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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2024-CP-04-02229
Appellate Case No. 2025-001549
Appellate Case No. 2025-002012

Moats Construction, Inc. and The Green Man, LLS,……..……Appellants,

v.

APB Partnership, LLC, Wesley Edwards, 2916 N. Main, LLC, W.H. Bass, Inc., Whataburger Restaurants, LLC, and United Community Bank,……Respondents.

Return to Motion to Reinstate Lis Pendens and Mechanic's Lien During Pendency of Appeal

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Pursuant to Rule 240(e), SCACR, Respondents APB Partnership, LLC, Wesley Edwards, 2916 N. Main, LLC (Respondents) file the following Return to the Motion filed by Appellant Moats Construction, Inc. The Court should dismiss the Motion or deny the relief requested.

Appellant contends the circuit court erred in discharging the *lis pendens* before Appellant had the opportunity to seek reconsideration pursuant to Rule 59, SCRCP. Appellant asserts that the circuit court was "prohibited from executing or taking any action to enforce its ruling" prior to the

expiration of the 10 days set forth under Rule 62(a), SCRCP.[1] (Motion, p. 2). Appellant describes this as a "premature dismissal" of the *lis pendens*. (Motion, p. 1). This Court should rule that it lacks jurisdiction to address these arguments or, alternatively, should deny this Motion.

First, the circuit court dismissed the *lis pendens* the same day as entry of the Order discharging the mechanic's lien, which was entered on June 17, 2025. Appellant filed and served two (2) motions to reconsider on June 27, 2025,[2] well aware that the Order, entitled "Order Discharging Mechanic's Liens, *Releasing Lis Pendens*, and Dismissing Plaintiff's Causes of Action," (emphasis added) had the effect of canceling and releasing the *lis pendens* by statutory provision. (Motion, Exh. 1). Furthermore, the mandate in the circuit court's Order expressly canceled the *lis pendens*. (Motion, Exh. 1, p. 9, ¶ 6). Despite that knowledge, Appellant failed to raise this issue in its Rule 59 motion and a supplemental Rule 59 motion, both filed on June 27, 2025, which was the earliest opportunity that the issue was available.[3] *See*, *e.g.*, *Johnson v. Hoechst*

[1] Rule 62(a) provides "[e]xcept as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry." There was no "execution upon a judgment" or "proceedings ... for its enforcement" as contemplated by this Rule. *Compare Gateway Enterprises, Inc. v. SC Dept. of Rev.*, 341 S.C. 103, 533 S.E.2d 896 (2000) (noting an order dissolving a stay of a prior order was not a "judgment" subject to the automatic 10-day stay under Rule 62(a)). Here, the applicable statute provides that unless a mechanic's lien claimant brings the action to foreclose within six months, "the lien *must* be resolved." S.C. Code Ann. § 29-5-120(A) (Supp. 2024) (emphasis added). Removal of the lien is therefore mandatory and automatic upon a finding that a mechanic's lien claimant failed to meet the 6-month deadline.

[2] The second one merely augmented the first one with additional information.

[3] In the Motion before this Court, Appellant failed to point out that it did not raise these issues in the Rule 59 motions. Instead, Appellant states it "timely filed a motion to reconsider ten days later." (Motion, p. 2). Appellant gives this Court the impression that it raised all of these things in those Motions but Appellant did not do so. (Motion, Exh. 2).

Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (party must raise alleged error at the first opportunity to preserve issue for appeal). Appellant therefore waived this issue.

Second, after the circuit court entered the Form 4 Order on July 3, 2025, summarily denying the motions to reconsider, Appellant filed and served a Notice of Appeal on August 1, 2025, from those orders. The circuit court was thereafter deprived of jurisdiction to consider any complaint regarding the release of the *lis pendens*. Rule 205, SCACR, provides:

> Upon the service of the notice of appeal, *the appellate court shall have exclusive jurisdiction over the appeal*; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Rule 205, SCACR (emphasis added). *See*, *also*, *Greenville Bistro, L.L.C. v. Greenville Cnty.*, 435 S.C. 146, 171, 866 S.E.2d 562, 575 (2021) (explaining the operation of Rule 205). The release of the lis pendens is a matter affected by the issues in this appeal.

Although Appellant brought this issue to the circuit court's attention by a letter dated July 17, 2025 (or 30 days after the June 17, 2025, Judgment and 14 days after the July 3, 2025, Order denying the Rule 59 motion), Appellant did not file any kind of motion raising the issue prior to filing and serving its Notice of Appeal on August 1, 2025. Thereafter, Appellant filed its "Memorandum Opposing Premature Release of Lis Pendens" on August 26, 2025; however, at that point the circuit court lacked jurisdiction to address the issue in the Memorandum as this issue was a matter affected by the appeal. Rule 205, SCACR. Although the circuit court held a hearing on the matter, issued a form Order on August 27, 2025, and a more formal order on September 4, 2025 denying the request, at that point the circuit court (due to the filing of the Notice of Appeal) lacked jurisdiction to do so (or to address this issue at all).

Third, in its Order denying Appellant's request, the circuit court pointed out that the court had the authority to order the *lis pendens* canceled pursuant to S.C. Code Ann. § 15-11-40 (2005) (providing the court in which an action was commenced, in its discretion at any time after the action is settled, discontinued, or abated, on application of a person aggrieved and on good cause shown and on a notice as directed or approved by the court, may order a notice of *lis pendens* to be canceled by the county clerk in the office where the notice was filed or recorded). Appellant did not challenge this ruling in its Brief of Appellant[4] so it is the law of the case. *E.g.*, *Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) ("A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case."); *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) ("[An] unchallenged ruling, right or wrong, is the law of the case and requires affirmance.").

Fourth, the circuit court held that under the statute Appellant's mechanic's lien dissolved by operation of law, and since the mechanic's lien was the sole basis for the *lis pendens*, the court, in its discretion, ordered its cancellation. (Order of September 4, 2025, p. 3). That ruling is correct.

Section 29-5-120 provides that unless a mechanic's lien claimant brings the action to foreclose within six months, "the lien *must be dissolved*." S.C. Code Ann. § 29-5-120(A) (Supp. 2024) (emphasis added). "Under the rules of statutory interpretation, use of words such as 'shall'

[4] Appellant attempts to raise these arguments in its Reply Brief. (See Initial Reply Brief, pp. 2-5). However, "an argument made in a reply brief cannot present an issue to the appellate court if it was not raised in the initial brief." *Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001). *Accord*, *Emerson Elec. Co. v. South Carolina Dept. of Rev.*, 395 S.C. 482, 488 n. 6, 719 S.E.2d 650, 654 n. 6 (2011) (the reply brief may not be used to argue issues not raised in the initial brief).

or 'must' indicates the legislature's intent to enact a mandatory requirement." *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018).

Finally, and respectfully, what Appellant should have done was pursue a supersedeas of the circuit court's order, which included cancellation of the *lis pendens* in its mandate as required by statute. Rule 241(c), SCACR. This would require Appellant to first seek a supersedeas from the circuit court (Rule 241(d)(1)) and then to seek relief by way of supersedeas from this Court. Rule 241(d)(2). Appellant has done neither. Instead, Appellant has taken the unusual step of seeking affirmative relief from this Court directing a lower court clerk to reinstate the *lis pendens,* as well as the mechanic's lien itself.

The circuit acted appropriately under the plain language of Section 29-5-120. Appellant has not appropriately raised this issue either before the trial court or before this Court. Appellant has also not followed the appropriate procedure in that it did not first seek supersedeas relief from the circuit court before applying for such relief on appeal.

Conclusion

The Court should decline to address Appellant's Motion or, alternatively, should deny the relief requested.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the **Return to Motion to Reinstate Lis Pendens** of Respondents APB Partnership, LLC, Wesley Edwards, 2916 N. Main, LLC upon the following by electronic mail:

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