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Dec 02 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

2021-001050

The Retreat at Charleston National County Club Home Owners Association, Inc., and The Retreat at Charleston National Country Club Horizontal Property Regime..... Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Costa De Oliverira Construction, LLC; Solesmar Jesus De Oliverira; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, INC.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado Defendants,

Builders FirstSource-Southeast Group, LLC Third-Party Plaintiff, Appellant,

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation; Edward Bruce Witham; and East Coast CarpentryThird-Party Defendants,

Of which, Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction Group, LLC are the Respondents,

RETURN TO BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC MOTION FOR
STATUS CONFERENCE AND TO STAY TIME TO FILE APPELLANT'S INITIAL BRIEF,
OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME TO FILE APPELLANT'S
INITIAL BRIEF

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Introduction

On November 22, 2021, Appellant Builders FirstSource-Southeast Group, LLC (“BFS”) filed with this Court a document which it styled as “Motion for Status Conference and to Stay Time to File Appellant’s Initial Brief, or, In the Alternative, For an Extension of Time to File Appellant’s Initial Brief.” Within that document, BFS uses three paragraphs to state why it needs the Court to either hold a Status Conference or grant it a 60-day extension of time to file its Initial Brief. BFS uses the remainder of the six pages of the document to restate, almost in their entirety, the objections and arguments made by BFS in Counsel’s letter to the Court dated October 25, 2021 [objecting to the Court’s decision to consolidate the eight appeals filed by BFS on September 22, 2021, all of which arise from the underlying case of The Retreat at Charleston National County Club Home Owners Association, Inc., et. Al. v. Winston Carlyle Charleston National, LLC, et al., [Civil Action No. 2016-CP-10-03783].

Respondent Pohlman Quality Exteriors, Inc. (“Pohlman”) has no objection to the request of BFS for a Status Conference or for an extension of time in which to file its Initial Brief. However, because the Court may take the present motion as an opportunity to consider BFS’s objection to consolidation, Pohlman is forced to respond to the arguments and proposal submitted by BFS.

Rule 214 SCACR

BFS first argues that the Court does not have the authority to consolidate the appeals in question. Rule 214 SCACR grants the Court the discretion to consolidate

- more than one appeal from the same order, or
- two or more appeals of different orders in different cases where the same question is involved.

BFS takes the position that because the third logical permutation of those circumstances is not specifically stated in the rule, i.e. the consolidation of more than one appeal from different orders in the same case, that consolidation under those circumstances is not allowed. That position is not logical. If Rule 214 SCACR allows the Court the discretion to consolidate appeals from different cases (which, by definition, will more than likely be from different orders), then surely that rule gives the Court the discretion to consolidate appeals from different orders on the same case which have issues in common.

It should also be noted that Rule 214 SCACR grants the Court the discretion to consolidate appeals “where the same question is involved.” The rule does not state that to be eligible for consolidation the question in common must be the only question at issue, or that all arguments supporting or opposing the question in common must be the same, or that all questions in the various appeals must be the same.

The basic question in each of these appeals is the same - Is the contractual indemnification provision in the BFS form subcontract valid under South Carolina law? Each of the Respondents may not have made exactly the same arguments, but all of the arguments lead to the same conclusion.

BFS’s concern that consolidation will cause extra work

BFS next argues that because some of the parties made different arguments as to why the indemnification language of its form subcontract is not valid or enforceable that it will be difficult to “brief, argue, and decide them together.” That argument does not withstand close scrutiny.

It should first be noted that BFS chose to file eight (8) separate appeals at the same time. In so doing BFS knew that it would have to submit a brief on and possibly participate in oral argument in each of those eight appeals. If having to brief the eight appeals at the same time was

really an issue, then soon after the appeals were filed, we would have expected BFS to have asked the Court for extensions on filing deadlines or a staggered briefing schedule. However, it was not until after BFS learned the Court had chosen to consolidate those eight appeals that BFS decided that it might have some difficulty in having to brief and possibly argue eight different appeals.

Further, and more to the point, consolidation of the appeals will make for less work for BFS, not more. Based upon statements in BFS's present motion, if the eight appeals are handled separately, BFS will have to submit five briefs discussing a Concord & Cumberland analysis as to one version of its subcontract and three briefs discussing a Concord & Cumberland analysis as a second version of its subcontract. If the appeals are consolidated, BFS need only submit each of its two Concord & Cumberland arguments one time. BFS will also have to brief its arguments as to the other issues raised in the Orders that have been appealed but, again, it will have to submit each of those arguments only one time.

In its motion, BFS states, "Appellant will be charged with submitting one overarching and disjointed brief to address all eight orders." *BFS Motion*, p. 4. The wording of that sentence shows that BFS assumes consolidation to be a glass half empty. A more accurate statement of that situation is, "Consolidation will allow BFS to submit one brief instead of eight, and in that brief, it will have to argue each of its positions only one time." That "glass half full" perspective is why consolidation of these eight appeals makes sense. BFS's "concern" that consolidation of the appeals will make more work for BFS simply does not hold water.

BFS's proposal to allow one appeal and stay the other seven appeals

As part of its criticism of consolidation, BFS complains that "despite consolidation, Respondent's desire to brief and argue (should oral arguments be scheduled) their positions separately..." *BFS Motion*, p. 4. Apparently BFS misperceives the process of consolidation.

The consolidation of appeals does not result in the merger of the parties nor their submissions, and each appeal retains its own identity. Every Respondent to each appeal has the option of submitting their own brief or of joining in the brief of another Respondent, or in a position or argument made by another Respondent, pursuant to Rule 208(b)(6) SCACR.

Under the pretext of “the convenience of the Court,” in its motion BFS proposes that the Court

- proceed with the *Hurley Services, LLC* appeal only;
- stay the other seven appeals;
- have the Court’s rulings in the *Hurley Services, LLC* appeal control the outcome of all common issues in the other seven appeals;
- of the seven appeals to be stayed, each of those appeals would be allowed to proceed only if it contained an issue not resolved by the *Hurley Services, LLC* appeal.

In making this proposal BFS suggests a solution to a problem that does not exist. As previously explained, the consolidation already ordered by the Court provides Appellant, Respondents, and the Court with various measures of convenience and efficiency while at the same time allowing Appellant and Respondents to participate in a full and fair appeal.

If the Court were to proceed as BFS suggests, then the Respondents in the seven stayed appeals would be denied the right to a full and fair appeal as is afforded to each of them by Rule 201 SCACR.

Conclusion

BFS chose to file eight appeals on the same day knowing the totality of the work which would be required to prosecute each of those appeals. The Court, noting the common issues in

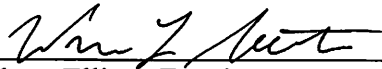
each of the appeals and recognizing the convenience and efficiency to be gained, ordered that the eight appeals be consolidated. In response, BFS objected to consolidation claiming the Court does not have the authority to consolidate these eight appeals, that consolidation will result in more work, not less, and that the confusion which will be created may result in the Court not being able to render decisions. And then, as if to double-down on the implausibility of its arguments against consolidation, BFS proposes that the Court adopt a procedure for the handling of these eight appeals which is not allowed the Appellate Court Rules, which tilts the playing field in favor of BFS, and which would deny the seven of the eight Respondents the opportunity to be heard and to participate in a full and fair appeal.

For all of the reasons stated in this Return, the Court's decision to consolidate the eight appeals in question is proper, justified, and the efficient thing to do. That said, if for any reason the Court should determine that these eight appeals should not be consolidated, then the only other option available under the Appellate Court Rules is for the Court to order that these appeals proceed as originally filed – as eight separate appeals. As explained, the alternate method of handling these eight appeals as suggested by BFS is unfair, unjust, and not proper under any circumstance.

Respectfully submitted,

[signature page follows]

Aiken, Bridges, Elliott, Tyler, & Saleeby

By: 

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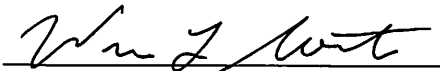
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Return To Builders Firstsource-Southeast Group, LLC's Motion For Status Conference And To Stay Time To File Appellant's Initial Brief, Or, In The Alternative, For An Extension Of Time To File Appellant's Initial Brief complied with Rule 211(b), *SCACR*.



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PROOF OF SERVICE

I certify that I have served the Respondent's Return To Builders Firstsource-Southeast Group, LLC's Motion For Status Conference And To Stay Time To File Appellant's Initial Brief, Or, In The Alternative, For An Extension Of Time To File Appellant's Initial Brief, by depositing a copy of it in the United States Mail, postage prepaid, on December 2, 2021, addressed to William H. Cox, III, Esquire, P.O. Box 40, Beaufort, South Carolina 29901-0040.



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