

The Supreme Court of South Carolina

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March 17, 2017

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210


REMITTITUR

Re: SCE&G v. Anson Constr.
Lower Court Case No. 2011CP1005099, 2011CP1005009
Appellate Case No. 2015-001456

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,


Deputy CLERK

c: Everett Augustus Kendall, II, Esquire
James Eric Cavanaugh, Esquire
John A. Massalon, Esquire
Irish Ryan Neville, Esquire

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

South Carolina Electric & Gas Co., Respondent,

v.

Anson Construction Co., Inc., Petitioner.

Appellate Case No. 2015-001456

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Memorandum Opinion No. 2017-MO-003
Heard January 11, 2017 – Filed March 1, 2017

REVERSED AND REMANDED

Everett A. Kendall, II, of Sweeny, Wingate & Barrow,
P.A., and James Eric Cavanaugh, both of Columbia, for
Petitioner.

John A. Massalon and I. Ryan Neville, both of Wills
Massalon & Allen, LLC, of Charleston, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision¹ affirming the circuit court's grant of summary judgment to Respondent South Carolina Electric and Gas Co. Having carefully reviewed the record, we are firmly persuaded there is a genuine issue of material fact regarding the terms of the parties' contract. Because of this factual dispute, the entry of summary judgment was improper. *See, e.g., Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003) ("Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." (citations omitted)); *cf. Zurich Am. Ins. Co. v. Tolbert*, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010) ("Summary judgment should be denied where the non-moving party submits a mere scintilla of evidence." (citing *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009))). The court of appeals' decision is therefore reversed and this case is remanded to the circuit court for trial.

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, JJ., and Acting Justices Clifton Newman and Edward W. Miller, concur.

¹ *S.C. Elec. & Gas Co. v. Anson Constr. Co.*, Op. No. 2015-UP-248 (S.C. Ct. App. filed May 13, 2015).

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

South Carolina Electric & Gas Co., Respondent,

v.

Anson Construction Company, Inc., Appellant.

Appellate Case No. 2013-001623

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-248
Heard March 12, 2015 – Filed May 13, 2015

AFFIRMED

Everett Augustus Kendall, II and James Eric Cavanaugh,
Sweeny Wingate & Barrow, PA, both of Columbia, for
Appellant.

John A. Massalon and Irish Ryan Neville, Wills
Massalon & Allen, LLC, both of Charleston, for
Respondent.

PER CURIAM: Anson Construction Company appeals the circuit court's
granting of partial summary judgment to South Carolina Electric & Gas Company
(SCE&G) on its contractual indemnity claim. We affirm.

In granting partial summary judgment, the circuit court determined the documents governing the contractual relationship between Anson and SCE&G were: (1) Anson's quotation; (2) SCE&G's purchase order; and (3) SCE&G's terms and conditions. The terms and conditions containing the indemnity provision were not included in Anson's quotation. Anson argues the circuit court erred in granting summary judgment as a matter of law because the terms and conditions were not part of the contract between Anson and SCE&G. *See Thalia S. ex rel. Gromacki v. Progressive Select Ins. Co.*, 401 S.C. 395, 399, 736 S.E.2d 863, 865 (Ct. App. 2012) ("The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment." (citation omitted)).

We find Anson's quotation constituted an offer to SCE&G, SCE&G's purchase order and terms and conditions constituted a counteroffer, and Anson accepted SCE&G's counteroffer by performing the work. *See Weisz Graphics Div. of Fred B. Johnson Co. v. Peck Indus., Inc.*, 304 S.C. 101, 106, 403 S.E.2d 146, 149 (Ct. App. 1991) ("[N]o contract is formed if the acceptance varies the terms of the offer. Instead, an acceptance which adds different or additional terms is treated as a counteroffer, which may be accepted or rejected by the other party." (internal citation omitted)). Paragraph 1:33 of SCE&G's terms and conditions provided, "[Anson] and [SCE&G] shall be bound by this CONTRACT and its terms and conditions . . . when [Anson] renders for [SCE&G] any of the services." Anson received SCE&G's counteroffer three days before beginning work on the project, and Peter Stutsman, the president of Anson, conceded the purchase order was received by Anson as "part of the document package" for the project and formed part of the contract with SCE&G. *See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977) ("[W]here the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole. This is true even though the transaction consumed more than one day; the date of the writings constituting such transaction is immaterial."). Thus, we find Anson accepted SCE&G's counteroffer on January 7, 2008, when it began to perform the work outlined in SCE&G's purchase order and attached terms and conditions. Therefore, the circuit court correctly concluded SCE&G's terms and conditions were part of the contract between the parties by operation of law.

Additionally, we find the documents exchanged between the parties unambiguously provided SCE&G with a right of indemnity. Anson's quotation to

SCE&G was "for work" on the "Church Street Conduit Duct System and Pre-cast Vault." SCE&G's purchase order stated "Anson Construction Company, Inc. ('Contractor') shall provide all labor, supervision, equipment and materials required to complete the installation of concrete vault for the Dock Street Theater project" The purchase order required Anson to perform the work "in accordance with . . . the attached General Terms & Conditions." The terms and conditions contained an indemnity provision in paragraph 1:26 and a clause in paragraph 1:33 stating the contract between the parties would be formed "when [Anson] renders for [SCE&G] any of the services." This language unambiguously provided SCE&G with a right of indemnity, and Anson accepted the terms of the contract by performing the work in accordance with paragraph 1:33.

Anson contends, however, the only document forming the contractual relationship between the parties was its quotation, which was accepted by SCE&G when Jesse Thigpen signed the document. Anson further asserts that it began work based solely on its quotation, and thus rejected SCE&G's terms and conditions. We disagree because there is no evidence in the record to support this position. Anson began work on the project three days after it received SCE&G's counteroffer. Thus, the circuit court was required to analyze SCE&G's purchase order and terms and conditions in determining what documents formed the contractual relationship between the parties. We find the circuit court properly considered all three documents exchanged between the parties to conclude Anson accepted and became bound by SCE&G's terms and conditions when Anson entered into the contract by performing the work.

Anson makes several other arguments as to why summary judgment was improper. We reject each of these on the basis that the circuit court properly considered all three documents together to conclude as a matter of law that SCE&G had a right of indemnity against Anson under the terms of their contract.

AFFIRMED.

FEW, C.J., and HUFF and WILLIAMS, JJ., concur.