

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4000164

Kitchen Planners LLC

Samuel E Friedman

Jane Breyer Friedman

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

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

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

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

For Clerk of Court Office Use Only

This judgment was entered on the 12 day of May, 2017 and a copy mailed first class or placed in the appropriate attorney's box on this 16 May 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Jean Perrin Derrick

Charles A. Krawczyk

A. Walker Barnes

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court

*Jeanette W. McBride*

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2016-CP-40-00164
The Kitchen Planners, LLC,	)	
	)	
Plaintiff,	)	ORDER GRANTING
vs.	)	DEFENDANTS' MOTION FOR
	)	SUMMARY JUDGMENT
Samuel E. Friedman and Jane Breyer	)	
Friedman, and Branch Banking and Trust.	)	
	)	
Defendants,	)	

2017 MAY 12 PM 12:44  
 COURT CLERK  
 COURT OF COMMON PLEAS  
 RICHLAND COUNTY

Date of Hearing: April 25, 2017

Trial Judge: The Hon. Robert Hood

Plaintiff's Attorneys: Jean Derrick

Defendants' Attorney: Charles A. Krawczyk

This matter came before the Court on April 25, 2017, for a hearing pursuant to Defendants Samuel E. Friedman and Jane Breyer Friedman's (hereinafter "Friedmans") Motion for Summary Judgment, whereby the Defendants sought a dismissal of Plaintiff The Kitchen Planners, LLC's ("KP") claim for foreclosure of its Mechanic's Lien and Verified Statement of Account in support of the Lien, 2015-CP-40-06849 (collectively "the Lien") filed on November 12, 2015.

Plaintiff Patricia Comose of KP was present in the Court with her attorney, Jean Derrick, Esquire. Attorney for the Friedmans, Charles Krawczyk, was also present in the Court.

I find for the following reasons, the Defendants' Motion should be GRANTED.

1. KP, through its representative Patricia Comose (hereinafter "Ms. Comose"), failed to follow the statutory requirements of S.C. Code Ann. §29 for the following:
  - a. The Lien was not timely filed because the Lien was filed and served later than 90 days from the date that KP performed any labor or furnished any materials to the Freidmans' property in violation of S.C. Code Ann. §29-5-90;
  - b. The basis of the Lien was not labor performed or furnished or for materials furnished and **actually used** in the erection, alteration, or repair of a building in violation of S.C. Code Ann. §29-5-10;
  - c. In filing the Lien, KP, through Ms. Comose, willfully and knowingly claimed more than it could possibly be due in violation of S.C. Code Ann. §29-5-100;
  - d. KP failed to commence the action to foreclose the lien within six (6) months of the date that pursuant to S.C. Code Ann. § 29-5-120.

## I. DISCUSSION

A mechanic's lien exists only by virtue of statute, and one's right to a mechanic's lien is wholly dependent upon the language of the statute creating it. *Clo-Car Trucking Co., Inc. v. Cliffure Estates of S. Carolina, Inc.*, 282 S.C. 573, 575, 320 S.E.2d 51, 53 (Ct. App. 1984). A mechanic's lien is purely statutory; therefore, the requirements of the statute must be strictly followed. *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985). The basis for a mechanic's lien is a debt due "for labor performed or furnished or for materials furnished and **actually used** in the erection, alteration, or repair of a building or structure upon real estate." S.C. Code Ann. § 29-5-10 (emphasis added). A Mechanic's lien must be filed **and served** within ninety days after the claimant ceases to labor on or furnish labor or materials on the property. S.C. Code Ann. §29-5-90. A suit to foreclose on the lien must be

commenced within six (6) months after the claimant ceases to labor on or furnish labor or materials on the property in order to collect the debt pursuant to S.C. Code Ann. § 29-5-120.

In addition to the strict rules required to file a valid lien, the mechanic's lien statutes provide for a discharge of the lien by showing that the filer of the lien willfully and knowingly claimed more than is due pursuant to S.C. Code Ann. § 29-5-100.

- a. **The Mechanic's Lien was not filed and served within 90 days of Plaintiff providing labor or material to the Friedmans' home.**

S.C. Code Ann. §29-5-90 states:

Such a lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, serves upon the owner or, in the event the owner cannot be found, upon the person in possession and files in the office of the register of deeds or clerk of court of the county in which the building or structure is situated a statement of a just and true account of the amount due (emphasis added).

The Lien was filed by Plaintiff with the clerk in the Richland County Court of Common Pleas on November 12, 2015. It was served upon Dr. and Mrs. Friedman on November 17, 2015. To be valid under S.C. Code Ann. §29-5-90, Plaintiff must have last provided material and labor on the home within 90 days of November 17, 2015, which is the date that the Friedmans were served. Ninety days back from November 17, 2015 is August 19, 2015. Thus, the Plaintiff had to perform work or provide materials on August 19, 2015 or later in order to satisfy the statute requirement.

On its face, the mechanic's lien filed by Plaintiff states that the materials and labor were furnished on or about "March 11, 2015 through on or about August 18, 2015." Thus, the date given on the Lien itself falls outside of the 90 day time period. Therefore, the Lien's service was untimely and must be dissolved.

The Court also reviewed the submissions of the parties regarding the evidence of when the last date that Plaintiff provided materials or labor to the Friedmans' home. It is clear to the Court that no credible evidence exists to show that Plaintiff provided any materials or labor to the Friedmans' home after August 18, 2015. Plaintiff's sworn deposition testimony stated that the last date any material or labor was provided by KP was before June 18, 2015. Ms. Comose, the only member/employee of KP, was deposed on April 7, 2017. In that deposition, Ms. Comose stated that she furnished no materials or labor after June 18, 2015. Additionally, there is corroborating evidence in the form of e-mails and other documents that indicate KP was no longer providing services of material after that June 18, 2015 date.

The Court finds that there is no question of material fact that the Lien was not timely filed and served in accordance with S.C. Code Ann. §29-5-90; therefore, the Lien should be dissolved, and the cause of action for foreclosure of the Lien dismissed with prejudice.

- b. The basis for Kitchen Planners' Lien was not actual labor and material used to construct the home and, as such, was in violation of S.C. Code Ann. § 29-5-10.**

The basis for a mechanic's lien is a debt due "for labor performed or furnished or for materials furnished and **actually used** in the erection, alteration, or repair of a building or structure upon real estate." S.C. Code Ann. § 29-5-10. Section 29-5-10 is an extraordinary remedy created by statute, and it requires strict compliance by the entity seeking to lien the property. In order to establish a mechanic's lien, it is generally necessary that the labor performed go into something which has attached to and become a part of the real estate, adding to the value thereof. *Tenny v. Anderson Water, Light & Power Co.*, 67 S.C. 11, 17, 45 S.E.2d 111, 113 (1903). The court finds that there is no question of material fact that the materials furnished by KP were never installed in the Friedmans' home; therefore, the materials were not "actually

used," which fails to meet the requirements of § 29-5-10. As such, the Lien should be dissolved, and the cause of action for foreclosure of the Lien dismissed with prejudice.

**c. Kitchen Planners willfully and knowingly claimed more than it could possibly be due.**

An inaccuracy in the statement of the amount due for labor and materials supporting a mechanic's lien shall not invalidate the lien "unless it appear[s] that the person filing the certificate has willfully and knowingly claimed more than his due." S.C. Code Ann. § 29-5-100. Mechanic's liens benefit the contractor, protecting the value of the materials and labor used on the project. Overhead and profit is not lienable unless the "terms of overhead and profit are agreed upon by the parties and are subsequently embodied within a contract." *Zepso Construction, Inc. v. Randazzo*, 357 S.C. 32, 591 S.E.2d 29 (2003).

In this case, Plaintiff testified that she already made a profit prior to filing the Lien. The terms of overhead and profit were not specified in the contract. The Lien is seeking solely overhead and profit. Ms. Comose understood this when she filed the Lien; therefore, she knowingly sought more than she was entitled. This action is in violation of S.C. Code Ann. § 29-5-100. Therefore, the amount sought is not for materials used in the job, but for overhead and profit alone. The Court finds that there is no question of material fact that the Plaintiff willfully and knowingly claimed more than her due; therefore, the Lien should be dissolved, and the cause of action for foreclosure of the Lien dismissed with prejudice.

**d. Suit for the enforcement of the Lien was not timely filed.**

For the same reasons put forth for the failure of the Lien, the Plaintiff's suit for enforcing the Lien was not timely filed. The last date that KP furnished labor or materials to the Friedmans' home was before June 18, 2015. This required that the suit be filed on or before December 18, 2015. The suit was not filed until January 13, 2016. The Court finds that there is

no question of material fact that the suit was not timely filed, violating S.C. Code Ann. § 29-5-120. As such, the action for foreclosure of the Lien should be dismissed with prejudice.

## II. ATTORNEY FEES

S.C. Code Ann. § 29-5-20(a) states in part that "if the party defending against the lien prevails, the defending party must be awarded costs of the action and a reasonable attorney's fee as determined by the court." In this case, the infirmities of the Lien require that the Lien be dissolved and the foreclosure action dismissed. As such, the Friedmans prevail and must be awarded attorney fees. The Defendants have submitted an attorney's fee affidavit, which I have reviewed and find to meet the factors necessary to determine reasonable attorney's fees as set out in Rule 407, South Carolina Appellate Court Rules and *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). The factors include: (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. I find the fee request to be proper and necessary under S.C. Code Ann. § 29-5-20(a). The Court finds that the Friedmans have amassed in excess of \$20,690.65 in attorney fees and costs associated with defending against the Lien and the associated foreclosure action. However, due to the limitation placed on the attorney fees award under S.C. Code Ann. §29-5-20(a), the Friedmans may only be awarded up to the amount of the Lien. Therefore, I find that the Friedmans shall be awarded \$16,594.68 in attorney fees and costs.

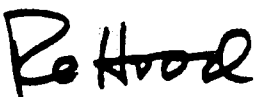
**NOW THEREFORE**, based upon the pleadings duly filed, the evidence before the Court, the arguments of counsel, and the laws of this State set forth above,

**IT IS HEREBY ORDERED THAT:**

- a. Defendants Samuel E. Friedman and Jane Breyer Friedman's Motion for Summary Judgment is granted;
- b. Plaintiff Kitchen Planners, LLC's Mechanic's Lien 2015-CP-40-06849 is discharged;
- c. Plaintiff Kitchen Planners, LLC's claim for Foreclosure of Mechanic's Lien is dismissed with prejudice; and
- d. Plaintiff Kitchen Planners, LLC shall pay the Defendants' attorney's fees and costs associated with defending against Mechanic's Lien 2015-CP-40-06849 and its foreclosure in the amount of \$16,594.68.

IT IS SO ORDERED.

Richland County, South Carolina  
May 11, 2017

  
\_\_\_\_\_  
Robert E. Hood, Judge  
Circuit Court, Fifth Judicial Circuit

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4000164

Kitchen Planners LLC

Samuel E Friedman

PLAINTIFF(S)

Jane Breyer Friedman

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

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- 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.
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 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 \_\_\_\_\_
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

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

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

**ORDER INFORMATION**

This order  ends  does not end the case. Additional Information for the Clerk : \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

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Circuit Court Judge \_\_\_\_\_ Judge Code 2164 Date \_\_\_\_\_

**For Clerk of Court Office Use Only**

This judgment was entered on the 6 day of July, 2017 and a copy mailed first class or placed in the appropriate attorney's box on this 6 day of July, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Jean Perrin Derrick

Charles A. Krawczyk

A. Walker Barnes

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court

*Jeanette W. McBride*

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2016-CP-40-00164
The Kitchen Planners, LLC,	)	
	)	
Plaintiff,	)	
vs.	)	ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND
	)	
Samuel E. Friedman and Jane Breyer Friedman, and Branch Banking and Trust.	)	
	)	
Defendants,	)	

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 CLERK OF COURT  
 JAMES H. ...  
 ...

This matter came before the Court pursuant to a Motion to Alter or Amend Pursuant to filed on May 30, 2017 by Plaintiff The Kitchen Planners, LLC's ("KP") seeking to Alter or Amend the Order of this Court of May 12, 2017 (the "Order"). This Court has considered the Plaintiff's Motion and all of the evidence provided the record in this action and by the parties and I find for the following reasons, the Plaintiff's Motion should be DENIED.

**I. DISCUSSION**

The Order was granted pursuant to Defendants' S.C.R.C.P. Rule 56(a) Motion which, while labeled Motion to Dismiss Mechanic's Lien and Foreclosure, was in fact a Motion for Summary Judgment both by reference in the filed motion, the memorandum in support of the motion and by statement of counsel at the hearing. Defendants timely filed a 10 page Memorandum in Support of the Rule 56(a) Motion with extensive exhibits and cross references to depositions and discovery in the action.

Plaintiff's Motion to sets forth 15 requests to Alter and Amend the Order which the Court addresses as follows:

1. The Court considered the affidavit of Patricia Comose which was filed one day prior to the hearing. The Court found that the affidavit was not credible as it was a self-serving statement which was in complete contradiction to all of the other evidence including the dates on the Lien, the e-mails between the parties and Ms. Comose's own sworn testimony that she provided no materials after June 18, 2015 and that Derrick Tackett had been fired from Friedman job by August 18, 2015 (the date given in the Lien).

Even if Ms. Comose's affidavit were credible its contents fail to change the filing date for the Lien. Title §29-5-90 requires that a mechanic's lien be filed and served within 90 days after the materials are **furnished**. Ms. Comose's affidavit merely states that materials were ordered and paid for, but never indicated that they were ever delivered to the Friedman residence. That the materials be actually delivered and used in the structure is essential to a contractor's right to a lien under the statute. For these reasons and the reasons set forth in the Order, Plaintiff's request to alter or amend is DENIED.

2. As set forth in the Order the court finds that the materials furnished by the Kitchen Planners under the Lien were never installed in the Friedmans home and as such were not "actually used" and as such does not meet the requirements of § 29-5-10. For the same reasons as above, the Court finds Ms. Comose's affidavit unpersuasive and fails to establish a question of fact. For the reasons set forth in the Order Plaintiff's request to alter or amend is DENIED.

3. For the reasons set forth in the Order Plaintiff's request to alter or amend is DENIED

4. For the reasons set forth in the Order and in Paragraph 1 above, Plaintiff's request to alter or amend is DENIED.

5. The Court found that the allegations in the Defendants' motion and supporting Memorandum were sufficient. For the reasons set forth in the Order Plaintiff's request to alter or amend is DENIED

6. The Motion filed by Defendants was clearly filed pursuant to Rule 56(a) and as such the Court may look to evidence outside the pleadings including but not limited to affidavits, deposition testimony and answers to discovery. For these reasons and the reasons set forth in the Order Plaintiff's request to alter or amend is DENIED.

7. Although the Court may take judicial notice of the requirements for filing a mechanic's lien under the applicable statutes, the Court finds Defendants' Amended Answer sets forth the specific defense of Plaintiff's failure to follow the requirements of Title 29 Article 5 of the South Carolina Code of Laws. Defendants' motion and memorandum in support also specifically set forth §29-5-90 as a basis to dismiss the Lien. For these reasons and the reasons set forth in the Order Plaintiff's request to alter or amend is DENIED

8. For the reasons set forth in the Order Plaintiff's request to alter or amend is DENIED.

9. The Defendants' motion and memorandum in support specifically set forth §29-5-10. For the reason set forth in the Order Plaintiff's request to alter or amend is DENIED.

10. Although the Court may take judicial notice of the requirements for filing a mechanic's lien under the applicable statutes the Court finds Defendant's Answer sets forth the specific defense of Plaintiff's failure to follow the requirements of Title 29 Article 5 of the South Carolina Code of Laws. The motion and memorandum in support also specifically set forth §29-5-90. For these reasons and the reasons set forth in the Order Plaintiff's request to alter or amend is DENIED.

11. For the reasons set forth in the Order Plaintiff's request to alter or amend is DENIED.

12. For the reasons set forth in the Order the Court finds Defendants' Fee Affidavit which was filed on April 20, 2017 sufficient. Plaintiff's request to alter or amend is DENIED.

13. For the reasons set forth in the Order the Court finds Defendants' Fee Affidavit which was filed on April 20, 2017 sufficient. Plaintiff's request to alter or amend is DENIED.

14. For the reasons set forth in the Order Plaintiff's request to alter or amend is DENIED.

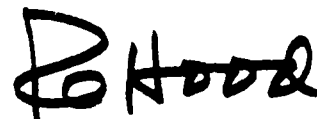
15. The judgment granted by the Order was an attorney fee award for an improperly filed mechanic's lien pursuant to S.C. Code Ann. § 29-5-20(a) and unrelated to any claims for damages made by the parties under the Complaint, Amended Answer, Counterclaims or Third Party Claims. Whatever settlement was reached between the Defendants and the Third Party Defendants are separate and unrelated to the attorney fees award required by §29-5-20(a). As such Plaintiff would not be entitled to a set off from moneys collected from the Third Party Defendant, and thus the amount of that settlement is irrelevant to the judgment under the Order. Plaintiff's request to alter or amend is DENIED.

**NOW THEREFORE**, based upon the pleadings duly filed, the evidence before the Court, the arguments of counsel, and the laws of this State set forth above,

**IT IS HEREBY ORDERED THAT:**

Plaintiff Kitchen Planners, LLC's Motion to Alter or Amend is hereby DENIED in its totality

**AND IT IS SO ORDERED.**



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Robert E. Hood, Judge  
Circuit Court, Fifth Judicial Circuit

Richland County, South Carolina

~~May~~ 2017

July 5, 2017