

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal From Greenwood County
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2014-002749
Trial Court Case No. 2012-CP-24-574

Miller Construction Company, LLC, Respondent / Appellant,

v.

PC Construction of Greenwood, Inc. and
Safeco Insurance Company of America, Appellants / Respondents.

APPELLANT'S INITIAL BRIEF OF RESPONDENT / APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

- I. THE COURT ERRED IN FAILING TO AWARD MILLER CONSTRUCTION COMPANY, LLC, PREJUDGMENT INTEREST ON ITS CLAIM WHEN THE PRINCIPAL BALANCE OWED IS CAPABLE OF BEING CALCULATED AS A SUM CERTAIN.

STATEMENT OF THE CASE

On November 28, 2011, Miller Construction Company, LLC, (hereinafter Miller) filed and served its Statement of Account and Certificate on Payment Bond. [R. Claim on Payment Bond].

On May 25, 2012, Miller filed its Summons and Complaint seeking, *inter alia*, damages for breach of contract and suit on payment bond. [R. Complaint]. PC Construction of Greenwood, Inc., (hereinafter PC) and Safeco Insurance Company of America (hereinafter Safeco) filed an Answer generally denying the allegations and offering affirmative defenses. [R. Answer]. Subsequently, PC was permitted to amend its Answer and Counterclaim alleging, *inter alia*, damages against Miller for breach of contract. [R., Amended Answer and Counterclaim].

A non-jury trial was held before the Honorable Eugene C. Griffith, Jr. on November 4, 5, and 6, 2013. [R. p. Final Order]. A Final Order & Judgment was filed with the Greenwood County Clerk of Court on July 6, 2014.

The parties all filed respective motions to reconsider. [R. Motions to Reconsider]. Those motions were denied by way of Order filed on November 26, 2014. [R. Order].

PC and Safeco filed their appeal. Miller filed its cross-appeal.

SEPARATE STATEMENT OF FACTS

PC Construction was the general prime contractor for construction of the Lander University Jeff May Sports Complex. [R. Final Order]. PC hired Miller Construction as a subcontractor on the project to perform, *inter alia*, grading and site prep work. [R. Complaint; Tr. p. 80, line 1 - p. 81, line 25]. The subcontract called for Miller to perform these services for a price of \$492,424. [R. Tr. p. 79, lines 14-25; Plaintiff's Exhibit 1, Tab A].

Early on into the project, widespread asbestos laden materials were discovered on site. [R. Tr. p. 82, line 1 - p. 85, line 17]. This discovery and the removal process of these materials caused significant delays to the project¹. [R. Tr. p. 82, line 1 - p. 85, line 17].

Throughout the project, Miller was paid by PC upon making pay applications. [R. Tr. p. 264, line 7 - p. 265, line 13; p. 201, line 10 - p. 202, line 7]. No complaints were made by PC regarding the timeliness of Miller's work or the quality of Miller's work. [R. Tr. p. 89, lines 14-22]. However, upon Miller making its final pay application, PC withheld payment to Miller. [R. Tr. p. 91, line 5 - p. 92, line 4].

Miller timely filed its Notice of Claim on the Payment Bond held by Safeco Insurance Company of America (hereinafter Safeco). [R. Notice of Claim on Payment Bond]. Originally, Miller claimed it was owed \$78,363.08. However, three (3) months after the filing of the claim on the payment bond, PC paid Miller \$24,688.00². This partial payment reduced Miller's claim to \$53,695.08. [R. Tr. p. 86, line 2 - p. 89, line 13].

At the time of Miller's final pay application, PC had not yet been paid its final payment from the owner, Lander University (a/k/a The Lander Foundation). A dispute arose

¹ Miller successfully bid on the removal of the asbestos. This was paid through change order.

² This payment was made without prejudice to the rights of the parties.

between Lander and PC regarding how much was owed to PC. [R. Tr. p. 91, line 5 - p. 92, line 4]. In the spring of 2013, an agreement was reached between PC and Lander regarding final payment, and PC then received final payment from Lander. However, PC still withheld final payment to Miller. [R. Tr. p. 91, line 5 - p. 92, line 4].

PC claims that it was damaged by delays allegedly caused by Miller. PC also claims that Miller can not sue PC because it is allegedly not licensed properly. [R. Amended Answer & Counterclaim].

At trial, PC admitted that it owed Miller \$51,270.08 of the \$53,695.08 claimed by Miller as being owed under the contract. [R. Tr. p. 259, line 21 - p. 263, line 20; Defendant's Exhibit 3, tab 20]. However, PC refused payment to Miller because it alleged that Miller owed PC damages for delays that exceeded, by alleged offset, what it owed Miller. [R. Tr. p. 267, line 19 - p. 268, line 5].

The Court denied PC's claim for delay damages. Of the \$53,695.08, the Court found that PC owed Miller \$51,270.08. It further denied PC's claim for alleged damages owed for delay in the project. However, the Court did not assess prejudgment interest to Miller's claim. [R. Final Order]. Miller appeals the Court's denial of its claim for prejudgment interest.

ARGUMENT

Standard of Review

“In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge’s findings.” *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). “The judges’s finding are equivalent to a jury’s findings in a law action.” *Id.* This Court may also correct any errors of law. *Id.*

Prejudgment Interest

S.C. Code Ann. § 34-31-20(A) (Supp. 2005) provides that prejudgment interest is set at 8 3/4 percent per annum. “The law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty.” *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258 (2006). “Stated another way, prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties.” *Id.*, 369 S.C. at 133, 631 S.E.2d at 258-59.

“The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest.” *Smith-Hunter Const. Co., Inc. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005). “The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.” *Id.*

“A judgment debtor is required to pay interest on his debt as compensation for his continued retention and use of the creditor’s money beyond the date payment was due.” *Butler Contracting*, 369 S.C. at 134, 631 S.E.2d at 259. “The right to prejudgment interest is not affect by rights of discount or offset claimed by the opposing party. It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable.” *Id.*, 369 S.C. at 133-34, 631 S.E.2d at 259.

In this case, Miller filed this action alleging it was owed the principal balance of \$53,695.08. [R. Tr. p. 90, line 21 - p. 91, line 1; Complaint]. During trial, PC testified that the amount owed to Miller was \$51,270.08, subject to offset by way of its counterclaim against Miller for damages due to alleged delays. [R. Tr. p. 267, line 19 - p. 268, line 10; Defendant’s Exhibit 3, tab 20]. The difference in the two (2) amounts is two (2) change orders totaling \$2,425.00. PC rejected these change orders because a) they were submitted after the work occurred and b) it was alleged warranty work. [R. Tr. p. 259, line 21 - p. 263, line 20].

Miller testified that it was seeking prejudgment interest and testified to the amount of prejudgment interest owed at the time of trial being \$7,586.09. [R. Tr. p. 90, line 21 - p. 91, line 4; Plaintiff’s Exhibit 1, Tab J]. Further, Miller affirmatively plead a request for prejudgment interest. [R. Complaint].

Pursuant to the parties’ contract, PC determined that it owed Miller \$51,270.08. [R. Tr. p. 267, line 19 - p. 268, line 10; Defendant’s Exhibit 3, tab 20]. In other words, the amount owed to Miller was certain or capable of certainty based upon the previously agreed upon calculations in the parties’ contract. As such, Miller is entitled to prejudgment interest on its claim. Further, it was an error of law for the Court to not award prejudgment interest on the principal balance awarded by the Court.

Miller included the revised prejudgment calculation to its Motion to Alter or Amend. Miller contends that the revised amount of prejudgment interest is \$10,691.35. [R. Plaintiff's Motion to Alter or Amend].

CONCLUSION

If the lower court's decision to award Miller the principal balance of \$51,270.08 is affirmed on appeal, then Miller contends that this Court should reverse the decision to deny prejudgment interest and award the same in the amount of \$10,691.35. Miller contends that the principal balance is clearly an amount capable of certainty pursuant to the parties' contract, and is directly in contemplation of S.C. Code Ann. § 34-31-30(A) (Supp. 2005) as interpreted by *Butler Contracting* and *Smith-Hunter*.

Respectfully Submitted,



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June 5, 2015

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PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief of Respondent / Appellant and Designation of Matter to be Included in the Record on Appeal on the Appellant by mailing a copy of the same to her attorney of record, Edward Wade Mullins, III, Bruner, Powell, Robbins, Wall & Mullins, LLC, Post Office Box 61110, Columbia, South Carolina 29260 via United States mail, postage prepaid this 5th day of June, 2015.

June 5, 2015



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The Honorable Jenny Abbott Kitchings
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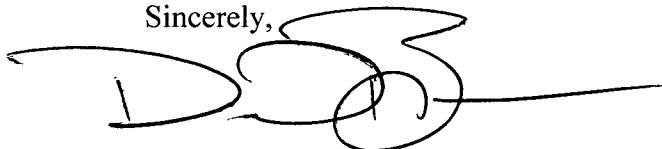
Re: *Miller Construction Company, LLC v. PC Construction of Greenwood, Inc. & Safeco Insurance Company of America*
Appellate Case No. 2014-002749
Trial Court Case No. 2012-CP-24-574

Dear Ms. Kitchings;

Enclosed for filing is Appellant's Initial Brief of Respondent / Appellant in the above case. Also enclosed are the following:

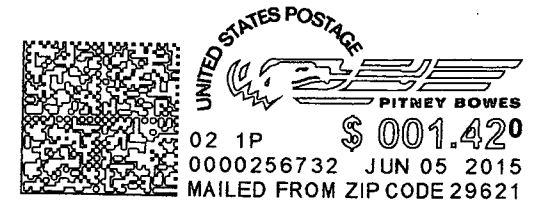
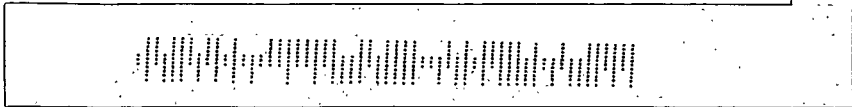
- (1) Designation of Matter to be Included in the Record on Appeal;
- (2) Proof of Service of the Appellant's Initial Brief of Respondent / Appellant and Designation of Matter to be Included in the Record on Appeal.

Sincerely,



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