

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-001623

South Carolina Electric & Gas, Co.,.....Respondent,

v.

Anson Construction Company,.....Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. Should the Trial Court's Order ruling that three documents together make up the Parties' Contract be affirmed, when the documents are unambiguous read together, they relate to the same subject matter, the provisions of each document explains and affects the provisions of the other documents, SCE&G accepted the Contract by signature/performance, and Anson accepted the Contract by holding and acting upon the three documents?

STATEMENT OF THE CASE

On July 15, 2011, Plaintiff, South Carolina Electric & Gas Co. ("SCE&G") filed this lawsuit against Anson Construction Co., Inc. ("Anson"), which is an indemnification case that arose from a prior lawsuit in which SCE&G and Anson were both defendants. Compl. SCE&G now seeks to recoup the money it spent remediating damages it contends Anson caused, defending the prior lawsuit, settling the prior lawsuit, and pursuing its claims against Anson in this lawsuit. Id. The Complaint alleges causes of action for breach of contract, contractual indemnification, and equitable indemnification. Id. On September 13, 2011, Anson filed and served its Answer to SCE&G's Complaint. Answer. In its Answer, Anson denied the claims and asserted affirmative defenses. Id.

On July 16, 2013, SCE&G filed a Motion for Partial Summary Judgment. Pl.'s Mot. Partial Summ. J. On July 18, 2013, counsel for the Parties presented oral argument at a hearing on the Motion. Mot. Partial Summ. J. Hr'g Tr. On July 22, 2013, Judge Nicholson announced his Honor's decision to grant SCE&G's Motion. July 22, 2013 Tr. One day later, the Court signed and filed its Order Granting the Motion. Order Granting Mot. Partial Summ. J.

On July 23, 2013, Anson filed and served its Notice of Appeal to this Court, which is a result of Judge Nicholson's Order of the same day. Notice of Appeal. The value at issue has yet to be determined as Respondent's Motion and Judge Nicholson's Order were directed only as to what documents make up the Parties' Contract. Pl.'s Mot. Partial Summ. J.; Order Granting Pl.'s Mot. Partial Summ. J.

STATEMENT OF FACTS

In June of 2007, the City of Charleston ("the City") closed the Dock Street Theater ("the Theater") to begin an extensive renovation. Order Granting Pl.'s Mot. Partial Summ. J. p. 1. At that time, an electric transformer owned by SCE&G served the Theater and several homes in the immediate area. Id. That transformer was located inside the Theater. Id. The City and SCE&G had a number of discussions and meetings about relocating the transformer outside of the Theater, and the decision was ultimately made to relocate the transformer to an underground vault in the sidewalk adjacent to the French Huguenot Church ("the Church"), which is located directly across the street from the Theater. Id.

In the late-Fall / early-Winter of 2007, SCE&G contacted Anson Construction Co., Inc. ("Anson") to install a concrete vault in the sidewalk adjacent to the Church so that SCE&G could then install its transformer in that location. Id. at p. 1-2. On or about December 13, 2007, Anson sent SCE&G a Quotation to install the vault. Quotation. Mr. Stutsman testified in his deposition that he prepared the Quotation and that no one at SCE&G helped him prepare the Quotation. P. Stutsman as Anson's SCRCP 30(b)(6) Rep. Dep. 58:25-59:4, July 18, 2012. Paragraph 2 of the Quotation, stated "[t]his

proposal is subject to execution of a non-modified AIA form or subcontractor approved equal.” Quotation.

On January 3, 2008, an itemized cost breakdown was added to the bottom of the Quotation. Updated Quotation. On January 4, 2008, SCE&G signed the Quotation to agree as to the price set forth therein and that other documents would be forthcoming that would also govern the Parties’ relationship. Signed Quotation. Also, importantly, on January 4, 2008, Anson received a Purchase Order from SCE&G. Purchase Order with Anson’s Received Stamp.

The Purchase Order stated in pertinent part that “Anson Construction Company, Inc. (“Contractor”) shall provide all labor, supervision, equipment and materials required to complete the installation of the concrete vault for the Dock Street Theater project (hereinafter “Work”) for South Carolina Electric and Gas Company.” Id. The Purchase Order further specifically provided that the work would be performed “in accordance with ...[SCE&G ‘s] General Terms and Conditions dated 02/28/2006...”. Id. Additionally, the Purchase Order stated that “The Work shall be performed at the Contractor’s quoted Price indicated below and in Contractor’s quotation dated December 11, 2007.” Id.

According to Paragraph 1:30 of the General Terms and Conditions, “[SCE&G] and [Anson] shall be bound by this contract and its terms and conditions when [Anson] executes and returns the unaltered, purchase order acknowledgement *or* when [Anson] renders for [SCE&G] any of the services or delivers to [SCE&G] and of the items required herein.” General Terms and Conditions. (emphasis added). In Paragraph 1:09 Anson agreed to protect the property of third parties from damage during its performance

of the work contemplated by the Contract. Id. Moreover, pursuant to paragraph 1:26 of the General Terms and Conditions, Anson agreed to “save, defend, indemnify, and hold harmless [SCE&G] from any and all liabilities, claims, suits, actions, proceedings, fines, penalties, forfeitures, losses, damages, and the cost and expenses incident thereto (including but not limited to costs of investigation, defense, settlement, and attorney’s fees) arising directly or indirectly out of any act or failure to act on [Anson]’s part, or the part of any agent, servant, or subcontractor, of [Anson], whether independent or otherwise, in connection with the work undertaken under the Contract.” Id.

On or about January 7, 2008, Anson began the work. C. Stutsman Dep. 18:14-18, February 28, 2011. Pursuant to the agreement between Anson and SCE&G, Anson controlled the means and methods necessary to accomplish the work. P. Stutsman as Anson’s SCRCF 30(b)(6) Rep. Dep. 98:9-11, July 18, 2012. The work was planned in three stages; first, Anson had to remove the existing sidewalk; second, a hole had to be excavated; and finally, Anson planned to install a trench box in the hole to keep the surrounding soil from shifting while the underground vault was being installed. Id. at 92:22-93:10; C. Stutsman Dep. 32:25-33:1318, February 28, 2011

Area residents testified that Anson broke the sidewalk into pieces with the bucket of its trackhoe by pounding the bucket on the ground and then used the trackhoe bucket to pound the trench box into place. D. Fisher Dep. 33:25-34:13, January 10, 2011. The resulting noise and vibration alarmed everyone in the immediate area including several neighbors on both sides of the Theater. Id. Immediately thereafter, the City issued a stop work order, and the Church and some adjacent property owners claimed that the vibration caused substantial property damage to the Church and surrounding homes. Compl.

French Protestant Huguenot Church of Charleston v. South Carolina Electric & Gas Co. and Anson Construction Co., Inc. (2009-CP-10-4358).

At this point, SCE&G stepped in to resolve the problem. Letter from David Kiebler, Supervisor of Claims, SCE&G, to Pete Stutsman, Anson Construction Company, February 5, 2008; Letter from Sandy Kammer, Claims Agent, SCE&G, to Pete Stutsman, Anson Construction Company, February 15, 2008. Unfortunately, Anson stepped back despite being asked to participate in the remediation process and put its insurance carrier on notice of the issue. P. Stutsman as Anson's SCRCP 30(b)(6) Rep. Dep. 106:16-110:20, July 18, 2011. At the City's and the Church's urging, SCE&G hired a soil engineer to evaluate the situation and recommend a procedure for remedying the problem. Id. Ultimately, the trench box was abandoned, the hole was filled in, and the transformer was returned to its original location inside of the Theater. Id.

Anson submitted Invoices to SCE&G, which reference the Purchase Order, for the work it performed. Anson's Invoices. SCE&G paid Anson for the work it was able to perform as contemplated in Anson's Quotation, SCE&G's Purchase Order, and SCE&G's General Terms and Conditions, and Anson accepted said payment without reservation of right. P. Stutsman as Anson's SCRCP 30(b)(6) Rep. Dep. 19:20-25, July 18, 2011.

Mr. Stutsman conceded in his deposition that the Purchase Order was generally part of the contract with SCE&G. Id. at 75:19-25. Mr. Stutsman conceded in his deposition and acknowledges that he received the Purchase Order and General Terms and Conditions as part of the package of documents for the subject job. Id. at 75:19-25. The Anson Quotation was a bid for the work at the Theater, and it could not be the

“subcontractor approved equal” described in Paragraph 2 of the same document. Order Granting Pl.’s Mot. Partial Summ. J.; Quotation; Purchase Order; General Terms and Conditions.

Anson’s Quotation, SCE&G’s Purchase Order, and SCE&G’s General Terms and Conditions were all entered into about the same time. Id. Anson’s Quotation, SCE&G’s Purchase Order, and SCE&G’s General Terms and Conditions all relate to the same subject matter. Id. The provisions of Anson’s Quotation, SCE&G’s Purchase Order, and SCE&G’s General Terms and Conditions limit, explain, and/or otherwise affect the provisions of said documents. Id. When read together, Anson’s Quotation, SCE&G’s Purchase Order, and SCE&G’s General Terms and Conditions are unambiguous. Id.

In July of 2009, the Church filed suit to collect money from SCE&G and Anson to repair its building. Compl. French Protestant Huguenot Church of Charleston v. South Carolina Electric & Gas Co. and Anson Construction Co., Inc. (2009-CP-10-4358). The Church’s claims were based on the means and methods used by Anson when installing the trenchbox, of which Anson testified SCE&G had no control. Id.; P. Stutsman as Anson’s SCRCP 30(b)(6) Rep. Dep. 98:9-11, July 18, 2012. SCE&G tendered the defense of that case to Anson and also made a claim against Anson for indemnity. Letter from David Kiebler, Supervisor of Claims, SCE&G, to Pete Stutsman, Anson Construction Company, February 5, 2008; Letter from Sandy Kammer, Claims Agent, SCE&G, to Pete Stutsman, Anson Construction Company, February 15, 2008. Anson refused to accept SCE&G’s defense and Anson denied the indemnity claim. P. Stutsman as Anson’s SCRCP 30(b)(6) Rep. Dep. 106:16-110:20, July 18, 2011. SCE&G subsequently hired the undersigned to represent it and paid the Church to settle its claim.

STANDARD OF REVIEW

“When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the circuit court under Rule 56(c), SCRCF.” Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 628 S.E.2d 902 (S.C. Ct. App. 2006). In Circuit Court, “[s]ummary judgment is appropriate where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Christina G. deBondt v. Carlton Motor Cars, Inc., 536 S.E.2d 399 (S.C. Ct. App. 2000). While the moving party bears the burden of demonstrating that there is not a genuine issue of material fact, once that burden has been met, the nonmoving party may not rest on the mere allegations contained in the pleadings. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Instead, the nonmoving party must come forward with specific facts showing that evidence exists to support its position, and that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). All evidence must be viewed in the light most favorable to the nonmoving party. Perini Corp. v. Perini Const., Inc., 915 F.2d 121 (4th Cir. 1990). In cases where the material facts are not in dispute, a trial court may resolve disputed legal questions on summary judgment. Thompson Everett, Inc. v. Nat'l Cable Adver., L.P., 57 F.3d 1317 (4th Cir. 1995).

ARGUMENT

- I. **Judge Nicholson's Order that three documents together make up the Parties' Contract should be affirmed since the documents are unambiguous when read together, they relate to the same subject matter, the provisions of each document explains and affects the provisions of the other documents, SCE&G accepted the Contract by signature/performance, and Anson accepted the Contract by holding and acting upon the three documents.**

The construction of an unambiguous written contract is a question of law for the court. J.T.M. Co. v. Vane, 323 S.E.2d 794 (S.C. Ct. App.1984). Where one construction makes the provision unusual or extraordinary and another construction that is equally consistent with the language employed would make it reasonable, fair and just, the latter construction must prevail. Farr v. Duke Power, 218 S.E.2d 431 (1975). The intent and purport of a written contract must be gathered from the contents of the entire agreement and not from any particular clause or portion of the contract. Bruce v. Blalock, 127 S.E.2d 439 (1962). In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties. Superior Automobile Insurance Co. v. Maners, 199 S.E.2d 719 (1973); Farr, 218 S.E.2d 431. When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. Warner v. Weader, 311 S.E.2d 78, 79 (1983). Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible. Superior Automobile Insurance Co., 199 S.E.2d 719.

It is not necessary, in order to give validity to a contract, that it should be signed because it is sufficient if it is accepted, held, and acted upon by the Parties. Peddler, Inc. v. Rikard, 221 S.E.2d 115 (S.C. 1975). The fact that one of the parties has signed the contract does not require that the other party should do likewise. Gladden v. Keistler, 140 S.E. 161 (S.C. 1927); Bulwinkle v. Cramer, 3 S.E. 776 (S.C. 1887). A written contract, which is not required to be in writing, is valid upon acquiescence to it. Id. Acceptance of a contract by assenting to its terms, holding it and acting upon it, is the equivalent to a formal execution. Id. When a party accepts and adopts a written contract,

even though it is not signed, it is deemed to have assented to the contract's terms and conditions and to be bound by them. Id.

Where instruments entered into by the same parties at different times relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. Wilbur Smith & Associates v. National Bank of South Carolina, 263 S.E.2d 643 (S.C. 1980). If the provisions of one instrument limit, explain, or otherwise affect the provisions of the other, they will be given effect to accomplish the entire agreement between the parties. Id.

Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. Southern Ry. Co. v. Springs Mills, Inc., 625 F. 2d 496 (4th Cir. 1980) (applying South Carolina law); Costas v. First Fed. Sav. & Loan Ass'n, 321 S. E. 2d 51 (S.C. 1984). Toomer v. Norfolk Southern Ry. Co., 544 S.E.2d 634 (S.C. Ct. App. 2001). Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties. Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 611 S.E.2d 235 (S.C. 2005).

Applying this well-settled law, even in the light most favorable to Anson searching for a scintilla of evidence that a genuine issue of material fact exists, there is no question as to what documents make up the contract between SCE&G and Anson. Order Granting Pl.'s Mot. Partial Summ. J.; Quotation; Purchase Order; General Terms and Conditions. Although Anson's Quotation, SCE&G's Purchase Order, and SCE&G's General Terms and Conditions were entered into at different times, these documents relate to the same subject matter, and as such, these documents should be construed

together to determine the entire agreement between the parties. Id. Prior to the work commencing, SCE&G signed the Quotation that referenced its Purchase Order that Anson received, held, assented to, acted upon, and was paid with reference to for its work. Id. The Parties performed their obligations under Anson's Quotation, SCE&G's Purchase Order, and SCE&G's General Terms and Conditions. Id. Anson requested and accepted payment pursuant to Anson's Quotation, SCE&G's Purchase Order, and SCE&G's General Terms and Conditions. Anson's Invoice.

The terms and provisions of these documents, which include a valid indemnification clause, bind Anson to indemnify SCE&G an amount of money to be determined at the trial of this matter including, but not limited to, what SCE&G spent remediating damages Anson caused, defending the prior lawsuit, settling the prior lawsuit, and pursuing its claims against Anson in this lawsuit because although Anson did not sign the Purchase Order, it assented to its terms, held it, and acted upon it thereby binding it as if it was formally executed. Id. Accordingly, this Court should affirm Judge Nicholson's Order Granting SCE&G's Motion for Partial Summary Judgment as his Honor has properly concluded as a matter of fact and a matter of law that Anson is contractually obligated to indemnify SCE&G for damages to be determined at a trial of this matter.

CONCLUSION

For the foregoing reasons as well as argument of counsel at a hearing on this matter and any ground appearing on the record as provided by SCACR 220(c), the Court of Appeals should affirm The Honorable J. C. Nicholson, Jr.'s Order Granting SCE&G

Partial Summary Judgment as to what documents make up the terms of the Parties' Contract, and remand this case for a determination of SCE&G's damages.

Respectfully submitted,

May 30, 2014



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ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-001623

South Carolina Electric & Gas, Co,.....Respondent

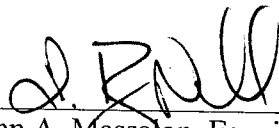
v.

Anson Construction Company,.....Appellant

PROOF OF SERVICE

I certify that I served Respondent's Initial Brief and Designation of Matter to be included in the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on May 30, 2014, addressed to Appellant's attorneys of record, Everett A. Kendall, II, Esquire & J. Eric Cavanaugh, Esquire, 1515 Lady Street, Columbia, South Carolina 29211.

May 30, 2014



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-001623

South Carolina Electric & Gas, Co.,.....Respondent


v.

Anson Construction Company,.....Appellant

CERTIFICATE OF COUNSEL

The undersigned certified that the Respondent's Designation of Matter to be included in the Record on Appeal complies with Rule 209 (c), SCACR.

May 30, 2014



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May 30, 2014

The Honorable Jenny Abbott Kitchings
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RE: South Carolina Electric & Gas Co. vs. Anson Construction Co., Inc.
Case No.: 2011-CP-10-5099
Appellate Case No.: 2013-001623
Our File No.: 1900-187

Dear Ms. Kitchings:

In regards to the above-referenced matter, enclosed for filing please find the original and one (1) copy of the Respondent's Initial Brief and Designation of Matter to be included on the Record on Appeal; along with the Proof of Service for the same. Please file the original and copy, returning a filed copy of each to me in the enclosed self-addressed, stamped envelope. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

WILLS MASSALON & ALLEN LLC



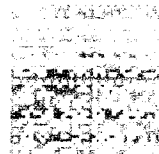
I. Ryan Neville

Enclosures

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