

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

RECORD ON APPEAL

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ORDERS, JUDGMENTS AND DECREES

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June 17, 2020

BARNWELL WHALEY PATTERSON &
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By:  _____

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v.

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

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Record on Appeal contains all materials proposed by the parties to be included in the Record on Appeal and does not include any other materials.

BARNWELL WHALEY PATTERSON &
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By:  _____

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

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.

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

Electronically signed on 2019-10-04 17:46:35 page 6 of 6

STATE OF SOUTH CAROLINA)

COUNTY OF FAIRFIELD)

EVERETT SAMUELS, JR.,)

Plaintiff(s))

vs.)

SCHUMACHER HOMES OF SOUTH CAROLINA)

HEATHER MCCARLEY & DAVE BOLDMAN,)

Defendant(s))

IN THE COURT OF COMMON PLEAS *mu* ✓

CIVIL ACTION COVERSHEET

___-CP-___

17 CP 160526

(Please Print)

Submitted By: Vincent A. Sheheen

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Camden, SC 29020

SC Bar #: 11552

Telephone #: 803-432-4391

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Other:

E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

X JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|--|--|
| Contracts
<input type="checkbox"/> Constructions (100)
<input type="checkbox"/> Debt Collection (110)
<input type="checkbox"/> Employment (120)
<input checked="" type="checkbox"/> General (130)
<input type="checkbox"/> Breach of Contract (140)
<input type="checkbox"/> Other (199) | Torts - Professional Malpractice
<input type="checkbox"/> Dental Malpractice (200)
<input type="checkbox"/> Legal Malpractice (210)
<input type="checkbox"/> Medical Malpractice (220)
<input type="checkbox"/> Other (299) | Torts - Personal Injury
<input type="checkbox"/> Assault/Slander/Libel (300)
<input type="checkbox"/> Conversion (310)
<input type="checkbox"/> Motor Vehicle Accident (320)
<input type="checkbox"/> Premises Liability (330)
<input type="checkbox"/> Products Liability (340)
<input type="checkbox"/> Personal Injury (350)
<input type="checkbox"/> Other (399) | Real Property
<input type="checkbox"/> Claim & Delivery (400)
<input type="checkbox"/> Condemnation (410)
<input type="checkbox"/> Foreclosure (420)
<input type="checkbox"/> Mechanic's Lien (430)
<input type="checkbox"/> Partition (440)
<input type="checkbox"/> Possession (450)
<input type="checkbox"/> Building Code Violation (460)
<input type="checkbox"/> Other (499) |
| Inmate Petitions
<input type="checkbox"/> PCR (500)
<input type="checkbox"/> Sexual Predator (510)
<input type="checkbox"/> Mandamus (520)
<input type="checkbox"/> Habeas Corpus (530)
<input type="checkbox"/> Other (599) | Judgments/Settlements
<input type="checkbox"/> Death Settlement (700)
<input type="checkbox"/> Foreign Judgment (710)
<input type="checkbox"/> Magistrate's Judgment (720)
<input type="checkbox"/> Minor Settlement (730)
<input type="checkbox"/> Transcript Judgment (740)
<input type="checkbox"/> Lis Pendens (750)
<input type="checkbox"/> Other (799) | Administrative Law/Relief
<input type="checkbox"/> Reinstate Driver's License (800)
<input type="checkbox"/> Judicial Review (810)
<input type="checkbox"/> Relief (820)
<input type="checkbox"/> Permanent Injunction (830)
<input type="checkbox"/> Forfeiture (840)
<input type="checkbox"/> Other (899) | Appeals
<input type="checkbox"/> Arbitration (900)
<input type="checkbox"/> Magistrate-Civil (910)
<input type="checkbox"/> Magistrate-Criminal (920)
<input type="checkbox"/> Municipal (930)
<input type="checkbox"/> Probate Court (940)
<input type="checkbox"/> SCDOT (950)
<input type="checkbox"/> Worker's Comp (960)
<input type="checkbox"/> Zoning Board (970)
<input type="checkbox"/> Administrative Law Judge (980)
<input type="checkbox"/> Public Service Commission (990)
<input type="checkbox"/> Employment Security Comm (991)
<input type="checkbox"/> Other (999) |
| Special/Complex/Other
<input type="checkbox"/> Environmental (600) <input type="checkbox"/> Pharmaceuticals (630)
<input type="checkbox"/> Automobile Arb. (610) <input type="checkbox"/> Unfair Trade Practices (640)
<input type="checkbox"/> Medical (620) <input type="checkbox"/> Other (699) | | | |

Submitting Party Signature: _____

Date: July 6, 2017

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)
)
COUNTY OF DARLINGTON)
)
Everett Samuels, Jr.)
)
)
)
Plaintiff,)
vs.)
)
Schumacher Homes of South Carolina,)
Heather McCarley & Dave Boldman)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS

Summons

(JURY TRIAL REQUESTED)

17 CP 160526

TO THE DEFENDANT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the undersigned attorneys at their offices at 1111 Church Street, Camden, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such services; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

SAVAGE, ROYALL & SHEHEEN, L.L.P.

By: _____

Vincent A. Sheheen, Esq. Bar # 11552
Post Office Drawer 10
1111 Church Street
Camden, South Carolina 29020
(803) 432-4391

2017 JUL 10 PM 1:14

July 6, 2017

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

) IN THE COURT OF COMMON PLEAS
)
)

Everett Samuel, Sr.
)
)

17CP160526

Plaintiff(s),
)
)

vs.
)
)

**COMPLAINT
JURY TRIAL REQUESTED**

Schumacher Homes of South Carolina
Heather McCarley & Dave Boldman
Defendants.
)
)
)

The Plaintiff, complaining of the Defendants, alleges as follows:

1. The Plaintiff is a citizen of South Carolina.
2. The Defendant Schumacher Homes of South Carolina is a South Carolina corporation operating a business in the State of South Carolina and conducting business in South Carolina and Darlington County.
3. Upon information and belief Dave Boldman and Heather McCarley are employees and agents of Schumacher Homes who reside in South Carolina.
4. The parties and subject matter of this suit are within the jurisdiction of this honorable court. Plaintiff has complied with the requirements of the Right to Cure Act and has received no response from Defendants.
5. All actions and inactions complained of in this matter were located in Darlington County. The property that is the basis of the dispute in this matter is located in Darlington County. Venue is proper in Darlington County.

2017 JUL 10 AM 1:14

Factual Allegations

6. Plaintiff entered into a contract with Schumacher Homes and Dave Boldman/GM to design and build a Residential Home on the Plaintiffs' property in Darlington County, South Carolina.. This contract was consummated in Darlington County, South Carolina.

7. Plaintiff paid Schumacher Homes and its agents \$ 359,000 more or less for the designing, manufacturing, and building of the residence.

8. Plaintiff has since paid thousands of dollars in an attempt to repair the home since flooding has occurred due to the negligence, misrepresentation, and breach of contract of Defendants.

9. Upon information and the Defendants improperly designed, built, and manufactured the home, causing the home to flood and retain water and becoming structurally unsound. Among other deficiencies, the design, manufacture, and building fell well below the standards in the profession and industry and fell below the standards specifically represented and promised to the Plaintiff as part of the sale agreement and advertising of Defendant. Defendants negligently and intentionally misrepresented multiple matters to Plaintiff relating to the design of the home and the features of the home being built, including costs, pricing, workmanship, and lowering the first floor elevation by over two feet and misrepresenting such to the Plaintiff.

10. Defendants' negligent and reckless actions and inactions have caused damages to Plaintiff including causing the residence to flood and other damage to the home. The home is uninhabitable, and was designed, installed and manufactured in a

haphazard and reckless manner. Plaintiff was purposefully or reckless misled about the design and construction of the home.

11. Upon information and belief, Defendant Schumacher and its agents failed to follow proper design, manufacturing, building, and installation standards, and the work was performed in a negligent and reckless manner, in breach of the Agreements in this case, and with negligent and intentional misrepresentation.

For a First Cause of Action
(Negligence, Gross Negligence, and Recklessness)

12. Plaintiff realleges each and every allegation above as if mentioned herein.

13. The Defendants failed to properly design, manufacture, install, and repair the property and residence, failed to use the standard of care in their work as a reasonable residential designer, manufacturer, installer, or contractor would do.

14. That as a direct and proximate result of the aforementioned acts and omissions of negligence, gross negligence, and recklessness, the Plaintiff has lost the use of the residence, incurred expenses toward engineers and repair, lost a substantial investment in the property, and incidental and consequential damages including damage to the interior and exterior of the Residence and landscape. Plaintiff will incur further expense in the removal and rebuild of the residence as well as reconstruction of the residential property/land. Plaintiff has suffered inconvenience, annoyance, vexation and emotional distress relating to the negligence and recklessness of Defendants and the damages resulting there from.

15. Plaintiff is entitled to recover actual, consequential, and punitive damages as well as any other relief this court and a jury deem appropriate.

For a Second Cause of Action
(Breach of Contract)

16. Plaintiff realleges each and every allegation above as if mentioned herein.

17. Plaintiff entered into a contract with Defendant Schumacher Homes of South Carolina and Dave Boldman/Gm to design, build and professionally manufacture/build a Residential Home and surrounding area in compliance with applicable codes and standards to meet the needs of the Plaintiff. Defendants further promised and represented to build the home to appropriate code and building standards. Defendant further agreed and warranted to build the home to a height and grade sufficient for the property and to prevent water damage or flooding. Defendants failed to design, manufacture and build the Residence in compliance with their promises, applicable codes, and standards thus breaching their duties under the contract.

18. Plaintiff is entitled to recover actual and consequential damages as well as any other relief this Court deems appropriate.

For a Third Cause of Action
(Breach of Express Warranties)

19. Plaintiff realleges each and every allegation above as if mentioned herein.

20. Defendants made certain express warranties about the building including that it would be built to code and professional standards.

21. Defendants further agreed and warranted to build the home to a height and grade sufficient for the property and to prevent water damage or flooding.

22. Plaintiff is entitled to recover actual and consequential damages as well as any other relief this Court deems appropriate.

For a Fourth Cause of Action
(Breach of Implied Warranties)

23. Plaintiff realleges each and every allegation above as if mentioned herein.

24. Defendants have breached the implied warranty of habitability and workmanlike service.

25. The home is not fit for normal habitability and was not done in an appropriate workmanlike manner..

26. Plaintiffs are entitled to recover actual and consequential damages as well as any other relief this Court deems appropriate.

For a Fifth Cause of Action
(Negligent and Reckless Misrepresentation)

27. Paragraphs 1-26 are incorporated herein by reference as if set forth verbatim.

28. Plaintiff is informed and believes that the relationship between the parties gave rise to a duty to use due care in advising Plaintiff as to the purchase, building, design, installation, and conditions of the home.

29. As more fully set forth above, Plaintiff is informed and believes that Defendants breached their duties by negligently representing to Plaintiff that the home would be built to certain standards. Among these standards was a representation that the house would be built over two feet higher in elevation than it was actually built. Defendants used alternate plans that were not approved by Plaintiff, without Plaintiff's knowledge, and in direct violation of the Agreements between the parties.

30. These representations were material and Plaintiff justifiably relied upon them in deciding to build the home. Plaintiff also relied to his detriment upon the Defendants' negligent promises and representations after the home was built and problems began to manifest themselves.

31. As a direct and proximate result of these negligent and reckless misrepresentations, Plaintiff has suffered damages in numerous and substantial ways including loss of use of his property, damage to property, actual and consequential damages, mental anguish and suffering.

32. Plaintiff is entitled to judgment against the Defendants for all actual, consequential, and punitive damages, for pre-judgment interest, for attorney's fees, and the cost of this action.

For a Sixth Cause of Action
(Fraud and Fraudulent Inducements)

33. Paragraphs 1-32 are incorporated herein by reference as if set forth verbatim.

34. The Defendants falsely stated that the home was being built to promised specifications.

35. Upon information and belief, the Defendants on multiple occasions falsely represented to the Plaintiff that the home would be built to the specifications agreed upon and made other representations about the home.

36. The Defendants representations were false and material, and they knew of their falsity.

37. The Defendants intended the Plaintiff to rely on the false statements, and the Plaintiff was ignorant of their falsity.

38. The Plaintiff relied on the false statements and suffered economic injury caused by them.

39. Due to the fraudulent statements and inducements, the Plaintiff is informed and believes that he is entitled to actual and incidental damages and punitive damages, and reasonable attorney fees in an amount to be determined by the Court.

WHEREFORE, Plaintiff prays for judgment against Defendants for actual damages, for an appropriate award of punitive damages, attorney's fees, prejudgment and post judgment interest, costs of this action, and any other relief this Court deems appropriate.

SAVAGE, ROYALL & SHEHEEN, L.L.P.

By

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2017 JUL 10 PM 1:15

July 6, 2017

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DARLINGTON	)	C/A No. 2017-CP-16-00526
)	
Everett Samuel, Sr.,)	
)	
Plaintiff,)	
)	
vs.	)	SCHUMACHER HOMES OF SOUTH
	)	CAROLINA, HEATHER MCCARLEY
Schumacher Homes of South Carolina,	)	AND DAVE BOLDMAN'S ANSWER TO
Heather McCarley and Dave Boldman,	)	PLAINTIFF'S COMPLAINT
)	
Defendants.	)	(JURY TRIAL DEMANDED)

Defendants Schumacher Homes of South Carolina, Heather McCarley and Dave Boldman hereby answer the Plaintiff's Complaint as follows.

FOR A FIRST DEFENSE

1. All allegations of the Plaintiff's Complaint not specifically admitted herein are hereby denied.
2. The allegations of Paragraph 1 are admitted upon information and belief.
3. The allegations of Paragraphs 2 and 3 are admitted.
4. Defendants admit this this Court has jurisdiction over this matter. The remaining allegations of Paragraph 4 state conclusions of law and, therefore, require no response. To the extent that a response may be required, the allegations are hereby denied and strict proof demanded thereof.
5. The allegations of Paragraph 5 are admitted.
6. The allegations of Paragraph 6 are admitted insofar as the allegations are consistent with the parties' written contract. Any allegations inconsistent therewith are hereby denied.

TRUE CERTIFIED COPY,
Scott B. Suggs
 CLERK OF COURT/RMC
 DARLINGTON COUNTY, S.C.

FILED
 2017 AUG 28 AM 10:19
 SCOTT B. SUGGS
 CLERK OF COURT/R.O.D.
 DARLINGTON COUNTY, S.C.

7. The allegations of Paragraph 7 are admitted.

8. The allegations of Paragraphs 8, 9, 10, and 11 are denied and strict proof demanded thereof.

9. Answering the allegations of Paragraph 12, Defendants repeat and restate each and every allegation of the preceding paragraphs as if fully set forth verbatim herein.

10. The allegations of Paragraphs 13, 14, and 15 are denied and strict proof demanded thereof.

11. Answering the allegations of Paragraph 16, Defendants repeat and restate each and every allegation of the preceding paragraphs as if fully set forth verbatim herein.

12. Answering the allegations of Paragraph 17, Defendants admit that Plaintiff entered into a contract with Schumacher Homes of South Carolina to design and build a home for the Plaintiff. Any allegations of Paragraph 17 inconsistent with the parties' written contract are hereby denied. The remaining allegations of Paragraph 17 are further denied and strict proof demanded thereof.

13. The allegations of Paragraph 18 are denied and strict proof demanded thereof.

14. Answering the allegations of Paragraph 19, Defendants repeat and restate each and every allegation of the preceding paragraphs as if fully set forth verbatim herein.

15. Responding to the allegations of Paragraphs 20 and 21, Defendants crave reference to any and all express warranties included in Schumacher's contract with the Plaintiff and deny any allegations inconsistent therewith.

16. The allegations of Paragraph 22 are denied and strict proof demanded thereof.

17. Answering the allegations of Paragraph 23, Defendants repeat and restate each and every allegation of the preceding paragraphs as if fully set forth verbatim herein.

18. Responding to the allegations of Paragraph 24, Defendants state that the existence of any and all implied warranties are questions of law and, therefore, require no response. To the extent that a response may be required, the allegations are hereby denied and strict proof demanded thereof.

19. The allegations of Paragraphs 25 and 26 are denied and strict proof demanded thereof.

20. Answering the allegations of Paragraph 27, Defendants repeat and restate each and every allegation of the preceding paragraphs as if fully set forth verbatim herein.

21. The allegations of Paragraph 28 state conclusions of law and, therefore, require no response. To the extent that a response may be required, the allegations are hereby denied and strict proof demanded thereof.

22. The allegations of Paragraphs 29, 30, 31, and 32 are denied and strict proof demanded thereof.

23. Answering the allegations of Paragraph 33, Defendants repeat and restate each and every allegation of the preceding paragraphs as if fully set forth verbatim herein.

24. The allegations of Paragraphs 34, 35, 36, 37, 38, and 39 are denied and strict proof demanded thereof.

FOR A FIRST DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Failure to Mitigate)

25. Plaintiff failed to mitigate his damages as required by law.

FOR A SECOND DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Contributory/Comparative Negligence)

26. Any damage suffered by the Plaintiff is the direct and proximate result of his comparative and contributory negligence, and Plaintiff's recovery should be barred or, alternatively, reduced proportionately to Plaintiff's comparative negligence.

FOR A THIRD DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Sole Negligence of Third Parties)

27. Plaintiff's damages, if any, are the direct and proximate result of sole negligence of third parties not affiliated with Defendants and not under their domain or control.

FOR A FOURTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Superseding/Intervening Negligence)

28. Should it be determined that Defendants were negligent, careless, reckless or grossly negligent, which allegations are expressly denied by Defendants, then Defendants would show this Court that the damages sustained by the Plaintiff, if any, were proximately caused by the intervening and superseding negligence of others, which intervening and superseding negligence proximately caused any damages alleged to have been suffered by the Plaintiff.

WHEREFORE, having fully answered Plaintiff's Summons and Complaint, Schumacher Homes of South Carolina prays that the same be dismissed with attorneys' fees and costs, and for such other relief as this Honorable Court deems just and proper.

Barnwell Whaley Patterson & Helms, LLC



K. Michael Barfield (S.C. Bar No. 69400)
D. Summers Clarke, II (S.C. Bar No. 74829)
288 Meeting Street, Suite 200
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700 FAX (843) 577-7708
mbarfield@barnwell-whaley.com
sclarke@barnwell-whaley.com

***Attorneys for Defendants Schumacher Homes of
South Carolina, Heather McCarley and Dave
Boldman***

August 18, 2017
Charleston, South Carolina

gds

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) 2016-CP-16-00526
 COUNTY OF DARLINGTON) 17-526
)
 Everett Samuel, Jr.) MOTION TO COMPEL
)
 Plaintiff,)
 vs.)
)
 Schumacher Homes of South Carolina,)
 Heather McCarley & Dave Boldman)
 Defendants.)
 _____)

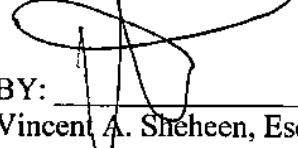
Pursuant to Rule 37(a), SCRPC, Plaintiff hereby moves this Honorable Court for an Order compelling the Defendant to respond to Plaintiffs' Interrogatories and Plaintiff's Request for Production, which were served upon the Defendant Attorney on October 5, 2017.

Rule 26(a) states that any party may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending case."

The Plaintiff's counsel has communicated in writing with opposing counsel and has attempted in good faith to resolve this matter.

Plaintiff request this Court enter an Order compelling the to respond to this request and pay the costs and attorney fees associated with the filing of this Motion pursuant to Rule 37(a)(4), SCRPC.

SAVAGE, ROYALL & SHEHEEN, L.L.P.

BY: 
 Vincent A. Sheheen, Esq. Bar # 52
 Attorney for the Plaintiff
 Post Office Drawer 10
 Camden, South Carolina 29024
 (803) 432-4391

2018 APR -6 PM 12:35
 SCDC 8 SUGGS
 CLERK OF COURT R.O.D.
 DARLINGTON COUNTY, S.C.

FILED

April 2, 2018

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Darlington)
)
 Everett Samuel)
)
 Plaintiff,)
)
 vs.)
)
 Schumacher Homes of South Carolina,)
 Heather McCarley & Dave Boldman)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT
 CASE NO.: 2016-CP-16-00526

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Plaintiff's Attorney: Vincent A. Sheheen, Bar No. 11552 Address: PO Drawer 10, Camden-SC 29020 Phone: 8034324391 Fax 8034254812 E-mail: vsheheen@thesavagefirm.com Other:	Defendant's Attorney: K. Michael Barfield, Esq, Bar No. ____ Address: PO Drawer H, Charleston, SC 29402 Phone: ____ Fax ____ E-mail: ____ Other: ____
---	---

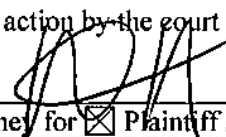
- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Compel
 Estimated Time Needed: 30 Court Reporter Needed: YES/ NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order
 I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff / Defendant

04/03/2018
 Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT: \$ _____**
- EXEMPT:** (check reason)
 - Rule to Show Cause in Child or Spousal Support
 - Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRPC)
 - Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instruction
 - Name of Court Reporter: _____
 - Other: _____

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.
 Other: _____

JUDGE CODE _____
 Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

FILED
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 SCOTT B. SUGGS
 CLERK OF COURT/RO.D.
 DARLINGTON COUNTY, S.C.

gob

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF DARLINGTON) C/A No. 2017-CP-16-00526
)
 Everett Samuels, Jr.,)
)
 Plaintiff,)
)
 vs.) **CONSENT SCHEDULING ORDER**
)
 Schumacher Homes of South Carolina,)
 Heather McCarley and Dave Boldman,)
)
 Defendants.)

Pursuant to Rule 16, S.C.R.C.P, the Court has determined that good cause exists to approve the schedule set forth herein, to which the parties have consented. The following schedule is established for this case:

1. Mediation of this case shall be held on or before February 12, 2019.
2. This case shall be eligible for trial not before March 12, 2019.

AND IT IS SO ORDERED.



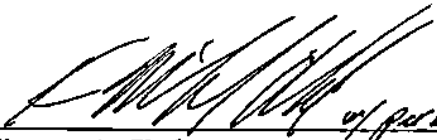
 Paul M. Burch, Chief Administrative Judge
 Fourth Judicial Circuit

This 1st day of August, 2018
 Pageland, South Carolina

FILED
 2018 AUG -6 PM 2:31
 SCOTT B. SUGGS
 CLERK OF COURT/R.O.D.
 DARLINGTON COUNTY, S.C.

WE CONSENT:

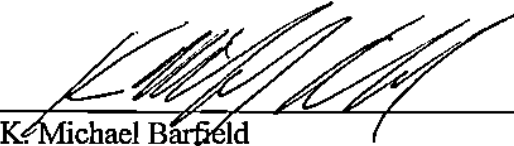
7/2/18
Date


of permission for
Vincent A. Sheheen
Greg B. Collins
Savage, Royal & Sheheen, LLP
P.O. Drawer 10
Camden, SC 29020
vsheheen@thesavagefirm.com
gcollins@thesavagefirm.com
Counsel for Plaintiff Everett Samuels, Jr.

FILED
2018 AUG -6 PM 2:34
SCOTT B. SUGGS
CLERK OF COURT/R.D.D.
DARLINGTON COUNTY, S.C.

WE CONSENT:

7/2/18
Date _____


K. Michael Barfield
D. Summers Clarke, II
P.O. Drawer H
Charleston, SC 29402
mbarfield@barnwell-whaley.com
sclarke@barnwell-whaley.com
*Attorneys for Defendant Schumacher Homes of
South Carolina, Heather McCarley and Dave
Boldman*

FILED
2018 AUG -6 PM 2:31
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.



STATE OF SOUTH CAROLINA)
)
 COUNTY OF DARLINGTON)
)
Everett Samuels, Jr.)
) Plaintiff,)
)
 vs.)
)
Schumacher Homes, et al.)
) Defendant.)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
 CASE NO.: 2017-CP-16-00526

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Plaintiff's Attorney: <u>Greg B. Collins, Bar No. _____</u> Address: <u>P.O. Drawer 10, Camden, SC 29020</u> Phone: _____ Fax _____ E-mail: <u>gcollins@thesavagefirm.com</u> Other: _____	Defendant's Attorney: <u>K. Michael Barfield, Bar No. 69400</u> Address: <u>P.O. Drawer H, Charleston, SC 29402</u> Phone: <u>843-577-7700</u> Fax <u>843-577-7708</u> E-mail: <u>mbarfield@barnwell-whaley.com</u> Other: _____
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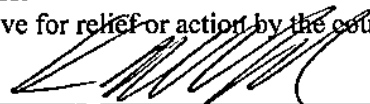
MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____
 Estimated Time Needed: _____ Court Reporter Needed: YES/ NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order
 I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff / Defendant

Date submitted: 7-2-2018

SECTION III: Motion Fee

PAID - AMOUNT: \$ _____
 EXEMPT: (check reason)

Rule to Show Cause in Child or Spousal Support
 Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRCPP)
 Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.
 Other: _____

JUDGE CODE _____
 Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

FILED
 2018 AUG -6 PM 2:31
 SCOTT B. SUGGS
 CLERK OF COURT/R.O.D.
 DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DARLINGTON	)	C/A No. 2017-CP-16-00526
)	
Everett Samuels, Jr.,)	
)	
Plaintiff,)	
)	
vs.	)	AMENDED
	)	CONSENT SCHEDULING ORDER
Schumacher Homes of South Carolina,)	
Heather McCarley and Dave Boldman,)	
)	
Defendants.)	

Pursuant to Rule 16, S.C.R.C.P, the Court has determined that good cause exists to approve the schedule set forth herein, to which the parties have consented. The following schedule is established for this case:

1. This case shall be eligible for trial not before June 10, 2019.

AND IT IS SO ORDERED.

Paul M. Burch, Chief Administrative Judge
Fourth Judicial Circuit

This ____ day of _____, 2019
Pageland, South Carolina

WE CONSENT:

February 14, 2019

Date

s/Greg B. Collins

Vincent A. Sheheen

Greg B. Collins

Savage, Royal & Sheheen, LLP

P.O. Drawer 10

Camden, SC 29020

vsheheen@thesavagefirm.com

gcollins@thesavagefirm.com

Counsel for Plaintiff Everett Samuels, Jr.

WE CONSENT:

February 14, 2019

Date

s/K. Michael Barfield

K. Michael Barfield

D. Summers Clarke, II

P.O. Drawer H

Charleston, SC 29402

mbarfield@barnwell-whaley.com

sclarke@barnwell-whaley.com

*Attorneys for Defendant Schumacher Homes of
South Carolina, Heather McCarley and Dave
Boldman*



Darlington Common Pleas

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

So Ordered

s/Paul M. Burch, Judge #2048

Electronically signed on 2019-02-19 10:17:08 page 4 of 4

STATE OF SOUTH CAROLINA)
)
COUNTY OF DARLINGTON)

Everett Samuels, Jr.,)
)
Plaintiff,)
)
vs.)
)
Schumacher Homes of South Carolina,)
Heather McCarley and Dave Boldman,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

C/A No.: 2017-CP-16-00526

MEDIATION RESULTS REPORT

(THIS FORM TO BE COMPLETED BY THE MEDIATOR WITHIN 10 DAYS OF CONCLUSION OF THE CONFERENCE, WHETHER OR NOT AGREEMENT WAS REACHED BY THE PARTIES.)

1. Mediated settlement conference was held before me on January 31, 2019.
2. As a result these conferences, this case should be considered *(please check one)*:
 - () Fully Settled *(please check one)*:
 - () by Consent Judgment, to be filed by _____ or,
 - () by Voluntary Dismissal, to be filed by _____
 - () Partially Settled, with agreement of the parties on the following issues:
(attach separate sheet, if necessary): _____

- () At an impasse.
- (X) In need of further mediation. (I X am/ ___ am not willing to mediate this case further).
- () Continued (Date) _____

3. Plaintiff	<u>X</u> was/	_____ was not	present.
Defendant	<u>X</u> was/	_____ was not	present.
Third-Party Defendant	_____ was/	_____ was not	present

4. Other participants were:

- attorney for plaintiff - Greg B. Collins, Esquire
- attorneys for defendants – K. Michael Barfield, Esquire
- Representatives for insurance carrier
- Guardian ad litem _____
- experts _____

5. This case was co-mediated with: _____

6. Choice of the mediator was by:

- Stipulation of Mediator Selection
- Court Order.

7. Further comments of the mediator: The parties plan to mediate again after an appraisal of the property is obtained.

Date: March 14, 2019, 2019

Signature of Mediator:

Print Name of Mediator:

Franklin J. Smith, Jr., SC Bar No. 5166
P.O. Drawer 7788
Columbia, SC 29202
(803) 771-4400
fsmith@richardsonplowden.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2016-CP-16-00526
COUNTY OF DARLINGTON)	
)	
Everett Samuel, Jr.	)	MOTION TO COMPEL
)	
Plaintiff,)	
vs.)	
)	
Schumacher Homes of South Carolina,)	
Heather McCarley & Dave Boldman)	
Defendants.)	
_____)	

Pursuant to Rule 37(a), SCRPC, Plaintiff hereby moves this Honorable Court for an Order compelling the Defendant to respond to attached, Plaintiff’s Supplemental Request for Production, which were served upon the Defendant Attorney on December 12th, 2018.

Rule 26(a) states that any party may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending case."

Defense counsel has objected to the referenced supplemental Requests and Interrogatories and not provided sufficient responses. This case involves claims for punitive damages in which financial information of the Defendant will be necessary for a jury to properly allocate any punitive award. Plaintiff requires the requested financial information prior to the trial of the case in order to fully evaluate the accuracy of the information.

The Plaintiff’s counsel has communicated in writing with opposing counsel and has attempted in good faith to resolve this matter.

Plaintiff request this Court enter an Order compelling the to respond to this request and pay the costs and attorney fees associated with the filing of this Motion pursuant to Rule 37(a)(4), SCRPC.

SAVAGE, ROYALL & SHEHEEN, L.L.P.

s/Greg B. Collins, Esq Bar #74010
Vincent A. Sheheen, Esq Bar#11552
Attorneys for the Plaintiff
Post Office Drawer 10
Camden, South Carolina 29021
(803) 432-4391

August 12, 2019

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
) 2016-CP-16-00526

COUNTY OF DARLINGTON)
)
)

Everett Samuel, Jr.) **PLAINTIFF'S 2nd SUPPLEMENTAL**
) **REQUESTS TO PRODUCE**

Plaintiff,)

vs.)

Schumacher Homes of South Carolina,)

Heather McCarley & Dave Boldman)

Defendants.)

_____)

TO: K. Michael Barfield & D. Summers Clarke, II, Attorneys for Schumacher Homes of South Carolina, Heather McCarley and Dave Boldman:

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, Plaintiff, Everett Samuels, Jr, by and through his undersigned counsel, hereby requests Defendants Schumacher Homes of South Carolina, Heather McCarley and Dave Boldman, by and through its attorneys, to produce the documents listed below for inspection and copying within 30 days from the date hereof.

SUPPLEMENTAL REQUESTS

1. Please provide copies of the financial reports indicating gross and net profits for the Defendant Schumacher Homes of South Carolina for the years 2014 through 2018.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DARLINGTON	)	C/A No. 2017-CP-16-00526
)	
Everett Samuel, Sr.,)	
)	
)	
	)	DEFENDANTS' RESPONSES TO
	)	PLAINTIFF'S SECOND
	)	SUPPLEMENTAL REQUESTS FOR
	)	PRODUCTION
)	
vs.)	
)	
Schumacher Homes of South Carolina,)	
Heather McCarley and Dave Boldman,)	
)	
)	
Defendants.)	

TO: PLAINTIFF AND HIS COUNSEL OF RECORD:

Defendants Schumacher Homes of South Carolina, Heather McCarley and Dave Boldman ("Defendants"), by and through their undersigned counsel, responds to Everett Samuel, Sr.'s Second Supplemental Requests for Production as follows:

Defendants state that these responses are complete and responsive in accordance with their understanding of the Requests as drafted, and are based upon records or other information and documents in their possession or reasonably available to them at the time they were made, and that if additional or different information is subsequently discovered or brought to Defendants' attention during the pendency of this case which renders any initial response incomplete, incorrect or otherwise subject to supplementation, they will do so as required by the South Carolina Rules of Civil Procedure.

Defendants further state that in preparing and making these responses, they have not accepted or acquiesced in the purported directions, conditions or definitions imposed at the time the Requests were propounded by Everett Samuel, Sr., except and to the extent that the same may have been consistent or in conformity with their understanding of the applicable discovery rules.

GENERAL OBJECTIONS

Defendants state the following general objections to Everett Samuel, Sr.'s Second Supplemental Requests for Production:

- a. Defendants object to these Requests for Production to the extent that they are inconsistent with or enlarged upon the South Carolina Rules of Civil Procedure.
- b. Defendants object to each Request for Production to the extent it seeks the disclosure of information and documents protected by the attorney-client privilege, the work-product doctrine and any other applicable privilege or doctrine.
- c. Defendants object to each Request for Production inasmuch as it seeks to discover information and documents or other tangible evidence that was prepared in anticipation of litigation.
- d. Defendants object to each Request for Production to the extent it requests information and documents in the possession of persons or entities that are not under their control.

While Defendants have responded to the Requests for Production propounded, such responses do not constitute a waiver of these objections. Defendants reserve the right to object to the introduction of these responses into evidence and further reserves the right to supplement or amend these responses at any time during the course of discovery.

Without waiving the foregoing objections, Defendants respond as follows:

RESPONSE TO SECOND SUPPLEMENTAL REQUEST FOR PRODUCTION

1. Please provide copies of the financial reports indicating gross and net profits for the Defendant Schumacher Homes of South Carolina for the years 2014 through 2018.

RESPONSE:

Defendants object to this Request on the grounds that it is overly broad, unduly burdensome and vague. Further, Defendants object on the grounds that the information being requested is not likely to lead to the discovery of admissible evidence. It is premature to request this information and documents at this stage of the case. Without waiving and specifically reserving all rights under objection, it would be more appropriate to produce these documents only after a jury has awarded compensatory or nominal damages at trial and only when Plaintiff puts forth clear and convincing evidence of entitlement to punitive damages.

Barnwell Whaley Patterson & Helms, LLC



K. Michael Barfield (S.C. Bar No. 69400)
D. Summers Clarke, II (S.C. Bar No. 74829)
288 Meeting Street, Suite 200
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700 FAX (843) 577-7708
mbarfield@barnwell-whaley.com
sclarke@barnwell-whaley.com
*Attorneys for Defendant Schumacher Homes of
South Carolina*

January 24, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF DARLINGTON) C/A No. 2017-CP-16-00526

Everett Samuels, Jr.,)
)
Plaintiff,)

vs.)

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

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS AND REFER
TO ARBITRATION**

YOU WILL PLEASE TAKE NOTICE that within ten days after service of this notice or as soon thereafter as it may be heard, Defendants Schumacher Homes of South Carolina, Heather McCarley and Dave Boldman, by and through the undersigned counsel, will move before this Honorable Court, pursuant to Rule 41, South Carolina Rules of Civil Procedure, for an Order dismissing this case and referring it to arbitration.

The parties entered into a contract whereby Defendant Schumacher Homes of South Carolina was to construct a home for the Plaintiff. The parties' written contract contained a waiver of jury trial and arbitration provision. The relevant portion of the contract is filed herewith.

Schumacher Homes of South Carolina is an Ohio corporation. At the time the parties entered into the contract, the Plaintiff was a citizen and resident of Pennsylvania. He is now a resident of South Carolina. Given these and other connections to interstate commerce, the Federal Arbitration Act applies to the parties' contract. Therefore, this action should be immediately dismissed so that the parties may resolve their dispute before an arbitrator, per the terms of their agreement.

This motion will be based on the pleadings filed in this matter, along with any affidavits, memoranda, and oral argument presented to the Court.

Barnwell Whaley Patterson & Helms, LLC

K. Michael Barfield

K. Michael Barfield

P.O. Drawer H

Charleston, SC 29402

mbarfield@barnwell-whaley.com

*Attorney for Defendants Schumacher Homes of
South Carolina, Heather McCarley and Dave
Boldman*

August 20, 2019
Charleston, South Carolina

under the mechanic's lien laws of the State of Ohio or any other rights it may have in law, in equity or under this Agreement. Upon Homeowner(s)'s default, the Deposit and/or Additional Deposit will be applied to actual costs for all work completed by Schumacher, up to the time of Homeowner(s)'s default, and against Schumacher's lost profits which could have been earned by Schumacher had this Agreement been completed. The balance of the Deposit and Additional Deposit, if any, will be returned to Homeowner(s). Upon termination of this Agreement, Homeowner(s) hereby release Schumacher from any further obligations of Schumacher under to the Contract Documents, and Homeowner(s) shall return all Contract Documents and other documents that Schumacher provided to the Homeowner(s).

Assignability

36. Homeowner may not assign the Contract Documents without prior written consent of Schumacher. Schumacher is hereby granted the right to assign the Contract Documents to another Schumacher entity without prior written consent of Homeowner.

Governing Law and Venue

37. The Contract Documents shall be governed by and construed in accordance with the laws of the state in which the home is to be constructed. The Parties agree that any and all arbitration proceeding, and any claims, cause of actions or disputes not otherwise subject to arbitration, regardless of the nature or kind, shall be venued in the county and state of Schumacher's office where Schumacher signed this Agreement. In the event any such claim involves the foreclosure of a mechanic's lien or forcible entry and detainer claims, the Parties agree the confirmation of the arbitrator's award will be venued in the county where the Property is located.

Liens

38. Schumacher agrees to keep the Property free from any Mechanic's Liens that might be filed against the Property because of labor or materials supplied by Schumacher for completion of the contract, if all payments have been made to Schumacher when requested. If Schumacher is not paid timely, it may file an Affidavit for Mechanic's Lien. The filing of the lien shall not affect the parties' right and ability to arbitrate as set forth in Paragraph 44 herein. The demand for arbitration pursuant to Paragraph 44 of the Agreement shall constitute the commencement of "suit" for purposes of any law which requires the holder of a mechanic's lien to file suit to preserve its mechanic's lien rights.

Headings

39. Paragraph headings, bold text and quoted items, are for the purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

Notices

40. Except as otherwise provided, any notice which any party is required or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service or private delivery service to the above addresses. Notice is deemed given when received.

Modifications

41. This Agreement may be modified only by a written document signed by representatives of both parties. A purported oral modification shall be not effective.

Severability

42. The various terms, provisions and covenants herein contained shall be deemed to be separate and severable, and the invalidity or unenforceability of them shall not affect or impair the validity or enforceability of the remainder.

Entire Agreement

43. This Agreement, any Addendum to this Agreement, Soil and Excavation Disclaimer, Standard Features, Limited Warranty, Price Quote, New Homeowner Manual, Change Orders, plans, drawings, and any other documents signed by Schumacher and Homeowner(s) (hereinafter collectively referred to as Contract Documents) constitute the entire agreement between the parties. The Contract Documents are the property of Schumacher and are not to be used or given to other persons without the written permission of Schumacher. All Contract Documents are protected under copyright law.

JURY WAIVER AND AGREEMENT TO BINDING ARBITRATION

44. The Parties agree that any claim, dispute or cause of action, of any nature, including but not limited to, those arising under tort, contract, consumer protection or other statute, equity, law, fraud, intentional tort, breach of statute, ordinance, regulation, code, or other law, or by gross or reckless negligence, arising out of or related to, the negotiations of the Contract Documents, the Home, the Property, materials or services provided to the Home or Property, the performance or non-performance of the Contract Documents or interaction of Homeowner(s) and Schumacher or its employees, agents, or subcontractors, shall be subject to final and binding arbitration by an

arbitrator appointed by the American Arbitration Association in accordance with the Construction Industry Rules of the American Arbitration Association, and judgment may be entered on the award in a court of appropriate venue. Further, the Emergency Measures of Protection Rules shall be applicable. Each party shall be responsible for one-half of the arbitrator's fees. A copy of the American Arbitration Association arbitration fees may be found in the Homeowner's Manual; however, you may contact the American Arbitration Association at 1-800-778-7879 to determine if the American Arbitration Association has changed the amounts of any of these fees. The arbitration proceeding will include all parties to the construction process who have signed any document incorporating or referring to this Agreement and includes but is not limited to Homeowner(s), Schumacher, and Schumacher's employees, officers, directors, owners, agents, or contractors. The rules referenced above may be found at <http://www.adr.org/aaa/faces/rules> or by contacting the American Arbitration Association at 1-800-778-7879, or by contacting Schumacher. You are entitled to a fair hearing but arbitration procedures, including but not limited to the rules governing discovery, are simpler and more limited than rules applicable in court. Pre-arbitration discovery is generally more limited than and different from court proceedings. The arbitrator's award is not required to include factual findings or legal reasoning, and any party's right to appeal or to seek modifications of rulings by the arbitrator is strictly limited.

The arbitrator(s) shall determine all issues regarding the arbitrability of the dispute. The powers of the arbitrator(s) shall include all legal and equitable remedies, including but not limited to, money damages, declaratory relief, and injunctive relief. Should any party refuse or neglect to appear at and participate in arbitration proceedings after due notice, the arbitrator will make an award based on evidence introduced by the parties who do appear and participate. If any state or federal law prohibits binding arbitration for any of the parties' claims, then the parties may proceed to non-binding arbitration of those claims, and all other claims will remain subject to binding arbitration as provided herein. Further, regarding any non-arbitrable claim, the parties must proceed with non-binding arbitration as a condition precedent to filing any claim in a court of law.

This arbitration paragraph shall not be interpreted as waiver of Schumacher's mechanic's lien rights. Either party's filing of a complaint asserting various claims and demanding arbitration of said claims shall not constitute a waiver of this arbitration paragraph.

THE PARTIES UNDERSTAND THAT BY AGREEING TO BINDING ARBITRATION THEY ARE AGREEING TO ARBITRATE AND NOT LITIGATE THEIR DISPUTES AND ARE GIVING UP THEIR RIGHT TO A TRIAL BY JURY OR TO A JUDGE AND THE RIGHTS TO APPEAL THE ARBITRATOR'S DECISION IN A COURT OF LAW AND TO SEEK REMEDIES FROM A COURT ARE LIMITED.

Receipt

We hereby acknowledge receipt of deposit of \$500.00.

We hereby acknowledge receipt of staking fee of 0.

Received by: Schumacher Homes of South Carolina, Inc.

By: *OMI*

Receipt

Homeowner(s) hereby acknowledge receipt of copy of Schumacher's Certificate of Insurance

By: *Everett Samuel*

By: _____

Name Printed: Everett Samuel

Name Printed: _____

Date: 7/31/14

Date: _____

The Parties have executed this Agreement, intending to be legally bound:

7/31/2014

Schumacher Homes • Frontdoor • Mark This Home As Sold

HOMEOWNER(S)

Schumacher Homes of South Carolina, Inc.

X Address: 1601 W. Jo Ann Lane
Addison, IL 60101

Address:

743 Jacobs Mill Pond Road
Columbia, SC 29045

Telephone: (803) 865-1083

X Telephone: 973 505 9430

Tax ID: 20-3943279

X By: [Signature]

By: [Signature]

X EVERETT A Samuel
Name Printed:

Date: 7/31/14

Date: 7/31/14

By: _____

Name Printed: _____

Date: _____

ELECTRONICALLY FILED - 2019 Aug 20 9:53 AM - DARLINGTON - COMMON PLEAS - CASE#2017CP1600526

and Plaintiff was forced to file 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 was forced to file 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 was forced to file 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 on the eve of trial.

LAW / ANALYSIS

I. 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. In fact, 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 without ever mentioning a request for arbitration. Plaintiff has expended considerable time and expense in his preparation for trial. As it stands, Plaintiff and his counsel are prepared to try the case and have put forth many resources to reach this level of readiness.

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 much 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 clearly 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, Plaintiff requests the Court deny the Defendants' motion. Defendants could not have feasibly delayed their request for arbitration any longer without actually trying the case to a jury verdict. There is ample prejudice to the Plaintiff as a result of this delay and the Defendants can provide no reasonable explanation why they waited over two years to assert their right to arbitration.

SAVAGE, ROYALL & SHEHEEN, L.L.P.

s/Vincent A. Sheheen, Esq. Bar # 11552

Greg B. Collins, Esq. Bar # 74010
Post Office Drawer 10
1111 Church Street
Camden, South Carolina 29020
(803) 432-4391

September 25, 2019



WARREN

VIA EMAIL: esamuel330@att.net



March 31, 2017

Attn: Mr. Everett Samuels
1559 Burkitts Lane
Darlington, SC 29532

Reference: Construction Issues at Samuels Residence
Represented: Everett Samuels
Date of Loss: October 7, 2016
Location of Loss: 1559 Burkitts Lane, Darlington, SC 29532
Warren File Number: 170094

Dear Mr. Samuels:

You asked for an investigation resulting from various construction issues regarding a loss dating back to October 7, 2016, for alleged water intrusion to your residence located at 1559 Burkitts Lane, Darlington, South Carolina 29532. The investigation and exploration focused on the overall exterior property areas and several interior residential areas. In light of this, you assigned The Warren Group (Warren) to determine if the standard of care performed by the contractor constructing your residence caused specific damage to your residence.

As a result of the investigation, a number of observations have been made and conclusions have been reached. The observations and conclusions stated in this report are based on information available as of this writing. It is conceivable that additional information may be forthcoming which bears on these conclusions and opinions. I reserve the right to review all conclusions and opinions at any future point in time, should, in fact, additional information become available.

Warren assigned me, Allan A. Abbata P.E., Senior Consulting Engineer with Warren, as engineer in charge of the investigation. I inspected, photographed, and documented my findings at the Samuels residence on March 23, 2017. Prior to my inspection, background information on the residence was received from Mr. Vincent Sheheen, an attorney with Savage, Royal and Sheheen representing Mr. Samuels. In addition, and as requested by Mr. Sheheen, I reviewed email correspondence in advance of an onsite interview with and property access provided by Mr. Everett Samuels, the homeowner.

It was reported by Mr. Samuels that in preparation of the home construction, Mr. Samuels paid another person to bring in approximately 10-15 tandem truckloads of fill material to 'level the ground' where the footprint of the residence would be constructed. Mr. Samuels ordered the fill material to dismiss the Contractor (Schumacher Homes) from adding additional cost for the overall construction. In addition, the original plans dated July 22, 2014, to construct the home as signed by Mr. Samuels and the Contractor were changed at some point prior to the building permit application process in September, 2014, without the knowledge or approval of Mr. Samuels. This change involved lowering the first-floor elevation by at least two feet.

During the October 7, 2016, weather incident, Mr. Samuels noticed water infiltrating his residence through ground level walls and doors. As part of my inspection, I conducted an in-depth investigation of the interior and exterior areas of the residence including the surrounding property associated with storm water drainage. Most of the remedial work within the residence was completed. For orientation purposes of this investigation, the front of the residence along Burkitts Lane faces in a southwesterly direction.

Attached to this report are 8 captioned photographs depicting the areas of concern at the residence and around the property where the residence is located. The photographs and captions illustrate and list some of the facts and observations used in the engineering analysis in this report.

Per Mr. Samuels, the residence was built in 2014-15. According to the presented and observed building plans signed by Mr. Samuels and the Contractor, the top of the first sub floor was designed to be approximately three feet above the final grade as depicted on these plans. In addition, Drawing No. 3 - Foundation Plan calls for a 'Raised Slab' consisting of 4 inches of concrete with a 6-mil vapor barrier. After the construction, several projects were undertaken by Mr. Samuel to deter storm water from entering his residence. There were some minor construction issues found in the residence including the garage area as well. In addition, Mr. Samuels reported that in order to remedy storm water drainage from backing up onto his property, he installed a sump pump and piping to direct and force the water off his property. Based on my inspection, the following was observed and analyzed:

- There was a gutter and downspout system around the entire residence with extended piping directing rainwater away from the residence;
- There was a sump pump and force main piping system in-place along the northwest property line;
- The first-floor concrete slab on grade is in a depressed area of the property;
- Exterior grading around the residence is not in accordance with the local building codes;

- There were reported signs of slab cracks but no signs of settlement or displaced foundations including the exterior brick veneer wall of the residence;
- Stress cracks were observed in drywall material at the stairs leading to the second floor and more likely than not are from structural issues yet to be uncovered;
- No raised front porch or steps as shown on the original home plans;
- No raised rear porch and steps as shown on the original home plans.

Based on my findings and review of the documentation provided, I have concluded the residence as constructed by the Contractor was with changes not approved by Mr. Samuels. These changes resulted in the water intrusion issues as described by Mr. Samuels. In addition, the changes also contributed to violation of the International Residential Code (IRC) Chapter 4 – Foundations, Section R401.3 – Drainage. This section of the code states “*Surface drainage shall be diverted to a storm sewer conveyance or other approved point of collection that does not create a hazard. Lots shall be graded to drain surface water away from foundation walls. The grade shall fall a minimum of 6 inches (152 mm) within the first 10 feet (3048 mm)*”.

I believe there is a direct correlation between the first-floor elevation as established by the Contractor and the surrounding grade which caused water to infiltrate the interior of the Samuels residence. From the documents provided, I also believe that the original home plans clearly depict a raised first floor slab with raised front and rear porch areas that included three sets of steps. I would also recommend that a site survey be undertaken to establish and verify the existing grades and first floor elevations at the residence and surrounding property.

Sincerely,

WARREN



Mr. Allan A. Abbata P.E.
Senior Consulting Engineer





Figure 1. A front view of the residence looking northeast. Note: The residence is constructed in a depression and there is improper grading away from the building in violation of the building codes.



Figure 2. A rear view of the residence looking southwest. Note: The slab and rear yard are flat with minimal grading away from the building.



Figure 3. A rear view of the residence looking northwest. Note: The slab and rear yard are flat with minimal grading away from the building.



Figure 4. A side view of the residence looking northwest.



Figure 5. A view of the residential driveway and garage entrance looking north.



Figure 6. A view along the east side property line showing grading to divert water away from the residence. Note: This work was performed by the homeowner and not the home contractor.



Figure 7. A view along the west side of the property line looking southwest. Note: The area between the drainage ditch on the right side and the residence on the left side does not drain properly.



Figure 8. A closer view of the front entrance. Note: The residence is constructed in a depression and there is improper grading away from the building in violation of the building codes. The original plans called for a raised porch with steps.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DARLINGTON	)	C/A No. 2017-CP-16-00526
)	
Everett Samuels, Jr.,)	
)	
Plaintiff,)	
)	
vs.	)	DEFENDANTS' MEMORANDUM IN
	)	SUPPORT OF MOTION TO DISMISS
Schumacher Homes of South Carolina,	)	AND REFER TO ARBITRATION
Heather McCarley and Dave Boldman,)	
)	
Defendants.)	

AND NOW COME Defendants Schumacher Homes of South Carolina, Heather McCarley and Dave Boldman, by and through their undersigned counsel, and file the following Memorandum in Support of Motion to Dismiss and Refer to Arbitration:

INTRODUCTION

Plaintiff Everett Samuels, Jr. ("Plaintiff") contracted with Defendant Schumacher Homes of SC, Inc. ("Schumacher"), to construct a home on property Plaintiff owned in Darlington County. At the time the parties entered into their contract, Plaintiff was living in Philadelphia. However, he was present for a pre-construction meeting at Schumacher's offices. Additionally, Plaintiff attended a lot walk on the property with Schumacher representatives to discuss the placement of the home on the property.

Schumacher is a semi-custom builder. Customers visit one of several Schumacher Design Centers, where they work with members of the Schumacher team to select a floor plan from available options. Schumacher then generates a preliminary set of architectural drawings. The customer will subsequently return to the design center to review the preliminary plans. To the extent that a customer wishes to the modify the initial plan, their requests are noted on the plans and initialed by the customer. The customer and the Schumacher representatives then walk through every aspect of the home and make design decisions and select finishes and fixtures from Schumacher's catalogs. As the customer makes their selections, they are entered into

Schumacher's system and ultimately turned into a detailed purchase contract, along with Schumacher's standard terms and conditions. Finally, Schumacher generates a revised set of plans that incorporate the customer's specific changes.

This case involves a dispute over the type of foundation that was used for the Plaintiff's home and the elevation of the building pad. Under the terms of the parties' contract, the homeowner was to be responsible for preparing the building pad, including providing any fill dirt that may be required. The Plaintiff did, in fact, hire an outside grading company to supply dirt and shape the pad. The preliminary drawings show the home sitting on an elevated concrete slab. The front elevation from that drawing set is attached hereto as Ex.1. The raised slab foundation would have involved raising the pad by an additional 18 inches and pouring a concrete slab on top of the compacted fill dirt. The finished floor elevation would have been two feet above grade. Thus, to enter the house, someone would walk up three steps to an elevated front porch to access the front door.

Plaintiff contends that he was consistent in his preference for the raised slab design shown in the preliminary drawings. However, Schumacher disputes this contention, recalling that the plaintiff expressly stated at the preconstruction meeting that he did not want to climb steps to the front door. To support its version of the facts, Schumacher notes that the contract, which the plaintiff signed at the pre-construction meeting, reflects a change in the foundation type from raised slab to slab, which designates a monolithic slab on grade foundation. The relevant page from the contract is attached as Exhibit 2. The final construction plans reflect this change as well. The front elevation from that set of drawings is attached as Exhibit 3. The final drawings were sent to Plaintiff's lender. Additionally, Schumacher contends they were also mailed to Plaintiff. Plaintiff disputes this and contends that he never saw any drawings showing a slab on grade foundation until after this suit was filed. Nevertheless, the home was built on grade. While Plaintiff was in Philadelphia during the majority of the construction process, his sister periodically took photos and emailed them to him. When Schumacher completed the house, Plaintiff accepted delivery of it. Plaintiff did not complain about the foundation type at

the time. However, he did note on one of the closing documents that he was concerned about the elevation of the home in the context of the surrounding property.

A Certificate of Occupancy was issued for the house on March 30, 2015. Plaintiff and his family lived in the home without incident until hurricane Matthew dropped torrential rains on South Carolina in October, 2016. Rivers across the state overtopped their banks and numerous dams were compromised, leading to widespread and unprecedented flooding from the coast all the way to the Pee Dee. On October 7, 2016, Plaintiff's property experienced flooding as a result of the record rainfall, combined with runoff from adjoining properties. Water entered into the interior of the home and rose above the baseboards. After the water receded, Plaintiff made repairs to the interior of the home, including upgrades to the flooring and other finishes.

Since Hurricane Matthew, the property has not experienced another flood event. Plaintiff complains of poor drainage, but he concedes that he has not experienced any prolonged periods of standing water or subsequent water intrusion into the interior of the home. Nevertheless, Plaintiff takes the position that the home is uninhabitable and that it must be torn down and rebuilt at a higher elevation. Schumacher contends that the house was built to code, passed inspection and, but for the 1000-year flood brought on by Hurricane Matthew, has performed very well throughout numerous other severe weather events. To the extent that drainage could be improved on the lot, Schumacher has proposed several simple and low-cost solutions.

For the reasons set forth below, the Court should dismiss this action, because the parties have agreed to arbitrate the disputes raised in this lawsuit. In the alternative, the Court should compel the parties to arbitrate this dispute in accordance with their agreement.

ARGUMENTS

The parties entered into a July 31, 2014 Purchase Agreement/Construction Agreement ("Agreement"), under which Defendant Schumacher was to construct the home for Plaintiff. Relevant portions of the parties' Agreement are attached to Defendants' Notice of Motion and Motion to Dismiss and Refer to Arbitration. The Agreement contained the following waiver of jury trial and arbitration provision:

The Parties agree that any claim, dispute or cause of action, of any nature, including but not limited to, those arising under tort, contract, consumer protection or other statute, equity, law, fraud, intentional tort, breach of statute, ordinance, regulation, code, or other law, or by gross or reckless negligence, arising out of or related to, the negotiations of the Contract Documents, the Home, the Property, materials or services provided to the Home or Property, the performance or non-performance of the Contract Documents or interaction of Homeowner(s) and Schumacher or its employees, agents, or subcontractors, *shall be subject to final and binding arbitration* by an arbitrator appointed by the American Arbitration Association in accordance with the Construction Industry Rules of the American Arbitration Association, and judgment may be entered on the award in a court of appropriate venue. . . .

THE PARTIES UNDERSTAND THAT BY AGREEING TO BINDING ARBITRATION THEY ARE AGREEING TO ARBITRATE AND NOT LITIGATE THEIR DISPUTES AND ARE GIVING UP THEIR RIGHT TO A TRIAL BY JURY OR TO A JUDGE AND THE RIGHTS TO APPEAL THE ARBITRATOR'S DECISION IN A COURT OF LAW AND TO SEEK REMEDIES FROM A COURT ARE LIMITED.

(*See Agr't*, at 9-10 ¶ 44 (emphasis added)). The Agreement further provides that "[t]he arbitrator(s) shall determine all issues regarding the arbitrability of the dispute." (*See id.*, at 10 ¶ 44). The Agreement further provides that:

The Contract Documents shall be governed by and construed in accordance with the laws of the state in which the home is to be constructed[, *i.e.*, South Carolina]. The Parties agree that any and all arbitration proceeding, and any claims, cause of actions or disputes not otherwise subject to arbitration, regardless of the nature or kind, shall be venued in the county and state of Schumacher's office where Schumacher signed this Agreement [(Columbia, according to Schumacher's signature line)].

(*See id.*, at 9 ¶ 37). Plaintiff alleges that the Agreement "was consummated in Darling County, South Carolina." (*See Pl.'s Compl.* ¶ 6).

For the reasons that follow, the Court should require Plaintiff to arbitrate the disputes he has asserted in this lawsuit.

B. The Court Should Require Arbitration Under the Federal Arbitration Act.

The Federal Arbitration Act ("FAA"), which applies to this arbitration provision, mandates that arbitration agreements in contracts "evidencing a transaction involving commerce . . . 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. § 2. The FAA “is a congressional declaration of a liberal federal policy favoring arbitration agreements.” *See Drews Distrib. v. Sillicon Gaming, Inc.*, 245 F.3d 347, 349 (4th Cir. 2001). The “central” purpose of the FAA is to “ensure that ‘private agreements to arbitrate are enforced according to their terms.’” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010) (citation omitted).

Plaintiff does not contest whether this dispute is within the substantive scope of the arbitration provisions of the Agreement. He does not contest the enforceability of the arbitration provision. Rather, Plaintiff *only* argues that Defendants have waived their right to demand arbitration under the Agreement by not requesting arbitration sooner. In the interest of efficiency, Defendants will only address waiver in this Memorandum. For the reasons that follow, Plaintiff’s argument lacks merit and does not warrant denial of Defendants’ Motion.

Initially, Defendants note that the Court is not empowered to determine the threshold issue of whether this dispute should be submitted to arbitration in the first instance. The Agreement provides that “[t]he arbitrator(s) shall determine all issues regarding the arbitrability of the dispute.” (*See Agr’t*, at 10 ¶ 44). Rule R-9 of the American Arbitration Association’s Construction Industry Arbitration Rules and Mediation Procedures (“Construction Industry Rules”) — which the Agreement provides will govern the arbitration — provides that “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.” Therefore, it is clear that the parties have chosen that issues relating to arbitrability, particular claims of waiver, must be decided by the arbitrator(s).

The Supreme Court has likewise observed that, under the FAA, procedural matters relating to arbitration are for the arbitrator(s):

[C]ourts presume that the parties intend *arbitrators, not courts*, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. *See [Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 86 (2002)]* (courts assume parties “normally expect a forum-based decisionmaker to decide forum-specific *procedural gateway matters*” (emphasis added)). These procedural matters include claims of “waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25, 103 S. Ct.

927, 74 L.Ed.2d 765 (1983). And they include the satisfaction of “ ‘prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.’” *Howsam, supra*, at 85, 123 S. Ct. 588 (quoting the Revised Uniform Arbitration Act of 2000 § 6, Comment 2, 7 U.L.A. 13 (Supp.2002); emphasis deleted). *See also* § 6(c) (“An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled”); § 6, Comment 2 (explaining that this rule reflects “the holdings of the vast majority of state courts” and collecting cases).

BG Grp., PLC v. Republic of Argentina, 572 U.S. 25, 34–35, 134 S. Ct. 1198, 1207, 188 L. Ed. 2d 220 (2014) (emphasis added). “[Q]uestions of mere delay, laches, statute of limitations, and untimeliness raised to defeat the compelled arbitration are issues of procedural arbitrability exclusively reserved for resolution by the arbitrator” *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 456 (4th Cir. 1997); *Joe v. Security Fin. Corp. of S.C.*, No. CA 0:14-159-CMC-SVH, 2014 WL 2094978, at *3 (D.S.C. May 20, 2014) (“These procedural questions, however, are not for the court to decide. As explained above, these are issues for the arbitrator.”). “[A]ny claim of untimeliness, waiver or laches . . . is for the arbitrator and may not be an excuse for non-arbitrability.” *In re Mercury Const. Corp.*, 656 F.2d 933, 942 (4th Cir. 1981), *aff’d sub nom. Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 765 (1983)).

Therefore, under the Agreement and the relevant case law, the question of whether Defendants waived the right to arbitrate this dispute is an issue for the arbitrators. As a result, the Court should dismiss this action and/or compel the parties to arbitrate this dispute (including the issue of waiver). Notably, Rule R-54 of the Construction Industry Rules expressly states that “[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party’s right to arbitrate.” The rules selected by the parties’ Agreement expressly rejects Plaintiff’s entire waiver argument. It is highly likely that the arbitrator(s) will conclude that Defendants did not waive the right to arbitrate.

In any event, even if this issue is proper for determination by this Court, Plaintiff has not shown that Defendants waived their right to arbitrate this dispute. The Fourth Circuit has held that a party asserting a waiver of the right to arbitrate bears the burden of showing prejudice:

Such default or waiver arises when the party seeking arbitration “so substantially utiliz[ed] the litigation machinery that to subsequently permit arbitration would

prejudice the party opposing the stay.” *Maxum Founds., Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985). However, in concert with other circuits, we have consistently held that because of the strong federal policy favoring arbitration “we will not lightly infer the circumstances constituting waiver.” *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 95 (4th Cir.1996). The party opposing arbitration on the basis of waiver thus bears a “heavy burden.” [*MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 251 (4th Cir.2001)] (internal quotations omitted); *Am. Recovery Corp.*, 96 F.3d at 95.

See Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc., 380 F.3d 200, 204 (4th Cir. 2004) (reversing denial of motion to compel arbitration). "Even if the party seeking to compel arbitration has engaged in litigation to some degree, the crucial question is whether the party opposing arbitration has suffered actual prejudice." *See Gadberry v. Rental Serv. Corp.*, 2011 WL 767034, at *3 (D.S.C. Jan. 21, 2011). The party opposing arbitration "bears the heavy burden of proving waiver." *See American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 95 (4th Cir. 1996).

Plaintiff argues that Defendants waived the right to arbitrate because in the two years this lawsuit has been pending: (a) the parties engaged in discovery (including written discovery, document subpoenas, and depositions); (b) the parties entered into scheduling orders; (c) Plaintiff permitted Schumacher access to his home; and (d) the parties took part in mediation. For the reasons that follow, none of these claims are sufficient to establish waiver, insofar as Plaintiff has not been prejudiced.

There is certainly no prejudice from the reasonable discovery conducted in this matter. The discovery taken to date (including two days of depositions occurring at the office of Plaintiff's counsel) would likely have occurred even if the case was submitted to arbitration two years ago. Additionally, the written discovery conducted here would most probably have been available in arbitration. *See Constr. Indus. Rules R-24* (permitting arbitrator to allow discovery in regular-track case). Plaintiff has noticed depositions to be taken in this matter in October; Defendants would allow those depositions to go forward, for Plaintiff's use in arbitration. Plaintiff has not presented any evidence to show that the discovery taken in this case would not have been permitted in arbitration. The discovery conducted in this case would not go to waste if

the case proceeds in arbitration. Rather, any discovery taken in this matter can certainly be used in an arbitration proceeding.

Aside from discovery, there has been little litigation of this matter in the Court. Defendants have not filed any substantive or dispositive motions in this matter. The only discovery motion in this case was resolved prior to a hearing. The *only* real involvement of the Court in the lawsuit has been to enter two short consent scheduling orders. Plaintiff has not been prejudiced in any way from any filings in this lawsuit. To the contrary, there would have been similar filings had this case been initiated in arbitration from the beginning (as Plaintiff agreed to do).

The mediation of this lawsuit also did not prejudice Plaintiff. Under the Construction Industry Rules, the parties would have been required to mediate this case had it been initially asserted in arbitration, either prior to or at the arbitration. (*See* Const. Indus. Rules R-10 ("In all cases where a claim or counterclaim exceeds \$100,000 . . . the parties shall mediate their dispute.")). In any event, Plaintiff has not shown any undue prejudice from attempting to resolve this dispute.

Finally, Plaintiff was not prejudiced by allowing Defendants access to his home. Such access was granted without the need for formal requests or a court order. Rather, the access occurred in connection with settlement negotiations. In any event, such access would most certainly have been requested irrespective of whether this case was litigated in this Court or in arbitration. Plaintiff cannot rely upon this as a basis for his waiver argument.

In light of the foregoing, Plaintiff has not shown that he would be harmed in any way by the dismissal of this action and/or its reference to arbitration. To the contrary, most of the alleged "waivers" by Defendants would have occurred even if this case was pending before arbitrator(s). In the end, arbitration would be more efficient for the parties and the court, as it is the parties' selected method for dispute resolution. Nonetheless, in an effort to reduce the claimed burden on Plaintiff, Defendant Schumacher is willing to agree to conduct the arbitration as expeditiously as possible and to pay the entire cost of arbitration.

CONCLUSION

For all of the foregoing reasons, this Court should grant Defendant's Motion to Dismiss and Refer to Arbitration. The Court should either: (a) dismiss this action and direct the parties to engage in arbitration; or (b) stay this lawsuit and compel the parties to engage in arbitration under their agreement with each other.

Barnwell Whaley Patterson & Helms, LLC

K. Michael Barfield

K. Michael Barfield

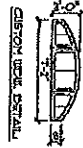
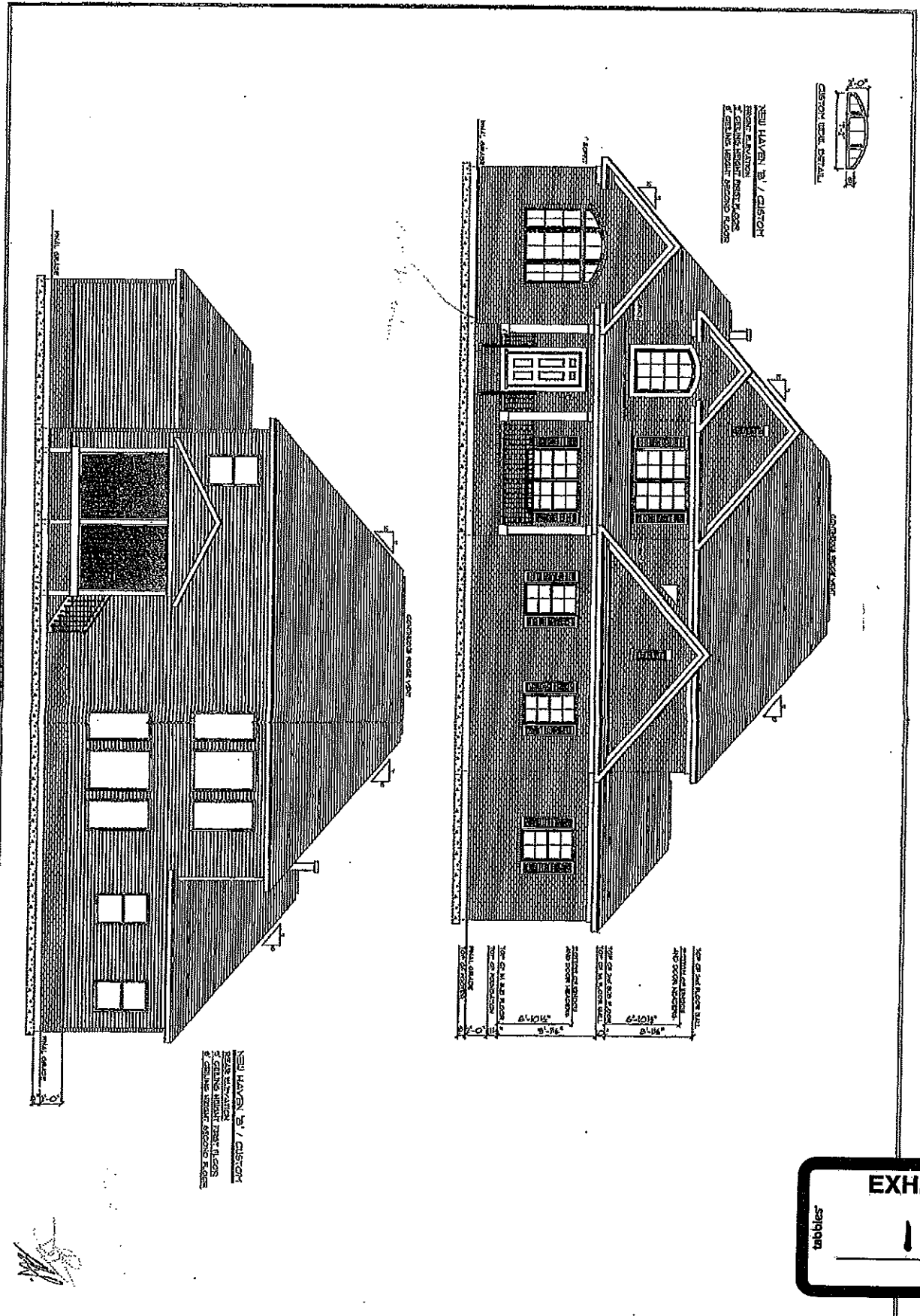
P.O. Drawer H

Charleston, SC 29402

mbarfield@barnwell-whaley.com

*Attorney for Defendants Schumacher Homes of
South Carolina, Heather McCarley and Dave
Boldman*

September 25, 2019
Charleston, South Carolina

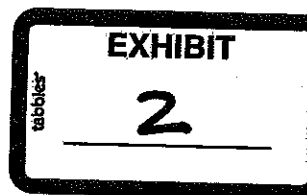


NEW HAVEN '18 / CUSTOM
 FRONT ELEVATION
 AT GRADING HEIGHT. FINISH FLOOR
 IS GRADE. HEIGHT TO SECOND FLOOR

NEW HAVEN '18 / CUSTOM
 SIDE ELEVATION
 AT GRADING HEIGHT. FINISH FLOOR
 IS GRADE. HEIGHT TO SECOND FLOOR



<p>SCHUMACHER HOMES</p>	Columbia, SC 240 Fern Drive, Suite 3 Columbia, SC 29223 Phone: (812) 267-3487 Construction: (866) 466-1003 www.schumacherhomes.com	EVERETT MANUEL ARCHITECT 400-94-0752	NEW HAVEN '18 / CUSTOM 2 1/2" x 3/4"	FIRST FLOOR LIVING AREA - 2240 SQ.FT. SECOND FLOOR LIVING AREA - 901 SQ.FT. SECOND FLOOR OPEN AREA - 253 SQ.FT. GARAGE AREA - 161 SQ.FT. PORCH AREA - 164 SQ.FT.	SCALE: 1/4" = 1'-0" DATE: JULY 18, 2018 DRAWN BY: RUD
	LOT 2 BURNETT LANE DARLINGTON, SC 29533 DARLINGTON COUNTY	© 2017 SCHUMACHER HOMES, INC. ALL RIGHTS RESERVED. NO PORTION OF THIS DOCUMENT MAY BE REPRODUCED OR TRANSMITTED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL, INCLUDING PHOTOCOPYING, RECORDING, OR BY ANY INFORMATION STORAGE AND RETRIEVAL SYSTEM, WITHOUT PERMISSION IN WRITING FROM SCHUMACHER HOMES, INC. A LICENSE TO REPRODUCE THIS DOCUMENT IS GRANTED TO THE USER OF THIS DOCUMENT FOR THE USER'S PERSONAL USE ONLY. THIS DOCUMENT IS NOT TO BE REPRODUCED OR TRANSMITTED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL, INCLUDING PHOTOCOPYING, RECORDING, OR BY ANY INFORMATION STORAGE AND RETRIEVAL SYSTEM, WITHOUT PERMISSION IN WRITING FROM SCHUMACHER HOMES, INC.			



Homeowner:

Everett Samuel
Home Address:
 141 Oak Street
 Darlington, South Carolina 29532
 Home Phone: (773) 505-9430
 Work Phone: (843) 861-9059
 Cell Phone:

Building Address:
 Burkitts Lane
 Darlington, SC 29532
 County: Darlington
 Area: Darlington
 Email: esamuel330@att.net

BASE PRICE: \$228,125.00

Custom Options:



Ten year insured warranty **\$0.00ea** **1** **\$0.00**

Every Schumacher Home is backed by a Ten-Year Insured Transferable Structural Warranty. The guidelines to qualify for this warranty are so strict that only 1% of builders nationwide qualify to offer it. Requirements include not only superior building materials and workmanship, but financial management and customer satisfaction as well. 2-10 Home Buyers Warranty, which provides the insured warranty, is one of the largest construction insurance companies in the country. Schumacher Homes has been recognized for having one of the lowest claim rates in the nation. Schumacher Homes is pleased to have received the Diamond Builder Designation by 2-10 Home Buyers Warranty for excellence in construction standards, customer satisfaction and financial stability. Only 46 Builders in the last 15 years have received this designation nationally. (vca0105)

Garage right (standard plan) **\$0.00ea** **1** **\$0.00**

Garage locations are assumed to be on the right side of the home. At the Homesite Inspection, your Personal Builder will review with you the proper location based on the contour of your specific homesite. Your garage should be on the high side of your homesite. (vca0106)

3 car side load garage (brick) **\$11,100.00ea** **1** **\$11,100.00**

This selection moves the Standard Overhead Garage Door to the outside wall of the garage and adds a 12 ft. wide brick front 3rd bay. Brick will be added to the front of the garage in place of the garage door. Two standard windows will be added to the front wall of the garage with shutters or wrapped windows as per elevation. (D464a)



Construction Detail **\$22,369.62** **1** **\$22,369.62**

Add 17x14 Dual owzers retreat off laundry room. Owners retreat to have full bathroom and WIC. Rearrange laundry room with opening towards stairs and relocate powder room to the other side of the door from garage into the mud room. (vca0125)



Construction Detail **\$11,426.00** **1** **\$11,426.00**

12x14 covered porch off morning room with vinyl ceiling aluminum screen and handrail with screen door and 3 treated steps to grade. (vca0125)

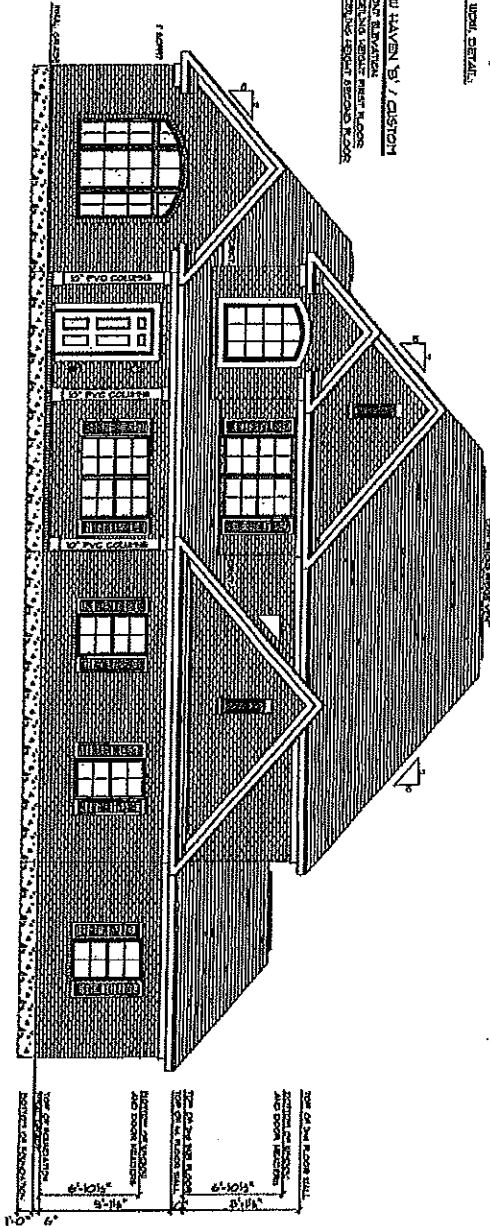


Per General Manager **\$0.00** **1** **\$0.00**

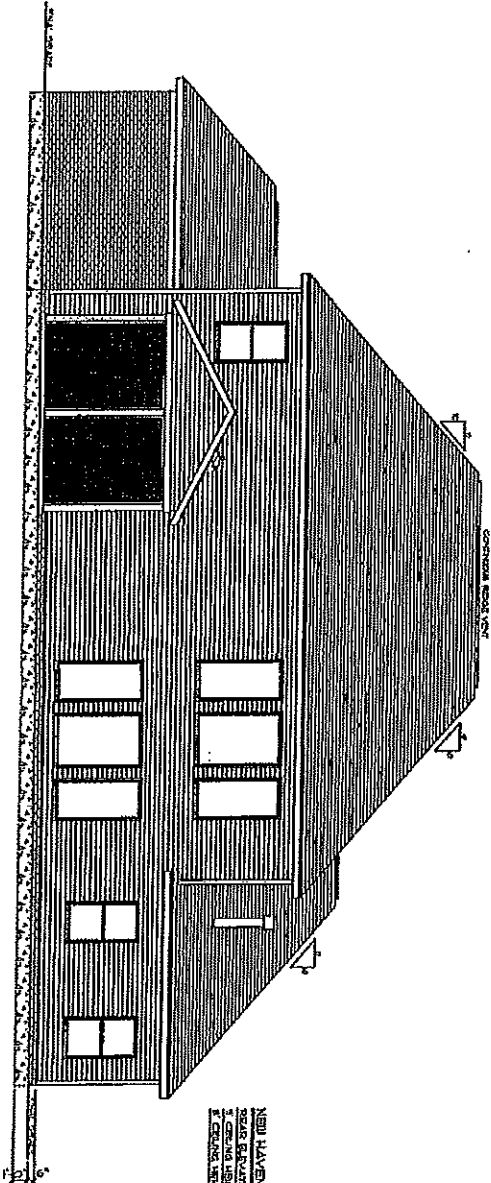
FOUNDATION- House will need to be slab construction. 8" of fill included for slab. Any extra fill will be needed to be paid for by the H.O. (vca0650)



NEW HAVEN 1 1/2 / CUSTOM
 FRONT ELEVATION
 1. CEILING LINE
 2. CEILING LINE
 3. CEILING LINE



TOP OF FINISH FLOOR WILL BE 4'-0" ABOVE FINISH GRADE
 TOP OF FINISH FLOOR WILL BE 4'-0" ABOVE FINISH GRADE
 TOP OF FINISH FLOOR WILL BE 4'-0" ABOVE FINISH GRADE



NEW HAVEN 1 1/2 / CUSTOM
 SIDE ELEVATION
 1. CEILING LINE
 2. CEILING LINE
 3. CEILING LINE

EXHIBIT
3

FINAL DRAWING APPROVED:
 08-29-14
 REVISED ON:
 04-17-15

<p>Columbia, SC 240 Four Drive, Suite 3 Columbia, SC 29229 Sales (811) 267-3482 Construction (866) 466-1083 www.schunaberhomes.com</p> <p>SCHUNABER HOMES</p>	<p>CLIENT NAME: EVERETT DANIEL DATE: 08-18-14 LOCATION: BARKITT'S LANE DARLINGTON, SC 29533 DARLINGTON COUNTY</p>	<p>STYLE: NEW HAVEN 1 1/2 / CUSTOM FIRST FLOOR LIVING AREA - 2240 SQ.FT. SECOND FLOOR LIVING AREA - 507 SQ.FT. SECOND FLOOR OPEN AREA - 888 SQ.FT. GARAGE AREA - 161 SQ.FT. PORCH AREA - 246 SQ.FT.</p>	<p>DATE: 08-29-14 SCALE: 1/8" = 1'-0" SHEET: 1 OF 1 © COP FRUIT 2014. ALL RIGHTS RESERVED. NO PART OF THIS BOOK MAY BE REPRODUCED OR TRANSMITTED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL, INCLUDING PHOTOCOPYING, RECORDING, OR BY ANY INFORMATION STORAGE AND RETRIEVAL SYSTEM, WITHOUT PERMISSION IN WRITING FROM COP FRUIT. ALL RIGHTS RESERVED.</p>
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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DARLINGTON)	C/A No. 2017-CP-16-00526
)	
Everett Samuels, Jr.,)	
)	
Plaintiff,)	
)	
vs.	)	DEFENDANTS' NOTICE OF MOTION
	)	AND MOTION TO RECONSIDERATION
Schumacher Homes of South Carolina,	)	AND ALTER OR AMEND JUDGMENT
Heather McCarley and Dave Boldman,)	
)	
Defendants.)	

YOU WILL PLEASE TAKE NOTICE that within ten days after service of this notice or as soon thereafter as it may be heard, Defendants Schumacher Homes of South Carolina, Heather McCarley and Dave Boldman, by and through the undersigned counsel, will move before this Honorable Court, pursuant to Rule 59(e), South Carolina Rules of Civil Procedure, that the Order of The Honorable Roger E. Henderson dated October 7, 2019 denying Defendants' Motion to Dismiss and Refer to Arbitration be reconsidered and altered or amended.

As argued by Defendants in their Memorandum in Support of Defendants' Motion to Dismiss and Compel Arbitration and at the hearing of Defendants' motion, incorporated here by reference, Plaintiff has not demonstrated that he would be prejudiced if this matter were referred to arbitration. The fact that the parties have taken several depositions in the case to date would only expedite the arbitration process. Additionally, the case law cited by Defendants in their supporting memorandum clearly holds that the question of whether a party has waived their right to invoke an arbitration clause in a contract is a fact question to be determined by the arbitrator rather than the Court. As such, Defendants respectfully request that the Court reconsider its denial of Defendants' motion to compel arbitration and amend its judgment accordingly.

Schumacher Homes of South Carolina is an Ohio corporation. At the time the parties entered into the contract, the Plaintiff was a citizen and resident of Pennsylvania. He is now a resident of South Carolina. Given these and other connections to interstate commerce, the Federal Arbitration Act applies to the parties' contract. Therefore, this action should be immediately dismissed so that the parties may resolve their dispute before an arbitrator, per the terms of their agreement.

This motion will be based on the pleadings filed in this matter, along with any affidavits, memoranda, and oral argument presented to the Court.

Barnwell Whaley Patterson & Helms, LLC

s/K. Michael Barfield

K. Michael Barfield

P.O. Drawer H

Charleston, SC 29402

mbarfield@barnwell-whaley.com

***Attorney for Defendants Schumacher Homes of
South Carolina, Heather McCarley and Dave
Boldman***

October 16, 2019
Charleston, South Carolina

91543

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

NOV 27 2019

SC Court of Appeals

Roger E. Henderson, Circuit Court Judge

Case No. 2017-CP-16-0526

Everett Samuels, Jr.,

Respondent,

v.

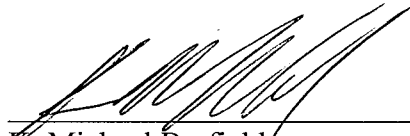
Schumacher Homes of South
Carolina, Heather McCarley,
and Dave Boldman,

Appellants.

NOTICE OF APPEAL

Schumacher Homes of South Carolina, Heather McCarley, and Dave Boldman appeal the order of the Honorable Roger E. Henderson dated October 7, 2019, and Judge Henderson's subsequent order denying Schumacher Homes, et al.'s Rule 59(e) Motion for Reconsideration dated November 21, 2019.

November 25, 2019



K. Michael Barfield
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700
Mbarfield@barnwell-whaley.com
Attorney for Appellants

Other Counsel of Record:
Greg B. Collins, Esq.
Vincent A. Sheheen, Esq.
Savage, Royal & Sheheen, LLP
P.O. Drawer 10
Camden, SC 29020
vsheheen@thesavagefirm.com
gcollins@thesavagefirm.com
(803) 432-4391
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

NOV 27 2019

SC Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Case No. 2017-CP-16-0526

Everett Samuels, Jr.,

Respondent,

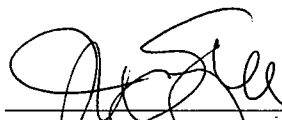
v.

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

Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Greg B. Collins and Vincent A. Sheheen, Savage, Royal & Sheheen, LLP, P.O. Drawer 10, Camden, SC 29020 by depositing a copy of it in the United States Mail, postage prepaid, on November 25, 2019.



Janet Segell, Legal Assistant



Janet Segell, Legal Assistant
jsegell@barnwell-whaley.com

reply to Charleston office

November 25, 2019

RECEIVED

NOV 27 2019

SC Court of Appeals

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 of South Carolina, et al.*
Appeal from Darlington County Court of Common Pleas

Dear Madam Clerk:

Please find enclosed a Notice of Appeal in the above-referenced matter, as well as our firm's check in the amount of \$250 for the filing fee. We would greatly appreciate your returning a date-stamped copy of the Notice in the enclosed, self-addressed envelope.

As demonstrated by the enclosed Proof of Service, I am serving a copy of the Notice of Appeal on counsel for Respondent.

With regards,

A handwritten signature in black ink, appearing to read "J. Segell", is written over the typed name of Janet Segell.

Janet Segell, Legal Assistant to
K. Michael Barfield

/jas
enclosures

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

{00887819.DOCX.1 }

www.barnwell-whaley.com

SOUTH CAROLINA OFFICE:
288 Meeting Street, Suite 200, Charleston, SC 29401
P 843.577.7700 F 843.577.7708

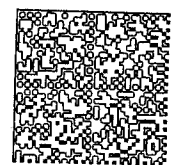
NORTH CAROLINA OFFICE:
1427 Military Cutoff Road, Suite 202, Wilmington, NC 28403
P 910.679.1388 F 910.679.4663

REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

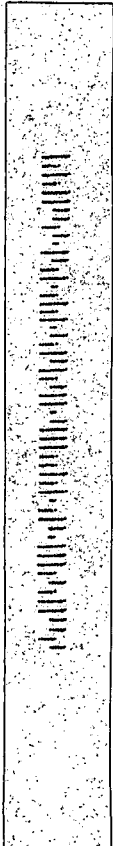
**BARNWELL
WHALLEY** | **80**
PATTERSON & HELMS LLC | YEARS
P.O. Drawer H | Charleston SC 29402-0197 ■ 1938-2018

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



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

RECEIVED
NOV 27 2019

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.

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

Electronically signed on 2019-10-04 17:46:35 page 6 of 6

ELECTRONICALLY FILED - 2019 Oct 07 8:36 AM - DARLINGTON - COMMON PLEAS - CASE#2017CP1600526



K. Michael Barfield
mbarfield@barnwell-whaley.com

Charleston office

February 17, 2020

RECEIVED
FEB 20 2020
SC Court of Appeals

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 be advised that our firm represents the Appellants in the above-referenced appeal. I am writing to request a 30-day extension for the filing and service of Appellants' Initial Brief and Designation of Matter, which are currently due on February 26, 2020. With the extension, the Brief and DOM would be due on March 27, 2020. There has been no previous request for an extension.

I have enclosed our firm's check for \$25.00. If you require anything further to grant this request, please let me know. Thank you for your consideration and attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "K. Michael Barfield", is written over a series of horizontal lines.

K. Michael Barfield

/jas
enclosure

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

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