

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2013-002176

Moats Construction Services, LLC. Appellant,

v.

Bobby D. Sanders, Jr.; Staci Y. Sanders; Premier Southern Homes, LLC; Elite Mechanical Services, Inc.; Level Construction, LLC; Love Heating & Air, LLC; Solid Rock Construction Services, LLC; All Carolina Exteriors, LLC; American Concrete and Precast, Inc.; and Harbin Lumber Co., Inc., Defendants,

Of whom Bobby Sanders is the Respondent.

Bobby Sanders, Jr., and Staci Y. Sanders, Third Party Plaintiffs,

Of whom Bobby Sanders, Jr. is the Respondent,

v.

Henry Beal. Third Party Defendant.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in holding that Moats Construction, LLC did not have a valid mechanic's lien under S.C. Code Annotated §29-5-10?
2. Did the Circuit Court err in holding that a S.C. Code Annotated §29-5-20 notice of furnishing was required for a valid mechanic's lien?
3. Did the Circuit Court err in holding that Moats Construction, LLC did not have a valid mechanic's lien under S.C. Code Annotated §29-5-20?
4. Did the Circuit Court err in calculating the remaining amount owed by Bobby Sanders under his contract with Premier?
5. Did the Circuit Court err in holding that Bobby Sanders was not unjustly enriched?

STATEMENT OF THE CASE

Appellant Moats Construction, LLC (hereinafter referred to as "Moats Construction") brought suit to foreclose its mechanic's lien and also for breach of contract and quantum meruit against Respondent Bobby D. Sanders (hereinafter referred to as "Sanders") arising out of the construction of a driveway at Sanders' Residence (hereinafter referred to as "Sanders' Residence"). Moats Construction completed the construction of the driveway on March 28, 2008, but was never paid. Moats Construction's mechanic's lien was filed and served on Sanders on May 27, 2008. On September 29, 2008, Moats Construction filed suit to foreclose its mechanic's lien.

The matter was tried before the Honorable Alexander S. Macaulay on March 15, 2012. The Order of Judgment was entered on March 28, 2013 (hereinafter referred to as the "March 28, 2013 Order"). In the March 28, 2013 Order, Judge Macaulay held that Moats Construction was a subcontractor and did not have a

separate contract with Sanders; that Moats Construction's mechanic's lien did not satisfy the statutory requirements of S.C. Code Ann. § 29-5-20(B); that the amount due by Sanders on the contract price for the residence was effectively zero; and that because Sanders had suffered damages as a result of the general contractor's breach of contract, Moats Construction's cause of action for quantum meruit failed. The circuit court also awarded Sanders costs and attorneys' fees pursuant to S.C. Code Ann. § 29-5-20(C).

On April 23, 2013, Moats Construction filed Plaintiff's Motion to Alter or Amend and for New Trial pursuant to SCRPC Rule 59(a) and (e). The Court heard Moats Construction's motion on May 23, 2013. On August 12, 2013, the Court filed its order denying Moats Construction's motion. On September 19, 2013, Moats Construction served the Notice of Appeal on Sanders.

STATEMENT OF FACTS

On July 14, 2007, Sanders, and his wife, contracted with Premier Southern Homes, LLC (hereinafter referred to as "Premier") through its owner, Henry Beal (hereinafter referred to as "Beal"), for the construction of Sanders' Residence, located at 311 Sunny Lane in Anderson, South Carolina. (R. p. 94-95.) (The contract between Sanders and Premier is hereinafter referred to as the "Premier Contract"). Pursuant to the Premier Contract, Sanders agreed to pay Premier \$236,544.00 for the construction of Sanders' Residence. (R. p. 132, lines 18-19.) The Premier Contract provided for the scope of construction, the time for completion of construction, the rights and obligations of the parties under the Contract, and the parties' remedies in the event of a breach of the Premier Contract.

Sometime in March of 2008, Moats Construction was asked to provide an estimate for the construction of a driveway. (R. p. 146, lines 6-13.) Russell Moats (hereinafter referred to as "Moats"), owner of Moats Construction, Beal, and Sanders met at Sanders' Residence to discuss the layout and cost of the driveway. (R. p. 147.) During the conversation, Moats provided an estimate for the work, which was accepted by Sanders. (R. p. 150, lines 9-13.) Thereafter, Moats Construction began construction of the driveway according to the specifications and instructions provided by Sanders. (R. p. 101, lines 152-153.)

Sometime after beginning construction of the driveway, Moats testified that he had a conversation with Sanders regarding payment, wherein Sanders assured Moats that there was ample money remaining in the escrow account and that Sanders would make sure Moats was paid for the work performed by Moats Construction. (R. p. 156, lines 12-22.)

After completing construction of the concrete driveway, Moats Construction attempted to invoice Sanders directly for payment. (R. p. 172, lines 1-12.) Moats Construction sent an invoice for \$5,921.63 to 103 McLain Lake Drive, Anderson, South Carolina 29625. (R. p. 154, lines 2-13.) Unbeknownst to Moats, Sanders was not presently residing at that address and the invoice was never received. (R. p. 102.)

According to Sanders, the last date that Premier was at the residence was the day after the driveway was completed, but Sanders testified that he did not become concerned by or become aware of any problems with Premier until Sanders' received notice of Elite Mechanical's mechanic's lien. (R. p. 128-130.) According to Sanders, he received notice of Elite Mechanical's lien a week or two after it was filed on

March 28, 2008. (R. p. 128-129.) After receiving notice of Elite Mechanical's mechanic's lien, Sanders confronted Beal regarding Elite Mechanical's lien. (R. p. 129.) Sanders testified that that was the last time he spoke with Beal. (R. p. 138, line 7-10.)

On May 15, 2008, the Certificate of Occupancy was issued for the residence. (R. p. 108, lines 3-8.) Shortly thereafter, on May 27, 2008, Moats Construction filed a mechanic's lien on the property. (R. p. 30-35.) At the time Moats Construction filed its mechanic's lien, \$23,654.40 remained from the original construction loan. (R. p. 194.) Sanders testified that he was aware of Moats Construction's mechanic's lien as of June 8, 2008. (R. p. 133, lines 15-17.) At that time, \$20,696.38 remained from the original construction loan. (R. p. 133, 194.) Rather than applying the remaining loan proceeds in whole to pay Moats Construction's mechanic's lien, Sanders used the money to make warranty repairs, pay unsecured creditors and legal expenses, and pay himself for liquidated damages for Premier's alleged breach of the Premier Contract. (R. p. 133, 194.) Sanders acknowledged that he was aware that several subcontractors including Moats Construction had not been paid. (R. p. 133, lines 18-21.) During discovery, Sanders produced a spreadsheet of the mechanic's liens which encumbered Sanders' Residence. (R. p. 195.) According to the document, several of the liens were not served. (R. p. 195.) At the time of trial, all of the liens except for Moats Construction's liens had been resolved.

ARGUMENT

- I. The circuit court erred in failing to hold that Moats Construction had a valid lien under §29-5-10

In the March 28, 2013 Order, the circuit court found that Moats Construction did not have a valid §29-5-20(A) mechanic's lien as it failed to properly file and serve a notice of furnishing as enumerated in S.C. Code Ann. §29-5-20(B). However, the circuit court failed to consider whether Moats Construction had a valid mechanic's lien under S.C. Code Ann § 29-5-10. Because it misapplied the law and reviewed Moats Construction's claim solely under §29-5-20, the circuit court erred in failing to find that Moats Construction had a valid mechanic's lien under S.C. Code Ann §29-5-10 and also that it perfected its lien.

S.C. Code Ann. §29-5-10 gives a mechanic's lien to a person who by agreement or with the consent of the owner performs labor upon or furnishes materials in the erection of a structure. Stoudenmire Heating & Air Conditioning Co., Inc. v. Craig Bldg. P'ship, 308 S.C. 298, 301, 417 S.E.2d 634, 636 (Ct. App. 1992) (citing Ringer v. Graham, 286 S.C. 14, 331 S.E.2d 373 (Ct.App.1985)).

In the March 28, 2013 Order, the circuit court held that Sanders and Moats Construction did not enter into an enforceable contract, however, the circuit court failed to consider whether Sanders consented to the work performed by Moats Construction. (R. p. 6-7.) That in itself may be sufficient to establish lien rights under S.C. Code Ann. § 29-5-10. As noted above, S.C. Code Ann. § 29-5-10 gives a lien to a person who with consent of the owner performs labor or furnishes materials. Consent implies a right and power to exercise a choice, to consent or object thereto. See Rice & Santos, Inc. v. Jones, 279 S.C. 201, 203, 305, S.E.2d 74, 75 (1983) (citations omitted).

It is not disputed that prior to Moats Construction performing any work at the project, Moats, Sanders, and Beal met at the residence to discuss the layout of the driveway. (R. p. 147.) Sanders directed the work to be performed by Moats Construction. (R. p. 147.) Sanders testified that he wanted to change the layout of the driveway set by the prior contractor and wanted to ensure that it would be done correctly. (R. p. 100.) During this meeting Moats provided an estimate for the work, which was agreed to by Sanders. (R. p. 150, lines 9-13.) If Sanders had not agreed with Moats' recommendations regarding construction or layout or the cost of the estimate, Sanders could have presumably asked for other bids from other contractors. As Sanders consented to the work performed by Moats Construction, Moats Construction had a valid and enforceable lien under S.C. Code 29-5-10 on the property on March 28, 2008, once it constructed the driveway.

S.C. Code Ann. § 29-5-90 requires the service and filing of a certificate of lien within 90 days of the last date that work was performed. See Preferred Sav. & Loan Ass'n, Inc. v. Royal Garden Resort, Inc., 301 S.C. 1, 4, 389 S.E.2d 853, 854 (1990). Section 29-5-90 provides for the dissolution of a lien unless within 90 days after the lienor provided labor or materials for the building or structure, the lienor files and serves a sworn statement of the just and true account due to the leinor, with all credits given, together with a description of the property intended to be covered by the lien, and the name of the owner of the property. See id.

It is undisputed in this case that Moats Construction properly complied with S.C. Code Ann. §29-5-90. On May 27, 2008, 61 days after Moats Construction completed the construction of Sanders' driveway, Moats Construction's Certificate of

Claim of Mechanic's Lien and Statement of Accounts (the "Certificate") was filed with the Anderson County Register of Deeds Office and served on Sanders. (R. p.30.) Exhibit A of the Certificate is a sworn statement of account signed by Moats, which provided that Moats Construction was owed \$5,921.63, which was a just and true account of the amount due to Moats Construction for labor, services, and materials provided by it for improvement of Sanders' Residence and that no payment on the account had been made and therefore no credits were given. (R. p. 32.) Exhibit B of the Certificate provided a legal description of the property on which Sanders' Residence was constructed. (R. p. 33.) Finally, the Certificate correctly provided that the property described in Exhibit B is owned in fee simple by Bobby D. Sanders, Jr. and Staci Sanders. (R. p. 33.)

Lastly, Moats Construction commenced suit to foreclosure its S.C. Code Ann. §29-5-10 lien within six months of March 28, 2008, as required by S.C. Code Ann. §29-5-120. (R. p. 15.) Section 29-5-120 requires that the lienor file suit to foreclosure its lien within six months after the lienor ceases to furnish labor or materials. Preferred Savings and Loan, 301 S.C. 1, 4, 389 S.E.2d 853, 854 (1990). Moats filed the lawsuit to foreclose its mechanic's lien on September 9, 2008, within six months of March 28, 2008, the last date it performed service. (R. p. 15.) Therefore, Moats Construction complied with requirements of S.C. Code Ann. §29-5-90.

As Moats Construction had a valid and enforceable lien under S.C. Code Ann. §29-5-10 and properly provided notice and filed suit on its mechanic's lien, Moats was not required to provide notice of the lien pursuant S.C. Code Ann. §29-5-40. Section 29-5-40 applies only to a lien arising out of S.C. Code Ann. §29-5-20, where

the claimant contracts with someone other than the owner and does not have a lien under §29-5-10. See S.C. Code Ann. §29-5-40; Stoudenmire Heating & Air Conditioning Co., Inc. v. Craig Bldg. P'ship, 308 S.C. 298, 417 S.E.2d 634 (Ct. App. 1992). A lien arising out of S.C. Code Ann. §29-5-10 is not affected by the amount of the contract between the owner and the general contractor. Stoudenmire Heating & Air Conditioning Co., Inc. v. Craig Bldg. P'ship, 308 S.C. 298, 301, 417 S.E.2d 634, 636 (Ct. App. 1992) (citing Ringer v. Graham, 286 S.C. 14, 331 S.E.2d 373 (Ct. App. 1985)). In Stoudenmire, the appellate court affirmed the trial court's holding that Stoudenmire had a lien under S.C. Code Ann. §29-5-10 and §29-5-20(A). Id. Regarding the amount owed under S.C. Code Ann. §29-5-10, the appellate court affirmed the trial court's award of the amount to Stoudenmire without regard to the amount remaining owed to the general contractor. Id. The circuit court failed to consider whether Moats Construction held a lien under S.C. Code Ann. § 29-5-10, as it constructed the driveway with Sanders' consent and as such its order should be reversed.

II. The circuit court erred in holding that Moats Construction was not entitled to recover under a mechanic's lien because it failed to file and follow the requirements of a notice of furnishing as provided by §29-5-20(B)

In its March 28, 2013 Order, the circuit court held that "Moats was not entitled to recover under a mechanic's lien for his failure to file and serve a proper notice of furnishing." (R. p. 11.) In reaching this conclusion, the circuit court compared Moats Construction's Certificate of Claim of Mechanic's Lien and Statement of Accounts against the requirements for a notice of furnishing provided by S.C. Code Ann. §29-5-20(B). (R. p. 11.) Specifically, the circuit court held that the

lien notice did not state with whom Moats Construction contracted, did not sufficiently describe the materials and supplies provided, or the date the first services were rendered as required by S.C. Code Ann. §29-5-20(B). (R. p. 11.). Regardless of whether Moats Construction had a lien under S.C. Code Ann. §29-5-10 or S.C. Code Ann. §29-5-20(A),¹ Moats was not required to file a notice of furnishing as provided under S.C. Code Ann. §29-5-20(B). As discussed below, Moats Construction was required to provide notice to Sanders under §29-5-40, which only requires written notification to the owner of the furnishing labor or material and the amount or value thereof.

In South Carolina, construction liens are governed by S.C. Code Ann. §29-5-10, et seq. The remedy of a mechanic's lien is derogation of the common law, and the statute is to be strictly construed. Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 129, 631 S.E.2d 252, 256 (2006).

In order to perfect and enforce a mechanic's lien, the person asserting the lien (1) must serve upon the owner or person in possession and file with the register of deeds or clerk of court a notice or certificate of lien containing the lien amount, a description of the real property, and other required information "within ninety days after he ceases to labor on or furnish labor or materials for such building or structure"; (2) must commence a lawsuit seeking to enforce the lien within six months after ceasing to provide labor or materials for such real property; and (3) must file a notice of the pending action (lis pendens) within six months after ceasing to provide labor or materials for such real property.

Id.

¹ As noted by the court in T.W. Morton Builders, Inc. v. von Buedigen, South Carolina's Mechanic's Lien Statute recognizes two types of liens. 316 S.C. 388, 400, 450 S.E.2d 87, 94 (Ct. App. 1994) Section 29-5-10 affords a lien to a mechanic or supplier who deals directly to the owner. Id. Section 29-5-20 affords a lien to a mechanic or subcontractor who deals with a general contractor or some person other than the owner or his agent. Id.

As explained below, compliance with Section §29-5-20(B) is not required to recover under a mechanic's lien, but rather S.C. Code Ann. §29-5-20(B) serves as a protection for a general contractor against remote claimants. It also provides a method by which a remote claimant can circumvent that protection by providing the general contractor with notice of its work and information regarding the offending party. S.C. Code Ann. §29-5-20(B) provides:

In no event shall the aggregate amount of any liens filed by a sub-subcontractor or supplier exceed the amount due by the contractor to the subcontractor to whom the sub-subcontractor or supplier has supplied labor, material, or services unless the sub-subcontractor or supplier has provided notice of furnishing labor or materials by certified or registered mail to the contractor. Such notice of furnishing labor or materials shall include:

- (1) the name of the sub-subcontractor or supplier who claims payment;
- (2) the name of the person with whom the claimant contracted or by whom he was employed;
- (3) a description of the labor, services, or materials furnished and the contract price or value thereof. Materials specially fabricated by a person other than the one giving notice and the contract price or value thereof shall be separately stated in the notice;
- (4) a description of the project where labor, services, or materials were used sufficient for identification;
- (5) the date when the first and the last item of labor or service or materials was actually furnished or scheduled to be furnished; and
- (6) the amount claimed to be due, if any.

After receiving such notice, no payment by the contractor to the subcontractor will lessen the amount recoverable by the person so giving notice. However, in no event shall the total aggregate amount of liens on the improvement exceed the amount due by the owner.

A plain reading of the statute enumerates why S.C. Code Ann. §29-5-20(B) does not apply to the facts of this case. First, the notice of furnishing or materials

provided in S.C. Code Ann. §29-5-20(B) applies to sub-subcontractors or suppliers who have provided labor or materials with someone other than the general contractor or the owner. There is no evidence in the record of Moats Construction contracting with anyone other than Sanders or Premier. Therefore, Moats is not a remote claimant.

Further, the notice of furnishing in S.C. Code Ann. §29-5-20(B) is intended to control the relationship of a remote claimant and the general contractor. S.C. Code Ann. §29-5-20(B) provides protection to a general contractor against remote subcontractors or suppliers where the general contractor has paid its subcontractors in full. Subsection B affords the general contractor a payment defense against remote claimants where the general contractor may be unaware of the subcontractor's subcontractors or suppliers and therefore should not be responsible for ensuring their payment. However, a remote claimant can thwart that protection by sending the general contractor a notice of furnishing as provided in S.C. Code Ann. §29-5-20(B) by certified or registered mail. If the remote claimant provides a S.C. Code Ann. §29-5-20(B) notice of furnishing to the general contractor, "no payment by the contractor to the subcontractor will lessen the amount recoverable by the person so giving notice." S.C. Code Ann. §29-5-20(B)(1)-(5) requires a remote claimant to provide the general contractor with information regarding the person with whom the remote claimant contracted, the labor or services provided, a description of the project, and the first and last date that materials were furnished. This provides the general contractor with the information necessary to determine which subcontractor has not paid the remote claimant, what materials or services were provided, and on

which project those services were provided. Once received, the general contractor uses this information to ensure that it does not pay the offending subcontractor, as “no payment by the [general] contractor to the [non-paying] subcontractor will lessen the amount recoverable by the [remote claimant].” S.C. Code Ann §29-5-20. Therefore, S.C. Code Ann. §29-5-20(B) is intended to limit a general contractor’s liability once he has paid his subcontractors in full, but also provides remote claimants with the ability to ensure receipt of payment by complying with S.C. Code Ann. §29-5-20(B).

As discussed below, where a laborer or supplier performed labor or supplied materials with the consent of the owner, the laborer or supplier has a lien under S.C. Code Ann. §29-5-10 and is not required to provide any notice to the general contractor, but must serve and file its notice of lien in accordance with S.C. Code Ann. §29-5-90. Alternatively, where a laborer or supplier contracts with the general contractor, the laborer or supplier has a lien under S.C. Code Ann. §29-5-20(A) and must provide notice to the owner in accordance S.C. Code Ann. §29-5-40² for the lien to attach and also serve and file its notice of lien in accordance with S.C. Code Ann. §29-5-90. Here the circuit court imposed requirements that the lien notice state the person with whom Moats Construction contracted, a description of the labor and services provided, and the initial date Moats Construction began its work, and therefore, the circuit court imposed requirements on Moats Construction that do not exist in the lien law. As the circuit court erred in applying the notice of furnishing

² Whenever work is done or material is furnished for the improvement of real estate upon the employment of a contractor or some other person than the owner and such laborer, mechanic, contractor or materialman shall in writing notify the owner of the furnishing of such labor or material and the amount or value thereof, the lien given by § 29-5-20 shall attach upon the real estate improved as against the true owner for the amount of the work done or material furnished. But in no event shall the aggregate amount of liens set up hereby exceed the amount due by the owner on the contract price of the improvement made. S.C. Code Ann. § 29-5-40

requirements of S.C. Code Ann. §29-5-20(B), this Court must reverse the circuit court's decision.

III. The circuit court erred in holding that Moats Construction did not have a valid lien under §29-5-20(A)

As discussed above, the circuit court erred in holding that Moats Construction was required to provide a notice of furnishing under S.C. Code Ann. §29-5-20(B). If this Court finds that Moats Construction did not direct contact with Sanders and thus did not have a lien against Sanders' property under S.C. Code Ann. §29-5-10, then, in the alternative Moats Construction had a mechanic's lien under S.C. Code Ann. §29-5-20(A).

S.C. Code Ann. § 29-5-20(A) affords a lien to a mechanic or subcontractor who deals with a general contractor or some person other than the owner or his agent. T.W. Morton Builders, Inc. v. von Buedigen, 316 S.C. 388, 400, 450 S.E.2d 87, 94 (Ct. App. 1994). Section 29-5-20(A) provides that "[e]very 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 the value of the labor or material so furnished."

The parties do not dispute that by constructing the driveway at Sanders' Residence, Moats Construction furnished labor and materials for the improvement of the Sanders' Residence. Nor do the parties dispute that Sanders authorized the construction of the driveway or that Moats Construction completed the construction of the driveway to Sanders' satisfaction. (R. p. 147.) It is likewise undisputed that Moats Construction was not paid for the labor or materials. As Moats Construction provided labor and material for the improvement of Sanders' Residence which

Sanders authorized and was not paid for the work, Moats Construction had a lien on the Sanders' property under S.C. Code Ann. §29-5-20(A).

Further, Moats Construction provided Sanders notice of its lien as required by S.C. Code Ann. §29-5-40 on May 27, 2008. (R. p. 30.) "If a person claiming [a] lien was employed by someone other than the owner, he must notify the owner of the furnishing of the labor or material for the lien to attach." Shelley Const. Co., Inc. v. Sea Garden Homes, Inc., 287 S.C. 24, 26, 336 S.E.2d 488, 490 (Ct. App. 1985) (citing South Carolina Code Ann. §29-5-40; Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956)). It is likewise not disputed that on May 27, 2008, Moats Construction served its Certificate of Lien on Staci Sanders, Sanders' wife, which is within the time set forth in the mechanics lien law.

Nor can it be disputed that the Certificate complied with the requirements of S.C. Code Ann. §29-5-40. Section 29-5-40 does not prescribe the form of the lien notice, but only requires that the owner receive notice in writing of the furnishing of such labor or material and the amount or value thereof. See Stoudenmire Heating & Air Conditioning Co., Inc. v. Craig Bldg. P'ship, 308 S.C. 298, 417 S.E.2d 634 (Ct. App. 1992). The Certificate states that Moats Construction provided labor, materials, and supplies which were utilized as improvements to the property with the consent of Sanders. (R.,p.30.) Further, it provides that during the progress of the aforementioned work, Moats Construction incurred expenses totaling \$5,921.63. (R. p. 30.) As Moats Construction complied with the provisions of §29-5-40, its §29-5-20(A) lien attached on May 27, 2008.

Notwithstanding the existence of a valid lien, Sanders argued, and the circuit court agreed, that Sanders was entitled under §29-5-20(B) to offset the amount owed to Moats Construction for various damages Sanders claimed against the homebuilder Beal. (R. p. 12.) Sanders cannot offset the amount remaining under the Premier Contract with payments made related to defects in workmanship or materials utilized as it could not have recovered those amounts under the Premier Contract. The Premier Contract provides that “[w]arranty of the construction project against defects in workmanship or materials utilized shall be handled between the Owner and the Subcontractors and/or Suppliers directly without involving the [Premier].” Therefore, pursuant to the contract, alleged defects in workmanship were to be handled by Sanders and the subcontractors who performed the work directly. Rather than contacting any of the subcontractors, Sanders paid additional contractors out of the remaining \$23,654.40 owed on the Primer Contract. Sanders’ payments to perform warranty work were not contemplated in, nor recoverable under the Premier Contract and therefore cannot be offset.

IV. The circuit court erred in applying improper offsets and determining that the remaining amount owed by Sanders on the Premier Contract was zero

In its March 28, 2013 Order, the circuit court calculated that Sanders had suffered damages in the amount of \$46,618.84 as a result of Premier’s negligent work, which exceeded the \$23,654.40 that Sanders owed Premier on May 20, 2008. (R. p. 12.)

Therefore, the remaining amount owed by Sanders on the Premier Contract was zero. The circuit court misapplied the law and erred in holding that Sanders

could offset the remaining amount on the Premier Contract with expenses not contemplated by S.C. Code Annotated §29-5-40. This Court should remand to allow the circuit court to correctly determine what offsets, if any, Sanders may properly apply against the Premier Contract.

The liability of the owner to claimants holding liens pursuant to §29-5-20(B) is limited to the balance due by him to the prime contractor at the time the owner receives the notice from the subcontractor. Stoudenmire Heating & Air Conditioning Co., Inc. v. Craig Bldg. P'ship, 308 S.C. 298, 302, 417 S.E.2d 634, 637 (Ct. App. 1992) (citations omitted). At trial, the circuit court found that \$23,654.40 remained owed on the contract price on May 20, 2008. (R. p. 12.) Sanders received notice of Moats Construction's lien on May 28, 2008. (R. p. 35.) There were no expenditures between May 20, 2008 and May 28, 2008. (R. p. 194.) Therefore, the amount remaining owed by Sanders under the Premier Contract at the time it received notice of Moats Construction's lien was \$23,654.40, which greatly exceeds the amount of Moats' lien.

Where the general contractor leaves the job before it is finished, the amount due under §29-5-40 is determined by the percentage of the contracted-for work completed. Action Concrete Contractors, Inc. v. Chappellear, 404 S.C. 312, 316, 745 S.E.2d 77, 79 (2013). An owner may assert a payment defense, which means that he has paid the general contractor the full amount due under the contract before receiving notice of the subcontractor's lien. Id. (citations omitted). However, it was not argued and the court did not find that Premier only performed a percentage of the

Premier Contract. Nor has it been adjudicated that Premier actually left the project before it was completed.

Sanders cannot offset the amounts paid for repairs after it filed its pleadings. On November 25, 2008, Sanders filed his Answer, Cross-Claim, and Third-Party Complaint, in which Sanders stated that “[Sanders had] paid Premier Southern Homes, LLC in full for all labor and materials supplied to the subject property, and denied owing any additional money on this project.” (R. p. 36.) In Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC, the appellate court affirmed the trial court’s exclusion of damages discovered after the pleadings were filed. 372 S.C. 89, 98, 641 S.E.2d 459, 463 (Ct. App. 2007). The trial court, in excluding evidence regarding property damage, held that “after discovered negligence may not be asserted by way of off-set because it has not pled.” Id. Because the damage was not discovered until after Owner’s pleading was submitted, the pleading obviously did not contain any reference to the damage. Id. As of the filing of Sanders’ Answer on November 25, 2008, Sanders had only expended \$12,156.30 of the initial \$23,654.40 which Sanders owed to Premier, leaving \$11,498.61 remaining under the original contract. (R. p. 194.) Further, included in the spreadsheet of alleged damages introduced at trial were five estimates for work that had not been completed. (R. p. 194.) The estimates were provided on March 17, 2010, nearly two years after the Certificate of Occupancy was issued for Sanders’ Residence. (R. p. 194.) The trial court improperly reduced the amount owed under the contract by amounts paid and estimates sought well after the filing of Sanders’ responsive pleading.

The circuit court erred in allowing Sanders to deduct amounts not related to the completion or repair of Premier's work, including liquidated damages, legal fees, and fees for a late closing. "Where a general contractor abandons a job before work is complete and the lienholder does not give notice until after that juncture, the owner is entitled to credit for damages, if any, incurred by the owner to finish the general contractor's work." Action Concrete Contractors, Inc. v. Chappellear, 404 S.C. 312, 319, 745 S.E.2d 77, 80 (2013) (citing Stoudenmire, 308 S.C. 298, 417 S.E.2d 634 (1992)) (emphasis added). Alternatively, where the general contractor abandons the job prior to completion and the subcontractor does not give notice until after the project is complete, and the original general contractor's work was shoddily performed, the owner may be entitled to offset moneys spent to repair that work against the lienholder's recover. Action Concrete Contractors, Inc. v. Chappellear, 404 S.C. 312, 319, 745 S.E.2d 77, 80 (2013) (citing Wood v. Hardy, 235 S.C. 131, 110 S.E.2d 157 (1959)). The Supreme Court in Action Concrete clearly limited the damages that could be used to offset against a lienholder's recovery to those expended to repair the work performed by the general contractor or to complete the project. Id.

In this case, the trial court erred in providing Sanders' credit for settlement amounts and the cost of the payment bond as they relate to the claims of non-perfected lien holders as those payments were not made to complete or repair Premier's work. At trial, Sanders introduced a spreadsheet of mechanic's liens that had been filed on the property (the "Liens Spreadsheet"). (R. p. 195.) The Liens Spreadsheet provides the name of the lienor, the type of service, dates of service, the

date the lien was filed, whether the lien was served, the amount owed, the lien status, and whether the lien was bonded. (R. p. 195.) The most recent date on the Liens Spreadsheet is January 7, 2009. (R. p. 195.) The spreadsheet also lists four liens which were not served. (R. p. 195.) A mechanic's lien which arises under §29-5-20(A) that is not filed with the register of deeds office and served on the owner within 90 days of the last date of work is dissolved under §29-5-90. See Preferred Sav. & Loan Ass'n, Inc. v. Royal Garden Resort, Inc., 301 S.C. 1, 4, 389 S.E.2d 853, 854 (1990). Therefore, these sums were improperly credited. The trial court also deducted amounts paid by Sanders for liquidated damages, delayed closing costs, and attorneys' fees. (R. p. 194.) Because those amounts were not expending in finishing or repairing the work performed by Premier, the trial court erred in crediting them to Sanders.

Likewise, Sanders cannot offset his legal expenses for items arising out of the alleged breach of the Premier Contract. The Premier Contract provides that "in the event of any arbitration or litigation relating to the project, project performance or this contract, the prevailing party shall be entitled to reasonable attorney fees, costs, and expenses." (Supp. R. p. 4.) Any attorneys' fees or costs paid by Sanders to settle with the other subcontractors are in the nature of contractual damages and cannot be used to offset the amount owed under the contract. Further, the attorneys' fees expended by Sanders in defending against Moats Construction's lien action cannot be applied to offset the amount owed on the contract. In essence, the trial court double-counted the attorneys' fees.

V. **The circuit court erred in holding that Moats Construction could not recover under Quantum Meruit.**

Where an appeal involves equitable questions, the Court may find the facts in accordance with its own view of the preponderance of the evidence. See e.g., Lewis v. Lewis, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011.) This is also described as *de novo* review. Id., 392 S.C. at 386, 709 S.E.2d at 652. “[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy.” QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct.App.2004) (internal quotation marks omitted). As such, an action based on a theory of quantum meruit sounds in equity. Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence. Denman v. City of Columbia, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). Further, this Court may decide this case without any particular deference to the decisions of the courts below. See Wiegand v. U.S. Auto. Ass’n, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011) (citations omitted).

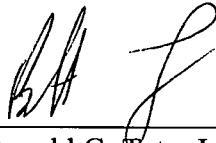
In the March 28, 2013 Order, the circuit court held that Sanders was not unjustly enriched as Sanders had suffered damages as a result of Premier’s breach. (R. p. 13.) Citing Columbia Wholesale, the circuit court held that quantum meruit will not lie if the owner can prove that he has fully performed under the contract with the general contractor. 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). However, as stated above, the circuit court incorrectly calculated the amount remaining due by Sanders under the Premier Contract. As the circuit court erred in its calculations, this

Court should remand to correctly determine the amount remaining owed to Premier and to hold that Sanders was unjustly enriched.

CONCLUSION

For the reasons stated herein, or for any reason that may appear in the record, Moats Construction respectfully requests that this Court reverse the circuit court's March 28, 2013 Order of Judgment.

Respectfully submitted,



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August 25, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No.: 2013-002176

Moats Construction Services, LLC. Appellant,

v.

Bobby D. Sanders, Jr.; Staci Y. Sanders; Premier Southern Homes, LLC; Elite Mechanical Services, Inc.; Level Construction, LLC; Love Heating & Air, LLC; Solid Rock Construction Services, LLC; All Carolina Exteriors, LLC; American Concrete and Precast, Inc.; and Harbin Lumber Co., Inc., Defendants,

Of whom Bobby Sanders is the Respondent.

Bobby Sanders, Jr., and Staci Y. Sanders, Third Party Plaintiffs,

Of whom Bobby Sanders, Jr. is the Respondent,

v.

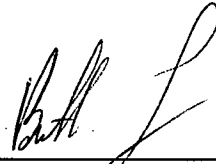
Henry Beal. Third Party Defendant.

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b),

SCACR



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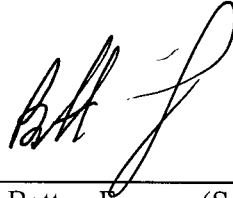
SC Court of Appeals

PROOF OF SERVICE

I do hereby certify that on the 25th day of August, 2014, I served a copy of the **FINAL BRIEF OF APPELLANT** upon the attorney for the Respondent, and others as specified below, by placing in the U.S. Postal Mail:

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