

STATE OF SOUTH CAROLINA )

COUNTY OF CHARLESTON )

RS Custom Homes, n/k/a )  
RS General Contracting, LLC )

Plaintiff, )

v. )

Matthew David DeNapoli, Lindsay Ann )  
DeNapoli, and Branch Banking & Trust, and )  
Mortgage Electronic Registration Systems, Inc. )

Defendants )

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2015-CP-10-0979

**FINAL ORDER AND JUDGMENT**

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This is a mechanic’s lien foreclosure action with claims for breach of contract by the Plaintiff Builder, and counterclaims asserted by the Defendant Homeowners. This matter came before the Court for trial January 30 through February 1, 2018. During a three day trial, in which the attorneys for all parties were well prepared and zealously advocated their respective positions, all the testimony was received, and hundreds of pages of exhibits were introduced. Based upon the evidence and testimony presented, I hereby make the following findings of fact and conclusions of law<sup>1</sup>.

**I. Procedural History**

This mechanic’s lien foreclosure complaint was commenced by the plaintiff, then known as RS Custom Homes (“RS” or “Builder”), against the defendants Matthew and Lindsay DeNapoli (“the DeNapolis” or “Homeowners”), on February 17, 2015. On that same date, a *lis pendens* was filed. The foreclosure action was commenced in connection

<sup>1</sup> To the extent any finding of fact includes conclusions of law, it is adopted as such. To the extent that any conclusions of law include findings of fact, they are likewise so adopted.



with a mechanic's lien that had been filed by RS with the Register of Means Conveyance at Book 456, Page 214 on February 9, 2015. The lien amount, according to the verified statement of account, was \$321,224.49.

In addition to foreclosure of the mechanic's lien, RS's complaint alleged causes of action for *quantum meruit* and breach of contract. The DeNapolis filed an answer setting forth affirmative defenses and counterclaims against the plaintiff. The counterclaims included causes of action for breach of contract, negligence, and breach of warranties. Plaintiff filed a reply to the counterclaim.

By Order filed on November 7, 2016, this matter was referred to the Master in Equity to issue a final order with any appeal being to the South Carolina Court of Appeals per S.C. Code Ann. § 14-11-85.

## **II. Findings of Fact**

1. This litigation concerns a residence in Snee Farm in Mt. Pleasant. The defendant Homeowners purchased the home in foreclosure for \$540,000 while the house was still under construction in August, 2013. The DeNapolis initially contracted with another homebuilder to complete the construction. For reasons not revealed in the record, the initial homebuilder left the project, and separate litigation ensued between the initial homebuilder and the DeNapolis.

2. The evidence revealed that a relative of the DeNapolis approached RS Custom Homes to determine if RS would complete the project for the DeNapolis. Discussions took place between the parties, and on January 21, 2014, a written contract was signed between RS Custom Homes and the DeNapolis. The evidence at trial showed some disagreement concerning the process of drafting and negotiating the contract. RS

Custom Homes' owner Chip Naramore ("Naramore") testified that he submitted a standard AIA contract form to the DeNapolis. (Tr. p. 58, ll. 14-21). It appears from the evidence that the contract form was revised by the DeNapolis to include a new first page of the agreement. (Tr. p. 58, l. 22-59, l. 5).

3. The front page of the agreement contains seven additional terms not included in the standard AIA form. Among those terms that are relevant to the dispute, are the following:

Paragraph 3: "The attached Annex-1 represents the Maximum amount to be paid by owner for said item. In the event of a *change* which results in a cost reduction to said item, the amount shall be adjusted to reflect the total cost plus 15%. A refund or credit shall be provided to Owners for said item." (Emphasis added) The court finds that in the performance of the agreement by both parties this contract term was not consistently followed by either party as described herein below, and the Homeowners have misconstrued this provision in claiming that RS owes them credits for fixed-cost items.

Paragraph 5: "In the event of a change requested by Owner which reflects a material difference in price, contractor will submit a written change order request to reflect the actual cost plus 15%, but shall not proceed and perform any change order work unless Owner signs and accepts the change order." The court finds that this term likewise was not generally followed in the performance of the contract by either party as described herein below.

Paragraph 7: "Contractor acknowledges that Owner may elect to purchase appliances or other items directly or through other third parties and provide to contractor for installation. In such a case, Contractor shall only be responsible for installation of such items. Contractor's liability shall be limited to proper installation of such items to include a warranty of work that is consistent with the manufacturer's specifications for installation." The court finds that there is evidence of many instances in which the Homeowners elected to select materials and equipment through third parties and had invoices submitted to the Builder by the material suppliers which were paid by the Builder, and in refusing to pay for selected materials have misapplied this provision.

4. An "Addendum to Standard Form of Agreement" included Section 1.04:



“Contractor agrees that it will, prior to commencing work thereon, submit to Owner detailed final estimates with respect to each line item listed. Contractor agrees not to proceed with work on any such line item until Owner has approved such final estimate in writing. Owner shall approve or disapprove within (3) working days of submittal or the time to completion will be adjusted accordingly.”

Likewise, the record is replete with examples where the Builder was asked to perform additional work and such additional work was completed, accepted and even paid for without the Builder obtaining the Homeowners’ written approval of the detailed final estimates called for in this section.

5. The contract called for a fixed price of \$684,035.35. A single change order was entered into and signed by both parties on April 2, 2014. The change order increased the contract price to \$737,544.00. While the change order did not explicitly provide for additional contract time. The court finds that additional time was implied considering the scope changes involved and that owner selections of materials continued well past the stated completion date.

6. The January 21, 2014, contract provided for a completion date of May 15, 2014. The evidence showed that after May 15, 2014, materials for many of the items of work called for in the contract still had not been selected and some items such as the powder room and make-up vanity, closets kitchen cabinets and cabinet doors, countertops and electrical fixtures remained to be finally designed or selected by the Homeowners.

7. The contract also provided that if the contractor is delayed in the progress of the work by changes ordered in the work, or by unusual delay in deliveries, or other causes beyond the contractor’s control, the contract time shall be subject to equitable adjustment. (Section 11.2). The evidence shows that a number of changes were ordered in the work, and there were unusual delays in deliveries of building components such as

the cabinets. There is ample evidence to show that there were delays in the progress of the work that were beyond the Builder's control and accordingly, the Builder is entitled to equitable adjustments in the contractor schedule. The schedule was updated in June and July 2014 (Tr. p. 72, ll. 18-21), and there was no evidence Homeowners protested or gave notice of delays.

8. The contract terms also provide for termination by the Builder (Section 16.1) and by the Owner (Section 16.2). Both the owner and the contractor were required under the terms of the contract to provide notice to the other to cure the cause of the termination. Ultimately, when the Builder separated from the project, neither party gave the other notice of termination.

9. By August 6, 2014, the house was substantially complete. A final inspection was conducted by the town of Mt. Pleasant on that date. Soon thereafter, the Homeowners took possession and moved into the house. Additional work in the nature of punch list work continued.

10. There was disagreement concerning the degree to which the home was completed at the time RS left the project. Mr. DeNapoli testified that, for example, the master bath was in a state of disrepair and that the tile work was incomplete at the time RS left the project. However, testimony from Mr. DeNapoli's repair contractor demonstrated to the court that Mr. DeNapoli's testimony on that issue was incorrect. In narrating his slideshow with photographs of the condition of the home when RS left the project, he stated "this is how (RS') subcontractors abandoned my job. No drain, they put mud, or whatever you call it, grout, caked it on the shower floor and this is how they left it." (Tr. p. 390, ll. 9-13). Joseph Sikes, the representative of Atlantic Stone who testified at trial for the



DeNapolis said, on cross examination, that the shower was “complete, but not up to standards,” and the following colloquy took place:

Q: “That was not the finished product shower that you saw, was it?”

A: No. I saw the original shower before we demoed it.

Q: The pictures he showed were of the demolition?

A: Yes.

Q: The pictures that he showed were not of the final product?

A: No. We hadn’t finished.” (Tr. p. 612. ll. 6-25)

11. After the Homeowners took possession of the house, the relationship between the parties deteriorated. The Homeowners issued a stop work order and requested that RS cease work except for drywall repairs and painting “until further notice,” on September 7, 2014. Notwithstanding that order, the Builder did continue to perform work, including punch list items, until November 2014. The Homeowners were aware that the Builder continued to work in the home and there is no contention that the Builder was on the premises without the Homeowners’ permission and knowledge.

12. The evidence showed that when the Homeowners took possession of the house in August 2014, some work, such as the iron railings, remained to be completed. A powder room with vanity and countertop was incomplete; the master tub, water feature in the master bath and the glass shower door remained unfinished awaiting the selection and delivery of the doors. (Tr. p. 50, ll. 2-8). The cabinet doors remained unfinished. Much of the remaining work such as the installation of cabinet doors and the powder room remained unfinished because the Homeowners had not made material selections that were required to complete the work. Other unfinished work, including painting and drywall

finishing, was due to repairs and rework that had been requested by the Homeowners. The testimony revealed that some of these finish items related to work performed by the previous contractor, not RS Custom Homes. (Tr. p. 93, l. 23-94, l.1).

13. The owner testified that written change orders were not required with each of the changes that were requested during the project. (Tr. p. 514, ll. 2-16). In fact, the Homeowner testified that he expected that RS would “accumulate...costs”. (*Id*) The failure of the Homeowners to enforce the change order provisions was not due to ignorance or deceit. Certainly, both parties knew how to write a change order because Change Order 1 was written and made a part of the contract. (Tr. p. 515, ll. 18-21). The Homeowners used the change order requirements in the contract as a shield when it was to their benefit but did not use them when it benefited the Builder. The record contains several examples. The Homeowners unilaterally made scope changes reducing the Builder’s scope such as removing a tile medallion from the contract which was done by notice but no change order was issued. (Tr. p. 558, l. 4 - 559, l. 8). Likewise, when the pool construction was taken from the Builder’s scope, no change order was entered. (Tr. p. 575, ll. 20-24; 576, ll. 10-15).

14. Homeowners introduced a version of the construction budget that included items that they completed and corrected. These items included “finish out” work such as the work necessary to hang a new hoist and a heavier chandelier than was anticipated along with additional supporting beams. Other of these items such as a dehumidifier are betterments not included in the original contract. Items such as the installation of onyx cabinet panels were likewise not a part of the parties’ original contract, and there was no

change order entered for them, yet the Homeowners claimed credit against the amounts owed to the Builder for the completion of that work.

15. The Homeowners' expectations were discussed at trial. The Homeowner, Mr. DeNapoli, said that this was to be his "forever home, my masterpiece." (Tr. p. 508, l. 10). He employed unique materials, like onyx, which he described as being used in places such as Dubai. (Tr. p. 520, ll.15-22). Mr. Naramore testified that he understood the owner envisioned a "very nice, very extravagant house with a lot of very high-end elaborate features inside and out." (Tr. p. 24, ll. 18-20). The Homeowners were not experienced in building contracting, construction, or in accounting, and this was the Homeowners' first home building experience. (Tr. p. 489, ll. 10-21; 511, ll. 14-15; 519, ll. 1-9). In fact, the prior homebuilder who had contracted to finish the house before RS became involved provided a proposal to the Homeowners to build out the house the way they wanted it for \$970,950.<sup>43</sup> (Tr. p. 49, 40, l. 16 – 497, l. 10).

16. The Homeowners provided RS with a set of drawings. The drawings, however, had no finish schedules or specifications. (Tr. p. 53, ll. 5 - 9, 20 - 22).

17. Homeowners are also charging the Builder with credits for costs, under the fixed price contract, that are less than budgeted. (Tr. p. 509 l. 16 - 510 l. 25). In this regard, the Homeowners claim the benefits of a fixed price contract where it favors them, yet they did not provide the Builder the benefit of cost savings, under a strained interpretation of the contract. Homeowners misinterpret paragraph 3 of the first page of the agreement which provides: "In the event of a change which results in a cost reduction...the amount

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<sup>2</sup> Mr. DeNapoli testified he did not know if he ever gave this proposal to RS. (Tr. p. 497, ll. 8-10). The court notes that the total amount of the prior contractor's proposal is comparable to the total amount of money that RS expended in completing the house.

shall be adjusted to reflect the actual cost plus 15%. A refund or credit shall be provided to Owners for said item.” The key word is “change.” The items for which Homeowners seek a deduction are indeed not “changes” but are simply reductions in costs obtained by the Builder. In a fixed-price contract as this agreement was intended to be, the contractor generally enjoys the benefit of cost savings, as noted by the Builder’s accounting expert who has considerable experience in the construction industry. Moreover, Plaintiff’s claim is based on Plaintiff’s costs due to scope changes and excess allowance costs. Plaintiff in fact billed based on its costs, and its mechanic’s lien is based entirely on Plaintiff’s cost of the work. The credits which Homeowners claim were in fact not part of the Builder’s claim in this action. Even when Homeowners attempted to give credit to RS for changes, the Homeowners calculated the additional sums due based on the original budget amounts instead of the actual costs. For example, carpet costs increased with the addition of a new room and stair which was not included in the original budget. The owner increased RS’s budget based on the original “allocated amount” – a unit cost that was contained in the budget – rather than the actual cost of the carpet that was actually selected by the Homeowners. (Tr. p. 556, ll.3-17).

18. The Homeowners “reconciliation” document was rife with errors. Some of those errors were based on incorrect assumptions while others resulted from arbitrary deductions and from an erroneous interpretation of the contract that the Homeowners believed allowed those credits for cost savings on fixed cost items. The Homeowner also admitted that the reconciliation document, which was last updated on the day of the trial, did not include RS’s documents that were produced in litigation. (Tr. p. 560, ll.1-19). The reconciliation also omitted costs such as materials for trim, according to the evidence. (Tr.

p. 559, ll. 9-25). The court finds that the reconciliation document is not a reliable accounting for scope changes, excess allowance costs or other construction costs and does not provide a basis for the court's decision.

19. Many of the items of completion and correction that Homeowners claim were not supported by the evidence. Homeowners claimed to have paid some \$20,000 to three individuals to perform repair and corrective work. The one individual called as a witness by Homeowners, of the three who claimed to have performed repair and corrective work for the Homeowners, was, in fact, a relative of the Homeowners and an employee of Mr. DeNapoli. He was not licensed to perform any of the work that he claims to have performed. I find that the Homeowners have failed to sustain their burden of proof that this \$20,000 claim was either necessary or reasonable under the circumstances.

20. Homeowners did call a witness who testified concerning damage to the master bathroom shower. He testified concerning the conditions that he found, his demolition work, and his repairs to the shower. The court finds these expenses were both reasonable and necessary and, accordingly, the Homeowners are entitled to a credit for those sums. The amount of \$3,255 will be credited for that repair work necessitated by the lack of proper tile installation by RS Custom Homes' tile sub-contractor.<sup>3</sup> This work would have been within the scope of RS Custom Homes' warranty obligations.

21. The court finds that RS Custom Homes established its entitlement to recover its unpaid job costs. The accounting firm Dixon, Hughes, Goodman, LLP verified the job costs. Builders' expert, Catherine Stoddard, a certified public accountant, testified in her opinion that the work performed by her firm validated the costs to a reasonable

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<sup>3</sup> See T. p. 613, ll. 10 – 13 for discussion of the repairs and the costs.



degree of certainty. She testified concerning the utilization of allowances in construction contracts. Between allowance items and scope changes that were described in detail in her report and in her presentation, Ms. Stoddard testified that excess allowance items and scope changes accounted for \$660,188, of the total costs incurred by RS Custom Homes.

22. Ms. Stoddard identified six areas where costs exceeded the budget. Those six principal items alone accounted for \$210,397 in additional costs.

23. The most compelling example provided in both Ms. Stoddard's testimony and in the testimony of other witnesses was in the category of cabinets and countertops, of which \$52,561 in costs were billed. The original cabinets had been built for the previous owner. By the time the Homeowners had purchased the home, some of the cabinets were damaged and some of the cabinet doors were missing. (Tr. p. 38, ll. 14-15). The Homeowners worked with the original cabinet maker to install what was already there and to build additional cabinets under a separate contract between the Homeowners and the cabinet maker. (Tr. p. 75, ll. 1-21). The construction budget provided that all of the cabinets were to be owner supplied. Only later did the Homeowners discontinue their efforts to have the original cabinet maker perform. They asked RS to find another cabinet maker. Therefore, the process of designing and building the remaining cabinets including a kitchen island, started after the initial contract completion date had passed. An email was introduced into evidence wherein the Homeowners instructed RS to "move on from DIW" (the original cabinet maker) on July 16, 2014. (Tr. p. 100, ll. 14-23). Of note, when the Homeowners requested RS to procure the replacement cabinets, there was no written change order entered. (Tr. p. 101, ll. 5-7). The cabinet delay had a domino effect which



was described in the testimony as causing delays to the installation of countertops, plumbing and trim work. (Tr. p. 101, ll. 14-20).

24. Additionally, the Homeowner agreed in his testimony that he approved the design of the powder room and the make-up vanity in October and that no countertop could be ordered until then. (Tr. p. 585, l. 21 - 586, l. 7). Likewise, an allowance of \$10,000 for countertops was provided in the budget; yet the actual cost of countertops was \$24,955. This was due to a scope change where RS Custom Homes was asked to order a replacement countertop after the Homeowner rejected the granite slab that the Homeowner had purchased, and for other excess allowance item costs. That granite slab had already been purchased by the Homeowners and was in storage. The Homeowner rejected it, contending that it was not the slab that he had selected. (Tr. p. 46, ll. 4-7; 47, ll. 7-11). He asked the Builder to order another slab. RS did so and paid for it; there was no change order entered for this purchase. (Tr. p. 47, ll. 16-21; 99, ll. 14-25; 100, ll. 1-6). The cabinet work was \$37,606 greater than the construction budget which had no provision for the purchase of cabinets. The countertops cost \$24,955 for a total of \$52,561 in cost relating to these scope changes. (Tr. p. 229, ll. 15-21; 231, ll. 10-21).

25. Similarly, \$24,907 in electrical costs were incurred by RS; \$15,000 of those costs were for fixtures paid for by the Builder that were not budgeted in the construction budget which included only installation costs. (Tr. p. 225, ll. 6-25). Moreover, the selection of electrical materials continued into July 2014. (Tr. p. 84, ll. 2-7).

26. Other scope changes were identified with respect to the pool and pond. After the Builder began its work, an engineering study requested by the Homeowner (Tr. p. 109, ll. 18-19) showed that the existing pool structure (an above-ground pool) was



structurally unsound because it was built using lightweight AAC block. As a result, additional costs were incurred to remove the existing soils, replace them with structural fill, dispose of broken concrete, and demolish the existing pool wall and footings. No change order accompanied this scope change. (Tr. p. 516, ll. 10-15). This also resulted in a delay to the exterior work called for by the contract.

27. The light concrete AAC block was used by the initial contractor to construct the flooring system, as well. (Tr. p. 42, ll. 12-18). The Builder discovered that the floor system was not level and its surfaces were irregular. It required grinding before the tile could be installed. According to the Builder, this process caused a delay of 1.5 weeks. (Tr. p. 96, ll. 12-14). The Builder stated that the floor condition was not evident on initial inspection but it was revealed to be "a couple inches" out of level requiring the Builder to incur additional costs. (Tr. p. 42, l. 23; 43, ll. 11-12, 15). No written change order was entered for this work.

28. The Homeowner's selection of tile materials, that actually cost more than the entire tile budget including installation, added to the exceedance of the budget. (Tr. p. 69, ll. 1-5). The floor tile that the Homeowner selected, however, was ultimately rejected by the supplier. RS notified the Homeowner of the problem and of the resulting delay and outlined options to the Homeowner. It took three additional weeks to use the Homeowner's chosen supplier, and additional costs were incurred. (Tr. p. 96, l. 24 - 97, l. 24). Further compounding the tile problem is that the owner's tile selections were not finalized until June 2014. (Tr. p. 116, l. 20-117, l. 5). The Builder and the Builder's superintendent both testified that the costs were driven up in part because the Homeowner chose to purchase twice the amount of tile needed in one section of the bathroom because the Homeowner

wanted the tile installer to remove one brown glass “crackle” from the tile sheets and replace that tile with another color tile that was obtained from the extra sheets ordered by the Homeowner. (Tr. p. 247, ll. 15-19; 282 ll. 5-22).

29. The Builder’s costs also escalated because the Homeowner requested repeated repairs to the finishes of the walls and ceilings. When RS arrived on the job, portions of the home had been drywalled and/or plastered, with walls in a finished condition. (Tr. p. 36, ll. 2-4; 90, ll. 17-20). There was no specification for the type of finish that was to be provided for the drywall. (Tr. p. 91, ll. 6-8). The prior contractor’s drywall and paint work complied with construction standards according to the Builder and the Builder’s superintendent. (Tr. p. 92, ll. 9-12; 280, ll. 8-11). Accordingly, no repairs to the existing walls were budgeted. (Tr. p. 92, ll. 16-19). The Homeowners identified areas of walls to be repaired, including areas that were finished before RS’s involvement. (Tr. p. 93, l. 10-94 l. 1). RS began “floating out entire walls and ceilings to get basically as seamless, flawless and perfect application as we could get.” (Tr. p. 94, ll. 4-11). The Builder’s superintendent asked the Homeowner to approve the finished work, and the Homeowners did so, but they later identified repairs to the same areas that had been previously repaired such that some areas were repaired more than twice. (Tr. p. 286, l. 13 – 287, l. 6). Additional costs were incurred because of this work, and the schedule was impacted according to the testimony. (Tr. p. 95, ll. 5-15).

30. The bathrooms also presented cost escalations. First, the Homeowner selected two new tubs and new shower valves to replace tubs and shower valves that were already in the house when they purchased it. The Homeowner selected the two new tubs and shower valves, had them delivered, asked RS to install them, and asked RS to remove

and dispose of the old tubs and fixtures. "We went and picked out what we knew we wanted." (Tr. p. 545, ll. 15-16). Notwithstanding the Homeowner's directions to perform this work, no change order was entered. (Tr. p. 70, ll. 20-22).

31. The master bathtub was originally to be set into the floor. When the work began, a hole was present in the floor of the master bath, of some three to four feet. (Tr. p. 33, ll. 3-4). RS retained an engineer to provide a specification for the fill to ensure adequate support for the large tub that was to be set on top of the fill. (Tr. p. 48, ll. 21-22). The master tub was shown in the budget as a fixed cost, yet the Homeowners added a heater and "masseur" which involved additional costs of some \$1,500.00 to \$1,600.00. (Tr. p. 224, ll. 14-18).

32. The doors inside the home were also the subject of extensive changes. The door rough openings were constructed of the AAC light concrete block that formed the remainder of the structure. (Tr. p. 32, ll. 9-10). The Homeowner indicated that he wanted to use Alder wood in some areas. (Tr. p. 50, ll. 20-24). Eventually, the Homeowner decided that all of the interior doors would be wood. The contract had no specification for the doors and Mr. Naramore submitted cost information to the owner to which the Homeowner replied that he "trusted (the Builder's) judgment." (Tr. p. 51, ll. 7-12; 69, ll. 11-20). There was no change order for the door changes. (Tr. p. 107, ll. 10-7). The condition of the rough openings and their irregular size presented problems to the Builder requiring additional trim carpentry, plaster work and sheet rock at additional cost. (Tr. p. 105, ll. 21-106, l. 12). Moreover, the number of doors grew from the original budget. (Tr. p. 234, ll. 13-235, l. 235).

33. The Homeowners had a line of credit for the construction in the amount of \$798,000.00. (Tr. p. 521, ll. 21-22). Mr. DeNapoli said that his difficulties with Graceworks, the initial builder hired to complete the project, “put (him) in a pinch.” (Tr. p. 522, l. 12), and “behind on the money.” (Tr. p. 523, ll. 3-9). Mr. DeNapoli admitted that by the end of 2014 the line of credit was exhausted. (Tr. p. 529, l. 24 - 530, l.8). Notably, there is no evidence that the lender took exception to any of the draw requests submitted by RS Custom Homes. (Tr. p. 524, ll. 1-5). This evidence leads the court to infer that the Homeowners were in a budget “pinch” by the time RS completed its portion of the work, thereby further contributing to the difficulties encountered in the project.

34. After RS sent its August 24 invoice to the Homeowners, in September 2014 Mr. DeNapoli informed RS that the job site was only opened for repairs to drywall and paint. (Tr. p. 119, l. 17 - 120, l. 14). Thereafter, RS had difficulty getting a commitment from the Homeowners to pay RS’s invoices. Mr. Naramore requested a payment on the August invoice and the owner stated that he would make a payment. Then, the owner said that he would have to look at his spreadsheet and agreed to “get back with” Mr. Naramore. Several weeks passed, and there was no payment made. The owner indicated that he had been busy but then indicated that he would make the payment. However the only payment forthcoming was for \$25,000.00. (Tr. p. 129, l. 9 – 120, l. 11). Mr. Naramore testified that he was surprised that only \$25,000.00 was paid and that he returned to discuss the shortage. At that time, the owner sat behind “a large stack of cash” and then told Mr. Naramore that he could talk with Mr. DeNapoli’s lawyer. (Tr. p. 130, l. 17-25).



35. The Homeowners made the identification of which costs were reimbursed more difficult by making a statement toward the end of the relationship that the last payment they made was not paid towards any specific cost items.

36. Moreover, in answering interrogatories in this action the Homeowners admitted that RS was terminated. (Exhibit 38, interrogatory 20). The Homeowner denied that RS was terminated, at trial. (Tr. p. 325, ll. 3-4). Nevertheless, the evidence indicates that the Homeowners expressly terminated the agreement, or at a minimum, constructively terminated the Builder by unjustifiably withholding payment.

37. The Builder has sustained its burden of proof that the Homeowners breached the contract by 1) refusing to pay the Builder's invoices when due; 2) restricting the Builder's ability to complete the work remaining under the contract by "closing" the job site to the Builder except for drywall and painting work; and 3) failing to pay those sums that Homeowners agreed to pay as undisputed amounts, even after Builder delivered project cost documents as requested by the Homeowners to the Homeowners' legal counsel.

38. The court finds the evidence supports the following calculation of damages:

Project Cost Per Revised Construction Budget	\$737,544.00
Scope Changes and Allowances in Excess of Budget	\$220,805.00
Total Project Cost Including Contractor's Fee	<u>\$958,349.00</u>
CREDITS:	
Payments By Owner	(\$623,589.00)
Cost of Tile Repair	(\$3,255.00)
#5.05 Deleted Stucco (Tr. p. 354-56)	(\$4,343.55)
#5.12 Owner Paid Tile Medallion (Tr. p. 367-69)	(\$1,490.00)
#10.01 Landscaping (Tr. p. 396-98)	(\$8,395.00)
#11.09 Building Permit (Tr. P. 172-73)	(\$1,319.00)
Anx. 1 Owner Paid On-Site Trailer (Tr. P. 410, 185-86)	<u>(\$2,503.55)</u>
Total Credits	(\$644,895.10)
Total Project Costs Owed By Homeowners	\$313,453.90

Pre-Judgment Interest  
**GRAND TOTAL:**

\$99,499.00  
\$412,952.90



### **III. Conclusions of Law**

#### **1. Breach of Contract**

Builder and Homeowners both brought claims for Breach of Contract. To recover for breach of contract, one must prove (1) a binding contract entered into by the parties; (2) breach from the unjustifiable failure to perform the contract and (3) damage suffered by the party as a direct and proximate result of the breach. *Fuller v. Eastern Fire and Casualty Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962). RS Custom Homes has proven its claim for breach of contract by a preponderance of the evidence. There is no dispute concerning the existence of a written contract and a subsequent change order to the contract, both of which were entered into evidence and made part of the record.

As stated in the findings of fact above, Homeowners breached the contract by failing to pay the builder those sums that were due and/or constructively or expressly terminating the Builder. Moreover, the testimony established that the Homeowners had agreed to pay a sum of money that they considered to be undisputed at the time. Homeowners requested that the Builder produce cost information to their legal counsel for their review and consideration. The Builder did so. Thereafter, Homeowners made no response to the Builder's claim, such that the Builder filed its mechanic's lien and commenced this action.

As also found in the findings of fact above, the Homeowners' interpretation of the contract was, in some instances, strained and unsupported by the evidence or the law. Their construction budget set forth many items that were designated as "allowances."

Notwithstanding the designation of items as "allowances" in their contract, the Homeowners refused to pay for materials that they had selected, had delivered to the job site and had billed to the Builder, because those items exceeded the "budget". Their position is not supported by the contract, by custom and practice in the construction industry, or the conduct of the parties. Moreover, as stated in the findings of fact above, many of the Builder's costs in excess of the budget were due to scope changes.

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Homeowners claim that Builder breached the contract by abandoning the project before it was complete. The court finds that RS Custom Homes' refusal to proceed with the remainder of the work was excused under the circumstances. Homeowners had restricted RS Custom Homes access to the site, had restricted its scope of work and had failed and refused to pay the substantial sums that were due, thereby breaching the contract and excusing further performance by the Builder. Further, Homeowners stated in their discovery responses that RS had been terminated.

From the parties' course of dealing, the evidence is clear that strict adherence to the change provisions in the agreement was not enforced. The scope changes and allowance items exceeding the budget, for the most part, were either directed by the owner or were accepted by the owner. An owner's knowledge and personal direction of additional construction work precludes the owner from relying on written change order requirements set forth in a contract document. *T.W. Morton Builders v. Von Buedingen*, 316 S.C. 388, 397-98, 450 S.E.2d 87, 92-93 (Ct. App. 1994). (Homeowners waived their right to insist on the use of written change order forms, where they previously requested changes in the construction work without insisting on the use of the written change order forms, and knew that escalating costs were due to their requested changes.)

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Strict compliance with contract change requirements is waived where an owner fails to comply with the contract by receiving invoices and other documentation of costs without requiring written change orders to be entered. *Smith-Hunter Construction Co. v. Hopson*, 365 S.C. 125, 128 n.1, 616 S.E.2d 419, 421 (2005) (Rejecting homeowner's insistence on strict compliance with change provisions where the homeowner waived them by accepting invoices and memos documenting additional work.); *Lazer Construction Co. v. Long*, 297 S.C. 127, 130, 370 S.E.2d 900, 902 (Ct. App. 1988) (Approving a trial court's charge that "where the owner has actual notice of extra work and permits it to proceed without objection, the notice requirement, if any, may be waived.")

Moreover, when a contractor fails to execute change orders for additional work, the contractor may still recover if it shows that the owner approved the changes.

[A] written contract may be modified by oral agreement even when it explicitly states all changes must be in writing *Evatt v. Campbell*, 234, S.C. 1, 106 S.E.2d 447 (1959). This rule has been applied to building and construction contracts. (Citation omitted). [Builder's] failure to execute change orders for additional work did not necessarily preclude recovery if it could show [owner] approved the changes.

*Lazer Construction Co. v. Long*, 297 S.C. at 130, 370; S.E.2d at 902. See also, *King v. PYA/Monarch*, 317 S.C. 385, 453 S.E.2d 885 (1995); *Koontz v. Thomas*, 333 S.C. 702, 511 S.E. 2d 407 (Ct. App. 1999).

A handwritten signature in black ink, appearing to be 'JMS', enclosed within a large, loopy oval shape.

2. Mechanic's Liens

A mechanic's lien exists when labor is performed or materials are furnished by a contractor, and the mechanic's lien arises, inchoate, upon the provision of the labor and materials. *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC*, 409 S.C. 331, 341, 762, S.E.2d 561, 566 (2014).

The lien of the builder was perfected by the filing of a Notice of Mechanic's Lien and a Certificate of Account verified by the Builder, and the timely commencement of a foreclosure action and the filing of a *lis pendens*. The Builder sustained its burden of proof that it performed the labor and furnished materials, and the labor and materials so provided to the property in issue were properly within the scope of §29-5-10, the mechanic's lien statute. The fact that the costs claimed in the mechanic's lien include the Builder's overhead and profit does not affect the Builder's ability to lien for those sums, where, as here, the overhead and profit was built into the contract price. *Sentry Engineering & Construction, Inc. v. Mariner's Cay*, 287 S.C. 346, 338 S.E.2d 631 (1985). Accordingly, the Builder is entitled to recover under his mechanic's lien for the amount of his overhead and profit.

3. Damages

The Builder is entitled to damages for the Homeowners' breach of contract. This is true notwithstanding the fact that the Builder did not fully perform under the contract. Substantial performance was achieved, a final inspection was conducted by the town of Mount Pleasant, a Certificate of Occupancy was obtained, and the Homeowners took possession and had enjoyment of the home. There remained some punch list work to be done. Even so, a contractor who was wrongfully prevented from completing a contract



may recover his actual expenses and damages for lost profits. *Bensch v. Davidson*, 354 S.C. 173, 177-78, 580 S.E.2d 128, 130 (2003). Here, Builder was wrongfully prevented from completing the work and is entitled to recover its costs of performance, including overhead and profit.

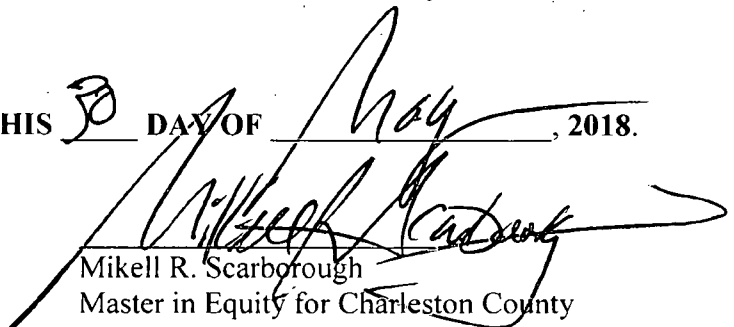
4. Pre-Judgment Interest

Builder is entitled to pre-judgment interest. An obligation to pay money is subject to pre-judgment interest if the sum is certain or capable of being reduced to certainty. "On an obligation to pay money, if the sum is certain or capable of being reduced to certainty, pre-judgment interest is allowed from a point when the parties agree, or the law provides, payment was demandable." *Southern Welding Works, Inc. v. K&S Construction Co.*, 286 S.C. 158, 332 S.E.2d 102 (Ct. App. 1985); *Smith/Hunter Construction Co. v. Hopson*, 365 S.C. 125, 616 S.E.2d 419 (2005). Here, payment was demandable by August 29, 2014. Accordingly, prejudgment interest should be applied as of this date.

5. Conclusion

Based on the findings of fact and conclusions of law, judgment is hereby entered in favor of the plaintiff against the defendants Matthew David DeNapoli and Lindsay Ann DeNapoli in the amount of Four Hundred Twelve Thousand Nine Hundred Fifty-Two and 90/100 Dollars (\$412,952.90). Attorneys' fees shall be determined by the court at a subsequent proceeding.

AND IT IS SO ORDERED THIS 30 DAY OF May, 2018.

  
Mikell R. Scarborough  
Master in Equity for Charleston County

Charleston, South Carolina