THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Henry W. Brown
Special Referee

Appellate Case Number 2019-000513

Brown Contractors, LLC, under S.C. Residential Builders License No. 20378, ...
.....Appellant/Respondent,

v.

Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin and Amy Salzhauer, ...
.....Respondents/Appellants.

And

Andrew McMarlin and Amy Salzhauer, ...Respondents/Appellants,

v.

James Brown, IV and Brown-Meihaus Construction Co., LLC, ...Third-Party Defendants.

FINAL BRIEF
OF RESPONDENTS/APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the Special Referee misapply the law regarding the personal liability of Jay Brown?
2. Was the Special Referee holding that Jay Brown was not personally liable supported by the evidence?
3. Did the Special Referee err as a matter of law by failing to rule on the issues of alter ego and amalgamation for purposes of Jay Brown's personal liability.

STATEMENT OF THE CASE

This action was instituted by Jay Brown, and his company Brown Contractors, LLC (collectively "Brown", Appellants/Respondents), with the wrongful filing of a mechanics lien (R. pp. 656-659) against the property of Amy and Andy McMarlin, Respondents/Appellants. Brown asserted claims for foreclosure of a mechanic's lien and breach of contract, alleging an entitlement to payment for work he performed on the McMarlin's home on Sullivans Island, SC (the "Home"). Brown claimed a total of $206,428.59.

The McMarlins answered (R. pp. 33-47), denying any liability to Brown, alleging that the lien was defective because Brown was not properly licensed and counterclaimed for overpayment and for the costs associated with the completion of the Home and for the repairs to defectively performed work. Ultimately, the McMarlins claimed damages totaling $727,361.56.

The parties submitted the claim to a Special Referee by Order dated June 21, 2016 (R. pp. 1-2). The matter was tried before the Special Referee from November 7 to 10, 2017 and December 13, 2017 and the Special Referee issued an Order dated May 1, 2018 (filed May 4, 2018) (R. pp. 3-19). In that Order, he found that Brown was not properly licensed and that his ostensible "qualifier", Vuong Nuguyn, was not an employee of Brown Construction, LLC or in responsible charge of construction. Therefore, the Special Referee found the mechanic's lien to be invalid and

he denied Brown's claim. He found in favor of the McMarlins as to their counterclaim and awarded damages totaling $346,693.00. However, he ruled that the McMarlins had failed to establish the personal liability of Jay Brown.

The parties subsequently filed motions pursuant to Rule 59, dated May 11, 2018 (R. pp. 71-96, pp. 97-103). The McMarlins also filed an affidavit of attorneys' fees (R. pp. 104-110). On February 25, 2019, the Special Referee denied the parties Rule 59 motions and awarded the McMarlins attorneys' fees totaling $133,161.00 by Order dated February 25, 2019 (R. pp. 22-25).

This appeal follows and the parties filed notices of appeal dated March 25, 2019 (R. pp. 111-112) and March 27, 2019.

STANDARD OF REVIEW

"When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law, and the appellate court will not disturb the special referee's findings of fact as long as they are reasonably supported by the evidence." *Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 649, 748 S.E.2d 801, 804 (Ct. App. 2013) (internal quotation marks omitted).

ARGUMENT

I. The Special Referee Erred as a Matter of Law by Misapplying the Law of Personal Liability.

II. The Special Referee Erred Because his Ruling Regarding the Personal Liability of Jay Brown is Unsupported by the Evidence.

The Special Referee erred in in two respects by holding that Jay Brown is not personally liable for the claims of the McMarlins. First, the Special Referee misapplied the law relative to the personal liability of Jay Brown. Second, the Special Referee's holding is not supported by the evidence. The Special Referee incorrectly held that the McMarlins failed to prove that Jay Brown was personally liable for the judgment entered against his company, Brown Contractors, LLC.

The evidence on the case, the applicable law and the Special Referee's own Order establishes that Jay Brown was personally liable for the conduct at issue that gave rise to the McMarlin's claim, and the judgment should, therefore, be against him personally and against his insolvent company. In his Order, at page 16 (R. p. 18), the Special Referee found that the evidence was insufficient to establish Jay Brown's personal liability:

> Jay Brown clearly acted on behalf of Brown Contractors, LLC. However, Jay Brown could be personally liable if negligent conduct as to the portion of the residence addressed in the Brown Atlantic report is shown by Mr. Brown personally. As to the specific items of damage found herein, there is not sufficient evidence of Jay Brown's personal negligence to impose liability on Mr. Brown.

The Special Referee was in error on this point.

The Order correctly states the general premise of the law with respect to liability of an individual who is a member of an LLC. It is clear that one may not be personally liable for the torts of another merely by his or her status as a shareholder or officer of an LLC; but it is also clear when the member has participated in or directed the tortious act, personal liability will attach. *See Steinke v. Beach Bungee, Inc.,* 105 F.3d 192 (4th. Cir. 1997) (holding personal liability attached to corporate members who personally contributed unsafe conditions resulting in Plaintiff's death), *citing Rowe v. Hyatt,* 468 S.E.2d 649, 650 (S.C. 1996) ("An officer, director or controlling person in a corporation is not merely as a result of his or her status as such, personally liable for the torts of the corporation. To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act"). *BPS, Inc., v. Worthy,* 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005) (Summary judgment reversed as to corporate officer's individual liability where evidence presented to support liability based on his own conduct); *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.,* 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009)(Officer

who made misrepresentations regarding proposals of the LLC was not shielded from liability by his status as a corporate officer).

South Carolina's corporate statute provides, in relevant part, as follows: "Unless otherwise provided in the articles of incorporations, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct." *S.C. Code Ann.* 33-6-220(b), Liability of Shareholders.

Similarly, the South Carolina Limited Liability Company statute "Liability of Members and Managers" *S. C. Code. Ann.* 33-44-303 contains a limitation on the protection afforded to members. This statute reads as follows:

> (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company **solely by reason of being or acting as a member or manager.**

The comment to the statute includes the following:

> *A member or manager, as an agent of the company, is not liable 161 the debts, obligations, and liabilities of the company simply because of the agency. A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity.*

In *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009), the court found where an officer of a corporation participated in the commission of conversion and fraud, specifically in making representations regarding proposals of the LLC, he was not shielded from liability merely by his status as an officer or shareholder of a corporation by *S.C. Code Ann.* 33-6-220(b). Specifically, Gerald concealed

his knowledge of foreclosure proceedings on certain property when negotiating with *Plantation, A.D.*, for development of the property.

In assessing whether or not Jay Brown is personally liable, the first question is whether Jay Brown should have been afforded the protection of an LLC in the first instance. The Special Referee erroneously concluded that he was so protected which was in error.

Jay Brown was cavalier about how he did business, a fact which is established by the Special Referee's finding that Jay Brown was not properly licensed and wrongfully filed the mechanics lien which commenced this litigation. There was never a contract between the McMarlins or Brown. The evidence establishes that the relationship began with Brown making a proposal to the McMarlins on letterhead of a company called Brown-Meihaus (R. pp. 720-721). As the parties began to refine their agreement, Brown submitted numerous proposals by emails (collectively Amended Designation Exhibits 32 through 41 and 58 through 80, which were not included in the Record on Appeal) and the parties ultimately agreed on a price. Brown submitted a proposed cost-plus contract to the McMarlins with the contractor identified as "Brown Contractors". Since the McMarlins had never agreed to pay Brown on a cost-plus basis, they refused to sign the contract so the parties proceeded without one. The McMarlins never signed an agreement with Brown Contractors and never manifested their intent to do business with that entity in particular. Their testimony at trial was to the contrary, that they believed they were hiring Jay Brown, who they wrongfully believed to be a licensed contractor.[1]

[1] R. p. 273, line 2-274, line 10; R. p. 449, line 17-450, line 8

At most, the evidence in this case establishes that at some point, Jay Brown unilaterally decided to proceed via his LLC without the consent or agreement of the Defendants.

In order to secure the protections afforded by a corporate entity, it is incumbent on the party doing business to comply with the corporate code and to do business in such a way that the public is aware that they are doing business with a corporate entity. Corporate protections cannot be afforded to people who disregard the requirements of the law or who are cavalier about how they do business. To allow Brown the protections of the corporate code would be to allow anyone to simply unilaterally put the name of any assetless LLC on a bill or invoice and then stand behind that entity to avoid personal liability. That cannot be the law.

Because there is no evidence that Brown complied with the law with regard to securing the protections afforded by the corporate code, and because there was no evidence that the McMarlins assented to doing business with an LLC, and, to the contrary, the testimony was that the McMarlins believed they were hiring and doing business with Jay Brown, Brown should not have been afforded the protections of the corporate code and should have been personally liable for all sums awarded.

The Order suggests that in the absence or evidence that Jay Brown personally performed defective work, he cannot be held personally liable for it. This finding is in error since it does not take into account the functions that Jay Brown was hired to perform. The proposal made by Jay Brown included a fee for "Project Management." Even if there was a valid relationship between the Defendants and an LLC, the "project management" function had to be performed by someone. The testimony of the McMarlins was that they expected

Jay Brown to manage the project for that fee, believing, of course, that he was licensed to perform that function. Whether it be called negligent supervision of subcontractors or inadequate coordination and sequencing, Jay Brown was ultimately responsible for ensuring that the work of the subcontractors was performed properly and completely. The evidence at trial was clear that he failed to fulfill those duties as evidenced by the award of the Special Referee.

Additionally, it was Jay Brown personally who failed to tell the McMarlins that he was not licensed; falsified the application for the certificate of authority with the LLR; filed the mechanic's lien in violation of the statute; brought a collection action when he had no right to recover, and refused to complete the home or correct the deficient work caused by his subcontractors. All of which is established by the Order of the Special Referee. It was simply wrong, and erroneous, to conclude that the person who committed those wrongful acts should be insulated from the effects of those acts by the veil of corporate protections.

The record in this case, and the Court's Order, proves conclusively that Jay Brown personally misrepresented his qualifications to get the job, failed in his project management duties for which he was paid a fee, failed to properly supervise his subcontractors, failed to complete the home his defective work, and commenced this action by wrongfully filing a mechanic's lien, all of which was found by the Special Referee and all of which establishes that Jay Brown is personally liable for the sums awarded to the McMarlins.

II. The Special Referee Erred by Failing to Rule on The McMarlins' Claims of Alter/Ego and Amalgamation.

The McMarlins assert claims against Brown personally under theories of Alter Ego and/or Amalgamation. These are not addressed by the Order of the Special Referee.

An alter-ego theory requires a showing of (1) total domination and control of one entity by another and (2) inequitable consequences caused thereby. *Oskin v. Johnson,* 400 S.C. 390,

400, 735 S.E.2d 459, 465 (S.Ct. 2012), *citing Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006). Control may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity. *Id.* (citation omitted). This theory does not apply, however, in the absence of fraud, injustice, or contravention of public policy. *Id.* (citations omitted).

In this instance it is irrefutable that Brown Contractors, LLC was the alter ego of Jay Brown, who totally controlled Brown Contractors, LLC. In fact, he was the only person who controlled any aspect of Brown Contractors, LLC, whose sole purpose was to insulate Jay Brown from the consequences of his actions. By limiting the McMarlins' recovery to Brown Contractors, LLC, only, the Special Referee has effectively prevented the McMarlins from seeking financial redress from the only person they believe they hired and the only person they relied upon to manage the construction of their home. Their correspondence was with Jay Brown. Their questions were sent to Jay Brown, their complaints were sent to Jay Brown. Ultimately, their pleas for a completed home, cost management and correction of all defective work were made to Jay Brown (collectively Amended Designation Exhibits 32 through 41 and 58 through 80, which were not included in the Record on Appeal).

Further, by limiting the McMarlins' recovery to an insolvent entity, the Special Referee rewarded not only Jay Brown's disregard of the requirements of the corporate code and fair dealing, he insulated Jay Brown from the consequences of his misrepresentations regarding his licensure, his failures to properly select, coordinate or supervise his subcontractors, his overcharging of the McMarlins, and his false and wrongful mechanic's lien, resulting in attorneys' fees and costs of $158,169.29. All of that is inequitable.

Regarding amalgamation, now known as the single business enterprise theory, the Supreme Court recently held as follows:

> We formally recognize today this single business enterprise theory, and in doing so, we acknowledge that corporations are often formed for the purpose of shielding shareholders from individual liability; there is nothing remotely nefarious in doing that. For this reason, the single business enterprise theory requires a showing of more than the various entities' operations are intertwined. Combining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions.

Pertuis v. Front Roe Restaurants, Inc., 423 S.C. 640, 654–55, 817 S.E.2d 273, 280–81 (2018), *reh'g denied* (Aug. 16, 2018)

Pertius is the culmination of three decades of law regarding what was formally known as amalgamation. The roots of the claim of amalgamation grew from circumstances where members of corporate entities were casual about their use of corporate designations, in such a way as to cause confusion among people with whom the corporate entities did business as to exactly what entity, or with whom, they were conducting business. Liability among corporate entities, and people, was shared where the activities of the corporate entities or people were such that they "blur[ed] the legal distinction between corporations and their activities." *Magnolia North POA, Inc., v. Heritage Communities,* Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) *citing Kincaid v. Landing Development Corp.,* 289 S.0 89, 344 S.E.2d 869 (Ct. App. 1986). As in *Kincaid*, because they signed no contract with Brown Contractors, LLC, and because they believed they hired and were doing business with Jay Brown, the McMarlins were confused and never understood that Brown Contractors alone stood behind the work of Jay Brown.

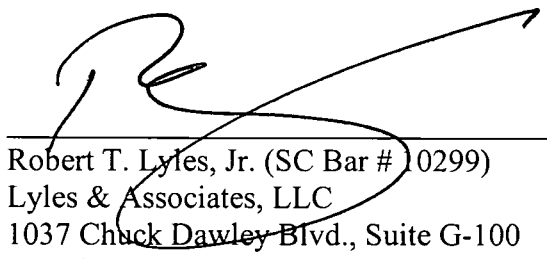
As discussed above with regard to alter ego, it would be unfair and unjust to allow Jay Brown to reap the benefits of the McMarlin business, then wipe his hands of any consequences of his misrepresentations, false court filings and poor workmanship

As noted previously, Jay Brown purported to do business as Brown-Meihaus and there was never a contract between Brown Contractors, LLC and the McMarlins. The McMarlins were never told, and never assented to doing business with Brown Contractors, LLC, an entity about which they knew nothing. What they knew, or falsely believed, was that Jay Brown was a licensed contractor.

Jay Brown was the sole member and sole employee of Brown Contractors, LLC. The casual nature with which Jay Brown represented himself reflects the fact that he totally controls and dominates the LLC and that entity is, for all intents and purposes, Jay Brown. If Jay Brown desired to properly conduct business through an LLC, he should have communicated that intent clearly to the McMarlins. As with the fact that he did not have a license, he did not. The evidence in this case establishes conclusively that Jay Brown neither let the McMarlins know of his intent to do business through his LLC and they did not know, or expect that their relationship was with an LLC and not Jay Brown, personally. As the testimony made clear, it was always the McMarlins' expectation that they were doing business with Jay Brown, who they believed at the time was a properly licensed contractor, and who concealed that the fact that he was not.

CONCLUSION

For the reasons set forth above, Respondents/Appellants respectfully request that this Court reverse the Special Referee and hold that Jay Brown is personally liable for the debts of Brown Contractors, LLC.



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