THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Appellate Case No. 2012-213563

The Greens of Rock Hill, LLC; GRH 2011, LLC,

Respondents,

v.

Rizon Commercial Contracting, Inc., Road Machinery and Supplies Co.,

Appellants.

Respondent's Final Brief

Tracy Thompson Vann
Herbert W. Hamilton
W. Keith Martens
HAMILTON MARTENS BALLOU & CARROLL, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7672
herb.hamilton@hamiltonmartens.com
keith.martens@hamiltonmartens.com
ATTORNEYS FOR RESPONDENT

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II. Did the trial court exercise its power to vacate a mechanic's lien at an appropriate stage of the litigation and in an appropriate manner, where the trial court followed a procedure approved by South Carolina's Supreme Court, and where the lien claimant has failed to demonstrate that additional discovery might have changed the trial court's decision?

III. Did the trial court properly refuse to consider whether a lien claimant might be entitled to a mechanic's lien under some other statute, where the claimant did not assert its alleged right to a lien under other statutes until it moved for reconsideration of the trial court's order, and where the undisputed evidence in the record reveals that the claimant was not entitled to a mechanic's lien under any other statute?

STATEMENT OF THE CASE

On March 30, 2012, Appellant Rizon Commercial Contracting, Inc. ("Rizon") filed a mechanic's lien covering real property ("Property") owned by The Greens of Rock Hill, LLC and GRH 2011, LLC (the "Owners"). In its lien, Rizon alleged that it had provided "labor and materials on [the Property]" pursuant to a contract with Owners' general contractor, Celriver Services, LLC ("Celriver"). (R. p. 122). (hereafter, cited as "Lien"). Rizon asserted that it was entitled to a mechanic's lien under S.C. Code Ann. § 29-5-20 (Law. Co-op. 2007), but did not claim a lien under any other statute. (R. p. 122).

On May 18, 2012, Owners posted a surety bond to have Rizon's lien released from the Property pursuant to S.C. Code Ann. § 29-5-110. (R. 54-72). That same day, Owners filed a petition to discharge Rizon's lien. (R. p.p. 16-38) (hereafter, cited as "Petition"). Owners'

petition alleged that Rizon's lien should be discharged because Rizon did not provide "labor or material for the improvement" of the Property. (R. 18, ¶ 9). Owners sought to invoke "the inherent powers of the court to afford relief where the deprivation imposed by a wrongfully filed mechanic's lien cannot be corrected by statutory methods." (R. p. 17, ¶ 6). (citing Sea Pines o. v. Kiawah Island Co., Inc., 268 S.C. 153, 232 S.E.2d 501 (1977)).

On June 18, 2012, before Owners' petition could be heard, Rizon filed suit to foreclose its mechanic's lien. (R. pp. 78-84). In its complaint, Rizon also asserted claims for breach of contract and quantum meruit against Celriver. Id. Rizon's claims against Celriver are not affected by this appeal, and are proceeding in the circuit court.

On June 21, 2012, Rizon and Owners appeared before the Honorable S. Jackson Kimball, III, Special Circuit Court Judge for York County upon Owners' petition to discharge Rizon's lien. After reviewing Sea Pines with counsel, Judge Kimball continued the hearing and instructed both parties to submit affidavits in support of their respective positions. Owners filed an amended affidavit of Celriver's vice president, Dave Williams. (R. pp. 191-213). (hereafter, cited as "Williams Aff."). Rizon filed affidavits of Robert and Stephanie Phillips, respectively Rizon's president and vice president. (R. pp. 185-190).

Judge Kimball reconvened the hearing on Owner's petition on August 16, 2012. At the conclusion of that hearing, and based upon the affidavits submitted by the parties, Judge Kimball found that "Rizon did not provide anything or do anything to improve ... real estate." (R. p. 3). Consequently, Judge Kimball ordered that Rizon's mechanic's lien should be vacated. Id. Rizon moved for reconsideration, but its motion was denied.

STATEMENT OF FACTS

The material facts of this case are simple and undisputed. Owners are the developers of several parcels of land along the Catawba River in Rock Hill, South Carolina. (R. p.17, ¶ 1).

One of those parcels was the site of an abandoned manufacturing facility, which Owners decided to demolish. Owners hired Celriver to complete the demolition. (R. p. 1). "As a result of the demolition of the manufacturing facility, Celriver was left with large pieces of scrap concrete." Id.

In 2010, Owners began to develop the Property into a large, mixed-use development known as the "Riverwalk" Community. Id. Celriver served as Owners' general contractor for portions of the construction project, including the installation of roads, sidewalks and other infrastructure. Celriver decided to reuse the on-site scrap concrete as aggregate, and hired Rizon to crush the stockpiled concrete. (R. p. 185; R. p.1) Celriver then transported the crushed concrete to "various locations" throughout Riverwalk, where it used the material as a construction base for roads and sidewalks. (R. p. 1).

STANDARD OF REVIEW

"The authority to vacate a mechanic's lien may be somewhat likened to the judge's authority to grant a summary judgment if there is no genuine issue of material fact to be determined, or [the court's] authority to direct a verdict when the evidence is susceptible of only one reasonable inference. However, the judge to whom application for relief is made may not try disputed facts." Sea Pines v. Kiawah Island Co., 268 S.C. 153, 157, 232 S.E.2d 501, 502 (1977). On appeal, the appellate court applies the same standard of review as the trial court under S.C. R. Civ. P. 56. Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005)(citations omitted). The judgment of the trial court should be affirmed where there are no genuine issues of material fact such that the respondents are entitled to judgment as a matter of law. Id.

ARGUMENT

I. The trial court properly vacated Rizon's lien because the undisputed evidence demonstrates that

Rizon was not a "laborer, mechanic, subcontractor or person furnishing material" for the improvement of real property.

As an initial matter, it is worth noting that Rizon's mechanic's lien was based upon the assertion that Celriver owed Rizon money for "work ... done under contract" between Rizon and Celriver. (R. p. 121). Owners' petition to discharge Rizon's lien did not, in any manner, affect Rizon's breach of contract and quantum meruit claims against Celriver. Nor did the trial court's order impair Rizon's ability to pursue those claims. The trial court's order simply discharged a mechanic's lien that Rizon had no right to file in the first place.

As the trial court recognized, "[a] mechanic's lien is a creature of statute, [and] the right to a mechanic's lien is wholly dependent on the language of the statute creating the right." (R. p. 2) (citing Skiba v. Gressnor, 374 S.C. 208, 648 S.E.2d 605 (2007) and Clo-Car Trucking Co. v. Clifflure Estates of South Carolina, Inc., 282 S.C. 573, 320 S.E.2d 51 (Ct. App. 1984)). Courts are "not at liberty to depart from the plain meaning of [the statute's] language" or to "create a lien where none exists or was intended by the legislature." Clo-Car Trucking Co. v. Clifflure Estates of South Carolina, Inc., 282 S.C. at 576, 320 S.E.2d at 53; *see also* Guignard Brick Works v. Gantt, 251 S.C. 29, 32, 159 S.E.2d 850, 851 (1968)("'It is elementary that statutory liens may not be extended by courts to include the claims of persons not specified by the statute. He who sets up such a lien must bring himself fairly within the expressed intention of the lawmakers.'"). Furthermore, courts have the inherent power to vacate "a wrongfully filed mechanic's lien" where the undisputed evidence reveals that a lien claimant has no statutory right to a lien. Sea Pines Co. v. Kiawah Island Co., Inc., 268 S.C. 153, 157, 232 S.E.2d 501, 502 (1977).

On appeal, Rizon does not challenge the court's "inherent power" to vacate a wrongfully filed lien. Rather, Rizon contends the trial court abused that power by vacating Rizon's lien before the factual record was fully developed through discovery. Appellant's Brief at 5. However, no amount of additional discovery would have brought Rizon's claim within the "plain meaning" of the mechanic's lien statutes, and the trial court properly exercised its power to "afford relief . . . [from the] deprivation imposed by [Rizon's] wrongfully filed mechanic's lien" early in the litigation. *See* Sea Pines, 268 S.C. at 157, 232 S.E.2d at 502.

The statute under which Rizon claimed a mechanic's lien provides that "every laborer, mechanic, subcontractor or person furnishing material for the improvement of real estate . . . has a lien thereon." S.C. Code Ann. § 29-5-20 (Law. Co-op. 2007). The plain language of that statute makes clear that the labor or material must actually *improve real estate* before the claimant will be entitled to a lien. *See also* George A.Z. Johnson, Jr., Inc. v. Barnhill, 279 S.C. 242, 245, 306 S.E.2d 216, 218 (1983)(surveyor not entitled to a mechanic's lien where the surveyor merely "designated an area [of real property] to be sold," because the surveyor's "service did not go into anything which attached to or become a part of the realty."). As the trial court recognized, Rizon could not satisfy that threshold requirement because Rizon did not actually provide any labor or materials to improve the Property.

The undisputed evidence in the record reveals that Rizon was hired by Celriver to perform a single task – to "crush concrete" that Celriver had stockpiled at the former Celanese Plant in Rock Hill, South Carolina. (R. p. 185; 191, ¶ 5). Rizon did not furnish the material that it crushed. Rizon did not own the material that it crushed. (R. 192, ¶ 7). As Rizon completed its work, Celriver transported the newly-crushed concrete to "various sites," where Celriver used the material as a paving base for roads, sidewalks and parking lots. (R. 187; 192, ¶ 8). No amount

of additional discovery would change those basic facts. The trial court properly decided the issue as a matter of law, where the parties' affidavits showed that the material facts were not in dispute. *See* Sea Pines Co. v. Kiawah Island Co., Inc., 268 S.C. 153, 155, 232 S.E.2d 501, 502 (1977).

The parties' affidavits conclusively established that Rizon did not provide labor or materials that improved, or "added value," to the real estate on which Rizon claimed a lien. The nature of Rizon's work simply did not entitle it to a mechanic's lien under the laws of this state, and the trial court properly vacated Rizon's wrongfully filed lien. That ruling should be affirmed on appeal.

II. The trial court vacated Rizon's lien at an appropriate stage of the litigation, using an appropriate standard, and Rizon has failed to demonstrate that any additional discovery would have changed the outcome below.

For more than thirty-five years, South Carolina's Supreme Court has recognized that courts have "inherent powers" to vacate wrongfully filed mechanic's liens "if there is no genuine issue of material fact to be determined," or "when the evidence is susceptible of only one reasonable inference." Sea Pines Co. v. Kiawah Island Co., 268 S.C. 153, 157, 232 S.E. 2d 501, 502 (1977). While Sea Pines cautions that "the judge to whom application for relief is made may not try disputed facts," nothing in Sea Pines dictates when, or how, a trial court should entertain a properly filed motion to vacate a mechanic's lien. Furthermore, nothing in Sea Pines affords a lien claimant a "right" to engage in additional discovery in an effort to support its lien claim or to defeat a motion to vacate the lien. In fact, the procedure utilized by the trial court in this case (consideration of affidavits submitted by the parties) is the same procedure that was utilized by the trial court, and apparently approved by South Carolina's Supreme Court, in Sea Pines. *See*

268 S.C. at 155, 232 S.E.2d at 502. Rizon has failed to demonstrate that there was anything inherently "unfair" or prejudicial about the manner in which the trial court dealt with Respondent's motion.

More importantly, Rizon has failed to demonstrate that additional factual discovery might have salvaged its mechanic's lien. "A party claiming [a court's ruling] was premature because they did not have a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (2009). Rizon has not met, and cannot meet, this burden.

In its brief, Rizon poses several vague unanswered questions that, hypothetically, "would have benefitted the [trial] court and this appellate court" in deciding whether to vacate Rizon's lien.[1] Appellant's Brief at 6. However, Rizon has failed to demonstrate how any of those questions, if resolved in Rizon's favor, would have entitled Rizon to a mechanic's lien under § 29-5-20. As the trial court noted in its order, "Rizon's sole task was simply to change the form of the scrap concrete supplied by others into stone usable in the construction of roads." (R. 2); *see also* (R. p. 185; p. 191¶ 5. "Rizon did not provide anything or do anything to improve the real estate." (R. p. 3); George A.Z. Johnson, Jr., Inc. v. Barnhill, 279 S.C. 242, 244, 306 S.E.2d 216, 218 (1983). Consequently, Rizon was not entitled to a lien for its work, and no amount of additional discovery could change that result.

III. The trial court properly refused to consider whether Rizon was entitled to a mechanic's lien under some other statute, where Rizon did not assert its alleged

[1] Rizon contends, but fails to demonstrate how, "discovery would have benefited the court as well as this appellate court in the analysis of Appellant's work, how Appellant's work improved the land and how Appellant's work should be viewed in light of the various mechanic's lien statutes." Appellant's Brief at 6.

> right to a lien under other statutes until it moved for reconsideration, and where the undisputed evidence in the record revealed that Rizon's activities did not entitle it to a lien under either of the cited statutes.

After the trial court vacated Rizon's lien, Rizon moved for reconsideration of the court's order. (R. p. 8). In its motion for reconsideration, Rizon asserted, for the first time, that it was entitled to a mechanic's lien because it provided "tools, appliances, machinery or equipment," as described in South Carolina Code § 29-5-22, or because it provided "construction and demolition debris disposal services," as described in § 29-5-27. (R. pp. 155-156). Rizon makes those same arguments on appeal. Appellant's Brief at 9-10. The trial court rejected those arguments, as should this court.

It is well settled that "an issue may not be raised for the first time in a motion to reconsider." Johnson v. Sonoco Products Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). Yet, that is precisely what Rizon did in this case. (R. p. 171). Rizon's lien did not assert that Rizon had provided "tools, appliances, machinery, equipment" or "construction and demolition debris disposal services." (*See* R. pp. 121-122). By the same token, neither Rizon's pleadings in this litigation, nor the complaint Rizon filed on June 18, 2012, alleged that Rizon had lien rights under § 29-5-22 or § 29-5-27. (R. 40, ¶ 29). (Rizon "was hired for the purpose of providing materials and services for the improvement of land"); *see also* R. p. 81, ¶ 3 (Rizon provided "services for the production of crushed concrete"). Finally, Rizon did not assert rights under either §29-5-22 or §29-5-27 in its opposition to Respondent's motion to vacate Rizon's lien. (R. p. 171). (Court: "It concerns me that . . . I wasn't directed to these newer statutes the first time."). The very first time Rizon claimed lien rights as a "supplier" of tools or machinery or as the provider of "debris disposal" services occurred *after* the trial court issued its order vacating Rizon's mechanic's lien. By then, it was too late for Rizon to make those arguments.

Even if Rizon had timely asserted lien rights under § 29-5-22 or § 29-5-27, the undisputed facts in the record would not support those claimed rights. "'He who sets up . . . a lien must bring himself fairly within the expressed intention of the lawmakers.'" Clo-Car Trucking Co. v. Clifflure Estates of South Carolina, Inc., 282 S.C. 573, 577, 320 S.E.2d 51, 53 (Ct. App. 1984)(quoting Williamson v. Hotel Melrose, 110 S.C. 1, 34, 96 S.E. 407 (1918)). As shown by the record, Rizon was hired only to crush concrete. (R. p. 185). It did not supply tools, machinery or equipment, and until its lien was vacated, Rizon did not claim that it had provided tools, machinery or equipment. Rizon did not provide demolition debris disposal services, and until its lien was vacated, Rizon did not claim that it had provided those services. Rizon is not entitled to a lien under § 29-5-22 or § 29-5-27, and the trial court properly rejected Rizon's untimely arguments to the contrary. So, too, should this court.

CONCLUSION

The trial court properly vacated Rizon's mechanic's lien, because the undisputed factual record revealed that Rizon had not provided any labor or materials for the improvement of Owners' Property. Rizon's only service was to transform Celriver's stockpiled scrap concrete from one form to another. As the trial court noted in its order, "Rizon did not provide anything or do anything to improve real estate." Rizon's remedy, if it has one, lies in a breach of contract action against Celriver. Owners were entitled to have Rizon's wrongfully-filed lien removed from their property, and the trial court had the "inherent power" to provide that relief. The trial court's order should be affirmed.

November 6, 2013

Respectfully Submitted,

W. Keith Martens

W. Keith Martens
Herbert W. Hamilton
HAMILTON MARTENS BALLOU & CARROLL, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7672
keith.martens@hamiltonmartens.com
herb.hamilton@hamiltonmartens.com

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

December 13, 2013

W. Keith Martens

Herbert W. Hamilton
W. Keith Martens
HAMILTON MARTENS BALLOU
& CARROLL, LLC
P.O. Box 10940
Rock Hill, SC 29731
(803) 329-7672
ATTORNEYS FOR RESPONDENTS