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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.

APPELLANT'S PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner Allsouth Electrical Contractors, Inc. (hereinafter sometime called "Petitioner" or "Allsouth") petitions this Court for Rehearing and Reconsideration of its Opinion filed March 25, 2015, on the grounds that this Court's dismissal of the appeal pursuant to the terms of S.C. Code Ann. Section 15-48-200(a) would result in the application of the statute authorizing access to the appellate courts for the party who is seeking arbitration and denying access to the appellate courts to the party opposing arbitration. This would make the statute unconstitutional as applied and result in the denial of equal protection and due process to the Petitioner.

Statement of the Case

On July 21, 2011, Respondent Lend Lease (US) Public Partnerships, LLC f/k/a Actus Lend Lease (hereinafter "Lend Lease" or "Respondent") served an arbitration demand in the amount of $950,000 Allsouth. See Arbitration Demand (R. pp. 15-25). The majority of the demand was for the replacement of alleged defective work by Allsouth. Lend Lease stated in the arbitration demand that various causes of action against Allsouth were subject to arbitration. Lend Lease stated as follows:

> "Claim by General Contractor against Electrical Subcontractor for breach of 4 separate but project related subcontracts based on defective workmanship and breach of the contract warranties for the defective work and failure to cure the defective work, as well as negligence and indemnity on a government facility."

See Arbitration Demand (R. pp. 15-25). On July 22, 2011, Lend Lease also filed a civil action in the South Carolina Court of Common Pleas for Charleston County. See Complaint[1] (R. pp. 26-54). The same legal causes of action alleged in the Arbitration Demand were

[1] The Complaint alleges causes of action relating to four separate subcontracts. As will be explained below, the terms of the four subcontracts relevant to the present appeal are substantially the same. Therefore, the cases of action related to Subcontract 1 will be discussed herein as representative.

alleged in the Complaint, though Lend Lease alleged it was entitled to arbitrate all of its causes of action against Allsouth. On September 29, 2011, Allsouth filed an Answer to Lend Lease's Complaint and alleged, in part, that Lend Lease was not entitled to arbitration because it failed to comply with the provisions of the Subcontracts related to arbitration. See Answer (R. pp. 55-63). On October 5, 2011, Lend Lease moved the circuit court in Charleston County for an Order compelling arbitration of its entire action and staying the matter. See Lend Lease Motion to Stay and Compel Arbitration (R. pp. 181-195). Allsouth once again objected to the arbitration of this matter pursuant to the plain terms of the Subcontract. On October 17, 2011, Allsouth filed a written objection to the motion to compel arbitration. See Allsouth Memorandum in Opposition to Motion to Compel Arbitration (R. pp. 196-199). Allsouth argued that Lend Lease failed to comply with the South Carolina Uniform Arbitration Act, and, therefore, its claim for arbitration was barred. Allsouth also argued that Lend Lease waived its right to bring its claims because it failed to bring the claims or suit within 180 days of the date it knew or should have known it had a potential cause of action against Allsouth. The contracts between the parties read, in pertinent part, 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 Section 4.2.1.2 of Exhibit 1 to the Affidavit of Alan Roman[2] (R. pp. 119-120). Prior to the hearing, Allsouth served the affidavit of William Lesesne, President of Allsouth, which authenticated correspondence sent by Lend Lease regarding Lend Lease's knowledge of facts giving rise to its alleged claims against Allsouth. See Affidavit of William Lesesne with attachments (R. pp. 173-180). Lend Lease began sending the letters to Allsouth alleging that it had claims against it on May 21, 2010. This date is more than 180 days prior to Lend Lease's arbitration demand and its civil action.

At the hearing on the motion to compel arbitration, Lend Lease argued that the South Carolina Uniform Arbitration Act did not apply as it was bringing its claim pursuant to the Federal Arbitration Act. Lend Lease also argued that the foregoing section on the limitation of any rights to arbitration did not bar its claims as all of its causes of action are actually for indemnity, and, as such, the time limitations of the Subcontract do not apply. The Court ruled that though Lend Lease styled some of its causes of action under a heading for various other causes of action (including breach of contract, negligence, and breach of warranty), all of its claims actually "lie in indemnity." See Order filed 2/9/12 (R. p. 7). The Court ruled that the "180 day waiver deadline" did

[2] As noted in the Designation of Matter, the four Subcontracts are the same with regard to the provisions cited herein. For ease of reference, Allsouth will refer to Exhibit 1 of the Affidavit of Alan Roman, which is a Subcontract dated March 1, 2006, as representative of the other Subcontracts.

not apply to Lend Lease's demand for arbitration for any of its causes of action and the Court compelled the entire matter to arbitration. The Court necessarily ruled that the parties contractually agreed to arbitrate all of the claims brought by Lend Lease against Allsouth. On February 21, 2012, Allsouth filed a Motion to Alter or Amend the Order. See Motion to Alter or Amend (R. pp. 210-212). On March 6, 2012, the Court once again ruled that all of Lend Lease's causes of action were subject to arbitration because all of the claims "were in the scope of indemnity." See Order dated March 6, 2012, pp.3-4 (R. pp. 11-13).

Subsequent to the Arbitration of this action, on August 26, 2013, Allsouth filed a Motion to Lift the Stay in the state court action. On November 27, 2013, the circuit court granted the motion to lift the stay. See Order Lifting Stay (R. p. 13-14). Allsouth filed the Notice of Appeal on December 11, 2013.[3]

On March 25, 2015, this Court issued an unpublished Opinion which dismissed the appeal finding that the Court of Appeals did not have jurisdiction over the appeal and concluded:

"We dismiss the appeal because this court lacks jurisdiction over an appeal from an order granting a motion to stay and compel arbitration."

Opinion, p. 2. The Court went on to conclude as follows:

"An order compelling arbitration is not appealable under Section 15-48-200(a)."

Id.

[3] This Court directed Allsouth to file a Memorandum on Appealibility of this matter on January 6, 2014. Allsouth filed its memorandum on January 15, 2014. This court agreed to hear this appeal on March 17, 2014. That memorandum is incorporated herein to the extent it is necessary. (R.pp. 261-266).

Argument

I. The Court of Appeals erred in applying Section 15-48-200(a) in a manner that denies a party who is compelled to arbitrate by an order of the Circuit Court the right to ever appeal that order.

The Opinion of the Court of Appeals in this case clearly presents a violation of the Petitioner's right to equal protection and due process under the law. The Opinion expressly states that a party seeking to compel arbitration from the circuit court has the statutory right to appeal that decision while a party who is compelled to arbitrate has no right to appellate review. This cannot be the law.

A. The Court of Appeals' Opinion and their application and interpretation of Section 15-48-200(a) violates the Petitioner's right to equal protection under the laws.

South Carolina courts have indeed held that an order compelling arbitration is not immediately appealable. 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."). As such, a party who argues that it is not required to arbitrate a dispute must first go through the arbitration process prior to appealing the order. In contrast, an order denying a motion to compel arbitration is immediately appealable. *See* S.C. Code Therefore, a legal distinction already exists for some reason between a party seeking to compel arbitration and a party arguing it did not contractually agree to arbitration.

Whether or not that distinction is constitutional, however, in not at issue in the present case because the Opinion of the Court of Appeals expressly extends that legal distinction by ruling that a party compelled to arbitrate can **never** directly appeal the order

compelling arbitration because the statute does not give them jurisdiction to hear an appeal of such an order. The Court held as follows:

"We dismiss the appeal because this court lacks jurisdiction over an appeal from an order granting a motion to stay and compel arbitration."

Opinion, p. 2. This interpretation and application of the statute is wrong for at least three reasons.

First, it amounts to a statutory interpretation and application that an order compelling arbitration cannot ever be appealed while an order denying arbitration can be appealed. Such distinction is a violation of the equal protection clauses of the United States' Constitution (*See* U.S. Const. Amend. XIV) and South Carolina Constitution (*See* S.C. Const. art. I, Section 3.) The United States Supreme Court held in Lindsey v. Normet, 405 U.S. 56, 77, 92 S. Ct. 862, 876 31 L. Ed. 2d 36 (1972) as follows:

"This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review, and the continuing validity of these cases is not at issue here. **When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.**"

(emphasis supplied). The Court of Appeals' Opinion does not apply a procedural restraint on the right to appeal an order compelling arbitration, as has previously been applied by the Courts of this state, **but it applies an absolute and outright restraint on any appeal of an order compelling arbitration.** There is no basis for this distinction and as such is it violative of the Petitioner's right to equal protection. Perhaps the most compelling case on point by the South Carolina Supreme Court is the case of City of Spartanburg v. Cudd, 132 S.C. 264, 128 S.E. 360 (1925). In Cudd, the municipality in a condemnation case attempted to appeal a decision from the commissioners. 128 S.E. at 360. The landowner took that position that, though it had the right to appeal, the city did

not have any appeal rights under the governing statute. Id. The Circuit Court agreed with the Landowner and found that the "the Legislature had the right to deny the right of appeal if it chose to do so, and having made no provision for such appeal, none exists, in my opinion,..." Id. The Supreme Court reversed and held that the Circuit Court erred and stated as follows:

"The circuit court erred:

(1) In holding that "the Legislature had the right to deny the right of appeal if it chose to do so, and having made no provision for such appeal, none exists, in my opinion," the error being that in view of the provisions of section 15 of Article 5 of the Constitution, to the effect that the courts of common pleas "shall have appellate jurisdiction in all cases within the jurisdiction of inferior courts," the Legislature has not the power to deny the right of appeal.

(2) **In not holding that, the right of appeal being conferred on the property owner, the attempted denial of that right to the municipality denies the equal protection of the law** to the municipality in the discharge of its right and duty to adequately provide for the public necessity.

(3) **In not holding that the statute construed as denying the right to appeal to the city, while conferring such right on the property owner was unconstitutional, as offending against the equal protection clause of the Constitution, in so far as it attempts to deny the right of appeal to the city**, but was valid and constitutional to the extent of providing a convenient means for initiating proceedings to acquire needed property for street purposes, and that therefore the court had jurisdiction, and it was its right and duty to entertain the appeal and try the case de novo, according to custom and to the statutes governing appeals in similar proceedings instituted by municipalities to condemn for other purposes.

(4) **In not holding that the proceeding here is a proceeding affecting property rights, and that the right of appeal is secured by the constitutional guarantee of due process.**"

128 S.E. at 360-361 (emphasis supplied).

Second, the Court of Appeals impliedly stated in its opinion that in order to have jurisdiction a party must first have a legal right to appeal some other issue related to the arbitration prior to being able to appeal the order compelling arbitration. However, the standard applied to the appeal other issues related to the conduct of the arbitration itself (e.g. modification and vacation) is different from mere contract interpretation as is required for a Court to determine arbitrability in the first instance. *See* Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001); Hilton Head Resort Four Seasons Ctr. Horizontal Property Regime Council of Co-Owners v. Resort Inv. Corp., 311 S.C. 394, 429 S.E.2d 459 (Ct. App. 1993); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). In essence, the Court of Appeals' holding that an aggrieved party forced to arbitrate would first have to meet the "narrow" and "limited" grounds for overturning an arbitration award (*See* C–Sculptures, LLC v. Brown, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances, inter alia, when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law.")) prior to any appeal would also be a violation of the equal protection clause because the heightened standard for the appeal of an order compelling arbitration would, of course, be different from the standard to be applied to any appeal of an order refusing to compel arbitration which is immediately appealable (i.e. contract interpretation as a matter of law v. manifest disregard of the law). The present appeal is not an appeal from the arbitration award. It is an appeal from the Circuit Court's Order compelling arbitration. In South Carolina, the preliminary issue of arbitrability is for the Court to

decide. Partain v. Upstate Auto. Grp., 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010) "The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise."). Therefore, there would be nothing on any issue that was even decided by the arbitrator for which a modification or vacation would be appropriate. This gives rise to the third issue, discussed below, in that a Circuit Judge ruled that this case was subject to arbitration not the arbitrator.

Third, a Circuit Court order compelling arbitration entered prior to arbitration would not be subject to review by another Circuit Court Judge after arbitration. *See* Rule 43, SCRCP ("If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action.") *see also* Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979) (one circuit judge does not have power to reverse an order of another circuit judge regarding the proper mode of trial). Therefore, the Petitioner could not even have made a "new" motion to the court after the Circuit Court's original order that is the subject of this appeal.

Accordingly, the Court of Appeals' Opinion holding that an order compelling arbitration simply cannot *ever* be directly appealed is in violation of the Petitioner's right to equal protection and the Opinion should be reversed. The Petitioner is entitled to appeal the Circuit Court Order compelling arbitration just as a party who has been denied arbitration has the right to appeal.

B. The Court of Appeals' Opinion and their application and interpretation of Section 15-48-200(a) violates the Petitioner's right to due process under the law.

The Petitioner argues that it was not required to arbitrate a complaint/action that was brought against it alleging that Petitioner must pay to the Respondent money damages.

The Circuit Court ruled, incorrectly as argued by Petitioner, that the claim for money damages was subject to arbitration and this order forced the Petitioner into an arbitration that resulted in the award of money damages to the Respondent from the Petitioner. Therefore, this action involves the property (i.e. money) of the Petitioner. As the Supreme Court found in Cudd, when "a proceeding affecting property rights, and that the right of appeal is secured by the constitutional guarantee of due process." 128 S.E. 361. The Court of Appeals' Opinion that holds that holds that the Petitioner has no right to appeal is a denial of its due process.

Moreover, because the Court of Appeals' Opinion refuses to address the merits of the Petitioner's arguments it necessarily denies the Petitioner Due Process. "Procedural due process requires notice and the opportunity to be heard." Cameron & Barkley Co. v. South Carolina Procurement Review Panel, 317 S.C. 437, 454 S.E.2d 892, 98 Ed. Law Rep. 474 (S.C. 1995); U.S. Const. Amend. 14. The Petitioner has been denied an opportunity to be heard.

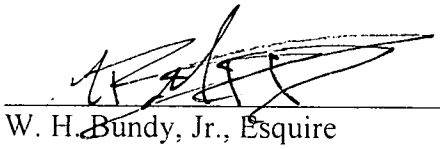
II. The Court of Appeals erred in finding that it did not have jurisdiction and in failing to rule on the merits of the Petitioner's appeal.

Based upon the foregoing, the Court of Appeals erred in failing to reach the merits of the Petitioner's appeal. The Court of Appeals should have found that its application and interpretation of the S.C. Code ann. Section 15-48-200(a) violated the equal protection and due process requirements of the United States and South Carolina Constitutions and exercised jurisdiction over this appeal.

Conclusion

For the aforementioned reasons, the Petitioner respectfully asks this Court to rehear and reconsider its ruling in light of the fact that its interpretation and application of S.C. Code Ann. Section 15-48-200(a) violates the due process and equal protection rights of the Petitioner. This Court should exercise jurisdiction over the appeal and hear the case on the merits.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



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

vs.

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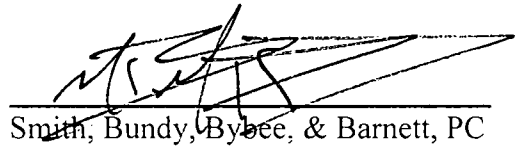
PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on Respondent Lend Lease (US) Public Partnership, LLC, by depositing a copy with Federal Express Service shipping, pre-paid for overnight service, on April 7, 2015, addressed to its attorney of record, Edward James "Trip" Coyne, III, Esquire, Williams Mullen, P.C., 300 N. Third Street, Suite 420, Wilmington, North Carolina 28401.



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April 7, 2015

VIA FED EX – OVERNIGHT

The Honorable Jenny Abbott Kitchings
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1015 Sumter Street
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Phone: 803-734-1080

Re: Lend Lease (US) Public Partnership, LLC f/k/a Actus Lend Lease, LLC vs.
Allsouth Electrical Contractors, Inc.
Case No: 2013-002679

Dear Ms. Kitchings:

Please find enclosed for filing with the South Carolina Court of Appeals the original and seven copies of the Appellant's Petition for Rehearing along with the Proof of Service of the same.

Also enclosed is our check in the amount of $25.00 for the filing fee.

Please file the original and return the extra copy, file stamped as received, to us in the envelope enclosed for your convenience.

I thank you for your attention to this matter.

Sincerely yours,

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