**IN THE STATE OF SOUTH CAROLINA**
In The Court of Appeals

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**APPEAL FROM CHARLESTON COUNTY**
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

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2016-CP-10-1143
Appellate Case No.: 2016-002308

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Palmetto Construction Group, LLC Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward, Appellants.

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**RESPONDENT'S**
**MOTION TO DISMISS THE APPEAL**

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Respondent, Palmetto Construction Group, LLC ("Palmetto"), files its motion to dismiss the appeal on the following grounds:

**A. Background Facts**

This matter arises out of Palmetto's suit against Appellants alleging, inter alia, that the Defendants misappropriated funds from a government construction project, failed to pay the subcontractors and suppliers, and defaulted on its agreements with Palmetto and the indemnity agreement with the surety, leaving Palmetto responsible for over $1,400,000.00 to the surety in claims on the payment bond issued for the project.

Palmetto personally served its complaint on the Appellants on March 14, 2016, but the Appellants failed to answer. An affidavit of default was filed on April 18, 2016, and on April 21, 2016, The Honorable Roger M. Young entered an order referring the matter to the Master in Equity. A damages hearing was scheduled on June 6, 2016. The day before the hearing, counsel appeared on behalf of Appellants and filed a motion for a continuance of the damages hearing and to lift the default. The motion for continuance was granted and a new hearing was scheduled for July 14, 2016. Four days prior to the hearing, Appellants filed a motion to compel arbitration. The motions to left the default was denied by Order dated July 14, 2016, and further held that the motion to compel arbitration was not properly made as the Appellants were in default. The Order set a default damages hearing for October 4, 2016 at 2:00pm and was served on all parties by the lower court on July 18, 2016.

Appellants filed a motion to reconsider pursuant to Rule 59 SCRCP on July 27, 2016. The motion to reconsider was scheduled to be heard by the Court on October 11, 2016. Defendants wrote the Court on September 7, asking that the motions be heard in advance of the damages hearing. The Court elected to keep the hearing as originally scheduled with the damages hearing on October 4 and the motion to reconsider be heard on October 11.

On September 30, 2016, Palmetto was served with a notice of appeal, and immediately filed a motion to dismiss. The parties appeared before this Court on October 4, and a record of the parties' positions was made as the procedural posture of the case was unusual considering there was no timely appeal of the interlocutory order denying the motion to lift the default and the Rule 59 motions remained pending.

On October 5, Palmetto's counsel received a letter from the Court of Appeals returning its motion to dismiss on the grounds that the Court had no record of such an appeal. Also on October

5, Palmetto was served by facsimile with a copy of another notice of appeal, different than the one previously served, which attached the July 14, 2016 Order and portions of the transcript of hearing. On October 6, 2016, Palmetto's counsel was served by facsimile with yet another version of the notice of appeal. On October 17, 2016, Palmetto's counsel received a letter from the Court of appeals stating that one of the notices of appeal was being returned to Ms. Arial together with the transcript as the transcript is not an order and is not properly included with a notice of appeal. Palmetto promptly refiled its motion to dismiss the appeal which was granted by this Court on November 10, 2016. While the motion was pending, the Master issued his order denying Appellants' motion to reconsider on the grounds that: (1) Appellants failed to show good cause to lift the default; and 2) the Appellants' Motion to Stay and Compel Arbitration was not properly made as a party in default cannot raise affirmative defenses. (Reconsideration Order dated October 28, 2016). This appeal followed.

**B. <u>The Appeal Must Be Dismissed as the Orders at issue are Interlocutory</u>**

Appellants appeal the Master's order dated July 14, 2016, which denies Appellants' motion to lift the entry of default against them as well as the Master's Order dated October 28, 2016, denying Appellants' motion to reconsider. "An order denying a motion to lift entry of default is interlocutory and not immediately appealable." *See Thynes v. Lloyd*, 294 S.C. 152, 153, 363 S.E.2d 122, 122 (Ct. App. 1987) ("an order refusing to grant relief from the entry of default is not appealable until after final judgment.").[1] Appellants contend that the orders are appealable because they also deny that the dispute is subject to arbitration. However, the orders make no substantive

[1] At the hearing on Appellants' motion to reconsider, Judge Scarborough reasoned: "The question as I see it is whether or not the question for the appeal is procedural, whether or not there's a final order from which you can appeal. I think that's number one. The second thing has to do with whether or not there's finality to that, and I don't think there's finality until a determination of damages has been held." (October 4, 2016 Hearing Transcript, p. 32 lines 15-21).

ruling on the arbitration issue and thus are not immediately appealable. Rather, Judge Scarborough held that the arbitration motion was not properly before him as the Appellants were in default. (See July 14, 2016 Order). Judge Scarborough succinctly stated his ruling at the July 14, 2016 hearing: "Well, Ms. Ariail, I think the first thing you have to do is get out of default before you can bring affirmative relief." (June 14, 2016 Hearing Transcript, p. 9 lines 2-4).

### C. The Lower Court Correctly Held That the Motion to Compel Arbitration Was Not Properly Before Him as Parties in Default Cannot Seek Affirmative Relief

As an initial matter, there are multiple Appellants/Defendants named in this action and all are in default. Arbitration is not a defense available to Mark Ward or Lynette Ward as they are not parties to the construction contract that contains the arbitration provision. *Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 207, 588 S.E.2d 136, 138 (Ct. App. 2003) (Arbitration is a matter of contract, and only parties to the agreement can be compelled to arbitrate). The appeal, as to these parties, should be dismissed for this reason alone.

#### 1. Arbitration is an Affirmative Defense that must be Plead

Arbitration is an affirmative defense as specifically defined by the South Carolina of Civil Procedure and by the Federal Rules of Civil Procedure. Rule 8(c) SCRCP states in relevant part:

> Affirmative Defenses; Reply. In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality...and any other matter constituting an avoidance or affirmative defense.

Further, South Carolina courts have consistently held that arbitration is an affirmative defense. See, e.g., *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 452, 730 S.E.2d 312, 314 (2012) (where plaintiff "opposed the motion to compel arbitration on the ground Brentwood Homes waived the right to assert the affirmative defense due to its delay in responding"; *Partain v. Upstate*

*Auto. Grp.*, 386 S.C. 488, 490, 689 S.E.2d 602, 603 (2010) ("Upstate Auto asserted three affirmative defenses in its Answer, including an arbitration agreement with Partain.").

Where the contract documents "evidence transactions in commerce," the Federal Arbitration Act ("FAA"), enacted pursuant to the commerce clause, supersedes South Carolina law. Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977). Ms. Arial represented that Restoration Specialists is a Georgia corporation, and the project was in fact constructed in Augusta Georgia. Therefore, there is interstate commerce and the FAA applies.

The analysis under the FAA is the same as arbitration is an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. *See, e.g., McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152, 155-56 (D. Conn. 1985) (Holding that under Fed. R. Civ. P. 8(c), the affirmative defense of arbitration must appear in the answer, and "a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation." (internal citations omitted).

**2. An Affirmative Defense is Waived if Not Plead**

An affirmative defense is waived if not pled. *Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 272, 750 S.E.2d 615, 623 (Ct. App. 2013) (internal citations omitted), *Howard v. S. C. Dep't of Highways*, 343 S.C. 149, 152, 538 S.E.2d 291, 294 (Ct. App. 2000); see also *RIM Assocs. v. Blackwell*, 359 S.C. 170, 182-83, 597 S.E.2d 152, 159 (Ct. App. 2004)(claims or defenses not presented in the pleadings are waived).

In the context of a party in default seeking to compel arbitration, courts in the Fourth Circuit have held that unless the movant is able to show good cause for its default, the defaulting party has waived its right to assert arbitration as an affirmative defense against continued litigation in the circuit court. *See State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 168-69, 539 S.E.2d 106, 111-12 (2000) *citing American Recovery Corp. v. Computerized Thermal Imaging,*

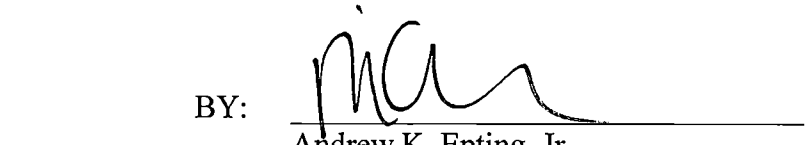
*Inc.*, 96 F.3d 88, 96 (4th Cir. 1996) (affirmative defense of arbitration must be pled in answer). *In State ex rel. Barden,* the West Virginia Supreme Court held that "[u]nexcused conduct that results in the entry of a default judgment is no less of an implicit waiver of a right to arbitration than any other procedural forfeiture."

**D. Conclusion**

Appellants are in default, and this appeal was filed before the entry of default judgment. Appellants never answered the complaint and never plead the affirmative defense of arbitration. As the lower court held, the motion to compel arbitration was not properly made. This appeal must be dismissed and the case returned to the Master for disposition.

Respectfully Submitted by:

ANDREW K. EPTING, JR., LLC

BY: 

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ATTORNEYS FOR PLAINTIFF / RESPONDENT

On this 2nd day of December, 2016
Charleston, South Carolina

**THE STATE OF SOUTH CAROLINA**
In the Court of Appeals

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**APPEAL FROM CHARLESTON COUNTY**
Court of Common Pleas for the Ninth Circuit

Mikell R. Scarborough, Master-In-Equity



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Palmetto Construction Group, (Respondent)

v.

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward. (Appellants).

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**PROOF OF SERVICE**

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I certify that I have served the Respondent's Dismiss Appeal on all counsel of record by depositing a copy in the United States Mail, Postage prepaid, on December 2, 2016, addressed as follows:

**A. Bright Ariail, Esquire**
**Law Office of A. Bright Ariail, LLC**
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ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW



December 2, 2016

**VIA FEDERAL EXPRESS**

The Honorable Jenny Abbott Kitchings
Clerk of Court
1220 Senate Street
Columbia, South Carolina 29201

RE: *Palmetto Construction Group v. Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward*
Case No.: 2016-CP-10-1143
Appellate Case No.: 2016-002308

Dear Ms. Kitchings:

Enclosed for filing the original and seven (7) copies of Respondent's Motion to Dismiss together with a Proof of Service and the $25.00 motion fee in the above-referenced matter. I would greatly appreciate your filing the originals and returning a file-stamped copy to me in the self-addressed, stamped envelope provided.

With kind regards,

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr.
AKE/agg

Enclosures – as stated

cc: A.Bright Ariail, Esquire

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