THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Eugene P. Warr, Jr., Special Referee

Appellate Case No. 2019-001062

Vincent C. Carter d/b/a Elite Construction Co., Respondent,

v.

Eagles Landing Restaurants, LLC, Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case concerns the conversion of a former Ruby Tuesday's restaurant into an IHOP Restaurant. The parties are the Contractor and the Restaurateur. The case involves claims by Contractor and counter-claims by Restaurateur.

This case began on March 21, 2016, when the Contractor, Plaintiff-Respondent Vincent C. Carter ("Vince"), d/b/a "Elite Construction Co.'" filed suit in the Florence County Court. (R. p.). Contractor alleged causes of action for breach of contract and quantum meruit against Restaurateur, Defendant-Appellant Eagles Landing Restaurants, LLC ("Eagles Landing"), stemming from a contract to upfit the restaurant. (Compl.). Restaurateur answered on May 2, 2016 (R. p.), and counterclaimed for breach of contract (p. 2), fraud/constructive fraud (p. 3), quantum meruit/unjust enrichment (p. 4), negligence/gross negligence (*id.*), and indemnity (p. 5).

On April 4, 2017, Contractor moved for reference to a Special Referee. Restaurateur consented. (R. p.).

The case was referred to Eugene Warr, Jr., as Special Referee, by order of the Honorable Michael G. Nettles, dated May 2, 2017. (R. p.).

The action was tried as a bench trial on December 20, 2017. (1st Order, p. 1).

The Special Referee issued an order almost a year later, on October 25, 2018. (*Id.*) In that order, he

(a) found for Contractor in the amount of $165,131.59 (*id.*, p. 8);

(b) found for Restaurateur in the amount of $5,000.76 (*id.*, p. 7);

(c) denied Restaurateur's claim for lost profits (*id.*);

(d) stated that Appellant was responsible for the costs incurred by Carolina Construction Solutions, which had provided additional electricians, and reserved for later determination the question of attorney fees incurred by Carolina Construction (*id.* p. 6); and

(e) directed that "the cost for the Special Referee be apportioned equally between the Plaintiff and Defendant to include the appearance fee and the costs of the transcript as requested by the Court to provide a thorough review of the facts and figures" (*id.* p. 8).

On October 30, Restaurateur filed a motion pursuant to Rules 52(e) and 59(e), SCRCP. (R. p.).

On November 5, Contractor filed a motion pursuant to Rule 59(e). (R. p.).

In the interim between the filing of the original order and the filing of the Special Referee's order on the Rule 59 motions, Restaurateur paid Carolina Construction Solutions $50,000.00. (Supp. Order p. 2).

On May 28, 2019, the Special Referee issued a Supplemental Order. It addressed the competing Rule 59 motions. (R. pp. -). The order stated the standard for considering such motions as follows:

> The Fourth Circuit has similarly said of Rule 59(e) motions that "[i]n general reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Pacific Ins. Co. v. American Nat'l Fire Assoc.*, 148 F.3d 396,403 (4th Cir. 1998) (citations omitted). The Fourth Circuit, applying South Carolina law, established three grounds for revisiting a settled matter under Rule 59(e): (1) to accommodate an intervening change in the law; (2) to account for new evidence not previously available; and (3) to correct a clear error of law or prevent manifest injustice. *Dockins v. Benchmark Commc'ns*, 180 F.R.D. 294, 295 (D.S.C. 1998), *aff'd*, 176 F.3d 745 (4th Cir. 1999); *see also E.E.O.C. v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 172 (4th Cir. 1997). A Rule 59(e) motion may not be used to relitigate old matters. *Pacific Ins. Co.*, 148 F.3d at 403.

(*Id.*, p. 4) (emphasis added).

The order then denied each party's Rule 59 motion. (*Id.*, p. 5).

The order also resolved the previously-reserved issue regarding Carolina Construction Solutions by ordering Appellant Eagles Landing Restaurants, LLC, to pay Respondent Vincent Carter an additional $16,664.16 and interest thereon. (*Id.*, p. 3).

STATEMENT OF THE FACTS

This case involves a construction dispute. Appellant Eagles Landing Restaurants, LLC ("Restaurateur") is a limited liability corporation. It is owned by Mohammed Makawi. (Pl.'s Ex. 2, p. 14).

Through his limited liability companies, Mr. Makawi is an IHOP franchisee. (332:14-16). He owns eight IHOPs. (332:17-19).

Mr. Makawi had previously upfitted other buildings to make them into IHOPs, in conformance with IHOP standards. (336:7-15). He identified a location in James Island to convert into an IHOP restaurant. It had previously been a Ruby Tuesday's. (Tr. 165:2-3). It required upfitting to become an IHOP.

Plaintiff-Respondent Vincent C. Carter ("Vince") is the principal and sole employee "Elite Construction Co.," which is an unincorporated, d/b/a name for Vince.

Vince has known Mohamed for many years. (Tr. 78:25-79:3; 345:4-7). Vince walked into Mr. Mohammed's office one day and learned about the project. (78:25-79:3). Vince asked to take a look at it. (*Id.*)

Vince then put in a bid at $624,354.00. (79:20-23; Pl.'s Ex. 1, p. 3).

By the time the project was completed, Restaurateur had spent $923,078.97. (Tr. 208:23-209:1). And had incurred additional obligations relating to the upfit for a total of more than a million dollars—$1,019,037.03.[1]

Yet Vince, the Contractor, sued, asking Restaurateur to pay even more. (Complaint). The Contractor now maintains that $1.3 million would be reasonable.

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[1] *See* 259:6-13,

> Q; . . . . So the total amount [Restaurateur] has paid for this project is 923,078 -- $923,078 dollars -- seventy-eight -- and 78.97 cents, correct?
>
> A That is correct.
>
> Q All right. And that we've incurred $1,019,037.03, correct?
>
> A Correct.

"I would say 1.2, 1.3 million dollars to have a turnkey restaurant is pretty reasonable." (227:19-21).

At trial, Vince admitted that he had provided no invoices, no estimates, no quotes or the like to justify the charges, and that even on the date of trial, he had no such documents. (218:6-20.) There was no description of the work in any of the documents Vince possessed.[2] (226: 3-6). Instead, Vince claimed that he had estimated a price that he thought was "reasonably fair," then added a "management fee" to the estimate, and then added a 25% surcharge to the estimated price and management fee.

> Q So you, essentially, went back, put a date on here of June the 15th of most of these, and put a number you thought was fair?
>
> A No -- no, as far -- I put a number that I thought was reasonably fair due to my years of experience, yes.

(219:21-220:1) (emphasis added).

He then added a "management fee" for his work, plus a "profit" of "20, 25 percent." (236:1-13). Apparently, this is calculated to provide a "20, 25 percent" markup on the management fee as well.

Vince's counsel explained to the Court an example of how this works. (237:4-15). In his telling, a $20,000 charge to Vince became a $33,519.43 charge to Restaurateur (*id.*)—more than a two-thirds markup. Vince himself explained another example. His firm incurred a cost of $15,204.83. (239:18-22). His firm

[2] In contrast, when Restaurateur paid the subcontractors directly, Restaurateur always obtained receipts detailing the work done. *Compare* Defendant-Appellant's Exhibit 8 (R. pp. _-_) (detailed receipts) *with* Plaintiff-Respondent's Exhibit 8 (R. pp. _ -_) (consisting simply of cancelled checks without invoices or the like).

then charged Restaurateur $31,506.04. (240:7-9). That is more than a 100% markup.

No reasonable restaurant-owner would agree to construction under terms like this.

Substantial completion of the project was 75 to 105 days late. Vince's bid had a completion date of 90 days after the commencement date, yet the contract that Vince provided to Eagles Landing stated a completion date of 120 days after commencement. (Tr. 29:6-12; 206:17-23). The commencement date of the contract was the ninth of April, 2015. (205:23-25). The project was substantially completed on October 23, 2015. (57:18-22; 206:24- 207:3; Pl.s' Ex. 14). Even using the expanded 120-days-for-completion, the project was 75 days late. (One hundred and twenty days from April 9, 2015 was August 9 2015. (206:17-22). From August 9 to October 23 is 75 days). (*See also* 376:1-6 (completion of project was late by two and a half months); 383:7-9 (same)).

"Substantial completion" was defined as a Certificate of Occupancy being issued. (Tr. 206:24-207:3; Pl.s' Ex. 14). As the Court below recognized, receiving a Certificate of Occupancy would enable Appellant Restaurateur to bring staff in to begin training, and then to open the restaurant for business. (381:25-382.2; *see also* 302:25-3:03:2; 335:25-336:4; 348:011). Every day that the restaurant is not open, Restaurateur was losing money. (29:13-17; 207:14-18). The two-and-a-half month delay cost Restaurateur $35,892.26 a month, based on its comparable monthly

income. (Def.'s Exs. 7, 9; Tr. 269:1-5). Restaurateur asked for only two months of lost income, or $71,784.52. (Def.'s Exs. 7, 9; Tr. 269:1-5).

The Special Referee denied Restaurateur's claim to lost profits, but stated nothing about his reasoning for do so. (Order. p. 7; Supp. Order, p. 5).

One reason for the delay was that mold was discovered in the building. However, this delayed the project for only ten days or less (37:11-15; 45:15-18, 46:8-9), not months. In fact, to reduce the delay, Restaurateur requested that additional electricians be hired via a company that could put more electricians on the job. (Pl.s' Ex. 4; 210:24-211:2; 438:3-8).[3] Vince agreed—and then charged Restaurateur for the work performed by these new electricians in addition to, not instead of, the amount Vince had budgeted for the work.

The Special Referee required Restaurateur to pay the entirety of the $66,664.16 (plus interest) associated with these additional electricians who were brought in to get the job done (Ord. pp. 2-3; Supp. Ord. pp. 2 -3 (amounts of $50,000

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[3] As described in the Contractor's own Exhibit 4, a "change order" that Vince himself wrote:

> "Carolina Construction Solutions aided in the completion of electrical services needed on the project."

(Pl.'s Ex. 4).

The reason for hiring Carolina Construction was "to complete all electrical as quickly as possible." (*Id.*). *See also* 210:24-211:2 (Vince agreeing that "Carolina Construction Solutions aided in the completion of electrical services needed on the project."); 438:3-8 (Restaurateur agreeing that he asked for further electricians to be hired in order to get the job "sped up" because they were "already late.")

and $16,664.16)). Yet he inexplicably failed to allow Restaurateur a credit for the amount that had been originally budgeted to do the job.

Nor did the Special Referee provide any offset at all for Restaurateur's lost income. He offered no explanation for failing to offset the lost income, stating simply "I concluded that the Defendant is not entitled to damages for . . . lost income." (First Order, p. 7). Although Defendant Restaurateur timely filed a Rule 59 motion asking the Special Referee to reconsider, specifically objecting to the failure to find liability "for lost income or other delay damages to Defendant" (Supp. Order p. 4) , the Special Referee refused to do so, incorrectly believing that he could consider a Rule 59 motion only as " 'an extraordinary remedy,'" available only in three narrow situations, and "not . . . to relitigate old matters" (Second Order, p. 4) (citing and quoting only federal cases).

ARGUMENT

Standard of Review

The standard of review for all Issues in this brief is de novo. *See, e.g., Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.,* 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013) (Questions of law are reviewed de novo). As the reasons for a de novo standard of review subtly differ among the Issues raised in this brief, this brief provides a brief discussion of the standard of review for each issue within the discussion of each issue.

I. THE SPECIAL REFEREE ERRED IN NOT CREDITING APPELLANT RESTAURATEUR FOR THE AMOUNTS IT PAID TO CAROLINA CONSTRUCTION SOLUTIONS AND NOT SETTING OFF THE AMOUNTS SAVED.

Standard of Review

Where a party has shown a clear entitlement to a setoff, denial of the setoff is an error of law, subject to de novo review. *Cf. Perry v. Sullivan Mfg. Co.*, 6 S.C. 310, 311 (1875) (noting without comment that the Referee found "as an issue of law, that [plaintiff] was entitled to set off"); *Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013) (issues of law are reviewed de novo). Alternatively, there is case law suggesting that denial of a setoff is subject to an abuse of discretion standard. *Bentrim v. Bentrim*, 282 S.C. 333, 335-36, 318 S.E.2d 131, 133 (Ct. App. 1984) (concerning family law matter).

As argued below, the refusal to offset the amounts saved by hiring additional electricians against the costs incurred was clearly erroneous, and thus reversible under any standard of review.

Discussion

The parties disputed whether the additional costs incurred in hiring Carolina Construction Solutions should be attributed to Restaurateur, or to Contractor. These electricians were hired to increase the speed of the electrical work and thus reduce the delay in completing the project. The company that Contractor had initially engaged could provide only two electricians at a time. Carolina Construction Solutions could and did provide more electricians at a time, thus speeding the completion date. (53:21-24; 210:24-211:2; 438:3-8; Pl.s' Ex. 4).

However, there was, or should be, no dispute that if Restaurateur is responsible for that additional cost, Restaurateur is liable only for that additional cost. Whatever extra it cost to hire them is the most that can be charged to Restaurateur. Yet the Special Referee charged the entire, not the extra, cost of Carolina Construction Solutions to Restaurateur, LLC. (Supp. Order, pp. 2, 5-6)

The "Bid" submitted by Elite Construction Co. as part of the contract contained $92,780 for "Electrical Materials and Labor Site Work." (D's Ex. 1, p. 2; *see also* 152:22-25; 173:8-13). Yet Elite Construction spent only $35,521.62 on Electrical Materials and Labor Site Work. This includes $3,414.81 to Atlantic Electric, LLC (Pl.s' Ex. 13, p. 1), $4,910.00 to Bell Electric (*id.*),[4] $847.75 to City Electric (*id.*, p. 2), $23,421.00 to City Lighting (*id.*), $275.81to Red Mountain Lighting Products (*id.*, p. 6), and $3,500.00 to Turner Electric (*id.*, p. 6).

Vince admitted he did not spend the $92,780 budgeted for electrical work.

> Q: So you -- you quoted -- you quoted in your electrical labor and materials 92,000 dollars -- 92,780 --
>
> A: Uh-huh.

(152:22-25).

> Q: And -- and to clarify, did you spend 92,780 on -- in electrical?
>
> A: No, [I] did not.

(172:3-5).

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[4] Vince maintained at trial that the work of Bell Electric is not within the scope of the project, and thus not within the $92,780. (95:20-23). If so, Vince spent less than the $35,521.62 figure in text. Vince's claim that he is entitled to the $92,780 budgeted while Restaurateur separately pays $66,664.16 to electricians is preposterous.

Vince also admitted that the work of Carolina Construction Solutions was on matters that were part of the contract between Elite Construction Co. and Eagles Landing Restaurant. (210:25-211:1-2).

Yet the Orders held Restaurateur responsible for the full contract price, plus the full charge of the electricians who performed work that was supposed to be done under the contract. The Original Order held Restaurateur responsible for the full $624,354.00 amount of the contract between Restaurateur and Contractor. (Order, p. 8). The Supplemental Order assigned to Restaurateur liability for all funds paid or due to Carolina Construction. (Supp. Ord. p. 3, 5-6).

There was simply no reason to require Restaurateur to both pay Contractor $92,780 for electrical materials and labor site work that was supposed to be done under the contract, and to separately pay the company that did the bulk of that work. In so holding, the order was clearly erroneous. It erred as a matter of law in denying Restaurateur Eagles Landing a setoff to which it was clearly entitled. To the extent if any that the matter might be a question subject to an abuse of discretion standard, it was an abuse of discretion to deny Restaurateur a setoff to which it is clearly entitled. The result is the same under any standard of review. Restaurateur Eagles Landing is entitled to a setoff of $57,258.38 ($92,780 minus $35,521.62).

This Court should so hold.

II. THE SPECIAL REFEREE MADE A MATHEMATICAL OR CLERICAL ERROR THAT THIS COURT SHOULD CORRECT.

Standard of Review

The standard of review is de novo. Appellate courts provide no deference to lower courts regarding conclusions of math, nor do appellate courts hesitate to correct clerical errors. *See Trotter v. Trane Coil Facility*, 393 S.C. 637, 651, 714 S.E.2d 289, 296 (2011) (correcting clerical error and noting that Rule 60 has no explicit time limit for correction of clerical errors).

Additionally, assuming, arguendo, that another standard of review applies, the error still would properly be corrected on appeal. If the proper standard were "clearly erroneous," it is clearly erroneous to produce mathematical or clerical errors. If the proper standard were abuse of discretion, lower courts do not have discretion to make mathematical errors, and it is an abuse of discretion to make clerical errors.

Discussion

The Special Referee's original order noted, "The Parties acknowledge that at the time of trial the Defendant had paid $390,888.33 to third-party vendors and subcontractors related to the project." (First Order, p. 2). The order then states that the Referee has identified $97,607.74 in amounts that Defendant had paid to third parties that "do not fall within the scope of the contract." (*Id.*, pp. 4-5). The order then credits $212,195.26 as "Payments Made by [Defendant] Eagles Landing" that fell within the scope of the contract (*Id.*, pp. 3-4, 8).

However, $390,888.33 minus $97,607.74 is $293,280.59, not $212,195.26. The Referee made an error in Respondent's favor of $81,085.33. Appellant respectfully requests the Court direct the Referee to correct the error.

III. THE SPECIAL REFEREE ERRED IN FAILING TO REQUIRE RESPONDENT CONTRACTOR TO REIMBURSE APPELLANT RESTAURATEUR FOR LOST INCOME CAUSED BY RESPONDENT'S DELAYS.

Standard of Review

The standard of review is de novo. It is a matter of law in South Carolina that Owners of buildings are generally entitled to damages for delays in completion of construction contracts. *Cf. United States ex rel. Williams Elec. Co. v. Metric Constructors*, 325 S.C. 129, 131, 480 S.E.2d 447, 448 (1997) (internal quotation marks omitted) (concerning "what exceptions, if any, to an unambiguous no-damages-for-delay clause in a construction contract would the South Carolina Supreme Court recognize?") (Implicit in the discussion is that without a no-damages-for-delay clause, one is liable for the delay). *Drews Co. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 371 S.E.2d 532 (1988) (Lost profits are a proper measure of damages for Restaurateurs where Contractors delay renovating a restaurant.)

Discussion

A. South Carolina Law Allows Restaurateurs to Recover from Contractors for Delays in Renovating Restaurants, Where, As Here, Damages Were the Natural Consequence of the Breach, Were Foreseeable, and Were Presented with Reasonable Precision.

1. South Carolina Law Allows Restaurateurs to Recover from Contractors for Delays in Renovating Restaurants, Where Lost Profits Were the Natural Consequence of the Breach, Were Foreseeable, and Were Presented with Reasonable Precision.

In South Carolina, contractors are liable for delay damages even when the contract contains no completion date. "Contractor first argues that the trial court erred in admitting evidence of Owner's 'delay damages' because the contract contained no completion date or statement that 'time was of the essence.' We disagree." *Drews Co. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 209, 371 S.E.2d 532, 533 (1988) (emphasis added) (concerning lost profits for Restaurateur as delay damages against contractor renovating building for use as a restaurant). Here, a fortiori, there was a completion date in the contract, as discussed below.

Lost profits are an important component of those delay damages. "Profits lost by a business as the result of a contractual breach have long been recognized as a species of recoverable consequential damage in this state." *Id.* at 210, 371 S.E.2d 532, 534 (citing *Hollingsworth on Wheels, Inc., v. Arkon Corp.*, 279 S.C. 183, 305 S.E. (2d) 71 (1983); *South Carolina Finance Corp. v. West Side Finance Co.*, 236 S.C. 109, 122, 113 S.E. (2d) 329, 335 (1960)).

Nor does the so-called "new business rule" prevent recovery for those lost profits. *Id.* at 210-214, 371 S.E.2d at 534-536. Rather, "[t]he same standards that

have for years governed lost profits awards in South Carolina will apply with equal force to cases where damages are sought for a new business or enterprise." *Id.* at 213, 371 S.E.2d at 535.

Lost profits are appropriate where three conditions are met. (1) That the damages were the natural consequence of the breach; (2) that the damages were reasonably foreseeable; and (3) that the lost profits be established with reasonable certainty. *Id.*, 371 S.E.2d at 535-36. These lost profits "may be established [by] . . . business records of similar enterprises, and the like." *Id.* at 214, 371 S.E.2d at 536 (alteration in original) (internal quotation marks omitted). Additionally,

> [M]eans of proving prospective profits include (1) "yardstick" method of comparison with profit performance of business similar in size, nature, and location; (2) comparison with profit history of plaintiff's successor, where applicable; (3) comparison of similar businesses owned by plaintiff himself, and (4) use of economic and financial data and expert testimony).

Id.

2. Here, Lost Profits Were the Natural Consequence of the Breach, Were Foreseeable, and Were Presented with Reasonable Precision. The Special Referee Erred in Denying Restaurateur Its Lost Profits.

There is no dispute that the project was delayed. Nor is there any dispute that the delay caused lost income to Restaurateur for each day that it was unable to open its business. Delaying a restaurant's opening obviously causes the restaurant's owner to lose its profits during the time the restaurant is not open, and it is obviously foreseeable that delaying the opening of a restaurant causes the

restaurant's owner to lose those profits. The Contractor admitted that was "obvious."

> Q And, obviously, if the restaurant is not opening, not operating, it's losing money, correct?
>
> A Yes.

(207:15-18) (emphasis added).

Yet the Special Referee, with no explanation whatsoever, failed to award compensation to Restaurateur for the lost profits it would have enjoyed had the project been timely completed.[5]

Nor is there any dispute that the contract specified a complete-by date. Nor is there any dispute that Contractor failed to complete the project by that date. The commencement date of the contract was the ninth of April, 2015. (205:23-25). The bid had a completion date of 90 days, yet the contract that Vince provided to Eagles Landing stated a completion date of 120 days. (206:17-22). Using the larger figure would produce a completion date of August ninth. (*Id.*)

The project was actually completed on October 23, 2015. (57:18-22). Even using the expanded 120-days-for-completion, the project was 75 days late.

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[5] The original order failed to address the issue at all. The order on the Rule 59 motions noted that Restaurateur had raised the issue in its Rule 59 motion, p. 4, but again failed to address the issue. It simply stated that,

> After considering the grounds raised in the motions of the Plaintiff and Defendant, and after reviewing the transcript of the trial, including the testimony of the witnesses and the exhibits that were admitted into evidence, as well as the notes from the trial, this Court denies both the Plaintiff's Motion to Reconsider and the Defendant's Motion to Amend.

Id., p. 5.

Contractor points to its finding mold in the building as causing delay. (37:11-15). However, testimony was that the mold delayed the project between one day and ten days, not the 75 days that the Contractor was later. Travis Everrett, a plumber, was called by Vince. (45:15-18, 46:8-9). He was "familiar, not only with the plumbing on this job, but other aspects of the work on this particular project." (46:22-25). He was "familiar with the -- the mold issues on this project." (47:5-7). "It delayed us a day for the tear out to be done." (*Id.*:7-8).

Mohamed Ali was called by Restaurateur. He testified that it took "A week, a week and a half, somewhere there" to deal with the mold. (294:5-11).[6]

But regardless of whether one employs Contractor's witness's one day or Restaurateur's witness' ten days for delay caused by finding mold, that leaves more than two months of delay unaccounted for. As noted above, Restaurateur sought lost profits for only two months (D's Ex. 9, Tr. 269:1-3)—which is proper under either witness' estimate.

Moreover, Restaurateur Eagles Landing presented evidence of lost profits. (D's Ex. 7). Exhibit 7 was Eagles Landing's Profit and Loss Statement for the subject restaurant for December of 2015. Eagles Landing avoided the error of the restaurateur in *Drews Co.*, which had provided only gross profits and the owner's guess that a third of that figure was profit. *Drews Co.*, 296 S.C. at 214, 371 S.E.2d

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[6] Nor is there any dispute that by hiring an expanded group of electricians, Restaurateur sped up the completion of the project. (52:18-53:4). At a minimum, Restaurateur should recover an amount equal the additional lost profits it would have incurred if the additional electricians were not employed to speed up the project.

at 536. The gross profits figures there "were not supplemented with corresponding figures for overhead or operating expenditures." *Id.* In contrast, the net profit figures in the present case were supplemented with detail breaking down costs into such categories as "meat," "seafood," "labor" (further broken down into subcategories of labor); detailed breakdowns of categories such as "Controllables" (further divided into items such as "Paper and Disposables," "Office Supplies"), and "Uncontrollables" (further broken down into "Rent," "Utilities," and the like). (Def.'s Ex. 9).

Eagles Landing did what the restaurateur in *Drews Co.* failed to do. The proof Eagles Landing provided suffices, as a matter of law, to entitle this Restaurateur to his lost profits. The Special Referee erred in failing to give Eagles Landing its Lost Profits.

3. In the Alternative, the Court Should Vacate the Portion of the Order that Refused to Award Appellant Its Lost Profits.

Rule 52(a) of the South Carolina Rules of Civil Procedure provides,

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

The findings must be sufficient to allow the appellate court to ensure the law is faithfully executed below. *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002). "The absence of factual findings makes our task of reviewing the court order impossible because 'the reasons underlying the decision [are] left to speculation.'" *Id.* (quoting *Kiawah Property Owners Group v. Public Serv. Com'n of South Carolina*, 338 S.C. 92, 96, 525 S.E.2d 863, 866). Where a lower court order fails to substantially comply with Rule 52(a), an appellate court will generally vacate the order or portion of the order that fails to do so. *Id.* at 131-34, 568 S.E.2d at 342-44.

Here, all that was stated in the original order regarding the lost profits was that "I concluded that the Defendant is not entitled to damages for labor paid to Mohamed Ali and Chris Monis or lost income." (Order. p. 7) (emphasis added). The Supplemental Order on the parties' Rule 59 Motions simply noted that Restaurateur Eagles Landing had raised the issue of lost profits in its Rule 59 motion, and then denied its claim, and all Rule 59 claims of each party, in a single sentence. (Supp. Order, p. 5).

Restaurateur complied with the preservation requirements of *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) and *Elam v. S.C. DOT*, 361 S.C. 9, 602 S.E.2d 772 (2004). Restaurateur is entitled to a ruling sufficiently detailed for the appellate court to determine whether the ruling is erroneous.

Because the orders' discussion of the issue fails to comply with Rule 52(a), the Court should vacate those portions of the orders and remand, if the Court is not

inclined to hold that the Restaurateur here is entitled to its lost profits as a matter of law.

IV. THE SPECIAL REFERRE APPLIED THE WRONG STANDARD IN RULING ON APPELLANT RESTAURATEUR'S RULE 59 MOTION. AT A MINIMUM, THE MATTER SHOULD BE REMANDED FOR RECONSIDERATION IN LIGHT OF THE PROPER STANDARD.

Standard of Review

The question here is whether the trial court applied the correct standard. The question of whether the trial court applied the correct standard is a matter of law. Review is de novo. "[W]hether the trial court applied the correct standard of review . . . is a question of law, which we review de novo." *Mercury Ins. Co. v. Lara*, 35 Cal. App. 5th 82, 97, 246 Cal. Rptr. 3d 907, 920 (2019) (alteration in original) (internal quotation marks omitted).

Discussion

The Special Referee denied Restaurateur's motion pursuant to Rule 59 on grounds that federal courts apply an exacting standard to these motions. Federal courts might do so, but South Carolina courts properly apply a much more relaxed standard. Because the Referee applied an incorrect standard, he erred as a matter of law.

After quoting the South Carolina Rule, and noting that the language of South Carolina's rule is substantially similar to the federal rule, and that South Carolina courts tend to follow federal courts in interpreting rules whose language is similar to federal rules (Supplemental Order at 3), the Special Referee then quoted several

federal cases, all decided in the last century, as markedly constricting his ability to consider the motion.

> The Fourth Circuit has similarly said of Rule 59(e) motions that "[i]n general reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Pacific Ins. Co. v. American Nat'l Fire Assoc.*, 148 F.3d 396,403 (4th Cir. 1998) (citations omitted). The Fourth Circuit, applying South Carolina law, established three grounds for revisiting a settled matter under Rule 59(e): (1) to accommodate an intervening change in the law; (2) to account for new evidence not previously available; and (3) to correct a clear error of law or prevent manifest injustice. *Dockins v. Benchmark Commc'ns*, 180 F.R.D. 294, 295 (D.S.C. 1998), *aff'd*, 176 F.3d 745 (4th Cir. 1999); *see also E.E.O.C. v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 172 (4th Cir. 1997). A Rule 59(e) motion may not be used to relitigate old matters. *Pacific Ins. Co.*, 148 F.3d at 403.

(*Id.*, p. 4) (emphasis added).

However, South Carolina law regarding motions pursuant to Rule 59 was changed and clarified by our Supreme Court in 2004. *Elam v. S.C. DOT,* 361 S.C. 9, 602 S.E.2d 772 (2004).

> [I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.

602 S.E.2d at 778-79 (emphasis added).

The Supreme Court added, "There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument." *Id.* at 779 (emphasis added). "The wisdom of giving district courts the

opportunity promptly to correct their own alleged errors is all the justification needed for the practice of freely allowing a motion for reconsideration." *Id.*

Under South Carolina law, motions for reconsideration are to be "freely allow[ed]" and encompass relitigating of "previously raised argument[s]."

Because the Special Referee labored under the misapprehension that he was strictly limited in what he could consider and was precluded from correcting his errors on questions that had been previously raised, he applied the wrong standard.

Therefore, if the Court does not agree with Restaurateur that the Special Referee erred as a matter of law and as a matter of math in denying Restaurateur $57,258.38 as a setoff against the electrical work that was not done by Respondent, in mistakenly, as a clerical or mathematical error, reducing Restaurateur's credits by $81,085.33, and in denying Restaurateur $71,784.52 in recovery for lost income, the Court should, at a minimum, remand for reconsideration of these matters in light of the proper standard, and allow the Special Referee to correct his own errors.

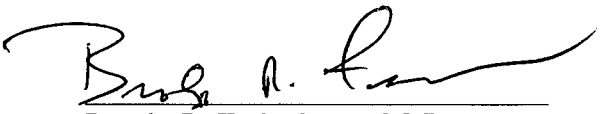
Conclusion

The Court should direct that the Special Referee credit Appellant $57,258.38 as a setoff against the electrical work that was not done by Respondent, credit Appellant with $81,085.33 that was erroneously removed from the credits to Appellant, and direct that he award Appellant $71,784.52 in lost income. These total $210,128.23. Applying these to the final order below, which held that Appellant owes Respondent $176,794.99 (plus interest), the Court should remand with instructions that Respondent owes Appellant $33,333.24 (plus interest).

In the alternative, the Court should remand with instructions that the Referee revisit the issue of lost profits, and revisit all the issues raised in Appellant's Rule 59 motion.

Respectfully Submitted,

LAW OFFICE OF BROOKS R. FUDENBERG LLC



December 2, 2019

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Eugene P. Warr, Jr., Special Referee

Case No. 2016-CP-21-00702
Appellate Case No. 2019-001062

Vincent C. Carter d/b/a Elite Construction Co.,

Respondent,

v.

Eagles Landing Restaurants, LLC,

Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Appellant's Designation of Matter to Be Included in the Record on Appeal on Vincent C. Carter d/b/a Elite Construction Co., the Respondent, by depositing a copy of each in the United States Mail, postage prepaid, on today's date, addressed to its attorney of record Patrick B. Ford, Esq., P.O. Box 1317, Florence, SC 29503.

December 2, 2019

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December 2, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Vincent C. Carter d/b/a Elite Construction Co., v. Eagles Landing Restaurants, LLC
Case No: 2016-CP-21-00702 / Appellate Case No. 2019-001062

Dear Ms. Kitchings:

Please find enclosed:

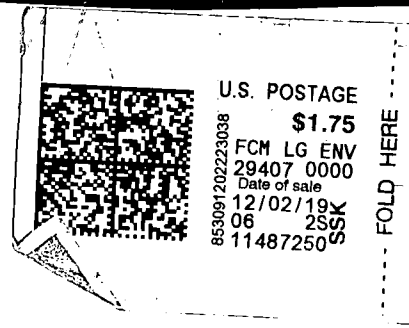
* the Initial Brief of Appellant,
* Appellant's Designation of Matter to Be Included in the Record on Appeal; and
* a proof of service of the Initial Brief and the Designation of Matter.

Thank you.

Sincerely,

Brooks R. Fudenberg
Law Office of Brooks R. Fudenberg LLC
Attorney for Appellant

cc: Patrick B. Ford, Esq.
Gary Ivan Finklea, Esquire



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