

# **EXHIBIT A**

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-10-1833

Andrew and Kimberly McIntire,

Seaquest Development Company, Inc.; Red Bay Constructors, Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork — Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC,

2017 MAY -1 AM 11: 52

JULIE J. ARMSTRONG  
CLERK OF COURT

RECEIVED

JUN 02 2017

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Jean H. Toal

Attorney for :  Plaintiff  Defendant  
or  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk :

*Order attached Dismissing  
Jurisdiction*

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CASE NO. 2016-CP-10-1833

ANDREW and KIMBERLY McINTIRE, )  
 )  
Plaintiffs, )

v. )

SEAQUEST DEVELOPMENT COMPANY, )  
INC.; RED BAY CONSTRUCTORS CORP.; )  
BENZENBERG CUSTOM CABINETS, INC.; )  
JONATHAN MARSHALL )  
CONSTRUCTION; COASTAL WINDOW & )  
DOOR CENTER OF CHARLESTON, LLC; )  
CAROLINA WINDOW & MILLWORK, LLC )  
n/k/a CAROLINA WINDOW & MILLWORK )  
- OMNI GLASS INDUSTRIES, LLC; )  
SOUTHCOAST EXTERIORS, INC.; )  
MICHAEL CASTEEN d/b/a CASTEEN )  
CUSTOM CABINETS; QUALITY CEDAR )  
PRODUCTS, INC. OF MICHIGAN d/b/a )  
MICHIGAN PRESTAIN CO.; COASTAL )  
PLUMBING & GAS, LLC; FOAM )  
INSULATION CO. INC.; JERRY COMER )  
d/b/a JERRY'S TILE & MARBLE, LLC; )  
LOWCOUNTRY FIREPLACES, INC.; )  
CAROLINA PEST SOLUTIONS, INC.; NEW )  
SOUTH CONSTRUCTION SUPPLY, LLC, )

Defendants. )

SEAQUEST DEVELOPMENT COMPANY, )  
INC., )

Third-Party Plaintiff, )

v. )

ARCHITECTURAL PRODUCTS OF )  
CHARLESTON, LLC; SEALTIGHT OF )  
SOUTH CAROLINA, LLC, )

Third-Party Defendants. )

**FILED**  
2017 MAY - 1 AM 11:53  
JULIE J. ARBUSTRONG  
CLERK OF COURT

**ORDER OF DISMISSAL**

**RECEIVED**

JUN 02 2017  
SC Court of Appeals

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This residential construction-defect case is before the Court on the following four motions, all of them heard October 13, 2016:

- (1) Seaquest's<sup>1</sup> **Motion to Dismiss or Stay Proceedings** filed June 17, 2016 ("Seaquest's Motion to Dismiss");
- (2) Red Bay's<sup>2</sup> **Motion to Dismiss or for Stay of Proceedings** filed June 23, 2016 ("Red Bay's Motion to Dismiss");
- (3) The McIntires'<sup>3</sup> **Motion to Stay and to Compel Arbitration** filed July 27, 2016 (the "Motion to Compel Arbitration"); and
- (4) The McIntires' **Motion for Protective Order as to Requests for Admissions of Seaquest Development Company** filed August 15, 2016 (the "Motion for Protective Order").

For the reasons below, Seaquest's Motion to Dismiss, which calls for a complete dismissal of the case, is GRANTED; the Motion to Compel Arbitration is DENIED; and the remaining motions (Red Bay's Motion to Dismiss and the McIntires' Motion for Protective Order) are MOOT as this case is DISMISSED in its entirety.

### BACKGROUND

In August of 2007, the McIntires entered into a written contract with general contractor Seaquest for the construction of a home in Mount Pleasant. The work was performed by various subcontractors (the majority of whom are defendants or third-party defendants), and a certificate of occupancy was issued on September 25, 2008.

On April 8, 2016, the McIntires filed this lawsuit alleging defects in the home's construction and asserting the following causes of action against Seaquest: Negligence/Gross Negligence, Breach of Warranty of Habitability, Negligent Misrepresentation and Constructive

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<sup>1</sup> "Seaquest" refers to Defendant Seaquest Development Company, Inc.

<sup>2</sup> "Red Bay" refers to Defendant Red Bay Constructors Corp.

<sup>3</sup> The "McIntires" refers to Plaintiffs Andrew and Kimberly McIntire.

Fraud, and Breach of Warranty of Good and Workmanlike Work. Though their contract with Seaquest contains an arbitration clause, the McIntires have not asserted a cause of action for breach of contract.

Prior to filing this suit, the McIntires had discovered a number of alleged construction defects in the home and, without notifying Seaquest, had hired experts and begun repairs. The repairs had been substantially completed before suit was filed, or were so soon thereafter.

## DISCUSSION

### I. Seaquest's Motion to Dismiss

Seaquest contends this case should be dismissed because the McIntires filed this action before first complying with the requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §§ 40-59-810 to -860 (the "Right to Cure Act"), and under the circumstances, it is not possible for the McIntires to comply with the requirements of the Right to Cure Act, nor is it possible for Seaquest to be afforded its rights thereunder. The Court agrees.

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The Right to Cure Act grants contractors like Seaquest (as well as subcontractors) the right to notice of, and an opportunity to inspect and cure, alleged "construction defect[s]"<sup>4</sup> in a

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<sup>4</sup> As used in the Right to Cure Act,

"Construction defect" means a deficiency in or a deficiency arising out of the design, specifications, surveying, planning, supervision, or observation of construction or construction of residential improvements that results from any of the following:

- (a) defective material, products, or components used in the construction of residential improvements;
- (b) violation of the applicable codes in effect at the time of construction of residential improvements;
- (c) failure of the design of residential improvements to meet the applicable professional standards of care at the time of

“dwelling.”<sup>5</sup> It requires a “claimant”<sup>6</sup> to “serve”<sup>7</sup>, no less than ninety days before filing an “action”<sup>8</sup> against a contractor or subcontractor arising out of the construction of a dwelling, “a written notice of claim on the contractor” containing certain required information about the

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governmental approval of the design of residential improvements; or

(d) failure to construct residential improvements in accordance with accepted trade standards for good and workmanlike construction at the time of construction. Compliance with the applicable codes in effect at the time of construction conclusively establishes construction in accordance with accepted trade standards for good and workmanlike construction, with respect to all matters specified in those codes.

§ 40-59-820(3).

<sup>5</sup> As used in the Right to Cure Act,

“Dwelling” means a single-family house or duplex or a multifamily unit not to exceed sixteen units and not to exceed three stories in height, and which is intended for residential use. A dwelling includes the systems and other components and improvements that are part of a single or multifamily unit at the time of construction.

§ 40-59-820(4).

<sup>6</sup> As used in the Right to Cure Act,

“Claimant” means a homeowner, including a subsequent purchaser, who asserts a claim against a contractor, subcontractor, supplier, or design professional concerning a defect in the design, construction, condition, or sale of a dwelling or in the remodel of a dwelling.

§ 40-59-820(2).

<sup>7</sup> As used in the Act, “‘Serve or ‘service’ means personal service or delivery by certified mail to the last known address of the addressee.” § 40-59-820(5).

<sup>8</sup> As used in the Right to Cure Act,

“Action” means *any* civil lawsuit or action *or arbitration proceeding* for damages or indemnity asserting a claim for injury or loss to a dwelling or personal property caused by an alleged defect arising out of or related to the design, construction, condition, or sale of the dwelling or a remodel of a dwelling.

§ 40-59-820(1) (emphasis added).

claim. § 40-59-840(A); see also § 40-59-840(B) (providing, “The contractor or subcontractor shall advise the claimant within fifteen days of receipt of the claim if the construction defect is not sufficiently stated and shall request clarification.”). It also establishes a mandatory pre-suit inspection/opportunity-to-cure procedure and the related rights/obligations of the respective parties. See § 40-59-850; see also § 40-59-850(C) (“If the parties cannot settle the dispute pursuant to [the Right to Cure Act], the claimant *may* proceed with a civil action or other remedy provided by contract or by law.”) (emphasis added); § 40-59-830 (“If the claimant files an action in court before first complying with the requirements of this article, on motion of a party to the action, the court *shall* stay the action *until the claimant has complied* with the requirements of this article.”) (emphasis added).

Our Supreme Court was called upon to construe the Right to Cure Act in Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010). In so doing, the Court endorsed the view that § 40-59-840 “encompasses civil lawsuits filed against a contractor or subcontractor,” “imposes an absolute condition precedent to the filing of lawsuits that qualify under the Right to Cure Act[,]” and “*requires* the claimant to serve written notice no later than ninety days before filing the action.” Id. at 570, 703 S.E.2d 200-01 (emphasis in original). Further, regarding the legislative intent underlying the Right to Cure Act, the Court stated as follows:

The Right to Cure Act has an express public policy intent of: (1) addressing the need for an alternative dispute resolution method to promote settlement of construction disputes without litigation, while adequately protecting the rights of homeowners; and (2) requiring a would-be plaintiff in certain construction defect matters to file a notice of claim with the would-be defendant and provide an opportunity to resolve the claim without litigation. The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to *require compliance* with the Right to Cure Act’s notice provisions.

Id. at 572-73, 703 S.E.2d at 202 (emphasis in original) (internal citation omitted).

Without question, the Right to Cure Act applies here; the McIntires filed this action before first complying with its requirements; and under the circumstances, it is not possible for the McIntires to comply with its requirements, nor indeed is it possible for Seaquest to be afforded its rights thereunder. Wherefore, consistent with the Court's directive to ascertain and effectuate the intention of the legislature,<sup>9</sup> based on the statutory language and in view of Grazia, I find that this case should be dismissed.

While, as referenced above, the Right to Cure Act expressly calls for a "stay" when a claimant files an action before compliance, it also expressly calls for the stay to remain in effect "until the claimant has complied . . . ." § 40-59-830 (emphasis added). Moreover, as also referenced above, the language of the Right to Cure Act makes plain the legislature's intent that no "civil action or other remedy provided by contract or by law" proceed until there has been compliance. See § 40-59-850(C) ("If the parties cannot settle the dispute pursuant to [the Right to Cure Act], the claimant *may* proceed with a civil action or other remedy provided by contract or by law.") (emphasis added). Here, the McIntires have made compliance with the Right to Cure Act impossible. They have substantially repaired and remodeled their home, in the process

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<sup>9</sup> "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007); see also id. ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."); id. at 499, 640 S.E.2d at 459 (In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."); S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("[T]he statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect."); Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citation omitted) ("If the statute is ambiguous . . . courts must construe the terms of the statute."); id. (statutory language must be construed in light of the intended purpose of the statute); id. (a statute should not be construed in a way which leads to an absurd result or renders it meaningless).

destroying the alleged defects without giving Seaquest any notice of those alleged defects and without giving Seaquest an opportunity to inspect/cure them. Because the McIntires have not complied with the Right to Cure Act, the act plainly requires a stay; because they foreclosed even the possibility of compliance with the Right to Cure Act, the stay must be permanent; as a practical matter, a permanent stay is a dismissal, which this Court now orders.

## II. The Motion to Compel Arbitration

The McIntires contend the case should be stayed and the dispute compelled to arbitration. The Court disagrees, concluding that the McIntires are barred from arbitrating this dispute due to waiver as well as by the terms of their contract.

Whether a claim is subject to arbitration is a matter for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001). Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Like other contracts, arbitration clauses are to be enforced in accordance with their terms. Zabinski, 346 S.C. at 592.

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The McIntires have waived any right they may have had to demand arbitration. Although South Carolina favors arbitration, the right to enforce an arbitration clause may be waived. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). “[T]o establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration.” Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). No set rule exists “as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case.” Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)

(quoting Hyload, Inc. v. Pre-Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992)). Our courts consider the following three factors when determining whether a party has waived its right to compel arbitration:

- (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration;
- (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration;
- and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Rhodes, 374 S.C. at 126, 647 S.E.2d at 251.

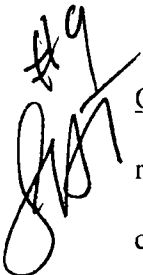
“To establish prejudice, the non-moving party must show something more than ‘mere inconvenience.’” Id. at 127, 647 S.E.2d at 251 (quoting Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003)). “Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts.” Id., 647 S.E.2d at 251-52 (internal citation omitted). The particular and peculiar facts of this case lead the Court to the inescapable conclusion that the McIntires waived any right to arbitrate.

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Prior to filing the Motion to Compel Arbitration, the McIntires engaged in extensive discovery in that they retained forensic and construction liability and repair experts to investigate, document, and repair the alleged defects at their home. They undertook these actions related to litigation without demanding arbitration and, as noted above, without complying with the Right to Cure Act. The repairs to the home were substantially completed prior to the filing of the Motion to Compel Arbitration. The resulting material prejudice to Seaquest is clear and irreparable.

A substantial amount of time transpired between the time the McIntires engaged their experts and the time they moved to compel arbitration. By the time of the Motion to Compel Arbitration, the repairs to the alleged defects were substantially completed, the alleged defective conditions eliminated, precluding Seaquest from investigating, inspecting, and/or challenging the McIntires' claims. In a residential construction case, the most important evidence may in fact be the home itself. Here, the home Seaquest constructed, in its allegedly defective condition, no longer exists, with Seaquest left to rely on the McIntires' inspections and investigations and the evidence they chose to preserve.

Had the McIntires demanded arbitration when they first discovered the alleged defects, or when they first engaged liability or construction experts to perform their investigation, or at any time prior to repairing them, Seaquest would have had the opportunity to inspect, investigate, and/or test the alleged defects. Their delay in demanding arbitration does not constitute a mere inconvenience; rather, it amounts to a denial of Seaquest's right to fairly defend itself.

Additionally, the McIntires are contractually barred from demanding arbitration. The McIntires are attempting to invoke provisions in their contract<sup>10</sup> with Seaquest to compel arbitration. Specifically, they claim that Section 4.6 of that contract requires arbitration.

 The interpretation of a written contract is a matter of law to be decided by the court. Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991) (providing, "As a general rule, written contracts are to be construed by the Court" except where a contract is ambiguous or capable of more than one construction.). The McIntires have failed to demand arbitration in accordance with the very section they are attempting to enforce. Paragraph 4.6.2 states that a

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<sup>10</sup> The contract is a standard form AIA Document A101-1997, including AIA Document A201-1997 – General Conditions of the Contract for Construction. The Court has noted that the Plaintiffs have not sued for breach of contract, the very contract which Plaintiffs now contend requires arbitration of this dispute.

demand for arbitration must be filed in writing with the opposing party and with the American Arbitration Association. The McIntires have not done so; indeed, though they would like it stayed in favor in arbitration, they filed this lawsuit.

Paragraph 4.6.3 of the contract states that a “demand for arbitration shall be made . . . within a reasonable time after the claim has arisen . . . .” As previously stated, the McIntires have not made a demand for arbitration pursuant to the contract. They could not possibly comply with the “reasonable time” requirement in their contract. Having discovered alleged defects that would have given rise to a “Claim,” they investigated that claim, retained counsel, retained experts, and substantially repaired and eliminated the alleged defects underlying the claim they wish to arbitrate. Accordingly, they are barred from demanding arbitration. The determination of a “reasonable time” for performance of one’s obligations under a contract must be determined upon examination of the facts and circumstances of each particular case. And while generally the question of “reasonable time” would be one of fact for a jury, this case is different. As a matter of law, I find that an attempt to compel arbitration (without any prior demand therefor and, indeed, in the context of court proceedings that the moving parties themselves commenced) after the party seeking arbitration destroyed all or most of the physical evidence to support or refute the claim is manifestly unreasonable. Cf. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001) (“If the evidence as a whole is susceptible of only one reasonable inference, no jury issue is created and a directed verdict motion is properly granted.”).

Paragraph 4.6.3 of the contract goes on to reference statutes of limitations for demanding arbitration. Specifically, Paragraph 4.6.3 states that “in no event shall [an arbitration demand] be made after the date when the institution of legal or equitable proceedings based on such Claim

would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.” The applicable statute of limitations for the claims brought by the McIntires is three years as set forth in S.C. Code Ann. § 15-3-510, *et seq.* Paragraph 13.7.1.3 states, “As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued . . . .” Accordingly, the McIntires’ demand for arbitration had to have been made sometime prior to 2012.<sup>11</sup> The statute of limitations to demand arbitration, as calculated by the contract and by the arbitration clause contained therein, has run.

Wherefore, I find the Motion to Compel Arbitration should be denied.

Handwritten signature and initials in black ink, appearing to be 'JH' and 'JH'.

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<sup>11</sup> The Certificate of Occupancy was issued on September 25, 2008 and it is doubtless that the final Certificate of Payment was issued soon thereafter. Therefore, the statute of limitations would have run during 2009, 2010, and 2011

CONCLUSION

NOW, THEREFORE, for the foregoing reasons, it is hereby


ORDERED, ADJUDGED AND DECREED that Sequest's Motion to Dismiss is GRANTED; it is

ORDERED, ADJUDGED AND DECREED that the Motion to Compel Arbitration is DENIED; it is

ORDERED, ADJUDGED AND DECREED that all remaining motions in this case are MOOT; and it is

FURTHER ORDERED that this case shall be and is hereby DISMISSED.

AND IT IS SO ORDERED.

  
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Jean Hofer Toal  
Presiding Judge  
Ninth Judicial Circuit

Charleston, South Carolina

Jan. 17, 2017

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