

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Pampa Bay Landscape Construction,
LLC,

C/A No. 2024-CP-08-02013

Plaintiff,

**ORDER DENYING DEFENDANT GILLAM
& ASSOCIATES, INC.'S MOTION TO STAY
ACTION PENDING ARBITRATION**

vs.

Gillam & Associates, Inc. and Drayton-
Parker Companies, LLC,

Defendants.

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SC Court of Appeals

INTRODUCTION

This matter came before the Court on Defendant Gillam & Associates, Inc.'s ("Gillam") Motion to Stay Action Pending Arbitration. A hearing was held in-person on January 7, 2025. Gillam was represented by Matthew E. Cox, Esq., and the Plaintiff, Pampa Bay Landscape Construction, LLC ("Pampa Bay"), was represented by Dylan R. Glick, Esq. Based on briefs filed by the Parties, arguments made during the hearing, and South Carolina law, the Court **DENIES** Gillam's Motion to Stay Action Pending Arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

This dispute revolves around a subcontract ("Subcontract") Pampa Bay entered into with Gillam on or around June 23, 2023 to perform certain landscaping work at a new Parker's Kitchen gas station located at 343 College Park Road in Ladson, South Carolina 29456. A dispute arose as to Pampa Bay's payment and performance under the Subcontract leading to the instant action filed by Pampa Bay.

Pampa Bay filed a mechanic's lien on June 27, 2024 and its corresponding foreclosure complaint on July 19, 2024. Gillam filed a Motion to Dismiss, a Motion to Stay and Compel Arbitration, and an Answer and Counterclaim (subject to the Motion to Stay Action) on August 26, 2024. Gillam's Motion to Stay and Compel Arbitration is premised on an arbitration provision found within the Subcontract which reads as follows:

10.1 All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof shall be addressed by in-person meeting between corporate officers of the Contractor and the Subcontractor within twenty-five (25) calendar days after notice of the claim is first delivered. Additional meetings may be agreed to in writing by Contractor. Subcontractor's failure to attend that meeting for reasons beyond the control of the Contractor shall constitute a waiver of the claim or dispute if the claim or dispute is initiated by the Subcontractor for additional money or time. All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof not resolved at the meeting described in the first sentence of this paragraph or in a subsequent meeting agreed to in writing by Contractor, and not waived by Subcontractor's failure to meet, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") then obtaining unless the parties mutually agree in writing otherwise. The parties agree that the arbitration shall be administered by the arbitrator selected by agreement of the parties and not by the AAA unless the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party. If the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party then the arbitration shall be administered through the AAA, the arbitrator shall be selected through the rules and procedures of the AAA, and the parties shall be responsible for payment of AAA fees according to the Construction Industry Arbitration Rules of the AAA. This agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina. The arbitration hearing shall take place in Aiken or Columbia, South Carolina and the arbitrator shall be a South Carolina resident. The award rendered by the arbitrator(s) shall be final, and judgment may be entered in accordance with applicable law in any court having jurisdiction thereof. The foregoing notwithstanding, in the event the dispute resolution procedures in the Prime Contract differ from those set forth in this Subcontract, the claim and dispute resolution procedures of the Prime Contract shall govern disputes between Contractor and Subcontractor and supersede the prior terms of this subparagraph 10.1 to the extent Contractor determines, in its sole discretion, that disputes between the Contractor and the Subcontractor involve common issues of fact or law with disputes between the Contractor and the Owner. Subcontractor agrees that as to any disputes it has with the Contractor which the Contractor deems to involve common issues of fact or law with disputes with Owner or other subcontractors, then the

disputes between Contractor and Subcontractor may be consolidated or joined in the same dispute resolution procedure with other subcontractors, the Owner, and other entities as Contractor deems appropriate in its sole discretion.

Subcontract, Art. 10.1.

FINDINGS OF LAW

I. THE ARBITRATION CLAUSE IS UNENFORCEABLE BECAUSE IT FAILS TO MEET NOTICE REQUIREMENTS SET FORTH IN S.C. CODE ANN. § 15-48-10(A). IN ADDITION, THE FEDERAL ARBITRATION ACT (FAA) DOES NOT OTHERWISE APPLY.

a. Notice Requirements of S.C. Code ann. § 15-48-10(a) not met.

The South Carolina Uniform Arbitration Act (“SCUAA”) requires that any instrument requiring arbitration to boldly display notice to the parties that the instrument is subject to arbitration. S.C. Code Ann. § 15-48-10(a) provides, in relevant part:

Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

If notice is not provided as required by S.C. Code Ann. § 15-48-10(a), then the requirement to arbitrate is unenforceable. *Id.*

As recently as 2023, the Supreme Court of South Carolina refused to enforce an arbitration clause which failed the notice requirement required by S.C. Code Ann. § 15-48-10(a). *Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 634, 889 S.E.2d 564, 570 (2023). In *Hicks Unlimited, Inc.*, a dispute arose between UniFirst Corporation – a uniform rental company – and Hicks. UniFirst Corporation sought to enforce the arbitration provision in its contract. Importantly, the provision did not comply with the notice requirements of the South Carolina Uniform Arbitration Act. *Id.* at 628. The Circuit Court agreed and declined to enforce arbitration on that basis. The Court of Appeals reversed on other grounds. Finally, the Supreme Court of South Carolina agreed and declined to enforce the arbitration provision for failure to comply with South

Carolina Uniform Arbitration Act and because the FAA did not otherwise apply to the parties' contract. *Id.*

South Carolina courts require strict interpretation of statutes when the language is clear. *See Soil Remediation Co. v. Nu-Way Env't.*, 323 S.C. 454, 457 (1996) (“where the terms of the statute are clear, the court must apply those terms according to their literal meaning.”).

Here there is no dispute that the Subcontract does not meet the SCUAA notice requirements. The notice of arbitration is not prominently rubber-stamped on the first page, nor does it appear in capitalized and underlined letters anywhere in the Subcontract. The arbitration provision in the Subcontract is the same font size and color as every other provision in the Subcontract. The portion of the Subcontract where the arbitration clause is found is found on pages 11 and 12 with the inconspicuous title ‘Claims,’ without any mention of arbitration except further in that section. Based on Gillam’s failure to comply with the statutory requirements of S.C. Code Ann. § 15-48-10(a), the Court finds that arbitration clause in Gillam’s Subcontract is unenforceable.

B. The FAA does not apply to the Subcontract.

I. The Subcontract states South Carolina law shall apply.

Gillam argues that even though its arbitration provision does not comply with SCUAA, the requirements of the SCUAA do not apply because they are preempted by the FAA. The South Carolina Uniform Arbitration Act (“SCUAA”) applies to any agreement to arbitrate in South Carolina unless it is stipulated that SCUAA shall not apply in the agreement. S.C. Code Ann. § 15-48-10(b). In that case, the Federal Arbitration Act may apply only if interstate commerce is demonstrated by the moving party. The party claiming the FAA preempts state law bears the burden

of proving the contract involves interstate commerce. 9 U.S.C.A. § 1; *see also Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 634, 889 S.E.2d 564, 570 (2023).

South Carolina Courts have held that parties to a contract are free to elect state arbitration law or the FAA for dispute resolution. *See e.g. Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001) (“Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA.”); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (“Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.”)

The Court observes that Gillam’s Subcontract does not make any reference to the FAA. The FAA is not mentioned in the arbitration provision nor is it mentioned anywhere else in the 13-page Subcontract. On the contrary, Subcontract explicitly states it is governed by South Carolina law. Paragraph 11.1 provides “[t]he provision of this Subcontract shall be controlled and interpreted by the laws of the State of South Carolina. . .” The arbitration provision in the Subcontract specifically provides “this agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina.” The arbitration provision further provides any arbitration hearing shall take place in Aiken or Columbia, South Carolina and that the arbitrator shall be a South Carolina resident. The Court finds that these requirements in Gillam’s Subcontract evince a clear intent that South Carolina law should govern. “To discover the intention of a contract, the court must first look to its language-if the language is perfectly plain and capable of legal construction, it alone determines the document’s force and effect.” *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007)

(citing *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)). Accordingly, the Court finds Gillam intended for SCUAA to govern the arbitration provision in the Subcontract.

II. Even assuming the Subcontract did not specify South Carolina Law applied, Gillam has failed to demonstrate the existence of interstate commerce to invoke the FAA.

The previously cited 2023 South Carolina Supreme Court opinion in *Hicks Unlimited, Inc.* also has particular relevance for resolving the question of applicability of the FAA. The Court in *Hicks* held “a party seeking to compel arbitration under the FAA must demonstrate that the contract implicates interstate commerce.” 439 S.C. at 632, 889 S.E.2d at 568. Importantly, a party “may not make the connection by declaring or contemplating the FAA will govern.” *Id.* By reaching this conclusion, the Court clarified the opinions in *Munoz* and *Damico* which ushered in a presumption of the applicability of the FAA, especially in construction contracts. “To the extent *Munoz v. Green Tree Fin. Corp.* and *Damico v. Lennar Carolinas, LLC* have been read as allowing parties to agree the FAA preempts South Carolina law without an accompanying demonstration the contract involves interstate commerce, we clarify now they do not.” *Id.* To determine whether interstate commerce is implicated by the parties, a court looks to “the agreement, the complaint, and the surrounding facts, including any affidavits submitted.” (internal quotations omitted). *Id.* The Court held that the mere shipping of products from Kentucky to South Carolina, payment made outside the state of South Carolina, and one of the parties being domiciled in Massachusetts were all insufficient to invoke interstate commerce. As a result, the Court affirmed the trial court’s decision to deny arbitration as unavailing under the FAA and failing to comply with the SCUAA.

Gillam’s Motion to Stay Action Pending Arbitration Between the Parties argues that the FAA should apply instead of SCUAA because the Subcontract involves interstate commerce. To

support this argument, Gillam offers the Affidavit of Eric Floyd, the project manager for Gillam. The Affidavit contains statements by Mr. Floyd about where materials used by Pampa Bay may have originated from. Mr. Floyd attests 'I understand that Pampa Bay purchased the following products from SiteOne Landscape Supply which procured the materials outside South Carolina:

- (a) Irrigation heads and clock valves from Hunter Brand – these were distributed from *either* Charlotte, North Carolina or Atlanta, Georgia;
- (b) PVA pipe from Crestline Pipe which were directly sourced from Pennsylvania *or* Indiana Fittings (Spears) and distributed from either Charlotte or Atlanta.'

Aff. of Eric Floyd ¶ 4 (a-b).

The Court is unwilling to accept Mr. Floyd's Affidavit as sufficient evidence to support the existence of interstate commerce. The Affidavit amounts to unsupported assumptions by Mr. Floyd about the origin of various products. Mr. Floyd cannot even narrow down the state of origin of particular products to less than two possible states, even assuming his assumptions are correct at the outset. This is insufficient under the new standard for demonstrating the existence of interstate commerce set forth in *Hicks Unlimited; see also Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 285, 851 S.E.2d 724, 734 (Ct. App. 2020), *aff'd as modified*, 440 S.C. 456, 892 S.E.2d 297 (2023) (trial court has discretion to strike or disallow an affidavit for consideration).

Moreover, Peter Gallo, Pampa Bay's owner, submitted an Affidavit attesting Pampa Bay did not directly source the products Mr. Floyd cites from out-of-state sources and were instead purchased and picked up from a local Ladson store. Aff. of Peter Gallo ¶¶ 8, 10.

Based on the Affidavits of Peter Gallo and Eric Floyd, it is clear there is a genuine dispute about the existence of interstate commerce. Under these circumstances and our case law, it would be inappropriate to deprive Pampa Bay of its constitutional right to a jury trial. Accordingly, the FAA does not preempt the SCUAA under the facts at hand because Gillam has failed to demonstrate the existence of interstate commerce.

CONCLUSION

For the foregoing reasons, the Court denies Gillam's Motion to Stay Action Pending Arbitration.

[Judge's electronic signature page to follow]



Berkeley Common Pleas

Case Caption: Pampa Bay Landscape Construction Llc VS Gillam & Associates, Inc.
, defendant, et al
Case Number: 2024CP0802013
Type: Order/Other

And It Is So Ordered!

s/Dale E. Van Slambrook S.C. Circuit Court Judge
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