

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

CIVIL ACTION NO.: 2017-CP-40-04437

James R. Zedosky, Lenore K. Zedosky, Douglas Shea and Sally Shea)

Plaintiffs,)

ORDER DENYING MOTION TO STAY AND TO COMPEL ARBITRATION

vs.)

D.R. Horton, Inc. and Town of Blythewood)

Defendants.)

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SC Court of Appeals

INTRODUCTION

RICHLAND COUNTY FILED 2018 MAR -1 AM 8:30 JAMETTE W. ... C.C.P. & H.P.

This matter came before this Court for hearing on February 15, 2018 on Defendant D.R. Horton, Inc.'s Motion to Stay and to Compel Arbitration filed on September 7, 2017. Appearing on behalf of Plaintiffs was M. Alan Peace of Harrell, Martin & Peace, P.A. of Chapin, South Carolina. Appearing on behalf of Defendant D.R. Horton, Inc. ("Horton") was T. McRoy Shelley, III of Rogers Townsend & Thomas, PC of Columbia, South Carolina. Appearing on behalf of Defendant Town of Blythewood ("Town") was Andrew F. Lindemann of Lindemann, Davis & Hughes, P.A. of Columbia, South Carolina.

FACTS

This is an action between Plaintiffs and Defendants whereby Plaintiffs are seeking to temporarily and permanently enjoin the further development of property within a certain area of Cobblestone Park subdivision. Plaintiffs contend the property at issue may only be developed as a 9-hole golf course, or otherwise it must remain green way ("Green Way") as required by applicable restrictive covenants. In addition to filing its Answer in response to Plaintiffs' Complaint, Horton

filed a Motion to Stay and to Compel Arbitration of the dispute between Plaintiffs and Horton. Horton claims that the separate Home Purchase Agreements ("Agreements") entered into between Plaintiffs and Horton for the sale of homes from Horton to the respective Plaintiff couples require arbitration of this dispute. Horton further relies upon the arbitration provisions found in the Declaration of Covenants, Conditions, and Restrictions for Cobblestone Park recorded in the Register of Mesne Conveyance for Richland County in Book R1098 at Page 3647 ("CCRs"). As additional support for Horton's motion, Horton contends that this dispute involves interstate commerce and the arbitration provisions found in the Agreements and CCRs are thus enforceable under the Federal Arbitration Act found at 9 U.S.C Section 1 et seq. even though they fail to comply with the South Carolina Uniform Arbitration Act found at South Carolina Code Ann. §15-48-10 et.seq.

Plaintiffs contend the arbitration provision in the Agreement is not applicable to this dispute. Plaintiffs further contend this dispute is exempt from the arbitration provisions of the CCRs based on a specific exemption referenced in the CCRs.

DISCUSSION

The policy of the United States and South Carolina is to favor arbitration of disputes. *Tritech Electric, Inc. v. Frank M. Hall & Company*, 343 S.C. 396, 540 S.E. 2d 864 (ct. app. 2000). Arbitration is matter of contract and controlled by contract law. *South Carolina Public Service Authority v. Great Western Coal (Kentucky, Inc.)*, 312 S.C. 559, 437 S.E. 2d 22 (1993).

The separate Agreements between Horton and the Plaintiff couples each have the following arbitration clauses:

15. MANDATORY BINDING ARBITRATION. PURCHASER AND SELLER SHALL SUBMIT TO BINDING ARBITRATION ANY AND ALL DISPUTES WHICH MAY ARISE BETWEEN THEM REGARDING THIS CONTRACT AND/OR THE PROPERTY INCLUDING BUT NOT LIMITED TO ANY DISPUTES REGARDING



(A) SELLER'S CONSTRUCTION AND DELIVERY OF THE HOME; (B) SELLER'S PERFORMANCE UNDER ANY PUNCH LIST OR INSPECTION AGREEMENT; AND (C) SELLER'S WARRANTY PURSUANT TO SECTION 14 ABOVE. THE ARBITRATION SHALL TAKE PLACE IN THE COUNTY IN WHICH THE PROPERTY IS LOCATED. THE PROCEEDING SHALL BE CONDUCTED PURSUANT TO THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION (THE "AAA"), AND TO THE EXTENT POSSIBLE, UNDER RULES WHICH PROVIDE FOR AN EXPEDITED HEARING. THE FILING FEE FOR THE ARBITRATION SHALL BE PAID BY THE PARTY FILING THE ARBITRATION DEMAND, BUT THE ARBITRATOR SHALL HAVE THE RIGHT TO ASSESS OR ALLOCATE THE FILING FEES AND ANY OTHER COSTS OF THE ARBITRATION AS A PART OF THE ARBITRATOR'S FINAL ORDER. THE ARBITRATION SHALL BE BINDING AND FINAL, AND EITHER PARTY SHALL HAVE THE RIGHT TO SEEK JUDICIAL ENFORCEMENT OF THE ARBITRATION AWARD. NOTWITHSTANDING ANY OTHER PROVISION HEREIN, ANY DISPUTES ARISING UNDER THE STRUCTURAL WARRANTY PROVIDED TO PURCHASER BY THE NWP SHALL BE MEDIATED, ARBITRATED AND/OR JUDICALLY RESOLVED PURSUANT TO THE TERMS, CONDITIONS, PROCEDURES AND RULES OF THAT WARRANTY PROGRAM. (emphasis added).

The "property" which is the subject of the separate Agreements is, by definition in those Agreements, the homes which the Plaintiffs were each purchasing. Therefore, the arbitration provision in the Agreements only applies to disputes concerning the respective contracts and the respective residences which the Plaintiffs purchased from Horton.¹ The lawsuit before the Court involves neither the contract nor the properties which the Plaintiffs purchased. It involves the intended development and change of use of an entirely separate parcel of land which abuts Plaintiffs' residences. Therefore, Horton's reliance upon the arbitration provision in the Agreements is misplaced.

¹ The Court notes that the Town of Blythewood is not a signatory to either the Home Purchase Agreements or the Declaration of Covenants, Conditions and Restrictions for Cobblestone Park, which contain the arbitration provisions on which Horton relies. In *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (2012), the South Carolina Court of Appeals explained that "[w]hen a signatory seeks to enforce an arbitration agreement against a non-signatory," a non-signatory may be estopped "from claiming that he is not bound to the arbitration agreement when he received a direct benefit from a contract containing an arbitration clause." 733 S.E.2d at 604. Here, Horton has not argued, nor has evidence been presented, that the Town has received a direct benefit from the Home Purchase Agreements or from the Declaration of Covenants, Conditions and Restrictions for Cobblestone Park. Horton thus has not demonstrated that the Town may be compelled to submit the pending claims to arbitration.



Horton next relies upon the arbitration provisions contained within Article 14 of the CCRs to argue that the CCRs require this action be stayed. However, Article 14 of the CCRs identify certain categories of claims which are exempt from its terms requiring arbitration. One of those exemptions is found in Paragraph 14.2 (d) and provides as follows:

14.2 Exempt Claims.

The following Claims (“exempt claims”) are exempt from the provisions of Section 14.3:

(d) any suit upon which an **indispensable party** is not a “Bound Party” (see CCRs Paragraph 14.2(iv), p 73). (emphasis added).

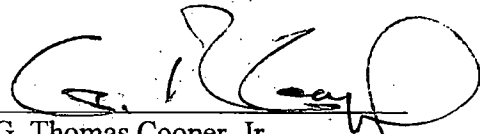
The definition of a “Bound Party” for the purpose of this lawsuit is Horton, as the Declarant under the CCRs, and Plaintiffs, as Owners under the CCRs (see CCRs, Paragraph 14.1, p 72). Defendant Town would not be considered a “Bound Party”. Plaintiff has sued Horton and Town seeking to prevent further subdivision and development of homes within the Green Way area. Town has been named as a Defendant by Plaintiffs in the litigation relying on South Carolina Code Ann. §6-29-1145 which specifically prohibits Town from permitting activity on property which violates a restrictive covenant. The Town is not subject to the arbitration provisions of the CCRs. To have a proceeding between Plaintiffs and Horton in arbitration separate from the proceeding between Plaintiffs and Town could lead to inconsistent results. As a consequence, the Court considers Town an indispensable party for this litigation. An additional indication of the Town’s indispensability in the litigation is the fact that Horton has asserted crossclaims against Town to require that Town allow Horton to proceed with its intended activity. Based on the foregoing, Horton’s reliance upon the CCRs as the basis for its Motion to Stay pending arbitration is also misplaced. Because Town is an indispensable party and cannot be forced to participate in an arbitration, Plaintiffs’ claims asserted in this litigation are expressly exempt from the arbitration provision of the CCRs.



ORDER

Based upon the discussion above, the Court denies Horton's Motion to Stay and to Compel Arbitration. This lawsuit is not a claim between Plaintiffs and Horton pertaining to their Agreements or the properties which they purchased from Horton. Further, this lawsuit is exempt from the arbitration provision in the CCRs because the Town is an indispensable party and cannot be forced to participate in an arbitration.

IT IS SO ORDERED.



G. Thomas Cooper, Jr.
Circuit Court Judge for Richland County

February 27, 2018
Columbia, South Carolina

