

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Jonathan Mart, on behalf of himself and others similarly situated,)	Civil Action No. 2018-CP-40-00873
)	
Plaintiff,)	
)	
vs.)	ORDER DENYING GREAT
)	SOUTHERN HOMES, INC.'S MOTION
)	TO DISMISS AND COMPEL
Great Southern Homes, Inc.,)	ARBITRATION
)	
Defendant.)	

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INTRODUCTION

This matter comes before the Court upon Defendant Great Southern Homes, Inc.'s Motion to Dismiss and Compel Arbitration. Judge DeAndrea Gist Benjamin heard arguments of counsel on June 13, 2018 at the Court of Common Pleas for Richland County, South Carolina. This Court reviewed the pleadings, memoranda, exhibits, affidavits, and arguments of counsel and issues the following Order to **DENY** the Defendant's Motion to Dismiss and Compel Arbitration.

FACTS

Jonathan Mart is a purchaser of a home from Great Southern Homes, a large builder and seller of new homes in South Carolina. On February 12, 2018, Mart instituted this action, on behalf of himself and others similarly situated, seeking monetary and declaratory relief based upon certain warranty waivers contained in Great Southern Homes' "Contract For Sale." In his Complaint, Mart asks (1) the Court to declare as a matter of law that Great Southern cannot waive the implied warranty of habitability without paying its customers such as Mart adequate consideration for such waiver, and (2) a jury to determine that Mart and all others similarly situated

may recover the fair value of the waiver. In response to the Complaint, Great Southern filed the present motion to compel arbitration of the issues raised in the Complaint.

In July 2015, Mart executed Great Southern's proprietary Contract For Sale for the purchase of a new home to be built by Great Southern in Kershaw County. The Contract For Sale contains a disclaimer of fundamental warranty rights implied by law in South Carolina in connection with the sale of a new home. One of the implied warranties that Great Southern requires that its purchasers waive is the implied warranty of habitability.

In lieu of these implied warranties, Great Southern's Contract For Sale substitutes an "Express Limited Warranty," under which Great Southern warrants certain express obligations and other express warranty obligations are transferred to a third-party. Particularly, the Express Limited Warranty is an insurance backed warranty administered by StrucSure Home Warranty, LLC. Under this Express Limited Warranty, Great Southern is the "Warrantor" for Years 1 and 2 with respect to defined warranty items and a third-party company, the "Insurer," is the Warrantor for Years 1 through 10 for "major structural defects." StrucSure is the Administrator of the warranty with no direct responsibility to a homeowner for resolution of warranty issues. Aff. Jonathan Mart, Exh. A, Section 1, Section 17).

Both the Contract For Sale and the Express Limited Warranty contain arbitration provisions. For reference throughout this Order, the Contract For Sale's arbitration clause states in full:

Any dispute between the parties hereto arising out of this contract, related to the contract 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 arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10 et. seq.

Compl., Exh. 1. The Express Limited Warranty's arbitration clause also states in relevant part:

The parties to the Express Limited Warranty intend and agree that **any and all claims, disputes and controversies by or between the Homeowner, the Builder, the Administrator, and/or the Insurer, or any combination of the foregoing, arising out of or related to the Express Limited Warranty . . . or the sale of the subject home by the Builder, including without limitation, any claim of breach of contract . . . or breach of any alleged duty of good faith and fair dealing,** shall be settled by arbitration in a manner consistent with this arbitration agreement.

Aff. Jonathan Mart, Exh. A at pg. 22 (emphasis added). There is no provision in the Contract For Sale or the Express Limited Warranty, such as a merger clause, specifying which of these conflicting provisions take precedent over the other.

Plaintiff Mart argues the Contract For Sale and the Express Limited Warranty have broad and sweeping arbitration provisions that apply to all claims related to the Contract For Sale or breach thereof, including the claims set forth in Mart's Complaint. Mart argues that material differences exist between the Contract For Sale's arbitration provision and the Express Limited Warranty's arbitration provision which demonstrates that Mart and Great Southern had no "meeting of the minds" on the agreement to arbitrate. With no meeting of the minds there is no agreement to arbitrate. Great Southern argues there is no conflict between the Contract For Sale's and Express Limited Warranty's arbitration provisions because the arbitration clause in the Contract For Sale applies to Mart's claims rather than the arbitration provision in the Express Limited Warranty.

For the reasons set forth below, the Court finds the arbitration provisions in the Contract For Sale and the Express Limited Warranty are both applicable to the claims set forth in Mart's Complaint and directly and materially conflict with one another. Accordingly, Mart and Great Southern did not mutually assent to an agreement to arbitrate, and this court cannot compel arbitration in this matter.

APPLICABLE LAW

Whether a valid arbitration agreement exists is a matter for judicial determination. *Partain v. Upstate Auto Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010); see *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007) (finding a “gateway matter” to arbitrability is the existence of an agreement to arbitrate). Neither the FAA nor the South Carolina Uniform Arbitration Act require parties to arbitrate when they have not agreed to do so. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so.”). Instead, state contract law determines whether parties entered into a valid agreement to arbitrate a set of claims. *Weckesser v. Knight Enters. LLC*, 228 F. Supp. 3d 561, 564 (D.S.C. 2017) (“Whether the parties agreed to arbitrate a particular dispute is a question of state law governing contract formation.”). “When the parties dispute whether a valid arbitration agreement exists, any ambiguities must be resolved against the drafter. *Id.* at 565. While there is a presumption in favor of arbitration, this presumption disappears when the parties dispute the existence of a valid arbitration agreement. *Id.*”

“South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). Where material terms of a contract are inconsistent and conflicting, there is no meeting of the minds. See *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013) (acknowledging where arbitration agreements provided for conflicting and inconsistent material terms, it would be unenforceable for lack of mutual assent thereto). The designation of a specific arbitral forum is a material term of an arbitration agreement. *Grant v.*

Magnolia Manor–Greenwood, Inc., 383 S.C. 125, 128-32, 678 S.E.2d 435, 437-39 (2009) (finding specification of the named arbitrator a material term of the agreement and that where this material term was rendered ineffective, arbitration was no longer required).

Other courts who have addressed the effect of conflicting arbitration agreements also considered material the following aspects of conflicting applicable arbitration agreements. *Ragab v. Howard*, 841 F.3d 1134, 1138 (10th Cir. 2016) (holding conflicting details in the multiple arbitration provisions regarding “(1) which rules will govern, (2) how the arbitrator will be selected, (3) the notice required to arbitrate, and (4) who would be entitled to attorneys’ fees indicate that there was no meeting of the minds with respect to arbitration”); *see NAACP of Camden East v. Foulke Management Corp.*, 421 N.J. Super. 404, 424-25 (N.J. Appellate Div. 2011) (finding “the arbitration provisions, . . . too plagued with confusing terms and inconsistencies [related to nature and locale, time limits, and costs for arbitration] to put a reasonable consumer on fair notice of their intended meaning” and therefore “unenforceable for lack of mutual assent”); *In re Willis*, 579 B.R. 381, 390-95 (S.D. Miss. 2017) (finding under Mississippi law parties did not agree to arbitrate where two arbitration agreements applied to same claims but provided for inconsistent terms regarding (1) the number of arbitrators, (2) how the arbitrator(s) will be selected, (3) the notice required to arbitrate, (4) the location of the arbitration, (5) who pays the costs of the arbitration, (6) who would be entitled to attorneys’ fees and on what showing, and (7) when arbitration proceedings need not be initiated).

I. The arbitration clauses in the Contract For Sale and Express Limited Warranty are broad and sweeping and both cover the claims asserted by Mart against Great Southern in this action.

The plain language of the Contract For Sale’s and Express Limited Warranty’s arbitration provisions are broad and sweeping and apply unambiguously to any claims related to the Contract For Sale, including the claims set forth in Mart’s Complaint. *Compare* Compl., Exh. 1 (providing

for arbitration of “[a]ny dispute between the parties hereto arising out of this contract, related to the contract or the breach thereof”), *with* Aff. Jonathan Mart, Exh. A at pg. 22 (providing for arbitration of “any and all claims, disputes and controversies by or between the Homeowner, the Builder, arising out of . . . the sale of the subject home by the Builder, including without limitation, any claim of breach of contract . . . or breach of any alleged duty of good faith and fair dealing”). *See also Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 7-9, 791 S.E.2d 128, 131-32 (2016).

Great Southern argues that even if the two provisions broadly apply to the type of claims set forth in the Complaint, Great Southern is only a party to the Contract For Sale and the Express Limited Warranty’s arbitration provision is irrelevant to the court’s determination of the arbitrability of this dispute. However, the Contract For Sale to which Great Southern admits it is a party, expressly incorporates the Express Limited Warranty into its terms. The Contract For Sale references the Express Limited Warranty and provides that “[t]he [Express] Limited Warranty issued to the Purchaser shall be in lieu of all other warranties, express or implied” by law. Compl. Exh. 1 at Limited Warranty. The Contract For Sale further clarifies that Great Southern is the source and supplier of the Express Limited Warranty, stating “[Great Southern] shall furnish [Mart] with a limited warranty issued by a warranty company approved by the SC Real Estate Commission.” *Id.* The Express Limited Warranty also confirms that Great Southern provides the Express Limited Warranty to Mart. *See* Aff. Jonathan Mart, Exh. A, Section 1 (“Your builder . . . sold You a home that includes the Express Limited Warranty protection.”).

Even if the court considered the Contract For Sale and Express Limited Warranty as separate agreements, moreover, Great Southern is a party to the Express Limited Warranty and the Contract For Sale and Express Limited Warranty must be construed together. While StrucSure

may issue and administer the Express Limited Warranty in the technical, administrative sense, Great Southern is the *provider, supplier, and source* of the Express Limited Warranty. Admittedly, Great Southern knew and understood the terms of the Express Limited Warranty and that its terms expressly made Great Southern, the Builder, a party thereto as a Warrantor of certain workmanship issues related to the home. *Id.* (stating “[t]he Builder is the Warrantor in years (1) for Workmanship/Materials and years (1) and (2) for Delivery Portions of Systems.”). Pursuant to the Express Limited Warranty, Great Southern, the Builder and Warrantor, agreed to be bound by its terms. *Id.* (stating the Express Limited Warranty is binding on [Great Southern] and [Mart]). Both the Contract For Sale’s and the Express Limited Warranty’s arbitration provisions therefore apply to Mart’s claims.

II. Material terms in the Contract For Sale’s and Express Limited Warranty’s arbitration provisions are inconsistent and therefore Great Southern and Mart had no meeting of the minds on an agreement to arbitrate the claims set forth in the Complaint.

The Contract For Sale’s and Express Limited Warranty’s arbitration provisions conflict in several material respects, including, but not necessarily limited to (1) the law governing and the forum for arbitration; (2) the selection and number of arbitrators to determine the matter; (3) post-award rights and remedies; and (4) the arbitral costs and fees. Under these circumstances, there can be no agreement to arbitrate between Mart and Great Southern.

a. The Contract For Sale’s and Express Limited Warranty’s arbitration provisions provide for conflicting governing law and forums.

Under the Contract For Sale, arbitration will be conducted pursuant to the South Carolina Uniform Arbitration Act (“SCUAA”) and rules thereunder. Compl., Exh. 1 at Arbitration. The Express Limited Warranty on the other hand requires using an independent arbitration service such as Construction Dispute Resolution Services and the procedures by that independent arbitration

service and the Federal Arbitration Act. *Aff. Jonathan Mart, Exh. A, Section 15.* The SCUAA, moreover, provides parties certain additional rights as to the conduct of the arbitration hearing and pre-hearing discovery that are not found in the Federal Arbitration Act. *Compare S.C. Code Ann. §§15-48-50-80, with 9 U.S.C.A. §§1-16.* Therefore, the two arbitration provisions' governing law and forums explicitly differ in substance, where the SCUAA provides the parties more procedural and pre-hearing discovery rights than those rights provided under the FAA, all of which could substantially affect the outcome of the proceeding.

b. The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for a conflicting number of arbitrators and process for selecting the same.

The Contract For Sale requires proceeding with three arbitrators with each party appointing an arbitrator and those two arbitrators appointing a third arbitrator. *Compl., Exh. 1 at Arbitration.* The Express Limited Warranty contemplates utilizing only a single arbitrator and further states that in the event of a conflict between the rules of the independent arbitration service and the Federal Arbitration Act as to arbitrator selection, the Federal Arbitration Act would control under which the judge appoints a single arbitrator. *See 9 U.S.C.A. § 5; Aff. Jonathan Mart, Exh. A, Section 15.*

c. The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for conflicting post-award remedies.

The Express Limited Warranty states that “[i]f the Homeowner disagrees with the Arbitrator’s decision, s/he has the right to appeal it.” *Aff. Jonathan Mart, Exh. A, Section 16.* The Contract for Sale, following the South Carolina Uniform Arbitration Act, does not provide such unlimited, broad right to appeal the merits of an award on any ground. *See S.C. Code Ann. §§ 15-48-120-200* (providing limited grounds and specific procedures upon which a court can review

and vacate or modify an arbitration award).

- d. **The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for conflicting provisions related to arbitration costs and arbitrator fees.**

Under the Contract for Sale, the SCUAA allows arbitrators to determine allocation for costs and fees in the award. Compl. Exh. 1 at Arbitration. However, under the Express Limited Warranty, the Homeowner bears the initial burden of all arbitration costs. Aff. Jonathan Mart, Exh. A, Section 15.

With no merger clause in either the Contract For Sale or Express Limited Warranty, there is no method to determine which of these conflicting arbitration provisions control and govern the procedure for arbitrating the claims Mart asserts against Great Southern. No South Carolina court, moreover, has specifically ruled upon arbitration provisions between the same parties and applicable to the same claims which contain expressly conflicting arbitration terms. Yet, several South Carolina courts have acknowledged in dicta that that such circumstance precludes any meeting of the minds on the issue. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83-84, 749 S.E.2d 139, 147-48 (Ct. App. 2013) (finding that two arbitration provisions in separate contracts were not inconsistent and conflicting to make agreements unenforceable). The Court finds that the conflicting arbitration provisions present here evidence a lack of mutual assent to arbitration and, therefore, there is no valid arbitration agreement for this Court to enforce in this case.

- III. **The HUD regulations governing warranty plans such as the Express Limited Warranty are not relevant to the Court's analysis in ruling on the Motion to Dismiss and Compel Arbitration.**

Great Southern argues HUD regulations governing VA loans, such as that obtained by Mart, mandate that home warranty plans such as the Express Limited Warranty provide for

arbitration. Great Southern further contends that this Court cannot declare that arbitration provision contained in the Express Limited Warranty invalid because the arbitration provision is provided for by federal mandate. For the reasons explained below, the Court does not find its ruling in this matter in contravention of any federal mandate provided in the HUD regulations cited by Great Southern.

First, as Great Southern stressed to the Court at the hearing on this motion, Mart's claims do not relate to the certain defined claims involving workmanship and material defects to which the HUD regulations direct its mandatory provision of arbitration. *See* 24 C.F.R. §203.200-209. Mart's claims relate to Great Southern's breach of the covenant of good faith and fair dealing or unjust enrichment of itself in extracting a waiver of the implied warranty of habitability without separate consideration to its homebuyers in the Contract For Sale. Nothing in the HUD regulations require Great Southern to include the broad and sweeping arbitration clause found in the Express Limited Warranty, which applies to Mart's claims in this instance. *See id.* Great Southern's decision to use this Express Limited Warranty with such a broad and sweeping arbitration clause that covers matters outside of the terms of the warranty itself is a contractual decision of its own making—not any HUD requirement. The HUD regulations therefore have no application to the court's consideration of the parties' agreement to arbitrate the claims asserted in this case.

Further, *Daugherty v. Pulte Homes of Greater Kansas City*, relied on by Great Southern to encourage the court's grant of its motion to compel is inapplicable to this case. No. 09-2523-KHV, 2010 WL 4963041 (D. Kan. June 11, 2018). In this case, *Daugherty* did not involve the issue of conflicting arbitration clauses within the purchase agreement and the builder's limited warranty which covered the same scope of claims. *See id.* South Carolina law is clear that an arbitration provision in a home warranty plan can apply to claims arising under the purchase agreement. *See*

Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 7-9, 791 S.E.2d 128, 131-32 (S.C. 2016).

Therefore, because the conflict in the arbitration clauses was caused by Great Southern's drafting of its Contract For Sale and by its election to utilize the StrucSure Express Limited Warranty as a purchaser's sole and exclusive remedy for contract matters, such conflicts should be resolved in favor of purchasers such as Mart. See *Weckesser v. Knight Enterprises S.E., LLC*, 228 F.Supp.3d 561, 565 (D.S.C. 2017).

CONCLUSION

The arbitration clauses contained in the Contract For Sale and the Express Limited Warranty both cover claims arising out of or relating to the Contract For Sale. Furthermore, these arbitration clauses are in conflict in numerous material respects. Accordingly, the Court finds that there was no mutual assent between Mart and Great Southern as to any arbitration procedure; and, therefore, there was no meeting of the minds as to an agreement to arbitrate as to claims arising out of or related to the Contract For Sale. For the reasons stated above, Defendant's Motion to Dismiss and Compel Arbitration is **DENIED**.

IT IS SO ORDERED.

Columbia, South Carolina
_____, 2018

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



Richland Common Pleas

Case Caption: Jonathan Mart vs Great Southern Homes Inc

Case Number: 2018CP4000873

Type: Order/Other

So Ordered

s/DeAndrea Gist Benjamin, #2161

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