

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE
COUNTY OF LEXINGTON)	ELEVENTH JUDICIAL CIRCUIT
J & H Grading & Paving, Inc.,)	Civil Action No.: 2018-CP-32-01746
)	
Plaintiff,)	
)	
v.)	
)	
Clayton Construction Company, Inc.,)	
)	
Defendant.)	

**ORDER
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SC Court of Appeals**

This matter is before the Court pursuant to an action filed by J & H Grading & Paving, Inc. (“Plaintiff” or “J&H”) against Clayton Construction Company, Inc. (“Defendant” or “Clayton”). The parties filed cross-motions for summary judgment. Plaintiff contends that Clayton owes J&H attorney’s fees and interest for failure of Defendant to timely pay J&H for J&H’s work under the parties’ subcontract after receiving proper demand under South Carolina Code Section 27-1-15. Defendant argues that its pay-when-paid clause allowed Clayton to withhold J&H’s payment for an indefinite number of months until it received payment from the project owner, Herlong.

This was called for a bench trial before this Court on August 14, 2019, at the Lexington County Courthouse. Plaintiff was represented by Wesley D. Peel and J. Croom Hunter of Bruner, Powell, Wall and Mullins, LLC. Defendant was represented by W. Townes Jones, IV of William T. Jones, PA. The Parties stipulated to the introduction of all exhibits and waived opening statements. Plaintiff moved to conform the pleadings to the facts, and the motion was granted without objection. Josh Baggot, the President and Owner of J& H Grading & Paving, Inc. testified for Plaintiff regarding the facts *infra*. Defendant presented no witnesses. The

Court incorporates the pleadings, exhibits, testimony, and arguments of the Parties in reaching the following ruling.

Findings of Fact

In a bench trial, the trial judge acts as the finder of fact. *Lollis v. Dutton*, 421 S.C. 467, 483, 807 S.E.2d 723, 731 (Ct. App. 2017). “[T]he judge, as the finder of fact, may believe all, some, or none of the testimony, even when [the testimony] is not contradicted.” *Id.* (internal citation omitted). A trial judge will be accorded great deference where matters of credibility are involved. *Id.* (internal citations omitted).

The facts are undisputed. Defendant was the General Contractor for the construction of a new dealership for Herlong Chevrolet Buick (“Herlong” or “Owner”), and Defendant subcontracted with Plaintiff to perform site work at the project location. The subcontract (Plaintiff’s Exhibit 1), dated September 24, 2015, was for \$688,075.00. The payment language provided for progress payments with 10% held back as retainage. Over the course of several change orders, an additional \$28,855.70 was ultimately added to the contract price, bringing the contract total to \$716,930.70. After completion of Plaintiff’s work, the amount remaining to be paid was \$75,298.00, which included the 10% retainage and a small outstanding balance. Under contract Article 1, progress payments and retainage are due “no later than seven (7) days after receipt by Contractor of final payment from Owner for Subcontractor’s work.” Clayton claims it was reasonable to withhold payment to J&H because it had not been paid (Plaintiff’s Exhibit 8). Clayton offers no other justification for holding the money that undisputedly J&H had earned for the satisfactory performance of its work.

The following facts and dates are undisputed:

1. The Certificate of Occupancy (Plaintiff's Exhibit 2) was issued on March 20, 2017, at which point, the owner of the Project was able to begin using the building.

2. Plaintiff submitted the final pay application on April 26, 2017. Plaintiff was not tasked to perform any further work on the Project, and neither Defendant nor the Project's owner reported any deficiencies with Plaintiff's work.

3. Plaintiff, having not received payment, resubmitted the final pay application via email on July 25, 2017. Clayton responded on August 1, 2017 that "We have not been paid retainage by Mr. Herlong and therefore we cannot issue your remaining retaining until paid." (Plaintiff's Exhibit 4).

4. Plaintiff's last day of work on the Project, finishing miscellaneous punch list items was in December 2017.

5. On January 19, 2018, Plaintiff again requested payment from Clayton. Clayton responded "Joe Ben (Herlong) still has not paid per his contract ..." owing to a dispute between Clayton and Herlong which was unrelated to any of J&H's work. (Plaintiff's Exhibit 5).

6. On January 25, 2018, Plaintiff again demanded payment via letter. (Plaintiff's Exhibit 6). Payment was not forthcoming.

7. Plaintiff recorded a mechanic's lien on the property on February 27, 2018.

8. Plaintiff subsequently sent Clayton a demand letter (Plaintiff's Exhibit 7) pursuant to S.C. Code Ann. § 27-1-15, dated March 2, 2018, requesting a reasonable and fair investigation and demanding payment in full and warning that failure to do so could result in an award of interest and attorney's fees.

9. Counsel for Clayton responded to the § 27-1-15 demand on March 9, 2018, via letter (Plaintiff's Exhibit 8), in which he relied on the "pay when paid" language in the subcontract to support continued nonpayment, writing "As you may also be aware, Clayton has not received payment for the work from the owner of the project ... and is currently in litigation against Herlong seeking same. In accordance with the provisions with the subcontract, therefore, there are no amounts due and owing to J&H at this time."

10. On May 21, 2018, Plaintiff filed suit against Defendant as well as the Project owner to foreclose the mechanic's lien and for breach of contract.

11. Almost a year later and pursuant to mediation, in February of 2019 the Project owner paid Plaintiff the outstanding amount and was released from the suit. J&H reserved its rights to seek its attorney's fees and interest from Clayton.

Plaintiff now seeks the payment of attorney's fees by Defendant for the costs incurred to pursue recovery.

Conclusions of Law

1. The "Pay When Paid" clause is unenforceable.

Defendant relies on an unenforceable and illegal contract provision as its only defense to Plaintiff's payment demand under Section 27-1-15, claiming it is reasonable to hold the money for years past the due date. The original subcontract between the parties, drafted by Defendant, provides that final payment will not be made to Plaintiff until Defendant receives payment from the owner. This language, known as a "pay when paid" provision, is unenforceable in this state, and therefore Clayton's refusal to pay is unreasonable on its face.

The South Carolina Code states in the Subcontractors' and Suppliers' Payment Protection Act ("the Protection Act"), "Notwithstanding any other provision of law,

performance by a construction subcontractor in accordance with the provisions of its contract entitles the subcontractor to payment from the party with whom it contracts.” S.C. Code Ann. § 29-6-230. The statute then goes on to explicitly forbid “pay when paid” arrangements, stating, “The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, a condition precedent for payment to the construction subcontractor.” *Id.* Importantly, “**Any agreement to the contrary is not enforceable.**” *Id.* (emphasis added).

Clayton is seeking the Court’s ratification of the pay-when-paid language it included in its contract with Plaintiff by arguing it was reasonable to withhold payment indefinitely and that under Section 27-1-15, it conducted a fair and reasonable investigation and paid nothing. Specifically, the contract provides, “Final payment of the balance due shall be made to Subcontractor no later than seven (7) days after receipt by Contractor of final payment from Owner Subcontractor’s Work.” This language is the only defense Defendant offered to duly demanded payment under Section 27-1-15. This language, interpreted by Defendant to allow withholding of payment until the owner pays, is contrary to statutory law. The Protection Act explicitly forbids the use of a payment condition precedent like the one asserted by Defendant. *See* S.C. Code Ann. § 29-6-230. The meaning of this language is plain.

There are nor reported cases in South Carolina interpreting the Subcontractor Protection Act; however, in a North Carolina case construing a statute almost identical to South Carolina’s, the court concluded that pay-when-paid clauses in subcontracts are unenforceable and illegal, writing

“Our General Statutes state that ‘payment by the owner to a contractor is not a condition precedent for payment to a subcontractor and payment by a contractor to a subcontractor is not a condition precedent for payment to any other subcontractor, and an agreement to the contrary is unenforceable.’ N.C.

Gen. Stat. § 22C-2 (2003). ‘When a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced.’ *Rose v. Materials Co.*, 282 N.C. 643, 658, 194 S.E.2d 521, 532 (1973). We therefore conclude that the "pay when paid" clause of the contract is indeed unenforceable, but that it is severable from the rest of the contract and does not defeat the other portions of the contract, such as the notice of delay provision, which are in no way dependent on the illegal provision.”

Am. Nat’l Elec. Corp. v. Poythress Commer. Contractors, Inc., 167 N.C. App. 97, 101, 604 S.E.2d 315, 317 (2004) (applying N.C. Gen. Stat. § 22C-2). The same is true in this case.

While this situation has not been discussed in any South Carolina cases that the Court is aware of, it has been addressed by scholarly publications. An article in South Carolina Lawyer discussed the Protection Act, asserting “if a subcontractor performs in accordance with the terms of its contract, it is entitled to payment. . . . Payment to the subcontractor by the contractor is not conditioned upon payment to the contractor from the owner. Importantly, **the parties cannot contract around this.**” Joshua D. Spencer, *You Can’t Rob Peter to Pay Paul: South Carolina Statutory Payment Protections in Construction Projects*, S.C. Lawyer, Sept. 2012 at 24 (emphasis added). Again, the plain language of the statute controls.

The Court notes that Defendant relies on a 1976 case to claim “reasonableness” in its investigation and failure to pay. *See Elk & Jacobs Drywall v. Town Contractors, Inc.*, 267 S.C. 412, 229 S.E.2d 260 (1976). Defendant’s premise is that the *Elk* court concluded that pay-when-paid clauses are not “conditions precedent” and therefore do not violate Payment and Protection Acts. This Court disagrees; it is not that pay-when-paid clauses “are not conditions precedent,” it is that payment by the owner may not be used as a condition precedent. The holding in *Elk* was that contractors have a reasonable time after receiving an invoice to pay their subcontractor. Clayton’s interpretation of *Elk* would require a

subcontractor to work on a project indefinitely without payment. That is not a reasonable expectation.

At most, the precedent set by *Elk* merely serves to give the contractor a **reasonable** amount of time to attempt to obtain payment from the owner before paying the subcontractor. In fact, the *Elk* Court held “As a practical matter the suppliers and small contractors on large construction projects need reasonably prompt payment for their work and materials in order for them to remain solvent and stay in business.” *Elk*, 267 S.C. at 418, 229 S.E.2d at 262. The Court further held “We do not think sub-paragraph (iv) created a condition precedent but rather only postponed payment ... for a reasonable time so as to afford ... an opportunity to obtain funds from the owner. The evidence created a jury issue as to what constitutes such a reasonable time.” *Id.* The Court notes, however, that *Elk* was decided in 1976, and the General Assembly passed the Protection Act in 2000, almost a quarter of a century later. That “the legislature is presumed to intend that its statutes accomplish something” when it enacts them is a well-established principle of statutory construction. *State v. Long*, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005) (citing *S.C. Coastal Conserv. League v. S.C. Dep’t of Health and Envtl. Control*, 354 S.C. 585, 582 S.E.2d 410 (2003)). Further, “When a statute’s language is plain and unambiguous and conveys a clear and definite meaning, the court has no right to impose another meaning.” *Bone v. U.S. Food Serv.*, 404 S.C. 67, 75, 744 S.E.2d 552, 556 (2013) (quoting *Regions Bank v. Strawn*, 399 S.C. 530, 541, 732 S.E.2d 230, 236 (Ct. App. 2012)). The Protection Act unequivocally forbids conditioning payment to a subcontractor on payment by an owner. While the Court finds *Elk* instructive, it is not controlling, given the legislature’s adoption of the plain and unambiguous language that any agreement “to the contrary” is unenforceable.

Accordingly, the Court finds the “pay when paid” clause in the subcontract between the parties is unenforceable.

2. Plaintiff was forced to wait an unreasonable amount of time for payment.

Given the Court’s finding *supra*, the Court must now address what is a reasonable amount of time Plaintiff should be expected to wait after demanding payment. Although the Court does not find *Elk* to be controlling with regards to the enforceability of “pay when paid” clauses, it does provide some guidance as to what may constitute a reasonable delay in payment. “As a practical matter the suppliers and small contractors on large construction projects need reasonably prompt payment for their work and materials in order for them to remain solvent and stay in business.” *Elk*, 267 S.C. at 418, 229 S.E.2d at 262. The *Elk* Court quoted a Sixth Circuit case, writing

“In our opinion paragraph 3 of the subcontract is a reasonable provision designed to postpone payment for a reasonable period of time after the work was completed, during which the general contractor would be afforded the opportunity of procuring from the owner the funds necessary to pay the subcontractor. To construe it as requiring the subcontractor to wait to be paid for an indefinite period of time until the general contractor has been paid by the owner, which may never occur, is to give it an unreasonable construction which the parties did not intend at the time the subcontract was entered into.”

Thos. J. Dyer Co. v. Bishop International Engineering Co., 303 F. (2d) 655 (6th Cir. 1962). Indeed, while there is no controlling jurisprudence in South Carolina of which this Court is aware, in looking to other jurisdictions which have held “pay when paid” clauses are unenforceable, the courts seem to be of a similar mind. *See Galloway Corp. v. S.B. Ballard Const. Co.*, 250 Va. 493, 506, 464 S.E.2d 349, 357 (1995) (holding that the default interpretation of “pay when paid” clauses is that they require payment within a reasonable time); *In re Davidson Lumber Sales, Inc.*, 66 F.3d 1560, 1565 n.4 (10th Cir. 1995) (“Moreover, with respect to construction contracts, the general rule is that such pay-when-paid provisions

do not operate as conditions precedent under which the duty to pay is contingent upon receipt of funds from a third party ... To the contrary, these provisions are viewed as only postponing payment for a reasonable time and merely establishing a convenient time for payment.”); *Paul Morrell, Inc. v. Kellogg Brown & Root, Inc.*, 682 F. Supp. 2d 606, 630-631, 2010 U.S. Dist. LEXIS 7532, 64-65 (“Under most circumstances, pay-when-paid provisions are not “suspensive conditions” but rather terms for payment that only delay a contractor’s obligations to make payment, and then only for a limited time”).

Thus, it becomes the purview of this Court, as the trier of fact, to determine what constitutes a reasonable delay under the facts of this case. In the case at bar, this Court holds that delaying payment to the Plaintiff longer than ninety days was *per se* unreasonable. Plaintiff finished work on the Project and submitted its final pay applications in December of 2017. As such, Plaintiff was required to file its mechanic’s lien within ninety days in order to preserve its rights.

In South Carolina, mechanics’ liens are purely statutory and may be acquired and enforced only in accordance with the terms and conditions set forth in the statutes creating them. *Multiplex Bldg. Corp. v. Lyles*, 268 S.C. 577, 235 S.E.2d 133 (1977). As a general rule, mechanics’ liens arise when a contractor, subcontractor, or other person improves real property by furnishing labor and/or materials for a building or structure. 22 S.C. Jur. *Mechanics’ Liens* § 2 (1994). “Because the improvements usually attach to and become an inseparable part of the structure, the lien statutes give the persons responsible for the improvements a security interest, or a lien on the improvement to the value of the amount due them.” *Id.* § 3 (footnote omitted). *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 340, 762 S.E.2d 561, 565 (2014). “The lien arises, inchoate, when the

labor is performed or the materials are furnished." *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 26, 336 S.E.2d 488, 489 (Ct. App. 1985). Section 29-5-90 requires that, within ninety days after he ceases to furnish labor or materials for a building or structure, the party asserting a lien must serve upon the owner (or person in possession of the property) and file with the register of deeds or clerk of court a notice or a certificate that includes a statement of the amount due him, together with a description of the property intended to be covered by the lien, the name of the owner of the property, if known, and other required information. S.C. Code Ann. § 29-5-90 (2007). "If these steps are taken, the person claiming the lien may foreclose against the property to satisfy the debt." *Id.* "On the other hand, if he fails to take any one of these steps, the lien against the property is dissolved pursuant to Sections 29-5-90 and 29-5-120." *Id. Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 342-343, 762 S.E.2d 561, 567 (2014).

Thus, according to the Mechanic's Lien Statute, Plaintiff would foreclose any possibility of protecting his rights without initiating proceedings within ninety days. At that point, Plaintiff began to accumulate legal bills, through no fault of its own, in order to recover money that no one disputes it was owed. Suspending payment past the statutory deadline for filing the mechanic's lien required Plaintiff to initiate legal proceedings which dragged on for two years before Plaintiff was finally paid.¹ This unreasonable delay occurred despite the facts that there was no dispute that J&H had satisfactorily completed their work, the Certificate of Occupancy was issued prior to J&H even submitting the final pay application, and the amount owed J&H was undisputed. Presumably Defendant would have the Court believe that a time

¹ The Court notes that it was the owner of the Project, not Defendant, who finally paid Plaintiff for its work.

period exceeding two years is a reasonable amount of time to delay payment to a subcontractor. The Court can not reconcile this argument with the interests of justice.

The party seeking an award of attorney's fees and interest under the statute has the initial burden of presenting prima facie evidence that the opposing party did not make a fair and reasonable investigation. *Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 229, 647 S.E.2d 488, 495 (Ct. App. 2007); *Moore Elec. Supply, Inc. v. Ward*, 316 S.C. 367, 374–75, 450 S.E.2d 96, 100 (Ct.App.1994). Whether a party's steps taken were “reasonable and fair” is a question of fact. *Id.*

This Court finds that a reasonable amount of delay is such that would not force Plaintiff to resort to legal action in order to comply with the provisions of the Mechanic’s Lien Statute. It can not be reasonable to expect a party to waive a statutory remedy in the hope that one day they might get paid, and it cannot be reasonable to expect a party who bears no fault to resort to legal proceedings to collect what they are owed under a contract when the quality of the work and the amount owed are undisputed.

This Court additionally finds Clayton failed to conduct a reasonable and fair investigation pursuant to South Carolina Code Section 27-1-15 where Clayton knew the amount owed was undisputed yet still refused to make payment to J&H.

Accordingly, this Court finds that the delay in payment beyond the statutory deadline for filing a mechanic’s lien and preserving Plaintiff’s rights was unreasonable.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that:

1. The “pay when paid” clause in the subcontract is unenforceable;
2. The delay in payment to Plaintiff past the statutory deadline for filing a mechanic’s lien was unreasonable;

3. Judgment is hereby entered against Defendant; and

4. Defendant may seek payment for reasonable attorney's fees and costs incurred in bringing this action by filing a motion for such relief in the ordinary course.

IT IS SO ORDERED.

The Honorable Walton J. McLeod, IV
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina
October 3, 2019



Lexington Common Pleas

Case Caption: J & H Grading & Paving Llc VS Clayton Construction Company Inc
, defendant, et al
Case Number: 2018CP3201746
Type: Order/Other

So Ordered

s/Walton J. McLeod, 2765