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STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS SIXTH JUDICIAL CIRCUIT
Concerned Riverchase Estate Owners, Clark, Perry, Elder & White, Plaintiffs, vs. Riverchase Estates Property Owners Assoc., Inc.;Woodforest Bank, N.A.; LGI Land SC, LLC; and LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc., Defendants.	)	ORDER DENYING DEFENDANTS' RULE 12(B)(6) MOTION C.A. No. 13-CP-29-649

This matter came before the Court January 6, 2014 pursuant to Defendants' Rule 12(b)(6) Motion to Dismiss or Stay Proceedings and Compel Arbitration. The motion was filed Defendants Riverchase Estates Property Owners Assoc., Inc. , LGI Land SC, LLC ("Developer"), LGI Holdings, LLC, LGI Development, Inc. and Lexon Insurance Company, Inc., (collectively, the "LGI Defendants") and joined in by Defendant Woodforest Bank, N.A., who filed a similar motion to dismiss.

All parties of record appeared and presented arguments through counsel. Mark W. White, Esq. of the York County bar appeared on behalf of the Riverchase, LGI and Lexon Defendants. Tucker S. Player, Esq. of the Richland County bar appeared for Defendant Woodforest Bank, N.A. Leland L. Greeley, Esq. and J. Cameron Halford, Esq. of the York

County bar appeared for Plaintiffs Elder, White, Clark and Perry. Based on the matters before the Court, the arguments of counsel, the Court denies the Defendants' Motions.

Defendants' motions first seek the full dismissal of the Complaint pursuant to Rule 12(b)(6), SCRCP. "*The trial court must dispose of a motion for failure to state a cause of action based solely on the allegations set forth in the face of the complaint.*" Brown v. Leverette, 291 S.C. 364, 366, 353 S.E. 2d 697, 698 (1987). When a pleading filed in an action fails "*...to state facts sufficient to constitute a cause of action*", it may be dismissed. Rule 12(b)(6), SCRCP. The motion must be deal with based solely on the allegations contained in the pleading. FOC Lawshe Limited Partnership v. International Paper Company, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002). In considering the motion, all allegations of the pleadings, and all inferences reasonably deducible therefrom are deemed *admitted.* Id. "*If the facts and inferences drawn from the facts alleged in the complaint, viewed in a light most favorable to the Plaintiff, would entitle Plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper.*" Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). Based on this standard of review, the arguments of counsel, and the court's review of the pleadings, the court finds that dismissal would be

improper. The motion must be dealt with based solely on the allegations contained in the pleading. FOC Lawshe Limited Partnership v. International Paper Company, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002).

Defendants' motions seek, alternatively, that the court stay proceedings and compel binding arbitration. Defendants cite what Defendants describe as mandatory pre-litigation condition precedents contained within the covenants and restrictions of the Riverchase development that require written notices and a series of nonbinding arbitration processes (both inside and outside of South Carolina). All counsel have acknowledged that the restrictive covenants require, *inter alia*, that arbitration proceedings must be conducted in Lancaster County, South Carolina *unless they involve the Developer*, in which case the proceedings ultimately must be conducted in Montgomery County, Texas. Again, the court must review these matters on the face of the pleadings, and Plaintiffs have pleaded causes of action as against the developer, as amalgamated, with other defendants, for various causes of action arising out of the construction of a large residential project in Lancaster County.

Plaintiff has argued that followed through to its legal conclusion, ultimately only the developer could resort to the courts of South Carolina after lengthy, complex non-binding arbitration

procedures involving Texas forums and law. Plaintiffs argue the language of the covenants to be unconscionable and violative of South Carolina public policy where the developers failure to maintain registered offices effectively abandoned informal dispute resolution processes.

The court finds and concludes that the provisions of the covenants must be analyzed and applied in accordance with South Carolina law. S.C. Code Ann. §15-7-120. Construction and interpretation of a contract is a question of law to be decided by the court. Hawkins v. Greenwood Development Corp., 328 S.c. 585, 493 S.E.2d 875 (Ct. App. 1997). "*Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it.*" Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E. 2d 485, 493 (Ct. App. 2004). (Quoting Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001). S.C. Code Ann. §15-7-120(1976, as amended) provides:

> Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action.

It is plain that the language of the developer covenants intended that legal action could only follow nonbinding arbitration(s), including application of Texas law and Texas venue, where the developer is named. What is left to determine is how the covenant provisions are affected by S.C. Code Ann. 15-7-120. It is illogical to say that the statute could be given effect only when the covenants mandate application of laws of another jurisdiction. If that were so, the statute could never be given effect in any agreement where another state's law otherwise governed the substance of the parties' agreement and was controlling. *See, e.g.*, Johnson v. Paraplane, 391 S.C. 247, 460, S.E.2d 398 (Ct. App. 1995), *vacated on other grounds*, 321 S.C. 316, 468 S.E. 2d 620 (1996). The court ultimately is presented with the reasonableness of a forum selection clause.

The common thread of case law on the subject is succinctly expressed in the United States Supreme Court decision of M/S Breman v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S.Ct. 1907, 32 L.E.2d 513 (1972) where the court stated that forum selection clauses "... *are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable"* under the circumstances". Id. Other courts have tended to look to the facts of the case presented and either expressly, or impliedly, applied a standard of reasonableness under the circumstances. Applying the

above factors to this case, there are several things to be considered.

First, this case involves a multi-party, complex matter. The subject matter involves a large scale planned residential project in Lancaster County. Under the complaint allegations, all parties had some role in the design, finance, and construction of the project. Severing parts of a complex master deed from others would not serve judicial economy or a global resolution of the dispute as among all parties.

Second, it is clear that the parties would nevertheless be subjected to this state's jurisdiction for alleged tort liability arising from the development and construction of the project, thus making it reasonable to infer that defendant parties contemplated, from the beginning, that they may have to deal with litigation in South Carolina. This is further illustrated by the complex binding arbitration mechanisms argued by the parties that are set forth in the developer covenants. Thus I find and conclude that the covenants provision requiring arbitration would be unconscionable, void, and unenforceable as contravening the policy of South Carolina insofar as it purports to require binding arbitration pursuant to Texas law where the developer is named as a Defendant party.

The court notes that the face of the Complaint alleges that Defendants, as amalgamated, failed to fully develop the project

pursuant to master plan, and that Defendants abandoned informal dispute processes under the covenants. Viewing the face of the complaint and its allegations as true, or admitted, the Defendants' Rule 12(b)(6) motion to compel binding arbitration is therefore improper and should be denied.

NOW, THEREFORE, based upon the foregoing

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss and Defendants' motion to stay and compel binding arbitration brought pursuant to Rule 12(b)(6) is denied.

AND IT IS SO ORDERED this 24 day of ~~February~~ April, 2013.

Honorable R. Knox McMahon
Presiding Judge
Sixth Judicial Circuit

Date: 24 April 13
~~Lancaster~~, South Carolina