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.....Respondents

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REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The trial Court erred (i) in denying Appellants' motion to compel, (ii) in finding that the threshold question of compliance with the Right to Cure Act, S.C. Code § 40-59-810 *et seq.* ("the Act"), was to be determined by the Court rather than by the arbitrator, and (iii) in dismissing the case pursuant to the Act. Respondent, perhaps recognizing the validity of Appellants' arguments to this effect, opted to either not respond to Appellants' contentions or to claim they were not preserved for appeal. With regard to the issues Respondent's brief *does* address, one is made without reference to any authority (*see infra* Part III) and the other is fatally undercut by the very case it relies upon. *See infra* Part II (discussing *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002)).

This Court should reverse and allow the case to proceed to arbitration in accordance with the Parties' agreement.

I. RESPONDENT CONCEDES CERTAIN OF APPELLANTS' ARGUMENTS

Respondent failed to respond to certain of Appellants' arguments in its Opposition Brief ("Opp."), and thus this Court should conclude that Respondent conceded them. *See* 5 Am. Jur. 2d Appellate Review § 512 (2016) (when a respondent "fails to respond to an issue in its brief, the [appellate] court may treat the failure to respond as a confession that the appellant's position is correct"); *First Union Nat. Bank of S.C. v. FCVS Comms.*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd in part on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

These arguments include:

- that the Parties' contract contains a valid arbitration provision and that this dispute falls within the scope of that provision;

- that the dispute between the Parties is governed by the Federal Arbitration Act ("FAA");
- that the FAA requires arbitration of disputes when contractually agreed upon;
- that the McIntires' arbitration demand was timely;
- that there was no evidence before the trial Court upon which to base the Court's finding that the McIntires had not and could not comply with the Right to Cure Act;
- that there was no evidence before the Court upon which to base the Court's finding that the McIntires had engaged in "extensive discovery" prior to filings their motion to compel, thereby waiving their right to arbitrate;[1]

Accordingly, this Court should regard these arguments as conceded.

II. ANY QUESTION OTHER THAN ARBITRABILITY WAS NOT PROPERLY BEFORE THE TRIAL COURT

Respondent contends that the trial court did not err in dismissing the case on account of the purported impossibility of compliance with the Act because that question is not a "procedural" question as identified in *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002). However, as is evident from *Howsam*, it is *precisely* such a question.

The *Howsam* Court explained that "procedural" questions are separate from the question of arbitrability and thus are for the arbitrators and not the court to decide. Included among the types of "procedural" questions identified by the *Howsam* Court are "prerequisites, such as time limits, notice, laches, estoppel, *and other conditions precedent to an obligation to arbitrate.*" The South Carolina Supreme Court held that the Act "imposes an absolute condition precedent" to initiating an action, including arbitration.[2] *Grazia v. S.C. State Plastering, LLC*, 390 S.C.562, 570, 703 S.E.2d 197, 200–01 (2010). According to *Howsam* then, a s compliance with the Act is

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[1] Indeed, counsel for Seaquest acknowledged before the trial Court that "we have done zero discovery in this case." Hearing Tr. (Oct. 13, 2017) at 46.

[2] The Act defines an "action" as including "arbitration." S.C. Code § 40-59-820.

a condition precedent to arbitration, it is a "procedural" question that must be left to the decision of the arbitrator(s). *Howsam*, 537 U.S. at 85.

In sum, as the Sixth Circuit Court of Appeals explained:

> Whether a collective bargaining agreement commits a dispute to arbitration, the Supreme Court has held, is a question of arbitrability for the courts to decide. Whether the parties have complied with the procedural requirements for arbitrating the case, by contrast, is generally a question for the arbitrator to decide. If doubt exists over whether a dispute falls on one side or the other of this line, the presumption in favor of arbitrability makes the question one for the arbitrator.

United Steelworkers of Am. v. Saint Gobain Ceramics & Plastics, Inc., 505 F.3d 417, 419–20 (6th Cir. 2007) (citations omitted).

Accordingly, all issues other than arbitrability were threshold procedural questions for the arbitrator to decide, not the court.

III. THE MCINTIRES HAVE NOT WAIVED THEIR ARBITRATION RIGHT

Citing no authority, Respondents incorrectly argue that the McIntires waived their right to arbitrate simply by filing suit. Opp. at 12. Indeed, the McIntires were obliged to file suit when they did in order to avoid running afoul of the statute of repose, as was explained during oral argument before the trial Court. *See* Hearing Transcript (Oct. 13, 2016) at 5, 11, 35, 37, 39.

It is a logical proposition that the filing of suit in order to obtain an order compelling arbitration does not waive the right to arbitrate.[3] The FAA, which governs this dispute, provides that "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order

[3] *See* Hearing Transcript (Oct. 13, 2016) 34:2–3 (the trial Court acknowledging that the McIntires "brought a lawsuit asking that arbitration be compelled").

directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Section 3 of the FAA states that,

> [i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall on application of *one of the parties* stay the trial of the action until such arbitration has been had. . . .

9 U.S.C. § 3. The FAA thus allows any party—including the plaintiff—to stay an action in favor of arbitration. If filing suit alone had the effect of waiving a plaintiff's arbitration right, these provisions of the FAA would be without effect.

Courts in this state consider three factors to determine whether a party has waived its right to arbitrate: (i) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel; (ii) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (iii) whether the non-moving party was prejudiced by the delay in seeking arbitration. *Wilson v. Willis*, 416 S.C. 395, 420–21, 786 S.E.2d 571, 584 (Ct. App. 2016) (citing *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007)).

Here, within days of the final defendant being served with the summons and complaint, the McIntires filed their motion to compel arbitration. (Summons & Complaint; Affidavit of Service) The McIntires did not engage in any discovery at all, let alone "extensive discovery." On the contrary, they filed a motion for a protective order that would protect them from participating in discovery precisely so as not to waive their arbitration rights. (Motion for Protective Order). As there was no delay between effective service of suit and the filing of the motion to complaint, there was no prejudice to Respondent, nor has any been alleged. Under South Carolina law, there has been no waiver of the right to arbitrate.

IV. ALL ISSUES WERE PROPERLY PRESERVED FOR APPEAL

Rather than addressing the substance of Appellants' remaining arguments,[4] Respondent seeks to avoid them by arguing they were not preserved for appeal. Respondent contends they are not preserved either because (i) they were not raised before the trial court, or (ii) they were not ruled upon by the trial Court. In each instance, Respondent's contention is without merit.

A. Arbitrability

There is no dispute that the issue of whether the trial Court, considering a motion to compel arbitration, could rule on any question beyond that of arbitrability was properly raised below.[5] Instead, Respondent states that, "the McIntires' issues/arguments about the supposedly impermissible scope of the trial court's ruling . . . are not preserved for appellate review, the trial court not having ruled on them." Opp. at 8–9. This is erroneous.

The McIntires moved to compel arbitration and argued that any issue relating to the Right to Cure Act was for the arbitrator. Judge Toal ruled with regard to the Right to Cure Act rather than leaving that issue for the arbitrator in the first instance, as the McIntires argued she must. This constitutes a rejection in fact of the McIntires' argument.

An argument need not be expressly accepted or rejected by a court in order to have been "ruled on." In *Pryor v. Nw. Apartments, Ltd.*, 321 S.C. 524, 469 S.E.2d 630 (Ct. App. 1996), this Court faced a similar argument to Respondents' and rejected it :

> Northwest further argues the issue [of the applicability of the South Carolina Residential Landlord and Tenant Act] is not preserved for appeal because the trial court did not expressly rule on it and Pryor

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[4] *See infra* Parts IV.A and IV.B.

[5] The issue was raised before the trial court during the hearing on Seaquest's Motion to Dismiss and the McIntires' Motion to Compel Arbitration (*see* Hearing Transcript (Oct. 13, 2016) 13:15–17, 37:7–13) and again in Appellants' January 20, 2017 objections to Seaquest's proposed order. (Jan. 20 Letter Objections at 2).

> failed to raise the issue in a Rule 59(e) motion to alter or amend the judgment. However, Pryor's pleadings clearly asserted the RLTA was applicable to the facts of this case. Moreover, the trial court implicitly ruled on and rejected this argument in finding Northwest had no duty to warn of dangerous conditions existing on its property.

321 S.C. at 528, n.2, 469 S.E.2d at 632 n.2. Likewise, in *Gartside v. Gartside*, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009), this Court found the family court's reduction of alimony was "an implicit rejection of the argument that [the husband] was underemployed" and held the issue of the husband's underemployment properly preserved for appeal. 383 S.C. at 44, 677 S.E.2d at 626. As another example, when a motion is denied in a form order, issues are preserved for appeal if they were adequately raised to the court and the transcripts of the proceedings are included in the record on appeal. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 29, 602 S.E.2d 772, 782–83 (2004) (Waller, J. dissenting) (citing *Bailey v. Segars*, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001)).

Here, by ruling on questions beyond that of arbitrability, the trial Court necessarily rejected the argument that it had no authority to decide any issue other than arbitrability. As Respondent concedes, the trial court "had ample time to consider the McIntires' objections and, were it so inclined, to revise the order." Opp. at 10. Therefore, the issue was raised before the trial court, ruled upon by the trial court, and thus properly preserved for appeal.[6]

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[6] However, even if the issue was *not* preserved for appeal, the issue of the trial Court's authority to decide matters beyond arbitrability is jurisdictional in nature. It is well established that "issues related to subject matter jurisdiction can be raised at any time" and "may not be waived, even by consent of the parties. . . ." *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) (internal citations omitted).

B. Public Policy Considerations and Statutory Interpretation Regarding the Possibility of Compliance with the Right to Cure Act

Respondent urges that Appellants' discussion of public policy and statutory construction were not raised below and thus are not preserved for appeal. Opp. at 6–7. However, an issue properly preserved for appeal may be argued more fully on appeal than it was before the trial Court. *See Bailey v. Int'l Bhd. of Boilermakers, Blacksmiths, Forgers, & Helpers, Local 374*, 175 F.3d 526, 529–30 (7th Cir. 1999) (a "skeletal argument below" may be "fleshed out and emphasized on appeal"). Indeed, "it would be in disharmony with one of the primary purposes of appellate review were we to refuse to consider each nuance or shift in approach urged by a party simply because it was not simply urged below." *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir. 1991).

In a January 20, 2017 letter to the trial Court, Appellants argued (i) that "[t]here is no provision of the Right to cure act that authorizes the dismissal of a lawsuit for the failure to comply with the Act" (January 20 letter at 1) and (ii) that "there is no basis for holding that the McIntires will be unable to comply with the Act." (*Id.* at 2). In its May 1, 2017 Order, the trial Court expressly found that the Act *did* authorize dismissal in the instant case and that compliance with the Act *was* impossible. (Order at 6–7).

These questions were thus preserved for appeal. Appellants' discussion of the language of the Act and the public policy implications of the Court's interpretation of that language (Appellants' Brief at 10–12) is merely the fleshing-out of these arguments. *See Bailey*, 175 F.3d at 529–30; *Universal Title Ins. Co.*, 942 F.2d at 1314. Accordingly, they are properly before the Court.

CONCLUSION

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

Respectfully submitted,

November 16, 2017
Charleston, South Carolina

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PROOF OF SERVICE

I certify that I have served the Appellants' Reply Brief by depositing a copy in the United States Mail, Postage prepaid, on November 16th, 2017, addressed to Respondent's attorneys of record as follows:

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November 16, 2017

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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' Reply Brief 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,

ANDREW K. EPTING, JR., LLC

Angela Gross
Legal Assistant to Andrew K. Epting, Jr., Esquire
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Enclosures – as stated
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