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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

CASE NO.: 2009-CP-15-0595

THE SPRIGGS GROUP, P.C., ... Respondent,

GENE R. SLIVKA, ...Petitioner.

BRIEF OF PETITIONER IN SUPPORT OF WRIT FOR CERTIORARI

Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Email: rtl@lylesfirm.com
ATTORNEYS FOR PETITIONER

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE PETITIONER AS TO THE RESPONDENT'S MECHANIC'S LIEN CLAIM BECAUSE THE RESPONDENT'S LIEN WAS NOT TIMELY AS A MATTER OF LAW.

2. WHETHER THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE PETITIONER AS TO THE RESPONDENT'S CLAIM PURSUANT TO *S.C. CODE ANN.* § 27-1-15. BECAUSE THE EVIDENCE WAS UNDISPUTED THAT AN INVESTIGATION HAD TAKEN PLACE INTO THE RESPONDENT'S CLAIM IN THE FORM OF FORMAL DISCOVERY, NO PORTION OF THE CLAIM WAS UNDISPUTED, AND THE PETITIONER HAD ALREADY DEPOSITED AN AMOUNT WHICH EXCEEDED THE ENTIRE CLAIM WITH THE COURT.

STATEMENT OF THE CASE

This matter stems from a dispute between the Petitioner, Mr. Gene R. Slivka, ("Slivka") and the Respondent, The Spriggs Group, PC, ("Spriggs") regarding the provision of architectural services for Slivka's home and several outbuildings on property located in Colleton County known and often referred to as "New Julianton Plantation." The buildings include the main house, a conservatory with attached potting shed, a grotto, a stable, and two garages, all in historical style. Spriggs provided architectural services pursuant to a written agreement included in a letter prepared by Spriggs dated November 17, 2006, (hereinafter "Fee Agreement"). (R. pp. 346-353) The Fee Agreement states that it includes a fee proposal to complete the architectural and engineering work, with restrictions and limitations noted, and sets forth a fee of $161,500.00 (which the parties do not dispute was later modified to $151,402.00). Id. It is uncontested that, pursuant to the terms of the Fee Agreement, Slivka paid one half of the fee at the outset of the project. The balance was to be paid at the conclusion of the project.

Dissatisfied with Spriggs' services, in December, 2008, Slivka picked up his remaining drawings and told Spriggs that he did not want any more drawings. (R. p. 265, lines 20-25) In

February, 2009, Slivka was presented with invoices numbered 0609-2, 0609-3, 0609-4, and 0609-5, all dated February 9, 2009, which total $198,834.53 (altogether the "February 9, 2009 Invoice") and which reflect work ostensibly done by Spriggs in 2006, 2007 and 2008. This was significantly more than double the agreed upon balance called for in the Fee Agreement. (R. pp. 354-363) Included were charges for tasks and work that had been performed by Spriggs for over two years and which had never been billed. Further, Spriggs admitted that he had not advised Slivka that he was incurring charges for work outside of what Spriggs believed to be the scope of work contemplated by the Fee Agreement. (R. p. 202 lines 9-23) Id.

A. MECHANICS LIEN

Slivka disputed the additional charges. Spriggs subsequently filed a mechanic's lien on April 13, 2009, in the amount of $198,834.53, which is the total of the February 9, 2009 Invoice. (R. pp. 376-386), which were attached to the Affidavit of Account filed in support of the mechanics lien: The Affidavit of Account made no reference to charges for any work ostensibly done in 2009. Id.

To release the encumbrance on his property, on May 12, 2009, Slivka posted a bond to release the mechanic's lien in the amount of $265,112.71, an amount equal to one and one-third the amount of the recorded lien. (R. pp. 387-391). On May 21, 2009, Spriggs issued an additional invoice, Invoice 0509-6, for services regarding an appraisal which were ostensibly performed by Spriggs in May, 2009 related to help he gave to an appraiser who was doing work for a boarder of Slivka. (R. p. 364) On July 8, 2009, Spriggs brought suit to foreclose on its mechanic's lien. (R. pp. 31-54) Through counsel, Slivka answered and initiated counterclaims, including slander of title, based on the untimeliness of the lien, since the work referenced in the February 9, 2009, invoices had all been done more than 90 days before the notice of lien was

served. (R. pp. 55-67) Subsequently, on November 16, 2009, and in what was obviously an effort to cure the defect in the timing of the lien, Spriggs issued yet another invoice, Invoice 0609-7, for work described as" Construction Phase Services and which were allegedly done in the time period January 1-13, 2009. (R. p. 365).

On June 30, 2011, Slivka made a formal offer to settle the matter in the amount of $100,000.00, pursuant to the procedures in the Mechanic's Lien Statute, the statutory relief selected by Spriggs when it filed its mechanic's lien action. (R. p. 461) Spriggs made no response other than to file a Motion to Strike the offer, which was denied. (R. pp. 462-464)

B. DEMAND PURSUANT TO § 27-1-15

In 2009 the parties engaged in the initial discovery phase of the case, in which Spriggs claimed Slivka owed money and in which Slivka disputed the amount owed and contended that he was owed money because of Spriggs defective mechanics lien and because of defects in the plans. On March 15, 2010, over nine months after litigation had commenced and in the midst of discovery, Spriggs sent Slivka, and his prior counsel, a demand for payment pursuant to S.C. Code Ann. § 27-1-15. (R. pp. 366-375) Slivka, having answered Spriggs' complaint and being engaged in discovery with Spriggs, did not formally respond to the demand letter. On May 5, 2010, Spriggs amended his complaint to add a cause of action for Failure to Comply with S.C. Code Ann. § 27-1-1,5 Enforcement of Claim Against Mechanic's Lien Bond, Breach of Contract, Breach of Contract Accompanied by Fraudulent Acts, and Unjust Enrichment/Quantum Meruit. (R. pp. 68-93) Slivka again answered denying liability and asserting alleging counterclaims. (R. pp. 94-104)

C. EVIDENCE AT TRIAL

Spriggs presented two and a half days of testimony in which it asserted that the additional

charges reflected in its invoices were made due to changes and demands of Slivka and were justified by the Fee Agreement. Mr. Thomas Bozeman,, an employee of Spriggs, testified that items that were not contemplated by the scope of the original agreement were billed pursuant to the Fee Agreement. (R. p. 201, line 5- p. 202, line 8) The Fee Agreement provides in Paragraph 18, that "[Spriggs] will provide any requested construction phase services by the project architect or staff on an hourly basis." (R. p. 350) In Paragraph 19, it further provides that "Once we begin construction documents, any changes in room layouts, sizes, window locations, door locations and exterior elevation design will be performed on an hourly basis." Id. Invoice 0609-2 states that it is for "design and preparation of final drawings" but indicates an amount due of $163,574.00, an amount in excess of $85,000.00 over the remaining balance of the agreed upon fee. (R. pp. 354-363) Mr. Ken Spriggs testified Invoice 0609-02 was not calculated on an hourly basis, as required by the Fee Agreement, but by a "formula" charging for additional work by the sheet. (R. p. 274, line 12 - p. 277, line 19 and pp. 354-363) Mr. Bozeman admitted that he did not advise Slivka when he was performing tasks not covered by the original scope of services, or that he was going to bill him extra for it. (R. p. 202, lines 9-23) In response, Slivka asserted the position that items that Spriggs claims were additional were or should have been contemplated when the original agreement was made.

Mr. Andy Bozeman of The Spriggs Group admitted that what was basic and what was additional (with the exception of preparation of drawings for a retaining wall) was completely subjective. (R. p. 204, lines 3-17) Slivka testified that with the exception of charges related to a construction meeting and the design of a garden wall, neither Spriggs nor Bozeman ever told him that items he requested did not fall within the fee contemplated in the original agreement. (R. p. 298, lines 15-20) He testified that Spriggs decided what the charges were and did not inform him

of them for two years. (R. p. 301, lines 13-25)

Mr. Scott Harvey, an expert on architectural standards and practices, testified on behalf of Spriggs. (R. p. 309, line 25 - p. 310, line 22) Harvey offered the opinion that an architect who fails to inform an owner that he has requested something that falls outside of the original scope of work has violated rules of professional conduct and the applicable standard of care. (R. p. 311, lines 4-23)

Slivka testified that in response to the mechanic's lien he had to borrow $265,000.00 to bond off the lien, as it clouded the title to his property, (R. p. 125, lines 9-23) and that he had paid roughly $50,000.00 in interest over a three year period. Id. This was required as the mechanic's lien filed by Spriggs affected not only his home, but all property that he owned. Id.

Following appropriate motions, which are discussed below, the matter was submitted to the jury. After deliberations, the jury found for Spriggs on the causes of action of foreclosure of mechanic's lien, breach of contract, and claims under S.C. Code Ann. § 27-1-15. (R. p. 333) The jury found for Spriggs as to Slivka's slander of title claim. Id. The jury awarded Slivka $173,990.53 in actual damages. (R. p. 334). Both parties reserved the right to make post-trial motions within ten days.

D. VALIDITY OF SLIVKA CLAIM

Spriggs tried on numerous occasions to obtain judgment against Slivka as a matter of law, but all of those motions were denied. Spriggs filed a Motion for Summary Judgment on January 31, 2011, which was denied. (R. pp. 453-40 and 438-447). At the close of the Spriggs' case at trial, Slivka and Spriggs made cross-motions for directed verdict as to the claim under S.C. Code Ann. § 27-1-15. (R. p. 285 line 7 - p. 290, line3) Those motions were denied on the basis that a question of fact existed as to Slivka's liability under that statute.

Following Slivka's case, Spriggs moved for a directed verdict as to Slivka's slander of title action, based upon Slivka's position that the lien was timely. (R. p. 314, lines 1-20) That motion was denied. Id. Slivka also renewed his directed verdict motions as to the claim under § 27-1-15 and the Mechanic's Lien Statute, (R. p. 315, line 4- p. 318, line 9) which were both denied.

Slivka also moved for a directed verdict regarding the timeliness of the lien (R p. 290, line 4 - p. 294, line 17), and as to Spriggs' breach of contract action. (R. p. 295, line 1 - p. 297, line 15). All motions were denied (R. p. 297, lines 16-23) Over Slivka's objections, the trial judge ruled that both causes of action would be submitted to the jury. (R. p. 318, line 12 - p. 319, line 14).

In summary, after all appropriate motions were made by each party, the Court declined to rule on any remaining aspect of the claim as a matter of law, and submitted the claims of both Spriggs and Slivka to the jury.

E. POST TRAIL MOTIONS/ATTORNEYS' FEES

Slivka made his post-trial motions on August 1, 2011. (R. pp. 522-535) The grounds for said motion included that Slivka was entitled to judgment as a matter of law on Spriggs's mechanic's lien because it was not timely and that Slivka was entitled to judgment, as a matter of law, on the grounds that when Spriggs's claim under S.C. Code Ann. § 27-1-15 was made, the lawsuit was pending, discovery was on-going and that Slivka had paid an amount equal to one and one third of the lien in the form of a bond with the court. Id. That motion was denied. (R. pp. 4-13) Slivka filed a Rule 59(e), *SCRCP* motion asking the court to alter, amend or reconsider its order. (R. pp. 567-573) That motion was also denied. (R. pp. 24-25)

Spriggs moved the court for attorneys' fees, costs, and interest based on both S.C. Code Ann. § 27-1-15 and the Mechanic's Lien Statute. (R. pp. 465-521) Spriggs asked for all attorneys' fees, costs, and prejudgment interest beginning from the date that invoices were sent to

Slivka in February, 2009. Id. Slivka filed a memorandum in opposition to said motion on the grounds that the fees, costs and interest sought by Spriggs were not legally supportable by statute and were excessive. (R. pp. 536-554) The Court awarded Spriggs attorneys' fees and costs in the amount of $235,030.31 and prejudgment interest in the amount of $37,413.92, thus ordering that a judgment in the total amount of $446,434.76 be entered against Slivka. (R. pp. 14-18) Slivka filed a motion to reconsider said order. (R. pp. 576-586) That motion was denied. (R. pp. 26-30)

Slivka filed a Notice of Appeal on December 2, 2011. The matter was briefed and argued before the Court of Appeals on January 10, 2013 which issued an order on February 6, 2013. In the order, the Court of Appeals remanded the attorneys' fee award back to the Circuit Court. The Court of Appeals also found that submission of the mechanic's lien claim to the jury was in error but held that the error was harmless since the lien was timely, affirming the Circuit Court. The Court of Appeals also held that Slivka had failed to preserve its rights with regard to Spriggs' claim pursuant to § 27-1-15. Slivka filed a Petition for Rehearing on February 21, 2013 which was denied by order dated March 22, 2013. Slivka filed his Petition for Writ of Certiorari on April 19, 2013 which was granted by Order dated July 14, 2014.

ARGUMENT

1. BECAUSE SPRIGGS' LIEN WAS NOT TIMELY THE VERDICT IN FAVOR OF RESPONDENT MUST BE REVERSED AND THE ENTIRE MATTER REMANDED.

When a party files a notice of lien under § 29-5-90 he is asserting that at a time within ninety (90) days before the notice, he has performed "labor" for which he is entitled to assert a lien. Preferred Savings and Loan Association, Inc., v. Royal Garden Resort, Inc., 301 S.C. 1, 4, 389 S.E.2d 853, 854 (S Ct 1990). In this case, Spriggs did not perform work fitting the definition of

"labor" under the Mechanic's Lien Statute in the ninety day period before notice of the lien was provided to Slivka. In an effort to make Spriggs' claim under the mechanic's lien statute timely, the trial court and the Court of Appeals failed to apply the statute's definition of "labor" as it was written by the legislature. Instead, the lower courts expanded the definition of labor to include off site contract administration services purportedly performed by Spriggs in January, 2009. This was in error. Strictly applying the statute, as it is written by the legislature, makes it clear that, as a matter of law, Spriggs did not perform services which meet the statutorily provided definition of "labor" within 90 days of serving notice of the lien. Therefore, his claim was untimely and the verdict in favor of Spriggs must be reversed and the entire matter remanded for entry of judgment in favor of Slivka with respect to the mechanic's lien claim and a trial on the remaining issues in the case, including Slivka' s claim for attorney's fees and costs.

A. ACTIVITIES PERFORMED BY THE RESPONDENT IN JANUARY, 2009, DO NOT FALL WITHIN THE DEFINITION OF LABOR ENTITLING ONE TO A LIEN SET FORTH IN THE MECHANIC'S LIEN STATUTE.

For purposes of the timeliness of the lien, Spriggs must have provided "labor" actually used in the erection, alteration, or repair of Slivka's buildings on or after January 13, 2009. S.C. Code Ann. § 29-5-90 (the "Act") . For design professionals, the statute specifically provides as follows:

> As used in this section, **labor** performed or furnished in the erection, alteration, or repair of any building or structure upon any real estate **includes the preparation of plans, specifications, and design drawings** and the work of making the real estate suitable as a site for the building or structure. The work is considered to include, but not be limited to, the grading, bulldozing, leveling, excavating, and filling of land (including the furnishing of fill soil), the grading and paving of curbs and sidewalks and all asphalt paving, the construction of ditches and other drainage facilities, and the laying of pipes and conduits for water, gas, electric, sewage, and drainage purposes, and the disposal of any construction and demolition debris, as defined in Section 44-96-40(6), including final disposal by a construction and demolition landfill. Any private security guard services provided by any person at the site of

> the building or structure during its erection, alteration, or repair is considered to be labor performed or furnished within the meaning of this section. S.C. Code Ann.§ 29-5-10

(emphasis added).

Critical to this appeal, the statute does not include "contract administration services" in its definition of labor, which certainly makes sense as there are an infinite number of tasks an architect could perform in connection with a job, from meeting with the client or others about the project, to inspecting or photographing the project during construction, to reviewing pay applications, none of which can be said to have "been used in the erection, alteration or repair" of a building. Simply stated, an architect who is preparing design plans, drawings and specifications is considered to be performing labor under the Act, where one who is conferencing with people by phone from the office is not.

On November 16, 2009, (seven months after Spriggs' lien was first filed and four months after this action was commenced) Spriggs sent Slivka Invoice 0609-7. With that invoice, Slivka was advised, for the first time, that Spriggs performed work described as "Construction Phase Services" between the dates of January 1-13, 2009. (R. p. 365)

The testimony and evidence at trial confirm that Spriggs did not prepare plans, specifications or drawings in 2009. Bozeman testified that in January, 2009, he performed "construction administration services." (R. p. 198, lines 1-20) Specifically, he answered a call from a plumbing subcontractor. (R. p. 199) He also communicated with a mechanical engineer and answered questions regarding concrete cracks. Id. None of this work was performed on site as Bozeman never viewed the construction of the main house on site. (R. p. 205, lines 14-19) Ken Spriggs, principal of The Spriggs Group, described work performed by Bozeman during this time as "general coordination." (R. p. 264) Spriggs also testified that his own activities

performed in January, 2009, were related to construction administration. Id. He did not prepare any plans, specifications or design drawings during this time. He admitted that in December, 2008, Slivka had told him that he did not want any more drawings and that he picked up the last of his drawings. (R. p. 265, lines 20-25) Like Bozeman, Spriggs testified that in January, 2009, he participated in answering the phone calls from the plumbing and framing subcontractor. (R. p. 230-231) The last time Spriggs was on site was in 2007 or 2008. (R. p. 267) He acknowledged that he was not directing work of the construction at any time. Id.

Notwithstanding the fact that the work at issue was not "the preparation of plans, specifications or design drawings, "the trial court denied Slivka's motions, relying on the case Williamson v. Hotel Melrose, 110 S.C. 1, 96 S.E. 407 (S.Ct. 1918). (R. pp. 4-13) Reliance on this case was in error.

In Williamson, the Court specifically sought to determine whether the scope of the mechanic's lien statute included the services of an architect. The statute in existence at the time afforded a lien to "any person to whom a debt is due for labor performed or furnished." Id. at 411. It did not define labor as "the preparation of plans, specifications and design drawings" as the Act now does. In the absence of that definition, the Williamson Court found that the architect who had furnished plans and specifications, and who had "superintended" the construction of the project, had performed labor within the meaning of that version of the statute. Id.

> Since Williamson, the legislature has provided a definition of "labor" to include "the preparation of plans, specifications and design drawings" which are some of the services typically provided by an architect" as well as many other services typically provided by an architect, such as "contract administration," "construction phase services," were not included in the definition of labor.

"The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature." River woods, LLC, v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651(S.Ct. 2002), citing Grant v. City of Folly Beach, 346 S.C. 74, 551 S.E.2d 229 (S.Ct. 2001). "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Id. Citing, Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (S.Ct. 2000). Had the legislature decided to include off-site administration services that a design professional may perform in its definition of "labor" it could have done so but did not. Therefore a correct construction of the statute would lead to the conclusion that the work performed by Spriggs was not within the definition of "labor" as defined by the legislature for the purposes of the Mechanic's Lien Statute.

In Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C., 2012-212191, 2014 WL 3375688 (S.C. July 9, 2014), ,_the South Carolina Supreme Court results notes that 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 trial court and the Court of Appeals both did what they could not do reasonably, expand the Act beyond its plain language and include, as "labor," work not

meeting the definition provided by the Act.

Furthermore, the activities by Spriggs that the trial court relied on as work justifying the lien do not even fit within the definition of "labor" set forth in Williamson, 96 S.E. 411. The Court in Williamson found that the architect in that case had, in addition to furnishing plans and specifications, "superintended" the construction. Id. Confirming the importance of the jobsite work in Williamson, the Supreme Court, in George A.Z. Johnson, Jr., Inc. v. Barnhill, 279 S.C. 242, 306 S.E.2d 216 (1983), explained that Williamson relates to matters which, "deal with labor performed in the actual construction of the buildings **on the property**." 279 S.C. at 245 (emphasis added).

To the contrary, no one for Spriggs was on-site during the operative time frame and Spriggs admitted that, unlike the architect in Williamson, he did not "superintend" or "direct" any work at Slivka's property, as was the case in Williamson and George A.Z. Johnson. His testimony as to the nature of contract administration services was as follows:

> Q: ...Now, construction observation as a term of art in the architectural profession involves only observing construction. It specifically does not include the architect in any way directing or otherwise controlling the means and methods of construction?
> A: That's correct.
> Q: And the idea is as an architect you're willing to go and look and see conditions, but you're not assuming responsibility for those conditions?
> A: That's correct.
> Q: And you're not directing the work; is that right?
> A: No.
> Q: And you're not ordering the work in any particular sequence or method or means?
> A: That's correct.
> Q: Okay. And you're not as part of the observation services supervising the construction?
> A: That's correct. (R. p. 267, line 14 - p. 268, line 6)

The trial court erred in applying Williamson rather than applying the language of the Act to the facts of this case with respect to whether Spriggs' January 2009 work constituted "labor" as defined by the Act. Because Spriggs did not perform what the Act refers to as "labor" within ninety (90) days of April 13, 2009, the mechanics lien Spriggs filed was untimely and Slivka is entitled to dismissal of Spriggs mechanics lien claim and a new trial of all remaining matters, including his damages as a result of Spriggs' filing of a defective lien, and an award of his attorneys' fees.

B. WORK PERFORMED IN MAY, 2009, DOES NOT JUSTIFY THE FILING OF A LIEN IN APRIL, 2009, IS NOT "LABOR" AS DEFINED IN THE MECHANICS LIEN STATUTE, AND WAS NOT AUTHORIZED IN ANY WAY BY SLIVKA.

The trial court erroneously found that work performed in May, 2009, a month after the lien was filed, also supported the timeliness of Spriggs' lien which was filed on April 13, 2009. (R. pp. 4-13) Mr. Spriggs testified that the work in May, 2009, consisted of an email exchange with an appraiser who contacted him indicating she was preparing an appraisal of the Slivka's property. (R. pp. 272, line 18 - p. 273, line 24) He admitted the work done during this time consisted of supplying the appraiser with information regarding the square footage of the buildings and the rooms within them. Id.

For numerous reasons, the trial court erred in holding that this work supports the timeliness of Spriggs' Mechanics Lien claim. First, the work in May, 2009, was performed after Spriggs filed its Mechanic's Lien on April 13, 2009. "When a party files a notice of lien under Section § 29-5-90 he is asserting that at a time within ninety (90) days **before** the notice he has performed work for which he is entitled to assert a lien." Preferred Savings and Loan, 301 S.C. at 4 (emphasis added). Spriggs may not go and

perform work after the fact to justify a lien it has already filed.

Second, the work allegedly performed does not fit the definition of "labor" protected by the Mechanic's Lien Statute since it was not related to the "preparation of plans, specifications or design drawings" used in the "erection, alteration, or repair of any building or structure," all of which, as noted previously, is required by the Mechanic's Lien Statute.

Third, there was no testimony whatsoever that Slivka authorized or even knew that the appraiser had contacted Spriggs, which is also required by the statute. S.C. Code Ann. § 29-5-10. Slivka testified that the he did not know that the appraisal company had contacted Spriggs. (R. pp. 126-7) Slivka also testified that he did not authorize the appraiser to contact Mr. Spriggs .(R. p. 300) Mr. Spriggs testified that this work was done after he was contacted by someone who said "she was preparing an appraisal for Slivka or of the Slivka property." (R. p. 273, lines 3-4) He admitted that he never talked with Slivka about it. (R. p. 273, lines 22-25)

C. BECAUSE THE RESPONDENT'S MECHANIC'S LIEN WAS UNTIMELY AS A MATTER OF LAW SLIVKA IS ENTITLED TO A NEW TRIAL OF ALL MATTERS.

Because the mechanic's lien was not timely as a matter of law, Slivka is entitled to dismissal of Spriggs mechanic's lien claim and a new trial. Spriggs' wrongfully filed lien may also serve as a basis for an action for slander of title. Huff v. Jennings, 319 S.C. 142, 459 S.E.2d 886 (S.C.App.,1995). Additionally, Slivka is entitled to his attorneys fees as the prevailing party under the Mechanic's Lien Statute.

S.C. Code Ann. § 29-5-10(b) contemplates one verdict in the action, including consideration of compulsory counterclaims. Id. The judgment in the amount of

$446,434 which was entered against Slivka included the jury's single award of damages under all causes of action, in the amount of $173,990.53 on all of Spriggs' causes of action, as well as the jury's consideration and erroneous rejection of Slivka's Counterclaims. (R. p. 334-336 and pp. 14-18) It also includes the Court's erroneous award of attorneys' fees to Spriggs under the Mechanic's Lien Statute where the award of fees should have been only to Slivka. (R. pp. 14-18)

Because there can only be one award, the entire matter must be reversed and remanded, including Spriggs' judgment, in the amount of $173,990.53 on its breach of contract claim, since the damages and attorneys' fees awardable to Slivka as a result of Spriggs' faulty lien should be off-set against that contract award and may very well exceed it.

2. BECAUSE RESPONDENT'S DEMAND UNDER *S.C. CODE ANN.* § 27-1-15 WAS MADE WHILE THE PARTIES WERE IN LITIGATION, INCLUDING THE PROSECUTION AND DEFENSE OF VIABLE CLAIMS AGAINST ONE ANOTHER, AND BECAUSE SLIVKA HAD DEPOSITED INTO THE COURT AN AMOUNT THAT EXCEEDED THE ENTIRE AMOUNT OF THE RESPONDENT'S CLAIM, AS A MATTER OF LAW SLIVKA COULD NOT BE FOUND LIABLE UNDER *S.C. CODE ANN.* §27-1-15.

Where parties are engaged in litigation, with opposing claims, and the issue of which party is liable to the other, and in what amount, cannot be determined as a matter of law, there can be no liability under liability under § 27-1-15. Spriggs' claim under that statute should have been, and should be, dismissed as a matter of law.

A. A PRESERVATION OF ISSUE

Though the Court of Appeals ruled that Slivka had abandoned his arguments with respect to § 27-1-15, nothing could be further from the truth. Slivka moved for a directed

verdict at the close of Spriggs case on the basis that, as a matter of law, Slivka could have no liability for attorneys' fees under this statute. (R. pp. 285-286) Slivka renewed this argument after the close of its case. (R. pp. 315-317) Additionally, Slivka raised this issue in a post-trial motion. (R. pp. 522-535). All motions were denied and the issue was a central issue in Slivka's Notice of Appeal (R. p 598-599). The issue has been properly preserved and the trial court was in error for submitting it to the jury and not dismissing it.

S.C. Code Ann. § 27-1-15 provides:

> Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, **it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days** from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

(Emphasis added.)

This statute is not intended to award attorneys' fees to a prevailing party. Rather, it is intended to encourage parties to resolve the payment of undisputed sums short of litigation. The fact that the party receiving the demand does not ultimately prevail does not, in and of itself, entitle the demanding party to the recovery of fees under the statute. Carolina Steel Corporation v. Palmetto Bridge Constructors, 444 F.Supp.2d 577 (D.S.C. 2006).

Submission of this claim to the jury, and denial of Slivka's post-trial motions, was reversible error for three reasons. First, since at the time the demand was made the parties

were engaged in litigation, involving colorable claims against one another, and associated discovery, it cannot be said that Slivka did not perform a fair and reasonable investigation. Second, because of the claims pending between the parties at the time the demand was made, it cannot be said what would have been a "valid" amount to be paid at the time the demand was received. Third, because Slivka had paid an amount which exceeded the entire amount of Spriggs's claim into the court, in full compliance with the mechanic's lien statute, which Spriggs had invoked, his failure to make additional an payment of some "valid" amount at the time the statutory demand was made cannot be said to be unreasonable.

B. SINCE, AT THE TIME IT MADE ITS DEMAND UNDER S. C. CODE ANN. § 27-1-15, LITIGATION WAS PENDING BETWEEN THE PARTIES AND, THROUGH DISCOVERY, SLIVKA CANNOT BE SAID TO HAVE FAILED TO PERFORM A REASONABLE INVESTIGATION.

The party seeking an award of attorneys' fees and interest under this statute has the initial burden of presenting a *prima facia* case that the opposing party did not make a fair and reasonable investigation before a refusal to pay. Moore Elec. Supply, Inc., v. Ward, 316 S.C. 367, 374-75, 450 S.E.2d 96, 100 (Ct.App. 1994). Where a statute does not define a word, Courts look to sources including Black's Law Dictionary for a definition. E.G. State v. Dickinson, 339 S.C. 194, 528 S.E.2d 675 (Ct.App. 2000). Black's defines "reasonable" as, "Fair, proper, or moderate under the circumstances." Black's Law Dictionary 1272 (7th Ed. 1999).

Spriggs filed a mechanic's lien on April 13, 2009. (R. pp. 376-386) Spriggs brought suit to foreclose on that lien on July 8, 2009. (R. pp. 31-54) Slivka replied with counter-claims, including a claim that Spriggs' lien was not timely, and asserted that he

was entitled to damages and attorneys' fees. (R. pp. 55-67)

Spriggs chose the method for the resolution of his dispute with Slivka with that method being litigation via the mechanic's lien statute. Eight (8) months after the commencement of the litigation, Spriggs made the first demand for payment pursuant to this statute on March 15, 2010. (R. pp. 366-75) The circumstances at the time the demand was made were that the parties were in the midst of litigation and were engaged in discovery.

Called to testify during Spriggs's case, Slivka testified that at the time he received the May 15, 2010, letter containing the statutory demand he had already hired a lawyer to defend the lien and Spriggs's lawsuit and the parties were engaged in discovery. (R. p. 128, lines 11-14) Slivka testified:

> A: Discovery means trying to find out the facts of the case.
> Q: And so that is that an investigation?
> A: Yes, that word. An investigation, yes. (R. p. 128, lines 16-19)

Slivka also testified:

> A: ...when you're asking somebody to look at money or talking about money, did you make a review of the invoices? Did you look to see if these were legitimate invoices? Did you consider how they should be paid, or if they should be paid?
> In that sense, if that's what you meant by investigation, I'm telling you, yes, I absolutely investigated. Not only did I investigate them but I already had an attorney. There was already a lawsuit filed and we had an attorney representing us. So surely they were investigated.
> And had already put $265,000.00 in the court.
> (R. pp. 120a, line 22 - 121, line 8)

This testimony was not disputed by Spriggs.

Discovery is not only one form of investigation, but is the proper form of

investigation between two parties involved in litigation. As a matter of law, it cannot be said that Slivka, engaged in litigation and discovery at the time the § 27-1-15 demand was received, failed to make a reasonable investigation. Therefore, there could be no liability under that statute and Slivka was entitled to a directed verdict on this claim.

C. AT THE TIME THE STATUTORY DEMAND WAS MADE THERE WAS NO "VALID" SUM DUE TO SPRIGGS BECAUSE OF THE VIABLE COUNTER-CLAIMS OF SLIVKA AND THE ISSUE OF ATTORNEYS FEES UNDER THE MECHANIC'S LIEN STATUTE.

The statute imposes a duty on the person against whom the claim is made to investigate the claim and to pay "whatever portion of it is determined as valid" S.C. Code Ann. § 27-1-15. At the time of the demand, there was no "valid" amount due and owing from Slivka since the parties had claims pending against each other for damages. As outlined by Slivka:

> A: I admit that I owe them $76,210 as the remainder of that contract, but less the $20,000 that I claim in damages for structural issues, and less the $50,000 that I claim for having my $265,000 tied up for three years. (R. p. 109, lines 11-14)

In addition, because of the nature of the Mechanic's Lien Statute, the amount of attorneys' fees was also in dispute when the § 27-1-15 demand was sent since Slivka mentioned then, and still does, that the lien was untimely.

That is as an open question about whether Slivka or Spriggs would be ultimately liable, and for what, was established when the trial court denied Spriggs request for directed verdict on both its claims and on Slivka's counterclaims and submitted Slivka's counter-claims to the jury. The question of what amount was owed, or even who owed it was not answered until the jury rendered its verdict on July 15, 2011, and the court determined that Spriggs was the prevailing party and entitled to fees. Until that time,

there was a very real possibility of an award in favor of Slivka or, short of that, a jury verdict that would have made Slivka, not Spriggs, the prevailing party under the mechanics lien statute, and therefore entitled to attorneys' fee. In summary, at the time the statutory demand was made in 2010, it cannot be said that any portion of Spriggs' claim was "valid," and should have been paid and Slivka was therefore entitled to a directed verdict.

D. AT THE TIME THE STATUTORY DEMAND WAS MADE SLIVKA HAD ALREADY PAID INTO THE COURT A SUM IN EXCESS OF SPRIGGS"S ENTIRE CLAIM.

A person is only liable for attorneys' fees and interest if he makes a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion. S.C. Code Ann. § 27-1-15. Black's Law Dictionary defines "unreasonable" as, "Not guided by reason, irrational or capricious."

In addition to the fact that the parties were engaged in litigation, and there cannot be said to have been a "valid" amount owed by Slivka when the demand was received, to release the cloud on his title created by the mechanic's lien he believed was wrongfully filed by Spriggs, and in strict compliance with the Mechanic's Lien Statute, on May 12, 2009, Slivka posted a cash bond with the Clerk of Court in the amount of Two Hundred Sixty-Five thousand Twelve and 71/100 Dollars ($265,012.71). This was for one and one-third the amount of Spriggs total claim. (R. pp. 387-391) At no time prior to filing the mechanic's lien, or the payment of the cash bond, did Spriggs make a demand for payment pursuant to the procedures outlined in S.C. Code Ann. § 27-1-15. That demand was not made until May 15, 2010, over a year after Slivka's deposit into the court had been made to bond off the lien.

Nothing in the statute suggests that Slivka is required to pay a sum twice and

Spriggs never agreed to the release of any deposited sum in exchange for a reduced lien amount. As a matter of law, Slivka's failure to pay a "valid" amount (if there can be said to have been one) after receipt of the § 27-1-15 demand, cannot be said to have been "unreasonable" in light of the fact that he had already paid 133% of all sums claimed by Spriggs pursuant to the mechanism Spriggs previously chose as their method of dispute resolution.

CONCLUSION

For the foregoing reasons, Slivka was entitled to a directed verdict as to Spriggs' claims pursuant to the South Carolina Mechanic's Lien Statute and as to Spriggs' claim under S.C. Code Ann. § 27-1-15. Slivka is entitled to recover his attorneys' fees and costs as the prevailing party under the Mechanic's Lien Statute. Additionally, the single verdict rendered by the jury must be reversed and the matter remanded to the trial court to be reheard based on the invalidity of Spriggs' mechanic's lien.

Respectfully submitted,

LYLES & LYLES, LLC

Robert T. Lyles, Jr., Esquire
342 East Bay Street
Charleston, South Carolina 29401
Telephone: (843) 577-7730
Fax: (843) 577-7172
Email: rtl@lylesfirm.com

ATTORNEYS FOR PETITIONER

August 15, 2014

Charleston, SC

Other Counsel of Record

James Atkinson Bruorton, IV,Esquire
Rosen, Rosen & Hagood, LLC
134 Meeting Street, Suite 200
Post Office Box 893
Charleston, S.C. 29402
(843) 577-6726
bariail@rrhlawfirm.com
Attorney for Respondent

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STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

CASE NO.: 2009-CP-15-0595

THE SPRIGGS GROUP, P.C., ... Respondent,

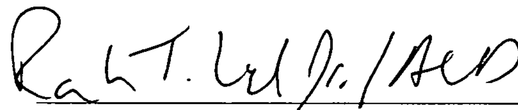
v.

GENE R. SLIVKA, ... Petitioner.

PROOF OF SERVICE

I certify that I have served the Petitioner's Brief on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on August 15, 2014, addressed to their attorneys of record, James Atkinson Bruorton, IV, Esquire, Rosen, Rosen & Hagood, LLC, 151 Meeting Street, Suite 400, Post Office Box 893, Charleston, S.C. 29402.

August 15, 2014



Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street (29401)
Post Office Box 773
Charleston, South Carolina 29402
(843) 577-7730
rtl@lylesfirm.com
Attorney for Petitioner