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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. ..... *Plaintiff and Appellant/Respondent*.

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,. ..... *Defendants and Respondents/Appellants*.

FINAL REPLY BRIEF OF APPELLANT/RESPONDENT TCC OF CHARLESTON, INC.

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/RESPONDENT

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INTRODUCTION

Appellant/Respondent TCC of Charleston, Inc. ("TCC") files this consolidated Reply Brief to the briefs of Respondents the Concord and Cumberland HPR and individual homeowners (collectively, "the HPR") and Betty Beatty ("Beatty") (collectively, "Respondents").

A. Timeliness of Service Is Calculated From the Day of Last Work

Respondents observe that mechanics liens are creatures of statute and that the statute's requirements must be strictly followed, while at the same time asking this Court to ignore the statute's requirements. Per the South Carolina Mechanic's Lien statute, service of a lien by a contractor is timely if it occurs "within ninety days *after he ceases to labor on or furnish labor or materials for such building or structure.*" S.C. Code § 29-5-90 (emphasis added).

In 68 pages of briefing by Respondents, nowhere is it contested (i) that TCC *actually was* onsite performing warranty work in June 2016[1] (**R. p. 002094**) (Tomberlin affidavit), (ii) that TCC continued to be onsite at the owner's behest through January 23, 2017 performing work on the Stone Tower[2] (**R. p. 002695**) (Dagg timesheets), nor (iii) that the arbitration panel awarded $23,733.86 for work performed through January 23, 2017. **R. p. 000012** (Award at 6). Nor could there be any dispute about these facts.

Instead, Respondents pin their hopes upon a technicality, an erroneous date in TCC's original pleadings and Statement of Account—a date not required to be stated in either, as

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[1] The same month personal service began on unit owners. **R. p. 002434** (Gross Affidavit).

[2] The HPR argues, citing nothing in the record, that the stone tower work was part of a separate contract. The arbitrators rejected this contention and awarded TCC costs for that work. **R. p. 000012** (Award at 6). The HPR also argues the Panel never made a ruling as to the date of last work; however, in awarding Trident damages for work through January 2017, it necessarily acknowledged Trident was working through January 2017.

Respondents concede—and argue TCC must be held to that erroneous date and that TCC is estopped from asserting any other date of last work.[3] **Beatty Brief** at 23; *see infra*.

The statute is unequivocal. It says a lien must be filed and served "within ninety days *after he ceases to labor on or furnish labor or materials for such building or structure*." S.C. Code § 29-5-90 (emphasis added). The case law also leaves no room for doubt, the South Carolina Supreme Court stating:

> 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) (emphasis added).

B. <u>Judicial Estoppel</u>

Nor should TCC be estopped from asserting the actual date of last work. Estoppel applies when a party changes its position within a proceeding because its interests have changed. *Zimmerman v. Central Union Bank*, 194 S.C. 518, 8 S.E.2d 359 (1940) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.").

There has been and could be no showing that TCC's inclusion of an erroneous date of last work in its Statement of Account could ever have been in TCC's interest, when doing so shortened the time for service and when no date was required to be stated in either. It was an

[3] The HPR argues that in answering the complaint's allegation that the last date of work was March 17, 2016, the HPR "admitted" the allegation (**R. p. 002574**), removing it from the case. As TCC was allowed to amend that pleading to remove the allegation, this argument fails. In addition, Ms. Beatty denied the allegation (**R. p. 000475**).

error. TCC sought to correct the error by seeking leave to amend its pleading at the first opportunity following the lifting of the stay; it could not have been raised previously for fear of waiving arbitration rights by utilizing the machinery of the courts.

C. Error in the Statement of Account

The statute establishes that a lien cannot be deemed invalid because of an error in the statement of account. S.C. Code § 29-5-100. As the HPR notes, "the legislative intent behind Section 29-5-100 was to keep a scrivener's error from invalidating an otherwise valid lien." Yet here, the erroneous date in the statement of account is precisely the reason TCC's lien was invalidated by the trial court because, based on that date, service was found to be untimely. Ms. Beatty contends without support that there is a distinction between a lien "dissolving" for failure of service and being deemed "invalid." **Beatty Brief** at 20–21. But the statute could not be plainer — the enforceability of a lien will not be affected by an error in the statement of account. Here, the lien was deemed unenforceable because it was found to be not served within 90 days of an erroneous last day of work. This was error.

D. Policy Considerations

Respondents' argument for why TCC should be held to the erroneous date is because title examiners reviewing the public record of liens should be able to determine whether the lien was dissolved. But this is a case where the statute dictates the result (*supra*), not policy considerations.

Even so, Respondents' argument fails. Because the date of last work is not required to be included in the lien of suit to foreclose, there can be no expectation that title examiners would ever be able to make such a determination. Further, where (as was the case here) a pending

lawsuit exists to foreclose a lien and no court had declared the lien invalid, no title examiner could be misled as they are on notice foreclosure is in process.

RESPONDENTS' CONTENTIONS

A. Judge McCoy's Order

Respondents contend that TCC misstated the effect of Judge McCoy's order permitting TCC to amend its pleading to remove the erroneous date of last work, contending that (i) her ruling was not a ruling on the date of last work and (ii) that she did not rule on TCC's entitlement to discovery. **HPR Brief** at 8, 14; **Beatty Brief** at 25-26.

1. Last Work

Judge McCoy rejected the notion that TCC was bound to the erroneous date in its pleading. As noted in TCC's initial brief, TCC asked Judge McCoy to permit amendment of its pleading to remove the erroneous date of last work, the HPR opposed the motion on the basis that TCC was bound by that date, and Judge McCoy ruled against the HPR and permitted the amendment. **Brief** at 9–10. By allowing the amendment over the HPR's opposition, Judge McCoy necessarily rejected the argument that TCC was bound by the erroneous date of last work. *And see Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) ("It is well settled that parties are judicially bound by their pleadings *unless withdrawn, altered or stricken by amendment or otherwise*." (emphasis added)).

2. Discovery

As to the entitlement to discovery, Judge McCoy found the pending discovery precluded consideration of the pending motions for summary judgment, stating:

> 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*.

R. p. 000042 (emphasis added). This was necessarily a finding that TCC was entitled to that discovery prior to summary judgment being appropriate.

3. Effect of the Order

The effect of Judge McCoy's order was to bind the Master in Equity and allow TCC to prove the date of last work.

B. <u>Master's Ruling on Entitlement to Discovery</u>

Ms. Beatty argues that the Master never ruled on TCC's entitlement to the pending discovery, rendering that issue unpreserved for purposes of this appeal. This is inaccurate.

TCC argued to the Master that summary judgment could not be granted to Respondents given the pending, unanswered discovery propounded upon Respondents. **R. p. 002172** (11/30/2020 Omnibus Response to HPR motion at 18) ("TCC objects to the grant of summary judgment in the HPR's favor while discovery remains pending that is probative to the issues involved.").[4] Judge Scarborough necessarily rejected this argument in granting summary judgment to Respondents, and it is therefore preserved for appeal. *See Church v. McGee*, 391 S.C. 334, 347, 705 S.E.2d 481, 488 (Ct. App. 2011) (finding implied rulings not expressly stated in the court's order preserved for appeal without the necessity of a Rule 59(e) motion). TCC submitted a proposed order on December 4, 2020, that stated:

> This Court, having reviewed the post-argument submittals of the parties, concludes that the discovery bearing upon the provision of notice of the lien should be concluded before this Court decides the matters pending before it.

[4] *See also Carolina Alliance for Fair Empl. v. S.C. Dep't of Labor, Licensing & Reg.*, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (Ct. App. 1999) (noting summary judgment is not appropriate "where further inquiry into the facts of the case is desirable to clarify the application of the law"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986) ("summary judgment [must] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition").

R. p. 002130 (TCC Proposed Order). Further, the Master *did* indicate his ruling on this question during the January 27, 2021 hearing:

> I am going to find that it [the lien] was not properly perfected and that there would be no need, at this point in time, for discovery on that issue, so I'm going to deny that motion as well.

R. p. 002513, lines 4-7. The issue is preserved.

C. "Sham" Affidavits

Respondents contend that the affidavits filed by TCC regarding the last date of work were "sham" affidavits filed solely to create a dispute of fact and defeat summary judgment. Tellingly, Respondents make no effort to dispute the contents of those affidavits. Nor can they. The affidavits are accurate and are filed for purposes of evidencing that which is not contested — that TCC was onsite at the project at the owner's behest well after March 17, 2016.

Ms. Beatty contends that no effort was made by TCC to explain the prior misstatement. This is inaccurate. The affidavit of John David Griffith (then-President of TCC) dated September 28, 2020 explains that the date of substantial completion as understood by Trident at the time was referred to in the statement of account, not the date of last work:

> When I signed the statement of account, I referred to the date of substantial completion.

R. p. 000805 (Griffith Affidavit). Before Judge McCoy, TCC's counsel argued that Mr. Griffith simply made a mistake:

> It wasn't a benefit for him to say that. If he had said what actually turned out to be true that it went through June he would have been in a much better position. So this isn't a situation of taking one position that is advantageous at the time and then changing it when the position is no longer advantageous. It's just a mistake.

R. p. 002623 lines 14–21.

Ms. Beatty made this same argument to the Master, who did not adopt it. Accordingly, the burden is on Respondents to demonstrate these affidavits are "sham" affidavits and an additional sustaining ground, a burden which cannot be carried.

D. Kitchen Planners

In *Kitchen Planners*,[5] this Court bound a party to a date of last work stated in its pleadings where, unlike here:

- the pleading had not been amended to correct or remove the date of last work;
- no motion to amend had been filed to preserve the issue for appeal; and
- there was insufficient evidence to establish that the date of last work was not as stated in the pleading or even create a question of fact to preclude summary judgment.

Here, in contrast, the complaint *was* amended with leave of court,[6] and there has been no effort by any party to dispute that TCC was actually onsite performing work after the date in the original pleading, as the arbitration tribunal ruled. This case is distinguishable.

Even in that context though, the *Kitchen Planners* Court looked past the date on the unamended pleading and examined whether there was evidence showing the actual last date of work differed from that in the pleading; it did so because it is the date of last work from which the timeliness of service of a lien is determined. This Court should undertake the same examination here, and it will find the evidence sufficient to establish that TCC's lien was timely.

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

[6] *See Duncan v. CRS Sirrine Engs., Inc.*, 337 S.C. 537, 541–42, 524 S.E.2d 115, 117 (Ct. App. 1999) ("Duncan first contends Sirrine is bound by its original pleadings and the circuit court erred in granting Sirrine's motion to amend its answer. We disagree. 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.").

E. Foreclosure and the HPR

The HPR contends that "TCC has continuously pursued its improper assertion of a foreclosure of mechanics lien cause of action against the HPR." **HPR Brief** at 17. The HPR's argument ignores the record, which amply demonstrates that the foreclosure was sought against the individual homeowners only. As this record is set forth in TCC's initial brief, TCC will not belabor the point here. *See* **TCC's Final Brief** at 27–30.

F. Beatty's Characterization of the Lien

Ms. Beatty argues that TCC sought to foreclose a lien "for work no later than March 17, 2016." **Beatty Brief** at 21–22. While it is not clear to the undersigned what Ms. Beatty means by this, suffice it to say that TCC did not lien *the work*, it liened *the property* where it performed work, and its work continued after March 17, 2016, extending the time to file and serve the lien under the mechanic's lien statute. *See Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 131, 631 S.E.2d 252, 257 (2006).

G. Horizontal Property Regime as "Owner"

While Respondents contend the Horizontal Property Regime Act precludes a lien against the HPR, nowhere do Respondents address the effect of a contractor contracting with an HPR for work and the listing of the HPR as the property owner under that contract. **R. p. 000128**. Nor does the HPR contest it is obligated under its master deed and bylaws to discharge all liens against the common elements. These points are therefore conceded. *See* 5 Am. Jur. 2d Appellate Review § 512 (2016) (when a respondent "fails to respond to an issue in its brief, the [appellate] court may treat the failure to respond as a confession that the appellant's position is correct"); *First Union Nat. Bank of S.C. v. FCVS Comms.*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd in part on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

The HPR is therefore the owner and was served through its counsel. **R. p. 002493**. That service was effected in this manner is affirmed by counsel for the HPR consenting on behalf of the HPR to stay the case pending arbitration. **R. p. 000003**.

H. <u>The HPR's Fees</u>

It was error to award attorneys' fees to the HPR, because (i) the lien was timely served and should not have been dissolved, and (ii) foreclosure was not sought against the HPR. *Supra*. It was further error to award a quarter of a million dollars in fees without affording TCC due process, which must include the ability to review and challenge the fees.

The HPR states that its fee request included only time relating to the foreclosure cause of action. **HPR Brief** at 18. However, as (i) foreclosure was never sought against the HPR, (ii) the time periods included in the HPR's affidavit date back to June of 2016 and continue through the arbitration and post-arbitration filings (*see* **TCC Final Brief** at 30-32; **R. p. 002389**), and the individual homeowners made no motion regarding foreclosure prior to January 17, 2021 (after the HPR's and Ms. Beatty's motions had already been granted) (**R. p. 001265**), the award is unreasonable.

Further, the HPR's fee affidavits were redacted before being provided to TCC (**R. p. 002389**), denying TCC the opportunity to demonstrate what appears obvious — that the HPR's counsel's affidavits contain fees unrelated to the foreclosure cause of action and that are therefore not awardable to the HPR. *Utilities Construction Co. v. Wilson*, 321 S.C. 244, 250, 468 S.E.2d 1, 4 (Ct. App. 1996). No hearing was held on the amount of the fees.[7] In the event

[7] The HPR, accusing TCC of making a "gross misstatement," proceeds to entirely misconstrue an email from TCC's counsel to the Master on February 26, 2021 as disclaiming TCC's desire for a hearing. In reality, TCC wanted the hearing, but recognized the Master had likely made up his mind. When it appeared no hearing would be forthcoming, TCC's counsel wrote:

this Court affirms the Master's grant of summary judgment, TCC requests the case be remanded for further proceedings to determine the amount of fees, proceedings in which TCC is permitted to view and challenge the entries provided by the HPR as due process requires.

I. Ms. Beatty's Fees

1. Issue is Preserved

Ms. Beatty argues that TCC's contention regarding the amount of fees awarded to Ms. Beatty are not preserved. On November 30, 2020, following the Master's oral ruling that he would grant Ms. Beatty's motion for summary judgment and award her fees, TCC filed a response to Ms. Beatty's fee submittals stating:

> Should she prevail on her motion for summary judgment, Ms. Beatty's request for approximately $65,000 in attorneys' fees is improper and inconsistent with the law. Caselaw limits the recovery of fees to those incurred in successfully defending a lien foreclosure action.
>
> [. . .]
>
> Ms. Beatty first filed a pleading in this matter on January 17, 2020, not previously having answered TCC's complaint filed June 10, 2016. Nevertheless, the fee affidavit submitted by Mr. Buckley includes time from 2016–2019, prior to even filing a pleading in this case. This time should be struck. Further, time entries are included for attorneys Siau Barr and Michael Molony; TCC's counsel is unaware that Mr. Barr or Mr. Molony represented Ms. Beatty, having interacted with them only in their capacity as counsel for Betty Segal (a prior unit owner TCC dismissed by agreement) and not Betty Beatty.

> Judge, Cordes mentioned a hearing on quantum of fees at one time and do not know your thinking in light of the path we are on. I write only to out scoup [*sic*] "Scoup [*sic*] Jackson" who late one night on the Senate floor said-'everything that can be said on this subject has been said, but not by me.' We refrain, if you need us to say more, then let us know. Have a good weekend.

R. p. 002673 (Epting email). The purpose was to inquire whether a hearing would occur and to note that TCC's objections (including objecting to an award of fees without having the opportunity to review the fee narrative) remained pending.

> Ms. Beatty did not move for summary judgment until May 11, 2020 after the stay had been lifted. Ms. Beatty seeks $65,000 in attorneys' fees for work over six months relating to the sole argument that Ms. Beatty was served with the lien more than 90 days after March 17, 2016, the erroneous date of last work. This Court should not allow it.

R. pp. 002138–39. The trial court did not change its mind, and its order issued on February 22, 2021 granting Ms. Beatty her requested fees. **R. p. 000104**. TCC's arguments made to this Court are the same as were raised on November 30, 2020 to the Master and were rejected; they are preserved.[8]

2. Court's Discretion Is Limited

Ms. Beatty contends the amount of fees awarded in the foreclosure context is discretionary. TCC's initial brief cited cases for that same proposition, however there are limiting factors. First, if the reasonableness of the fees awarded pursuant to statute is challenged and at issue, the amount of the award is reviewed *de novo*. *Layman v. State,* 376 S.C. 434, 658 S.E.2d 320 (2008) ("[T]he issue of the amount of attorneys' fees awarded hinges on the Court's interpretation of "reasonable" attorneys' fees as contained in the state statute. The interpretation of a statute is a question of law, which this Court reviews de novo."). Here, the fees were awarded pursuant to the mechanic's lien statute and their reasonableness was challenged by TCC:

> Ms. Beatty did not move for summary judgment until May 11, 2020 after the stay had been lifted. Ms. Beatty seeks $65,000 in attorneys' fees for work over six months relating to the sole argument that Ms. Beatty was served with the lien more than 90 days after March 17, 2016, the erroneous date of last work. This Court should not allow it.

[8] Out of an abundance of caution, TCC filed a motion on March 12, 2021 further challenging Ms. Beatty's fee award, which was denied. **R. p. 002240**.

R. p. 002139.

Second, it is firmly established that attorneys' fees in the mechanic's lien foreclosure context are limited to those fees incurred in defeating a lien foreclosure claim. *Utilities Construction Co. v. Wilson*, 321 S.C. 244, 250, 468 S.E.2d 1, 4 (Ct. App. 1996) ("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.").

The Master erred in the amount of fees awarded to Ms. Beatty.

J. TCC's Purported "Misstatements"

Respondents allege numerous "misstatements" and "blatant mischaracterizations" of law and fact by TCC. Beatty Brief 14–21; HPR Brief 6–8. TCC stands by its statements of law and fact, but will not belabor these points, recognizing that Respondents are entitled to disagree with TCC's positions and that the Court's review of the record and the case law will suffice to establish the accuracy of TCC's statements.

K. Remaining Contentions

With regard to Respondents' remaining contentions, including those relating to:

1. The unreasonableness of requiring a contractor to serve a multitude of individual unit owners when its contract is with the HPR (**TCC Brief** at 15-16),
2. The effect of the Horizontal Property Act (**TCC Brief** at 15–16),
3. Notice as service of lien (**TCC Brief** at 17-18),
4. The time for service upon non-resident owners (**TCC Brief** at 18-19),
5. The accrual of interest on the sums deposited into Court (**TCC Brief** at 24–24), and
6. The parties' agreement regarding attorneys' fees from arbitration (**TCC Brief** at 25–26),

TCC will not rehash its position but will rely upon its arguments from its initial brief.

CONCLUSION

For the reasons stated, 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 the HPR, Ms. Beatty, and the individual homeowners;
- The ruling that payment of the judgment amount into court halts the accrual of interest.

Respectfully submitted:

EPTING & RANNIK, LLC

This 15th day of December, 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/RESPONDENT TCC

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CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(b)

The undersigned certifies that Appellant's Final Brief and Final Reply Brief comply with Rule 211(b).

This 15th day of December, 2021
Charleston, S.C.

EPTING & RANNIK

/s/ Jaan Rannik
Jaan G. Rannik, Esquire
46A State Street,
Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
jgr@epting-law.com

ATTORNEY FOR APPELLANT/RESPONDENT