

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED

MAY 05 2017

SC Court of Appeals

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,
Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast IUI, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators, Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations and Siding LLP, Third Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construct, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are also Respondents.

And

Décor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Richardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

**INITIAL BRIEF OF RESPONDENT SPRING GROVE PLANTATION
DEVELOPMENT, INC.**

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STATEMENT OF THE CASE

This matter arises out of alleged construction deficiencies in a community of single-family homes known as The Abbey at Spring Grove Plantation in Moncks Corner, South Carolina. Spring Grove Plantation Development Inc. (“Spring Grove Development”) was the original owner of the land on which the homes are currently located. Spring Grove Development sold the land which now is known as The Abbey to Lennar Carolinas, LLC (“Lennar”). Specifically, by deeds dated May 20, 2011 and September 26, 2012, Spring Grove conveyed numerous lots to Lennar. (R._) Thereafter, on December 12, 2014, the plaintiffs/owners of the homes initiated a lawsuit against Lennar, Spring Grove Development and others. (R._). On February 17, 2015, Lennar filed its Answer, Cross-Claims, and Third-Party Complaint. (R._). Then, on June 1, 2015, Lennar filed a Motion to Compel Arbitration. (R._).

The owners filed an Amended Complaint on November 23, 2015. (R._). Lennar then amended its Motion to Compel Arbitration on March 30, 2016, wherein it requested the circuit court to compel the owners, Spring Grove Development, and the subcontractors to arbitration. (R._).

Spring Grove Development filed a Memorandum in Opposition to the Amended Motion to Compel Arbitration and a hearing on Lennar’s Motion to Compel Arbitration was held on April 11, 2016. (R._). The court below heard arguments from all interested parties and duly considered the same. (R._) The circuit court then issued an order denying Lennar’s Motion to Compel on September 19, 2016. (R._).

Lennar filed a motion to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on October 3, 2016. (R._). Spring Grove Development also filed a Rule

59(e) motion asking the court to address the Lennar's motion as it related to the alleged arbitration agreement between Lennar and Spring Grove Development. (R. _).

ARGUMENT

I. **SPRING GROVE DEVELOPMENT AND LENNAR DID NOT ENTER INTO AN ARBITRATION AGREEMENT AND THEREFORE, THE CIRCUIT COURT DID NOT ERR IN FAILING TO PERFORM ANY ANALYSIS OF AN ALLEGED ARBITRATION AGREEMENT BETWEEN LENNAR AND SPRING GROVE DEVELOPMENT**

Unless the parties provide otherwise, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001). Although it is well known that the policy of this State is to favor arbitration of disputes, arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Id.*; *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718, 720 (2007). Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is restricted by the terms of the agreement. *Id.*

The Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Spring Grove Plantation Community ("Covenants") was signed only by Spring Grove Development on April 10, 2007. (R. _). This is the only document that purports to have an arbitration provision between Lennar and Spring Grove Development.

However, the Covenants are not a contract or an agreement between Lennar and Spring Grove Development. Lennar admits that Lennar entered into an agreement for the Purchase and Sale of subdivision lots with Spring Grove Development on October 22, 2010, three years after the Covenants were signed by Spring Grove Development. (R. _). South Carolina courts have held that broadly-worded arbitration clauses or agreements apply to disputes only in which a

“significant relationship” exists between the claims and the contract. *Zabinski*, at 598, 119. The Covenants do not include in “the range of issues that can be arbitrated” the alleged construction deficiencies in this matter. Furthermore, Lennar’s argument to compel arbitration shall be restricted by the terms of the agreement.

To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. *Hinson v. Jusco Co.*, 868 F.Supp. 145 (D.S.C. 1994).

In order to compel arbitration pursuant to the Federal Arbitration Act, a party must establish all of four threshold factors: 1) the existence of a dispute between the parties, 2) a written agreement that includes an arbitration provision which purports to cover the dispute, 3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and 4) the failure, neglect or refusal of the defendants to arbitrate the dispute. *American General Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005) and *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 U.S. Dist. LEXIS 103638 (D.S.C. 9/13/2011).¹

Spring Grove Development did not exercise any control or authority over Lennar during construction of Plaintiffs’ homes. Lennar designed, developed, constructed and sold the homes in The Abbey. Any reference by Lennar to other documents which may or may not contain an arbitration clause is inapplicable to Spring Grove Development. Rather, Lennar attempts to “sweep” Spring Grove into arbitration with other defendants on the basis of the arbitration clause contained in the Covenants. However, under both South Carolina and federal law, this arbitration language does not encompass the underlying dispute in this matter.

¹ Although South Carolina law is referenced in the Covenants, Lennar has moved to compel under both state and federal law. Under both laws, the provision in the Covenants does not amount to an agreement between Lennar and Spring Grove Development to compel arbitration.

The Covenants are strictly an agreement between the developer and the homeowners. The Covenants set forth design criteria, maintenance of common lands, and creates a homeowners' association. However, an ordinary homeowner would not have contemplated defects related to the construction of their home. The Covenants cannot be extended to cover construction deficiencies alleged by homeowners.

II. IF THE CIRCUIT COURT ERRED IN FINDING SOME CLAIMS ARE ENTITLED TO BE DECIDED BY A JURY, IT STILL MUST FIND THERE IS NO BINDING ARBITRATION AGREEMENT BETWEEN LENNAR AND SPRING GROVE DEVELOPMENT

Lennar seeks to compel arbitration against all Plaintiffs, Defendants, and Third-Party Defendants. However, a party cannot be compelled to arbitrate a dispute it has not agreed to arbitrate. If the court finds some claims may be subject to arbitration, this Court has the power to stay the Lennar/Spring Grove Development claims until those issues against other parties subject to arbitration, if any, are decided. Section 15-48-20 of the South Carolina Code provides:

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is *no agreement to arbitrate*. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration...

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is *severable*, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

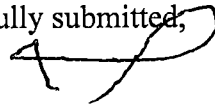
S.C. Code Ann. 15-48-20 (emphasis added) (comparing to §15-48-60: Joinder of parties to arbitration). Consolidation under §15-48-60 is appropriate only among parties who have agreed to arbitrate. *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631 (1977) (affirming consolidated arbitration except for party who did not sign arbitration agreement). Because Spring Grove

Development did not agree to arbitrate the claims alleged in this matter, it cannot be forced into joining other parties in arbitration, if any. To compel Spring Grove Development to arbitrate when Plaintiffs will likely bring direct claims against Spring Grove Development will subject Spring Grove Development to inconsistent findings of fact, liability and judgments.

CONCLUSION

In addition to the grounds set forth herein, Spring Grove Development incorporates by reference those arguments set forth by other Defendants/Third Party Defendants/Fourth Party Defendants, in which Spring Grove Development joins. For the reasons stated above, this Court should affirm the circuit court. However, if the Court finds Lennar is entitled to arbitration as it pertains to the claims asserted by the owners, this matter should be remanded to the trial court for determination of Spring Grove Development's obligation to arbitrate under the Covenants or any other claimed agreement to arbitrate between Spring Grove Development and Lennar.

Respectfully submitted,



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May 5, 2017

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Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

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The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast IUI, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators, Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations and Siding LLP, Third Party Defendants,

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And

Décor Corporation, Fourth Party Plaintiff,

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PROOF OF SERVICE

I hereby certify that I have this 5th day of May, 2017 served a copy of Respondent Spring Grove Development Plantation, Inc.'s Initial Brief mailing copies of same, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

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May 5, 2017

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May 5, 2017

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MAY 05 2017

SC Court of Appeals

Via Hand Delivery

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
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RE: Patricia Damico and Lenna Lucas, individually and on behalf of all others similarly situated, et al. vs. Lennar Carolinas, LLC vs. Spring Grove Plantation Development, Inc., et al.
Civil Action No.: 2014-CP-08-02424 (Berkeley)
Date of Incident: January 2, 2011
Carrier Claim No.: 81647
MGC File No.: 20185.15002

Dear Ms. Kitchings:

Please find enclosed for filing an original and two (2) copies of the following regarding the above-referenced case:

1. Respondent Spring Grove Plantation Development, Inc.'s Initial Brief;
2. Respondent Spring Grove Plantation Development, Inc.'s Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.


Please file the original documents and return filed-stamped copies to me via my courier delivering the same.

By copy of this correspondence, I am serving Spring Grove Plantation Development, Inc.'s Initial Brief, Designation of Matter to be Included in the Record on Appeal and Proof of Service on all counsel of record.

I appreciate your assistance and attention in this regard. Please do not hesitate to contact me should you have any questions, concerns or need any additional information regarding this matter.

The Honorable Jenny Kitchings
May 5, 2017
Page 2

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Adam Ribock". The signature is fluid and cursive, with a large loop at the end.

J. Adam Ribock

JAR/caw
Enclosures
cc: All Counsel of Record