

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Peter T. Phillips and Summar C.)
 Phillips,)
)
 Plaintiffs,)
)
 Omega Flex, Inc., John Wieland)
 Homes and Neighborhoods of the)
 Carolinas, Inc., AAA Plumbing, Fogel)
 Services, Inc., Charleston LEC, Inc.,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 CASE NUMBER: 2012-CP-10-0870

FILED
 APR 25 AM 9:28
 JULIE J. ARMSTRONG
 CLERK OF COURT

ORDER

BY _____

This matter came to be heard before me on December 18, 2012. Counsel representing all of the parties were in attendance.

JM

The matter was before the court upon the motion of the Defendant John Wieland Homes and Neighborhoods of the Carolinas, Inc. (Hereafter John Wieland Homes), to compel arbitration in this matter. The court has received memoranda both supporting and against the motion. The court also entertained arguments of counsel and all present were allowed to speak. After consideration of the matter, the court concludes that the motion to compel arbitration should be denied.

In determining the issues before it, the court had the pleadings of the parties, the contract between the Plaintiffs and John Wieland Homes and the affidavit of Dennis Black, with exhibits, and the affidavit of Andrew R. McBride. The McBride affidavit concerned John Wieland Homes' attempt to require the other Defendants to arbitrate with the Plaintiffs and John Wieland Homes.

As an initial matter, there seems to be no issue that the contract between the Plaintiffs and John Wieland Homes did not comply with the provisions of South Carolina's Uniform Arbitration Act, §15-48-10(a), S.C. Code Ann. (2005). The language of the contract requiring mandatory arbitration appears on page four (4) of the document and in order for the provisions of South Carolina's Uniform Arbitration Act to apply, the language concerning mandatory arbitration was required to be on the front page of the document in emboldened letters and underlined. §15-48-10(a) supra. Without such designation, according to the statute, "the contract shall not be subject to arbitration." id. As a consequence, the viability of the contract's mandatory arbitration provision depends upon the application of the Federal Arbitration Act (hereafter FAA), 9 U.S.C.A. §§1-16 (2009 and supp. 2012). I have concluded that under recent South Carolina jurisprudence, the determination of this dispute depends on whether the contract between the Plaintiffs and John Wieland Homes was for the construction of a dwelling or for the sale of a home. Bradley v. Brentwood Homes, Inc., et al. 398 S.C. 447, 730 S.E. 2d 312 (2012). If the former, the FAA would apply; but if the latter, the FAA would not apply and under established South Carolina law, mandatory arbitration would not take place. As the court views all of the material submitted in connection with this matter by all parties, it has concluded the transaction between the parties as contained in the agreement was a contract for the sale of a home and not for the construction of a house.

The Bradley case was decided by the South Carolina Supreme Court and filed on July 11, 2012. In connection with its motion to compel arbitration, John Wieland

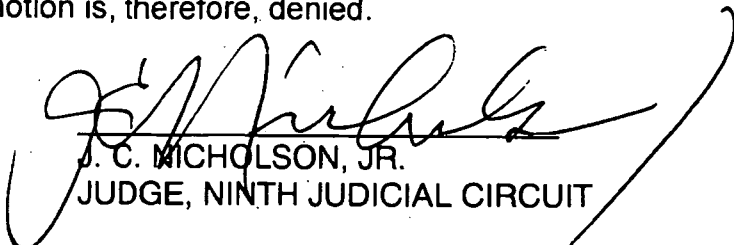
2012
Homes submitted the affidavit of Dennis A. Black, Division Quality Manager for John Wieland Homes. The affidavit was dated October 29, 2012, some three months after the decision in Bradley. In that affidavit, Mr. Black averred his belief on behalf of the Defendant John Wieland Homes that the parties "entered a purchase agreement...to buy a home located at 1417 Hooper Street, Charleston, SC 29492." In view of the law as established by Bradley, his choice of words is significant. Nowhere in his affidavit does he indicate the contract involved the construction of a home. The agreement itself negates the idea that this was a contract for the construction of a home in the traditional sense. Under this contract, the seller, John Wieland Homes, had a right to build as it deemed fit. It had ultimate discretion on materials. The provision of the agreement allowing the Plaintiffs to make certain selections was marked as not applicable. John Wieland Homes reserved the right to decide home placement, driveway location, number of deck steps and all exterior colors. The seller was not required to gain the purchaser's permission prior to making any of these decisions. The agreement further provided that no structural or mechanical changes could be made once framing was complete. Importantly, under the contract the Plaintiffs did not even have the right to enter the property without the written permission of the seller until the walk through prior to closing. If the Plaintiffs had questions concerning the home, they were required under the contract to direct them to the sales agent or community coordinator for the neighborhood and not the seller, John Wieland Homes.

The purchase agreement entered into by the parties was a contract for the sale of a completed home. Only incidental choices could be made by the Plaintiffs and these

would not have affected the "essential character of the agreement" which "was strictly for the purchase of a completed residential dwelling and not [its] construction." Bradley, supra. Since this was a purchase agreement for a completed home, South Carolina law for an intrastate transaction applies and the provision for mandatory arbitration fails since it is not subject to the FAA.

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Defendant John Wieland Homes' motion is, therefore, denied.



J. C. MICHOLSON, JR.
JUDGE, NINTH JUDICIAL CIRCUIT

Charleston, South Carolina
April 23 2013.