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SEP 26 2016

SC Court of Appeals

CGBS Residential, LLC

Christopher Briggs

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: James J. Wegmann, Esquire

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
CGBS Residential, LLC	Christopher Briggs	\$80,771.30
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

3069
Judge Code

8/25/16
Date

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
 CGBS RESIDENTIAL, LLC,)
)
 Plaintiff,)
)
 vs.)
)
 CHRISTOPHER BRIGGS,)
)
 Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS
 Case No.: 2015-CP-07-2599

FINAL ORDER

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SC Court of Appeals

This matter came before me on the 27th day of July 2016 at the Beaufort County Courthouse on the Plaintiff's Motion for Damages Hearing. Present at the appointed place and time were the Plaintiff and his attorney, James J. Wegmann, and the Defendant's Attorney, Benjamin T. Coppage. Prior to the start of the hearing, the Defendant, through his counsel, filed a Motion to Compel Arbitration, to Dismiss and a Motion to Set Aside the Default.

PROCEDURAL HISTORY

This action was commenced on October 10th 2015 with the filing of a Summons and Complaint. The Defendant was personally served on November 11th, 2015. On or about December 4th, 2015, Defendant's prior counsel of record contacted the Plaintiff's attorney requesting an extension of time to file responsive pleadings. Plaintiff's counsel granted the Defendant an extension until January 25th, 2016. With no responsive pleadings filed, Plaintiff filed an Affidavit of Default on January 29th, 2016. The Plaintiff served the Affidavit of Default on the Defendant, by first class mail, at the same address he was originally personally served the Summons and Complaint, and on the Defendant's

prior attorney who requested the extension of time to file responsive pleadings. On March 4th, 2016, the Defendant's prior counsel filed a Notice of Motion and Motion to be Relieved as Counsel. On April 6th, 2016, the Defendant's counsel's motion was heard and the relief requested granted with the Defendant's counsel to prepare the order for the Court's signature. On June 9th, 2016, Plaintiff filed a Motion for Damages hearing. On June 15th, 2016, the Clerk of Court issued an order of Reference to the Master in Equity that further indicated the Defendant was "in default" and that, to date the Defendant had not filed any responsive pleadings, a motion to set aside the default, or a motion to enlarge the Defendant's time to answer.

The Defendant was served with the Notice of the Damages hearing by first class mail at the same address he was personally served and was subsequently served with the Affidavit of Default. On July 25th, 2016 the Defendant, through new counsel, filed a Motion to Enforce Arbitration, a Motion to Dismiss and in the alternative a Motion to Set Aside the Default. Having heard the arguments of counsel, considered the documents of record, the testimony of the witnesses, etc., I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the matter of the Defendant's motions, Defendant first argues that the contract the parties signed required the parties to arbitrate their agreement and therefore, the Plaintiff's Summons and Complaint should be dismissed. I find that argument to be without merit. South Carolina Code § 15-48-10(a), and the case law interpreting it, are very clear, notice that a contract is "subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to

arbitration.” The Supreme Court of South Carolina in *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 588-589, 553 S.E.2d 110 (S.C. 2001) stated the terms of section 15-48-10(a) are “clear, and those terms must be applied according to their literal meaning.” In the contract in question, the arbitration notice appears in the body of the contract on the second page. The statutory requirements of S.C. Code § 15-48-10(a) are not present on the first page of the contract and therefore the arbitration clause is not enforceable. Consequently, the Defendant’s Motion to Dismiss based on the enforcement of the arbitration clause is also without merit.

The Defendant next argues that “for good cause shown,” the Defendant should be relieved of default pursuant to Rule 55(c), SCRCPP. The Defendant properly recites the factors to be considered in setting aside an “entry of default” under Rule 55(c), SCRCPP, as outlined in *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989). The Plaintiff, however, argued that a “default judgment” had already been entered and that the Defendant must seek relief pursuant to Rule 60(b), SCRCPP which is a much “more rigorous than the “good cause” standard established in Rule 55(c).” *Sundown Operating Company v. Intedg Industries, Inc.* 383. S.C. 601, 608, 681 S.E.2d 885, 888 (S.C. 2009).

The Court finds that an order of default has already been entered as recited in the order of reference filed on June 15th, 2016 and as further noted in this Court’s order of July 13th, 2016. Therefore, the Court finds that the Defendant would be required to seek relief pursuant to Rule 60(b), SCRCPP in order to have the “order of default” set aside. With that said, having reviewed the Defendant’s affidavit and argument of counsel, the Court finds that the Defendant has failed to meet the showing of “good cause” under Rule

55(c), SCRCP. The inability to meet the minimum standard under Rule 55(c) necessarily dictates that the Defendant has not met the rigorous burden under Rule 60(b). Consequently, the Court finds that the Defendant is not entitled to relief under either Rule 55(c) or Rule 60(b). The Defendant, through counsel argues that the first time the Defendant realized that he was in default was when he received the Notice of Hearing, etc. for the July 27th, 2016 damages hearing. The Court finds that argument to be without merit and that argument alone, even if accurate, would not rise to the level required by either standard to set aside the default.

The Defendant was personally served on November 22nd, 2016 with the Summons and Complaint at 27 Lady's Walk, Beaufort, SC 29907. Thereafter the Defendant was served with the Affidavit of Default on February 3rd, 2016 by first class mail at the same 27 Lady's Walk address. Finally, the Plaintiff served the Defendant by first class mail at the same 27 Lady's Walk address with a copy of the Court's July 13th, 2016 Order of Continuance and the Notice of Hearing for the July 27th, 2016 Damages Hearing. Clearly the Defendant received the Summons and Complaint and the Notice of Hearing at the 27 Lady's Walk address. The personal service of the Summons and Complaint promoted the Defendant to have his prior counsel call the Plaintiff's attorney. Likewise, the service of the Notice of Damages Hearing gave rise to the Defendant hiring a second counsel to file the motions for arbitration, dismissal and to set aside the default. Consequently, the Court finds the Defendant had notice of the entry of default on or about February 3rd, 2016 which is over five (5) months from the point that the Defendant finally filed some responsive pleading in the form of the motion to enforce arbitration, dismiss and to set aside the default.

Additionally, given the Defendant has: (1) a law enforcement background; (2) has had the benefit of counsel in this matter since approximately early December of 2015; and (3) nearly six (6) months have passed since the expiration of the extension granted to Defendant to file responsive pleadings, it is incomprehensible that the Defendant didn't know he was in default. For all the reasons stated above, the Court is not persuaded that the Defendant has met the minimal standards of Rule 55(c) or the rigorous standards of Rule 60(b) and therefore the Defendant's motions are denied and the Court proceeded with the damages hearing.

As such, the allegations contained within the Plaintiff's Complaint are deemed admitted. The Court will not fully recite them verbatim in this order but any of the allegations contained in the Complaint not recited herein, are hereby incorporated by reference in this order as if fully recited herein. Now therefore, the Court finds as follows on the matter of damages:

1. The Court has jurisdiction over the subject matter and individuals in this case. Venue is appropriate in this matter and the matter was properly referred to this Court.

2. On or about March 26, 2015, for valuable consideration, the Plaintiff and Defendant entered into the Agreement wherein Plaintiff agreed to act as a construction manager and perform the duties of a construction manager in accordance and as enumerated in their written Agreement.

3. The Agreement concerned the construction of a residence located at 6 Governor Blake Ct., Beaufort, SC 29907, the ("Project") in which the Defendant was acting as his own builder/contractor as evidenced by the "Unlicensed Residential

Builder's Disclosure Statement" recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Book 3387 at Page 1908.

4. The Agreement required the Plaintiff to perform certain duties on behalf of Defendant and for the Defendant to compensate the Plaintiff the sum of 8% of the total cost of the Project as a Construction Management Fee. Said fee was to be paid in monthly draws at a rate of \$2,000.00 per month for a period not to exceed ten (10) months with a final payment based on 8% of the total construction cost minus the monthly draws taken to date.

5. The Plaintiff testified that the total cost to build the project, based on his years of building custom residential homes, was between \$475,000.00 and \$525,000.00. The Defendant applied for a building permit with Beaufort County and stated to the County that the "valuation of construction" was \$376,710.00. Given that this is a damages hearing, the Court is persuaded that the proper amount to be used in calculating the 8% fee is the Defendant's own valuation of construction cost, or \$376,710.00 8% of that amount results in a management fee under the contract of \$30,136.80. The Plaintiff testified that the Defendant had made monthly payments toward the 8% fee of \$7,300.00. Therefore, the Plaintiff is due and owing under the contract as a management fee, \$22,836.80.

6. During the course of the parties' contract, materials used in the construction of the Defendant's home were purchased by various parties at Grayco a local building supply company on the Plaintiff's business account pursuant to an oral agreement between the Plaintiff and the Defendant. The Plaintiff presented, through several Grayco employees, numerous invoices that fall into two categories, those

materials that were “delivered” by Grayco employees to the Defendant’s job site and those materials that were physically picked up at the building center for the Defendant’s job site.

7. The total amount presented as due and owing by Grayco for materials either delivered to the Defendant’s job site or picked up for use at the Defendant’s job site, on the Plaintiff’s account, plus interest to the date of the hearing, was \$46,438.47. In arriving at that number, the Grayco employees testified that all credits for any returned items, etc. had been applied and that Grayco had, for the time being, suspended the interest charges that apply on this type of account. There was further testimony by several witnesses that they believed all the invoices entered into evidence represented amounts still due and owing to Grayco and that those materials were actually delivered and/or picked up and used in the construction of the Defendant’s home.

8. The parties’ contract requires the Defendant to indemnify, defend and hold the Plaintiff harmless from and against all claims, damages, losses and expenses. The Grayco employees testified that, although they understand the Plaintiff’s predicament, they expect the Plaintiff’s account to be paid in full regardless of whether or not said amount is paid by the Defendant or the Plaintiff. In addition to the parties’ contract, the parties made an oral agreement allowing the Defendant to order materials on CGBS’s account at Grayco Building Center so long as he made timely payments for those materials ordered on CGBS’s account. Pursuant to this agreement, Defendant purchased or caused to be purchased those items and materials referred to in Paragraphs 6 and 7, *supra*. Plaintiff failed to pay for the items ordered on CGBS’s account and, therefore, the

Court finds that the Plaintiff is entitled to a judgment against the Defendant for the total amount of the outstanding Grayco bill of \$46,438.47.

9. Additionally, there was testimony that the Plaintiff had routinely paid subcontractors and for other materials and that the Defendant had thereafter reimbursed the Plaintiff for those invoices. As of the date of the hearing, the Plaintiff testified that the Defendant had not reimbursed the Plaintiff for the following invoices:

- a. \$150.00 to Collins Pest Control for the required pre-termite treatment; and
- b. \$512.32 to Pro Disposal Dumpster for dumpster rental;

The total amount of the two (2) invoices being \$662.32. The Court finds the Plaintiff is entitled to recover from the Plaintiff \$662.32 for the repayment of these invoices.

10. The parties' contract, both in the indemnity paragraph and in a separate attorney's fees and costs paragraph allows the Plaintiff to recover from the Defendant its reasonable attorney's fees and costs. The Plaintiff's counsel filed an affidavit of attorney's fees and costs calculating attorney's fees and costs up to the date of the hearing in the amount of \$8,113.31. The amount did not include hearing prep and hearing time on the day of trial or the time anticipated to draft the order, etc. When awarding attorney's fees, the trial court must consider the following six factors: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; and (6) the beneficial results obtained. *Baron Data Sys., Inc., v. Loter*, 297 S.C. 382, 384-85, 377 S.E.2d 296, 297 (S.C. 1989). The Court, in considering the factors delineated in the *Baron Data Sys., Inc.* case, the Court finds the amount claimed to be appropriate and reasonable. In addition, the final amount in the order shall reflect the addition of hearing prep and hearing time on the day of trial and the time to draft this order. The attorney's fee amount claimed includes the attorney's time prior to filing the suit in which the attorney attempted to resolve the issues with

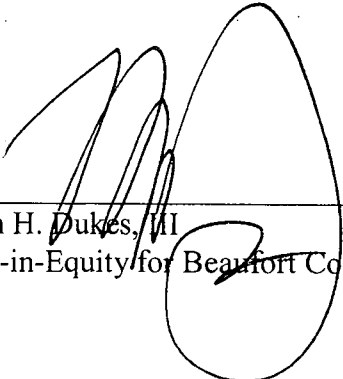
both the Defendant and Grayco Building Center.¹ The matter in general is not an overly difficult matter but the matter spanned several areas of law to include contracts, mechanic's liens, conversion, etc. The Court finds the time devoted to attempting to resolve multiple issues with several parties was reasonable and the Plaintiff's attorney has been practicing in these areas of the law for a considerable amount of time appearing regularly in this Court on such matters. This matter was not a contingency case but I find the fee charged to be customary for the type of matter charged by attorneys with similar backgrounds and experience. Finally, the Plaintiff's attorney has obtained a favorable outcome for his client and the total final judgment reflects a sum that makes the Plaintiff whole or as near whole as possible as if the contract had not been breached by the Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows, to wit:

- A. The Plaintiff shall have judgement in this matter against the Defendant in the sum of \$80,771.30 broken down as follows:
- a. Remaining 8% Management Fee - \$22,836.80
 - b. Grayco Materials Bill - \$46,438.47
 - c. Collins Pest Control Bill - \$150.00
 - d. Pro Disposal, LLC Bill - \$512.32
 - e. Attorney's Fees and Costs - \$10,833.71

¹ The attorney's fee affidavit reflects that prior to drafting and filing the Summons and Complaint there was considerable effort to resolve the matter that included attempting to resolve the Mechanic's Lien in which the Plaintiff was named as a Defendant with Grayco's attorney as well as attempting to resolve the ultimate matter with the Defendant.

AND IT IS SO ORDERED..



Marvin H. Dukes, III
Master-in-Equity for Beaufort County

August 25, 2016
Beaufort, South Carolina

15-2595