

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2013-001623

South Carolina Electric & Gas Company,Respondent,

v.

Anson Construction Company,Appellant.

INITIAL REPLY BRIEF OF APPELLANT

Everett A. Kendall, II
James Eric Cavanaugh
1515 Lady Street
Post Office Box 12129
Columbia, S. C. 29211
(803) 256-2233
Attorneys for Appellant

RECEIVED

JUN 19 2014

SC Court of Appeals

TABLE OF CONTENTS

Reply1

**I. RESPONDENT HAS UTTERLY FAILED TO ADDRESS THE
FUNDAMENTAL PROBLEM WITH THE TRIAL COURT’S ORDER –
THAT THERE IS A FACTUAL DISPUTE AS TO WHETHER THE
PARTIES AGREED TO THE CONTRACT FORMS. INSTEAD,
RESPONDENT JUMPS TO THE ABILITY OF THE COURT TO
INTERPRET THE CONTRACT DOCUMENTS.....1**

**II. BY LOOSELY PARAPHRASING SELECTED TESTIMONY,
RESPONDENT COMPLETELY GLOSSES OVER FACTS
DEMONSTRATING THAT ANSON REJECTED SCE&G’S EFFORT TO
REFORM THE CONTRACT3**

**III. RESPONDENT’S ARGUMENT TURNS ENTIRELY ON THE
INCORPORATION OF THE SCE&G FORMS INTO THE ANSON
PROPOSAL THROUGH THE LANGUAGE OF PARAGRAPH 2.
HOWEVER, RESPONDENT IGNORES THE CLEAR REQUIREMENTS
OF THAT PARAGRAPH, ALL THE EVIDENCE IN THE RECORD
DISPUTING THEIR CONSTRUCTION, AND THE LEGAL ARGUMENT
OF WAIVER OF THE CONDITION PRECEDENT.....4**

Conclusion6

TABLE OF AUTHORITIES

Cases

Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993) 6

Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009)..... 2

Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010)..... 2

Rogers v. Norfolk Southern Corp., 356 S.C. 85, 588 S.E.2d 87 (2003) 2

Stevens Aviation, Inc. v. DynCorp Intern. LLC, 407 S.C. 407, 415, 756 S.E.2d 148, 152
(2014)..... 2

Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428 (2004) 6

Other Authorities

Black’s Law Dictionary, (7th ed.)..... 2

Rule 208(b)(2), SCACR 6

COMES NOW Appellant Anson Construction Company (“Anson”), pursuant to Rule 208(b)(3) of the South Carolina Appellate Court Rules, by and through its undersigned attorneys, in reply to Respondent South Carolina Electric and Gas Company, Inc.’s (“SCE&G”) Initial Brief. Appellant incorporates all arguments made in its initial brief hereto.

REPLY

I. RESPONDENT HAS UTTERLY FAILED TO ADDRESS THE FUNDAMENTAL PROBLEM WITH THE TRIAL COURT’S ORDER – THAT THERE IS A FACTUAL DISPUTE AS TO WHETHER THE PARTIES AGREED TO THE CONTRACT FORMS. INSTEAD, RESPONDENT JUMPS TO THE ABILITY OF THE COURT TO INTERPRET THE CONTRACT DOCUMENTS.

In its Initial Brief, rather than addressing and disputing Appellant’s arguments, Respondent instead chose to spend three (3) pages briefly asserting why the trial court had the ability to interpret the contract documents, and in doing so, determine the intent of the parties. Respondent’s brief does not address the essential argument made by Appellant, and the central issue before this Court on appeal, that Appellant did not accept, and therefore never agreed to, SCE&G’s documents.

Appellant argued in its Initial Brief that summary judgment was improper because there is a genuine issue of fact — supported by abundant evidence — that Anson did not accept or agree to be bound by the terms of SCE&G’s Purchase Order and General Terms and Conditions. Specifically, Appellant cited to testimony by several fact witnesses which clearly rejected the Respondent’s argument that Anson agreed to SCE&G’s documents. Pete Stutsman Dep. 34:17-22, 34:24-35:1, 46:11-15, 64:14-18, July 18, 2012; R. ___; Additionally, testimony by SCE&G’s own employees not only confirmed that SCE&G had signed, and therefore agreed, to the terms of the Anson Proposal, but

also did so with the intent that Anson would immediately start work. Jesse Thigpen Dep. 27:21-25, 54:3-56:15, June 26, 2012; R. _____. Furthermore, in its order granting SCE&G's motion for partial summary judgment, the trial court even acknowledged the existence of a "mere scintilla" when the court stated: "Anson has argued that the sum and substance of its agreement with SCE&G is contained in the [Anson Proposal] . . ." Order Granting Mot. Partial Sum. J., July 23, 2013; R. _____. However, despite that language, and the existence of a plethora of testimony to the contrary, the court ignored this dispute and instead interpreted the evidence in the light most favorable to the moving party.

The non-moving party must only present a mere scintilla of evidence in order to survive summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-03 (2009). "A scintilla is defined as "a trace" of evidence." Rogers v. Norfolk Southern Corp., 356 S.C. 85, 95, 588 S.E.2d 87, 92 (2003) (Burnett dissenting) (citing Black's Law Dictionary, (7th ed.)). In determining whether a genuine issue of material fact exists, the evidence and inferences that can reasonably be drawn therefrom are to be viewed in the light most favorable to the nonmoving party. Stevens Aviation, Inc. v. DynCorp Intern. LLC, 407 S.C. 407, 415, 756 S.E.2d 148, 152 (2014) (citing Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010)).

As it is clear from the record that more than a scintilla exists that Anson did not agree to be bound by the terms of SCE&G's Purchase Order and General Terms and Conditions, summary judgment was improper and therefore this Court should overturn the trial court's ruling on this issue.

II. BY LOOSELY PARAPHRASING SELECTED TESTIMONY, RESPONDENT COMPLETELY GLOSSES OVER FACTS DEMONSTRATING THAT ANSON REJECTED SCE&G'S EFFORT TO REFORM THE CONTRACT.

In its brief, Respondent asserts that “[o]n January 4, 2008, SCE&G signed the [Anson Proposal] to agree as to the price set forth therein and that other documents would be forthcoming that would also govern the Parties’ relationship.” Respondent’s Brief, p.3. There is no evidence in the record to support this assertion. In fact, Jesse Thigpen testified on behalf of SCE&G that he signed the Anson Proposal specifically “so that Anson could go to work.” Thigpen Dep. 27:21-25; R. _____. While the Anson Proposal did contain a condition precedent indicating that it was specifically “subject to [the] execution of a non-modified AIA form or subcontractor approved equal,” this condition never came to pass and instead was waived by the parties. Additionally, Pete Stutsman testified on behalf of Anson that Anson considered the signed Proposal to be the “subcontractor approved equal.” P. Stutsman Dep. 26:11-23, 32:23–33:19; R. _____.

Respondent also erroneously cites as fact that Mr. Stutsman “conceded . . . that the Purchase Order was generally part of the contract with SCE&G.” Respondent’s Brief, p.5. To the extent that this statement suggests that there was a consistent, routine course of business between Anson and SCE&G, which included use of a purchase order, it is incorrect. As addressed in Appellant’s brief, it is clear that the various undertakings by Anson on behalf of SCE&G were not initiated or pursued in any consistent fashion. P. Stutsman Dep. 159:18, 22-23, 25-161:15; R. _____. Furthermore, the evidence in the record clearly suggests that the Purchase Order was used primarily as a vehicle for the subcontractor to be paid, rather than as a vehicle for adding terms to an already existing contract. Randy Morris Dep. 20:8-21:20, 28:1-7, May 17, 2012; R. _____; Donnie

Graham Dep. 18:2-6, 14-19:1-10, 21:2-8, 34:2-9, May 17, 2012; R. ____; P. Stutsman Dep. 29:22-30:4, 44:14-19, 22-24; R. ____.

Finally, citing only the Trial Court's Order, Respondent states that, "[w]hen read together, [the Anson Proposal], SCE&G's Purchase Order, and SCE&G's General Terms and Conditions are unambiguous." Respondent's Brief, p. 6. Again, Respondent has failed to cite to any evidence in the record which supports this assertion.

III. RESPONDENT'S ARGUMENT TURNS ENTIRELY ON THE INCORPORATION OF THE SCE&G FORMS INTO THE ANSON PROPOSAL THROUGH THE LANGUAGE OF PARAGRAPH 2. HOWEVER, RESPONDENT IGNORES THE CLEAR REQUIREMENTS OF THAT PARAGRAPH, ALL THE EVIDENCE IN THE RECORD DISPUTING THEIR CONSTRUCTION, AND THE LEGAL ARGUMENT OF WAIVER OF THE CONDITION PRECEDENT.

Respondent's brief focuses almost exclusively on the incorporation of SCE&G's later arriving and unsigned forms into the previously existing signed Anson Proposal. Respondent's argument focuses on paragraph 2 of the Anson Proposal which states that the proposal is subject to the execution of a non-modified AIA form or subcontractor approved equal. In focusing on the incorporation of SCE&G's later arriving forms into the signed Anson Proposal, Respondent and the court assumes that despite the multitude of evidence to the contrary, the Purchase Order and the General Terms and Conditions is either the AIA form or subcontractor approved equal. Anson Proposal; R. ____. However, there is no evidence in the record that SCE&G's documents were intended to serve as those documents. Furthermore, neither of those documents were ever signed and executed by the parties as is specifically stated in paragraph 2.

Anson's Proposal – the only document executed prior to the beginning of construction – included a statement that clearly limited the documents to which that the Anson Proposal would be subject. Anson Proposal, January 4, 2008; R. _____. Paragraph

2 of the Proposal, under stated “Conditions,” specifically makes the Proposal subject to the execution of a non-modified AIA form or subcontractor approved equal. *Id.*; R. _____. The plain wording of this “Condition” means that the Anson Proposal is subject only *to the execution of* a non-modified form from the American Institute for Architects, or a form that was specifically approved by Anson. See *Id.*: R. _____. (emphasis added).

The record is clear that Anson and SCE&G have directly contradictory interpretations of paragraph 2 of the Anson Proposal. In its brief, Appellant argued that Paragraph 2 of Anson’s Proposal requiring the execution of a non-modified AIA form or sub-contractor approved equal, was a condition precedent that was waived by the parties upon Anson starting work. Appellant’s Brief, pp.20-22. Furthermore, Appellant argued that because neither SCE&G nor Anson insisted upon the execution of another document prior to Anson beginning work, the record supports a finding that Paragraph 2 was not an essential term of the contract and the parties therefore consciously waived it. *Id.* To support this argument, Anson cited deposition testimony by Jesse Thigpen and Pete Stutsman that clearly evidences the parties’ conscious decision to waive the condition requiring execution of a non-modified AIA or subcontractor approved equal. Thigpen Dep. 27:23-25; R. ____; P. Stutsman Dep. 34:24-35:1; R. _____. This testimony clearly provides at least a mere scintilla of evidence that SCE&G and Anson waived the condition requiring execution of another document, thereby making summary judgment improper.

Furthermore, Respondent does not argue this issue but merely cites the trial court’s order in stating that “SCE&G signed the [Anson Proposal] that referenced its Purchase Order.” Respondent’s Brief, p. 10. Because Respondent did not address this

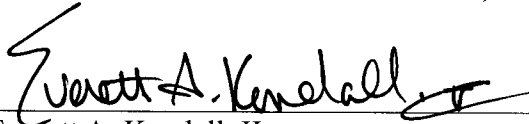
argument in its initial brief, Respondent thereby has waived and abandoned any counterarguments thereto. Woodson v. DLI Properties, LLC, 406 S.C. 517, 519 n.11, 753 S.E.2d 428, 434, n.11 (2004) *citing* Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993); Rule 208(b)(2), SCACR.

CONCLUSION

The Court's grant of partial summary judgment should be reversed as the record clearly demonstrates that a mere scintilla exists regarding what documents make up the contract between the parties. For the reasons listed above, Appellant respectfully requests this Court overturn the lower court's Order and remand the case back to circuit court for further consideration.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



Everett A. Kendall, II
J. Eric Cavanaugh
Sweeny, Wingate, & Barrow, P.A.
Post Office Box 12129
Columbia SC 29211
(803) 256-2233

**ATTORNEYS FOR APPELLANT
ANSON CONSTRUCTION COMPANY**

Columbia, South Carolina
June 18, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2013-001623

South Carolina Electric & Gas Co.,Respondent,

v.

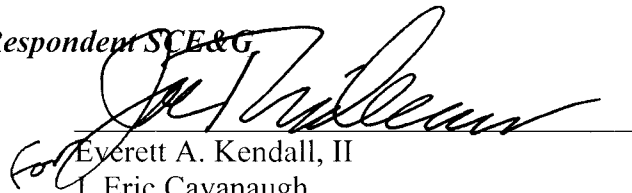
Anson Construction Co.,Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Reply Brief on South Carolina Electric & Gas Co. by depositing a copy of it in the United States Mail, postage prepaid, on June 19, 2014, addressed to their attorneys of record, listed as follows:

John A. Massalon, Esquire
I. Ryan Neville, Esquire
Wills Massalon & Allen, LLC
97 Broad Street
Post Office Box 859
Charleston, SC 29402

Attorneys for Respondent SCE&G



Everett A. Kendall, II
J. Eric Cavanaugh
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, South Carolina 29201
(803)256-2233
**Attorney for Appellant Anson
Construction Company**

RECEIVED

JUN 19 2014

SC Court of Appeals

S·W·B

SWEENEY WINGATE & BARROW P.A.

June 19, 2014

Reply to: Main Office

Everett A. Kendall, II
(803) 217-3447
eak@swblaw.com

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: SCE&G v. Anson Construction Co., Inc.
Appellant Case No.: 2011-CP-10-5099
Our File: 1395-7955

Dear Ms. Kitchings:

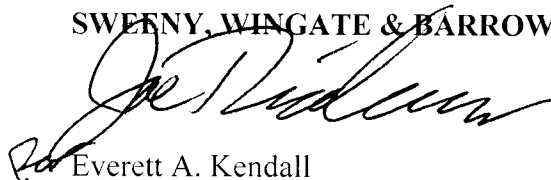
Enclosed for filing is the original and seven copies of Anson Construction Company's Initial Reply Brief of Appellant, along with the Proof of Service. Please return a filed stamped copy of the Initial Reply Brief of Appellant and Proof of Service with the courier.

By copy hereof, all counsel of record are being served with the above.

Thank you for your assistance, and should you have any questions, please do not hesitate to contact me. I remain,

Best Regards,

SWEENEY, WINGATE & BARROW, P.A.



Everett A. Kendall

EAK/mha
Enclosures

cc: John A. Massalon, Esquire, Attorney for SCE&G
I. Ryan Neville, Esquire, Attorney for SCE&G

RECEIVED

JUN 19 2014

SC Court of Appeals