STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY

Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2015-CP-08-1213

Christopher Duvall and Natalie Duvall, ... Plaintiffs,

v.

The Ryland Group, Inc., ... Defendant,

And

The Ryland Group, Inc. . . . . Third-Party Plaintiff,

v.

Land Site Services, Inc., Carolina Consulting Engineers, Inc., Higdon Concrete, LLC, A.C. Construction, Inc., and Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc., ... Third-Party Defendants,

Of which The Ryland Group, Inc. is the . . . . . Appellant,
And

Of which Christopher Duvall and Natalie Duvall, Land Site Services, Inc., Carolina Consulting Engineers, Inc., and Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc. are . . . . . Respondents.

RESPONSE TO APPELLANT'S MOTION TO STRIKE PORTIONS OF RESPONDENTS CHRISTOPHER DUVALL AND NATALIE DUVALL'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

COMES NOW RESPONDENTS CHRISTOPHER DUVALL AND NATALIE DUVALL and file this Response to Appellant's Motion to Strike Portions of Respondents Christopher Duvall and Natalie Duvall's Designation of Matter to be Included in the Record on Appeal. (hereinafter "Motion to Strike").

The Motion to Strike seeks to strike the Duvalls' inclusion of The Ryland Group, Inc.'s Answers to Plaintiffs' Interrogatories, The Ryland Group, Inc.'s Responses to Plaintiffs' Request for Production, and multiple discovery requests from the Third-Parties[1] added to this case by Ryland. Ryland made no attempt to resolve this matter without a motion.

Ryland's Motion is frivolous. During the hearing on this matter counsel for the Duvalls indicated to the Circuit Court that "On December 4, 2015, Ryland answered our discovery. They provided a thousand pages of documents." (Transcript, June 27, 2016, P. 5). In Christopher and Natalie Duvalls' Memorandum in Opposition to the Ryland Group, Inc.'s Motion to Compel Arbitration (hereinafter "Memorandum in Opposition to Arbitration."), Plaintiffs stated that the Third-Parties "have served interrogatories and requests for production on the Duvalls (which the Duvalls have answered), and have served 6 subpoenas on non-parties." (Memorandum in Opposition to Arbitration., April 29, 2016, P. 4). Further, the Duvalls explicitly stated in their Memorandum in Opposition to Arbitration that "On December 4, 2015, Ryland served Defendant the Ryland Group, Inc.'s Answers to Plaintiffs' Interrogatories and Defendant the Ryland Group, Inc.'s Responses to Plaintiffs' Request for Production." (Memorandum in Opposition to Arbitration, April

[1]The "Third-Parties" are Ryland's subcontractors Land Site Services, Inc., Carolina Consulting Engineers, Inc., Higdon Concrete, LLC, A.C. Construction, Inc., and Stark Truss Company, Inc. They were joined to this case by Ryland pursuant to the December 4, 2015, Consent Order Allowing the Amended Answer of the Ryland Group, Inc.

29, 2016, P. 4). The Duvalls' Memorandum in Opposition to Arbitration went on to argue that "The Third-Parties have served discovery on the Duvalls and the Duvalls have answered and produced 108 pages of documents – to all parties – in response to said discovery. Rather than objecting to the Third-Parties' discovery to the Duvalls, Ryland has received the Duvalls answers and document production. The Third-Parties have also served 6 subpoenas on non-parties."

Again, in Christopher and Natalie Duvall's Memorandum in Opposition to the Ryland Group, Inc.'s Motion to Reconsider, Amend and/or Alter Order Denying its Motion to Compel Arbitration, the Duvalls stated that "Ryland has served third-party complaints on its subcontractors and those subcontractors have served extensive discovery on Plaintiffs." (Memorandum in Opposition to Motion to Amend, July 27, 2016, P. 2)

Ryland's claim that whether the Third-Parties conducted extensive discovery has "no bearing on whether Appellant waived its right to compel arbitration," (Ryandl's Reply Brief, P. 8) is incorrect. Ryland, for the first time, in its Reply Brief of Appellant, states that "Duvalls' counsel inexplicitly alleges that Appellant's counsel advised him that Appellant would not seek to compel arbitration, but Duvalls' counsel cannot, and do not, provide anything in support of such a contention."

The fact is that the Duvalls stated, in their Memorandum in Opposition to Arbitration, that "***Based on representations made by Ryland's counsel that Ryland would not seek to compel arbitration, the Duvalls consented to Ryland's asserting claims against the Third-Parties.***" Ryland filed no response indicating that was not true and did not dispute that allegation at the hearing of June 27, 2016. At the hearing counsel again stated:

"November 2015 they filed a motion to amend to add all these various third parties.

We agreed to that partially upon the understanding that there was not going to be an eventual motion to compel arbitration."

Transcript, P. 5, ll. 16-21.

Ryland's counsel made no attempt to dispute the above statement at the hearing or in its Motion to Reconsider. Aside from being factually true, the statement that the Duvalls consented to Ryland's amended answer based on a representation that Ryland would not seek to compel arbitration is clearly uncontradicted in the record. The Duvalls would never have consented to Ryland adding the Third-Parties to this case, with all of the attendant additional expense and discovery associated with multi-party litigation, had Ryland disclosed that it was going to seek to compel arbitration of all claims.

Ryland should not be allowed to add Third-Parties to this case, knowing they will conduct significant discovery, and then sit back and argue that it has not, itself, conducted significant discovery. Because Ryland is responsible for the Third-Parties' presence in this litigation, counsel for the Duvalls included some of the Third-Party discovery requests in the Record on Appeal.

Should this Court not want copies of those discovery requests in the Record on Appeal, the Duvalls will be happy to remove those items from its designation of matters to be included in the Record on Appeal. The Duvalls, however, argued about these discovery requests extensively in their memorandum and oral arguments to the Circuit Court and are in no way prohibited from making "arguments that rely on or cite to such materials." The Duvalls have made those arguments at every step of this litigation.

Finally, Ryland's repeated argument that its inspections of the Duvalls' home were made pursuant to The South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act must be addressed. In its Reply Brief, Ryland states "Contrary to the Duvalls' allegations,

Appellant's counsel sent a letter to Duvalls' counsel at the outset of this litigation on June 3, 2015, in which Appellant's counsel specifically stated that he would want to inspect the house pursuant to the Right to Cure Statutes, and Duvalls counsel responded to this correspondence on June 5, 2015. While such communications between counsel were not presented to the lower court and, therefore, cannot properly be included as part of the Record on Appeal, Duvalls' counsel cannot in good faith dispute or deny such written communications with Appellant's counsel." (Reply Brief at 7).

The Duvalls' June 5, 2015, "response," referenced by Ryland, explicitly states "Tom, I believe the Duvalls have complied with the requirements of the right to cure statute. Ryland was given notice of the defect, on multiple occasions, in the manner that Ryland requested. ***Ryland has already conducted a "right to cure" inspection.*** At Ryland's request, the Duvalls provided Ryland a copy of a written report from a general contractor detailing issues at the house. Having already conducted a "right to cure inspection," and having determined that there was no warranty issue at the house, Ryland is not entitled to another bite at the apple. Of course, ***in the ordinary course of discovery, we will make the home available for Ryland's inspection.***" Counsel will inquire as to whether Ryland will consent to have the letter and response it referenced made part of the Record on Appeal or whether a motion will be necessary in this regard.[2]

Again, the Duvalls are more than happy to remove the discovery materials from the record if so instructed. Indeed, the Duvalls may have been willing to do so without a motion. Now that a motion has been filed, however, the Duvalls await instruction from the Court.

Ryland's request that the Duvalls not be able to make arguments based on the significant

[2] Ryland's argument that the discovery it conducted at the Duvalls' house was really part of a pre-suit inspection under the "Right to Cure" statute is not worthy of much discussion. Ryland never made that argument in the Circuit Court and never filed any motion pursuant to the Right to Cure statute. The correspondence referenced by Ryland is unambiguous that the Duvalls did NOT allow Ryland on their property to conduct inspections pursuant to the Right to Cure Statute.

written discovery exchanged is frivolous. The Duvalls referenced the at-issue discovery in their briefs to the Circuit Court and at oral argument and the Circuit Court Judge clearly had that information before it when it ruled.

February 24, 2017

James Taylor Anderson, III
Kernodle Coleman
P. O. Box 13897
Charleston, SC 29422-3387
(843) 795-7800
tanderson@kernodlelaw.com
Attorney for Respondents
Christopher Duvall and Natalie Duvall

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY

Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2015-CP-08-1213

Christopher Duvall and Natalie Duvall, ... Plaintiffs,

v.

The Ryland Group, Inc., ... Defendant,

And

The Ryland Group, Inc. . . . . Third-Party Plaintiff,

v.

Land Site Services, Inc., Carolina Consulting Engineers, Inc., Higdon Concrete, LLC, A.C. Construction, Inc., and Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc., ... Third-Party Defendants,

Of which The Ryland Group, Inc. is the . . . . . Appellant,

And

Of which Christopher Duvall and Natalie Duvall, Land Site Services, Inc., Carolina Consulting Engineers, Inc., and Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc. are . . . . . Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 14, 2017 a copy of the ***Response to Appellant's Motion to Strike Portions of Respondents Christopher Duvall and Natalie Duvall's Designation of Matter to be Included in the Record on Appeal*** was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class postage prepaid, and addressed to the following:

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
Attorney for Appellant The Ryland Group

John E. Rogers, II, Esquire
C. Reed Teague, Esquire
The Ward Law Firm, PA
P.O. Box 5663
Spartanburg, SC 29304
Attorneys Respondent Land Site Services, Inc.

R. Michael Ethridge, Esquire
Robert B. Hawk, Esquire
Etheridge Law Group
P.O. Box 20969
Charleston, SC 29413
Attorneys for Respondent Carolina Consulting Engineers, Inc.

Mark S. Barrow, Esquire
Christy E. Mahon, Esquire
Sweeny, Wingate & Barrow, PA
1515 Lady Street
P.O. Box 12129
Columbia, SC 29211
Attorneys Respondent Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc.

Kevin W. Mims, Esquire
Caroline C. McIntosh, Esquire
Luzuriaga Mims, LLP
50 Immigration St., Suite 200
Charleston, SC 29403
Attorneys Respondent AC Construction, Inc.

Patrick T. Morrissey, Esquire
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
Attorneys Respondent AC Construction, Inc.

James Taylor Anderson, III

914 Folly Road, Suite 2'
P.O. Box 13897
Charleston, SC 29422-3897
Phone (843) 795-7800
Fax (843) 795-3032

KERNODLE COLEMAN
ATTORNEYS AT LAW

James Taylor Anderson, III
tanderson@kernodlelaw.com

February 14, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Christopher Duvall and Natalie Duvall, et al v. The Ryland Group, Inc. et al
Appellate Case No.: 2016-01825
Our File No. 77-35

Dear Ms. Kitchings:

In regard to Appellate Case No.: 2016-01825, I am enclosing an original and seven (7) copies of the Response to Appellant's Motion to Strike Portions of Respondents Christopher Duvall and Natalie Duvall's Designation of Matter to Be Included in the Record on Appeal, together with a Certificate of Service. Kindly return a clocked copy of the Response to me in the self-addressed, stamped envelope that is enclosed.

Very truly yours,

James Taylor Anderson, III

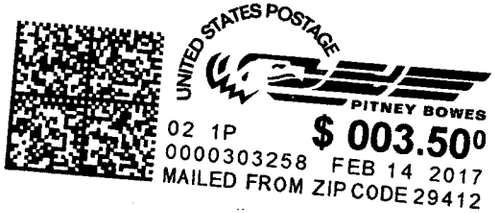
JTAIII/ads
Enclosure

cc: **Via U.S. Mail w/ encls.**
Thomas C. Hildebrand, Jr., Esquire / Olesya V. Vaskevich, Esquire

Via Email w/ encls.
John E. Rogers, II, Esquire / C. Reed Teague, Esquire
Mark S. Barrow, Esquire / Christy E. Mahon, Esquire
R. Michael Ethridge, Esquire / Robert B. Hawk, Esquire
Kevin W. Mims, Esquire / Caroline C. McIntosh, Esquire
Patrick T. Morrissey, Esquire

KERNODLE
COLEMAN
ATTORNEYS AT LAW

P.O. Box 13897
Charleston, SC 29422-3897



77-35
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211