

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

Marsh Waterproofing, Inc.,  
Plaintiff,

CASE NO.: 2018-CP-40-00527

vs.

Steeple Two Notch Ltd. and Hamilton  
Management Services Company, Inc.

**ORDER ON MOTION FOR SUMMARY  
JUDGMENT DISMISSING COUNTERCLAIM  
(CASE NOT ENDED)**

**RECEIVED**

Defendant(s). NOV 18 2019

**SC Court of Appeals**

This matter came before me for a hearing on Thursday, September 12, 2019 at 9:50 AM on the Motion for Summary Judgment of the Plaintiff seeking dismissal of the counterclaim for intentional interference with contractual relations. This Motion is identical to the motion in the companion case 2018-CP-40-00579, and both were argued simultaneously by counsel. Present and participating in the argument were Albert A. Lacour, III, Esquire of Clawson and Staubes, LLC for the Plaintiff, and C. Clay Olson, Esquire of Harper Little, PLLC for the Defendants.

The Plaintiff, Marsh Waterproofing, Inc. is a contractor that performed work upon seven Church's Chicken restaurants operated by the Defendants. Plaintiff was not paid for six locations at the conclusion of the work and filed six mechanics liens against the leasehold interests of Defendants to secure its right to payment, this being one such case. The landlord, ARC CAFÉUSA001, LLC, is not presently a party to the litigation. Upon consideration of the arguments of counsel and review of the pleadings, the Motion and Memorandum in Opposition, the deposition testimony of the Defendants' Rule 30(b)(6) witness and the applicable law, I make the following:

**FINDINGS OF FACT**

1. The Defendants were deemed by their landlord to be in breach of the lease agreement and the forbearance agreement between themselves and their landlord when they allowed mechanics liens to be filed against the leased property.
2. No facts have been submitted by Defendants to show that the landlord was in breach of any term of the lease agreement, but rather it appears that the landlord insisted on performance of the terms of the agreements requiring that the property be kept free of any liens.
3. The Plaintiff claims it performed work at the request of the Defendants and provided labor and materials for the improvement of the properties for which it was not paid. In an effort to secure its right to payment the Plaintiff filed and served a mechanics lien pursuant to South Carolina Code §29-5-10, et. seq. I therefore make the following:

#### **CONCLUSIONS OF LAW**

1. A trial court should grant a motion for summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCPP; see Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting Tupper v. Dorchester Cnty., 326 S.C. 318, 487 S.E.2d 187 (1997)).

“Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent’s case, the opponent may not simply rest on the mere allegations contained in the pleadings.” Grant v. Mount Vernon Mills, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). “Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” Id. at 151. Unsupported

allegations or denials that simply create an inference are insufficient to withstand summary judgment. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

2. “To establish a cause of action for tortious interference with contractual relations, a claimant must show: 1) the existence of a contract; 2) knowledge of the contract; 3) intentional procurement of its breach; 4) the absence of justification; and 5) resulting damages. The third essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the contract’s breach.” Eldeco, Inc. v. Charleston County School District 372 SC 470, 642 SE2d 726, 731 (2007), citing Kinard v. Crosby 315 SC 237, 433 SE2d 835, 837 (1993). “Where there is no breach of contract, there can be no recovery. Eldeco 642 SE2d at 732, citing First Union Mort. Corp. v. Thomas 317 SC 63, 451 SE2d 907, 913 (Ct. App. 1994). I conclude that on the record before me, there is no showing by the Defendants that the Plaintiff has procured the breach of the lease agreement or forbearance agreement by the landlord, but rather the Defendants themselves breached the agreements by not preventing the filing of the liens. The third required element of the cause of action is missing on the facts before me.

3. An unpaid contractor, having furnished labor and materials for the improvement of real property, may secure his right to payment by filing and serving a Statement For Mechanics Lien under SC Code §29-5-10, et. seq. “[T]he exercise in good faith of a legal right by a party to a contract affords no basis for an action by the second party for intentional interference with a contract even though the consequence of the exercise of

the legal right by the first party is to cause a third-party not to perform another contract with the second party.” Southern Contracting, Inc. v. H. C. Brown Construction Co. 317 SC 95, 99, 450 SE2d 602, 604 (Ct. App. 1994), citing Webb v. Elrod 308 SC 445, 418 SE2d 559 (Ct. App. 1992). Any alleged ill will or improper motive does not change the outcome. “[A]n act done in the exercise of a legal right cannot be treated as wrongful and actionable merely because a malicious motive prompted the exercise of that right.” *Id.* I conclude that under the foregoing authorities, Plaintiff’s filing of its mechanics lien cannot form the basis for the cause of action alleged because the filing was justified. The fourth required element of “absence of justification” cannot be met.

4. In Pond Place Partners Inc. v. Poole 351 SC 1, 567 SE2d 881 (Ct. App. 2002), the Court of Appeals held that the filing of a lis pendens, pursuant to the statute that authorizes such filing, enjoys the absolute privilege accorded to judicial proceedings because the recording of a lis pendens is specifically authorized by statute and has no existence separate and apart from the litigation of which it gives notice. “When a communication is absolutely privileged, no action lies for its publication, no matter what the circumstances under which it is published, i.e., an action will not lie even if the report is made with malice... The absolute privilege covers anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court... The law gives to all who take part in judicial proceedings, judge, attorney, counsel, printer, witness, litigant, a right to speak and to write, subject only to one limitation, that what is said or written bears upon the subject of litigation, that is, is pertinent, relevant, germane thereto... South Carolina has long recognized that relevant pleadings, even if defamatory, are absolutely privileged.” (*Citations omitted*). Pond Place 351 SC at 22-23, 567 SE2d at 892. The court also reviewed prior case law which adopted and quoted extensively from

the Restatement (Second) of Torts § 587 (1977): "A party to a private litigation... is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding... The common law rule protecting statements of judges, parties and witnesses offered in the course of judicial proceedings from a cause of action in defamation is well recognized in this jurisdiction... *That is, an absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial action of any official nature provided those steps bear reasonable relationship to it.*" (emphasis added). Pond Place 351 SC 1, 24-25, 567 SE2d 881, 893 (Ct. App. 2002), citing: Crowell v. Herring 301SC 424, 429, 392 SE2d 464, 467 (Ct. App. 1990). I conclude that the filing of the mechanics lien by the Plaintiff enjoys the absolute privilege accorded other judicial proceedings for the same reason that a lis pendens enjoys such privilege. Both are filed in advance of the action to which they relate, both are statutorily authorized, and both bear a reasonable relationship to the judicial proceeding that follows, and therefore cannot be the basis of a claim for intentional interference with contractual relations. It is therefore

**ORDERED** that the counterclaim of the Defendants for intentional interference with contractual relations be, and the same is hereby **DISMISSED**.

**AND IT IS SO ORDERED** this \_\_\_\_\_ day of \_\_\_\_\_,

2019, at Columbia, South Carolina.

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Robert E. Hood, Presiding Judge  
Fifth Judicial Circuit



Richland Common Pleas

**Case Caption:** Marsh Waterproofing Inc vs L W Smith Jr Trust , defendant, et al  
**Case Number:** 2018CP4000527  
**Type:** Order/Summary Judgment

So Ordered

s/ R.E. Hood #2164