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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Mikell Ross Scarborough, Master-In-Equity Judge

Case No. 2007-CP-10-0750

Mevers Kitchens and Baths, LLC,

Respondent,

v.

Maryann Wagner and Stipp Contracting, LLC,
Defendants,

of whom,

Maryann Wagner is Petitioner.

PETITION FOR WRIT OF CERTIORARI

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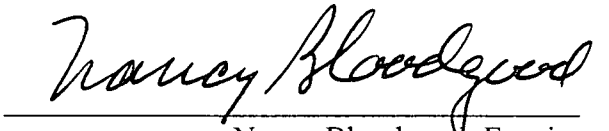
I. CERTIFICATE OF COUNSEL PURSUANT TO SCACR 242(D)(1)

The undersigned counsel certifies that a petition for rehearing was made and finally ruled upon by the Court of Appeals. Specifically, Counsel for Petitioner filed a Petition for Rehearing Pursuant to SCACR Rule 221 on October 21, 2015. The Court of Appeals ruled on the Petition for Rehearing by denying the same on January 21, 2016.



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II. QUESTIONS PRESENTED FOR REVIEW

1. **Did the Court of Appeals fail to address Petitioner's arguments regarding Sections 29-5-15 and 29-5-20 of the South Carolina Code?**

2. **Did the Court of Appeals overlook Petitioner's argument that the Lower Court's holding regarding Section 40-59-410 was unsupported by the facts?**

III. STATEMENT OF THE CASE

Respondent Mevers Kitchens and Baths, LLC is a business that sells and installs kitchen cabinets. (R. p. 57, l. 20-23; p. 55, l. 7-22.) Stipp Contracting LLC (Stipp), a general contractor, entered into a contract to build Petitioner's house on or about December 5, 2005. (R. pp. 98-103; p. 72, l. 17-19.) The contract between Petitioner and the general contractor Stipp states that Petitioner agreed to a 10% surcharge being added by Stipp to all materials and subcontractors. (Id.) Stipp agreed to furnish all labor, materials and equipment necessary for the proper construction and completion of the home. (Id.) Respondent acknowledges that Stipp was the general contractor of Petitioner's home. (R. p. 59, l. 22 – p. 60, l. 1.)

While the house was being built in early March of 2006, Petitioner was told by Stipp to go to Respondent's store to pick out her kitchen cabinets. (R. p. 73, l. 14-20.) After Petitioner chose her cabinets, she was provided a document labeled "Cabinetry Quote" which was subsequently signed by two persons, Petitioner and an employee of the general contractor Stipp. The Cabinetry Quote was not signed by anyone representing Respondent Mevers Kitchens and Baths, LLC. (R. pp. 92-93.) The Cabinetry Quote does not indicate which of the two (2) persons who signed the Quote who is responsible for paying for the kitchen cabinets. (R. p. 93, l. 8-10; p. 64, l. 23 – p. 65, l. 1; pp. 92-93.)

The Cabinetry Quote does not state when the cabinets will be ordered or when the 50% deposit is due. (R. p. 65, l. 2-8; pp. 92-93.) The Cabinetry Quote also does not state who is going to pay the 50% deposit or when the cabinets will be delivered. (R. p. 65, l. 9 – p. 66, l. 1; pp. 92-93.) Petitioner testified she knew she was choosing cabinets but she did not know who would install them. (R. p. 89, l. 7-17.)

As Petitioner was concerned that the quoted price of $20,760 for the cabinets exceeded the $15,000 allowance for kitchen cabinets Stipp had included in her construction contract, she questioned Stipp and was advised in an email that Respondent had quoted her the general contractor's price and that Stipp would continue to work with Respondent to get the price down. (R. p. 74, l. 22 – p. 76, l. 1; p. 105.)

Respondent's managing partner Mevers testified he understood Stipp was supposed to pay the 50% deposit on the cabinets so Respondent never billed Petitioner for the cabinets. (R. p. 66, l. 2 – p. 67, l. 4.) In fact, when Respondent did not receive the 50% deposit, Mevers billed the general contractor Stipp, not Petitioner. (R. p. 67, l. 11-21.) When Mevers was in Petitioner's kitchen during the cabinet installation, he never asked Petitioner to pay for the cabinets. (R. p. 68, l. 4-21.)

Before the kitchen cabinets were installed, Stipp (not Respondent) invoiced Petitioner the cost of the kitchen cabinets minus his 10% commission, which Petitioner paid in full to Stipp. (Id.; R. pp. 106-112.) Stipp thereafter signed two (2) waivers of lien prepared by Petitioner on May 26, 2006 and August 29, 2006 after he had received payment in full from Petitioner for the invoiced cabinets. (R. pp. 106-112.) The Lien Waivers both stated that the general contractor Stipp "agrees it is responsible for paying any of its subcontractors involved in such work." (Id.) Stipp later provided Petitioner a

list of all of the subcontractors he had used to build her home, including Respondent on the list, and Stipp requested in writing that Petitioner not contact any of the subcontractors directly if she had problems. (R. p. 104.)

On November 20, 2006, almost three (3) months after Petitioner had paid the general contractor in full for the cabinets, Respondent notified Petitioner for the first time that he had not been paid for the kitchen cabinets. (R. p. 79, l. 5-12.) Petitioner contacted Respondent and told him she had already paid Stipp in full for the cabinets several months earlier. (R. p. 70, l. 4-18.) Petitioner refused to pay Respondent as she had already fully paid the invoiced cost of the cabinets to Stipp. Petitioner paid the general contractor all he was owed and moved into her house in September before Respondent files his lien two months later in November. (R. p. 79, l.5-17; p. 85, l. 5-20.)

IV. ARGUMENT

1. The Court of Appeals failed to address Petitioner's arguments regarding Sections 29-5-15 and 29-5-20 of the South Carolina Code.

Chapter 5 of Title 29 of the South Carolina Code governs mechanics' liens. Pursuant to rules of statutory construction, its Sections must be read together and interpreted as a whole. Section 29-5-10 defines and explains a mechanics' lien action, Section 29-5-15 explains the procedural requirements of filing a mechanics' lien, and Section 29-5-20 *limits* recovery for laborers, mechanics, subcontractor, sub-subcontractors, suppliers, and other persons furnishing materials for the improvement of real estate under certain circumstances. The Court of Appeals erred by ignoring the limitations imposed by Section 29-5-20 and overlooking Petitioner's argument that Section 29-5-20 bars Respondent's right to file a mechanic's lien. See, Skiba v. Gessner, 374 S.C. 208, 211, 648 S.E.2d 605, 611 (2007) (foreclosure action dismissed because

respondent did not have a contractor's license at the time the work was performed per S.C. Code § 40-11-30 and at the time he was a contractor performing more than $5,000 of work per S.C. Code § 40-11-20 (8)).

Here, the undisputed evidence was that Respondent was a subcontractor for the construction of Petitioner's home, not the general contractor. (R. p. 59, l. 22 – p. 60, l. 1; p. 72, l. 17-25; p. 104.) Respondent, as the subcontractor, dealt with the general contractor, not directly with the owner (Petitioner). (R. pp. 66-67.) Petitioner's only interaction with Respondent was that the general contractor sent Petitioner to Respondent's business to choose her cabinets. (R. p. 73.) The general contractor otherwise directed Petitioner not to deal with his subcontractors and his employee signed on "approved" line for Respondent's cabinet quote. (R. p. 63, l. 11-13; pp. 73-78.) Respondent installed cabinets at Petitioner's home, but said nothing to Petitioner about paying for the cabinets. (R. p. 66-68.) Respondent billed the general contractor and expected him to pay for the cabinets. (Id.)

As Respondent was clearly a subcontractor and/or supplier, the Lower Court should have applied S.C. Code §29-5-20 in analyzing whether Respondent's mechanic's lien was proper. Section 29-5-20 allows suppliers, subcontractors, and sub-subcontractors to file mechanics' liens, but only in certain circumstances and only for a limited amount of money. Specifically, liens filed by sub-subcontractors and suppliers cannot exceed the amount of money due by the contractor to the subcontractor. In other words, if the contractor has paid the subcontractor in full, a sub-subcontractor (e.g., an independent contractor of a subcontractor) cannot file a mechanic's lien against the property at issue. Obviously, the sub-subcontractor could file an action in law or equity against the

subcontractor if the subcontractor withheld payment from the sub-subcontractor, but cannot file a lien against the property per Section 29-5-20.

The statute further states "in no event shall the total aggregate amount of liens on the improvement exceed the amount due by the owner." §29-5-20(B). See, Action Concrete Contrs., Inc. v. Chappelear, 404 S.C. 312, 745 S.E.2d 77 (homeowner's defense to a foreclosure action is that the general contractor was been paid the full amount under the contract before receiving notice of the subcontractor's lien); see also, Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 120, 659 S.E.2d 158, 165 (2008) ("The subcontractor's lien, however, is not intended to create a windfall to the subcontractor. ...the owner's liability is limited to the remaining unpaid balance of the contract with the general contractor at the time the owner receives notice from the subcontractor of the general contractor's non-payment."); in accord, Maddux Supply Co. v. Safhi, 316 S.C. 404, 411, 450 S.E.2d 101, 105 (1994); Wood v. Hardy, 235 S.C. 131, 110 S.E.2d 157 (1959); Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 630, 93 S.E.2d 855, 860 (1956) (delay in notice of a lien by the subcontractor does not operate to the detriment of the homeowner.)

Here, Petitioner was the owner of the property and it is undisputed that she had paid the general contractor for the amount he invoiced her for the cabinets and the general contractor had signed two lien waivers. (R. p. 107; p. 110.) Respondent admitted he has no evidence that any money is owed to the general contractor for the cabinets. (R. p. 71, l. 1-11.) Further, there was evidence in the Record that the general contractor actually owed Petitioner money because her home was not up to code as he agreed to do

by contract (R. pp. 140-151; p. 79, l.13 – p. 85, l. 19) and Petitioner had to finish the construction work the general contractor failed to finish. (R. pp. 147-151.)

As no money was owed to the general contractor by the Petitioner, Respondent's subcontractor cannot file a mechanic's lien against Petitioner's property. Section 29-5-20 bars the use of a mechanic's lien in this fact scenario; Respondent can seek payment from the general contractor, not from Petitioner.

The Court of Appeals ignored Petitioner's argument and did not address the applicability of Section 29-5-20 to these facts. Further, the Court of Appeals also overlooked the applicability of Section 29-5-15(A), which states that:

> To file a mechanic's lien, a contractor must provide the clerk of court or register of deeds proof that he is licensed or registered if he is required by law to be licensed or registered. As proof of licensure or registration, the contractor must record his contractor license number or registration number on the lien document when the lien document is filed. (emphasis added)

"A mechanics lien exists only by virtue of statute; therefore, one's right to a mechanic's lien is wholly dependent upon the language of the statute creating it ...We are not at liberty to depart form the plain meaning of the mechanic's lien's statutory language." Skibka v. Gressner, 374 S.C. 212, 648 S.E.2d 606-607, supra. Per S.C. Code §29-5-15(A), Respondent's mechanic's lien is invalid on its face as there is no contractor's license listed on it. Respondent's contractor's license number is not recorded on the lien. As no contractor's license is listed on the lien at issue, the lien is invalid. The Court of Appeals failed to rule on the applicability of this Section to the facts of this appeal and failed to consider Petitioner's argument that the Lower Court erred in failing to apply this Section.

2. The Court of Appeals erred in overlooking Petitioner's argument that the Lower Court's holding regarding Section 40-59-410 was unsupported by the facts.

Per S.C. Code §40-11-370(C), an entity which does not have a valid license cannot bring an action in law or equity to enforce a contract. Respondent does not have a valid license for residential home building or residential specialty contracting. (R. pp. 94-95.) S.C. Code Section 40-59-410 specifies the requirements necessary for firms to engage in residential home building and residential specialty contracting and specifically states that firms cannot hold a license or registration for building or contracting. However, employees of a firm can perform building and contracting services if the firm has a residential business certificate of authorization or if a 51% owner of the firm is the sole resident licensee of the firm. Here, there was no evidence in the Record that Respondent had a certificate of authorization or that it's presumed "resident licensee" (Roy Mevers) owned 51% of the firm. Thus, Respondent's employees (including Billy Mevers) were not authorized to perform residential building or residential specialty contracting through Section 41-59-410(A).

Subsection (B) provides an alternate method of authorization for employees by stating that work by individuals can be authorized "through a firm" if one of the firm's owners or officers is individually licensed and designated as the firm's resident licensee and the firm has obtained a $15,000 surety bond and has been issued a residential business certificate of authorization. The Court of Appeals cites to S.C. Code Section 40-59-410(B) in support of its affirmation of the Lower Court's judgment against Petitioner. However, the Court of Appeals did not cite the entire text of subsection (B) and ignored the part of the statue that requires that the firm obtain a surety bond and a certificate of

authorization. Respondent does not meet these requirements and, thus, Roy Mevers and Respondent were not authorized to engage in residential building or specialty contracting. There is no evidence in the Record that Respondent met the requirements of Section 40-59-410(A) or (B).

Per S.C. Code §40-11-370(A), "It is unlawful to use the term "licensed contractor" or to perform or offer to perform general or mechanical construction without first obtaining a license as required by this chapter." Further, pursuant to subsection (B) of this statute, it is "unlawful to engage in construction under a name other than the exact name which appears on the license issued pursuant to this chapter. "Engaging in construction" includes marketing, advertising, using site signs, and submitting contracts." (Id.) Respondent, through Billy Mevers, engaged in construction. Roy Mevers did not engage in any construction at Petitioner's home. As Respondent is not a licensed contractor, it cannot enforce the document it alleges is a contract, nor can it enforce a mechanic's lien. S.C. Code §40-11-370(C) bars Respondent's ability to recover under law or equity and the Court of Appeals erred in finding that Respondent could enforce its alleged contract and mechanic's lien pursuant to 40-59-410(B). Subsection (B) includes additional requirements that were overlooked by the Panel.

S.C. Code §29-5-20 is intended to protect suppliers who deal with general contractors and limits a supplier's recovery to the amount due to the contractor. The Master erred in finding that because Petitioner accepted and signed a cabinetry quote that Respondent was dealing directly with her. The Master made no findings of fact as to this issue and again ignored the significant evidence in the Record to the contrary.

The Record reflects the general contractor signed to approve the quote; he chose Respondent's business and directed Petitioner to go there to choose cabinets; the general contractor required Petitioner not to contact any subcontractors (such as Respondent) if she had problems; he negotiated the price of the cabinets with Respondent; and, most tellingly, Respondent sent the general contractor the bill and expected payment from him, not the Petitioner. (R. p. 66, l. 2-8; p. 68- p. 69, l. 13; p. 73, l. 21- p. 75, l. 4; pp. 92-93; pp.104-105.) Petitioner testified she never even met Billy Mevers until he was installing her cabinets in her kitchen which was five (5) months after she approved the quote. (R. p. 78, l. 5-25.) It was only when the contractor failed to pay for the cabinets that Respondent looked to Petitioner for payment. The Record clearly reflects and, the Respondent agreed, that the general contractor was responsible for payment; the evidence does not support the Master's conclusion that Petitioner ever agreed to pay him for the cabinets. See, Corotzes v. Trapalis, 259 S.C. 244, 247, 191 S.E.2d 523, 524 (1972) ("the proof in this case is not clear, cogent and convincing") citing Caulder v. Knox, 251 S.C. 337, 345, 162 S.E. 2d 262 (1968); see also, Kerr v. Kennedy, 105 S.C. 496, 90 S.E. 177 (1916). The Court of Appeals erred in affirming the Master's Order as the Order omitted relevant facts pertaining to the existence of any agreement between the parties.

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Date: 2-22-16

Charleston, South Carolina

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PROOF OF SERVICE FOR PETITION FOR WRIT OF CERTIORARI

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I, Nancy Bloodgood, Esquire, certify that on February 22, 2016 I served a copy of the **Petition for Writ of Certiorari** via First Class Mail by placing a copy of said documents in the United States mail with sufficient postage thereon to the following:

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