

THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

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S.C. SUPREME COURT

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

Rose Electric, Inc., Petitioner,

v.

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

Of whom

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

PETITION FOR A WRIT OF CERTIORARI

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

Other Counsel of Record:

Kathryn M. Cook
306 Calhoun Road
Myrtle Beach, SC 29577
(843) 222-2116 (T)
Attorney for Respondent Southern
Produce, Inc.

J. Robin Turner, P.A.
1722 Marion Street
Columbia, SC 29201
(803) 799-7894 (T)
(803) 252-6082 (F)
Attorney for Respondent S2P, LLC

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 29, 2016.

QUESTIONS PRESENTED

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the Court of Appeals failed to recognize that although two other subcontractors had filed liens, those liens were no longer active or owed by Southern Produce due to settlement or payment prior to trial?

II. Whether 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?

STATEMENT OF THE CASE

After a one-day bench trial held on February 13, 2013, the trial court issued an Order (R. p. 1) on January 30, 2014, filed on February 3, 2014, in which the court ruled that the Appellant, Rose Electric, Inc. ("Rose Electric") was not entitled to recovery under the theory of *quantum meruit* because an express contract existed between Rose Electric and Cooler Erectors of Atlanta, Inc. ("Cooler Erectors") for a price of \$54,319.13 for the electrical work performed by Rose Electric at a new refrigerated building, and an express contract existed between Rose Electric and the Respondent, Southern Produce, Inc. ("Southern Produce") for a price of \$10,755.39. (App. p. 1).¹ The trial court also ruled in

¹ The Court alternatively found that if no express contracts existed, Rose Electric would not be entitled to recover under the theory of *quantum meruit* because there was no

the Order that Southern Produce was entitled to a judgment for attorney's fees and costs plus an award of interest based on the amount of the award for such fees and costs under Rule 68, SCRCP, and S.C. Code Ann. §15-35-400, and that the Respondent, S2P, LLC ("Property Owner") was entitled to a judgment for attorney's fees and costs. (R. p. 17).

By Order dated June 11, 2014, and filed on June 20, 2014, the trial court modified the Order by (1) deleting the award of interest on the attorney's fees and costs stating that such an award under Rule 68, SCRCP, and S.C. Code Ann. §15-35-400 would not be appropriate, and (2) the court also issued a substituted order in which some typographical errors were corrected by motion of the court (the "Amended Order"). (R. p. 20). The trial court made all modifications on the face of the initial Order by showing all deletions and corrections as marked up.

This action arises from the construction of a new refrigerated building to be used by Southern Produce for its business operations and located within the new South Carolina Farmers Market. Southern Produce had been ordered to vacate its old location by December 2, 2010. (R. p. 272, lines 9-11). The business of Southern Produce is the processing of fresh vegetables and fruit for sale to wholesale produce distribution companies. The new refrigerated building is located on a portion of property owned by Property Owner, and Southern Produce had a lease for the area of land on which the refrigerated building is located. (R. p. 233, line 20 - p. 234, line 4).

Cooler Erector, a general contractor doing work in South Carolina without being issued a license to do such work, entered into a written contract entitled "Contractor

evidence that there would be unjust retention of benefit without payment. (Order dated January 30, 2014, p. 11).

Agreement" dated October 27, 2010, with Southern Produce to act as the general contractor on the building project (the "Contractor Agreement"). (App. p. 402). The Contractor Agreement covered all aspects of the project including site work and a large metal building for a total project cost of \$213,385. For the electrical work specified in the Contractor Agreement, Cooler Erector contacted Rose Electric to perform such work, and Rose Electric performed its work over a thirty-day period of time with the building getting a certificate of occupancy on November 30, 2010, but Rose Electric has not paid for such work. (App. p. 157, line 21 - p. 158, line 5). During that time, Rose Electric did extra work at the specific request of the general manager of Southern Produce who was at the job site every day during the construction of the building. (App. p. 206, lines 12-14).

On March 4, 2011, Rose Electric filed a notice of Mechanic's Lien with a Statement of Account attached showing the amount owed of \$65,095 including a claim for "Change Orders" in the amount of \$10,755.39. (App. p. 381). Notices of Mechanic's Lien were also filed by Custom Concrete of Lexington, Inc. (\$14,529) and by Dunlap Services (\$10,211), but the claims of those parties had been resolved at the time of trial. (App. p. 422 and 427).

On May 20, 2011, Rose Electric filed an action alleging a claim to foreclose on its mechanic's lien and for claims of breach of contract against Cooler Erectors and claims for unjust enrichment and *quantum meruit* against Southern Produce and Property Owner. (App. p. 52). Southern Produce filed an Answer to the Complaint on July 25, 2011, in which Southern Produce denied owing any amounts to Rose Electric for the work performed for the new refrigerated building. (App. p. 60). Property Owner and Senn

Bros., Inc. also filed Answers and filed a cross claim against Southern Produce.² (App. p. 65; App. p. 62).

Cooler Erectors had been served and was given notice of the trial, but did not appear at the trial.³ (App. p. 105, lines 5-19).

The Court of Appeals reversed and remanded the Order of the trial court by Opinion 5444 published on September 28, 2016, and the Petition for Rehearing was denied by Order filed December 29, 2016. The decision of the Court of Appeals in reversing and remanding the trial court's decision was to adopt the trial's court's finding that the total contract price of the project included the architectural plans and to find that the trial court properly calculated the retainage to which Rose Electric was entitled. The Court reversed and remanded to the trial court to modify its judgment to include an award of damages for the payment of the extra work and for payment of a portion of the retainage totaling \$17,703.63.

² Senn Bros. Inc. was dismissed from the action by agreement at the beginning of trial, but the Order mistakenly includes it as a party.

³ A Notice of Hearing sent to the registered agent was put into evidence.

ARGUMENT

I. 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.

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. The testimony of Stocker, the only witness presented by Southern Produce, shows that the total amount paid to both was \$465. He testified:

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

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

A. Other than legal fees, no, sir.

Q. Okay. But nothing to Custom Concrete?

A. Correct.

App, p. 266, lines 16-22).

Q. Okay. Now, let's go to Dunlap Services, the second one.

A. Yes, sir.

Q. That's where Southern Produce is named as a defendant. Do you see that?

A. Yes, sir.

Q. And the amount there again is \$10,210; correct?

A. Yes, sir.

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

A. That was a settlement, yes, sir.

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

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

(App. p. 266, line 23 – p. 267, line 12).

The analysis done by the Court of Appeals dealing with the allocation of the retainage presents novel questions of law. First, based upon the recovery under *quantum meruit*, Rose Electric had to prove that Southern Produce was benefitted by the work of Rose Electric and that it would be inequitable for Southern Produce to retain the benefit without paying its value. Swanson v. Stratos, 350 S.C. 116, 121, 564 S.E.2d 117, 199 (Ct.App. 2002). Thus, it would be inequitable for Southern Produce not to pay Rose Electric the remaining retainage of \$9,647.00.

The Court of Appeals instead of applying the theory of *quantum meruit* applied the mechanic's lien statute for allowing an owner to allocate the subcontractors' unpaid amounts to compute how much each subcontractor would be paid from the retainage. But, the statement in the Court of Appeals' decision that the mechanic's lien statute does not distinguish between liens that settle prior to trial and those that continue to trial (Rose Electric v. Cooler Erectors of Atlanta, Inc., Op. No. 5444 at 7 (S.C.Ct.App. filed Sept. 28, 2016.) is not logical or fair to the subcontractor that pursues the payment from the owner.

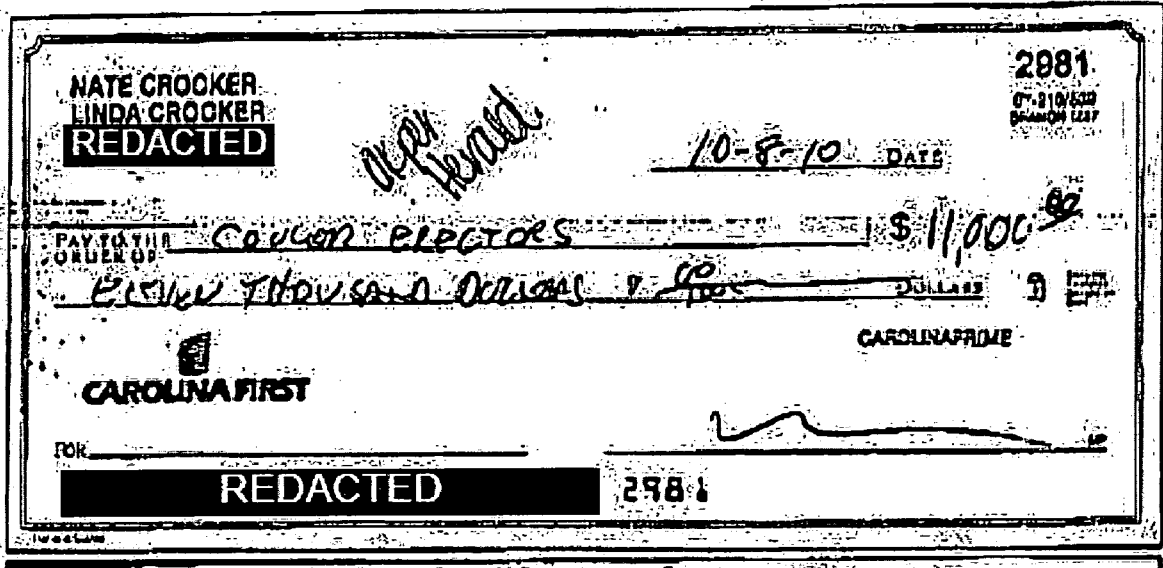
At the time of the hearing of this action, there were no other creditors having liens of any kind and so the only lien to be considered for any determination was that of Rose. Because the other subcontractors had settled any claims, they no longer had any lien and were paid under the contract. Therefore, at the time of the hearing, the only subcontractor not paid was Rose and there were no other creditors with which to prorate any retainage.

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.

The Record contradicts the statements in the Opinion of the Court of Appeals that there was evidence to support the position of Respondent Southern Produce, Inc. ("Southern Produce") that the architectural plans were included in the contract price when the payment for the plans was made several weeks before the contract was executed. The discussion by the Court as to the total contract price is done in footnote 1 of the Opinion.

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

Nate and Linda Crocker and was dated two weeks prior to the execution of the contract between Cooler Erectors and Southern Produce.



(App. p. 410)

The other four checks were written on the checking account of Southern Produce and dated after the execution of the contract.

Therefore, this Court should find that the total project cost was \$224,385 because the amount in the Agreement does not include the cost for obtaining the architectural plans. This Court should further find that Southern Produce did not pay Cooler Erectors \$21,108 of the total project cost.

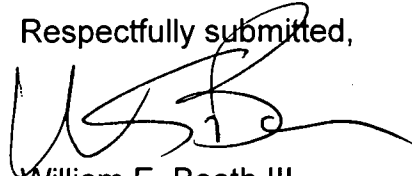
Plans	Oct. 8, 2010 - Payment for Plans	\$11,000.00	
Contract	Oct. 22, 2010 - Date Signed	\$213,385.00	
	Total Project Cost	\$224,385.00	
Other Payments			
10/27/2010	Southern Produce, Inc.	Cooler Erectors of Atlanta	\$49,600.00
10/27/2010	Southern Produce, Inc.	Cooler Erectors of Atlanta	\$42,677.00
11/16/2010	Southern Produce, Inc.	Cooler Erectors of Atlanta	\$70,000.00

12/2/2010	Southern Produce, Inc.	Cooler Erectors of Atlanta	\$30,000.00
		Total Other Payments:	\$192,277.00
		Payment for Plans	\$11,000.00
		Total All Payments	\$203,277.00
		Total Project Cost	\$224,385.00
		Total All Payments	\$203,277.00
		Total Retainage	\$21,108.00

CONCLUSION

The Court of Appeals was incorrect in determining the total contract price and in determining the amount of retainage that should be paid to Rose Electric.

Respectfully submitted,



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

Attorney for Petitioner

February 3, 2017

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Of whom

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

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari and Appendix by causing to be mailed via USPS Priority Mail with sufficient postage affixed thereto on February 3, 2017, addressed to the Respondent S2P, LLC's attorney of record, Jon Robin Turner, Esquire, P.O. Box 11646, Columbia SC 29211.

February 3, 2017



William E. Booth III
3231 Sunset Boulevard, Suite A
West Columbia, SC 29169
(803) 791-9211 (T)
(803) 791-3159 (F)
Attorney for Appellant
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February 3, 2017



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

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