THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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

Appellate Case No. 2018-000723

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 .....Appellant,

AND Town of Blythewood is a.....Respondent.

FINAL BRIEF OF RESPONDENTS JAMES R. ZEDOSKY, LENORE K. ZEDOSKY, DOUGLAS SHEA AND SALLY SHEA

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ADDITIONAL STATEMENT OF THE FACTS

Respondents James R. Zedosky, Lenore K. Zedosky, Douglas Shea, and Sally Shea (collectively hereinafter "Respondents") purchased homes in The Farms ("The Farms") portion of the Cobblestone Park planned unit development located within the Town of Blythewood. (R. 0012) The Zedoskys purchased their house on May 30, 2015. (R. pp. 0023) The Sheas purchased their home on December 5, 2014. (R. pp. 0021) At the time of purchase, the following provision within Article II of Supplement III to the Declaration of Covenants, Restrictions, Easements, Liens and Charges was in effect:

> Section 3. Addition Covenants. It is the intent of the Declarant to deed the property described as Proposed Golf Course/Greenway on the plat of The Farm to The University Club Gold Co., LLC to construct an additional nine (9) golf holes to be included in the golf course at The University Club. In the event golf course property is not constructed, the Declarant restricts this property known as Proposed Golf Course/Greenway as a perpetual green way.
>
> (Hereinafter, "the Greenway Covenant.")(R. pp. 0013-0014, 0099)

Appellant admitted in its Answer that it has sought to subdivide property it owns while denying the existence of a "Greenway Covenant." (R. p. 0048) This same allegation was admitted by the Town of Blythewood. (R. p. 0059) The Town of Blythewood further admitted it would be precluded from "issuing permits for any activity inconsistent with the development of a greenway or golf course" if the "Greenway Covenant" if it were in effect. *Id.* Appellant also filed a cross-claim against the Town of Blythewood seeking equitable relief. (R. pp 0051-0055)

Appellant then filed a motion to compel arbitration. (R. p. 0025-0045) The Respondents filed a motion for a temporary injunction. (R. pp. 0017-0020) The trial court denied Appellant's motion to compel arbitration and granted Respondents' motion for a temporary injunction. (R. pp. 0002-0006, 0067-0090). Appellant has filed this instant appeal related to the Order Denying Motion to Compel Arbitration.

ARGUMENT

I. CIRCUIT COURT CORRECTLY RULED THE INSTANT ACTION WAS NOT SUBJECT TO ARBITRATION PROVISION OF PURCHASE CONTRACT.

The Circuit Court correctly ruled the Respondents' purchase contract did not require arbitration of a separate dispute with Appellant.

In order to compel arbitration, a moving party must demonstrate the following: "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the nonmoving party to arbitrate the dispute." Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005)

"An arbitration clause is a contractual term, and general rules of contract interpretation must be applied to determine a clause's applicability to a particular dispute." Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct.App.1999). An agreement to submit a claim or claims to arbitration is governed by general contract principles. Perry v. Thomas, 482 U.S. 483, 492 n. 9 (1987). Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement; a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596–97, 553 S. E.2d 110, 118 (2001).

The South Carolina Supreme Court has traditionally considered whether a "significant relationship" exists between the claims asserted and the contract in which the arbitration clause is contained. Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 15, 791 S.E.2d 128, 135 (2016). In order to decide whether an arbitration agreement encompasses

a dispute, the court must determine whether the factual allegations underlying the claim fall within the scope of the arbitration clause, regardless of the label assigned to the claim. Zabinski, 346 S.C. at 597, 553 S.E.2d at 118. In its evaluation of whether a cause of action falls within the scope of an agreement to arbitrate, a court must determine whether the particular claim is so interwoven with the contract that it could not stand alone. Id., at 597 n. 4, 553 S.E.2d at 119 n. 4. If the claim is completely independent of the contract and could be maintained without reference to the contract, the claim is not arbitrable. Id.

Contrary to the assertions of the Appellants, the home purchase agreements (HPA) signed by Respondents do not form the basis for the Respondents' action. A plain reading of the arbitration clause in the HPA shows it applies in only two particular circumstances: "this" contract (the HPA) and "the property." The term "property" is a term defined by the HPA in paragraph 1 as "the lot" with "all improvements" and various mineral/water/gas rights under the subsurface. (R. pp. 0027) The HPA does not support Appellant's attempt to broaden the definition to include all property within the Association.

The HPA also makes no reference to the promises made by a salesperson or the particular covenant that Respondents seek to enforce. Paragraph 24 of the HPA contains a merger clause which states, "No representation, statement, promise or inducement shall be binding upon either party hereto unless specifically stated in this Agreement." (R. pp. 0034) Thus, the basis of Respondents' action is independent of the HPA and not subject to the arbitration clause.

The basis for Respondents' action against Appellants are the promises contained within the Restrictive Covenants which govern the property within the entirety of The Farms portion of Cobblestone Park (of which Respondents' homes are only a part) and the various amendments to those covenants. Respondents have relied upon these three specific provisions:

1. The Property is subject to restrictive covenants entitled Supplement III to Declaration of Restrictions, Easements, Liens and Charges, "The Farm" recorded in the Richland County Register of Deeds on January 14, 2000 in Book R377 at page 278 ("Farm CCRs") which limit the Property to development of a Nine (9) hole golf course. Barring development as a Nine (9) hole golf course, Farm CCRs provide that the Property is perpetually to remain a green way.

2. The restrictions contained in the Farm CCRs were restated as part of the Declaration of Covenants, Conditions and Restrictions for Cobblestone Park recorded on September 15, 2005 in the Richland County Register of Deed in Book R1098 at page 3647. ("Cobblestone Park CCRs"). The Cobblestone Park CCRs further provide that the Cobblestone Park CCRs may be amended only with written consent of the majority of the existing owners whose rights are materially affected by such amendment.

3. The aforementioned restrictions and limitations on amendment to said restrictions were once again affirmed in the First Amendment and Restated Declaration of Covenants, Conditions and Restrictions for Cobblestone Park and Supplemental Declaration recorded in the Richland County Register of Deeds on November 5, 2005 in Book R117 at page 3721 ("First Amendment to Cobblestone Park CCRs").

(R. pp. 0017- 0024)

Contrary to Appellant's argument, the HPA did not make the Restrictive Covenants applicable to the Respondents because the HPA did not confer title to the land. It is the chain of title and a deed, not a purchase agreement that makes the covenants applicable to a particular piece of property. Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 582–83 (2009); Santoro v. Schulthess, 384 S.C. 250, 270–71, 681 S.E.2d 897, 907–08 (Ct. App. 2009); Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 362, 628 S.E.2d 902, 913 (Ct. App. 2006). The covenants, and, in particular, the Greenway Covenant, apply to Respondents independent of the existence of the HPA. Restrictive covenants are voluntary contracts that "run with title to land." Harbison Community Ass'n v. Mueller, 319 S.C. 99, 459 S.E.2d 860, 862–863 (Ct.App.1995).

II. THE INSTANT ACTION FALLS WITHIN AN EXCEPTION TO THE ARBITRATION CLAUSE OF THE RESTRICTIVE COVENANT.

The trial court correctly held the Town of Blythewood is an indispensable party to the instant action and thus, this matter is exempt for arbitration as provided under the applicable restrictive covenants.

Paragraphs 14.1 and 14.3 along with Exhibit C of the First Amended and Restated Covenants, Conditions and Restrictions for Cobblestone Park and Supplemental Declaration provide for arbitration of disputes except as to "Exempt Claims" which are defined in Paragraph 14.2. (R. pp. 0316-0317) Paragraph 14.2 provides in relevant part:

> 14.2 Exempt Claims.
>
> The following Claims ("Exempt Claims") are exempt from the provisions of 14.3:
>
> (iv) any suit in which an indispensable party is not a Bound Party:

(R. pp. 0317)

This covenant does not define "indispensable party." The parties and the trial court have applied the definition of "indispensable party" from Rule 19, SCRCP.

Rule 19, SCRCP provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

S.C. Code § 6-29-1145(A) provides:

> In an application for a permit, the local planning agency must inquire in the application or by written instructions to an applicant whether the tract or parcel of

land is restricted by any recorded covenant that is contrary to, conflicts with, or prohibits the permitted activity.

S.C. Code § 6-29-1145(B) prohibits the Town of Blythewood from issuing the development permit if the permit would conflict with an applicable restrictive covenant. Thus, the Town of Blythewood is an indispensable party under subpart 2 of Rule 19. S.C. Code § 6-29-1145(A) requires the Town of Blythewood to claim an interest in determining whether the Greenway Covenant is enforceable against Appellant. Appellant claims the Greenway Covenant is not enforceable by either Respondents or the Town of Blythewood for various reasons. (R. pp. 0051-0054)

The Supreme Court has also determined that a permittee is a necessary party to appeal. Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of Town of Hilton Head Island, 295 S.C. 67, 68–69, 367 S.E.2d 160, 161 (1988). It is illogical to require Respondents to litigate the enforceability of the Greenway Covenant with the Town of Blythewood in a court and with Appellant in arbitration. The Town of Blythewood would not be bound or discharged from their duties under S.C. Code § 6-29-1145(A) if they were excluded from the instant action. S.C. Dep't of Transp. v. Hinson Family Holdings, LLC, 361 S.C. 649, 655, 606 S.E.2d 781, 785 (2004). The Town of Blythewood would not be bound by any ruling from arbitration. The only way to get full relief in the instant action is include both Appellant and the Town of Blythewood in this single proceeding. Charleston Cty. Parents for Pub. Sch., Inc. v. Moseley, 343 S.C. 509, 514–15, 541 S.E.2d 533, 536 (2001).

III. THE FAA DOES NOT APPLY TO THE INSTANT ACTION.

The Federal Arbitration Act (FAA), 9 U.S.C.A. § 1 *et seq.*, does not apply to the instant action under either arbitration agreement. Both HPAs are directly tied to the development and

rights of real estate which have been determined by our courts consistently as involving only intrastate commerce.

"The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos 351 S.C. 534, 540 570 S.E.2d 565, 568 (Ct.App.2002). To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabinski at 594, 553 S.E.2d at 117. "Our courts consistently look to the essential character of the contract when applying the FAA." Thornton v. Trident Med. Ctr., LLC, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct.App.2003).

The South Carolina Supreme Court and this Court have steadfastly ruled that the purchase of a constructed house within South Carolina's borders is "the quintessential example of a purely intrastate activity." Zabinski, 346 S.C. at 595, 553 S.E.2d at 117–118. The Supreme Court reaffirmed this rule as recently as 2012. Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 456, 730 S.E.2d 312, 316–17 (2012). In Bradley, the Supreme Court referred back to Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994), *overruled on other grounds by* Munoz v. Green Tree Financial Corp., 343 S.C. 531, 539 n. 3, 542 S.E.2d 360, 363 n. 3 (2001). In both Bradley and Mathews, the South Carolina Supreme Court reiterated that the presence of out of state parties or use of materials from outside of South Carolina was irrelevant to the determination of the "inherently intrastate" nature of purchasing a constructed house.

Appellant's appeal to the FAA is futile.

IV. THE TRIAL COURT RULED CORRECTLY REGARDLESS OF WHICH STATUTORY SCHEME APPLIES.

The trial court was correct under either FAA or the SCUAA. It does not matter whether the FAA or the South Carolina Uniform Arbitration Act (SCUAA), S.C. Code Ann. § 15-48-10, *et. seq.* applies. "Appellate courts recognize—or at least they should recognize—an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter." McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

The application of the FAA rather than the SCUAA, to the instant action does not change the outcome. The issues in a case must fall within the purview of the arbitration agreement for the FAA to apply. Adkins v. Labor Ready, Inc., 303 F.3d 496, 500 (4th Cir. 2002); United States v. Bankers Ins. Co., 245 F.3d 315, 319 (4th Cir. 2001) There still must be an underlying agreement between the parties to arbitrate." Arrants v. Buck, 130 F.3d 636, 640 (4th Cir.1997). Whether a party agreed to arbitrate a particular dispute is a question of state law governing contract formation. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law. Perry v. Thomas, supra. Thus, generally applicable contract defenses may be applied to invalidate arbitration agreements without contravening the FAA. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). This includes determining the full scope of the contract and its applicability to the instant action.

As previously set forth herein, the trial court correctly held the arbitration agreements within the HPA and the covenants did not apply to the instant action. "The law in this state regarding the construction and interpretation of contracts is well settled." Lee v. Univ. of S.C., 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014) The interpretation of an unambiguous contract is a

question of law. Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co., 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013). "If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect." Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 499, 649 S.E.2d 494, 502 (Ct. App. 2007). "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." D.A. Davis Constr. Co. v. Palmetto Props., Inc., 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). A court is "without authority to alter an unambiguous contract by construction or to make new contracts for the parties." First S. Bank v. Rosenberg, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016); S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008).

The trial court correctly ruled that the parties did not agree in the HPA to arbitrate the instant action, and this action is exempt from arbitration provided under the restrictive covenants. The Appellant's interpretation of either of these agreements would require a rewriting of clear terms like "property" under the HPA and "indispensable party" under the covenants.

CONCLUSION

For the reasons set forth herein, this Court should DENY the appeal of the Appellants.

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I, M. Alan Peace, the attorney for Appellant, do hereby certify that I served via electronic mail the Final Brief of Respondents Attorneys for Respondents James R. Zedosky, Lenore K. Zedosky, Douglas Shea, and Sally Shea on all opposing counsel on January 15, 2021.

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