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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas for the Fifth Judicial Circuit

The Honorable William W. Wheeler, III, Circuit Court Judge

Appellate Case No.: 2026-001127
Trial Court Case No.: 2020-CP-40-03915

ATC Site Construction, LLC, Respondent,

v.

NKD, Inc., Appellant,

INITIAL REPLY BRIEF OF APPELLANT

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In its response brief, Respondent ATC Site Construction, LLC ("ATC") does not reconcile the fee award with the dispositive facts established by the Interim and Final Awards issued by the Arbitration Panel. ATC obtained no enforceable lien and could not foreclose against the property, which was the relief it sought in the mechanic's lien action. ATC does not address the requirement under S.C. Code § 29-5-10 that one verdict "assumes some entitlement to the mechanic's lien" and that the "one verdict" in the mechanic's lien action below resulted in a net award of $785,717.93 in favor of Appellant NKD, Inc. ("NKD"). Instead, ATC asks this Court to treat the offer-comparison formula of S.C. Code § 29-5-10(b) as the sole test for determining attorney's fees while ignoring the remainder of the statute and decades of precedent establishing that the prevailing party is the party in whose favor judgment is entered. ATC does not address NKD's argument that the circuit court confirmed the Final Award under a legally erroneous, extra-statutory standard rather than the manifest disregard and/or perverse misconstruction of law standard, which is the applicable standard of review of arbitration awards recognized by the South Carolina Supreme Court. Furthermore, the Panel's fee award to ATC in the amount of $228,600.00 was drawn from a one-page internal ledger and two generalized affidavits of ATC's counsel without any contemporaneous, itemized billing records presented by ATC. Notwithstanding the conspicuous absence of contemporaneous billing records, and NKD's concerns with duplication, ATC offers no additional evidentiary support as to the amount of the fees awarded.

As discussed below, ATC fails to address several of the arguments raised in NKD's Initial Brief. At a minimum, ATC has not explained how a contractor against whom the only net judgment was entered retained an enforceable lien capable of supporting the Panel's $228,600.00 fee award.

I. ATC DOES NOT REBUT NKD'S ARGUMENT THAT THE CIRCUIT COURT APPLIED AN ERRONEOUS STANDARD WHEN REVIEWING THE FINAL AWARD

The circuit court's role in reviewing the Final Award was to determine whether the Panel manifestly disregarded or perversely misconstrued controlling law. However, because the circuit court's Order is controlled by an erroneous legal standard, one that ATC has not attempted to defend, this Court owes it no deference. *See Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997); *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). As discussed in NKD's Initial Brief, the circuit court erroneously described its "primary role" as providing relief only where the arbitrators acted in an "unexpected and harmful manner," such as through corruption, evident partiality, or conduct beyond their powers. (Order p. 3.) However, as the South Carolina Supreme Court has recognized, the pertinent question is whether "the award can be reconciled with factual inferences and legal conclusions that are at least 'barely colorable.'" *See Waldo v. Cousins*, 442 S.C. 662, 665, 901 S.E.2d 276, 278 (2024) (*quoting Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 111, 333 S.E.2d 781, 789 (1985)). Contrary to the standard adopted by the circuit court in confirming the Final Award, the manifest disregard standard does not require corruption, partiality, "unexpected and harmful" conduct, or a malicious motive. Rather, courts have authority to vacate an arbitration award when the award "is untethered from controlling legal principles known to, but shrugged off by, the arbitrator." *Waldo*, 442 S.C. at 669, 901 S.E.2d at 279; *see also C-Sculptures, LLC v. Brown*, 403 S.C. 53, 55, 742 S.E.2d 359, 360 (2013) (vacating arbitration award where arbitrator was "apprised of the applicable law" yet declined to apply it). Even in the absence of corruption, evident partiality, or other "unexpected and harmful" misconduct by the Arbitration Panel, the manifest disregard standard is met here.

ATC relies on the deferential standard of review that is afforded to the decision to award attorney's fees. ATC invokes the abuse of discretion standard applicable to ordinary statutory fee awards without addressing the antecedent question presented in this appeal of whether ATC is entitled to recover attorney's fees under S.C. Code § 29-5-10(b) that are expressly reserved for the "prevailing party" where the "one verdict" entered in the mechanic's lien action was a net judgment in favor of NKD.

II. THE OFFER-COMPARISON FORMULA IN S.C. CODE § 29-5-10(B) DOES NOT ELIMINATE THE STATUTORY THRESHOLD THAT "ASSUMES SOME ENTITLEMENT TO THE MECHANIC'S LIEN"

A. ATC's Offer-Comparison Analysis is Based on an Impermissible Reading of S.C. Code § 29-5-10

ATC asks this Court to treat the offer-comparison formula of S.C. Code § 29-5-10(b) as the sole test while ignoring the statute's threshold requirement of "some entitlement to the mechanic's lien" and decades of precedent tying the fees to an enforceable lien. ATC argues that it is "entitled to a mechanic's lien" because the Arbitration Panel found that ATC was entitled to recover a contract balance of $838,685.95. *See* Resp't's Br. at 8. ATC's argument rests on a single proposition that, because ATC's lien demand of $847,236.20 was "closer to the verdict reached" than NKD's counterclaim demand, ATC must be the prevailing party. *See* Resp't's Br. at 8 – 9. In reaching its conclusion that it prevailed, ATC reads out of existence the sentence immediately preceding the offer-comparison formula, which provides that "[o]ne verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims." *See* S.C. Code § 29-5-10(b). The word "assumes" in the statute cannot be read in a manner that renders it "surplusage, or superfluous." *See Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.") If the closest-offer formula were the exclusive test, as ATC suggests, then the General Assembly would have no reason to include the language "some entitlement to the mechanic's lien" in the statute. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (holding that South Carolina's cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature).

Without citing any legal authority for its proposition, ATC speculates about hypothetical "logistical" conveniences and insists that it is still entitled to the mechanic's lien notwithstanding the "offset against a larger amount." *See* Resp't's Br. at 8. However, ATC fails to address the fact that the setoff in the amount of $838,685.95 was entirely consumed by NKD's larger recovery and resulted in a judgment against ATC. Furthermore, ATC states that the offset merely simplified the collection process. *See* Resp't's Br. at 8. ATC's statement is contrary to the record in this case, which confirms that the Panel did not enter separate awards requiring each party to pay the other and no amount was due from NKD to ATC. The Panel acknowledged in the Final Award that it reduced all claims and compulsory counterclaims in the mechanic's lien action to a "net award, or one verdict." (Final Award at 3.) ATC theorizes that the offset operated simply as a solution to "a logistical problem" that left intact ATC's purported entitlement to the mechanic's lien. *See* Resp't's Br. at 8. There is no merit to ATC's unsupported theory. The offset did not change the method by which ATC collected some amount from NKD. ATC had no amount to collect. The "net award, or one verdict," issued by the Panel required ATC to pay a net award of $785,717.93 to NKD. (Final Award at 3.)

Section 29-5-10(a) provides that "the fee and the court costs may not exceed the amount of the lien." *See* S.C. Code § 29-5-10(a). After the offset, the "amount of the lien" was zero. The Final Award left no amount due or payable to ATC. Although NKD raised this issue below and on appeal, ATC has yet to identify the “amount of the lien” that is enforceable against NKD. Regardless, the Panel’s $228,600.00 fee award to ATC plainly exceeds zero.

B. The Decisions in *Brasington*, *JRS Builders*, and *Seckinger* Do Not Support ATC’s Position

ATC relies on *Brasington Tile Co. v. Worley*, 327 S.C. 280, 491 S.E.2d 244 (1997), and *JRS Builders, Inc. v. Neunsinger*, 364 S.C. 596, 601, 614 S.E.2d 629, 632 (2005), to argue that the offer-comparison formula is the exclusive test. *See* Resp’t’s Br. at 11. Neither case involved a contractor who was a net judgment debtor. In *Brasington*, the contractor actually recovered a mechanic’s lien judgment. *See Brasington*, 327 S.C. at 283, 491 S.E.2d at 245. In *JRS Builders*, “final judgment was entered for Builder” in the amount of $20,617.14, ***after*** offset. *See JRS Builders*, 364 S.C. at 601, 614 S.E.2d at 632. Both *Brasington* and *JRS Builders* involved net judgments in favor of the lien claimant and support the finding that the offer-comparison formula determines which party prevails for fee purposes only when the contractor obtains a net judgment. The decisions by the South Carolina Supreme Court in *Brasington* and *JRS Builders* do not support ATC’s position because neither case decided the issue here. These decisions support the conclusion that, because ATC owes NKD $785,717.93, and no amount remains upon which ATC could enforce or foreclose its lien, the contractor in this case cannot be the prevailing lien claimant.

Furthermore, ATC argues that *Brasington* and *JRS Builders* “effectively overruled” the holding in *Seckinger v. Vessel Excalibur*, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997), because the 1999 amendment to S.C. Code § 29-5-10(a) supersedes *Seckinger’s* holding as to whether the offer-comparison formula applies when neither party makes a written offer. *See* Resp’t’s Br. at 10 – 11. NKD cites *Seckinger* for the principle that “in a mechanic’s lien action the defendant is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic’s lien cannot be enforced against it.” *Seckinger*, 326 S.C. at 388, 483 S.E.2d at 778. That principle has not been overruled and was not addressed in either *Brasington* or *JRS Builders*. ATC's argument that this foundational principle has been "effectively overruled," without any supporting legal authority, should be rejected.

C. ATC Does Not Address the Authorities Governing Enforceability Against the Property or Bond or NKD's Entitlement to Fees Under S.C. Code § 29-5-10

ATC's bare assertion that it is the "prevailing party" under S.C. Code § 29-5-10 and thus entitled to attorney fees and costs is erroneous and unsupported by South Carolina law. As discussed in NKD's Initial Brief, South Carolina law recognizes that the prevailing party in a mechanic's lien action is "the party in whose favor the decision or verdict on liability is rendered" and "judgment entered." *See EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006) (*quoting Heath v. Cnty. of Aiken*, 302 S.C. 178, 182–83, 394 S.E.2d 709, 711 (1990)). Without reconciling the fact that the only judgment entered in the action below was against ATC with the prevailing-party standard, ATC argues that *EFCO* does not apply because the supplier failed to bring a timely foreclosure action and the court found the mechanic's lien procedurally defective. *See* Resp't's Br. at 10. However, the procedural defect in *EFCO* has no bearing on the governing principle that the prevailing party is the party who successfully prosecutes or defends the action and in whose favor the decision is rendered and judgment is entered. *Heath*, 302 S.C. at 182-83, 394 S.E.2d at 711. ATC refers to the South Carolina Supreme Court's decision in *Heath* as "irrelevant" because that case involved the fee shifting provision under S.C. Code § 15-77-300 rather than S.C. Code § 29-5-10. *See* Resp't's Br. at 11. ATC's attempts to distinguish these cases fail. The prevailing-party principle instead favors NKD, who prevailed in defending against the enforcement and foreclosure of the mechanic's lien, prevailed on its compulsory counterclaims, and obtained the only net judgment in the mechanic's lien action.

Furthermore, ATC does not address and has not responded to the additional authorities cited by NKD in which the owner was determined to be the "prevailing party" in a mechanic's lien action when the lien could not be enforced against the property because of the filing of a bond. *See, e.g., Keeney's Metal Roofing, Inc. v. Palmieri*, 345 S.C. 550, 548 S.E.2d 900 (Ct. App. 2001) (reversing trial court and awarding fees to owners where lien could not be enforced against the property due to bond). Nor does ATC address the authorities confirming that the creation and perfection of the lien alone are insufficient to confer prevailing party status where ATC obtained no enforcement of the lien. *See Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 340, 762 S.E.2d 561, 565 (2014) (recognizing that "mechanics' liens are purely statutory" and "[t]he statutory process encompasses several steps, including the (1) creation, (2) perfection, and (3) enforcement of the lien"); *see also Moorhead Const., Inc. v. Enter. Bank of S.C.*, 410 S.C. 386, 391, 765 S.E.2d 1, 3 (Ct. App. 2014) ("If there is no right to foreclosure because the right to a lien is not established, there is no right to recover against the surety on the bond.")

While ATC addresses only its own asserted entitlement to fees, it leaves unaddressed NKD's independent entitlement to attorney fees under S.C. Code § 29-5-10(a), which authorizes the owner who successfully defends against the mechanic's lien to recover its reasonable attorney's fees and costs. *See* S.C. Code § 29-5-10(a) (providing that "[t]he costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party"). The record demonstrates that: (i) NKD successfully prevented the enforcement and foreclosure of the lien; (ii) NKD obtained the "net award, or one verdict," in the mechanic's lien action; and (iii) the mechanic's lien, bond, and lis pendens were all discharged without any recovery by ATC. These undisputed facts are drawn from the record on appeal and have not been challenged by ATC. NKD's argument that the Panel erred by refusing to award NKD its attorney's fees and costs incurred in defending against the mechanic's lien under S.C. Code § 29-5-10(a) is, therefore, unrebutted.

III. ATC'S RECITATION OF THE *JACKSON* FACTORS DOES NOT SUPPLY THE EVIDENCE NECESSARY TO SUPPORT THE $228,600.00 FEE AWARD

Even if this Court were to affirm the circuit court's finding that ATC is the "prevailing party" determined from the one verdict in the mechanic's lien action, the fee award in the amount of $228,600.00 cannot stand because it lacked an adequate evidentiary basis to support each of the six factors in *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). For example, the record contains no contemporaneous, itemized billing records from which the Panel could reliably determine the work actually performed, the identity of each timekeeper, the hours attributable to each attorney or paralegal, whether the work related exclusively to the lien claim, whether multiple attorneys duplicated the same work, and whether the hours were reasonable and necessary. In response, ATC merely restates the Panel's recitation of the *Jackson* factors. *See* Resp't's Br. at 12. ATC's assurance that the "Panel went through each factor" and explained its conclusions is not a substitute for the evidentiary support that was never provided in this case.

ATC does not address NKD's argument that the absence of itemized records precluded the Panel from making specific findings relating to the duplicative efforts of counsel for ATC who routinely had four or more attorneys present at depositions. The Panel made no finding as to whether ATC's claimed 762 hours included duplicative attorney attendance. ATC does not respond to this error but instead suggests that the Panel's observation of the four-day hearing and its familiarity with the work of counsel during the proceeding are sufficient to inform its assessment of the fee petition. *See* Resp't's Br. at 12 – 13. ATC cites no authority for the proposition that the Panel's familiarity with the proceeding, or the one-page QuickBooks ledger or conclusory Affidavit of Russell Jeter, can supply the evidence necessary to support the $228,600.00 fee award.

Precedent from this Court expressly recognizes that if "there is inadequate evidentiary support for each of the factors, the appellate court should reverse and remand so the trial court may make specific findings of fact." *See Griffith v. Griffith,* 332 S.C. 630, 646, 506 S.E.2d 526, 535 (Ct. App. 1998).

In *TCC of Charleston, Inc. v. Concord & Cumberland, LLC*, 446 S.C. 202, 918 S.E.2d 699 (Ct. App. 2025), this Court reversed and remanded a fee award in a mechanic's lien action because itemized records of the hours each attorney and legal staff member spent on the case were not included in the record on appeal. *Id.* at 229, 918 S.E.2d at 713–14. In this case, ATC has never presented contemporaneous, itemized billing records. ATC does not attempt to distinguish the holding in *TCC* or explain how the Panel's reliance on the unsubstantiated affidavits of Mr. Jeter and Mr. Buchanan satisfies ATC's burden as the fee petitioner. At a minimum, the $228,600.00 fee award should be reversed and remanded for further proceedings as to the amount of the fees awarded.

CONCLUSION

For the foregoing reasons, Appellant NKD, Inc., respectfully requests that this Court (i) reverse the circuit court's Order confirming the Final Award as to attorney's fees; (ii) vacate the Arbitration Panel's award of attorney's fees to Respondent ATC Site Construction, LLC; and (iii) vacate the Arbitration Panel's refusal to award attorney's fees to NKD and remand this case to the circuit court with instructions to determine and enter an award of reasonable attorney's fees and costs to NKD under S.C. Code § 29-5-10(a). In the alternative, NKD respectfully requests that this Court reverse and remand the issue of the attorney's fees awarded to ATC for further proceedings.

Respectfully submitted,

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