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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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 REPLY BRIEF OF APPELLANT

January 26, 2021

s/ Roy Shelley

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ARGUMENT

I. THERE ARE THREE RELATED BUT INDEPENDENT GROUNDS WHICH ENTITLE APPELLANTS TO ARBITRATION.

First, Plaintiffs purchased their properties pursuant to a Home Purchase Agreement (HPA), which contains an arbitration clause. The HPAs incorporate the Cobblestone CCRs. The Plaintiffs' complaint is based on an asserted restriction in the CCRs. Therefore, the Complaint arises from a provision of the HPA.

Second, the CCRs contain an express arbitration clause which is not abrogated by the Town's status. The Town is not an indispensable party because nothing the Town does (or fails to do) affects the relief requested by Plaintiffs (an injunction against development) or their property interests.

Third, the Complaint seeks to enjoin the construction of new houses near the Plaintiff's property. It is undisputed this new construction would involve interstate commerce, which this Court has explicitly held is subject to the Federal Arbitration Act.

A. Plaintiffs' argument regarding the HPA is incomplete

Plaintiffs argue the HPA arbitration provision does not apply to this dispute, citing cases involving contract law. Plaintiffs have never claimed their HPAs are invalid or otherwise unenforceable; therefore, many of the cases cited by Appellees are not relevant. The only potential relevance (to the issue of whether the HPA arbitration provision applies) is whether the parties contracted for this type of dispute to be arbitrated; that is, whether a dispute over the application of an asserted CCR restriction is part of the HPA contract.

The definition of "Property" in the HPAs is broader than that asserted in Plaintiffs' brief. It includes more than just the house and the land upon which it sits. As cited in Appellant's Brief, the "Property" conveyed to Plaintiffs also include the rights, responsibilities, and obligations of

the applicable CCRs. Plaintiffs' complaint seeks to enforce an asserted right under the CCRs.[1] Plaintiff's right to enforce an asserted restriction in the CCRs arises solely as a result of their status as property owners, which occurred through their respective HPA.

The Property conveyed also includes the value of the property and other property rights recognized by law, including the right to peaceful enjoyment. Plaintiffs complaint specifically asserts their property values and right to peaceful enjoyment will be negatively impacted without the injunction. These rights arose under the HPA.

Plaintiffs own none of the rights asserted in their complaint absent the HPA.

The HPA explicitly requires arbitration of "ANY AND ALL DISPUTES WHICH MAY ARISE BETWEEN [the parties] REGARDING THIS CONTRACT AND/OR THIS PROPERTY." (R. 32, 41).

Our Supreme Court has held:

> To determine whether an arbitration clause applies to a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 … The heavy presumption in favor of arbitrability requires that **when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.**
>
> *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.,* 418 S.C. 1, 7, 791 S.E.2d 128, 131, (2016) (emphasis added; some internal citations omitted)

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[1] The CCRs referenced by Plaintiffs in their brief are the 2000 CCRs is an earlier version. (R. 96 – 121). The Greenway restriction does not exist in the current 2005 CCRs, which had been filed before Plaintiffs purchased their property. (R. 122 – 238). Plaintiffs contend the current CCRs were not adopted properly, therefore the 2000 CCRs apply. This is the gravamen of the dispute below.

Further our Supreme Court has held:

Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. *Aiken,* 373 S.C. at 149, 644 S.E.2d at 708, citing *Zabinski,* 346 S.C. at 596-97, 553 S.E.2d at 118-19. Regardless of the label the plaintiff uses, when deciding whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause. *Zabinski,* 346 S.C. at 597, 553 S.E.2d at 118. **Moreover, even if the court finds that a claim is outside of the scope of the arbitration clause, the clause may still apply. "A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained."** *Zabinski,* 346 S.C. at 598, 553 S.E.2d at 119, citing *Long v. Silver,* 248 F.3d 309 (4th Cir. 2001). Thus, a claim falls within the scope of an arbitration clause if it is encompassed by the language of the clause or if a "significant relationship" exists between the claim and the contract.

Partain v. Upstate Auto. Group, 386 S.C. 488, 491-492, 689 S.E.2d 602, 603-604, (2010) (emphasis added)

This Court has consistently applied and elucidated these holdings:

[I]t bears repeating that "as a matter of policy, arbitration agreements are liberally construed in favor of arbitrability." *Id.* at 108-09, 739 S.E.2d at 213. This "'*heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration*.'" *Id.* at 109, 739 S.E.2d at 213 (emphasis added) (quoting *Am. Recovery*, 96 F.3d at 94).

Moreover, "[s]uch a presumption is strengthened when an arbitration clause is broadly written." *Id.* "Therefore, 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[,]' arbitration must generally be ordered." *Id.* (quoting *Am. Recovery*, 96 F.3d at 92). For example, "[a] clause [that] provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly." *Id.* "Courts have held that such broad clauses are 'capable of an expansive reach.'" *Id.* at 109, 739 S.E.2d at 214 (quoting *Am. Recovery*, 96 F.3d at 93).

Our supreme court and the Fourth Circuit Court of Appeals have held that sweeping language in broad arbitration clauses "applies to disputes in which a significant

> relationship exists between the asserted claims and the contract in which the arbitration clause is contained." *Id.* "Thus, the scope of the clause does 'not limit arbitration to the literal interpretation or performance of the contract *[, but] embraces every dispute between the parties having a significant relationship to the contract*.'" *Id.* at 109-10, 739 S.E.2d at 214 (emphasis added) (quoting *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988)). "In applying this standard, th[e appellate c]ourt 'must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, *regardless of the legal label assigned to the claim*.'" *Id.* (emphasis added) (quoting *J.J. Ryan & Sons*, 863 F.2d at 319).
>
> *Masters v. KOL, Inc.,* 846 S.E.2d 893, 898, (S.C. Ct. App. 2020)

The Plaintiffs seek enforcement of a right given to them under the HPA, as well as the protection of rights they obtained through the HPA. There is, at the very least, a significant relationship between the HPAs and the alleged rights asserted by Plaintiffs. Therefore, the arbitration provisions of the HPAs apply to this dispute.

B. The Respondents' argument regarding the CCRs arbitration provision and the issue of an "indispensable party" is erroneous

The argument against the application of the CCRs arbitration provision rests entirely upon the claim that the Town is an indispensable party. It is not.

"Indispensable party" is not defined in the CCRs; however, under Rule 19 an indispensable party is defined as one who, "in his absence complete relief cannot be accorded among those already parties."

In this context, our Supreme Court has stated:

> "'[a]dditional parties are not necessary to a complete determination of [a] controversy unless they have rights which must be ascertained and settled before the rights of the parties to the suit can be determined.'" *Doctor v. Robert Lee, Inc.*,

215 S.C. 332, 335, 55 S.E.2d 68, 69 (1949) (quoting *Phillips v. Clifton Mfg. Co.*, 204 S.C. 496, 502, 30 S.E.2d 146, 148 (1944)).

Smith v. Tiffany, 419 S.C. 548, 562, 799 S.E.2d 479, 486-487, (S.C. 2017)

Here, there are no rights of the Town (and no assertions of any) which must be ascertained or settled before a determination of whether Plaintiffs are entitled to an injunction against development by D.R. Horton (and it is this claim for which Appellants seek arbitration).[2]

Specifically, Plaintiffs only claim against D.R. Horton is for an injunction against development based on their interpretation of the applicable CCRs. Plaintiffs can obtain this relief regardless of whether the Town is a party. The issuance of permits is merely a step in the development process; it is not development itself. In fact, an injunction can be obtained *even if permits have already been issued*. The Town's actions or inactions have no bearing on Plaintiffs' ability to obtain an injunction against D.R. Horton, nor on Plaintiffs' asserted interests. If an injunction is issued against development, the issuance of permits would not override or alter it. A party cannot reasonably be deemed "indispensable" if its actions have no bearing on the requested relief against another party.

In *Stewart v. State Crop Pest Comm'n*, 307 S.C. 133, 414 S.E.2d 121 (S.C. 1992), the defendants moved for dismissal based on the failure to join certain government agencies as

[2] The "relief" for which Appellant seeks arbitration is the claim between Plaintiff Homeowners and Appellant for an injunction. Plaintiff Homeowners can seek this relief without the involvement of the Town. See, for example, 3A Moore's Federal Practice P 19.07-1(1) at 19-128: ('Complete' relief refers to relief as between the persons already parties, not as between a party and the absent person whose joinder is sought …."); see *also United States v. County of Arlington*, 669 F.2d 925, 929, (4th Cir. 1982) ("Complete resolution of the dispute between the United States and Arlington County does not require the joinder of the GDR.")

indispensable parties. Defendants argued that because these governmental entities authorized and inspected the activities at issue in the complaint, they were indispensable parties. Our Supreme Court held this was not sufficient.

Similarly, in *South Carolina Dep't of Health & Environmental Control v. Fed-Serv Industries, Inc.*, 294 S.C. 33, 362 S.E.2d 311 (S.C. Ct. App 1987), the defendant argued the companies and the governmental entity which managed and controlled the entities which discharged waste oil were indispensable parties to a claim by DHEC that the discharge was improper. The procedural posture was different, but this Court held:

> the omission of a party who might be a proper party does not render the petition demurrable unless that party is a necessary or indispensable party. *Owen Steel Company, Inc. v. S.C. Tax Commission*, 281 S.C. 80, 313 S.E. (2d) 636 (Ct. App. 1984). "A party is not a necessary party unless it has rights which must be ascertained and settled before the rights of the parties to the action can be determined." *Id* at 639. While the Navy, Luckow and Koppers Industries may be proper parties, they are not necessary or indispensable parties. Here, the controversy is whether Fleet is liable to clean up discharged waste oil. The presence of the Navy, Luckow and Koppers Industries is not required for such a determination. There is nothing in the record to indicate the rights of the above three must be ascertained and settled before the rights of Fleet and the other parties can be determined.
>
> *Id.*, 294 S.C. at 37, 362 S.E.2d at 314.

By way of further example, if a plaintiff seeks an order to prevent a defendant from transferring assets, would the defendant's bank be an indispensable party? Would a register of deeds where the defendant owns property be an indispensable party? Would a court who might be called upon to enforce an order be deemed an indispensable party? More specifically, would the entities with whom Horton might contract for development be indispensable parties? Is the

architect or engineer who might review and approve plans an indispensable party? What about companies who might contract to perform the development? The answer to all of these is obvious. They are merely entities involved in some part of the process, but they are not indispensable parties to a request for an injunction against the process itself.

Simply put, an injunction can be issued against Appellants with or without the involvement of the Town. Complete relief (the requested injunction) can be granted *even in the absence of the Town as a party*. Plaintiffs "claim" against the Town is actually just a request that it help enforce the injunction they seek.

C. The Plaintiffs' argument against the application of the FAA is incomplete

This Court has recently succinctly recited the law regarding the application of the FAA:

> "Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 448, 748 S.E.2d 221, 225 (2013) (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)).
>
> *Grant v. Chevrolet*, 847 S.E.2d 806, 808, (S.C. Ct. App. 2020)

Nonetheless, Plaintiffs claim the FAA does not apply, citing general statements regarding the sale of a completed house. However, as Plaintiffs argue in connection with the application of the HPA arbitration provision, they are not seeking relief regarding their houses, nor the formation of the HPA contracts; they are seeking to prevent new construction – specifically, the development of lots and construction of new houses near their property.

Here, it is undisputed that not only did the Plaintiffs' homes involve multiple areas of interstate commerce but also that the planned development would involve interstate commerce. The Affidavit of Robert L. Haney, an officer of D.R. Horton explicitly states:

> 5. Many of the building materials and supplies used in constructing D.R. Horton's houses are obtained from suppliers and distributors in states other than the state where the homes are constructed. ……
>
> 8. The areas in dispute in this lawsuit have already been platted for approximately 150 houses. Development was moving forward and houses were expected to be constructed as scheduled until the Town of Blythewood stopped issuing permits as a result of the claims and lawsuit by Mr. & Ms. Zedosky and Mr. & Ms. Shea. (R. 65 – 66).

Under similar circumstances, this Court has explained and held:

> In general, the development and sale of residential real estate is an intrastate activity that does not implicate the FAA, *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012), but here the transaction also involved the construction of residential homes. As *Bradley* acknowledged, "our appellate courts have consistently recognized that contracts for construction are governed by the FAA." *Id.* at 458 n.8, 730 S.E.2d at 318 n.8; s*ee also Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977). The affidavit of Lennar's Controller states the construction involved interstate commerce, specifically the use of out-of-state contractors and materials and equipment manufactured outside South Carolina*. See Cape Romain Contractors*, 405 S.C. at 123, 747 S.E.2d at 465 (holding FAA applied where out of state materials used in dock construction were "instrumentalities of interstate commerce" and parties' contract specifically invoked FAA). We hold the transaction here involved interstate commerce, and the FAA therefore applies.
>
> *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196-197, 844 S.E.2d 66, 71, S.C. Ct. App. (2020)

Therefore, the FAA clearly applies to Plaintiffs request for an injunction seeking to stop development which indisputably involves interstate commerce.

CONCLUSION

There are three separate grounds which entitle Appellant to arbitration of Plaintiff Homeowners complaint against it, and Respondents arguments against it are either incomplete or erroneous. Therefore, the Order of the circuit court denying Appellant's Motion to Stay and to Compel Arbitration should be reversed, and this Court should direct the entry of an order compelling arbitration of Plaintiffs' claim against Appellant.