

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

OCT - 2 2015

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

S.C. Supreme Court

Appellate Case No. 2015-001456

South Carolina Electric & Gas Co.,Respondent,

v.

Anson Construction Co.,Petitioner.

PETITIONER'S REPLY TO RETURN TO PETITION FOR CERTIORARI

Everett A. Kendall, II, Esquire
J. Eric Cavanaugh, Esquire
SWEENEY WINGATE & BARROW, P.A.
1515 Lady Street
Post Office Box 12129
Columbia, S.C. 29211
(803) 256-2233
Attorneys for Petitioner

Other Counsel of Record:

John A. Massalon, Esquire
I. Ryan Neville, Esquire
WILLS MASSALON & ALLEN, LLC
97 Broad Street
Post Office Box 859
Charleston, S.C. 29402
(843) 727-1144
Attorneys for Respondent

PETITIONER'S REPLY

COMES NOW Petitioner Anson Construction Company ("Anson"), in Reply to Respondent South Carolina Electric & Gas Co.'s ("SCE&G") Return to Anson's Petition for Writ of Certiorari. For the reasons set forth below and those previously outline in Anson's Petition, Anson respectfully requests this Court grant its Petition.

I. BY CONSTRUING ALL INFERENCES IN FAVOR OF THE MOVING PARTY, BOTH THE TRIAL COURT'S ORDER AND THE COURT OF APPEALS' OPINION CLEARLY CONFLICT WITH ESTABLISHED SUPREME COURT PRECEDENT FOR SUMMARY JUDGMENT.

This Court has repeatedly spoken about the standards applicable to granting summary judgment stating specifically that summary judgment is a drastic remedy that "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Watson v. Southern Ry. Co., 420 F.Supp. 483, 486 (D.S.C.1975). "Summary judgment is appropriate when it is clear that there is *no genuine issue of material fact* and that the moving party is entitled to a judgment as a matter of law." Cafe Assoc., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991) (emphasis added). "[T]he non-moving party is only required to show a mere scintilla of evidence in order to withstand a motion for summary judgment." Baughman v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 329, 673 S.E.2d 801, 803 (2009).

In deciding on a motion for summary judgment, "the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the non-moving party." Id. "[I]f the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, *summary judgment must be denied*[".] See Title Ins. Co. of Minnesota v. Christian, 267 S.C. 71, 226 S.E.2d 240 (1976).

SCE&G's Return highlights the fact that both the trial court and the Court of Appeals ignored Supreme Court precedent by viewing the evidence and all inferences therefrom in the light most favorable to SCE&G as the moving party. In doing so, both the trial court and Court of Appeals ignored clear and repetitious evidence in the Record regarding the intent of the parties and what documents the parties intended would form the contract between them.

In support of its argument that this Court should deny certiorari, SCE&G states that in order for this Court to accept Anson's argument that the evidence permits more than one reasonable inference as to the Parties' intent, this Court would have to disregard the undisputed facts and law of this State. See Ret. to Pet. 11, Sept. 22, 2015. However, as is clear from the evidence in the Record, in order to grant Anson's Petition, this Court simply has to apply the scintilla standard as outlined in our law and view the evidence in the Record and all inferences therefrom in the light most favorable to Anson as the non-moving party. Neither the trial court nor the Court of Appeals did that; rather, they ignored the clear evidence before them as to the parties' intent, appeared to weigh the credibility of the parties, and then summarily viewed the evidence in favor of SCE&G, which is in clear contradiction to the legal standard governing summary judgment in this state. In fact, there is far more than a scintilla of evidence in the Record supporting the denial of summary judgment in this case.

To support its argument, SCE&G misstates the facts and incorrectly extrapolates a provision in the signed Quotation in favor of SCE&G's position. As is well briefed to this Court and in the courts below, the signed Quotation includes a provision that states it is "subject to the execution of a non-modified A1A form or a subcontractor approved

equal.” R. p. 19. In its Return, SCE&G incorrectly states that the “evidence leads to the inescapable conclusion that there had to be another document (i.e. SCE&G’s Purchase Order) exchanged between the Parties prior to the commencement of the work.” See Ret. to Pet. 13. This illogical jump by SCE&G ignores the fact that the other document contemplated was specifically defined in the Quotation as 1) a non-modified A1A form or 2) a subcontractor approved equal. R. p. 19.

First, it is undisputed that a non-modified A1A form was never exchanged or signed by the parties. Moreover, the logic used by SCE&G also ignores the testimony of Pete Stutsman that he considered the signed Quotation to be the subcontractor approved equal contemplated in the document. In addition, while admitting for the first time in its Return that the provision contemplating the execution of another document may well have been a condition precedent, this argument acknowledges the argument advanced by Anson to both the trial court and Court of Appeals that the condition was waived by the parties. See Ret. to Pet. 16. However, this instance, like all other facts in the Record, clearly presents a question of fact for which there is clearly more than a scintilla of evidence that supports Anson’s argument such that summary judgment should not have been granted in this case.

Second, the Record is clear that Anson did not intend to be bound by SCE&G’s Purchase Order and General Terms and Conditions on the Church Street Theater job. Moreover, Mr. Stutsman clearly stated that he considered the signed Quotation to be the contract between the parties and that another document was not needed before Anson went to work. R. p. 492, lines 7-10; p. 509, line 3; p. 513, lines 14-24; p. 516, lines 8-23. Perhaps most importantly, and a fact which was clearly ignored by both the trial court and

the Court of Appeals as well as SCE&G, SCE&G's own employee Jesse Thigpen admitted that he signed Anson's Quotation so that Anson could go to work. R. p. 339, line 13-p. 342, line 2.

Contract law in South Carolina is clear that only one party's signature need be present in order to have a fully enforceable contract as long as the document contains all material terms. See Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) ("South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement."). South Carolina law defines those material terms as including price and scope of work. See Stevens and Wilkinson of S. C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) ("In a contract for services two essential terms are the scope of work to be performed and the amount of compensation.") (*quoting* W.E. Gilbert & Assocs. v. S.C. Nat. Bank, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985)). In this case it is clear that the material terms required by South Carolina law do not include an indemnification clause or other terms or clauses outlined in SCE&G's unsigned Purchase Order and General Terms and Conditions.

It is undisputed that Jesse Thigpen signed Anson's Quotation so that Anson could go to work. It is further undisputed that the signed Quotation is the only signed document that exists between the parties. The only dispute between the parties is whether the unsigned Purchase Order and General Terms and Conditions were intended to be part of the contract between the parties; a fact which is heavily in dispute and for which there

is more than an scintilla of evidence in the Record that should have prevented the trial court from granting summary judgment to the moving party in this case.

II. THE RECORD STANDS IN STARK CONTRAST TO THE “FACTS” RELIED ON BY SCE&G IN ITS RETURN.

In its Return, SCE&G repeatedly makes representations regarding the Record. However, a review of the Record clearly reveals that those representations are not supported by the Record. Furthermore, a review of the Record reveals that those representations are directly contradicted by deposition testimony from both Anson and SCE&G’s employees.

Specifically, SCE&G states the following in support of its request that this Court deny Anson’s Petition: “Anson acknowledged that it received the Purchase Order and General Terms and Conditions as part of the package of documents for the subject job, that the Anson Quotation was a bid for the work, and that it (e.g. Quotation) could not be the “subcontractor approved equal” described in Paragraph 2 of the same document.” See Ret. to Pet. 11-14. These representations are in stark contrast with the Record that was before the trial court and Court of Appeals and do not provide support for SCE&G’s position.

To begin with, SCE&G states that Pete Stutsman, the President of Anson, “acknowledged that Anson received the Purchase Order and General Terms and Conditions as part of the package of documents for the *subject* job[.]” Id. (emphasis added). However, in Mr. Stutsman’s deposition, while he acknowledged that a purchase order and general terms and conditions were generally part of the document package, he categorically rejected that they were part of the contract between the parties. R. p. 524, line 8-p. 525, line 5.

Second, in a continuing attempt to lessen the significance of the only signed document between the parties, SCE&G states the Mr. Stutsman testified that “Anson Quotation was a [nothing more than] a *bid* for the work[.]” See Ret. to Pet., pp. 11-14. However, Mr. Stutsman clearly testified that Anson considered the signed Quotation to be the contract between the parties. R. p. 475, lines 11-17; p. 481, lines 23-p. 482, line 18; p. 489, line 40-p. 490, line 9; p. 509, line 24-p. 510, line 5; p. 516, lines 8-25.

Third, and perhaps most surprisingly, SCE&G maintains that Mr. Stutsman testified that the Quotation “*could not be* the subcontractor approved equal described in Paragraph 2 of the same document.” (emphasis added) (internal quotations removed). See Ret. to Pet., pp. 12-14. As is clear throughout Mr. Stutsman’s deposition, he testified repeatedly that he considered the signed Quotation to be the subcontractor approved equal referred to in Paragraph 2 of the same document. R. p. 41, line 10-p. 491, line 17; p. 492, lines 2-10; p. 508, line 5-p. 509, line 3; p. 513, lines 14-24; p. 516, lines 11-23.

Finally, SCE&G states that Mr. Stutsman “did not dispute that Anson applied for payment per the Purchase Order” and was paid as provided by the Purchase Order terms and conditions. See Ret. to Pet. 12. This statement is unsupported by any evidence in the Record before this Court. In fact, as the Record clearly demonstrates, Mr. Stutsman testified that the purchase order was only a vehicle Anson used to get paid because SCE&G would not pay Anson without reference to the purchase order number. R. p. 44, lines 14-19. Contrary to SCE&G’s unsupported insinuation that because Anson requested payment and referenced a purchase order number with that request, Mr. Stutsman never acknowledged that the purchase order was part of the contract for the subject job or that he agreed to be bound by the general terms and conditions referenced by the purchase

order. In fact, he flatly and clearly rejected that notion throughout his deposition testimony. R. p. 506, line 24-p. 507, line 6; p. 525, lines 1-5.

All of the above clearly demonstrate why there is more than the required scintilla of evidence as to what documents formed the contractual relationship between the parties such that summary judgment was improvidently granted in this case.

III. THE RULINGS BY THE TRIAL COURT AND THE COURT OF APPEALS ARE WHOLLY DIFFERENT AND FURTHER HIGHLIGHT THE FACT THAT DIFFERENCES EXIST AS TO THE PARTIES' INTENT AND WHAT DOCUMENTS FORMED THE CONTRACT BETWEEN THE PARTIES SUCH THAT SUMMARY JUDGMENT WAS IMPROVIDENTLY GRANTED IN THIS CASE.

As is clear from the lower court's order granting summary judgment and the Court of Appeals' decision affirming that order, the basis for those findings are totally and completely different and only serve to highlight why, when construing the evidence in the light most favorable to Anson as the non-moving party, summary judgment was inappropriate in this case.

In its Return, SCE&G states that the Court of Appeals affirmed the lower court's ruling on "slightly different grounds." See Ret. to Pet. 14. However, as is instantly clear from reading the lower court's order and the opinion from the Court of Appeals, each court came to totally different conclusions as to why SCE&G's Purchase Order and General Terms and Conditions were part of the contract as a matter of law.

In granting summary judgment to SCE&G, the lower court determined that the parties' intended for another document to be executed and further determined that that document was SCE&G's Purchase Order. R. pp. 3-9. However, in arriving at its conclusion, the lower court ignored the existence of the signed Quotation and a plethora of testimony and evidence in the Record that disputed this finding.

Tellingly, in rendering its decision affirming the lower court's order, the Court of Appeals only mentioned in passing that it agreed with the lower court's finding, but spent the majority of its opinion outlining why the Quotation was only an offer and SCE&G's purchase order was a counteroffer that was accepted by Anson by performance. This is a position that was not argued by the parties in the Record below or advanced by the parties in their briefs or on oral argument to the Court of Appeals.

The inability and apparent unwillingness of the Court of Appeals to follow the logic and holdings of the lower court clearly highlight why summary judgment was inappropriate in this case. The Court of Appeals' opinion is clearly an incorrect interpretation of South Carolina contract law, as is thoroughly discussed in Anson's Petition for Writ of Certiorari. Tellingly, SCE&G's Return does not advance any legal justification for the Court of Appeals' decision. Instead, SCE&G attempts to misdirect the Court into a factual examination that is not at all supported by the Record.

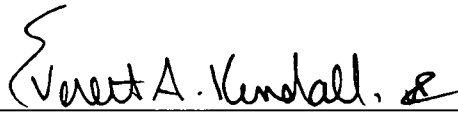
Moreover, and as is outlined above, it is clear that both the lower court and the Court of Appeals ignored clear testimony in the Record that provided more than a scintilla of evidence as to what the parties' intent was, and specifically as to whether the parties' intended that SCE&G's Purchase Order and General Terms and Conditions became part of the contract between the parties. Furthermore, there is no evidence in the Record that would support the Court of Appeals' opinion and its finding that Anson's signed Quotation was only an offer. This determination is clearly in conflict with existing and basic contract law and certainly provides ample reason alone for this Court to grant certiorari to Petitioner.

CONCLUSION

For the foregoing reasons, as well as those previously briefed in Petitioner's Writ and briefs to both the lower court and Court of Appeals, Petitioner respectfully requests this Court grant Petitioner's Writ of Certiorari and reverse the lower court's holding.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.



Everett A. Kendall, II, Esquire
J. Eric Cavanaugh, Esquire
P.O. Box 12129
1515 Lady Street (29201)
Columbia, SC 29211
(803) 256-2233

Attorneys for the Petitioner

October 2, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

RECEIVED

OCT - 2 2015

Appellate Case No. 2015-001456

S.C. Supreme Court

South Carolina Electric & Gas Co.,Respondent,

v.

Anson Construction Co.,Petitioner.

PROOF OF SERVICE

I certify that I have served a copy of Petitioner's Reply to Return to Petition for Certiorari on South Carolina Electric & Gas Co. by depositing a copy of it in the United States Mail, postage prepaid, on October 2, 2015, addressed to its 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
**Attorneys for Petitioner Anson
Construction Company**