

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., Defendants,
of whom

Rizon Commercial Contracting, Inc.
is the **Appellant**.

APPELLANT'S REPLY BRIEF

November 7, 2013

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ARGUMENT

- I. The trial court improperly vacated Rizon's lien because the evidence demonstrates that Rizon was a laborer, subcontractor or person that furnished materials for the improvement of real property as contemplated by S.C. Code 29-5-20, 29-5-22 and 29-5-27.**

The trial court's decision to dissolve and dismiss the mechanic's lien is inconsistent with the law as it exists in the State of South Carolina. The Respondent is correct that a mechanic's lien is a creature of statute and the right to a mechanic's lien is dependent on the language of the statute creating that right. The Appellant asserted a mechanic's lien (R. pp. 121-130) pursuant to S.C. Code Section 29-5-20 which provides, "Every laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon, subject to existing liens of which he has actual or constructive notice, to the value of labor or material so furnished, including the costs of the action." The analysis does not end with a reference to S.C. Code Section 29-5-20 but must include a review of the subsequent statutes with which define and elaborate upon the terms used in the lien statute. Specifically, it is necessary to look at Section 29-5-22 in analyzing the plain language of the statute because this section defines terms used in S.C. Code Section 29-5-20. S.C. Code Section 29-5-22 provides, "A person who supplies tools, appliances, machinery, or equipment used as provided in Section 29-5-10(A) is considered to have furnished material for the improvement of real estate within the meaning of section 29-5-20 and 29-5-40 to the extent of the reasonable rental value of the tools, appliances, machinery, or equipment for the period of actual use." As such, the plain language of 29-5-20 must be read in conjunction with 29-5-22 which is part of the same statutory scheme. The legislature has defined a subcontractor's mechanic's lien to cover the person who supplies tools, appliances, machinery or equipment used for the purpose of improving real estate. As such, the statute does not require the labor or material to actually improve real estate but provides a lien to someone who supplies tools, appliances, or machinery for the improvement of the real estate. The

court has held that to recover for rental charges on leased equipment used in the construction, the lessor must supply the equipment operators. **Hardin Construction Group, Inc. v. Carlisle Const. Co.** 300 S.C. 456, 388 S.E.2d 794 (1990). In the case at hand, the affidavit of Robert Phillips (R. pp. 185-186) established that Rizon provided the labor for the operation of the equipment as well as the fuel and the equipment itself. In addition, Dave Williams provided an affidavit (R. pp. 191-213) for the respondent which substantiates the fact that the Appellant provided the equipment to crush the stone which was used on the site.

In addition, S.C. Code Section 29-5-27 defines a “laborer” and a “person” for reference to S.C. Code Section 29-5-20. The statute specifically provides, “Any person providing construction and demolition debris disposal services, as defined in section 44-96-40(6), including but not limited to final disposal services provided by construction and demolition landfill, is a laborer within the meaning of sections 29-5-20 and 29-5-40. “Person”, as used in this section, means “any individual, corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization or other entity.” As such, laborer is defined to include individuals who provide disposal services which are not directly improving the property.

As argued in the initial brief, the trial court erred in not considering 29-5-22 and 29-5-27 in analyzing the mechanic’s lien statute 29-5-20. The evidence presented to the Court by both the Appellant and Respondent established that Rizon rented equipment from RMS Machinery, Rizon provided individuals who worked for the purpose of demolishing and removing construction debris from the site and converting it into usable stone and that Rizon provided the fuel, labor and equipment for this purpose. As such, Rizon was entitled to a lien based upon the statutes and the statutory definitions of the terms.

To the extent it is not clear, discovery pursuant to South Carolina Rules of Civil Procedure would have been beneficial and helpful in enabling the court to fully analyze the case more thoroughly.

The respondent asserts that Rizon was hired to crush concrete Celriver stockpiled and after the concrete was crushed, it was transported to various sites on the project and used as paving base for roads, sidewalks and parking lots. The concrete had to be disposed of from the site and Celriver chose to reuse it. The work and services Rizon provided clearly fall within the parameters of the mechanics lien statute. The trial court erred in discharging the lien and erred in not allowing additional discovery to fully develop these issues.

In addition, the Respondent asserts that the affidavits establish Rizon did not provide labor or materials that improved or added value to the real estate. The statute does not require the work to add value. The statute establishes that the individual who furnishes the material for the property is entitled to a lien for the value of the labor or material so provided. The value is what the supplier provided. The lien is inchoate and exists by law. An individual must take steps to perfect its lien but it exists when the labor or material is provided.

II. The Court's decision to discharge Appellant's lien was inappropriate at this stage of the litigation and additional discovery would have benefited the trial court in an analysis.

Appellant submits that the trial judge acted prematurely in discharging the lien and that such a decision was inherently unfair and prejudicial. The grant and/or decision to discharge the lien is the same standard as for granting summary judgment. The court should have denied the motion because there are questions of fact which exist. The Court should have allowed discovery pursuant to South Carolina Rules of Civil Procedure to develop the issues. Appellant, at the very first hearing, was instructed by the trial judge as to what the court was looking for in its analysis. The following are the exchanges which occurred and which are documented at page 16 and 17 (R. pp. 146-147) of the transcript from the June 21, 2012 hearing.

Mr. D'Agostino: Are we allowed to engage in discovery between now and the time the court reconvenes this hearing? And the reason why is because there was a site where the crushing occurred,

the rock crushing occurs. And, then, materials were transported to these various pieces of property.

The Court: That is what I inferred from what I read.

Mr. D'Agostino: Yes sir, Your Honor. Now to know exactly how much it is GRH and the Greens and the seller have to – as to how much was put on a piece of property.

The Court: The question is – the issue is not how much but whether at all.

Mr. D'Agostino: Thank you, Your Honor.

The Court: How much doesn't matter. The question is whether it was actually used in the improvement of real estate. And maybe some more, but – so, no, those don't. I think that will save us all at least one appeal.

As can be seen, the judge said he was looking for whether materials were actually used in the improvement of real estate. Appellant focused the affidavit and arguments on the Court's assertion as to what it was reviewing, whether material was actually used.

Discovery would have helped clarify the work each party was performing and would have enabled the parties to fully develop the facts of the case, including why did Celriver hire Rizon to crush concrete and put it in a form for re-use and was this actually part of the demolition process of the old plant. Discovery would have assisted in the analysis of the scope of Rizon's contractual obligations as well as Celriver's obligations to the owners as it relates to the demolition of the Celanese plant. Had the trial court allowed the parties to fully develop what was actually occurring, summary judgment would have been denied.

Respondent asserts that Rizon has not demonstrated there is anything inherently unfair or prejudicial about the manner in which the trial court dealt with Respondent's motion. In fact, it was inherently unfair because Appellant was not allowed to conduct discovery as to any issue including the issues of demolition and debris removal. The trial court substituted its knowledge and familiarity with construction as opposed to allowing the parties to produce the documents which defined their roles and

allow the parties to develop the record. Discovery would have benefited as to the scope of the job, where the job is being performed and how is being performed. All of these issues would and do support that Rizon's statutory lien was properly filed and should not have been discharged.

III. The trial court failed to properly consider the entire statutory scheme and Respondent is incorrect in asserting that Appellant has attempted to file a lien under the other statutes.

Appellant filed a lien and proceeded to foreclose on the lien pursuant to S.C. Code Section 29-5-20. Respondent filed a Motion to Dismiss and Discharge Lien (R. pp. 16-38) referenced S.C. Code Section 29-5-10, et. seq. Respondent actually argued, at the hearing on August 16, 2012, the court should analyze the lien pursuant to S.C. Code Section 29-5-10. After arguing this position most of the hearing, Respondent changed and argued that Section 29-5-20 was not applicable. There is no transcript from the August hearing. Appellant provided affidavits, pursuant to the Court's instruction as to whether material was used on the property.

As is evident from the statutory scheme, Section 29-5-20 is the statute which creates a lien. Appellant is not attempting to assert a lien exists pursuant to some other statute such as 29-5-22 or 29-5-27. Those statutes do not create a lien but define terms of art used in Section 29-5-20. The trial court erred in not considering the statutory definitions of terms used in S.C. Code Section 29-5-20. The fact that the Court failed to consider the definitions was an error which the Appellant pointed out to the Court in a Motion to Alter or Amend (R. pp. 8-16). Without being repetitious, the lack of discovery contributed to this problem as well as respondent's vague motion referencing one statute and arguing it and halfway through the hearing, changing to another statute.

Appellant is not bringing up a new issue for the first time in the motion to alter or amend. Appellant was requesting that the Court change its mind on discharging a lien because the statutory scheme did not exclude Appellant as a lien claimant but actually included Appellant within the definition of an individual entitled to a lien.

Respondent seems to assert that because there is another lawsuit with breach of contract and quantum meruit as causes of action that Appellant is not harmed by the discharge of the mechanic's lien. The mechanic's lien is an inchoate statutory right. The dismissal of the lien released the security which Appellant had for the collection of its money. Contrary to Respondent's position, one does not assert a lien under 29-5-22 or 29-5-27 based upon the plain language of the statute. The Respondent's failure to appreciate the statutory scheme further substantiates that discovery would have been beneficial in analyzing the facts in this case.

Appellant submits the lien filed and the cause of action to foreclose are both consistent with the statutory scheme. Rizon asserted that labor and materials were provided for the property owned by the The Greens of Rock Hill and GRH (R. pp. 121-130). The lien asserts that labor and materials were performed on the property identified. The lien also asserts that labor and materials were provided with the express knowledge, consent and acquiescence and request of Defendants which included the Greens and GRH. The lien asserts the reasonable value of such labor or materials so performed or so furnished was in a certain amount. As such, Appellant had a statutory right which fell within the statutory scheme.

CONCLUSION

The trial court erred in dismissing and discharging the mechanics lien and such error has materially and appreciably harmed Rizon. Based upon the statutes, Rizon is a proper lien claimant and was entitled to protection pursuant to the mechanics lien statute. At the very least the court should have allowed discovery so that the parties could develop the true relationship between the parties and how and why the concrete was being crushed and removed.

Respectfully submitted.



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Reply Brief of Appellant complies with Rule
211(b), SCACR.

November 7, 2013



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