

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Ellis B. Drew, Jr., Master-In-Equity

Appellate Case No. 2012-213318

Moorhead Construction, Inc., Craft Construction Company, Inc., and
Miller Construction Company, LLC Respondents,

v.

Pendleton Station, LLC, Enterprise Bank of South Carolina, and
Angelo Penza..... Defendants

Of whom Enterprise Bank of South Carolina is the Appellant.

RESPONDENTS' PETITION FOR
REHEARING

RECEIVED

APR 29 2014

SC Court of Appeals

David J. Brousseau
McIntosh, Sherard, Sullivan & Brousseau
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Anderson, South Carolina 29622-0197
(864) 225-0001 || (864) 225-0004 (Fax)
Attorney for Respondent

NOW COMES the Respondents, pursuant to Rule 221, SCACR, who respectfully move this Court for a rehearing based upon the following:

On April 16, 2014, this Court issued its Opinion vacating the Master's prior order and remanding for foreclosure proceedings. Additionally, this Court ordered the Master to reconsider the issues presented by the Appellant on appeal, and issue an order including specific findings of fact and conclusion of law as to each issue.

Respondents request that this Court adopt Judge Short's dissent as its opinion in this matter. In January of 2014, a bond was issued by Appellant substituting the bond for the real property in this matter.¹ Foreclosure of the real property is no longer an issue because Appellant issued irrevocable letters of credit substituting the real property.

S.C. Code Ann. § 29-5-110 allows an owner of property to post a bond in order to substitute the real property. It is "an instructional mechanism to the court directing that a judgment on a foreclosed mechanic's lien be executed against a cash bond or other secured undertaking if one has been substituted in accordance with the statutory requirements." *Cohen's Drywall Co. Inc. v. Sea Spray Homes, LLC*, 374 S.C. 195, 200, 648 S.E.2d 598, 600-601 (2007).

As noted below, many of the issues presented by Appellant deal with issues relating to the real property. Those issues are no longer applicable. This leaves essentially two (2) issues: a) whether the liens were timely filed and, if so, b) how much was due to the Respondents. As noted by the dissent, Respondents contend that the Master correctly determined that the liens were properly filed and correctly determined the amounts due to Respondents at that time.

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The bond is in the form of irrevocable letters of credit issued on by the Appellant in a guaranteed amount of at least two (2) times the amount of the judgment in this matter.

Many of the Appellant's issue on appeal have now become moot because of the fact that the bond has substituted the real property. Appellant's Issues IV, IV(A), IV(B), IV(C), V, VI, VII, VII(A), VII(B), and VII(C) all relate to real property issues. These are only relevant if one is foreclosing on the real property as opposed to the bond. Appellant's Issue I has been ruled on by this Court and all parties agreed that no personal judgment could be issued as a result of a cause of action for foreclosure of the mechanic's liens.

Appellant's issue III deals with the issue of whether the liens were timely filed. The Master found, and evidence is included in the record to support, that the liens were timely filed within the statutory time period. "An action to foreclose a mechanic's lien is a law case in South Carolina. In an action at law, tried with a jury, the judge's findings will not be disturbed unless they are without evidentiary support." *Zepa Const., Inc v. Randazzo*, 357 S.C. 32, 35-36, 591 S.E.2d 29, 30 (Ct. App. 2004).

Appellant's issues II, VIII and IX deal with the amount that was ordered by the Court. The Master found, and evidence is included in the record to support, that this amount is the amount that was due to the Respondents at the time of trial. The Master's findings are "equivalent to those of a jury in an action at law." *Id.*

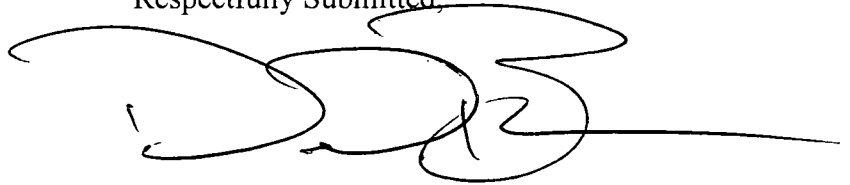
Appellant's issue X deals with whether the Respondents were the prevailing party for purposes of an award of attorney's fees and costs. The amounts found due to the Respondents was well in excess of one-half (½) of the amount that was claimed in the lien. The term "prevailing party" is defined as the "one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006).

Respondents contend that they have met the statutory definition of “prevailing party” as well as the definition as provided in *EFCO*. Respondents would note that the Appellant contends in this appeal that the amount found due to the Respondents was incorrect. It is not typical to find a party who ‘prevailed’ on an issue to appeal the same.

In regards to Appellant’s issue XI, it argues that the Master erred in determining the amount of attorney’s fees to be ordered. Appellant did not object to the manner in which the Master determined the amount of fees at trial. Further, the Master, at the remand hearing, may determine this as an amount now due to the Respondent.

Accordingly, Respondents move this Court to grant a rehearing be held in this case, or in the alternative, to modify the Court’s opinion and adopt the dissent by Judge Short.

Respectfully Submitted,

A large, stylized handwritten signature in black ink, appearing to read 'DJB', with a long horizontal line extending to the right.

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Counsel for Respondents

April 28, 2014.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Ellis B. Drew, Jr., Master-In-Equity

Case No. 2007-CP-04-2786
(Appellate Case No. 2012-213318)

Moorhead Construction, Inc., Craft Construction Company, Inc., and
Miller..... Respondents,

v.

Pendleton Station, LLC, Enterprise Bank of South Carolina, and
Angelo Penza..... Defendants,

Of whom Enterprise Bank of South Carolina is the..... Appellant.

PROOF OF SERVICE

I certify that I have served the Respondents' Petition for Rehearing in the above-referenced case has been served on all parties of record by mailing a copy of the same in the Unites States mail, postage prepaid this 28th Day of April, 2014, addressed as follows:

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M. Stokely Holder, Esquire
704 East McAbee Avenue
Greenville, South Carolina 29601

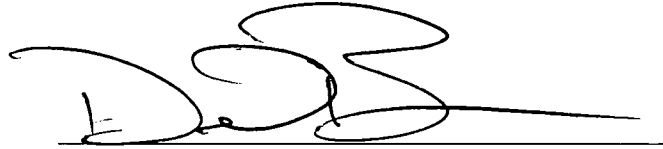
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MARSHALL P. SHERARD, JR.
GEORGE P. SULLIVAN
DAVID J. BROUSSEAU

April 28, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201

Re: *Moorhead Construction, Inc. et al. v. Enterprise Bank et al.*
Lower Court Case No.: 2007-CP-04-2785
Appellate Case No.: 2012-213318

Dear Ms. Kitchings;

Enclosed for filing is the original and six copies of the Respondents' Petition for Rehearing. Also enclosed for filing is the Certificate of Service of the Respondents' Petition for Rehearing.

With kindest regards; I remain,

Sincerely,



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Attorney for Appellant

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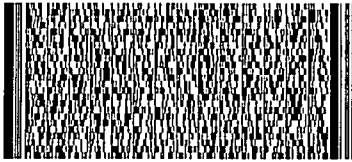
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1205 Pendleton Street

COLUMBIA, SC 29201

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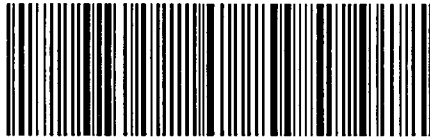
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