STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B Hyman, Jr , Resident Judge, Fifteenth Judicial Circuit

---

Civil Action No 2009-CP-26-7477

Fred Bradley,

Respondent,

vs

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 RESPONDENT

William W DesChamps, Jr
William W DesChamps, III
DESCHAMPS LAW FIRM
1551 21st Avenue North Ste 14
Myrtle Beach, South Carolina 29577
(843) 448-2391
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 5

STANDARD OF REVIEW 6

ARGUMENT 7

I THE HOME PURCHASE AGREEMENT ON ITS FACE DOES NOT INVOLVE INTERSTATE COMMERCE AS THE ESSENTIAL CHARACTER OF THE CONTRACT INVOLVES THE PURCHASE OF REAL PROPERTY IN SOUTH CAROLINA 7

II THE TRIAL COURT'S FACTUAL FINDINGS WITH RESPECT TO THE TERRY AFFIDAVIT MUST NOT BE REVERSED AS APPELLANTS DID NOT PROPERLY PRESERVE THE ISSUE OF THE SUFFICIENCY OF THE TERRY AFFIDAVIT, AND THERE EXISTS AMPLE EVIDENCE THAT REASONABLY SUPPORTS THE TRIAL COURT'S FINDING 10

CONCLUSION 17

CERTIFICATE OF COUNSEL 18

TABLE OF AUTHORITIES

CASES

Camlin v Bi-Lo, Inc ,
311 S C 197, 428 S E 2d 6 (Ct App 1993) 12

Evans v Accent Manufactured Homes, Inc ,
352 S C 544, 550, 575 S E 2d 74, 76 (Ct App 2003) 15

Mathews v Flour Corp ,
312 S C 404, 440 S E 2d 880 (1994) 7, 8, 9, 12

Munoz v Green Tree Fin Corp ,
343 S C 531, 542 S E 2d 360 (2001) 7, 12

Skinner v Elrod,
308 S C 239, 417 S E 2d 599 (Ct App 1992) 10

Soil Remediation Co v Nu-Way Envtl Inc ,
323 S C 454, 460, 476 S E 2d 149, 152 (1996) 7

Talley v South Carolina Higher Educ Tuition Grants Comm'n ,
289 S C 483, 487, 347 S E 2d 99, 101 (1986) 10

Thorton v Trident Med Ctr , L L C ,
357 S C 91, 94 592 S E 2d 50, 51 (Ct App 2003) 6

Timms v Greene,
310 S C 469, 472, 427 S E 2d 642, 644 (1993) 7

Zabinski v Bright Acres Assoc ,
346 S C 580, 594, 553 S E 2d 110, 117 (2001) 7, 8, 9

STATUTES

S C Code Ann § 15-48-10(A) 4

RULES

SCRCP 37(d)	2
SCRCP 12(b)(6)	3
SCRCP 59(e)	10, 11
SCRE 401	12
SCRE 602	13

OTHER AUTHORITIES

4 Am Jur 2d Alternative Dispute Resolution § 131 (1995)	15
James F Flanagan SCRCP 475 (2d ed 1996)	11

STATEMENT OF ISSUE ON APPEAL

I DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION TO STAY AND COMPEL ARBITRATION WHEN THE ESSENTIAL CHARACTER OF THE CONTRACT AT ISSUE WAS FOR THE PURCHASE AND SALE OF REAL ESTATE LOCATED IN SOUTH CAROLINA, THE TERRY AFFIDAVIT WAS NOT SUFFICIENT TO ESTABLISH INTERSTATE COMMERCE, AND THE APPELLANTS WAIVED ANY RIGHT TO SEEK ARBITRATION?

STATEMENT OF THE CASE

On July 31, 2009, Respondent Fred Bradley (hereinafter sometimes referred to as "Bradley") filed a Complaint against Appellants 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 Low Country, Inc , Brentwood Homes of Fort Mill, Inc , Brentwood Homes of Beaufort-Bluffton, Inc , Harris Street, LLC, Crescent Homes SC, Inc , and Brentwood Homes Incorporated, a Georgia Corporation, alleging causes of action under an alter ego theory of liability for fraud, negligence, and breach of implied warranty (R pp 14-21) Caroline Bernard, Esq , filed an initial Answer on behalf of Appellants in the form of a general denial (R pp 22-23) Thereafter, Bradley served his initial discovery requests on Appellants on September 9, 2009 (R p 78) Caroline Bernard, Esq , filed a Motion to Amend Appellants' Answer to include a counterclaim for frivolous proceedings on September 30, 2009 (R p 206, lines 8-11) Bradley served Appellants' counsel with his Second Request for Admissions, Second Set of Interrogatories, and Second Request for Production of Documents on October 27, 2009 (R p 130) Bradley filed a Notice of Motion and Motion to Compel Discovery on December 22, 2009 to request the Trial Court to grant him an order compelling Appellants to produce their responses to Respondent's Second Request for Production of Documents and responses to Respondent's Second Set of Interrogatories and/or an Order entering a Default Judgment against Appellants for their willful failure to respond to said discovery requests pursuant to Rule 37(d), *South Carolina Rules of Civil Procedure* (R pp 71-77) In his Motion to Compel Discovery, Bradley also moved for the Trial Court to determine the sufficiency of Appellants' responses to Respondent's Second Request for Admissions as well as the Appellants' responses to Respondent's initial

requests for admission numbers 1 and 2, initial request for production of documents, and for an Order compelling Appellants to completely answer Respondent's first set of interrogatories numbers 1, 2, 3, 4, 10, and 11 (R p 72)

Appellants retained new counsel, Allen DuPre, Esq , of Lyles & Lyles, LLC on January 11, 2010 (R pp 12-13) Mrs DuPre filed and served an Amended Notice of Motion and Motion to Dismiss on behalf of Appellants on January 5, 2010 (R pp 159-160) The grounds for Appellants' Amended Motion to Dismiss were that Bradley's allegation that the Appellants were alter egos constituted a legal conclusion and was not proper pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure (R p 159) Thereafter, Appellants' counsel served Bradley with Appellant Brentwood Homes, Inc 's First Set of Interrogatories and Requests for Production, as well as Appellant Brentwood Homes – Limehouse, LLC's First Set of Interrogatories on January 19, 2010 (R p 241)

On February 1, 2010, the Honorable Larry B Hyman, Jr , heard Bradley's Motion to Compel Discovery and Appellants' Motion to Dismiss wherein the Trial Court ordered Appellants to respond to Respondent's discovery requests within 45 days (R pp 8-9) The Honorable Larry B Hyman, Jr , also heard Bradley's Motion for Summary Judgment on February 1, 2010 (R pp 10-11) At the hearing on February 1, 2010, Appellants' counsel asserted that summary judgment would punish the client for the prior acts of their prior attorney, and that summary judgment would not promote an adjudication on the merits (R p 207, lines 9–17) Thereafter, the Honorable Larry B Hyman, Jr , permitted Appellants to amend their Answer to promote an adjudication on the merits (R p 207, lines 24-25)

Subsequent to the February 1, 2010 hearing, Appellants served Bradley with their Amended Answer and Counterclaim on February 5, 2010 (R pp 24-43) Appellants also filed

and served a Motion to Compel Arbitration along with the Home Purchase Agreement at issue attached thereto on February 5, 2010 (R pp 161-172) Thereafter, Bradley filed and served a Motion to Reconsider to request the Honorable Larry B Hyman, Jr , to amend his prior Order (R pp 173-174) Bradley alleged that the Trial Court should strike the affirmative defenses asserted in Appellants' Amended Answer and Counterclaim because the Appellants were reluctant to respond to his discovery requests and were attempting to use affirmative defenses to avoid complying with the Trial Court's prior Order granting Bradley's Motion to Compel and Denying Appellants' Motion to Dismiss (R pp 173-174)

Appellants agree that the Home Purchase Agreement is not subject to arbitration pursuant to S C Code Ann 15-48-10(A) and, therefore, the only issue before this Court is whether the Home Purchase Agreement involves interstate commerce within the scope of the FAA At the hearing before the Trial Court on June 1, 2010, Appellants asserted that the Home Purchase Agreement involved interstate commerce because the agreement included a provision wherein the seller will purchase a warranty from 2-10 HBW Warranty or such other national warranty provider as seller may reasonably elect (R p 177, lines 18-20) Appellants further asserted that the Home Purchase Agreement involved interstate commerce because South Carolina has basically found that construction contracts involving materials and contractors from out-of-state involve interstate commerce (R p 190, lines 3-8) Bradley asserted at the hearing that the Home Purchase Agreement does not evidence interstate commerce as it is a general contract to purchase and sell the subject home (R p 189, lines 11-15) The Trial Court denied Appellants' Motion to Compel Arbitration and granted Appellants 40 days to respond to Bradley's discovery requests pursuant to the terms of the Trial Court's order (R pp 6-7) The Trial Court examined the Home Purchase Agreement, the Complaint and the surrounding facts when it determined

that the transaction involving the purchase of Bradley's home did not involve interstate commerce (R pp 5-6) Further, the Trial Court found that the Home Purchase Agreement clearly states that the South Carolina Arbitration Act is Applicable (R p 191, lines 7-10)

STATEMENT OF FACTS

This action arises out of Appellants' material misrepresentations regarding the marketing and selling the subject home to Bradley, as well as Bradley's discovery of construction defects and deficiencies (R p 15, lines 25-27, p 16, lines 8-9) It is unclear at this stage in the litigation whether Brentwood Homes, Inc , or Brentwood Homes of South Carolina, Inc , was the contractor with respect to constructing the subject home as Brentwood Homes of South Carolina, Inc , is listed as the contractor on the building permit (R p 102) On or about January 31, 2007, Bradley executed a Home Purchase Agreement in order to purchase the subject home (R p 35, p 43) The Home Purchase Agreement was executed by Bradley, as purchaser, and Donald Gerratt, as agent for seller, Brentwood Homes, Inc (R p 43, lines 24-26) Pursuant to the Home Purchase Agreement, Bradley agreed to purchase a completed dwelling wherein Brentwood Homes Inc , was not acting as a contractor for purchaser in the construction of the dwelling, but rather as a seller of a completed dwelling (R p 41, lines 41-43) The closing of Bradley's home took place on March 2, 2007 and was conducted by the Brush Law Firm (R p 223, lines 7-8) Thomas H Brush, Esq , of the Brush Law Firm was the assistant vice president of Brentwood Homes, Inc , at the time of closing (R pp 227-228) However, Bradley was never informed that the closing attorney was an officer of Brentwood Homes, Inc , prior to or at the time of closing (R p 224, lines 19-20)

The Home Purchase Agreement provides that "validation of the 2-10 HBW warranty is conditioned upon seller's compliance with all 2-10 HBW's enrollment procedures and upon

seller remaining in good standing in the 2-10 HBW Program" (R p 38, lines 13-16) The document entitled "Builder Application for Home Enrollment" states to the buyer that "By signing below, you acknowledge that you have read a sample copy of the Warranty Booklet, and consent to the terms of these documents including the binding arbitration provision contained therein" (R p 226) The Builder Application for Home Enrollment also provides that there is no coverage by the builder's warranty insurer if the buyer has not received a certificate of warranty coverage and a warranty booklet from 2-10 HBW within thirty days after closing (R p 226) The Builder Application for Home Enrollment was never presented to Bradley before the commencement of this litigation, nor did he ever execute any document relating to the 2-10 Home Buyers Warranty associated with the home he purchased from Appellants (R p 223, lines 9-12, p 224 lines 1-2) Bradley did not receive the Home Buyers Warranty Limited Warranty Booklet until after April 11, 2007 (R p 224, lines 8-11, R p 230)

Edward M Terry, past president of Brentwood Homes, Inc , ran the operations of the company but did not deal directly with Bradley (R p 92, lines 7-9) Donald Gerratt, former vice president of construction for Brentwood Homes, Inc , was alleged by Appellants to be the builder who built the subject home (R p 92, lines 2-6)

STANDARD OF REVIEW

"Determinations of arbitrability are subject to de novo review" Thorton v Trident Med Ctr , L L C , 357 S C 91, 94, 592 S E 2d 50, 51 (Ct App 2003) "Nevertheless, a circuit court's factual findings will not be reversed on appeal if there is any evidence reasonably supporting the findings" Id

ARGUMENT

Bradley respectfully requests that this Court affirm the Order denying Appellants' Motion to Compel Arbitration as there exists substantial evidence to support the Trial Court's finding that the Home Purchase Agreement is not subject to the Federal Arbitration Act

I THE HOME PURCHASE AGREEMENT ON ITS FACE DOES NOT INVOLVE INTERSTATE COMMERCE AS THE ESSENTIAL CHARACTER OF THE CONTRACT INVOLVES THE PURCHASE OF REAL PROPERTY IN SOUTH CAROLINA

In order for the Federal Arbitration Act 'to apply, the commerce involved in the contract must be interstate or foreign" Soil Remediation Co v Nu-Way Envtl Inc, 323 S C 454, 460, 476 S E 2d 149, 152 (1996) "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts" Zabinski v Bright Acres Assocs, 346 S C 580, 594, 553 S E 2d 110, 117 (2001) The court is required to review the entire contract "in determining whether the contract on its face evidences commerce" Timms v Greene 310 S C 469, 472, 427 S E 2d 642, 644 (1993) South Carolina courts "consistently look to the essential character of the contract when applying the FAA" Thorton, at 96, 592 S E 2d at 52 The South Carolina Supreme Court has found that a contract for the sale of land in this state to out-of-state parties did not involve interstate commerce even though the parties obtained engineering services and procured financing from other states See Mathews v Fluor Corp 312 S C 404, 440 S E 2d 880 (1994), overruled by Munoz v Green Tree Fin Corp, 343 S C 531, 542 S E 2d 360 (2001) (overruling Mathews to the extent it considered whether the parties contemplated interstate commerce as a factor in determining whether the FAA applied) In Mathews, the South Carolina Supreme Court found that the transaction did not involve interstate commerce and was not within the scope of the Federal Arbitration Act even though the contracting parties were domiciled outside the confines

of South Carolina, and the "transactions incident to the sale, [including the financing of the purchase by foreign lending institutions], were conducted in foreign jurisdictions" Mathews, at 407, 440 S E 2d at 881-82

Subparagraph H, in paragraph 22, on Page 8 of the Home Purchase Agreement executed by Bradley and Donald Gerratt, as agent for Appellant Brentwood Homes, Inc, specifically states that "Purchaser is buying a completed dwelling and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling" (R p 41, lines 41-43) The Home Purchase Agreement contains a merger clause which provides that the contract 'contains the sole and entire agreement between the parties hereto and no modification of this Agreement shall be binding unless attached hereto and signed by all parties to this Agreement" (R p 42, lines 60-61) The merger clause in the Home Purchase Agreement also provides that "no representations, promise, or inducement not included in this Agreement shall be binding upon any party hereto" (R p 43, lines 1-2) Further, the terms of the Home Purchase Agreement do not refer to equipment and materials to be furnished from outside the State of South Carolina, nor does it list any subcontractors which were outside the confines of this state Therefore, the terms of the Home Purchase Agreement unambiguously indicate that the essential character of the agreement involves the purchase of real property with improvements thereon rather than a contract for warranty coverage, financing, or construction of a dwelling

The contract and transaction at issue in Mathews mirrors the Home Purchase Agreement and transaction between the parties in the present case as both cases involve a transaction in which the essential character of the contract is the purchase and sale of real estate located in South Carolina Appellants rely on Zabinski, 346 S C at 595, 553 S E 2d at 117, to assert that out-of-state financing establishes interstate commerce with respect to the subject transaction

involving the purchase and sale of real property in South Carolina However, Zabinski involved an action whereby Appellants sought arbitration of the distribution of partnership assets and other partnership disputes wherein the partnership agreement expressly provided that all controversies or claims arising out of the agreement shall be subject to arbitration Id at 586, 553 S E 2d at 112-113 The partnership in Zabinski was formed "in order to buy, renovate, and sell thirty apartments and approximately twenty-six acres of land on Hilton Head Island" Id, 553 S E 2d at 112 The South Carolina Supreme Court found that "the development of land within South Carolina's borders is the quintessential example of a purely intrastate activity However, the transaction [at issue] involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors Id at 595, 553 S E 2d at 118 The essential character of the Home Purchase Agreement and the transaction at issue in the present action involved the purchase and sale of real property with a previously constructed dwelling thereon rather than a dispute amongst partners belonging to a partnership which utilized out-of-state materials, contractors, and investors to buy, renovate, and sell apartments located within the confines of South Carolina Therefore, Zabinski is not analogous or applicable to the present action as the set of facts and causes of action therein substantially differ from the present action

Appellants contend that the financing of the purchase, the provision within the Home Purchase Agreement giving the seller the discretion to purchase a warranty from any warranty company of its choosing, and the construction materials and subcontractors used to construct the subject dwelling cause the Home Purchase Agreement to involve Interstate Commerce However, these transactions, like the incidental transactions in Mathews, are incident to the sale of the subject property and, therefore, do not cause the Home Purchase Agreement to involve

interstate commerce within the scope of the Federal Arbitration Act Further, the warranty referenced by Appellants was not validated because Appellants did not offer any evidence or present any arguments to oppose the allegations in the Bradley Affidavit which alleged that Bradley never read a sample copy of the warranty booklet, consented to any terms with respect to the warranty, or received a certificate of warranty coverage along with a warranty booklet within 30 days after closing Therefore, the warranty issue raised by Appellants is not relevant to the present action as they did not validate the warranty, Bradley never agreed to any terms with respect to the warranty, the terms of HBW 2-10 Warranty were never presented to the Trial Court or offered into evidence, and this action does not arise from the 2-10 HBW warranty referenced in the Home Purchase Agreement

II THE TRIAL COURT'S FACTUAL FINDINGS WITH RESPECT TO THE TERRY AFFIDAVIT MUST NOT BE REVERSED AS APPELLANTS DID NOT PROPERLY PRESERVE THE ISSUE OF THE SUFFICIENCY OF THE TERRY AFFIDAVIT, AND THERE EXISTS AMPLE EVIDENCE THAT REASONABLY SUPPORTS THE TRIAL COURT'S FINDINGS

1 Appellants Did Not Preserve the Issue of the Sufficiency of the Terry Affidavit for Review

"It is an axiomatic rule of law that issues may not be raised for the first time on appeal " Talley v South Carolina Higher Educ Tuition Grants Comm'n, 289 S C 483, 487, 347 S E 2d 99, 101 (1986) Further, an issue is not preserved for appeal even if it was raised below, but not ruled upon by the trial judge Id A specific issue or allegation is not properly preserved for review when the trial judge considers it, but fails to specifically rule on it, and the Appellant makes no mention under Rule 59(e), SCRCP for the trial judge to alter or amend his order to consider that specific issue or allegation See, e g, Skinner v Elrod, 308 S C 239, 417 S E 2d 599 (Ct App 1992) "The appellate courts have ruled consistently that an issue presented to the

trial judge but not decided, may not be heard on appeal " James F Flanagan, South Carolina Rules of Civil Procedure 475 (2d ed 1996)

Appellants assert that the Trial Court made no specific finding that the information set forth in the Terry Affidavit was untrue or inaccurate, or that the affidavit was proper for consideration to establish the involvement of interstate commerce in the transaction between Appellants and Bradley Bradley objected to the submission of the Terry Affidavit due to its factual inaccuracies in comparison to Appellants' initial responses to Bradley's interrogatories, and Donald Gerratt being the signatory of the Home Purchase Agreement on behalf of Appellants (R p 190, lines 18-25) At the hearing, Bradley alleged that Edward Terry was not competent to give testimony because the Appellants alleged that they were not alter egos and did not list Mr Terry as an officer of Brentwood Homes of South Carolina, Inc , which was the entity listed on the building permit as the contractor (R p 190, line 25 – p 191, line 6) Appellants did not respond to Bradley's objection to the submission of the Terry Affidavit, nor did they mention, by filing a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, the issue that the Trial Court made no specific finding that the Terry Affidavit was untrue or inaccurate or that the affidavit should have been considered to establish the involvement of interstate commerce in the subject transaction Therefore, Appellants must be precluded from asserting for the first time on appeal any alleged error resulting from the Trial Court's alleged failure to consider the Terry Affidavit to establish the involvement of interstate commerce in the subject transaction, as well as the Trial Court's omission of a specific finding that the information set forth in the affidavit was untrue and inaccurate

2 The Terry Affidavit Fails to Establish Interstate Commerce

The South Carolina Supreme Court has found that a contract for the sale of land in this state to out-of-state parties did not involve interstate commerce even though the parties obtained engineering services and procured financing from other states See, Mathews, 312 S C 404, 440 S E 2d 880 (1994), overruled by Munoz v Green Tree Fin Corp , 343 S C 531, 542 S E 2d 360 (2001) (overruling Mathews to the extent it considered whether the parties contemplated interstate commerce as a factor in determining whether the FAA applied) In Mathews, the South Carolina Supreme Court found that the transaction did not involve interstate commerce and was not within the scope of the Federal Arbitration Act even though the contracting parties were domiciled outside the confines of South Carolina, and the "transactions incident to the sale, [including the financing of the purchase by foreign lending institutions], were conducted in foreign jurisdictions " Mathews, at 407, 440 S E 2d at 881-82 Pursuant to Rule 401 of the South Carolina Rules of Evidence, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence " A party's response to an interrogatory constitutes an admission of the responding party and may be used as substantive evidence Camlin v Bi-Lo, Inc , 311 S C 197, 428 S E 2d 6 (Ct App 1993)

The Home Purchase Agreement was executed by Bradley and Donald Gerratt on behalf of Appellant Brentwood Homes, Inc Subparagraph H, in paragraph 22, on Page 8 of the Home Purchase Agreement specifically states that "Purchaser is buying a completed dwelling and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling " (R p 41, lines 41-43) Further, the Home Purchase Agreement contains a merger clause which provides that the contract "contains the sole and entire agreement between the parties hereto and no

modification of this Agreement shall be binding unless attached hereto and signed by all parties to this Agreement" (R p 42, lines 60-61) The terms of the Home Purchase Agreement unambiguously indicate that it is an agreement for the purchase and sale of real estate and, therefore, cannot be construed as a construction contract Paragraph 12 of the Terry Affidavit solely relates to the construction, materials, and suppliers associated with the construction of Bradley's home (R pp 211-212), and, therefore, paragraph 12 of the affidavit is not relevant to establish any fact arising from the purchase and sale of the home to establish interstate commerce

The Trial Court specifically restated Appellants' discovery responses to Bradley's initial Set of Interrogatories Numbers 1(a) and 1(b) which stated that Edward M Terry did not deal directly with the customer and that Donald Gerratt was the builder who built Plaintiff's home and dealt with all warranty calls (R p 5, lines 28-29 - p 6, lines 1-2) Appellants submitted no evidence to establish that Edward M Terry ever read the Home Purchase Agreement, met or communicated with Bradley, or ever visited or witnessed any transaction involving the sale or construction of Bradley s Home Therefore, Bradley was not required to offer evidence to refute the specific information contained in the Terry Affidavit as the Trial Court properly relied on the Appellants' responses to Bradley's initial Set of Interrogatories, Bradley's objections to the admission of the Terry Affidavit, as well as the fact that the transaction involved the purchase and sale of Bradley's Home, not the construction thereof, while rendering its decision

3 The Terry Affidavit is Not Based Upon Personal Knowledge

Rule 602, South Carolina Rules of Evidence, provides that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter"

At the June 1, 2010 hearing, Appellants submitted no evidence to support the allegations in the Terry Affidavit with respect to Edward Terry's personal knowledge thereof The only evidence the Trial Court had to consider when reviewing the Terry Affidavit were Appellants' responses to Bradley's initial set of interrogatories attached to his Motion to Reconsider wherein Appellants responded that Edward Terry did not deal directly with the customer and Donald Gerratt built the subject home Further, Appellants did not oppose Bradley's contention that Edward Terry was not listed as an officer of Brentwood Homes of South Carolina, Inc , which was listed on the building permit as the contractor Therefore, Appellants did not introduce evidence sufficient to support a finding that Edward Terry had personal knowledge regarding the construction of Bradley's home

Appellants did not preserve the issue of the sufficiency of the Terry Affidavit for Appeal The Terry Affidavit is irrelevant to establish interstate commerce with respect to Home Purchase Agreement as the agreement constitutes a contract to purchase and sale real estate located in South Carolina rather than a construction contract Further the Trial Court was limited to Appellants' discovery responses the arguments of counsel, and the terms of the Home Purchase Agreement when reviewing the Terry Affidavit after Appellants submitted it to the Trial Court Therefore, reasonable evidence exists in the record to support the Trial Court's finding that the Appellants failed to submit sufficient evidence to demonstrate that the subject transaction involved interstate commerce in the event this Court finds that Appellants preserved this issue for appeal

III EVEN IF THIS COURT WERE TO FIND THAT THE HOME PURCHASE AGREEMENT WAS SUBJECT TO THE FEDERAL ARBITRATION ACT, THE APPELLANTS WAIVED ANY RIGHT TO ARBITRATION

"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) (citing 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 "A party seeking to establish waiver must show prejudice through an undue burden caused by delay in demanding arbitration" Id "There is no set rule as to what constitutes a waiver of the right to arbitrate, the question depends on the facts of each case" Evans, 352 S C at 544, 575, S E 2d at 77

Appellants have filed a Motion to Dismiss, two Answers in conjunction with two counterclaims, and served discovery requests on Bradley prior to raising the issue of arbitration on February 5, 2010 Prior to Appellants filing their Motion to Compel Arbitration, the Trial Court, on February 1, 2010, granted Bradley's Motion to Compel which required Appellants to respond to Bradley's discovery requests within 45 days (R pp 8-9) At the February 1, 2010 hearing, the Trial Court also heard Bradley's Motion for Summary Judgment Appellants' counsel asserted that the Trial Court should not grant Bradley's Motion for Summary Judgment because it would essentially punish the Appellants for the actions of their prior attorney, and not promote an adjudication on the merits Thereafter, Appellants were permitted to amend their original Answer, which was in the form of a single paragraph general denial, to avoid default however, Appellants subsequently raised the arbitration issue in their Amended Answer and filed a Motion to Compel Arbitration Bradley was forced to file Motion to Reconsider the Trial Court's Order arising from the hearing on February 1, 2010 as the Appellants raised various

defenses, including the arbitration issue, and failed to comply with the terms of the Order which granted Bradley's Motion to Compel Further, Appellants have not supplemented the initial discovery responses of their prior counsel, nor have they complied with the terms of the Trial Court's Order, dated June 16, 2010

The record clearly reflects that Appellants availed themselves with discovery tools not available in arbitration There is also ample evidence in the record which shows that the Appellants used the judicial process to substitute counsel, amend their Answer to avoid default, assert a counterclaim against Bradley, and avoid cooperating with the discovery process As a result of Appellants' use of the judicial process and discovery tools available therein, Bradley has been forced to incur much prejudice as he has incurred substantial attorney's fees resulting from his counsel having to appear before the Trial Court on two separate occasions regarding Appellants' reluctance to respond to his discovery requests Appellants also used the judicial system to avoid default prior to raising the arbitration issue, and now seek to compel arbitration even though they previously requested the Trial Court for an adjudication on the merits in opposition to Bradley s Motion for Summary Judgment Although Appellants were entitled to appeal the Trial Court's Order denying their Motion to Compel Arbitration, the facts and circumstances of this proceeding indicate that this action was taken to delay the proceeding in an attempt to avoid compliance with the terms of the Order in which Appellants have appealed Therefore, the record contains ample evidence which indicates that Appellants were unjustifiably slow in seeking arbitration, engaged in discovery to their benefit, participated in the judicial process for their benefit, and forced Bradley to incur costs he would not have incurred in arbitration, even though Appellants have yet to provide complete and accurate discovery responses to Bradley's initial discovery requests

CONCLUSION

The decision of the Trial Court must be affirmed because there exists ample evidence which reasonably supports the Trial Court's findings of fact The Trial Court reviewed the Home Purchase Agreement, the Complaint, and considered the surrounding facts when it found that the Home Purchase Agreement did not involve interstate commerce

Respectfully submitted,

William W DesChamps, Jr
William W DesChamps, III
DesChamps Law Firm
1551 21st Avenue North, Suite 14
Myrtle Beach, South Carolina 29578
(843) 448-2391
Email wwd@deschampslaw com
trey@deschampslaw com
Attorneys for Respondent

December 30, 2010

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B Hyman, Jr , Resident Judge, Fifteenth Judicial Circuit

---

Civil Action No 2009-CP-26-7477

Fred Bradley,

Respondent,

vs

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

CERTIFICATE OF COUNSEL

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

RECEIVED
DEC 31 2010
SC Court of Appeals

December 30, 2010

William W DesChamps, Jr
William W DesChamps, III
DESCHAMPS LAW FIRM
1551 21st Avenue North Ste 14
Myrtle Beach, South Carolina 29577
(843) 448-2391
Attorneys for Respondent

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B Hyman, Jr , Resident Judge Fifteenth Judicial Circuit

Civil Action No 2009-CP-26-7477

Fred Bradley,

Respondent,

vs

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

PROOF OF SERVICE

I certify that I have served three (3) copies of the Final Brief of Respondent on counsel for Appellants by depositing copies of same in the United States Mail, postage prepaid, on December 30, 2010, to the following addressee

Robert T Lyles, Esquire
Lyles & Lyles
342 East Bay Street
Charleston, SC 29401

[SIGNATURE APPEAR ON NEXT PAGE]

Dated December 30 2010

William W DesChamps Jr
William W DesChamps, III
1551-21st Avenue North, Suite 14
Myrtle Beach, SC
(843) 448-2391
wwd@deschampslaw com
trey@deschampslaw com
Attorneys for Respondent