

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

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Case No. 2019-CP-32-01927

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Acadian Steel, Inc., a South Carolina  
Corporation,

Appellant,

**RECEIVED**

vs.

JAN 08 2020

**SC Court of Appeals**

Nan, Inc.; Fidelity and Deposit Company  
of Maryland; and Zurich American  
Insurance Company,

Defendants,

Nan, Inc.,

Respondent.

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**INITIAL BRIEF OF APPELLANT**

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**STATEMENT OF ISSUE ON APPEAL**

- 1. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY AND COMPEL ARBITRATION?**

## STATEMENT OF THE CASE

On May 15, 2019, Appellant filed its Summons and Complaint in Lexington County, asserting causes of action against Respondent for breach of contract and unjust enrichment; and a cause of action against Respondent's sureties for payment on surety bonds. (Complaint).

On July 22, 2019, Respondent filed a Motion to Dismiss, or in the alternative, to Stay and Compel Arbitration ("Motion to Stay and Compel Arbitration"). (Motion to Stay and Compel Arbitration).

On August 28, 2019, the Honorable Walton J. McLeod, IV, Chief Judge – Common Pleas for the 11<sup>th</sup> Judicial Circuit, heard Respondent's Motion to Stay and Compel Arbitration. (Transcript of Record).

On September 20, 2019, the Court entered an Order granting Respondent's motion, compelling arbitration of Appellant's claims against Respondent and staying the claim against the surety defendants pending the outcome of the arbitration. (Order).

On October 17, 2019, Appellant timely filed its Notice of Appeal of the September 20, 2019 Order.

## STANDARD OF REVIEW

“Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (citations omitted). “The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise.” Id. (citations omitted). “Determinations of arbitrability are subject to *de novo* review.” Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 609, 571 S.E.2d 711, 713 (Ct. App. 2002) (citation omitted).

## FACTS

Appellant is a corporation organized and existing under the laws of the State of South Carolina,<sup>1</sup> and maintains its principal place of business in Lexington County, South Carolina. (Complaint, ¶1). Upon information and belief, Respondent is a corporation organized and existing under the laws of the State of Hawaii and maintains its principal place of business in Hawaii. (Complaint, ¶2). Upon further information and belief, Respondent conducts substantial business activity in South Carolina, including without limitation, entering into the subcontract at issue in this action. (Complaint, ¶3).

Appellant is primarily in the business of providing and installing structural steel and steel components for industrial, commercial, and government projects. (Complaint, ¶ 9). Upon information and belief, Respondent provides professional construction services, including serving as a general contractor. (Complaint, ¶ 10).

On or about December 22, 2015, Respondent entered into prime contract number CT-HRT-1600152 (the “Prime Contract”) with Honolulu Authority for Rapid Transit (“HART”) for the Kamehameha Highway Stations Group Construction (the “Project”). (Complaint, ¶13).

On or about January 27, 2017, Appellant and Respondent entered into a subcontract agreement related to the Project. (Complaint, ¶15). Specifically, Respondent sent Appellant an email that stated, in part, “Please consider this email as a notice to proceed.” (“Notice to Proceed”). (Piper Affidavit, ¶6; Ex. A). In response to the Notice to Proceed, Appellant issued on February 6, 2017, a purchase order to a third-party vendor to perform steel detailing work. (Piper Affidavit, ¶7).

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<sup>1</sup> The Complaint states Appellant was organized and exists under the laws of the State of North Carolina law; however, that was a typographical error.

On February 27, 2017, Appellant received from Respondent a ‘Letter of Intent to Issue Purchase Order’ (“Letter of Intent”). (Piper Affidavit, ¶8; Ex. B). Following delivery of the Letter of Intent to Appellant, Respondent solicited commencement of fabrication of various steel components referenced in the Letter of Intent, which Appellant commenced consistent with Respondent’s request. (Piper Affidavit, ¶¶10-11).

On or about April 5, 2017, Respondent emailed to Appellant Purchase Order 17-01727 (dated March 29, 2017) (the “March Purchase Order”). (Motion to Stay and Compel Arbitration, ¶2; Ex. A). The March Purchase Order described the scope of work Appellant was to perform for the Project for a total price of \$5,318,283.77 (the “Original Contract”). (Motion to Stay and Compel Arbitration, ¶2, Ex. A). Following receipt of the March Purchase Order, Appellant continued to perform as requested by Respondent and commenced additional work consistent with the March Purchase Order. (Piper Affidavit, ¶¶15).

Neither the Letter of Intent nor the March Purchase Order contained an arbitration provision. (Piper Affidavit, ¶¶9, 14; Transcript, p. 12, ll. 1-5).

On or about May 9, 2017 – more than three (3) months after the Notice to Proceed – Respondent sent to Appellant a second purchase order, Purchase Order 17-01727 R2, that added to the Original Contract a line item for “Estimated Taxes (7%) and 2% Bond Fee” totaling \$336,046.23 (the “Revised Purchase Order”). (Motion to Stay and Compel Arbitration, ¶5; Ex. B).

For the first time, the Standard Terms and Conditions accompanying the Revised Purchase Order sought to introduce an arbitration provision into the parties’ contract. (Motion to Stay and Compel Arbitration, ¶6, Ex. A; Transcript, p. 12, ll. 6-7).

Appellant performed its obligations under the parties' agreement. (Complaint, ¶16). Various disputes arose between Appellant and Respondent regarding the amounts due Appellant under the parties' agreement, and Appellant commenced this action to collect payment for the work it performed at the request of Respondent. (Complaint, ¶17; Motion to Stay and Compel Arbitration, ¶10).

## ARGUMENT

This case presents the issue of whether a valid arbitration agreement exists between the parties – specifically, whether an arbitration provision inserted following an agreement on all material terms of a subcontract fails for lack of consideration and is thus unenforceable. More specifically, the determinative question before this Court is whether the addition of estimated taxes and a bond fee to a previously agreed-upon and accepted contract constitutes valuable consideration sufficient to enforce the arbitration provision at issue in this case. As set forth herein, because the parties had, prior to May 2017, reached an agreement on all material terms and Respondent provided no consideration for any amendment at the time the arbitration provision was introduced, the arbitration provision at issue in this case is unenforceable, and the trial court erred in compelling arbitration.

Because the subcontract at issue in this case involves interstate commerce, the Federal Arbitration Act (“FAA”) – not the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240 – governs the parties’ obligation to arbitrate any dispute arising of the subcontract. However, South Carolina law regarding contract formation dictates whether the parties entered into a valid agreement to arbitrate. See Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC, 356 S.C. 328, 334-35, 588 S.E.2d 617, 620-21 (Ct. App. 2003) (“The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties.... The determination of whether an arbitration agreement exists is ‘a matter to be forthwith and summarily tried by the Court.’ ... Courts ‘should apply ordinary state-law principles that govern the formation of contracts’ in determining whether an agreement to arbitrate exists.”) (citations omitted).

Here, Appellant presented sufficient, credible, and uncontested evidence to prove it received no consideration in exchange for purportedly agreeing to arbitrate a dispute arising of the subcontract in Hawaii. Therefore, the arbitration provision is not supported by valuable consideration and is unenforceable. The trial court order granting Respondent's Motion to Stay and Compel Arbitration should be reversed, and the parties allowed to litigate their dispute in Lexington County.

**I. BECAUSE THE ARBITRATION PROVISION WAS NOT SUPPORTED BY VALUABLE CONSIDERATION, APPELLANT CANNOT BE COMPELLED TO ARBITRATE ITS DISPUTE IN HAWAII.**

The FAA provides “a written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... or an agreement in writing to submit to arbitration an existing controversy arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C.A. § 2. While the effect of § 2 is to “create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA],” the “savings clause [of § 2] permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses....’” Noohi v. Toll Bros., Inc., 708 F.3d 599, 606 (4<sup>th</sup> Cir. 2013), citing AT&T Mobility, LLC v. Concepcion, 131 S.Ct. 1740, 1746 (2011). Ergo, any common law defense to enforcement of a contract likewise may invalidate an agreement to arbitrate. See, e.g., id. at 614 (holding arbitration provision was unenforceable for lack of mutual consideration under Maryland contract law).

Under South Carolina law, the formation of a valid, enforceable contract requires: 1) an offer; 2) acceptance; and 3) valuable consideration. Sauner v. Pub. Serv. Auth., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). “Valuable consideration to support a contract may consist of some

right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.” Prestwick Golf Club v. Prestwick Ltd. P’ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998).

As set forth above, it is not disputed that neither the Letter of Intent nor the March Purchase Order which Appellant accepted and commenced work thereunder contained an arbitration provision. Rather, it was only when Respondent sent on or about May 9, 2017, the Revised Purchase Order (to include estimated taxes and a bond fee) that Respondent first introduced terms and conditions that included an arbitration provision. By then, however, Appellant and Respondent already had agreed on the scope of work to be performed by Appellant and, more significantly, Appellant had commenced – at significant expense – the work requested by Respondent.

Stated differently, the arbitration provision at issue in this matter was proposed by Respondent after the parties were otherwise bound to one another. After all, on or about February 6, 2017, Appellant already had received from Respondent a Notice to Proceed and, as a result, issued its own purchase order to a third-party vendor for steel detailing consistent with Respondent’s request and specifications.

Following delivery of the Letter of Intent and March Purchase Order, Appellant continued to commit resources at significant expense to fulfill the scope of work agreed to between the parties, all of which was accepted and performed prior to any attempt to include an arbitration provision in any agreement between the parties.

It was only after Appellant’s commitment to the Project; acceptance of the scope of work; contracting with third parties; and incurring significant expense that Respondent attempted to introduce the arbitration provision at issue in this action.

Respondent's subterfuge and attempt to compel Appellant to submit its claims to arbitration in Hawaii was never a term of the parties' agreement at the time Respondent issued the Notice to Proceed, the Letter of Intent, or the March Purchase Order. Construing the terms of the parties' agreement on the face of the applicable documents, it is apparent that Appellant received nothing in exchange for its apparent assent to the inconspicuous arbitration provision. Appellant received no benefit for the newly inserted arbitration provision given that all material changes to the parties' contract were resolved as of the "04/13/17 Revision" and Change Order #1 of the same date.

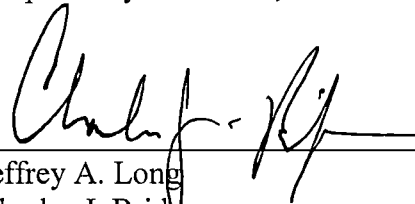
Thus, the Revised Purchase Order lacked valuable consideration to support any amendment to the parties' agreement to include an arbitration provision.

## CONCLUSION

The record lacks any basis to conclude that Appellant received something – anything – in exchange for agreeing to arbitrate any dispute arising of the subcontract in Hawaii. Appellant accepted the scope of work and began performing work pursuant to the subcontract in or around February 2017 – at least three (3) months before Respondent presented a version of the parties' agreement that included the inconspicuous arbitration provision at issue. Therefore, because the arbitration provision was not supported by adequate consideration, the trial court's Order granting the Motion to Stay and Compel arbitration should be reversed.

January 7, 2020

Respectfully submitted,



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Nan, Inc.; Fidelity Deposit Company  
of Maryland; and Zurich American Insurance  
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Defendants,

Of whom Nan, Inc., is the,

Respondent.

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**PROOF OF SERVICE**

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I certify that I have served the following on Defendants/Respondent, by depositing a copy in the United States Mail, postage prepaid, on January 7, 2020, addressed to their attorney of record, Bryan P. Kelley, Elmore Goldsmith, P.A., Post Office Box 1887, Greenville, South Carolina 29602:

1. Initial Brief of Appellant;
2. Designation of Matter to be Included in the Record on Appeal.

January 7, 2020

  
\_\_\_\_\_  
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January 7, 2020

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**VIA UPS OVERNIGHT**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

**Re: Acadian Steel, Inc. v. Nan, Inc.  
Lexington County Case No. 2019-CP-32-01927  
Appellate Case No. 2019-001760**

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter is an original and a copy of the following:

- (1) Initial Brief of Appellant;
- (2) Designation of Matter to be Included in the Record on Appeal; and
- (3) Proof of Service of the Initial Brief of Appellant on the Defendants/Respondent.

If the enclosed meet with your approval, please file the originals with the Court, and return the file-stamped copies to our office in the enclosed self-addressed, stamped envelope.

Please do not hesitate to contact us with any questions and thank you for your assistance with this matter.

Sincerely,

Noelle G. Robertson  
Certified Paralegal

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JAN 08 2020

**SC Court of Appeals**

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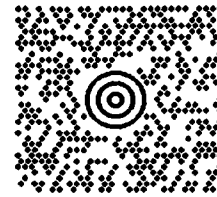
cc: Bryan P. Kelley, Esq.  
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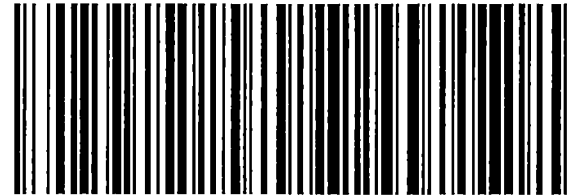
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