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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Kristi Lea Harrington, Circuit Court Judge

Common Pleas Case No. 2013-CP-10-7413

Affordable Concrete and Masonry ..... Respondent.

v.

Roper Hanks, LLC.....Appellant,

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

Factual Background:

Respondent Affordable Concrete and Masonry d/b/a RSS, LLC ("Affordable Concrete"), a South Carolina subcontractor, entered into a written contract, dated March 16, 2013, with Appellant Roper Hanks, LLC ("Roper Hanks"), a Georgia general contractor ("the Contract"), to provide labor and materials for the installation of concrete, pavers and brick work at a Haverty Furniture Companies, Inc. ("Haverty") store in Charleston, South Carolina. (R. pp. 221-243). The construction project took place in South Carolina, but many of the subcontractors and materials for the project were from states other than South Carolina. (R. pp. 186-195). During the project, a conflict developed between Roper Hanks and Affordable Concrete and Affordable Concrete ceased working on the project. Affordable Concrete subsequently brought the underlying breach of contract action against Roper Hanks, seeking to recover payment that Affordable Concrete contends it is owed under the terms of the Contract. (R. pp. 018-023).

Procedural Posture:

Affordable Concrete filed a Complaint against Haverty on December 23, 2013 for Foreclosure, Breach of Contract, and Quantum Meruit. On August 6, 2014, a Stipulation of Dismissal as to Haverty was filed, simultaneously adding Roper Hanks to the Complaint. Affordable Concrete filed an Amended Complaint against Roper Hanks on September 15, 2014 for Breach of Contract and Quantum Meruit. On September 29, 2014, Roper Hanks filed a Motion to Dismiss Action, Transfer Venue and Compel

Arbitration on the grounds that the Contract contains a forum selection clause, an arbitration clause, and is subject to the Federal Arbitration Act. (R. pp. 029-055).

Oral arguments on the Motion to Dismiss Action, Transfer Venue and Compel Arbitration took place on December 18, 2014. (R. pp. 200-216). Affordable Concrete submitted a Memorandum in Opposition to the Motion at the hearing. (R. pp. 056-179). Both Roper Hanks and Affordable Concrete submitted proposed Orders to the Trial Court on December 23, 2014. (R. pp. 013-017). After review of the pleadings and proposed Orders and after contemplation of the arguments presented at the hearing by counsel for both parties on December 18, the Trial Court denied the Motion to Dismiss Action, Transfer Venue and Compel Arbitration on March 2, 2015. (R. pp. 003-010). On March 12, 2015, Roper Hanks filed a Motion for Reconsideration. (R. pp. 180-182). The parties were notified by email correspondence from the Trial Court, on May 26, 2015, that Roper Hanks had failed to deliver a copy of the Motion to Reconsider to the Judge's chambers. In the same email, the Trial Court requested that the parties submit their memoranda in support of or in opposition to the Motion to Reconsider by June 5, 2015. (R. pp. 217-219). Memoranda in response to the Motion for Reconsideration were filed on June 1 (Affordable Concrete) and June 5 (Roper Hanks). (R. pp. 183-195). The Motion for Reconsideration was denied on June 30, 2015, and Roper Hanks received notice of the Order denying the Motion for Reconsideration on July 7, 2015. (R. pp. 011-012). In response thereto, Roper Hanks filed its Notice of Appeal on July 31, 2015. (R. pp. 196-199).

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). In ruling on a summary judgment motion, the Court should consider the pleadings, depositions, interrogatory answers, admissions, and affidavits in determining whether there is a genuine issue of material fact for trial. *See Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659 (Ct. App. 1994). "If evidence favoring the non-moving party is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (*citing AT & T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). An appeal from the denial of a motion to compel arbitration is subject to *de novo* review. *Gissel v. Hart*, 382 S.C. 235, 249, 676 S.E.2d 320, 323 (2009).

ARGUMENT

I. THE TRIAL COURT INCORRECTLY FOUND THAT THE CONTRACT WAS UNCONSCIONABLE, ERRED IN DISMISSING THE CHOICE OF LAW PROVISION AND INCORRECTLY APPLIED SOUTH CAROLINA LAW TO EVALUATE THE ARBITRATION PROVISION OF THE CONTRACT.

There has been no evidence establishing that Respondent unknowingly or unwillingly entered into the Contract with Appellant to provide labor and materials during the construction of the Haverty's store. Respondent cannot seek to avoid the terms of the Contract that it agreed to while simultaneously seeking the benefit of the Contract by bringing a breach of contract claim against Defendant. "[A] party may not 'rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.'" *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 295-96, 733 S.E.2d 597, 604 (Ct. App. 2012) (quoting *Jackson v. Iris.com*, 524 F.Supp.2d 742, 749 (E.D.Va. 2007)). In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, the court found that "[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 843, 130 L. Ed. 2d 753 (1995). The Contract at issue is valid and enforceable. A person who can read is bound to read an agreement before signing it. *Hood v. Life & Cas. Ins. Co. of Tennessee*, 173 S.C. 139, 175 S.E. 76 (1934). Both parties, Respondent and Appellant, initialed each page of the Contract and signed the Contract in two different places, knowingly agreeing to be bound by its terms. The Contract is a typical and balanced agreement between a general contractor and a subcontractor.

The Trial Court mistakenly found that the Contract was both an adhesion contract and unconscionable. Although the Trial Court recognized that an adhesion contract need not necessarily be unconscionable, the Court failed to properly determine the conscionability of the Contract. Generally, an adhesion contract is a standard form agreement offered on a "take-it or leave-it" basis with terms that are not negotiable. *Lackey v. Green Tree Fin. Corp.,* 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998). Under state law, an adhesion contract is not *per se* unconscionable. *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.,* 322 S.C. 399, 472 S.E.2d 242 (1996) (unconscionability is the absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them); *Lackey v. Green Tree Fin. Corp.*, (fact that a contract is one of adhesion does not render it unconscionable); *see also Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 542 S.E.2d 360 (2001).

Perceived Imbalance of Sophistication Amongst Parties to the Contract and Findings Based on Assumptions of a Lack of Meaningful Choice

The Trial Court seems to believe and so found that the circumstances surrounding the execution were such that there was no meaningful choice by Respondent to enter into the Contract, based on a perceived disparity of bargaining power amongst the parties. However, the Trial Court's decision turns a blind-eye to the lack of evidence to support such a conclusion. Respondent has not advanced any evidence to support the Court's finding that the "respective size, scope of business, and business experience demonstrates an imbalance in the parties' sophistication." (R. p. 008). No facts were considered by the Court in order to actually compare the respective size, scope of business, and business experience of either party. Moreover, there is no evidence in the record to demonstrate

that the Contract was not fully negotiated. Similarly, there is no factual support to rely upon to hold that the Contract was not freely entered into.

To find in favor of Respondent's position that the arbitration and choice of law provisions in the Contract are unconscionable, the Trial Court relied heavily on factually inadequate assumptions of perceived imbalances of bargaining power. The record clearly states that Respondent regularly deals with large national and international corporate entities such as "Hobby Lobby, Pet Smart, O'Reilly Auto Parts, Verizon, Starbucks,[...]" (R. p. 006). Nevertheless, the Trial Court agreed with Respondent's self-characterization as an unsophisticated and unwitting victim of the Contract it entered into with Appellant – despite never providing an example of an imbalance of control or sophistication, nor any evidence that Appellant attempted to exert power over Respondent to try to accomplish some nefarious objective.

The Trial Court's Order simply speculates that "[i]f Plaintiff refused to sign Defendant's subcontract, Plaintiff risked not getting paid for the work previously done." (R. p. 008). There is, however, zero evidence in the record to suggest that Respondent was forced or coerced to sign the agreement in any way, or that a threat of a lack of payment for any work performed was made or intimated to encourage the signing of the Contract between the parties. Respondent began work on its own accord, prior to the execution of its Contract, at its own risk, and now seeks to use its own irresponsible behavior as a justification for escaping the terms of the Contract, which in retrospect it no longer finds favorable.

Respondent should not be able to use and benefit from its own reckless business practices (i.e. in delaying to enter into its Contract), as means to now suggest it was on

unequal bargaining ground with Defendant. The record is clear that Respondent deals regularly with sophisticated national and international corporate entities. Consequently, this Court should reject the Trial Court's findings that the Contract is unconscionable and unenforceable based on an assumed perception of inequality and/or timing of events.

The Trial Court boldly found that Respondent was not afforded a meaningful choice in executing the Contract, yet fails to support this finding by offering evidence of any avenues of negotiation or free will that were not available to Respondent when it decided to enter into the Contract with Appellant. In its Order the Trial Court repeatedly pointed to the timing of when the Contract was executed to infer and ultimately to hold that Respondent lacked a meaningful choice. However, the Trial Court fails to describe why or how the timing actually prejudiced Respondent's ability to make a meaningful choice. One can speculate ad infinitum as to the choices Respondent had at the time it and Appellant were both reviewing and signing their contractual agreement. Clearly, the Respondent's options at the time the contract was signed included the ability to negotiate the terms of the contract, withhold work until the terms were revised to Respondent's liking, stop work and demand payment for work done, and, lastly, accept the terms for work performed on Phase I and then start work on Phase II under the same terms. There is no evidence that Respondent did not make an informed decision or was under any coercion when it opted for this final option.

The Contract itself has language that provides for revisions and amendments to be adopted into the terms of the parties' agreement. The Contract also allows either party to initiate arbitration proceedings. Additionally, the Contract specifically provides that disputes resolved by arbitration are at the expense of the losing party. Such a provision is

tailored to accommodate the needs of a party not at fault and to encourage a rightful claim and provide an equitable result. Arbitration is thus equally accessible to both contracting parties in resolving claims. With no evidence that Respondent was denied the right to revise unfavorable terms of the Contract, or evidence of terms that are themselves so oppressive and unfair that a reasonable person would not accept them, This Court should find that the Contract, including the arbitration clause, is not unconscionable or an adhesion contract.

Neither Respondent nor the Trial Court offers an explanation of why certain actions could not have been taken by Respondent as a means to negotiate the terms of the Contract. The record does not indicate Respondent ever alerted Appellant of its displeasure with any of the terms of the Contract, or expressed any hesitation or reluctance to enter into the Contract. Additionally, there is no evidence in the record nor does Respondent allege that any representations were made by Appellant to justify the perception that Respondent would not be paid for work performed if the Contract was not signed, as was interpreted by the Trial Court. In short, the record is simply insufficient to support a finding that Respondent was not given a meaningful choice in relation to its decision to enter into the Contract. Consequently, the Trial Court's Order Denying Appellant's Motion to Reconsider should be overruled and the Trial Court's Order Denying Appellant's Motion to Dismiss be reversed and remanded because the Trial Court lacked sufficient evidence in the record to find that Respondent was not afforded a meaningful choice when entering into the Contract with Appellant.

The Trial Court Incorrectly Found That The Choice of Law Provision at Issue is One-Sided, Oppressive, Adhesive and Unenforceable

The first page of the Contract, itself initialed by both Respondent and Appellant, clearly states in all capital, bold, and underlined type "**THIS AGREEMENT IS GOVERNED BY THE STATE OF GEORGIA".** This choice of law provision, a choice decided upon and agreed to by both parties, is reiterated in Article XIII of the Contract and notes in bold all capital letters **"GOVERNING LAW"**. The first sentence of the Article regarding governing law clearly sets forth that the Contract "shall be governed by, and construed in accordance with" the laws of the State of Georgia. Not only did Respondent initial this page, the governing law provision is the last section directly above where Respondent executed the Contract.

The clarity with which the Contract identifies the choice of governing law demonstrates that both parties were aware of and intended for Georgia law apply. "Choice of law provisions are generally honored in South Carolina." *Team IA, Inc. v. Lucas*, 395 S.C. 237, 248, 717 S.E.2d 103, 108-09 (Ct. App. 2011) (citing *Nucor Corp. v. Bell*, 482 F.Supp.2d 714, 728 (D.S.C. 2007). "Traditional choice of law rules apply only in the absence of an express provision regarding the applicable law to govern the contract." *Id.* at 249, 717 S.E.2d at 109.

Under Georgia law, the arbitration provision in the Contract is enforceable and is not unconscionable. "Georgia courts are required to uphold valid arbitration provisions in contracts." *Saturna v. Bickley Const. Co.*, 252 Ga. App. 140, 141, 555 S.E.2d 825, 827 (2001) (citing *Bishop Contracting Co. v. Center Bros. Inc.*, 213 Ga. App. 804, 805(1), 445 S.E.2d 780 (1994)). "An unconscionable contract is one abhorrent to good morals and conscience. It is one where one of the parties takes a fraudulent advantage of another.

It is an agreement that no sane person not acting under a delusion would make and that no honest person would take advantage of." *William J. Cooney, P.C. v. Rowland*, 240 Ga. App. 703, 704, 524 S.E.2d 730, 732 (1999) (citations omitted).

In this case, as discussed above, there is no evidence that Appellant took advantage of Respondent or acted fraudulently in any way. As noted, the Trial Court found there was a lack of bargaining power and lack of sophistication amongst the parties to the Contract, which are factors in determining whether Respondent had a meaningful choice. The thrust of an unconscionability analysis does not rest on those factors alone, but on the oppressiveness of the terms themselves. Respondent has not shown that the terms of the arbitration provision are abhorrent, fraudulent, or oppressive.

The Trial Court points to "the cost of moving the venue to Georgia coupled with the relative size of the parties makes the clause further imbalanced." (R. p. 010). Yet the Trial Court gives no consideration to the costs to be incurred by Appellant to come to South Carolina, or to recognize the financial ramifications to Appellant if it were forced to handle all disputes with its various subcontractors at the venue of their choosing after previously agreeing to and memorializing a different contractual arrangement. Moreover, the above finding by the Trial Court is simply another example of a false assumption by it regarding the perceived "relative size of the parties" to affirm its unsupported perception of imbalance.

As a result, the Trial Court's Order Denying Appellant's Motion to Reconsider should be overruled and the Trial Court's Order Denying Motion to Dismiss be reversed and remanded because the Trial Court erroneously concluded the choice of law provision

in the Contract was one-side, oppressive, adhesive and unenforceable based on insufficient factual support by Respondent.

II. THE TRIAL COURT FAILED TO PROPERLY APPLY THE FEDERAL ARBITRATION ACT.

The Trial Court Failed to Properly Find that the Arbitration Clause in the Contract Involves Interstate Commerce and is Valid and Enforceable Under the Federal Arbitration Act

The Federal Arbitration Act ("FAA") controls this dispute because the transaction affects interstate commerce. In finding that the FAA does not apply to the case at hand, the Trial Court relied on *Zabinski*, and stated "[t]o determine whether a contract involves interstate commerce, the court must examine the agreement, the complaint, and surrounding facts. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594, 553 S.E.2d 110, 118 (2001). The development of land within South Carolina's border is the quintessential example of purely intrastate activity." (R. p. 007). Yet, the Trial Court neglected to include the following integral sentence from *Zabinski* and ignored the holding of the *Zabinski* decision. That sentence, including referenced supporting case law, is as follows: "However, the transaction involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors. See generally *Munoz*, *supra* (finding interstate commerce in an installment contract case where builder was domiciled in South Carolina but assigned rights to a Delaware Creditor, agreement was prepared in Minnesota, and proceeds were disbursed in Minnesota); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1997) (holding construction contract involved interstate contract where materials, equipment, and supplies were produced and manufactured out-of-state); *Circle S.*, *supra* (finding construction contract involved interstate commerce where equipment, materials, and

subcontractors were furnished from out-of-state)." (*Zabinski* at 595). The Court then went on to find that because of the FAA's expansive view of interstate commerce, the FAA applied to the agreement at issue. (*Zabinski* at 596).

The Trial Court also erred in finding "[a]ll of the laborers and potential witnesses are located in South Carolina." (R. p. 007). At this juncture, all of Appellant's anticipated witnesses will come from states outside of South Carolina, including representatives of former defendant to this case Haverty and Respondent Roper Hanks, LLC. Additionally, the Trial Court incorrectly noted that Respondent "did not supply any evidence, other than the incorporation of Defendant in Georgia, that the specific contract for concrete services involved interstate commerce." (R. p. 007). To the contrary, Respondent provided repeated examples of interstate commerce and argued for the appropriate application of the FAA based on the same. At the Hearing on Appellant's Motion (R. p. 206), again in its Proposed Order in support of its Motion (R. p. 017) and then in its Memorandum in Support of its Motion to Reconsider (R. pp. 188-189), Appellant informed the Trial Court that materials for the project, parties involved in the project and even parties to the Contract were from outside South Carolina, and thus the matter involved interstate commerce and warranted the application of the FAA.

Pursuant to the FAA "a contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . . ." 9 U.S.C. § 2. Georgia courts recognize that construction projects performed in one state can still affect interstate commerce under the FAA. *See McCormick-Morgan, Inc. v. Whitehead Elec. Co.*, 179 Ga. App. 10, 12, 345 S.E.2d 53, 55 (1986) ("Where one contractor is not from Georgia

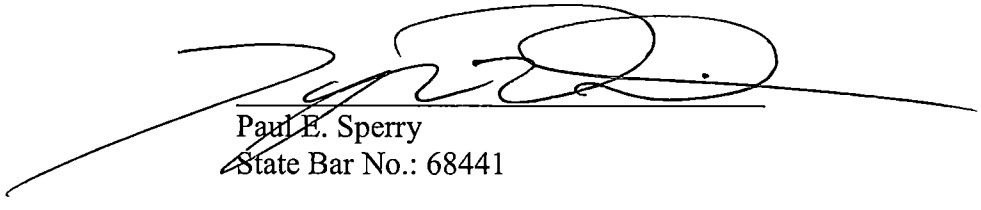
and the contract is to be performed in Georgia, and material incorporated in the contract work is from out of state, as in the instant case, the contract is one involving interstate commerce within the meaning of 9 U.S.C. § 1."). Georgia law also recognizes that "most building materials pass in interstate commerce." *Wise v. Tidal Const. Co.,* 261 Ga. App. 670, 673, 583 S.E.2d 466, 469 (2003). Although the construction took place in South Carolina, the owner, general contractor and many of the subcontractors, as well as materials for the project were from states other than South Carolina. Exhibit B to Respondent's own Memorandum in Opposition to Appellant's Motion to Dismiss Action, Transfer Venue, and Compel Arbitration contains invoices evidencing the purchase by Respondent of materials for work on the subject project that were purchased by suppliers outside of South Carolina (including concrete from Coastal Concrete Southeast II, LLC out of Pooler, Georgia, and rebar and other materials and tools from New South Construction Supply with a remittance address in Atlanta, Georgia). Due to the fact that the Contract affects interstate commerce, the FAA controls and the Trial Court's Order Denying Appellant's Motion to Reconsider should be overruled and the Trial Court's Order Denying Appellant's Motion to Dismiss be reversed and remanded because the Trial Court failed to properly apply the Federal Arbitration Act due to a factual erroneous finding that the Contract did not implicate interstate commerce.

CONCLUSION

The Trial Court did not have a sufficient basis to support a finding that the Contract provisions regarding choice of law and arbitration were unconscionable. The conclusions rendered by the Trial Court on the imbalanced bargaining positions of the respective parties were not adequately supported by the record and should be

reconsidered. The findings by the Trial Court concerning the applicability of the Federal Arbitration Act were erroneous because the Contract involved parties and goods which implicate interstate commerce. Based on the reasons set forth above, Appellant respectfully requests that the decision of the Trial Court's Order Denying Appellant's Motion to Reconsider be overruled and the Trial Court's Order Denying Appellant's Motion to Dismiss be reversed and remanded.

Respectfully,



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellant's Final Brief complies with South Carolina Rule of Appellant Procedure 211(b).

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PROOF OF SERVICE

I certify that I have served Appellant's Final Brief upon the parties below by depositing a copy of it in the United States Mail, postage prepaid, on May 2, 2016, addressed as follows:

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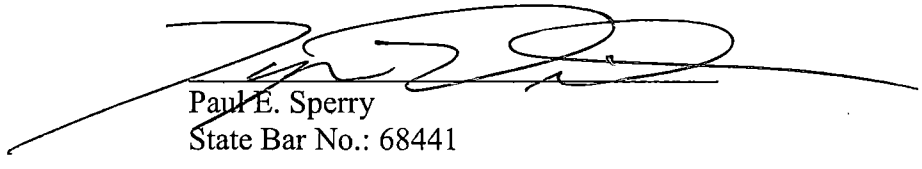

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