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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2020-001048

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, 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

Decor 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, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth Party Defendants,

Of whom Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Davis Morrow are the Petitioners.

PETITIONERS' REPLY TO THE JOINT BRIEF OF SUBCONTRACTOR RESPONDENTS

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Petitioners, above-named, through their undersigned counsel, hereby respectfully submit this Reply to the Joint Brief filed on behalf of Respondents Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Myers Landscaping, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete South East II, LLC, Guaranteed Framing, LLC, LA New Enterprises, LLC, Décor Corporation, Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., and South Carolina Exteriors, LLC (collectively, "Subcontractor Respondents").

ARGUMENT

I. NONE OF THE ARGUMENTS RAISED BY THE SUBCONTRACTOR RESPONDENTS IN THEIR JOINT BRIEF ARE PRESERVED FOR REVIEW BECAUSE:

A) NOT A SINGLE ONE OF THE SUBCONTRACTOR RESPONDENTS FILED A RETURN OPPOSING PETITIONERS' PETITION FOR WRIT OF CERTIORARI AS REQUIRED BY RULE 240, SCACR.

Rule 240(e), SCACR sets forth the requirements for opposing a Petition for Writ of Certiorari. Specifically, the Rule states: "Any party opposing a motion or petition *shall* have ten (10) days from the date of service thereof to file an original and six (6) copies of his return with the clerk and serve all parties a copy of the return [...] Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition" [Emphasis added]. In the present case, Petitioners filed and served their Petition for Writ of Certiorari on July 31, 2020. None of the Subcontractor Respondents filed a timely Return to the Petition. Subcontractor Respondents now seek to file a Joint Return in opposition to Petitioners more than a year after the filing of their Petition. Subcontractor Respondents provide no reason for their untimely response, other than vaguely stating that they "file this joint brief out of an abundance of caution and to preserve the arguments they made to the Court of Appeals." (Brief at p. 3) Subcontractor Respondent's arguments should be denied, as they have failed to exercise any caution under the

rules, instead waiting until the very last possible moment to involve themselves in a Petition before this Court. See Chavis v. S.C. Dep't of Agric. & Whillhite Seed Inc. (South Carolina Administrative Law Court, 2014), noting, "Since the Appellant has been afforded ample time to respond to the above motion and has not notified the ALC of any extenuating circumstances regarding her failure to file a response, this Court finds that the case should be dismissed."

B) THIS IS THE FIRST TIME IN THE HISTORY OF THIS LITIGATION THAT ANY SUBCONTRACTOR RESPONDENT HAS RAISED THE ARGUMENTS CONTAINED IN THEIR JOINT BRIEF.

As reflected in the Appendix filed by Petitioner in this case, the Subcontractor Respondents filed separate briefs while this case was before the Court of Appeals (App. pp. 103-271). Not a single one of the Subcontractor Respondents made the arguments set forth in their Joint Brief to the Court of Appeals, nor did they attempt to rely upon, misconstrue, or even cite this Court's finding in Sentry Eng'g & Const., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 338 S.E.2d 631 (1985) or Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 232 S.E.2d 20 (1977), discussed below. To the contrary, nearly all of the Subcontractor Respondent argued that the Circuit Court had properly denied Lennar's Motion to Compel Arbitration. (App. pp. 103-271). Others argued that they should not be compelled to arbitrate because they did not enter into any arbitration agreement with Lennar. Regardless, Subcontractor Respondents' arguments have not been preserved for review by this Court. They should be estopped from attempting to circumvent the Appellate Court rules to raise new and/or unpreserved arguments that contradict their earlier stance in this case.

II. IN THE ALTERNATIVE, SUBCONTRACTOR RESPONDENTS' ARGUMENT THAT LENNAR'S ARBITRATION PROVISIONS NOT BE READ TOGETHER SHOULD BE DENIED A) FOR THOSE REASONS ALREADY SET FORTH IN PETITIONERS' LOWER COURT AND APPELLATE BRIEFS AND PETITION, AND B) BECAUSE IT MISCONSTRUES AND RUNS IN DIRECT CONTRAVENTION TO THE CASES CITED IN THEIR BRIEF.

In addition to those reasons already set forth in Petitioners' Lower Court and Appellate Court Briefs, and in their Petition, Subcontractor Respondents argument that Lennar's various arbitration provisions not be read together despite their cross-references to one-another, should be denied because it misconstrues the law. Subcontractor Respondents cite on Sentry Eng'g & Const., Inc. v. Mariner's Cay Dev. Corp. to support their argument that the arbitration agreements in this case cannot be incorporated and construed together. Sentry Eng'g & Const., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 338 S.E.2d 631 (1985). In Sentry, a builder filed a mechanic's lien for balances due under construction contracts. *Id.* at 348. The developer in that case argued that the contract for construction costs and the contract for profit constituted two separate contracts and that the builder was only entitled to arbitration under the construction contract and not the contract for profit. *Id.* at 349. The Court in Sentry found that the two contracts comprised a single, integrated agreement because they were executed at the same time, were executed by the same parties, were for the same purpose, and were in the course of the same transaction. *Id.* at 350. The Court did not, however, hold that this is the only scenario in which multiple instruments shall be construed as one instrument or agreement.

Further, the Court in Sentry found that the construction contract and the contract for profit both referred to different components of the contract's price term and overall purpose, which was compensation for the construction of the project. *Id.* In the case at hand, the instruments in this case all went to the same purpose: Plaintiffs' purchase of a Lennar home.

The Court in Sentry uses the analysis in Klutts Resort Realty, Inc. v. Down'Round Dev. Corp. to support its findings. *Id.* citing to Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 232 S.E.2d 20 (1977). The Court in Klutts points out that when determining whether instruments should be construed together, if there are any provisions in one instrument limiting,

explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Id.* at 88-89. In the case at hand, Plaintiffs contend that the subject instruments limit, explain, affect, and cross-reference each other with intertwining paragraphs, and under the rationale in Sentry and Klutts, these instruments should, in fact, be read as a whole and comprised as a single agreement.

CONCLUSION

For the reasons stated hereinabove, Petitioners respectfully asks that the Court to dismiss Subcontractor Respondents' Brief and the unpreserved arguments contained therein. Not a single one of the Subcontractor Respondents filed a Return to Petitioners' Petition for Writ of Certiorari as required by Rule 240, SCACR. Subcontractor Respondents, have instead waited around more than a year before attempting to now involve themselves in a case which they have otherwise ignored. In the alternative, Petitioners submit that Subcontractor Respondents' arguments be dismissed and/or otherwise denied for those reason already set forth in Petitioners' trial and appellate court briefs and in their Petition.

[Signature on Following Page]

Respectfully submitted,

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