

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2011-CP-32-1929

RECEIVED

OCT 13 2016

SC Court of Appeals

Rose Electric, Inc., Appellant

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified
Development Corporation of South Carolina, Senn Bros., Inc.,
Custom Concrete of Lexington, Inc., and
James Dunlap d/b/a Dunlap Services, ... Defendants

Of whom

Southern Produce, Inc., and S2P, LLC are Respondents

PETITION FOR REHEARING EN BANC

Opinion No. 5444

Heard June 16, 2016 – Filed September 28, 2016

William E. Booth III
3231 Sunset Boulevard, Suite A
West Columbia, SC 29169
(803) 791-9211 (T)
(803) 791-3159 (F)
SC Bar No. 771

Attorney for Appellant

Under Rule 221(a), SCACR, Appellant, Rose Electric, Inc. ("Rose"), submits this Petition for Rehearing *en banc* on the points overlooked or misapprehended by this Court in its Opinion No. 5444 filed on September 28, 2016, :

POINT 1: The Record contradicts the statements in the Opinion that there was evidence to support the position of Respondent Southern Produce, Inc. ("Southern Produce") that the architectural plans were included in the contract price as well as the position of Rose that the cost of the plans were not included in the total contract price.

There was no evidence in the Record that the architectural plans were included in the total contract price. The evidence of the contract price was based upon a written contract which clearly in the scope had no suggestion that the architectural plans were included. The Contractor Agreement entered by Cooler Erectors and Southern Produce is divided into eight separately numbered paragraphs and is dated October 27, 2010. The first paragraph contains six subparts describing the different categories of work to be performed; *i.e.* the scope of work. Paragraph 4 states that the amount to be paid for doing the scope of work as outlined is \$213,385. Paragraph 3 states that the finished architectural plans are attached to and made a part of the Agreement so no need for the finished plans to be done under the Agreement. Obtaining architectural plans is not listed in the sub-parts of the Agreement detailing the scope of work.

Therefore, this Court should find that the total project cost was \$224,385 because the amount in the Agreement does not include the cost for obtaining the

architectural plans. This Court should further find that Southern Produce did not pay Cooler Erectors \$21,108 of the total project cost.

Contract	Oct. 22, 2010 - Date Signed	\$213,385.00	
Plans	Oct. 8, 2010 - Payment for Plans	\$11,000.00	
	Total Project Cost	\$224,385.00	
Other Payments			
10/27/2010	Southern Produce, Inc.	Cooler Erectors of Atlanta	\$49,600.00
10/27/2010	Southern Produce, Inc.	Cooler Erectors of Atlanta	\$42,677.00
11/16/2010	Southern Produce, Inc.	Cooler Erectors of Atlanta	\$70,000.00
12/2/2010	Southern Produce, Inc.	Cooler Erectors of Atlanta	\$30,000.00
		Total Other Payments:	\$192,277.00
		Payment for Plans	\$11,000.00
		Total All Payments	\$203,277.00
		Total Project Cost	\$224,385.00
		Total All Payments	\$203,277.00
		Total Retainage	\$21,108.00

POINT 2: The Court failed to recognize that although two other subcontractors had filed liens, those liens were no longer active or owed by Southern Produce due to settlement or payment prior to trial. The testimony of Stocker, the only witness presented by Southern Produce, shows that the total amount paid to both was \$465. He testified :

A To my understanding, no, sir, it's not active.

Q And even though they claim they're owed about \$14,529, has Southern Produce paid anything to Custom Concrete?

A Other than legal fees, no, sir.

Q Okay. But nothing to Custom Concrete?

A Correct.

(Transcript, p. 174, lines 16-22).

Q And you said you paid something on that and the amount you paid, I believe, was \$465 back on August 19th, 2011; correct?

A That was a settlement, yes, sir.

Q But, again, do you remember the date of the settlement?

A No, sir. I believe you just said August.

(R. p. 267, lines 6-12).

The Court misapprehends the mechanic's lien statute for allowing an owner to allocate the subcontractors' unpaid amounts to compute how much each subcontractor would be paid from the retainage. But, the statement in the Court's decision that the mechanic's lien statute does not distinguish between liens that settle prior to trial and those that continue to trial is not logical or fair to the subcontractor that pursues the payment from the owner.

In fact, S.C. Code §29-5-220 contemplates this scenario. §29-5-220 states:

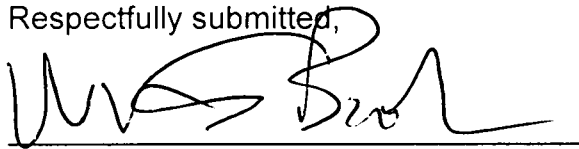
At the time assigned for the hearing, or within such further time as the court allows for that purpose, every creditor having a lien of the kind before mentioned upon the same property may appear and prove his claim and the owner and each of the creditors may contest the several claims of every other creditor and the court shall hear and determine them in a summary manner, either with or without a jury, as the case may require.

At the time of the hearing of this action, there were no other creditors having liens of any kind and so the only lien to be considered for any determination was that of Rose. Because the other subcontractors had settled any claims, they no longer had any lien and were paid under the contract. Therefore, at the time of

the hearing, the only subcontractor not paid was Rose and there were no other creditors with which to prorate any retainage.

For these reasons, Respondent asks the Court to rehear the case *en banc*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. Booth III', written over a horizontal line.

October 13, 2016

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Of whom

Southern Produce, Inc., and S2P, LLC are Respondents

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing by causing to be mailed via First Class US Mail with sufficient postage affixed thereto on October 13, 2016, addressed to the Respondent S2P, LLC's attorney of record, Jon Robin Turner, Esquire, P.O. Box 11646, Columbia SC 29211.

October 13, 2016



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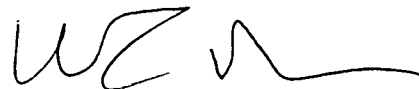
Of whom

Southern Produce, Inc., and S2P, LLC are Respondents

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing by causing to be mailed via Priority US Mail with sufficient postage affixed thereto, on October 13, 2016, addressed to the Respondent Southern Produce, Inc.'s attorney of record, Kathryn M. Cook, Esquire, Kathryn M. Cook, PA, 306 Calhoun Road, Myrtle Beach, SC 29577.

October 13, 2016



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October 13, 2016

VIA HAND DELIVERY

Honorable Jenny Abbott Kitchings
Clerk of Court of the Court of Appeals
1015 Sumter Street
Columbia, SC 29201

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SC Court of Appeals

Re: Rose Electric, Inc. vs. Southern Produce, Inc., et al.
C/A No. 2011-CP-32-1929
Appellate Case No. 2014-001633
(Our File No. 4657.1151)

Dear Ms. Kitchings:

I represent the Appellant in this action and I enclose the following:

1. Original and six (6) copies of Petition for Rehearing En Banc;
2. Proof of Service on Respondent Southern Produce, Inc.;
3. Proof of Service on Respondent S2P, LLC; and
4. Check in the amount of \$25.00 for the filing fee.

By copy of this letter, I am serving a copy of the Petition and Proofs of Service on each Respondent. If you have any questions on this or need anything further at this time, please let me know.

Very truly yours,



William E. Booth III

WEBIII/eje

Enclosure

C: J. Robin Turner, Esquire (w/Enc.)
Kathryn M. Cook, Esquire (w/Enc.)