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SC Court of Appeals

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

Civil Action No. 2012-CP-10-03870
Appellate Case No. 2013-001449

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 the

Respondents.

FINAL BRIEF OF RESPONDENT OMEGA FLEX, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

STATEMENT OF THE ISSUES ON APPEAL

Respondent Omega Flex (hereinafter "this Respondent") would restate the issue on appeal as:

> Did the Trial Court properly refuse to compel binding arbitration because the Purchase Agreement between the parties Plaintiffs/Homebuyers and the Seller/John Wieland Homes is a contract for the sale of a home that did not involve interstate commerce to invoke application of the Federal Arbitration Act?

STATEMENT OF THE CASE

This action arises from a fire that occurred in the Daniel Island home of the Plaintiffs (hereinafter "Homebuyers") on June 25, 2009. In their complaint, Homebuyers allege that the fire was caused when lightning energy entered their home resulting in the perforation of the corrugated stainless steel tubing (hereinafter "CSST") which supplied natural gas to the gas water heater and heat exchanger. [ROA 9; Complaint, filed June 14, 2012.] Homebuyers have sued this Respondent (the manufacturer of the CSST) asserting products liability causes of actions for negligence, breaches of express and implied warranties and strict liability. In addition, Homebuyers have asserted causes of action for negligence, breach of contract and breaches of warranties against (a) Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. (hereinafter "Seller") from whom Homebuyers purchased the home and (b) several subcontractors allegedly involved in the installation of the CSST–Respondents AAA Plumbing, LLC, and Charleston LEC, Inc., and Fogel Services, Inc. (collectively hereinafter "Seller's Subcontractors").

Charleston LEC filed an answer denying that it installed the tubing. [ROA 29; Answer, filed, July 23, 2012.] Fogel Services filed an answer admitting that it installed the tubing, but denying any negligence or breach of warranties. [ROA 35; Answer, filed August 10, 2012. AAA Plumbing filed an answer with general denials and various defenses. [ROA 45; Answer, filed August 20, 2012.]

This Respondent filed an answer, denying the allegations and asserting various defenses. [ROA ; Answer, filed August 17, 2012.] This Respondent filed an amended answer, with cross-claims for indemnification. [ROA 226; Amended Answer, filed December 19, 2012.]

Seller filed an answer denying the allegations and asserting various defenses. Seller also has asserted cross-claims against Seller's Subcontractors for negligence, breach of contract, breach of warranty and indemnification, and cross-claims against this Respondent for negligence, breach of warranty and strict liability. [ROA 73; Answer and Cross-claims, filed October 30, 2012.]

In addition, Seller asserted, as a defense in its answer, that the action is barred by a mandatory binding arbitration provision. Seller also filed a motion to compel arbitration, seeking to compel Homebuyers and all of Seller's Subcontractors (thus all of Seller's Co-Defendants other than this Respondent) to arbitrate all claims against Seller and Seller's Subcontractors. [ROA 324; Motion, filed October 30, 2012.]

The Trial Court denied the motion based on its conclusion that "the transaction between the parties was a contract for the sale of home and not for the construction of a house," and thus, did not involve interstate commerce under the holding in Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012). [ROA 4; Order p. 2, filed

4/25/2013.] Seller filed a motion for reconsideration, which was denied in a Form 4 order. [ROA 344, 8; Motion, filed May 8, 2013; Order, filed May 30, 2013.] Seller timely filed a Notice of Appeal.

STATEMENT OF THE FACTS

In June 2008, Homebuyers entered into a "Purchase Agreement" with Seller for property at 1417 Hooper Street in the Daniels Island development in Charleston, South Carolina. The agreement is denominated as as an "Agreement to Buy and Sell: Property."[ROA 172; Purchase Agreement ¶1 attached to Affidavit of Dennis Black.] Homebuyers and Seller executed a series of addenda to the Purchase Agreement covering such matters as the a change to the grass type for landscaping and custom paint colors. [ROA 161-168, 178-85; Attachments to Black Affidavit.]

Seller is listed and identified as "Seller." Homebuyers are listed and identified as "Purchasers" in the Purchase Agreement and they are listed alternately as "Buyers" or "Homebuyers" in certain other of the documents. [ROA 161-168, 178-85; Attachments to Black Affidavit.]

The Purchase Agreement does not actually contain an arbitration clause; rather, it purports to incorporate the arbitration provisions of a separate Warranty Agreement through Paragraph 22 of the Purchase Agreement which is designated as "Warranty and Arbitration" and states that:

> ... in connection with the sale contemplated by this agreeement, Purchaser will be enrolled in [Seller's] 5-20 Extended Warranty program [Seller's] Warranty), [Seller's] Warranty being incorporated herein by reference. .... PURCHASER ACKNOWLEDGES THAT PURCHASER HAS RECEIVED AND READ A COPY OF THE CURRENT [Seller] WARRANTY AND CONSENTS TO THE TERMS THEREOF, INCLUDING, WITHOUT LIMITATION, THE MANDATORY

BINDING ARBITRATION PROVISIONS CONTAINED THEREIN...." [ROA 175.]

Section V, Paragraph O of the Warranty, entitled "Mandatory Binding Arbitraton" provides, in pertinent parts:

> Any and all unresolved claims and disputes of any kind or nature between [Seller] and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with [Seller], (if any), this warranty, the Home and/or property on which it is constructed, or otherwise, shall be resolved by final and binding arbitration conducted in accordance with this provision, and such resoluaton shall be final. This applies only to claims or dispute that arise after the later of: (a) the issuance of the final certificate of occupancy for the Home, or (b) the initial closing of the purchase of the Home by the initial Homebuyer(s). This specificially includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by [Seller] or its representatives; rescission of any contract or agreement; any tort; any implied warranties; any personal injury; and any property damage.
>
> ****
>
> As the purchase agreement with [Seller] and this warranty are transactions involving interstate commerce ,arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Section 1-16, to the exclusion of any provisions of state law.
>
> ****
>
> [SELLER] AND HOMEBUYER(S) HEREBY ACKNOWLEDGE AND AGREE THAT THE ARBITRATION PROCEDURE SET FORTH HEREIN SHALL BE THE SOLE AND EXCLUSIVE REMEDY FOR THE RESOLUTION OF ANY AND ALL DISPUTES ARISING AFTER THE INITIAL CLOSINGO F THE PURCHASE OF THE HOME BY THE INITIAL HOMEBUER(S). [SELLER] AND HOMEBUYER(S) HEREBY WAIVE ANY AND ALL OTHER RIGHTS AND REMEDIES AT LAW, IN EQUITY OR OTHERWISE WHICH MIGHT OTHERWISE HAVE BEEN AVAILABLE TO THEM IN CONNECTION WITH ANY SUCH DISPUTES.

[ROA 199-201; Warranty attached to Black Affidavit.]

Each of Seller's Subcontractors executed a "Trade Contractor Application and Agreement Form" with Seller, although they do not specifically reference the home sold to Homebuyers. The form provides that the Trade Contractor "shall cooperate and participate in, as may be reasonably directed by [Seller], any arbitration proceedings arising out of the home warranty coverage provided by [Seller] or otherwise related to or arising out of the construction of the homes by [Seller]." [ROA 218; Affidavit of Andrew McBride with attachments.]

ARGUMENT

Standard of Review

Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013). Arbitrability determinations are subject to *de novo* review. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007).

The Federal Arbtration Act – "Involving Commerce"

While both state and federal policy favor arbitration, Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013), the predicate question on any motion to compel is whether there is compliance with the state or federal arbitration law requirements. There is no dispute in this case that the arbitration agreement is not enforceable under state law because it does not meet the technical requirements of the South Carolina statute, §15-48-10(a), in that the arbitration provision is not underlined and does not appear on the first page of the Purchase Agreement. [See Appellant's Brief, p. 2 n. 1.] Thus, the question is whether the arbitration agreement is enforceable under the Federal Arbitration Act, 9 U.S.C. §§1, et seq.

Section 2 of the FAA, provides that a "written provision in any ... contract ***evidencing a transaction involving commerce*** to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2013) (emphasis added).

"Involving commerce" means the functional equivalent of "affecting commerce." Zabinski v. Bright Acres Associates, 346 S.C. 580, 593, 553 S.E.2d 110, 115 (2001) (quoting Allied–Bruce Terminix Co. v. Dobson, 513 U.S. 265, 274 (1995)); *accord* Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56(2003)).

Our Supreme Court has repeatedly stated that: "Generally, any arbitration agreement affecting interstate commerce ... is subject to the FAA." Landers v. Federal Deposit Ins. Co., 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)); Henderson v. Summerville Ford-Mercury Inc., 405 S.C. 440, 448, 748 S.E.2d 221, 225 (2013). To determine whether the FAA applies to a particular arbitration agreement, a court must consider whether the contract concerns a transaction involving interstate commerce. Episcopal Housing Corp. v. Fed. Ins. Co., 269 S.C. 631, 637, 239 S.E.2d 647, 650 (1977); Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 122, 747 S.E.2d 461, 464 (2013).

I. The Trial Court properly denied the motion to compel arbitration because the Purchase Agreement was for the sale of a home to which the FAA does not apply.

In accord with the authorities discussed above, in order to compel arbitration under the provisions of the FAA, Seller must prove that the Purchase Agreement with the Homebuyers was a transaction involving interstate commerce. The Trial Court held that:

> I have concluded that under recent South Carolina jurisprudence, the determination of this dispute depends on whether the contract between the [Homebuyers] and [Seller] was for the construction of a dwelling or the sale of a home. Bradley v. Brentwood Homes, Inc., et al., 398 S.C. 447, 730 S.E.2d 312 (2012). If the former, the FAA would apply; but if the latter, the FAA would not apply and under established South Caroilna law mandatory arbitration would not take place. As the Court views all the material submitted in connection with this matter by all parties, it has concluded the transaction between the parties as contained in the agreement was a contract for the sale of a home and not for the construction of a house. [ROA 4; Order, p. 2.]

In Bradley v. Brentwood Homes, the Supreme Court addressed the issue of when a transaction involves interstate commerce:

> "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." [Zabinski] at 594, 553 S.E.2d at 117. "Our courts consistently look to the essential character of the contract when applying the FAA." Thornton v. Trident Med. Ctr., LLC, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct.App.2003) (finding it was proper to "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved"). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct.App.1999).

730 S.E.2d at 316. The Supreme Court discussed the historical intrastate character of real estate transactions, and noted that precedent adhered to the view that the development of real estate is an inherently intrastate transaction. Ultimately, the Supreme Court concluded that: "Because the essential character of the Agreement was strictly for the purchase of a completed residential dwelling and not the construction, we find the FAA does not apply as these types of transactions have historically been deemed to involve intrastate commerce." *Id.* at 318.

Seller argues that the Purchase Agreement should be governed by the FAA because the Warranty contains the recitation that: "As the purchase agreement with

[Seller] and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Section 1-16, to the exclusion of any provisions of state law." However, Seller's argument is based on a circular logic using the language of the arbitration clause to prove the predicate fact of whether the very same clause is enforceable. Such a recitation is a warranty form incorporated by reference, unsupported by the facts of the actual transaction between the parties to the agreement, and does not per se establish the requisite involvement in interstate commerce. See Mostella v. N & N Motors, 840 So. 2d 877, 881 (Ala. 2002) (abrogated on other grounds as stated in Wolff Motor Co. v. White, 869 So. 2d 1129, 1135 (Ala. 2003)); Aronov Realty Brokerage, Inc. v. Morris, 838 So.2d 348 (Ala.2002); Rogers Foundation Repair, Inc. v. Powell, 748 So.2d 869, 872 (Ala.1999).

Seller also argues that the addenda proves that the contract was more than just a contract to sell a completed home; rather, Seller argues, it is one "to customize the construction of a home" that involved interstate commerce. Howewer, as noted by the Trial Court, the affidavit of Dennis Black submitted by Seller states that Homebuyers "entered into a purchase agreement with [Seller] ***to buy a home***." [ROA 159; Black Affidavit, ¶ 3. Emphasis added.] In view of the very recent pronoucement by the Supreme Court in Bradley v. Brentwood Homes, the Trial Court properly viewed this agreement, with all the addenda, and correctly concluded that the essential character of the Purchase Agreement in this case is for the purchase of a home, not construction, and it did not involve interstate commerce. Accordingly, the Trial Court's order should be affirmed, and the case remanded for all the claims to proceed through the judicial process in Circuit Court.

The Trial Court's determination is especially appropriate in the context of the multiple claims and cross-claims with Seller's subcontractors and this Respondent as the manufacturer of the CSST. The language in the Trade Contractor form does not impose mandatory binding arbitration on Seller's Subcontractors, and no basis exists (or has even been asserted) to compel this Respondent to submit to binding arbitration. Thus, submitting the primary claims by the Homebuyers against Seller to binding arbitration would create the potential for inconsistent verdict and be a disservice to judicial economy.

CONCLUSION

The Plaintiffs/Homebuyers entered into a Purchase Agreement with Seller/John Wieland Homes to purchase a house. Under Bradley v. Brentwood Homes, that contract does not involve interstate commerce, and the FAA does not apply. Therefore, the Trial Court properly denied the motion to compel and the order should be affirmed.

Respectfully submitted,

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April 24, 2014
Charleston, South Carolina

Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Robert H. Hood, Jr.

Certificate of Service

I certify that on this 29th day of April, 2014, a copy of the foregoing Final Brief of Respondent Omega Flex, Inc. was served on all Parties by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to their Counsel of Record of as listed below:

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