THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-001825
Trial Court Case No. 2015-CP-08-01213

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., 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. are the Respondents.

AMENDED REPLY BRIEF OF APPELLANT

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Christopher and Natalie Duvall ("Duvalls"). (Stark and Land Site's Initial Brief pp. 5-6). However, Appellant's agreements with Stark and Land Site clearly, unambiguously, and specifically provide that Stark and Land Site "agree to (a) allow to join into the arbitration proceeding hereunder or (b) join any other arbitration proceeding being conducted by, persons or entities related to the dispute whose Involvement may be necessary to completely resolve the dispute, such as (1) a homeowner . . . ." (Boyle Aff., Ex. C-D and F-G, ¶ 16). Appellant moved to compel arbitration against Duvalls, the homeowners, in this matter, and pursuant to the terms of Appellant's agreements with Stark and Land Site, Appellant moved to join Stark and Land Site, among others, into the arbitration proceeding with Duvalls. As a result, the plain and unambiguous language of the subject agreements requires Stark and Land Site to join and participate in Appellant's arbitration proceedings against Duvalls, which Appellant has moved to compel and is now seeking this Court to enforce.

In light of the foregoing, Appellant's agreements with Stark and Land Site do not exclude this matter from arbitration, and the agreements require Stark and Land Site to join and be a part of the arbitration proceeding that Appellant is seeking to enforce against Duvalls.

II. THE FACTS, WHICH SHOW ONLY LIMITED DISCOVERY PRIOR TO APPELLANT'S MOTION TO COMPEL ARBITRATION, ARE MISSTATED BY DUVALLS AND FAIL TO SUPPORT DUVALLS' ARGUMENT THAT APPELLANT WAIVED ITS RIGHT TO COMPEL ARBITRATION.

In their Amended Initial Brief, Duvalls allege certain facts concerning discovery that took place prior to Appellant moving to compel arbitration, but such facts are misstated.

ARGUMENTS

I. APPELLANT'S AGREEMENTS WITH ITS SUBCONTRACTORS DO NOT EXCLUDE THIS MATTER FROM ARBITRATION.

In the Initial Brief of Respondents 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. ("Stark") and Land Site Services, Inc. ("Land Site"), Stark and Land Site appear to deny, without evidentiary support, the applicability of the agreements between Stark and Appellant and between Land Site and Appellant. (Stark and Land Site's Initial Brief pp. 1-2). Further, Stark and Land Site allege that assuming that these agreements apply to Land Site and Stark, the plain language of the arbitration clause in the agreements excludes the subject action from arbitration. (Stark and Land Site's Initial Brief pp. 4-6).

As set forth in Appellant's Initial Brief, Appellant's agreements with its subcontractors, including Stark and land Site, contain clear, unambiguous, and binding arbitration provisions that cover the parties' claims in this action, and Appellant specifically references and incorporates the arguments set forth therein. (Appellant's Initial Brief pp. 14-15 and 17-19).

Contrary to Stark's and Land Site's allegations that the agreements between Stark and Appellant and between Land Site and Appellant do not apply, the uncontradicted evidence in the record reflects the fact that these agreements predate the construction of the residence at issue in this action and are applicable to the work and materials provided for the residence. (Boyle Aff., ¶¶ 4 and 8; Boyle Aff., Ex. C and G-H).

Stark and Land Site further argue that the arbitration provision in the subject agreements contains an exclusion that precludes arbitration in this case because Appellant has been sued by "someone other than a party" to these agreements, namely, Respondents

In any event, the arguments set forth in Appellant's Initial Brief evidencing the fact that the arbitration provision is not unconscionable similarly apply to refute Duvalls' new unconscionability allegations, and Appellant specifically references and incorporates the arguments set forth therein. (Appellant's Initial Brief pp. 25-28). Specifically, the arbitration provision contained in Section B-5 of the Warranty is still contained within an entirely separate and distinct paragraph than the allegedly unconscionable provision in Section B-3(d), and, contrary to Duvalls' allegation, Section B-3 is not intertwined with the arbitration provision in Section B-5. *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) ("in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself and not those of the whole contract"); *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) (finding that the trial court "erred in finding the arbitration agreement was not separable from other allegedly unconscionable provisions that precede the arbitration agreement on page 5" and that "these provisions [were] clearly outside the arbitration agreement").

Duvalls' further represent that Appellant's argue that Section B-5(g) is severable and not a part of the arbitration provision itself. (Duvalls' Amended Initial Brief p. 20). This allegation is incorrect. Appellant argues that Section B-5(g), while being part of the arbitration provision, is in itself not unconscionable because, among other things, the attorneys' fees provision in Section B-5(g) is a mutual obligation applicable to both parties, is not oppressive, and would not prevent the facilitation of an unbiased decision by the arbitrator. (Appellant's Initial Brief pp. 27-28).

In light of the foregoing, the arbitration provision governing the relationship between Duvalls and Appellant in this matter is not unconscionable.

CONCLUSION

For the additional reasons stated herein, the circuit court erred in denying Appellant's Motion to Compel Arbitration, and this Court should reverse the decision of the circuit court.

Respectfully submitted,

May 8, 2017

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As set forth in Appellant's Initial Brief, Appellant did not waive its right to compel arbitration because, among other reasons set forth in Appellant's Initial Brief, only limited discovery took place prior to Appellant moving to compel arbitration, and Appellant specifically references and incorporates the arguments set forth therein. (Appellant's Initial Brief pp. 8-14).

Duvalls' argue that preliminary investigations of the subject residence in July 2015 had nothing to do with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act ("Right to Cure Statute"). (Duvalls' Amended Initial Brief pp. 3 and 9-10). Contrary to Duvalls' allegations, Appellant's counsel sent a letter to Duvalls' counsel at the outset of 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 Statute, 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. In addition, Duvalls' counsel inexplicably 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. (Duvalls' Amended Initial Brief p. 3).

Duvalls' representation that Appellant "continues to gather data via crack monitors" on the residence is incorrect. (Duvalls' Amended Initial Brief pp. 6 and 8). As stated in Appellant's Initial Brief, the crack monitors were installed by Appellant's engineer on January 28, 2016, and Appellant's engineer read the monitors only once on

March 7, 2016. (Duvalls' Mem. Opp'n to Appellant's Mot. to Compel Arbitration p. 5). After Appellant filed its Motion to Compel Arbitration on March 17, 2016, Appellant instructed its engineer not to go back to the residence and not to read the monitors until the arbitration matter was resolved.

Duvalls claim Third-Party Defendants conducted discovery in this action. (Duvalls' Amended Initial Brief pp. 6 and 13-14). However, such arguments have no bearing on whether Appellant waived is right to compel arbitration. Appellant did not respond to any written discovery served by Third-Party Defendants subcontractors. Further, after filing its Motion to Compel Arbitration, Appellant, by way of communications and correspondence with parties' counsel, continued its refusal to participate in written discovery in order to preserve its arbitration rights.

In light of the foregoing, because certain facts evidencing limited discovery that occurred prior to Appellant's filing of its Motion to Compel Arbitration are misstated by Duvalls, Duvalls allegations further fail to support their argument that Appellant waived its right to compel arbitration.

III. THE APPLICABLE ARBITRATION PROVISION IS NOT UNCONSCIONABLE.

In their Amended Initial Brief, Duvalls raise additional arguments in support of their allegation that the applicable arbitration provision in the Ryland Home Warranty (the "Warranty"), on which Duvalls rely in bringing their claims against Appellant, is purportedly unconscionable. (Boyle Aff., Ex. B; Duvalls' Amended Initial Brief pp. 17-21). Duvalls previously have not raised the alleged unconscionability of Section B-3(d) of the Warranty. (Duvalls' Mem. Opp'n to Appellant's Mot. to Compel Arbitration pp. 11-14).