

2013 SC Construction Law Update

SC Bar Convention
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Kiawah Island, SC

Presented By:



2013 South Carolina Construction Law Update

Presented By



Editors:

**L. Franklin Elmore
Robert L. Mebane, Jr.
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I. Arbitration

A. S.C. Court of Appeals Upholds Separate Consumer Arbitration Agreements Implicating the SCUAA and FAA

Plaintiff One entered into two purchase agreements with Dealership for two used vehicles. One purchase agreement stated at the top that it was subject to arbitration pursuant to the South Carolina Uniform Arbitration Act (SCUAA). The bottom of the purchase agreement included language which stated that the agreement was subject to the Federal Arbitration Act (FAA).

Plaintiff Two purchased a new 2008 vehicle from a different Dealership and entered into two separate contracts: a buyer's order which governed the sale of the vehicle and a retail installment contract which addressed the financing and payment terms for the vehicle. The buyer's order stated that it was subject to the FAA but that if the FAA were not applicable then the contract would be subject to the SCUAA. The reverse side of the buyer's order also included further terms defining the scope of arbitration including remedy and claim limitations. The installment contract provided that the FAA applied to any disputes arising out of the contract.

Both Plaintiffs filed a single action against both Dealerships alleging misleading business practices. Dealerships filed motions to dismiss and to compel arbitration which were granted by the trial court. Plaintiffs filed a rule 59(e) motion which was denied by the trial court and appealed to the South Carolina Court of Appeals.

On appeal, the South Carolina Court of Appeals upheld the trial court's finding that Plaintiffs were bound by valid arbitration agreements because each Plaintiff entered into an arbitration agreement that (1) involved interstate commerce and complied with the FAA, (2) evidenced an intent to arbitrate, (3) was not unconscionable and (4) was not void as a matter of public policy. The court held that Plaintiff Two's buyer's order contract was unconscionable because it was tainted by the absence of meaningful choice and contained oppressive one-sided terms and because it provided that the Dealership retained judicial remedies that "entirely superseded the consumer's arbitral remedies" and because both provisions were not severable. However the court did find that Plaintiff Two's installment contract did not "preclude the arbitrator from awarding mandatory statutory remedies and did not incorporate a lack of mutuality of remedies" holding that it was not unconscionable and enforceable.

The court also rejected Plaintiffs arguments that the arbitration agreements were void against public policy due to the fact that both agreements' bans against class arbitration could not "be invalidated based upon public policy considerations embodied within state law." *York v. Dodgeland of Columbia, Inc.*, 2013 WL 4734569 (S.C. Ct. App. September 4, 2013).

B. South Carolina Uniform Arbitration Act Requires Confirmation of an Arbitration Award after Party Pays Award Prior to Confirmation

Plaintiff filed an action against Dealership alleging Dealership made misrepresentations to her in connection with her purchase of a used vehicle. Dealership moved to compel arbitration which was granted by the trial court. The arbitrator found in favor of Plaintiff and awarded damages for Plaintiff's claims regarding Dealership's violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers Act"). Plaintiff moved to confirm the arbitration award. Before the trial court was able to confirm the arbitration award Dealership paid the amount of the award to Plaintiff. During the confirmation hearing Plaintiff argued that the action had been stayed pending arbitration, needed to be concluded and that the South Carolina Uniform Arbitration Act ("UAA") mandated confirmation. Dealership argued that confirmation of the award was a moot point since it had already paid Plaintiff. The trial court confirmed the award based on Dealership's violation of the SCUTPA and applied S.C. Code § 14-48-130 which required the court to confirm the award. Dealership appealed and argued that the trial court erred in (1) "rejecting Dealer's assertion that payment of the award mooted the request for confirmation, leaving no justiciable controversy; and alternatively (2) in applying the provision for confirming awards contained in the UAA rather than the Federal Arbitration Act ("FAA")."

On appeal the South Carolina Court of Appeals upheld the findings of the trial court holding that "although the arbitration agreement stated the FAA would apply to the arbitration, it did not expressly state the FAA would apply to the subsequent procedure for confirmation once the award was made. However, this is not a concern because the outcome would be the same." The court also held that the trial court did not err in applying the SCUTPA because the confirmation statute was procedural not substantive. Finally, the court held that Dealership's payment of the award prior to confirmation failed to make the matter nonjusticiable, stating that "confirmation of an award is a distinguishable issue from a defendant's payment or satisfaction of an award" and that the statutory procedure of the UAA required confirmation of the award. *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 748 S.E.2d 221 (Ct. App. 2013).

C. Bank's Offer of Employment Letter without Arbitration Clause Still Required Arbitration Due to Arbitration Clause Contained within Employment Paperwork

Bank offered Employee a position as a private financial advisor and sent Employee an offer letter outlining the terms of employment. Part of the terms of employment were that Employee would receive a \$100,000 signing bonus but if Employee failed to remain at the bank for sixty months 2.78% of the bonus would be forgiven. The letter also provided that if Employee voluntarily terminated his employment, "or [Employee] was involuntarily terminated before the entirety of any repayment obligation has been forgiven, [Employee] was required to

reimburse [Bank] for the outstanding portion of the gross amount owed” in addition to any fees incurred with collection of such amount. The offer letter also required Employee to obtain Financial Industry Regulatory Authority (“FINRA”) series licenses within a certain time period. Employee accepted Bank’s offer and signed the offer letter.

As part of Employee’s FINRA registration, Employee had to complete certain required FINRA forms. One form contained an arbitration clause which provided that Employee agreed to arbitrate any dispute between himself and his “firm.” Employee resigned from the Bank before the sixty month time period ended. Bank subsequently demanded Employee repay the outstanding amount of the signing bonus. After Employee disputed his obligation to repay the Bank, the Bank’s Investment Branch (“BIB”) initiated arbitration proceedings through the FINRA. Plaintiff refused to engage in arbitration and filed a declaratory judgment action in the U.S. District Court of South Carolina. Plaintiff argued that because Bank’s offer letter did not contain an arbitration provision and the arbitration provision within the FINRA form only applied to any disputes between Employee and BIB. Bank and BIB filed a motion to dismiss which the district court granted.

The court based its holding on the fact that Employee consented to arbitration by filling out the required FINRA paperwork and because BIB paid the signing bonus, the dispute fell within the parameters of the arbitration clause which was directly related to the arbitration proceedings initiated by BIB. *Troutman v. SunTrust Bank*, 2013 WL 5657681 (D.S.C. October 16, 2013).

D. Fourth Circuit Applies State Law in Absence of Federal Law in Upholding Arbitration Award

Labor Union and Private Company were parties to a multiple pre-hire agreement which provided for a mandatory arbitration procedure outlined by the National Joint Adjustment Board (“NJAB”) to address grievances. The agreement at issue included an “interest-arbitration clause, which established that if negotiations for a renewal came to a deadlock, the parties were to submit the issues to the NJAB for a binding decision.”

Labor Union notified Private Company that it wanted to renew the agreement. When Private Company refused to renew the agreement, Labor Union submitted the unresolved negotiations to the NJAB, which ordered the parties to execute an agreement, the interest-arbitration award. When Private Company refused to comply with the interest-arbitration agreement Labor Union filed a grievance with the NJAB. The NJAB then issued a grievance arbitration award in favor of Labor Union. Subsequent to the NJAB’s award, Labor Union sought judicial enforcement of the award under the Labor Management Relations Act (“LMRA”). Private Company moved to vacate the award and Labor Union argued that the statute of limitations prevented Private Company from doing so.

The district court upheld the arbitration award holding that the statute of limitations prohibited Private Company from vacating the arbitration award. The court applied the 90 day statute of limitations period as outlined in South Carolina Code § 15-48-130(b) for vacating an arbitration award because the LMRA did not provide a statute of limitations period which addressed this issue. On appeal the Fourth Circuit affirmed the findings of the district court. *Sheet Metal Workers' Intl. Assn. v. McLeMore*, 2013 WL 5545889 (4th Cir. 2013).

II. Contracts

A. Developer Awarded Summary Judgment under Terms of Commercial Contract Based on Statute of Limitations

Electrical Service Provider (“ESP”) entered into an agreement with Developer in May 2004 where ESP agreed to install underground electrical service facilities in one of Home Builder’s developments. ESP also agreed to waive any charges for the installation of the services. Part of the agreement also provided that 95% of all homes within the development be equipped with electric water heaters before the initial residential occupancy and also provided that if Developer permitted anything other than an electric water heater which exceeded “5% of the total number of lots before the initial residential occupancy of each lot, then [Developer] shall immediately owe and pay [ESP] an amount equal to \$500 per lot for those lots exceeding 5%.” ESP first discovered a potential breach of the agreement in April-May 2012 based on a field audit of the development. Subsequent to ESP’s discovery of the breach it made a demand for payment of \$80,000 to Developer regarding 160 homes that were in violation of the agreement.

In 2012 ESP brought an action against Developer for breach of contract. Developer filed a motion for summary judgment arguing that the statute of limitations barred a claim for all of the homes subject to the agreement, and in the alternative it barred ESP’s claims for all but seven homes since the homes were sold between 2004 and 2012. ESP argued that under the discovery rule its cause of action didn’t accrue until 2012 which was an issue reserved for the jury. ESP also argued that because under the terms of the agreement Developer was “solely responsible for ensuring the homes had electric water heaters installed prior to the initial occupancy” Developer was estopped from asserting a statute of limitations defense. Developer argued that ESP didn’t act with reasonable diligence until 2012.

The district court granted Developer’s motion for summary judgment holding that “the initial residential occupancy of a home equipped with a water heating source other than electricity furnished by Plaintiff trigger[ed] a breach of the Agreement” and based on the court’s holding in *Richland-Lexington Airport Dist. v. Am. Airlines, Inc.*, 306 F.Supp.2d 548, 566 (D.S.C. 2002) aff’d, 61 F. App’x 67 (4th Cir. 2003) “[ESP] accrued a new cause of action each time a water heating source other than electric was present at the initial residential occupancy, or close date, of a home subject to the Agreement.” The court also held that ESP failed to exercise

reasonable diligence in discovering the breach by waiting until 2012 to perform the field audit of the development.

ESP also argued that the terms of the agreement requiring Developer to be “solely responsible for ensuring full compliance” with the agreement “(1) relieved [ESP] from its duty to act with reasonable diligence, and (2) estop[ped Developer] from asserting the statute of limitations.” The court strongly rejected these arguments holding that this interpretation of the agreement “leads to absurd consequences” whereby Developer should not be required to notify ESP of any breach of the agreement. *Fairfield Elec. Coop., Inc. v. DR Horton, Inc.*, 2013 WL 5409143 (D.S.C. September 25, 2013).

III. Insurance

A. Developer Entitled to Indemnification from Its Predecessor-In-Interest’s Insurer

Insurer filed a declaratory judgment action seeking a declaration that it owed no coverage or defense obligations to Developer under Developer’s policies for losses arising out of a large construction defect suit involving 77 condominium buildings. Developer filed an answer and counterclaim seeking a declaration that the policies issued by Insurer provided both indemnification and a defense for the claims asserted and damages in the suit (“suit”). Developer also asserted a claim against Insurer for breach of contract.

Developer was a successor-in-interest to prior companies which had insurance policies through additional insurers. Developer subsequently amended its answer to assert a third party complaint against Developer’s predecessor-in-interest’s Insurer (Prior Insurer) seeking a declaration that Prior Insurer provided coverage and also had a duty to defend in the suit. Prior Insurer subsequently filed an answer and counterclaim against Developer and Insurer seeking a declaration that its policies did not provide coverage or a duty to defend in the suit. Prior Insurer also filed a fourth party complaint against Multiple Insurers, who had issued policies to Developer and its predecessor in interest, seeking a declaration that if Prior Insurer had a duty to defend then Multiple Insurers also had a duty to defend and should be held liable in contribution for any amounts to be paid by Prior Insurer.

In ruling on the parties’ motions for summary judgment the district court ruled that Prior Insurer had a duty to defend “because coverage passed to successors-in-interest through merger”, the suit reflected the potential for an “occurrence” during Prior Insurer’s policy period, Prior Insurer had a duty to Defend Developer in the suit and Prior Insurer was not entitled to contribution from the fourth party defendants.

The court set the remaining issues for trial which included (1) “whether there was coverage for any portion of the amount eventually paid by [Developer] to settle the [suit], and if so, what amount, if any, [Prior Insurer] owed to [Developer] for its pro-rata time-on-risk portion

of those covered damages,” and (2) “what amount, if any, [Prior Insurer] owed to [Developer] in reimbursement of the reasonable, necessary and related defense costs in the [suit].” Insurer was dismissed from the declaratory judgment action by stipulation of the parties on the first day of trial.

The court held that because no prior exclusion in Prior Insurer’s policies barred coverage, Prior Insurer must indemnify Developer in accordance with the pro rata time-on risk method as provided in *Crossmann Cmty. of N. A., Inc. v. Harleyville Mutual Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) (holding that losses in a progressive damage case should be allocated among all triggered policies based on each insurer’s time-on-the-risk). In applying this methodology the court held that 12 buildings involved in the 77 building suit triggered coverage and awarded \$16,473 on Developer’s indemnity claim against Prior Insurer. The court also held that because the suit triggered Prior Insurer’s duty to defend the entirety of all claims in the suit, Developer’s remedy for Prior Insurer’s breach of its duty to defend (which the court had already addressed in a prior order) was payment for Developer’s expenses incurred in providing its own defense. Accordingly, the court applied the twelve factors outlined in *Barber v. Kimbrell’s, Inc.*, 577 F.2d 216 (4th Cir. 1978) in its analysis of whether Developer’s attorney’s fees incurred in defending the suit were reasonable and necessary. The court emphasized that because (1) Developer had a strong economic incentive to “pay only those attorneys’ fees and defense costs that were reasonable and necessary to defend” the suit, (2) Developer closely managed its defense costs through its thorough review of all billings, (3) Developer’s Prior Insurer acquiesced in Developer’s defense strategy by virtue of its knowledge of status reports and failure to attempt to manage Developer’s defense plan, (4) Developer’s selection of its lead counsel was reasonable, and (5) because Developer’s defense team achieved an excellent result in the suit, all unreimbursed attorney’s fees incurred by Developer were reasonable and necessary.

The court also held that because Developer entered into settlement agreements with six additional insurance carriers from which it sought coverage and a defense in the suit it was prevented from also recovering these costs from Prior Insurer. The court emphasized that because Developer’s settlement agreements with the additional six carriers provided that Developer agreed to “release all claims for coverage under the insurer’s policies” and because Developer “claimed both defense and indemnity under the policies at issue and the settlement agreements contained general releases, without allocation of an amount toward defense costs or an amount toward indemnity ... the settlement amounts paid by the carriers included payment for both.” In its reasoning the court stated that the collateral source rule only applies to tort claims and in this instance because Developer’s claim was a breach of contract claim it was prevented from double recovery. Thus, the court reduced the amount Prior Insurer was obligated to pay Developer by the amount of the settlement payments made by the six additional carriers.

Finally, the court also held that under South Carolina law Developer was entitled to recover its costs and fees from Prior Insurer for prosecuting its third-party claim in order to

enforce Prior Insurer's duty to defend. *Crossman Cmty. of N.A., Inc. v. Harleyville Mut. Ins. Co.*, 2013 WL5437712 (D.S.C. September 27, 2013).

B. Fallen Billboard Sign and Removal of Additional Signs Constitutes an Occurrence under CGL Policy

A jury determined that Insured was liable in a tort action involving the construction of three outdoor advertising billboard signs. One sign fell into the interstate and the two remaining signs were removed. The jury awarded actual and punitive damages to plaintiffs. Insured then sought indemnification from its CGL Insurer as a result of the tort action. Insurer filed a declaratory judgment action to determine whether or not it had a duty to indemnify Insured as a result of Insured's liability. The trial court found that Insurer's policy covered all damages awarded by the jury and ordered that Insurer was obligated to indemnify Insured for the judgment in the tort action. The court of appeals reversed the trial court based on the trial court's failure to grant Insured's motion to transfer venue to its county of residence. Insured subsequently filed a Rule 59(e) motion and a motion under Rule 60 SCRPC to have the trial court's declaratory judgment order voided. The trial court only struck the portion of its order referencing the money damages awarded by the jury. Insured appealed the trial court's order which the court of appeals affirmed as modified. The South Carolina Supreme Court granted Insured's petition for writ of certiorari.

On appeal the South Carolina Supreme Court held that the court of appeals correctly affirmed the trial judge's denial of Insured's Rule 60 motion because there was a justiciable controversy sufficient to implement the S.C. Uniform Declaratory Judgment Act. The Court further clarified that the DJ decision regarding property damages was not proper for its consideration because it was based on questions of fact to be presented at trial. The Court also held that there was an "occurrence" under the policy and stated that "we view the fallen sign and the removal of the remaining two signs under a continuum of an occurrence, as this is analogous to the CGL cases involving continuous or repeated exposure to substantially the same general harmful conditions." The Court also held that "because the signs were simultaneously constructed, we view [the falling of the first sign and removal of the other two] as a single occurrence with progressive damage." *Auto-Owners Ins. Co. v. Rhodes*, 2013 WL5348381 (S.C. Sup. Ct. September 25, 2013).

III. Miscellaneous

A. Successor Company of Material Supplier Held to be Proper Claimant Under Miller Act

General contractor entered into a contract with the federal government to provide labor and materials to improve a federal facility and posted the necessary bond under The Miller Act. General contractor subcontracted with Firm to perform some of the work on the project. Firm had previously operated its business as a sole proprietorship and its owners considered Firm to

be a successor company. Sole Proprietorship had an open credit account with Material Supplier that supplied Firm with the materials for the Project. Firm failed to pay for all of the materials and Material Supplier attempted to recover the additional monies owed from General Contractor and its Surety. The district court granted summary judgment in favor of Material Supplier holding that it was a proper claimant under the Miller Act because Firm was the successor company to Sole Proprietorship. On appeal the Fourth Circuit affirmed the decision of the district court holding that because Successor Company acted as if there was a contractual relationship between itself and Sole Proprietorship. *L&W Supply Corp. v. Greenway Enters., Inc.*, 2013 WL 5832244 (4th Cir. October 29, 2013).

B. District Court Upholds Breach of Warranty Cause of Action Filed Against Engineering Firm

Engineering Firm performed engineering and testing services on a home site on behalf of Home Builder. Home Builder subsequently built a home for Home Buyers on the site and the home developed structural problems after construction. Home Builder made efforts to fix the problems and also offered to conduct further repairs. Home Buyers have initiated arbitration proceedings against Home Builder which is scheduled for a final hearing in March 2014.

Home Builder asked Engineering Firm to participate in the arbitration proceedings and when Engineering Firm declined to participate Home Builder filed an action against Engineering Firm seeking indemnity for its incurred repair costs and alleged breach of the express or implied contractual obligations and warranties, professional negligence, non-delegable duty/vicarious liability, breach of warranty and breach of contract.

Engineering Firm filed a motion to dismiss arguing that Home Builder's claims were not ripe for adjudication due to the pending arbitration. The district court held that some of Home Builder's claims were ripe for adjudication because they did not arise from or relate to the arbitration proceeding. The court dismissed Home Builder's breach of non-delegable duty/vicarious liability claims holding that they were not independent causes of action but doctrines related to the professional negligence claim. The court denied Engineering Firm's motion to dismiss as to Home Builder's breach of express and implied warranty claims holding that the services Engineering Firm provided services that were related to the "testing or preparation of land, a tangible thing" as opposed to a service designed to achieve a specific result. The court denied this motion without prejudice to renewal of the arguments after completion of discovery. *Pulte Home Corp. v. S&ME, Inc.*, 2013 WL4875077 (D.S.C. September 11, 2013).

C. Surety's Relief from Contractor's Breach of GIA Prevents Surety from Obtaining Additional Equitable Relief

As part of Surety's issuance of payment and performance bonds to Contractor, Contractor executed a general indemnity agreement ("GIA") which provided that Contractor would indemnify Surety for any and all liability, losses, costs, etc. incurred should Surety pay any claims related to the issuance of payment and performance bonds on Contractor's behalf. Contractor subsequently sent a letter to Surety acknowledging its default and inability to perform the construction contracts which were secured by the bonds which Surety had issued. Surety completed the construction contracts and also made payments on behalf of Contractor on the projects.

Surety subsequently filed an action against Contractor seeking (1) specific performance of the GIA, (2) alleging a breach of the GIA, (3) seeking a permanent injunction for deposit of collateral security, and (4) requesting relief under the equitable doctrines of quia timet and exoneration. Contractor answered and Surety filed a motion for summary judgment. Contractor did not file a response to Surety's motion for summary judgment.

The district court denied Surety's motion for specific performance due to the fact that Contractor admitted its default under the GIA, which provided an adequate remedy of law. Consequently, the court granted Surety's motion for summary judgment as to its claim for Contractor's breach of the GIA due to Contractor's admission of its breach of the GIA. The court denied Surety's motion for a permanent injunction requiring that a collateral security deposit be made due to the fact that Surety failed to present any evidence of irreparable harm. In denying Surety's request for an injunction the court emphasized that Surety only requested deposited collateral in the same amount which it sought for its claim of breach of the GIA. Finally, the court denied Surety's motion for relief under quia timet and exoneration holding that because it granted Surety's motion for breach of the GIA, Surety was not also entitled to equitable relief as well. *N.A. Specialty Ins. Co., v. Able Constructors, Inc.*, 2013 WL5439141 (D.S.C. September 27, 2013).

D. Contractor Without License Lacked Standing to Bring Cause of Action against Home Builder

Contractor brought an action against Home Builder for breach of contract. Contractor failed to possess the required license under S.C. Code Ann. § 40-59-30(B). The trial court dismissed Contractor's action holding that because Contractor failed to possess the required license it lacked standing to enforce the contract. On appeal the South Carolina Court of Appeals affirmed the trial court due to the fact that Contractor failed to possess the required license. *Stolf Constr. LLC v. Sweetgrass Home Builders, LLC*, Op. No. 2013-UP-375 (S.C. Ct. App. October 9, 2013).

E. South Carolina Supreme Court Holds Notice of Furnishing Statute Doesn't Apply to Common Law Payment Bond Claim

Subcontractor was hired to perform mechanical and plumbing work for a high school project and was required to furnish a payment bond. The language of the payment bond issued by Surety stated that if the principal made payment to all persons supplying labor and material for the work in the subcontract then Surety would not have any obligation for payment. Subcontractor subcontracted certain ductwork to HVAC Subcontractor ("HVACS"). HVACS then subcontracted with Plaintiff for temporary skilled labor. Subcontractor fully paid HVACS for its work on the project but HVACS failed to fully pay Plaintiff for its work on the project. During construction Plaintiff's assistant project manager sent Subcontractor's assistant project manager various emails communicating Plaintiff's involvement in the project. Plaintiff subsequently informed Subcontractor's representatives that it wasn't fully paid for its work on the project. Subcontractor then declared HVACS in default due to lack of performance.

Plaintiff brought an action against HVACS for breach of contract and obtained a default judgment. Plaintiff also filed a claim against HVACS' payment bond. Surety moved for summary judgment as to Plaintiff's claim arguing that Plaintiff failed to provide it with adequate notice of its work on the project pursuant to S.C. Code § 29-5-440. Surety argued that its liability on the payment bond was limited to the amount Subcontractor owed HVACS at the time Plaintiff informed Subcontractor of its bond claim and because it had fully paid HVACS, Plaintiff was barred from recovery. The trial court granted Surety's motion for summary judgment holding that Plaintiff failed to satisfy the requirements of S.C. Code § 29-5-440. The trial court held that Plaintiff's emails to Subcontractor did not meet the requirements of "notice of furnishing" because "they were in the nature of solicitations for business rather than notices of furnishing, and were sent to an assistant project manager stationed at a jobsite trailer" as opposed to Subcontractor's permanent place of business.

On appeal the South Carolina Supreme Court reversed the trial court holding that because the payment bond issued by Surety was a "common law bond" as opposed to a "statutory bond" it must be enforced according to its terms, thus Plaintiff "had no duty to comply with section 29-5-440's notice provisions." The Court also held that even if 29-5-440 did apply, the trial court erred in granting summary judgment because Plaintiff's emails to Subcontractor presented a genuine issue of material fact as to whether Plaintiff provided an adequate notice of furnishing under the statute. *Hard Hat Workforce Solutions, LLC v. Mech. HVAC Serv., Inc.*, 2013 WL 6001868 (S.C. Sup. Ct. November 13, 2013).

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On appeal the South Carolina Court of Appeals upheld the findings of the trial court holding that "although the arbitration agreement stated the FAA would apply to the arbitration, it did not expressly state the FAA would apply to the subsequent procedure for confirmation once the award was made. However, this is not a concern because the outcome would be the same." The court also held that the trial court did not err in applying the SCUTPA because the confirmation statute was procedural not substantive. Finally, the court held that Dealership's payment of the award prior to confirmation failed to make the matter nonjusticiable, stating that "confirmation of an award is a distinguishable issue from a defendant's payment or satisfaction of an award" and that the statutory procedure of the UAA required confirmation of the award. *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 748 S.E.2d 221 (Ct. App. 2013).

C. Bank's Offer of Employment Letter without Arbitration Clause Still Required Arbitration Due to Arbitration Clause Contained within Employment Paperwork

Bank offered Employee a position as a private financial advisor and sent Employee an offer letter outlining the terms of employment. Part of the terms of employment were that Employee would receive a \$100,000 signing bonus but if Employee failed to remain at the bank for sixty months 2.78% of the bonus would be forgiven. The letter also provided that if Employee voluntarily terminated his employment, "or [Employee] was involuntarily terminated before the entirety of any repayment obligation has been forgiven, [Employee] was required to

reimburse [Bank] for the outstanding portion of the gross amount owed” in addition to any fees incurred with collection of such amount. The offer letter also required Employee to obtain Financial Industry Regulatory Authority (“FINRA”) series licenses within a certain time period. Employee accepted Bank’s offer and signed the offer letter.

As part of Employee’s FINRA registration, Employee had to complete certain required FINRA forms. One form contained an arbitration clause which provided that Employee agreed to arbitrate any dispute between himself and his “firm.” Employee resigned from the Bank before the sixty month time period ended. Bank subsequently demanded Employee repay the outstanding amount of the signing bonus. After Employee disputed his obligation to repay the Bank, the Bank’s Investment Branch (“BIB”) initiated arbitration proceedings through the FINRA. Plaintiff refused to engage in arbitration and filed a declaratory judgment action in the U.S. District Court of South Carolina. Plaintiff argued that because Bank’s offer letter did not contain an arbitration provision and the arbitration provision within the FINRA form only applied to any disputes between Employee and BIB. Bank and BIB filed a motion to dismiss which the district court granted.

The court based its holding on the fact that Employee consented to arbitration by filling out the required FINRA paperwork and because BIB paid the signing bonus, the dispute fell within the parameters of the arbitration clause which was directly related to the arbitration proceedings initiated by BIB. *Troutman v. SunTrust Bank*, 2013 WL 5657681 (D.S.C. October 16, 2013).

D. Fourth Circuit Applies State Law in Absence of Federal Law in Upholding Arbitration Award

Labor Union and Private Company were parties to a multiple pre-hire agreement which provided for a mandatory arbitration procedure outlined by the National Joint Adjustment Board (“NJAB”) to address grievances. The agreement at issue included an “interest-arbitration clause, which established that if negotiations for a renewal came to a deadlock, the parties were to submit the issues to the NJAB for a binding decision.”

Labor Union notified Private Company that it wanted to renew the agreement. When Private Company refused to renew the agreement, Labor Union submitted the unresolved negotiations to the NJAB, which ordered the parties to execute an agreement, the interest-arbitration award. When Private Company refused to comply with the interest-arbitration agreement Labor Union filed a grievance with the NJAB. The NJAB then issued a grievance arbitration award in favor of Labor Union. Subsequent to the NJAB’s award, Labor Union sought judicial enforcement of the award under the Labor Management Relations Act (“LMRA”). Private Company moved to vacate the award and Labor Union argued that the statute of limitations prevented Private Company from doing so.

The district court upheld the arbitration award holding that the statute of limitations prohibited Private Company from vacating the arbitration award. The court applied the 90 day statute of limitations period as outlined in South Carolina Code § 15-48-130(b) for vacating an arbitration award because the LMRA did not provide a statute of limitations period which addressed this issue. On appeal the Fourth Circuit affirmed the findings of the district court. *Sheet Metal Workers' Intl. Assn. v. McLeMore*, 2013 WL 5545889 (4th Cir. 2013).

II. Contracts

A. Developer Awarded Summary Judgment under Terms of Commercial Contract Based on Statute of Limitations

Electrical Service Provider (“ESP”) entered into an agreement with Developer in May 2004 where ESP agreed to install underground electrical service facilities in one of Home Builder’s developments. ESP also agreed to waive any charges for the installation of the services. Part of the agreement also provided that 95% of all homes within the development be equipped with electric water heaters before the initial residential occupancy and also provided that if Developer permitted anything other than an electric water heater which exceeded “5% of the total number of lots before the initial residential occupancy of each lot, then [Developer] shall immediately owe and pay [ESP] an amount equal to \$500 per lot for those lots exceeding 5%.” ESP first discovered a potential breach of the agreement in April-May 2012 based on a field audit of the development. Subsequent to ESP’s discovery of the breach it made a demand for payment of \$80,000 to Developer regarding 160 homes that were in violation of the agreement.

In 2012 ESP brought an action against Developer for breach of contract. Developer filed a motion for summary judgment arguing that the statute of limitations barred a claim for all of the homes subject to the agreement, and in the alternative it barred ESP’s claims for all but seven homes since the homes were sold between 2004 and 2012. ESP argued that under the discovery rule its cause of action didn’t accrue until 2012 which was an issue reserved for the jury. ESP also argued that because under the terms of the agreement Developer was “solely responsible for ensuring the homes had electric water heaters installed prior to the initial occupancy” Developer was estopped from asserting a statute of limitations defense. Developer argued that ESP didn’t act with reasonable diligence until 2012.

The district court granted Developer’s motion for summary judgment holding that “the initial residential occupancy of a home equipped with a water heating source other than electricity furnished by Plaintiff trigger[ed] a breach of the Agreement” and based on the court’s holding in *Richland-Lexington Airport Dist. v. Am. Airlines, Inc.*, 306 F.Supp.2d 548, 566 (D.S.C. 2002) aff’d, 61 F. App’x 67 (4th Cir. 2003) “[ESP] accrued a new cause of action each time a water heating source other than electric was present at the initial residential occupancy, or close date, of a home subject to the Agreement.” The court also held that ESP failed to exercise

reasonable diligence in discovering the breach by waiting until 2012 to perform the field audit of the development.

ESP also argued that the terms of the agreement requiring Developer to be “solely responsible for ensuring full compliance” with the agreement “(1) relieved [ESP] from its duty to act with reasonable diligence, and (2) estop[ped Developer] from asserting the statute of limitations.” The court strongly rejected these arguments holding that this interpretation of the agreement “leads to absurd consequences” whereby Developer should not be required to notify ESP of any breach of the agreement. *Fairfield Elec. Coop., Inc. v. DR Horton, Inc.*, 2013 WL 5409143 (D.S.C. September 25, 2013).

III. Insurance

A. Developer Entitled to Indemnification from Its Predecessor-In-Interest’s Insurer

Insurer filed a declaratory judgment action seeking a declaration that it owed no coverage or defense obligations to Developer under Developer’s policies for losses arising out of a large construction defect suit involving 77 condominium buildings. Developer filed an answer and counterclaim seeking a declaration that the policies issued by Insurer provided both indemnification and a defense for the claims asserted and damages in the suit (“suit”). Developer also asserted a claim against Insurer for breach of contract.

Developer was a successor-in-interest to prior companies which had insurance policies through additional insurers. Developer subsequently amended its answer to assert a third party complaint against Developer’s predecessor-in-interest’s Insurer (Prior Insurer) seeking a declaration that Prior Insurer provided coverage and also had a duty to defend in the suit. Prior Insurer subsequently filed an answer and counterclaim against Developer and Insurer seeking a declaration that its policies did not provide coverage or a duty to defend in the suit. Prior Insurer also filed a fourth party complaint against Multiple Insurers, who had issued policies to Developer and its predecessor in interest, seeking a declaration that if Prior Insurer had a duty to defend then Multiple Insurers also had a duty to defend and should be held liable in contribution for any amounts to be paid by Prior Insurer.

In ruling on the parties’ motions for summary judgment the district court ruled that Prior Insurer had a duty to defend “because coverage passed to successors-in-interest through merger”, the suit reflected the potential for an “occurrence” during Prior Insurer’s policy period, Prior Insurer had a duty to Defend Developer in the suit and Prior Insurer was not entitled to contribution from the fourth party defendants.

The court set the remaining issues for trial which included (1) “whether there was coverage for any portion of the amount eventually paid by [Developer] to settle the [suit], and if so, what amount, if any, [Prior Insurer] owed to [Developer] for its pro-rata time-on-risk portion

of those covered damages,” and (2) “what amount, if any, [Prior Insurer] owed to [Developer] in reimbursement of the reasonable, necessary and related defense costs in the [suit].” Insurer was dismissed from the declaratory judgment action by stipulation of the parties on the first day of trial.

The court held that because no prior exclusion in Prior Insurer’s policies barred coverage, Prior Insurer must indemnify Developer in accordance with the pro rata time-on risk method as provided in *Crossmann Cmty. of N. A., Inc. v. Harleyville Mutual Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) (holding that losses in a progressive damage case should be allocated among all triggered policies based on each insurer’s time-on-the-risk). In applying this methodology the court held that 12 buildings involved in the 77 building suit triggered coverage and awarded \$16,473 on Developer’s indemnity claim against Prior Insurer. The court also held that because the suit triggered Prior Insurer’s duty to defend the entirety of all claims in the suit, Developer’s remedy for Prior Insurer’s breach of its duty to defend (which the court had already addressed in a prior order) was payment for Developer’s expenses incurred in providing its own defense. Accordingly, the court applied the twelve factors outlined in *Barber v. Kimbrell’s, Inc.*, 577 F.2d 216 (4th Cir. 1978) in its analysis of whether Developer’s attorney’s fees incurred in defending the suit were reasonable and necessary. The court emphasized that because (1) Developer had a strong economic incentive to “pay only those attorneys’ fees and defense costs that were reasonable and necessary to defend” the suit, (2) Developer closely managed its defense costs through its thorough review of all billings, (3) Developer’s Prior Insurer acquiesced in Developer’s defense strategy by virtue of its knowledge of status reports and failure to attempt to manage Developer’s defense plan, (4) Developer’s selection of its lead counsel was reasonable, and (5) because Developer’s defense team achieved an excellent result in the suit, all unreimbursed attorney’s fees incurred by Developer were reasonable and necessary.

The court also held that because Developer entered into settlement agreements with six additional insurance carriers from which it sought coverage and a defense in the suit it was prevented from also recovering these costs from Prior Insurer. The court emphasized that because Developer’s settlement agreements with the additional six carriers provided that Developer agreed to “release all claims for coverage under the insurer’s policies” and because Developer “claimed both defense and indemnity under the policies at issue and the settlement agreements contained general releases, without allocation of an amount toward defense costs or an amount toward indemnity ... the settlement amounts paid by the carriers included payment for both.” In its reasoning the court stated that the collateral source rule only applies to tort claims and in this instance because Developer’s claim was a breach of contract claim it was prevented from double recovery. Thus, the court reduced the amount Prior Insurer was obligated to pay Developer by the amount of the settlement payments made by the six additional carriers.

Finally, the court also held that under South Carolina law Developer was entitled to recover its costs and fees from Prior Insurer for prosecuting its third-party claim in order to

enforce Prior Insurer's duty to defend. *Crossman Cmty. of N.A., Inc. v. Harleyville Mut. Ins. Co.*, 2013 WL5437712 (D.S.C. September 27, 2013).

B. Fallen Billboard Sign and Removal of Additional Signs Constitutes an Occurrence under CGL Policy

A jury determined that Insured was liable in a tort action involving the construction of three outdoor advertising billboard signs. One sign fell into the interstate and the two remaining signs were removed. The jury awarded actual and punitive damages to plaintiffs. Insured then sought indemnification from its CGL Insurer as a result of the tort action. Insurer filed a declaratory judgment action to determine whether or not it had a duty to indemnify Insured as a result of Insured's liability. The trial court found that Insurer's policy covered all damages awarded by the jury and ordered that Insurer was obligated to indemnify Insured for the judgment in the tort action. The court of appeals reversed the trial court based on the trial court's failure to grant Insured's motion to transfer venue to its county of residence. Insured subsequently filed a Rule 59(e) motion and a motion under Rule 60 SCRPC to have the trial court's declaratory judgment order voided. The trial court only struck the portion of its order referencing the money damages awarded by the jury. Insured appealed the trial court's order which the court of appeals affirmed as modified. The South Carolina Supreme Court granted Insured's petition for writ of certiorari.

On appeal the South Carolina Supreme Court held that the court of appeals correctly affirmed the trial judge's denial of Insured's Rule 60 motion because there was a justiciable controversy sufficient to implement the S.C. Uniform Declaratory Judgment Act. The Court further clarified that the DJ decision regarding property damages was not proper for its consideration because it was based on questions of fact to be presented at trial. The Court also held that there was an "occurrence" under the policy and stated that "we view the fallen sign and the removal of the remaining two signs under a continuum of an occurrence, as this is analogous to the CGL cases involving continuous or repeated exposure to substantially the same general harmful conditions." The Court also held that "because the signs were simultaneously constructed, we view [the falling of the first sign and removal of the other two] as a single occurrence with progressive damage." *Auto-Owners Ins. Co. v. Rhodes*, 2013 WL5348381 (S.C. Sup. Ct. September 25, 2013).

III. Miscellaneous

A. Successor Company of Material Supplier Held to be Proper Claimant Under Miller Act

General contractor entered into a contract with the federal government to provide labor and materials to improve a federal facility and posted the necessary bond under The Miller Act. General contractor subcontracted with Firm to perform some of the work on the project. Firm had previously operated its business as a sole proprietorship and its owners considered Firm to

be a successor company. Sole Proprietorship had an open credit account with Material Supplier that supplied Firm with the materials for the Project. Firm failed to pay for all of the materials and Material Supplier attempted to recover the additional monies owed from General Contractor and its Surety. The district court granted summary judgment in favor of Material Supplier holding that it was a proper claimant under the Miller Act because Firm was the successor company to Sole Proprietorship. On appeal the Fourth Circuit affirmed the decision of the district court holding that because Successor Company acted as if there was a contractual relationship between itself and Sole Proprietorship. *L&W Supply Corp. v. Greenway Enters., Inc.*, 2013 WL 5832244 (4th Cir. October 29, 2013).

B. District Court Upholds Breach of Warranty Cause of Action Filed Against Engineering Firm

Engineering Firm performed engineering and testing services on a home site on behalf of Home Builder. Home Builder subsequently built a home for Home Buyers on the site and the home developed structural problems after construction. Home Builder made efforts to fix the problems and also offered to conduct further repairs. Home Buyers have initiated arbitration proceedings against Home Builder which is scheduled for a final hearing in March 2014.

Home Builder asked Engineering Firm to participate in the arbitration proceedings and when Engineering Firm declined to participate Home Builder filed an action against Engineering Firm seeking indemnity for its incurred repair costs and alleged breach of the express or implied contractual obligations and warranties, professional negligence, non-delegable duty/vicarious liability, breach of warranty and breach of contract.

Engineering Firm filed a motion to dismiss arguing that Home Builder's claims were not ripe for adjudication due to the pending arbitration. The district court held that some of Home Builder's claims were ripe for adjudication because they did not arise from or relate to the arbitration proceeding. The court dismissed Home Builder's breach of non-delegable duty/vicarious liability claims holding that they were not independent causes of action but doctrines related to the professional negligence claim. The court denied Engineering Firm's motion to dismiss as to Home Builder's breach of express and implied warranty claims holding that the services Engineering Firm provided services that were related to the "testing or preparation of land, a tangible thing" as opposed to a service designed to achieve a specific result. The court denied this motion without prejudice to renewal of the arguments after completion of discovery. *Pulte Home Corp. v. S&ME, Inc.*, 2013 WL4875077 (D.S.C. September 11, 2013).

C. Surety's Relief from Contractor's Breach of GIA Prevents Surety from Obtaining Additional Equitable Relief

As part of Surety's issuance of payment and performance bonds to Contractor, Contractor executed a general indemnity agreement ("GIA") which provided that Contractor would indemnify Surety for any and all liability, losses, costs, etc. incurred should Surety pay any claims related to the issuance of payment and performance bonds on Contractor's behalf. Contractor subsequently sent a letter to Surety acknowledging its default and inability to perform the construction contracts which were secured by the bonds which Surety had issued. Surety completed the construction contracts and also made payments on behalf of Contractor on the projects.

Surety subsequently filed an action against Contractor seeking (1) specific performance of the GIA, (2) alleging a breach of the GIA, (3) seeking a permanent injunction for deposit of collateral security, and (4) requesting relief under the equitable doctrines of quia timet and exoneration. Contractor answered and Surety filed a motion for summary judgment. Contractor did not file a response to Surety's motion for summary judgment.

The district court denied Surety's motion for specific performance due to the fact that Contractor admitted its default under the GIA, which provided an adequate remedy of law. Consequently, the court granted Surety's motion for summary judgment as to its claim for Contractor's breach of the GIA due to Contractor's admission of its breach of the GIA. The court denied Surety's motion for a permanent injunction requiring that a collateral security deposit be made due to the fact that Surety failed to present any evidence of irreparable harm. In denying Surety's request for an injunction the court emphasized that Surety only requested deposited collateral in the same amount which it sought for its claim of breach of the GIA. Finally, the court denied Surety's motion for relief under quia timet and exoneration holding that because it granted Surety's motion for breach of the GIA, Surety was not also entitled to equitable relief as well. *N.A. Specialty Ins. Co., v. Able Constructors, Inc.*, 2013 WL5439141 (D.S.C. September 27, 2013).

D. Contractor that Didn't Have Its License Lacked Standing to Bring Cause of Action against Home Builder

Contractor brought an action against Home Builder for breach of contract. Contractor failed to possess the required license under S.C. Code Ann. § 40-59-30(B). The trial court dismissed Contractor's action holding that because Contractor failed to possess the required license it lacked standing to enforce the contract. On appeal the South Carolina Court of Appeals affirmed the trial court due to the fact that Contractor failed to possess the required license. *Stolf Constr. LLC v. Sweetgrass Home Builders, LLC*, Op. No. 2013-UP-375 (S.C. Ct. App. October 9, 2013).