

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Judge

Case No. 2016-CP-39-00103

Appellate Case No. 2019-00235

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SC Court of Appeals

Scott E. Arbet.....Respondent,

v.

Riverstone Development Group, Inc.Appellant.

INITIAL BRIEF OF APPELLANT RIVERSTONE DEVELOPMENT GROUP, INC.

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STATEMENT OF ISSUES ON APPEAL

- I. Does South Carolina Code Section 40-11-370(C) preclude a general contractor's enforcement of a construction contract where the general contractor possessed the necessary general contracting license at the contract's creation but the client's change orders pushed the contract price above the general contractor's license threshold?

STATEMENT OF THE CASE

This case is a construction dispute. Scott Arbet (“Arbet”) filed this case on February 1, 2016, alleging causes of action for declaratory judgment, breach of contract, breach of express and implied warranties, negligence, negligent misrepresentation, fraud, constructive fraud, breach of fiduciary duty, and violation of the South Carolina Unfair Trade Practices Act. (Compl., R. at __.) Arbet filed an amended summons and complaint on August 16, 2016 and added causes of action for violation of South Carolina Code Section 29-5-10, slander of title, and equitable indemnification. (Am. Compl., R. at __.) Riverstone Development Group, Inc. (“Riverstone”) filed its answer and counterclaims on September 15, 2016, alleging quantum meruit and breach of contract counterclaims. (Answer, R. at __.) On November 28, 2017, Arbet moved for partial summary judgment on his declaratory judgment cause of action. (Pl.’s Mot. for Partial Summ. J., R. at __.)

The trial court granted Arbet’s partial summary judgment motion on January 7, 2019. (Order, R. at __.) In this order, the court:

- (1) barred Riverstone from enforcing the provisions of the construction contract with Arbet pursuant to South Carolina Code Section 40-11-370(C);
- (2) dismissed Riverstone’s quantum meruit and breach of contract counterclaims with prejudice; and
- (3) dissolved a mechanics’ lien Riverstone filed on Arbet’s real property.

(Order, R. at __.) Riverstone moved to alter or amend the Court’s judgment on January 11, 2019.

(Mot., R. at __.) The trial court denied this motion on February 6, 2019. (Order, R. at __.)

Riverstone filed its notice of appeal on February 22, 2019. (Notice, R. at __.) Arbet filed a

motion to dismiss the appeal with this Court on February 26, 2019. (Mot., R. at __.) This Court denied Arbet’s motion to dismiss on May 2, 2019. (Order, R. at __.)

STATEMENT OF FACTS

Riverstone is a licensed general contractor with the South Carolina Department of Labor, Licensing, and Regulation, Contractor's Licensing Board ("Contractor's Licensing Board"). (Def.'s Opp. to Mot. for Partial Summ. J. ("Opp. to MSJ"), R. at __.)

Arbet asked Riverstone to build a house, and Riverstone agreed. (Opp. to MSJ, R. at __.) On February 13, 2015, Riverstone and Arbet entered into a construction contract ("Contract"). (Opp. to MSJ, R. at __.) When the parties entered into the Contract, Riverstone held a Group IV general contractor's license (Opp. to MSJ, R. at __), which, in 2015, allowed Riverstone to bid on and build projects up to \$750,000. *See* S.C. Code Ann. § 40-11-260(A)(4) (2015).

Pursuant to the Contract, Arbet agreed to pay "Seven Hundred Fifty Thousand Dollars and Zero Cents (\$750,000)[,] with final contract amount to be adjusted plus or minus 5% based upon client's final selections and design changes to the Arbet Residence home plan to achieve this budget." (Opp. to MSJ, R. at __.)

Arbet assured Riverstone that Arbet would not make any change orders during construction. (Opp. to MSJ, R. at __.) In April 2015, less than two months after Riverstone and Plaintiff entered into the Contract, Plaintiff requested a change order that pushed the Contract above the \$750,000 amount, to over \$875,337. (Tr. at 9; Opp. to MSJ, R. at __.) Between February 2015 and January 2016, Arbet requested a total of twelve change orders that increased the Contract amount by \$263,892, to \$1,013,892. (Opp. to MSJ, R. at __.) Arbet and Riverstone disputed about the construction, and Riverstone filed a summons and complaint to initiate this action. (Compl., R. at __.)

STANDARD OF REVIEW

A trial court may only grant summary judgment when there exists no issue of material fact and Arbet, as the moving party, is entitled to judgment as a matter of law. Rule 56(c), SCRPC.

When reviewing the trial court's grant of a summary judgment motion, this Court applies the same standard of review as the trial court under Rule 56, SCRPC. *Fowler v. Hunter*, 380 S.C. 121, 668 S.E.2d 803 (Ct. App. 2008) (citing *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005)).

To determine whether any triable issues of fact exist, this Court must consider the evidence and all reasonable inferences in the light most favorable to Riverstone, the non-moving party in the trial court. *Law v. S.C. Dep't of Corrs.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

ARGUMENT

- I. THE TRIAL COURT ERRED IN HOLDING THAT SOUTH CAROLINA CODE SECTION 40-11-370(C) AND CASELAW PRECLUDE RIVERSTONE FROM ENFORCING ITS CONTRACT WITH ARBET BECAUSE RIVERSTONE POSSESSED THE NECESSARY GENERAL CONTRACTING LICENSE AT THE CONTRACT'S CREATION.

Because the trial court based its holding on Supreme Court caselaw that is distinguishable from this case, it erred in holding that Riverstone is precluded from enforcing its contract with Arbet. Accordingly, this Court should reverse the trial court's order and remand for further proceedings.

In its January 1, 2019 Order Granting Plaintiff's Motion for Partial Summary Judgment ("Order"), the trial court made several findings of fact. First, the Court found that Riverstone held a general contractor's license allowing it to perform jobs worth up to \$750,000. (Order, R. at __.) Second, the Court found Arbet and Riverstone entered into a construction contract for a sum of "Seven Hundred Fifty Thousand Dollars and Zero Cents (\$750,000.00) with *final contract amount* to be adjusted plus or minus 5% based upon client's final selections and design changes to the Arbet Residence home plan to achieve this budget." (Order, R. at __ (emphasis added).) Last, the Court found that Riverstone and Arbet entered into change orders that ultimately pushed the contract sum to \$1,004,197. (Order, R. at __.)

South Carolina Code Title 40, Chapter 11 governs the licensure of general contractors.

South Carolina Code Section 40-11-30 states:

No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting . . . without a license issued in accordance with this chapter.

S.C. Code Ann. § 40-11-30 (2019). A contractor’s failure to hold a license as required by section 40-11-30 is governed by section 40-11-370(C):

An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract.

S.C. Code Ann. § 40-11-370(C) (2019). The 2015 version of the South Carolina Code, which was in force when the parties contracted to build the house, limited Riverstone to construct houses worth \$750,000 or less. S.C. Code Ann. § 40-11-260(A)(5) (2015).¹

In *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 742 S.E.2d 359 (2013), the South Carolina Supreme Court analyzed sections 40-11-30 and 40-11-370(C). In *C-Sculptures*, a residential general contractor agreed to build a home for \$800,000, but it only had a general contractor’s license limiting it to projects under \$100,000. 403 S.C. at 55, 742 S.E.2d at 360. During construction the parties disputed about the project, and the general contractor filed an action seeking to enforce its mechanic’s lien against the buyer. *Id.* The matter went before an arbitrator, and the buyer argued that the general contractor was barred by South Carolina Code Section 40-11-370(C) from bringing an action against the buyer because the general contractor did not have a valid license. *Id.* at 56, 742 S.E.2d at 361.

The general contractor admitted that it did not have the appropriate license, but argued that it was merely “under-licensed,” not unlicensed, and therefore section 40-11-370(C) did not prevent its enforcement of the contract. *Id.* at 57, 742 S.E.2d at 361. The South Carolina Supreme Court’s holding was narrow. It held that the plain language of section 40-11-370(C) is “clear, defined, explicit, and unquestionably applicable[,]” and that the arbitrator simply chose to ignore the statutory language, which was a “manifest disregard” of the law and was sufficient to vacate the

¹ South Carolina Code Section 40-11-260(A)(5) was amended in June 2016. For purposes of this lawsuit, the pre-amendment version from the 2015 South Carolina Code of Laws controls.

arbitrator's award. *Id.* at 56-58, 742 S.E.2d at 360-61. Furthermore, the Court stated that "the term 'valid' does not give rise to the slightest ambiguity." *Id.* at 57, 742 S.E.2d at 361.

The *C-Sculptures* court held that section 40-11-370(C) is valid and unambiguous. 403 S.C. at 56-58, 742 S.E.2d at 360-61. Again, section 40-11-370(C) states that "[a]n entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract." In this case, Riverstone *had* a valid license at the formation of the contract for the amount set forth in the contract but the change orders pushed the contract amount above the licensure threshold. (Opp. to MSJ, R. at __.) This case is different from *C-Sculptures*, and this Court should not apply the *C-Sculptures* holding here.

The Court then discussed several cases in accord with its holding. In *Duckworth v. Cameron*, 270 S.C. 647, 244 S.E.2d 217 (1978), a residential general contractor entered into a contract to build a house but did not have a general contractor's license. The Supreme Court analyzed a similar statute that prevented a contractor without the appropriate license from enforcing the contract and found that "any builder who violates the chapter by *entering into* a contract for home construction *without obtaining* the required license simply cannot enforce the contract." *Duckworth*, 270 S.C. at 649, 244 S.E.2d at 318 (emphasis added).

In *Skiba v. Gessner*, 374 S.C. 208, 648 S.E.2d 605 (2007), an unlicensed contractor was hired to perform lot clearing and the removal of ground debris. The property owner claimed that the work he requested also included landscaping preparation and refused to pay the contractor's invoices. *Id.* at 208, 648 S.E.2d at 605. The contractor filed a mechanic's lien, and the trial court held that the contractor was foreclosed from enforcing their contract because he did not have a general contractor's license. *Id.* at 209-210, 648 S.E.2d at 606. At a hearing, the contractor presented evidence showing that the work the contractor did was not in preparation for a building site and argued that he did not have to have a general contractor's license to perform the work. *Id.*

Accordingly, the court changed its previous ruling, holding that the contractor was not required to have a license to perform the work. *Id.* On appeal, the property owner argued that because the work that the contractor performed was to prepare for landscaping, not for work related to a building, a mechanic's lien could not attach to the property. *Id.* at 211, 648 S.E.2d at 606. The South Carolina Supreme Court agreed and held that the mechanic's lien could not attach to the owner's property because the contractor's work was "not in connection with the erection, alteration, or repair of a building or structure," and the Court found that the general contractor "decided to take an inconsistent position" when he "discovered that he was required to have a license to legally perform the work." *Id.* at 211-12, 648 S.E.2d at 607.

C-Sculptures, *Duckworth*, and *Skiba* all consider scenarios where the general contractor at issue was either unlicensed (*Duckworth* and *Skiba*) or under-licensed (*C-Sculptures*). In *C-Sculptures*, the general contractor was licensed for \$100,000 but bid on a \$800,000 job. In *Duckworth* and *Skiba* the contractors were unlicensed but bid on jobs.² In those three cases the general contractors were far from possessing the appropriate licensure.

The legislative intent behind sections 40-11-30 and 40-11-370(C) is to protect the public from the shoddy work of unlicensed and under-licensed general contractors. See S.C. Code Ann. § 40-1-10(A) (2019) (stating that South Carolina can regulate lawful occupation and trade when "necessary for the preservation of the health, safety, and welfare of the public"); S.C. Code Ann. § 40-1-10(B) (2019) (statutes and regulations may be imposed upon a profession or occupation to protect the public interest).

There are several other facts that distinguish this case from *C-Sculptures*. Riverstone previously had a South Carolina General Contractor Group V license, which allowed it to build

² The *Duckworth* opinion does not state the amount of the contract. The *Skiba* contract was for \$13,200. 374 S.C. 208, 648 S.E.2d at 605.

houses of any value, but Riverstone let the Group V license change to the Group IV license, as Riverstone did not do enough business to warrant the Group V recertification. (S.C. Code Ann. § 40-11-260(A)(5) (2015); Opp. to MSJ, R. at __.) In *C-Sculptures*, *Duckworth*, and *Skiba*, each of the general contractors were either unlicensed or under-licensed. *C-Sculptures*, 403 S.C. at 55, 742 S.E.2d at 360; *Duckworth*, 270 S.C. at 647, 244 S.E.2d at 217; *Skiba*, 374 S.C. at 208, 648 S.E.2d at 605. In those cases, none of the general contractors previously held a license allowing them to perform work up to an unlimited amount and were all unlicensed or under-licensed. *See generally id.* Riverstone previously held an unlimited Group V license, so it had demonstrated to the Contractor's Licensing Board that it was capable of performing work up to a higher dollar amount. In addition, Riverstone also has unlimited general contractor's licenses in North Carolina and Florida. (Opp. to MSJ, R. at __.) None of the *C-Sculptures*, *Duckworth*, or *Skiba* general contractors were licensed in any other state. *See generally C-Sculptures*, 403 S.C. at 55, 742 S.E.2d at 360; *Duckworth*, 270 S.C. at 647, 244 S.E.2d at 217; *Skiba*, 374 S.C. at 208, 648 S.E.2d at 605. *C-Sculptures* is distinguishable from this case.

Before construction began, Arbet assured Riverstone that Arbet would not make any change orders during construction. (Opp. to MSJ, R. at __.) In exchange for Arbet's assurances, Riverstone reduced its administrative building fees from fifteen percent to twelve percent, or \$27,000. (Opp. to MSJ, R. at __.) Additionally, Arbet requested that Riverstone strike its boilerplate \$200 change order processing fee, and Riverstone agreed, based on Arbet's assurances. (Opp. to MSJ, R. at __.)

In *C-Sculptures*, the general contractor was licensed up to \$100,000 but agreed to build a house for \$800,000. 403 S.C. at 55, 742 S.E.2d at 360. In *C-Sculptures*, there is no mention that the buyer assured the general contractor of the final contract amount and went back on his assurances. *Id.* The *C-Sculptures* opinion contains no mention of the general contractor amending

its standard construction contract, as Riverstone did here, in reliance on the buyer's assurances. Arbet cannot promise one thing to Riverstone and do another, and then use the law to cover up his conduct. Equity weighs against unclean hands. See *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant."). Similarly, neither *Duckworth* nor *Skiba* involved a buyer who reneged on his assurances. *Duckworth*, 270 S.C. at 647, 244 S.E.2d at 217; *Skiba*, 374 S.C. at 208, 648 S.E.2d at 605.

Each of Riverstone's principals has worked in the construction industry for twenty-eight years and knows to respect legal boundaries. (Opp. to MSJ, R. at __.) When Arbet requested the first change order, Riverstone representatives met with Arbet at the construction site and told Arbet that Riverstone would need to discuss Arbet's requested changes with the Pickens County Building Codes Administration as the changes would exceed Riverstone's Group IV license threshold. (Opp. to MSJ, R. at __.) In good faith, Riverstone contacted the Pickens County Building Codes Administration *before performing any work*, who told Riverstone that Riverstone did not need to obtain an additional permit for Arbet's requested changes, as Riverstone could not control when a client requested changes. (Opp. to MSJ, R. at __.) South Carolina has a strong policy of deference to administrative agencies, and Riverstone acted in reliance on the Administration's response and should not be punished for following its guidance. See *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014) (analyzing the doctrine of administrative deference and stating that "[t]he construction given to a statute by those charged with the duty of exercising it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons"). When applying South Carolina's deference doctrine, courts defer to an administrative agency's interpretations "unless there is a compelling reason to

differ.” *Id.*; see also *Barton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 415, 745 S.E.2d 110, 121 (2013) (stating that an agency's interpretation “will not be overruled absent compelling reasons”).

In a similar vein, another South Carolina administrative agency found that Riverstone committed no wrong against Arbet. When Arbet failed to pay Riverstone for the work it performed, Riverstone formally demanded payment, and Arbet filed a complaint against Riverstone with the South Carolina Contractor’s Licensing Board. (Opp. to MSJ, R. at __.) Riverstone responded to the complaint and provided the Contractor’s Licensing Board with substantial information and documentation regarding the construction. (Opp. to MSJ, R. at __.) After reviewing the matter, the Contractor’s Licensing Board dismissed Arbet’s complaint. (Opp. to MSJ, R. at __.)

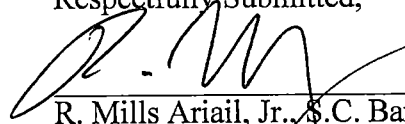
Two South Carolina administrative agencies charged with overseeing general contractors have scrutinized Riverstone for its work on Arbet’s house and found that Riverstone committed no wrong. (Opp. to MSJ, R. at __.) Because the circuit court’s holding ignored South Carolina’s doctrine of administrative deference, this Court should reverse the trial court’s judgment and remand for further proceedings.

This case is distinguishable from *C-Sculptures* for many reasons, and the *C-Sculptures* narrow holding does not foreclose Riverstone’s enforcement of its contract with Arbet.

CONCLUSION

Because Riverstone had a valid license for the original \$750,000 at the contract's formation, South Carolina Cod Section 40-11-370(C) and *C-Sculptures'* narrow holding do not foreclose Riverstone from enforcing its contract with Arbet, and Riverstone respectfully requests that this Court reverse the trial court's judgment and remain this case for further proceedings.

Respectfully Submitted,



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June 28, 2019
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM PICKENS COUNTY
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The Honorable Perry H. Gravely, Circuit Judge

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PROOF OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this 28th day of June, 2019, I served upon the below named Respondents copies of the **Initial Brief of Appellant Riverstone Development Group, Inc. and Designation of Matter to be Included in the Record on Appeal** by depositing copies of the same via U.S. Mail, postage prepaid, US Mail in an envelope addressed as set forth herein below:

Townes B. Johnson, III, Esquire
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Denise Tanner LaBeck
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June 28, 2019

Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
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RE: Scott E. Arbet vs. Riverstone Development Group, Inc.
Appellate Case No. 2019-000235

Dear Ms. Kitchings:

Enclosed please find an original and a two copies of each of the following: (1) Initial Brief of Appellant Riverstone Development Group, Inc; (2) Designation of Matter to be Included in the Record on Appeal; and (3) Proof of Service.

Please return a filed copy of each to my office in the envelope provided for your convenience.

Thank you for your consideration of this letter.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl

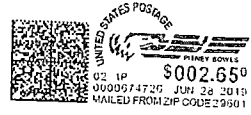
RMAjr/dl
Enclosures (as stated)

cc:
Townes B. Johnson, Attorney for Respondent

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