IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No.: 2012-CP-10-03870

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 ...Appellant,

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court correctly find that the Purchase Agreement was not governed by the Federal Arbitration Act when the Purchase Agreement did not involve transactions involving interstate commerce?

2. Did the Circuit Court correctly find that the Purchase Agreement was not governed by the Federal Arbitration Act in view of the fact that the Addenda to the Agreement included only inconsequential choices that the Phillipses could make on the home in question?

3. Did the Circuit Court correctly find that the arbitration clause should not be enforced?

4. Did the Circuit Court correctly find that the Phillipses should not be compelled to arbitrate their claims against the Trade Contractors?

STATEMENT OF THE CASE

A. Procedural History of the Case

Peter T. Phillips and Summar C. Phillips ("the Phillipses"), the Respondents, filed a complaint in the Charleston County Court of Common Pleas on June 14, 2012, against Respondent Omega Flex, Inc. ("Omega Flex"), Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("John Wieland Homes"), Respondent AAA Plumbing ("AAA Plumbing"), Respondent Fogel Services, Inc. ("Fogel Services"), and Respondent Charleston, LEC, Inc. ("Charleston LEC"). (R. pp. 9-28). The Phillipses pled the following causes of action: negligence, breach of express warranty, breach of implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, strict liability, breach of contract, breach of implied warranty of workmanlike service, and breach of implied warranty of habitability. (R. pp. 9-28).

The Phillips Complaint arises out of a home fire on June 25, 2009, at the Phillipses' home located at 1417 Hooper Street in Daniel Island, South Carolina. (R. p. 4). The Phillipses purchased the home from John Wieland Homes approximately one (1) year prior to the fire. (R. p. 14). The Phillipses pled that the fire resulted from a lightning strike which created a hole in the corrugated stainless steel tubing ("CSST"), and caused the natural gas to ignite at the hole in the CSST. (R. p. 14). The ignited gas which escaped the hole in the CSST ignited surrounding materials and spread, creating an extensive fire. (R. p. 14). As a result, the Phillipses home and its contents were severely damaged, and they were unable to live in their home for a period of time. (R. p. 14).

At the time of the purchase, the Phillipses and John Wieland Homes executed a Purchase Agreement containing an arbitration clause, prompting the Appellant, John Wieland Homes, on

October 29, 2012, to move to compel arbitration between the Phillipses and the other Defendants in the original action. (R. pp. 324-27). The Appellant argued in its motion to compel arbitration that the Phillipses claims were subject to arbitration under the Federal Arbitration Act. (R. pp. 324-27). In turn, the Phillipses filed a Memorandum in Opposition to John Wieland Homes' motion to compel arbitration, arguing that the Agreement was not subject to the Federal Arbitration Act because the contract was for the sale of a home rather than the construction of a home, meaning interstate commerce was not involved in the transaction. (R. pp. 340-43). The Honorable J.C. Nicholson, Jr. heard the motion on December 18, 2012, and issued an order which held that, in accordance with the Phillipses Memorandum in Opposition to Motion to Compel Arbitration, the Agreement did not involve interstate commerce, and therefore, was not subject to the Federal Arbitration Act. (R. pp. 3-7).

The Appellant filed a Motion to Reconsider, Alter, or Amend that Order on May 6, 2013, which was denied, and Appellant filed a notice of its intent to appeal on June 25, 2013. (R. pp. 345-58).

B. Facts

The Phillipses and John Wieland Homes entered into a Purchase and Sale Agreement ("Purchase Agreement") on June 7, 2008, which purported to include a mandatory arbitration provision. (R. pp. 359-64). The parties have agreed that the arbitration section does not conform to the South Carolina Uniform Arbitration Act requirements. (R. p. 4). The Purchase Agreement states that the contract is for the sale of property. (R. p. 359). Additionally, the Purchase Agreement incorporated the John Wieland Homes and Neighborhoods 5-20 Extended Warranty, along with the Addendum to the Purchase Agreement. (R. p. 362). (R. p. 365). (R. p. 368).

STANDARD OF REVIEW

"'Arbitrability determinations are subject to *de novo* review.'" *Bradley vs. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (Ct. App. 2012) (citing *Simpson vs. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). However, an appellate court will not reverse a circuit court's factual findings "if any evidence reasonably supports the findings." *Id.*

ARGUMENT

I. The trial court did not err when it found that the purchase agreement was not governed by the Federal Arbitration Act because the agreement was for the sale of a home and not the construction of a home.

According to the Federal Arbitration Act, "[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 (West). The Federal Arbitration Act defines commerce under the Act as "among the several States." 9. U.S.C.A. § 1 (West). In the instant case, the Court did not commit an error of law when it found that the Purchase Agreement did not involve interstate commerce because the Purchase Agreement was for the sale of a home rather than for the construction of a home.

The contract between Appellant and the Phillipses provided for mandatory binding arbitration in the original Purchase Agreement. (R. p. 362). Even though all parties agree that the arbitration provision is invalid and unenforceable under South Carolina law, the Appellant asserts that the Federal Arbitration Act preempts state law if state law invalidates a valid arbitration agreement involving interstate commerce. *Bradley*, 398 S.C. at 454-55, 730 S.E.2d at 315. The trial court was correct in determining that the Federal Arbitration Act does not govern this transaction because this was a contract for the sale of a home as distinguished from the

construction of a home. "The development of land within South Carolina borders is the quintessential example of a purely intrastate activity." *Zabinski vs. Bright Acres, Ass'n*, 346 S.C. 580, 595, 553 S.E.2d 110, 117-18 (2001).

Our Supreme Court has held that when a home purchase agreement provides that a purchaser is receiving a completed dwelling and is not contracting for the construction of a home, the transaction does not involve interstate commerce, meaning that the transaction is not subject to the Federal Arbitration Act. *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318. This is the case here. Paragraph One (1) of the purchase agreement explicitly states that the contract is for the sale of property. (R. p. 359). Additionally, Appellant's own witness, Dennis A. Black, a Division Quality Manager for Appellant, states in Paragraph Three (3) of his affidavit supporting Appellant's motion that the Phillipses "entered a purchase agreement with JWH to buy a home in the located [sic] at 1417 Hooper Street, Charleston, SC 29492." (R. pp. 159-160). The sale occurred after the Supreme Court of South Carolina decided *Bradley vs. Brentwood Homes, Inc.* It is clear in this context that this was a contract for the sale of a dwelling and not for the construction of a home. Consequently, the agreement is not governed by the Federal Arbitration Act.

Appellant relies on *Munoz vs. Green Tree Fin. Corp.* in an attempt to claim that arbitration agreements are enforceable according to their terms. 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001). However, *Munoz* involved "an installment contract and security agreement with Gerald Sealy (Builder) to finance home improvements in the amount of $15,000 secured by a mortgage on their home." 343 S.C. at 536, 542 S.E.2d at 362. The facts in *Munoz* implicate interstate commerce. First, it was a construction contract; additionally, the Court found that the Builder assigned its right to a Delaware corporation, the principal place of business of that

corporation was in Minnesota, the agreement was prepared in Minnesota, and the proceeds of their loan were disbursed from a Minnesota bank. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364. The instant case deals solely with the sale of a home, and the sale of a home is a purely intrastate activity. *Zabinski*, 346 S.C. at 595, 553 S.E.2d 117-18.

II. The Trial Court correctly considered the Addenda to the Agreement in finding the Agreement was not governed by the Federal Arbitration Act.

Appellant claims that because the Phillipses made some choices regarding the home that the Purchase Agreement was for the construction of a home rather than for the sale of a home. However, Appellants' argument is flawed.

In *Bradley*, the Supreme Court of South Carolina found that arbitration was not mandatory when the Purchaser made incidental choices regarding the home. This Court can review the public record and take judicial notice of the *Bradley* Home Purchase Agreement where the seller "[gave] $1,000.00 credit towards [sic] refrigerator to Buyer" and "upgrade[d] lighting to Buyer satisfaction in kitchen and dining room." Plaintiff's Notice of Motion and motion for Summary Judgment Pursuant to Rule 56, S.C.R.C.P., "Exhibit C," at 59, *Bradley vs. Brentwood Homes*, 398 S.C. 447, 730 S.E.2d 312 (2012). Mr. Bradley, the purchaser, determined which appliances would be in his kitchen with the $1,000.00 credit, and also chose the lighting in the kitchen and the dining room. Even though the Purchaser made some choices regarding the home, the Supreme Court of South Carolina found these were not significant and that the Home Purchase Agreement was for the purchase of a home and not the construction of a home.

The present case is on point with *Bradley* in that the choices made by the Phillipses were, at most, incidental. In Section Eight (8) of the Purchase Agreement, the seller (John Wieland Homes) is given full authority to make all decisions over the materials used on the home. (R. p.

360). Section Twelve (12) of the purchase agreement states that the seller "reserves the right to approve the lot, house placement, driveway location, number of deck steps included in Purchase Price and all exterior colors." (R. p. 361). Additionally, Section Fourteen (14) of the purchase agreement states that the purchaser (Phillipses) or the purchaser's agents have no authority to do work on the property prior to closing on the home. (R. p. 361). In Section Nine (9) of the purchase agreement, the Phillipses were given the option to choose the type of carpet, vinyl, and fixtures. (R. p. 360). In Addendum One, the Phillipses were to make selections regarding heated and cooled rooms, the bathrooms, and the closets on the third floor. (R. p. 368). The addendum has a Design Selection Checklist where the Phillipses had the option to choose incidental, purely aesthetic features of the home. (R. p. 369). From both the original Agreement and the Addendum, it is clear that the Phillipses, like in *Bradley*, had no real decision-making authority regarding the construction specifics of the home. If the contract were for the actual construction of a home, then the Phillipses would have made the ultimate decisions regarding the materials and would have been allowed access to the construction process prior to closing. (R. pp. 359-64). However, like in *Bradley*, since the Phillipses made only incidental choices, it is clear that the contract was for the sale of a home and not the construction of a home.

Appellants cite *Bradley* to state that this Purchase Agreement should be governed by the Federal Arbitration Act and argue that the Supreme Court of South Carolina did not consider the Bradleys' choices when determining whether the contract was for the sale of a home or the construction of a home. The Appellants cite a footnote which states that if the Agreement was for the construction of a residence, then it would have been subject to the Federal Arbitration Act. *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318, n. 8. We agree that if this Purchase Agreement had been for the construction of a home that it would have been governed by the

Federal Arbitration Act, but this, like the Purchase Agreement in *Bradley*, was for the sale of a home for the reasons set forth above.

Appellants' argument that the Agreement was for the construction of a home fails, and this Court should uphold the circuit court's factual analysis and determination that the transaction is not governed by the Federal Arbitration Act.

III. The trial court correctly found that the Purchase Agreement does not expressly and unambiguously compel arbitration because the arbitration clause is unconscionable.

The trial court correctly determined that the Purchase Agreement does not expressly and unambiguously compel arbitration of all claims. "General contract principles of state law apply to arbitration clauses governed by the FAA." *Munoz*, 343 S.C. at 549, 542 S.E.2d at 364. Therefore, even if this Court were to find that the arbitration clause is subject to the Federal Arbitration Act, this Court should not enforce the arbitration clause because it is unconscionable. In South Carolina, to assert the defense of unconscionability, one must prove, first, the absence of meaningful choice, and, second, that the terms are oppressive and one-sided. *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668-69.

When determining whether there was a lack of meaningful choice in the bargaining process, courts generally "take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." S*impson*, 373 S.C. at 25, 644 S.E. 2d at 669. The contract between the Phillipses and John Wieland Homes was a contract of adhesion. The majority of the terms in the agreement were from a standard agreement used by John Wieland Homes.

In *York vs. Dodgeland*, the South Carolina Court of Appeals examined an arbitration agreement between York and Dodgeland and another arbitration agreement between Cristy and Jim Hudson. 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013). The Court of Appeals determined that Cristy lacked meaningful choice when "[a]side from the selection of the desired vehicle VIN and figures dependent upon the agreed price, the remaining terms of the sale, many of which are quite significant, were pre-printed, and presumptively, non-negotiable." 406 S.C. at 67, 749 S.E.2d at 149. In *York*, Cristy lost the right to a jury trial, her purchase price was not a substantial business concern of the car dealership, and there was a significant disparity in the bargaining power between the purchaser and the car dealership. *Id.* As in *York*, the Phillipses lacked meaningful choice because they, too, lost the right to a jury trial, the purchase price of the home was not a substantial business concern of John Wieland Homes, and there was a significant disparity in the bargaining power between the Phillipses and John Wieland Homes.

The Phillipses can also satisfy the second prong of the unconscionability defense because the terms of the agreement are both oppressive and one-sided. A clause is considered oppressive when "'no reasonable person would make them and no fair and honest person would accept them.'" *York*, 406 S.C. at 67, 749 S.E.2d at 149-50 (citing *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668). The South Carolina Court of Appeals has held that when the amount of damages are restricted by the arbitration clause that the terms are oppressive. *York*, 406 S.C. at 67, 749 S.E.2d at 150. The Wieland 5-20 Extended Warranty similarly restricts the Phillipses amount of damages: "The maximum amount payable under this warranty by Wieland for all claims submitted is the original final sales price of the Home shown on the warranty certificate applicable to the Home, which includes the parcel of land on which the Home was constructed." (R. p. 382).

While the sales price of the home is the **most** one can recover, the warranty further restricts recovery in certain situations, all of which arguably apply here. According to the Wieland 5-20 Extended Warranty, only the defective item itself will be repaired or replaced should there be a defect, not the damage caused by the defect, and damage caused by failure to comply with warranty requirements "by anyone other than Wieland or Wieland's employees, agents or subcontractors" is not covered by the Extended Warranty. (R. p. 376). "Loss or damage not caused by a defect or deficiency in the design or construction of the Home by Wieland or Wieland's employees, agents or subcontractors" is not covered by the warranty. (R. p. 379). John Wieland Homes also states in its warranty that it is not liable for any loss, defect, or claim if the Phillips had insurance on the home. (R. p. 383). Since this case involves an allegedly defective product, and also involves a subrogated claim, the warranty on its face would not cover the damages to the home, the Phillipses contents, or the Phillipses loss of use of the home. Appellant John Weiland Homes, who through its agents and/or servants chose the allegedly defective product, installed the allegedly defective product, and sold the home to the Phillipses containing the allegedly defective product, would be responsible for at most, the cost of replacing corrugated stainless steel tubing. No reasonable person would make or accept these incredibly oppressive provisions.

The terms of the arbitration clause in the Purchase Agreement and Warranty are unconscionable, and the lower court correctly chose not to enforce the arbitration clause even though the Phillips signed the Agreement that the Purchase Agreement was subject to the FAA, which factually it was not.

IV. The Circuit Court did not commit an error in law in denying Appellant John Wieland Homes' motion to arbitrate the Phillipses' claims against the Trade Contractors.

The Phillipses have no contract between themselves and any of the Trade Contractors. The Phillipses claims against the Trade Contractors are based in whole or in part on work they did on the home sold to the Phillipses. Since the Federal Arbitration Act does not apply to the transaction between the Phillipses and John Wieland Homes, it should not govern any claims by the Phillipses against the Trade Contractors. The Phillipses agree that the claims against John Wieland Homes and the Trade Contractors should be handled in a consistent manner and as determined under the circuit judge's order.

CONCLUSION

The Circuit Court's decision that the Purchase Agreement between the Phillipses and John Wieland Homes was not governed by the Federal Arbitration Act should be affirmed because the Agreement was for the sale of a home rather than the construction of a home.

For the foregoing reasons, the Circuit Court's Order Denying the Motion to Compel Arbitration filed by John Wieland Homes and the Order Denying John Wieland Homes' Motion to Reconsider Alter or Amend the Order Denying the motion to Compel Arbitration should be **AFFIRMED**.

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CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I hereby certify that the Final Brief of Respondents Peter T. Phillips and Summar C. Phillips complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the Final Brief of Respondents Peter T. Phillips and Summar C. Phillips and the Certificate of Compliance with Rule 211(b) were served upon the attorneys listed below by depositing said paper(s) in the United States Mail, Columbia, South Carolina, on the 22nd day of April, 2014, with the first class postage duly-affixed and a return address clearly indicated on the envelope, addressed as follows:

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