Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO: 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 MC MARLIN 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

This matter comes before me, as Special Referee, by order of the court dated June 21, 2016. A trial was held from November 7, 2017 through November 10, 2017, and the parties supplemented the record with additional deposition excerpts and exhibits. All exhibits and supplemental testimony have been introduced into evidence without objection. All of my findings and conclusions are based upon my consideration of all of the evidence submitted by the parties.

Defendants (hereinafter referred to collectively as "McMarlins") were solicited by, and thereafter engaged Brown Contractors, LLC ("Plaintiff" or "Brown Contractors") to perform a

substantial renovation in connection with a home they purchased at 1850 Flag Street on Sullivan's Island, South Carolina (the "Project"). Brown Contractors, LLC was owned by James "Jay" Brown. Plaintiff instituted this matter with the filing of a Notice of Mechanic's Lien dated March 19, 2014 (the "Lien"). Suit to foreclose the Lien was filed on June 16, 2014. In its Complaint, Plaintiff alleged that the McMarlins did not pay Brown Contractors and, in addition to the Lien, brought claims for Breach of Contract and Unjust Enrichment. Plaintiff contends it is owed the sum of $206,428.59.

The McMarlins denied the claims, asserting various affirmative defenses, and counterclaimed asserting causes of action against both Plaintiff and Jay Brown personally[1]. The McMarlins asserted causes of action for Negligence, Breach of Implied Warranty of Workmanlike Service, Breach of Contract, Unfair Trade Practices ("SCUTPA") and Alter Ego/Amalgamation. The McMarlins claim Brown over-billed for the Project, failed to perform all of the work he contracted to perform and was paid to perform, and performed defective work, which either has been repaired or must be repaired. As of trial, the McMarlins' alleged damages total $669,280.98 in completion/repair costs and $58,080.58 for loss of use occasioned by the delay in completion of the project, for a total of $727,361.56. The McMarlins also claim an entitlement to punitive damages and relief under SCUTPA. Both parties seek an award of attorneys' fees under the Mechanics' Lien Act, and the McMarlins also seek an award under SCUTPA. Any award of attorneys' fees pursuant to the Mechanics Lien Act will be assessed after determination of the prevailing party as provided in the relevant statute.

[1] Unless otherwise noted, Plaintiff and Jay Brown will hereinafter be referred to collectively as "Brown".

PLAINTIFF'S CLAIM

Brown seeks payment totaling $206,428.59. This is reflected in Brown's Notice of Lien, dated March 19, 2014, which is Plaintiff's Exhibit 5. The parties do not have an executed written contract and Brown contends that the basis of the claim is that work at the McMarlin home was agreed to be on a cost-plus basis. In support, Brown points to pay applications that were submitted to the McMarlins and to the father of Mrs. McMarlin, Henry Salzhauer. (*See, e.g.* Defendants' Exhibits 78, 80, 82). Those pay applications are premised on costs incurred with an amount for profit and overhead. The McMarlins paid based on this billing format, but withheld $206,428.59 from Brown's billing for profit and overhead. All costs of construction were apparently paid.

The McMarlins deny that the work was to be done on a cost-plus basis and point to several pieces of evidence supporting their position. First, Brown submitted proposals to accomplish the work for a stated sum, which expressly contained an agreed upon, fixed project management fee for Brown (Defendants' Exhibit 8). They also point to a proposed cost-plus contract that Brown sent them (Defendants' Exhibit 13) that they refused to sign. Finally, there are voluminous email communications between the parties that reflect an effort on the part of the McMarlins to identify the estimated cost to complete the project and also reference agreed upon adjustments to Brown's fee as part of those negotiations. (*See e.g.* Defendants' Exhibits 48, 50-53, 55-56).

There are numerous disputes between the parties relating to the accuracy of Brown's billing. The parties also dispute why the price of the work increased significantly. Brown's first proposal has an estimated price of $685,000.00 (Defendants' Exhibit 8). Brown's final pay

application shows a total project price of $1,357,528.22 (Defendants' Exhibit 116). Brown's total billings were $1,461,999. This amount was established through Roy Strickland ("Strickland") a CPA (Defendants' Exhibit 9). However, based upon the findings below, those issues need not be decided because the failure to comply with the Residential Licensing Statute precludes Plaintiff's recovery.

1. **A Failure to obtain statutorily required license precludes Plaintiff's recovery.**

Regardless of the basis of the payment, Plaintiff's claims for payment under all causes of action are denied. Section 40-59-30 of the South Carolina Code of Laws prohibits an unlicensed residential builder from filing a Mechanic's Lien or collecting on a contract or any other claim for residential services. This prohibition extends to actions at law or in equity. Section 40 of the South Carolina Code regulates Residential Builders as follows:

40-59-20. Definitions.

> As used in this chapter unless the context clearly indicates otherwise:
>
> (4) "Firm" means a business entity functioning as a sole proprietorship, partnership, limited liability partnership, professional association, professional corporation, business corporation, limited liability company, joint venture or other legally constituted organization which *practices **or offers to practice** residential building or residential specialty contracting.* [emphasis added]
>
> (6) "Residential builder" means one who constructs, superintends, or **offers to construct or superintend** the construction, repair, improvement, or reimprovement of a residential building or structure which is not over three floors in height and which does not have more than sixteen units in any single apartment building, when the cost of the undertaking exceeds five thousand dollars. *Anyone who engages **or offers to engage** in such undertaking in this State is considered to have engaged in the business of residential building.* [emphasis added]

40-59-30. License requirement; enforcement of contracts; restraining orders.

> (B) Notwithstanding Section 29-5-10, or another provision of law, a person or firm who first has not procured a license or registered with the commission and is required to do so by law may not file a mechanics' lien or bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the person or firm entered into in violation of this chapter.

This is also clearly expressed in numerous cases. *See Lenz v. Walsh*, 362 S.C. 603, 607, 608 S.E.2d 471, 473 (S.C. Ct. App. 2005) ("South Carolina courts have held that, pursuant to the statute, a builder who is not licensed ***at the time he enters into a contract*** for residential construction may not bring an action to enforce the provisions of the contract"); *see also C-Sculptures, LLC v. Brown*, 403 S.C. 53, 57, 742 S.E.2d 359, 361 (2013). [emphasis added]

Brown admits that he personally did not carry a license as a residential builder or a general contractor. He personally holds a license that allows him to perform carpentry only. Brown contends that his company, Brown Contractors, LLC, maintained a certificate of authorization that authorized Brown Contractors, LLC to engage in residential building through the use of an individual's license. The individual who dedicates his license to the use of a firm is often referred to as that firm's qualifier. A firm may contract for Residential Work and receive payment for such services, but must first obtain an individual qualifier who dedicates his employment and his time to that firm. A firm must then obtain a valid Certificate of Authority ("COA"), and the Firm must also comply with all aspects of the statute. Brown contends that his company was granted the COA through the use of the license of a subcontractor, Vuong Nguyen. Mr. Nguyen has held a builders license since October 14, 2004, bearing license number 20378.

Section 40-59-410, authorizes an individual residential home builder or specialty contractor to practice through a firm offering residential building services. However, to become "properly licensed" in this way requires that the following conditions be met:

(1) one or more of the corporate officers in the case of a corporation, or one or more of the *principal owners in the case of a firm, or one or more employees are designated as the resident licensee in responsible charge* of each principal or branch office for the building services regulated by the commission and are licensed under the provisions of this chapter;

(2) the firm has obtained an executed surety bond approved by the commission in the sum of fifteen thousand dollars initially and as subsequently provided by regulation; **and**

(3) the firm has been issued a residential business certificate of authorization by the commission. Nothing in this section may be construed to mean that a license or registration to practice residential home building, residential specialty contracting, or home inspecting may be held by a firm.

Section 40-59-410 (H) states the following:

Residential business certificate of authorization as requirement for firm to engage in residential home building, residential specialty contracting, and home inspecting.

* * *

(H) Residential home builders, residential specialty contractors, or home inspectors engaged in practice through firms involving the practice of residential building, residential specialty contracting, or home inspecting may maintain branch offices as well as a principal place of business.

Each principal place of business as well as each branch office must have a resident residential builder, residential specialty contractor, or home inspector in responsible charge of the field and office building work or services provided. A residential home builder must supervise the residential home building aspects of the principal or branch office and may also supervise the residential specialty contracting from that location. A residential specialty contractor may supervise residential specialty contracting services of the principal or branch office as long as the services are within the scope of residential specialty contracting in the classifications for which the individual is authorized to engage. A home inspector may supervise home inspecting services of the principal or branch office as long as the services are within the scope of home inspecting for which the individual is authorized to engage. ***The resident residential home builder, residential specialty contractor, or home inspector is considered in responsible charge of only one place of business at a given time.*** [emphasis added]

> For purposes of this subsection, ***"engaged in practice" means holding oneself out generally to the public as qualified and available*** to perform residential building, residential specialty contracting, or home inspecting services. [emphasis added]

The application submitted to the state office of Labor License and Regulation in support of Brown's request for a certificate of authorization is Defendant's Exhibit 5. In that exhibit, Brown and the license holder, Mr. Nguyen, both attest that Mr. Nguyen is an employee of Brown Contractors, LLC. The application lists license number 20738 (Nugyen's license) as the qualifying license, and the application is dated June 6, 2012. The COA was first issued in January 2013. Defendants' Exhibit 3 is a COA with an issue date of April 16, 2014. There is no suggestion that Brown Contractors, LLC had been issued a COA at the time work commenced on the McMarlin home, no later than August 2012. On Brown's pay applications the contract date is stated to be January 23, 2012, five (5) months before an application for a COA was submitted to the state's licensing board.

The record also establishes that Brown, if it did not have a contract as of June 2012, was negotiating with Amy McMarlin, and soliciting the residential project in April 2012 and earlier, also prior to the application being submitted. Section 40-59-10 defines a Residential Builder as one who "offers to construct or superintend . . . ." The solicitation of the project prior to even applying for the COA is an unequivocal violation of the licensing statute. Soliciting a contract without a license would be a violation of 40-50-30 (B).

In addition, Brown admitted at trial that Mr. Nguyen was a 1099 independent contractor and that his work at the McMarlins' home was controlled, at all times, by Brown. Brown, not Mr. Nugyen, was directing the building services to a successful completion, and Brown, not Mr.

Nugyen was the person in responsible charge. The testimony also establishes that Mr. Nugyen was not an employee of Brown LLC within the intent of the statute. .

To be the qualifier for the COA, MR. Nguyen would have to be "the resident licensee in responsible charge." Mr. Nguyen does not meet the definitions of either role as set out in 40-59-400 (5) and (6). Specifically, Mr. Nguyen was not an employee with responsible charge.

Brown's bookkeeper, Deborah Wenner, was asked how many employees Brown Contractors, LLC had and she testified, "None." Mr. Nguyen was a subcontractor who billed as a subcontractor and who was, according to Brown, free to accept work, and did accept work, from other contractors while also working jobs for Brown Contractors. Mr. Nguyen, was not an employee of Brown Contractors, LLC. Even if he were to be considered an employee, he was not in full time responsible charge, and in particular did not have responsibility for the McMarlin project.

The application states that "The qualifying party may be in responsible charge of only one place of business at a given time." The last sentence of 50-410 (H) states the same limitation. "The resident residential home builder . . . is considered in responsible charge of only one place of business at a given time."

Mr. Nugyen executed the application representing he would be the qualifier in responsible charge for Brown while continuing to use the same license to support his separate subcontracting business. Mr. Nugyen was using one license for two places of business and this is a clear violation of the statute, rendering the statements in the application misrepresentations. Brown acquired no rights as the result of the COA issued in response to misrepresentations and false statements of fact.

Brown contends that *16 Jade Street, LLC v. R. Design Construction Co.*, 778 S.E.2d 448 (2012) salvages its right to enforce its claims. *Jade Street* did not repeal the provisions of the licensing statute. *Jade Street* ruled that the holder of a license is not personally liable for the defaults of the builder simply by being the qualifier or holding the license. The licensee's delicts related to the use of the license are a matter to be dealt with by the licensing body, unless there are omissions by the individual license holder that would subject the licensee to liability for claims by the firms wrongful conduct, independent of the license held. Nothing in the *Jade Street* holding would negate the statutory provisions and case law upon which the conclusions in this Order are based. While the qualifier may not be personally liable solely because he or she is the qualifier, the firm remains unable to enforce its contract or assert equitable claims if the firm fails to comply with the licensing statute. Nothing in *Jade Street* can be read to negate the prohibitions set forth in §40-59-30.

Based on the totality of the evidence, and the credibility of the witnesses, I find that Brown was not properly licensed at any time during the solicitation or performance of the McMarlin job. Because a license was required, and Brown was not properly licensed, Brown's claims, in their entirety, in law or in equity, are denied, and should be and are dismissed with prejudice.

2. Plaintiff's Mechanics Lien Is Invalid

For the reasons set forth above, Plaintiff's Mechanic's Lien is invalid. As an additional ground, the Mechanics Lien filed by Plaintiff did not comply with the filing requirements of the Mechanic's Lien statute, § 29-5-10, et seq., S.C. Code, Ann.

Section 29-5-15 requires that a contractor seeking to file a lien record his contractor's license number on the lien document when the lien is filed. Plaintiff used Nguyen's license number, and based on the findings above, this was not a valid license number for Brown Contractors and failed to satisfy the requirements of the statute.

MCMARLINS' CLAIM

I find that the McMarlins have been damaged by the deficient work by Brown Contractors LLC and are entitled to recover damages. Prior to identifying these damages, an explanation of the overall contractual relationship is necessary.

The McMarlins and Brown are each capable and experienced in construction and its management and methods. Despite their expertise, the parties proceeded with a complex residential renovation without first having adequately defined their agreement. Brown wanted a cost-plus, however, McMarlin rejected that format and made their rejection clear. McMarlin wanted a fixed price and Brown rejected that format. With each side having clearly stated their position contrary to that of the other side, the work proceeded and reached a less than satisfactory conclusion without the form of the contract ever having been decided by express agreement.

Although much of the testimony related to Brown's billings, and their reasonableness and necessity, McMarlin stated near the end of the testimony that they were not seeking recovery of any of the money paid to Brown. For that reason I have not considered any recovery by McMarlin of the amount they paid of Brown's billings. These claims will be dismissed.

McMarlin is asking for an award to compensate them for the costs necessary to correct defective, deficient, and incomplete work. In order to consider these claims, the contractual

obligations of Brown must be defined with sufficient clarity to establish where Brown did (or did not) breach its obligations. The project was a renovation of an existing structure and any and all problems with the home cannot be charged to Brown, as its responsibility is limited to those aspects of the residence that Brown agreed to correct or reconstruct.

In the absence of an executed agreement the parties' course of conduct would be a reasonable standard to define the agreement reached and Brown's scope of responsibility. The billings by Brown were clearly presented on a cost plus basis. There was a total cost number stated in each pay application, based on accumulated and identified costs, and costs were billed and paid generally as incurred. There was no apparent effort to establish a cap on costs.

As a result, the contract adopted between the parties by their conduct was cost-plus. That does not fully define the areas and components of the residence to be worked on by Brown, nor does it determine the obligations assumed. However, the line items in the schedule of values, the amount billed, together with the testimony, provides a reliable baseline to define the extent of the contractual obligations and the scope of the work assumed by Brown.

Roofing illustrates this approach outlined above. Defendants Exhibit 8 is an initial estimate of the cost of the work. This Exhibit lists, but does not price or set the scope of 5 V metal roofing. The early pay application included at Defendants Exhibit 29 lists membrane roofing at $600, with other line items that may or may not include roofing. By the time of pay application 2.11, dated December 9, 2013, Defendants Exhibit 116, the line item for membrane roofing for phase one is listed as $6,000, with the total billed costs having increased to $12,822.

HVAC has a scheduled value in Defendants Exhibit 29 of $4700. In Defendants Exhibit 116, HVAC is a two phase item, with the initial phase reaching $23,000 and phase two added

$5,800, totaling $28,800 as the estimated total. The actual billing is $43,147, indicating a significantly larger scope of work, encompassing a large part, if not all of the HVAC system.

Applicable case law does not require damages to be assessed with precision, only that there be a sufficient evidentiary basis to make a fair and reasonable assessment. I find that the record established by the testimony, exhibits, and the costs billed for the various aspects of the residence, establishes with sufficient accuracy Brown's contractual scope of work to allow a reasonably accurate assessment of the portions of the residence Brown assumed responsibility for and in relation to which Brown breached its obligations and is liable for damages. I find that the record is sufficient to make a reasonably accurate award of damages as noted hereinafter. I have made findings only as to those damages that are supported by sufficient evidence.

DAMAGES

Brown's final pay application is Exhibit D116, which reflects the value of the completed and stored to date labor and materials as $1,367,528. The balance to finish is a negative and unexplained ($357,583). The only items of work within the schedule of values not completed are the overhead door at $3,000, medicine cabinets and mirrors at $3,000, interior doors are 84% complete and windows 99% complete and flashing and water proofing at 34%. McMarlin paid all but $206,000 of this total, and the unpaid amount was created by deductions to profit and overhead. In effect, Brown has been paid for all labor and materials.

Based on the exhibits and testimony, I find that McMarlin has paid an amount sufficient to entitle them to full performance of the scope of work agreed to be performed for the items of work in the schedule of values (including punch list). The punch list allowance in Defendants Exhibit 116 is $15,000, and the amount billed and paid is $29,182. Accepting Brown's line items

as reasonable amounts to accomplish the work described in each line item, I conclude McMarlins' payment of these amounts entitles them to full performance of the scope of work undertaken, and as identified in the schedule of values.

I have reviewed the amended report of Brown Atlantic submitted after the conclusion of the testimony and found it to be an adequate basis to assess damages. Counsel for Brown examined Howard Brown of Brown Atlantic by deposition and the deposition testimony has been submitted, reviewed and is part of the record. I find that Brown is responsible for the scope of work addressed by Brown Atlantic.

REPAIRS AND COMPLETION COSTS NOW EXPENDED

Exhibit 1 to the Howard Brown testimony (given by deposition on January 24, 2018) reflects the items of work performed and the total payment of $174,695.04 to Howard Brown. The majority of the money spent was for HVAC and the roof, which were aspects of the work that Brown charged extensive amounts to perform and accepted liability for the adequacy of the results. Note VLN invoices for detailed HVAC work by Brown in exhibits 142, 143, and 144.

Glasgow put on a copper roof on the Project, but this was beyond the quality contracted for by Brown. Taking into consideration adjustments for copper and other differences, I find that McMarlin shall recover $132,500 for money paid to Brown Atlantic, as described in Exhibit 1.

In Exhibit 2 to the Brown Atlantic deposition, an estimate is given of $43,593 to correct structural inadequacies caused by an undersized beam used by Brown. The necessity for such a beam was not noted by the architect in his plans; however, Brown recognized the need for support and determined the size and characteristics of the needed bean. Brown was incorrect

and used an undersized beam. Brown accepted the responsibility to properly size the beam but failed to do so. McMarlin shall recover $43,593.

Exhibit 2 of the Brown Atlantic testimony includes an estimate for paint, flooring and punch list items in the amount of $152,117.00. I conclude a portion of these costs, subject to adjustments, should be recovered. I find that McMarlin should recover $133,100 of this total.

Exhibit 2 includes a claim of $298,875 to rewire the entire house. A substantial rewire was alleged necessary because of the absence of nail guards and the discovery of a nail penetrating a wire. I find that Brown did perform improper work in regard to the nail, but I do not find that the scope of the claim is supported.

Brown submitted evidence that the dimensions of the walls did not implicate the code requirement for nail guards. Absent any contrary testimony, I accept their position. The McMarlins' claim is premised not exclusively on the code, but on the uncertainty of the frequency of nails into wires.

This leads to the McMarlins' conclusion that the entire house must be rewired. Exhibit 74 contains a number of photos of exposed interior walls without protector plates, but without any nails penetrating. Repairs were made to the damaged areas and the McMarlins are entitled to recover some measure of damages. In the absence of a code violation, an award sufficient to require removal and replacement of all drywall, cabinets, trim and electrical wire is not supported by the evidence. The record does not show sufficiently repetitive instances of incorrectly nailed wires to support the McMarlins damage claim in its entirety. In fact, the photos show repetitive instances of undamaged wire that do not require replacement. I find the McMarlins are entitled to recover $25,000 for rewires and a reasonable investigation.

The McMarlins also seek to recover for loss of use. I cannot conclude that all delays and loss of use are the responsibility of Brown. Brown does bear some reasonable responsibility for loss of use, given the extended time period to perform repairs and conclude the punch list. Brown's contribution would include any loss of use due to the performance of repairs. I find the McMarlins are entitled to recover $12,500.

The McMarlins should recover as follows:

Expended money	$132,500
Structural repairs	$43,593
Paint flooring and punch list	$133,100
Electrical	$25,000
Loss of Use	$12,500
Total Award	**$346,693**

CAUSES OF ACTION

I conclude, as a matter of law, that the McMarlins are entitled to recover against Brown Contractors, LLC on their causes of action for Breach of Contract and Breach of Implied Warranty of Workmanlike Service. Although there was no executed contract, the course of conduct created a contract between Brown and McMarlin. Brown was obligated to perform its work in compliance with code, industry standard, and according to the documents and correspondence defining the scope of work on the Project. Furthermore, a warranty of Workmanlike Service arose out this relationship.

Brown Contractors, LLC also undertook a duty, independent of the contract, to adhere to code and industry standard, and undertook a duty in tort/negligence owed to McMarlin that also supports the recovery awarded against Brown Contractors, LLC.

The facts found herein create a breach of these three causes of action.

I conclude that this action involves a contract between two private parties and does not have the requisite public interest or possibility of repetition to support an action under the Unfair Trade Practices Act. I conclude this cause of action should be dismissed.

JAMES BROWN PERSONAL LIABILITY

The McMarlins contend Jay Brown should be held liable for the damages caused by the work performed by Brown Contractors, LLC. I do not believe the record supports the imposition of personal liability as to the specific damages awarded here.

The record shows that Jay Brown indicated during the negotiations and through the work that Brown Contractors, LLC was to be the contracting party. The proposed contracts sent to Mr. Salzhauer (Defendants Exhibits 13 and 14) both stated the contracting party was Brown Contracting and not Mr. Brown personally. Mr. Salzhauer noted his objection to the cost plus format, but not Brown Contractors, LLC as the contracting party. Numerous exhibits reflect messages and emails exchanged with the signature as Jay Brown for Brown Contractors, LLC.

Jay Brown clearly acted on behalf of Brown Contractors, LLC. However, Jay Brown could be personally liable if negligent conduct as to the portions of the residence addressed in the Brown Atlantic report is shown by Mr. Brown personally. As to the specific items of damage found herein, there is not sufficient evidence of Jay Brown's personal negligence to impose liability on Mr. Brown individually.

The claims against Mr. James Brown IV should be dismissed with prejudice.

CONCLUSIONS

NOW THEREFORE, based on the findings of fact and conclusions of law expressed herein,

IT IS HEREBY ORDERED THAT

1) All of Plaintiff Brown Contractors, LLC's claims and causes of action are dismissed with prejudice;

2) The Mechanics Lien and Lis Pendens filed by Brown Contractors, LLC is dismissed and the RMC is authorized and directed to cancel and dismiss such documents in the real estate records for Charleston County;

3) Andrew Joseph McMarlin and Amy Salzhauer are entitled to recover, and are awarded judgment against Brown Contractors, LLC on their causes of action for Breach of Contract, Breach of Warranty of Workmanlike Service and Negligence in the amount of $346,693, with the right to recover this amount on any cause of action but for only one recovery;

4) All other claims and causes of action asserted by Andrew Joseph McMarlin and Amy Salzhauer are dismissed with prejudice;

5) All claims against James Brown, IV personally are dismissed with prejudice; and

6) I retain jurisdiction over this case to review and rule on any subsequent applications for attorney's fees.

AND IT IS SO ORDERED!

Henry Brown as Special Referee

May 1, 2018