

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

NOV 09 2015

Eugene C. Griffith, Jr., Circuit Court Judge

SC Court of Appeals

Case No. 2012-CP-24-00574
Appellate Case No. 2014-002749

Miller Construction Company, LLC.....Respondent/Appellant

v.

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

RESPONDENTS' FINAL BRIEF OF APPELLANTS/RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT CORRECTLY DETERMINE THAT MILLER CONSTRUCTION COMPANY, LLC WAS NOT ENTITLED TO PREJEDGMENT INTEREST ON ITS CLAIM PURSUANT TO S.C. CODE ANN. § 34-31-20(A)(SUPP. 2005)?

STATEMENT OF THE CASE

Respondent-Appellant Miller Construction Company, LLC (“Miller”) commenced this action on May 25, 2012, seeking damages for breach of contract for failure to pay the balance due on its subcontract with Appellant-Respondent PC Construction of Greenwood, Inc. (“PC Construction”) and asserting a cause of action on a payment bond against Safeco Insurance Company of America (“Safeco”). (R. pp. 14-20). On April 23, 2013, PC Construction filed an Amended Answer and Counterclaim, asserting a counterclaim against Miller for breach of contract due to its delay of the Project. (R. pp. 34-41). Prior to trial, PC Construction was permitted to further amend its Answer and Counterclaim, asserting as an affirmative defense that Miller was not properly licensed, and therefore, barred from pursuing a claim for breach of contract. (R. p. 162, line 8 – p. 164, line 5).

A non-jury trial occurred in this matter on November 4, 5, and 6, 2013. At the direction of the Court, the parties submitted post-trial briefs to the Court on or about November 20, 2013. (R. pp. 71-82; R. pp. 65-70). On July 8, 2014, the Court issued a Final Order and Judgment on the merits against PC Construction for breach of contract in the amount of \$51,270.08 and ordered payment to be made immediately by Safeco pursuant to the bond. (R. p. 9).

On July 21, 2014, Miller moved the Trial Court to reconsider, alter or amend its order on the grounds that the trial court erred in not granting respondent pre-judgment interest on the breach of contract cause of action. On July 18, 2014 PC Construction and Safeco also filed a timely Rule 59(e) Motion to Alter or Amend the July 8 Order on the grounds that the Trial Court erred as a matter of law in finding that PC Construction

could not recover delay damages from Miller and it failed to consider the overwhelming evidence that Miller in fact caused delays on the Project. (R. pp. 88-99). The Trial Court denied both motions by Order dated November 18, 2014 and filed on November 26, 2014. (R. pp. 12-13).

PC Construction then served its Notice of Appeal, seeking review of the July 8, 2014 and the Order denying Appellants Rule 59(e) Motion filed on November 26, 2014. On January 6, 2014, Miller filed a Notice of Cross-Appeal of the same.

FACTS

PC Construction was the general contractor for the Lander University Jeff May Sports Complex in Greenwood, South Carolina ("the Project"). On December 15, 2009, PC Construction entered into a general contract (the "Prime Contract") with Lander University (the "Owner") for the construction of soccer, baseball, softball and tennis facilities on the Lander University campus for \$7,005,310.00. (R. pp. 512-528).

On December 17, 2009, PC Construction entered into a subcontract with Miller (the "Subcontract") to perform construction services, including but not limited to sitework, grading, paving, and installation of storm sewer for the Project. (R. pp. 533-557). The original amount of the Subcontract was \$492,424.00. (R. p. 534).

The terms of the Subcontract are clear and unambiguous with respect to Miller's obligations to timely perform its scope of work, and there are repeated references to the fact that **TIME IS OF THE ESSENCE** in regard to performance and completion of the work. (R. pp. 536-537). The portions of the Subcontract that are relevant to this action provide as follows:

ARTICLE 4

a. Subcontractor recognizes PC Construction of Greenwood, Inc.'s obligations to the Owner for timely progress upon and completion of the Work and each part thereof and that **TIME IS OF THE ESSENCE** in the performance of the Work under this Subcontract. Subcontractor agrees to perform Subcontractor's Work so that the entire Project and every portion thereof will be completed in accordance with the Contract Documents, including any scheduling requirements contained in this Subcontract. ...

b. **JOB SCHEDULE.** PC Construction of Greenwood, Inc. shall furnish and publish a progress schedule for the Project. This will constitute the basis for starting and finishing of the Subcontractor's Work....PC Construction of Greenwood, Inc. will seek and use information from the Subcontractor regarding durations of tasks, sequences, etc. in formulating the progress schedule. The Subcontractor shall take whatever measures necessary to ensure completion within the framework of the schedule.

.1 The Subcontractor is solely responsible for scheduling his manpower and equipment to meet the needs of the Project and maintain the flow of construction as required by the job schedule. PC Construction of Greenwood, Inc. will not perform required coordination or supervision of the Subcontractor's work force.

ARTICLE 5

d. **COORDINATION OF ITS WORK WITH OTHERS.** Subcontractor agrees as follows:

.4 Subcontractor shall be responsible for taking all field measurements necessary to ensure the proper fitting of Subcontractor's Work with the Work of PC Construction of Greenwood, Inc. and others. Field measurements shall be taken and coordinated in a timely manner to avoid delaying the Job Schedule;

j. **JOB SITE CONDITIONS.** The Subcontractor shall perform his work in accordance with the following conditions:

.1 ... Should the Subcontractor, in the sole judgment of PC Construction of Greenwood, Inc., delay the progress of the Work, the Subcontractor shall, at his own expense and cost, work such overtime as may be necessary to finish the Work within the Schedule.

ARTICLE 6

a. **CHANGES.** Without nullifying this Subcontract or any bond given pursuant to this Subcontract, PC Construction of Greenwood, Inc. may, in writing, direct the Subcontractor to make changes to the Subcontractor's Work, which changes are within the scope of this Subcontract. Within ten (10) days of PC Construction of Greenwood, Inc.'s directive or if the Contract Documents require notice to be given by PC Construction of Greenwood, Inc. to the Owner is less than ten days, Subcontractor shall comply with the notice requirements of the Contract Documents by giving notice and a written proposal to PC Construction of Greenwood, Inc. within such time as to enable PC Construction of Greenwood, Inc. to give notice to the Owner or to comply with any other notice requirements of the Contract Documents. **FAILURE OF THE SUBCONTRACTOR TO SUBMIT A WRITTEN PROPOSAL WITHIN THE TIME PROVIDED HEREIN, OR TO PROVIDE A WRITTEN NOTICE WITHIN THE TIME REQUIRED HEREIN, SHALL CONSTITUTE A WAIVER OF THE SUBCONTRACTOR'S RIGHT TO AN ADJUSTMENT OF THE SUBCONTRACT PRICE OR JOB SCHEDULE OR, WHERE A CREDIT IS INVOLVED, SUBCONTRACTOR ACCEPTS THE AMOUNT DETERMINED BY THE OWNER, ARCHITECT AND/OR PC Construction of Greenwood, Inc.** Any adjustments to Subcontract Price or Job Schedule, if any, shall be set forth in a written Subcontract Change Order. ...

... THERE WILL BE NO ADJUSTMENT TO THE SUBCONTRACT PRICE OR JOB SCHEDULE WHICH ARE NOT ORDERED IN WRITING BY PC Construction of Greenwood, Inc. AND SIGNED BY THE PROJECT MANGAER, Gary Piontek...

e. **DELAY.** If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the Job Schedule shall be adjusted accordingly, but only to the extent an extension of time is obtained by PC Construction of Greenwood, Inc. from Owner under the terms of the Contract Documents; provided that Subcontractor must give written notice of delay to PC Construction of Greenwood, Inc. within such time as to enable PC Construction of Greenwood, Inc. to give Owner any notices required by the Contract Documents, but in any event, no later than five (5) days after the occurrence of the event claimed to be substantial delay, otherwise the right to such an adjustment to the Job Schedule is waived.

...
... If the Contract Documents provide for liquidated or other damages for delay and such damages are so assessed against PC Construction of Greenwood, Inc., then PC Construction of Greenwood, Inc. may assess same against Subcontractor in proportion to Subcontractor's share of the responsibility for such delay as determined by PC Construction of Greenwood, Inc. **Subcontractor shall also be liable for all additional damages PC Construction of Greenwood, Inc. may incur as a result of Subcontractor's failure to complete the Subcontractor's Work or any portion thereof in accordance with the Job Schedule, including direct costs, liquidated damages and/or PC Construction of Greenwood, Inc. extended overhead.**

(R. pp. 536-542).

For the duration of the Project, Miller submitted 87 change orders to PC. (R. p. 575). Of those 87 change orders, only one, Change Order 40, included a request for additional days due to delays caused by the discovery of a large amount of asbestos in early 2010 at the softball field and main parking area. (R. pp. 576-578; R. p. 266, lines 3-22). PC added additional days to the schedule to compensate Miller for the asbestos issue pursuant to Change Order 40, and PC does not claim any damages against Miller for that delay. (R. p. 316, line 6 –p. 317, line 9; R. p. 372, line 24–p. 373, line 3).

After the asbestos issue was resolved, Miller failed to maintain the Schedule and caused significant additional delays to the Project. (R. p. 281, line. 22–p. 284, line. 3; R. p. 357, lines 20-23). PC Construction communicated regularly with Miller about the Project Schedule and the problems PC Construction was having with Miller. (R. pp. 582-617; R. p. 284, line 1 –p. 292, line 23). Miller submitted what it purported to be as its final pay application to PC Construction on or around November 28, 2011. (R. pp. 475-478). However, PC Construction did not remit payment to Miller because it needed to factor the impact of the delay damages caused by Miller as required by the Subcontract before a sum certain could be determined which resulted in no payment being due Miller. (R. p. 357, lines 20-23). PC Construction's claim for damages it incurred was not based on the imposition of liquidated damages; rather, it was based on the additional damages incurred by PC Construction for direct costs and extended overhead as a result of Miller not maintaining the Project Schedule as specifically contemplated by Article 6.e of the Subcontract set forth above. (R. p. 372, line 24 –p. 373, line 3; R. pp. 618-623; R. p.

629). The amount presented that was owed by Miller to PC Construction was \$89,686.89. (R. p. 362, lines 8-23; R. p. 629).

STANDARD OF REVIEW

“In an action at law, on appeal of a case tried without a jury, the appellate court’s standard of review extends only to the correction of errors of law.” *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 271, 705 S.E.2d 73, 76 (Ct. App. 2010) (quoting *Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004)). In an action at law tried without a jury, the appellate court will not disturb the trial court’s findings of fact unless there is no evidence to reasonably support them; however, an appellate court may make its own determination on questions of law and need not defer to the trial court’s rulings in this regard. *Auto-Owners Ins. Co. v. Rhodes*, 748 S.E.2d 781 (S.C. 2013); *Steege v. Otto Zollinger, Inc.*, 287 S.C. 207, 336 S.E.2d 870 (1985) (overturning findings of fact of trial court where there was no evidence to reasonably support the conclusion that the contract was rescinded).

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE AWARD OF PREJUDGMENT INTEREST WAS NOT WARRANTED UNDER S.C. CODE ANN. § 34-31-20(A) IN THAT THE CLAIM WAS UNLIQUIDATED, UNCERTAIN AS TO QUANTITY AND FAILED TO ASSERT A TRUE STATEMENT DUE AT A SPECIFIC POINT.

The Trial Court granted involuntary nonsuit as to PC Construction’s claim for breach of contract arising out of Miller’s delay on the Project, finding that because the PC Construction was not assessed liquidated damages by the Owner it could not recover liquidated damages against Miller. PC Construction has appealed the Final Order of the Trial Court on the basis that the determination to grant an involuntary nonsuit was a result of error of law and failed to consider significant relevant evidence in the Record as

to the basis for PC Construction's claim for breach of contract. To the extent PC Construction is successful in its appeal, Miller's claims regarding prejudgment interest are moot. Should the Final Order determination on PC Construction's claims be affirmed, the Trial Court's determination not to award prejudgment interest should be affirmed.

"[A]n award of prejudgment interest is not proper if the measure of recovery is not fixed by conditions existing at the time the claim arose." *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 148, 641 S.E.2d 53, 60 (Ct. App. 2007). "[P]rejudgment 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. Prejudgment is not allowed on an unliquidated claim in the absence of an agreement or statute." *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006). "In general, damages are unliquidated where they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict." 22 Am. Jur. 2d *Damages* § 489 (2003).

Miller asserts that it is entitled to prejudgment interest based on its claim that PC Construction failed to pay its final pay application in full with said amount being \$53,695.08 as set forth in its Complaint. (R. pp. 14-20). It is further supported by the erroneous assertion that PC Construction admitted that it owed Miller \$51,270.08 subject to its counterclaim; and therefore, the amount owed to Miller was certain or capable of certainty based upon the previously agreed upon calculations in the Subcontract. (Appellants Brief, p. 6). Randy Piontek, PC Construction's President, merely testified

that the contract balance was \$51,270.08 after change order accounting and not that PC Construction had determined that it owed Miller that amount. (R. p. 359, lines 7-20). Furthermore, in addition to the erroneous assertion of PC Construction's agreement as to amounts owed, Miller's simple approach to the application of prejudgment interest fails to end the inquiry in that it omits pertinent established facts and fails to apply prior caselaw analysis from this Court concerning prejudgment interest.

The amount of any such claim that is asserted by Miller and "demandable" requires an application of all of the pertinent provisions of the Subcontract. A claim cannot be considered a liquidated claim merely by the submission of an invoice. A determination of what might be due as final payment requires an application of what the impact may be for delay on the Project incurred as a result of Miller's actions or inactions. The Subcontract between PC Construction and Miller states in relevant parts:

e. **DELAY.** If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the Job Schedule shall be adjusted accordingly, but only to the extent an extension of time is obtained by PC Construction of Greenwood, Inc. from Owner under the terms of the Contract Documents; provided that Subcontractor must give written notice of delay to PC Construction of Greenwood, Inc. within such time as to enable PC Construction of Greenwood, Inc. to give Owner any notices required by the Contract Documents, but in any event, no later than five (5) days after the occurrence of the event claimed to be substantial delay, otherwise the right to such an adjustment to the Job Schedule is waived.

...

... If the Contract Documents provide for liquidated or other damages for delay and such damages are so assessed against PC Construction of Greenwood, Inc., then PC Construction of Greenwood, Inc. may assess same against Subcontractor in proportion to Subcontractor's share of the responsibility for such delay as determined by PC Construction of Greenwood, Inc. **Subcontractor shall also be liable for all additional damages PC Construction of Greenwood, Inc. may incur as a result of Subcontractor's failure to complete the Subcontractor's Work or any portion thereof in accordance with the Job Schedule, including direct costs, liquidated damages and/or PC Construction of Greenwood, Inc. extended overhead.**

(R. pp. 541-542, Article 6.e)(emphasis added).

As such, the agreement between the parties concerning what amount may be due or "demandable" by Miller required an application of additional costs incurred by PC

Construction as a result of any delay. Importantly, the Subcontract provides no mathematical calculation, let alone any guidelines, for how such delay damages will be computed beyond stating that Miller, as subcontractor, is responsible for the same. The measure of computation of the delay damages presents “an intermediate question that ha[s] to be decided before the measure of damages [can] be ascertained.” *Vaughn Dev., Inc. v. Westvaco Dev. Corp.*, 372 S.C. 576, 580, 642 S.E.2d 757, 759 (Ct. App. 2007).

The uncertainty regarding the calculation of delay damages distinguishes this case from those relied upon by Miller, where the measure of damages was fixed at the time the claim was made. In other words, PC Construction is not merely disputing an invoice. Rather, it asserts that a determination of an amount due under the Subcontract requires the application of Article 6.e, of which there is no formulaic or mathematical approach to determine a sum certain. An award of prejudgment interest in this case would expand the interpretation of ‘ascertainable’ as set forth in the statute beyond that defined in the cases cited by Miller. See, *Butler Contracting, Inc.*, 369 S.C. at 133, 631 S.E.2d at 258; *Smith-Hunter Const. Co., Inc. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005). Indeed, this Court in *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 656 S.E.2d at 765 (Ct. App. 2007), conducted an historical analysis of the development of the law involving the concept and principle of prejudgment interest. In so doing, this Court cited a number of cases containing analysis and facts helpful to the issues in this case. See, *Southern Welding Works, Inc. v. K&S Const. Co.*, 286 S.C. 158, 332 S.E. 102 (Ct. App. 1985); *T.W. Morton Builders, Inc. v. von Buedingen*, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994),

In *Southern Welding Works, Inc.*, the Court found that pre-judgment interest was not appropriate. In so doing, the Court explained:

Southern proved the account was actually stated. However, in its answer K&S specifically denied the parties ever agreed it was a true account. Consequently, the burden was on Southern to prove agreement to the account as stated. In the record before us there is no evidence that K&S expressly or impliedly agreed there was at any specified time due to Southern the sum of money specified in the account. Likewise, we find no evidence that the parties agreed to a contract price for the repairs before they were performed.

Id. at 165-66, 332 S.E.2d at 106.

The Court in *T.W. Morton Builders, Inc. v. von Buedingen*, held that prejudgment interest was inappropriate where the parties had agreed to changes in the project, but did not have a stated account as to the cost overruns.

T. W. Morton's success in proving the additional amount due for the renovations does not automatically translate into entitlement to prejudgment interest on the unpaid balance. To establish its right to prejudgment interest, T. W. Morton had the burden of establishing a stated account and the parties' agreement, express or implied, that the account is a true statement due at a specific point. The master's implicit finding of no stated account is supported by the testimony of Dr. von Buedingen, who vigorously disputed the amount due T.W. Morton for cost overruns. We accordingly affirm the denial of prejudgment interest.

Id. at 326 S.C. at 399, 450 S.E.2d at 93.

Similarly, PC Construction and Miller agreed that Miller would be responsible for delay damages pursuant to Article 6.e. The Subcontract required consideration of this provision before a sum certain could be determined. However, Article 6.e provided no mechanism or agreement for calculating the impact of such delays. Furthermore, there is no agreed upon stated account or any evidence that the alleged account claimed by Miller was agreed upon, expressly or impliedly, as a true statement due at a specific point. The party claiming prejudgment interest has the burden of establishing a stated account and

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the parties' agreement that the account is a true statement due at a specific point. Miller has not established that its claim was a sum certain or that its claim arises from an agreement made by the parties, and therefore is not entitled to prejudgment interest by statute or agreement.

II. TO THE EXTENT THAT THE COURT DETERMINES THAT PREJUDGMENT INTEREST IS WARRANTED UNDER S.C. CODE ANN. § 34-31-20(A), THE TRIAL COURT FAILED TO MAKE SPECIFIC FINDINGS AS TO WHAT POINT A LIQUIDATED CLAIM AROSE FOR PURPOSES OF TRIGGERING THE ACCRUAL OF PREJUDGMENT INTEREST

As stated, PC Construction has appealed the Trial Court's determination to grant Miller's motion for involuntary nonsuit as to PC Construction's claim for breach of contract arising out of its delay on the Project. To the extent PC Construction's appeal is granted, the issue of prejudgment interest becomes moot. However, should the Court affirm the Trial Court's determination and should the Court determine prejudgment interest is appropriate, there are insufficient findings in the Record to determine at what point a sum certain demandable claim accrued. There are no findings in the Final Order & Judgment or the Order on the Motion to Alter or Amend that would enable this Court to determine when payment was demandable or when the sum was certain or capable of being reduced to certainty. See, *Southern Welding Works, Inc.*, 286 S.C at 165, 332 S.E.2d at 106.

While PC Construction asserts that it was error for the Trial Court to do so, the Trial Court found that PC Construction could not recover any liquidated damages against Miller because "PC was never assessed with any liquidated damages for delay from the

owner.” (R. p. 8).¹ According to the Trial Court, in order for PC Construction to recover delay damages from Miller, it would first have to get these damages assessed from the Owner. The lack of assessment from the Owner hinders the measure of recovery from being fixed as required by the statute and the established caselaw and prohibits the triggering of prejudgment interest.

Miller asserts that prejudgment interest began to accrue on March 29, 2012. (Appellants Brief, p. 7; R. pp. 84-85). Even accepting the findings of the Trial Court, such an assertion is improper. The Trial Court found that final payment from the Owner was an express condition to PC Construction’s obligation to issue final payment to Miller, which was some time in 2013. (R. pp. 8-9). As such, there could not have been a sum certain until some time well after the March 29, 2012 date asserted by Miller as the accrual time for prejudgment interest.

The conditions existing at the time Miller brought its claim did not fix the measure of recovery, and the sum owed Miller, should the findings of the Trial Court stand, cannot be readily determined based on the Record. Should the Court determine that prejudgment interest is appropriate, the case should be remanded to the Trial Court for a determination as to when the sum certain was demandable under the Subcontract.

CONCLUSION

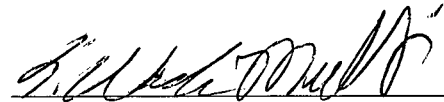
PC Construction’s appeal of the Trial Court determination warrants reversal of the Final Order and Judgment as to PC Construction’s claims. However, to the extent the Trial Court’s determination to award Miller the sum of \$51,270.88 is affirmed, then the

¹ The Trial Court’s determination that as a matter of law PC Construction could not recover any type of liquidated damages against Miller is erroneous in this case as PC Construction was not seeking liquidated damages. (R. p. 372, line 24 –p. 373, line 3).

Trial Court's determination that the award of prejudgment interest was not warranted should be affirmed. In the alternative, the matter should be remanded to the Trial Court for a determination as to the appropriate date for the accrual of prejudgment interest.

Respectfully submitted,

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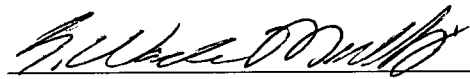
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RESPONDENTS' BRIEF CERTIFICATION

I certify that the **Respondents' Final Brief of Appellants/Respondents** conforms to the requirements of Rule 211(b) of the Appellate Court Rules.

November 9, 2015



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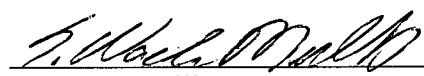
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PROOF OF SERVICE

I certify that I have served the **RESPONDENTS' FINAL BRIEF OF APPELLANTS/RESPONDENTS** upon the attorney of Record for the Respondent/Appellant by mailing a copy of the same to their attorney of record, David J. Brousseau, Esquire, McIntosh, Sherard, Sullivan & Brousseau, Post Office Box 197, Anderson, South Carolina 29622 via United States mail, postage prepaid this 9th day of November 2015.


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