

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit 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. aka MITCHELL
MANAGEMENT, INC., ALLEN HARKEN,
KATHI BARFIELD DUCHARME, JOHN DOE
LEASING AGENTS and JOHN DOE PREMISES
MANAGERS

Respondents.

INITIAL BRIEF OF APPELLANT

ANASTOPOULO LAW FIRM, LLC

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PROCEDURAL POSTURE

The instant action was initially filed on December 19, 2012, by Plaintiff Monique Frazier. She sought class certification on behalf of all persons residing at the Somerset Apartments, located in Summerville, South Carolina, from June 29, 2006 through the date of the action, and alleged causes of action sounding in breach of contract as well as tort. Defendants, Respondents herein, are the owner and management company of the complex, as well as certain leasing agents. All of Defendants answered.

Appellant timely filed her Motion for Class Certification, which was opposed by Respondents. Respondents subsequently filed a Motion to Compel Arbitration, opposed by Appellant. Both Motions were consolidated for hearing on November 12, 2013.¹ On January 3, 2014, the Court granted the Motion to Compel Arbitration of Appellant's individual claims. Based upon that decision, the Court denied Class Certification.

FACTS

Appellant leased a residential unit at Somerset Apartments in November, 2011, and continued to live there until January, 2013. Significant to her decision to lease at Somerset, and an important part of the class allegations, is the claim that she entered into the lease in the first instance because of a number of promises made by Respondents. Included in these promises were claims that Somerset was "a great value" and that Respondents were committed to providing "great service." This service contract included maintenance of the appliances, including hot water heaters and HVAC units, regular pest control, and exterminators.

¹ At the same time, the Court heard the Motion of Defendant Allen Harken to dismiss, predicated upon allegedly improper service. This Motion was denied and is not a part of the instant appeal.

Over the period of time Appellant resided at the Somerset Apartments, she had repeated and on-going problems with many of the specific areas over which Appellants had contracted to exercise control. The HVAC system in her unit had multiple problems, including lack of hot water, and a lack of either heat or air conditioning. Additionally, when it did work, it did so poorly, and caused Appellant to incur excessive utility bills, especially excessive in light of the fact that Somerset Apartments community, as demonstrated in particular by its advertising, is aimed at and geared towards rental to low income residents. More significantly, Respondents failed to provide the pest control and exterminating services they had promised in the lease contract. As a direct result of the breach of the contract to properly maintain the structure, the fixtures, and the unit, Appellant was injured; she lost the value of her contract with Respondents. In addition, she and her children suffered personal injury. All of them became ill as a result of the mold and mildew in the unit, which had resulted from lack of maintenance, and her daughter had a severe reaction to insect bites and required extensive treatment, as a direct result of the failure to perform pest control.

Appellant sought class certification because, as was shown by the affidavits of several neighbors also submitted into evidence as a part of her Class Certification Motion, the problems she faced were endemic to the complex. The residents of Somerset Apartments, as a group, were subjected to grossly misleading advertising and living conditions that failed to comport with the contracts they executed and the promises they were made. Appellant, on behalf of herself and other members of the putative class, seeks reimbursement for costs incurred as a result of the breaches of contract by

Respondents, as well as compensation for the personal injuries she and her family have suffered.

ARGUMENT

I. The Trial Court Incorrectly Ruled on Respondent's Motion to Compel Arbitration Before Determining Whether Class Certification Was Appropriate.

There is no question but that Appellant's Motion to Certify a Class was filed prior to the filing of Respondents' Motion to Compel Arbitration, and the Trial Court expressly clarified that on the record at the commencement of the hearing. Tr., p. 5. Although Appellant had no objection to the order in which the Trial Court wished to hear argument, she has made it clear from the inception of these disagreements that she believes that ruling on her Motion takes precedence, and that a determination in her favor as to certification moots any further discussion of arbitration. The Trial Court's Order, which rules on arbitration prior to determining whether or not class certification is appropriate, incorrectly and erroneously inverts the decision process in this case.

A. The Trial Court Properly Determined that Class Certification Was a Gateway Issue.

The majority of the Opinion of the Trial Court is addressed to the question of whether or not a residential apartment lease involves interstate commerce so as to bring the arbitration provision in the addendum within the Federal Arbitration Act, 9 U.S.C. § 2. As is discussed in more detail *infra*, Appellant disagrees with the ultimate conclusion reached below that her lease, or those of other class members she proposes to represent, is anything other than a purely local transaction. Regardless of this conclusion, however, the fact that the Trial Court made this determination prior to reaching the merits of Appellant's Motion for Class Certification is error and merits reversal.

As the Trial Court itself noted, the question of class certification under an arbitration agreement in itself silent as to whether such actions may be arbitrated is a "gateway" question. The United States Supreme Court has indicated that issues involving arbitrability, in general, must be answered by the court before an action may be sent to arbitration. *Stolt-Neilson S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010). In other words, if an arbitration agreement precludes class action, and the principal action itself is properly certifiable as a class, it should not and may not be referred to arbitration. As Appellant argued before the Trial Court, this determination must be made prior to any decision as to whether the arbitration agreement itself is enforceable as to any individual member of the class.

A "gateway" issue, as the Supreme Court has explained, is a question which determines the arbitrability of the action in the first instance. As a preliminary matter to its discussion, the Supreme Court addressed the rule laid down by the South Carolina Supreme Court in *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 569 S.E.2d 349 (2002), in which this State found that class certification could be ordered under otherwise silent arbitration agreements in certain types of situations. The *Stolt-Neilson* Court made it clear that *Bazzle* did not address what was the fundamental issue before it: whether the question of arbitrability was one for a court or an arbitrator, and whether class certification was or was not such an issue to begin with.

It is clear, however, as the Trial Court recognized, that whether or not a particular arbitration agreement allows for class arbitration is initially an issue for the Court to decide. "The question whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability,' is 'an issue for judicial determination

'[u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)(quoting *AT&T Techns., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). That being the case, the first determination that should have been made was with respect to the Motion for Class Certification, not the Motion to Compel Arbitration.

B. The Trial Court Erred in Ruling on the Enforceability of the Arbitration Agreement Prior to Ruling on the Motion for Class Certification.

Although the Trial Court properly recognized that the gateway issue before it was the arbitrability of the class allegations, and the merits of Appellant's Motion for Class Certification, it ruled on the validity of the arbitration agreement first. The preliminary question which should have been addressed was whether the class is properly certifiable and, if it is, whether the arbitration agreement provides an avenue for class action. If the first of these questions is answered in the affirmative, and the second in the negative, there is no reason to proceed further with the validity of the arbitration agreement itself, nor is there any question but that the action should not be referred to arbitration. Instead, the Trial Court addressed the independent validity of the arbitration agreement as constituting the first fundamental question. Having found that the arbitration clause was enforceable as to Appellant, individually, it then decided that even the possibility of class action was precluded as a matter of law. This is, simply stated, putting the cart before the horse.

As noted above, the question of arbitrability is a gateway issue which must be decided prior to deciding whether or not the particular arbitration clause in question is enforceable. The Trial Court properly concluded that the validity of the arbitration provision itself might be dependent upon whether or not a class was certified. Rather

than taking up the class certification issue first, however, it ruled on the independent validity of the arbitration agreement, and then concluded that arbitrability itself was dependent on the language of an agreement which might not pass "gateway" muster. Because the first inquiry into the enforceability of the arbitration agreement is dependent on the question of class certification, the Trial Court's ruling on enforcement as a preliminary matter constitutes error.

C. The Trial Court Erred in Concluding that Silence as to Class Treatment Equates a Finding that Class Certification Is Precluded in Arbitration

Arbitration is a creature of contract; absent a valid contract for arbitration, the process cannot be enforced. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). It is black-letter law that, in order to have a valid and enforceable contract, the parties thereto must have a "meeting of the minds." *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989). Having first erroneously concluded that the arbitration agreement is enforceable regardless of whether the Plaintiff Class should be certified, the Trial Court additionally erred in finding that silence in the arbitration agreement necessarily precluded class treatment.

The finding that an agreement that is silent as to the possibility of class certification prohibits such action relies principally on two cases: *Stolt-Neilson S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010) and *Reed Elsevier, Inc. v. Crockett*, 2013 U.S. App. LEXIS 22408 (6th Cir. Nov. 5, 2013). The first of these, despite the Trial Court's statements to the contrary, expressly leaves this particular question for future development; the latter is factually distinguishable.

In *Oxford Health Plans LLC v. Sutter*, ___ U.S. ___, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013), a unanimous Supreme Court made it clear that its decision in *Stolt-*

Neilson was not as broad as the lower courts generally, and the Trial Court herein, were presuming. The *Sutter* Court specifically noted that the parties in *Stolt-Neilson* had stipulated to the fact that they had not agreed to maintenance of a class action proceeding. It was, consequently, not so much the silence of the parties as to the certification issue as their stipulation that no agreement had been reached that was determinative. Furthermore, the *Stolt-Neilson* Court looked to the availability of class action treatment under maritime law and the laws of the State of New York, neither of which would have permitted the particular type of case in question to be treated as a class, and found that where the parties expressly said they had come to no different agreement as between themselves, the arbitrators over-reached in imposing certification.

The Supreme Court did not say, anywhere in *Stolt-Neilson*, that silence on the issue necessarily means that class certification is impermissible. Rather, the Court emphasized that where the parties had not reached a meeting of the minds with respect to the issue, the arbitrators – or court, if the question was a "gateway" matter – should look elsewhere for guidance, rather than simply reaching their own independent conclusion:

Because the parties agreed their agreement was "silent" in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation. Had they engaged in that undertaking, they presumably would have looked either to the FAA itself or to one of the two bodies of law that the parties claimed were governing, *i.e.*, either federal maritime law or New York law. But the panel did not consider whether the FAA provides the rule of decision in such a situation; nor did the panel attempt to determine what rule would govern under either maritime or New York law in the case of a "silent" contract. Instead, the panel based its decision on post-*Bazzle* arbitral decisions that "construed a wide variety of clauses in a wide variety of settings as allowing for class arbitration." The panel did not mention whether any of these decisions were based on a rule derived from the FAA or on maritime or New York law.

Id. at 673.

As noted, the Trial Court also relied on the decision of the Sixth Circuit in *Crockett* to find that where an arbitration agreement says that it applies to a specific dispute and fails to make mention of the possibility of class action, class action is precluded. *Crockett* is, as noted, factually distinguishable, and that distinction is made the more clear by the Supreme Court's decision in *Sutter*. It is inapposite here.

Crockett involved a dispute over billing between a law firm and the on-line system through which it conducted its research. The arbitration agreement between the parties did not address class treatment, but mandated binding arbitration, to be held at the location at which the research company was headquartered, of any disputes "arising out of or in connection with this Order..." The Sixth Circuit found that class certification was not proper under the specific arbitration agreement before it, principally because of the "this Order" language. The Trial Court herein equated that phrase with that referencing "this lease" in Appellant's contract. These terms are not identical, and a reference to "this lease" is not necessarily as limited as that referring to a single purchase order. It is equally possible, and certainly creates – minimally – a factual issue which must be further developed. It is equally probable that the parties intended this term to be a reference to the leases, in general and as a whole, between the residents of Somerset Apartments and the Respondents. A reference to a purchase order can be nothing other than the transaction involved in the performance of the purchase order. A reference to leases can be just as limited. It can also be as broad as the entirety of the relationship between any given landlord and all those with whom he has executed identical leases.

As an initial matter, of course, this analysis is again complicated by the fact that the Trial Court ruled on the enforceability of the agreement itself before determining

whether or not class treatment was appropriate. Clearly, where the agreement references disputes arising under a singular purchase order, as was the case in *Crockett*, there will be no common or typical issues of fact so as to warrant class treatment in the first instance: the dispute arising exclusively with respect to the one and only problem between the two parties entering into that one and only purchase order, at that one and only time.

However, where identical issues arise under identical leases, all of them involving identical treatment of identically situated putative class members, and the identical promises made to each of those persons, the words "this lease" can and should be read to mean the broad group of these identical leases, as a whole, not any single document.

This is especially true when standard, form, leases are employed, as was the case here.

Reliance on a singular decision involving expressly limiting language is error, and *Crockett* is factually dissimilar to the instant situation. Furthermore, and because the Trial Court erred in dealing with certification only after finding the agreement itself to be enforceable, the Order improperly looks to the result to justify the analysis. The Trial Court erred in concluding that the arbitration agreement precludes class certification.

II. The Trial Court Failed to Address the Class Certification Requirements of Rule 23 of the South Carolina Rules of Civil Procedure.

In addition to failing to address the "gateway" issue of arbitrability prior to concluding the arbitration agreement was enforceable, the Trial Court also found that Appellant had failed to meet the requirements of Rule 23 of the South Carolina Rules of Civil Procedure. The Court did not address this failure in any detail, and failed to give any rationale or explanation for its conclusion.

Appellant would note, at the outset, that this portion of her argument has not been waived. Appellant did not file a Motion to Reconsider seeking explanation of this

portion of the Trial Court's Order. However, in this instance, no such Motion should be required. Prior to the single-sentence dismissal of Appellant's Motion for Class Certification on the merits, the Trial Court had already concluded that class treatment was impermissible under the arbitration agreement it had erroneously found to control. Any discussion of the merits of Appellant's arguments under Rule 23 was immaterial, irrelevant, and mere dictum. No discussion of the Rule was necessary. The Trial Court had already determined that class certification was precluded by other factors. This is not a case in which the Court below failed to address a necessary component of Appellant's argument. Rather, it is a situation in which no further argument is permissible, as other portions of the decision obviate the need for this portion altogether.

However, as the matter of class certification should have been decided prior to deciding whether or not the arbitration agreement was separately enforceable, the Trial Court's bald and arbitrary conclusion that Appellant failed to meet the Rule 23 requirements is error. Appellant submitted affidavits of other residents of the Somerset Apartments, residents who have suffered the same treatment and incurred the same injuries. Her Memorandum in Support of Class Certification clearly demonstrates that she has met the requirements of Rule 23(a): her claims are typical of the putative class, common to the putative class, the putative class is so numerous that joinder is impractical, she (and her counsel) will adequately represent the class, and the claims of each class member exceed \$100. Although the Trial Court dismissively states that Appellant has "failed to carry her burden of proving each of the prerequisites for class certification," the Trial Court did not identify any such failure to specificity, and appears to have made this comment only as an addendum to its decision to enforce the arbitration

agreement and find class certification precluded in the first place. The South Carolina Supreme Court has stated that upon a motion for class certification, "it will be incumbent on the circuit court to determine whether or not the action meets each of the five prerequisites proponents of class certification are required to prove." *Grazia v. S.C. State Plastering, Inc.*, 390 S.C. 562, 575 – 76, 703 S.E.2d 197, 204 (2010)(citing *Gardner v. South Carolina Dep't of Revenue*, 353 S.C. 1, 20 – 21, 577 S.E.2d 190, 200 (2003)).

Appellant respectfully submits that the failure to discuss each element of Rule 23 is error in several respects. First, as noted *supra*, the determination regarding certification should have been made prior to any discussion of the enforceability of the arbitration agreement. Second, the Trial Court failed to identify any specific area in which Appellant's Motion failed, as the Court had already decided that it would not certify a class under any circumstances. The failure of the Court below to address any of the requirements of Rule 23(a) of the South Carolina Rules of Civil Procedure constitutes reversible error.

III. The Trial Court Erred in Concluding that Residential Leases Impact Interstate Commerce.

Had the Trial Court properly addressed the initial "gateway" issue of class certification, it would have had no need to deal with the separate question of whether the transaction underlying this action affects interstate commerce so as to bring the arbitration agreement within the ambit of the Federal Arbitration Act, 9 U.S.C. § 2. However, even if this Court concludes that class certification should not have been decided prior to making a decision regarding the enforceability of the agreement, the

issue of enforcement should be determined based on South Carolina, rather than federal, law.

The FAA applies, as the Trial Court noted, "to any arbitration agreement regarding a transaction that in fact involves interstate commerce..." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Although the reach of the FAA has been described as being as broad as permissible under the Commerce Clause, *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), a purely residential lease of real property located in this State, entered into between parties both of whom are residents of this State, is not such a transaction.²

The Trial Court cited several cases, most notably *Russell v. United States*, 471 U.S. 858 (1985) and *Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 747 S.E.2d 461 (2013), for the general proposition that activity in the residential lease market constitutes interstate commerce. Neither of these cases is as broad as Respondents have argued. *Russell* was a criminal prosecution, in which the government of necessity had to force the rental business into the field of interstate commerce in order to justify a federal indictment against a property owner who had attempted to set fire to a building he owned. In affirming the conviction under 18 U.S.C. § 844, the Supreme Court relied less on the reach of the Commerce Clause than on the legislative history of the criminal statute, which Congress had clearly intended to encompass as broad a range of business property as possible. Because the defendant made taxable income from the rental of his property, the Court was able to justify its decision to call it "business property," determine that the

² Respondents have never disputed that the arbitration agreement at issue fails to comply with South Carolina law, and is unenforceable if the FAA does not apply. See S.C. Code § 15-48-10.

attempted arson impacted interstate commerce, and bring the crime within the scope of the federal statute.

Wando E is even less appropriate. The issue before the South Carolina Supreme Court in this case was, in fact, whether the arbitration provision contained in a contract that appeared, on its face, to contemplate only intrastate activity was subject to analysis under the FAA or state law. Although there was no question but that the construction project giving rise to the case was located exclusively within South Carolina, and all of the parties were South Carolina corporations, the Court found that federal law applied. This was not, however, a lease agreement, nor did it involve residential property. Significantly, the construction at issue was the construction of a marina, a structure which was intended to extend out into the navigable waterways of the Wando River. Even aside from any discussion regarding the sources of the materials to be used or where different professionals employed on the project were located, the Court emphasized that the property itself was under the control of federal authorities – the Army Corps of Engineers had to issue a permit, and the United States Supreme Court long ago held that the Constitution provides for federal authority over all such waterways. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Broad, sweeping, language regarding instrumentalities and channels of commerce is immaterial; all navigable waterways are within the purview of Congress, and the FAA applies whenever such property is at issue.

The South Carolina Supreme Court has held, however, that residential real property transactions are matters of state law, and that arbitration agreements contained in agreements dealing with residential real property are not subject to preemption under the FAA. In *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 477, 730 S.E.2d 312 (2012),

the Court specifically found that the sale of a house located in North Myrtle Beach was entirely – and historically – intrastate in character, even though the materials, the workmen, and the financing all came from out-of-state. The Supreme Court has not overruled *Bradley*; its decision in *Wando E* deals with completely different issues. Furthermore, although the language of *Russell*, which talks in broad terms of the movement of people around the country, could be read to encompass civil actions involving the enforcement of arbitration provisions and not merely criminal cases, people moving around the country is certainly not limited to property rental situations to the exclusion of property purchases. *Russell* predates *Bradley* by nearly thirty years. If the South Carolina Supreme Court had believed that the mere fact that people and construction materials move from state to state had been sufficient to transform a transaction in real property into a situation involving interstate commerce, it would not have invalidated the arbitration provision at issue in the latter case.

Transactions involving real property are traditionally and historically matters of state law, and of state law exclusively. Certain exceptions apply, and the cases relied upon by the Trial Court to reach its conclusion that the instant situation is preempted by the Federal Arbitration Act are squarely within those exceptions: federal criminal law, for example, and property otherwise under the exclusive control of Congress. Simple residential property transactions, whether the property is rented or purchased, are not transactions that involve interstate commerce. The Trial Court erred in finding that federal law applies to the enforceability of the arbitration provision contained in Appellant's lease.

IV. The Trial Court Erred in Failing to Find the Arbitration Provision Unconscionable

Even if this Court finds that the Trial Court properly denied Appellant's Motion for Class Certification, and that the transaction underlying this case involves interstate commerce, the Court should find that the arbitration agreement is unenforceable on grounds of unconscionability.

The issue of unconscionability is governed by general contract standards. The lease, both in its entirety and specifically the arbitration provision, is clearly intended to be drafted in a manner that would make it unlikely that any individual lessee, let alone a lessee who, like Appellant and the other members of the putative class is seeking low income, subsidized, housing, would be aware of many of the terms or be able to negotiate their exclusion. As the Court of Appeals of Missouri said in a strikingly similar case, in which it talked specifically about the relative bargaining power of landlords and low-income tenants, such persons have even less with which to negotiate than do average citizens and renters. The anticipated "bargained for exchange is not present when a stronger party, of admitted unequal bargaining power, forces obligations and abandonment of remedies on a weaker party. In the absence of special consideration. . . those clauses should be declared unconscionable and void as against public policy." *Fuller v. TLC Prop. Mgmt., LLC*, 402 S.W.3d 101, 114 (Mo. App. 2013)(Rahmeyer, J., concurring).

As noted above, Somerset Apartments is low-income housing. Furthermore, the arbitration provision not only fails to comply with South Carolina law, but is one of at least ten or fifteen separate addenda given to Appellant in the course of her execution of the lease. Some of these overlap. Others contradict one another. The type face of the

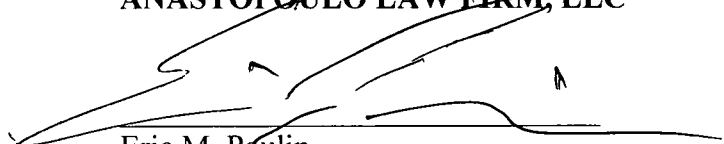
principal lease document is practically illegible. Two separate handbooks are referenced but do not appear to have been provided; many of the provisions of these two documents are inconsistent. Persons such as Appellant and the other tenants would have little opportunity to read and understand, let alone negotiate, lease terms. The agreement is unconscionable, and the Trial Court erred in concluding that it was enforceable.

CONCLUSION

For the reasons set forth above, Appellant Monique Frazier respectfully requests that the Order of the Court of Common Pleas of Charleston County denying class certification and sending her individual claims against Respondents to binding arbitration be reversed.

Respectfully Submitted,

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Dated at North Charleston, SC

This 4th day of March, 2014