

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

M1529

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No.: 2012-CP-18-2826

Monique Frazier, individually, and on behalf of all similarly situated
Plaintiffs,.....Appellant

vs.

Somerset South Carolina, LLC d/b/a Somerset Apartments, Multifamily Management,
Inc., aka Mitchell Management, Inc., Allen Harken, Kathi Barfield Ducharme, John Doe
Leasing Agents and John Doe Premises
Managers.....Respondents.

Motion to Dismiss Appeal

RECEIVED

MAR 11 2014

SC Court of Appeals

Steven W. Ouzts
Jonathan G. Roquemore
Joshua D. Shaw
Turner Padgett Graham & Laney P.A.
Post Office Box 1473
Columbia, SC 29202
(803)-254-2200

Attorney for Respondents
Somerset South Carolina, LLC and
Multifamily Management, Inc.

MOTION

The Respondents Somerset South Carolina, LLC (“Somerset”) and Multifamily Management, Inc. (“Multifamily”), move for an order dismissing this appeal for lack of jurisdiction. The Respondents base this motion on the grounds that (1) the Order compelling arbitration and staying this action is interlocutory and not appealable under the South Carolina Uniform Arbitration Act or the Federal Arbitration Act; and (2) the Order denying class certification is interlocutory and not appealable under the requirements of S.C. Code Ann. § 14-3-330. Therefore, there is no “final judgment, appealable order or decision” giving rise to a right to appeal, and Appellant’s appeal should be dismissed. Rule 201, SCACR. Additionally, Appellant’s Notice of Appeal was filed while a Rule 59, SCRCR, motion to alter or amend judgment was pending. Because Appellant has not filed a timely Notice of Appeal following the amended Order, the appeal should be dismissed.

Pursuant to Rule 240(c)(2), SCACR, Respondents set forth their supporting arguments and authorities in the memorandum that follows below.

STATEMENT OF THE CASE

Appellant is a former tenant of an apartment complex owned by Somerset South Carolina, LLC (“Somerset”) and managed by Multifamily Management, Inc. (“Multifamily”). Appellant’s complaint alleged claims for fraud, violation of the Landlord Tenant Act, breach of contract, and negligence. Additionally, Appellant purported to represent a putative class consisting of all persons domiciled at Somerset Apartments since June 29, 2006 who had been “adversely affected” by Respondents. On November 12, 2013, the matter came before the Honorable Kristi Lea Harrington, who

heard arguments on outstanding motions including: 1) Motion to Dismiss and Compel Arbitration of Defendants Somerset South Carolina, LLC and Multifamily Management, Inc.; 2) Motion of Plaintiff for class certification; and 3) Motion of Defendant Allen Harken to dismiss the action under Rule 12(b) (2), (4), and (5) for insufficient service of process¹.

Judge Harrington ruled on the motions in a Form 4 Order filed on November 21, 2013. (Attached as Ex. A.) The Order granted Respondents' motion to compel arbitration and stay this action, denied Appellant's motion for class certification, and deemed all other outstanding motions moot as the case was to be referred to arbitration. On December 3, 2013, Defendant Allen Harken served a Motion to Alter or Amend Judgment under Rule 59(e), SCRPC, seeking a ruling on his Rule 12 motion to dismiss. (Attached as Ex. B.)

On December 10, 2013, while Defendant Harken's Motion to Alter or Amend Judgment was pending, Appellant served a Notice of Appeal. (Attached as Ex. C.) Subsequently, on January 3, 2014, the Court amended its November 21, 2013 Order. (Attached as Ex. D.) The January 3, 2014 Order denied Appellant's motion for class certification, denied Harken's motion to dismiss, and granted Respondents' motion to compel arbitration and stay this action. Appellant did not appeal the January 3, 2014 Order.

¹ There were two other outstanding motions: 1) Respondents' motion for a protective order; and 2) Allen Harken's motion for protective order. The Trial Court did not reach these discovery motions based on its ruling on the other motions.

ARGUMENT

I.

The appeal of the order compelling arbitration and staying the action should be dismissed pursuant to the South Carolina Uniform Arbitration Act or the Federal Arbitration Act.

Respondents moved to compel arbitration under the Federal Arbitration Act (“FAA”) pursuant to a written arbitration agreement between Appellant and Respondents. The trial court granted Respondents’ motion and ordered a stay of the action under the FAA.

The appealability of an order compelling arbitration pursuant to the FAA is governed by South Carolina’s procedural law. *Toler’s Cove Homeowners Assoc. v. United Health Care Services*, 355 S.C. 605, 610-11, 586 S.E.2d 581, 584-85 (2003)(applying South Carolina’s procedural rule on appealability, S.C. Code Ann. § 15-48-200(a), to an order compelling arbitration under the FAA); *Heffner v. Destiny, Inc.*, 321 S.C. 536, 538, 471 S.E.2d 135, 136 (1995)(same)². Section 15-48-200(a) provides as follows:

an appeal may be taken from: (1) an order **denying** an application to compel arbitration; (2) an order granting an application to stay arbitration; (3) an order confirming or denying confirmation of an award; (4) an order modifying or correcting an award; (5) an order vacating an award without directing a rehearing; or (6) a judgment or decree entered pursuant to provisions of the Uniform Arbitration Act.

² The *Heffner* court further expressly rejected the argument that S.C. Code Ann. § 14-3-330 should be applied to determine the appealability of an order compelling arbitration, as S.C. Code Ann. § 15-48-200 contains a more specific provision regarding the appealability of orders relating to arbitration. 321 S.C. 536, 538, 471 S.E.2d 136, 136 (citing *National Advertising Co. v. Mount Pleasant Board of Adjustment*, 312 S.C. 397, 440 S.E.2d 875 (1994)).

S.C. Code Ann. § 15-48-200(a) (emphasis added). In *Heffner*, the South Carolina Supreme Court interpreted this statute as follows:

By application of the rule of statutory construction “expression unius est exclusio alterius” (the mention of one is the exclusion of another), all other orders related to arbitration are not immediately appealable. Therefore, the order in this case, which **stays this action and compels arbitration**, is **not immediately appealable** under § 15-48-200.

Heffner, 321 S.C. at 537-538, 471 S.E.2d at 136 (citing *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984))(emphasis added). Subsequently, in *Toler’s Cove*, the Supreme Court reiterated this principle: “The court’s order compelling arbitration is not immediately appealable under South Carolina law because *Heffner* held all orders relating to arbitration not mentioned in S.C. Code Ann. § 15-48-200(a) (Supp. 2002) are **not immediately appealable**.” 355 S.C. at 610, 586 S.E.2d at 584 (emphasis added). Based on the foregoing principles, it is clear that the Order compelling arbitration and staying this action is not immediately appealable, and the appeal should be dismissed so that this case may proceed to arbitration.³

II.

The appeal of the order denying class certification should be dismissed as interlocutory.

An order denying class certification is not a “final order,” as it does not terminate the action. Rather, the order is interlocutory in nature. Absent some specialized

³ The result would be the same if the procedural rule of the FAA were applied concerning appealability of arbitration orders. The FAA provides that “an appeal may not be taken from an interlocutory order-- (1) granting a stay of any action under section 3 of this title [9 USCS § 3]; (2) directing arbitration to proceed under section 4 of this title [9 USCS § 4];” 9 U.S.C. § 16(b).

statute, the immediate appealability of an interlocutory order depends on whether the order falls within one of the categories listed in S.C. Code § 14-3-330. See *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995). In relevant part, Section 14-3-330 states that appellate courts have jurisdiction to review:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas;
- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action

S.C. Code Ann. § 14-3-330.⁴ For the challenged order to be immediately appealable, it must fall squarely into one of the categories set forth in Section 14-3-330. Otherwise, the Court must dismiss the appeal for lack of subject matter jurisdiction. See *State v. Castleman*, 219 S.C. 136, 139, 64 S.E.2d 250, 252 (1951).

A review of the case law interpreting Section 14-3-330 demonstrates the limited nature of its scope. To “involve the merits” for purposes of Section 14-3-330(1), an order “must finally determine some substantial matter forming the whole or part of some cause of action or defense.” *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Similarly, the provisions of Section 14-3-330(2) only apply “when [the] order would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.” *Id.* at 334-35, 426 S.E.2d at 780. When an order can be reviewed following a trial on the merits, the order does

⁴ Subsections (3) and (4) deal with, respectively, final orders and orders dealing with injunctions or the appointment of a receiver. Neither of those categories is involved in the present action.

not affect a “substantial right,” and, thus, does not fall within the scope of Section 14-3-330. *Breland v. Love Chevrolet Olds., Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000).

Clearly, these standards are intended to be restrictive because judicial policy favors waiting until the end of a case to pursue an appeal. As Chief Justice Toal and her co-authors have explained, “It is only in exceptional cases that the appellate court views with approval an appeal from an interlocutory order; it is usually far better for the party to await the final decree or judgment.” Toal, et al., *Appellate Practice in South Carolina* 88 (2nd Ed. 2002).

Applying these principles, the South Carolina Supreme Court has consistently held that class certification orders are interlocutory and not immediately appealable. See *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 448, 661 S.E.2d 81, 85 (2008) (holding “[t]he general rule established by this court is that class certification orders are not immediately appealable.”); *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002) (“Usually, an order denying class certification is interlocutory and not immediately appealable.”); *Schein v. Lamar*, 274 S.C. 329, 331, 263 S.E.2d 383, 384 (1980) (finding issue of class certification was interlocutory and appeal regarding that issue was dismissed); *Knowles v. Standard Sav. & Loan Ass’n*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979) (dismissing appeal of class certification order as interlocutory on the grounds that “[c]lass certification, essentially procedural in nature, does not involve substantial or essential legal rights which require attention prior to final judgment”).

Based on this clear line of precedent, the Court lacks jurisdiction to hear Appellant's challenges to this interlocutory order, and the appeal of the order denying class certification should be dismissed.

III.

The Notice of Appeal was filed prematurely while a motion to alter or amend was pending and the trial court's amended Order was not timely appealed.

On December 3, 2013, Defendant Allen Harken served a Rule 59, SCRCP, motion to alter or amend the Form 4 Order entered by Judge Harrington. (Attached as Ex. B.) Appellant's Notice of Appeal was subsequently served on December 10, 2013, while Harken's motion to alter or amend was pending. (Attached as Ex. C.)

Because Defendant Harken's Rule 59, SCRCP, motion was pending on December 10, 2013, Appellant's Notice of Appeal was premature and should have been dismissed without prejudice. *See Elam v. S.C. Dep't of Transportation*, 361 S.C. 9, 20, 602 S.E.2d. 772, 778 n. 2 (2004); *Hudson v. Hudson*, 290 S.C. 215, 216, 349 S.E.2d 341, 341-42 (1986). Because Appellant never filed a Notice of Appeal of Judge Harrington's amended January 3, 2014 Order, the prior Notice of Appeal filed by Appellant was a nullity and should be dismissed.

CONCLUSION

For all of these reasons, the Court lacks jurisdiction and should dismiss this appeal as interlocutory and/or untimely pursuant to Rule 240, SCACR.

Respectfully submitted,



Steven W. Ouzts

Jonathan G. Roquemore

Joshua D. Shaw

Turner Padgett Graham & Laney P.A.

Post Office Box 1473

Columbia, SC 29202

(803) 254-2200

Attorney for Respondents

Somerset South Carolina, LLC and

Multifamily Management, Inc.

March 10, 2014

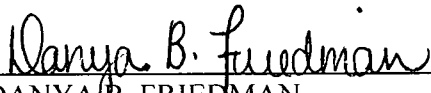
CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2014 a copy of the above and foregoing Motion to Dismiss Appeal has been sent via U.S. Mail, postage prepaid, to all counsel of record as follows:

Albert A. Lacour, III, Esq.
Clawson and Staubes, LLC
126 Seven Farms Dr., Ste. 200
Charleston, SC 29492

Roy Wiley, Esq.
Eric Marc Poulin, Esq.
Anastopoulo Law Firm
2557 Ashley Phosphate Rd.
North Charleston, SC 29418

Paul Eliot Sperry, Esquire
Carlock, Copeland & Stair
40 Calhoun Street, Suite 400
Charleston, SC 29401



DANYA B. FRIEDMAN
LEGAL SECRETARY

EXHIBIT A

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF Dorchester
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-18-2826

CERTIFIED COPY

Monique Frazier

2013 NOV 21 PM 4:07 Somerset South Carolina, LLC, et al

PLAINTIFF(S)

Christina Harken

DEFENDANT(S)

Submitted by:	CLERK OF COURT DORCHESTER COUNTY	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
		or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: This case came before the Court on November 12, 2013, on Plaintiff's Motion for Class Certification, Defendant Harken's Motion to Dismiss, Defendant Somerset's Motion to Compel Arbitration, and Defendant Somerset's Motion for Protective Order. This Court hereby DENIES Plaintiff's Motion and GRANTS Defendant Somerset's Motion to Compel Arbitration. The additional motions are hereby MOOT as this case is to be arbitrated.

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

11/21/2013

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on 11-21-2013, and a copy mailed first class or placed in the appropriate attorney's box on 11-21-2013, to attorneys of record or to parties (when appearing pro se) as follows:

Eric Marc Poulin 2557 Ashley Phosphate Rd. North
Charleston, SC 29418
Roy T. Willey IV 2557 Ashley Phosphate Road North
Charleston, SC 29418

Paul Eliot Sperry Carlock Copeland & Stair 40 Calhoun
Street, Suite 400 Charleston, SC 29401
Albert A. Lacour III 126 Seven Farms Dr., Ste. 200
Charleston, SC 29492
Steven Wayne Ouzts PO Box 1473 Columbia, SC 29202
Jonathan Gamble Roquemore PO Box 1473 Columbia, SC
29202
Joshua Daniel Shaw PO Box 1473 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

EXHIBIT B

**CLAWSON
AND
STAUBES**
LLC

Albert A. Lacour, III
alacour@clawsonandstaubes.com

December 3, 2013

File No.: 2013-0281

VIA US MAIL

The Honorable Cheryl L. Graham
Dorchester County Clerk of Court
5200 East Jim Bilton Blvd.
St. George, SC 29477

Re: Monique Frazier, individually, and on behalf of all similarly situated Plaintiffs v. Somerset South Carolina, LLC, d/b/a Somerset Apartments, Multifamily Management, Inc., a/k/a Mitchell Management, Inc., Allen Harken, Kathi Barfield Ducharme, John Doe Leasing Agents, and John Doe Premises Managers
Case No: 2012-CP-18-02826

Dear Ms. Graham:

Enclosed for filing please find the original and one (1) copy of the Motion Coversheet, Notice of Motion and Motion to Alter or Amend Judgment - Rule 59(e) with attachments in the above-referenced case. Also enclosed is our firm's check in the amount of \$25.00 which represents the filing fee. Please file the original motion along with the other papers in the case and clock and return the extra copy in the envelope provided as proof of filing.

Thank you very much for your attention to the above.

With best regards I remain,

Very truly yours,

CLAWSON AND STAUBES, LLC



Albert A. Lacour, III

AALIII/nm
enclosure

cc: Eric M. Poulin, Esquire
Roy T. Willey, IV, Esquire
Daniel J. Crooks, III, Esquire
Paul E. Sperry, Esquire (via e-mail only)
Steven W. Ouzts, Esquire (via e-mail only)
The Honorable Kristi L. Harrington

www.clawsonandstaubes.com

126 Seven Farms Drive, Suite 200, Charleston, South Carolina 29492

Fax: (843) 722 - 2867 / Office: (843) 577 - 2026

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Monique Frazier

Plaintiff

v.

Multifamily Management, Inc., a/k/a Mitchell Management, Inc., Allen Harken, Kathi Barfield Ducharme, John Doe Leasing Agents, and John Doe Premises Managers

Defendant

IN THE COURT OF COMMON PLEAS

CASE NO. 2012-CP-18-02826

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney: Roy T. Willey, IV, Esquire Bar No. Address: Anastopoulo Law Firm, LLC 2557 Ashley Phosphate Rd. North Charleston, SC 29418 Phone: 843-614-8888 Fax: email: Roy@akimlawfirm.com Other:	Defendant's Attorney: Albert A. Lacour, III Bar No. 3099 Address: CLAWSON AND STAUBES, LLC 126 Seven Farms Drive, Suite 200 Charleston, SC 29492-8144 Phone: (843) 577-2026 Fax: (843) 722-2867 email: alacour@clawsonandstaubes.com Other:
---	---

- MOTION HEARING REQUESTED (Attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Alter or Amend Judgment - Rule 59(e)

Estimated Time Needed: 15 Minutes

Court Reporter Needed: YES NO

SECTION II: Motion/Order Type

- Written motion attached
- Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Submitted Signature of Attorney for Plaintiff / Defendant

Date

SECTION III: Motion Fee

PAID - AMOUNT: \$25.00

- EXEMPT: (Check Reason)
 - Rule to Show Cause in Child or Spousal Support
 - Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRCP)
 - Proposed order submitted at request of the court; or reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
 - Other

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other:

JUDGE _____

CODE: _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____
(Print Name)

DATE FILED:

- MOTION FEE COLLECTED: _____
- CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
 Monique Frazier, individually, and on)
 behalf of all similarly situated Plaintiffs,)
)
 Plaintiffs,)
 vs.)
)
 Somerset South Carolina, LLC, d/b/a)
 Somerset Apartments, Multifamily)
 Management, Inc., a/k/a Mitchell)
 Management, Inc., Allen Harken, Kathi)
 Barfield Ducharme, John Doe Leasing)
 Agents, and John Doe Premises)
 Managers,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIRST JUDICIAL CIRCUIT
 CASE NO.: 2012-CP-18-02826

**NOTICE OF MOTION AND MOTION
 TO ALTER OR AMEND JUDGMENT -
 RULE 59(e)**

TO: ERIC M. POULIN, ESQUIRE, ROY T. WILLEY, IV, ESQUIRE, AND DANIEL J. CROOKS, III, ESQUIRE, ATTORNEYS FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendant Harken, by its undersigned attorney will move before the Honorable Kristi L. Harrington, in the Dorchester County Courthouse on the 10th day after service hereof, or at such other time and place as is convenient to the Court and counsel, for an Order from the Court granting relief from the Form 4 Order dated November 19, 2013, filed November 21, 2013, and received in our office on November 25, 2013, pursuant to the provisions of SCRCP Rule 59(e) providing for the filing of a motion to alter or amend judgment where it appears that the Court failed to rule on all issues before it.

The grounds for this motion are that at the hearing on November 12, 2013 the Defendant Harken argued its Motion to Dismiss for lack of proper service under Rules 12(b)(2), (4) and (5). The Form 4 Order entered herein, a copy of which is attached, does not contain a ruling on Harken's motion.

Although there were other pending discovery motions before the Court which were agreed among counsel to be considered moot if the Court granted the Co-Defendant's motion to compel arbitration (such as the motions for protective order filed by Defendant DuCharme and by others which are also not listed on the Form 4 Judgment), there was no agreement by Harken that his motion to dismiss was in any way affected by the ruling on the motion to compel arbitration. Harken therefore argued his motion and submitted a proposed Order after review by opposing counsel. Harken requests that the Court please rule on his motion and execute the proposed Order as submitted to the Court under cover of counsel's letter of November 18, 2013.

CLAWSON AND STAUBES, LLC



Albert A. Lacour, III
CLAWSON AND STAUBES, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Attorneys for Allen Harken

Charleston, South Carolina

December 3, 2013

SOUTH CAROLINA RULES OF CIVIL PROCEDURE
RULE 11 CERTIFICATION

I certify that consultation with opposing counsel on the subject of the within Motion would serve no useful purpose.



Albert A. Lacour, III

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading has been served upon opposing counsel by mailing a copy properly addressed and with sufficient postage affixed thereto on this 3rd day of December, 2013.

Nancy Martz

EXHIBIT C

ANASTOPOULO LAW FIRM, LLC

ATTORNEYS AT LAW

Toll Free: (800) 313-2546

Fax: (843) 853-2291

Mailing Address: 2557 Ashley Phosphate Rd.
North Charleston, SC 29418

Florence Office: 150 W. Evans Street, Florence, SC

Akim A. Anastopoulos (SC)

John I. Henderson (SC)

Thomas Bailey Smith (SC)*

*Affiliate Counsel

Eric M. Poulin (GA) (NC) (SC)

Roy T. Willey, IV (SC)

Reply to the North Charleston Office

Tuesday, December 10, 2013

RE: *Monique Frazier, et al. v. Somerset South Carolina, LLC, et al.*
Case No.: 2012-CP-18-2826

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal in the above case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal on Respondent.
- (2) A filing fee of \$100.00.
- (3) A copy of the Order to be appealed.

We would appreciate it if you would file the original Notice and Proofs of Service and return the copies in the enclosed envelope.

Sincerely,



Roy T. Willey, IV

Cc:

✓ Steven W. Ouzts, Esq.
Jonathan G. Roquemore, Esq.
Josh D. Shaw, Esq.
Turner Padgett Graham & Laney, P.A.
1901 Main Street, 17th Floor
Columbia, SC 29201

Paul Eliot Sperry
Carlock, Copeland & Stair
40 Calhoun St., Suite 400
Charleston, SC 29401

Albert A. Lacour III, Esq.
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492

ADDITIONAL OFFICES

Florence, South Carolina * Greenville, South Carolina * Columbia, South Carolina * Allendale, South Carolina
Orangeburg, South Carolina * Myrtle Beach, South Carolina * Wilmington, North Carolina

ANASTOPOULO LAW FIRM, LLC

ATTORNEYS AT LAW

Toll Free: (800) 313-2546

Facsimile: (843) 853-2291

Mailing Address: 2557 Ashley Phosphate Rd.
North Charleston, SC 29418

Florence Office: 150 W. Evans Street, Florence, SC

Akim A. Anastopoulos (SC)

John I. Henderson (SC)

Thomas Bailey Smith (SC)*

*Affiliate Counsel

Eric M. Poulin (GA) (NC) (SC)

Roy T. Willey, IV (SC)

Reply to the North Charleston Office

Tuesday, December 10, 2013

Dorchester County Clerk of Court
Court of Common Pleas
5200 E. Jim Bilton Blvd.
St. George, SC 29477

RE: *Monique Frazier, et al. v. Somerset South Carolina, LLC, et al.*
Case No.: 2012-CP-18-2826

Dear Sir or Madam:

Please find enclosed a copy of the Notice of Appeal in the above referenced case.

Sincerely,


Roy T. Willey IV

Cc:

✓ Steven W. Ouzts, Esq.
Jonathan G. Roquemore, Esq.
Josh D. Shaw, Esq.
Turner Padgett Graham & Laney, P.A.
1901 Main Street, 17th Floor
Columbia, SC 29201

Paul Eliot Sperry
Carlock, Copeland & Stair
40 Calhoun St., Suite 400
Charleston, SC 29401

Albert A. Lacour III, Esq.
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492

ADDITIONAL OFFICES

Florence, South Carolina * Greenville, South Carolina * Columbia, South Carolina * Allendale, South Carolina
Orangeburg, South Carolina * Myrtle Beach, South Carolina * Wilmington, North Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2012-CP-18-2826

Monique Frazier, individually and on behalf of all similarly situated Plaintiffs,Appellant


v.

Somerset South Carolina, LLC, d/b/a Somerset Apartments, Multifamily Management, Inc. a/k/a Mitchell Management Inc., Allen Harken, Kathi Barfield Ducharme, John Doe Leasing Agents, and John Doe Premises Managers. Respondents

NOTICE OF APPEAL

Monique Frazier, individually and on behalf of all similarly situated Plaintiffs, appeals the Order of the Honorable Kristi L. Harrington, ordering arbitration, denying class certification, and denying all other pending motions as moot, signed November 19, 2013, and entered November 21, 2013. Appellant received written notice of said Order on or about November 20, 2013.

December 10, 2013



Roy T. Willey IV, Esquire
Eric M. Poulin, Esquire
Ryan C. Andrews, Esquire
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Rd.
North Charleston, SC 29418
(843) 614-8888
Attorneys for Appellant

Other Counsel of Record:

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Carlock Copeland & Stair
40 Calhoun Street, Suite 400
Charleston, SC 29401

Albert A. Lacour, III
126 Seven Farms Drive, Suite 200
Charleston, SC 29492

Steven Wayne Ouzts
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P.O. Box 1473
Columbia, SC 29202

STATE OF SOUTH CAROLINA
COUNTY OF Dorchester
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-18-2826

CERTIFIED COPY

Monique Frazier

Somerset South Carolina, LLC, et al

2013 NOV 21 PM 4:04

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

CLERK OF COURT
DORCHESTER COUNTY

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: This case came before the Court on November 12, 2013, on Plaintiff's Motion for Class Certification, Defendant Harken's Motion to Dismiss, Defendant Somerset's Motion to Compel Arbitration, and Defendant Somerset's Motion for Protective Order. This Court hereby DENIES Plaintiff's Motion and GRANTS Defendant Somerset's Motion to Compel Arbitration. The additional motions are hereby MOOT as this case is to be arbitrated.

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2012-CP-18-2826

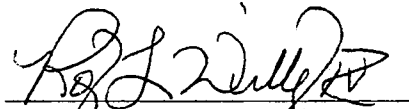
Monique Frazier, individually and on behalf of all similarly situated Plaintiffs,Appellant
v.

Somerset South Carolina, LLC d/b/a Somerset Apartments, Multifamily Management, Inc. a/k/a Mitchell Management, Inc., Allen Harken, Kathi Barfield Ducharme, John Doe Leasing Agents, and John Doe Premises Managers,Respondents

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on by depositing a copy of it in the United States Mail, postage prepaid, on December 6, 2013, addressed all counsel of record listed below.

December 10, 2013



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Joshua Daniel Shaw
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P.O. Box 1473
Columbia, SC 29202

EXHIBIT D

Monique Frazier, et al

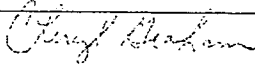
CERTIFIED COPY

Somerset South Carolina, LLC, et al

2014 JAN -3 AM 10:30

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	 CLERK OF COURT DORCHESTER COUNTY	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
		or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: This case came before the Court on Defendant Harken's Motion to Alter/Amend Pursuant to SCRPC Rule 59(e). In consideration of Defendant's Motion, the Court alters and amends the Order dated November 21, 2013, to reflect the following:

This case came before the Court on November 12, 2013, on Plaintiff's Motion for Class Certification, Defendant Harken's Motion to Dismiss, Defendant Somerset's Motion to Dismiss and Compel Arbitration, Defendant Ducharme's Motion for Protective Order, and Defendant Somerset's Motion for Protective Order. This Court hereby DENIES Plaintiff's Motion for Class Certification, DENIES Defendant Harken's Motion to Dismiss, and GRANTS Defendant Somerset's Motion to Compel Arbitration. The remaining motions are MOOT and the case is stayed until arbitration has occurred.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

For Clerk of Court Office Use Only

This judgment was entered on 1/3/2014, and a copy mailed first class or placed in the appropriate attorney's box on 1/3/2014, to attorneys of record or to parties (when appearing pro se) as follows:

Eric Marc Poulin/Roy T. Willey IV 2557 Ashley Phosphate Road North Charleston, SC 29418

Paul Eliot Sperry Carlock Copeland & Stair 40 Calhoun Street, Suite 400 Charleston, SC 29401

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ATTORNEY(S) FOR THE PLAINTIFF(S)

Ronda T. Cummings

Court Reporter

ATTORNEY(S) FOR THE DEFENDANT(S)



Cheryl Graham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
 Monique Frazier, individually, and on behalf)
 of all similarly situated Plaintiffs,)
)
 Plaintiffs,)
)
 vs.)
)
 Somerset South Carolina, LLC d/b/a)
 Somerset Apartments, Multifamily)
 Management, Inc., aka Mitchell)
 Management, Inc., Allen Harken, Kathi)
 Barfield Ducharme, John Doe Leasing)
 Agents and John Doe Premises Managers,)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS
 FOR THE FIRST JUDICIAL CIRCUIT
 CASE No.: 2012-CP-18-2826

CERTIFIED COPY
 2014 JAN -3 AM 10:15
 Clerk of Court
 DORCHESTER COUNTY

ORDER

On November 12, 2013, the Court conducted a hearing regarding three motions: (1) Motion to Dismiss and Compel Arbitration of Defendants Somerset South Carolina, LLC and Multifamily Management, Inc.; (2) Motion of Plaintiff for class certification; (3) Motion of Allen Harken to dismiss the action under Rule 12(b) (2), (4), and (5) for insufficient service of process; (4) Motion for Protective Order of Defendants Somerset South Carolina, LLC; and (5) Motion for Protective Order of Defendants Ducharme and others. All parties were represented by counsel.

Defendant Harken filed a Motion to Alter/Amend Judgment Pursuant to SCRCR Rule 59(e) on December 4, 2013. In consideration of Defendant's Motion, the Court alters and amends the Order dated November 21, 2013, to clarify its previous Order. The Court grants the Defendants' motion to compel arbitration of the Plaintiff's individual claims, and dismiss the claims alleged by Plaintiff as representative of a putative class. The Court denies Defendant Harken's Motion to Dismiss pursuant to South Carolina Rules of Civil Procedure, specifically

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Rule 12(b). The motions for protective order are rendered moot as the case is ordered to arbitration.

PROCEDURAL HISTORY

Plaintiff initiated this action with the filing of her summons and complaint in the Court of Common Pleas for Dorchester County on December 19, 2012. In the Complaint, Plaintiff asserts claims for fraud, violation of the Landlord Tenant Act, breach of contract, and negligence.¹ Furthermore, Plaintiff purports to represent a putative class consisting of all persons domiciled at Somerset Apartments since June 29, 2006, who have been adversely affected by Defendants. Defendants filed timely answers to the Complaint, denying the material allegations and asserting numerous affirmative defenses.

Defendants Somerset and Multifamily Management filed their Motion to Dismiss Action and Compel Arbitration on September 20, 2013. At the hearing on November 12, counsel for the defendant Kathi Barfield Ducharme, a former employee of Multifamily Management, also consented and joined the co-defendants' motion. Plaintiff opposed the motion on two grounds. She admits signing the arbitration agreement, but argues that it is not enforceable under the Federal Arbitration Act ("FAA") because it did not involve interstate commerce.² Further, the Plaintiff argues the arbitration agreement is unconscionable.

Defendants oppose Plaintiff's motion for class certification on several grounds, arguing first that the motion is premature because of the pending motion to compel arbitration and

¹ Plaintiff's Third and Fourth causes of action – failure to disclose latent defect and breach of the implied warranties of habitability and quiet enjoyment – were dismissed by Order of the Court filed July 11, 2013.

² Plaintiff also argued the arbitration agreement was not enforceable under the South Carolina Arbitration Act because it did not comply with certain notice provisions. There is no need for the Court to consider Plaintiff's arguments under the South Carolina Arbitration Act since Defendant's motion is made pursuant to the FAA, which is binding on this Court. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001)

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because of a lack of discovery or evidentiary support for the motion, and further, that the Plaintiff's motion fails to meet the requirements for class certification under Rule 23, SCRPC.

DEFENDANTS' MOTION TO COMPEL ARBITRATION

1. Applicability of the Federal Arbitration Act

"Unless the parties have contracted to the contrary, the [FAA] applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). In order to compel arbitration under the FAA, the litigant must show: "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute." *Goer v. Jasco Industries, Inc.*, 395 F. Supp.2d 308, 311 (D.S.C. 2005). Defendants have demonstrated each of these elements. The only one contested by Plaintiff is the relationship of the transaction evidenced by the agreement to interstate commerce.

The terms "involving interstate commerce" as used in the FAA have been held to extend the reach of the FAA to fullest extent permitted under the Commerce Clause. *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 288 733 S.E.2d 597, 600 (Ct. App. 2012). To determine whether a transaction involves commerce within the FAA, the court must examine the agreement, the complaint, and the surrounding facts. *Id.*

In this case, Plaintiff is a former tenant at Somerset Apartments, which is owned and managed by Defendants Somerset and Multifamily Management. An arbitration agreement was included as an addendum to Plaintiff's lease agreement. This "Arbitration Addendum" is a one-page document signed by Plaintiff. The Arbitration Agreement provides, in pertinent part, as follows:

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Any dispute or any controversy arising under this lease, except for actions for lease termination, eviction, recovery of unpaid rent, or action against tenant for damages to the unit, shall be settled by arbitration in Mobile, Alabama / or (site of property at which the alleged action arises) in accordance with the commercial rules and regulations of the American Arbitration Association or its successor organization. This shall include any action seeking damages by tenant for personal injury or property damage, or any person claiming a duty arising under this lease or the condition of the premises. . . .

The United States Supreme Court has held that the leasing of real property is “unquestionably” an activity that affects interstate commerce. *Russell v. United States*, 471 U.S. 858, 862 (1985) (“We need not rely on the connection between the market for residential units and ‘the interstate movement of people,’ to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class”). *Accord Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008) (finding “[t]here was never any question” that the real property leases from which a dispute arose met the requirement of “involving commerce”). *See also Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 747 S.E.2d 461 (2013). The claims alleged in the Complaint all arise under the lease.

Based on these facts and authorities, the Court finds that the underlying real estate lease agreement is “a contract evidencing a transaction involving commerce” pursuant to 9 U.S.C. § 2. Accordingly, this Court finds the Arbitration Addendum is enforceable under the FAA, as Plaintiff did not show grounds at law or in equity for the revocation of the agreement as provided in 9 U.S.C. § 2.

2. Plaintiff’s unconscionability argument

At the hearing, though not in its memoranda, Plaintiff attempted to avoid the arbitration agreement by arguing that it is unconscionable. The Court finds that Plaintiff failed to make an adequate showing of unconscionability.

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State law governs the decision of whether or not an arbitration agreement is valid and enforceable, except where state law places arbitration agreements on an unequal footing with other contracts generally or is otherwise inconsistent with the policies underlying the FAA, in which case state law is preempted by the FAA. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539-40, 542 S.E.2d 360, 364 (2001). Under South Carolina law, “[t]here is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes.” *Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

South Carolina law defines unconscionability 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. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). In the context of arbitration agreements, the focus is on “whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.” *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. Plaintiff has failed to make a showing that the arbitration agreement she signed is unconscionable according to these standards. The Court finds that the agreement is valid and enforceable under the FAA.

3. Arbitrability of Plaintiff's claims

Under the FAA, questions regarding the “arbitrability” of claims, such as whether or not a claim is encompassed within an arbitration agreement, are determined by the court according to the federal substantive law of arbitrability. *Pearson*, 400 S.C. at 289, 733 S.E.2d at 600. Arbitration agreements are given a liberal interpretation so that “[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Id.*

The Court finds that the arbitration agreement in this case encompasses the disputes at issue in this litigation. The parties entered into a valid lease agreement and, as reflected in the

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Arbitration Addendum signed by Plaintiff, anticipated and agreed that “[a]ny dispute or any controversy arising under this lease” would be subject to binding arbitration, including “any action seeking damages by tenant for personal injury or property damage, or any person claiming a duty arising under this lease or the condition of the premises.”

Under South Carolina law, “unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.” *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 119 (citing *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993)). Moreover, “A clause which provides for arbitration of all disputes ‘arising out of or relating to’ the contract is construed broadly.” *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013).

Each of Plaintiff’s causes of action is premised on allegations concerning the physical condition of her apartment building. The Court finds that the Arbitration Addendum is broadly written and plainly covers Plaintiff’s claims. Furthermore, Plaintiff’s claims against non-signatory defendants, including former employee Kathi Barfield Ducharme, arise under the same lease agreement and are inextricably intertwined with Plaintiff’s claims against Somerset and Multifamily Management so that Plaintiff is estopped from contesting the applicability of the arbitration agreement to them.³ See *Goer v. Jasco Industries, Inc.*, 395 F. Supp.2d 308, 311 (D.S.C. 2005); *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012).

Therefore, the Court orders that each of the Plaintiff’s individual claims be referred to arbitration in accordance with the commercial rules and regulations of the American Arbitration Association. Pursuant to the FAA, this action is hereby stayed “until such arbitration has been had in accordance with the terms of the agreement”. 9 U.S.C. §3.

³ At the hearing, counsel for Defendant Ducharme consented to binding arbitration of this matter. Plaintiff has not objected – either in her written submissions or at the hearing – to the individual Defendant’s participation in a binding arbitration. Therefore, the Court finds that Plaintiff’s claims against the individual Defendants are properly referred to binding arbitration for that reason as well. The Court further notes that Defendant Harken has a separate Motion to Dismiss, which was heard at the November 12, 2013 hearing and will be addressed ~~separately~~.

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PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

In addition to her own individual claims, Plaintiff also purports to allege claims on behalf of a putative class of other persons. For the reasons stated below, the Court finds that the arbitration agreement signed by Plaintiff precludes class claims and they should be dismissed pursuant to *Stolt-Neilson S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 686 (2010) as well as Rule 23(d), SCRPC. Furthermore, Plaintiff's motion for class certification fails to meet the requirements for class certification under Rule 23, SCRPC.

The Court finds that the question of whether or not Plaintiff's class claims are precluded under the arbitration agreement is a "gateway" question properly addressed to the court. *Reed Elsevier, Inc. v. Crockett*, 2013 U.S. App. LEXIS 22408, 2013 FED App. 0323P (6th Cir. Nov. 5, 2013). The United States Supreme Court has held that class arbitration is not a term that can be inferred from silence or solely from the fact of the parties' agreement to arbitrate. *Stolt-Neilson S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 686 (2010). Thus, absent an express agreement to class arbitration, a party to an arbitration agreement is precluded from pursuing class claims.

The Court finds that the arbitration agreement at issue in this case does not authorize Plaintiff to assert class claims. The agreement is silent on the issue and nowhere mentions class arbitration. To the contrary, the arbitration agreement limits Plaintiff's claims to those arising under "this lease", as opposed to other tenants' leases. See *Reed Elsevier, Inc. v. Crockett*, 2013 U.S. App. 22408 at pp. 7-8 (class claims precluded where arbitration agreement contains no mention and is limited to "this [purchase] order," not others). Therefore, pursuant to *Stolt-Neilson* and *Reed Elsevier*, the Plaintiff is precluded under the FAA from pursuing claims on behalf of a class. Having thus determined that the action cannot be maintained as a class action and the Plaintiff cannot adequately represent or protect the interests of absent persons she purports to represent, the Court hereby orders that all class allegations and references to the

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representation of absent person be stricken from the pleadings pursuant to Rule 23(d)(1) and (3), SCRPC. *See Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475 (Ct. App. 2011)(trial court's grant of motion to strike was a denial of class certification pursuant to Rule 23). Moreover, having considered the Plaintiff's Motion for Class Certification, including oral argument and written submissions, the Court finds that Plaintiff has failed to carry her burden of proving each of the prerequisites for class certification set forth in Rule 23(a), SCRPC. *See Gardner v. S.C Dep't of Revenue*, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003).

DEFENDANT HARKEN'S MOTION TO DISMISS UNDER SCRPC RULE 12(b)

The motion to dismiss is limited to Defendant Allen D. Harken. For the reasons that follow, the Court finds that the motion to dismiss is without merit, and it is hereby denied.

This case arises out of conditions at an apartment complex known as Somerset Apartments. The details of the complaint are more fully set out above, and will not be repeated here, as they are essentially immaterial to the instant motion. Defendant Allen Harken is alleged to have been a leasing agent at Somerset Apartments and therefore personally responsible for some of the breaches of contract of which Plaintiff complains.

The sole basis of the motion to dismiss is Harken's assertion that Plaintiff has failed to properly serve him. That being the case, it is the procedural, rather than substantive, history and background of this action that is relevant.

Plaintiff initially attempted to serve Harken on June 14, 2013, by certified mail. There is no dispute between the parties that this service was ineffective under Rule 4(b)(8), as the mail was not sent "restricted delivery" and it is unclear whose signature appears on it. On June 19, 2013, the Honorable Judge Dickson of this Court ordered that Plaintiff serve Harken within fourteen (14) days of the date of the filing of his Order, which occurred on July 11, 2013. He further ordered that the action be dismissed as to Harken if Plaintiff was unable to comply.

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On July 23, 2013, Plaintiff filed her petition for publication, supported by the affidavit of counsel. It is this petition that is presently the basis for Harken's motion to dismiss, as Harken asserts that Section 15-9-710(2) and (3), which are the two subsections that would allow for service by publication in this instance, both require an affirmative showing that the defendant is a resident of South Carolina. Defendant asserts that "there is not a single document which has been served on the undersigned [counsel] which attempts to establish through direct knowledge, by affidavit or otherwise, that Allen Harken is still a resident of the State of South Carolina."

The affidavit submitted by Plaintiff in support of her motion for leave to publish states that Plaintiff made several attempts to locate Harken. The affidavit and supporting documents detail these attempts, which include service by mail at his last known address, personal service by the Charleston County Sheriff's Department at the same address, and contact by a private process server with Harken's grandmother, who apparently resides at the forwarding address that was obtained. None of these was successful. Harken's grandmother apparently indicated to the process server that she had not seen her grandson in a number of years and did not know where he lived.

Harken does not dispute Plaintiff's allegation that she made the diligent search required by statute. His sole argument is that there is no evidence that he is a resident of this State as required by law. In response, Plaintiff has submitted a document from LexisNexis People Finder, labeled "Historical Person Locator," which gives his address as being in Charleston. The search performed on Lexis was done in response to Harken's motion, and the information contained is therefore recent. It does not show that he now resides, or has at any time in the recent past resided, anywhere other than within the State of South Carolina.

It is often difficult if not impossible to differentiate between a defendant who cannot be found within the State because he has left it, and one who cannot be found because he is, in the words of the law, "avoiding service or attempting to conceal himself." The law does not require

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a definitive showing, however, merely sufficient evidence to satisfy the Clerk or the Court. See *Ingle v. Whitlock*, 282 S.C. 391, 318 S.E.2d 367 (1984). Although the burden does not shift to the defendant to demonstrate beyond any doubt that he has left the State, the statute does not require that the Plaintiff remove any question but that he has remained. In this case, where Plaintiff has presented sufficient evidence to satisfy the Clerk to issue an Order for Publication, the Court declines to second-guess that showing.

Based on the foregoing, the motion of Defendant Allen Harken to dismiss for improper service is denied.

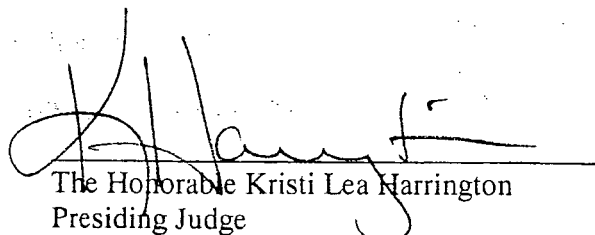
CONCLUSION

For the reasons stated above, the Court hereby orders that each and every claim asserted by the Plaintiff Monique Frazier, personally and individually, shall be referred to binding arbitration in accordance with the commercial rules and regulations of the American Arbitration Association. Furthermore, Plaintiff is precluded under the arbitration agreement from maintaining class claims because of the absence of any express agreement to permit class claims in the binding arbitration, and, therefore, any and all allegations purporting to set forth class claims are hereby stricken from the Complaint pursuant to Rule 23(d), SCRPC. Class certification also is denied for failure to satisfy the requirements of Rule 23. Finally, the Court finds that Defendant Harken's motion to dismiss was without merit and denies said motion.

Therefore, pursuant to 9 U.S.C. §3, this action is stayed until such arbitration has been had in accordance with the terms of the arbitration agreement.

AND IT IS SO ORDERED!

This 20th day of December, 2013


The Honorable Kristi Lea Harrington
Presiding Judge
Dorchester County Court of Common Pleas

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MAR 11 2014

SC Court of Appeals

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