RECEIVED
May 11 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Mikell Scarborough, Master in Equity

Case No. 2016-CP-10-2955

Appellate Case No. 2021-000272

TCC of Charleston, Inc. ..... Appellant.

v.

Concord and Cumberland, LLC, 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, Jo-Ann Cooper, Betty Y. Segal, 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,. ..... Respondents.

INITIAL BRIEF OF APPELLANT

EPTING & RANNIK, LLC
Jaan G. Rannik
46A State Street
Charleston, South Carolina 29401
843-377-1871
843-377-1310 (fax)
jgr@epting-law.com

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

A lien is timely if it is served and filed within 90 days of the last date the contractor provided labor or materials to the project.[1] And, under South Carolina law, a lien shall not be invalidated because of an error on the statement of account.[2] The trial court rejected both of these statements of law in holding Appellant's lien invalid. Its holding is legal error and must be reversed.

The trial court invalidated Appellant TCC of Charleston, Inc.'s ("TCC's") lien because TCC used the date of substantial completion rather than the date of last work in the statement of account accompanying the lien. Respondents argued that, because the lien was not served and filed within 90 days of that date listed in the statement of account, it was invalid. The Court agreed. This was error because (i) it is the *actual* date of last work that controls timeliness of service, (ii) the date of last work was previously litigated and determined in arbitration and was therefore *res judicata*, (iii) the uncontested evidence of record regarding the date of last work establishes the date as January 23, 2017, (iv) the circuit court (over the HPR's objection) allowed TCC to amend to remove the erroneous last date of furnishing materials and services in its complaint, and (v) the trial court erroneously disallowed TCC's motion to amend the statement of account.

The trial court also erroneously held that the deposit of funds into court would stop contractual interest. It further erred in awarding attorneys' fees to Respondents despite TCC

[1] S.C. Code § 29-5-90; *see also, e.g.*, *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 631 S.E.2d 252 (2006).

[2] S.C. Code § 29-5-100; *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020).

being deemed the prevailing party in a prior ruling in arbitration and in awarding fees to Respondents in violation of the mechanic's lien statute and case law.

STATEMENT OF ISSUES ON APPEAL

1. Whether the Master in Equity erred in finding TCC's lien was not timely served based on the date in the statement of account when it is both undisputed and *res judicata* that all parties were timely served based upon the actual date of last work.

2. Whether the Master in Equity erred in dissolving a lien based upon an error in the statement of account and in denying TCC's motion to amend the statement of account to use the last day of work and not the earlier date of substantial completion.

3. Whether the Master in Equity erred in dismissing TCC's lien without allowing TCC discovery permitted by law and ordered by a prior circuit court order.

4. Whether the Master in Equity erred in holding that a deposit of a judgment into court would stop contractual interest on the amount owed to TCC.

5. Whether the Master in Equity erred in denying TCC's motion for attorneys' fees and TCC's request that confirmation and appeal not occur until adjudication of TCC's claims was final.

6. Whether the Master in Equity erred (i) in granting the HPR an award of attorneys' fees on the foreclosure cause of action and awarding them in excess of $250,000 in attorneys' fees, including fees incurred at a time when the foreclosure cause of action was stayed by Court order and (ii) in denying TCC's motion for reconsideration.

7. Whether the Master in Equity erred (i) in granting Betty Beatty summary judgment as to TCC's lien claims and awarding her $76,000 in attorneys' fees as a prevailing party and (ii) in denying TCC's motion for reconsideration.

STATEMENT OF FACTS

On February 27, 2014, TCC was contracted by Respondent Concord and Cumberland HPR ("the HPR") to repair construction defects on the exterior of the condominium building located at 175 Concord Street in Charleston, South Carolina. **ROA ___** (Contract). Though the exterior common elements were owned by the unit owners and not the HPR, the HPR was listed as the owner in the contract between the parties. *Id.*

The scope of TCC's work and its bid to perform the work were based upon an architectural evaluation of the building commissioned by the HPR. Shortly after the notice to proceed issued on July 28, 2014 and demolition began, it became obvious to all involved that the scope of the construction defects was far greater than had been revealed in the architectural evaluation. This included exterior walls that were out of plumb, structural columns that were rusted, improperly attached, cut and dangerously rewelded, structural members that were cut off, and floating stacks of blocks, four-stories high, tied into nothing and held in place by stucco. When all was said and done, 124 Requests for Information, 148 Proposed Change orders, and 10 Owner Change Orders had been issued to account for the additional scope required to repair the building. The time and cost of the project had doubled.

During the project, multiple out-of-scope issues were often discovered in a single location, causing concurrent sources of delay to the in-scope work, and requiring that the delay and cost impact be apportioned between the sources of delay only once the work was complete on each. Given the ubiquity of these out of scope issues, the parties agreed that TCC would bill its out-of-scope work on a time and material ("cost plus") basis (rather than halt work each time an issue was discovered), and that certain costs would have to be accounted for at the end of the project due to the difficulty in attributing project delays to particular issues when so many concurrent delays existed.

When the HPR encountered funding issues in May and June of 2015, TCC advised the HPR that it could not proceed without adequate assurances of funding. To avoid a shutdown of the project, the parties reached an agreement that included approval of payment requests and assurances by the HPR that TCC would be compensated for its additional work. The agreement was reduced to writing on May 27, 2015. **ROA ___**. At a June 25, 2015 meeting between the

HPR and TCC, it was agreed that, in order to keep the job moving, costs would continue to be tracked on a cost-plus basis, with some proposed change orders to be resolved in a final accounting at the end of the project. On these assurances, Trident advanced over $2mm to complete the work. This agreement was further preserved in a June 26, 2015 email from the HPR's attorney, Chris Ogiba, to TCC's attorney, Drew Epting. **ROA ___**.

The HPR made partial payments on certain of TCC's proposed change orders; TCC expressly did not waive its entitlement to the remainder of its costs. *E.g.*, **ROA ___** (PCO 130, Jan. 26, 2015, TCC Arb. Exh. 73). When the HPR failed to honor its agreement, this suit followed.

STATEMENT OF THE CASE

TCC filed its mechanic's lien and verified complaint to foreclose on June 6, 2016 and an amended lien and amended verified complaint on June 10, 2016. The amended lien and amended complaint both incorrectly listed the date of substantial completion as the date of last work, March 17, 2016.[3] **ROA ___** (amended lien, amended complaint), _____ (Griffith Affidavit) The matter was stayed from December 2017 until May 1, 2020 while TCC and the HPR arbitrated and while the HPR sought to vacate the arbitration award. **ROA ___** (Order staying case).

TCC prevailed in arbitration and was awarded in excess of $2mm, including certain AAA fees and costs as the prevailing party. The HPR filed multiple motions to vacate the arbitration award, both in arbitration and in circuit court, and attempted to appeal the circuit court's denial

[3] It is uncontested that this date is incorrect and that TCC remained on the project until January 2017. *See infra*. Indeed, a prior ruling by the arbitration panel established the last date of work as January 23, 2017.

of the motion to vacate.[4] While the attempts to vacate the arbitration award remained pending, the HPR refused to allow TCC to move forward with the case as to the individual unit owners or to collect its attorneys' fees as the prevailing party.

Following the lifting of the stay on May 1, 2020, the parties came before the circuit court on (i) TCC's motion to amend its complaint (**ROA ___**) and (ii) various other motions relating to foreclosure and attorneys' fees. The circuit court granted TCC's motion to amend its complaint to remove March 17, 2016 as the date of last work and referred the remaining motions to the Master in Equity. **ROA ___**. TCC filed its second amended complaint on August 24, 2020. **ROA ___**.

After referral to the Master, two hearings were conducted on the various motions, and the Master resolved those motions via the following orders:

1. February 16, 2021 order (**ROA ___**):
    a. Denying TCC's Motion for Attorneys' Fees (**ROA ___**);
    b. Denying TCC's Motion to Amend Statement of Account (**ROA ___**);
    c. Denying TCC's request that confirmation be stayed until TCC's attorneys' fees had been awarded, and only *then* confirming the arbitration award (**ROA ___**);
    d. Granting the HPR's Motion for Summary Judgment (**ROA ___**);
    e. Granting the HPR's Motion to Dismiss (**ROA ___**);
    f. Granting the HPR's Motion to Deposit Funds Into Court (**ROA ___**); and
    g. Finding the HPR and individual homeowners to be the "prevailing party" under the South Carolina Mechanic's Lien statute (S.C. Code § 29-5-10(a));
2. February 16, 2021 order (**ROA __**) granting Defendant Betty Beatty's Motion for Partial Summary Judgment (**ROA ___**) and awarding fees of $76,000; and

[4] The appeal was dismissed as interlocutory on September 11, 2020.

3. March 3, 2021 order (**ROA ___)** awarding $250,553.70 in attorneys' fees to all Defendants other than Ms. Beatty.

TCC timely appealed those three orders on March 11, 2021 and then filed a motion to reconsider under Rules 59(e) and 60, SCRCP on March 12, 2021. **ROA** ___. That motion was denied by order of March 26, 2021 (**ROA** ___), which TCC timely appealed on April 1, 2021. **ROA ___**.

LEGAL STANDARDS

Orders granting summary judgment, like all questions of law, are reviewed *de novo*. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008) ("When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court.").

An award of attorneys' fees awarded is reviewed for abuse of discretion. *Kiriakides v. Sch. Dist. of Greenville Cnty.,* 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) ("The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion.") "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Id.* The amount of fees awarded is also generally reviewed for abuse of discretion; where interpretation of "reasonable" attorneys' fees is at issue, however, the amount of the award is reviewed *de novo*. *Layman v. State,* 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)

SUMMARY OF ARGUMENT

The lower court erred in (i) dissolving TCC's lien that was timely served. It erred in dissolving the lien because of an error in the statement of account. It erred in dissolving the lien after denying TCC's motion to amend its statement of account. It erred in holding that the

deposit of the judgment amount against the HPR into court halted the accrual of contractual interest to which TCC is entitled. It erred in granting summary judgment to the HPR and Betty Beatty while critical discovery critical remained pending. It erred in awarding attorneys' fees to the HPR and Betty Beatty as the prevailing party (i) on the basis of the improper dissolution of TCC's lien and (ii) despite TCC being declared the prevailing party by the arbitrators. And, it erred in awarding fees under the mechanic's lien statute to the HPR and Betty Beatty unrelated to the foreclosure cause of action.

ARGUMENT

I. It Was Error to Dissolve TCC's Lien

The trial court dissolved TCC's lien because it found it had not been timely served based upon the date stated in the statement of account and in prior, now-amended versions of TCC's complaint. This was error.

A. The Lien Was Timely Served and Filed

When determining the date by which a mechanic's lien must be served and filed, the relevant date is the date of last work: "To perfect a mechanic's lien, a claimant must '*serve* and record a certificate of lien *within ninety days after he ceases to furnish labor or materials*.'" *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 277, 851 S.E.2d 724, 730 (Ct. App. 2020) (quoting *Shelley Contsr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985)) (emphases in original). If a lien is served and filed within 90 days of last work, it is timely. Period.

TCC's amended lien was filed June 10, served on the HPR on June 15, 2016, and also personally served on the individual homeowners between June 22, 2016 and October 24, 2016. Thus, if the date of last work was later than July 26, 2016, *all* individual homeowners were

timely served. It is undisputed, and also *res judicata*, that the date of last work was January 23, 2017.

1. The Date of Last Work Is Uncontested

The uncontested evidence in the record establishes that the date of last work was not March 17, 2016, but rather January 23, 2017. The evidence in the record before the lower court included:

- The time sheets of Heather Dagg, a TCC superintendent, showing her last day onsite as January 23, 2017 (**ROA ___**);
- a summary exhibit offered in arbitration showing time and costs related to a corner of the building known as the "stone tower" (**ROA ___**);
- the affidavit from Ryan Tomberlin (**ROA ___**), the project superintendent, stating he remained onsite performing work under the contract following substantial completion until June 9, 2016:
  - (i) installing railings on the fourth-floor terraces,
  - (ii) inspecting and verifying proper installation of the railings with the HPR's construction manager,
  - (iii) reviewing potential water intrusion issues, and
  - (iv) performing warranty trim work at the request of the HPR's construction manager;
- the affidavit of John David Griffith (**ROA ___**), stating that "[w]hen I signed the statement of account, I referred to the date of substantial completion" and that "Ryan Tomberlin, the project superintendent, was on the site performing contract work in the months following substantial completion."

Respondents have never argued to the contrary or offered evidence to refute TCC's contention regarding the date of last work. Nor can they.

2. The Date of Last Work Is *Res Judicata*

a. Arbitration

As part of its breach of contract claim, TCC sought and the arbitrators awarded costs, overhead, and profit for its work on the stone tower, work that took place after substantial completion and continued to January 23, 2017.

In support of this claim, TCC submitted as evidence (i) Heather Dagg's timesheets (**ROA ___**) for her work onsite from December 5, 2016 through January 23, 2017, (ii) the summary exhibit showing costs and time relating to the stone tower (**ROA ___**), and (iii) Proposed Change Order # 142 relating to the work on the stone tower. (**ROA ___**). The Panel awarded Trident 75% of the costs relating to the stone tower, after deducting 25% to account for an "inefficiency factor" in the claims administration process:

> Based on the evidence presented and the testimony of both parties, the Panel concludes and finds that the disputed claims and work performed by TCC, including the stone tower had an inefficiency factor of 25 percent (25%) of the amount claimed. The total award to TCC is calculated as follows:
>
> [. . .]
>
> C. The stone tower adjustment is $32,540.00 – ($32,540.00 x 25%) (1.0825) = $23,733.86. NOTE: The inefficiency adjustment is $8,806.14 including O&P and data processing.

ROA ___ (Corrected Award at 5–6). In awarding damages for the stone tower—again, work that occurred through January 23, 2017—the Panel held that the work continued until January 23, 2017. No evidence was submitted to the panel to contest this date of last work.

b. Circuit Court

Before the Circuit Court, TCC moved to amend its pleading to remove the inaccurate date of last work. TCC cited the *Butler* case to Judge McCoy, which states:

> The deadline to serve and record a mechanic's lien begins running from the date the last material was furnished or work performed, regardless of whether such material or work is insignificant and regardless of whether the final work is delayed, provided the reason for the delay is not to improperly extend the period for perfecting the lien.

Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 131, 631 S.E.2d 252, 257 (2006). The HPR opposed the amendment, arguing it was futile:

> In its amendment, TCC proposes to delete its alleged date of "final completion" of the construction project, an allegation upon which they proceeded to arbitrate and have obtained an award. TCC is bound to this date of final completion by judicial estoppel and cannot retract it now in order to assert a different date as to the individual unit owners.

ROA ___ (HPR Reply, May 27, 2020 at 6). Judge McCoy rejected the HPR's argument and ruled that TCC was permitted to remove the date of substantial completion as the date of last work,[5] stating:

> Rule 15(b) provides that leave to amend a pleading should be freely given, and the Court grants TCC's motion to amend.

ROA ___ (August 11, 2020 Order). The Order stated further:

> Given the pending amendment, pending discovery requests, and the lack of a final judgment, the Court finds it would be inappropriate to consider the remaining motions at this time.

[5] Rendering this the law of the case. *See infra*, Part I.B.2.

ROA ___. Judge McCoy considered the evidence regarding the date of last work and, over Defendants' objections, granted TCC's motion to amend.[6] Accordingly, it is *res judicata* that TCC is not bound by the date of last work as listed in its initial pleadings.[7]

B. Courts Cannot Invalidate a Lien Because of an Error in the Statement of Account

The mechanic's lien law expressly states that an inaccuracy in the statement of account cannot form the basis for invalidating a lien. S.C. Code § 29-5-100 ("Proceedings not invalidated by inaccuracy of statement of account"). This is necessarily true as to matters that are not required to be included in the statement of account in the first place. The only items required to be included in a statement of account are (i) "a just and true account of the amount due to him" and (ii) "a description of the property intended to be covered by the lien." S.C. Code § 29-5-90. Therefore, an error in the statement of account as to the date of last work is not a

---

[6] In South Carolina, an amended pleading supersedes the prior pleading, rendering it a nullity. *Duncan v. CRS Sirrine Engs., Inc.*, 337 S.C. 537, 541–42, 524 S.E.2d 115, 117 (Ct. App. 1999). Nevertheless, Ms. Beatty repeatedly argued that the inclusion of the date of last work in the verified pleadings filed by TCC in 2016 was binding on TCC. This argument is disingenuous given TCC's amendment of the pleading—with leave of Court—to remove the incorrect reference to the last date of work.

[7] Moreover, once amended, prior versions of pleadings become a nullity:

> While Duncan asserts Sirrine should be bound by its original pleadings, even the cases Duncan relies on as authority relieve a party from its original pleadings when the party withdraws or amends its pleadings. *See, e.g.*, *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) ("We consider the pleadings in this case in the light of the general rule, that the parties to an action are judicially concluded and bound by such unless withdrawn, altered or stricken by amendment or otherwise." (emphasis added)).

Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 537, 541–42, 524 S.E.2d 115, 117 (Ct. App. 1999).

basis to invalidate an otherwise valid lien. Yet that is precisely what the Master relied on, that which was not required and which cannot serve as a basis to invalidate a lien.

Ms. Beatty argued to the trial court that the statutory requirement that liens not be invalidated by errors in the statement of account applies only to "non-fatal" errors,[8] contending "non-fatal" errors are only those regarding the amount of the lien or the description of property. This is insupportable. The provision in question is entitled simply "Proceedings not invalidated by inaccuracy of statement of account." Naturally, the provision only explicitly refers to errors regarding the amount of the lien or the description of the property, because these are the only required elements in a statement of account. *See* S.C. Code § 29-5-90 (requiring service of "a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien sufficiently accurate for identification"). It is not a limitation on the nature of the errors, especially given the unequivocal title of the provision — "Proceedings not invalidated by inaccuracy of statement of account."

1. *Kitchen Planners*

The HPR relies on the *Kitchen Planners* case[9] in support of its contention that TCC was bound by the date of last work as listed in its statement of account and that TCC's lien must be dissolved. *Kitchen Planners* is support for TCC's amendment of its statement of account.

In *Kitchen Planners*, a contractor filed a mechanic's lien and sued to foreclose, listing a date of last work in both the lien and the complaint. The property owner moved to dismiss a contractor's lien foreclosure suit, arguing the lien was not timely served. The trial court found

---

[8] The term "non-fatal" appears nowhere in the statute, and as the order submitted by Ms. Beatty noted, "The rules of statutory interpretation are clear: the General Assembly is presumed to intend for the words of a statute to mean what they say." **ROA** ____ (Feb. 16 Order at 10).

[9] *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020).

that "no credible evidence exist[ed] to show that [the contractor] provided any materials or labor" after the date of last work set forth in its pleading and its lien, that the lien was not served within 90 days of that last work, and granted the motion to dismiss. 432 S.C. at 274, 851 S.E.2d at 728. The contractor appealed.

On appeal, this Court noted that "parties are bound by their pleadings *unless withdrawn, altered or stricken by amendment or otherwise,*" *id.* at 278, 851 S.E.2d at 730–31 (quoting *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (emphasis added)), and acknowledged that the contractor would have the right to amend its pleading to correct any error as to the date of last work. *Kitchen Planners*, 432 S.C. at 278, 851 S.E.2d at 730–31. However, it bound the contractor to the date of last work as stated in its pleading because the contractor there, unlike here, (i) had not amended, or even moved to amend, its pleading, and (ii) had not raised its entitlement to amend before the trial court, thus failing to preserve it for appeal. *Id.* at 279–80, 851 S.E.2d at 732.

Further and importantly, this Court found that—even reading the evidence in the light most favorable to the contractor—there was insufficient evidence that any materials or labor were in fact provided after the date set forth in the pleading and that the evidence actually suggested the contrary. *Id.* at 282, 851 S.E.2d at 732. Again, that is distinguishable from the present case, where there is no debate that TCC *did* perform work until January 2017 and the Panel so held. However, that the *Kitchen Planners* Court even undertook to analyze whether there was proof of a different day of last work evidences that it is the actual date of last work that governs the timeliness of service of a lien.

2. The Master Is Bound by the Circuit Court's Prior Ruling

It is well-settled that a prior ruling by the lower court cannot be reversed by a different lower court judge in the same case between the same parties. *E.g.*, *Wilkinson v. Wilkinson*, 192 S.C. 497, 7 S.E.2d 447, 449 (1940) ("The proposition is certainly not open to debate that one circuit judge may not reverse another and that the order of a circuit judge made in the due course of the case stands as the law thereof unless and until reversed by the Supreme Court."); *Matheson v. McCormac*, 187 S.C. 260, 196 S.E. 883, 884 (1938) ("That a decree from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter is the well-settled law in this state, and it is therefore unnecessary to enter upon any extended discussion of this postulate.")

Here, TCC sought and was granted leave to amend its pleading to remove the reference to March 17, 2016, because that was the date of substantial completion. **ROA ___** (Affidavit of J.D. Griffith). The HPR expressly argued that TCC was bound by the date in its pleadings:

> In its amendment, TCC proposes to delete its alleged date of "final completion" of the construction project, an allegation upon which they proceeded to arbitrate and have obtained an award. TCC is bound to this date of final completion by judicial estoppel and cannot retract it now in order to assert a different date as to the individual unit owners.

ROA ___ (HPR Reply, May 27, 2020 at 6). In granting the amendment, Judge McCoy rejected the HPR's argument that TCC was bound by an erroneous statement of the date of last work. This ruling became the law of the case and was therefore binding on the Master in Equity.

Nevertheless, the Master denied TCC's motion to amend its statement of account,[10] though the amendment was sought for the very same purpose, and overruled Judge McCoy, finding TCC was bound by the erroneous date of last work.

C. Service on the HPR Constitutes Service of the Homeowners

It is uncontested that this suit was served upon counsel for the HPR[11] no later than June 15, 2016. **ROA ___** (Epting Affidavit). This was natural, as the contract between the parties for work on the building's common elements lists the HPR as the owner, not the individual owners, **ROA ___** (contract), and the original suit filed June 6, 2016 listed the HPR. That the HPR was the proper party to serve with the lien is also borne out by the HPR's bylaws and master deed, which:

(i) authorize the HPR to enter into contracts on behalf of the individual homeowners (**ROA ____** (Master Deed) at §§ 2.3, 3.6(a), and 8.1, **ROA ___** (Bylaws) § 7.2(e)), and

(ii) *require* the HPR to discharge liens against the common elements. **ROA ___** (Bylaws) § 7.1(c).

For these reasons, and those that follow, the unit owners were served on June 16, 2016 as a matter of law.

1. Statutory Intent

The Horizontal Property Act[12] states that a lien cannot lie against a horizontal property regime, but rather only against individual units. S.C. Code § 27-31-230(a). Based on this

---

[10] This motion was filed before the Master in Equity, as lien matters are within the jurisdiction of the Master. Rule 53(b), S.C.R.C.P.; Rule 71(a), S.C.R.C.P.

[11] Who also represents 34 of the 35 homeowners.

[12] S.C. Code § 27-31-10 *et seq*.

statute, the HPR argues each individual homeowner must be served for the lien to be effective against that owner's proportional share of the common elements.

This was not the purpose of the statute. As noted by this state's Supreme Court,:

> [M]ore importantly, the purpose of the first sentence is to prevent an individual condominium owner or in this case, the developer, from encumbering the interests of others by giving a lien against the whole property once the master deed is filed.

Resolution Tr. Corp. v. Eagle Lake & Golf Condos., 310 S.C. 473, 476–77, 427 S.E.2d 646, 648 (1993). What the statute did *not* intend was to require a contractor—engaged by a horizontal property regime to perform work on the building's common areas and representing itself as the owner—to serve each individual homeowner (in some buildings, there can be hundreds, if not thousands of unit owners), many of whom do not live in their units, in order to protect its lien rights.

2. Service on All Owners

The efforts to serve the individual homeowners in this case perfectly illustrate why the imposition of such a requirement is not proper. TCC sought to serve the individual unit owners beginning on June 10, 2016, when the amended mechanic's lien and suit to foreclose were given to Mr. John Gamble, a process server. **ROA ___** (Gross Nov. 3, 2020 affidavit) at ¶ 2.b. On June 11 or June 12, Mr. Gamble attempted service of the unit owners at their units, but found that the building was locked and secured by a door code. *Id.* at ¶ 2.c. It transpired that numerous unit-owners did not reside in their units. *Id.* at ¶ 2.d.

Ten days later, on June 22, 2016, Mr. Gamble was finally able to obtain the door code and enter the building to serve those individual unit owners residing in the building. **ROA ___** (Gamble May 22, 2020 Affidavit) at ¶ 3. However, when he returned the following day to serve additional unit owners, the door code had been changed in an attempt to avoid service. *Id.* at ¶ 5.

The burden on a contractor to serve notices of a mechanic's lien (i) on owners who may not live at the property in question or even in the state (ii) within ninety days of last work prevents a contractor from enforcing its lien rights.

3. The Master-in-Equity's Grant of Summary Judgment Without Discovery Is Inappropriate, Especially Where Specifically Ordered by the Circuit Court

As noted by Mr. Gamble, the unit-owners he *was* able to serve when he finally gained access to the building indicated that they were already aware of the lien and the suit and had been expecting service. **ROA ___** (Gamble May 22, 2020 Affidavit) at ¶ 4. To establish how and when they first received notice of the suit, TCC sought discovery from the HPR. This discovery was denied by the Master.

It is not difficult to deduce—and has never been disputed—that the HPR in fact gave notice to each unit owner after its counsel was served with the lien. Here, TCC served discovery that bears on the question of when the individual homeowners received notice of the lien and suit to foreclose, including requests that each homeowner:

1. Identify the date or dates you contend you were served with the amended mechanics' lien and statement of account.
2. Identify the manner in which you were served with the amended mechanics' lien and statement of account.
3. Identify the date you were first made aware of the filing of this lawsuit.
4. Identify the date you retained counsel to defend this suit.

ROA ___ (May 22, 2020 Interrogatories). The requests for production served at the same time request that Respondents:

1. Please produce all communications in your possession regarding the filing of a lien and lawsuit by TCC of Charleston, Inc. against the HPR and yourself individually.

ROA ___ (May 22, 2020 Requests for Production).

The mechanic's lien statute does not specify how a lien must be served, but allows courts to authorize any measure of providing notice that "under the circumstances of the case, [are] considered most proper and effectual." S.C. Code § 29-5-200. Before it could be determined whether the first notice provided to the homeowners was proper and effectual, it must be discovered when and by what means the individual homeowners received notice of the lien. To that end, TCC requested all subsequent communications between the HPR and the individual homeowners regarding the lien, as well as the date each individual homeowner retained Mr. Ford as their counsel. The trial court did not allow this discovery, though the circuit court had previously acknowledged TCC's entitlement to it:

> Given the pending amendment, ***pending discovery requests***, and the lack of a final judgment, the Court finds it would be inappropriate to consider the remaining motions at this time.

ROA ___ (McCoy Order) (emphasis added). This order bound the Master to allow the discovery.

4. Non-Residency and Avoidance of Service Tolls the Statute

Also included in TCC's discovery was requests that Respondents:

7. Identify where you were residing during the period of June through September, 2016;
8. Identify all dates you were out of state during the period of June through September, 2016; and
9. Identify your state of primary residence in 2016 and 2016.

ROA ___ (May 22, 2020 Interrogatories). These were requested, as the time for service is equitably tolled by a party being out the state or avoiding service. S.C. Code § 15-3-30 (noting the exception to the running of the statute of limitations when the defendant is out of the state); *Hooper v. Ebenezer Senior Servs. & Rehab Ctr.*, 386 S.C. 108, 115–17, 687 S.E.2d 29, 32–33 (2009) (noting equitable tolling may be applied wherever justified by the circumstances). The

trial court erred in preventing TCC from discovering this information, which in turn denied TCC another avenue for demonstrating timely service. TCC's process server, Mr. Gamble, submitted an affidavit that efforts were made by the homeowners to avoid service. **ROA ___** (Gamble Affidavit).

II. Trident Is Entitled to Continued Contractual Interest

The Master permitted the HPR to pay the amount of the Judgment against it into Court and held such payment into court would halt the accrual of interest on the judgment.[13] As discussed *infra*, this was further error, as the contract between the HPR and TCC provides for interest on late payments, and contractual interest is not stopped by depositing funds into court.

A. TCC Is Entitled to its Judgment

Before presuming an entitlement to interest and not in anticipation of the HPR's appeal, TCC adumbrates the validity of the Panel's ruling, its denial of the HPR's motion to reconsider, and Judge Jefferson's first (**ROA ___**) and second (**ROA ___**) orders refusing to vacate the arbitration award.

1. The Panel Did Not Err in Holding TCC to Be the Prevailing Party as to the Cost of the Arbitration

There is no question that the Panel unanimously found TCC to be the prevailing party and awarded it the costs of the arbitration[14]:

> The Panel finds in accordance with S.C. Code Ann. § 15-48-110 and the prevailing party fee provision contained in the Mechanic's Lien

[13] As the Master-in-Equity failed to award fees to TCC prior to confirmation of the award and the appeal that would follow, statutory interest is not tolled because there is no final judgment as to *all claims*.

[14] The arbitrators declined to consider the parties' competing motions for attorneys' fees and reserved that question to the courts.

> Laws that TCC is entitled to recover from the HPR [its arbitration costs].

ROA ___ (Corrected Award at 7).

The Panel did not err. The HPR's case before the Panel consisted of the following:

- TCC was bound by the Guaranteed Maximum Price ("GMP") stated in its contract with the HPR, despite subsequent agreements between the parties (including an agreement in writing between counsel for the HPR and counsel for TCC, **ROA ___** (Ogiba Email)) (i) to perform additional, unforeseen work on a "cost plus" basis and (ii) to leave certain issues to be resolved after the end of the project, and (iii) the HPR's architect's recognition that cost-plus items were to be resolved at the conclusion of the project;
- TCC issued lien waivers with each payment application and, accordingly, waived any entitlement to additional costs predating the lien-waivers, in spite of (i) the agreement to hold certain items to the end of the job, (ii) TCC's pay applications specifically reserving claims to such amounts, and (iii) numerous other writings preserving the cost-plus agreement.

The Panel precisely understood the case before it, rejected the HPR's contentions. Recognizing that TCC had advanced over $2mm for the benefit of the project, it awarded TCC that $2mm.

The HPR's grounds for vacating or modifying the order were that the Panel erred in its understanding of the facts of the case and its application of the law. The circuit court properly found—as this Court should too—that this was both inaccurate and legally insufficient to vacate or modify an arbitration award, which can only occur pursuant to the very narrow criteria set forth in S.C. Code §§ 15-48-130 and -140. *See infra*, Part II.A.3.

2. The HPR Is Bound by the Panel's Holding

a. "Final & Binding"

The parties agreed that the arbitration would be "final and binding." **ROA ___** (Agreement to Arbitrate). "Final and binding" is not merely decorative language; its inclusion

meant the arbitration is the last word and binds the parties. Nothing in the South Carolina Arbitration Act requires the inclusion of the "final and binding" language in an arbitration agreement in order for an arbitration award to be confirmable. So when that plain, unambiguous language is included in an arbitration agreement, it should be given weight. Nevertheless, the HPR has repeatedly attempted to overturn the unanimous arbitration award in TCC's favor.

b. Confirmation

TCC filed a motion to confirm the arbitration award on July 30, 2020; however, anticipating that the HPR would appeal once the award was confirmed and seeking to avoid piecemeal appeals, TCC requested the Court not rule on confirmation until all other pending motions—including TCC's motion for attorneys' fees—had been resolved. The HPR, however, requested the Court grant TCC's motion.

In a memorandum filed October 27, 2020, the HPR stated:

> [T]he HPR requests that this Court GRANT TCC of Charleston, Inc.'s ("TCC") Motion to Confirm the Corrected Arbitration Award but without the requested delay.

ROA ___. As the HPR's counsel expressly requested confirmation, it has no appeal regarding its confirmation as only an aggrieved party may appeal, Rule 201, S.C.A.C.R.

3. The Scope of Review of Arbitration Awards Is Exceedingly Narrow

"The scope of judicial review for an arbitrator's decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all." *Group III Mgmt., Inc. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 149, 819 S.E.2d 781, 785 (Ct. App. 2018) (internal quotations omitted). "Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." *Pittman Mortg. Co., Inc. v. Edwards*, 327 S.C.72, 76, 488 S.E.2d 335, 337 (1997).

Reviewing an arbitration award, the court's function is limited "to determin[ing] whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it." *Group III*, 425 S.C. at 150, 819 S.E.2d at 786 (internal quotation omitted). "Even a clearly erroneous interpretation of the contract cannot be disturbed." *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (internal quotation omitted).

"Therefore, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Group III*, 425 S.C. at 151, 819 S.E.2d at 786 (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

A court may vacate an arbitration award only under very narrow circumstances:

(i) the four statutory grounds enumerated in S.C. Code § 15-48-130(a)[15]; and

(ii) one common law ground—manifest disregard of the law, as stated in *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009).

Regarding the former, "[a]rbitrators exceed their powers only if the issue resolved by them is not within the scope of the agreement to arbitrate." *Pittman*, 327 S.C. at 77. It is the scope of the arbitration agreement, and not the pleadings, that determines what matters have been referred to the arbitrators. *Id.*

Regarding manifest disregard of the law, "[a] court may vacate an arbitration award under the manifest disregard standard only when a plaintiff has shown that: (1) the disputed legal principle is clearly defined and is not subject to reasonable debate; and (2) the arbitrator refused

[15] Of which only one—the arbitrators exceeding their authority—has been advanced by the HPR as grounds for vacating this award; accordingly, the other grounds set forth in this statute are not discussed.

to apply that legal principle." *Group III*, 425 S.C. at 154–55, 819 S.E.2d at 788. More precisely, "manifest disregard of the law is established only where the arbitrator[] understand[s] and correctly state[s] the law, but proceed[s] to disregard the same." *Id.* at 155, 819 S.E. 2d at 788 (alterations in original). The manifest disregard standard "is not an invitation to review the merits of the underlying arbitration." *Id.* (internal quotation omitted).

With regard to modification of an arbitration award, a court may modify the award only "so as to effect its intent," S.C. Code § 15-48-140(b), and only if one of three grounds set forth in S.C. Code § 15-48-140(a) is applicable. These grounds are: (i) an evident mistake in the calculation of figures or the description of any person, thing, or property referred to in the award; (ii) award by the arbitrators on a matter not submitted to them, so long as correcting the award does not affect the merits; or (iii) imperfection in the form of the award unrelated to the merits of the controversy.

TCC argues the Panel made legal and factual errors, entitling it to a modification or vacation of the award. As the United States Supreme Court noted though, "[i]t is not enough . . . to show that the [arbitrator] committed an error—or even a serious error." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010). It is not the job of this Court or any court to substitute its own judgment for that of the arbitrators who presided over the trial of the case.

B. Contractual Interest Is Not Suspended by Paying Funds Into Court

The arbitrators ruled that TCC was entitled to contractual interest on a portion of its award that the HPR's architect had approved back in 2017, at the rate of 4% provided for in TCC's contract with the HPR. The Panel's award noted that this lower rate of interest on this portion of the award would run until the award was paid or reduced to a judgment. The Panel recognized it had no jurisdiction to provide for what the effect of the entry of a judgment would

have on the award of interest and, ensuring it did not exceed its authority, temporally limited its award of interest.[16]

Before the Master, the HPR argued that depositing the amount of the judgment against the HPR into court pursuant to Rule 67, S.C.R.C.P. would stop interest accruing on the judgment. The Master agreed. This was error and certainly does not stop contractual interest provided for in the parties' agreement. *Renaissance Enters. v. Ocean Resorts, Inc.*, 334 S.C. 324, 327, 513 S.E.2d 617, 618–19 (1999) (stating that the post-judgment statutory rate applies "only where there was no contractual interest rate; where the contract provided a rate of interest, that rate would apply to a judgment entered on the contract," noting "there is nothing in Rule 67 indicating a deposit into court will affect the parties' contract regarding interest," and concluding "a deposit into court pursuant to Rule 67 does not stop the accrual of interest provided by contract").[17]

TCC remains entitled to contractual interest, both (i) under the terms of its contract with the HPR and (ii) under the law, which says payment of money into court does not halt the accrual of contractual interest; and, as the HPR's payment of funds was not pursuant to a final disposition of all TCC's claims, TCC is entitled to statutory interest.

---

[16] As discussed *infra*, the entry of a judgment does not halt contractual, and contractual interest cannot be halted by payment of a judgment into court. *Renaissance Enters. v. Ocean Resorts, Inc.*, 334 S.C. 324, 327, 513 S.E.2d 617, 618–19 (1999)

[17] Moreover, the full amount of fees has not been paid into court, as the amount of TCC's fees has not yet been determined. *See infra*, Part III.

III. The Master Erred in Denying TCC's Motion for Attorneys' Fees and Should Have Permitted TCC to Establish its Fees

Before the arbitrators, TCC moved for an award of its attorneys' fees as the "prevailing party" as defined in the mechanic's lien laws. The basis for submitting the question to the Panel was the parties' arbitration agreement, which stated:

> [T]he arbitrators shall assess, in whole or in part, their fees and expenses incurred in connection with the Arbitration as a part of their award in accordance with S.C. Code § 15-48-110 and the fee provision contained in the Mechanic's Lien Laws.

ROA ___ (Agreement to Arbitrate). The agreement arose from the unusual circumstance of TCC's contract being with the HPR, but the individual homeowners being the owners of the common areas and the only parties against whom foreclosure could be sought. The parties sought to streamline the resolution of the dispute and agreed that arbitration should occur between the HPR and TCC only.

The agreement to arbitrate contained a section entitled Fees and Expenses of Arbitrators that stated the arbitrators would award fees "in accordance with . . . the fee provision contained in the Mechanic's Lien Laws." The purpose of including this language was to establish that the party who prevailed in arbitration would be entitled to attorneys' fees. That both parties understood this is evidenced by the fact that, in their proposed orders, both the HPR and TCC sought an award of attorneys' fees from the Panel.[18]

After the Panel unanimously ruled in TCC's favor, the HPR took the position that the language related only the question of arbitrator fees and AAA costs. The Panel agreed, and though it found TCC was the "prevailing party," it held the question of entitlement to attorneys'

[18] **ROA ____** (HPR Proposed Order) ("Further, the Panel agrees to entertain a motion by C&C for payment by TCC of its attorneys' fees . . . ."); **ROA ___** (TCC's Motion for Prejudgment Interest, Costs of Arbitration, and Attorneys' Fees and Costs).

fees had not been submitted to it. It therefore denied TCC's motion without prejudice to seek those fees in the circuit court.

The Master erred in denying TCC's motion for attorneys' fees (**ROA ___** (Sept. 11, 2020 Motion for Attorney's Fees)) on the basis of the parties' agreement that the prevailing party in arbitration would be awarded its attorneys' fees.

IV. The Quantum of Attorneys' Fees Awarded to the HPR Is Inconsistent With the Law

Because it was error for the Master to invalidate TCC's lien, it was likewise error to award attorneys' fees to the HPR and Ms. Beatty. However, should this Court find that the HPR *is* entitled to fees, it must recognize that the quantum of fees awarded to the HPR is inconsistent with the law. Caselaw limits the recovery of fees to *only* those incurred in successfully defending the lien foreclosure action:

> Utilities next argues the attorney fee award was excessive in view of the fact Wilson was required to defend two other causes of action and the fee awarded necessarily compensated her attorney for time spent in defending all three causes of action. We agree.
>
> [. . .]
>
> We find an abuse of discretion as to the amount of the attorney fee award and remand to the trial court for entry of an award based upon the time Wilson's counsel spent defending the mechanic's lien cause of action only.

Utilities Construction Co. v. Wilson, 321 S.C. 244, 250, 468 S.E.2d 1, 4 (Ct. App. 1996) (emphasis added).

A. TCC Did Not Seek to Foreclose the Lien Against the HPR

Under the South Carolina Mechanic's Lien statute, attorneys' fees may be awarded to the "prevailing party." S.C. Code § 29-5-10(a). A party who successful defeats a mechanic's lien foreclosure cause of action is deemed to have "prevailed" per the mechanic's lien statute.

Utilities, 321 at 250, 468 at 4. However, a party against whom foreclosure is not sought in the first place cannot have "prevailed" on that cause of action.

1. TCC's First Amended Pleading

Upon learning that the HPR was not the owner as stated in the contract, TCC amended its pleading on June 10, 2016 (**ROA ___**) to name all individual unit owners as defendants, as the recorded master deed conflicted with the contract as to who the owners of the common elements were. The purpose was to have the owners of the common elements in the suit so as to foreclose against them.

2. Order Staying the Case

In January 2017, Judge Young entered an order compelling arbitration between TCC and the HPR and "stay[ing] Plaintiff's foreclosure request *as to the remaining Defendants*." **ROA ___** (emphasis added).

3. No Foreclosure Request in Arbitration

As the HPR repeatedly acknowledged, the only cause of action before the arbitration panel was TCC's breach of contract claim against the HPR. There can be no doubt of this for, as stated by the HPR to the arbitration panel:

> [T]he Order [of Judge Young compelling arbitration] withholds the foreclosure actions to the Circuit Court.

ROA ___ (Exh. A to Omnibus response at 1);

> [T]he only cause of action before the Panel is a breach of contract claim.

ROA ___ (Exh. A to Omnibus response at 2);

> [T]he foreclosure actions were stayed . . . to allow TCC and the Regime to *arbitrate the dispute between them, the breach of contract claim*.

ROA ___ (Exh. A to Omnibus response at 2);

> This [the breach of contract claim] was briefed by both parties in their pre-trial briefs and was the only cause of action arbitrated at the hearing. In fact, TCC's pre-trial brief was extensive, very detailed, and, notably, only addressed a breach of contract.

ROA ___ (Exh. A to Omnibus response at 2, n.1); and

> This Panel does not have jurisdiction over the foreclosure actions.

ROA ___ (Exh. A to Omnibus response at 5).

The parties understood after the title exam: (i) that the HPR did not own the common elements; (ii) that therefore, only the contract claim against the HPR would be arbitrated; (iii) that the common elements were owned by the individual unit owners; and (iv) that the foreclosure action would only be as to the unit owners. The foreclosure action was stayed and was not part of the arbitration.

4. No Foreclosure Request as to the HPR in Circuit Court

a. Foreclosure Action Stayed Until May 1, 2020

TCC's foreclosure cause of action was stayed in the trial court pending arbitration. **ROA ___** (Judge Young Order Staying Case). After the arbitration, TCC moved to lift the stay so it could proceed in the foreclosure action *against the individual homeowners* only:

> Plaintiff seeks to lift the stay so as to proceed to confirm the award and pursue its claims ***against the individual defendants***.

ROA ___ (Exh. B to Omnibus response) (emphasis added).

HPR's counsel would not consent:

> The HPR's position is that the Arbitration Panel retains jurisdiction at this point, and thus we have not consented to lift the stay.

ROA ___ (Exh. C to Omnibus response).

On December 12, 2019, after the Panel's final award, HPR's counsel again objected to lifting the stay:

> We do object to lifting the stay, as we think the Motion to Lift [the stay] is subject to the Motion to Vacate or Correct [the arbitration award]. When the court resolves the latter, perhaps Monday, or perhaps sometime thereafter, and perhaps after remand, the stay might then be lifted, and the most recent motion [for summary judgment] would become ripe.

ROA ___ (Exh. D to Omnibus Response).

The stay was ultimately lifted on May 1, 2020, after the denial of the HPR's motion to reconsider the denial of its motion to vacate. Accordingly, even if TCC *had* sought to foreclose against the HPR, the HPR's efforts while the foreclosure cause of action was stayed were necessarily unrelated to that cause of action and cannot form the basis of an award of fees under the *Utilities Construction* case.

Nevertheless, the HPR sought and was awarded fees prior to the lifting of the stay. Indeed, approximately half of the redacted fee entries provided to TCC predate May 1, 2020. *See infra*, Part IV.B.

b. *After May 1, 2020, Foreclosure was Sought Against the Homeowners Only*

After the stay was lifted, TCC made no effort to foreclose upon the HPR as the owner of the real property. As stated in TCC's June 12, 2019 Motion to Lift the Stay:

> Plaintiff seeks to lift the stay so as to proceed to confirm the award *and pursue its claims against the individual defendants*.

ROA ___ (Exh. B to Omnibus response) (emphasis added). Accordingly, even fees incurred by the HPR *after* May 1, 2020 are not recoverable as prevailing party fees.

TCC did seek to foreclose on the individual homeowners. To the extent this Court finds TCC's lien was invalid, the time spent after May 1, 2020 defending the lien foreclosure action

only on behalf of those homeowners *would* be awardable. However, no motion for summary judgment was even filed by the individual homeowners for attorneys' fees (other than Ms. Beatty) until January 17, 2021, after the Master had already granted the HPR's and Ms. Beatty's motions.

B. The HPR's Fees

After the grant of summary judgment, the HPR submitted fee invoices totaling $250,000 for review *in camera*, providing TCC with redacted invoices from which all description of the work was removed. Prior to this, the HPR had submitted fee affidavits seeking $270,000 in attorneys' fees that made no effort to segregate time as between (i) the HPR's efforts to overturn the arbitration award and (ii) the HPR's pursuit of summary judgment on the issue of foreclosure.

Only the latter could be awarded. And, despite having agreed that arbitration was final and binding and that the Panel could award prevailing party fees,[19] the HPR filed the following motions seeking to undo the Panel's award:

1. *three* separate motions before the arbitrators to correct or reconsider the arbitration award (**ROA** ___, ____, _____);
2. a motion to vacate the arbitration award in circuit court, (**ROA** ___);
3. a motion for reconsideration of the denial of the motion to vacate in circuit court, (**ROA** ___); and
4. an appeal of the denials of the motions to vacate and to reconsider to the Court of Appeals, (**ROA** ___).

[19] Included in the HPR's proposed Award submitted to the Panel was: "Further, the Panel agrees to entertain a motion by C&C for payment by TCC of its attorneys' fees . . . ." **ROA** ___ (HPR Proposed Order). It was only after an unfavorable result that the HPR contended the Panel did not have authority to award fees.

In addition, the HPR filed a motion to deposit funds in circuit court. **ROA ___**. All of these motions and related briefing (i) were filed in the period of time encompassed by the HPR's fee request and (ii) were unrelated to the foreclosure cause of action.

Nevertheless, weeks later, the HPR was awarded all of its $250,000 fee request based on fee invoices provided *in camera*. It cannot be that even half of the fees submitted by the HPR—let alone *100%*—relate to the foreclosure cause of action, especially as (i) approximately half of the fees predate the lifting of the stay of the foreclosure action, (ii) TCC did not seek to foreclose on the HPR, and (iii) the homeowners never moved as to the foreclosure until January 17, 2021, as the HPR itself expressly acknowledged. *See* **ROA ___** (HPR Proposed Order re 11/23/2020 hearing at 7).

The award of fees to the HPR and the homeowners has many moving parts and sources of potential objection, including (i) the relatedness of the fees awarded to foreclosure, (ii) whether foreclosure was sought against the HPR, (iii) whether the homeowners incurred fees related to foreclosure prior to seeking summary judgment on the question on January 17, 2021, and (iv) whether the award of fees to multiple parties for making the same argument is duplicative. The Court applied the six-part test from *Jackson v. Speed*[20] to determine reasonableness of fees; but with no access to the fee invoices and descriptions of the work, TCC has no ability to challenge the reasonableness of the award. The attorney-client privilege is deserving of protection. But if an award a quarter of a million dollars in attorneys' fees may be entered against a party, that party is deserving and entitled to due process in challenging the reasonableness of the award.[21]

---

[20] 326 S.C. 289, 486 S.E.2d 750 (1997).

[21] The same due process concern applies to Respondent Beatty, *infra.*

The HPR's request for fees is flawed in support and unreasonable as a matter of law. The Court erred in its award, and in denying TCC's motion to reconsider.

V. Fees Awarded to Betty Beatty Are Not Appropriate

As an initial matter, Ms. Beatty never filed a pleading in this case until three and a half years after the amended complaint was filed, answering on January 17, 2020 while the case remained stayed. **ROA ___**. After answering, it was another four months until Ms. Beatty filed her motion for summary judgment on May 11, 2020. **ROA ___**. In that motion and before the court, Ms. Beatty argued that she had been served with the lien more than 90 days after March 17, 2016, the date referenced in the statement of account, entitling her to summary judgment.[22] For these efforts, she requested and received $76,000.

The fee affidavit submitted by Mr. Buckley includes time from 2016–2019, prior to a pleading being filed by Ms. Beatty. TCC does not know what efforts were undertaken on Ms. Beatty's behalf during this time, but cannot relate to foreclosure, as the foreclosure action was stayed until May 1, 2020.

Ms. Beatty seeks fees for the time of Siau Barr, Esq. and Michael Molony, Esq., who represented two homeowners – Ms. Betty Beatty, and Ms. Betty Segal. There is no effort to relate the fees to Ms. Beatty, which would be required and makes the application flawed and the award unreasonable as a matter of law. The Court erred in its award, and in denying TCC's motion to reconsider.

Finally, Ms. Beatty's award of fees is predicated on the trial court's erroneous dissolving of TCC's lien, the correcting of which will entitle TCC to recover its fees from Ms. Beatty.

---

[22] This was precisely the argument advanced by the HPR and other homeowners, rendering the award of attorneys' fees against TCC duplicative.

CONCLUSION

The following rulings of the trial court must be reversed:

- As to TCC, the denial of (i) TCC's motion to amend the statement of account, (ii) TCC's motion for attorneys' fees', and (iii) TCC's request that the arbitration award not be confirmed until the amount of TCC's fees had been decided;

- The dissolution of TCC's lien and grant of summary judgment and/or dismissal to the HPR, Ms. Beatty, and the other individual homeowners;

- The award of attorneys' fees to, and reasonableness of fees requested by, the HPR, Ms. Beatty, and the individual homeowners;

- The ruling that payment of the judgment amount into court would halt statutory and contractual interest.

Respectfully submitted:

EPTING & RANNIK, LLC

This 10th day of May, 2021
Charleston, South Carolina

/s/ Jaan Rannik

Jaan G. Rannik
46A State Street
Charleston, South Carolina 29401
843-377-1871
843-377-1310 (fax)
jgr@epting-law.com

ATTORNEY FOR APPELLANT