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SC Court of Appeals

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 Samuel, Jr. .....Respondent

v.

Schumacher Homes of South Carolina, Heather McCarley, and

Dave Boldman .....Appellants

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

The Plaintiff, Everett Samuel, Jr. ("Plaintiff") filed this action in the Court of Common Pleas of Darlington County on July 10, 2017. (*See* R. pp. 011-19). Plaintiff named Schumacher Homes of South Carolina ("Schumacher"), Heather McCarley ("MacCarley") and Dave Boldman ("Boldman") as defendants to the suit. (All three will be collectively referred to as "Defendants"). (*See* R. p. 013 ¶¶ 2-3). Prior to filing the action, Plaintiff served Schumacher with a right to cure letter outlining the issues eventually identified in the Complaint. The letter was received in April of 2017. Plaintiff entered into a contract with Defendants to design and build a home on his property in Darlington, South Carolina. (*See* R. p. 014 ¶ 6). Plaintiff paid Defendants $359,000 and relied on Defendants to design and build his home on the subject property according to industry standards and applicable codes. (*See* R. p. 014 ¶ 7). After construction of the home, Plaintiff endured flooding events due to the Defendants' recklessness, gross negligence, negligence, misrepresentations, breach of contract, and other intentional actions in the negotiations and construction of the home. (*See* R. pp. 014-15 ¶¶ 8-11).

Because of Defendants' actions and inactions, Plaintiff has expended and continues to expend a large amount of money to protect his home from flooding. (*See* R. p. 014 ¶ 8). Plaintiff's claims in this matter include (a) negligence, gross negligence and recklessness; (b) breach of contract; (c) breach of express warranties; (d) breach of implied warranties; (e) negligent and reckless misrepresentation; and (f) fraud and fraudulent inducement. (*See* R. pp. 015-19 ¶¶ 12-39). Although there are many deficient issues concerning the construction of the home, the main point in dispute is that the Plaintiff alleges Defendants contracted to build his home on a 32 inch raised slab foundation, but decided to intentionally and recklessly build the home on a monolithic slab foundation on grade, causing it to flood.

After being served with the current lawsuit, Defendants filed their Answer to the Complaint on August 28, 2017, denying liability, but not asserting arbitration. (*See* R. pp. 020-24). Plaintiff served Defendants with Interrogatories and Requests to Produce on October 5, 2017. Defendants then served its Interrogatories and Requests to Produce on the Plaintiff on November 8, 2017. Defendants' written discovery requests included 38 Interrogatories (including subsections) and 40 Requests to Produce (including subsections). Defendants' discovery requests encompassed all of the issues of the case and made no specific reference to the arbitration clause in the contract. Plaintiff was forced to file a motion to compel responses to his discovery requests on April 6, 2018. (*See* R. p. 025). After the hearing was scheduled for this motion, Defendants ultimately partially responded to the discovery requests and the motion to compel was withdrawn. Defendants served Plaintiff with one round of supplemental discovery requests and Plaintiff served Defendants with multiple supplemental requests. Defendants responded to discovery with multiple productions of documents which required extensive review and analysis.

The parties consented to the filing of two separate scheduling orders on August 6, 2018 and February 19, 2019 respectively. (*See* R. pp. 026-34). The first scheduling order simply stated mediation to be completed by February 12, 2019 and eligible for trial on March 12, 2019. (*See* R. pp. 026-29). The subsequent scheduling order called for the case to be eligible for trial June 10, 2019. (*See* R. pp. 030-34). Defendants entered into these scheduling orders voluntarily without making any mention of seeking arbitration.

Mediation of the case took place January 31, 2019 in which the case resulted in a continuing effort to resolve the case. (*See* R. pp. 035-36). During the course of mediation and

the subsequent settlement negotiations, Defendants never mentioned any desire to invoke arbitration.

Throughout the discovery phase of the case, several depositions were taken of potential witnesses. Defendants took the depositions of the Plaintiff and his sister Janie Latham on July 17, 2018. Plaintiff took the depositions of Eric Fleming and Dave Boldman on August 8, 2018 and August 31, 2018 respectively. All of these depositions involved questioning about all facets of the case, without any mention of the arbitration clause in the contract.

On August 12, 2019, Plaintiff was forced to file a motion to compel a discovery response to an inquiry about Defendants' net worth. (*See* R. pp. 037-42). In response to this motion, on August 20, 2019, Defendants' filed a motion to dismiss and refer to arbitration. (*See* R. pp. 043-47). This is the first time in the two years of litigation that Defendants made reference to the arbitration clause in the contract despite two separate potential trial dates passing. Both motions were heard by the Court on September 26, 2019 in a formal hearing. The Honorable Roger E. Henderson entered an order denying the Defendants' motion on the ground that they waived any right to arbitration by their extensive participation in litigation within the Court of Common Pleas and failure to timely claim arbitration. (*See* R. pp. 004-09). Defendants filed a motion to reconsider on October 16, 2019. (*See* R. pp. 073-74). The Honorable Roger E. Henderson held a hearing on the motion and formally denied the Motion for Reconsideration on November 21, 2019. (*See* R. p. 010).

Additionally, on October 15, 2019, the Honorable Roger E. Henderson entered an order granting Plaintiff's motion to compel a response to his request for the financial net worth of the Defendants. (*See* October 15, 2019 Order Granting Plaintiff's Motion to Compel). Despite the

Court ordering Defendants to provide the requested information within ten days, Defendants have yet to provide a response.

After asserting arbitration, Defendants continued its discovery efforts by noticing and taking the deposition of the Plaintiff's expert, Alan Abbata, on November 12, 2019. Defendants' inquired into all facets of the expert's opinions and observations in the case. Defendants also allowed Plaintiff to take the depositions of Heather McCarley and Defendant expert, Martin Phillips on October 15, 2019.

On November 25, 2019, Defendants filed their Notice of Appeal in the instant matter. (*See* R. pp. 075-86). On February 17, 2020, Defendants requested a 30 day extension to file its brief in this matter, which extended the deadline to March 27, 2020[1]. (*See* R. p. 087). Plaintiff ultimately received Defendants' brief on April 4, 2020 in lieu of the COVID-19 accommodations extending deadlines.

[1] It should be noted this request was made before any special accommodation were needed for the current COVID-19 situation.

ARGUMENT

A. Standard of Review

"[D]eterming whether a party waived its right to arbitrate is a legal conclusion subject to de novo review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them." *Liberty Builders, Inc. v. Horton,* 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999).

B. The Trial Court correctly ruled Defendants waived arbitration

Although South Carolina favors arbitration, a party may waive their right to enforce an arbitration clause. *See Rhodes v. Benson Chrysler-Plymouth, Inc.,* 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). "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." *Evans v. Accent Manufactured Homes, Inc.,* 352 S.C. 544, 550, 575 S.E.2d 75, 76 (Ct .App.2003). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Rhodes,* 374 S.C. at 126, 647 S.E.2d at 251(quoting *Liberty Builders, Inc.,* 336 S.C. at 665, 521 S.E.2d at 753).

Assuming the Federal Arbitration Act applies to this case, Defendants fail to mention or address the default provision in 9 U.S.C. § 3. The FAA authorizes a party to an arbitration agreement to demand a stay of proceedings in order to pursue arbitration, "provid[ed] the applicant for the stay is not in default" of that right. 9 U.S.C. § 3. 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).

There are three factors a Court generally considers when determining whether a party has waived its right to compel arbitration. *See Rhodes,* 374 S.C. at 126, 647 S.E.2d at 251. First, the Court considers "whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration." *Id.* Second, the Court examines "whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration." *Id.* Additionally, the Court examines whether the case is on the trial docket at the time of a party's motion to compel arbitration in analyzing this second factor. *Id.* at 128, 647 S.E.2d at 252. Finally, the Court considers "whether the non-moving party was prejudiced by the delay in seeking arbitration." *Id.* at 126, 647 S.E.2d at 251.

The Honorable Roger E. Henderson thoroughly addressed these factors in his order denying Defendants' Motion to Dismiss and Refer to Arbitration and concluded with the following summary:

> 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.

(*See* R. pp. 004-09 at 008).

Since the order denying arbitration, Defendants have been ordered to provide their financial net worth, which they will undoubtedly re-argue in arbitration if the case is referred. (*See* October 15, 2019 Order Granting Plaintiff's Motion to Compel). Defendants now make the claim that the current issue of waiver is for the arbitrator to decide despite the fact they have fully litigated the case to the brink of trial in the Court of Common Pleas. This request is nonsensical and would create a very dangerous scenario in which parties could abuse the litigation process to the detriment of anyone who dares challenge a large company with resources to drag out litigation and disputes. It would also allow entities in the Defendants' shoes to default and/or waive arbitration through participation in litigation, and when things aren't going their way in the litigation, refer the case to arbitration to start over in the hopes of a better outcome.

This Court should affirm the trial Court's ruling because there was more than ample evidence reasonably supporting its decision. In fact, since asserting its alleged right to arbitration, Defendants have further utilized the litigation machinery to take the deposition of Plaintiff's expert.

I. Did the trial Court correctly consider the question of waiver of Appellants' claim for arbitration based on the Appellants' extensive participation in litigation?

The issue of waiver in this case was for the trial Court to decide, not a yet-to-be-determined arbitrator. Defendants base their argument that the trial Court cannot decide the issue of waiver on the Supreme Court case, *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79 (2002). *Howsam,* when read out of context, states "the presumption is that the arbitrator should decide allegations of waiver, delay, or like defense of arbitrability." *Id* at 84. Despite dicta

included in *Howsam,* the overwhelming consensus is that the Court did not intend the word "waiver" to apply to allegations of waiver by participation in litigation.

The *Howsam* Court based its decision in part on the judgment that arbitrators may be "comparatively more expert" than the courts at applying procedural requirements of the parties' contract. *Id.* at 84. For issues of waiver by participation in litigation, it is the Court where the litigation has been proceeding that will have firsthand knowledge of the relevant activity of the parties.

Defendants correctly anticipated that Plaintiff will argue that certain types of waiver issues are to only be determined by the Court. The *Mercury* case clearly defines the type of waiver we are dealing with in the current case, and specifically directs the Court to determine the issue as opposed to an arbitrator. *In Re Mercury Const. Corp.,* 656 F2d. 933,940 (4th Cir. 1981). *Aff'd sub nom. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983).

Defendants then try to circumvent this clearly established rule by claiming a delegation provision in the contract only allows an arbitrator to decide the issue of waiver.[2] Defendants cite the United States Supreme Court case, *Henry Schein, Inc. v. Archer & White Sales, Inc.,* 139 S. Ct. 524, 202 L.Ed. 2d 480 (2019), to argue that the delegation provision in this case requires an arbitrator to decide the issue of waiver. The *Schein* case did not involve a situation where one of the parties waived its right to arbitration through participation in litigation, and made no mention of waiver at all in the opinion. Defendants misplace their reliance on *Schein* and their argument

[2] In attempting to support the nonsensical argument that waiver by participation in litigation is only an issue for the arbitrator, Defendants attempt to cite to far reaching, non-binding precedent. *See McKellar v. Mithril Capital Mgmt. LLC,* No. 19-CV-07314-CRB, 2020 WL 1233855 (N.D. Cal. Mar. 13, 2020), and *Fleetwood Transp. Corp. v. Packaging Corp. of Am.,* No. CIV.A. 6:10-01219, 2012 WL 761737 (D.S.C. Mar. 8, 2012).

fails because Defendants neglected to address 9 U.S.C. § 3 and their own default of the entire arbitration provision (including the delegation provision). By utilizing the machinery of litigation to the prejudice of the Plaintiff, Defendants waived any rights conferred by the arbitration provision in the contract.

Based on these reasons, the issue of waiver through participation in litigation is clearly a question for the Court to decide. This Court should affirm the trial Court's learned decision.

II. Did the trial Court correctly rule Appellants waived arbitration by not asserting it until after 27 months of notice, 25 months of litigation, participating in several rounds of written discovery, utilizing subpoena powers, conducting numerous depositions before and after asserting arbitration, participating in mediation, and voluntarily consenting to two scheduling orders providing trial dates?

The Defendants clearly waived arbitration in this matter due to their extensive utilization of the current litigation. Defendants participated in all phases of discovery and litigation up to and even past potential trial dates before they even mentioned the term arbitration. To rule that they have not waived their right to arbitration in this case, with these set of facts would establish a very dangerous precedent undermining the entire purpose of 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* § 131 (1995). "A party may waive the right to arbitration by being unjustifiably slow in seeking arbitration." *Id.* at § 129. Hence, generally, 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); 6 C.J.S. *Arbitration* § 37 (1975). A party seeking to establish waiver must show prejudice through an undue burden caused by 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); *General Equip. & Supply Co.,* 344 S.C. at 556, 544 S.E.2d at 645; *Liberty Builders, Inc. v. Horton,* 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct.App.1999). "Mere inconvenience to an opposing party is not sufficient to establish prejudice, and thus invoke the waiver of right to arbitrate." *General Equip. & Supply Co.,* 344 S.C. at 557, 544 S.E.2d at 645. "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Liberty Builders, Inc.,* 336 S.C. at 665, 521 S.E.2d at 753, *Hyload, Inc.,* 308 S.C. at 280, 417 S.E.2d at 624.

There are three factors a Court generally considers when determining whether a party has waived its right to compel arbitration. *See Rhodes,* 374 S.C. at 126, 647 S.E.2d at 251. First, the Court considers "whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration." *Id.* Second, the Court examines "whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration." *Id.* Additionally, the Court examines whether the case is on the trial docket at the time of a party's motion to compel arbitration in analyzing this second factor. *Id.* at 128, 647 S.E.2d at 252. Finally, the Court considers "whether the non-moving party was prejudiced by the delay in seeking arbitration." *Id.*at 126, 647 S.E.2d at 251.

Plaintiff argued, and the trial Court agreed, that he was prejudiced by the actions of the Defendant in the pending litigation. Throughout the two and one half year litigation process of this case, Defendants initially served 40 Requests to Produce (including subsections) and 38 Interrogatories (including subsections) and supplemental discovery requests. Defendants have also utilized the Court's jurisdiction to obtain information through the service of subpoenas on numerous third parties. Defendants noticed and took the depositions of the Plaintiff, his sister,

Janie Latham, and allowed Plaintiff to notice and take the depositions of Dave Boldman and Eric Fleming (employees of Schumacher). Even after asserting arbitration, Defendants continued to participate in the depositions of Plaintiff's expert, Defendant's expert, and Heather McCarley. Plaintiff allowed Defendants access to his home on two separate occasions based on the discovery rules applicable to the Court of Common Pleas. Defendants' actions in litigation required the filing of two separate motions to compel.[3] Defendants took part in a mediation that extended beyond the day of the in-person proceeding with the third party mediator. Finally, Defendants voluntarily entered into two separate consent scheduling orders setting potential trial dates that both passed before Defendants asserted an alleged right to arbitration.

Defendants rely on *Maxum Foundations, Inc. v. Salus Corp.,* 779 F.2d 974 (4th Cir. 1985) to argue that mutual discovery would aid Plaintiff in any subsequent arbitration. This language quoted by Defendant from this case is not applicable to the current litigation. In *Maxum,* the defendant had not noticed any of its own depositions or received any information through written discovery before asserting its right to arbitration. *Id.* at 982, 983. Moreover, the *Maxum* case involved a rigid scheduling order that required the completion of discovery before the defendants' motion to dismiss could be heard. *Id.*

Neither of those is true in the instant case. Defendants obtained large amounts of information from the Plaintiff through discovery and even gained access to his home on two occasions. Defendants' assertion that discovery is allowed under the arbitration rules leaves out the important element of arbitrator approval of discovery. *See* Constr. Indus. Rules R-24. The information garnered by Defendants through written discovery and the site inspections would most certainly be used by the Defendants should the case go to arbitration, which is exactly why

[3] Defendant still has not complied with a Court order to produce its financial net worth from November of 2019.

it has prejudiced the Plaintiff. By its very nature, arbitrations are meant to be more limited in discovery in order to be a more efficient path to resolution compared to litigation. Defendants utilized every aspect of litigation to obtain information it would not have obtained in arbitration. After obtaining this information for over two years, Defendants now wish extend the dispute even longer armed with information it would not have had access to if they had asserted their arbitration rights in a timely manner.

Defendants noticed and took the depositions of the Plaintiff, his sister, and the Plaintiff's expert in this case. Additionally they have provided their expert with transcripts of all the witnesses deposed either by Plaintiff or Defendants. There is no provision in the arbitration rules that allow for depositions, much less providing experts the additional resources of other witnesses' testimony. Again, Defendants have taken advantage of the broader discovery allowed in the Court of Common Pleas which prejudices the Plaintiff. Defendants even continued noticing and participating in depositions after asserting its alleged right for arbitration despite the ability to seek protection under SCRCP 26(c) (1). As the parties seeking arbitration, Defendants bore the onus to halt discovery by seeking the Court's protection. *See Evans v. Accent Manufactured Homes, Inc.*, 352 SC 544, 551, 575 S.E.2d 74, 81 (Ct. App. 2003).[4] Instead, they decided to continue to engage in discovery to its benefit.

Defendants assert that Plaintiff has not been prejudiced because Defendants did not file a summary judgment motion. Plaintiff maintains the only reason Defendants did not file a motion for summary judgment is because they did not have a good faith basis to do so. Defendants' egregious actions will certainly lead to punitive damages, and the facts simply do not support a

[4] The facts of *Evans* are very similar to the current set of facts of this case, and the Court ruled that the Defendants participation in litigation prejudiced Plaintiff, amounting to a waiver.

motion to dismiss. Defendants should not be allowed to skirt the waiver issue through its own detrimental conduct. Defendants cannot possibly assert they were not seeking to obtain a favorable judgment in this case by participating so intensively in discovery.

Defendants refused to provide its financial information to Plaintiff, even after a Court order to do so. They will undoubtedly look to revisit the issue should the case be referred to arbitration. This is the exact behavior the Fourth Circuit admonished in *Degidio v. Crazy Horse Saloon & Rest., Inc.,* 880 F.3d 135 (4th Cir.), *cert. denied sub nom. Crazy Horse Saloon & Rest., Inc.,* 138 S. Ct. 2666, 201 L. Ed. 2d 1053 (2018). Should the issue be revisited, it will prejudice the Plaintiff by having to re-argue an issue it has already prevailed on.

While the Construction Industry Rules allow for a mediation of the case when the claim or counterclaim exceeds $100,000, the rules also allow for one party to "unilaterally opt out of this rule upon notification to the AAA and the other parties." *See* Const. Indus. Rules R-10. Plaintiff expended a substantial amount of time and money to participate with good faith in the mediation of the case. The mediation extended beyond the date of the mediation, and ultimately led to Plaintiff granting Defendants access to his home for the purposes of an appraisal. This inspection was subsequent to an inspection allowed by the Plaintiff by Defendants' expert.

Finally, Defendants voluntarily signed and entered into *two* separate scheduling orders setting a trial date. (*See* R. pp. 027-34). Plaintiff expended vast resources, time, and money preparing for each trial date. This is not a simple case, and requires extended preparation to be properly presented to a jury. Plaintiff paid a substantial amount of money in reliance the Defendants would provide a quality home. He has expended a large amount of his time participating in this litigation, and has adjusted his schedule numerous times to comply with the

scheduling orders. Defendants did not assert or even mention arbitration until over two years of litigation and two trial dates had passed. Plaintiff spent a substantial amount of money on experts in preparation for trial, and the time they spent (and charged for) could potentially double if the case is referred to arbitration. Each time a trial date was agreed upon, Plaintiff was forced to expend time and money to prepare. The amount of work put in to prepare this case for trial numerous times cannot be cast aside by Defendants, as it certainly was to the prejudice of the Plaintiff.

CONCLUSION

The Honorable Roger E. Henderson clearly laid out the reasons for denying Defendants' motion to refer to arbitration in his order. (*See* R. pp. 004-09). The trial Court had full authority to decide the issue based on Defendants' default/waiver of their arbitration rights. There is more than enough evidence in the record to reasonably support trial Court's findings in this matter, and this Court should affirm the ruling.

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RULE 211 CERTIFICATE

The undersigned certifies that this Respondent's Final Brief complies with Rule 211(b). SCACR.

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