THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
In the Court of Common Pleas for the Fourth Judicial Circuit

The Honorable Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2019-001972

Everett J. Samuels, Jr. ..... Respondent

v.

Schumacher Homes of South Carolina, Heather McCarley, and Dave Boldman ..... Appellants

INITIAL REPLY BRIEF OF APPELLANTS

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ARGUMENT[1]

A. Plaintiff Asks the Court to Ignore the Parties' Agreement to Have Questions of Arbitrability Be Decided by the Arbitrator.

In his Brief, Plaintiff argues that "[t]he issue of waiver in this case was for the trial Court to decide, not a yet-to-be determined arbitrator." (*See* Pl.'s Init. Resp. Br., at 12). He further argues "[b]y utilizing the machinery of litigation to the prejudice of the Plaintiff, Defendants waived any rights conferred by the arbitration provision in the contract," including the right to have the question of arbitrability decided by the arbitrator. (*See id.*, at 14). For the reasons that follow, Plaintiff's arguments lack merit, and the threshold issue of whether Defendants waived the right to arbitration should be decided by the arbitrator, not the Court..

Under the parties' July 31, 2014 Agreement, the parties agreed that "[t]he arbitrator(s) shall determine *all issues* regarding the arbitrability of the dispute." (*See* August 20, 2019 Exhibit to Defendants' Notice of Motion and Motion to Dismiss and Refer to Arbitration Ex. A ¶ 44 (emphasis added)). While this provision does not mention "waiver" by name, it is written in the broadest of possible terms. It provides that "all issues" — without any limitation — concerning arbitrability must be decided in arbitration. The question of whether Defendants waived their right to demand arbitration through their conduct in this lawsuit is an issue "regarding the arbitrability of the dispute." Therefore, contrary to Plaintiff's arguments in his Initial Respondent's Brief, the trial court erred in even reaching that issue. Rather, the trial judge should have referred the parties for arbitration — at least for the initial determination of that question. While it is certainly possible that the arbitrator(s) will agree with Plaintiff that there has been a waiver, Defendant is entitled (under the plain language of the parties' agreement) to have that issue decided in the chosen forum

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[1] As a preliminary matter, Defendants note that their Initial Brief of Appellants was timely filed on March 27, 2020. Under the Rules of Appellate Procedure, filing may be accomplished by "depositing the document in the U.S. mail, properly addressed to the clerk, with sufficient first class postage attached. The date of filing shall be the date of delivery *or the date of mailing.*" *See* S.C.R.A.P., Rule 262(a)(2) (emphasis added). Defendants' Initial Brief of Appellants was mailed (and, therefore, timely filed) on March 27, 2020.

of arbitration. Respondent's Brief does not undermine or challenge Defendant's plain reading of the agreement.

Other courts have held that a broad delegation provision like the one cited above can reserve to the arbitrators the question of whether a party waived arbitration by their litigation conduct:

> Jones next argues that determining whether Ford Motor Credit waived arbitration by pursuing litigation is not encompassed by the delegation provision and was properly determined by the trial court. "[T]he presumption is that the arbitrator should decide allegation[s] of waiver, delay, or a like defense to arbitrability." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 592, 154 L.Ed. 2d 491 (2002) (internal quotation omitted). More than application of a presumption, however, the delegation provision in the contract in this case explicitly provides that the arbitrator determines issues of arbitrability. The presence of this delegation provision distinguishes the cases Jones cites in his brief.

See Ford Motor Credit Co., LLC v. Jones, 549 S.W.3d 14, 24 (Mo. Ct. App. 2018), *reh'g and/or transfer denied* (May 1, 2018), *transfer denied* (July 3, 2018) (construing arbitration provision delegating to arbitrator "[c]laims regarding the interpretation, scope, or validity of this provision, *or arbitrability of any issue.*") (emphasis added); *accord Brown v. RAC Acceptance E., LLC*, 303 Ga. 172, 175–76, 809 S.E.2d 801, 805 (2018), *reconsideration denied* (Mar. 5, 2018) ("[D]elegation provision clearly assigns responsibility for resolving 'disputes about the validity, enforceability, arbitrability or scope of this Arbitration Agreement' to the arbitrator. And Brown's conduct-based waiver argument is a direct challenge to the enforceability of the arbitration agreement."); *Gozzi v. Western Culinary Inst., Ltd.*, 276 Or. App. 1, 13, 366 P.3d 743, 750, *opinion modified on reconsideration on other grds.*, 277 Or. App. 384, 371 P.3d 1222 (2016) (enforcing delegation provision). Here, the language of the arbitration agreement is sufficiently broad to encompass waiver through judicial conduct as an arbitrable issue.

Therefore, this Honorable Court should reverse the trial court and compel the parties' to arbitrate their disputes.

B. The "Default Provision" of the Federal Arbitration Act Does Not Remove the Threshold Question of Arbitrability from the Arbitrator(s).

In his Initial Respondent's Brief, Plaintiff states that "Defendants fail to mention or address the default provision in 9 U.S.C. § 3." That section states, *in toto*, as follows (emphasis on the alleged "default provision"):

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration.*

"'Default in this context resembles waiver, but, due to the strong federal policy favoring arbitration, courts have limited the circumstances that can result in statutory default.'" *Iraq Middle Mkt. Dev. Found. v. Harmoosh*, 848 F.3d 235, 241 (4th Cir. 2017) (*quoting Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 342 (4th Cir. 2009)); *accord In re TP, Inc. (TP, Inc. v. Bank of America, N.A.)*, 479 B.R. 373, 379 (Bankr. E.D.N.C. 2012) (same).

In other words, the "default" language of Section 3 of the Federal Arbitration Act does not impose some new, more stringent obligation on Defendant to overcome Plaintiff's waiver argument. If anything, "default" is a narrower term than waiver. Moreover, this provision does not invalidate the parties' explicit delegation provision. Therefore, the question of whether Defendant was in default under Section 3 (or had waived any right) is one for the arbitrator(s), not the Court. Section 3 does not defeat Defendants' argument that the trial court erred in even considering the question of whether waiver defeated arbitrability in this case.

Therefore, this Court should revere the trial judge's refusal to enforce the plain language of the arbitration agreement.

C. Plaintiff Has Not Carried His Burden of Showing Prejudice.

In support of his contentions, Plaintiff complains that he has been highly prejudiced by having to conduct substantial discovery and incur costs in this litigation. First, Plaintiff has not presented any actual, competent evidence supporting these claims. He complains about

interrogatories and document requests, but those have not been made part of the record. He complains about depositions being taken that have not been made part of the record. He complains about incurring expenses in responding to this lawsuit that have not been made part of the record. He complains about expert discovery that has not been made part of the record. He complains about a site visit that is not supported by any record evidence. To the contrary, Plaintiff relies only on the unsworn statements of his attorney about what occurred during discovery. On appeal (and before the trial judge), that is not sufficient; rather, Plaintiff must support his waiver by presenting actual, admissible evidence.[2] Having failed to do so here, it was plain error for the trial judge to ignore the parties' plain arbitration agreement.

CONCLUSION

Therefore, for the foregoing reasons, this Court should reverse and vacate the trial court's denial of Appellants' Notice of Motion and Motion to Dismiss and Refer to Arbitration. The court should remand this action with instructions to dismiss this action and/or to compel the parties to honor their contractual promises to each other.

May 18, 2020

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[2] In his Initial Respondent's Brief, Plaintiff states that "[s]ince the order denying arbitration, Defendants have been ordered to provide their financial net worth, which they will undoubtedly re-argue in arbitration if the case is referred." (*See* Pl.'s Init. Resp. Br., at 12). He further states that "Defendant still has not complied with a Court order to produce its financial net worth from November of 2019." (*See id.*, at 16 n.3). Respectfully, the Court should not consider facts or events occurring after the trial judge's decision.

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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellants on the above-referenced Respondent by depositing a copy of it in the United States Mail, postage prepaid, on May 18, 2020, addressed to his attorneys of record:

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May 18, 2020

3548.007
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Everett Samuels, Jr. v. Schumacher Homes, et al.
Appellate Case No. 2019-001972

Dear Ms. Kitchings:

Please find enclosed for filing the Initial Reply Brief of Appellants. Pursuant to the March 20, 2020 Order from the South Carolina Supreme Court, we are sending only one unbound original to the Court for filing.

As indicated in the enclosed Proof of Service, we are also serving a copy of the Initial Reply Brief on counsel for the Respondent.

Very truly yours,

John W. Fletcher

JWF/jgc
Enclosures

cc: Greg B. Collins, Esq.
Vincent A. Sheheen, Esq.

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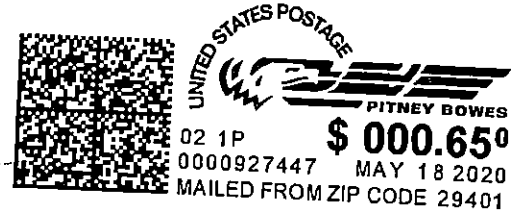

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