

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Larry B Hyman, Jr , Circuit Court Judge

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Case No 2009-CP-26-7477

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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

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FINAL REPLY BRIEF OF APPELLANTS

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## ARGUMENT

I THE ISSUE OF THE SUFFICIENCY OF THE AFFIDAVIT OF EDWARD M TERRY (“TERRY AFFIDAVIT”) WAS PROPERLY PRESERVED AND THE TRIAL COURT’S FINDING THAT EVIDENCE PRESENTED BY WAY OF THAT AFFIDAVIT DID NOT ESTABLISH INTERSTATE COMMERCE MUST BE REVERSED

A Because the issue of the sufficiency of the Terry Affidavit to establish interstate commerce was specifically ruled on by Trial Court, this issue is proper for review

Appellants presented the Terry Affidavit (R pp 210-222) to support their contention that the arbitration provision between the parties was enforceable pursuant to the Federal Arbitration Act found at 9 U S C § 2 (“FAA”) Respondent claims that the issue of the sufficiency of the Terry Affidavit to establish evidence of interstate commerce was not preserved for review because no motion was filed pursuant to South Carolina Rule of Civil Procedure 59(e) An appeal may be taken, as provided by law, from any final judgment appealable order, or decision S C R A P 201(a) Appellants presented the Terry Affidavit in support of their motion to compel arbitration which established the involvement of interstate commerce in the transaction between Brentwood Homes, Inc , and Respondent In its Order Granting Plaintiff’s Motion to Alter/Amend and Denying Defendants’ Motion to Compel Arbitration dated June 16, 2010 (hereinafter “Order”) the Court ruled that the “Defendants have not submitted sufficient evidence to demonstrate that the transaction between Plaintiff and Defendants involved interstate commerce ” (R p 6) As the Court’s ruling on this issue is clearly set forth in the Order no motion pursuant to SCRCP 59 was required The issue of whether the evidence of interstate commerce presented by the Defendants specifically in the form of the Terry Affidavit is sufficient is clearly preserved

for review

B The Trial Court's finding that transaction between Plaintiff and Defendants did not involve interstate commerce is not supported by the evidence including the Terry Affidavit

The arguments of the Respondent simply do not refute the existence of a binding arbitration clause contained in the agreement between the Appellants and Respondent (hereinafter "Agreement") that on its face and through information in Mr Terry's affidavit clearly contemplates interstate commerce. Under *de novo* review the appellate court is to grant deference to the trial court's factual findings underlying its conclusion **if there is any evidence reasonably supporting them**. Rich v. Walsh, 357 S.C. 64, 68, 590 S.E.2d 506, 508 (Ct. App. 2003)(emphasis added). The facts simply do not support the Court's finding that there was not sufficient evidence to demonstrate that the transaction between Appellants and Respondent involved interstate commerce.

The Court found that there was no evidence of interstate commerce based on the following

- The Home Purchase Agreement did not refer to equipment and materials to be furnished from outside the State of South Carolina, nor does it list subcontractors which were from outside the confines of this state (R pp 5),
- Defendants did not list Edward M Terry as an officer for Brentwood Homes of SC, Inc, which was listed as the contractor on the Building Permit filed with the City of North Myrtle Beach (R pp 5),
- Defendants' discovery responses to Plaintiff's initial Set of Interrogatories Numbers 1(a) and 1(b) state that Edward M Terry did not deal directly with the customer and that Donald Garratt was the builder who built Plaintiff's home and dealt with all warranty calls (R pp 5-6)

However, none of these points dispute that Exhibit A to the Terry Affidavit is a true and accurate copy of the Home Purchase Agreement entered into between Brentwood Homes, Inc and John L and Carole G Bradley (R pp 210-222) None of the facts relied on by the court or argued by the Respondent refute the fact that throughout the warranty section of the Agreement the use of a national warranty program is contemplated throughout the document to address structural issues with the home (R pp 210-222) None refute the fact that the home that was the subject of the Home Purchase Agreement was constructed with subcontractors and suppliers from outside of the state of South Carolina Respondent argues that issues exist with respect to the enrollment of this home in the national warranty program (*Affidavit of John F Bradley ( Fred Bradley ) In Opposition to Defendant's Motion to Compel Arbitration* R pp 223-240) However, this does not dispute that the national warranty program is clearly contemplated within the four corners of the Agreement between the parties (R pp 210-222) Whether the home was properly enrolled in the program is an issue to be addressed in arbitration, not an issue to be used to avoid arbitration<sup>1</sup> Therefore, there is simply no dispute that the Agreement between the parties involved interstate commerce

Mr Terry sets forth that the affidavit is made of his own knowledge (R pp 210-222) He states that he served as president of Brentwood Homes, Inc , who is the party to the Home Purchase Agreement attached as an exhibit thereto (R p 210-211) He verifies that

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Appellants contend that the home was properly enrolled, but that Respondent has breached the terms of the Agreement in refusing to utilize that program to address the issues complained of in this suit (*Amended Answer and Counterclaim* dated February 11, 2010, R pp 24-33)

the exhibit to his Affidavit is a true and accurate copy of the Home Purchase Agreement between the Respondent and Carole G Bradley (who is not a party to this action) (R pp 210-211) Respondent contends that because answers to interrogatories indicate that Donald Garratt was the representative who dealt with the customer and Donald Garratt was listed as the builder on documentation, that Mr Terry may not offer evidence of the company's contracts, the details of the warranty program referenced in that contract, or information regarding the homes that it sold including who and what was used to construct them. An officer of the company that is a party to the agreement would clearly have knowledge of these details. As set forth in Appellants' Final Brief, all of these factors clearly involve interstate commerce. The trial court's finding that sufficient evidence of interstate commerce did not exist is without foundation.

## II APPELLANT HAS NOT WAIVED ITS RIGHT TO COMPEL ARBITRATION

A Respondent may not argue that Appellants have waived their right to arbitrate as this issue was not ruled on by the lower court.

Respondent argues that Appellants have failed to preserve issues for review by this Court, but also asks this Court to refuse to uphold the arbitration agreement on grounds not ruled upon by the Trial Court. No ruling was made on the issue of waiver by the Court, but Respondent argues that the Appellants have waived their right to arbitrate this matter. Generally, an issue must be raised and ruled upon by the circuit court to be preserved for appellate review. Elam v South Carolina Dept Of Transp, 361 S C 9, 23, 602 S E 2d 772, 779-80 (2004). As stated herein, under *de novo* review the appellate court is to grant deference to the trial court's factual findings. Rich at 68. The "Findings of Fact" contained

in the trial court's order states

Plaintiff further asserted that Defendants were not entitled to arbitrate the above-captioned matter as they delayed the discovery process by not completely and accurately answering Plaintiff's discovery requests despite this Court's previous Order granting Plaintiff's Motion to Compel Discovery did not raise the issue of arbitration in their initial answer and two prior Rule 12 Motion, and served discovery requests on Plaintiff prior to filing a Motion (R pp 3-4)

However, the Order issued by the Court made no finding that the Appellants had waived their right to arbitrate<sup>2</sup> Contentions pertaining to delay were made by the Respondent and examined by the Court, but no finding of prejudice to the Respondent due to this delay or waiver of the arbitration clause was made by the Court

B Respondent cannot establish that Appellants waived their right to arbitrate as it cannot establish that any delay or conduct by the Appellants prejudiced the Respondent

In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration Sentry Eng'g & Constr , Inc v Marine's Cay Dev Corp, 287 S C 346, 351, 338 S E 2d 631, 634 (S Ct 1985) South Carolina has generally adopted the approach utilized by the Fourth Circuit and other jurisdiction which require that a party show actual prejudice before finding a waiver Rich v Walsh, 357 S C 64, 590 S E 2d 506 (Ct App 2003)(Court did not find that Bank had waived right to compel arbitration even after discovery including the exchange of written discovery and a limited deposition ) "Mere inconvenience to an opposing party is not sufficient to establish prejudice, and thus invoke the waiver of right to arbitrate " Id At 71, citing Evans v Manufactured Homes Inc , 352 S C 544, 575 S E 2d 74 (Ct App 2003) "Neither delay nor

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<sup>2</sup>The Order was drafted by the Respondent (See Transcript generally, R pp 179-202)

the filing of pleadings by the party seeking a stay will suffice” Id. Quoting Microstrategy v. Lauriccia, 268 F.3d 244, 249 (4<sup>th</sup> Cir. 2001)

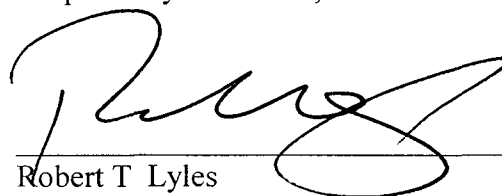
There was no prejudicial delay in asserting the right to arbitrate. The right to arbitrate was raised in the Amended Answer filed with leave of the court and the motion to compel arbitration was filed simultaneously therewith. (R. pp. 24-33 and 161-172) Said answer raising arbitration was filed pursuant to leave of court. (R. pp. 10-11)

Respondent contends that Appellants are not entitled to their right to arbitrate because it served discovery requests prior to filing its motion to compel arbitration. As reflected in the Order, Respondent has issued multiple written discovery requests in the form of interrogatories, requests for production, and requests for admission. No depositions were taken. There was no discovery tool available by the Appellants that was not utilized to further extent by the Respondent. In fact, Respondent heavily relies on the discovery responses issued by the Appellants to oppose Appellants’ motion to compel arbitration. (R. p. 4) There has been no demonstration of prejudice to the Respondent and therefore, Appellant’s right to arbitrate has not been waived.

CONCLUSION

Because the Appellants have presented sufficient evidence of the involvement of interstate commerce in the transaction between the Appellants and Respondent, the arbitration agreement between the parties must be enforced pursuant to the Federal Arbitration Act. Furthermore, because the Respondent cannot establish any prejudice due to any delay in Appellants seeking to enforce the arbitration agreement, Appellants' right to arbitrate have not been waived.

Respectfully submitted,



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Certificate of Counsel

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

December 29, 2010



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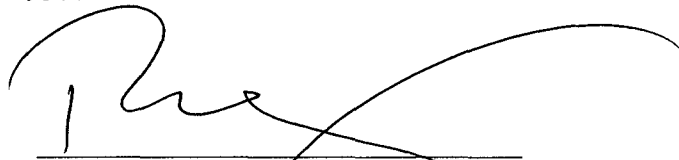
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I certify that I have served the Final Reply Brief of Appellants on Fred Bradley by depositing a copy of it in the United States Mail, First Class postage prepaid, on December 29, 2010, addressed to his attorney of record, William W DesChamps, III,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

December 29, 2010



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