THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
The Honorable William P. Keesley, Circuit Court Judge
Trial Court Case No. 2011-CP-32-01929

Appellate Case No. 2014-001633

Rose Electric, Inc., Appellant

v.

Cooler Erectors of South Carolina, 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 the Respondents

INITIAL BRIEF OF RESPONDENT S2P, LLC

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STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court err in determining that a contract existed between the Appellant and Cooler Erectors, Inc. encompassing the electrical work performed by Appellant pursuant to the building plans and specifications?

II. Did the Trial Court err in determining that a contract existed between the Appellant and Southern Produce, Inc. encompassing the electrical work performed by Appellant for changes and add-ons "outside" the building plans and specifications?

III. If contracts indeed existed as described in issues (I) and (II), did the Court err in determining that the Appellant was barred or prevented from recovering the reasonable value of Appellant's labor and materials expended in these activities under Appellant's claims of *quantum meruit*, in each instance?

IV. If the Appellant should not have been barred or prevented from asserting one or more claims in *quantum meruit* as a result of the Court of Appeals' determination of issue (III), then, did the Trial Court err in his finding that there were no facts or circumstances rendering the retaining of benefits of by Southern Produce, Inc. unjust, preventing recovery by the Appellant under *quantum meruit*?

V. Was the Trial Court's determination that Respondent Southern Produce, Inc. properly apportioned its retainage among unpaid subcontractors controlled by an error of law?

STATEMENT OF THE CASE

The nature of the action below was a controversy arising over payment on a commercial construction project. An action was commenced by Appellant, an unpaid electrical subcontractor, against several parties for a monetary judgment and for foreclosure of a mechanics lien, and this is an appeal of a final order in that matter.

The project was for the construction of a refrigerated produce processing building at the new South Carolina State Farmers Market. Despite having been paid approximately 95% of the building's contract price, the general contractor, Cooler Erectors, Inc., a Georgia corporation ("Cooler Erectors"), left the job unfinished and failed to pay at least three (3) subcontractors (including the Appellant and two others). On March 4, 2012, Appellant filed and served a mechanics lien against the real property.

Appellant filed suit on May 20, 2011, perfecting the mechanics lien and seeking payment from Cooler Erectors (general contractor), Southern Produce, Inc. (owner of the new building, referred to herein as "Southern Produce") and S2P, LLC (or "S2P," the owner of a tract of land, a portion of which was leased to Southern Produce).

Certified Development Corporation of South Carolina was named as a party by virtue of its pre-existing mortgage on the liened real estate, but made no appearance. The remaining two unpaid subcontractor-lienors, James Dunlap d/b/a Dunlap Services and Custom Concrete of Lexington, Inc., had both been dismissed as parties prior to the trial of the case, having resolved their liens by agreement. Another commercial tenant (other than Respondent Southern Produce) on S2P's 4-acre tract of real estate (Senn Brothers, Inc.) was named as a Defendant but was dismissed as a party by the Appellant

without objection on the date of the trial.

Respondent Southern Produce, Inc. generally denied the allegations of the Complaint by Answer, denying knowledge of the actions of the general contractor with respect to Appellant, as did Respondent S2P, LLC, which also asserted defense under S.C. Code Ann. 29-5-40 (2014), centered upon S2P's belief that the owner of the project had paid the GC at the time of the notice of the lien, and was protected against the subcontractor except as to amounts still due and payable between Southern Produce and Cooler Erectors. S2P additionally raised other defenses of statutory construction based upon the definition of "owner" within the statutory scheme. Additionally, S2P cross-claimed against Southern Produce for indemnification for the costs of its defense against the project's mechanics liens pursuant to the language of the lease between them or, in the alternative, for equitable indemnification from Southern Produce. The cross-claims were denied by Southern Produce's reply, but S2P and Southern Produce later stipulated at trial to allow the Court to order indemnification under the lease.

The general contractor on the project, Cooler Erectors, did not answer the complaint or otherwise appear during the case and was found in default by the Court, though judgment against Cooler Erectors, Inc. was not pursued by the Appellant at trial.

Formal pretrial offers of settlement were found by the Court to have been properly made to the Appellant by Respondent by Appellant Southern Produce, Inc., the last in the amount of $18,000, but were all refused.

Trial was held on February 13, 2013, and testimony completed that same afternoon.

In its opening statement, Appellant's counsel announced to the Court that

Appellant was proceeding only on its *quantum meruit* claim and was not going to pursue its claims based on contract as a previously pled, thereafter seeking judgment solely based on *quantum meruit*, both as to the work performed under the original building specifications (priced at $54,319.13) and as compensation for the extras, changes or add-ons to the original construction job (priced at $10,755.39).

Testimony of four (4) witnesses was taken, and numerous exhibits introduced into evidence. At the conclusion of the evidence, the Court and the parties agreed that the parties could submit any further argument by memorandum to be considered prior to final decision. Rose Electric, Southern Produce and S2P did submit memoranda.

In addition to entertaining memoranda, the Court invited Counsel to appear before it and can on October 23, 2013 for further argument (Order 6/11/14, p.14).

A decision on the merits was issued in the case by January 30, 2014 Order. A Motion for Reconsideration was timely made by the Appellant resulting in the "Order on Reconsideration," modifying, but not changing the basic holdings of the January 30 Order. The latter Order was issued by Judge William R. Keesley dated June 11, 2014 and filed June 20, 2014. This appeal followed.

In the order appealed from, the Trial Court ruled that there was an express contract between Appellant Rose Electric and General Contractor Cooler Erectors to supply the electrical subcontracting pursuant to plans and specifications shared between them, and that there was a second express contract between Appellant Rose Electric and Southern Produce for change orders or add-ons separate from the contract between Appellant and Cooler Erectors (Order 6/11/14, p.19). He further held that where there is an express contract encompassing the same work for which the Plaintiff seeks quantum

meruit, then, an action in quantum meruit cannot lie. He denied relief in *quantum meruit* to the Appellant for that reason (Order 6/11/14, pp. 20, 21), but also ruled as an additional ground for denial that, even if Appellant were allowed to seek quantum meruit based upon the facts of this case, the Court would have denied such an award, finding that, because Respondent Southern Produce stood ready to pay the Appellant, there was no evidence of a "...retention by the Defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." (Order 6/11/14, pp. 21, 22).

Based upon the outcome of the case in favor of the Respondents, and also because of the prior offers of judgment made to Appellant under S.C. Code Ann. 29-5-10 (2014), were refused by the Appellant (offers of payment were partially prorated under S.C. Code Ann. 29-5-60 [2014]), the Court found that the Respondents were prevailing parties. The Court went on to award attorneys fees and costs to each of the Respondents as against the Appellant. The Court based its award of fees to S2P based upon the expense of defending against the Appellant's mechanics lien under S.C. Code Ann. 29-5-10 and -20 (2014), and based its award of fees by Appellant to Southern Produce upon a finding that Southern Produce's prior $18,000 offer of settlement was more than sufficient to establish its entitlement to fees under S.C. Code Ann. 29-5-20(C) (2014). (Order 6/11/14, p. 22). .

The Court took note that there had already been partial reimbursement by Southern Produce of S2P's attorneys fees and costs of litigation, quantified those, ordered that Southern Produce, Inc. be required to reimburse the remainder of those fees to S2P under the indemnification terms of the land lease between them, and awarded Southern Produce an offset, credit or reimbursement from S2P of any amounts S2P may collect

from Appellant, to avoid a double recovery by S2P.

ARGUMENT

Argument as to Issues I and II

I. DID THE TRIAL COURT ERR IN DETERMINING THAT A CONTRACT EXISTED BETWEEN THE APPELLANT AND COOLER ERECTORS, INCORPORATED ENCOMPASSING THE ELECTRICAL WORK PERFORMED BY APPELLANT PURSUANT TO THE BUILDING PLANS AND SPECIFICATIONS?

And

II DID THE TRIAL COURT ERR IN DETERMINING THAT A CONTRACT EXISTED BETWEEN THE APPELLANT AND SOUTHERN PRODUCE, INCORPORATED ENCOMPASSING THE ELECTRICAL WORK PERFORMED BY APPELLANT FOR CHANGES AND ADD-ONS "OUTSIDE" THE BUILDING PLANS AND SPECIFICATIONS?

Appellant attempts to avoid the defense raised by the Respondents (that nearly the entire price of the building had already been made to the general contractor before notice of the subcontractor's claim was received, so that the Appellant was therefore relegated to a prorated share of the retainage under S.C. Code Ann. 29-5-40 [2014]), by way of announcing, *on the day of trial,* that it would not pursue further its breach of contract claim and began claiming there *was no* contract, after approximately 2 years of asserting that there was a contract applicable to each instance of its work on the project. Even

without affording the Respondents the opportunity to conduct pretrial discovery to disprove the underpinnings of that 11th hour assertion, it is apparent, readily, that such a convenient repudiation of contract could only be sustained by an inaccurate and unreasonable view of the facts. Respondent S2P, LLC asserts that this maneuver cannot fairly be allowed to frustrate the provisions of the mechanics lien statutes under which the action was brought, and upon which defense S2P rightly depended.

The Court's finding that contracts for electrical work with the Appellant existed in both instances giving rise to the suit (the larger contract between Appellant and the contractor, and the smaller, later contract between Appellant and the owner) are well supported by the testimony of Mr. Rose and the testimony of Mr. Stocker. And the Court's contract finding, carefully made by the learned trial judge after much research, briefing and oral argument, becomes important and a central issue of the Appellant's argument, which seems to be: if there was no contract, then Appellant should not only not be relegated to the mechanics lien remedies or subject to the mechanics lien defenses, but, instead, should be entitled to relief in *quantum meruit*, since there was no contract.

Firstly, it cannot be claimed that contracts do not exist without a signed writing encompassing all material terms of the agreement, and this is especially true with respect to subcontract work on a building site; in fact, it is common knowledge that artisans, materialmen and laborers often provide goods and services without benefit of a signed contract. And while this sometimes leads to disagreements as to what the parties intended, and while, in a perfect world, there would be no understandings with or without written contracts, the fact remains that the courts, especially in mechanics lien litigation, recognize that contracts may exist by virtue of verbal agreements, course of dealing, and

actual performance, or a combination of these. And in a case such as this, where there was a previous course of dealing between the parties establishing the method of invoicing and payment, where the work was fully performed, where the existence of a contract was pled by the Plaintiff and where such contracts admitted by the Defendants, to claim there never was a contract seems ingenuous.

There is obviously no requirement of a written contract for legal recognition as a contract of and subsequent enforceability of verbal construction agreements generally (Stanley Smith & Sons, 283 S.C. 430, 322 S.E.2d 474 [Ct.App.1984]), nor in the mechanics lien context (Devereaux v. Taft, 20 S.C. 555 [1884]). In the instant case, uncontradicted testimony shows that the place, time and description of the work were clearly and definitely agreed in each instance, and the only term which was not determined in advance was the exact cost, however, this is where the course of dealing and the "time and materials" billings between the Appellant and the GC and between the Appellant and Southern Produce become dispositive as to the issue of pricing in this contract. But that doesn't have to be a fixed price: "Where a contract does not fix a price, there must be a definite method for ascertaining it." 17 C.J.S. contracts§36(2)(c), cited with approval in Edens v. Laurel Hill, Inc., 271 S.C. 360, 247 S.E.2d 434, at 436 (1978). Respondent submits that there was such a method, the "T and M" method described by Appellant's Homer Rose to the Court (Tr. p.55, ln 4 - 25), in which the subcontractor submitted one or more invoices based upon the amount of work and materials required for the job, generally after the work and materials were expended. Without doubt, the Trial Court was correct in not allowing the absence of an exact dollar-price control its determination that a contract existed in each instance.

At the risk of belaboring the issue, the representations of the parties throughout the litigation, including sworn testimony, the applicable law all and common sense establish that a contract existed not only for the electrical work performed for the general contractor, but also for the add-ons and extra work provided for Southern Produce. For other specific instances in the record supporting the Court's finding of the existence of a contract or agreement for the electrical work, we would respectfully point out the following:

a. Mr. Homer Rose, Appellant's owner, along with his legal counsel, filed a sworn verification of account (Exhibit "B" Statement of Account) appended to a NOTICE OF MECHANICS LIEN dated March 3, 2011 and filed March 4, 2011 in Mechanics Lien Book 14754 at Page 57 in the Lexington County Register of Deeds (Defendant's Exh. #1). An examination of the body of this central filing by the Appellant reveals the following statement, "Services and materials were furnished by the Plaintiff by virtue of an agreement with the above-named Defendant, Cooler Erectors of Atlanta, Inc." (Emphasis added).

b. Months after the filing of the mechanics lien mentioned above, Appellant filed its complaint in the action, alleging, *"... The Plaintiff did subcontract... ... with Defendant Cooler* [Erectors, Inc.] *to furnish all labor, materials, equipment, subcontract work, and services required to provide electrical service for the construction of a refrigerated building..."* . (Complaint, Page 3, paragraph 10) (emphasis added).

c. Appellant again referred to the arrangement between itself And Cooler Erectors as a "*subcontract*" (Complaint, p.3, paragraph 11), and stated that the

amount due "*under the said contract is $65,094.52*," (Complaint, p.3, paragraph 12) (emphasis added).

d. Appellant's second cause of action in its complaint repeatedly refers to the "contract" between itself and the Defendants as a *fait accompli*, a binding agreement completely executed except for the payment, not requesting the Court to add any missing terms, but representing the arrangement as a binding and fully performed construction subcontract. (Complaint, p.5, paragraphs 17-20).

e. At trial, while Mr. Homer Rose, the owner and prime functionary of the Appellant, was careful to testify under his counsel's questioning that there was never any *written* contract between Rose Electric and Cooler Erectors on this job, his testimony clearly shows that there was an agreement between his company and the general contractor, that he would provide the labor and materials necessary to complete the work with he was presented in the plans and specs from the general contractor, with an understanding that the general contractor would pay him on his standard invoices for the work. On each job he did for this GC, Mr. Rose surely had a clear expectation of payment based upon his invoices or "takeoffs" that he would prepare from time to time and submit to Cooler Electric in order to be paid immediately and "...paid well," (Tr. p. 55, ln. 17-19). Late in the project, Appellant submitted invoices for $10,755.39 to Southern Produce for change orders (Plaintiff's Exh. 2 through Exh. 10), which were likewise calculated on a time and materials basis (Tr. p.56 ln. 1 - 9), and $56,488.07 for the main construction contract with Cooler Erectors (Tr. p.85 ln.24 - p.86 ln.3) (Plaintiff's Exh 14), and later, perhaps in anticipation of

litigation, Appellant submitted a combined invoice with time and materials records for the 2 contracts (general contractor and owner build together), for $65,094.52 based on a time and materials calculation by Appellant (Plaintiff's exhibit #15). Mr. Rose understandably expected to be paid his invoices based upon time and materials, into which his profit was ostensibly built, apparently coming up with a more rigorous summary after the original "takeoffs" done during the project for $56,488.07 (Plaintiff's Exh. #14) Other billings in varying amounts were also submitted after that point by Appellant, at the request of the general contractor, according to Mr. Rose, but the important thing to recognize is that, while there might have been some difference of opinion as far as the exact amount of money to which the Appellant was entitled, that bit of uncertainty was accepted by the parties to the contract and that reasonable standard of pricing was part of the contract.

f. Mr. Homer Rose's trial testimony admitted that he had done several jobs for the same general contractor at the market on the other wholesalers' buildings (Tr., p34, ln. 10 - p35, ln. 22), and he was unable to distinguish in any meaningful way between his prior payment process with this general contractor and his relationship with the contractor on this occasion, except, perhaps, in that that he apparently had **more** written terms (plans and specifications [Plaintiff's Exhibit #1]) on the Southern Produce job (Tr.p.37, ln.6-17; Tr.p.39, ln.15 - p.40, ln.23; Tr. P.59, ln. 10 - ln. 25) than he may have started with on the Hook building or the Rabon building or the Senn building, and while he didn't know why they weren't signed, viewed in the context of his testimony, it didn't matter

whether the plans and specifications were signed or not, he agreed to perform them and his Company did so. And pricing was based, to some extent, upon his standard charges for labor and materials, submitted at the end or near the end of his performance.

In conclusion of the argument as to ISSUE I, the parties to the litigation either alleged are admitted the existence of the contract. Aside from that, The scope of the work was clearly understood, being laid out in the plans and specifications exchanged between the contractor and the subcontractor, and received in evidence. The location and the persons charged with performance were never an issue. The timing was well understood and agreed (to begin immediately, and if possible to be completed within 30 days), and the work was to be billed by the subcontractor generally on his calculations based upon Appellant's expenditure of time and materials. Which occurred. The amount charged is not contested by any party to the litigation. The evidence taken as a whole clearly establishes that this was a construction subcontract between Cooler Erectors Inc. and Appellant.

In conclusion to argument on ISSUE II, the parties to the litigation alleged or admitted the existence of a contract. The scope of the work was also clearly understood, being laid out in discussions in which representatives of the owner, the contractor and the subcontractor agreed to the changes, and for which the owner was responsible. The location and the persons charged with performance were never an issue. The timing was well understood and agreed (to begin immediately and finish as soon as possible, on an urgent basis), and the work was to be invoiced to the owner on a time and materials basis.

Which occurred. Weather was some disagreement as to the reasonableness of the charges for the change orders, the full amount sought by the Appellant was eventually offered by the Respondent Southern Produce. This evidence, taken as a whole, clearly establishes the existence of an agreement or contract between Southern Produce, Inc. and Appellant.

Argument as to issue III

III. IF CONTRACTS INDEED EXISTED AS DESCRIBED IN ISSUES (I) AND (II), DID THE COURT ERR IN DETERMINING THAT THE APPELLANT WAS BARRED OR PREVENTED FROM RECOVERING THE REASONABLE VALUE OF APPELLANT'S LABOR AND MATERIALS EXPENDED IN THESE ACTIVITIES UNDER APPELLANT'S CLAIMS OF *QUANTUM MERUIT*, IN EACH INSTANCE?

No, no error. The law is quite clear, and the Trial Court committed no error in dismissing the quantum meruit claims based upon this issue. Once it established that contracts had been formed by Appellant for the electrical work involved in the main construction project and in the change orders, and that those contracts encompassed all of the work done by the Appellant, the Appellant is precluded from seeking compensation for that work by *quantum meruit* as a matter of law. (*"If the tasks the Plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the Plaintiff may not recover under quantum meruit."* So wrote our S.C. Court of Appeals in Swanson v. Stratos, 350 S.C. at 122, 564 S.E.2d at 120 (Ct.App 2002), citing with approval 6 Am Jur 2nd *Restitution and Implied Contracts* §81 (2001), and quoted with approval in Williams

Carpet Contractors, Inc. v. Skelly, 400 S.C. at 327, 734 S.E.2nd at 181 (S.C.App.2012). In this case, the Respondents have not abandoned the contract, have never denied the existence of contract, have not waived or abandoned their statutory defenses based upon the existence of contract under the mechanics lien statutes, and still crave the protection of the Court. It is only the Appellant who decided not to pursue his contract claim on the day of trial in what amounts to a misguided attempt to avoid this principle of law. That does not eliminate the existence of the contract. In the instant case, neither contract was rescinded nor abandoned by the Respondents, but were fully performed by Appellant's according to all accounts, and offer of full performance made by Respondent Southern Produce, Inc. Under the policy and the language of this line of cases, it is not proper to consider an award for *quantum meruit* for the work done on these contracts.

Argument As to Issue IV

IV. IF THE APPELLANT SHOULD NOT HAVE BEEN BARRED OR PREVENTED FROM ASSERTING ONE OR MORE CLAIMS IN *QUANTUM MERUIT* AS A RESULT OF THE COURT OF APPEALS' DETERMINATION OF ISSUE (III), THEN, DID THE TRIAL COURT ERR IN HIS FINDING THAT THERE WERE NO FACTS OR CIRCUMSTANCES RENDERING THE RETAINING OF BENEFITS OF BY SOUTHERN PRODUCE, INC. UNJUST, PREVENTING RECOVERY BY THE APPELLANT UNDER *QUANTUM MERUIT*?

Assuming, arguendo, that Respondent S2P has misapprehended the controlling common law (as a bar to the Appellant from recovering in quantum meruit where the

Appellant's performance is encompassed by a viable contract), then, the issue still remains as to whether the Appellant could otherwise meet the burden of recovery in the facts of this case, under a theory of *quantum meruit*. Appellant rightly asserts in its initial brief that there are three elements required for a claim of quantum meruit, and that the Supreme Court of the State of South Carolina has adopted one dispositive test "for a quantum meruit/quasi-contract/implied by law claim,": stating the three (3) required elements as, "(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." (Appellant's initial brief, page 13, *mirroring the order appealed from, citing with approval* Earthscapes Unlimited, Inc. V. Ulbrich, 390 S.C 609, 703 SE2d 221[2010]; Columbia Wholesale Co. V. Scudder May, N.V., 312 S.C. 259, 440 S.E.2d 129 [1994]). In the instant case, this "strict" test has simply not been met, as it the Appellant has not shown that any circumstances or conditions exist which would make it unjust for any Respondent to retain the benefits of Appellant's labors: on the contrary, Southern Produce paid for the electrical work to be done in connection with the contract, by paying the price of the building to the general contractor, which price was supposed to contain supposed to have been paid over by the general contractor to the Appellant. That it was not paid over to the Appellant does not render that Respondent's position or retention of benefits unjust. There was no evidence that Southern Produce or S2P engaged in any conduct that would render the retention of the electrical work by Southern Produce unjust. On the contrary, the clear weight of the evidence, and the express finding below, was that after Southern Produce paid to its contractor (Cooler Erectors, Inc.) the lion's share of the

agreed contract price for the building (including Rose's work performed for the contractor), it offered a sum of money from the $10,108 retainage to Appellant properly prorated among lienors ($6953.29 to Rose), and, additionally, formally tendered to Appellant the payment demanded ($10,755.39) for extra work performed by Appellant for Southern Produce, but Appellant has refused to accept this payment (Order 6/11/14, p. 21).

Considerable effort was expended by Appellant in trying to prove and arguing that the person applying for the initial construction permit for the project, a licensed contractor who did the site preparation on the project, made application or "pulled the building permit" as an apparent accommodation for the unlicensed general contractor Cooler Erectors, Inc., or as a subterfuge to mislead the County planning officials, a person who had no active role in Cooler Erectors and only worked on the site briefly. And it became generally understood that Cooler Erectors was an unlicensed contractor, according to the testimony. Assuming, *arguendo*, this to be the case, any violation in the permitting process or application for building permit does not affect the rights and remedies between the owner and any subcontractors on the project. It may well affect the potential right of Cooler Erectors to enforce its contract against Southern Produce, but that is not the issue in the case. Even if the lack of a GC license for cooler erectors is somehow relevant to the harm suffered by the various parties to this case, and that was not shown to the trial judge, still, there was no evidence whatsoever that anyone other than the GC was at fault for anyone's damages, and, just as importantly, there was absolutely no evidence that the GC and the owner conspired in any way to harm the subcontractor-appellant, nor was any legal duty shown to exist on the part of the owner to

investigate the contractor for the good of the subcontractor. Rather, the *subcontractor* had dealt with the contractor on numerous occasions, and, as between the parties to this case, if anyone were in a position to detect any irregularity in the GC's permit, as between between the parties still in the case, it would be the Appellant, who would have more knowledge of the general contractor's licensure, mettle and fidelity. The permitting information was posted on the site (testimony of Michael Moore, Tr., p.73 ln. 22 - p. 74 ln. 20). There was no evidence that the owner had any knowledge that the contractor was unlicensed, or that it improperly used another licensed contractor to obtain the building permit. Appellant is a professional in this field, and Southern Produce is not, being in the business of vegetables, contrary to the situation with the appellant, the respondent Southern Produce had never worked with the general contractor prior to this project nor was there any evidence that any respondent conspired in any way with the general contractor to hoodwink or defraud appellant. Nevertheless, this apparent permitting violation was urged by Appellant as an additional basis for arguing that this leant an air of injustice to the retention of the electricl work by Southern Produce or that that the making of full payment to Cooler Erectors by the owner could not protect the owner from an unpaid subcontractor under S.C.Code Ann 29-5-40 (2014) – essentially arguing that, since the counterfeit GC would not have been allowed to use South Carolina Courts or the mechanics lien statutes to enforce his contract, likewise, Southern Produce's payments to such an unlicensed GC do not deserve full credit as against the unpaid subcontractor under the mechanics lien statutes. The argument is specious. It has neither equitable nor legal merit.

And, should other equitable considerations enter into the analysis? Probably not,

but if the court were inclined in its wisdom to allow this sort of case to represent an exception to the rule, the result would be manifestly unfair to the litigants and counsel in this case: the parties' respective rights and responsibilities in this matter should be determined by reference to the mechanics liens statutes, especially since this route was chosen by the appellant and that is the way the case was conducted up until the trial. While the Appellant certainly had the option of pleading both contract causes of action and quantum meruit or unjust enrichment, as alternative causes of action, and did so (which was presumed to have been done in an abundance of caution -- in the event the lien was somehow disallowed), Appellant should not have been allowed to enjoy the luxury of proceeding to the date of trial, then, denying the existence of a contract unilaterally, then simply to totally shift the trial of the case to an equitable process that was precluded up to that minute, thereby defeating statutory defenses and solid legal presumptions relied upon. Adding to the unfairness of allowing this shift in tactics to succeed, such would have changed the discovery process considerably: individual building materials and labor processes would have to have been studied in minute detail, priced out, other experts retained, etc., raising the cost of litigation still further, to be ready to give persuasive expert testimony as to the relative value of the work performed and materials installed. The Respondents did, and should have, had the ability to rely upon existing case law indicating that, where the work is fully encompassed in a contractual relationship, and there is no misdeed on the part of the property owner, quantum meruit should not lie.

No circumstances rendering it unjust that Southern Produce keep its electric work being shown to the court, and no reason to force the owner to pay twice for it, there was

no unjust enrichment, and, based upon the above analysis, there was no error, nor basis for quantum meruit. Columbia wholesale, supra.

Argument, issue V

V. WAS THE TRIAL COURT'S DETERMINATION THAT Respondent Southern Produce, INC. PROPERLY APPORTIONED ITS RETAINAGE AMONG UNPAID SUBCONTRACTORS CONTROLLED BY AN ERROR OF LAW?

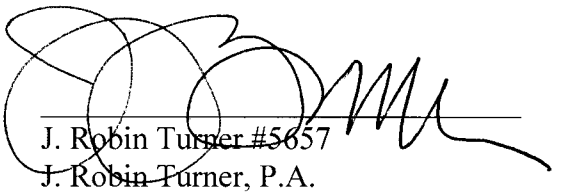
The Trial Court found that the contract price between Respondent Southern Produce, Inc. and the general contractor, Cooler Erectors, Inc. was $213,385.00, of which $203,277.00 was paid, leaving a $10,108 retainage (June 11, 2014 Order, pp 16-17). There were 3 subcontractors who filed liens on the project, the Appellant ($65,094.52 total lien, of which $54,339.12 was attributable to the Cooler Erectors contract [and retainage]) and two of the original Defendants, James Dunlap DBA Dunlap services ($10,210.93) and custom concrete of Lexington, Inc. ($14,529.20). Based upon these figures, the total mechanics liens attributable to the contract with Cooler Erectors equaled $79,079.26. The Appellant's lien attributable to the contract with Cooler Erectors, $54,339.12, would indicate that "Appellant's percentage" would equal 68.71% of the retainage, or $6945.21 Respondent Southern Produce offered Appellant $6953.29 out of the retainage pursuant to S.C. Code Ann. 29-5-60 (2014), which was ruled as sufficient by the Trial Court for purposes of applying the apportionment statute. The Trial Court also ruled that Plaintiff, when it decided not to seek judgment based on contract, also

waived its right to proceed under the mechanics lien and, under the procedural posture of the case, the Court was unable to award any of the retainage under the statute, making the issue of the amount of the retainage and the calculations moot, especially in so far as the Trial Court found that offers of judgment were made and refused; however, Appellant's initial brief does not contain sufficient information from which this claim of improper proration can be evaluated, nor does the record. There was some testimony elicited from witness Dan Stocker on the subject of the other liens, but insufficient testimony was taken from that witness from which any alternative calculations could have been made, if appropriate. The Trial Court did not commit an error using the amounts listed in the liens as the most reliable evidence of the competing claims for the retainage, especially in the absence of further evidence at trial. No error was committed and even if it were error, the calculation itself is, as posited above, moot under these particular circumstances.

CONCLUSION

Examination of the Transcript and the Orders of the learned Trial Judge's will show that there was no error controlling his decisionmaking, that the Court entertained every argument and gave every opportunity for the Appellant to develop and argue its case, but that there was no way for a Court of Law to award relief to Appellant in this particular posture in which it found, or placed, itself. Its remedy lies against its Contractor, Cooler Erectors, Inc., or its principals. The appeal is without substantial merit. The decision below should be affirmed.

Respectfully submitted,



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February 27, 2015

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
The Honorable William P. Keesley, Circuit Court Judge
Trial Court Case No. 2011-CP-32-01929

Appellate Case No. 2014-001633

Rose Electric, Inc.,Appellant

v.

Cooler Erectors of South Carolina, 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 the Respondents

PROOF OF SERVICE

I hereby certify that I have served in the within INITIAL BRIEF OF RESPONDENT S2P, LLC in this matter by depositing copies of same into the US mails with first class postage affixed thereto, return receipt plainly marked, along with a copy of this Proof of Service, on February 27, 2015, addressed, respectively, to Kathryn M. Cook, PA 306 Calhoun Rd., Myrtle Beach, SC 29577, and to William E. Booth III , 3231 Sunset Blvd., Suite A, West Columbia, SC 29169.

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February 27, 2015

The Hon. Jenny Abbott Kitchings
Clerk, the South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Rose Electric, Inc., v. Southern Produce, et Al
Appeal of Trial Court Case No. 2011-CP-32-01929
Appellate Case No. 2014-001633

Dear Ms. Kitchings:

Enclosed for filing, please find the Initial Brief of Respondent S2P, LLC in this matter. I am, under copy of this letter, simultaneously serving the other attorneys involved.

Friday afternoon I received a copy of a letter from Kif (Kathryn) Cook, in which she asked your office for an extension of time to file her brief for Respondent Southern Produce, Inc. I called your office and spoke briefly with Ella who asked me to send her a copy of the letter, although she had no status report for me Friday afternoon, so I went ahead and filed this initial brief without benefit of the other transcript. In the event that Ms. Cook's extension (while a separate hearing transcript is sought and reviewed) is granted, I would appreciate your letting me know what I should do to perhaps obtain similar relief, so that I may better brief this case. In any event, I would respectfully request you let me know the status of Ms. Cook's request at your convenience.

If this raises any questions or comments, I do hope you will not hesitate to let me know With kind regards, I remain

Yours truly,

J. Robin Turner

cc: Ms. Kif Cook
Mr. Bill Booth

enclosures: as stated

South Carolina Court of Appeals
Honorable Jenny Abbott Kitchings, Clerk
P.O. Box 11629
Columbia, SC 29211