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**Jun 19 2020**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Marsh Waterproofing, Inc.,

Plaintiff,

vs.

Steeple Dorchester Ltd. and Hamilton  
Management Services Company, Inc.,

Defendant(s).

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-00262

**FINAL ORDER FOR FORECLOSURE  
OF MECHANIC'S LIEN  
NON-JURY DECISION**

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This matter came on before me for a jury trial at the February 3, 2020 term of court and was called for 9:30 AM on Wednesday February 5, 2020. At the outset, the Defendants indicated that the amount of the debt was not disputed, though Plaintiff's entitlement was, and the parties then agreed to waive the right to have the jury decide the facts concerning the amount of the debt and to try the case to the Court alone, whereupon the jury venire was discharged. The hearing was attended by Albert A. Lacour, III, Esq. and witnesses Tim Marsh and Avant Armentrout for the Plaintiff, Marsh Waterproofing, Inc., (or "Marsh"). C. Clay Olson, Esq., appeared for the Defendants. The testimony was taken, and from the testimony and exhibits in evidence, I find and conclude as follows:

**FINDINGS OF FACT:**

1. The initial Lis Pendens was filed on January 11, 2018.
2. The Amended Lis Pendens, Summons and Complaint were filed on January 22, 2018, and the Second Amended Lis Pendens and Amended Summons and

Amended Complaint were filed March 12, 2018.

3. Service was made upon the Defendant Hamilton Management Services Company, Inc. on January 23, 2018 and on the owner, ARC CAFEUSA001, LLC, on January 24, 2018 as shown by the proof of service filed herein.

4. The Defendants Steeple Dorchester, Ltd. and Hamilton Management Services Company, Inc., answered and asserted a Counterclaim on February 28, 2019 and a Reply to the Counterclaim was filed March 6, 2019.

5. The Defendants ARC CAFEUSA001, LLC, and Churpeyes II, Inc. were removed by the amendments to the pleadings. Paragraph 3 of the Amended Complaint alleges that the Churpeyes entity is the tenant of record, and the Steeple entity is the tenant in fact. Plaintiff is proceeding on its contract against Hamilton Management Services Company, Inc., and Steeple, and on its lien against the leasehold interest of the Defendant Steeple Dorchester, Ltd.

6. I find that the parties hereto and the real property which is the subject of the within action are within the jurisdiction of this Court.

7. I find that all of the correspondence between the Defendant, Hamilton Management Services Company, Inc., and Marsh Waterproofing, Inc., indicates Alexander Burns was acting for Hamilton Management Services Company, Inc. I find that Hamilton Management Services Company, Inc. authorized improvements to the property to be made by Marsh Waterproofing, Inc. and signed the acceptance of Plaintiff's proposal (Exhibit 6), thereby forming a valid and binding agreement supported by valid consideration.



8. I find that Plaintiff fully performed all the work it committed to perform but has not been paid for said work. The testimony reflects that there was never any complaint made about the quality of the work or the quantity of the work of Marsh.

9. I find that the Plaintiff timely filed its Statement for Mechanic's Lien which was introduced into evidence as Exhibit 11. The Statement for Lien was timely served as reflected by the Affidavit of Service, Exhibit 12. I further find that the Plaintiff perfected its lien by the timely filing a Lis Pendens and the commencement of this action to foreclose the lien, as detailed above.

10. When the time came for presentation of the Defendants' case, Defendants withdrew their Counterclaim and elected not to call any witnesses. Defendants rely on the fact that Plaintiff was not licensed in South Carolina as a general contractor and therefore maintain that Plaintiff is not entitled to recover on the contract or the lien.

11. Title 40, Chapter 11 of the South Carolina Code is the statutory regulatory scheme for general and mechanical contractors. A "general contractor" is one who performs or supervises or offers to perform or supervise "general construction". S.C. Code §40-11-20(9). "General construction" is installation, replacement or repair of a building or structure. S.C. Code §40-11-20(8). I find that the facts in the record establish that Marsh Waterproofing, Inc. and the work it performed do not fall within these definitions. The definitions reflect the history and common understanding that general contractors are defined essentially by either the nature of the work performed or the scope of the work performed.

12. Analyzing this case by the nature of the work, S.C. Code §40-11-20(8)



would require Marsh to build a building or structure, or replace a building or structure, or repair a building or structure. I find Marsh made absolutely no repairs or modifications to the structural elements of the building other than to mix up a couple of bags of concrete to close up the access opening in the slab. That work does not amount to \$5,000 worth of work to the existing structural elements. I find the foam was installed by Marsh in the open air space between grade and the bottom of the steel deck. It does not attach to any of the structural elements and does not modify or change any of the structural elements. The foam simply occupies the airspace to prevent the slab from moving downward if the slab fails. The scope of work outlined in the engineering report does not specify any repairs to any existing structural elements. I find that Marsh made no repairs to any footings, CMU walls, brick masonry walls, steel girders, steel joists, steel decking or the existing slab. None were called for by the engineering report. The installation of foam for supplemental support is not a classification of work identified in the statutory scheme as being the work of a general contractor in code section S.C. Code §40-11-410. (Exhibit 14).

13. Analyzing this case by the scope of the work, general contractors are sometimes identified by the fact that they contract to perform all of the work required to complete the project. Marsh clearly did not do this. I find that Marsh was not the only contractor on the project. The other contractor worked ahead of Marsh to perform the preparatory work. Marsh arrived last, in the order of the work, to install the foam in the airspace above grade and below the slab.

14. The scope of the general contractor's work generally includes providing



permitting, temporary utilities, temporary facilities, scheduling of the trades, sequencing of the trades, supervision of the trades, and general overall responsibility to see all of the work gets fully and properly executed. I find that none of the foregoing are within the scope of work defined by the proposal of Marsh. (Exhibit 6). The testimony of the witnesses for Marsh indicates that, to the extent that Marsh employees could observe whether these "general contractor" obligations were being met by others, they appeared to be furnished by someone else.

15. Additionally, I find that the representations of the Defendants to Marsh that they had a "contractor" working one step ahead of Marsh to do the preparatory work outlined in the engineer's report reasonably led Marsh to believe a general contractor was working ahead of Marsh on the project. The preparation work involved multiple trades, all of which required separate trade licenses, and would have required someone to pull a building permit before Marsh ever set foot on the project.

16. Additionally, I find that Defendants did not rely on the existence or non-existence of a license. Marsh made no representation to Defendants that it was licensed in the correspondence, the proposal, or the discussions of the parties. The Teseniar case stands for the proposition that "where the reason for the rule ends, so ends the rule." Teseniar v. Professional Plastering & Stucco, Inc., 407 SC 83, 754 SE2d 267 (Ct. App. 2014). On the facts in the record I find the parties discussed licensing before the work started and Tim Marsh told Mr. Burns that he was not licensed in South Carolina and asked if Mr. Burns thought he needed to be. Mr. Burns promised to check on it. Thereafter the parties proceeded with the work. Mr. Burns could not rely upon the



existence of a license for the qualifications of the contractor if he knew none existed.

17. Additionally, I find that Mr. Burns was referred to Marsh by Church's Chicken and was aware of the past activities of Marsh making repairs for the Church's franchise stores in multiple states at numerous store locations. I find that Defendants were made aware of the extensive experience and the ability of Marsh to install the foam by Marsh and by Church's. I find Defendants were not relying upon the existence of a license to know the contractor's qualifications to do the work. Defendants were made aware of the experience, the qualifications, and the track record of the contractor and were relying upon that knowledge, rather than the existence of a license, in deciding whether to engage the contractor. As the Court observed in Teseniar, "The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. ... In the case before us, [Defendant] was in a position to know, and did know, the qualifications of [Marsh]. No reliance was placed upon the existence of a license, as presumptively would be the case if [Marsh] was dealing with the general public." Teseniar, 407 SC at 97, 754 SE2d at 274.

18. I have reviewed the Affidavit of Counsel and the itemized time and cost entries submitted in support of Plaintiff's request for an award of attorney's fees, and I find that the fees and costs as set forth therein are reasonable. I find that the total fees and costs requested do not exceed the amount of the lien.

19. There are 6 factors to consider in determining an award of attorney's fees:  
1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted



to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. Bloomberg v. Nealco, Inc. 310 S.C. 492, 427 SE2d 659 (1993); citing Collins v. Collins 239 S.C. 170, 122 S.E.2d 1 (1961). I find that the litigation has been aggressively defended and involved novel arguments and issues on both sides. I find that counsel was required to prepare for numerous hearings prior to the trial itself. I find that the total attorney's hours devoted to this case exceed 120 hours as detailed in the motion for the award of the fees and costs and supporting documents. I find that counsel for Marsh enjoys high professional standing and has extensive experience in construction litigation. I find the rates charged are reasonable and in line with those customarily charged for similar services and that the results obtained justify the amount awarded.

20. I find that the amount due and owing to the Plaintiff upon its mechanic's lien is \$36,800, together with attorney's fees in the amount of \_\_\_\_\_ together with costs in the amount of \_\_\_\_\_ for a total debt of \_\_\_\_\_.

21. I find that the agreement of the parties is silent as to interest, and in the absence of an agreement on the matter, I decline to award pre-judgment interest. I find Plaintiff shall be entitled to recover interest after the entry of this judgment at the judgment rate as established by the current Order of the South Carolina Supreme Court dated January 6, 2020 in the amount of eight and three-quarters percent (8.75%) per annum upon the total debt set forth above and that such interest should be added to the total debt to determine the total amount secured by Plaintiff's lien through the date to

which such interest is computed. Upon the forgoing findings, I reach the following conclusions of law:

### CONCLUSIONS OF LAW

22. I conclude Plaintiff constructed valuable improvements to the subject property leased to Steeple Dorchester Ltd. for which the Plaintiff has not been paid, and the Plaintiff is entitled to claim a Mechanic's Lien to secure the debt due together with costs and attorney's fees.

23. I conclude Plaintiff should have judgment for foreclosure of Plaintiff's mechanic's lien for the Total Amount Due of \_\_\_\_\_ together with interest from the date of entry of this order at 8.75%, as set forth above, and that the leasehold interest of Steeple Dorchester Ltd. in the subject property shall be sold at public auction after due advertisement.

24. I conclude that Hamilton Management Services Company, Inc. entered into the agreement for the work, and Plaintiff should have judgment against it on the contract claim. The mechanics lien statute preserves the claimant's right to pursue the contract remedy simultaneously in S.C. Code §29-5-420.

25. I conclude that Marsh Waterproofing, Inc. was not the general contractor on the job and was not required to be licensed as a general contractor.

26. I conclude that Hamilton Management Services Company, Inc. did not rely on the licensing of Marsh to determine the qualifications of the contractor; rather, Defendants relied on the information made known to it by Marsh and by the franchisor, Church's Chicken, as to the numerous restaurants upon which Marsh performed similar



work, and the experience, qualifications, and ability of the contractor to perform the work.

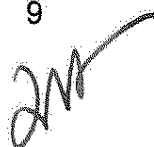
27. I conclude the cases relied upon by Defendants which deny recovery to general contractors are distinguishable from the facts of this case. As an example, the C-Sculptures case cited by Defendants reflects in the very first paragraph of the syllabus that it arises from a construction contract by which "a general contractor agreed to build a home..." C-Sculptures, LLC v. Brown 403 SC 53, 55, 742 SE2d 359, 360, (2013). I conclude that the decided cases cited by Defendants uniformly involve contractors who were either admittedly general contractors, or were adjudged to be general contractors based upon either the nature of the work or the scope of the work; therefore, the cases are inapplicable to these facts.

28. Neither of the parties filed an offer of settlement pursuant to the Mechanic's Lien Statute, and I conclude that the verdict is closer to the prayer in Plaintiff's Complaint, resulting in Plaintiff being the prevailing party.

29. I conclude the Plaintiff filed and served its Statement of Mechanic's Lien within 90 days of the last date of labor or materials furnished and also filed and served its Lis Pendens, Summons and Complaint for foreclosure within six months of the last date of labor or materials furnished.

30. I conclude that since the Plaintiff prevails, this case shall be referred to the Master in Equity so that he may conduct the sale and any additional proceedings incidental thereto.

**It is therefore:**



**ORDERED**, that there is due to the Plaintiff upon the contract claim set forth in the Complaint the sum of \$36,800 together with interest of 8.75% per annum accruing from and after the entry of this Order, and that judgment therefore shall be entered against Hamilton Management Services, Company, Inc.; and it is further,

**ORDERED**, that there is due to the Plaintiff upon the Mechanic's Lien set forth in the Complaint the Total Amount Due of \_\_\_\_\_ as of the date hereof, together with interest of 8.75% per annum accruing from and after the entry of this Order, and that the leasehold interest of Defendant Steeple Dorchester Ltd. in the property should be sold and the proceeds thereof applied to payment and satisfaction of the debt; and it is further,

**ORDERED**, that this matter is hereby referred to the Honorable Mikell R. Scarborough, Master in Equity for Charleston County, to conduct the Sale pursuant to S.C. Code Ann. §14-11-80 upon the terms hereinafter set forth and to conduct all further proceedings necessary or incidental thereto with leave to enforce final judgment herein and that any appeal shall be taken in accordance with S.C. Code Ann. §14-11-85; and it is further,

**ORDERED**, that the Defendant, Steeple Dorchester Ltd., shall on or before the date of Sale of the property hereinafter described, pay to the Plaintiff or the Plaintiff's attorney the full amount of the Plaintiff's debt, attorney's fees and costs as set forth herein; and it is further,

**ORDERED**, that on default of payment at or before the Sale date, the subject property described in the Complaint and hereinafter set forth, shall be sold by the



Master at public auction at the County Courthouse, in the City of Charleston, County and State aforesaid, on some convenient sale date hereafter (and should the regular day of judicial sales fall on a legal holiday, then, in such event, the sale day shall be the same day of the week next succeeding such holiday), that is to say:

(a) For cash; the Master will require a deposit of five (5%) percent on the amount of the bid (in cash or equivalent) the same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within thirty (30) days, the same to be forfeited and applied to the costs and Plaintiff's debt.

(b) Interest on the balance of the bid shall be paid to the day of compliance at the rate of 8.75% percent per annum.

(c) The sale shall be subject to taxes and assessments, existing easements and restrictions of record.

(d) Purchaser to pay for deed stamps and costs of recording the deed; and it is further,

**ORDERED**, that if Plaintiff is the successful bidder at the Sale, for a sum not exceeding the amount of costs, disbursements, expenses and indebtedness of Plaintiff in full, Plaintiff may pay to the Master in Equity only the amount of the costs, disbursements and expenses crediting the balance of the bid on Plaintiff's indebtedness; and it is further,

**ORDERED**, that the Plaintiff is seeking a deficiency judgment and the same having not been waived, the bidding shall not be closed upon the day of sale but shall remain open until the thirtieth (30th) day after such sale, exclusive at the day of sale,

whereupon the bidding shall be reopened by the Master and closed, all in accordance with S.C. Code Ann. §15-39-720 (1976 as amended); and it is further,

**ORDERED**, that the Master in Equity will, by advertisement, according to law, give notice of the time and place of such sale, and the terms thereof; and will execute to the purchaser, or purchasers, a deed to the premises sold. The Plaintiff or any other party to this action may become a purchaser at such Sale, and that if upon such Sale being made the purchaser, or purchasers, should fail to comply with the terms thereof within thirty (30) days after date of Sale, then the Master may advertise the premises for sale in the next or some subsequent sales date, at the risk of the former highest bidder, and sold from time to time thereafter until full compliance shall be secured; and it is further,

**ORDERED**, that the Master shall apply the proceeds at the Sale as follows:

**First:** To payment of the amount of the costs, disbursements, and expenses of this action, including any Guardian Ad Litem fees, or fees of attorneys appointed under Order of Court;

**Next:** To the payment to the Plaintiff or Plaintiff's attorney of the amount of Plaintiff's debt and interest or so much thereof as the purchase money will pay on same;

**Next:** Deficiency judgment being demanded by the Plaintiff, if the proceeds of sale be insufficient to pay the amounts hereinbefore authorized to be paid out of the proceeds with the costs and expenses, and the Plaintiff's debt and interest, then the Plaintiff shall have judgment for the unpaid portion thereof against Steeple



Dorchester Ltd.;

**Next:** Any surplus funds to be held pending the further Order of the Master; and it is further,

**ORDERED**, that upon entry of the report of the sale herein ordered, the Master shall enter judgment against the Defendant, Steeple Dorchester, Ltd., for any residue of the debt remaining unsatisfied after such sale.

**ORDERED**, that the Defendants and all persons whomsoever claiming under them be forever barred and foreclosed of all rights, title, interest and equity of redemption in the subject property so sold or any part thereof; and it is further,

**ORDERED**, that the deed of conveyance made pursuant to said sale shall contain the names of only the Plaintiff and the Defendant, Steeple Dorchester, Ltd., and Churpeyes II, Inc., who was the leasehold holder of record at the time of the filing of the initial notice of Lis Pendens in the within action, and the name of the grantee, and the Register of Mesne Conveyances of Clerk of the Court is authorized to omit from the indices pertaining to such conveyances the names of all parties not contained in said deed; and it is further,

**ORDERED**, that the Master in Equity will retain jurisdiction to do all necessary acts incident to this foreclosure including but not limited to the issuance of a Writ of Assistance. And in the event that the successful bidder is other than the Defendant in possession herein, a Master may enter such additional Orders or Writs as may be necessary to eject and remove from the premises the occupants of the property sold, together with all personal property located thereon, and put the successful bidder or his



assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

The following is a description of the premises herein ordered to be sold:

The leasehold interest of Defendant Steeple Dorchester, Ltd., in and to:

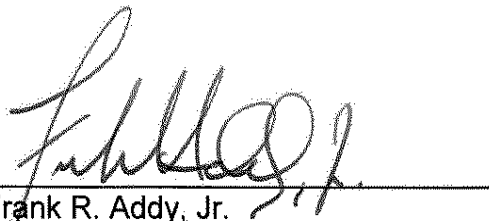
All that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Charleston County, City of North Charleston, State of South Carolina, being as shown on an ALTA/ACSM Land Title Survey prepared for Churpeyes Real Estate Limited Partnership, by Cox and Dinkins, Inc., dated May 21, 1990, and recorded June 28, 1991 in the Office of the RMC for Charleston County in Plat Book CD at Page 91. The aforesaid plat is incorporated by reference herein.

TMS: 408-10-00-229

Present Address: 5343 Dorchester Road, Charleston, SC 29418-5620

Present Derivation: Memorandum of Assignment of lease to Churpeyes II, Inc. dated June 30, 2008 and recorded July 24, 2008 in Book N 655, Page 085 in the RMC Office for Charleston County.

**AND IT IS SO ORDERED** this 9<sup>th</sup> day of March, 2020 at Greenwood, South Carolina.



Frank R. Addy, Jr.  
Presiding Judge, Ninth Judicial Circuit