

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Emory J. Infinger and Associates
Construction Company, Inc.,
Plaintiff,

vs.

North Charleston Community Interfaith
Shelter, Inc., Bobby Knight, in his official
capacity as Chairman and President of Board
for The Good Neighbor Center, The Good
Neighbor Center, Bank of America, N.A., S.C.)
State Housing Finance and Development
Authority, Atlantic Construction Services,
Inc., L&W Supply Corporation dba CK
Supply, Now Mechanical, Inc., Wilson &
Associates Electrical Contractors, Inc.,
Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2012-CP-10-2872

FINAL ORDER

BY _____
JULIE J. ARMSTRONG
CLERK OF COURT
2016 MAR 18 PM 4:16

FILED

Hearing Date:

December 8, 2015

Presiding Judge:

Master-in-Equity Mikell R.
Scarborough

Plaintiff's Attorney:

Theodore L. Manos, Esq.

Attorney for Defendant:
North Charleston Community Interfaith Shelter, Inc.
The Good Neighbor Center

J. Seth Whipper, Esq.

Attorney for Defendant:
S.C. State Housing Finance and Development Authority

Did not participate at trial

The above-captioned foreclosure action was tried before me on December 8, 2015. The Plaintiff, Emory J. Infinger and Associates, Inc., was represented by Theodore L. Manos of Robertson Hollingsworth and Flynn, LLC. The Defendants North Charleston Community Interfaith Shelter, Inc. and the Good Neighbor Center were represented by J. Seth Whipper. Defendant S.C. Housing Finance and Development Authority appeared in the action by answering the Complaint, but did not participate through counsel at trial.¹ The remaining named defendants were previously dismissed pursuant to a Mutual Stipulation of Dismissal dated August 5, 2014.

Pre-trial motions were disposed of prior to trial. Specifically, Defendant's Motion to Amend its Answer to include a Thirty-Fifth Defense was granted to the extent that the allegations therein conformed to the evidence to be presented at trial. Defendant's Motion for Summary Judgment was denied.

I. BACKGROUND AND FACT SUMMARY

A. The Good Neighbor Center

The Good Neighbor Center now referred to as the North Charleston Community Interfaith Shelter, Inc. is a non-profit entity which provides transitional housing shelter for homeless veterans at a facility located at 1905 Burton Lane a/k/a 2713 Spruill Avenue in North Charleston, South Carolina. The facility contains thirty-two (32) beds located in an old two-story motel-like building. The shelter was operated by an executive director throughout its history up until her termination in 2011. The shelter is currently operating under the direction of a volunteer board of directors.

In the mid-2000s, as part of its operational funding, the Good Neighbor Center was receiving per-diem grants from the Department of Veterans Affairs Veteran's Health Administration ("VA"). In order to expand its services to the veterans, the Good Neighbor Center decided to construct a new two-story structure on the property where its existing facility operates. In furtherance thereof, it applied for a capital grant from the VA and a forgivable loan from the South Carolina State Housing Finance and Development Authority ("State Housing Authority"). Ultimately, funds were secured from the VA and State Housing Authority for use in the design and construction of a new facility.

By agreement dated December 10, 2010, The Good Neighbor Center contracted with Emory J. Infinger and Associates Construction Company, Inc. ("Infinger") for the design/construction of a new, two-story, fourteen (14) bed, transitional housing project for veterans located in North Charleston, South Carolina (hereinafter the "Project"). The Agreement provided for a Contract Sum of \$799,456.00 subject to modifications as set forth in Infinger's Proposal dated December 8, 2010 which was incorporated into the Agreement.

¹ S.C. Housing Finance and Development Authority was named as a defendant based on virtue of its mortgage on the subject property recorded in Book 0176, Page 769, in the Charleston County R.M.C. Office.

By Change Order dated March 1, 2011, the Agreement was modified to: 1) increase the Contract Sum by \$10,264 for the purchase of Performance and Payment Bonds; 2) change the legal name of the Owner from Good Neighbor Center to North Charleston Community Interfaith Shelter; 3) to modify Contract retainage per Article No. 5.4.3 to reflect retainage and percentages of funds by the Housing Authority and VA; and 4) to note delays and impacts on estimated budget.

A Pre-Construction Conference was held on March 15, 2011. In attendance at the meeting were Bobby Knight (the President and Chairman of the Board for the Shelter), Emory Infinger (the President and Owner of Infinger), the Project's engineers, and three additional representatives of Infinger including its Project Manger, David Haun. A "Notice to Proceed" was issued at the conference establishing a date to commence work on or before March 16, 2011, and it was agreed that the engineers would be notified to proceed with soil borings and site design. A number of other issues were also discussed including, but not limited to: 1) payment procedures; 2) chain of command; and 3) change orders. At the time of the meeting, the exact procedures for payment were not known. Mr. Knight was designated as the Owner's representative and in charge of initiating change orders.

Following the conference, Infinger's design consultants proceeded with the design, and the construction began thereafter. Pursuant to the Agreement, Infinger submitted Applications and Certifications for Payment ("Payment Applications") to the Shelter for approval and payments. Infinger's Pay Applications included a summary page containing the various line items including but not limited to: 1) the Original Contract Sum; 2) Net change by Change Orders; 3) Contract Sum to date; 4) Total Completed and Stored to Date; 5) Current Payment Due; and 6) Balance to Finish, including retainage. Each Payment Application also included Continuation Sheets providing detailed line items describing the work, providing the scheduled value of each line item of work, and explanations of the amount of work performed and stored to date for each individual line item.

The Shelter submitted draw requests from the VA and the Housing Authority based on the information provided by Infinger. The VA wired funds directly to the Shelter's account, and the Housing Authority mailed its payments to the Shelter. The Shelter in turn wrote checks out of its account to pay Infinger for the labor, services and materials being provided under the Agreement. The Housing Authority's payments to the Shelter were subject to inspections being performed relating to percentage of completion.

Throughout the design and construction process, Infinger submitted a total of nine (9) Payment Applications to the Shelter from April 15, 2011 through December 31, 2011. Infinger's Pay Applications totaled \$664,215, but it only received payments from the Shelter totaling \$467,803 leaving an unpaid balance of \$196,412. The Housing Authority did not release any funds to the Shelter to pay for the first draw request. Thereafter, the Housing Authority's and VA's release of funds to the Shelter were based on their respective determinations.

Following Change Order Number One, the Parties executed Change Orders 2-6 between April 2011 and September 2011 increasing the Contract Sum in excess of \$100,000 from \$799,456 to \$920,333. The Change Orders included multiple items including but not limited to: 1) insurance



costs; 2) concrete and foundation work; 3) structural steel; 4) finish materials and impact glass; and 5) a ductless AC system.


In August 2011, pursuant to its investigation of the Shelter's ongoing operations (unrelated to the VA's capital grant for the new construction by Infinger), the VA sent the Shelter a pre-determination letter identifying an over-billing of per diem by \$122,073.

On or around September 30, 2011, the Shelter notified the VA of the increased costs to the Project. On November 7, 2011, Infinger notified its subcontractors and material suppliers that it was directing that all work and material deliveries be temporarily suspended due to the VA cutting its September invoice and temporarily putting a hold on future payments to the Shelter until the Shelter provided additional paperwork.

By letter dated November 16, 2011, the VA notified the Shelter that the capital grant payments would be held until such time as the Shelter could demonstrate it had matching funds needed to complete the Project. The Shelter was unable to procure additional funds to comply with the VA's requirements and its funding remained frozen.

By letter dated December 26, 2011 to the Shelter, Infinger expressed its concern regarding the exposed condition of the building and recommended that the rescue option it had previously recommended be undertaken in order to protect the current investment in the unfinished building. Infinger also inquired about the Shelter's plans to continue or abandon the Project.

Ultimately, the Shelter was not able to secure additional funding from the VA or other sources in order to continue with the construction, and the building remains as it did when construction was suspended in mid-November 2011. The Housing Authority also suspended its funding under its loan to the Shelter at the end of 2011.

Thereafter, after various communications by and between the Shelter and the VA, the VA by letter dated May 6, 2013 notified the Shelter that its capital grant was terminated and that the Shelter's eligibility to receive grant and per diem payments was revoked and would not be reinstated. 

Mr. Knight filed a lawsuit against the VA In the United States Court of Federal Claims on October 17, 2013 seeking damages arising out of the termination of the grant. Mr. Knight's lawsuit was dismissed by Order dated October 2, 2014.

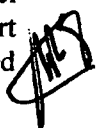
II. PROCEDURAL HISTORY

On February 6, 2012, Emory J. Infinger and Associates Construction Company, Inc. filed a Mechanic's Lien on the Shelter's Property, and thereafter foreclosed on its lien by filing a Lis Pendens, Summons and Complaint on May 1, 2012. The Shelter and Good Neighbor Center accepted service of the Lis Pendens and Complaint on May 7, 2012. Defendants Bobby Knight, The Good Neighbor Center and North Charleston Community Interfaith Shelter filed an Answer to the

Complaint on July 18, 2012. The Housing Authority filed an Answer to the Complaint on January 14, 2013.

During this same time period, a number of Infinger's subcontractors on the Shelter Project, including Atlantic Construction Services, Inc. L&W Supply Corporation d/b/a CK Supply, Now Mechanical, Inc., Charleston Interior Construction, LLC, and Wilson & Associates Electrical Contractors, Inc. filed their own liens and foreclosure actions against the Shelter's property. Those separate actions were consolidated into Infinger's action by Order dated August 14, 2013. Thereafter, Defendants Bank of America, N.A., Atlantic Construction Services, Inc. L&W Supply Corporation d/b/a CK Supply, Now Mechanical, Inc., Charleston Interior Construction, LLC and Wilson & Associates Electrical Contractors, Inc. were dismissed from Infinger's action by a Mutual Stipulation of Dismissal filed on August 5, 2014.

On March 5, 2015, the Court granted Turner Padgett's Motion to be relieved as counsel for the Shelter, and provided the Shelter until May 1, 2015 in order to secure new counsel. J. Seth Whipper appeared for the Shelter on May 1, 2015.

The case was tried on December 8, 2015. David Haun and Bobby Knight testified as witnesses. Defendant also called David B. LaRoe to provide opinion testimony regarding interpretation of certain contractual terms between the Shelter and Infinger. Infinger objected to Mr. LaRoe's testimony on the grounds that: 1) he was not identified during discovery; 2) Infinger did not have an opportunity to depose him to evaluate his opinions; and 3) the opinions that Defense counsel intended to elicit were the province of the Court and not the proper subject matter of expert testimony. The Court permitted the Shelter to proffer Mr. LaRoe's testimony but sustained Infinger's objection. 

Plaintiff entered Exhibits 1- 18, and 20 - 25 without objection. Defendant entered one compilation exhibit without objection by Plaintiff but only for the purpose that Knight received certain documents contained therein. Plaintiff did not concede that all information contained in the numerous documents included in Defendant's Exhibit 1 could be used for the truth of the matter asserted.


The Court denied Plaintiff's Motion for a Directed Verdict at the end of its case. Plaintiff renewed its Motion for Directed Verdict at the close of the trial.

III. THE CLAIMS

The Complaint included five causes of action as follows: 1) mechanic's lien foreclosure; 2) breach of contract; 3) quantum meruit/unjust enrichment; 4) claim pursuant to S.C. Code Section 27-1-15; and 5) Negligence against Bobby Knight as Chairman of the Board for the Shelter. The negligence claim had been dismissed prior to trial by a Mutual Stipulation of Dismissal dated August 5, 2014. The Plaintiff abandoned its claim for quantum meruit/unjust enrichment at trial and proceeded only on its contract and lien claims. The claim under S.C. Code Section 27-1-15 simply

provides Plaintiff an additional avenue in which to recover attorney's fees and interest if successful on his substantive claims under the lien foreclosure and/or contract.

IV. FINDINGS OF FACT

1. The Shelter entered an Agreement with Infinger dated December 10, 2010 for the design and construction of a building located at 1905 Burton Lane a/k/a 2713 Spruill Avenue in North Charleston, South Carolina.
2. Pursuant to their Agreement, and in consideration of the labor, services and material to be provided by Infinger, the Shelter agreed to pay Infinger a total Contract Sum of \$799,456 as modified by executed change orders.
3. From March 1, 2011 through September 9, 2011 the Shelter approved Change Orders 1 -6 to the Agreement which increased the Contract Sum from \$799,456 to \$920,333.
4. The Shelter's primary funding sources for the construction of the Project were a VA capital grant and a loan from the Housing Authority. Upon receiving Payment Applications from Infinger, the Shelter requested draws from the VA and the Housing Authority.
5. In or around November 2011, the VA suspended the funding of draw requests being made by the Shelter for the construction work by Infinger based on the increased costs of the Project and the Shelter's inability to provide matching funds for the increased grant funds it was requesting.
6. As a result of the VA suspending funding, the Shelter was unable to pay Infinger for the services it was providing to the Project.
7. Infinger was ready, willing and able to complete the construction, but suspended its work in November 2011 as a result of non-payment. Infinger recommended that the building be secured and covered in order to protect it from the elements. 
8. By letter dated December 26, 2011 to the Shelter, Infinger expressed its continuing concern regarding the exposed condition of the building and recommended that the rescue option it had previously recommended be undertaken in order to protect the current investment in the unfinished building. Infinger also inquired about the Shelter's plans to continue or abandon the Project.
9. Ultimately, the Shelter was not able to secure additional funding from the VA or other sources in order to continue with the construction, and the building remains as it did when construction was suspended in mid-November 2011.
10. Infinger submitted nine Payment Applications to the Shelter for labor, services and materials it provided to the Project. Infinger's Pay Applications totaled \$664,215 but it only received payments from the Shelter totaling \$467,803 leaving an unpaid balance of \$196,412.

V. CONCLUSIONS OF LAW

Mechanic's Lien Foreclosure Action

11. Under S.C. Code § 29-5-10, a mechanic who contracts directly with the owner, or his agent has a lien in the amount of the debt owed to him under the contract, and the owner is liable to him for the total amount. A claim of lien must be filed no later than 90 days after the last day on which the claimant furnished labor or materials to the project.
12. An action to enforce a mechanics lien must be initiated within six (6) months from the last day on which the claimant furnished labor and/or materials to the project. S.C. Code § 29-5-120.
13. Infinger contracted with Shelter by written agreement dated December 10, 2010 for the design and construction of a building on the Shelter's property.
14. Infinger submitted nine Payment Applications to the Shelter for labor, services and materials it provided to the Project. Infinger's Pay Applications totaled \$664,215 but it only received payments from the Shelter totaling \$467,803 leaving an unpaid balance of \$196,412.
15. On February 6, 2012, less than ninety days from the last day it had provided labor, services or material to the Project pursuant to a written contract with the Shelter, Infinger filed and served, in accordance with S.C. Code §29-5-10, a Mechanic's Lien ("Lien") in the amount of \$196,412 on the real property commonly known as 1905 Burton Lane a/k/a 2713 Spruill Avenue in North Charleston, South Carolina with TMS No. 466-03-00-097. Infinger's Lien was recorded in the Charleston County Register Mesne Conveyance in Book O 232 at Page 031.
16. On May 1, 2012, less than six months from the last day it provided labor, services or material to the Project, Infinger commenced a suit to foreclose its Lien and filed a Lis Pendens, Summons and Complaint against the Good Neighbor Center and Shelter.
17. Accordingly, Infinger has established a lien in the amount of \$196,412.

Breach of Contract

18. A binding, valid contract must exist for there to be a cause of action for breach of contract. See Tidewater Supply Co. v. Industrial Elec. Co., 253 S.C. 483, 171 S.E.2d 607 (1969); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Patricia Grand Hotel, LLC v. MacGuire Enters, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007). "In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation." W.E. Gilbert & Assocs. v. S.C. Nat. Bank, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985).

The necessary elements of a contract are offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 581 S.E.2d 161 (2003). To recover for a breach of contract, the plaintiff must prove: (1) a binding contract entered into by the parties; (2) a breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962).

Damages in a breach of contract action are to place the non-breaching party in the position he or she would have been had there been no breach and the contract was performed. See Drews Co. v. Ledwith-Wolfe Assocs., Inc., 296 S.C. 207, 371 S.E.2d 532 (1988). The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329 (1960). In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed. Collins Entm't, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

19. In this case, both parties' witnesses agreed that a written agreement dated December 10, 2010 set forth the terms and obligations agreed upon between Infinger and the Shelter, and that those terms generally consisted of Infinger agreeing to design and construct a building for the Shelter in exchange for payment of the costs of such work.

20. Specifically, pursuant to their Agreement, and in consideration of the labor, services and material to be provided by Infinger, the Shelter agreed to pay Infinger a total Contract Sum of \$799,456 as modified by executed change orders.

21. From March 1, 2011 through September 9, 2011 the Shelter approved written Change Orders 1-6 to the Agreement which increased the Contract Sum from \$799,456 to \$920,333.

22. Infinger submitted nine Payment Applications to the Shelter for labor, services and materials it provided to the Project. Infinger's Pay Applications totaled \$664,215 but it only received payments from the Shelter totaling \$467,803 leaving an unpaid balance of \$196,412

23. Mr. Knight, the Shelter's Chairman and the Owner's representative under the Agreement, testified that he executed all six change orders to the Agreement, and he did not dispute that Infinger's balance under the Agreement was \$196,412.

24. Mr. Knight asserted that the balance due Infinger was the responsibility of the VA and/or Housing Authority and not the Shelter. The Court disagrees. Whether the VA (and/or Housing Authority) had grounds to freeze the grants which the Shelter was using to pay Infinger is not before the Court, and is not relevant to the Shelter's ultimate responsibility to comply with its contractual obligations to Infinger which were breached by the Shelter's failure to pay Infinger.

S.C. Code Ann. 27-1-15

25. SC Code Section 27-1-15 provides: [w]henever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

26. In conjunction with the filing of the Complaint on May 1, 2012, Infinger's counsel mailed Plaintiff a certified letter demanding payment of \$196,412 due Infinger.

27. As previously discussed herein, Mr. Knight acknowledged Infinger's balance due of \$196,412 on its contract for the improvement of the Shelter's property, and testified that the Shelter's reason for failing to pay said balance was lack of funding due to the VA freezing its grant funds which occurred in or around November 2011.

28. Accordingly, the Court finds that Infinger is entitled to reasonable attorney's fees and interest at the judgment rate on an award amount of \$196,412 from May 1, 2012.

*\$ 33,485.97 fees
\$ 1450.74 costs*

*plus 8% of the \$196,412
Blumsey v. Nucleo factor.*

IT IS THEREFORE,

ORDERED, that Infinger's claim to Foreclose its Mechanic's Lien is hereby granted, and that the Shelter's real property commonly known as 1905 Burton Lane a/k/a 2713 Spruill Avenue in North Charleston, South Carolina, TMS No. 466-03-00-097 shall be sold subject to S.C. Code § 29-5-260; and it is further

ORDERED, that Infinger is entitled to a Judgment against North Charleston Community Interfaith Shelter, Inc. and The Good Neighbor Center, jointly and severally, in the amount of \$196,412 on its breach of contract claim; and it is further

ORDERED, that Infinger is entitled to reasonable attorney's fees and costs as set forth in its Affidavit of Attorney's Fees totaling \$34,936.71; and it is further

ORDERED, that Infinger is entitled to interest on the principal amount of \$196,412.00 at the judgment rate from May 1, 2012.

AND IT IS SO ORDERED.

This 11 day of March, 2016.
Charleston, South Carolina

[Signature]
Master-in-Equity Mikell R. Scarborough