

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Dale E. Van Slambrook, Circuit Court Judge

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Case No. 2023CP1004408

Brenda Kennedy,

Respondent,

v.

Crescent Homes Realty, LLC,

Appellant.

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NOTICE OF APPEAL

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Crescent Homes Realty, LLC, appeals the Order of the Honorable Dale E. Van Slambrook dated November 25, 2024. Appellant received written notice of entry of this Order on November 25, 2024, by Notice of Electronic Filing. A copy of this Order is appended with a Certificate of Service.

December 12, 2024

s/ Allan R. Holmes, Sr.  
Allan R. Holmes, Sr.  
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STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH CIRCUIT

CRESCENT HOMES REALTY, LLC

Civil Case No. 2023-CP-10-04408

Plaintiff,

v.

BRENDA KENNEDY,

Defendant.

**ORDER DENYING PLAINTIFF’S MOTION TO STAY PROCEEDINGS AND COMPEL  
ARBITRATION**

This matter comes before the Court on Plaintiff’s Crescent Homes Realty, LLC (“Crescent” or “Plaintiff”) Motion to Stay Proceedings and Compel Arbitration against Defendant Brenda Kennedy. (“Kennedy” or “Defendant”). The parties filed briefs, and a hearing was held on October 16, 2024. The motion is ripe for ruling. For the reasons set forth below, the Court denies Plaintiff’s motion.

**BACKGROUND**

Plaintiff filed a complaint against Defendant in Charleston County Magistrate Small Claims Court on July 14, 2023, seeking a judgment for \$7500. The complaint which was signed under penalty of perjury by Plaintiff’s President Edward Terry (“Terry”) alleges that Defendant had a contractual obligation to repay draws. Plaintiff filed the “Independent Contractor Agreement” signed by Kennedy and Terry with the complaint. The first page of the agreement states in bold capital letters:

**THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO  
THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, S. C. CODE**

**§ 15-48-10 et. seq., and the FEDERAL ARBITRATION ACT, 9 U.S.C. § 1 et. seq.**

Thus, even though the agreement gave Plaintiff the right to arbitrate, Plaintiff chose to file an action in small claims court. Defendant filed an answer and counterclaim bringing class claims for unpaid wages and failure to pay overtime pursuant to Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., South Carolina Payment of Wages Act, S.C. Code Ann § 41-10-10, et seq. ("SCPWA"). On September 8, 2023, the Magistrate Court transferred the case to the Court of Commons Pleas because the Defendant's counterclaims exceeded the \$7500 limit for small claims court. On October 20, 2023, Plaintiff filed a motion seeking to enforce the arbitration agreement.

### **DISCUSSION**

The Court finds that Plaintiff waived the right to compel arbitration under the test set forth in *Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022). The Supreme Court rejected the prejudice-focused arbitration waiver, unanimously ruling that the Federal Arbitration Act (FAA)'s "policy favoring arbitration" does not permit courts to condition a waiver of the right to arbitrate on a showing of prejudice to the opposing party. *Id* at 412. *Morgan* held that the test for waiver is whether the party seeking to enforce arbitration knew of an existing right to arbitrate and acted inconsistently with that right. *Id.* at 419. Here, Plaintiff knew they had a right to arbitrate because the agreement filed with their complaint clearly states they had the right to compel arbitration. By initiating this action rather than seeking to arbitrate, Plaintiff acted inconsistently with their right to arbitrate.

Plaintiff doesn't dispute that it had knowledge of the arbitration agreement; rather it argues that it did not act inconsistently with its right to arbitrate because Defendant's counter claims are not sufficiently related to the debt-collection action it filed in smalls claims court. Defendant argues the counterclaims are related because they are a defense to the debt-collection action.

Defendant asserts that she does not owe the draws because Plaintiff misclassified her as an independent contractor when she was an employee. (Answer ¶ 3) Defendant alleges Plaintiff exercised significant control over her by requiring her to work over forty (40) hours a week in the sales center, and to perform administrative and data-entry tasks that she was not paid for. (Answer ¶ 40, 57, 63). Defendant also alleges she could only sell homes built by Plaintiff, was subject to Plaintiff's supervision and was required to wear appropriately colored attire. (Answer ¶ 42, 49, 52, 54) Defendant argues because she was an employee rather than an independent contractor, the agreement violates the SCPWA and the FLSA and is not enforceable. Defendant also argues even if the agreement is enforceable the debt would be offset by what Plaintiff owes her under the SCPWA and FLSA.

The Court finds that Defendant's SCPWA and FLSA counter claims are sufficiently related to the debt-collection claim since Defendant filed the claims in defense of the action that Plaintiff initiated. Additionally, the SCPWA and FLSA claims are relevant to whether Defendant owes the debt. The Court further finds Plaintiff knew of its right to arbitrate but explicitly chose not to exercise that right by filing an action and Plaintiff waived its right to compel arbitration by acting inconsistently with the right to arbitrate by commencing this action.

### CONCLUSION

Accordingly, for the foregoing reasons, Plaintiff's Motion to Compel Arbitration and stay this proceeding is DENIED.

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The Honorable Dale E. Van Slambrook

Dated: \_\_\_\_\_  
Charleston, South Carolina



Charleston Common Pleas

**Case Caption:** Crescent Homes Realty Llc VS Brenda Kennedy

**Case Number:** 2023CP1004408

**Type:** Order/Stay

And It Is So Ordered!

s/Dale E. Van Slambrook S.C. Circuit Court Judge  
#2781

## CERTIFICATE OF SERVICE

I hereby certify that I have served the Respondent Brenda Kennedy with this Notice of Appeal by serving it electronically upon her attorney, Marybeth Mullaney, Esq. This service was accomplished by filing it electronically with both the Court of Common Pleas for the Ninth Judicial Circuit, and the South Carolina Court of Appeals and by emailing a copy of the Notice of Appeal to Ms. Mullaney's email address: [marybeth@mullaneylaw.com](mailto:marybeth@mullaneylaw.com)

Done this 12<sup>th</sup> day of December, 2024.

S/Allan R. Holmes, Sr.