THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Case No. 2016-CP-02-02339
Appellate Case No. 2018-001039

University of South Carolina Aiken, Plaintiff,

v.

University Housing Services, Inc., H.G. Reynolds Co., Southern Wall Systems, Inc., McElroy Specialty Interiors, Inc., Croft Hill Siding, Inc., East Coast Painting, Inc., and John Does 1 Through 3, Defendants,

And

H.G. Reynolds Co., Inc., Third-Party Plaintiff,

v.

William Bell, Bell Siding and Roofing, William Bell d/b/a Bell Siding & Roofing a/k/a Bell Siding and Roofing, LLC, and Bell Siding and Roofing, LLC, Third-Party Defendants,

Of which University Housing Services, Inc., and H.G. Reynolds Company, Inc. are the Appellants,

And

Of Which University of South Carolina Aiken is the Respondent.

INITIAL BRIEF OF APPELLANT UNIVERSITY HOUSING SERVICES, INC.

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II. DID THE CIRCUIT COURT ERR IN GRANTING USC'S MOTION TO AMEND THE FIRST AMENDED COMPLAINT TO WITHDRAW THE BREACH OF CONTRACT CAUSE OF ACTION WHEN THE MOTION WAS FUTILE AND PREJUDICIAL TO UHS IN THIS CASE?

STATEMENT OF THE CASE

This is an appeal from the circuit court's Order Denying University Housing Services, Inc. and H.G. Reynolds Company, Inc.'s Motion to Dismiss or Stay Civil Action for Arbitration ("Order Denying Arbitration"), Order Granting Leave to File Second Amended Complaint ("Order Granting Motion to Amend") and Form 4 Decision of the circuit court denying Appellant University Housing Services, Inc.'s ("UHS") Motion to Reconsider the Order Denying Arbitration and Order Granting Motion to Amend ("Order Denying Motion to Reconsider").

On October 21, 2016, the University of South Carolina Aiken ("USCA") commenced Civil Action 2016-CP-02-02339 by filing its Complaint against UHS and other companies complaining about the quality of the construction of a building on the campus of USCA. (Complaint, pg. 1). On October 24, 2016, USCA filed its First Amended Complaint. (First Amended Complaint, pg. 1). On December 27, 2016, UHS filed its Answer to the First Amended Complaint and Cross-Claims. (UHS Answer, pg. 1). On December 30, 2107, UHS filed and served its Motion to Dismiss or in the Alternative, Motion to Substitute Real Party in Interest ("Real Party-in-Interest Motion"). On January 9, 2017, UHS filed and served its Motion to Dismiss or Stay the Civil Action in Favor of Arbitration ("Arbitration Motion"). On March 9, 2017, USCA filed its Motion to Amend First Amended Complaint to: 1) change the Plaintiff's name to the University of South Carolina ("USC"); 2) assert direct causes of action against the third-party defendants; and 3) add new defendants to the civil action ("Motion to Amend").

The circuit court scheduled a hearing on the Arbitration Motion, Real Party-in-Interest Motion and Motion to Amend for April 10, 2017. At the hearing, USCA agreed to amend its First Amended Complaint to change the name of the Plaintiff to USC. (April 10, 2017 Transcript, pg. 31, L 21-25; pg. 23, L 1-6). The parties argued the Arbitration Motion, which was

opposed by USCA. (USC Memorandum in Opposition to Arbitration). USCA also attempted to make an oral motion to withdraw its breach of contract cause of action against UHS. (April 10, 2017 Transcript, pg. 3, L 13- 21; pg. 4 L 1-7; pg. 32, L 8-10; pg. 33 L 1-3, 13-20). Given the oral motion, the circuit court did not decide the Motion to Amend on April 10, 2017 and rescheduled a hearing on it for May 1, 2017. (April 10, 2017 Transcript, pg. 35, L 12-13). The circuit court also took the Arbitration Motion under advisement.

UHS opposed the part of the Motion to Amend that was to withdraw the breach of contract cause of action. (UHS Memorandum in Opposition to Motion to Amend). At the hearing on May 1, the circuit court granted the Motion to Amend and continued to hold the Arbitration Motion under advisement. (May 1, 2017 Transcript, pg. 10, L 12-14). The circuit court filed its Order Granting Leave to File Second Amended Complaint on May 19, 2017 ("Order Granting Motion to Amend"). On May 23, 2017, the circuit court filed its Order Denying University Housing Services, Inc. and H.G. Reynolds Company, Inc.'s Motion to Dismiss or Stay Civil Action for Arbitration ("Order Denying Arbitration"). On May 26, 2017, UHS filed its Motion to Reconsider the Order Denying Arbitration and Order Granting Motion to Amend ("Motion to Reconsider").

The circuit court scheduled a hearing on the Motion to Reconsider for June 20, 2017. (June 20, 2017 Transcript, pg. 4, L 8-15). On that day, the circuit court heard arguments on the Motion to Reconsider and took the motion under advisement. (June 20, 2017 Transcript, pg. 30, L 23-24). The circuit court later contacted the parties and scheduled a second hearing on the Motion to Reconsider for April 23, 2018. (April 23, 2018 Transcript, pg. 4, L 1-4, 22-25; pg. 33 L 10-25). Subsequent to the hearing on April 23, 2018, the circuit court announced it would deny the Motion to Reconsider and filed a Form 4 Decision on May 10, 2018 ("Form 4 Decision").

UHS filed and served a Notice of Appeal on June 4, 2018 to appeal the Order Denying Arbitration, Order Granting Motion to Amend and Form 4 Decision.

STATEMENT OF FACTS

The civil action is a construction defect claim concerning the Pacer Commons student housing building on the campus of USCA.[1] By way of background, the development, financing, and construction of Pacer Commons was undertaken with the issuance of Economic Development Revenue Bonds involving the South Carolina Jobs Economic Development Authority, Carolina Housing Properties, Inc. ("Carolina Housing Properties"), the Aiken Student Housing Foundation, Inc. ("Aiken Foundation") and other companies. (Underwriting Agreement, pg. 1).

Before the construction of Pacer Commons, the Aiken County Commission for Higher Education ("Aiken Commission") held title to the real estate on which the building is constructed. (Lease Agreement, pg. 1; General Warranty Deed). For the construction, the Aiken Commission entered into a ground lease agreement dated August 2, 2003 with Collegiate Housing Properties for Collegiate Housing Properties ("Lease Agreement") to build Pacer Commons on the real estate.[2] Among other things, the Lease Agreement states that Collegiate Housing Properties will assign all its interests, rights and obligations in the lease to the Aiken Foundation. (Lease Agreement, pg. 3 ¶ 11). The assignment was to occur once the Aiken Foundation became a qualified corporation under Section 501(c)(3) of the Internal Revenue Code. (Lease Agreement, pg. 3 ¶ 11). The assignment of the lease was in fact effectuated in an

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[1] USCA is one of eight campuses of the University [of South Carolina] System. USC identifies USCA as one of its three "Comprehensive Universities" in the University System. South Carolina state law authorizes USC to incur bond indebtedness for the construction of university facilities. S.C. Code Ann. § 59-117-210 et seq.

[2] Collegiate Housing Properties is a not-for-profit public benefit corporation organized and existing under the law of the State of Florida. Collegiate Housing Properties is not a party in the Civil Action.

agreement titled *Assignment and Assumption Agreement re: Inter Alia Lease Agreement (with Tenants) Recorded in Deed Volume 2339, Page 99*, which also included an assignment of the project documents rights, interest and obligations. ("Assignment and Assumption Agreement to the Aiken Foundation").

To develop and construct Pacer Commons, Collegiate Housing Properties entered into an agreement dated August 13, 2003 with University Housing Services, Inc., titled *Design-Build Agreement Between Collegiate Housing Properties, Inc. and UHS , Inc.* ("Design-Build Agreement") for UHS to develop and construct Pacer Commons. Collegiate Housing Properties also entered into an agreement dated August 12, 2003 with The Board of Trustees of USC titled Management Agreement for USC to manage Pacer Commons once the building was completed and ready for occupancy.

The Design-Build Agreement provides for arbitration as the forum for resolving any controversy or claim over UHS's role in the development and construction of Pacer Commons. (Design-Build Agreement, § Article 12, ¶ 12.1 to ¶ 12.3). The Design-Build Agreement states, *"[a]ny controversy or claim arising out of or relating to this Agreement or its breach*" shall be resolved by arbitration. (Design Build Agreement, pg. 22, ¶ 12.2). The Design-Build Agreement states that an arbitration shall be conducted pursuant to the Construction Industry Arbitration Rules of the American Arbitration Rules of the American Arbitration Association, unless the parties agree otherwise. (Design-Build Agreement, pg. 22, ¶ 12.2).

In order to construct Pacer Commons, UHS entered into an agreement dated August 13, 2003 with Appellant H.G. Reynolds Company, Inc. ("H.G. Reynolds") titled *Standard Form of Agreement Between Owner and Contractor* ("H.G. Reynolds Construction Agreement") for H.G. Reynolds to be the general contractor. To design Pacer Commons, UHS entered into an

agreement dated August 13, 2003 with Aiken, Aiken, Beauchamp & Sheetz Architects, Inc., a Georgia corporation, ("Aiken Architects") titled *Standard Form of Agreement Between Owner and Architect.* ("Aiken Architects Agreement"). H.G. Reynolds began the construction of Pacer Commons on September 19, 2003 and completed the building in August 2004.

After the construction of Pacer Commons, the Aiken Foundation entered into an agreement dated April 3, 2006 with USC and the Aiken Commission titled *Assignment, Assumption and Consent Agreement* for the Aiken Foundation to transfer its rights, interests and obligations in Pacer Commons to USC. ("Assignment, Assumption and Consent Agreement to USC"). On April 4, 2006, the Aiken Commission deeded title to Pacer Commons to USC. ("General Warranty Deed").

Twelve years after Pacer Commons was constructed, USCA commenced the civil action against UHS and others involved in the construction of Pacer Commons complaining that there are defects in the construction of the building. The alleged defects involve the exterior parts of the building, including the roof, windows/doors, stucco and the masonry veneer. (Complaint ¶ 20). Among other allegations, USCA alleged that UHS had contracted with USCA to construct Pacer Commons and had breached that contract because of the construction defects with the building. (Complaint ¶¶ 35-38).

Diagram of Parties

Aiken County Commission for Higher Education/University of South Carolina Aiken
(The Commission originally held title to real estate and leased the real estate to Carolina Housing Properties, Inc. to develop Pacer Commons)

Collegiate Housing Properties, Inc. ("CHP")
(CHP assigns its rights, interests and obligations in Pacer Commons to the Aiken Student Housing Foundation, Inc.

The University of South Carolina ("USC")
(CHP contracts with USC to manage Pacer Common)

University Housing Services, Inc. ("UHS")
(CHP contracts with UHS to develop and construct Pacer Commons)

Aiken Student Housing Foundation, Inc. ("Aiken Foundation")
(Aiken Foundation assigns its rights, interests and obligations in Pacer Commons to USC)

H.G. Reynolds & Company (UHS contracts with H.G. Reynolds to construct Pacer Commons)

-and-

Aiken, Aiken & Beauchamp (UHS contracts with Aiken, Aiken & Beauchamp to design Pacer Commons)

USC

(Aiken County Commission for Higher Education deeds title to the real estate to USC)

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Id.* (citing *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 91 (2000)).

ARGUMENTS

I. THE CIRCUIT COURT ERRED IN NOT COMPELLING THE UNIVERSITY OF SOUTH CAROLINA ("USC") TO ARBITRATE ITS CLAIMS AGAINST UNIVERSITY HOUSING SERVICES, INC. ("UHS") THAT ARISE OUT OF AND RELATE TO THE DESIGN-BUILD AGREEMENT.

A. The circuit court erred in ruling that USC is not required to arbitrate simply because USC did not sign the Design-Build Agreement.

The circuit court ruled that USC was not required to arbitrate simply because USC was not a party to or did not sign the Design-Build Agreement. (Order Denying Arbitration, pg. 4). The circuit court found "[i]mportantly, at no point in time has there ever been a contract or agreement between the Plaintiff and University Housing Services, Inc. (Order Denying Arbitration, pg. 3). The circuit court found there was no compelling evidence to suggest USC ever agreed to arbitrate the claims. (Order Denying Arbitration, pg. 4).

(1) USC's construction defect claims against UHS are governed exclusively by 9 U.S.C.A § 2 et seq. (the Federal Arbitration Act)("FAA").

To begin with, assuming there is an enforceable agreement to arbitrate, the FAA is the controlling law for an arbitration between USC and UHS. This is because the construction of Pacer Commons involved interstate commerce. Accordingly, any requirements of S.C. Code Ann. §15-48-10 et seq. that are inconsistent with the FAA do not apply because the FAA supersedes and preempts state law. *Episcopal Housing Corp. v. Fed. Ins. Co.,* 269 S.C. 631, 636, 239 S.E.2d 647, 650 (1977).

9 U.S.C.A § 2 provides as follows:

> [A] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the

revocation of any contract.

The FAA states that a party may compel another party to arbitrate by demonstrating all of the following: (1) a dispute between the parties; (2) a written agreement containing an arbitration provision that [can] be read as covering the dispute; (3) the relationship of the transaction to interstate or foreign commerce, as evidenced by the agreement; and (4) the failure, neglect, or refusal of the defendant to submit the dispute to arbitration. *Adkins v. Labor Ready, Inc.,* 303 F.3d 496, 500-01 (4th Cir. 2002).[3] The first and fourth requirements above are not in dispute in this case. The second requirement is disputed and is the basis for the circuit court's ruling that USC is not required to arbitrate. The third requirement is also disputed, as USC previously disputed that the construction of Pacer Commons involved interstate commerce; so UHS will address the third requirement in more detail in a later part of this brief.

It is worth noting that there is no contention that USC's claims about the construction of Pacer Commons fall outside the scope of the arbitration provision in the Design-Build Agreement: *"[a]ny controversy or claim arising out of or relating to this Agreement or its breach"*. (Design-Build Agreement, pg. 22 ¶ 12.2). The allegations made by USC against UHS plainly arise out of or relate to UHS's role and obligations that are set out in the Design-Build Agreement. USCA alleged that UHS breached the Design-Build Agreement. (Complaint ¶¶ 35-38); (First Amended Complaint ¶¶ 35- 38). USCA and USC alleged that UHS was negligent in the development and construction of Pacer Commons. (Complaint ¶¶ 23- 27); (First Amended Complaint ¶ 23-27); (Second Amended Complaint ¶ 35-39). USCA and USC alleged that UHS breached implied warranties in the development and construction of Pacer Commons.

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[3] The FAA requires a court to stay an action or proceeding pending the arbitration of claims covered by the terms of the parties' written agreement. *Id.* at 500 (citing 9 U.S.C.A § 3).

(Complaint ¶¶ 28-34); (First Amended Complaint ¶¶ 28-34); (Second Amended Complaint ¶ 40-45).

Courts construing the FAA have ruled time and again that a court must consider the strong presumption in favor of arbitration when analyzing whether an arbitration provision includes or covers a particular claim. A motion to compel arbitration should only be denied where the subject arbitration clause is not susceptible to any interpretation, which would cover the asserted dispute. *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). "[U]nless the court can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute, arbitration should be ordered." *South Carolina Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993). "'[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.'" *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996) (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989).

(2) The FAA and South Carolina state law heavily favoring arbitration applies to the determination whether a non-signatory can be compelled to arbitrate its claims otherwise subject to the FAA.

To begin with, the circuit court found that the policy favoring arbitration does not factor into an analysis of the second requirement of the FAA or the determination of whether there is a valid agreement to arbitrate between USC and UHS. (Order Denying Arbitration, pg. 3). The circuit court relied on *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) as

precedent for this finding. (Order Denying Arbitration, pg. 3).[4]

The circuit court erred in following the decision of the Fifth Circuit Court of Appeals due to the fact that the South Carolina Court of Appeals does not follow that precedent. Rather, the South Carolina Court of Appeals follows precedent from the Fourth Circuit Court of Appeals. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 219, 733 S.E.2d 597, 601 (Ct. App. 2012) (citing *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 416 (4th Cir. 2000)). Per the Fourth Circuit Court of Appeals, South Carolina law does factor in the policy favoring arbitration into an analysis of the second requirement, or, as here, where a party seeks to compel a non-signatory to arbitrate. The South Carolina Court of Appeals has stated, "[b]ecause the determination of whether a non-signatory is bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question." *Id.* at 289-90, 733 S.E.2d at 601.

(3) The FAA and South Carolina State law heavily favor arbitration.

Factoring in the FAA policy favoring arbitration into the second requirement of the FAA should have led the circuit court to only one conclusion, which is that USC is required to arbitrate its claims. South Carolina courts have consistently held that arbitration itself is the favored forum for resolving disputes – particularly for construction cases. The policy of the United States and South Carolina is to favor arbitration of disputes. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014); *Tritech Elec., Inc. v. Frank M. Hall & Co.,* 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000). There is a strong presumption in favor of the validity of arbitration agreements based on the strong policy under South Carolina law favoring

[4] The sentence in the Order Denying Arbitration does not include a citation to a judicial decision; however, the *Fleetwood Enterprises* decision does stand for that proposition and is cited in another sentence in the order. (Order Denying Arbitration, pg. 3).

arbitration. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) (both federal and state policy favor arbitrating disputes); *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 586 S.E.2d 581 (2003).

USC's construction defect claims are clearly best suited for arbitration. The action involves multiple parties, a large building, complex construction and design issues that are best suited for construction professionals to hear and resolve rather than a jury of lay persons. If necessary, the Design-Build Agreement provides that the American Arbitration Association can join other parties involved in the construction into one proceeding to efficiently dispose of USC's claims. (Design-Build Agreement, pg. 22, ¶ 12.6).[5] USC's claims involve sophisticated parties and complex construction and do not involve issues of consumer protection, unconscionable or adhesion contracts that may cause additional scrutiny by a court.

(4) The FAA and South Carolina state law do not absolutely require someone to sign an agreement in order to compel one to arbitrate.

Regardless whether the FAA and South Carolina state policy factors into the second requirement, the FAA and South Carolina law require that USC arbitrate its claims against UHS. The fact that the Board of Trustees for USC did not sign the Design-Build Agreement does not mean that USC cannot be required to arbitrate pursuant to the FAA. A duty to arbitrate pursuant to the FAA is not limited to only those parties who sign an agreement. The South Carolina Court of Appeals has held that no requirement exists in the FAA or in contract law that a contract must be signed by all parties to be enforceable. *Wilson v. Willis*, 416 S.C. 395, 409, 786 S.E.2d 571, 578 (Ct. App. 2016) (addressing a claim for arbitration and compelling arbitration). "While a

[5] Should there be a defendant in the present case that is not subject to arbitration, that fact cannot prevent the Court from enforcing arbitration as between USC and UHS. *Episcopal Housing Corp.*, 269 S.C. at 640, 239 S.E.2d at 652. ("We feel it was erroneous to condition the relief to which respondents are plainly entitled upon the voluntary submission of [another party not subject to arbitration] to arbitration proceedings.").

contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, '[i]t does not follow... that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.'" *Pearson*, 400 S.C. at 288, 733 S.E.2d at 600, (quoting *Fisser v. Int'l Bank,* 282 F.2d 231, 233 (2d Cir. 1960). "Rather, a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause." *Id.* "Well-established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Id.* at 288, 733 SE.2d at 600 (quoting *Int'l Paper Co.*, 206 F.3d at 416-17).

The South Carolina Supreme Court and the South Carolina Court of Appeals have cited six established theories or principles, recognized by other courts analyzing the FAA, that can be used to compel a non-signatory to arbitrate: "1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel." *Pearson*, 400 S.C. at 289, 733 S.E.2d at 601, (quoting *Int'l Paper Co.*, 206 F.3d at 417); *Malloy v. Thompson*, 409 S.C. 557, 562, 762 S.E.2d 690, 692 (2014)("In addition to [the five] theories, some federal courts have recognized that a third-party beneficiary of a contract containing an arbitration clause may be compelled to arbitrate as a non-signatory."). Not all must apply. That said, at least four of the six principles apply to the facts in this case and any one principle compels the conclusion that USC should be required to arbitrate.

First, the assumption principle requires USC to arbitrate. In the Assignment and Assumption Agreement to the Aiken Foundation, Collegiate Housing Properties assigned its rights, interests and obligations in Pacer Commons to the Aiken Foundation:

> Section I. Project Assignment. The Assignor does hereby assign to the Assignee, as of the date hereof, and subject to all liens and security interests thereon in favor

> of Bank of America, N.A. all of Assignor's right, title and interest in the Project and all documents, permits and agreements related to the Project, including, but not limited to, those set forth on Schedule A attached hereto and all of the Assignor's duties and obligations therewith. The Assignee hereby assumes all the responsibilities of Assignor with respect to the Project under the Loan Agreement.

(Assignment and Assumption Agreement to the Aiken Foundation, pg. 2).

Thereafter, in the Assignment, Assumption and Consent Agreement to USC, the Aiken Foundation assigned its rights, interests and obligations in Pacer Commons to USC:

> Assignment and Assumption. Aiken Student Housing Foundation hereby assigns to the University of South Carolina all of its rights, title and interest in the Lease Agreement, the Demised Premises, all easements granted pursuant to the Lease Agreement, and all obligations thereunder, and all improvements made to the Demised Premises, said improvements being a student housing facility commonly known as Pacer Commons, and the University of South Carolina agrees to assume all of Aiken Student Housing Foundation's rights, title and interest in said matters.

(Assignment, Assumption and Consent Agreement to USC, pg. 2).

USC's actions can also be characterized as an "acceptance". "[I]t has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both." *Wilson v. Willis*, 416 S.C. 395, 409, 410, 786 S.E.2d 571, 578 (quoting *Jaffe v. Gibbons,* 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986)). Further, "[a] contract does not always require the signature of both parties; it may be sufficient[ ] if signed by one and accepted and acted on by the other." *Id.* 416 S.C. at 409, 786 S.E.2d 578-579 (quoting *Peddler, Inc. v. Rikard,* 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975) (stating to give validity to a contract, it is not always necessary that it be signed by both parties, but rather it may be sufficient if one party signed the contract and the other party accepted, held, and acted upon it).

Second, the estoppel principle requires USC to arbitrate the dispute. The principle is

explained in the following citations. "In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause *when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.*" *Pearson,* 400 S.C. at 290, 733 S.E.2d at 601, (quoting *Int'l Paper Co.,* 206 F.3d at 417-418.) (emphasis original). "'To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.'" *Id.* "[A] party may not 'rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.'" *Id.* 400 S.C. at 295, 733 S.E.2d at 604 (quoting *Jackson v. Iris.com,* 524 F.Supp.2d 742 (E.D.Va. 2007)). "When a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a 'direct benefit' from a contract containing an arbitration clause.'" *Id.* 400 S.C. at 295, 733 S.E.2d at 604 (quoting *Jackson,* 524 F.Supp.2d at 749-50). "To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Avila Group, Inc. v. Norma J. of California*, 426 F.Supp. 537, 542 (S.D.N.Y. 1977)).

USC is seeking the direct benefits of the Design-Build Agreement in its suit against UHS while simultaneously seeking to avoid the burdens of the same agreement. USCA sued UHS for breaching the Design-Build Agreement in the construction of Pacer Commons. (Complaint ¶¶ 35-38). Notwithstanding its later motion to retreat from that position, USC continues to sue UHS for causes of action that are based in contract law. USC alleges a cause of action in its Second

Amended Complaint based on a breach of implied warranty of habitability. (Second Amended Complaint ¶ ¶ 40-45). The implied warranty of habitability is a contractual remedy that arises out of the sale of a new house. *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854 (2006). USC alleges a cause of action in its Second Amended Complaint based on a breach of implied warranty of workmanlike service. (Second Amended Complaint ¶ ¶ 40-45). This cause of action too arises from a contract. *Smith v. Breedlove*, 377 S.C. 415, 661 S.E.2d 67 (2008). USC also alleges that UHS deviated from the plans and specifications, prepared by Aiken Architects, which again would be a breach of contract. (Second Amended Complaint ¶ 37). Without a doubt, USC continues to attempt to enforce the Design-Build Agreement against UHS.

Second, it does not matter under arbitration law that USC withdrew its breach of contract cause of action and will rely on other causes of action for relief. This is because a South Carolina court does not decide arbitration based on a cause of action's label. A South Carolina court looks to the surrounding facts of the dispute to decide arbitration: "[T]o decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). Again, USC's claims about the construction of Pacer Commons plainly arise out of or relate to the Design-Build Agreement. Regardless whether USC is formally pleading a breach of contract, USC is and will be looking to the Design-Build Agreement in this case to make its claims against UHS. The Design-Build Agreement is, of course, the basis for which UHS has any connection with or obligations concerning Pacer Commons.

Third, the agency principle requires USC to arbitrate. There can be no dispute that USCA is at least an apparent agent of USC. USCA is one of eight campuses of the "University System"

and is governed ultimately by the Board of Trustees for USC.[6] Further, USC is not a bona-fide purchaser or a subsequent purchaser that was not previously involved with Pacer Commons such that it may be unfair somehow to compel arbitration. USC cannot contend that it had no involvement with the development of Pacer Commons prior to the Aiken Commission deeding title to USC. USC has been involved with Pacer Commons from the inception of the project. (USC Management Agreement).

Fourth, the third-party beneficiary principle applies to require USC to arbitrate. The Design-Build Agreement reads, *"2.3 Extent of Agreement. This Agreement is solely for the benefit of the parties and the Lessor and the University, which are third party beneficiaries hereof."* (Design-Build Agreement, pg. 3 ¶ 2.3). Again, USCA is part of the University System. It is clear that USC's exposure and stature, as an institution of higher education, is greatly improved by having multiple campuses and facilities that can accommodate growth and provide alternatives to students. The ultimate third-party beneficiary in the Design-Build Agreement is none other than USC.

(5) The construction of Pacer Commons involves interstate commerce and, therefore, USC's claims are governed by the FAA

UHS meets the third requirement of the FAA. UHS does so because the construction of Pacer Commons is a transaction involving interstate commerce. USC has previously argued that the third requirement is not met, but USC's argument falls short and is contrary to South Carolina state law. Further, UHS discusses this requirement because it is the one that makes the FAA applicable and thus controlling over state law. Moreover, once a court decides that the FAA

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[6] The eight campuses compose the University System. The Columbia campus is the central one. The Chancellor of USCA reports to the President of the University System, who reports to USC's Board of Trustees. The official name of the school system is the University of South Carolina. See University of South Carolina ByLaws promulgated and adopted by the USC Board of Trustees.

is the controlling law, the strong policy favoring arbitration demands that a court set aside any prejudice it may have against arbitration. The circuit court did not do so: "[s]o, what you're asking me to do, Mr. McCants, is deny this plaintiff his constitutional right to [a] jury trial simply because he signed a contract with you?" (April 10, 2017 Transcript, Pg. 8, L 17-19).

"Generally, any arbitration agreement affecting interstate commerce ... is subject to the FAA." *Landers,* 402 S.C. at 108, 739 S.E.2d at 213; *see Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 121 (2001). 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. *Allied–Bruce Terminix Companies, Inc. v. Dobson,* 513 U.S. 265, 115 (1995); *Soil Remediation Co. v. Nu–Way Envtl., Inc.,* 323 S.C. 454, 476 S.E.2d 149 (1996).

The United States Supreme Court "has previously described the [FAA]'s reach expansively as coinciding with that of the Commerce Clause." *Allied–Bruce Terminix Cos.,* 513 U.S. at 274; *see Perry v. Thomas,* 482 U.S. 483, 490 (1987). In determining whether the FAA applies to an arbitration provision, a court considers whether the contract concerns a transaction involving interstate commerce. *Episcopal Housing Corp.,* 269 S.C. at 637, 239 S.E.2d at 650. 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. *See Zabinski,* 346 S.C. 580, 553 S.E.2d 110 (2001). The South Carolina Supreme Court has stated the following concerning commerce and a construction project:

> We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA. *See, e.g., Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (holding that performance required under a contract for the construction of an eighteen-story building involved interstate commerce because

> "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina"); *New Hope Missionary Baptist Church v. Paragon Builders,* 379 S.C. 620, 626–27, 667 S.E.2d 1, 4 (Ct. App. 2008) (finding contract for construction of a church pertained to a transaction "involving interstate commerce due to the nature of the construction project" and the builders' affidavit swearing the project would involve businesses and supplies from outside of South Carolina).

Bradley, 398 S.C. at 458, 730 S.E.2d at 318.

The construction, design, financing, materials and parties involved in Pacer Commons involve interstate commerce. The Design Build Agreement involves two corporations based in Florida that are part of the development and construction of Pacer Commons. (Design-Build Agreement, pg. 1). The architect that designed Pacer Commons is a Georgia corporation. (H.G. Reynolds Construction Agreement, pg. 1). Subcontractors from the State of Georgia and State of Florida constructed part of Pacer Commons. (Second Amended Complaint ¶¶ 4, 5). Financing for Pacer Commons was provided by national banking institutions including Bank of America, N.A., which is headquartered in North Carolina and The Bank of New York Trust Company of Florida, N.A., headquartered in Florida, and an underwriting firm located in Alabama. (Economic Development Revenue Bonds, pg. 1). H.G Reynolds' president filed an affidavit addressing the extent to which the construction of Pacer Commons involved interstate commerce. (Affidavit of Jeffrey Reynolds). A South Carolina court should reach only one conclusion for the third requirement, which is that the construction of Pacer Commons is one involving interstate commerce.

II. THE CIRCUIT COURT ERRED IN GRANTING USC'S MOTION TO AMEND ITS FIRST AMENDED COMPLAINT TO WITHDRAW ITS BREACH OF CONTRACT CAUSE OF ACTION BECAUSE THE MOTION WAS FUTILE AND PREJUDICIAL TO UHS IN THIS CASE.

The circuit court ruled that USC may amend its First Amended Complaint to withdraw its breach of contract cause of action. (Order Granting Motion to Amend). UHS's objections to the Motion to Amend are intertwined with its arguments for arbitration. The circuit court erred in granting the Motion to Amend because withdrawing the breach of contract cause of action would be or should be futile. *See Health Promotion Specialists, LLC v. South Carolina Bd. Of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 813 (2013) ("Even if the motion had been timely, Judge Keesley found the amendments involving civil conspiracy would be 'futile' as the Board would be immune from suit for claims involving the commission of intentional torts under the "TCA").[7] The amendment to withdraw the breach of contract cause of action is futile because USC's claims are subject to arbitration.

Second, a court should not allow an amendment that prejudices a party. Rule 15(a), SCRCP. The Motion to Amend (at least as to the breach of contract cause of action) was made to prejudice UHS's previously filed Motion for Arbitration. In its original Motion to Amend, USCA sought to make three amendments: 1) to change the name of Plaintiff to USC; 2) add new parties; and 3) allege direct causes of action against third-party defendants brought into the civil action by H.G. Reynolds. The later oral amendment to withdraw the breach of contract was a complete change in the facts and retreat from a position taken already and repeatedly in the civil action. (Complaint ¶ 36; First Amended Complaint ¶ 36; Proposed Second Amended Complaint ¶ 48). The change was simply requested because USC knew it could not on one hand allege there was an agreement that had been breached and on the other hand disclaim an obligation in the same agreement to arbitrate. The circuit court allowed USC to change its position on the facts

[7] The "futile" standard originates with the United States Supreme Court's interpretation of Rule 15. *See Johnson v. Oroweat Foods Co.*, 785 F.2d 503 (4th Cir. 1986).

and did so to the prejudice of UHS. Once the circuit court granted the Motion to Amend, the circuit court then issued its Order Denying Arbitration and found that, "*at no point in time has there ever been a contract or an agreement between the Plaintiff and University Housing Services, Inc....*" (Order Denying Arbitration, pg. 3).[8] The prior positions and the ruling cannot be reconciled.

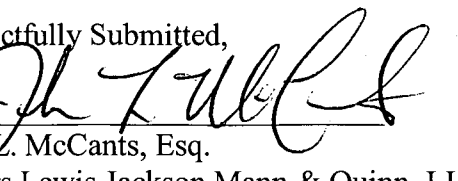
Finally, the circuit court erred in dismissing the breach of contract cause of action without prejudice. (Order Granting Motion to Amend, pg. 2). USC did not, at either the hearing or in its memorandum filed with the court, argue for a dismissal without prejudice. (Plaintiff's Memorandum in Support Motion to for Leave to File Second Amended Summons and Complaint; May 1, 2017 Transcript). UHS did argue that the breach of contract cause of action should be dismissed with prejudice. (UHS Memorandum in Opposition to Motion to Amend, pg. 3). Doing so would in effect prevent USC from patently relying on the Design-Build Agreement going forward in the litigation after withdrawing the cause of action; and prevent USC from changing its position on the facts again. However, the circuit court allowed USC to dismiss the cause of action without prejudice. The circuit court erred in dismissing the breach of contract cause of action without prejudice.

Conclusion

The Court of Appeals should reverse the circuit court and compel USC to arbitrate its claims against UHS.

[8] The circuit court stated that it would not rule on the Motion for Arbitration (filed before the Motion to Amend) before deciding the Motion to Amend. (April 10, 2017 Transcript, pg. 33, L 1-12).

Respectfully Submitted,



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September 20, 2018

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Case No. 2016-CP-02-02339
Appellate Case No. 2018-001039

University of South Carolina Aiken, Plaintiff,

v.

University Housing Services, Inc., H.G. Reynolds Co., Southern Wall Systems, Inc., McElroy Specialty Interiors, Inc., Croft Hill Siding, Inc., East Coast Painting, Inc., and John Does 1 Through 3, Defendants,

And

H.G. Reynolds Co., Inc., Third-Party Plaintiff,

v.

William Bell, Bell Siding and Roofing, William Bell d/b/a Bell Siding & Roofing a/k/a Bell Siding and Roofing, LLC, and Bell Siding and Roofing, LLC, Third-Party Defendants,

Of which University Housing Services, Inc., and H.G. Reynolds Company, Inc. are the Appellants,

And

Of Which University of South Carolina Aiken is the Respondent.

APPELLANT UNIVERSITY HOUSING SERVICES, INC.'S PROOF OF SERVICE OF INITIAL BRIEF, DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL, AND CERTIFICATE OF COUNSEL

I certify that I have served Appellant University Housing Services, Inc.'s Proof Of Service Of Initial Brief, Designation Of Matter To Be Included In The Record On Appeal, And Certificate Of Counsel by depositing a copy of it in the United States Mail, postage prepaid, on **September 20, 2018** addressed to their attorneys of record, listed as follows:

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THE STATE OF SOUTH CAROLINA

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APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Case No. 2016-CP-02-02339
Appellate Case No. 2018-001039

University of South Carolina Aiken, Plaintiff,

v.

University Housing Services, Inc., H.G. Reynolds Co., Southern Wall Systems, Inc., McElroy Specialty Interiors, Inc., Croft Hill Siding, Inc., East Coast Painting, Inc., and John Does 1 Through 3, Defendants,

And

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v.

William Bell, Bell Siding and Roofing, William Bell d/b/a Bell Siding & Roofing a/k/a Bell Siding and Roofing, LLC, and Bell Siding and Roofing, LLC, Third-Party Defendants,

Of which University Housing Services, Inc., and H.G. Reynolds Company, Inc. are the Appellants,

And

Of Which University of South Carolina Aiken is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Brief complies with Rule 211(b), SCACR.

Certificate of Counsel of Appellant University Housing Services, Inc.
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Appellate Case No. 2018-001039

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September 20, 2018

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
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RE: University of South Carolina Aiken v. University Housing Services, Inc., et al.
Case No. 2016-CP-02-02339
Appellate Case No. 2018-001039

Dear Ms. Kitchings:

Enclosed for filing please find an original and a copy of each of the following for filing:

1. Initial Brief of Appellant University Housing Services, Inc.;

2. Appellant University Housing Services, Inc.'s Designation of Matter to be Included in the Record on Appeal; and

3. Appellant University Housing Services, Inc.'s Certificate of Counsel.

Please file the originals and return file-stamped copies to me via the courier from my office. By copy hereof, all counsel of record are being served with the above.

Thank you for your assistance, and should you have any questions, please do not hesitate to contact me.

Sincerely,

John L. McCants

Enclosures

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