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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No.: 2012-CP-10-03870

Peter T. Phillips and Summar C. Phillips Respondents,

v.

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

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

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

**RETURN TO PETITION FOR REHEARING OF RESPONDENTS PETER T. PHILLIPS
AND SUMMAR C. PHILLIPS**

Appellant John Wieland Homes and Neighborhoods of the Carolina, Inc. (“Appellant” or “John Wieland Homes”) served a Petition for Rehearing on July 9, 2015, which was sent out by the South Carolina Court of Appeals on July 10, 2015. Appellant filed this petition alleging that the Court failed to address its arguments and misapplied the standard of review. For the following reasons, Respondents Peter T. Philips and Summar C. Phillips (“Respondents” or the “Phillips”) respectfully request that this Court deny John Wieland Homes’ petition for rehearing.

FACTUAL/PROCEDURAL BACKGROUND

The Phillipses and John Wieland Homes entered into a Purchase and Sale Agreement (“Purchase Agreement”) on June 7, 2008, which purported to include a mandatory arbitration provision. (R. pp. 359-64). The parties have agreed that the arbitration section does not conform to the South Carolina Uniform Arbitration Act requirements. (R. p. 4). The Purchase Agreement states that the contract is for the sale of property. (R. p. 359). Additionally, the Purchase Agreement incorporated the John Wieland Homes and Neighborhoods 5-20 Extended Warranty, along with the Addendum to the Purchase Agreement. (R. p. 362). (R. p. 365). (R. p. 368).

Peter T. Phillips and Summar C. Phillips (“the Phillipses”), the Respondents, sued Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. (“John Wieland Homes”), along with other Defendants who are also Respondents in this appeal. (R. pp. 9-28). The Phillipses pled several causes of action. (R. pp. 9-28).

The Phillipses Complaint arises out of a home fire on June 25, 2009, at the Phillipses’ home located at 1417 Hooper Street in Daniel Island, South Carolina. (R. p. 4). The Phillipses purchased the home from John Wieland Homes approximately one (1) year prior to the fire. (R. p. 14). As a result, the Phillipses home and its contents were severely damaged, and they were unable to live in their home for a period of time. (R. p. 14).

At the time of the purchase, the Phillipses and John Wieland Homes executed a Purchase Agreement containing an arbitration clause, prompting the Appellant, John Wieland Homes, on October 29, 2012, to move to compel arbitration between the Phillipses and the other Defendants in the original action. (R. pp. 324-27). The Appellant argued in its motion to compel arbitration that the Phillipses claims were subject to arbitration under the Federal Arbitration Act. (R. pp.

324-27). In turn, the Phillipses contended that the Agreement was not subject to the Federal Arbitration Act because the contract was for the sale of a home rather than the construction of a home, meaning interstate commerce was not involved in the transaction. (R. pp. 340-43). The Honorable J.C. Nicholson, Jr. heard the motion on December 18, 2012, and issued an order which held that the Agreement did not involve interstate commerce, and, therefore, was not subject to the Federal Arbitration Act. (R. pp. 3-7).

The Appellant filed a Motion to Reconsider, Alter, or Amend that Order on May 6, 2013, which was denied, and Appellant filed a notice of its intent to appeal on June 25, 2013. (R. pp. 345-58). This appeal followed. The case was decided on the briefs, and the Court issued its decision on June 24, 2015, affirming the decision of the lower court, citing several cases to support its decision. *See Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc., et. al.*, Order No. 2015-UP-300 (S.C. Ct. App. filed June 24, 2015).

LAW/ANALYSIS

A party may file a Petition for Rehearing if a point has been overlooked or misapprehended by the Court. Rule 221, SCACR. However, it is important to note that “the purpose of a petition for rehearing is not just to have the case tried in [the appellate court] a second time.” *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 172, 167 S.E. 234, 237 (1933). Petitions for rehearing are typically dismissed because “they contain nothing but a ‘rehash’ of what the losing party has said before, matters which the Court has already considered well and disposed of.” *Id.* Appellant’s petition for rehearing rehashes its previous arguments that the Court has already considered well and disposed of.

The Phillipses assert that a rehearing should be denied based on the following grounds:

1. The Court's decision addresses, considers, and correctly interprets Appellant's arguments regarding the applicability of the Federal Arbitration Act.

Appellant rehashes the arguments verbatim from its Final Brief rather than introduce new arguments that the Court has not considered. Therefore, it is the Respondent's position that the court has already considered well and disposed of those arguments. Appellant's Final Brief discussed the contractual provisions of the Agreement, and Respondent's Final Brief discussed, among other things, that the alleged contractual agreement was not enforceable. It is clear that the Court considered the contractual arguments in both Appellant's and Respondent's Final Briefs.

The Appellants contend that *Bradley v. Brentwood Homes, Inc.*, is inapposite. The Supreme Court of South Carolina held in *Bradley* that when a home purchase agreement provides that a purchaser is receiving a completed dwelling and is not contracting for the construction of a home, the transaction does not involve interstate commerce, meaning that the transaction is not subject to the Federal Arbitration Act. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012). Paragraph One (1) of the purchase agreement explicitly states that the contract is for the sale of property. (R. p. 359). Additionally, Appellant's own witness, Dennis A. Black, a Division Quality Manager for Appellant, states in Paragraph Three (3) of his affidavit supporting Appellant's motion that the Phillipses "entered a purchase agreement with JWH to buy a home in the located [sic] at 1417 Hooper Street, Charleston, SC 29492." (R. pp. 159-160).

The South Carolina Court of Appeals cited specific quotes from the *Bradley* case in its Opinion, which Appellant attacks. The Court of Appeals determined that this contract was a contract for real estate only, and "real estate is an inherently intrastate transaction." *Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc., et. al.*, Order No. 2015-UP-300 (S.C. Ct.

App. filed June 24, 2015), citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 456, 730 S.E.2d at 317 (2012).

Finally, Appellant states that the Court cited *Munoz* but does not provide any discussion of this case. The Court cited *Munoz v. Green Tree Financial Corporation*, “stating ‘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.’” *Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc., et. al.*, Order No. 2015-UP-300 (S.C. Ct. App. filed June 24, 2015), citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Again, it is clear that the Court synthesized the Appellant’s arguments in its Final Brief and determined that an arbitration agreement must actually involve interstate commerce for the FAA to apply, whether the parties intended for it to apply or not. Since the Court determined that this was a transaction which involved real estate only, interstate commerce was not involved, and the FAA did not apply even though Appellant hoped for it to apply.

2. The Court’s decision addresses, considers, and correctly interprets the Appellant’s arguments regarding the Addenda to the Agreement and applied the correct standard of review.

a. The Court addressed, considered, and correctly interpreted the rule that a circuit court’s factual findings are entitled to deference on appeal.

The Circuit Court considered the Addenda to the Agreement in making its decision. First, the Addenda, or its contents, were mentioned at both the hearing on December 18, 2012, and April 16, 2013. (R. pp. 255-323). In the Order issued by Judge Nicholson on April 23, 2013, he mentioned the “incidental choices” that Plaintiffs could make, which were contained within the Addenda. (R. p. 5). It is clear that Judge Nicholson considered the Addenda when

issuing his Order. Therefore, this Court addressed, considered, and correctly interpreted the standard of review because the Circuit Court considered the Addenda in rendering its Order.

b. The Court addressed, considered, and correctly interpreted the Appellant's argument when it determined that the Agreement and Addenda did not involve interstate commerce.


Appellant, again, rehashes the arguments verbatim from its Final Brief rather than introduce new arguments that the Court has not considered. Therefore, it is the Respondent's position that the court has already considered well and disposed of those arguments. The Court cites the *Bradley* case regarding this issue in its Order, "noting the purchase agreement specifically provided for the purchase of a completed dwelling." *Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc., et. al.*, Order No. 2015-UP-300 (S.C. Ct. App. filed June 24, 2015), citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 458, 730 S.E.2d at 317 (2012). The Court then addressed that the homeowner in *Bradley* did not make any decisions regarding the house plan, options, or color selection. *Id.* As in *Bradley*, the Phillipses had no real decision-making authority regarding the construction specifics of the home. The Court's use of this particular quote shows that it considered the incidental choices that the Phillipses made in the original Agreement and Addenda and determined that this was the sale of a home rather than the construction of a home.

CONCLUSION

The Court's Opinion addresses, considers, and correctly interprets all of the Appellant's arguments. Based on the discussion above, a rehearing should be denied.

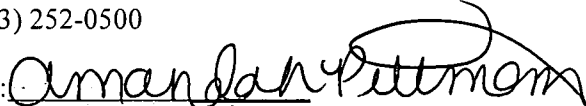
Columbia, South Carolina
July 17, 2015

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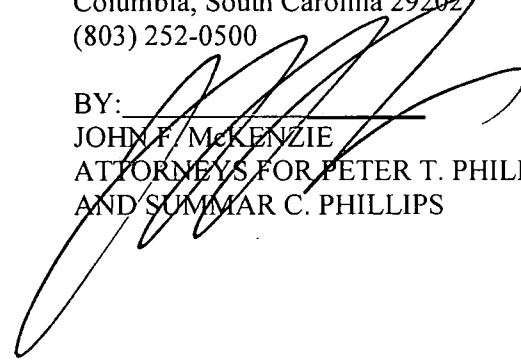
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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the Return to Petition for Rehearing of Respondents Peter T. Phillips and Summar C. Phillips was served upon the attorneys listed below by depositing said paper(s) in the United States Mail, Columbia, South Carolina, on the 17th day of July, 2015, with the first class postage duly-affixed and a return address clearly indicated on the envelope, addressed as follows:

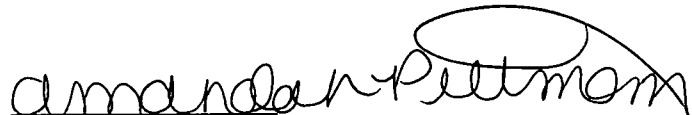
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AMANDA N. PITTMAN

RE: Appellate Case Number: 2013-001449

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July 17, 2015

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RE: Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc, John Wieland
Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, LLC.,
Fogel Services, Inc., Charleston LEC, Inc.
Appellate Case Number: 2013-001449
Trial Court Case Number: 2012-CP-10-03870

Dear Ms. Kitchings:

Enclosed please find the Return to Petition for Rehearing of Respondents Peter T. Phillips and Summar C. Phillips . Also enclosed is a Certificate of Service indicating that each attorney of record was sent a copy.

Yours very truly,


Amanda N. Pittman

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