

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Special Circuit Court Judge

Case No. 2016-CP-40-00642
APPELLATE CASE NO. 2018-001156

Quality Lawn Care and Landscaping, d/b/a Design South Landscape Co., Appellant

v.

Coogler Construction Company, Inc. Respondent

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. DID THE SPECIAL CIRCUIT COURT ERR WHEN IT FOUND AS A FACT THAT THE CONSTRUCTION WAS NOT WHERE IT WAS SUPPOSED TO BE?

A. Did the Special Circuit Court err when it held that a subcontractor is in breach of his contract when he constructs his work in the wrong place and then refuses to correct that work?

II. CAN THE APPELLATE COURT FIND THAT A PORTION OF THE WALL COULD HAVE BEEN SAVED WITHOUT DISTURBING THE FACTS FOUND BY THE SPECIAL CIRCUIT COURT?

STATEMENT OF THE CASE

Appellant Quality Lawn Care and Landscaping, Inc. (“Quality”) sued Coogler Construction Company, Inc. (“Coogler”) for breach of contract. (Complaint, ¶ 12.) Coogler counterclaimed for breach of contract. (Answer and Counterclaim, ¶¶ 7, 42.) The Special Circuit Court presided over a bench trial on October 30 and 31 and November 1, 2017 and filed its order on April 25, 2018 (“the Order”), making Findings of Fact (“FOF”) and Conclusions of Law (“COL”) and awarding Respondent \$64,572.55. The Order included finding of facts and conclusions of law. Quality filed a motion to reconsider on May 7, 2018, which the Special Circuit Court denied in its order dated June 12, 2018.

STATEMENT OF FACTS

Quality was a sub-subcontractor to Coogler on a project on which Edward Rose & Son (“Rose”) was both the owner and the general contractor. Quality’s work was to construct segmental retaining walls. Coogler’s work was to construct the entire civil package for a large apartment complex. Coogler’s work included the retaining walls, which it subcontracted to Quality. After a three-day trial, the Special Circuit Court found the following relevant facts:

- a) Over several years Quality had constructed numerous segmental retaining walls for Coogler previous to the one at issue here. (FOF 9);
- b) On one project, Quality mislocated the wall between six inches and three feet (FOF 10, 11);

- c) Quality had to remove that wall in its entirety and reconstruct it in the correct place (FOF 12);
- d) Quality admitted that it had to remove and reconstruct that wall because Quality built it in the wrong place (FOF 13);
- e) Quality was paid only one time for that wall (FOF 14);
- f) Quality knew or should have known that a wall that was misplaced more than 6" would have to be removed and replaced (FOF 17);
- g) The surveyor established the hubs from which Quality would determine where to build the wall (FOF 18);
- h) The surveyor was hired by Rose (FOF 19);
- i) Quality used the surveyor's stakes to determine where to build the wall (FOF 21);
- j) The wall at issue was not located where it should be (FOF 69);
- k) Quality made mistakes in locating the wall (FOF 45);
- l) Quality's mistakes are the reason the wall is not where it was supposed to be (FOF 46);
- m) The surveyor made an as-built drawing showing where the wall was in relation to where it was supposed to be (FOF 67);
- n) The surveyor used the same design information (AutoCAD file) when he established the hubs and when he surveyed the wall for the as-built drawing (FOF 25);
- o) Rose demanded that the wall be removed and reconstructed in the correct location (FOF 70);
- p) Rose informed Coogler that if Coogler did not remove and reconstruct the wall, Rose would have the work done and charge Coogler for the cost (FOF 70);
- q) Quality knew that a wall that was mislocated by more than six inches may have to be removed and reconstructed (FOF 17);
- r) Coogler demanded that Quality remove and reconstruct the wall (FOF 73);
- s) Quality refused to remove and reconstruct the wall (FOF 74);

ARGUMENT

I. THE SPECIAL CIRCUIT COURT JUDGE DID NOT ERR IN FINDING THAT THE WALL WAS NOT WHERE IT WAS SUPPOSED TO BE.

The as-built location of the wall is at issue, as well as who was responsible for that location. Quality testified that it did everything correctly (TR P. 284, l. 8 through P. 288, l. 1) and that if the wall is not where it belonged it is because of a faulty survey (TR P. 67, l. 1 -25). Quality testified that some of the wall was constructed in the wrong place ((TR P. 76, l. 1-12; P. 139, l. 2-6). Coogler testified that the survey was correct and that Quality mislocated the wall (TR P. 446, l. 11-19). The surveyor testified that he used the same design information when he set the hubs from which Quality determined where to construct the wall as he used to determine where the wall actually was after it was constructed (TR P. 537, l. 2-17; P. 556, l. 4-12). The surveyor also testified that the wall as constructed varied from its design placement (TR P. 539, l. 20 through P. 541, l. 9). Nearly the entire wall was out of place (Defendant's Exhibit 36). This conflicting testimony raises questions of fact.

“An action for a breach of contract is an action at law.” Palmetto Mortuary Transp., Inc. v. Knight Sys., ___ S.C. ___, 818 S.E.2d 724, 729 (2018). “In an action at law, when a case is tried without a jury, the trial court’s findings of fact will be upheld on appeal when they are reasonably supported by the evidence. Stated another way, the trial court’s findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or unless it clearly appears the findings were influenced or controlled by an error of law. The trial court’s findings in such a case are equivalent to a jury’s findings in a law action.” Butler Contr., Inc. v. Court St., LLC, 369 S.C. 121, 127-28, 651 S.E.2d 252, 255-56 (2006).

Here, the findings of the trial court are not wholly unsupported by the evidence, and therefore the Court did not err.

A. THE SPECIAL CIRCUIT COURT JUDGE DID NOT ERR WHEN HE HELD THAT THE CONTRACTOR WAS IN BREACH WHEN IT CONSTRUCTED ITS WORK IN THE WRONG PLACE AND REFUSED TO FIX IT.

Quality testified that on the Marina job, it mislocated a wall and had to tear down the entire wall and build it back up in the correct place (TR P. 325, l. 24 through P. 327, l. 4). Coogler testified that the Marina wall was out of place by 6 inches to 2 feet, depending upon where on the wall one measured (TR: P. 425, l. 1-25). The Special Circuit Court found as a fact that Quality knew, or should have known, that a wall misplaced by more than 6” would have to be removed and reconstructed (FOF 17). Quality testified that when Coogler told it to tear down and rebuild the wall at issue in this case it refused to do so (TR P. 330, 15-19). Coogler testified that when he told Quality to tear down the wall, Quality refused to do so (TR P. 460, l. 15-21). Apparently, Quality believed the mislocation was not its fault. However, the trial court found as a fact that the mislocation was Quality’s fault (FOF 45, 46).

Quality is a licensed general contractor (TR P. 279, l. 7-10). When “a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use” Hill v. Polar Pantries, 219 S.C. 263, 271, 64 S.E.2d 885, 888 (1951) (citing General Fireproofing Co. v. L. Wallace & Son, 175 F. 650 (8th Cir. 1910)).

A contractor that provides materially poor workmanship has breached its contract. Leonard v. Peoples Tobacco Warehouse Co., 128 S.C. 155, 122 S.E. 678 (1924) (substantial completion required.). The non-breaching party in a construction dispute is entitled to recover the cost of correction. Kincaid v. Landing Dev. Corp., 289 S.C. 89,344 S.E.2d 869 (Ct.App. 1986). Quality’s breach was material because Rose required the wall to be demolished and rebuilt.

The Special Circuit Court held, as a matter of law, that:

- a) Quality held itself out as specially qualified to construct segmental retaining walls (COL 4);
- b) Quality had a contractual duty to construct the wall in a workmanlike manner (COL 5);
- c) The evidence shows that Quality did not construct the wall in a workmanlike manner (COL 6, 7);
- d) Quality did not construct the wall in the correct place (COL 40).

A breach of contract occurs when the contractor's work does not conform to the plans in a material respect. Austin-Griffith, Inc. v. Goldberg, 224 S.C. 372, 79 S.E.2d 447 (1953) (owner recovers for cost to complete); Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986); Dermott v. Jones, 69 U.S.1 (1864); Newton v. American Surety Co., 329 F.2d 299 (4th Cir. 1964). Because Quality breached its contract by building the wall in the wrong place, and because Quality breached its contract by not rectifying its poor workmanship, and because Quality knew or should have known that if the wall was mislocated by more than six inches it would have to be replaced, the Special Circuit Court did not err in finding that Quality breached the contract.

II. WITHOUT DISTURBING THE FACTS FOUND BY THE SPECIAL CIRCUIT COURT, THE APPELLATE COURT CANNOT CONCLUDE THAT PART OF THE WALL COULD HAVE REMAINED IN PLACE.

Quality argues that, should this Court decide against it on the first question, that it should find that the trial judge committed an error of law in requiring Quality to pay for tearing down the entire wall when "only a small section of wall needed to be replaced." Quality alleges that the proper remedy is to repair only the section that affects completion of the project.

There is a problem with Quality's assertion. The trial court did not find that parts of the wall could be saved. Instead, the trial court found as a fact that it is not possible to save small portions of the wall (FOF 78), and that almost the entire wall was not where it was supposed to be

(FOF 69). There is only a small area of the wall that is where it belongs (FOF 69; Def. Exhibit 36). It follows inexorably from these facts, and the trial court concluded, that the entire wall had to be removed. (COL 42).

Without ignoring the trial court's findings of fact, the Appellate Court cannot conclude that part of the wall could have been saved. Without ignoring the trial court's findings of fact, the Appellate Court cannot conclude that the Special Circuit Court made an error in ordering Quality to pay Coogler for the entire demolition and reconstruction of the wall.

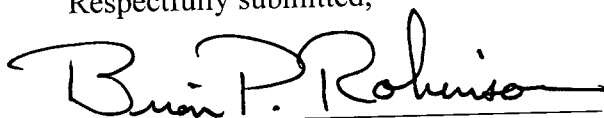
CONCLUSION

The Special Circuit Court did not err when it found as a fact that the construction was not where it was supposed to be. The testimony was in conflict, and the Special Circuit Court, sitting as the trier of fact, resolved that dispute in accordance with its view of the evidence. It follows that the Special Circuit Court did not err when it held that Quality breached its subcontract when it refused to make its work conform to the subcontract requirements.

The Appellate Court is unable to change the finding of facts reached by the Special Circuit Court. It is impossible for the Appellate Court to find as a fact that some portion of the misplaced wall could have been saved when the Special Circuit Court found the opposite.

The appeal should be dismissed and the judgment affirmed.

Respectfully submitted,



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APPEAL FROM RICHLAND COUNTY
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Joseph M. Strickland, Special Circuit Court Judge

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APPELLATE CASE NO. 2018-001156

Quality Lawn Care and Landscaping, d/b/a Design South Landscape Co., Appellant

v.

Coogler Construction Company, Inc. Respondent

PROOF OF SERVICE

I certify that I have served Appellant's counsel, T. Jeff Goodwyn, Jr., Esquire with a copy of Respondent's *Initial Brief and Designation of Matter to be Included in the Record on Appeal* by mailing a copy, postage paid, to:

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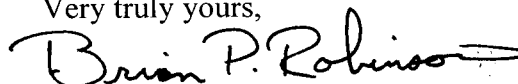
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Coogler Construction Company, Inc.
Appellate Case No.: 2018-001156
Our File No.: 7-617.127

Dear Ms. Kitchings:

Enclosed please find for filing one copy of the Respondent's Initial Brief, along with the Designation of Material to be included in the Record on Appeal and Certification of Service. With my kindest regards, I am

Very truly yours,



Brian P. Robinson

BPR/os

Enclosures

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