STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE NINTH CIRCUIT COURT OF COMMON PLEAS
MIKELL ROSS SCARBOROUGH, PRESIDING JUDGE IN CHARLESTON COUNTY

APPELLATE CASE NUMBER: 2016-002366

Emory J. Infinger and Associates Construction Company, Inc,.....Respondent

v.

North Charleston Community Interfaith Shelter, Inc., Bobby Knight, in his official capacity as Chairman and President of Board for The Good Neighbor Center, Bank of America, N.A., S.C. State Housing and Development Authority, Atlantic Construction Services, Inc., L & W Supply Corporation dba CK Supply, Now Mechanical, Inc., Wilson and Associates Electrical Contractor, Inc., Defendants, Of whom North Charleston Community Interfaith Shelter, Inc. is .....Appellant

---

BRIEF OF APPELLANT

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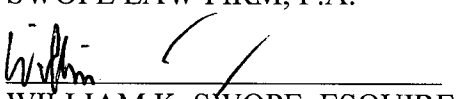

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ISSUES ON APPEAL

1. Did the trial court err in hearing the mechanic's lien claim, which was time barred under ***S.C. Code*** §29-5-90?

2.

   A. Did the trial court err in granting Respondent a judgment on a breach of contract claim when the Respondent was also in breach of the contract?

   B. Did the trial court err in proceeding to trial after Appellant demanded arbitration pursuant to the parties' Contract?

3. Did the trial court err in granting sum certain damages, a portion of which, were not specified?

STATEMENT OF THE CASE

Defendant's grant for the construction of the shelter was approved in 2008 (R. pp. 53-4). Plaintiff and Defendant had their first meeting to discuss the construction of the shelter in July of 2010 (R.). Plaintiff and Defendant entered into a contract to construct the shelter on Dec. 10, 2010 (R. p. 2). Construction did not begin immediately; it was delayed until the State approved its grant for the shelter (R. p. 53 lines 12 - 21). The Defendant gave its notice to Plaintiff to proceed with construction in March of 2011 (R. p. 3). Design, and construction of the shelter, began in June of 2011 (R. p. 124 lines 7 – 19). Plaintiff was aware that the project was to be financed by the Veteran's Administration ("VA") and the South Carolina State Housing authority ("State Housing") (R. p. 53 line 18 – p. 54 line 15). Plaintiff was aware that the funding was split with the VA providing sixty-five (65%) percent and State Housing providing thirty (35%) percent (R. p. 11). Funding issues for the project were apparent as early as Aug. 30, 2011 (R. p. 124 lines 17 - 25). Construction continued until Plaintiff issued a "stop work" letter to its subcontractors; informing them to cease construction on the project on Nov. 7, 2011 (R. p.23, para. 15). Plaintiff is required to file its certification of mechanic's lien within ninety (90) calendar days from the last date of construction. Ninety (90) calendar days from Nov. 7, 2011 is Feb. 5, 2011. Plaintiff did not file its certification of the mechanic's lien until Feb. 6, 2012 (R. p, 24, paras. 20 -21).

The contract between Plaintiff and Defendant requires that any claim, as defined by § A.4.1.1 of the contract, be initiated within 21 days after the occurrence of the event giving rise to the claim or within 21 days after the claim first recognizes the condition giving rise to the claim, whichever is later (R. p. 195, § A.4.1.1-A.4.1.2). The contract also requires that the builder

submit to the owner a schedule of values allocated to the various portions of the work (R. p. 201 § A.9.2.1). Unless objected by the owner, the schedule was to be used as the basis for reviewing the builder's application for payment (R. p. 202 § A.9.2.3). Should the owner fail to make a payment, the contract allowed the builder, with seven day's written notice, to cease construction and extend the contract time (R. p. 204 § A.9.7.1). The only written notice given by the Plaintiff was the Nov. 7, 2011 "stop work" order to its subcontractors (R. p. 113 line 14 – p. 114 line 3). The delay in payment would entitle the builder to increase the contract sum to include any reasonable costs incurred due to a shutdown, delay, and start-up, plus interest (R. p. 204 §A.9.7.1). The funding and issues regarding payment were known to the Plaintiff as early as Aug. 30, 2011 (R. p. 124 lines 16 - 20). Despite the Plaintiff's knowledge of the ongoing funding issues, it made no notice or demand on the Defendant until Dec. 26, 2011, well outside the 21-day deadline imposed by the contract (R. p. 284 and p. 195 § A.4.1.2).

The contract also requires that any claim must first be referred to a Neutral for a decision (R. p. 195 § A.4.2.1). If no Neutral is identified, the Owner must provide the initial decision (R. p. 195 § A.4.1.2). The initial decision, subject first to mediation, shall be binding (R. p. 195 § A.4.1.3). Requests for mediation may be made concurrently with the filing of a demand for arbitration or other binding dispute resolution, but mediation shall proceed in advance thereof or of legal or equitable proceedings, which shall be stayed pending mediation for 60 days from the date of filing (R. p. 197 § A.4.3.2). Any claim not resolved by mediation shall be subject to arbitration (R. pp. 197-8 § A.4.4-4.4.1). The Plaintiff was permitted to pursue a mechanic's lien in compliance with applicable law while awaiting the resolution of any claim subject to arbitration or mediation (R. p. 197 § A.4.2.5).

The contract required that the Design-Build payments be based on the amount of materials and equipment delivered and suitably stored at the site for incorporation in construction (R. p. 202 § A.9.3.2). Any payment for material suitably stored off the site had to be agreed upon in writing (R. p. 202 § A.9.3.2).

DISCUSSION

I. SUBJECT MATTER JURISDICTION OF MECHANIC'S LIEN CLAIM (SCRCP Rule 12(b)(1))

The Plaintiff ceased providing labor or materials to the project site on or before November 7, 2011. ***S.C. Code* §29-5-90, *Code of Laws of South Carolina 1976***, as amended, provides in pertinent part:

> 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...upon the person in possession and files in the office of the register of deeds or the 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 him, with all just credits given, together with a description of the property intended to be covered by the lien sufficiently accurate for identification, with the name of the owner of the property, if known, which certificate shall be subscribed and sworn to by the person claiming the lien or by someone in his behalf and shall be recorded in a book kept for the purpose by the register or clerk who shall be entitled to the same fees therefor as for recording mortgages of equal length....

Thus, ninety (90) days after November 7, 2011, the trial was court's subject matter jurisdiction to grant mechanic's lien was extinguished. That date was February 5, 2012, the day before the Plaintiff's Notice/Certificate of Mechanic's Lien was filed with the Register of Deeds in Charleston County, South Carolina. This defect is fatal and uncorrectable. Further, the clear meaning of the statute dictates that it operates to dissolve any lien claim without any act or affirmative action by the Owner.

The Plaintiff's complaint avers in paragraphs 20 and 21:

> 20....Plaintiff filed, in accordance with S.C. Code§29-5-20, a Mechanic's Lien on the Property on February 6, 2012, 2012 (sic) in the Register Mesne Conveyance in Book O-232, at Page 031....
>
> 21. Upon information and belief, said Mechanic's Lien was served on the Good Neighbor Center, the owner of the Property, within ninety (90) days of the last furnishing of labor and construction materials by the Plaintiff to the property. (R. p. 24 paras. 20 - 1).

The Defendant's timely filed answer provides:

> 14. These Defendants lack sufficient information with which to admit or deny the allegations of paragraphs 20, 21...of the Complaint and deny those allegations.... (R. p. 37 para. 14).
>
> 32. These Defendants plead the statute of limitations.... (R. p. 39 para. 32).
>
> 37. Plaintiff is barred from relief to the extent that it has unclean hands and/or engaged in any improper, unlawful, illegal, fraudulent and/or prohibited act.... (R. p. 40 para. 37).
>
> 40. These Defendants plead the statute of limitations and/or laches to the extent that Plaintiff untimely filed suit.... (R. p. 40 para. 40)
>
> 44. Doctrines of waiver and/or estoppel bar Plaintiff's claims against these Defendants.... (R. p. 41 para. 44).
>
> 49. Plaintiff's claims are barred to the extent that it lacks standing. (R. p. 42 para. 49).

Clearly, this issue was joined in the pleadings; however, the trial court erred in its conclusions of law, specifically:

11. Under S.C. Code §29-5-10, a mechanic who contracts directly with the owner, or his agent has a lien in the amount of the debt owed to him under the contract, and the owner is liable to him for the total amount. A claim of lien must be filed no later than 90 days after the last day on which the claimant furnished labor or materials to the project. (R. p. 12 para. 11).

15. On February 6, 2012, less than ninety days from the last day it had provided labor, services or material to the Project pursuant to a written contract with the Shelter, Infinger filed and served , in accordance with S.C. Code §29-5-10, a Mechanic's Lien ("Lien") in the amount of $196,412 on the real property commonly known as 1905 Burton Lane a/k/a 2713 Spruill Avenue in North Charleston, South Carolina with TMS No. 466-03-00-097. Infinger's Lien was recorded in the Charleston County Register Mesne Conveyance in Book O 232 at Page 031. (R. p. 12 para. 15).

17. Accordingly, Infinger has established a lien in the amount of $196,412. (R. p. 12 para. 17).

The trial record is devoid of any evidence to support the proposition that any labor or material were delivered to the job site after November 7, 2011. Thus, no lien was available to the Plaintiff in this action once its lien dissolved on February 5, 2011. This conclusion is logically inescapable.

Further, any attorney fee award to the Plaintiff under the mechanic's lien statute is improper. Moreover, this Defendant is entitled to an award of reasonable attorneys' fees as the prevailing party in the mechanic's lien claim. The Appellant would ask this Honorable Court to remand the issue of Plaintiff's attorneys' fees to the trial court for proper determination.

II. PRIOR BREACH BY PLAINTIFF/FAILURE TO COMPLY WITH CONTRACTUAL TERMS

Where the existence of contract is admitted but parties have differed about proper construction, practical construction by the parties is relevant concerning their intention when contract was made, but the rule cannot be invoked to show existence of partly written and partly oral contract. ***Hudepohl Brewing Co. V. Bannister***, 50 F. Supp. 422 (D. C. S. C. 1943). When determining whether a contract exists, the intention of the parties should be determined from the testimony of all witnesses, and subsequent acts are relevant to show whether the contract was intended. ***Wright v. Trask***, 495 S.E. 2d 222, 329 S.C. 170 (S.C. App. 1997). Under S.C. law, assent to proffered terms and conditions need not be express, but may be inferred from parties' conduct. ***Laidlaw Environmental Services (TOC), Inc. v. Honeywell, Inc.***, 966 F. Supp. 1401, Affirmed 114 F. 3d 1232 (D.S.C. 1996). Finally, if [an] agreement is manifested by words, resulting contract is said to be "express", if it is manifested by conduct, it is said to be "implied". ***Wade v. Brooks***, 413 S.E. 2d 33, 306 S.C. 553, Cert. Den. (S.C. App. 1992).

The contract controlling the relationship between these parties was freely and voluntarily entered into on December 10, 2010. (R. pp. 175 - 213). It defined the Design-Builder in Article A.1 and the Owner in Article A.2. (R. p. 176 § A.1 and A.2). The agreement set forth a method of dispute resolution in Article A.4 and a payment process in Article A.9. (R. pp. 177 - 178 § A.4 and R. pp. 202 - 5 § A.9).

From the outset this project faced challenges. Financing was being provide by two (2) separate government sources: the Veterans Administration ("VA") and the South Carolina State Housing Authority ("State Housing"). (R. p. 53 line 18 - p. 54 line 15). All parties were aware that at the time of contracting the construction funding was to be split with the VA providing sixty-five (65%) percent and State Housing providing thirty-five (35%) percent. (R. p. 11). While the contract provided that the Owner was to pay the Design Builder, it was apparent from the outset that funding was actually passing through the Owner as a conduit to the Design Builder as work was to progress.

Issues arose concerning items not initially included in the design work through oversight or inadvertence. Additional issues arose when a different VA funding program issuing funds to the Owner for a different purpose triggered an audit of the Owner. This imperiled continued VA financing of this project.

However, the Design Builder continued to work through short payments and delayed payments until November 7, 2011 when it issued a "stop work" order to its subs. (R. p. 113 line 14 - p. 114 line 3). The timing here is key.

The contract provides in pertinent part:

> Article A.4 Dispute Resolution
> §A.4.1 CLAIMS AND DISPUTES
> §A.4.1.1 Definition. A claim is a demand or an assertion by one of the parties seeking, as a matter of right,...payment of money....
> §A.4.1.2 Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such

claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

The first notice/demand issued by the Plaintiff, even after knowing for months that payment issues were growing, occurred on December 26, 2011. (R. p. 284). Thus, no claim prior to December 5, 2011 is viable. That is arguably the earliest "whichever is later" condition could occur. Failure to comply with the time deadlines imposed for this administrative remedy is fatal to the Plaintiff's breach of contract claim. The only viable claim available to the Plaintiff is for work or services provided after December 5, 2011.

The contract cannot logically allow the Plaintiff's submission under Article 9 of a payment schedule to constitute "a claim" as set forth in Article 4. To do so, would expose the Design Builder to loss of a claim every month of the first week or so of work performed (months with 30 days through day 8; months with 31days through day 9 and months with 29 days through day 7). Thus, something more must be required of the Design Builder in the way of filing a claim under Article 4 in compliance with terms of the express contract between the parties. Exactly what constitutes the filing of a claim is a matter of conjecture, but the only document sent by the Plaintiff and directed to the Owner in the record is the December 26, 2011 letter.

These issues were joined in the pleadings. Appellant again refers to the Complaint paragraphs 27, 28 and 29 and it's Answer paragraphs 17, 33, 35, 37, 40,

43, 44 and most especially 55. (R. p. 25 para. 27 - 29; p. 37 para. 17; p. 39 paras. 33 and 35; p. 40 paras. 37 and 40; and p. 43 para. 55).

Assuming *arguendo* that the Respondent posits the November 7, 2011 "stop work" order satisfies Article 4.1.2 "claim", the Appellant would again urge that said document is not directed to the Owner, but rather to the subs. Even an overly broad interpretation of that document would only entitle the Plaintiff to work performed and materials provided after October 21, 2011.

At best, the Plaintiff breached the contract in bringing its dispute for breach of contract before exhausting its contractual remedies. The clarity of this position is buttressed by the inclusion of §A.4.2.5 which envisions a mechanic's lien claim in addition to a breach of contract claim under this Agreement:

> §A.4.2.5 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to initial resolution of the Claim. (R. p. 197 § A.4.2.5).

This allows a mechanic's lien claim to proceed while the breach of contract dispute remains subject to the dispute resolution regime set forth in the parties' Agreement. Mechanic's lien claims are also subject to arbitration. ***General Equip. & Supply Co. v. Keller Rigging and Constr. S.C., Inc.***, 344 S.C. 553 (S.C. App. 2001).

§A.4.2 RESOLUTION OF CLAIMS AND DISPUTES sets forth two (2) alternate procedures for resolving claims: (1) Decision by a Neutral (§A.4.2.1) or (2) Decision by Owner (§A.4.2.2). (R. p. 197 § A.4.2.1 and § A.2.2). The record is devoid of any "Neutral". Thus, §A.4.2.2 must control and provides in pertinent part:

> ...[T]he Owner shall provide an initial decision. An initial decision by the Owner **shall** be required as a condition precedent to mediation of all Claims between the Owner and Design-Builder arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Owner with no decision having been rendered by the Owner. (R. p. 197 § A.4.2.2).

Here, no claim was properly filed by the Plaintiff with the Owner until December 26, 2011 or, at best for the Plaintiff, on November 7, 2011. No pre-filing mediation was held in compliance with §A.4.3, nor was there any pre-filing Arbitration in compliance with (§A.4.4. R. pp. 197 - 8 § A. 4.3 and § A.4.4)

Pursuant to the Administrative Order requiring mediation in all non-exempt filed cases in the Court of Common Pleas, this matter was mediated post-filing. It is Appellant's contention that this did not "cure" the breach of the Plaintiff moving forward to litigation in derogation of the contract provisions requiring mediation and subsequent arbitration if mediation was unsuccessful. The Plaintiff herein skipped all its contractually-mandated remedies and proceeded to trial in breach of the very contract it seeks to enforce in this action.

III. LACK OF SPECIFICITY OF DAMAGES/FAILURE TO MITIGATE

The contract between the parties provides in §A.9.3.2:

> Unless otherwise provided in the Design-Build Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payments may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Design-Builder with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

In reviewing the trial record, it is devoid of a breakdown between materials "incorporated into the structure" and materials "stored". It is neither itemized by piece goods, nor by economic value. Further, the contract language requires "payment for materials...shall be conditioned upon compliance...with procedures satisfactory to the Owner...." No procedure was even posited by Plaintiff's agent(s), much less a demonstration that Plaintiff had complied with the Owner's specified procedure. This brings the entire calculation of damages into question. You cannot simply assert that one subtotal is unspecified and that somehow the total does not become infected with the variable.

The trial court determined that Defendant's "expert" was "invading the province of the Court". Appellant contends this decision was misguided. Thus, should this Honorable Court determine the failure to comply with the dispute resolution regime is not fatal to the Plaintiff's breach of contract claim,

the Appellant would ask the Court to remand this damages issue to the trial court for a proper damage determination with specificity, if possible.

CONCLUSION

Based on the foregoing, this Honorable Court is compelled: (1) to overturn the trial court's verict in favor of the Plantiff on its mechanic's lien claim, (2) remand the case or controversy to the trial court for a proper determination of the Plaintiff's attorneys' fees and award same to the Defendant; (3) to dismiss the Plaintiff's breach of contract and ***S.C. Code*** §29-5-10 claims or, in the alternative, (4) remand these causes of action for mandatory arbitration.

Respectfully submitted,

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APPELLANT'S COUNSEL'S CERTIFICATION
AS TO APPELLANT'S BRIEF

I certify that the Brief of Appellant mailed to the Honorable South Carolina Court of Appeals in this matter complies with SCACR 211(b) and contains no matter which was not included in the Appellant's Initial Brief other than as allowed under SCACR Rule 211(b).

Respectfully submitted,

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