THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-001361

L&M, LLC, ... Appellant,

v.

Robert Yearick..... Respondent.

RESPONDENT'S FINAL BRIEF

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QUESTIONS PRESENTED

1. **IS AWARD OF ATTORNEY'S FEES TO "PREVAILING PARTY" IN MECHANIC'S LIEN ACTION SUBJECT TO SOUND DISCRETION OF TRIAL COURT?**

2. **WHERE COUNSEL FOR "PREVAILING PARTY" DOES NOT PROVIDE TRIAL COURT WITH REQUISITE EVIDENTIARY SUPPORT FOR AN AWARD OF ATTORNEY'S FEES, MAY TRIAL COURT, IN ITS SOUND DISCRETION, DENY APPLICATION FOR ATTORNEY'S FEES?**

3. **CAN FILING OF NOTICE OF MECHANIC'S LIEN GIVE RISE TO AN ACTION FOR SLANDER OF TITLE?**

STATEMENT OF THE CASE

During early 2009, Leo Chiagkouris, (who is the sole member of Appellant LLC), engaged Respondent, Bob Yearick, to perform services and to purchase decorative items for the periodic redecoration of Henry's, a bar/restaurant in the downtown Charleston area. Henry's is the sole asset of Appellant. Respondent and Appellant visited several successful bar/restaurants in New York City to determine the style of decor which would work for Appellant's bar/restaurant in Charleston.

After Appellant and Respondent jointly agreed on a style of decor, Respondent visited antique stores, estate sales, and other sources to put together the decorative items necessary to complete the decoration of Appellant's bar/restaurant in Charleston. Appellant made an interim payment to Respondent for Respondent's work and for the decorative items purchased, pursuant to the parties' understanding. Appellant never paid Respondent for any items which had not been delivered to, and accepted by, Appellant.

In late spring, 2009, Respondent completed the project. Respondent presented Appellant with a bill for the decorative items accepted by Appellant and for the services rendered by Respondent. Appellant, however, refused to pay for the items and for the services. After good faith efforts to reach a mutually agreeable settlement, Respondent retained an attorney who filed a Mechanic's Lien on July 7, 2009, against Appellant, seeking to get compensated for the improvements to the bar/restaurant, pursuant to the parties' agreement. (R., p. 63). Respondent alleged that he was owed $49,000.

Appellant commenced this action to dissolve the Mechanic's Lien filed by Respondent

against the building and land owned and occupied by Appellant, in which the bar/restaurant was located. (R., pp. 07-11). Appellant also asserted a cause of action against Respondent for slander of title, arising from the filing of the Notice of Mechanic's Lien. (R., pp. 007-11). Respondent asserted counterclaims for breach of contract, or for *quantum meruit*, against Appellant, seeking the unpaid balance due to Respondent. (Supp.R., pp. 2-4).

In the meantime, Respondent never commenced an action to foreclose the Mechanic's Lien, so the Mechanic's Lien had become dissolved, by operation of law.

Respondent filed, on October 1, 2012, a Motion for Summary Judgment, seeking the dismissal of all causes of action alleged in Appellant's complaint. (R., pp. 13, 14; Supp.R., p. 63).

Judge J. C. Nicholson, Jr. tried this case non-jury on November 14, 2012.

Prior to the commencement of the trial, Respondent argued his Motion for Summary Judgment, (R., pp. 15-22), seeking dismissal of the claims of Appellant, on grounds of mootness and on grounds of absolute privilege. In support of his Motion for Summary Judgment, Respondent first asserted that he had never taken any action to execute his Notice of Mechanic's Lien by foreclosure or other legal action. Respondent argued that, due to the passage of time without Respondent taking any action to enforce his lien, the Notice of Mechanic's lien had, by operation of law, become of no force and effect. Respondent cited §29-5-120, SC Code of Laws, 1976, as amended, as authority that, in the absence of any enforcement of the Mechanic's Lien by foreclosure, the lien had been dissolved and released by operation of law. Respondent's argument was first based on the mootness of the claims due to the dissolution and release of the lien by operation of law.

Second, Respondent asserted that *Pond Place Partners, Inc.* v. *Poole*, 567 SE 2d 881, (Ct.App. 2002) established an absolute privilege which bars any action in South Carolina for slander of title, based upon pleadings filed in court, such as a *Lis Pendens*. Respondent asserted that *Pond Place* operates, in this case, to bar Appellant's claim for damages arising from Respondent's alleged slander of the title of Appellant's real property.

After argument by the parties' counsel, the Trial Court granted Respondent's Motion for Summary Judgment, dismissing Appellant's claims for dissolution of the Mechanic's Lien and dismissing Appellant's claim for damages arising from Respondent's alleged slander of title. (R., p. 22).

After the trial of this action, the Trial Court issued a First Order on May 7, 2013. The first Order granted judgment in favor of Respondent in the amount of $33,501.65. (Supp.R., pp. 21-24).

Subsequently, Appellant made a Motion to Alter or Amend. By its Motion, Appellant, argued that it was a "prevailing party" and sought to impose attorneys fees and costs on Respondent for the filing of a Notice of Mechanic's Lien which had dissolved by the passage of time, without any action. (R., pp. 40-61). Appellant also sought leave to re-assert its claim for slander of title. In support of its Motion, Appellant cited the case of *EFCO* v. *Renaissance of Charleston Harbor, LLC*, 635 SE 2nd 922, (Ct.App. 2006), for the proposition that, although Respondent's Notice of Mechanic's Lien had not been enforced by foreclosure, nor executed by any other action, Appellant was a "prevailing party" under the Mechanic's Lien statutory scheme. Appellant argued that, as a "prevailing party," it was entitled to costs and attorney's fees. Appellant also argued that it was entitled to assert a claim for slander of title against Defendant.

In partial response to Appellant's Motion to Alter or Amend, Respondent filed the following procedural chronology with the Trial Court, (R., p. 63):

7/07/09	Yearick files Notice of Mechanic's Lien (Yearick never filed an action to foreclose); deadline to foreclose Mechanic's Lien: 90 days from date of filing
8/28/09	Atty Shoun files this action in Common Pleas to dissolve Yearick's Notice of Mechanic's Lien
10/07/09	Deadline for enforcement of Mechanic's Lien. Yearick brought no action for foreclosure by this date, so there could not have been any adversarial proceeding on which Plaintiff could "prevail."
12/21/09	Order for Service of Summons/Complaint by Publication
3/25/10	Defendant Yearick files Answer, Counterclaim
3/25/10	Defendant Yearick files Motion to Dismiss Plaintiff's action due to mootness, because deadline for enforcing Mechanic's Lien by foreclosure expired 6 months earlier.
4/21/10	Plaintiff replies to Yearick's counterclaims
1/17/12	Order substituting Atty. Sheriff as counsel for Plaintiff

By the procedural chronology, Respondent demonstrated that counsel for Appellant did not participate in the case until almost a year and a half after the expiration of time to commence an action to foreclose a Mechanic's Lien. Respondent argued, therefore, that counsel for Appellant could not claim attorneys fees for defending Appellant against the enforcement of a Mechanic's Lien in this case because the time for foreclosure of the Mechanic's Lien had long expired. Respondent demonstrated that counsel for Appellant could only have expended time and energy to defend against Respondent's claim for breach of contract.

Respondent also filed a Memorandum in opposition to Appellant's Motion to Alter or Amend. (Supp.R., pp. 13-20). In his Memorandum, Respondent argued that *EFCO, supra,*

required, *inter alia*, detailed billing to support a claim for attorney's fees. Respondent argued that Appellant failed to meet the rigorous standards of *EFCO, supra*, to win an award of attorney's fees, as the "prevailing party."

By a Second Order, dated May 8., 2013, (R., pp. 3,4), the Trial Court denied Appellant's Motion to Alter or Amend, thereby determining that Appellant would not receive attorney's fees as a "prevailing party".

Appellant has taken an appeal from the First and Second Orders issued by the Trial Court in this case.

QUESTIONS PRESENTED

AWARD OF ATTORNEY'S FEES TO "PREVAILING PARTY" IN MECHANIC'S LIEN ACTION IS SUBJECT TO SOUND DISCRETION OF TRIAL COURT.

WHERE COUNSEL FOR "PREVAILING PARTY" DOES NOT PROVIDE TRIAL COURT WITH REQUISITE EVIDENTIARY SUPPORT FOR AN AWARD OF ATTORNEY'S FEES, TRIAL COURT MAY, IN ITS SOUND DISCRETION, DENY APPLICATION FOR ATTORNEY'S FEES.

FILING OF NOTICE OF MECHANIC'S LIEN CANNOT GIVE RISE TO AN ACTION FOR SLANDER OF TITLE.

ARGUMENT

1. Under *EFCO*, despite lack of any action by lienor to enforce Mechanic's Lien, Appellant may *assert* a claim for attorney's fees and costs, subject to the sound discretion of the Trial Court.

Appellant bases its claims on *EFCO, supra*. *EFCO, supra*, holds:

> The foreclosure of a mechanic's lien is an action at law in South Carolina. In an action at law, on appeal of a case tried without a

> jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. *EFCO, supra*, p. 926; **accord**: *Mozingo* v. *Wallace*, 666 SE 2d 267 (Ct. App. 2008); *Townes Assocs.* v. *City of Greenville*, 221 SE 2d 773 (S.Ct. 1976).

EFCO, supra, also held:

> The determination of the amount of attorney's fees that should be awarded under the mechanic's lien statute is addressed to the sound discretion of the trial court. The court's decision will not be disturbed on appeal absent an abuse of discretion.
> *EFCO, supra*, p. 926.

Appellant argues that an award of attorney's fees is automatic when *EFCO, supra*, is applied to the facts of this case. Respondent concedes that, while the holding in *EFCO, supra,* confers on a property owner the right to *claim* attorney's fees against the Respondent, as a "prevailing party," *EFCO, supra*, does not confer an *absolute* right to attorney's fees, as asserted by Appellant. Rather, Appellant must satisfy the guidelines established by *EFCO, supra*, to achieve an award of attorney's fees.

2. Under *EFCO* and the mechanic's lien statute, there are strict guidelines for award of attorney's fees.

Under *EFCO, supra*, at Page 927, the *EFCO* Court noted that a party claiming attorney's fees must provide a detailed accounting for the work allegedly performed in prevailing against an asserted Mechanic's Lien. In its Second Order, (R., pp. 3,4), the Trial Court found that Appellant had failed to provide any detailed accounting to support Appellant's claim for attorney's fees. Without any detailed accounting, it is fair to assert that the Trial Court could not

have intelligently assigned a value to opposing counsel's efforts to Appellant's defense[1]. In short, Appellant's failure to present a detailed accounting to support a claim for attorney's fees was a flaw fatal to Appellant's claim for attorney's fees, under *EFCO*, supra..

EFCO, supra at p. 926, also set forth the following criteria, in addition to a detailed billing, for the award of attorney's fees to a "prevailing party:"

1. The nature, extent and difficulty of the case;
2. The time necessarily devoted to the case;
3. Professional standing of counsel;
4. Contingency of counsel;
5. Beneficial results obtained; and
6. Customary legal fees for similar services.

EFCO, supra, held that there must be sufficient evidence in the record to support **each** factor, *EFCO, supra* at p. 927. As set out above, *EFCO, supra* at p. 927, with approval that counsel provided a **detailed** time sheet outlining the time spent on and the tasks performed for the case.

As to the first criterion set forth above, Respondent submits that there was no difficulty presented where counsel for Appellant did nothing that resulted in the dissolution and release of the lien under §29-5-120, SC Code of Laws, 1976, as amended. Indeed, it is difficult to imagine a simpler task for counsel than to have let time elapse for the dissolution of the lien, as presented in this case.

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[1]Respondent notes that counsel for Appellant cannot provide a detailed accounting for work performed in defending against the Mechanic's Lien, because the time for enforcing the Mechanic's Lien, by foreclosure or otherwise, had expired before counsel for Appellant became involved in the case. All work performed in this case by counsel for Appellant was to defend against Respondent's contractual claim.

As to the second criterion set forth above, it is difficult to imagine any time spent in defending against a Notice of Mechanic's lien which expired due to the passage of time and due to the inaction of Respondent, in this case.

As to the third criterion set forth above, Respondent cannot argue about the professional standing of counsel for Plaintiff, because the Record does not include any probative documentation on the issue.

As to the fourth criterion set forth above, Respondent cannot assert any knowledge on which to base any argument due to lack of anything in the Record which addresses this criterion.

As to the fifth criterion set forth above, Respondent asserts that no beneficial results came from any **action** by counsel for Appellant, because the time for foreclosure of a Mechanic's Lien had long since expired.

As to the sixth criterion set forth above, Respondent asserts that it is groundlessly meretricious to argue for legal fees for taking no action to defend the Notice of Mechanic's Lien.

Appellant failed to submit an appropriate, detailed accounting as called for under EFCO, *supra*. Respondent, on the other hand, submitted a procedural chronology, (R., p. 63), that irrefutably demonstrated that counsel for Appellant could not have performed any work defending against an expired Mechanic's Lien. There has been no abuse of discretion by the Trial Court in the denial of Appellant's application for attorney's fees. ("The court's decision will not be disturbed on appeal absent an abuse of discretion." *EFCO, supra*, p. 926.)

3. *EFCO* and related cases limit Plaintiff's recovery as a prevailing party to attorney's fees; Plaintiff is barred from a claim for slander of title in this action.

Plaintiff asserts rights to attorney's fees under *EFCO*, *supra*. *EFCO* only

authorizes the Court to award attorney's fees and costs to the "prevailing party." *EFCO* does not authorize the award of anything other than attorney's fees and costs. Plaintiff, however, is additionally claiming that it has a right to claim damages for slander of title under §29-5-120, SC Code of Laws, 1976, as amended and under *EFCO*. (R., pp. 40-61). In *Mozingo & Wallace Architects, LLP* v. *Grand*, 666 SE 2nd 267 (Ct.App. 2008), the Court of Appeals held:

> We hold that the legislature intended to limit the award of fees and costs to the amount set forth in the notice and certificate of mechanic's lien. *Mozingo, supra*, p. 271.

Clearly, *Mozingo*, *supra*, and *EFCO, supra,* contemplate only the award of attorney's fees, and costs to a "prevailing party." Of the cases which deal with an award to a "prevailing party," none allow the award of anything other than attorney's fees and costs, limited to the amount in controversy under the mechanic's lien, *Mozingo, supra.*

Plaintiff's efforts to expand the holding of *EFCO, supra,* to authorize a claim for slander of title runs afoul of the clear[2] import of *Pond Place Partners*, *supra*. Indeed, there is **no** authority for the notion that mechanic's lien statute authorizes the assertion of a claim for slander of title. On the contrary, it is established precedent that the mechanic's lien statute contemplates only the award of attorney's fees and costs as sufficient deterrence for misuse of the mechanic's lien statute:

> Clearly the intent of the legislature in allowing the prevailing party in an action brought under the mechanic's lien statute to recover attorney fees and costs stems from a desire to deter both the wrongful filing of liens and unjustified refusal to pay debts

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[2]Defendant notes that the Court in *Pond Place Partners, supra*, emphasizes the absolute privilege given to pleadings by bold, capitalization of the term "**absolutely**" and the term "**cannot**" to drive home the emphasis of the Court's holding that pleadings **cannot** be the basis for an action for slander of title.

subject to mechanic's liens." *Cedar Creek Properties* v. *Cantelou Associates, Inc.*, 465 SE 2nd 774, (Ct.App. 1995); **Accord:** *Crenshaw's TV and Radio Service, Inc. v. Jocassee Partners Holdings, LLC,* Unpublished Opinion No. 2012-UP-610 (Ct.App. Nov. 14, 2012)[3].

CONCLUSION

Based on the foregoing, Defendant respectfully submits that there was no abuse of discretion by the Trial Court in denying an award of attorney's fees to an Appellant who was found "incredible," as a matter of law and whose counsel failed to conform to the criteria set forth in *EFCO, supra.* Respondent points to the lack of a detailed billing statement in support of Appellant's application for attorney's fees and costs as a flaw fatal to the application for attorney's fees.

Finally, Respondent strongly asserts that there is no authority for the use of the mechanic's lien statute, under *EFCO*, as a basis for asserting a claim for damages resulting from an alleged slander of title, in light of the clear, strong holding in *Pond Place Partners* against actions for slander of title.

Accordingly, Respondent seeks that this Court affirm the Trial Court in this case.

Respectfully Submitted,

Dated: 8/8/14

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[3]Defendant notes that the *Crenshaw* case is an unpublished opinion, of no precedential value; the *Crenshaw* case does, however, suggest that *Cedar Creek*, cited above, is still dispositive that an award of attorney's fees and costs is the limit that may be awarded in actions arising from mechanic's liens.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he sent, by US Mail, on the date set forth below, a copy of Respondent's Final Brief to counsel for Appellant in this case at the following address:

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Dated: 8/12/14

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CERTIFICATE OF COMPLIANCE WITH SC APPELLATE COURT RULE 211(b)

The undersigned hereby certifies that Respondent's Final Brief complies with SC Appellate Court Rule 211(b).

Dated: 8/14/14

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