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 Case No. 2016-2339
Case No. 2014-CP-08-2424

Patricia Damico, and Lenna 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 .....Respondent.

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, Inc. and Rick Bryant,

Of which Lennar Carolinas, LLC is.....Appellant.

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, Inc. are.....Respondents.

Lennar Carolinas, LLC.....Appellant.

v.

The Earthworkers 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 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, and Low Country Renovations and Siding, LLP,

Of which A.C. & A. Concrete, Inc., Alpha Omega Construction Group, Inc., Builders FirstSource-Southeast Group, LLC, Coastal Concrete of Southeast, LLC, Coastal Concrete of Southeast II, LLC, Construction Applicators of Charleston, LLC, Décor Corporation, DVS, Inc., Guaranteed Framing, LLC, Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., LA New Enterprises,

LLC, Land/Site Services, Inc., Myers Landscaping, Inc., Ozzy Construction, LLC, Raul Martinez Masonry, LLC, South Carolina Exteriors, LLC, and Volkmar Consulting Services, LLC are .....Respondents.

RESPONDENT SUPER CONCRETE OF SC, INC.'S FINAL BRIEF

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August 30, 2017
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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S REQUEST TO COMPEL THE SUBCONTRACTORS TO ARBITRATE

STATEMENT OF THE CASE

This appeal arises from the circuit court's order filed September 21, 2016 that denied Appellant Lennar Carolinas, LLC's ("Appellant") Motion to Compel Arbitration and the circuit court's October 26, 2016 order that denied multiple parties' Motion to Alter or Amend.

On December 12, 2014, Patricia Damico, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglas, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins (collectively the "Owners") filed the Complaint, both individually and derivatively as the Spring Grove Plantation Development Homeowners Association, alleging defective construction of their single family homes located in The Abbey at Spring Grove Plantation, Berkeley County, South Carolina (the "Abbey"). On February 17, 2015, Appellant filed its Answer, Cross-Claims and Third-Party Complaint. Appellant directed its third-party claims against its alleged subcontractors, including claims against Respondent Super Concrete of SC, Inc. ("Super Concrete").

On April 10, 2015, Super Concrete answered Appellant's Third-Party Complaint. On April 14, 2015, Appellant amended its Answer, Cross-Claims and Third-Party Complaint. Super Concrete answered this amended pleading on May 5, 2015.

On June 1, 2015, Appellant filed a Motion to Compel Arbitration. On November 23, 2015, the Owners filed a First Amended Complaint, therein substituting their derivative claims for claims of a putative class and including direct claims against Super Concrete. On November 25, 2015, Appellant answered the First Amended Complaint, including therein reassertions of its cross-

claims and third-party claims. On December 11, 2015, Super Concrete answered the First Amended Complaint and on December 14, 2015 answered Appellant's cross-claims and third-party claims.

Appellant amended its Motion to Compel Arbitration on March 30, 2016. Super Concrete served a memorandum in opposition on April 7, 2016. The circuit court heard arguments on April 11, 2016 and denied the motion by order filed September 21, 2016. On October 3, 2016, Appellant moved pursuant to Rule 59(e), SCRCP to alter or amend the circuit court's order. Multiple other parties also moved to alter or amend the circuit court's order. The circuit court denied all motions to alter or amend by Form 4 order filed October 26, 2016. Appellant served its Notice of Appeal on November 16, 2016 and Amended Notice of Appeal on November 18, 2016.

STATEMENT OF FACTS

Appellant based its demand that Super Concrete arbitrate this matter on the nonbinding May 8, 2007 Contractor Base Agreement that Appellant never signed and on the June 10, 2008 Subcontract Agreement and the Supplier Base Agreement between Super Concrete and Appellant's Myrtle Beach division. (R. p. 260, Exhibit 22 to Lennar's Motion; p. 289-290; p. 1542-1563) These agreements pertained to certain projects in Horry County. Approximately three years later, in May 2011, Appellant purchased from Spring Grove Plantation Development the residential lots in Berkeley County that would become the Abbey.[1] Appellant constructed residences, including the Owners' residences, on these lots between 2011 and 2013. (R. p. 2832; p. 2243-2432) Appellant alleges that Super Concrete provided grading, foundation slabs and footings, flatwork and formwork for the construction of the Owners' residences. (R. p. 66, ¶163; p. 134, ¶169)

[1] See, Title to Real Estate, recorded in the Berkeley County RMC Office on May 20, 2011 in Book 8943, Page 1.

STANDARD OF REVIEW

"Arbitration determinations are subject to *de novo* review." Smith v. D.R. Horton, Inc., 417 S.C. 42, 47, 790 S.E.2d 1 (2016), citing, Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id.

Arbitration is a matter of contract, and a party cannot be required to arbitrate any dispute which he has not agreed to arbitrate. Chassereau v. Global-Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718, 720 (2007), citing, Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Whether an enforceable or valid arbitration agreement exists between the parties is a question of state contract law. *See*, First Options of Chicago, Inc. V. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920 (1995). The constraint on courts to resolve disputes in favor of arbitration is not an absolute truism intended to replace careful judicial analysis. Chassereau, 644 S.E.2d at 721. The judicial inquiry is not focused solely on an examination of contractual formation defects such as lack of mutual assent and want of consideration but also on such grounds as exist at law or in equity for the revocation of any contract. Hooters of America, Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S REQUEST TO COMPEL SUPER CONCRETE TO ARBITRATE

Appellant contends that the circuit court failed to perform any analysis of Appellant's individual contracts with its subcontractors. Appellant's motion, supporting memorandum, and statements to the circuit court set forth its arguments as to the subcontractors. The circuit court considered Appellant's arguments, found them wanting, found the arguments of Super Concrete

compelling, and denied Appellant's motion accordingly. On appeal, Appellant does not address the circuit court's adoption of the arguments set forth by Super Concrete.

Appellant alleged to the circuit court that the Contractor Base Agreement, the Subcontract Agreement and the Supplier Base Agreement pass the requirements of both the South Carolina Arbitration Act (S.C. Code Section 15-48-10, et. seq.) and the Federal Arbitration Act (9 U.S.C. Section 1, et. seq.). In fact, with respect to the Abbey, the agreements cannot satisfy the requirements of either statute.

A. The Contractor Base Agreement, the Subcontract Agreement and the Supplier Base Agreement Fail the Notice Requirements of the South Carolina Arbitration Act

The South Carolina Arbitration Act, Section 15-48-10(a) provides:

> Notice that a contract is subject to arbitration pursuant to this chapter 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.

Courts strictly construe the notice requirement of S.C. Code Section 15-48-10(a). Zabinski, 346 S.C. at 588. The terms of this section are clear and must be applied according to their literal meaning. Id. at 588-589, citing, Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). No variation is acceptable. Id. at 599.

Even had the circuit court applied the Contractor Base Agreement, the Subcontract Agreement and the Supplier Base Agreement to the Abbey, which Super Concrete denies, the first page of these agreements are silent as to arbitration. (R. p. 260, Exhibit 22 to Lennar's Motion; p. 1542 and 1551). As a result, these agreements fail the statutory requirements as set forth in Zabinski to compel Super Concrete to arbitration pursuant to the South Carolina Arbitration Act.

B. The Contractor Base Agreement, the Subcontract Agreement and the Supplier Base Agreement Fail to Comply with the Federal Arbitration Act

The Federal Arbitration Act requires compliance with four threshold factors to compel arbitration. These factors include: "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute." American General Life and Accident Insurance Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005) and THI of S.C. at Columbia, LLC v. Wiggins, 2011 U.S. Dist. LEXIS 103638 (D.S.C. 9/13/2011), citing, Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 87, 87 (4th Cir. 2005). In deciding the second threshold factor, courts consider whether (1) a valid arbitration agreement exists and (2) whether the dispute falls within the substantive scope of the arbitration agreement. THI, citing, AT&T Tech. v. Commc'ns Workers of Am., 475 U.S. 643, 651 (1986).

i. *The Contractor Base Agreement fails the second threshold factor, because it is not a valid agreement and, even if it were, this dispute is not within the substantive scope of the agreement.*

The unsigned Contractor Base Agreement failed to identify the entity with whom Super Concrete allegedly contracted. (R. p. 260, Exhibit 22 to Lennar's Motion) Instead the agreement contained form fields to be completed at a later time by Appellant or one of its affiliated entities not a party to this matter. (Id.) Section 21.15 of the agreement required a signature in order for each party to certify the necessary authority to bind the party to the agreement. (Id.) Without both signatures, no contract and no arbitration clause existed to bind Super Concrete.

Assuming *arguendo* that the Court finds the Contractor Base Agreement constituted a valid contract between Super Concrete and Appellant, the current dispute over the alleged construction defects at the Abbey does not fall within the scope of the arbitration clause. The arbitration clause

only applies to projects governed by the agreement. The entire agreement, including the arbitration clause, did not specifically reference the Abbey or any other construction project. As a mere general contract, the Construction Base Agreement only became binding as to a particular project as follows:

> SCOPE OF WORK: [Super Concrete] shall provide labor, materials, equipment and other services in such location(s) and under such terms and conditions as Lennar shall deem necessary (the "Work") upon receipt of a Purchase Order by Lennar. When issued, the Purchase Order (see Schedule A) shall become a part of this Agreement. The location(s) where the Work is to be performed shall be known as the job site or Project site, and may be more fully described in Exhibit "A" to the Purchase Order. (Id.)

The blank "Schedule A - Purchase Order" referenced above, as attached to the Contractor Base Agreement, did not mention the Abbey or the Owners and its basic terms purported to be a separate contract that specifically identified each project name, scope of work, and payment terms. (Id.) Until Appellant and Super Concrete executed a "Schedule A - Purchase Order" specifically identifying a particular project, the Contractor Base Agreement (and the arbitration clause therein) could not apply to a particular project. Appellant did not issue a "Schedule A – Purchase Order" for the Abbey; therefore, the Contractor Base Agreement and its arbitration clause did not apply to the Abbey.

Additionally, Section 21.11 of the Contractor Base Agreement states:

> The venue for any disputes between Lennar and [Super Concrete] shall be as follows: (1) Third Party Actions – if Lennar is involved in litigation or arbitration with a third party and Lennar or any other party joins [Super Concrete] as a party to the litigation or arbitration, [Super Concrete] consents to be joint in the same venue; (2) Other Actions or Disputes – in all other situations, venue shall be in the state or federal court located in the state and county where the Project is located. (Id.)

The circuit court properly denied Appellant's Motion to Compel Arbitration as to the Owners and the proper venue for this matter is the circuit court in Berkeley County.[2] As a result of Section 21.11, the Contractor Base Agreement requires the Owners' claims and Appellant's claims against Super Concrete to be heard in the same venue. To the extent Appellant alleges claims against Super Concrete independent of the Owners "third-party action," Section 21.11 requires Appellant to litigate those claims in the state court where the project is located (i.e. the circuit court of Berkeley County).

ii. The Subcontract Agreement and the Supplier Base Agreement fail the second threshold factor, because they lack an arbitration provision that purports to cover the dispute.

Super Concrete executed a Subcontract Agreement and a Supplier Base Agreement nearly three years before Appellant owned any real property relating to the Abbey. These 2008 agreements contemplated projects in Horry County, not the Abbey in Berkeley County. Also, the agreements contained no reference to the Abbey and no subsequent agreement specifically incorporates those agreements with respect to the Abbey. As a result, no valid arbitration agreement exists between Appellant and Super Concrete as to the Abbey and the Owners.

In addition, the alleged dispute does not fall within the substantive scope of these agreements. These agreements did not specify the scope of labor and/or materials supplied by Super Concrete. Neither the Owners nor Appellant have produced any documentation or expert report to support their claims of construction deficiencies or the relation of the deficiencies to Super Concrete.

[2] Super Concrete incorporates the Owners' memorandum of law and oral arguments in opposition to Appellant's Motion to Compel Arbitration and their brief herein.

Section 14 of the Subcontract Agreement and Section 19 of the Supplier Base Agreement limit Super Concrete to arbitrate claims or controversies between Appellant and third-parties subject to binding arbitration. (R. p. 1549 and 1557) The circuit court correctly ruled that an enforceable arbitration agreement does not exist between the Owners and Appellant. (R. p. 4-23) Without such an enforceable arbitration agreement, Appellant cannot trigger Section 14 of the Subcontract Agreement and Section 19 of the Supplier Base Agreement.

iii. *The Subcontract Agreement and the Supplier Base Agreement contain invalid arbitration clauses.*

In South Carolina a valid and enforceable contract exists when there is a meeting of the minds between parties with regard to all essential elements and material terms of the contract. THI of S.C. at Columbia, LLC v. Wiggins, 2011 U.S. Dist. LEXIS 103638 (D.S.C. 9/13/2011), citing, Players v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). "The 'meeting of the minds' required to make a contract is not based on secret purpose or intent on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." Players, 299 S.C. at 105. The designation of a specific arbitral forum is among the material and essential terms of an arbitration clause. *See generally*, Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009).

Neither the Subcontract Agreement nor the Suppler Base Agreement define the third-party arbitration agreement referenced to therein or the forum for arbitration. The circuit court correctly rejected Appellant's argument that the arbitration clauses in the covenants, recorded deeds, the Owners' purchase and sale agreements, and contracts with other subcontractors are all applicable to Super Concrete. (R. p. 4-23) Some of these agreements were entered prior to and some after

Appellant's agreements with Super Concrete. The arbitration clauses within these documents vary in both form, substance, and procedural requirements.

Section 17 of the Subcontract Agreement stated that the entire agreement between Super Concrete and Appellant was contained in that agreement and the "Work Notification Forms," as defined in Section 1.6, for each project. (R. p. 1549) Section 21.4 of the Supplier Agreement stated that the entire agreement between Super Concrete and Appellant was contained within that agreement, the attached "Schedules," and the "Purchase Orders" issued by Appellant. (R. p. 1557) No "Schedules" were attached to the agreement. Section 17 and Section 21.4 did not incorporate the covenants for Spring Grove, the Appellant's contracts with other subcontractors, or the purchase and sale agreements with the Owners.

Appellant's demand for arbitration is based on ambiguous terms in these agreements from other projects and its attempt to improperly incorporate ambiguous and conflicting terms from Appellant's agreements with others. Appellant cannot resolve this ambiguity by rewriting the Subcontract Agreement and the Supplier Base Agreement for its benefit. Appellant failed to convince the circuit court of, and does not present on appeal, evidence to establish the existence of a meeting of the minds in which Super Concrete agreed to arbitrate this dispute involving this Berkeley County project. The circuit court correctly denied Appellant's motion and this Court should deny the appeal.

CONCLUSION

As set forth above, the circuit court properly denied Appellant's Motion to Compel Arbitration against Super Concrete, because the alleged agreements fail to comply with either federal or state statutory requirements. Super Concrete respectfully requests the Court uphold the circuit court's order and remand this matter to the circuit court for discovery and trial.

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LLC, Land/Site Services, Inc., Myers Landscaping, Inc., Ozzy Construction, LLC, Raul Martinez Masonry, LLC, South Carolina Exteriors, LLC, and Volkmar Consulting Services, LLC are .....Respondents.

RESPONDENT SUPER CONCRETE OF SOUTH CAROLINA, INC.'S CERTIFICATION OF FINAL BRIEF

I, Michael E. Wright, do hereby certify that the Final Brief of Respondent Super Concrete of South Carolina, Inc. 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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