THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2016-000635

ANGELA CARTMEL

Respondent,

v.

EDWARD BRICE TAYLOR Appellant.

FINAL BRIEF OF RESPONDANT

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January 3, 2017

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STATEMENT OF THE CASE

Appellant and Respondent entered in to a Residential Lease Agreement with a five year term for the property known as 2694 Camp Rawls Rd, Wagener, SC on May 9, 2014. Said agreement specifically included rent to own provisions for the property. The agreement also contained an arbitration buried in paragraph 61 of said agreement which states, "If any dispute relating to this lease between Landlord and Tenant is not resolved through informal discussion within 14 days from the date the dispute arises, the Parties agree to submit the issue first before a non-binding mediator and to an arbitrator in the event mediation fails. The decision of the arbitrator will be binding on the Parties. Any mediator or arbitrator must be a neutral party acceptable to both landlord and tenant. The cost of any mediations or arbitrations will be paid by the tenant". (R. pp. 93), Respondent alleges that prior to taking residence at the property she informed Appellant that there was water damage around the light and over the sink located in the kitchen of the home. Appellant informed the Respondent that the damage was from the February 2014 ice storm that occurred in Aiken County and he would have it repaired along with resurfacing the cabinet doors in order to induce Respondent to enter into the agreement. Respondent took residence at said property on or about June 15, 2014.

Respondent alleges that in June of 2014 Respondent made numerous requests, orally and in writing, to repair roof leaks in a certain part of the home. Appellant made various representations regarding the leaky roof, which included contracting for repairs and an alleged ongoing lawsuit against the manufacturer of the manufactured home. Due to the representation of Appellant, Respondent forebear any repairs herself and therefore said representations of Appellant were to Respondent's detriment. On or about December 14, 2014 a fire caused by said

leaking roof shorting electrical wires erupted in the home causing damage to said home and Respondents property, including property located outside of said home belonging to Respondent.

Respondent filed the underlying action in the Aiken County Circuit Court alleging fraud in the inducement, fraud and misrepresentation on May 14, 2015 due to the loss of the residence. Respondent is also seeking consequential damages related to losses related to her home based business.

Appellant filed a Motion to Compel Arbitration on September 27, 2015 which was heard before the Hon. Casey E. Manning on January 25, 2016. (R. p. 33)

During said hearing, Appellant admitted the Agreement, and arbitration clause contained therein, made by Appellant did not comport with the South Carolina Uniform Arbitration Act and therefore arbitration was not enforceable under said act. (R. p. 77, lines 12-13) After hearing the arguments of counsel, reviewing the Courts record and applicable case law, Judge Manning accordingly dismissed Appellants Motion via Order filed with the Aiken County Clerk of Court on February 8, 2016. (R. p. 9) Appellant filed a Motion for Reconsideration which was filed with the Court February 15, 2016 and accordingly denied by the Court. (R. p. 14) The instant appeal followed.

STANDARD OF REVIEW

Arbitrability determinations are subject to de novo review[1] However, "although arbitrability determinations are subject to de novo review, the Court's factual findings will not be reversed if reasonably supported by the evidence." [2] "Arbitration is a matter of contract law and

[1] [1] Bradley V. Brentwood Homes, 398 S.C. 447, 453 (2012),
[2] Faltaous v Anderson Ocean Club Development, LLC, 388 S.C. 45, 48 (Ct. App. 2010)

general principles of state law apply to the Court evaluation of the enforceability of an arbitration clause."[3]

STATEMENT OF ISSUES ON APPEAL

I. Is the underlying Residential Lease Agreement subject to the Federal Arbitration Act?

II. Did the Circuit Court's decision to deny arbitration in the instant case comport with South Carolina law regarding real estate transaction and the Federal Arbitration Act?

ARGUMENT

A. The Residential Lease Agreement with rent to own provisions are not subject to arbitration under South Carolina Law.

Appellant misinterprets the nature of the underlying Lease with Option to Purchase Contract. The nature of the underlying contract was residential, "The Landlord Agrees to rent the tenant the mobile home described a 2694 Camp Rawls Rd., Wagner, Aiken, South Carolina 29164 (the property) for use as residential purposes only". (R. p. 85, para. 1) However the contract is for purchase of real property, "this is a lease to own agreement." (R. p. 85, para. 1, p. 94, para. 64-69) "Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement."[4] Where the contract language is plain and capable of legal construction, that language alone determines the instrument's force and effect.[5] Appellant argues that the

[3] Simpson V. MSA of Myrtle Beach, Inc. 373 S.C. 14,24 (2007).
[4] Miles v. Miles, 393 S.C. 111, 117 (2011)
[5] Jordan v. Sec. Grp., Inc., 311 S.C. 227, 230 (1993)

Residential Lease Agreement is a "mixed use" contract. [6] In the instant case, there was no contemplation of a "mixed contact" and the plain and ordinary meaning of the contract is apparent, lease and purchase of real property located in the State of South Carolina. "If the intention of the parties is clear, the courts have no authority to change the contract in any particular."[7] The Appellant in the instant action is asking the Court to do just that, change the nature and particulars of the agreement to suit their argument.

B. Intrastate real estate contracts are not subject to the FAA

Appellant seeks to bring an intrastate contract into the realm of interstate commerce by virtue of a single sentence stating "tenant may use part of the property for a home based business" in an 82 paragraph agreement involving real estate located in the State of South Carolina (R. p. 85) The only other language, and the intent readily inferred therefrom, is that appellant requests full indemnification due to the fact that Respondent is involved in the equestrian business which is inherently dangerous. There is no clause or other language indicating that the nature of the contract is anything other than a transaction for real estate which is inherently intrastate. Appellant simply asserts that any home based business must be interstate in nature because it is a home based business. (R. p. 78, lines 16 – 20) Appellants also asserts that the Residential Lease Agreement is a "mixed use" contract to indicate the contract is commercial in nature.[8] However, the plain reading of the contract indicates that, as it's title indicates, that it is simply a residential lease/sales contract with a recitation of the renter/buyers business in order that Appellant will not be responsible for any injuries related to equine activity.

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[6] Appellants Initial Brief, Pg. 7

[7] Newell & Company v. American Mutual Liability Insurance Company, 199 S.C. 325, 332 (1942)

[8] See Appellants Initial Brief, Pg. 7

"The FAA generally does not apply to real estate transactions that have no substantial or direct effect to interstate commerce..."[9]

Appellant fails to provide any proofs that the nature of the agreement between the Parties involves interstate commerce, "The FAA 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. Therefore, in order to activate the application of the FAA, the commerce involved in the contract must be interstate or foreign." [10]

"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."[11] "Our courts consistently look to the essential character of the contract when applying the FAA." [12] Additionally, the Courts "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved".[13]

"This Court has continued to adhere to the view that the development of real estate is an inherently intrastate transaction."[14] In deciding the effect of a real estate contract on interstate commerce, the Supreme Court has looked to the law in other states where contracts, such as the agreement in the case at bar, and has adopted the following:

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[9] Bradley V. Brentwood Homes, 398 S.C. 447, 458 (2012), quoting Garrison v Palmas Del Mar Homeowners Ass'n. 538 F. Supp. 2nd 468, 473 (D.P.R. 2008)
[10] Bradley V. Brentwood Homes, 398 S.C. 447, 455 (2012), quoting provisions of the Federal Arbitration Act.
[11] Id at 554.
[12] Id., quoting *Thornton v. Trident Med. Ctr., LLC,* 357 S.C. 91, 96 (Ct.App.2003)
[13] *Thornton v. Trident Med. Ctr., LLC,* 357 S.C. 91, 96 (Ct.App.2003)
[14] Bradley V. Brentwood Homes, 398 S.C. 447, 456 (2012)

> **Notwithstanding its congenial effects on interstate commerce, the sale of residential real estate is inherently intrastate. Contracts strictly for the sale of residential real estate focus entirely on a commodity — the land — which is firmly planted in one particular state. The citizenship of immediate parties (the buyer and the seller) or their movements to or from that state are incidental to the real estate transaction. Those movements are not part of the transaction itself. All of the legal relationships concerning the land are bound by state law principles. Single residential real estate transactions of this type have no substantial or direct connection to interstate commerce. For all these reasons, logic suggests that such transactions are not among those considered as involving interstate commerce. To characterize a residential real estate [transaction] as involving interstate commerce under these circumstances would actually promote a lack of uniformity in the law, which is exactly contrary to one of the FAA's stated purpose. If the FAA applied to out-of-state purchasers of Kentucky real estate, different rules would apply in that considerable volume of transactions concerning property here. Applying Kentucky law to all Kentucky real estate transactions creates a more uniform and, therefore, a more equitable body of law.[15]**

A plain reading of the agreement of the Parties agreement puts the agreement squarely in the realm of a contract for South Carolina real estate with no element of interstate commerce or contemplation thereof by the Parties.

C. Appellants argument fails under Bradley v. Brentwood

[15] Bradley V. Brentwood Homes, 398 S.C. 447, 457-458 (2012)

C.1. The Agreement

In the instant case, the essential character of the contract is one for the lease and purchase of real estate in the State of South Carolina as between two residents of the State of South Carolina. The commodity subject to the agreement is the land itself. In applying the three prongs as stated in Bradley v Brentwood, there is no instance of interstate commerce as between the Parties for the lease and purchase of real property and the false notion that a home based business must be "interstate commerce" adds nothing to change the Parties agreement or the underlying facts. Additionally, the only required performance in the agreement as it pertains to Respondent and Appellant is related to the paying of rent/payments towards equity and the upkeep of property, which does not touch or effect interstate commerce. (R. pp. 85-98) Therefore the "essential character" of the contract does not need to be sussed out through careful examination and is on it's face a residential lease agreement with rent to own provisions.

To follow the line of Appellants reasoning, the following instance would result in real estate transactions in the state of South Carolina becoming regulated by interstate commerce: *Independent tractor-trailer driver engages in a lease to own agreement in South Carolina for a home, does his bookkeeping in the home and parks his rig outside of said home (an allowance recited in the lease to own agreement) when not working. Due to negligence of landlord/seller, the home explodes and damages the rig. Tenant/buyer sues and includes the loss of the rig as consequential damages. Under Appellants theory it touches interstate commerce because the tenant/buyer drives his rig (filled with "It's a beautiful day in South Carolina" bumper stickers) across state lines as part of his work.*

Simply put, if Appellant were to succeed because a Party demands consequential damages related to a loss from real estate which is business related, there would be a chilling

effect on real estate law and tort law in South Carolina, taking virtually all real estate transactions into the realm of the commerce clause by virtue of actions, facts, and circumstances which are squarely outside of the Parties agreement.

C.2. **The Contract**

The complaint of Respondent names four causes of action in tort; specifically, fraud and misrepresentation in the inducement, breach of contract accompanied by a fraudulent act, negligence and negligent misrepresentation. (R. p. 15-25). The damages related to Respondent's home based business are consequential to destruction of the home due to Appellants alleged misrepresentation and fraud. (R. p. 15 – 25). Appellant is asking the Court to rewrite the Parties Residential Lease Agreement as something contrary to the nature and plain language of the agreement and somehow bring said agreement into the realm of interstate commerce. Consequential damages are "losses that so not flow directly or immediately from the injurious act but result indirectly from the act."[16] Therefore the nature of the contract falls within the realm of a real property transaction and all causes of action within the complaint sound in tort regarding said contract for real property.

C.3. The Facts

The facts surrounding this action indicate that the Parties engaged in an agreement for real property in the state of South Carolina. Appellant admits that the Agreement, the maker of which is appellant, does not comport with and is not enforceable under the South Carolina Arbitration Act.[17] Respondent has caused an action to be filed with a Court of competent jurisdiction based on fraud in the inducement, and misrepresentation and alleges that Appellant received insurance funds for the repair of a leaky roof prior to engaging with Respondent, failed

[16] Blacks Law Dictionary 416 (8th Ed. 2004)
[17] Initial Brief of Appellant, Pg. 2.

to make repairs, said failure to make repairs after notice from Respondent caused a short in the wiring which caused the destruction of the home and Respondent's losses. (R. p. 15-25) . There are no facts in the immediate case which involve interstate commerce.

D. **Appellant failed to offer sufficient evidence that the Residential Lease Agreement is subject to the FAA**

Appellant alleges that Respondent failed to bear the burden of proof that Respondent's claims are unsuitable for arbitration. "[T] the Party resisting arbitration bears the burden of proving that the claims are unsuitable for arbitration."[18] However, the facts of Hall V. Green Tree Servicing do not comport with the facts in the instant case. Green Tree's challenge to Hall was based on a transaction for personal property and statutory causes of action, "Respondents entered into a credit and sale contract (the Contract) with Green Tree through which the parties agreed Green Tree would finance Respondents' purchase of a mobile home."[19] Therefore, the challenge to arbitration does not rely on the exception to real property transactions.

Appellant also relies on Bradley v. Brentwood Homes, Inc. which states that if the transaction is for real property, the burden shifts: "We agree with the circuit court's conclusion that Brentwood Homes failed to satisfy its burden of proof as none of the factors relied upon to establish the involvement of interstate commerce negate the intrastate nature of the sale and purchase of residential real estate."[20] In the instant case, it was noted in the lower Court that Bradley was controlling and further noted that Brentwood Homes argued that references in the contract to a home warranty from an out of state vendor and financing from an out of state

[18] Hall v Green Tree Servicing, LLC, 408 S.C. 267, 268 (Ct. App. 2015)
[19] Id.
[20] Bradley v. Brentwood Homes, Inc. 398 S.C. 447, 458 (2012) (emphasis added)

vendor (J.P. Morgan). (R. p. 82, lines 9-25, R. p. 10, lines 1-7) [21] Therefore, more on point as to the findings of the lower Court in the instant case, "[b]ased on the foregoing, we conclude that Brentwood Homes failed to offer sufficient evidence that the transaction involved interstate commerce to subject the Agreement to the FAA."[22] Appellant merely offers that respondent's business is interstate in nature. The Appellant is very well aware that the equine industry is vital to Aiken County and Camden County and is isolated to those horse riders using facilities at said locales. In short, fence builders in Aiken build fences in Aiken County, Aiken Contractors build barns in Aiken County, and horse jumps in Aiken County are for use in Aiken County. It is simply common sense, well known and confined to those locales where equestrian activities are located in South Carolina.

The action at bar is one for fraud and misrepresentation, including fraud in the inducement. Respondent alleges that the Appellant misrepresented the condition of the home and did so intentionally. Due to Appellant's intentional fraudulent act, the home caught fire and Respondent suffered a loss of personal property and business earnings. "[G]enerally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements[23]"

E. CONCLUSION

The Circuit Court committed no error of law in reaching it's decision

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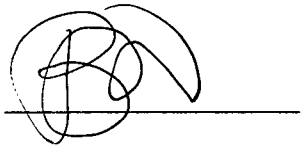
[21] See also Bradley v. Brentwood Homes, Inc. 398 S.C. 447 (2012), Pages 456-459.
[22] Id. at 459.
[23] Doctor's Associates, Inc. v. Casarotto, 116 S.Ct. 1652, (1996).

The lower Court heard the arguments of Appellant regarding the nature of the contract. In determining the applicability of the FAA, the Court considered the nature of the underlying contract, "[t]he Court acknowledges that the Federal Arbitration Act applies to contracts effecting interstate commerce. The issue before the Court is whether the residential lease with option to purchase agreement at issue effects interstate commerce. "The intent and objective manifestation of the Parties to a contract at the time a contract is made governs it's interpretation." (R. p. 10, quoting Lewis v. Carnaggio, 257 S.C. 54 (S.C. 1971)). "If a contract appears ambiguous in one of it's terms, the entire contract is to be viewed as a whole to determine it's intent and not isolated portions. (R. p. 10, quoting Farr v. Duke Power Co. 265 S.C. 356 (S.C. 1975)). The contact at issue clearly states that it is a residential lease for real property and contains the typical clauses regarding terms of lease, an option to purchase and other clauses relating to the rights and responsibilities of landlord and tenant. The contract acknowledged that Plaintiff has a home based business, however, the clause "Tenant is responsible for all permits and licensing related to this home-based business and Tenant indemnifies the Landlord of all Liability, costs and fees associated with this business" is an indemnification clause." (R. p. 10).

The Court has reasonably interpreted the contract of the Parties and concluded that the underlying agreement is a Residential lease Agreement with rent to own provisions included therein. The only legal inference to be drawn therefrom is that the FAA does not apply to the instant case and in light of holdings regarding the enforcement of the FAA to real estate contracts, the transaction is intrastate and the FAA is inapplicable. This appeal should be dismissed.

Respectfully Submitted



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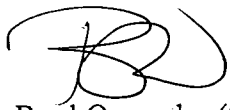
RULE 211 (b) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the brief of Respondent complies with Rule 211 (b) of the South Carolina Appellate Court Rules.



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Respondent's Final Brief,*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid this 4th day of January, 2017 to the following:

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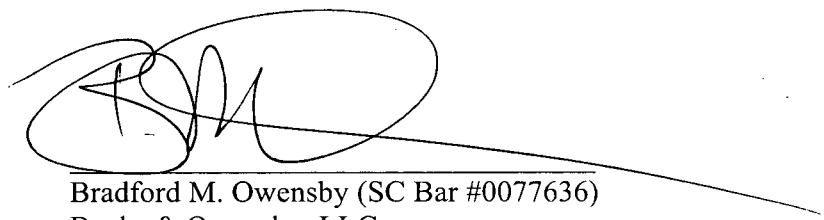

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