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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Charleston County
Court of Common Pleas
Jean Hoefler Toal, Circuit Court Judge**

Opinion No. 2019-UP-413 (S.C. Ct. App. filed December 31, 2029)

Andrew and Kimberly McIntire, Respondents,

v.

Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshal Construction; Coast Window & Door Center of Charleston, LLC; Carolina Window & Millwork, L LC c/k/a/ Carolina Window & Millwork – Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co., Inc., Jerry Comer d/b/a Jerry’s Tile & Marble, LLC; Lowcountry Fireplaces, Inc., Carolina Pest Solutions, Inc.; New South Construction Supply, LLC,

Defendants,

Of which Seaquest Development Company, Inc, is thePetitioner.

**RESPONDENTS’ OPPOSITION TO
APPELLANT’S PETITION FOR WRIT OF CERTIORARI**

Respectfully submitted,

EPTING & RANNIK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES **ii**

INTRODUCTION **1**

COUNTERSTATEMENT OF THE CASE..... **1**

ARGUMENT..... **3**

I. Petitioner’s Contentions Regarding the Form of the Subject Order Are Without Merit **3**

II. The Court of Appeals Properly Held That Compliance With the Act Is for the Arbitrators to Decide **4**

 A. The Dispute is Arbitrable 4

 B. Once Arbitrability Is Established, All Other Matters Are for the Arbitrators... 7

III. The Trial Court Erred in Granting Petitioner’s Motion to Dismiss..... **7**

 A. The Act Does Not Authorize Dismissal 8

 B. Compliance With the Act Remains Possible..... 8

CONCLUSION **10**

TABLE OF AUTHORITIES

Cases

Cent. W. Va. Energy, Inc. v. Bayer Cropscience LP, 645 F.3d 267 (4th Cir. 2011) 7

Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010)..... 8, 10

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S. Ct. 909 (1964) 7

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007)..... 5

Wilson v. Willis, 416 S.C. 395, 786 S.E.2d 571 (Ct. App. 2016) 5

Statutes

9 U.S.C. § 3..... 6

9 U.S.C. § 4..... 6

S.C. Code Ann. § 15-48-20..... 7

S.C. Code Ann. § 40-59-810 *et seq.* 1, 2, 8

S.C. Code Ann. § 40-59-830..... 8

S.C. Code Ann. § 40-59-850..... 9

Rules

Rule 220(a), S.C.A.C.R. 3

Rule 220(b), S.C.A.C.R. 4

Rule 34(a)(2), S.C.R.C.P. 9

INTRODUCTION

It is well-settled that, when presiding over a motion to compel arbitration, a court's function is limited to determining the question of arbitrability. The parameters of that question are well defined — (i) is there a valid agreement to arbitrate, and (ii) if so, is the dispute in question encompassed within the scope of that agreement? All other matters, including whether procedural prerequisites for a particular cause of action have been satisfied, are left to the arbitrators to decide.

The Court of Appeals correctly held that this matter is arbitrable and, therefore, that the question of compliance with the Right to Cure Act (S.C. Code § 40-59-810 to -860 (the "Act")) was such a procedural prerequisite for the arbitrators, not the trial court, to decide in the first instance. Accordingly, the Court of Appeals did not reach the question of whether a trial court may dismiss a case for a purported failure to comply with the Act. Had the Court of Appeals reached the question, however, this Court's prior discussion of the Act evidences that the answer is "no."

The Court of Appeals did not err, and the Petition for Certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

In 2007, Andrew and Kimberly McIntire ("Respondents" or "the McIntires") contracted with Petitioner Seaquest Development Company, Inc. ("Seaquest") for the construction of a residence in Mount Pleasant, South Carolina. (**R. p. 158**). Seaquest was the general contractor for the project, which was completed and a certificate of occupancy issued in September 2008. (**Supp. R. pp. 011**).

In September of 2013, the McIntires' residence was struck by lightning, blasting a hole in the roof and causing substantial fire damage. In the course of inspecting the damage caused by the lightning strike, the McIntires first discovered numerous and significant construction defects.

The McIntires notified Seaquest and at least one subcontractor of the defects they had discovered but received no response. Initiating repairs to the damaged roof was a matter of urgency to prevent further damage to the structure. Accordingly, concerned about further damage and not contemplating legal action, the McIntires hired another contractor to repair the roof. In the course of the repairs, additional construction defects were discovered and addressed by the second contractor, including structural, water, and plumbing issues.

The McIntires filed suit against Seaquest and its various subcontractors on April 8, 2016 — within the three-year statute of limitations and the eight-year statute of repose. (**R. p. 015**). The last defendant was served on July 20, 2016 (**R. p. 030**), and the McIntires filed a motion to compel arbitration on July 27, 2016 (**R. p. 036**). They later filed a motion for a protective order on August 15, 2016 (**R. p. 060**), protecting the McIntires from participating in discovery pending their motion to compel arbitration. The McIntires never engaged in discovery and did not use any of the judicial machinery except to ask the Court to compel arbitration of the dispute.

Seaquest moved to dismiss or stay proceedings on June 17, 2016 (**R. p. 031**), alleging that Appellants had failed to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act. S.C. Code Ann. § 40-59-810 *et seq.* (hereinafter the “Right to Cure Act” or “the Act”). A hearing was held on October 13, 2016 encompassing the Seaquest's motion to dismiss, the McIntires' motion to compel arbitration, and various motions by subcontractors (**R. p. 064**).

On January 4, 2017, Justice Toal requested that Seaquest provide the Court with an order (**R. p. 117**), which was circulated to the Court and counsel of record on January 13, 2017 (**R. p. 122**). The McIntires requested an opportunity to object to the proposed order on January 17, 2017 (**R. p. 140**), and Justice Toal granted the request and gave the McIntires until January 20, 2017 to lodge their objections (**R. p. 147**), which were lodged on January 20, 2017 by letter to Justice Toal with counsel of record copied (**R. p. 154**).

On May 1, 2017, the instant order—unchanged from Respondent’s proposed order—was filed dismissing the case, denying the McIntires’ motion to compel arbitration, and denying the subcontractors’ motions as moot (**R. p. 001**); however, the order had been signed by Justice Toal on January 17, 2017 — three days before the Court received the McIntires’ objections that Justice Toal had authorized.

The McIntires timely appealed. The Court of Appeals reversed and remanded the trial court by order dated December 31, 2019, finding that the case must be referred to arbitration for all purposes. S.C. Ct. App. Opinion 2019-UP-413 (“**Subject Opinion**”).

ARGUMENT

I. Petitioner’s Contentions Regarding the Form of the Subject Order Are Without Merit

Petitioner contends that (i) the Court of Appeals is not authorized to issue unpublished opinions and (ii) the Court of Appeals was required to reach the merits of the Right to Cure issue. Both contentions are erroneous.

Rule 220(a) states: “The appellate court shall make its decisions in writing by published opinions or memorandum opinions. . . .” Rule 220(a), S.C.A.C.R. On its very face, then, the Rule authorizes the appellate courts, including the Court of Appeals, to issue unpublished, memorandum decisions, as has been the practice for decades.

Rule 220(b) states:

In every decision rendered by an appellate court, every point distinctly stated in the case *which is necessary to the decision of the appeal* and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case.”

Rule 220(b), S.C.A.C.R. (emphasis added). The Court of Appeals found that the trial court erred in denying the motion to compel arbitration and, therefore, that the trial court erred in reaching any question beyond that of arbitrability. Because the trial court's ruling was reversible in its entirety on that ground alone, it was not necessary for the Court of Appeals to reach additional issues, which are for the arbitrators to decide (*see infra*).

Petitioner's arguments regarding the form of the subject order are without merit.

II. The Court of Appeals Properly Held That Compliance With the Act Is for the Arbitrators to Decide

A. The Dispute is Arbitrable

There is no disagreement that the Parties have a valid contract or that the contract contains an enforceable arbitration provision. The contract is a standard form AIA Document A101-1997 that incorporates A201-1997, section 4.6 of which broadly provides that “[a]ny claim arising out of or related to the Contract . . . [is] subject to arbitration.” (**R. p. 199**). There is likewise no disagreement that the dispute between the parties “aris[es] out of or relate[s] to the Contract.” The matter is plainly arbitrable.

1. The McIntires Did Not Waive their Arbitration Right¹

The case must be referred to arbitration unless the right to arbitrate was waived. The Court of Appeals correctly found that the McIntires did not waive their arbitration rights.

¹ Courts in this state consider only three factors to determine whether a party has waived its right to arbitrate: (i) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel; (ii) whether the party requesting

a. The Trial Court's Erroneous Findings

The trial court's opinion, drafted by Petitioner and adopted by the trial court,² contained statements upon which the waiver finding was based that were inaccurate, entirely unsupported in the record, and properly rejected by the Court of Appeals. For example, the order stated that "the McIntires engaged in extensive discovery" and they "retained forensic and construction liability and repair experts . . . related to [the] litigation" prior to demanding arbitration. (**R. p. 010**).

The Court of Appeals properly rejected these statements. The McIntires engaged in no in discovery *at all*, let alone "*extensive*" discovery; indeed, the McIntires moved for protection from participation in discovery specifically to avoid waiver of their arbitration right. *See Subject Opinion* at 5. The McIntires did not retain any formally- or informally-consulted expert prior to the filing of the motion; although even if they had, this would not constitute a waiver of the arbitration right, as experts are permitted in arbitration too. In addition, the demand for arbitration was timely; the motion to compel was filed within two days of confirmation of service of the summons and complaint upon the last defendant. *Id.*

arbitration engaged in extensive discovery before moving to compel arbitration; and (iii) whether the non-moving party was prejudiced by the delay in seeking arbitration. *Wilson v. Willis*, 416 S.C. 395, 420–21, 786 S.E.2d 571, 584 (Ct. App. 2016) (citing *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007)).

² There were notable inconsistencies with the trial court's order. First, the trial court granted the McIntire's request to file objections to the proposed order drafted by Seaquest. **R. p. 147**. However, the trial court signed the order signed on January 17, 2017, prior to the January 20, 2017 objections being received and reviewed by the court. **R. pp. 001, 154**. Second, the substance of the order is entirely inconsistent with the trial court's orientation during oral argument. (**R. pp. 064-116**). For context, Justice Toal's law clerk went out on maternity leave in January 2017.

b. Filing Suit

Filing a civil action does not itself constitute a waiver of arbitration rights, especially when the purpose of filing the suit is to enforce that right. It is a logical proposition that the filing of suit in order to obtain an order compelling arbitration does not waive the right to arbitrate.³

The FAA, which the parties agree governs this dispute, provides that “*a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.*” 9 U.S.C. § 4 (emphasis added). Section 3 of the FAA states that:

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

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

Accordingly, there was no valid basis for the trial court’s finding of waiver, and the Court of Appeals did not err.

³ See **Hearing Transcript** (Oct. 13, 2016) 34:2–3 (**R. pp. 097**) - (the trial Court acknowledging that the McIntires “brought a lawsuit asking that arbitration be compelled”).

B. Once Arbitrability Is Established, All Other Matters Are for the Arbitrators

The United States Supreme Court has explained that, while the “gateway dispute about whether the parties are bound by a given arbitration clause” is for the court, all “procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide.”⁴ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (emphasis in original, quotation marks and citation omitted).

“Procedural” questions for the arbitrator, often referred to as questions of “procedural arbitrability,” include “*whether prerequisites* such as time limits, notice, laches, estoppel, *and other conditions precedent to an obligation to arbitrate have been met.*” *Id.* at 85 (emphasis added); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S. Ct. 909, 918–19 (1964) (“Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, ‘procedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.”); *see also Cent. W. Va. Energy, Inc. v. Bayer Cropscience LP*, 645 F.3d 267, 272–74 (4th Cir. 2011) (discussing the difference between questions of procedure and questions of arbitrability).

Accordingly, the trial court erred in reaching any matters beyond the question of arbitrability, and the Court of Appeals properly reversed the trial court.

III. The Trial Court Erred in Granting Petitioner’s Motion to Dismiss

Because the Court of Appeals properly found that the question of compliance with the Act was for the arbitrators, it did not reach the question of whether the Act authorizes dismissal

⁴ The South Carolina Uniform Arbitration Act requires the same: “On application of a party showing an agreement described in Section 15-48-10, and the opposing party’s refusal to arbitrate, the court *shall* order the parties to proceed with arbitration” S.C. Code Ann. § 15-48-20 (emphasis added).

of an action. This Court need not reach it either, as this Court has previously delineated the scope of parties' rights and obligations pursuant to the Act. As this Court previously noted, the rights under the Act "are not new substantive rights, but instead represent an effort by the General Assembly to provide the contractors/subcontractors a new procedural timeline for asserting existing litigation rights." *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2011). Likewise, "the Right to Cure Act does not confer any corresponding obligations on the part of the claimant that would not ordinarily be present" *Id.* No further elucidation is necessary.

However, should this Court reach the question, it should find that the Trial Court erred in dismissing the case.

A. The Act Does Not Authorize Dismissal

No provision of the Right to Cure Act authorizes dismissal of a lawsuit for failure to comply with the Act. *See* S.C. Code Ann. § 40-59-810 *et seq.* Rather, Section 40-59-830 of the Act, entitled "Stay of the action upon non-compliance with article," states: "If the claimant files an action in court before first complying with the requirements of this article, on motion of a party to the action, the court shall stay the action until the claimant has complied with the requirements of this article." S.C. Code Ann. § 40-59-830.

B. Compliance With the Act Remains Possible

This Court's prior discussion of the rights and obligations under the Act will guide the arbitrators to find that compliance remains possible for the McIntires.

1. "Cure" Is an Undefined Term

The Act purports to give contractors the right to "cure" defects. The term "cure" is not defined in the Act. However, the language of the Act evidences legislative intent that "cure" not

be limited to meaning “repair.” Section 40-59-850 of the Act notes that a contractor may elect to “offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects.” S.C. Code Ann. § 40-59-850. Thus, the Act contemplates that a contractor can “cure” the defect by settling the claim. That option remains available to Seaquest.

2. The Term “Inspect” is Not Defined in the Act

Section 40-59-850 of the Act also gives contractors the right to “inspect” the defect. The term “inspect” is not defined in the Act either, but nothing in the Act functions to limit the term to meaning a physical inspection of the defect. The defects discovered in the McIntire home were documented and photographed; these records are more than sufficient to allow Seaquest to determine whether it wishes to deny or settle the claim. Thus, Seaquest has not been denied the right to inspect.

Nor is a party to a civil action entitled to inspect a defective condition as a matter of right. A party may demand to inspect property under Rule 34(a)(2), S.C.R.C.P., just like a party can demand the production of documents; if those documents do not exist, however, the rules cannot force a party to provide them. If a defective condition no longer exists—because the property was destroyed completely or it was necessary to repair it immediately to prevent further damage—Rule 34 cannot require a party to make the defective condition available for physical inspection. Seaquest may be entitled to inspect the *property*, as provided for in Rule 34(a)(2); but, as the Act created no new substantive rights or obligations, it does not create an automatic right of physical inspection.

3. Seaquest Is Not Prejudiced by Any Non-Compliance with the Act

As noted by the South Carolina Supreme Court, “the Right to Cure Act does not confer any corresponding obligations on the part of the claimant that would not ordinarily be present: the claimant is not required to accept any offer by the contractor/subcontractor to remedy the

alleged defect, and he or she is not required to accept an offer of settlement of the claim.”

Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 573, 703 S.E.2d 197, 202 (2010). Because the McIntires would not be required to accept any offer by Seaquest to repair the defective work at their home, something a homeowner who has suffered from a contractor’s negligence is unlikely to do anyway, Seaquest cannot demonstrate prejudice from any failure to comply with the Act.

CONCLUSION

The McIntires moved to compel arbitration. The trial court’s function was therefore limited to determining whether any reading of the parties’ arbitration agreement could cover the parties’ dispute. The answer, as the Court of Appeals found, is plainly “yes.” Accordingly, all remaining matters—including whether the McIntires complied or still can comply with the Act—are for the arbitrators to decide in the first instance. The Court of Appeals did not err, and the Petition for Certiorari should be denied.

Respectfully submitted,

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This 22nd day of July, 2020
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