THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Master-In-Equity

Hon. Deadra L. Jefferson, Circuit Court Judge
Hon. Mikell R. Scarborough, Master-In-Equity

Case No. 2016-CP-10-2955

Appellate Case No. 2021-000272

TCC of Charleston, Inc., 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,

Of Which Concord & Cumberland HPR is the Respondent/Appellant.

FINAL BRIEF OF RESPONDENT/APPELLANT

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INTRODUCTION

For the entirety of this case, Appellant/Respondent TCC of Charleston, Inc. ("TCC") has repeatedly sought to avoid the plain meaning and legal impact of its own words and actions. TCC was successful in part before the Panel, and unsuccessful before Judge Scarborough. This Court now faces cross-appeals.

Respondent/Appellant Concord & Cumberland HPR ("HPR"), having relied upon the plain meaning and legal impact of TCC's words and actions, seeks enforcement thereof in both appeals. Notably, in each appeal, it is not just the written words of TCC to be evaluated and enforced, it is the sworn statements of TCC to be evaluated and enforced.

As initially briefed, the primary subject of the HPR's appeal is the Panel's wrongful refusal to enforce a sworn lien waiver and release executed and delivered by TCC to the HPR to induce a significant project payment. In turn, this brief focuses on Judge Scarborough's proper enforcement of four other TCC sworn statements, consisting of two mechanic's lien statements of account and two verified Complaints, each of which state that the last date of work on the project was March 17, 2016. Indeed, the HPR and Respondent/Appellant homeowners represented by the undersigned admitted that the last date of work was March 17, 2016, in their Answer to the verified Amended Complaint. Despite the last date being repeatedly asserted precisely as it chose, TCC now, years later, seeks to amend its filed mechanic's lien and statement of account to reflect a later date based on a different project performed ten months after and for which TCC never previously sought to file a lien or amend its lien. Specifically, the amount claimed for the later work was never the subject of either the original filed lien or any amended lien. Rather, TCC seeks the amendment only to rescue itself from its failure to timely serve its mechanic's lien.

Judge Scarborough properly rejected TCC's effort, ruling that TCC's lien was inchoate as

of March 17, 2016, was never perfected by timely service, and thus dissolved as a matter of law.

Further, Judge Scarborough properly dismissed the mechanic's lien foreclosure cause of action as to the HPR, regardless of the service issue, on the statutory ground that liens cannot be perfected against a horizontal property regime. TCC, despite having asserted the cause of action against the HPR three times, from its initial Complaint to its latest Amended Complaint, now seeks to avoid its written words again by asserting that a foreclosure was not sought as to the HPR. This incredible "about face" typifies TCC's standard operating procedure throughout this case.

Accordingly, Judge Scarborough found on separate and independent grounds that the HPR and the unit owners were the prevailing parties on the foreclosure of mechanic's lien cause of action and were entitled to reasonable attorney's fees thereon.

Finally, Judge Scarborough ruled that, upon deposit of the full amount of the award into Court, interest stops accruing pursuant to Rule 67, SCRCP.

Judge Scarborough, having based his decision on the facts and applicable law, should be affirmed.

STATEMENT OF THE CASE

On June 6, 2016, TCC filed a mechanic's lien containing a sworn statement of account and a verified Complaint against the HPR for (1) foreclosure of mechanic's lien, (2) breach of contract, and (3) quantum meruit. TCC amended the mechanic's lien and verified Complaint on June 10, 2016, to add all of the individual condominium unit owners. Contemporaneously with filing the initial Complaint, TCC also filed a Motion to Stay and Compel Arbitration. These four sworn statements specified the last date of work as March 17, 2016. The HPR and Respondent/Appellant homeowners represented by the undersigned answered the verified Amended Complaint, admitted

the date of last work was March 17, 2016, and consented to arbitration pursuant to the terms of the guaranteed maximum price construction contract ("GMP Contract") between the HPR and TCC.

Procedural History of the Arbitration

On December 30, 2016, Judge Roger M. Young, Sr. entered a Consent Order staying the court action and allowing the claims between TCC and the HPR to proceed to arbitration. Although the court action was stayed as to the foreclosure action against the homeowners, the mechanic's lien was not, and each unit's title has been clouded since June of 2016.

The parties entered into an Arbitration Agreement, dated January 18, 2017, and, on April 19, 2017, the Panel issued Panel Order No. 1, which specified that the form of the award would be a "Reasoned Award." The Panel conducted its merits hearing on January 21-24, 2019. The Parties each submitted proposed orders on or before March 21, 2019, and the Panel issued the Arbitration Award awarding $2,023,074.45[1] to TCC and delivered it to all parties via email on April 17, 2019. The parties submitted various post-award motions. On June 17, 2019, TCC filed a Motion to Lift Stay in the Circuit Court. On July 12, 2019, the Panel issued its Post Award Order, and, on July 15, 2019, the HPR submitted a Motion to Change Award. In order to preserve its right to judicial review, on July 16, 2019, the HPR also filed a Motion to Vacate the Arbitration Award or, Alternatively, to Modify or Correct the Arbitration Award.

Subsequently, the Panel issued a Corrected Arbitration Award dated August 12, 2019, and served it on all parties on August 19, 2019. The Corrected Arbitration Award withdrew the Post Award Order and amended and supplemented the original Award. The Corrected Arbitration Award awarded $2,016,066.73, plus interest and costs. In response, on September 7, 2019, the HPR submitted a Motion for Change of Corrected Arbitration Award. The Panel issued an Order

[1] The HPR agrees that the arbitration award included the arbitration panel's fees and costs but states that this was not an arbitration conducted by the American Arbitration Association.

on the HPR's Motion for Change of Corrected Arbitration Award on October 23, 2019. The October 23, 2019, Order was the last order from the Panel in the underlying arbitration.

On November 18, 2019, the HPR filed a Motion to Vacate the Corrected Arbitration Award or Alternatively, to Modify or Correct the Corrected Arbitration Award in the Circuit Court. Judge Deadra L. Jefferson heard this motion on December 16, 2019. On January 30, 2020, Judge Jefferson issued an Order Granting TCC's Motion to Lift Stay and Denying the HPR's Motions to Vacate or Correct the Panel's Corrected Arbitration Award. On February 10, 2020, the HPR filed a Motion to Reconsider, Alter, or Amend Judgment pursuant to Rule 59, SCRCP, and, on May 1, 2020, Judge Jefferson denied that motion without a hearing.

The HPR appealed Judge Jefferson's orders in Appellate Case No. 2020-000875. Chief Judge James E. Lockemy determined that the appeal was not ripe because Judge Jefferson did not confirm the award when she ruled, notwithstanding the language of S.C. Code Ann. §§ 15-48-120[2], -130(d)[3], and -140(b)[4].

Procedural History Following Arbitration

After Judge Jefferson decided not to vacate or change the arbitration award and with an appeal pending, which this Court subsequently dismissed as indicated above, the HPR proceeded to litigate the issues that were not subject to the appeal before the Circuit Court. On December 6, 2019, prior to Judge Jefferson ruling on the motions involving the Arbitration Award, the HPR filed a Motion for Summary Judgment as to Plaintiff's Foreclosure of Mechanic's Lien Cause of

[2] S.C. Code Ann. § 15-48-120 ("Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 15-48-130 and 15-48-140.").
[3] S.C. Code Ann. § 15-48-130(d) ("If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.").
[4] S.C. Code Ann. § 15-48-140(b) (stating that "[t]he court shall confirm the award as made").

Action. On May 8, 2020, homeowner Betty Beatty, by and through her counsel, filed a Partial Motion for Summary Judgment as to the foreclosure of mechanic's lien cause of action. On May 11, 2020, the HPR filed a Motion to Deposit Funds seeking to deposit the arbitration award with the Charleston County Clerk of Court in anticipation of challenging the award on appeal, and, on May 15, 2020, TCC filed a Motion to Amend the Complaint. Judge Jennifer B. McCoy heard these four pending motions on May 28, 2020, and, in an order dated August 11, 2020, granted the Motion to Amend and referred the remaining motions on the merits to the Master in Equity, Judge Mikell R. Scarborough.

Following the order of reference by Judge McCoy, TCC filed its Second Amended Complaint on August 24, 2020, and, on September 11, 2020, its Motion for Attorneys' Fees. On September 14, 2020, the HPR filed a Motion to Dismiss Plaintiff's Second Amended Complaint and its Motion for Attorneys' Fees. On October 1, 2020, TCC filed a Motion to Amend Statement of Account.

Judge Scarborough received extensive briefing on the outstanding motions and heard oral arguments on November 5, 2020, and January 27, 2021. Prior to the January 27, 2021, oral argument, the Respondent/Appellant homeowners represented by the undersigned filed a Motion for Summary Judgment on January 17, 2021. After studying the record, the numerous motions, memoranda, correspondences, statutes, and case law, Judge Scarborough denied TCC's Motion to Amend Statement of Account and Motion for Attorneys' fees but confirmed TCC's arbitration award. Judge Scarborough then granted the HPR's Motions to Dismiss and for Summary Judgment as to the Plaintiff's Second Amended Complaint and the HPR's Motion to Deposit. Judge Scarborough further ordered that the HPR and homeowners were the prevailing parties on the foreclosure of mechanic's lien cause of action and thus entitled to attorneys' fees. The HPR

and homeowners subsequently filed affidavits of attorneys' fees and provided unredacted timesheets to Judge Scarborough for his *in camera* review. On March 3, 2021, Judge Scarborough awarded $250,533.70 to the HPR and homeowners and entered judgment for the same. On March 11, 2021, Judge Scarborough entered judgment on the arbitration award of $2,216,899.06 in favor of TCC. On April 23, 2021, the HPR deposited all $2,216,899.06 with the Charleston County Clerk of Court.

TCC'S MISSTATEMENTS

TCC has made the following misstatements in its initial brief:

1. TCC states that it served the HPR on June 15 or 16, 2016. Initial Brief of Appellant, pp. 7, 15. This is not true, and TCC, accordingly, cannot cite any evidence in the record to support its proposition.

2. TCC argues that it inadvertently used the date of substantial completion instead of the last date of work on the statement of account. *Id.* at 1, 4, 8. However, prior to TCC seeking to amend the statement of account, both the Arbitration Panel and Judge Jefferson found the date of substantial completion to be March 17, 2016, based on TCC's prior verified assertions, and that finding is not contested in this appeal.

3. TCC states that the date of last work was previously litigated and determined in arbitration and is therefore res judicata. *Id.* at 1. This statement is false. The last date of work for purposes of analysis under the mechanic's lien statute was not a litigated issue in the arbitration, as the mechanic's lien foreclosure claims were expressly stayed as to the homeowners by Judge Young.

4. TCC's brief is replete with statements that it is "uncontested" that the date of last work on the project was January 23, 2017. *Id.* at 1, 4, 8. Rather, this date was contested and is

contrary to TCC's multiple sworn statements that the last date of work was March 17, 2016. Further, while TCC claims money is owed for the work completed on January 23, 2017, TCC never asserted a lien for the claimed amount within 90 days of the alleged completion thereof and now attempts to use work from an entirely separate project to salvage a lien on the project that was subject to and controlled by the GMP Contract.

5. TCC states that the circuit court allowed TCC to amend to remove the erroneous last date of work. *Id.* at 1. This statement is intentionally overbroad. Yes, the circuit court allowed TCC to amend the pleadings, per Rule 15(b), SCRCP, but the court expressly withheld a determination of the merits of the case, including the last date of work. It referred the determination of the merits to the Master in Equity.

6. TCC states that it was deemed the prevailing party in a prior arbitration ruling and is thus entitled to its attorneys' fees. *Id.* at 2, 25. This statement is also intentionally overbroad and ignores the law. While TCC has thus far prevailed in the breach of contract claim, which was governed by an arbitration agreement and the GMP Contract, the Panel held that neither the arbitration agreement nor the GMP Contract provided for attorneys' fees. TCC has not contested this holding. The only basis for attorneys' fees in this case is the foreclosure of mechanic's lien cause of action, on which the HPR and homeowners prevailed.

7. TCC stated that the parties agreed that TCC would bill its out-of-scope work on a time and material basis and that certain costs would be accounted for at the end of the project. *Id.* at 3. TCC has not and cannot cite to any evidence in the record setting forth such an agreement. The HPR did not have a second agreement with TCC to perform work outside the scope of the GMP Contract, as is clearly evidenced by the fact that the parties followed the GMP Contract through the first nine (9) change orders and seventeen (17) pay applications, which themselves

contained supporting documentation and were evaluated and approved by the architect prior to payment, to compensate for original scope, out-of-scope, and changed scope work.

8. TCC states that suit followed when the HPR failed to honor its agreement. *Id.* at 4. In reality, suit followed when the HPR challenged TCC's efforts to unilaterally modify the GMP Contract by seeking its alleged total project costs in Change Order 10 and Pay Application No. 18, which, unlike the first nine change orders and seventeen pay applications, contained no supporting documentation relating the alleged costs to any original scope work or changed scope work.

9. TCC asserts that Judge McCoy expressly ruled on the last date of work at the project. *Id.* at 10, 11. However, Judge McCoy issued a narrow ruling to grant TCC's requested amendment to the Complaint pursuant to Rule 15(b), SCRCP. Judge McCoy did not evaluate the merits of the case and expressly withheld this evaluation and all remaining motions for decision by the Master in Equity.

ARGUMENT

I. TCC'S MECHANIC'S LIEN WAS NOT PERFECTED AS A MATTER OF LAW.

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, 26-27, 336 S.E.2d 488, 489-90 (Ct. App. 1985) (stating that "mechanic's liens are purely statutory and can only be acquired and enforced in accordance with the conditions of the statute creating them," and "[t]he lien 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." *Ferguson Fire & Fabrication*, 409 S.C. at 342, 762 S.E.2d at 566 (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.*, 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 (citations omitted).

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" and must do so "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.

A. <u>The Last Date of Work is March 17, 2016.</u>

The last date of work on this project was unequivocally March 17, 2016, as referenced in no less than four sworn statements of TCC, and as admitted in the HPR and homeowners' answers. (R. p. 468, ¶10). As such, separate and apart from TCC's sworn statements of account, TCC is bound by the admitted allegations. *See Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 279, 851 S.E.2d 724, 731 (Ct. App. 2020) (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."); *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.").

TCC has taken great efforts to change the last date of work to a later, different project on the same building, even though that project was not "warranty work" for the GMP contract project. *See Crystal Pools, Inc. v. Old Claussen's Bakery Partners*, 303 S.C. 68, 70, 399 S.E.2d 5, 6 (Ct. App. 1990) (finding that a contractor who performed warranty work "necessary to complete performance under the contract" could file a mechanic's lien within ninety days of that work). Specifically, the stone tower work by TCC was a completely different project, was not included in the scope of work under the project at issue in this case, was billed separately by TCC, and was never a part of the amount of money sought by the subject lien or any lien asserted within ninety days of that work.

Further, TCC has provided affidavits on the eve of the circuit court hearings purporting to support a later in time last date of work on the project. Specifically, one of its superintendents, Ryan Tomberlin, stated on May 22, 2020, before the May 28, 2020, hearing, that he was onsite

performing work as late as June 9, 2016. If that was the case, then why did TCC not state the last date of work as June 9, 2016, when it amended its lien on June 10, 2016? Further, TCC's president, John David Griffith, submitted an affidavit on the eve of the motion for summary judgment hearing before Judge Scarborough stating that he inadvertently referred to the date of substantial completion in the lien and not the last date of work. This sham affidavit was submitted with full knowledge that both the Panel and Judge Jefferson had already found, based on TCC's prior assertions, that the date of substantial completion was March 8, 2016, which finding was uncontested. In other words, this affidavit was submitted for the sole purposes of manufacturing a genuine issue of material fact and should be viewed accordingly. *See McMaster v. Dewitt*, 411 S.C. 138, 151, 767 S.E.2d 451, 458 (Ct. App. 2014) (providing the proposition that a plaintiff cannot, by the "last-minute submission of [an] affidavit . . . create an issue of fact for purposes of summary judgment").

Finally, TCC's res judicata argument as to the last date of work has no merit. The last date of work was not an issue in arbitration, as the homeowners' mechanic's lien foreclosure action was stayed and not referred to arbitration. The "last date" issue was irrelevant to the breach of contract action pending in arbitration. Furthermore, even if the last date had been relevant in the arbitration proceeding, the date was already established by prior pleadings by virtue of the HPR's admission in its Answer that the date of final completion was March 17, 2016, as asserted by TCC. Accordingly, the HPR had no reason to offer evidence in that forum to either establish or contest the last date of work. Finally, the Panel had no reason to rule on the last date of work, and indeed they did not, certainly not in the context of the mechanic's lien foreclosure cause of action as to the HPR, which the Panel found to be improper.

B. TCC's Lien was Not Timely Served.

TCC first served the mechanic's lien, at the earliest, on June 22, 2016, seven days too late. (R. p. 89). In an effort to remedy the untimely service, TCC argues that it served the HPR with the lien on June 15, 2016. However, TCC offers no evidence supporting this claim. The HPR has never been served with the mechanic's lien; however, even if it had, South Carolina requires service on all unit owners as discussed in Subsection F below.

C. A Sworn Statement of Account Cannot Be Amended Four Years Later to Rescue an Untimely Filed Mechanic's Lien.

S.C. Code Ann. § 29-5-100 quickly disposes of TCC's argument that an inaccuracy in the statement of account cannot be the basis for invalidating a lien. It states:

> No inaccuracy in such statement relating to the property to be covered by the lien, if the property can be reasonably recognized, or in stating the amount due for labor or materials shall invalidate the proceedings, unless it appear that the person filing the certificate has wilfully and knowingly claimed more than is his due.

Thus, Section 29-5-100 expressly provides only two situations – (1) the amount stated and (2) the description of the property – in which a statement of account can be amended to prevent a mechanic's lien from being invalidated. This section does not provide a lien claimant the right to rescue his lien four years later by changing the last date of work in the sworn statement. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature."); *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (holding that, under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute).

Based on its plain language, which is not ambiguous, the legislative intent behind Section 29-5-100 was to keep a scrivener's error from invalidating an otherwise valid lien. Mistyping the

description of the property, or accidentally stating the wrong amount of the lien, does not change the fact that a lien exists. However, if a lien claimant fails to serve the lien within 90 days of the last date of work, then the statute expressly provides that the lien is dissolved and no longer exists as a matter of law. Common sense also dispels TCC's argument, as allowing an untimely lien to be cured by amendment at a much later date would prevent a title examiner from being able to determine with relative certainty that a property is unencumbered. *See Preferred Sav. & Loan Ass'n v. Royal Garden Resort, Inc.*, 301 S.C. 1, 389 S.E.2d 853 (1990) (providing a similar analysis in the context of commencing suit to foreclose the mechanic's lien within six months of the certificate of lien).

D. *Kitchen Planners* Addresses Amended Pleadings, Not Filed Mechanic's Liens.

Kitchen Planners expressly addresses amendments to pleadings, not mechanic's liens. As TCC noted, this Court stated that "'parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise.'" *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 278, 851 S.E. 2d 724, 730-31 (quoting *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992)). Although elementary, a review of Rule 7(a), SCRCP, is informative, as it defines a pleading:

> There shall be a complaint and an answer; and a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14, and there shall be a third-party answer, if a third-party complaint is served. 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).

In other words, a mechanic's lien and statement of account are not pleadings. They are statutory instruments affecting title. Accordingly, *Kitchen Planners* does not lend any support to TCC's effort to alter, amend, or withdraw the statement of account and the date of work sworn to

therein. Such action can only occur, if at all, by strict adherence to the mechanic's lien statute.

E. <u>All Dispositive Motions Were Heard by the Master, Not the Circuit Court.</u>

Contrary to TCC's argument, Judge Scarborough did not reverse a prior ruling of the circuit court. Judge McCoy's ruling was extremely narrow. In a one-page order, Judge McCoy held: "Rule 15(b) provides that leave to amend a pleading should be freely given, and the Court grants TCC's motion to amend." (R. p. 42). Judge McCoy then referred all other motions to the Master in Equity, who, taking into account the Second Amended Complaint filed by TCC after Judge McCoy's ruling, heard all material evidence and found that the last date of work was March 17, 2016. (R. p. 89). Judge McCoy never addressed the last date of work and certainly never granted leave to amend the statement of account associated with the statutory mechanic's lien. TCC's assertion that Judge Scarborough overruled Judge McCoy is a gross misstatement.

F. <u>The Horizontal Property Act Precludes a Blanket Lien.</u>

As an initial matter, the HPR has never been served. However, even if the HPR had been timely served with the mechanic's lien, the Horizontal Property Act expressly provides that all liens must be perfected against the individual unit owners.

In *Resolution Trust Corp. v. Eagle Lake & Golf Condominiums*, 310 S.C. 473, 427 S.E.2d 646 (1993), the Court evaluated the relevant section of the Horizontal Property Act and found that the legislature expressly adopted the language it used and therefore the plain language of the statute controls. In doing so, the Court found that this statute is based on a Model Act that was proposed by the Federal Housing Administration in 1962 and that various states have modified the language of the Act. *Id.* at 477, 427 S.E.2d at 648. South Carolina enacted the Model Act without modification. *Id*. In other words, the legislature meant for the Horizontal Property Act (the "Act"), S.C. Code Ann. § 27-31-10 *et seq.*, to be strictly construed according to its plain language. The

Act provides the following in S.C. Code § 27-31-230:

> SECTION 27-31-230. Liens arising subsequent to recording of master deed or lease.
>
> (a) **No lien arising subsequent to recording the master deed or lease as provided in this chapter**, and while the property remains subject to this chapter, **shall be effective against the property**. During such period **liens or encumbrances shall arise or be created only against each apartment and the percentage of undivided interest in the common elements appurtenant to such apartment**, in the same manner and under the same conditions in every respect as liens or encumbrances may arise or be created upon or against any other separate parcel of real property subject to individual ownership; provided, that no labor performed or materials furnished with the consent or at the request of a co-owner or his agent or his contractor or subcontractor, shall be the basis for the filing of a mechanic's or materialman's lien against the apartment or any other property of any other co-owner not expressly consenting to or requesting the same, except that such express consent shall be deemed to be given by the owner of any apartment in the case of emergency repairs thereto. **Labor performed or materials furnished for the common elements**, if duly authorized by the council of co-owners, the administrator or board of administration or other administration specified by the bylaws, in accordance with this chapter, the master deed, lease or bylaws, shall be deemed to be performed or furnished with the express consent of each co-owner and **shall be the basis for the filing of a mechanic's or materialman's lien against each of the apartments** and shall be subject to the provisions of subparagraph (b) hereunder.
>
> (b) In the event a lien against two or more apartments becomes effective, the owners of the separate apartments may remove their apartment and the percentage of undivided interest in the common areas and facilities appurtenant to such apartment from the lien by payment of the fractional or proportional amounts attributable to each of the apartments affected. Such individual payment shall be computed by reference to the percentages appearing in the master deed or lease. Subsequent to any such payment, discharge or other satisfaction, the apartment and the percentage of undivided interest in the common elements appurtenant thereto shall thereafter be free and clear of the lien so paid, satisfied or discharged. Such partial payment, satisfaction or discharge shall not prevent the lienor from proceeding to enforce his rights against any apartment and the percentage of undivided interest in the common elements appurtenant thereto not so paid, satisfied or discharged.

(emphasis added).

The Act explicitly references the mechanic's lien statute and provides that the procedure for a mechanic's lien is for the lien to be filed against the individual apartments according to each apartment's percentage share of the undivided interest in the common areas. Further, the Act states

that "no lien" against the HPR "shall be effective against the property." *Id.*

While the task of serving all unit owners with a mechanic's lien for common element improvements in a condominium may be onerous, the task is clearly necessary to perfect such liens by statute in South Carolina. All the more reason for lien claimants to avoid waiting until the eleventh hour to begin an effort to perfect a mechanic's lien.

G. Notice is Not Service Under the Mechanic's Lien Statute and Discovery Would be Futile.

The Master in Equity expressly found that TCC's mechanic's lien was not served timely. (R. pp. 89-90). S.C. Code § 29-5-90, states:

> Such a lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, **serves upon the owner or, in the event the owner cannot be found, upon the person in possession** and files in the office of the register of deeds or clerk of court of the county in which the building or structure is situated a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien sufficiently accurate for identification, with the name of the owner of the property, if known, which certificate shall be subscribed and sworn to by the person claiming the lien or by someone in his behalf and shall be recorded in a book kept for the purpose by the register or clerk who shall be entitled to the same fees therefor as for recording mortgages of equal length. **Provided, that in the event neither the owner nor the person in possession can be located after diligent search, and this fact is verified by affidavit of the sheriff or his deputy, the lien may be preserved by filing the statement together with the affidavit.** The delivery on the register or clerk for filing, as provided in this section, shall be and constitute the delivery contemplated with regard to such liens in Title 30 of this Code.

(emphasis added).

As indicated, Section 29-5-90 provides multiple avenues for service of the lien. However, TCC improperly cites to Section 29-5-200 in support of its argument, which provides a lienor the opportunity to serve the petition on the owners by some other means than personal service. The fact that service can be effected against persons in possession, under Section 29-5-90, and not only the owner, bars TCC's tolling argument due to the non-residency status of some owners.

II. TCC HAS CONTINUOUSLY PURSUED ITS IMPROPER ASSERTION OF A FORECLOSURE OF MECHANIC'S LIEN CAUSE OF ACTION AGAINST THE HPR.

TCC argues that it has never pursued a foreclosure of mechanic's lien cause of action against the HPR. However, TCC filed not one or two, but three Complaints asserting claims against the HPR for foreclosure of mechanic's lien. All causes of action against the HPR were referred to arbitration for disposition by Judge Young. (R. p. 4).

In arbitration, when TCC sought its attorneys' fees, the Panel properly found that "S.C. Code Ann. 27-3-20 [sic] requires that TCC's lien must be filed against the property owners rather than the HPR." (citing S.C. Code Ann. § 27-31-230).[5] The Panel would have no reason to include this finding in its award if TCC had not been pursuing an award of attorney's fees against the HPR via Section 29-5-10. Thus, this finding by the Panel proves two points: (1) TCC was pursuing its mechanic's lien foreclosure cause of action against the HPR, as asserted, in arbitration and in the circuit court; and (2) the HPR was defending the same prior to the lifting of the stay.

The record reflects that TCC only changed its story regarding its pursuit of the foreclosure of mechanic's lien cause of action against the HPR when it realized that the HPR was correct that such pursuit was a statutory impossibility and that the HPR would be entitled to attorneys' fees.

III. BECAUSE TCC IMPROPERLY PURSUED A MECHANIC'S LIEN AGAINST THE HPR AND BECAUSE TCC FAILED TO TIMELY SERVE THE HOMEOWNERS, THIS COURT SHOULD AFFIRM THE AWARD OF ATTORNEYS' FEES.

The HPR and homeowners successfully defeated TCC's foreclosure of mechanic's lien cause of action and 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 Constr. Co., Inc. v. Wilson*, 321 S.C. 244, 468 S.E.2d 1 (Ct. App. 1996).

[5] TCC did not challenge this finding in any motion to correct or vacate the arbitration award.

Judge Scarborough evaluated, and clearly enumerated in his order, the following six factors in determining the reasonable attorneys' fee awarded: 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. *See Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). Further, Judge Scarborough reviewed the affidavits and, *in camera*, the detailed time records of the undersigned counsel. As referenced in the attorneys' fee affidavits, counsel took great efforts to include in their requests only those fees related to the foreclosure of mechanic's lien cause of action. In his discretion, and enumerating clearly his opinion and reasoning in his Order, Judge Scarborough ordered TCC to pay the HPR and certain homeowners represented by the undersigned counsel $250,533.70.

Further, TCC again makes a gross misstatement when it argues that it "ha[d] no ability to challenge the reasonableness of the award" and "is desiring and entitled to due process in challenging the reasonableness of the award." Prior to the award of fees and after the Court had received the HPR's affidavits and fee statements, TCC's counsel expressly "refrain[ed]" from any additional argument or desire for a hearing on the "quantum of fees." (R. p. 2673). Therefore, TCC should be estopped from seeking a *de novo* review of the fee award in this Court as long as this Court finds that Judge Scarborough did not abuse his discretion. *Kiriakides v. Sch. Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) ("The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion.").

IV. TCC IS NOT ENTITLED TO CONTINUED CONTRACTUAL INTEREST.

Pursuant to Judge Scarborough's order, the HPR deposited the judgment of $2,216,899.06 into Court on April 23, 2021. Upon the HPR doing so, Judge Scarborough ordered that all interest

stop. In *Duval v. Heritage Life Ins. Co.*, this Court stated:

> In *Russo v. Sutton*, [317 S.C. 441, 454 S.E. 2d 895 (1995),] the supreme court held a judgment debtor's deposit of funds into court pursuant to Rule 67, SCRCP, pending the debtor's own appeal stops the accrual of interest on the judgment. The rationale was that "such a rule encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available." [*Id.* at 442, 454 S.E. 2d at 896]. This court has followed that rule. [*See, e.g.*, *Small v. Pioneer Mach., Inc.*, 330 S.C. 62, 65, 496 S.E. 2d 884, 885 (Ct. App. 1998) ("A judgment debtor's deposit of funds into the court pending his own appeal prevents further accrual of interest on the judgment.")].

339 S.C. 616, 620, 529 S.E.2d 566, 568 (Ct. App. 2000); *see also S.C. Dep't of Transp. v. Faulkenberry*, 337 S.C. 140, 153, 522 S.E.2d 822, 828-29 (Ct. App. 1999) ("'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.'" (quoting *Horry County v. Woodward*, 291 S.C. 1, 3, 351 S.E.2d 877, 878 (Ct. App. 1986))).

However, TCC cites *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 327, 513 S.E.2d 617, 618-19 (1999), for the proposition that a deposit into court pursuant to Rule 67 does not stop the accrual of interest provided by contract. *Renaissance* is distinguishable as it discusses Rule 67 in the context of supplemental proceedings, not an appeal. *Renaissance* involved a judgment that was final and binding and not an indeterminate amount subject to appeal. Here, the judgment amount is being appealed and the amount is not yet determined; therefore, interest cannot accrue.

Further, this Court favorably cited *Russo* as recently as 2016 in the unpublished case of *Graham v. Town of Latta*, Op. No. 331 (S.C. Ct. App. filed June 29, 2016) (unpublished). In *Graham*, this Court held that "'a judgment debtor's deposit of funds into court pending his own appeal prevents further accrual of interest.'" *Id.* (quoting *Russo*, 316 S.C. at 444, 454 S.E.2d at 896). The facts of this case closely track *Russo*, and this Court should affirm Judge Scarborough's

ruling to stop the accrual of interest. Indeed, if a deposit into Court does not stop interest from accruing pending an appeal, there would be no incentive to make such a deposit in the first place. The depositing party would be better off holding funds in its own accounts earning interest for itself.

CONCLUSION

For the reasons stated above, the HPR respectfully requests that the Court affirm Judge Scarborough.

Respectfully submitted this 29th day of December 2021.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Master-In-Equity

Hon. Deadra L. Jefferson, Circuit Court Judge
Hon. Mikell R. Scarborough, Master-In-Equity

Case No. 2016-CP-10-2955

Appellate Case No. 2021-000272

TCC of Charleston, Inc., 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, Respondents,

Of Which Concord & Cumberland HPR is the Respondent/Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent as the Respondent/Appellant complies with Rule 211(b), SCACR.

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Charleston, South Carolina