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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
William P. Keesley, Circuit Court Judge

Opinion No. 5444 (S.C.Ct.App., filed September 28, 2016)

Rose Electric, Inc.....Petitioner

v.

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

Of whom

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

RETURN BY S2P, LLC TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

Respondent S2P's Counter-statement of the Case.....1

Argument, Question I 4

Argument, Question II 10

Conclusions 13

RESPONDENT S2P'S COUNTER-STATEMENT OF THE CASE

Petitioner ("Subcontractor")was an electrical subcontractor involved in the construction of a refrigerated vegetable-processing building at the South Carolina State Farmers Market, and, as with some other subcontractors, was not paid by the Contractor (Cooler Erectors, Inc.). Contractor, Cooler Erectors, Inc., insolvent after receiving approximately 95% of the contract price, left the project unfinished and has not appeared in the litigation.

Some $10,103 was retained by Southern Produce (not paid to the Contractor), yet this amount was grossly insufficient to pay the subs or to complete the project contemplated by the project's contract between them.

Three of the unpaid subcontractors filed mechanics liens, including Petitioner, Rose. Rose included in its lien, along with its project charges, charges for additional work unrelated to the initial contract, filing one, combined lien. The other lien claims were settled by Southern Produce, without litigation. Petitioner then filed suit to foreclose its "combined" mechanics lien. This Respondent (S2P, LLC) the property owner of the parent tract and lessor to Southern Produce, was liened by Rose (as to its entire Farmer's Market tract containing other, unrelated business operations), and raised certain defenses and claims, including a cross-claim against Southern Produce for indemnification under a ground lease, which claims were essentially not

contested by Southern Produce. None of the other parties of record have participated in the litigation.

On the date of trial, February 13, 2013 Petitioner announced to the Court that it was proceeding only on its *quantum meruit* claim and was not going to pursue its claims based on contract or mechanics lien foreclosure, neither as to the work performed under the original building specifications (priced at $54,319.13) nor under its contract/mechanics lien foreclosure suit against Southern for the extras, changes or add-ons to the original construction job (priced at $10,755.39).

After trial, Rose Electric, Southern Produce and S2P did submit memoranda on the legal issues raised by the unusual posture created by the Plaintiff's abandonment at trial of the contract and mechanics lien foreclosure causes. In addition to entertaining memoranda, the Court invited Counsel to appear before it on October 23, 2013 for further argument, which was received and considered.

A decision on the merits was issued in the case by the Hon. Judge William R. Keesley of the Circuit Court dated June 11, 2014 and filed June 20, 2014.

In the Order appealed from, the Trial Court found that formal pretrial offers of settlement were properly made to the Peitioner by Respondent Southern Produce, Inc., the last in the amount of $18,000, and should have been accepted under its view of the evidence, but were all refused. Accordingly, attorney's fees and costs were assessed against Plaintiff (Petitioner) below (R., pp. 42-44). The court also found that there was an express contract between Peitioner Rose Electric and General Contractor Cooler Erectors to supply the necessary electrical subcontracting on a cost plus labor

basis, pursuant to plans and specifications shared between them, and further confirmed that there was a *second express contract* directly between Peitioner Rose Electric and Southern Produce for change orders or add-ons. Judge Keesley held that where there is an enforceable, express contract subject to legal remedy, then, an action in quantum meruit for the ssme work cannot lie (R., pp 36-41). He denied relief in *quantum meruit* to the Peitioner for that reason and also ruled as an additional ground for denial that, even if Peitioner were allowed to seek quantum meruit under an express contract inthis case, the Court would still have denied the equitable remedy, holding that because Respondent Southern Produce had offered to pay Rose during the litigation, there was no evidence of a retention by Southern Produce of Rose's work under conditions that make it unjust to retain it without paying its full value (R.p.41).

The Court of Appeals reversed, by Order filed September 28, Opinion Number 5444(R. p. 569, et seq.) . The unanimous Court ruled, contrary to the Trial Court, that the absences of actual price terms within each of the agreements (Cooler Erectors/ Rose Electric and the Southern Produce/Rose Electric) would have been fatal to a cause of action to enforce those agreements under contract law, so that quantum meruit was appropriate as to both of the jobs completed by Rose Electric.

The Court of Appeals implied, however, that it would be inequitable to make Southern Produce pay twice for the same work – since Petitioner's prorated share of all liens filed on the project, applied to the $10,103 retainage held back from the Contractor (68.74% of all liens), equaled $6948.24, the Court of Appeals held that

this exact sum is the reasonable measure of an equitable remedy the Subcontractor under the project contract.

It further found that even thoogh it would be also unfair and unjust to require Southern to pay twice for the same project, Southern's retention of the benefit conferred upon Southern by Rose Electric was unjust, perhaps implying that the injustice had to do with the delayed payment for the "add-ons," rather than pertaining to payment of the retainage The Court of App endeavored to determine an appropriate equitable remedy by reference to the mechanics lien statutory remedies, in effect adopting those "prorated payment" amounts as equitable amounts (By direct analogy to S.C. Code Ann. 29-5-60, [1992]), though the mechanics lien statutes were held not to apply. Essentially, the Court of Appeals granted petitioner a prorated share of the retainage $6948.24, plus the agreed value of the "add-on's" of $10,755.39, totaling some $17,703.63, as fair compensation for the Rose work retained by Southern Produce, and remanded so that the trial court should consider Rose's prejudgment interest claim in light of the reversal of the earlier denial of the quantum meruit prayer . Pertaining to the add-ons (R. p. 576).

ARGUMENT, QUESTION I

I. **Petitioner's Question I**: *Whether the Court of Appeals failed to recognize that although two other subcontractors had filed liens, those liens were no longer active or owed by Southern Produce due to settlement or payment prior to trial*?

"... **It is the duty of the owner to prorate among all just claims the amount due the contractor**. " (S.C. Code Ann. 29-5-60, [1992] Proration of Payments Among Lienors.). The principle set forth in this statute --designed for application in mechanic lie cases– was adopted here, by the Court of Appeals **as a guideline for its determination of what was fair or unfair in a quantum meruit case.** The approach is reasonable, though other equitable issues might be considered– in a case brought in equity.

Petitioner's Argument I in this particular Petition argues not against the blending of statutory provisions and equitable causes of action to Produce a just equitable award, but rather urges the Supreme Court to adopt a narrower equitable measurement procedure that would, in determining the percentages of proration derived from the mechanics lien procedures, only consider mechanics liens which are still pending on the date of trial to determine the correct proration of any retainage. It is difficult to consider that suggestion in an equitable context. Perhaps Petitioner's first question could more accurately have been phrased: *should Section 29-5-60[A] be interpreted so as to require the court to determine a lienor's proportionate share of the retainage after any outstanding liens have already been settled, paid or compromised prior to the date of a subcontractor's trial*?

The idea on its face seems unfair, since the statute is intended to protect the owner against multiple payment liability for the same work, only providing that subcontractors will be paid a prorated share of their liens by an owner, if unpaid by their contractor. It has been long acknowledged that considering all liens and prorating all of

them, is a method chosen by the legislature to help avoid that sort of injustice to the Owner. Lowndes Hill Realty Co. V.. Greenville Concrete Co,, 229 SC 619, 629, 93 S.E. 2d 855, 860 (1956). And that is a statutory means to avoid an injustice, not an invitation to use this as a yardstick to fashion equitable remedies.

Perhaps Question #I, if literal consideration was not intended, might, in the alternative, seek this High Court's adoption a revision of the plain language of the statute, where used in equitable case, to be applied as follows: "... *It is the duty of the owner to wait 90 days after the very last labor and materials are furnished on a project (so that all potential liens can be considered) , before paying or negotiating any liens of any subcontractors or materialmen, and before paying any other just claims of any other persons who have not filed mechanics liens, and, if settlement of any perfected liens are reached prior to trial which were brought by any lienholder other than Plaintiff and, further, the terms of such oher paid just claims or settlements shall be either disregarded by the trial court or examined by the trial court and determined as to the settlement value conferred upon the parties to the settlement, so that (a) each claim or lien still outstanding or (b) the amount of actual value provided by the owner to a subcontractor if a claim is settled prior to trial, whichever be the lesser, shall be considered as a factor in the proration of all liens, for purposes of application of the proration statute at the time of trial*, to determine an equitable remedy." Such a change, admittedly virtually unworkable at the trial level, constitutes *legislation*, and probably not good legislation, at that. And it ignores other equitable issues as well.

But, simply, Petitioner's question asks if it is equitable to disregard good faith payments to other perfected lienors. The answer should be no. Otherwise, the effect, of

course, would be to punish an owner who attempts to discharge as many perfected liens as possible in settlement, perhaps without protracted litigation. How could ignoring those expenditures be part of an equitable determination?

While Petitioner would thereby seek to narrow the inquiry into Owner's costs to determine what award to a subcontractor would be just, in equity, it could have been argued in this case that Southern Produce *actually already paid twice* for much of the work that was done, *before* the trial, as the Contractor abandoned the job and his subs long before finishing the contract – as a result, other people had to be paid by the owner to finish (clearly implied in testimony of Dan Blocker, R. p. 260, lines 1-16 and R. p. 252, lines 10- 23). But under the subsection quoted above, when proceeding under the mechanics lien statute being considered , the actual amount necessary to **finish** a job is irrelevant. Because it is a procedure taken from a statutory scheme, and is intended by the Legislature as a legal remedy, yet used by the Court of Appeals for an equitable inquiry. Such use is not improper, but it is not always complete, nor completely just. And it might create a tremendous inequity to an owner, especially when a job has not been finished. *But now that this is truly an equitable case*, such other relevant considerations could have been made, including but not limited to the proposition that the retainage could even have been used to help finish the structure, unburdened by the mandatory statutory prorations required under the mechanics lien law *in an action at law*. In short, the Petition seeks to re-write a bit of statutory law pertaining to a legal remedy, plucked out of context to too-narrowly determine an equitable issue.

Petitioner's request that a Trial Court, when placed in such a difficult position by a lienor, only be allowed to consider the amounts of the *mechanics liens still active,*

narrows S.C. Code Ann. 29-5-60, [1992] even beyond its clear language – but in fact, the equitable inquiry should be **broader, not narrower**, into the facts: so as to allow the Trial Judge to consider all relevant factors to enable the Court to do substantial justice and equity to all the parties involved in the litigation. If this Honorable Court is considering giving guidance to the weighing of the equities involved, by the granting of the Petition currently before it, perhaps there is a way to guide the lower courts to consider these other equities, as well, rather than to torture S.C. Code Ann. 29-5-60, [1992] to use it to determine, solely, the scope of an equitable remedy. Equity cannot rightly be so constrained.

Moreover, public policy would not be served by adopting the rule urged. This code section, in the context of mechanics lien litigation, sets a reasonable expectation of the maximum amount of cash that any lienholder (or potential lienholder) might expect from the retainage, and, as such, is a very important, if not essential, consideration in pretrial settlement negotiations, even in pre-litigation negotiations, when problems are expected to occur. The proration is a fairly straightforward formula adopted by the Legislature by which all parties can determine, by exchange of information, and eventually by reference to filed documents, what their respective realistic settlement positions should be, thereby achieving the desired effect of *encouraging the pretrial settlement of controversies*. We believe disregarding "paid" liens would discourage such settlements or at least remove the encouragement provided by the proration statute.

Another difficulty created by the rule urged by Petitioner is a practical one: this would arise in the situation of *non-monetary* settlement between an owner and subcontractor, or between a contractor and subcontractor. A common practice in the

construction industry, especially with respect to materials, is that owners, contractors, laborers and materialmen often work out monetary problems between themselves which have arisen on one job, by employing the other party on other jobs, or by agreeing on concessions on pricing or materials selection or granting other favorable terms on other pending or upcoming projects or contracts, or even as credits against existing obligations or disagreements already existing between them, and considering the very real issue of trust and invaluable goodwill (or lack of it) between contractors, materialmen, architects, designers and other subs in the construction marketplace. If the statute were interpreted to only consider liens pending on the date of trial, or, even, considering liens pending on the date of trial and actual cash previously paid by the owner in settlement of prior liens, as urged by the Petitioner, the trial court will be faced with determining the real value of monetary and nonmonetary settlements involving third parties, in order to properly prorate the retainage which should be awarded to a yet-unsettled lien holder, positioned such as Petitioner. Not only is this going to be a burden to the trial court and create difficult issues of fact at the trial level, but it would discourage an owner or unpaid subcontractor from offering such settlements..

In opposing the granting or Certiorari, we also respectfully submit that even if the case is again reconsidered and an another, higher opinion rendered along the lines urged by Petitioner, it is unlikely to have any clear precedential effect upon either equitable litigation or mechanics lien litigation, simply because of the case's pecuthat is, at least it is hoped that abandoning a mechanic's lien litigation in favor of quantum meruit on the morning of trial will not become a common trial tactic. It will certainly mak trial preparation more difficult where both legal and equitable remedies are alleged in the initial complaint.

ARGUMENT, QUESTION II

Petitioner's Question II:

The record contradicts the statements in the Opinion of the Court of Appeals that there was evidence to support the position of Southern Produce that the cost of the architectural plans was included in the contract price when the payment for the plans was made several weeks before the contract was executed.

Argument:

Can a payment be made in contemplation of a contract, to be applied to the total price, especially when services are provided to the payor prior to the contract being fully memorialized? Simply answered, Yes. We are aware of no rule against this, at law or in equity. so the question is, was there sufficient evidence the trial court to reach the conclusion that this occurred? the answer is clearly yes.

Petitioner asserts now and at did trial, that cost of the architectural plans were not included in the contract price, but instead either (a) represented a separate transaction, so that the $11,000.00 payment made in advance did not relate to the project-contract; or (b) the project-contract price itself was higher than represented by Southern Produce at trial and as quoted in the Cooler Erectors, Inc. project-contract, $213,385.00 (R., pp 402-404).

Evidence showed the initial $11,000.00 payment was credited toward the $213,385 contract, admitted without objection (R.222, pp. 1-14). If the Petitioner's allegation had been proven, however, it would mean that Southern Produce had withheld a greater net amount from the contractor, ostensibly making a larger verdict for Petitioner "more equitable," if figured, as by the Court of Appeals, solely a percentage of retainage

– it would increase the Owner's retainage, increasing the Petitioner's monetary share. This argument of "seperateness" of the architectural work and $11,000.00 payment from the construction contract itself was asserted at trial but the Petitioner claims the Trial Court's and the Court of Appeals' findings (as to the amount of the retainage and as to whether or not the architectural plans were included in the contract price) were clearly erroneous.

There was considerable examination and cross-examination of Southern Produce's Manager, Dan Stocker, at trial. Substantial testimony appears in the record concerning Southern Produce's admission of (over Petitioner's objection) and description of the purposes behind the personal check for $11,000 that was paid by the owner of Southern Produce, Nate Crocker, on behalf of Southern Produce to the Contractor, Cooler Erectors, Inc., and testimony concerning the inclusion of the cost of the architectural plans attached within the overall project contract (record P. 227 line 13 through record page 232, line 25) . During this portion of direct examination, Mr. Stocker testified that the $11,000 payment in question was the initial payment to Cooler Erectors, that it was a portion of the contract price, that the plans and drawings were included in the overall contract, that they was referred to within the project contract, that the plans were attached to the contract, and that payment of the $11,000 was required by Cooler Erectors, Inc. in order for Southern Produce to obtain the plans, which were reported to have been drawn by an engineer or architect at Cooler Erector's initial insistence and Southern Produce's cost.

Mr. Stocker also testified that the price paid and the contractual arrangement between Southern Produce and Cooler Erectors, was intended to be a "turnkey operation"

and inclusive of all costs, including design and construction, and that contract was admitted into evidence (R. p. 223, line 8 - R. p. 225, line 8). Petitioner's attorney fully cross-examined Mr. Stocker on these points (R.254 line 7 - R. p. 259 line 21). The clear weight of the actual evidence, as viewed at trial, supports the Trial Judge's finding that the initial payment of $11,000 to release the architectural plans and drawings attached to the contract for some $213,385 was, in fact, accounted for by the Respondent Southern Produce as a portion of that same contract to which it was attached, and there was no direct evidence to the contrary.

The Trial Judge had the opportunity to hear extensive argument, to observe the testimony of Mr. Stocker and the opportunity to examine the exhibits at trial, including the project-contract between Southern Produce and Cooler Erectors, as well as the check to Cooler Erectors of $11,000 to release the plans to the owner, and made the determination that these items were all included as a part of the overall project contract between the Contractor and Southern Produce. The Court of Appeals in this case, while rejecting the existence of contract, still agreed that the architectural plans were included in the total project price and that in light of conflicting evidence, they would not disturb the trial court's decision on that point which was obviously decided on the basis of credibility of the witnesses (R. pp.573-4, footnote) . Therefore, the Question II, as submitted, is without merit, as any contradictory evidence is circumstantial and, according to the Trial Court, unpersuasive.

Since there is substantial evidence in the record supporting the trial court's finding that the cost of the architectural plans and drawings was included in the overall project price and included in the contract with the Contractor, the acceptance by the Court of

Appeals of the Trial Court's finding on that point was clearly appropriate.

Conclusions:

This is a case in which the court below fashioned an equitable remedy by considering the interests of the parties involved, and the Petitioner objects to the method used to determine the amount of relief awarded it. If a "novel question of law" under SCRAP 242 exists, it is not a meritorious novelty, and not worthy of the Writ.

Petitioner's other ground asserted can only be interpreted as a dispute as to a finding of fact by the Trial Court, affirmed upon appeal, and its overruling is unsupported by any compelling argument or omission at the trial level.

The Writ should be denied, it is respectfully urged by this Party.

Respectfully submitted,

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March 3, 2017

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Of whom

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PROOF OF SERVICE

I hereby certify that I have served the RETURN BY S2P, LLC TO PETITION FOR A WRIT OF CERTIORARI in this matter upon the parties hereto by causing a copy of it to be mailed via first class US Mail to their counsel of record in the matter, the address clearly shown upon the envelopes containing same, with sufficient postage affixed thereto and return address clearly marked thereon, on March 2017, directed as follows:

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