THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS
Deadra L. Jefferson, Circuit Court Judge
Case No.: 2011-CP-10-5191

Appellate Case No. 2013-002679

Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease..... Respondent,

vs.

Allsouth Electrical Contractors, Inc. ..... Appellant.

MEMORANDUM ON APPEALABILITY IN THIS MATTER

On December 11, 2013, the Appellant Allsouth Electrical Contractors, Inc. ("Appellant") served and filed a Notice of Appeal regarding two orders issued by the lower court in which the lower court compelled the Appellant to arbitrate the claims of Respondent Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease ("Respondent"). On January 6, 2014, the clerk for the South Carolina Court of Appeals sent a letter to counsel for the Appellant requesting a memorandum on the "issue of appealability" of the orders challenged on appeal. The Appellant hereby submits the following:

Procedural History

The Respondent filed a civil action in the Court of Common Pleas for Charleston County on July 22, 2011. In the Complaint, the Respondent alleged that the claims made in its complaint were subject to arbitration. The Appellant answered the Complaint on September 29, 2011 and denied the allegations therein, including the allegations that this

action was subject to arbitration. The Respondent moved to stay the civil action it filed and to compel arbitration pursuant to S.C. Code Ann. Section 15-48-20 and Federal Arbitration Act, 9 U.S.C. Sections 1, *et seq.* ("FAA") on October 5, 2011. The Appellant responded to the motion and objected to arbitration.

The Honorable Deadra Jefferson entered an order staying the civil action and compelling arbitration on February 9, 2012, pursuant to Section 15-48-20 and the FAA.[1] The lower court found that whether or not to compel arbitration was an issue "for judicial determination." *See* February 9, 2012 Order, p. 2.

Importantly, the lower court did not dismiss the action, but stayed the civil action pending arbitration. The Appellant filed a Rule 59(e) on February 21, 2012 and the lower court denied the motion on March 6, 2012. As will be discussed below, the orders compelling arbitration were not immediately appealable.

An arbitration hearing was held on October 30, 2012 through November 1, 2012. The Arbitrator entered his award on November 29, 2012. Subsequent to the entry of the Arbitration Award, on December 18, 2012, Appellant served a Motion for Modification of the Award to the Arbitrator. This Motion was denied.

On February 27, 2013, Respondent filed a Notice and Petition to Vacate Award in the United States District Court for the District of South Carolina. The Appellant sought to vacate the arbitration award in federal court based upon the FAA and the issues in that action were as follows: (1) whether the arbitrator exceeded the authority provided to him under the alleged arbitration agreement and exceeded the authority granted to him pursuant to the order compelling arbitration; (2) whether the arbitrator manifestly disregarded the law; (3) whether the arbitrator prejudiced the rights of Allsouth; (4) whether the arbitrator so

[1] The lower court found that pursuant to Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) that the requirement of the South Carolina Arbitration Act, S.C. Code Ann. Section 15-48-10, to have the arbitration provision on the first page was preempted by the FAA.

imperfectly executed his obligations that a final, definite and mutual award upon the subject matter submitted was never made; (5) whether the arbitrator acted on information and material outside of the record; and (6) whether the arbitrator issued a contradictory and incomplete award. All of these issues arise out of 9 U.S.C. § 10 of the FAA and were brought in federal court as it was federal law that was to be applied. Importantly, the issue of whether or not the action was subject to arbitration in the first instance as ordered by the state lower court was not before the federal court, nor could it have been, and the Appellant expressly reserved its right to appeal the state court order(s) compelling arbitration.

On June 13, 2013, the United States District Court for the District of South Carolina entered an order dismissing the Petition to Vacate the Arbitration Award and confirming the Arbitration Award.

On August 26, 2013, the Appellant filed a Motion to Lift the Stay in the state court action. On November 27, 2013, the circuit granted the motion to lift the stay. It was only at this time that the Appellant had the right to appeal the orders which are the subject of this appeal and did so by filing the Notice of Appeal on December 11, 2013.

Legal Argument

An order "which stays [an] action and compels arbitration is not immediately appealable under S.C. Code Ann. Section 15-48-200." Heffner v. Destiny, 321 S.C. 536, 471 S.E.2d 135 (1995) *see also* Toler's Cove Homeowners Ass'n v. Trident Const. Co., Inc., 355 S.C. 605, 586 S.E.2d 581 (2003)("[A] court's order compelling arbitration is not immediately appealable under South Carolina law.") This is true even if the actual arbitration will be conducted pursuant to the FAA because the procedural rules of the South Carolina Arbitration Act still apply. *See* Toler's Cove, 586 S.E.2d at 584.

In the present case, once the lower court entered the Order staying the case and compelling arbitration, the Appellant did not have the right to appeal the order until after the arbitration of the matter and until after the stay was lifted. The fact that the Appellant chose to have the federal court review the arbitration award under federal law has no bearing on whether or not the action was subject to arbitration in the first instance—a judicial issue decided by the state court. The sole issue in this appeal is whether or not the lower court erred in compelling arbitration.

At the hearing on the motion to stay, the Respondent presented two South Carolina cases and argued that the South Carolina Court of Appeals would not have jurisdiction over any appeal of the orders compelling arbitration even if the stay were to be lifted. The cases cited, however, are inapposite to the present situation. First, in both cases, Main Corporation v. Black, 357 S.C. 179, 592 S.E.2d 300 (2004) and Steinmetz v. American Media Services, LLC, 393 S.C. 72, 709 S.E.2d 708 (2011), the parties consented to refer the actions to binding arbitration and, as such, an order compelling arbitration was not appealed. The issues in those cases were related to the findings in the arbitration award rather than an actual order from the state court. Second, if this Court were to read those cases in the manner argued by Respondent and in conjunction with Toler's Cove Homeowners Ass'n, 586 S.E.2d 581, then a party aggrieved by an order compelling arbitration would never be entitled to appellate review of the order compelling arbitration because it is not specifically enumerated in Section 15-48-200 which would preclude immediate appellate review and appellate review after the stay is lifted. Third, one circuit court judge cannot overrule the order of another circuit court judge. Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979). Accordingly, other than the motion to lift the stay, there is no other motion that could be ruled upon by the lower

court related to the order compelling arbitration. The sole issue on this appeal is whether the action was subject to arbitration in the first instance—a matter already ruled upon by the lower court prior to the arbitration.

Conclusion

In sum, the present appeal is proper because this is the only time the order of the lower court could be appealed to this court. Any other procedural construction by this Court would necessarily result in the prevention of a party aggrieved by an order compelling arbitration from access to the appellate courts.

Smith, Bundy, Bybee, & Barnett, PC
W. H. Bundy, Esquire
M. Brent McDonald, Esquire
Post Office Box 1542
Mount Pleasant, SC 29465-1542
843-881-1623
Attorneys for Appellant

Mt. Pleasant, South Carolina
January 15, 2014

Other Counsel of Record:

Edward James "Trip" Coyne, III, Esquire
Williams Mullen, P.C.
300 N. Third Street, Suite 420
Wilmington, NC 28401
Attorney for Lend Lease (US) Public Partnership, LLC

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS
Deadra L. Jefferson, Circuit Court Judge
Case No.: 2011-CP-10-5191

RECEIVED
JAN 16 2014
SC Court of Appeals

Appellate Case No.: 2013-002679

Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease is the ...Respondent,

vs.

Allsouth Electrical Contractors, Inc. is the .....Appellant.

PROOF OF SERVICE

I certify that I have served the Memorandum of Appealability in this matter on Lend Lease (US) Public Partnership, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on January 15, 2014, addressed to its attorney of record, Edward James "Trip" Coyne, III, Esquire, Williams Mullen, P.C., 300 N. Third Street, Suite 420 , Wilmington, NC 28401

Smith, Bundy, Bybee, & Barnett, PC
W. H. Bundy, Esquire
M. Brent McDonald, Esquire
Post Office Box 1542
Mount Pleasant, SC 29465-1542
843-881-1623
Attorneys for Appellant

Mt. Pleasant, South Carolina
January 15, 2014

SMITH, BUNDY, BYBEE & BARNETT, P.C.
ATTORNEYS AT LAW
1037 CHUCK DAWLEY BOULEVARD
SUITE 100, BUILDING F
POST OFFICE BOX 1542
MOUNT PLEASANT, SC 29465
(843) 881-1623
FAX (843) 881-4406
FED. ID # 57-0988087

ELLISON D. SMITH, IV
W.H. BUNDY, JR.
RICHARD D. BYBEE
STAN BARNETT

M. BRENT MCDONALD

M. BRENT MCDONALD
bmcdonald@s3blaw.com
Direct Line (843) 513-1032

January 15, 2014

VIA FEDEX OVERNIGHT

The Honorable Jenny Abbott Kitchings
Clerk of Appeals Court of South Carolina
1015 Sumter Street
Columbia, SC 29201
803-734-1890

Re: Lend Lease (US) Public Partnership, LLC vs. Allsouth Electrical Contractors, Inc.
Appellate Case no: 2013-002679

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of Appellant's Memorandum on Appealability in this Matter requested by the Court, along with the Proof of Service of the same.

Please file the original Memorandum on Appealability and the Proof of Service and return a copy of the file stamped copies to me in the envelope enclosed for your convenience;

Sincerely yours,

M. Brent McDonald
P.O. Box 1542
Mt. Pleasant, SC 29464
(843) 881-1623

MBM/sfr
Enclosures
cc:
Edward James "Trip" Coyne, III, Esq.
Williams Mullen, P.C.
300 N. Third Street, Suite 420
Wilmington, NC 28401