

STATE OF SOUTH CAROLINA)

)

IN ARBITRATION

COUNTY OF YORK)

)

J. W. NEAL CONSTRUCTION,)

LLC)

)

Plaintiff)

)

Vs.)

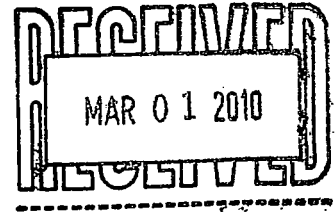
ARBITRATION AWARD

)

CASE NUMBER 2007-CP-46-119

CORNELIA THOMAS,)

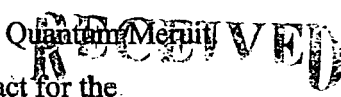
Defendant.)



This matter comes for arbitration hearing on January 28 and 29, 2010 in Rock Hill, SC. The undersigned was appointed as Arbitrator by stipulation of the parties.

The Plaintiff is represented by John Martin Foster of the York County Bar and the Defendant is represented by Herbert W. Hamilton, also of the York County Bar. The Plaintiff testified along with Robert L. Belk, James Slusarski and Gregory B. Miller. There were 4 Court's exhibits, without objection and 17 Plaintiff's exhibits without objection. The Defendant testified along with Buddy Brault. Part of Defendant's case was the report of Brian Connolly, Plaintiff's exhibit 17 and photographs taken by the Defendant. Defendant also introduced 3 other exhibits without objection. All parties and witnesses testified under oath.

In essence the Plaintiff's complaint was to foreclose a mechanics lien in the amount of \$112,790.00. He also had causes of actions for breach of contract and Quantum Meruit. About November 22, 2005 the parties entered into a fixed price contract for the construction of a house for the amount of \$359,000.00. The Defendant paid 5% down-



SC Court of Appeals

\$17,950.00. Plaintiff began work and worked until either middle of December 2006 or January Of 2007 at which time he was ordered off the job by the Defendant. Prior to that time the defendant had paid the Plaintiff 2 draws totaling \$143,600.00, making a total payment to Plaintiff of \$161,550.00.

The Defendant responded with an Answer and Counterclaim, alleging, in addition to a general denial, equitable estoppel and counterclaims, which consisted of allegations of breach of contract, negligent and/or defective work and breach of express and implied warranties.

The Parties stipulated that the Arbitrator's fee will be equally divided between them.

The issues are:

1. Is Plaintiff entitled to additional payment from Defendant for the work he did until the time of his termination from the job by the Defendant, and if so, in what amount?
2. Is the Defendant entitled to an award of money from the Plaintiff pursuant to any of her counterclaims, and if so, in what amount?
3. Whether either party is entitled to attorney fees?

The contract between the parties had an attachment that set out specifications of the job and included references to the specifications set out in the constructions plans. The contract also stated that any change orders were to be signed by both parties. This was a "fixed price" contract. The Plaintiff has charged Defendant with 5 change orders, which were not signed. Both parties testified at length regarding these change orders and the work was done. However, the contract is clear and the Plaintiff can not recover these amounts.

The Plaintiff is seeking to foreclose his mechanics lien, which by stipulation was timely and properly filed, in the amount of \$112,790.00, plus pre-judgment and post judgment interest and attorney fees. In order to determine what amount, if any, the Plaintiff is due, a point in time must be set to examine what percentage of the contract the Plaintiff had

finished. There was conflicting testimony from the parties as to the last date worked by the Plaintiff, but the middle of January, 2007 seems to be the date to be used for this purpose. (The middle of December was also considered, but there is no relevant difference between the two.) It is determined that the Plaintiff's percentage of completion of the job was 66.75%, using a combination of the Defendant's bank's figures- Plaintiff's no. 11- and Plaintiff's estimate- Plaintiff's no. 12. (The Defendant's concern about defective work, repairs necessary, completion of the job and diminution of value to the home will be addressed in the Defendant's counterclaim.) The Plaintiff is entitled to be paid for the amount of completed work. The Plaintiff carried his burden of proof to show the actual work he did and the amount of money he spent thereon. Since this is a fixed price contract, this method of determining any amount, i.e. the percentage of completion, due him is appropriate.

The contract price was \$359,000.00 and the amount of completion was 66.75 percent, which would be \$239,632.00. The Defendant has paid a total of \$197,450.00, leaving a balance due to Plaintiff of \$42,182.00. The Plaintiff is not entitled to the charges for the change orders.

The Plaintiff is not entitled to prejudgment interest. The amount in the Complaint was not liquidated and the amount finally awarded was able to be computed only after obtaining testimony and evidence regarding percentage of completion. This is not a situation where the amount due can be readily ascertained by mere computation or by a legal or recognized standard. The contract between the parties makes no mention of any interest, pre-judgment or otherwise.

As to the Defendant's counterclaims, substantial testimony and evidence was taken from both parties and their witnesses. The primary thrust of the Defendant's case was an attempt to present the defects of Plaintiff's work, the amount the Defendant spent to complete the contract and any diminution in value of the home. In order to determine her entitlements, if any, a determination must be made as to whether she repaired any defective work of Plaintiff, completed remaining work left on the contract when Plaintiff left the job, or had any diminution in value (DIV) of the residence resulting from any of Plaintiff's work that was defective and could not be reasonably repaired. A determination

must be made as to what, if any of the work by Plaintiff was defective, did Defendant expend a "cost to cure" such defect or, if the work could not be reasonably repaired, then an amount of DIV of the whole due to such defect. The Defendant has the burden of proving these matters by a preponderance of the evidence and such must be beyond mere speculation. The Defendant attached a list to her counterclaim and an exhibit that itemizes the claimed defects and each item must be addressed. Defendant's no. 9. It is important to note that the Defendant is not entitled to a "perfect house" nor, in this case, that the work done by the Plaintiff is perfect. She is however entitled to expect that the quality of construction be of reasonable quality.

1. Black felt—Defendant had photographs taken April of 2006 and the inspection report of Mr. Brault, her expert, showing several areas of no or improperly installed felt. Mr. Brault testified he could not state that there were any International Residential Code violations, did not know whether the items he mentioned were addressed by Plaintiff before he left job and could not give any "cost of cure" for any of the defects he mentioned. However, there was no evidence that these areas were not repaired and/or completed by the Plaintiff, nor was there evidence of the extent of such defects, if they existed, and there was no evidence of "cost to cure" or diminution in value (DIV).
2. Foundation—these are also addressed by Mr. Brault on behalf of the Plaintiff and covered by his report. (Court's no. 4.) Defendant gives no evidence of a defect that required repair, cost of same or DIV. Mr. Brault again states that he just pointed out items that concerned him, could not say they were code violations, could not state the method or cost of repair. He specifically stated that he was not aware of any money damage due to these alleged defects. The only evidence of any suggested, but not necessary, repair came from Mr. Belk, the Plaintiff's expert, who stated that \$100.00 could be spent to realign a floor joist. **Mr. Brault testified that if a contractor did not follow the recommendations in his report such would not mean that the contractor "guilty of poor or unworkmanlike conduct."**
3. Master bath windows— The plans called for glass block and the Plaintiff installed acrylic block. He admitted he would have changed them with no cost to the

Defendant, but was not allowed on the job long enough to do so. There is no evidence the Defendant had any cost to remove and replace them, no apparent cost on the exhibit 6 for glass blocks and no testimony regarding DIV resulting from having acrylic versus glass blocks.

4. Window transoms— The plans call for some windows to have transoms and some do not. But there is no testimony about cost to repair this item or DIV.
5. Small windows—No evidence of repair costs or DIV.
6. Front door—The Defendant, on her exhibit no. 6, shows she spent \$5909.00 for a replacement door, but the testimony was that the original door needed to be repaired and that Mr. Belk also saw it. However, there was no evidence that the entire door needed to be replaced and no evidence for Defendant about the cost of repair or DIV. Mr. Belk gave the only repair cost of 200.00
7. Pocket doors—The Plaintiff was ordered off the job before these could be installed, but there was no testimony they were not done or any DIV.
8. Back terrace—This was done differently than the plans, but the only reliable testimony was that it was well built. The fact that it was not in accordance with the plans does not per se mean there was any DIV and there was no testimony to that effect.
9. Grading lot—This is not to be done till the end of the job. Plaintiff had not gotten to that point.
10. Color of bricks—Her expert, Mr. Brault, did not mention this as a defect. Mr. Belk noticed it after it was pointed out to him by the Defendant and his opinion was that it was not objectionable. Even if it was a defect that required correction, there was no evidence of the extent of repair, nature of repair, cost of repair or, if not repaired, any DIV.
11. Stucco window—There was no indication of values except for Mr. Belk who suggested repair cost to be 50.00.
12. Kitchen plumbing—The alleged defects regarding this issue by the Defendant is not chargeable to him since he had not gotten to that stage in his work. No evidence of defect in what he had done, no values of cost to repair any alleged defects nor DIV.

13. Chimney—This was called for in the plans and should be part of the finished house. However, there was no evidence of any cost to add the chimney and if it was not added, whether there was any DIV.
14. Foyer window—There was a finishing defect and the only testimony regarding the repair cost was from Mr. Belk for 100.00.
15. Living room window sills—This complaint does is not a deviation from the plans and is not a defect.
16. & 17. Walls and floors. There is no evidence of a defect that rose to the level of requiring repair, and if repair was needed, no cost of repair nor DIV.
18. Foundation—This has been addressed in number 2 above.
19. Insulation—There is no code violation to have mixed methods of insulation. The areas Defendant complains of having no or improper insulation-see Mr. Brault's report- have been covered so that no one can now testify that these areas have been properly done either by Plaintiff before he left the job or by The Defendant's sub contractor who finished insulation. There are no repair costs or DIV associated with this item.
20. Front stucco windows—This item needed correction and the only repair cost from all the testimony came from Mr. Belk in the amount of \$100.00.
21. Crawl space—This has been addressed earlier as to the change order. The Defendant did not produce any cost to have this changed to comply with the plans, which would not have been practical to do anyway. However, she did not produce any evidence that the house as completed suffered any DIV.
22. Tempered window—There was no evidence of any cost of repair or DIV.
23. Moisture barrier—The testimony clearly showed there was a moisture barrier laid down-although done after the Plaintiff left the job- and there was no moisture problem in the crawl space. Also, the Connolly report, Plaintiff no. 17, clearly indicated that although there was no moisture problem noted as of the date of his inspection, that there could be such in the future, but that the cause was improper placement and grading for the sidewalks and final landscaping, which were not the responsibility of the Plaintiff. Mr. Slusarski also testified confirming the Connolly findings and that the landscaping and drains had apparently been installed similar to

the plans he had done for the Plaintiff- Plaintiff exhibit no. 10. The Defendant testified that she spent an additional \$1890.00 for the final landscaping but this is not chargeable to the Plaintiff.

24. Weep-holes—This is addressed in number 1 above.

25. Garage concrete—There is insufficient evidence of cracking that would be deemed a defect and no evidence of repair cost or DIV.

26. Floor insulation—This was not required in the plans.

The Defendant testified and presented evidence that she spent \$229,700.00 in total to complete and repair the job. She stated that there should be credits for allowances in the contract and some overages that she did in the total amount of \$29,262.00. In reviewing Defendants exhibits numbers 6, 7 & 8 and comparing all the entries thereon, the credits to be given should be as follows:

1. Main entrance-- \$9318.00—This is assuming the replacement of the front door-\$5909.00- is included therein.
2. Plumbing—The after allowance value is \$28,401.00.
3. Light fixtures—There were some ambiguities that were resolved in favor of the Defendant, and the after allowance value is \$17,471.00.
4. Kitchen appliances—The after allowance value is \$11,907.

The Defendant can not charge to the Plaintiff the mold remediation expense- \$1,344.00- since there is no evidence of any act or omission by the Plaintiff proximately caused the mold she noticed over a year after the Plaintiff left the job. The Defendant shall be able to include in her counterclaim the \$1,000.00 charged by Mr. Brault as an incidental and consequential damage. She is not entitled to recover any of the other charges on her exhibit number 8. She shall also include the proven costs of repair as indicated in the above list of 1 through 26 in the total amount of \$550.00.

The Defendant undertook to be her own general contractor to complete the job after she ordered the Plaintiff to cease work. At the time she undertook to complete the job 33.25% of the contract remained incomplete. This percentage of the contract is \$119,367.00.

Reducing her expenses by the total of the 1 through 4 above and the mold remediation

amount- a total of \$68,441.00, she has spent \$161,259.00 to complete the contract. She spent \$161,259.00 to complete the contract which should have cost \$119,367.00, the difference being \$41,892.00, the amount she is entitled from the Plaintiff. She is entitled to add \$550.00 repair cost and \$1,000.00 as incidental and consequential damage, as above set out, for a total amount of \$43,442.00.

Regarding attorney fees, the Defendant is the "prevailing" party. Neither Party made a demand or offer as required by the statute and therefore the Plaintiff's demand is the amount claimed in his complaint, \$112,790.00 and the Defendant's offer is "zero." Therefore, based on the above Award, the Defendant is the "prevailing" party and is entitled to attorney fees that are solely for the defense of the foreclosure of the mechanics lien. The award to the Plaintiff is closer to the offer of the Defendant than to the Plaintiff's demand. The award to Defendant on her Counterclaim is not used to determine who is the "prevailing" party.

When there is a determination of the "prevailing" party, therefore attorney fees must be awarded to that party, and the determination of the amount of attorney fees to be awarded to the Defendant is totally within the discretion of the Arbitrator, *Keeney's Metal Roofing, Inc.*, 345 S.C. at 553, 548 S.E.2d at 901. Not only must the fees be regarding the defense of the mechanics lien, they must be related to our case law criteria: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services, *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) (citing *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993)).

The parties both presented to the Arbitrator their respective itemized fees. After careful review and considering the above six criteria applied to Defendant's counsel and his statement of fees, the amount Defendant incurred solely the defense of the mechanics lien is \$6,2500.00, which amount she shall be entitled to be recovered by the Defendant from the Plaintiff. The total amount of the Defendant's attorney fees were substantially in excess of the amount awarded and were considered to be for the presentation of her

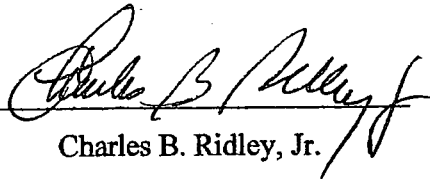
counterclaim or other matters not associated with strictly the defense of the mechanics lien.

THEREFORE, the **ARBITRATION AWARD** is as follows:

1. Plaintiff, on its Complaint, shall receive the amount of \$42,182.00, Forty Two Thousand One Hundred Eighty Two and no/100 Dollars from the Defendant.
2. The Defendant, on her Counterclaim, shall receive the amount of \$43,442.00, Forty Three Thousand Four Hundred Forty Two and no/100 Dollars from the Plaintiff.
3. The Parties will equally divide the fees of the Arbitrator, which shall be submitted to counsel for the parties within 14 days for the date hereon.
4. The Defendant shall be awarded the amount of \$6,250.00 (Six Thousand Two Hundred Fifty and no/100 Dollars) from the Plaintiff as attorney fees for the defense of the mechanics lien as the prevailing party.

Date: February 25, 2010

Arbitrator:


Charles B. Ridley, Jr.

STATE OF SOUTH CAROLINA]
COUNTY OF YORK]
J.W. NEAL CONSTRUCTION, LLC,]
a South Carolina limited liability company,]
Plaintiff,]
v.]
CORNELIA THOMAS,]
Defendant.]

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

ORDER

Case No. 2007-CP-46-0119

FILED-RECEIVED
2010 JUN 23 AM 11:31
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

This matter came before me for a hearing on May 19th, 2010, upon motions of the parties pertaining to an arbitration award in this case. John Martin Foster appeared for the Plaintiff; Herbert W. Hamilton of Hamilton appeared for the Defendant. Based on the record and evidence presented, and arguments of counsel, I make the following findings and conclusions.

By Agreement of the parties, this Mechanics Lien case was dismissed without prejudice and submitted to binding arbitration. With the agreement of counsel for the parties, I interpret the dismissal order as recognizing the continuing jurisdiction of this court pursuant to S.C. Code Ann. §§ 15-48-10 *et seq.* (1976, as amended).

After a full hearing of the matter, the Arbitrator issued his decision, awarding the Plaintiff \$41,182.00 on his claim, and the Defendant \$43,442.00 on her counterclaim. In accordance with applicable statute and precedent, the Arbitrator also ruled that Defendant was the prevailing party, entitled to an award of attorneys fees and costs.

The decision of the Arbitrator is dated on its face February 25, 2010. A cover letter of that date transmitting the same to both counsel was introduced. Neither a certificate of service or a proof of mailing was submitted by either counsel.

By e-mail dated and sent March 22, 2010, Plaintiff requested a revision of the Award due to a mathematical error. By his e-mail of March 23, 2010, the Arbitrator acknowledged that there was a mathematical error, and offered to correct the same. Defendant objected to the correction. All e-mails referenced herein were either attached to the Motion pleadings, or presented to the Court.

Defendant moves pursuant to S.C. Code Ann. § 15-48-120 to re-open the case and confirm the original reward. Pursuant to S.C. Code § 15-48-140, and Rule 60(a), S.C.R.C.P.,

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Plaintiff moves the Court to Modify or Correct the Arbitration Award to be entered.

§ 15-48-140 provides, in relevant part, as follows:

(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; . . .

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

In this case, I find and conclude that there is ". . . an evident miscalculation of figures [and] an evident mistake in the description of [a] thing . . . referred to in the award." The Arbitrator states in the first, partial paragraph of page 2 of his Award:

"Prior to that time the defendant had paid the Plaintiff 2 draws totaling \$143,600.00, making a total payment to Plaintiff of \$161,550.00."

He states, however, in the second, full paragraph on Page 3 of the award:

"The Defendant has paid a total of \$197,450.00, leaving a balance due to Plaintiff of \$42,182.00."

The two cited statements are obviously inconsistent and contradict each other. This is "evident" on the face of the Award, and I construe the plain language of the statute to apply and to require a correction. Given this fact, Plaintiff is entitled to a modification of the Award to correct this mistake. The other provisions of the Award as to damages will not be affected.

Defendant asserts that a stricter standard should be applied, and that such standard dictates that this award may not be corrected. In *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188 (4th Cir. 1998), the Court construed the Federal Arbitration Act to limit the remedy of modification to apply only to "mathematical errors appearing on the face of the award." *Id.*, 142 F.3d at 194. In *United States Postal Service v. Natl. Postal Professional Nurses*, 232 F.3d 892 (4th Cir. 2000), the Court applied that reasoning to the Maryland Uniform Arbitration Act. No South Carolina case controls this particular question of interpretation of our state statute.

I find and conclude that even if the cited standard is applied in this case, there are "mathematical errors appearing on the face of the award." *Apex, supra*, 142 F.3d at 194. It is clear that the Arbitrator found as a fact that a certain amount was paid by Defendant to Plaintiff, and then through error used another amount to calculate the Plaintiff's award. The correct amount is easily calculable from the face of the award. Thus, I find and conclude that this

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satisfies the *Apex* standard, and entitles Plaintiff to relief under § 15-48-140.

The result of this correction is to change the prevailing party from Defendant to Plaintiff. Thus, counsel for Plaintiff shall submit his Affidavit for Attorneys Fees for a determination of reasonable attorney's fees and costs.

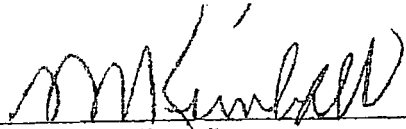
Therefore, based on the discussion herein, it is ordered as follows:

1. The Arbitration Award shall be corrected to show an award to Plaintiff of \$78,082.50, and an award to Defendant on her counterclaim of \$43,442.00.

2. As the prevailing party, Plaintiff is granted an award of reasonable attorney's fees and costs. Plaintiff shall submit his motion and affidavit in support of reasonable attorneys fees and costs within ten days from the date of this order. Defendant shall have ten days from the date of service of the motion and affidavit in which to respond to the same. If requested by either party, a hearing will be held to determine the amount of any award.

AND IT IS SO ORDERED.

June 1, 2010



S. Jackson Kimball
Special Circuit Court Judge
York County

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NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2007-CP-46-00119

JW Neal Construction, LLC, Respondent,

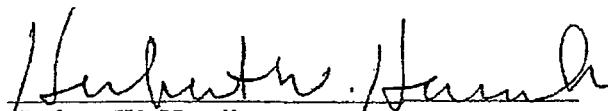
v.

Cornelia Thomas, Appellant.

NOTICE OF APPEAL

Notice is hereby given that Cornelia Thomas appeals the Order of the Honorable S. Jackson Kimball dated June 1, 2010 and filed of record with the York County Clerk of Courts offices on June 23, 2010. The Appellant received written notice of the entry of this order on June 27, 2010. A copy of the order is attached.

Respectfully submitted,



Herbert W. Hamilton
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, SC 29730
(803) 329-7672

July 26, 2010
Rock Hill, South Carolina

ATTORNEYS FOR APPELLANT

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AUG 31 2010

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

10366-001

Case No.: 2007-CP-46-00119

JW Neal Construction,

.....Respondent,

v.

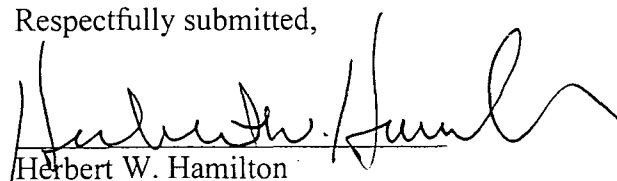
Cornelia Thomas.....

Appellant.

MOTION TO DISMISS APPEAL

Appellant hereby moves to dismiss this Appeal without prejudice. The Motion is made on the grounds that the Order of June 1, 2010, from which this Appeal is taken, is not the final order and the Appeal is premature.

Respectfully submitted,



Herbert W. Hamilton
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, SC 29730
(803) 329-7672

ATTORNEYS FOR APPELLANT

August 26, 2010
Rock Hill, South Carolina

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2007-CP-46-00119

JW Neal Construction,Respondent,

v.

Cornelia Thomas.....Appellant.

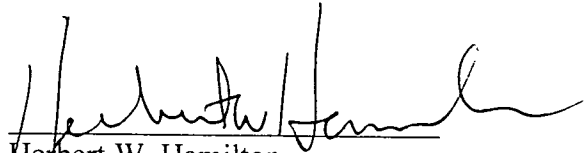
MEMORANDUM

On June 1, 2010, the Honorable S. Jackson Kimball issued an Order captioned "Judgment in a Civil Case". The Order purports to rule on all substantive issues before the Court. Thereafter, the Court remanded the case to the Arbitrator for the purpose of determining attorneys' fees under the Mechanic's Lien Statute. (See Exhibits A & B)

Out of an abundance of caution, the Appellant filed a Notice of Appeal from Judge Kimball's Order of June 1, 2010. It now appears that a supplemental order regarding attorney's fees will be necessary. Consequently, Judge Kimball's Order of June 1, 2010 is not a final order as required by Rule 201(a) of the Appellate Court Rules, and this Appeal is premature.

The Appellant respectfully requests that this Appeal be dismissed without prejudice.

Counsel for the Appellant has been unable to obtain the consent of Respondent's
Counsel to this Motion.



Herbert W. Hamilton
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, SC 29730
(803) 329-7672

ATTORNEYS FOR APPELLANT

August 27, 2010
Rock Hill, South Carolina

4820-6738-0999, v. 1

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL ^{CASE} RECEIVED
CASE NO: 2007CP4600119

JUL 27 2010

SC Court of Appeals

JW Neal Construction LLC vs. Cornelia Thomas

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.
- 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: _____

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Order

Dated at York, South Carolina, this 1st day of June, 2010.

Court Reporter: s/S. Jackson Kimball

PRESIDING JUDGE - S. JACKSON KIMBALL

This judgment was entered on the 23rd day of June, 2010, and a copy mailed first class this 23rd day of June, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

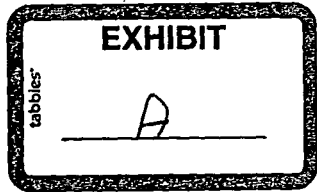
John Martin Foster Attorney at Law P.O. Box 106 Rock Hill, SC 29731
ATTORNEY(S) FOR THE PLAINTIFF(S)

Herbert W. Hamilton Hamilton Martens Ballou & Sipe, LLC P.O. Box 10940 Rock Hill, SC 29731
ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

SCRPC APP-24/FORM 4



STATE OF SOUTH CAROLINA]
]
 COUNTY OF YORK]
]
 J.W. NEAL CONSTRUCTION, LLC,]
 a South Carolina limited liability company,]
]
 Plaintiff,]
]
 v.]
]
 CORNELIA THOMAS,]
]
 Defendant.]

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

ORDER

Case No. 2007-CP-46-0119

DAVID HAMILTON
 C.C.P. & S.S.
 YORK COUNTY, SC

2010 JUN 23 AM 11:31

FILED-RECEIVED

This matter came before me for a hearing on May 19th, 2010, upon motions of the parties pertaining to an arbitration award in this case. John Martin Foster appeared for the Plaintiff; Herbert W. Hamilton of Hamilton appeared for the Defendant. Based on the record and evidence presented, and arguments of counsel, I make the following findings and conclusions.

By Agreement of the parties, this Mechanics Lien case was dismissed without prejudice and submitted to binding arbitration. With the agreement of counsel for the parties, I interpret the dismissal order as recognizing the continuing jurisdiction of this court pursuant to S.C. Code Ann. §§ 15-48-10 *et seq.* (1976, as amended).

After a full hearing of the matter, the Arbitrator issued his decision, awarding the Plaintiff \$41,182.00 on his claim, and the Defendant \$43,442.00 on her counterclaim. In accordance with applicable statute and precedent, the Arbitrator also ruled that Defendant was the prevailing party, entitled to an award of attorneys fees and costs.

The decision of the Arbitrator is dated on its face February 25, 2010. A cover letter of that date transmitting the same to both counsel was introduced. Neither a certificate of service or a proof of mailing was submitted by either counsel.

By e-mail dated and sent March 22, 2010, Plaintiff requested a revision of the Award due to a mathematical error. By his e-mail of March 23, 2010, the Arbitrator acknowledged that there was a mathematical error, and offered to correct the same. Defendant objected to the correction. All e-mails referenced herein were either attached to the Motion pleadings, or presented to the Court.

Defendant moves pursuant to S.C. Code Ann. § 15-48-120 to re-open the case and confirm the original reward. Pursuant to S.C. Code § 15-48-140, and Rule 60(a), S.C.R.C.P.,

Plaintiff moves the Court to Modify or Correct the Arbitration Award to be entered.

§ 15-48-140 provides, in relevant part, as follows:

(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

In this case, I find and conclude that there is “. . . an evident miscalculation of figures [and] an evident mistake in the description of [a] thing . . . referred to in the award.” The Arbitrator states in the first, partial paragraph of page 2 of his Award:

"Prior to that time the defendant had paid the Plaintiff 2 draws totaling \$143,600.00, making a total payment to Plaintiff of \$161,550.00."

He states, however, in the second, full paragraph on Page 3 of the award:

"The Defendant has paid a total of \$197,450.00, leaving a balance due to Plaintiff of \$42,182.00."

The two cited statements are obviously inconsistent and contradict each other. This is “evident” on the face of the Award, and I construe the plain language of the statute to apply and to require a correction. Given this fact, Plaintiff is entitled to a modification of the Award to correct this mistake. The other provisions of the Award as to damages will not be affected.

Defendant asserts that a stricter standard should be applied, and that such standard dictates that this award may not be corrected. In *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188 (4th Cir. 1998), the Court construed the Federal Arbitration Act to limit the remedy of modification to apply only to “mathematical errors appearing on the face of the award.” *Id.*, 142 F.3d at 194. In *United States Postal Service v. Natl. Postal Professional Nurses*, 232 F.3d 892 (4th Cir. 2000), the Court applied that reasoning to the Maryland Uniform Arbitration Act. No South Carolina case controls this particular question of interpretation of our state statute.

I find and conclude that even if the cited standard is applied in this case, there are “mathematical errors appearing on the face of the award.” *Apex, supra*, 142 F.3d at 194. It is clear that the Arbitrator found as a fact that a certain amount was paid by Defendant to Plaintiff, and then through error used another amount to calculate the Plaintiff’s award. The correct amount is easily calculable from the face of the award. Thus, I find and conclude that this

mmk
#2

satisfies the *Apex* standard, and entitles Plaintiff to relief under § 15-48-140.

The result of this correction is to change the prevailing party from Defendant to Plaintiff. Thus, counsel for Plaintiff shall submit his Affidavit for Attorneys Fees for a determination of reasonable attorney's fees and costs.

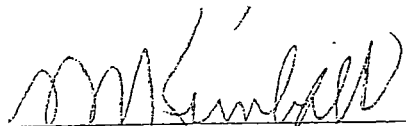
Therefore, based on the discussion herein, it is ordered as follows:

1. The Arbitration Award shall be corrected to show an award to Plaintiff of \$78,082.50, and an award to Defendant on her counterclaim of \$43,442.00.

2. As the prevailing party, Plaintiff is granted an award of reasonable attorney's fees and costs. Plaintiff shall submit his motion and affidavit in support of reasonable attorneys fees and costs within ten days from the date of this order. Defendant shall have ten days from the date of service of the motion and affidavit in which to respond to the same. If requested by either party, a hearing will be held to determine the amount of any award.

AND IT IS SO ORDERED.

June 1, 2010



S. Jackson Kimball
Special Circuit Court Judge
York County

$\frac{1}{2}$ 2

10566001

FILED-RECEIVED
2010 JUN 11 AM 8:45
DAVID HAMILTON
C.O.S.P. & G.S.
YORK COUNTY, SC

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF YORK

CASE NO: 2007CP4600119

IN THE COURT OF COMMON PLEAS

JW Neal Construction LLC vs. Cornelia Thomas

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.
- 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: _____

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

This matter came before me for consideration of an award of attorneys' fees and costs to Plaintiff as the prevailing party in its mechanic's lien claim. Plaintiff was represented by J. Martin Foster, and Defendant was represented by Herbert W. Hamilton.

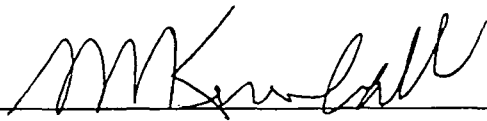
By previous order and pursuant to S.C. Code Ann. Section 15-48-140, I corrected a miscalculation of the arbitration award in this action. The correction altered the Arbitrator's determination of the prevailing party. Thus, it is now appropriate to remand the case to the Arbitrator for a determination of an award of reasonable attorney fees to the Plaintiff as the prevailing party in accordance with the Arbitrator's consideration of the factors set forth in *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997), and *Barron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989), *et al.*

Therefore, it is ordered that this case be remanded to the Arbitrator for a determination of an award of attorney fees and costs in this action.

AND IT IS SO ORDERED.

Dated at York, South Carolina, this June 9, 2010.

Court Reporter: N/A


S. JACKSON KIMBALL, SPECIAL CIRCUIT JUDGE -

This judgment was entered on the 11th of June, 2010, and a copy mailed first class this 11th of June, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

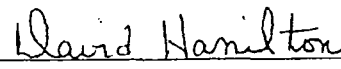
John Martin Foster Attorney at Law P.O. Box 106 Rock Hill, SC 29731

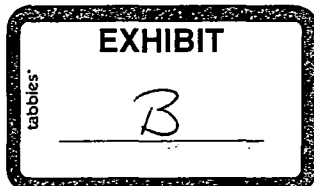
Herbert W. Hamilton Hamilton Martens Ballou & Sipe, LLC P.O. Box 10940 Rock Hill, SC 29731

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4


David Hamilton - Clerk of Court



THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2007-CP-46-00119

JW Neal Construction, LLC, Respondent,

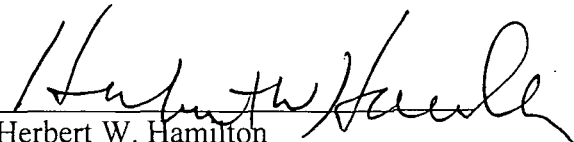
v.

Cornelia Thomas, Appellant.

PROOF OF SERVICE

I, Herbert W. Hamilton, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to its attorney of record, John Martin Foster, Attorney at Law, PO Box 106, Rock Hill, South Carolina 29731.

August ____, 2010


Herbert W. Hamilton
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, SC 29730
(803) 329-7672

ATTORNEYS FOR APPELLANT

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2007-CP-46-00119

JW Neal Construction,Respondent,

v.

Cornelia Thomas.....Appellant.

MEMORANDUM

On June 1, 2010, the Honorable S. Jackson Kimball issued an Order captioned "Judgment in a Civil Case". The Order purports to rule on all substantive issues before the Court. Thereafter, the Court remanded the case to the Arbitrator for the purpose of determining attorneys' fees under the Mechanic's Lien Statute. (See Exhibits A & B)

Out of an abundance of caution, the Appellant filed a Notice of Appeal from Judge Kimball's Order of June 1, 2010. It now appears that a supplemental order regarding attorney's fees will be necessary. Consequently, Judge Kimball's Order of June 1, 2010 is not a final order as required by Rule 201(a) of the Appellate Court Rules, and this Appeal is premature.

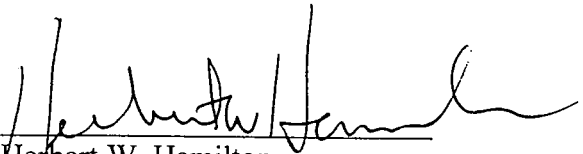
The Appellant respectfully requests that this Appeal be dismissed without prejudice.

RECEIVED

NOV 09 2012

SC Court of Appeals

Counsel for the Appellant has been unable to obtain the consent of Respondent's
Counsel to this Motion.



Herbert W. Hamilton
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, SC 29730
(803) 329-7672

ATTORNEYS FOR APPELLANT

August 27, 2010
Rock Hill, South Carolina

4820-6738-0999, v. 1

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2007CP4600119

RECEIVED

JUL 27 2010

SC Court of Appeals

JW Neal Construction LLC vs. Cornelia Thomas

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.
- 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: _____

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Order

Dated at York, South Carolina, this 1st day of June, 2010.

Court Reporter:

s/S. Jackson Kimball

PRESIDING JUDGE - S. JACKSON KIMBALL

This judgment was entered on the 23rd day of June, 2010, and a copy mailed first class this 23rd day of June, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

John Martin Foster Attorney at Law P.O. Box
106 Rock Hill, SC 29731

ATTORNEY(S) FOR THE PLAINTIFF(S)

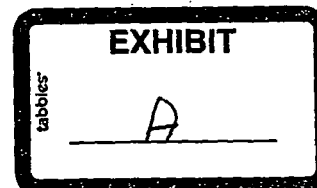
Herbert W. Hamilton Hamilton Martens Ballou &
Sipe, LLC P.O. Box 10940 Rock Hill, SC 29731

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

SCRPC APP-24/FORM 4



STATE OF SOUTH CAROLINA]
]
 COUNTY OF YORK]
]
 J.W. NEAL CONSTRUCTION, LLC,]
 a South Carolina limited liability company,]
]
 Plaintiff,]
]
 v.]
]
 CORNELIA THOMAS,]
]
 Defendant.]

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

ORDER

Case No. 2007-CP-46-0119

FILED-RECEIVED
 2010 JUN 23 AM 11:31
 DAVID HAMILTON
 C.C.C.P. & GS
 YORK COUNTY, SC

This matter came before me for a hearing on May 19th, 2010, upon motions of the parties pertaining to an arbitration award in this case. John Martin Foster appeared for the Plaintiff; Herbert W. Hamilton of Hamilton appeared for the Defendant. Based on the record and evidence presented, and arguments of counsel, I make the following findings and conclusions.

By Agreement of the parties, this Mechanics Lien case was dismissed without prejudice and submitted to binding arbitration. With the agreement of counsel for the parties, I interpret the dismissal order as recognizing the continuing jurisdiction of this court pursuant to S.C. Code Ann. §§ 15-48-10 *et seq.* (1976, as amended).

After a full hearing of the matter, the Arbitrator issued his decision, awarding the Plaintiff \$41,182.00 on his claim, and the Defendant \$43,442.00 on her counterclaim. In accordance with applicable statute and precedent, the Arbitrator also ruled that Defendant was the prevailing party, entitled to an award of attorneys fees and costs.

The decision of the Arbitrator is dated on its face February 25, 2010. A cover letter of that date transmitting the same to both counsel was introduced. Neither a certificate of service or a proof of mailing was submitted by either counsel.

By e-mail dated and sent March 22, 2010, Plaintiff requested a revision of the Award due to a mathematical error. By his e-mail of March 23, 2010, the Arbitrator acknowledged that there was a mathematical error, and offered to correct the same. Defendant objected to the correction. All e-mails referenced herein were either attached to the Motion pleadings, or presented to the Court.

Defendant moves pursuant to S.C. Code Ann. § 15-48-120 to re-open the case and confirm the original reward. Pursuant to S.C. Code § 15-48-140, and Rule 60(a), S.C.R.C.P.,

mk
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Plaintiff moves the Court to Modify or Correct the Arbitration Award to be entered.

§ 15-48-140 provides, in relevant part, as follows:

(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; . . .

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

In this case, I find and conclude that there is “. . . an evident miscalculation of figures [and] an evident mistake in the description of [a] thing . . . referred to in the award.” The Arbitrator states in the first, partial paragraph of page 2 of his Award:

“Prior to that time the defendant had paid the Plaintiff 2 draws totaling \$143,600.00, making a total payment to Plaintiff of \$161,550.00.”

He states, however, in the second, full paragraph on Page 3 of the award:

“The Defendant has paid a total of \$197,450.00, leaving a balance due to Plaintiff of \$42,182.00.”

The two cited statements are obviously inconsistent and contradict each other. This is “evident” on the face of the Award, and I construe the plain language of the statute to apply and to require a correction. Given this fact, Plaintiff is entitled to a modification of the Award to correct this mistake. The other provisions of the Award as to damages will not be affected.

Defendant asserts that a stricter standard should be applied, and that such standard dictates that this award may not be corrected. In *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188 (4th Cir. 1998), the Court construed the Federal Arbitration Act to limit the remedy of modification to apply only to “mathematical errors appearing on the face of the award.” *Id.*, 142 F.3d at 194. In *United States Postal Service v. Natl. Postal Professional Nurses*, 232 F.3d 892 (4th Cir. 2000), the Court applied that reasoning to the Maryland Uniform Arbitration Act. No South Carolina case controls this particular question of interpretation of our state statute.

I find and conclude that even if the cited standard is applied in this case, there are “mathematical errors appearing on the face of the award.” *Apex, supra*, 142 F.3d at 194. It is clear that the Arbitrator found as a fact that a certain amount was paid by Defendant to Plaintiff, and then through error used another amount to calculate the Plaintiff’s award. The correct amount is easily calculable from the face of the award. Thus, I find and conclude that this

mm
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satisfies the *Apex* standard, and entitles Plaintiff to relief under § 15-48-140.

The result of this correction is to change the prevailing party from Defendant to Plaintiff. Thus, counsel for Plaintiff shall submit his Affidavit for Attorneys Fees for a determination of reasonable attorney's fees and costs.


Therefore, based on the discussion herein, it is ordered as follows:

1. The Arbitration Award shall be corrected to show an award to Plaintiff of \$78,082.50, and an award to Defendant on her counterclaim of \$43,442.00.

2. As the prevailing party, Plaintiff is granted an award of reasonable attorney's fees and costs. Plaintiff shall submit his motion and affidavit in support of reasonable attorneys fees and costs within ten days from the date of this order. Defendant shall have ten days from the date of service of the motion and affidavit in which to respond to the same. If requested by either party, a hearing will be held to determine the amount of any award.

AND IT IS SO ORDERED.

June 1, 2010



S. Jackson Kimball
Special Circuit Court Judge
York County

2

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2007CP4600119

FILED-RECEIVED
2010 JUN 11 AM 8:45
DAVID HAMILTON
C.O.P. & G.S.
YORK COUNTY, SC

JW Neal Construction LLC vs. Cornelia Thomas

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.
- 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: _____

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

This matter came before me for consideration of an award of attorneys' fees and costs to Plaintiff as the prevailing party in its mechanic's lien claim. Plaintiff was represented by J. Martin Foster, and Defendant was represented by Herbert W. Hamilton.

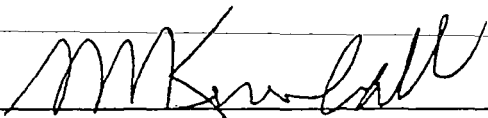
By previous order and pursuant to S.C. Code Ann. Section 15-48-140, I corrected a miscalculation of the arbitration award in this action. The correction altered the Arbitrator's determination of the prevailing party. Thus, it is now appropriate to remand the case to the Arbitrator for a determination of an award of reasonable attorney fees to the Plaintiff as the prevailing party in accordance with the Arbitrator's consideration of the factors set forth in *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997), and *Barron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989), et al.

Therefore, it is ordered that this case be remanded to the Arbitrator for a determination of an award of attorney fees and costs in this action.

AND IT IS SO ORDERED.

Dated at York, South Carolina, this June 9, 2010.

Court Reporter: N/A


S. JACKSON KIMBALL, SPECIAL CIRCUIT JUDGE -

This judgment was entered on the 11th of June, 2010, and a copy mailed first class this 11th of June, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

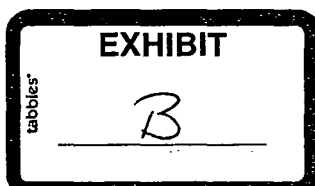
John Martin Foster Attorney at Law P.O. Box 106 Rock Hill, SC 29731

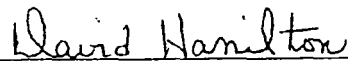
Herbert W. Hamilton Hamilton Martens Ballou & Sipe, LLC P.O. Box 10940 Rock Hill, SC 29731

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4





David Hamilton - Clerk of Court

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2007-CP-46-00119

JW Neal Construction, LLC, Respondent,

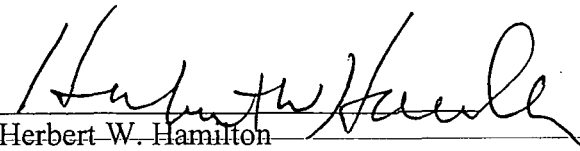
v.

Cornelia Thomas, Appellant.

PROOF OF SERVICE

I, Herbert W. Hamilton, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to its attorney of record, John Martin Foster, Attorney at Law, PO Box 106, Rock Hill, South Carolina 29731.

August ____, 2010


Herbert W. Hamilton
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, SC 29730
(803) 329-7672

ATTORNEYS FOR APPELLANT

The South Carolina Court of Appeals

J.W. Neal Construction, LLC, a South
Carolina limited liability company, Respondent,

v.

Cornelia Thomas, Appellant.

The Honorable S. Jackson Kimball, III
York County
Trial Court Case No. 2007-CP-46-00119

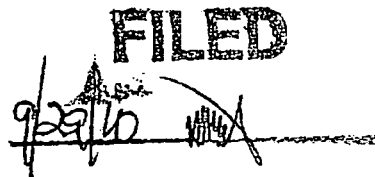
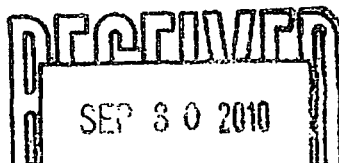
ORDER of DISMISSAL AND REMITTITUR

The above entitled case is pending on appeal in this Court. It now appears that the Appellant wishes to withdraw the appeal and moves the Court for an Order dismissing the appeal.

IT IS ORDERED that the above captioned appeal be and hereby is dismissed. This case is REMITTED to the Clerk of Court for York County.

V. Claire Allen, Deputy Clerk
For the Court

Columbia, South Carolina
Original to: The Honorable David Hamilton
cc: Herbert W. Hamilton, Esquire
John Martin Foster, Esquire



Other Counsel of Record:

John Martin Foster
Attorney at Law
PO Box 106
Rock Hill, SC 29731
(803) 324-8100

ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2007-CP-46-00119

JW Neal Construction, LLC, Respondent,

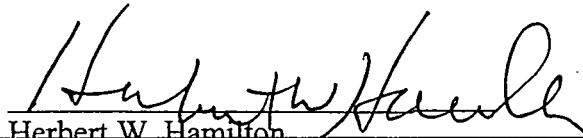
v.

Cornelia Thomas, Appellant.

PROOF OF SERVICE

I, Herbert W. Hamilton, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to its attorney of record, John Martin Foster, Attorney at Law, PO Box 106, Rock Hill, South Carolina 29731.

August ____, 2010



Herbert W. Hamilton
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, SC 29730
(803) 329-7672

ATTORNEYS FOR APPELLANT

5m

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
J.W. NEAL CONSTRUCTION, LLC,)
 Plaintiff,)
 vs.)
)
CORNELIA THOMAS,)
 Defendant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
 CASE NO.: 2007-CP-46-00119
**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Plaintiff's Attorney: <u>John Martin Foster, Bar No. 2086</u> Address: <u>223 E Main St Ste 520 POB 106 Rock Hill SC 29731</u> Phone: <u>803 324-8100</u> Fax <u>803 324-8109</u> E-mail: <u>jmfooster@comporium.net</u> Other: _____	Defendant's Attorney: <u>Herbert W. Hamilton, Bar No. 2626</u> Address: <u>130 E Main St, POB 10940, Rock Hill, SC 29731</u> Phone: <u>803 329-7672</u> Fax <u>803 329-7678</u> E-mail: <u>hhamilton@hmandb.com</u> Other: _____
--	---

MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: To Confirm Arbitration Award
 Estimated Time Needed: 20 min. Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order
 I hereby move for relief or action by the court as set forth in the attached proposed order.

 Signature of Attorney for Plaintiff / Defendant Date submitted _____

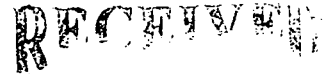
SECTION III: Motion Fee

PAID - AMOUNT: \$ 25.00
 EXEMPT: (check reason) Rule to Show Cause in Child or Spousal Support
 Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRPC)
 Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
--	---------------------------------

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____


 NOV 09 2012

STATE OF SOUTH CAROLINA]	IN THE COURT OF COMMON PLEAS
]	
COUNTY OF YORK]	SIXTEENTH JUDICIAL CIRCUIT
]	
J.W. NEAL CONSTRUCTION, LLC,]	
a South Carolina limited liability company,]	NOTICE AND MOTION
]	
Plaintiff,]	TO CONFIRM ARBITRATION AWARD
v.]	
]	
CORNELIA THOMAS,]	C.A. No. 2007-CP-46-0119
]	
Defendant.]	
]	

To: The Defendant and
Herbert W. Hamilton
Hamilton, Martens & Ballou, LLC
Attorneys for Defendant
130 East Main Street
Post Office Box 10940
Rock Hill, South Carolina 29731

You or your attorney should appear before this Court to present evidence or argument, if any you have, relating to the Motion herein, as follows:

DATE AND TIME: To be set by the Clerk of Court, or as soon thereafter as counsel may be heard.

PLACE: Office of the Master in Equity
1 North Congress Street
York, South Carolina 29745, or such other place as may be designated by the Judge or the Clerk of Court.

Pursuant to S.C. Code § 15-48-140(b) (West), the Plaintiff, by his counsel undersigned, moves this Court (as necessary) for an order:

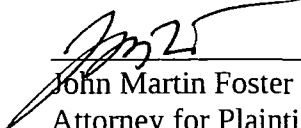
1. Confirming the amended awards made by the Arbitrator in the above-entitled matter, both as to the case in chief and as to attorney's fees;
2. Directing that judgment to be entered on the award pursuant to the statute cited above; and
3. Enforcing the judgment entered on the arbitration award.

This Motion is made on the grounds that:

- A. The motion will be made on the ground that the arbitrators have made a written award determining the dispute between the parties following hearings held by the arbitrators in accordance with the arbitration agreement executed by the parties.
- B. All awards of the arbitrator d herein have already been filed with the Clerk of Court for York County, and are attached hereto and incorporated herein.

Pursuant to Rule 11(a), S.C.R.C.P., counsel for the Movants hereby affirms that prior to filing this Motion, he has communicated, orally or in writing, with opposing Counsel and has attempted in good faith to resolve the matter contained in this Motion, or certifies that such consultation is unnecessary due to the dispositive nature thereof, would serve no useful purpose or could not be timely held.

This Motion is based on the records, pleadings, and files of this civil action, on the attachments hereto, and upon such Brief or Memorandum of Law as the Movants may submit, all of which are hereby incorporated herein.



John Martin Foster
Attorney for Plaintiff

The Guardian Building
223 East Main Street, Suite 320
Rock Hill, SC 29730

Post Office Box 106
Rock Hill, SC 29731-6106

803 324 8100
803 324 8109 fax
jmfoster@comporium.net

April 3, 2012

Rock Hill, South Carolina

Charles B. Ridley, Jr., P.A.

Attorney at Law
PO Box 11783
Rock Hill, SC 29731

February 25, 2010

The Honorable David Hamilton
York County Clerk of Court
PO Box 649
York, SC 29745

Re: J.W. Neal Construction, LLC vs. Cornelia Thomas
CA no. 2007-CP-46-119
Arbitration Award

Dear Mr. Hamilton:

Enclosed please find for filing the original Arbitration Award in the above matter.
I am sending copies of same by copy of the letter to counsel for the Parties.

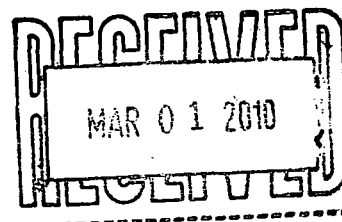
Thank you, I am

Sincerely yours,



Charles B. Ridley, Jr.

CBRJr
Enclosures
Cc: Herbert W. Hamilton
John Martin Foster ✓



STATE OF SOUTH CAROLINA)

IN ARBITRATION

COUNTY OF YORK)

J. W. NEAL CONSTRUCTION,)

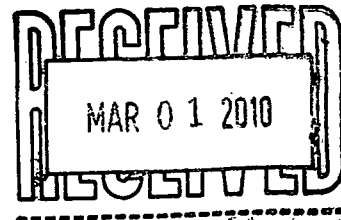
LLC)

Plaintiff)

Vs.)

CORNELIA THOMAS,)

Defendant.)



ARBITRATION AWARD

CASE NUMBER 2007-CP-46-119

This matter comes for arbitration hearing on January 28 and 29, 2010 in Rock Hill, SC. The undersigned was appointed as Arbitrator by stipulation of the parties.

The Plaintiff is represented by John Martin Foster of the York County Bar and the Defendant is represented by Herbert W. Hamilton, also of the York County Bar. The Plaintiff testified along with Robert L. Belk, James Slusarski and Gregory B. Miller. There were 4 Court's exhibits, without objection and 17 Plaintiff's exhibits without objection. The Defendant testified along with Buddy Brault. Part of Defendant's case was the report of Brian Connolly, Plaintiff's exhibit 17 and photographs taken by the Defendant. Defendant also introduced 3 other exhibits without objection. All parties and witnesses testified under oath.

In essence the Plaintiff's complaint was to foreclose a mechanics lien in the amount of \$112,790.00. He also had causes of actions for breach of contract and Quantum Meruit. About November 22, 2005 the parties entered into a fixed price contract for the construction of a house for the amount of \$359,000.00. The Defendant paid 5% down -

\$17,950.00. Plaintiff began work and worked until either middle of December 2006 or January Of 2007 at which time he was ordered off the job by the Defendant. Prior to that time the defendant had paid the Plaintiff 2 draws totaling \$143,600.00, making a total payment to Plaintiff of \$161,550.00.

The Defendant responded with an Answer and Counterclaim, alleging, in addition to a general denial, equitable estoppel and counterclaims, which consisted of allegations of breach of contract, negligent and/or defective work and breach of express and implied warranties.

The Parties stipulated that the Arbitrator's fee will be equally divided between them.

The issues are:

1. Is Plaintiff entitled to additional payment from Defendant for the work he did until the time of his termination from the job by the Defendant, and if so, in what amount?
2. Is the Defendant entitled to an award of money from the Plaintiff pursuant to any of her counterclaims, and if so, in what amount?
3. Whether either party is entitled to attorney fees?

The contract between the parties had an attachment that set out specifications of the job and included references to the specifications set out in the constructions plans. The contract also stated that any change orders were to be signed by both parties. This was a "fixed price" contract. The Plaintiff has charged Defendant with 5 change orders, which were not signed. Both parties testified at length regarding these change orders and the work was done. However, the contract is clear and the Plaintiff can not recover these amounts.

The Plaintiff is seeking to foreclose his mechanics lien, which by stipulation was timely and properly filed, in the amount of \$112,790.00, plus pre-judgment and post judgment interest and attorney fees. In order to determine what amount, if any, the Plaintiff is due, a point in time must be set to examine what percentage of the contract the Plaintiff had

finished. There was conflicting testimony from the parties as to the last date worked by the Plaintiff, but the middle of January, 2007 seems to be the date to be used for this purpose. (The middle of December was also considered, but there is no relevant difference between the two.) It is determined that the Plaintiff's percentage of completion of the job was 66.75%, using a combination of the Defendant's bank's figures- Plaintiff's no. 11- and Plaintiff's estimate- Plaintiff's no. 12. (The Defendant's concern about defective work, repairs necessary, completion of the job and diminution of value to the home will be addressed in the Defendant's counterclaim.) The Plaintiff is entitled to be paid for the amount of completed work. The Plaintiff carried his burden of proof to show the actual work he did and the amount of money he spent thereon. Since this is a fixed price contract, this method of determining any amount, i.e. the percentage of completion, due him is appropriate.

The contract price was \$359,000.00 and the amount of completion was 66.75 percent, which would be \$239,632.00. The Defendant has paid a total of \$197,450.00, leaving a balance due to Plaintiff of \$42,182.00. The Plaintiff is not entitled to the charges for the change orders.

The Plaintiff is not entitled to prejudgment interest. The amount in the Complaint was not liquidated and the amount finally awarded was able to be computed only after obtaining testimony and evidence regarding percentage of completion. This is not a situation where the amount due can be readily ascertained by mere computation or by a legal or recognized standard. The contract between the parties makes no mention of any interest, pre-judgment or otherwise.

As to the Defendant's counterclaims, substantial testimony and evidence was taken from both parties and their witnesses. The primary thrust of the Defendant's case was an attempt to present the defects of Plaintiff's work, the amount the Defendant spent to complete the contract and any diminution in value of the home. In order to determine her entitlements, if any, a determination must be made as to whether she repaired any defective work of Plaintiff, completed remaining work left on the contract when Plaintiff left the job, or had any diminution in value (DIV) of the residence resulting from any of Plaintiff's work that was defective and could not be reasonably repaired. A determination

must be made as to what, if any of the work by Plaintiff was defective, did Defendant expend a "cost to cure" such defect or, if the work could not be reasonably repaired, then an amount of DIV of the whole due to such defect. The Defendant has the burden of proving these matters by a preponderance of the evidence and such must be beyond mere speculation. The Defendant attached a list to her counterclaim and an exhibit that itemizes the claimed defects and each item must be addressed. Defendant's no. 9. It is important to note that the Defendant is not entitled to a "perfect house" nor, in this case, that the work done by the Plaintiff is perfect. She is however entitled to expect that the quality of construction be of reasonable quality.

1. Black felt—Defendant had photographs taken April of 2006 and the inspection report of Mr. Brault, her expert, showing several areas of no or improperly installed felt. Mr. Brault testified he could not state that there were any International Residential Code violations, did not know whether the items he mentioned were addressed by Plaintiff before he left job and could not give any "cost of cure" for any of the defects he mentioned. However, there was no evidence that these areas were not repaired and/or completed by the Plaintiff, nor was there evidence of the extent of such defects, if they existed, and there was no evidence of "cost to cure" or diminution in value (DIV).
2. Foundation—these are also addressed by Mr. Brault on behalf of the Plaintiff and covered by his report. (Court's no. 4.) Defendant gives no evidence of a defect that required repair, cost of same or DIV. Mr. Brault again states that he just pointed out items that concerned him, could not say they were code violations, could not state the method or cost of repair. He specifically stated that he was not aware of any money damage due to these alleged defects. The only evidence of any suggested, but not necessary, repair came from Mr. Belk, the Plaintiff's expert, who stated that \$100.00 could be spent to realign a floor joist. **Mr. Brault testified that if a contractor did not follow the recommendations in his report such would not mean that the contractor "guilty of poor or unworkmanlike conduct."**
3. Master bath windows— The plans called for glass block and the Plaintiff installed acrylic block. He admitted he would have changed them with no cost to the

Defendant, but was not allowed on the job long enough to do so. There is no evidence the Defendant had any cost to remove and replace them, no apparent cost on the exhibit 6 for glass blocks and no testimony regarding DIV resulting from having acrylic versus glass blocks.

4. Window transoms— The plans call for some windows to have transoms and some do not. But there is no testimony about cost to repair this item or DIV.
5. Small windows—No evidence of repair costs or DIV.
6. Front door—The Defendant, on her exhibit no. 6, shows she spent \$5909.00 for a replacement door, but the testimony was that the original door needed to be repaired and that Mr. Belk also saw it. However, there was no evidence that the entire door needed to be replaced and no evidence for Defendant about the cost of repair or DIV. Mr. Belk gave the only repair cost of 200.00
7. Pocket doors—The Plaintiff was ordered off the job before these could be installed, but there was no testimony they were not done or any DIV.
8. Back terrace—This was done differently than the plans, but the only reliable testimony was that it was well built. The fact that it was not in accordance with the plans does not per se mean there was any DIV and there was no testimony to that effect.
9. Grading lot—This is not to be done till the end of the job. Plaintiff had not gotten to that point.
10. Color of bricks—Her expert, Mr. Brault, did not mention this as a defect. Mr. Belk noticed it after it was pointed out to him by the Defendant and his opinion was that it was not objectionable. Even if it was a defect that required correction, there was no evidence of the extent of repair, nature of repair, cost of repair or, if not repaired, any DIV.
11. Stucco window—There was no indication of values except for Mr. Belk who suggested repair cost to be 50.00.
12. Kitchen plumbing—The alleged defects regarding this issue by the Defendant is not chargeable to him since he had not gotten to that stage in his work. No evidence of defect in what he had done, no values of cost to repair any alleged defects nor DIV.

13. Chimney—This was called for in the plans and should be part of the finished house. However, there was no evidence of any cost to add the chimney and if it was not added, whether there was any DIV.
14. Foyer window—There was a finishing defect and the only testimony regarding the repair cost was from Mr. Belk for 100.00.
15. Living room window sills—This complaint does is not a deviation from the plans and is not a defect.
16. & 17. Walls and floors. There is no evidence of a defect that rose to the level of requiring repair, and if repair was needed, no cost of repair nor DIV.
18. Foundation—This has been addressed in number 2 above.
19. Insulation—There is no code violation to have mixed methods of insulation. The areas Defendant complains of having no or improper insulation-see Mr. Brault's report- have been covered so that no one can now testify that these areas have been properly done either by Plaintiff before he left the job or by The Defendant's sub contractor who finished insulation. There are no repair costs or DIV associated with this item.
20. Front stucco windows—This item needed correction and the only repair cost from all the testimony came from Mr. Belk in the amount of \$100.00.
21. Crawl space—This has been addressed earlier as to the change order. The Defendant did not produce any cost to have this changed to comply with the plans, which would not have been practical to do anyway. However, she did not produce any evidence that the house as completed suffered any DIV.
22. Tempered window—There was no evidence of any cost of repair or DIV.
23. Moisture barrier—The testimony clearly showed there was a moisture barrier laid down-although done after the Plaintiff left the job- and there was no moisture problem in the crawl space. Also, the Connolly report, Plaintiff no. 17, clearly indicated that although there was no moisture problem noted as of the date of his inspection, that there could be such in the future, but that the cause was improper placement and grading for the sidewalks and final landscaping, which were not the responsibility of the Plaintiff. Mr. Slusarski also testified confirming the Connolly findings and that the landscaping and drains had apparently been installed similar to

the plans he had done for the Plaintiff- Plaintiff exhibit no. 10. The Defendant testified that she spent an additional \$1890.00 for the final landscaping but this is not chargeable to the Plaintiff.

24. Weep-holes—This is addressed in number 1 above.

25. Garage concrete—There is insufficient evidence of cracking that would be deemed a defect and no evidence of repair cost or DIV.

26. Floor insulation—This was not required in the plans.

The Defendant testified and presented evidence that she spent \$229,700.00 in total to complete and repair the job. She stated that there should be credits for allowances in the contract and some overages that she did in the total amount of \$29,262.00. In reviewing Defendants exhibits numbers 6, 7 & 8 and comparing all the entries thereon, the credits to be given should be as follows:

1. Main entrance-- \$9318.00—This is assuming the replacement of the front door-\$5909.00- is included therein.
2. Plumbing—The after allowance value is \$28,401.00.
3. Light fixtures—There were some ambiguities that were resolved in favor of the Defendant, and the after allowance value is \$17,471.00.
4. Kitchen appliances—The after allowance value is \$11,907.

The Defendant can not charge to the Plaintiff the mold remediation expense- \$1,344.00- since there is no evidence of any act or omission by the Plaintiff proximately caused the mold she noticed over a year after the Plaintiff left the job. The Defendant shall be able to include in her counterclaim the \$1,000.00 charged by Mr. Brault as an incidental and consequential damage. She is not entitled to recover any of the other charges on her exhibit number 8. She shall also include the proven costs of repair as indicated in the above list of 1 through 26 in the total amount of \$550.00.

The Defendant undertook to be her own general contractor to complete the job after she ordered the Plaintiff to cease work. At the time she undertook to complete the job 33.25% of the contract remained incomplete. This percentage of the contract is \$119,367.00. Reducing her expenses by the total of the 1 through 4 above and the mold remediation

amount- a total of \$68,441.00, she has spent \$161,259.00 to complete the contract. She spent \$161,259.00 to complete the contract which should have cost \$119,367.00, the difference being \$41,892.00, the amount she is entitled from the Plaintiff. She is entitled to add \$550.00 repair cost and \$1,000.00 as incidental and consequential damage, as above set out, for a total amount of \$43,442.00.

Regarding attorney fees, the Defendant is the "prevailing" party. Neither Party made a demand or offer as required by the statute and therefore the Plaintiff's demand is the amount claimed in his complaint, \$112,790.00 and the Defendant's offer is "zero." Therefore, based on the above Award, the Defendant is the "prevailing" party and is entitled to attorney fees that are solely for the defense of the foreclosure of the mechanics lien. The award to the Plaintiff is closer to the offer of the Defendant than to the Plaintiff's demand. The award to Defendant on her Counterclaim is not used to determine who is the "prevailing" party.

When there is a determination of the "prevailing" party, therefore attorney fees must be awarded to that party, and the determination of the amount of attorney fees to be awarded to the Defendant is totally within the discretion of the Arbitrator, *Keeney's Metal Roofing, Inc.*, 345 S.C. at 553, 548 S.E.2d at 901. Not only must the fees be regarding the defense of the mechanics lien, they must be related to our case law criteria: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services, *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) (citing *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993)).

The parties both presented to the Arbitrator their respective itemized fees. After careful review and considering the above six criteria applied to Defendant's counsel and his statement of fees, the amount Defendant incurred solely the defense of the mechanics lien is \$6,250.00, which amount she shall be entitled to be recovered by the Defendant from the Plaintiff. The total amount of the Defendant's attorney fees were substantially in excess of the amount awarded and were considered to be for the presentation of her

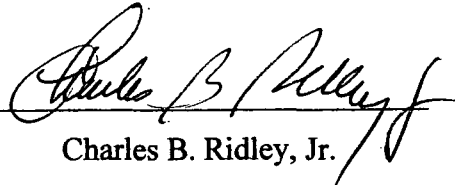
counterclaim or other matters not associated with strictly the defense of the mechanics lien.

THEREFORE, the **ARBITRATION AWARD** is as follows:

1. Plaintiff, on its Complaint, shall receive the amount of \$42,182.00, Forty Two Thousand One Hundred Eighty Two and no/100 Dollars from the Defendant.
2. The Defendant, on her Counterclaim, shall receive the amount of \$43,442.00, Forty Three Thousand Four Hundred Forty Two and no/100 Dollars from the Plaintiff.
3. The Parties will equally divide the fees of the Arbitrator, which shall be submitted to counsel for the parties within 14 days for the date hereon.
4. The Defendant shall be awarded the amount of \$6,250.00 (Six Thousand Two Hundred Fifty and no/100 Dollars) from the Plaintiff as attorney fees for the defense of the mechanics lien as the prevailing party.

Date: February 25, 2010

Arbitrator:



Charles B. Ridley, Jr.

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF YORK

CASE NO: 2007CP4600119

IN THE COURT OF COMMON PLEAS

JW Neal Construction LLC vs. Cornelia Thomas

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.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRCP;
 - Rule 41(a),
 - SCRCP (Vol. Nonsuit);
 - Rule 43(k), SCRCP (Settled);
 - Other:
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRCP;
 - Bankruptcy:
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____

IT IS ORDERED AND ADJUDGED:

See attached order;

Statement of Judgment by the Court:

Order

Dated at York, South Carolina, this 1st day of June, 2010.

Court Reporter:

s/S. Jackson Kimball

PRESIDING JUDGE - S. JACKSON KIMBALL

This judgment was entered on the 23rd day of June, 2010, and a copy mailed first class this 23rd day of June, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

John Martin Foster Attorney at Law P.O. Box
106 Rock Hill, SC 29731

Herbert W. Hamilton Hamilton Martens Ballou &
Sipe, LLC P.O. Box 10940 Rock Hill, SC 29731

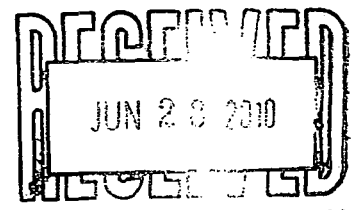
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

SCRCP APP-24/FORM 4

David Hamilton - Clerk of Court



STATE OF SOUTH CAROLINA]
]
 COUNTY OF YORK]
]
 J.W. NEAL CONSTRUCTION, LLC,]
 a South Carolina limited liability company,]
]
 Plaintiff,]
]
 v.]
]
 CORNELIA THOMAS,]
]
 Defendant.]

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

ORDER

Case No. 2007-CP-46-0119

DAVID HAMILTON
 C.C.P. & S.S.
 YORK COUNTY, SC

2010 JUN 23 AM 11:31

FILED-RECEIVED

This matter came before me for a hearing on May 19th, 2010, upon motions of the parties pertaining to an arbitration award in this case. John Martin Foster appeared for the Plaintiff; Herbert W. Hamilton of Hamilton appeared for the Defendant. Based on the record and evidence presented, and arguments of counsel, I make the following findings and conclusions.

By Agreement of the parties, this Mechanics Lien case was dismissed without prejudice and submitted to binding arbitration. With the agreement of counsel for the parties, I interpret the dismissal order as recognizing the continuing jurisdiction of this court pursuant to S.C. Code Ann. §§ 15-48-10 *et seq.* (1976, as amended).

After a full hearing of the matter, the Arbitrator issued his decision, awarding the Plaintiff \$41,182.00 on his claim, and the Defendant \$43,442.00 on her counterclaim. In accordance with applicable statute and precedent, the Arbitrator also ruled that Defendant was the prevailing party, entitled to an award of attorneys fees and costs.

The decision of the Arbitrator is dated on its face February 25, 2010. A cover letter of that date transmitting the same to both counsel was introduced. Neither a certificate of service or a proof of mailing was submitted by either counsel.

By e-mail dated and sent March 22, 2010, Plaintiff requested a revision of the Award due to a mathematical error. By his e-mail of March 23, 2010, the Arbitrator acknowledged that there was a mathematical error, and offered to correct the same. Defendant objected to the correction. All e-mails referenced herein were either attached to the Motion pleadings, or presented to the Court.

Defendant moves pursuant to S.C. Code Ann. § 15-48-120 to re-open the case and confirm the original reward. Pursuant to S.C. Code § 15-48-140, and Rule 60(a), S.C.R.C.P.,

mk
 #1

Plaintiff moves the Court to Modify or Correct the Arbitration Award to be entered.

§ 15-48-140 provides, in relevant part, as follows:

(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

In this case, I find and conclude that there is “. . . an evident miscalculation of figures [and] an evident mistake in the description of [a] thing . . . referred to in the award.” The Arbitrator states in the first, partial paragraph of page 2 of his Award:

"Prior to that time the defendant had paid the Plaintiff 2 draws totaling \$143,600.00, making a total payment to Plaintiff of \$161,550.00."

He states, however, in the second, full paragraph on Page 3 of the award:

"The Defendant has paid a total of \$197,450.00, leaving a balance due to Plaintiff of \$42,182.00."

The two cited statements are obviously inconsistent and contradict each other. This is “evident” on the face of the Award, and I construe the plain language of the statute to apply and to require a correction. Given this fact, Plaintiff is entitled to a modification of the Award to correct this mistake. The other provisions of the Award as to damages will not be affected.

Defendant asserts that a stricter standard should be applied, and that such standard dictates that this award may not be corrected. In *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188 (4th Cir. 1998), the Court construed the Federal Arbitration Act to limit the remedy of modification to apply only to "mathematical errors appearing on the face of the award." *Id.*, 142 F.3d at 194. In *United States Postal Service v. Natl. Postal Professional Nurses*, 232 F.3d 892 (4th Cir. 2000), the Court applied that reasoning to the Maryland Uniform Arbitration Act. No South Carolina case controls this particular question of interpretation of our state statute.

I find and conclude that even if the cited standard is applied in this case, there are "mathematical errors appearing on the face of the award." *Apex, supra*, 142 F.3d at 194. It is clear that the Arbitrator found as a fact that a certain amount was paid by Defendant to Plaintiff, and then through error used another amount to calculate the Plaintiff's award. The correct amount is easily calculable from the face of the award. Thus, I find and conclude that this

mmk
#2

satisfies the *Apex* standard, and entitles Plaintiff to relief under § 15-48-140.

The result of this correction is to change the prevailing party from Defendant to Plaintiff. Thus, counsel for Plaintiff shall submit his Affidavit for Attorneys Fees for a determination of reasonable attorney's fees and costs.

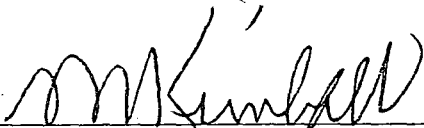
Therefore, based on the discussion herein, it is ordered as follows:

1. The Arbitration Award shall be corrected to show an award to Plaintiff of \$78,082.50, and an award to Defendant on her counterclaim of \$43,442.00.

2. As the prevailing party, Plaintiff is granted an award of reasonable attorney's fees and costs. Plaintiff shall submit his motion and affidavit in support of reasonable attorneys fees and costs within ten days from the date of this order. Defendant shall have ten days from the date of service of the motion and affidavit in which to respond to the same. If requested by either party, a hearing will be held to determine the amount of any award.

AND IT IS SO ORDERED.

June 1, 2010



S. Jackson Kimball
Special Circuit Court Judge
York County

2

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

J. W. NEAL CONSTRUCTION, LLC)
)
Plaintiff(s))

Vs.)

CORNELIA THOMAS,)
)
Defendant(s).)
_____)

IN ARBITRATION

DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

2010 JUN 24 AM 11:12

FILED-RECEIVED

AMENDMENT TO

ARBITRATION AWARD

CASE NUMBER 2007-CP-46-119

Pursuant to two Orders in the above matter from the Honorable S. Jackson Kimball,
Special Circuit Judge, the original Award in the above matter is hereby amended to
consider the award of attorney fees.

cmf

The Arbitrator used the incorrect amount of \$197,550.00 as the total amount paid by the Defendant to Plaintiff on the contract. The correct amount should be a total of \$161,550.00 paid by the Defendant to the Plaintiff on the contract and is so stated in other portions of the Award. Since the Plaintiff completed 66.75% of the contract, he would be entitled to \$239,632 less the amount paid by the Defendant (\$161,550) for a total due him of \$78,082.50. The Defendant on her Counterclaim is awarded the amount of \$43,442.00. These amounts are set forth in the above Orders of Judge Kimball.

Because the amount awarded to the Plaintiff has substantially increased, he is entitled to an award of attorney fees as being the "prevailing party." Reference is made to the attorney fee portion of the original Award for analysis as to which party is "prevailing." The Plaintiff is recovering an amount closer to his amount claimed in his complaint to foreclose the mechanics lien.

Applying the same criteria for determining attorney fees as in the original Award, the crucial element is what amount appears reasonably applicable to the pursuit of the foreclosure of the mechanics lien as opposed to the amount dedicated to the defense of the Defendant's counterclaim. After careful review of the Plaintiff's counsel's attorney fee statement, the amount of \$5,649.00 is a proper amount to award the Plaintiff as regarding his pursuit of foreclosure of the mechanics lien.

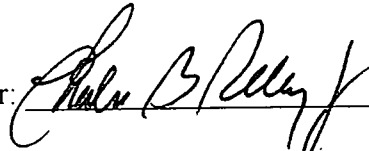
CBP

THEREFORE, the initial Arbitration Award is hereby amended as follows:

1. The Plaintiff is awarded the amount of \$5,649.00, Five thousand six hundred forty nine and no/100 dollars, for attorney fees.
2. The Defendant is not entitled to any attorney fees.

Date: June 17, 2010

Arbitrator:



Charles B. Ridley, Jr.

STATE OF SOUTH CAROLINA]	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK]	SIXTEENTH JUDICIAL CIRCUIT
J.W. NEAL CONSTRUCTION, LLC,]	
a South Carolina limited liability company,]	
]	CERTIFICATE OF SERVICE
Plaintiff,]	
v.]	
]	
CORNELIA THOMAS,]	C.A. No. 2007-CP-46-0119
]	
Defendant.]	
]	

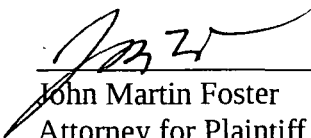
The undersigned, as counsel for the Movant herein, hereby certifies that on April 3, 2012, he served copies of the following pleadings or documents in the above-captioned and numbered civil action:

Notice and Motion to Confirm Arbitration Award;
This Certificate of Service

the original of which were sent to be filed with the Clerk of the Court for the Court named above, by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; or if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R., as follows:

Herbert W. Hamilton
Hamilton, Martens & Ballou, LLC
Attorneys for Defendant
Post Office Box 10940
Rock Hill, South Carolina 29731



John Martin Foster
Attorney for Plaintiff
223 East Main Street, Suite 320
Rock Hill, SC 29730
Post Office Box 106
Rock Hill, SC 29731-6106
803 324 8100
803 324 8109 fax
jmfoster@comporium.net

April 3, 2012

Rock Hill, SC

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2007-CP-46-00119

JW Neal Construction, LLC, Respondent,

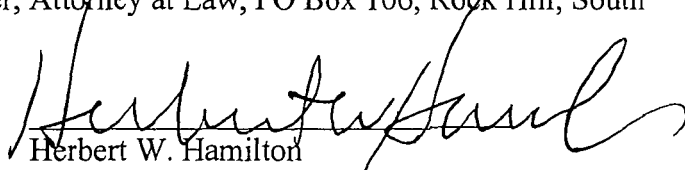
v.

Cornelia Thomas, Appellant.

PROOF OF SERVICE

I, Herbert W. Hamilton, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to its attorney of record, John Martin Foster, Attorney at Law, PO Box 106, Rock Hill, South Carolina 29731.

July 13, 2012



Herbert W. Hamilton
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, SC 29730
(803) 329-7672

ATTORNEYS FOR APPELLANT

10364001 Sm
Deadline to file
Int. Brief
Aug 13th

Calendared
At

RECEIVED
JUL 16 2012
SC COURT OF APPEALS

RECEIVED

NOV 09 2012

SC Court of Appeals

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2007-CP-46-00119

JW Neal Construction, LLC, Respondent,

v.

Cornelia Thomas, Appellant.

NOTICE OF APPEAL

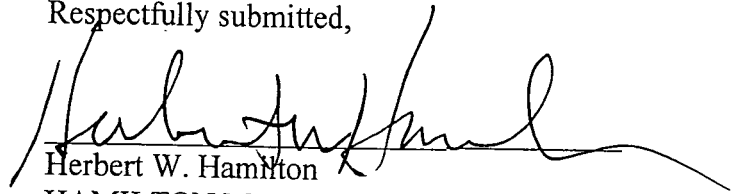
Notice is hereby given that Cornelia Thomas appeals the final order of the Honorable S. Jackson Kimball dated June 18, 2012 and the judgment entered thereon as well as Interlocutory Order of Judge Kimball dated June 1, 2010, and the Arbitration Award and Amended Arbitration award to which Judge Kimball's Orders refer. Appellant received written notice of entry of the final order and judgment on June 27, 2012. Copies of the orders, from which the Appellant appeals, are attached hereto.

SC Court of Appeals

JUL 16 2012

RECEIVED

Respectfully submitted,



Herbert W. Hamilton
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, SC 29730
(803) 329-7672

July 13, 2012
Rock Hill, South Carolina

ATTORNEYS FOR APPELLANT

Other Counsel of Record:

John Martin Foster
Attorney at Law
PO Box 106
Rock Hill, SC 29731
(803) 324-8100

ATTORNEY FOR RESPONDENT

-and-

The Honorable David Hamilton
York County Clerk of Court
PO Box 649
York, SC 29745

STATE OF SOUTH CAROLINA]
 COUNTY OF YORK]
 J.W. NEAL CONSTRUCTION, LLC,]
 a South Carolina limited liability company,]
 Plaintiff,]
 v.]
 CORNELIA THOMAS,]
 Defendant.]

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

ORDER

Case No. 2007-CP-46

RECEIVED
 JUL 16 2012
 FILED-RECEIVED
 2012 JUN 20 AM 9:48
 DAVID HAMILTON
 S.C.C.P. & G.S.
 YORK COUNTY, SC

This matter came before me on April 19, 2012, on Defendant's motion to dismiss Plaintiff's mechanic's lien, and Plaintiff's motion to confirm the amended awards made by the Arbitrator as to the case in chief and as to attorney's fees, and directing that judgment to be entered on the award, pursuant to S.C. Code Ann. § 15-48-140(b) (1976, as amended). Based on the record presented and the arguments of counsel, I make the following findings and conclusions.

Defendant's Motion is based, first, on a claim of the Plaintiff's lack of proper licensure under South Carolina law. This argument, to the extent it is cognizable other than by the Arbitrator, is untimely.

Defendant's other argument for dismissal is, in effect, based on a claim of laches in registering the judgment.

The equitable doctrine of laches is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.' (Citation omitted.) 'Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights.' (Citation omitted.) *Robinson v. Estate of Harris*, 388 S.C. 616, 627, 698 S.E.2d 214, 220 (2010).

I find and conclude that Defendant has not made the requisite showing of prejudice necessary to invoke the doctrine of laches. Thus, Defendant's Motion must be denied.

Based on the applicable statute, I find and conclude that Plaintiff is entitled to confirmation of the arbitration award and entry of the same as a judgment. Accordingly, Plaintiff is entitled to foreclosure of its mechanic's lien, and to that end, I make the following

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findings of fact and conclusions of law:

1. The Defendant is the owner of record of the following subject real property:

All that certain piece, parcel, or lot of land, lying, being and situate in Ebenezer Township, County of York, State of South Carolina and being shown and designated as Lot 25 on plat of Wellington Heights Phase IV, containing 1.236 acres upon plat entitled "Property Surveyed for Cornelia Thomas prepared by William Thomas Stafford Jr. dated February 21, 2002 and recorded in the office of the Clerk of Court for York County, SC in Plat Book C-117 at Page 9, which plat is incorporated herein by reference, and having such metes, bounds, courses and distances as by reference to said plat will more fully appear.

Derivation: This being the identical property:

- a) conveyed to DJBSMA Development Company LLC by deed of Paul D. Poston and John H. Poston dated November 2, 2002 and recorded November 8, 2002 in Record Book 4772 at Page 9;

- b) conveyed to Cornelia Thomas by deed of DJBSMA Development Company LLC dated March 1, 2002 and recorded March 14, 2002 in Record Book 4245 at Page 3; and

- c) conveyed by a corrective deed of DJBSMA Development Company LLC to Cornelia Thomas dated November 4, 2002 and recorded November 8, 2002 in Record Book 4772 at Page 13;

all recording references being to the Office of the Clerk of Court for York County, South Carolina.

2. There is has an existing first mortgage on the subject real property with Carolina First, now known as TD Bank, as the mortgagee. The mortgage is a purchase money mortgage, as the funds received by Defendant were used to finance the building of her residence. This litigation arose out of a mechanic's lien filed by Plaintiff as a result of that construction.

3. By Agreement of the parties, this Mechanics Lien case was submitted to binding arbitration. As amended by the Arbitrator and approved by this Court, there is a net award to the Plaintiff of \$34,540.50, and an award to Plaintiff of attorney fees in the amount of \$5,546.00.

4. Plaintiff's mechanic's lien is a valid and subsisting second lien on the subject real property, after that of TD Bank, on the interest of the Defendant in the subject real property for the sum of \$40,186.50, with interest from the date of this judgment at the legal rate.

5. No proof was presented by any party that the debt which is the subject of this action may be satisfied by selling the subject real property in parcels or lots, rather than selling the whole to satisfy the said claim.

6. Based on the record and the findings herein, I make the following conclusions:

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A) That Defendant, being liable for the Mechanic's Lien shall, shall on or before the date set for sale of the subject real property, pay to the Plaintiff or its counsel the amount of the judgment set out herein, together with the costs and disbursements of this civil action;

B) That in default of payment of such said payment to Plaintiff on or before the time herein indicated, the real property described herein be sold by or under the direction of the Master in Equity at public auction, at the Office of the Master in Equity, 1 North Congress Street, York, South Carolina, on such date as is indicated in the Notice of Sale and on the following terms:

- A. **FOR CASH:** The bidding shall not be closed upon the day of sale and shall remain open until the thirtieth (30th) day after such sale, exclusive of the day of sale, pursuant to S.C. Code §§ 15-39-750 and 29-5-280 (West);
- B. The sale shall be subject to pro-rated taxes and assessments, and existing easements, restrictions and other matters of record;
- C. TD Bank's mortgage constitutes a first lien on the real property which is the subject thereof;
- D. J.W. NEAL CONSTRUCTION, LLC's Mechanic's lien constitutes a second lien on the real property which is the subject thereof; and
- E. The successful purchaser shall pay and be responsible for Deed Stamps and the costs of recording the Deed and other proof of title.

C) That Plaintiff is entitled to a pro-ration of all taxes and assessments due on the subject real property;

D) That because a personal or deficiency judgment is not waived by the Plaintiff, the bidding shall not be closed upon the day of sale and shall remain open until the thirtieth (30th) day after such sale, exclusive of the day of sale, pursuant to S.C. Code Ann. §§ 15-39-750 and 29-5-280 (1976);

E) That the Master in Equity shall, by advertisement according to law; that is, by public advertisement of the subject real property setting out the time and place of sale (providing that if such sale be set on a judicial sales day and if the regular day of judicial sales fall on a legal holiday, then and in such event the sale shall be on the Tuesday next succeeding such holiday) and the terms thereof, such advertisement to appear for twenty-one (21) days, that is to say once a week for three (3) weeks, prior or immediately previous to the sale day or days on which the Master in Equity means to expose them to sale, and the Master in Equity shall cause the said notice to be published at three (3) public places in the county, and such publication shall be made in some gazette or newspaper published or printed in the county;

F) That the successful bidder be required at the conclusion of the bidding to comply immediately with the bid pursuant to S.C. Code Ann. § 15-39-750 and 29-5-260 (1976);

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G) That upon conclusion of the sales process, the Defendant owner, and all persons claiming under defendant owner subsequent to the filing of the notice of *Lis Pendens* of this action in the office of the Clerk of Court for York County, South Carolina, in which county the real property in question is situated, and every person whose conveyance or encumbrance is subsequent, or subsequently recorded, filed, or docketed, is forever barred and foreclosed of all right, claim, lien, or equity of redemption in any part of the real property;

H) That the Plaintiff is entitled to an order that the Master in Equity will execute to the Purchaser a deed and other proof of title to the real and personal property sold; that the Plaintiff, or any other party to this action may become a purchaser at such sale; and that if, upon closing of the bidding, a (prospective) purchaser shall fail to comply with the terms thereof at the time and place set for such sale, then the Master in Equity may, in his discretion, either:

- i. re-advertise the for sale on such convenient sales day or other day thereafter as that Court may set in another Notice of Sale, or
- ii. announce the time and date of such sale at the close of the original bidding, and so from time to time until a successful bid and full compliance therewith shall be secured.

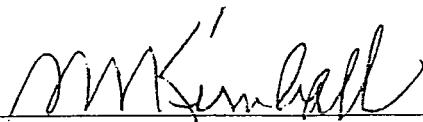
I) That the proceeds of the said sale brought into this Court and applied in payment of the amount due to the Plaintiff, and any residue shall be applied in the same manner as if there had been no such attachment, pursuant to S.C. Code Ann. § 29-5-330 (1976);

J) That upon the sale, the Defendant CORNELIA THOMAS, and all persons claiming under her, be forever barred and foreclosed from any right, title, interest, claim, lien, or equity of redemption in the said real property vested in the said Defendant CORNELIA THOMAS by virtue of the said Mechanic's lien; and

K) That the purchaser of the subject real property at such sale be let into possession of the same on production of the deed and other proof of title thereto;

AND IT IS SO ORDERED.

June 18, 2012



S. Jackson Kimball
Special Circuit Court Judge
York County

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STATE OF SOUTH CAROLINA]
COUNTY OF YORK]

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

J.W. NEAL CONSTRUCTION, LLC,]
a South Carolina limited liability company,]
Plaintiff,]

v.]

CORNELIA THOMAS,]
Defendant.]

ORDER

Case No. 2007-CP-46-0119

FILED-RECEIVED
2010 JUN 23 AM 11:31
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

This matter came before me for a hearing on May 19th, 2010, upon motions of the parties pertaining to an arbitration award in this case. John Martin Foster appeared for the Plaintiff; Herbert W. Hamilton of Hamilton appeared for the Defendant. Based on the record and evidence presented, and arguments of counsel, I make the following findings and conclusions.

By Agreement of the parties, this Mechanics Lien case was dismissed without prejudice and submitted to binding arbitration. With the agreement of counsel for the parties, I interpret the dismissal order as recognizing the continuing jurisdiction of this court pursuant to S.C. Code Ann. §§ 15-48-10 *et seq.* (1976, as amended).

After a full hearing of the matter, the Arbitrator issued his decision, awarding the Plaintiff \$41,182.00 on his claim, and the Defendant \$43,442.00 on her counterclaim. In accordance with applicable statute and precedent, the Arbitrator also ruled that Defendant was the prevailing party, entitled to an award of attorneys fees and costs.

The decision of the Arbitrator is dated on its face February 25, 2010. A cover letter of that date transmitting the same to both counsel was introduced. Neither a certificate of service or a proof of mailing was submitted by either counsel.

By e-mail dated and sent March 22, 2010, Plaintiff requested a revision of the Award due to a mathematical error. By his e-mail of March 23, 2010, the Arbitrator acknowledged that there was a mathematical error, and offered to correct the same. Defendant objected to the correction. All e-mails referenced herein were either attached to the Motion pleadings, or presented to the Court.

Defendant moves pursuant to S.C. Code Ann. § 15-48-120 to re-open the case and confirm the original reward. Pursuant to S.C. Code § 15-48-140, and Rule 60(a), S.C.R.C.P.,

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Plaintiff moves the Court to Modify or Correct the Arbitration Award to be entered.

§ 15-48-140 provides, in relevant part, as follows:

(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

In this case, I find and conclude that there is “. . . an evident miscalculation of figures [and] an evident mistake in the description of [a] thing . . . referred to in the award.” The Arbitrator states in the first, partial paragraph of page 2 of his Award:

"Prior to that time the defendant had paid the Plaintiff 2 draws totaling \$143,600.00, making a total payment to Plaintiff of \$161,550.00."

He states, however, in the second, full paragraph on Page 3 of the award:

"The Defendant has paid a total of \$197,450.00, leaving a balance due to Plaintiff of \$42,182.00."

The two cited statements are obviously inconsistent and contradict each other. This is “evident” on the face of the Award, and I construe the plain language of the statute to apply and to require a correction. Given this fact, Plaintiff is entitled to a modification of the Award to correct this mistake. The other provisions of the Award as to damages will not be affected.

Defendant asserts that a stricter standard should be applied, and that such standard dictates that this award may not be corrected. In *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188 (4th Cir. 1998), the Court construed the Federal Arbitration Act to limit the remedy of modification to apply only to "mathematical errors appearing on the face of the award." *Id.*, 142 F.3d at 194. In *United States Postal Service v. Natl. Postal Professional Nurses*, 232 F.3d 892 (4th Cir. 2000), the Court applied that reasoning to the Maryland Uniform Arbitration Act. No South Carolina case controls this particular question of interpretation of our state statute.

I find and conclude that even if the cited standard is applied in this case, there are "mathematical errors appearing on the face of the award." *Apex, supra*, 142 F.3d at 194. It is clear that the Arbitrator found as a fact that a certain amount was paid by Defendant to Plaintiff, and then through error used another amount to calculate the Plaintiff's award. The correct amount is easily calculable from the face of the award. Thus, I find and conclude that this

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satisfies the *Apex* standard, and entitles Plaintiff to relief under § 15-48-140.

The result of this correction is to change the prevailing party from Defendant to Plaintiff. Thus, counsel for Plaintiff shall submit his Affidavit for Attorneys Fees for a determination of reasonable attorney's fees and costs.

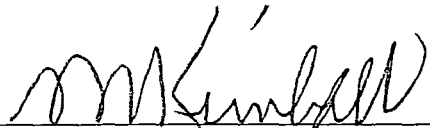
Therefore, based on the discussion herein, it is ordered as follows:

1. The Arbitration Award shall be corrected to show an award to Plaintiff of \$78,082.50, and an award to Defendant on her counterclaim of \$43,442.00.

2. As the prevailing party, Plaintiff is granted an award of reasonable attorney's fees and costs. Plaintiff shall submit his motion and affidavit in support of reasonable attorneys fees and costs within ten days from the date of this order. Defendant shall have ten days from the date of service of the motion and affidavit in which to respond to the same. If requested by either party, a hearing will be held to determine the amount of any award.

AND IT IS SO ORDERED.

June 1, 2010



S. Jackson Kimball
Special Circuit Court Judge
York County

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

FILED-RECEIVED

J. W. Neal Construction, LLC

Plaintiff

2010 APR -1 PM 4:50

CASE NO.
2007-CP-46-0119

v.

DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Cornelia Thomas

Defendant.

Plaintiff's Attorney: John Martin Foster, Bar No. Address: P. O. Box 106, Rock Hill, SC 29731 phone: (803) 324-8100 fax: (803) 324-8109 e-mail: other:	Defendant's Attorney: Herbert W. Hamilton, Bar No. 2626 Address: Hamilton Martens & Ballou LLC, PO Box 10940, Rock Hill, SC 29731 phone: 803-329-7672 fax: 803-329-7678 e-mail: hhamilton@hmandb.com other:
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Re-Open Case and Confirm Arbitration Award Estimated Time Needed: 30 mins Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type <input type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
_____ Signature of Attorney for <input type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant Date submitted	
SECTION III: Motion Fee <input checked="" type="checkbox"/> PAID - AMOUNT: 25.00 <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION Date Filed: _____ Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

J. W. Neal Construction, LLC)

Plaintiff)

vs.)

Cornelia Thomas,)

Defendant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2007-CP-46-0119

MOTION TO RE-OPEN CASE AND
CONFIRM ARBITRATION AWARD

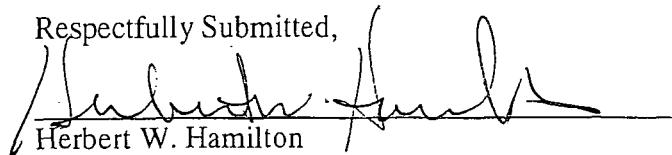
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2010 APR - 1 PM 4: 50
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

The Defendant hereby moves to re-open this case and confirm the arbitration award filed by the Arbitrator on February 25, 2010 (a copy of which is attached hereto) and enter judgment thereon. The Motion is made on the following grounds:

1. A consent order was issued submitting this case to binding arbitration and dismissing the case without prejudice.
2. On February 25, 2010 the Arbitrator filed his arbitration award.
3. This Court has authority to confirm the award and enter judgment thereon pursuant to S. C. Code §15-48-120 (Rev. 2005).

The Motion will be based on the award attached hereto and statutory and common law authority.

Respectfully Submitted,



Herbert W. Hamilton
Hamilton Martens & Ballou, LLC
130 East Main Street
P. O. Box 10940
Rock Hill, South Carolina 29731
Phone: (803) 329-7672
Fax: (803) 329-7678

March 31, 2010

ATTORNEY FOR THE DEFENDANT

STATE OF SOUTH CAROLINA)

)

IN ARBITRATION

COUNTY OF YORK)

)

J. W. NEAL CONSTRUCTION,)

LLC)

)

Plaintiff)

)

Vs.)

ARBITRATION AWARD

)

CASE NUMBER 2007-CP-46-119

CORNELIA THOMAS,)

Defendant.)

This matter comes for arbitration hearing on January 28 and 29, 2010 in Rock Hill, SC. The undersigned was appointed as Arbitrator by stipulation of the parties.

The Plaintiff is represented by John Martin Foster of the York County Bar and the Defendant is represented by Herbert W. Hamilton, also of the York County Bar. The Plaintiff testified along with Robert L. Belk, James Slusarski and Gregory B. Miller. There were 4 Court's exhibits, without objection and 17 Plaintiff's exhibits without objection. The Defendant testified along with Buddy Brault. Part of Defendant's case was the report of Brian Connolly, Plaintiff's exhibit 17 and photographs taken by the Defendant. Defendant also introduced 3 other exhibits without objection. All parties and witnesses testified under oath.

In essence the Plaintiff's complaint was to foreclose a mechanics lien in the amount of \$112,790.00. He also had causes of actions for breach of contract and Quantum Meruit. About November 22, 2005 the parties entered into a fixed price contract for the construction of a house for the amount of \$359,000.00. The Defendant paid 5% down -

\$17,950.00. Plaintiff began work and worked until either middle of December 2006 or January Of 2007 at which time he was ordered off the job by the Defendant. Prior to that time the defendant had paid the Plaintiff 2 draws totaling \$143,600.00, making a total payment to Plaintiff of \$161,550.00.

The Defendant responded with an Answer and Counterclaim, alleging, in addition to a general denial, equitable estoppel and counterclaims, which consisted of allegations of breach of contract, negligent and/or defective work and breach of express and implied warranties.

The Parties stipulated that the Arbitrator's fee will be equally divided between them.

The issues are:

1. Is Plaintiff entitled to additional payment from Defendant for the work he did until the time of his termination from the job by the Defendant, and if so, in what amount?
2. Is the Defendant entitled to an award of money from the Plaintiff pursuant to any of her counterclaims, and if so, in what amount?
3. Whether either party is entitled to attorney fees?

The contract between the parties had an attachment that set out specifications of the job and included references to the specifications set out in the constructions plans. The contract also stated that any change orders were to be signed by both parties. This was a "fixed price" contract. The Plaintiff has charged Defendant with 5 change orders, which were not signed. Both parties testified at length regarding these change orders and the work was done. However, the contract is clear and the Plaintiff can not recover these amounts.

The Plaintiff is seeking to foreclose his mechanics lien, which by stipulation was timely and properly filed, in the amount of \$112,790.00, plus pre-judgment and post judgment interest and attorney fees. In order to determine what amount, if any, the Plaintiff is due, a point in time must be set to examine what percentage of the contract the Plaintiff had

finished. There was conflicting testimony from the parties as to the last date worked by the Plaintiff, but the middle of January, 2007 seems to be the date to be used for this purpose. (The middle of December was also considered, but there is no relevant difference between the two.) It is determined that the Plaintiff's percentage of completion of the job was 66.75%, using a combination of the Defendant's bank's figures- Plaintiff's no. 11- and Plaintiff's estimate- Plaintiff's no. 12. (The Defendant's concern about defective work, repairs necessary, completion of the job and diminution of value to the home will be addressed in the Defendant's counterclaim.) The Plaintiff is entitled to be paid for the amount of completed work. The Plaintiff carried his burden of proof to show the actual work he did and the amount of money he spent thereon. Since this is a fixed price contract, this method of determining any amount, i.e. the percentage of completion, due him is appropriate.

The contract price was \$359,000.00 and the amount of completion was 66.75 percent, which would be \$239,632.00. The Defendant has paid a total of \$197,450.00, leaving a balance due to Plaintiff of \$42,182.00. The Plaintiff is not entitled to the charges for the change orders.

The Plaintiff is not entitled to prejudgment interest. The amount in the Complaint was not liquidated and the amount finally awarded was able to be computed only after obtaining testimony and evidence regarding percentage of completion. This is not a situation where the amount due can be readily ascertained by mere computation or by a legal or recognized standard. The contract between the parties makes no mention of any interest, pre-judgment or otherwise.

As to the Defendant's counterclaims, substantial testimony and evidence was taken from both parties and their witnesses. The primary thrust of the Defendant's case was an attempt to present the defects of Plaintiff's work, the amount the Defendant spent to complete the contract and any diminution in value of the home. In order to determine her entitlements, if any, a determination must be made as to whether she repaired any defective work of Plaintiff, completed remaining work left on the contract when Plaintiff left the job, or had any diminution in value (DIV) of the residence resulting from any of Plaintiff's work that was defective and could not be reasonably repaired. A determination

must be made as to what, if any of the work by Plaintiff was defective, did Defendant expend a “cost to cure” such defect or, if the work could not be reasonably repaired, then an amount of DIV of the whole due to such defect. The Defendant has the burden of proving these matters by a preponderance of the evidence and such must be beyond mere speculation. The Defendant attached a list to her counterclaim and an exhibit that itemizes the claimed defects and each item must be addressed. Defendant’s no. 9. It is important to note that the Defendant is not entitled to a “perfect house” nor, in this case, that the work done by the Plaintiff is perfect. She is however entitled to expect that the quality of construction be of reasonable quality.

1. Black felt—Defendant had photographs taken April of 2006 and the inspection report of Mr. Brault, her expert, showing several areas of no or improperly installed felt. Mr. Brault testified he could not state that there were any International Residential Code violations, did not know whether the items he mentioned were addressed by Plaintiff before he left job and could not give any “cost of cure” for any of the defects he mentioned. However, there was no evidence that these areas were not repaired and/or completed by the Plaintiff, nor was there evidence of the extent of such defects, if they existed, and there was no evidence of “cost to cure” or diminution in value (DIV).
2. Foundation—these are also addressed by Mr. Brault on behalf of the Plaintiff and covered by his report. (Court’s no. 4.) Defendant gives no evidence of a defect that required repair, cost of same or DIV. Mr. Brault again states that he just pointed out items that concerned him, could not say they were code violations, could not state the method or cost of repair. He specifically stated that he was not aware of any money damage due to these alleged defects. The only evidence of any suggested, but not necessary, repair came from Mr. Belk, the Plaintiff’s expert, who stated that \$100.00 could be spent to realign a floor joist. **Mr. Brault testified that if a contractor did not follow the recommendations in his report such would not mean that the contractor “guilty of poor or unworkmanlike conduct.”**
3. Master bath windows— The plans called for glass block and the Plaintiff installed acrylic block. He admitted he would have changed them with no cost to the

Defendant, but was not allowed on the job long enough to do so. There is no evidence the Defendant had any cost to remove and replace them, no apparent cost on the exhibit 6 for glass blocks and no testimony regarding DIV resulting from having acrylic versus glass blocks.

4. Window transoms—The plans call for some windows to have transoms and some do not. But there is no testimony about cost to repair this item or DIV.
5. Small windows—No evidence of repair costs or DIV.
6. Front door—The Defendant, on her exhibit no. 6, shows she spent \$5909.00 for a replacement door, but the testimony was that the original door needed to be repaired and that Mr. Belk also saw it. However, there was no evidence that the entire door needed to be replaced and no evidence for Defendant about the cost of repair or DIV. Mr. Belk gave the only repair cost of 200.00
7. Pocket doors—The Plaintiff was ordered off the job before these could be installed, but there was no testimony they were not done or any DIV.
8. Back terrace—This was done differently than the plans, but the only reliable testimony was that it was well built. The fact that it was not in accordance with the plans does not per se mean there was any DIV and there was no testimony to that effect.
9. Grading lot—This is not to be done till the end of the job. Plaintiff had not gotten to that point.
10. Color of bricks—Her expert, Mr. Brault, did not mention this as a defect. Mr. Belk noticed it after it was pointed out to him by the Defendant and his opinion was that it was not objectionable. Even if it was a defect that required correction, there was no evidence of the extent of repair, nature of repair, cost of repair or, if not repaired, any DIV.
11. Stucco window—There was no indication of values except for Mr. Belk who suggested repair cost to be 50.00.
12. Kitchen plumbing—The alleged defects regarding this issue by the Defendant is not chargeable to him since he had not gotten to that stage in his work. No evidence of defect in what he had done, no values of cost to repair any alleged defects nor DIV.

13. Chimney—This was called for in the plans and should be part of the finished house. However, there was no evidence of any cost to add the chimney and if it was not added, whether there was any DIV.
14. Foyer window—There was a finishing defect and the only testimony regarding the repair cost was from Mr. Belk for 100.00.
15. Living room window sills—This complaint does is not a deviation from the plans and is not a defect.
16. & 17. Walls and floors. There is no evidence of a defect that rose to the level of requiring repair, and if repair was needed, no cost of repair nor DIV.
18. Foundation—This has been addressed in number 2 above.
19. Insulation—There is no code violation to have mixed methods of insulation. The areas Defendant complains of having no or improper insulation-see Mr. Brault's report- have been covered so that no one can now testify that these areas have been properly done either by Plaintiff before he left the job or by The Defendant's sub contractor who finished insulation. There are no repair costs or DIV associated with this item.
20. Front stucco windows—This item needed correction and the only repair cost from all the testimony came from Mr. Belk in the amount of \$100.00.
21. Crawl space—This has been addressed earlier as to the change order. The Defendant did not produce any cost to have this changed to comply with the plans, which would not have been practical to do anyway. However, she did not produce any evidence that the house as completed suffered any DIV.
22. Tempered window—There was no evidence of any cost of repair or DIV.
23. Moisture barrier—The testimony clearly showed there was a moisture barrier laid down-although done after the Plaintiff left the job- and there was no moisture problem in the crawl space. Also, the Connolly report, Plaintiff no. 17, clearly indicated that although there was no moisture problem noted as of the date of his inspection, that there could be such in the future, but that the cause was improper placement and grading for the sidewalks and final landscaping, which were not the responsibility of the Plaintiff. Mr. Slusarski also testified confirming the Connolly findings and that the landscaping and drains had apparently been installed similar to

the plans he had done for the Plaintiff- Plaintiff exhibit no. 10. The Defendant testified that she spent an additional \$1890.00 for the final landscaping but this is not chargeable to the Plaintiff.

24. Weep holes—This is addressed in number 1 above.

25. Garage concrete—There is insufficient evidence of cracking that would be deemed a defect and no evidence of repair cost or DIV.

26. Floor insulation—This was not required in the plans.

The Defendant testified and presented evidence that she spent \$229,700.00 in total to complete and repair the job. She stated that there should be credits for allowances in the contract and some overages that she did in the total amount of \$29,262.00. In reviewing Defendants exhibits numbers 6, 7 & 8 and comparing all the entries thereon, the credits to be given should be as follows:

1. Main entrance-- \$9318.00—This is assuming the replacement of the front door-\$5909.00- is included therein.
2. Plumbing—The after allowance value is \$28,401.00.
3. Light fixtures—There were some ambiguities that were resolved in favor of the Defendant, and the after allowance value is \$17,471.00.
4. Kitchen appliances—The after allowance value is \$11,907.

The Defendant can not charge to the Plaintiff the mold remediation expense- \$1,344.00- since there is no evidence of any act or omission by the Plaintiff proximately caused the mold she noticed over a year after the Plaintiff left the job. The Defendant shall be able to include in her counterclaim the \$1,000.00 charged by Mr. Brault as an incidental and consequential damage. She is not entitled to recover any of the other charges on her exhibit number 8. She shall also include the proven costs of repair as indicated in the above list of 1 through 26 in the total amount of \$550.00.

The Defendant undertook to be her own general contractor to complete the job after she ordered the Plaintiff to cease work. At the time she undertook to complete the job 33.25% of the contract remained incomplete. This percentage of the contract is \$119,367.00.

Reducing her expenses by the total of the 1 through 4 above and the mold remediation

amount- a total of \$68,441.00, she has spent \$161,259.00 to complete the contract. She spent \$161,259.00 to complete the contract which should have cost \$119,367.00, the difference being \$41,892.00, the amount she is entitled from the Plaintiff. She is entitled to add \$550.00 repair cost and \$1,000.00 as incidental and consequential damage, as above set out, for a total amount of \$43,442.00.

Regarding attorney fees, the Defendant is the “prevailing” party. Neither Party made a demand or offer as required by the statute and therefore the Plaintiff’s demand is the amount claimed in his complaint, \$112,790.00 and the Defendant’s offer is “zero.” Therefore, based on the above Award, the Defendant is the “prevailing” party and is entitled to attorney fees that are solely for the defense of the foreclosure of the mechanics lien. The award to the Plaintiff is closer to the offer of the Defendant than to the Plaintiff’s demand. The award to Defendant on her Counterclaim is not used to determine who is the “prevailing” party.

When there is a determination of the “prevailing” party, therefore attorney fees must be awarded to that party, and the determination of the amount of attorney fees to be awarded to the Defendant is totally within the discretion of the Arbitrator, *Keeney's Metal Roofing, Inc.*, 345 S.C. at 553, 548 S.E.2d at 901. Not only must the fees be regarding the defense of the mechanics lien, they must be related to our case law criteria: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services, *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) (citing *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993).

The parties both presented to the Arbitrator their respective itemized fees. After careful review and considering the above six criteria applied to Defendant’s counsel and his statement of fees, the amount Defendant incurred solely the defense of the mechanics lien is \$6,2500.00, which amount she shall be entitled to be recovered by the Defendant from the Plaintiff. The total amount of the Defendant’s attorney fees were substantially in excess of the amount awarded and were considered to be for the presentation of her

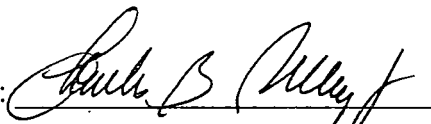
counterclaim or other matters not associated with strictly the defense of the mechanics lien.

THEREFORE, the ARBITRATION AWARD is as follows:

1. Plaintiff, on its Complaint, shall receive the amount of \$42,182.00, Forty Two Thousand One Hundred Eighty Two and no/100 Dollars from the Defendant.
2. The Defendant, on her Counterclaim, shall receive the amount of \$43,442.00, Forty Three Thousand Four Hundred Forty Two and no/100 Dollars from the Plaintiff.
3. The Parties will equally divide the fees of the Arbitrator, which shall be submitted to counsel for the parties within 14 days for the date hereon.
4. The Defendant shall be awarded the amount of \$6,250.00 (Six Thousand Two Hundred Fifty and no/100 Dollars) from the Plaintiff as attorney fees for the defense of the mechanics lien as the prevailing party.

Date: February 25, 2010

Arbitrator:



Charles B. Ridley, Jr

CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens & Ballou, LLC, certifies that the within **MOTION TO RE-OPEN CASE AND CONFIRM ARBITRATION AWARD** was served upon the Plaintiff's counsel on this date, by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

John Martin Foster
Attorney at Law
P. O. Box 106
Rock Hill, SC 29731

This 31st day of March, 2010.

Alayne Mecton

STATE OF SOUTH CAROLINA)

IN ARBITRATION

COUNTY OF YORK)

J. W. NEAL CONSTRUCTION, LLC)

Plaintiff(s))

Vs.)

CORNELIA THOMAS,)

Defendant(s).)

_____)

DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

2010 JUN 24 AM 11:12

FILED-RECEIVED

AMENDMENT TO

ARBITRATION AWARD

CASE NUMBER 2007-CP-46-119

Pursuant to two Orders in the above matter from the Honorable S. Jackson Kimball, Special Circuit Judge, the original Award in the above matter is hereby amended to consider the award of attorney fees.

CHM

The Arbitrator used the incorrect amount of \$197,550.00 as the total amount paid by the Defendant to Plaintiff on the contract. The correct amount should be a total of \$161,550.00 paid by the Defendant to the Plaintiff on the contract and is so stated in other portions of the Award. Since the Plaintiff completed 66.75% of the contract, he would be entitled to \$239,632 less the amount paid by the Defendant (\$161,550) for a total due him of \$78,082.50. The Defendant on her Counterclaim is awarded the amount of \$43,442.00. These amounts are set forth in the above Orders of Judge Kimball.

Because the amount awarded to the Plaintiff has substantially increased, he is entitled to an award of attorney fees as being the "prevailing party." Reference is made to the attorney fee portion of the original Award for analysis as to which party is "prevailing." The Plaintiff is recovering an amount closer to his amount claimed in his complaint to foreclose the mechanics lien.

Applying the same criteria for determining attorney fees as in the original Award, the crucial element is what amount appears reasonably applicable to the pursuit of the foreclosure of the mechanics lien as opposed to the amount dedicated to the defense of the Defendant's counterclaim. After careful review of the Plaintiff's counsel's attorney fee statement, the amount of \$5,649.00 is a proper amount to award the Plaintiff as regarding his pursuit of foreclosure of the mechanics lien.

CBP

THEREFORE, the initial Arbitration Award is hereby amended as follows:

1. The Plaintiff is awarded the amount of \$5,649.00, Five thousand six hundred forty nine and no/100 dollars, for attorney fees.
2. The Defendant is not entitled to any attorney fees.

Date: June 17, 2010

Arbitrator:

A handwritten signature in cursive script, appearing to read "Charles B. Ridley, Jr.", is written over a horizontal line.

Charles B. Ridley, Jr.

Hamilton Martens Ballou & Carroll

ATTORNEYS AT LAW

Debbie Helms
debbie.helms@hamiltonmartens.com
803-329-7672

November 7, 2012

Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

RE: *JW Neal Construction, LLC v. Cornelia Thomas*
Case Tracking Number: 2007-CP-46-00119
Our File No.: 10366-001

Dear Ms. Kitchings:

Enclosed are the original and seven (7) copies of Return to Motion to Dismiss Appeal in the above-named matter. Please file the original and return a clocked copy of the same to me in the envelope that I have provided. I have also enclosed my firm's check in the amount of \$25.00 for the filing fee.

By copy of this letter, I am serving the Return to Motion to Dismiss Appeal on upon other counsel of record as evidenced by the enclosed Proof of Service.

Thank you for your assistance in this matter.

Sincerely,



Debbie Helms
Legal Assistant for the Firm

/dh

Enclosure

cc: John Martin Foster
Attorney at Law
PO Box 106
Rock Hill, SC 29731

RECEIVED

NOV 09 2012

SC Court of Appeals

Hamilton Martens Ballou & Carroll, LLC