

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

Appellate Case No. 2018-000723
Case No. 2017-CP-40-4437

FEB 11 2019
SC Court of Appeals

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

v.

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

Of Which, D.R. Horton, Inc. is the Appellant,

And Town of Blythewood is a Respondents.

INITIAL BRIEF OF RESPONDENT TOWN OF BLYTHEWOOD

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TABLE OF AUTHORITIES

Cases

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Folkens v. Hunt,
290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986).

Gissel v. Hart,
382 S.C. 235, 676 S.E.2d 320 (2009).

Jones v. Lott,
387 S.C. 339, 692 S.E.2d 900 (2010).

Pearson v. Hilton Head Hospital,
400 S.C. 281, 733 S.E.2d 597 (2012).

Wilder Corp. v. Wilkie,
330 S.C. 71, 76, 497 S.E.2d 731 (1998).

Statutes and Rules

S.C. Code Ann. § 6-29-1145.

S.C. Code Ann. § 15-48-60.

STATEMENT OF THE CASE

This is an appeal from the denial of a Motion to Stay and Compel Arbitration filed by the Appellant D.R. Horton, Inc. The Respondent Town of Blythewood was named as a party-defendant in the Complaint filed by the Respondents Zedokys and Sheas, in which they seek a permanent injunction prohibiting “any action to permit, approve, or otherwise develop the property which is the subject of the Greenway Covenant for any use other than as a Nine (9) hole golf course or green way or in any manner inconsistent with the terms of the Greenway Covenant.” (Complaint). Dr. Horton subsequently answered and cross-claimed against the Town seeking injunctive and mandamus relief as well.

The Motion to Stay and Compel Arbitration was heard by Circuit Court Judge G. Thomas Cooper on February 15, 2018. Thereafter, on March 1, 2018, Judge Cooper issued an Order denying that motion. Judge Cooper also denied a subsequent Motion to Alter, Amend or Reconsider Order filed by D.R. Horton. This interlocutory appeal was subsequently filed.

STANDARD OF REVIEW

“The determination of whether a claim is subject to arbitration is subject to *de novo* review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.” *Gissel v. Hart*, 382 S.C. 235, 676 S.E.2d 320, 323 (2009). *See also, Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 611 S.E.2d 305 (Ct. App. 2005).

ARGUMENTS

In denying the motion to compel arbitration filed by the Appellant D.R. Horton, Inc., the trial court ruled, in part, that “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.” (Order, p. 5).

In asserting its entitlement to arbitration, D.R. Horton relies on Article 14 of the First Amended and Restated Declaration of Covenants, Conditions and Restrictions for Cobblestone Park (“CCRs”). Section 14.1 of the CCRs provides as follows:

14.1 Agreement to Avoid Costs of Litigation and to Limit Right to Litigate Disputes.

Declarant, Association, Owners, and any person not otherwise subject to the Declaration who agrees to submit to this Article (collectively, "Bound Parties") agree to encourage the amicable resolution of disputes between and among themselves involving these CC&Rs or the Development, and to avoid the emotional and financial costs of litigation. Accordingly, each Bound Party covenants and agrees that all claims, grievances and disputes (including those in the nature of counterclaims or cross-claims) between Bound Parties involving the Declaration or the Development (but not matters applicable solely under a Covenant to Share Costs), including without limitation, claims, grievances or disputes arising out of or relating to the interpretation, application or enforcement thereof (collectively "Claims"), except for "Exempt Claims" under Section 14.2, are subject to the procedures set forth in Section 14.3.

(R. ____).

The trial court correctly ruled that the Town of Blythewood is not a “bound party” under the CCRs and “is not subject to the arbitration provisions of the CCRs.” (Order, p. 4). In fact, the trial court expressly found 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.” (Order, p. 3).

The trial court further explained:

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.

(Order, p. 3). On appeal, D.R. Horton does not challenge or contest this ruling.

There is no evidence that the Town has received any direct benefit as a non-signatory. In short, D.R. Horton does not argue that the Town may be compelled

to submit to the arbitration.¹ That ruling is the law of this case and cannot be overturned on appeal. Hence, the trial court's decision to deny arbitration is subject to affirmance under the "two-issue" rule.²

In addition to finding that the Town cannot be forced to participate in an arbitration, the trial court also relied on Section 14.2 of the CCRs which provides an exception to the arbitration requirement for "any suit in which an indispensable party is not a Bound Party." (R. ____). Again, D.R. Horton does not contest the trial court's finding that the Town is not a "bound party." Instead, D.R. Horton argues that the Town is not an "indispensable party," which is not a defined term in the CCRs. The trial court, nonetheless, found as fact that the Town is named in this lawsuit by the Plaintiffs based on S.C. Code Ann. § 6-29-1145 "which

¹ Citing to S.C. Code Ann. § 15-48-60, D.R. Horton states in a conclusory manner that "[t]he Town can be made a party to the arbitration." See, Appellant's Brief, p. 26. That argument was never made in the trial court, and as a result, cannot be made for the first time on appeal. See, *Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). It is, nonetheless, very ironic that D.R. Horton points to S.C. Code Ann. § 15-48-60 as a mechanism to join the Town as an unwilling party to the arbitration. The language of S.C. Code Ann. § 15-48-60, in essence, allows for the joinder of an indispensable party to the arbitration proceeding. However, as discussed below, because the Town is already an indispensable party to the litigation pending in Circuit Court, this litigation is exempt from the arbitration provision in the CCRs.

² In applying the "two-issue" rule, the South Carolina Supreme Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845.

specifically prohibits Town from permitting activity on property which violates a restrictive covenant.” (Order, p. 4). The trial court further pointed to “the fact that Horton has asserted crossclaims against Town to require that Town allow Horton to proceed with its intended activity.” (Order, p. 4). The cross-claims against the Town seek injunctive and mandamus relief, including an injunction “enjoining the Town from refusing permits and approvals” and a writ of mandamus “to mandate issuance of such permits and approvals.” (D.R. Horton Cross-Claims, p. 10).

In short, under the applicable standard of review, the trial court’s factual finding that the Town is an “indispensable party,” as that term is used in the CCRs, is supported by the evidence and should not be disturbed on appeal. Having found that the Town is an “indispensable party” under the CCRs, the trial court was correct in finding that the “indispensable party” exception to the arbitration provision in the CCRs applicable and thus was also correct in denying D.R. Horton’s motion to compel arbitration. That ruling should be affirmed on appeal.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Town of Blythewood respectfully requests that the Court affirm the trial court's denial of D.R. Horton's Motion to Stay and Compel Arbitration.

Respectfully submitted,

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February 8, 2019

THE STATE OF SOUTH CAROLINA
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G. Thomas Cooper, Jr., Circuit Court Judge

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James R. Zedosky, Lenore K. Zedosky, Douglas Shea, and
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v.

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

Of Which, D.R. Horton, Inc. is the Appellant,

And Town of Blythewood is a Respondents.

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent Town of Blythewood, does hereby certify that service of the **Initial Brief of Respondent Town of Blythewood and Respondent Town of Blythewood's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies


in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 8th day of February 2019:

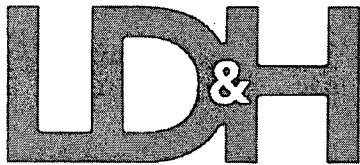
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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: James R. Zedosky, Lenore K. Zedosky, Douglas Shea, and Sally Shea v. D.R. Horton, Inc.
and Town of Blythewood
Appellate Case Number: 2018-000723
Civil Action Number: 2017-CP-40-4437
Claim Numbers: SF-17-0775-0001, 0002, 0003, 0004, 0005, 0006 and 0007
Our File Number: 321.10317

Dear Ms. Kitchings:

Please find enclosed for filing the originals and one copy each of the **Initial Brief of Respondent Town of Blythewood** and **Respondent Town of Blythewood's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. I would appreciate you filing the originals and returning a clocked in copy of each document to me in the enclosed envelope.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

The Honorable Jenny Abbott Kitchings
February 8, 2019
Page Two

cc: (w/ Enclosures)

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