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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Concerned Riverchase Estate Owners, Andrew Dodd, Heather Dodd and Charles Ratay . . . . . Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc. . . . . Appellants.

AND

Concerned Riverchase Estate Owners, Clark, Perry, Elder & White. . . . . Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.; Woodforest Bank, N.A., LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc.. . . . . Defendants

Of whom Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc. are the . . . . Appellants.

Appellate Case No. 2015-00193

The Honorable R. Knox McMahon
Lancaster County
Trial Court Case Nos. 2013CP2900649, 2014CP2900792

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in refusing to enforce the Arbitration Clause as written?

2. Did the lower court err in refusing to enforce the pre-litigation dispute resolution mandate as written?

STATEMENT OF THE CASE

Respondents Concerned Riverchase Estate Owners, Clark, Perry, Elder & White filed the first lawsuit, designated C.A. No. 2013-CP-29-649, on May 3, 2013 ("First Lawsuit"). On August 9, 2013, Appellants served the Motion to Dismiss or Stay Proceedings and Compel Arbitration in the First Lawsuit. The lower court conducted a hearing on January 6, 2014 and denied the motion by order filed April 29, 2014 ("First Order"). Appellants served a motion to reconsider on May 12, 2014.

Respondents Concerned Riverchase Estate Owners, Andrew Dodd, Heather Dodd and Charles Ratay filed the second lawsuit, designated C.A. No. 2014-CP-29-792, on June 23, 2014 ("Second Lawsuit"). Appellants served the Motion to Dismiss or Stay Proceedings and Compel Arbitration in the Second Lawsuit on August 14, 2014.

The lower court conducted a hearing on September 8, 2014 to address both the motion to reconsider in the First Lawsuit and the motion to dismiss and compel arbitration in the Second Lawsuit. The lower court rendered its decision on the matters

addressed in the September 8, 2014 hearing by the filing of two orders on December 18, 2014.[1]

In the First Lawsuit, the lower court altered its prior order and ordered that the parties shall submit to binding arbitration in Lancaster, South Carolina. The order in the Second Lawsuit incorporated the amended decision reached the First Lawsuit and placed the two matters on parallel tracts.

Appellants timely served notices of appeal on January 21, 2015. This Court consolidated the appeals from the First Lawsuit and Second Lawsuit by order filed on May 28, 2015.

STATEMENT OF THE FACTS

Respondents purchased residential lots in the Riverchase Subdivision and commenced the First Lawsuit and Second Lawsuit alleging that Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc. (collectively, "Appellants") failed to develop the property in accordance with the original master plan for the development as set forth in the Declaration of Covenants, Conditions and Restrictions for Riverchase Estates, Section I recorded in Book 480, Page 89 with the Register of Deeds for Lancaster County, SC (the "Covenants") (See First Complaint, ¶ 2, 4, 18; Second Complaint, ¶ 2, 4, 15.) Respondents claim an "undivided legal

[1] Appellants first received written notice of the filing of these two orders upon receipt of the filed orders on December 22, 2014.

estate interest to community common elements as joints tenants in common pursuant to the Restrictive Covenants . . ." (Complaints, ¶2.) Respondents further claim that "LGI Land SC, LLC and/or LGI Development [Inc.] is unwilling or incapable of completing the common areas, and has failed to develop the subdivision by installation of utilities, roads, sewer, clubhouse, grounds and other common areas." (First Complaint, ¶25; Second Complaint ¶29.)[2]

Although Respondents lodge numerous claims against numerous defendants, the gravamen of these actions is that the developer of Riverchase Estates, LGI Land SC, LLC ("Developer"), failed to develop Riverchase Estates in accordance with the Covenants. Accordingly, Respondents do not dispute that the Covenants exist in their chain of title and are binding as between Appellants and Respondents.

The Covenants set forth specific dispute resolution procedures including pre-litigation conditions precedent as well as mandatory arbitration. Respondents did not seek informal resolution, did not seek mediation and did not seek arbitration. Rather, Respondents filed the lawsuits against Appellants in Lancaster County. Respondents failed to comply

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[2] The Common Area is broadly defined in the Covenants to include "all real property (including the improvements thereto) within the Subdivision owned by the Developer and/or the Association for the common use and enjoyment of the Owners . . . ." (Covenants, § 1.06.)

with any of the mandatory dispute resolution procedures set forth in the Covenants.

The Covenants unambiguously mandate that all disputes be initiated and pursued in strict accordance with the terms thereof. (Covenants, §§ 10.02 and 10.03.) The Covenants require any party to follow the mandatory dispute resolution procedures. The Covenants provide that substantial compliance with the terms thereof is a condition precedent to the right to bring suit pertaining to any Dispute. (Covenants, § 10.08.) These procedures include formal presentment, formal response, and non-binding mediation. (Covenants, §§ 10.02 and 10.03.)

Section 10.02 of the Covenants sets forth the sole manner a party may initiate a claim over any dispute and requires that following the presentment of the Notice of Dispute, "the Developer and the Disputing Party agree to use reasonable efforts to resolve the Disputes." (Covenants, § 10.03.) If a Dispute is not settled within sixty-days, "then Developer by written request may require that all unresolved matters be submitted to non-binding mediation." (Covenants, § 10.04.) Respondents failed to satisfy this condition precedent to filing the First Complaint or the Second Complaint.

The Covenants provide that if mediation is not successful, then "the Developer or the Disputing Party may by

written request, whether made before or after the institution of any legal action, require that all unresolved matters as set forth in the Dispute Notice be submitted to binding arbitration . . ." (Covenants, § 10.05(a).) The Covenants further provide that arbitration proceedings must be conducted in Lancaster County, South Carolina *unless* they involve Developer, in which instance the proceedings must be conducted in Montgomery County, Texas. (Covenants, § 10.05(d) (emphasis added).)

ARGUMENT

THE TRIAL COURT ERRED IN REFUSING TO ENFORCE THE ARBITRATION CLAUSE AND PRE-LITIGATION DISPUTE RESOLUTION MANDATES AS WRITTEN IN THE COVENANTS

A. Appeal of Refusal to Enforce Arbitration Clause

A lower court's refusal to enforce an arbitration clause is immediately appealable. See Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 121, 747 S.E.2d 461, 464, n. 4 (2013)(finding that an "order denying arbitration is immediately appealable"); see also S.C.Code Ann. § 15-48-200(a)(1) (an appeal may be taken from an order denying an application to compel arbitration). In this case, Appellants moved the lower court to compel arbitration in Texas as prescribed in the Covenants. The lower court refused to enforce the arbitration clause as written in the Covenants and as agreed by the parties; rather, the lower court elected to

order arbitration in South Carolina. As discussed herein, the lower court failed to adhere to the necessary legal standard in rendering this decision and the record is devoid of any evidence to support the necessary legal standard to disregard and set aside the unambiguous terms contained in the Covenants.

Although no South Carolina precedent addresses this issue, Tennessee has addressed this precise issue. The Tennessee court of appeals reversed a lower court's refusal to enforce the express language of an arbitration clause by ignoring the forum selection clause. The Tennessee Court of Appeals upheld an immediate appeal, reasoning as follows:

> However, as in this case, when the trial court compels arbitration but, sua sponte, reforms the parties' agreement as to their forum selection and that decision is not immediately appealable, both the purposes of the FAA and section 16 are thwarted. If the parties in this case were denied the right to appeal, they would have to proceed through arbitration, then appeal the trial court's action, and if it was determined by this Court that the trial court's reformation of the agreement should be reversed, the parties would have to conduct a second arbitration. Such a result surely does not ensure the "speed, simplicity, and economy associated with arbitration." *Accordingly, we hold that an aggrieved party may appeal in the unique situation where the trial court orders arbitration but, sua sponte, reforms the parties' choice of law and forum selection clauses.*

Spell v. Labelle, 2004 WL 892534, at *3 (Tenn.Ct.App. 2004) (italics added). The "unique situation" described in Spell is squarely presented in this matter and this appeal is necessary to protect the contractual rights and benefits of Appellants

intended by the dispute resolution provisions contained in the Covenants. To require otherwise, Appellants lose even if they ultimately prevail.

B. Standard of Review

"Arbitrability determinations are subject to de novo review." Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). "'[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.'" Id. The motion to dismiss was based upon subject matter jurisdiction, personal jurisdiction, venue and failure to state a claim upon which relief may be granted. Jurisdictional and venue matters are questions of law. "Questions of law may be decided with no particular deference to the trial court." Doe ex rel. Legal Guardian v. Barnwell Sch. Dist. 45, 369 S.C. 659, 662, 633 S.E.2d 518, 519 (Ct. App.2006).

C. Enforcement of the Forum Selection Contained in the Arbitration Clause

1. Validity and Enforcement of Arbitration Clauses

The arbitration provisions in the Covenants are valid, binding and enforceable. Respondents do not dispute the validity of the Covenants. Respondents do not claim the Covenants are not binding on the parties. Respondents do not claim that the dispute resolution clauses contained in the Covenants are ambiguous. Rather, Respondents claimed below

that the forum selection clause should be unenforceable on the grounds that it is unconscionable. Nothing in the record supports Respondents' argument, and the lower court committed reversible error by failing to apply the proper legal standard to invalidate the forum selection clause.

The Federal Arbitration Act ("FAA") and the South Carolina Uniform Arbitration Act mandate enforcement of arbitration provisions. "Arbitration is not litigation carried on by other means, but is an alternative means for resolving disputes without the cost and delay of a lawsuit . . . Arbitration is a favored method of settling disputes in South Carolina." Lauro v. Visnapuu, 351 S.C. 507, 516, 570 S.E.2d 551, 555-56 (Ct.App.2002).

"A written provision in any contract evidencing a transaction involving commerce to settle by arbitration shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2 (2000).[3] "Where a contract evidencing interstate commerce contains an arbitration clause, the FAA preempts conflicting state arbitration law. This prohibition specifically prevents state courts from requiring a judicial resolution of a conflict which the parties agreed to arbitrate." Tritech Elec., Inc. v. Frank M. Hall & Co.,

[3] The parallel South Carolina arbitration statute has almost identical language as the FAA. See S.C.Code Ann. § 15-48-10.

343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct.App.2000) (citations omitted) (finding that the state venue statute was preempted and that trial court erred by refusing to dismiss the action and compel arbitration).

Respondents did not make any argument to the lower court that interstate commerce is not involved. Any argument on the point would have been futile; the Covenants clearly evidence interstate commerce in that the Covenants control agreements and transactions involving the construction and development of a large residential subdivision proximate to border between North Carolina and South Carolina. (See Covenants, p. 1 (noting that Riverchase Estates encompasses almost 600 acres in Lancaster County).

Respondents did not make any argument to the lower court that the subject matter of this litigation falls outside the scope of the Arbitration Clause. Again, any argument on the point would have been futile.

> Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement. To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. A motion to

> compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute.

Zabinski, 346 S.C. at 596-97, 553 S.E.2d at 118-119 (citations omitted).

"The basic purpose of the FAA is to overcome state court's refusal to enforce arbitration agreements." Zabinski v. Bright Acres Associates, 346 S.C. 580, 590-91, 553 S.E.2d 110, 115 (2001). In this case, after initially refusing to enforce the Arbitration Agreement, the lower court refused to enforce the Arbitration Clause as written by refusing to enforce the forum selection clause contained therein. The lower court failed to apply the correct legal standard in reaching this decision and based its decision on a record lacking any facts in support.

2. Validity and Enforcement of Forum Selection Clauses

The lower court's refusal to enforce the forum selection clause violated controlling federal and state legal principles. "The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." Grant v. Magnolia Manor Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). "Section 4 [of the FAA] specifically states that 'the court shall make an order directing the parties to proceed to arbitration *in accordance*

with the terms of the agreement.' Id. (emphasis added). The district court must, therefore, apply a forum selection clause contained in the agreement if such a clause exists." Energy Absorption Sys. v. Carsonite Int'l, 377 F. Supp. 2d 501, 504 (D.S.C. 2005); See 6 C.J.S. Arbitration § 36 (noting that "[a]greements to arbitrate in a particular forum are enforced as a matter of contract law").

The Covenants provide that "[t]he arbitration proceedings must be conducted in Lancaster County, South Carolina unless they involve Developer, in which instance the proceedings must be conducted in Montgomery County, Texas." (Covenants, § 10.05(d).)

The lower court should have following South Caroina Supreme Court precedent. The Supreme Court, applying Texas law,[4] has affirmed enforcement of a forum selection clause requiring the arbitration to occur *in Texas*. The South Carolina Supreme Court established the following legal standard:

> The party opposing enforcement of the forum-selection clause carries a heavy burden of showing the forum-selection clause should not be enforced. A forum selection clause will be invalidated only (1) if it was the product of fraud or overreaching, (2) if the agreed forum is so inconvenient as to deprive the litigant of his day in court, or (3) if enforcement would contravene a strong public policy of the forum in which the suit is brought.

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[4] In this matter, the Covenants provide that the substantive and procedural laws of Texas govern if Developer is a party to the arbitration. (Covenants, § 10.05(d).)

Minorplanet Sys. USA Ltd. v. Am. Aire, Inc., 368 S.C. 146, 150, 628 S.E.2d 43, 45 (2006). This legal standard is similar to federal precedent.

> A forum-selection clause is 'prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances.' A clause is unreasonable if (1) it was the result of 'fraud or overreaching'; (2) 'trial in the contractual forum [would] be so gravely difficult and inconvenient [for the complaining party] that he [would] for all practical purposes be deprived of his day in court'; or (3) 'enforcement would contravene a strong public policy of the forum in which suit is brought'").

Pee Dee Health Care, P.A. v. Sanford, 509 F.3d 204, 213-14 (4th Cir. 2007) *quoting* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

In Atl. Floor Servs., Inc. v. Wal-Mart Stores, Inc., 334 F. Supp. 2d 875 (D.S.C. 2004), the District Court of South Carolina enforced a forum selection clause imposed by Walmart for a contract originating in South Carolina and to be performed in South Carolina. While dismissing the action and holding that Arkansas was the proper forum, the court noted:

> Plaintiff is a small, closely held South Carolina corporation while defendant, Walmart is a billion dollar corporation. Unequal bargaining power is not a justification in and of itself to hold a provision of a contract invalid. In Carnival Cruise Lines the U.S. Supreme Court upheld a forum selection clause where the parties were a large corporation and individual plaintiffs even though their sizes were dramatically different . . . A party seeking to escape a forum selection clause must 'show that trial in the contractual

> forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.'

Atl. Floor Servs., 334 F. Supp. 2d at 877-78 (citations omitted).

As cautioned by the United States Supreme Court in Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 592 (1991), "even where the forum clause establishes a remote forum for resolution of conflicts, 'the party claiming [unfairness] should bear a heavy burden of proof.'" In Carnival, the forum selection clause was enforced mandating residents of the State of Washington who boarded a cruise ship on the west coast to litigate in Florida. Notably, the Supreme Court recognized that terms of a forum selection clause in a cruise ticket "are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line." The Supreme Court rejected any requirement that the clause be negotiated. Carnival, 499 U.S. at 593.

The lower court's orders do not attempt to apply any of the three parts of the prescribed legal standard: "(1) if [the forum selection clause] was the product of fraud or overreaching, (2) if the agreed forum is so inconvenient as to deprive the litigant of his day in court, or (3) if enforcement would contravene a strong public policy of the

forum in which the suit is brought." Minorplanet, 368 S.C. at 150, 628 S.E.2d at 45.

As to the first basis, Respondents have not met their "heavy burden." As in the cases involving Walmart and Carnival, the record in this appeal is "devoid of any evidence of fraud or overreaching on the part of [LGI] despite the alleged unequal bargaining power of the parties." Atl. Floor Servs., 334 F. Supp. 2d at 878.

As to the second basis, the lower court had nothing on which to support a finding that arbitration in Texas would be "so gravely difficult and inconvenient that [Respondents] will for all practical purposes be deprived of [their] day in court." Atl. Floor Servs., 334 F. Supp. 2d at 877-78.

As to the third basis, forum selection clauses are not violative of public policy and have been enforced by numerous South Carolina appellate courts. See Atl. Floor Servs., 334 F. Supp. 2d at 879-80 (noting "despite numerous opportunities, South Carolina's appellate courts have not suggested, much less declared, that forum selection clauses violate the public policy of the State. In fact, the courts have affirmed and recognized that these clauses are valid and enforceable"). Public policy favors enforcement of both contractual and arbitration provisions.

> Arbitration is contractual by nature . . . There is a strong presumption in favor of the validity of

> arbitration agreements because of the strong policy favoring arbitration. This policy [favoring arbitration], as contained within the Act, requires courts to enforce the bargain of the parties to arbitrate. [C]ourts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted. Thus, the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that arbitration proceed in the manner provided for in the parties' agreement.

Cape Romain, 405 S.C. at 125-126, 747 S.E.2d at 466 (citations and internal quotations omitted). There is no evidence that an arbitrator in Texas will be unfair to Respondents. Respondents proffered nothing to satisfy the necessary legal standard to support the lower court's refusal to enforce the forum selection clause contained in the Covenants.

In addition, the lower court applied the wrong standard. The lower court's sole finding was that "no party would suffer prejudice by ordering the parties to submit to binding arbitration in Lancaster County, South Carolina." (Order in First Lawsuit, filed December 18, 2014, p. 2.) Under the FAA, the Supreme Court expressly refused to allow a lower court to consider "a more convenient forum" and held the "correct approach would have been to enforce the forum clause specifically unless [the plaintiff] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching". M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

The lower court committed clear error of law under Minorplanet, Wal-Mart, and Carnival.

3. Forum Selection is not Unconscionable

[5]The forum selection clause in the Covenants is not unconscionable. "General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. In 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." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007)(citations omitted). The decision is not whether the court believes the terms to be fair, reasonable or advisable. Rather, Courts must focus "on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." Simpson, 373 S.C. at 25, 644 S.E.2d at 668.

> Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom

[5] This section is included to the extent the lower court's discussion regarding unconscionability was not abrogated by the filing of the two orders on December 18, 2014.

> enforcement is sought cannot be said to have consented to the contract.

Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882, 885 (2013); see also Carlson v. South Carolina State Plastering, LLC, 404 S.C. 250, 743 S.E.2d 868 (Ct.App.2013) (enforcing an arbitration provision involving facts more similar to this matter (homeowner against a builder and subdivision developer) than the facts involved in Simpson).

The arbitration provisions in the Covenants are not oppressive and apply to all parties as "an alternative means for resolving disputes without the cost and delay of a lawsuit." There is no evidence that these purchasers of real estate were not sophisticated or lacked "basic reading ability." In addition, Respondents were required to be represented by an attorney at the closing transaction for each purchase of real estate involving Developer and the lots at Riverchase. See State v. Buyers Service Co., 292 S.C. 426, 357 S.E.2d 15 (1987). The forum selection clause is contained in the Covenants which is within the chain of title of each lot purchase; the forum selection clause was not hidden or obscured. The lots subject to this lawsuit were not small purchases but rather vacant lots in an upscale development for future construction. (See Complaint, Exhibit A (noting purchase price of $144,900 for one of the lots).)

Accordingly, the trial court's finding the forum selection provision unconscionable is an error and should be reversed.

D. Conditions Precedent to Litigation

In the initial instance, the lower court committed error by refusing to dismiss the First Lawsuit and the Second Lawsuit without prejudice on the grounds Respondents failed to satisfy the Covenants' dispute resolution terms which are conditions precedent to the filing of any litigation. The Covenants require parties to undertake certain efforts at informal resolution as a condition precedent to litigation. Section 10.02 provides as follows:

> Present of Dispute Required. The Disputing Party must submit written notice to Developer by certified mail, return receipt requested within the time as hereinafter set forth, setting forth all Disputes, if any, claimed or asserted against or adverse to Developer (herein referred to as the "Dispute Notice"). The Dispute Notice must set forth each claim, demand, action and cause of action to be included in the Dispute, a reasonably detailed factual description thereof and all remedial action deemed necessary to remedy all Disputes, and a reasonably detailed description of the nature and extent and amount of all claims for damages, if any. Upon request of Developer, the Disputing Party must also provide Developer with any evidence that depicts the nature and cause of the Dispute, the nature and extent of all remedial action including expert reports, photographs and videotapes to the fullest extent the evidence would be discoverable under the South Carolina Rules of Civil Procedure. ALL DISPUTES NOT SET FORTH IN THE DISPUTE NOTICE, IF ANY, ARE WAIVED BY THE DISPUTING PARTY.

(Covenants, § 10.02.) Following the presentment of the Notice of Dispute, "the Developer and the Disputing Party agree to use reasonable efforts to resolve the Disputes." (Covenants,

§ 10.03.) If a Dispute is not settled within sixty-days, "then Developer by written request may require that all unresolved matters be submitted to non-binding mediation." (Covenants, § 10.04.) Only if mediation is not requested or is not successful can a party proceed to request arbitration. (Covenants, § 10.05.)

"Modern courts are quite willing to enforce agreements to mediate as a condition precedent to litigation." (1 Mediation: Law, Policy and Practice 6:4 (2014).) "A number of courts have found that when parties to a lawsuit have elected not to be subject to a court's jurisdiction until some condition precedent is satisfied, such as mediation, the appropriate remedy is to dismiss the action." Tattoo Art, Inc. v. Tat Int'l, LLC, 711 F. Supp. 2d 645, 651 (E.D.Va.2010) (dismissing action); see also Houseboat Store, LLC v. Chris-Craft Corp., 692 S.E.2d 61, 65 (Ga.2010)(holding that plaintiff's failure "to allege in its complaint that it had complied with the mediation provision prior to filing the instant lawsuit, the trial court's dismissal on this ground was proper"); Hometown Servs., Inc. v. Equitylock Solutions, Inc., -F.Supp.2d-, 2014 WL 4406973, at *2 (W.D.N.C. Sept. 5, 2014)(dismissing lawsuit because the "[a]greement requires the parties to mediate before any legal action is instituted").

In Santana v. Olguin, 208 P.3d 328, 335 (Kan.2009), the court dismissed the action and noted "mediation is intended to provide an alternative to litigation and thus creates a condition precedent to litigation that the parties mediate their disputes. Our conclusion is consistent with case law that has construed contracts with grievance procedures as requiring pursuit of such procedures *prior* to litigation."

Dismissal is consistent with the FAA because the mandatory enforcement of arbitration provisions are not triggered when a party fails to comply with mediation requirements. "FAA's policy in favor of arbitration does not operate without regard to the wishes of the contracting parties . . . . Because neither party requested mediation, the arbitration provision has not been activated and the FAA does not apply." Kemiron Atl., Inc. v. Aguakem Int'l, Inc., 290 F.3d 1287, 1291 (11thCir.2002). "Where contracting parties condition an arbitration agreement upon the satisfaction of some condition precedent, the failure to satisfy the specified condition will preclude the parties from compelling arbitration and staying proceedings under the FAA. Because neither HIM nor DeVito ever attempted to mediate this dispute, neither party can be compelled to submit to arbitration." HIM Portland, LLC v. DeVito Builders, Inc., 317 F.3d 41, 44 (1stCir.2003).

The Developer has been denied its right to engage in pre-litigation negotiation and mediation to work with purchasers to resolve potential claims. Requiring Respondents to participate in pre-litigation alternative dispute resolution as required by the Covenants, to which each of them voluntarily elected to be bound, offends no legal or equitable principle. Depriving the Developer its contractual right to have an opportunity to work through issues prior to litigation in a large development such as Riverchase is particularly egregious given the unforeseen real estate recession which directly impacted the development.

Although Respondents make numerous factual allegations in the Complaint, there is no dispute that the Covenants mandate actions prior to litigation that Respondents failed to undertake. The trial court properly determined that the parties "could reasonably have expected to have to engage in alternative dispute resolution pursuant to the covenants." (Order, p. 2.) However, the trial court failed to enforce the contractual mandate and this Court should reverse this error through enforcement of the mandatory dispute resolution procedures of the Covenants and dismiss the lawsuit without prejudice.

CONCLUSION

For the reasons stated above, the trial court's order refusing to dismiss this case or in the alternative mandate arbitration in Montgomery County, Texas should be reversed.

Respectfully submitted,

Date: July 29, 2015

By: _____

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants and the Designation of Matter to Be Included in the

Record on Appeal by depositing a copy of each in the United States Mail, postage prepaid, on July 29, 2015, addressed to counsel of record as follows:

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