THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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

Unpublished Opinion No. 2015-UP-300
Submitted March 1, 2015 – Filed June 24, 2015

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.

RESPONDENT OMEGA FLEX, INC.'S RETURN TO PETITION FOR REHEARING BY APPELLANT JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.

Respondent Omega Flex (hereinafter "this Respondent") submits this Return to the Petition for Rehearing filed by Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. (hereinafter "Seller") as directed by the Court. Respondent

respectfully submits that this Court properly affirmed the Trial Court in its decision Phillips v. John Wieland Homes, Op. No. 2015-UP-300 (Ct. App. filed June 24, 2015) and did not overlook or misapprehend any relevant points. Specifically, this Court applied the appropriate standard of review and the applicable law on the point that the purchase agreement for the sale of a home did not involve interstate commerce to invoke application of the Federal Arbitration Act.

The Purchase Agreement ~ Paragraph 22 – The Warranty & Arbitration Clause

A full recitation of the facts are found in the brief. Briefly, for the context of this Return, the Respondent would not that 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.] 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.]

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." The Appellant contends that the Court overlooked or misapprehended the fact that the Warrant Agreement included the following lanugage: "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." [ROA 200.]

1. The Federal Arbitration Act does not apply because the transaction for purchase of a home that did not – as a matter of fact -- involve interstate commerce, notwithstanding any provision in the Warranty.

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 arbitration is whether there is compliance with the state or federal arbitration law requirements. It is indisputable 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. Thus, the question is whether the arbitration agreement is enforceable under the Federal Arbitration Act, 9 U.S.C. §§1, et seq. This Court correctly relied on that applicable authorities of Bradley v.Brentwood Homes, Inc., 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012), and Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001), in affirming the Trial Court's finding that the Purchase Agreement is not governed by the FAA.

> 1. As to whether the Purchase Agreement was governed by the FAA: *Bradley v.Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012) ("adher[ing] to the view that the development of real estate is an inherently intrastate transaction"); id. at 458, 730 S.E.2d at 317-18 (noting the FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce); id. at 459, 730 S.E.2d at 318 (stating if ancillary factors in the purchase agreement for a residential home, such as out-ofstate financing or a national warranty, were enough to constitute interstate commerce, "then every transaction that involved these ancillary factors would be subject to the FAA"); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (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"); id. at 539 n.3, 542 S.E.2d at 363 n.3 (overruling Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994) to the

> extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied).

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). As a predicate to applying the FAA, the court first 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).

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 Carolina 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.]

Seller argues that Bradley v. Brentwood Homes is somehow not controlling as to the issues in this case. This Respondent urges this Court to examine the Supreme Court's holding in Bradley v. Brentwood Homes and rebut Seller's attempt to distinguish that

case from the present one. 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.

Appellant Seller argues that Brentwood Homes is not controlling because it did not address the issue of whether a contract, providing that the transaction involves interstate commerce and would be governed by the Federal Arbitration Act, is enforceable. 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." Seller's argument, however, is based upon the circular logic that uses the

language of the arbitration clause to prove the predicate fact of whether the very same clause is enforceable. The Court's direction as expressed in Brentwood Homes is "the court must examine the agreement, the complaint, and the surrounding facts." 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 establish by itself the requisite involvement in interstate commerce.

The Appellant Seller also relies upon Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, (1989), but while that opinion may stand for the proposition that the parties are free to enter into a contract providing for arbitration under rules established by state law rather than under rules established by the FAA, it does not support the proposition that the such a recitation, as in this case, meets the predicate involvement of interstate commerce where the facts do not establish any such interstate commerce.

In Munoz v. Green Tree Fin. Corp., as cited by this Court, the Supreme Court expressly stated that the "transaction in this case in fact involves interstate commerce;" notably, the Supreme Court did not rely upon a similar recitation in the agreement in that case. 542 S.E.2d at 364. Similarly, as the Court discussed in Zabinski v. Bright Acres Associates, 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001), the appropriate test is a "commerce in fact" test to determine if the transaction involves interstate commerce for the FAA to apply: "In other words, the transaction must turn out, in fact, to have involved interstate commerce." Thus, the facts – not the recitation – are determinative. *See also* 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).

2. The addenda to the Purchase Agreement to buy a home do not conclusively establish involvement of interstate commerce.

Appellant Seller also argues that the Court's decision misapplies the standard of review for factual findings because the Circuit Court failed to consider certain Addenda to the Agreement provides for the specific customization of the construction of the Phillips' house. This Court applied the correct standard of review, to wit: a circuit court's factual findings in determining whether to compel arbitration will not be reversed on appeal if any evidence reasonably supports the findings. Aiken v. World Fin. Corp. of S. Carolina, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

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 itself states that Homebuyers "entered into a purchase agreement with [Seller] ***to buy a home***." [ROA 159; emphasis added.] The fact that the Circuit Court's order does not include a discussion of the addenda specifically does not mean that the Circuit Court ignored the addenda. But in any event, that affidavit constitutes "any evidence" which reasonably supports the Circuit Court's predicate finding that the contract did not involve interstate commerce.

In view of the very recent pronoucement by the Supreme Court in Bradley v. Brentwood Homes, this Court properly viewed this agreement, with all the addenda, and correctly concluded that the essential character of the Purchase Agreement in this case is

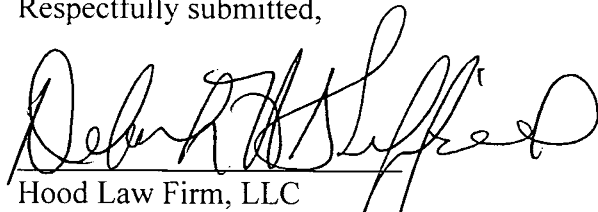
for the purchase of a home, not construction, and it did not involve interstate commerce. Accordingly, this Court's decision should be affirmed, and the case remanded for all the claims to proceed through the judicial process in Circuit Court.

This Court's determination is especially appropriate in the context of the multiple parties in this case, including this Respondent's role in this case. No basis exists (or has even been asserted) to compel this Respondent to submit to binding arbitration. Thus, submitting the claims by the Homebuyers against Seller to binding arbitration would create the potential for an inconsistent verdict and be a disservice to judicial economy.

CONCLUSION

This Court did not overlook or misapprehend either the law or the facts. The Plaintiffs/Homebuyers entered into a Purchase Agreement with Seller/John Wieland Homes to purchase a completed house. Under Bradley v. Brentwood Homes, that contract does not involve interstate commerce, and the FAA does not apply. Therefore, this Court properly affirmed the Circuit Court' order denying the motion to compel arbitration.

Respectfully submitted,



Hood Law Firm, LLC
Robert H. Hood, Jr. (SC #13491)
A. Walker Barnes (SC #78485)
Deborah H. Sheffield, *Of Counsel* (SC #2757)
172 Meeting Street ~ P.O. Box 1508
Charleston, South Carolina29402
Phone: (843) 577-4435 / Facsimile: (843) 722-1630
Attorneys for Respondent Omega Flex, Inc.

July 20, 2015
Charleston, South Carolina

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Certificate of Service

I certify that on July 20, 2015, a copy of the foregoing Return 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:

John Francis McKenzie
Robert A. McKenzie
Amanda Nicole Pittman
P.O. Box 58
Columbia, SC 29202-0058
Attorneys for Respondents Peter and Summar Phillips

Everett Augustus Kendall, II
James Eric Cavanaugh
P.O. Box 12129
Columbia, SC 29211
Attorneys for Respondent Fogel Services

R. Patrick Flynn
Christopher Michael Ramsey
177 Meeting St., Suite 300
Charleston, SC 29401
Attorneys for Respondent Charleston LEC

Jeffrey Alan Ross
Clawson & Staubes
126 Seven Farms Dr., Suite 200
Charleston, SC 29492
Attorney for Respondent AAA Plumbing

George Trenholm Walker
John Phillips Linton, Jr.
P. O. Drawer 22247
Charleston, SC 29413
Attorneys for Appellant

Deborah Harrison Sheffield (SC #2757)
Attorneys for Respondent Omega Flex, Inc.

HOOD
LAW FIRM
LLC

DEBORAH HARRISON SHEFFIELD
Of Counsel
DIRECT DIAL: (803) 419-7837
E-MAIL: Deborah.sheffield@hoodlaw.com

July 20, 2015

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

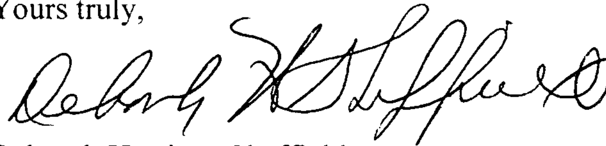
Re: Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, LLC, Fogel Services, Inc., Charleston LEC, Inc.
C/A No. 2012-CP-10-3870, Charleston CP
Appellate Case No. 2013-001449
HLF File No. 3.217

Dear Madam Clerk:

Pursuant to the Court's direction, enclosed for filing, please find the original and six (6) copies of the Return to the Petition for Rehearing on behalf of Respondent Omega Flex, Inc., which we are serving on all other counsel of record, as evidenced by the attached Certificate of Service. Thank you.

Kind personal regards,

Yours truly,



Deborah Harrison Sheffield

DHS/jad
Enclosure(s)
cc: Robert A. McKenzie, Esquire
G. Trenholm Walker, Esquire
John P. Linton, Jr., Esquire
R. Patrick Flynn, Esquire
Jeffrey A. Ross, Esquire
Everett A. Kendall, II, Esquire