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4841-6274-3062, v. 1

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2007-CP-46-0119

J. W. Neal Construction, LLC.................................. Respondent,

v.

Cornelia Thomas.. Appellant.

APPELLANT'S REPLY BRIEF

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1. **The Appellant was not required to appeal the interlocutory order.**

To enter judgment on an arbitration award, a motion to confirm the arbitration award must be made. S.C. Code Ann. Section 15-48-120 (1978) Until the order confirming the award is entered, there is no final judgment from which an appeal must be taken.

Here, after twenty-two (22) months of inaction, Neal filed a motion to confirm the arbitrator's award. (Neal Motion to Confirm) The Court issued its order confirming the arbitration award and entered judgment thereon. A Notice of Appeal was timely filed.

The Order issued by the Trial Court on June 1, 2010 was not a final order. The Order denied Thomas's motion to confirm the initial award issued by the Arbitrator, modified the Arbitrator's award, and remanded the case to the Arbitrator to determine attorneys' fees. (Trial Court Order June 1, 2010)

Section 15-48-200 (1976) of the South Carolina Code provides that a party may appeal an order modifying an arbitration award. However, the appeal of an interlocutory order is not required. If an appeal of an interlocutory order is not filed, the Court of Appeals has jurisdiction to review all interim orders when the final order is appealed. S.C. Code Ann §14-3-330 (1). Having filed a timely appeal from the final order, the Court may properly review the issues addressed in the Trial Court's Order dated June 1, 2010.

Respondent misreads Link v. Destiny, Inc., 302 S.C. 1, 393 SE 2d 176 (1990). Appellant submits that Link supports the approach taken by the Appellant regarding appeal of intermediate orders.

In Link, the Court granted summary judgment on several, but not all, claims asserted by the Plaintiff. The case was tried. A directed verdict was granted against Link on one cause of action, a jury verdict was granted against Link on the remaining claims.

Issuance of the jury verdict against Link was the "final judgment". Adickes v. Allison & Bratton, 21 S.C. 245 (1884). Link filed a notice of appeal seeking appellate review of the intermediate order granting summary judgment.

The Supreme Court specifically and expressly rejected the argument that Link waived his right to appeal the intermediate order granting partial judgment by waiting to appeal after issuance of the final order.

> "...Link was entitled here under § 14-3-330 (1) to wait until final judgment to appeal the Summary Judgment order against him." Link, id. at p. 178

The Court found that Link's appeal was controlled by §14-3-330 (1). §14-3-330 (1) provides that when intermediate orders involving the merits are issued:

> "...if no appeal be taken until final judgment is entered, the Court may, upon appeal from such final judgment review, any intermediate order or decree necessarily affecting the judgment not before appealed from ..." Link, id. at p. 178

Here, Appellant initially filed a Notice of Appeal of the intermediate order modifying the arbitrator's award. As reflected in Appellant's motion to dismiss the initial appeal, the appeal was filed out of an abundance of caution. (Motion to Dismiss Appeal)

After reviewing § 14-3-330 and the cases interpreting the statute, Appellant elected to dismiss the appeal of the intermediate order. Upon issuance of the final order, a timely appeal was filed requesting review of the intermediate order. This is the procedure specifically approved by Link.

The Trial Court modified the Award by Order filed June 23, 2010. The Court remanded the case to the Arbitrator to determine the amount of attorneys' fees. For reasons which are unexplained in the record, Respondent did not file a motion to confirm the award until April 19, 2012. The delay was exclusively the fault of the Respondent. As soon as final judgment was entered this Appeal was filed.

2. **Appellant moved to amend the answer to assert failure to be licensed as a defense.**

A contractor, who is not properly licensed in South Carolina to build a house, may not pursue an action to enforce the provisions of a contract. C – Sculptures, LLC. v. Brown, 403 S.C. 53, 742 SE 2d 359 (2013). Failure of an arbitrator or a Court to enforce

the prohibition against unlicensed contractors pursuing a claim constitutes "manifest disregard of the law" and is grounds for vacating an arbitration award. (Id. at p. 362).

The defense of failure to have a valid license is an affirmative defense which must be pled. Earthscapes Unlimited, Inc. v. Ullrich, 390 S.C. 609, 703 SE 2d 221 (S. Ct. 2010). However, in Earthscapes, the Supreme Court recognized that Rule 15(b) provides an exception to the waiver rule by permitting a party to amend his or her pleadings to conform to the evidence. Id. at p. 225. Even at the Rule 59 (e) post trial motion stage, a motion to amend the pleadings to assert an affirmative defense may be made. Id. at p. 225.

It is apparent that the Supreme Court's decision in Earthscape would have been different had a motion to amend the pleadings to assert lack of a valid license been made.

> "In this case, there was a Rule 59(e) post trial motion filed arguing that Section 40-11-370 of the South Carolina Code precludes the enforcement of this action. However, Appellants never amended their pleadings to incorporate this affirmative defense. Appellants cannot benefit from an affirmative defense that was never pled. Hence we affirm the Circuit Court's denial of Appellants' Rule 59 (e) post trial motion". Id at p. 225

In the case now before the Court, Appellant filed a motion to amend the pleadings to include the defense that respondent Neal was not validly licensed. (Motion to Dismiss Mechanic's Lien) There is no evidence in the record that Neal's license lapsed. The only evidence in the record is that J. W. Neal, LLC has never been licensed. Appellant submits that the Court's failure to allow the amendment and the trial court's confirmation of the award was error.

3. **The Arbitrator was not authorized to amend the first award**. The record is clear that the request to modify the award was not made within the time required

by the rules of the American Arbitration Association[1]. Respondent essentially argues that the time limit for asking for modification of an arbitration award should not be applied. The basis for the Respondent's argument is not clear.

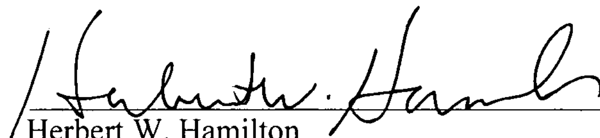
It is clear that the time limit for asking for modification of the award was not met. There is no reason why the time limit should be waived or extended after the fact.

Appellant's previous brief addresses the issue of the nature of awards which can be amended under the Rules of the American Arbitration Association. The arguments made by Respondent do not change the fact that a computational error does not appear on the face of the Order. Without resort to information outside of the Order itself, which of the figures recited by the Arbitrator is accurate cannot be determined.

CONCLUSION

Respondent respectfully requests that the Court's Order confirming the amended award should be reversed and judgment entered on the arbitrator's first award.

September 30, 2013



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[1] Appellant refers to Rule R-48 of the Construction Industry Rules of the American Arbitration Association. Respondent refers to Rule R-46 of the Commercial Rules of the American Arbitration Association. The rules are identical.

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Cornelia Thomas.. Appellant.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens Ballou & Carroll, LLC certifies that the Appellant's Reply Brief was served upon other counsel of record by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

John Martin Foster
Attorney at Law
P. O. Box 106
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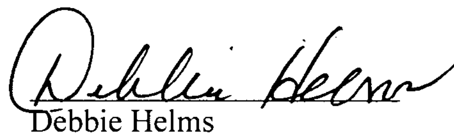
This the 30th day of September, 2013.



Debbie Helms

4817-4898-6390, v. 1

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2007-CP-46-0119

J. W. Neal Construction, LLC.................................. Respondent,

v.

Cornelia Thomas.. Appellant.

Supplemental Designation of Matters to be
Included in Record on Appeal

1. Motion to Dismiss
   Appeal and Memorandum dated April 26, 2010

2. Order dated June 9, 2012 remanding case to Arbitrator

3. Letter transmitting Arbitration Award

4812-8545-0518, v. 1