STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

James Panicara and Sylvia Panicara,

Plaintiffs,

v.

Bonterra Builders, LLC and Quality Builders Warranty Corporation,

Defendants.

Bonterra Builders, LLC,

Third-Party Plaintiff,

v.

One Grade, Inc., Summit Land Services, P.C. n/k/a Veritas Land, Sanchez Concrete Co., Inc., and Nash Company, Inc.,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2019-CP-29-00564

ORDER DENYING MOTION TO COMPEL ARBITRATION

This matter is before the Court on Defendant Quality Builders Warranty Corporation's ("QBW") Motion to Compel Arbitration ("Motion") as to the claims asserted against QBW in Plaintiffs James Panicara and Sylvia Panicara's ("Plaintiffs") Complaint.

FACTUAL AND PROCEDURAL HISTORY

This case arises out of alleged damage to the foundation of Plaintiffs' house, located at 4104 Granite Circle, Fort Mill, South Carolina in Lancaster County (the "House"). Plaintiffs entered into a sales agreement for the purchase of the House on February 3, 2012 from builder

Defendant Bonterra Builders, LLC ("Bonterra"), a North Carolina Limited Liability Corporation. (Sales Agreement attached to QBW's Memorandum in Support of its Motion as Exhibit A).

QBW is a Pennsylvania Corporation that contracts with home builders to administer a ten-year new home limited warranty program, which warrants against certain specified defects in the homes constructed by the member builders. At the time Plaintiffs purchased their House, Bonterra was a member of QBW's ten-year new home limited warranty program. Coverages under QBW's Limited Warranty Agreement ("LWA") and time frames for making claims are set forth on page 4 of the LWA in Section IV(A), which states that in years three (3) through ten (10) after construction of the home, QBW warrants the home will be free from major structural defects. (LWA § IV(A)). (LWA attached to QBW's Memorandum in Support of its Motion as Exhibit B). The LWA goes on to define "major structural defects." (LWA § II(E)).

In connection with the purchase of their House, Plaintiffs signed the QBW enrollment form and were issued an LWA through QBW with an effective date of warranty of March 14, 2012. (Signed Enrollment Form attached to QBW's Memorandum in Support of its Motion as Exhibit C). Section I, page 1, fourth paragraph, of the LWA states:

> Finally, this Agreement contains the Enrollment Form to be completed by the parties who want to take advantage of the protection offered through this Limited Warranty Agreement. The Enrollment Form must be signed by the parties and returned to QBW with the proper warranty fee or the warranty will not be in effect.

(LWA § I). By signing the enrollment form, Plaintiffs agreed to the terms of the LWA.

On February 23, 2018, during the fifth year of coverage, QBW received an email from Plaintiffs instituting a complaint under the warranty. Plaintiffs described cracking in a concrete floor, dry wall, and brick veneer exterior. By letter dated March 5, 2018, Plaintiffs were advised that the conditions described would not constitute a major structural defect as defined in the

LWA and were advised that if they disagreed with that assessment, the next steps were detailed in Section VI of the LWA.

Section VI of the LWA details the Complaint and Claims Procedure. Plaintiffs provided written notice of the alleged construction defects in their House to QBW as prescribed in the LWA. (LWA § VI at *16, ¶ 4). The next step, Step Three of Complaint and Claims Procedure, details that QBW will review the complaint and will cause an investigator to assess the defect. (LWA § VI(C)). Step Four states that if the homebuyer disagrees with the investigator's report, the disputed items must be submitted for arbitration. (LWA § VI(D)).

On June 7, 2018, Plaintiffs' Attorney, J. Cameron Halford, forwarded a letter to QBW regarding "structural defects" in Plaintiffs' House. (Letter attached to QBW's Memorandum in Support of its Motion as Exhibit D). In response to the letter, QBW advised Attorney Halford of the Complaint and Claims Procedures set forth in Section VI of the LWA. QBW, the Plaintiffs, and Attorney Halford proceeded with the Complaint and Claims Procedure. An inspection of the home by QBW's engineer was arranged through Attorney Halford's office in accordance with Step Three of the Complaint and Claims Procedure.

That inspection was performed on August 10, 2018 by Brian Cone, a professional engineer licensed in the State of South Carolina, and Attorney Halford was present during the inspection. A report prepared by Mr. Cone was sent to Attorney Halford on August 15, 2018, concluding that none of the issues identified by the Plaintiffs constituted a Major Structural Defect as defined in the LWA. (Report attached to QBW's Memorandum in Support of its Motion as Exhibit E). Attorney Halford was advised that if Plaintiffs disagreed with the findings the next step was to proceed with arbitration as required by Step Four of the Complaint and Claims Procedure. *Id.*

Step Four of the Complaint and Claims Procedure states: "If you disagree with the investigator's report[,] You have thirty (30) days to notify QBW in writing, that you disagree. In such event, disputed items shall be submitted to arbitration . . . ." (LWA § VI(D)). Plaintiffs did not request arbitration under the terms of the LWA. Instead, Plaintiffs instituted the within suit on May 8, 2019. Thereafter, on September 20, 2019, QBW filed the present Motion to Dismiss and Compel Arbitration under the terms of the LWA. For the reasons set forth below, this motion is denied.

ANALYSIS

Plaintiffs argue the arbitration agreement is unenforceable because it fails to have "notice that a contract is subject to arbitration … typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract," pursuant to the S.C. Uniform Arbitration Act, et seq.. QBW admits it does not meet the requirements of S.C. Code Ann. § 15-48-10, but responds it does not have to because the Federal Arbitration Act applies and preempts the S.C.U.A.A.. QBW is correct if the FAA applies, but the Court finds it does not. Application of the FAA requires "interstate or foreign" commerce. Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 454 (2012). The Bradley Court instructs us, however, that that "the development of real estate is an inherently intrastate transaction." Id. at 456. In Bradley, the home was built with supplies from out of state, financed with an out of state bank, and involved a warranty with a foreign corporation, and the court nevertheless found it was an intrastate transaction. The Bradley court did note "Bradley did not name the national warranty company as a defendant," which is different than the instant case. Id. at 459. However, Bradley did have a Georgia corporation as a named defendant ("Brentwood Homes Incorporated"). This Court finds that if naming a Georgia corporation as a defendant did not provide the required interstate commerce

nexus in Bradley, the fact QBW is a foreign corporation does not provide it here. Because the FAA does not apply, the arbitration provision is unenforceable pursuant to S.C. Code Ann. § 15-48-10.

In the alternative, the arbitration provision is also unenforceable because it is unconscionable. For an arbitration clause to be unconscionable, there must be both an absence of meaningful choice of terms, and oppressive, one-sided terms. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). The arbitration provision at issue here was presented as a take-it-or-leave it proposition and was not open to negotiation, and QBW did not contest this portion of the test. The arbitration agreement states: "disputed items shall be submitted for arbitration by QBW to Construction Arbitration Program, administered by DeMars & Associates Limited (CAP-Home), or such other independent arbitration service as may be designated by QBW, for resolution in accordance with the rules and regulations for home warranty disputes of CAP-Home or such other service. You must pay the cost of arbitration when filing a claim." LWA § VI(D). Two terms here are extremely oppressive. First, QBW is not even bound to any particular arbitrator. It may choose DeMars "or such other independent arbitration service as may be designated by QBW." Not only may QBW choose any arbitrator it wishes, without restriction, but the claimant must pay all the fees of the arbitration ("[y]ou must pay the cost of arbitration"). There is not even a cap on the amount that can be charged. The contract therefore permits QBW to pick any arbitration service it wants, no matter how unfair or expensive, and then stick the claimant with the entire bill, with no limit at all. These terms "are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403 (1996). The Court therefore declines to enforce the arbitration provision.

CONCLUSION

For the reasons stated above, this Court denies QBW's motion to compel arbitration.

IT IS SO ORDERED.

The Honorable William A. McKinnon

_____, 2020
Lancaster, South Carolina

Lancaster Common Pleas

Case Caption: James Panicara , plaintiff, et al VS Bonterra Builders Llc , defendant, et al

Case Number: 2019CP2900564

Type: Order/Other

So Ordered

/s William A. McKinnon, #2761, Circuit Judge