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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2024-000788
Case No.: 2019-CP-10-01108

Balfour Beatty Construction, LLC, Appellant,

v.

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

And

Library Associates, LLC, Third-Party Plaintiff,

v.

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

Of which Library Associates, LLC is the Respondent.

RESPONDENT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

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COUNTER-STATEMENT OF ISSUES ON APPEAL

(1) The Trial Judge in this non-jury case was correct in finding and concluding based upon the evidence submitted that Appellant was NOT entitled to any further payments from Owner pursuant to the Contract Documents.

(2) The Trial Judge in this non-jury case was correct in finding and concluding based upon the evidence submitted that Appellant breached the Contract Documents which proximately caused Owner $3,320,329.00 in damages.

(3) The Trial Judge in this non-jury case was correct in finding and concluding based upon the evidence submitted that Appellant breached the Contract Documents with fraudulent intent.

(4) The Trial Judge in this non-jury case was correct in its well-reasoned Order to award punitive damages against Appellant for its conduct.

(5) The Trial Judge in this non-jury case was correct in awarding attorneys' fees to the Owner as the Owner was the clear prevailing party under the Mechanic's Lien Statute.

(6) The Trial Judge in this non-jury case was correct in awarding costs for the only Auditor in this case under the S.C. Declaratory Judgement Act provision S.C. Code Ann. 15-53-100.

(7) The Court of Appeals should affirm the Orders and Judgment of the Trial Court based upon any evidence appearing in the record pursuant to Rule 220(c), SCACR.

COUNTER-STATEMENT OF THE CASE

The action which is the subject of this appeal was originally filed by Appellant on March 5, 2019 (hereinafter sometimes called "Appellant or Balfour or Contractor"). The pleading was accompanied by a Lis Pendens that remains in place to this day. Despite the extraordinary efforts of the Owner to unsuccessfully remove this cloud on its title this Lis Pendens remains and has caused significant additional damages. The complaint was amended by Appellant two additional times and the operative pleading is the Second Amended Complaint filed on October 12, 2020. (Second Amended Summons and

Complaint)(R. p.). Owner filed and served its responsive pleading to the operative pleading on October 20, 2020 and asserted certain counterclaims against Appellant. (Answer to the Second Amended Summons and Complaint)(R. p.).

Appellant pursued the following causes of action (1)foreclosure of a mechanic's lien against Owner's Property; (2) breach of contract against Owner; (3) quantum meruit/quasi contract; (4) attorneys' fees pursuant to S.C. Code Section 27-1-15; (5) abandonment, waiver, and/or estoppel; (6) cardinal change; (7) indemnity; (8) breach of implied warranty of plans and specifications; (9) first to breach; and (10) breach of contract accompanied by a fraudulent act.

Owner pursued the following counterclaims against Contractor (1) breach of contract; (2) breach of contract accompanied by a fraudulent act; (3) indemnification; (4) certain claims for declaratory relief; (5) unfair trade practices; and (6) civil conspiracy.

This matter was tried before the Trial Court on non-consecutive days beginning on September 13, 2021 and concluding on December 3, 2021. On October 6, 2023[1], the Trial Judge issued an order in favor of Owner, including a hearing on punitive damages. (R. p.). Pursuant to the October 6 Order, the hearing on the amount of punitive damages was to be set at a future date.

On October 16, 2023, Appellant filed a motion to alter or amend the October 6 Order. Importantly, that motion remained pending before the Court until May 15, 2024.

On November 6, 2023, Owner, in accordance with the October 6 Order, Owner submitted its Petition for Attorneys' Fees and Costs. On April 12, 2024, the Trial Judge issued the Order on Attorneys' Fees and Costs.

[1] The Order was delayed due to a significant amount of time for the Court Reporter to prepare the trial transcript.

On April 2, 2024, the Trial Judge held a hearing on the amount punitive damages that could be awarded. On April 12, 2023, the Trial Court issued its award on the amount of punitive damages. (R. p.) On April 22, 2024, Appellant filed an additional motion to alter or amend the award of punitive damages to Owner. (R. p.). On April 29, 2024, the Trial Judge entered an Order requiring Owner to elect remedies between causes of action. (R. p.)

On May 6, 2024, the Trial Judge entered a Final Judgment in favor of Owner. (R. p.). On May 9, 2024, Appellant again filed another motion to alter or amend. On May 15, 2024, the final motion of Appellant to alter or amend was denied. (R. p.) At no time did Appellant contend that the Trial Judge did not have jurisdiction over the matter.[2]

STATEMENT OF THE FACTS

This case arises out of the construction of a luxury hotel in downtown Charleston, South Carolina known as the Hotel Bennett ("Project"). The contract for the construction of the Project is what is known in the industry as a Cost Plus with a Guaranteed Max contract. It is on a form that was originally created by the American Institute of Architects "AIA". (Plaintiff's Ex. 56. (R. p.) The underlying forms in this matter consist of AIA-A133 ("Agreement"), Exhibit A to the Agreement, and the General Conditions known as AIA-A201. Id. In addition to the Agreement and the General Conditions, the Contract Documents include "Drawings, Specifications, Addenda issued prior to the execution of the contract, other documents listed in the Agreement and Modifications issued after the execution of the Agreement. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change

[2] The Contract Documents, as agreed to by the parties, provide that the Master-In-Equity has sole jurisdiction over this matter. (R. p.)

Directive, or (4) a written order for a minor change in the work issued by the Architect. See Section 1.1.1 of the AIA-A201 (R. p.). These are sometimes be collectively referred to by the parties to this appeal as "Contract Documents". Importantly, Owner is only required to pay "certified pay requests" from Contractor. (R. p.). Approved and certified "Change Orders" are required for any additional payment to the Contractor due to Contractor.

The Contract Documents provide that Contractor is entitled to be paid for eligible costs ("Costs of the Work") incurred for the work on the project plus a fee subject to a maximum amount ("GMP"). Section 2.2.1 of the AIA-A133. (R. p.). To be clear the maximum amount is just that—it is not the minimum amount. Unlike a lump sum contract, Contractor is entitled only to the lesser of the "Cost of the Work" plus a fee or the "GMP". Section A.1.1 of Exhibit A to AIA-A133 (R. p.); Section 2.2.1 of the AIA-A133; Article 6 of the AIA-A133 (R. p.).

Owner, along with Owner's Representative Jim Clements, issued a request for proposal ("RFP") for this Project to interested bidders. Defendant's Ex. 103 (R. p.); Transcript, pp. 3142-3148 (R. p.). Contractor responded to the RFP. Defendant's Ex. 39 (R. p.). On September 22, 2014, Owner and Contractor entered into the Agreement-AIA-A133. Plaintiff's Ex. 56 (R. p.). Though the parties utilized the AIA form, significant changes were made to the contract terms through extensive negotiations. Deposition Testimony of Mike Baumbach (R. p.).

The AIA-A133 Agreement was broken down into two phases. The first phase was preconstruction phase to develop the GMP. Section 2.1 and 2.2 of AIA-A133; Transcript pp. 3154-3155. (R. p.). Contractor was paid a separate fee for the

preconstruction phase. Article 4 of AIA-A133 (R. p.). The preconstruction portion stated that Contractor "shall, through preconstruction, review the constructability of the Architect's plans and specifications and shall notify the Owner and Architect in writing of any discovered defects, deficiencies, or recommended changes." Section 2.1.8.1 of the AIA-A133 . (R. p.). Contractor, in fact, approached Owner and requested an additional $36,000.00 in preconstruction costs to further develop and evaluate the design development documents. Transcript, pp. 3166-3170. (R. p.). The Owner paid Contractor the additional preconstruction costs for "higher cost security." Id. Contractor and the Architect "worked in conjunction with each other" during the preconstruction period. Id.

The second phase of the AIA-133 Agreement is the construction phase. Section 2.3 of the AIA-A133. (R. p.). This phase is begun once the Contractor submits the GMP and the Owner agrees to proceed. Section 2.2.1 of the AIA-A133. The GMP and the project schedule or duration are both created by Contractor. Transcript, pp. 3171-3173. (R. p.). Just prior to the submission of the GMP, Contractor informed Owner that it needed to add an additional $870,000.00 for general conditions to the GMP. Transcript, pp. 3175-3179. (R. p.). The Owner agreed to the additional sums. Id. In March of 2015, Exhibit A to the AIA-A133 was executed which included a GMP of $59,344,747.00 and a project duration of 28 months from the Notice to Proceed. Plaintiff's Ex. 56. (R. p.). Owner did not have any involvement in the creation of the schedule for the Project. Transcript, p. 3194. (R. p.). The Contractor is "solely responsible" for the schedule. Section 3.10.4.7 of the AIA-A201. (R. p.).

The Notice to Proceed was issued on March 19, 2015. Defendant's Ex. 2. (R. p.).

Because this was a Cost Plus with a Guaranteed Max Contract, the Contract Documents required the Appellant to provide substantial access to financial records.

At the trial of this matter, Owner offered the testimony of Ms. Sandra "Sam" Hadley as an expert in "accounting and auditing, construction accounting and auditing and damage compilation in construction projects." Transcript pp. 3901-3902 (R. p.). Hadley was qualified as an expert in those fields without objection. Id. Hadley is a certified public accountant, a certified government financial manager, certified fraud examiner, and certified in financial forensics. Transcript pp. 3890-3893 (R. p.); see also Defendant's Ex. 150 (R p.).

The uncontradicted testimony was Appellant did not provide a final accounting or an audit for the Project—notwithstanding that the mandatory, fundamental, and unambiguous requirements of the Contract Documents required it to do so. Plaintiff Ex. 56 (R. p.).

Section 6.11.1 of the AIA133 states as follows:

"The Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda, and other data relating to this Contract. The Construction Manager shall preserve these records for a period of four (4) years after final payment, or for such longer period as may be required by law." Id.

Moreover, Section 7.1.11 of the AIA133 states as follows:

"The Owner has the right, at its sole discretion, to perform periodic examinations, audits, and verifications of the Construction Manager's cost accounting records and other Project documentation. The Contractor shall make all its records available to the Owner upon reasonable advance notice and shall provide the Owner with copies of specific records from time to time upon reasonable request."

See also Sections 7.2.2 and 7.2.3 of the AIA-A133. (R. p.)

Pursuant to the foregoing sections of Contract Documents, on April 22, 2019, Hadley wrote to Contractor requesting specific documentation required to perform an audit of the project costs or "cost of the work" as that term is defined at Article 6 of the AIA-A133. Transcript pp. 3923-3925 (R. p.). On April 30, 2019, Contractor responded that it was refusing to produce any documentation, data, or response to support the contractually required audit. Defendant's Ex. 50 (R. p.); Transcript p. 3926 (R. p.); Transcript p. 2274 (R. p.).

As a direct and proximate result of Contractor's refusal to produce documents, data or accountings, Hadley was forced to rely on anecdotal information available to Owner. Transcript pp. 3926-3927 (R. p.). At the time of Contractor's refusal to produce documents, Contractor had also shut down Owner's access to the Egnyte document repository for the Project. Transcript, pp. 2204-2207 (R. p.); Plaintiff's Ex. 258 (R. p.). Contractor's witness Alec Dooley testified that the Egnyte site was a shared folder service that contained "everything". Transcript, p. 392 (R. p.). Based solely upon that anecdotal information, however, Hadley concluded, as of June 11, 2019, that there was approximately $7,700,000.00 of duplicative and potentially excessive mechanic's lien amounts. Transcript pp. 3926-3927 (R. p.). At this time, Contractor and its subcontractors had filed mechanic's liens in the amount of $26,341,655.00. Transcript pp. 3927-3928 (R. p.).

As of September 17, 2019, Hadley was able to conclude that approximately $13,800,000.00 of the mechanic's lien amounts were duplicative and potentially excessive. Transcript pp. 3929-3930 (R. p.). All the while, Contractor continued to refuse to comply with contractually required audit procedures. Id.

On November 27, 2019, Hadley was able to identify $17,400,000.00 in duplicative, potentially excessive, and uncorrelated mechanic's lien amounts. Transcript, p. 3931 (R. p.). Contractor continued to refuse to comply with the audit provisions mandated by the Contract Documents. Id.

On March 17, 2020, upon motion of Owner, the Trial Court entered an Order directing Contractor to comply with the audit provisions of the Contract Documents. March 17, 2020, Order Granting Owner's Motion for Affirmative Injunction (R. p.); Transcript p. 3931 (R. p.).

On June 17, 2020, again upon motion of Owner, the Trail Court issued an Order to Enforce which for the second time directed Contractor to comply with the audit provisions of the Contract Documents. June 17, 2020, Order to Enforce (R. p.); Transcript, p. 3931 (R. p.). The Order to Enforce expressly found that the audit was a matter of "contract" and not "discovery" in litigation. Id.

During the month of July 2020, Hadley attempted to conduct the audit as required by the Contract Documents and twice ordered by the Court. Transcript pp. 3932-3939 (R. p.).

On August 3, 2020, Hadley again notified the Court and Contractor that Contractor was not allowing Hadley to perform the audit. Transcript, pp. 3939-3940 (R. p.).

As of November 16, 2020, Hadley was unable to finish the audit work. Transcript, p. 3941 (R. p.).

Contractor NEVER submitted a final payment request or the documentation required pursuant to Section 7.2.1 of the AIA133. Transcript p. 3907 (R. p.).

Moreover, Section 7.2.2 of the AIA133 states as follows:

"The Owner's auditors will review and report in writing on the Construction Manager's final accounting within 60 days after delivery or the final accounting to the Architect by the Construction Manager. The Construction Manager's final accounting is a complete and full accounting of costs incurred by the Construction Manager in performance of the Work, organized according to the Construction Manager's schedule of values and cost codes and correlated to the costs to be reimbursed under Article 6 of this Agreement Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of the AIA Document A20l-2007. The time periods stated in this Section supersede those slated in Section 9.4.1 of the AIA Document A201-2007. The Architect is not responsible for verifying the accuracy of the Construction Manager's final accounting."

Contractor NEVER submitted a final accounting or the documentation required pursuant to Section 7.2.2 of the AIA133. Transcript p. 3908

In fact, during the trial of this matter Hadley sat in the rear of the courtroom and continued to try and audit the Project and the numerous iterations of the new claims submitted by Contractor during the trial. Transcript, pp. 3955-3957 (R. p.); Transcript pp. 4149-4150 (R. p.).

After two and a half years of attempting to audit the Contractor's records, Hadley concluded and testified to a reasonable degree of accounting and auditing certainty as follows:

(1) The total of the final reconciliations of the eligible costs of the work and the GMP for the general conditions and the primary portion of the contract as well as the preconstruction and construction fees is $60,413,815.00. Transcript, pp. 4110-4111 (R. p.).

(2) The Contractor has been paid $59,994,390.00 to date. Transcript, p. 4111 (R. p.).

(3) Therefore, prior to the award of any amounts of set off for liquidated damages or other damages, there remains a delta or maximum balance potentially owed to the Contractor of $419,425.00. Transcript, p. 4111 (R. p.); Transcript, pp. 4120-4121(R. p.).

Again, since Contractor refused to provide the audit it was compelled by the Contract Documents, Ms. Hadley's testimony is undisputed.

STANDARD OF REVIEW

The matter before this Court arises from a lawsuit tried and argued before the Honorable Mikell R. Scarborough for years. This is an action at law. The case was tried before the Trial Judge without a jury, and this Court's scope of review is limited to correction of errors of law, and factual findings are reviewed for any evidence which supports the Trial Court's finding. *See* Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 1976) ("In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings."); Myers v. Nat'l Sales Ins. Co., 362 S.C. 41, 44, 606 S.E.2d 486, 488 (Ct. App. 2004); Osterneck v. Osterneck, 374 S.C. 573, 577, 649 S.E.2d 127, 129 (Ct. App. 2007) ("In a

law case tried by the judge without a jury the standard of appellate review is limited to a correction of errors of law and a determination if there is any evidence to support the factual findings of the trial judge.").

LEGAL ARGUMENT

I. The Trial Judge in this non-jury case was correct in finding and concluding based upon the evidence submitted that Appellant was not entitled to any further payments from Owner pursuant to the Contract Documents.

The Trial Court had substantial evidence to support that Appellant was not entitled to any additional payments pursuant to the terms of the Contract Documents.

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009).

The only element that was met by the Contractor is the existence of the Contract Documents. Owner was not in breach of the contract as no breach was shown. In fact, Contractor's representative, David Simonton testified that all certified payment applications were paid. Transcript, p. 4316. (R. p.). The Trial Court also ruled that each and every change order submitted into evidence by the Appellant was unsupported by the facts and the Contract Documents. Finally, as shown above, the Trial Court had substantial evidence that Contractor was unable to support any damages claim.

II. The Trial Judge in this non-jury case was correct in finding and concluding based upon the evidence submitted that Appellant breached the Contract Documents which proximately caused Owner $3,320,329.00 in damages.

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009).

The Owner and Contractor entered into a valid and enforceable contract.

Contractor "accepted the relationship of trust and confidence" and "covenant[ed] with the Owner to cooperate with the Architect and exercise [Contractor's] skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish and supply at all times an adequate supply of workers and materials; and to perform the work in an expeditious and economical manner consistent with the Owner's interests. Section 1.2 of the AIA-A133 (R. p.). Contractor breached this provision.

Contractor was to be "solely responsible for the acts and omissions of its subcontractors." Section 2.1.6 of the AIA-A133. (R. p.) Contractor was to make the Owner an intended third party beneficiary of "all agreements" between Contractor and subcontractors. Id. Contractor breached this provision.

Contractor is solely responsible for scheduling, phasing and coordination of the work. Section 2.3.1.4 of the AIA-A133 (R. p.); Section 3.10 of the AIA-A201 (R. p.). Contractor breached this provision.

Contractor "shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes." Id. (R. p.) Contractor breached this provision.

Contractor was required to account for back charges to be assessed between its subcontractors for the benefit of the Owner. Section 6.7.3 of the AIA-A133. (R. p.). Contractor breached this provision.

Contractor was required to keep "full and detailed accounting records" and to "substantiate all costs incurred." Section 6.11.1 of the AIA-A133. (R. p.) Contractor breached this provision.

Contractor was required to submit to an audit of its books and records. Sections 6.11.1 and 7.1.11 of the AIA-A133. R. p.) Contractor breached this provision.

Contractor was required to summarize its cost records and maintain complete "back up documentation." Section 7.1.4 of the AIA-A133. (R. p.) Contractor breached this provision.

Contractor was required to submit a final accounting for the Project. Section 7.2 of the AIA-A133. (R. p.) Contractor breached this provision.

Contractor was required to provide all "management staff with whatever additional supervisory personnel are required to ensure that the Work will be completed by the Contractual date of Substantial Completion. Section 3.3.4 of the AIA-A201. (R. p.)

Contractor was required to employ a competent superintendent and necessary assistants. Section 3.9.1 of the AIA-A201. (R. p.)

Contractor was required solely responsible for all of the scheduling requirements. Section 3.10.1 of the AIA-A201. Contractor breached these provisions.

Contractor was required to bond-off subcontractor liens. Section 9.3.1.2 of the AIA-A201. (R. p.) Contractor breached this provision.

Contractor was required to promptly and at its own expense correct defective work. Section 12.2.1 of the AIA-A201. (R. p.) Contractor breached this provision.

Section 2.4 of the AIA-A201 (R. p.) states, in pertinent part, that "If the Contractor defaults or neglects to carry out the work in accordance with the Contract Documents" and the Owner provides notice to the Contractor of such failure, Owner may proceed to perform the work itself. Owner put Contractor on notice of the defective work. Defendant's Exs. 104 and 105. (R. p.) Owner then performed the work through other contractors. Transcript, pp. 3819-3827. (R. p.) Owner incurred costs performing work or self-performing work that Contractor was contractually required to perform, but Contractor either failed to perform the work or the work was defective and no it compliance with the Contract Documents. Defendant's Ex. 146B (R. p.); Transcript, p. 3817 (R. p.). This work included warranty work, laundry costs, labor, cleaning fees, repair work, painting work, punch list repair work, fixtures, and pool repairs. Transcript, pp. 3819-3827 (R. p.); Transcript pp. 3247-3255(R. p.); Transcript, pp. 3267-3272. (R. p.) Defendant's Exhibit 146B (R. p.) contains proper and complete supporting documentation. The total amount of the Owner supplied work is $2,256,764.00.

There is substantial evidence that Owner was required to perform work that the Contractor failed to perform in the amount of $2,256,764.00 that was directly and proximately caused by the Contractor.

Additionally, the Contract Documents expressly require what is known as a "Critical Path Method" or "CPM" schedule. Section 3.10.4.2 of the AIA-A201 (R. p). The Contractor is "solely responsible" for the schedule. Section 3.10.4.7 of the AIA-A201. Contractor must show that any changes "directly" impact the critical path." Section 5.3.1 of the AIA-A133. On this Project, Contractor employed an in-house scheduling manager to create and manage the CPM schedule. Transcript, pp. 384-385

(R. p.). His name was Joe Lauricella. Id. Mr. Lauricella was not presented as a witness by Contractor at the trial of this matter.

Contractor was required to submit an initial schedule that, if followed, would allow Contractor to complete the work by the substantial completion date. Section 3.10.4.1 of the AIA-A201 (R. p.); Transcript pp. 4248-4249 (R. p.). This initial schedule was required to be submitted to the Architect and Owner within fourteen (14) days of the Notice to Proceed. Section 3.10.4.1 of the AIA-A201 (R. p.). This initial CPM schedule is referred to as an "as planed schedule." Transcript, p. 4250 (R. p.). In Contractor's "as-planned schedule", however, there was a four (4) month "bust" because it failed to include the activity of the removal of the tower crane that was required to set the pool in place. Transcript pp. 4250-4251 (R. p.); Transcript pp. 2671-2674 (R. p.). This "bust" in the as-planned schedule by Contractor impacted all portions of the Contractor's updated schedules that were required by Section 3.10.4.5 of the AIA-A201 (R. p.); Transcript, pp. 2673-2674 (R. p.). In fact, it took Contractor nineteen (19) months—over two-thirds of the as planned project duration—before they inserted it into the logic of an updated schedule. Id. This practice of changes in the logic of the CPM schedules, removal of restraints and the reduction and increases in durations by the Contractor and without notice to the Owner was systemic on this Project.

In the absence of Lauricella, Contractor offered the testimony of Mark Doran—an outside consultant. Doran testified that the Project was originally scheduled by the Contractor to be completed by July 30, 2017. Transcript, p. 724 (R. p.). He further testified that the Project was not complete until December 28, 2021—a difference of 516 days. Id. He concluded that of the five hundred and sixteen (516) days of delay to the

Project, Owner was responsible for four hundred and ninety four (494) days, neither party was responsible for twenty one (21), days and Contractor was responsible for a single (1) day of delay. Transcript, pp. 808-814 (R. p.).

In contrast, Owner offered the testimony of Mark Boe. He was qualified as an expert in the field of scheduling, delay claims, and construction claims. Transcript, pp. 2607-2609 (R. p.). Boe gave several opinions. First, he concluded that the "four notebooks" supposedly supporting the Appellant's claim (Defendants Exs 11, 12, 13, and 14 (R. p.) were essentially useless. Transcript, pp. 2615-2662 (R. p.); Plaintiff's Ex. 261 (R. p.). Second, Boe concluded that Doran used the wrong CPM methodology. Transcript, p. 2665 (R. p.). The methodology utilized by Doran to essentially conclude that the Contractor was not responsible for any delay on this Project failed to meet industry standards for CPM scheduling as recognized in learned treatises. Transcript, pp. 2667-2705 (R. p.); Defendant's Exs. 89-90 (R. p.). Third, Boe concluded that Doran made a significant error even when employing a rejected methodology. Doran ignored the Contractor's own critical path as identified by the Contractor's own employees and schedulers contemporaneously with the work itself. Transcript, pp. 2666-2669 (R. p.). Doran was forced to ignore or reject the Contractor's actual schedules in order to reach his conclusion. Id. Fourth, Boe concluded that, like Contractor's as-planned schedule, Doran failed to consider the removal of the tower crane in his conclusions of the critical path and delay analysis. Transcript, pp. 2669-2674 (R. p.). This was a significant error because Doran had the tower crane on his critical path. Id. Fifth, Boe concluded that even with Doran's improper methodology he failed to identify any cause and effect for any of his delay claim. Transcript, pp. 2674-2675 (R. p.). Sixth, and finally, Boe

concluded that Doran ignored significant delays and manpower problems caused by Contractor's subcontractors. Transcript, pp. 2675-2676; 2716-2768 (R. p.); Defendant's Ex. 91 (R. p.); Transcript, pp. 2794-2871 (R. p.).

Owner also offered the testimony of Grady Query. He was qualified as an expert in scheduling, delay claims, and construction claims. Transcript, p. 2949 R. p.). Query actually dealt with Lauricella during the Project. Transcript, p. 2950 (R. p.). Unlike Doran, Query analyzed Contractor's actual contemporaneous CPM schedules and gave several opinions. First, the Contractor deleted activities and actual dates from its schedules which hindered the ability to review Contractor's schedules. Transcript pp. 2968-2969 (R. p.). Second, he concluded that the Contractor's schedule "has such significant fatal flaws that it is neither an effective forecasting or coordination tool." Transcript, pp. 2970-2971 (R. p.).

Given the duration of the delay and the cap on liquidated damages, Ms. Hadley calculated to a reasonable certainty the amount of liquidated damages of $1,483,090.00. Transcript, pp. 4120-4121 (R. p.). There is substantial evidence upon which the Trial Judge based its award on delay damages.

III. The Trial Judge in this non-jury case was correct in finding and concluding based upon the evidence submitted that Appellant breached the Contract Documents with fraudulent intent.

The elements of a claim for breach of contract accompanied by a fraudulent act as "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002).

Contractor's failure to perform its own accounting and blatant obfuscation of the accounting and audit process constituted not only a breach of the contract but it was accompanied by fraudulent intent. The true purpose of trying to avoid the audit was not for the reasons stated by Contractor in Defendant's Ex. 50 (R. p.), but to avoid for as long as possible the discovery that Contractor's claim was not $22,452,287.00 or any of the iterations of Contractor's spreadsheets. The actual claim once Ms. Hadley was finally able to perform her work as the ball could no longer be hidden once the trial was over was for $419,425.00. Transcript, p. 4111 R. p.); Transcript, pp. 4120-4121 (R. p.). This amount is prior to the award of any amounts of set off for liquidated damages and other damages proximately caused by the Contractor. In fact, Contractor was owed nothing. Therefore, Contractor breached the Contract Documents and the breach was accompanied by a fraudulent act. The Trial Court expressly asked itself: "What is the legitimate purpose of filing duplicative and excessive liens? What is the legitimate purpose of refusing to do an accounting or allow ones books and records to be audited?" The Trial Court concluded that there is not one. The only purpose would be to attempt to force an Owner into submission to pay a claim that was not due.

There is substantial evidence to support the Trial Court's ruling that there was a breach of contract accompanied by a fraudulent act.

IV. The Trial Judge in this non-jury case was correct in its well-reasoned Order to award punitive damages against Appellant for its conduct.

Respondent hereby adopts the Trial Court's April 12, 2024 well-reasoned order on the award of punitive damages. Further, Appellant presents a straw man argument. In the April 12 Order, the Trial Judge made findings by clear and convincing evidence that

punitive damages should be assessed against Appellant. As such, there is no error. There is substantial evidence to support the Trial Court's ruling that there was a breach of contract accompanied by a fraudulent act, and the Trial Court properly awarded punitive damages, pursuant to statutory and common law.

V. The Trial Judge in this non-jury case was correct in awarding attorneys' fees to the Owner as the Owner was the clear prevailing party under the Mechanic's Lien Statute.

There is no question that Owner was the prevailing party in this action under the Mechanic's Lien statute. Contractor was awarded nothing on its $12,066,147.00 excessive and fraudulent lien. In harm to foul, the mechanic's lien exists to this day. The Owner has been unable to remove it from its property. The Trial Judge had substantial evidence to award attorneys' fees in the amount of $2,127,592.00. (R. p.)

VI. The Trial Judge in this non-jury case was correct in awarding costs for the only Auditor in this case under the S.C. Declaratory Judgement Act provision S.C. Code Ann. 15-53-100.

Again, the Appellant presents a straw man argument. There is no question that Owner was the prevailing party in this action under the Mechanic's Lien statute AND the S.C. Declaratory Judgment Act-entitling it to expert fees. Moreover, the declaratory judgement cause of action that Appellant argues was "withdrawn" related only to ONE declaratory judgment cause of action (R. p.) that had no relation to the award made by the Trial Judge.

VII. The Court of Appeals should affirm the Orders and Judgment of the Trial Judge in this non-jury matter based upon any evidence appearing in the record pursuant to Rule 220(c), SCACR.

There is ample evidence in the record to support the Order, findings and Judgment of the Trial Judge in this action. In fact, much of the evidence is uncontradicted and the Trial Judge sat as the finder of fact. This Court should affirm the Trial Judge based upon any evidence in the Record pursuant to Rule 220(c).

CONCLUSION

For the reasons stated herein, there is substantial evidence in the record to support the findings of fact and conclusions of law of the Trial Judge. The Court sat non-jury for over two years. This matter is over. The Appellant is not entitled to any relief they have requested. The Orders and the Judgment of the Trial Court should be affirmed.

BUNDY MCDONALD, LLC

/s W.H. Bundy, Jr.

Bundy McDonald, LLC
W.H. Bundy, Jr., Esq. (SC No. 1012)
M. Brent McDonald, Esq. (SC No 78057)
1516 Old Trolley Rd, 2nd Floor
Summerville, SC 29485
888-552-1559
walter@bundymcdonald.com
brent@bundymcdonald.com
Attorneys For Library Associates, LLC.

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