EXHIBIT “C”

ELECTRONICALLY FILED - 2021 Feb 16 11:45 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 2016-CP-10-2955
TCC OF CHARLESTON, INC. Plaintiff, vs. CONCORD & CUMBERLAND HPR, LEO HALL, DIANE HALL, BEA H. SMITH, MARGARET C. POPE, WILLIAM D. FOSTER, JR., GENE G. FOSTER, MATTISON J. MACGILLIVRAY, TERESA MACGILLIVRAY, PAMELA L. VAUGHN, NELIA A. PATRICIO, Trustee of the Nelia A. Patricio Revocable Trust Agreement, STUART D. REEVES, EDWARD T. STROM, BARBARA K. HENDERSON, JAMES R. CLARKE, PAUL A. BRIM, ROBERT K. SEIDL, JENNIFER M. SEIDL, ROBERT KENNETH SEIDL, II, M. BERT STOREY, THOMAS R. MATHER, EDWARD T. STROM, 304 CONCORD & CUMBERLAND, LLC, MARION M. SIMPSON F/K/A MARION MOORE MCDONALD SIMPSON, KATHY GARDNER, GREGORY J. GARDNER, FREEMAN WATERFRONT PROPERTIES, LLC, JOHN FREEMAN, JO-ANN COOPER, BETTY Y. SEGAL, by and through her Assignee, DONALD D. LEONARD, ROBERT M. LEVIN AND BONITA K. LEVIN, DONALD D. LEONARD, BETTY L. BEATTY, MATTELLEN, LLC, AND THOMAS R. DEBNAM, Trustee of the Trust Agreement of Thomas R. Debnam, Defendants.	)	RECEIVED Mar 16 2021 SC Court of Appeals **ORDER**

THIS MATTER came before me for a hearing on the following motions pursuant to an Order of Reference issued by Judge McCoy on August 11, 2020:

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(1) Defendant Concord & Cumberland HPR's Motion for Summary Judgment as to Plaintiff's Foreclosure of Mechanic's Lien Cause of Action, filed December 6, 2019;

(2) Defendant Betty L. Beatty's Motion for Partial Summary Judgment, filed May 8, 2020;

(3) Concord and Cumberland HPR's Motion to Deposit Funds, filed May 11, 2020;

(4) TCC of Charleston, Inc.'s Motion to Confirm Arbitration Award and to Stay Granting of Requested Relief, filed July 30, 2020;

(5) TCC's Motion for Attorneys' Fees, filed September 11, 2020;

(6) Concord and Cumberland HPR's Motion to Dismiss Plaintiff's Second Amended Complaint and Motion for Attorneys' Fees, filed September 14, 2020;

(7) TCC of Charleston Inc.'s Motion to Amend Statement of Account, filed October 1, 2020; and

(8) Remaining Defendants' Motion for Summary Judgment, filed January 17, 2021.

The hearing began in person on November 5, 2020, in the Master in Equity's courtroom located at 100 Broad Street, Courtroom 2A, Charleston, SC 29401, and reconvened after additional briefing via videoconference on January 27, 2021. Present for the hearing were counsel for TCC of Charleston, Inc. ("TCC"), counsel for Concord & Cumberland HPR ("HPR"), and counsel for all unit owner Defendants.

I have received extensive briefing and memoranda of law from the parties and, after studying the record, motions, memoranda, correspondence, statutes, and case law diligently, and

hearing the oral arguments of counsel on two separate occasions, I find, conclude, and hold as a matter of the law the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case arises from a repair project at condominiums located at 175 Concord Street in Charleston, South Carolina. The HPR hired TCC as the general contractor and, at the end of the project, a contractual dispute arose as to payment. TCC commenced the present action against the HPR on June 6, 2016, by filing a Notice and Certificate of Mechanic's Lien, sworn Statement of Account, and verified Complaint. Subsequently, on June 10, 2016, TCC filed an Amended Notice and Certificate of Mechanic's Lien, sworn Statement of Account, and verified Amended Complaint adding all of the individual property owners to the case. In both verified Complaints, and in the attached Statements of Account, TCC swore under oath that the last date of furnishing materials and services on this project was March 17, 2016. The HPR and certain unit owners answered the Amended Complaint and admitted that March 17, 2016, was, indeed, TCC's last date of furnishing materials and services on this project. TCC first served some unit owners with the mechanic's lien and pleadings starting on June 22, 2016.

Following the initial pleadings, the HPR consented to arbitration, which was ordered by Judge Roger M. Young, Sr. on December 30, 2016. Judge Young stayed the foreclosure action against the unit owner Defendants, pending the arbitration. Over the next 3 years, TCC and the HPR arbitrated all claims against the HPR, which resulted in an Arbitration Award and, subsequently, a Corrected Arbitration Award of $2,016,066.73 for all claims, plus interest and arbitration costs. However, somewhat complicating matters, the Arbitration Panel, while finding that the Horizontal Property Regime Act at S.C. Code § 27-31-230 required that TCC's lien must

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be filed against the property owners rather than the HPR, expressly reserved the award of attorney's fees based on prevailing party status to the Circuit Court.

The HPR moved to vacate or correct the Corrected Arbitration Award in the Circuit Court on other grounds, which motions were denied by Judge Deadra L. Jefferson. However, Judge Jefferson did not expressly confirm the Corrected Arbitration Award. TCC did not file any motion to vacate or correct any portion of the Corrected Arbitration Award.

This case has a complicated procedural history, but the important facts relevant to these motions as outlined above specifically include the following facts dispositive of this case: (1) TCC swore under oath, in two verified Complaints and two Statements of Account, that March 17, 2016, was the date of last furnishing labor or materials on the project, which was admitted by the HPR and certain unit owners in their answers; (2) ninety days following March 17, 2016, is June 15, 2016; and (3) TCC first served its mechanic's lien on June 22, 2016, seven days too late pursuant to S.C. Code Ann. § 29-5-90. Further, the record reflects that the Amended Lis Pendens was both executed and filed on June 16, 2016. The Amended Lis Pendens is listed among the documents that the process server received and thereafter served on defendant parties beginning on June 22, 2016. As such, the process server could not have received the documents for service until June 16, 2016 at the earliest, and this is one day after the lien had statutorily dissolved.

The law is clear on this issue. A mechanic's lien is a creature of statute and arises inchoate. *See Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 130, 631 S.E.2d 252, 257 (2006) ("A mechanic's lien is purely statutory. Therefore, the requirements of the statute must be strictly followed."); *see also Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985) (stating "mechanic's liens are purely statutory and can only be acquired and enforced in accordance with the conditions of the statute creating them," and that "[t]he lien

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arises, inchoate, when the labor is performed or the materials are furnished."); *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 341, 762 S.E.2d 561, 566 (2014) ("[W]hen the labor is performed or material is furnished, the right exists but the lien has not been perfected.") (quoting *Butler Contracting*, 369 S.C. at 128, 631 S.E.2d at 256). "For an inchoate lien to become valid, the lien must be perfected and enforced in compliance with South Carolina's mechanic's lien statutes." *Id.* at 342 (citing *Preferred Sav. & Loan Ass'n v. Royal Garden Resort, Inc.*, 301 S.C. 1, 389 S.E.2d 853 (1990)). The Court in *Shelley Constr. Co.*, *supra*, succinctly outlined the steps to perfect the lien as follows:

> [T]o perfect and enforce the lien against the property, the person claiming it must: (1) serve and record a certificate of lien within ninety days after he ceases to furnish labor or materials...; (2) bring suit to foreclose the lien within six months after he ceases to furnish labor or materials ...; and (3) file notice of pendency of the action within six months after he ceases to furnish labor or materials ....
>
> 287 S.C. at 27, 336 S.E.2d at 490.

Relevant to the specific facts of this case is step (1), which is enumerated in S.C. Code Ann. § 29-5-90, and provides that a person seeking to enforce a mechanic's lien must file and serve "upon the owner ... a statement of a just and true account of the amount due" "within ninety days after [a contractor] ceases to labor on or furnish labor or materials for such building . . . ." Otherwise, the "lien shall be dissolved." *Id.*; *see also Butler Contracting*, 369 S.C. at 131, 631 S.E.2d at 257 ("The deadline to serve ... a mechanic's lien begins running from the date the last material was furnished ...."). Therefore, the date of last furnishing materials and labor and the date of service of the mechanic's lien are crucially important.

The South Carolina Court of Appeals recently affirmed the above stated law in *Kitchen Planners, LLC v. Friedman,* 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020), which is particularly relevant to this case.

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In *Kitchen Planners*, a contractor filed a pleading and lien stating that it provided labor and materials on a project "in or around March 16, 2015 and continuing through August 18, 2015." The contractor served the owner with the lien on November 17, 2015 – 91 days later – and the owner then filed a motion to dismiss the mechanic's lien as being untimely. The Circuit Court dismissed the foreclosure action, and the contractor appealed. The contractor argued that it could cure the timeliness issue by amending its pleadings to assert a later date when it actually finished work on the project. The Court of Appeals disagreed and affirmed the Circuit Court. In doing so, the Court of Appeals found that the contractor was bound by the dates asserted in its pleadings and on the face of the lien. *Id.* at *5. Thus, Kitchen Planners failed to serve and file its mechanic's lien within ninety days of the last date it supplied materials or labor on the project. *Id.* at *8.

i. TCC of Charleston, Inc.'s Motion to Amend Statement of Account

TCC seeks to amend its Statement of Account to reflect a later date of last furnishing labor or materials on the project. TCC argues that the date originally submitted was the date of substantial completion and that TCC has since provided additional labor or materials on the project, which would cure the fact that the lien was served untimely. However, TCC submitted four separate statements under oath that the date of last furnishing labor or materials was March 17, 2020. The HPR and certain unit owners answered the last such statement in the verified Amended Complaint and admitted the allegation as true.

Although TCC now, over four years later, seeks to amend its Statement of Account to assert a later date as the date it last furnished labor or materials, this court relies heavily on TCC's two separate sworn Statements of Account, which were filed in the Register of Deeds office for Charleston County and appended to two Complaints as exhibits. Further, the HPR and certain unit owners admitted in their Answer TCC's allegations that the last date of furnishing labor and

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materials was March 17, 2016. As such, separate and apart from the sworn Statements of Account, TCC is bound by the admitted allegations. *See Kitchen Planners, No. 2017*-001522, 2020 WL 3551777, at *5 *(*finding that "Kitchen Planners is bound by the dates asserted in its pleadings and on the face of the lien*."); see also Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) ("The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the *facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action*.") (emphasis added); *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) ("[A] party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible."); *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) ("Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions.")

Accordingly, TCC is bound by the March 17, 2020, date in its pleadings and on the face of its lien. TCC's Motion to Amend Statement of Account is therefore DENIED.

ii. Motions for Dismissal and Summary Judgment

a. Foreclosure of Mechanic's Lien

Prior to this hearing, TCC filed affidavits with the Court attaching all affidavits of service related to this case. Reviewing the record, it is apparent that June 22, 2016, was the first date of service on any Defendant and that the papers were provided to the process server no earlier than June 16, 2016, as indicated by the inclusion of the Amended Lis Pendens in the documents served on various unit owners beginning on June 22, 2016. Because the last date of furnishing was March

17, 2016, service on or after June 22, 2016, was at least seven days too late. Further, it appears from the record and the filing of the Amended Lis Pendens that the documents were not provided to the process server until, at the earliest, June 16, 2016, one day too late. Although TCC's lien arose inchoate as of March 17, 2016, TCC failed to perfect the lien timely by June 15, 2016, and it therefore DISSOLVED as a matter of statutory law. S.C. Code Ann. § 29-5-90. This Court GRANTS summary judgment on the foreclosure of mechanic's lien cause of action in favor of all Defendants and orders the Charleston County Register of Deeds to cancel the liens of record.

Further, as an additional, independent, and sustaining ground for dismissal of the foreclosure action against the HPR, this Court finds that the HPR cannot be the subject of a mechanic's lien by law. *See* S.C. Code Ann. § 27-31-230 (stating that a mechanic's lien must be filed against the property owners and that "no lien … shall be effective against the property.") The HPR is not a property owner. In addition, this is the same finding made by the Arbitration Panel, which finding TCC did not move to vacate or correct.

b. Breach of Contract

The parties consented to arbitration between TCC and the HPR, and Judge Young issued an Order on December 30, 2016, that provided: "[T]he parties have consented to an arbitration of the dispute between Plaintiffs [sic] and Defendant CONCORD & CUMBERLAND HPR ("Regime") and stay of Plaintiffs [sic] foreclosure request as to the remaining Defendants . . . ." The arbitration resulted in an award to TCC of over two million dollars. As such, this Court finds that TCC's breach of contract claim against the HPR has already been decided and is now moot with confirmation of the award as referenced herein. Therefore, this Court GRANTS the HPR's Motion to Dismiss TCC's Second Amended Complaint as it relates to the breach of contract claim.

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Regarding the individual unit owner Defendants, Judge Young's Order explicitly reserved only the foreclosure action against the individual unit owners with the understanding that the breach of contract action was to be decided in arbitration against the HPR. As indicated above, the foreclosure action has been dismissed. However, to the extent that the breach of contract action survives the arbitration referral against the unit owner Defendants, this Court finds that TCC's Second Amended Complaint fails to state a breach of contract claim against the unit owner Defendants. Specifically, TCC's Second Amended Complaint fails to allege any elements of a breach of contract claim. Most notably, TCC does not allege that a contract existed between the individual unit owners and TCC. As such, this Court dismisses the breach of contract action in TCC's Second Amended Complaint against all Defendants.

c. Equity/*Quantum Meruit*

Judge Young ordered all claims against the HPR to arbitration, which included foreclosure of mechanic's lien, breach of contract, and *quantum meruit*. The Panel explicitly stated that the award of $2,016,066.73 was for "all claims asserted in this proceeding." Although not specified by the Panel whether the award was based on contract or *quantum meruit*, this Court finds that the *quantum meruit* claim against the HPR was referred to arbitration and disposed of therein with the award. *JASDIP Props. SC, LLC v. Estate of Richardson*, 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct.App.2011) (citing Franke Assocs. by Simmons v. Russell, 295 S.C. 327, 332, 368 S.E.2d 462, 465 (1988)) ("A breach of contract claim and *quantum meruit* claim can be alternative rather than inconsistent remedies."). As such, similar to the breach of contract claim, this cause of action is moot.

TCC filed a Second Amended Complaint on August 24, 2020, and asserted a new claim for "equity". TCC argues that the equity claim was included simply to ensure the HPR remained

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active in the foreclosure litigation in order to require payment under the HPR's bylaws. The HPR argues that TCC filed the equity claim in an effort to obtain attorney's fees, which TCC admitted during the reconvened hearing. To the extent TCC intends to seek attorney's fees based on equity, this court forecloses that possibility, as attorney's fees can only be awarded based on a contract or statute. The Panel was clear that there was no contractual basis to award attorney's fees, and this Court's ruling dismissing the mechanic's lien foreclosure action bars any statutory right that TCC might have to attorneys' fees. Therefore, this Court dismisses the equity cause of action as it relates to the HPR in TCC's Second Amended Complaint.

Additionally, the plain language of the Second Amended Complaint fails even to mention, much less assert, a claim against the unit owner Defendants for equity. For the same reasons indicated above, and because the plain language of the Second Amended Complaint cannot be reconciled to assert a claim against the individual unit owners, this Court dismisses the equity cause of action as to all remaining Defendants.

Having ruled that TCC served its mechanic's lien untimely, there are no remaining causes of action in TCC's Second Amended Complaint, and it is therefore dismissed in its entirety.

iii. Motion to Confirm the Award

Prior to the hearings, TCC argued that the award should not be confirmed until it knows the extent of its attorneys' fees associated with the Circuit Court foreclosure action. This Court has dismissed all foreclosure actions based on TCC's failure to perfect the lien, and based on the legal impossibility of TCC asserting a lien against the HPR. As such, TCC's argument is moot. Regardless, TCC agreed in the hearing that the award should be confirmed. Therefore, this Court CONFIRMS the Corrected Arbitration Award, effective February 12, 2021.

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iv. Motion to Deposit Funds

The HPR moved to deposit the arbitration award into the Court to stop the accrual of interest pending an appeal once the award is confirmed. Regarding the amount of the deposit, the Corrected Arbitration Award provides as follows:

> TCC is entitled to recover against HPR the sum of $2,016,066.73 for all claims asserted in this proceeding including, but not limited to, approved and unapproved PCOs and retainage.
>
> . . .
>
> TCC is entitled to recover its arbitrator deposit in the amount of $44,250.00 against HPR. . . .
>
> TCC is entitled to recover its expenses, not including counsel fees, incurred in the conduct of the arbitration in the amount of $21,691.02 against HPR pursuant to S.C. Code Ann. §15-48-110.
>
> TCC is entitled to interest on the sum of . . . $958,573.00, since September 29, 2017, at the rate of 4% compounded annually through August 1, 2019 in the amount of $71,667.31. Interest shall accrue at the rate of $112.90 per day thereafter until (1) this Corrected Arbitration Award is satisfied and paid in full; or (2) until judgment is entered on this Corrected Arbitration Award, whichever first occurs.

Accordingly, the amount owed on the Corrected Arbitration Award as of February 12, 2021, is $2,216,899.06 which includes the additional 560 days of interest at $112.90, or $63,224.00, from August 2, 2019 to February 12, 2021. Upon the HPR's deposit of the $2,216,899.06, this Court finds that the further accrual of interest stops. "Payment of a judgment into court is deemed to be a payment of money for the use of the person entitled thereto and stops the running of judgment interest." *S.C. DOT v. Faulkenberry*, 337 S.C. 140 (Ct. of Appeals 1999) (quoting *Horry Cty. v. Woodward*, 291 S.C. 1, 3, 351 S.E.2d 877, 878; *see also*, *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995) (holding that a judgment debtor's deposit of funds into court prevents accrual of interest upon compliance with Rule 67, SCRCP).

Therefore, pursuant to Rule 67, SCRCP, this Court GRANTS the HPR leave to deposit all of the arbitration award into Court, which on the date of deposit will stop the accrual of further interest.

v. Prevailing Party Status and Attorneys' Fees

The parties have filed competing motions for attorneys' fees. Attorneys' fees and costs are only appropriate and can only be awarded if authorized by contract or statute. *See Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989) (providing the rule that attorney's fees are not recoverable unless authorized by contract or statute); *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997); *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993). The contract does not provide for attorneys' fees, and, as indicated above, the mechanic's lien is dissolved and there is no statutory basis for attorneys' fees. Because there is no statutory or contractual basis for attorneys' fees, TCC's Motion for Attorneys' fees is DENIED.

Further, all Defendants have successfully defended against the foreclosure of the mechanic's lien, which has resulted in this Court's dismissal of TCC's foreclosure cause of action. Thus, Defendants are the prevailing parties in the lien foreclosure action and are entitled to attorneys' fees per statute. S.C. Code Ann. § 29–5–10(a) requires the court to award reasonable attorney's fees and costs to the party defending against the mechanic's lien if the defending party "prevails" in the action. *See Utilities Constr. Co. v. Wilson*, 321 S.C. 244, 248, 468 S.E.2d 1, 3 (Ct.App.1996) ("[T]he Legislature ... intended to afford a property owner [the] remedy [of recovering attorney's fees and costs] where a mechanic attempts to enforce a defective or wrongful mechanic's lien.") (citation omitted); *Seckinger v. Vessel Excalibur*, 326 S.C. 382, 483 S.E.2d 775 (Ct.App.1997) (stating the defendant is entitled to an award of attorney's fees as the "prevailing party" if the trial court determines a mechanic's lien cannot be enforced against the defendant). It

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matters not that Plaintiff "prevailed" on the breach of contract claim and was issued an award by the Panel. *See Wilson supra*, 321 S.C. at 249–50, 468 S.E.2d at 3–4 (upholding an award of attorney's fees to a property owner who successfully defended a contractor's claim for a mechanic's lien, even though the contractor prevailed on its claims for unjust enrichment and breach of contract).

As the prevailing party on the foreclosure of mechanic's lien cause of action, Defendants are entitled to attorneys' fees and costs and the HPR's Motion is GRANTED. Defendants' fees will be awarded under separate order after this Court closely scrutinizes the parties updated Affidavits of Attorneys' Fees and supporting documentation, which shall be provided to this Court within seven days of this Order for review.

CONCLUSION

Accordingly, it is

ORDERED ADJUDGED AND DECREED that

(1) TCC of Charleston Inc.'s Motion to Amend Statement of Account is DENIED;

(2) TCC's Motion for Attorneys' Fees is DENIED;

(3) TCC of Charleston, Inc.'s Motion to Confirm Arbitration Award is GRANTED, effective February 12, 2021, and TCC's requested stay of the confirmation is DENIED;

(4) Defendants Concord & Cumberland HPR and the Remaining Unit Owner Defendants' Motions to Dismiss and for Summary Judgment as to Plaintiff's Second Amended Complaint are GRANTED.

(5) Concord and Cumberland HPR's Motion to Deposit Funds is GRANTED and the HPR is granted leave to deposit all of the amount of the award plus interest,

which equals $2,216,899.06 as of February 12, 2021, at which time interest will stop accruing on the amount deposited.

(6) Defendants are determined to be the prevailing party under S.C. Code Ann. § 29–5–10(a), and shall be entitled to attorneys' fees to be GRANTED and awarded under separate order, with the amount to be determined pending submission of Affidavits of Attorneys' Fees by the HPR for review and scrutiny by this Court.

IT IS SO ORDERED.

February __, 2021

____
The Honorable Mikell R. Scarborough
Master-In-Equity

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Charleston Common Pleas

Case Caption: Tcc Of Charleston Inc VS Concord And Cumberland Llc , defendant, et al

Case Number: 2016CP1002955

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062

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