THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY

Eugene P. Warr, Jr., Special Referee

Appellate Case No.: 2019-001062

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SC Court of Appeals

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

v.

Eagles Landing Restaurants, LLC, Appellant.

AMENDED INITIAL BRIEF OF RESPONDENT

PROPOSED

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STATEMENT OF THE ISSUES

1. Did the Special Referee err in not crediting the Appellant for the amounts it paid to Carolina Construction Solutions and not setting off the amounts saved?
2. Did the Special Referee make a mathematical or clerical error that this Court should correct?
3. Did the Special Referee err in failing to require the Respondent to reimburse the Appellant for lost income caused by Respondent's delays?
4. Did the Special Referee apply the wrong standard in ruling on the Appellant's Rule 59 Motion?

STATEMENT OF THE CASE

This cases arises from a contract (the "Contract") between the Plaintiff-Respondent, Vincent C. Carter, d/b/a Elite Construction Co. (the "Respondent"), and the Defendant-Appellant, Eagles Landing Restaurants, LLC ("Appellant"). Under the Contract, the Respondent agreed to provide general contractor services to the Appellant for the commercial renovation upfit of an IHOP Restaurant (the "Contract"). The Respondent commenced this action in the Court of Common Pleas for Florence County on March 21, 2016. (Compl.) The Respondent alleged causes of action for breach of contract and unjust enrichment/quantum meruit against the Appellant. (*Id.*). The Respondent's claims arose from the Contract. (*Id.*). The Appellant answered the Complaint on May 2, 2016, and asserted counterclaims for breach of contract, fraud/constructive fraud, quantum meruit/unjust enrichment, negligence/gross negligence, and indemnity (Answer).

The Honorable Michael G. Nettles referred this matter to Eugene P. Warr, Jr., as Special Referee, by Consent Order of Reference, dated May 2, 2017. (Consent Order of Reference). The case was tried before the Special Referee on December 20, 2017. (Order, p. 1). The Special Referee

issued an Order on October 11, 2018, ruling in favor of the Respondent. (*Id.* at p. 8). The Order was filed with the Clerk of Court for Florence County on October 25, 2018. (Order). The Special Referee found for the Respondent in the amount of $165,131.59. (*Id.* at p. 8). The Special Referee found for the Appellant in the amount of $5,000.76. (*Id.*). The Respondent was awarded a judgment in the amount of $160,130.83. (*Id.*). The Court further found that the Appellant was liable for the costs incurred by Carolina Construction Solutions, a contractor that supplied additional electricians, on the grounds that retaining the additional electricians constituted a modification of the Contract by the Appellant and Respondent. (*Id.* at p. 6).

On October 30, 2018, the Appellant filed a Motion to Alter/Amend pursuant to Rules 52(e) [sic] and 59(e), SCRCP. (Def. Not. Mot. Amend). On November 5, the Respondent filed a Motion to Reconsider pursuant to Rule 59(e), SCRCP. (Pl. Mot. Reconsider). In the meantime, the Appellant paid Carolina Construction Solutions $50,000.00 to settle the action it initiated in the Charleston County Court of Common Pleas. (Supp. Order, p. 2). A hearing on the post-trial motions of the Appellant and Respondent was held on December 12, 2018. (*Id.* at p. 1). Subsequently, on May 28, 2019, the Special Referee issued a Supplemental Order, denying both the Appellant's Motion to Alter/Amend and the Respondent's Motion to Reconsider. (*Id.* at pp. 5-6) The Special Referee awarded further judgment to the Respondent in the amount of $16,664.16, and interest thereon, which was the balance due to Carolina Construction Solutions after payment by the Appellant. (*Id.* at p. 6).

The Appellant filed its Notice of Appeal on June 24, 2019 (Not. Appeal). The Appellant appealed from the Special Referee's Order and Supplemental Order rendering judgment in the favor of Respondent in the total amount of $177,794.99. (*Id.*)

STATEMENT OF THE FACTS

The Appellant is a general contractor licensed under the laws of the State of South Carolina. (Tr., p. 76:4-11; 83:8-14). The Respondent is a limited liability company owned and operated by Mohammed Makawi. (*Id.* at pp. 10:5-8; 334:8-10) Mr. Makawi is an IHOP franchisee who operates approximately eight IHOP restaurant franchises through various corporate entities. (*Id.* at pp. 332:14-19). The Appellant is a management company for the IHOP restaurants operated by Mr. Makawi's businesses. (*Id.* at pp. 10:23-25; 11:18-19; 332:20-333:).

Mr. Makawi desired to open an additional IHOP restaurant at 771 Daniel Ellis Drive, in Charleston South Carolina. (*See* Pl.'s Exhibit 2; Tr., p. 334:1-5). The building located at 771 Daniel Ellis Drive was a former Ruby Tuesday and required renovations in order for Mr. Makawi to open the new IHOP restaurant. (Tr., pp. 81:16-20; 343:13-23). Prior to executing any contractual documents, the Respondent furnished a bid to the Appellant in the amount of $624,354.00 to perform the renovations. (Pl.'s Ex. 1).

On April 9, 2015, the Appellant contracted with the Respondent to perform the renovations necessary to upfit the building for the IHOP restaurant. (Pl.'s Ex. 2). The Contract provided for a lump sum of $624,354.00 to be paid to the Respondent in exchange for general contracting services. (*Id.*; Tr., pp. 79:17-19; 340:11-14; 355:24). The Contract provides that it consists of:

> this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement *and Modifications issued after the execution of this Agreement*, all of which form the Contract, and are as fully a part of the Contract if attached to this Agreement or repeated herein.

(Pl.'s Ex. 2, p. 2, Art. 1) (emphasis added). The Contract provided that construction was to commence on April 9, 2015, and was to be completed within 120 days. (*Id.* at pp. 2-3, Art. 3, §§ 3.1, 3.3). However, the construction did not begin until early June of 2015. (Tr., p. 81:9). The

Respondent was unable to commence construction because the Appellant had not secured financing. (*Id.* at pp. 8:24-25, 9:20-25; 82:5-10). The Appellant was unable to secure financing, because its principal, Mr. Makawi, was involved with divorce proceedings. (*Id.* at p. 9:4-12, 17:4-5; 334:21-25).

Although the Appellant was unable to secure financing, the Appellant directed the Respondent to begin construction (*Id.* at 82:21-25). Once construction began, Mr. Makawi was out of the country for roughly half of the project and the Respondent had difficulties communicating with him regarding the construction. (*Id.* at pp. 36:1-13; 134:3). Mr. Makawi testified that all decisions regarding payment and construction had to be approved by him. (*See id.* at pp. 439:17-440:22). The Respondents inability to discuss the issues with Mr. Makawi caused delays on the project. (Tr., p. 134:15).

Furthermore, the Respondent ran into unforeseen issues including mold in the building and electrical issues. (*Id.* at pp. 37:15-18; 24-25, 38:1; 213:22). The mold remediation required additional work and held up the construction for at least a week and a half. (*Id.* at 37:11-18, 24-25, 38:1; 294:5-11).

The Appellant also requested modifications that increased the scope and the amount of the work of the upfit. The Appellant required the Respondent to pour a concrete floor in the kitchen, rather than trench the kitchen as originally agreed. (*Id.* at pp. 192:3-19; 193:7-22; 213:22-25). The Appellant also demanded that the tile in the kitchen replaced with a rubber flooring system, contrary to the plans. (*Id.* at 198:5-7). The Appellant further required that carpeting be replaced with tile flooring, which was not in the original plans or specifications. (*Id.* at pp. 54:18-56:5; 121:10-3; 203:8-17).

The Appellant further demanded that the Respondent retain additional electricians to speed up construction. (*Id.* at pp. 52:14-53:24; 100:18-101:11; 438:3-8). The Respondent advised Mr. Makawi that retaining additional electricians would cost additional money and constitute a change to the Contract. (*Id.* at pp. 52:14-53:11-13; 101:6-11). Despite the Respondent's representations, the Appellant directed the Respondent to hire the additional electricians. (*Id.* at p. 213:17-18). The Respondent retained Carolina Construction Services to provide the additional electricians and issued a Change Order. (*Id.* at pp. 100:18-101:1; Pl.'s Ex. 4). The additional electricians retained by the Respondent at the direction of the Appellant resulted in a cost of $36,664.16.[1] (Pl. Ex. 13). Excluding the amount paid to Carolina Construction Solutions, the total amount paid for electrical work under the Contract was $49,630.27.[2] (Pl.'s Ex. 10, 13).

As the upfit progressed, the Respondent received several draws totaling $229,900.00. (Pl.'s Exhibit 13) However the draws were not enough for the Respondent to cover costs to move the project forward. While the Appellant paid some subcontractors and vendors, it failed to pay Carolina Construction Solutions. (*See id.*).

The temporary certificate of occupancy was issued on October 23, 2015, at which time the business could open for operations. (57:18-22; 206:24-207:3; Pl's Ex. 14). However, the IHOP restaurant did not begin operating until about December 1, 2015. (Def.'s Ex. 7; 381:17-382:17). The Appellant claimed lost profits, but only provided the net profits for one month of its operation. (Def.'s Ex. 7). The Appellant's bookkeeper was unable to provide the net profit for the months of January and February of 2016. (277:14-278:7). While Mr. Makawi testified that the average

[1] The principal amount claimed by Carolina Construction Solutions in its Complaint was $36,664.16. (Pl.'s Ex. 15, p. 9). . The Appellant eventually paid Carolina Construction Solutions $50,000.00 to settle the matter, $30,000 for attorney's fees and $20,000 to the principal balance. (Pl's Exs. 13, 15; Supp. Order, p. 3). The Respondent later confessed judgment to the remaining principal balance of $16,664.16. (Supp. Order, p. 3)

[2] In addition to the $35,521.62 paid to Atlantic Electric, LLC, Bell Electric, City Electric, City Lighting, Red Mountain Lighting Products, and Turner Electric, (Pl.'s Ex. 13, pp. 1-2, 6), the Respondent also paid $12,750.00 to Ricky Turner with Turner Electric and an additional $786.71 for electrical materials, (Pl.'s Ex. 10).

monthly net profits were between $30,000 and $35,000 per month, (380:16-19), he further testified that opening months have more sales than other months, (381:1-3).

STANDARD OF REVIEW

An action for breach of contract seeking money damages is an action at law. *Branche Builders, Inc. v. Coggins*, 386, S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009). In an action at law, tried without a jury, a Special Referee's findings of fact will not be disturbed on appeal unless found to be without evidence which reasonably supports the findings. *South Carolina Federal Savings Bank v. Thornton-Crosby Development Co., Inc.*, 310 S.C. 232, 235, 423 S.E.2d 114, 116 (1991) (citations omitted).

On the other hand, "[w]hether a contract is ambiguous is a question of law, and the interpretation of an unambiguous contract is a question of law. *Bennett & Bennett Construction, Inc. v. Auto Owners Insurance Company*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013) (citations omitted). "Questions of law are viewed *de novo*." *Id.* Generally, these are the two standards that apply to this issue on appeal. However, because the standards of review applicable to each issue vary, this Brief provides the applicable standard of review within the discussion of each issue.

ARGUMENT

I. The Appellant is not entitled to a setoff as a matter of law because the Appellant and Respondent modified the contract, and even if the Appellant were entitled to a setoff, Appellant is only entitled to a setoff equal to the principal balance due to Carolina Construction Services.

The Appellant is not entitled to any setoff because the additional electricians retained constituted a modification of the Contract. The modification was agreed upon by the Respondent and Appellant. In the event that this court finds that the Appellant is entitled to a setoff, this Court should hold that the Appellant is entitled to a setoff in the principal amount of $36,664.16.

a. Standard of Review.

Whether a party is entitled to a setoff is an issue of law. *C.f. Kizer v. Kinard,* 361 S.C. 68, 70-71, 602 S.E.2d 783 (Ct. App. 2004) (holding that a UIM carrier was entitled to setoff for any amount of liability coverage not exhausted at settlement) (citations omitted); *c.f. Huck v. Oakland Wings*, LLC, 422 S.C. 430, 437, 813 S.E.2d 288, 291 (Ct. App. 2017) (holding that a joint tortfeasor is entitled to a setoff as a matter of law when there is a settlement with a subsequent tortfeasor). However, the trial judge's factual finding related to the amount of the setoff a party is entitled to will not be disturbed on appeal unless there is no evidence which reasonably supports the judge's finding. *Kizer*, 361 S.C. at 71; *Bentrim v. Bentrim*, 282, S.C. 333, 335-36, 318 S.E.2d 131, 133 (Ct. App. 1984). The interpretation of a contract is also an issue of law. *Bennett*, 405 S.C. at 4, 747 S.E.2d at 427. Issues of law are subject to *de novo* review. *Id.*

b. The Appellant is not entitled to a setoff because the Appellant and Respondent modified the Contract.

The Appellant is not entitled to a setoff under the Contract. The Respondent initially retained the services of Turner Electric to perform the electrical work provided by the project. (Tr., p. 126:8-14). However, the Appellant wanted the Respondent to retain more electricians to speed up the progress on the upfit. (*Id.*, at pp. 52:14-53:11-13; 101:6-11; 213:17-18). The Respondent advised the Appellant that the additional electricians would cost more and would require a change order. (*Id.* at pp. 52:14-53:11-13; 101:6-11). Despite the Respondent's representations, the Appellant directed the Respondent to hire the additional electricians and the Respondent issued a change order. (*Id.* at 213:17-18; Pl.'s Ex. 4).

The Contract between the Parties contemplated modifications as a result of changes occurring during the upfit. (Pl.'s Ex. 2, Art. 1) ("The Contract Documents consist of this

Agreement . . . and Modifications issued after the execution of this Agreement."). Furthermore, the Contract, which is unambiguous, does not require any modifications to be in writing. (*See id.*).

While the Bid, which is part of the Contract, (*Id.*). allocated $92,780.00 for "Electrical Labor & Materials, (Pl.'s Ex. 1, p. 2), the Special Referee concluded that, based on the testimony of the witnesses, the additional electricians were not originally contemplated by the Parties in the Contract and constituted a modification to the Contract (Order, p. 6). The evidence supports the Special Referee's finding of the modification. Because the Contract unambiguously includes modifications and found that the Appellant and Respondent agreed to the modification, the Appellant was not entitled to a setoff. Therefore, this Court should affirm the Special Referee's decision.

c. Even if the Appellant is entitled to a setoff, Appellant is only entitled to a setoff equal to the principal balance due to Carolina Construction Solutions.

Assuming *arguendo* that the Respondent and Appellant had not modified the Contract, the Appellant is not entitled to a setoff in the amount of $57,258.38. The Appellant, if entitled to a setoff at all, is not entitled to a setoff equal to $36,664.16, the principal amount due to Carolina Construction Services.

Based on the evidence and testimony, the Special Referee found that the Appellant had breached the contract because it had not paid draws as agreed. (Order, p. 6). If the Appellant paid draws pursuant to the Contract, the Respondent would have been able to pay Carolina Construction Services for the labor and materials it furnished for the upfit. Had Carolina Construction been paid timely, it would not have incurred attorney's fees and costs or interest on the balance it was due. (*See* Pl.'s Ex. 15).

In this case, the Bid submitted by the Respondent allocated $92,780.00 for labor and materials related to the electrical work. (Pl.'s Ex. 1, p. 2). The Respondent expended $13,536.71

on labor and materials for electrical work. (*See* Pl.'s Ex. 10). The Appellant spent an additional $35,521.62 for electrical work (Pl.'s Ex. 13, pp. 1-2, 6). Therefore, the total spent for labor and materials for electrical work by both the Respondent and the Appellant (excluding Carolina Construction Services), is $49,058.33. Including the principal balance due to Carolina Construction Services (excluding interest and attorney's fees), the total amount spent for electrical work is $85,722.49. Thus, if Carolina Construction Services had been timely paid, then the Respondent would have realized an additional $7,057.51 in profit. However, that profit is lost due to the Appellant's breach.

In a breach of contract action "the measure of damages is the loss actually suffered by the contractee as a result of the breach," *South Carolina Finance Corp. of Anderson v. West Side Finance Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 336 (1960), including lost profits, *see Drews Co., Inc. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 209-213, 371 S.E.2d 532, 533-535 (1988). If this Court were to award the Appellant the $57,258.38 offset it alleges it is entitled to, then it reaps the benefit of its breach. Therefore, if this Court finds that the Appellant is entitled to an offset as a matter of law, the offset should not exceed the principal balance due to Carolina Construction Services.

If, however, this Court finds the Appellant entitled to an offset based on its reasoning, then it should limit the amount of the offset to $43,724.67. This amount consists of the amount contained in the bid less the amount actually expended by both the Appellant and Respondent ($92,780 less $49,058.33). (*See* Pl.'s Exs. 10, 13, pp. 1-2, 6). The Appellant fails to take into account other expenses related to the electrical work which the Respondent incurred.

II. The Special Referee did not make a mathematical or clerical error in favor of the Respondent in the amount of $81,085.33, as the Special Referee found that the Appellant was not entitled to a setoff under the Contract and the oral modifications made by the parties, however, there was an error made in the amount of $100.00.

a. Standard of Review.

The standard of review regarding clerical errors appears to be *de novo*. *See Trotter v. Trane Coil Facility*, 393 S.C. 637, 651, 714 S.E.2d 289, 296 (2011); *see also Melton v. Olenik*, 379 S.C. 45, 55-56, 664 S.E.2d 487, 493 (Ct. App. 2008). Furthermore, it is unclear whether it is appropriate for the appellate court to correct the clerical error or to remand the case to the trial court. *Compare Trotter*, 393 S.C. at 651, 714 S.E.2d at 296 (correcting the error), *with Melton*, 379 S.C. at 55-56, 664 S.E.2d at 493 (remanding the proceedings to the trial court for further proceedings because the clerical error may have impacted the trial courts ruling).

b. The Special Referee correctly accounted for $69,677.96 of the perceived error in favor of the Respondent of $81,085.33.

The Special Referee did not make a clerical error in favor of the Respondent in the amount of $81,085.33. It is true that the Parties acknowledged that the Appellant had paid a total of $390,888.33 to third-party vendors and subcontractors that were related to the project. (Order, p. 2; *see* Pl.'s Ex. 13). The Special Referee credited $212,195.26 of the payments that were made by the Appellant on the Appellant's account under the Contract. (*Id.*, pp. 3-4, 8). However, the Special Referee found that some of the payments that the Appellant made throughout the project, totaling $97,607.74, did not fall within the scope of the Contract. (*Id.* pp. 4-5). As the Appellant correctly points out, this creates a discrepancy of $81,085.33 for payments made by the Appellant that were unaccounted for.

Nevertheless, one of the amounts paid by the Appellant in furtherance of the project consists of an $11,285.00 payment made to ARS Rescue Rooter. (Pl.'s Ex. 13, p. 1). The Special

Referee found that this payment pertained to the HVAC work under the Contract, and thus, was within the scope of the Respondent's obligations. (Order, p. 7). While, the $212,195.26 credited to the Appellant did not include the $11,285.00 payment to ARS Rescue Rooter, the Appellant still received a setoff for the $11,285 in the Order. (*Id.*, p. 8).

A second amount paid by the Appellant in furtherance of the project includes $58,392.96 for the two HVAC units. (Pl.'s Ex. 13, p. 7). The Special Referee found that the Appellant and Respondent agreed that the HVAC system would not be replaced, thus modifying the Contract. (Order, p. 7). The Special Referee further found the Appellant was not entitled to damages for the two HVAC units. (*Id.*). Therefore, the Appellant received no credit for the $58,392.96. Hence, there was no clerical error with respect to $69,677.96 of the $81,085.33 asserted by the Appellant. Therefore, this Court should affirm Special Referee's decision.

c. While the Special Referee failed to account for two payments made by the Appellant to third party vendors or contractors totaling $11,307.37, the finding of the Special Referee is supported by the evidence.

It appears that there are two expenses that were omitted from the Order, a payment to Johnson Concrete in the amount of $5,048 and a payment to S&D Coffee in the amount of $6,259.37. (*Compare* Order, pp. 3-5 *with* Pl.'s Ex. 13, pp. 4, 6). The Order makes no finding as to whether these payments were within the scope of the Contract.

While the Order makes no finding, the testimony in the record supports the Special Referee's decision crediting the payments totaling $11,307.37 in favor of the Respondent. First, under the Contract, the Respondent was not responsible for purchasing or installing equipment for coffee. (*See* Pl.'s Ex. 1-2) (excluding equipment such as seating and booth package and the refrigeration). Furthermore, when asked about the payment to S&D Coffee, the Respondent did

not know what labor, materials or services S&D Coffee furnished for the project and further testified that he was not responsible for the furnishing equipment. (Tr., p. 125:8-14).

Similarly, there is testimony demonstrating that, of the $8,548.00 paid to Johnson Concrete, $3,500 was for work which the Respondent was contracted to perform, while $5,048 resulted from a change requested by the Appellant. (*Id.* at pp. 114:21-125:1; 190:17-193:22). This evidence supports the Special Referee's findings. Furthermore, crediting the Respondent with the payment of $5,048 is consistent with the Special Referee findings that the parties agreed to the change order regarding the changes to the kitchen floor. (Order, pp. 6-7). Therefore, the Special Referee did not make a mathematical or clerical error in favor of the Respondent in the amount of $81,085.33. Thus, this Court should affirm the Special Referee's Order.

Notwithstanding the foregoing, should this Court find that the findings of the Special Referee are insufficient in light of the mathematical and clerical error asserted by the Appellant, it should remand the matter to the Special Referee to allow the Special Referee to clarify or reconsider any findings. *C.f. Melton*, 379 S.C. at 55-56, 664 S.E.2d at 493.

d. There was a clerical error in the amount of $100.00 made in the Respondent's favor, which should be corrected.

It appears that $100.00 was unaccounted for in the Special Referee's Order. The payments made to ARS Rescue Rooter ($11,285.00), S&D Coffee ($6,259.37), Johnson Concrete ($5,084.00), and for the two HVAC units ($58,392.96) total $80,985.33. (Pl.'s Ex. 13, pp. 1, 3, 6, 7) This is a $100.00 difference between the amount the Appellant asserts was made in the Respondents favor. Upon further review of the Order, there appears to be clerical error in the amount of $100.00. Specifically, the Order found that the Appellant paid $26,522.00 to Multi-tech Safety Products, Inc., on behalf of the Respondent. (Order, p. 4). However, the Appellant paid $26,622.00 to Multi-tech Safety Products, Inc. (Pl.'s Ex. 13, p. 5). Therefore, there is a clerical

error, which would increase the total amount paid by the Appellant from $212,195.26 to $212,195.26, and thereby reducing the total judgment by $100.00 from $160,130.83.

If this Court decides that this case should be remanded to the Special Referee due to other issues, this Court should also remand this issue to the Special Referee. Rule 60(a), SCRCP ("Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from the oversight or omission by the court at any time . . . ."). If this Court does not remand the matter to the Special Referee due to other issues, then it should correct the clerical error and order the judgment be modified accordingly. *Trotter*, 393 S.C. at 651, 714 S.E.2d at 296.

III. The Special Referee correctly ruled by not awarding the Respondent lost profits because the Appellant breached the Contract and the evidence presented did not permit the Special Referee to calculate profits to a reasonable certainty.

a. Standard of Review.

South Carolina, as a matter of law, permits the recovery of lost profits for a new business as a result of the breach of a contract claim. *Drews Co.*, 296 S.C.at 209-213, 371 S.E.2d at 533-535 (discussing the history of rights to lost profits in South Carolina) The new business rule is a rule of evidentiary sufficiency rather than an automatic bar to the recovery of lost profits by a new business. *Id.* 296 S.C. at 212, 371 S.E.2d at 535. As an evidentiary rule, the fact finder must determine whether a new business is entitled to lost profits. *See id.* Accordingly, "on an appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *South Carolina Federal Savings Bank*, 310 S.C. at 235, 423 S.E.2d at 116 (reviewing the Master's finding awarding lost profits under this standard).

b. The Appellant is not entitled to lost profits because it breached the Contract.

In South Carolina, courts use a three-part test to determine whether a party is entitled to lost profits in a breach of contract claim. *Id.* 310 S.C. at 234-35, 423 S.E.2d at 115. In order to recover lost profits in a breach of contract action the party asserting the claim must show that (1) the profits were prevented or lost as a natural consequence of the breach, (2) the lost profits were foreseeable, and (3) the lost profits must be established with reasonable certainty. *Id.*

In *South Carolina Federal. Savings Bank*, Thornton Crosby Development Company, Inc. (the "Developer") contracted with T.R. Tucker Construction Co., Inc. (the "Builder") to construct and complete an ocean-front condominium in Garden City, South Carolina. *Id.* 310 S.C. at 233, 423 S.E.2d at 115. The Builder and Developer entered the contract in May of 1984. *Id.* The Construction was to be completed by December 31, 1984. *Id.* The project was financed by South Carolina Federal Savings Bank (the "Bank"). *Id.* The Bank required, among other items, performance and payment bonds. *Id.* Construction began after June 4, 1984, but fell behind schedule shortly thereafter. *Id.* The Builder abandoned the project on November 18, 1985. *Id.*

On February 24, 1986, the Bank filed suit to foreclose on the property against the Developer, Builder, and Hartford Accident Indemnity Co., Inc. (the "Surety"). *Id.* 310 S.C. at 234, 423 S.E.2d at 115. The Developer asserted cross-clams against the Builder and the Surety for Breach of Contract. *Id.* The contract claims were referred with finality to the Master, who awarded judgment to the Developer against the Builder and the Surety in the amount of $1,029,0555.80. *Id.* Lost profits in the amount of was $382,600.00 were included in the Developer's damages award. *Id.* The Builder appealed and the South Carolina Court of Appeals affirmed the Master's Order. *Id.* The Builder subsequently appealed to the Supreme Court of South Carolina. *Id.*

There, the Master found that the Builder failed to perform and was in breach of contract. *See id.* 310 S.C. at 235, 423 S.E.2d at 116. Because the Developer would have realized a profit had the Builder performed in accordance with the contract, the Master awarded lost profits. *Id.*

Like in *South Carolina Federal Savings Bank*, the Respondent and Appellant entered into a construction contract with a fixed deadline. (Pl.'s Exhibit 2). However, in this case, the Special Referee found in favor of the Respondent rather than the Appellant, while in *South Carolina Federal Savings Bank*, the Master found for the Developer. (Order, p. 3). Because the Special Referee found in favor of the Respondent, the Appellant was not entitled to lost profits. *South Carolina Federal Savings Bank*, 310 S.C. at 234-35, 423 S.E.2d at 115 ("First, profits must have been prevented or lost as a natural consequence of the breach of contract.").

Here, the Special Referee found that the Appellant breached the contract with the Respondent in failing to pay the Respondent under the Contract. (Order p. 3). Implicit in the Special Referee's finding of the Appellant's breach was that the delay in the upfit was not the fault of the Respondent. While the Appellant asserts that the project was to be completed on August 9, 2015, 120 days from the date the Contract was executed, construction did not begin until June of 2015, nearly two months from the date the Contract was entered. (Pl.'s Ex. 2; Tr., p. 81:9). The Respondent was unable to begin the renovations for the upfit because the Appellant was waiting to secure financing. (Tr., pp. 8:24-25, 9:20-25; 82:5-10). The Appellant was unable to secure financing due to the divorce. (*Id.* at pp. 9:4-12, 17:4-5; 334:21-25). The Respondent had no control over the Appellant's divorce proceedings or the Appellant's ability to obtain financing.

The project was further delayed as a result of issues with mold at the job site. (*Id.* at pp. 37:15-18, 24-25, 38:1; 213:22). The mold issue delayed the project for at least a week, if not a week and a half. (*Id.* at. pp. 37:11-18, 24-25, 38:1; 294:5-11). Furthermore, a delay was caused

when the Appellant required the Respondent to remove the existing floor in the kitchen and pour a whole new floor. (*Id.* at pp. 192:3-19; 193:7-22; 213:22-25). Thus, there was sufficient evidence presented to the Special Referee to support a finding that the delays to the upfit were not caused by or within the control of the Respondent. Therefore, Special Referee correctly ruled by declining to award the Appellant lost profits. Accordingly, this Court should affirm the Special Referee's decision.

c. The Appellant is not entitled to recover lost profits because the evidence it offered failed to establish lost profits with reasonable certainty.

Assuming *arguendo* that the Appellant were entitled to lost profits as a result of the Respondent's breach of the Contract, the Appellant failed to establish its alleged lost profits with reasonable certainty. A party seeking to recover lost profits as the result of a breach of contract action must establish lost profits with reasonable certainty. *South Carolina Federal Savings Bank*, 310 S.C. at 234-35, 423 S.E.2d at 115. Under the third part of the test, "recovery cannot be had for profits that are conjectural or speculative." *Id.* 310 S.C. at 235, 423 S.E.2d at 115.

There are numerous methods for proving lost profits. *Global Protection Corp., v. Halbersberg*, 332 S.C. 149, 158, 503 S.E.2d 483 (Ct. App. 1998).

> Proof of [lost profits] may be established through expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, comparison with profit performance of businesses similar in size, nature and location, comparison with profit history of [the party's] successor, comparison of similar businesses owned by [the party itself] and use of economic and financial data and expert testimony.

Id. (citing *Drews Co.*, 296 S.C. at 213-14, 371 S.E.2d at 536).

In *Drews Co.*, the Drews Company, Inc. (the "Contractor") contracted to renovate a building owned by Ledwith-Wolfe Associates, Inc. (the "Owner"). *Id.* 296 S.C. at 208, 371 S.E.2d at 533. The project in that case was plagued by construction delays from the beginning. *Id.* Eventually, the Contractor abandoned the job and sued the Owner to foreclose a mechanic's lien. *Id.* The Owner counterclaimed for breach of contract, claiming the Contractor's delays caused the Owner to lose profits from the restaurant. *Id.* The jury returned a verdict in favor of Contractor and also awarded the Owner damages for its counterclaim, including $14,000.00 in lost profits. *Id.*

To prove its lost profits the Owner relied on a sheet of paper reflecting the gross profits the restaurant made in the first 11 months. *Id.* 296 S.C. at 214, 371 S.E.2d at 536. There, the South Carolina Supreme Court held the evidence presented by Owner was insufficient to submit to the jury because it did not establish lost profits with a reasonable certainty. *Id.* The evidence was insufficient because it failed to provide figures for overhead or operating expenditures. *Id.* While the Owner testified that one-third of the gross figure would be net profit, the Supreme Court still held the evidence to be insufficient. *Id.*

The Appellant has failed to proffer evidence sufficient to establish lost profits with reasonable certainty. While the Appellant in this case did furnish a profit and loss statement that accounted for overhead and operating expenditures, the Appellant only provided a profit and loss statement for one month. (Def.'s Ex. 7). Neither the Appellant's principal, Mr. Makawi, or its bookkeeper could provide the net profits for months immediately following December of 2015.

While both Mr. Makawi and the bookkeeper testified that the other months were similar, (Tr., pp. 277:14-278:7; 380:16-19), Mr. Makawi also testified that opening months have greater sales than other months, (*Id.* at p. 381:1-3). However, there is nothing in the record showing how much the Appellant lost in the January of 2016.

In *Global Protection Corp.*, a case involving trademark infringement, the Plaintiff, Global Protection Corp. was awarded lost profits by the Master. *Global Protection Corp.*, 332 S.C. at 152. There, the South Carolina Court of Appeals upheld the Master's award for lost profits. *Id.* at 158. In that case, the Plaintiff's President testified that its West Coast market experienced a 590% increase in profit in the relevant time period. *Id.* The President further testified that the Plaintiff's East Coast market would have performed similar but for the intentional infringement. *Id.* The President testified that the comparison between the East Coast Market and the Southern California Market was reasonable because both were tourist beach resorts. *Id.*

Unlike in *Global Protection Corp.*, where the party claiming lost profits provided data of a similar region during the same time frame, the Appellant did not provide evidence of the subsequent month's sales. Given Mr. Makawi's testimony that sales in the opening month were greater than in subsequent months, (Tr., p. 381:1-3), the Appellant should have furnished a profit and loss statement for January as well. *See Global Protection Corp.*, 332 S.C. at 158. Therefore, the Appellant failed to establish lost profits with reasonable certainty. Even assuming that the Appellant was entitled to lost profits by virtue of the Respondent's alleged breach, the Special

Referee did not err when it declined to award the Appellant lost profits. Therefore, this Court should affirm the decision of the Special Referee.

d. This Court should not vacate the portion of the Order that refused to award the Appellant lost profits because the Appellant failed to prevail on its breach of contract claim.

Rule 52(a) of the South Carolina Rules of Civil Procedure requires that the court must find the facts specially and state its conclusions of law separately in all actions tried without a jury. Rule 52(a), SCRCP. The findings in an order must be sufficient to permit the appellate court to ensure the law is faithfully executed below. *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002). In this case, the Special Referee, based on the evidence presented, found that the Appellant had breached the contract with the Respondent. (Order, p. 3). The Order further provides that it is clear from the evidence that the Appellant failed to pay the Respondent for various draws after demanded. *Id.*

The findings of the Special Referee relating to the Appellant's breach of the Contract are clear and are supported by the evidence. Because the Appellant breached the Contract, it is not entitled to recover lost profits. *South Carolina Federal Savings Bank*, 310 S.C. at 234-35, 423 S.E.2d at 115. Therefore, this Court should affirm the Special Referee's decision denying the Appellant its lost profits.

IV. The Appellant did not preserve the issue of whether the Special Referee applied the wrong standard on the Appellant's Rule 59 Motion, therefore this Court cannot address the issue.

A losing party must try to convince the lower court it has ruled wrongly before it can convince the appellate court that the lower court erred. *I'ON, LLC, v. Town of Mount Pleasant*, 338 S.C. 406, 421-422, 526, S.E.2d 716 (2000). "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. *Id.* (citations omitted). In this case, the Appellant asks the court to remand the case because the Special Referee applied the wrong standard to its Rule 59 Motion. However, the Appellant never raised the issue with the Special Referee. The Appellant only filed one Rule 59 Motion. In order to preserve this issue for review, the Appellant needed to file a motion to alter or amend the Special Referee's Supplemental Order, which it alleges applied the wrong standard when denying its motion. *Id.* 338 S.C. at 421. Consequently, this Court cannot address this issue on appeal. *See id.*

V. While the Special Referee may have applied the wrong standard in ruling on the Respondent's Rule 59 Motion, any such error was harmless.

Even if the Special Referee applied the wrong standard any such error was harmless. The Special Referee applied federal case law when ruling on the Appellant and Respondent's Rule 59 Motions. (Supp. Order, pp. 3-4). Federal law, which provides that a Rule 59(e) motion may not be used to converse old matters, *Pacific Ins. Co. v. American Nat'l Fire Assoc.*, 148, F.3d 396, 403 (4th Cir. 1998), is antithetical to South Carolina law which permits a court to reconsider a decision "even if it means rehashing all or part of an argument previously presented[,]" *Elam v. S.C. DOT*, 361 S.C. 9, 21, 602 S.E.2d 772 (2004).

While the Special Referee may have applied the wrong standard, the Supplemental Order provides in pertinent part:

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

(Supp. Order, p. 5). It is clear that the Special Referee, while citing to federal law, considered the grounds contained in the motions of both parties, which were the same as the grounds raised during the trial. *Id.* Therefore, any error asserted by the Appellant is harmless. *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 486 S.E.2d 269, 275 (Ct. App. 1997) (holding that the conversion of a 12(b)(6) motion into a summary judgment motion is harmless error when, without reference to matters outside of the complaint, dismissal can still be justified under Rule 12(b)(6)). Because the error is harmless, this Court should affirm the Special Referee's decision.

CONCLUSION

This Court should affirm the Special Referee's decision. The Appellant is not entitled to setoff as a matter of law. Even if this Court concludes that the Appellant is entitled to a setoff as a matter of law, the amount of the setoff should not exceed the amount of the principal balance due to Carolina Construction Services. Furthermore, the Special Referee properly accounted for all payments made under the Contract or the evidence supported its findings. While the Order contains a clerical error in the amount of $100.00, this Court may and should correct the error by reducing the judgment by $100.00.

Likewise, the Appellant is not entitled to lost income because it was found to be the breaching party. Even if the Respondent had breached the Contract, the Appellant failed to prove establish lost profits with reasonable certainty. Additionally, the Special Referee's findings of fact and conclusions of law as to the breach are clear enough for this Court to ensure that the law was faithfully executed by the Special Referee. Finally, the Appellant failed to raise the issue of

whether the Special Referee applied the wrong standard when denying the Appellant's Rule 59 Motion. Even if the Special Referee applied the wrong standard, the error was harmless.

In the event that this Court determines that the Special Referee did not make specific findings of fact regarding the unaccounted for payments to S&D Coffee and Johnson Concrete, or the Appellant's claims for lost profits, it should remand the matter to the Special Referee for further consideration.

Respectfully submitted,

FINKLEA LAW FIRM

February 18, 2020

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PROOF

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Eugene P. Warr, Jr., Special Referee

RECEIVED
MAR 16 2020
SC Court of Appeals

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

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

v.

Eagles Landing Restaurants, LLC — Appellant.

PROOF OF SERVICE

I certify that I have served Respondent's Motion to Amend Initial Brief of Respondent upon counsel for the Appellant, Brooks, R. Fudenberg, Esquire, at the Law Office of Brooks R. Fudenberg LLC, 171 Church Street, Suite 170 Charleston, SC 29401 by depositing a copy of it in the United States Mail, postage prepaid, on January 31, 2020.

March 13, 2020

Florence, South Carolina

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March 13, 2020

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MAR 16 2020
SC Court of Appeals

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

Re: Elite Construction Co. vs. Eagles Landing Restaurants, LLC
Case No.: 2016-CP-21-00702
Appellate Case # 2019-001062
Our File No.: 15511.2PFVB

Dear Ms. Kitchings:

Enclosed for filing in the above matter are an original and six (6) copies of the Motion to Amend Initial Brief of Respondent, Proposed Amended Initial of Brief Respondent, Proof of Service, and a check in the amount of $50.00 representing the filing fee. I would appreciate your office filing and returning the certified copies in the enclosed self-addressed stamped envelope.

By copy of this letter with enclosures to counsel for Appellant, Brooks R. Fudenberg, Esquire, I am serving opposing counsel with copies of the same.

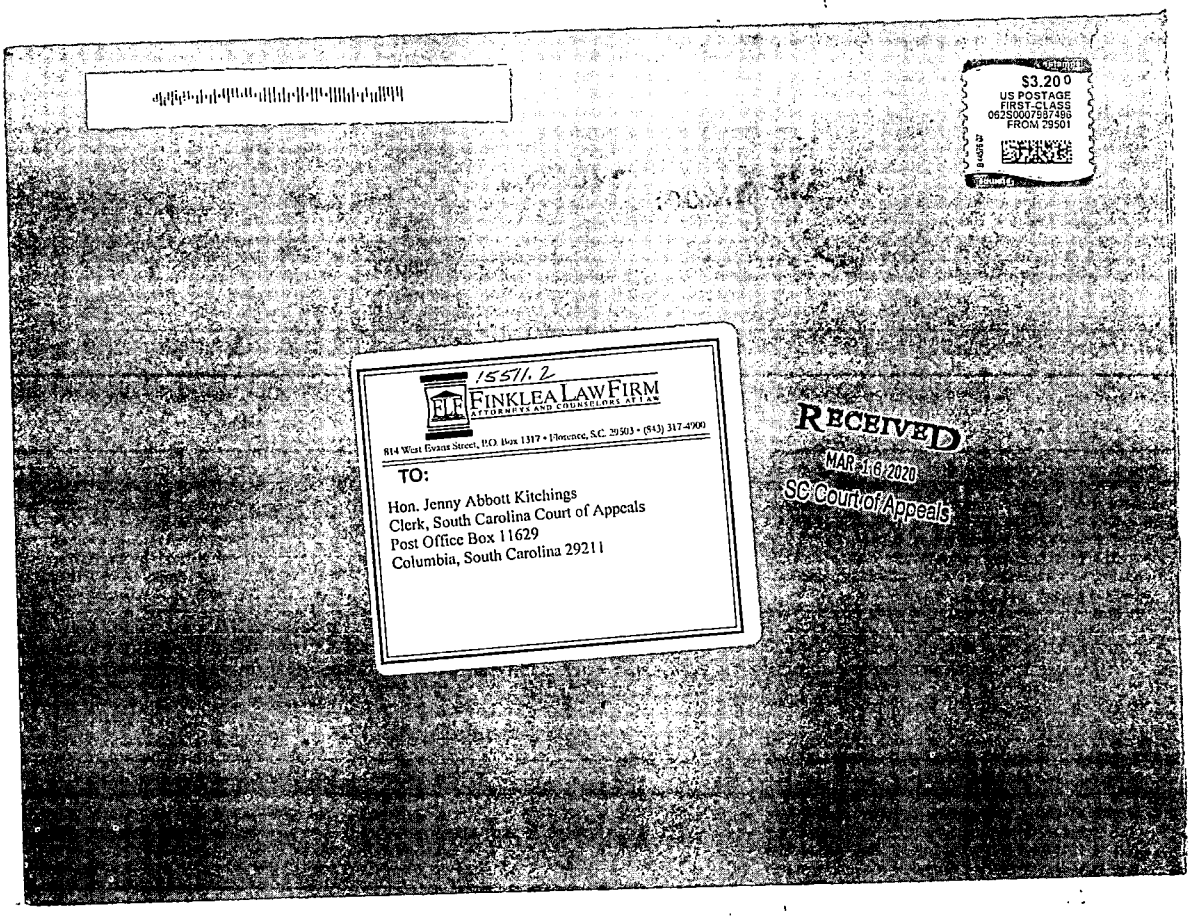
With kindest regards, I am

Very truly yours,

Vevelyn Bradley, Paralegal for
PATRICK FORD

PBF:vlb
Enclosures

Cc: Vince Carter (w/enclosures)
Brooks R. Fudenberg, Esquire (w/enclosures)



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TO:

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