Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284(2000). Simply, "[a]n issue that was not preserved for review should not be addressed by the Court of Appeals…." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Furthermore, in situations where it is not clear whether issues were raised or ruled upon, courts will find that those issues are not preserved. *See Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("At a minimum, issue preservation requires that an issue be raised and ruled upon by the trial judge. The issue must be sufficiently

clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.") (internal citations omitted); *Carolina First Bank v. Ashley Tower, LP*, 2005 WL 7084806 at *2 (Ct. App. Nov. 21, 2005) ("[T]here is no way for this court to determine if the issues asserted on appeal have been raised to and ruled upon by the trial court. As such, we find none of the issues are preserved for our review.").

Appellant failed to argue with any legal support, or thought, that it was error to dismiss Appellant's non-negligence based claims brought against Respondent on the premise that they also fall within the Act's requirements of a supporting Affidavit because they stem from the alleged negligence of Respondent performing its scope of work as an architect. While Appellant cites to the Circuit Court's Order finding that, "[i]n its Motion Defendant contends that the claims asserted against it by Plaintiff are all based upon its alleged negligent performance of professional services as an Architect, and that Plaintiff failed to file a proper Affidavit in support of those claims as required by S.C. Code Ann. §15-36-100(B). The Court agrees with those and other arguments presented by Counsel for Defendant and, as a result, grants the Motion." (Order dated Dec. 16, 2021 at p. 2, R. at p. 93). Appellant took no further steps in its appeal to prove to this Court how the Circuit Court erred. In other words, Respondent's briefing is void of any argument to support why the non-negligence causes of action should be maintained despite the dismissal of the professional negligence cause of action asserted against Respondent. Additionally, Appellant failed to file a Rule 59(e) motion challenging the Circuit Court's finding.

Simply, Appellant failed to preserve on appeal the ability to challenge dismissal of its warranty and breach of contract causes of action. The Court overlooked Appellant's failure and nonetheless held that the Court is, "unable to agree that the breach of contract and breach of warranty claims were properly dismissed at this stage of the litigation." As such, Respondent

respectfully requests that this Court reverse its finding that Appellant's claims for Breach of Contract and Breach of Warranty against Respondent are open for interpretation by the Circuit Court as separate and viable claims, and further that no expert affidavit is required to pursue such claims under the Act.

II. Even presuming Appellant's unpreserved arguments were maintained for appeal, all of Appellant's claims are subject to the Act's expert affidavit requirement.

In actions for damages alleging negligence against certain professionals, including architects, the Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, et. seq. applies. *See* S.C. Code Ann. §§ 15-36-100(B) & -100(G)(6) & (17) (emphasis added). Here, because Respondent is an architectural firm organized and licensed under the laws of South Carolina, "the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act and the factual basis for each claim . . .." S.C. Code Ann. § 15-36-100(B). Appellant asserts that the Circuit Court erred in dismissing all "non-negligence based" causes of action against Respondent because the Act only applies to situations where professional negligence is alleged. This is untrue. And while this Court misapprehends the Act by holding that Appellant's breach of contract and breach of warranty claims are not subject to the contemporaneous affidavit filing requirement of Section 15-36-100, the Court also found, "that if all of the claims included in the complaint were grounded in professional negligence and the affidavit failed to meet the requirements of Section 15-36-100, the circuit court would not have erred in dismissing the entire complaint," thereby leaving this matter open for interpretation.

Based on the plain language of the Act, failure to file an expert affidavit with the Complaint necessitates dismissal of the Complaint as a whole. The Act dictates that "if an affidavit is not filed . . . and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to

file the requisite affidavit, ***the complaint*** *is subject to dismissal for failure to state a claim.*" S.C. Code § 15-36-100(C)(1) (emphasis added). The Act provides the sanction of dismissal of "*the complaint*" when there is non-compliance with its terms. The Act's choice of words here is abundantly clear – the Act does not reference dismissal of just negligence causes of action, and instead chooses to reference the "complaint" as a whole. To meet the intent conveyed by the Legislature within Section 15-36-100, the Complaint ***as a whole*** must be dismissed.

Further, South Carolina courts routinely hold that claims arising under professional negligence, while not plead explicitly as "professional negligence," still fall under § 15-36-100's purview. *See, e.g., H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.*, 405 S.C. 469, 748 S.E.2d 72 (Ct. App. 2013) (finding that a plaintiff's claim for breach of contract against its closing attorney was actually a claim for professional negligence and that plaintiff was required to comply with 15-36-100, even though it did not explicitly plead professional negligence);[1] *see also David v. Savage*, No. 2:19-CV-3139-SAL, 2020 WL 12618896, at *7 (D.S.C. July 6, 2020) (applying South Carolina law) ("Because this court concludes *that all of Plaintiff's claims stem from and relate to the same factual allegations of legal malpractice,* it must determine whether the affidavit requirement in S.C. Code Ann. § 15-36-100 applies to the negligence claim. It finds that it does.") (emphasis added); *In re Steinmetz*, No. ADV 10-80177, 2011 WL 4543894 at *7 (Bankr. D.S.C. Mar. 18, 2011) (applying South Carolina law) ("Since *the* ***essence*** *of Plaintiffs' Fifth Cause of Action is a claim for professional negligence* against a professional licensed by the state of South Carolina, South Carolina law requires that Plaintiffs file an affidavit of an expert witness.") (emphasis added).

[1] Notably, the same case law cited to in Respondent's Final Brief and utilized by the Court in its attempt to discern whether or not Appellant's breach of contract and breach of warranty claims are grounded in professional negligence.

Appellant's claims against Respondent are all *rooted* in allegations that Respondent was negligent in the performance of its duties as an architectural firm and as the "architect of record." It is undisputed that Appellant brought a negligence claim against Respondent along with claims for Breach of Contract and Breach of Warranty that were each based upon the same alleged negligent performance of professional architectural services, whether in the design or contract administration. Appellant asserted that Respondent breached its contract with Appellant by failing to "properly design and prepare specifications for the stair tower." (Compl. at ¶ 9, R. at pp. 72-73); Appellant asserted that Respondent breached its contract by "[f]ailing to act as a reasonably prudent design professional would act under similar circumstances." (Compl. at ¶ 9,R. at pp. 72-73); Appellant asserted that Respondent "breached [its] express and implied warranties by failing to design the stair tower free from defects and in compliance with applicable building codes and industry standards." (Compl. at ¶ 20, R. at p. 75). Whether Respondent failed to act as a "reasonably prudent design professional," whether Respondent "properly" created specifications, and whether Respondent furnished plans "free from defects," necessarily hinges on whether Respondent's architectural scope of work met the professional standard of care. It is axiomatic that an Architect's breach of contract or breach of an implied warranty requires a showing of how an Architect failed in the performance of his or her duties.

Appellant simply reiterates its assertions against Respondent in different ways in an attempt to fit the framework of multiple causes of action, nonetheless, both Appellant's claim for Breach of Contract and Breach of Warranty require the support of an expert affidavit under the Act, which according to Appellant's own expert's testimony, Appellant lacks. Mr. Hackney was deposed on three separate occasions and questioned by respondent's counsel regarding his

qualifications; during Mr. Hackney's August 27, 2020 deposition, the following exchange occurred:

> Q ***You do not intend in this case to offer a professional opinion about the standard of care of an architect, do you?***
> A ***No.***
> Q That's something that would be beyond your qualifications?
> A I don't believe so, but I have never done it in the past. I've looked at enough buildings, I have looked at enough plans, and seen enough issues to feel like I could provide an opinion about that but I have -- to this point, I have not provided one.
> Q *And you don't intend to start in this case?*
> A *No*, not at this time.

(Mot. dated Jun. 28, 2021, Ex. 3 at pp. 208-09 ll. 15-2, R. at pp. 210-211) (emphasis added).

When further queried in his September 4, 2020 deposition, as to whether he would be offering an opinion as to the Architect's standard of his care, Mr. Hackney testified:

> Q ***Do you recall telling me when we were together last that you were not going to offer an opinion about the standard of care of the architect in this case?***
> A ***Yes.***
> Q ***Does that remain your intention?***
> A ***Yes***. I feel comfortable talking about individual details if questioned about them, and I feel comfortable talking about construction phase services, but *not specifically about the architect's standard of care.*
> Q In relation to either of those things, correct?
> A Correct. I'll talk about -- I feel comfortable as a design professional talking about details specifically and/or lack of details as a design professional but *not specifically to the standard of care of an architect.*
> Q And, in fact, *without addressing the standard of care of the architect* in this case, right?
> A *Correct.*
>
> ***
>
> Q. When he asked you to sign the Affidavit, did you tell him that you would *not offer an opinion about the standard of care of an architect in the case?*

A *I don't recall the specific conversations about standard of care* at that point in time.

Q ***By signing the Affidavit, though, you did not intend to offer an opinion about the standard of care of an architect, did you?***

A ***No.*** The Affidavit says, and I talked about it before, that pertaining to the construction phase services and construction administration services that were provided.

Q But when you talked about those things in your Affidavit, *you did not intend to state an opinion about the standard of care of an architect performing those services, did you?*

A A *better word there* than a professional performing -- *a design professional* performing the role of a -- during construction phase services.

Q You are an engineer?

A I am.

Q Mr. Glick is an architect?

A Correct.

Q *Glick/Boehm are architects and not engineers?*

A *Correct.*

Q Getting back to question then is: *You did not intend this Affidavit to contradict your intention against offering an opinion of the standard of care related to the architect, did you?*

A My intent -- again, I know we're parsing words a little bit. My intent is that I feel comfortable talking about the standard of care that a professional would provide in either giving or completing construction administration services, whether that be an architect or an engineer. Those services are similar across the board of professionals, and I feel confident and comfortable in talking about them.

Q ***So your intention is to state an opinion of the standard of care of a professional but not an architect, correct?***

A ***That's probably a better way to say it. Yes.***

(Mot. dated Jun. 28, 2021, Ex. 4 at pp. 278-79 ll. 17-12; Ex. 5 at pp. 282-84 ll. 22-13, R. at pp. 213-214; R. at pp. 216-218) (emphasis added). In sum, Mr. Hackney admitted on multiple occasions that he was not intending to state, nor was he stating, any opinions that Respondent Architect had violated the Architect's standard of care, and that he was not qualified to express an opinion as to the standard of care of an architectural firm, thereby contradicting his Affidavit.

Therefore, by the Court's own finding (if all of the claims included in the complaint were grounded in professional negligence and the affidavit failed to meet the requirements of Section 15-36-100, the Circuit Court would not have erred in dismissing the entire complaint)[2], the Court must hold that the Circuit Court did not err in dismissing Appellant's Complaint in its entirety.

Should the Court opine that Appellant's Breach of Contract and Warranty claims are not subject to the contemporaneous affidavit filing requirement under the Act, the Court has still misapprehended the plain meaning of the Act. The Act provides that a Complaint in actions (plural) alleging professional negligence requires the expert affidavit. It is abundantly clear, that when a plaintiff brings a professional negligence claim, ***all*** other claims brought along with it (including breach of contract and breach of warranty) are, likewise, subject to the Act's expert affidavit requirement.

Accordingly, the Circuit Court was correct in dismissing Appellant's Complaint against Respondent in its entirety, as each of Appellant's causes of action against Respondent are integrally related to Respondent's duties as an Architect and fit squarely within the Act's purview.

III. To satisfy the Act's expert affidavit filing requirement, an expert must provide relevant testimony on the performance of an allegedly negligent professional in their *specific* field.

The Court noted that, during oral arguments, Appellant's counsel argued architectural and engineering services at times overlap, particularly in the area of contract administration. However,

[2] In support of this contention, the Court cites to the holding in *H & H of Johnston, LLC v. Ole Republic Nat. Title Ins. Co.*, 405 S.C. 469, 748 S.E.2d (Ct. App. 2013), which provides that the circuit court properly granted summary judgment on behalf of a closing attorney being sued by a plaintiff claiming breach of contract because professional negligence claims were subject to section 15-36-100's affidavit requirement. The Court's reference to *H & H of Johnston, LLC*'s holding, in fact, supports Respondent's argument that all of Appellant's claims are subject to the Act's requirement of an affidavit and blatantly rejects the Court's holding in the very next sentence that Appellant's breach of contract and breach of warranty claims are *not* subject to the Act's contemporaneous requirement of an affidavit. The reasoning for the Court's opposite opinion to that of *H & H Johnston, LLC* to which is cites for support, is undiscernible.

Appellant's counsel provided no legal or factual support for this assertion. In fact, to the contrary, the Act provides parameters for what experts are qualified to opine:

> (A) As used in this section, "expert witness" means an expert *who is qualified as to the acceptable conduct of the professional whose conduct is at issue* and who:
>
> > (1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and
> > (2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or
> > (b) has actual professional knowledge and experience *in the area of practice or specialty in which the opinion is to be given* as the result of having been regularly engaged in . . . .

§15-36-100(A)(1-2(b)).

Additionally, there is an overwhelming amount of South Carolina law which clearly provides that to satisfy the affidavit filing requirement in the Act, an expert must provide relevant testimony on the performance of an allegedly negligent professional in their specific field. *See e.g., Doe v. Am. Red Cross Blood Servs.,* 297 S.C. 430, 435, 377 S.E .2d 323, 326 (1989) ("[T]he standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices ***in his profession***.") (emphasis added); *Pittman v. Stevens,* 364 S.C. 337, 613 S.E.2d 378 (2005) (citing *Doe*); 18 S.C. Jur. Negligence § 58 ("In a professional negligence cause of action, the standard of care that the plaintiff must prove is that the ***professional failed to conform to the generally recognized and accepted practices in his profession***, and if the plaintiff is unable to demonstrate that the professional failed to conform to the generally recognized and accepted practices in his profession, then the professional cannot be found liable as a matter of law."); *Walker,* 324 S.C. at 354, 477 S.E.2d at

473 ("Although [a licensed residential builder] may be versed in building codes and in the inspection of buildings, ***there is no evidence in the record that she has any architectural experience or training . . . [t]he trial court did not abuse its discretion, therefore, in finding that Lain could not properly testify as to an architect's standard of care.***) (emphasis added).

The Court supported its conclusion herein with reference to the statutory definition of an engineer set forth in S.C. Code §40-22-20 (Supp. 2023), but, unfortunately, such reference was limited. First, the Court misapprehends Mr. Hackney's ability to opine on an architect's standard of care in its interpretation of the definition of the "Practice of Engineering." Read as a whole, one should find that Section 40-22-20(25), "Practice of Engineering" may include design coordination, but only as to how an *engineer's* design correlates with an *architect's* design and the coordination of the *engineering works and systems*, it does not open the door to an engineer to opine on an architect's design and design coordination. Under Section 40-22-20(25), the "Practice of Engineering" is:

> any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as commissioning, consultation, investigation, expert technical testimony, evaluation, design and design coordination of **engineering works and systems**, design for development and use of land and water, performing engineering surveys and studies, and the review of construction for the purpose of monitoring compliance with drawings and specifications, any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems projects, and industrial or consumer products or equipment of control systems, chemical, communications, mechanical, electrical, environmental, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property, and including such other professional services as may be necessary to the planning, progress, and completion of any engineering services. The mere execution, as a contractor, of work designed by a professional engineer or supervision of the

> construction of such work as a foreman or superintendent is not considered the practice of engineering. A person must be construed to practice or offer to practice engineering, within the meaning and intent of this chapter who:
>
> (a) Practices any branch of the procession or discipline of engineering;
> (b) By verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be a professional engineer or through the use of some other title implies that he is a professional engineer or that he is licensed under this chapter; or
> (c) Holds himself out as able to perform or does perform any engineering service or work or any other professional service designated by the practitioner or which is recognized as engineering.

(emphasis added). First, Professional Engineers, along with Architects, are covered by the Act, but are distinguished as separate professionals who must stay within their lane pursuant to the educational degrees, licensing and regulation in which they are bound. Likewise, Architects are restricted to their own lane. For example, South Carolina Code Section 40-3-20(6),

> Practice of architecture' means a service or creative work requiring architectural education, training, and experience and the application of the principles of architecture and related technical disciplines to the professional services or creative work as consulting, evaluating, planning, designing, specifying, coordinating of consultants, **administration of contracts**, and **reviewing of construction for the purpose of assuring compliance with the specifications and design**, in connection with a building or site development.

(emphasis added). Clearly, through a complete reading of both statutory definitions related to the practice of engineering and architecture, Mr. Hackney, a Professional Engineer, does not possess the ability to opine as to an Architect's unique role of administrating the project contract. Allowing Mr. Hackney to indict Respondent's contract administration work would be condoning Mr. Hackney to practice architecture without the proper licensing requirements.

Additionally, the definition of an engineer's practice provides that engineers may play a role in the coordination of *engineering* works and systems, it does not refer to the works and systems of <u>any design professional, including the architect</u>. As such, applying the definition of

"Design coordination," further misapprehends Appellant's Expert, Mr. Hackney's allowable role in this matter. Section 40-22-20(7) sets forth the definition of "Design coordination" which, "includes the review and coordination of those technical submissions prepared by others, including as appropriate and without limitation, consulting engineers, architects, landscape architects, surveyors, and other professionals working under the direction of the engineer." (emphasis added). Mr. Hackney can only opine, as an engineer, on the scope of work of an architect *if* that architect is working at his discretion. Here, there was no engineer that Respondent reported to, much less Mr. Hackney himself, therefore, Section 40-22-20(7) is wholly inapplicable.

For these reasons, and the reasons noted above, the Circuit Court did not err in dismissing this Complaint despite Respondent's performance of contract administration services on the project, and the Court should affirm the Circuit Court's holding that Appellant's Complaint be dismissed in its entirety.

IV. If the Court denies Respondent's Petition for Rehearing, this Court should clarify its Order as to the dismissal of Appellant's claims against Respondent prior to remanding the matter to Circuit Court for "further proceedings."

Certain portions of this Court's Order are unclear as it currently stands, which will undoubtedly confuse the parties as well as the Circuit Court if the issues are remanded for "further proceedings." First, the Court currently holds that "the circuit court erred in dismissing the entirety of 480 King's action," however, the Court fails to expand upon which portions of Appellant's Complaint the Circuit Court erred in dismissing. The Court confusingly provides that "[b]ased on the language of 480 King's complaint and the record before us, we are unable to agree that the breach of contract and breach of warranty claims were properly dismissed at this stage of the litigation." However, approximately three sentences above its holding, the Court stated, "that if all of the claims included in the complaint were grounded in professional negligence and the affidavit

failed to meet the requirements of Section 15-36-100, the circuit court would not have erred in dismissing the entire complaint." This statement is followed with a citation to a South Carolina case which supports Respondent's argument that ***all*** of Appellant's claims are subject to the Act's expert affidavit requirement. Yet, the Court concludes that Appellant's breach of contract and breach of warranty claims are allegedly not subject to the Act's affidavit requirement. The Court's position, as currently written, leaves the door open for the Circuit Court to interpret the Court's holding how it so chooses despite already ruling in Respondent's favor, leaving this exact conflict to undoubtedly arise again.

Second, in the Court's holding that the Circuit Court erred in dismissing the entirety of Appellant's action, the Court failed to clarify whether or not it intended to affirm the Circuit Court's dismissal of Appellant's Negligence claim. The Court holds that,

> to the extent the circuit court dismissed 480 King's claims relating to contract administration services for which an engineer may be properly qualified, we reverse. However, we affirm the dismissal of 480's King negligent design and supervision claims to the extent they require testimony by an expert qualified to address an architect's standard of care.

Furthering the confusion, the Court notes in footnote 2 that the Court recognizes that,

> it may be difficult to delineate the engineering and architectural categories. A properly supported motion for summary judgment may be required to aid this sorting process; the parties will also likely need to address whether 480 King's breach of contract and warranty claims are truly disguised claims for architectural negligence or claims about which a non-architect engineer may properly testify.

However, as set forth above, Appellant's asserted allegations against Respondent in its Breach of Contract and Breach of Warranty claims arise out of Appellant's negligent design and supervision claims. Therefore, it is unclear which of Appellant's claims against Respondent the Court intends to affirm and which claims the Court intends to reverse.

Further, the Court fails to clarify whether Appellant's remaining claims require an expert affidavit to be filed contemporaneously with the action, instead asserting that Appellant "raised breach of contract and warranty claims *arguably* not subject to the contemporaneous affidavit filing requirement of Section 15-36-100." (emphasis added).

Without the Court's clear and unequivocal holding, the Circuit Court will be left with little to no guidance on how to conduct "future proceedings" upon remand. Further, Respondent will be forced to expend significant additional costs and resources defending against claims which were properly argued, briefed, and dismissed by the Circuit Court.

V. Conclusion

The Court overlooked and addressed Appellant's arguments which are predicated on unpreserved issues and, therefore, the Court should grant Respondent's petition for a rehearing to affirm the Circuit Court's ruling on those unpreserved issues alone. Nevertheless, Appellant did not furnish an affidavit of an Architect with its Complaint, which details allegations of professional negligence against Respondent, architectural firm. Respondent suggests the Court overlooked or misapprehended the aforementioned points in affirming, reversing, and remanding the Circuit Court's decision and, therefore, the Court should amend its prior holding to account for the above overlooked and misapprehended points and grant Respondent's Petition for a Rehearing.

[Signature page to follow}

This 17th day of June, 2024.

Respectfully submitted,

s/ Jordan N. Teich

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RECEIVED
Jun 17 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2021-001510
Case No. 2016-CP-10-03468

Charles Blanchard Construction Corp. Inc.……Plaintiff

v.

480 King Street, LLC ….…… Defendant

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480 King Street, LLC……Third-Party Plaintiff, Appellant

v.

Glick/Boehm & Associates, Inc. ……Third-Party Defendant, Respondent

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PROOF OF SERVICE

I certify that I have served the Respondent's Petition for Rehearing on the following parties' counsel, at the addresses listed below by depositing a copy of same in the United States Mail and electronic mail on June 17, 2024.

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The South Carolina Court of Appeals

Charles Blanchard Construction Corp., Inc., Respondent,

v.

480 King Street, LLC, Defendant,

And

480 King Street, LLC, Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

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

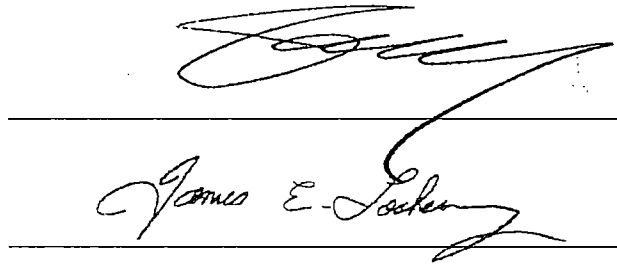
Appellate Case No. 2021-001510

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Stephanie P. McDonald

_____ J.



_____ J.

_____ A.J.

Columbia, South Carolina

cc:
Jesse Sanchez, Esquire
Brent Souther Halversen, Esquire
Kent Taylor Stair, Esquire
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The Honorable Jennifer B. McCoy

FILED
Aug 02 2024

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge
Case No. 2016-CP-10-03468

Appellate Case No. 2021-001510
Opinion No. 6060, Filed May 22, 2024

Charles Blanchard Construction Corp. Inc.……Plaintiff

v.

480 King Street, LLC ….…… Defendant

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480 King Street, LLC……Third-Party Plaintiff, Respondent

v.

Glick/Boehm & Associates, Inc. ……Third-Party Defendant, Petitioner

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PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petitioner filed a Petition for Rehearing on June 17, 2024, and that the Court of Appeals denied the Petition by order dated May 22, 2024.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in considering an argument not preserved by Respondent upon Appeal in its finding that the Circuit Court erred in dismissing the entirety of Respondent's action?

2. Did the Court of Appeals err in finding that Respondent's Breach of Contract and Warranty claims are not subject to the contemporaneous affidavit filing requirement under the Frivolous Civil Proceedings Sanctions Act, when each claim resounded in Petitioner's performance as an architect?

3. Did the Court of Appeals err in finding that Respondent's expert affidavit was sufficient under Section 15-36-100 of the South Carolina Code, which permits experts to opinion only as to the standard of care of a professional in their specific field?

4. Did the Court of Appeals err in failing to clarify its May 22, 2024 Order as to the dismissal of Respondent's claims against Petitioner, prior to remanding the matter to Circuit Court for further proceedings?

SPECIAL CONSIDERATIONS FOR GRANTING WRIT UNDER RULE 242(B), SCACR

The South Carolina Legislature adopted the expert affidavit requirement in the Frivolous Civil Proceedings Sanctions Act to shield professionals from spurious claims of negligence. The Legislature requires that in order to proceed against a licensed professional in the State of South Carolina, the plaintiff must provide an expert affidavit establishing the standard of care and a related deviation unless the claim is within the common knowledge of the jury. Expert testimony to establish the standard of care and a deviation therefrom, in claims against a professional, has further been required by common law and the rules of evidence. The Legislature mandates the contemporaneous filing requirement to force plaintiffs to set forth their contentions against professionals early in the case, and a plaintiff's responsibility to establish by expert testimony the standard of care and the professional's deviation from throughout the litigation to meet their

burden of proof at trial. It has become fundamental practice in this state that S.C. Code 15-36-100(A) mandates that the expert witness(es) selected by plaintiff must possess the requisite expertise in the area of practice or specialty about which the opinion on the standard of care is offered. In this matter, the Court of Appeals blurred the brightline interpretation which has been applied by the bench, bar, and professionals in this state since the institution of the Frivolous Civil Proceedings Sanctions Act ("Act") by holding that in some circumstances depending on the work being performed, an engineer can testify as to an architect's standard of care. This Court now has the opportunity to overrule the Court of Appeals and institute certainty and guidance for all in this state who rely upon the clear and unequivocal terms of the Act and its application.

This Writ was necessary because the Court of Appeals incorrectly applied a limited interpretation of the Act which, if applied to the numerous construction cases filed in this state in the future, will require intense factual analysis on a case-by-case basis, increased motion practice, and likely varying and disjointed results. The Court of Appeals undoubtedly failed to recognize the obvious consequences of its own decision: If the Court of Appeals holding is maintained, then essentially not only will a professional engineer be able to render opinions as to an architect's standard of care, an orthopedist will be able to render opinions as to the standard of care of a medical doctor in a different field, such as a pulmonologist; real estate agents will be able to render opinions as to real estate appraiser's standard of care, etc., just because they may provide licensed care to others in the same general area but despite their education or practical experience. This Court should grant this Writ to prevent what could become an absurd application across a multitude of professions here in South Carolina.

STATEMENT OF THE CASE

This appeal involves the design and construction of a stair tower (the "tower") located at 480 King Street, in Charleston, South Carolina, which provides elevator access to tenants of two apartment buildings. 480 King Street, LLC ("Respondent"), the building's owner, engaged the architectural firm of Glick/ Boehm & Associates, Inc. ("Petitioner") to serve as the "architect of record" for the construction of the stair tower. (Compl. at ¶ 3). Petitioner's agreement with Respondent was to perform both an architectural design (prepare contract documents) and provide contract administration services of the contractor's contract pursuant to an American Institute of Architects' Standard Form of Agreement between an Owner and an Architect. In fact, the contract administration services performed by Petitioner were described by Respondent as the *interpretation of the contract documents*, visits to the site, reviewing the Contractor's submittals, rejecting non-conforming work *deviating from Petitioner's plans*, and *reporting to Respondent known deviations from the Contract documents*. (Compl. at ¶ 7) (emphasis added).

Charles Blanchard Construction Corp., Inc ("Blanchard") constructed the stair tower. (Compl. at ¶ 6). Following numerous delays and issues with the construction of the tower, on July 6, 2016, Blanchard filed suit against Respondent, asserting claims related to non-payment. (App. Br. at p. 2). Respondent then asserted counterclaims against Blanchard, alleging Blanchard's work was defective. (App. Br. at p. 2). On June 26, 2017, Respondent filed a separate case against Petitioner,[1] including Breach of Contract, Breach of Warranty, and Negligence all of which were founded upon the Architect's alleged negligent performance of services under its Professional Services Agreement with Respondent. (Compl. at ¶¶ 5-29).

[1] Following a Motion to Consolidate, filed by Respondent, the two separate cases were consolidated via Form 4 Order on August 24, 2018. (Order dated August 24, 2018).

In actions for damages alleging negligence against certain professionals, including architects, the Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, et. seq. (the "Act") applies. *See* S.C. Code Ann. §§ 15-36-100(B) & -100(G)(6) & (17). Here, because Petitioner is an architectural firm organized and licensed under the laws of South Carolina, "the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act and the factual basis for each claim . . . ." S.C. Code Ann. § 15-36-100(B). If a plaintiff fails to comply with the Act's affidavit requirement, the complaint "is subject to dismissal for failure to state a claim." S.C. Code Ann. § 15-36-100(C)(1). Respondent did not submit an affidavit with the initial Complaint filed against Petitioner. Apparently realizing this critical omission, on August 10, 2017, Respondent filed a Motion for Extension of Time to file the required Affidavit by representing that Respondent's retained expert was unable to review sufficient documents prior to filing the Complaint to properly furnish an affidavit. (Mot. dated Aug. 10, 2017). Petitioner in turn filed a timely Motion to Dismiss for failure to comply with the affidavit requirement on August 29, 2017. (Mot. dated August 29, 2017). On November 17, 2017, the Honorable J.C. Nicholson, Jr., conducted a hearing on these motions and thereafter issued an Order on December 7, 2017,[2] granting Respondent's Motion for Extension of Time and denying Petitioner's Motion to Dismiss. (Order dated Dec. 7, 2017). In his Order, Judge Nicholson allowed Respondent to "file [a supporting affidavit] within ten days of the date of this Order," and further provided that "[u]pon the filing of the Affidavit by this date, the [Respondent] will have been deemed to be in compliance with the requirements of S.C. Code §15-36-100(B). [Petitioner] will then have 30 days from the date of the filing of the Affidavit to file any motion contesting the sufficiency of the Affidavit." (Order dated Dec. 7, 2017 at p. 3).

[2] While the Circuit Court's Order was entered on December 7, 2017, it is dated November 27, 2017.

On November 20, 2017, Respondent filed an affidavit from Louis Hackney, P.E., REWC, RRC, CDT, LEED AP, Respondent's prior-retained expert (the "Affidavit"). In the Affidavit, Mr. Hackney suggested he was qualified to testify as to an architect's "standard of care," stating: "I have experience investigating and assessing the *design* and construction of commercial buildings in Charleston, South Carolina and my investigation of the 480 King Stair Tower is ongoing . . . I further reviewed the *architectural* drawings . . . prepared by [Petitioner]." (Aff. of Hackney at p. 1) (emphasis added). Mr. Hackney proceeded to opine that Petitioner breached the "standard of care" of an Architect, further stating: ". . . it is my professional opinion, to a reasonable degree of professional certainty that the Architect [Petitioner] deviated from the standard of care…." (Aff. of Hackney at p. 2). On its face, through Mr. Hackney's representations only, the Affidavit appeared to meet the requirements of the Act, and absent any information indicating otherwise, Petitioner did not immediately contest the Affidavit's contents.

As the case progressed, Mr. Hackney was deposed three times, January 28, 2019, August 27, 2020, and September 4, 2020, and on these occasions, Counsel questioned Mr. Hackney twice regarding his qualifications. During Mr. Hackney's August 27, 2020 deposition, he testified that he had never provided a professional opinion about the standard of care of an architect, prior to issuing his expert affidavit in this case, and had no intention of offering such professional opinion in this case. (Mot. dated Jun. 28, 2021, Ex. 3 at pp. 208-09 ll. 15-2). When further queried in his September 4, 2020 deposition, as to whether he would be offering an opinion as to the architect's standard of his care, Mr. Hackney testified that while he felt comfortable opining as to specific details and/or lack of details as a design professional, he did *not* feel comfortable specifically talking about an architect's standard of care. (Mot. dated Jun. 28, 2021, Ex. 4 at pp. 278-79 ll. 17-12; Ex. 5 at pp. 282-84 ll. 22-13). In sum, Mr. Hackney admitted on

multiple occasions that he was not intending to state, nor was he stating, any opinions that Petitioner Architect had violated the architect's standard of care, and that he was not qualified to express an opinion as to the standard of care of an architectural firm, thereby contradicting his Affidavit.

Once Petitioner became aware that Mr. Hackney was not stating an opinion as to an architect's standard of care, as not clearly previously represented, Petitioner promptly requested Leave to file a renewed Motion to Dismiss. (Req. for Leave to File Mot. to Dismiss dated Sept. 17, 2020). Petitioner's Request remained pending as COVID-19 took its hold over the pragmatic disposition of cases until a status conference could be scheduled on March 24, 2021. One day prior to the Circuit Court's March 24, 2021 status conference, counsel for Respondent consented to Petitioner filing a renewed Motion to Dismiss without the necessity of leave of court. (E-mail from Stair to Circuit Court and All Counsel of Record dated March 23, 2021). Therefore, with Respondent's consent, on June 28, 2021, Petitioner filed a second Motion to Dismiss on the basis that Respondent failed to file a proper expert affidavit; Petitioner now had clear confirmation from Mr. Hackney's testimony that he could not and would not opine as to the standard of care of an architect. (Motion dated Jun. 28, 2021). Respondent filed a response in opposition on November 19, 2021. (Resp. in Opp.).

The Circuit Court held a hearing on Petitioner's Motion on December 2, 2021. The Circuit Court heard arguments from both Respondent and Petitioner. The Circuit Court stated:

> I mean, there's a reason the legislature laid out specific professions for which you must submit an affidavit stating the deviation from the standard of care **from that particular profession**.
>
> ***
>
> . . . respectfully, I have to go back to legislative intent. I don't get to, you know, legislate from the bench, I have to go by what's in the black and white statute.

> ***
> . . . [the Act] clearly delineates profession. And from there under that professional umbrella, then someone can speak to whether or not someone deviated the standard of care.
>
> ***
> I'm granting the motion to dismiss. I think that allowing [Mr. Hackney] to testify as to whether or not an architect reaches the standard of care, with any job that architect reformed, it's [sic] frankly flies in the face of the statute.

(Hearing Tr. dated Dec. 2, 2021 at p.15, ll. 20-23; p. 21 ll. 5-9; 11-14; 22-25) (emphasis added).

Via written Order (the "Order") dated December 16, 2021, the Circuit Court granted Petitioner's Motion to Dismiss. (Order dated Dec. 16, 2021). The Circuit Court held that because Petitioner is an architectural firm and Mr. Hackney's experience mostly lies in professional engineering, not architecture, Mr. Hackney was not qualified to opine as to Petitioner's performance in this matter, and therefore Respondent failed to satisfy the Act's affidavit requirement. (Order dated Dec. 16, 2021 at pp. 2-3) ("[T]he Defendant in this case is an architect and its services must be judged against the standard of care of an Architect."). Accordingly, the Circuit Court dismissed all of Respondent's claims against Petitioner, not just Respondent's claim for professional negligence, with prejudice. Respondent did not file a motion under South Carolina Rule of Civil Procedure Rule 59(e) contesting the Circuit Court's ruling. An appeal followed.

Via order rendered on May 22, 2024, the Court of Appeals affirmed in part, reversed in part, and remanded this matter to the Circuit Court for further proceedings. Notably, the Court of Appeals found that if all of the claims included in the Complaint were grounded in professional negligence and the affidavit failed to meet the requirements of Section 15-36-100, the Circuit Court would not have erred in dismissing the entire Complaint. *Charles Blanchard Construction Corp., Inc. v. 480 King, Street, LLC*, 443 S.C. 165, 170, 904 S.E.2d 182, 184 (Ct. App. 2024). However,

the Court of Appeals ultimately left the rest of the matter up for interpretation by holding that Respondent's breach of contract and warranty claims are *arguably* not subject to the contemporaneous affidavit filing requirement of Section 15-36-100.[3] *Id.* Petitioner requested the Court of Appeals rehear the appeal and alter its decision following the Court of Appeals' confusing and potentially detrimental holding for many professionals. The Court of Appeals denied Petitioner's petition. Therefore, Petitioner requests this Court grant writ of certiorari and remedy the errors in the Court of Appeal's decision.

ARGUMENT

I. The Court of Appeals erred in considering Respondent's arguments not preserved upon Appeal in its finding that the Circuit Court erred in dismissing the entirety of Respondent's action.

The Court of Appeals held that the Circuit Court erred in dismissing the entirety of Respondent's action against Petitioner. *480 King, Street, LLC*, 443 S.C. 165, 170, 904 S.E.2d 182, 184 (Ct. App. 2024). However, the Court of Appeals overlooked the fact that Respondent's argument, including the dismissal of all claims against the Petitioner, is predicated on unpreserved issues and, therefore, should not have even been addressed by the Court of Appeals. Respondent failed to clearly raise the issue of whether its contract and warranty claims should not fall under the Act's purview and, therefore, the Court of Appeals should not have considered any of Respondent's arguments to that effect.

For an issue or an argument to be properly preserved for appellate review, it is well settled that it must have been raised to and ruled upon by the trial court. *See Holy Loch Distributors, Inc.*

[3] Throughout oral arguments, the Court of Appeals, displayed its distaste for Petitioner having brought a Motion to Dismiss as opposed to a Motion for Summary Judgment based on S.C. Code 15-36-100, however, the Court of Appeals seemingly failed to acknowledge that it had the power to convert Petitioner's Motion to Dismiss into a Motion for Summary Judgment as both parties were afforded a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *See* Rule 12(b), SCRCP; *see also Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69, 73 (1999) (stating that conversion of a motion to dismiss into a motion for summary judgment is proper when the parties are afforded a reasonable opportunity to respond to such matters).

v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284(2000). Simply, "[a]n issue that was not preserved for review should not be addressed by the Court of Appeals…." *State v. Dunbar,* 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Furthermore, in situations where it is not clear whether issues were raised or ruled upon, courts will find that those issues are not preserved. *See Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("At a minimum, issue preservation requires that an issue be raised and ruled upon by the trial judge. The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.") (internal citations omitted); *Carolina First Bank v. Ashley Tower, LP*, 2005 WL 7084806 at *2 (Ct. App. Nov. 21, 2005) ("[T]here is no way for this court to determine if the issues asserted on appeal have been raised to and ruled upon by the trial court. As such, we find none of the issues are preserved for our review.").

Respondent failed to reference the Circuit Court's dismissal of all of its claims beyond that for professional negligence even though the Circuit Court held that *all* of Respondent's claims stem from the alleged negligence of Petitioner performing its scope of work as an architect. While Respondent merely cited to the Circuit Court's Order finding that,

> [i]n its Motion Defendant contends that the claims asserted against it by Plaintiff are all based upon its alleged negligent performance of professional services as an Architect, and that Plaintiff failed to file a proper Affidavit in support of those claims as required by S.C. Code Ann. §15-36-100(B). The Court agrees with those and other arguments presented by Counsel for Defendant and, as a result, grants the Motion.

(Order dated Dec. 16, 2021 at p. 2, R. at p. 93). Respondent took no further steps in its appeal to prove the Circuit Court erred in dismissing all causes of action it had asserted against Petitioner. In other words, Respondent's briefing is void of any argument to support why the non-negligence causes of action should be maintained despite the dismissal of the professional negligence cause

of action asserted against Petitioner. Additionally, Respondent failed to file a Rule 59(e) motion challenging the Circuit Court's finding.

Simply, Respondent failed to preserve on appeal the ability to challenge dismissal of its warranty and breach of contract causes of action. The Court of Appeals overlooked Respondent's failure and nonetheless held that the Court is, "unable to agree that the breach of contract and breach of warranty claims were properly dismissed at this stage of the litigation." As such, the Court of Appeals erred in considering Respondent's arguments not preserved upon Appeal in its finding that Respondent's claims for Breach of Contract and Breach of Warranty against Petitioner are open for interpretation by the Circuit Court as separate and viable claims, and further that no expert affidavit is required to pursue such claims under the Act, thus reversing the Circuit Court's dismissal of all of Respondent's causes of action against Petitioner. Petitioner respectfully requests, therefore, that this Court grant the petition for writ of certiorari to correct the erroneous decision.

II. Even presuming that Respondent's unpreserved arguments were maintained for appeal, ***all*** of Respondent's claims are subject to the Act's expert affidavit requirement.

In actions for damages alleging negligence against certain professionals, including architects, the Act applies. *See* S.C. Code Ann. §§ 15-36-100(B) & -100(G)(6) & (17). Here, because Petitioner is an architectural firm organized and licensed under the laws of South Carolina, "the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act and the factual basis for each claim . . .." S.C. Code Ann. § 15-36-100(B). Respondent asserts that the Circuit Court erred in dismissing all "non-negligence based" causes of action against Petitioner because the Act only applies to situations where professional negligence is alleged. This is untrue. And while the Court of Appeals misapprehended the Act by holding that

Respondent's breach of contract and breach of warranty claims are not subject to the contemporaneous affidavit filing requirement of Section 15-36-100, the Court of Appeals also found, "that if all of the claims included in the complaint were grounded in professional negligence and the affidavit failed to meet the requirements of Section 15-36-100, the circuit court would not have erred in dismissing the entire complaint," thereby leaving this matter open for interpretation. *480 King, Street, LLC*, 443 S.C. 165, 170, 904 S.E.2d 182, 184 (Ct. App. 2024).

Based on the plain language of the Act, failure to file an expert affidavit with the Complaint necessitates dismissal of the Complaint as a whole. The Act dictates that "if an affidavit is not filed . . . and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, ***the complaint*** *is subject to dismissal for failure to state a claim.*" S.C. Code § 15-36-100(C)(1) (emphasis added). The Act provides the sanction of dismissal of "*the complaint*" when there is non-compliance with its terms. The Act's choice of words here is abundantly clear – the Act does not reference dismissal of just negligence causes of action, and instead chooses to reference the "complaint" as a whole. To meet the intent conveyed by the Legislature within Section 15-36-100, the Complaint ***as a whole*** must be dismissed.

Further, South Carolina courts routinely hold that claims arising from a professional's scope of work pursuant to a standard of care, while not plead explicitly as "professional negligence," still fall under § 15-36-100's purview. *See, e.g., H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.*, 405 S.C. 469, 748 S.E.2d 72 (Ct. App. 2013) (finding that a plaintiff's claim for breach of contract against its closing attorney was actually a claim for professional negligence and that plaintiff was required to comply with 15-36-100, even though it did not

explicitly plead professional negligence);[4] *see also David v. Savage*, No. 2:19-CV-3139-SAL, 2020 WL 12618896, at *7 (D.S.C. July 6, 2020) (applying South Carolina law) ("Because this court concludes *that all of Plaintiff's claims stem from and relate to the same factual allegations of legal malpractice,* it must determine whether the affidavit requirement in S.C. Code Ann. § 15-36-100 applies to the negligence claim. It finds that it does.") (emphasis added); *In re Steinmetz*, No. ADV 10-80177, 2011 WL 4543894 at *7 (Bankr. D.S.C. Mar. 18, 2011) (applying South Carolina law) ("Since *the **essence** of Plaintiffs' Fifth Cause of Action is a claim for professional negligence* against a professional licensed by the state of South Carolina, South Carolina law requires that Plaintiffs file an affidavit of an expert witness.") (emphasis added).

Respondent's claims against Petitioner are all *rooted* in allegations that Petitioner was negligent in the performance of its duties as an architectural firm and as the "architect of record." As exemplified by the appellate panel at the hearing, all alleged failures by Petitioner pursuant to its contractual requirements fold in some architectural professional work. (Oral Argument at 39:42-40:12, Charles Blanchard Construction Corp., Inc. v. 480 King, Street, LLC, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4). It is undisputed that Respondent brought a negligence claim against Petitioner along with claims for Breach of Contract and Breach of Warranty which cannot be distinguished. They are *all* based upon the same alleged failure to perform professional architectural services, whether in the design or in administering the construction contract which construction is pursuant to Petitioner's design. Respondent asserted that Petitioner breached its contract with Respondent by failing to "properly design and prepare specifications for the stair tower." (Compl. at ¶ 9, R. at pp. 72-73); Respondent

[4] Notably, the same case law cited to in Petitioner's Final Brief and utilized by the Court of Appeals in its attempt to discern whether or not Respondent's breach of contract and breach of warranty claims are grounded in professional negligence.

asserted that Petitioner breached its contract by "[f]ailing to act as a reasonably prudent design professional would act under similar circumstances." (Compl. at ¶ 9,R. at pp. 72-73); Respondent asserted that Petitioner "breached [its] express and implied warranties by failing to design the stair tower free from defects and in compliance with applicable building codes and industry standards." (Compl. at ¶ 20, R. at p. 75). Whether Petitioner failed to act as a "reasonably prudent design professional," whether Petitioner "properly" created specifications, and whether Petitioner furnished plans "free from defects," necessarily hinges on whether Petitioner's architectural scope of work met the professional standard of care for an architect. It is axiomatic that an Architect's breach of contract or breach of an implied warranty requires a showing of how an Architect failed in the performance of his or her licensed duties. In fact, during oral arguments, Respondent's counsel conceded that the breach of contract breach of warranties claims might be sufficiently intertwined with the administration of professional services. (Oral Argument at 16:52-17:07, Charles Blanchard Construction Corp., Inc. v. 480 King, Street, LLC, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4).

Respondent simply reiterates its assertions against Petitioner in different ways in an attempt to fit the framework of multiple causes of action, nonetheless, both Respondent's claim for Breach of Contract and Breach of Warranty require the support of an architect expert affidavit under the Act, which according to Respondent's own expert's testimony, Respondent lacks. Mr. Hackney was deposed on three separate occasions and questioned by respondent's counsel regarding his qualifications; during Mr. Hackney's August 27, 2020 deposition, he testified that he had never provided a professional opinion about the standard of care of an architect, prior to issuing his expert affidavit in this case, and had no intention of offering such professional opinion in this case. (Mot. dated Jun. 28, 2021, Ex. 3 at pp. 208-09 ll. 15-2, R. at pp. 210-211). When further queried

in his September 4, 2020 deposition, as to whether he would be offering an opinion as to the Architect's standard of his care, Mr. Hackney testified that while he felt comfortable opining as to specific details and/or lack of details as a design professional, he did *not* feel comfortable specifically talking about an architect's standard of care. (Mot. dated Jun. 28, 2021, Ex. 4 at pp. 278-79 ll. 17-12; Ex. 5 at pp. 282-84 ll. 22-13, R. at pp. 213-214; R. at pp. 216-218). In sum, Mr. Hackney admitted on multiple occasions that he was not intending to state, nor was he stating, any opinions that Petitioner Architect had violated the Architect's standard of care, and that he was not qualified to express an opinion as to the standard of care of an architectural firm, thereby contradicting his Affidavit.

Therefore, the Court of Appeals' only logical finding should have been that the Circuit Court did not err in dismissing Respondent's Complaint in its entirety because all of Respondent's claims are grounded in Petitioner's alleged non-performance of its standard of care as an architect. This result is in keeping with the unequivocal language of the Act which provides that when a plaintiff brings a professional negligence claim, ***all*** other claims brought along with it (including breach of contract and breach of warranty) are, likewise, subject to the Act's expert affidavit requirement. Any other result is contrary to the language the legislature promulgated to protect licensed professionals in this state.

Accordingly, the Court of Appeals erred in reversing the Circuit Court dismissal of Respondent's Complaint against Petitioner in its entirety, as each of Respondent's causes of action against Petitioner are integrally related to Petitioner's duties as an Architect and fit squarely within the Act's purview. As such, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to correct the erroneous decision.

III. To satisfy the Act's expert affidavit filing requirement, an expert must provide testimony as to the professional's performance pursuant to their standard of care in the expert's *specific* field.

The Court of Appeals, during oral arguments, noted that it agreed with the circuit court "one hundred percent" in that Respondent is unable to bring in an expert that doesn't have architectural expertise to be an architectural expert. (Oral Argument at 6:23-6:39, Charles Blanchard Construction Corp., Inc. v. 480 King, Street, LLC, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4). However, the Court of Appeals held that architectural and engineering services may at times overlap, particularly in the area of contract administration. (Oral Argument at 6:39-6:47 & 39:49-40:12, Charles Blanchard Construction Corp., Inc. v. 480 King, Street, LLC, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4). However, there was no legal or factual support for this diversion from the Act's language.[5] In fact, to the contrary, the Act clearly delineates parameters for what experts are qualified to opine:

> (A) As used in this section, "expert witness" means an expert *who is qualified as to the acceptable conduct of the professional whose conduct is at issue* and who:
>
> > (1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and
> >
> > (2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or

[5] When asked by the Court of Appeals whether or not Respondent was able to discern, throughout the entire discovery process, whether an Architect or an Engineer was responsible for contract administration within Petitioner's firm, Respondent conceded that they did not know whether an Architect or Engineer was responsible for performing contract administration on the Project. (Oral Argument at 13:09-14:11, Charles Blanchard Construction Corp., Inc. v. 480 King, Street, LLC, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4).

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

§15-36-100(A)(1-2(b)). (emphasis added). Pursuant to Respondent's own allegations, Petitioner Architect was interpreting the contract documents, reviewing the Contractor's submittals, and otherwise rejecting work not in general conformance with the architectural design. (Compl. at ¶ 7). Based upon Respondent's own admissions of Petitioner's architectural scope of work on the Project, under the Act's legislative intent, the alleged negligent acts of Petitioner Architect require an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue; simply put, Respondent is required to set forth an architect expert to opine as to the alleged deficiencies in Petitioner's work on the Project.

There is an overwhelming amount of South Carolina law which clearly provides that to satisfy the affidavit filing requirement in the Act, an expert must provide relevant testimony on the performance of an allegedly negligent professional in their specific field. *See e.g., Doe v. Am. Red Cross Blood Servs.,* 297 S.C. 430, 435, 377 S.E .2d 323, 326 (1989) ("[T]he standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices ***in his profession***.") (emphasis added); *Pittman v. Stevens,* 364 S.C. 337, 613 S.E.2d 378 (2005) (citing *Doe*); 18 S.C. Jur. Negligence § 58 ("In a professional negligence cause of action, the standard of care that the plaintiff must prove is that the ***professional failed to conform to the generally recognized and accepted practices in his profession***, and if the plaintiff is unable to demonstrate that the professional failed to conform to the generally recognized and accepted practices in his profession, then the professional cannot be found liable as a matter of law."); *Walker*, 324 S.C. at 354, 477 S.E.2d at 473 ("Although [a licensed residential builder] may be versed in building codes and in the inspection of buildings, ***there is no evidence in the record***

that she has any architectural experience or training . . . [t]he trial court did not abuse its discretion, therefore, in finding that Lain could not properly testify as to an architect's standard of care.) (emphasis added). The Court of Appeals' finding here would disrupt this long-standing principle and have a spider web effect on all licensed professionals/workers in this state. Anyone from any profession would be able to opine as to another's separate and distinct professional standard of care and performance of their contractual duties unbeknownst to the professional whose standard of care is being called into question.

Notwithstanding, the Court of Appeals supported its conclusion herein with reference to the statutory definition of an engineer set forth in S.C. Code §40-22-20 (Supp. 2023), but, unfortunately, such reference was limited. First, the Court of Appeals misapprehended Mr. Hackney's ability to opine on an architect's standard of care in performing contract administration in its interpretation of the definition of the "Practice of Engineering." Read as a whole, one should find that Section 40-22-20(25), "Practice of Engineering" may include design coordination, but only as to how an *engineer's* design correlates with an *architect's* design and the coordination of the *engineering works and systems*, it does not open the door to an engineer to opine on an architect's design and design coordination. Under Section 40-22-20(25), the "Practice of Engineering" is:

> any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as commissioning, consultation, investigation, expert technical testimony, evaluation, design and design coordination of **engineering works and systems**, design for development and use of land and water, performing engineering surveys and studies, and the review of construction for the purpose of monitoring compliance with drawings and specifications, any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes,

> work systems projects, and industrial or consumer products or equipment of control systems, chemical, communications, mechanical, electrical, environmental, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property, and including such other professional services as may be necessary to the planning, progress, and completion of any engineering services. The mere execution, as a contractor, of work designed by a professional engineer or supervision of the construction of such work as a foreman or superintendent is not considered the practice of engineering. A person must be construed to practice or offer to practice engineering, within the meaning and intent of this chapter who:
>
> (a) Practices any branch of the procession or discipline of engineering;
> (b) By verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be a professional engineer or through the use of some other title implies that he is a professional engineer or that he is licensed under this chapter; or
> (c) Holds himself out as able to perform or does perform any engineering service or work or any other professional service designated by the practitioner or which is recognized as engineering.

(emphasis added). First, Professional Engineers, along with Architects, are covered by the Act, but are distinguished as separate professionals who must stay within their lane pursuant to the educational degrees, licensing and regulation in which they are bound. Likewise, Architects are restricted to their own lane. For example, South Carolina Code Section 40-3-20(6),

> Practice of architecture' means a service or creative work requiring architectural education, training, and experience and the application of the principles of architecture and related technical disciplines to the professional services or creative work as consulting, evaluating, planning, designing, specifying, coordinating of consultants, **administration of contracts**, and **reviewing of construction for the purpose of assuring compliance with the specifications and design**, in connection with a building or site development.

(emphasis added).

As such, despite Respondent's contention to the contrary, it *does* matter whether an engineer or architect was performing the contract administration services as set forth in Petitioner and Respondent's American Institute of Architects' Standard Form of Agreement. Petitioner is an

Architect, performing contract administration services related to its periodic review of construction compared to Petitioner's design; a professional engineer is not qualified to opine as to that scope of work performed by an Architect. Clearly, through a complete reading of both statutory definitions related to the practice of engineering and architecture, Mr. Hackney, a Professional Engineer, does not possess the ability to opine as to an architect's unique role of administrating the project construction contract which sets forth that the contractor is building pursuant to a design prepared by an architect. Allowing Mr. Hackney to indict Petitioner's contract administration work would be condoning Mr. Hackney to practice architecture without the proper licensing requirements.

Additionally, the definition of an engineer's practice provides that engineers may play a role in the coordination of *engineering* works and systems, it does not refer to the works and systems of any design professional, including the architect. As such, applying the definition of "Design coordination" to the facts here further misapprehends Respondent's Expert, Mr. Hackney's, allowable role in this matter. Section 40-22-20(7) sets forth the definition of "Design coordination" which, "includes the review and coordination of those technical submissions prepared by others, including as appropriate and without limitation, consulting engineers, architects, landscape architects, surveyors, and other professionals working under the direction of the engineer." (emphasis added). Mr. Hackney can only opine, as an engineer, on the scope of work of an architect *if* that architect is working at his discretion. Here, there was no engineer that Petitioner reported to, much less Mr. Hackney himself, therefore, Section 40-22-20(7) is wholly inapplicable.

For these reasons, and the reasons noted above, the Court of Appeals erred in reversing the Circuit Court's dismissal of this Complaint in its entirety, despite Petitioner's performance of

contract administration services on the project as an architect under its architectural contract. As such, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to correct the erroneous decision.

IV. The Court of Appeals erred in failing to clarify its Order as to the dismissal of Respondent's claims against Petitioner prior to remanding the matter to Circuit Court for "further proceedings."

Certain portions of the Court of Appeals' Order are unclear as it currently stands, which will undoubtedly confuse the parties as well as the Circuit Court if the issues are remanded for "further proceedings." First, the Court of Appeals stated that "the circuit court erred in dismissing the entirety of 480 King's action;" however, the Court of Appeals failed to expand upon which portions of Respondent's Complaint the Circuit Court erred in dismissing. *480 King, Street, LLC*, 443 S.C. 165, 171, 904 S.E.2d 182, 185 (Ct. App. 2024). The Court of Appeals confusingly provided that "[b]ased on the language of 480 King's complaint and the record before us, we are unable to agree that the breach of contract and breach of warranty claims were properly dismissed at this stage of the litigation." *Id.* at 170, 904 S.E.2d at 184. However, approximately three sentences above this holding, the Court of Appeals stated, "that if all of the claims included in the complaint were grounded in professional negligence and the affidavit failed to meet the requirements of Section 15-36-100, the circuit court would not have erred in dismissing the entire complaint." *Id.* This statement is followed with a citation to a South Carolina case which supports Petitioner's argument that ***all*** of Respondent's claims are subject to the Act's expert affidavit requirement. *Id.* Yet, the Court of Appeals concludes that Respondent's breach of contract and breach of warranty claims are allegedly not subject to the Act's affidavit requirement. *Id.* The Court of Appeals' position, as currently written, leaves the door open for the Circuit Court to

interpret the Court of Appeals without any clear direction, leaving this exact conflict to undoubtedly arise again.

Second, in the Court of Appeals' holding that the Circuit Court erred in dismissing the entirety of Respondent's action, the Court of Appeals failed to clarify whether or not it intended to affirm the Circuit Court's dismissal of Respondent's Negligence claim. The Court holds that,

> to the extent the circuit court dismissed 480 King's claims relating to contract administration services for which an engineer may be properly qualified, we reverse. However, we affirm the dismissal of 480's King negligent design and supervision claims to the extent they require testimony by an expert qualified to address an architect's standard of care.

480 King, Street, LLC, 443 S.C. 165, 172, 904 S.E.2d 182, 185 (Ct. App. 2024). Furthering the confusion, the Court of Appeals notes in footnote 2 that the Court of Appeals recognizes that,

> it may be difficult to delineate the engineering and architectural categories. A properly supported motion for summary judgment may be required to aid this sorting process; the parties will also likely need to address whether 480 King's breach of contract and warranty claims are truly disguised claims for architectural negligence or claims about which a non-architect engineer may properly testify.

Id. at 172, 904 S.E.2d at 185 n.2. However, as set forth above, Respondent's asserted allegations against Petitioner in its Breach of Contract and Breach of Warranty claims arise out of Respondent's negligent design and supervision claims. Therefore, it is unclear which of Respondent's claims against Petitioner the Court of Appeals intends to affirm and which claims the Court of Appeals intends to reverse.

Further, the Court of Appeals failed to clarify whether Respondent's remaining claims require an expert affidavit to be filed contemporaneously with the action, instead asserting that Respondent "raised breach of contract and warranty claims *arguably* not subject to the

contemporaneous affidavit filing requirement of Section 15-36-100." (emphasis added). *480 King, Street, LLC,* 443 S.C. 165, 170, 904 S.E.2d 182, 184 (Ct. App. 2024).

The Circuit Court clearly set forth in its decision that the Act delineates certain professions for which it applies to and protects, and plaintiff's required expert can speak to whether or not someone deviated from the standard of care, but only if that expert falls into the same profession for which they seek to opine. (*See* Hearing Tr. dated Dec. 2, 2021 at p.15, ll. 20-23; p. 21 ll. 5-9; 11-14; 22-25). Further, the Circuit Court clearly and correctly held that allowing Mr. Hackney, a professional engineer, to testify as to whether or not an architect adheres to the standard of care, "flies in the fact of the statute." *Id.*

Without a clear and unequivocal direction by the appellate courts, the Circuit Court will be left with little to no guidance on how to conduct "future proceedings" upon remand. Further, Petitioner will be forced to expend significant additional costs and resources defending against claims which were properly argued, briefed, and dismissed by the Circuit Court. As such, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to correct the erroneous decision.

V. Conclusion

Petitioner respectfully requests this Court grant the petition for writ of certiorari and reverse the Court of Appeals thereby upholding the lower court's decision to dismiss all claims against Petitioner. The Court of Appeals overlooked Respondent's failure to preserve issues on appeal and addressed all causes of action dismissed by the Circuit Court. Additionally, Respondent did not furnish the necessary affidavit of an Architect which details how Petitioner, an architectural firm, breached its standard of care in all aspects it was required to perform under contract related to the underlying project. Petitioner suggests the Court of Appeals overlooked or misapprehended the

aforementioned point which will thereby lead to a potentially devastating and inconsistent conclusion for licensed professionals in this state notwithstanding Petitioner. Therefore, this Court should grant the petition for writ of certiorari to correct overlooked and misapprehended points which lead to the Court of Appeals' erroneous decision.

This 13th day of September, 2024.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge
Case No. 2016-CP-10-03468

Appellate Case No. 2021-001510
Opinion No. 6060, Filed May 22, 2024

Charles Blanchard Construction Corp. Inc.……Plaintiff

v.

480 King Street, LLC ….…… Defendant

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480 King Street, LLC……Third-Party Plaintiff, Respondent

v.

Glick/Boehm & Associates, Inc. ……Third-Party Defendant, Petitioner

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PROOF OF SERVICE

I certify that I have served a copy of the Petitioner's Petition for Writ of Certiorari on the following parties' counsel, at the addresses listed below by depositing a copy of same in the United States Mail and electronic mail on September 13, 2024.

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2024-001403

Charles Blanchard Construction Corp. Inc.……Plaintiff

v.

480 King Street, LLC ….…… Defendant

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480 King Street, LLC……Third-Party Plaintiff, Respondent

v.

Glick/Boehm & Associates, Inc. ……Third-Party Defendant, Petitioner

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly determine that Respondent 480 King Street LLC's Breach of Contract and Breach of Warranty claims should not have been dismissed by the Circuit Court, those arguments being sufficiently preserved for appellate review?

2. Did the Court of Appeals correctly determine that Respondent's 480 King Street, LLC's Breach of Contract and Breach of Warranty claims are not subject to the contemporaneous affidavit filing requirement set forth under the Frivolous Civil Proceedings Sanctions Act?

3. Did the Court of Appeals correctly find that Respondent's expert affidavit was sufficient because Respondent's expert, a professional engineer, meets the criteria set forth under S.C. Code § 15-36-100(A)(3) and possesses the necessary scientific, technical, and/or specialized knowledge, having performed the same type of services himself?

4. Was the Court of Appeals sufficiently clear with regard to its findings?

COUNTER-STATEMENT OF THE CASE

This appeal centered on whether the Circuit Court erred in dismissing the entirety of Respondent 480 King Street, LLC's lawsuit against Petitioner Glick/Boehm & Associates, Inc., pursuant to the contemporaneous affidavit requirements for professional negligence actions.[1] The Court of Appeals reversed the Circuit Court in part, finding that 480 King Street's expert, a professional engineer, may be properly qualified to offer opinions relating to the contract administration services rendered by the Petitioner. The Court of Appeals further found that dismissal of 480 King's Breach of Contract and Breach of Warranty claims was improper given that such claims are arguably not subject to the contemporaneous affidavit filing requirement of section 15-36-10, stating, "Based on the language of 480 King's complaint and the record before us, we are unable to agree [with the lower court] that the breach of contract and breach of warranty claims were properly dismissed at this stage of litigation." In addition, the Court of Appeals

[1] See South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code § 15-36-10, et seq.

affirmed the Circuit Court's dismissal of 480 King's negligent design and supervision claims to the extent said claims require testimony by an expert qualified to address an architect's standard of care.

Relevant Facts and Procedural History

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

On June 26, 2017, 480 King filed a separate lawsuit against Petitioner Glick/Boehm & Associates, Inc. ("GBA") asserting separate claims for Breach of Contract, Breach of Warranty, and Negligence relating to construction contract administration services that GBA provided during construction of the subject project ("GBA Lawsuit"). (R. p. 70). GBA is a multi-disciplinary firm that heralds itself as specializing, *inter alia*, in architecture, planning, and interior design.[2] The CBC Lawsuit and GBA Lawsuit were later consolidated via Form 4 Order, entered on August 24, 2018 following 480 King's Motion to Consolidate (Order, R. p. 91; Motion, R. p. 187).

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

On August 10, 2017, 480 King filed a Motion for an Extension of Time pursuant to S.C. Code § 15-36-100(c)(1), wherein it requested an extension of time, for good cause, to file the requisite expert witness affidavit as to its *professional negligence* claim against GBA.[3] (R. p. 97). 480 King asserted that good cause for an extension existed because, *inter alia*, its expert witness had not yet had an opportunity to review over eight thousand (8,000) documents relating to the commercial project and because the statute of limitation loomed at the time the Complaint was filed. (R. p. 98; p. 268, line 24 to p. 269, line 16).

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

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

On November 17, 2017, the Honorable J.C. Nicholson, Jr., heard 480 King's Motion for Extension of Time and GBA's Motion to Dismiss. (Transcript, R. p. 266). The Court found that good cause existed to allow 480 King extra time to procure and file its expert witness affidavit, noting, *inter alia*, the voluminous number of records that had been provided to the expert. (Order,

[3] 480 King's Breach of Contract and Breach of Warranty claims, notably, do not require an affidavit under S.C. Code § 15-36-100, which is specifically titled, Complaint in actions for damages alleging ***professional negligence***; contemporaneous affidavit of expert specifying ***negligent*** act or omission. [Emphasis added]

R. p. 88). The Court also found no prejudice to GBA in granting the motion. (Order, R. p. 89). In addition, the Order stated that "Defendant will then have thirty days from the date of the filing of the Affidavit to file any motion contesting the sufficiency of the Affidavit." (R. p. 90). [Emphasis added]. Notably, the language providing GBA a thirty-day period to contest the sufficiency of the affidavit had been incorporated into the Order at the request of GBA's trial counsel. (Email, R. pp. 247- 253). GBA did not appeal this Order and did not file a motion contesting the sufficiency of the Affidavit within thirty days of 480 King's timely-filed Affidavit as required by the Order. (Affidavit, R p. 301).

On September 17, 2020—two years and nine months *after* the circuit court's thirty (30) day deadline had expired—GBA filed a Request for Leave to File Motion to Dismiss and Motion to File Sanctions, attacking the sufficiency of the Mr. Hackney's Affidavit. (Request for Leave, R. p. 189). GBA did not, however, formally request a hearing on its Request for Leave. Instead, GBA waited *another* nine months and simply filed its Motion to Dismiss and Motion for Sanctions on June 28, 2021, having failed to obtain leave in the interim. (R. p. 195).

On November 19, 2021, 480 King filed a Memorandum in Opposition to GBA's Motion to Dismiss and Motion for Sanctions, asserting that GBA's Motion should be denied because, *inter alia*, (1) GBA was time-barred from contesting the sufficiency of the affidavit because it had failed to do so within the thirty-day time period specified in Judge Nicholson's order, (2) Mr. Hackney, a professional engineer, meets the criteria for serving as an expert witness under S.C. Code § 15-36-100(A)(3), and is qualified to offer an expert opinion as to GBA's performance of contract administration services, possessing the necessary scientific, technical, or specialized knowledge, and having performed the same type of services himself, and (3) the Complaint asserts separate

claims for Breach of Contract and Breach of Warranty, neither of which require an Affidavit from an expert witness in order to survive a Motion to Dismiss. (Memo, R. p. 225).

On November 19, 2021, GBA filed a Memorandum in Support of its Motions. (R. p. 219). GBA's Motion argued that, "although Glick/Boehm questioned ***then*** [in November of 2017] whether an Engineer (and particularly this Engineer, Mr. Hackney) is qualified to express an opinion concerning the standard of care of an architect," GBA "did not contest [the affidavit's] 'sufficiency' by filing a further motion to dismiss" within the time period afforded by the Court because it "appeared" from Mr. Mr. Hackney's affidavit that he was providing an opinion as to the standard of care for an architect. (Motion to Dismiss, R. p. 197).[4]

A hearing on GBA's Motions were held on December 2, 2021 before the Honorable Jennifer B. McCoy, wherein Judge McCoy granted GBA's Motion to Dismiss 480 King's Complaint—dismissing all three causes of action brought against GBA, including those that do not require an Affidavit under the subject statute—and denying GBA's Motion for Sanctions. (Transcript, R. p. 278). A corresponding order on GBA's motions was entered on December 16, 2021. (Order, R. p. 92). Thereafter, on December 22, 2021, 480 King appealed the Circuit Court's order.

After briefing by the parties, the Court of Appeals heard oral arguments on December 5, 2023. On May 22, 2024, the Court of Appeals issued an Opinion wherein it affirmed the Circuit Court's order in part, reversed it in part, and remanded the case for further proceedings.

[4] Curiously, despite offering the above reasoning to justify its two year and nine-month delay in challenging the sufficiency of Mr. Hackney's affidavit, GBA's Petition now argues that professional engineers may not offer an opinion as to any services carried out by an architect, such as construction contract administration services, regardless of whether such services are commonly rendered by professional engineers and architects alike.

Specifically, the Court of Appeals found that based on the language of 480 King's Complaint and the record before it, the Circuit Court had erred in dismissing the *entirety* of 480 King's action, which included claims for Breach of Contract and Breach of Warranty (in addition to the claim for professional negligence) and that said claims are arguably not subject to the contemporaneous filing requirement of Section 15-36-100.

The Court of Appeals noted that under Section 15-36-100(A), an "expert witness" means "an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue," and that although this subsection incudes numerous additional requirements, none specify that the expert witness must be a professional in the same field as the defendant. The Court of Appeals also noted that Section 15-36-100(A)(3) allows the submission of an affidavit from an individual who "has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both." The Court noted that the statutory definitions of the "Practice of engineering" and "Design coordination" further clarify the expert's ability to satisfy the affidavit requirements for an expert witness pursuant to section 15-36-100, citing S.C. Code §40-22-20 (Supp. 2023) (defining the "Practice of engineering" as requiring education training, and experience in "design and design coordination" and "the review of construction for the purpose of monitoring compliance with drawings and specification" and "Design coordination" as including "the review and coordination of those technical submissions prepared by others, including….architects." (Emphasis added).

In rendering its decision, the Court of Appeals acknowledged 480 King's argument that architectural and engineering services at times overlap, particularly in the area of contract administration, and further acknowledged that 480 King's expert testified as to his experience

providing construction contract administration services, the very services at issue in the Complaint. Accordingly, the Court of Appeals reversed the Circuit Court in part, finding that under the Act, 480 King Street's expert, a professional engineer, may be properly qualified to offer opinions relating to the contract administration services rendered by the Petitioner. In addition, the Court of Appeals affirmed the Circuit Court's dismissal of 480 King's negligent design and supervision claims to the extent that they require testimony by an expert qualified to address an architect's standard of care.

Contrary to Petitioner's contention, the Court of Appeals did not ignore the "clear and unequivocal terms of the Act and its application." To the contrary, the Court of Appeals conducted a proper analysis of the law and attendant facts as they applied to Petitioner's Motion to Dismiss and Motion for Sanctions and corrected errors made by the Circuit Court including its misapplication of S.C. Code § 15-36-100 with regard to 480 King's claims involving contract administration services, and the dismissal of Breach of Contract and Breach of Warranty claims, which are not encompassed by the Act.

Counter-Statement as to Certain Representations Made in the Petition

Respectfully, Petitioner's Brief, and particularly the statements set forth in its "Statement of the Case," contain representations that are not supported by the record and are otherwise misleading. To the extent these representations have any bearing on this Honorable Court's evaluation of the Petition, Respondent briefly addresses them here.

First, Petitioner misrepresents Respondent's Complaint as one "founded upon" or "rooted" solely in negligence. (Petition, p. 5 and p. 14). This is incorrect. Even a cursory review of 480 King's Complaint establishes that it asserted three (3) separate and distinct causes of action,

asserting claims against GBA for Breach of Contract, Breach of Warranty, and Professional Negligence. (Complaint, R. p. 70, see also 480 King's Final Brief, Argument II, pp. 8-9).

Second, Petitioner attempts to misconstrue 480 King's Professional Negligence claim by limiting its application to the performance of architectural design services, whereas the Complaint *specifically* asserts that GBA was negligent in performing construction contract administration services, and not merely architectural design services. (R. pp. 71 and 76). 480 King's expert witness, a professional engineer, meets the criteria for serving as an expert witness under S.C. Code § 15-36-100(A)(3), because he is qualified to offer an expert opinion as to Respondent's performance of *construction contract administration services*, and possesses the necessary scientific, technical, and/or specialized knowledge, having performed the same type of services himself. (MIO to Motion to Dismiss, R. p. 231; Affidavit, ¶ 10, R. p. 302; See also Hearing Transcript, R. p. 292, line 24 to p. 296, line 4, addressing Mr. Hackney's qualifications under the statute). As even Petitioner was forced to acknowledge in its Final Brief, Mr. Hackney testified, "I feel comfortable talking about the standard of care that a professional would provide in either giving or completing construction administration services, whether that be an architect or an engineer. Those services are similar across the board of professionals, and I feel confident and comfortable talking about them." (Respondent GBA's Final Brief, p. 5).

Third, Petitioner misrepresents the procedural history of this case, speciously claiming that "counsel for Respondent consented to Petitioner filing a renewed Motion to Dismiss without the necessity of court leave." (Petition, p. 8). To the contrary, 480 King's trial counsel stated that 480 King would challenge any such relief, "To be clear, your request for 'leave of court,' is a motion seeking court relief-and—it will be opposed." (MIO to Motion to Dismiss, Exh. 4, Email dated March 23, 2021, R. p. 260). While 480 King's trial counsel acknowledged that Petitioner's counsel

could technically *file* whatever motion he pleased without leave of court, he absolutely did not consent to the relief sought in Petitioner's motion and expressly stated his opposition to the motion. (December 2, 2021 Hearing Transcript, R. p. 296, line 4 to p. 297, line 8).

Fourth, Petitioner's contention that it "acted promptly" and had no way of knowing in 2017, or several ensuing years, that Mr. Hackney "was not stating an opinion as to an architect's standard of care" is directly contradicted by the record and Petitioner's own admissions. Petitioner was made aware by the September 7, 2017 affidavit that Mr. Hackney was a licensed professional engineer with specialized knowledge and experience in providing *construction contract administration services*, and not an architect. (See 480 King's Memo in Opposition; R. pp. 225-231; and Hackney Affidavit, R. pp. 301-302). Further, Petitioner specifically alleged that after reading Mr. Hackney's affidavit in November of 2017, it questioned whether Mr. Hackney was qualified to present an expert opinion in this case. (Motion to Dismiss, R. p. 197). Petitioner further alleged that it had "some questions as to the sufficiency of the affidavit [even] prior to Mr. Hackney's [Deposition] testimony." (Motion to Dismiss, R. p. 201, ¶ 11).

Despite purporting to have said doubts and/or questions in November of 2017, Petitioner failed to contest the sufficiency of the affidavit within the time period afforded by the Circuit Court. Petitioner did not even bother to hold Mr. Hackney's first deposition until over a year later in January of 2019 (See Motion to Dismiss, R. p. 197, at footnote 1). Thereafter, Petitioner waited over one more year to file its Request for Leave to file a Motion to Dismiss on September 17, 2020. (R. p. 189). It then waited an additional nine months to file its Motion to Dismiss on June 28, 2021, having failed to obtain leave in the interim. (R. p. 195). Contrary to Petitioner's representations, there is absolutely no reason for Petitioner's three-and-one-half year delay in

contesting the sufficiency of Mr. Hackney's affidavit, which meets the criteria set forth under S.C. Code § 15-36-100(A)(3) as it relates to construction contract administration services.

Finally, Petitioner misconstrues and misrepresents the Court of Appeals' findings, hyperbolically stating that "the Court of Appeals blurred the brightline *interpretation* which has been applied by the bench, bar, and professionals in this state since the institution of the Frivolous Proceedings Sanctions Act." (Petition, p. 4, emphasis added). The Court of Appeals did no such thing. It correctly found that Mr. Hackney was qualified to offer an opinion as to 480 King's claims relating to contract administration services *because,* as a professional engineer with experience providing construction contract administration services, he "has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both." S.C. Code § 15-36-100(A)(3), emphasis added. That has always been the standard applied by our Courts.

ARGUMENTS

I. GMA's Petition for a Writ of Certiorari fails to raise any special or important reasons, required by Rule 242(b) of the South Carolina Appellate Court Rules, to qualify for review by this Court.

As Rule 242(b), SCACR, provides, a Writ of Certiorari is not a matter of right. While such review is a matter of discretion for this Court, it is well settled that such review should only be granted when the petition raises special and important reasons. Generally, as embodied in Rule 242(b) itself, these special and important reasons should take the form of: (1) a novel question of law; (2) the existence of dissent in the decision of the Court of Appeals; (3) a conflict between the decision by the Court of Appeals and a prior decision by the Supreme Court; (4) the direct involvement of a substantial constitutional issues; and (5) the existence of a federal question and

a conflict between the decision of the Court of Appeals and a prior decision by the United States Supreme Court. Here, Petitioner fails to identify or raise any such special and important reason for review by this Court. The reason is clear: no special and important reasons exist.

In reality, Petitioner simply seeks to have this Honorable Court substitute a new decision for that of the Court of Appeals. However, as discussed herein, the Court of Appeals conducted a proper analysis of the law and attendant facts as they applied to Petitioner's Motion to Dismiss and Motion for Sanctions and corrected errors made by the Circuit Court including its misapplication of S.C. Code § 15-36-100 with regard to 480 King's claims involving contract administration services, and the dismissal of Breach of Contract and Breach of Warranty claims, which are not encompassed by the Act. Accordingly, the Petition should be denied and the unanimous decision of the Court of Appeals upheld.

II. Respondent 480 King Street, LLC's arguments are clearly preserved, having been raised to and ruled upon by the Circuit Court and the Court of Appeals.

Petitioner's contention that Respondent 480 King's arguments were not preserved are indisputably contradicted by the record. First, 480 King clearly argued to the Circuit Court that its Breach of Contract and Breach of Warranty Claims do not require an expert affidavit in order to survive Petitioner GBA's Motion to Dismiss, noting, *inter alia*, that "Glick's motion made no mention that 480 King has lodged breach of contract and warranty claims against Glick as 480 King and Glick were operating under a contract to perform contract administration services." (Memorandum in Opposition to Motion to Dismiss, R. p. 232). Respondent 480 King specifically argued that "an Affidavit of an expert witness is not needed to make a breach of contract or warranty claim," and that "480 King has Contractual Claims pending against Glick that warrant a

jury trial irrespective of its Negligence claim against Glick." (Memorandum in Opposition, R. p. 232).

The Circuit Court, in turn, ruled upon these arguments, stating, "The Court read and considered all of these written submissions and thereafter, on December 2, 2021, heard argument from counsel for both parties." (Order, R. pp. 92-93, emphasis added). Having done so, the argument was clearly preserved for appellate review. See *Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000), cited in GBA's own Petition and Final Brief, noting the well-settled principal that an issue or argument must have been raised to and ruled upon by the trial court in order to be preserved.

Further, 480 King specifically raised these same issues on appeal to the Court of Appeals in Section II of its Final Brief, stating, "The Circuit Court erred in finding that [480 King's] claims against Glick/Boehm and Associates, Inc. are all based upon [GBA's] alleged negligent performance of professional services as an architect. (480 King's Final Brief pp. 8-9). In support of its argument, Respondent 480 King further noted that the Complaint asserts three separate and distinct claims against GMA, that its Breach of Contract and Breach of Warranty claims do not require a supporting affidavit under S.C. Code § 15-36-100, and that its professional negligence claim specifically involves GBA's performance of construction contract administration services, and not merely architectural design services. (Ibid., pp. 8-9, see also Argument I of 480 King's Final Reply Brief, pp. 4-6). These issues were clearly preserved. Accordingly, Respondent 480 King respectfully requests that this Honorable Court look beyond Petitioner's attempts to side-step the Court of Appeals' unanimous decision, deny the Petition, and remand this case for a trial on the merits.

III. The Court of Appeals correctly determined that Respondent 480 King Street, LLC's Breach of Contract and Breach of Warranty claims are not subject to the contemporaneous filing requirement set forth under the Frivolous Civil Proceedings Sanctions Act, which sets forth requirements for *Professional Negligence* actions.

The Court of Appeals correctly determined that, based on the language of 480 King's Complaint and the record before it, the Circuit Court had erred in dismissing the *entirety* of 480 King's action, which included claims for Breach of Contract and Breach of Warranty (in addition to the claim for professional negligence) and that said claims are arguably not subject to the contemporaneous filing requirement of Section 15-36-100.

Notably, S.C. Code § 15-36-100 is specifically titled, "Complaint in actions for damages alleging *professional negligence*; contemporaneous affidavit of expert specifying *negligent act* or omission." (Emphasis added). The statute does not encompass actions for breach of contract or breach of warranty. In fact, the statute specifically limits application of the contemporaneous affidavit requirement to *professional negligence* claims that require specialized learning, noting, "The contemporaneous filing requirement of subsection (B) is *not required* to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." Emphasis added. S.C. Code § 15- 36-100(C)(2). Here, 480 King's Breach of Contract and Breach of Warranty claims are separate and distinct causes of action asserted against Petitioner GBA. Given that the statute does not require a contemporaneous affidavit for *regular* Negligence claims, it certainly does not require a contemporaneous affidavit for Breach of Contract and Breach of Warranty claims—causes of action that are not even addressed by the statute.

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Id. (internal quotations omitted). "Dismissal is improper '[i]f the facts alleged and inferences reasonably deducible therefrom, *viewed in the light most favorable to the plaintiff*, would entitle the plaintiff to relief on *any* theory.'" *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2000) (emphasis added in Court of Appeals' Opinion). "Questions of law may be decided with no particular deference to the trial court." Wiegand v. U.S. Auto Ass'n, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).

The Court of Appeals correctly determined that the Circuit Court erred in dismissing 480 King's actions for Breach of Contract and Breach of Warranty, theories of law where a contemporaneous affidavit is not statutorily required. Accordingly, Respondent 480 King respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari, uphold the Court of Appeals' decision, and remand this case for a trial on the merits.

IV. The Court of Appeals correctly found that that Respondent 480 King Street, LLC's expert affidavit was sufficient because Mr. Hackney meets the criteria set forth under S.C. Code § 15-36-100(A)(3), and is qualified to offer an expert opinion as to GBA's performance of contract administration services.

Contrary to Petitioner's contention, 480 King's Professional Negligence Claim specifically involves GBA's performance of Construction Contract Administration Services, and not merely Architectural Design Services. Specifically, Petitioner ignores that Respondent's Negligence claim sets forth that GBA provided both architectural and engineering services for the design and

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

Further, the Complaint specifically asserts that GBA performed construction contract administration services, and not merely architectural design services: "GBA agreed to make periodic visits to the stair tower during construction and perform other contract administration services to observe, among other things, whether construction was being completed in accordance with the plans and specification and all applicable building codes and regulation." (Complaint, at R. p. 71). The Court of Appeals correctly determined that the Circuit Court erred in holidng that "the claims asserted against [GBA] by Plaintiff are all based upon [GBA's] alleged negligent performance of professional services as an Architect." [Emphasis added] (Order, R. p. 93).

A. 480 King's expert meets the statutory requirement for providing a contemporaneous affidavit pursuant to S.C. Code § 15-36-100(A)(3).

Here, Mr. Hackney, a professional engineer, meets the criteria for serving as an expert witness under S.C. Code § 15-36-100(A)(3), and is qualified to offer an expert opinion as to GBA's performance of contract administration services, possessing the necessary scientific, technical, or specialized knowledge, and having performed the same type of services himself. (Appellant's Brief, pp. 10-12; Memo in Opposition, R. pp. 229-232; Affidavit, R. pp. 301-302).

Contrary to Petitioner's contention, South Carolina does not require that one must have an affidavit from an architect in order to sue an architect for professional negligence. (Memo in Opposition, R. pp. 229-232). That is not the law and has never been the law. Rather, one simply

needs to file an affidavit from a party that meets the criteria for "expert witness" under the catch-all provision contained § 15-36-100(A)(3), which states:

> SECTION 15-36-100. Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.
>
> (**A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:**
>
> (1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and
>
> (2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; **or**
>
> (b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
>
> (i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;
>
> (ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or
>
> (iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion;
>
> (**3) <u>is an individual not covered by subsections (A)(1) or (2)</u>, that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both. […]**
>
> [Emphasis Added]

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

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

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

(Affidavit, ¶ 10, R. p. 302).

The Affidavit clearly satisfies SC Code §15-36-100(A)(3). Specifically, Mr. Hackney satisfies the criteria for an "expert witness" under the statute as he can testify regarding Petitioner GBA's performance of contract administration services, possessing the requisite scientific, technical or other specified knowledge by reason of his study, experience, or both. (See also Hearing Transcript, R. p. 292, line 24 to p. 296, line 4, addressing Mr. Hackney's qualifications under the statute). While Petitioner can certainly try to attack Mr. Hackney's qualification at trial, he has met the threshold requirement set forth by the statute for purposes of bringing an action. It was error for the circuit court to hold that Appellant failed to file a proper affidavit in support of its claims pursuant to the statute. Accordingly, the Petition should be denied and the Court of Appeals unanimous decision should be upheld.

B. Engineers are statutorily qualified to review and testify as to the work of architects pursuant to S.C. Code § 40-22-20.

Lastly, as the Court of Appeals correctly notes, the statutory definitions of the "Practice of engineering" and "Design coordination" further clarify Mr. Hackney's ability to satisfy the affidavit requirement for an expert witness pursuant to S.C. Code § 15-36-100. See S.C. Code § 42-20-20 (Supp. 2023) (defining the "Practice of engineering" as requiring education, training, and experience in "design and design coordination" and the "review of construction for the purpose of monitoring compliance with drawing and specifications" and "Design coordination" as including "the review and coordination of those technical submission prepared by others, including…architects"). (See 480 King's Final Reply Brief, Argument III, pp. 9-10).

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

CONCLUSION

For those reasons set forth above, and in Respondent 480 King Street, LLC's Final Briefs, Respondent respectfully requests that this Honorable Court deny GBA's Petition for Writ of Certiorari, uphold the Court of Appeal's unanimous decision, and remand this case for a trial on the merits. The Petition should be denied because (1) Respondent's Complaint asserts three separate and distinct claims, including claims for Breach of Contract and Breach of Warranties, which do not require a contemporaneous affidavit under the statute, 2) Respondent's Professional Negligence Claim involves Petitioner's performance of Construction Contract Administration Services, and not merely architectural design services, and 3) Mr. Hackney, a professional engineer, meets the criteria for serving as an expert witness under S.C. Code § 15-36-100(A)(3), and is qualified to offer an expert opinion as to Petitioner GBA's performance of Contract Administration Services, possessing the necessary scientific, technical, and/or specialized knowledge, and having performed the same type of services himself. Further, contrary to Petitioner's contention, Respondent's arguments are clearly preserved, having been raised to and ruled upon by the Circuit Court and Court of Appeals. Lastly, Petitioner's contention that Mr. Hackney, a professional engineer is not qualified to opine as to construction administration services performed by an architect is contradicted by the very definitions for Engineer and Design Coordination.

[Signature on following page]

Respectfully submitted,

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November 4, 2024
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2024-001403

Charles Blanchard Construction Corp. Inc.……Plaintiff

v.

480 King Street, LLC ….…… Defendant

---

480 King Street, LLC……Third-Party Plaintiff, Respondent

v.

Glick/Boehm & Associates, Inc. ……Third-Party Defendant, Petitioner

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PROOF OF SERVICE

I, the undersigned, certify that I have served Respondent 480 King Street, LLC's Return to the Petition for Writ of Certiorari via electronic mail on Counsel for Petitioner Glick/Boehm & Associates, Inc., Kent T. Stair, Esquire (kstair@csvl.law), Jordan N. Teich, Esquire (jteich@csvl.law), and Hannah E. Smoth, Esquire (hskith@csvl.law) at their respective AIS-designated email addresses on November 4, 2024.

[Signature on following page]

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