

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

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

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DEC 30 2016

SC Court of Appeals

Palmetto Construction Group, LLC

Respondent,

v.

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

Appellants.

RESPONDENT'S REPLY IN SUPPORT OF ITS
MOTION TO DISMISS THE APPEAL

Respondent, Palmetto Construction Group, LLC ("Palmetto"), replies in support of its motion to dismiss the appeal as follows:

A. The Appeal Must Be Dismissed as the Orders at issue are Interlocutory

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 claim the orders also deny that the dispute is subject to arbitration. However, the orders make no substantive 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).

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

1. Mark Ward And Lynette Ward On Not Parties To The Construction Contract, Have Not Been Sued For Breach Of That Contract, And Therefore The Defense Of Arbitration Is Not Available To Them-Further These Parties Too Are In Default

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, they have not been sued for breach of contract, and the claims against them sound in fraud. *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) *see also Zandford v. Prudential-Bache Sec., Inc.*, 112 F.3d 723, 727 (4th Cir.1997) (holding that arbitration may only be compelled when parties have agreed to it, and then only to the extent agreed); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir.1997) (“[E]ven though arbitration

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).

has a favored place, there still must be an underlying agreement between the parties to arbitrate.”). The appeal, as to these parties, should be dismissed for this reason alone.

2. 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) SCRPC 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. Ariel 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).

3. 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."

4. Appellants Raise Issues Of The Scope Of Arbitration Provision, The Merits Of Plaintiff/Respondent's Lawsuit And Appellants' Substantive Defenses To The Action

Perhaps the best indication that this appeal must be dismissed and sent back to the Master for disposition is evident in Appellants return to this motion. In their return, Appellants raise issues of the scope of arbitration provision, the merits of Plaintiff/Respondent's lawsuit and appellants' substantive defenses to the action – none of which are in the record as the Master never reached the merits of the arbitrability of the suit nor did he reach the merits of the lawsuit. Rather, the Master simply held that the Appellants' are in default and therefore, the motion to compel arbitration was not properly before him. ("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). Further, Appellants have submitted to this Court hundreds of pages of contract documents and other financial documents with their return. None of these documents are part of the record as none of these documents were submitted to the Master as the merits of the dispute were never reached.

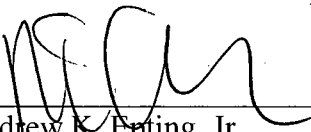
C. Conclusion

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:

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BY:



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ATTORNEYS FOR PLAINTIFF / RESPONDENT

On this 27th day of December, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
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SC Court of Appeals

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

Mikell R. Scarborough, Master-In-Equity

CASE NO. 2016-CP-10-1143

Palmetto Construction Group, (Respondent)

v.

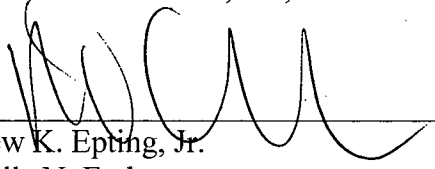
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward. (Appellants).

PROOF OF SERVICE

I certify that I have served the Respondent's Reply in Support of its Motion to Dismiss Appeal on all counsel of record by depositing a copy in the United States Mail, Postage prepaid, on December 27, 2016, addressed as follows:

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ATTORNEYS AT LAW

December 27, 2016

VIA US MAIL

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

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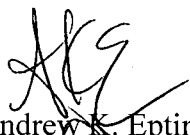
RE: *Palmetto Construction Group v. Restoration Specialists, LLC, Reuben Mark Ward,
and Lynnette Pennington Ward*
Case No.: 2016-CP-10-1143
Appellate Case No.: 2016-002308

Dear Ms. Kitchings:

Enclosed for filing the original and seven (7) copies of Respondent's Reply in Support of its Motion to Dismiss together with a Proof of Service for the same. I would greatly appreciate your filing the original 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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