

STATE OF SOUTH CAROLINA
COUNTY OF YORK

SUMMERLAKE TOWNHOMES
HOMEOWNERS' ASSOCIATION, INC.
and SUSAN HAGY and KARIN FUENTES,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

TRUE HOMES, LLC; CAROLINA
DEVELOPMENT SERVICES, LLC;
SUMMERLAKE PROPERTIES, LLC; RJB
LEGACY COMPANY f/k/a Barefoot &
Company; BMC EAST, LLC; AIRTRON,
INC.; MPK GRADING AND EROSION
CONTROL, LLC; SOUTHEND
EXTERIORS, LLC; MCGEE BROTHERS
COMPANY, INC.; ALPHA OMEGA
CONSTRUCTION GROUP, INC.;
PENDER-PETTUS INSULATING, INC.;
CHARLOTTE LANEHART ELECTRIC
COMPANY, INC.; C&C PLUMBING, INC.;
ASSOCIATED MATERIALS, LLC a/k/a
Alside, Inc.; T&A EXCAVATING, LLC;
CALLAHAN EXCAVATING, LLC a/k/a
Callahan Grading & Hauling, Inc. a/k/a
Callahan Grading, LLC; AHR
CONSTRUCTION, INC.; JJS
COMMERCIAL CONSTRUCTION, INC.;
CDJ CONSTRUCTION, INC.; JIMENEZ
CONTRACTORS, LLC; J. COV ROOFING,
LLC; AYALAS WINDOW
INSTALLATIONS, LLC; ATLANTA
FLOORING DESIGN CENTERS, INC.;
PEDRO DEJESUS LOPEZ d/b/a PJI
CONSTRUCTION; and PEDRO
VILLAREAL-CONCEPCION d/b/a CVP
CONSTRUCTION,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2020-CP-46-03592

**ORDER DENYING DEFENDANT TRUE
HOMES, LLC'S MOTION TO STAY
AND COMPEL ARBITRATION**

RECEIVED

AUG 15 2022

SC Court of Appeals

This matter came before the Court for a hearing on May 17, 2022, on a Motion to Stay and Compel Arbitration (the “Motion”) filed by Defendant True Homes, LLC (“True Homes”) seeking to compel the claims of Plaintiffs Susan Hagy (“Hagy”) and Karin Fuentes (“Fuentes”) into arbitration. At the hearing, Elliotte Quinn with The Steinberg Law Firm, LLC appeared on behalf of Plaintiffs, and Joshua Hinson with Wolfe, Campbell, Gunst & Hinson, PLLC appeared on behalf of True Homes. Having reviewed the parties’ submissions, heard oral arguments, and conducted a rigorous analysis of the arbitration provisions at issue, this Court finds that the arbitration provisions are unenforceable and the Motion is denied.

BACKGROUND

This action is a construction defect action arising from the construction of a residential development in Fort Mill known as “Summerlake Townhomes” and which contains 101 townhomes (“Summerlake”). Plaintiffs allege that True Homes was the general contractor for the construction of the 101 townhomes and sold the townhomes to the original purchasers. On November 25, 2020, Plaintiffs Summerlake Townhomes Homeowners’ Association, Inc. (the “Association”), Hagy, and Fuentes filed this action asserting claims against True Homes, its subcontractors, two developer entities, and the two developer entities’ subcontractors for alleged negligence, breach of the implied warranties of habitability and workmanship, breach of fiduciary duty, and violations of the South Carolina Unfair Trade Practices Act (“UTPA”).

The Association is the homeowners association for Summerlake, and as set out in the Declaration of Covenants, Conditions and Restrictions for Summerlake Townhomes (“Covenants”), the Association owns and is responsible for the maintenance, repair, and replacement of the common elements. The Covenants also provide that while each townhome and the lot on which it is located is owned by the individual townhome owners, the Association is

responsible for the maintenance, repair, and replacement of certain exterior components of the townhomes.

Plaintiffs Fuentes and Hagy own townhomes in Summerlake with Fuentes having purchased his townhome directly from True Homes, whereas Hagy is a subsequent purchaser of her townhome with a former owner of her townhome having purchased it from True Homes. Fuentes and Hagy assert claims in this action both individually and on behalf of a putative class of all owners of townhomes in Summerlake.

On February 15, 2022, True Homes filed the Motion seeking to compel Fuentes' and Hagy's claims into arbitration. True Homes did not move to compel any claim asserted by the Association into arbitration. True Homes moved to compel Fuentes' and Hagy's claims into arbitration based on arbitration provisions in the purchase agreement for the townhomes entered into between True Homes and Fuentes and between True Homes and the original purchaser of Hagy's townhome. Plaintiffs assert the arbitration provisions are unenforceable for numerous reasons, including because arbitration provisions generally are not enforceable against subsequent purchasers and no exception to that general rule exists here and because the Federal Arbitration Act ("FAA") does not apply to the arbitration provisions because the provisions are contained in an agreement involving intrastate commerce and the provisions are unenforceable under the South Carolina Uniform Arbitration Act ("SCUAA") because the purchase agreements do not contain the statutorily required notice of arbitration.

ANALYSIS

I. The Arbitration Provision is Unenforceable Because Non-Signatories Generally Cannot be Compelled into Arbitration, and the Direct Benefits Estoppel Exception is Not Applicable Here.

The Court finds the arbitration provision in the purchase agreement between True Homes and the original purchaser of Hagy's townhome does not permit True Homes to compel Hagy's claims into arbitration because Hagy is not a party to that agreement. South Carolina law recognizes that a nonsignatory to an arbitration agreement generally cannot be compelled to arbitrate claims, and the narrow exception to that general rule is where there are unusual facts present that satisfy one of the special theories under which a nonsignatory can be compelled to arbitrate claims. *See, e.g., Int'l. Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000); *Wilson v. Willis*, 426 S.C. 326, 338–39, 827 S.E.2d 167, 173–74 (2019). True Homes does not contest the general rule that nonsignatories cannot be compelled into arbitration but contends the facts of this case meet the requirements for compelling a non-signatory to arbitrate under the direct benefits estoppel theory. True Homes contends that "Plaintiffs have brought claims sounding in contract" and that *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020) provides that subsequent purchasers "may still be compelled to arbitration where the homeowner seeks to enforce rights pursuant to the contract." (Mot. ¶12.)

As an initial matter, the *Damico* decision does not support True Homes' argument for compelling a subsequent purchaser into arbitration. While True Homes cites *Damico* as "noting a successor homeowner, who did not sign an arbitration agreement may still be compelled to arbitration where the homeowner seeks to enforce rights pursuant to the contract," (Mot. ¶12), the *Damico* opinion expresses no holding on that point. The only reference to a subsequent purchaser in the *Damico* opinion is a factual statement that one of the plaintiffs there was "the second owner

of a home, but in her amended complaint, she alleges a breach of contract cause of action based upon the [purchase agreement]” between her and the defendant. *Damico*, 430 S.C. at 70, 844 S.E.2d at 195. The *Damico* opinion contains no further discussion of the subsequent purchaser plaintiff. Moreover, even were the *Damico* opinion instructive as to when a subsequent purchaser may be compelled into arbitration, at most it would indicate that a subsequent purchaser may be compelled to arbitrate where the subsequent purchaser “alleges a breach of contract cause of action based upon the [purchase agreement].” *Id.* Unlike the subsequent purchaser plaintiff in *Damico*, here Plaintiffs do not assert a breach of contract cause of action, much less a breach of contract cause of action based on True Homes’ purchase agreement. Therefore, the Court finds *Damico* does not support the expansive reading given it by True Homes and does not provide a basis independent of the direct benefits estoppel theory for compelling a nonsignatory into arbitration. The Court finds that because Plaintiffs do not assert a breach of contract claim under True Homes’ purchase agreement, *Damico* does not provide any basis for compelling Hagy’s claims into arbitration.

Dispensing with True Homes’ contention that the *Damico* opinion provides an independent basis for compelling Hagy’s claims as a subsequent purchaser into arbitration, the Court turns to whether the direct benefits estoppel theory for compelling nonsignatories’ claims into arbitration is applicable here. The direct benefits estoppel theory provides that a non-signatory can be compelled into arbitration when the non-signatory “receives a direct benefit from a contract containing an arbitration clause.” *Wilson v. Willis*, 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019) (internal quotation omitted). The direct benefit to the nonsignatory required for direct benefits estoppel to apply exists where the nonsignatory “has consistently maintained that other provisions of the same contract should be enforced to benefit him” or “knowingly exploits the benefits of an

agreement containing an arbitration clause, and receives benefits flowing directly from the agreement.” *Id.* at 340–41, 827 S.E.2d at 175 (internal quotations and emphasis omitted). The direct benefit required for direct benefits estoppel does not exist “simply because a claim relates to or would not have arisen ‘but for’ a contract’s existence.” *Id.* at 343, 827 S.E.2d at 176. Rather, “any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.” *Id.*

Here, Hagy does not assert a claim based on True Homes’ purchase agreement with the original purchaser of her townhome and does not seek to enforce any rights pursuant to that purchase agreement. Plaintiffs’ First Amended Complaint does not even allege the existence of True Homes’ purchase agreement or any other contract between True Homes and any homeowner. Moreover, contrary to True Homes’ assertions, none of Hagy’s claims arise from or sound in contract. Therefore, the direct benefits estoppel theory is inapplicable here, True Homes has shown no basis for setting aside the general rule that subsequent purchasers are not subject to arbitration, and Hagy’s claims are not subject to arbitration.

II. The Arbitration Provision is Unenforceable Because the FAA Does Not Apply and the Agreement Does Not Meet the Requirements for Enforceability Under the South Carolina Uniform Arbitration Act.

The Court finds the Federal Arbitration Act (“FAA”) does not apply because True Homes’ purchase agreement at issue here is a transaction involving intrastate, rather than interstate, commerce as required for the FAA to apply. Because the FAA does not apply to True Homes’ purchase agreement, the arbitration provision therein is only enforceable if the agreement meets the requirements of the South Carolina Uniform Arbitration Act (“SCUAA”). The agreement does not meet the notice of arbitration requirements of the SCUAA, and therefore, the arbitration provision is unenforceable.

The FAA, 9 U.S.C. §§ 1, *et seq.*, only applies to an arbitration provision in a contract for interstate commerce or in a contract providing that the FAA applies. *See* 9 U.S.C. § 2; *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273–77 (1995); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001). Here, True Homes’ purchase agreement does not mention the FAA. Therefore, the FAA only applies to True Homes’ purchase agreement if the agreement was for a transaction involving interstate commerce.

The purchase of a parcel of real property is an intrastate transaction, and therefore, the FAA does not apply to a contract for the purchase of real property.¹ *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012). A contract for the purchase of real property concerns “a commodity—the land—which is firmly planted in one particular state.” *Id.* at 457, 730 S.E.2d at 317 (quoting *Saneii v. Robards*, 289 F. Supp. 2d 855, 858 (W.D. Ky. 2003)).

True Homes’ purchase agreement is a contract for the purchase of real property. True Homes acknowledges as much in the Motion, stating that “True Homes *sells homes* to members of the public using a *standard purchase agreement*.” (Mot. ¶1 (emphasis added).) The Motion proceeds to refer to each purchase agreement as for the sale of a home. (Mot. ¶¶1 & 4.) True Homes’ purchase agreement also indicates it is a contract for the purchase of real property, rather

¹ True Homes misconstrues the Court of Appeals’ opinion in *Damico v. Lennar Carolinas, LLC*, as holding that a contract for the purchase of real property involves interstate commerce so long as the construction of that real property involved interstate commerce. Contrary to True Homes’ contentions, the *Damico* opinion found the FAA applied to the contract at issue there because the contract specifically provided for the application of the FAA. *Damico*, 430 S.C. at 196, 844 S.E.2d at 70. The *Damico* opinion went on to state that the contract at issue there was for both the construction and sale of a residence, unlike a contract for the sale of real property which is an intrastate transaction. *Id.* 196, 844 S.E.2d at 71 (“In general, the development and sale of residential real estate is an intrastate activity that does not implicate the FAA, but here the transaction also involved the construction of residential homes.”).

than a contract for the construction of a home, by True Homes entitling the document "HOME PURCHASE AGREEMENT."

Additionally, on May 27, 2014, York County issued the building permit for the construction of a townhome on what is now Fuentes' property, three months prior to when Fuentes signed the purchase agreement with True Homes. Plaintiffs submitted an affidavit from Fuentes in opposition to the Motion in which Fuentes attests that at the time he signed the purchase agreement, True Homes had already completed the construction of a townhome on the property. True Homes questions the veracity of Fuentes' attestation as to the completion of the townhome on the basis that York County issued the certificate of occupancy for the townhome after Fuentes signed the purchase agreement. Regardless of whether the construction of the townhome was completed when Fuentes signed the purchase agreement, True Homes does not contest that construction of Fuentes' townhome was underway prior to Fuentes signing the purchase agreement, and that fact alone is sufficient to establish that the purchase agreement was a contract for the purchase of real property, not a contract for the construction of a home. True Homes was constructing the townhome regardless of whether Fuentes signed the purchase agreement. If True Homes was already constructing the townhome and was going to continue with that construction regardless of whether Fuentes signed the purchase agreement, the purchase agreement cannot have been a contract for construction.

The same analysis applies to the purchase agreement entered into between True Homes and the original purchaser of Hagy's townhome. That purchase agreement incorporated a "Closing Expectation Addendum" providing that at the time the original purchaser signed the purchase agreement, the townhome was "currently under construction." Again, True Homes was constructing the townhome regardless of whether that original purchaser signed the purchase

agreement, and therefore, the purchase agreement cannot have been a contract for the construction of a townhome.

The determinative consideration when analyzing whether a contract involved interstate or intrastate commerce in relation to a structure is what obligations the parties were contractually agreeing to undertake. As the South Carolina Supreme Court instructed in *Bradley v. Brentwood Homes, Inc.*, a court is to examine the “essential character” of the contract containing an arbitration provision at issue. 398 S.C. at 459, 730 S.E.2d at 318. In a contract for construction, one party agrees to construct a specified structure for the other party in exchange for consideration. *See, e.g.*, Black’s Law Dictionary 343 (8th ed. 2004) (defining “construction contract” as “A contract setting forth the specifications for a building project’s construction.”). In a contract for the sale of real property, one party agrees to transfer ownership of the real property, typically including the improvements on the property, to the other party in exchange for consideration. *See, e.g.*, 42 C.J.S. *Improvements* § 4 (“[I]mprovements to realty are considered part of the real property and ownership of the improvements follows title to the land.”). In a contract for construction of a structure and the sale of property, a party agrees to construct a specified structure on the property and to then transfer ownership of the property to the other party. The fact that a contract for the sale of real property includes completed or soon to be completed improvements does not change the nature of that contract into a contract for construction.

True Homes contends the foregoing analysis is immaterial because the purchase agreement provided a warranty to townhome purchasers. True Homes contends that it is a non-South Carolina entity, the warranty company is a non-South Carolina entity, True Homes’ employees located outside South Carolina were used to perform warranty work, and in other ways the provision and performance of the warranty involved interstate commerce thereby making the purchase agreement

a transaction involving interstate commerce and subject to the FAA. However, in *Bradley v. Brentwood Homes, Inc.*, the South Carolina Supreme Court rejected that argument, holding that “ancillary factors” like a national warranty and out-of-state financing do not result in a transaction involving interstate commerce where the plaintiff does not assert claims under the national warranty. *Id.* at 459, 730 S.E.2d at 318.

Having concluded True Homes’ purchase agreement arises from a transaction involving intrastate commerce, and the FAA therefore does not apply, the arbitration provision in True Homes’ purchase agreement is enforceable only if it meets the requirements of the SCUAA, S.C. Code Ann. §§ 15-48-10, *et seq.* The SCUAA provides that an arbitration provision is enforceable only if the first page of the contract contains a notice “typed in underlined capital letters” that the contract “is subject to arbitration pursuant to [the SCUAA].” S.C. Code Ann. § 15-48-10. An arbitration provision in a contract that does not precisely conform to that notice requirement is not enforceable under the SCUAA. *See id.* (“[U]nless such notice is displayed thereon the contract shall not be subject to arbitration.”); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001) (“No other variation is acceptable.”). True Homes’ purchase agreement does not contain any notice of arbitration pursuant to the SCUAA on the first page or any other page, and therefore, the arbitration provision in the purchase agreement is not enforceable under the SCUAA. With the FAA not applicable to True Homes’ purchase agreement and the agreement unenforceable under the SCUAA, the arbitration provision in True Homes’ purchase agreement is not enforceable against Fuentes or Hagy.

III. The Court Does Not Address Plaintiffs’ Remaining Arguments as to the Enforceability of the Arbitration Provision.

Having found the arbitration provision in True Homes’ purchase agreement is unenforceable against Hagy because she is a subsequent purchaser of her townhome who did not

enter into any agreement with True Homes and unenforceable against both Fuentes and Hagy because the FAA does not apply and the agreement does not meet the requirements for enforcing the arbitration provision under the SCUAA, the Court need not address Plaintiffs' remaining arguments regarding the enforceability of the arbitration provision. *See, e.g., Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 597 (1999) ("In light of our disposition of the case, it is not necessary to address Futch's remaining issues.").

CONCLUSION

Having found that the arbitration provision in True Homes' purchase agreement is unenforceable against Fuentes and Hagy, this Court **DENIES** True Homes' Motion to Stay and Compel Arbitration.

AND IT IS SO ORDERED.

The Honorable William A. McKinnon
Circuit Court Judge for the Sixteenth Circuit

York, South Carolina
_____, 2022



York Common Pleas

Case Caption: Summerlake Townhomes Homeowners Association Inc , plaintiff, et al
VS True Homes Llc , defendant, et al
Case Number: 2020CP4603592
Type: Order/Other

So Ordered

/s William A. McKinnon, #2761, Circuit Judge