STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DENISE M. PETERSEN, individually and as TRUSTEE OF THE DENISE M. PETERSEN 2005 REVOCABLE TRUST DATED NOVEMBER 9, 2005, as TRUSTEE OF THE 601 OCEAN BOULEVARD RESIDENCE TRUST DATED NOVEMBER 30, 2012, and as TRUSTEE OF THE 601 OCEAN BOULVEARD RESIDENCE TRUST II DATED DECEMBER 7, 2012,

Plaintiffs,

vs.

DCTCL, L.P. d/b/a BUFFINGTON HOMES, L.P., DONNIX CONSTRUCTION, LLC, HUNT BROTHERS CONSTRUCTION, INC., ISLAND EXTERIORS AND SIDING, INC., PLASTERING SURFACES, LLC, A UNIQUE DESIGN, INC., BERKELEY HEATING AND AIR CONDITIONING, INC., ENERGYONE AMERICA, LLC, AQUA BLUE POOLS OF CHARLESTON, INC., SUNNYSIDE FARMS, INC., TAMKO BUILDING PRODUCTS, LLC, HADDIGAN ELECTRICAL CONTRACTORS, LLC and JOHN DOE CONTRACTORS 3 THROUGH 50,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2021-CP-10-01973

ORDER DENYING TAMKO BUILDING PRODUCTS, LLC'S MOTION TO DISMISS AND COMPEL ARBITRATION

This matter came before me on June 2, 2022, on Tamko Building Products LLC's ("Tamko") Motion to Dismiss and Compel Arbitration. This matter was submitted for consideration with oral argument and filing of briefs by counsel for Tamko, Plaintiff, and Donnix Construction, LLC ("Donnix"). The Court has reviewed arguments, the briefing, and the record herein, is fully informed, and denies Tamko's Motion to Dismiss and Compel Arbitration based upon the following:

LEGAL STANDARD OF REVIEW

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). If one party denies the existence of an arbitration agreement raised by an opposing party, a court must determine whether the agreement exists. If the agreement does not exist, the court must deny any application to arbitrate. *Simpson v. MSA of Myrtle Beach, Inc*. 373 S.C. 14, 644 S.E.2d 663, 667 (2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. *York v. Dodgeland of Columbia, Inc*., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

Whether the parties agreed to arbitration is a question of substantive state law. *Simpson*, 373 S.C. at 25, 644 S.E. 2d at 688 ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."). The courts, not arbitrators, are charged with deciding certain "gateway matters" including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008).

In determining whether the Federal Arbitration Act (the "FAA") applies, the initial inquiry to be made by the court is whether an arbitration agreement exists between the parties. *The Housing Authority of City of Columbia v. Cornerstone Housing, LLC*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003). Arbitration is a matter of contract and the evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. *Munoz v. Green Tree Fin.*

Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

DISCUSSION

I. Plaintiff cannot be compelled to arbitration because there is no enforceable contract between Plaintiff and Tamko.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Pearson v. Hilton Head Hosp*., 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). Courts have held that mutual assent and a meeting of the minds is necessary for an enforceable arbitration agreement. *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) ("[A]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate."). South Carolina law requires that "in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Grant v. Magnolia Manor-Greenwood, Inc*. 383 S.C. 125, 678 S.E.2d 435 (2009).

Here the court finds, Plaintiff and Tamko never entered a contract containing an arbitration provision, ergo there cannot have been any meeting of the minds to give rise to an enforceable agreement to arbitrate the disputes herein. *Pearson*, supra. The only evidence provided by Tamko of the alleged binding arbitration agreement is Tamko's limited warranty attached as Exhibit A to its' Memorandum in Support of its' Motion to Compel Arbitration. Tamko itself admits the limited warranty containing the arbitration clause was only delivered to the Defendant Donnix *after* it completed the purchase of the Tamko product, and Tamko does not contest Plaintiff's assertion that she never received the limited warranty.[1] Thus, there could be no meeting of the minds

[1] See Affidavit of Denise Petersen file June 1, 2022.

regarding the arbitration clause, as it was not included in a sales contract or otherwise discussed during the sale of the product.

Counsel for Tamko argued the court should apply the precedent established in *One Belle Hall Property Owners Assoc. Inc. v. Trammell Crow Residential Co*., 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). However, the arbitration clause at issue in the *One Belle Hall Property Owners Assoc. Inc.* case involved an arbitration clause contained in a bulk sales agreement that was entered into prior to the purchase of and delivery of the product. Here the court finds that Plaintiff was never made aware of limited warranty much less the arbitration clause, and that Donnix, whom actually purchased the underlayment, only became aware of the arbitration clause after the purchase of the product was completed and the underlayment was delivered to Plaintiff's residence. Additionally, the Court of Appeals noted that the HOA, via the developer, utilized the warranty process and availed itself of the limited warranty prior to filing the lawsuit in that case. *See Id.* at 58. In this instance, neither Plaintiff nor Donnix, availed themselves of the limited warranty.[2] The court finds, that unlike the developer and ultimately the HOA in *One Belle Hall Property Owners Assoc. Inc.*, Plaintiff was not given the opportunity to consent to the terms of the arbitration clause *prior* to the purchase of the Tamko underlayment, nor did she attempt to avail herself of the express warranty contained therein.

Further, the court finds Tamko attached an unexecuted limited warranty to its Memorandum in support of its' Motion to assert there has been a meeting of the minds between Plaintiff and Tamko regarding an arbitration agreement. However, the court does not find this is evidence sufficient to establish an enforceable agreement to arbitrate, as the warranty is wholly

[2] Plaintiff Complaint specifically alleges breach of implied warranties, negligence and/or gross negligence, and strict liability for product defect.

unexecuted, does not specify the applicable Tamko product the warranty pertains to, and it cannot be established the limited warranty Tamko references pertains to the construction of Plaintiffs' residence. *See Nelson v. Tamko Building Prods., Inc.*, 2015 U.S. Dist. LEXIS 75597, 2015 WL 3649384, (D. Kan. June 11, 2015). Counsel for Tamko argued the arbitration clause need not be signed by Plaintiff or Donnix, citing the *Pearson* precedent. The court finds the *Pearson* precedent holds a non-signatory to a contract containing an arbitration clause can be bound by the contract under a theory of equitable estoppel, *only if* the non-signatory received a direct benefit from the contract. *Pearson*, 400 S.C. 281, 290. Here, however, the court does not need to address the issue of estoppel, as Tamko has failed to establish that a binding agreement to arbitrate exists or that Plaintiff has received a direct benefit from any contract with Tamko.

Lastly, since the Federal Arbitration Act is guided by the general principles of contract law and Tamko has not submitted evidence sufficient to establish an enforceable agreement to arbitrate, the arbitration clause cannot be enforced. The issue of interstate commerce does not need to be discussed, as there is no enforceable agreement between Tamko, Donnix, or Plaintiff regarding arbitration.

In view of the foregoing, Tamko's Motion to Dismiss and Compel Arbitration is denied.

II. Donnix cannot be compelled to arbitration because there is no enforceable arbitration agreement between Donnix and Tamko

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). Courts have held that mutual assent and a meeting of the minds is necessary for an enforceable arbitration agreement. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) ("[A]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate."). South Carolina law

requires that "in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Grant v. Magnolia Manor-Greenwood, Inc*. 383 S.C. 125, 678 S.E.2d 435 (2009).

Here the court finds, Donnix and Tamko never entered a contract containing an arbitration provision, ergo there cannot have been any meeting of the minds to give rise to an enforceable agreement to arbitrate the disputes herein. *Pearson*, supra. The only evidence provided by Tamko of the alleged binding arbitration agreement is Tamko's limited warranty attached as Exhibit One to its' Memorandum in Support of its' Motion to Compel Arbitration. Tamko itself admits the limited warranty containing the arbitration clause was only delivered to Donnix *after* it completed the purchase of the Tamko product. Thus, there could be no meeting of the minds regarding the arbitration clause, as it was not included in a sales contract or otherwise discussed during the sale of the product.

Counsel for Tamko argued the court should apply the precedent established in *One Belle Hall Property Owners Assoc. Inc. v. Trammell Crow Residential Co*., 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). However, the arbitration clause at issue in *One Belle Hall Property Owners Assoc. Inc* involved an arbitration clause contained in a bulk sales agreement, that was entered into prior the purchase of and delivery of the product. Here the court finds Donnix only became aware of the arbitration clause after the purchase of the product was completed and the underlayment was delivered to Plaintiff's residence. The court finds, unlike the developer in *One Belle Hall Property Owners Assoc. Inc.*, Donnix was not given the opportunity to consent to the terms of the arbitration clause *prior* to the purchase of the Tamko underlayment.

Further, the court finds Tamko attached an unauthenticated and unexecuted limited warranty to its Memorandum in support of its' Motion to assert there has been a meeting of the

minds between Donnix and Tamko regarding an arbitration agreement. However, the court does not find this is evidence sufficient to establish an enforceable agreement to arbitrate, as the warranty is wholly unexecuted, does not specify the applicable Tamko product the warranty pertains to, and it cannot be established the limited warranty Tamko references pertains to the construction of Plaintiffs' residence. *See Nelson v. Tamko Building Prods., Inc.,* 2015 U.S. Dist. LEXIS 75597, 2015 WL 3649384, (D. Kan. June 11, 2015). Counsel for Tamko argued the arbitration clause need not be signed by Donnix, citing the *Pearson* precedent. The court finds the *Pearson* precedent holds a non-signatory to a contract containing an arbitration clause can be bound by the contract under a theory of equitable estoppel, *only if* the non-signatory received a direct benefit from the contract. *Pearson*, 400 S.C. 281, 290. Here, however, the court does not need to address the issue of estoppel, as Tamko has failed to establish that a binding agreement to arbitrate exists or that Donnix has received a direct benefit from any contract with Tamko.

Lastly, since the FAA is guided by the general principles of contract law and Tamko has not submitted evidence sufficient to establish an enforceable agreement to arbitrate, the arbitration clause cannot be enforced. The issue of interstate commerce does not need to be discussed, as there is no enforceable agreement between Tamko and Donnix regarding arbitration.

In view of the foregoing, Tamko's Motion to Dismiss and Compel Arbitration is denied.

AND IT IS SO ORDERED.

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THE HONORABLE BENJAMIN CULBERTSON

_____, South Carolina

June _____, 2022

Charleston Common Pleas

Case Caption: Denise M Petersen , plaintiff, et al VS Dctcl Lp , defendant, et al

Case Number: 2021CP1001973

Type: Order/Other

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148