Terlizzi Home Improvement, LLC, Appellant,

v.

Michael L. Boheler, Jeannette A. Boheler and the Palmetto Bank as Assignee of Midlands Mortgage Corp., Defendants,

Of Whom Michael L. Boheler and Jeannette A. Boheler are the Respondents,

v.

William Terlizzi, Third-Party Defendant and an Appellant.

Appellate Case No. 2014-002540

INITIAL REPLY BRIEF

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The Appellants, per Rule 208(b)(3), SCACR, and by way of reply to the Respondents' initial brief, would show as follows:

I. THE RESPONDENTS FAIL TO SHOW THAT THOSE PORTIONS OF THE ATTORNEY'S FEE AWARD CONTESTED BY THE APPELLANTS WERE VALID.

The Appellants have shown (at pages 13-15 of their initial brief) that numerous, specific portions of the attorney's fees awarded to the Respondents by the trial judge should be struck as being unrelated to the lien action, unnecessary or otherwise not properly awardable. Rather than actually address the deficiencies noted by the Appellants, the Respondents respond by merely reciting the general case law regarding the award of attorney's fees and state that the trial judge followed the law. (Respondents' initial brief at pages 26-28). In doing so, the Respondents (at page 27, footnote 9) do note that the Spriggs case relied upon by the trial judge at page 8 of his order as authority for the factors to review has since been de-published by the Supreme Court and held to have no precedential authority whatsoever. While the de-publication of the Spriggs case used by the trial judge is an interesting matter, the really remarkable thing about the Respondents' brief is its complete failure to address the specific points raised by the Appellants concerning the award of attorney's fees.

For example, the Respondents do not address, much the less contest, the Appellants' argument that they should not be required to pay Respondents' fees for a motion the Appellants actually won. (No. 1, page 13 of Appellants' initial brief). Similarly, absolutely no effort is made to explain or justify the trial judge's decision to include in the fees awarded time spent on matters not related to the mechanic's lien action and/or clearly not necessary, such as conferences between attorneys the nature of which was not even identified. (No. 2 and No. 3, pages 13-14 of Appellants' initial brief). Likewise, the Respondents make no effort to explain

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why the Appellants should have to pay for updating pleadings, reviewing spreadsheets, or $1,076.09 for computerized research that simply was not necessary to this action. (No. 4 and No. 5, page 14 of Appellants' initial brief).

The Respondents do point out, if somewhat weakly and in passing, that the Appellants did not prove that $275 was an excessive hourly rate for the locale in question, which was Newberry County. While that is possibly true as a statement of actual fact, it is completely irrelevant to a judicial review of the attorney's fees awarded. The Respondents had the burden of proof as the party seeking an award of fees from the Court. In fact, this statement by the Respondents counsel, taken alone, is really a conclusive admission by the Respondents that they did not meet their burden of proving that $275 per hour was customary for Newberry County, particularly as they also fail to point out any evidence in the record as to what the customary fee actually is for the locale in question. There simply is no such evidence in the record regarding that issue. In light of that, this Court should reduce the attorney's fee awarded as requested in Section III of the Appellants' brief. See Rowell v. Whisnant, 360 S.C. 181, 600 S.E.2d 96 (Ct. App. 2004) (award of fees cannot be sustained on appeal in the absence of any evidence to support the same).

II. THE RESPONDENTS POINT TO NO CASE OR STATUTORY LAW AUTHORIZING AN AWARD OF ATTORNEY'S FEES AGAINST A NON-PARTY IN A MECHANIC'S LIEN ACTION.

At pages 18-25 the Respondents strenuously argue that the trial judge properly found William Terlizzi to be personally liable for the attorney's fees awarded, primarily based upon the Respondents' tortured reading of our limited liable company act. Nothing within the LLC act addresses the primary defect in that argument, which is that William Terlizzi was not a party to the mechanic's lien action. In fact, the Respondents admit that the first time the issue of the

personal liability of William Terlizzi for fees came up was in the context of a letter from Respondents' counsel to the trial judge, **after** the summary judgment hearing (emphasis added). (Respondents' initial brief at page 8, in which the Respondents' counsel somewhat confusingly admits that on April 23rd he sent the trial judge such a letter dated April 25th). There is no motion or other pleading by which William Terlizzi was made a party to the mechanic's lien action. There is nothing within Title 29 that authorizes a non-party to be held personally liable for fees. As a non-party, it was manifest legal error for the trial judge to hold William Terlizzi personally liable for such fees and that part of the order should be reversed outright.

Additionally, it bears noting that the Respondents' claim that the issue of the personal liability for attorney's fees by a non-party owner of a limited liability company in a mechanic's lien action is not a novel issue of law in South Carolina. (Respondents' initial brief at page 25 in which they state "This is not a novel issue."). Presumably, they make this assertion in an attempt to rebut the Appellants' reliance upon the fairly well understood proposition of appellate law that novel legal issues are not normally amenable to summary disposition. Unfortunately, at least for the Respondents, they fail to point to or discuss any prior court decision in which such a factual scenario was ever addressed or discussed by an appellate court of this state. At least insofar as counsel for all parties have failed to find any appellate case law on point, this does seem to be a novel issue of law, contrary to the Respondents' assertion otherwise, and this provides an additional reason to reverse the trial judge on this issue.

III. THE ISSUE OF THE ENFORCEABILITY OF THE LIEN WAIVERS WAS PRESERVED.

On page 12 of the Appellants' initial brief they alleged, incorrectly, that the lien waiver enforceability issue was not preserved for appeal. In addition to the submission of evidence on

that issue at the summary judgment hearing by way of the deposition of William Terlizzi (at pages 134-35, 142, and 150), that issue was specifically raised in the Appellants' motion for reconsideration at No. 5 ("That the Court erred in granting summary judgment to the Defendants and dismissing the mechanic's lien when there was a genuine material dispute as to the enforceability of the mechanic's lien waivers relied upon by the Court in support of its ruling." (Citation omitted)). The preservation of this issue could not be any more clear, nor could the Respondents' argument to the contrary be any more wrong and misleading.

IV. THE RESPONDENTS FAIL TO SHOW THE APPELLANTS' VOLUNTARY REDUCTION OF THE LIEN AMOUNT DID NOT PRECLUDE DIMISSAL UNDER S.C. CODE SECTION 29-5-100.

At pages 12-16 the Respondents attempt to argue that the Appellant LLC could not make a binding stipulation to reduce the amount of the lien, all the while inconsistently arguing throughout their brief that if only the Appellant LLC had reduced the lien as asked, then everything would be fine. (See e.g., "the Bohelers asked Terlizzi to perform an accounting and reduce the Lien ..." at page 28 of initial brief). The LLC's reduction of the lien amount did not create a new lien, it merely constituted a binding election to reduce the amount sought under the existing lien. Further, there is no compelling argument made by the Respondents that the Appellants could not stipulate to a binding reduction in the amount of the lien claimed.

If the Court were to adopt the logic (such as it is) contained in the Respondents' brief it would have a chilling effect on the mechanic's lien law in this state. Basically, the Respondents claim that the reduction in the amount of the lien created a new lien that was in itself invalid as having been filed more than 90 days after the work was done, but also claim that the prior, higher lien was still in existence insofar as it permitted the trial judge to dismiss the same per Section 29-5-100 and assess fees against the lienor (and its owner who was not a party). The

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Respondents are asking this Court to hold that the Appellants could not reduce the lien amount and use that reduced lien amount in defense of a motion to dismiss filed **after** the lien amount was reduced. (emphasis added). It seems reasonable to conclude that if this Court were to rule in that manner it would have a resultant, deterring effect on lienors agreeing to voluntarily reduce the amount of any filed lien, even when the same is clearly justified by the necessities of trial, or other events occurring or coming to light after the filing of the lien. In other words, protecting the Appellant LLC in this case will also have the effect of protecting other lienors under a vast array of potential factual scenarios in which they may wish to reduce the amount of their claimed lien after the 90 day filing period has run. Also, it bears noting that this discussion revolves around the reduction of the lien amount, which directly benefited the Respondents, and not an effort to subsequently increase the amount of the lien sought. Appellants assert that lien reductions, when deemed appropriate by the lienor, should be encouraged by this Court and not punished.

The Respondents fail to show that there is any statute, case decision or rule that precluded the Appellants from reducing the amount of its lien prior to the filing of the Respondents' summary judgment motion, which in fact was the very relief the Respondents were previously requesting. The Respondents have no one but themselves to blame for failing to file their motion to dismiss the lien prior to the Appellants' reduction in the amount of the same. The trial judge erred in dismissing the lien based upon the higher, original amount of the lien.

V. EVIDENTIARY DISPUTES CONERNING THE AGREEMENT OF THE PARTIES PRECLUDED SUMMARY JUDGMENT.

The Respondents contend that the Appellants confuse the issues of the parties' contract with issues related to what could properly be claimed as part of the mechanic's lien.

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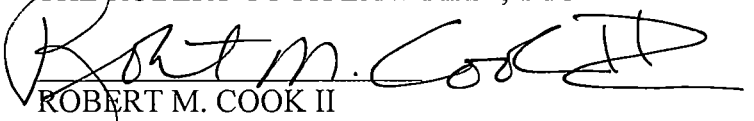
(Respondents' initial brief at page 11). The foundational premise of this argument by the Respondents is that only the higher mechanic's lien figure was relevant to a dismissal under Section 29-5-100, with which the Appellants disagree for the reasons stated here and elsewhere. Nevertheless, the original, higher lien amount claimed by the Appellant LLC was based, in part, on the inclusion of profit and overhead. Basically, the Respondents argue that profit and overhead are not properly included in a mechanic's lien, except under certain limited situations when profit and overhead are included in the agreement between the parties. Of course, that is the exact point being raised by the Appellants; that there was evidence that the actual agreement between the parties included profit and overhead as the Respondents never objected to the inclusion of profit and overhead when agreeing to pay for extras and changes. (See Appellants' initial brief at page 9, particularly the agreement signed by Michael Boheler on 7/22/11 to pay for those items.). The Respondents do correctly note (at page 11, footnote 6) that the initial brief of the Appellants cites the earlier, withdrawn version of the Zespa Construction case in support of its contention about the inclusion of profit and overhead in a mechanic's lien, but the Respondents fail to note that the subsequent substituted opinion contains the very same ruling as to the permissibility of the inclusion of such items in a mechanic's lien. The nature of the contractual agreement between the parties, which is disputed, is relevant to whether or not the Appellant LLC could properly claim overhead and profit as part of the original lien amount. There is a factual dispute as to whether such items were part of the agreement between the parties. In light of that dispute over a material factual element, the trial judge erred in granting summary judgment to the Respondents.

CONCLUSION

For the reasons stated above, or as made in the Appellants' first brief or to be made during oral argument, the Appellants request that this Court reverse the dismissal of the mechanic's lien. In the alternative, these parties ask the Court to reverse that part of the order awarding attorney's fees against Mr. Terlizzi personally, and also seek amendment of the award of attorney's fees to a more reasonable, lower amount that is consistent with the actual time and expertise needed in handling this matter and the actual evidence regarding the same.

Respectfully submitted,

THE ROBERT COOK LAW FIRM, LLC



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August 6 2015

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Appellate Case No. 2014-002540

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Reply Brief on the attorney for Michael L. Boheler and Jeannette A. Boheler by depositing a copy of it in the United States Mail, postage prepaid, on August 6, 2015, addressed to Charles A. Krawczyk, Esquire, Finkel Law Firm, LLC, P.O. Box 1799, Columbia, SC 29202.

August 6, 2015

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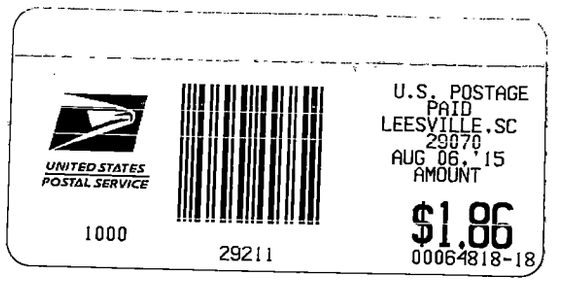

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