

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2010-CP-08-3540

Sweetgrass Home Builders, LLC and Reginald Gaskins, Respondents,

v.

Stolf Construction, LLC, Appellant.

INITIAL BRIEF OF APPELLANT

Thomas O. Sanders, IV
Sanders Law Firm, LLC
1738 Three Oaks Avenue
Charleston, SC 29407
(843)573-8828
ATTORNEY FOR APPELLANT

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Not applicable.

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR WHEN IT DENIED PLAINTIFF'S MOTIONS FOR A NEW TRIAL AND TO ALTER OR AMEND?
2. DID THE TRIAL COURT ERR IN HOLDING THAT APPELLANT LACKED STANDING?
3. DID THE TRIAL COURT ERR IN HOLDING THAT APPELLANT FAILED TO PRESENT AN ACCOUNTING OF A PRIOR CONSTRUCTION PROJECT BETWEEN THE PARTIES FOR WHICH RESPONDENTS' PAYMENTS WERE APPLIED?
4. DID THE TRIAL COURT ERR IN FINDING THAT RESPONDENT SWEETGRASS HOME BUILDERS, LLC WAS PROPERLY FORMED?

STATEMENT OF THE CASE

On October 5, 2010, Appellant Stolf Construction, LLC ("Appellant") filed this action against Respondents Sweetgrass Home Builders, LLC and Reginald L. Gaskins ("Respondents"). On October 13, 2011, a bench trial was conducted. The trial court found in favor of Defendants on all causes of action. On November 29, 2011, Appellant served its *Notice of Motion and Motion to Alter or Amend the Judgment* with supporting affidavits on Respondents. On January 4, 2012, the circuit court denied Appellant's Post-Trial Motions. On February 3, 2012, Appellant served its *Notice of Appeal* on Respondents. Appellant realizes that litigants are entitled to a fair trial, not a perfect one. Smoak v. Seaboard Coast Line R.R. Co., 193 S.E.2d 594, 598 (S.C. 1972). This appeal was filed in the spirit of seeking fairness.

ARGUMENTS

- I. THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFF'S MOTIONS FOR A NEW TRIAL AND TO ALTER OR AMEND.

On a motion for a new trial in an action tried without a jury, the court may open

the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. Rule 59(a), SCRPC. Appellant's *Motion for New Trial and to Alter or Amend the Judgment* was accompanied by three affidavits which produced new evidence not available at trial. Ateras Stolf/Stolf Construction, LLC's homebuilder's license #19612 was active between October 9, 2003 and June 30, 2012 (Affidavit of Atila Stolf #2 Exhibit "A"; Affidavit of Ateras Yuri Stolf #2 p. 1). This document was generated 13 days after the trial and thus was not available at the trial. Respondents did not make an issue of Appellant's license until the start of trial, leaving no time to properly address it. At a minimum, this document indicates the existence of fact which warrants the taking of new testimony.

On or about April 1, 2009, Appellate began its work on the Project. As such, Appellant's license appeared to be in effect throughout Appellant's work on the project at 123 Jungle Lane, Cross, South Carolina ("the Project").

On October 31, 2011 (18 days after the trial), Appellant obtained an affidavit from the Residential Builders Commission stating that Appellant's license renewed May 15, 2009 (Affidavit of Atila Stolf #2 Exhibit "B"; Affidavit of Ateras Yuri Stolf #2 Exhibit "B"). After May 15, 2009, Respondents acknowledged that they owed Appellant the sum total of \$15,900.00 (Affidavit of Atila Stolf #2 p. 2; Affidavit of Ateras Yuri Stolf #2 p. 2). At a minimum, this evidence indicates an existence of fact which warrants the taking of new testimony.

Respondents admitted that Appellant fully performed the required work (Plaintiff's 1st Request for Admission to Defendants p.1; Responses to Requests for

Admission p. 1). However, at trial, Respondent Gathers perjured himself (Transcript pp. 76 and 79).

Further, Respondent Gaskins testified that he paid Appellant \$16,600.00 by check #1779 dated April 17, 2009 (Plaintiff's Exhibit #2) for the foundation before he was billed for this work (Transcript p. 94). Appellant's Invoice for this work was dated April 28, 2009 (Plaintiff's Exhibit #3), after the aforementioned check.

Appellant testified that he and Respondents had done business in the past. In doing so, Appellant would generate an invoice showing the work which had been done and showing the amount owed, and Respondent Gaskins would sign it. As such, Respondents' check #1779 dated April 17, 2009 (Plaintiff's Exhibit #2) was not applied to Invoice #90123 (Plaintiff's Exhibit #3). Instead, Invoice #90123 (Plaintiff's Exhibit #3) showed that \$14,200.00 was still owing on April 28, 2009.

The evidence is reasonably susceptible of concluding that Respondents owed money to Appellant. This warrants the taking of new testimony.

II. THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT LACKED STANDING.

In an action at law, on appeal of a case tried by the court without a jury, the judge's findings of fact will not be disturbed upon appeal unless the court committed some error of law leading to an erroneous conclusion or unless the evidence is reasonably susceptible of the opposite conclusion only. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). The trial court's interpretation of, and application of, S.C. Code §40-59-30 is incorrect.

A person or firm who has not procured a license or registered with the commission and is required to do so by law may not file a mechanic's lien or bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the person or firm entered into in violation of this chapter. Id.

The trial court's holding misapplies the law in that it fails to consider that Appellant's license was through Ateras Stolf/Stolf Construction, LLC, who is the brother of Atila Stolf who testified (Transcript pp. 6 and 51; Affidavit of Atila Stolf #2 Exhibit "B"; Affidavit of Ateras Yuri Stolf #2 Exhibit "B").

III. THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT FAILED TO PRESENT AN ACCOUNTING OF A PRIOR CONSTRUCTION PROJECT BETWEEN THE PARTIES FOR WHICH RESPONDENTS' PAYMENTS WERE APPLIED.

Pursuant to Townes Associates, Ltd., *supra*, the evidence is reasonable susceptible of concluding that Respondents owed money to Appellant. At trial, Appellant testified that it did not get paid (Transcript p. 7) the \$28,704.18 it is owed (Transcript p. 26) with a credit for the \$1,500.00 received when the mechanic's lien was resolved (Transcript p. 37; Plaintiff's Exhibit #12). Its accounting was presented in both written form (Plaintiff's Exhibit #1-A; Plaintiff's Exhibit #2; Plaintiff's Exhibit #11; Plaintiff's Exhibit #87) and through oral testimony (Transcript pp. 11, 12, 14, 18, 20, 25-28).

Appellant testified that he and Respondents had done business in the past. In doing so, Appellant would generate an invoice showing the work which had been done and showing the amount owed, and Respondent Gaskins would sign it. Appellant testified that, as of June 19, 2009, it was owed \$21,904.18 by Respondents and that Respondent Gaskins signed a Statement acknowledging this balance owed (Transcript pp. 21-22; Plaintiff's Exhibit #8). Because this process of accounting had worked in the past

between the parties, and because it appeared to be working on this Project, Appellant saw no reason to deviate from it (Transcript pp. 15-16). The evidence is reasonably susceptible of concluding that Respondents owed money to Appellant.

IV. THE TRIAL COURT ERRED IN FINDING THAT RESPONDENT SWEETGRASS HOME BUILDERS, LLC WAS PROPERLY FORMED.

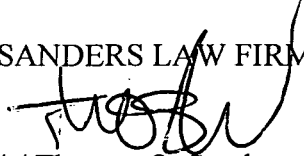
Pursuant to Townes Associates, Ltd., *supra*, there is no evidence in the record to support a finding that Respondent Sweetgrass Home Builders, LLC (“the LLC”) was properly formed. Although Respondent Reginald L. Gaskins (“Respondent Gaskins”) testified that he owns 100% of the LLC (Transcript p. 81), he admitted that he had no resolutions of the LLC (Transcript p. 81), no minutes of any meetings of the LLC (Transcript pp. 81-82), no operating agreement (Transcript p. 82), no documentation showing that he owns 100% of the LLC (Transcript p. 82), and no minute book (Transcript p. 83). The only LLC document of which Respondent Gaskins is aware is the articles of organization which was filed by his attorney and which he did not sign (Transcript 82-83). Although Appellant requested disclosure of the LLC documents through written discovery, none were ever produced except for the statement, “See Secretary of State documents” which was produced on the day of trial (Transcript p. 81, Defendant’s Responses to Plaintiff’s First Request for Production of October 13, 2011).

The Secretary of State’s Office does not maintain minutes, resolutions or operating agreements for LLCs. It maintains only Articles of Organization and Notices of Change of registered agents and company addresses. As such, the LLC was improperly formed and Respondent Gaskins had not been issued any percentage of it.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the trial court either to reopen the matter to take additional testimony, or to grant a new trial or to allow the judgment to be altered or amended.

SANDERS LAW FIRM, LLC


/s/ Thomas O. Sanders, IV

Thomas O. Sanders, IV
1738 Three Oaks Avenue
Charleston, South Carolina 29407
(843)573-8828
ATTORNEY FOR APPELLANT

July 17, 2012
Charleston, South Carolina