STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
Boggs Materials, Inc., Plaintiff, v. JEY General Contractors, LLC; Marco Contractors, Inc.; and Old Republic Surety Company, Defendants.	C/A No.: 2020-CP-29-00841 **ORDER GRANTING SUMMARY JUDGMENT**

THIS MATTER came before the undersigned for a hearing on a motion for summary judgment on behalf of Plaintiff Boggs Materials, Inc. ("Plaintiff" or "Boggs") filed June 8, 2021. At a hearing held March 28, 2022, before the undersigned, Benjamin C. Bruner, Esquire appeared on behalf of the Plaintiff, and Christopher A. Cafardi, Esquire appeared on behalf Defendants Marco Contractors, Inc. ("Marco") and Old Republic Surety Company ("Surety") (collectively hereinafter, "Defendants"). After careful consideration of the submissions and arguments of counsel, the Court finds Boggs' motion should be granted for the reasons set forth below and enters judgment against the Defendants accordingly.

NATURE OF THE CASE

This case arose out of a construction project to build a new Dollar Tree store in Lancaster County at 1338 Highway 9 Bypass West, Lancaster, South Carolina ("the Project"). The property owner, Dollar Tree Stores, Inc. ("Dollar Tree") hired Marco Contractors, Inc. ("Marco") to build the Project at a price of $1,320,043.34. Marco subcontracted $500,000 worth of site, paving, and utility work to JEY General Contractors, LLC ("JEY"), a local commercial contractor. JEY in turn contracted with Boggs, an asphalt supplier, to buy asphalt JEY needed to perform its work on the Project. Before providing any asphalt, Boggs requested a Joint Check Agreement with JEY

and Marco. The Joint Check Agreement Boggs sent on October 21, 2019, proposed terms that guaranteed (i) Boggs's invoices would be paid by Marco by joint check; (ii) Boggs would be paid out of the first sums payable to JEY, (iii) if JEY's subcontract balance was ever insufficient to honor Boggs's invoices Marco would directly notify Boggs, and (iv) Boggs was entitled to rely on the absence of any such notice from Marco as evidence that JEY's subcontract balance was sufficient to pay Boggs's invoices. Marco's project manager, Tom Furge, received the Joint Check Agreement on October 22, 2019, made hand-written revisions to add a $80,000 not-to-exceed price term, struck through the last paragraph, and then signed it. From November 6, 2019, through December 19, 2019, Boggs sold 1,525.33 tons of material worth $102,727.96 to the Project. Neither Marco nor JEY ever paid Boggs, nor did either notify Boggs that JEY's subcontract balance was insufficient to pay the invoices. When Boggs demanded payment, JEY claimed it was not paid by Marco. Boggs sought payment from Marco, but Marco claimed it did not owe Boggs any money, notwithstanding the Joint Check Agreement, because it had to correct JEY's work on the Project. Boggs then filed and served a mechanic's lien, which Marco bonded off before Boggs commenced the action at bar. Old Republic Surety Company was the surety that issued the Release of Lien Bond, Bond Number 5421491 dated March 10, 2020, in the amount of $136,970.60.[1]

Boggs asserts seven causes of action: (i) breach of contract, (ii) payment pursuant to the mechanic's lien bond, (iii) quantum meruit, (iv) a lien on contract proceeds, (v) a constructive trust, (vi) attorney's fees and interest under S.C. Code § 27-1-15, and (vii) prejudgment interest under S.C. Code § 29-6-50. Having conducted discovery, Boggs seeks summary judgment on its first, second, sixth, and seventh causes of action.

[1] S.C. Code Ann. § 29-5-100 requires a bond equal to one and one-third times the amount claimed.

STANDARD

Summary judgment is proper when "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), SCRCP; Wogan v. Kunze, 379 S.C. 581,585,666 S.E.2d 901, 903-04 (2008). In determining whether a triable issue of fact exists, "the evidence and all factual inferences must be viewed in the light most favorable to the nonmoving party." Id. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Id.

"Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (internal quotation and citation omitted). "Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a 'fishing expedition.'" Id.

ANALYSIS

I. Breach of Contract

Boggs asserts a breach of contract claim against Marco based on the Joint Check Agreement. A breach of contract claim requires proof of (i) the existence of a contract, (ii) breach of it, and (ii) damages resulting from the breach. Maro v. Lewis, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010). The only reasonable conclusion based on the record and arguments of counsel is that Boggs proved its breach of contract claim.

"The elements required for formation of a contract are an offer, acceptance, and valuable consideration." Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 225, 647 S.E.2d 488, 492–93 (Ct. App. 2007) (citing Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003)). Boggs contends Marco entered the Joint Check Agreement and breached

its obligations under it. Marco argues it never accepted the agreement. The undisputed facts in the record and applicable provisions of the Uniform Commercial Code (UCC) compel a determination that the parties in fact entered an agreement that did not include Furge's different terms.

Under the UCC a contract can be formed even when the accepting party attempts to include additional or different terms:

> A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

S.C. Code Ann. § 36-2-207(1). It is undisputed that Marco's representative, Tom Furge, received the agreement from JEY and Boggs and signed it after he made hand-written changes to the terms. Furge's signature constituted the "[a] definite and seasonable expression of acceptance or a written confirmation" contemplated by the UCC. See id. Furge testified unequivocally as a Rule 30(b)(6), SCRCP, designee of Marco that he signed the Joint Check Agreement because he intended to accept it. Under the UCC, therefore, there is no genuine dispute that offer and acceptance occurred. The critical issue is whether the different terms Furge hand-wrote became part of the contract. The UCC also answers that question.

"Between merchants[2] such terms become part of the contract unless…(a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received." S.C. Code Ann. § 36-2-207(2).

In Mace Indus., Inc. v. Paddock Pool Equip. Co., 288 S.C. 65, 339 S.E.2d 527 (Ct. App.

[2] Marco and Boggs are merchants as defined by S.C. Code Ann. § 36-2-104(1).

1986), Judge Cureton explained,

> Prior to enactment of the [UCC], a purported acceptance containing terms that did not "mirror" those of the offer operated as a rejection thereof and amounted to a counterclaim. See e.g., Sossamon v. Littlejohn, 241 S.C. 478, 486, 129 S.E.2d 124, 126 (1963) ("To constitute a contract the acceptance of the offer must be absolute and identical with the terms of the offer. If one offers another to do a definite thing, and that other person accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat or it is in effect a counter proposal.").
>
> [UCC] Section 2–207(1) was designed to abrogate two "rather severe common-law concepts, the so called 'mirror image' rule and its 'last shot' consequence." Annot., 72 A.L.R.3d 479, 488 (1976); Leonard Pevar Co. v. Evans Products Co., 524 F.Supp. 546, 550 (D.Del.1981). Under this code section an expression of acceptance of an offer creates a contract on the offered terms despite additional or different terms contained in the acceptance unless the acceptance is expressly made conditional on assent to the additional or different terms. Falcon Tankers, Inc. v. Litton Systems, Inc., 355 A.2d 898 (Del. Super 1976). "In other words, the result of the offeree making his acceptance expressly conditional on the offeror's assent is the transformation of the offeree's document into a traditional counter-offer." 355 A.2d at 906.

288 S.C. at 68–69, 339 S.E.2d at 529–30.

Here, the $80,000 not-to-exceed price never became part of the Joint Check Agreement because it materially altered the terms of the contract. Furge testified that while he intended for the $80,000 cap to apply, he never used those words with JEY or Boggs; he never expressly conditioned his acceptance on JEY and Boggs agreeing to the $80,000 not-to-exceed price. Furthermore, Furge testified unequivocally that his hand-written notes on the Joint Check Agreement changed a material term of the contract. (Depo. of Tom Furge, April 29, 2021, page 37, line 16 to page 38, line 1.) Under the UCC, therefore, the different terms Furge wrote on the Joint Check Agreement did not become part of the contract despite Marco's "last shot" effort. See S.C. Code Ann. § 36-2-207(2); see also Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 269, 356 S.E.2d 115, 116 (1987) (holding material alteration in price did not become a part of the contract under same version of S.C. Code Ann. § 36-2-207). Consequently, Marco agreed and guaranteed

Boggs under the Joint Check Agreement that (i) Boggs's invoices would be paid by joint check without a price cap; (ii) Boggs would be paid out of the first sums payable to JEY, (iii) if JEY's subcontract balance was ever insufficient to honor Boggs's invoices Marco would directly notify Boggs, and (iv) Boggs was entitled to rely on the absence of any such notice from Marco as evidence that JEY's subcontract balance was sufficient to pay Boggs's invoices.

Even viewing the evidence in the record in the light most favorable to Marco, the only reasonable conclusion is that Marco breached these obligations to Boggs. From November 6, 2019, through December 19, 2019, Boggs sold 1,525.33 tons of material worth $102,727.96 to the Project. Boggs sought payment from JEY and from Marco, but it never received one penny. Furge readily admitted during his deposition that Marco failed to pay Boggs' invoices when it should have; that Marco failed to notify Boggs that Marco was back charging JEY's subcontract balance; and that Boggs had the right to rely on the lack of notice from Marco as evidence that Boggs would be paid. (Depo. of Tom Furge, April 29, 2021, page 52, line 5 to page 53, line 1.) Furge also admitted that if the $80,000 cap were not a term of the agreement, then Marco would owe Boggs the full $102,727.96. (Depo. of Tom Furge, April 29, 2021, page 53, lines 2 to 6.)

There also is no genuine dispute about the damages Boggs incurred as a result of the breach. "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Maro v. Lewis, 389 at 222, 697 S.E.2d at 688 (quoting Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). "The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed." Id. (quoting Minter v. GOCT, Inc., 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct.App.1996). "The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." Id.

Boggs' damages resulting from Marco's breach are demonstrated in the unpaid invoices that show the quantities and total $102,727.96. Marco argues issues of fact exist as to damages because it has not yet verified the quantities and because it questions the quality of the asphalt. However, Marco's arguments contradict testimony from its own project manager. When asked directly whether he had any reason to dispute the quantities shown in Boggs' invoices, Furge testified that he did not. With this action now nearly two years old, Marco has had ample opportunity to discover facts and records to verify the asphalt quantities. It has presented no evidence, by affidavit or otherwise, creating a triable issue about the quantities. At the hearing, Marco's counsel offered mere argument, which is insufficient to withstand summary judgment. See Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (holding legal argument alone insufficient to avoid summary judgment).

Furge's testimony also belies Marco's about the quality of the asphalt. When asked about that issue, Furge testified as follows:

> Q. Was there anything wrong with the asphalt that Boggs Materials furnished or that Boggs Transport brought?
>
> A. Not -- not to my knowledge.
>
> Q. Was there anything wrong with the trucking?
>
> A. I don't know. I wasn't there firsthand. I didn't witness it, so yeah –
>
> Q. Okay.
>
> A. -- but there were testing agencies there. If there was a problem with it, we would have been made aware of it.

(Furge Depo., April 27, 2021, page 120, lines 2 to 135.) Not only has Marco failed to present any evidence calling the quantity or quality of the asphalt into question, Marco's own witness confirmed the asphalt Boggs delivered was acceptable. As Furge testified, testing that was

conducted on site contemporaneously with the asphalt deliveries would have notified Marco at the time if there been a problem with the asphalt.

Taking into account the pleadings, exhibits, depositions, and other submissions in the record, the Court finds no genuine issue as to any material fact about Boggs' breach of contract claim and further finds Boggs is entitled to a judgment as a matter of law in the amount of $102,727.96, the sum of the unpaid invoices for the material furnished to the Project, plus prejudgment interest, attorney's fees, and costs as set forth below.

II. Bond Claim

Boggs' second cause of action is for payment under bond posted in release of the mechanic's lien. See S.C. Code Ann. § 29-5-110. Defendants do not dispute that Boggs timely filed and served its mechanic's lien or that the Release of Lien Bond in the amount of $136,970.60 was posted to release that lien. By statute, the bond took "the place of the property upon which the lien existed." Id. Based upon the Court's findings above that Boggs is entitled to payment in full for the $102,727.96 worth of asphalt furnished for the Project, by statute Boggs also has a right to payment for that sum under the bond, plus "the costs of the action and a reasonable attorney's fee," not to exceed the amount of the bond. S.C. Code Ann. § 29-5-20(A). The bond unequivocally states Marco and Surety bound themselves to pay Boggs up to the sum of $136,970.60. As discussed below, the total sum to which Boggs is entitled for the material, including prejudgment interest,[3] reasonable attorney's fees and costs, is more than the bond amount. I therefore find Boggs is entitled to summary judgment against Defendants, jointly and severally, in the full amount of the bond.

[3] See Butler Contracting, Inc. v. Ct. St., LLC, 369 S.C. 121, 135, 631 S.E.2d 252, 259 (2006) (reversing trial court denial of prejudgment interest for mechanic's lien claim and remanding case for calculation of prejudgment interest from the date mechanic's lien was filed).

III. Prejudgment Interest

Boggs seeks prejudgment interest pursuant to several statutes. Under S.C. Code Ann. § 34-31-20 Boggs is entitled to recover prejudgment interest at 8.75% per annum because its measure of damages was fixed when its claim arose. See Dixie Bell, Inc. v. Redd, 376 S.C. 361, 372, 656 S.E.2d 765, 771 (Ct. App. 2007) (Reaffirming "[t]he proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.") (quoting Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993)). At the statutory rate of 8.75% per annum, a total of $19,799.76 in interest has accrued since January 28, 2020 ($24.627 per day x 804 days).

As an alternate sustaining ground, the Court hold Boggs entitled to recover under S.C. Code Ann. § 27-1-15. That statute imposed a burden on Marco to make a reasonable and fair investigation of the merits of Boggs's claim and to pay it, or the valid portion of it, within by forty-five days from the date of the demand. Marco has presented no evidence from which a fact finder could reasonably conclude Marco took any steps to discharge its obligations under S.C. Code Ann. § 27-1-15. To the contrary, Furge testified that Marco failed to fairly investigate the claim and failed to pay the portion of it that Marco deemed valid within forty-five days. (Furge Depo., April 27, 2021, page 60, lines 1 to 23.)

I therefore find Boggs entitled as a matter of law to recover attorney's fees and prejudgment interest under § 27-1-15.

IV. Attorneys' Fees & Costs

Boggs has multiple grounds to recover its reasonable attorney's fees and costs. The first is S.C. Code Ann. § 27-1-15, as noted above, which gives Boggs the right to recover all reasonable attorney's fees and costs. Second, S.C. Code Ann. § 29-5-20 gives Boggs the right to recover the

"value of the labor or material so furnished, including the costs of the action and a reasonable attorney's fee" up to the value of the lien. Third, the Joint Check Agreement contains a fee-shifting provision that makes JEY and Marco are jointly and severally liable for the reasonable attorney's fees and costs Boggs incurs in the enforcement of the agreement. Boggs is entitled to an award of fees and costs under all three theories.

Boggs seeks attorney's fees $19,154.03 and costs in the amount of $862.29 for a total of $20,016.32, supported by an Affidavit of Counsel. South Carolina courts have historically relied on six common law factors to determine reasonableness of an attorney's fee award: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). After considering these factors, I find the fee request should be granted for the reasons discussed below.

A. The nature, extent, and difficulty of the case.

In this case, the evidence in the record demonstrates the nature, extent and difficulty of the case justifies the requested fee. This case required the prompt analysis of invoices and project records to serve the demand letter and preserve Boggs' claims. The case also required title work and related efforts to file and serve a mechanic's lien and lis pendens. Once suit was commenced, the parties conducted full discovery, including depositions. In addition to the work required for written discovery and to prepare for the depositions, counsel also was required to dedicate additional time to the motion for summary judgment and to rebutting Marco's opposition to that motion. At every step, Marco's actions have increased the complexity and duration of this dispute and have made it exponentially more difficult for Boggs to recover the sums it is owed. That

increased complexity and duration has naturally and predictably resulted in Boggs incurring significantly more fees and costs.

B. The time necessarily devoted to the case.

I find based on the Affidavit of Counsel and supporting documents that the time necessarily devoted to the case is reasonable and also justifies the requested fee. The law firm representing Boggs expended a total of 91.92 hours of work with a total value of $19,154.03. Boggs has been trying to collect payment for nearly two-and-a-half years. It is evident this dispute has required significant time and resources from Boggs and its counsel during that time not only to prove its claims but also to refute Marco's defenses and to pursue payment.

C. Professional standing of counsel.

I find Plaintiff's counsel is a partner at the law firm of Bruner, Powell, Wall & Mullins, LLC with over 13 years of experience as an attorney and is in good professional standing in the community and the State.

D. Contingency of compensation.

Plaintiff's counsel is being paid on an hourly fee plus cost basis. The fee counsel is paid is not contingent.

E. Beneficial results obtained.

The result obtained is the most beneficial result counsel could have obtained because Plaintiff has obtained a judgment for the full value of its unpaid invoices, plus prejudgment interest, attorneys' fees and costs.

F. Customary legal fees for similar services.

The rates charged by Plaintiff's firm for this work range from $80 per hour to $250 per hour, which are at or below rates commonly charged in the market for construction-related cases

like the one at bar. Attorneys in South Carolina routinely charge $350, $450, and even more per hour for this type of work. In Layman v. State, the rates the supreme court used in its lodestar analysis were as high as $600 per hour. 376 S.C. at 460, 658 S.E.2d at 334. The nature and character of the property, the amount of money at stake, and the various legal and equitable issues involved in this case, coupled with the beneficial result obtained, justify the Court awarding a reasonable fee based upon the rates sought in counsel's affidavit.

Accordingly, I find the Plaintiff's request for attorney's fees in the amount of $19,154.03 is reasonable. I further find the costs Plaintiff has incurred in the amount of $862.29 were reasonable and necessary and should also be awarded.

CONCLUSION

For the forgoing reasons, I find this case presents no genuine dispute of material fact and further find Boggs Materials, Inc. is entitled to judgment against Marco Contractors, Inc. and Old Republic Surety Company as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Boggs' motion for summary judgment is hereby GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of Boggs Materials, Inc. and against Marco Contractors, Inc. in the amount of $102,727.96, plus prejudgment interest of $19,799.76, plus attorney's fees and costs of $20,016.32, for a total judgment against Marco Contractors, Inc. of $142,544.02. In the event the judgment is not satisfied, Boggs also shall also have the right to request an award of its reasonable fees and costs incurred in the collection of this judgment.

IT IS FURTHER ORDERED that judgment be entered in favor of Boggs Materials, Inc. and against Old Republic Surety Company, jointly and severally with Marco, in the full amount

of the bond, $136,970.60, which sum is immediately due and payable.

AND IT IS SO ORDERED.

[JUDGE'S ELECTRONIC SIGNATURE ON FOLLOWING PAGE]

Lancaster Common Pleas

Case Caption: Boggs Materials Inc VS Jey General Contractors Llc, defendant, et al

Case Number: 2020CP2900841

Type: Order/Summary Judgment

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge