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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

JAN 21 2016

SC Court of Appeals

Concerned Riverchase Estate Owners, Andrew
Dodd, Heather Dodd and Charles Ratay Respondents,

v.

Riverchase Estates Property Owners
Assoc., Inc.; LGI Land SC, LLC; LGI
Holdings, LLC; LGI Development, Inc.;
and Lexon Insurance Company, Inc. Appellants.

AND

Concerned Riverchase Estate Owners, Clark,
Perry, Elder & White. Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.;
Woodforest Bank, N.A., LGI Land SC, LLC; LGI
Holdings, LLC; LGI Development, Inc.; and
Lexon Insurance Company, Inc. Defendants

Of whom Riverchase Estates Property Owners
Assoc., Inc.; LGI Land SC, LLC; LGI
Holdings, LLC; LGI Development, Inc.;
and Lexon Insurance Company, Inc. are the Appellants.

Appellate Case No. 2015-00193

The Honorable R. Knox McMahon
Lancaster County
Trial Court Case Nos. 2013CP2900649, 2014CP2900792

REPLY IN SUPPORT OF
PETITION FOR REHEARING

Appellants hereby submit the following in Reply to Respondents' Return¹ to the Petition for Rehearing in accordance with Rule 240(f), SCACR.²

In the Return, Respondents merely regurgitate the same arguments set forth in the Motion to Dismiss. Respondents miscast the subject of this appeal and reveal their misunderstanding of the Record below and controlling precedent as to the many ways a lower court's order may aggrieve a party. Respondents compound these errors by inserting factual allegations that are outside the Record.

1. **Arbitration was Denied.** The following facts are not contested. The Covenants are a part of the contract between the parties. The Covenants mandate that arbitration be conducted in Montgomery County, Texas when a dispute involves the Developer. The Developer made a motion to compel arbitration in Montgomery County, Texas in accordance with the Covenants. The lower court refused to grant this motion and denied arbitration in Montgomery County, Texas. This appeal is the result of the denial of a contractual right to

¹ The document filed and served by Respondents in response to the Petition for Rehearing was improperly titled as a *Reply* instead of as a *Return*.

² Defined terms herein shall have the meaning set forth in Appellants' Petition for Rehearing.

arbitration. The denial of arbitration is immediately appealable.

Appellants concur that S.C.Code § 15-48-200 and the cases cited by Respondents preclude the appeal of an order *enforcing* a contractual arbitration agreement. However, this case is not the appeal of an order enforcing an arbitration agreement in accordance with the subject contract. It cannot be disputed that the lower court did not compel arbitration in accordance with the contractual terms. Thus, the legal precedent as to the immediate appeal of an order enforcing a contractual arbitration agreement is inapplicable to this appeal.

To be more specific, the lower court in this matter refused to compel arbitration in Montgomery County, Texas as expressly required in the contract, the Covenants. This denial of arbitration as required and defined by the contract is the subject of this appeal. This Court's order misconstrued the gravamen of this appeal. This distinction is critical and manifest.

"The basic purpose of the FAA is to overcome state court's refusal to enforce arbitration agreements." Zabinski v. Bright Acres Associates, 346 S.C. 580, 590-91, 553 S.E.2d 110, 115 (2001). "[C]ourts must rigorously enforce arbitration agreements *according to their terms*, including

terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted.'" Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) (citations omitted) (italics added). "The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." Grant v. Magnolia Manor Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). "Section 4 [of the FAA] specifically states that 'the court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement.*' Id. (emphasis added). The district court must, therefore, apply a forum selection clause contained in the agreement if such a clause exists." Energy Absorption Sys. v. Carsonite Int'l, 377 F. Supp. 2d 501, 504 (D.S.C. 2005); See 6 C.J.S. Arbitration § 36 (noting that "[a]greements to arbitrate in a particular forum are enforced as a matter of contract law"). Therefore, this Court should allow this appeal to proceed as the gravamen of this appeal is to redress the refusal of the lower court to compel the arbitration prescribed in the contract.

2. **Appellants are Aggrieved.** As noted in the Petition for Rehearing, the primary relief sought by Appellants was enforcement of the arbitration clause which mandated

arbitration in Montgomery County, Texas. Appellants argued in the alternative only to the extent the primary relief requested was denied.

Respondents' contention that Appellants consented to arbitration in Lancaster County, South Carolina is contrary to and unsupported in the Record. During the hearing and on the record, the undersigned expressly told the lower court that if arbitration was ordered in Lancaster County, South Carolina, then the undersigned would have to consult with Respondents and that Respondents may elect to appeal such a decision. (Trans. of Sept. 8, 2014 Hearing, pp. 23-24 attached in part hereto at **Exhibit A.**)

Upon receipt of the proposed order, the undersigned expressly informed the lower court as follows: "It should be noted in this letter that [Appellants] do not agree with or consent to the Court's announced decision to compel arbitration of these two lawsuits in Lancaster County, South Carolina rather than Montgomery County, Texas." (December 15, 2014 letter attached hereto as **Exhibit B.**)

Appellants did not consent to arbitration by arguing for alternative relief. As noted in the Petition, a party may be aggrieved by receiving alternative relief rather than primary relief. Sickora v. Metro. Life Ins. Co., 278 S.C. 99, 101, 292 S.E.2d 593, 595 (1982) (holding "[t]he alternative relief

did not prevent a review by this Court on the basic contention. If the primary relief had been granted, as it should have been, the alternative motion would have been unnecessary"); see also Jean Hoefer Toal, Appellate Practice in South Carolina, p. 109 (2002) (noting that "a party may appeal adverse portions of an otherwise favorable verdict or order."

WHEREFORE, the undersigned counsel for Appellants respectfully request this Court to grant this Petition for Rehearing and allow this appeal to proceed on the merits.

Date: January 19, 2016

Respectfully submitted,

By: W. Mark White

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF LANCASTER
2013-CP-29-649, 792

Concerned Riverchase Estate Owners, et al.

vs.

Riverchase Estates Property Owners Association, Inc.

Lancaster, South Carolina

September 8, 2014

Before the Honorable Knox McMahon

APPEARANCES

For the Plaintiffs: Halford, Greeley

For the Defendant: Mark White

Reported by: Michael C. Watkins

Official Court Reporter

1 THE COURT: Well, I looked at Mr. White's reply to the
2 plaintiff's return to the motion to reconsider, and on the
3 next to the last page, three or four, indicates, "based on
4 the foregoing the Court should reconsider the order and
5 enforce the mandatory arbitration provision in either Texas
6 or Lancaster County along with the dismissal of certain
7 defendants." I get -- I mean, I guess my question is, Mr.
8 White, would the defendants be amenable to mediation in
9 Lancaster County?

10 MR. WHITE: The defendants would certainly be amenable
11 to mediation in Lancaster County.

12 THE COURT: Would the plaintiffs?

13 MR. GREELEY: To mediation? Of course, mediation is
14 not binding and so that's why I think the defendants are
15 saying that they are amenable to it.

16 MR. WHITE: Well, I will go further. If the Court asks
17 me were the defendants willing to resolve these various
18 motions for arbitration in Lancaster County, I don't know, I
19 would have to speak to my client, but I would speak to them
20 and we could render -- get a decision back to the Court
21 rather quickly.

22 MR. GREELEY: That's fine with us. Yeah, we -- I
23 mean --

24 THE COURT: Well, what if I just order it?

25 MR. WHITE: Well, then if you order it then they have a

1 choice, if they're amenable to it then we rock on and move
2 this case along, if they are not then they have the decision
3 to make of whether they want to pay the piper to roll on
4 down to Columbia.

5 THE COURT: I'm not sure they have a choice then unless
6 that choice would be being held in contempt or not if I
7 order it.

8 MR. WHITE: I would have to look at it. It's a mode of
9 trial. The question is is Texas arbitration, is that a mode
10 of trial and immediately appealable versus Lancaster? It
11 may not be, I can't stand here and say I know the answer to
12 that.

13 THE COURT: And I was going by your return to the -- I
14 mean that -- to me that seems like a way to move the case
15 along for the plaintiffs, they -- wherever the case ends up
16 it has got to be resolved between the parties. I think it's
17 unconscionable -- and I'm not using that necessarily in the
18 legal sense -- to have plaintiffs that do own property in
19 Lancaster County have to go to Texas to resolve that issue,
20 to resolve whatever the issues are.

21 MR. WHITE: If this Court were to preserve the
22 arbitration right and force it in Lancaster, it would
23 present the defendants a very difficult choice on whether
24 they -- for one, it may not be a amenable, I don't know the
25 answer to that. Number two, they are getting their mode,

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December 15, 2014

Via U.S. Mail and Electronic Mail (kcmahonlc@sccourts.org)

The Honorable R. Knox McMahon
Lexington County Judicial Center
205 E. Main Street
Lexington, SC 29072

Re: Concerned Riverchase Estate Owners, et al. v. Riverchase
Estates Property Owners Association, Inc., et al.
C.A. No.: 13-CP-29-649

Concerned Riverchase Estate Owners, et al. v. Riverchase
Estates Property Owners Association, Inc., et al.
C.A. No.: 14-CP-29-792

Dear Judge McMahon:

This firm represents defendants Riverchase Estates Property Owners
Assoc., Inc., LGI Land SC, LLC, LGI Holdings, LLC, LGI Development, Inc.
and Lexon Insurance Company, Inc., (collectively, the "LGI Defendants")
in the matters referenced above.

I write to comment on the proposed orders submitted by counsel for
the plaintiffs.

In the civil action bearing C.A. No. 13-CP-29-649, the LGI
Defendants suggest two modifications to the proposed order. First, the
LGI Defendants submit that the following paragraph should be deleted
from the middle of Page 2 of the proposed order:

*Counsel for all parties indicated that there may
exist support for binding arbitration in Lancaster*

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The Honorable R. Knox McMahon
December 15, 2014
Page 2

County, South Carolina to move the case toward resolution. Plaintiffs' counsel indicated that there is no objection by Plaintiffs to binding arbitration. Defendants' counsel indicated that while no objection was known at the time of oral argument, that support may exist after defense counsel consults with Defendants. The court finds that the matter has been pending since April 24, 2014 wherein the parties could have engaged in discussions regarding moving the case forward to resolution but that this has not occurred.

The basis for this proposed modification is that the content of this paragraph is not germane to the Court's decision and does not serve to provide any legal or factual basis for the Court's decision.

Second, the LGI Defendants submit that the last sentence of the proposed order should be modified as follows:

All plaintiff and defendant parties are required to submit to binding arbitration of this dispute in Lancaster County, South Carolina before a single arbitrator conducted in accordance with the Construction Industry Arbitration Rules (or substantial equivalent) of the American Arbitration Association as may be arranged through the office of the Clerk of Court.

The basis for this proposed modification is to harmonize the order and the Court's reasoning. The Court held that the arbitration clause contained in the Covenants is enforceable except as to the Texas venue. The inserted language set forth above is the exact language used in the Covenants to establish the procedure for the arbitration.

The LGI Defendants have no comments as to the proposed order in the civil action bearing C.A. No. 14-CP-29-792.

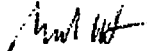
It should be noted in this letter that the LGI Defendants do not agree with or consent to the Court's announced decision to

The Honorable R. Knox McMahon
December 15, 2014
Page 3

compel arbitration of these two lawsuits in Lancaster County, South Carolina rather than Montgomery County, Texas.

Respectfully,

SPENCER & SPENCER, P.A.



W. Mark White

(Via Electronic Mail)

cc: Chris Wren
Tucker S. Player, Esq.
J. Cameron Halford, Esq.
Leland B. Greeley, Esq.

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and Lexon Insurance Company, Inc. are the Appellants.

Appellate Case No. 2015-00193

The Honorable R. Knox McMahon
Lancaster County
Trial Court Case No. 2013CP2900649, 2014CP2900792

PROOF OF SERVICE

I certify that I have served the Reply in Support of
Petition for Rehearing by depositing a copy in the United

States Mail, postage prepaid, on January 19, 2016, addressed
to counsel of record as follows:

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Date: January 19, 2016

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January 19, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: **Concerned Riverchase Estate Owners, et al. v. Riverchase
Estates Property Owners Association, Inc., et al.**
Appellate Case No.: 2015-00193

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of the Reply in Support of Petition for Rehearing and Proof of Service in the above referenced matter. Please file the originals with the records of your court and return a clocked copy in the enclosed envelope.

Thank you for your assistance in this matter.

Respectfully,

SPENCER & SPENCER, P.A.



W. Mark White

enclosures

cc: Chris Wren
Beth Richardson, Esq.
J. Cameron Halford, Esq.
Leland Greeley, Esq.

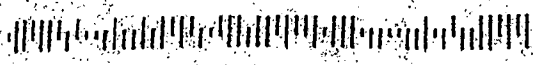
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