

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM AIKEN COUNTY
Court of Common Pleas
James Martin Harvey, Jr., Special Referee

S.C. SUPREME COURT

[Unpublished] Opinion No. 2015-UP-351 (S.C. Ct. App. filed July 15, 2015)

Elite Construction, Inc., Respondent,

v.

Doris E. Tummillo and Georgia Bank and Trust
Company of Augusta, Defendants,

Of Whom Doris E. Tummillo is the Petitioner,

And

Georgia Bank and Trust Company of Augusta is a
Respondent.

Appellate Case No. 2013-001624

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE SPECIAL REFEREE’S HOLDING THAT THE CONTRACT FOR THE CONSTRUCTION OF A POLE BARN WAS UNAMBIGUOUS AS A MATTER OF LAW ON THE ISSUE OF THE SIZE OF THE INDIVIDUAL HORSE STALLS IN THIS POLE BARN 2

Conclusion 3

QUESTION PRESENTED

Did the Court of Appeals err in affirming the Special Referee’s holding that the contract for the construction of a pole barn was unambiguous as a matter of law on the issue of the size of the individual horse stalls in this pole barn?

STATEMENT OF THE CASE

The Respondent agrees that the Statement of the Case as outlined in the Petition for a Writ of Certiorari is correct, with one exception. Near the end of the first paragraph of the Statement of the Case the Petitioner states that the parties to the contract involved in this case agreed that the size of each horse stall would be “12’ x 12’”, suggesting actual measurements of “12 feet by 12 feet”. The Respondent contends that the record for this case shows that the parties agreed that the stalls would be “12 x 12”, which is a nominal measurement. The difference between actual and nominal measurements is a critical issue in this case.

ARGUMENT

A proceeding for the enforcement of a statutory lien, such as a mechanic's lien, is legal in nature." Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006) (citing Willard v. Finch, 123 S.C. 56, 116 S.E. 96 (1923)). In an action at law tried without a jury, the trial court's findings of fact will be upheld on appeal when the findings are reasonably supported by the evidence. Butler Contracting, 369 S.C. at 126, 631 S.E.2d at 255. The trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or clearly influenced or controlled by an error of law. *Id.* at 126-28, 631 S.E.2d at 255-56. Taylor, Cotton & Ridley, Inc. V. Okatie Hotel Group, LLC, et al., 372 S.C. 89, 641 S.E. 459 (Ct. App. 2007).

The Respondent respectfully contends that the decisions of the Special Referee and the Court of Appeals are not only supported by the facts presented at trial, but also by the legal principles applicable here.

The Special Referee found that the parties' contractual document is not ambiguous, and clearly sets forth the type, nature and specifications of the barn to be constructed. The document, in fact, sets forth that the barn is to be built as "12 feet on center, not interior dimensions." Thus, there is no specific reference in the contract to the interior dimensions of the barn stalls, or any written promise by the Respondent in that regard.

Had the contract involved in this case contained terms as to the interior size of the stalls, and those terms were ambiguous, then the legal authorities cited by the Petitioner would apply. However, and as found by the Special Referee, the actual terms of the parties' written agreement, itself, were not ambiguous.

The Petitioner contends that the Respondent verbally promised, beyond and outside the written terms of the contract, that the interior dimensions of the stalls would actually measure "12 feet by 12 feet." The Respondent denies that such a specific promise was made, and any verbal communications regarding the actual interior stalls centered around the concept of nominal and not actual measurements. That is, the stalls would be "12 by 12".

Both lay and expert evidence was offered to the Special Referee to assist him with understanding this concept. Columbia East Associations v. Bi-Lo, 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989); Maddox v. Cassady, 289 S.C. 57, 344 S.E.2d 620 (Ct. App. 1986). That evidence shows that the building specifications of the barn, as outlined in the Parties' written agreement, necessarily results in stall dimensions not measuring exactly "12 feet by 12 feet." In addition, evidence was offered to support the proposition that it is commonly known and accepted in the equestrian industry that the term "12 by 12" means that the interior of barn stalls are approximately "12 feet by 12 feet".

Thus, while the parties' written agreement as to building specifications is clear, parole or similar evidence is helpful in aiding the Court with an understanding of the type of structure involved in this case and expectations of the Parties. The Special Referee considered all of this evidence in reaching his rulings here, and specifically with respect to his finding that the Parties' agreement is not ambiguous.

The Petitioner relies upon Langston v. Niles, 265 S.C. 445, 219 S.E.2d 829 (1975) and other cited authorities to support her position that the Court has a duty to interpret the true intention of the parties in the face of an ambiguous agreement. The Respondent does not quarrel

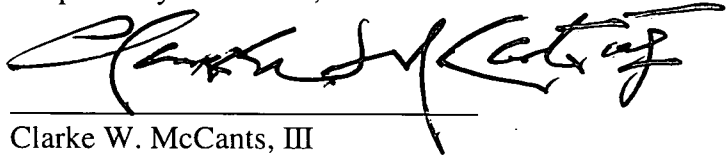
with that proposition. However, the Petitioner's argument assumes that the written document executed by the parties is unclear. Again, it is not. The Respondent delivered to the Petitioner the pole barn described in the written agreement. There is no written promise in the four corners of the document, unambiguous or ambiguous, which states that the individual stalls will actually measure twelve feet by twelve feet in dimensions.

CONCLUSION

The decisions of the Special Referee and the Court of Appeals in this matter are clearly supported by the evidence presented at the trial of this case. For the reasons stated, the Petition for a Writ of Certiorari should be denied.

November 16, 2015

Respectfully Submitted,



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S.C. SUPREME COURT

The Honorable J. Martin Harvey, Special Referee

Case No. 09-CP-02-958

Elite Construction, Inc., Respondent

v.

Doris E. Tummillo and Georgia Bank and Trust Company of Augusta,
Defendants,

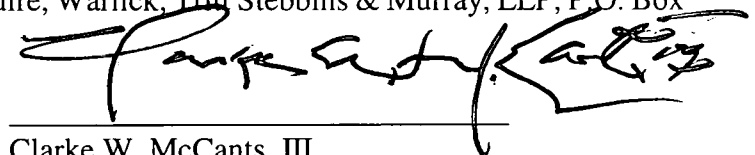
Of Whom Doris E. Tummillo is the Appellant,

And

Georgia Bank and Trust Company of Augusta is the Respondent

PROOF OF SERVICE

I certify that I have served a copy of the Respondent's Return to Appellant's Petition for Writ of Certiorari on counsel for the Appellant, Neal W. Dickert, Paul K. Simons, Jr, and T. Paul Timmerman by depositing a copy of it in the United States Mail, postage prepaid on November 16, 2015 addressed to Neal W. Dickert, Esquire, and Paul K. Simons, Jr., Esquire, Hull Barrett P.C., P. O. Box 1564, Augusta, GA 30903-1564 and T. Paul Timmerman, Esquire, Braithwaite Law Firm, P.O. Box 324, Aiken, S.C. 29802 and upon Counsel for Georgia Bank and Trust Company of Augusta addressed to James S. Murray, Esquire, Warlick, Tritt Stebbins & Murray, LLP, P.O. Box 1495, Augusta, GA 30903-1495.



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