

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

Honorable Mikell Ross Scarborough, Master-In-Equity

MAR 11 2016

Appellate Case No. 2016-000339

S.C. SUPREME COURT

Meyers Kitchens and Baths, L.L.C. Respondent

V.

Maryann Wagner and Stipp Contracting, L.L.C. Defendants,

Of whom, Maryann Wagner is Petitioner,

RETURN TO PETITION

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STATEMENT OF THE CASE

This is a mechanic's lien case that was filed by Respondent Mevers Kitchens and Baths, L.L.C. on February 21, 2007 against a general contractor, Stipp Contracting, L.L.C. and Appellant homeowner. (R. p. 24-37) Stipp Contracting, L.L.C. declared bankruptcy while the case was pending so the case was stayed on August 24, 2009. (R. p. 1) On March 24, 2011, the bankruptcy stay was lifted. (R. p. 2) On June 22, 2011, the case was referred to the Master with the consent of the parties. (R. p. 3) Appellant thereafter filed a Motion to Dismiss for Lack of Prosecution and an Order was issued by the Master on April 10, 2012 granting Appellant's motion and awarding Appellant attorney fees. (R. p. 4-11)

Respondent obtained new counsel and filed a Motion to Reconsider which was subsequently granted. (R. p. 50) On March 8, 2013, the Master summarily dismissed Respondent's claim for quantum meruit against Appellant. (R. pp. 12-14) Respondent did not appeal the dismissal of that cause of action.

On May 15, 2013, a bench trial was held before the Master regarding Respondent's two remaining causes of action against Appellant; a breach of contract claim and a action to foreclose on a mechanic's lien. The Master issued his Order dated October 3, 2013 finding in favor of Respondent on both causes of action, and this appeal ensues. (R. pp. 15-21)

Defendant Maryann Wagner appealed the decision of the Master to the South Carolina Court of Appeals. The Court of Appeals issued its decision on October 7, 2015 affirming the decision of the trial court with the exception of the trial court's award of attorney's fees which award was modified. Defendant subsequently petitioned before the Court of Appeals for a rehearing which petition was denied by order on January 21, 2016. This petition follows.

STATEMENT OF THE FACTS

Respondent Mevers Kitchens and Baths, L.L.C. is a business that sells and installs kitchen and bath cabinetry. The two officers of Mevers Kitchens and Baths, L.L.C. (hereinafter "Mevers") are William E. Mevers and his brother, Roy E. Mevers. The Respondent company is licensed through its member, Roy E. Mevers. (R. p. 53, line 7 - p. 54, line 19)

On or about March 7, 2006, Respondent provided Appellant Wagner with a quote for the provision and installation of cabinetry. (R. p. 57, line 22 - p. 58, line 3) Said quote was accepted by Appellant Wagner on March 9, 2006 as evidenced by her signature on the bottom of said quote at the place designated by "Approved By:" (R. p. 59, lines 3-9) Said contract specifically sets forth the cabinets to be installed and the costs therefor. (R. p. 58, line 4 - p. 59, line 5) It also list MaryAnn Wagner as the party for whom the quote was prepared and offered. *Id.* Five days after said contract was executed by Appellant Wagner, (R. p. 87, line 13 - p. 88, line 8) it was also signed by an employee for the Stipp Contracting, L.L.C. evidencing its approval as well.

Mevers provided and installed the cabinets in Appellant Wagner's home as required under the terms of the parties' agreement. (R. p. 90, lines 14-18) Mevers has never been paid. (R. p. 60, line 22 - p. 61, line 11)

Respondent brought its action against Maryann Wagner and Stipp Contracting seeking relief under cause of action for Breach of Contract, Foreclosure and Quantum Meruit. Defendant Stipp previously filed for Bankruptcy under Chapter 7 and is out of the case. Respondent's Quantum Meruit claim was previously disposed of via Motion for Summary Judgement.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED ARE NOT OF THE CHARACTER OF REASONS WHICH WILL BE CONSIDERED FOR A WRIT OF CERTIORARI

Appellate Court Rule 242 states which types of questions will be considered for a writ of certiorari. In particular, Rule 242(b) provides as follows:

(b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Here, there is no novel question of law; no dissent in the decision of the Court of Appeals; no conflict with a prior decision of the Supreme Court; no constitutional issue involved; and there is no federal question included. Therefore, the questions presented are not of the character of issues normally taken up by the Supreme Court and the petition should be denied.

II. THE COURT OF APPEALS CORRECTLY RULED WITH REGARD TO PETITIONER'S SOUTH CAROLINA CODE SECTION 29-5-20 ARGUMENT

Petitioner first argues that the controlling mechanic's lien statute is S.C. Code §29-5-20 applies and not is S.C. Code §29-5-10. That assertion is again grounded upon the fact that Appellant claims there was no contract between she and Respondent. Clearly there was.

Mechanic's liens in South Carolina are governed by two main statutes. South Carolina Code Ann. § 29-5-20 controls liens established by subcontractors who are seeking payment for services provided to home owners pursuant to a contract between the home owner and a general contractor. That statute provides that:

In no event shall the aggregate amount of the lien filed by a subcontractor or supplier exceed the amount due by the contractor to the subcontractor . . . in no event shall the aggregate amount of liens on the improvement exceed the amount due the owner.

S.C. Code Ann. § 29-5-20(B).

South Carolina Code Ann. § 29-5-10 controls liens established by subcontractors or contractors who contract directly with or provide material or labor approved by the home owner to that home owner. That Section contains no language such as that contained within Section 29-5-20(B) and the limitation contained therein does not apply. "If the contract is with or approved by the owner, the property is subject to the lien for the materials or labor without regard to payments made under the building contract." (J. Kershaw Spong, Mechanic's Lien Laws in South Carolina, South Carolina Lawyer, Vol. 6, Pg. 32)

This matter was discussed by the South Carolina Court of Appeals in Ringer v. Graham, 286 S.C. 14, 331 S.E.2d 373 (S.C.App. 1985) within which it stated that "Code Section 29-5-10

gives a mechanic's lien to persons who by agreement or with the consent of the owner perform labor upon or furnish materials in the erection of aa structure. *Such a lien is unaffected by the amount of the contract between the owner and the contractor.*" Id. (Emphasis added).

Here, the testimony of both the Appellant and Respondent at trial was that Appellant approved of the contract as evidenced by her signature thereon. In fact Appellant testified in no uncertain terms that she did approve the cabinetry contracted for (R . p. 89, lines 4-6) Similarly, Respondent testified that Appellant approved of the cabinetry as evidenced by her signature on the contract. (R. p.59, lines 3-9)

Again, it is abundantly clear that Appellant contracted with Respondent and approved of the goods and service provided. Therefore, S.C. Code §29-5-10 controls. Consequently, Respondent's lien is unaffected by the amount of the contract between Appellant and Stipp. In any event, there was sufficient evidence submitted upon which the trial court could base its decision.

III. THE COURT OF APPEALS CORRECTLY DECLINED TO FIND FOR THE PETITIONER ON HER ARGUMENT REGARDING SOUTH CAROLINA CODE SECTION 29-5-15

Petitioner argues that a writ of certiorari is appropriate because the Court of Appeals failed to adequate take into account the provisions of South Carolina Code §29-5-15. Petitioner's argument has no merit.

The effective date of South Carolina Code §29-5-15 was June 2, 2009. The date the mechanic's lien herein was filed was November 20, 2006, nearly three years before that date. Therefore, that code section was not in effect at the time of filing and is inapplicable to this case. Petitioner's argument clearly fails and, in any event, does not justify a writ of certiorari.

III. PETITIONER'S ARGUMENT REGARDING SOUTH CAROLINA CODE SECTION 40-59-410(B)(1) AND (2) FAILS BECAUSE IT WAS NOT RAISED BELOW

Finally, Petitioner opines that a writ of certiorari is warranted because the Court of Appeals overlooked the provisions of S.,C. Code §49-59-410. In particular, Petitioner claims that there is no evidence in the record relative to the existence or nonexistence of a certificate of authorization or a surety bond. There is no evidence because the issue was never raised at the trial court level. In fact, Petitioner first raised the issue after the Court of Appeals issued its opinion below. Those issues were not raised at the trial court level nor were they raised in the appeal to the Court of Appeals. In fact, those issues were first raised in Petitioner's Petition for Rehearing filed below. As a result, that argument has not been preserved and should not be addressed. Food Mart v. South Carolina Dep't of Health and Env'tl. Control, 322 S.C. 232, 471 S.E.2d 688 (1996). See Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995) (issue not preserved for review should not have been addressed by Court of Appeals and opinion was vacated to extent it addressed issue that was not preserved); Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (due process claim raised for first time on appeal was not preserved); Beaufort County v. Butler, 316 S.C. 465, 451 S.E.2d 386 (1994) (issues not raised at merits hearing were not preserved for review); Cook v. South Carolina Dep't of Highways and Pub. Transp., 309 S.C. 179, 420 S.E.2d 847 (1992) (issues not timely raised to and ruled upon by trial court will not be addressed on appeal); Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 399 S.E.2d 779 (1990) (claim that was not raised below would not be considered for first time on appeal).

Moreover, Appellate Court Rule 242(d)(2) provides that “[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” Again, the question presented was not raised in the Court of Appeals and does not justify the grant of a writ of certiorari.

CONCLUSION

For the reasons set forth above, Petitioner’s Petition for Writ of Certiorari should be denied.

Respectfully submitted



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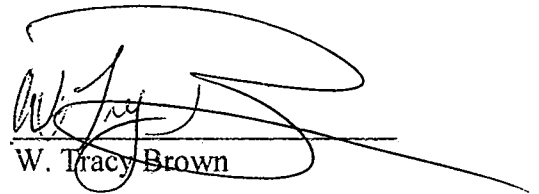
Of whom, Maryann Wagner isPetitioner,

PROOF OF SERVICE OF RETURN TO PETITION

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I, W. Tracy Brown, Esquire, certify that on March 8, 2016, I served a copy of the Respondent's Return to Petition via First Class Mail by placing a copy of the said document in the United States mail with sufficient postage thereon on the following:

Nancy Bloodgood, Esq.
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