IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-10-03870

Peter T. Phillips and Summar C. Phillips ..... Respondents,

v.

Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., ... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the .....Appellant,

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are..... Respondents.

INITIAL REPLY BRIEF OF APPELLANT JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC. IN REPLY TO RESPONDENT OMEGA FLEX, INC.

G. Trenholm Walker
John P. Linton, Jr.
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
(843) 727-2243
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REPLY ARGUMENT

I. Respondent Omega Flex, Inc., like the circuit court, mistakenly ignores that where, as here, the subject agreement expressly provides that the relevant transaction involves interstate commerce, the Federal Arbitration Act applies as a matter of law.

By its plain language, the Purchase and Sale Agreement (the "Purchase Agreement"), which incorporates the terms of the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program (the "Warranty") (collectively, the "Agreement"), provides that the Purchase Agreement and Warranty are transactions involving interstate commerce and that the Agreement and Warranty are governed by the Federal Arbitration Act ("FAA"): ***"As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act. . . ."*** **(Aff. of Dennis A. Black, Ex. B, JWH Warranty, §V, ¶ O)** (double emphasis added).

"The construction of a clear and unambiguous contract presents a question of law for the court." U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 379, 684 S.E.2d 199, 207 (Ct. App. 2009). An appellate court may decide questions of law "with no particular deference to the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000).

The Supreme Court of South Carolina has held that a contractual provision that a particular agreement involves interstate commerce such that it is governed by the FAA—like the provision quoted above in the Agreement between Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("John Wieland Homes") and Respondents Peter T. Phillips and Summar C. Phillips (the "Phillips")—is enforceable. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001). Specifically, in Munoz, the Court held that "the arbitration agreement, which applies to this contract and the relationships which result from this contract, ***provides it shall be governed by the FAA . . . [and] . . . [a]rbitration***

agreements, like other contracts, are enforceable in accordance with their terms." Id. at 539, 542 S.E.2d at 363-64 (internal quotation marks omitted; double emphasis added) (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland, 489 U.S. 468, 478 (1989)). Moreover, the Supreme Court of South Carolina recently reiterated this holding in Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 126, 747 S.E.2d 461, 466 (2013), by parenthetically citing to this ruling in Munoz.

Nevertheless, Respondent Omega Flex, Inc. ("Omega Flex"), mistakenly relying on Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012), argues that the Agreement was *not* governed by the FAA because, according to Omega Flex, the Agreement only involved the sale of a completed home. As set forth *infra*, this argument ignores the true nature of the transaction, which involved the construction and sale of the Phillips' home. Moreover, this argument ignores the impact of Munoz and Cape Romain Contractors, discussed above, which unequivocally emphasize that, where an agreement states that the transaction involves interstate commerce, the FAA governs. It is worth noting that this issue was not raised or addressed in the Brentwood Homes opinion. Furthermore, Omega Flex has not cited any precedent from a South Carolina court holding that such an agreement is unenforceable. Under these circumstances, there is no reason for a court to proceed to analyze the nature of the transaction further because the plain, unambiguous language of the contract must be applied, as a matter of law.

Based on the foregoing, the circuit court committed an error of law warranting reversal because the plain, unambiguous language of the Agreement states that the underlying transaction involves interstate commerce and that the FAA governs the transaction.

II. Respondent Omega Flex, Inc., like the circuit court, mistakenly ignores the Addenda to the Purchase Agreement, including the customization specifications

applicable to the construction of the Phillips' house, which unambiguously involve interstate commerce. For this alternative reason, the FAA governs, as a matter of law.

Not only did the Phillips and John Wieland Homes expressly agree that the Agreement would be governed by the FAA, but the Agreement also unambiguously involved the construction and customization of the subject home. Accordingly, as a matter of law, the Agreement includes transactions involving interstate commerce, and the FAA applies.

Appellate courts in South Carolina have consistently held that a contract involving the construction of a residence, by its very nature, involves interstate commerce. For instance, in Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318, n. 8 (2012), the Supreme Court of South Carolina held that a contract for the mere purchase of real property would not involve interstate commerce, but nevertheless emphasized "that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA." (citations omitted); see also Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 639, 239 S.E.2d 647, 651 (1977) (holding that the contract for the construction of an elderly housing project 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, 431-32, 343 S.E.2d 45, 47 (Ct. App. 1986) (finding a construction contract involved interstate commerce where the equipment, materials, and subcontractors at issue were furnished from out-of-state).

Relying on Brentwood Homes, Omega Flex argues that the Agreement did not involve interstate commerce because, according to Omega Flex, the Agreement solely involved the purchase of a completed residence. This belies both the unambiguous language of the Agreement

and the only evidence submitted as to the nature of the transaction, which establish, as a matter of law, that the subject transaction involved interstate commerce.

In this respect, a comparison of the facts in the present case to those involved in Brentwood Homes is instructive. In Brentwood Homes, 398 S.C. at 458, 730 S.E.2d at 317, the Court held that the sale and purchase of residential real estate was a purely intrastate activity. In reaching its conclusion, the Court specifically noted that the contract in that case did *not* include customizations of the home: "Notably, the provisions of the Agreement providing for . . . 'Options,' and 'Color Selection,' are eliminated as 'N/A' and were not signed by Bradley." Id.

In this case, on the other hand, the parties contracted for the customizations which were noticeably absent in Brentwood Homes. Specifically, the parties agreed to the following customizations in various Addenda to the Agreement: (1) adding custom paint colors; (2) converting the patio and front walkway to oyster shell; (3) adding phone/cable to the bonus room over garage; (4) adding a dedicated receptacle for a wine cooler in butler's pantry area; (5) reframing of the stairs to accommodate hardwood treads on first flight of stairs to second floor; (6) constructing an additional parking pad to the drive; (7) adding additional patio space; (8) converting the entire house to 7 ¼ inch baseboards; and (9) several modifications related to wiring or prewiring for surround sound. **(Aff. of Dennis A. Black, Ex. A, Purchase Agreement, Addenda).**

These customizations, which are incorporated into the Purchase Agreement, involve interstate commerce, as confirmed by the only evidence submitted to the circuit court on this issue—the affidavit of Dennis A. Black, the one-time Division Quality Control Manager for John Wieland Homes. In fact, Black specifically states in his affidavit that the construction of the Phillips' home "implicates interstate commerce." **(Aff. of Dennis A. Black, ¶¶ 1, 4).** The terms

of the Addenda to the Purchase Agreement and Black's affidavit that the construction of the Phillips' house involved interstate commerce unequivocally establish that the Agreement was governed by the FAA. See e.g., New Hope Missionary Baptist Church v. Paragon Bldrs., 379 S.C. 620, 626–27, 667 S.E.2d 1, 4 (Ct. App. 2008) ("we find the trial court properly determined the Federal Arbitration Act . . . applies to the arbitration agreement in this matter since the parties did not contract to the contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project . . . [the builder's] affidavit swearing the project will involve businesses and supplies from outside South Carolina.").

Based on the foregoing, the circuit court's decision that the Agreement did not encompass transactions involving interstate commerce is an error of law, warranting reversal. See Brentwood Homes, at 458, 730 S.E.2d at 318, n. 8 ("We emphasize that had the Agreement *actually encompassed the construction of the residence*, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA." (emphasis added)).

III. Omega Flex's failure to respond to the remaining issues in John Wieland Homes' opening brief should amount to a concession that the circuit court ruled incorrectly as to these issues.

A respondent's failure, in the respondent's brief, to address an issue raised in the appellant's brief may amount to a concession as to that issue. See First Union Nat. Bank v. FCVS Commc'ns, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) rev'd in part on other grounds, 328 S.C. 290, 494 S.E.2d 429 (1997) ("We note initially First Union's failure to respond to this argument in its brief could amount to a concession that the trial court ruled incorrectly.").

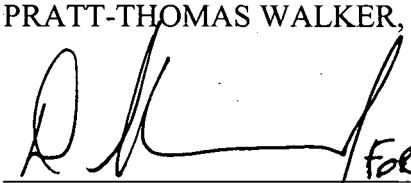
In its brief, Omega Flex asserts only that the Agreement did not involve interstate commerce and, therefore, the Agreement falls outside the scope of the FAA. While John Wieland Homes additionally contends in its opening brief that the scope of the arbitration provision in the Agreement encompasses every claim raised by the Phillips and that any claims against John Wieland's trade contractors should also be subject to arbitration, Omega Flex advances no arguments in opposition to these contentions. Consequently, Omega Flex's failure to respond to these arguments should amount to a concession as to their validity.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the opening brief of John Wieland Homes, the circuit court's orders refusing to compel arbitration should be **REVERSED,** and this Court should remand this case to the circuit court for the entry of an order compelling the parties to arbitrate all claims involved in this case.

Respectfully Submitted,

PRATT-THOMAS WALKER, PA



G. Trenholm Walker (S.C. Bar #5777)
John P. Linton, Jr. (S.C. Bar #79130)
P.O. Drawer 22247 (29413-2247)
16 Charlotte Street
Charleston, SC 29403
Phone: (843) 727-2200
Email: gtw@p-tw.com; jpl@p-tw.com

March 6, 2013
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-10-03870

Peter T. Phillips and Summar C. Phillips ..... Respondents,

v.

Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., ... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the .....Appellant,

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are..... Respondents.

PROOF OF SERVICE

I hereby certify that a true and correct copy of the Initial Reply Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. in Reply to Respondent Omega Flex, Inc. were served on this 6th day of March, 2014 via U.S. mail, postage prepaid, upon the following counsel of record:

John F. McKenzie, Esq.
Robert A. McKenzie, Esq.
McDonald, McKenzie, Rubin, Miller & Lybrand, LLP
Post Office Box 58
Columbia, SC 29202
Attorneys for Respondents Peter T. Phillips and Summar C. Phillips

R. Patrick Flynn, Esq.
Christopher M. Ramsey, Esq.
Robertson Hollingsworth & Flynn
Wells Fargo Center
177 Meeting Street, Suite 300
Charleston, SC 29401

Attorneys for Respondent Charleston LEC, Inc.

Jeffrey A. Ross, Esq.
Clawson & Staubes
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
Attorneys for Respondent AAA Plumbing, LLC

Robert H. Hood, Esq.
Robert H. Hood, Jr., Esq.
A. Walker Barnes, Esq.
Hood Law Firm, LLC
172 Meeting Street
Charleston, SC 29401
Attorneys for Respondent Omega Flex, Inc.

Everett A. Kendall, II, Esq.
J. Eric Cavanaugh, Esq.
Sweeny Wingate & Barrow, P.A.
PO Box 12129
Columbia, SC 29211
Attorneys for Respondent Fogel Services, Inc.

PRATT-THOMAS WALKER, P.A.

Michaela Shepherd

Michaela L. Shepherd
Paralegal to John P. Linton, Jr., Esq.

PRATT-THOMAS | WALKER **ATTORNEYS AT LAW**

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON, SC 29403

PO DRAWER 22247
CHARLESTON, SC 29413-2247

PHONE: 843.727.2200
FAX: 843.727.2238

WWW.P-TW.COM

(843) 727-2219 (direct dial)
(843) 727-2236 (fax)
mls@p-tw.com (e-mail)

E. DOUGLAS PRATT-THOMAS
G. TRENHOLM WALKER
W. ANDREW GOWDER, JR.
JON L. AUSTEN
LINDSAY K. SMITH-YANCEY (SC, NC)
THOMAS H. HESSE (SC, GA)
IAN W. FREEMAN (SC, CA)
DANIEL S. McQUEENEY, JR.
KATHLEEN FOWLER MONOC

March 6, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Peter T. Phillips, et al. v. Omega Flex, Inc., et al.
Appellate Case Tracking No.: 2013-001449

Dear Ms. Kitchings:

Enclosed please find an original and one copy of the Initial Reply Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. in Reply to Respondent Omega Flex, Inc., and Proof of Service on counsel for all parties. We would greatly appreciate your returning file-stamped copies in the enclosed, self-addressed envelope.

Thank you for your assistance.

With regards, I am,

PRATT-THOMAS WALKER, P.A.

Michaela Shepherd

Michaela L. Shepherd
Paralegal to John P. Linton, Jr., Esq.

/mls
enclosures

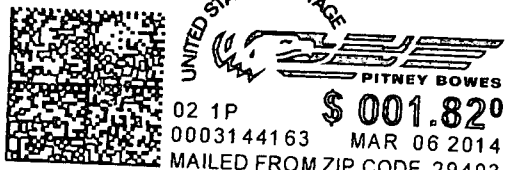
c: John F. McKenzie, Esq.
Robert A. McKenzie, Esq.
R. Patrick Flynn, Esq.
Christopher M. Ramsey, Esq.
Jeffrey A. Ross, Esq.
Robert H. Hood, Esq.
Robert H. Hood, Jr., Esq.
A. Walker Barnes, Esq.
Everett A. Kendall, II, Esq.
J. Eric Cavanaugh, Esq.

PRATT-THOMAS | WALKER

ATTORNEYS AT LAW

16 CHARLOTTE STREET
CHARLESTON, SC 29403

PO DRAWER 22247
CHARLESTON, SC 29413-2247



The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211