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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, 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 D. Sanders, Jr. is the ..... Respondent,

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

v.

Henry Beal, Third-Party Defendant.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court correctly hold that Moats Construction, LLC's was a subcontractor in contractual privity with Premier Southern Homes, LLC and not Bobby and Staci Sanders and therefore limited a lien under S.C. Code § 29-5-20?**

II. **Did the trial court correctly hold that Moats Construction, LLC was not entitled to recover under S.C. Code Ann. § 29-5-20 because the aggregate amount of liens exceeded the amount due by the Sanders on the contract with Premier Southern Homes?**

III. **Did the trial court correctly hold that the Sanders were not unjustly enriched because they had already paid Premier Southern Homes?**

STATEMENT OF THE CASE

In March 2008 Appellant, Moats Construction, LLC (hereinafter referred to as "Moats") constructed a concrete driveway for Respondent, Bobby D. Sanders, Jr., and Staci Y. Sanders (hereinafter referred to as "Sanders"). On May 27, 2008 Moats filed and served a mechanic's lien related to these services. On September 29, 2008 filed suit to foreclose its mechanic's lien. Moats also sought damages for breach of contract and unjust enrichment.

Trial was held before the Honorable Alexander S. Macaulay on March 25, 2012. On March 28, 2013 the court held that Moats was a subcontractor who contracted with the general contractor on the project, Premier Southern Homes (hereinafter referred to as "Premier"). Accordingly, the court found no contract existed between Moats and Sanders. Because Moats was a subcontractor he was limited to the remedies provided by S.C. Code Ann. § 29-5-20. The court further held that, pursuant to S.C. Code Ann. § 29-5-40, Moats was not entitled to any recovery because the aggregate amount owed by the

Sanders on the project's contract was effectively zero. Finally, the court held that Moats was not entitled to recover under a theory of unjust enrichment because the Sanders had fully performed under the contract with Premier. The court also awarded attorney's fees and costs to Sanders pursuant to S.C. Code Ann. § 29-5-20(C).

On April 23, 2013 Moats filed a Motion to Alter or Amend and for a New Trial pursuant to SCRCP Rule 59(a), (e). The court heard Moats' motion on May 23, 2013 and issued an order denying the motion on August 12, 2013. Moats' appeal followed.

STATEMENT OF FACTS

On July 14, 2007 Sanders contracted with Premier for the construction of a home on 311 Sunny Lane in Anderson County, South Carolina. (R. pp. 94-95.) In March 2008 Premier contacted Moats to request an estimate for the construction of a driveway. (Trial R. p. 146, l. 4-18.) Moats met with Premier and Sanders to review the property and scope of work and provide an estimate. (R. p. 146, l. 18-25.) Premier accepted the estimate and Moats began construction of the driveway. (R. p. 148, l. 9-13.)

After the work was completed Moats approached Sanders about payment. Sanders told Moats that there were funds available in escrow and to send the bill to Premier for payment. (R. p. 156, l. 8-22.) In April 2008 the mechanical subcontractor on the project, Elite Mechanical, filed a mechanic's lien seeking $5,498.90. (R. p. 195.) Shortly thereafter Sanders became aware that Premier had abandoned the job, other subcontractors had not been paid, and the project was not complete. (R. p. 127, l. 13-24; R. pp. 128-129.) On May 27, 2007 Moats filed a mechanic's lien on the property seeking $5,921.63. (R. p. 195.) At that time $23,654.40 remained due on the Premier contract. (R. p. 103.) Sanders was forced to pay additional contractors to complete

unfinished items and repair severely defective work completed by Premier and its subcontractors. (R. p. 114-125.)

STANDARD OF REVIEW

"A proceeding to enforce a mechanic's lien is legal in nature and [the appellate] court's scope of review is limited to determining if there is any evidence to support the ruling of the trial court." Stoudemire Heating and Air Conditioning Co., Inc. v. Craig Bldg P'ship, 308 S.C. 298, 300, 417 S.E.2d 634, 636 (Ct. App. 1992). "The [trial court's] findings of fact will not be disturbed on appeal unless found to be without evidence which reasonably supports the [trial court's] findings." T.W. Morton Builders, Inc. v. von Buedingen, 316 S.C. 388, 397, 450 S.E.2d 87, 92 (Ct. App. 1994). "The trial judge is in a superior position to judge the witnesses' demeanor and veracity, and therefore, his findings should be given broad discretion." Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

ARGUMENT

I. The trial court correctly held that Moats was a subcontractor pursuant to S.C. Code § 29-5-20.

A. Moats was a subcontractor in direct contractual privity with Premier and not Sanders.

The necessary elements of a contract are: offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). With certain exceptions, a contract need not be in writing to be enforceable. Gaskins v. Firemen's Ins. Co. of Newark, N.J., 206 S.C. 213, 216, 33 S.E.2d 498, 499 (1945). However, for a contract to be binding, there must be a mutual manifestation of assent between the parties as to the terms of the contract. Edens v. Laurel Hill, Inc., 271 S.C. 360, 247 S.E.2d 434 (1978). Moats, as the plaintiff at trial, bore the burden of proof

as to all terms essential to the creation of a contract. Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 322 S.E.2d 474 (Ct. App. 1984).

The trial court held that Moats was hired by Premier and was therefore a subcontractor on the project. The testimony and documentary evidence reasonably support this finding and should not be disturbed on appeal. The court based this ruling on the "demeanor of the witnesses and an examination of the documentary evidence that was submitted." (R. p. 8.) Specifically, the court found Bobby Sanders' testimony to be credible and that Moats lacked credibility. (R. p. 8.). Sanders testified that Premier hired Moats and that he had no input on the hiring of any subcontractors. (R. p. 98, l. 23-25.) Sanders further testified that Premier hired Moats, brought him to the jobsite, and was responsible for paying Moats along with the other subcontractors. (R. p. 98, l. 23-24; p. 101, l. 20; p. 106, l. 10-13; p. 114, l. 17-24.)

The documentary evidence also supports the trial court's finding. The construction contract includes installation of the driveway as part of the scope of work between Premier and Sanders. (R. p. 5.) The only documentary evidence Moats presented at trial was an invoice he prepared after he completed the work. Moats admitted at that the invoice was not signed or acknowledged by Sanders. (R. p. 173, l. 2-4.)

The trial court was in the best position to judge the credibility and weight of the testimony and evidence presented. The record demonstrates that that evidence reasonably supports the trial court's determination that Moats' contract was with Premier as a subcontractor and should not be overruled on appeal.

B. Sanders did not "consent" to the Moats' work as required to establish a lien pursuant to § 29-5-10.

1. Because Moats failed to argue consaent at trial it is not preserved for appellate review.

Moats argues that he is entitled to a lien under S.C. Code § 29-5-10 because he performed work with the consent of Sanders. However, Moats failed to raise this argument at trial or in his Motion to Alter or Amend. Specifically, Moats' Motion to Amend only raises issue with the trial court's failure to find the existence of a separate contract with Sanders. (R. p. 48, ¶ 1.) "An issue not raised to or ruled on by the trial court is not preserved for appellate review." Creighton v. Coligny Plaza Ltd. P'ship., 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998). Moats cannot seek to overturn the trial court on an issue that he never raised and the trial court never ruled on.

2. Sanders merely acquiesced, not consented, to the work performed by Moats.

Our Supreme Court "has consistently construed the consent required by section 29-5-10 as 'something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which, but for the consent, could not exist, and which the party consenting has a right to forbid.'" F & D Elec. Contractors, Inc. v. Powder Coaters, Inc., 342 S.C. 443, 448, 537 S.E.2d 285, 288 (Ct. App. 2000) aff'd as modified, 350 S.C. 454, 567 S.E.2d 842 (2002) (citing Geddes v. Bowden, 19 S.C. 1, 7 (1883)). Thus, a property owner who retains a general contractor to construct the building and furnish all necessary materials does not have the authority or control contemplated by Section 29-5-10. Geddes, 19 S.C. 1. An owner "merely recognizing that a builder will utilize sub-contractors or acknowledging the builder's selection of a

sub-contractor is insufficient to establish the consent required under section 29-5-10." F & D, 342 S.C. at 449, 537 S.E.2d at 288.

The testimony at trial was that Premier Homes brought Moats to the jobsite to quote the project (Trial Tr. p. 30, l. 20-24); Premier Homes contracted with Moats (R. pp. 98-99, l. 23-2); Premier Homes was responsible for paying Moats (R. p. 105, l. 23-25); Moats was contacted by Premier Homes (R. p. 146, l. 14-15); and Moats understood that Premier Homes was the general contractor on the project (R. p. 147, l. 7-9; p. 160, l. 18-20.) Moats argues that Sanders directed the design of the driveway and was present on the jobsite several days while work was performed. However, these actions do not constitute consent. Our courts have held that a property owner's choice of particular items from a supplier's inventory does not give rise to "consent" under § 29-5-10. C & B Co. v. Collins, 269 S.C. 688, 239 S.E.2d 725 (1977). Similarly, an owner's mere presence at a job site during construction does not constitute consent either. F & D, 342 S.C. at 451, 537 S.E.2d at 289.

The evidence clearly demonstrated that Premier hired Moats as a subcontractor on Sanders' project. As such Moats is limited to a lien for subcontractors under § 29-5-20. Sanders' minimal involvement in the project did not constitute "consent" required to establish a lien under § 29-5-10.

II. The trial court correctly held that Moats was not entitled to recover under S.C. Code Ann. § 29-5-20 because the aggregate amount of liens exceeded the amount due by the Sanders on the contract with Premier.

A. The evidence and testimony reasonably supports the trial court's finding that Sanders was damaged in excess of the amount due under the contract.

A contractor in direct contractual privity with a property owner is entitled to a lien upon the land for which he makes improvements. S.C. Code Ann. § 29-5-10. Conversely, a contractor who furnished labor or material but was not a party to a contract with the owner is a subcontractor entitled to a lien under section 29-5-20. Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC, 372 S.C. 89, 641 S.E.2d 459 (Ct. App. 2007). Section 29-5-40 requires subcontractors to provide a notice of furnishing to the owner of real property before a lien will attach in favor of the subcontractor. Specifically, the subcontractor must "in writing, notify the owner of the furnishing of such labor or material and the amount or value thereof . . ." S.C. Code Ann. § 29-5-40. However, "in no event shall the aggregate amount of liens [in this section] exceed the amount due by the owner on the contract price of the improvement made." Id. A property owner's "liability under the lien is limited to the balance due by him to the prime contractor at the time the owner receives notice from the subcontractor." Stoudemire, 308 S.C. at 302, 417 S.E.2d at 637. Where a general contractor leaves a job before it is complete and the lienholder does not give the owner notice until after the general contractor leaves, the owner is entitled to credit for damages incurred to finish the general contractor's work. Action Concrete Contractors v. Chappelear, 404 S.C. 312, 319, 745 S.E.2d 77, 80 (2013). An owner is also entitled to a credit for repair work where the general contractor has completed the project but performed defective work. Id.

1. Any damages erroneously included in the trial court's finding was harmless error because the repair and completion costs alone exceed the contract balance.

"An appellant seeking reversal must show error and prejudice." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 350, 479 S.E.2d 67, 78 (Ct. App. 1996). "An appellate

court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is sufficient to support the judgment or unless if affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made." Builders Steel Co. v. C.I.R., 179 F.2d 377, 379 (8th Cir. 1950).

The trial court correctly found that Moats was a subcontractor hired by Premier Homes. (R. p. 8.) The testimony at trial established that Premier Homes left the project before it was completed. (R. p. 105, l. 10-12; p. 130, l. 11-14; p. 5.) The testimony also established that the work performed before Premier left the project was defective. (R. pp. 115-125; p. 6.) The parties agree that Sanders owed $23,654.40 on the contract with Premier at the time Moats filed its notice. However, Sanders testified that there was at least one other subcontractor's lien filed before Moats that totaled $5,498.90. Sanders also testified and presented evidence of the following repairs or defective work:

Defect/Incomplete Item	Cost of Repair/Completion	Record Location
Carpet	$9,258.92	p. 115, l. 13-15
Water Pipes	$2,325.00	pp. 116-117; l. 16-3
Porches	$4,000.00	p. 118, l. 7-2
Flashing	$100.00	p. 118, l. 12-25
Drywall	$2,306.00	pp. 119-120, l. 6-5
Painting	$6,250.00	p. 120, l. 3-5
Vinyl/Window Repair	$175.00	p. 120, l. 9-22

These items alone exceed the amount owed by Sanders on the Premier contract. Even if the trial court erred in considering the other damages claimed by Sanders, that error was harmless since the repair/completion items alone exceeded the contract amount. The damages Moats seeks to exclude were not necessary for the court to determine that

Sanders suffered damages in excess of the balance owed to Premier and do not require reversal or remand.

B. Sanders' damages are not limited to the pleadings because the parties agreed offset would be considered.

Moats also argues that Sanders' damages should be limited to the date Sanders filed the responsive pleading. Specifically, Moats argues that "after discovered negligence" cannot be an offset. However, there is no evidence in the record that the damages claimed by Sanders were *discovered* after the underlying litigation. The evidence simply shows that repairs were made or estimates sought after the pleadings were filed. Additionally, the parties specifically agreed that the pleadings would be amended to conform to the testimony and evidence and that offset would be specifically considered. (R. p. 190, l. 9-23). Moats received the benefit of the amendment when he was allowed to argue that they had a separate contract with the Sanders. He cannot now seek to exclude testimony and evidence detrimental to his case.

III. The trial court correctly held that the Sanders were not unjustly enriched because they had already paid Premier Southern Homes.

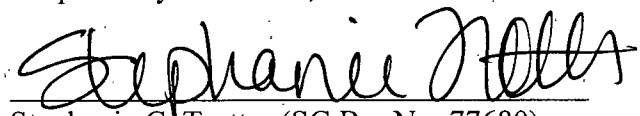
To establish a claim for quantum meruit a party must show "(1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value. Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). A quantum meruit case will not lie if the owner can prove that they have fully performed under a contract with the general contractor. Id.

The evidence submitted at trial clearly establishes that the Sanders paid Premier for the work and materials actually supplied but were still left with damages due to incomplete and defective work. Unjust enrichment cannot lie in this case because it is not equitable for the owner to pay for the same work twice.

CONCLUSION

For the reasons stated herein Sanders respectfully request that this Court affirm the circuit court's ruling.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Stephanie C. Trotter, an attorney with the Law Firm of McCabe, Trotter & Beverly, P.C., attorneys for the Respondent, hereby certify that I have served a copy of the foregoing document(s) upon the below named individuals and/or counsel this the 12th day of August, 2014 via U.S. Mail, postage prepaid and addressed as follows:

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Respondent's Final Brief and Certificate of Counsel

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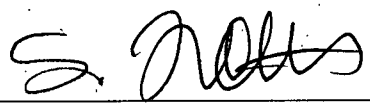

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