IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Appellate Case No.: 2024-002009

Dow, Inc., ...Appellant

v.

Beth Bartolini.....Respondent

APPELLANT'S INITIAL REPLY BRIEF

BLAND RICHTER, LLP
Attorneys For Appellant

Ronald L. Richter, Jr. (SC Bar No. 66377)
Scott M. Mongillo (SC Bar No. 16574)
18 Broad Street, Mezzanine
Charleston, South Carolina 29401
T: 843.573.9900 | F: 843.573.0200
ronnie@blandrichter.com
scott@blandrichter.com

Eric S. Bland (SC Bar No. 64132)
105 West Main Street, Suite D
Lexington, South Carolina 29072
T: 803.256.9664 | F: 803.256.3056
ericbland@blandrichter.com

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Without waiving its right to take exception to the arguments and authorities cited by the Respondent which are not addressed herein, the Appellant wishes to brief the court further and/or respond further to several of the issues raised by the Respondent. Specifically, the Respondent incorrectly states that the denial of the Appellant's November 20, 2023, "Motion to Compel Arbitration Pursuant to the Federal Arbitration Act" is not properly before this Court. In addition, the Respondent incorrectly argues that if this issue is before the Court, then the Appellant's motion to compel arbitration was properly denied by the lower court. On a fundamental level there is one issue before the Court in this appeal: Does the Federal Arbitration Act apply to parties' construction contract to remodel the Respondent's home?

COUNTER TO RESPONDENT'S ARGUMENT #1: Is the denial of Appellant's motion to compel arbitration properly before this Court?

Respondent's Initial Brief engages in revisionist history. It somehow claims that the lower court did not sufficiently rule on Appellant's November 20, 2023, "Motion to Compel Arbitration Pursuant to the Federal Arbitration Act" when it denied the relief sought exactly a year later in its November 20, 2024, Form 4 Order. Plaintiff's November 20, 2023, motion had a singular issue which was literally **embedded in its title**, to compel arbitration pursuant to the Federal Arbitration Act ("FAA")[1]. (Motion to Compel at page 1.) This motion also contained a memorandum in support.

The very first paragraph of the argument in the Appellant's supporting memorandum is entitled "FEDERAL ARBITRATION ACT (9 U.S.C.A. §1 *et seq.*)" and states that, "The

[1] Also, the **ONLY** cause of action in the Appellant's October 3, 2023, "Complaint to Compel Arbitration" is for a "FIRST CAUSE OF ACTION: COMPEL ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT, 9 U.S.C. §4."

arbitration clause listed above is clear and unambiguous. "Any controversy or claim" relating to the Contract shall be settled by "arbitration administered by the American Arbitration Association." However, Defendant seeks a jury trial and has refused to arbitrate. Thus, the Defendant is improperly trying to evade this mandatory arbitration language she knowingly agreed to in the Contract." (Motion to Compel at p. 3.)

The next sentence of the memorandum's second paragraph states that, "The arbitration provision in question is valid under Federal law because the contract implicates interstate commerce." (Motion to Compel at p. 3.) This issue permeates the memorandum and is also included in the Appellant's argument that public policy requires arbitration because, as the memorandum in support states, "In addition, Federal Courts have opined that the basic purpose of the Federal Arbitration Act is to promote the speedy disposition of disputes without the expense and delay of extended court proceedings. *U.S. for Use of Duo Metal and Iron Works, Inc. vs. S.T.C. Const. Co.*, E.D. Pa. 1979, 472 F.Supp. 1023." (Motion to Compel at p. 4.)

This singular issue, the FAA and how it affected the parties underlying construction contract, was the sole matter considered by the Court during the July 18, 2024, hearing on the Appellant's "Motion to Compel Arbitration **Pursuant to the Federal Arbitration Act**." (Emphasis supplied.) In the Appellant's supporting memorandum, as well as during the argument before the lower court, the Appellant admitted that its construction contract in question did not have the S.C. Code Ann. §15-48-10(a) language but that it was not required because the Appellant's construction contract involved "interstate commerce." (Motion to Compel.)

In support of this proposition the Appellant cited in both its brief and argument before the lower court the South Carolina Supreme Court's ruling on the supremacy of the Federal Arbitration Act over the South Carolina Uniform Arbitration Act (S.C. Code Ann. §15-48-10 *et seq.*) when it

ruled in *Osteen v. T.E. Cuttino Const. Co*., 315 S.C. 422, 434 S.E.2d 281 (1993) that an arbitration clause in a **construction contract** was not invalid for failing to comply with §15-48-10 et seq. because the contract involved interstate commerce; consequently, federal substantive law supplanted state law regarding arbitration. (Emphasis supplied and see Motion to Compel at p. 4.)

Of course, the present matter also involves a construction contract which did not contain the S.C. Code Ann. §15-48-10(a) language so the only factual distinction between *Osteen* and the present matter is that in *Osteen* the interstate construction contract involved new construction, and the present matter involves a home remodel. This is a distinction without legal consequence as the Appellant contends its construction contract, like the *Osteen* contract, involves interstate commerce and thus the FAA is invoked in this matter as it was in *Osteen.* The policy in favor of arbitration becomes even more evident in cases that implicate interstate commerce, like this one and *Osteen*. *See KPMG LLP v. Cocchi*, 565 U.S. 18, 21, 132 S. Ct. 23, 25 (2011) (citations omitted) ("The [FAA] reflects an 'emphatic federal policy in favor of arbitral dispute resolution.'"). *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345, 131 S. Ct. 1740, 1749 (2011) ("our cases place it beyond dispute that the FAA was designed to promote arbitration").

However, the lower court ignored the ruling in *Osteen* as well as the Appellant's FAA argument in its Form 4 Order when it ruled that, "This matter came before the Court on Plaintiff's Motion to Compel Arbitration. After review of the record, arguments, and relevant law, the Court DENIES this Motion for failure to comply with South Carolina Code Section 15-48-10(a)." Despite these obvious and uncontradicted facts, Respondent's Initial Brief focuses on the premise that somehow the lower court did not deny the "Motion to Compel Arbitration Pursuant to the Federal Arbitration Act" in its Form 4 Order.

Apparently, the Respondent is upset that the lower court did not include the full title of the denied motion in the Form 4 order which, once again, was "Motion to Compel Arbitration Pursuant to the Federal Arbitration Act." The Respondent's Initial Brief states that the issue on appeal must have been "raised to and ruled on 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." (Respondent's Initial Brief at p. 7.) One cannot fathom how the trial court did not understand or contemplate that the sole reason for Appellant's motion was to compel arbitration as per the FAA or that the Form 4 Order denies this motion to compel arbitration pursuant to the FAA. Based on the title of the Appellant's denied motion alone, this part of Respondent's Initial Brief is a nonissue and that is why clarification under Rule 59(e), SCRCP was not appropriate.

Under South Carolina law, a Rule 59(e) motion to reconsider is appropriate in two basic situations. First, "[a] party may wish to file such a motion when [he] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Second, "[a] party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id.* To be clear, a Rule 59(e) order was never required, as Respondents argue, because the issue raised in Appellant's motion before the lower court was crystal clear, was ruled on in a definite manner, and as such, the issue on appeal was preserved which is: Does the Federal Arbitration Act apply to parties' construction contract to remodel the Respondent's home?

COUNTER TO RESPONDENT'S ARGUMENT #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 is valid.

Although this matter is subject to de novo review, this Court should not assume facts not in the record. The Respondent submitted no affidavits to the lower court. For example, there is no proof whatsoever to support the statement in the Respondent's Initial Brief that, "At the time Dow made said representations, he knew, or should have known that the cost of work would be significantly higher than that." (Respondent's Initial Brief at p. 9.) Instead, the only affidavit in the record is that of the Appellant which statement eviscerates the Respondent's argument that the arbitration provision at issue is not valid, "because there was no meeting of the minds as to the essential and material terms to the same." (Respondent's Initial Brief at p. 9.)

The Scott Dow, President of Appellant, affidavit is clear and unequivocal about this issue when it states in paragraphs 5-9 as follows:

> "5. On or about August 17, 2022, the above name parties entered into a "Construction Contract" ("Contract") which is attached to the Complaint in this matter as **Exhibit A**.
>
> 6. On page one of the Contract, it states that the "Project" is for "Miscellaneous Interior and Exterior Work" at the Defendant's home located in Charleston, South Carolina.
>
> 7. On page three of the Contract, there is an arbitration provision that states, "Any controversary of claim relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration rules…"
>
> 8. This arbitration provision of the Contract is a material term to the Contract.
>
> 9. That I watched and saw the Defendant read the Contract, initial under the above referenced arbitration provision as well as all pages of the Contract, and sign the Contract. In addition, the Defendant did not have any questions or issues with any section of the Contract before she executed the Contract." (See Scott Dow Affidavit.)

This uncontested sworn statement of facts literally states that the arbitration provision was a "material term" to the parties' construction contract. As for the meeting of the minds issue, the Respondent failed to provide an affidavit to the lower court stating that she had not read the construction contract or did not have time to investigate the American Arbitration Association or did not agree to abide by the Construction Industry Arbitration rules or did not have time to have the construction contract reviewed by legal counsel or was pressured or coerced or cajoled to sign the construction contract or did not understand the constriction contract or did not know where the arbitration would take place or did not agree to the arbitration; but, instead she failed to file any affidavit much less one that supports her current position. The record before this Court contains no factual basis for these claims. Instead, the Appellant's affidavit establishes that the Respondent read the arbitration provision and agreed to the same. Plus, the Respondent initialed near the arbitration provision and therefore specifically agreed to use the Construction Industry Arbitration rules.

Since both the Appellant and Respondent were signatories to the construction contract they are presumed under South Carolina law to have read and agreed to the terms therein. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (citing *Hood v. Life & Cas. Ins. Co. of Tennessee*, 173 S.C. 139, 175 S.E. 76 (1934)) (enforcing an arbitration agreement in part because "a person who can read is bound to read an agreement before signing it"). Plus, a valid contract requires an offer, acceptance, and valuable consideration. *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012) (quoting *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003)). Therefore, based on the only affidavit in the record, the parties' construction contract meets these three requirements.

Also, the basic principle of contract interpretation is applicable to this appeal which states that "[i]n determining the intent of the parties, the court looks to the language of the contract and if this language is unambiguous, it alone determines the contract's force and effect." *Valley Pub. Serv. Auth. v. Beech Island Rural Cmty. Water Dist*., 319 S.C. 488, 493, 462 S.E.2d 296, 299 (Ct. App. 1995). So "[t]he judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract." *Dobyns v. S.C. Dept. of Parks, Recreation & Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997).

There is no cogent argument that the arbitration provision, standing on its own, lacks material terms or otherwise fails to demonstrate a meeting of the minds. Respondent's allegation that there was a failure of the meeting of the minds is a concocted argument designed to frustrate the four corners of the unambiguous construction contract and contradicts the factual record before this Court.

Finally, it is the Respondent who has refused to arbitrate not the Appellant. The record and timeline concerning this issue is well established. On September 6, 2023, the Appellant invoiced the Respondent for the remaining contractually owed balance due of seventy-one thousand, four hundred and fifty and 71/100 ($71,450.71). (Complaint at p. 3 and see **Exhibit B** attached to the Complaint for the $71,450.71 invoice.) The Respondent refused to pay so a mechanic's lien was filed on September 29, 2023. (Complaint at p. 3.) On October 3, 2023, Appellant filed a Complaint seeking to have its claims heard in arbitration pursuant to the FAA. (Complaint at p. 4.) On November 11, 2023, Respondent filed an Answer and Counterclaims seeking a jury trial; thus, denying that the FAA applied and denying that the Respondent was required to arbitrate. (Answer and Counterclaims).

Arbitration is supposed to be a fast and effective method of dispute resolution that lightens the burden on courts. But solely due to Respondent's September 2023 refusal to arbitrate the Appellant has been forced on this nineteen (19) month legal odyssey to collect the $71,450.71 owed to it. Any filing to arbitrate was obviously futile in light of Respondent's demand for a jury trial. Specifically, the Respondent's Answer and Counterclaims states that Appellant's "demand for Arbitration should be denied" and that Respondent "hereby requests that the Court deny Plaintiff's Motion to Compel Arbitration, dismiss Dow's Complaint, that all issues of fact be tried by a jury…" (Answer and Counterclaims). Based on the Respondent's refusal to arbitrate pursuant to the FAA the Appellant has been forced to wait almost two years before his case will be heard which is in direct contradiction to the United States Supreme Court holdings in *KPMG LLP* and *AT&T Mobility LLC* as well as the holding in *Osteen.*

CONCLUSION

For the foregoing reasons, Appellant requests that the Court reverse the order of the trial judge and remand this case be referred to arbitration as per the FAA in accordance with the construction contract between the parties.

Charleston, South Carolina
March 11, 2025

BLAND RICHTER, LLP
Attorneys for Appellant

s/Ronald L. Richter, Jr.
Ronald L. Richter, Jr. (SC Bar No. 66377)
s/Scott M. Mongillo
Scott M. Mongillo (SC Bar No. 16574)
18 Broad Street, Mezzanine
Charleston, South Carolina 29401
T: 843.573.9900 | F: 843.573.0200
ronnie@blandrichter.com
scott@blandrichter.com

s/Eric S. Bland
Eric S. Bland (SC Bar No. 64132)
105 West Main Street, Suite D
Lexington, South Carolina 29072
T: 803.256.9664 | F: 803.256.3056
ericbland@blandrichter.com

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CERTIFICATE OF SERVICE

BLAND RICHTER, LLP
Attorneys for Appellant

Ronald L. Richter, Jr., SC Bar No. 66377
Scott M. Mongillo, SC Bar No. 16574
18 Broad Street, Mezzanine Level
Charleston, South Carolina 29401
T: 843.573.9900 | F: 843.573.0200
ronnie@blandrichter.com
scott@blandrichter.com

Eric S. Bland, SC Bar No. 64132
105 West Main Street, Suite D
Lexington, South Carolina 29072
T: 803.256.9664 | F: 803.256.3056
ericbland@blandrichter.com

I do hereby certify that I have served upon the parties in the above-referenced matter, by forwarding a copy of the same, via email to the following counsel listed below on March 11, 2025:

Documents:
APPELLANT'S INITIAL REPLY BRIEF

Counsel:

Paul Robert Rahn
Robertson Hollingsworth Manos & Rahn, LLC
40 Calhoun Street, Suite 330,
Charleston, SC 29401
prr@roblaw.net

Charleston, South Carolina
March 11, 2025

Bland Richter, LLP
Attorneys

Eric S. Bland*
Ronald L. Richter, Jr.
Scott M. Mongillo, Associate

*Also admitted in PA & FL
www.blandrichter.com

Reply to:
Peoples Building
Mezzanine Level
18 Broad Street
Charleston, SC 29401
Phone: 843.573.9900
Fax: 843.573.0200
ronnie@blandrichter.com
scott@blandrichter.com

Offices also at:
105 West Main Street
Suite D
Lexington, SC 29072
Phone: 803.256.9664
Fax: 803.256.3056
ericbland@blandrichter.com

March 11, 2025

VIA EMAIL ONLY:
Ms. Jenny Abbot Kitchings
South Carolina Court of Appeals – Clerk of the Court
PO Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

RE: Dow, Inc. vs. Beth Bartolini
Appellate Case No 2024-002009

Dear Ms. Kitchings,

Enclosed herewith, please find Appellant's Initial Reply Brief and Certificate of Service for the same regarding the above-referenced matter.

If you have any questions or concerns, please let me know.

Sincerely,

s/Ronald L. Richter, Jr.
Ronald L. Richter, Jr.
RLR/ebh

cc: (via email)
Eric S. Bland, Esquire
Scott M. Mongillo, Esquire
Paul Robert Rahn, Esquire
Alexander James Rudiak, Esquire
James David Smith, Jr., Esquire