THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2018-001598

Case No. 2018-CP-40-00873

Jonathan Mart, on behalf of himself and others similarly situated,.....Respondent,

v.

Great Southern Homes, Inc.,.....Appellant.

FINAL BRIEF OF RESPONDENT

Charles H. McDonald [SC Bar # 11580]
McDonald Law, LLC
Post Office Box 96
Columbia, South Carolina 29202
(803) 999-1260

June 11, 2019

Terry E. Richardson, Jr. [SC Bar # 4721]
Matthew A. Nickles [SC Bar # 80364]
Brady R. Thomas [SC Bar # 72530]
Richardson, Patrick, Westbrook & Brickman, LLC
P.O. Box 1368
Barnwell, SC 29812
(803) 541-7850

Beth B. Richardson [SC Bar # 69552]
Robinson Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court correctly found that the expansive arbitration clauses in Appellant Great Southern Homes' Contract For Sale and Express Limited Warranty both apply to the claims asserted in this action?

2. Whether the Circuit Court correctly found that the conflicting and irreconcilable terms of the arbitration provisions set forth in Appellant's Contract For Sale and Express Limited Warranty demonstrated a lack of mutual assent as to an agreement to arbitrate the claims asserted in this action?

STATEMENT OF THE CASE

Under well-established law, the "warranty of habitability" is implied in the sale of all new homes in South Carolina. Recognizing the importance of this implied warranty, and the relative sophistication of homebuilders such as Appellant Great Southern Homes vis-à-vis a new home buyer, the South Carolina Supreme Court has recognized that the warranty of habitability cannot be waived or disclaimed unless the waiver is (1) conspicuous; (2) known to the buyer; and (3) specifically bargained for. *See Kirkman v. Parex*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006). As a purchaser of a new Great Southern home, Respondent Jonathan Mart brings this action, on behalf of himself and others similarly situated, asking the Court to (1) declare as a matter of law that Appellant cannot waive the im7plied warranty of habitability without paying its customers adequate consideration for such waiver, and (2) determine that Appellant's business practice gives its customers a right of recovery against Appellant for the fair value of this waiver.

Respondent filed this action on February 12, 2018, in the Richland County Court of Common Pleas seeking monetary and declaratory relief based upon the warranty waivers in Appellant's proprietary "Contract For Sale." In response, Appellant filed its Motion to Dismiss and to Compel Arbitration on April 16, 2018. The Honorable DeAndrea Gist Benjamin then heard Appellant's Motion to Dismiss and Compel Arbitration on June 13, 2018. On July 16,

2018, Judge Benjamin issued an Order denying Appellant's Motion to Dismiss and Compel Arbitration. Appellant filed and served its Notice of Appeal on August 21, 2018, seeking review of the trial court's denial of its Motion to Dismiss and Compel Arbitration.

STATEMENT OF FACTS

Appellant is a large, sophisticated builder and seller of new homes in South Carolina. In July 2015, Appellant sold a new home to Respondent located in Kershaw County, South Carolina. Appellant requires purchasers of its homes to execute its proprietary "Contract For Sale." (R. p. 29, Complaint, Ex. 1.) Appellant's Contract For Sale contains a disclaimer of fundamental warranty rights implied by law in South Carolina in connection with the sale of a new home. (R. p. 32, Complaint Ex. 1 at "Limited Warranty.") One of the implied warranties that Appellant requires that its purchasers waive is the implied warranty of habitability. (*Id.*) In lieu of the implied warranties, Appellant instead substitutes an "Express Limited Warranty" under which Appellant has certain defined warranty responsibilities and other warranty obligations are transferred to a third-party warranty company. (*Id.*; R. p. 192, Mart Aff. Ex. 1.) This Express Limited Warranty is the operative document that sets forth the warranty obligations of Appellant to its purchasers such as Respondent Mart. Appellant utilizes the StrucSure Home Warranty as the Express Limited Warranty provided to its purchasers under the Contract For Sale. (*Id.*) In addition to the broad disclaimer of warranty rights, Appellant's Contract For Sale and the Express Limited Warranty contain other significant limitations on the rights and remedies afforded to the buyer of a Great Southern home. (*Id.*)

Further, Appellant purports to require that any claim that one of its purchasers may have against it arising out of or related to the Contract For Sale be resolved through arbitration. The Contract For Sale contains a broad arbitration clause which reads as follows:

> Any dispute between the parties hereto arising out of this contract, related to the contract or the breach thereof, including without limitation disputes relating to the property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10 et. seq.

(R. p. 33; Complaint, Ex. 1.)

In addition to this arbitration clause, the Express Limited Warranty also contains a separate, and equally broad, arbitration clause which reads in relevant part as follows:

> The parties to the Express Limited Warranty intend and agree that any and all claims, disputes and controversies by or between the Homeowner, the Builder, the Administrator, and/or the Insurer, or any combination of the foregoing, arising out of or related to the Express Limited Warranty . . . or the sale of the subject home by the Builder, including without limitation, any claim of breach of contract . . . or breach of any alleged duty of good faith and fair dealing, shall be settled by arbitration in a manner consistent with this arbitration agreement.

(R. p. 215; Affidavit of Jonathan Mart; Ex. A at p. 22.)

The procedure specified in the Express Limited Warranty for arbitration differs in a number of material respects from the arbitration provision set forth in the Contract For Sale. (R. pp. 11-13; Order denying Great Southern's Motion to Dismiss and Compel Arbitration (discussing multiple conflicting material terms in two arbitration provisions) at 7-9.) There is no provision in the Contract For Sale or the Express Limited Warranty, moreover, which specifies which of these conflicting provisions take precedence. Based upon these facts well detailed and discussed in the circuit court's Order, the circuit court correctly ruled that both arbitration provisions found in the Contract of Sale and Express Limited Warranty apply in this action and because the material provisions of those arbitration provisions conflict, Appellant and Respondent cannot have made an agreement to submit the claims or disputes subject to this action to arbitration.

STANDARD OF REVIEW

This appeal involves the circuit court's construction of two competing arbitration clauses contained in Appellant's Contract For Sale and the Express Limited Warranty. "Arbitration clauses are separable from the contracts in which they are imbedded." *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994). [T]he issue of [the arbitration clause's] validity is distinct from the substantive validity of the contract as a whole." *Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). "An action to construe a contract is an action at law reviewable under an 'any evidence' standard." *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). "In an action at law, tried, without a jury, the appellate court's standard of review extends only to the correction of errors of law." *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006). "When the parties dispute whether a valid arbitration agreement exists, any ambiguities must be resolved *against the drafter* . . . While there is a presumption in favor of arbitration, this presumption disappears when the parties dispute the *existence* of a valid arbitration agreement." *Weckesser v. Knight Enters. S.E., LLC*, 228 F. Supp. 3d 561, 565 (D.S.C. 2017) (emphasis in original and internal citations omitted).

ARGUMENT

In order for a court to compel arbitration, there must first be an agreement by the parties to arbitrate the particular claims or disputes at issue. In the present case, the Circuit Court correctly found that the expansive arbitration clauses in Appellant's Contract for Sale and Express Limited Warranty both apply to the claims in this action and then that the conflicting and irreconcilable terms of the two arbitration provisions demonstrate that Appellant and

Respondent lacked mutual assent to arbitrate the claims asserted in this action. Appellant's Contract For Sale and Express Limited Warranty contain two separate arbitration clauses with irreconcilable differences, thus there was no meeting of the minds as to a procedure to arbitrate the claims asserted by Respondent. For these reasons, this Court should affirm the circuit court's denial of Appellant's Motion to Dismiss and to Compel Arbitration.

I. The circuit court correctly found that the broad and expansive arbitration clauses contained in the Contract for Sale and the Express Limited Warranty both apply to the claims asserted by Respondent against Appellant.

The Contract For Sale states, in the provision captioned "**LIMITED WARRANTY**," that "[t]he Seller shall furnish the Purchaser, at closing, with a limited warranty issued by a warranty company approved by the South Carolina Real Estate Commission. A sample copy of the warranty shall be available for inspection during reasonable business hours prior to closing at the offices of the Seller."[1] (R. p. 32, Complaint, Ex. 1 at "Limited Warranty".) Appellant, as the "Seller," is therefore the party providing the limited warranty to its purchaser. Indeed, it is the contractual obligation of the Seller (Great Southern) to provide the limited warranty to the Purchaser (Mart) at the closing. Appellant is the party that selects the limited warranty to be used, and the buyer has no role or choice in this selection. In addition, Appellant plainly intended to use the "Express Limited Warranty" issued by StrucSure Home Warranty for the limited warranty as it so indicated in the Contract For Sale. (R. p. 153, Defendant's Memorandum in Support filed June 6, 2018, Ex. 1 at "Standard Features.")

---

[1] This also refutes Appellant's contention that the Contract for Sale does not incorporate the Express Limited Warranty because the Express Limited Warranty did not exist when the Contract for Sale was executed. (Br. of App. at 21-22). Certainly, Great Southern could not provide a copy of the warranty to Mart for inspection if the warranty did not exist.

A. As the only warranty provided to a purchaser of a new home from Great Southern, the circuit court correctly found that the Express Limited Warranty is an integral part of the Contract For Sale.

Appellant argues that the Express Limited Warranty is a separate agreement bearing no connection or relation to the Contract For Sale. However, this argument ignores how the Express Limited Warranty is conveyed to a Great Southern purchaser and conflicts with the plain language of the Contract For Sale discussed above.

In addition, the "Limited Warranty" provision of the Contract For Sale also contains the following language:

> This Limited Warranty issued to the Purchaser shall be in lieu of all other warranties, express or implied, any warranty of habitability, suitability for residential purposes, merchantability, or fitness for a particular purpose is hereby excluded and disclaimed. Seller shall in no event be liable for consequential or punitive damages of any kind. . .Purchaser agrees to accept said limited warrant in lieu of all other rights and remedies, whether baser [sic] on contract or tort.

(R. p. 32, Complaint Ex. 1 at "Limited Warranty.") The **only** warranty provided to a purchaser of a Great Southern home is the Express Limited Warranty issued to the purchaser at closing by Great Southern. As the circuit court correctly concluded, "Great Southern is the *provider, supplier, and source of* the Express Limited Warranty." (R. p. 11, Order at p. 7 (emphasis in original).) Thus, the Express Limited Warranty is part and parcel of the Contract For Sale and the closing on the sale of the home itself.[2]

Appellant argues that the Express Limited Warranty is a separate contract.[3] Yet, it is unclear as to whom Appellant contends are the parties to this separate contract. Appellant

---

[2] The language of the Express Limited Warranty also demonstrates its strong nexus with the Contract For Sale as it states "[y]our builder . . . sold You a home that includes the Express Limited Warranty protection." (R. p 194, Mart. Aff. Ex. A.)

[3] Appellant assets in its brief that Respondent acknowledges there were "two written agreements but contends that these two documents should be interpreted as one." (Br. of App. at 11). Obviously, the Express Limited Warranty is a separate document from the Contract For

seems to suggest that the Express Limited Warranty is a separate contract between Mart and StrucSure Home Warranty under which Appellant has some duties and responsibilities with respect to construction defects. However, StrucSure Home Warranty has only a limited, administerial role under the Express Limited Warranty and makes it clear that it does not act as the "Warrantor" or the "Insurer" under the Express Limited Warranty and serves only as the "Administrator." (R. p. 194, pp. 216-17, Mart Aff. Ex. A.) Conversely, Great Southern is identified as both the "Builder" and the "Warrantor" under the Express Limited Warranty and carries the duties and obligations that accompany those roles. (*Id.*)

While one reference in the Express Limited Warranty suggests the Express Limited Warranty is not a part of the Contract For Sale, that does not make it so.[4] The Express Limited Warranty is not signed by either Mart, Great Southern, or StrucSure Home Warranty, nor does it bear any other indicia of being a separate and distinct contract from the Contract For Sale. (R. pp. 192-223, Mart Aff. Ex. A.) Finally, Mart gave no separate consideration for the Express Limited Warranty.[5] As it lacks any of the requirements for being a separate contractual agreement, the Express Limited Warranty is not a separate contract—it is an integral part of the Contract For Sale.

B. The circuit court correctly found that the arbitration clauses of the Contract For Sale and the Express Limited Warranty both cover the claims asserted by Respondent against Appellant.

Sale; however, it is not a **separate** agreement as it springs directly from the Contract For Sale's references thereto and the sale of the home. Mart has consistently taken this position throughout these proceedings.

[4] The Express Limited Warranty states "This Express Limited Warranty is separate and apart from any contracts between You and Your Builder, including any sales agreement." (R .p. 295, Mart Aff. Ex. 1)

[5] As a member of StrucSure's home warranty program, Great Southern pays StrucSure Home Warranty any fees associated with the StrucSure Express Limited Warranty based on a set formula related to the sales price of the home. (R. p. 295, Defendant's Reply Memorandum filed June 11, 2018, Ex. 4.)

The respective arbitration clauses in the Contract For Sale and the Express Limited Warranty are very broad in nature and cover the same scope of claims and disputes. They are both designed to cover virtually any claim or dispute that might arise between a purchaser and Appellant. For example, both arbitration clauses cover claims for breach of contract and issues relating to the sale of the home which are the very claims asserted by Respondent in the Complaint.

Appellant seeks to differentiate these arbitration provisions and argues that only the arbitration clause in the Contract For Sale governs the claims asserted by Respondent in this action. However, this argument falls apart in the face of the language of the arbitration provision in the Express Limited Warranty which reads:

> The parties to the Express Limited Warranty intend and agree that **any and all claims, disputes and controversies by or between the Homeowner, the Builder**, the Administrator, and/or the Insurer, or any combination of the foregoing, **arising out of or related to** the Express Limited Warranty . . . or **the sale of the subject home by the Builder, including without limitation, any claim of breach of contract . . . or breach of any alleged duty of good faith and fair dealing**, shall be settled by arbitration in a manner consistent with this arbitration agreement.

(R. p. 215, Mart Aff. Ex. A (emphasis added).) It is beyond dispute that the scope of the arbitration clause in the Express Limited Warranty covers claims arising out of and relating to the Contract For Sale including those asserted by Respondent in this action.

Indeed, South Carolina law is clear that an arbitration provision in a home warranty plan can apply to claims arising under the purchase agreement. *See Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 7-9, 791 S.E.2d 128, 131-32 (2016) (holding that scope of arbitration clause in warranty for new home purchase was not limited to claims covered by warranty, even though clause was located in warranty, and thus scope of clause was broad enough to encompass homeowners' claims for breach of purchase agreement).

As was the case in *Parsons*, the arbitration clause in the Express Limited Warranty is broad in scope and expressly encompasses claims relating to breach of the parties' purchase agreement. Thus, it is clear that both the arbitration clause in the Contract For Sale and the arbitration clause in the Express Limited Warranty encompass the claims asserted by Respondent in this action.

Appellant spends significant time arguing the distinctions between the respective purposes of the Contract For Sale and the Express Limited Warranty which are obvious. However, there is no meaningful distinction between the purposes of the two arbitration clauses. Moreover, while Appellant is correct that Respondent's claims in this action do not relate to any construction defects addressed by the Express Limited Warranty, that is of no moment when it comes to the respective arbitration clauses. Because, as discussed above, the scope of the arbitration clause in the Express Limited Warranty goes far beyond claims for construction defects and clearly extends to any claims arising out of the Contract For Sale.

II. The circuit court correctly found that without a meeting of the minds as to a procedure to resolve disputes through arbitration, there is no arbitration agreement to enforce.

Whether a valid arbitration agreement exists is a matter for judicial determination. *Partain v. Upstate Auto Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010); *see Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007) (finding a "gateway matter" to arbitrability is the existence of an agreement to arbitrate). In making this determination, trial courts consider "general contract defenses" to ensure that a meeting of the minds to arbitrate existed, and that such an agreement was not the result of "fraud, duress, [or] unconscionability." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001); *see also NAACP of Camden East v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404, 424-25 (N.J. App. Div. 2011) (finding that an agreement to arbitrate must be the result of a "meeting of the minds" and that "clarity and internal consistency of a contract's arbitration provisions are

important factors in determining whether a party reasonably understood those provisions and agreed to be bound by them.") State contract law determines whether parties entered into a valid agreement to arbitrate a set of claims. *Weckesser v. Knight Enters. S.E., LLC*, 228 F. Supp. 3d 561, 564 (D.S.C. 2017), *aff'd*, No. 17-1247, 2018 WL 2972665 (4th Cir. June 12, 2018) ("Whether the parties agreed to arbitrate a particular dispute is a question of state law governing contract formation.") (*citing First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)); *THI of S.C. at Columbia, LLC v. Wiggins*, No. CA 3:11-888-CMC, 2011 WL 4089435, at *5 (D.S.C. Sept. 13, 2011) (citing *Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir.2005) (and noting that, even when the FAA governs, state law controls whether a dispute is arbitrable which are issues of contract formation).

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original); *see also Potomac Leasing Co. v. Otts Mkt., Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct.App.1987) ("It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms."). And where material terms of a contract are inconsistent and conflicting, there is no meeting of the minds. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013) (acknowledging where arbitration agreements provided for conflicting and inconsistent material terms, it would be unenforceable for lack of mutual assent thereto).

A. Great Southern's Contract For Sale and Express Limited Warranty contain two conflicting arbitration agreements that cannot be reconciled.

i. The two arbitration clauses govern the same scope of claims and disputes.

As discussed above, both arbitration clauses are very broad in nature and cover the same scope of claims and disputes. They are both designed to cover virtually any claim or dispute that might arise between a purchaser and Great Southern.

ii. The two arbitration clauses have conflicting provisions as to the selection of any arbitrator(s), as to the number of arbitrators, and as to the governing procedures for arbitration.

The arbitration clause in the Contract For Sale requires proceeding with three arbitrators with each party appointing an arbitrator and those two arbitrators appointing a third arbitrator. (R. p. 33, Complaint, Ex.1 at "Arbitration".) The arbitration procedure is that set forth in the South Carolina Uniform Arbitration Act. (*Id.*) However, the arbitration clause in the Express Limited Warranty requires using an independent arbitration service such as Construction Dispute Resolution Services. (R. p. 215, Mart Aff.; Ex. A at p. 22.) The arbitration procedure shall be that specified by the independent arbitration service and the Federal Arbitration Act. (*Id.*) The method of selecting an arbitrator under the clause in the Express Limited Warranty is not specified, but in the absence of any provision in the rules of the independent arbitration service as to arbitrator selection, it would follow the Federal Arbitration Act under which the judge appoints a single arbitrator. *See* 9 U.S.C.A. § 5.

iii. The two arbitration clauses differ in post-award remedies.

Under the Express Limited Warranty, a homeowner such as Mart has a right to appeal the decision of any arbitrator on the merits. The Express Limited Warranty states that "[i]f the Homeowner disagrees with the Arbitrator's decision, s/he has the right to appeal it." [R. p. 216, Mart Aff.; Ex. A at p. 23.] Under South Carolina's Uniform Arbitration Act, Mart would have no right of appeal and very limited grounds on which to seek to vacate an arbitration award. *See* S.C. Code Ann. §§ 15-48-120-200 (providing limited grounds and specific procedures upon

which a court can review and vacate or modify an arbitration award). Thus, Respondent would have much more expansive rights to challenge any arbitration award under the arbitration clause of the Express Limited Warranty than under the arbitration provisions of the Contract For Sale.

iv. The two arbitration clauses have conflicting provisions related to arbitration costs and fees.

Under the Contract For Sale's arbitration clause, there is no initial filing fee required to initiate arbitration. (R. p. 33, Complaint Ex. 1 at "Arbitration.") However, under the Express Limited Warranty's arbitration clause, the Homeowner bears the initial burden of all arbitration costs including the filing fees to be paid to the independent arbitration service. (R. p. 215, Mart Aff.; Ex. A, Section 15 at p. 22.)

v. The conflicting provisions in the respective arbitration clauses are material and irreconcilable.

The South Carolina Supreme Court has held that the designation of a specific arbitral forum is a material term of an arbitration agreement. *Grant v. Magnolia Manor–Greenwood, Inc.*, 383 S.C. 125, 128-32, 678 S.E.2d 435, 437-39 (2009) ("Where designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, we believe that it is neither 'logistical' nor 'ancillary.'") When there are two separate arbitration clauses that differ as to the procedures for selecting an arbitrator, differ on the number of arbitrators to be used, and further differ on the procedure and rules that govern the arbitration, an irreconcilable conflict exists regarding material terms of arbitration. *See Grant*, 383 S.C. at 131-32, 678 S.E.2d at 439. This conclusion is supported by opinions reached by courts in other jurisdictions when addressing the same issues present here.

Applying Mississippi law, a federal bankruptcy court found that the parties did not agree to arbitrate where two arbitration agreements applied to the same claims but provided for

inconsistent terms regarding, among other things, the number of arbitrators, the process of how the arbitrator(s) were to be selected, and the responsibility for payment of arbitration costs and fees. *In re Willis*, 579 B.R. 381, 390-95 (S.D. Miss. 2017). Similarly, in *Ragab v. Howard*, 841 F.3d 1134, 1138 (10th Cir. 2016), the Tenth Circuit Court of Appeals held that conflicting provisions in multiple arbitration clauses regarding which rules would govern and how the arbitrator would be selected demonstrated no meeting of the minds on material terms of arbitration. Applying this logic to the same type of conflicting arbitration provisions as are present in this case, this Court should find the conflicts in the respective arbitration clauses material and irreconcilable.

B. There was no mutual assent as to the material terms of arbitration; and, therefore, no enforceable arbitration agreement between Respondent and Appellant.

The above comparisons demonstrate that the two arbitration clauses cannot be construed in harmony with each other. There is simply no way to determine which of these conflicting arbitration provisions would control and govern the procedure for arbitrating the claims Respondent asserts against Appellant. Appellant suggests that Respondent could simply chose to proceed under the arbitration clause of his choice thereby avoiding any conflict.[6] However, this argument is belied by Appellant's vigorous denial that the arbitration clause in the Express Limited Warranty applies to Respondent's claims in any respect. In addition, the presence of

---

[6] Appellant contends that "it is uncontested that the arbitration provisions in both the parties' Contract for Sale and the StrucSure Home Warranty were not unconscionable and did not lack any material terms, there existed a meeting of the minds in 2015 that Mart would choose either document under which to proceed." (Br. of App. at 12). While the circuit court's order did not address the issue of whether any terms in the arbitration clauses were unconscionable, Respondent did not concede this point and, in fact, raised unconscionability as grounds for not enforcing the arbitration clauses in its opposition to Appellant's Motion to Dismiss and Compel Arbitration. (R. pp. 181-86, Mart's Memorandum in Opposition to Great Southern's Motion to Dismiss and Compel Arbitration.)

conflicting arbitration clauses in a contract covering the same scope of claims creates ambiguity as to which clause is the clause under which a party is to proceed with initiating the arbitration process. Courts have held that in such situation, the ambiguities must be resolved against the drafter (Great Southern) and any presumption in favor of arbitration disappears. *See Weckessser,* 228 F. Supp. 3d at 564-65.

For the first time on appeal, Appellant raises the issue that the presence of a "merger" clause in both the Contract For Sale and the Express Limited Warranty demonstrates error in the circuit court's ruling that the arbitration clauses found in the respective documents should both be construed as applying to the Respondent's claims. In its brief, Appellant asserts such error is grounds for reversal of the circuit court's Order. (Br. of App., "Argument II" at p. 13-20.) Because Appellant failed to raise this issue in the court below, it has not been preserved for review and Appellant may not raise it on appeal for the first time. *Pye v. Estate of Fox,* 369 S.C. 555, 564-65, 633 S.E.2d 505, 510-11 (2006). Accordingly, this issue is not properly before this court and should not be considered as grounds for reversal of the circuit court's Order.[7]

However, even if this issue was preserved for review on appeal, Appellant's argument regarding the presence of merger clauses in the Contract For Sale and the Express Limited Warranty is misplaced. The merger clauses cited by Appellant do not provide instruction on which arbitration provision takes precedence over the other or which provision supersedes the other. *See Ragab,* 841 F.3d at 1138 (finding that in absence of provision specifying which arbitration clause takes precedence or supersedes another, the court cannot arbitrarily pick one over another.) Accordingly, there was no mutual assent, or meeting of the minds, as to the

---

[7] Notably, Appellant did not file a Rule 59(e) motion seeking a ruling from the trial court on this issue. *See Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file [a Rule 59(e) motion] when an issue or argument has been raised, but not ruled on, on order to preserve it for appellate review." (emphasis in original).)

material terms of arbitration.

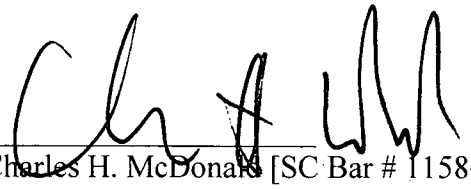
The court's holding in *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013), furthermore, does not support Appellant's position. First, unlike this case, the arbitration clauses at issue in *York* appeared in two separate contracts. *Id.*, 406 S.C. at 83-85, 749 S.E.2d at 147-48. Second, the Court of Appeals found that the terms set forth in the purchaser's (Cristy) "Buyers Order," which was the first contract executed, permitted modification of its terms in a second written agreement. *Id.* The court found that "if the subsequently executed Installment Contract effectuated a valid modification to the arbitration terms of the Buyer's Order, no inconsistencies existed." *Id.* 406 S.C. at 84, 749 S.E.2d at 148. No such situation is present here as there was no subsequently executed document which modified the arbitration terms of Great Southern's Contract For Sale.

While South Carolina's appellate courts have not addressed the specific situation where a parties' claims are subject to conflicting arbitration provisions, the Court has, in dicta, indicated that such a situation would demonstrate a lack of mutual assent as to any agreement to arbitrate such claims or disputes. *Cf. York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83-84, 749 S.E.2d 139, 147-48 (Ct. App. 2013) (finding that two arbitration provisions in separate contracts were not inconsistent and conflicting so as to make agreements unenforceable). As discussed above, moreover, when faced with conflicting arbitration agreements such as those present here, other jurisdictions have found that this lack of clarity resulted in no meeting of the minds as to an agreement to arbitrate and refused to enforce the conflicting agreements. *See In re Willis*, 579 B.R. 381 (Bankr. S.D. Miss. 2017) (denying motion to compel arbitration when conflicting arbitration provisions indicate there was no meeting of the minds with respect to arbitration); *see also Ragab v. Howard*, 841 F.3d 1134, 1137-39 (10th Cir. 2016) (affirming on appeal the same);

Basulto v. Hialeah Automotive, 141 So. 3d 1145, 1155-57 (Fla. 2014) (affirming on appeal the same); *NAACP of Camden Cnty. East v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404, 437-38 (2011) (holding that "the cumulative effect of the many inconsistencies and unclear passages in the arbitration terms within the [contract documents] compel us to declare them unenforceable for lack of mutual assent."). This Court should follow this well-reasoned line of cases also relied upon by the circuit court and affirm the circuit court's ruling that the conflicting arbitration provisions in the Contract For Sale and the Express Limited Warranty evidence a lack of mutual assent to arbitration.

CONCLUSION

As the circuit court found in its well-reasoned Order, the respective arbitration clauses in the Contract For Sale and the Express Limited Warranty are very broad in nature and cover the same scope of claims and disputes. Because material terms of the arbitration clauses in the Contract For Sale and the Express Limited Warranty are in direct conflict and cannot be reconciled, furthermore, there was no mutual assent between Appellant and Respondent to arbitrate. Accordingly, the circuit court correctly denied Appellant's Motion to Compel Arbitration.



Charles H. McDonald [SC Bar # 11580]
McDonald Law, LLC
Post Office Box 96
Columbia, South Carolina 29202
(803) 999-1260

Terry E. Richardson, Jr. [SC Bar # 4721]
Matthew A. Nickles [SC Bar # 80364]
Brady R. Thomas [SC Bar # 72530]
Richardson, Patrick, Westbrook & Brickman, LLC
P.O. Box 1368
Barnwell, SC 29812
(803) 541-7850

Beth B. Richardson [SC Bar # 69552]
Robinson Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2018-001598

Case No. 2018-CP-40-00873

Jonathan Mart, on behalf of himself and others similarly situated,.....Respondent,

v.

Great Southern Homes, Inc.,.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Charles H. McDonald [SC Bar #11580]
McDonald Law, LLC
Post Office Box 96
Columbia, South Carolina 29202
(803) 999-1260

Attorneys for Respondent

June 11, 2019