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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2011-CP-32-1929

Rose Electric, Inc., ... Appellant

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified Development Corporation of South Carolina, Senn Bros., Inc., Custom Concrete of Lexington, Inc., and James Dunlap d/b/a Dunlap Services, ... Defendants

Of whom

Southern Produce, Inc., and S2P, LLC are Respondents

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

After a one-day bench trial held on February 13, 2013, the trial court issued an Order ("Order") on January 30, 2014, filed on February 3, 2014, in which the court ruled that the Appellant, Rose Electric, Inc. ("Rose Electric"), was not entitled to recovery under the theory of *quantum meruit* because an express contract existed between Rose Electric and Cooler Erectors of Atlanta, Inc. ("Cooler Erectors") for a price of $54,319.13 for the electrical work performed by Rose Electric at a new refrigerated building, and an express contract existed between Rose Electric and the Respondent, Southern Produce, Inc. ("Southern Produce") for a price of $10,755.39. (Order dated January 30, 2014).[1] The trial court also ruled in the Order that Southern Produce was entitled to a judgment for attorney's fees and costs plus an award of interest based on the amount of the award for such fees and costs under Rule 68, SCRCP, and S.C. Code Ann. §15-35-400, and that the Respondent, S2P, LLC ("Property Owner") was entitled to a judgment for attorney's fees and costs. (Order dated January 30, 2014, p. 17).

By Order dated June 11, 2014, and filed on June 20, 2014, the trial court modified the Order by (1) deleting the award of interest on the attorney's fees and costs stating that such an award under Rule 68, SCRCP, and S.C. Code Ann. §15-35-400 would not be appropriate, and (2) the court also issued a

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[1] The Court alternatively found that if no express contracts existed, Rose Electric would not be entitled to recover under the theory of *quantum meruit* because there was no evidence that there would be unjust retention of benefit without payment. (Order dated January 30, 2014, p. 11).

substituted order in which some typographical errors were corrected by motion of the court (the "Amended Order"). (Order dated June 11, 2014). The trial court made all modifications on the face of the initial Order by showing all deletions and corrections as being marked up.

This action arises from the construction of a new refrigerated building to be used by Southern Produce for its business operations and located within the new South Carolina Farmers Market. (Transcript, p. 5, lines 19-23). Southern Produce had been ordered to vacate its old location by December 1, 2010. (Transcript, p. 180, lines 9-11). The business of Southern Produce is the processing of fresh vegetables and fruit for sale to wholesale produce distribution companies. (Transcript, p. 6, lines 3-5). The new refrigerated building is located on a portion of property owned by Property Owner, and Southern Produce had a lease for the area of land on which the refrigerated building is located. (Transcript, p. 141, line 20 - p. 142, line 4).

Cooler Erector, a general contractor doing work in South Carolina without being issued a license to do such work, entered into a written contract entitled "Contractor Agreement" dated October 27, 2010, with Southern Produce to act as the general contractor on the building project (the "Contractor Agreement"). (Defendant's Exhibit No. 9). The Contractor Agreement covered all aspects of the project including site work and a large metal building for a total project cost of $213,385. For the electrical work specified in the Contractor Agreement, Cooler Erector contacted Rose Electric to perform such work, and Rose Electric performed its work over a thirty-day period of time with the building getting a

certificate of occupancy on November 30, 2010, but Southern Produce has not paid for such work. (Transcript, p. 65, line 21 - p.66, line 5). During that time, Rose Electric did extra work at the specific request of the general manager of Southern Produce who was at the job site every day during the construction of the building. (Transcript, p. 114, lines 12-14).

On March 4, 2011, Rose Electric filed a notice of Mechanic's Lien with a Statement of Account attached showing the amount owed of $65,095 including a claim for "Change Orders" in the amount of $10,755.39. (Defendant's Exhibit No. 1). Notices of Mechanic's Lien were also filed by Custom Concrete of Lexington, Inc. ($14,529) and by Dunlap Services ($10,211), but the claims of those parties had been resolved at the time of trial. (Defendant's Exhibit Nos. 14 and 15).

On May 20, 2011, Rose Electric filed an action alleging a claim to foreclose on its mechanic's lien and for claims of breach of contract against Cooler Erectors and claims for unjust enrichment and *quantum meruit* against Southern Produce and Property Owner. (Complaint dated May 20, 2011). Southern Produce filed an Answer to the Complaint on July 25, 2011, in which Southern Produce denied owing any amounts to Rose Electric for the work performed for the new refrigerated building. (Answer of Southern Produce dated July 25, 2011). Property Owner and Senn Bros., Inc. also filed Answers and filed a cross claim against Southern Produce.[2] (Answer of S2P, LLC, dated October 11, 2011; Answer of Senn Bros., Inc. dated October 6, 2011).

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[2] Senn Bros. Inc. was dismissed from the action by agreement at the beginning of trial, but the Order mistakenly includes it as a party.

Cooler Erectors had been served and was given notice of the trial, but did not appear at the trial.[3] (Transcript, p. 13, lines 5-19).

After receiving written notice of entry of the Order on February 11, 2014, Rose Electric filed a Motion to Alter or Amend the Order. (Motion of Plaintiff dated February 21, 2014). Rose Electric received written notice of the entry of the Amended Order on June 25, 2014, and filed its Notice of Appeal on July 24, 2014.

STATEMENT OF THE FACTS

The construction of the refrigerated building for Southern Produce was a rush job due to the notice to vacate that had been issued with the deadline of December 2, 2010. (Transcript, p. 180, lines 3-13). The building permit was issued on November 2, and the Certificate of Occupancy was issued on November 30. (Plaintiff's Exhibit No. 17; Plaintiff's Exhibit No. 18). Rose Electric was hired to perform the electrical work and was given a set of detailed electrical drawings done by an electrical engineer shortly before beginning the work. (Plaintiff's Exhibit No. 1). Due to the urgency of Southern Produce having to vacate, Rose Electric commenced the electrical work without submitting a price or obtaining a written contract with a price signed by either Cooler Erectors or Southern Produce. (Transcript, p. 55, lines 4-10). Although Rose Electric later submitted proposals with a price for the work after the work had been completed,

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[3] A Notice of Hearing sent to the registered agent was put into evidence.

neither Cooler Erectors nor Southern Produce ever signed any of the proposals. (Transcript, p. 59, lines 15-20).

Cooler Erectors did not pay Rose Electric for any of the work performed by it even though Southern Produce paid approximately $203,277 to Cooler Erectors. (Defendant's Exhibit No. 11). Cooler Erectors did not file any response and did not appear at the trial so recovery against it was non-existence. Thus, in its Complaint and at the start of the trial, Rose Electric stated that its claim against Southern Produce would be based upon the theory of *quantum meruit* and not under the theory of an express contract. (Complaint dated May 20, 2011; pages 6-7; Transcript, p. 10, line 22 – p. 11, line 5).

During the thirty days that Rose Electric was on the job performing electrical work, the general manager of Southern Produce, Daniel Stocker, Jr., was also present each day. (Transcript, p. 114, lines 12-14). On numerous occasions, Stocker directed changes from the original plans and specifications. (Transcript, p. 41, lines 6-11). These changes included the following:

1. Adding disconnects and plugs to allow for proper cleaning;
2. Modifying the material of disconnects to stainless steel to avoid corrosion;
3. Adding a hand-washer heater system;
4. Relocating an onion peeler from inside to outside the building, rewiring, and placing a disconnect for that device;
5. Adding receptacles and the circuits needed to accomplish that addition;

6. Adding dedicated circuits, a time clock, and breakers;

7. Wiring the evaporator coils; and

8. Adding lights in the office.

(Plaintiff's Exhibits 4-10).

The Contractor Agreement required that charges for extra work be set out and agreed to in writing, but no such written agreements were done for the extra work done by Rose Electric. (Transcript, p. 170, lines 9-19).

The other defendants in this action were also subcontractors for work on the new refrigerated building, but they did not appear and the court was told that their liens had been resolved. (Transcript, p. 18, lines 16-24; p. 174, lines 16-22; p. 175, lines 6-12). Stocker testified that Custom Concrete was not paid anything on its claim and that Dunlap Services was paid $465 in August of 2011. (Transcript, p. 175, lines 6-9).

The building permit and the certificate of occupancy showed that the general contractor was Mike Hutchins but as far as Southern Produce knew, he only did some grading work but he did not act as the general contractor. (Plaintiff's Exhibit No. 17; Plaintiff's Exhibit No. 18; Transcript p. 181, line 13 – p. 182, line 4). A placard with the building permit information including the name of the general contractor is required to be posted at the jobsite so the fact that Cooler Erectors was not the general contractor was clear from this information which was at the site and could have been easily viewed by Southern Produce. (Transcript, p. 74, lines 12-20). The owner of Southern Produce, Nate Crocker, did not appear at the trial.

ARGUMENT

"Absent an express contract, recovery under *quantum meruit* is based on quasi-contract." Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010) "[Q]*uantum meruit,* quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000); see also Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 466, 684 S.E.2d 756, 764 (2009) (*quantum meruit* as an equitable doctrine allows recovery for unjust enrichment); JASDIP Properties, SC, LLC v. Estate of Richardson, 395 S.C. 633, 640, 720 S.E.2d 485, 488 (Ct.App. 2011) (requirements are the same to recover for *quantum meruit*, unjust enrichment, and restitution).

"When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence." Earthscapes Unlimited, 390 S.C. at 616, 703 S.E.2d at 225.

"The elements of a *quantum meruit* claim are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." Earthscapes Unlimited, 390 S.C. at 616-617, 703 S.E.2d at 225. The South Carolina Supreme Court has adopted this as the "sole test for a *quantum meruit*/quasi-contract/implied by law claim." Myrtle Beach Hosp., 341 S.C. at 9, 532 S.E.2d at 872.

A quasi-contract or contract implied in law is no contract at all, but an obligation created by the law in the absence of any agreement between the parties. Id. For a contract to arise there must be an agreement between two or more parties. There must be an offer, there must be an acceptance, and there must be a meeting of the minds of the parties involved. Masonic Temple v. Ebert, 199 S.C. 5, 18 S.E.2d 584 (1942); Lee v. Travelers' Insurance Co., 173 S.C. 185, 175 S.E. 429 (1934). Mutual assent to all the essential terms of the agreement is necessary to the formation of a contract. Edens v. Laurel Hill, Inc., 271 S.C. 360, 247 S.E.2d 434 (1978). In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation. Farr v. Barnes Freight Lines, 97 Ga.App. 36, 101 S.E.2d 906 (Ga.Ct.App. 1958).

"However, if a person renders services pursuant to an express agreement and does not receive the agreed exchange, he may also, in some instances, recover the fair value of the services in *quantum meruit*. Coens v. Marousis, 275 Pa. 478, 119 A. 549 (1923). In both cases, restitution is awarded on the theory that the plaintiff conferred a benefit at the request of the defendant in the mutual expectation that it was to be paid for. If the defendant receives the benefit of the services without paying for it, he will be unjustly enriched." Johnston v. Brown, 290 S.C. 141, 348 S.E.2d 391 (Ct.App.. 1986).

I. The trial court misapprehended and ignored well settled principles of law dealing with recovery under the theory of *quantum meruit.*

   A. Because there was an absence of an agreed upon price for the scope of work performed based upon the original plans and specifications and for the additional work ordered to be done by Southern Produce.

Ordinarily a plaintiff sues in *quantum meruit* because he had no agreement with the defendant concerning the compensation to be paid for his services. Under an implied contract, the plaintiff, because he had no agreement as to the price for his services, is entitled to recover the fair value of the work and labor he performed for the defendant. Braswell v. Heart of Spartanburg Motel, 251 S.C. 14, 159 S.E.2d 846 (1968).

Instead, the trial court found that a binding contract existed by stating the law applicable to a *quantum meruit* action. The following portion of the trial court's Order clearly shows the misapprehension of the law:

> To have a contract for materials, labor or services does not require a predetermined set price. The price is typically implied to be the fair and reasonable price in any number of contractual arrangements. For example, consulting a doctor without a predetermined charge implies a promise to pay the reasonable costs of the doctor's services and constitutes a contract between the parties.
>
> (Order dated January 30, 2014, p. 8-9)

The above portion of the Order deals with a contract implied in fact where there is a manifestation of an agreement to pay.

B. Because the trial court ruled that even if recovery under the theory of *quantum meruit* was appropriate, Rose Electric would not be entitled to a judgment.

While this statement is found in the Order, the trial court did not perform any analysis for the theory of *quantum meruit* saying only that Southern Produce paid Cooler Erectors for the benefit obtained except for the retainage. Thus, the trial court should have found that Rose Electric would be entitled to a judgment for the retainage. Moreover, the fact that Southern Produce paid Cooler Erectors

does not automatically foreclose an examination of other factors to determine if it would be inequitable for Southern Produce to pay for the work performed by Rose Electric. Earthscapes Unlimited, Inc.

The fact that Southern Produce did not make the payment for the extra work without demanding that Rose Electric release the lien and release Southern Produce from any further liability was unfair to Rose Electric. The fact that Cooler Erectors was paid within a few days after the Certificate of Occupancy was issued by the County was unfair to Rose Electric. The fact that the contract did not account for payments due the subcontractors was unfair to Rose Electric The fact that the contractor was unlicensed was unfair to Rose Electric. The fact that Southern Produce knew that Rose Electric had not been paid for the extra work since the contract price with Cooler Erectors had not been increased due to the extra work was unfair to Rose Electric. The fact that the final payment to Cooler Erectors was not justified and could have been withheld was unfair to Rose Electric. (Transcript, p. 168, line 23 – p. 169, line 8). The fact that the general manager of Southern Produce was at the site every day and directed work to be done by Rose Electric.

II. The total cost of the project was $224,385.

There was a dispute as to the total project cost for the new building and how much of the total was paid by Southern Produce. Southern Produce claims that the total project cost is $213,385. The proof of payments made was done by

the testimony of Stocker and the submission of five checks[4] payable to Cooler Erectors. Check number 291 is dated October 8, 2010, in the amount of $11,000, and according to Stocker, this check was only for the payment of the cost of the architectural plans[5]. The other checks are dated October 27, October 27, November 16, and December 2. These four checks total $192,277.

The Contractor Agreement entered into by Cooler Erectors and Southern Produce is divided into eight separately numbered paragraphs and is dated October 27, 2010. The first paragraph contains six subparts describing the different categories of work to be performed; *i.e.* the scope of work. Paragraph 4 states that the amount to be paid for doing the scope of work as outlined is $213,385. Paragraph 3 states that the finished architectural plans are attached to and made a part of the Agreement. The obtaining of architectural plans is not listed in the sub-parts of the Agreement detailing the scope of work.

Therefore, this Court should find that the total project cost was $224,385 because the amount set forth in the Agreement does not include the cost for obtaining the architectural plans. This Court should further find that Southern Produce did not pay Cooler Erectors the sum of $21,108 of the total project cost.

III. <u>There was extra work performed by Rose Electric and the extra work was authorized by Southern Produce.</u>

There was no dispute that Rose Electric performed extra work. But there was a dispute as to whether Stocker specifically authorized Rose Electric to do

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[4] Defendant's Exhibit 12.
[5] Defendant's Exhibit 10.

the extra work and whether Southern Produce is directly responsible for paying for the extra work. The extra work performed can be divided into two categories based on the descriptions of the work on the Invoices[6] and the testimony of Rose and Frazee. The first category was work required to modify the specifications[7] set forth on the electrical plans[8]. The second category of work is additional work not detailed in the electrical plans.

Rose and Frazee testified that Stocker was frequently at the job site and that he provided the specifications for all the extra work. Stocker knew that Rose Electric would be performing the extra work, and in some cases, he supervised the completion of extra work. Stocker admitted that no written change orders were done for Cooler Erectors to perform, or subcontract for, the extra work.[9]

At times, Stocker assured Frazee that Rose Electric would be paid by Southern Produce for the extra work.[10]

This Court should, therefore, find that Southern Produce specifically authorized the extra work performed by Rose Electric, and that it is responsible for payment directly to Rose Electric and not as part of the Contractor Agreement with Cooler Erectors.

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[6] Plaintiff's Exhibits 2-10.
[7] An example of a modification was the use of stainless steel disconnects in the place of hard wiring for the equipment used in the refrigerated area so the equipment could be shut off quickly and could be easily moved for cleaning and maintenance.
[8] Plaintiff's Exhibit 1.
[9] Paragraph 5 of the Agreement specifies that any "extra services and work" must be set out and agreed to in writing by both the contractor and owner.
[10] The testimony of Frazee was that Stocker said "it's on him". (Transcript, p. 124, lines 13-17).

IV. Rose Electric is entitled to recover the reasonable value of the extra work performed directly for Southern Produce and without a contract.

All the elements were proven for Rose Electric to recover the value for the extra work done directly for Southern Produce and without a contract. The value of this work is $10,755.39. In addition, based on a finding of fact that Southern Produce did not pay Cooler Erectors the sum of $21,108 of the total project cost, the minimum recovery that Rose Electric is entitled is $31,863.39.

Southern Produce never asked for a price and there was no written modification of the contract with Cooler Erectors specifying a price for the extra work and although Southern Produce later agreed to pay a certain price, does not create an express contract and Rose Electric should have been awarded a judgment for the reasonable value of the work performed by Rose Electric.

Again, the trial court denied recovery under *quantum meruit* for the extra work performed by Rose Electric because Rose Electric had abandoned the contract claims. (Order dated January 30, 2014).

Southern Produce did not admit that it owed Rose Electric separately for these changes and additions in its Answer even thought at trial it finally agreed that the price of $10,750.39 was acceptable. Although Offers of Judgment were submitted, Southern Produce never tendered or offered to pay this amount without agreeing that such payment would be the final payment due Rose Electric for all the electrical work performed by Rose Electric. (Offers of Judgment). In other words, Southern Produce presented a settlement through the offers of judgment, but Southern Produce should have paid both the costs for

the extra work as well as its calculation of the proration retainage without a condition or stipulation that depositing the check would be considered final and not allow Rose Electric to seek further payments from Southern Produce.

So, the trial court justifies this misapprehension of the application of the theory of *quantum meruit* solely on the basis that Southern Produce had offered to pay Rose Electric $10,755.39 for the change orders after the work had been performed. Clearly, this payment was a settlement payment and cannot be construed as making a contract with Rose Electric. The trial court erred in stating that the plaintiff has an argument under its motion to reconsider that it now wanted to seek a judgment on a contract claim against Southern Produce.

V. The reasonable value of all work and services performed by Rose Electric was $65,095 and Southern Produce did benefit by the work performed.

There was no dispute as to the value of the work and services furnished by Rose Electric based on the original plans and for the extra work, and no dispute that Southern Produce benefitted by the work performed by Rose Electric. For the proof of the value, Rose Electric presented a detailed spreadsheet as page one of the exhibit[11], and the accompanying support for each of the line items on the spreadsheet. The total sum shown is $65,094.52. Therefore, this Court should find that the reasonable value of the labor and materials furnished by Rose Electric for this project is $65,094.52.

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[11] Plaintiff's Exhibit 15.

This Court should further find that a breakdown of the value of the work attributable to the original plans, and the value of the work attributable to the extra work is as follows:

Item	Value
Original electrical plans	$54,339.13
Extra work	$10,755.39

For recovery of the balance of the value of the work done by Rose Electric, this Court will need to apply equitable principles and decide whether or not allowing Southern Produce to retain the benefit of Rose Electric's work without paying its value under the circumstances of this case would be unjust. This Court should examine a recent case for assistance in applying equitable principals to determine if there is unjust enrichment.

The subcontractor in Earthscapes Unlimited, Inc., had not been paid for landscaping work at a new house owned by Ulbrich. The contract with the general contractor included a $30,000 allowance for landscaping and an irrigation system. The general contractor hired the landscaper to perform work at the house, but no written contract existed as to the landscaping work.

During the course of doing the landscaping work, Ulbrich asked Earthscapes Unlimited to provide additional work not included in the original plans. This extra work included the installation of drainage for water runoff, adding additional plant materials, and the installation of a well for yard irrigation. A bill was submitted to Ulbrich and the general contractor in the amount of

$33,555, and Ulbrich paid only for the cost of the extra work. When the general contractor did not pay the balance, Earthscapes Unlimited sought payment from Ulbrich who refused to pay the balance saying he had already paid the general contractor for landscaping and an irrigation system. The Court of Appeals found that:

> The benefit conferred by Respondent to Appellants was the work performed by Respondent on Appellants' property. Appellants have realized and enjoyed the benefit of the work performed by Respondent. Finally, allowing Appellants to retain the benefit of Respondent's work without paying its value under the circumstances of this case would be unjust.
>
> Id.

This case is applicable because the owner dealt directly with the subcontractor for extra work, and there was no contract for the landscaping work. The Court affirmed the judgment obtained for the payment of $30,000 to the landscaper.

Certainly, in this case, Southern Produce should not be able to retain the benefit of the work under the original plans performed by Rose Electric. It has treated Rose Electric unfairly by withholding payment for the extra work. By certified mail dated February 16, 2011[12], Rose Electric demanded payment for the extra work from Southern Produce and informed Southern Produce that Cooler Erectors had not made any payments for the work under the original plans. At that time, Southern Produce knew it had withheld some of the payment due Cooler Erectors that could have been paid to Rose Electric. There was no

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[12] Plaintiff's Exhibit 11.

payment made because Southern Produce wanted Rose Electric to accept the payment for the extra work and retainage in return for a full release of Southern Produce from any further liability for the unpaid portion of the work.

Southern Produce also acted unfairly to Rose Electric by not opting to pay for the extra work at the same time that it made the last payment to Cooler Erectors on December 2, 2010. Southern Produce knew that Rose Electric had done the extra work at its request and knew that there had been no written change orders with Cooler Erectors. When Southern Produce asked Rose Electric to do some work in December, it had the opportunity to obtain from Rose Electric the cost of the extra work, but did not even though it paid for this work.

VI. There was no evidence of an express contract for the work and services furnished by Rose Electric.

Rose Electric presented evidence to show that it never had an express contract for any of the work done on the project.[13] While Rose Electric submitted a proposal[14] to Cooler Erectors for the cost of the work based on the original plans, this proposal was never signed.[15] At the time of authorizing the extra work, Stocker did not ask for a set price for the work but he knew the work was being done by Rose Electric.

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[13] The requirements for an express contract are discussed in Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 322 S.E.2d 474 (Ct.App. 1984) ("A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct.")

[14] Plaintiff's Exhibit 14, Defendant's Exhibit 2.

[15] The proposal dated November 24, 2010, specifically states that it is "not a contract for services".

After all the work was completed, Rose Electric did submit several "Service Invoices" setting forth a "description of job" and the "total due". The written Invoices do not refer to a contract and were used by Rose Electric in an attempt to get payment. Moreover, there was no proof that any of these Invoices or the amounts shown due was the result of any agreements made as to the cost for the work. While Invoices were submitted to Cooler Erectors and sometimes included billing for the extra work, there was no proof that an agreement existed as to the cost for the work described.

Therefore, this Court should find that there was no contract, either express or implied, for any of the work done by Rose Electric on this project.

VII. The general contractor for the work performed for Southern Produce did not have a license to do such type of work as required by the State of South Carolina.

There was no dispute that Cooler Erectors performed as a general contractor for this project without a license being issued by the State of South Carolina. The County of Lexington had issued a building permit[16] based upon an application filed by Mike Hutchins, a licensed contractor, but there was no evidence that Hutchins performed any work on the project or received any payments. The Contractor Agreement did not contain a provision that Cooler Erectors represented that it was licensed and there was no requirement that the contractor's license number be furnished to Southern Produce.

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[16] Plaintiff's Exhibit 17.

The fact that Cooler Erectors was unlicensed prevents Southern Produce from maintaining that it paid Cooler Erectors for the work. A contract with an unlicensed general contractor is void as against public policy as stated below:

In Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993), we recognized the general rule that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the constitution. See also Grant v. Butt, 198 S.C. 298, 17 S.E.2d 689 (1941); Rountree v. Ingle, 94 S.C. 231, 77 S.E. 931 (1913). Similarly, the Court of Appeals recently held:

> It is a well-founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. This rule applies at both law and in equity and whether the cause of action is in contract or in tort....

Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276, 437 S.E.2d 168, 170 (1993).

Moreover, Southern Produce did not pay the general contractor named on the Building Permit and on the Certificate of Occupancy. Section 40-11-30 of the South Carolina Code states:

> No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

Section 40-11-370 states that:

> (B) It is unlawful to engage in construction under a name other than the exact name which appears on the license issued pursuant to this chapter. "Engaging in construction" includes marketing, advertising, using site signs, and submitting contracts. This requirement does not include advertising on vehicles, which may use an abbreviated version of the license name so long as the advertising is not misleading.

(C) An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. An entity that enters into a contract to engage in construction in a name other than the name that appears on its license may not bring an action either at law or in equity to enforce the provisions of the contract.

VIII. While the trial court considered all liens filed, the trial court erred in allowing a proration that was based upon the amount of the claims set forth in the mechanic's lien filings rather than the actual payment or resolution of these liens.

The trial court ignored the evidence presented about the payments made for the work performed by Custom Concrete and Dunlap Services. The testimony of Stocker shows that the total amount paid to both of these subcontractors was $465. His testimony is as follows:

A To my understanding, no, sir, it's not active.

Q And even though they claim they're owed about $14,529, has Southern Produce paid anything to Custom Concrete?

A Other than legal fees, no, sir.

Q Okay. But nothing to Custom Concrete?

A Correct.

(Transcript, p. 174, lines 16-22).

Q And you said you paid something on that and the amount you paid, I believe, was $465 back on August 19th, 2011; correct?

A That was a settlement, yes, sir.

Q But, again, do you remember the date of the settlement?

A No, sir. I believe you just said August.

(Transcript, p. 175, lines 6-12).

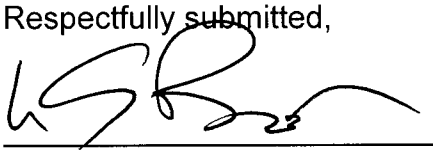
IX. Rose Electric is entitled to prejudgment interest.

Rose Electric has pled and seeks prejudgment interest on any sums found due it by Southern Produce. It seeks interest at the legal rate of 8.75% under S.C. Code §34-31-20(A). The South Carolina Court of Appeals has found that an award of prejudgment interest is permissible in an action to recover under the theory of *quantum meruit*. QHG of Lake City, Inc. v. McCutheon, 360 S.C. 196, 600 S.E.2d 105 (Ct.App. 2004). This Court should find and conclude that Rose Electric is entitled to prejudgment interest in the event this Court reverses the trial court's decision on the application of *quantum meruit*. This Court should further find that Southern Produce should have made payment to Rose Electric for the reasonable value of its labor and materials no later than 30 days after receipt of the demand by letter dated February 16, 2011. Therefore, interest began to accrue on March 18, 2011.

CONCLUSION

For the reasons discussed above, this Court should reverse the rulings of the trial court and remand with instructions to issue an Order granting the relief sought by Appellant and requested herein.

Respectfully submitted,



January 28, 2015

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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2011-CP-32-1929

Rose Electric, Inc., ... Appellant

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified Development Corporation of South Carolina, Senn Bros., Inc., Custom Concrete of Lexington, Inc., and James Dunlap d/b/a Dunlap Services, ... Defendants

Of whom

Southern Produce, Inc., S2P, LLC, and Senn Bros, Inc., are Respondents

---

CERTIFICATE OF COUNSEL

The undersigned certifies that the Initial Brief of Appellant complies with Rule 211(b), SCACR.

January 28, 2015

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Of whom

Southern Produce, Inc., S2P, LLC are Respondents

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant by causing to be mailed via First Class US Mail with sufficient postage affixed thereto, on July 24, 2014, addressed to the Respondent Southern Produce, Inc.'s attorney of record, Kathryn M. Cook, Esquire Cook & Roy, LLC, P.O. Box 4086, N. Myrtle Beach SC 29597.

January 28, 2015

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Of whom

Southern Produce, Inc. and S2P, LLC.....are Respondents

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant by causing to be mailed via First Class US Mail with sufficient postage affixed thereto, on July 24, 2014, addressed to the Respondent S2P, LLC's and Senn Bros, Inc.'s attorney of record, Jon Robin Turner, Esquire, 1722 Marion Street, Columbia SC 29201.

January 28, 2015

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January 28, 2015

Honorable Jenny Abbott Kitchings
Clerk of Court of the Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Rose Electric, Inc. vs. Southern Produce, Inc., et al.
C/A No. 2011-CP-32-1929
Appellate Case No. 2014-001633
(Our File No. 4657.1151)

Dear Ms. Kitchings:

I represent the Appellant in this action and I enclose for filing the following:

1. Original Initial Brief of Appellant;

2. Original Designation of Matter;

3. Original Proof of Service on Respondent Southern Produce, Inc.; and

4. Original Proof of Service on Respondent S2P, LLC.

By copy of this letter, I am serving a copy of same on counsel for Respondents Southern Produce, Inc. and S2P, LLC.

I also ask that the Court modify the caption of this matter in that Certified Development Corporation of South Carolina, Senn Bros, Inc., Custom Concrete of Lexington, Inc. and James Dunlap d/b/a Dunlap Services were all dismissed from this action either prior to or during the trial of this action and their names should not appear as Defendants or Respondents. If I need to file a motion with the Court on this, I request that you let me know as soon as possible.

I appreciate your assistance on this.

Very truly yours,

William E. Booth III
Enclosure
C: J. Robin Turner, Esquire **(w/Enc.)**
Kathryn M. Cook, Esquire **(w/Enc.)**

4657.1151-0101.DOC

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Honorable Jenny Abbott Kitchings
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P.O. Box 11629
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