THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-10-7594

Case Tracking No. 2014-002115

One Bell Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated, ...

Respondents,

v.

Trammell Crow Residential Company; TCR NC Construction I, LP; Belle Hall Direct 101, LP; TCR RLD Condominiums, Inc.; CS 101 Belle Hall, LP; TCR Southeast, Inc.; TCR Carolina Properties, Inc.; TCR SE Construction, Inc.; TCR SE Construction II, Inc.; TCR Construction, a division of Trammell Crow Residential; TCR Development, a division of Trammell Crow Residential; Trammell Crow Residential Carolina, a division of Trammell Crow Residential; and Tauer Consulting Company, Inc., a division of Trammell Crow Residential, each individually, and collectively d/b/a "Trammell Crow Residential," "Trammell Crow" or "TCR"; Halter Properties, LLC; Halter Realty LLC; and Halter Realty Group, LLC, each individually, and collectively d/b/a "Halter Companies", Jane Doe 1-5; ABG Caulking & Waterproofing of Morristown, Inc. a/k/a ABG Caulking Contractors; Advanced Building Products & Services, LLC; BASF Corporation; Budget Mechanical Plumbing, Inc.; Builders First Source – Southeast Group, LLC; Builders Services Group, Inc., individually, and d/b/a Gale Contractor Services, Inc.; Century Fire Protection, LLC; Cline Design Associates, P.A. and Gary D. Cline; Coastal Lumber & Framing, LLC; Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control; First Exteriors, LLC; Flooring Services, Inc.; General Heating .....& Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air; Jimmy Warner, individually, and d/b/a Warner Heating & Air; Glazing Consultants, Inc.; GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc.; Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric; KMAC of the Carolinas, Inc.; P&P Metal Sales Co., Inc. a/k/a P&P Metal Sales, LLC a/k/a P&P Metal Sales, Inc. a/k/a Carolina Metals; Pleasant Places, Inc.; Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida; RS Custom Homes,

LLC; Southern Specialties, Inc.; Structural Contractors South, Inc.; Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc.; TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc.; VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc.; What Don't We Do; and John Doe 1-25, Defendants,

Appellant.

Of whom TAMKO Building Products, Inc. is the Appellant.

VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Third-Party Plaintiff,

v.

Billy Gray, d/b/a United Builders, LLC,, Third-Party Defendant,

Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric, Third-Party Plaintiff,

v.

J. Correa Electrical Company, LLC, Third-Party Defendant,

FINAL REPLY BRIEF OF APPELLANT, TAMKO BUILDING PRODUCTS, INC.

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May 7, 2015

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Appellant TAMKO hereby files this reply brief in response to the Initial Brief of Respondents.

ARGUMENT

TAMKO is entitled to reversal of the lower court's denial of its motion to dismiss, to dismissal of OBH's lawsuit as to TAMKO, and to have this dispute be submitted to arbitration based on the valid and enforceable arbitration clause contained in the warranty.

I. Because there are no valid grounds, independent of the warranty, on which to challenge the arbitration clause, the lower court erred in finding the arbitration clause unconscionable and unenforceable.

Under South Carolina law, arbitration cannot be avoided without valid grounds to void the arbitration clause, independent from the other terms of the warranty. *Brown v. Green Tree Servs., LLC*, 585 F. Supp. 2d 770, 775 (D.S.C. 2008) (internal citations omitted) ("If a party is seeking to avoid arbitration by challenging the validity or enforceability of the arbitration provision, that party must state grounds which relate specifically to the arbitration clause and not just to the contract as a whole."); *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 404, 440 S.E.2d 877, 879 (1994) ("[I]t is only when a party has valid grounds upon which to challenge the arbitration clause itself that arbitration may be avoided.") In its responsive brief, OBH fails to show valid grounds to justify the lower court's unsupported finding that the arbitration clause was unconscionable and unenforceable.

The TAMKO shingles at issue were accompanied by a limited warranty that included an express provision requiring all disputes related to the shingles to be submitted to mandatory binding arbitration. (R. p. 170; R. p. 174). The arbitration clause provides:

> **MANDATORY BINDING ARBITRATION:** EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER INCLUDING WHETHER ANY PARTICULAR MATTER IS SUBJECT TO ARBITRATION (EACH AN "ACTION") BETWEEN YOU AND TAMKO

(INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE SHINGLES OR THIS LIMITED WARRANTY SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION (WHICH ARE AVAILABLE ONLINE AT www.adr.com OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1-800-778-7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED MAIL AT P.O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.

(R. p. 170) (bold and capital letters in original). The lower court determined that this "arbitration provision is made unconscionable based on the cumulative effect of several ambiguous, oppressive and one-sided provisions located throughout the Warranty. . . ." (R. p. 5) (emphasis added). This holding is clear legal error because it is based on the terms of the warranty, not on any problem related solely to the arbitration clause itself.

South Carolina has adopted the reasoning of the U.S. Supreme Court's *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) for analyzing the enforceability of an arbitration clause. *S.C. Pub. Serv. Auth. v. Great Western Coal, Inc.*, 312 S.C. 559, 562-63 437 S.E.2d 22, 24 (1993). "[A] party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." *Id.* at 562-63, 437 S.E.2d at 24 (emphasis added). In applying *Prima Paint,* the South Carolina Supreme Court explained, "Arbitration clauses are separable from the contracts in which they are imbedded." *Jackson Mills, Inc.*, 312 S.C. at 403, 440 S.E.2d at 879 (internal citation omitted). "[I]t is only when a party has valid grounds upon which to challenge the arbitration clause itself that arbitration may be avoided." *Id.* at 404, 440 S.E.2d at 879 (emphasis added).

In its order, the lower court relied heavily upon *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013),[1] *cert. granted* (July 24, 2014) (No. 2013-001345), in reaching its conclusion that because provisions in the warranty were viewed as one-sided, the arbitration clause was therefore unconscionable. The lower court failed to consider in its analysis that an "arbitration clause's validity is distinct from the substantive validity of the contract as a whole" and "even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision." *Housing Auth. of City of Columbia v. Cornerstone Housing, LLC,* 356 S.C. 328, 338 & 340, 588 S.E.2d 617, 622 & 623 (Ct. App. 2003) (internal quotation and citation omitted) (emphasis added). Under South Carolina law, arbitration cannot be avoided by concluding the warranty is unconscionable, without a challenge on valid grounds establishing that the arbitration agreement itself is unconscionable.

Now, OBH attempts to supply a remedy to the lower court's failure to provide valid grounds, independent of the warranty, to support a finding that the arbitration clause was unconscionable. South Carolina case law provides examples of "valid grounds" for challenging an arbitration clause, such as where the arbitration clause itself lacks mutuality, where the dispute arose from events occurring after the arbitration clause expired, or when a claim can be made that the arbitration clause was never entered into. *See Carlson v. S.C. State Plastering, LLC,* 404 S.C. 250, 260, 743 S.E.2d 868, 874 (Ct. App. 2013); *see also York v. Dodgeland of*

[1] D.R. Horton's petition for certiorari for *Smith v. D.R. Horton* was granted on July 24, 2014 (No. 2013-001345). Oral arguments were heard on March 3, 2015, and a decision from the Supreme Court of South Carolina is forthcoming. In the lower court hearing, TAMKO acknowledged the differing analysis employed by the S.C. Court of Appeals in the *D.R. Horton* case, as compared, for example, to the *Carlson* case, where the Court of Appeals correctly limited its analysis to the terms of the arbitration clause only. TAMKO notes that this is the primary issue addressed by appellants in the *D.R. Horton* appeal ongoing before the S.C. Supreme Court, and it is likely that the results of that appeal will influence the outcome of this appeal, as the issues are similar.

Columbia, Inc., 406 S.C. 67, 89, 749 S.E.2d 139, 150 (Ct. App. 2013); *Jackson Mills, Inc.*, 312 S.C. at 404, 440 S.E.2d at 879. None of these conditions exist here. The lower court's unsupported statement that the arbitration clause by itself is unconscionable and unenforceable is clearly erroneous.

An examination of the lower court's Order does not identify any specific terms within the arbitration clause that support the conclusion that the arbitration clause, by itself, is unconscionable. OBH attempts to cure this error by stating that the arbitration clause "is exculpatory in nature." Initial Brief of Respondents p.21. What remains unanswered is how this arbitration clause, by itself and without considering the warranty's provisions, could be "exculpatory" in nature. How does a clause, which requires arbitration under American Arbitration Association guidelines and does nothing more than provide a mechanism for initiating the arbitration, "exculpate" or clear TAMKO from potential fault?

In another attempt to create "valid grounds," OBH repeatedly references Judge Nicholson's comment at the hearing that he could not read the copy of the warranty document, referring to the exhibit as "illegible." *Id.* at p. 25, 27. OBH now attempts to stretch that commentary into a basis for concluding that the arbitration clause is somehow unconscionable. *Id.* at p. 26. This makes no sense.

OBH included a signed copy of the warranty, which was issued along with the shingles in the 2006-2007 timeframe, as Exhibit 79 to its memorandum in opposition to TAMKO's motion to compel arbitration. (R. p. 90, lines 8-10; R. p. 91, lines 5-12; R. pp. 140-149). At the hearing, counsel for TAMKO handed up to Judge Nicholson that signed copy of the warranty, as well as an easier-to-read copy, because the court filings (briefs and exhibits) were not in front of the Judge. (R. p. 94, lines 1-12). The copy of the warranty that Judge Nicholson struggled to read

was a facsimile photocopy of the original 2006-2007 signed warranty document. (R. p. 142). That a facsimile photocopy may have been of poor quality and contained text that was difficult to read does not mean the original signed document was "illegible."

As explained in the affidavit of Alex Hines, submitted to the lower court with TAMKO's supplemental brief, "[a]t the time these shingles were manufactured and sold (in or about 2006), the TAMKO limited warranty was legibly printed on the shingle packages, and was also provided with the shipments, ... [and] was also available on TAMKO's website, at www. TAMKO.com." (R. pp. 174-175, ¶¶ 4-5; R. pp. 181-188). The alleged "illegible" document originally provided by the Respondent was simply a poor copy of the original, and it has no substantive bearing on whether the arbitration clause is unconscionable.

In a further attempt to find "valid grounds" for a challenge to the arbitration clause itself, OBH argues that the arbitration clause is so embedded and intertwined within the warranty that it cannot be considered separately from the warranty's allegedly unconscionable provisions. Initial Brief of Respondents p. 20-21. Yet, repeatedly saying this is so does not make it so. An arbitration clause is virtually always contained within the relevant contractual document, yet it is still recognizable as an arbitration clause to be considered separately from the rest of the contract's provisions. *See, e.g., Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 19, 644 S.E.2d 663, 665 (2007) ("This case arises out of an arbitration clause in an automobile trade-in contract. . ."); *see also Jackson Mills, Inc.*, 312 S.C. at 402, 440 S.E.2d at 878 (noting a shareholder's agreement "contains an Arbitration Clause").

The arbitration clause does not "incorporate" the warranty's limitations or disclaimers, and it does not "preclude[e] the accessibility of remedies at law." Initial Brief of Respondents p. 21. It simply provides the mechanism for dispute resolution. "An agreement providing for

arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined." *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001) (internal citation omitted) (emphasis in original). OBH's argument that the arbitration clause has "the deleterious effect of barring any right to a jury trial" is not evidence of an oppressive or one-sided arbitration agreement. Initial Brief of Respondents p. 21. That is simply the nature of all arbitration clauses. *Simpson,* 373 S.C. at 27, 644 S.E.2d at 670 ("The loss of a right to a jury trial is an obvious result of arbitration.") The arbitrator would be free to exercise the same authority as any court, and if called for, could declare the warranty disclaimers and limitations unconscionable, and decline to enforce them. Arbitration will not remove from OBH any remedy it would be able to achieve through litigation.

The lower court erred in adopting OBH's arguments and wholesale incorporating them into its Order. The problem at hand does not lie in a failure by the lower court, or OBH, to "conclude" that the arbitration clause is unconscionable. The error lies in the lower court's failure to support that conclusion with a valid basis, independent of the warranty. That the lower court "understood, and ultimately concluded, that OBH successfully challenged TAMKO's arbitration provision" does not cure the lower court's errors. Initial Brief of Respondents p. 15.

II. TAMKO made no "concessions" regarding whether OBH challenged the arbitration clause or regarding severability of the warranty's allegedly unconscionable provisions.

OBH incorrectly asserts that TAMKO "conceded" that OBH challenged the arbitration clause itself and is, therefore, precluded from addressing the issue on appeal. Specifically, OBH asserts that TAMKO "conceded" that "OBH challenged the applicability of TAMKO's arbitration provision" by engaging in a discussion with the lower court at the hearing on the motion as to whether the arbitration clause is unconscionable. Initial Brief of Respondents p. 13.

The lower court's Order adopted OBH's assertion that the arbitration clause was unconscionable, without providing any valid grounds specific to the arbitration clause itself upon which to base such a finding. At the hearing, TAMKO explained to the lower court why the arbitration clause is not unconscionable. The fact that TAMKO addressed this at the hearing does not amount to a concession that OBH had valid grounds to challenge the arbitration clause independently from the warranty or that the lower court correctly decided the issue.

Similarly, OBH asserts in its responsive brief that TAMKO's arguments at the hearing before the lower court rendered its severability argument moot. Initial Brief of Respondents p. 29 – 30. Specifically, OBH states that by "allowing the Circuit Court to assess the unconscionability of both TAMKO's arbitration provision as well as TAMKO's warranty," the severability of any allegedly unconscionable warranty provisions is moot. *Id.* at p. 30.

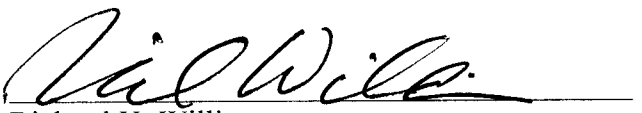
TAMKO is appealing errors in the lower court's Order. The lower court, citing *Simpson* and *D.R. Horton,* held that, "TAMKO's arbitration clause is made unconscionable by oppressive provisions which pervade the Warranty, thereby rendering severability impractical, if not impossible." (R. p. 20). This holding is clearly erroneous because it bases the finding of unconscionability of the arbitration clause on "oppressive provisions which pervade the Warranty." TAMKO does not believe that these substantive warranty limitations are oppressive, but neither this Court nor the lower court should reach that issue. As the prior case law clearly instructs, these legal determinations are for the arbitrator. The only question the lower court should have answered in its Order was whether the arbitration clause itself is fair and mutual. If it is, the dispute must be submitted to arbitration.

Further, TAMKO clearly pointed out the warranty's severability clause at the hearing. (R. p. 85, lines 14-20; R. p. 88, lines 20 – 23; R. p. 89, lines 3-6). Therefore, the issue of severability is not moot.

CONCLUSION

The lower court erred in finding the arbitration clause unconscionable because it provided no basis independent of the warranty and cited no valid grounds specific to the arbitration clause itself. The arbitration clause in TAMKO's Limited Warranty is not one-side or oppressive. Other limitations in the warranty do not factor into the determination of whether the arbitration clause is unconscionable. Even if the substantive warranty provisions are considered in determining whether the arbitration clause is enforceable, the warranty contains a severability clause that allows the simple and straightforward arbitration clause to survive. Therefore, TAMKO is entitled to arbitration of this dispute and dismissal of OBH's lawsuit as to TAMKO.

Respectfully submitted,



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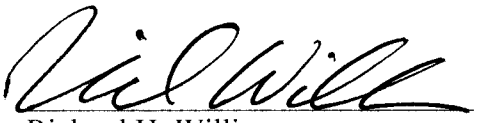
CERTIFICATION PURSUANT TO RULE 211, SCACR

Pursuant to Rule 211(a), SCACR, undersigned counsel certifies that the Final Reply Brief of Appellant filed in this matter on behalf of TAMKO Building Products, Inc. complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellant, TAMKO Building Products, Inc. on One Belle Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated, by depositing a copy of it in the United States Mail, postage prepaid, on May 7, 2015, addressed to their attorneys of record, Justin Lucey and Dabny Lynn, Post Office Box 806, Mt. Pleasant, SC 29465.

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