

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Appellate Case No.: 2024-000753

Case No.: 2019-CP-10-1108

Balfour Beatty Construction, LLC, Appellant,

v.

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

And

Library Associates, LLC, Third-Party Plaintiff,

v.

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

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

**RESPONDENT STRONG TOWER CONSTRUCTION, LLC D/B/A KOCH
CORPORATION'S AMENDED INITIAL BRIEF**

Samuel M. Wheeler
SC Bar No. 101008
NC Bar No. 52540
P.O. Box 1101
23 S. Broad Street, Suite 204
Brevard, NC 28712
Phone: 828-884-4529
Fax: 828-884-4528
E-mail: sam@whitfieldcargilelaw.com

*Attorney for Respondent Strong Tower Construction, LLC
d/b/a Koch Corporation*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

COUNTER-STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 10

ARGUMENTS 11

 I. THE LOWER COURT PROPERLY GRANTED STRONG TOWER’S MOTION FOR PARTIAL SUMMARY JUDGMENT, WHEN AFFIDAVITS, DEPOSITION TESTIMONY AND BBC’S RESPONSES TO THE INTERROGATORIES WERE USED TO SUPPORT STRONG TOWER’S MOTION, AND BBC CONTINUOUSLY FAILED TO RAISE ANY GENUINE ISSUES OF MATERIAL FACT.. 11

 II. THE LOWER COURT PROPERTY GRANTED PARTIAL SUMMARY JUDGMENT, WHEN IT IS ALLOWED BY RULE 56 AND WHEN BBC DID NOT RAISE ITS ARGUMENT CONCERNING PARTIAL SUMMARY JUDGMENT TO THE LOWER COURT 16

 III. BBC’S ARGUMENT THAT PARTIAL SUMMARY JUDGMENT IS NOT ALLOWED UNDER RULE 56 IS MOOTED BY THE FACT THAT, PRIOR TO THIS APPEAL BEING FILED, STRONG TOWER DISMISSED ITS REMAINING CLAIMS AGAINST BBC, AND THE SUMMARY JUDGMENT AWARD WAS CERTIFIED AS FINAL BY THE LOWER COURT UNDER RULE 54.. 16

 IV. THE LOWER COURT PROPERLY GRANTED STRONG TOWER ATTORNEYS’ FEES AND COSTS UNDER A CONTRACTUAL PROVISION EXPLICITLY ALLOWING SUCH AN AWARD 17

 V. THIS COURT SHOULD AFFIRM THE ORDERS OF THE LOWER COURT FOR ANY REASON FOUND IN THE OTHER RESPONDENT’S BRIEF OR ANY ADDITIONAL GROUNDS APPEARING IN THE RECORD. 19

CONCLUSION..... 19

TABLE OF AUTHORITIES

CASES

Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).....10, 11, 12, 15

Elk & Jacobs Dry Wall v. Town Contractors, Inc., 267 S.C. 412, 229 S.E.2d 260 (1976).....13, 14

Evans v. Stewart, 370 S.C. 522, 636 S.E.2d 632 (Ct.App.2006).....11

Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 892 S.E.2d 297 (2023).....10, 11, 12

Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 698 S.E.2d 773 (2010).....19

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538, 552 (1986).....10, 11, 12, 15

SSI Medical Services, supra; Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (Ct.App.1988).....10

Town of Hollywood v. Floyd, 403 S.C. 466, 744 S.E.2d 161 (2013).....11

Wachovia Bank, N.A. v. Winona Grain Co., Inc., 2004 WL 6334915 (S.C. Ct. App. Sept. 20, 2004).....15

STATUTES AND COURT RULES

S.C. Code Ann. § 29-5-90.....12, 13

S.C. Code Ann. § 29-6-230.....13, 18

Rule 56, SCRCP.....10, 11, 15

Rule 208, SCACR.....16, 17, 19

Rule 220, SCACR.....19

COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE LOWER COURT PROPERLY GRANTED THE RESPONDENT’S MOTION FOR PARTIAL SUMMARY JUDGMENT, WHEN AFFIDAVITS, DEPOSITION TESTIMONY AND THE APPELLANT’S RESPONSES TO INTERROGATORIES WERE USED TO SUPPORT THE RESPONDENT’S MOTION, AND THE APPELLANT CONTINUOUSLY FAILED TO RAISE ANY GENUINE ISSUES OF MATERIAL FACT.**

- II. WHETHER THE LOWER COURT PROPERTY GRANTED PARTIAL SUMMARY JUDGMENT, WHEN IT IS ALLOWED BY RULE 56 AND WHEN THE APPELLANT DID NOT RAISE ITS ARGUMENT CONCERNING PARTIAL SUMMARY JUDGMENT TO THE LOWER COURT.**

- III. WHETHER THE APPELLANT’S ARGUMENT THAT PARTIAL SUMMARY JUDGMENT IS NOT ALLOWED UNDER RULE 56 IS MOOTED BY THE FACT THAT, PRIOR TO THIS APPEAL BEING FILED, THE RESPONDENT DISMISSED ITS REMAINING CLAIMS AGAINST THE RESPONDENT AND THE SUMMARY JUDGMENT AWARD WAS CERTIFIED AS FINAL BY THE LOWER COURT UNDER RULE 54.**

- IV. WHETHER THE LOWER COURT PROPERLY GRANTED THE RESPONDENT ATTORNEYS’ FEES AND COSTS UNDER A CONTRACTUAL PROVISION EXPLICITLY ALLOWING SUCH AN AWARD.**

- V. WHETHER THIS COURT SHOULD AFFIRM THE ORDERS OF THE LOWER COURT FOR ANY REASON FOUND IN THE OTHER RESPONDENT’S BRIEF OR ANY ADDITIONAL GROUNDS APPEARING IN THE RECORD.**

STATEMENT OF THE CASE

The underlying action and this appeal arose out of the construction of the Hotel Bennett in downtown Charleston (the “Project”), owned by Library Associates, LLC (the “Owner”). The Appellant, Balfour Beatty Construction, LLC (“BBC”), acted as the general contractor for the Project, and, under a contract with BBC, the Respondent, Strong Tower Construction, LLC d/b/a Koch Corporation (“Strong Tower”), was a subcontractor responsible for installation of the

ground level, storefront bronze windows and doors. (Strong Tower Subcontract; Strong Tower Compl., 2019-CP-10-2868). After completion of its scope of work on the Project and non-payment by BBC, Strong Tower filed a mechanic's lien in the amount of \$124,080.21, recorded in Book 0781, Page 071 of the Charleston County Register of Deeds (the "Strong Tower Lien"). (Recorded Strong Tower Lien). Strong Tower recorded with its lien an affidavit of account, stating the sum it was owed for work on the Project under its contract with BBC. (Aff. of Account, Strong Tower Lien). By that time, BBC had already filed its own mechanic's lien on the project in the amount of \$8,409,658.54, recorded in Book 0774, Page 273 of the Register of Deeds. (Recorded BBC Lien). BBC later amended its lien to \$12,066,147.09, which was recorded in Book 0810, Page 324 of the Register of Deeds (the "BBC Lien"). (Amended Recorded BBC Lien). BBC had its Vice President of Operations, David Simonton, sign an affidavit attesting that the BBC Lien sum was owed. (Aff. of Account, Amended Recorded BBC Lien)

On or about May 30, 2019, Strong Tower filed Case No. 2019-CP-10-2868 for, *inter alia*, foreclosure of the Strong Tower Lien and for breach of contract against BBC. (Strong Tower Compl., 2019-CP-10-2868). Somewhat simultaneously, BBC filed Case No. 2019-CP-10-1108, in which it sought, *inter alia*, foreclosure of the BBC Lien. (BBC Compl., 2019-CP-10-1108). Ultimately, the two actions were consolidated, along with all the actions filed by the other subcontractors, under BBC's case number and referred to the Honorable Mikell R. Scarborough, Master-In-Equity for Charleston County (the "lower court"). (Consolidation Order; Order of Reference).

Based on the pleadings and amount in controversy, BBC and the Owner were, by all appearances, embarking in litigation over tens of millions of dollars, while the Strong Tower

Lien amounted to less than \$125,000. Given the disparity in claims, Strong Tower sent short and specific written interrogatories to BBC that sought a simple response concerning how much of the Strong Tower Lien BBC did not contest. (BBC Response to Strong Tower Interrogatories). In order to determine that uncontested sum, Strong Tower requested BBC set forth the amount BBC also claimed was owed by virtue of its filing of the BBC Lien. (Id.). BBC responded that \$104,859.21 of the Strong Tower Lien was included in the BBC Lien. (Id.). Strong Tower had no contractual relationship with the Owner, thus sums claimed in the Strong Tower Lien were owed under its contract with BBC. In turn, BBC unquestionably thought \$104,859.21 was owed under the Strong Tower-BBC subcontract; otherwise, it would not have included that sum in the BBC Lien. And, as stated above, BBC filed with the BBC Lien an affidavit of account, which was recorded in the Charleston County Register of Deeds and attached to its amended complaint, swearing the sum was owed. (Aff. of Account, Amended Recorded BBC Lien).

With that uncontested sum of \$104,859.21 established, Strong Tower's next interrogatory asked BBC why it had not paid Strong Tower that sum. (BBC Response to Strong Tower Interrogatories). BBC responded as follows:

Balfour objects to this Interrogatory to the extent it seeks information protected by attorney-client privilege or the work-product doctrine. Balfour further objects to the characterization of the Plaintiff's claim as "uncontested." Subject to and without waiving these objections, the Owner of the Project has not paid Balfour in full for the value of the prime contract, as amended. Further responding, the Owner of the Project claims it is owed damages for delays and/or defects in the construction and delivery of the Project, but has not identified all of the work, delays and/or subcontractors are alleged to be involved. One of the defects that the Owner has identified and sent notice of involves leaks relating to the exterior doors installed by Strong Tower. The Owner sent notice of these defects to Strong Tower on October 24, 2019. Documents related to these defects are produced in conjunction with this discovery response (Balfour- Koch 000001 to Balfour-Koch 000047). Balfour denies any responsibility for any delays or defects, but to the extent a third-

party finds such delays or defects exist, Strong Tower will be liable to Balfour for the same. Additionally, there is currently a \$22,000 pending back charge that would reduce the contractual amount owed to Plaintiff. As discovery is ongoing, Balfour reserves the right to supplement and/or amend its Answer to this Interrogatory.

(Id.).

Based on this response, BBC had three reasons for non-payment. (Id.). First, BBC had not paid because the Owner had not paid it for sums owed to Strong Tower. (Id.). Second, BBC did not know at the time what delay or defect damages the Owner would claim as a result of Strong Tower's work. (Id.). And third, BBC contended it was entitled to a \$22,000 back charge. (Id.).

With the reasons for non-payment established, Strong Tower participated in the depositions of the Owner's representatives, to determine if the Owner did in fact claim damages associated with Strong Tower's work. Two of the Owner's representatives, Kim Brown and James Clement, were deposed and both testified that there were no outstanding issues with Strong Tower's work, that Strong did not cause any delays and that Strong should be paid under its contract with BBC. (First Brown Depo. Tr. pp. 536-541; First Clement Depo. Tr. pp. 369-374). Clements testified that Strong Tower was "a pleasure to do business with." (First Clement Depo Tr. p. 374, lines 11-12).

On or about October 19, 2020, Strong Tower moved for summary judgment against BBC on its breach of contract claim and sought \$82,859.21, which was uncontested by BBC and calculated based on the \$104,859.21 of the Strong Tower Lien that BBC included in the BBC Lien, minus the \$22,000 back charge. (Strong Tower First Mot. Summ. J.). As to the \$22,000 back charge, it was unclear as to how BBC arrived at that figure, but Strong Tower's motion sought to take the path of least resistance given the contentiousness of the litigation between

BBC and the Owner. (Id.). Strong Tower established what BBC agreed was owed, then gave BBC credit for all back charges, simply to recoup a majority of its claim and prevent further legal fees and costs. (Id.).

At a hearing on Strong Tower's motion for summary judgment, held on January 6, 2021, BBC, through its counsel, explicitly stated that Strong Tower should be paid and hoped that it would be paid. (Tr., January 6, 2021). This sentiment mirrored BBC's interrogatory responses and memorandum in which it denied any responsibility for delays or damages asserted by the Owner. (BBC Response to Strong Tower Interrogatories). Despite that direct statement, BBC withstood the motion based on its argument, both in its memorandum in opposition to the motion and during oral arguments, that it did not know yet whether the Owner would be presenting evidence of delays or damages associated with Strong Tower's work. (BBC Memo Opp. Strong Tower Mot. Summ. J.; Tr., January 6, 2021). BBC argued that, without deposition testimony from the Owner's experts, that issue remained outstanding. (Id.). At no point in its memorandum or arguments did BBC raise an issue with a possible award of partial summary judgment being in violation of Rule 56, SCRCF. (Id.). Ultimately, the same day, the Court denied Strong Tower's motion via a Form 4 order, but it suggested the motion might be ripe once the Owner's experts had been deposed, given that was BBC's argument against summary judgment. (Form 4 Denial; Tr., January 6, 2021).

Following the hearing on Strong Tower's motion for summary judgment, the lower court held a status conference on March 19, 2021, to discuss possible trial sequencing. At that hearing, BBC and the Owner both suggested that many of the subcontractors should be paid, but they both argued that the other should be the party paying the subcontractors, such as Strong Tower. (Tr., March 19, 2021). At one point, either BBC or the Owner suggested that the

subcontractors, such as Strong Tower, should bring their claims in dispositive motions. (Id.). Strong Tower reminded the lower court that it had in fact brought such a motion (i.e., its October 19, 2020, motion for summary judgment). (Id.). Growing frustrated with the significant costs that many of the subcontractors, such as Strong Tower, were incurring to endure a very contested litigation between BBC and the Owner, the lower court requested that subcontractors determine whether the Owner's experts took issue with their work and, if not, bring motions for summary judgment on their breach of contract claims against BBC, the party with whom the subcontractors had a contractual relationship. (Id.). The logic of the lower court was clear and very appropriate: If BBC did not contest a subcontractor's claim, and the Owner had no damages associated with a subcontractor's work, then there was no reason for BBC to continue to withhold payment.

After that status conference, the Owner's experts were all deposed, and Strong Tower participated to determine if any took issue with its work. Specifically, the following depositions were been taken: On April 22, 2021, Jim Clements was deposed a second time, as a person named as an expert by the Owner in the areas of scheduling, supervision, sequencing, coordination, management and construction; on April 28 and 29, 2021, Kim Brown was deposed a second time, as the Rule 30(b)(6), SCRCF, deponent for the Owner; on May 3, 2021, Mark Boe, Capital Project Management, Inc, the Owner's scheduling, management and construction expert, was deposed; and, finally, on May 5 and May 6, 2021, Sam Hadley, Cotton & Company, the Owner's cost and lost profits expert, was deposed. (Second Clements Depo. Tr., pp. 175-177; Second Brown Depo. Tr., pp. 320-324; Boe Depo. Tr., pp. 161-165; Hadley Depo. Tr., pp. 314-319, 324-325). None of these experts or witnesses took issue with Strong Tower's work or could identify any damages attributable to Strong Tower. (Id.; see also Query Depo. Tr., pp. 74-

76).

Having established that none of the Owner's representatives or experts had complaints or damages associated with Strong Tower's work, Strong Tower again moved for partial summary judgment on May 6, 2021, asserting in its motion that no genuine issues of material fact existed with respect to the undisputed sum of \$82,859.21 owed by BBC. (Strong Tower Second Mot. Summ. J.). On August 9, 2021, Strong Tower supplemented its motion and memorandum with excerpts from the transcripts of the above-mentioned depositions. (Strong Tower Supp. Memo.). In response to Strong Tower's motion, BBC filed a memorandum in opposition on August 16, 2021. (BBC Memo. Opp. Mot. Summ. J.). Despite its discovery responses concerning undisputed sums and the deposition testimony of the Owner's experts and representatives establishing that Strong Tower's work was not the source of the Owner's damages, BBC blankly, and without support, argued that "there are, inarguably, questions of fact that must be addressed." (Id.). BBC also raised concerns over a request for admission concerning the quality of Strong Tower's work that the Owner denied. (Id.). BBC's request for admission and the Owner's response were as follows:

Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Strong Tower Construction, LLC d/b/a Koch Corporation caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

(Id.).

BBC made identical requests concerning all subcontractors whom it anticipated making summary judgment motions. (Id.). This lone request for admission was the source of argument at a hearing on Strong Tower's motion for summary judgment, held on August 16, 2021. (Tr.,

August 16, 2021, pp. 105-109). Any doubts about whether this lone request for admission created a genuine issues of material fact were dispelled when the Owner interjected into the arguments, stating clearly that that the requests for admission were (1) simply too broad to admit and (2) should not replace the testimony on record in this case. (Id. at. pp. 108-109). At no point in its memorandum or arguments did BBC raise to the lower court an issue with a potential partial summary judgment award being in violation of Rule 56. (BBC Memo. Opp. Mot. Summ. J Tr.; August 16, 2021). The lower court verbally granted Strong Tower's motion for partial summary judgment, and, on September 9, 2021, it followed with a written order that there existed no genuine issues of material fact with Strong Tower's claim for \$82,859.21. (Tr. pp 110; Order Granting Summ. J.). It also awarded Strong Tower attorneys' fees in the sum of \$64,927.50, costs in the amount of \$404.88, prejudgment interest in the sum of \$16,367.53, and post judgment interest at 7.25%. (Tr. pp. 110-112; Order Granting Summ. J.).

On September 13, 2021, the Owner and Strong Tower entered into a consent order dismissing with prejudice all claims by and between them, ending any debate or argument that the Owner was pursuing Strong Tower for damages. (Consent Order of Dismissal). A few days later, on September 15, 2021, Strong Tower moved to dismiss all other damages and causes of action against BBC, requesting the lower court certify the partial summary judgment award as final. (Strong Tower Mot. Dismiss, Certify).

On September 20, 2021, BBC filed a motion for reconsideration of the order granting Strong Tower summary judgment. (BBC Mot. Reconsideration). BBC made two arguments. First, it argued that the contract between BBC and Strong Tower did not allow for attorneys' fees and costs. (Id.). Second, BBC argued that BBC might be entitled to a set-off, should the impending trial between it and the Owner yield some damages against it attributable to Strong

Tower's work. (Id.). At no point in this motion did BBC raise the issue of partial summary judgment being in violation of Rule 56. (Id.). On December 1, 2021, Strong Tower filed a brief memorandum in opposition to that motion for reconsideration. (Strong Tower Memo. Opp. Reconsideration). The lower court elected not to rule on Strong Tower's motion to dismiss and certify its judgment as final, as well as BBC's motion for reconsideration, prior to trial.

The case between BBC and the Owner proceeded to a bench trial that ran on non-consecutive days between September 13, 2021, and December 3, 2021. (see Trial Order). For reasons beyond the control of the parties and the lower court, and due to the court reporter failing to provide the parties and court with complete trial transcripts, the lower court was not able to issue a trial order until October 6, 2023. (see date of Trial Order compared to trial dates).

After issuing its order on trial, the lower court addressed BBC's motion for reconsideration of Strong Towers summary judgment. On March 4, 2024, Strong Tower filed a memorandum in support of certifying its partial summary judgment award as final. (Strong Tower Memo). On March 7, 2024, BBC filed a second memorandum in support of reconsideration. (Second BBC Memo.). It made two arguments. It again argued that the lower court should not have awarded Strong Tower attorneys' fees and costs. (Id.). And it argued that the trial yielded setoff damages against certain subcontractors. (Id.). However, BBC's memorandum was generic as to all subcontractors, and there was no mention in it of Strong Tower's work being criticized at trial or forming the basis for any damages awarded against BBC by the trial court. (Id.). Further, BBC at all times, dating back to its interrogatory responses and first opposition to Strong Tower's motion for summary judgment, and up through trial, took the position that it was not responsible for delay damages. (BBC Response to Strong Tower Interrogatories; BBC Memo Opp. Strong Tower First Mot. Summ. J.). The trial order

specifically noted that BBC’s expert testified that BBC was only responsible for one day of delays (out of 516 days). (Trial Order, p. 31). And, again, the memorandum makes no mention of a partial summary judgment award violating Rule 56. (Second BBC Memo Supp. Mot. Reconsideration).

The lower court heard pending motions on March 13, 2024, and, on April 4, 2024, it thereafter certified Strong Tower’s judgment as final and dismissed Strong Tower’s remaining claims, ending any “partial” award and making summary judgment final. (Tr., March 13, 2024; Order Certifying Judgment and Dismissal). This appeal followed.

STANDARD OF REVIEW

Rule 56(c) states that summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. “Once moving party carries its initial burden, opposing party must, under Rule 56(e), ‘do more than simply show that there is some metaphysical doubt as to the material facts’ but ‘must come forward with ‘specific facts showing that there is a *genuine issue for trial.*’” *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986)) (emphasis in original). “Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings.” *Id.* (citing *SSI Medical Services, supra; Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449 (Ct.App.1988)). Recently, the South Carolina Supreme Court took the opportunity to restate the above standard and restate its historical rejection of the “mere scintilla” standard. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297

(2023). To survive a motion for summary judgment, the non-moving party must show a genuine issue of material fact. *Id.* “However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) (citing *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct.App.2006)).

ARGUMENTS

I. THE LOWER COURT PROPERLY GRANTED STRONG TOWER’S MOTION FOR PARTIAL SUMMARY JUDGMENT, WHEN AFFIDAVITS, DEPOSITION TESTIMONY AND BBC’S RESPONSES TO THE INTERROGATORIES WERE USED TO SUPPORT STRONG TOWER’S MOTION, AND BBC CONTINUOUSLY FAILED TO RAISE ANY GENUINE ISSUES OF MATERIAL FACT.

Strong Tower’s motion for partial judgment was supported by the pleadings, deposition testimony, BBC’s responses to interrogatories, affidavits, and statements by BBC in open court concerning payment, all evidence expressly considered by Rule 56, SCRPC. In response, BBC continued to rely on hypothetical and speculative damages that the Owner might assert against BBC, yet it at all times denied damages claimed by the Owner, even through trial, at which it took responsibility for a single day of delay damages. (Trial Order, p. 31).

Rule 56(c) has always been clear as to what is required by the moving party, listing “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any” as evidence that serves to support summary judgment. Rule 56(c), SCRPC. Further, it is equally well-established that “[o]nce moving party carries its initial burden, opposing party must, under Rule 56(e), ‘do more than simply show that there is some metaphysical doubt as to the material facts’ but ‘must come forward with ‘specific facts showing

that there is a *genuine issue for trial.*” *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986)) (emphasis in original).

In its brief, BBC has apparently taken it upon itself to create a new standard under some misguided interpretation of the *Kitchen Planners* decision, arguing that summary judgment requires “competent, admissible evidence.” (Initial Br., pp. 7, 8, 11). It then argues that Strong Tower did not put forth such “competent, admissible evidence.” (Id. at p. 11).

Neither the word “competent” nor the word “admissible” appears anywhere in the *Kitchen Planners* decision. see *Kitchen Planners*, 440 S.C. 456, 892 S.E.2d 297 (2023). Instead, the entire purpose of the *Kitchen Planners* decision was to re-establish what has been historically required, not of the moving party, but of the non-moving party – to bring forward a genuine issue of material fact. *Id.*

Strong Tower brought forward evidence identified by Rule 56(c) to support its motion for summary judgment. S.C. Code Ann. § 29-5-90 requires a sworn statement from a lien claimant, establishing the amount owed to him. *Id.* Attached to the Strong Tower Lien and complaint was an affidavit of account, stating the sum owned on the Project. (Aff. of Account, Strong Tower Lien). Attached to the BBC lien and complaint was an affidavit of account, stating the sum it was owed on the Project. (Aff. of Account, Amended Recorded BBC Lien). These pleadings and affidavits were used to support Strong Tower’s motions for summary judgment.

Strong Tower used these affidavits because BBC’s answers to interrogatory requests indicated that BBC included in the BBC Lien \$104,859.21 that Strong Tower included in the Strong Tower Lien. (BBC Response to Strong Tower Interrogatories). Strong Tower had no

contractual relationship with the Owner, so it claimed a sum it was owed under its contract with BBC, and Strong Tower supported that sum with an affidavit. (Aff. of Account, Strong Tower Lien). In turn, BBC included \$104,859.21 of that sum in the BBC Lien and its claim against the Owner. (BBC Response to Strong Tower Interrogatories; Aff. of Account, Amended Recorded BBC Lien). These sums were sworn to by affidavits, as required by South Carolina's mechanic's lien laws. S.C. Code Ann. § 29-5-90. There is no more perfect evidence of what BBC owed to Strong Tower than BBC's own affidavit, making a claim for that sum against the Owner. If BBC did not think the sum was owed, it would not have included it in the BBC Lien. This is a direct admission by BBC of what it owed to Strong Tower.

Strong Tower also relied on BBC's responses to interrogatory responses. When asked why BCC had not paid Strong Tower the \$104,859.21 sum it did not dispute by virtue of also including it in the BBC Lien, BBC gave three reasons: (1) it had not been paid by the Owner; (2) it had a \$22,000 back charge; and (3) it did not know what damages the Owner claimed that were associated with Strong Tower's work, which BBC denied existed regardless. (BBC Response to Strong Tower Interrogatories).

BBC's first justification was invalid, because nonpayment by the Owner as the reason for its own nonpayment to Strong Tower is not a valid defense under South Carolina law. *See* S.C. Code Ann. § 29-6-230 ("The payment by the owner to the contractor . . . is not . . . a condition precedent for payment to the construction subcontractor. Any agreement to the contrary is unenforceable."); *Elk & Jacobs Dry Wall v. Town Contractors, Inc.*, 267 S.C. 412, 418, 229 S.E.2d 260, 262 (1976) (recognizing that a contractor may delay payment to a subcontractor only for a reasonable time while it attempts to obtain payment from an owner, and that such payment from the owner is not a condition precedent to the contractor's obligation to pay the

subcontractor).

BBC's second justification did not create a genuine issue of material fact because Strong Tower moved for \$82,859.21, giving BBC credit for the full sum of the \$22,000 back charge, regardless of whether it was valid or supported by any evidence. (Strong Tower Second Mot. Summ. J.).

Lastly, the deposition testimony of six different representatives, witnesses and experts for the Owner supported Strong Tower's motion. Jim Clements was deposed twice, once as an Owner-representative and its architect, and a second time, as a person named as an expert by the Owner in the areas of scheduling, supervision, sequencing, coordination, management and construction; Kim Brown was deposed twice, once as a fact witness for the Owner and a second time, as the Rule 30(b)(6), SCRCF, deponent for the Owner; Mark Boe, Capital Project Management, Inc, the Owner's scheduling, management and construction expert, was deposed; and Sam Hadley, Cotton & Company, the Owner's cost and lost profits expert, was deposed. (Second Clements Depo. Tr., pp. 175-177; Second Brown Depo. Tr., pp. 320-324; Boe Depo. Tr., pp. 161-165; Hadley Depo. Tr., pp. 314-319, 324-325). None of these experts or witnesses took issue with Strong Tower's work or could identify any damage attributable to Strong Tower. (Id.; see also Query Depo. Tr., pp. 74-76). The Owner had no claims against Strong Tower, nor did it have the right to make claims against Strong Tower, as all claims by and between these parties had been dismissed with prejudice. (Consent Order of Dismissal). And the Owner made clear during oral arguments that speculation concerning damages should not replace the testimony on record in this case. (Tr., August 16, 2021, pp. 108-109).

Despite its own affidavit stating a claim for sums that included amounts owed to Strong Tower, its responses to interrogatories, and the deposition testimony of the Owners experts and

representatives, BBC continued to argue in its memorandums in opposition to summary judgment and in support of reconsideration that summary judgment was not appropriate because it may be entitled to some form of set-off based on the Owner's damages. (BBC Memo Opp. Mot. Summ. J.). This baseless argument is exactly the type of "metaphysical doubt" that does not amount to a "showing that there is a *genuine issue for trial*." *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986)) (emphasis in original). Moreover, "the mere existence of [a] potential right of setoff does not create a genuine issue of material fact." *Wachovia Bank, N.A. v. Winona Grain Co., Inc.*, 2004 WL 6334915, at *4 (S.C. Ct. App. Sept. 20, 2004).

Pursuant to Rule 56, SCRPC, Strong Tower relied on affidavits, pleadings, depositions and interrogatory responses to support its motions for summary judgment. BBC now argues that Strong Tower's evidence was not credible or admissible, despite it being the type of evidence expressly considered by Rule 56. To be clear, the only portion of Rule 56 that mentions credibility or admissibility is Rule 56(e), which places requirements on affidavits used in support or opposition to summary judgment. *Id.* BBC never challenged the credibility or admissibility of the affidavits attached to both the Strong Tower Lien and the BBC Lien. To do so would be to challenge its own claim for damages against the Owner and its own affidavit.

For all of these reasons, and any grounds found in the record, this Court should affirm the orders of the lower court and remand this action to the lower court for supplemental proceedings in connection with Strong Tower's right to execute and enforce its judgment.

II. THE LOWER COURT PROPERTY GRANTED PARTIAL SUMMARY JUDGMENT, WHEN IT IS ALLOWED BY RULE 56 AND WHEN BBC DID NOT RAISE ITS ARGUMENT CONCERNING PARTIAL SUMMARY JUDGMENT TO THE LOWER COURT.

The brief of Respondent Watson Electrical Construction Co., LLC (“Watson”) properly analyzes Rule 56 as it relates to partial summary judgment and the law concerning preservation of issues for appeal. (Watson Initial Br., pp. 6-12). Pursuant to Rule 208(b)(6), SCACR, Strong Tower adopts by reference Watson’s arguments concerning this issue.

With respect to the preservation issue and case law analyzed by Watson in its brief, at no point in its memorandums in opposition to summary judgment or in support of its motion to reconsider did BBC mention partial summary judgment violating Rule 56. (Memo Opp. Summ. J.; Memos Reconsideration).

For all of these reasons, and any grounds found in the record, this Court should affirm the orders of the lower court and remand this action to the lower court for supplemental proceedings in connection with Strong Tower’s right to execute and enforce its judgment.

III. BBC’S ARGUMENT THAT PARTIAL SUMMARY JUDGMENT IS NOT ALLOWED UNDER RULE 56 IS MOOTED BY THE FACT THAT, PRIOR TO THIS APPEAL BEING FILED, STRONG TOWER DISMISSED ITS REMAINING CLAIMS AGAINST BBC, AND THE SUMMARY JUDGMENT AWARD WAS CERTIFIED AS FINAL BY THE LOWER COURT UNDER RULE 54.

On September 15, 2021, after being awarded partial summary judgment, Strong Tower moved to dismiss all other damages and causes of action against BBC, requesting the lower court certify the partial summary judgment award as final. (Strong Tower Mot. Certify and Dismiss).

On March 4, 2024, Strong Tower filed a memorandum in support of certifying its partial summary judgment award as final. (Strong Tower Memo). On April 4, 2024, the lower court certified Strong Tower’s judgment as final and dismissed Strong Tower’s remaining claims, ending any “partial” award and making summary judgment final. (Order Certifying and Dismissing). Prior to this appeal being filed, any “partial” award was certified as final. (Id.). BBC never made claims against Strong Tower, and Strong Tower has dismissed its remaining claims for any damages. (BBC Answer, 2019-CP-10-2868). The summary judgment award is final, rendering moot any arguments BBC might have that a partial award violates Rule 56.

For all of these reasons, and any grounds found in the record, this Court should affirm the orders of the lower court and remand this action to the lower court for supplemental proceedings in connection with Strong Tower’s right to execute and enforce its judgment.

IV. THE LOWER COURT PROPERLY GRANTED STRONG TOWER ATTORNEYS’ FEES AND COSTS UNDER A CONTRACTUAL PROVISION EXPLICITLY ALLOWING SUCH AN AWARD.

The brief of Watson properly analyzes its right to attorneys’ fees and costs under explicit contractual provisions, which are the same as the contract between Strong Tower and BBC. (Watson Initial Br., pp. 12-24). Pursuant to Rule 208(b)(6), SCACR, Strong Tower adopts by reference Watson’s arguments concerning this issue.

In addition, Strong Tower asserted a breach of contract claim against BBC only, and the lower court heard arguments and granted summary judgment to Strong Tower on that cause of action only. (Order Granting Summ. J.). The breach of contract claim was not and could not have been asserted against the Owner, as Strong Tower had no contract with the Owner. Accordingly, it constitutes a “dispute between the Subcontractor and Contractor not involving

the conduct of the owner” as described in Section 10.A. and 10.D. of the contract between BBC and Strong Tower. (Strong Tower-BBC Subcontract, Section 10.A and 10.D.).

In its interrogatory responses, BBC pointed to nonpayment by the Owner as the reason for its own nonpayment to Strong Tower. (BBC Response to Strong Tower Interrogatories). It also pointed to the Owner’s speculative damages associated with Strong Tower’s work. (Id.). These are ostensibly the reasons BBC argues that Strong Tower’s claim involves the Owner. Non-payment by the Owner does not make the Owner’s conduct relevant to Strong Tower’s breach of contract claim, because nonpayment by the Owner is not a valid defense under South Carolina law. *See* S.C. Code § 29-6-230 (“The payment by the owner to the contractor . . . is not . . . a condition precedent for payment to the construction subcontractor. Any agreement to the contrary is unenforceable.”). And, again, the Owners experts, representatives and witnesses testified repeatedly that they had no damages or claims associated with Strong Tower’s work. (First Brown Depo. Tr. pp. 536-541; First Clement Depo. Tr. pp. 369-374; Second Clements Depo. Tr., pp. 175-177; Second Brown Depo. Tr., pp. 320-324; Boe Depo. Tr., pp. 161-165; Hadley Depo. Tr., pp. 314-319, 324-325; Query Depo. Tr., pp. 74-76). Further, Strong Tower and the Owner dismissed all claims by and between them with prejudice. (Consent Order of Dismissal). The Owner took no role in the breach of contract claim between Strong Tower and BBC. BBC simply pointed the finger at the Owner as a basis for non-payment.

In short, Strong Tower contracted with BBC; it performed its contract, as acknowledged by BBC’s lien, affidavit, and responses to interrogatories; and it was not paid in full by BBC. The Owner’s conduct has nothing to do with it.

Finally, should the Court find that an ambiguity exists regarding the applicability of the attorneys’ fee provision in the subcontract to this claim, it must be construed against the drafter,

BBC. *E.g., Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010) (“Moreover, even if the language creates an ambiguity, a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.”).

For all of these reasons, and any grounds found in the record, this Court should affirm the orders of the lower court and remand this action to the lower court for supplemental proceedings in connection with Strong Tower’s right to execute and enforce its judgment.

V. THIS COURT SHOULD AFFIRM THE ORDERS OF THE LOWER COURT FOR ANY REASON FOUND IN THE OTHER RESPONDENT’S BRIEF OR ANY ADDITIONAL GROUNDS APPEARING IN THE RECORD.

“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR. “Respondent’s brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).” Rule 208(b)(2), SCACR. As the prevailing party, Strong Tower would request that this Court affirm the orders of the lower courts for any grounds appearing in the record.

CONCLUSION

For all of the of the above reasons, for all the reasons set forth by the lower court, for all the reasons set forth in the briefs of the other Respondent, and for any ground appearing in the record, this Court should affirm the orders of the lower court and remand this action to the lower court for supplemental proceedings in connection with Strong Tower’s right to execute and enforce its judgment.

WHITFIELD-CARGILE LAW, PLLC

s/Samuel M. Wheeler

Samuel M. Wheeler
SC Bar No. 101008
NC Bar No. 52540
P.O. Box 1101
23 S. Broad Street, Suite 204
Brevard, NC 28712
Phone: 828-884-4529
Fax: 828-884-4528
E-mail: sam@whitfieldcargilelaw.com

*Attorney for Respondent Strong Tower Construction,
LLC d/b/a Koch Corporation*

March 20, 2025
Brevard, North Carolina