

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

RECEIVED

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

JUN 05 2017
SC Court of Appeals

Patricia Damico, and Lenna Lucas, Individually and on behalf of all other 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,

Respondent

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, Inc. and Rick Bryant,

Of which Lennar Carolinas, LLC is

Appellant

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, Inc. are

Lennar Carolinas, LLC

Appellant

v.

The Earthworkers Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Southeast, II, 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-Southwest Group, LLC and Low Country Renovations and Siding, LLP,

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

Respondents.

MYERS LANDSCAPING, INC.'S INITIAL BRIEF

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STATEMENT OF APPEAL

This appeal is based upon the Circuit Court's Order denying Lennar Homes Motion to Compel Arbitration of construction defect claims from Plaintiff against Lennar Homes. By extension, Lennar Homes has also attempted to compel arbitration of the Third Party claims against Respondents. Myers Landscaping would assert that the lower court did not err in denying the Motion to Compel Arbitration against Plaintiffs or Third Party Defendants. However, even if the Appellate Court were inclined to reverse the lower court, they must not compel arbitration against Respondents that never entered into contractual arbitration agreements with Lennar Homes, including Myers Landscaping.

FACTS AND PROCEDURAL POSTURE

This action arises out of allegations of defective construction by the homeowners at The Abbey located in Spring Grove Planation. The Abbey is a subdivision consisting of sixty nine homes in the Spring grove Plantation neighborhood in Berkeley County.

(R. __)

On October 30, 2014, Plaintiffs commenced this action by Complaint which asserted a number of claims against Lennar Homes of the Carolina and associated Defendants, including negligence, breach of warranty, and others pertaining to the construction of their homes. (R. __). Lennar Homes filed and Answer to the Plaintiff's Complaint along with Cross-Claims and a Third-Party Complaint on February 17, 2015.

(R. __). Lennar subsequently filed the Motion to Compel Arbitration that is the subject of this appeal on June 1, 2015. (R. __). Homeowners filed an Amended Complaint on November 23, 2015. (R. __). In response, Lennar amended their Motion to Compel

Arbitration on March 30, 2016, while also requesting the court to compel Spring Grove Development and named Third Party subcontractors to arbitration as well. (R.__). The Motion was argued in front of Judge J. C. Nicholson on April 11, 2016. (R.__). Judge Nicholson denied the Motion on September 19, 2016. (R.__). Lennar filed a Motion to Reconsider, which was also denied on October 28, 2016. (R.__). Lennar Homes initiated this current appeal on November 18, 2016.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DENYING LENNAR HOME'S MOTION TO COMPEL ARBITRATION AGAINST PLAINTIFF.

Whether a claim is subject to arbitration is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). A circuit court's factual findings for which there is reasonable evidentiary support should not be reversed on appeal. Smith v. D.R. Horton, Inc., 417 S.C. 42, 742 S.E.2d 37 (2016).

Myers Landscaping joins in the arguments of other Respondents on the subject of the denial of Appellant's Motion to Compel Arbitration against the Plaintiffs in this case. Myers would assert that the Circuit Court had ample factual basis to find the Arbitration clauses in the contracts between Lennar Homes and Plaintiff did not comply with the South Carolina law and were unconscionable. See, S.C. Code Ann. § 15-48-20(a); Smith v. D.R. Horton, *supra*.

Respondent would further assert that the denial of Appellant's motion to compel Plaintiff to arbitrate should defeat any attempt by Lennar Homes to compel arbitration between them and any subcontractor for claims arising out of the Plaintiff's claims.

Compelling arbitration against subcontractors when it is not ordered between the Plaintiff and Lennar would create a jurisdictional and procedural issue with the same claims being adjudicated in different courts. All Third Party Defendants, including Myers Landscaping, are now exposed to direct allegations from Plaintiff, and if arbitration is compelled against Myers for the allegations from Lennar Homes, but Plaintiff is not required to arbitrate, Myers would be required to defend against Circuit Court allegations, as well as those in arbitration. Further, there is most certainly no agreement between Myers Landscaping and the Plaintiffs to arbitrate claims directly or through Lennar Homes, so compelling Myers to arbitrate would be in error.

II. THE CIRCUIT COURT DID NOT ERR IN DENYING LENNAR HOME'S MOTION TO COMPEL ARBITRATION AGAINST THIRD PARTY DEFENDANTS, INCLUDING RESPONDENT MYERS LANDSCAPING, DUE TO THE FACT THAT MYERS AND LENNAR HOMES DID NOT ENTER INTO AN ARBITRATION AGREEMENT

The language in the decision denying Appellant's Motion to Compel Arbitration focuses mainly on the agreements between Appellant and the Plaintiff in this matter. There is little to no discussion of the denial of the entire motion, which included a request to compel arbitration against named subcontractors and Third Party Defendants as well. Appellant's Motion to Compel Arbitration included an Affidavit from Robert Mauch detailing the relationships of several subcontractors. This Affidavit and the contracts submitted by Appellant in their Motion do not include Myers Landscaping. Therefore, the Circuit Court did not err in denying Lennar's Motion to Compel Arbitration against Respondent Myers Landscaping.

The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise. Zabinski v. Bright Acres Assocs., 346 S.C. 580,

596, 553 S.E.2d 110, 118 (2001). Arbitration is a matter of contract, and a party cannot be required to submit to arbitration of any dispute which they have not agreed to submit. Id. The policy of the United States and South Carolina is to favor arbitration of disputes. Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396 (Ct. App. 2000). Regardless, a party cannot be required to submit to arbitration of any dispute which they have no agreed to submit. Aiken v. World Fin. Corp. of SC, 373 S.C. 144 (2007). Arbitration agreements are required to meet the basic tenets and requirements of contract law. Towlers v. United Health Care Corp., 338 S.C. 29 (Ct. App. 1999). The necessary elements of a contract are an offer, acceptance, and valuable consideration. Clardy v. Bodolosky, 383 S.C. 418 (Ct. App. 2009).

The South Carolina Uniform Arbitration Act (UAA) generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. S.C. Code Ann. § 15-48-20(a)(2005). See also, Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22-23, 644 S.E.2d 663, 667 (S.C. 2007). If no agreement is found to exist, the court must deny any application to arbitrate. Id. In the absence of a written Arbitration Clause in a contract, there must be clear and unmistakable evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clauses' validity. Id. at 24.

Here, there is no agreement to arbitrate between Lennar and Myers Landscaping. The contracts Lennar attempted to compel arbitration for are Purchase and Sale Agreement and Warranty with original buyers of the homes in the development and now Plaintiffs in an action against them. Lennar also moved in their

Amended Motion to Compel Arbitration to include all Third Party defendants, ostensibly based upon subcontract agreements. However, there is no evidence in the record that Lennar Homes has ever executed a contract with Respondent Myers Landscaping, much less a contract that contains an enforceable arbitration clause. Appellant provided multiple contracts and agreements with homeowners and other subcontractors, but did not include a contractual agreement with an arbitration clause with Myers Landscaping.

In addition, Appellant has provided no argument that there was ever any non-written contractual relationship between them and Myers Landscaping upon which to form an agreement to arbitrate disputes. Appellant's argument against the lower court's decision in their Initial Brief merely laments the lack of analysis given to their request to compel arbitration of the subcontractors, but offers no case law or substantive arguments as to why the subcontractors should be compelled. They again reference six contracts with Lennar Homes, but again, none of the referenced documents pertain to Respondent Myers Landscaping. Respondent Myers Landscaping is not obligated to arbitrate disputes based upon contractual agreements between Lennar and Plaintiff or contractual agreements between other subcontractors and Lennar. See, Simpson, supra.

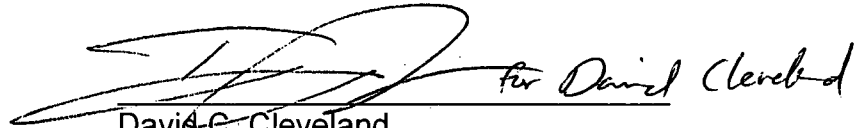
Even if the Appellate Court is inclined to overturn the lower court's decision concerning the arbitration between Plaintiff and Appellant, they should not overturn the lower court's decision to deny the motion to compel arbitration between Appellant and Third Party Defendants.

CONCLUSION

In addition to the grounds set forth above, Myers Landscaping incorporates by

reference all arguments set forth by other Defendants and Third Party Defendants, in which Myers Landscaping joins. This Court should affirm the Circuit Court's decision to deny Lennar Home's Motion to Compel Arbitration for the reasons herein, but if the Court finds Lennar is entitled to arbitration for the claims asserted by the Plaintiffs, they should still find that Lennar is not entitled to arbitration of the Third Party claims against Myers Landscaping.

CLAWSON AND STAUBES, LLC

A handwritten signature in black ink, appearing to read "David C. Cleveland", is written over a horizontal line. The signature is stylized and cursive.

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Charleston, South Carolina
June __, 2017

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June 2, 2017

File No.: 20163984.000

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211-1629

Re: Damico, et al v. Myers Landscaping, et al.
Appellate Case No: 2016-2339

Dear Ms. Kitchings:

Enclosed please find Myers Landscaping's Initial Brief regarding the above-referenced matter. We have enclosed an extra copy of the brief and ask that you please return a file stamp copy in the self-addressed, stamped envelope.

Thank you very much for your attention to the above.

Very truly yours,

CLAWSON and STAUBES, LLC


David C. Cleveland *for David Cleveland*

DCC/wrb
Enclosure
Cc: Attorneys of Record

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JUN 05 2017
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