THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2008-CP-07-3386

Roger F. Carlson and Mary Jo Carlson, ... Respondents,

v.

South Carolina State Plastering, LLC,
Peter Conley, Individually, Del Webb
Communities, Inc., and Pulte Homes, Inc.,. .....Defendants,

And

OF WHOM Del Webb Communities, Inc.,
and Pulte Homes, Inc., are ..... Appellants.

RESPONDENTS' FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. **THE LOWER COURT WAS CORRECT THAT PULTE WAIVED ANY RIGHTS IT HAD TO COMPEL ARBITRATION**

II. **THE TERMS OF THE SALES CONTRACT ARE UNCONSCIONABLE, SO AS TO MAKE IT UNENFORCEABLE, INCLUDING ITS ARBITRATION CLAUSE**

III. **THE DOCTRINE OF MERGER - WHERE A SUBSEQUENT DEED WAS ISSUED AFTER THE PURCHASE CONTRACT CONTAINING NO ARBITRATION CLAUSE NOR CLAIM LIMITATIONS - PREVENTS ARBITRATION OF THE PURCHASE CONTRACT TERMS**

IV. **THE PLAIN LANGUAGE OF THE ARBITRATION CLAUSE DOES NOT REQUIRE ARBITRATION OF TORT CLAIMS**

INTRODUCTION

This is an Appeal from the Circuit Court's Order denying Appellants' Motion to Compel Arbitration (R. pp. 17-25). The Plaintiffs/Appellees own one of the 4,300 houses negligently built by Appellant Del Webb/Pulte. All homeowners in Sun City must, by Master Deed, be at least 55 years of age to purchase a home. At the time this Motion was filed, Mr. and Mrs. Carlson were 75 and 62 years of age, respectively. Appellants have embarked on a course of delay in an attempt to deny Plaintiffs/Appellees meaningful access to the judicial system. This Appeal and the underlying Motion are just part of that concerted effort. For Plaintiffs, any delay is prejudicial.

It is beyond incredible that the Appellants conclude their Brief by stating that the Plaintiffs/Respondents have not pursued this litigation with any vigor and will suffer no prejudice if required to essentially start their case again in another forum. Plaintiffs, along with over 140 of their neighbors, have pursued their claim for defective construction as

vigorously as possible in the South Carolina judicial system. After waiting the better part of three years to move to compel arbitration, filing an Appeal with no merit on October 28, 2011, and requesting three (3) extensions of time to file their Brief (in a case that has been pending in this Court for ten months), the Appellants have the temerity to advance the argument that requiring these Plaintiffs to seek redress in another forum would cause them no prejudice. The sole purpose of Pulte/Del Webb in this litigation is to prolong for as long as possible an adjudication on the merits, in any forum, so as to deny Plaintiffs and those similarly situated (over 4,300 households in Sun City) any meaningful access to a judicial forum.

STATEMENT OF THE CASE

The Plaintiffs/Respondents are one (1) of the 4,300 houses in Sun City that have negligently constructed by the Appellant Pulte/Del Webb. Respondents brought this civil action to recover damages as a result of Pulte's negligent construction. (R. pp. 33-45). This case is one of approximately 150 similar cases pending in the Beaufort County Court of Common Pleas. There is also a parallel action, *Grazia v. South Carolina State Plastering, LLC, et al,* Case No.: 2007-CP-07-1396, (R. pp. 1-16) which has been certified as a Class that includes an additional 4,100 Plaintiffs who have been damaged by the negligent acts of Pulte.

Three years after the current action was brought, Pulte moved to compel Arbitration. As a matter of fact, the Circuit Court found that by availing itself of the South Carolina judicial system, Pulte had waived its right to Arbitration. In so finding, the Court held as follows:

> This court factually finds that the Plaintiffs have been prejudiced by Webb/Pulte's use of the court system and the significantly enhanced discovery opportunities thereunder, as well as causing a two and one-half year delay in attempting to trigger its arbitration rights. The filings in the record establish that Well/Pulte was fully aware of these arbitration rights early on, and indeed pled arbitration as an affirmative issue in its answer, and actually arbitrated a similar case in the fall of 2008.
>
> The Court factually finds both delay and prejudice as a result of the resort to the Court System, and pursuant to the controlling authority of *Liberty Builders, Inc., supra,* the court is required to deny Webb/Pulte's motion. (R. pp. 17-25).

This Appeal, filed October 28, 2011, followed.

STANDARD OF REVIEW

"Arbitration 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) (emphasis added). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id. "The denial of a motion to compel arbitration, based on a finding of waiver, is reviewed on appeal de novo." *Rich v. Walsh,* 357 S.C. 64, 68, 590 S.E.2d 506, 508 (Ct. App. 2003); *Davis v. KB Home of South Carolina, Inc.,* 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011). As a result, this Court is free to consider additional reasons to deny Appellants' Motion, such as are set out below.

ARGUMENT

I. THE LOWER COURT WAS CORRECT THAT PULTE WAIVED ANY RIGHTS IT HAD TO COMPEL ARBITRATION

A party may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration. *Davis v. KB Home of South Carolina, Inc.,* 394 S.C. 116, 713 S.E.2d 799

(Ct. App. 2011); *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007). Appellants have plainly done so.

Generally the factors considered by our courts to determine if a party waived its right to compel arbitration are: 1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; 2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and, 3) whether the non-moving party was prejudiced by the delay in seeking arbitration. *Rhodes*, *supra*, at 250. Here, almost three (3) years passed before a Motion to Compel Arbitration was filed, Del Webb/Pulte continuously availed themselves of the court system and the delay is a tactic specifically designed to prejudice Plaintiffs.

The *Rhodes* Court reviewed the prior decisions of time delay and discovery where waiver was found. One decision reviewed is *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct.App. 1999). There the Circuit Court found *Liberty* had waived its right to arbitrate by delaying two years in filing its motion to compel. During that period, *Liberty* sought recourse in the court system many times, and waited until the litigation was nearly complete prior to filing its motion to compel arbitration. *Liberty* was attempting to "test the water before taking the swim." *Liberty Builders* at p.753. Here, Del Webb/Pulte has gone beyond the *Liberty* threshold and therefore plainly waived whatever right it might have to demand arbitration. No other case in South Carolina has found that a party did not waive their rights to compel arbitration after a year and a half of litigation. *Davis. v. KB Home of South Carolina, Inc.*

Interestingly, in *Liberty Builders*, the focus was not on discovery undertaken but rather on whether the delaying party had utilized the resources of the Court System during

the period of delay, as Liberty had done, having primarily used the Courts to file various motions over the two year period.

The actions of Webb/Pulte in the Sun City Stucco Litigation in general, and in this case in particular, demonstrate a clear and intentional waiver of any claim to arbitration, as this Defendant has delayed for two and one-half years before filing their motion, all the while utilizing the Court System.

Webb/Pulte has known that it had arbitration clauses in its sales contracts since at least the filing of its answer in the *Oros* case (CA 2006-CP-07-454), which answer was filed on July 13, 2006. Indeed, the *Oros* case went to arbitration, and arbitration award in favor of the Oros, and against Webb/Pulte on November 12, 2008. (R. pp. 138-145).

During 2008, and up until the present, Webb/Pulte has utilized the Court System to argue its Right To Cure alleged defenses in the *Grazia* matter, filing Motions to Strike Class Allegations, participating in Court hearings, appealing to the South Carolina Supreme Court and participating in oral argument in an attempt to prevent Class Certification of any of the Sun City cases, including Carlson.

As to Webb/Pulte's activities in the Carlson case, the timeline demonstrates not only the long delay in filing a Motion to Compel Arbitration, but its participation in and use of the Court System for all of this time. (R. pp. 22-25). These activities include participating in discovery, obtaining stays of the litigation, enforcing the Right to Cure Act, S.C. Code Ann. §40-59-810, *et. seq.*, inspecting the house, in other words utilizing all of the discovery of the Court System which would have been unavailable in the Arbitration process.

In fact, Webb/Pulte has never had any intention of compelling arbitration in any of these cases. Only when a Motion to Certify a Class was looming in this matter and *Grazia*,

did Webb/Pulte come up with the arbitration concept, apparently in an effort to exempt some cases from the Class, or to create some appellate issue. The proposed Case Management Order Webb/Pulte sent to this Court in May 2010, consisting of nine pages, is wholly silent as to any arbitration of any of these cases, but rather contemplates extensive use of the South Carolina courts (R. pp. 152-160).

In conclusion, this factual pattern and timeline presents a more compelling argument for waiver than any of the reported decisions. Had Webb/Pulte really wanted to arbitrate this case, and expedite resolution of Plaintiffs' claims, the arbitration process could have been concluded years ago. Instead, delay and use of discovery are the hallmarks of Webb/Pulte's actions. By its actions, and its proposed Case Management Order, Appellants have indicated a desire for a trial rather than arbitration, and the Court should affirm the denial of the Motion to Compel Arbitration.

II. THE TERMS OF THE SALES CONTRACT ARE UNCONSCIONABLE, SO AS TO MAKE IT UNENFORCEABLE, INCLUDING ITS ARBITRATION CLAUSE

It has been held that: "arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate." Accordingly, a party may seek revocation of the contract under "such grounds as exist at law or in equity" S.C. Code Ann. §15-48-10(a). *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (2007).

In furtherance of this concept is the additional statement by the Court, "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Simpson, supra*, at 671, citing *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, at 555, 606 S.E.2d 752 at 758 (2004). In refusing to enforce an arbitration clause inserted in an automobile purchase contract, the

Supreme Court in *Simpson* first looked to the concept of whether the contract in question was a contract of adhesion, in other words, whether the contract was "tainted by an absence of meaningful choice." *Carlson v. General Motors Corp.*, 883 F.2d 287, at 295 (4th Cir. 1989). Here, there is no question this purchase contract is so tainted. It is a form contract, prepared by Pulte, with no room for negotiation. Indeed, all of the sales contracts in the many separate cases before the Lower Court are identical.

Courts here look to the elements of the nature of the injuries suffered by the Plaintiff; whether the Plaintiff is or is not a substantial business concern; the relative disparity of the parties' bargaining power; the parties' relative sophistication; and the conspicuousness of the clause. *Simpson*, *supra*, at 669. Here, with form contracts prepared by the nations' largest homebuilder, the purchasers being retirement-age individuals, the Plaintiffs damages being the entire exterior of their residence, clearly, the contract is "tainted."

The next subject for examination in determining the enforceability of the instant contract is whether it violates public policy, statutory law, or provisions of the Constitution. Rather than being a question of one of these violations, the contract at issue violates all of the above.

Section 4.0 at p.17 of the contract is illustrative. (R. pp. 96-121). This contract provision attempts to illegally reduce the South Carolina Statute of Limitations, and to deprive the consumer of protections granted by the Supreme Court in case law without the requirements granted by the Court. Essentially, Pulte seeks unilaterally to impose a two year "discovery rule" on its customers, instead of the three year rule in this State in violation of S.C. Code Ann. §15-3-140. Additionally, Pulte seeks to deprive the customer of the remedy for Breach of the Implied Warranty of Habitability - a Court-granted remedy. This

disclaimer of the Implied Warranty of Habitability can only be accomplished where it is 1) conspicuous, 2) known to the buyer, and 3) specifically bargained for. None of these factors exist here, and all must exist if this Implied Warranty is to be disclaimed. Interestingly, this disclaimer can only be successfully met, "only in rare circumstances" *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854, at 858 (2006). Additionally, and worse, this contract provision attempts to prohibit consumers from pursuing against Pulte, "any claim for incidental, secondary, or consequential damages incurred as a result of any defective material or workmanship in the home or property." Taken to its logical conclusion if enforced, a homeowner who is injured or killed when a defectively installed roof collapses, has no remedy. This provision on its face violates South Carolina public policy and decisional law.

At common law, prevailing parties in litigation are not entitled to awards of attorneys fees against their adversaries, and this has been termed the "American" versus the "English" system, which does routinely impose "loser-pays" provisions. Here, again, Pulte seeks to violate this tradition and public policy, as its arbitration clause at. pp. 4.3 seeks to impose this system. Indeed, Pulte with its legions of attorneys effectively utilizes the contract provision and its attendant risks to the homeowner as a shield against claims.

In examining general contract principles with regard to arbitration clauses, one necessarily looks to the elements of contract. One of the basic tenents here, is there offer, acceptance, and consideration? The right to a jury trial in this State is Constitutionally guaranteed. The arbitration clause here is a relinquishment of a Constitutional right. Did the homeowner at issue receive any consideration for giving up this right? The answer is no, again demonstrating contract invalidity.

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan Inc., v. United HealthCare Services, Inc.,* 361 S.C. 544, 606 S.E.2d 752, 757 (2004).

This is what exists here without any doubt. Pulte seeks to enforce a "tainted" contract the terms of which violate this State's public policy, decisional law, statutory law, and Constitutional guarantees.

Obviously, if the entire contract at issue here is unenforceable due to the violations listed above, the Arbitration Clause with its attendant penal attorney fee awards and suffering from a total lack of contractual consideration, should not be enforced. Indeed, as set forth above, the South Carolina Arbitration Act contemplates in its language that if grounds for contract revocation or unenforceability exist, the Arbitration provision may be rejected. SC Code. §15-48-10(a).

III. THE DOCTRINE OF MERGER - WHERE A SUBSEQUENT DEED WAS ISSUED AFTER THE PURCHASE CONTRACT CONTAINING NO ARBITRATION CLAUSE NOR CLAIM LIMITATIONS - PREVENTS ARBITRATION OF THE PURCHASE CONTRACT TERMS

South Carolina law has long stated that the provisions in a contract for sale of real property are merged in a subsequently-executed deed. As noted: "The doctrine of merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance. The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates and amendment of the original contract, and generally the rights of the parties are fixed by their

expressions as contained in the deed." *Wilson v. Landstrom*, 315 S.E.2d 130, 132-133 (Ct.App.1984).

It is a long-standing rule in this State's jurisprudence that, once the parties execute the deed, "the written or oral agreement to convey is discharged....the deed regulates the rights and liabilities of the parties, and evidence of contemporaneous or antecedent agreements between the parties is inadmissible to vary or contradict the terms of the deed." *Charleston & Western Carolina Railway Co. v. Joyce*, 99 S.E.2d 187, at 193 (1957).

While not binding on this Court as precedent being an unpublished opinion, a review of the 4th Circuit Court of Appeals reasoning in *Tower South Property Owners Association v. Summey Building Systems, Inc.*, is illustrative. There, Judges Donald Russell, Widener, and Hall, affirmed a jury verdict against Summey Building for defective condominium construction. At trial, Summey had sought to introduce individual sales contracts which limited warranties, the District Court refused to permit this evidence in light of subsequent deeds which did not contain warranty limitations. The Fourth Circuit agreed, and authored a summary of the South Carolina doctrine of merger as it relates to real estate sales contracts and subsequent deeds. *Tower South Property Owners Association v. Summey Building Systems, Inc.*, 47 F.3d 1165 (4th Cir. 1995).

Here, the Merger Doctrine is exactly on point. Subsequent to the sales contract dated March 8, 2002, which contains the Arbitration provision, a deed was executed, delivered, accepted, and recorded. (R. pp. 134-136). It contains no claim limitation language nor does it contain an arbitration clause. Those antecedent provisions - even if they had any validity - are merged into the deed and those provisions are extinguished and of no effect.

IV. THE PLAIN LANGUAGE OF THE ARBITRATION CLAUSE DOES NOT REQUIRE ARBITRATION OF TORT CLAIMS

South Carolina has long permitted both breach of contract and tort claims to be brought by homeowners against builder-developers. *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 345-46, 384 S.E.2d 730, 737 (1989); *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 163 (4th Cir. 2004). Indeed, standard pleadings as here, normally allege claims in breach of contract, negligence, and breach of the Implied Warranty of Habitability. The Arbitration Clause at issue here makes no attempt to require arbitration of tort as opposed to contract claims.

The Arbitration provision here found in section 4.3 of the purchase contract consists of three paragraphs. The first paragraph deals with arbitration of disputes before the closing of the sale contract. The second paragraph - the one at issue here - deals with post-closing arbitration. An analysis of the different language is instructive.

First Paragraph: "Any controversy or claim arising out of or relating to this Agreement or Your purchase of the property shall be finally settled by arbitration...."

Second (post-closing) Paragraph: "After closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration...."

Thus, the differences in the language and intent are obvious. Pre-closing, anything having to do with the property in question is required to be arbitrated. Post-closing, as here, only claims arising out of the contract or the breach of the contract, are required to be arbitrated.

Pulte, as the drafter of this document, could have made the post-closing language inclusive of tort claims - it didn't. The general rule is that the terms of a contract are strictly construed against the drafter. *S. Atl. Fin. Services, Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002), and should be construed according to the plain language of the document if there is no ambiguity. *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002). Only where there is an ambiguity, is there the necessity for judicial construction, again, against the drafter and in favor of the non-moving party.

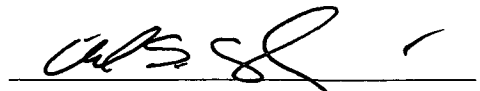
Here, the plain language of the post-closing clause limits itself to arbitrating only contract claims. Under any construction, if there is an ambiguity, the Court must construe that ambiguity against Pulte, and not graft requirements onto the contract which the drafter failed to specify.

Accordingly, even if this Court finds that: 1) the contract at issue is enforceable and 2) that Pulte has not waived its arbitration provision, the Plaintiffs are still free to pursue their tort claims at common law with a jury trial.

CONCLUSION

For all of the foregoing reasons, this Court should, and must, affirm the Lower Court.

Respectfully submitted,



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The undersigned certifies that Respondents' Final Brief complies with the provisions of Rule 211(b) of the South Carolina Appellate Court Rules.

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CERTIFICATE OF COMPLIANCE

Respondents, by and through its undersigned counsel, hereby certify that all personal data identifiers and other sensitive information in the Record on Appeal is redacted or sealed as required by the August 13, 2007, Order of the South Carolina Supreme Court.

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