THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Opinion No. 2013-001449 (S.C. Ct. App. filed Aug. 20, 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 Petitioner,

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

REPLY TO OMEGA FLEX, INC. AND PETER T. PHILLIPS AND SUMMAR C. PHILLIPS'S RETURNS TO JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.'S PETITION FOR A WRIT OF CERTIORARI

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REPLY ARGUMENT

John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("Petitioner" or "John Wieland Homes") respectfully submits this Reply to Respondents Peter T. Phillips and Summar C. Phillips (the "Phillips") and Respondent Omega Flex, Inc. ("Omega Flex") Returns to Petitioner's Petition for Writ of Certiorari. Respondent AAA Plumbing ("AAA Plumbing"), Respondent Fogel Services, Inc. ("Fogel Services"), and Respondent Charleston LEC, Inc. ("Charleston LEC") did not file a Return to the Petition for Writ of Certiorari.

I. The Phillips and Omega Flex's arguments ignore that the subject agreement expressly provides that the relevant transaction involves interstate commerce.

The Phillips and Omega Flex argue that the Purchase and Sale Agreement (the "Purchase Agreement"), which incorporates the terms of the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program (the "Warranty") (collectively, the "Agreement") did not involve interstate commerce[1] because, according to them, it was a contract for the sale of real estate. Their argument ignores that the Agreement expressly provides that the Purchase Agreement and Warranty are transactions involving interstate commerce and that the Agreement and Warranty are governed by the Federal Arbitration Act ("FAA"): ***"As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act. . . ."*** **(R.p.200, ¶ O).** (double emphasis added).

This Court has held that a contractual provision that a particular agreement involves interstate commerce such that it is governed by the FAA—like the provision quoted above

[1] As explained in section II, the Agreement did involve interstate commerce.

in the Agreement—is enforceable. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001). Specifically, in Munoz, the Court held that "the arbitration agreement, which applies to this contract and the relationships which result from this contract, ***provides it shall be governed by the FAA . . . [and] . . . [a]rbitration agreements, like other contracts, are enforceable in accordance with their terms***." Id. at 539, 542 S.E.2d at 363-64 (internal quotation marks omitted; double emphasis added) (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland, 489 U.S. 468, 478 (1989)).

Respondents attempt to distinguish the facts of Munoz, however, they fail to explain why the holding in Munoz –that a contract that states that it shall be governed by the Federal Arbitration Act is enforceable in accordance with its terms –is not applicable to this case. Munoz was not limited to it facts and the Court of Appeals decision is at odds with its holding. Respondents also note that the Munoz Court found that the contract in that cases did involve interstate commerce. The Court did make such a finding, however, the Court made that finding in addition to ruling the contract provision providing that the Federal Arbitration Act governed was enforceable:

> ***Here, the arbitration agreement, which applies to "this contract and the relationships which result from this contract," provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms.*** Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989).
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> ***Further***, the transaction in this case in fact involves interstate commerce. . .

Munoz, at 539, 542 S.E.2d at 363-364 (double emphasis added). This Court's recent citation to Munoz for the proposition that an agreement that provides it shall be governed by the Federal Arbitration Act is enforceable in accordance with its terms is Contrary to Respondents agreement that the Court of Appeals decision is not at odds with the holding

in Munoz is See Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 126, 747 S.E.2d 461, 466 (2013) (citing Munoz, 343 S.C. at 538, 542 S.E.2d at 363–64, and stating in a parenthetical as follows: "holding an agreement that provides it shall be governed by the FAA is enforceable in accordance with its terms"). The rule stated in Munoz and Cape Romain Contractors is based in point upon the decision of the United States Supreme Court decision in Volt Information Sciences case. See Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 479, 109 S. Ct. 1248, 1256 (1989) (recognizing that an arbitration agreement should be enforced in accordance with its terms).

In their respective Returns to the Petition for Writ of Certiorari, Respondents present no argument justifying the departure from the prior holdings of this Court. Therefore, the Court of Appeals decision is in his Court should grant the Petition for Writ of Certiorari and correct the Court of Appeal's departure from the prior decisions of this Court and the United States Supreme Court.

II. The Phillips's and Omega Flex's arguments ignore that the Federal Arbitration Act applies to the Agreement, because the phase involving interstate commerce has been broadly interpreted and that courts have found that Congress intended to utilize its powers to regulate interstate commerce to its full extent.

The Federal Arbitration Act provides: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . 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.A. § 2. "The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to

mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)).

Respondents argue that the Circuit Court and the Court of Appeals correctly found that the Agreement does not actually involve interstate commerce because the Agreement is essentially for the purchase of a home and the Addenda only involved insignificant changes to the Agreement, which are insufficient to result in the Addenda involving commerce. Their argument ignores that the changes to the Agreement were not insignificant. Specifically, the Addenda include the following significant customizations of the construction of the home: adding custom paint colors; converting the patio and front walkway to oyster shell; adding phone/cable to the bonus room over garage; adding a dedicated receptacle for a wine cooler in butler's pantry area; reframing of the stairs to accommodate hardwood treads on first flight of stairs to second floor; constructing an additional parking pad to the drive; adding additional patio space; converting the entire house to 7 ¼ inch baseboards; and several modifications related to wiring or prewiring for surround sound. **(R.pp.161-68).** Arguably, under the applicable standard for whether a particular agreement involves interstate commerce—that involving commerce is the same as affecting commerce—some of the items in the Addenda are sufficient alone to meet the standard. For example, constructing an additional parking pad to the drive or reframing are construction activaties that clearly affect interstate commerce. See generally, Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 639, 239 S.E.2d 647, 651 (1977) (holding that the contract for the construction of an elderly housing project was interstate where materials, equipment, and supplies were produced and manufactured out-of-state); Circle

S. Enterprises, Inc. v. Stanley Smith & Sons, 288 S.C. 428, 431-32, 343 S.E.2d 45, 47 (Ct. App. 1986) (finding a construction contract involved interstate commerce where the equipment, materials, and subcontractors at issue were furnished from out-of-state).

Respondents repeatedly rely on the Brentwood Homes case, and argue that the Agreement was for the purchase of a completed residence so it did not involve interstate commerce their agrument ignores that the Agreement actually involved construction related actives. See Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318, n. 8 (2012) ("We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA."); Id. At 458, 730 S.E. 2d at 318 (specifically noting that the contract in that case did not include customizations of the home: "Notably, the provisions of the Agreement providing for . . . 'Options,' and 'Color Selection,' are eliminated as 'N/A' and were not signed by Bradley).

The Court of Appeal's decision is contrary to clearly established law providing that contracts the Federal Arbitration Act is to be broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent and that contracts for construction are governed by the Federal Arbitration Act. Significantly, the decision is also contrary to "[t]he federal policy favoring arbitration, as expressed in the FAA . . ." Zabinski v. Bright Acres Assoc., 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001); Id. at 590-91, 553 S.E.2d at 115 ("The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements." (citation omitted)(double emphasis added)).

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition for Writ of Certiorari, John Wieland Homes respectfully requests that this Court **GRANT** its Petition for Writ of Certiorari.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that I served the Reply to Omega Flex, Inc. and Peter T. Phillips and Summar C. Phillips's Returns to John Wieland Homes and Neighborhoods of the Carolinas, Inc.'s Petition for a Writ of Certiorari; Postage prepaid, to the addresses below, on November 20, 2015.

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