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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*.

RECORD ON APPEAL
VOL. 6 of 6

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INDEX

ORDERS

1. Form 4 Judgment in a Civil Case [Hon. Deadra Jefferson] dated November 3, 2016 000001

2. January 3, 2017 Order [Hon. Roger M. Young, Sr.] Staying Case and Compelling Arbitration 000003

3. Corrected Arbitration Award dated August 12, 2019 000007

4. January 30, 2020 Order and Form 4 [Hon. Deadra L. Jefferson] Denying HPR Motion to Vacate 000016

5. May 1, 2020 Order [Hon. Deadra L. Jefferson] Denying HPR Motion for Reconsideration 000027

6. August 11, 2020 Order [Hon. Jennifer B. McCoy] on Pending Motions and Order of Reference 000041

7. S.C. Court of Appeals Order Dismissing Appeal (App. Case No.: 20-000875) 000044

8. Betty L. Beatty proposed Order Granting Partial Summary Judgment dated November 18, 2020 000046

9. February 16, 2021 Order [Mikell R. Scarborough] Granting Partial Summary Judgment to Betty L. Beatty 000064

10. February 16, 2021 Order [Hon. Mikell R. Scarborough] re: various motions 000083

11. Form 4 Judgment in a Civil Case [Mikell R. Scarborough] Entering Judgment to Betty L. Beatty filed February 22, 2021 000098

12. March 2, 2021 Order [Hon. Mikell R. Scarborough] Awarding Attorneys' Fees 000104

13. Form 4 Judgment on the Arbitration Award of $2,216,899.06 in favor of TCC of Charleston dated March 11, 2021 000110

14. March 26, 2021 Order [Hon. Mikell R. Scarborough] Denying Motion for Reconsideration 000115

PLEADINGS

15. Summons and Complaint, with all supporting exhibits, filed June 6, 2016 000120

16. TCC of Charleston, Inc.'s Lis Pendens filed June 10, 2016 000260

17. Amended Summons and Amended Complaint, with all supporting exhibits, filed June 10, 2016 000276

18. TCC of Charleston, Inc.'s Amended Lis Pendens filed June 16, 2016 000431

19. Amended Notice and Certificate of Mechanic's Lien, with all supporting exhibits, recorded June 10, 2016 000447

20. Answer of Concord & Cumberland HPR, with all supporting exhibits, dated October 31, 2016 000466

21. Betty L. Beatty's Answer to Amended Complaint dated January 17, 2020 000473

22. Second Amended Complaint dated August 24, 2020 000478

23. Betty L. Beatty's Answer to Plaintiff's Second Amended Complaint dated September 3, 2020 000599

24. Answer of Certain Unit Owner Defendants to Second Amended Complaint and Motion to Stay (Jury Trial Demanded) filed September 14, 2020 000607

MOTIONS (*with all supporting exhibits*)

25. TCC Motion to Stay and Compel Arbitration, with all supporting exhibits, filed June 6, 2016 000615

26. HPR Proposed Order re Arbitration Award, dated March 22, 2019 000745

27. TCC of Charleston Proposed Order to Panel (in arbitration proceedings) 000765

28. TCC of Charleston's Motion for Prejudgment Interest, Cost of Arbitration, and Attorney's Fees and Costs and TCC's Motion to Provide Fees and Costs Billing, with all supporting exhibits, dated April 26, 2019 000785

29. Concord & Cumberland HPR's Motion for Reconsideration (*filed in Arbitration proceedings*) dated May 17, 2019 000811

30. TCC Motion to Lift Stay filed June 17, 2019 000824

31. Concord & Cumberland HPR's Motion for Change of Award (*filed in Arbitration proceedings*) dated July 15, 2019 000826

32. Concord and Cumberland HPR's Motion to Vacate the Arbitration Award or, Alternatively, to Modify or Correct the Arbitration Award dated July 16, 2019 000854

33. Concord & Cumberland HPR's Motion for Change of Corrected Award (*filed in Arbitration proceedings*) dated September 7, 2019 000928

34. Concord and Cumberland HPR's Motion to Vacate the Corrected Award or, Alternatively, to Modify or Correct the Corrected Award dated November 18, 2019.....001250

35. Concord & Cumberland HPR's Motion for Summary Judgment with all supporting exhibits dated December 6, 2019.....001265

36. Concord and Cumberland HPR's Memo of Law (1) In Opposition to Motion to Lift Stay (2) In Support of Motion to Vacate or Correct the "Corrected Arbitration Award" and (3) In Support of Motion for Summary Judgment with all supporting exhibits dated December 11, 2019.....001290

37. Concord & Cumberland HPR's Motion to Reconsider, Alter or Amend the Court's Order on Motion to Lift Stay and Motions to Vacate or Correct Arbitration Award dated February 10, 2020.....001707

38. TCC of Charleston, Inc.'s Memorandum in Opposition of Concord and Cumberland HPR's Motion to Reconsider, Alter, or Amend the Court's Order with all supporting exhibits dated March 12, 2020.....001742

39. Concord and Cumberland HPR's Reply to TCC of Charleston's Memorandum in Opposition to Motion to Reconsider, Alter, or Amend with all supporting exhibits dated April 21, 2020 001748

40. Betty L. Beatty's Motion for Partial Summary Judgment, with all supporting exhibits, dated May 8, 2020.....001820

41. Concord and Cumberland HPR's Motion to Deposit Funds dated May 11, 2020 001827

42. Plaintiff's Motion to Amend with all supporting exhibits dated May 15, 2020.....001830

43. TCC of Charleston, Inc.'s Objection to Proceeding, Memorandum in Opposition to Pending Motions for Summary Judgment, and Response to Motion to Deposit Funds, with all supporting exhibits, dated May 22, 2020.....001953

44. Betty L. Beatty's Reply to TCC of Charleston's Memorandum in Opposition to Motion for Summary Judgment with all supporting exhibits dated May 27, 2020 ...002014

45. Concord & Cumberland HPR's Reply to TCC of Charleston, Inc.'s Objection to Proceeding, Memorandum in Opposition to Pending Motions for Summary Judgment,

and Response to Motion to Deposit Funds, and Opposition to TCC's Motion to Amend, with all supporting exhibits, dated May 27, 2020 002028

46. TCC of Charleston's Motion to Confirm Arbitration Award, with all supporting exhibits, dated July 30, 2020 002035

47. TCC Motion for Attorney's Fees, with all supporting exhibits, dated September 11, 2020 002060

48. Concord & Cumberland HPR's Motion to Dismiss Plaintiff's Second Amended Complaint and Motion for Attorney's Fees, with all supporting exhibits, filed September 14, 2020 002062

49. TCC Motion to Amend Statement of Account with all supporting exhibits, dated October 1, 2020 002081

50. Concord & Cumberland HPR's Memorandum of Law in Support of Its Position as to the Pending Motions, with all supporting exhibits, dated October 27, 2020 002106

51. HPR Proposed Order re 11/05/2020 hearing, dated November 16, 2020 002118

52. TCC Proposed Order to Judge Scarborough dated December 4, 2020 002130

53. TCC Omnibus Response and Objections to Filings and Submittals to Betty Beatty with all supporting exhibits dated November 30, 2020 002132

54. TCC Omnibus Response and Objections to Filings and Submittals to Concord and Cumberland HPR with all supporting exhibits dated November 30, 2020 002155

55. Concord & Cumberland HPR's Motion to Strike TCC's Omnibus Response and Objections to Filings and Submittals of Concord and Cumberland HPR, with all supporting exhibits, dated December 3, 2020 002207

56. Individual Homeowners' Motion for Summary Judgment with all supporting exhibits dated January 17, 2021 002234

57. TCC Motion for Reconsideration and/or Clarification with all supporting exhibits dated March 12, 2021 002240

58. HPR Memorandum in Opposition to TCC Motion for Reconsideration with all supporting exhibits dated March 17, 2021 002248

59. Betty L. Beatty Memorandum in Opposition to TCC of Charleston, Inc.'s Motion for Reconsideration with all supporting exhibits dated March 19, 2021 002254

60. TCC of Charleston, Inc.'s Reply in Support of Motion for Reconsideration with all

supporting exhibits dated March 19, 2021 002268

61. Trial Brief of TCC of Charleston, Inc. (filed in arbitration proceedings) dated January 17, 2019 002270

AFFIDAVITS (*with all supporting exhibits*)

62. F. Cordes Ford, IV Affidavit of Attorney's Fees dated November 18, 2020 002302

63. Henry E. Grimball's Affidavit of Attorneys Fees dated November 18, 2020 002369

64. R. Andrew Walden's Affidavit of Attorneys Fees dated November 18, 2020 002376

65. F. Cordes Ford, IV Affidavit of Attorney's Fees dated February 22, 2021 002386

66. Henry E. Grimball's Affidavit of Attorneys Fees dated February 22, 2021 002429

67. R. Andrew Walden's Affidavit of Attorneys Fees dated February 22, 2021 002431

68. Affidavit of Angela Gross, with all supporting exhibits, dated November 3, 2020 .. 002434

69. Affidavit of Andrew K. Epting, Jr., with all supporting exhibits, dated November 3, 2020 002493

70. Affidavit of Service of Betty Beatty dated June 22, 2016 002495

TRANSCRIPTS

71. Transcript of January 27, 2021 Hearing before Hon. Mikell R. Scarborough 002496

72. Transcript of November 5, 2020 Hearing before Hon. Mikell R. Scarborough 002532

73. Transcript of May 28, 2020 Hearing before Hon. Jennifer B. McCoy 002597

74. Transcript of December 16, 2019 Hearing before Hon. Deadra L. Jefferson 002632

OTHER

75. TCC Email to Judge Scarborough re Hearing on Attorneys Fees dated February 26, 2021 002673

76. Email serving Corrected Arbitration Award dated August 12, 2019 002675

77. TCC Arb. Exh. 32 – June 26, 2015 Chris Ogiba email to AKE 002676

78. TCC Arb. Exh. 33 – May 27, 2015 Letter Agreement 002679

79. TCC Arb. Exh. 73 – PCO 130 002681

80. TCC Arb. Exh. 130 – PCO 142 002694

81. TCC Arb. Exh. 155 – Dagg Timesheets 002695

82. TCC Arb. Exh. 157 – Summary exhibit 002697

83. Agreement to Arbitrate dated January 18, 2017 002700

84. Notice of Appeal dated March 31, 2021, appealing Order dated March 26, 2021 Denying Plaintiff's Motion to Reconsider its February 16, 2021 and March 3, 2021 orders.....002704

85. Notice of Appeal dated June 1, 2020, appealing Order on Motion to Lift Stay and Motions to Vacate or Correct Arbitration Award and Order on Concord & Cumberland HPR's Motion to Alter/Amend.....002712

86. TCC's Notice of Appeal, with all supporting exhibits, dated March 11, 20201 002739

87. Defendant Betty L. Beatty's letter to Judge Scarborough regarding TCC's Omnibus Response and Objections to Filings and Submittals of Betty Beatty dated December 3, 2020.....002799

88. Andrew K. Epting, Jr., Esquire's letter to Judge Scarborough dated December 4, 2020

.....002803

89. Concord & Cumberland HPR's letter to Judge Scarborough regarding proposed Order resolving Motion to deposit Funds dated December 17, 2020 002804

90. Concord & Cumberland HPR's letter to Charleston County Clerk of Court depositing funds dated April 22, 2021.....002808

So one of the issues we were fighting over, of course, was attorneys fees and who was to become the prevailing party. So there had been -- one of the first things I want to address is that there had been from the Circuit Court on the referral here -- Mr. Rannik and Mr. Epting, this is going to get into you-all's category.

There had been the order of the Circuit Court to allow for the amendment of the pleadings, The pleadings being the summons and complaint. We spent a fair amount of time discussing that last time, but I was not clear on my ruling. Where I have come down is that I think that the Circuit Court can allow the amendment, however I don't believe that the amendment of the pleadings would apply to the verified statement which went with the pleadings.

That's where I came down on the conclusion that 90-plus days had run and cited to the Kitchen Planners case, Kitchen Planners versus Friedman was one of the cases we talked about.

So I wanted to pick up there. I want you to know that I have second-guessed myself about five times on that one, gone back and reviewed it, and have come back to the same conclusion that I originally had. There was an additional issue. I

think it was presented in that amendment, which was the equity remedy, and we never really broached that at the last hearing, so I did want to broach that with you-all today on behalf of the Plaintiffs, and I'll be glad to hear that. So that's Item No. 1 for me.

Then Item No. 2 is going to be -- we're going to talk about who the "prevailing party" is for the issue of attorneys fees in the case. I have received some attorneys fees affidavits. That was what I wanted to get to. Then I'll take up any other motions. The third thing would be to take up any other motions that we had. I know that the remaining owners, I guess, through Mr. Walden and Mr. Ford, have filed their Motions for Summary Judgment on the issue of the Mechanic's Lien cause of action.

So that's what I wanted to address with you-all today to try to give you some finality on this thing. That's what I'm after. Let me just turn first to the Plaintiffs. Are there any other issues that I need to address before we get into those? Mr. Rannik?

MR. RANNIK: Thank you, Judge. Yes. We think there is one other outstanding matter which is Judge McCoy's previous order which allowed for the

amendment of the complaint and also allowed us to serve in producing discovery authorized (technical interruption) when the individual homeowners received notice of the liens. Of course the Court will remember the HPR is timely as there's no contest (technical interruption) but HPR's timely notice of the lien.

The question then is: When did the homeowners receive notice? Of course notice under the Mechanic's Lien Statute is broader than just service of process. So we insert some discovery seeking to establish when the HPR provided notice to the homeowners, and then the lien. Discovery remains pending, and one thing I think everyone on this call would agree with is that there are likely to be appeals of whatever Your Honor's order is including this appeal.

You could also conclude the validity of the arbitrator's decision (technical interruption) a complete record of what happens including knowledge of the individual homeowners that received notice of the lien so that everything could be appealed at once and it doesn't come back for piecemeal proceedings. We would say that that is a separate issue that we would ask the Court to grant us some relief to

perform that discovery.

THE COURT: So discovery as to when the owners had notice of the claim, the Mechanic's Lien claim, is that what you're saying?

MR. RANNIK: Yes, Your Honor.

THE COURT: That may have been the other order. I was thinking I knew I had another order in there somewhere.

MR. FORD: Your Honor, may I?

THE COURT: Sure. Go ahead, Mr. Ford.

MR. FORD: I'm referring to Mr. Rannik's motion that he's filed, the memorandum he's filed recently, but also those comments. There is no issue of fact that what he's asking for is really irrelevant when the law is applied. We did talk about the law that is applicable to this issue in November.

He said that -- he states in the memorandum that it's undisputed that the HPR was timely served with the lien. That is a misstatement of the law. There can be no lien against the regime by statute. We discussed that issue last time and argued it, and so the statement itself is irrelevant, and even if it wasn't irrelevant, even if that wasn't the law, then there's not been presented any affidavit of service

on the HPR or acceptance of service on the HPR.

But again, that might matter except that you can't have a Mechanic's Lien filed and served against an HPR. It's not allowed per statute pursuant to the Horizontal Property Regime Act. We discussed that at length and briefed it as well.

The second related issue to that is that they have asked for discovery on the issue of, "notice of the lien to the owners from the HPR". Well, again, we're dealing with a Mechanic's Lien which arises from the Mechanic's Lien Statute which must be strictly construed.

Notice of the lien from the HPR was also a misstatement of the law. How you perfect a lien, as Your Honor discussed in November, is filing the lien with the Register of Deeds office and serving it on the owners, and the evidence on that issue has already been presented by TCC and the affidavit of Angela Grubbs where she attends every single affidavit of service that they've got and the earliest service date of which was June 22nd, 2016, which is, you know, I think, six days beyond the 90th day. Then there were other owners, that the affidavits would show, were served later than June 22nd.

So the request is illusory. There is no basis of law for it. Those issues are already established by the present affidavits before Your Honor.

THE COURT: Okay. So let me work on that just a second. So is it your position that there is no lien or there was no lien if only the HPR was served, or is it your position that there was a lien and the lien dissolved by failure to properly perfect?

MR. FORD: Well, I think that's two questions. So as to the HPR, there never could have been a lien against the HPR to perfect. It can't arise under applicable statutes. There is no such thing under South Carolina law as a blanket lien. That's essentially the argument, that you can serve the HPR with the lien and cover all the owners. That is not the law in South Carolina, and that is clear in the Horizontal Property Regime Act.

That may be in other states. There is no blanket lien in South Carolina. There's no lien that can arise against the HPR. As to the owners, which the Regime Act specifically refers to, that the owners must be served with a Mechanic's Lien, then the issue is, yes. A lien arises in choate, but it's been established that the last date of labor and material was March 17, 2016, which makes the 90th day

June 15th, 2016 when the first owner was served according to the affidavits submitted by Ms. Gross on June 22nd, so seven days later.

So because they were served late, at the earliest June 22nd, then those liens did indeed dissolve as to the owners.

MR. RANNIK: And Judge, if I might respond?

THE COURT: Okay.

MR. RANNIK: The argument is that obviously the lien had not dissolved by the time the suit and the lien were served upon the HPR. Whether it's effective against the HPR is another question. Our point is that service of the lien to the HPR, and then the HPR disseminating it to all of the homeowners would provide notice to the homeowners eventually within the period of time by which the lien needs to be served.

Because the notice provisions in the Mechanic's Lien Statute are broad, there's at least a possibility that gives us effective service of the lien within the statutory period. It's an issue for appeal. It's an argument. Who know how it goes, but we feel there should a complete record to make that argument before this case ends with you.

THE COURT: Would the date that the service

was effected, would that -- if it's in an affidavit and then noted, would that change where you are in that aspect of the case? In other words, there's a clear affidavit of service as to each owner eventually.

MR. FORD: There's no affidavit of service as to the HPR anyway. We filed a Motion for Summary Judgment and the Plaintiffs have had an opportunity to respond with evidence. They have not. They have responded with more pleading on the issue, and there's several cases out there that say something like this: Under Rule 56 SCRCP, when a party makes a Motion for Summary Judgment and supports it by affidavits, the adverse party may not rest on the allegations of his pleadings but must respond by affidavits or other evidence demonstrating a genuine issue of material fact.

Even if this matters, even if it's relevant, which we think it's not, well, then they haven't -- TCC has not responded with any affidavit or evidence for the HPR.

MR. RANNIK: Sorry. I didn't mean to interrupt. Judge, that's inaccurate. There is an affidavit from Drew Epting that attaches e-mails that show the service of the lawsuit upon the HPR from

2015 to 2016. There is absolutely evidence of that in the record.

MR. EPTING: Judge, this is Drew Epting. One thing that keeps getting lost here is that he had been trying to lift the stay and then the pleading and to do the discovery to see what the HPR wrote and said to the individual homeowners when they were served on June 15th. Because if they turned around and their records showed that on June 15th they sent an e-mail to all of the homeowners that says, We just got served with this lawsuit, and you're named in it.

So no, we don't have any evidence. We've been trying to get the records and the discovery and the HPR and the individual homeowners have not given us the records. That's why we want to do the discovery.

MR. GRIMBALL: The problem is that notice is not the same as service at all. Those are two totally different things. I can know a case is coming down the pike. Many times people know they're going to be sued. That's not service. Those are two different things, and the statute calls for service, not notice.

So this business about notice to the unit owners is totally bogus. That's irrelevant. You've got to serve them. You've got to put that complaint

in their hands or get it to them in a proper form, and that wasn't done in time. What difference does notice -- what does notice mean? Nothing.

MR. EPTING: We want a record so we can tell the Supreme Court, Here's where we are. Here is the Master Deed appointing the HPR to do all of these things on behalf of the homeowners.

Here is an e-mail serving this lawsuit on every homeowner. They all have actual knowledge, but that doesn't count under the Mechanic's Lien Law.

THE COURT: All right. Let me let Mr. Buckley jump in here. Mr. Buckley?

MR. BUCKLEY: Your Honor, there is no evidence at all that the HPR was served with the complaint. I think if you look at the e-mails that are referenced between Mr. Epting and Mr. Ford, Mr. Ford clearly advised Mr. Epting that he did not have authority to accept service on behalf of the owners.

The fact that he may have received the complaint before June 22nd does not in any way affect my right vis-a-vis TCC of Charleston, and the obligation of TCC of Charleston to serve my client, Betty Beatty.

So I am not sure -- I don't know enough about the communications between Mr. Ford and Mr. Epting to

determine whether Mr. Ford actually accepted service of the complaint or whether that was merely a courtesy copy.

I do know that there is not an affidavit of service upon any officer or director of the Horizontal Property Regime, and I also have not seen anything to indicate that the Horizontal Property Regime under any governing document or statutory authority had authority to accept service on behalf of Betty Beatty or any other, Your Honor.

THE COURT: All right. I've got it. Well, the language of notice here comes from the language of the statute, but it clearly states that notice and -- generally when we talk in terms of notice we talk about legal notice. The heading of the statute reads, Notice to owner before lien attaches when labor was employed by someone other than the owner.

29-5-10 talks about the lien and whether or not there was a lien. That's my question. That's why I started this inquiry as to whether or not we even have a lien.

So the lien has got to be furnished, according to the language of 29-5-40 by the laborer, the mechanic, the contractor, or the materialman who shall in writing notify the owner of the furnishing

of the labor and material -- of the lien given by the statute before it will attach upon the real state.

It is my opinion, my conclusion, that the owners were not timely notified of the commencement of the action based upon the record that we have, based upon the service of process in this case on those owners, and therefore the lien -- because it is a creature of statute it has to be strictly construed with in order to perfect service of process and to, in fact, validate the lien. As we've talked about before the lien arises in choate, but then it needs to be perfected.

The failure to properly perfect the lien renders it of no value. It becomes dissolved as an operation of law. As we get into these arguments about the lien, the one thing that keeps coming back to me is some of the language that we talked about previously and they talk about in the courts.

Really the purpose of these liens is for title abstractors to go down to what's now the ROD -- what we always called the RMC office -- to figure out whether or not there is a lien out there. If there is a lien on the property, you can't otherwise encumber it. You can't sell it. You can't mortgage it. You can't do anything with it.

If the lien, by operation of law, dissolves and then you can rely upon that as a title abstractor to say that's not been done. So I'm not going to change my mind on that. I am going to find that it 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.

Is there something about the equity cause of action that I needed to hear from you, Mr. Rannik, in that regard?

MR. RANNIK: Your Honor, I don't believe so. I think the equity cause of action was waived by whatever name to the issue of attorneys fees for the prevailing party before this Court. I don't think there's anything specific to that outside of what the Court was already going to discuss about that issue.

THE COURT: Well, that leads me right into that prevailing party argument. Here we go. We've got a party who -- the Plaintiffs have prevailed on the breach of contract cause of action to the tune of some $2 million, but the arbitrator has clearly said we're not touching the Mechanic's Lien cause of action. You have been awarded $2 million on your contract.

My reading of the record is that they didn't

get into the Mechanic's Lien and that was something they were going to steer clear of. So how do we determine who the prevailing party is? Mr. Rannik, I'll first give you that forum.

MR. RANNIK: Well, Judge, I think here the case law says what it says which is for purposes of prevailing party under the Mechanic's Lien Statute it is whoever prevails on the lien cause of action, and if the Court's ruling that the lien is dissolved then the prevailing party would be the party that contested that it should be prevailed.

Now, we would make no distinction here. We have never contested that we can foreclose the lien against the HPR. The HPR -- you were here and they have said that they are the prevailing party because they moved for Summary Judgment and received Summary Judgment on the lien cause of action. They have contested that.

Nonetheless, there is an affidavit from Mr. Ford who claims he has $2,000 in attorneys fees, so prevailing on an issue that was never an issue. We would say that the prevailing party between TCC and the HPR there is none because that's just not an issue. As to the individual homeowners, whatever acts were taken specifically (technical interruption)

prevailing party and their attorneys being admitted to whatever those actions were.

THE COURT: I'm sorry, Mr. Rannik. Say that one more time. I apologize. I got --

MR. RANNIK: No worries. I'm not sure where it cut off. I was saying that as between TCC and the HPR there is no prevailing party as to the question of the lien because we never made the argument that it was foreclosable against the HPR.

As to the individual homeowners, the homeowners would be the prevailing party. These would be recoverable only to the only extent of the effort expended prevailing on the Mechanic's Lien cause of action.

THE COURT: I've got it. Thank you. Mr. Ford?

MR. FORD: That's absolutely correct. There is, you know, the Mechanic's Liens names Concord and Cumberland HPR as a target Defendant of the lien, and they've sought to foreclose that lien, not once, not twice, but three times in the various versions of the complaint. In every version of the complaint they have asserted a foreclosure of lien cause of action against the HPR, in this issue, Your Honor.

This case is almost five years old. A lot of

the reason it's that old is because of this pursuit of the lien against the HPR. We spent a lot of time and money of the HPR defending (technical interruption0. I'm sorry. Someone's piped in and needs to mute their phone. 803 number, please mute your phone.

THE COURT: I just did that. I got them.

MR. FORD: Okay. So the bottom line is they have asserted the lien against the HPR in the lien itself and in three different versions of the complaint, and we have incurred a lot of time and cost in that action. We've prevailed on it. We've always known that was the law, and here we have the law that has rendered judgment in favor of the HPR on the lien cause of action, so we're entitled to fees.

I believe we cite case law to you in several of the memoranda regarding this notion that the Defendant on a lien claim might lose a breach of contract cause of action but prevail on the Mechanic's Lien foreclosure cause of action and be awarded fees even though they might have lost the breach of contract action.

As to what's happening here, at this point in time, we certainly request our fees. We've been very reasonable in that request. I think the first

request from TCC for fees was for $899,000 and change.

Our request at this point is less than $300,000, but all of that has been generated in response to this pursuit of the lien claim by TCC. So we respectfully request that Your Honor grant the HPR fees as the prevailing party.

THE COURT: Are all those fees incurred post the arbitration award? That's my question.

MR. FORD: Yes. In the affidavit for fees, we looked at it, we analyzed it, and we tried to pick the most reasonable battles. We took our fees, you know, from before the arbitration was commenced to get to the arbitration agreement because that work was clearly work that was done in response to the lien claim. It got the contract action kicked off of arbitration.

When that action was complete, we've obviously incurred a lot of fees over this issue of attorneys fees. This has been a big holdup in trying to resolve this case. It's generated a lot of work, and here we are in a moment of prevailing on that issue. So yes, we've taken out fees incurred during arbitration, asked for those few months of fees before the referral to arbitration, and then the fees

incurred after the arbitration.

MR. RANNIK: Judge, if I may, my impression, and the Court will correct me, of course, if I am wrong, from the affidavit, the total and gross arbitration includes all kinds of things that have absolutely nothing to do with foreclosure including an appeal to the Court of Appeals about the validity of the arbitration award to begin with.

A motion to vacate the arbitration award in front of Judge Jefferson, a motion for reconsideration after they lost that motion, a motion to pay fees into Court. There were motions filed before the arbitration panel that I thought were also included as fees for which recovery is sought. I don't know if we're ready to have a full-blown hearing on the this, but there is certainly evidence to suggest that (technical interruption) is far, far beyond the question of foreclosure.

THE COURT: All right. Very good.

MR. FORD: Judge, just briefly, we've submitted to you an affidavit with our bills and redacted descriptions of time and certainly are able to offer to provide that to you in camera for your review.

THE COURT: I was going to ask for that. My

position is going to be that as it relates to the award of attorneys fees -- in my opinion they need to be related to the Mechanic's Lien claim. I think you-all spent a substantial amount of time and effort in arbitration, and I'm sure that this was a labor-intensive and document-intensive presentation to the arbitrators. I have no question about that, but I think fees would be limited to work in that regard as to the Mechanic's Lien.

So on that standpoint then, I'm going to award them to the, quote, "prevailing party". That would be the Horizontal Property Regime and the homeowners. My understanding of the homeowners -- at the last hearing the only homeowner involved was Mr. Buckley, and then today you-all are representing all of the remaining homeowners; is that right, Mr. Ford?

MR. FORD: Right. So Concord represents the HPR and all of the owners except for Ms. Beatty. The defense of the owners -- the claims against the owners has been wrapped up into the defense of the claim against the HPR.

We will be sure to provide you information regarding the work done and fees incurred to defend against those lien claims against all of those Defendants, but Mr. Buckley has his own claim for

fees.

THE COURT: All right. And Mr. Buckley, I got your proposed order. Did I receive from you a Motion for Attorneys Fees or not yet?

MR. BUCKLEY: I did send you my affidavit, and also just as Mr. Ford had offered, I sent you the redacted statements showing the actual time entries and the amount of our expenses as well and offered at that time to send you, either by hand delivery or e-mail, the full narrative versions of those time sheets.

THE COURT: If you-all can do that by e-mail -- if you'll send it to my clerk? It's just MIElawclerk. I think you-all know that. If you'll send those in that regard. I'm going to go through those.

MR. FORD: And Your Honor, the last issue for me would be -- obviously the affidavit was submitted a couple of months ago. We've been working on the lien issue for the last couple of months. If Your Honor is agreeable, we will update our affidavit with the latest couple of months of fees.

THE COURT: Yes. You can update that. All right? And then that begs the next question, which is really the entry of the final judgment and leads

right into that one as well. There was a proposed order, I guess, to lift the stay and to enroll the judgment.

My understanding was you-all were ready to pay those funds into the Court. My question for the Defendants then is: Is that still you-all's position? Are you-all ready to do that?

MR. FORD: Yes. We filed a motion to deposit the funds. There is an important issue that Your Honor still needs to decide, I think. It will matter ultimately. We filed the motion to deposit funds. We have updated that in our proposed order with the amount of the award and interest.

Obviously, the issue of attorneys fees that might be subtracted of that amount is yet to be determined, but at the end of the day, also, we've got to determine whether or not interest on that amount runs or not, and we've briefed that and argued it.

Just briefly, Your Honor, case law would indicate, I think, that the payment of money into Court, should stop interest from running while, you know, the appeal is pending and the judgment is not yet final, not through the appellate process because it provides benefit to both parties.

The payment of funds into court, guarantees a recovery to the Plaintiff should they hold onto their judgment on appeal. It is of benefit to the payor, the judgment debtor, is that it stops interest.

Now, TCC has, I think, cited to a case that talks about contract interest running. That case arises in the context of supplemental proceedings. We're not there yet, and in fact, if we're allowed to pay money into the Court and interest stops, that would obviate the need for supplemental proceedings coming back to you at some point down the road because the money would be in Court. There wouldn't be the need for those proceedings.

We think that case is not pertinent in that the rule doesn't provide any benefit to the judgment debtor if interest continues to run. So I would question whether or not the owners or the HPR would actually pay the money if interest continued to accrue.

So our position is that we be allowed to pay whatever the final net amount is and that once that payment is made that that would stop interest for the life of the appeal or until the case was resolved. Wouldn't that be great if we could then resolve the case?

THE COURT: I'm with you on that one. Mr. Rannik?

MR. RANNIK: Thank you, Judge. Judge, the case the Court is referring to is called Renaissance Enterprises v. Ocean Resorts. That's 334 SC 324, and that's a 1999 Supreme Court case. I quote from it.

In conclusion, any deposit into Court, pursuant to Rule 67 does not stop the accrual of interest provided by contract. What Rule 67 does is say, 8.75 percent interest on judgments. You pay it into Court, that interest then stops, but if there is a contractual interest, you're late paying us the money you owe us, whatever it is, that does not stop under Rule 67 of the Supreme Court. It is said plain as day.

In a different context it doesn't really matter. The ruling is not based on the fact that this is supplemental proceedings. It's a blank statement of law, that a deposit into Court does not stop the accrual of contract interest.

THE COURT: You-all's contract called for interest, or is this a prejudgment amount?

MR. RANNIK: This is contractual interest, Judge.

THE COURT: What was that rate?

MR. RANNIK: I believe it's (technical interruption) percent.

COURT REPORTER: I didn't get that.

THE COURT: We missed that.

MR. RANNIK: I would also --

COURT REPORTER: I did not get that.

THE COURT: We didn't hear what the answer was, Mr. Rannik.

MR. RANNIK: I'm sorry, Judge. 4 percent.

THE COURT: 4, okay. Thank you. Go ahead.

MR. FORD: Your Honor, I'll just refer you back to the -- hold on one second.

The WebEx was yelling at me. Sorry.

If you read the award from the panel, I think they make it pretty clear, how this is supposed to work, that interest runs until payment. Payment into Court would be the equivalent of payment pursuant to both the award's language and also the case law that we cited to you in our briefing, Your Honor.

In other words, payment into Court would equate to payment for the benefit of TCC in this regard, and even according to the panel's ruling would indicate interest to stop at that point. Otherwise, there's just no benefit to paying the amount into Court. They can hold on to it and earn

interest themselves.

Payment into the Court guarantees that a recovery should then prevail on the appeal and hold on to the award and gives the benefit to the owners and the HPR of stopping interest. Otherwise there would be no point to the rule.

THE COURT: Okay.

MR. EPTING: This is Drew Epting. One thing that I think is pretty obvious, whatever this Court rules, the party who's affected -- the important thing is to rule. If you rule the interest stops. That's okay. If you rule that interest does not stop and they choose not to post the money into Court, then perhaps we get not contractual interest but the judgment interest.

Whatever you do, the record will be clean. It will be something that (technical interruption) and we'll do it all over again.

THE COURT: Thank you, Mr. Epting. I agree with you on that one. I know that's been a tough one. So what I'm going to ask that you do -- as of December when this order was submitted it was some $2.21 million was the amount of the judgment.

I'm going to ask that you-all calculate that amount through the end of this week, and then I'm

going to order that it be deposited. I frankly think that that should stop the running of the interest. I'm not the final arbiter of that. You-all can take that issue up as well.

I think there's an incentive to do this. When I think about the whole statutory scheme, it would seem to me that the rationale, and I think you-all are well aware that I do a lot of foreclosures here. The ultimate remedy -- as a matter of fact, much to my surprise, I got affirmed today in an unpublished opinion. I wish they would publish my affirmations and not my reversals.

Anyway, this is one in which I refused to allow a lender to foreclose on a mortgage because I tried to keep getting this lender to foreclose the case when it first came in. They kept asking for more time to foreclose. I finally said, I'm dismissing this case, and I'm dismissing the foreclosure with prejudice.

Two years later, after they've sold the paper to another lender, a new lender comes in and wants to foreclose. I said, No. I've dismissed the foreclosure of this case with prejudice. You can go get your debt all day long. That's sort of where this is, and that's what I think these Mechanic's

Lien Statutes are really designed to do. They're designed to make sure that people actually pay the judgment so the contractors can remain in business, so the owners can prevail and move on themselves.

So whether it's in the form of the bond or the judgment, it would seem to me that once the money is paid the ultimate remedy, i.e. collection -- how do we avoid supplemental proceedings, is alleviated to a large degree. It won't be totally, but I've been reading a lot of Mechanic's Lien cases and scratching my head as to what the nuances of them all mean, and I've got much better lawyers in this case than I am and can figure this stuff out.

Every time we get together my head spins a little bit. I just know I need to rule. So as for that standpoint, I'm sticking by my decision that I made earlier. I do think that the Mechanic's Lien was not properly filed and perfected, that as a consequence of that the owners were not timely served with the Mechanic's Lien, and therefore by operation of law the Mechanic's Lien cause of action should be dismissed.

That's true across the board as to all owners, not just Ms. Beatty as we addressed previously. I'm going to grant that motion, Mr. Ford, on you-all's

behalf. I'm going to order that the stay be lifted, that the funds be paid into the Court.

I would like to get an order that sort of wipes this whole thing up so that you-all can, in fact, go forward with how you-all wish to appeal. I think there's enough for each person to go their own way.

We'll have cross-appellants and cross-respondents, and I look forward to reading about this in years to come. I don't really care if I get affirmed or reversed. I just hate to get remanded. I try to make the best decision. Hopefully you can live with whatever the response is. All right?

MR. FORD: Your Honor, to be clear, would you like us to prepare a proposed order for you?

THE COURT: Yes, I would, Mr. Ford. What I'm going to order that you-all do is that you-all pay the full amount into the Court. I'm going to issue an award separately as to attorneys fees. At this point in time, it's not a setoff. You'll each sort of have a judgment as to the other to go forward and collect on those things as you go. Okay?

MR. FORD: My question on the dispositive issue, and I appreciate what Drew said earlier as

well, but in our prior proposed order on that we -- and in our motion, too -- we asked for the filing date of the motion, which was May 11th.

Obviously we've had multiple reasons for delay on a result on that motion, not the least of which is Covid, and of course Judge McCoy had it a long time ago.

We supplied another Circuit Court order that did indeed stop interest on the date of the filing of the motion. I know you said to calculate it to the end of this week. That's fine. We'll do it either way, but I just wanted to raise to you that we raised that issue and ask for that May 11th date.

THE COURT: All right. Well, unless you want to stop your award of attorneys fees on that date I'm not going to grant you that date either. I don't think you want that one. All right? I was not going to give you that date anyway.

If you want a firm ruling on that, I'm happy to give it to you right now. As I said, I'm an equal opportunity punisher. I don't really care. I just try to call them. Ultimately, as Mr. Epting says, they've just got to get called. You-all can go deal with it with a body of either three or five judges in front of you. I wish you-all much success with that.

All right?

Very good. I would ask for those additional attorneys fees, proposed orders to come in. It may be -- I don't know whether it's easier just to do it for February 1st. That's Monday, I think is the 1st of February. Why don't you do it through February 1st, and let's just get through an entire month and be done with it. Okay? That gives you-all a couple of days to update those numbers.

MR. RANNIK: Thank you, Your Honor.

MR. FORD: Thank you, Your Honor.

THE COURT: Thank you-all very much. Good to see everybody and some new folks, too. Take care. Bye-bye now.

(The proceedings were concluded at 3:53 p.m.)

State of South Carolina)
)
County of Charleston) C E R T I F I C A T E

I, Christine A. Smith, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 6th day of April, 2021 at Charleston, Charleston County, South Carolina.

_____
Christine A. Smith
Notary Public
My Commission Expires
May 12, 2021

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

TCC of Charleston, Inc.,

Plaintiff,

vs. CASE NO. 2016-CP-10-2955

Concord and Cumberland, LLC, et, al.,

Defendants.

_____

Hearing before the Honorable Mikell R. Scarborough, reported by Christine A. Smith, Court Reporter and Notary Public, at 10:20 a.m. on November 5, 2020 at 100 Broad Street, Courtroom 2A, Charleston, South Carolina.

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P R O C E E D I N G S

THE COURT: I've been doing a little reading. I've been doing some additional reading back there, which is why we're starting a little bit late. I want to thank you-all for the memoranda and the briefs. I've been reading plenty of law.

So we'll take these motions up in somewhat of an order. I think -- my analysis -- this is the TCC of Charleston versus Concord and Cumberland HPR case. It was referred to this Court by Judge McCoy, who referred it, I think, for all matters is the way I saw it, but she did allow for an amendment. I want to make sure what we got amended because there's Motions to Amend today.

I think factually -- my analysis so far factually -- it's been fairly straightforward. Procedurally it's real complicated. I think you-all have been to every Circuit Judge in the courthouse so far and have found your way to me for whatever reason that is.

I kind of want to get from each of you a summary of where we are in the case procedurally, and then I want to get into the motions themselves. I know I've got them from Mr. Rannik, Mr. Epting, from

Mr. Ford, Mr. Grimball, and Mr. Walden, right?

MR. WALDEN: That's correct, Your Honor.

THE COURT: Very good. And then Mr. Buckley, I've got your Motion for Summary Judgment as well. I think that's the only one I got from you; is that correct?

MR. BUCKLEY: That's correct, Judge.

THE COURT: That's as to Betty Beatty. Very good. I see you brought your sidekick with you today, too.

MR. BUCKLEY: Yes, sir. Cole Shannon, Your Honor.

THE COURT: All right, Mr. Shannon. Good to see you. Good morning.

Let me turn first to Mr. Rannik or Mr. Epting. I just want to get you-all's background factually on the case so I'm clear, and then I'm going to ask the same thing of whoever's going to argue on your behalf, Mr. Grimball or Mr. Ford.

MR. FORD: I will, Judge.

THE COURT: Very good. And then let's get into the motions themselves.

MR. EPTING: Judge, I think that was very ably stated. I have a timeline here with just a few things that I think help bring this larger picture in

focus, and it's my belief that if you can get the larger picture here penetrating it is not so difficult. So my remarks in this little timeline here will largely be directed to that. If I can approach you I will tender this to you.

THE COURT: All right, sir. Very good. Thank you, sir.

MR. EPTING: So Judge, Concord and Cumberland is a condominium project right down here on Concord Street. There are 27 or 28 units in it. Some of the units are owned -- there are multiple units owned by one owner. The construction of the original units, Judge, turned out to be almost criminal if not criminal.

Trident was hired -- and I say Trident, Judge -- TCC Trident were hired to come in and repair this. It did not go the way it was supposed to go. The project went on from July of 2014 and the last work was ultimately done in December of 2016.

So substantial completion was achieved in March of 2016. The contract with the HPR -- it contained an arbitration provision, so the HPR on behalf of the homeowners contracted with Trident to perform a certain scope of work with the architect. So Trident began performing these services, and

pretty soon it became pretty obvious that so much of this work was going to have to be done, time and material, just to keep the project moving. So that was done.

To say that it turned out to be somewhat confusing would be an understatement, and what ultimately happened is substantial completion was achieved. Trident was not being paid, and Trident filed a lien on June 6th of 2016, and amended that lien on June 10th.

The amendment, Judge, was largely to add individual unit owners, as the common elements were not owned by the regime but rather by the unit owners. I had understood that Cordes was involved in the case and somewhere in May, I would have forwarded him a complimentary copy of the suit. We had some discussions about if we were really going to need to add all of these individuals. The conclusion was that we needed to do that.

Cordes asked me for an extension of time. I gave him an extension of time. We then set out to amend the complaint to add all of the homeowners, which we did, and we then began serving -- Cordes indicated he didn't want to accept service for the individual unit owners, but he did ask for an

extension of time on their behalf, which I also gave him.

Subsequently a pleading was filed. Cordes and I came to the conclusion that the easiest thing for us to do would be to litigate the dispute about how much is owed to Trident for the underlying work, which would have been a contract between the homeowners, HPR and -- I mean HPR on behalf of the homeowners and Trident.

We agreed that we would prefer that, and we agreed on behalf of the homeowners that the foreclosure action would be stayed. So it was always understood, Judge, that the primary suit, the breech of contract action, was a prerequisite to proceeding in any foreclosure against the individuals, but that the individual homeowners ultimately owned the interest and would have to be foreclosed.

THE COURT: Did you-all have a written agreement to that effect, or is that essentially what the --

MR. EPTING: Well, at this point in time, Judge, I would say it's just Cordes and I trying to work our way through.

THE COURT: Okay.

MR. EPTING: Ultimately what happened is in

January of 2017, Judge Young entered an order that stayed the foreclosure suit and allowed us to proceed in arbitration. Cordes and I executed an arbitration agreement setting forth the terms. That agreement said that arbitration would be final and binding.

That agreement in my estimation said that the panel of arbitrators would be the party to determine prevailing fees and costs once it was litigated. It was my belief that that was the agreement.

Cordes, after the verdict came back, took a different view of that and argued that no, the fees would have to be determined in the Circuit Court, and accordingly the panel, they agreed with him, but the panel said that the agreement was such to be interpreted in terms of who was to pay their fees and Trident's expenses.

Trident was -- there was no question but that Trident was the prevailing party, and so the panel awarded all of their fees, AAA fees and Trident's expenses as part of the verdict. The verdict also included, Judge, a component for interest because interest was provided for in the contract, and so this $2 million plus verdict was bumped up another $150,000 because of these fees and costs.

And so that's sort of part one. What I think,

Judge, is important and what this is ultimately going to boil down to is Trident is simply trying to conclude the case that it has partially tried and to get the rest of its relief, the fees that it thinks it's entitled to.

If you keep in mind that one fact, so much of this in terms of the party's motivation as to why we do what we do, will make sense. So when the arbitration panel ruled, Trident asked to lift the stay so that we could proceed meaning proceed in collecting the attorneys' fees.

Cordes had by then filed a Motion to Reconsider before the panel and filed a second Motion to Reconsider before the panel and so the panel's order that was tried in January of '17 -- no, '19 -- the panel issued its first order in April but because of motion practice, a final order was not achieved until August of 2019.

I feel more comfortable, Judge -- this HPR, the homeowners, I find I can get confused. I refer to it as Cordes did this and Cordes did that is purely a question of -- it's easier for me to remember it that way. So Cordes moved within the time to vacate the panel's award. At that point in time we also asked that we be allowed to proceed and

finish the case that we thought we had begun because of course the Breach of Contract action is now finished.

So Cordes' view was no. If the award has been done then I'm not interested in lifting the stay, and so this went on for some period of time, Judge, as well. Ultimately Judge Jefferson denies the Motion to Vacate in January of '20.

Cordes filed another Motion to Reconsider which she denied in May, so that's kind of the history of how we got to this place. The parties then, Judge, realizing, okay, there's nothing more to do with this, and what is our next strategy. Well, my strategy, once again, was I think I probably need to be over in Judge Scarborough's courtroom because I need to prove that I can foreclose so that I can get my fees.

Cordes came up with this ingenious idea that perhaps he could get some ruling out of the Circuit Court that would dismiss all claims against the HPR and somehow he could appeal, and what then happened is he filed a motion to pay the amount of the arbitration award, the 2.06, not the interest, fees, and the like, just the judgment.

What then occurred, Judge, is he took the

position that because the judgment had not been vacated that he could appeal. The statute that allows for interlocutory appeals in arbitration only grants the right to appeal from a confirmation of an award.

Now, I'm going to do this for emphasis. They taught me this when I was like 27 or 28. I'm going to come over here and stand so that you can say: Oh, this must be something that I'm supposed to pay attention to. We deliberately did not move to confirm this. Recognizing that the minute we did that it would be off to the Supreme Court, and here I am, Judge. I'm just trying to finish my case. Okay? I'm just trying to finish my case. I don't want to go to Columbia. So we moved to dismiss that appeal. All right?

THE COURT: As interlocutory?

MR. EPTING: Right. And of course, Judge, it was pretty obvious that it would be dismissed and it was dismissed.

Now, Cordes had also persisted. There's another little wrinkle here, Judge, and in a case like this with great lawyers, you have to do what -- what was the fellow's name? He was the CEO of Intel. Anyway, he wrote a book, Only the Paranoid Survive.

All right?

So while Cordes and I agreed to try this under the South Carolina Arbitration Act, the Federal Act would also apply because it's interstate commerce. The Federal Act requires you to move to confirm within one year. So I thought as sure as I don't move to confirm, they will file a motion that the order of the panel is of no impact, and I'll be in another skirmish over whether or not the Federal Act and its Supremacy Clause means because I didn't comply with that act we have no judgment even from the panel.

So I moved to stay my own motion because in filing it I've done what the statute said. I moved to stay because of course, Judge, I don't want to appeal. They have the verdict.

THE COURT: Okay. I'm with you.

MR. EPTING: All right. One of the reliefs that Cordes has asked for is for you to decide my motion to confirm even though I've asked that it be stayed and now you know the reason for it, and I would ask that it be stayed.

So the appeal is dismissed, and in the meantime we're now in front of Judge McCoy. What we do, Judge, is we file a Motion to Amend our

Complaint, and I'll come to that in just a moment, Judge. By this time you have Cordes' motion to pay money into Court. He's moved for Summary Judgment and perhaps Motion to Dismiss the HPR on the basis that the HPR doesn't own real estate and therefore can't be sued and so they need to be dismissed. Ed has decided to join in and file a Motion for Summary Judgment on behalf of his client, Betty Beatty.

The basis of his motion, Judge, is the Statement of Account listed the date of substantial completion rather than the date of last work, and the date in the statement of account is like six days longer than 90 days, and so he filed the motion on that basis.

With all of that we then appear in front of Judge McCoy who listens very intently. I think -- not because she recognized that she could get this off of her plate -- I think she just concluded that the fellow over there in the Master in Equity's office, this is what he does for a living. Why am I getting myself all involved in this?

So what she does on her own motion is she grants our Motion to Amend. There is also discovery, Judge, that is outstanding on the basis of the amendment, and I will come to that in just a moment.

The whole case comes to you. Largely, Judge, everything that is before you is what was before her with one exception. We moved to amend the statement of account not knowing that it was necessary since the statute says since the date of last work, and you can put in the statement of account that the last day of work and that would be binding, then you wouldn't have any trouble meeting the lien requirements. You just put a date in there.

So anyway, we moved to amend the statement of account, and so that's what is in front of you. Here, Judge, you asked the question procedurally where --

THE COURT: Let me stop you there. The Motion to Amend that Judge McCoy granted was --

MR. EPTING: -- to amend the complaint.

THE COURT: The complaint?

MR. EPTING: Right.

THE COURT: And that was the first or second amended complaint?

MR. EPTING: Yes. I think it's the second.

THE COURT: Okay. All right.

MR. EPTING: So Judge, I've been giving you a litany of facts. I'm getting ready to parse those in a procedural way. Is there something that you want

to ask me before I begin the parsing?

THE COURT: I think I'm just trying to get straight on which motions were being covered so I think we've got that. So before me is the second amended complaint. There's also the issue about amending the statement of account.

MR. EPTING: Right. And what I'll do, Judge, is I'll break these things down for you, and when we had our status conference, I said to you that in this case, in my opinion, that all of this stuff needs to be decided, but the order in which it gets decided is really the most important thing.

So let me first -- rather than starting with the HPR, take one piece of this case that is before you, which is probably ripe for decision on the papers that have been filed before you. It is this: The basis of Ms. Beatty's motion is that the statement of account says that the last day of work was on whatever date -- more than 90 days ran before she was served.

THE COURT: Okay.

MR. EPTING: We have filed an amendment to the statement of account with affidavits, and time and material records, Judge, that emphatically show that work was going on on this project really up until

December of 2016. Here Judge, is something that you don't normally find in these cases. The panel actually awarded money to Trident for the work that was done in December of '16 on the basis of the time records and the material records for work that was provided under Trident's contract to the homeowners establishing and ruling that the last day of work was sometime in December of 2016.

Part one, a resolution, Judge, of the date of last work would dispose of the issue between Ed's client on the summary judgment, but it also, Judge, would dispose of 90 percent of the services because most of them occurred in a very short period of time after the lien was filed. So if the last day of work was even June, then all but three or four of these people will have been served timely.

THE COURT: The lien was first filed in like March, was it not?

MR. EPTING: No. No. The lien was first -- the substantial completion was March. The first lien was filed June 6th, and the amendment was June 10th.

THE COURT: I've got it.

MR. EPTING: Now, let me put a hanging chad on that, Judge. One of the arguments that I would make if necessary is that it's serving the HPR, the

homeowners' regime. All of these people were served, and they had the authority, and indeed I'm going to give you some of the bylaws on just how substantial the HPR's authority is with regard to this case.

And then there's the question, Judge, in this case, a few things -- some of these residents decided it was time for them to move back home. They changed the code so that the process server couldn't get in, and one woman even has an affidavit devoted to all of her goings on with the process server in order to avoid him.

My suggestion is perhaps we not get too far down that road because it concerns three or four people, but that a decision on this statement of account and the last date of work would take care of Ed's motion and would clear the decks for us to proceed forward.

So procedurally, Judge, it's my suggestion that you think of this as okay, this is one piece of it. So you have a piece to amend the statement of account. I'm standing on the shoulders of a giant there. I just found an order out of Your Honor saying that such should be done because that's the way the statute reads, and it should be granted liberally. That whole lien and what's in place of

the lien and the foreclosure is done.

The second piece of this, Judge, involves Cordes' motion, and here Judge, I'm just going to tell us a story. The documents that I think are important are here. I may refer to one or two of them. Of course things change in the law. In this case, the bylaws between the HPR and homeowners requires the HPR to discharge liens. That's a requirement in the documents.

Well, I wish, Judge, that I understood all these things in the beginning and I could have made a note of all of that when I first filed this lawsuit. I didn't realize that until we got a little further down the road. It became significant to me in this way. I don't pretend to know the answer, Judge. That's why we have judges who are steeped in equity.

This HPR has all sorts of intangible rights and powers under this operating agreement and bylaws. So what happens if you decide, yes, you're entitled to some fees? What's the easiest way forward here?

I think the easiest way forward, Judge, may just be for you to turn to the HPR who is still a party to the suit and say, Pay them. That's what your document says to do. And that's just one of many examples, Judge. It occurs to me that there may

be some intangible right that my client has that it can foreclose on the HPR.

We've never contended that we are trying to foreclose on the real estate. The real estate is owned by the individuals. That's why we added the individuals to the suit. Cordes is still wanting to execute the I-26 strategy. He wants to get the HPR out of here, get you to order so that he can pay the money into Court and never give me a chance to prove what I'm entitled to and believe should have been established before the panel.

What I'm asking is: Judge, just help me get to the end of where I began in 2016 and haven't gotten there yet. We can do this in this fashion, and then when it's all over if they really think they have an appeal they can appeal. So there's nothing about HPR's Motion for Summary Judgment.

There's discovery outstanding as part of Judge McCoy's order. It's one of the reasons she granted the amendment noticing that discovery was ongoing, and so there's nothing to say that that motion just can't be postponed and he could make it at some later date.

What I would say, Judge, is it will be a lot easier to look at that motion and what's the right

answer to that motion if we know what your verdict is in terms of how much money has been awarded, and then we can figure out -- all right. Do we need the HPR? Don't we need the HPR? If we do, they're in the lawsuit.

There are a lot of other bells and whistles, Judge, on why the HPR ought to stay in this lawsuit. I think I've picked a pretty handy one, a fairly simple one to grasp. I've been talking a long time, so if you have questions, again, I'll be happy to address them.

THE COURT: Well, I do have a couple. So what we're talking about here, and I don't want to make the argument, but I want to play devil's advocate for a second. The statute refers to -- the Mechanic's Lien Statute says you've got to go after the owners of these condominium regimes, right?

MR. EPTING: Right.

THE COURT: What I like to refer to as communal living quarters, so everybody owns a piece of the pie. Nobody owns the whole thing. Everybody owns a piece of the pie. Originally this was done. That's where I wanted to go back to. The order that basically stayed -- that allowed you-all to go to arbitration and stayed the matter was Judge Young's

order dated 12/30/16.

It says, The parties consented to an arbitration of dispute between the Plaintiffs and the regime and to stay the Plaintiff's foreclosure request as to the remaining Defendants and names them all. Right? As to those Defendants it's stayed to allow the arbitration to proceed. You've signed it. Mr. Ford's signed it. Mr. Molony signed it. Mr. Ford signed it on behalf of both the HPR and as to this motion for the attorneys for the remaining Defendants, not claiming to represent him, but as to this motion he was covering that issue there.

So that's what got us over to arbitration. You-all fight for two years over an arbitration, and you get your final award in August of '19 is what you've got.

MR. EPTING: That's right, sir.

THE COURT: The arbitration panel makes a ruling that they can't award attorneys' fees. My question to you is: Was that issue before them at the time, and if so how, for them to make that ruling?

MR. EPTING: Well, this is where, Judge, Cordes might have just outsmarted me. I thought the agreement itself said that the question of

entitlement to fees itself would be decided by the panel as well. It could have been worded a little more articulately.

What the panel said was: We believe, based on Paragraph 5 that you guys drafted, that we can award the arbitrators fees, the lawyers fees, AAA's fees and Trident's expenses, but that the other fees are under the statute and are something that is going to have to be decided by -- and they don't say that it has to be decided by you. They just say, It's not with us, and our order is not with prejudice to you to make your argument. Cordes can make any argument that he wants to make.

So at that point in time, I guess the statute means what the statute means. It says, If you prove your entitlement to fees in conjunction with your foreclosure you're entitled to them, and so this is a unique case, and I thought we had bundled all of this stuff up in one place, and now we've decided that, No. We need the Master in Equity involved to finish this up. Judge McCoy seemed all too happy to assist in that regard, too.

THE COURT: Thank you. I'm happy to be here. My question, though, boils down to whether or not they have ruled on that issue. That's my question.

MR. EPTING: You mean in terms of entitlement to fees?

THE COURT: Correct.

MR. EPTING: No. They specifically say, We're not addressing it. It's not before us. It's something that's going to have to be decided somewhere else.

THE COURT: Okay. They clearly didn't award it. You're saying that they didn't even address it?

MR. EPTING: They specifically said, Judge, they were not getting involved in it in reaching it because they thought that the parties didn't give them the authority to reach the issue, and it would be something that would have to be decided pursuant to the foreclosure aspect.

THE COURT: All right. Very good.

MR. EPTING: Anything else?

THE COURT: I think those are my questions there.

All right. Mr. Ford? If you take any issue with sort of the procedural aspect of it I would like to hear that, but my concern being -- I want to make sure the facts are fairly clear. Before I can even get to a summary judgment I have to be clear on the facts of the law.

I've been reading the facts, and from what I can tell, Mr. Epting's laid those out pretty clearly. There may be a difference in interpretation. I recently was reversed by the Supreme Court that said that even if you have an agreement you're going to have a difference of opinion as to what the agreement means. So that's going to lead to some trees getting cut out on Sullivan's Island, but that's another story for another day.

MR. FORD: Understood. I don't think I need to get into too much, but there were issues of argument that apply to the motions, which I think we can deal with by motion. Certainly this -- we're here because we had an agreement to do it a certain way, so there appears to be a dispute about what the agreement says.

THE COURT: Okay.

MR. FORD: But the motions before you are pretty clear. The order in which they were filed are pretty clear. On behalf of the HPR, we need this Court to finish the job that was begun by the panel. They made a couple of substantive rulings. They didn't take the next step and they expressly dismissed the foreclosure cause of action asserted against the HPR, and they didn't take up the

attorneys' fee issue thereafter. So they've made a couple of rulings and then they kicked it out to this Court. We're prepared to deal with that in accordance with the agreement between the parties and the law.

THE COURT: All right. Anything further? Are you ready to start arguing your motion?

MR. FORD: Again, if you're asking for input into the order of motions, I would say that they should be taken as they were filed. Mr. Epting spoke about the issue with regard to particular unit owners and their motion which was the last filed motion to amend their statement of lien.

Ms. Beatty has a motion and she's represented here by Mr. Buckley, but the issues as they relate to the other -- all the owners, they've asked for discovery on those topics. They're asking or asserting a Motion for Summary Judgment on the date of service. That's not for this hearing.

We can talk about whether or not he might be entitled to amend that date on the lien and we can deal with it, I think, properly in the order to comply.

THE COURT: Let's talk about that. One of the cases I read in preparation for today is this case

that came out this summer, Kitchen Planners versus Friedman. Are you familiar with that one?

MR. FORD: No, sir. What is the cite?

THE COURT: 2020 WL 3551777. It looks like you are familiar with it?

MR. EPTING: We are.

THE COURT: So in that particular case -- one of the issues I was wrestling with is the ability to go back and amend the time for the lien to start. Okay?

In this case, Judge Hood in Richland County ruled that the granted summary judgment -- there was a Motion to Dismiss. An affidavit was filed, and at the hearing summary judgment was granted. There was, in fact, an affidavit in response to it. However, the issue that kept coming up in this case as I read the Court of Appeals opinion, Chief Judge Lockemy, they kept saying -- they kept talking about how they didn't do this and didn't do that. They'd go to the Ferguson Fire case. For the lien to become valid the lien must be perfected and forced according to statute. That's what we're going to do here.

The question became one of when was the lien filed and served and whether or not additional work that was performed allowed for an extension of time.

As to timeliness, Kitchen Planners -- let me go back.

Minor imperfections and mistakes in the complaint to foreclose a lien did not affect its validity. Allegations in a complaint to foreclose a lien may be amended, however it's well settled that the parties are judicially bound by our pleadings unless withdrawn, altered, or stricken by amendment.

As to timeliness, Kitchen Planners contends that it timely served and filed its Mechanic's Lien. An amendment could easily cure the slight discrepancy between the date alleged in the lien and the actual date of the last work. I'm on -- this is essentially, at least for me, Page 3 of this, West Law citation, Page 8. Timeliness is the section: They could easily cure the slight discrepancy. Kitchen Planners asserts it timely commenced the suit less than six months after last work was performed. They disagree. We find Kitchen Planners bound by the dates asserted in its pleadings and on the face of the lien. They held them to the date that was in there, and then they talked further on and they say, Well, had they asked for it to be amended they could have amended it. Clearly that's exactly what Plaintiffs are seeking to do here, seeking to amend the date of last work to be performed.

MR. FORD: In their original complaint they asserted -- there was the term, substantial completion utilized earlier. There was a factual discrepancy on that issue. Then they also pled final completion.

MR. BUCKLEY: Your Honor, I hate to interrupt. This is really my issue.

THE COURT: Okay.

MR. BUCKLEY: Can I address it?

THE COURT: Sure. Sure. I'm glad to hear from you, Mr. Buckley.

MR. BUCKLEY: Ed Buckley for Betty Beatty. We're not talking about amending a statement of account. It's simply a statement signed by somebody. We're talking about a verified affidavit. I'm not talking about one verified affidavit. We're talking about two.

We're not talking about a complaint where they want to amend the complaint. We're talking about a verified complaint under oath. We're talking about a second verified complaint which is the first amended complaint. So there are four affidavits before Your Honor, four issues with sworn testimony of President John David Griffith, the President of TCC under oath testified not that the date of substantial completion

was March 17, 2016. Instead he testified that the date of last work, the last day work was performed or materials were provided to the property described in Exhibit B was March 17th, 2017. He swore to that in his statement of account. He swore to that in paragraph -- he swore --

THE COURT: March 17th of '16, right?

MR. BUCKLEY: Did I say a wrong date? It is '16. I apologize, Your Honor. In the amended complaint that was filed on June 10th in Paragraph 10 he says this: That in accordance with their agreements the Plaintiffs furnished the agreed-upon material and services to the Defendants which were used in the work and on related structures on the property, that materials and services improved the property, and the last date of such furnishing of materials and services was March 17, 2016.

That identical language was in Paragraph 9 in the original complaint. Let me read to Your Honor the language of that verification. It's not what I'm used to seeing. What I'm used to seeing is a verification that says something like this: I am Joe Blow. I am authorized to sign this affidavit or sign this verification, and I know the facts of my own knowledge and information, and I swear that the facts

above are true and correct except as to those matters that are alleged in my information and belief. As to those matters I believe them to be true.

That's not what this says. What this says is -- again, there's no allegation upon information and belief. There is a stated fact. It says, I, John David Griffith, being first duly sworn declare that I am an officer of the Plaintiff, TCC of Charleston, and have been duly authorized by said corporation to make this verification. We're all familiar with Rule 30(b)(6) which allows a corporation to designate a witness to testify on its behalf. What's the import of that?

The import of that is people get to find out what the corporation's position is. And why is it important? Because by designating someone to testify on behalf of the corporation, the corporation is bound by that testimony. This is testimony. It is not a pleading. It is simply filed with the Court. It is attested to as true.

It says, I have read the forgoing complaint and know the contents thereof, and that based upon my own personal knowledge the facts as alleged therein are true and correct, period.

We're not talking about amending a pleading.

We're talking about an effort to change the date and statement of account that's been verified twice, and it's an exhibit to two verified complaints. It's been attached as Exhibit A in the original complaint, and it's attached as Exhibit A in the amended Complaint.

What we're talking about is a sham affidavit situation. Our courts have given us guidance on how that issue should be addressed. There are six factors that you have to look at. May I approach the bench, Your Honor?

THE COURT: Certainly.

MR. BUCKLEY: I'm handing Your Honor a copy of the case of McMaster versus Dewitt, and it's 411 S.C. 138 and 767 S.E.2d 451. That's a 2014 case. I've highlighted it for the Court and I've highlighted it for everybody else on their copies as well. The summary judgment said, At what point in time did we first hear that March 16th -- March 17th, 2016 was wrong? We don't hear that until I move for summary judgment. I moved for summary judgment on May 8, 2020.

The very first time we hear those verified statements, that testimony of TCC is false or inaccurate is on May 22nd, six days before our

hearing on May 28th. That's important because that's one of the six factors that the Court's going to be required to look at.

Keep in mind, Your Honor, that we've already argued this for probably three hours.

THE COURT: Before Judge McCoy?

MR. BUCKLEY: Yes, Your Honor. Yes. The most recent filing, to amend the statement, was filed October 1st of this year. That was five months or four months after we've already argued this. Under Subsection B of the Court's opinion in McMaster -- I think it's the third page in, fourth page in -- at the bottom of the page it says that a trial court may exclude an affidavit when it is submitted to contradict the party's own prior sworn statement in an attempt to create a sham issue of material fact.

It says, Our Supreme Court delineated the following considerations for, quote, "Distinguishing between a sham affidavit and a correcting or clarifying affidavit," close quotes, and then it lists those six factors.

They are: Number one, whether an explanation is offered for the statements that contradict the prior sworn statements; number two, the importance to the litigation of the fact about which there is a

contradiction; number three, whether the nonmoving party has access to this fact prior to the previous sworn statement; number four, the frequency and degree of variation between statements in the previous sworn testimony and statements made in the latter affidavit concerning this fact; number five, whether the previous sworn testimony indicates the witness was confused at that time. Finally, number six, when in relation to summary judgment the second affidavit is submitted.

Here, let's look at each of them individually, each of those criteria individually. TCC has not offered any explanation as to why it's stated March 17th, 2016, was the last date materials or labor were supplied. They now come in and say that that was the date of substantial completion. That never appeared in this record on this motion until October 1st. That's contradicted by the specific findings that are unappealed in this case by the arbitration panel. The arbitration panel found that substantial completion was March 8th. So we know that's false.

We know it's false that they're now alleging that they believed that it was March 17th. It was March 8th, a week earlier. They got interest from

March 8th awarded by the arbitration panel. More importantly, they didn't give one false statement or one incorrect statement as they alleged. They gave four prior statements.

The second criteria is the importance of the fact about which there is a contradiction. The Mechanic's Lien Statute, Your Honor, is -- a Mechanic's Lien right is a right created by the statute. The rights provided by the statute are only available to parties that strictly comply with their requirements of the statute.

In doing so, in trying to comply with the statute, the Plaintiffs made a number of errors. First, they only sued the HBR. That really isn't germane to what I'm arguing, but they clearly did not have a right to do that.

THE COURT: Initial complaint?

MR. BUCKLEY: Correct. And there is only -- the only right that you can foreclose in a Mechanic's Lien Statute is a right to foreclose on a real property interest. You can't foreclose on a bank account. You can't foreclose on an automobile. It's only a real property interest, and because it's a real property interest, the Courts are very strict on the way they construe these things. We hear it all

the time: God ain't making no more land. We all know how important land interests are.

There is no more important fact in timing, which is where all of these cases fall -- the time is what either allows or disallows these liens. All the cases we see -- the matter of missing a deadline by a day, you know, you're out. Here, as of June 10th, the date of the first filing, that's five days late on the 90-day requirement from March 17th, 2016. They served my client on June 22nd.

June 10th, is not five date late. As of June 10th, the day they filed, they had five days to serve my client. I apologize. They served my client on June 22nd. There's no question as to whether or not that was late based on the sworn testimony of TCC.

Regarding the third consideration was whether the nonmovant had access to this fact prior to the previous sworn testimony. Obviously Mr. Griffith clearly had access to that fact. He's provided an affidavit -- an affidavit saying he had personal knowledge of it, and he's very proud of the fact that he's president of the corporation, and that he was involved in this project since day one.

As to the fourth consideration, frequency and degree of variation between the deposition testimony

or sworn testimony here, and the statements in the affidavit, you can't get any more contradictory than where we are right here. March 17th, 2016, is the last date. No. No. No. We didn't mean to say it was the last day four different times. We instead meant to say that that was the date of substantial completion.

Number five, there's been no indication here that Mr. Griffith was in any way confused at all. All he's doing now is just changing his testimony. He provided an affidavit on October 1st after we've already argued this thing stating that what he really meant to say was date of substantial completion in all four prior sworn affidavits.

He's actually ignored the fact that in his corrective affidavit he's actually ignored the fact that he was sworn under oath four different times. He's just acting like it was just a document that I signed. It's no big deal.

Finally, when was the corrective affidavit filed? The first one by Mr. Tomlin (phonetic) was filed six days before we argued this motion on May 28th. The latest one was filed October 1st and it was signed sometime in late September. I think September 29th, 2020.

If you look at all those factors, Your Honor, I think the Court is compelled to reject any proposed amendment just on the basis of a sham affidavit announced, but that's not the end of the inquiry as far as I'm concerned. You know, we had a memorandum we filed on May 8th of this year, and then we received a response on May 22nd, and then I filed a reply to that response. We argued what we agreed were issues that had been raised among those various memoranda on May 28th.

Now we have a separate set of arguments being made and a document that's been filed October 1st. I didn't file a response to that because I didn't want to file a written response. I've seen what's happened before. Every time I do that you get another movement. Well, we need to add this. We need to add that. I'm trying to hit a moving target.

Targets can't move legally, and here's why. There's a case, Your Honor, called Preferred Savings and Loan Association versus Royal Garden Resort. I think I have copies of it.

In the Preferred Savings and Loan case, Your Honor, which is 295 S.C. 268, 368 S.E.2d 78. It's a 1988 case. On the second page, under subheading II, or heading II, the Court analyzed the case of Willard

versus Finch. It noted that the contractor made a mistake in his notice as to the date of ceasing work. For purposes of the timing of the suit, he asserted he ceased work six days later than the date specified in his notice.

On the following page, the Court says in the second full paragraph at the end, because the party asserts in his notice that the work has already been performed, the date of cessation of the labor for which the lienor seeks payment, must be a date before the notice of lien is filed and not after. They refused to allow the lienor to change the day in his notice.

Here Your Honor, we have more than just that. We have a verified complaint. There is no reason they had to file a verified complaint. They chose to do that. There's no reason they had to file an amended verified complaint. They chose to do that. They are required to file a verified statement of accounting. They did that. Now what they want the Court to allow them to do is: We don't want to put any date in there. Well, guess what? We're here for summary judgment, and they still can't tell Your Honor under oath what the last date of service is, and they shouldn't be allowed to.

That's our position on the changing of the date of last work, Your Honor, and it's not date of substantial completion. They didn't ever say it was date of substantial completion, and that's not accurate because the Court or rather the arbitration panel found that it was March 8th and not March 17th. Thank you.

THE COURT: Mr. Buckley, you distinguished between substantial completion and the last day of work. Doesn't the statute talk in terms of the last day materials or work are furnished?

MR. BUCKLEY: Correct. That's my position. That was their position. That's what they stated. Now they're trying to say, Well, I didn't mean to say in my verified complaint and my second verified complaint and my first verified statement of account and my second verified statement of account. I didn't mean to say the last date of furnishing materials and labor was March 17th, 2016. I really meant to say that was substantial completion. If they did that that doesn't comply with the statute either, Judge. Get it?

THE COURT: I'm with you. All right.

Mr. Epting, do you want to be heard on that? Mr. Buckley preempted Mr. Ford.

MR. EPTING: Just a couple of things, Judge. Of course Ed wouldn't have been part of this trial.

THE COURT: Only representing one of the homeowners.

MR. EPTING: Right. He was out. The notion that when the last day of work occurred, is something that he only learned, and maybe he only did learn it, Judge, but the whole case was tried for a solid week with evidence going into the record in support of Trident receiving money under its contract for work that was performed in December.

I would think the Court didn't object to it. It was tried and the panel ruled that yes, you were entitled to be paid for that work.

THE COURT: You-all tried the Breach of Contract claim, right?

MR. EPTING: Right. We tried the Breach of Contract, but of course the question became, What's part of the contract, and what work were we entitled to be paid for? Well, the work that we were still doing on this project, we were still doing in December of 2016. So there was ample proof at the trial that the actual date of last work was different than what was in the affidavit. It would not have been any surprise to Cordes that there was work on

this project long after that time.

Number two, Ed makes the point, Judge, that nothing was amended here until the last day. One of the things that you have in your package, Judge, is Tab 3.

THE COURT: All right.

MR. EPTING: When the panel ruled, we began asking for the ability to move forward in this lawsuit. Cordes opposed it, and not only did he oppose it, it wasn't until Judge Jefferson asked him in 2020, Do you take the position that you can move forward with your motion and not lift the stay? And she ruled, I think, Judge, for the first time in May.

So the notion of filing anything in this case, it could never have been done until the stay was lifted. So yes, the timing is a little upset. It's not what we would have liked to have done. We would have liked to have moved forward far sooner, but if you have a stay in place and the other side won't agree to lift the stay, all you can do is ask a Court to do something about it and we did. Cordes was not interested in that.

The other thing, Judge, and I don't know how much you want to be inundated, Ed wants to make it that this is -- the date of substantial completion

couldn't be the truthful justification for what the date of substantial completion was. The panel reached one conclusion. My client had another conclusion. The HPR had yet another conclusion.

These dates of substantial completion were somewhere between March 8th and March 17th depending on which party you were consulting with, so I would say to you, Yes, John David's confusion is unfortunately what brings us here. He's not a lawyer. That's the way he sees it. That's what runs him getting paid. He said, that that was the last day, but we can say empirically here, Judge, without question, it was not the last day. That issue was tried in front of a panel, and they awarded damages on the basis of last work in December of 2016.

THE COURT: Okay.

MR. BUCKLEY: None of that is in the record.

MR. EPTING: Oh, yes it is, Judge. All the materials and the dates and the times and the labor and material sheets are in the file.

MR. BUCKLEY: The only thing that's in the record that could possibly gravitate toward what he's trying to do is a summary of -- the fact that the arbitration award says, We're awarding money for work on the stone tower.

MR. EPTING: You have the actual time sheets of the person attached.

MR. BUCKLEY: Who is that?

MR. EPTING: Heather Dye (phonetic).

MR. BUCKLEY: Bingo. That's a summary, Your Honor. They're not the time sheets. It's a summary. We don't have the underlying data. The summary is not admissible under Rule 1006. Thank you.

MR. EPTING: It was good enough for the panel, Judge.

MR. BUCKLEY: You're a little bit better suited to follow the Rules of Civil Procedure than the panel, Your Honor.

THE COURT: I'm with you on that one. Back to you (indicating).

MR. FORD: The only other thing I'd say on that issue is that we didn't try the last date issue before the panel. We had already admitted in our pleading that March 17, 2016 was the last date of their providing labor or materials to the job. As you point out that was by design, by the agreement because of all of this mess surrounding the lien situation we were trying the contract action. We weren't trying that issue. It was already resolved by our answer.

THE COURT: You-all agreed to that date in your answer?

MR. FORD: We answered and admitted the March 17, 2016 date.

THE COURT: Okay. All right. Well, there you have it.

(Brief pause.)

THE COURT: What was the dollar amount of the lien at the time the lien was filed? Wasn't it like $300,000 or something?

MR. FORD: It was originally about $1.9. They amended it to $2.3 million total lien, $2.3 and change.

THE COURT: All right. This case presents an interesting dilemma for the Court, and that is -- you've got in order for the mechanic's lien action to survive, the requirement is that you have to satisfy the statutory procedure for the perfection of the lien. The lien arises in choate from the provision of either the materials or the work that's done, and then the statutes require that -- to perfect the lien, the notice of lien has to be filed and then it deals with the owner -- it is served on the owner within a timely period and the action commenced within six months of that.

This case has had, like you say, has its own tortured procedural history. It appears to me that the -- based upon the filing of the verified statement of account, which was apparently consented to in the answer, and how this case has since then been tried, it appears that that date, the Plaintiff is going to be held to that date.

The Plaintiff's argument is a good one, and that is that we've provided additional materials and labor post that date and seek to amend its pleadings and lien to assert that. That is the issue that this court saw raised in the Kitchen Planners versus Friedman case. Again, it's relatively new. I don't have a cite on it. It was filed July 1 of 2020. It's Appellate Case No. 2017-001522. The case was argued in December of '19, about the same time all of this was going on and was filed in July. It was an $8,000 case as opposed to this $2 million case.

I do think that the statutory criteria is the same, and I think the purpose of the statutory criteria is to allow for the perfection of the lien such that it entitled the prevailing party to foreclose on the lien.

It appears to the Court, based upon the argument of Counsel for the Defendants that the lien

was set as of March 17 of '16. The action was commenced and amended in June of '16, which I find to be within the 90-day timeframe, however service of the lien on the owner was not perfected timely as it relates to Betty Beatty. There may have been some others, but I don't know that that ends the inquiry because you have got an order of the arbitration panel that seeks to be collected on.

I'm happy to hear further arguments, but I'm going to rule that the lien was not perfected according to the statute, and I'm going to deny the Motion to Amend the Notice of Lien from that standpoint. I find it's not pursuant to the statute. Mr. Epting?

MR. EPTING: And Judge, is that a ruling that we can't prove to you that the actual last day of work was something other than that, and therefore the lien is timely?

THE COURT: That's going to be my ruling, yes, sir. I'm looking strictly at the language of the statute and what has, in fact, been done, relying heavily on the verified complaint, frankly, that's been admitted to, and the parties have to live and die by their complaint, so that's the other part of Kitchen Planners, which I think is significant to the

Court's inquiry.

MR. EPTING: Perhaps details, Judge. Beatty did not admit today, number one. Number two, I think, Judge, this ruling is likely going to bar all of the dates because nobody was served, and then it presents the other problems of was there an attempt to avoid being served? Is service on the HPR sufficient? And is the ruling of the panel timely on the date of last worked, and is it something that this Court has --

THE COURT: Well, you-all tried a Breach of Contract case, and you have a substantial verdict arising from that; do you not?

MR. EPTING: I did, Judge.

THE COURT: And as you touched on the bylaws, it seems to me that somewhere along the way you-all have a right to get paid.

MR. EPTING: Well, I don't think the issue, Judge, is getting paid. The issue is the entitlement fees.

THE COURT: Right. And unless it's in the contract or granted by statute, they don't come, right?

MR. EPTING: That's right.

THE COURT: Frankly, that was the language of

the arbitration award as well. If we don't see that we're not getting there.

MR. EPTING: So shall we -- Judge, I have heard your ruling. Shall we reconvene on the question of this service on the HPR sufficient to have told the time for the lien to have been served?

THE COURT: Mr. Ford, do you want to be heard that one?

MR. FORD: There is no provision in the law of South Carolina for a blanket lien. There was no service on the HPR, but the fundamental issue is, the lien can't arise as to the HPR. The lien can only be asserted against the owners, and the statutory process must be effectuated against the owners. There's no provision for it to be effectuated against the HPR.

THE COURT: It's specifically excluded if I remember right; was it not?

MR. FORD: Yes.

THE COURT: As to the lien. In order to foreclose on the lien, you have to follow through on the statutory procedure.

MR. FORD: Against the unit owners of the condominiums.

MR. EPTING: I don't think there's any

question about it has to be as to the owners, Judge. The question is as to having an HPR under the bylaws who's designated to handle all of these matters on behalf of the issues. Is that sufficient? If they're served the owners are served since they're delegated with that responsibility in the bylaws.

MR. BUCKLEY: That's not been raised.

MR. EPTING: It absolutely was raised in the brief, Ed.

THE COURT: As to whether or not service on the HPR is sufficient to serve the individual owners?

MR. EPTING: Yes, sir.

MR. BUCKLEY: Against Betty Beatty, that's never been raised, number one; and number two, there's only two ways you can serve somebody: Personally or by verified/certified mail. The only evidence in this case, Your Honor, is the affidavit taken from Angela Gross, who I think works for Mr. Epting, where she says that she delivered these documents to Johnnie Gamble on the 22nd of June to be served.

There was no effort to serve anybody other than by personal service, so even looking at that in the light most favorable to the Plaintiffs, every single owner was served after June 22nd, on or after

June 22nd.

THE COURT: Outside of the 90 days.

MR. BUCKLEY: Correct.

THE COURT: Okay. Thank you. I think that's what the statute provides for, Mr. Epting. I think there's an opportunity here for an argument to be made, and I'm entertaining it. I just don't think it it was done in compliance with the statutory procedure for perfection of the mechanic's lien as it relates to the owners.

I think clearly the Horizontal Property Regime is required to pay the judgment, at least the way I read it. There's other issues going on there. I understand that. The question of whether or not the lien was perfected -- it's an in choate lien. Whether that was perfected, I don't believe that's been done. That is my ruling in that regard.

MR. EPTING: Thank you, Judge.

THE COURT: Anything further?

MR. BUCKLEY: May I prepare an order, Your Honor?

THE COURT: Yes, sir, if you would. What else have we got?

MR. FORD: We have other pending motions, Your Honor.

THE COURT: Okay.

MR. FORD: The first is: HPR's Motion for Summary Judgment as to the foreclosure cause of action that arose -- that was filed against the first amended complaint. There was the second amended complaint filed for which we responded with a Motion to Dismiss. The issues are overlapping, but the issues are a matter of law to be determined, and it's already been discussed.

THE COURT: Okay.

MR. FORD: So may it please the Court?

THE COURT: I'm looking at your brief. That's Argument No. 1, Memorandum of Law?

MR. FORD: Yes, Your Honor. We'll address all of the pending motions as to the HPR some of which were brought by TCC. I move then substantively first on this issue of whether or not the lien claimant can serve a lien against the Horizontal Property Regime. We cited statute -- well, first we defer to the panel's finding on that issue where they address both prongs of the ability of a named claimant or any party when you sue to claim attorney's fees.

One, they reviewed the arbitration agreement and found that there was no agreement for the prevailing party's attorney's fees. They made that

finding.

Then they state in the award that the lien can't be filed against the regime. It must be filed against the owners which was just dealt with. They made that finding. And then they did that in the context of TCC's motion for attorney's fees. Frankly, also, our Motion for Attorney's Fees because to the extent that TCC asserted for the panel that they were entitled to foreclosure and to the extent they would have declined that, we would be entitled to fees.

They left those issues for the Court, having made those findings. So one way the Court can proceed is to simply take the next step and give effect to what the panel ruled and found as to the law of the case. Those issues, those findings of the panel weren't subject to a Motion to Vacate or Correct by TCC.

Setting that aside, the Court can look to the law, and read the statute itself and make its own determination that a lien cannot be asserted against the regime. We want a conclusion also. We want a conclusion as to the case against HPR which has largely been tried and resolved and the panel subject, of course, to appeal. The hanging issue is

this asserted mechanic's lien foreclosure cause of action against the HPR -- asserted against the HPR and the owners.

That has to be resolved and dismissed because there's no basis for the agreement or statute to assert that claim so we're asking the Court to dismiss that cause of action. To the extent that TCC has through its second amended claim, we asserted a breach of contract cause of action for an equitable claim. Those claims were dealt with by the panel and resolved, and so all of the claims against the HPR should be dismissed, but and primarily our focus initially was in filing a Motion for Summary Judgement on that foreclosure cause of action because that was all that was left to be resolved by the panel.

THE COURT: Okay. Mr. Epting?

MR. EPTING: Judge, there was never any effort to try any foreclosure suit in the arbitration. How the panel got off on this discussion of the foreclosure had to do with his discussion of fees. The reason that we named the individuals was because we know that's who we have to foreclose against.

THE COURT: Right.

MR. EPTING: So there's never been any issue

about the foreclosure is against the individuals and not the HPR, which is why the breach of contract action went to the panel and that alone. So that's not the issue.

The amended pleading, however, attempts to make certain that the HPR is not dismissed because the HPR may have some other involvement in this lawsuit because of their rights under the bylaws and the operating agreement, and it may be some way to short circuit us getting paid.

So I think they're a proper party, but we're not seeking to foreclose on the HPR on any kind of condominium real estate rights at all.

THE COURT: Okay. So as to the foreclosure claim, based on the Court's Ruling, you're not claiming that, but you still would address that they be a party to the action in order to bring fulfillment?

MR. EPTING: We never have, Judge, because that was the reason the pleadings amended to add the individuals to start with.

THE COURT: Okay. That I could grant. I don't have a problem with that.

MR. FORD: Both motions are addressing asserted causes of action in both complaints, which

are for foreclosure against the HPR.

MR. BUCKLEY: He just granted your motion, I think.

THE COURT: I think so. But the breach of contraction action is going to get -- where I'm going to go is I'm going to affirm that award pretty soon here. That question is before me, and that's what I'm going to do.

MR. FORD: So my question is for dismissal of that cause of action against the HPR.

THE COURT: As to the foreclosure?

MR. FORD: Yes.

THE COURT: Granted. Granted.

MR. FORD: Your Honor --

THE COURT: Do you want to confirm the award?

MR. FORD: Well, the next motion will flow from the dismissal of the mechanic's lien foreclosure action which would be the HBR's entitlement to its fees for successfully litigating that cause of action.

THE COURT: Okay. Do you have an affidavit to that effect? Or is that something you want to submit?

MR. FORD: I'd like to submit that.

THE COURT: I'm assuming we did that today in

preparation for this; did we not?

MR. FORD: We asked for the right to do it. We didn't present it. They did the same thing. They filed a motion for fees and asked for the right to, if granted, present proof of the fees.

THE COURT: All right.

MR. FORD: We would ask that they do that.

THE COURT: All right. I'll grant you that. Do you need 15 days? What do you need?

MR. FORD: Ten days is fine.

THE COURT: Ten days? I'll give you-all an additional ten days to response. Okay?

MR. EPTING: Okay, sir.

MR. FORD: My next issue, Your Honor, is with that, the award we believe before should have been confirmed because there was no pending Motion to Vacate or Correct at the time Judge Jefferson finalized and issued her ruling. We believe the statute required that she do that.

Nevertheless, it would be proper for the Court to confirm the award together with these rulings which would then allow for review of the final confirmed award and your ruling today. So we're seeking confirmation of the award that we believe should have occurred on the denial of our Motion to

Vacate the Record.

THE COURT: That was back in January or something? When was that?

MR. FORD: It's been some time, Your Honor.

THE COURT: Okay. Do you want to be heard on that one? We've touched on that earlier.

MR. EPTING: Judge, I see no reason not to confirm the award, but I would say it's different than they're paying money into Court because the question is: The interest accrues because of the contract not because of the statute, and there needs to be some discussion, if they're going to pay money into the Court what needs to be paid in order that it not trigger the higher statutory judgment rate, and so I think the award should be confirmed and we can leave for later the question of paying monies into the Court. I don't know how to address that here.

I just know that the amount that they want to pay into the Court is not the amount of the judgment because the judgment has continued to accrue interest and it was, I think, for $2,060,000, and it's now in the order of $2,150,000, and it will continue to accrue interest into the future.

Q. So we would want to make some arrangement about what needed to be paid into the Court if their

attempt is to suspend the statutory interest rate.

THE COURT: I'm with you. I'm with you. No objection to confirming the award, but jumping ahead as to the deposit of the funds, we need to determine what the amount of the judgment is at this point in time; is that correct?

MR. EPTING: That can easily be done.

MR. FORD: That can be done except for this issue -- the rule that allows us to pay, Rule 67, and there's case law that discusses why that's done. The case was cited to you in the brief. There's no reason to pay money into Court unless we can stop the accrual of interest. That gives mutual benefit to both parties in the event the appeal is taken and successful then the money's to be paid into the Court, but the benefit to us, of course, is that it would stop the interest from running. If the interest doesn't stop, there would be no reason for HPR to pay money into Court. It would just take its appeal.

THE COURT: All right. I'm going to ask that you-all brief that issue. I need to know what the finite figure is. You-all can do that in the next ten or 15 days as well. Okay?

MR. EPTING: Judge --

THE COURT: Let me figure out what it is. I'm gong to confirm the award. I want to hear from you-all on what the amount of that award is and where we stand today, and the same thing back from you-all.

MR. EPTING: Judge, we don't object to them paying a sufficient sum of money in to stop the statutory -- coming to some agreement about what that would be. The point that I'm making is that that statutory rate or paying money into the Court is in no way going to stop the interest awarded by the panel because of the contract providing for the interest in the amount of this judgment.

THE COURT: On the arbitration award, right?

MR. EPTING: Right. The panel essentially said, you have judgment in this amount, and interest continuing until such time as paid.

THE COURT: Right.

MR. EPTING: And so we don't want that interest -- we --

THE COURT: You're not waiving your right to that interest?

MR. EPTING: Right. We can deal with that later. I just wanted to make sure the Court understood that there are two sets of interest here.

THE COURT: I think I follow that. I'm going

to see if you-all can come to an agreement as to what that is. If you can't, then I'm going to have to cut the baby.

MR. FORD: Perhaps there will be an opportunity to do that, and if we can't agree then we'll have a brief and --

THE COURT: Come see me. Okay?

MR. BUCKLEY: And on behalf of Ms. Beatty, Your Honor, I think the Court should allow the payment of the money into the Court, whatever that amount is, and whatever the law requires as to accruing interest under the contract or under the statute, under the statutory post judgment rate, will be determined when all of this is ultimately determined.

MR. EPTING: I'm not sure, Ed, that I understood that.

THE COURT: He doesn't want to get individual checks from the homeowners. He's going to be pursuing a claim against the HPR. The HPR is going to go collect from the homeowners.

MR. BUCKLEY: The money is in the bank. The money is ready to be paid into the Court today. Obviously, we don't know exactly what that amount is, Drew, but we are prepared to pay money into the

Court. I think that what you want to be sure of is that the amount that is paid into court includes the amount of interest that accrued pursuant to the arbitration and the contract.

MR. EPTING: That's right. And it would be continued.

THE COURT: I think you-all are going to be able to come to an agreement on that. That's what I think.

MR. BUCKLEY: From Ms. Beatty's point of view, I just don't want a situation where we pay the money into the Court or we're not allowed to pay the money into the Court, and then from their point of view they change their tune and say, Well, now there's judgment and we confirmed the award, and so we're entitled to interest at the rate of 9.5 percent.

MR. EPTING: And we will do that, Judge, unless they pay -- I mean, if they pay the correct amount into the Court, they certainly will have, under the rule, suspended the higher interest rate.

THE COURT: Right.

MR. EPTING: There's no issue about that. But you can't pay half the money into the Court and think that you're suspending the statutory rate.

THE COURT: That's why I think you-all are

going to be able to work towards an agreed upon amount. I'm fairly confident of that.

And I think we had one other one?

MR. FORD: The last one was the Motion to Dismiss the Second Amended Complaint which again, we've sort of already addressed.

THE COURT: Yes.

MR. FORD: The second amended complaint states three causes of action against the HPR. It states the mechanic's lien foreclosure cause of action, a breach of contract action, and an equity cause of action. So our position is quite simply -- you've already ruled on the foreclosure cause of action expressly.

There can be no other causes of action pending against the HPR because they've already been litigated before the panel. The equity cause of action that they've written, we don't believe, states a claim because it's another attempt to collect attorney's fees. That issue has resolved effectively by the prior rulings, and there's no cause of action for that. Fees can only arise from an agreement or statute.

We would ask that all causes of action against the HPR be dismissed, and again, that would complete

the rulings applicable to the HPR that would allow for consideration.

THE COURT: All right. Want to be heard on that?

MR. EPTING: Judge, I think practically that's in the right direction. I would say, Could you reserve ruling on that until we see that all this other is accomplished? There is no reason for you to have to issue any ruling with regard to the HPR in the light then it won't make any difference.

THE COURT: Okay. I'll take it under advisement. I'll give you a ruling on that when you-all get the other stuff. Just for our purposes, the foreclosure is gone. The Breach of Contract, I think, is moot once I confirm the award, and then the issue of equity, it recently was brought as quantum meruit. There was a discussion about that. Now it's just a claim for equity.

MR. EPTING: It has largely to do, Judge, with us going to be able to use bylaws in the event that there's some mechanism that you could reach over and influence the payment of money because the HPR is in the suit and has all of these rights with regard to the homeowners.

THE COURT: Okay. I think you-all are going

to be able to work that out once you've come to a dollar amount on the amount of the judgment, I think that's going to resolve itself it sounds like to me. It sounds like they are ready, willing, and able to pay.

MR. EPTING: Thank you for coming down here face-to-face braving the Covid crisis and spending a few moments with us.

THE COURT: Well, I know I hurt you a little bit, but anyway, that's just the way it goes sometimes.

MR. EPTING: Sometimes it does, Judge.

THE COURT: I'm an equal opportunity punisher. They know that.

MR. BUCKLEY: I know that, Judge.

(The proceedings were concluded at 12:07 p.m.)

State of South Carolina)
)
County of Charleston) C E R T I F I C A T E

I, Christine A. Smith, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 4th day of December, 2020 at Charleston, Charleston County, South Carolina.

_____
Christine A. Smith
Notary Public
My Commission Expires
May 12, 2021

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	DOCKET NO. 2016-CP-10-2955
	)	
	)	
	)	
TCC OF CHARLESTON	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
CONCORD & CUMBERLAND, LLC, et al	)	
	)	
	)	
Defendants	)	
	)	
_____	)	TRANSCRIPT OF RECORD

May 28, 2020
WebEx videoconferencing

B E F O R E:

THE HONORABLE JENNIFER B. MCCOY, JUDGE

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INDEX TO PROCEEDINGS

	PAGE
PROCEEDINGS	3
MOTION FOR SUMMARY JUDGMENT	
Remarks by Mr. Ford	5
Remarks by Ms. Rannik	8
Reply by Mr. Ford	13
Remarks by Mr. Buckley	15
Response by Mr. Rannik	17
MOTION FOR PARTIAL SUMMARY JUDGMENT	
Remarks by Mr. Buckley	18
MOTION TO AMEND COMPLAINT	
Remarks by Mr. Buckley	22
Remarks by Mr. Rannik	23
Reply by Mr. Buckley	26
Response by Mr. Rannik	27
Remarks by Mr. Ford	28
Response by Mr. Buckley	28
Response by Mr. Rannik	29
MOTION TO DEPOSIT FUNDS	
Remarks by Mr. Ford	29
Reply by Mr. Rannik	31
Response by Mr. Ford	33
Response by Mr. Rannik	34
CERTIFICATE OF THE COURT REPORTER	35

INDEX TO EXHIBITS

No exhibits were introduced

PROCEEDINGS

THE COURT: Hi. How are you all?

THE COURT REPORTER: Judge, before we start could I ask who the call-in person is that just says call-in user?

THE COURT: Yes. I'm actually going to ask everybody for my benefit, and maybe you already have for the court reporter but just if you don't mind just announcing who you are and who you are representing for this hearing today.

MR. FORD: Your Honor, Cordes Ford ---

MR. RANNIK: --- Your Honor -- sorry Cordes; go ahead.

MR. FORD: Sure, thanks. I'll raise my hand first before I speak. Cordes Ford, Your Honor, on behalf of Concord and Cumberland Horizontal Property Regime. And I have with me also Andrew Walden and Henry Grimball who can introduce themselves.

MR. GRIMBALL: This is Henry Grimball. Good morning, Your Honor.

THE COURT: Good morning.

MR. WALDEN: Your Honor, Andrew Walden. To answer the court reporter's question I think that's Henry that is the call-in number but I'm here also with Cordes and Henry on behalf of Concord & Cumberland.

MR. RANNICK: Good morning everybody. Jaan Rannik here on behalf of TCC of Charleston, the Plaintiff.

MR. BUCKLEY: And Your Honor, Ed Buckley here on behalf of Betty L. Beatty.

THE COURT: Okay. Are we waiting on anybody else or does that -- do we have everybody covered then?

MR. FORD: I believe we have everybody covered, Judge.

THE COURT: Okay. All right. I have I believe three or four motions to be heard today in this case. And we put it off a week so that we could make sure everybody had adequate notice. And you'll have to excuse me; I flip back and forth through my computer screen so if it looks like I'm looking at you funny that's just because I'm reading something on my computer.

So we have the Motion for Summary Judgment by Concord and Cumberland. Mr. Walden requested about a half hour for that and I'm happy to hear these in whatever order y'all see fit. But I'll probably start off with that one if it suits everybody else.

MR. FORD: Your Honor, I think we should take them in order. This is Cordes Ford.

THE COURT: Okay. That's fine. Well, I'm happy to hear from y'all. I'm going to mute myself. I'm going to ask you all to do the same if you are not actively

speaking. It just helps me and it helps the court reporter as well.

MR. FORD: Understood. Okay. I'll proceed, Your Honor. Cordes Ford again on behalf of Concord and Cumberland Horizontal Property Regime. I'll refer to that entity as the HPR. I think I probably overestimated on the time for this motion. We said 30 minutes but it's really pretty straightforward with reference to a finding of the panel that heard this case and a statute.

So I'll give you a little background on the case and then get to the motion. This is a construction dispute, Your Honor. There was actually a lawsuit years and years ago regarding construction defects that was resolved and settled. And that led to a repair project where the HPR engaged TCC through a contract to conduct those repairs.

Repair process went along and got to the end and there was a dispute over the cost of the project. And that resulted in a couple of things happening. TCC filed mechanic's liens and a lawsuit to recover their claimed costs. And in that lawsuit they actually filed an initial lawsuit and then amended it to include all of the owners as part of the lawsuit.

And they brought three causes of action which are the three causes of action pending against all of the Defendants; the HPR and all of the unit owners. And the

three causes of action were for a mechanic's lien foreclosure, breach of contract, and quantum meruit.

What happened next was that the construction contract between the HPR and TCC had an arbitration provision and so the issues between TCC and the HPR were referred to arbitration. And the causes of action against the unit owners was stayed, was stayed by an order of Judge Young.

And so the arbitration proceeded. It took a couple of years give or take. A hearing was held over four days and the panel ultimately issued an award and there was and we disputed frankly the amount of the award. And so we filed motions to change and correct and whatnot with the panel and went back and forth on those issues for awhile.

Ultimately, exhausted those avenues and then filed a Motion to Vacate or Correct with the Court. And Judge Jefferson took up those motions and issued an order. We filed a Motion to Reconsider and she issued an order on that.

So we have now an award that has been reviewed by the Court and Your Honor we may appeal that. We're looking at that. But for the time being we have a lingering issue that was dealt with by the panel but which we're asking the court to enforce essentially.

And while there are a number of issues that we had with the award one issue that was not disputed an omission that TCC didn't dispute was a finding by the panel with regard to this issue and this motion which we've brought before you.

And that is whether or not a lien claimant can assert a lien against a horizontal property regime. And there is a statute directly on point at section 27-31-230 and that's the Horizontal Property Regime Act. And in section (a) the first sentence has very clear and absolute language, Your Honor. It says no lien arising subsequent recording the master deed shall be effective against the property. And I skipped over some that is just not pertinent. But that's essentially it.

And that issue was put before the panel and they wrote this in their final corrected arbitration award. They actually did correct some portions of the award and issued a later award. But their last award states S.C. Code annotated 27-3-20, which was a citation error, it should be 27-31-230 requires that TCC's lien must be filed against the property owners rather than the HPR.

And that's a correct statement, Your Honor. That's simply referencing the statute we're referencing to you and that's a correct statement. And so we're asking the Court to do one of two things. Either give effect the

holding of the panel, which hasn't been challenged or to just go ahead and enforce the statute as the panel has referenced. And that way the foreclosure action would be dismissed as to the regime according to the statute.

And that's really it. It's just -- that is the legal issue before you. And we think it again it's properly before you. We anticipate that TCC is going to make an argument that this should be before the Master.

But we responded by a reply brief that points out that there is no rule or law that provides for the Master to have exclusive jurisdiction over this issue. It's properly before you. Rule 53 does not mandate any reference and there is no motion pending to refer the matter at all.

And so again we think the issue is properly before you, Your Honor. And we ask you to dismiss the foreclosure cause of action as asserted against the HPR by TCC. Thank you.

THE COURT: Sure. All right. Who wants to respond?

MR. RANNIK: I would like to, Your Honor. Jaan Rannik for TCC. May it please the Court? Like Cordes said I'm going to refer to my client as either TCC or Trident. I sort of flip back and forth between the two. Your Honor, we're happy to be before you today. And yes

we are, to address Cordes' last point, requesting that Your Honor refer this case to the Master. We make the request for two reasons. One, the rules and the case law say that foreclosure issues are ordinarily referred to the Master. That's the language in the rule.

Secondly, what we have following the arbitration are issues surrounding foreclosure of TCC's lien. And there is also now in our proposed amended complaint an additional equitable cause of action but I'll save that for when we get to that motion.

Judge, it's so customary for the Master to decide foreclosure issues. The matters can be referred to the Master even without a court order by the Clerk of Court. Rule 53 provides this.

Now the HPR has contended that because there are fact issues related to the mechanic's lien that are appropriate to be submitted to a jury that means that there is no reality that the case has to be referred to the Master.

A couple of things with that, Judge. They're trying to have it both ways. They're trying to say first there are potential fact issues so that means that the Master doesn't have exclusive jurisdiction. But then they're trying to say there is no dispute of fact and therefore we're entitled to summary judgment. Secondly, as Cordes

referred to any fact issues around this case were decided in arbitration by the consent of the parties. Now, the arbitration was simply between TCC and the HPR but that was a practicality because rather than having 30 parties involved in the arbitration which would defeat the purpose of trying to streamline the process and make it less expensive we agreed to do it with the two parties and try and keep the costs down.

Let me back up a second, Judge. Yes, referring to the Master is discretionary. But Rule 71 says that foreclosure matters are, and I quote, ordinarily referred. The HPR hasn't shown any extraordinary circumstance here suggesting that reference wouldn't be appropriate. And so we are requesting that the Court by its own motion refer it that way. To get into the ---

THE COURT: --- is there -- I don't want to interrupt you. Is there a pending motion to refer this case to the Master?

MR. RANNIK: There is not a pending motion, no Judge. We requested in our opposition to the various motions that the Court make the reference. There is not a formal motion that has been served. We're happy to do that if the Court feels it would change the circumstance or would be necessary. Judge, as to the substance of the summary judgment argument, again, this motion arises in

the context of the remedy of foreclosure so we do think it should be referred to the Master but it comes down to the intent of the statute.

The South Carolina Supreme Court in the Eagle Lake case, the Resolution Trust case went into some detail about this. And they said look, the purpose of this statute is to make sure that the builder had not encumbered the entire building after he's already entered the master deed and he's no longer the principle property owner.

And also to make sure that any individual unit owner who is having work done on his particular unit can't say, okay well I'm not going to pay you contractor but you can lien the entire building and lien everyone else's units.

That's not the intent of the statute to say that if the HPR contracts with a contractor who performed work on the entire building that no lien can lie against the entire building. Let's go back to this Eagle Lake case. It's a very clear demonstration of what the statute was intended to do.

You had the developer who owed money to his predecessor in interest. The predecessor in interest gets a judgment against him and then tries to lien the entire building. Of course he tries to lien the building after the master deed has been entered and the Court says

no, you can't do that. You can't protect your own remedy against the whole building which is no longer under the control of the person who you have a judgment against.

But that's not what we have here. The HPR's own bylaws say that they are obligated to discharge any lien on the common elements of the building. Now practically rather than having TCC marshal funds from every individual unit owner the HPR in its own bylaws says that it has the obligation to access those funds, gather them and discharge the lien.

So any argument that the lien can't lie against the property itself is nothing more than a legal fiction and it's a burdensome one because it requires locating and serving each individual unit owner after entering into a contract with the HPR.

And finally before any foreclosure can happen in the first place -- well, Judge I sense that point didn't hit home so let me...

THE COURT: --- no, don't think so. It's hard to judge people's facial characteristics on the video chat. But you made an interesting point; that's all. Go ahead.

MR. RANNIK: And before any foreclosure can occur here, before we can try and effectuate this remedy that we put in our original complaint the entire matter of the damages has to be determined. Now Judge, we sought to

recover the amount we think we were due under the contract and the bulk of the contract. And we've sought to get our attorney's fees under the mechanic's lien laws because we filed a lien and mechanic's lien laws provide for attorney's fees. That portion has not been determined yet.

So we would also ask and say that summary judgment is inappropriate on a foreclosure cause of action before we know what we're foreclosing on because the damages haven't been determined. With that Judge I think I've said more than I need to say so I'll leave it at that.

THE COURT: Okay. All right Mr. Ford, you want to reply at all?

MR. FORD: [No response]

THE COURT: Mr. Ford, I didn't know if you wanted to respond.

MR. FORD: Yes, thank you.

THE COURT: You don't have to.

MR. FORD: I was hitting the wrong unmute button; sorry. Your Honor, just briefly, the statute can't be read any other way. And even the case that TCC cites Resolution Trust v Eagle Lake, their head note three and four says the first sentence of 27-31-230(a) provides no lien arising subsequent recording the master deed shall be effective against the property. No lien. That case

was about a mortgage lien, this is about a mechanic's lien. They are both liens. And that language is absolute.

There is simply no lien against the HPR. There are only a means against the unit owners, if any. There are other issues of fact that surround the lien being asserted against the unit owners. But a lien is a creature of statute, a villa is a regime and the statutory language here is clear. There just is no lien against the regime. And that's all that I have. Thank you.

THE COURT: Okay. What about his argument at the end about attorney's fees haven't yet been determined so therefore summary judgment is not appropriate at this time?

MR. FORD: Your Honor, that's a separate issue. The panel dealt with against -- there were three causes of action. Now they don't necessarily spell it out but the award was issued on a breach of contract action. The quantum meruit action I believe is subsumed into that.

The attorney's fees issue can arise only in two ways either through statute or agreement. They looked at those issues also and didn't award attorney's fees. And that's where this language comes from. They didn't find an agreement that allowed for attorney's fees and they

stated in their award that by statute there aren't attorney's fees, there is no lien, there is no statutory basis for attorney's fees because a lien can't arise against the regime. Those were the parties to the action was the Regime and TCC. The issues against the owners were stayed.

So, if this motion is granted and the lien foreclosure action is dismissed then at that time perhaps attorney's fees would be ripe to be discussed. But for the time being we're just simply trying to enforce the statute cited by the panel in their award and which we've discussed with you today.

MR. BUCKLEY: Your Honor, Ed Buckley. Can I be heard on that just briefly?

THE COURT: Sure. And Ed something is blocking about half of your camera but that's all right; I can see you enough. But go ahead.

[Whereupon, Mr. Buckley adjusts his computer]

MR. BUCKLEY: How about that? Is that better? All right. Your Honor, condominium units are a creature of statute and they are very unusual because the Horizontal Property Regime owns no property at all.

We've been through this issue as you're aware in construction litigation cases. Whenever the master deed is declared once all the units have been conveyed every

single unit owner owns his unit and his unit also includes an undivided interest in all of the common elements including every other unit's common elements.

The only people who own property at this project are the owners. They have been sued and they have been sued for three causes of action; mechanic's lien, breach of contract, and quantum meruit. The HPR is entitled to summary judgment because there cannot be a mechanic's lien action against the HPR. They do not own any property and that's why the Horizontal Property Act is written the way it is written.

That is also why the Plaintiffs who initially only sued the HPR and the original developer very quickly realized that and sued every single owner including my client. Whether my client owes a lien or not is yet to be determined, owes money on a lien or not is yet to be determined. But the Horizontal Property Regime does not and cannot.

And the issue of whether it is entitled to attorney's fees has been determined in arbitration. And the panel found that there was no basis by statute or contract to award those fees. And they also specifically found that the lien cannot be asserted against the property -- I mean the HPR and must be asserted against the individual owners. And so Jaan's client may very

well prevail on everything against my client and her co-owners including attorney's fees but he cannot prevail against the HPR on the mechanic's lien claim. Thank you.

THE COURT: Sure. Mr. Rannik, I'll let you have the last word. Well, anybody else before that?

MR. RANNIK: Thank you, Judge. I want to be clear up one thing. It's been said that the arbitration panel found that there was no basis to award attorney's fees. That's not really what they found. They found that the question of attorney's fees was not before them.

They said there is no basis in the order of referral or in the arbitration agreement or the panel to take up the issue of attorney's fees. And so they punted it. They said nope, we're not even going to get here. You guys can figure this out in the court and here we are and that's what we're doing.

And so when they quote this section of the statute, it's in passing, indicta in a section of them saying we don't have jurisdiction to consider this. This is for the courts; not for us. So that's the first thing.

The second thing that I would say just as a matter of policy the idea that an HPR -- imagine an HPR that has 100 units. And they contract with somebody for remediation of the entire building and they don't pay. The contractor now has to go find 100 residents and serve

all of them in order to have a mechanic's lien to protect its remedy? That cannot be the intent of the statute. That's all I got.

THE COURT: Okay. Well, let's move on to the next motion. I'll let y'all run the show. Who is next?

MR. BUCKLEY: I believe I am, Your Honor.

THE COURT: Okay.

MR. BUCKLEY: I filed a Motion for Partial Summary Judgment on behalf of Ms. Beatty. Again, the claims pending against Ms. Beatty are mechanic's lien foreclosure, breach of contract, and quantum meruit. We are not seeking for a ruling on the two common law claims; only the statutory mechanic's lien claim.

The basis for our motion is that the HPR -- the contractor TCC has filed two verified complaints each of which attest to the fact that March 17th, 2016 was the date of last provision of services or providing materials to the project.

And I want to read to you what the verification actually says because it doesn't have any wiggle room in it at all. It says: I, John David Griffith, being first duly sworn declare that I am an officer of the Plaintiff TCC of Charleston, Inc and have been duly authorized by said corporation to make this verification. I have read the foregoing complaint and know the contents thereof.

And that based upon my own personal knowledge the facts as alleged therein are true and correct.

Mr. Griffith did that in a complaint that was filed on June 6th. And he then subsequently did it again in a complaint that was filed on June 10th, the amended complaint that we're here on today.

In addition each of those complaints has attached to it a sworn statement of account that again is under oath signed by Mr. Griffith and attested to as true under penalty of perjury. And in each of those statements of account he says that March 17, 2016 is the date they last provided materials of service to the project. The arbitration panel found that -- after the arbitration panel had ruled on essentially what the amount owed would be an issue came up as to what amount, if any, of prejudgment interest would be awarded.

TCC filed a petition for attorney's fees and prejudgment interest, arbitrator's expenses and other costs and expenses of the arbitration. It took the position and actually filed a chart or spreadsheet in connection with that petition for prejudgment interest.

And attached to that petition was an affidavit of one of its employees where she stated that the interest due on each of a certain events where the contractual interest rate, which was a prime rate I think in the Wall

Street Journal, as it changed each time she recalculated the interest and all of it dated back to May -- to March 8th.

So -- and the reason apparently they used that date is because the arbitration panel found that March 8th was the date of substantial completion. It wasn't the date of last work from the date that Mr. Griffith as authorized by TCC has stated under oath on four separate occasions was the date of last work.

Ms. Beatty was served on June 22nd. That's I think 97 days after March 17th. By statute a lien exists and arises inchoate when the work or materials are supplied to a project. However, the lien is not perfected and will dissolve by operation of law unless actions are taken to perfect that lien. The actions we're talking about here today are the actions of filing and serving the notice of lien upon Ms. Beatty.

Because it is -- there is no dispute at all that the service upon her was more than 90 days beyond March 17th, 2016. Ms. Beatty is entitled to judgment as a matter of law that she cannot be responsible for a mechanic's lien debt or have a lien upon her property.

Whether or not she is or can be responsible for any quantum meruit or other claim remains to be determined and that's not before Your Honor. I cited in my brief

the case of Utilities Construction v Wilson. And I remember Utilities Construction v Wilson because it happened to be a Young Clement case.

And one of my former partners had brought an action on behalf of Utilities Construction against Ms. Wilson who owns some property in the Rainbow Market and they sued her for unpaid bills totally some 87 -- 8,900 dollars. And they went to trial. And at trial Ms. Wilson moved for directed verdict on the mechanic's lien statute.

And the basis of that motion was exactly what we have here; that there was untimely service of that lien upon her and the judge directed a verdict against her -- I mean against our client, Utilities Construction. The case then proceeded to a jury and Utilities Construction was awarded 100 percent of its claim including interest by the jury. And in the face of that the judge went ahead and awarded attorney's fees to Ms. Wilson for successfully defeating the mechanic's lien claim.

And that case went up on appeal and the appellate court held that the statute is crystal clear that attorney's fees, the amount of attorney's fees are discretionary, the award of attorney's fees is not.

I need to kind of address another pending motion in order to go further with this based on what's been filed

since I filed my motion, Your Honor. And that is the Plaintiff's Motion to Amend their complaint. And one of the amendments they propose is to remove any reference to any date, last date of service and leave all of that completely blank except to say that the last date of service was determined by the panel of arbitrators.

Well, that's simply not true, number one. And number two TCC is actually estopped from providing any testimony to you that contradicts the prior four sworn statements that have been filed with this court. I cited in my reply to TCC's opposition a case Dawkins v Fields which says that a verified complaint is tantamount to or equivalent to an affidavit. And of course an affidavit is the same as any other sworn testimony whether you raise your hand in court or raise your hand before a notary public.

We cited also some federal court cases where courts have refused to allow a party in opposition to summary judgment to retract or modify or contradict statements within a verified pleading for exactly this reason. They are estopped to deny that. They are stuck with it.

And there is no way you can calculate March 17th to June 22nd to be within 90 days. We're entitled to summary judgment on that claim and the Plaintiff is entitled to sue Ms. Beatty for whatever remedies in

common law that they can prevail upon. Thank you very much.

THE COURT: Okay. Sure. All right. Mr. Rannik, you want to respond?

MR. RANNIK: Thank you, Judge. Several things. First absent from this motion and Mr. Buckley's argument is any assertion that the last date of work actually was March 17th. Instead this is an attempt to try and bind TCC to an error it made in its filings and try and validate a lien.

Second, there is no question but that the work, that if work is provided after substantial completion, even really trivial work even delivering ceiling tiles under South Carolina law that extends the time within which to serve a mechanic's lien. The March 17th date it's incorrect. The last date of materials was later, and we discovered this during arbitration during the course of discovery.

Of course we couldn't amend our complaint at that time to correct this error because the case was stayed because everything was in arbitration. The stay was lifted and at the first opportunity here we are trying to amend our complaint to correct this error.

Now the parties argue that TCC is estopped from correcting this. In their previous statements it had

said that this was the last date of work. Well, Judge there is South Carolina case law that says and I quote: allegations in a complaint denied in an answer are evidence of nothing. And that's from Curry v Carolina Insurance Group, that's 428 S.C. 60.

Ms. Beatty, in fact, did deny the allegation that was in the complaint that the last date of work was the 17th of March. Accordingly that case goes on to say you can put up evidence and you're not bound by that statement. So we are not bound by that statement.

Additionally, allegations in a complaint can be amended. A fact witness's statement is not binding on the part in the same way that an expert's testimony would be. Now, judicial estoppel which seems to be what is being argued of course prevents a party from taking a contrary position from what they took previously in the same action. Now, that hasn't happened here. Substantial completion was in fact in March of 2016 and we did, in fact, seek interest from that date in front of the arbitration panel.

What was not in front of the arbitration panel is whether the service of the liens on the individual unit owners was timely because that was all stayed in this court. So it's a very separate question. When was substantial completion and when was the last date of

work. So when does interest start running and when is the lien service timely. Those are separate unrelated questions. Interest was before the panel, timeliness of service was not. So we have taken no position in front of the panel that the last date of work was anything other than what we're saying now. And there is no issue of judicial estoppel.

Mr. Toggleman's [phonetic] affidavit establishes he was back on the job several times after substantial completion doing various things at the request of the owner under the contract. It is undisputed. And the law is very clear that whether service is timely relates only to the last date work is performed on the job; however trivial.

So to the extent there is a dispute of fact as to when that date was summary judgment is obviously not appropriate. But again, there doesn't actually seem to be any contesting of the truth of Mr. Toggleman's [phonetic] affidavit. It is a technical argument to try and establish an earlier date and the argument should be rejected.

THE COURT: All right. Mr. Buckley, you want to respond?

MR. BUCKLEY: Yes ma'am, Your Honor.

THE COURT: I guess this is sort of like you said;

this is sort of both motions at once. Go ahead.

MR. BUCKLEY: I'll read to you what paragraph -- well, first of all I agree 100 percent with what Mr. Rannik just told you which is that allegations in a complaint denied in an answer mean nothing.

However, allegations in an amended complaint are the equivalent of an affidavit. And the allegations of this amended verified complaint in paragraph 10 say that in accordance with their agreements the Plaintiff furnished the agreed upon material and services to the Defendants which were used in the work and on related structures on the property and materials and services improved the property. And the last day of such furnishing materials and services was March 17th 2016.

On May 19th with the original complaint John David Griffith, the president of TCC signed a verified answer; I mean a verified complaint alleging that. He then on May 19th also signed a verified statement of account. He then on June 10th signed this verified answer; I mean verified complaint alleging exactly that. And he signed a verified statement of account attesting to those dates.

The law in South Carolina is that those verifications are much different from an ordinary complaint. They are the equivalent of an affidavit. And in the case that I cited to you the Plaintiff wanted to

use his verified complaint to defeat summary judgment by the Defendant. Here we want to use it against him to defeat -- I mean to obtain summary judgment.

And the law is also just as clear that you cannot allow a party who has come into court and taken a position and sued upon that position under oath to come in later and change his position because he realizes that what he sought to benefit from with his prior position now hurts him. Thanks a lot.

MR. RANNIK: Judge, may I also speak in response if I may? I don't -- there was no benefit to try for saying the date of last work was the 17th of March. That's what Mr. Griffith thought it was at the time when he filed his affidavit. And he was simply incorrect. 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.

And to quickly since the Motion to Amend was alluded to I'm going to briefly say again there is not even a dispute that Trident was on the job in June of 2016. Amendments should be freely -- leave to amend should be

freely granted when justice so requires and no party would be prejudiced. Justice does require it because again it's not disputed here. There is no prejudice because we're about to start discovery on this portion of the case that has been stayed. We moved to amend as soon as we could once this case came back to life and our Motion to Amend should be granted. I'm sorry Cordes; I cut you off so I'm going to stop it there.

MR. FORD: And I just wanted to jump in briefly to the extent that the Motion to Amend was being considered on this point about the March 17th date. And to the extent Your Honor that you are considering Mr. Rannik's citation about allegations denied mean nothing.

Well, as a matter of fact the HPR and the other owners admitted the March 17th date in their answer. So, on that point with regard to the Motion to Amend we believe the issue is closed. But again I realize we may be jumping ahead to that motion but I just wanted to point out that issue as it came up.

THE COURT: Okay. All right ---

MR. BUCKLEY: --- Your Honor, one last point. Trident did obtain, did seek an advantage by utilizing a date even a week earlier. They wanted to obtain interest, prejudgment interest from the earliest possible date so they took March 8th, 2016 as the date from which

they sought interest. So they actually have sought a benefit from a March date although it is actually a week earlier than March 17th. Thank you.

THE COURT: Okay.

MR. RANNIK: And Judge, I'm very sorry if I may. The March 8th date was substantial completion. That's the date on which okay, we're submitting our final pay application. We're not going to be asking for you know we're not going to be submitting additional change orders or additional pay applications.

It's not the date that we did our last work. If we go back and do some warranty work that is required under the contract for example we're not going to then turn around and submit a bill. The date of substantial completion is March 8th. The date of last work is a totally separate question. We sought interest from the date of substantial completion. We did not seek interest from the date of last work. Thank you.

THE COURT: Okay. All right. The last thing I have on the docket this morning for this case appears to be Mr. Ford's request; he had a Motion to Deposit Funds. Let me hear from you on that.

MR. FORD: Thank you, Your Honor. Again, Cordes Ford on behalf of the HPR. We filed a Motion to Deposit Funds to the court pursuant to Rule 67. This rule allows

for paying funds sought through another party. And it is important as discussed in case law that the payment of funds into court pending an appeal stop interest from accruing. And so as I mentioned before Your Honor the HPR is considering an appeal of Judge Jefferson's order enforcing the award.

And so there remains a possibility that the amount of the order might change. However, the HPR is interested in paying the amount of the award into court to stop interest for that express purpose as provided for by those cases. Quite simply we want to just take that interest issue off the table going forward.

In response I believe TCC will raise a case to you called Renaissance. That case arose in a completely different context. It arose after judgment was final in supplemental proceedings which are proceedings to execute on a final judgment. We don't believe that case applies here because again with the pending potential appeal the judgment may well not be finalized until that process is complete. And South Carolina law in that context allows us to pay the money into court to stop interest.

So my request to you is allow us to pay the award amount into court to stop the accrual of interest upon it. And again it makes sense. It provides a benefit to both parties and should be favored by the Court. Again,

I said it would allow us to stop interest. But it also essentially provides the funds to pay the award to TCC should our appeal not be successful.

And so with that guarantee it of course obviates the potential for supplemental proceedings. And so that's the mutual benefit Your Honor and if that mutual benefit didn't exist then there would be no reason for us to pay money into the court pursuant to Rule 67. Thank you.

THE COURT: Sure. Mr. Rannik, you oppose that?

MR. RANNIK: Well, Judge we don't conceptually object to the idea that the money get paid into court. What we do object to is the implications of that. First, the total amount of damages as I mentioned earlier still hasn't been determined. So we would be paying in potentially not all the damages but that's one of the issues. The second, of course, is that under ---

THE COURT: --- so the only thing is give me everything but attorney's fees?

MR. RANNIK: Correct, Your Honor, correct ---

THE COURT: --- okay ---

MR. RANNIK: --- because the final judgment that could be entered here may well include our attorney's fees and it would be substantially more than the amount that the HPR seeks to deposit into court.

What we would not want is the HPR to say well we

deposited money into the court. You didn't object so you have since waived any argument you're entitled to anything more than the amount we deposited. Is that likely? No, they're smart lawyers. But I just wanted to say that for the record.

But the more important thing Judge a deposit of funds under Rule 67 only stops judgment interest. All of the cases cited by the HPR referred to interest, judgment and judgment interest. Here we don't yet have a judgment so there isn't judgment interest.

What we do have is a contract that says that late payments accrue interest. That does not stop upon payment of funds into court under Rule 67 and the state Supreme Court has said so.

The Renaissance case states and I quote: a deposit into court pursuant to Rule 67 does not stop the accrual of interest provided by contract period.

The HPR is trying to persuade the court this is a narrow holding and a different circumstance and it doesn't apply to our facts. But Judge, it's not a narrow holding. It's as clear as it can be. A deposit into court does not stop interest provided by contract.

So again, we don't object to HPR depositing the funds but to the extent they try and suggest that whatever they deposit is the full amount of damages to

which we are entitled we disagree. And to the extent in which they argue that it will stop interest we disagree with that. Thank you.

THE COURT: That might be an argument for another day down the road though. It seems like this is a little premature. But I understand. Your arguments are preserved and I understand your reason for making those today. Okay. All right. Anybody else? Anybody else want to respond on that note?

MR. FORD: Just briefly, Your Honor. First of all the rule says when you pay all or part of any such sum. And then also with regard to the finality the issues against the HPR then determined subject to appeal and subject to our motion that is before you on the foreclosure cause of action. And so again, we filed a Motion to Vacate. It was heard and there was an order issued. And so Judge Jefferson at this point has confirmed that award. And we still have appeal rights. And so again in that situation Duval and Russo state that the debtor can stop the accrual of interest on that judgment. And so that's what we're asking you to allow us do and that's the extent of my argument. Thank you.

THE COURT: Okay. All right. Anyone else? Anybody else, anything else that needs to be on the record today for anybody?

MR. RANNIK: I have one last sentence which is just -- this is Jaan Rannik on behalf of TCC. In response to Cordes comment that Judge Jefferson has confirmed the arbitration award there has been no confirmation entered. She has declined to vacate it. There has been no confirmation entered. Thank you.

THE COURT: Okay. All right. Well, I'll certainly take a closer look at everybody's briefs one more time as well as the exhibits that are attached that are pertinent to your argument and anticipate I should be able to get an order to you on, orders to you on these motions within the next two weeks. And we'll go ahead -- and if we need any formal proposed orders we will reach out to your respective offices and ask for those, okay?

MR. BUCKLEY: Thank you, Your Honor.

MR. RANNIK: Thank you very much, Your Honor.

THE COURT: Thank y'all very much. And we're here for you so if there is anything, any feedback you can give the court at this time we are always welcome for that so please do so. And everybody please continue to stay safe. All right.

MR. RANNIK: Thank you.

MR. FORD: Thank you, Your Honor.

THE COURT: All right. Thank y'all.

********END OF TRANSCRIPT OF RECORD********

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is, to the best of my ability, a complete Transcript of Record of the proceedings had, using WebEx videoconferencing, and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Charleston County, South Carolina on the 28th day of May, 2020.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 13, 2020

_____

Joyce C. Rueger, CVR-M

Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS NONJURY
COUNTY OF CHARLESTON	)	
TCC OF CHARLESTON, INC.,	)	TRANSCRIPT
PLAINTIFF,	)	OF
vs.	)	RECORD
CONCORD AND CUMBERLAND, LLC AND CONCORD AND CUMBERLAND, HPR, ET AL,	)	2016-CP-10-2955
DEFENDANTS.	)	

December 16th, 2019
Charleston, South Carolina

B E F O R E:

THE HONORABLE DEADRA L. JEFFERSON, Judge.

A P P E A R A N C E S:

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JASON DAIGLE and COLE SHANNON
ESQ.
Attorney for Betty Beatty

Transcribed by Pamela E. Green, from
DCRP, Digital Courtroom Recorder Project

I N D E X

(WHEREUPON, there were no exhibits marked or testimony taken during this hearing.)

P R O C E E D I N G S

THE COURT: TCC of Charleston, Inc. versus Concord and Cumberland, LLC, Concord and Cumberland, HPR, et cetera, and they're about one, two -- I assume these are -- they're about 37 other parties. We'll give you a copy.

So, before we get started, who's appearing on behalf of the Plaintiff?

MR. RANNIK: Good morning, Your Honor. Jaan---

THE COURT: Good morning.

MR. RANNIK: Jaan Rannik is my name, and---

THE COURT: Is that Y-O-N?

MR. RANNIK: It's J-A-A-N, for---

THE COURT: Good thing I asked, right?

MR. RANNIK: ---extra confusion.

THE COURT: J-A-H-N, and how's your last name spelled?

MR. RANNIK: I'm sorry. It's J-A -- double A. So, J-A-A-N.

THE COURT: Oh, J-A-A -- okay. Let me start all over. J-A-A-N?

MR. RANNIK: Yes, Your Honor.

THE COURT: And your last name?

MR. RANNIK: It's Rannik. R-A double N I-K.

THE COURT: Okay.

MR. EPTING: And I'm Drew Epting, Your Honor.

THE COURT: Yes, sir.

Okay. And now let's take the Defendants in order.

Now, Mr. Ford, you're sitting at the table. So, tell me who you represent.

MR. FORD: Yes, Your Honor. Cordes Ford on behalf of Concord and Cumberland, HPR, and, and that's the entity at issue today. I also represent a number of the named individual Defendants, but the action against them is stayed, and this -- these motions deal with the HPR under arbitration that proceeded.

THE COURT: Okay. So, you represent HPR in this motion, which is the---

MR. FORD: Yes.

THE COURT: ---Con -- well, let me see.

MR. FORD: Con -- yeah, Concord and Cumberland---

THE COURT: Which is Concord and Cumberland, HPR?

MR. FORD: Correct.

THE COURT: Okay.

MR. FORD: And Andrew Walden is with me on behalf of the HPR also.

THE COURT: All right.

MR. FORD: And I also have representatives from the Board of the HPR in the audience.

THE COURT: Okay. But are there any other lawyers representing any other parties or any other Defendants?

Yes, sir.

MR. DAIGLE: Yes, Your Honor. Jason Daigle.

THE COURT: Yes, sir.

MR. DAIGLE: D-A-I-G-L-E.

THE COURT: And you represent?

MR. DAIGLE: Betty Beatty.

THE COURT: That's---

MR. DAIGLE: Betty---

THE COURT: ---Betty---

MR. DAIGLE: B-E-A-T-T-Y.

THE COURT: I was just trying to find her on my list. Here we go.

Was she previously a Segal or is this just -- oh, I see Betty Beatty. There's a Betty Segal. Got you.

Okay. And is there anybody else representing anybody else?

MR. DAIGLE: I've, I've got Cole Shannon here with me on it as well.

THE COURT: Cole Shannon.

All right. Now, this is Concord and Cumberland, HPR's motion to vacate the arbitration award or, alternatively, to modify or correct the arbitration award filed July 16th of 2019, and a Plaintiff's Motion to Lift Stay, which was filed 6/17/19. We'll take them in the order they were filed.

So, Plaintiff's Motion to Lift Stay.

You may proceed.

MR. RANNIK: Thank you, Your Honor.

THE COURT: You welcome.

MR. RANNIK: May it please the Court?

THE COURT: Yes, sir.

MR. RANNIK: Judge, very simply, this case was stayed by an Order, a Consent Order, signed by Judge Young back in -- at the end of 2016, and the case was stayed to allow for final and binding arbitration to proceed between the HPR and TCC of Charleston.

Very simply, that arbitration has proceeded. It went to trial last January. The Order was issued in March, and, finally -- the Final Order was entered in April --

THE COURT: Of what year?

MR. RANNIK: -- and we're here simply to ask the Court---

THE COURT: Of what -- of this year?

MR. RANNIK: Yes, of, of this year. Yes, Your Honor. And we're here simply to ask the Court to lift the stay so that this matter can proceed.

THE COURT: What did the Consent Order say?

MR. RANNIK: If I may approach, Judge?

I have a, a copy if --.

THE COURT: What date was the Consent Order filed?

MR. RANNIK: It was filed on the 3rd of January, 2017.

THE COURT: I can -- I'll ask for it if I need it. I, I probably have it right here electronically.

MR. RANNIK: Okay. But what it says, Judge, is -- okay.

THE COURT: Go ahead. I'm listening.

MR. RANNIK: It, it says whereas the parties have consented to an arbitration of the dispute between Plaintiffs and Defendant, Concord and Cumberland, HPR, and stay of Plaintiff's foreclosure request as to remaining Defendants, which it then lists, therefore, this matter is stayed as to all Defendants to allow the arbitration to proceed between the regime and Plaintiff.

THE COURT: So, tell me, and this may be just an overly simplistic question, if it was stayed to complete the arbitration, why doesn't it just dissolve by virtue of the fact that arbitration's been completed?

Why does it need an Order?

MR. RANNIK: Judge, I think you may be right that the stay, the stay may actually just be lifted by operation of law. However, I believe there's some disagreement as to that between the parties, and, therefore, we're seeking an Order of the Court stating that the Order -- that the stay has been lifted.

THE COURT: Yeah, I don't know if I can -- okay.

MR. FORD: Your Honor, on that point, I, I would say

that what the Motion to Lift Stay is trying to do is to enroll the awards of judgment, and that can't occur if there's a pending motion to vacate or correct.

THE COURT: So, won't it be moot by virtue of this motion you filed?

MR. FORD: That I filed?

THE COURT: Uh-huh. (Affirmative).

MR. FORD: Yes. In other words, the stay can't be lifted until the motion to vacate and correct is heard and resolved.

THE COURT: But it was lifted -- it was enacted for the purpose or put in place for the purpose of doing the arbitration, right?

So, wouldn't then, logically, once the arbitration's completed, there is -- I mean the whole purpose for which it was put in place has been---

MR. FORD: Under 15---

THE COURT: ---completed.

MR. FORD: ---48-120, any, any party -- either party can make a motion to enroll the awards of judgment.

THE COURT: Uh-huh. (Affirmative).

MR. FORD: That hasn't -- that such a motion hasn't been filed, although I think there's some language in the Motion to Lift Stay that would indicate that that's what they're trying to do, but that can't occur pursuant to that

statute if there is a motion to vacate or correct---

THE COURT: That wasn't my question---

MR. FORD: ---pending.

THE COURT: My question was about the stay --

MR. FORD: Okay.

THE COURT: -- which is, if you have a stay in place, stays are in place for a purpose.

Once that purpose has been accomplished, what's the purpose of the stay?

The stay to have your arbitration, that's taken place, right?

MR. FORD: It has.

THE COURT: So then what would be the further purpose of having the stay?

MR. FORD: To -- well, to resolve the remaining issues that are pending before the Court with regard---

THE COURT: But you've agreed---

MR. FORD: ---to the award.

THE COURT: ---that your motion makes it moot all -- doesn't it?

Cause your motion is to vacate the arbitration award or modify or correct it, which also begs the question, if it needs to be modified or corrected, why wouldn't you go to the person who wrote it if you claim it's incorrect in some way?

MR. FORD: We did that.

THE COURT: Uh-huh. (Affirmative).

MR. FORD: We asked the Panel to address a number of things. They---

THE COURT: And I have a Corrected Arbitration Award that was filed December 6th of 2019.

MR. FORD: I, I think it was maybe October. It, it wasn't December.

THE COURT: Okay. I'm just looking at the filing date---

MR. FORD: Right. This---

THE COURT: ---on this document.

MR. FORD: So there's an---

THE COURT: This may be an exhibit to the motion.

MR. FORD: There's a procedural history that I can, you know, relate, relate to Your Honor if that would be helpful.

There was an award issued earlier in the year, and we pursued our rights under the statute to ask for the, the Panel to make corrections to it. They have, in fact, made changes to it, and it has resulted, resulted in a Corrected Arbitration Award. That's the title of the document. And we have supplemented by filing a Motion to Vacate that corrected award.

THE COURT: And it was arbitrated by Allen Campbell,

John McCants, and L. Frank Elmore, correct?

MR. FORD: That's correct.

THE COURT: And it's dated August 12th of 2019, the Amended Order?

MR. FORD: That's correct.

THE COURT: Well, it says Corrected Order.

MR. FORD: Right.

The sud -- that, that is really the, I would say, the controlling award of the Panel because they, they heard -- they -- well, they didn't -- there wasn't a hearing, but they received briefing on issues where we raised issues where we said there, there needed to be changes made, and they received briefing from both sides, and issued post-award orders, and, ultimately, this Corrected Arbitration Award.

We asked for a change of that, and they issued a, a, I guess, the final order, and now we've exhausted our remedies at the Panel level, and now we've come to the Court seeking the Court to vacate the award---

THE COURT: Why would I do---

MR. FORD: ---pursuant to 15-30---

THE COURT: What authority would I have to do that?

MR. FORD: I'm sorry?

THE COURT: What authority would I have to do that?

MR. FORD: You, you have authority under Section

15-48-130, Your Honor, and, in this case, the Panel, in our view, has exceeded their powers, and manifestly disregarded the law in issuing their award.

THE COURT: What type -- what -- when y'all agreed to arbitrate this, was it pursuant to a contract?

MR. FORD: It was. This is---

THE COURT: And what did that arbitration contract provision say?

MR. FORD: This was an AIA form construction contract with a guaranteed maximum price. It had an arb, arbitration provision.

The AIA form calls for AAA Arbitration, but the parties struck that language, and simply referred to the State statute, the Uniform Arbitration Act, as governing the arbitration of the dispute, Your Honor. When the Plaintiffs filed suit, they also filed a Motion to Stay, to pursue arbitration, the arbitration provisions in the agreement. And so we agreed to have that arbitrated and, and the statute calls for, in this case, we chose to use three panelists.

The Plaintiffs selected Mr. Elmore. We selected Mr. McCants. And the two of them chose, as the third arbitrator, Mr. Campbell.

THE COURT: What does the Arbitration Agreement say? Does it say it's final?

Does it say that their findings are final?

What does it say exactly?

MR. FORD: It, it says that the arbitration should be conducted pursuant to the Uniform Arbitration Act, and it references the statutes that, that I'm referencing to you, 15-48-10, et sec. Enrollment occurs under 120. Motions to Vacate can be filed under 130. And Motions to Correct can be filed under 140.

THE COURT: How did you -- how do you contend they exceeded their powers cause that---

MR. FORD: In a couple of---

THE COURT: That is governed by your agreement.

MR. FORD: No, Your Honor. There's, there's two issues.

The, the first issue, which we raise in the first motion, while there were pending motions to change of the Panel, was that they didn't provide a reasoned award. The Arbitration Agreement between the parties, and the first Order of the Panel required a reasoned award to be issued.

What we received was a, was a brief two page document that didn't have much discussion at all about---

THE COURT: But the amended one doesn't, which is the controlling document.

It's nine pages, isn't it?

MR. FORD: The, the amended one certainly provides more

information, but on a very crucial issue, and, Your Honor, we believe there is no reasoning provided, and it really is---

THE COURT: So why didn't you go back and ask them to give you the reason?

MR. FORD: We, we did ask them to correct and enforce essentially a, a release and waiver of lien document, which is unambiguous on its face. Yet they refused, refused to enforce it.

THE COURT: But didn't they put a whole paragraph in the Order about that?

MR. FORD: They, they did, Your Honor, and what they said was that they declined to enforce it for a couple of reasons.

One, and, again, this is -- was, was a guarantee maximum price contract, and just to back up a little bit more and provide some context, there was another lawsuit before, which was a construction defect suit. It resulted in a settlement for my client, which was the Plaintiff in that case. Those dollars were taken forward to this construction contract, which was a 4-million-dollar guarantee maximum price contract.

There were changes that occurred in the work, additional work, and that was dealt with in Change Orders, which turned it into almost a 6-million-dollar contract.

And then, at the very end of the job, and after work was complete, there was essentially a 2-million-dollar Change Order that was presented.

We think that violated this lien waiver and release document titled Conditional Release and Waiver of Lien that is, again, clear and unambiguous on its face.

What the Panel found was that there was an agreement between the parties to address additional costs at the end of the job, and that's what they say in their Corrected Arbitration Award.

THE COURT: Yeah, but my question is a very simple one.

You said that they did not provide reasoning for why they did not agree to your position, and I would assume that you presented your position to them. And, according to this amended document, it says effective condition of lien waivers accompanying Payment Application Number 17, and prior payment applications. And it appears to me that they addressed that issue, and they put their reasoning for it in this amended document, which starts at Page 4.

MR. FORD: And, Your Honor, we---

THE COURT: And goes on to Page---

MR. FORD: You're looking on Line and---

THE COURT: ---5, and then they make a correction of the award.

My concern is the way you're arguing this is you want

me to substitute my judgment for three arbitrators that heard this, and I don't think there's any provision in the law for that.

MR. FORD: Well---

THE COURT: It, it is contrary to public policy, and if I were to follow it, then anybody could come back and argue that they just didn't like the arbitrator's award, and I should substitute my judgment, and put my own reasoning in it.

MR. FORD: Right.

THE COURT: And I don't think the law supports that proposition.

I mean why have arbitration if you can do that?

MR. FORD: Well, it's important that a Panel not manifestly disregard the law, and that has been held as a basis for overturning an award. In here, we believe that the law was manifestly disregarded.

The lien waiver document is unambiguous on its face. The Panel didn't find any ambiguity with it. An unambiguous contract is the law. Yet it was ignored to reach the result that we have now.

That can't stand, and, and, and there's a public policy argument for me to stand here asking you to change it, Your Honor. Parties who are contracting on the front end have to have confidence in the arbitration process, and if they

believe that an unambiguous contract can be ignored, then, then they're probably going to run from arbitration, and, and, you know---

THE COURT: I don't think---

MR. FORD: ---flood the Courts with more---

THE COURT: I don't think---

MR. FORD: ---litigation.

THE COURT: ---there's any support for that proposition, and we wouldn't be---

MR. FORD: I---

THE COURT: ---flooded in the market with all these arbitration agreements with -- from everything from your cell phone, to your house, to everything else. If people didn't have confidence in them, the market would not be inundated with them.

MR. FORD: If this result---

THE COURT: Apparently---

MR. FORD: Yeah.

THE COURT: ---there's some benefit to the marketplace. That's why we have them.

MR. FORD: Understood. But I---

THE COURT: Yeah.

MR. FORD: My, my point is that if this result stands, it would erode confidence in the arbitration process because an unambiguous contract was ignored by the Panel without a

legal basis. They said there was an agreement by the parties prior to this lien waiver to address costs at the end of the project. Yet that is nothing more than an agreement to do something in the future, which is not enforceable.

There was a later release and lien waiver executed and sworn to by TCC that induced the HPR to make a payment of $648,000 in exchange for a release of all prior claims and liens arising on this construction job. Yet the Panel ignored that.

THE COURT: Well, not in my reading. It says knowing that TCC had signed conditional release and waiver of liens, HPR, nonetheless, agreed to PCOs, signed the Change Orders, and made payment for claims that may of otherwise been released or barred by the conditional release and waiver of liens. HPR can not now claim that the conditional release and waiver of liens bars TCC claims, and there is certainly supporting case law for that proposition.

MR. FORD: Your Honor, and you, you read that correctly. There is, there was a---

THE COURT: But they still correct the math, don't they?

MR. FORD: They, they do need to correct the math. I think---

THE COURT: No, they do. It says correction of award.

The corrected total award is based, in part, on the sum of approved and unpaid PCOs and the amounts of, and it states the amounts, one -- let's see. PCO 143, and 144R, 146. Plus retainage in an amount as itemized in TCC Exhibit 161 for a total of 958,573.

Additionally, a portion of the disputed amount of 1.417, well, it's 1.4-million-dollars, give or take, and a portion of the stone towers also awarded. However, both parties testified that PCO 145 for the transom door in the amount of $9,608, which is Exhibit 131, should not be included.

And so basically they adjust the amount, do they not?

MR. FORD: They, they adjust the amount by $9,000 and, and change because one of the PCOs, which is a proposed Change Order, potential Change Order, was submitted to the Panel, but we agreed, at the time, that that was not subject to that arbitration proceeding. So, it was withdrawn. So, that was the correction on the dollar amount.

With regard to the issue of their addressing our concerns about enforcement of the lien waiver and release, they cite -- it's, it's Exhibit J, Your Honor, to the, to the Memorandum. It's order on HPR Motion for Change or Corrected Arbitration Award issued October 23rd, 2019. They, they addressed our question, and, and answered it this way.

They said that TCC and HPR agree to address outstanding PCOs as cited, and, and you read, and they said this Panel also found evidence that prior to Payment Application 17, some of the PCOs and TCC's claims for costs, were subsequently submitted and paid. And then they say if that's -- well, that's it, and that's the point.

They say that, prior to Payment Application 17, and prior to the execution of this sworn notarized Release and Waiver of Lien, there was some discussion about addressing PCOs and claims after the project. And the law is that you can't amend a writing, signed enforceable contract by prior oral conversations or alleged contracts.

THE COURT: But you can do it by action. You can amend an Order by action, especially when it's accompanied with consideration, which is appears---

MR. FORD: Correct.

THE COURT: ---what they're saying in this Order.

MR. FORD: You can do it -- you can't do it by prior action, and there must be consideration. There has---

THE COURT: But that's not what the Order says, is it?

MR. FORD: It doesn't. There, there has to be an enforceable agreement after the latest agreement, which is this Release and Lien Waiver, which, again, is unambiguous, to amend it. There is no later, later contract or enforceable contract.

At best, the Panel is referencing an earlier agreement and they say then it's an agreement to address these issues, which is merely an agreement to agree or an, an agreement to negotiate or do something uncertain in the future, which is unenforceable.

That is not a contract. The Lien Waiver is. That the -- but, but that, that is -- I mean that's -- on, on that issue, that is the essence of the argument.

The, the stone tower issue is another substantive issue that, that we've addressed to the Court in our memorandum. This is a smaller dollar issue. It's a 29,000 issue. But it arises from work that was done, as the, the Plaintiffs say, after completion of this project.

So, not as part of a contract, but after and pursuant to some different agreement, which may or may not be subject to arbitration, we don't know. But it wasn't, it wasn't part of the, the claim as filed in the, the Amended Complaint. It wasn't part of the lien asserted against the property. It doesn't make up any portion of, of that dollar amount claimed, and it wasn't referred to arbitration.

It wasn't before the Panel. It wasn't, as far as I know, even served upon the HPR for consideration. It's not subject to the arbitration, and because it, it was ruled upon, that portion of the award should be vacated and dismissed as not properly before the Panel. This Court

didn't refer that matter to arbitration.

THE COURT: I'm sorry. Repeat that.

MR. FORD: This stone tower issue---

THE COURT: Does -- the Court doesn't refer it. Your agreement defines what arbitration covers.

MR. FORD: The, the agreement on this project, which is the repair project at the condominium, this stone tower work was investigation that occurs---

THE COURT: But he says---

MR. FORD: ---per the Plaintiff.

THE COURT: But he says in your -- in the Order that y'all didn't con -- y'all conceded that point, and you wanted them---

MR. FORD: He doesn't say we conceded it.

THE COURT: I---

MR. FORD: He just says it was presented.

THE COURT: ---think y'all---

MR. FORD: And it did show up about a day before the hearing in---

THE COURT: Let me see what it says.

MR. FORD: ---proposed exhibits. But my point is more fundamental to the, to the contract that you're referring to. Our contract is for the, the repair project.

The Plaintiffs say that stone tower work happened. They incurred the cost that they claim after that project

was complete, that project that's governed by the contract with the arbitration provision. So, it was put in a file of exhibits. I think they're 151 of them.

THE COURT: And he says they don't include it, and y'all agree it shouldn't be included. So, I'm confused as to what you're talking about.

MR. FORD: Well, it's funny. The transom door issue, which they withdrew, that is related to this stone tower work, it happened at about the same time, and we asked the panel to, to pull back or, or, or, or subtract out the cost for the stone tower work.

THE COURT: Uh-huh. (Affirmative).

MR. FORD: They did not. They, they, they decided to keep it in --

THE COURT: That's not what this says.

MR. FORD: -- even, even though it's related to the, the transom door work.

THE COURT: Are you sure that's what this says cause this says that---

MR. FORD: And what are you looking at, Your Honor? I'm sorry.

THE COURT: I'm looking at the Corrected Award. It says additionally, a portion of the disputed amount, which is the 1.4-million-dollar amount, and a portion of the stone tower's also awarded. However, both parties testified that

PCO 145, for the transom door in the amount of 9,608, should not be included.

So, that's some portion of the stone tower, correct, or is that a totally separate item?

MR. FORD: Well, it, it, it -- that work was done, and, again, you know -- that work was done about the same time as the stone tower work. It's, it's -- the timing of it is the same. That's why the one -- PCO 145 was pulled out by agreement. It had come up in testimony.

The stone tower issue did, did not, and, and wasn't -- it wasn't addressed, in, in our view, at all, and wasn't properly before the Panel just like the transom door issue wasn't properly before the Panel.

THE COURT: Anything further?

MR. FORD: Those are the two issues, Your Honor. Obviously there's a substantial amount of briefing and exhibits that we've attached. We've tried to attach the record of, of the awards, and the back and forth on that, and, and one other thing on the public policy issue, something strange happened in, in their providing to us responses on our motions.

Again, the first award was a, a two pager with, with very little reasoning in our view. They, they later addressed motions, I think they're with regard to attorney's fees, and they -- and the calculation of interest, and they

say that, you know, as part of their 2-million-dollars and change that they awarded, two million twenty-three, they, they stated clearly to us, in their decision, that Pay Application 17 was not paid, and they awarded interest on Pay Application 17.

We received that and we were, we were, were shocked because Pay Application 17 was indeed paid. It's, it's the Pay Application that is, is based upon this Lien Waiver that I discussed earlier that was paid to the tune of $648,000. Yet they wrote that it wasn't paid.

THE COURT: Did you bring that to their attention?

MR. FORD: We absolutely did. We brought it to their attention. Said that is an evident mistake that must be corrected, must lead to a recalculation, and, and what they said in response was oh, no, no. We made a mistake by referencing Pay Application 17. And instead of pulling that amount out and pulling interest out, they pivoted and added the award of a PCO 146 that the first award didn't award.

And so they worked to recreate a number that was similar to the 648, and replace that in their Corrected Arbitration Award, which, Your Honor, I mean to have written that Pay Application 17 wasn't paid, how, how does one write that, and not believe it to be true?

THE COURT: I don't know.

MR. FORD: It, it calls into question---

THE COURT: You'll have to ask them. I can't get into their minds to know.

MR. FORD: It---

THE COURT: If they've recalculated it, and they've survived -- provided a sufficient basis for recalculating it, and the math adds up, I can not -- I, I can't---

MR. FORD: It just---

THE COURT: ---like I said, in someone's mind, three people's minds, and know---

MR. FORD: Un---

THE COURT: ---other than what they've written.

MR. FORD: Understood. It just calls into question the whole, the whole credibility of the process, Your Honor, to make such an error like that, and to say that oh, we just, we just mistakenly wrote that, that's a huge issue for, for my client, and it just shows they, they weren't paying attention, Your Honor, and, again, that harms the---

THE COURT: But didn't you pick one of the arbitrators?

MR. FORD: ---credibility of the process.

THE COURT: Didn't you pick one?

MR. FORD: Absolutely. We picked Mr. Mc---

THE COURT: And they picked one?

MR. FORD: Yes.

THE COURT: And then who picked the third one?

MR. FORD: They, they deliberated together and picked

the third.

THE COURT: Okay. So, you're telling me you have absolutely no confidence in the person you picked?

MR. FORD: I -- Your Honor, I, I certainly disagree with, with the result, and that's why I'm here.

THE COURT: Yeah, but that's not the question.

You're telling me you have absolutely no---

MR. FORD: I---

THE COURT: ---confidence in the professional competence of the person that I would imagine you deliberated and selected?

MR. FORD: Understood, Your Honor. And, and, and, again, I can't get into their minds either. We, we haven't had a hearing after the initial award. We've submitted briefing on these issues. I---

THE COURT: Did you request an additional hearing?

MR. FORD: We just did it on the briefs, Your Honor. I didn't request an additional hearing.

THE COURT: So y'all made that decision, right?

MR. FORD: I suppose I could of asked for a hearing, Your Honor. But, but the point is, I -- it, it, it baffles the mind to me that that can be written, that they could base their decision on Pay Application 17 not being paid when that was never in dispute, and the parties agree that it had been paid.

MR. RANNIK: Well, Your Honor, to begin with, I don't, I don't know how much, judging the Court's orientation here, I don't know how much their---

THE COURT: I've read the entire file --

MR. RANNIK: Exactly.

THE COURT: -- if that helps you.

MR. RANNIK: It, it does and I don't know how much there is left for me to, to tell the Court.

THE COURT: Well, you need to respond to his argument---

MR. RANNIK: Happily.

THE COURT: ---and --

MR. RANNIK: Happily.

THE COURT: Yeah.

MR. RANNIK: Well, first, Your Honor, the -- and I can respond to the merits arguments and I will, but the first thing is what the Court actually has before it.

Your Honor has stated that the Court does not have authority to reconsider the findings and the conclusions of the Panel to the extent that they do not exceed their authority or manifestly disregard the law and that's correct. Neither one of those occurred in this case.

For a manifest disregard of the law to occur, the Plaintiff -- the, the party claiming it has to show that the Panel understood the law, and just chose not to enforce it,

chose not to apply it. Here, the exact opposite's true.

As Your Honor noted, they -- the Panel went into detail as to why these particular arguments were being rejected. They did not disregard the law. They found that there was a subsequent agreement that controlled and they applied it. They applied the law.

Secondly, with regard to exceeding authority, the only way that a Court can or that a Panel can exceed its authority under South Carolina law is to decide something that was not presented to it. What is presented to the Panel is governed by the Arbitration Agreement. The Arbitration Agreement in this case, and I have a, a copy of it if, if the Court would---

THE COURT: Wasn't it submitted as an exhibit --

MR. RANNIK: I do believe that it---

THE COURT: -- or was it not?

MR. RANNIK: I do believe that it was. Otherwise---

THE COURT: I think it was attached to the original motion, correct?

MR. RANNIK: I, I believe it was.

THE COURT: Uh-huh. (Affirmative).

MR. RANNIK: Yes, Your Honor.

THE COURT: And it's a fairly broad Arbitration Agreement.

MR. RANNIK: It, it is indeed.

THE COURT: Uh-huh. (Affirmative).

MR. RANNIK: It calls for final and binding arbitration pursuant to the Arbitration Act, and it states that -- it applies to exterior repairs to Concord and Cumberland located at 175 Concord Street. It's quite broad.

With regard to the stone tower issue, the stone tower, like so many of the other items on this project, were out of the scope of the original contract, and so were done by Change Order. But the work was done. The work was performed. It was exterior work performed at this address, and it falls right under the Arbitration Agreement, which, again, the wording that the parties agreed to was this is final and binding arbitration.

The Panel that heard this case has over sixty years of construction law experience. There were over 200 exhibits put into evidence over four days of testimony.

The Panel did not get this wrong, but even if the Panel got it wrong, that's not the function of the Court to reconsider unless there was a manifest disregard of the law, which I would submit there absolutely was not, or the Panel exceeded its authority, which it absolutely did not.

With regard to the reasoning of the award, we have a nine page corrected award. I, I, I don't believe that's -- there's much argument that this constitutes a reasoned award under the law.

With that, Your Honor, I'm happy to answer any further questions.

THE COURT: I don't, I don't have any.

Anything further at this time?

MR. FORD: I, I have to correct a, a very important statement made by, by Mr. Rannik that's just wrong. He says the Panel found a subsequent agreement to amend the Lien Waiver of the condition, the Conditional Release and Waiver of Lien. That is not what the Panel found.

All they found was an agreement to do something in the future, which they said occurred prior to Payment Application 17. The law does now allow prior oral communications to amend a later writing, which is the Conditional Release and Waiver of Lien that was sworn to by TCC.

It wasn't just a signed writing. It was a sworn to writing. And there's nothing subsequent to that to amend it, and the Panel didn't find that.

And, and with regard to the stone tower, they write -- the Plaintiffs write that that work occurred after the project, which is after the project subject to this contract. They wrote that, and that's all.

Thank you.

THE COURT: Okay. Yes, sir.

MR. RANNIK: Your Honor, if I might?

Just for some contrast on this lien, lien waiver question, the same lien waiver was provided with every single Pay Application over the course of this job from the first to the last.

Mr. Ford said that there was a subsequent or a prior oral agreement. That's not true either.

What happened here is the attorney for Concord and Cumberland, the HPR at the time, Mr. Chris Ogiba, agreed with counsel for TCC, and, in writing, said we agree that certain matters will have to be resolved at the end of this job. That was done after a number of these lien waivers had been signed and executed. And then, rather than rewrite the lien waiver, the parties just kept the same lien waiver with this understanding as memorialized in an email by the counsel for the HPR that there would be certain matters resolved at the end.

The Panel found that to be compelling evidence that the HPR should be estopped from asserting the lien wavier on the final Pay Application as a means for rejecting payment for the work that was agreed upon.

Thank you.

MR. FORD: If I may briefly, Your Honor?

THE COURT: Uh-huh. (Affirmative).

MR. FORD: The -- Mr. Rannik now refers to a writing by Mr. Ogiba that is clearly prior. If it's a -- if it's an

agreement then to agree in the future, again, it's not enforceable.

THE COURT: I have to rely on what it says in this Order---

MR. FORD: It---

THE COURT: ---and the Order doesn't say it was prior---

MR. EPTING: It doesn't---

THE COURT: ---which arose and existed as of the date of the execution of the Conditional Release, Release and Waiver of Liens.

MR. FORD: So -- well -- so I'll address that real, real quick, Your Honor.

But -- they, they also -- the Panel doesn't reference Mr. Ogiba's writing at all. All, all they say is what they say, and---

THE COURT: And what they say is enough to support a reasonable interpretation of contract law---

MR. FORD: Except that they---

THE COURT: ---which is contrary to your position.

MR. FORD: Except that if you look at -- except if you look at Exhibit J where we ask them to clarify that point, all they do is refer to prior actions---

THE COURT: That's not---

MR. FORD: ---or agreements.

THE COURT: ---what this Order says. It doesn't say it's prior. It says they existed and arose at the date of the execution of the Conditional Release and Waiver of Liens. And knowing that you had signed, your parties had signed the Conditional Release and Waiver, they, nonetheless, took these other actions contrary to that.

MR. FORD: Are you reading from the October 23rd, 2019?

THE COURT: No, I'm reading from the controlling award, which is the last one, which is the amended one.

MR. FORD: And---

THE COURT: If I sign an order today, and I amend it tomorrow, that one before doesn't matter because I've amended it, which means I can, I can completely change my reasoning. It in -- it, in essence, invalidates what I said today.

So, once you sign an -- once you ask for clarification of an award, and they provide you with one, you don't get to refer back to that previous document because, arguably, they have done what you've asked, which is to provide clarity of their ruling, and basically invalidate what they did before or to augment what they've done before by providing you with additional reasoning.

So, I don't think there can be any good faith argument that this amended award from August is not the controlling

document.

MR. FORD: I---

THE COURT: You're saying I should read them all together as one document?

MR. FORD: Well, it's, it's an Order of the Panel.

THE COURT: Yeah, but you asked them---

MR. FORD: Exhibit J.

THE COURT: But you asked them to amend it, and they did, and it says corrected -- it is a corrected award. So that is the one that is the agreement -- I mean the award.

MR. FORD: But it, it, it is and we filed on that except that the, the corrected award doesn't refer to a later agreement that amends the Lien Waiver and Release document. They clarify, they clarify---

THE COURT: Did you bring that to their attention?

MR. FORD: Yes, and their Order is attached as Exhibit J to the Memorandum.

THE COURT: The only Order that matters is this August 12th, 2019, Order, which is the corrected award. And if there's something else missing, you should of brought it to their attention.

I don't -- I'm not gonna read every one of these awards and, and look at them independently. There's no case law that supports that. That's like saying that, that, if a judge amends a ruling, that I look back at the previous

ruling that has been amended. That makes no sense.

What's the purpose of me having amended it if I want you to read the other one?

MR. FORD: The -- Your, Your Honor, we have, we have done everything in our power to ask them to, to review this.

THE COURT: Okay.

MR. FORD: And, and this is the whole string of our asking and their responding, and they found it necessary enough to---

THE COURT: No, it looks like they---

MR. FORD: ---to clarify---

THE COURT: No, it looks like extrapolated and basically rewrote another award, and what they basically did was they expounded on every single thing in the previous awards, and brought you the clarity that you sought regarding those issues. I don't think -- unless you find a case for me that says I'm suppose to read all of these awards as one award, I don't think it works like that. If they've done a corrected award, then that is the totality of their ruling.

MR. FORD: I, I can ask the Court to correct an, an error in the award if it's a manifest disregard of the law, and that is indeed what I'm asking the Court to do.

THE COURT: Yeah, but the case law doesn't support your proposition. The U.S. Supreme Court says that, even if it's

a gross error in their interpretation of the law, it's not a basis for me to substitute my judgment and say that I get to rewrite your Order. That defeats the whole purpose of having arbitration.

MR. FORD: I understand. It can be an error of law. I acknowledge that. It can not be a manifest disregard of the law, and the, and the, the simple point is they have manifestly disregarded this Lien Waiver, which is unambiguous and controlling, because they have found and cited no subsequent agreement, which is what Mr. Rannik said, but that is not supported by the Corrected Arbitration Award or their Order responding to us on that issue.

THE COURT: I have to be -- you know, Mr. Ford, you've known me a long time.

MR. FORD: Understood.

THE COURT: I'm very direct. I think you just want me to issue a ruling -- you want me to reinterpret all this evidence, and you want me to issue a ruling based on how I would of heard it, and the case law just simply does not support that.

What I hear you saying is I don't agree with what they did. I don't agree with how they interpreted the law, and if I -- that's a Pandora's Box. That would defeat the entire purpose of having arbitration.

Why would you go to arbitration?

You might as well just leave it on the trial docket---

MR. FORD: I---

THE COURT: ---and let a judge decide it nonjury or let a jury decide it. But the U.S. Supreme Court has been very clear that even, arguably, if they acted -- as long as they acted within the scope of their agreement, and I've read the agreement. It's broad. It covers -- which is how all Arbitration Agreements are because the person who drafted it never wants there, arguably, to be any issue left out of the scope of it that can be left for litigation. Because, again, it defeats the entire purpose of having arbitration if we've got little tentacles hanging out here that can still be tried because if, you know, just from an economic standpoint, it makes no sense.

But the Supreme Court, and I'm talking about the U.S. Supreme Court, says that even if a serious error on the part of the arbitrator, even if there is a serious error, it doesn't warrant overturning the decision. Once you've decided to turn it over to that Panel, you, arguably, have turned every issue that covers that agreement into their hands, and that's why it allows you to select somebody. It allows them to select somebody. And then, I guess, the agreement provided for these other two folk to select somebody.

And the whole purpose of it is for it to be resolved in

a summary fashion. And, and, you know, an arbitration is agreement is a contract. People enter into it arm's length, and there must be something that's beneficial on either side for them to come to that agreement.

I don't -- I'm bound by what that Order actually says. Not what y'all say it's saying. And the plain language of it doesn't support the proposition that this was some -- something that happened well in advance, and somehow disregards the release.

And I think they articulated their position on it, but I'm gonna think about it. I need to do a little more research. Y'all can give me Proposed Orders within five days. It should include any findings of fact and conclusions of law that are supported by the record.

Thanks.

Have a great day.

MR. FORD: Thank you, Your Honor.

MR. RANNIK: Thank you, Your Honor.

THE COURT: You welcome.

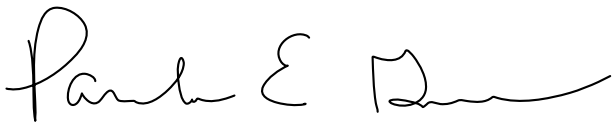
* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Charleston County, South Carolina, on the 16th day of December, 2019.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

January 12th, 2019



PAMELA E. GREEN, Court Reporter

Angela Gross

From: Andrew K. Epting
Sent: Friday, February 26, 2021 1:59 PM
To: Mikell Scarborough; MIELawClerk@charlestoncounty.org
Cc: Herron, Robin; Ford, Cordes; Walden, Andrew; Grimball, Henry; Buckley, Edward D. (Ed; Barr, Jr., W. Siau; ADemato@ycrlaw.com; Mixson, Kathryn; Jaan Rannik; Andrew K. Epting
Subject: RE: TCC OF CHARLESTON, INC. V. BEATTY, ET AL.; Letter to Judge Scarborough w/o enclosures

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 "Scoup 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.

Drew

Epting & Rannik, LLC
46A State Street
Charleston, SC 29401
843-377-1871

From: Herron, Robin <Robin.Herron@wbd-us.com>
Sent: Monday, February 22, 2021 15:18
To: Andrew K. Epting <ake@epting-law.com>; Ford, Cordes <Cordes.Ford@wbd-us.com>; Walden, Andrew <Andrew.Walden@wbd-us.com>; Grimball, Henry <Henry.Grimball@wbd-us.com>; Jaan Rannik <jgr@epting-law.com>; Buckley, Edward D. (Ed <ebuckley@ycrlaw.com>; Barr, Jr., W. Siau <SBarr@ycrlaw.com>; ADemato@ycrlaw.com; MIELawClerk@charlestoncounty.org; Mixson, Kathryn <kmixson@ycrlaw.com>
Subject: TCC OF CHARLESTON, INC. V. BEATTY, ET AL.; Letter to Judge Scarborough w/o enclosures

Mimecast Attachment Protection has deemed this file to be safe, but always exercise caution when opening files.

Please find attached a copy of a letter(without enclosures) sent to Judge Scarborough today.

Best regards,

Robin R. Herron
Legal Practice Assistant
Womble Bond Dickinson (US) LLP

d: 843-576-5526
e: Robin.Herron@wbd-us.com

5 Exchange Street
PO Box 999 (29402)
Charleston, SC 29401

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Angela Gross

From: Frank Elmore <felmore@elmoregoldsmith.com>
Sent: Monday, August 19, 2019 9:29 AM
To: Ford, Cordes; Walden, Andrew; Andrew K. Epting; Jaan Rannik
Cc: Alan Campbell; John McCants; Frank Elmore
Subject: TCC of Charleston Concord & Cumberland HPR - Corrected Arbitration Award
Attachments: We sent you safe versions of your files; Corrected Arbitration Award FINAL - fully executed.pdf; Elmore Goldsmith Trust Account Reconciliation 2019.08.14.pdf

Mimecast Attachment Protection has deemed this file to be safe, but always exercise caution when opening files.

Colleagues,

Attached please find the Panel's Corrected Arbitration Award.

I am also attaching separate reconciliation statements of our trust account for each or your arbitrator fees & deposits.

Frank



L. Franklin Elmore
Attorney
felmore@elmoregoldsmith.com

Elmore Goldsmith, P.A.
55 Beattie Place, Suite 1050 (29601)
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From: Chris Ogiba <chrisogiba@mvalaw.com>
To: Andrew K. Epting
Sent: 6/26/2015 8:26AM
Subject: FW: Meeting Summary

Drew:

As you and I discussed yesterday afternoon, it would probably be prudent to keep communications flowing between you and me in order to avoid any confusion or miscommunication. To answer John David's questions, my understanding is that the scaffolding will remain up. John David indicated during the meeting that it would be more costly to take down the scaffolding and put it back up in 30 days, than to leave it up from now until then. In terms of funds available to cover the scaffolding, balconies, and remaining demolition (which I believe was estimated to be approximately $50K), the HOA is going to be exploring short term bank financing or alternative financing methods, including potentially certain willing owners prepaying their estimated special assessments in the near term (i.e., even before the special assessment vote). Understanding that the lead up to reaching 100% work effort on the job may be up to 4 weeks, I believe that it was agreed that Trident will begin that process of ramping up now in order to be at 100% on the first week in August. Obviously, the pace of that ramp up will be dictated by subcontractor availability.

In the meantime, the board is planning to send out a notice for a special meeting to vote on a special assessment on Tuesday, June 30. That special assessment will include additional construction costs over and above the existing contract in an amount not to exceed $3,250,000. The special meeting will be held on August 1. I suspect, though have not confirmed, that it may be helpful to have a Trident representative at that meeting to help explain the numbers. As soon as that special assessment passes, Trident will be back up to full speed, with a substantial completion date of November 30. The HOA, Trident, and GBA will work to diligently assess and process ongoing payment applications and change order requests, with an understanding that some portions of some of the PCOs may require additional negotiation or compromise at or near the end of the project.

Please let me know if your understanding is any different.

Thanks,

Chris

From: John David Griffith [mailto:JDG@TridentCon.com]
Sent: Thursday, June 25, 2015 6:13 PM

To: tom mather (tmather@icloud.com); Johan Schultz (smjsbooboo@aol.com); msimpson17@aol.com; April Gawrych (agawrych@mcalisterdevelopment.com); Chris Ogiba; Drew Epting (AKE@epting-law.com)
Cc: Chris Burrell
Subject: Meeting Summary

Would someone please summarize exactly what we decided to day. My understanding is somewhat different from my Chris's?

1. I understood that we were going to leave the scaffold in place.

2. What are we to do about the swap from the scaffold to doing work on the balconies? If we try to do both, we will go over the $400,000.

3. We talked about the board getting a short term commitment from a bank? To guarantee the slow down work? To ramp up the work? To full on the work?

4. Whatever that number is effects how much work we can do until the either bank commitment or additional assessment is finalized.

5. We talked a lot about "ramping back up." One question there is When? Second question there is How Much? Is it full on or just more than what we agreed to now? If more, how much more?

Sorry for the uncertainty. But again, Chris and I recall (while most all of the same discussion) differently what the direction to TCC is?

Thank you, John David

John David Griffith

Vice President

small trident_teambuild_cmyk

2245 Technical Parkway

North Charleston, SC 29406

Main: 843.572.7600

Direct: 843.576.5122

Fax: 843.764.1704

www.tridentconstruction.com <http://www.tridentconstruction.com/>

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TCC CONSTRUCTION

May 27, 2015

Concord & Cumberland HPR
c/o McAlister Preferred Properties
106 Pitt Street
Mt. Pleasant, SC 29464

ATTN: Ms. Johan Schultz/Dr. Tom Mather

RE: Meeting Summary & Agreement To Avoid Work Stoppage
Concord & Cumberland Exterior Repairs

Dear Ms. Johan Schultz and Dr. Tom Mather:

As a follow up to our May 27th meeting at Glick/Boehm & Associates' (GBA) office, discussions were had relative to how the Team can avoid a full work stoppage onsite due to a lack of full project funding. In attendance of the meeting were you, Ms. Marion Simpson, Shawn Mellin, Miles Glick, Chris Burrell, Ryan Tomberlin, and myself.

The following are our interpretations of the relevant details of the conversation.

TCC currently has costs in excess of $3.9 million on the project (not including allowed overhead and profit) and currently is in a significant negative cash position of $1.9 million on the project. TCC stated that it cannot continue to fund the project out of its reserves without a firm commitment from the Owner that adequate funding is in place to complete the Work and that TCC will be compensated for the additional work.

1. *(Please Note: The job cost to date figures that were shared in the meeting did not include any labor for either last week or this week. They also did not include any invoices not yet posted for the period of May 22nd thru May 31st.)*

2. HOA stated that it needs a firm final number to take to the Home Owners in order to obtain additional funding. TCC stated that a firm number would be difficult due to continued findings of unforeseen conditions. Miles suggested possibly putting a contingency factor on approved/known extras to cover unforeseens.

3. HOA needs to have known costs reviewed and validated by GBA in order to begin to present cost overruns to Home Owners. Shawn and Chris agreed to work together to substantiate and validate the cost of the approved work in place as quickly as possible and that numbers could be validated within two (2) weeks.

4. HOA has planned an upcoming meeting with the Home Owners on June 20 to present the cost overruns and to discuss a Special Assessment. It was discussed that it could take between 60 to 90 days in order to obtain a special assessment and that it could be days after that before all funds are in hand from the Home Owners.

TCC of Charleston, Inc.
P.O. Box 61976 · North Charleston, SC 29419-1976
PHONE 843.830.7600 FAX 843.764.1704

Bindertek #CLEX EXH 23 MELLIN 11.28.18

5. Team agreed that a stop gap measure to avoid work stoppage would be to use the Board's remaining funds (plus/minus $1.733M after payment of Pay Application #10) and the $400,000 guaranteed of additional monies by Dr. Mathers to fund the cost of the work in place and to fund significantly scaled back operations (approximately $30K per week including TCC Supervision, scaffolding and equipment, and continued progress by the Stucco Subcontractor) over a period of approximately 90 days. With this TCC still forecasts that it would still have a negative cash flow position on the project in excess of $400K at the end of the 90 day period. TCC agreed to reinstitute full operations immediately once the Board is able to confirm that full funding is approved for the balance of the work. At that time, all parties will agree to a new completion date based on remaining work and the payment of associated costs to return and complete the balance of the Work and extend the project insurance.

TCC agreed not to stop work provided that it receives payment for Pay Application #10 ($508,796.37) and that approval be issued for Owner Change Order #004 ($220,907) and the Board approve the use of funds in hand and the Dr. Mathers guarantee to fund work in place and the next 90 days of scaled down construction. Furthermore, it was agreed that the HOA will continue to process and pay additional cost when as validated by the Architect. The HOA also agrees that TCC can invoice for the full Contractor controlled contingency and that a full accounting of contingency dollars spent will be made before the Owner makes final payment. If funding is not approved TCC will immediately halt work unless other agreements are made.

I believe that all parties agree that this is the best course of action for the project. Continued communication and leadership by the Board is necessary in order to maintain open lines of communication and report progress and the status of the necessary fund raising activities. If in agreement please sign below and return a copy of this memo for our files.

Thank you for your assistance and please call should you have any questions or comments.

Sincerely,
TCC OF CHARLESTON, INC.

John David Griffith
President

Approved,
CONCORD & CUMBERLAND HPR

Johan Schultz/Tom Mather
Board Representatives

Cc: Johan Schultz, Marion Simpson - HOA
Shawn Mellin, Miles Glick - GBA
April Gawrych - McAlister Preferred Properties

* Need to redate insurance para 5 stop work

TCC CONSTRUCTION

Estimate Summary PCO 130 - Waterproofing Impact Due To Increased Duration and Existing Conditions

Prepared By: Chris Burrell
Date: 01/26/15

The PCO addresses Waterproofing Impact Due To Increased Duration and Existing Conditions.

Item	Quantity	Unit	Labor	Material	Sub	Equipment	Other	Total
Additional Waterproofing Crew Duration Due To Unforeseens (Salem)	1	LS			$ 54,301			$ 54,301
								$ -
								$ -
								$ -
								$ -
								$ -
Sub Totals			$ -	$ -	$ 54,301	$ -	$ -	$ 54,301
					Sales Tax			$ -
					Labor Burden			$ -
					Sub Total			**$ 54,301**
					CGL Insurance: 2.65%			$ 1,439
					Data Processing: .25%			$ 136
					Permits/Licenses: 1%			$ 543
					Overhead & Profit: 8%			$ 4,344
					Total Estimate			**$ 60,762**

Additional Time Requested (Calendar Days) 0

Chris Burrell
TCC of Charleston, Inc.

Shawn Mellin 2-4-16
Glick Boehm

Owner's Representative
Concord & Cumberland HPR

Based on the information provided, the Architect approves only the amount in this PCO. TCC disagrees that this is the total amount of this PCO.

Team Build

Chris Burrell

From: Shawn Mellin <mellin@glickboehm.com>
Sent: Tuesday, January 26, 2016 7:26 AM
To: John David Griffith; Trey McCraw; April Gawrych (agawrych@mcalisterdevelopment.com)
Cc: Ryan Tomberlin; Chris Burrell; Natalie Boone
Subject: RE: Concord & Cumberland - PCO 102r2 Response To GBA Comments

Follow Up Flag: Follow up
Flag Status: Flagged

John David,
You have my reviews on PCO's, which are based on information you have provided. Not sure if you reviewed them in detail but to recap:

PCO 025 - Waterproofing
I reviewed PCO 025 R2 Waterproofing Impact. I reviewed daily reports and found 182 actual days attributed to air barrier/waterproofing.
182 actual days
-90 original scheduled days
92 days variance
4 men x 7hours/day x $18.33 x 92days = $47,218.08
With markups $60,762.58
This is the amount I am prepared to approve.
Issue revised PCO 025 for approval.

PCO 079 - Window Installer
I reviewed PCO 079 Window Installer Impact. I reviewed every daily report for the days attributed to window installation and found the following:
There were days included for window blocking/framing work. This cost was covered under PCO 80.
There were days included for cutting shear wall. This cost was covered in PCO 11.
There was corrective work included.
Water testing windows was included.
There were days included for window removal.
After removal of these days there were 167 actual window installation days.

Actual days installing windows	167
Original days included in bid	148
Variance	19 days

8 men x 7 hours/day x $18.33 x 19 days = $19,503.12
With markups $25,097.59.
This is the amount I am prepared to approve.
Issue revised PCO 079 for approval.

PCO 083 - Salem's GC's

A. October 2014 thru early December 2014 there was a lack of construction production and performance (Salem). Trident acknowledged this issue and put Salem on written notice directing them to take action to correct delays and other issues. The delays and issues due Salem's lack of construction production and performance were no fault of the owner and the owner should not pay

TCC CONSTRUCTION

Estimate Summary PCO #025 Revised 2 - Waterproofing Impact Due To Increased Duration and Existing Conditions

Prepared By: Chris Burrell
Date: 12/07/2015

Item	Quantity	Unit	Labor	Material	Sub	Equipment	Other	Total
Additional Waterproofing Crew Duration Due To Unforeseens (Salem)	1	LS			$72,007.00			$72,007.00
								$0.00
								$0.00
								$0.00
								$0.00
								$0.00
								$0.00
								$0.00
								$0.00
Sub Totals			$0.00	$0.00	$72,007.00	$0.00	$0.00	$72,007.00

Sales Tax		$0.00
Labor Burden		$0.00
Sub Total		**$72,007.00**
CGL Insurance: 2.65%	$	1,908
Data Processing: .25%	$	180
Permits/Licenses: 1%	$	720
Overhead & Profit: 8%	$	5,761
Total Estimate		~~$80,576~~ Not Approved

Additional Time Requested (Calendar Days) 0

Change proposal does not include additional costs for general conditions.
time impact to be evaluated with concurrence of other delays

CWB

Chris Burrell	Shawn Mellin	HOA Board Rep.
TCC of Charleston, Inc.	Glick Boehm	Concord & Cumberland HPR

TeamBuild

Proposal for Change Order

Project:	Concord and Cumberland	**PCO Number:**	**079-R3**
Regarding:	Window Installer Impact Due To Increased Duration and Existing Conditions	**Additional Cost:**	**$ 72,007.25**
Date:	12/7/15	**Additional Time:**	**0**

Description:

Installation	$	62,615.00
Sub	$	-
Other	$	-
Sub Total	$	62,615.00
Tax		
Subtotal	$	62,615.00
Overhead (10%)	$	6,261.50
Profit (5%)	$	3,130.75
Total	$	~~72,007.25~~ Not Approved

This PCO does not include extended general conditions which will be requested at a later date.

Attachments: PCO Worksheet
Salem Takeoffs

All work shall be in accordance with the terms, stipulations, and conditions of the original Contract Documents.

Salem Services Group, LLC By: _____ Date: _____

TCC of Charleston, Inc. By: _____ Date: _____

Architect / Engineer :
_____ By: _____ Date: _____

Salem Services Group, LLC is directed to make the changes indicated above for the proposed amount and time herein. The Field Change of Scope becomes a fully executed Change Order upon signature of the Contractor's Agent, Engineer, or Owner's Representative.

PCO #025-R2 (Waterproofing Installation)

Claim for additional labor expenditures for the air barrier/waterproofing is being submitted due to the significant additional length of time that our crews have had to be onsite while installing windows and waiting for unforeseen issues to be corrected. The baseline duration which we based our original pricing on was roughly 90 working days (5 days/drop, 3,4 excl.). Our actual days spent performing waterproofing activities (based on information from Daily Reports) is 212 working days. The reason for the extension of the waterproofing duration is because existing items had to be corrected prior to installation of waterproofing. At no point on the project have we been able to install waterproof according to the originally planned sequence. Our waterproofing crew has been slowed and their flow has been interrupted continuously as a result of having to waterproof on a case by case basis depending on the completion of the building repairs and we have had to bounce from drop to drop in order to complete the waterproofing. All of the unforeseens on the project have resulted in a substantial overrun in our expenses for the air barrier & waterproofing activities. We have provided a comparison demonstrating the "Baseline" plan versus the "Actual" waterproofing installation schedule for your review and in support of this claim.

Original Days Included In Our Estimate	90	
Actual Days Spent Work Onsite	212	182 Actual Days -90 Original Scheduled Days
Variance	122	92 Days variance
4 Men x 7 Hours/Day x $18.33	$ 62,615	$47,218

Baseline (by Area):

Act ID	Description	Orig Dur	Early Start	Early Finish	Area
1010	Waterproofing	8	08/22/2014	09/02/2014	1
2504	Waterproofing	5	09/08/2014	09/12/2014	2
2560	Waterproofing	5	10/06/2014	10/10/2014	2
3060	Waterproofing	8	10/17/2014	10/28/2014	3
4060	Waterproofing	8	10/29/2014	11/07/2014	4
4126	Waterproofing	8	11/10/2014	11/19/2014	4
5060	Waterproofing	8	11/27/2014	12/08/2014	5
5116	Waterproofing	8	12/16/2014	12/26/2014	5
6006	Waterproofing	8	12/30/2014	01/09/2015	6
7007	Waterproofing	8	01/13/2015	01/22/2015	7
7028	Waterproofing	8	01/23/2015	02/03/2015	7
8007	Waterproofing	8	02/20/2015	03/03/2015	8
	Total Days	**90**			

Actual Waterproofing Days Spent Per Daily Reports

DATE	DAY	WATERPROOFING
~~06/16/2014~~	~~Monday~~	~~applied waterproofing to sheathing~~ Prior to NTP, Mockup wall
~~06/17/2014~~	~~Tuesday~~	~~coated entire wall with liquid applied waterproofing~~ Prior to NTP, Mockup wall
~~06/18/2014~~	~~Wednesday~~	~~waterproofing~~ Prior to NTP, Mockup wall
~~06/19/2014~~	~~Thursday~~	~~waterproofing mockup~~ Prior to NTP, Mockup wall
09/25/2014	Thursday	waterproofing of window in stone tower
~~10/03/2014~~	~~Friday~~	~~waterproofing building~~ Temp. waterproofing for rain
10/06/2014	Monday	continued waterproofing drop 2 201
10/07/2014	Tuesday	continued waterproofing window openings
10/08/2014	Wednesday	continued waterproofing drop 2 201, started waterproofing 3
10/09/2014	Thursday	continued waterproofing
10/10/2014	Friday	waterproofing at windows
10/13/2014	Monday	continue waterproofing window openings in 201 drop 2
~~10/14/2014~~	~~Tuesday~~	~~fixing waterproofing at from 3-401 A windows~~ Corrective work
10/15/2014	Wednesday	waterproofing in 401 and 201
10/16/2014	Thursday	waterproofed pans
10/17/2014	Friday	waterproofing drop 4 units 401 and 201
10/20/2014	Monday	waterproofing stone tower windows in 401
10/21/2014	Tuesday	401 stone tower continued waterproofing openings, coated waterproofing
10/22/2014	Wednesday	unit 401 continued waterproofing at stone tower
10/23/2014	Thursday	waterproofing 101, final waterproofing of steel at drop 2
10/24/2014	Friday	waterproofing windows 4-6 drop 3 & 4, drop 4 continued waterproofing
10/25/2014	Saturday	complete waterproofing 401, continue waterproofing drops 3 & 4 unit 201
10/27/2014	Monday	waterproofing 201 drop 1, waterproof in 401, 201 started waterproofing, drop 4 waterproofed 201
10/28/2014	Tuesday	101 waterproofing, waterproofing blocking, 201 cont waterproofing
10/29/2014	Wednesday	101- cont waterproofing and installed blocks at tube steel for waterproofing, cont waterproofing
10/30/2014	Thursday	waterproofing window 6, completed waterproofing 10, 11, 12
11/03/2014	Monday	waterproofing at drop 2 units 301, 201, 101
11/04/2014	Tuesday	waterproofed opening, 101 started waterproofing
11/05/2014	Wednesday	90% of waterproofing, 101 completed waterproofing
11/06/2014	Thursday	301 complete waterproofing, waterproofing opening set pans
11/07/2014	Friday	301 waterproofed, 201 complete waterproofing, 101 completed waterproofing
11/10/2014	Monday	started waterproofing 201, started waterproofing 301
11/11/2014	Tuesday	301 completed waterproofing, cont waterproofing
11/12/2014	Wednesday	301 waterproofing openings, 101 waterproofing openings ready to set pans
11/13/2014	Thursday	101 completed waterproofing, cont waterproofing

002687

TCC-CONCORD 002390

11/14/2014	Friday	201 exterior backer rod and sealant, 101 cont waterproofing
11/15/2014	Saturday	301 complete pan installs and waterproof
11/17/2014	Monday	drop 1-401 started waterproofing
11/18/2014	Tuesday	drop 1-401 waterproofed openings
11/20/2014	Thursday	drop 1-401 completed waterproofing at window
11/21/2014	Friday	101 waterproofed window flanges and entire field to bottom of relief angle
11/22/2014	Saturday	cont waterproofing in the field of drop 1 & 2
11/25/2014	Tuesday	drop 1 exterior waterproofing CMU (2)
11/26/2014	Wednesday	exterior repair waterproofing at windows, started waterproofing 1 & 2, CMU waterproofing
12/01/2014	Monday	drop 1 waterproofing CMU and window flanges on exterior, 301 waterproof window flanges
12/02/2014	Tuesday	exterior punched waterproofing, waterproofed nailing flanges exterior
12/03/2014	Wednesday	exterior cont punching waterproofing
12/06/2014	Saturday	waterproofing tested for leak, waterproofed in field
12/08/2014	Monday	started waterproofing
12/09/2014	Tuesday	waterproofing L door
12/10/2014	Wednesday	drop 2 began waterproofing process, 101 started waterproofing
12/11/2014	Thursday	cont field waterproofing, 101 completed waterproofing at U doors
12/12/2014	Friday	waterproofing U doors 202 drop 6,drop 2 started waterproofing, drop 5 complete waterproofing on U doors 101 terrace
12/13/2014	Saturday	drop 2 completed waterproofing at 401 D doors, Waterproof L and U openings
12/15/2014	Monday	started waterproofing ties, drop 20-404 waterproofing windows
12/16/2014	Tuesday	waterproof brick ties, waterproofing U doors and S window, waterproofed openings, started waterproofing 20-3/4
12/17/2014	Wednesday	waterproofing at 201, 101 waterproofing openings, cont waterproofing a N window, waterproofing openings at 208
12/18/2014	Thursday	waterproofed openings, waterproofing U door opening, waterproofing P window openings, drop 20 cont waterproofing window openings and prep for liquid applied waterproofing
12/19/2014	Friday	drop 5 waterproofing openings at 201/101, drop 6 waterproof openings 102/202, waterproofing field and window openings at 108
~~12/22/2014~~	~~Monday~~	~~drop 19/20 started waterproofing~~ Rain stopped work
12/23/2014	Tuesday	drop 5 waterproofed, 201/101 waterproofed P window
12/30/2014	Tuesday	drop 2 - completed waterproofing, drop 20 - completed waterproofing field
01/02/2015	Friday	drop 19/20 - waterproofing bottom of wall
01/03/2015	Saturday	waterproofing at S opening, waterproofing at L door
01/05/2015	Monday	201 - completed waterproofing S window opening, began waterproofing doors, waterproofed 308 window flanges
01/06/2015	Tuesday	202 - completed waterproofing of L door, 301 - started waterproofing of windows 1 & 2
01/07/2015	Wednesday	201 cont waterproofing windows U & S, 301 completed waterproofing both V openings, started waterproofing 8-3 Q window
01/09/2015	Friday	drop 2 waterproofed brick ties
01/13/2015	Tuesday	8-301 set pan and started waterproofing
01/16/2015	Friday	waterproofing of L and V openings

002688

TCC-CONCORD 002391

01/17/2015	Saturday	started waterproofing ties and flashing, waterproofing V & L
01/19/2015	Monday	complete waterproofing of U door, waterproofed 102 V window
01/20/2015	Tuesday	completed waterproofing of V window
01/21/2015	Wednesday	102 waterproofing of V window
01/22/2015	Thursday	waterproofed V window exterior, 301 waterproofed flanges of windows, drop 17 waterproofing of field, waterproofed exterior flanges
01/26/2015	Monday	waterproofing exterior rock 404
01/27/2015	Tuesday	102 waterproofed, drop 19/20 waterproofed flanges
01/28/2015	Wednesday	drop 7 - 401 waterproofing densglass at parapet, drop 18 - 404 started waterproofing densglass
01/29/2015	Thursday	drop 2 - 401 waterproofing of field, waterproofing field of 4th floor
01/30/2015	Friday	drop 2 waterproofing 401, 202/102 waterproofing exterior flanges
02/03/2015	Tuesday	201/101 replace terrace balcony waterproofing
02/04/2015	Wednesday	waterproofers made repairs at RFI 49 unit 401, 201 waterproofed exterior of S window, started waterproofing at balcony
02/06/2015	Friday	301 waterproof repair at shearwall, 303 started waterproofing opening, 202 waterproofing opening, drop 19 waterproofed KA openings
02/07/2015	Saturday	waterproofing at drop 8 at Q windows at 303, 203, 202, 102
02/09/2015	Monday	308 waterproofed N window, waterproofed head
02/10/2015	Tuesday	drop 5 waterproof 301 N, U, S and U openings
02/11/2015	Wednesday	waterproofed and started running bond above releif angle
02/12/2015	Thursday	drop 18 waterproofed field of 308 M and N windows
02/16/2015	Monday	301 waterproofed exterior, 303 waterproofed Q opening, drop 19-208 reworked framing and waterproofed opening
02/18/2015	Wednesday	drop 5-401 waterproofed K and D doors
02/19/2015	Thursday	drop 5-401 completed waterproofing at K and D door
02/20/2015	Friday	waterproofed drop 6-2, drop 19 waterproofed K window at 404
02/26/2015	Thursday	drop 5 waterproofed K corner, drop 6 waterproofed H unit on 401 balcony
02/27/2015	Friday	drop 18-12 waterpoofed N window
02/28/2015	Saturday	drop 6-2 waterproofed last H unit, waterproofed block at garage
03/02/2015	Monday	drop 5/6 waterproofed pan flashing 5-1, drop 18 waterproofed J, K units
03/03/2015	Tuesday	drop 2 waterproofed flashing, drop 6 working on H units waterproofing, drop 18 waterproofing, drop 19 waterproofing
03/04/2015	Wednesday	drop 18 waterproofed H unit and J units, drop 9 waterproofed
03/05/2015	Thursday	waterproofing with hydraulic cement same balcony, drop 9 waterproofed V units in 303
03/07/2015	Saturday	drop 9-5 weatherproof opening
03/09/2015	Monday	drop 2 weatherproofed
~~03/10/2015~~	~~Tuesday~~	~~drop 18 waterproof balcony hydraulic cement~~ Balcony waterproofing
03/12/2015	Thursday	drop 5 - 101 waterproofing, drop 17 waterproofed H unit at 17-2, drop 18 waterproofed wall at 404 balcony at 18-1
03/13/2015	Friday	drop 17-404 waterproofed last H unit
03/16/2015	Monday	drop 9 waterproofed steel framed V's, drop 18/17 waterproofed field of 404 balcony
03/17/2015	Tuesday	waterproofing on 307 balcony, waterproofing exterior walls at 404 balcony, drop 20 waterproofed

002689

TCC-CONCORD 002392

03/18/2015	Wednesday	drop 17 waterproofed 307 balcony openings, waterproofed field
03/20/2015	Friday	drop 17 waterproofed L and UA on 107, drop 18 waterproofed
03/21/2015	Saturday	drops 5/6 waterproof field of 401 balcony and 1st floor of drop 6, weatherproofing windows 203/303
03/24/2015	Tuesday	drop 6 waterproofing balconies and face at P's
03/25/2015	Wednesday	drop 3/4 waterproofing on stone, waterproof densglass above K and D doors, waterproofed balcony 202, drop 8 waterproofed 3rd floor plane
03/26/2015	Thursday	waterproofed field 401 terrace, waterproofed 301 balcony, redid plastic temp waterproofing
03/27/2015	Friday	drop 8 terrace C waterproofed window opening and wall plane
~~03/30/2015~~	~~Monday~~	~~Terrac B waterproofing~~ Terrace waterproofing, no daily report
~~03/31/2015~~	~~Tuesday~~	~~waterproofing balconies drop 5~~ Balcony waterproofing
~~04/01/2015~~	~~Wednesday~~	~~waterproofing balconies drop 5~~ Balcony waterproofing
~~04/02/2015~~	~~Thursday~~	~~waterproofing balconies drop 5~~ Balcony waterproofing
~~04/03/2015~~	~~Friday~~	~~waterproofing balconies drop 5~~ Balcony waterproofing
04/08/2015	Wednesday	waterproofed J openings and H openings at 402
04/09/2015	Thursday	drop 10 waterproofing, waterproofed ties
04/10/2015	Friday	drop 2 waterproofed, drop 10 waterproofed 203 balcony units
04/13/2015	Monday	drop 17 waterproofing P units
04/14/2015	Tuesday	drop 2 rewaterproofed steel, drop 10-103 waterproofed L and UA openings, waterproofing 307 P opening and face
04/15/2015	Wednesday	drop 10 waterproofed at 303 UA and L balcony, waterproofing at shearwalls floors 1 to 3
~~04/16/2015~~	~~Thursday~~	~~installing temp waterproof protection at 404 balcony~~ temp. waterproof protection
04/21/2015	Tuesday	drop 6 waterproofing ends of shearwalls, drop 16 waterproofing V openings
~~04/22/2015~~	~~Wednesday~~	~~drop 10 & drop 11 temp waterproofing at balconies~~ temp. waterproof protection
04/23/2015	Thursday	drop 6 cont waterproofing at 3rd floor balcony, water tested windows
04/24/2015	Friday	drop 16 waterproofed
04/27/2015	Monday	drop 7 waterproof field
04/28/2015	Tuesday	drop 7 waterproofing field, drop 16 completing waterproofing
04/30/2015	Thursday	completed temp waterproofing 401 balcony, drop 7 completed waterproofing wall plane
05/01/2015	Friday	drop 10 waterproof P openings at floors 1 and 2, drop 15 waterproof KA opening
05/02/2015	Saturday	drop 10 waterproofing last p unit at 303
05/04/2015	Monday	drop 9 waterproofing plane
05/05/2015	Tuesday	drop 9 waterproofing field
05/06/2015	Wednesday	drop 9 completed terrace wall waterproofing, drop 17 waterproofed plane
05/08/2015	Friday	drop 6 waterproofing 624 installed at 401 balcony, drop 17 completed waterproofing field
05/09/2015	Saturday	drop 11 waterproofing balcony openings, drop 17 waterproofing in field
05/11/2015	Monday	624 waterproofing at 401 terrace B, drop 10 waterproofing amd worked on P units, drop 11 waterproofing M and U on 304
05/12/2015	Tuesday	drop 5 waterproofed, drop 8 waterproofed flanges at KA drop 9 waterproofed flanges at D and E, drop 17 waterproofed flanges on balcony doors and windows
05/14/2015	Thursday	drop 15 waterproofed Q window openings at third floor, waterproof balconies

002690

TCC-CONCORD 002393

05/15/2015	Friday	drop 17 waterproofing on face, waterproof balconies
05/18/2015	Monday	drop 6 waterproofing kneewall, drop 15 starting waterproofing in field
05/19/2015	Tuesday	drop 6 waterproofing kneewall at 401 balcony, drop 15 waterproofing Q windows, started waterproofing 1st floor of 107
05/20/2015	Wednesday	drop 10 waterproof field of 402 balcony, drop 11 waterproof field of 402 balcony, drop 15 waterproofed Q window openings, drop 17 waterproofed 2nd floor balcony, drop 18 waterproof J door above copper roof
05/21/2015	Thursday	drop 15 waterproof of openings, wp 1st and 2nd floor balconies, wp stone lintel, drop 6 kneewall waterproofing at 401
05/22/2015	Friday	drop 10 cont waterproofed balconies, drop 12 waterproofed second floor M opening
~~05/25/2015~~	~~Monday~~	~~Holiday~~
05/26/2015	Tuesday	drop 12 completed waterproofing, drop 15 waterproofing field, drop 16 waterproofing field
05/27/2015	Wednesday	waterproofing sergio balcony, drop 15 completed waterproofing 2nd and 3rd floor face and SR work at Q openings, drop 16 waterproof plane
05/28/2015	Thursday	drop 6 waterproofing balcony edges at 3 floors, drop 14 waterproofing field, drop 16 waterproofing in field
05/29/2015	Friday	drop 11 waterproofing M openings on face, drop 12 waterproofing M openings on face, drop 14 waterproofed top left corner, drop 17 waterproofed top right corner of 404 balcony
06/02/2015	Tuesday	Drop 16 waterproofing, waterproofing adjacent to south expansion joint
06/08/2015	Monday	drop 10 waterproof face
06/09/2015	Tuesday	drop 10 waterproof face, drop 12 started waterproofing
06/10/2015	Wednesday	drop 10 waterproof half of kneewall, drop 11 waterproof, drop 12 started waterproofing 105
06/11/2015	Thursday	drop 10 finish waterproofing kneewall, drop 11 waterproof face 2nd floor, drop 12 1dt floor waterproof door and window
06/15/2015	Monday	drop 11 waterproofing face
06/16/2015	Tuesday	drop 7/8/9 hot prime
06/17/2015	Wednesday	drop 7/8/9 hot prime
06/18/2015	Thursday	drop 11 waterproofing, drop 12 waterproofing
06/22/2015	Monday	drop 7/8/9 installing armor coat mesh
~~06/25/2015~~	~~Thursday~~	~~drop 11 waterproofing third floor balconies~~ waterproofing balconies
~~07/10/2015~~	~~Friday~~	~~drop 12 temp waterproof~~ temp. waterproof protection
~~07/14/2015~~	~~Tuesday~~	~~install base flashing and waterproofing~~ not noted on daily report
07/21/2015	Tuesday	drop 8 WP densglass
07/31/2015	Friday	drop 17/18/19 waterproof
~~08/03/2015~~	~~Monday~~	~~drop 17/18 fixed temp waterproofing~~ temp. waterproof protection
08/04/2015	Tuesday	drop 10 waterproofing densglass at kneewall
~~08/06/2015~~	~~Thursday~~	~~drop 8 fixing waterproofing~~ corrective rework
~~08/07/2015~~	~~Friday~~	~~drop 18 waterproofed terrace G~~ waterproofing terrace
08/12/2015	Wednesday	drop 12 waterproofed window
08/13/2015	Thursday	drop 12 waterproofed M on balcony, drop 18 waterproofed columns
08/14/2015	Friday	drop 18 complete waterproofing brick ties on columns
~~08/19/2015~~	~~Wednesday~~	~~drop 5 caulk and waterproofing copper roof, drop 11 rewaterproofed all three windows on face~~ roof & corrective work
08/21/2015	Friday	drop 12 waterproof terrace E, drop 14 waterproof V at 306 and 206

002691

TCC-CONCORD 002394

08/24/2015	Monday	drop 13 finished waterproofing
08/28/2015	Friday	drop 13 waterproof windows at 206 L and U and 106 P unit at face
09/01/2015	Tuesday	drop 13 waterproofing face of P's and 106/206 balconies openings, drop 16 waterproofing V window sills
09/02/2015	Wednesday	drop 16 waterproof sills at V windows
09/04/2015	Friday	drop 12 waterproof face 3rd floor exterior sheathing
09/09/2015	Wednesday	drop 12 waterproofing field on 305 balcony, drop 13 waterproofing exterior of windows on 3rd floor balcony, drop 14 waterproofing V window openings
09/10/2015	Thursday	drop 11/12 waterproofing, drop 17 waterproofing balcony edges
09/11/2015	Friday	drop 11/12 waterproofed above terrace D/E copper roof
09/14/2015	Monday	drop 11/12 waterproofing wall to copper roof edge above terrace D/E, drop 12 waterproofing block column at terrace D and waterproof second floor, drop 13 waterproof 2 H openings at terrace D
09/15/2015	Tuesday	drop 13 waterproof 2nd floor balcony sheathing
09/16/2015	Wednesday	drop 12 waterproof K opening, drop 13 waterproofed 1st and 2nd floor balconies
09/18/2015	Friday	drop 12 waterproofing balconies, drop 14 waterproofing shearwall densglass
09/19/2015	Saturday	waterproofing balcony edges drop 13, waterproofed drop 14 shearwall
09/21/2015	Monday	drop 12 waterproofing demising wall at terrace E and waterproofing balconies, drop 14 waterproofing densglass on shearwall
09/23/2015	Wednesday	drop 10 rewaterproof top, drop 12 waterproof J openings, drop 13 waterproof terrace E wall
09/25/2015	Friday	drop 12 waterproof J openings and temp set J's and waterproof columns, drop 15 waterproof Q on 1st floor
09/26/2015	Saturday	waterproof P window at 1st floor drop 13 face and surrounding densglass
09/28/2015	Monday	drop 11 waterproof punch and installation of ties, drop 14 waterproof punch on terrace F, drop 18 waterproof punch on terrace G
09/29/2015	Tuesday	drop 11 waterproof punch and tie install waterproof columns on terrace D, drop 12 waterproof columns terrace E, drop 14 TU waterproofing sill flashings, drop 15 waterproof punch,
09/30/2015	Wednesday	drop 7/8/9 waterproof copper roof, drop 12 waterproofed densglass, drop 14 waterproof punch throughout, drop 15 waterproof punch on lower floors
10/01/2015	Thursday	drop 11 waterproof punch, drop 13 temp waterproof at tie points
10/05/2015	Monday	drop 12 waterproof J flanges, drop 13 waterproof openings and kneewall waterproofing at top and temp waterproofing at bottom
10/07/2015	Wednesday	drop 12 waterproof ties and lintels
10/08/2015	Thursday	drop 12 lintel prep with waterproofing
~~10/10/2015~~	~~Saturday~~	~~waterproofing throughout~~ rain day temp. protection
~~10/14/2015~~	~~Wednesday~~	~~drop 6 waterproof tie point~~ no daily report
10/16/2015	Friday	drop 18 waterproofing
10/17/2015	Saturday	drop 18 completed waterproofing on terrace G columns
~~10/19/2015~~	~~Monday~~	~~drop 12 terrace E clean peel and stick from waterproofing~~
~~10/28/2015~~	~~Wednesday~~	~~drop 14/15/16 terrace F repaired waterproofing at terrace edge~~ corrective work
~~10/29/2015~~	~~Thursday~~	~~drop 17 waterproof tie point on third floor face~~

002692

TCC-CONCORD 002395

~~10/31/2015~~	~~Saturday~~	~~drop 7/8/9 waterproof trench at terrace C~~ terrace waterproofing
~~11/02/2015~~	~~Monday~~	~~drop 7/8/9 waterproof terrace C~~ terrace waterproofing
11/03/2015	Tuesday	drop 18 waterproof densglass on terrace G roof
11/04/2015	Wednesday	drop 18 waterproof angle at top for cast stone flashing and complete waterproofing terrace G densglass, drop 19 waterproof lintel at cast stone
11/05/2015	Thursday	drop 12/13 waterproofed K door

2

Total Days Actually Spent **213**

002693

TCC-CONCORD 002396

TCC CONSTRUCTION

Estimate Summary PCO #142 - Exploratory Work Stone Tower

Prepared By: Chris Burrell
Date: 03/01/17

As requested by Owner's Representative, Trident performed exploratory work to determine possible causes for water infiltration at the stone tower.

Item	Quantity	Unit	Labor	Material	Sub	Equipment	Other	Total
Superintendent	11.00	HRS	$ 715					$ 715
Project Manager	2.00	HRS	$ 200					$ 200
Miscellaneous Material	1.00	LS		$ 207				$ 207
								$ -
Sub Totals			$ 915	$ 207	$ -	$ -	$ -	$ 1,122
					Sales Tax			$ 18
					Sub Total			**$ 1,140**
					CGL Insurance: 2.65%			$ 30
					Data Processing: .25%			$ 3
					Permits/Licenses: 1%			$ 11
					Overhead & Profit: 8%			$ 91
					Total Estimate			**$ 1,275**

Additional Time Requested (Calendar Days) **0**

Chris Burrell
TCC of Charleston, Inc.

Shawn Mellin
Glick Boehm

Board Representative
Concord & Cumberland HPR

TeamBuild

TCC OF CHARLESTON, INC.
HEATHER DAGG HOURS
2016-2017
CONCORD & CUMBERLAND

PR Group: 1 **Weekly payroll**

PR End Date: 12/11/16
Employee: 1015 Dagg Heather

Pay Seq	Date		State Loc	Craft/Class	PRDept/JCDept	Ins	GL/JC/EMCo's Cert	Eq CTCompanies Job/Phase	Equipment	CostCode	quipmentUsage	EC	Rate	Hours
1	12/05/16	1015	SC/SC	10/00	3/ 30	SC/5403	Y 1/1/	14001-/01-630-	0		0.00	1	65.00000	2.50
1	12/05/16	1015	SC/SC	10/00	3/ 30	SC/5403	Y 1/1/	14001-/02-100-	0		0.00	1	65.00000	5.50
							Timecard Totals for 12/05/16 :							
1	12/06/16	1015	SC/SC	10/00	3/ 30	SC/5403	Y 1/1/	14001-/01-630-	0		0.00	1	65.00000	7.50
1	12/06/16	1015	SC/SC	10/00	3/ 30	SC/5606	Y 1/1/	14001-/01-110-	0		0.00	1	65.00000	2.00
							Timecard Totals for 12/06/16 :							
1	12/07/16	1015	SC/SC	10/00	3/ 30	SC/5403	Y 1/1/	14001-/01-630-	0		0.00	1	65.00000	5.50
1	12/07/16	1015	SC/SC	10/00	3/ 30	SC/5606	Y 1/1/	14001-/01-110-	0		0.00	1	65.00000	3.50
							Timecard Totals for 12/07/16 :							
1	12/08/16	1015	SC/SC	10/00	3/ 30	SC/5403	Y 1/1/	14001-/01-630-	0		0.00	1	65.00000	6.00
1	12/08/16	1015	SC/SC	10/00	3/ 30	SC/5606	Y 1/1/	14001-/01-110-	0		0.00	1	65.00000	3.00
							Timecard Totals for 12/08/16 :							
1	12/09/16	1015	SC/SC	10/00	3/ 30	SC/5403	Y 1/1/	14001-/01-630-	0		0.00	1	65.00000	0.50
1	12/09/16	1015	SC/SC	10/00	3/ 30	SC/5403	Y 1/1/	14001-/01-630-	0		0.00	2	97.50000	8.50
							Timecard Totals for 12/09/16 :							
								Employee Totals			0.00			44.50

00295

PR End Date: 12/18/16
Employee: 1015 Dagg Heather

1	12/12/16	1015	SC/SC	10/00	3/ 30	SC/5403	Y 1/1/	14001-/01-630-	0		0.00	1	65.00000	9.00
1	12/13/16	1015	SC/SC	10/00	3/ 30	SC/5403	Timecard Totals for 12/12/16 : Y 1/1/	14001-/01-630-	0		0.00	1	65.00000	6.50
1	12/14/16	1015	SC/SC	10/00	3/ 30	SC/5403	Timecard Totals for 12/13/16 : Y 1/1/	14001-/01-630-	0		0.00	1	65.00000	5.50
1	12/14/16	1015	SC/SC	10/00	3/ 30	SC/5606	Y 1/1/	14001-/01-110-	0		0.00	1	65.00000	2.00
1	12/15/16	1015	SC/SC	10/00	3/ 30	SC/5403	Timecard Totals for 12/14/16 : Y 1/1/	14001-/01-630-	0		0.00	1	65.00000	3.00
1	12/16/16	1015	SC/SC	10/00	3/ 30	SC/5403	Timecard Totals for 12/15/16 : Y 1/1/	14001-/01-630-	0		0.00	1	65.00000	2.50
							Timecard Totals for 12/16/16 :							
								Employee Totals			0.00			28.50

PR End Date: 01/01/17
Employee: 1015 Dagg Heather

1	12/26/16	1015	SC/SC	10/00	3/ 30	SC/5606	Y 1/1/	14001-/01-702-	0		0.00	17	65.00000	8.00
1	12/27/16	1015	SC/SC	10/00	3/ 30	SC/5606	Timecard Totals for 12/26/16 : Y 1/1/	14001-/01-702-	0		0.00	1	65.00000	8.00
1	12/28/16	1015	SC/SC	10/00	3/ 30	SC/5606	Timecard Totals for 12/27/16 : Y 1/1/	14001-/01-702-	0		0.00	1	65.00000	8.00
1	12/29/16	1015	SC/SC	10/00	3/ 30	SC/5606	Timecard Totals for 12/28/16 : Y 1/1/	14001-/01-702-	0		0.00	1	65.00000	8.00
							Timecard Totals for 12/29/16 :							

Employee Totals 0.00 32.00

Earnings Code Recap

Employee: 1015 Dagg Heather

1	01/23/17	1015	SC/SC	10/00	3/ 30	SC/5403	Y	1/1/	14001-f97-000-	0	0.00	2	97.50000	1.50

Timecard Totals for 01/23/17 :

Employee Totals 0.00 1.50
1.50

Earnings Code Recap

Grand Total Recap

		Earnings Code	Hours
1	Employee(s)	1	88.50
		2	10.00
		Grand Totals	106.50

106.50 x 65 = 6,922.50

002696

Summary of Extras After Completion

Concord & Cumberland

Labor Other	$ 2,187.00
Labor Heather	$ 6,922.50
Material - December	$ 20,436.74
- March	$ 6,384.00
- October	$ 2,347.67
Total	**$ 38,277.91**
(Subtractions)	
PCO 142 (Stone Tower)	$ (715.00)
	$ (207.00)
PCO 145 (Miss Betty's)	$ (8,585.81)
Total after subtractions	$ 28,770.10
Other additions	
Fuel and Telephone	$ 570.00
Keating	$ 3,200.00
Grand Total	$ 32,540.10

TCC OF CHARLESTON, INC.

Plaintiff,

v.

CONCORD & CUMBERLAND HPR,

Defendant.

ARBITRATION AGREEMENT

This Arbitration Agreement ("Agreement") is entered into by and between TCC of Charleston, Inc. ("Trident") and Concord & Cumberland HPR ("HPR") who agree as follows:

WHEREAS, Trident is a South Carolina corporation with its principal place of business in Charleston, South Carolina;

WHEREAS, the HPR is a horizontal property regime organized and existing under the laws of the State of South Carolina, with its principal place of business in Charleston, South Carolina;

WHEREAS, Trident entered into a contract with the HPR dated 27 February 2014 (the "Contract") to perform exterior repairs to Concord & Cumberland located at 175 Concord Street, Charleston, South Carolina (the "Project");

WHEREAS, certain disputes have arisen regarding performance and payment on the Project;

WHEREAS, on or about June 10, 2016, Trident filed an Amended Mechanic's Lien on the Project for $2,385,503.57 in the RMC Office of Charleston County recorded in Plat Book 0560 at Page 116 ("Trident Lien");

WHEREAS, Mediation took place on July 22, 2016 with Dawes Cooke;

WHEREAS, this dispute is to be decided by final and binding arbitration pursuant to S.C. Code § 15-48-10 et seq., and the parties to this document agree further as follows:

1. Selection of Arbitrators – The Parties shall select arbitrators in accordance with S.C. Code § 15-48-30. Trident has selected Frank Elmore and the HPR has selected John McCants who shall proceed to choose a third arbitrator.

2. Location of Arbitration – The Arbitration will be conducted in Charleston, South Carolina, at a location determined by the Arbitrators.

3. Dates of Arbitration – The date(s) of the Arbitration will be set by mutual agreement of the Parties and the Arbitrators.

4. Discovery – Discovery shall be limited to the following:

- The parties will exchange all documents related to this dispute that are not privileged. The HPR will undertake reasonable efforts to obtain relevant, non-privileged, non-confidential project documentation from unit owners, but cannot guarantee a complete production of same. A log shall be prepared for documents withheld by the parties. Privileged documents that are inadvertently produced may be "clawed backed" and will not be subject to an argument of waiver.
- Each party shall be allowed to take up to five (5) depositions.
- Each party may serve up to fifteen (15) Interrogatories.

5. Fees and Expenses of Arbitrators – All fees and expenses incurred and charged by the Arbitrators prior to the hearing shall be borne equally between the Parties, with Trident bearing one-half and the HPR bearing one-half. However, the 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.

6. Claims / Issues – The Parties agree that the scope of arbitration will be governed by § 15.4.1 of the AIA Document A201-2007, General Conditions of the Contract entered into between the parties and S.C. Code § 15-48-110.

7. Issuance of Award – The Arbitrators shall, if at all possible, issue their award in this case within thirty (30) calendar days of the conclusion of the hearing. The form of the award shall be reserved until 30 days before the hearing.

8. Entire Agreement – This Agreement, along with the prior Contract between the parties and S.C. Code § 15-48-10 et seq., sets forth all of the agreements between the Parties relating to this arbitration, and all other agreements, understandings, representations and statements, oral or written, are merged herein.

9. Severability – In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

10. Successors and Assigns – This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns.

Witness

Witness

TCC OF CHARLESTON, INC.

By: _____
ANDREW K. EPTING, JR., LLC
Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
46A State Street
Charleston, SC 29401
Phone: (843) 377-1871
Fax: (843) 377-1310
ake@epting-law.com; mne@epting-law.com

Dated: _____

Witness

Witness

CONCORD & CUMBERLAND HPR

By: _____
F. Cordes Ford
Womble Carlyle Sandridge & Rice
5 Exchange Street
Charleston, SC 29401
Telephone: 843.720.4631
Facsimile: 843.723.7398
cford@wcsr.com

Dated: 1/18/17

RECEIVED
Mar 31 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-10-02955

TCC OF CHARLESTON, INC.,……. .....Plaintiff / Appellant,

v.

CONCORD AND CUMERLAND, 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/Respondents.

NOTICE OF APPEAL

Plaintiff, TCC of Charleston, Inc., appeals from the order of the Honorable Mikell Scarborough dated March 26, 2021 (**Exh. A**) denying Plaintiff's motion to reconsider its February 16, 2021 and March 3, 2021 orders currently on appeal (appellate case number 2021-000272). Plaintiff received notice of the order appealed from on March 26, 2021.

[signature on following page]

March 31, 2021
Charleston, South Carolina

EPTING & RANNIK, LLC

/s/ Jaan Rannik
Jaan G. Rannik
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ATTORNEYS FOR PLAINTIFF/APPELLANT

RECEIVED
Mar 31 2021
SC Court of Appeals

EXHIBIT A

ELECTRONICALLY FILED - 2021 Mar 26 10:32 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.	)	**ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION**

Plaintiff TCC of Charleston, LLC (TCC) filed its Motion for Reconsideration or Clarification, pursuant to Rules 59(e), 60(a), and 60(b), SCRCP on March 12, 2021, of this court's

ELECTRONICALLY FILED - 2021 Mar 26 10:32 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

orders awarding attorney's fees in this matter. The Court awarded $76,000 in attorney fees and costs to Defendant Betty Beatty by order entered February 19 and a Form 4 Order filed February 22, 2021. The Court awarded $250,553.70 in attorney fees and costs to the remaining defendants by order of Judgment and Form 4 both entered on March 3, 2021.

TCC's motion seeks a ruling as to how the court exercised its discretion in its award of attorney fees, principally contending, that no attorney fees should be awarded prior to the lifting of the stay in this action on May 1, 2020. Furthermore since the court viewed the unredacted attorney's fees affidavits *in camera*, Plaintiffs were unable to review the basis for all charges assessed, and claim this requires specific findings to satisfy due process. Plaintiffs also contend defendants are estopped from pursuing attorney fees prior to May 1, 2020.

Defendants' memorandum in opposition to the motion states numerous grounds including the motion is too late to contest the February 16 order as beyond the 10 day time limit of Rule 59(e), that Rule 60 does not apply here, and also waiver and estoppel. I conclude as a matter of law that the 59(e) motion is too late as to Beatty's order but timely as to the remaining defendants.

Notwithstanding the Arbitration Award to Plaintiffs in excess of $2 Million dollars (this court entered judgment on behalf of Plaintiff in a Form 4 Order on March 11, 2021 in the amount of $2,216,899.06), in my February 16, 2021 Order, I stated how this court determined that Defendants were the prevailing parties in the foreclosure of mechanic's lien action filed against all Defendants by Plaintiff. As such, based upon court precedent, Defendants were entitled to an award of attorneys' fees. As stated therein, while the amount of fees and expenses to be awarded is discretionary, the question of Defendants' entitlement to fees is not. Utilities Construction Co., Inc. v. Wilson, 321 S.C. 244, 468 S.E.2d 1 (Ct. App. 1996).

ELECTRONICALLY FILED - 2021 Mar 26 10:32 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

Defendants submitted their time entries and fee affidavits, and I found that Defendants had met the 6 factor test for an award of a reasonable attorney's fee pursuant to authority. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). The court considered and made findings as to the following six factors: 1) the nature, extent, and difficulty of the case; 2) the time necessarily devoted to the case; 3) the professional standing of counsel; 4) the contingency of compensation; 5) the beneficial results obtained; and 6) the customary legal fees for similar services. The court is unsure of what level of review Plaintiff seeks; however, this court, having reviewed the request and found the amount of fees and costs to be reasonable, declines to make specific findings applying the 6 factor test to **each entry** for attorney's fees requested.

Instead the court reviewed the time sheets and affidavits of the very competent Defense counsel: F. Cordes Ford, Henry Grimball, and Andrew Walden and the court record in this case. Significant to this court's findings of attorney fees was the fact that counsel specifically did not seek attorney fees for all activity in the case but only as it related to the issue of attorney fees applicable to the mechanics lien cause of action. Both parties acknowledged that there was no contractual basis for attorney fees. Accordingly, the only basis for awarding attorney fees was necessarily by statute; i.e., the mechanics lien foreclosure action. Jackson, *supra*.

In particular, Mr. Ford's affidavit of November 2020, states he specifically divided his time into 3 stages with the third stage applying to the period following TCC's request for attorney fees from April 27, 2019 to November 15, 2020. (see Aff. Para 5). In addition, in Aff. Para. 6, Ford states that all fees sought by Mr. Walden and Mr. Grimball were incurred after TCC filed its Motion for Attorney Fees. I would note that almost all the attorney fees awarded to Betty Beatty were incurred after the claim for attorney fees was filed by Plaintiff. I have given her credit for

filing the answer to the initial complaint and awarded no fees while the matter was stayed during the arbitration proceeding.

As to Plaintiff's Rule 60 motion, I find no basis to overturn the judgment and award of attorney's fees and none has been submitted in this motion.

This has been a hard fought and highly contested case and this court expects that will continue; however, while there is a significant battle over who is the prevailing party (since Plaintiff received a substantial arbitration award and this court, based upon precedent, found defendants prevailed on the statutory claim which entitled them to attorney fees), this court believes this is a matter now ripe for determination by the appellate courts of this state.

Accordingly, the Plaintiff's motion is DENIED.

IT IS SO ORDERED!

_____
The Honorable Mikell R. Scarborough
Master-In-Equity for Charleston County

March __, 2021

SIGNATURE PAGE TO FOLLOW

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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: Order/Other

So Ordered

s/Mikell R. Scarborough 3062

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Deadra L. Jefferson, Circuit Court Judge

Case No. 2016-CP-10-2955

TCC of Charleston, Inc.,

Respondent,

v.

Concord & Cumberland HPR, Appellant.

NOTICE OF APPEAL

Concord & Cumberland HPR appeals the following orders of the Honorable Deadra L. Jefferson:

- Order on Motion to Lift Stay and Motions to Vacate or Correct Arbitration Award, filed January 30, 2020; and
- Order on Concord & Cumberland HPR's Motion to Alter/Amend, filed May 1, 2020.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellant received written notice of entry of the most recent order on May 1, 2020.

June 1, 2020

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ELECTRONICALLY FILED - 2020 Jan 30 5:05 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE NINTH JUDICIAL CIRCUIT**
COUNTY OF CHARLESTON	)	
TCC OF CHARLESTON, INC. Plaintiff, v. CONCORD AND CUMERLAND, 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.	)	Case No.: 2016-CP-10-2955 **ORDER ON MOTION TO LIFT STAY AND MOTIONS TO VACATE OR CORRECT ARBITRATION AWARD**

ELECTRONICALLY FILED - 2020 Jan 30 5:05 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff's Attorneys:	Jaan Rannik, Esq., and Andrew Epting, Jr., Esq.
Defendant Concord and Cumberland, LLC's Attorney:	Cordes Ford, Esq.
Defendant Concord and Cumberland HPR's Attorney:	Andrew Walden, Esq.
Date of Hearing:	December 16, 2019
Court Reporter:	Lorraine Harris

This matter came before the Court on December 16, 2019 for a hearing on TCC of Charleston's ("TCC's") Motion to Lift Stay, filed June 17, 2019 and the Concord & Cumberland HPR's ("the HPR's") Motion to Vacate or Modify Arbitration Award, filed July 16, 2019.[1] After reviewing the materials and authorities filed with this Court and considering the record and arguments presented at the hearing, the Court rules as follows.

FINDINGS OF FACT

This is a construction contract payment dispute arising from a repair project at condominiums located at 175 Concord Street in Charleston, South Carolina (the "Project"). The HPR was the Project owner. TCC was the Project's general contractor. The dispute centers on TCC's final pay application, Pay Application eighteen (18), and TCC's resulting claim for $2,385,503.57. The parties do not dispute payment in full of the first seventeen (17) pay applications.

The dispute was referred to binding arbitration by agreement. After the hearing, issuance of an initial Award, and exchange and consideration of subsequent motions, the Arbitration Panel (the "Panel") issued a Corrected Arbitration Award granting TCC $2,016,066.73, plus interest and

[1] While this Order refers to the HPR's "motion" (singular), the HPR filed two separate motions to vacate — one filed on July 16, 2019 relating to the initial award delivered by the arbitrators, and one filed November 18, 2019 relating to the corrected award signed by the arbitrators on August 12, 2019. The only award properly before the Court is the corrected award, and this award forms the basis for the Court's ruling on the HPR's motions.

costs. TCC commenced this action by filing a lawsuit in Charleston County against the HPR on June 6, 2016. TCC amended the Complaint on June 10, 2016 to add the individual condominium unit owners as captioned herein. Contemporaneously with filing the initial Complaint on June 6, 2016, TCC filed a Motion to Stay and Compel Arbitration. The HPR consented to Arbitration in a Consent Order filed with this Court on December 30, 2016, and the arbitration proceeded on the claims between TCC and the HPR.

The Parties entered into an Arbitration Agreement on January 18, 2017, which provides in relevant part, "this dispute is to be decided by final and binding arbitration pursuant to S.C. Code § 15-48-10 et. seq. ..." The Panel agreed to issue a "Reasoned Award" as stated in Panel Order No. 1, dated April 19, 2017. The arbitration hearing was held January 21 – 24, 2019, and the Panel issued its initial Award on April 16, 2019. After the exchange of post-hearing motions and the Panel's issuance of a Post Award Order, the HPR submitted a Motion to Change Award to the Panel on July 15, 2019. To preserve its right to judicial review, the HPR also filed an initial Motion to Vacate with this Court.

Subsequently, the Panel issued a Corrected Arbitration Award on August 19, 2019. The HPR then submitted a Motion to Change the Corrected Arbitration Award, asserting the Panel's manifest disregard of well-settled contract law, which resulted in the Panel's October 23, 2019 "Order on HPR Motion for Change of Corrected Arbitration Award." The HPR then filed the present Motion to Vacate Corrected Arbitration Award on November 18, 2019 and its Memorandum of Law in support on December 11, 2019.

ELECTRONICALLY FILED - 2020 Jan 30 5:05 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

ELECTRONICALLY FILED - 2020 Jan 30 5:05 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

CONCLUSIONS OF LAW

I. Motion to Lift Stay

On January 3, 2016, Judge Roger M. Young signed a consent order staying this matter pending binding arbitration between TCC and the HPR. That arbitration has taken place and ended with a Corrected Arbitration Award signed on August 12, 2019. The arbitration having taken place, the stay is no longer in effect by the terms of the consent order signed by Judge Young. Moreover, as agreed to by counsel for the HPR, the HPR's filing of their motion to vacate the arbitration award is itself a consent to lift the stay.

II. Motion to Vacate or Correct the Corrected Arbitration Award

A. Legal Standard

Because "[a]rbitration is a favored method of settling disputes in South Carolina," Pittman Mortg. Co., Inc. v. Edwards, 327 S.C.72, 76 (1997), "[t]he 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 (Ct. App. 2018) (internal quotations omitted). "Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." Pittman, 327 S.C. at 76.

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." Id. at 150 (internal quotation omitted). "Even a clearly erroneous interpretation of the contract cannot be disturbed." Gissel v. Hart, 382 S.C. 235, 241 (2009) (internal quotation omitted).

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"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 (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: the four statutory grounds enumerated in S.C. Code Ann. § 15-48-130(a);[2] and one common law ground—manifest disregard of the law, as stated in Gissel v. Hart, 382 S.C. 235, 241 (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 to apply that legal principle." Group III, 425 S.C. at 154–55. 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 (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 Ann. § 15-48-140(b), and only if one of three grounds set

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

ELECTRONICALLY FILED - 2020 Jan 30 5:05 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

forth in S.C. Code Ann. § 15-48-140(a) is applicable. These grounds are: an evident mistake in the calculation of figures or the description of any person, thing, or property referred to in the award; award by the arbitrators on a matter not submitted to them, so long as correcting the award does not affect the merits; or imperfection in the form of the award unrelated to the merits of the controversy.

B. Public Policy Behind the Exacting Legal Standard

There is a strong State and Federal policy in favor of arbitration of disputes. Pittman, 327 S.C. at 75; Trident Tech. College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 103 (1985). The Parties agreed that each would appoint their own arbitrator and that the party-appointed arbitrators would jointly select the third arbitrator. This is a case involving construction, and the HPR selected John McCants, Esq., and TCC selected Frank Elmore, Esq., each known for his extensive experience in construction litigation. Mr. McCants and Mr. Elmore selected Alan Campbell, an engineer, as the third arbitrator. The qualifications of this panel to preside over a full arbitration proceeding on the merits in their area of expertise is an example that justifies the strong policy in favor of arbitration. After four (4) days of testimony, during which 200 exhibits were submitted into evidence, the panel issued a unanimous decision in favor of TCC.

Given the panel's experience in disputes of this nature, it is not without significance or logic that the Parties stipulated to final and binding arbitration. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011) (recognizing arbitration's benefit of giving parties the "ability to choose expert adjudicators to resolve specialized disputes."). Notwithstanding this stipulation, the Court continues and considers the HPR's motion.

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C. HPR's Arguments for Vacating or Modifying the Award

1. Not A Reasoned Award

The HPR argues that the arbitrators failed to deliver a "reasoned award" as required by the arbitration agreement, requiring vacating or modification of the award. South Carolina courts have not directly defined a "reasoned award." However, the Supreme Court of South Carolina held, "[a]rbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are 'barely colorable.'" Pittman, 327 S.C. at 77, 488 S.E.2d at 338.

The Court finds that the nine (9) page order submitted by the arbitrators explains the basis for the amounts awarded and the grounds for the award. The factual inferences and legal conclusions are sufficient to support the arbitrators' findings, and the award therefore constitutes a reasoned award within the meaning of the parties' arbitration agreement. Accordingly, the HPR's Motion to Vacate is heard and respectfully Denied on this ground.

2. Manifest Disregard of Applicable Law

The HPR argues that the arbitrators manifestly disregarded the law in declining to enforce the lien waiver attached to Pay Application 17 and in "wrongfully eviscerat[ing] the GMP"[3] referred to in the contract between TCC and the HPR. A review of the applicable law and of the arbitrator's final award shows the HPR's position to be untenable.

As this Court noted during the hearing, the arbitrators made express findings that are consistent with the applicable law and provided reasoning supporting those findings. For example, with regard to the lien waiver, the arbitrators dedicated an entire page of their order to a discussion of why the lien waiver was not enforceable in the circumstances, stating:

---

[3] "GMP" stands for Guaranteed Maximum Price.

ELECTRONICALLY FILED - 2020 Jan 30 5:05 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

> Knowing that TCC had signed Conditional Release and Waiver of Liens, HPR nonetheless agreed to PCOs; signed the Change Orders; and made payment for claims that may have otherwise been released or barred by the Conditional Release and Waiver of Liens. HPR cannot now claim that the Conditional Release and Waiver of Liens bar TCC's claims.

Corrected Award at 5. The Court finds no error or manifest disregard of the law in the panel's finding, especially in light of a contemporaneous email from HPR's agent confirming the agreement.

In its initial Award, filed December 11, 2019, as to the contract price, the panel found that "[i]t is undisputed that the condition of the building was different than what TCC contemplated when it originally submitted its bid" and that certain proposed change orders "were paid on a cost-plus basis" pursuant to agreements between TCC and agents of the HPR. Award at 3. The Court finds no error or manifest disregard of the law in the panel's finding that the GMP provided for in the contract was overcome by the agreement that TCC would fix out-of-scope items and be compensated for those items on a time and material basis. Further, as the issue of the contract price was not corrected or reversed by the Corrected Award,

These findings by the panel indicate that, far from disregarding the law, the panel considered and applied the law, and reached a result that the HPR simply disagrees with. The HPR has not carried its burden of showing the arbitrators manifestly disregarded the law, and this argument for vacating the arbitration award is unavailing. Accordingly, the HPR's Motion to Vacate is heard and respectfully Denied as to this ground.

3. Exceeding Authority

The HPR also argues that the award should be vacated, or in the alternative modified, because the arbitrators exceeded their authority in awarding $29,000.00 relating to the "Stone

ELECTRONICALLY FILED - 2020 Jan 30 5:05 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

tower," a portion of the exterior of the property not in the original scope of the contract. The Court disagrees.

As noted *supra*, arbitrators only exceed their authority when they rule on something not submitted to them. Here, as the Court noted during oral argument, the language of the referral in the arbitration agreement is very broad, applying to "certain disputes [that] have arisen regarding performance and payment on the Project," with "Project" being referred to in the agreement as "exterior repairs to Concord & Cumberland located at 175 Concord Street, Charleston, South Carolina." The Stone Tower work relates to the exterior of the building and is within the scope of the referral to the panel. To the extent there is doubt about the scope of the referral, the doubts are to be resolved in favor of arbitration. See Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App. 2010) ("[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

Moreover, the HPR acknowledges that TCC asked for this precise relief in their pretrial brief, that the issue was tried, that the relief was asked for requested by TCC in its post-trial proposed order to the panel.

The Court therefore finds that the award relating to the Stone Tower was within the scope of the arbitrators' authority, as the Parties gave them this authority. The arbitrators did not exceed their authority and this basis for vacating or modifying the award likewise is unavailing. Accordingly, the HPR's Motion to Vacate is heard and respectfully Denied as to this ground.

4. Evident Miscalculation

The South Carolina Arbitration Act grants the Court authority to modify or correct an award if some technical issue with the award means that its intent would not be effective without modification. See S.C. Code Ann. § 15-48-140(b) ("If the application is granted, the court shall

ELECTRONICALLY FILED - 2020 Jan 30 5:05 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

modify and correct the award so as to effect its intent…"). The Court finds no such technical issue, such as any "evident miscalculation of figures," "evident mistake in the description of any person, thing, or property," imperfection in the form of award, or any other basis provided under the statute. The award is not subject to modification or correction. Accordingly, the HPR's Motion to Vacate is heard and respectfully Denied as to this ground.

III. Conclusion

Precedent is clear, even were the Court to believe the arbitrators committed error on these topics, the United States Supreme Court has stated, "[i]t is not enough… to show that the [arbitrator] committed an error—or even a serious error." Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662, 671 (2010). It is not the prerogative of this Court to substitute its own judgment for that of the arbitrators who presided over the arbitration proceeding. Accordingly, having reviewed the arbitration panel's award and considering the record and the arguments of counsel it is hereby ordered that the Plaintiff's Motion to Lift Stay is Granted, and the HPR's Motion to Vacate or Modify is Denied.

AND IT IS SO ORDERED.

_____
Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

January _____, 2020
Charleston, South Carolina

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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:	Order/Form 4

IT IS SO ORDERED.

s/D.L. Jefferson Ninth Judicial Circuit Judge 2128

ELECTRONICALLY FILED - 2020 May 01 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

TCC OF CHARLESTON, INC. Plaintiff, v. CONCORD AND CUMERLAND, 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.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT Case No.: 2016-CP-10-02955 **ORDER ON CONCORD & CUMBERLAND HPR'S MOTIONTO TO ALTER/AMEND**

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff's Attorney:	Jaan Rannik, Esq., and Andrew Epting, Jr., Esq.
Defendants Concord and Cumberland, LLC's Attorney:	Cordes Ford, Esq.

ELECTRONICALLY FILED - 2020 May 01 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

Defendant Concord and Cumberland HPR's Attorney:	Andrew Walden, Esq.
Date of Hearing:	December 16, 2019
Court Reporter:	Lorraine Harris

THIS MATTER comes before the Court by way of Defendant Concord & Cumberland HPR's (hereinafter "HPR") Motion to Reconsider, Alter, or Amend Judgment pursuant to Rule 59 (e), SCRCP, filed February 10, 2020. HPR asks the Court to Amend its Order, January 30, 2020 Denying HPR's Motion to Vacate or Modify and Granting Plaintiff's Motion to Lift Stay. HPR filed its Motion to Reconsider on February 10, 2020. TCC filed its response in opposition to HPR's Motion on March 12, 2020. HPR filed its reply to TCC's response on April 22, 2020. Having considered HPR's Motion, as well as the various interests balanced by the Court at the time of the ruling, HPR's Motion to Reconsider, Alter, or Amend is hereby Denied. [1]

FINDINGS OF FACT AND PROCEDURAL HISTORY

On February 27, 2014, HPR contracted with TCC to perform a scope of work at 175 Concord. The contract was cost plus a fee, with a guaranteed maximum price ("GMP") of $3,923,939.00. Corrected Arbitration Award at 3. The contract consisted on an A102 and A201 as modified by the parties. Id. HPR designated Tom Mather as its initial owner's representative and the project architect was Shawn Mellin of Glick Boehm and Associates ("GBA"). Id. Generally, TCC was to declad the building, apply waterproofing, replace the windows, and apply new cladding. Id.

A Notice to Proceed was issued on July 28, 2014. Id. The contract required the work to be substantially completed 306 days after the Notice to Proceed, specifically May 30, 2015. Id.

[1] This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401–402, 444 S.E.2d 534, 536 (Ct. App. 1994).

ELECTRONICALLY FILED - 2020 May 01 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

Substantial competition occurred on March 8, 2016. Id. It is undisputed that the condition of the building was different from what TCC contemplated when it originally submitted its bid. Id. During the course of the work, at least 134 proposed change orders ("PCOs") were requested by TCC. Id. $1,953,145.00 of the PCOs were paid by HPR, increasing the total contract to $5,877,084.00 as of February 2016. Id. The paid PCOs were paid on a cost-plus basis. Id. This dispute involves architect approved but unpaid PCOs, architect approved but unpaid retainage, and remaining unapproved PCOs. Id.

The matter came before an arbitration panel by the Order of the Honorable Roger M. Young, Sr. dated December 30, 2016, staying the case and compelling arbitration between the parties. Id. at 2. The Arbitration Panel ("the Panel") conducted a merits hearing on January 21 – 24, 2019. Each part was represented by counsel and presented exhibits and witness testimony. The Panel issued an Award on April 16, 2019. Id. The Panel subsequently issued a Corrected Arbitration Award on August 12, 2019 which "corrects, amends, and supplements" its April 16, 2019 Award. Id. at 1. HPR filed a Motion to Change the Corrected Arbitration Award on September 7, 2019, which the Panel denied in its October 23, 2019 order.

On June 17, 2019, TCC filed a Motion to Lift Stay, and on July 16, 2019, HPR filed a Motion to Vacate or Modify the Panel's Corrected Arbitration Award. A hearing was held on December 16, 2019 before this Court, and on January 30, 2020, the Court issued an Order Granting TCC's Motion to Lift Stay and Denying HPR's Motion to Vacate the Panel's Corrected Arbitration Award.

ELECTRONICALLY FILED - 2020 May 01 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

CONCLUSIONS OF LAW

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E. 2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E. 2d 268 (1993)); See also Arnold v. State, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992).

I. HPR's contention that the Court's January 30, 2020 Order relies on new findings of fact as to the Conditional Release and Waiver of Liens is without merit.

HPR argues:

> The Court's Order is improperly based on new findings of fact. On page 8, the Court states: "The Court finds no error or manifest disregard of the law in the panel's findings, especially in light of a contemporaneous email from HPR's agent confirming the agreement." The Panel made no such finding regarding any "contemporaneous email," and the Court has no legal basis to make the finding in its Order.

Motion to Reconsider at 3 (emphasis omitted). HPR's argument is based on the contested Conditional Release and Waiver of Liens ("Lien Waivers") accompanying each pay application, specifically Pay Application 17.

ELECTRONICALLY FILED - 2020 May 01 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

In its Corrected Arbitration Award, the Panel found that the Lien Waivers were not enforceable in the present circumstances, stating:

> Knowing that TCC had signed Conditional Release and Waiver of Liens, HPR nonetheless agreed to PCOs; signed the Change Orders; and made payment for claims that may have otherwise been released or barred by the Conditional Release and Waiver of Liens. HPR cannot now claim that the Conditional Release and Waiver of Liens bar TCC's claims.

Corrected Award at 5. The record reflects that Lien Waivers were provided with every payment application over the course of the project. However, when issues began to arise with the scope of the project and PCOs, the parties came to an agreement whereby they would resolve certain matters at the conclusion of the project. Corrected Award at 4. ("Credible testimony at the hearing was presented and considered by the Panel that TCC and HPR agreed to address outstanding PCOs and TCC's claims for additional costs at the end of the project.")

TCC asserts that this agreement was memorialized by an email between counsel for the parties. The Court did not introduce new evidence or make new findings of fact by referring to this email. However, in light of the fact that the Panel did not explicitly reference the email in its Corrected Award, the Court will clarify that it did not rely on the email in issuing its January 30, 2020 Order. Referencing the email was merely a reflection of the entire record the Panel had access to in reaching its Corrected Award and ultimate conclusion that HPR was estopped from claiming the protections of the Lien Waiver. The Court's reference to the email was harmless error as the Court had a separate basis for concluding there was no manifest disregard of the law by the Panel. As a result, the Court's Order dated January 30, 2020 is modified at Page eight (8) to redact any reference to the email of HPR's agent, as it was not a specific finding of the Panel and not relied upon in this Court's final ruling on the merits.

ELECTRONICALLY FILED - 2020 May 01 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

However, absent consideration of the email, there was sufficient evidence of HPR and TCC's conduct for the Panel to conclude that the Lien Waivers were not controlling, namely, "that TCC had signed Conditional Release and Waivers of Liens, HPR nonetheless agreed to PCOs; signed the Change Orders; and, made payment for claims that may have otherwise been released or barred by the Conditional Release and Waiver of Liens." Corrected Award at 5.

Additionally, and more importantly, the Court can discern no manifest disregard of the law or any other violation of S.C. Code Ann. § 15-48-130(a) that would empower the Court to vacate the Panel's Corrected Award. The Panel's conclusion that HPR is estopped from asserting that the Lien Waivers bar TCC's claim is not predicated on a violation of statutory law or a manifest disregard of the law, and therefore the Court will not disturb the Panel's conclusions. Further, as explained supra, the Court did not rely on any new evidence or findings of fact in reaching this conclusion, and referenced the email merely in an observatory capacity based on the entirety of the record presented to the Panel, but in no way relied upon the email to reach its decision. Accordingly, HPR's Motion is respectfully Denied as to this ground.

II. HPR's contention that the Court's January 30, 2020 Order relies on new findings of fact as to the GMP and out-of-scope items is without merit.

Similar to the argument supra, HPR argues that the Court relied on new findings of fact in concluding that there was no evidence of error or manifest disregard of the law in the Panel's finding that the GMP provided for in the contract was overcome by the agreement that TCC would fix out-of-scope items and be compensated for those items on a time and material basis.

The parties contracted for a guaranteed maximum contract price of $3,923,030.00. Corrected Award at 3. However, the Panel found that the condition of the building was different from what TCC contemplated when it originally submitted its bid. Id. To address the difference in the condition of the building, TCC submitted at least 134 PCOs, and those PCOs were paid on a

ELECTRONICALLY FILED - 2020 May 01 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

cost-plus basis. Id. This additional work and cost increased the total contract price to $5,877,084.00. Id.

As addressed supra, the Panel found, "[c]redible testimony at the hearing was presented and considered by the Panel that TCC and HPR agreed to address outstanding PCOs and TCC's claims for additional costs at the end of the project." Corrected Award at 4. Evidently, sufficient proof existed for the Panel to conclude, "TCC performed additional work outside the original scope of work" which entitled TCC to be paid "a portion of the remaining unapproved PCOs." Id. at 3-4.

However, in light of the fact that the Panel did not use the exact phrase, "that the GMP provided for in the contract was overcome by the agreement that TCC would fix out-of-scope items and be compensated for those items on a time and material basis," the Court will clarify. While the Panel phrased the increase to the GMP as "additional costs at the end of the project" on a "cost-plus" basis, and the Court phrased the increase to the GMP as "overcome" by an agreement to be compensated on a "time and material basis," the difference between the two phrasings is merely semantic, and both phrasings have the same effect. Specifically, that TCC and HPR agreed to address outstanding PCOs and claims at the end of the project, which led to the increase in the GMP. See Corrected Award at 3. ("It is undisputed that the condition of the building was different than what TCC contemplated when it originally submitted its bid. During the course of the work, at least 134 proposed change orders ('PCOs') were requested by TCC. $1,953,145.00 of the PCOs were paid by HPR, increasing the total contract to $5,877,084.00 as of February 2016. The paid PCOs were paid on a cost-plus basis."); see id. at 4. ("Credible testimony at the hearing was presented and considered by the Panel that TCC and HPR agreed to address outstanding PCOs and TCC's claims for additional costs at the end of the project."). While the Court may have used

ELECTRONICALLY FILED - 2020 May 01 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

different phrasing, the difference is merely semantic, and the Court did not misstate the substance of the Panel's findings.

Therefore, the Court cannot discern how it introduced new findings of fact that would preclude it from ruling that the Panel made no error or manifestly disregarded the law in concluding that by the agreement of the parties, the additional work and costs overcame the contract's GMP. Finally, the Court can discern no manifest disregard of the law or any other violation of S.C. Code Ann. § 15-48-130(a) that would empower the Court to vacate the Panels' Corrected Award. Accordingly, HPR's Motion is Denied as to this ground. However, to the extent necessary the January 30, 2020 Order of this Court is modified at Page eight (8) to reflect the exact findings of the Panel, which state: "It is undisputed that the condition of the building was different than what TCC contemplated when it originally submitted its bid. During the course of the work, at least 134 proposed change orders ("PCOs") were requested by TCC. $1,953,145.00 of the PCOs were paid by HPR, increasing the total contract to $5,877,084.00 as of February 2016. The paid PCOs were paid on a cost-plus basis[;]" "TCC performed additional work outside the original scope of work…[;]" and, "Credible testimony at the hearing was presented and considered by the Panel that TCC and HPR agreed to address outstanding PCOs and TCC's claims for additional costs at the end of the project." Corrected Award at 3-4.

III. HPR's contention that the Court did not rule on HPR's argument as to the Panel's October 23, 2019 Order on HPR's Motion for Change of Corrected Arbitration Award is without merit.

After the Panel issued its Corrected Award on August 12, 2019, HPR filed a Motion for Change of Corrected Award on September 7, 2019 ("Motion to Change Corrected Award"), arguing that the Panel made erroneous findings regarding the Lien Waivers and that the Panel awarded upon a matter not submitted to it. Order on HPR Motion for Change of Corrected

ELECTRONICALLY FILED - 2020 May 01 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

Arbitration Award at 1. The Panel issued an Order denying HPR's Motion for Change on October 23, 2019. HPR correctly notes that the Court inadvertently failed to discuss its argument regarding the Panel's October 23, 2019 Order in the Court's January 30, 2020 Order.

In its Corrected Award, the Panel found "'that some of the PCOs and TCC's claims for additional costs were subsequently submitted and paid by HPR which arose and existed as of the date of the execution of the Conditional Release and Waiver of Liens." Corrected Award at 4-5. In its Motion to Change Corrected Award, HPR argued that the Panel found that "'some of the PCOs and TCC's claims for additional costs were subsequently submitted and paid by the HPR which arose and existed as of the date of the execution of the Conditional Release and Waiver of Liens' *of Payment Application No. 17*." Order on HPR Motion for Change at 1 (emphasis in original).

This is not what the Panel found. HPR interjected "of Payment Application No. 17" into the Panel's finding where the Panel made no such finding. The Panel addresses this interjection in its October 23, 2019 Order, finding that in its Corrected Award, the Panel concluded that TCC and HPR agreed, prior to Payment Application No. 17, that some of the outstanding PCOs and TCC's claims for additional costs would have to be resolved at the end of the project. The Panel further explained:

> Rather, this Panel found from the evidence presented that prior to the submission of Payment Application No. 17 'TCC and HPR agreed to address outstanding PCOs and TCC's claims for additional costs at the end of the project.' This Panel also found evidence that prior to Payment Application No. 17 'some of the PCOs and TCC's claims for additional costs were subsequently submitted and paid by the HPR which arose and existed as of the date of the execution of the Conditional Release and Waiver of Liens' that had been executed by TCC.

Order on HPR Motion for Change of Corrected Award at 1.

ELECTRONICALLY FILED - 2020 May 01 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

HPR argues "any agreement between TCC and HPR that could have somehow indicated that HPR waived, or was not enforcing the Release precedes, not succeeds, Pay Application 17 and the accompanying Release. Clearly, even if there was an agreement to agree that HPR would pay additional costs, such agreement would be superseded by the explicit terms of the later Release." Motion to Reconsider at 9.

However, this argument was considered and rejected by the Panel. Evidently, sufficient proof existed for the Panel to conclude that HPR and TCC's agreement to address certain PCOs and costs at the conclusion of the project, coupled with HPR's conduct of paying PCOs and claims after the execution of other Lien Waivers, estopped HPR from claiming the protections of the Lien Waiver as to Pay Application No. 17. See Corrected Award at 4-5. ("Credible testimony at the hearing was presented and considered by the Panel that TCC and HPR agreed to address outstanding PCOs and TCC's claims for additional costs at the end of the project...Knowing that TCC had signed Conditional Release and Waiver of Liens, HPR nonetheless agreed to PCOs; signed the Change Orders; and, made payment for claims that may have otherwise been released or barred by the Conditional Release and Waiver of Liens.") The Court finds that the Panel did not err or manifestly disregard the law in reaching that conclusion. Accordingly, HPR's Motion is Denied as to this ground.

IV. HPR's contention that the Court did not rule on the Release document itself is without merit.

HPR argues, "[t]he Court did not rule on or address the Release document itself..." and, "if the Court maintains its denial of the Motion to Vacate, it must do so having determined and held, consistent with the Panel's factual findings, that the Release was an unambiguous contract, executed by TCC under oath, which was last in time as compared to any other agreement or action

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that the Panel found the HPR to have undertaken and upon which the Panel based its disregard of the Release." Motion to Reconsider at 4.

HPR's argument is based on a misapprehension of the Court's scope of authority in ruling on a motion to vacate an arbitration award. Because "[a]rbitration is a favored method of settling disputes in South Carolina," Pittman Mortg. Co., Inc. v. Edwards, 327 S.C.72, 76 (1997), "[t]he 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 (Ct. App. 2018) (internal quotations omitted). "Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." Pittman, 327 S.C. at 76.

In 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." Id. at 150 (internal quotations omitted). Therefore, it is not within the scope of this Court's authority to rule on or address the Release document itself. Rather, the Court's only duty is to determine whether the Panel ruled on the Release document without exceeding its power or manifestly disregarding the law.[2] The Court conducts a thorough inquiry to determine whether the Panel exceeded its power or manifestly disregarded the law on Pages 7 – 10 of its January 30, 2020 Order.

Therefore, the Court will not entertain HPR's invitation to substitute its interpretation of the Release for the interpretation reached by the Panel in issuing its Corrected Award. Accordingly, HPR's Motion to Reconsider is Denied as to this ground.

[2] The Court must also consider whether the Panel violated any of the remaining three statutory grounds enumerated in S.C. Code Ann. § 15-48-130(a) in reaching its award, however, the arbitrators exceeding their authority was the only statutory ground advanced by HPR for vacating the Corrected Award.

ELECTRONICALLY FILED - 2020 May 01 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

V. HPR's contention that the Court did not rule on whether the manifest disregard standard was met is without merit.

HPR contends, "the Court did not consider the circumstances that meet the manifest disregard standard... The Court's Order does not consider or rule upon whether the manifest disregard standard is met by an arbitration panel's disregard of unambiguous contract provisions...." Motion to Reconsider at 4.

The Court addressed HPR's manifest disregard argument on Pages 7 – 8 of its January 30, 2020 Order. Specifically, the Court found that the Panel made express findings consistent with the applicable law and provided reasoned support of those findings. Order on Motion to Lift Stay and Motions to Vacate or Correct Arbitration Award at 7. The Court found, "far from disregarding the law, the panel considered and applied the law, and reached a result that the HPR simply disagrees with. The HPR has not carried its burden of showing the arbitrators manifestly disregarded the law, and this argument for vacating the arbitration award is unavailing." Id. at 8.

Therefore, the Court finds without merit the HPR's argument that the Court failed to rule upon whether the manifest disregard standard was met. Accordingly, HPR's Motion to Reconsider is Denied as to this ground.

CONCLUSION

Except as otherwise clarified by the Court supra, HPR's Motion seeks only to reargue the issues on the same basis previously presented to the Court and presents no novel facts, arguments, or theories in support of the Motion to Alter or Amend the Judgment. Except as addressed supra, HPR has not highlighted any portions of the record this Court may have misunderstood, failed to fully consider, or perhaps failed to rule on. Accordingly, HPR's Motion is heard and respectfully Denied.

AND IT IS SO ORDERED.

_____

Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

April_____, 2020
Charleston, South Carolina
At Chambers

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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: Order/Other

IT IS SO ORDERED.

s/D.L. Jefferson Ninth Judicial Circuit Judge 2128

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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-10-02955

TCC OF CHARLESTON, INC.,……. .....Plaintiff / Appellant,

v.

CONCORD AND CUMERLAND, 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/Respondents.

NOTICE OF APPEAL

Plaintiff, TCC of Charleston, Inc., appeals from the orders of the Honorable Mikell Scarborough dated February 16, 2021 (**Exhs. A, B**) and March 3, 2021 (**Exh. C**) in which the Court, *inter alia*, granted summary judgment in favor of Defendants/Respondents and awarded them attorneys' fees pursuant to the South Carolina Mechanic's Lien Statute, S.C. Code § 29-5-10 *et seq*.

[signature on following page]

March 11, 2021
Charleston, South Carolina

EPTING & RANNIK, LLC

/s/ Jaan Rannik
Jaan G. Rannik
46A State Street
Charleston, SC 29401
Phone: 843-377-1871
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ATTORNEYS FOR PLAINTIFF/APPELLANT

RECEIVED
Mar 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-10-02955

TCC OF CHARLESTON, INC.,……. .....Plaintiff / Appellant,

v.

CONCORD AND CUMERLAND, 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/Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal dated March 11, 2021, on opposing counsel via e-mail, on March 11, 2021, addressed to Respondents' counsel of record.

Edward D. Buckley, Esquire - ebuckley@ycrlaw.com

W. Siau Barr, Jr., Esquire – sbarr@ycrlaw.com

R. Andrew Walden, Esquire – Andrew.Walden@wdb-us.com

Henry Grimball, Esquire - Henry.Grimball@wbd-us.com

F. Cordes Ford, IV, Esquire - Cordes.Ford@wbd-us.com

A copy of the e-mail is attached to this Proof of Service as Exhibit A.

March 11, 2021
Charleston, South Carolina

EPTING & RANNIK, LLC

*/s/ Rhonda H. McCraw*_____
Rhonda H. McCraw
Legal Assistant to Jaan G. Rannik
46A State Street
Charleston, SC 29401
Phone: 843-377-1871
Fax: 843-377-1310
rhm@epting-law.com

EXHIBIT A

Jaan Rannik

From: Rhonda H. McCraw
Sent: Thursday, March 11, 2021 15:33
To: Herron, Robin; Buckley, Edward D. (Ed; Barr, Jr., W. Siau; ADemato@ycrlaw.com; Mixson, Kathryn; Walden, Andrew; Grimball, Henry; Ford, Cordes
Cc: Andrew K. Epting; Jaan Rannik
Subject: TCC of Charleston v Concord & Cumberland, et al
Attachments: 2021 03 11 - TCC Notice of Appeal.pdf; 2021 03 11 - TCC Notice of Appeal Exh. A.PDF; 2021 03 11 - TCC Notice of Appeal Exh. B.PDF; 2021 03 11 - TCC Notice of Appeal Exh. C.PDF

Dear Counsel:

Attached for service you will find Plaintiff/Appellant, TTC of Charleston's, Notice of Appeal from the orders of Judge Scarborough dated February 16, 2021. Feel free to contact me if you have any difficulty opening the attachments.

Sincerely,

Rhonda

Rhonda H. McCraw, ACP
Legal Assistant to Jaan G. Rannik
Epting & Rannik, LLC
46A State Street
Charleston SC 29401
843-377-1871

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EXHIBIT A

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 11 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:

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

(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

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

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

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

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

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

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.

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

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

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

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

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

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.

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

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

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

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.

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

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).

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

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

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,

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

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.

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

February __, 2021

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

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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

EXHIBIT B

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	FOR THE NINTH JUDICIAL CIRCUIT
TCC OF CHARLESTON, INC.,)	CASE NO. 2016-CP-10-2955
)	
Plaintiff,)	
)	
vs.)	
)	
CONCORD AND CUMERLAND, LLC.,)	
CONCORD & CUMBERLAND HPR,)	
LEO HALL, DIANE HALL, BEA H.)	
SMITH, MARGARET C. POPE,)	
WILLIAM D. FOSTER, JR., GENE G.)	
FOSTER, MATTISO J.MACGILLNRAY,)	
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. CLARICE,)	**ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO BETTY L. BEATTY**
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.)	
SIMSPON F/KA 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.)	
)	

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SC Court of Appeals

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

In this action, TCC of Charleston, Inc. ("TCC") seeks to recover payment from the defendants for work performed under a written contract with Concord and Cumberland HPR (the "HPR"), for extensive repairs to condominium units located at 175 Cumberland Street in Charleston, South Carolina. TCC asserts causes of action for mechanic's lien foreclosure, breach of contract and "Equity."

This matter came before me upon the motion of Betty L. Beatty ("Beatty" or "Mrs. Beatty") for summary judgment upon TCC's first cause of action for mechanic's lien foreclosure. Mrs. Beatty owns a unit at 175 Cumberland Street. Her motion is based upon the grounds that TCC's lien dissolved due to TCC's failure to serve its lien upon her within the time required under S.C. Code §29-5-90. This motion was originally filed on May 8, 2020, was briefed and was fully argued before the Honorable Jennifer B. McCoy on May 28, 2020. Judge McCoy declined to rule upon the motion and referred the case to me by order dated August 11, 2020, to decide *inter alia*, this motion.

A hearing was held in this court on November 5, 2020, and a second hearing was held on January 27, 2021, so that the court could rule upon all outstanding motions. Beatty was represented by Edward D. Buckley, Jr. and TCC was represented by Andrew K. Epting, Jr. and Jaan Rannik in both hearings. Having reviewed the court record, the parties' respective motions, memoranda, attachments and exhibits, affidavits, written objections and rebuttals to those objections, and having considered the oral arguments of counsel, and the applicable law, I hereby grant Beatty's motion. For the reasons set forth below, TCC's First Cause of Action for Foreclosure of Mechanic's Lien is dismissed, and the Lien filed in this action shall be removed from the public record, that lien having dissolved as a matter of law. Having prevailed in

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

defeating TCC's mechanic's lien claim against her, Beatty is entitled to an award of reasonable attorney's fees and costs pursuant to S.C. Code §29-5-20(A).

APPLICABLE LAW

A. Summary Judgment

Rule 56(c) of the South Carolina Rules of Civil Procedure provides for judgment as a matter of law where "there is no genuine issue as to any material fact." "A party against whom a claim, counterclaim, or cross-claim is asserted, or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Rule 56(b), SCRCP. Summary judgment is appropriate when "the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRP. "'The purpose of summary judgment is to expedite disposition of cases [that] do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (S.C. 2001).

B. Perfecting a Mechanic's Lien

Mechanic's liens are creatures of statute, and the requirements of the statute must be strictly followed. *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724, 729 (S.C. Ct. App. 2020). Sections 29–5–10 to 440 of the South Carolina Code (2007 & Supp. 2019) set forth the requirements for establishing and enforcing a mechanic's lien. The statutes establish three (3) distinct steps in that process, namely (1) creation, (2) perfection, and (3) enforcement of the lien. *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC*, 409 S.C. 331, 340, 762 S.E.2d 561, 565. For the lien to become enforceable, the lien must be perfected and enforced in compliance with South Carolina's mechanic's lien statutes. The lien arises inchoate when the

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

labor is performed or material is furnished, but the lien has not been perfected until the statutory requirements are met. *Id.* at 341, 762 S.E.2d at 256. The procedures for enforcing a mechanic's lien must be strictly followed; the court is "not at liberty to depart from the plain meaning of the language contained in the mechanic's lien statute." *Morehead Construction, Inc. v. Enterprise Bank of South Carolina,* 410 S.C. 386, 765 S.E.2d 1 (Ct. App. 2014).

To perfect and enforce the lien against the property, the person claiming it must: (1) record and serve a certificate of lien, containing a sworn statement of account within ninety (90) days after he ceases to furnish labor or materials; (2) bring suit to foreclose the lien within six (6) months after he ceases to furnish labor or materials; and (3) file notice of pendency of the action within six (6) months after he ceases to furnish labor and materials. If the person claiming the lien fails to take any one of these steps, the lien against the property is dissolved by operation of law. *Kitchen Planners*, 432 S.C. at 267, 851 S.E.2d at 729 (Ct. App. 2020). Here, the uncontroverted facts establish that TCC failed to serve the lien upon Beatty within 90 days of March 17, 2016, the date sworn under oath to be the last date of work. TCC's president has sworn to this fact under oath in four (4) sworn statements: two (2) verified complaints and two (2) sworn statements of account. TCC sought to perfect and enforce a lien for work performed no later than March 17, 2016. That lien expired on June 15th, prior to service of the lien upon Mrs. Beatty on June 22, 2016.

BACKGROUND

TCC originally filed suit against the HPR, filing its Summons, Verified Complaint, Notice and Certificate of Mechanic's Lien, Statement of Account, and Motion to Stay and Compel Arbitration on June 6, 2016. TCC filed a Lis Pendens on June 10, 2016. In its Verified

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

Complaint and sworn Statement of Account TCC stated that it last furnished labor or materials on March 17, 2016. Apparently realizing that it could not enforce a mechanic's lien against the HPR under South Carolina Law, Plaintiff filed an Amended Summons and Amended Verified Complaint, Amended Notice and Certificate of Mechanic's Lien and Amended Statement of Account adding each unit owner, including Beatty, as a defendant on June 10, 2016. An Amended Lis Pendens was filed on June 16, 2016. TCC realleged under oath in its Amended Verified Complaint and Statement of Account that March 17, 2016 was the date of last furnishing labor or materials. Mrs. Beatty was served via process server on June 22, 2016; the transmittal letter from TCC's counsel to Beatty is dated June 21, 2016. Thus, Beatty was served ninety-seven days after the March 17th date asserted by TCC. Mrs. Beatty moved for partial summary judgment on the grounds that there is no dispute of material fact that service was not timely under the mechanic's lien statute and that she is entitled to judgment upon the FIRST CAUSE OF ACTION for mechanic's lien foreclosure as a matter of law.

The March 17th date of last furnishing labor and materials is crucial to perfection of TCC's lien. TCC has attested under oath, on the public record, and on four (4) occasions, that March 17, 2016, was the date it ceased providing labor or materials for which it sought to perfect and enforce its lien. In response to Beatty's summary judgment motion, TCC contends that date is incorrect and that it should be allowed to present evidence contradicting its prior sworn statements and public record filings which state unequivocally that March 17, 2016, was the date it ceased work.

TCC's original summons and verified complaint, dated May 19, 2016, was filed on June 6, 2016. That complaint asserted claims against the HPR only. The complaint, in paragraph 9, reads as follows:

> 9. That in accordance with their agreements the Plaintiff furnished the agreed-upon material and services to the Defendants which were used in the work, and on related structures on the subject property, that material and services improved the property, and *the last date of such furnishing materials and services was March 17, 2016.*

(emphasis added).

TCC's president, John David Griffith, verified the Complaint by VERIFICATION dated May 19, 2016. In the Verification, Mr. Griffith swore under oath that he was an officer of TCC, and that he had been authorized by TCC to make the verification. As to the facts of the Complaint, he swore to the following:

> "… I have read the foregoing Complaint and know the contents thereof and that based upon my own personal knowledge, the facts therein are true and correct."

TCC's president also swore to that fact in TCC's Statement of Account attached to the Complaint as Exhibit "A". In Exhibit "A", paragraph 4, TCC's president, Mr. Griffith swore under oath to the following:

> 4. That the last day work was performed or materials provided to the property described in EXHIBIT B was March 17, 2016.

Four days after filing its verified Complaint and sworn Statement of Account, TCC filed an Amended Complaint on June 10, 2016, which Amended Complaint purports to assert claims against the HPR and all the owners of units within the HPR. Paragraph 10 of the Amended Complaint contains the identical language which is quoted above as paragraph 9 of the original Complaint, alleging that "[T]he last date of such furnishing of materials and services was March 17, 2016."

Mr. Griffith, TCC's president, on June 10, 2016, again verified the Amended Complaint, attesting unequivocally that "[B]ased upon my own personal knowledge, the facts as alleged

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

therein are true and correct." This was the *third* sworn attestation under oath that March 17, 2016 was the date TCC ceased work. TCC attached to its Amended Complaint as Exhibit "A", a second sworn statement of account dated June 10, 2016, and signed by its president, Mr. Griffith. This was TCC's *fourth* sworn attestation under oath that March 17, 2016 was the date it ceased work. The June 10, 2016 statement of account was filed with the Charleston County Register of Deeds at Book 0560, Page 116.[1]

Several months after the Amended Complaint was filed, the mechanic's lien claims were stayed by order of Judge Roger M. Young, Sr. filed December 30, 2016, while TCC and the HPR took their contractual dispute to arbitration as required under the terms of their contract. The Panel of Arbitrators determined that March 8, 2016, was the date of substantial completion of TCC's work, and awarded interest from that date. The Panel of Arbitrators made no findings regarding the last date labor or materials were supplied to the project. After the panel of arbitrators issued its final, corrected award, the stay was lifted by order of the Honorable Deadra L. Jefferson, filed January 30, 2020. Judge Jefferson also found that March 8, 2016, was the date of substantial completion. From June 2016 until May 2020, TCC made no effort to either change, amend, or contradict its four (4) sworn statements that March 17, 2016 was the date of last work.

The instant motion was filed by Beatty on May 8, 2020. On May 22, 2020, TCC filed its "Objection to Proceeding," Memorandum in Opposition to Pending Summary Judgment Motions and Response to Motion to Deposit Funds. TCC also moved on May 15, 2020 for leave to amend its complaint. Notably, this proposed Second Amended Complaint removed any reference to the date upon which TCC last performed work or provided materials, instead alleging in Paragraph 12 that TCC timely gave the Defendants notice of the statement of account

[1] *See* TCC's Motion to Amend Statement of Account filed October 1, 2020.

and timely served and filed its lien relative to the date of last work as determined by the Panel of Arbitrators. The Panel of Arbitrators made no finding regarding the date of last work. The only date contained within the Panel of Arbitrators' corrected award is March 8, 2016, which the panel determined to be the date of substantial completion.

The Honorable Judge Jennifer McCoy scheduled a hearing on these motions for May 28, 2020. On May 22, 2020, six (6) days prior to the scheduled hearing, TCC filed an affidavit from TCC's project superintendent, Ryan Tomberlin, which directly contradicts the four (4) prior sworn statements of TCC's president regarding alleged dates TCC performed work at the project. The only explanation in Mr. Tomberlin's affidavit for Mr. Griffith's contradictory testimony is found in paragraph 3, stating:

> 3. TCC believed substantial completion of the project was March 17, 2016.

The four (4) sworn statements by TCC's president make no mention of the term substantial completion. Instead, Mr. Griffith swore in each prior statement that he was an officer of TCC, that he had been authorized by the corporation to make the statement on its behalf, and that the last date it provided labor and materials for the project was March 17, 2016. TCC, through Mr. Tomberlin's affidavit, made no effort to explain why Mr. Griffith swore to the facts as he did. Notably, Mr. Griffith, TCC's president, made no effort to explain or correct his prior sworn statements prior to the May 28, 2020 hearing.

This motion and others were argued before Judge Jennifer B. McCoy on May 28, 2020. However, she declined to rule on them. Instead, she granted TCC's motion to amend and authorized it to file a Second Amended Complaint which deletes all reference to any date of cessation of work at the project. She entered an order of August 11, 2020, referring this matter

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

to me and directing that this Court decide the remaining motions, including Beatty's motion for summary judgment. This Court scheduled those motions for hearing on November 5, 2020.

On October 1, 2020, four (4) months after the parties argued this motion before Judge McCoy and a month before this Court's hearing, TCC filed a motion to amend its statement of account. The proposed revised statement of account, prepared for the signature of Mr. Griffith, is unsigned. It does, however, delete any reference to the date when TCC ceased working on the project. Even if signed, the proposed statement of account would directly contradict the testimony given by Mr. Griffith in four (4) filings provided to this court and filed of record, and it offers no explanation regarding his prior attestations. Exhibit 3 to the motion is an affidavit of Mr. Griffith dated September 25, 2020, which states in pertinent part, the following: 1) That he was involved in the Concord and Cumberland project from its beginning, and he signed the verified complaint and statement of account relating to the project; 2) that when he signed the statement of account, he referred to the date of substantial completion; and 3) that additional work was performed through August, 2017.

TCC filed a subsequent Memorandum in Opposition to Beatty's motion on October 27, 2020. In its Memorandum, TCC did not explain why Mr. Griffith swore under oath that the last date of work was March 17, 2016. Instead, TCC refiled the affidavit of Mr. Tomberlin and a number of Exhibits, including a document identified as EXHIBIT D which purports to be a payroll summary for Heather Dagg, listing her hours for the months of December, 2016 and January, 2017.

At the November 5, 2020 hearing, the Court issued its oral ruling which, among other things, granted Beatty's summary judgment motion. As requested by the court, Beatty submitted a proposed order granting her motion, and she submitted an attorney's fee affidavit in support of

her claim for fees. TCC objected to the proposed order on November 30, 2020, filing with the court a document entitled "TCC Omnibus Response and Objections to Filings and Submittals of Betty Beatty." Beatty responded to TCC's "Omnibus Response" by letter dated December 3, 2020. The court scheduled the hearing on January 27, 2021 to hear all outstanding motions.

Argument was presented before me on November 5, 2020, and again on January 27, 2021. The Court has considered the record, the parties' respective memoranda, attachments and exhibits, written objections and rebuttals to objections, and considered the oral arguments of counsel and the applicable law.

LEGAL ANALYSIS

Mechanic's liens are purely statutory and can only be acquired and enforced in accordance with the conditions of the statute creating them. *Shelley v. Sea Garden Homes, Inc.*, 287 S.C. 24, 336 S.E.2d 488 (Ct. App. 1985). The lien arises inchoate when the labor is performed or material is furnished. However, to be valid, the lien must be perfected and enforced in compliance with the Mechanic's Lien Statutes, S.C. Code §29-5-10 to 430.

In order to defeat Beatty's motion for summary judgment, TCC seeks to contradict or disprove its prior sworn statements. It seeks to amend the statement of account in order to eliminate the March 17, 2016, date which it swore to be true and correct. By doing so, TCC has asked the Court to disregard the date provided in the statement of account filed of record. TCC has submitted an affidavit and other documents contradicting its prior testimony in order to create an issue of fact. TCC must be held to the date that it attested and swore to in multiple documents filed of record. There is no question that the date of service of process, June 22, 2016, is more than ninety days after March 17, 2016, the date TCC has sworn to be the last day it provided labor and materials. The lien TCC filed and sued upon sought payment for work

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

performed on or before March 17, 2016. That lien was served upon Beatty on the 97th day after the last date of work for which TCC claimed a lien, and the lien constituted a cloud upon the title to Mrs. Beatty's property.

A. TCC cannot change the date asserted in its statement of account.

TCC, in its opposition to Beatty's motion and in its motion to amend its statement of account, argues that Section 29–5–100 expressly allows correction of inaccuracies in the statement of account. TCC also argues that amendment of the statement of account is proper, because the amendment of the statement of account, as a pleading, should be liberally allowed. However, neither S.C. Code §29–5–100 nor our rules of civil procedure allow a mechanic's lien claimant to alter the date of last work or materials set forth in its sworn statement of account, which must, by statute, be filed of record and which, upon filing, becomes a cloud upon the title to the owner's property. (emphasis supplied).

1. An incorrect date of completion is not considered an excusable inaccuracy under Section 29-5-100.

S.C. Code §29-5-100 contemplates and excuses certain inaccuracies in a statement of account. That section states that certain errors in the property description or in the amount due will not invalidate the statement of account. The statute is silent as to an inaccuracy as to the dates of work, and the Court cannot read into the statute an exception that would allow TCC to amend its statement of account to change the date it verified as its last day of work. 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. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (S.C. 2000). Likewise, where the General Assembly chose not to include words within a statute, this Court cannot add language to the plain language of the statute. *Id.* By omitting timing errors among those inaccuracies which will be forgiven, I must presume the legislature meant to do so.

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

Accordingly, Section 29–5–100 provides no basis for TCC to alter or delete its date of last work at the project. On its face, the lien TCC filed, recorded in the public record, and sued upon, seeks payment for work performed no later than March 17, 2016.

2. Statements of Account are not pleadings which may be amended.

TCC cites Rule 15, SCRCP, in support of its effort to amend its statement of account to delete the last date of furnishing materials or labor. Amendments to the pleadings in a mechanic's lien action are allowed under Section 29–5–180 of the mechanic's lien statute and Rule 15, SCRCP. However, TCC has not submitted any South Carolina case law allowing amendment of the last date of performing labor or providing materials service in a lien claimant's statement of account. The Court has been unable to find any as well. This dearth of authority makes sense, because a statement of account is not a pleading and thus is not subject to amendment under Rule 15, SCRCP. Rule 7 of our South Carolina Rules of Civil Procedure is entitled "Pleadings Allowed," and section (a) of the Rule delineates the form of pleadings recognized in this state. The rule makes no mention of a statement of account. After listing the pleadings allowed, the Rule specifically states that no other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer; and there may be a reply to affirmative defenses as provided in Rule 8(c). Rule 7, SCRCP. Therefore, a statement of account is not a pleading as defined by Rule 7, SCRCP, and cannot be amended under Rule 15, SCRCP. Amendments are permitted, if at all, pursuant to S.C. Code §29-5-100 and only to correct inaccuracies in the property description or the amount of the lien.

B. The Court cannot disregard TCC's four sworn statements that March 17, 2016 was the date of last furnishing work or materials.

The filing of a mechanic's lien places a cloud upon the title to real property by providing record notice of the nature of the claim. In *Preferred Savings and Loan Ass'n., Inc. v. Royal*

Garden Resort, Inc., 295 S.C. 268, 273, 368 S.E.2d 78, 81 (S.C. Ct. App. 1988), *aff'd*, 301 S.C. 1, 389 S.E.2d 853 (S.C. 1990), the Court of Appeals held that the date of cessation of labor must pre-date the notice of lien. (emphasis supplied). The court recognized that matters of public record must be reliable for title examiners who find a lien of record. *Id.* In reaching its holding, the court cited with approval the North Carolina case of *Strickland v. General Building and Masonry Contractors, Inc.*, 22 N.C.App. 729, 207 S.E.2d 399 (N.C. Ct. App. 1974).

Our mechanic's lien statute does not require that the statement of account include a date when labor and materials were last provided. S.C. Code Ann. § 29–5–90 (1976). However, in order to effectuate the policy considerations discussed in *Preferred Savings*, a claimant who includes a date of last performing work in their statement of account must be held to it. In *Strickland,* the North Carolina Court of Appeals addressed this very issue. There, the claimant filed his notice and claim of lien on July 27, 1973 with a statement declaring that materials were last furnished upon the property on March 28, 1973. *Id.* This was beyond North Carolina's requirement that the claim of lien be filed no later than 120 days after the furnishing of last labor. N.C. Gen. Stat. Ann. § 44A-12 (2019). North Carolina, like South Carolina, did not require that a claimant state in his claim of lien the date of last furnishing labor or materials. *Compare* S.C. Code Ann. §29-5-90 (1976) *with* N.C. Gen. Stat. Ann. §44A-12 (2019). The North Carolina Court of Appeals in *Strickland* held that, even though the date of last furnishing is not required by statute, it cannot be treated as "a mere surplusage," because to do so "would do injury to the purpose of the lien statute." It would require title examiners to go outside the public record to discover the true date of last furnishing which, in turn, would "impose an undue burden on the title examiner and would damage the principle of reliance upon the public record." *Id.* at 400–01.

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

The South Carolina Court of Appeals recently affirmed the above stated law in the *Kitchen Planners* case, *supra*. In *Kitchen Planners,* a contractor filed a complaint and a lien stating that it provided labor and materials "beginning in or around March 16, 2015 and continuing through August 18, 2015. The contactor 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 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. Thus Kitchen Planners' lien dissolved, because it failed to serve the lien within ninety (90) days of the last date it supplied labor or materials on the project.

Here, TCC did not serve Betty Beatty until June 22, 2016. Anyone examining the title would see that TCC swore to March 17, 2016, as the last date of furnishing materials or labor. TCC did not file the affidavit of service evidencing service of the lien upon Mrs. Beatty until November 3, 2020, more than four (4) years after serving her. Anyone examining title to the property between June 10, 2016 and November 3, 2020 would conclude that Beatty had not been served and that the lien was dissolved. After the affidavit of service was filed, the examiner would conclude that the service of process occurred more than 90 (ninety) days after the date set forth in the sworn statements of account and the verified complaints, and that the lien was expired. Therefore, the public record advises anyone examining it that the lien had expired. In order to effectuate the policy reasons articulated by our Court of Appeals in *Preferred Savings*,

and *Kitchen Planners*, TCC must be held to the March 17, 2020 date asserted in its sworn statement of account. TCC's lien dissolved before it was served on Mrs. Beatty.

ATTORNEY'S FEES

Beatty has prevailed in defeating TCC's mechanic's lien claim. She is, therefore, entitled to an award of her attorney's fees. While the amount of fees to be awarded is discretionary, the question of her entitlement to fees is not. *Utilities Construction Co., Inc. v. Wilson,* 321 S.C. 244, 468 S.E.2d 1 (Ct. App. 1996).

In determining a reasonable attorney's fee, the court has considered the following six factors: 1) the nature, extent and difficulty of the case; 2) the time necessarily devoted to the case; 3) the professional standing of counsel; 4) the contingency of compensation; 5) the beneficial results obtained; and 6) the customary legal fees for similar services. *Jackson v. Speed,* 326 S.C. 289, 486 S.E.2d 750 (1997).

I have reviewed the affidavit of Edward D. Buckley, Jr. and have reviewed, *in camera*, detailed time records entered upon his firm's billing software. I have also reviewed the court record in this case.

1. Nature, extent and difficulty of the case.

This case presented a multi-million dollar mechanic's lien claim and involved the potential interplay of the arbitration award in TCC's contract claim, application of the provisions of the mechanic's lien statutes, competing claims for attorney's fees, the filing of record by the plaintiff of multiple sworn statements, which it subsequently sought to retract, and hearings before a circuit judge and this court. It was complex, difficult and hotly contested.

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

2. The time necessarily devoted to the case.

Beatty's counsel has presented *in camera* his firm's detailed itemized records reflecting the hours each attorney or legal staff member expended upon each task as described in the narrative billing entry for each task. The hourly rate for each billing entry is included as well. Each expense is itemized upon the billing records.

The total time expended by Mr. Buckley, his partners, associates and professional staff, from June 23, 2016, through February 1, 2021, equals 265.2 hours. I have reviewed each time entry and the itemized costs to determine the reasonableness of the time entered and the costs incurred.

3. Professional Standing of Counsel.

The court is familiar with the professional standing of Beatty's counsel, and they are experienced, well qualified and well respected in the legal community. Attorneys practicing in this court fall upon a scale representing a wide range of experience and competence from inexperienced or minimally qualified to highly skilled advocates. Beatty's attorneys are at the top of that scale.

4. Contingency of Compensation.

Beatty's counsel is not working on a contingent fee basis, so this factor is not applicable.

5. Beneficial Results Obtained.

Beatty's counsel succeeded in defeating a lien claim where the contractor had obtained an arbitration award in excess of $2,000,000.00 against the HPR. Opposing counsel had presented to the Panel of Arbitrators an attorney's fee affidavit seeking fees of approximately $900,000.00 in 2019, and if the plaintiff had prevailed upon its lien claim, its fees to date likely

would have exceeded $1,000,000.00 over and above its unpaid contract claim. Beatty's condominium is now free of liens, and she does not face the prospect of owing additional attorney's fees to the plaintiff. These results are very beneficial to Mrs. Beatty.

6. Fees Customarily Charged in Similar Cases.

The hourly rates and tasks performed in defense of this case are within the range of fees charged by comparable attorneys for comparable services. The total fees sought by Beatty's counsel, $78,453.50, pales in comparison to the fees previously sought by plaintiff's counsel in connection with the arbitration award.

Based upon the foregoing factors, I have determined that Beatty is entitled to reasonable attorney's fees in the sum of $ 75,000.00 together with costs in the amount of $ 1000 .

CONCLUSION

In June 2016, TCC filed upon the public record four sworn statements representing to the parties, the court, and everyone examining those records that March 17, 2016, was the last day labor and materials were supplied to the project. TCC sought to perfect and sue upon a lien for work performed on or before March 17, 2016. Beatty was served June 22, 2016, after TCC's lien dissolved by operation of law on June 16, 2016. The Court holds that a lien claimant who chooses to include a date of last service in his verified statement of account filed with the Register of Deeds is bound by the date the claimant chose to insert and cannot retroactively perfect a dissolved lien by amending its statement of account to delete that date. There is no dispute of material fact that TCC failed to perfect its lien and that its lien dissolved by operation of law.

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

For the reasons set forth above, Beatty's motion is granted, and IT IS HEREBY ORDERED as follows:

1) Judgment is entered in favor of Beatty upon TCC's FIRST CAUSE OF ACTION for mechanic's lien foreclosure;
2) The *Lis Pendens* and mechanic's lien upon Beatty's unit shall be removed from the public record within five (5) days of the entry of this order;
3) Having prevailed by successfully defeating TCC's mechanic's lien foreclosure action, Beatty is entitled to her attorney's fees pursuant to S.C. Code § 29-5-10(a); and
4) Beatty is awarded attorney's fees and costs in the amount of $76,000.00 and the Clerk of Court shall enter judgment against TCC of Charleston, Inc. in that amount in favor of Betty L. Beatty.

IT IS SO ORDERED.

_____
Mikell R. Scarborough
Master-in-Equity
Charleston County

Dated: _____

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

ELECTRONICALLY FILED - 2021 Feb 16 11:52 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

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

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 **CP-10** 02955

TCC OF CHARLESTON INC	CONCORD AND CUMBERLAND LLC , DEFENDANT, ET AL
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

RECEIVED
Mar 11 2021
SC Court of Appeals

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
BETTY L. BEATTY	TCC of Charleston, Inc	$76,000.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

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or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
	CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ELECTRONICALLY FILED - 2021 Feb 22 2:52 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

ELECTRONICALLY FILED - 2021 Feb 22 2:52 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

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FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

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9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

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ELECTRONICALLY FILED - 2021 Feb 22 2:52 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

Charleston Common Pleas

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

Case Number: 2016CP1002955

Type: Order/Form 4

So Ordered

s/Mikell R. Scarborough 3062

EXHIBIT C

ELECTRONICALLY FILED - 2021 Mar 03 9:10 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.	)	**ORDER AWARDING ATTORNEYS' FEES**

RECEIVED
Mar 11 2021
SC Court of Appeals

In my Order, filed on February 16, 2021, I determined that Defendants were the prevailing parties of the foreclosure of mechanic's lien cause of action filed against all Defendants by

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Plaintiff. As such, Defendants are entitled to an award of their attorneys' fees. While the amount of fees and expenses to be awarded is discretionary, the question of Defendants' entitlement to fees is not. Utilities Construction Co., Inc. v. Wilson, 321 S.C. 244, 468 S.E.2d 1 (Ct. App. 1996). Defendants have now submitted their time entries and fee affidavits, and I find as follows:

In determining a reasonable attorney's fee, the court has considered the following six factors: 1) the nature, extent, and difficulty of the case; 2) the time necessarily devoted to the case; 3) the professional standing of counsel; 4) the contingency of compensation; 5) the beneficial results obtained; and 6) the customary legal fees for similar services. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). I have reviewed the affidavits of F. Cordes Ford, Henry Grimball, and Andrew Walden and have reviewed, in camera, detailed time records entered upon their firm's billing software. I have also reviewed the court record in this case.

1. Nature, extent and difficulty of the case.

This case presented a multi-million-dollar mechanic's lien claim and involved the potential interplay of the arbitration award in TCC's contract claim, application of the provisions of the mechanic's lien statutes, competing claims for attorney's fees, the filing of record by the plaintiff of multiple sworn statements, which it subsequently sought to retract, and hearings before the arbitration panel, circuit judge, and this court. It was complex, difficult and hotly contested.

2. The time necessarily devoted to the case.

Defendants' counsel has presented, in camera, his firm's detailed itemized records reflecting the hours each attorney or legal staff member expended upon each task as described in the narrative billing entry for each task. The hourly rate for each billing entry is included as well. Each expense is itemized upon the billing records. The total time expended by Mr. Ford, his partners, associates and professional staff, from June 22, 2016, through February 18, 2021, related

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specifically to the foreclosure of mechanic's lien equals 776.70 hours. I have reviewed each time entry and the itemized costs to determine the reasonableness of the time entered and the costs incurred.

3. Professional Standing of Counsel.

The court is familiar with the professional standing of Defendants' counsel, and they are experienced, well qualified and well respected in the legal community. Attorneys practicing in this court fall upon a scale representing a wide range of experience and competence from inexperienced or minimally qualified to highly skilled advocates. Defendants' attorneys are at the top of that scale.

3. Contingency of Compensation.

Defendants' counsel is not working on a contingent fee basis, so this factor is not applicable.

4. Beneficial Results Obtained.

Defendants' counsel succeeded in defeating the lien claim where the contractor had obtained an arbitration award in excess of $2,000,000.00 against the HPR. Opposing counsel had presented to the Panel of Arbitrators an attorney's fee affidavit seeking fees of approximately $900,000.00 in 2019, and if the plaintiff had prevailed upon its lien claim, its fees to date likely would have exceeded $1,000,000.00 over and above its unpaid contract claim. The unit owner Defendants' condominiums are now free of liens, and they do not face the prospect of owing additional attorney's fees to the plaintiff. These results are very beneficial to Defendants.

5. Fees Customarily Charged in Similar Cases.

The hourly rates and tasks performed in defense of this case are within the range of fees charged by comparable attorneys for comparable services. The total fees sought by Defendants'

counsel, $262,080.00, is substantially less than the fees sought by plaintiff's counsel in connection with the arbitration award. Further, it is apparent from the time sheets, that Defendants' counsel billed their clients a reduced fee off of their standard rate and are only seeking reimbursement on the reduced fee.

Based upon the foregoing factors, I have determined that Defendants are entitled to a reasonable attorney's fees in the sum of $250,000.00 together with costs in the amount of $553.70, for a total award of attorneys' fees and costs of $250,553.70.

IT IS SO ORDERED.

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

February __, 2021

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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

ELECTRONICALLY FILED - 2021 Mar 03 9:38 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-10-02955

TCC OF CHARLESTON, INC.
PLAINTIFF(S)

CONCORD AND CUMBERLAND HPR, et al
DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
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.	TCC OF CHARLESTON, INC.	$250,553.70

RECEIVED
Mar 11 2021
SC Court of Appeals

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, MATTELLEN, LLC, AND THOMAS R. DEBNAM, Trustee of the Trust Agreement of Thomas R. Debnam,		
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

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This judgment was entered on the ____ day of _____, 2021 and a copy mailed first class or placed in the appropriate attorney's box on this ____ day of _____, 2021to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

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8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

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9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

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11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

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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: Order/Form 4

So Ordered

s/Mikell R. Scarborough 3062

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YCRLAW

Edward D. Buckley, Jr.

Direct Dial: (843) 724-6671
Direct Fax: (843) 579-1370
E-mail: ebuckley@ycrlaw.com

December 3, 2020

VIA EMAIL AND U.S. MAIL
The Honorable Mikell R. Scarborough
Charleston County
100 Broad Street
Suite 266
Charleston, SC 29401

Re: TCC of Charleston, Inc. v. Beatty, Concord and Cumberland, HPR, et al.
Case No.: 2016-CP-10-2955
YCR File: 5321-20160538

Dear Judge Scarborough:

I am in receipt of TCC's "Omnibus Response and Objections to Filings and Submittals of Betty Beatty," and feel compelled to respond on behalf of Mrs. Beatty. I will address each of TCC's objections below:

1. TCC erroneously contends that Mrs. Beatty's proposed order would invalidate Judge McCoy's prior order in this case. Nothing could be further from the truth. Judge McCoy allowed TCC to file a Second Amended Complaint. Judge McCoy's order did not address the two (2) verified statements of account TCC filed of record in June, 2016, nor did it address the legal significance of TCC's previous sworn statements in its original and amended complaints. TCC's prior verified pleadings, unlike unverified pleadings, are the equivalent of affidavits, sworn statement made under penalty of perjury. Those sworn statement do not disappear by virtue of the Second Amended Complaint.

   For reasons known only to TCC, it elected to verify its pleadings, even though there was no requirement for it to do so. That election carries with it consequences.

2. TCC cites the case of *Duncan v. CRS Sirrine Engs., Inc.*, 337 S.C. 537, 541-542 (Ct. App. 1999), for the proposition that an amended pleading "supersedes the prior pleading, rendering it a nullity." That language appears nowhere in the *Duncan* opinion. TCC, in footnote 2, page 4, immediately after the *Duncan* case cite, says, without any legal basis, that the above quoted principle, (though entirely absent from the *Duncan* case,) applies to pleadings "Verified or otherwise." There is no legal

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support for TCC's contention that statements sworn to be true in prior verified pleadings are "rendered a nullity" by filing an amended pleadings omitting those prior statements.

TCC has provided nothing to refute the case law cited in Mrs. Beatty's proposed order holding that verified pleadings are, in fact, affidavits. *Duncan* does not mention verified pleadings, nor has TCC produced any authority to support its position that its prior sworn statements are now a "nullity."

3. Sham Affidavit.

TCC, either intentionally or through oversight, fails to address the six (6) *McMaster v. Dewitt* factors set forth on pages 14-16 of Mrs. Beatty's proposed order.

Mr. Griffith's last minute affidavit filed after this motion was fully argued months earlier does not make any effort to explain why he verified two (2) complaints stating that "the last date of such furnishing materials and services was March 17, 2016."

His most recent affidavit states that when he signed the statement of account, "I referred to the date of substantial completion." The words "substantial completion" do not appear anywhere in TCC's public record filings in June, 2016. Moreover, by the time he signed the most recent affidavit, he was fully aware that the Arbitration Panel and Judge Jefferson had found that substantial completion was accomplished on March 8, 2016, not March 17th.

4. TCC contends that it would be error to invalidate TCC's lien because of an inaccuracy in the statement of account. TCC quotes the catch line heading or caption for Section 29-5-100, "Proceedings not invalidated by inaccuracy of statement of account," as if it was part of the statute. It is not. Section 2-13-175, specifically states that headings or captions within the S.C. Code are not part of any code section and are not the law. It reads, in its entirety, as follows:

> "The catch line heading or caption which immediately follows the section number of any section of the Code of Laws must not be deemed to be a part of the section and must not be used to construe the section more broadly or narrowly than the text of the section would indicate. The catch line or caption is not part of the law and is merely inserted for purposes of convenience to the person using the Code."

Our courts have recognized that the legislature is presumed to intend to use the words it includes within the statute and, just as importantly, is presumed to omit words not

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included therein, as the court expressly recognized in *Hodges v. Rainey*, cited on page 10 of the proposed order. Section 29-5-100 speaks to two (2) categories of inaccuracies which will be excused: a) descriptions of the property, if the property can be reasonably identified from the inaccurate description and b) inaccuracies in the amount of the lien. There is no mention of dates of cessation in 29-5-100, and Your Honor can conclude that the legislature intended that code section pertain only to the two types of inaccuracies which it included in that section.

TCC chose the work for which it sought to perfect its lien. It asserted the lien for work on or before March 17th. Its contract claim may be valid for work performed thereafter. The lien, itself, representing work performed on or prior to March 17th, is dissolved.

5. TCC cites Your Honor's order in *Lowcountry Case & Millwork v. Library Associates, LLC*, in support of its claim that statements of account may be amended. Your Honor, in *Lowcountry*, rightly permitted an amendment in the amount of the lien, as Section 29-5-100, expressly references the amount of the lien as a permitted inaccuracy which will not invalidate the lien. TCC has not and cannot provide any legal authority to support a change in the sworn date of last work where, again, it chose to insert and swear to March 17, 2016, even though the law does not require it. TCC sought to perfect a lien for work performed on or before March 17, 2016, and that lien dissolved when TCC failed to timely serve Mrs. Beatty.

6. In support of its position that the date of last work is merely an error, TCC cites to exhibits allegedly presented during Arbitration which are not before this court. The only time sheets TCC submitted to Your Honor were those of Heather Dagg, which proves only that Ms. Dagg worked on the project after the notice of claim was filed. The date of cessation of labor must be a date before the notice of lien is filed, not after. *Preferred Savings*, page 17 of proposed order.

7. Mrs. Beatty's attorney's fees.

Mrs. Beatty is entitled to fees. The amount of the fees is within the Court's discretion. Mrs. Beatty has offered to submit to the Court in camera, the unredacted time entries on this case to allow the court to make a fully informed evaluation of the fees to be awarded.

Mrs. Beatty intentionally did not move for summary judgment on TCC's breach of contract or "Equity" causes of action, so there would be no argument that fees incurred in seeking dismissal of those claims should be excluded.

8. Matters involving real property interest filed on the public record are of particular import.

Our sister state, North Carolina, in the *Strickland* case, cited with approval in *Preferred Savings*, and the more recent *Beach & Adams Builders* case, addressed the policy reasons for holding a lien claimant to a date of last service he chose to insert in the lien he filed.

It is this simple. TCC could have waited days, weeks or months beyond June 6, 2016, to file and serve upon Mrs. Beatty its lien for work performed as late as January, 2017. Instead, it elected to sue for work performed on or before March 17, 2016. By operation of law, that lien had expired before Mrs. Beatty was served on June 22, 2016.

On the final page of its Omnibus Response, at paragraph 11, TCC objects to the Court granting relief inconsistent with TCC's entitlement to move forward with its claim for attorney's fees as a "prevailing party." TCC continues to conflate, either inadvertently or by design, the concepts of "prevailing party" in the context of its arbitrated contract claims and this mechanic's lien foreclosure action. The fact that it prevailed upon its contract claim in arbitration entitled TCC to certain costs associated with that arbitrated dispute and nothing more. TCC is not the "prevailing party" in the mechanic's lien foreclosure action. Rather, Betty Beatty is one of the "prevailing parties" here.

I sincerely apologize for the length of this response, but I believe the proposed order represents the correct application of the law to the facts of this lien claim.

With kindest regards, I am

Respectfully,

YOUNG CLEMENT RIVERS, LLP

By: s/ Edward D. Buckley, Jr.
Edward D. Buckley, Jr. (SC Bar No. 994)
P.O. Box 993
Charleston, SC 29402
(843) 720-5436
ebuckley@ycrlaw.com
Attorneys for Defendant Betty L. Beatty

EDB/khm
cc: Counsel of Record (via email only)

ELECTRONICALLY FILED - 2020 Dec 03 4:18 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

EPTING & RANNIK
ATTORNEYS AT LAW
ANDREW K. EPTING, JR. · AKE@EPTING-LAW.COM
JAAN G. RANNIK · JGR@EPTING-LAW.COM

December 4, 2020

VIA EMAIL & E-FILING

The Honorable Mikell R. Scarborough
Master in Equity for Charleston County
100 Broad Street
Suite 266
Charleston, SC 29401
master@charlestoncounty.org

RE: *TCC of Charleston, Inc. v. Concord & Cumberland HPR, et al.*
No. 2016-CP-10-2955

Judge,

I appreciate Cordes' sentiment that further proceedings are required. Perhaps I am wrong when I disagree with his assertion that the quality of justice before this Court does not include the right of this Court to question its own rulings in pursuit of just results. To that end, I enclose an order for the Court's review.

With kindest regards,

EPTING & RANNIK

/s/ Drew

Andrew K. Epting, Jr.

AKE,Jr./agg
Enclosure as stated

cc: Cordes Ford, Esq.
Andrew Walden, Esq.
Ed Buckley, Esq.

46A STATE STREET · CHARLESTON · SC · 29401
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Post Office Box 999
Charleston, SC 29402
5 Exchange Street
Charleston, SC 29401
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f: 843.723.7398

December 17, 2020

The Honorable Mikell R. Scarborough
Charleston County Master-in-Equity
100 Broad St. Ste 266
Charleston, SC 29401-2243

Re: TTC of Charleston, Inc. v. Concord and Cumberland HPR
Case No. 2016-CP-10-2955

Andrew Walden
Attorney
Direct Dial: 843-720-4634
Direct Fax: 843-723-7398
E-mail:Andrew.Walden@wbd-us.com

Dear Judge Scarborough:

Enclosed is a proposed order for your review resolving the motions to deposit and to confirm the award. Specifically, Your Honor requested at the hearing on November 5, 2020, that counsel attempt to agree on the amount of money to be deposited into court prior to you ruling on the matter and confirming the award. We have requested consent from TCC of Charleston, Inc. ("TCC"), regarding the calculations contained in the proposed order, but have not received a response. TCC is not incentivized to respond or agree with the HPR, as they believe each day of delay is another day of interest.

Nonetheless, we believe the panel was very clear in how to calculate the interest on the award and have outlined those amounts in the proposed order. We offer two options for your honor to consider – (1) interest running to the date the HPR filed the Motion to Deposit, May 11, 2020, and, in brackets, (2) interest running until the date your honor confirms the award.

Due to the unusual circumstances of 2020 and the COVID-19 pandemic, as well as Judge McCoy's referral to Your Honor, instead of deciding the Motion to Deposit at the May 28, 2020 hearing, or when she issued her ruling on August 11, 2020, we believe equity would be served if this court ran the interest until the date the HPR filed the motion. At $112.90 per day, the HPR, who was willing and able to deposit the money on May 11, 2020, has been harmed by $24,838.00 as of December 17, 2020. Some courts have granted similar relief – i.e., interest running to the date the motion was filed – even before the circumstances involving COVID-19. *See* Attachment A.

We also believe that resolution of the motion to deposit, this Court's confirmation of the award, and payment of the award into court effectively resolves the entire case at this level. Your Honor has already issued a verbal order that the breach of contract action becomes moot once the award is confirmed and that the mechanic's lien actions cannot stand. The only outstanding cause of action to be decided as to the HPR is one for "equity." TCC argued at the hearing that the equity cause of action is important to keep the HPR in the case to trigger the HPR's bylaws and, ultimately, payment. With the deposit of funds into Court, the HPR will have satisfied any obligations under their by-laws and TCC's argument will no longer hold merit. Thus, the equity cause of action should be dismissed upon payment of the monies into court.

Thank you for your time and, if Your Honor desires any additional briefing on this matter, please let us know.

Best regards,

Womble Bond Dickinson (US) LLP

s/ Andrew Walden

Andrew Walden

Enclosures

Cc: All Counsel of Record

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ATTACHMENT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NUMBER: 08-CP-08- 2715

200 RIVER LANDING DRIVE PHASE I CONDOMINIUM ASSOCIATION, INC.; CHRISTINE WINTER; SERGIO FEDELINI; DIANE MONROE; WILLIAM AND CHRISTINE PACE; CARROLL SPENCER; HARRIET FELLOWS; and KATHY SAINI,

Plaintiffs,

vs.

CLINE DESIGN ASSOCIATES, P.A.,

Defendant.

ORDER

FILED
2011 AUG -1 AM 9:10
MARY P. BUNDY
CLERK OF COURT
BERKELEY COUNTY, SC

This matter came on for hearing before the Court on July 29, 2011, pursuant to the Defendant's Motion to deposit the judgment into Court in order to prevent further accrual of statutory interest. The initial judgment in this matter is $500,000, and the verdict was brought back on Sept. 20, 2010. The Statutory rate of judgment interest accruing on the verdict pursuant to S.C. Code § 34-31-20(B) and Orders of the Supreme Court is 7.25% annually.

Accordingly, the judgment at issue carries a daily interest rate of $99.315068, and this interest rate runs from the verdict date until the filing of the Rule 67 Motion on June 2, 2011. The total amount of the Judgment as of June 2, 2011, is therefore calculated at 255 days at the interest rate, for an interest calculation of $25,325.34, or a total Judgment of $525,325.34.

Therefore, it is Ordered, Adjudged and Decreed that the Defendant's Rule 67 Motion is Granted, and it is directed to tender good and sufficient funds in the amount of $525,325.34 into the registry of the Court.

ERH JBKM JSM
MS RHH WJL
JBO EGE

002806

AND IT IS SO ORDERED this 1st day of August, 2011, at Berkeley County, South Carolina.

Kristi Lea Harrington
Judge, Ninth Judicial Circuit

womblebonddickinson.com

WOMBLE BOND DICKINSON

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t: 843.722.3400
f: 843.723.7398

April 22, 2021

VIA HAND DELIVERY

The Honorable Julie Armstrong
Charleston County Clerk of Court
100 Broad Street
Charleston, SC 29401

Re: *TCC of Charleston, Inc. v. Concord and Cumberland HPR*
Case No. 2016-CP-10-2955

F. Cordes Ford IV
Partner
Direct Dial: 843-720-4631
Direct Fax: 843-723-7398
E-mail: Cordes.Ford@wbd-us.com

Dear Ms. Armstrong:

Enclosed is a check in the amount of $2,216,899.06 to be deposited with the Court. These funds are being deposited in accordance with Judge Mikell R. Scarborough's Order, dated February 16, 2021, in the above referenced matter.

Please acknowledge receipt of the check by signing the letter below.

Best regards,

Womble Bond Dickinson (US) LLP

F. Cordes Ford IV

Cc: All Counsel of Record

I HEREBY ACKNOWLEDGE RECEIPT
OF A CHECK IN THE AMOUNT OF
$2,216,899.06.

CHARLESTON COUNTY CLERK OF COURT

BY: Stacy Bledsoe

ITS: Accounting Supervisor

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Common Pleas

Julie Armstrong

Charleston County Judicial Center

Charleston, SC 29401

Date: 4/22/2021

Transaction Number: 1

Clerk: Julie Armstrong

Receipted By: COCSLB

Received From: SYNOVUS BANK

Paying For: SYNOVUS BANK

Payment Type: CK

Payment Amount: $2,216,899.06

Reference Number: 518091

Case #	Caption	Amount Paid
2016CP1002955	Tcc Of Charleston Inc VS Concord And Cumberland Llc , defendant, et al	$2,216,899.06

SYNOVUS
Synovus Bank, Member FDIC

OFFICIAL CHECK

1000518091

64-60
611

DATE April 20, 2021

PAY TWO MILLION TWO HUNDRED SIXTEEN THOUSAND EIGHT HUNDRED NINETY NINE DOLLARS AND SIX CENTS

$**2,216,899.06

TO THE ORDER OF CHARLESTON COUNTY CLERK OF COURT

REMITTER FOR CONCORD & CUMBERLAND

PAYABLE THROUGH SYNOVUS BANK COLUMBUS, GEORGIA

AUTHORIZED SIGNATURE

[redacted]