

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2013-002176

Moats Construction, LLC. Appellant,

v.

Bobby D. Sanders, Jr. Respondent,

APPELLANT'S INITIAL REPLY BRIEF

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SC Court of Appeals

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ARGUMENT

I. **As it is undisputed that the trial court erred in holding that Moats Construction had a valid lien under §29-5-20, the circuit court's holding must be reversed**

There is no evidence to support the trial court's ruling that Moats Construction, Inc. (hereinafter "Moats Construction") did not have a valid mechanic's lien under §29-5-20(A). A proceeding to enforce a mechanic's lien is legal in nature and this court's scope of review is limited to determining if there is any evidence to support the ruling of the trial court. Stoudenmire Heating & Air Conditioning Co., Inc. v. Craig Bldg. P'ship, 308 S.C. 298, 301, 417 S.E.2d 634, 636 (Ct. App. 1992). As argued in Moats Construction's Initial Brief, Moats Construction fully complied with the statutory requirements in S.C Code Ann §29-5-10, et seq.; therefore; Moats Construction had a valid lien. Respondent, in his Initial Reply Brief, does not dispute that that Appellant Moats Construction had a valid mechanic's lien under S.C. Code Ann. §29-5-20(A). Therefore, the decision of the trial court should be reversed.

Further, the trial court erred in denying Moats Construction's Motion to Alter or Amend and for a New Trial. The trial court misapplied the statutory requirements of S.C. Code Ann. § 29-5-10, et seq. and should have granted Moats Construction's motion for a new trial. "Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law." Daves v. Cleary, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003) (citing Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999)). As discussed in Moats Construction's Initial Brief, the trial court, in holding that Moats Construction did not

have a valid lien, incorrectly applied the notice of furnishing requirements found in §29-5-20(B), rather than the notice requirements found in §29-5-40. Therefore, the decision of the trial court should be reversed.

II. The trial court erred in calculating the remaining amount owed by Sanders on the Premier Contract and therefore, the case should be remanded

In its March 28, 2013 Order, the trial court erred in holding that the amount remaining due under the Premier Contract was zero. As discussed in Moats Construction's Initial Brief, many of the expenses included by the trial court, which were submitted by the Respondent, were not legitimate offsets under South Carolina Code Ann. § 29-5-40. Respondent's damages include unsubstantiated estimates for work that was never performed and was discovered after the filing of Respondent's pleadings, expenses for betterments, and damages for breach of warranty. Therefore, this Court should remand the case to determine what expenses, if any, can be offset from the contract balance of \$23,654.40.

The trial court erred in offsetting Respondent's estimates for work that was never performed from the total amount owed by Respondent on the Premier Contract. Where a project is completed and the general contractor's work was defective, "[an] owner may be entitled to offset **moneys** spent to repair that work against the lienholder's recovery. Action Concrete Contractors v. Chappellear, 404 S.C. 312, 319, 745 S.E.2d 77, 80 (2013) (emphasis added). As Respondent merely submitted repair estimates for allegedly needed repairs without actually completing the repairs, Respondent did not actually spend any money. While Respondent may have been

entitled to offset moneys spent to repair Premier's work, the statute does not allow for an owner to offset repair estimates.

The trial court also erred by offsetting costs and repair estimates for alleged deficiencies, which were dated more than a year after Respondent's served his responsive pleadings. The record is devoid of any evidence supporting Respondent's contention that the problems were discovered prior to the filing of the pleadings. Therefore, this matter should be remanded to allow for the trial court to determine when the alleged deficiencies were discovered.

When the trial court allowed Respondent to plead offset under Rule 15(b), the amendment was treated as though it was raised in the pleadings. At the trial, the parties agreed that the pleadings would be amended to conform to the testimony to allow Respondent to plead offset and to allow Moats Construction to plead the existence of a contract between Respondent and Moats Construction. When issues not raised by the pleadings are tried by consent, they shall be treated in all respects as if they had been raised in the pleadings. SCRCR Rule 15(b). When the trial court allowed Respondent to amend his pleadings to include offset, the amendment related back to the date of the original pleading. Therefore, the time for determining after-discovered negligence is the date that the initial pleading was filed.

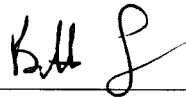
Further, to allow Respondent to offset the remaining balance under the Premier Contract with estimates for alleged defects created after the filing of his responsive pleadings is against public policy and would provide any owner with a device to circumvent the mechanic's lien statutes' protection of subcontractors. In any similar situation where a general contractor allegedly fails to pay a subcontractor

and the subcontractor brings a claim against the owner for any amount remaining under the construction contract, an owner could simply provide an estimate for work that it contended was not done correctly to offset any remaining amount under contract, but never actually have the work performed. The mechanic's lien statute was designed to protect subcontractors from this exact situation. Therefore, this Court should remand this matter to the trial court for calculation of what amounts, if any can Respondent can offset from the Premier Contract.

CONCLUSION

For the reasons stated herein, or for any reason that may appear in the record, Moats Construction respectfully requests that this Court reverse the trial court's March 28, 2013 Order of Judgment and remand the matter back to the trial court to determine the actual amount remaining under the Premier Contract.

Respectfully submitted,



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July 7, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No.: 2013-002176

Moats Construction, LLC,.....Appellants,

v.

Bobby D. Sanders, Jr.,.....Respondent.

PROOF OF SERVICE

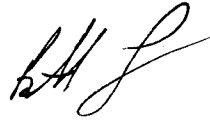
I do hereby certify that on the 7th day of July, 2014, I served a copy of the **APPELLANT'S INITIAL REPLY BRIEF** upon the attorney for the Respondent, and others as specified below, by placing in the U.S. Postal Mail:

D. Ryan McCabe, Esq.
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July 7, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29111

Re: Moats Construction, LLC v. Bobby D. Sanders, Jr.
Case No.: 2013-002176

Dear Ms. Kitchings:

Enclosed for filing please find the originals and three copies of the Appellant's Initial Reply Brief and a Proof of Service in the above-referenced matter. Please file the originals and return the clocked copies to us in the enclosed stamped envelope.

Thank you for your assistance in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely yours,

GALLIVAN, WHITE & BOYD, P.A.

R. Batten Farrar

RBF/cs
Enclosures
cc: D. Ryan McCabe, Esq.

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