

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No.: 2014-CP-08-2424
Appellate Court Case No. 2016-2339

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SEP 07 2017

SC Court of Appeals

Patricia Damico, and Lerma Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins Respondents,
v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale, Landscaping LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC and Civil Site Environmental are Respondents,

And
Lennar Carolinas, LLC Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP, ... Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource Southeast Group, LLC, are also Respondents,

And

Décor Corporation Fourth-Party Plaintiff,
v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidni Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Diwinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4 Fourth-Party Defendants.

**RESPONDENTS KNIGHT'S CONCRETE PRODUCTS, INC.
AND KNIGHT'S REDI-MIX, INC.'S
FINAL BRIEF**

Rogers E. Harrell, III, Esquire
MURPHY & GRANTLAND, P.A.
4406-B Forest Drive (29206)
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1241
(803) 782-4140 (facsimile)
Attorney for Knight's Concrete Products, Inc. and
Knight's Redi-Mix, Inc.

Zachary James Closser, Esquire
PO Box 40578
Charleston SC 29423-0578
zclosser@scnlaw.com
843-760-0220

Samuel Melvil Wheeler, Esquire
7455 Cross Country Road, Suite 1
PO Box 40578
Charleston SC 29423-0578
swheeler@scnlaw.com
843-760-0220

Steven L. Smith, Esquire
Smith Closser, PA
PO Box 40578
Charleston SC 29423-0578
ssmith@scnlaw.com
843-760-0220

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STATEMENT OF THE CASE

This matter arises out of alleged construction deficiencies in a community of single-family homes known as The Abbey at Spring Grove Plantation in Moncks Corner, South Carolina. Spring Grove Plantation Development Inc. ("Spring Grove Development") was the original owner of the land on which the homes are currently located. Spring Grove Development sold the land which now is known as The Abbey to Lennar Carolinas, LLC ("Lennar"). Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc. ("Knight's Redi-Mix") are alleged to have manufactured and delivered ready mix concrete pursuant to a Business Partners Agreement with Lennar, during the construction The Abbey ("Project").

On December 12, 2014, Patricia Damico and Lenna Lucas, individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis - Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins ("plaintiffs/owners") of the homes initiated a lawsuit against Lennar, Spring Grove Development and others. (R. pp. 24-41). On February 17, 2015, Lennar filed its Answer, Cross-Claims, and Third-Party Complaint. (R. pp. 42-74). Lennar filed a Motion to Compel Arbitration on June 1, 2015. (R. pp. 257-261).

The owners filed an Amended Complaint on November 23, 2015. (R. pp. 75-108). Lennar amended its Motion to Compel Arbitration on March 30, 2016, wherein it requested the circuit court to compel the owners, Spring Grove Development, and the subcontractors to arbitration. (R. pp. 262-270).

Spring Grove Development filed a Memorandum in Opposition to the Amended Motion to Compel Arbitration and a hearing on Lennar's Motion to Compel Arbitration was held on April 11, 2016. (R. pp. 2587-2593). The Circuit Court heard arguments from all interested

parties and duly considered the same. (R. p. 3). The Circuit Court then issued an order denying Lennar's Motion to Compel on September 19, 2016. (R. pp 4-23).

Lennar filed a motion to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on October 3, 2016. (R. pp. 2553-2572). Spring Grove Development also filed a Rule 59(e) motion asking the court to address Lennar's motion as it related to the alleged arbitration agreement between Lennar and Spring Grove Development. (R. pp. 2594-2599). On October 26, 2016, the Circuit Court issued a Form 4 Order (the "Form 4 Order") denying all motions to reconsider. (R. p. 3) This appeal followed.

This appeal concerns whether Plaintiffs/Owners must arbitrate their construction defect claims against Lennar Carolinas, LLC ("Lennar") and, by extension, whether Lennar's third-party claims against Knight's Redi-mix must be arbitrated. By failing to raise its substantive arguments in support of its motion to compel arbitration as to Knight's Redi-mix and the other subcontractors in its issues on appeal or in the arguments in its brief, Lennar abandoned the issue. Nonetheless, to the extent this Court elects to consider and rule on the matter, Knight's Redi-mix may be compelled to arbitrate only: (A) pursuant to the agreement in place at the time of Knight's Redi-mix's work on the project, (B) if Plaintiffs/Owners and Lennar must also arbitrate the disputes between them, and (C) pursuant to the Federal Arbitration Act.

FACTS AND PROCEDURAL HISTORY

Knight's Redi-mix entered into a Business Partners Agreement with Lennar on March 13, 2008. (R. pp. 1288-1299). The Business Partners Agreement includes the following arbitration provision contained on page seven:

**14. ARBITRATION: IF A CONTROVERSY OR CLAIM
ARISES OUT OF OR RELATED TO THIS AGREEMENT**

AND THE PARTIES CANNOT RESOLVE THE MATTER BETWEEN THEMSELVES WITH SIXTY (60) DAYS AFTER CONTRACTORS IS FIRST PROVIDED WRITTEN NOTICE OF THE CLAIM OR CONTROVERSY BY BUSINESS PARTNER, THE PARTIES AGREE TO TRY IN GOOD FAITH TO RESOLVE THE DISPUTE BY MEDIATION UNDER THE CONSTRUCTION INDUSTRY MEDIATION RULES OR THE AMERICAN ARBITRATION ASSOCIATION. IF NOT RESOLVED BY MEDIATION, THE DISPUTE SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION, AND JUDGMENT UPON THE AWARD RENDERED BY THE ARBITRATOR(S) MAY BE ENTERED IN ANY COURTS HAVING JURISDICTION THEREOF. SHOULD A DISPUTE ARISE BETWEEN CONTRACTOR AND A BUYER OF A RESIDENCE REGARDING MATERIALS SUPPLIED OR WORK PERFORMED BY THE BUSINESS PARTNER, BUSINESS PARTNER AGREES TO PARTICIPATE IN, AND BE BOUND BY, ARBITRATION PROCEEDINGS BETWEEN CONTRACTOR AND THE BUYER.

Operating under the terms of the Business Partner Agreement, Knight's Redi-mix manufactured and delivered ready mix concrete to the Project

ARGUMENT

I. LENNAR HAS WAIVED AND ABANDONED ITS ARGUMENTS THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO KNIGHT'S REDI-MIX.

While Lennar addressed the Circuit Court's ruling denying the motion to compel arbitration as to Knight's Redi-mix and the other subcontractors on a procedural basis, Lennar failed to make any substantive arguments or provide citations to case law in support of its motion as to Knight's Redi-mix in its appeal brief. "[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106

n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) (citing Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989); Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991)).

Knight's Redi-mix agrees with Lennar's procedural concern that the Order does not make specific findings based on the arguments presented between Lennar and Knight's Redi-mix. In its Rule 59(e) motion, Lennar also asked the trial court to articulate the basis for its decision as to Knight's Redi-mix and other subcontractors. (R. pp. 1035-1043). These motions were denied in the Form 4 Order. (R. p. 3.)

The filing of the Rule 59(e) motion, although an important first step, is not the only action a party must take in preserving an issue on appeal. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). Although it could be argued Lennar fulfilled its duty to bring its substantive arguments as to Knight's Redi-mix before the circuit court in its Motion to Reconsider by referencing the "the reasons previously articulated in writing and at the hearing on the Motion," this broad, general statement is not sufficient to preserve the arguments in the appeal. (R. p. 2572). In order to bring the issue before this Court, Lennar was obligated to put forth each of its substantive arguments why its claims against Knight's Redi-mix are subject to arbitration along with citations to supporting case law. Lennar's brief contains only some cursory assertions that the subcontractors entered into various contracts which contain arbitration clauses, but it does not specifically set forth any arguments as to Knight's Redi-mix nor does it contain applicable references to supporting authority. In fact, Lennar's brief even fails to specify which of the several agreements it

mentions form the basis for its assertion that its claims against Knight's Redi-mix must be submitted to arbitration. Accordingly, this Court should find that Lennar has waived and abandoned the issue as to whether it can compel Knight's Redi-mix to arbitrate the claims in this matter. See Rule 208(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.")

II. IF THIS COURT ELECTS TO RULE ON WHETHER AND UNDER WHAT TERMS KNIGHT'S REDI-MIX MUST ARBITRATE, THE COURT SHOULD FIND THAT LENNAR MAY COMPEL KNIGHT'S REDI-MIX TO ARBITRATE THIS ACTION ONLY: (A) PURSUANT TO THE BUSINESS PARTNER AGREEMENT, (B) IF LENNAR AND PLAINTIFFS MUST ALSO ARBITRATE, AND (C) PURSUANT TO THE FEDERAL ARBITRATION ACT.

If the Court finds that Lennar has not abandoned the issue, the Court should find that the Circuit Court properly denied Lennar's motion to compel Knight's Redi-mix to arbitrate the claims when it denied Lennar's motion as to Plaintiffs. Arbitration Agreements are required to meet the basic tenets and requirements of contract law. Towles v. United HealthCare Corp., 338 S.C. 29, 37, 529 S.E.2d 839, 844 (Ct. App. 1999). Additionally, arbitration is a matter of contract, and a court's evaluation of the enforceability of an arbitration agreement is guided by the principles of contract law. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). Under South Carolina common law, 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). A party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007).

With these guiding principles, the Court must examine the Agreements to determine

the limited circumstances under which the parties agreed to submit any dispute between them to arbitration.

- A. Lennar may compel Knight's Redi-mix to arbitrate only if Plaintiffs are required to arbitrate their claims against Lennar.**

The Business Partner Agreement, which, for the reasons set forth below, is the only arbitration provision governing Knight's Redi-mix's materials supplied to the Project, unambiguously provides that Lennar may only compel Knight's Redi-mix to arbitrate if Lennar and Plaintiffs must arbitrate. Specifically, the arbitration provision provides as follows:

THE DISPUTE SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION

(R. p. 1294). (emphasis added).) As applied to the circumstances in this case, the foregoing provision unambiguously demonstrates Knight's Redi-Mix and Lennar agreed to resolve their disputes in the same forum in which the disputes between Lennar and Plaintiffs are resolved. Thus, if Lennar is unable to enforce its arbitration provisions against Plaintiffs, it cannot independently compel Knight's Redi-mix to submit to arbitration, because the arbitration provision in the applicable contract is derivative and, therefore, does not provide for arbitration without a third-party claim being adjudicated in the same action. Thus, as it relates to Knight's Redi-mix, Lennar's Motion to Compel fails unless it successfully compels Plaintiffs to arbitrate.

- B. Lennar may compel Knight's Redi-mix to arbitration only pursuant to the Federal Arbitration Act, because the arbitration provisions in the Business Partner Agreement do not meet the requirements of the South Carolina Arbitration Act.**

Under the South Carolina Uniform Arbitration Act ("SCUAA"), notice that a contract is subject to arbitration "shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. Code Ann. § 15-48-10(a). These requirements are enforced strictly and literally. See Soil Remediation Co. v. Nu-Way Envtl., 323 S.C. 454, 456-58, 476 S.E.2d 149, 150-51 (1996) (finding that an arbitration provision which was not underlined did not meet the requirements of S.C. Code Ann. § 15-48-10(a)). The Business Partner Agreement does not include arbitration provisions on the first page of the agreement as required by § 15-48-10(a). (R. p. 1035.) Accordingly, the Business Partner Agreement does not contain an arbitration provision enforceable under the SCUAA. Thus, in the event Lennar and Plaintiffs must arbitrate, Lennar may compel Knight's Redi-mix to arbitrate only pursuant to the FAA.

CONCLUSION

For the foregoing reasons, Knight's Redi-mix respectfully submits that the Court should affirm the ruling of the trial court denying Lennar's motion to compel Knight's Redi-mix to submit this matter to arbitration.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to read 'Rogers E. Harrell, III', written over a horizontal line.

Rogers E. Harrell, III, Esquire

4406-B Forest Drive (29206)

Post Office Box 6648

Columbia, South Carolina 29260

(803) 782-4100, ext. 1210

(803) 782-4140 (facsimile)

Email: rharell@murphygrantland.com

**Attorney for Knight's Concrete Products, Inc.
and Knight's Redi-mix**

September 6, 2017

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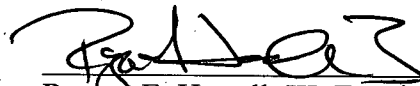
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CERTIFICATE OF COUNSEL

In accordance with Rule 210(c), SCACR, the undersigned certifies that the Final Brief of Respondent complies with the Supreme Court Order of April 15, 2014.



Rogers E. Harrell, III, Esquire
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1241
rharrell@murphygrantland.com

Attorneys for Respondent

September 6, 2017

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