

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
CASE NUMBER: 2014-CP-10-3881

Brown Contractors, LLC, under S.C. )  
Residential Builders License No. 20378, )

Plaintiff, )

vs. )

Andrew Joseph McMarlin a/k/a Andrew )  
Joseph McMarlin and Amy Salzhauer, )

Defendants. )

Andrew McMarlin and Amy Salzhauer, )

Third-Party Plaintiffs, )

vs. )

James Brown, IV and Brown-Meihaus )  
Construction Co., LLC, )

Third-Party Defendants. )

**ORDER  
AWARDING ATTORNEY'S FEES**

**RECEIVED**  
MAR 27 2019  
SC Court of Appeals

In the Final Order submitted on May 1, 2018, I retained jurisdiction over this matter to review and rule on subsequent applications for attorney's fees. On May 25, 2018, Defendants, Andrew Joseph McMarlin a/k/a Andrew Joseph Mc Mar'in and Amy Salzhauer ("Defendants"), filed *Defendants' Motion for Attorney's Fees and Costs*. In its motion, Defendants requested attorney's fees in the amount of \$158,169.29. A hearing was held by telephone on August 22, 2018 and counsel for both sides presented their arguments relative to this motion. After considering all of the evidence submitted at trial, the memorandum of counsel and the Affidavit of Robert Lyles in support of *Defendants' Motion for Attorney's Fees and Costs*, I hereby award the Defendants attorney's fees and costs in the amount of \$133,161.00.

**1. Defendants Are the Prevailing Party**

In the trial of this matter involving a mechanic's lien, the Defendants were the prevailing party and the claims of Brown Contractors, including its claim under the Mechanic's Lien Statute. I also awarded Defendants the sum of \$346,693.00 on their counterclaim. Defendants were, therefore, clearly the prevailing party and are, therefore, entitled to attorney's fees. The party defending against a mechanic's lien that is ultimately dismissed is the prevailing party for the purposes of the attorney's fee award under § 29-5-10(a). *Cedar Creek Properties v. Cantelou Associates, Inc.*, 320 S.C. 483, 486, 465 S.E.2d 774, 775-776 (Ct. App. 1995); *Seckinger v. The Vessel, Excalibur*, 326 S.C. 382, 388, 483 S.E.2d 775, 777 (Ct. App. 1997). Alternatively, § 29-5-10(b) entitles the Defendants to an award of attorney's fees as the prevailing party whose offer of settlement was closer to the verdict reached. Under § 29-5-10(b), when both parties make an offer of settlement, the prevailing party is determined by the offer that is closer to the verdict reached, a verdict that is inclusive of counterclaims. The court ordered a judgment of \$346,693.00 in favor of the Defendants' counterclaims and dismissed the Plaintiff's mechanic's lien. The parties exchanged offers pursuant to the statute, with Plaintiff offering to accept the sum of \$75,000.00 in exchange for settlement and the Defendants offering to accept \$150,000.00 in exchange for settlement. Therefore, the Defendants' offer was closer to the verdict of \$346,693.00, rendering the Defendants the prevailing party under § 29-5-10(b).

S.C. Code Ann. § 29-5-10(a) allows the prevailing party to recover costs, including attorney's fees, associated with defending against the lien. In fact, I must award reasonable attorney's fees to the prevailing party. *T.W. Morton Builders, Inc. v. von Buedingen*, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994) (holding that "may" in § 29-5-10(a) should be interpreted as "must").

2. *Award of Attorney's Fees and Costs*

In their motion, Defendants request fees and costs associated with all of the claims asserted against them and for those associated with their counterclaims, under *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992). *Taylor* contemplates a situation in which nonstatutory causes of action are joined with the statutory cause of action that entitles the prevailing party to the award of attorney's fees. *Id.* Furthermore, the nonstatutory causes of action are related and intertwined with the statutory claim. *Id.* *Taylor* holds the following:

[W]hen an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim or it is shown that the services related to issues which were clearly beyond the scope of the statutory claim proceeding. This approach requires the party asserting the right to attorney fees to produce an itemized affidavit of their fees that they believe are related to the statutory claim. The opposing party then has the burden of showing which of the fees are clearly unrelated.

*Id.* (citation omitted). Whereas *Taylor* holds that an attorney need not discount his fees incurred in a related and intertwined nonstatutory claim presented as an alternative theory of recovery based on the same transaction, the instant case presents a procedural history even more compelling. Here, the Defendants defended against the mechanic's lien claim by counterclaiming with nonstatutory causes of action.

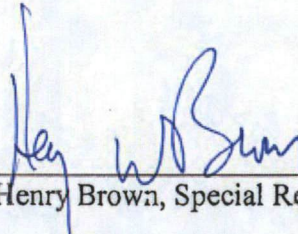
I find that Defendants' counterclaims were related to and intertwined with the statutory claim prosecuted by Plaintiff and that, other than as noted below, there were no claimed fees that were either "unrelated" to the statutory claim or that were clearly "beyond the scope" of the statutory proceeding.

In determining a reasonable attorney's fee, I am directed by law to assess the following six factors: 1) the nature, extent, and difficulty of the case; 2) the time necessarily devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) beneficial results

obtained; and 6) customary legal fees for similar services. *Glassock v. Glassock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). I have reviewed the Affidavit of Robert Lyles submitted in this matter and am familiar with the pleadings and discovery in this matter, the pre-trial motions that were filed, the claims and defenses of both sides, and the evidence that was submitted as part of these proceedings, and have applied each of the *Glassock* factors noted above to the fee request made by Defendants in rendering this award.

In Defendants' Motion for Attorney's Fees and Costs, Defendants included the Affidavit of Robert T. Lyles, which provides the basis for the Defendants' requested amount for attorney's fees. The amount requested totaled \$158,169.29. Pursuant to § 29-5-10(a), however, it lies within the province of the court to determine the attorney's fees provided they do not exceed the amount of the lien. Based upon the totality of the evidence before me, the materials submitted by the parties and the arguments of counsel, I hereby award Defendants the sum of \$133,161.00 in attorney's fees and costs which will be added to my award dated May 1, 2018.

AND IT IS SO ORDERED!

  
Henry Brown, Special Referee

Columbia, South Carolina  
February 22<sup>nd</sup>, 2019