

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	Civil Action No.: 2024-CP-18-01431
	)	
MARISOL KELLY,	)	
	)	
PLAINTIFF,	)	<b>ORDER DENYING DEFNDANT’S</b>
	)	<b>MOTION TO STAY AND COMPEL</b>
vs.	)	<b>ARBITRATION</b>
	)	
MID-AMERICA APARTMENTS, L.P.,	)	
d/b/a WATER’S EDGE APARTMENTS,	)	
	)	
DEFENDANT.	)	

<p><b>EXHIBIT</b></p> <p><b>A</b></p>
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This matter came before the Court on February 24, 2025, in regards to Defendant’s Motion to Stay and Compel Arbitration. Having reviewed the Motion, memoranda from parties’ counsel, and oral argument on February 24, 2025, the Court hereby **DENIES** the motion to stay and compel arbitration. This decision is based on the following:

This matter arises from an incident that occurred on February 20, 2023, when Plaintiff, Marisol Kelly (hereinafter “Plaintiff Kelly”), was walking down the stairs in the common area of the apartment owned by Defendant, Mid-America Apartments, L.P., d/b/a Water’s Edge Apartments (hereinafter “Defendant Water’s Edge”), when Plaintiff Kelly slipped and fell on trash that had accumulated on the stairs, causing Plaintiff Kelly to suffer significant injuries to her back. A Complaint was initiated against Defendant Water’s Edge in this Court on August 30, 2024. Defendant Water’s Edge filed an Answer on October 8, 2024, and proceeded to engage in discovery for several months. On January 15, 2025, Defendant Water’s Edge filed a Motion to Stay and Compel Arbitration seeking to enforce the arbitration clause contained in a lease agreement between parties, which is the Motion.

  
**Jun 17 2025**  
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This Court finds that Defendant's Motion shall be denied for two reasons.

1. **The Arbitration Clause in the lease agreement between Plaintiff Kelly and Defendant Water's Edge is unconscionable and therefore unenforceable.**

In South Carolina, unconscionability as it pertains to a contractual arbitration clause is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them, and no fair and honest person would accept them. *Simpson v. MSA Myrtle Beach, Inc.* 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). While it is not per se unconscionable, a strong indication that an arbitration clause is unenforceable is when it is found in an adhesion contract. *Id.* In determining unconscionability South Carolina courts have also considered if the adhesion contract is between a commercial entity and a consumer, whether the consumer lacked the business judgment necessary to make her aware of the implications of the arbitration agreement, and whether the consumer had a lawyer present to provide any assistance in negotiating the arbitration agreement. *Id.*

Plaintiff Kelly argued that the arbitration clause contained in section 24 of the lease agreement between Plaintiff Kelly and Defendant Water's Edge is unconscionable and thus unenforceable because the lease agreement is a contract of adhesion in which Plaintiff Kelly lacked any meaningful choice in negotiating its terms and it contains several oppressive, one-sided terms. Plaintiff Kelly was presented with a 26-page standard form lease contract and was not given an opportunity to negotiate its terms, lacked significant bargaining power, and did not have an attorney present when signing. The arbitration clause between Plaintiff and Defendant included oppressive terms such as language which sought to bar all claims older than one year in clear contravention of S.C. Code section 15-3-140 (2005), the waiver of a jury trial, inability to appeal

the arbitration decision, inability to participate in a class action, and putting the burden on paying the arbitration filing fees on the Plaintiff.

2. **Defendant Water's Edge waived its ability to enforce arbitration by participating in litigation.**

South Carolina courts have held that the right to enforce arbitration can be waived and whether a waiver has occurred will depend on the facts of each case. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 251 S.E.2d 749, 753 (1999). Historically, South Carolina courts have required a showing of prejudice to the party seeking waiver of the arbitration clause but the recent U.S. Supreme Court decision in *Morgan v. Sundance* suggests that simply participating in litigation can be considered a waiver of the right to arbitration, even without a showing of prejudice. 596 U.S. 411, 142 S.Ct. 1708, 212 L.Ed. 2d 753 (2022).

Plaintiff Kelly argued the Defendant Water's Edge's actions were inconsistent with the intent to enforce the arbitration clause and specifically that the following actions resulted in Defendant Water's Edge waiving its ability to enforce arbitration: (1) Defendant Water's filed the Motion to Stay and Compel Arbitration almost five months after Plaintiff Kelly filed her Complaint, (2) Defendant Water's Edge's answer to Plaintiff Kelly's Complaint did not raise the right to enforce arbitration as a defense, (3) Defendant Water's Edge served Plaintiff Kelly with written discovery requests, which were answered, and (4) Defendant Water's Edge had sent out eight subpoenas since the commencement of this action. This Court, therefore, finds that Defendant Water's Edge has significantly engaged in litigation and exhibited actions contrary to that of a party intending to enforce an arbitration agreement.

Based on the foregoing evidence, this Court determines Defendant Water's Edge's Motion to Stay and Compel Arbitration is **DENIED**.

**AND IT IS SO ORDERED.**

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The Honorable William C. McMaster, III

Dorchester, South Carolina  
March \_\_\_\_, 2025



Dorchester Common Pleas

**Case Caption:** Marisol Kelly VS Mid America Apartments Lp , defendant, et al

**Case Number:** 2024CP1801431

**Type:** Order/Stay

So Ordered

William C. McMaster, III