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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge
Trial Court Case No. 2016-CP-40-00164

Appellate Case No. 2017-001522

The Kitchen Planners, LLC, Appellant

v.

Samuel E. Friedman and Jane Breyer Friedman and Branch Banking and Trust, Respondents

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RESPONDENTS' INITIAL BRIEF

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a. The mechanic's lien and verified statement of account were not timely served and filed.

b. None of the materials furnished by Appellant were actually used in construction of the home and are not affixed to the real estate and as such not subject to a lien.

c. Appellant has already been paid in excess of the value of the materials provided, and is now solely seeking overhead and profit which is not subject to lien under the mechanic's lien statute.

d. The action to foreclose the lien was untimely filed.

II. Did the trial Judge err in denying Appellant's Motion to Strike?

III. Did the trial Judge err in awarding attorneys' fees?

STATEMENT OF THE CASE

Respondents, Sam and Jane Friedman, own a home at 333 Spring Lake Rd., Columbia, SC 29206. In February 2015, a water pipe burst in their home, requiring that the entire kitchen be dismantled in order to dry the floors. Respondents would need to completely reconstruct their kitchen. They wanted to duplicate their existing kitchen including cabinets from the same cabinet manufacturer, Crystal Cabinets. The only Crystal Cabinets dealer in Columbia, South Carolina is Appellant, Kitchen Planners. Respondents contacted the Appellant who provided a contract for the delivery and installation of the replacement Crystal Cabinets. The agreement was a fixed price agreement for $50,284.04 for the cabinets ("Contract"). The Contract did not itemize the

amount of overhead or profit which was being made by Appellant. It just stated what the final price would be. (Contract)

The agreement was entered into on March 16, 2015 and on May 21, 2015, the cabinets were delivered to Respondents' residence. Prior to delivery, Respondents paid Kitchen Planners $33,629.36 of the $50,284.04 contract price for the cabinets (Verified Statement of Account). It would be determined through discovery that Appellant paid $28,953.58 for the cabinets, and had already made a $4,675.78 profit on the cabinets before they were even delivered. (Deposition of Comose, p. 117, line 13/Invoices)

The cabinets delivered on May 21, 2015 are the only materials subject to the lien because they are the only cabinets that the Appellant ever delivered to Respondents' home (Affidavit of Sam Friedman). It was immediately apparent to Respondents that there were problems with the cabinets that Appellant delivered to the home. (E-mail June 13, 2015; (Depo. of Comose, p. 70, lines 6-9) When Respondents confronted Appellant with the problems, Appellant made certain representations that the deficiencies would be addressed. When Appellant failed to address the deficiencies in a timely manner, Respondents contacted Crystal Cabinets directly. Crystal Cabinets sent out their independent representative, Derek Tackett, to look at the issues (Depo. of Comose, p. 80, line 6-10). Derek Tackett came to the home and inspected the cabinets. Derek Tackett recognized some issues with the cabinets and told Respondents that he could order the correct cabinets, but Respondents would have to pay the cost of the new cabinets. Respondents became increasingly unhappy with the work of Appellant. As a result of Respondents concerns, Derek Tackett took over the job from Appellant on June 18, 2015. (E-mail from 7-13-15) On June 29, 2015, Derek Tackett ordered new cabinets for which Respondents paid directly to Crystal Cabinets. (Depo. of Comose, p. 87, line 22-24)

Appellant was not involved in supplying any additional materials which are subject to the Lien to the Respondents' home, other than those provided on May 21, 2015 (Depo. of Comose, p. 111, lines 1-5).

The new cabinets ordered by Derek Tackett and paid for by Respondents arrived on August 10, 2015 (Aff. of Sam Friedman, Cancelled Check). This was the last day that any materials were delivered, by Crystal Cabinets or any other party, to Respondents' home. When the new cabinets arrived, they too were deficient. At this point Respondents had been without a kitchen for six months. They had run out of patience and in August 2015 told Derek Tackett that his services were no longer required (Email from August 18, 2015).

Respondents ended up hiring a local custom cabinet maker to manufacturer new cabinets for their kitchen. None of the Crystal Cabinets paid for and furnished by the Appellant were installed in Respondents' home. Those cabinets that Appellant provided are still sitting in Respondents' garage where Appellant left them (Jane Friedman's Depo. p. 23, line 17; Sam Friedman's Depo. p. 31, line 3).

Appellant filed a Mechanic's Lien with the Clerk in the Richland County Court of Common Pleas on November 12, 2015 ("the Lien"). The Lien indicated that the materials were furnished on or about March 11, 2015 (the date of the Contract) through on or about August 18, 2015 (the date of the e-mail dismissing Derek Tackett). The lien was not served upon Respondents until November 17, 2015 (Cert. of Service). Appellant filed a complaint to foreclose on the Lien on January 13, 2016. The Parties engaged in extensive discovery including depositions of the parties. On April 7, 2017, the deposition of Patricia Comose, (the principal and sole member of Appellant) was taken. In that deposition Ms. Comose testified as to her involvement at the Respondents' home.

On January 19, 2017, Respondents filed what was titled a Motion to Dismiss Mechanic's Lien and Foreclosure, but which was, in actuality, a motion for summary judgment. Within the body of the motion and the filed Memorandum in Support of Defendants' Motion for Summary Judgment, it was clear that relief was being sought pursuant to South Carolina Rules of Civil Procedure 56 (Motion and Memorandum).

On April 13, 2017, Respondent filed an Aff. of Samuel Friedman which was immediately served upon Counsel for Appellant. (Aff. of Sam Friedman) Appellant filed her own opposing Affidavit of Patricia Comose which was not objected to by Respondents. (Aff. of Comose) Respondents filed a Memorandum in Support of the Motion (Memo). The hearing took place on April 25, 2017, and on May 11, 2017 an Order was issued granting Summary Judgment in favor of Respondents from which the Appellant is now appealing. On May 30, 2017, Appellant filed a Motion to Alter or Amend, which motion was denied by and order issued July 5, 2017 (Order on Motion to Alter or Amend).

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Adamson v. Richland Cnty. Sch. Dist. One*, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998) (quoting *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997)).

The United States Supreme Court has interpreted Rule 56(e) to require the party opposing the motion for summary judgment to "go beyond the pleadings . . . and

designate 'specific facts showing that there is a genuine issue for trial.'" *Cellotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. Rule 56(e)). The party opposing the motion must establish the existence of a genuine issue of material fact by referring to the depositions, answers to interrogatories, and admissions on file. *Id.* The party opposing the motion, not the Court, bears the burden of identifying the specific facts in the record which establish a genuine issue of material fact. *Id.* Finally, summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (S.C. 1991).

ARGUMENT

I. The trial judge properly granted summary judgment and vacated Appellant's mechanic's lien and the associated foreclosure action.

a. The mechanic's lien and verified statement of account were not timely served and filed.

It is paramount to the perfection of a mechanic's lien that the Lien be timely filed and served in accordance with requirements of the statute. While the trial Court established several reasons for dismissing the Lien, the easiest and most obvious reason was that the Lien was not timely filed and served (Order p. 3-4). The Lien in question is not for the performance of labor but solely for providing materials (Verified Statement of Account). As such, the dates in which those materials are actually delivered to Respondents' home is crucial to the proper timing of the Lien. It is axiomatic that if the Lien is improper or untimely, then the action to foreclose on that Lien must also fail. All of the evidence and testimony in this action points to the fact that the Lien was not timely filed and served within the 90-day time period established by South Carolina Code Ann.

Title §29-5-90. Because no question of fact existed as to the untimely filing of the Lien, the Court was correct to dissolve the Lien and to dismiss the foreclosure action.

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. Clifflure Estates of S. Carolina, Inc.*, 282 S.C. 573, 575, 320 S.E.2d 51, 53 (Ct. App. 1984). 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). Additionally, the prevailing party shall recover the costs which may arise in enforcing or defending against a mechanic's lien, including attorney's fees. (S.C. Code Ann. § 29-5-20(a)). As a derivation of the common law the mechanic's lien must be strictly complied with; no variation or leeway may be given.

South Carolina Code Ann. Title §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 in this action 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 (Affidavit of Service). To be valid under South Carolina Code Ann. Title §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 Respondents

were served. Ninety days back from November 17, 2015 is August 19, 2015 (hereinafter referred to as the "Deadline Date"). Thus, the Plaintiff would have had to provide materials on August 19, 2015 or later for the Lien to be timely.

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". (Lien) If accurate then the Lien was served ninety-one days after materials and labor were furnished to the home. As such, the lien is invalid on its face and must be dissolved. Yet the Lien couches the dates in terms of "on or about" so discovery was required in order to determine the exact dates that the materials were delivered to Respondents' home. There is no dispute that the cabinets ordered and delivered by Appellant were delivered to Respondents' home on or about May 20 or 21, 2015 (Depo. of Comose, p. 77, lines 11-18; Aff. of Sam Friedman). It is the contention of Respondents that these were the only materials subject to the Lien that were ever delivered to the home (Aff. of Sam Friedman). As these materials were delivered well before the Deadline Date, Appellant would have to have delivered some other materials to create a different delivery date. Appellant has provided no proof of Appellant delivering any additional materials to the Friedman home after May 21, 2015.

Ms. Comose indicated in her deposition that on June 18, 2015, she received a call from Derek Tackett indicating that Respondents were "done with me". (Dep. of Comose, p. 97, lines 5-7) indicating that she had been terminated. In her deposition, Ms. Comose was clear that she performed no additional work and provided no additional materials after June 18, 2015. In fact, she said it multiple times:

Q. Okay. After the June 18th date, did you order any more materials for Respondents' job?
A. No. Derrick ordered -- Derrick was doing re-order --
Q. Okay.
A. -- and he had arranged, I guess, at that date -- I mean, that's what he was proposing, to arrange with them to just pay Crystal directly at dealer cost.

(Dep. of Comose, p. 102-103, lines 19-25)

Q: All right. So the last day you were at the – did anything, as far as being at Respondents' house was before June 18, correct? I think we established that.
A: I believe so, yes.
Q: Okay. And you did not provide any additional materials after June 18th. You didn't provide anything. Derrick did all that.
A: I think that is correct.

(Dep. of Comose, p. 112, lines 12-20)

Because of Derek's call, on July 3, 2015, Ms. Comose wrote an e-mail to Ms. Friedman indicating that she understood that she had been terminated and that Derek Tackett had arranged for Respondents to order additional and substitute cabinets directly through Crystal Cabinets (E-mail). She even sent a cessation of contract agreement along with the e-mail (Cessation of Contract). On July 15, 2017, Ms. Friedman wrote an e-mail to Ms. Comose "Derek is taking over the design and execution of this project, independent of the prior situation, and no further payment is due to you/The Kitchen Planners" (July 13, 2015 email). This was clearly an indication that she was being terminated and would receive no further payment for the materials that were delivered. Appellant has provided no evidence that she has delivered any additional materials to the Respondents' home after the initial May 21, 2017 delivery date. From her own testimony, it is clear that nothing was done by Appellant after June 18, 2015. From the evidence and testimony, there is no question of fact that the Appellant did not provide any additional materials to the Respondent's home after the Deadline Date.

In her defense to the Motion for Summary Judgment, Appellant attempts to bootstrap her materials delivery date to the work and delivery of materials ordered directly through Crystal by Derek Tackett and paid for directly by the Respondents. Yet, as stated before, when the reordered cabinets arrived on August 10, 2015, they were also incorrect. That was the final date that anyone involved in this action delivered any materials to Respondents' home. On August 18, 2015, Ms. Comose received an e-mail from Derek Tackett stating that he had been terminated from the job due to his errors and cancelling all further orders (E-mail August 18, 2015). This e-mail appears to be the reason that the Lien had the date of August 18, 2015. In her deposition testimony, Ms. Comose admits that Derek was also off the job as of that date:

> Q. All right. So as of August 18th Derrick's off the job?
>
> A. That's what it looks like
>
> Q. And are you aware of anything more that Derrick might have done after August 18th at the house? Do you have any knowledge, information?
>
> A. I don't have any direct knowledge of that
>
> (Dep. of Comose, p. 114, lines 7-13)

Even if Appellant were allowed to bootstrap onto another party, the last date of delivery for any materials was August 10, 2017, which still fails to fall after the Deadline Date.

In her affidavit filed in April of 2017, Appellant attempts to manufacture a question of fact for the summary judgment hearing. Ms. Comose executed an affidavit that flies in the face of all the evidence and testimony in the case and contradicts her own sworn deposition testimony. She does so in order to find a date past the Deadline Date to validate the Lien. In her affidavit she states that:

> "she continued to work with Derek Tackett, the manufacturer's representative for Crystal Cabinets through November 2015 when Crystal was taken off the job too. For example, on September 29, 2015 I reordered drawer boxes for the island in the kitchen, and paid $550.61."
>
> Aff. of Comose, Paragraph 4.

That Ms. Comose could have been working at or providing materials to the residence of the Respondents in November of 2015 is patently false. Ms. Comose blatantly ignores her own e-mails provided in discovery and her own sworn deposition testimony that indicated that both she and Crystal were off the job as of August 18, 2015, and that she provided no material or labor after June 18, 2015. There is no conceivable way that she was working with the Respondents in November of 2015. The Lien itself, while not filed until November 15, 2015, was executed by Ms. Comose on October 22, 2015 (Lien).

To support the manufactured claim, Appellant points to a check that was written on September 29, 2015, ostensibly for materials on Respondents' home. In Appellant's brief she references a portion of Ms. Comose's deposition that addresses this check. That testimony does not indicate that anything was ordered or delivered in September of 2015, but that the check may have been written in September 2015, and Ms. Comose could not account for the date on the check. (Depo. of Comose, p. 62, line 22) In addition, Ms. Comose's testimony indicates that it was for re-ordering drawers for an island after a conversation with Jane Friedman (Depo. of Comose, p. 62, line 15-18). In accordance with her own testimony, this conversation could not have taken place after June 18, 2015 (Depo. of Comose, p. 102, line 19-22) and certainly not August 18, 2015, when both she and Derek had been fired and off the job (Depo. of Comose, p. 114, lines 7-13). The statements made in the affidavit contradict all the correspondence, evidence and

testimony in this case that nobody provided any materials or labor to Respondents' home since the August 10, 2015 delivery of the re-ordered cabinets. It is obvious that Appellant's statements in her affidavit are self-serving and made to manufacture some question of fact in order to provide a date to save the untimely Lien and survive summary judgment. This is exactly what the Court determined in its Order (Order Denying Alter or Amend Paragraph 1).

Even if the statements made in Ms. Comose's affidavit were accurate and taken at face value, it still does not create a new date for the filing under the Mechanic's Lien statute. S.C. Code § 29-5-90 requires that the lien be filed within 90 days of when the materials are *delivered.* There is nothing in the affidavit that indicates that any materials allegedly ordered on September 29, 2015 were ever *delivered* to Respondents' home. Ms. Comose could have ordered items and paid for items in September, however, unless those materials are actually delivered and become attached to the real estate they are not subject to a mechanic's lien. (§ 29-5-90) The mere act of ordering materials and paying for them does not establish a new delivery date under the mechanic's lien statute. Otherwise any person could create a new lien date simply by walking to the local hardware store and buying something in the name of a property upon which their statutory lien date had run.

The evidence, and testimony is clear. In order for the Lien to have been valid Appellant must have provided/delivered materials to the Respondents' home on or after August 19, 2015. By all evidence in this action the last date that any materials were delivered by Appellant was May 21, 2015. By all evidence in this action the last date that *any materials* were delivered by *anyone* in this action was August 10, 2015. Both of

those dates precede the Deadline Date of August 19, 2015. Thus, the Court was correct in determining that the Lien must fail for being untimely filed and served and with it the foreclosure action must also fail.

b. None of the materials furnished by Appellant were actually used in construction of the home and are not affixed to the real estate and as such not subject to a lien.

Once the trial Court determined that no question of fact existed to dispute that the Lien was untimely filed, and the foreclosure action associated with the Lien was no longer valid, there was no reason for the Court to go any further with its Order. If the Lien was untimely filed, the rest of the discussion is unnecessary. Yet the Order went on to find that the Lien was invalid for additional reasons. If this Court should determine that the trial Court's ruling on the timeliness of the Lien should be reversed, then the Respondents would state that the other findings by the trial Court would also independently support the dissolution of the Lien and dismissal of the foreclosure action.

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. 111, 113 (1903)

The cabinets ordered by the Kitchen Planners were never installed in Respondents' home (Aff. of Sam Friedman; Jane Friedman Depo. p. 20, lines 16-19). In her brief Appellant cites to an estimate by a contractor Viggiano given to Respondents that indicated that some cabinets supplied by the Appellant *might* be used to save money. However, all the evidence and testimony in the case indicates that this did not happen. The Respondents in their depositions were questioned about this and testified that none of the cabinets provided by Appellant were installed in the house. In her deposition, Jane Friedman was questioned about the materials supplied by Kitchen Planners. Her response was:

> "The only thing that is in my kitchen now that was purchased by us directly from Crystal, we paid Crystal directly for the what I call corner cabinets that had Lazy Susans in them. That is the only two pieces."
>
> (Jane Friedman Depo. p. 20, lines 16-19).
>
> In his deposition Mr. Friedman also testified as to what was used in their home.
>
> A:..."We ultimately did not use again anything but the boxes and Lazy Susans for those corner cabinets. We used none of the hinge hardware if you will. The pulls as I mentioned were purchased separately.
>
> Q. When you say we used the boxes, you're talking about the actual cabinets?
>
> A. Correct. Just those, the two Lazy Susan cabinets. The doors were not used.
>
> (Sam Friedman Depo. p. 44, lines 11-18)

As Ms. Friedman testified, the Lazy Susans cabinets being discussed were not provided by Appellant, but were provided directly from Crystal and paid for by the Respondents. This is confirmed by Ms. Comose's testimony that Respondents purchased cabinets directly from Crystal at cost (Depo. of Comose, p. 87, lines 22-24). The testimony from both Jane Friedman and Samuel Friedman is that none of the cabinets which are the subject of the Lien were used in their home. The cabinets are still sitting in

the Respondents' garage (Sam Friedman Depo. p. 21, line 3). Appellant has provided no proof that any materials provided by Kitchen Planners were used. Thus, since the materials furnished were not "actually used" and such does not meet the requirements of S.C. Code Ann § 29-5-10 and should not be subject to the Lien. Appellant could have simply gone to the Respondents' home and taken them back.

In her brief, Appellant raises many tangential issues not associated with the mechanic's lien. For example, she raises the issues of the cabinets being special ordered and who refused to allow them to be installed (Appellant Brief 9-10). These issues may be germane to other causes of action, but not to the ultimate question of whether or not the cabinets are properly subject to a mechanic's lien. For that you must look to the statute that requires those materials to be attached to the real estate (S.C. Code Ann. § 29-5-90).

In her Brief, Appellant raises several issues which were not raised in the pleadings, motion or the hearing. She raises issues about design fees, hourly rates, labor for supervision, design, problem solving and others. The Verified Statement of Account attached to the Lien stated that the Lien was for "cabinets for their remodeled kitchen" and that the money due was "exclusive of installation costs" (Verified Statement of Account). The parties entered into a separate design contract for which Appellant was paid $500 (Design Contract). In responses to Interrogatories Appellant indicated that the mechanic's lien was calculated upon the cost of the materials plus 33% (Pl. Resp. Int. 11, Depo. of Comose, p. 49, line 5-8). There has been no claim for any of the additional labor and time as raised in Appellants' brief. None of these issues were raised or argued before the Trial Court. Thus, it is improper for the Appellant to raise these defenses for

the first time in the appeal. Even if they were timely raised, none of these issues have any bearing on whether the materials were ultimately installed on Respondents' home or if the Lien was timely filed.

Since the materials delivered by the Appellant were not attached to the real estate, the trial Court was correct in vacating the Lien and dismissing the foreclosure cause of action.

c. Appellant has already been paid in excess of the value of the materials provided and is now solely seeking overhead and profit which is not subject to lien under the mechanic's lien statute.

Mechanic's liens are made for the contractor to protect the value of the cost 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". *Zepsa Construction, Inc. v. Randazzo* 357 S.C. 32; 591 S.E.2d 29 (2003). In her deposition, Ms. Comose had indicated that all the materials were already paid for and that the Kitchen Planners had already made over $4,000 in profit on Respondents prior to filing the lien.

> Q: Provided the numbers I give you are correct you've made a little over $4,000 in profit on this job? Well, just the cabinets?
>
> A: Okay. Probably. Roughly. Roughly
>
> (Depo. of Comose, p. 119, lines 17-20)

In this case Appellant had already made a profit on the job and the amount of the profit was a highly guarded secret until disclosed in discovery. It certainly was not specifically set forth and itemized into the contract. The Lien is clearly seeking solely overhead and profit.

In her brief, Appellant cites the correct law but fails to properly apply it to this case. Properly applied to the facts of this case *Zepsa*, stands for the proposition that overhead and profit are not proper for a mechanic's lien because the amount of overhead and profit was not specifically set forth in the terms of the Contract. The Contract merely states the total price for the cabinets. It does not set forth the amount of profit. It is undisputed that Appellant has already made a profit on the sale of the cabinets to the Respondents. Thus, the entire amount of the Lien is composed of overhead and profit and thus improper. As such, the trial Court was correct in vacating the Lien and dismissing the foreclosure cause of action.

d. The action to foreclose the lien was untimely filed.

For the same reasons set forth in Argument I (a) above, the suit for foreclosure was not timely filed. The last materials delivered to the Respondents' home was on May 21, 2015. The foreclosure suit was filed more than six months after the date that Appellant last provided materials to the home. In addition, if the Lien was not timely filed then the foreclosure action must also fail. As such, the trial Court was correct in vacating the Lien and dismissing the foreclosure cause of action.

II. The Trial Court did not Err in not striking the Affidavit of Samuel Friedman

Respondents' Motion for Summary Judgment granted by the trial court was supported by an Affidavit of Samuel Friedman filed on April 13, 2017, and a Memorandum in Support of Summary Judgment filed April 20, 2017. Prior to the hearing, Appellant filed a Motion to Strike the Affidavit of Samuel Friedman as not being timely filed (Motion to Strike) while simultaneously filing an Affidavit of Patricia Comose. The Court heard that Motion at the hearing of April 25, 2017, and denied the

Motion in that Appellant received the Affidavit and was able to file a responsive affidavit in time for the hearing (Hearing Transcript, p. 5, lines 4-6).

It appears that Appellant may have improperly thought that the motion filed by Respondents was being filed in accordance with Rule 12(b)(6) because it had the words "motion to dismiss" in the title. In truth, the Motion was filed pursuant to South Carolina Rule of Civil Procedure Rule 56 as was stated in the body of the Motion (Motion). The title was referring to the dismissal of the Lien and is only for reference. The body of the Motion and the subsequent memorandum was clearly seeking relief in the form of summary judgment pursuant to Rule 56 (Motion and Memo). The trial court recognized this and properly applied the proper standard for a motion for summary judgment. At the hearing this was discussed, clarified with the Court, and the Court proceeded under Rule 56 without objection by Appellant. (Hearing Transcript, p. 4, lines 13-25; p. 5, lines 1-11).

At the hearing, Appellant only objected to the timeliness of the Affidavit pursuant to S.C.R.C.P 6. (Hearing Transcript, p. 3, lines 18-25) Appellant did not object to the hearing as a motion for summary judgment pursuant to S.C.R.C.P. 56, nor did Appellant object to the use of any evidence being presented. Any appeal based upon the grounds that the hearing was converted from a motion to dismiss to a motion for summary judgment at the last minute or that the Judge improperly allowed evidence, (Appellant Brief p. 15) is improper as Appellant raised no objection to the trial Court and such objections may not be raised for the first time on Appeal. Nonetheless, even though these arguments are not properly before this Court, Respondents will attempt to respond.

In her initial Brief, Appellant's argument over this portion of the Order is difficult to follow and as such Respondents have difficulty deciding how to respond. Appellant "objects" to: 1) the violation of basic rules of pleading by the last-minute conversion of the nonspecific Motion to Dismiss into a Motion for Summary Judgment; and 2) Objects to every affidavit and evidentiary exhibit Respondents utilized in support of the Motion to Dismiss. Even if it were timely raised, Appellant cites no authority or rule, which would support her objections to the Court's actions.

The only response Respondents can make to Appellant's "objections" appears to be to point out that the Motion was filed pursuant to Rule 56. In determining a Rule 56 Motion, the Court may look to the pleadings, depositions, answers to interrogatories and admissions on file together with any affidavits, if any to determine if there is any genuine issue of material fact in order to grant or deny a motion for summary judgment.

III. Did the trial Judge err in awarding attorneys' fees?

Appellant requests that the attorney fee award be reversed for two reasons. The first reason is because the granting of summary judgment in favor of Respondents should be reversed. It is axiomatic that the award of attorneys' fees under the Mechanic's Lien statute would not be proper at this juncture unless the Court's Order for Summary Judgment is upheld. Respondents believe that the trial courts decision was proper and as such the granting of attorneys' fees is proper.

South Carolina Code Ann. § 29-5-20(a) states, "[i]f 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." "Ordinarily, the award of attorney fees lies within the sound discretion of the trial court and will not be disturbed on appeal

absent an abuse of discretion." *McElveen v. McElveen*, 332 S.C. 583, 601, 506 S.E.2d 1, 10 (Ct. App. 1998), *citing Cudd v. Arline*, 277 S.C. 236, 285 S.E.2d 881 (1981).

The second reason given by Appellant is that the amount of fees was not properly proven. In this argument Appellant does not take issue with the Court's method but with the claims of Respondents and the amount of fees accumulated for the services provided. Respondents provided an affidavit putting forth the basis for the fee demand. As an officer of the Court, counsel for Respondents swore that the amounts were accurate and correct. Appellant is the plaintiff in this action. Their filing of an untimely and improper lien and foreclosure action associated with that lien necessitated the expenditure of all fees incurred by Respondents. Respondents have actually incurred fees in excess of those awarded by the Court and those fees continue to mount (Memorandum). However, the Mechanics' Lien statute only authorizes attorney fees up to the amount of the Lien which in this instance is $16,594.68 (29-5-20(a)).

Appellant takes issue with the amount of time devoted to the case by Respondents' Counsel. Appellant requested no documentation from Respondents' counsel before, at or following the hearing. Despite the fact that an attorneys fee award is required by the Mechanic's Lien statute that Appellant sued on, and that an award was demanded by Respondents, Appellant failed to ask the Court or Respondents for any information or to cross examine counsel for Respondents on the issue of fees. Since Appellant did not raise this issue at the hearing, her argument as to the amount of fees or request for further documentation has been waived and is not properly before this court.

While counsel for Appellant may find it difficult to conceive how an attorney could expend almost 60 hours in this action based upon her own efforts to date,

Respondents would respond that the time allotted by Respondents counsel was accurate and necessary for the defense of this action as set forth in the Affidavit of Attorney Fees. The litigation had been on going for 18 months at the time of the hearing. Respondents and Appellant produced hundreds of documents including e-mails, texts, invoices and others. The filing of the Lien and foreclosure action necessitated mandatory counterclaims and third-party claims. Respondents had to review for potential experts and damages claims. There was preparation, attendance and review of three depositions as well as the hearing necessary for the Motion for Summary Judgment. Additional fees subject to the mechanics' lien statute continue to incur as a result of defending this appeal. The Respondents take Appellant's attempt to foreclose on their home seriously.

Respondents argue that the reasonableness of the attorney's fees and costs lie within the sound discretion of the trial judge, pursuant to *McElveen.* The Order sets forth that the judge reviewed the information and considered all of the factors necessary to determine the amount of attorney fees pursuant to *Jackson v. Speed*, 326 S.C.289, 486 S.E.2d 750 (1977) (Order). Since Appellant cannot show where the trial court abused its discretion, this Court should affirm its findings. Appellant initiated this action understanding that attorney fees award was mandatory. Appellant should not now complain that the award of fees is improper.

CONCLUSION

The trial Court determined that there is no question of fact that the Lien filed by Appellant was improper because: 1) The Lien was not timely filed; 2) The Lien was for materials that were never installed and never became affixed to Respondents' real estate; and 3) The Lien was solely for overhead and profit, which is not properly subject to a

mechanics' lien. The evidence presented to the trial court was abundantly clear. The Mechanic's Lien statute requires strict compliance with its terms. The Court correctly determined that the Appellant failed to comply with those terms. As such, the Order granting Respondents' Motion for Summary Judgment and awarding attorney fees should be affirmed.

Respectfully submitted,

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/s/ Charles A. Krawczyk / by permission
Charles A. Krawczyk
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Attorneys for Defendants

Columbia, South Carolina
January 26, 2018

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge
Trial Court Case No. 2016-CP-40-00164

Appellate Case No 2017-001522

The Kitchen Planners, LLC, Appellant

v.

Samuel E. Friedman and Jane Breyer Friedman
and Branch Banking and Trust, Respondents

PROOF OF SERVICE

I certify that I have served Respondents' Initial Brief and Designation of Matter to be Included in Record on Appeal, on The Kitchen Planners, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on January 26, 2018, addressed to their attorney of record, Jean P. Derrick, Esquire, Post Office Box 929, Lexington, SC 29071.

SC Bar No. 10242
For Charles Krawczyk by permission

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Reply to:
Columbia Office

Reply to Columbia Office

January 26, 2018

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Respondents' Initial Brief and Designation of Matter to be Included in Record on Appeal to File
The Kitchen Planners, LLC (Appellant) v. Samuel E. Friedman and Jane Breyer Friedman and Branch Banking and Trust (Respondents)
Appellate Case No.: 2017-001522
Civil Action No.: 2016-CP-40-00164
On Appeal from the Court of Common Pleas-Richland County
Our File No.: 77515-50289

Dear Ms. Kitchings:

Enclosed for filing, please find the original and one copy of Respondents' Initial Brief, Designation of Matter to be Included in Record on Appeal, and Proof of Service of each document upon opposing counsel.

If you have any questions or comments, please feel free to contact our office.

Sincerely,

Brenda E. Peterson
Paralegal

/bep
Enclosures
cc : Jean P. Derrick, Esq. (w/enclosures)