THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Benjamin Culbertson, Circuit Court Judge

Appellate Case No. 2022-000938

Denise M. Petersen, individually and as Trustee of the Denise M. Petersen 2005 Recovable 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 Boulevard Residence Trust II Dated December 7, 2012, Respondent,

v.

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,

of which Donnix Construction LLC is the Respondent and TAMKO Building Products, LLC is the Appellant.

INITIAL BRIEF OF RESPONDENT, DONNIX CONSTRUCTION, LLC

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November 18, 2022
Charleston, South Carolina

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FINDING TAMKO'S ARBITRATION CLAUSE IS UNENFORCEABLE?

STATEMENT OF THE CASE

This controversy arises from a construction defect lawsuit brought by Plaintiffs/Respondents Denise Petersen, individually and as a trustee of the Denise M. Peterson 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 Boulevard Residence Trust II dated December 7, 2012, (collectively, "Petersen") against eleven named defendants, including Defendant/ Appellant TAMKO Building Products, LLC ("TAMKO"), and forty-eight "John Doe Contractors." The Third Amended Complaint, filed April 28, 2022, alleges multiple construction defects at Petersen's residence at Kiawah Island, South Carolina. *See generally* Third Amend. Compl. ("Compl."). TAMKO manufactured the roofing underlayment, "TAMKO TW Metal and Tile Underlayment," installed by roofing subcontractor Defendant/Crossclaimant/Respondent Donnix Construction, LLC ("Donnix"). Compl. ¶ 30.

On July 27, 2021, Donnix filed a Crossclaim against TAMKO asserting causes of action of negligence/gross negligence, breach of implied contract, breach of express and implied warranties, equitable indemnity, and contribution. In response, TAMKO asserted Donnix is bound by an arbitration clause subject to the Federal Arbitration Act, contained within a limited warranty. *See generally* Exhibit One to TAMKO'S Memorandum in Support of its Motion to Compel Arbitration.

On May 11, 2022, TAMKO moved to dismiss both Petersen's claims and Donnix's crossclaims, and to compel arbitration, seeking to enforce the arbitration clause that is part of the express limited warranty provided with the underlayment. *See* TAMKO Motion to Dismiss.

On June 2, 2022, the Honorable Benjamin Culbertson heard arguments on TAMKO's motion. *See generally* Transcript of Oral Argument. At the hearing, the parties argued primarily

over whether an enforceable arbitration contract exists between TAMKO and Donnix and between TAMKO and Petersen. *Id*. Donnix argued the binding arbitration agreement was not bargained for when making the purchase of the TAMKO underlayment, and only became aware of its existence after the product had been purchased and delivered to the Peterson residence. Notably the binding arbitration agreement was not signed by *any* party, including TAMKO.

On June 9, 2022, Judge Culbertson adopted in full the proposed order submitted by Petersen and Donnix, and denied TAMKO's Motion to Dismiss. *See* Order Denying Motion to Dismiss. On June 17, 2022, TAMKO moved under Rules 52(b), 59(e) and 60(b), SCRCP, for the trial court to reconsider, alter or amend its order denying TAMKO's motion to dismiss and compel arbitration. *See* TAMKO Motion to Reconsider. The court denied TAMKO's motion by form order. *See* Order Denying Motion to Reconsider.

In so ruling, the trial court correctly upheld the terms of the Federal Arbitration Act, controlling South Carolina case law by affirming arbitration 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.

FACTS

On July 18, 2015, Petersen entered into a written contract with DCTCL, L.P. d/b/a Buffington Homes, L.P. ("Buffington") to build her residence. *See generally* July 8, 2015, Contract between Buffington and Petersen ("Buffington Contract"). Buffington was the general contractor and subcontracted with Donnix to install the roof and related flashings and waterproofing. *See generally* March 9, 2016, Subcontract Agreement between Donnix and Buffington ("Subcontract Agreement"). Donnix purchased and installed the TAMKO underlayment which was defective.

Donnix purchased the TAMKO underlayment in three separate purchases from ABC Supply Co., Inc. See ABC Supply Co. Purchase Order Invoices, Invoice Nos. 52062460,

51973240, 52102388 (together, the "Purchase Order Invoices"). Notably none of these Purchase Order Invoices reference an arbitration clause to which Donnix consented to or that it would be bound by. Upon the completion of the sale, the TAMKO underlayment was delivered to the Peterson residence for insulation. Attached to the TAMKO product delivered to the Peterson was a limited warranty in addition to an unexecuted arbitration clause that not only lacked signatures from both TAMKO and Donnix but also did not specify the product the arbitration clause pertained to. Donnix never consented to the terms of the binding arbitration clause. The terms of the binding arbitration clause were never negotiated between TAMKO and Donnix when conducting the sale of the product. Nonetheless TAMKO now asserts TAMKO is bound by the arbitration clause despite the lack of meeting of the minds between the parties. Boldy, TAMKO also asserts since the terms of the arbitration clause are available on TAMKO'S website, this is sufficient to bind Donnix to the arbitration agreement, which not only is unfathomable but does not follow the terms of Federal Arbitration Act and controlling South Carolina case law on how an arbitration clause can be enforced. Donnix is not required to arbitrate its' claims against TAMKO since there is not an enforceable arbitration agreement between the parties.

STANDARD OF REVIEW

The question of arbitrability of a claim is an issue for judicial determination, de novo. *One Belle Hall Property Owners Association, Inc. v. Trammell Crow Residential Co*., 418 S.C. 51, 59, 791 S.E.2d 286,291 (Ct. App. 2016). 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 an 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).

ARGUMENT

I. Donnix Did Not Enter Into a Contact with TAMKO Submitting Claims to Arbitration Because there Was No Meeting of The Minds Between the Parties Regarding an Arbitration Clause

"[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* 373 S.C. 14, at 24, ("[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). Likewise, Arbitration "is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." *Wilson v. Willis*, 426

S.C. 326, 827 S.E.2d 167 (S.C. 2019), citing *E.E.O.C. v. Waffle House, Inc*., 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (recognizing that arbitration "is a matter of consent, not coercion" (citation omitted)); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) ("Even though arbitration has a favored place, *there still must be an underlying agreement between the parties to arbitrate*.") (emphasis added).

Here, Donnix and TAMKO never entered into 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. Additionally, there was no meeting of the minds where Donnix waived its' fundamental right to access to the courts. The only evidence provided by TAMKO of the alleged binding arbitration agreement is Tamko's limited warranty, which was *not* accompanied with the Purchase Order Invoices. However, TAMKO fails to establish that the limited warranty was part of an enforceable agreement between Donnix, as it was never signed by any parties. Further, the limited warranty does not even specify what TAMKO product it applies to. The section on the warranty where the applicable product should have been listed is left blank, further rendering the arbitration clause contained within the limited warranty as unenforceable. There is no ascertainable way to establish the limited warranty TAMKO references even concerns the construction of Plaintiffs' residence.

Moreover, an almost identical motion was filed by TAMKO in the 10th Circuit, in *Nelson v. TAMKO Building Prods., Inc.,* 2015 U.S. Dist. LEXIS 75597, 2015 WL 3649384, (D. Kan. June 11, 2015). In this case, TAMKO filed a Motion to Compel Arbitration of Plaintiffs' claims citing there was a binding arbitration clause in the limited warranty attached to the shingles installed on the residence. *Id*. Here, the court determined TAMKO failed to establish that the limited warranty was part of an enforceable agreement between the Plaintiffs and TAMKO because it was

unauthenticated. Accordingly, Tamko's motion was denied. *Id*. at 4. Similarly in this case, TAMKO has merely attached the unauthenticated and unexecuted limited warranty to its Memorandum in support of its' Motion to Compel Arbitration in an attempt to assert there has been a meeting of the minds between Donnix and TAMKO regarding an arbitration agreement. However, this is not sufficient to prove a meeting of the minds occurred, as the warranty is wholly unexecuted and does not specify the applicable TAMKO product the warranty pertains to. TAMKO has not submitted evidence sufficient to establish an enforceable agreement to arbitrate, therefore Donnix cannot be compelled to arbitration.

A. The Federal Arbitration Act is Inapplicable Because There is Not a Valid and Enforceable Arbitration Agreement Between Donnix and Tamko

The Federal Arbitration Act (the "FAA applies") when the party seeking arbitration can demonstrate "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute." *Am. Gen. Life & Accident Ins. CO. v. Wood*, 429 F.3d 83. 87 (4th Cir. 2005). In determining whether 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).

As previously discussed, there was no meeting of the minds between Donnix and TAMKO

regarding the arbitration clause and Donnix did not waive its' right to access the courts. 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 does not meet the requirements of the FAA. The issue of interstate commerce does not need to be discussed, as there is no enforceable agreement between TAMKO and Donnix regarding arbitration.

B. While A Contract for the Sale of Goods Exists Between TAMKO a Donnix, This Contract Does Not Contain a Binding Arbitration Clause.

Donnix does not deny the Purchase Order Invoices, evidence the Sale of Goods Between TAMKO and Donnix. However, the Purchase Order Invoices do not contain the binding arbitration clause TAMKO argues Donnix is bound by. In fact, a recent decision from the South Carolina Supreme court held, "In conducting an unconscionability inquiry, courts *may only consider the provisions of the arbitration agreement itself, and not those of the whole contract. Damico v. Lennar Carolinas, LLC*, No. 28114, 2022 S.C. LEXIS 107, at *1 (Sep. 14, 2022) (emphasis added). Thus, the court must look to the provisions of the arbitration agreement itself when determining whether it is valid, rather than the contract as a whole. Again, Donnix and TAMKO never entered a contract containing an arbitration provision. Additionally, there was no meeting of the minds where Donnix waived its' fundamental right to access to the courts. Accordingly, Tamko's Motion to Compel Arbitration should be denied as matter of law. The Trial court agreed with this argument and rightfully denied TAMKO'S Motion to Dismiss and Compel Arbitration.

II. Donnix is a Non-Signatory to the Arbitration Clause And Cannot be Bound Because it Receives No Direct Benefit from the Provision

Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31, 630 n.5, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009). South Carolina has recognized

several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel. *Malloy v. Thompson*, 409 S.C. 557, 561-62, 762 S.E.2d 690, 692 (2014); *see also Pearson,* 400 S.C. 281 at 289, (discussing federal decisions setting forth five theories that could provide a basis to bind nonsignatories to arbitration agreements). TAMKO asserts the theory of estoppel provides justification for compelling Donnix to arbitration. Specifically, under the doctrine of estoppel, TAMKO asserts Donnnix had a constructive notice of the arbitration clause and receives a direct benefit from the same.

A. Donnix Lacked Constructive Notice of the Arbitration Provision in Tamko's Limited Warranty

Constructive Notice is defined as "notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts." *Strother v. Lexington Cty. Recreation Comm'n*, 332 S.C. 54, 63 n.6, 504 S.E.2d 117, 122 n.6 (1998). TAMKO relies on *Krusch v. TAMKO Building Products, Inc*., 34 F.Supp.3d 584 (M.D.N.C. 2014), as proof that Donnix had constructive notice of its' binding arbitration clause. However, in *Krusch* the facts show the Plaintiff received a copy of the limited warranty containing the arbitration clause *before* completing the sale, which is the opposite of what occurred in this present case. TAMKO does not deny the fact that the limited warranty containing the arbitration clause was only supplied to Donnix after the sale had been completed and the products were delivered to the Peterson residence. At no point prior to the sale, was the arbitration clause provided to Donnix. It is inequitable to assert Donnix had inquiry notice of the existence of an arbitration clause when Donnix was only ever supplied the binding arbitration clause it was alleged to be bound by after the sale had been completed.

B. Donnix Has Not Knowingly Exploited the Benefits of the Arbitration Clause and the Limited Warranty is Unconscionable

The framework for invoking equitable estoppel as a basis for compelling a nonsignatory to arbitration, is often referred to the direct benefit test. *Wilson v. Willis*, 416 S.C. 395, at 418. This framework was utilized in a prior court of appeals decision, *Pearson*, which applied the federal test as set forth in *International Paper Co*. "[u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement." *Wilson* at, 340-41.

Here, TAMKO has not established what direct benefit Donnix is enjoying from the limited warranty containing the binding arbitration clause. In fact, subjecting Donnix to binding arbitration unlawfully abrogates Donnix's constitutional right to a jury trial. The right to a jury trial under the Seventh Amendment is a fundamental one, but it "can be *knowingly and intelligently* waived by contract." *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986) (emphasis added). Accordingly, the Fourth Circuit has held that a party seeking to enforce a contractual provision waiving the right to a jury trial must establish that the waiver was *knowing and voluntary*. *Leasing Serv. Corp*., 804 F.2d at 833. Here, Donnix has not knowingly or voluntarily waived its' constitutional right to a jury. As TAMKO'S own brief states, "The very essence of equitable estoppel is to prevent a party from taking one position when it is to that party's advantage, and taking the opposite position when it is to that party's disadvantage." *United States ex rel. Coastal Roofing Co. v. P. Browne & Assocs*., 585 F. Supp. 2d 708, 715 (D.S.C. 2007). TAMKO is asserting for Donnix to be provided an express warranty it must agree to the terms of the binding arbitration clause, including the waiver of a jury trial, despite only being provided these provisions after completing the sale, when such terms cannot be altered.

At its core, unconscionability is defined "as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id*. at 16, citing *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc*., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996); *see also* 17A Am. Jur. 2d Contracts § 272 (2016). This is exactly what TAMKO has done by providing an arbitration clause to Donnix after the sale had been completed. TAMKO forces Donnix to waive its right to a jury trial without its' express consent, which makes the binding arbitration clause within the limited warranty unconscionable. Accordingly, the mandatory arbitration clause within the limited warranty cannot be enforced against Donnix.

III. Donnix Should Not Be Compelled to Arbitration Due to Concerns for Expedience or Judicial Economy

The Court should not simply enforce their own views of judicial economy and efficiency on the parties where there has been no agreement to arbitrate. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (internal citations omitted) ("The FAA, both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and not to substitute its own views of economy and efficiency for those of Congress."). There must be a valid agreement to arbitrate, even if the outcome results in bifurcated proceedings. *Id*., 470 U.S. at 221.

South Carolina has held that courts cannot refuse to enforce an otherwise valid arbitration provision on the basis of judicial economy. *Wellman, Inc. v. Square D Co*., 366 S.C. 61, 71, 620 S.E.2d 86, 90 (Ct. App. 2005). The inverse of *Dean Witter Reynolds, Inc. and Wellman, Inc.* should also be true. If a court cannot deny a motion to compel arbitration where a valid provision exists for reasons of judicial economy, then a court should not be able to require a party to arbitrate claims where no agreement to arbitrate exists. After all, "arbitration 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, at 288. While this may result in litigation and arbitration of "intertwined issues", "[a]ny inefficiency or risk of inconsistent results is a consequence of the parties' bargaining." *Wellman, Inc*. 366 S.C. at 70, 620 S.E.2d at 91. Otherwise, a party could compel anyone into arbitration, despite the absence of a valid arbitration provision, simply by including a party in the suit that is subject to a valid arbitration agreement. *See Id*. at 70–71, 620 S.E.2d at 91.

Here, it is evident Donnix never entered an agreement to submit its' claims against TAMKO to arbitration. Since there is no valid arbitration agreement between Donnix and Tamko, it would hinder judicial economy to compel Donnix to arbitration. Therefore, Tamko's Motion to Compel Arbitration should be denied as matter of law.

CONCLUSION

This Court should uphold the order of the trial court dismissing TAMKO's Motion to Dismiss and Compel Arbitration because Donnix and TAMKO never entered into a contract where there was a meeting of the minds regarding the terms of the arbitration clause or where Donnix agreed to waive its' right to a jury. Furthermore, the arbitration clause is unconscionable because the limited warranty containing the arbitration clause was only supplied to Donnix after the sale had been completed, the products were delivered to the Peterson residence, and the terms of the arbitration clause could not be altered.

Boldly TAMKO blames the rulings of trial court for the delay in the disposition of this case, and refuses to acknowledge the fact its' own appeal, filed after receiving two denials of its' motion, is the root cause in the delay. Accordingly, Donnix respectfully asks this Court to affirm the trial court's rulings and to deny Tamko's Motion to Dismiss and Compel Arbitration.

Respectfully submitted,

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of which Donnix Construction is the Respondent and TAMKO Building Products, LLC is the Appellant.

PROOF OF SERVICE

The undersigned certifies that she served a copy of the foregoing *Initial Brief of Respondent, Donnix Construction, LLC* on all counsel of record on this 18st day of November 2022 via electronic mail and/or by U.S Mail, postage pre-paid to the following:

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November 18, 2022

VIA ELECTRONIC MAIL

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Re: *Denise M. Petersen, et al vs. DCTCL, L.P. d/b/a Buffington Homes, L.P., et al*
Appellate Action No. 2022-000938

Dear Ms. Kitchings:

Enclosed please find Respondent, Donnix Construction, LLC's Initial Brief, Designation of Matter and Proofs of Service for your review and filing in connection with the above-referenced appeal.

With kindest regards, I am

Very truly yours,

/s/ Patrick J. McDonald
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For the Firm

PJM/hf
Enclosures

Cc: All Counsel of Record (*via e-mail only*) w/ Enclosures