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I. INTRODUCTION

This Article focuses on noteworthy opinions by Georgia appellate courts between June 1, 2014 and May 31, 2015 relevant to the practice of construction law.[1]

II. MECHANICS' AND MATERIALMEN'S LIENS AND SLANDER TO TITLE

The Georgia Court of Appeals in *Seaboard Construction Co. v. Kent Realty Brunswick, LLC*[2] addressed section 44–14–361.1(e) of the Official Code of Georgia Annotated (O.C.G.A.),[3] part of the mechanics' and materialmen's lien law. That subsection provides, "In no event shall the aggregate amount of liens set up by Code Section 44–14–361 exceed the contract price of the improvements made or services performed."[4]

Harbor Development, LP (Harbor) was developing a 135–acre parcel for residential lots and condominiums. Harbor entered into a contract with Seaboard Construction Co. (Seaboard) to perform site preparation work on Phase I of that parcel. Seaboard received $6,261,192.52. A dispute arose concerning the remaining $326,661.50 under the contract. Seaboard then filed five mechanics' and materialmen's liens, each in the amount of the remaining $326,661.50. Two of the liens were filed against property in the development owned by Kent Realty Brunswick, LLC (Kent). One of the Kent properties was in Phase I, the other in

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1. For an analysis of Georgia construction law during the prior survey period, see Frank O. Brown, Jr., *Construction Law, Annual Survey of Georgia Law*, 66 MERCER L. REV. 27 (2014).

2. 331 Ga. App. 742, 771 S.E.2d 429 (2015).

3. O.C.G.A. § 44-14-361.1(e) (2002).

4. *Id.*

Phase II. Thus, the aggregate amount of the liens against the Kent properties was $727,919.62, and the aggregate amount of liens against all five properties was $1,819,799.05.[5]

Kent filed suit against Seaboard for slander to title, and Seaboard counterclaimed to foreclose the liens. The trial court granted Kent's motion for summary judgment on the lien foreclosure claims after concluding the liens were excessive under O.C.G.A. § 44–14–361.1(e), which is quoted above. The trial court denied Seaboard's motion for summary judgment on Kent's slander to title claim because it found there were jury issues about it.[6]

The Georgia Court of Appeals affirmed the grant of summary judgment to Kent on the lien foreclosure claims, reasoning that they were invalid under O.C.G.A. § 44–14–361.1(e).[7] In doing so, the court effectively interpreted "the contract price" in O.C.G.A. § 44–14–361.1(e) as meaning the remaining unpaid amount of the contract price owed for work on Kent's properties.[8] The court of appeals reversed the trial court's denial of summary judgment to Seaboard on Kent's slander to title claim, reasoning that Kent failed to prove any special damages required for such a claim.[9] The court rejected Kent's contention that the attorney fees it incurred in defending Seaboard's lien foreclosure claims were special damages.[10]

In *Hill v. VNS Corp.*,[11] a contractor failed to pay a supplier for materials purchased for a home. The supplier filed a mechanics' and materialmen's lien against the home and then filed a suit against the contractor and its personal guarantor (contractor defendants) on the debt and against the homeowner to enforce its lien. The trial court granted a default judgment against the contractor defendants because they did not answer the suit. In addition to the principal debt, the judgment included attorney fees and pre-judgment interest.[12]

Thereafter, the contractor defendants paid about two-thirds of the judgment amount. In response, the supplier reduced its lien claim against the home, but not by the full payment. The supplier contended that part of that payment was appropriately allocated to attorney fees and pre-judgment interest owed by the personal guarantor, and,

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5. *Seaboard*, 331 Ga. App. at 742-43, 771 S.E.2d at 430-31.
6. *Id.* at 742-43, 771 S.E.2d at 430.
7. *Id.* at 743-44, 771 S.E.2d at 431.
8. *Id.* at 743-44, 771 S.E.2d at 430-31.
9. *Id.* at 744, 771 S.E.2d at 431.
10. *Id.* at 745, 771 S.E.2d at 431.
11. 329 Ga. App. 274, 764 S.E.2d 876 (2014).
12. *Id.* at 274-75, 764 S.E.2d at 877-78.

therefore, that part did not reduce the amount of the lien. The trial court granted the supplier's motion for summary judgment against the homeowner on the reduced amount of the lien, plus pre-judgment interest on that amount. The homeowner appealed.[13]

The court of appeals stated that the supplier had the burden of proving the lien amount by producing evidence of lienable items included in the default judgment against the contractor defendants.[14] The court reversed the grant of summary judgment, holding that there was an issue of fact about the amount of the lien because of conflicting affidavits.[15] Additionally, the court held the homeowner was entitled to credit against the lien for the full post-default judgment amount paid by the contractor defendants to the supplier, and that the supplier could not reduce that credit for either attorney fees, since they were not a lienable item, or re-judgment interest owed by the contractor, because it was not lienable as a result of not being liquidated.[16] Finally, the court held the supplier was not entitled to pre-judgment interest for the amount of the actual lien because it also was not liquidated.[17]

III. REPRESENTATIVE'S PERSONAL CONTRACT LIABILITY

In *Progressive Electric Services, Inc. v. Task Force Construction, Inc.*,[18] the general contractor, Task Force Construction, Inc. (TFC), sued a subcontractor, Progressive Electrical Services, Inc. (Progressive), and the subcontractor's president for breach of contract and indemnification for payments made by TFC to its surety for reimbursements the surety paid to settle a claim by Progressive's supplier. The trial court entered summary judgment in favor of TFC against Progressive and its president.[19]

The key issue on appeal was whether the president was individually liable for the debt.[20] In affirming the trial court, the court of appeals stated that, although the president had "ostensibly" signed its contract with TFC in a representative, rather than individual, capacity, the contract contained a provision stating that:

> Signing Individual . . . . *Each and every individual signing on behalf of [Progressive] also further agrees that, notwithstanding anything*

13. *Id.* at 275, 764 S.E.2d at 878.
14. *Id.* at 276, 764 S.E.2d at 878.
15. *Id.* at 276-77, 764 S.E.2d at 879.
16. *Id.* at 277, 764 S.E.2d at 879.
17. *Id.*
18. 327 Ga. App. 608, 760 S.E.2d 621 (2014).
19. *Id.* at 608-09, 760 S.E.2d at 623.
20. *Id.* at 611, 760 S.E.2d at 624.

> *contained herein or on any signature line to the contrary, each such individual signing on behalf of [Progressive], in addition to signing in a representative capacity, is also signing [the Agreement] in his or her personal and individual capacity and each such individual signing on behalf of [Progressive], by signing below, hereby individually and personally agrees to be bound by all of the obligations of [Progressive]* in [the Agreement] (including, but not limited to, the Attachments hereto).[21]

The court held that this language bound the president individually.[22] Additionally, the court rejected the president's argument that this language merely created a guaranty and was unenforceable for other reasons.[23] The "Signing Individual" provision of the contract is a good provision to consider including in a contract if your client might benefit from it, but it is also a very bad provision to agree to if your client's representative will be obligated by it.

IV. THIRD PARTY BENEFICIARY AND NEGLIGENT CONSTRUCTION

Jai Ganesh Lodging, Inc. v. David M. Smith, Inc.[24] arose from settlement-related structural damage to a newly constructed hotel. The franchisee of the hotel and the owner of the land on which the hotel is located sued the grading contractor, grading subcontractor, and two individuals associated with the grading subcontractor. Their claims included breach of contract and negligent construction. After withdrawing its earlier order allowing the addition of the two individuals as defendants, the trial court granted summary judgment to the general contractor and subcontractor. The plaintiffs appealed.[25]

The Georgia Court of Appeals affirmed the grant of summary judgment relating to the breach of contract claim, finding the plaintiffs were not third-party beneficiaries of the grading subcontract even though they were, in fact, the property owner and hotel franchisee.[26] The court based that finding on several facts.[27] First, neither plaintiff was a party to the general contract, which was instead between the general contractor and the property owner, Anil Patel, who the general contract and subcontract referred to as the owner and developer.[28]

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21. *Id.* at 609, 760 S.E.2d at 623 (emphasis supplied by court).
22. *Id.* at 612, 760 S.E.2d at 625.
23. *Id.* at 612-13, 760 S.E.2d at 625.
24. 328 Ga. App. 713, 760 S.E.2d 718 (2014).
25. *Id.* at 713-14, 760 S.E.2d at 720-21.
26. *Id.* at 713, 719, 760 S.E.2d at 720, 723.
27. *Id.*
28. *Id.* at 719, 760 S.E.2d at 723.

Second, neither the general contract nor subcontract mentioned the plaintiffs.[29] Thus, the court reasoned that neither the general contractor nor the subcontractor intended to benefit the plaintiffs' undisclosed corporate entities, which were the actual owners of the land and the franchisee.[30] Next, the court reversed the trial court's grant of summary judgment to the defendants on the plaintiffs' negligent construction claims, reasoning that the trial court erroneously concluded that privity of contract was a prerequisite to that claim.[31] The court stated that privity is unnecessary when a negligence claim arises from a duty imposed by law and not from a contractual duty.[32]

V. QUANTUM MERUIT

In *One Bluff Drive, LLC v. K.A.P., Inc.*,[33] a homeowner contracted with a general contractor to construct improvements to a residence. Thereafter, the homeowner significantly revised the scope of the project. In response, the contractor gave the homeowner an estimate for the additional work. The estimate did not include any contractual terms. After receiving that estimate, the homeowner made further changes to the project. When the homeowner failed to pay amounts claimed by the contractor, the latter sued. The jury returned a large award against the homeowner, which included attorney fees for bad faith.[34]

On appeal, the homeowner argued that the trial court erred by charging the jury on the law of quantum meruit because the contractor never raised a claim under that theory and needed to plead quantum meruit in a separate count.[35] The court of appeals held that it was unnecessary for the contractor to set forth a quantum meruit claim in a separate count and, furthermore, to even specifically allege a quantum meruit cause of action since the complaint prayed for relief and presented evidence to support that claim.[36]

VI. UNJUST ENRICHMENT

First Bank of Georgia v. Robertson Grading, Inc.[37] stands as a firm reminder that a contractor generally cannot make claims against the

29. *Id.* at 718, 760 S.E.2d at 723.
30. *Id.* at 718-19, 760 S.E.2d at 723.
31. *Id.* at 720, 760 S.E.2d at 724.
32. *Id.* at 719-20, 760 S.E.2d at 723-24.
33. 330 Ga. App. 45, 766 S.E.2d 508 (2014).
34. *Id.* at 45-46, 766 S.E.2d at 510-11; *see also* O.C.G.A. § 13-6-11 (2010).
35. *One Bluff Drive, LLC*, 330 Ga. App. at 47, 766 S.E.2d at 511.
36. *Id.* at 48-49, 766 S.E.2d at 512-13.
37. 328 Ga. App. 236, 761 S.E.2d 628 (2014).

owner's lender even though the contractor's work greatly increases the value of the secured property, which, as a result, benefits the lender. In this case, a paving contractor asserted a number of causes of action against a lender that foreclosed on property that included the contractor's paving work. One of the claims was for unjust enrichment. A jury rendered a significant verdict for the contractor partly because of the lender's significant profit from the post-foreclosure resale of the project, which profit was partly possible because of the paving work. The lender appealed, arguing the trial court should have granted its directed verdict on all claims.[38]

The Georgia Court of Appeals agreed with the lender.[39] The court held that the contractor did not have an unjust enrichment claim because the Georgia mechanics' and materialmen's lien statute provided the contractor's sole remedy, and since the lender had the right to foreclose, it had not received any unjust enrichment.[40] The court also rejected the contractor's promissory estoppel and negligent misrepresentation claims, which were based on statements allegedly made by the lender about paying the contractor.[41]

VII. SURETY RIGHTS AND SOVEREIGN IMMUNITY

In *State Department of Corrections v. Developers Surety & Indemnity Co.*,[42] the Georgia Department of Corrections (GDOC) contracted with a roofing contractor to re-roof several buildings at a state prison. As a condition to the contract with GDOC, the contractor received payment and performance bonds. Thereafter, GDOC declared the contractor in default for delays on completing the project. Prior to that declaration, the surety on the bonds provided financial assistance to the contractor under the bonds. After the declaration, the surety incurred additional costs from investigating its liability under the bonds. Following the investigation, the surety, as subrogee for the contractor, sued GDOC for breach of contract and for a declaratory judgment that it had no duty under the bonds. GDOC counterclaimed for breach of contract. On cross-motions for summary judgment, the trial court entered judgment for the surety. GDOC appealed, and the Georgia Court of Appeals affirmed.[43]

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38. *Id.* at 236, 761 S.E.2d at 630-31.
39. *Id.* at 236, 761 S.E.2d at 631.
40. *Id.* at 247-48, 761 S.E.2d at 638-39.
41. *Id.* at 245-46, 761 S.E.2d at 637.
42. 295 Ga. 741, 763 S.E.2d 868 (2014).
43. *Id.* at 741-44, 763 S.E.2d at 869-71.

The Georgia Supreme Court granted certiorari.[44] The matter of "first impression" before the Georgia Supreme Court was whether the surety, as subrogee of the contractor, could rely on GDOC's waiver of sovereign immunity for breach of contract claims.[45] In a unanimous decision, the court held that the surety could rely on that waiver.[46]

VIII. GOVERNMENT PAYMENT BONDS AND ALTERNATIVE CLAIMS

In *City of College Park v. Sekisui SPR Americas, LLC*,[47] a subcontractor on a city sewer project sued the city after the general contractor failed to pay the subcontractor. The subcontractor contended that the city was liable for the unpaid amounts because it failed to assure that the general contractor had a payment bond. In the alternative, the subcontractor asserted quantum meruit, unjust enrichment, and an implied duty to pay claims. After the trial court granted the subcontractor's motion for summary judgment, the city appealed.[48]

The Georgia Court of Appeals held that the city was excused from liability otherwise imposed by O.C.G.A. § 36–91–91[49] for the absence of a payment bond because the sewer project was an emergency and, therefore, the exception allowed by O.C.G.A. § 36–91–22(e)[50] applied.[51] Additionally, the court held that the subcontractor could not pursue quantum meruit, unjust enrichment, or an implied duty to pay claims against the city because, under Georgia law, those claims do not exist against an owner or general contractor with whom the subcontractor has no contract.[52] Instead, the subcontractor's sole remedies in this context were for a payment bond, which did not exist, and for funds owed by the city to the general contractor, which also did not exist because the city had paid all amounts owed.[53]

IX. RESCISSION

Legacy Academy, Inc. v. Mamilove, LLC[54] was not a construction case, but the court addressed fraud and rescission claims, which often

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44. *Id.* at 741, 763 S.E.2d at 869.
45. *Id.* at 742 n.2, 744, 763 S.E.2d at 870 n.2, 871.
46. *Id.* at 747, 763 S.E.2d at 873.
47. 331 Ga. App. 404, 771 S.E.2d 101 (2015).
48. *Id.* at 404-05, 771 S.E.2d at 102-03.
49. O.C.G.A. § 36-91-91 (2012).
50. O.C.G.A. § 36-91-22(e) (2012).
51. *College Park*, 331 Ga. App. at 408-09, 771 S.E.2d at 104-05.
52. *Id.* at 409, 771 S.E.2d at 105.
53. *Id.* at 409-10, 771 S.E.2d at 105.
54. 297 Ga. 15, 771 S.E.2d 868 (2015).

arise in the sale of residences by contractor and sellers. This case stemmed from the purchase of a daycare franchise. The plaintiffs were the purchaser and its officers. The defendants were the seller and its related officers. The plaintiffs alleged that the defendants fraudulently induced them to sign the purchase agreement by providing false information about the historical earnings of existing franchisees. A jury found in favor of the plaintiffs, and the Georgia Court of Appeals affirmed.[55]

On certiorari to the Georgia Supreme Court, a key issue was whether the plaintiffs could rely on the alleged misrepresentations underlying their rescission and fraud claims when the purchase agreement made no such representations.[56] The court held that the plaintiffs could not rely on the alleged misrepresentations, reasoning that those statements directly contradicted the terms of an agreement and, therefore, could not be the grounds for rescission based on fraud because the plaintiffs could read the contract.[57]

Another key issue before the supreme court was whether the plaintiffs were excused from reading the purchase agreement, which they admitted they had not done.[58] They contended they were excused from reading the agreement because the defendants rushed them into signing it by representing, on the same day as presenting the contract, that they would lose the franchise if they did not sign that day.[59] The supreme court rejected the plaintiffs' argument as a sufficient excuse.[60]

A third issue was whether the merger clause in the purchase contract barred the plaintiff's fraud claims.[61] The court held that it did because, as noted above, the plaintiffs were not entitled to rescind the agreement and were, therefore, bound by its provisions, including the merger clause.[62]

This case serves as an important reminder that many civil actions are won at the contract drafting stage and that affirmative disclaimers and merger clauses importantly function as defensive tools and contain terms that purchasers can carefully read and modify, if appropriate, to reflect the actual pre-contract representations.

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55. *Id.* at 15, 15-16, 771 S.E.2d at 869, 869-70.
56. *Id.* at 18, 771 S.E.2d at 871.
57. *Id.* at 17, 771 S.E.2d at 870-71.
58. *Id.* at 17-19, 771 S.E.2d at 871-72.
59. *Id.* at 17-18, 771 S.E.2d at 871.
60. *Id.* at 19, 771 S.E.2d at 872.
61. *Id.*
62. *Id.* at 20, 771 S.E.2d at 872.