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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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

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SC Court of Appeals

Patricia Damico, and Lerma Lucas, Individually and on behalf of all others similarly situated, Joshua and Brittany 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, Geometries 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 II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor 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 Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor 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, Isidni 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, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4 Fourth-Party Defendants.

**RESPONDENTS COASTAL CONCRETE SOUTHEAST, LLC AND COASTAL
CONCRETE SOUTHEAST II, LLC'S
INITIAL BRIEF**

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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"). Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC are alleged to have manufactured and delivered ready mix concrete pursuant to a Supplier Base Agreement with Lennar, during the construction The Abbey ("Project").

On December 12, 2014, Patricia Damico and Lenna Lucas, individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, 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 ("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.). Lennar filed a Motion to Compel Arbitration on June 1, 2015. (R.).

The owners filed an Amended Complaint on November 23, 2015. (R.). Lennar 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 Circuit Court 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 Lennar's motion as it related to the alleged arbitration agreement between Lennar and Spring Grove Development. (R.). On October 26, 2016, the Circuit Court issued a Form 4 Order (the "Form 4 Order") denying all motions to reconsider. (R.) This appeal followed.

This appeal concerns whether Plaintiffs/Owners must arbitrate their construction defect claims against Lennar Carolinas, LLC ("Lennar") and, by extension, whether Lennar's third-party claims against Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC (collectively "Coastal Concrete Southeast") must be arbitrated. By failing to raise its substantive arguments in support of its motion to compel arbitration as to Coastal Concrete Southeast and the other subcontractors in its issues on appeal or in the arguments in its brief, Lennar abandoned the issue. Nonetheless, to the extent this Court elects to consider and rule on the matter, Coastal Concrete Southeast may be compelled to arbitrate only: (A) pursuant to the agreement in place at the time of Coastal Concrete Southeast's work on the project, (B) if Plaintiffs/Owners and Lennar must also arbitrate the disputes between them, and (C) pursuant to the Federal Arbitration Act.

FACTS AND PROCEDURAL HISTORY

Coastal Concrete Southeast II, LLC entered into a Supplier Base Agreement with Lennar on January 1, 2008. (R.). The assets of Coastal Concrete Southeast, LLC were purchased by Coastal Concrete Southeast II, LLC on November 12, 2009. Coastal Concrete

Southeast did not enter into an Agreement with Lennar (R.). The Supplier Base Agreement (“Supplier Agreement”) includes the following arbitration provision contained on page seven:

19. WAIVER OF JURY TRIAL/ARBITRATION: TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW, AND AFTER CONSULTING WITH LEGAL COUNSEL OF THEIR OWN CHOOSING, SUPPLIER AND LENNAR, ON BEHALF OF THEMSELVES AND ANY PERSON OR ENTITY ACTING BY, THROUGH OR UNDER THEM, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY AGREE TO WAIVE THE RIGHT TO TRIAL BY JURY IN CONNECTION WITH ANY LITIGATION OR JUDICIAL PROCEEDING RELATING TO OR CONCERNING, DIRECTLY OR INDIRECTLY, THIS AGREEMENT OR ANY OTHER RIGHTS OR OBLIGATIONS BETWEEN LENNAR, SUPPLIER AND ALL PERSONS ACTING BY, THROUGH OR UNDER LENNAR OR CONTRACTOR. . . . NOTWITHSTANDING THE FOREGOING, IF (A) LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL SHALL NOT APPLY; OR (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT SUPPLIER IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND SUPPLIER AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN STRICT ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES THEN GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR JURY. LENNAR AND SUPPLIER SPECIFICALLY AGREE THAT THIS AGREEMENT INVOLVES INTERSTATE COMMERCE, AND THAT ANY ARBITRATION SHALL BE GOVERNED BY THE FEDERAL ARBITRATION ACT.

Operating under the terms of the Supplier Agreement, Coastal Concrete Southeast, II,

LLC manufactured and delivered ready mix concrete to the Project from November 12, 2012 through March 12, 2013 (R. .) No work was performed on the Project by Coastal Concrete Southeast, II, LLC.

ARGUMENT

I. **LENNAR HAS WAIVED AND ABANDONED ITS ARGUMENTS THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO COASTAL CONCRETE SOUTHEAST, LLC AND COASTAL CONCRETE SOUTHEAST II, LLC.**

While Lennar addressed the Circuit Court's ruling denying the motion to compel arbitration as to Coastal Concrete Southeast and the other subcontractors on a procedural basis, Lennar failed to make any substantive arguments or provide citations to case law in support of its motion as to Coastal Concrete Southeast in its appeal brief. "[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) (citing Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989); Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991)).

Coastal Concrete Southeast agrees with Lennar's procedural concern that the Order does not make specific findings based on the arguments presented between Lennar and Coastal Concrete Southeast. In its Rule 59(e) motion, Lennar also asked the trial court to articulate the basis for its decision as to Coastal Concrete Southeast and other subcontractors. (R. p. 20.) These motions were denied in the Form 4 Order. (R. .)

The filing of the Rule 59(e) motion, although an important first step, is not the only action a party must take in preserving an issue on appeal. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) ("The losing party must first try

to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). Although it could be argued Lennar fulfilled its duty to bring its substantive arguments as to Coastal Concrete Southeast before the circuit court in its Motion to Reconsider by referencing the "the reasons previously articulated in writing and at the hearing on the Motion," this broad, general statement is not sufficient to preserve the arguments in the appeal. (R. .) In order to bring the issue before this Court, Lennar was obligated to put forth each of its substantive arguments why its claims against Coastal Concrete Southeast are subject to arbitration along with citations to supporting case law. Lennar's brief contains only some cursory assertions that the subcontractors entered into various contracts which contain arbitration clauses, but it does not specifically set forth any arguments as to Coastal Concrete Southeast nor does it contain applicable references to supporting authority. In fact, Lennar's brief even fails to specify which of the several agreements it mentions form the basis for its assertion that its claims against Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC must be submitted to arbitration. Accordingly, this Court should find that Lennar has waived and abandoned the issue as to whether it can compel Coastal Concrete Southeast to arbitrate the claims in this matter. See Rule 208(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.")

II. IF THIS COURT ELECTS TO RULE ON WHETHER AND UNDER WHAT TERMS COASTAL CONCRETE SOUTHEAST, LLC AND COASTAL CONCRETE SOUTHEAST II, LLC MUST ARBITRATE, THE COURT SHOULD FIND THAT LENNAR MAY COMPEL COASTAL CONCRETE SOUTHEAST, LLC AND COASTAL CONCRETE SOUTHEAST II, LLC TO ARBITRATE THIS ACTION ONLY: (A) PURSUANT TO THE SUPPLIER AGREEMENT, (B) IF LENNAR AND PLAINTIFFS MUST ALSO ARBITRATE, AND (C) PURSUANT TO THE FEDERAL ARBITRATION ACT.

If the Court finds that Lennar has not abandoned the issue, the Court should find that the Circuit Court properly denied Lennar's motion to compel Coastal Concrete Southeast to arbitrate the claims when it denied Lennar's motion as to Plaintiffs. Arbitration Agreements are required to meet the basic tenets and requirements of contract law. Towles v. United HealthCare Corp., 338 S.C. 29, 37, 529 S.E.2d 839, 844 (Ct. App. 1999). Additionally, arbitration is a matter of contract, and a court's evaluation of the enforceability of an arbitration agreement is guided by the principles of contract law. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). Under South Carolina common law, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). A party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007).

With these guiding principles, the Court must examine the Agreements to determine the limited circumstances under which the parties agreed to submit any dispute between them to arbitration.

- A. Lennar may compel Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC to arbitrate only if Plaintiffs are required to arbitrate their claims against Lennar.**

The Supplier Agreement, which, for the reasons set forth below, is the only arbitration provision governing Coastal Concrete Southeast's materials supplied to the Project, unambiguously provides that Lennar may only compel Coastal Concrete Southeast to arbitrate if Lennar and Plaintiffs must arbitrate. Specifically, the arbitration provision provides as follows:

NOTWITHSTANDING THE FOREGOING, IF (A) LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT SUPPLIER IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL SHALL NOT APPLY; OR (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT SUPPLIER IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND SUPPLIER AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN STRICT ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES THEN GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR JURY.

(R. __ (emphasis added).) As applied to the circumstances in this case, the foregoing provision unambiguously demonstrates Coastal Concrete Southeast and Lennar agreed to resolve their disputes in the same forum in which the disputes between Lennar and Plaintiffs are resolved. Thus, if Lennar is unable to enforce its arbitration provisions against Plaintiffs, it cannot independently compel Coastal Concrete Southeast to submit to arbitration, because the arbitration provision in the applicable contract is derivative and, therefore, does not provide for arbitration without a third-party claim being adjudicated in the same action. Thus, as it relates to Coastal Concrete Southeast, Lennar's Motion to Compel fails unless it successfully compels Plaintiffs to arbitrate.

B. Lennar may compel Coastal Concrete Southeast to arbitration only pursuant to the Federal Arbitration Act, because the arbitration provisions in the Supplier Agreement do not meet the requirements of the South Carolina Arbitration Act.

Under the South Carolina Uniform Arbitration Act ("SCUAA"), notice that a contract is subject to arbitration "shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the

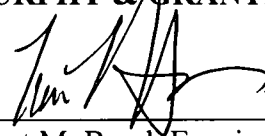
contract shall not be subject to arbitration." S.C. Code Ann. § 15-48-10(a). These requirements are enforced strictly and literally. See Soil Remediation Co. v. Nu-Way Envtl., 323 S.C. 454, 456-58, 476 S.E.2d 149, 150-51 (1996) (finding that an arbitration provision which was not underlined did not meet the requirements of S.C. Code Ann. § 15-48-10(a)). The Supplier Agreement does not include arbitration provisions on the first page of the agreement as required by § 15-48-10(a). (R. __.) Accordingly, the Supplier Agreement does not contain an arbitration provision enforceable under the SCUAA. Thus, in the event Lennar and Plaintiffs must arbitrate, Lennar may compel Coastal Concrete Southeast to arbitrate only pursuant to the FAA.

CONCLUSION

For the foregoing reasons, Coastal Concrete Southeast respectfully submits that the Court should affirm the ruling of the trial court denying Lennar's motion to compel Coastal Concrete Southeast to submit this matter to arbitration.

Respectfully submitted,

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