

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

TERLIZZI HOME IMPROVEMENT, LLC

CASE NO. 2012-CP-36-00090

MICHAEL L. BOHELER, JEANNETTE A. BOHELER AND THE PALMETTO BANK AS ASSIGNEE OF MIDLANDS MORTGAGE CORP.

RECEIVED

DEFENDANT(S)/THIRD-PARTY PLAINTIFF(S)

NOV 24 2014

WILLIAM TERLIZZI

SC Court of Appeals

PLAINTIFF(S)

THIRD PARTY DEFENDANT

Submitted by:	Attorney for Plaintiff	<input type="checkbox"/>
	Defendant	<input type="checkbox"/>
	Self-Represented Litigant	<input type="checkbox"/>

Disposition Type (Check One)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

FILED
 NEWBERRY COUNTY
 2014 OCT 20 AM 11 05
 JACKIE B. BOWERS
 CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

This matter came before the court on October 16, 2014 pursuant to Plaintiff's Motion to Reconsider the Court's Order dated July 1, 2014. Said Order (1) granted Defendant/Third Party Plaintiff's Motion for Partial Summary Judgment, (2) dismissed Plaintiff's Mechanic's Lien, 2011-LN-36-634, (3) dismissed Plaintiff's claim for foreclosure of Mechanic's Lien, 2011-LN-36-634 with prejudice, and (4) ordered Plaintiff Terlizzi Home Improvement and Third Party Defendant William Terlizzi to pay Defendants' attorney's fees and costs, totaling \$31,611.75.

After reviewing all relevant materials on file and considering testimony of the parties at the above referenced hearing, Plaintiff's motion to reconsider is denied.

Plaintiff's motion to reconsider is **denied** and the Order dated July 1, 2014 shall stand.

Order Information

This order ends does not end the case.

Additional Information for the Clerk :

The court subsequently issued a form 4 granting the Defendant's/Third Party Plaintiffs' motion. Counsel for the Bohelers submitted a proposed formal order and attorney fee affidavit to the court on April 24, 2014. Upon receiving Terlizzi's counsel's request for a hearing on the issues of attorney's fees and costs and Terlizzi's personal liability, the court held a hearing on May 8, 2014. Upon conclusion of the hearing, Boheler's counsel submitted an amended Attorney's Fees Affidavit which the court has reviewed in full. For the reasons stated at the hearings and explained herein, the Boheler's motion is **GRANTED**.

A. Motion for Partial Summary Judgment

A mechanic's lien is a creature of statute. South Carolina law provides four ways to discharge a mechanic's liens, one of which is by showing the filer of the lien has willfully and knowingly claimed more than is due pursuant to South Carolina Code Ann. § 29-5-100. Additionally, the court has inherent powers to afford relief where the deprivation imposed by a wrongfully filed mechanic's lien cannot be corrected by the statutory methods. *Sea Pines Co. v. Kiawah Island Co., Inc.*, 268 S.C. 153 at 157 (1977).

S.C. Code Ann. 29-5-100 provides that an inaccuracy in the statement of the amount due for labor and materials supporting a mechanic's lien shall not invalidate the lien "unless it appear(s) that the person filing the certificate has willfully and knowingly claimed more than is due." To willfully and knowingly act in a manner has been held to have the same effect as one who acts with a conscious failure to exercise due care or with a conscious disregard for the truth.

Upon a complete review of the records, this Court concludes that Mr. Terlizzi clearly violated § 29-5-100 in that he willfully and knowingly overstated the sum due in filing the lien. The court can find no rational basis for how Mr. Terlizzi initially came up with the \$106,001.13 figure for the lien. In his own deposition, Mr. Terlizzi admitted the figure was not based on what



his material and labor costs were. *See* Deposition of William Terlizzi, p. 93. Mr. Terlizzi's own testimony indicates that, despite valid lien waivers being signed, he still included the value of property subject to these waivers in the lien amount filed. *Id.* p. 142. Furthermore, John Harding, Mr. Terlizzi's partner on the job, states Mr. Terlizzi approached him with the idea of placing a lien on the property so large that they would have the Bohelers "over a barrel." Affidavit of John Harding, ¶ 18.¹ Although Mr. Terlizzi attempts to deny the existence of a partnership with Harding, there is no dispute that they were, in fact, partners under South Carolina law.

Under South Carolina law, a court cannot dissolve a lien if the contractor makes a *prima facie* showing for filing the lien or if the amount owed depends upon which of the party's allegations are to be believed. *Sea Pines Co. v. Kiawah Island Co.*, 268 S.C. 153, 232 S.E.2d 501 (1977); *Black v. Haile*, 270 S.C. 93, 240 S.E.2d 646 (1978). "A mechanic's lien, by its own terms, secures a debt 'for labor performed or furnished or for materials furnished and actually used.'" *Id.* at 503. Mr. Terlizzi has made no *prima facie* showing for filing the lien, nor does the amount owed depend on which of the party's allegations is to be believed. No factual basis existed for Mr. Terlizzi filing a mechanics lien in the sum of \$106,001.13. Plaintiff claims to have made a "good faith estimation (sic)" in arriving at this figure. *See* Terlizzi Depo. p. 109. Again, however, there is nothing to support the numbers he used in filing the lien. The initial lien amount is properly characterized as "a guess." Furthermore, two (2) years after filing the lien Plaintiff has now stipulated to reducing the lien to \$48,719.23, a figure which arguably accounts for the outstanding work and labor actually put into the home. *See* Terlizzi

¹To the extent this statement may be disputed and even if the court were to discount entirely this statement, Plaintiff Terlizzi's calculation of the initial lien amount remains grossly negligent at the very least.

Depo.p.153-155. This reduced amount is a drastic deviation from the original lien amount and evidences a wilful disregard for *any* care in calculating the initial lien amount.

Simply stated, this Court cannot find, and Mr. Terlizzi cannot offer, any rational basis which could conceivably make the initial \$106,001.13 lien even arguably valid. The fact that a new lien amount has been stipulated to does not affect the validity, or lack thereof, of the original lien amount. Therefore, the court finds Plaintiff's Supplemental Argument, received via e-mail March 13, 2014, unpersuasive.

This Court notes that it does not take this action lightly. Had Mr. Terlizzi's initial lien had some basis in fact, had Mr. Terlizzi not included in the lien amount work for which lien waivers had already been executed, had Mr. Terlizzi not admitted to "reverse engineering" the sums, had some modicum of care been executed by Mr. Terlizzi, or had direct evidence of an effort to put the Bohelers "over a barrel" not existed, this Court's order might be different. By filing a lien completely lacking in accuracy and of specious validity, Mr. Terlizzi caused the Bohelers to suffer significant financial hardship in terms of raising the money so that they could bond off the lien. In short, the facts are undisputed, and this case represents one of those (fortunately) rare cases where summary judgment is warranted due to the willful and wanton conduct of the contractor Plaintiff.

Mechanics liens serve the laudable goal of protecting contractors who, in good faith, personally incur obligations for materials and labor and are subsequently unfairly denied payment. However, the law does not permit those protections to be extended to contractors who insist upon filing liens which are wholly unsupported, the result of mere guesswork, or which are intended to create an improper collateral advantage over the owners. This court will not

countenance an effort by an individual to pervert legitimate legal process into an effort to extort obscene sums which are excessively more than could arguably be due.

B. Attorney's Fees

South Carolina Code Ann. § 29-5-20(a) states in part that "[i]f the party defending against the lien prevails, the defending party *must* be awarded costs of the action and a reasonable attorney's fee as determined by the court." (emphasis added).

This court finds that Mr. Terlizzi willfully and knowingly filed a lien for more than he was due, a lien with an amount with no basis in fact and which included in the lien amount work *for which lien waivers had already been executed*. The Court finds direct evidence, through Mr. Terlizzi's partner, John Harding, that Mr. Terlizzi intended to make the lien large enough to "put the Boheler's over a barrel." *See Harding Aff.*, ¶ 18. As early as September 14, 2011 the Boheler's had communicated their concerns to Mr. Terlizzi. They indicated on several occasions that Mr. Terlizzi was seeking more than he was due and asked him to perform an accounting and reduce the lien to an accurate amount so that it could be bonded off and the parties litigate their differences. *See September 14, 2011 e-mail from Charles Krawczyk to Robert Cook*. Counsel for the Bohelers even went so far as to state that "Mr. Terlizzi knows that he is not entitled to \$106,000 on this home and has willfully and intentionally claimed more than he is due. This is in violation of the mechanic's lien statute and may subject him to attorney's fees and costs". *Id.* Not only did Mr. Terlizzi refuse to perform an accounting or reduce his lien, he filed this action to foreclose and insisted that the Boheler's raise the \$143,000.00 necessary to bond off the lien. In so doing he knew that his actions might subject him the award of attorney's fees and costs. The Boheler's were able to raise the money, but at great financial peril and hardship as documented in the record. They were also forced to litigate this matter for almost two years



before Mr. Terlizzi reduced his lien to what his counsel indicated was “a more defensible number.”

The court wants to be perfectly clear on a crucial point central to the court's ruling: This case does not represent the typical mechanic's lien dispute where dismissal of the lien is based upon an untimely filed lien or failure to follow the statutory requirements. The actions by Mr. Terlizzi were intentional, wanton, and with a conscious disregard for the truth. This was not just a minor accounting mistake. The only reasonable inference from the evidence is that Mr. Terlizzi signed the affidavit and statement of account knowing he was not entitled to the amounts he sought. In short, he guessed at the numbers and intentionally inflated them intending to create an insurmountable financial burden for the Bohelers. After the Bohelers requested an accounting, Mr. Terlizzi refused to cooperate. These actions are not actions taken in the ordinary course of his ownership of the Plaintiff entity, nor are they merely negligent.² These actions are *ultra vires* for which Mr. Terlizzi may be held personally liable. Moreover, a member of a limited liability company cannot use it as a shield for personal liability for his own intentional acts. See Jeffrey S. Quinn, Allen v. Dackman: Doing Away with Limited Liability in Maryland, 70 Md. L.Rev. 1171, 1216 (“The economic justifications and, specifically, the concept of limited liability support an interpretation of the [LLC act] that protects members from personal liability *when acting in good faith* service of the LLC.”)(emphasis supplied) Mr. Terlizzi, as a Third Party Defendant to this action and the only individual who could direct the actions of the LLC, is personally subject to the court's findings and is personally liable for the reasons outlined above.

The court finds that Mr. Terlizzi should not be allowed to use his LLC to shield him from personal liability for his personal actions. Section 33-44-409 provides that a member's duty of

² Cf. 16 Jade Street, LLC v. R. Design Const. Co., 398 S.C. 338, 728 S.E.2d 448 (2012) (holding that an owner of a LLC is not exempt from personal liability for simple negligence), *withdrawn*, 16 Jade Street, LLC v. R. Design Const. Co., LLC., 405 S.C. 384, 747 S.E.2d 770 (2013).

care in the conduct of a company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law. Mr. Terlizzi's conduct, described in detail above, can only be described as the exact type of conduct the statute proscribes: gross negligence, recklessness, intentional misconduct, and/or a knowing violation of the law. As with any limited liability company, this LLC could only act through and at the direction of Mr. Terlizzi.³ Any intentional action taken by Mr. Terlizzi, even though it may ostensibly be taken through Terlizzi Home Improvement, LLC, remains the individual action of Mr. Terlizzi, and Section 33-44-303 does not insulate him from his own conduct under the facts of this case.⁴ The court finds this type of conduct clearly prohibited under the law. Therefore, because Mr. Terlizzi personally directed these knowing, intentional (or at the very least, grossly negligent) acts he is personally liable.

The Defendants have submitted an attorney's fee affidavit which the Court has reviewed in detail. The Court finds it meets the factors necessary to determine reasonable attorney's fees as set out in Rule 407, South Carolina Appellate Court Rules and *Spriggs Group, P.C. V. Slivka*, 402 S.C. 42, 738 S.E.2d 295 (Ct. App. 2013), as well as being proper and necessary under South Carolina Code Ann. § 29-5-20(a).

The Bohelers are the prevailing party under South Carolina Code Ann. § 29-5-20(a). As authorized by this statute and as a result of Mr. Terlizzi's egregious conduct, Michael and Jeanette Boheler, should be awarded \$31,611.75 for the fees and costs of defending against the mechanic's lien in this matter. Further, the aforementioned intentional acts by Mr. Terlizzi were

³ Clearly, not all actions taken by Terlizzi on behalf of the LLC would render Terlizzi personally liable. See Section 33-44-303(a).

⁴ Cf. Section 33-6-220(b); Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 208-09, 687 S.E.2d 714, 720 (Ct. App. 2009) (Status as an officer or shareholder of corporation does not shield individual from personal liability for an intentional tort committed through the corporation); Dutch Fork Development Group, II, LLC v. SEL Properties, LLC, 406 S.C. 596, 753 S.E.2d 840 (2012) (Concerning imposition of individual liability upon a LLC manager under tortious interference of contractual relations theory).

ultra vires and beyond his power as a representative of THI. Therefore, THI and Mr. Terlizzi, individually, should be responsible for these costs incurred defending against the lien.

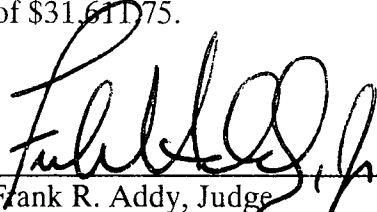
NOW THEREFORE, based upon the pleadings duly filed, the evidence before the Court, the arguments of counsel, and the laws of this state set forth above,

IT IS HEREBY ORDERED THAT:

- a. Defendants/Third Party Plaintiffs Michael and Jeanette Boheler's Motion for Partial Summary Judgment is granted
- b. Plaintiff Terlizzi Home Improvement's Mechanic's Lien, 2011-LN-36-634 is discharged;
- c. Plaintiff Terlizzi Home Improvement's claim for foreclosure of Mechanic's Lien, 2011-LN-36-634 is dismissed with prejudice; and
- d. Plaintiff Terlizzi Home Improvement and Third Party Defendant William Terlizzi, individually, shall pay the Defendants/Third Party Plaintiffs' attorney's fees and costs associated with defending against Mechanic's Lien, 2011-LN-36-634 and its foreclosure in the amount of \$31,611.75.

AND IT IS SO ORDERED.

Greenwood, South Carolina
July 1, 2014



Frank R. Addy, Judge
Circuit Court, Eighth Judicial Circuit