

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Larry B Hyman, Jr , Circuit Court Judge

Case No 2009-CP-26-7477

Fred Bradley,

Respondent

v

Brentwood Homes, Inc , Brentwood Homes – Limehouse, LLC,
Brentwood Homes – The Retreat at Johns Island, LLC, Brentwood
Homes of South Carolina, Inc , Brentwood Homes of North Carolina,
Inc Brentwood Homes of Myrtle Beach, Inc , Brentwood Homes of
Low Country, Inc , Brentwood Homes of Fort Mill Inc , Brentwood
Homes of Beaufort-Bluffton, Inc , Harris Street, LLC, Crescent Homes
of SC, Inc , Brentwood Homes Incorporated, a Georgia Corporation,

Appellants

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

I DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION TO STAY AND COMPEL ARBITRATION?

STATEMENT OF THE CASE

This is an appeal from the circuit court's denial of the Appellants' motion to stay this case and to compel arbitration. Appellants submit that binding and valid agreements to arbitrate exist between Fred Bradley, Plaintiff/Respondent, ("Bradley") and Appellant, Brentwood Homes, Inc ("BHI"). Bradley filed this action on or about July 31, 2009, in which he alleges multiple causes of action, all of which relate to the construction of a home he purchased. (R pp 14-21) Bradley actually purchased the residence from BHI pursuant to an agreement dated January 31, 2007 ("Agreement") (R pp 163-172). Bradley also alleges these causes of action against all Appellants as "alter egos" of one another ("Alter Ego Entities"). The causes of action alleged are fraud, negligence, and breach of implied warranty. (R pp 14-21) Appellants filed an Answer on August 19, 2009. (R pp 22-23) Appellants also filed a Notice of Motion and Motion to Dismiss Pursuant to Rule 12(b)(6) or in the Alternative to Amend Answer to Include Counterclaim for Frivolous Proceedings on October 5, 2009. (R pp 44-45) Bradley moved for Summary Judgment on December 22, 2009, alleging that the Answer was insufficient. (R pp 46-70) A substitution of counsel was made by Order on or about January 11, 2010. (R pp 12-13)

The Court denied the Motion to Dismiss (which was later amended), but granted ten (10) days to Appellants to "amend their Answer to the Plaintiff's Complaint." (R pp 8-9) Bradley's Motion for Summary Judgment was denied. (R pp 10-11)

On February 5, 2010, Appellants served an Amended Answer and Counterclaim which raised Arbitration as an affirmative defense (R pp 24-33) On the same date Appellants served a Notice of Motion and Motion to Stay and Compel Arbitration (R pp 161-172)

On June 1, 2010, the Honorable Larry H Hyman, Jr , heard oral arguments on Appellants' Motion to Stay and Compel Arbitration and orally issued and denied said motion from the bench Defendants served a notice of appeal on June 3, 2010 On June 11, 2010, Judge Hyman signed a written order denying the motion to compel arbitration ("Order") (R pp 1-7) Said Order was filed on June 16, 2010 Defendants served an amended notice of appeal on June 29, 2010

FACTS

The lawsuit arises out of alleged deficiencies in the construction of a home located at 2304 Tortuga Drive, North Myrtle Beach, South Carolina ("Residence") (R pp 14-21) Bradley entered into a Home Purchase Agreement for the Residence with BHI the builder and seller of the home, dated January 31, 2007 ("Agreement") (R pp 163-172) Pursuant to Section 14 of the Agreement, a 2-10 Homebuyers Warranty was to be provided to the purchasers (R p 167) This "Warranties and Dispute Resolution" provision of the Agreement contains a Mandatory Binding Arbitration Clause (Subsection G) which was initialed by Bradley (R p 168) It provides

“Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to (1) any claim arising out of Seller’s construction of the home, (2) Seller’s performance under any Punch List or Inspection Agreement, (3) Seller’s performance under any warranty contained in this Agreement or otherwise, and (4) any matters as to which Purchaser and Seller agree to arbitrate.”

The Respondent alleges that an inspection of this residence has resulted in the discovery of construction defects and deficiencies in the building (*Complaint*, R p 16). Respondent further claims that the Appellants failed to construct the residence in accordance with applicable building codes (*Complaint*, R p 17). Appellants have denied Respondent’s Allegations and maintain that such issue should be addressed by and through the 2010 Home Buyers Warranty as provided in the Agreement (*Amended Answer and Counterclaim*, R p 24-33).

STANDARD OF REVIEW

Determinations of arbitrability are subject to de novo review. MBNA Am Bank v. Christianson, 377 S C 210, 213, 659 S E 2d 209, 211 (Ct App 2008). Unless the parties provide otherwise, the question of the arbitrability of a claim is an issue for judicial determination. Zabinski v Bright Acres Assocs, 346 S C 580, 596-97, 553 S E 2d 110, 118-19 (S Ct 2001). “There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration.” Towles v United Healthcare Corp, 338 S C 29, 37, 524 S E 2d 839, 843-844 (Ct App 1999).

ARGUMENT

I THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTION TO STAY AND COMPEL ARBITRATION BECAUSE A BINDING AND VALID AGREEMENT TO ARBITRATE EXISTS BETWEEN RESPONDENT BRADLEY AND APPELLANT BRENTWOOD HOMES, INC

The Agreement purports to be subject to the South Carolina or North Carolina Uniform Arbitration Act (R pp 163-172) The Court found that the Agreement did not strictly comply with S C Code Ann § 15-48-10(a), in that the notice of the arbitration provision was not typed in underlined capital letters on the first page Appellants acknowledge that strict compliance with this provision is required but not met by the agreement at issue

The circuit court erred in failing to enforce the arbitration pursuant to the Federal Arbitration Act When an arbitration provision of an agreement does not meet the technical requirements of S C Code Ann § 15 48-10(a) the Court must inquire whether the Federal Arbitration Act applies Zabinski 346 S C at 590 See also Soil Remediation Co v Nu-Way Env'tl Inc., 323 S C 454, 460, 476 S E 2d 149, 152 (S Ct 1996) Like the contract at issue, in Soil Remediation the arbitration provision purported to comply with the South Carolina Arbitration Act, but failed to comply with the technical requirements However, because the contract involved interstate commerce, the court found that the Federal Arbitration Act ("FAA") preempted the South Carolina Act and enforced the provision

Because the Agreement involves interstate commerce, the arbitration provision in the instant case should also be enforced under the FAA The FAA provides that

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy therefore arising out of such contract or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract 9 U.S.C. § 2

Within the FAA, courts have interpreted “involving commerce” “signals an intent to exercise Congress' commerce power to the full” Allied Bruce Terminix Co. v. Dobson, 513 U.S. 265, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) See also Towles v. United Healthcare Corp., 338 S.Ct. at 36

The terms of the contract at issue reveal that the transaction between the parties involves interstate commerce. The FAA preempts state law when the transaction in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction. Munoz v. Green Tree Fin. Corp., 343 S.Ct. 531, 538, 542 S.Ct. 360, 363 (S.Ct. 2001). The Agreement between the parties specifies that a national warranty company will be used to provide a structural warranty on the Residence (R p 167)(emphasis added). Specifically, the Agreement provides that the Seller (BHI) will purchase a warranty from 2-10 HBW Warranty (“2-10 Warranty”) or such other national warranty provider as Seller may reasonably elect (§ 14A) (R p 167). Therefore the Agreement shows evidence of the involvement of interstate commerce on its face.

The trial court further erred in finding that the *Affidavit of Edward M. Terry* (*Terry Affidavit*) did not provide additional evidence of interstate commerce (R pp 210-222) “To

ascertain whether a transaction involved commerce within the meaning of the FAA the court must examine the agreement, the complaint, and the surrounding facts ” Zabinski 346 S C at 594, citing Towles, supra Courts have relied on the use of affidavits to determine whether a transaction involves interstate commerce Id In the *Terry Affidavit*, Mr Terry sets forth that in the construction of the Residence materials, subcontractors and suppliers from outside of South Carolina were used (R pp 211-212) Such evidence has been accepted to establish interstate commerce by courts in South Carolina, who have all but found that contracts involving construction inherently involve interstate commerce See Episcopal Housing Corp v Federal Ins Co, 269 S C 631, 239 S E 2d 647 (S Ct 1977) (Construction contract involved interstate commerce where materials, equipment and supplies were produced and manufactured out-of-state), Circle S Enterprises Inc v Stanley Smith & Sons 288 S C 428, 343 S E 2d 4 (Ct App 1998) (Though contract did not refer to out-of-state materials or subcontractors, an affidavit made part of record stated that numerous items specified in contract were purchased and shipped from outside state, and the nature of project was sufficient to give notice that materials, equipment and supplies from outside state would be required, thus evidencing transaction involving interstate commerce) Additionally, the *Terry Affidavit* provides that Claims under the 2-10 Warranty specified in the Agreement are to be submitted to HBW’s location in Georgia (R p 211)

The Trial Court made no specific finding that the information set forth in the *Terry Affidavit* was untrue or inaccurate, but apparently found that because Mr Terry (1) did not “deal directly with the customer,” was not the “builder”, and did not deal with warranty calls that his affidavit did not establish the involvement of interstate commerce (R pp 5-6)

Under South Carolina Rule of Evidence 602 evidence to prove personal knowledge may consist of the witness' own testimony. Mr. Terry set forth that he was the Vice President and later President of Brentwood Homes, Inc. (R. p. 210). The Seller listed in the Agreement is Brentwood Homes, Inc. Mr. Terry states that he made the affidavit of his personal knowledge (R. p. 210). The Respondent offered no affidavit or other evidence to refute the specific information contained in the *Terry Affidavit*. The affidavit was therefore proper for consideration and established the involvement of interstate commerce in the transaction between BHI and the Respondent.

Finally, the Respondent himself provides evidence of interstate commerce in the transaction with BHI. In the *Affidavit of John F. Bradley (Fried Bradley) In Opposition to Defendants' Motion to Compel Arbitration* ("Bradley Affidavit"), the Respondent attached a copy of the settlement statement from the sale of the Residence (R. pp. 223-240, 227-228). South Carolina Courts have considered evidence of out-of-state financing in determining if a transaction evidences interstate commerce. See *Zabinsky*, 346 S.C. at 595 (Partner offered affidavit evidencing the use of out of state financing to establish interstate commerce and the Court found that the transaction involved interstate commerce because the partnership utilized out-of-state materials, contractors, and investors). This settlement statement indicates that the Respondent's lender in the transaction is a North Carolina lender. The Respondent's own affidavit therefore establishes the involvement of interstate commerce in the transaction.

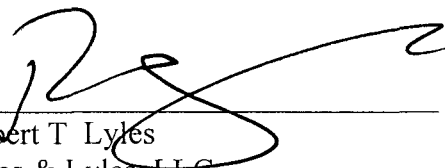
Because evidence of interstate commerce is established by the face of the Agreement between Respondent and BHI, the *Terry Affidavit*, and the Respondent's own affidavit, the

arbitration provision in the Agreement is therefore enforceable under the FAA and the entire proceeding against all Appellants should be stayed pending the arbitration

CONCLUSION

Because a valid and enforceable arbitration provision exists between Brentwood Homes, Inc , and the Respondent, this action must be stayed until arbitration is complete

Respectfully submitted,



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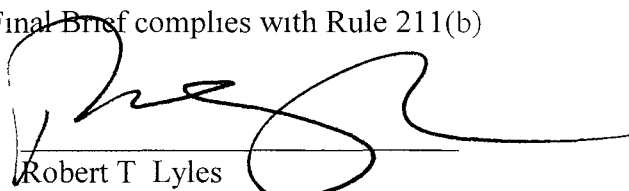
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Certificate of Counsel

The undersigned certified that this Final Brief complies with Rule 211(b)
SCACR

December 29, 2010



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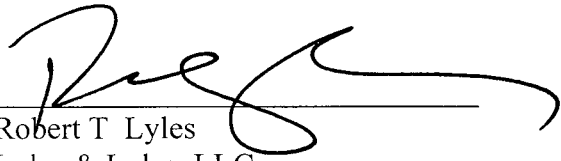
Appellants

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellants on Fred Bradley by depositing a copy of it in the United States Mail, First Class postage prepaid, on December 29, 2010, addressed to his attorney of record, William W DesChamps, III, Esquire, DesChamps Law Firm, Post Office Box 2402, Myrtle Beach, South Carolina 29577

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