STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Michael C. Germain and Marcia A. Germain Plaintiffs, vs. Weekley Homes, LLC d/b/a David Weekley Homes, Defendant.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL DISTRICT Case No.: 2018-CP-08-02321 **ORDER GRANTING WEEKLEY HOMES' MOTION TO DISMISS OR STAY AND TO COMPEL ARBITRATION**

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff's Attorneys:	Amanda Blundy, Esq.
Defendants' Attorneys:	Taylor Morris, Esq.
Date of Hearing:	April 2, 2019
Court Reporter:	Patricia Szoke

THIS MATTER came before the Court on Defendant Weekley Homes, LLC d/b/a David Weekley Homes' ("Weekley Homes") Motion to Dismiss or Stay and to Compel Arbitration, filed February 28, 2019. At the April 2, 2019 hearing on this matter, Taylor Morris appeared on behalf of Weekley Homes, and Amanda Blundy appeared on behalf of Plaintiffs Michael and Marcia Germain ("Plaintiffs"). After considering the pleadings, memorandum, affidavits and evidence before the Court and hearing the arguments presented by counsel, the Court hereby grants Weekley Homes' Motion to Dismiss or Stay and to Compel Arbitration.

FACTS

1. Plaintiffs, Michael C. Germain and Marcia A. Germain, are the owners of 1695 Pierce Street, Charleston, SC 29492 ("the Property"). (Compl. ¶ 1).

2. Defendant, Weekley Homes d/b/a David Weekley Homes, is a limited liability company organized and existing under the laws of the State of Delaware. (Compl. ¶ 2).

3. Weekley Homes and Plaintiffs entered into a Home Purchase Agreement ("the Agreement") on June 26, 2012 for the construction and sale of the Property.[1] (Agreement at 1).

4. At the time of this transaction, Plaintiffs were citizens and residents of the State of North Carolina. (Agreement at 8).

5. At the time the Parties entered into the Agreement, construction of the Property was not yet complete. (Agreement at 7; Homeowner Transaction Summary at 1).[2]

6. On November 20, 2018, Plaintiffs filed suit against Weekley Homes alleging claims of negligence, breach of warranty, unfair trade practices, and breach of contract.

7. Weekley Homes moved to compel arbitration of Plaintiffs' claims in accordance with the Federal Arbitration Act pursuant to the arbitration provision in Section 4 of the Agreement. (Agreement at 4).

8. In bold and conspicuous lettering, Section 4 of the Agreement reads as follow: **"ANY CLAIM, DISPUTE OR CAUSE OF ACTION INVOLVING SELLER OR PURCHASER . . . SHALL BE RESOLVED BY BINDING ARBITRATION, IN ACCORDANCE WITH THE FEDERAL ARBITRATION ACT (TITLE 9, U.S. CODE) OR THE APPLICABLE ARBITRATION STATUTE, IF THE FEDERAL ARBITRATION ACT DOES NOT APPLY."**).[3]

9. Additional notice that the Agreement is subject to arbitration is located directly below the Plaintiffs' signatures on page of 8 of the Agreement. (Agreement at 8).

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[1] The Home Purchase Agreement is attached as Exhibit 1 to the Affidavit of John Burchfield ("Aff. of J. Burchfield"). The Aff. of J. Burchfield is attached as Exhibit A to Weekley Homes' Motion to Dismiss or Stay and to Compel Arbitration.

[2] Initialed by Plaintiffs "Seller will finish the Frog with the standard features per contract . . . Buyer will select features from the David Weekley Design center"

[3] The arbitration provision is included in Section 4 ("Dispute Resolution") of the Agreement, Exhibit 1 to the Aff. of J. Burchfield.

10. The construction of the home involved the use of materials from outside the State of South Carolina. (Aff. of J. Burchfield at 3).

CONCLUSIONS OF LAW

Federal law and South Carolina law favor the resolution of disputes through arbitration. See Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 109, 739, S.E.2d 209, 213 (2013); See Heffner v. Destiny, Inc., 321 S.C. 536, 471 S.E.2d 135 (1995); O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997) (stating that the FAA represents "a liberal federal policy favoring arbitration agreements."). Where parties contractually agreed to arbitrate disputes, a court must compel the parties to submit a dispute to arbitration for resolution. See 9 U.S.C. § 2; S.C. Code Ann. §§ 15-48-20 & -180; Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

Therefore, the ultimate issue in this matter is whether the Federal Arbitration Act ("FAA") or the South Carolina Uniform Arbitration Act ("SCUAA") applies to the Agreement between the parties. If the FAA applies, the inquiry ends to the extent the arbitration provision is not found unenforceable, the Motion must be granted, and arbitration must be compelled. If the FAA does not apply, the Court must determine whether the Agreement complies with the requirements of SCUAA.

I. The Federal Arbitration Act applies to the Parties' Agreement because the Agreement involves interstate commerce.

The original purpose of the FAA was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (U.S. 1991). See also Zabinski v. Bright Acres

Assocs., 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001) ("The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements.").

The United States Supreme Court has ruled that the FAA, "both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and not substitute [its] own views of economy and efficiency for those of Congress." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217, 105 S. Ct. 1238, 1241 (1985). Further, the FAA "leaves no place for the exercise of discretion" by a trial court, but instead mandates that trial courts "*shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Id. at 218, 105 S. Ct. at 1241 (emphasis in original).

The FAA provides that "a written provision in any maritime transaction or a contract evidencing a transaction *involving commerce* to settle by arbitration a controversy thereafter arising out of such contract ... 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. § 2 (emphasis added). To determine whether a transaction involves interstate commerce, the court should examine the agreement, the complaint, and the surrounding facts. Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 95–96, 592 S.E.2d 50, 52 (Ct. App. 2003) (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). Courts may also rely on affidavits in making this determination. See Episcopal Hous., 269 S.C. at 640, 239 S.E.2d at 652. Further, courts are to construe interstate commerce for purposes of the FAA broadly so as to be coextensive with Congress's broad Commerce Clause power to regulate interstate commerce. See Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003).

It is well settled that the purchase and sale of a completed dwelling does not constitute interstate commerce within the meaning of the FAA. See Bradley v. Brentwood Homes, Inc., 398

S.C. 447, 458, 730 S.E.2d 312, 318 (2012) (holding that when a home purchase agreement specifically provides for the purchase of a completed dwelling rather than a contract for the construction of a dwelling the FAA does not apply); See also Zabinski, 346 S.C. at 595, 553 S.E.2d at 117-18 ("The development of land within South Carolina borders is the quintessential example of a purely intrastate activity.").

However, where a construction contract involves labor, equipment, materials, subcontractors, suppliers, or management that originates from a state other than where the project is located, courts find that the contract involves interstate commerce. See Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 123-24, 747 S.E.2d 461, 465 (2013) ("[t]his Court has previously held that incorporating out-of-state materials and consulting with out-of-state professionals in connection with a construction project are indicators of interstate commerce"). For example, in Zabinski, the court found that that the sale and development of apartments, "involved interstate commerce because the partnership utilized out-of-state materials, contractors, and investors." Id. See also Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) ("It would be virtually impossible to construct an eighteen (18) story apartment building . . . with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina.").

Here, the Court finds that interstate commerce was involved in the transaction between the parties, and thus the FAA is invoked and applies to the Agreement. At the time the Agreement was signed by the Parties, the Property was still under construction. (Homeowner Transaction Summary at 1). Weekley Homes agreed to finish "the Frog" and Plaintiff's agreed to select features from the David Weekley Design Center, which is evidenced by the initials of the Plaintiffs on June 26, 2012. (Homeowner Transaction Summary at 1). The supporting Affidavit of John Burchfield

confirms that the Agreement arises from a transaction involving interstate commerce by detailing specific instances of interstate commerce involved in the construction of the Property. Specifically, interstate communications, products, construction materials, fixtures, and appliances that were manufactured outside the State of South Carolina were used in connection with the construction and sale of the residence. (Aff. of J. Burchfield).

Moreover, the contractual relationship between Plaintiffs and Weekley Homes was one rooted in interstate commerce. See Munoz, 343 S.C. at 539, 542 S.E.2d at 364 (holding the Munozes contractual relationship with a creditor involved interstate commerce because the Munozes were domiciled in South Carolina, the Creditor was a Delaware corporation with is principal place of business in Minnesota, the agreement was prepared in Minnesota, and the proceeds were disbursed from a bank in Minnesota). Here, similar to Munoz, the Agreement itself involves interstate commerce because the Plaintiffs were citizens and residents of North Carolina at the time they entered into the Agreement, Weekley Homes is a Delaware Limited Liability Company, and the transaction related to property located in South Carolina. (Agreement at 8; Complaint ¶ 2). Accordingly, because the Agreement between the parties involved interstate commerce, the Court finds that the FAA applies to the Agreement, and therefore compels mandatory arbitration.

II. The arbitration agreement is enforceable because the provisions are neither ambiguous nor unconscionable.

In light of the strong presumption in favor of the validity of arbitration agreements, South Carolina courts must resolve any doubts concerning the application and scope of arbitration agreements in favor of arbitration. See Towles v. United Healthcare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) (stating that trial court should apply ordinary principles that govern the formation of contracts when determining whether an agreement to arbitrate exists); Munoz v.

Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) (overturning trial court's refusal to apply the FAA to parties' agreement which stated that "this contract and the relationships which result from this contract" is to be governed by the FAA).

However, "[g]eneral contract principles of state law apply to arbitration clauses governed by the FAA." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); See also Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 685, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); Allied–Bruce, 513 U.S. at 281, 115 S.Ct. 834; Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); Keystone, Inc. v. Triad Systems Corp., 292 Mont. 229, 971 P.2d 1240 (1998) (applying general state law to arbitration clause governed by FAA). "State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally." Id. (citing Perry v. Thomas, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987)).

Such state law is invoked in situations where one party alleges that the arbitration agreement is unconscionable or ambiguous. The Supreme Court held that "to avoid arbitration, a party must assert a contractual defense to the arbitration agreement itself, and not to the contract as a whole." Smith v. D.R. Horton, Inc., 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406, 87 S. Ct. 1801, 1807, 18 L. Ed. 2d 1270 (1967)). Therefore, to avoid mandatory arbitration, Plaintiffs must show that the arbitration provisions are either ambiguous or unconscionable. For the following reasons, the Court finds that the provisions are neither ambiguous nor unconscionable, and therefore compels mandatory arbitration.

A. The Agreement is not ambiguous.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (citing United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct.App.1992)). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Id. Therefore, "[w]hen a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." Id. (citing C.A.N. Enter., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988)).

However, "a contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." Id. (quoting 17A Am.Jur.2d Contracts § 338, at 345 (1991)). In order to determine whether a contract is ambiguous, the contract is "read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574. "Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract." Williams v. Gov't Employees Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014) (citing Farr v. Duke Power Co., 265 S.C. 356, 218 S.E.2d 431 (1975)); See also Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 658 S.E.2d 539 (Ct.App.2008).

The Agreement between Weekley Homes and Plaintiffs for the construction and sale of the residence contains a dispute resolution section which contains an arbitration provision in bold

capital letters stating that, "**ANY CLAIM, DISPUTE OR CAUSE OF ACTION INVOLVING SELLER OR PURCHASER . . . SHALL BE RESOLVED BY BINDING ARBITRATION, IN ACCORDANCE WITH THE FEDERAL ARBITRATION ACT (TITLE 9, U.S. CODE) OR THE APPLICABLE ARBITRATION STATUTE, IF THE FEDERAL ARBITRATION ACT DOES NOT APPLY.**" (Agreement at 4). Directly below the arbitration provision is the initials of both Michael and Marcia Germain.

The Court finds the above provision is unambiguous and is constrained to construe it according to its plain and ordinary meaning. Plaintiff contends that the Agreement is ambiguous because it contains conflicting terms. Namely, Plaintiff argues that the Agreement offers conflicting remedies that would lead a reasonable person to believe the Agreement is subject to more than one interpretation. The Court finds this argument without merit. While the remedies available to the Seller and the Purchaser differ, the Agreement is clear as to which remedies apply to which party. Accordingly, because the provisions of the Agreement are readily comprehensible and not subject to multiple interpretations, the Arbitration Provision is not unambiguous and therefore enforceable.

B. The Agreement is not unconscionable.

Unconscionability is defined as "the absence of meaningful choice on the part of one party due to one-sided contractual provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Id. at 49, 790 S.E.2d 1, 4 (citing Simpson, 373 S.C. at 24–25, 644 S.E.2d at 668) (citations omitted). 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." Id. (quoting Simpson, 373 S.C. at 25, 644 S.E.2d at 669).

Plaintiffs contend that the Agreement is unconscionable because it contains oppressive and one-sided terms. However, in the cases cited by Plaintiffs, the arbitration provisions were inconspicuous and not readily apparent. For example, in Smith v. D.R. Horton, the arbitration provision was contained in subparagraph 14(g), and the one-sided remedy terms were contained in subparagraph 14(i). Id. at 47, 790 S.E.2d at 3. The Supreme Court affirmed the finding that the arbitration agreement was unconscionable because it contained multiple oppressive and one-sided provisions and was inconspicuous. Id. at 50, 790 S.E.2d at 5.

Here, unlike the arbitration provision in Smith, the Agreement at issue in this case contains a separate and conspicuous arbitration provision in Paragraph 4 (Agreement at 4) that is not included with the "Default and Remedies" section found on Page 3. Thus, in examining the arbitration provision alone, the Court cannot find that it contains any one-sided terms. The provision contains boilerplate arbitration language that is fair and equal to both sides, does not evidence an absence of meaningful choice, and is therefore enforceable.

In conclusion, the Court finds that the Home Purchase Agreement does not contain ambiguous, one sided, and multiple conflicting arbitration provisions and is therefore neither unconscionable nor ambiguous. Accordingly, the Arbitration Agreement is enforceable.

III. The Scope of the Arbitration Provision in the Agreement Covers Plaintiffs' Claims.

Courts are to presume arbitration agreements are valid and enforceable and are to resolve any uncertainty in favor of arbitration. See, e.g., Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985). "[A]ny doubt as to whether [claims are] subject to arbitration must be resolved in favor of arbitration." Hall v. Green Tree Servicing, LLC, 413 S.C. 267, 275, 776 S.E.2d 91, 96

(Ct. App. 2015). A court may find an arbitration agreement inapplicable only where it has "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986); See also Zabinski, 346 S.C. at 592, 553 S.E.2d at 116.

Plaintiffs allege that construction defects exist at the residence, including, but not limited to, deficiencies with respect to the installation of the cementations siding, trim, windows, sealants, framing, sheathing, porches, decks, flooring, and insulation. Plaintiffs' allegations concerning the claimed construction deficiencies at the residence clearly fall within the ambit of the arbitration provision contained in the Agreement between Weekley Homes and Plaintiffs. Paragraph 4 of the Agreement provides as follows in bold letters with respect to the scope of the arbitration provision:

> a. **Scope of Arbitration. The Arbitration provisions of this Agreement apply to all claims brought by [Plaintiffs] whether sounding in contract, tort, or otherwise .... The claims, disputes or causes of action within the scope of arbitration include, but are not limited to, those arising in connection with: (i) the Agreement, including the negotiation, formation, subject matter, breach, cancellation or termination hereof; (ii) the development, design, construction, preparation, maintenance or repair, of improvements to the Property; ... (iv) any representations or warranties, express or implied, relating to the Agreement or the Property; ... (vi) any violations of any statute including, but not limited to, consumer protection, disclosure, or similar statutes or regulations; (vii) any personal injury or property damage claim; ....**

(Agreement at 5). By signing the Agreement, Plaintiffs and Weekley Homes agreed to submit any dispute or claims arising in connection with the Agreement to binding arbitration, including, but not limited to, disputes arising out of the Agreement; the development, design, or construction of the residence that is the subject of this litigation; the marketing or sale of the subject residence; and any warranties, express or implied, relating to the subject residence. (Id.) Plaintiffs' claims in the Complaint directly relate to the construction of the residence. Moreover, at no time have Plaintiffs disputed the validity of the Agreement. In fact, Plaintiffs assert specific rights under the

Agreement because they brought, among others, a claim for breach of contract in this action against Weekley Homes based on the Agreement.

Therefore, the Court finds the arbitration provision of the Agreement encompasses the claims alleged in Plaintiffs' Complaint, and those claims are subject to mandatory arbitration as provided for in the Agreement. Because Plaintiffs' claims against Weekley Homes clearly fall within the scope of the applicable arbitration provision, Plaintiffs are required to arbitrate their disputes. See Zabinski, 346 S.C. at 597, 553 S.E.2d at 118 ("[U]nless 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.").

For all the reasons listed above, the Court finds the Agreement between Plaintiffs and Weekley Homes contains an unambiguous, mandatory, and binding arbitration provision which is governed by the FAA and which clearly covers Plaintiffs' claims at issue in this litigation.

Therefore, it is hereby ORDERED that Defendant's Motion to Dismiss or Stay and to Compel Arbitration is GRANTED.

It is further ORDERED that Plaintiffs must pursue their claims against Weekley Homes in binding arbitration to be conducted by the American Arbitration Association and that Plaintiffs' claims against Weekley Homes in this action will then be dismissed.

IT IS SO ORDERED!

_____
Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

_____, 2019
Moncks Corner, SC

Berkeley Common Pleas

Case Caption: Michael C. Germain , plaintiff, et al VS Weekley Homes, Llc

Case Number: 2018CP0802321

Type: Order/Compel

IT IS SO ORDERED.

s/D.L. Jefferson Ninth Judicial Circuit Judge 2128