STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF RICHLAND	)	**FOR THE FIFTH JUDICIAL CIRCUIT**
	)	
Meritage Asset Management, Inc. d/b/a Century Glass Company	)	Civil Action No.: 2016-CP-40-07647
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
Freeland Construction Company, Inc. and the South Carolina Military Department,	)	
	)	
Defendants.	)	

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RICHLAND COUNTY
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JEANNETTE W. MCBRIDE
C.C.P. & G.S.

This Court held a hearing concerning competing motions for Summary Judgment, filed by the Plaintiff, Meritage, and the Defendant, South Carolina Department of the Military (Department). The hearing took place on December 8, 2017. Mr. Yarbrough represented Meritage. Mr. Maroney represented the Department. After considering the arguments of both parties, the Court grants the Department's Motion for Summary Judgment.

STANDARD OF REVIEW

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." State Farm Fire & Casualty Co. v. Breazell, 324 S.C. 228, 230, 478 S.E.2d 831, 832 (1996) (citing Café Associates, Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991)). Both parties agree that the facts in this case are not in dispute, and each filed separate Motions for Summary Judgment, requesting the court rule on the legal issues in this case.

BACKGROUND

This case is about the extent of government entity liability to a subcontractor. The Department contracted with Freeland Construction Company, Inc. (Freeland), to perform construction work on one of the Department's properties, the Saluda Armory. Freeland engaged Meritage Asset Management, Inc. d/b/a Century Glass Company (Meritage) as a subcontractor to perform certain work. The work has been completed. The Department paid Freeland for the work performed. Almost two months after paying Freeland in full, Meritage informed the Department that Freeland had not paid Meritage. The relevant timeline is as follows.

19 September 2014: The Department and Freeland agree on a contract.

21 January 2016: Meritage submitted a subcontractor proposal to Freeland for subcontractor work on the Saluda Armory.

27 January 2016: Freeland accepted Meritage's proposal for the work on the Saluda Armory.

1 June 2016: Freeland completed the work on the Armory.

3 June 2016: Final invoice from Freeland was submitted to the Department.

7 June 2016: The final invoice for $93,973.69 was posted for payment to Freeland, completing the contract between the Department and Freeland.

17 June 2016: The final payment was deposited.

8 August 2016: The first time the Department learned of Freeland's failure to pay Meritage.

In its Motion for Summary Judgment, Meritage argued it is entitled to judgment on its third party beneficiary breach of contract claim, based on the fact the Department did not ensure that Freeland obtained a labor and material bond pursuant to Section 29-6-250, the Subcontractors' and Suppliers' Payment Protection Act (SPPA). The Department, in its Motion, argued that it is entitled to Summary Judgment because Meritage did not give the Department

notice of Freeland's nonpayment, before the Department paid Freeland in full.

THIRD-PARTY BENEFICIARY CONTRACT UNDER SPPA

"[A] governmental entity may be liable to a subcontractor only for breach of contract for failing to comply with the SPPA bonding requirements." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 564, 743 S.E.2d 778, 780 (2013). Although Meritage may pursue a third-party beneficiary breach of contract claim against the Department, the law is clear: "[T]he government entity's liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment." Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165–66 (2008). The only exception to this limitation on liability is the additional recovery of attorneys' fees under any applicable statue. Id., 377 S.C. 108, 121, 659 S.E.2d 158, 166.

Meritage informed the Department of Freeland's failure to pay on August 8, 2016. At that time, the Department did not owe any money to Freeland; it had paid Freeland in full on June 17, 2016. Under Sloan, because no outstanding balance existed between the Department and Freeland at the time of notice, the Department does not owe Meritage. Meritage's third party beneficiary breach of contract claim fails, consequently, as a matter of law.

Meritage gave three arguments opposing this conclusion. The first argument involves two cases, one from Texas and one from Florida. Meritage asserted that these cases involved statutes similar to the SPPA, and courts ruled, in those cases, that the government entity was liable to the subcontractor. Meritage asked this court to rule similarly. These cases are respectively construing a Texas and a Florida statute; they were not construing the South Carolina statute at issue in this case. Our State Supreme Court has construed the SPPA and expressly limited the liability of government entities as described above. What Meritage is asking, in effect, is for this court to

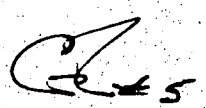
overrule the unequivocal decision of the South Carolina Supreme Court. That, however, is not within the authority of this court to do. *See* State v. Phillips, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) ("[I]t is incumbent upon the court of appeals to apply this Court's precedent") (*citing* S.C. Const. art. V, §9).[1]

Meritage's second argument is just as unavailing. The Court in Sloan compared the SPPA to Section 29-5-20, titled "Lien of Laborer, mechanic, subcontractor or materialman." The Court then concluded as follows: "Given the similar purposes behind the SPPA bond requirements for public projects and the subcontractors' mechanics' lien on private work, we hold that in a tort or contract action arising under the SPPA, the government entity's liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment." Sloan, 377 S.C. 108, 121, 659 S.E.2d 158, 165–66 (2008). Meritage points to another mechanics' lien statute, Section 29-5-10, and asked this court to compare the SPPA to that statutory section rather than Section 29-5-20. Doing so, according to Meritage, may enable it to recover under the SPPA. This argument has no basis in law, for at least two reasons. First, the Supreme Court has already compared the SPPA to Section 29-5-20 and limited government entity liability in accordance with that comparison; this court may not effectively overrule the Supreme Court's determination by analyzing the issue of government liability in a different manner. Second, Section 29-5-10 does not give a lien to subcontractors, which makes any comparison between it and the SPPA inapposite. *See* Kelly v. Bank of State (1841) 16 S.C. Eq. 431; Murray v. Earle (1880) 13 S.C. 87; Gray v. Walker (1881) 16 SC 143; Geddes v. Bowden (1883) 19 S.C. 1; and Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 629-33, 93 S.E.2d 855, 860-62 (1956).

[1] What is true for the Court of Appeals is certainly also true for Circuit Courts.

In Lowndes Hill, the Court reviewed the history of South Carolina mechanics' lien statutes. While doing so, it considered the case of Gray v. Walker, 1881, 16 S.C. 143. The Court in Gray v. Walker, according to the Court in Lowndes Hill, made clear that Section 45-251 (the previous codification of Section 29-5-10) did not apply to laborers who performed work pursuant to a contract with the prime contractor. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 632, 93 S.E.2d 855, 861 (1956).

Finally, Meritage argues that it was not due payment from Freeland until after the Department had paid Freedland in full and thus, Meritage had no opportunity to notify the Department of Freeland's nonpayment. But that does not obviate the governing law: "[T]he government entity's liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment." Id. In this case, when Meritage gave notice, the Department had already paid Freeland in full. Because the extent of government entity liability is reached once the government entity pays the general contractor in full, Meritage has no viable claim against the Department. Meritage would like to distinguish the facts in this case from those in Sloan and Shirley's Iron Works. Its efforts are misguided because those cases erected a limit on government entity liability, regardless of the facts in any particular case. Meritage wants this court to extend liability beyond the current limit and, in doing so, overturn the Supreme Court's ruling in Sloan and Shirley's Iron Works. As stated above, this court does not have the authority to do that, and will not.



CONCLUSION

In conclusion, Meritage's only legal recourse is against Freeland. **THEREFORE**, the Department's motion for summary judgment is **GRANTED**.

G. Thomas Cooper, Jr.
Presiding Judge
Fifth Circuit

January 2, 2018