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
Appellant Case No. 2015-001788

Roper Hanks, LLC.....Appellant,

v.

Affordable Concrete and Masonry d/b/a RSS, LLC.....Respondent.

APPELLANT'S REPLY BRIEF TO RESPONDENT'S FINAL BRIEF

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INTRODUCTION

Appellant Roper Hanks, LLC ("Roper Hanks") hereby responds to the Final Brief of Respondent Affordable Concrete and Masonry d/b/a RSS, LLC ("Affordable Concrete"). The format of this Reply follows the same order of issues in Respondent's Final Brief. On occasion, previously stated information (argument and analysis of Appellant) will be referenced herein in lieu of restating the same and in consideration for the Court's time.

ARGUMENT

I. THE TRIAL COURT INCORRECTLY FOUND THAT THE CONTRACT'S ARBITRATION PROVISION WAS NOT SUBJECT TO THE FAA BY FINDING THE CONTRACT DID NOT INVOLVE INTERSTATE COMMERCE.

In response to Respondent's position that the FAA does not apply to the contract between the parties, Appellant directs this Court to the arguments previously presented, specifically including those on pages 12 through 14 of its Final Brief. Appellant has clearly and consistently articulated a position, supported by facts in the record, that the subject project and contract, as well as the relationship between Affordable Concrete and Roper Hanks involved interstate commerce.

Presumably backing away from a prior reliance on *Zabinsky v. Bright Acres Ass'n,* 346 S.C. 580, 853 S.E.2d 110 (2001), which holds that interstate commerce is taking place in a factual scenario very similar to the current underlying facts of this case (as further discussed in Appellant's Final Br. at 12-13), Respondent now appears to rely on a few new cases related to discrete real estate transactions (i.e. the sale of land) in support of its contention that this project and the subject contract involved only intrastate activities. However, Respondent's reliance on

these cases is misplaced as a real estate transaction, by its very nature, is far different than the construction of a commercial building.

Although Respondent cites repeatedly to *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), its holding supports enforcement of the arbitration provision under the facts of this case:

> Thus, although the parties were free to agree that our state arbitration act would apply, the FAA would preempt an application of our state law to the extent it invalidated the arbitration agreement, if interstate commerce is involved. *See Zabinsky v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001) ("While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate."); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539 n. 2, 542 S.E.2d 360, 363 n. 2 (2001) ("State law was therefore preempted *to the extent it would have invalidated the arbitration agreement. The parties to a contract are otherwise free to agree that our state Arbitration Act will apply and this agreement shall be enforceable even if interstate commerce is involved.*" (second emphasis added)); *Soil Remediation Co. v, Nu-Way Envtl., Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996) (holding that FAA displaced South Carolina notice-requirement statute, which would have precluded arbitration, where parties agreed to arbitration and the transaction involved interstate commerce).

Bradley v. Brentwood Homes, Inc., 398 S.C. at 453-54.

The Supreme Court in *Bradley* helps distinguish the unique nature of the real estate transaction by stating:

> The analysis of this issue necessarily involves a discussion of the historical intrastate character of real estate transactions. Beginning in 1994, this Court recognized the unique nature of real estate transactions when it issued its decision in *Mathews v. Fluor Corp.*, 312 S.C. 404, 440 S.E.2d 880 (1994), *overruled on other grounds by Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539 n. 3, 542 S.E.2d 360, 363 n. 3 (2001) (overruling *Mathews* "to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied"). In

> *Mathews*, this Court held that interstate commerce was not involved in a contract for sale of a commercial building located in South Carolina to out-of-state parties even though, incidental to the sale, the parties utilized the services of a North Carolina engineer and procured financing from a Pennsylvania lender. *Id.* at 407, 440 S.E.2d at 881. In so ruling, the Court found the transaction was outside the scope of the FAA because it was "unable to discern from the evidence presented whether the contract *required* respondent to administer anything related to interstate commerce." *Id.* at 407, 440 S.E.2d at 882.

Id. at 456.

The far more applicable case law regarding similar construction projects involving a host of contractors from numerous states, as well as materials supplied from various sources crossing state commerce lines is discussed fully in Appellant's Final Brief, and those cases are not addressed in Respondent's Final Brief. In sum, the cases cited by Respondent, focus on factual scenarios involving real estate transactions, and as a result are both legally and factually distinguishable from this case. Respondent fails to cite to any case that overturns the ruling in *Zabinsky* which holds that construction projects like the one at issue here is subject to interstate commerce. Consequently, the case law presented by Respondent fails to support a finding that the FAA does not apply and Respondent's cited case law merits no further analysis.

II. THE TRIAL COURT INCORRECTLY DETERMINED THAT THE CONTRACT'S ARBITRATION PROVISION WAS UNENFORCEABLE UNDER THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, AND IN FINDING THAT IT WAS A CONTRACT OF ADHESION.

Respondent started its analysis of its second issue on appeal by stating "[b]ecause the FAA did not apply to this contract, the Trial Court correctly examined the arbitration provision under the law of South Carolina." (Resp't Final Br. 7.) Respondent fails to acknowledge that the determination of the validity of the arbitration provision is to be made through an analysis of the facts and circumstances under Georgia law.

Appellant has never claimed that the arbitration provision meets the requirements of the South Carolina Uniform Arbitration Act rendering the thrust of Respondent's second issue immaterial and moot. Rather, Appellant has repeatedly, since originally filing its Motion to Dismiss, advocated that the mutually chosen choice of law provision (in this case Georgia law) is enforceable and it does not violate public policy. This issue is further discussed in response to Respondent's issue VI. Argument as to the issue of an adhesion contract follows in the next section.

III. THE TRIAL COURT WAS WRONG IN DETERMINING THAT THE ARBITRATION PROVISION OF THE CONTRACT WAS UNENFORCEABLE ON A FINDING THAT IT IS AN ADHESION CONTRACT.

Respondent's primary argument in support of its position that the contract is unenforceable is, and has been, because it contends that it is an adhesion contract. Respondent claims that it is an adhesion contract by asserting there was an absence of meaningful choice for Affordable Concrete in entering into the agreement, as a direct result of the timing during which it received the contract. The Trial Court's Order states: "Plaintiff began work within ten (10) days of being selected as the subcontractor on March 7, 2013. Defendant did not provide the contract to Plaintiff until March 21, 2013. Plaintiff had performed significant work on the project prior to this date." (R. p. 009) (emphasis added).

Respondent does little to offer new support of the general statements regarding the timing of the work performed and the execution of the contract between the parties in its Final Brief, except to state that: "In the instant case, the Subcontract Agreement was [...] presented to Affordable approximately **one month** *after* Affordable had already began work on the project and had completed substantial work." (Resp't Final Br. 10.) (emphasis added). Respondent then goes on to focus on the timing of the presentation of the contract, as they had before, as being a

crucial factor in supporting its contention that it is an adhesion contract and to bolster the Trial Court's finding of the same.

Respondent continues to focus on the timing of when it was presented the contract in order to support a finding of unconscionability and a lack of meaningful choice. The story, as repeatedly told by Respondent, is that the contract was not first presented to it until after "substantial" or "considerable" work was performed. (*See*, Resp't Final Br. 11, 15.) Respondent goes on to state "[i]n this case, Affordable made an offer in the way of a bid to Roper Hanks, Roper Hanks accepted the bid and Affordable began work on the project within ten days. This occurred weeks before Roper Hanks' written 'subcontract agreement' was ever presented to Affordable." (Resp't Final Br. 14.) However, the clear facts and evidence show that Affordable Concrete did not begin work within ten (10) days of Roper Hanks accepting its bid. Furthermore, the facts and evidence in the record, as well as admissions by Respondent, undeniably demonstrate that Affordable Concrete received the subject contract within twenty-four (24) hours of obtaining its first materials for work on the job and actually starting work at the subject project.

The best evidence relative to the timing of events and amount of work performed or, rather more tellingly not performed by March 21 is contained in Respondent's invoices which are included in Exhibit B to its Memorandum in Opposition to Roper Hank's Motion to Dismiss. (Resp't Final Br. 3.) Those invoices clearly demonstrate that Respondent, as the concrete subcontractor on the project, did not purchase any concrete until the day after it received its contract, and then purchased additional concrete in greater amounts on the following dates: 3/29; 4/03; 4/05; 4/11; 5/07 and 5/29. Only three (3) invoices/receipts out of thirty (30) submitted for the purchase of materials by Affordable Concrete on this project are dated prior to March 21,

when Respondent acknowledges receiving the subject contract. (R. pp. 93-132) These three invoices are dated March 20, only one day prior to Respondent's receipt of the contract. March 20 also coincides with the date that the parties reached an agreement on the subcontract price which explains why no materials were ordered prior to that date, and why the contract was provided to the Respondent on the following day. Moreover, based on the legible invoices, the cost of materials purchased for the job by Respondent totaled over $13,000, yet the cost of materials purchased one day prior to March 21 was less than $2,000. (*Id.* at 93-105.) Finally, the demo hammers utilized in the initial work performed by Affordable Concrete on the project were not rented-out until 5PM on March 20. (*Id.* at Ex. B, 104-105.)

A proper analysis of the relevant facts demonstrates that there was a meaningful choice in Respondent's execution of the contract – as discussed fully in Appellant's Final Brief. The invoices presented by Respondent clearly show that Phase 1 was not complete, over half the project was not complete and "considerable" or "substantial" work by Affordable Concrete, under any reasonable analysis of the facts, had not been performed on the first day of work out of the roughly ninety (90) days Affordable Concrete was working at the project site. (*See* Resp't Final Br. 3) ("Affordable [...] worked for approximately three months on the project."). Respondent had ample time to negotiate the terms of the contract, if it chose to do so, prior to performing any significant work on the Project. Consequently, the Trial Court's reliance on Respondent's assertions that it performed significant work on the project prior to being presented with the contract by the Appellant in support of the finding that the contract between the parties was one of adhesion and unconscionable is improper and should be reversed, as there is no evidence to support this holding. (*See* Bradley, 398 S.C. 453-54.)

Respondent's reliance upon *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011) is ill-founded. *Concepcion* involved a sales and servicing agreement between two individuals and an international supplier of cell phones, and specifically dealt with the enforceability of an arbitration provision that protected purported class actions (i.e. a collective-arbitration waiver) and authorized AT&T to make unilateral amendments to the contract, which it did to the arbitration provision on several occasions. *Id.* Although the Supreme Court's analysis of those particular facts under unique California law is interesting, it is not illustrative of the facts of the current case. Strikingly, Respondent's quote from the *Concepcion* case on page 8 and 9 of its Final Brief dismantles the argument Respondent attempts to make to invalidate the arbitration provision. Respondent quotes "*This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,'* **but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.**" *Id.* at 333. (emphasis added).

The last line in the above quote originates from *Doctor's Associates, Inc. v. Casaratto*, 517 U.S. 681 (1996), and clarifies that an arbitration provision cannot alone be invalidated by general contract defenses. Interestingly, as it relates to the element of surprise and conspicuousness of the clause dwelled-upon by Respondent, *Doctor's Associates* quickly resolves such concerns as to the enforceability of an arbitration provision under the FAA, in the face of alternate statutory requirements:

> The Federal Arbitration Act (FAA or Act) declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C § 2. Montana law, however, declares an arbitration clause unenforceable unless "[n]otice that [the] contract is subject to arbitration" is "types in underlined capital letters on

> the first page of the contract." Mont.Code Ann § 27-5-114(4) (1995). The question here presented is whether Montana's law is compatible with the federal Act. We hold that Montana's first-page notice requirement, which governs not "any contract," but specifically and solely contracts "subject to arbitration," conflicts with the FAA and is therefore displaced by the federal measure.

Id. at 681.

Respondent had every opportunity to negotiate the terms of the contract prior to performing any substantial work at the Project, and the terms of the contract at issue are not unconscionable. To hold otherwise would in essence invalidate how most contracts are presented and executed in the construction industry. The arbitration provision, similar to other terms of the contract, could have been negotiated by Respondent, yet Respondent failed to do so before executing the contract. The Respondent made a meaningful and independent choice to proceed with the Project pursuant to the terms of the executed contract, which includes an enforceable arbitration provision pursuant to the FAA. As a result, arbitration in Atlanta is the agreed upon dispute resolution provision, and the Trial Court's Order should be reversed in order to enforce the agreement of the Parties.

IV. THE TRIAL COURT FAILED TO CONSIDER THE IMPACT OF RESPONDENT'S INCONSISTENT ATTEMPTS TO BOTH ENFORCE AND INVALIDATE THE SUBJECT CONTRACT AND THE ISSUE OF ESTOPPEL ADVANCED BY APPELLANT.

Respondent incorrectly asserts that the issue of estoppel has not been properly preserved for appeal. Appellant submitted a proposed Order Granting its motion per the request of the presiding Judge. The proposed Order included Appellant's assertion that Respondent's position in barred by estoppel as follows:

> This Court finds that the Contract at issue is valid and enforceable. "[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)). Both parties initialed all sixteen pages of the contract and signed the contract in two different places, agreeing to be bound by its terms. Plaintiff 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.

(R. p. 14)

As such, the issue was not new or raised for the first time in support of Roper Hank's Motion to Reconsider. Therefore, it is properly before this Court and yet another ground for the contract to be enforced in full.

V & VI. THE TRIAL COURT INCORRECTLY FOUND THAT THE CHOICE OF LAW PROVISION AT ISSUE IS ONE SIDED, OPPRESSIVE, ADHESIVE AND UNENFORCEABLE.

Respondent offers no analysis under Georgia law to support its contention that the subject contract is unenforceable, despite stating "[e]ven if Georgia law did apply to the case, the Arbitration Provision would still be unconscionable under Georgia law." (Resp't Final Br. 16.) The only response Respondent offers in support of this assertion is to state "[f]or all of the reasons discussed above under South Carolina law for unconscionability, the Arbitration Provision would still be unenforceable under Georgia law" and "[e]ven if Georgia law applies, it fails for the same reasons as it would under South Carolina law." (Resp't Final Br. 16.)

Despite the inclusion of these self-serving conclusory statements, Respondent offers no Georgia case law or analysis of the same to support its claim regarding the unconscionability of the subject contract, or any portion of the contract. Moreover, Respondent does not provide any arguments or supporting case law in opposition to the cases cited by Appellant that establish that the subject contract is enforceable and conscionable pursuant to applicable Georgia law.

Appellant further relies on its arguments set forth on pages 10 through 12 of its Brief in support of the enforceability of the choice of law provision.

CONCLUSION

The conclusions reached by the Trial Court as to the lack of meaningful choice, particularly those based on timing of the contract presentation relative to the work performed, were not adequately supported by the record and should be reconsidered. Moreover, the Trial Court's findings concerning the inapplicability of the FAA were incorrect because the contract involved parties and goods that implicated interstate commerce. 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, and the applicable case law does not support its decision. In light of the arguments set forth herein, as well as those contained in Appellant's Final Brief, Appellant Roper Hanks, LLC respectfully requests that 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 submitted,

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