THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2011-CP-10-5099

South Carolina Electric & Gas Co., ...Respondent,

v.

Anson Construction Co., ...Petitioner.

REPLY BRIEF OF PETITIONER

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COMES NOW Petitioner 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 ("Respondent") Brief. Petitioner incorporates all arguments made in its Brief hereto.

REPLY

I. RESPONDENT IGNORES EVIDENCE IN THE RECORD THAT CLEARLY DEMONSTRATES THE EXISTENCE OF AN ISSUE OF FACT AS TO WHAT DOCUMENTS AND TERMS FORMED THE CONTRACT BETWEEN THE PARTIES

Respondent's brief largely ignores SCE&G's signature on the Quotation. In doing so, SCE&G fails to address Anson's principal argument: that more than a scintilla of evidence exists that Anson never agreed to SCE&G's documents. Instead, as it did in its brief to the Court of Appeals, Respondent continues to argue that the trial court had the ability to interpret the intent of the parties.

Under well established case law governing the standard for summary judgment in South Carolina courts, a nonmoving party must only put forth 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., 256 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) (emphasis added)).

"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." Player v. Chandler, 299 S.C. at 105, 382 S.E.2d at 893 (1989). "In a contract for services two essential terms are the scope of work to be performed and the amount of compensation." Stevens and Wilkinson of S. C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) (*quoting* W.E. Gilbert & Assocs. v. S.C. Nat. Bank, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985)). A contract is valid even if it is signed by only one party. Peddler, Inc. v. Rikard, 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975). "It is not always necessary, in order to give validity to a contract, that it should be signed by both parties; it may be sufficient if it be signed by one party and accepted, held, and acted upon by the other." Id. (quoting Gladden v. Keistler, 141 S.C. 524, 524, 140 S.E. 161, 164 (1927)).

To begin with, the signed Quotation clearly contains the scope of work as well as a price term, thereby making it a fully valid and enforceable contract under South Carolina law. R. 708. While the Quotation is only signed by SCE&G, under existing case law, SCE&G's signature alone is sufficient to make it a valid contract. Moreover, SCE&G, in the person of Jesse Thigpen, testified repeatedly that he signed the Quotation so that Anson could go to work immediately. R. p. 313, lines 21-25. Furthermore, the testimony in the record from Anson's President Pete Stutsman is clear that Anson considered the signed Quotation to be an agreement and went to work based on that agreement. R.p. 475, lines 11-23, p. 481, line 23-p. 482, line 19.

Respondent's brief largely ignores the existence and import of the signed Quotation. Instead, Respondent argues that Jesse Thigpen's signature on behalf of SCE&G simply was "to note that other documents would be forthcoming that would also govern the Parties' relationship" and then suggests, without any evidence, that those documents were the Purchase Order and General Terms and Conditions. Respondent's Brief, p. 16. However, there is absolutely no evidence in the record that supports this assertion; rather, Mr. Thigpen testified that he signed the Quotation so that Anson could go to work. R. p. 313, lines 21-25, p. 340, line 3-p. 342, line 15. Moreover, Mr. Thigpen testified that he only glanced at the conditions before signing the Quotation, thereby implying that he never read or contemplated additional documents being executed by the parties. R. p. 341, lines 4-7.

Evidence in the Record clearly provides more than a scintilla of evidence as to what documents the parties believe form the contract between the parties. Viewing this evidence in the light most favorable to the nonmoving party, in this case Anson, summary judgment should have been denied in this case. Contrary to Respondent's assertions in its brief, it is clear the trial court and the Court of Appeals took on the role of fact finder and assessed the credibility of the evidence presented rather than viewing the evidence in the light most favorable to Anson. This is directly contrary to existing case law regarding both contract formation and the standard for reviewing a summary judgment motion. For those reasons, this Court should overturn the decisions of the lower courts and remand this case to the trial court.

II. RESPONDENT REPEATEDELY MISSTATES AND MISCHARECTERIZES EVIDENCE IN THE RECORD

In its brief, Respondent repeatedly argues that the signed Quotation could not be the complete agreement between the parties. To support this argument, Respondent relies on a condition precedent contained in the Quotation that states that the Quotation was "subject to the execution of a non-modified AIA form or sub-contractor approved equal" and, therefore, could not be the complete agreement between the parties since it contemplated the exchange of further documents. In doing so, Respondent fails to cite any evidence in the Record that supports that assertion. Instead, relying solely on the trial court's order, SCE&G mischaracterizes direct testimony by Anson's President, stating in its brief that Anson's President "acknowledged . . . that [the signed Quotation] *could not be* the 'subcontractor approved equal' described in paragraph 2 of the same document." Respondent's Brief, p. 11 (emphasis added). This misstatement is inaccurate and misleading as Anson's President actually testified that Anson considered the signed Quotation to be the subcontractor approved equal described in paragraph 2 of the same document. P. Stutsman Dep. 26:11-23, 32:23-33:19; R. p. 475, lines 11-23, p. 482, line 23-p. 482, line 19.

Respondent also erroneously cites as fact that Mr. Stutsman "conceded . . . that the Purchase Order was generally part of the contract with Respondent." Respondent's Brief, p. 5. To the extent that this statement suggests that there was a consistent, routine course of business between Anson and Respondent, which included use of a purchase order, it is incorrect. As addressed in Petitioner'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. R. p. 608, lines 18, 22-23, 25-p. 610, line 15. 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. R. p. 688, line 8-p. 689, line 20, p. 696, lines 1-7; Donnie Graham Dep. 18:2-6, 14-19:1-10, 21:2-8, 34:2-9, May 17, 2012; R. p. 636, lines 2-6, 14-p. 637, line 10, p. 639, lines 2-8, p. 652, lines 2-9; R. p. 478, line 22-p. 479, line 4, p. 493, lines 14-19, 22-24.

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. 4. Again, Respondent has failed to cite to any evidence in the record which supports this assertion.

III. RESPONDENT'S BRIEF GLOSSES OVER AND LARGELY IGNORES THE TIMING OF THE DOCUMENTS THAT WERE EXCHANGED BETWEEN THE PARTIES

In its opinion, the Court of Appeals determined that the signed Quotation, which included a scope of work and a price term, was nothing more than an offer to SCE&G. The Court of Appeals also determined that SCE&G's Purchase Order which incorporated the General Terms and Conditions was a counteroffer, which Anson accepted by performance. Notably, these arguments were not advanced by either party at the trial court, nor were they briefed by either party to the Court of Appeals. The Court of Appeals construct ignores the existence of SCE&G's signature on the Quotation and are not supported by any evidence in the Record which would establish the timing of the exchange of those documents between the parties necessary to make that determination.

As has been extensively briefed by Anson, if SCE&G sent Anson the Purchase Order and General Terms and Conditions before SCE&G signed Anson's Quotation, then

Anson's insistence that SCE&G sign the Quotation clearly constituted a rejection by Anson of SCE&G's counteroffer. However, if SCE&G sent Anson the Purchase Order and General Terms and Conditions after Jesse Thigpen signed the Quotation, those documents are an attempt to unilaterally modify the contract between the parties. Regardless, SCE&G's Purchase Order and General Terms and Conditions cannot be, and are not a part of the agreed upon contract between the parties.

Even so, Respondent asserts that Anson failed to reject SCE&G's Terms and Conditions. Respondent's Brief, p.18. Respondent repeatedly asserts that in order to have rejected the Terms and Conditions Anson would have had to take some action. Id. Again, this argument ignores SCE&G's signature on the Quotation. Moreover, even if SCE&G sent the Purchase Order referencing the General Terms and Conditions prior to signing the Anson Quotation, then Anson *did* take action to reject the Purchase Order and General Terms and Conditions by insisting that SCE&G sign the Quotation. Conversely, if the Purchase Order and General Terms and Conditions arrived after SCE&G signed the Anson Quotation, Anson *did not* have to take any action to reject an attempt to unilaterally modify the contract formed by the signed Anson Quotation.

Because there was already a valid contract between the parties, the Purchase Order and General Terms and Conditions would have been considered a modification and could have only been altered by mutual agreement and for further consideration; neither of which took place. See Lee v. Univ. of S. Carolina, 407 S.C. 512, 518, 757 S.E.2d 394, 398 (2014) (quoting Layman v. State, 368 S.C. 631, 640, 630 S.E.2d 265, 269 (2006)).

CONCLUSION

For the reasons listed above, and for the reasons listed in its initial Brief, Petitioner respectfully requests this Court overturn the holdings of both the Court of Appeals and the trial court and remand the case for trial on all issues.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief complies with Rule 11(b), SCACR.

Respectfully submitted,

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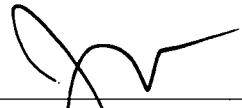

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PROOF OF SERVICE

I certify that I have served a copy of Petitioner's Reply Brief on South Carolina Electric & Gas Co. by depositing a copy of it in the United States Mail, postage prepaid, on November 10, 2016, addressed to its attorneys of record, listed as follows:

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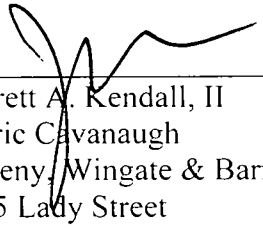

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