

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-07-03386

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,

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

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENTS

I. Seller did not waive its right to enforce the arbitration clause.

The “timeline” submitted by Respondent/Plaintiff (Buyer) was the centerpiece of Buyer’s waiver argument and the trial court’s ruling – the trial court even attached the timeline to its order. In its Brief of Appellant, (Appellant/Defendant) Seller demonstrated that this timeline was not competent evidence of anything and, in any event, did not establish a use of the court system warranting a waiver of arbitration. (App. Br., Arg. III(A)). Buyer never responds to this argument and never defends the “timeline.”¹

Buyer argues the claims against Seller have been pursued “as vigorously as possible in the South Carolina judicial system” and that Seller has delayed the resolution of these claims. (Resp. Br., “Introduction”). The undisputed facts of this case demonstrate the contrary:

1. Buyer sued rather than arbitrate as required by the parties’ agreement, presumably upon advice of counsel that the advantage(s) of doing so outweighed the resulting delay in resolving Buyer’s claims.²
2. Buyer filed this lawsuit in August 2008 but did not serve Seller until October 2008, presumably upon advice of counsel that the advantage(s) of this two month delay outweighed the resulting delay in resolving Buyer’s claims.
3. Buyer filed this lawsuit in knowing violation of the Right to Cure Act, which requires a claimant to first give notice of a claim to a contractor and complete the

¹ Buyer argues that Seller and Seller’s counsel have engaged in delay tactics to avoid resolution of Buyer’s claims. There is no evidence of this – Seller and their counsel, including undersigned counsel – deny any such intent.

² Assuming Buyer and Buyer’s counsel were unaware of the arbitration requirement, they became aware of it when Seller filed its answer in December 2008, but Buyer continued to choose litigation over arbitration, presumably upon advice of counsel that the advantage(s) of doing so outweighed the resulting delay in resolving Buyer’s claims.

alternative dispute resolution system mandated by the Act before filing a lawsuit, presumably upon advice of counsel that the advantage(s) of doing so outweighed the resulting delay in resolving Buyer's claims.³

4. In May 2009, Buyer consented to an order staying the action for compliance with the Right to Cure Act. Buyer had earlier suggested this consent order in February 2009. Buyer chose this process rather than comply with the Act before filing the lawsuit, presumably upon advice of counsel that the advantage(s) of doing so outweighed the resulting delay in resolving Buyer's claims.

5. As permitted by the Act, Seller requested clarification of the notice sent by Buyer, but Buyer never responded, presumably upon advice of counsel.

6. In April 2010 and again in July 2010, the court held status conferences on the 140 stucco cases, including Buyer's case, at which Seller's counsel advised that these cases had two preliminary issues: (1) about half of the cases, including Buyer's case, were subject to a mandatory arbitration clause; and (2) all of the cases were subject to the Right to Cure Act and there had not been any compliance with the Act. The trial court decided to address the Right to Cure Act first. Buyer acquiesced to this approach, presumably upon advice of counsel that the advantage(s) of doing so outweighed the resulting delay in resolving Buyer's claims or the arbitration issue. The issue of complying with the Right to Cure Act was not resolved until February 2011, and Seller moved immediately on February 14, 2011, to compel arbitration.⁴

³ Buyer may not have known of this requirement, but Buyer's counsel clearly knew of it and clearly knew that both defendants would raise the issue immediately, because that is precisely what both defendants did in the *Grazia* case before Buyer commenced the present action. Buyer's counsel was also plaintiff's counsel in *Grazia*, and it is axiomatic that knowledge of counsel is imputed to the client.

⁴ Seller cannot be "charged" with the delay caused by the trial court's decision to address the Right to Cure Act issues before addressing the issue of mandatory arbitration, particularly when Buyer acquiesced in the trial court's decision to do so.

7. As found by the trial court and not challenged or disputed by Buyer, the delay in proceeding with the 140 cases, including Buyer's case, was that all parties were awaiting the decision in the *Grazia* case, which was issued in October 2010. Presumably, Buyer awaited the outcome in the *Grazia* case upon advice of counsel that the advantage(s) of doing so outweighed the resulting delay in resolving Buyer's claims. The reason for Buyer's willingness to incur this delay became apparent in September 2011, when Buyer moved to amend the complaint and make class allegations so that Buyer could become the class representative for approximately 4,000 homeowners, presumably upon advice of counsel that the advantage(s) of doing so, and the inevitable delay caused by the class discovery and class certification process, outweighed the resulting delay in resolving Buyer's individual claims.⁵

In short, the undisputed facts of this case demonstrate that Buyer has willingly and knowingly delayed the resolution of the claims in the complaint and the issue of arbitration, presumably upon advice of counsel that the advantage(s) of doing so outweighed the resulting delay in resolving Buyer's claims. Buyer continues to do so by pursuing class certification. Under these circumstances, Buyer cannot claim any prejudice in any delay regarding the motion to compel arbitration.

Buyer argues at length that Seller has "utilized the court system" and thereby waived the right to compel arbitration. Buyer, however, never identifies a single "utilization" by Seller that was directed at Buyer's case. Rather, Buyer relies on activities in other cases which manifestly have no bearing upon the issues in this case.

⁵ Buyer had earlier decided to incur this delay, when it sought to certify the 140 stucco cases as a class and make Buyer the class representative, presumably upon advice of counsel. In September 2011, Buyer decided to incur even more delay by seeking to be the class representative for a class of 4,000 homes, presumably upon advice of counsel.

Moreover, Buyer never denies that Seller has not conducted any discovery in Buyer's case, and Buyer never identifies any discovery undertaken by Seller in Buyer's case.

Finally, Buyer never submitted any evidence, by affidavit or otherwise, that Buyer has been prejudiced in any manner whatsoever by any delay caused by Seller. The only "evidence" submitted by Buyer was the "timeline" but, as demonstrated in Seller's Brief of Appellant, this "timeline" is not competent evidence of anything. In short, as demonstrated above, and as demonstrated in the Brief of Appellant, no evidence supports the trial court's ruling that Seller waived the right to arbitrate Buyer's claims.

II. The "merger doctrine" does not prevent enforcement of the arbitration clause in the parties' agreement.

Buyer argues that the "merger doctrine" prevents enforcement of the arbitration provision in the purchase agreement. (Resp. Br. Arg. III). This is a frivolous argument.

The merger doctrine provides generally that a sales agreement is merged into and extinguished by a subsequent deed delivered in full performance of the sales agreement. But "South Carolina also recognizes the contrary intent exception to the merger doctrine. '[I]n the absence of ... agreements which are not intended to be merged in the deed, upon the acceptance of a deed tendered in performance of an agreement to convey, the written or oral agreement is merged in the deed ...'" *Hughes v. Greenville Country Club*, 322 S.E.2d 827, 828 (S.C. App. 1984) (underlining added) (citations omitted); *accord*, *Shoney's, Inc. v. Cooke*, 353 S.E.2d 300, 302-303 (S.C. App. 1987). Moreover, "[w]here a deed constitutes only part performance of a preceding contract, other distinct and unperformed provisions of the contract are not merged in the deed." *New Prospect Area Fire Dist. v. New Prospect Ruritan Club*, 429 S.E.2d 791, 792 (S.C. 1993). Thus, when the sales agreement "clearly contains provisions that are not addressed in the deed or

performed by the deed, the doctrine of merger by deed is inapplicable.” *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F.Supp.2d 431, 505 (D.S.C. 2011), *citing and applying New Prospect Area and Hughes*, both *supra*.

Here, the parties expressly agreed that the obligations imposed by their agreement were not merged into the deed:

The covenants, disclaimers and agreements contained in this Agreement *shall not be deemed to merged* into or waived by the instruments executed at Closing [*i.e.*, the deed], but shall *expressly survive the Closing continue to be binding upon the parties*.

(R. 118 at ¶ 5.4.1) (emphasis added). This provision conclusively demonstrates the parties intended that the obligations imposed by the agreement would survive the issuance of the deed and not be merged into the deed. Moreover, and more specifically, the Agreement expressly imposed a duty to arbitrate claims after closing, *i.e.*, after execution and delivery of the deed:

After Closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act.

(R. 114 at ¶ 4.3) (emphasis added). This provision could not merge into the deed, because the obligations imposed by it did not arise until after issuance of the deed. Nothing in the deed mentions or changes the parties’ obligation to arbitrate their disputes. Thus, Buyer’s “merger doctrine” argument is manifestly without merit and frivolous.

III. The arbitration clause applies to Buyer’s tort claims.

Buyer argues that the arbitration clause does not apply to tort claims, because it does not mention “torts” specifically. In support of this argument, Buyer argues the general contract rule that contracts are to be construed strictly against the drafter. (Resp. Br., Arg. IV). Buyer’s argument is without merit.

The strict construction rule argued by Buyer does not apply here. It is firmly established that South Carolina's public policy favors arbitration of disputes. Thus, "*any doubt* concerning the scope of arbitrable issues should be *resolved in favor of arbitration*" such that a motion to compel arbitration must be granted unless "the clause is not susceptible to *any interpretation* which would cover the asserted dispute." *Grant v. Magnolia Manor-Greenwood, Inc.*, 678 S.E.2d 435, 437-438 (S.C. 2009) (emphasis added). Applying these rules, the Supreme Court held that the following arbitration clause included tort claims: "*any controversy or claim arising out of* the partnership agreement." *Zabinski v. Bright Acres Assocs.*, 553 S.E.2d 110, 118 (S.C. 2001) (emphasis added). Here, the parties' agreement has virtually identical language: "*every controversy or claim arising out of or relating to* this Agreement, or the breach thereof shall be settled by binding arbitration" (R. 114 at ¶ 4.3) (all emphasis added).

Any contract action manifestly arises from a "breach" of the contract. Here, the arbitration clause covers any claim involving a breach of contract and every controversy that arises out of or relates to the agreement. Thus, by its plain language, the arbitration clause covers more than contract claims – it includes tort claims as well as any other type of claim. In addition, all of Buyer's claims – including tort claims – relate to and arise out of Seller's construction of Buyer's home. (See R. 35-56, *passim*). The parties' agreement was for the construction of the home. (*E.g.*, R. 106-109 at ¶¶ 2.2 – 2.5). Thus, Buyer's tort claims relate to and arise out of the parties' agreement.⁶ Accordingly, Buyer's attempt to draw some distinction between the two arbitration clauses in the

⁶ In *Zabinski*, the Supreme Court also held: "A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." 553 S.E.2d at 118. Here, the arbitration clause is broadly-worded and any tort claims manifestly have a significant relationship to the agreement. Absent the relationship created by the agreement, Buyer would not have tort claims against Seller.

agreement is meaningless. (Resp. Br., Arg. IV). Moreover, it does not withstand scrutiny under the terms of the agreement.

Buyer notes that the parties' agreement contains two arbitration clauses, one of which become operative after closing. This simply demonstrates that the contractual duty to arbitrate disputes was not merged into the deed. Buyer also notes that the pre-closing arbitration agreement refers to arbitration of disputes relating to "Your purchase of the property" but this language does not appear in the post-closing arbitration agreement. From this distinction, and without any supporting analysis, Buyer makes a quantum leap in logic to conclude the post-closing arbitration clause applies only to contract disputes. As demonstrated above, the Supreme Court has held the same language covers tort claims, and the specific reference to breach of contract claims demonstrates that the arbitration clause reaches beyond contract claims. Moreover, after closing, the property was already purchased, so any claims were captured by the post-closing arbitration clause as a controversy or claim arising out of or related to the parties agreement.

IV. The arbitration clause is not unconscionable.

Relying primarily on the Supreme Court's decision in *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007),⁷ Buyer argues the arbitration clause is unconscionable and not enforceable, because other provisions in the contract are unconscionable. (Resp. Br., Arg. II). The question, however, is whether the arbitration clause itself is unconscionable. As demonstrated below, it is not. Thus, Buyer's

⁷ Buyer also cites S.C. Code Ann. 15-48-10(a) (Rev. 2005), which provides that an arbitration agreement is "valid, enforceable and irrevocable" unless it is shown the arbitration agreement is unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." In other words, this statute simply provides that general legal principles for revoking a contract apply to arbitration agreements. As demonstrated in the argument above, no grounds exist for revoking the arbitration agreement at issue here. Moreover, and contrary to Buyer's argument at the end of Argument II, this code section does not provide that the arbitration agreement is unenforceable if other provisions in the contract are unenforceable.

arguments that other provisions of the contract are unconscionable (and they are not) is a matter for arbitration.

In *Simpson*, the only issue was whether the arbitration clause itself was unconscionable. Applying general principles of contract law, the Supreme Court found the clause was unconscionable for four reasons, none of which apply here.

First, the Supreme Court found the plaintiff in *Simpson* had no “meaningful choice,” because the arbitration clause inconspicuously waived significant rights and remedies that were otherwise available by law. 644 S.E.2d at 669-670. Here, the arbitration clause does not waive any rights or remedies that are otherwise available by law – it simply provides that an arbitrator, rather than a court, must decide those issues.

Second, the arbitration clause in *Simpson* precluded the arbitrator from awarding “punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party.” 664 S.E.2d at 670. Thus, the arbitrator could not award treble and double damages as required by the South Carolina Uniform Trade Practices Act and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act. *Id.* This limitation on statutory remedies violated the public policy underlying those statutes, particularly the policy of punishing acts that adversely affect the public interest. *Id.* at 671. When combined with the lack of a meaningful choice, the arbitration clause was an unconscionable and unenforceable waiver of statutory rights. *Id.* Here, the arbitration clause does not preclude the arbitrator from awarding any rights or remedies that are available under any South Carolina law, including any South Carolina statute. Rather, the arbitration clause simply provides that an arbitrator, rather than a court, must apply South Carolina law to Buyer’s claims.

Third, the arbitration clause in *Simpson* lacked mutuality in that the seller was free to pursue several judicial remedies outside arbitration and, more importantly, the seller could pursue and obtain these remedies during and before the conclusion of any arbitration proceedings. Thus, the seller could obtain remedies judicially before the arbitrator determined what remedies were available to the buyer, and the remedy granted to the seller could interfere with or moot the remedies available to the buyer. Accordingly, the arbitration clause was “one-sided and oppressive.” 644 S.E.2d at 671-672. Here, the arbitration clause does not except any claims from arbitration – it does not permit Seller to pursue any judicial remedies while limiting Buyer to arbitration only. Rather, the arbitration clause provides that both parties must pursue all claims and remedies in arbitration.

Fourth, the arbitration clause in *Simpson* used language that captured and required arbitration of any claims under the Magnuson-Moss Warranty Act, despite the specific federal law prohibition against arbitration of claims under that Act. Thus, the arbitration clause violated public policy. 644 S.E.2d at 672-673. Here, there is no claim that the arbitration clause captures and requires arbitration of any matter that any law exempts from arbitration.

In short, the arbitration clause in the present case bears no meaningful resemblance to the arbitration clause in *Simpson*. As demonstrated below, Buyer’s contrary argument is intellectually dishonest, at best, and manifestly without merit.

Buyer first argues that the arbitration agreement here is an adhesion contract and therefore, under *Simpson*, is unenforceable. This argument fails for two reasons. First, an adhesion contract “is a standard form contract offered on a ‘take-it-or-leave-it’ basis

with terms that are not negotiable.” *Simpson*, 644 S.E.2d at 669. Here, Buyer offered no evidence, by affidavit or otherwise, of any attempt or desire to negotiate any term of the parties’ agreement that was rejected on a “take-it-or-leave-it” basis. Thus, Buyer failed to carry the burden of proof. Second, assuming the parties’ agreement was an adhesion contract, such contracts “are not per se unconscionable” – adhesion is “merely the beginning point of the analysis.” *Simspon*, 664 S.E.2d at 669. In *Simpson*, the Supreme Court found the arbitration agreement was part of an adhesion contract, but it rested its conclusion that the arbitration agreement was unconscionable upon numerous grounds that are not applicable here.

Buyer next argues that the parties’ agreement “violates public policy, statutory law, [and] provisions of the Constitution.” This argument is manifestly without merit and fails to show the arbitration clause is unconscionable and unenforceable.

Buyer argues that Section 4.0 of the agreement violates statutory law by illegally reducing the three-year statute of limitations in S.C. Code Ann. 15-3-140 to two years. Buyer, however, cites no authority that contracting parties are not free to reduce the statute of limitations, and it is axiomatic that “parties are always free to contract away their rights.” *Simpson*, 644 S.E.2d at 670. More importantly, Buyer’s argument is irrelevant to the question of whether the arbitration clause is enforceable. Assuming Section 4.0 of the agreement illegally reduces the statute of limitations (and it does not), this is an issue for the arbitrator, not the courts. Unlike the situation in *Simpson*, nothing in the arbitration clause at issue here precludes the arbitrator from considering and deciding this issue. To the contrary, the arbitration clause at issue here expressly permits the arbitrator to decide “every controversy or claim” without limitation.

Buyer also argues that Section 4.0 of the parties agreement wrongly deprives Buyer of the “Court-granted remedy” known as the “Breach of Implied Warranty of Habitability” without satisfying the judicially imposed prerequisites for any disclaimer of that warranty. Again, Buyer’s argument is irrelevant to the question of whether the arbitration clause is enforceable. Assuming Section 4.0 violates the case law on this warranty (and it does not), this is an issue for the arbitrator, not the courts. Unlike the situation in *Simpson*, nothing in the arbitration clause at issue here precludes the arbitrator from considering and deciding this issue. To the contrary, the arbitration clause at issue here expressly permits the arbitrator to decide “every controversy or claim” without limitation.

Buyer next argues summarily, without citation of any authority, that Section 4.0 “violates South Carolina public policy and decisional law” by limiting the damages that are available to Buyer “as a result of defective material or workmanship in the home or property.” Again, Buyer’s argument is irrelevant to the question of whether the arbitration clause is enforceable. Assuming Section 4.0 violates any law or policy on damages (and it does not), this is an issue for the arbitrator, not the courts. Unlike the situation in *Simpson*, nothing in the arbitration clause at issue here precludes the arbitrator from considering and deciding this issue. To the contrary, the arbitration clause at issue here expressly permits the arbitrator to decide “every controversy or claim” without limitation.

Buyer next argues that the arbitration clause violates “tradition and public policy” by permitting the arbitrator to award attorney’s fees in contravention of the “American Rule” that “prevailing parties in litigation are not entitled to awards of attorneys fees

against their adversaries.” Buyer’s argument is manifestly without merit for two reasons. First, Buyer mis-states the so-called American Rule, which actually provides: “*absent a contract, statute, or recognized ground of equity, the prevailing party does not recover attorney fees as costs of litigation.*” *Solley v. Navy Federal Credit Union, Inc.*, 723 S.E.2d 597, 605 (S.C. App. 2012) (emphasis added), quoting *Rorvig v. Douglas*, 873 P.2d 492, 497 (Wash. 1994); accord *JASDIP Properties SC, LLC v. Estate of Richardson*, 720 S.E.2d 485, 489 (S.C. App. 2011) (“Generally, attorney's fees are not recoverable unless authorized *by contract or statute*”) (emphasis added). Second, the parties contracted out of the American Rule under a mutual provision that the prevailing party, be it Buyer or Seller, was entitled to an award of attorneys fees and costs from the arbitrator. (Agreement at § 4.3). They were free to do so, and there is no public policy against such agreements. See *Simpson*, 644 S.E.2d at 670.

Buyer next argues summarily that the arbitration clause is a relinquishment of the Constitutional right to a jury trial without any contractual “consideration for giving up this right[.]” Buyer cites no authority in support of this argument, and it is manifestly without merit. The consideration is that Seller also gave up its right to a jury trial, as well as all of the other values exchanged by the parties in the arbitration clause. Moreover, every arbitration agreement relinquishes the right to a jury trial, and no South Carolina court has invalidated an arbitration agreement on this basis.

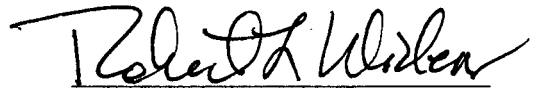
In short, the arbitration clause at issue here does not suffer from any of the defects identified in *Simpson* as the basis for finding the arbitration clause in that case was unconscionable. Rather, the arbitration clause at issue here is enforceable under South Carolina’s public policy that favors arbitration and grants freedom of contract to all

contracting parties. To the extent Buyer challenges other provisions in the contract, those claims are for the arbitrator, not the courts.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Brief of Appellant, it is respectfully submitted that this Court should reverse the appealed order and remand the case with instructions that the motion to compel arbitration be granted.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellants complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



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OF WHOM Del Webb Communities, Inc.,
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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served a copy of the Final Reply Brief of Appellants, by depositing a copy in the United States Mail, postage prepaid, on December 13, 2012, and addressed to the attorneys of record, as follows:


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