

2. On or about April 10, 2006, Superior, as general contractor, entered into a subcontract (“Building 3 Subcontract”) with Plaintiff. Pursuant to the Building 3 Subcontract, Plaintiff was to provide, among other things, all labor, equipment, and materials required for the steel studs, drywall, insulation, and exterior sheathing in connection with the construction of Building 3 for the Project. A document purporting to be the Building 3 Subcontract was generated by Superior, but was never signed by the parties.

3. On or about April 25, 2006, Superior entered into a second subcontract with Plaintiff, for Building 4 of the Project (“Building 4 Subcontract”). Under the Building 4 Subcontract, Plaintiff, as subcontractor, would provide services for Building 4 similar to those called for under the Building 3 Subcontract. A document purporting to be the Building 4 Subcontract was generated by Superior, but was never signed by the parties.

4. On or about April 26, 2006, Superior entered into a third subcontract with Plaintiff, for Building 5 of the Project (“Building 5 Subcontract”). Under the Building 5 Subcontract, Plaintiff, as subcontractor, would provide services for Building 5 similar to those called for under the Building 3 Subcontract. A document purporting to be the Building 5 Subcontract was generated by Superior, but was never signed by the parties.

5. When relevant, the Building 3 Subcontract, Building 4 Subcontract and Building 5 Subcontract are collectively referred to herein as the “Subcontract(s).”

6. At times material, Plaintiff undertook to perform pursuant to the Subcontracts. During the course of performance of the work, disputes arose between Plaintiff and Defendant regarding their respective contractual obligations.

7. Paragraph 14.1 of each Subcontract (the “Arbitration Clause”) provides:

All claims, disputes and matters in question arising out of, or relating to, this Agreement or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, and the claims described in Article 14.7, shall be decided by arbitration in accordance with the Construction Industry Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law.

8. Defendant, claiming that Plaintiff's filing of this civil action is in violation of the terms of the Subcontracts, seeks an order directing Plaintiff to proceed to arbitration pursuant to G.S. 1-569.1 and staying any further proceedings in this action for claims subject to the arbitration provision.

9. The Building 3 Subcontract contains a "Subcontract Number" on the cover page of 05MBD006-S21. While the Building 3 Subcontract is not signed, there are Addenda to the subcontract signed by both Plaintiff and Defendant, which state in part:

The following Additions and Changes are hereby incorporated into, complement and constitute part of the Subcontract fo [sic] Construction between and American Drywall Construction, Subcontract # 05MBD006-S21 on Project Number 05MBD006 . . . Except as expressly and specifically set forth, all terms and conditions of the Subcontract and the Contract Documents are incorporated herein by reference and shall remain in full force and effect.

10. The subcontract price stated in the Building 3 Subcontract is \$770,000.00, which is the same amount referred to as the "Initial Subcontract Value" on the signed Addenda.

11. Plaintiff submitted Application for Payment forms that reflect the same Subcontract Number stated on the Building 3 Subcontract, and reflect the original contract sum stated of \$770,000.00. The Application for Payment forms state that "SUBCONTRACTOR HEREBY REPRESENTS, WARRANTS, AND CERTIFIES to

Superior, as 'Contractor' that this Application For Progress Payment is made in strict accordance with the terms of the Subcontract . . .”

12. Similarly, the Building 4 Subcontract and the Building 5 Subcontract, while also unsigned, each contain an Arbitration Clause identical to the Building 3 Subcontract.

13. The Building 4 Subcontract includes addenda with Subcontract Numbers matching the Building 4 Subcontract. These addenda have matching Initial Subcontract Values, but these addenda are unsigned by the parties. The Building 4 Subcontract also has Application for Payment forms stating that the performance is in strict accordance with the terms of the Subcontract. These Application for Payment forms are signed by Plaintiff.

14. The Building 5 Subcontract has no addenda, but does have accompanying Application for Payment forms stating that the performance is in strict accordance with the terms of the Subcontract. These Application for Payment forms are signed by Plaintiff.

15. On May 30, 2008, Defendant filed a Motion to Stay Pending Arbitration, Answer, Third-Party Complaint and Motion to Stay Third-Party Complaint Pending Arbitration. Defendant requested that the court issue an order staying the relevant claims and compelling Plaintiff to proceed with arbitration under the terms of the contracts between Parties.

BASED upon the foregoing FINDINGS, the court CONCLUDES:

1. In North Carolina, arbitration clauses are governed by the North Carolina Arbitration Act, G.S. 1-569.1 et seq. Section 1-569.6, specifically, defines the

parameters of which disputes should be referred to arbitration:

Validity of agreement to arbitrate. (a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract. (b) The Court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate . . .

2. North Carolina has a strong public policy in favor of arbitration and will resolve disputes regarding the scope of arbitrable issues in favor of arbitration. *Carteret County v. United Contractors*, 120 N.C. App. 336, 462 S.E.2d 816 (1995).

3. In addition to North Carolina law, Defendant correctly points to the Federal Arbitration Act (“FAA”) as applicable to this dispute. Under the FAA, a written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of the contract or transaction is deemed to be valid, irrevocable, and enforceable unless such grounds exist at law or in equity for the revocation of the contract. 9. U.S.C.A. § 2. Here, Defendant was involved in “commerce” as defined by the FAA, and the Act requires a stay while the arbitration dispute is pending.

4. Furthermore, in this civil action Plaintiff seeks payment for performance of the work done pursuant to the terms of the respective Subcontracts, while at the same time it seeks to deny the enforceability of one of the terms of the Subcontracts. Much like the case of *Real Color Displays, Inc. v Universal Applied Techs.*, 950 F. Supp. 714 (E.D.N.C. 1997), Plaintiff’s conduct demonstrates that it intended to be bound by the Subcontracts, including the Arbitration Clause. In addition, Defendant’s argument in favor of the enforceability of the arbitration clause is bolstered by the signed subsequent

writings, which specifically relate back to and incorporate the terms of the respective Subcontracts.

5. While the Subcontracts were never signed, the fact remains that Plaintiff undertook to perform the contracts in accordance with the terms of the Subcontracts. The facts and circumstances of the dealings between the parties clearly demonstrate that the Subcontracts were intended by the parties to be binding. The fact that certain of the agreements were not signed does not change this result.

6. Therefore, the arbitration provisions contained in the Subcontracts are enforceable, and Defendant's Motion should be granted.

NOW THEREFORE, based upon the foregoing FINDINGS and CONCLUSIONS, it is ORDERED that:

1. The Defendant's Motion to Stay and Compel Arbitration is hereby GRANTED.

2. The Parties are ORDERED to proceed to arbitration pursuant to G.S. 1-567.1 et seq., as required by the terms of the Subcontracts.

3. Further proceedings in this action are STAYED, pending completion of arbitration between the parties, except as ordered by the Arbitrator.

This the 19th day of November, 2008.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Special Superior Court Judge for
Complex Business Cases