THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jean H. Toal, Circuit Court Judge

Case No. 2016-CP-10-1833
Appellate Case No. 2017-001270

Andrew and Kimberly McIntire..... Appellants,

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-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;
of which Seaquest Development Company, Inc. is.....Respondent

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INITIAL BRIEF OF APPELLANTS

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2. DID THE TRIAL COURT ERR IN ADDRESSING ISSUES OF STATUTE OF LIMITATIONS, RIGHT TO CURE, AND WAIVER WHEN THE COURT'S SOLE JURISDICTION WAS TO DECIDE THE QUESTION OF ARBITRABILITY?

3. DID THE TRIAL COURT ERR IN DISMISSING THE CASE FOR FAILURE TO COMPLY WITH THE RIGHT TO CURE ACT WHEN THE RECORD WAS DEVOID OF EVIDENCE THAT APPELLANT HAD NOT COMPLIED AND NO PROVISION OF THE ACT AUTHORIZES DISMISSAL OF AN ACTION FOR ANY FAILURE TO COMPLY?

STATEMENT OF THE CASE

Andrew and Kimberly McIntire ("Appellants" or "the McIntires") filed suit against the Respondents on April 8, 2016, bringing claims relating to significant construction defects in their home (**Exh. A**). The last defendant was served on July 20, 2016 (**Exh. B**), and the McIntires filed a motion to compel arbitration on July 27, 2016 (**Exh. C**). They later filed a motion for a protective order on August 15, 2016 (**Exh. D**), protecting the McIntires from participating in discovery pending their motion to compel arbitration. The McIntires never engaged in discovery and did not use any of the judicial machinery except to ask the Court to compel arbitration of the dispute.

Respondent Seaquest Development Company, Inc. ("Seaquest") moved to dismiss or stay proceedings on June 17, 2016 (**Exh. E**), alleging that Appellants had failed to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act. S.C. Code Ann. § 40-59-810 *et seq.* (hereinafter the "Right to Cure Act"). A hearing was held on

October 13, 2016 encompassing the Seaquest's motion to dismiss, the McIntires' motion to compel arbitration, and various motions by subcontractors (transcript at **Exh. F**).

On January 4, 2017, Justice Toal requested that Seaquest provide the Court with an order (**Exh. G**), which was circulated to the Court and counsel of record on January 13, 2017 (**Exh. H**). The McIntires requested an opportunity to object to the proposed order on January 17, 2017 (**Exh. I**), and Justice Toal granted the request and gave the McIntires until January 20, 2017 to lodge their objections (**Exh. J**), which were lodged on January 20, 2017 by letter to Justice Toal with counsel of record copied (**Exh. K**).

On May 1, 2017, the instant order—unchanged from Respondent's proposed order—was filed dismissing the case, denying the McIntires' motion to compel arbitration, and denying the subcontractors' motions as moot (**Exh. L**); however, the order had been signed by Justice Toal on January 17, 2017 — three days before the Court received the McIntires' objections that Justice Toal had authorized.

STATEMENT OF THE FACTS

In 2007, the McIntires contracted with Respondents for the construction of a residence in Mount Pleasant, South Carolina. Seaquest was the general contractor for the project, which was completed and a certificate of occupancy issued in September 2008.

In September of 2013, the McIntires' residence was struck by lightning, blasting a hole in the roof and causing substantial fire damage. In the course of inspecting the damage caused by the lightning strike, the McIntires discovered—for the first time—numerous and significant construction defects. The McIntires notified Seaquest and at least one subcontractor of the defects they had discovered, but received no response. Accordingly, the McIntires hired another

contractor to repair the roof, which was a matter of some urgency to prevent further damage to the structure.

In the course of the repairs, defect after defect was discovered and addressed by the second contractor, including water and plumbing problems and major termite infestations. The McIntires filed suit against Seaquest and the various subcontractors in April 2016 — within the three-year statute of limitations.

ARGUMENT

I. Standard of Review

This Court reviews the dismissal of a case under Rule 12(b), SCRCP[1]—like all questions of law—*de novo*. *See, e.g.*, *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014) ("Questions of law are reviewed *de novo*."); *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) ("In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court.").

II. The Court's Function Is Solely to Determine Arbitrability

When a party moves to stay litigation and compel arbitration under the Federal Arbitration Act ("FAA"), the only question before the court is whether the parties' contractual agreement renders the dispute arbitrable. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85 (2002). "Procedural" questions, including "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met," are for the arbitrator to decide in the first instance, not the court. *Id.* at 85.

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[1] Seaquest's motion does not refer to Rule 12(b), SCRCP (**Exh. E**), but the trial court's Form 4 Judgment reflects that the case was dismissed pursuant to that Rule. (**Exh. L** at 1).

The contract between the Parties is governed by the FAA and requires arbitration of disputes; the dispute is arbitrable. This Court should vacate the trial court's order and direct the parties to engage in arbitration.

A. The Parties' Contract Requires Arbitration of Disputes

There is no dispute that the Parties have a valid contract or that the contract contains a notice that states: "**WARNING: THIS AGREEMENT SUBJECT TO BINDING ARBITRATION IN THE STATE OF SOUTH CAROLINA, CITY OF CHARLESTON, UNDER THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (CODE SEC. 15-48-10, ET SEQ.)**." **(Exh. M)**. The notice is in bold, underlined text, displayed prominently on the first page of the contract as required by S.C. Code Ann. § 15-48-10.

Additionally, the contract is a standard form AIA Document A101-1997 that incorporates A201-1997, section 4.6 of which requires "[a]ny claim arising out of or related to the Contract . . . be subject to arbitration." **(Exh. N)**. The contract thus requires disputes to be resolved via mandatory, binding arbitration.

B. The Dispute is Governed by the FAA

The South Carolina Supreme Court has long recognized that construction contracts evidencing transactions in interstate commerce are governed by the FAA. *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977). In *Episcopal Housing*, the South Carolina Supreme Court explained that if a contract "references . . . equipment and materials to be furnished from outside South Carolina," it "evidence[s] commerce" and implicates the FAA. *Id.* at 639–40, 651–52.

The contract between Appellant and Respondent is sufficient to "put [Respondent] on notice that materials and equipment from outside South Carolina would be used in the

construction of the [Appellant's] house." *Id.* at 640. For example, Exhibit B to the contract notes that the gas range/hood will be provided by "Wolf or French equivalent." (**Exh. M** at Exh. B, p. 2). Wolf is a subsidiary of the Sub-Zero Group, whose corporate headquarters are located in Madison, Wisconsin. Exhibit B to the contract also specifies that "Advantech" sheathing would be used in the framing of the house; "Advantech" is owned by Huber, a North Carolina company.

Moreover, "[u]nless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that *in fact* involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (emphasis added). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski Bright Acres Assoc.*, 346 S.C 580, 594, 553 S.E.2d 110, 117 (2001). At least one of the subcontractors hired by Seaquest, Quality Cedar Products, Inc. of Michigan, is an out-of-state business, so there can be no question but that the contract involved interstate commerce.

In short, the FAA applies to the dispute pursuant to *Episcopal Housing* and *Munoz*.

C. The FAA Requires Arbitration When Contractually Agreed Upon, Consistent With a National Policy Favoring Arbitration

The language of the FAA makes clear that arbitration is mandatory when, as here, the parties have a valid agreement to arbitrate. The FAA states:

> A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be 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. The United States Supreme Court has interpreted the language of the FAA as "embod[ying] a national policy favoring arbitration and plac[ing] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 1208 (2006). In *Southland Corp. v. Keating*, the Supreme Court stated further that the FAA not only "declared a national policy favoring arbitration," but actually "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." 465 U.S. 1, 10 (1984).

D. Once Arbitrability Is Established, All Other Issues Are to be Resolved In the First Instance by the Arbitrator(s)

The United States Supreme Court has explained that the "gateway dispute about whether the parties are bound by a given arbitration clause" is for the court, but "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide."[2] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–84 (2002) (emphasis in original, quotation marks and citation omitted). "Procedural" questions, including "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met," are for the arbitrator to decide in the first instance, not the court. *Id.* at 85; *see also Cent. W. Va. Energy, Inc. v. Bayer Cropscience LP*, 645 F.3d 267, 272–74 (4th Cir. 2011) (discussing the difference between questions of procedure and questions of arbitrability).

The trial court therefore improperly resolved procedural matters in finding that the McIntires (i) waived their arbitration right by engaging in extensive discovery, (ii) did not

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[2] The South Carolina Uniform Arbitration Act requires the same: "On application of a party showing an agreement described in Section 15-48-10, and the opposing party's refusal to arbitrate, the court *shall* order the parties to proceed with arbitration . . . ." S.C. Code Ann. § 15-48-20 (emphasis added).

comply with the contractual requirement that arbitration be demanded "within a reasonable time," and (iii) filed suit outside the statute of limitations. These issues were not properly before the trial court. *See, e.g.*, *Howsam*, 537 U.S. at 83–85 (procedural issues are to be decided in the first instance by the arbitrator); *Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1220 (10th Cir. 2005) ("We do not address waiver in this appeal. It is presumed that the arbitrator will address any allegations concerning waiver.").

Moreover, these findings by the trial court were in error as they were not supported by any evidence in the record[3].

i. The McIntires Have Not Waived Their Right to Arbitrate

The trial court, faced with a motion to dismiss,[4] erred in finding that the McIntires waived their arbitration right. Nothing in the record supports a finding of waiver. The McIntires' complaint (**Exh. A**) does not. Nor were any exhibits submitted by Seaquest along with its motion to dismiss or stay that support the finding, despite Seaquest bearing the burden of proof as to waiver. *See In re Mercury Constr. Co.*, 656 F.2d 933, 939 (4th Cir. 1981) (the party opposing arbitration "bears the heavy burden of proving waiver").

The McIntires have not participated in discovery at all, and certainly have not engaged in "extensive discovery" or retained "forensic and construction liability and repair experts" as the trial court found. *See* Order at 8. Rather, two days[5] after they received notice that the last defendant had been served with the complaint, they moved to compel arbitration. (*See* **Exhs. B**

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[3] The findings were also inconsistent with the trial court's comments during oral argument.

[4] *See supra* note 1.

[5] The last defendant was served on July 20, 2016. The McIntires received confirmation of the service on July 25, 2016, and filed their motion to compel arbitration on July 27, 2016. (**Exh. B & C**).

& C). In addition, they filed for a protective order seeking protection from participating in discovery, precisely so as not to waive their contractual right to arbitration. **(Exh. D)**.

Nor does hiring a contractor to inspect and repair issues with their residence amount to engaging in discovery, especially since this repair began because of a lightning strike and led to the discovery of the construction defects that form the basis of this suit.

Nothing in the record before the trial court supports the notion that the McIntires waived their arbitration right. Accordingly, it would be improper to find waiver of the right at the motion to dismiss stage, even ignoring the McIntires' actions to preserve that right.

ii. The Demand for Arbitration Was Timely

One factor in determining whether a party has waived its arbitration right is "whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

Again, as a procedural matter separate from the question of arbitrability, this question was not properly before the trial court. And, in the absence of evidence in the record supporting the contention that the arbitration demand was untimely, the trial court had no basis to make such a finding and grant a motion to dismiss.

The trial court's discussion of this question focuses not on the amount of time between the filing of the suit and the filing of the motion, but rather the time between when "the McIntires engaged their experts"[6] and the filing of the motion. *See* Order at 9. This is not the test as set forth in *Rhodes*, which focuses on the amount of time between filing the complaint and

[6] A subject about which the record contains no evidence. Nor could it, as the McIntires have not engaged an expert at this time.

moving to compel arbitration. *Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251. And, as discussed above, the McIntires have not yet engaged expert witnesses in this case and certainly had not done so prior to filing suit.

The suit was filed on April 8, 2016 and the motion to compel arbitration on July 27, 2016, two days after the McIntires received confirmation that all defendants had been served with the complaint. (*See* **Exhs. B & C**). The finding that the demand for arbitration was not made within a reasonable time is erroneous.

iii. The Statute of Limitations Has Not Expired

Likewise, the trial court erred in finding that the statute of limitations expired,[7] especially based on the evidence in the record before it at the motion to dismiss stage. *See* Order at 10–11.

The parties' contract specified that arbitration under the contract must be demanded within the applicable statute of limitations. (**Exh. N** at ¶ 4.6.3). In South Carolina, the statute of limitations for suits based in contract is three years. S.C. Code Ann. § 15-3-530. South Carolina courts apply the discovery rule, which states that the statute of limitations begins to run only "when a cause of action reasonably ought to have been discovered." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

The McIntires discovered the defects only after their home was struck by lightning in September 2013, and Seaquest submitted no evidence to the contrary. The McIntires filed suit in April 2016, well within the three-year statute of limitations. Thus, there was no basis on the record before the trial court for the matter to be dismissed under Rule 12(b), SCRCP, even if the question had been properly before the court.

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[7] This issue was not raised by Seaquest at oral argument.

III. The Court Erred in Dismissing the Case

As a procedural question, rather than a question of arbitrability, the issue of compliance with the Right to Cure Act was not properly before the trial court for the reasons discussed above. However, even if the issue were properly before it, the trial court erred in finding noncompliance and dismissing the case.

The trial court's decision is based upon its finding—despite the record being devoid of evidence on the question at the motion to dismiss stage—that compliance with the Act is not possible in this case, and that therefore any stay of proceedings pursuant to the Act would be a permanent stay, which is equivalent to a dismissal. For the following reasons, the McIntires contend this decision was in error.

A. The Act Does Not Authorize Dismissal

No provision of the Right to Cure Act authorizes dismissal of a lawsuit for failure to comply with the Act. *See* S.C. Code Ann. § 40-59-810 *et seq.* Rather, Section 40-59-830 of the Act, entitled "Stay of the action upon non-compliance with article," states: "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." S.C. Code Ann. § 40-59-830.

Nor is there any prior reported court decision in this state authorizing dismissal of a suit for failure to comply with the Act.

B. Compliance With the Act Is Not Impossible

The McIntires dispute the trial court's finding that compliance has been rendered impossible.

i. The Right to "Cure" Under the Act Includes Right to "Remedy" or "Settle" Claims

The term "cure" is not defined in the Right to Cure Act. However, the language of the Act evidences legislative intent that "cure" not be limited to meaning "repair." Section 40-59-850 of the Act notes that a contractor may elect to "offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects." S.C. Code Ann. § 40-59-850. Thus, the Act contemplates that a contractor can "cure" the defect by settling the claim. That option remains available to Seaquest.

ii. The Term "Inspect" is Not Defined in the Act

Section 40-59-850 of the Act also gives contractors the right to "inspect" the defect. The term "inspect" is not defined in the Act either, but nothing in the Act functions to limit the term to meaning a physical inspection of the defect. The defects discovered in the McIntire home were well documented and photographed; these records are more than sufficient to allow Seaquest to determine whether it wishes to deny or settle the claim. Thus, Seaquest has not been denied the right to inspect.

C. Seaquest Is Not Prejudiced by Any Non-Compliance with the Act

As noted by the South Carolina Supreme Court, "the Right to Cure Act does not confer any corresponding obligations on the part of the claimant that would not ordinarily be present: the claimant is not required to accept any offer by the contractor/subcontractor to remedy the alleged defect, and he or she is not required to accept an offer of settlement of the claim." *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 573, 703 S.E.2d 197, 202 (2010). Because the McIntires would not be required to accept any offer by Seaquest to repair the defective work at their home, something a homeowner who has suffered from a contractor's negligence is

unlikely to do anyway, Seaquest cannot demonstrate prejudice from any failure to comply with the Act.

D. Public Policy Does Not Support the Trial Court's Interpretation of the Act

Under the trial court's interpretation of the Right to Cure Act, a homeowner would be powerless to prevent a contractor that has performed grossly substandard work from returning to perform more work on the residence. Rather, the homeowner would be forced to give the negligent contractor a right to repair the damage. The contractor may negligently damage another part of the dwelling while trying repair the original defect, and the homeowner may not discover the new damage for years. Would the homeowner then be forced again to give the contractor an opportunity to repair the new damage?

The trial court's decision implies that contractors have an inviolable right to physically repair any defects in their work (and presumably to also remediate consequential damage stemming from the defective work), and the homeowner has no right to hire a different, more competent contractor repair the defective work. Such an interpretation is inconsistent with public policy.

CONCLUSION

The trial Court went far beyond its authority to determine arbitrability, decided matters reserved for the arbitrator, and—most surprisingly—also decided issues of waiver, statute of limitations, and notice under the Right to Cure Act without any supporting documentation. Not one exhibit was introduced. The record was devoid of support for finding that the statute of limitations had run, that no notice had been sent of a right to cure, or that the McIntires engaged in discovery.

For the reasons stated, this Court should reverse the judgment of the circuit court and order the parties to arbitrate the dispute.

Respectfully submitted,

July 31, 2017

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PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter by depositing a copy in the United States Mail, Postage prepaid, on July 31, 2017, addressed to Respondent's attorneys of record as follows:

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July 31, 2017

The Honorable Jenny Abbott Kitchings
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RE: *Andrew McIntire and Kimberly McIntire v. Seaquest Development Company, et al.*
Case No. 2016-CP-10-1833
Appellate Case No.: 2017-001270

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of Appellants' Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service in the above-referenced matter.

I would greatly appreciate your filing the originals and returning a file-stamped copy to me in the self-addressed, stamped envelope provided.

With kindest regards,

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Enclosures – as stated
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