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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2025-001046

Civil Case No. 2024-CP-07-02002

Cambridge Building, Inc. (License No. 117526)

Appellant,

v.

Robert S. Lotstein, Kristin Huffman, Robert S. Lotstein, Trustee of the Robert S. Lotstein Family Trust dated September 4, 2002, as Amended and Restated, and Kristin S. Huffman, Trustee of the Kristin S. Huffman Family Trust dated September 4, 2002, as Amended and Restated

Respondents.

APPELLANT'S FINAL BRIEF

Lee Anne Walters (SC Bar No. 74984)
WALTERS LAW
Post Office Box 1214
Beaufort, South Carolina 29901-1214
(843) 379-0973
Email: leeanne@walterslawsc.com

Counsel for Appellant

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1. Did the circuit court err in dismissing Appellant's unjust enrichment claims against the property owners with prejudice under Rule 12(b)(6) without providing an opportunity to amend?

2. Did the circuit court improperly rely on Respondents' affidavit to resolve factual disputes in their favor, contrary to the limitations of Rule 12(b)(6) review?

3. Did the circuit court fail to accept Appellant's well-pled allegations as true and in the light most favorable to Appellant, as required under Rule 12(b)(6)?

4. Did the circuit court err in dismissing Appellant's mechanic's lien?

5. Did the circuit court abuse its discretion by dismissing parties and claims with prejudice without ruling on or allowing Appellant an opportunity to amend the Complaint?

STATEMENT OF THE CASE

This appeal arises from an order of the circuit court partially granting a Rule 12(b)(6), SCRCP motion to dismiss. In that order, the court dismissed Appellant's mechanic's lien and lis pendens with prejudice, dismissed three of four defendants from the case with prejudice without allowing amendment, and compelled arbitration of Appellant's breach of contract and unjust enrichment claims against Defendant Lotstein individually.

Appellant Cambridge Building, Inc. ("Cambridge" or "Appellant"), a licensed general contractor, constructed a 6-bedroom, nearly 6000 square foot home on a Palmetto Dunes oceanfront lot — 8 Iron Clad, Hilton Head Island (the "Property")[1] — legally owned by Robert Lotstein (Lotstein) and Kristin Huffman (Huffman) as trustees of their respective trusts.[2] There is a written agreement with an arbitration clause — signed by Lotstein and Frank Guidobono, on behalf of Cambridge — to build the home for a sum of $2,246,078. (R. pp.121-137.) Cambridge alleges it has not been paid $365,314.76 plus interest.

Cambridge filed this action on September 18, 2024, alleging three causes of action (for foreclosure of a mechanic's lien, breach of contract, and unjust enrichment) against four defendants — Robert S. Lotstein and Kristin S. Huffman, individually and in their capacities as trustees of the Robert S. Lotstein Family Trust and the Kristin S. Huffman Family Trust (collectively "Owners" or "Respondents"). (R. pp. 25-34.)

[1] The Property is also referred to as Lot 1 Iron Clad. (R. p. 37.)

[2] On or about January 24, 2022, Robert Lotstein and Kristin Huffman, as members of Petal & Twoey, LLC, transferred 8 Iron Clad to Robert Lotstein, as trustee of the Robert S. Lotstein Family Trust dated September 4, 2002 and Kristin S. Huffman, Trustee of the Kristin S. Huffman Family Trust dated September 4, 2002, as Amended and Restated. (R. p. 35-36. The Complaint and the caption above contain typographical errors identifying the trust date as 2022 instead of 2002 (R. p. 25.) The trustee holds legal title to the trust property until it is transferred consistent with the trust terms. *See Eidson v. S.C. Dep't of Educ*., 444 S.C. 166, 179, 906 S.E.2d 345, 351 (2024).

On October 18, 2024, Owners filed a Rule 12(b)(6) Motion to Dismiss, arguing the mechanic's lien was not served, the contract was only signed by Robert Lotstein individually, and the contract had a binding arbitration clause. (R. pp. 116-120.) A motion hearing was scheduled for and took place on February 21, 2025, before the Honorable Benjamin Culbertson. (R. pp. 96-115.) In advance of the hearing, Cambridge filed a memorandum in opposition and a Motion to Amend the Complaint. (R. pp. 140-157.) Two days before the motion hearing, Owners filed an affidavit. (R. pp. 138-139.)

Following the February 21, 2025 hearing, Judge Culbertson issued a Form 4 Order, which directed Respondents' counsel Attorney Finger to prepare an order (R. pp. 1-3.) The proposed order was submitted and opposed. (R. pp.158-168.) On March 7, 2025, Cambridge filed a Motion to Alter or Amend/Reconsider.[3] (R. pp. 169-177.)

On April 24, 2025, Judge Culbertson issued two orders: (1) an order partially granting Defendants' Rule 12(b)(6) Motion to Dismiss (the "Rule 12(b)(6) Order") and (2) a Form 4 order denying Plaintiff's Motion to Alter or Amend. (R. pp. 7-14.) The Rule 12(b)(6) Order— in substance Respondents' proposed order — dismissed the mechanic's lien cause of action, dismissed all Defendants except Robert Lotstein (Huffman and the trusts) from the case *with prejudice*, and ordered the breach of contract and unjust enrichment claims against Lotstein individually to binding arbitration. (R. pp.7-11, 158-162.) The court dismissed with prejudice Appellant's Mechanic's Lien and lis pendens claims, finding that service of the lien failed to comply with statutory requirements under S.C. Code Ann. § 29-5-90. Specifically, the court found that service on Joanna 'Nicky' Gleason did not constitute service on a 'person in possession' and that the due

[3] Included, as exhibits, were copies of Respondents' proposed order, counsel's letter objecting to the proposed order, the Complaint and Cambridge's opposition to the Motion to Dismiss

diligence affidavit the Beaufort County Sheriff's Office completed regarding service of the owners was insufficient. Additionally, the court dismissed Kristin Huffman and both family trusts from the case with prejudice, holding they were not parties to the contract. The breach of contract and unjust enrichment claims against Robert Lotstein individually were allowed to proceed, but the case was ordered to binding arbitration after Lotstein was allowed to respond. (R.p.10.) Lotstein filed counterclaims and third-party claims against Frank Guidobono. (R. pp.51-70.)

Appellant filed a second motion to reconsider following entry of the Rule 12(b)(6) Order, which the circuit court denied on May 28, 2025. (R. pp. 206-233, 15-17.) Appellant filed a Notice of Appeal on May 27, 2025, and was granted leave to amend the appeal. (R. pp. 238-268.)

STANDARD OF REVIEW

An appellate court reviews the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, under the same standard applied by the trial court. "Rule 12(b)(6) allows the trial court to address the sufficiency of a pleading; it is not a vehicle for addressing the underlying merits of the claim." *Skydive Myrtle Beach, Inc. v. Horry Cnty*., 426 S.C. 175, 826 S.E.2d 585, 587 (2019); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, (2007) (allowing a complaint to proceed "even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.") A motion to dismiss under Rule 12(b)(6) should not be granted if the "facts alleged and reasonable inferences 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).

The court is not permitted to resolve factual disputes. A motion to dismiss pursuant to Rule 12(b)(6) is not intended to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992).

The well-pled facts in the complaint must be accepted as true. *Gressette v. S.C. Elec. & Gas Co*., 370 S.C. 377, 378-79, 635 S.E.2d 538, 538 (2006). ("A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the complaint and we must presume all well-pled facts to be true."); *Skydive Myrtle Beach, Inc. v. Horry Cty*, 426 S.C. 175, 180,826 S.E.2d 585, 588 (2019) ("[A]ny plaintiff is…entitled to litigate the validity of its original pleading without having to convince the trial court of the merits of its underlying claim.").

STATEMENT OF FACTS

The Owners hired Cambridge as general contractor to construct a large residence on their beachfront lot in Palmetto Dunes for a set sum. The written agreement — signed by Lotstein and Frank Guidobono, on behalf of Cambridge — identifies the owners as Kristen Huffman and Robert Lotstein. The Deed identifies the owners as "Robert Lotstein, as trustee of the Robert S. Lotstein Family Trust dated September 4, 2002 and Kristin S. Huffman, Trustee of the Kristin S. Huffman Family Trust dated September 4, 2002, as Amended and Restated."

Change orders resulted in a *credit* of $168,767.24 from the original $2,246,078, and ultimately a total of $2,077,310,76 was due. Cambridge completed the construction, and the Owners received a Certificate of Occupancy. Cambridge received $1,711,996 in payments. The owners refused to pay the remaining $365,314.76 principal or the 1 ½ % per month interest on late payments stated in the written agreement. The Owners began listing the property for rent through Luxury Rentals of Hilton Head, LLC.

Cambridge filed a mechanic's lien. (R. pp. 31-32.)

Service of the mechanic's lien:

Beaufort County Sheriff's Office (BCSO) diligently searched for Lotstein and Huffman, as verified by affidavit, but was unable to serve them. (R. p. 32.) Corporal K. Korinek, BCSO,

made service attempts on July 17, July 18, July 19, July 22, July 25, and July 26 of 2024. (R. p.47-48.) Corporal K. Korinek left a message for Lotstein and upon return call advised Lotstein of the nature of the civil action and asked to meet him for service. (R. pp. 47-48.). Korinek was advised Lotstein was on vacation. Korinek determined that the Property was a short-term rental, and BCSO served the property manager, Luxury Rentals of Hilton Head, LLC at its address, 62 New Orleans Road, Hilton Head by personally delivering a copy of the mechanic's lien to Nicky Gleason. (R. pp. 32, 49.)

Gleason Affidavit:

Respondents filed an affidavit from Joanna "Nicky" Gleason. The affidavit stated that on July 25, 2024, Ms. Gleason, at 62 New Orleans Road, received a Notice and Certificate of Mechanic's Lien relative to 8 Iron Clad, Hilton Head. The affidavit further stated that Luxury Homes of Hilton Head, LLC and not Luxury Rentals of Hilton Head employed Ms. Gleason. (R. p. 138.)

SUMMARY OF ARGUMENT

On a Rule 12(b) motion to dismiss, the Order erroneously dismisses Appellant's claims and multiple defendants *with prejudice and without leave to amend*, stays the case, and orders the two remaining claims, only against Lotstein individually, to binding arbitration. First, the circuit court erred in dismissing the unjust enrichment claims because the unjust enrichment claims were not raised in Respondents' motion and were legally sufficient and well-pleaded. The circuit court also improperly considered Respondents' affidavit and other extrinsic evidence and failed to construe the pleadings in the light most favorable to Appellant or allow Appellant an opportunity to amend. Finally, the court erroneously dismissed the mechanic's lien, although the service requirements were met.

ARGUMENT

I. It was error to dismiss Cambridge's unjust enrichment claims.

It was error for the trial court to dismiss Appellant's unjust enrichment claims and all claims against (1) Huffman, individually, (2) Huffman as trustee of the Kristen S. Huffman Trust dated September 4, 2002, and (3) Lotstein as trustee of the Robert S. Lotstein Family Trust dated September 4, 2002, (Huffman and the trustees of the family trusts) ***entirely with prejudice***, finding they were not parties to the contract. This dismissal was improper — first, because Cambridge had no notice of it. Dismissal was also improper because the unjust enrichment claims are valid claims against all Respondents if (1) they are parties to the contract and (2) if they are not parties to the contract. The elements of the unjust enrichment cause of action are sufficiently well-pleaded against all Respondents to survive a Rule 12(b)(6) challenge.

a. The Motion to Dismiss does not challenge Plaintiff's unjust enrichment claims.

Cambridge alleged three causes of action (foreclosure of mechanic's lien, breach of contract and unjust enrichment) against all Respondents. The Motion to Dismiss filed October 18, 2024, did not challenge the unjust enrichment claims. (R. pp. 116-120.) The words unjust enrichment, quantum meruit, quasi-contract, or contract implied by law do not appear in the motion. The Motion to Dismiss at Section III states only that Plaintiff's Claims should be dismissed (1) because the contract says all claims shall be decided by arbitration and (2) the breach of contract claims should be dismissed against those defendants who are not parties to the Contract. (R. p. 118.) Cambridge's Memorandum in Opposition did not address the unjust enrichment claims *because those claims were not raised by the motion.*

The unjust enrichment claims were also not addressed at the motion hearing. (R. pp. 97-115.) On page 12, Mr. Finger states,

So just to sum it up, Your Honor….

We are asking that the breach of contract action be dismissed against Ms. Huffman and the trust.

And we are asking that whatever may be left --and the only thing that could be left was a breach of contract claim and perhaps unjust enrichment (inaudible), that those most go to arbitration (inaudible).

(R. p. 107.)

At the end of the hearing, the Court states,

THE COURT: All right. I am going to grant the motion to dismiss the mechanic's lien and the lis pendens, the breach of contract, and the unjust enrichment. I'm going to stay this action pending arbitration. We'll send those two to arbitration.

(R. pp.113-14.)

The claims are also not addressed in the Order, which does not include any discussion of the cause of action or explanation of the basis for the dismissal of these claims. The Order acknowledges that the motion does not raise the unjust enrichment claims by stating,

Defendants' Motion to Dismiss essentially asserted the following grounds: (1) the Mechanic's Lien was not timely properly served within 90 days of the last work, (2) the Plaintiff's contract was only with Robert Lotstein, and (3) the contract has a binding arbitration clause.

(R. p. 7.)

The Order dated April 24, 2025 reads:

4. The Contract was between Cambridge Building, Inc., and Frank Guidobono and Robert Lotstein. Kristin Huffman and the respective trusts were not signatories or parties to the Contract.

(R. p.10.)

2. Kristin Huffman, individually, and the Robert S. Lotstein Family Trust dated September 4, 2002 and the Kristin S. Huffman Trust dated September 4, 2002 are dismissed from this case with prejudice.

(R. p. 10.)

The Order does not address the pleading of the unjust enrichment claims against Huffman and the trusts or refer those claims to arbitration, yet it dismisses all claims against Huffman and the family trusts, *including the unjust enrichment claims*, entirely with prejudice. (R. p. 10.)

b. Cambridge adequately alleges the elements of the claim against these defendants.

Unjust enrichment (also referred to as quantum meruit, quasi-contract, or contract implied by law) is an equitable doctrine designed to prevent one party from being unjustly enriched at the expense of another. The three elements are "(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." *Donnelly v. Linden Capital Partners III*, 2021 U.S. Dist. LEXIS 80786, Civil Action No. 2:20-cv-3719-RMG, at *7-8 (D.S.C. Apr. 27, 2021) *quoting Regions Bank v. Wingard Props., Inc.,* 394 S.C. 241, 257, 715 S.E.2d 348, 356 (Ct. App. 2011). The remedy for unjust enrichment is restitution.

Here Cambridge adequately alleges these elements — namely (1) Cambridge conferred a benefit on the Owners by constructing a home on the Property, which directly increased the real estate's value; (2) Kristin Huffman as trustee of the Kristin S. Huffman Family Trust dated September 4, 2002[4] and Robert S. Lotstein as trustee of the Robert Lotstein Family Trust dated

[4] A typographical error in the Complaint and subsequent filings identifies the trust date as 2022. The correct date is September 4, 2002, as stated on the Deed.

September 4, 2002, the owners, realized this benefit through the increased property value and utility of having a completed home on the property; and (3) retained the benefit without making full payment, which is unjust. Complaint ¶¶ 3-6 (alleging Lotstein and Huffman, as trustees of their respective family trusts, own the oceanfront property in Palmetto Dunes with an address of 8 Iron Clad), Complaint ¶ 34 (alleging Cambridge conferred a benefit on all Defendants including Huffman by constructing a new residence on her property and expected to be paid) ¶¶ Complaint ¶ 35 (alleging Defendants including Huffman own an oceanfront home that they rent for income) Complaint ¶ 36 (alleging allowing Huffman to retain the benefit of an oceanfront home without paying the Plaintiff would be inequitable). (R. pp. 26-33.) These allegations, set forth in the Complaint, support the unjust enrichment cause of action against all Respondents.

In the light most favorable to Cambridge, it states a claim for unjust enrichment and there is no basis for dismissal. A party may bring an unjust enrichment cause of action as an alternative claim to breach of contract and may bring such a claim although it does not file a mechanic's lien. Although a court may deny a subcontractor's claim of unjust enrichment against a property owner when the owner in fact paid on its contract with a general contractor, those are not the facts at issue here. *See Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. 502, 515, 839 S.E.2d 468, 475 (Ct. App. 2020); *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 327-28, 734 S.E.2d 177, 181 (Ct. App. 2012) (finding it was error for the trial court to grant a JNOV in favor of the owner when there was evidence the contractor was not paid in full, finding the failure to file a mechanic's lien does not bar an unjust enrichment claim and allowing the party to allege an unjust enrichment cause of action as an alternative claim for breach of contract). The allegations are that Cambridge, the general contractor, has not been paid in full.

Defendants' Rule 12(b)(6) motion ***did not challenge*** the unjust enrichment claims but the Order erroneously dismisses those claims and all claims against 1) Huffman 2) Huffman as Trustee of the Huffman Family Trust dated September 4, 2002, as Amended and Restated, and 3) Lotstein, as Trustee of the Lotstein Family Trust dated September 4, 2002 (Huffman and the trustees of the family trusts) entirely with prejudice, although as alleged Huffman and Lotstein as trustees own the Property and have been unjustly enriched by owning the improvements without making full payment. (R. pp. 118-120,7-10.)

II. The circuit court erred in considering Respondents' affidavit and other materials outside the complaint and in failing to view the Complaint's allegations in the light most favorable to Appellant.

The Order improperly considered and relied upon the Affidavit of Gleason and other materials outside the complaint without converting the motion to one for summary judgment and without providing Plaintiff reasonable opportunity to present contradictory evidence, despite Plaintiff's specific objection to consideration of the affidavit.

a. The Order's conclusion that Plaintiff failed to object to the Court's consideration of an affidavit is inaccurate and contradicted by the record.

The Order states that "the Affidavit of Joanna Nicky Gleason was not objected to by Plaintiff." (R. p. 9, Conclusion of Law 1(c).) However, the record establishes that Plaintiff Appellant ***did object*** to consideration of the Gleason Affidavit. (R. pp. 146,143.) In its memorandum, Plaintiff specifically argued: "The Defendants filed the Affidavit of Joanna 'Nicky' Gleason. As an initial matter, ***this affidavit should not be considered***." (emphasis added). The memorandum further cited *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006) for the proposition that the court should not consider facts outside of the Four Corners of the Complaint:

> …See *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006) ("In considering . . . a [Rule 12(b)(6)] motion, the trial court must base its ruling solely on allegations set forth in the complaint.")

(R. p. 144.)

b. It was error for the court to consider the affidavit submitted by the Respondents.

Matters outside of the complaint should not be considered at the Rule 12(b)(6) stage, and if converted, Appellant was not provided notice or a reasonable opportunity to submit evidence to challenge the affidavit. The South Carolina Supreme Court has established that in considering a 12(b)(6) motion, the court must base its decision solely on the allegations set forth in the complaint, and the motion cannot be supported by affidavits or other evidence outside the pleadings. *See* Rule 12(b), SCRCP ("…If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."; *see also Brown v. Leverette*, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987) (". . . The notice provisions in Rule 56 are incorporated into Rule 12(b)(6)."); *id*. at 367, 353 S.E.2d at 699 (holding the circuit court erred in considering the defendant's supporting affidavits in ruling on a 12(b)(6) motion); *see James Kincannon v. Ashley Griffith*, Op. No. 2023-UP-070 (S.C. Ct. App. filed May 22, 2023) ("...we agree with Kincannon that it would be improper for the circuit court to consider an affidavit at the Rule 12(b)(6), SCRCP, stage of litigation,…")

The circuit erred by relying on Ms. Gleason's affidavit to determine service issues, rather than converting the motion to one for summary judgment with proper notice.

c. The Court failed to view the allegations of the Complaint as true, in the light most favorable to the Appellant.

The standard on a motion to dismiss requires the trial court to construe the complaint in the light most favorable to the Plaintiff as the non-moving party and consider all well-pled allegations as true. *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) *citing Turner v. Daniels*, 404 S.C. 430, 431 n.1 (2013) (noting under the standard of review applicable to Rule 12(b)(6) motions, we construe all of the facts in the appellant's well-pled complaint in the light most favorable to the appellant and presume those facts to be true); *Grimsley v. S.C. Law Enf't Div*., 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) ("If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper.")

The dismissal of claims "with prejudice" is also improper given the early procedural posture of this case and because the Court has not given the Appellant an opportunity to amend. *See Skydive Myrtle Beach v. Horry Cty.,* 426 S.C. 175, 179, 826 S.E.2d 585, 587 (2019) ("When a trial court finds a complaint fails "to state facts sufficient to constitute a cause of action" under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal."). Here, Appellant was not provided any opportunity to amend its Complaint to address the Court's concerns, and it is far from certain that Cambridge Building has not or cannot establish valid claims against these Defendants now or with appropriate amendments. Plaintiff filed a Motion to Amend on February 18, 2025, which was scheduled for a hearing on before Judge Hyman on April 8, 2025. Respondents' counsel argued it was improper to allow amendment without allowing Judge Culbertson to enter an Order. On April 17, 2025, Judge Hyman issued a Form 4 Order continuing the Motion to Amend for 60 days. The motion was subsequently scheduled for a hearing before the Honorable R. Lawton McIntosh. Judge McIntosh entered a Form 4 Order staying the motion pending the appeal. (R. pp. 18-24.)

III. It was error to dismiss Cambridge's Lien.

The Order erroneously dismisses Cambridge's mechanic's lien. (R. p. 10.) S.C. Code Ann. § 29-5-90 — the statute relevant to service of a mechanic's lien — states that a mechanic's lien will be dissolved unless served on the owner or the "person in possession." Person in possession is not a defined term. An issue arises when the owner or person in possession, if any, cannot be located. The statute provides an alternative: "…in the event neither the owner nor the person in possession can be located after diligent search, and this fact is verified by affidavit of the sheriff or his deputy, the lien may be preserved by filing the statement together with the affidavit. S.C. Code Ann. § 29-5-90.

In this case, the owner could not be located for service. The Beaufort County Sheriff's Office made multiple attempts to serve Robert Lotstein and Kristin Huffman but could not locate them for service as verified by affidavit (R. p. 32.) According to the Sheriff's service affidavit, the owner was on vacation. (R. p. 47.) As part of its "diligent search" the deputy discovered that the property was being managed as a short-term rental by Luxury Rentals of Hilton Head. According to the Complaint, and service affidavit, service was made on Luxury Rentals of Hilton Head, as property manager, by delivering a copy to Nicky Gleason, at its location. (R. p. 32, 49.)

Respondents essentially made three arguments: (1) The property manager was not a "person in possession." (R. p.118.); (2) BCSO's service of the property manager was a different entity in the same office or on someone that was not an agent authorized for service of that entity; and (3) there is some other error in the Sheriff's affidavits attached to the Complaint. (R. p. 117.)

Cambridge responds to Plaintiff's service arguments in two ways. First, it responds that the property manager is a person in possession and was properly served. Second, it argues that if the property manager is not a "person in possession" under the statute — as Respondents argue

— or, as Respondents also argue, the property manager was not properly served, then there was no "person in possession" and the allegation — taken as true, and supported by the Sheriff's affidavit — that the Sheriff could not after diligent search serve the owner is sufficient for compliance with the statute.

a. The property manager was served as a "person in possession."

First, Cambridge argues, the property manager was a "person in possession" and was properly served. The Order finds either that Luxury Rentals of Hilton Head, the property manager is not a "person in possession" or Luxury Rentals of Hilton Head was not served by hand delivery at its office to Nicky Gleason. The Order references two distinguishable cases in support of the finding that a property manager is not a person in possession. *Stovall Bldg. Supplies v. Mottet*, 305 S.C. 28, 406 S.E.2d 176 (Ct. App. 1990) addresses a different code section — S.C. Code Section 29-5-40, *not* S.C. Code Section 29-5-90 — which provides that the mechanic's lien of a subcontractor will not attach to an owner's property without notice to the owner and does not at all refer to the "person in possession" term used in S.C. Code Ann. § 29-5-90. In *Stovall Bldg. Supplies,* this court held that service on a security guard at the subdivision entrance was not service on the owners, the Maguires, as the "security guard was not a responsible person living in the Maguire's home." S.C. Code Section 29-5-40 does not refer to a "person in possession." For this reason, it has no relevance to a determination of whether the property manager was a "person in possession" under § 29-5-90. The other case cited, *Reid v. Carr*, Opinion No. 2008-UP-541, is an unpublished order. Pursuant to Rule 268(f)(2), SCRAP: "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Moreover, *Reid v. Carr* addresses summary judgment, improperly relies on *Stovall* and holds that a painting subcontractor at the home is not a "person

in possession." In any event, the proper determination of a "person in possession" is a novel issue which should not be decided on a 12(b)(6) motion. *Keiger v. Citgo, Coastal Petroleum Inc*., 326 S.C. 369, 373, 482 S.E.2d 792, 794 (Ct. App. 1997) ("…holding whether the exception applied in that case was a novel issue that should not have been summarily decided on a 12(b)(6) motion to dismiss.")

BCSO, through its inquiry and as stated by affidavit, found that Luxury Rentals of Hilton Head was the property manager for the short-term rental of the Property and served that company in compliance with applicable statutes. The Complaint identifies Exhibit E as an affidavit of service on the entity Luxury Rentals of Hilton Head, the property manager, as alleged in the Complaint. (R. p. 32, p. 25.) The Beaufort County Sheriff's Office affidavit attached to the complaint shows service on the entity Luxury Rentals at 63 New Orleans Road, through an individual identified as Nicky Gleason. The BCSO affidavit also states that the service was made in accordance with applicable statutes and the South Carolina Rules of Civil Procedure. (R. p. 49.)

The Order erroneously finds that the mechanic's lien was not served on a "person in possession" based on the affidavit of Joanna "Nicky" Gleason. However, Rule 12(b)(6) does not permit courts to consider affidavits or weigh credibility at the dismissal stage. As noted above, the Plaintiff objected to the Court's consideration of this Gleason Affidavit as improper at this stage and without converting the motion to one for summary judgment with notice. The Order also makes factual findings in considering the affidavits that lack any legal basis or support. For instance, Gleason's statements are not conclusive. Service on an employee is effective when the employee has apparent authority to receive it on behalf of the employer. *See Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 295, 721 S.E.2d 430, 433 (2012); *Richardson v. P.V., Inc.,* 383

S.C. 610, 682 S.E.2d 263 (2009) (holding that hotel receptionist had authority to receive service of process where she was only employee present in office, which represented to third parties that she was in charge).

Factual disputes, such as whether Nicky Gleason is a proper agent for service on the owner's property manager should not be resolved on a Rule 12(b) motion, and if resolved, on a motion to dismiss, should be resolved in favor of the Appellant. The Order not only improperly considers the Gleason affidavit, but it also weighs it as credible over the Plaintiff's allegations or the BCSO service affidavit. If this is allowed, Plaintiff should be given notice and allowed to submit evidence. If there are questions of fact regarding the Sheriff's Affidavit, it is not appropriate for a motion to dismiss where the complaint is "viewed in the light most favorable to the plaintiff" and should not be dismissed if the Plaintiff states "any valid claim."

b. The deputy's diligent search for the owners, as verified by affidavit, satisfies the statute and preserves the lien.

The owners could not be located for service. The Beaufort County Sheriff's Office attempted to serve Robert Lotstein and Kristin Huffman but could not locate them for service as verified by affidavit (R. p. 32, ¶ 24, Ex. D.) According to the Sheriff's affidavit, the owner was on vacation. (R. p.47-48.) The Sheriff's Office used diligent efforts in its attempts for the purpose of service, which is verified by the Sheriff's affidavits and alleged in the Complaint (which should be viewed in the light most favorable to the Plaintiff). (R. pp. 32, 47, 145.) This complies with the statute, S.C. Code Section 29-5-90, which provides, as an alternative if the owner cannot be found the lien may be preserved by Sheriff's affidavit of its diligent search. See S.C. Code Section 29-5-90.

The Order's conclusion (in Conclusions of Law No. 3) that the BCSO Affidavit (attached to the Complaint as Exhibit D) does not comply with the language required by the statute because

the Sheriff did "locate" Mr. Lotstein for service by talking to him on the phone is also not supported. (R. p. 9.) First, Respondents raised this issue for the first time in response to the motion to reconsider. The Order appears to conclude that because the Sheriff's Deputy spoke with Mr. Lotstein by telephone, he was "located" within the meaning of the statute. The statute's reference to "locating" an owner contemplates physical location for the purpose of effectuating personal service, not merely establishing telephone contact. Reading the statute to require only telephone contact would render the provision allowing an alternative to service meaningless.

The Sheriff's affidavit establishes that despite diligent efforts, including telephone contact, Mr. Lotstein could not be physically located for the purpose of service. (R. p. 47.) To the extent, he was "located" by phone, he was also made aware of the lien.

The Order's conclusion (in Conclusions of Law No. 2 at page 3) that the Plaintiff "attempts to switch and move away" from one argument to another is a misapprehension of Cambridge's argument. (R. p. 9.) S.C. Code 29-5-90 states that the Plaintiff must serve the lien on the owner and if the owner cannot be found on the "person in possession" — which is an undefined term. If the owner cannot be located, the statute allows the lien to be preserved by the Sheriff's affidavit that he made a diligent search. See S.C. Code Section 29-5-90. In the Complaint, Plaintiff alleges BCSO served the owner's property manager as a "person in possession." (R. p. 25.) Plaintiff did not abandon the argument that the property manager is a "person in possession" and was properly served, as the Respondents and the Order suggest. Instead, Cambridge argued that even if Respondents' arguments are correct — the property manager, is not a "person in possession" or was not properly served — then the Sheriff's Office still used diligent efforts in its attempts to serve the owners, which is verified by the Sheriff's

affidavits and alleged in the Complaint. When viewed in the light most favorable to Appellant — as it must — both are alleged and either satisfies the statute.

CONCLUSION

For the reasons discussed herein, Appellant respectfully requests the Court reverse the circuit court's Order and remand for further proceedings.

RESPECTFULLY SUBMITTED,

s/Lee Anne Walters
Lee Anne Walters (SC Bar No. 74984)
WALTERS LAW FIRM
Post Office Box 1214
Beaufort, South Carolina 29901-1214
(843) 379-0973
Email: leeanne@walterslawsc.com

Counsel for Appellant

Hilton Head, South Carolina
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