

TAKING THE OFFENSIVE AGAINST A MECHANIC'S LIEN

A non-statutory offensive and pro-active procedure to remove a mechanic's lien from property was first recognized by the South Carolina Supreme Court in Sea Pines Co. v. Kiawah Island Co., 268 S.C. 153, 232 S.E.2d 501 (1977). On December 19, 1995, the Court of Appeals in Cedar Creek Properties v. Cantelou Associates, Inc., _____, S.C. _____ Op. 2430, 465 S.E.2d 774 (Ct. App. 1995), significantly strengthened the so-called Sea Pines action by removing any doubt as to the ability of a party bringing a Sea Pines action to collect attorneys' fees. This article, by illustration, will summarize how a Sea Pines action works and how it works even better after Cedar Creek. The following illustration is, of course, entirely fictional and is in no way based on real people or events.

BrownWater: The Saga

Developer Bill Jefferson comes to you with a serious problem. Jefferson is developing a single family community on the Wateree River known as "BrownWater". Jefferson has just completed Phase I of the development and BrownWater has been a great success. Jefferson is selling several lots a week in Phase I and has just purchased the land to build a promised golf course and is in the process of arranging financing for construction of the course.

I. The Problem

All is well except for a dispute that Jefferson is having with his New York-based road contractor, Alfonse Pothole. Jefferson has decided to hire a local road contractor for the golf course and for additional phases of BrownWater due to a host of problems with Pothole. Nevertheless, Jefferson has paid Pothole all amounts due for materials and labor under his contract which was limited to Phase I only. In retaliation, and as a ploy to get Jefferson to hire him to pave the golf course area and the future phases of BrownWater, Pothole has filed a mechanic's lien under S.C. Code Ann. §29-5-10 et seq. (1991) (the "Statute") claiming an amount due of \$600,000.00 for labor and materials supplied. There is no basis under the Statute for Pothole's claim. For one thing, Pothole's contract was

only for \$60,000.00 and that has been paid in full. In addition, there has been no additional work done or materials furnished that have not been paid for. Pothole simply feels he is entitled to the future road work at BrownWater. At most, Pothole may have some type of contract action, but not an action under the Statute.

The bank has informed Jefferson that it will not finance the golf course, a promised amenity of BrownWater, so long as there is a mechanic's lien on any property that would secure the loan. The golf course construction must begin in two months or it will have to wait a year. If construction of the course is delayed by a year, Jefferson fears that BrownWater will be ruined. Furthermore, Jefferson cannot sell the remaining lots in Phase I since they are also encumbered by the mechanic's lien. In other words, BrownWater's cash flow has been turned off.

Jefferson wants to know his options, but most of all he wants you to get rid of the lien so that he can build the golf course and continue selling the BrownWater lots.

II. The Solutions

Since mechanics' liens in South Carolina are statutory creatures, the logical starting point is the mechanic's lien statute itself. (With any mechanic's lien issue, an important rule of thumb is look to the Statute first but it is just as important to look to the annotations since most sections of the Statute have been significantly interpreted by the courts.) Under the Statute, Jefferson has essentially two options.

A. **Defend Under the Statute.** First, Jefferson can defend, and possibly counterclaim, against the suit to enforce the lien. Under §29-5-120 of the Statute, a suit to enforce the lien must be brought within six months after the labor or materials at issue were furnished. (The lien itself must be filed within 90 days of the furnishing of labor or materials, S.C. Code Ann. §29-5-90.) Although the actual mechanic's lien is filed of record with the County RMC Office, or the County Clerk of Court, there is no pending civil action until the party that filed the lien files and serves a

complaint that seeks to collect the subject claim and enforce the lien. If the lien is not filed within 90 days of the furnishing of labor or material or the action to enforce is not brought within six months, the action can be dismissed.

Option one is no option at all for Jefferson. Pothole is in no hurry to enforce a meritless lien and has every incentive not to bring a suit to enforce the lien until the last possible moment - up to the six months. In addition, once the suit is brought it will have to get in line with the other civil actions. Jefferson cannot afford to wait because his business, like most developers, depends on a steady cash flow.

B. Bond Off the Lien. Second, Jefferson can remove the lien from his property by posting a cash or surety bond under §29-5-110. The cash or bond must be filed with the Clerk of Court in an amount equal to one and one-third times the amount claimed. Jefferson therefore would have to post \$800,000.00. Although option two would most likely allow Jefferson to finance the golf course and continue to sell lots, it is not a viable choice because Jefferson cannot commit the money necessary even to post the bond.

C. Sea Pines. Jefferson's best option is to go outside the statute and invoke the non-statutory procedure recognized in Sea Pines Co. v. Kiawah Island Co., 268 S.C. 153, 232 S.E.2d 501 (1977). Sea Pines found for the first time in South Carolina that "the court has inherent powers to afford relief where the deprivation imposed by a wrongfully filed mechanic's lien cannot be corrected by the statutory methods". 232 S.E.2d at 502. The Sea Pines court further recognized the need of property owners to vacate a mechanic's lien filed by an "unscrupulous claimant". Id.

In Sea Pines, the party whose property had been lien-ed filed an affidavit with the court asserting that the amount claimed bore no relation to the amount for labor performed or materials furnished, but instead represented an approximation of damages arguably due for improper termination of a contract. Based on the affidavit the judge issued an ex parte rule to show cause

requiring the party who filed the lien to show cause why the lien should not be withdrawn or cancelled. A return to the rule was filed, and eventually the court ordered the mechanic's lien vacated. The primary issue on appeal was whether the court could use a nonstatutory method to remove a mechanic's lien. The South Carolina Supreme Court found that the nonstatutory authority to vacate a mechanic's lien was similar to a court's authority to grant summary judgment or direct a verdict. Instead of waiting for the party who filed the lien to bring suit to enforce the lien, the party whose property has been attached brings his own action to have the lien removed.

As Sea Pines itself and subsequent Sea Pines actions have shown, the action can be very simple. The action can assert any number of causes of action including, but not limited to: a cause of action seeking a declaratory judgment as to the validity of the lien and seeking cancellation of the lien; a cause of action asserting that the lien was wilfully and knowingly filed for more than the amount due, and therefore invalid under §29-5-10 of the Statute; or a cause of action seeking an order cancelling or otherwise removing the lien of record under a special proceeding and Rule to Show Cause Hearing. Each cause of action should seek recovery of attorneys' fees under the Statute and, if the contract provides for recovery of attorneys' fees, the contract at issue. Also, the complaint should be accompanied by a motion for expedited hearing.

III. Cedar Creek

Since Jefferson does not have enough money to bond-off the lien, he (and you) are concerned about how the wonderful Sea Pines action is going to be paid for. After all it is difficult to worry about Jefferson's money if you have to worry about your own. If you would have attempted to discharge the lien under the Statute, Jefferson (and you) would have been entitled to attorneys' fees after Jefferson had been found to be the "prevailing party". The Statute provides that the prevailing party in a mechanic's lien dispute is entitled to attorneys' fees. The allowance of attorneys' fees is an important part of the Statute as it discourages the filing of meritless liens, discourages unjustified refusals to pay and encourages settlement. The problem is that Jefferson has no choice but to take the non-statutory route. Moreover, Jefferson's contract with Pothole does not allow for attorneys' fees.

Before Cedar Creek there was no law on whether the party bringing a Sea Pines action would be entitled to attorneys' fees under the Statute. Cedar Creek answered the attorneys' fee question by holding that offensively moving to dissolve a mechanic's lien was the equivalent of defending against a lien under the statute and thereby the prevailing party in such an action should be entitled to attorneys' fees.

In addition, under the facts before it, the Cedar Creek court also found that the property owner was the prevailing party even though the party filing the lien voluntarily cancelled the lien on the day of the scheduled expedited hearing. In other words, there was never a judicial proceeding to determine the validity of the lien in question. In effect, the matter settled on the courthouse steps as they so often do. The party that filed and removed the lien argued that there was no prevailing party since the lien had been removed before the court had a chance to rule. The Cedar Creek court disagreed finding that the party bringing the Sea Pines action had obtained the relief it sought, was therefore the prevailing party and entitled to attorneys' fees under the Statute.

IV. Conclusion

The Sea Pines action, as strengthened by Cedar Creek, can accomplish two things for Jefferson, or similarly situated property owners. First, it can get the lien removed on an expedited basis. Second, it can allow Jefferson, or other property owners found to be the prevailing party, to collect attorneys' fees. Cedar Creek should also serve as a strong deterrent to anyone considering wrongfully filing a mechanic's lien.

the prevailing party Cedar Creek)

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