

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

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

Patricia Damico, and Lenna Lucas, Individually and on behalf of 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,

Of which Lennar Carolinas, LLC is

Appellant,

and

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,

Lennar Carolinas, LLC,

Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC,
Geometrics Consulting, LLC, Land/Site Services, Inc., Myers
Landscaping, Inc., A.C.&A Concrete, Inc., Knight's Concrete Products,
Inc., Knight's Red-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, Décor Corporation, DVS, Inc., Raul Martinez Masonry,

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SC Court of Appeals

LLC, Builders FirstSource-Southeast Group, LLC, and Lowcountry 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., Knights Concrete Products, Inc., Knights 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, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource Southeast Group, LLC, are

Respondents,

South Carolina Exteriors, LLC, Fourth-Party Plaintiff,

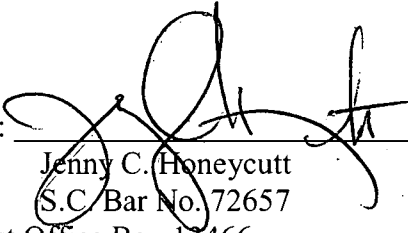
Respondent,

v.

Juan Garza Ramos d/b/a Juan Constructors, Fourth Party Defendants.

RESPONDENT SOUTH CAROLINA EXTERIORS, LLC'S FINAL BRIEF

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September 5, 2017
Charleston, South Carolina

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER LENNAR HAS WAIVED AND ABANDONED THE ISSUE THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO SOUTH CAROLINA EXTERIORS BY FAILING TO INCLUDE ARGUMENTS AND SUPPORTING CASE LAW ADDRESSING THE ISSUE IN ITS APPEAL BRIEF.
- II. TO THE EXTENT THE ISSUE HAS NOT BEEN WAIVED, WHETHER THE TRIAL COURT'S DENIAL OF LENNAR'S MOTION TO COMPEL AS TO SOUTH CAROLINA EXTERIORS SHOULD BE UPHELD BECAUSE THE ARBITRATION PROVISION IN THE ONLY APPLICABLE CONTRACT IS DERIVATIVE.

STATEMENT OF THE CASE

This appeal is about whether Plaintiffs must arbitrate their construction defect claims against Lennar Carolinas, LLC ("Lennar") and, by extension, whether Lennar's third-party claims against South Carolina Exteriors, LLC ("South Carolina Exteriors") must be arbitrated. By failing to raise its substantive arguments in support of its motion to compel arbitration as to South Carolina Exteriors 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, South Carolina Exteriors may be compelled to arbitrate only: (A) pursuant to the agreement in place at the time of South Carolina Exteriors' work on the project, (B) if Plaintiffs and Lennar must also arbitrate the disputes between them, and (C) pursuant to the Federal Arbitration Act.

FACTS AND PROCEDURAL HISTORY

I. Factual Background

Plaintiffs are a putative class of owners of single family residences in a development known as The Abbey at Spring Grove Plantation ("The Abbey"). (R. 24). The motion for class certification has not been granted and there are currently nine residences at issue in the suit. (R. 75). South Carolina Exteriors is alleged to have been a roofing subcontractor providing related waterproofing, flashings and components of the general contractor, Lennar, during the construction (the "Project") of Plaintiffs' residences. (R. 109). According to SC Exteriors' records, it performed work at The Abbey through its subcontractor Juan Garza Ramos d/b/a Juan Contractors on three of the subject residences between February and April 2013. (R. 2862).

On April 12, 2010, South Carolina Exteriors entered a Subcontract Agreement with Lennar (the "2010 Agreement"). (R. 1490). The 2010 Agreement includes the following arbitration provision contained on page eight:

14. WAIVER OF JURY TRIAL/ARBITRATION: TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW, THE SUBCONTRACTOR AND THE CONTRACTOR HEREBY EXPRESSLY COVENANT AND AGREE TO WAIVE THE RIGHT TO TRIAL BY JURY IN CONNECTION WITH ANY LITIGATION OR JUDICIAL PROCEEDING RELATING TO OR CONCERNING, DIRECTLY OR INDIRECTLY, THIS AGREEMENT OR THE CONDUCT, OMISSION, ACTION, OBLIGATION, DUTY, RIGHT, BENEFIT, PRIVILEGE OR LIABILITY OF A PARTY, THIS WAIVER OF RIGHT TO TRIAL BY JURY IS SEPERATELY GIVEN AND IS KNOWINGLY, INTENTIONALLY AND VOLUNTARILY MADE BY THE SUBCONTRACTOR AND THE CONTRACTOR, AND BOTH ACKNOWLEDGE THAT SEPARATE AND GOOD AND VALUABLE CONSIDERATION HAS BEEN PROVIDED BY EACH FOR THIS WAIVER. THE SUBCONTRACTOR AND THE CONTRACTOR HAVE HAD AN OPPORTUNITY TO SEEK LEGAL COUNSEL CONCERNING THIS WAIVER. THIS WAIVER IS INTENDED TO AND DOES ENCOMPASS EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A JURY TRIAL WOULD OTHERWISE ACCRUE, THE SUBCONTRACTOR AND THE CONTRACTOR FURTHER CERTIFY AND REPRESENT TO EACH OTHER THAT NO PARTY, REPRESENTATIVE OR AGENT OF THE SUBCONTRACTOR OR THE CONTRACTOR (INCLUDING, BUT NOT LIMITED TO, THEIR RESPECTIVE COUNSEL) HAS REPRESENTED, EXPRESSLY OR OTHERWISE TO THE SUBCONTRACTOR OR THE CONTRACTOR OR TO ANY AGENT OR REPRESENTATIVE OF THE SUBCONTRACTOR OR THE CONTRACTOR (INCLUDING, BUT NOT LIMITED TO, THEIR RESPECTIVE COUNSEL) THAT THEY WILL NOT SEEK TO ENFORCE THIS WAIVER OF RIGHT TO JURY TRIAL, THIS WAIVER SHALL APPLY TO THIS AGREEMENT AND ANY FUTURE AMENDMENTS, SUPPLEMENTS OR MODIFICATIONS OF THIS AGREEMENT. NOTWITHSTANDING THE FOREGOING, IN THE EVENT A CLAIM OR CONTROVERSY ARISES BETWEEN CONTRACTOR AND ANY THIRD PARTY REGARDING MATERIALS SUPPLIED AND/OR WORK PERFORMED BY OR THROUGH SUBCONTRACTOR, AND SUCH CLAIM OR CONTROVERSY IS SUBJECT TO BINDING ARBITRATION BETWEEN CONTRACTOR AND THE THIRD PARTY, SUBCONTRACTOR AGREES TO PARTICIPATE AS A PARTY IN ANY MEDIATION OR ARBITRATION, AND TO BE BOUND BY ANY ARBITRATION PROCEEDINGS OR ARBITRATION RULING IN SUCH ARBITRATION.

(R. 1497).

Operating under the terms of the 2010 Agreement, South Carolina Exteriors provided roofing work at The Abbey from February 2013 to April 2013. (R. 2863-2875). Therefore, the only applicable arbitration provision as to South Carolina Exteriors and Lennar is the clause contained in the 2010 Agreement which states that South Carolina Exteriors is required to submit to arbitration only if Lennar is successful in forcing Plaintiffs to arbitrate their claims.

II. Procedural History

Plaintiffs sued Lennar and others alleging various construction deficiencies in their residences. (R. 24). In turn, in Lennar's Answer to Plaintiffs' First Amended Complaint, Lennar asserted third-party claims against South Carolina Exteriors and other subcontractors for the Project. (R. 109).

On June 1, 2015, Lennar filed a Motion to Compel Arbitration asserting that Plaintiffs' claims were subject to ADR. (R. 259). On March 30, 2016, Lennar filed an Amended Motion to Compel Arbitration ("Lennar's Motion to Compel"), wherein it sought to compel arbitration of its claims against South Carolina Exteriors. (R. 263). Attached to Lennar's Motion to Compel Arbitration was the 2010 Agreement. (R. 1490).

On April 11, 2016, South Carolina Exteriors submitted its Memorandum of Law in Response to Lennar's Motion to Compel. (R. 2837). That same day, at the hearing on Lennar's Motion to Compel, South Carolina Exteriors joined numerous other parties in oral argument. (R. 203).

On September 19, 2016, the circuit court entered an Order (the "Order") denying Lennar's Motion to Compel. (R. 4). While it contained detailed findings supporting its ruling denying Lennar's motion to compel arbitration as to Plaintiffs, the Order was silent as to the arguments

presented between Lennar and South Carolina Exteriors, as well as the other subcontractors. (R. 4). Accordingly, on September 29, 2016, South Carolina Exteriors filed a Motion to Alter or Amend, wherein it respectfully requested the Order be amended to add findings proffered by South Carolina Exteriors. (R. 2844). Likewise, on October 3, 2016, Lennar filed its Motion to Reconsider Order Denying its Motion to Compel Arbitration. (R. 2553). In the last section of its Motion to Reconsider, Lennar sought "clarification and confirmation" as to whether the Order denied Lennar's Motion to Compel as to the subcontractors including South Carolina Exteriors.

On October 26, 2016, the circuit court, without further discussion, reasoning or explanation, issued a Form 4 Order (the "Form 4 Order") denying all motions to reconsider. (R. 3). This appeal followed.

ARGUMENT

I. LENNAR HAS WAIVED AND ABANDONED ITS ARGUMENT THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO SOUTH CAROLINA EXTERIORS.

While it addressed the lower court's ruling denying the motion to compel arbitration as to South Carolina Exteriors 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 South Carolina Exteriors 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)).

South Carolina Exteriors agrees with Lennar's procedural concern that the Order did not make specific findings based on the arguments presented between Lennar and South Carolina

Exteriors. In fact, South Carolina Exteriors moved the circuit court to amend the Order to address the arguments and offered proposed findings. (R. 2844). In its Rule 59(e) motion, Lennar also asked the trial court to articulate the basis for its decision as to South Carolina Exteriors and the subcontractors. (R. 2572). These motions were denied in the Form 4 Order. (R. 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 South Carolina Exteriors 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. 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 South Carolina Exteriors 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 South Carolina Exteriors 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 South Carolina Exteriors must be submitted to arbitration. Accordingly, this Court should find that Lennar has waived and abandoned the issue as to whether it can compel South Carolina Exteriors to arbitrate the claims in this matter.

II. IF THE COURT ELECTS TO RULE ON WHETHER AND UNDER WHAT TERMS SOUTH CAROLINA EXTERIORS MUST ARBITRATE, THE COURT

SHOULD FIND THAT LENNAR MAY COMPEL SOUTH CAROLINA EXTERIORS TO ARBITRATE THIS ACTION ONLY: (A) IF LENNAR AND PLAINTIFFS MUST ALSO ARBITRATE AND (B) 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 South Carolina Exteriors 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." Towlers v. United Health Care Corp., 338 S.C. 29,529 S.E.2d 839 (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, 678 S.E.2d 439 (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, 382 S.E.2d 891 (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 SC, 373 S.C. 144,644 S.E.2d 705 (2007).

With these guiding principles, the Court must examine the Agreement to determine the limited circumstances under which the parties agreed to submit any dispute between them to arbitration.

A. Lennar may compel South Carolina Exteriors to arbitrate only if Plaintiffs are required to arbitrate their claims against Lennar.

The 2010 Agreement is the only arbitration provision governing South Carolina Exteriors' Project work, unambiguously provides that Lennar may only compel South Carolina Exteriors to arbitrate if Lennar and Plaintiffs must arbitrate. Specifically, the arbitration provision provides as follows:

NOTWITHSTANDING THE FOREGOING, IN THE EVENT A CLAIM OR CONTROVERSY ARISES BETWEEN CONTRACTOR AND ANY THIRD PARTY REGARDING MATERIALS SUPPLIED AND/OR WORK PERFORMED BY OR THROUGH SUBCONTRACTOR, AND SUCH CLAIM OR CONTROVERSY IS SUBJECT TO BINDING ARBITRATION BETWEEN CONTRACTOR AND THE THIRD PARTY, SUBCONTRACTOR AGREES TO PARTICIPATE AS A PARTY IN ANY MEDIATION OR ARBITRATION, AND TO BE BOUND BY ANY ARBITRATION PROCEEDINGS OR ARBITRATION RULING IN SUCH ARBITRATION.

(R. 1497). As applied to the circumstances in this case, the foregoing provision unambiguously demonstrates South Carolina Exteriors and Lennar agreed to resolve their disputes in the same forum in which the disputes between Lennar and “any third party” are resolved. Thus, if Lennar is unable to enforce its arbitration provisions against Plaintiffs, it cannot independently compel South Carolina Exteriors to submit to arbitration because the arbitration provision in the applicable contract is derivative and, therefore, does not provide for arbitration without there being a third party claim being adjudicated in the same action. Thus, as it relates to South Carolina Exteriors, Lennar’s Motion to Compel fails unless it successfully compels Plaintiffs to arbitrate.

B. Lennar may only compel South Carolina Exteriors to arbitrate pursuant to the Federal Arbitration Act, because the arbitration provision of the 2010 Agreement does 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 arbitration provision which was not underlined did not meet the requirements of S.C. Code Ann. § 15-48-10(a)).

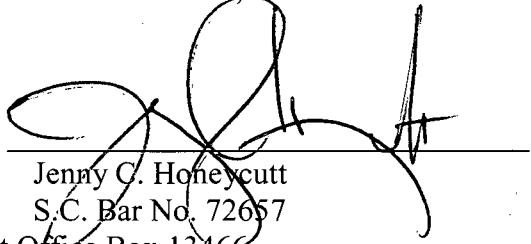
The 2010 Agreement entered into by Lennar and South Carolina Exteriors does not include arbitration provisions on the first page of the agreement as required by § 15-38-10(a). (R. 1490). Accordingly, the agreement does not contain an arbitration provision enforceable under the SCUAA. Thus, in the event Lennar and Plaintiffs must arbitrate, Lennar may compel South Carolina Exteriors to arbitrate only pursuant to the FAA.

CONCLUSION

For the foregoing reasons, South Carolina Exteriors respectfully submits that the Court should affirm the ruling of the trial court denying Lennar's motion to compel South Carolina Exteriors to submit this matter to arbitration.

Respectfully submitted,

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v.

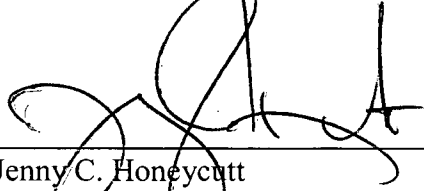
Juan Garza Ramos d/b/a Juan Constructors, Fourth Party Defendants.

**RESPONDENT SOUTH CAROLINA EXTERIORS, LLC'S
CERTIFICATION OF FINAL BRIEF**

I, Jenny C. Honeycutt, do hereby certify that the Final Brief of Respondent South Carolina Exteriors, LLC complies with Rule 211(b) SCACR. Additionally, the undersigned hereby certifies that the Final Brief complies with the Supreme Court Order of April 15, 2014.

Respectfully Submitted,

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