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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Ross Scarborough, Master-in-Equity

Opinion No. 2020-UP-004 (S.C. Ct. App. Filed Jan. 8, 2020)

Emory J. Infinger and Associates Construction Company, Inc.Respondent

v.

North Charleston Community Interfaith Shelter, Inc., Bobby Knight, in his official capacity as Chairman and President of Board for The Good Neighbor Center, bank of America, N.A., S.C. State Housing and Development Authority, Atlantic Construction Services, Inc., L & W Supply Corporation dba CK Supply, Now Mechanical, Inc., Wilson and Associates Electrical Contractor, Inc., Defendants,

Of which North Charleston Community Interfaith Shelter, Inc. is.....Petitioner

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 31, 2020.

QUESTIONS PRESENTED

1. Whether Appellant’s Motion for a New Trial and to Alter or Amend Judgment satisfies legal requirements for preservation of an issue for appellate review.
2. Whether Appellant contested the amount of damages in such a manner as to preserve the issue for appellate review.

STATEMENT OF THE CASE

Defendant's grant for the construction of the shelter was approved in 2008 (R. pp. 53-4). Plaintiff and Defendant had their first meeting to discuss the construction of the shelter in July of 2010 (R.). Plaintiff and Defendant entered into a contract to construct the shelter on Dec. 10, 2010 (R. p. 2). Construction did not begin immediately; it was delayed until the State approved its grant for the shelter (R. p. 53 lines 12 - 21). The Defendant gave its notice to Plaintiff to proceed with construction in March of 2011 (R. p. 3). Design, and construction of the shelter, began in June of 2011 (R. p. 124 lines 7 – 19). Plaintiff was aware that the project was to be financed by the Veteran's Administration ("VA") and the South Carolina State Housing authority ("State Housing") (R. p. 53 line 18 – p. 54 line 15), Plaintiff was aware that the funding was split with the VA providing sixty-five (65%) percent and State Housing providing thirty (35%) percent (R. p. 11).

The contract requires that any claim must first be referred to a Neutral for a decision (R. p. 195 § A.4.2.1). If no Neutral is identified, the Owner must provide the initial decision (R. p. 195 § A.4.1.2). The initial decision, subject first to mediation, shall be binding (R. p. 195 § A.4.1.3). Requests for mediation may be made concurrently with the filing of a demand for arbitration or other binding dispute resolution, but mediation shall proceed in advance thereof or of legal or equitable proceedings, which shall be stayed pending mediation for 60 days from the date of filing (R. p. 197 § A.4.3.2). Any claim not resolved by mediation shall be subject to arbitration (R. pp. 197-8 § A.4.4-4.4.1). The Plaintiff was permitted to pursue a mechanic's lien in compliance with applicable law while awaiting the resolution of any claim subject to arbitration or mediation (R. p. 197 § A.4.2.5). The contract required that the Design-Build payments be based on the amount of materials and equipment delivered and suitably stored at the site for incorporation in construction (R. p. 202 § A.9.3.2).

Any payment for material suitably stored off the site had to be agreed upon in writing (R. p. 202 § A.9.3.2).

The contract required that the Design-Build payments be based on the amount of materials and equipment delivered and suitably stored at the site for incorporation in construction (R. p. 202 § A.9.3.2). Any payment for material suitably stored off the site had to be agreed upon in writing (R. p. 202 § A.9.3.2).

ARGUMENTS

I. APPELLANT'S MOTION FOR NEW TRIAL AND TO ALTER OR AMEND JUDGMENT SATISFIES LEGAL REQUIREMENTS FOR APPELLATE REVIEW

On April 7, 2016, Appellant served its Notice of Motion and Motion for New Trial and to Alter or Amend Judgment (SCRPC 59(a)(e)) (R.p.161-162). The motion was filed on April 11, 2016 by the Clerk of Court for the Charleston County Court of Common Pleas. In the motion, Appellant clearly states several issues that needed further consideration in order to arrive at a fair and just determination of the issues. Appellant argued as follows: Defendant did not and could not approve any form of offsite storage of materials; Approval of storage must be in writing and Defendant absolutely gave no written approval of storage; Defendant, in questioning of Plaintiff and argument to court, raised the issue of proof of existence and value of stored materials; the Rules of Evidence require a determination of the value of storage when it becomes an issue (SCRE 1006); Plaintiff is required to comply with AIA Contract.

Where Appellant made a general statement of the law, Appellant cited specific South Carolina Supreme Court holdings that gave the trial court the rule of law that should be applied to this case. Also, Appellant cited to specific sections of the AIA Contract admitted as Exhibit 2 (R.p. 174-221) (R.p.195-198). These sections set out the requirements for storage and arbitration. This failure to arbitrate was pled, a pretrial motion, in court, was made for referral to arbitration, and again raised in the Motion For New Trial and to Alter or Amend the Judgment. In Conits v. Conits, 422 S.C. 74, 810 S.E.2d 253 (2018), the Court held that a husband preserved for appeal in a divorce action the issue of valuation of a farm located outside of the country, even though the words husband used to make his argument concerning the size and value of the farm changed from the family court, to his motion to

alter judgment, and to his brief at the Court of Appeals; considering husband's argument practically, his argument was the same at each stage of the proceedings, and the family court ruled on the issue. Our Supreme Court identifies two ways to preserve an issue: "A ruling by the trial judge or a post-trial motion." Pelican Building Centers v. Dutton, 311 S.C. 56, 427 S.E.2d 673, 675 (1993).

In concluding the trial, the Master-in-Equity asked that the parties submit proposed orders (R.p. 159, line 19). All parties did their particular responses in keeping with the positions taken during trial. The Master-in-Equity qualified the request for proposed orders by indicating his findings for Respondent. Hence, Petitioner's Motion for New Trial and to Alter or Amend Judgment sought to clarify its position as well as to get a ruling on Petitioner's issues. Petitioner declared definite and certain points of law and facts.

Petitioner clearly made the proper filings in a timely manner to preserve issues raised in the motion. This motion was based on SCRCP 59 (a) and 59 (e) and appropriately tracked in court litigation and post-trial filings, i.e. proposed orders and post-trial written arguments. The Trial court ruled and Appellant comes now to this Court for full and proper review. Review should be given.

II. APPELLANT CONTESTED THE AMOUNT OF DAMAGES IN SUCH A MANNER AS TO PRESERVE THE ISSUE FOR APPELLATE REVIEW

The record is replete with questions and answers regarding the value of Respondent's labor and the substantiation of the amount claimed as loss (R.p. 87, lines 9 - 23). The trial court acknowledges Petitioner's concern with the proper calculation and determination of Respondent's alleged losses. (R.p. 159: lines 7-11). In closing observations, Petitioner raised these concerns (R.p. 156, line 4 -157, line 8). Petitioner's Witness, Norman Robert Knight, testified that at least three of Respondents exhibits had no amount in a space shown for storage (R.p. 131, line 1-132, line 19). He further agreed there was no figure on other like forms (R.p. 132, line 20 -133, line 1).

A review of recorded testimony reveals that Respondent did complain about wasted material. Respondent's witness testified about complaining to Petitioner that the new structure needed a completed roof and temporary enclosure and raised concerns for materials stored on site but these were fixtures, i.e. HVAC, plumbing fixtures.(R.p. 112, line 22-23). These are materials that are attached to the building and tabulated.

The contract that controls the relationship of these parties (R.p. 174-221) in its Section A.9.3.2. of the 2004 Exhibit A sets the standards for material and equipment "delivered and suitably stored at the site for subsequent incorporation in the work "and for materials stored" off the site. There is no foundation in the records for a "materials and equipment on site or offsite" claim. None of the contract standards were met; there was no "material and equipment" as contemplated in the contract on site; the Petitioner, N.C.C.I.S., had not approved any offsite storage. There was no advanced approval by the Owner; there were no procedures to establish the Owner's title to such materials or equipment. Respondent could not quantify the stored materials figure and the figure cannot be left to conjecture (R.p.114, line 23 - R.p. 115, line 19).

Respondent at trial could not give a figure for stored materials, regardless of the contract requirements on those items. (R.p.112, lines 8-12).

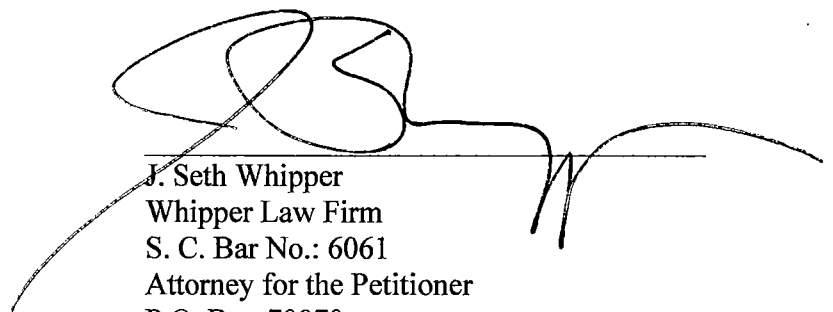
Petitioner raised the issue of what is actually owed in many ways. (R.p.93, line 13 – 94, line 2) (R.p. 103, lines 18 - 25). Petitioner deserves a proper determination on this figure. The \$196,412.00 figure was never accepted by Petitioner as more than a suggested figure (R.p. 87, lines 9-23). This issue was raised in Petitioner’s SCRCP 59 (a)(e) motion: it is timely and it is proper. Conits v. Conits, 422 S.C. 74, 810 S.E.2d 253 (2018); Pelican Building Centers v. Dutton, 311 S.C. 56, 427 S.E.2d 673, 675 (1993).

CONCLUSION

For the reasons stated, Petitioners ask the court to grant the petition for a writ of certiorari.

Respectfully Submitted,

April 30, 2020



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