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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-40-7647 - Appellate No.: 2018-000162

Meritage Asset Management, Inc., d/b/a Century Glass
Company.....Appellant,

v.

Freeland Construction Company, Inc. and South Carolina Military
Department.....Defendants,

Of which South Carolina Military Department is the Respondent.

RECORD ON APPEAL

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BACKGROUND

This case is about the extent of government entity liability to a subcontractor. The Department contracted with Freeland Construction Company, Inc. (Freeland), to perform construction work on one of the Department's properties, the Saluda Armory. Freeland engaged Meritage Asset Management, Inc. d/b/a Century Glass Company (Meritage) as a subcontractor to perform certain work. The work has been completed. The Department paid Freeland for the work performed. Almost two months after paying Freeland in full, Meritage informed the Department that Freeland had not paid Meritage. The relevant timeline is as follows.

19 September 2014: The Department and Freeland agree on a contract.

21 January 2016: Meritage submitted a subcontractor proposal to Freeland for subcontractor work on the Saluda Armory.

27 January 2016: Freeland accepted Meritage's proposal for the work on the Saluda Armory.

1 June 2016: Freeland completed the work on the Armory.

3 June 2016: Final invoice from Freeland was submitted to the Department.

7 June 2016: The final invoice for \$93,973.69 was posted for payment to Freeland, completing the contract between the Department and Freeland.

17 June 2016: The final payment was deposited.

8 August 2016: The first time the Department learned of Freeland's failure to pay Meritage.

In its Motion for Summary Judgment, Meritage argued it is entitled to judgment on its third party beneficiary breach of contract claim, based on the fact the Department did not ensure that Freeland obtained a labor and material bond pursuant to Section 29-6-250, the Subcontractors' and Suppliers' Payment Protection Act (SPPA). The Department, in its Motion, argued that it is entitled to Summary Judgment because Meritage did not give the Department

GC 2

notice of Freeland's nonpayment, before the Department paid Freeland in full.

THIRD-PARTY BENEFICIARY CONTRACT UNDER SPPA

"[A] governmental entity may be liable to a subcontractor only for breach of contract for failing to comply with the SPPA bonding requirements." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 564, 743 S.E.2d 778, 780 (2013). Although Meritage may pursue a third-party beneficiary breach of contract claim against the Department, the law is clear: "[T]he government entity's liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment." Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165-66 (2008). The only exception to this limitation on liability is the additional recovery of attorneys' fees under any applicable statute. Id., 377 S.C. 108, 121, 659 S.E.2d 158, 166.

Meritage informed the Department of Freeland's failure to pay on August 8, 2016. At that time, the Department did not owe any money to Freeland; it had paid Freeland in full on June 17, 2016. Under Sloan, because no outstanding balance existed between the Department and Freeland at the time of notice, the Department does not owe Meritage. Meritage's third party beneficiary breach of contract claim fails, consequently, as a matter of law.

Meritage gave three arguments opposing this conclusion. The first argument involves two cases, one from Texas and one from Florida. Meritage asserted that these cases involved statutes similar to the SPPA, and courts ruled, in those cases, that the government entity was liable to the subcontractor. Meritage asked this court to rule similarly. These cases are respectively construing a Texas and a Florida statute; they were not construing the South Carolina statute at issue in this case. Our State Supreme Court has construed the SPPA and expressly limited the liability of government entities as described above. What Meritage is asking, in effect, is for this court to



· overrule the unequivocal decision of the South Carolina Supreme Court. That, however, is not within the authority of this court to do. See State v. Phillips, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) (“[I]t is incumbent upon the court of appeals to apply this Court’s precedent”) (citing S.C. Const. art. V, §9).¹

Meritage’s second argument is just as unavailing. The Court in Sloan compared the SPPA to Section 29-5-20, titled “Lien of Laborer, mechanic, subcontractor or materialman.” The Court then concluded as follows: “Given the similar purposes behind the SPPA bond requirements for public projects and the subcontractors’ mechanics’ lien on private work, we hold that in a tort or contract action arising under the SPPA, the government entity’s liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor’s nonpayment.” Sloan, 377 S.C. 108, 121, 659 S.E.2d 158, 165–66 (2008). Meritage points to another mechanics’ lien statute, Section 29-5-10, and asked this court to compare the SPPA to that statutory section rather than Section 29-5-20. Doing so, according to Meritage, may enable it to recover under the SPPA. This argument has no basis in law, for at least two reasons. First, the Supreme Court has already compared the SPPA to Section 29-5-20 and limited government entity liability in accordance with that comparison; this court may not effectively overrule the Supreme Court’s determination by analyzing the issue of government liability in a different manner. Second, Section 29-5-10 does not give a lien to subcontractors, which makes any comparison between it and the SPPA inapposite. See Kelly v. Bank of State (1841) 16 S.C. Eq. 431; Murray v. Earle (1880) 13 S.C. 87; Gray v. Walker (1881) 16 SC 143; Geddes v. Bowden (1883) 19 S.C. 1; and Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 629-33, 93 S.E.2d 855, 860-62 (1956).

¹ What is true for the Court of Appeals is certainly also true for Circuit Courts.

In Lowndes Hill, the Court reviewed the history of South Carolina mechanics' lien statutes. While doing so, it considered the case of Gray v. Walker, 1881, 16 S.C. 143. The Court in Gray v. Walker, according to the Court in Lowndes Hill, made clear that Section 45-251 (the previous codification of Section 29-5-10) did not apply to laborers who performed work pursuant to a contract with the prime contractor, Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 632, 93 S.E.2d 855, 861 (1956).

Finally, Meritage argues that it was not due payment from Freeland until after the Department had paid Freeland in full and thus, Meritage had no opportunity to notify the Department of Freeland's nonpayment. But that does not obviate the governing law: "[T]he government entity's liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment." Id. In this case, when Meritage gave notice, the Department had already paid Freeland in full. Because the extent of government entity liability is reached once the government entity pays the general contractor in full, Meritage has no viable claim against the Department. Meritage would like to distinguish the facts in this case from those in Sloan and Shirley's Iron Works. Its efforts are misguided because those cases erected a limit on government entity liability, regardless of the facts in any particular case. Meritage wants this court to extend liability beyond the current limit and, in doing so, overturn the Supreme Court's ruling in Sloan and Shirley's Iron Works. As stated above, this court does not have the authority to do that, and will not.



CONCLUSION

In conclusion, Meritage's only legal recourse is against Freeland. **THEREFORE**, the Department's motion for summary judgment is **GRANTED**.



G. Thomas Cooper, Jr.
Presiding Judge
Fifth Circuit

January 2, 2018

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2016CP4007647

Meritage Asset Management Inc
Century Glass Company
PLAINTIFF(S)

Freeland Construction Company Inc
South Carolina Military Department
DEFENDANT(S)

Submitted by: _____ Attorney for: Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- STAYED DUE TO BANKRUPTCY
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case. Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code 2126 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 8 day of January, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 8 day of January, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

William Harley Yarborough Jr. Thomas Parkin C. Hunter Kevin Desmond Maroney

ATTORNEY(S) FOR THE PLAINTIFF(S)
Court Reporter _____

ATTORNEY(S) FOR THE DEFENDANT(S)
Clerk of Court *Francelle W. [Signature]*

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Meritage Asset Management, Inc., d/b/a Century Glass Company,

Plaintiff(s)

CIVIL ACTION COVERSHEET

2016CP400 7647

vs.

Freeland Construction Company, Inc. and the South Carolina Military Department

Defendant(s)

Submitted By: William H. Yarborough
Address: Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211

SC Bar #: 102868
Telephone #: (803) 256-2233 x7102
Fax #: (803) 256-9177
Other:
E-mail: why@swblaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.
NON-JURY TRIAL demanded in complaint.
This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is exempt from ADR. (Proof of ADR/Exemption Attached).

NATURE OF ACTION (Check One Box Below)

- Contracts: Construction (100), Debt Collection (110), Employment (120), General (130), Branch of Contract (140), Other (199)
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case #, Notice/File Med Mal (230), Other (299)
Torts - Personal Injury: Assault/Slander/Libel (300), Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)
Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599)
Administrative Law/Relief: Reinstatement Drv. License (800), Judicial Review (810), Relief (820), Permanent Injunction (830), Forfeiture-Petition (840), Forfeiture-Consent Order (850), Other (899)
Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Confession of Judgment (770), Petition for Workers Compensation Settlement Approval (780), Other (799)
Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOT (950), Worker's Comp (960), Zoning Board (970), Public Service Comm. (990), Employment Security Comm (991), Other (999)
Special/Complex/Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of-State Depositions (650), Motion to Quash Subpoena in an Out-of-County Action (660), Sexual Predator (510)

FILED
2016 DEC 29 PM 2:42
RICHLAND COUNTY

Submitting Party Signature:

Date: December 27, 2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Berkeley, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	FOR THE FIFTH JUDICIAL CIRCUIT
)	
Meritage Asset Management, Inc.)	Civil Action No.:
d/b/a Century Glass Company)	
)	
)	
Plaintiff,)	
)	
v.)	
)	
Freeland Construction Company, Inc.)	
and the South Carolina Military)	
Department)	
)	
Defendants.)	

SUMMONS

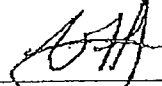
RICHLAND COUNTY
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2015 DEC 29 PM 2:42
JEANNETTE W. MORRIS
C.C.P. & G.S.

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 1515 Lady Street, Columbia, South Carolina 29201, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, Plaintiffs will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

~Signature Page to Follow~

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.



Everett A. Kendall, II
William H. Yarborough
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211
(803) 256-2233

ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina

December 27, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Meritage Asset Management, Inc.)
d/b/a Century Glass Company)

Plaintiff,)

v.)

Freeland Construction Company, Inc.)
and the South Carolina Military)
Department)

Defendants.)

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No.:

COMPLAINT
(Jury Trial Demanded)

2016 DEC 29 PM 2:42
JEANNETTE W. MCBRIDE
C.S.P. & G.S.

RICHLAND COUNTY
FILED

Plaintiff Meritage Asset Management, Inc. d/b/a Century Glass Company ("Plaintiff") brings this action against Defendants Freeland Construction Company, Inc. ("Freeland") and the South Carolina Military Department (the "Department").

PARTIES

1. Plaintiff is a South Carolina Corporation located in Irmo, South Carolina.
2. Freeland is a South Carolina corporation located in Charleston, South Carolina.
3. The Department is an agency of the State of South Carolina headquartered in Columbia, South Carolina.

JURISDICTION

4. The Court has subject matter jurisdiction over the claims in this lawsuit under Article V § 11 of the South Carolina Constitution and South Carolina Code § 14-5-350.
5. Plaintiff submits to personal jurisdiction of the Court for purposes of this matter by filing this action.

6. The Court has personal jurisdiction over Freeland because it is a South Carolina corporation.

7. The Court has personal jurisdiction over the Department because it is an agency of the State of South Carolina.

VENUE

8. Venue is proper in this circuit because Defendant Department is headquartered in Richland County, South Carolina.

FACTS

9. Freeland submitted bids to the Department for the construction of the National Guard Armory ("Saluda Armory") in Saluda, South Carolina.

10. Freeland did not secure payment bonds for the Saluda Armory projects or submit any proof of adequate bonding in its bid submission to the Department.

11. The Department failed to reject Freeland's bid on the Saluda Armory project despite the lack of payment bonds securing subcontractor payment for work on the project.

12. The Department ultimately selected Freeland's bid to act as the general contractor on the Saluda Armory project.

13. On January 21, 2016, Plaintiff submitted a subcontractor proposal to Freeland for glass and aluminum work on the Saluda Armory.

14. Freeland signed and accepted this proposal on January 27, 2016.

15. Plaintiff and Freeland subsequently executed an AIA Standard Form of Agreement Between Contractor and Subcontractor ("Contract").

16. The Contract incorporated Plaintiff's Saluda Armory proposal by which Plaintiff would be paid \$50,600 for its work.

17. Plaintiff began and completed its work on the Saluda Armory and properly submitted applications for payment.

18. To date, Plaintiff has not received any payments for any work done on the Saluda Armory.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract - Freeland)

19. The allegations of paragraphs 1 - 16 above are hereby realleged as if set forth herein verbatim.

20. Freeland entered into a valid, binding contract with Plaintiff

21. Plaintiff performed in accordance with the contract by completing all aluminum and glass work.

22. Freeland breached the contract by failing to timely pay Plaintiff after submission of payment applications.

23. As a direct and proximate result of Freeland's breach, Plaintiff has suffered damages in the amount of \$55,027.50.

FOR A SECOND CAUSE OF ACTION
(Violation of S.C. Code § 29-6-250 - South Carolina Military Department)

24. The allegations of paragraphs 1 - 22 above are hereby realleged as if set forth herein verbatim.

25. Plaintiff, as a subcontractor, was a third-party beneficiary to the contract formed between Freeland and the Department for the construction of the Saluda Armory.

26. The Department violated South Carolina's Subcontractors' and Suppliers' Payment Protection Act ("SPPA") that requires a government agency secure and maintain statutory bonding.

27. As a direct result of the Department's violation, payment was not secured and Plaintiff was not able to collect for its work on the Saluda Armory after Freeland failed to pay; as a result, Plaintiff suffered damages in the amount of \$55,027.50.

FOR A THIRD CAUSE OF ACTION
(Quantum Meruit -- South Carolina Military Department)

28. The allegations of paragraphs 1 - 27 above are hereby realleged as if set forth herein verbatim.

29. Plaintiff conferred a benefit on the Department by completing aluminum and glass work on the Saluda Armory in accordance with the Contract between Plaintiff and Freeland.

30. The Department realized the benefit of Plaintiff's work by utilizing and continuing to utilize the Saluda Armory.

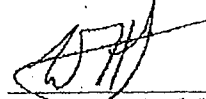
31. The Department continues to use the Saluda Armory and Plaintiff has not been paid the value of their work.

WHEREFORE, Plaintiff prays for judgment against Defendants and that Plaintiff be awarded: (1) actual damages; (2) prejudgment interest; (3) attorneys' fees and costs; and (4) such other and further relief as the Court and jury deem just and appropriate.

~Signature Page to Follow~

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



Everett A. Kendall, II
William H. Yarborough, Jr.
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(803) 256-2233

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina

December 27, 2016

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Meritage Asset Management, Inc. d/b/a
Century Glass Company

Plaintiff,

v.

Freeland Construction Company, Inc. and the
South Carolina Military Department,

Defendants.

) IN THE COURT OF COMMON PLEAS

) FOR THE FIFTH JUDICIAL CIRCUIT

) Civil Action No.: 2016-CP-40-07647

) Answer and Cross Claim

RICHLAND COUNTY
FILED
2017 MAR 29 AM 8:37
CLERK OF COURT

The South Carolina Military Department (the "Department") files and serves its Answer and Cross Claim on Meritage Asset Management, Inc. d/b/a Century Glass Company ("Meritage") and Freeland Construction Company, Inc. ("Freeland").

FOR A FIRST DEFENSE

1. Every allegation that is not admitted, qualified, or otherwise explained is denied.
2. Responding to the allegations of Paragraph 1 and Paragraph 2, the Department lacks knowledge or information sufficient to form a belief as to the truth of these paragraphs and therefore denies same.
3. Responding to the allegations of Paragraph 3 and Paragraph 4, the Department admits the allegations of these paragraphs.
4. Responding to the allegations of Paragraph 5 and Paragraph 6, the Department lacks knowledge or information sufficient to form a belief as to the truth of these paragraphs and therefore denies same.
5. Responding to Paragraph 7 through Paragraph 12, the Department admits the allegations of these paragraphs.
6. Responding to Paragraph 13 through Paragraph 18, the allegations are admitted in so far as the Department understands that Meritage was a subcontractor for Freeland but otherwise the Department lacks knowledge or information sufficient to form a belief as to the remaining allegations in these paragraphs and therefore denies same.

7. Responding to Paragraph 19, the allegations of Paragraph 1 through Paragraph 6 of this Answer are realleged as fully as if repeated verbatim herein.

8. Responding to Paragraph 20 through 23, the Department lacks knowledge or information sufficient to form a belief as to the truth of these paragraphs and therefore denies same.

9. Responding to Paragraph 24, the allegations of Paragraph 1 through Paragraph 8 of this Answer are realleged as fully as if repeated verbatim herein.

10. Responding to Paragraph 25, the Department denies these allegations.

11. Responding to Paragraph 26, the Department admits that, as of its knowledge, no bond or security was obtained for the construction of the Saluda Armory. The Department denies the remaining allegations of these paragraphs as written.

12. Responding to Paragraph 27, Department lacks knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies same.

13. Responding to Paragraph 28, the allegations of Paragraph 1 through Paragraph 12 of this Answer are realleged as fully as if repeated verbatim herein.

14. Responding to Paragraph 29, the Department admits that Plaintiff installed aluminum and glass at the Saluda Armory. As to the remaining allegations of this Paragraph, Department lacks knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies same. Department denies that any work performed by Plaintiff gives rise to a valid claim for *quantum meruit* or any other claim against the Department.

15. Responding to Paragraph 30, the Department admits that Plaintiff performed work on the Saluda Armory and that the Department continues to utilize the Saluda Armory. Department denies that any work performed by Plaintiff gives rise to a valid claim for *quantum meruit* or any other claim against the Department.

16. Responding to Paragraph 31, the Department admits that it continues to use the Saluda Armory. As to the remaining allegations, the Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding the payment status and therefore denies same.

FOR A SECOND DEFENSE

17. To the extent that a response is necessary to the Prayer for Relief, the Department denies that the Plaintiff is entitled to the requested relief as to the Department.

FOR A THIRD DEFENSE AND MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

18. The allegations of Paragraph 1 through Paragraph 17 of this Answer are realleged as fully as if repeated verbatim herein.

19. Meritage has failed to state facts sufficient to constitute a cause of action for a claim of relief under Section 29-6-250.

20. The Department prays that this cause of action be dismissed.

FOR A FOURTH DEFENSE AND MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

21. The allegations of Paragraph 1 through Paragraph 20 of this Answer are realleged as fully as if repeated verbatim herein.

22. Meritage has failed to state facts sufficient to constitute a cause of action for a claim of relief for *quantum meruit*.

23. There is an express contract between the Department and Freeland and between Freeland and Meritage. Therefore, there is no cause of action for *quantum meruit* and these claims should be dismissed.

24. The Department prays that the cause of action for *quantum meruit* be dismissed with prejudice.

FOR A FIFTH DEFENSE

25. The allegations of Paragraph 1 through Paragraph 24 of this Answer are realleged as fully as if repeated verbatim herein.

26. Department paid its obligations under its contract with Freeland on 7 June 2016.

27. Prior to making the aforementioned payment, Department had not received a demand for payment from Meritage.¹

28. “[T]he government entity's liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment.” Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165-66 (2008) holding modified by Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013) (to clarify that there is not a recovery in tort under

¹ Personnel at the Department were copied on an email dated August 8, 2016, from Mr. Rando Motley of Century Glass to Mr. Vince Bell of Freeland telling Freeland that Meritage had not received payment.

the SPPA). Therefore, the Plaintiff is not entitled to relief from the Department pursuant to the South Carolina Subcontractors' and Suppliers' Payment Protection Act.

29. The Department prays that the Complaint be dismissed with prejudice.

FOR AN SIXTH DEFENSE

30. The allegations of Paragraph 1 through Paragraph 29 of this Answer are realleged as fully as if repeated verbatim herein.

31. Department is an agency of the State of South Carolina and is protected under the doctrine of sovereign immunity.

32. The Department prays that this case be dismissed with prejudice.

CROSS CLAIM AGAINST FREELAND CONSTRUCTION COMPANY, INC.

33. The allegations of Paragraph 1 through Paragraph 32 of this Answer are realleged as fully as if repeated verbatim herein.

34. Freeland was the general contractor for the improvements to the Saluda Armory, and, upon information and belief, Freeland engaged Meritage as a subcontractor to perform certain work at the Saluda Armory as a subcontractor for Freeland.

35. It was Freeland's duty, obligation, and responsibility to pay Meritage for whatever work Meritage performed in accordance to whatever agreement existed between Freeland and Meritage.

36. The Department has made all required payments under the contract to Freeland.

37. If Freeland has not paid Meritage for its work, Freeland has breached its duties and obligations and has retained funds it received from the Department that should have been paid to Meritage.

38. Freeland did not inform the Department prior to the Department's final payment to Freeland that Meritage had not been paid all it was due as a subcontractor for its work.

39. Meritage did not inform the Department prior to the Department's final payment to Freeland that Meritage had not been paid all it was due as a subcontractor for its work.

40. Should a judgment be entered against the Department for sums due to Meritage, the Department is entitled to indemnification from Freeland.

41. Wherefore, should this Court find that the Department owes any sums to Meritage, the Department prays for a judgement of indemnification against Freeland for such sums plus interest, costs, attorney fees, and any other appropriate relief.

WHEREFORE, having fully answered the Complaint in this matter, Department prays:

1. That all claims alleged against Department be dismissed with prejudice.
2. That Department be awarded attorney's fees and costs.
3. For such other and further relief as may be appropriate.

WHEREFORE, Department further prays for indemnification for any sums that may be found owing to Meritage plus interest, costs, attorney fees and any other appropriate relief.

Respectfully submitted,

ALAN WILSON
Attorney General

T. PARKIN C. HUNTER
Senior Assistant Attorney General
S.C. Bar No. 2827

KEVIN DESMOND MARONEY
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

BY: 

March 24, 2017

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Meritage Asset Management, Inc. d/b/a
Century Glass Company

Plaintiff,

v.

Freeland Construction Company, Inc. and the
South Carolina Military Department,
Defendants.

) IN THE COURT OF COMMON PLEAS

) FOR THE FIFTH JUDICIAL CIRCUIT

) Civil Action No.: 2016-CP-40-07647

) CERTIFICATE OF SERVICE

) (Answer and Cross Claim)

RICHLAND COUNTY
FILED
2017 MAR 29 AM 8:37
JENNIFER L. GOSWAMI

I hereby certify that I have served Meritage Asset Management, Inc. d/b/a Century Glass Company and Freeland Construction Company, Inc. the below listed documents by mailing to their attorneys or registered agents at the addresses below via the United States Mail, return receipt requested to Mr. Canty, this March 24, 2017.

William H. Yarborough
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211

Kenneth B. Canty
1629 Meeting Street Road
Charleston, South Carolina 29405

Documents served:

I. Answer and Cross Claim


THOMAS PARKIN C. HUNTER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680
(803)734-3677 (Fax)

March 24, 2017

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Meritage Asset Management, Inc., d/b/a
Century Glass Company)

vs.)

Freeland Construction Company, Inc. and the
South Carolina Military Department)


Plaintiff,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-40-07647

MOTION AND ORDER INFORMATION

FORM AND COVER SHEET

Plaintiff's Attorney: William H. Yarborough, Jr., Bar No. 102868 Address: Sweeny, Wingate & Barrow, P.A. Post Office Box 12129 Columbia, SC 29211 Phone: 803-256-2233 Fax: _____ E-mail: why@swblaw.com Other: _____	Defendant's Attorney: T. Parkin Hunter Bar # 2827 Kevin D. Maroney, Bar No. 102545 Address: P.O. Box 11549, Columbia, SC 29211-1549 Phone: 803.734.6151 Fax 803.734.3827 E-mail: phunter@sacg.gov kmaroney@scag.gov Other: _____														
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)															
SECTION I: Hearing Information Nature of Motion: Motion to For Summary Judgment Estimated Time Needed: 15 min. Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO															
SECTION II: Motion/Order Type <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. <div style="display: flex; justify-content: space-between;"> <div>  Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant </div> <div> 5/26/2017 Date submitted </div> </div>															
SECTION III: Motion Fee <input checked="" type="checkbox"/> PAID - AMOUNT: \$ _____ <input type="checkbox"/> EXEMPT: (check reason) <table style="width: 100%; border: none;"> <tr> <td><input type="checkbox"/> Rule to Show Cause in Child or Spousal Support</td> <td><input type="checkbox"/> State Agency v. Indigent Party</td> </tr> <tr> <td><input type="checkbox"/> Domestic Abuse or Abuse and Neglect</td> <td><input type="checkbox"/> Post-Conviction Relief</td> </tr> <tr> <td><input type="checkbox"/> Indigent Status</td> <td><input type="checkbox"/> Motion for Stay in Bankruptcy</td> </tr> <tr> <td><input type="checkbox"/> Sexually Violent Predator Act</td> <td><input type="checkbox"/> Motion for Execution (Rule 69, SCRPC)</td> </tr> <tr> <td colspan="2"><input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions</td> </tr> <tr> <td colspan="2">Name of Court Reporter: _____</td> </tr> <tr> <td colspan="2"><input type="checkbox"/> Other: _____</td> </tr> </table>		<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support	<input type="checkbox"/> State Agency v. Indigent Party	<input type="checkbox"/> Domestic Abuse or Abuse and Neglect	<input type="checkbox"/> Post-Conviction Relief	<input type="checkbox"/> Indigent Status	<input type="checkbox"/> Motion for Stay in Bankruptcy	<input type="checkbox"/> Sexually Violent Predator Act	<input type="checkbox"/> Motion for Execution (Rule 69, SCRPC)	<input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions		Name of Court Reporter: _____		<input type="checkbox"/> Other: _____	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support	<input type="checkbox"/> State Agency v. Indigent Party														
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<input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions															
Name of Court Reporter: _____															
<input type="checkbox"/> Other: _____															
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____														

CLERK'S VERIFICATION

Collected by: JM Date Filed: 5-26-17

MOTION FEE COLLECTED: \$ _____

CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Meritage Asset Management, Inc. d/b/a
Century Glass Company

Plaintiff,

v.

Freeland Construction Company, Inc. and the
South Carolina Military Department,

Defendants.

) IN THE COURT OF COMMON PLEAS

) FOR THE FIFTH JUDICIAL CIRCUIT

) Civil Action No.: 2016-CP-40-07647

) South Carolina Military Department's
) Motion for Summary Judgment and
) Memorandum in Support of Motion for
) Summary Judgment

FILED
MAY 26 AM 10:54
JANETTE W. HERRON
C.P. & C.S.

This case is about claims for payment by a subcontractor. The South Carolina Military Department (the "Department") contracted with Freeland Construction Company, Inc. ("Freeland") as general contractor to perform work at the Department's Saluda Armory (the "Saluda Armory"). Freeland engaged Meritage Asset Management, Inc. d/b/a Century Glass Company ("Meritage") as a subcontractor to perform certain work. The work has been completed. The Department does not dispute that the work has been satisfactorily performed. The Department does not have any direct knowledge about the payment status of the accounts between Freeland and Meritage. The Department, however, has paid its general contractor, Freeland, in full for the work performed. Meritage never told the Department that Freeland had not been paying Meritage before the Department made its final payment to Freeland.

Meritage asserts that the Department failed to ensure that Freeland obtained a bond under § 29-6-250, the Subcontractors' and Suppliers' Payment Protection Act (SPPA). That assertion is correct. Nevertheless, any recovery by Meritage is limited to any amounts owed on the contract between the Department and Freeland, at the time Meritage either gave notice to or demanded

payment from the Department. The Department did not have notice of any claims by Meritage at the time the Department made its final payment to Freeland. Thus, any claim related to the bond is limited, and in this case is zero.

BACKGROUND

19 September, 2014: The Department and Freeland agree on a contract. (Affidavit in Support, ¶2)

21 January, 2016: Meritage submitted a subcontractor proposal to Freeland for subcontractor work on the Saluda Armory (Complaint, paragraph 13).

27 January, 2016: Freeland accepted Meritage's proposal for the work on the Saluda Armory (Complaint, paragraph 14).

1 June, 2016: Freeland completed the work on the Armory (Affidavit in Support, ¶3).

3 June, 2016: Final invoice from Freeland submitted to the Department (Affidavit in Support, ¶4).

7 June 2016: The final invoice for \$93,973.69 was posted for payment to Freeland, completing the contract between the Department and Freeland. (Affidavit in Support, ¶5).

17 June 2016: The final payment was deposited. (Affidavit in Support, ¶6).

Meritage admits that it did not give the Department notice of Freeland's nonpayment prior to June 7, 2016. (Attached is Meritage's Responses to Request to Admit, Response #2).

The first time the Department learned of Freeland's nonpayment was August 8, 2016. (Affidavit in Support, ¶8).

Meritage has asserted a third party beneficiary breach of contract claim against the Department for the failure to require Freeland to obtain a bond under the SPPA, and a claim for quantum meruit. Meritage has also asserted a claim for breach of contract against Freeland.

There are not any disputed facts with regard to the matters between Meritage and Freeland and the Department. The claims against the Department fail as a matter of law.

TORT ACTION UNDER THE SPPA

Although Meritage asserts third party beneficiary and quantum meruit claims only, the Department would like to make the following clear: “[N]o tort action arises under the SPPA.” Shirley’s Iron Works, Inc. v. City of Union, 403 S.C. 560, 572, 743 S.E.2d 778, 784 (2013). Thus, if Meritage is asserting a tort action under the SPPA, such a claim fails as a matter of law.

THIRD PARTY BENEFICIARY CONTRACT UNDER SPPA

“[A] governmental entity may be liable to a subcontractor only for breach of contract for failing to comply with the SPPA bonding requirements.” Id. 403 S.C. 560, 564, 743 S.E.2d 778, 780. Although Meritage may pursue a third party beneficiary breach of contract claim against the Department, the law is clear that “the government entity’s liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor’s nonpayment.” Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165–66 (2008) holding modified by Shirley’s Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013) (to clarify that there is not a recovery in tort under the SPPA).

There was no outstanding balance owed to Freeland when Meritage made its claim for payment to the Department. Meritage, moreover, had not given the Department notice of Freeland’s nonpayment when the Department paid Freeland in full. Because no outstanding balance existed between the Department and Freeland when Meritage notified the Department of Freeland’s nonpayment, Meritage is not entitled to pursue recovery from the Department based on a third party beneficiary breach of contract claim. Thus, Meritage’s third party beneficiary breach of contract claim against the Department falls as a matter of law.

QUANTUM MERUIT

"Quantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct.App.2012) (quoting OHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 202, 600 W.S.E.2d 105, 108 (Ct.App.2004)). Although modern case law utilizes terms such as "restitution" and "unjust enrichment," those terms are simply modern designations for the doctrine of quasi-contract. Id., 400 S.C. 320, 325, 734 S.E.2d 177, 180 (quoting Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct.App.1988)). Because unjust enrichment is a modern designation for the doctrine of quasi-contract, and because quasi contract and quantum meruit are equivalent terms for an equitable remedy, the term quantum meruit can be substituted for unjust enrichment in the following sentence. "Courts addressing a claim of unjust enrichment [or quantum meruit] by a subcontractor against a property owner have typically denied recovery where the owner in fact paid on its contract with the general contractor." Id., 400 S.C. 320, 326, 734 S.E.2d 177, 180 (quoting Columbia Wholesale Co. v. Scudder May N.Y., 312 S.C. 259, 262-63, 440 S.E.2d 129, 131 (1994)).

In Williams Carpet Contractors, Inc. v. Skelly, the court reviewed a case in which a jury awarded damages for the Plaintiff on his claim for quantum meruit. Notwithstanding the jury award, the Defendant filed a JNOV motion, which the trial court granted. The Plaintiff appealed. The Court of Appeals overturned the trial court's decision to grant a JNOV because the Plaintiff had presented some evidence that the general contractor had not been paid in full. Id., 400 S.C. 320, 326, 723 S.E.2d 177, 180. If the one reasonable inference that could have been drawn from the evidence supported the claim that the general contractor had been paid in full, the court would have affirmed the decision to grant a JNOV. Cf. Id., 400 S.C. 320, 325, 734 S.E.2d 177,

180 ("If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to a jury" (quoting Chancy v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965))).

In this case, the Department paid Freeland (the general contractor) in full on June 7, 2016. Meritage admits that it did not give the Department notice of Freeland's nonpayment prior to June 7, 2016. The Department confirms that it did not have notice prior to June 7, 2016. Because the Department has paid on its contract with the general contractor, Meritage is not entitled to pursue its claim for quantum meruit against the Department. Thus, Meritage's quantum meruit claim fails as a matter of law.

CONTRACT OR QUANTUM MERUIT

Although Meritage is careful to base its quantum meruit claim against the Department on the benefit that the Department received because of the contract between Meritage and Freeland rather than on the contract between the Department and Freeland, the Department would like to make a few points clear.

Quantum meruit is incompatible with the existence of a valid contract. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 574-5, 743 S.E.2d 778, 785-6 (2013) (citing Sloan I, 377 S.C. 108, 659 S.E.2d 158 (holding the SPPA's bonding requirements are incorporated into all public works construction contracts); Strickland v. Coastal Design Assocs., 294 S.C. 421, 424, 365 S.E.2d 226, 228 (Ct.App.1987) ("The law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in quantum meruit *unless the original contract remains in force.*" (Emphasis added by the Court))). "If the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not

been abandoned or rescinded, the plaintiff may not recover under quantum meruit.” Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 328, 734 S.E.2d 177, 181 (Ct.App.2012) (quoting Swanson v. Stratos, 350 S.C. 116, 122, 564 S.E.2d 117, 120 (2002)).

Although courts have asserted that the existence of an express contract covering the issue of compensation is a defense to an action for quantum meruit, they have also said the following. “While recovery may be had in quantum meruit for services fully performed under an express contract, the plaintiff’s recovery is limited to the amount the parties agreed should be paid for the services.” Id., 400 S.C. 320, 328-29, 734 S.E.2d 177, 182 (quoting Johnston v. Brown, 290 S.C. 141, 148, 348 S.E.2d 391, 395 (Ct.App.1986, rev’d on other grounds, 292 S.C. 478, 357 S.E.2d 450 (1987)). Nevertheless, “[c]ase law bars recovering under both [a breach of contract theory and a quantum meruit theory],” Id., 400 S.C. 320, 329, 734 S.E.2d 177, 182, though both theories may be pled. Id., 400 S.C. 320, 328, 734 S.E.2d 177, 181 (“A breach of contract claim and quantum meruit claim can be alternative rather than inconsistent remedies”) (quoting JASDIP Props. SC, LLC v. Estate of Richardson, 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct. App.2011)).

In this case, the Department had an express contract with Freeland and Freeland had an express contract with Meritage. The contract between the Department and Freeland covering compensation for work on the Saluda Armory serves as the basis for Meritage’s third party beneficiary breach of contract claim against the Department. Because Meritage uses that contract as the basis for its first cause of action against the Department, Meritage cannot and does not dispute the existence and validity of that contract. Just as importantly, Meritage does not argue that the contract was rescinded or abandoned. Consequently, the contract between the Department and Freeland must remain in force. Similarly, the contract between Meritage and

Freeland covering compensation for work on the Saluda Armory serves as the basis for Meritage's breach of contract claim against Freeland. Because Meritage uses that contract as the basis for its breach of contract claim against Freeland, Meritage cannot and does not dispute the existence and validity of that contract. Therefore, the contract between Meritage and Freeland must remain in force.

Because valid contracts covering compensation for work on the Saluda Armory exist and remain in force, the quasi-contractual claim of quantum meruit is inapplicable to this action, at least to the extent Meritage seeks recovery in an amount above the compensation agreed to for work on the Saluda Armory in those contracts. Thus, to that extent, Meritage's quantum meruit claim fails as a matter of law.

In its breach of contract claim against both Freeland and the Department, Meritage asserts that it suffered damages for \$55,027.50. (Complaint ¶23 and ¶27). The amount that Meritage and Freeland agreed would be the compensation for Meritage's work on the Saluda Armory, however, is \$50,600. (Complaint ¶16). Meritage does not say how much money it seeks for its claim of quantum meruit. Meritage only asserts that it has not been paid the "value of [its] work," (Complaint ¶31), though Meritage still incorporates the damages amounts asserted in the breach of contract claims against the Department and Freeland. (Complaint ¶28). For the quantum meruit claim against the Department, any amount over the contracted for compensation of \$50,600 fails as a matter of law.

FAILURE TO PURSUE A MECHANIC'S LIEN

The Department asked the court for leave to amend its answer to include the affirmative defense of the failure to pursue a mechanic's lien, though it believes that defense is contained within its Fourth Defense to this action (the failure to state facts sufficient to constitute a

quantum meruit claim). (Answer ¶¶21-24). The motion to amend is pending before the court. If the court grants the Department's motion to amend (which it requests as a precaution), the failure to pursue a mechanic's lien is an additional delineated ground for judgment in favor of the Department.

The South Carolina Supreme Court has stated that the failure to pursue a mechanic's lien "will not bar an action for quantum meruit recovery as a matter of law if a plaintiff can otherwise prove circumstances establishing unjust enrichment." Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 327, 734 S.E.2d 177, 181 (Ct.App.2012) (citing Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 263, 440 S.E.2d 129, 131-32 (1994) (citing Gee v. Eberle, 279 Pa.Super. 101, 420 A.2d 1050 (1980); Costanzo v. Stewart, 9 Ariz.App. 430, 453 P.2d 526 (1969) (failure to file a mechanic's lien no bar to recovery for unjust enrichment where owner paid no one).

Additionally, "[the mechanic's lien statute] limits the aggregate amount of subcontractor/materialmen mechanic's liens to the amount of the owner's contract with the general contractor." Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 262 n. 2, 440 S.E.2d 129, 131 n. 2 (1994). That statutory limit, moreover,

"provides a framework for determining what recovery is proper in quantum meruit cases involving construction contracts. Where...a building owner has paid a general contractor a substantial amount of the contract price, we find the mechanic's lien statute, and their limitations, are a proper measure of the subcontractor's damages against the property owner in a quantum meruit action."

Rose Electric, Inc. v. Cooler Erectors of Atlanta, Inc., 418 S.C. 424, 433, 794 S.E.2d 382, 387 (Ct.App.2016).

Again, if the property owner has paid on its contract with the general contractor, then the subcontractor's damages against a property owner are zero. *Supra* Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 326, 734 S.E.2d 177, 180 (Ct.App.2012) ("Courts addressing a

claim of unjust enrichment [or quantum meruit] by a subcontractor against a property owner have typically denied recovery where the owner in fact paid on its contract with the general contractor") (quoting Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 262-63, 440 S.E.2d 129, 131 (1994)).

In this case, Meritage did not pursue a mechanic's lien. More importantly, the Department paid the general contractor, Freeland, in full for the construction of the Saluda Armory. Thus, the Department is not unjustly enriched; it paid for the construction of the Saluda Armory. Because Meritage cannot prove circumstances establishing unjust enrichment, its failure to pursue a mechanic's lien is fatal to its quantum meruit claim.

If Meritage's quantum meruit claim did not fail as a matter of law (which it does), Meritage would still receive nothing from the Department. A subcontractor's recovery in a quantum meruit action is limited to the amount of the property owner's contract with the general contractor. Recovery, however, is typically denied when the property owner has paid the general contractor in full. Because the general contractor has been paid in full for the construction of the Saluda Armory, the Department does not owe Meritage anything. There is no genuine issue of material fact in this case, and the Department is entitled to judgment as a matter of law.

SOVEREIGN IMMUNITY

Meritage has two claims against the Department in this case. One of those claims is a third party beneficiary breach of contract claim. That claim stems from a contract between the Department and Freeland. The SPPA's bonding requirements are incorporated into all public works construction contracts. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 574-5, 743 S.E.2d 778, 785 (2013) (citing Sloan Const. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 120, 659 S.E.2d 158, 165 (2008)). Thus, the SPPA's bonding requirements are incorporated

into the contract between the Department and Freeland.

The Supreme Court has held that the exclusive procedures for resolving suits on contracts with the State or State entities are contained within the South Carolina Consolidated Procurement Code, Unisys Corp. v. South Carolina Budget and Control Bd. Div. of General Services Information Technology Management Office, 346 S.C. 158, 170, 551 S.E.2d 263, 270 (2001) (citing S.C. Code Ann. §11-35-4230 "Authority to resolve contract and breach of contract controversies"). Those procedures do not involve the circuit court, unless a party appeals the decision of the procurement panel, S.C. Code Ann. §11-35-4410(6).

Meritage's third party beneficiary breach of contract claim is a contractual dispute with a State entity. Because the procurement code provides the exclusive procedures for resolving contract disputes with State entities—procedures removed from circuit court until an appeal of the procurement panel—Meritage should be barred from bringing its third party beneficiary breach of contract claim in circuit court. Nevertheless, the Supreme Court has allowed subcontractors to sue on a contract with a State entity in circuit court, when the suit is based on the failure to comply with the requirements of the SPPA. Sloan Const. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 166 (2008) (remanding subcontractor's third party beneficiary breach of contract claim to circuit court for a determination of SCDOT's liability to the subcontractor); and Sloan Const. Co., Inc. v. Southco Grassing, Inc., 395 S.C. 164, 173, 717 S.E.2d 603, 608 (2011) (affirming circuit court's ruling that SCDOT was liable to subcontractor for its failure to maintain a valid bond under SPPA). Therefore, Meritage's third party beneficiary breach of contract claim in circuit court is not barred by the doctrine of sovereign immunity, though it still fails as a matter of law for other reasons outlined earlier. (Nevertheless, the Department would like to preserve any right that it may have to argue against

the precedent of the Sloan line of cases, in the event of an appeal).

Meritage's quantum meruit claim, however, is barred by sovereign immunity. "[B]ecause a statute waiving the State's immunity must be strictly construed, the State can be sued only in the manner and upon the terms and conditions prescribed by the statute." Unisys Corp. v. South Carolina Budget and Control Bd. Div. of General Services Information Technology Management Office, 346 S.C. 158, 170, 551 S.E.2d 263, 270 (2001) (citing Jeff Hunt Mach. Co. v. South Carolina State Highway Dep't, 217 S.C. 423, 60 S.E.2d 859 (1950)). In Unisys, the Supreme Court made clear that the State, because of the passage of §11-35-4230, consented to be sued based upon contract; the State, however, did not and has not consented to suits in equity.

Meritage's quantum meruit claim is obviously not based upon contract; quantum meruit is an equitable remedy. Because the State has never consented to suits in equity, Meritage's quantum meruit claim is barred by State sovereign immunity, whether the claim is brought under the procurement code or in circuit court. Consequently, that claim fails as a matter of law.

CONCLUSION

Based on the above, the Department moves for summary judgment. "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." State Farm Fire & Casualty Co. v. Breazell, 324 S.C. 228, 230, 478 S.E.2d 831, 832 (1996) (citing Café Associates, Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991)). Under Rule 56(b), a defending party can move for summary judgment at any time.

Although the Department is sympathetic to the plight of Meritage, the only legal recourse is against Freeland. Meritage cannot obtain any money from the Department. Because there is no genuine issue of material fact, the Department is entitled to judgment as a matter of law.

Respectfully submitted,

ALAN WILSON
Attorney General

T. PARKIN C. HUNTER
Senior Assistant Attorney General
S.C. Bar No. 2827

Kevin Desmond Maroney
Assistant Attorney General
S.C. Bar No. 102545

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

BY: Kevin Desmond Maroney

May 26, 2017

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) THE FIFTH JUDICIAL CIRCUIT

Meritage Asset Management, Inc.,) Civil Action No.: 2016-CP-40-7647
d/b/a Century Glass Company)

Plaintiff,)

v.)

Freeland Construction Company, Inc.,)
and the South Carolina Military)
Department)

Defendant.)

CROSS MOTION FOR
SUMMARY JUDGMENT

RICHLAND COURT
FILED
2017 JUL 14 PM 12:42
JEANETTE W. MCBRIDE
CLERK

TO: THOMAS PARKIN C. HUNTER, ESQUIRE AND KEVIN DESMOND MARONEY,
ESQUIRE, ATTORNEYS FOR SOUTH CAROLINA MILITARY DEPARTMENT:

PLEASE TAKE NOTICE THAT, the undersigned attorneys for the Plaintiff, will move before a presiding judge for the Richland Court of Common Pleas on the tenth (10th) day after service thereof, or as soon thereafter as may be heard, for an Order granting Defendants summary judgment in accordance with Rule 56 of the South Carolina Rules of Civil Procedure.


The grounds for this Motion are that the Defendant South Carolina Military Department has filed a Motion for Summary Judgment. Plaintiff stipulates to the facts asserted by the Defendant and, as a result, no genuine dispute as to any material fact exists.

This motion will be supported by a memorandum of law that may include deposition transcripts, affidavits, and other evidentiary material which discovery has revealed in this matter.

Signature Page to Follow

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



Everett A. Kendall, II
William H. Yarborough, Jr.
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211
(803) 256-2233

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina

July 13, 2017

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS
)
) THE FIFTH JUDICIAL CIRCUIT

Meritage Asset Management, Inc.,
d/b/a Century Glass Company,

) Plaintiff,

v.

) Freeland Construction Company, Inc.,
) and the South Carolina Military
) Department,

) Defendants.

Civil Action No.: 2016-CP-40-7647

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S CROSS MOTION FOR
SUMMARY JUDGMENT

2017 NOV 29 11:53:58
JEANETTE H. BOBDE
C.C.P. & J.C.C.
RICHLAND COUNTY
FILED

This matter comes before the Court on Plaintiff Meritage Asset Management, Inc., d/b/a Century Glass Company's ("Meritage") Cross Motion for Summary Judgment. Meritage respectfully requests that this Court grant its Motion for Summary Judgment and deny Defendant South Carolina Military Department's (the "Department") Motion for the reasons set forth below.

FACTS

The facts relating to this Motion are not in dispute. The legal issue is whether the Department is obligated to pay a sub-contractor for work performed on the Saluda Armory where the department has failed to comply with the requirements of the Little Miller Act and the Subcontractors' and Suppliers' Payment Protection Act ("SPPA"). The Department failed to require Defendant Freeland Construction to obtain a payment bond for work performed. See Defendant's Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment at p. 1. Furthermore, neither the Department nor Freeland informed Meritage of the failure to obtain a payment bond. *Id.* Freeland was paid in full but failed to pay

Meritage. Id. Freeland is in default. To date, Meritage has still not been paid for the satisfactory work it performed on the Saluda Armory. Id.

LEGAL STANDARD

A motion for summary judgment shall be granted "if 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 a judgment as a matter of law." Rule 56(c), SCRCF. "When a motion for summary judgment is made and supported by such facts as would be admissible in evidence at trial, the adverse party may not rest upon the mere allegations of his pleadings. Instead his response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him." Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 452-53 (Ct. App. 1988) (citing Rule 56(e), SCRCF).

ARGUMENT

Prior to the enactment of South Carolina's "Little Miller Act", S.C. Code Ann. § 11-30-3030, South Carolina "law afforded limited protection to subcontractors and suppliers providing labor and materials on public projects." Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). "[T]hese provisions are . . . enacted to address the problem of subcontractors who may not use liens on public property to secure payment for work performed on public projects" Id. The Subcontractors' and Suppliers' Payment Protection Act ("SPPA") was designed to "expand[] the protections afforded these parties under the Little Miller Acts." Id. at 144. The SPPA states, in pertinent part:

(1) When a governmental body is a party to a contract to improve real property, and the contract is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond in the full amount of the contract...

....

(3) For purposes of any contract covered by the provisions of this section, it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.

S.C. Code Ann. § 29-6-250 (emphasis added). Further, the South Carolina Supreme Court has held that the “government’s failure to comply with the SPPA’s bond requirements [] gives rise to a third-party beneficiary breach of contract claim by the subcontractor against the government entity. Shirley’s Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013) (citing Sloan at 118, 659 S.E.2d at 164).

“[A] governmental entity may be liable to a subcontractor only for breach of contract for failing to comply with the SPPA bonding requirements.” Shirley’s Iron Works, Inc. v. City of Union, 403 S.C. 560, 572, 743 S.E.2d 778, 784 (2013). Under the SPPA, the Department was required to ensure that Freeland obtained a payment bond. It is not disputed that the Department failed to do so - in its own Motion for Summary Judgment, the Department boldly proclaims that it did not secure a payment bond.

The holding in Sloan, however, grants the Department a pass: “the government entity’s liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor’s nonpayment.” Sloan, 377 S.C. at 121, 659 S.E.2d at 165-66. With Sloan as a shield, the Department argues that its failure to follow the law as prescribed is of no consequence. Because the Department paid the full balance to Freeland, they are not liable.

The Court’s holding in Sloan should be overturned because it corrupts the very purpose for which the SPPA was created: to protect subcontractors that choose to provide labor and/or materials on government projects. In a private construction setting in which a subcontractor has not been paid for work completed, the subcontractor may take out a lien on a property it provided

labor and materials. See S.C. Code Ann. § 29-5-10. Because no lien may be had against the government, small businesses were at risk for financial ruin prior to the enactment of the SPPA. Consider, without the SPPA, a subcontractor provides labor and/or materials but is not paid. When the sub appeals to the prime and is told the prime is insolvent, he has no option but to take a loss. The SPPA was specifically enacted to protect small businesses from this scenario.

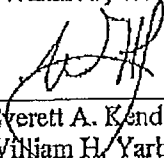
The holding in Sloan castrates each of the protections afforded to small businesses by the legislature in enacting the Little Miller Act and the SPPA. Take this case: Meritage provided labor and materials and was not paid. Meritage appealed to Freeland only to find Freeland is insolvent and no payment bond existed. Because the Department failed to follow the prescribed and codified process, Meritage has no option but to take the loss. Despite the enactment of the South Carolina Little Miller Act and the SPPA, the Sloan Court has ensured that the outcome is the same.

CONCLUSION

Meritage respectfully requests that the Court grant Summary Judgment in its favor as a third-party beneficiary to the contract between the Department and Defendant Freeland for the Department's admitted failure to comply with the SPPA's bonding requirements

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



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Columbia, South Carolina
November 29, 2017

State of South Carolina)	
)	In the Circuit Court
County of Richland)	
)	
Meritage Asset Management)	
Inc., et al.,)	
)	
Plaintiffs,)	2016-CP-40-07647
)	
versus)	December 8, 2017
)	
Freeland Construction)	Columbia, South Carolina
Company Inc., et al.)	
)	
Defendants.)	

TRANSCRIPT OF RECORD

B E F O R E:

The Honorable Thomas G. Cooper, Jr.

A P P E A R A N C E S:

William Harley Yarborough, Jr., Esq.
Attorney for the Plaintiff

Kevin Desmond Maroney, Esq.
Attorney for the Defendant

PROVIDED FOR: Will Yarborough, Jr., Esq.

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I N D E X

Hearing 4

Certificate 23

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E X H I B I T S

FOR THE PLAINTIFF:

P1 AIA Document - Contract 10

P2 Subcontractor's Application for Payment 11

P3 Affidavit of Randy Wright 11

P4 Computation of Interest 11

FOR THE DEFENDANT:

(WHEREUPON, no exhibits were introduced during this proceeding.)

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P R O C E E D I N G S

1
2 THE COURT: Meritage Asset versus Freeland
3 Construction.

4 Please identify yourself for the record.

5 MR. YARBOROUGH: William Yarborough for Meritage
6 Asset.

7 MR. MARONEY: Kevin Maroney for the South Carolina
8 Department of the Military.

9 MR. SMITH: I'm Edward Smith, Your Honor. I'm not
10 hear to argue. I'm just here to merely observe and be of
11 assistance.

12 THE COURT: You're what they call eye candy.
13 I'm sorry, and you are?

14 MR. YARBOROUGH: William Yarborough for Meritage
15 Asset, Your Honor.

16 THE COURT: All right. It's your motion, Mr. Maroney.

17 MR. MARONEY: Thank you, Your Honor. We also have a
18 motion to amend on the docket. I don't know if you want to
19 address that or just go straight to the motion for summary
20 judgement.

21 MR. YARBOROUGH: Your Honor, if I may? I think it
22 might be easiest if he does his motion and we kind of put
23 the motions for summary judgement together with the cross
24 motions. We don't really have a disagreement on the facts.
25 It might make the later argument moot.

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1 THE COURT: Well, somebody tell me something about it.

2 MR. MARONEY: Yes, Your Honor.

3 Just for the motion to amend, we move to add the
4 defense of a mechanics failure to pursue a mechanics' lien.

5 THE COURT: Well, tell me what happened.

6 MR. MARONEY: I'm sorry, Your Honor.

7 The Department of the Military contracted with
8 Freeland Construction in this -- to perform certain work on
9 various -- in this case, an armory. Freeland then
10 contracted with the subcontractor Meritage.

11 The work was completed on June 1st on the Saluda
12 Armory.

13 THE COURT: Was that 2017?

14 MR. MARONEY: 2016, Your Honor. Excuse me.

15 The Department paid Freeland, the general contractor,
16 in full on June 7, 2016. The first time that the
17 Department learned of the lack of payment between Freeland
18 and Meritage was August 8, 2016. That fact is important
19 because the Plaintiff Meritage brings a third party
20 beneficiary breach of contract claim based on the
21 Subcontractors' and Suppliers' Payment Protection Act.

22 The South Carolina Supreme Court has stated that the
23 only -- that the liability is limited to the amount
24 outstanding on the contract between the agency and the
25 general contractor at the time of notice. In this case,

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1 notice was given after payment had been given in full, so
2 there is no recovery possible.

3 THE COURT: What -- when was the certificate of
4 occupancy, if there was one, issued?

5 MR. MARONEY: I don't -- I don't think there was one,
6 Your Honor, but I wouldn't be able to say for certain.

7 THE COURT: Well ---

8 MR. MARONEY: It was -- the work was completed on June
9 1st and the payment was given in full on June 7, 2016 and
10 then it ---

11 THE COURT: So work was completed on June 1st.

12 MR. MARONEY: Yes, Your Honor.

13 THE COURT: And payment was made on June 7, 2016; is
14 that correct?

15 MR. MARONEY: That's correct, Your Honor.

16 THE COURT: And that's -- and that was the remaining
17 balance on the contract.

18 MR. MARONEY: Yes, Your Honor.

19 THE COURT: And the notice wasn't given until August
20 8th?

21 MR. MARONEY: That's correct, Your Honor.

22 THE COURT: And that was not in the form of a lien.

23 MR. MARONEY: It was not in the form of a lien. It's
24 an e-mail. It's listed in the affidavit in support,
25 paragraph eight. It's an e-mail to one of the individuals

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1 at the South Carolina Department of the Military. And Mr.
2 -- and Meritage agrees with the facts and the issue of
3 notice.

4 THE COURT: What is your motion to amend?

5 MR. MARONEY: We can actually drop it, Your Honor,
6 unless you'd like me to -- we had moved, but we can drop
7 that motion.

8 THE COURT: Well, it's up to you.

9 MR. MARONEY: We'll go ahead and drop it.

10 THE COURT: All right. It's withdrawn. That one's
11 signed.

12 And it looks like, Mr. Yarborough, you have a motion
13 for default?

14 MR. YARBOROUGH: Yes, Your Honor, against co-defendant
15 Freeland Construction.

16 THE COURT: Against who?

17 MR. YARBOROUGH: Freeland Construction, Your Honor.

18 THE COURT: Okay.

19 MR. YARBOROUGH: Would you like to hear that now, Your
20 Honor?

21 THE COURT: Yes. Either that or -- Yes, I think we
22 get to -- that will take us to the two motions for summary
23 judgement.

24 MR. YARBOROUGH: Sure.

25 THE COURT: All right. Go ahead.

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1 MR. YARBOROUGH: Your Honor, Meritage Asset signed --
2 enacted a contract with Freeland Construction for this
3 project on the Saluda Armory. It was for a total amount of
4 Fifty Thousand Six Hundred Dollars (\$50,600) and that
5 contract was actually appended to the complaint in this
6 matter.

7 I have a copy of it if you'd like to see it, Your
8 Honor.

9 THE COURT: Well, do you want me to see it?

10 MR. YARBOROUGH: I would, Your Honor.

11 (WHEREUPON, a document is presented to the Court.)

12 THE COURT: All right. Hold on a minute. Ma'am, are
13 you involved in this case?

14 UNIDENTIFIED SPEAKER: I'm just watching from the
15 Attorney General's office.

16 THE COURT: Okay. I didn't want to hold you here
17 because this make take some time, if you had another case.

18 All right. Tell me about this, Mr. Yarborough.

19 MR. YARBOROUGH: Your Honor, we completed work and
20 submitted our final invoice on May 20, 2016 which made
21 payment due 30 days following that application for payment.

22 I have the application for payment here too, Your
23 Honor, and I will pass it up.

24 We were never paid. To date we have not been paid
25 anything on this contract, so that's a total of ---

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1 THE COURT: Nothing?

2 MR. YARBOROUGH: Nothing.

3 THE COURT: No periodic pay?

4 MR. YARBOROUGH: Nothing, Your Honor.

5 THE COURT: Okay.

6 MR. YARBOROUGH: So the total of Fifty Thousand Six
7 Hundred Dollars (\$50,600) total, plus interest which is
8 computed -- which is accounted for in the contract at a
9 rate of 8.75 -- well, it's the South Carolina rate per
10 statute, but it's 8.75 percent per annum.

11 THE COURT: Tell me why they should -- you should find
12 them in default.

13 MR. YARBOROUGH: Well, Your Honor, we served them with
14 the complaint on February 9, 2017. Default was actually
15 entered on March 20, 2017. To date we've heard nothing
16 from Freeland Construction in regards to this lawsuit.

17 We sent them a letter. We had a -- we had another
18 hearing on this that was ultimately continued because we
19 had a trial that week, Your Honor, and then we sent a
20 letter giving them notice of that default hearing. And we
21 gave them -- we sent them a letter for this one as well,
22 Your Honor, and we have ---

23 THE COURT: Where's your notice letter?

24 MR. YARBOROUGH: Your Honor, I actually don't have it
25 with me. I can submit it to the Court. We do have a

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1 letter and it was sent, I believe, on November 6th by
2 certified and regular mail.

3 THE COURT: Well, it should -- let's put it in the
4 file.

5 MR. YARBOROUGH: All right.

6 THE COURT: For your protection.

7 MR. YARBOROUGH: Yes, Your Honor.

8 Your Honor, I also have ---

9 THE COURT: Now, do we have --- is there any doubt
10 about the amount of damages you're seeking?

11 MR. YARBOROUGH: No, Your Honor. I actually have an
12 affidavit ---

13 THE COURT: Was that provided to them?

14 MR. YARBOROUGH: Yes, sir. I have an affidavit from
15 Randy Wright who is the owner of Meritage Asset Century
16 Glass and it states that's it's Fifty Seven Thousand Two
17 Hundred and Ninety-Six Dollars and Eighteen Cents
18 (\$57,296.18).

19 THE COURT: Make it part of the record.

20 MR. YARBOROUGH: Yes, Your Honor, I will.

21 And I also have a computation of that interest if
22 you'd like it.

23 THE COURT: Make it part of the record.

24 MR. YARBOROUGH: Will do.

25 Your Honor, I would like to introduce Subcontractors'

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1 Application for Payment as Plaintiff's Exhibit Number Two.
2 (WHEREUPON, Subcontractors' Application for
3 Payment was introduced and received into
4 evidence as Plaintiff's Exhibit Number Two.)

5 THE COURT: Without objection.

6 MR. YARBOROUGH: And Your Honor, I'd like to make the
7 contract between Meritage Asset and Freeland Construction
8 Plaintiff's Exhibit Number One.

9 (WHEREUPON, the Contract between Meritage
10 Asset and Freeland Construction was
11 introduced and received into evidence as
12 Plaintiff's Exhibit Number One.)

13 THE COURT: Without objection.

14 MR. YARBOROUGH: The Affidavit of Randy Wright as
15 Plaintiff's Exhibit Number Three.

16 (WHEREUPON, the Affidavit of Randy Wright
17 was introduced and received into evidence as
18 Plaintiff's Exhibit Number Three.)

19 THE COURT: Without objection.

20 MR. YARBOROUGH: The computation of interest as
21 Plaintiff's Exhibit Number Four.

22 (WHEREUPON, the Computation of Interest was
23 introduced and received into evidence as
24 Plaintiff's Exhibit Number Four.)

25 THE COURT: Without objection.

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1 Anything further on this issue?

2 MR. YARBOROUGH: No, Your Honor. And I have a
3 prepared order if you'd like it.

4 THE COURT: You do?

5 MR. YARBOROUGH: Yes, sir.

6 THE COURT: Hand it up, please.

7 (WHEREUPON, a document is presented to the Court.)

8 THE COURT: I've signed your order and I'm going to
9 file it.

10 MR. YARBOROUGH: Thank you, Your Honor.

11 THE COURT: Who filed first?

12 MR. MARONEY: I did, Your Honor.

13 THE COURT: All right. You may proceed.

14 MR. MARONEY: Thank you, Your Honor.

15 As I noted in the earlier recitation, the general
16 contractor in this case, Freeland, was paid in full by the
17 Department on June 7, 2016. The Department was not given
18 notice by Meritage of the nonpayment between Freeland and
19 Meritage until August 8, 2016 after full payment had been
20 given.

21 The Supreme Court in *Sloan* and then reaffirmed in
22 *Shirley's Iron Works* said that the third-party beneficiary
23 breach of contract claim based on the SPPA, the
24 Subcontractors' and Suppliers' Payment Protection Act, is
25 limited to the amount outstanding on the contract between

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1 the agency and the general contractor at the time notice is
2 given of nonpayment between the general and the sub. That
3 precludes any recovery for Meritage under the SPPA in this
4 case. That's the argument pertaining to the third-party
5 beneficiary breach of contract claim, Your Honor.

6 Meritage has also asserted a *quantum meruit* claim.
7 For that we have two principle arguments, Your Honor.

8 First, in *Shirley's Iron Works*, the Court made clear
9 that the existence of an outstanding -- the existence of a
10 valid contract enforced precludes *quantum meruit* because
11 it's fundamentally at odds with an equitable -- with that
12 equitable claim which is supposed to occur when there is no
13 governing contract. In this case, as just occurred, the --
14 Meritage has brought Freeland into default for the contract
15 between them. They've also asserted a breach of contract
16 claim against -- they don't dispute that there's an existed
17 -- an existing governing contract for both Meritage and
18 Freeland as well as between the Department and Freeland.
19 That precludes a *quantum meruit* claim, Your Honor.

20 In addition, even if there is some -- perhaps some
21 case law that might indicate a *quantum meruit* claim can be
22 made, the limitation is the same as for the SPPA, which is
23 when a general contractor has been paid in full the agency
24 or property owner does not owe anything or recovery is not
25 possible under a *quantum meruit* claim.

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1 THE COURT: Is there evidence in the file that you
2 paid the general contractor in full?

3 MR. MARONEY: Yes, Your Honor. It's attachment --
4 it's in our motion for summary judgement. The final
5 payment was deposited -- it's affidavit in support,
6 paragraph six. The affidavit in support is attached to the
7 motion for summary judgement.

8 THE COURT: As what? Exhibit what?

9 MR. MARONEY: It's ---

10 THE COURT: It's not an exhibit. I found it.

11 MR. MARONEY: Yes, Your Honor. It's the -- That's
12 correct. It's the affidavit that's referencing various --
13 the screenshot was Exhibit E -- pardon me -- which shows
14 the direct deposit clearing date was June 17, 2016; that's
15 Exhibit E of the motion for summary judgement. But the
16 payment is explained in the affidavit in support which is
17 at the back of the motion for summary judgement or attached
18 to the motion for summary judgement.

19 THE COURT: All right. Anything further?

20 MR. MARONEY: No, Your Honor.

21 THE COURT: All right. Mr. Yarborough.

22 MR. YARBOROUGH: Your Honor, we do not dispute the
23 facts in this case and we understand that we have a hill to
24 climb and some hurdles to jump.

25 The South Carolina Supreme Court found in *Sloan* and

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1 did later affirm in *Shirley's Iron Works* that the
2 government's failure to secure a payment bond under the
3 SPPA does give rise to a third-party breach of contract
4 action against the government by an injured subcontractor.
5 And to reach this conclusion, Your Honor, the Supreme Court
6 looked at the legislature's intent in enacting SPPA. And
7 in *Sloan* the Court stated that as a remedial statute, the
8 SPPA should be liberally construed to effectuate its
9 purpose. And it further went on to quote that the very
10 title of the SPPA clearly indicates the General Assembly
11 intended to provide stronger payment protection
12 specifically for subcontractors and suppliers on government
13 projects.

14 THE COURT: Let me ask you, what should they have
15 done?

16 MR. YARBOROUGH: Your Honor, they should have complied
17 with their duty in ensuring that Freeland had the payment
18 bond in place prior to granting Freeland Construction the
19 contract.

20 THE COURT: Okay.

21 MR. YARBOROUGH: Going forward, Your Honor, the Court
22 also found that the SPPA does create an affirmative duty on
23 behalf of the government and that the legislators intended
24 for subcontractors to be able to vindicate their rights as
25 against the government when they're injured.

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1 The Court further looked at the public policy behind
2 SPPA and they said that protecting the subcontractor's
3 payment rights on government projects encourages
4 competitive bidding on projects which leads to a more
5 efficient use of our tax dollars.

6 Your Honor, with one hand the Court giveth and then
7 with the other it taketh away, because in *Sloan* and in
8 *Shirley's Iron Works*, as we stated correctly, it did limit
9 the recovery to the amount that was -- that is due -- that
10 is still remaining due at the time the government receives
11 the notice by the subcontractor that they have not been
12 paid by the general contractor.

13 But Your Honor, we would draw a distinction between
14 *Sloan* and *Shirley* because in both *Shirley* and *Sloan* the
15 Court had the background of knowing that the subcontractors
16 knew and notified the Court or notified the government
17 prior to the government issuing final payment that they had
18 not been paid in full.

19 Your Honor, we don't have that today. This is a novel
20 set of facts because in our case we didn't submit a final
21 invoice until May 20, 2016, so payment on that was due on
22 the 30th of June -- or about 30 days later which would be
23 June 20, 2016. And as we stated earlier, the final payment
24 was posted on, I think it was -- he said June 7th but I
25 believe that was June 17th, but I could be wrong. But

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1 either way, Your Honor, that is before the payment was due
2 to Meritage Asset under contract, so it was simply
3 impossible for us to know in the situation that we were not
4 going to be paid until -- according -- if the *Sloan* and the
5 *Shirley* courts previous case law is utilized in this
6 situation, there is no possibility for us to ever recover
7 in this case because our remedy was cut off before our
8 payment was even due.

9 And, you know, we believe that if the Supreme Court
10 was faced with the facts of this case, their conclusion
11 might be different, you know, especially considering the
12 strong stance they took on the legislative intent and the
13 public policy behind the SPPA. You know, and if they had
14 not, the ruling would really have been at odds with itself.
15 They would grant the protections that the legislators
16 intended under the SPPA, but then say never mind and you
17 actually don't get this in this situation. And that's just
18 -- we believe that doesn't go together.

19 So the situation that existed prior to the enactment
20 of the SPPA was if a subcontractor performed work on a
21 government project and the -- and, you know, submitted
22 their bid for payment and it came back that the prime
23 contractor was insolvent, there likely would be no remedy
24 and they would essentially just take a loss, and that's
25 what the SPPA was enacted to protect against. But then

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1 after *Shirley* in -- or after *Sloan* and *Shirley*, if that
2 holds, essentially the teeth of the SPPA would have been
3 completely nullified because now we have a subcontractor
4 who applies for payment with the prime contractor only to
5 find that the prime contractor is insolvent and they're
6 left with nothing again. So the entire purpose of the SPPA
7 is overridden if *Sloan* and *Shirley* applied in this specific
8 fact pattern.

9 THE COURT: All right.

10 MR. YARBOROUGH: Your Honor, we would submit that
11 instead of *Sloan* and *Shirley* applying and there's no
12 potential for recovery, like in this case, that the Court
13 modify how it would see it and take the stance that the
14 Florida and Texas courts have taken. They have similar
15 statutory structure, Your Honor, where there's an
16 affirmative duty on behalf of the government. And
17 essentially -- and I have copies of both of those cases for
18 your guys and for the Court if you'd like it. But
19 essentially, what those cases do is they -- if the
20 government does not comply with its duty, then they become
21 insured themselves so they step into the shoes of the
22 bonding agency. And so if they don't comply with their
23 duty, they then have to pay what would amount to probably
24 double in that contract.

25 Your Honor, so that's what we submit should happen in

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1 this situation.

2 As far as my motion for summary judgement, my motion
3 for summary judgement is extremely simple. It's just that
4 the SPPA creates a duty to the government, the government
5 didn't comply with that duty, and the Supreme Court
6 provides a remedy for third-party breach of contract when
7 the government fails to uphold that duty.

8 And since the government did fail to uphold that duty
9 and we are left with an injury, Your Honor, we would
10 respectfully request that -- we ask for recovery due from
11 the contractor -- from the government who did not ensure
12 that they complied with their duty.

13 THE COURT: All right.

14 MR. MARONEY: If I may, Your Honor? I would note that
15 this particular distinction was not made in the memorandum
16 of law, so I haven't -- obviously, I haven't reviewed these
17 cases that Mr. Yarborough presented to the Court.

18 Nonetheless, I would direct the Court to *Sloan*
19 *Construction Company* where in the section that starts on
20 page 121, the Extent of Government Liability section, it
21 draws a parallel between the SPPA and the mechanics' lien
22 statute. The Court said that they were taking cues from
23 the mechanics' lien statute and that is why they decided to
24 limit the extent of the government liability to the amount
25 outstanding on the contract between the property owner --

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1 in this case the government agency and the general
2 contractor because that's how it would work under the
3 mechanics' lien statute. A property owner is not entitled
4 to pay both the general contractor in full and a
5 subcontractor in full. That was the reasoning.

6 So these other statutes that were mentioned in these
7 case laws might be -- they might be doing exactly what Mr.
8 Yarborough says, but I haven't been able to review them.
9 But in our governing case, *Sloan*, the Court didn't look at
10 other bonding statutes; it looked at the mechanics' lien
11 statute and the -- and the way the mechanics' lien statute
12 was the rationale -- was adopted as the rationale for
13 limiting government liability under the SPPA.

14 THE COURT: Are you saying that the subcontractor sits
15 on his rights?

16 MR. MARONEY: Essentially, Your Honor.

17 THE COURT: All right.

18 MR. MARONEY: If there's no -- if the subcontractor --
19 these are sophisticated parties and if the subcontractor
20 was concerned about payment, I believe -- I'd have to
21 double check but I don't believe that they reached out
22 prior to check about the bond when they entered the
23 contract with Freeland. I don't believe they checked until
24 that. It's not disputed they did not give notice of
25 nonpayment until August 8th.

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1 THE COURT: Okay.

2 MR. MARONEY: And again, the -- I'm not disputing what
3 Mr. Yarborough said about these cases, but our court was
4 not drawing any comparison between the SPPA and other
5 bonding statutes. It was discussing and drawing comparison
6 between the SPPA and the mechanics' lien statute. And the
7 mechanics' lien statute is very clear that liability is
8 limited to -- for a property owner to the extent that's
9 outstanding on the contract between the property owner and
10 the general contractor.

11 THE COURT: Okay. Anything further?

12 MR. YARBOROUGH: Your Honor, I would just quickly note
13 that historically there are actually two types of
14 mechanics' liens and that's what you see in the statute. I
15 believe it's codified in two different sections -- and I
16 can't remember the first two, but the last is 20 and the
17 second one is 40, Your Honor. And what that is, is in 20
18 there is no mention of the remaining balance due by the
19 owner under a mechanics' lien. And I think that's a
20 codification of the historic principle that there are two
21 types of mechanics' liens, Your Honor, whereas that one
22 section of the statute does not state anything about what
23 the owner -- what the owner has left due on the contract
24 with the general contractor, the second part of that
25 statute does, Your Honor.

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1 So I believe there are two different types of
2 mechanics' liens. One precludes recovery against the owner
3 beyond what's owed on the general contract, and the other
4 one does not.

5 MR. MARONEY: There are two -- there are two
6 mechanics' liens statues. One applies to the general
7 contractor and the other is specifically for
8 subcontractors, Your Honor. But there is no -- the
9 distinction -- the case law governing the liability between
10 a property owner and a subcontractor is as I just stated
11 and is as the Court stated it in *Sloan*, that a property
12 owner never needs to pay a subcontractor beyond the amount
13 outstanding on a contract between a property owner and the
14 general contractor at the time of notice of nonpayment.

15 THE COURT: Okay. Proposed orders in ten days.

16 MR. YARBOROUGH: Thank you, Your Honor.

17 MR. MARONEY: Thank you, Your Honor.

18 (WHEREUPON, the hearing in the above-entitled
19 matter was concluded.)
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21
22
23
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25

STATE OF SOUTH CAROLINA)
) CERTIFICATE
 COUNTY OF RICHLAND)

Be it known that I, the undersigned DeeAnne Varnadoe, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing transcript represents a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, before the Circuit Court for Richland County, South Carolina, so given on December 8, 2017, to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

IN WITNESS WHEREOF I have here unto set my hand this 19th day of February, 2018.

Dee Anne Varnadoe
 DeeAnne Varnadoe
 Official Court Reporter
 Notary Public for South Carolina
 My commission expires 3/14/2026.

THIS TRANSCRIPT WAS PREPARED FOR WILL YARBOROUGH, ESQ.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-40-7647 - Appellate No.: 2018-000162

Meritage Asset Management, Inc., d/b/a Century Glass ~
Company.....Appellant,

v.

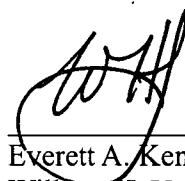
Freeland Construction Company, Inc. and South Carolina Military
Department.....Defendants,

Of which South Carolina Military Department is the Respondent.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210(c) of the South Carolina Rules of Appellate Procedure, I certify that the Record on Appeal only contains mater that was presented at the lower court or tribunal. Additionally, pursuant to Rule 209(c), I certify that the Record does not contain matter which is irrelevant to the appeal. Furthermore, and with the exception of certain documents designated by Appellant which was not considered by the lower court or the tribunal, I also certify that the Record contains all material proposed to be included by any of the other parties and not any other material.

August 1, 2018



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