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SC Court of Appeals

[FINAL] BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

George S. Nicholson, Jr., Circuit Court Judge

Case No. 2013-001361

L&M, LLC, Appellant,

v.

Robert Yearick, Respondent.

[FINAL] BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING THE DEFENDANT'S YEARICK'S MOTION FOR SUMMARY JUDGMENT AGAINST THE PLANTIFF L&M, LLC?

STATEMENT OF THE CASE

Yes. Before litigation began, Robert Yearick (hereinafter "Yearick") filed a Mechanics Lien against L&M, LLC (hereinafter "L&M"), the owner of the building that is the subject of this action, and its real property on July 7, 2009. Plaintiff L&M filed an action against Defendant Yearick to dissolve the Mechanics Lien and for damages on August 28, 2009. (R. 6-11).

Yearick did not commence any timely action to foreclose on his Mechanics Lien. Yearick then filed a Motion for Summary Judgment that was heard on November 14, 2012. (R. 13). Yearick argued a two pronged argument. The first argument was that Mechanics Liens are privileged. The second argument was that Yearick did not foreclose on the lien therefore any action against Yearick is moot because the passage of time removed the lien.

The lower Court found in favor of Yearick's motion for summary judgment on November 14, 2012. The Motion for Summary Judgment dismissed all of L&M's claims. A Motion for Reconsideration was raised on November 15, 2012 by L&M, wherein the Court heard L&M's argument to reverse the Summary Judgment Motion. The Motion for Summary Judgment was not reversed and Yearick was given more time to prepare a memoranda. The motion was reconvened on April 11, 2013. Testimony as to damages from the Mechanics Lien, attorney's fees, and costs were never heard. The Trial Court affirmed its ruling on Yearick's Summary Judgment motion based on Yearick's argument

that filings are privileged under the Pond Place Partners Inc. v. Poole 567 SE 2d 881, (Ct.App. 2002) case. An order was filed May 9, 2013 stating that the defendant's [Yearick] Motion to dismiss an action seeking to dissolve a lien whose time for foreclosure had long expired was well-founded. (R. 3-4). The court was then timely notified of an appeal and Yearick was served the Notice of Appeal.

FACTS

1. Yearick delivered decorative items such as chairs, tables, dishware and other like items for L&M, LLC;

2. Yearick states that he was not paid in full;

3. Yearick filed a Mechanics Lien against L&M and its real property on July 9, 2009;

4. L&M filed an action against Yearick to dissolve the Mechanics Lien and for damages on August 28, 2009. (R. 6-11);

5. L&M owns the building that is the subject of the Mechanics Lien filed against L&M;

6. Yearick did not commence any timely action to foreclose on his Mechanics Lien;

7. L&M, contends that according to SC §29-5, specifically, SC §29-5-10 - SC §29-5-20, and well founded case law Yearick did not have the right to place a Mechanics Lien on L&M's real property, due to the items being decorative in nature and not used in the erection, alteration, or repair of the building or structure as required by SC §29-5-10;

8. Yearick argued that a Mechanics Lien and Lis Pendens are treated the same. Yearick argued that it is an absolute privilege to place a Lis Pendens on a business and its

real property and so it is privileged to place a Mechanics Lien on real property as well (R. 22-29). Transcript 1 page 16 line 9-17);

9. Yearick argued his Motion for Summary Judgment, seeking dismissal of the claims of L&M on the grounds of mootness and on grounds of absolute privilege. (R. 13).;

10. Yearick also argued that since Defendant Yearick did not foreclose on the lien, there could not be any recourse from Yearick for damages. (R. 13);

11. The lower Court found in favor of Defendant Yearick's Motion for Summary Judgment. (R. 22-29. enclosed Transcript 1, dated November 14, 2012, Page 15 line 19 through Page 22 line 9) and (R. 3-4, Order).;

12. A Motion for Reconsideration was raised on November 15, 2012, during which time, the Court heard L&M's argument to reverse the Summary Judgment Motion. The Motion for Summary Judgment was not reversed and Yearick was given more time to prepare a Memoranda. Motion was reconvened on April 11, 2013. (R. 31-38). Transcript 2 dated November 15, 2012, Page 48 line 15 through Page 55 line 6) and (R. 16-20) Transcript 2 dated November 15, 2012, Page 48 line 15 through Page 55 line 6);

13. A Motion hearing was held on April 11, 2013 wherein opposition of Yearick's Summary Judgment was heard wherein the summary judgment motion was upheld. (R. 40-61, Transcript 3; Pages 4 -25) and (R. 3-4. Order);

14. Testimony as to damages from the Mechanics Lien, attorney's fees, and costs were never heard;

15. The Trial Court upheld the ruling for Yearick on Summary Judgment based on Yearick's argument that filings are privileged under Pond Place Partners Inc. v. Poole, 567 SE 2d 881, (Ct.App. 2002) (R. 40-61), Transcript 3 dated April 11, 2013, Page 24 line 2-19) and (R. 3-4. Order);

ARGUMENTS

1. BECAUSE MECHANICS LIENS ARE NOT PRIVILEGED, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

Defendant Yearick asserted that Pond Place Partners, Inc. v Poole, 567 SE 2d 881, (Ct.App. 2002), established as absolute privilege which bars any action in South Carolina for slander of title against an action such as a Lis Pendens.

A Lis Pendens is merely a notice that a suit is pending. It is also defined as a legal notice recorded to show a pending litigation relating to real property, and to give notice that anyone acquiring an interest in the property after the date of the Lis Pendens is filed may be bound by the outcome of litigation. The South Carolina Court of Appeals has held that a filing of a Lis Pendens is absolutely privileged by statute and has no existence separate and apart from the litigation of which it gives notice. SC §15-11-10.

A Lis Pendens is not to be filed before more than 20 days before a Summons and Complaint verses a Mechanics Lien which can encumber and cloud a title for 6 months without having to be perfected. While opposing counsel argues there are not remedies for a wrongfully filed Lis Pendens, it should be made clear that Lis Pendens and Mechanic's Lien are distinctly different and are not the same.

The Legislature as well as well founded case law, clearly states that there are penalties for improper Mechanics Liens. SC §29-5 as well as SC §29-5-10, §29-5-15, and

§29-5-20 sets out the legislative intent and remedies for the law, which clearly include attorneys fees and costs. It is undisputed that the Mechanic's Lien statute at issue here specifically authorizes the recovery of attorney fees and costs. Efco v. Renaissance On Charleston Harbor, 635 S.E.2d 922, 370 S.C. 612 (S.C. App., 2006). The legislature made separate rules and guidelines for Mechanics Liens as compared to Lis Pendens, as they are different in nature and effect.

Under our statutory scheme, the award of fees to the prevailing party in a Mechanic's Lien action is automatic and mandatory. S.C.Code Ann. § 29-5-10 & 20 (1991 & Supp. 2001); T.W. Morton Builders, Inc. v. von Buedingen, 316 S.C. 388, 402-03, 450 S.E.2d 87, 95 (Ct.App.1994) as stated in a concurring opinion by Hearn, C.J. Lauro v. Visnapuu, 351 S.C. 507, 570 S.E.2d 551 (S.C. App., 2002). Accordingly, § 29-5-10 entitles the prevailing party to all costs incurred in defending the Mechanic's Lien action up to the amount of the lien being foreclosed. Muller v. Myrtle Beach Golf and Yacht Club, 438 S.E.2d 248, 313 S.C. 412 (S.C., 1993). S.C.Code Ann. § 29-5-10 (a) provides that the prevailing party to an action to foreclose a Mechanic's Lien shall be awarded attorneys' fees and costs up to the amount of the actual lien award. Brasington Tile Co., Inc. v. Worley, 491 S.E.2d 244, 327 S.C. 280 (S.C., 1997).

Yearick filed the lien to collect on a disputed contract amount from decorative items and it is clear that "Mechanic's Liens under the statute are not a vehicle for collecting damages for breach of contract" Sea Pines Company, v. Kiawah Island Company, Inc.268 S.C. 153, 232 S.E. 2d. Costs and attorneys fees are to deter the wrongful filing of Mechanic's Liens, as wrongful liens place a cloud over title to property

which restricts the ability to use it as collateral. Cedar Creek Props. v. Cantelou Associates, Inc. 320 S.C. 483, 465 S.E.2d 774. The statutory relief is also in place to help guard against unscrupulous claims that curtail the landowner's full use and enjoyment of his property. There are bonds to protect the claimant, but there are no bonds to secure the landowner against the damages against the claimant's wrongful liens. Sea Pines Company v. Kiawah Island Company, Inc. 268 S.C. 153, 232 S.E.2d. Yearick does not dispute that he filed his lien for a contract claim to collect an alleged debt and wrongfully encumbered L&M's property.

Yearick wrongfully filed a lien for a contract issue against L&M which is exactly what SC §29-5-10 and the above case law is in place to protect against and why filing a mechanics lien is not privileged. The trial court improperly ruled in favor of Yearick for Summary judgment and the ruling should be reversed and a new trial ordered.

2. BECAUSE A LIEN IS NOT FORECLOSED ON DOES NOT MEAN THERE IS NO RECOVEREABLE DAMAGE TO THE PARTY IT WAS PLACED AGAINST.

Defendant Yearick asserted that he had never taken any action to execute his notice of mechanics lien by foreclosure or other legal action. Defendant Yearick argued that, due to passage of time without Defendant Yearick taking any action to enforce his lien, the notice of Mechanics lien had, by operation of law, become no force and effect.

However, the defendant is incorrect in his assertion that he is not liable for damages due to the passage of time removing the lien. Even if the lien is extinguished by not being perfected after six months, there is still a remedy for the party that it was placed against, as it damages the property it clouds. The South Carolina Supreme Court has

defined a "prevailing party" as "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."[I]n 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; *see also Cedar Creek Props. v. Cantelou Assocs.*, 320 S.C. 483, 486, 465 S.E.2d 774, 776 (Ct.App. 1995) (finding a property owner who filed a Complaint to dissolve a mechanic's lien was the prevailing party where the contractor filed a cancellation of the lien).

"In a mechanics lien action the defendant is entitled to an award of attorney's fees as the prevailing party if it is determined that a mechanics lien cannot be enforced against it." EFCO v. Renaissance on Charleston Harbour, 635 S.E. 3d 922, 370 S.C. 612. In this matter before the Court Yearick was never able to enforce the mechanics lien against L&M due to the work being decorative in nature and just because Yearick let the lien expire with time the expiration is not a bar from damages, attorney's fees, and cost.

Furthermore, in Cedar Creek Props. v. Cantelou the court states that even though the lien was voluntarily cancelled it did so only after an action to dissolve it was sought. Id. So although the lien itself was resolved, the damage, fees, and costs still remained along with the attorney's fees. As further stated in Cedar Creek Props. v. Cantelou, a decision to offensively seek dissolution of the lien rather than wait for foreclosure cannot be said to act as a waiver to collect attorney's fees. Id. As seen in the current action

L&M filed an action to remove the lien and for damages and Yearick did not foreclose on the lien.

When a party does not bring a foreclosure action within six months of filing its lien as required by statute it is the prevailing party because it successfully defended the action based on EFCO's failure to comply with what, in essence, amounted to a statute of limitations. EFCO v. Renaissance on Charleston Harbour, 635 S.E. 3d 922, 370 S.C. 61. In EFCO, the circuit court granted summary judgment in favor of Renaissance as to Lien one primarily because they did not bring a foreclosure action within six months of filing its lien as required by statute. EFCO v. Renaissance on Charleston Harbour, 635 S.E. 3d 922, 370 S.C. 612 As seen in the present case Yearick did not foreclose on its lien and thus should be held liable for L&M's damages. In Cedar Creek, Cantelou voluntarily cancelled the lien, it did so only after Cedar Creek instituted an action to have the lien dissolved. Thus, although Cedar Creek essentially received the relief it sought, that is, avoidance of the lien, it still had to defend against the lien until the issue was resolved, and it incurred attorney fees and costs during that time. Cedar Creek Props. v. Cantelou 320 S.C. 483, 486, 465 S.E.2d 774, 776 (Ct.App. 1995). Similarly in the present case, Yearick's lien finally elapsed with the passage of time, however, the costs, attorney's fees, and damages still remained and damaged L&M; which furthers L&M's argument that Yearick's Motion for Summary Judgment should not have been granted.

CONCLUSION

Yearick's Motions for Summary Judgment should have been denied. A Mechanics Lien is not privileged and anyone that places a wrongful mechanic's lien on real property

is in violation of the wrongful lien statute SC §29-5, SC §29-5-10, SC §29-5-15, SC §29-5-20, and well founded case law and is liable for damages, cost, and attorney's fees. Passage of time does not remove the liability from someone that places an improper mechanics lien.

L&M was damaged greatly by the wrongful Mechanics Lien which placed a cloud on L&M's property and damaged L&M by causing L&M to have to sell shares instead of obtaining commercial financing; by clouding L&M's real property; by having L&M, expend money on attorney's fees to file an action against the lien; and to expend monies to purchase a bond.

Yearick placed the lien on the property to try to resolve a contract dispute over decorative items which is strictly prohibited. The damage caused past, present, and future monetary harm to L&M.

For the reasons stated above, the trial court did err in granting the Defendant Yearick's Motion for Summary Judgment against the Plaintiff, L&M, LLC. As such, this Honorable Court should reverse the decision of the Trial Court on Yearick's Motion for Summary Judgment and grant a new trial.

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April 28, 2014

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PROOF OF SERVICE OF [FINAL] BRIEF OF APPELLANT TO RESPONDENT

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George S. Nicholson, Jr., Circuit Court Judge

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v.

Robert Yearick, Respondent.

PROOF OF SERVICE OF [FINAL] BRIEF OF APPELLANT TO RESPONDENT

I certify that I have served the Final Brief of Appellant to Respondent by depositing a copy of it in the United States Mail, postage prepaid, on April 25, 2014, addressed to Respondent's attorney of record, Robert C. Wilson, Esquire, 201 Whitesett Street, Greenville, SC 29601.

April 29th, 2014

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