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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Circuit Court Case No.: 2023-CP-10-04865

Dow, Inc., ……Appellant

vs.

Beth Bartolini,……Respondent

INITIAL BRIEF OF RESPONDENT

March 6, 2025
Charleston, South Carolina

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COUNTER-STATEMENT OF THE CASE

On October 3, 2023, Appellant filed a Complaint seeking to have its claims heard in arbitration. (Complaint). On November 11, 2023, Respondent filed an Answer and Counterclaims denying Plaintiff's were entitled to arbitrate asserting numerous affirmative defenses and asserting counterclaims for breach of contract, breach of warranty, negligence, fraud, negligent misrepresentation, unfair trade practices, conversion, and accounting and seeking a jury trial. (Answer and Counterclaims). On November 20, 2023, Appellant filed "Plaintiff's Motion to Compel Arbitration Pursuant to the Federal Arbitration Act." (Motion to Compel Arbitration). Appellant did not submit any affidavit in support of its Motion.

Respondent served discovery requests on May 9, 2024. Appellant objected to participation in discovery until its Motion to Compel was ruled upon.

On July 17th, 2024 the Respondent filed a memorandum in opposition to the Appellant's Motion to Compel Arbitration. On July 18th, 2024 the Honorable Judge Maite Murphy heard the Appellant's Motion to Compel Arbitration. The Respondent's arguments were:

1) The arbitration clause does not comply with South Carolina's Arbitration Act;
2) The Federal Arbitration Act does not apply in this case because there is no evidence before the Court that the work involves interstate commerce.[1]
3) That the contract was procured by fraud and as such is invalid and unenforceable.
4) That the arbitration agreement is unenforceable because there was no meeting of the minds as to essential and material terms to the same.
5) That the Appellant's failure to initiate arbitration proceedings through the American Arbitration Association constitutes a waiver.

[1] Appellant submitted the Affidavit of Scott Dow regarding interstate commerce after the hearing.

6) That the arbitration clause fails due to vagueness.

At the hearing, counsel submitted the American Arbitration Association American Arbitration Association Construction Industry Arbitration Rules and Mediation Procedures Amended March 1, 2024, the American Arbitration Association Home Construction Arbitration Rules and Mediation Procedures Amended August 1, 2018 and the Summary of Changes American Arbitration Association Construction Industry Arbitration Rules 2024 for the Court's consideration.

On September 6, 2024 the Respondent filed a Motion to Dismiss based on Appellant's failure to comply with the statutory requirements of S.C. Code Ann. § 29-5-15, § 29-5-90, § 29-5-120, § 29-5-160 and § 29-5-230 (1976).

On November 19, 2024, the Honorable Judge Maite Murphy, through her law clerk, advised the parties that she was denying the Appellant's Motion to Compel Arbitration and indicated that she would issue a Form 4 Order with the parties consent. The Appellant informed the Court that "a Form 4 Order is fine with the Plaintiff."

On November 20, 2024, the Honorable Judge Maite Murphy issued a Form 4 Order denying the Appellant's motion to compel arbitration "for its failure to comply with South Carolina Code Section 15-48-10(a)." (Form 4 Order).

Appellant did not file a Rule 59(e) Motion with the Circuit Court.

Appellant filed its Notice of Appeal on November 25, 2024.

Upon information and belief, as of this date the Appellant has failed to file a Demand for Arbitration with the American Arbitration Association.

STANDARD OF REVIEW

Unless the parties otherwise provide, "[t]he question of the arbitrability of a claim is an issue for judicial determination." Zabinski v. Bright Acres Assocs. , 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Determinations of arbitrability are subject to de novo review," but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings. Stokes v. Metro. Life Ins. Co. , 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

COUNTER-STATEMENT OF FACTS

Scott Dow, the principal Owner of Dow, Inc., the Appellant holds himself out as an expert in the repair of construction defects and cost estimating and has served as an expert witness in numerous construction cases throughout the State of South Carolina. In August of 2022 Respondent hired the Appellant to undertake repairs to her home. To induce her to enter into the contract, the Appellant represented that the repairs would cost between $150,000.00 and $225,000.00 (Contract, Article 4). In reliance on the Appellant's representations Respondent signed the contract and the Appellant proceeded with the work. Throughout the course of the work the Appellant billed Respondent for the work completed but continued to add more and more costs to the contract price ultimately raising the claimed construction cost to $507,453.49. Despite the fact that the construction costs more than doubled the amount represented by the Plaintiff to complete the repairs, Respondent paid the Appellant $434,943.36. She did so even though much of the work was incomplete or defective.

ARGUMENT

1. **Is the denial of Appellant's motion to compel arbitration properly before this Court?**

Following the lower court's issuance of a Form 4 Order denying its motion to compel

arbitration, Appellant immediately filed its notice of appeal but failed to file a Motion to Reconsider under Rule 59 (e) SCRCP thereby failing to preserve the issue of arbitrability for appeal.[2] The Appellant has repeatedly admitted that the arbitration agreement does not comply with South Carolina's Arbitration Act but claims the claims the lower court erred by not finding the Federal Arbitration Act applied to the contract's arbitration clause. Having raised the issue with the lower court, the Appellant was obligated to ask the court to rule upon it in order to preserve it for appellate review.

In Palmetto Wildlife Extractors, LLC v. Justin Ludy & First Cmty. Bank Corp., the court addressed the necessity of a Rule 59(e) motion to preserve issues for appeal. The court emphasized that if an issue is raised in the lower court but not ruled upon, a Rule 59(e) motion is required to preserve the issue for appellate review. In that case, the appellant filed a Rule 59(e) motion after the circuit court's partial denial of a motion to compel arbitration, which preserved the issue of arbitrability for appeal. The appellate court found that the Rule 59(e) motion was sufficient to preserve the issue, even though the trial court did not specifically rule on it. Palmetto Wildlife Extractors, LLC v. Justin Ludy & First Cmty. Bank Corp., 435 S.C. 690, 869 S.E.2d 859 (S.C. App. 2022)(435 S.C. 704-706).

> "If the [appellant] has raised an issue in the lower court, but the court fails to rule upon it, the [appellant] must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant* , 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Once [an] issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." *Coward Hund Constr. Co. v. Ball Corp.* , 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999) (quoting James F. Flanagan, *South Carolina Civil Procedure* 475 (2d ed. 1996)). " '[T]he Supreme Court identifies two ways to preserve the issue: "a ruling by the trial judge or a post-trial motion." The language implies that a properly requested ruling under Rule 59 is sufficient without a specific judicial decision on the matter.' " *Pye v. Est. of Fox* , 369 S.C. 555,

[2] A Form 4 Order is a judgment within the meaning of Rule 59. See Cheap-O's Truck Stop, Inc. v. Cloyd, 330 S.C. 596, 604, 567 S.E.2d 514,518 (Cr. App. 2002)

> 566, 633 S.E.2d 505, 511 (2006) (footnotes omitted by court) (quoting Flanagan, *South Carolina Civil Procedure* 475-76), *overruled on other grounds by* Paradis v. Charleston Cnty. Sch. Dist. , 433 S.C. 562, 861 S.E.2d 774 (2021) ; *see also* Zurich Am. Ins. Co. v. Tolbert , 378 S.C. 493, 500 n.2, 662 S.E.2d 606, 610 n.2 (Ct. App. 2008) (holding an issue preserved for appellate review when the circuit court's order failed to address an issue, the appellants raised the issue in a Rule 59(e) motion, and the circuit court still did not rule on it), *aff'd* , 387 S.C. 280, 692 S.E.2d 523 (2010).
> Additionally, "[w]hen a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." *In re Timmerman* , 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) (citing *Godfrey v. Heller* , 311 S.C. 516, 429 S.E.2d 859 (Ct. App. 1993) (finding when a theory of relief was first raised in the lower court's order, the appellant must challenge this theory with a Rule 59, SCRCP, motion)). Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.")

At the hearing, Appellant argued that although the contract did not comply with the South Carolina Arbitration Act, the Federal Arbitration Act applied to the contract because the work involved interstate commerce. Hower, the Form 4 Order is silent as to this issue and did not rule as to whether the Federal Arbitration Act applied to the contract's arbitration clause.

An issue cannot be raised for the first time on appeal, but must have been raised to and ruled on by the trial judge to be preserved for appellate review. Any objections and arguments must be sufficiently specific to inform the trial court of the point being urged by the objecting party. Wilder Corp. v. Wilke, 330 S.C. 71 ,76, 497 S.E. 2d 731, 733 (1997) (citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E. 2d 571 (1997); Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986).

In the instant case, Appellant did not file a Rule 59 (e) motion to reconsider and therefore it failed to preserve the issue for appellate review.

2. Even if this Court finds that the Appellant preserved the issue of arbitrability of the contract, the lower Court correctly determined that the arbitration clause was invalid.

In its brief, Appellant argues that the circuit court erred in denying its Motion to Compel Arbitration because even though the Contract didn't comply with the South Carolina Arbitration Act the Federal Arbitration Act supersedes it and applies to this contract. The Appellant cites caselaw which held that an arbitration provision in a contract may be enforceable under the Federal Arbitration Act even if it was not enforceable under the South Carolin Uniform Arbitration Act. However, the Appellant continues to argue against precedent by claiming that "South Carolina courts have an unbending policy which favors arbitration which has been supported in a legion of cases for the past thirty years." citing *Bazzel v. Green Tree Financial Corp.*, 351 S.C. 244, 569 S.E.2d 349 (2002). and *MailSource, LLC v. M.A. Bailey & Associates, Inc.*, 356 S.C. 370, 588 S.E.2d 639 (Ct.App. 2003). However, the Bazzel decision was vacated and as recently as yesterday the South Carolina Supreme Court addressed the issue in Lampo v. Amedisys Holding, LLC, Op. No. 28265 (S.C. Sup. Ct. filed March 5, 2025) (Howard Adv. Sh. No. 10 at 20).

> First, Amedisys—like many parties and some of our courts—continues to argue there is a federal and state "policy favoring arbitration." We remind our 28 litigants and lower courts that we dispensed with this incorrect notion almost four years ago. See Palmetto Constr. Grp. v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021) ("There is . . . no public policy—federal or state— 'favoring' arbitration."). The court of appeals in this case needed no such reminder, stating, "The FAA requires that courts treat arbitration agreements the same as all other contracts—no more, no less." Lampo, 437 S.C. at 241, 877 S.E.2d at 489. In other cases, however, our court of appeals has continued to recite this incorrect notion. See, e.g., Est. of Solesbee ex rel. Bayne v. Fundamental Clinical & Operational Servs., LLC, 438 S.C. 638, 646, 885 S.E.2d 144, 148 (Ct. App. 2023) (incorrectly stating, "South Carolina's policy is to favor arbitration of disputes"). An arbitration contract is like any other contract: if it exists, it will be enforced according to its terms. See Morgan v. Sundance, Inc., 596 U.S. 411, 417-19, 142 S. Ct. 1708, 1712-14, 212 L. Ed. 2d 753, 759-60 (2022) (unanimously rebuking the Eighth Circuit for creating "arbitration-specific variants of federal procedural rules" based on the incorrect notion of a "policy favoring arbitration" and stating, "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration").

Arbitrability and Unconscionability

Contract defenses such as fraud, duress and unconscionability apply to a court's evaluation of the enforceability of an arbitration clause governed under either the SCUAA or the FAA. 9

This is a suit filed by Dow, Inc., the general contractor hired by Bartolini to preform structural repairs on her home. The principal owner of Dow, Inc. is Scott Dow. Mr. Dow is a general contractor and consulting expert in the construction industry. Among the services he offers to clients is cost estimating prior to entering into the contract, Mr. Dow represented to the Defendant that the cost to perform the repairs to her home would be between $150,000.00 and $225,000.00 as set forth in Article 4.2 of the contract. At the time Dow made said representations, he knew, or should have known that the cost of the work would be significantly higher than that. In fact, Ms. Bartolini has made payment to Dow of $434,943.36 and he now is demanding an additional $72,510.02.

U.S.C. § 2 (providing written arbitration agreements may be invalid, revocable and unenforceable based upon "such grounds as exist at law or in equity for the revocation of any contract."); S.C. Code § 15-48-10(a) (containing similar language to that of the FAA). Thus, if this Court finds an arbitration clause unconscionable, the Court may refuse to enforce the clause or otherwise limit its application so as to avoid an unconscionable result. S.C. Code § 36-3-302(1).

The arbitration agreement is unenforceable because there was no meeting of the minds as to essential and material terms to the same.

The Arbitration agreement contained in the contract fails and is unenforceable because it lacks essential and material terms. The genesis for such an argument is the case of Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009), in which the court refused to enforce an arbitration provision in a personal injury action against a nursing home

because the court found the provision lacked essential and material terms to establish a meeting of the minds, because the arbitration provision did not state how the arbitration would be administered.

In this case, there are numerous essential and material terms missing from the agreement and the arbitration clause. The only terms of the arbitration clause are that any dispute "shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules"

The AAA made significant changes to its Construction Industry Arbitration Rules in 2024. Those rule changes include the removal of dispositive motions under certain circumstances, new limitations on a parties objection to the appointment of particular arbitrators. There can be no argument that the parties had a meeting of the minds about substantive rule changes which did not occur until 2 years after they entered into a contract. The parties could not have contemplated or agreed to rules that didn't exist when they formed the contract. The substantial changes to the rules in 2024 materially alter the dispute resolution process they originally contemplated.

Next, the arbitration clause contained in the contract is silent as to which set of AAA Rules (or even which process in those rules to use). The AAA currently has several paths under its Construction Rules. Those include Regular Track Procedures, Fast Track Procedures, Procedures for Large, Complex Construction Disputes, and Home Construction Arbitration Rules. The contract in this case contains no terms which would require the parties to use any of the particular formats for arbitration.

The arbitration clause at issue also fails to state what law applies to the case, where the arbitration is to be held, how long the arbitration should take, etc. Based on the lack of specificity

and broad range of arbitration paths, the parties could not have had a meeting of the minds and as such the arbitration clause is unenforceable.

Finally, the Appellant has failed to comply with the Rules of the Arbitration Process it seeks to compel.

> **R-4. Filing Requirements Under an Arbitration in a Contract**
> (a) Filing of a Demand. Arbitration under a contract provision shall be initiated in the following manner:
> i. The initiating party ("the claimant") shall, within the time period, if any, specified in the contract(s) file with the AAA a demand for arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration. Filing may be accomplished through use of the AAA Webfile, located at ww.adr.org, or by filing the demand with any AAA office.[3]

Upon information and belief, the Appellant has failed to file an arbitration demand with the AAA for over 17 months suggests a lack of good faith and constitutes a waiver of the right to arbitrate.

The Respondent respectfully requests this Court dismiss the Appellant's appeal and award costs and fees associated with the same.

Respectfully submitted,

March 6, 2025
Charleston, South Carolina

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[3] American Arbitration Association Consstruction Rules as Amended March 1, 2024.