THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE RICHLAND COUNTY
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CIVIL ACTION NO.: 2009-CP-40-0179

Boykin Contracting, Inc., ...Respondent.

v.

K. Wayne Kirby d/b/a Carolina Gold Bingo, ...Appellant,

BRIEF OF APPELLANT IN REPLY

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Table of Contents

Table of Authorities

Cases

Statutes

Argument

I. Boykin failed to prove Kirby owned or operated the bingo business known as Carolina Gold Bingo.

Boykin's theory of the case derives from its belief that Carolina Gold Bingo was Kirby's trade name and that Kirby owned or operated the business. Were this belief true, it may be acceptable to hold Kirby individually liable. However, the evidence in the record clearly shows that Carolina Gold Bingo was a bingo business that was formed and operated pursuant to the South Carolina Bingo Tax Act of 1996, S.C. Code Ann. §§ 12-21-3910 through 4300, ("the Bingo Act"), that it was owned by New Covenant Church, Inc. ("the Church"), and that was operated by Kirby Enterprises of SC, Inc. ("Kirby Enterprises"). (R. pp. 348-354, 358-359; R. p. 127, line 13—p. 129, line 23; R. p. 130, line 22—p. 131, line 1.) Thus, although the record may contain some scintilla of evidence supporting Boykin's belief and the trial court's finding that Kirby owned or operated Carolina Gold Bingo, the *preponderance of the evidence* in this case demonstrates that Boykin failed to carry its burden at trial to prove its belief. Earthscapes Unlimited, 390 S.C. 609, 616, 703 S.E.2d 221, 225 (2010) ("When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence.").

Since it has no evidence that Kirby personally benefitted from the project, Boykin relies on evidence that that its work allowed the bingo business to open and on speculation that, therefore, Kirby must have somehow, some way received a benefit. Having failed to present evidence to substantiate its speculation, Boykin failed to prove its work benefitted Kirby personally. Accordingly, the trial court's order must be reversed.

A. If Boykin did rely on the Richland County permitting records, its reliance was unreasonable because Boykin knew its work was for the bingo business, not Kirby individually.

Boykin insists Kirby should be held personally liable because the contractor relied on the Richland County permitting records that listed Kirby as the owner of the building. (Resp't.'s Br. 5.) However, Boykin's own records requested payment from "Carolina Gold Bingo," not "Wayne Kirby" or "Wayne Kirby d/b/a Carolina Gold Bingo." (R. pp. 199-200.) On cross, Boykin's project manager ("Brock") insisted he believed Kirby was the tenant. (R. p. 77, lines 1-22.) On recross, however, he conceded, "No. I never asked who was leasing the premise. It was pretty obvious from a set of plans that said Carolina Gold Bingo." (R. p. 91, lines 16-18.) Based on Brock's own testimony, it is apparent he knew before beginning work that the renovation was for a bingo business named Carolina Gold Bingo, that he believed Carolina Gold Bingo—not Wayne Kirby—was the tenant, and that Boykin requested and expected payment from the bingo business. Boykin's argument that it believed Kirby was personally bankrolling the renovation is, therefore, suspect.

Even assuming, *arguendo*, Boykin did rely on the permitting records, that reliance was unreasonable under the facts of this case. On cross-examination, Brock was insistent that Kirby had pulled the permit because it showed Kirby's name as the owner. (R. p. 66, lines 2-3.) Since Kirby had never been involved in a project like this, the Appellant had no reason to believe he could be held personally liable simply because Hemphill & Associates mistakenly listed him, not Carolina Gold Bingo, as the "owner" on the permit application. (R. p. 132, lines 5-7.) Boykin, on the other hand is a sophisticated

contractor and knowing "an awful lot more" than Kirby about the process. (R. p. 62, lines 10-16.) Nevertheless, Brock never pulled a permit for Boykin's work on the job, did not even know for sure who pulled the permit under which he worked, nor did he even ask who the responsible party was for the job. (R. p. 68, line 24—p. 69, line 1; R. p. 80, lines 5-20.) Instead, Brock assumed Kirby owned Carolina Gold Bingo, he assumed Kirby had personally hired Hemphill & Associates, and he assumed Boykin had an agreement with Kirby. (R. p. 76, lines 18-19; R. p. 79, lines 8-15; R. p. 90, line 16—p. 91, line 23.) In truth, Kirby never owned or operated the bingo business, Kirby Enterprises of SC, Inc. ("Kirby Enterprises") hired Hemphill & Associates (R. p. 132, line 19—p. 133, line 22; R. pp. 291-306.), and Boykin had no agreement with either Kirby or Kirby Enterprises. (R. p. 10.) When confronted with the fact that the only permit for the Carolina Gold Bingo space was pulled by Hemphill & Associates, Brock conceded, "Okay. If that's the case. I don't know anything else." (R. p. 67, lines 16-21.) Coupled with Brock's testimony that he knew the tenant was Carolina Gold Bingo, this evidence shows that even if Boykin did rely on the permitting records, Boykin's reliance was unreasonable, as were its assumptions. When its assumptions turned out to be wrong, Boykin strapped on its blinders, intent on holding Kirby individually liable. Within the context of Boykin's equitable claim, certainly the risk of Boykin's assumptions should fall on the sophisticated contractor who made them.

Boykin argues that Kirby's reaction to the pay application somehow proves Kirby's acquiescence that he was personally responsible for the bill. Boykin contends Kirby failed to take "steps to change his status as the responsible owner" and "did not refer Tom Brock to any other party for payment nor did Kirby deny was the responsible

party for payment." (Resp't.'s Br. 6.) What this argument fails to take into account, however, is that Boykin gave Kirby no reason to believe the contractor was asking that he personally pay for its work. Boykin's pay application requested payment from "Carolina Gold Bingo," not from "Wayne Kirby" or "Wayne Kirby d/b/a Carolina Gold Bingo." (R. pp. 199-200; r. p. 147, lines 12-15.) Therefore, Kirby had no reason to believe he was being held personally responsible for payment until Boykin filed this suit. If anything, Kirby's reaction to the invoice shows not that he believed he was being asked to dig into his own pocket but instead that he believed the Respondent was requesting payment from the bingo business, Carolina Gold Bingo. Had Boykin intended otherwise, it certainly could have stated so in its request for payment.

B. The building leases fail to prove that Kirby controlled the bingo space or that Kirby personally benefited from Boykin's work.

Boykin next argues that Kirby received the benefit of its work by virtue of the building leases and that Kirby's argument to the contrary is "the height of form over substance." (Resp't.'s Br. 6.) The law in this state values the form of commercial leases for real property. According to S.C. Code Ann. § 27-35-20 (2007), the lease agreements involved in this were not valid until they were reduced to writing. As a result, Kirby could have no enforceable interest in any part of the building until the agreement with the building owner was in writing. In this case, the lease signed in 2007 clearly names DTW, Sr., Inc. ("DTW") as the sole tenant. (R. pp. 330-332.) Although Kirby's signature does appear at the end of that lease, Kirby signed only after being asked to do so as a personal guarantor, not as a tenant as Boykin suggests. (R. p. 162, lines 6-11.) Thus, the 2007 lease gave Kirby no interest in the building.

The lease Kirby signed in 2008 took effect months after the renovations were complete and was negotiated after Boykin had left the job. With respect to Boykin's argument that this lease proves Kirby ran the bingo business, the abundance of evidence in the record prove otherwise. For this Court to hold, based on this document, that Carolina Gold Bingo was Kirby's business would require that the Court afford this one document greater weight than the Bingo Contract between Kirby Enterprises and the Church, the Church's the financial records from the bingo business, and Kirby's testimony to the contrary combined. Furthermore, Boykin's arguments about the leases ignore two key facts: (i) the Church leased the bingo space and paid rent directly to the building owner, and (ii) Kirby never used the bingo space, Carolina Gold Bingo did.

In its brief, Boykin states the purpose of the project was so Kirby could obtain a certificate of occupancy to operate the bingo business. (Resp't.'s Br. 7.) The evidence at trial, however, established the actual structure of the bingo business. (See Appellant's Br. 11.) In fact, Kirby and the bingo business were never one in the same, despite the assumptions Boykin made at the beginning of the project. Despite having over two years to conduct discovery, Boykin presented no financial statement, bank record, tax return, corporate records or other document to support its assumptions or to disprove that Kirby held no interest in Carolina Gold Bingo.

Finally, Boykin argues Kirby received a benefit because he exercised complete control of the bingo space. Noticeably lacking from this argument is a citation to any legal authority supporting Boykin's proposition that a sophisticated contractor who abandons its own contracting protocol and neglects to confirm the identity of its customer can nevertheless recover in *quantum meruit* from an individual who exercised control

over a portion of the improved space. Furthermore, Kirby's presence at the building fails to prove he received a benefit, for a business or corporation can operate only through its employees and agents. Therefore, the fact that Brock dealt only with Kirby does not, in and of itself, prove Kirby personally benefitted from Boykin's work, nor does it establish Boykin's belief that Kirby, in his individual capacity, exercised "complete control" over the space. Rather, it shows Kirby was the person acting on behalf of the bingo business, the identity of which was well-known to Brock. Indeed, that Kirby only dealt with Brock would not make Brock individually liable for Boykin's work.

For these reasons, Boykin failed to prove its case at trial, and the preponderance of the evidence is that Kirby received no personal benefit from Boykin's work.

II. The reasonable value of labor and materials furnished is not a proper measure of recovery under a theory of *quantum meruit* when the contractor's work benefits property other than the defendant's.

Boykin relies on Braswell v. Heart of Spartanburg Motel, 251 S.C. 14, 159 S.E.2d 848 (1968), and Costa & Sons Constr. Co., Inc. v. Long, 306 S.C. 465, 412 S.E.2d 450 (Ct. App. 1991), for the proposition that the proper measure of recovery for its equitable claim is the reasonable value of the labor and material it provided for the project. This measure of recovery, however, allows Boykin to recover from Kirby in excess of any unjust enrichment Kirby realized.

A claim for damages under a theory of *quantum meruit* allows a plaintiff to recover from a defendant the amount he has been unjustly enriched at the expense of the plaintiff. Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000) (quoting U.S. Rubber Prods., Inc. v. Town of Batesburg, 183 S.C. 49, 55, 190 S.E. 120, 126 (1937)). To the extent the amount of unjust enrichment coincides

with the reasonable value of the services rendered, the latter is a proper measure of recovery. On the other hand, that measure of recovery is improper when it allows a contractor to recover for work to property neither owned, leased, nor controlled by the defendant. Stated otherwise, the measure of recovery applied in Braswell and Costa & Sons is acceptable within the framework of damages allowed for *quantum meruit* and when it does not exceed the amount by which the court determines the defendant has been unjustly enriched.

In Braswell, the hotel was the only property the exterminator's work benefitted. 251 S.C. at 16, 159 S.E.2d at 848. The exterminator did not seek recovery for services it provided to the hotel and an adjacent property. Id. Awarding the reasonable value of Braswell's services, therefore, posed no threat that the hotel would be held liable for benefits it did not receive. Similarly, the contractor in Costa & Sons sued to recover for renovations to the defendants' home, not for work to that home and a neighbor's home. 306 S.C. at 466, 412 S.E.2d at 451. Thus, measuring the contractor's recovery by the value of the contractor's services allowed the contractor to recover only the amount by which the defendants had been unjustly enriched.

By contrast, in this case Boykin's work was on a building that was divided into three suites. Assuming, *arguendo*, that Boykin proved Kirby should be held personally liable, Kirby did not own the building, nor did he lease the entire building. (R. pp. 315-329 (Tr. Ex. 14), 330-347 (Tr. Ex. 15), and 348-354 (Tr. Ex. 19).) More importantly, Boykin's workers testified at trial that their work benefitted areas of the building that were not related to the bingo space. (R. p. 40, lines 3-5; R. p. 83, lines 8-17; R. p. 84, line 10—p. 85, line 6; R. p. 100, line 12—p. 101, line 1; R. p. 109, line 13—p. 111, line

18.) Thus, even assuming this Court finds Kirby personally benefitted from Boykin's work, there is no question that Kirby did not receive the benefit of all the labor and materials the trial court used to calculate Boykin's damages. Furthermore, the trial court failed to determine the value of Boykin's work that benefitted the exterior of the building, the Comedy Club, and other areas of the building not related to the bingo space. As a result, the trial court awarded Boykin an amount in excess of any benefit Kirby personally received.

Accordingly, if this Court holds the evidence proves Kirby is personally responsible for payment, the trial court's order nevertheless should be reversed and Boykin's damages measured by the value of the benefit Kirby received, rather than by the reasonable value of the labor and material provided.

III. Boykin argued and proved at trial that the value of the labor and material it provided for the project was $52,749.17.

Boykin contends the trial court's labor and materials calculation is supported by the job cost journal. (Resp't.'s Br. 12.) However, the standard of review in this case is what this Court determines based on its own view of the preponderance of the evidence, not whether the record contains any evidence supporting the trial court's conclusions. Brock testified at trial that he personally created Boykin's pay application, and he confirmed that the numbers in the pay application, which he signed and had notarized, are true and correct based on Boykin's records. (R. p. 49, line 23—p. 40, line 12; R. p.41, line 13—p. 42, line 11; R. p. 61, lines 3-8; R. p. 76, lines 8-12) Furthermore, Boykin alleged damages for its *quantum meruit* claim in the amount of $73,925.40, the sum of the line items shown on the pay application. (R. p. 21.) Despite the contractor's argument in this appeal, Boykin sought and proved at trial that its total labor and material

costs for the project totaled $55,509.46, minus the $2,760.29 for items it never provided to the job. (See Appellant's Br. 19-20 (discussing the line items shown in Boykin's pay application and charges for fuel prior to project).) Accordingly, the reasonable value of the labor and material Boykin provided for the project was only $52,749.17.

IV. Boykin failed to prove a claim for prejudgment interest pursuant to either statute or common law.

Boykin argues it is entitled to prejudgment interest under Anderson v. Purvis, 220 S.C. 259, 67 S.E.2d 80 (1951), without regard to whether its claim is liquidated.[1] Subsequent to that case, however, the South Carolina Supreme Court held in Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993), "The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." 310 S.C. at 372, 426 S.E.2d at 771. This Court rendered a similar holding in QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 600 S.E.2d 105 (Ct. App. 2004), the case on which the trial court relied for its ruling. "Thus, we hold that entitlement to prejudgment interest does not depend upon what theory of recovery a plaintiff chooses to proceed under, but rather, whether or not the measure of recovery is fixed by the conditions existing at the time the claim arose." 360 S.C. at 206, 600 S.E.2d at 110.

Two years later, the South Carolina Supreme Court reaffirmed this standard, explaining, "The law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, *if the sum is certain or capable of being reduced to certainty*." Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 258 (2006)

[1] At trial, Boykin sought prejudgment interest at the rate of 8.75% under S.C. Code Ann. § 34-31-20(A), not under Anderson v. Purvis, 220 S.C. 259, 67 S.E.2d 80 (1951). (R. p. 13.)

(emphasis added). "Prejudgment interest is not allowed on an unliquidated claim in the absence of an agreement or statute." 369 S.C. at 133, 631 S.E.2d at 259. Thus, Boykin's argument under Anderson overlooks the clear test South Carolina's appellate court have adopted to determine whether a party may recover prejudgment interest.

The trial court erred when it awarded Boykin prejudgment interest because Boykin's measure of recovery was not fixed at the time its claim arose. See Butler Contracting, supra; Smith-Hunter Constr. Co., Inc. v. Hopson, 365 S.C. 125, 128-29, 616 S.E.2d 419, 421 (2005); Dixie Bell, Inc. v. Redd, 376 S.C. 361, 656 S.E.2d 765 (Ct. App. 2007), *rehearing denied* February 14, 2008, *cert. denied* June 10, 2009; QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 600 S.E.2d 105 (Ct. App. 2004). In QHG, this Court held that a hospital which advanced a doctor loans for medical school was entitled to recover prejudgment interest because the amount by which the doctor had been unjustly enriched was capable of being reduced to certainty; that amount was equal to the amount of money the hospital advanced her. 360 S.C. at 207, 600 S.E.2d at 110. Specifically, this Court held "the litigation relate[d] to specific sums of money advanced by one party to another party, and, thus, the measure of recovery [was] capable of being reduced to a certainty." Id. The following year, the South Carolina Supreme Court held in Smith-Hunter that a contractor was entitled to recover prejudgment interest on its breach of contract claim because its damages were fixed by the parties' agreement and could be measured by the invoices the contractor issued to the homeowners. 365 S.C. at 128-29, 616 S.E.2d at 421.

In contrast to those cases, Boykin's *quantum meruit* claim does not relate to a specific sum of money it loaned Kirby or Carolina Gold Bingo, the parties did not have

an agreement about the price for Boykin's work, nor could Boykin's damages be measured by the amount it claimed in its pay application (the only invoice Boykin presented). Rather, Boykin's recovery under its equitable claim is for the value of the benefit it conferred on Kirby, which demanded that a fact-finder determine the total value of the labor and materials, and then reduce that amount by (i) the value of those items claimed Boykin never even provided to the project and (ii) the value of Boykin's work that benefitted areas not related to the bingo space. The analysis set forth in Dixie Bell is instructive. Applying that reasoning to this case, (1) there was no agreement between the parties as to a sum certain (Order of J. 6.); (2) Boykin's claim could not be reduced to a sum certain by computation or formula, (3) the price of Boykin's work was not contractually stipulated (Id.), (4) it was not reduced to a sum certain by operation of law or a controlling statute, and (5) it could only be reduced to certainty by a judge or jury making the determination. See Dixie Bell, 376 S.C. at 374, 656 S.E.2d at 771-72. For these reasons, Boykin's claim was unliquidated and its measure of recovery was not fixed by circumstances existing at the time its claim arose. Consequently, Boykin's claim fails both the statutory specification of a sum certain as well as the standard applied in Smith-Hunter, Butler Contracting, and QHG.

Finally, despite Boykin's claim that it demanded payment from Kirby, the only documents it has produced of its demand show it requested payment from the bingo business, Carolina Gold Bingo. Accordingly, the trial court erred when it awarded Boykin prejudgment interest.

Conclusion

Boykin knew at all times that the renovation to the bingo space was for a bingo business named Carolina Gold Bingo. Despite its allegations in this case, Boykin failed

to prove Kirby owned or operated the business, and it further failed to prove Kirby received any benefit from Boykin's work. Even assuming this Court affirms the trial court's finding that Kirby benefitted, Boykin's damages should be measured by the value of the benefit Kirby received, not the reasonable value of the services it provided, and the award of prejudgment interest should be reversed.

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October 29, 2012

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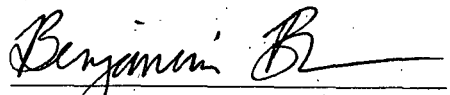
CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Briefs filed on behalf of the Appellant on October 30, 2012 in this matter comply with Rule 211(b), SCACR.

November 7, 2012



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