THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Carmen T. Mullen,
Circuit Court Judge

Civil Action No. 2010-CP-07-2407

Bank of America, N.A.,.....Respondent,

versus

Jerry C. Wardlaw Construction of South Carolina, Inc.;
Jerry C. Wardlaw Construction, Inc.;
Wardlaw Construction of Effingham, LLC;
JCW Construction, LLC; Jerry C. Wardlaw; Jack Wardlaw;
New Riverside Association, Inc.; and Midpoint at New Riverside
Homeowners Association, Inc.,.....Defendants,

Of whom

Jerry C. Wardlaw Construction of South Carolina, Inc.;
Jerry C. Wardlaw Construction, Inc.;
Wardlaw Construction of Effingham, LLC;
JCW Construction, LLC; Jerry C. Wardlaw; Jack Wardlaw
are the.....Appellants.

RESPONDENT'S INITIAL BRIEF

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I. STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred in ruling that Appellants, who had engaged in discovery and waited over a year to file their motion to compel arbitration, had waived their right to arbitration.

II. STATEMENT OF THE CASE

Respondent filed its foreclosure and guaranty Complaint on May 19, 2010, seeking a judgment of foreclosure on a mortgage covering real property in Beaufort County, South Carolina and an immediate money judgment against Appellants for amounts due under a loan agreement, note, and guaranties. On July 29, 2010, Appellants filed an Answer, Affirmative Defenses, and Counterclaim, asserting, among other things, that Respondent made certain assurances that Appellants would be able to continue to borrow money to complete their real estate projects. On August 30, 2010, Respondent filed its Reply to Counterclaim. Respondent filed a Motion for Summary Judgment on February 4, 2011, and Appellants filed a response to the motion on April 5, 2011. Respondent filed an Amended Motion for Summary Judgment on May 2, 2011. On May 5, 2011, Respondent filed a Motion to Amend Reply, seeking to assert an additional affirmative defense. Appellants filed a response to the Amended Motion for Summary Judgment on June 1, 2011. On June 3, 2011, in anticipation of a motions hearing to be held on June 6, 2011, Respondent filed a Memorandum in Support of Motion for Summary Judgment. Also on June 3, 2011, Appellants filed a Motion to Compel Arbitration based on arbitration provisions in the loan documents.[1] In an order dated June 29, 2011, and filed on June 30, 2011, the circuit court denied Appellants' Motion to Compel Arbitration. Appellants served their notice of appeal on July 27, 2011.

[1] Respondent notes that the arbitration provision from the loan agreement cited in Appellants' Initial Brief is no longer the applicable provision. That provision was replaced by a new arbitration provision in that certain Fifth Amendment to Loan Agreement dated October 12, 2007, a true and correct copy of which is attached to the Complaint as Exhibit A-6.

III. ARGUMENT AND CITATION OF AUTHORITY

The circuit court found that Appellants waited over a year to move to compel arbitration, engaged in discovery, and availed themselves of the court. The record reasonably supports these findings, and this Court should not overrule them. Moreover, Respondent has suffered prejudice by incurring costs and fees it otherwise would not have incurred. The circuit court's conclusion that Appellants have waived their right to arbitration should be affirmed.

This Court has held that the right to enforce an arbitration clause may be waived. *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (Ct. App. 2011); *Liberty Builders, Inc. v. Horton,* 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "'Arbitration laws are passed in order to expedite the settlement of disputes and should not be used as a means of furthering and extending delays. . . .'" *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003) (quoting 4 Am. Jur. 2d *Alternative Dispute Resolution* § 131 (1995)). "'A party may waive the right to arbitration by being unjustifiably slow in seeking arbitration.'" *Id.* The right to arbitrate can even be waived in the face of a "no-waiver" provision in the arbitration agreement. *Liberty Builders, Inc.,* 336 S.C. at 667, 521 S.E.2d at 754. Whether a party waived its right to arbitrate is a legal conclusion subject to *de novo* review. *Evans,* 352 S.C. at 549, 575 S.E.2d at 76 (citations omitted). However, this Court will not overrule the circuit court's factual findings underlying that conclusion if those findings are reasonably supported by any evidence. *Id.*

A party seeking to establish waiver must show prejudice through an undue burden caused by delay in demanding arbitration. *Liberty Builders, Inc.,* 336 S.C. at 665, 521 S.E.2d at 753. Whether a party has waived its right to compel arbitration depends on the facts of each case, and there is no set rule as to what constitutes a waiver of the right to arbitrate. *Id.* However, this

Court generally considers three factors when determining whether a party has waived its right to compel arbitration: "(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration." *Rhodes v. Benson Chrysler–Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). "To establish prejudice, the non-moving party must show something more than mere inconvenience." *Id.* at 127, 647 S.E.2d at 251 (internal citations and quotation marks omitted).

It is important to note that this Court shows deference to a circuit court's factual findings supporting the conclusion that a party has waived its right to arbitrate. *See Evans,* 352 S.C. at 549, 575 S.E.2d at 76. Here, the circuit court made several findings, all reasonably supported by the record, that this Court should not disturb and that lead to the conclusion that Appellants have waived their right to arbitrate. Regarding the delay factor, the circuit court found that a substantial length of time had passed in the instant matter. Appellants waited over a year after Respondent filed its Complaint to file their motion to compel arbitration. As the circuit court noted, "Well, why didn't you compel arbitration in the year that you've had since [the lawsuit was filed]?" Transcript, Page 3, Lines 4-5. Ultimately, in denying Appellants' motion, the circuit court found that "there has been plenty of time" for Appellants to have moved to enforce their right to arbitration. Transcript, Page 10, Line 4. Indeed, despite having already filed two responses to Respondent's Motion for Summary Judgment, Appellants did not file their Motion to Compel Arbitration until June 3, 2011, three days before the summary judgment hearing.

Regarding the second factor, Appellants chose to avail themselves of the litigation process by engaging in discovery, serving both interrogatories and requests for production on Respondent. The discovery at issue here should be deemed "extensive" due to the number of documents produced in response to Appellants' discovery requests. At the hearing on Appellants' motion, Respondent's counsel summarized regarding discovery, "[T]he [Appellants] did request written discovery, and we did go through the process, and it was obviously not easy. We had to produce over a thousand pieces of paper to the other side." Transcript, Page 5, Lines 12-16. Engaging in a discovery process that yielded such a large volume of produced documents, in addition to responding to interrogatories, prejudiced Respondent by forcing it to incur attorney's fees and costs that would not have been expended in arbitration. *See Davis*, 394 S.C. 116, 132, 713 S.E.2d 799, 807 (holding party was prejudiced by the costs he incurred in discovery); *Evans,* 352 S.C. at 551, 575 S.E.2d at 77 (holding defendant's continuation of discovery, rather than seeking arbitration in a timely manner, prejudiced plaintiff by forcing her to incur discovery costs that would not have been expended in arbitration); *Liberty Builders, Inc.*, 336 S.C. at 666, 521 S.E.2d at 753 (holding that delay in resolving issues and attorneys fees incurred during lengthy litigation were sufficient to support finding of prejudice).

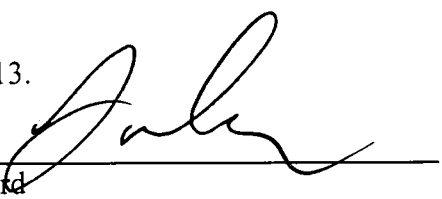
Finally, the circuit court found that the parties have availed themselves of the court on several occasions. In their July 29, 2010 response to the Complaint, Appellants asserted a counterclaim against Respondent. On August 30, 2010, Respondent filed its Reply to the counterclaim. Respondent then filed a Motion for Summary Judgment on February 4, 2011, and Appellants filed a response to the motion on April 5, 2011. Respondent filed an Amended Motion for Summary Judgment on May 2, 2011, and on May 5, 2011, Respondent filed a Motion to Amend Reply, seeking to assert an additional affirmative defense. Appellants filed a response

to the Amended Motion for Summary Judgment on June 1, 2011. On June 3, 2011, in anticipation of the motions hearing held on June 6, 2011, Respondent filed a Memorandum in Support of Motion for Summary Judgment. Appellants did not file their Motion to Compel Arbitration until June 3, 2011, three days before the June 6, 2011 hearing. As the circuit court noted, "[T]he whole idea of arbitration is to do things more quickly and to move things along; not do all the discovery. What you've done is you have availed yourself of the Court for a year and now you want to compel arbitration." Transcript, Page 3, Lines 19-24. Thus, in addition to the prejudice from unnecessary discovery costs, Respondent suffered prejudice by incurring fees and costs in pursuing its summary judgment motion that Appellants have attempted to short-circuit with their eleventh-hour arbitration demand.

IV. CONCLUSION

The circuit court found that Appellants waited far too long—over a year—to move to compel arbitration. The circuit court also found that Appellants had engaged in discovery and availed themselves of the court. Because the record reasonably supports these findings, this Court should not disturb them. Moreover, Respondent has suffered prejudice by incurring costs and fees it otherwise would not have incurred. For all of the foregoing reasons, Respondent respectfully requests that this Court affirm the circuit court's decision denying Appellants' Motion to Compel Arbitration.

Respectfully submitted this 24 day of May, 2013.



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DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent Bank of America, N.A. hereby designates the following matters to be included in the record on appeal:

1. Form 4 Order denying Appellants' Motion to Compel Arbitration
2. Transcript of Record, Pages 1-18
3. Lot Acquisition and Construction Loan Agreement, attached as Exhibit A-1 to Complaint
4. Fifth Amendment to Loan Agreement, attached as Exhibit A-6 to Complaint
5. Answer, Affirmative Defenses, and Counterclaim
6. Reply to Counterclaim
7. Motion for Summary Judgment
8. Response to Motion for Summary Judgment
9. Amended Motion for Summary Judgment
10. Motion to Amend Reply
11. Amended Response to Motion for Summary Judgment
12. Memorandum in Support of Motion for Summary Judgment
13. Motion to Compel Arbitration

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May 24, 2013

CERTIFICATION

The undersigned, counsel for Respondent, certifies that the Designation to which this certificate is attached contains no matter which is irrelevant to this appeal.

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May 24, 2013

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PROOF OF SERVICE

The undersigned hereby certifies that on May 24, 2013, the foregoing **RESPONDENT'S INITIAL BRIEF** and **DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** were served on all counsel of record addressed as follows:

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