

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2016-CP-16-00526
COUNTY OF DARLINGTON	)	
	)	
Everett Samuel, Jr.	)	<b>PROPOSED</b>
Plaintiff,	)	<b>ORDER DENYING DEFENDANTS'</b>
vs.	)	<b>MOTION TO DISMISS AND</b>
	)	<b>COMPEL ARBITRATION</b>
Schumacher Homes of South Carolina,	)	
Heather McCarley & Dave Boldman	)	
Defendants.	)	
_____	)	

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SC Court of Appeals

The matter before the Court is Defendants' motion to dismiss and compel arbitration. A hearing was held on September 26, 2019, at which all parties were afforded an opportunity for briefing and/or argument on the issues. All parties were present at the hearing in person or through his or her counsel.

The Court has considered the arguments and evidence submitted by all parties. Having considered those materials, and having heard the arguments of all parties, the Court enters this order.

**FACTS / PROCEDURAL HISTORY**

This case arises from the construction of a residential home by the above listed Defendants in Darlington County, South Carolina. Plaintiff hired Defendants to design and build this home. Defendants presented plans to the Plaintiff that set forth a raised slab construction as requested by Plaintiff. At some point in time, the plans were changed to a monolithic slab foundation. The parties dispute whether this change was agreed upon by the Plaintiff.

After final construction of the home in Darlington County with the monolithic slab foundation, a rain event caused major flooding within the interior and exterior of the home. In

April of 2017, Plaintiff sent a “right to cure” letter to Schumacher Homes requesting remediation of the numerous issues discovered by the Plaintiff after an inspection by a licensed engineer. Schumacher did not respond to this letter, and Plaintiff filed suit July 10, 2017. Defendants filed an answer to the Complaint in Darlington County Common Pleas on August 28, 2017. All parties participated in written discovery with both sides submitting and answering at least two sets of requests. Plaintiff filed a motion to compel discovery in 2018, but the parties were able to resolve the issue prior to a hearing. The parties each noticed and conducted two depositions of parties and fact witnesses. Both parties have served and received responses to multiple subpoenas. The parties participated in mediation on January 31, 2019 that resulted in an impasse. The last consent amended scheduling order calls for trial not before June 10, 2019. This order consented to by all parties leaves both parties ready for trial in the Court of Common Pleas at any upcoming docket.

On August 12, 2019, Plaintiff filed another motion to compel discovery responses. Defendants then filed this motion to dismiss and compel arbitration August 20, 2019 after over two years of intensive litigation and two months after the case was eligible for trial according the most recent consent scheduling order.

### LAW / ANALYSIS

**Defendants waived any contractual right to arbitration through its delayed demand for arbitration.**

“Arbitration laws are passed in order to expedite the settlement of disputes and should not be used as a means of furthering and extending delays...” 4 AM. Jur.2d *Alternative Dispute Resolution* § 109 (2019). “An arbitration provision has to be invoked in a timely manner or the option is lost.” *Id.* South Carolina has long held that the right to enforce an arbitration clause

may be waived. *General Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001); *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992). A party seeking to establish waiver must show prejudice through an undue burden caused by the delay in demanding arbitration. *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985); *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999).

In this case, Defendants chose not to assert a right to arbitration for over two years despite being well aware of the arbitration clause in the contract entered into in July of 2014. The answer filed by the Defendants has no mention or request for arbitration. The Defendants actively participated in written discovery with the plaintiffs and even served supplemental discovery requests that the Plaintiff spent considerable time answering. The written discovery included inquiries into every aspect of the case, not just those related to the arbitration clause in the contract. There was no mention of the arbitration clause throughout discovery and litigation until the filing of the present motion. Plaintiffs were forced to file a motion to compel discovery from the Defendants in April of 2018. The issue was resolved prior to a hearing, but the work put forth in drafting and filing the motion goes toward the prejudice suffered by the Plaintiff in this case. Plaintiff has another pending motion to compel discovery responses as well.

Defendants noticed and conducted the depositions of the Plaintiff and his sister, Janie Latham on July 17, 2018. During these depositions, counsel for the Defendants questioned the deponents about all aspects of the case for an extended amount of time. Neither of these depositions would have been allowed or conducted in any arbitration proceedings. Defendants

utilized jurisdiction of this Court in order to garner information that would not have been available to them in the requested arbitration proceeding.

Plaintiff noticed and conducted depositions of two representatives of Schumacher Homes in August of 2018. Defendants participated in these depositions, and Plaintiff incurred costs for transcripts and court reporter fees in all depositions.

Defendants issued subpoenas during litigation of this case to Plaintiff's insurance provider and Plaintiff's designated expert. The information garnered from these subpoenas provided Defendants with information that would not have been available in the requested arbitration proceeding. This is another example of the Defendants utilizing jurisdiction of this Court to the prejudice of the Plaintiff.

During the litigation of this case, Plaintiff allowed Defendants access to his home on numerous occasions in order for the Defendants to conduct inspections of the home at issue. Again, this has all been provided to the Defendant under the jurisdiction of this Court, but would not have been provided during the requested arbitration proceeding. Defendants have gained valuable information through the jurisdiction of this Court to the prejudice of the Plaintiff if the case is now sent to arbitration.

After conducting extensive discovery on all aspects of the case, the parties participated in a formal mediation on January 31, 2019. The mediation resulted in an impasse, but created even more costs to the detriment of the Plaintiff.

Finally, Defendants consented to two different scheduling orders on this case. The most recent scheduling order has the case currently available for trial. Defendants agreed to these scheduling orders with specific trial dates without ever mentioning a request for arbitration. Plaintiff has expended considerable time and expense in his preparation for trial.

Defendants have utilized every aspect of litigation within this jurisdiction except for a jury trial. In doing so, Defendants have gained access to far more information about the Plaintiff's claim than it would have garnered in any arbitration proceeding. Plaintiff has also been prejudiced by the extensive amount of preparation and work he has expended to be ready for a jury trial. This case involves more than a mere inconvenience or delay. Defendants have actively participated in discovery for over two years, and litigated the case to the brink of trial. Defendants now ask the Court to dismiss the case and refer it to arbitration after utilizing every aspect of this Court's jurisdiction. Their actions show a clear waiver and disregard of the arbitration clause in the contract at issue. Plaintiff has been prejudiced by the Defendants actions evidenced by the extra costs associated with two years of litigation, providing information and access to Defendants not otherwise available in arbitration proceedings, and the continued costs of seeking the Court's aid in obtaining proper discovery responses.

#### **Conclusion**

For the foregoing reasons, this Court DENIES Defendants' motion to dismiss and compel arbitration.

It is so ordered, this \_\_\_ day of October, 2019.

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The Honorable Roger E. Henderson  
Presiding Circuit Court Judge



Darlington Common Pleas

**Case Caption:** Everett Samuels Jr VS Schumacher Homes Of South Carolina ,  
defendant, et al  
**Case Number:** 2017CP1600526  
**Type:** Order/Other

So Ordered

s/Roger E. Henderson 2754