STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-10-5191

LEND LEASE (US) PUBLIC PARTNERSHIP LLC f/k/a ACTUS LEND LEASE LLC,

Plaintiff,

v.

ALLSOUTH ELECTRICAL CONTRACTORS, INC.,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO STAY AND COMPEL ARBITRATION

Presiding Judge:	Deadra L. Jefferson
Plaintiff's Attorney:	Edward J. Coyne, Esq.
Defendant's Attorney:	M. Brent McDonald, Esq.
Date of Hearing:	December 5, 2011
Court Reporter:	Joyce Huck

This matter came before the Court on December 5, 2011 on Plaintiff's Motion to Stay and Compel Arbitration filed October 7, 2011. Plaintiff's Motion is made pursuant to S.C. Code Ann. § 15-48-20 and the Federal Arbitration Act, 9 U.S.C. § 1 et seq. Appearing on behalf of the Plaintiff was Edward J. Coyne, Esq. Appearing for the Defendant was M. Brent McDonald, Esq. This Court, after reviewing the briefs, the record, and hearing oral argument, grants Plaintiff's Motion to Stay and Compel Arbitration.

STANDARD OF REVIEW

> On application of a party showing an agreement described in § 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

1-08
2009

S.C. Code Ann. § 15-48-20(a). Whether a claim is subject to arbitration is an issue for judicial determination unless the parties provide otherwise. Partain v. Upstate Automotive Group, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). "The policy of the United States and of South Carolina is to favor arbitration of disputes." Id. (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). "Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered." Partain, 386 S.C. at 491, 689 S.E.2d at 603–04. "[W]hen deciding whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause." Id. at 491–92, 689 S.E.2d at 604 (citing Zabinski, 346 S.C. at 597, 553 S.E.2d at 118). "[A] claim falls within the scope of an arbitration clause if it is encompassed by the language of the clause or if a 'significant relationship' exists between the claim and the contract." Partain, 386 S.C. at 492, 689 S.E.2d at 604.

APPLICABLE FACTS and PROCEDURAL POSTURE[1]

Lend Lease (US) Public Partnership, LLC f/k/a Actus Lend Lease, LLC ("Plaintiff") entered into certain contracts for construction with Tri-Command Managing Member, LLC ("Owner"), under which Plaintiff agreed to demolish and renovate certain existing housing and related facilities at the Beaufort Marine Corps Air Station Paris Island Marine Corps Recruiting Depot or the Beaufort Naval Hospital ("Projects"). In connection with its performance of the Projects, Plaintiff entered into four (4) separate contracts with Allsouth Electrical Contractor's

[1] These facts are taken as true for purposes of this Motion to Compel Arbitration. The Court is not finding these facts as true for the case, because in deciding whether the parties have agreed to submit a particular claim to arbitration, a court is not to rule on the potential merits of the underlying claims. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).

Inc. ("Defendant") to perform a part of the electrical work required by the projects ("Subcontracts"). Defendant undertook to perform all four (4) subcontracts, and subsequently, the Owner notified Plaintiff the electrical work performed by Defendant was defective and contained faulty workmanship. Plaintiff alleges it gave notice to Defendant of the defective work and made demand on Defendant to honor its contracts and warranties. Despite notice and demand, Defendant has allegedly refused to honor its contracts and warranties.

Plaintiff filed a Summons and Complaint in this action on July 22, 2011 in which it alleges, as to each subcontract, causes of action for breach of contract, breach of warranty, indemnity and negligence. Plaintiff alleges the claims are subject to arbitration. (Compl. ¶ 16–19.) Contemporaneous with the filing of this action, Plaintiff served and filed a demand for arbitration of all asserted claims with the American Arbitration Association. Defendant filed an Answer on September 29, 2011 in which Defendant denied Plaintiff's allegation that the claims are subject to arbitration. (Answer ¶ 17–20.) Defendant claims the subcontracts fail to comply with South Carolina law relative to arbitration clauses, and Plaintiff failed to comply with the express terms of the arbitration clause. (Id. at ¶ 17.) Plaintiff filed the present Motion to Stay and Compel Arbitration on October 7, 2011, and Defendant filed its Memorandum in Opposition thereto on October 17, 2011.

CONCLUSIONS OF LAW

Each subcontract entered into between Plaintiff and Defendant contains an identical arbitration clause which provides as follows:

> Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

> Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, *a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim.* If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

(See Ex. 1 to Compl.)

At the hearing before the Court on December 5, 2011, the Defendant conceded that the matter involves interstate commerce. First, Defendant contends the arbitration provision is deficient and unenforceable pursuant to S.C. Code Ann. § 15-48-10(a) in that notice of the arbitration provision does not appear on the first page of the alleged contracts. Section 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."

The Defendant is correct that notice of the arbitration provision does not appear on the first page of the alleged subcontracts. Rather, the provision is found in subsection "4.2.1.2 Unresolved Claims," which is one page 22 of each subcontract. However, Section 15-48-10 was

preempted by Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (2001). Title 9 U.S.C. § 2 of the FAA provides in pertinent part:

> [A] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

In Munoz, the South Carolina Supreme Court stated, "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." 343 S.C. at 538, 542 S.E.2d at 363. The transaction in this case in fact involves interstate commerce, as conceded to by the parties; thus the FAA applies.

Second, Defendant contends the letters attached to the affidavit of Mr. Lesesne evidence the fact that the Plaintiff was aware of facts giving rise to its potential claims at least as early as May 21, 2010. The Plaintiff filed a demand for arbitration in this matter on July 25, 2011. Thus, Defendant contends Plaintiff failed to meet the condition precedent provided in the arbitration provision requiring "a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim."

Plaintiff contends the "180 days" provision does not control in this case, as all of the causes of action fall within the preceding exception, which excludes from the 180 days demand requirement, "claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and . . . claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment"

("indemnity exception"). Defendant contends that all of the causes of action are not for indemnity because they are not titled as such.

"Regardless of the label the plaintiff uses, when deciding whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause." Partain, 386 S.C. at 491, 689 S.E.2d at 604 (citing Zabinski, 346 S.C. at 597, 553 S.E.2d at 118). Here, the Plaintiff alleges, as to each subcontract, causes of action for breach of contract, breach of warranty, indemnity and negligence. While the causes of action for indemnity obviously come within the indemnity exception, the Court must determine whether the remaining causes of action lie in indemnity. "Indemnity" is defined as follows:

> A collateral contract or assurance, by which one person engages to secure another from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person. Term pertains to liability for loss shifted from one person held legally responsible to another person.

Black's Law Dictionary 692 (5th ed. 1979).

In the breach of contract causes of action, Plaintiff alleges Defendant failed to "perform its work in a good and workmanlike manner and failed to comply with the plans and specifications." (Compl. ¶¶ 22, 48, 74, and 100.) In the breach of warranty causes of action, Plaintiff alleges the work performed by Defendant was defective, Defendant refused to correct the work despite demand, and breached its guarantee and warranty as set forth in the subcontracts. (Compl. ¶¶ 29–30, 55–56, 81–82, 107–08.) In the negligence causes of action, Plaintiff alleges Defendant performed the work required by the subcontracts in a negligent manner which caused Defendant damage. (Compl. ¶¶ 41–42, 67–68, 93–94, 119–20.) Under each cause of action, Plaintiff alleges damages to include the cost to repair the defective work, extended overhead and general conditions, and other costs incurred or to be incurred, in making

the repairs. The Court finds the Plaintiff is requesting to be indemnified for the costs incurred in making the repairs made as a result of Defendant's alleged breach of contract, breach of warranty, and negligence. Therefore, the Court finds the causes of action for breach of contract, breach of warranty, and negligence lie in indemnity and fall within the indemnity exception of the arbitration clause.

For further guidance, the Court also reviewed the Indemnification provision contained in each subcontract at Section 9. Subsection 9.1 "Subcontractor's Performance" provides in relevant part,

> . . . Subcontractor shall indemnify and hold harmless . . . Actus Lend Lease, LLC . . . from and against all claims, damages, losses and expenses, including but not limited to attorney's fees arising out of or resulting from the performance of Subcontractor's Work provided that any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property . . . including the loss of use resulting therefrom, to the extent caused or alleged to be caused in whole or in part by any negligent act or omission of Subcontractor or anyone directly or indirectly employed by Subcontractor or for anyone for whose acts Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

Based on the factual allegations in the Complaint, as well as the Indemnification provision contained in each subcontract, this Court finds that all causes of action lie in indemnity. Therefore, all causes of action fall within the indemnity exception, and Plaintiff was not required to provide 180 days' notice to submit the matter to arbitration. Accordingly, all of the underlying claims in this action are within the scope of the arbitration clause and shall proceed to arbitration.

CONCLUSION

The Court, having considered appropriate matters of record, the briefs and arguments of counsel, and the ends of justice, and having FOUND and CONCLUDED that the Plaintiff's Motion to Stay and Compel Arbitration should be GRANTED;

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED and DECREED that the above-captioned civil action be, and hereby is, STAYED, and the Parties shall proceed to arbitrate the dispute between them.

SO ORDERED, this the 2nd day of Feb., 2012.

D. L. Jefferson

The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By _____ DEPUTY CLERK

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-10-5191

LEND LEASE (US) PUBLIC PARTNERSHIP LLC f/k/a ACTUS LEND LEASE LLC,

Plaintiff,

v.

ALLSOUTH ELECTRICAL CONTRACTORS, INC.,

Defendant.

ORDER DENYING DEFENDANT'S RULE 59, SCRCP MOTION

Presiding Judge:	Deadra L. Jefferson
Plaintiff's Attorney:	Edward J. Coyne, Esq.
Defendant's Attorney:	M. Brent McDonald, Esq.
Date of Hearing:	December 5, 2011
Court Reporter:	Joyce Huck

THIS MATTER is before the Court on the Defendant's Motion to Alter or Amend Judgment pursuant to Rule 59, SCRCP. On December 5, 2011 this Court held a hearing on Plaintiff's Motion to Stay and Compel Arbitration. The Court's Order granting Plaintiff's Motion was filed February 9, 2012. Defendant's Motion to Alter or Amend was filed February 21, 2012 which was received by the Court on the same day. Plaintiff's Counsel advised the Court he was not inclined to file a written response to Defendant's Motion, as he found the Court's Order to be sufficient.

STANDARD OF REVIEW

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment, is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (quoting Arnold v. State, 309 S.C.

157, 172, 420 S.E.2d 834, 842 (1992)). The Supreme Court has clarified the two situations in which a Rule 59(e) motion is appropriate. "A party may wish to file such a motion when she 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. A party must file such motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Additionally, "[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Mem'l Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)).

ANALYSIS

First, Defendant requests the Court to rule upon each and every argument made in its Memorandum in Opposition to the Motion to Stay. The Court need not address all issues where disposition of a prior issue is dispositive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999). The Court ruled on the dispositive issues in the case, that being whether the Arbitration provision is enforceable and whether the Plaintiff's causes of action are encompassed by the scope of alleged contracts' arbitration provision. Accordingly, Defendant's request is denied.

Additionally, Defendant requests for clarification as to whether the Court ruled as a matter of fact and law that the limitations provision provided in the alleged contract between the parties does not apply to bar any claims of the Plaintiff. In opposition to the Plaintiff's Motion to Stay and Compel Arbitration, Defendant argued 1) the arbitration provision is deficient and unenforceable pursuant to S.C. Code Ann. § 15-48-10(a), and 2) the Plaintiffs filed the demand

for arbitration more than 180 days after the party knew, or should have known, of facts giving rise to the claim, as provided by the contract. Therefore, the Court had to determine 1) whether the arbitration provision was enforceable under Section 15-48-10(a), and 2) whether the "180 days" demand requirement in the arbitration provision was applicable to the Plaintiff's causes of action. The demand requirement referred to by the Defendant in provision "4.2.1.2 Unresolved Claims" states,

> Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, *a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim*.

The Plaintiff argued that the 180 days requirement did not apply because the Plaintiff's claims were for indemnity arising out of defects in the work performed by the subcontractors. Therefore, in order to determine the applicability of the 180 days demand requirement, the Court had to determine whether the Plaintiff's causes of action fell under "indemnity."

"[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). To clarify, the Court made the following conclusions of law. First, the Court found that the FAA applies, and, thus, Section 15-48-10 does not apply, as it was preempted by Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (2001). Second, the Court found that all of Plaintiff's causes of action lie in indemnity. Therefore, the 180 days demand requirement relied on by the Defendant is inapplicable, and the Plaintiff was not required to provide such demand in order to have this matter resolved by arbitration according to the arbitration provision in the alleged contracts. Accordingly, the Court found the underlying claims to be within the scope of the arbitration

clause. To clarify further, the Court did not make rulings of fact and law on the potential merits of the underlying claims.

CONCLUSION

Having considered the Defendant's Motion, the timeliness of the Motion, as well as the various interests balanced by the Court at the time of the ruling, the Defendant's Motion to Alter or Amend is hereby denied.[1]

IT IS SO ORDERED.

The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

3/1, 2012
Charleston, South Carolina

[1] This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).