

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

CASE NO.: 2009-CP-15-0595

RECEIVED

NOV 17 2014

S.C. Supreme Court

THE SPRIGGS GROUP, P.C., Respondent,

v.

GENE R. SLIVKA,
Petitioner

RESPONSE TO AMICUS CURIAE BRIEF OF THE
SOUTH CAROLINA CHAPTER OF THE AMERICAN INSTITUTE OF
ARCHITECTS

Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Attorneys for Petitioner

TABLE OF CONTENTS

Table of Authoritiesii

Statement of Facts.....1

Argument 4

I. EVEN IF THEY WERE PERFORMED, SPRIGGS' "CONSTRUCTION
ADMINISTRATION" SERVICES IN JANUARY 2009 DO NOT
CONSTITUTE "LABOR" UNDER THE SOUTH CAROLINA
MECHANIC'S LIEN LAW

Conclusion8

TABLE OF AUTHORITIES

CASES

Williamson v. The Hotel Melrose, 96 S.E. 407 (S.C. 1918)5, 6, 7, 8

STATUTES

23 S.C. Code Regs §11-10 and 11-12 B(4) and (5)..... 4, 5

§29-5-90, S.C. Code of Law.....6

OTHER AUTHORITIES

Black's Law Dictionary 1288 (5th ed. 1979)7.

STATEMENT OF FACTS

“Everyone is entitled to his own opinion, but not his own facts.” This quote is often credited to the late Senator Daniel Patrick Moynihan and is an appropriate introduction to Slivka’s response to a number of incorrect factual assertions made by the American Institute of Architects (“AIA”) in its Amicus brief. Two factual assertions made by the AIA, at page 2 of its brief, are of particular concern.

First, the AIA contends,

Owner’s plumbing contractor requested the architect to review and approve changes to the piping design for the project. The architect complied with this request by coordinating design drawings with the project’s mechanical engineer, and the revised plans and specifications for plumbing were used in the project. (references omitted) (Amicus Brief p.2)

Then, the AIA goes on to say,

The architect invoiced the owner for these construction administration services, but the owner refused to pay. The architect then filed a Mechanic’s Lien within ninety (90) days after its last performance of work on the project.” (references omitted) (Amicus Brief p.2)

A. There were no changes to the plumbing design.

In an effort to establish that the lien of Spriggs was timely, in its facts, the AIA asserts that the plans and specifications were reviewed by Spriggs and the mechanical engineer in January, 2009. In support, the AIA alludes to testimony from Andy Bozeman (Spriggs’ employee) indicating that in January, 2009, the plumber for the Slivka project requested that he be allowed to use a 3” drain pipe as opposed to a 4” drain pipe which had apparently been specified (though no evidence of that fact is in the Record). Mr. Bozeman offered testimony

about a conversation he had with the plumber and the mechanical engineer concerning this (neither the plumber or the engineer were called to testify by Spriggs.) The documents supporting this contention are made up of an email exchange between Mr. Bozeman and the mechanical engineer (Kayton Smith) and certain portions of Mr. Bozeman's time sheets. However, the contention that the plans or specifications were changed or reviewed is simply not supported by the testimony or by the documents.

To start, there is no evidence of any revised drawings, plans or specifications. If the drawings, plans or specifications were revised, the revisions were never given to Slivka, nor were they introduced as evidence in this case.

Also, Mr. Bozeman testified that he received a telephone call from the plumber on January 13, and that he then had follow-up conversations with the mechanical engineer. The emails between Mr. Bozeman and the plumber do not substantiate this. Those emails (R. pp 398-399) began at 12:31 PM on January 13, and referred to a subject of "Follow-up on 3" waste line change." The email does not say when the plumber called, but does say that prior to discussing it with the engineer, Mr. Spriggs, not the engineer, approved the change. Thus, the change requested by the plumber (assuming the plumber requested the change) did not require the services of the mechanical engineer.

There is also no evidence that the mechanical engineer billed for any time related to this discussion; there is no evidence that the approval from a 4" to a 3" pipe was ever communicated to the plumber; and there is no evidence that a 3" pipe, rather than a 4" pipe, was actually used at the Slivka project. All of which is contrary to what is implied by the AIA.

Finally, the time sheets of Mr. Bozeman establish that this task was not related to any revision of the plans, design or the specifications. Pages 435 and 436 of the Record are the

relevant pages of the Bozeman time sheets. During the first two weeks of 2009, which is the relevant time, Mr. Bozeman appears to have billed a total of ten (10) hours to the Slivka job. 1.5 hours of this was billed on January 13. (At Mr. Bozeman's rate of \$175.00 per hour, this time entry would have resulted in a total charge of \$262.50. The total time billed by Spriggs to Slivka, which is at issue in this case, is \$198,000.00.)

The Court should note that beside each time entry is a letter code which describes the activity which is being performed. Beside all of Mr. Bozeman's time entries for Slivka during January of 2009, the code used is "F" for "Contract Administration". At no point does Bozeman bill for code "A" (Schematic Design), "B" (Design Development), "C" (Construction Documents), or "D" (Specification). So, contrary to the wishful assertions of the AIA in its version of the facts of the case, Mr. Bozeman apparently did not believe that he was revising drawings, plans or specifications during his work in January, 2009. This is supported by the trial testimony of Bozeman and Spriggs who agreed that they did not do further drawings for Slivka after he picked his drawings up from Spriggs' office in early December 2008. (R. p. 198, lines 1-20; R. p. 199; R. p. 205, lines 14-19; R. p. 264; R. p. 265, lines 20-25; R. p. 230-231; R. p. 267).

B. An egregious factual error of the AIA is its assertion that the architect invoiced the owner for these construction administration services, but the owner refused to pay. The architect then filed a Mechanic's Lien within ninety days of its last performance of work on the project.

As referenced in Slivka's prior briefs, this assertion by the AIA is simply not true. In February of 2009, a month after Mr. Bozeman allegedly performed this work, Spriggs sent Slivka the February 9, 2009 Invoices (previously discussed and defined in other briefs). Those invoices referenced work done by Spriggs and Bozeman in 2006, 2007, and 2008. The February 9, 2009 Invoices do not reference any work performed in January of 2009. Slivka's refusal to

pay the February 9, 2009 Invoices resulted in the filing of the Mechanic's Lien on April 13, 2009. To be clear, when the Mechanic's Lien was filed, Slivka had never been invoiced for any work in January, 2009, and had therefore not refused to pay for January, 2009 work.

After filing the Mechanic's Lien, Spriggs sent Slivka an invoice dated May 21, 2009, which referenced yet more work Spriggs says he did in May of 2009. The May invoice also did not reference any work of Bozeman or Spriggs in January, 2009.

It was not until well after this litigation had been filed, on July 8, 2009, and after Slivka had denied Mechanic's Lien responsibility because the lien was untimely, that Spriggs invoiced Slivka for the work he now says was done in January, 2009. The date of that invoice was November 16, 2009. Those January, 2009, charges were not reflected on the previously filed Notice of Lien and are not properly the subject of Spriggs' Mechanic's Lien claim.

ARGUMENT

I. EVEN IF THEY WERE PERFORMED, SPRIGGS' "CONSTRUCTION ADMINISTRATION" SERVICES IN JANUARY 2009 DO NOT CONSTITUTE "LABOR" UNDER THE SOUTH CAROLINA MECHANIC'S LIEN LAW

A. *The Regulations cited by the AIA are irrelevant.*

In its brief, Spriggs references regulations governing the practice of architecture in South Carolina (23 S.C. Code Regs §11-10 and 11-12 B(4) and (5), Amicus Brief pp2 and 3). Those regulations include tasks associated with the "minimum construction administration services" expected or required of an architect who provides plans for a project in South Carolina as noted by the AIA, among other things, the regulations require an architect to perform,

periodic site observations of the construction process and quality, review of contractor submittal data and drawings, and reporting to the building official and owner, any violations of codes or substantial deviations from the contract documents which the architect observed.

For purposes of the issues on appeal, those regulations are completely irrelevant.

First, Mr. Spriggs did not comply with those regulations in connection with the Slivka job. Spriggs testified that the last time he went to the site was “sometime in 2008” (R. p. 267). There is no testimony that he made any site visits or observations in January, 2009, nor is there evidence that he reviewed contractor submittals or records, or that he reported to the building officials or owner about problems on the site in January, 2009. Similarly, the billing entries of Mr. Bozeman, which are at issue in the AIA brief, do not relate to any of these “minimum construction administration services” as outlined in the regulations.

Nothing about these regulations changes the language of the Mechanic’s Lien statute which does not include “construction administration services” within its definition of labor. While the trial court and the Court of Appeals may find it “implausible” that construction administration services are not included in the definition of “labor” under the Mechanic’s Lien Statute, that does not change the words or meanings of the statute. The legislature was clear in the types of architectural and design services which are included in the definition of “labor” and that definition does not include “construction administration”.

Had the legislature intended to include “construction administration” services in its definition of “labor”, it could easily have done so, and may well do so in the future. The AIA might suggest to the Legislature that the definition of “labor” be expanded to include “anything an architect is required to do by 23 S.C. Code Regs §11-12 (B)(5).” However, the Mechanic’s Lien, as it was written in 2009, does not include “construction administration” services in its definition of “labor”.

B. *Slivka has not misapplied Williamson v. The Hotel Melrose*, 96 S.E. 407 (S.C. 1918).

With regard to the *Williamson* case, Slivka has not attempted to confuse the Court or anyone else with regard to its application in this case. Slivka is also keenly aware that “construction supervision” is distinct from “direction of the work” and does not intend or confused those terms, either. ¹

Upon receipt of the AIA brief, the undersigned re-read *Williamson*, to ensure that it was not being misconstrued or misapplied. Satisfied that it has not been misconstrued or misapplied by Slivka, there are several aspects of that case that warrant discussion.

First, as noted, that case construed a very different version of the Mechanics Lien statute. The court notes that the statute, at the time, was very general and did not specify the class of persons (or activities) comprehended to be within the scope of the statute. The court was then left to decide whether the statute included within its coverage the work of an architect and the work of a project superintendent or whether the statutes’ coverage was limited to persons performing, essentially, manual labor.

Since *Williamson*, in 1918, our legislature has added significant definition to “class of persons” and activities comprehended by the statute (those changes are reflected in part in Slivka's prior briefs). The Mechanic’s Lien Statute now specifically recognizes that the labor of an architect is covered (it was not in 1918), but only to the extent of, "the preparation of plans, specifications and design drawings." §29-5-90, *S.C. Code Ann.* Thus, rather than trying to decide legislative intent, as the Court was required to do in *Williamson*, we now have a clear, relevant and applicable definition of “labor” from the legislature. That definition does not include "construction administration" services and to hold that it should, or meant to, simply changing the language of the statute which is prohibited.

¹ Slivka also agrees that the A201-207, cited by the AIA, says what it says. Since Spriggs did not use that form, it is also irrelevant to this case.

As to the AIA contention that Slivka is misapplying *Williamson*, the following holding seems fairly clear:

I am constrained to find that an architect *who furnishes plans and specifications, and superintends construction*, such as Witcover (the architect in that case)...[is] entitled to liens for [his] services.
[Emphasis added.]

Id. at 411.

The application to this case seems very clear. We know that the preparations of plans and specifications is covered by the definition of "labor" in the current Mechanics Lien Statute. Thus, the issue is whether the fact that Witcover also "superintended" the construction was relevant to that court's decision. The Courts use of the term "and" establishes that it was.

The next question is whether that aspect of architectural services is helpful to Spriggs or the AIA. It is not. The AIA does not provide a definition of "superintend" to assist with an explanation of the Court's holding in *Williamson*. Rather, the AIA differentiates between "construction supervision" and "direction of the work" contending that Slivka is confused by these terms. The AIA then provides a definition of "construction supervision" that is not contained in the cited regulations and then seems to use "construction supervision" interchangeably with "construction administration" (which is defined in the Regulations). Neither "construction supervision" or "construction administration" are utilized by the *Williamson* court. The *Williamson* court used the term "superintended". Black's defines superintend as follows:

To have charge and direction of; to direct the course and oversee the details; to regulate with authority; to manage; to oversee with the power of direction; to take care of with authority. *Black's Law Dictionary* 1288 (5th ed. 1979)

The AIA cites no evidence to suggest that Spriggs perfumed work meeting that definition in January, 2009, or any other time. In fact, Spriggs agreed at trial that he did not "direct" or perform services that would fit the commonly used definition of superintend.

Here, Spriggs neither performed construction supervision or directed the work, and certainly did not in January, 2009. Spriggs admits that he had not been on the site (notwithstanding his regulatory obligations to perform minimum onsite inspections) since sometime in 2007 or 2008. Absent evidence that Spriggs "superintended" the work in January, 2009, or that he was, at least, on-site in some meaningful capacity, *Williamson* is of no help to the AIA.

CONCLUSION

Neither the case law or the language of the Mechanic's Lien Statute supports a conclusion that an architect's "construction administration" is "labor" intended to be protected by the Mechanic's Lien Statute. The decision of the Court of Appeals to the contrary should be reversed.

Respectfully submitted,



Robert T. Lyles
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
rtl@lylesfirm.com
Attorneys for, Petitioner

November 10, 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

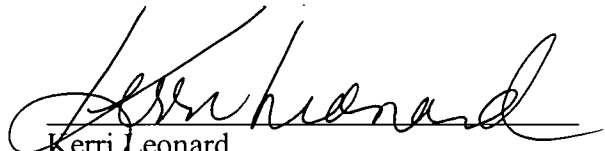
CERTIFICATE OF SERVICE

The undersigned, an employee of Lyles & Lyles, LLC certifies that the : Response to Amicus Curaie has been served via regular mail on the following counsel of record:

Lawrence C. Melton
Brian A. Autry
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, South Carolina 29201

James A. Bruorton, IV, Esq.
Rosen, Rosen, & Hagood, LLC
151 Meeting Street, Suite 400
Charleston, South Carolina 29401

November 10, 2014


Kerri Leonard
Paralegal