STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Walter Ruiz and Nidian Ruiz, individually and on behalf of all others similarly situated, Beth Ann Coultrap and Keith Henry Coultrap III, individually and on behalf of all others similarly situated, Marianne Clancy and Michael C. Stinson, individually and on behalf of all others similarly situated, Ahmad P. Moore and Susan M. Moore, individually and on behalf of all others similarly situated, Plaintiffs, v. Clayton Properties Group, Inc. d/b/a Mungo Homes Properties, LLC, Defendant.	Case No. 2024-CP-23-02296 **ORDER**

This matter came before the Court on September 23, 2024, on a Motion to Dismiss and Compel Arbitration ("Motion") filed by Defendant Clayton Properties Group, Inc. d/b/a Mungo Homes Properties, LLC ("Defendant"). Present at the hearing were Konstantine P. Diamaduros on behalf of Defendant and Townes B. Johnson III on behalf of Plaintiffs. Based upon the Motion, the arguments of counsel, and the memoranda submitted by the parties, the Court now makes the following findings and **GRANTS** Defendant's Motion.

FACTUAL BACKGROUND

This matter arises out of the contractual relationships between Plaintiffs and Defendant as set forth in the Purchase Agreements attached as ***Exhibit A*** to Defendant's memorandum in

support of the Motion. *See* Def's. Mem., ***Ex. A***.[1] Each Purchase Agreement, which memorialized the contractual relationships between each Plaintiff and Defendant, set forth a finite and identical remedy for any claim or dispute arising out of or relating to the Purchase Agreement. Specifically, each Purchase Agreement contains the following provision titled "Arbitration and Claims":

> Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties selected arbitrator.

Id. at 3. Each Purchase Agreement also contains the following bold, capitalized, underlined header on the top of page one: "**THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ**." *Id.* at 1 (emphasis in original).

ANALYSIS

I. The Arbitration Provision is Valid and Enforceable as to Non-Signatories

First, Plaintiffs argue that "no valid arbitration agreement exists" with respect to Plaintiffs Ahmad P. Moore and Susan M. Moore (collectively, "the Moores") because they purchased their property from an individual who originally purchased from Defendant, as opposed to purchasing directly from Defendant. Resp. at 2. Therefore, Plaintiffs argue, "[i]t is clear . . . that [Defendant] fails the first step of the *Simpson* two-step inquiry . . ." *Id.* The Court disagrees.

It is well established that in an appropriate case, a nonsignatory can be bound by an arbitration provision within a contract executed by other parties. *See Est. of Solesbee by Bayne v.*

[1] Although this Purchase Agreement is only between Defendant and Plaintiffs Walter Ruiz and Nidian Ruiz, the material terms are identical every Purchase Agreement.

Fundamental Clinical & Operational Servs., LLC, 438 S.C. 638, 647, 885 S.E.2d 144, 148 (Ct. App. 2023), *reh'g denied* (Apr. 14, 2023), *cert. denied* (Apr. 16, 2024); *Dixon v. Pattee*, 442 S.C. 233, 256, 898 S.E.2d 158, 170 (Ct. App. 2023). "South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Id.* Under the doctrine of equitable estoppel, the *Solesbee* court correctly recognized that a party is precluded from "refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause." *Id.* (citations and internal quotations omitted). Here, the Moores (and any other nonsignatory residents of Indigo Pointe) have received a plethora of direct benefits from the Purchase Agreements at issue, the most obvious of which is a fully constructed home in which to live. To allow the Moores (or any other nonsignatory residents of Indigo Pointe) to reap the benefits of living in Indigo Pointe while simultaneously avoiding the Arbitration Provision would not only contravene *Solesbee*; it would run afoul of public policy.[2] In addition, the Purchase Agreements specifically state that they "will be binding and inure to the benefit of . . . heirs, personal representatives, successors and assigns . . ." *See* Def's. Mem., ***Ex. A*** at 4.

Based on the foregoing, the Court finds that the Arbitration Provision is enforceable as to the Moores and all other nonsignatory residents of Indigo Pointe.

[2] Indeed, to hold otherwise would discourage not only homebuilders, but businesses in general, from coming to do business in South Carolina. All businesses, both large and small, must be able to contract with other parties with full confidence that their contracts will be enforced in accordance with their clear terms.

II. The Merger Doctrine is Inapplicable

Plaintiffs next argue that the Arbitration Provision was extinguished by Plaintiffs' deeds under the Merger Doctrine. The Court disagrees. In *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013), the Court of Appeals held that "agreements that are not intended to be merged in a deed are not merged into the deed." *Id.* (internal citations and quotations omitted). Specifically, the *Carlson* court found there was clear and convincing evidence that "the parties did not intend for the arbitration clause to be superseded by the subsequently-executed deed" because the purchase agreement there provided: "The covenants, disclaimers and agreements contained in this Agreement shall not be deemed to be merged into or waived by the instruments executed at Closing, but shall expressly survive the Closing and continue to be binding upon both parties." *Id.* at 261, 743 S.E.2d at 874.

Carlson is squarely on point. On page 4 of each Purchase Agreement at issue, subsection (j) states, "The provisions of this Agreement ***shall survive closing and not merge in the deed***." Def's. Mem., ***Ex. A*** at 4 (emphasis added). Like the purchase agreement in *Carlson*, the Purchase Agreements here clearly and convincingly evidence that "the parties did not intend for the arbitration clause to be superseded by the subsequently-executed deed." *Carlson*, 404 S.C. at 261, 743 S.E.2d at 874. Accordingly, the Court finds that the Purchase Agreements were not extinguished, superseded, or otherwise affected by subsequently executed deeds.

III. The Arbitration Provision is Not Unconscionable

Third, Plaintiffs argue that the Arbitration Provision is unconscionable. Again, the Court disagrees. Contrary to Plaintiffs' argument, the test for unconscionability is not "simply whether the arbitration clause creates a fair and impartial forum, or instead is used and intended to give one party an unfair advantage." *See* Resp. at 4 (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C.

14, 644 S.E.2d 663 (2007)). Nowhere in *Simpson* does the Court weigh "a fair and impartial forum" versus some sort of "unfair advantage." Indeed, the phrases "fair and impartial," "impartial forum," and "unfair advantage" appear nowhere in the *Simpson* opinion. Thus, Plaintiffs' understanding of the test articulated by the Court in *Simpson* is incorrect. The only proposition *Simpson* stands for in this regard is that "[i]n South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." 373 S.C. at 24-25, 644 S.E.2d 668; *see also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (same).

When considering whether a contract is unconscionable, courts weigh a variety of factors, such as "whether the plaintiff [was] a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Smith*, 373 S.C. at 24-25, 644 S.E.2d 668. Plaintiffs argue that the Purchase Agreements are unconscionable because, among other things, "there is no indication that the Plaintiffs enjoyed a substantially stronger bargaining position against [Defendant] than the average homebuyer; or that they were represented by independent counsel." Resp. at 5. The Court finds this argument unpersuasive, particularly in light of the fact that Plaintiffs already had the opportunity to amend their Complaint twice – once after being on notice of Defendant's Motion – yet nowhere in Plaintiffs' Complaint is there any allegation regarding attempts to bargain with Defendant or disparities in bargaining power.[3]

[3] Similarly absent from the Complaint is any allegation as to whether Plaintiffs sought the advice of counsel while negotiating their respective Purchase Agreements.

Carlson is instructive on this issue as well. In *Carlson*, the Court of Appeals considered and appropriately rejected the argument that an arbitration clause was unconscionable. *Carlson*, 404 S.C. at 258-59, 743 S.E.2d at 873. In so holding, the *Carlson* court noted: (1) there was no evidence in the record indicating whether the purchase agreement was an adhesion contract; (2) the arbitration clause was clearly identified in the purchase agreement; (3) the arbitration clause did not waive any rights or remedies otherwise available by law; and (4) the arbitration clause did not lack mutuality because it applied equally to both parties. *Id.* at 260, 743 S.E.2d at 874. So too here. There is no record evidence (nor is there an allegation in the Complaint) indicating that the Purchase Agreements are adhesion contracts. The Arbitration Provision is clearly identified on page 3 of each Purchase Agreement, as well as in a bold, underlined, and capitalized header at the top of page 1. *See* S.C. Code Ann. § 15-48-10. The Arbitration Provision does not waive any rights or remedies otherwise available by law, and it applies equally to both parties. Thus, the Arbitration Provision is not unconscionable.

IV. The Purchase Agreements are Valid and Enforceable

Plaintiffs' final argument regarding the validity of the Purchase Agreements is likewise without merit. Plaintiffs argue that subsection (n) on page 4 of each Purchase Agreement renders them void because the provision contravenes public policy. "An exculpatory agreement will be held to contravene public policy if it is ***so broad*** that it would absolve the defendant from ***any injury*** to the plaintiff for ***any reason***." *Fisher v. Stevens*, 355 S.C. 290, 297, 584 S.E.2d 149, 153 (Ct. App. 2003) (internal quotations and alterations omitted) (emphasis added). In holding that the provision at issue in *Fisher* was void against public policy, the Court of Appeals noted:

> [T]he release does not refer to an injury the plaintiff may sustain while riding as a passenger in the specified . . . vehicle . . . [and] purports to release the [defendant] from liability for any and all injury to the plaintiff while the plaintiff is a passenger in ***any*** vehicle (not necessarily one owned by the [defendant]) at ***any*** time . . . .

Id. (citation omitted) (alterations and emphasis in original). Here, unlike the overly broad provision in *Fisher*, subsection (n) to each Purchase Agreement was carefully and narrowly tailored to three specific categories of property damage/personal injury claims. Simply put, because subsection (n) of the Purchase Agreements only applies to a unique class of claims, the Purchase Agreements do not run afoul of public policy and are therefore valid and enforceable.

CONCLUSION

Based on the foregoing, Defendant's Motion is **GRANTED**. The Second Amended Complaint is hereby dismissed with prejudice.

SO ORDERED this ___ day of October, 2024.

Jessica A. Salvini
Presiding Judge, Greenville County

Greenville Common Pleas

Case Caption: Walter Ruiz , plaintiff, et al vs. Old Legacy Properties Inc , defendant, et al

Case Number: 2024CP2302296

Type: Order/Dismissal

So Ordered

Jessica A. Salvini