THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY

Court of Common Pleas

The Honorable Dale E. Van Slambrook, Circuit Court Judge

Case No. 2024-CP-08-02013

Appeal No. 2025-000500

Pampa Bay Landscape Construction, LLC, ...Respondent,

v.

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

Of which Gillam & Associates is the Appellant.

BRIEF OF RESPONDENT

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ARGUMENTS

This Court should affirm the Order of the Circuit Court denying the motion to compel arbitration, because:

- The Circuit Court properly held the Subcontract did not involve interstate commerce, and therefore the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) ("FAA") did not apply to the Subcontract.
- The Circuit Court, correctly applying the South Carolina Uniform Arbitration Act (S.C. Code Ann. § 15-48-10) ("SCUAA"), properly held the arbitration provision in the Subcontract was unenforceable.

I. THE CIRCUIT COURT PROPERLY HELD THE SUBCONTRACT DID NOT INVOLVE INTERSTATE COMMERCE, AND THEREFORE THE FAA DID NOT APPLY TO THE SUBCONTRACT.

a. The Circuit Court Correctly Found that The Parties Intended for the SCUAA, and not the FAA, to apply to arbitration under the Subcontract.

As a matter of first impression, South Carolina Courts have held that parties to a contract are free to elect state arbitration law, such as the SCUAA, over the FAA for dispute resolution. *See e.g. Zabinksi 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.") (emphasis added). Indeed, the United States Supreme Court has disavowed the reflexive application of the FAA to state arbitration law when the parties have contracted otherwise. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468,

477 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."); *see also Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) (recognizing the same principle).

Appellant attempts to distance itself from the language of its own standard Subcontract by arguing the phrase 'arbitration law of South Carolina' was somehow intended to mean the vast body of South Carolina case law instead of South Carolina's primary authority on arbitration, the SCUAA. Appellant's tortured interpretation of the language of its Subcontract is merely an attempt to revise the language of the Subcontract after its enforceability has been challenged. As evidenced by the clear language of Appellant's Subcontract, the intention of the parties was for South Carolina arbitration law – the SCUAA – to govern their dispute if subjected to arbitration. "This agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina." (Contract, Art. 10.1., R. pp. 28-29). In addition to expressly stating South Carolina arbitration law shall apply, the Subcontract goes further to mandate the arbitration hearing shall take place in Aiken or Columbia, South Carolina and the arbitrator shall be a South Carolina resident. "The arbitration hearing shall take place in Aiken or Columbia, South Carolina and the arbitrator shall be a South Carolina resident." (Contract, Art. 10.1., R. pp. 28-29). When the language of a written contract is clear, a Court must enforce it accordingly. *See e.g. 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) ("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."); *see also Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) ("Arbitration agreements, like other contracts, are enforceable in accordance with their terms.").

b. The Circuit Court Correctly found that Appellant failed to affirmatively demonstrate the existence of interstate commerce as required by the FAA and South Carolina law.

Even assuming the Court finds language of Appellant's Subcontract is not dispositive as to the exclusion of the FAA and applicability of the SCUAA, Appellant has failed to affirmatively demonstrate the presence of interstate commerce as required by the FAA and South Carolina law. Instead, Appellant appears to rely on a generalized assumption that any construction matter must inherently include interstate commerce, and therefore their obligation to prove interstate commerce is over before it even begins.

Such a view has been disavowed by the South Carolina Supreme Court and many other States. South Carolina has joined numerous other states by holding "a party seeking to compel arbitration under the FAA must demonstrate that the contract implicates interstate commerce." *Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 632, 889 S.E.2d 564, 568 (2023); *see also Gen. Fin., Inc. v. Morton*, 812 So.2d 282, 284-85 (Ala. 2001) ("The party seeking to compel arbitration has the initial burden of proving . . . that the contract evidences a transaction substantially affecting interstate commerce."); *Lane v. Francis Cap. Mgmt. LLC*, 224 Cal. App. 4th 676, 687–88, 168 Cal. Rptr. 3d 800, 809 (2014) ("a petitioner seeking an order to compel arbitration [under the FAA] must show that the subject matter of the agreement involves interstate commerce."; *Arkansas Diagnostic Ctr., P.A. v. Tahiri*, 370 Ark. 157, 163, 257 S.W.3d 884, 890 (2007) ("The party seeking to compel FAA arbitration must show the existence of a written agreement, which contains an arbitration clause and affects interstate commerce.").

Appellant cites to *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 608, 879 S.E.2d 746, 753 (2022) and *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001), in support of the claim that construction contracts create a rebuttable presumption of interstate commerce. However, Appellant overlooks the South Carolina Supreme Court's recent 2023

decision in *Hicks Unlimited, Inc.* which ended any such presumption of the FAA's applicability for construction contracts. The Court, alert to the Appellant's generalized argument about the reflexive application of the FAA in light of *Munoz* and *Damico*, clarified their scope and application. The Court declared "[t]o 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 involved interstate commerce, **we clarify now that they do not**." *Hicks*, at 632, 889 S.E.2d at 568. (emphasis added).

The Court in *Hicks*[1] supplanted any purported presumption in favor of FAA preemption with a rigorous, fact-dependent analysis applied on a case-by-case basis. To determine if a transaction implicates interstate commerce, "the court examines the agreement, the complaint, and the surrounding facts, including any affidavits submitted….The inquiry is fact dependent and focuses on what the specific contract terms require for performance." *Id*.; *see also Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) ("To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.").

As emphasized in *Hicks*, a Circuit Court's determination of interstate commerce is a factual finding. *See e.g. Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003) ("In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case."). Although the review of whether interstate commerce exists presents a *de novo* question of law for an appellate court, the *Hicks* Court clarified an appellate

[1] Appellant is correct that the *Hicks* case dealt with a non-construction fact pattern, however, such is irrelevant because the South Carolina Supreme Court declined to enforce arbitration pursuant to the FAA on the basis that the petitioner failed to demonstrate the existence of interstate commerce, thereby reversing the Court of Appeals which determined evidence of shipping uniforms from Kentucky to South Carolina and payments made from South Carolina to petitioner in Massachusetts were sufficient evidence of interstate commerce.

court examining the Circuit Court's factual basis for interstate commerce "will not . . . disturb the factual findings of the circuit court that have rational support in the record. *Hicks Unlimited, Inc.*, 439 S.C. at 629, 889 S.E.2d at 567.

The Circuit Court determined that the FAA did not apply to the Subcontract because Gillam failed to demonstrate the existence of interstate commerce. First, the language of the Subcontract evidences not only a lack of intent for the FAA to apply, but a lack of interstate commerce. The Subcontract makes no mention of the FAA whatsoever, stating instead: "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." (Contract, Art. 10.1., R. pp. 28-29). Therefore, there is no evidence of interstate commerce within the terms of the Subcontract.

Further, the Circuit Court did not abuse its discretion in reaching the conclusion that Gillam failed to demonstrate the existence of interstate commerce. In support of his Motion to Stay Action Pending Arbitration Between the Parties, Gillam relied upon the Affidavit of Eric Floyd, which contained attestations that Subcontract materials "were distributed from *either* Charlotte, North Carolina *or* Atlanta, Georgia," and "were directly sourced from Pennsylvania *or* Indiana Fittings (Spears) and distributed from *either* Charlotte *or* Atlanta." (Exhibit A-1 to Motion to Stay – Affidavit of Eric Floyd, ¶ 3 (a-b)., R. pp. 73-74) (emphasis added). After reviewing the Affidavit of Eric Floyd and other assertions by Appellant, the Circuit Court declined to accept the Affidavit as sufficient evidence of interstate commerce, finding Floyd's Affidavit to be no more than "unsupported assumptions" about the origin of various materials. (Order of February 12, 2025., R. p. 7). Conversely, Pampa Bay offered the Affidavit of Peter Gallo, attesting that Pampa Bay, a South Carolina Limited Liability Company conducting business solely in South Carolina, did not

directly source the Subcontract materials from out-of-state sources and were instead purchased and picked up from a local Ladson store. (Exhibit B to Memo in Opposition – Affidavit of Peter Gallo, ¶¶ 8, 10., R. pp. 98-99). The Circuit Court, considering the Subcontract, Complaint, and affidavits presented, weighed the factors in *Hicks* and correctly determined that Gillam failed to carry its burden to affirmatively demonstrate the existence of interstate commerce. The Court acted within its discretion and made a factual determination supported by the evidence in the record. Accordingly, the Circuit Court's finding that the FAA was not applicable to the Subcontract was not in error. *Accord Hicks Unlimited, Inc.*, 439 S.C. at 629, 889 S.E.2d at 567. "[an appellate court] will not . . . disturb the factual findings of the circuit court that have rational support in the record."

II. THE CIRCUIT COURT, CORRECTLY APPLYING THE SCUAA, PROPERLY HELD THE ARBITRATION PROVISION IN THE SUBCONTRACT WAS UNENFORCEABLE.

Because the Circuit Court correctly determined FAA does not apply to the Subcontract due to a lack of interstate commerce, the Circuit Court correctly applied the SCUAA when determining the enforceability of the Subcontract. S.C. Code Ann. § 15-48-10 (a) of the SCUAA 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 in accordance with S.C. Code Ann. § 15-48-10 (a), then the requirement to arbitrate is unenforceable. *Id.* The Circuit Court held that the notice requirements of the SCUAA were not met, as the notice of arbitration was not prominently rubber-stamped on the front page, nor is it capitalized or underlined anywhere in the Subcontract. Instead, the arbitration provision appeared on Pages 11 and 12 of the 13-page Subcontract with no other indication of its presence. In fact, the header to the arbitration provision itself is unassuming,

failing to mention arbitration and instead only noting the section applied to 'Claims'. (Contract, Art. 10.1., R. pp. 28-29). Based on these facts and the statutory requirements for all arbitration agreements in S.C. Code Ann. § 15-48-10(a), the Circuit Court properly applied the SCUAA and determined that the arbitration provision in the Subcontract was unenforceable.

Notably, Appellant does not challenge or address this determination on appeal. Appellant relies on their argument that the FAA preempts the SCUAA, and therefore does not even address the statutory requirements of the SCUAA. Based on the record, Appellant's arguments at the hearing, and Appellant Brief, there does not appear to be any dispute that Appellant failed to meet the requirements of S.C. Code Ann. § 15-48-10 (a). By not raising this issue on appeal, Appellant has conceded that the arbitration provision is unenforceable unless the FAA preempts the SCUAA, which is why Appellant attempts to argue for the presence of interstate commerce where none exists.

CONCLUSION

The Circuit Court properly denied Appellant's Motion to Stay and Compel Arbitration. The Circuit Court's factual findings that the Subcontract did not involve interstate commerce was reasonably supported by the evidence and consistent with South Carolina law. Lacking any credible evidence of interstate commerce, the Circuit Court properly applied the SCUAA as required by Appellant's Subcontract and correctly found that Appellant's Subcontract is unenforceable thereunder for lack of proper notice as required by the SCUAA. Accordingly, the Circuit Court acted within its discretion and with sufficient factual support in the record in denying Appellant's Motion to Compel Arbitration.

[*Signature page follows*]

Respectfully submitted,

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