

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHARLES CRIHFIELD,

Appellant,

v.

No. 34593

STEVEN BROWN, and  
THE HOME SHOW, L.L.C.

Appellees.

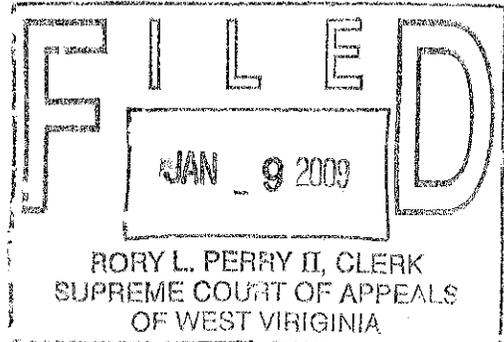
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**BRIEF  
ON BEHALF OF APPELLEES  
STEVEN BROWN AND THE HOME SHOW, L.L.C**

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Date: January 9, 2009

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**APPELLEES' RESPONSE BRIEF**

**I. KIND AND NATURE OF PROCEEDING**

Appellant filed a Motion for Summary Judgment v. Appellees' seeking declaratory judgment and injunctive relief asserting Appellees' were not authorized to continue with the arbitration and that such a continuance was improper.

Appellant's hearing on his motion was heard before the Honorable Judge Stucky on February 5, 2008. Following oral arguments from both parties, Judge Stucky denied Appellant's motion by Order entered April 15, 2008. (Exhibit "A")

**II. FACTUAL BACKGROUND:**

In 2001, Steve Brown (hereinafter "Brown") purchased the various Home Shows, a modular and mobile home business, from the Appellant and various other stockholders;

A Stock Purchase Agreement (hereinafter "Agreement") memorialized the sale;

Said Agreement contained a restrictive covenant outlining restrictions placed upon the sellers, including the Appellant. The covenant reads:

“ 5.3 Restrictive Covenant - Following Closing Sellers shall not, without the prior written consent of Purchaser: (i) directly or indirectly, engage in the manufactured home sales business, for a term of 5 years and covering the area within a 60 mile radius of any current location of any of the Companies, directly or as an employee of any other person or entity; (ii) contact or solicit any present or future customers or employees of Companies; or (iii) disclose or use any customer list, processes, sales techniques, sales books or information, pricing information of any kind, service information or techniques, operational processes or any other proprietary information, which constitute the sole and exclusive property of the Companies, the same being "trade secrets" under the law, and upon violation of this provision the Sellers agree that Purchaser shall be entitled to an injunction and compensatory or punitive damages, and reimbursement of reasonable attorneys fees and associated costs incurred to enforce this provisions; Provided however, that this restrictive covenant shall not apply to the interest of certain of Sellers in two (2) business locations for the business operated as the "Eden Fork Home Place", one located in Parkersburg, West Virginia, provided that none of Sellers shall, in connection with such excepted business locations, expand the territories beyond such excepted locations and shall not take any actions to solicit any employees of the Companies or take other actions that may damage the Companies in violation of this Section 5.3 “

At some point thereafter, Brown discovered the Appellant had breached the covenant by soliciting various employees of The Home Show;

Brown instituted a civil action in the Circuit Court of Kanawha County in December of 2001 alleging the breach;

Appellant responded, asserting that all disputes arising from the Agreement must be resolved through arbitration;

The Circuit Court found that disputes arising from the Agreement had to be resolved through arbitration and dismissed Brown's action in October of 2003;

Arbitration was instituted shortly thereafter alleging the claims set forth above;

The final hearing was set for December 23, 2003, with Judge James O. Holliday presiding over the arbitration;

On December 22, 2003, Brown withdrew from the arbitration opting to appeal the Circuit Court's finding that arbitration was the proper forum to the West Virginia Supreme Court of Appeals;

In May 2004, the West Virginia Supreme Court of Appeals refused Brown's petition;

In November 2004, Brown sought to bring his claim to a final arbitration hearing;

A preliminary hearing and scheduling conference was held on August 17, 2006, to which both parties participated;

On August 17, 2006, Appellant filed his Compliant and Petition for Injunctive Relief, requesting judgement in the form of a preliminary and permanent injunction "from any further attempts to arbitrate, litigate or otherwise assert claims previously asserted and dismissed with prejudice through the original arbitration."

Appellant's hearing on his Petition / Motion for Summary Judgment was held on September 13, 2006, before Judge Stucky. At the hearing, Judge Stucky informed the parties he had contacted Judge James O. Holliday (the original arbitrator) and that Judge Holliday had agreed to recommence the arbitration. The actions taken at the hearing were memorialized in an agreed Order entered November 27, 2006. (Exhibit "B")

As stated in the Order, a status conference was to be scheduled by the parties with Judge Holliday within sixty (60) days. Following numerous unsuccessful attempts to contact Judge Holliday, Appellees received a letter from Judge Holliday on August 31, 2007, stating he was unable

to continue with the arbitration. (Exhibit "C") No reason was given in the letter explaining his statement. Appellees notified the Appellant of the Judge's decision via letter of September 5, 2007 and enclosed a copy of the Judge's letter. (Exhibit "D")

Appellees, after hearing no response to their September 5, 2007 letter suggesting dates for the arbitration hearing and three available arbitrators to choose from, scheduled the hearing before Lyn Ranson on the 21<sup>st</sup> and 22<sup>nd</sup> of January 2008. Counsel, on or about January 10, 2008, filed a renewed Motion for Summary Judgment, essentially asserting a different arbitrator other than Judge Holliday would subject the Appellant to a second, new arbitration. Appellant continued by requesting "the court enter an order decreeing the 2003 arbitration cannot be reopened or renewed following its unilateral termination withdraw contrary to the provisions of the Arbitration Rules of the American Arbitration Association ("AAA")." Appellant pointed to Rule 28 of the Commercial Arbitration Rules of the AAA in support, which states:

"Postponements. The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative"

As stated above, Appellant's renewed Motion for Summary Judgment was denied and the Court Ordered the action proceed to arbitration within thirty (30) days with the condition that Appellant was given the statutory appeal period to bring the Judge's decision before the West Virginia Supreme Court of Appeals.

### **III. DISCUSSION OF THE LAW**

Appellant has assigned Four Errors committed by the Circuit Court as follows:

1. The Circuit Court erred in denying Appellant's Motion for Summary Judgment and should have ruled as a matter of law, that arbitration terminated by Appellees was

final and that claims could not be pursued in subsequent arbitration;

2. The Circuit Court erred in ordering that Appellees were entitled to re-institute arbitration, following an improper termination and withdrawal;
3. The Circuit Court erred in ordering that the matter proceed to arbitration, in effect, granting summary judgment to Appellees and disposing of the matter in their favor, without basis in law or evidence; and,
4. The Circuit Court's Order failed to include required Findings of Fact and Conclusion of Law.

Appellant asserts the Appellees have unilaterally terminated the arbitration based on the cancellation of the hearing in 2003. The reason for this cancellation was to allow the Appellee' to appeal the Circuit Court's decision (in finding that arbitration was the proper forum) to the West Virginia Supreme Court of Appeals. Following the Supreme Court's decision that arbitration was the sole means of addressing the accusations verses the Appellant, the Appellees, following the courts ruling attempted to re-set the hearing. The Appellees did not begin a second arbitration. This was unnecessary as the only remaining step was the arbitration hearing itself. No new issues were raised and no additional parties were brought in that would alter the arbitration (i.e.: further investigation, interviewing new witnesses, gathering additional documentation). There has been no dismissal of the 2003 arbitration by Judge Holliday either with or without prejudice. There has been no notice given by the Appellees that they intended to institute arbitration a second or third time. The only action taken by the Appellees with respect to arbitration following the Supreme Court's decision was to attempt to set the hearing.

According to Black's Law Dictionary, arbitration is defined as "the reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by arbitrator's award issued **after a hearing** at which both parties have an opportunity to be heard

(emphasis added) Black's Law Dictionary, 5<sup>th</sup> Edition, West Publishing Company, (1981). As can be seen above, an arbitration includes a hearing where both parties have had an opportunity to be heard, which has not occurred, and which is the only portion of the arbitration process to be commenced

There have not been three separate arbitrations in this matter as alleged by Appellant. The arbitration originally began by the Appellees is the same one now ongoing. A minor issue concerning whether the correct party was Steve Brown or The Home Show, LLC did not dismiss one arbitration and begin another. Rather, the AAA simply corrected the oversight on their own. Also, due to the parties inability to contact the original arbitrator, (and subsequent refusal to sit as arbitrator) the AAA issued a fax notifying the parties they were closing the file because the parties were unable to find another arbitrator. This again, was remedied by a note to the AAA requesting a choice of an arbitrator from their own panel. Once that option was abandoned, Appellees set a hearing date for the arbitration with Lyn Ranson as the arbitrator. Appellant declined to agree to the hearing date or for that matter, to the hearing itself, and instead filed a Renewed Motion for Summary Judgment.

Appellant has made several claims relating to "re-arbitration" and "re-instituting" the arbitration. As has been asserted throughout this dispute, this claim has never gone to hearing and has therefore never been "fully arbitrated." Judge Holliday has never dismissed the arbitration and as such, Appellant's claim of three separate arbitrations is erroneous.

The Appellant claims the Appellees are trying to "game the system" by seeking alternative outcomes by not appealing the outcome of the Circuit Court's ruling prior to filing for arbitration.

The Court's ruling found the Appellees sole remedy to the initial dispute was arbitration. Prior to the arbitration hearing and within the Court's statutory appeal period, the Appellees appealed the Circuit Court's decision to this Court, thereby suspending the arbitration hearing pending the decision of this Court.

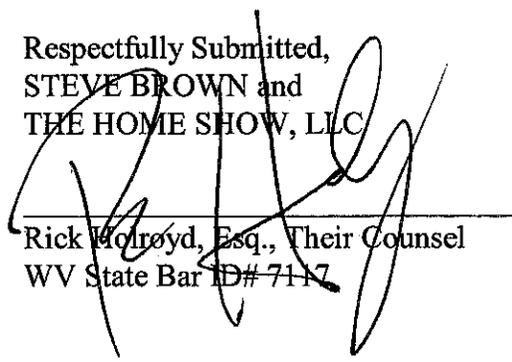
Once this Court denied the appeal, the Appellees sought to bring the arbitration to hearing. Interestingly, the Appellant's original Motion to Dismiss asserted arbitration was the only means to resolve the underlying controversy and are now before this Court attempting to bar the Appellees from the hearing, and are themselves attempting to "game the system."

#### IV. CONCLUSION

Appellant's assertion there has been three arbitrations in this matter is erroneous. The initial dispute in this action has not been fully arbitrated as there has been no hearing. Appellees, following the decision of the West Virginia Supreme Court of Appeals, has attempted, on several occasions, to bring this to a hearing and not to "re-instate" or "re-arbitrate" their claim, but simply to have a hearing.

THEREFORE, Appellees request this Court direct the Appellant to comply with the Circuit Court's Order of April 15, 2008, and set this matter for a final hearing before a mutually acceptable arbitration.

Respectfully Submitted,  
STEVE BROWN and  
THE HOME SHOW, LLC



Rick Holroyd, Esq., Their Counsel  
WV State Bar ID# 7117

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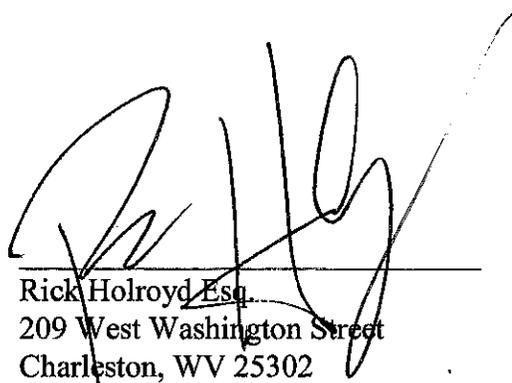
CERTIFICATE OF SERVICE

I, Rick Holroyd, Esq., hereby certify that I have served the foregoing **APPELLEES'**  
**RESPONSE BRIEF** on the following by mailing a true and exact copy thereof to:

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Dated: January 9, 2009



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**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**