

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master in Equity

2016-CP-10-1143
Appellate Case No.: 2016-002308

Palmetto Construction Group, LLC

Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward,

Appellants.

**RESPONDENT'S RETURN TO
APPELLANTS' PETITION FOR REHEARING**

Respectfully Submitted By:

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The actions available to a party in default are limited to moving to be relieved from default and, failing that, cross examining witnesses at a damages hearing. Appellants were in default when they filed a motion to compel arbitration. Because they were unable to demonstrate good cause to lift the default, the motion to compel arbitration was a nullity and was properly denied as such, as found by both the Master in Equity and this Court. For this reason, and because Appellants have failed to demonstrate that this Court misapprehended or overlooked Appellants' arguments, Appellants' Petition for Rehearing ("Petition") should be denied.

FACTUAL BACKGROUND¹

Respondent Palmetto Construction Group, LLC ("PCG") filed suit against Appellants on February 12, 2016, alleging misappropriation of funds from a construction project for the Department of Veterans Affairs, failure to pay subcontractors and suppliers, and defaults on agreements with PCG and the surety, leaving PCG responsible to pay Appellants' debts (of over \$1.4 million) to the surety and the subcontractors.

Respondents were personally served with the summons and complaint on March 14, 2016. Respondents did not answer within 30 days, and Appellants moved for default on April 18, 2016 and a default order was entered on April 21, 2016. The matter was referred to the Master in Equity for a damages hearing.

On June 3, 2016, Appellants filed a motion to be relieved from default and attached an affidavit that sought to explain why the default occurred, stating:

"when I received the Summons and Complaint for the instant action, I thought that it was related to my

¹ The complete underlying factual and procedural background is set forth in Respondent's Brief on file with the Court. An abbreviated version is presented here.

arrangements with [the surety]. I am not an attorney and did not understand that the above captioned action was separate and apart from the bond claims that I have been working directly with [the surety] to address.”²

Affidavit of Reuben Mark Ward at ¶¶ 9–10 (ROA 75). Neither the affidavit nor the motion cited arbitration as a reason for failing to answer. On July 11, 2016, Appellants filed a motion to compel arbitration. The Master in Equity ultimately denied the motion to lift the default and the motion to compel arbitration, and this appeal followed.

ARGUMENT AND CITATION OF AUTHORITY

I. Appellants’ Petition Fails to Satisfy Rule 221(a), SCACR

The purpose of rehearing is not to allow a party to try a case in the appellate court for a second time, but rather to ensure the Court gives proper consideration to the matter before it. *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (internal citation omitted). To be entitled to rehearing, the petitioner must demonstrate that this Court overlooked or misapprehended petitioner’s argument. *Id.*; Rule 221(a), SCACR.

Appellants’ Petition fails to demonstrate either of these elements; rather, it makes bald assertions of the misapprehension or overlooking of arguments,³ rehashes prior contentions that this Court has rejected, and quibbles with details of the cases cited by this Court. Appellants have failed to meet the burden of Rule 221(a) and the Petition should be denied.

² There was no suit filed by the surety.

³ *See infra.*

A. This Court Did Not Overlook Appellants' Argument

Page 4 of the Petition states that “the Panel did not address the Appellants’ argument allowing for the immediate appeal of the Master’s Orders regarding the Appellants’ substantial right to arbitration.” *Petition at 4*. This is demonstrably inaccurate. This Court’s order devotes nearly two pages to this very argument before concluding that a party in default has *no* right to arbitration, because a party in default has conceded liability and “forfeit[ed] the right to answer or otherwise plead to the complaint.” *Order at 4* (quoting *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978)). The Court further noted, “if we allow the reexamination of liability after default, we are defeating the purpose of arbitration: ‘to achieve streamlined proceedings and expeditious results.’” *Order at 4* (quoting *Preston v. Ferrer*, 552 U.S. 346, 357 (2008)).

B. The Court Did Not Misapprehend Appellants' Argument

This Court’s June 26 opinion sets forth two holdings — (i) the denial of Appellants’ motion to compel arbitration was not appealable as it was filed by a party in default; and (ii) by going into default, a party waives its right to arbitration. Both holdings result in the same outcome: that the appeal must fail.

The Petition argues that the Court must have misapprehended Appellants’ argument because the Court’s holdings of non-appealability and waiver are in conflict with one another. *Petition at 4*. The holdings are not in conflict; rather, they are alternative bases for why Appellants’ appeal did not succeed. The Court held in the first instance that a motion to compel arbitration by a defaulting party is a nullity and its denial is therefore not

appealable, and *also* that a party who is in default has waived its right to arbitrate. These are not inconsistent holdings, and the Court's order is not subject to rehearing on this basis.

1. The Court's Holding Is Not in Conflict With Other Decisions of This Court

Nor does the holding of non-appealability threaten the uniformity of this Court's decisions regarding appealability of orders denying arbitration, as Appellants urge. *Petition at 2.* The holding is narrow — a party in default cannot move to compel arbitration. There is no conflicting authority from this state.

II. This Court's Holdings Are Not Subject to Rehearing

A. Non-Appealability

As an initial matter, Appellants were not denied an appeal. As noted on pages 3–4 of Appellants' Petition, PCG's 2017 motion to dismiss the appeal was denied (without prejudice to issues of appealability being argued in the appeal of the merits). The Parties then briefed the merits of the appeal. After considering the parties' substantive briefs and conducting oral argument, this Court concluded that Appellants were properly in default, that Appellants were not permitted to move to compel arbitration while in default, and therefore that no appealable issue was before it.

Indeed, without first considering the merits (whether the Master abused his discretion in declining to lift the default), this Court could not have determined whether it had jurisdiction over the appeal.

B. Waiver

Appellants argue that rehearing *en banc* should be granted because the question of whether a defaulting party waives the right to arbitrate is of "exceptional importance to the

arbitration jurisprudence” *Petition at 4*. This conflates the standard for rehearing (misapprehension or overlooking of arguments) with the standard for when a matter should be heard or reheard *en banc* rather than by a three-judge panel (exceptional importance, maintaining uniformity of decisions). The Petition is not subject to rehearing on this basis.

Moreover, as discussed below, the Court properly held that the arbitration right had been waived.

1. Admission of Allegations

A defaulting party is deemed to have admitted the truth of the allegations against it, thus conceding liability. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 424, 246 S.E.2d 880, 882 (1978). One of the allegations in the complaint was that jurisdiction was vested in the trial court and that venue was proper there. *Complaint at ¶ 6* (ROA 13). Admission of that allegation constitutes an “emphatic repudiation” of the right to compel arbitration. *See Bland v. Green Acres Grp.*, 12 So.3d 822, 824 (Fla. App. 2009) (“Assuming proper service and actual knowledge of the case, it is difficult to imagine a more emphatic repudiation of the right to arbitrate than an admission that a court is a proper forum to determine the claim.”). This Court properly held that Appellants waived their arbitration right.

2. Affirmative Defense

Additionally, arbitration is an affirmative defense that is waived if not pled. *E.g.*, *Partain v. Upstate Auto Grp.*, 386 S.C. 488, 490, 689 S.E.2d 602, 603 (2010) (“Upstate Auto asserted three affirmative defenses in its Answer, including an arbitration agreement with Partain.”); *Howard v. S.C. Dept. of Highways*, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App. 2000) (“Affirmative defenses are waived if not pled.”); *Gen. Star Nat’l Ins.*

Co. v. Administratia Asigurarilor de Stat, 289 F.3d 434, 438 (6th Cir. 2002) (“a defendant’s failure to raise arbitration as an affirmative defense shows his intent to litigate rather than arbitrate”).

A party in default has waived its right to plead and therefore waived the right to raise the affirmative defense of arbitration.⁴ To regain the right, it must present good cause for the default to be lifted. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).⁵ It should not be permitted to circumvent this requirement by seeking to compel that which it waived.

3. Appellants’ Remaining Arguments

a. Cedar Surgery Case

Appellants argue that this Court overlooked precedent out of Utah,⁶ entitling Appellants to rehearing. *Petition at 12–13*. This argument is not supportable, given the Court’s thorough review of case law from other jurisdictions. *See Order at 5-7*.

In any event, the Utah case is materially distinguishable from this case. The basis for finding non-waiver in *Cedar Surgery* was that the defaulting party’s first action in the case included raising its arbitration right. *Cedar Surgery Center v. Bonelli*, 96 P.3d 911, 912, 2004 UT 58 (2004) (“On July 12, 2002, the Bonellis made their first appearance in the case by filing a rule 60(b) motion for relief from default *and a motion to compel*

⁴ *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880,882 (1978).

⁵ Indeed, a party in default can do little beyond move to be relieved from default and, should that motion be denied, move for reconsideration. If reconsideration is denied, it can participate in a damages hearing; but even then, it is only allowed to cross examine the plaintiff’s witnesses. *See Limehouse v. Hulsey*, 404 S.C. 93, 113–16, 744 S.E.2d 566, 577–79 (2013).

⁶ *Cedar Surgery Center v. Bonelli*, 96 P.3d 911, 2004 UT 58 (2004).

arbitration . . .” (emphasis added)). Here, in contrast, arbitration was not mentioned either in Appellants’ motion to be relieved from default or the affidavit setting forth Appellants’ purported justification for their default. Rather, Appellants’ motion to compel arbitration was not filed until over a month *after* Appellants moved to be relieved from default, and after the Master had indicated the motion to lift the default was unlikely to succeed. *See Hearing Tr. (June 6, 2016) 11:22–24 (ROA 466)* (“There’s not much I saw in that affidavit that would give me indication that I would grant that motion. I can tell you that right now.”)

Additionally, the Court in *Cedar Surgery* was reviewing an order lifting a default; that ruling—like the Master’s ruling in this case denying relief from default—would be reversible only if the trial court abused its discretion. *Id.* at 913; *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) (“The trial court’s decision [of whether to set aside an entry of default] will not be disturbed on appeal absent a clear showing of abuse of that discretion.”). The *Cedar Surgery* court and this Court found no abuse of discretion.

The absence of discussion by this Court of a distinguishable case from another jurisdiction is not a basis for rehearing.

b. Legal Authorities Cited by This Court

Appellants assert that this Court’s citations to legal authorities are inapposite or are mere dicta. *Petition at 5-12*. The cases cited by the Court stand for the propositions that the right to arbitrate can be waived in South Carolina, and that courts have previously found that a defaulting party has waived the right to arbitrate. *Order at 5-7*. The Court’s

citations are not inapposite, and the distinctions raised by Appellants have no impact on the validity of the propositions for which the cases were cited.

This Court's order is not subject to rehearing on this basis.

c. PCG's Motion to Compel Arbitration

Appellants argue that, because PCG's motion to compel arbitration was withdrawn⁷ and not formally ruled upon, it is not a valid basis for a finding of waiver of Appellants' arbitration rights. *Petition at 14–15*. However, this Court did not find waiver on that basis; it found waiver as a result of Appellants' default status. Accordingly, this is not a basis for rehearing either.

CONCLUSION

This Court's holdings of non-appealability and waiver are deliberate, well-reasoned, and should not be subject to reconsideration. Because Appellants have failed to demonstrate any argument that this Court misapprehended or overlooked, PCG respectfully submits that Appellants' petition for rehearing should be denied.

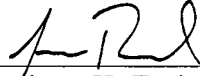
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⁷ The Petition rehashes the argument that PCG's motion to compel arbitration remained pending and that Respondents joined in that motion. *Petition at 14*. This is inaccurate and has been rejected by the trial court and this Court. *See Order at 2* ("After Appellants did not answer, PCG filed an affidavit of default on April 18, 2016 and withdrew its motion to stay and compel arbitration.").

This 30th day of July, 2019
Charleston, South Carolina

Respectfully Submitted:

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Mikell R. Scarborough, Master-In-Equity

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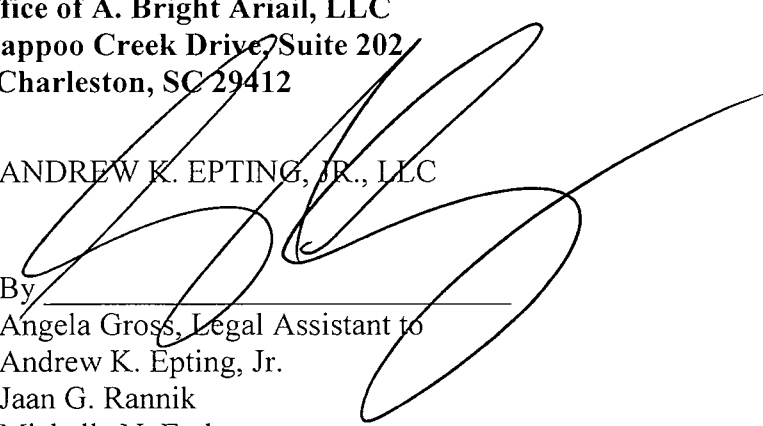
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward. (Appellants).

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Appellants' Petition for Rehearing on opposing counsel of record by depositing a copy in the United States Mail, Postage prepaid, on July 31, 2019, addressed as follows:

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Law Office of A. Bright Ariail, LLC
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SC Court of Appeals

V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
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RE: *Palmetto Construction Group v. Restoration Specialists, LLC, Reuben Mark Ward,
and Lynnette Pennington Ward*
Case No.: 2016-CP-10-1143
Appellate Case No.: 2016-002308

Dear Allen:

Please find enclosed an original and seven (7) copies of Respondent's Return to Appellants' Petition for Rehearing and the original and one (1) copy of the Proof of Service of same in the above-referenced appeal. I would greatly appreciate your filing the originals and returning a file-stamped copy to me in the self-addressed, stamped envelope provided. Thank you in advance. Should you have any question or concerns, please do not hesitate to contact our office.

With kind regards,

ANDREW K. EPTING, JR., LLC

Angela Gross
Legal Assistant to Andrew K. Epting, Jr.
/agg

Enclosures – as stated

cc: A. Bright Ariail, Esquire (w/enc.)

THE STATE OF SOUTH CAROLINA
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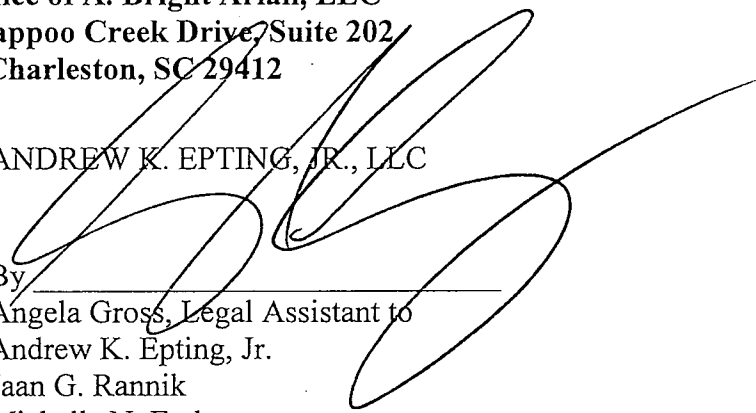
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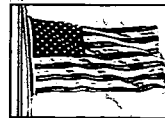
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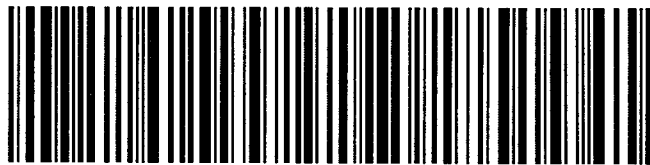
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