STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT
Amanda Leigh Huskins and Jay R. Huskins, Plaintiffs, v. Mungo Homes, LLC, Defendant.	)	CASE NO. 2017-CP-40-03697 **ORDER**

INTRODUCTION

This matter comes before the Court upon Mungo Homes' Motion to Dismiss and Compel Arbitration. Judge DeAndrea Gist Benjamin heard arguments of counsel on November 8, 2017 at the Court of Common Pleas for Richland County, South Carolina. This Court reviewed the pleadings, memoranda, and arguments of counsel and issues the following Order to **GRANT** the Defendant's Motion to Dismiss and Compel Arbitration.

FACTS

The Huskins are residential buyers who executed a Purchase Agreement with Mungo Homes, a national builder on June 29, 2015. Compl. ¶ 1. The Purchase Agreement was for the sale of a tract of land, the construction of a dwelling, and any improvements constructed on the property. Pl.'s Exh. 1. The Purchase Agreement categorizes the transaction as a "Building Job." *Id.* A Building Job gave the purchasers [the Huskins], an opportunity to inspect any Addendums added to the Purchase Agreement for improvements on the property. *Id.* The Purchase Agreement includes an Addendum where the Huskins requested the placement of the driveway on the right side of the property. *Id.* The improvements specified in the Purchase Agreement

Addendum began in August 21, 2015. *Id.* The Addendum includes a Development Rider explaining that factors such as weather and local municipalities may cause delays during the construction and completion of the home. *Id.* Mungo Homes obtained a permit from Richland County classifying the improvement as "residential new construction" for a "single family residence." *Id.* In addition, a Certificate of Occupancy was issued for the property on January 19, 2016. *Id.*

There are two provisions in the Purchase Agreement that are of importance in this lawsuit. First, is the "Limited Warranty" provision, located on page two of the Purchase Agreement. In this provision, Mungo Homes disclaims the implied warranty of habitability, suitability for residential purposes, merchantability, or fitness for particular purpose. *Id.* Mungo Homes also disclaims liability for consequential, or punitive damages. *Id.* A third-party corporation is responsible for any warranties or damages claims. *Id.*

Second, is the "Arbitration and Claims" provision, which is located at the top of page three of the Purchase Agreement. This provision subjects any claims or disputes arising out of, or relating to the Purchase Agreement to arbitration. *Id.* The provision sets a ninety-day period in which a party can demand arbitration after a claim or dispute arises. *Id.* The Arbitration and Claims Provision states:

> "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 party's arbitrator. *Each and every demand for arbitration shall be made within 90 days after the claim,* dispute or other mater in question has arisen . . . or else any claim, dispute or other matter

in question not asserted within said time periods shall be deemed waived and forever barred." *Id.*

The Huskins filed a Complaint on June 14, 2017 alleging four causes of action for (1) breach of contract; (2) unjust enrichment; (3) declaratory relief; and (4) violation of the South Carolina Unfair Trade Practices Act. Compl. ¶ 23, 27, 32, 34. Mungo Homes filed a Motion to Dismiss and Compel Arbitration on July 20, 2017. Def. Mot. to Dismiss at 1.

The Huskins put forth three main arguments. First, they argue that the Purchase Agreement involves the sale of a new home. Pl.'s Mem. in Opp'n at 4. Under South Carolina law, the sale of a new home involves *intrastate* commerce; it does not involve interstate commerce. *Id.* The Federal Arbitration Act does not govern this transaction because interstate commerce is not involved. *Id.* Rather, the South Carolina Uniform Arbitration Act applies to this transaction. *Id.* at 5. Second, they argue the "Arbitration and Claims" provision is unconscionable because they had no meaningful choice to negotiate the terms of the arbitration provision and the provision truncates the statute of limitations for when the Huskins may bring a claim arising out of, or related to the Purchase Agreement. Pl.'s Mot. in Opp'n at 7-8. This violates public policy. *Id.* Third, the Huskins argue South Carolina precedent requires the court to analyze the "Limited Warranty" and "Arbitration and Claims" provisions *together* to determine whether the arbitration provision is unconscionable. *Id.*

The Defendants argue that the Purchase Agreement involves the sale of property and the construction of a dwelling, or improvements to a dwelling. Def. Mot. to Dismiss at 2. The transaction involved the construction of real estate, which necessarily involves *interstate* commerce according to South Carolina law. *Id.* at 3. The Federal Arbitration Act governs agreements that involve interstate commerce. *Id.* Arbitration of claims subject to the Federal Arbitration Act require the court to analyze the validity of the arbitration provision in isolation

from the remainder of the underlying agreement. Def. Reply Mot. at 3. Mungo Homes argues the "Arbitration and Claims" provision is not unconscionable because the Huskins received an opportunity to review and make changes to the Purchase Agreement and Addendum. Def. Reply Mot. at 4. Further, the "Arbitration and Claims" provision merely sets a time frame for when either party may demand arbitration; it does not shorten the statute of limitations to file a claim arising out of the Purchase Agreement. *Id.* at 5.

I. INTERSTATE COMMERCE: COMMERCE-IN-FACT TEST

The Federal Arbitration Act Section 2 provides that a controversy or claim subject to arbitration arising out of a contract *involving commerce* is valid, irrevocable, and enforceable except upon grounds for revocation of any contract that exists at law or in equity. 9 U.S.C. § 2 (1988). South Carolina has a strong policy favoring arbitration. *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001).

Section 2 of the Federal Arbitration Act is generally binding on state claims where parties agree to arbitrate if the underlying transaction involved interstate commerce. South Carolina courts utilize a "commerce-in-fact" test to determine whether a transaction involves interstate commerce and subjects arbitration agreements to federal arbitration. *Zabinski*, 346 S.C. at 591, 553 S.E.2d at 111. Alternatively phrased, the transaction "must turn out, in fact, to have involved interstate commerce." *Id.* The South Carolina Supreme Court instructs the courts to "examine the agreement, the complaint, and the surrounding facts," to determine whether the transaction involved interstate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) (noting South Carolina courts consistently look to the essential character of the contract when applying the Federal Arbitration Act).

To determine whether interstate commerce is involved, the Court must determine whether the transaction was for the sale of a residential home, or a contract for the development or construction of a home. A contract for the sale of residential real estate does not involve interstate commerce. *Bradley*, 398 S.C. at 457, 730 S.E.2d at 317. South Carolina courts accept that construction projects generally involve interstate travel, purchase of materials, or other activities across state borders. *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 118.

This Court analyzed the agreement, the complaint, and the facts to determine whether the Purchase Agreement involved interstate commerce. Looking to the Purchase Agreement, there is one fact that distinguishes this case from *Bradley* in that the Purchase Agreement in *Bradley* was undisputedly for a "*completed dwelling*". *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318. In this case, the parties contest whether this contract was for a completed home. The language of the Purchase Agreement states the transaction involved improvements to a piece of property and the Purchase Agreement Addendum indicates a driveway was constructed. Pl.'s Exh. 1.

Other language in the Purchase Agreement in this case points to the involvement of construction. For instance, the Development Rider states that factors such as weather or local municipalities, may affect the construction start date or completion of the home. Pl.'s Exh. 1. Also, Richland County issued a permit on the property as "residential new construction" for a "single family residence." *Id.* The Purchase Agreement in *Bradley* checked "N/A" for options such as: "new construction, house plan, options, and color selection." *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318. Applying the commerce-in-fact analysis set forth in *Bradley*, the essential character of the Purchase Agreement was for the purchase and improvement of a piece of property, which involved some level of construction, which likely involved interstate commerce.

Although the Purchase Agreement in Huskins is distinguishable from the contract in *Bradley*, arbitration is grounded in principles of contract law. Parties are generally free to structure their arbitration agreements as they see fit. *Volt Info. Sci., Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). As such, parties are free to enter contracts providing for arbitration under rules established by state law rather than rules established by the Federal Arbitration Act, even if interstate commerce is involved. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 n.2 (2000). The Federal Arbitration Act preempts any state procedural law that completely invalidates the parties' agreement to arbitrate. *Id.* at 343 S.C. at 540, S.E.2d at 364 (invalidating the notice requirement contained in South Carolina's Uniform Arbitration Act because its application would have made the arbitration agreement completely unenforceable).

The "Arbitration and Claims" provision in this case subjects any controversies arising out of the Purchase Agreement to arbitration governed by the South Carolina Uniform Arbitration Act. Pl.'s Exh. 1. Although the Purchase Agreement may have involved interstate commerce, the parties freely agreed that the South Carolina Uniform Arbitration Act would govern. Pl.'s Exh. 1. One of the basic principles of arbitration is to ensure that private agreements to arbitrate are enforced according to their terms. *Volt,* 489 U.S. at 109. It follows that the specific terms of the arbitration provision should be upheld; the South Carolina Uniform Arbitration Act governs this dispute. *Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873-4 (Ct. App. 2013) (applying the South Carolina Uniform Arbitration Act as agreed upon in the purchase agreement between residential buyer and builder).

II. UNCONSCIONABILITY

The South Carolina Uniform Arbitration Act generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must determine whether the agreement to arbitrate exists in the first place. S.C. CODE ANN. § 15–48–20(a) (2005). If no agreement is found to exist, the court must deny any application to arbitrate. *Id.* To determine whether an agreement to arbitrate is valid, or exists, the trial court should apply ordinary state-law principles that govern the formation of contracts. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22-23 644, S.E.2d 663, 667-68 (2007).

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. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016); *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668. Unconscionability requires courts to focus generally on whether the arbitration clause is geared toward achieving an unbiased decision by a neutral decision maker. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69. If a court finds that any clause of a contract was unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. CODE ANN. § 36–2–302(1) (2003); *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668. A determination of unconscionability requires an evaluation of the facts and circumstances surrounding the particular case. *Id.*

a. The Huskins lacked meaningful choice to arbitrate their claims because they do not possess business judgment, did not hire counsel, and were not a substantial business concern.

Whether one party lacks a meaningful choice to enter an arbitration agreement typically speaks to the fundamental fairness of the bargaining process. *Smith*, 417 S.C. at 49, 790 S.E.2d at

4. "In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, *inter alia*, the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether the plaintiff is a substantial business concern." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

Considering the factors set forth in *Simpson*, the Court finds that the Huskins lacked a meaningful choice to arbitrate. First, the Huskins do not have business knowledge and did not hire outside counsel. Pl.'s Mem. in Opp'n at 7. The Huskins are homebuyers that did not enjoy substantially stronger bargaining power against a residential builder than any other average homebuyer. *Smith*, 417 S.C. at 50, 790 S.E.2d at 4–5. The Court in *Simpson* acknowledged that a lack of business judgment leaves the buyer without knowledge of the arbitration agreement's consequences. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. Second, The Huskins did not hire independent counsel to discuss the terms of the Purchase Agreement. Pl.'s Mem. in Opp'n at 7; *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. The Huskins, like the buyer in *Simpson*, were customers negotiating with a commercial entity that drafted the contract and held substantially more bargaining power. Compl. ¶ 6-7.; *Simpson* 373 S.C. at 26, 644 S.E.2d at 670. [1]

Further, the Huskins lacked a meaningful choice to arbitrate because they were not a substantial business concern to Mungo Homes. A homebuyer that is a single client to a national builder is not considered a substantial business concern. *Smith*, 417 S.C. at 50, 790 S.E.2d at 5. The Huskins executed a Purchase Agreement with Mungo Homes that pertained to one tract of land. Pl.'s Mem. in Opp'n at 7; Compl. ¶ 6-7. The Court finds that the Huskins lacked a

[1] The Huskins purchased a "critically important" item from Mungo Homes like the buyer in *Simpson* who purchased a car from the dealership; a home, like a car, is a modern-day necessity. Compl. ¶ 1; *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670.

meaningful choice to arbitrate because they did not hire independent counsel, they lacked business knowledge, and they were not a substantial business concern to Mungo Homes.

b. The arbitration agreement should be analyzed in isolation from the "Limited Warranty" provision because the warranty provision is clearly outside of the arbitration provision.

When determining the validity of an arbitration provision, courts generally analyze the arbitration provision in isolation from the rest of the contract. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873–74 (Ct. App. 2013); *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 56-58, 791 S.E.2d 286, 289-290 (Ct. App. 2016). The Court will analyze the arbitration provision in conjunction with other provisions of the contract when the arbitration provision cross-references other provisions in the contract. *Smith*, 417 S.C. at 45, 790 S.E.2d at 2.

The Court finds that the "Limited Warranty Provision" exists outside of the "Arbitration and Claims" provision. In *One Belle*, the contract contained a warranty provision that limited the warranty's transferability to a roof manufacturer for shingles it produced and contained an arbitration provision on a separate page. *One Belle*, 418 S.C. at 59, 791 S.E.2d at 290. The court found the warranty provisions *[were] clearly outside the arbitration agreement* and as such the court would only consider the arbitration agreement in an unconscionability analysis. *One Belle*, 418 S.C. at 64, 791 S.E.2d at 293. In the Huskins' case, the "Limited Warranty" provision is located on the second page of the Purchase Agreement whereas the "Arbitration and Claims" provision is located at the top of page three, which indicates the "Limited Warranty" provision is outside the arbitration agreement and should not be considered in the unconscionability analysis Pl.'s Exh. 1.; *see also Carlson*, 404 S.C. at 260, 743 S.E.2d at 873–74 (determining the unconscionability of an arbitration agreement required the court to analyze the arbitration

provision separate from other provisions in the purchase agreement such as a provision limiting the statute of limitations to bring a claim).

Further, the arbitration provision does not reference the "Limited Warranty" provision contained in the Purchase Agreement. The arbitration provision in *Smith* was intertwined within a complex paragraph titled "Warranties and Dispute Resolution." *Smith*, 417 S.C. at 45, 790 S.E.2d at 2. The "Warranties and Dispute Resolution" paragraph contained numerous sub-paragraphs which cross-referenced once another. *Id.* To determine whether the arbitration agreement was unconscionable, the Court in *Smith* analyzed the "Warranties and Dispute Resolution" paragraph as a whole because the arbitration provision could not be extracted from the "Warranties and Dispute Resolution" paragraph. *Smith*, 417 S.C. at 48, 790 S.E.2d at 4. Unlike the arbitration provision in *Smith*, the arbitration provision in this case is not intertwined with the "Limited Warranty" provision. Pl.'s Exh. 1; *Smith*, 417 S.C. at 48, 790 S.E.2d at 4.

This Court, in general, is tasked with whether the *arbitration agreement* is invalid, not whether the *contract as a whole* is invalid. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967). The "Limited Warranty" provision is clearly outside of the "Arbitration and Claims" provision as both provisions are located on separate pages and headings of the contract and do not cross reference one another. Pl.'s Exh.1. The Court will not consider the "Limited Warranty" provision to determine the unconscionability of the arbitration provision.

c. The arbitration agreement is not one sided and oppressive because it does not limit the Huskins' statutory remedies, it is clearly labeled, and it applies mutually to both parties.

To determine whether an arbitration agreement is one-sided and oppressive the courts look at a variety of factors. An arbitration clause that limits statutory remedies indicates one-sidedness and oppressiveness. *Simpson,* 373 S.C. at 29-30, 644 S.E.2d at 671. An arbitration provision that

stays one party's claims pending the outcome of arbitration, but does not stay the other party's claims indicates one-sidedness and oppressiveness. *Simpson,* 373 S.C. at 31, 644 S.E.2d at 672. An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum indicates one-sidedness and oppressiveness. *Simpson,* 373 S.C. at 33, 644 S.E.2d at 673. A clearly identified, mutual arbitration provision that does not limit remedies available by law indicates a non-oppressive or one-sided arbitration agreement. *Carlson*, 404 S.C. at 254, 743 S.E.2d at 870.

An arbitration clause that limits statutory remedies is an indicator of a one-sided and oppressive arbitration clause. *Simpson,* 373 S.C. at 29-30, 644 S.E.2d at 671. The arbitration provision in the case at hand sets a time frame of ninety days after any claim or dispute arises in which a party can demand arbitration. Pl.'s Exh. 1. The Huskins filed an action on June 14, 2017 and Mungo Homes filed a Motion to Compel Arbitration on July 20, 2017, within the ninety- day time frame. Compl. ¶ 1; Def. Mot. to Dismiss at 1. The ninety-day time frame to demand arbitration does not limit the Huskins' ability to arbitrate claims for damages unlike an arbitration provision that limits the buyer's ability to arbitrate any double and treble damages available under the South Carolina Uniform Trade Practices Act. *Simpson*, 373 S.C. at 20, 644 S.E.2d at 666.

An arbitration provision that stays one party's claims pending the outcome of arbitration, but does not stay the other party's claims is an indicator of a one- sided and oppressive arbitration clause. *Simpson,* 373 S.C. at 31, 644 S.E.2d at 672. In *Simpson*, the arbitration clause subjected all claims or controversies between the dealer and customer to arbitration. *Id.* The arbitration clause included an exception where claims between the dealer against the customer were not stayed pending the outcome of arbitration. *Id.* The Court found the arbitration provision was one-

sided and oppressive because the dealer's judicial remedies superseded the consumer's arbitral remedies. *Id.* The Court envisioned a scenario where the dealer could initiate a claim in court, complete the claim, and sell the contested vehicle prior to an arbitrator's determination of the consumer's rights in the same vehicle. *Simpson,* 373 S.C. at 32, 644 S.E.2d at 672.

In contrast to the unequal stay of one party's claims over another's in *Simpson*, the arbitration provision in this case allows both parties to arbitrate their claims equally. Pl.'s Exh. 1. The arbitration provision calls for binding arbitration before a panel consisting of three arbitrators: one selected by the Huskins, one selected by Mungo Homes, and one mutually selected by the arbitrator chosen by each party. *Id.* Unlike the arbitration provision in *Simpson*, the arbitration provision in the Huskins' case allows both parties to arbitrate the claims or disputes and includes a process for neutrally selecting the arbitrators. Pl.'s Exh. 1.; *Simpson* 373 S.C. at 31, 644 S.E.2d at 672.

An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum is an indicator of a one-sided and oppressive arbitration provision. *Simpson,* 373 S.C. at 33, 644 S.E.2d at 673. The arbitration clause in *Simpson* claimed that "any and all disputes" including "automobile warranty" and "any consumer protection statute" may be resolved *only* by "binding arbitration" which was unenforceable as a matter of public policy for precluding the buyer from filing claims under the Magnuson Moss Warranty Act. *Simpson,* 373 S.C. at 33, 644 S.E.2d at 673. The "Arbitration and Claims" provision in the Huskins' case does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting.[2] It

[2] The Purchase Agreement contains a separate "Limited Warranty" provision where Mungo Homes disclaims any liability for the implied warranty of habitability, consequential damages, and punitive damages. Pl.'s Exh. 1. This provision is outside the "Arbitration and Claims" provision of the contract and is discussed in detail in Section II of this Order. *See* Section II(b).

requires that all claims and disputes arising out of the Purchase Agreement are subject to arbitration. Pl.'s Exh. 1.

A clearly identified, mutual arbitration provision that does not limit remedies available by law indicates a non-oppressive or one-sided arbitration agreement. *Carlson*, 404 S.C. at 254, 743 S.E.2d at 870 (Ct. App. 2013). The arbitration agreement at hand is clearly labeled and underlined at the top of the page. Pl.'s Exh. 1. *But see Simpson*, 373 S.C. at 28, 644 S.E.2d at 670 (finding the arbitration agreement was unconscionable and noting the inconspicuous nature of the location of the arbitration clause as paragraph ten out of sixteen on the page). In *Carlson*, the arbitration provision did not waive any rights or remedies otherwise available by law. *Id.* Similarly, the "Arbitration and Claims" provision in the Huskins' case does not preclude their ability to file warranty claims. Pl.'s Exh. 1. Like the arbitration agreement in *Carlson*, the Huskins' case applies to both parties and allows each party to choose a neutral arbitrator. Pl.'s Exh. 1.; *Carlson*, 404 S.C. at 260, 743 S.E.2d at 873–74.

The "Arbitration and Claims" provision in the Huskins' case is distinguishable from the arbitration provision in *Simpson* because the arbitration provision here does not stay one party's claims over the other party's claims, it does not preclude the Huskins' from filing a warranty claim, and it does not divest the Huskins of a right available by statute. Pl.'s Exh. 1. On the contrary, it is clearly labeled and applies to both parties mutually. *Id.*; *see generally Carlson, v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013). This "Arbitration and Claims" provision is not one-sided and oppressive.

CONCLUSION

The arbitration clause under the Purchase Agreement is governed by the South Carolina Uniform Arbitration Act because the parties included a choice-of-law provision. There is a valid

agreement to arbitrate the Huskins' claims because the "Arbitration and Claims" provision is not unconscionable. Although the Huskins' lacked a meaningful choice to negotiate the terms of the arbitration provision, when analyzing the "Arbitration and Claims" provision in isolation from the underlying agreement, the Court finds that the "Arbitration and Claims" provision is not one-sided and oppressive.

For the reasons stated above, Defendant's Motion to Dismiss and Compel Arbitration is **GRANTED.**

IT IS SO ORDERED.

Columbia, South Carolina
March 7, 2018

The Honorable DeAndrea Gist Benjamin
Judge, Court of Common Pleas
Fifth Judicial Circuit