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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORTCOUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Lower Court 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, 2022, as Amended and Restated, and Kristin S. Huffman, Trustee of the Kristin S. Huffman Family Trust dated September 4, 2022, as Amended and Restated, Respondents.

Appellate Case No. 2025-001046

FINAL BRIEF OF RESPONDENTS

RUFFIN LAW FIRM
Adam Sinclair Ruffin
SC Bar No. 101350
1320 Main Street, Suite 300
Columbia, SC 29201
(803) 470-5629
adam@ruffinappeals.com

FINGER, MELNICK, BROOKS & LABRUCE
Terry A. Finger
SC Bar No. 2012
PO Box 24005
Hilton Head Island, SC 29925
(843) 681-7000
tfinger@fingerlaw.com

Attorneys for Respondents

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2.

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Whether the circuit court correctly dismissed Appellant's mechanic's lien where Appellant failed to serve its lien on the owner or the person in possession within the statutorily required time period?

STATEMENT OF THE CASE

This is an appeal from the partial granting of Respondents' motion to dismiss pursuant to Rule 12 of the South Carolina Rules of Civil Procedure.

Appellant, Cambridge Building, Inc., filed an action against Respondents on September 18, 2024. The Complaint had three causes of action: (1) foreclosure of a mechanic's lien, (2) breach of contract, and (3) unjust enrichment. (R. 25). Respondents filed a Motion to Dismiss on October 18, 2024. (R. 116). On February 14, 2025, Respondents filed an Affidavit of Joanna "Nicky" Gleason to demonstrate that service of the mechanic's lien was ineffective. (R. 138). On February 18, 2025, Appellant filed a Motion to Amend its Complaint. (R. 140). Appellant also filed a memorandum in opposition to the Motion to Dismiss on February 20, 2025. (R. 142).

The Motion to Dismiss was heard by Judge Benjamin Culbertson on February 21, 2025. (R. 96). Appellant was represented by Lee Ann Walters and Respondents were represented by Terry Finger. (R. 97). The circuit court partially granted the Motion to Dismiss on the record and issued a Form 4 Order on February 25, 2025 which directed Respondents' attorney to submit a proposed order. (R. 1). Appellant filed a Rule 59(e) motion on March 7, 2025, requesting the circuit court to reconsider this Form 4 Order. (R. 169).

On April 24, 2025, Judge Culbertson issued two Orders: (1) a formal Order Partially Granting Respondents' Motion to Dismiss, and (2) a Form 4 Order Denying Appellant's Motion to Alter or Amend dated March 7, 2025. (R. 7, 12). On May 5, 2025, Appellant filed a second Motion to Reconsider. (R. 206).

In accordance with the formal Order on the Motion to Dismiss, Respondent Robert Lotstein, the sole remaining Defendant, filed an Answer, Counterclaim, and Third-Party Complaint which named Frank Guidobono as a Third-Party Defendant on May 7, 2025. (R. 51).

On May 27, 2025, Appellant filed a Notice of Appeal with this Court. The next day, the circuit court denied Appellant's second Motion to Reconsider. (R. 15). On June 3, 2025, Appellant filed a Motion to file an Amended Notice of Appeal which added the May 28, 2025 Order denying Appellant's Second Motion to Reconsider. (R. 253).

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citing *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001)). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

"The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (citing *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987)). "The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." *Capital City Ins. Co.*, 382 S.C. at 99, 674 S.E.2d at 528 (citing *Ashley River Props. I, LLC v. Ashley River Props. II, LLC*, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007)).

ARGUMENT

1.

The circuit court properly dismissed all of Appellant's causes of action against Kristin Huffman and the two trusts because there was a valid and enforceable contract between only Robert Lotstein, Appellant, and Frank Guidobono, and there could be no cause of action against a non-party to the contract.

A. Respondents moved to dismiss Appellant's complaint in its entirety, which necessarily included Appellant's unjust enrichment claims.

Appellant argues that the circuit court erred in dismissing its unjust enrichment claims against Respondents because Respondents "did not challenge the unjust enrichment claims." (BOA p. 7). Appellant argues that because the words "unjust enrichment" do not appear in Respondents' motion to dismiss, the circuit court erred by dismissing those claims. Appellant also maintains that the "unjust enrichment claims were . . . not addressed at the motion hearing," and that the unjust enrichment claims were not addressed in the circuit court's order. (BOA pp. 8 – 9).

As an initial matter, Appellant cites to no authority to support its position and accordingly, this argument is abandoned on appeal and should not be considered by this Court. *See Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review").

Furthermore, Appellant's claim that Respondents "did not challenge the unjust enrichment claims" is not supported by the record. Respondents moved to dismiss Appellant's *entire complaint*, not just some of the complaint. (R. 118–120). At the hearing on the motion to dismiss, Counsel for Respondents also referenced the unjust enrichment cause of action as being covered by their motion to dismiss the entire complaint. (R. 100, ll. 4 – 24). The reasons given as to why

the entire complaint should be dismissed were that the mechanic's lien was not properly served, (R. 100, l. 25 – R. 105, l. 10), and there was an enforceable contract between only Respondent Robert Lotstein and Appellant, and that the contract included an arbitration clause, (R. 105, l. 25 – R. 106, l. 17).

Counsel for Respondents asked the circuit court to dismiss Kristin Huffman and the trusts from the lawsuit *entirely* because they were not parties to the contract. (R. 106, ll. 2 – 7). Counsel concluded his argument by arguing that "based upon the contract, arbitration is the correct way to resolve this matter, that the only parties left, that the contract is not signed by Ms. Huffman or by the trust[s]" and that "[t]he only way to do it is to dismiss the mechanic's lien and . . . send it to arbitration for what's left between [Appellant] and Mr. Lotstein." (R. 113, ll. 15 – 23).

In the circuit court's order, the court found that the contract was between Appellant, Frank Guidobono, and Mr. Lotstein. (R. 8). The contract named Frank Guidobono and Appellant as the Contractor and the contract is signed by Frank Guidobono and Mr. Lotstein. (R. 121). Accordingly, the circuit court properly dismissed Kristin Huffman and the two trusts from the lawsuit. To the extent Appellant is correct that the unjust enrichment claim is not specified in the order, it is meaningless. The circuit court clearly determined that because there was a valid and enforceable contract between only Robert Lotstein, Appellant, and Guidobono, *no cause of action* could be maintained against the non-parties. Thus, the circuit court dismissed Kristin Huffman and the trusts from the lawsuit entirely—exactly the relief requested by Respondents.

B. Claims for unjust enrichment are improper when an express contract exists which governs the subject matter of the dispute.

As an initial matter, Appellant has not appealed the circuit court's finding that there was a binding contract between only Appellant, Frank Guidobono, and Robert Lotstein. Appellant has also not appealed the circuit court's ruling that any dispute between them must be resolved through

arbitration. And lastly, Appellant has not appealed the circuit court's dismissal of the breach of contract claims against Kristin Huffman and the two trusts—conceding that they were not parties to the contract. These unappealed rulings by the circuit court are the law of the case. *See* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 214 (3d ed. 2016) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling").

Appellant, Guidobono, and Robert Lotstein entered into a written construction contract on April 23, 2022. That contract included an arbitration provision which provided that "[a]ll claims or disputes between [Appellant] and [Mr. Lotstein] arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration." (Mot. to Dismiss, Ex. A, sec. 10.2). Appellants do not challenge the existence or the validity of the Contract, nor do they challenge the validity of the arbitration provision. Appellant has not appealed the circuit court's determination that there was a binding contract between Appellant, Guidobono, and Mr. Lotstein. Appellant has also not appealed the circuit court's ruling that Kristin Huffman and the trusts were not parties to the contract. Furthermore, Appellant has not appealed the circuit court's ruling that any dispute between Appellant and Mr. Lotstein must be resolved through arbitration. Accordingly, the circuit court's finding of an enforceable contract between Appellant, Guidobono, and Mr. Lotstein must be affirmed. *See Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997) (an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance") (internal quotations omitted)).

"The main defense to an action for quantum meruit is that an express contract exists covering the subject in controversy." Randolph R. Lowell, et. al., *South Carolina Equity: A Practitioner's Guide* § 4.XIII.D. Because there is a binding contract between Appellant,

Guidobono, and Mr. Lotstein, there can be no unjust enrichment claims against non-parties to the contract. A claim for unjust enrichment (also referred to as quantum meruit or quasi-contract) arises only when no express or enforceable contract governs the subject matter of the dispute. Equity will not intervene to impose an implied obligation where the parties have already defined their rights and duties by contract. *See Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000) (addressing unjust enrichment claims where no contract existed between the parties); *Columbia Wholesale Co. v. Scudder May, N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) ("Absent an express contract, recovery under quantum meruit is based on quasi-contract"); *Swanson v. Stratos*, 350 S.C. 116, 122, 564 S.E.2d 117, 120 (Ct. App. 2002) (finding that quantum meruit is not available when the relationship between the parties is governed by an express contract).

Appellant argues that it adequately alleged the elements of unjust enrichment against Kristin Huffman and the trusts by alleging that Appellant conferred a benefit on them by constructing a home, that Huffman and the trusts realized the benefit, and that they retained the benefit without making full payment. (BOA pp. 9 – 10). The primary reason Appellant's argument fails is because Huffman and the trusts were under no obligation to pay Appellant. That is because the express terms of the contract are between Appellant, Guidobono, and Mr. Lotstein which Appellant has conceded. Any obligation to pay was on Mr. Lotstein alone. Accordingly, Appellant cannot show that any alleged benefit realized by Huffman or the trusts was retained unjustly. Appellant's dispute is with Mr. Lotstein and Mr. Lotstein alone. Appellant cannot also seek to recover against Huffman and the trusts where they were not parties to the contract and under no obligation of any kind to Appellant. *See Gibson v. Epting*, 426 S.C. 346, 356, 827 S.E.2d 178, 183 (Ct. App. 2019) ("A party cannot disavow a binding contract and pursue quantum meruit, no matter

how green the grass of equity may seem"); *Weimer v. Jones*, 364 S.C. 78, 81, 610 S.E.2d 850, 852 (Ct. App. 2005) (finding that arbitrator did not err in considering the plaintiff's unjust enrichment claim because the arbitrator found that there was no valid contract between the parties).

Appellant cites to *Williams Carpet Contractors, Inc. v. Skelly*, 400 SC 320 734 S.E. 2d 177 (Ct. App. 2012) to support the proposition that "[a] party may bring an unjust enrichment cause of action as an alternative claim to breach of contract." (BOA p. 10). However, in *Williams Carpet*, this Court unequivocally stated that "[c]ase law bars recovering under both theories." So while a plaintiff can bring an action for both breach of contract and unjust enrichment, it can only recover under unjust enrichment if the court determines that there is no contract. Here, there is a contract, the circuit court found the contract was only between Appellant, Guidobono, and Mr. Lotstein, and Appellant has not challenged that ruling. Accordingly, Appellant cannot pursue an unjust enrichment claim against anyone because the existence of a contract has already been established and is the law of the case.

The circuit court correctly determined that there was a valid and enforceable contract between Appellant, Guidobono, and Mr. Lotstein. The circuit court also correctly determined that Kristin Huffman and the trusts were not parties to the contract. Appellant has not appealed or otherwise challenged these rulings. Accordingly, Appellant cannot maintain an unjust enrichment cause of action against the Kristin Huffman or the trusts and the circuit court correctly dismissed the claims against them. This Court should affirm.

2.

The circuit court properly considered the affidavit of Joanna "Nicky" Gleason in ruling on Respondents' motion to dismiss the mechanic's lien because the affidavit was submitted for the sole purpose of demonstrating improper service of the mechanic's lien.

A. Appellant's argument that the circuit court erred in considering the Gleason Affidavit because it was outside the four corners of the complaint is not preserved for appellate review because Appellant's objection was not made with sufficient specificity to the circuit court.

As this Court is aware, "[i]n order to preserve an issue for appellate review, the issue must have been (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the lower court with sufficient specificity." Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 185 (3d ed. 2016). "'Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.'" *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). "Imposing [these] requirement[s] on the appellant 'is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Herron*, 395 S.C. at 465, 719 S.E.2d at 642 (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)).

Although "a party is not required to use the exact name of a legal doctrine in order to preserve the issue . . . the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Herron*, 395 S.C. at 466, 719 S.E.2d at 642. Admittedly, in Appellant's memorandum in opposition to Respondents' motion to dismiss, Appellant stated that Nicky Gleason's affidavit "should not be considered." (R. 146). Appellant did not, however, state any reason for why the circuit court should not consider the

affidavit. Accordingly, Appellant's argument is not preserved for appeal. *See Herron*, 395 S.C. at 468, 719 S.E.2d at 644 (holding that constitutional preemption argument was unpreserved where the argument in the trial court was just a general argument that arbitration was favored under both federal and state law); *State v. Nichols*, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997) (finding an objection to expert testimony unpreserved for appellate review because "appellant simply made a general objection during the experts' testimony without giving the specific ground"); *Campbell v. Bi-Lo, Inc.*, 301 S.C. 448, 454, 392 S.E.2d 477, 481 (Ct. App. 1990) (finding that because appellant failed to state the ground for his objection on the record, the objection was not preserved for appellate review").

Instead of stating a basis for the objection to the consideration of the Gleason Affidavit, Appellant immediately said that if the circuit court considers the Gleason Affidavit, it should also consider the web page for Luxury Rentals of Hilton Head which includes a photograph of Nicky Gleason that identifies her as the "Real Estate Sales Office Administrator." (R. 146). Appellant never argued that consideration of the Gleason Affidavit would improperly convert the motion to dismiss into a motion for summary judgment without proper notice. Appellant made that argument for the first time in its motion to reconsider. Furthermore, Appellant also failed to object to the consideration of the contract itself which was attached as an exhibit to Respondents' motion to dismiss and therefore also not within the four corners of the complaint. (R. 121). The circuit court noted in its order that Appellant did not object to the consideration of the contract and Appellant has not appealed that ruling. (R. 8).

Appellant failed to preserve its argument that consideration of the Gleason Affidavit improperly converted the motion to dismiss into a motion for summary judgment and this Court should not consider it. *See Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563,

567, 762 S.E.2d 693, 695 (2014) ("a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not"); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal").

Appellant's reasonless objection to consideration of the Gleason Affidavit was not sufficiently specific to bring the circuit court's focus on the precise nature of the error and accordingly is not preserved. Because this argument is not preserved, this Court should not address the merits of Appellant's argument. *See Hendrix v. E. Distribution*, 320 S.C. 218, 219, 464 S.E.2d 112, 113 (1995) (finding the Court of Appeals erred in reaching the merits of an issue that was unpreserved).

B. Consideration of the Gleason Affidavit was proper under the circumstances because it was relevant to the circuit court's jurisdiction and service of process, not to the merits of the underlying claim.

Initially, it is important to note that the Gleason Affidavit was unnecessary for the circuit court to reach the conclusion that Appellant failed to properly serve the mechanic's lien because Appellant's "Affidavit of Service" was defective on its face.

In fact, the Affidavit of Service has absolutely no information about this matter. Counsel for Respondents made that point at the hearing on the Motion to Dismiss. Specifically, Counsel pointed out that the Affidavit of Service incorrectly named "PMIC Luxury Rentals" as the defendant, none of Respondents were named in the Affidavit of Service, the Affidavit of Service did not contain a court number, and did not indicate what case the Affidavit of Service was in reference to. (R. 102, l. 25 – R. 103, l. 10).

Even if the circuit court relied on the Gleason Affidavit in reaching its conclusion, the affidavit was proper for the court to consider because it was related to the court's jurisdiction rather

than the substantive merits of the mechanic's lien. The Gleason Affidavit that supported Respondents' Motion to Dismiss was to inform the circuit court that she could not possibly be considered a "person in possession" under section 29-5-90 of the South Carolina Code since she had no relationship with Respondents and never had been to the property.

Under Rule 12(b) of the South Carolina Rules of Civil Procedure, the circuit court may consider affidavits and other evidence when deciding motions to dismiss for lack of personal jurisdiction or insufficiency of service. Consideration of such materials does not convert a motion to dismiss into a motion for summary judgment. *See Baird v. Charleston Cty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("affidavits and other evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on lack of jurisdiction"); *Edens v. Bellini*, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004) ("The court may consider affidavits on a question of law in a jurisdictional motion without converting the motion into one for summary judgment").

In *Springmasters, Inc. v. D & M Mfg*, this Court held that when a motion to dismiss challenges the existence of jurisdictional facts, "the court is not confined to the allegations of the complaint and may resort to affidavits or other evidence to determine jurisdiction." 303 S.C. 528, 532, 402 S.E.2d 192, 194 (Ct. App. 1991). Our Supreme Court has also approved the use of affidavits to prove or disprove whether valid service had occurred. *Williams v. Ray*, 232 S.C. 373, 377-78, 102 S.E.2d 368, 370 (1958).

Appellant's suggestion that the inclusion of an affidavit transformed Respondents' Motion to Dismiss into a motion for summary judgment misconstrues South Carolina procedure. A "speaking motion" arises only when a party introduces matters outside the pleadings to dispute the substantive allegations of a Complaint under Rule 12(b)(6). Here, the Gleason Affidavit did not

contest the merits of Appellant's mechanic's lien claim. Instead, it addressed only a threshold procedural defect—that the person served was not a "person in possession" of the property as required by statute, and in fact had no relationship whatsoever to the Respondents or the property. Accordingly, consideration of the Gleason Affidavit was proper and did not convert the motion to dismiss into a motion for summary judgment. *See Springmasters*, 303 S.C. at 532, 402 S.E.2d at 194

In most cases an affidavit would be the only way to show the court that service was defective. However, as discussed above, the Affidavit of Service in this case was defective on its face which obviated the need to even consider the Gleason Affidavit. But because the Gleason Affidavit went solely to the factual issue of whether service satisfied statutory and procedural requirements—and not to the merits of Appellant's claim—the circuit court acted within its authority in considering it. The inclusion of the Gleason Affidavit did not convert the motion to one for summary judgment. The circuit court properly dismissed the mechanic's lien for insufficiency of service and this Court should affirm.

3.

The circuit court correctly dismissed Appellant's mechanic's lien because Appellant failed to serve its lien on the owner or the person in possession within the statutorily required time period.

A. Mechanic's liens are statutory creations that require strict compliance and the failure to strictly comply with the statute mandates dissolution of the lien.

A mechanic's lien is a creature of statute, and strict compliance with the statute's procedural requirements is a condition precedent to its enforcement. *Preferred Sav. & Loan Ass'n v. Royal Garden Resort, Inc.*, 301 S.C. 1, 4, 389 S.E.2d 853, 856 (1990). *See also Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 762 S.E. 2d 561 (2014); *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985) (holding mechanic's liens are purely statutory and issues concerning them must be decided in accordance with the terms of the statute).

In *Ferguson*, our Supreme Court explained mechanic's liens as follows:

> In South Carolina, mechanics' liens are purely statutory and may be acquired and enforced only in accordance with the terms and conditions set forth in the statutes creating them. *Multiplex Bldg. Corp. v. Lyles*, 268 S.C. 577, 235 S.E.2d 133 (1977); accord *Skiba v. Gessner*, 374 S.C. 208, 212, 648 S.E.2d 605, 606 (2007) (stating "one's right to a mechanic's lien is wholly dependent upon the language of the statute creating it"); *Butler Contracting, Inc. v. Court St., L.L.C.*, 369 S.C. 121, 130, 631 S.E.2d 252, 257 (2006) (observing mechanics' lien statutes "must be strictly followed"). The statutory process encompasses several steps, including the (1) creation, (2) perfection, and (3) enforcement of the lien.

Ferguson, 409 S.C. at 340, 762 S.E.2d at 565.

In *Butler*, the Supreme Court stated that if the statutory requirements are followed, "the person claiming the lien may foreclose against the property to satisfy the debt." *Butler*, 369 S.C. at 129, 631 S.E.2d at 256. However, if the person claiming the lien "fails to take *any one of these steps*, the lien against the property is dissolved pursuant to Sections 29-5-90 and 25-5-120." *Id*.

(emphasis added). The failure to perfect a mechanic's lien does not preclude an action on the debt. *Shelley Constr. Co.*, 287 S.C. at 27, 336 S.E.2d at 490.

Section 29-5-90 of the South Carolina Code requires that a mechanic's lien be dissolved if it is not properly served. Specifically, that section provides:

> Such a lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, *serves upon the owner or, in the event the owner cannot be found, upon the person in possession* and files in the office of the register of deeds or clerk of court of the county in which the building or structure is situated a statement of a just and true account of the amount due him . . . Provided, that 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 § 29-5-90 (emphasis added). Under the plain language of the statute, service upon anyone other than the owner or a lawful person in possession is insufficient and defeats the lien as a matter of law.

B. Appellant failed to serve its mechanic's lien on the owner or a person in possession and therefore service was ineffective and the lien must be dissolved.

Paragraph 24 of the Complaint states that the Sherriff's Office searched for Robert Lotstein and Kristin Huffman and "was unable to locate them." (R. 32). Paragraph 25 then states that "[*t*]*o satisfy the statute*, the Beaufort County Sherriff's Office served the Mechanic's Lien upon the property manager, Luxury Rentals of Hilton Head, LLC, as the 'person in possession' pursuant to S.C. Code Section 29-5-90." (R. 32) (emphasis added). Accordingly, Appellant clearly and unequivocably states that it satisfied the requirement of service by serving its lien on the "property manager" and attached "Exhibit E" to the Complaint as proof.

However, the Affidavit of Service relied upon by Appellant in effectuating service of the mechanic's lien, has not one shred of information related to this matter. In fact, the Affidavit of

Service lists "PMIC Luxury Rentals" as the defendant. Furthermore, the Affidavit of Service states that the Sherriff "served the Notice and Cert of Mech Lien, Statement of Account on PMIC Luxury Rentals (Defendant) by delivering unto Nicky Gleason, at 62 New Orleans Rd, Hilton Head Isl, SC 29928" (R. 49). The Affidavit of Service does not refer to Appellant or Respondents anywhere, nor does it reference the subject property to which Appellant was seeking to place a lien on. Accordingly, the Affidavit of Service is defective.

South Carolina courts have been clear that service must be upon a responsible person living at the property. For instance, in *Stovall Building Supplies, Inc. v. Mottet*, this Court found that service of a mechanic's lien upon the security guard at the entrance to the home's subdivision was ineffective. 305 S.C. 28 406 S.E. 2d 176 (1990). This Court rejected this attempt at service because "[t]he security guard was not a responsible person living in the . . . home." *Stovall*, 305 S.C. at 33, 406 S.E.2d at 179.

Appellant's argument that *Stovall* is not dispositive on the distinction between sections 29-5-40 and 29-5-90 is misplaced. (BOA p. 15). Although *Stovall* involved service of a notice of lien under section 29-5-40, this Court's holding was not limited to that subsection. Section 29-5-40 deals with subcontractors who contracted with someone other than the owner. But the reason this Court found service was ineffective in *Stovall* was because the security guard "was not a responsible person living in the [owner's] home." 305 S.C. at 33, 406 S.E.2d at 179. This reasoning applies equally under section 29-5-90, which similarly requires service of the lien statement upon "the owner of the building or structure, or upon his agent, or upon any person in possession of the premises."

Appellant also cites to *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 295, 721 S.E.2d 430, 433 (2012) and *Richardson v. P.V., Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009) which

both stand for the proposition that some employees can accept service of process on behalf of a defendant corporation. (BOA p. 17). But *Graham* and *Richardson* are about service of process, not service of mechanic's liens, and are governed by different rules. *Compare* Rule 4, SCRCP *with* S.C. Code § 29-5-90. And even if the same rules for service of process were applied in this case, Gleason was not an employee of Respondents. Gleason had no relationship with Respondents whatsoever. As stated above and memorialized in the Gleason Affidavit, Nicky Gleason has never been to the property and has never met or spoken with Respondents. So, she did not have "apparent authority" to accept service like the employee in *Richardson*.

Appellant further argues that the circuit court erred by dismissing the mechanic's lien because whether Gleason was a person in possession is a novel issue in South Carolina and therefore improper to be ruled on at a motion to dismiss. (BOA p. 16). However, in *B&A Dev., Inc. v. Georgetown Cty.*, this Court rejected this exact argument. 361 S.C. 453, 462, 605 S.E.2d 551, 555 (Ct. App. 2004). In *B&A Dev., Inc*., this Court noted that "where the dispute is not as to the underlying facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss for failure to state a claim." *Id*. at 462, 605 S.E.2d at 556 (internal quotations omitted).

Nicky Gleason has no relationship whatsoever with Respondents. Nicky Gleason has never visited the property at issue in this dispute and has never even met or spoken with Respondents. (R. 138). Accordingly, as in *Stovall*, she could not be considered a person in possession and the attempted service on her was ineffective. Furthermore, the Affidavit of Service does not identify any aspect of this case, including who the laborer was, who the owner was, the dates of the alleged work that allegedly weren't paid for, or the property on which the work was performed. There is simply no way to tell by reading the four corners of the Affidavit of Service whether the mechanic's

lien which was purportedly served was the lien *by the Appellant* in this case *on the Respondents* in this case *for the property* in this case. Thus, the Affidavit of Service is defective on its face. Further development of the facts is unnecessary to the resolution of this question and the circuit court properly granted Respondents' motion to dismiss. *See B&A Dev., Inc.*, 361 S.C. at 463, 605 S.E.2d at 556. It was clear to the circuit court that Nicky Gleason was not a "person in possession" and that the Affidavit of Service was defective.

C. Even if Appellant failed to locate the owners, Appellant still cannot rely on the Affidavits of Non-Service because the Affidavits of Non-Service do not state that Appellant failed to locate a person in possession.

Despite Appellant's argument that it served the person in possession of the property at issue in this case by serving Nicky Gleason, Appellant simultaneously argues that "[t]he owners could not be located for service." (BOA p. 17). Appellant claims that the Affidavit of Non-Service on the owners, which predated the Affidavit of Service on the person Appellant claims is a person in possession, can satisfy section 29-5-90 in lieu of its subsequent defective service. (BOA pp. 18 – 19).

As in Issue 1, Appellant again fails to cite any authority supporting its argument and accordingly this argument has been abandoned on appeal. *See Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review"). Even if this argument is preserved, it is inconsistent with the plain language of the statute and the circuit court correctly rejected it.

Section 25-9-90 has two *alternative* methods for service for mechanic's lien. The statute provides: "*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 (emphasis added).

However, given that the complaint states in Paragraph 25 that it satisfied the mechanic's lien statute by serving a "person in possession" as well as attaching "Affidavits of Service" (Exhibit E), Appellant cannot elect the alternative method. It is only available when neither the owners nor a person in possession can be located. Appellant stated in Paragraph 25 of the Complaint that it "satisfied" the statute and effectuated service. Appellant attempted to flip flop as pointed out at the hearing on the Motion to Dismiss. (R. 111, l. 23 – R. 113, l. 11).

Alternative service under Section 29-5-90 is proper only when neither the owner nor a "person in possession" can be found. Appellant clearly states in its complaint and the Affidavit of Service that service was effectuated. Given that Appellant states that service was effectuated and provided an Affidavit of Service, it cannot now state that it was unable to serve the owner or a person in possession as required. Exhibit D to Appellant's Complaint—the Affidavit of Non-Service on the owners—clearly states that Respondents were "found." There was a telephone conversation and Respondents informed the Deputy Sheriff that they were out of town. (R. 47).

Appellant argues that if the person served is later determined by the circuit court to not be a "person in possession," then Appellant's previous Affidavits of Non-Service on the owners are somehow enough. It is important for the Court to recognize that it is Appellant who asserted in its Complaint that it satisfied the statutory requirements by serving a "person in possession." It is also important for this Court to recognize that the Affidavits of Non-Service referred to the owners only—not the person in possession. (R. 47). But section 29-5-90 requires the affidavit of non-service to show that *both* the owner *and* a person in possession were unable to be located. In other words, even if this Court were to agree that Appellant was unable to locate the owners, Appellant

still cannot satisfy the service statute with its Affidavits of Non-Service on the owners because it has not filed an affidavit of non-service on the person in possession. *See* S.C. Code § 29-5-90 (requiring a mechanic's lien to be served "upon the owner or, in the event the owner cannot be found, upon the person in possession" and "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") (emphasis added).

If this Court accepts Appellant's position that it is acceptable to state in a complaint that service was effectuated pursuant to the statute and attach affidavits of service in support along with affidavits of nonservice, then all parties desiring to ensure that service was properly effectuated, would serve the owner or a "person in possession" and file an affidavit of non-service, just in case the circuit court later determines service was ineffective. But the statute is not designed to allow this sort of gamesmanship. Instead, it provides an alternative method of service only in the event that neither the owner nor a "person in possession" can be found. The alternate means of service is only available if neither the owner nor a person in possession "can be located."

In this case, Appellant clearly states it served a "person in possession" and it attached the Affidavit of Service on Nicky Gleason in support of that claim. In fact, Appellant's Opening Brief even confirms Appellant's intentions are not in compliance with section 29-5-90, when it states that if a "person in possession" was not served, then Appellant relies on the Affidavits of Non-Service. Appellant states that "both are alleged and either satisfies the statute." (BOA p. 19).

Furthermore, the circuit court found that Appellant located the Respondents by communicating with Mr. Lotstein via telephone call and learning that he was on vacation. Accordingly, the circuit court correctly concluded that the Affidavits of Non-Service also failed to

comply with the requirements of section 29-5-90. Because Appellant located Respondents, the alternative method in the statute is not available to Appellant. And again, even if this Court agreed that Appellant failed to locate the owners, because the Affidavits of Non-Service refer only to Appellant's failure to locate the owners and not its failure to locate a person in possession, these Affidavits of Non-Service still fail to comply with section 29-5-90.

Appellant failed to comply with the statutory requirements for mechanic's liens. Mechanic's liens are statutory creations and Appellant must strictly comply with the statutory requirements. Appellant failed to timely effectuate service which rendered its mechanic's lien and *lis pendens* action fatally defective. *See* S.C. Code § 29-5-90. Appellant attempted to effectuate service with a "person in possession"; however, the Affidavit of Service is deficient because the person served has no relationship to the Respondents and never even has been to the property at issue. This information is available from the four corners of the pleadings and exhibits in this matter and the Gleason Affidavit is not necessary to conclude that service was ineffective.

For the reasons stated above, this Court should affirm the circuit court's order dismissing the mechanic's lien.

D. Appellant's proposed amendment to its complaint is futile because it does not cure the fatal defect of its ineffective service of its mechanic's lien.

Appellant's proposed amendment to its complaint would be futile and should not be allowed. While leave to amend a complaint should be freely given when justice so requires, Rule 15(a), SCRCP, it is well established that a circuit court does not abuse its discretion in denying a motion to amend when the proposed amendment would be futile, *Skydive Myrtle Beach v. Horry Cty.*, 426 S.C. 175, 190, 826 S.E.2d 585, 593 (2019).

Appellant's Motion to Amend the Complaint sought leave to delete paragraph 25, the paragraph which states that it served the mechanic's lien on Nicky Gleason if the circuit court

determined that Gleason was not a person in possession. (R. 141). But as was noted above, the circuit court's order dismissing the mechanic's lien also found that the Affidavit of Non-Service of the owners was defective because Appellant located the owners. And as was also noted above, even if Appellant did fail to locate the owners, the Affidavits of Non-Service do not indicate that Appellant also failed to locate a person in possession. Section 29-5-90 requires that a person seeking a mechanic's lien must try and fail to locate both the owner and the person in possession, and only then can the person file an affidavit attesting to this fact before its mechanic's lien can be preserved. Accordingly, even if the "service" of Nicky Gleason was deleted, the "non-service" of the owners was equally deficient. The circuit court thus correctly dismissed the mechanic's lien and Appellant's proposed amendment to its complaint would not have cured the service problems.

CONCLUSION

By reason of the foregoing arguments, this Court should affirm the circuit court's order dismissing Appellant's claims against Kristin Huffman and the two trusts, dismissing the mechanic's lien for ineffective service, finding that a contract existed between only Appellant and Mr. Lotstein, and ordering their dispute to be resolved in arbitration.

s/Adam Ruffin
Adam Sinclair Ruffin
SC Bar No. 101350
1320 Main Street, Suite 300
Columbia, SC 29201
(803) 470-5629
adam@ruffinappeals.com

Terry A. Finger
SC Bar No. 2012
PO Box 24005
Hilton Head Island, SC 29925
(843) 681-7000
tfinger@fingerlaw.com

Attorneys for Respondents

This 23rd day of March 2026.