THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY COURT OF COMMON PLEAS

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-07-02407
Appellate Case No. 2011-196888

Bank of America, N.A.,.....Respondent,

versus

Jerry C. Wardlaw Construction of South Carolina, Inc.;
Jerry C. Wardlaw Construction, Inc.;
Wardlaw Construction of Effingham, LLC;
JCW Construction, LLC; Jerry C. Wardlaw; Jack Wardlaw;
New Riverside Association, Inc.; and Midpoint at New Riverside
Homeowners Association,Inc,.....Defendants,

Of whom

Jerry C. Wardlaw Construction of South Carolina, Inc.;
Jerry C. Wardlaw Construction, Inc.;
Wardlaw Construction of Effingham, LLC;
JCW Construction, LLC; Jerry C. Wardlaw; Jack Wardlaw
are the..... Appellants.

FINAL BRIEF

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FINAL BRIEF

I. STATEMENT OF ISSUES ON APPEAL

Whether or not the trial judge erred in ruling that Appellants waived their right to arbitration?

II. STATEMENT OF THE CASE

Respondent Bank of America filed this action May 19, 2010, seeking to enforce remedies under certain loan documents and agreements it entered into with Appellants (hereinafter "Loan Agreements") including the foreclosure of certain real property and judgment against individual appellants pursuant to a promissory note and guaranties. Appellants filed an Answer, Affirmative Defenses and Counterclaims responding to Respondents Complaint, setting forth several defenses including that of duress and asserting counterclaims against Respondent including claims for fraud, misrepresentation and breach of contract. Appellants served initial discovery requests on Respondent and Respondent responded. Respondent filed a Motion for Summary Judgment on February 4, 2011 and Appellants filed a response thereto April 6, 2011. On May 25, 2011, Appellants demanded that the parties arbitrate as required under the Loan Agreements, and on June 3, 2011, Appellants filed a motion to compel arbitration. The trial court held a hearing on Appellants' motion to compel on June 6, 2011, and on July 5, 2011 entered an order, dated June 29, 2011, denying Appellants motion to compel, written notice of which Appellants received July 6, 2011. Appellants' notice of appeal was served on July 27, 2011.

III. ARGUMENT AND CITATION OF AUTHORITY

The parties entered into one or more agreements to submit any controversy or claim between them to arbitration (R. pp. 98-99, Section 6.12 of the Lot Acquisition and Construction Loan Agreement). Specifically, Section 6.12 states as follows:

> "6.12 Mandatory Arbitration. Any controversy or claim between or among the parties hereto including but not limited to those arising out of or relating to this Agreement or any related agreements or instruments, including any claim based on or arising from an alleged tort, shall be determined by binding arbitration in accordance with the Federal Arbitration Act (or if not applicable, the applicable state law), the Rules of Practice and Procedure for the Arbitration of Commercial Disputes of Judicial Arbitration and Mediation Services, Inc. (J.A.M.S.), and the "Special Rules" set forth below. In the event of any inconsistency, the Special Rules shall control. Judgment upon any arbitration award may be entered in any court having jurisdiction. Any party to this Agreement may bring an action, including a summary or expedited proceeding, to compel arbitration of any controversy or claim to which this agreement applies in any court having jurisdiction over such action.
>
> a. Special Rules. The arbitration shall be conducted in the city of the Borrower's domicile at time of the Agreement's execution and administered by J.A.M.S.

who will appoint an arbitrator, if J.A.M.S. is unable or legally precluded from administering the arbitration, then the American Arbitration Association will serve. All arbitration hearings will be commenced within 90 days of the demand for arbitration; further, the arbitrator shall only, upon a showing of cause, be permitted to extend the commencement of such hearing for up to an additional 60 days.

b. Reservations of Rights. Nothing in this Agreement shall be deemed to (i) limit the applicability of any otherwise applicable statutes of limitation or repose and any waivers contained in this Agreement; or (ii) be a waiver by Bank of the protection afforded to it by 12 U.S.C Sec. 91 or any substantially equivalent state law; or (iii) limit the right of Bank (A) to exercise self-help remedies such as (but not limited to) setoff, or (B) to foreclose against any real or personal property collateral, or (C) to obtain from a court provisional or ancillary remedies such as (but not limited to) injunctive relief or the appointment of a receiver. Bank may exercise such self-help rights, foreclose upon such property, or obtain such provisional or ancillary remedies before, during or after the pendency of any arbitration proceeding brought pursuant to this Agreement. At Bank's option, foreclosure under a Deed to Secure Debt, may be accomplished by any of the following: the exercise of a power of sale under the Deed to Secure Debt, or by judicial sale under the Deed to Secure Debt, or by judicial foreclosure. Neither the exercise of self-help remedies nor the institution or maintenance of an action for foreclosure or provisional or ancillary remedies shall constitute a waiver of the right of any party, including the claimant in any

such action, to arbitrate the merits of the controversy or claim occasioning resort to such remedies.

No provision in the Loan Documents regarding submission to jurisdiction and/or venue in any court is intended or shall be construed to be in derogation of the provisions in any Loan Document for arbitration of any controversy or claim."

(R. pp. 98-99)

"Determining whether a party waived its right to arbitrate is a legal conclusion subject to de novo review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them." Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). In this case, the circuit judge denied Appellant's motion to compel, indicating that she found that the time that had transpired between the commencement of the action and the commencement of the motion to compel arbitration was enough to establish that Appellants had waived their right to compel arbitration. Appellants contend that the evidence in the record does not reasonably support the trial court's findings.

South Carolina favors arbitration. Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct.App. 2001). The right to enforce an arbitration clause, however, may be waived. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999).

Generally, the factors 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 v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 250 (S.C. App. 2007) These factors are not mutually exclusive. One factor may be inextricably connected to, and influenced by, the others. Id. at 251.

The Rhodes case provides for two lines of cases concerning waiver. 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. What is "a substantial length of time" varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration. *Compare* Deloitte & Touche, LLP v. Unisys Corp., 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct.App. 2004) (finding a five-and-a-half year period where the parties "conducted a significant amount of discovery, resulting in the production of thousands of documents" demonstrated waiver); and Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 548, 575 S.E.2d 74, 75-76 (Ct.App. 2003) (finding a nineteen month period where the parties exchanged written interrogatories, requests to produce, and the party requesting arbitration took two depositions demonstrated waiver); and Liberty Builders, 336 S.C. at 666, 521 S.E.2d at 753-54 (finding a two-and-a-half year period where the parties sought assistance from the court on approximately forty occasions demonstrated waiver); with Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen month period where discovery was "very limited in nature and the

parties had not availed themselves of the court's assistance," and "Respondent had not held any depositions," did not demonstrate waiver); and Rich v. Walsh, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct.App. 2003) (finding a thirteen month period where "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting fifteen minutes did not demonstrate waiver); and Gen. Equip., 344 S.C. at 557, 544 S.E.2d at 645 (finding a period of less than eight months where the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories" did not establish waiver)." Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 250, 251 (S.C. App. 2007)

Furthermore, the Court in Rhodes provides that to "establish prejudice, the non-moving party must show something more than "mere inconvenience." Evans, 352 S.C. at 550, 575 S.E.2d at 76-77. To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took "advantage of the judicial system by engaging in discovery." Id. at 548, 575 S.E.2d at 76. This inquiry, however, is just part of a broader, common sense approach our courts take to determine whether a motion to compel arbitration should be granted or denied: (1) if the parties conduct little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," prejudice will likely not exist, and the law would favor arbitration; (2) if the parties conduct significant discovery, then the party seeking arbitration has taken "advantage of the judicial system," prejudice will likely exist, and the law would disfavor arbitration. Id. And finally, "cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and

motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts." Id.

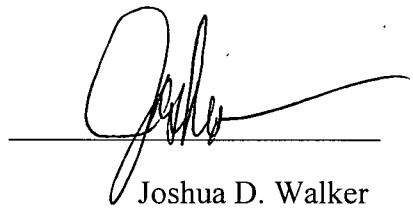
In this case, the motion to compel arbitration was filed a little more than a year after the case was filed. The only discovery conducted was little more than standard discovery propounded by Appellants to Respondent, and the responses provided in response thereto. No depositions were taken by either party and Respondent did not engage in any discovery except as set forth above. Furthermore, Respondent did not strongly pursue the litigation. (R. p. 6, Lines 5-7) Respondent's counsel admitted that the case had been stagnant. (R. p. 7, Lines 1, 17) As opposed to extensive or substantial litigation, Respondent's counsel described it as "some litigation" and "some discovery". (R. p. 11, Lines 13-15)

Appellants contend that this case is in line with the *General Equipment* cases referenced in Rhodes, as opposed to the *Liberty Builders* line of cases. Id. At 252 The time period between the filing of the suit and the filing of the motion to compel arbitration was less than thirteen months, and while initial discovery was conducted, it was not near as much as that conducted in the *Liberty Builders* cases and no depositions were taken. In fact, the record reflects that Respondent delayed its motion hearing on at least one occasion and was still amending its pleadings at the time of the hearing on the motion to compel. (R. p. 6, Lines 13-16) Also, Section 6.12(b) of the agreement that requires that the parties are to arbitrate their claims clearly states that initiating and maintaining a lawsuit would not constitute a waiver for any party at to the right to demand arbitration.

CONCLUSION

For the foregoing reasons, Appellant respectfully request that this Court reverse the circuit court judge's decision and order the parties to submit this matter to arbitration in accordance with their agreement.

Respectfully submitted this July 17, 2013.



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CERTIFICATION

The undersigned, counsel for Appellants, certifies that the foregoing Final Brief complies with Rule 211(b) SCACR.

July 17, 2013

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BANK OF AMERICA, N.A.,

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JERRY C. WARDLAW CONSTRUCTION OF SOUTH CAROLINA, INC., JERRY C. WARDLAW CONSTRUCTION, INC., WARDLAW CONSTRUCTION OF EFFINGHAM, LLC, JCW CONSTRUCTION, LLC, JERRY C. WARDLAW, JACK WARDLAW.

Appellants.

I hereby certify I am an employee of Joshua D. Walker, P.C., and that I have this day served a copy of the within and foregoing Final Brief upon all parties to this appeal by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

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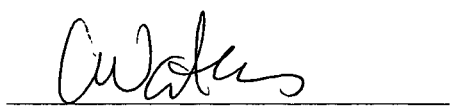
This 17th day of July, 2013



Cherese Waters