THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2019-000649

Melissa Dixon and Willard Dixon.....Respondents,

v.

Lansing Pattee, Stephanie Pattee, Weekley Homes, LLC f/k/a Weekley Homes, L.P., d/b/a David Weekley Homes, John Doe, A2Z Advanced Home Inspections, LLC, Fidelity and Deposit Company of Maryland, and Westchester Fire Insurance Company.....Defendants,

And

Lansing Pattee and Stephanie Pattee.....Third-Party Plaintiffs,

v.

Gutter Pros, LLC .....Third-Party Defendant,

Of whom Weekley Homes, LLC f/k/a Weekley Homes, L.P., d/b/a David Weekley Homes, is the Appellant,

And

Lansing Pattee and Stephanie Pattee are Respondents.

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the lower court correctly denied Weekley's motion to compel arbitration where the agreement failed to comply with the notice requirements of the South Carolina Uniform Arbitration Act.

II. Whether the lower court correctly denied Weekley's motion to compel arbitration where there was insufficient evidence to demonstrate that the inherently intrastate transaction involved interstate commerce required by the Federal Arbitration Act.

III. Whether the lower court correctly denied Weekley's motion to compel arbitration where the arbitration provision was unconscionable.

STATEMENT OF THE CASE

This is an appeal from the denial of Defendant Weekley Homes, LLC's motion to compel arbitration. After filing their initial Complaint against Stephanie and Lansing Pattee (the "Pattees") on August 30, 2017, Respondents Melissa and Willard Dixon (the "Dixons") subsequent amendments added causes of action and joined additional defendants including Appellant Weekley Homes, LLC ("Weekley") and various other individuals and entities whose business involved the construction, modification, or sale of the residence the Dixons purchased from the Pattees on September 10, 2008. (R. p. 89). The Dixons allege various causes of action against the defendants, including strict liability, negligence, gross negligence, and breach of the implied warranty of merchantability. (R. pp. 86-110). Notably, the Pattees cross-claimed against Weekley seeking equitable indemnification for Weekley's negligence and gross negligence. (R. p. 129).

On November 21, 2018, Weekley filed a motion to dismiss and to compel arbitration. (R. pp. 192-193). Weekley also filed one affidavit in support of its motions on the same date (the "Burchfield Affidavit"). (R. pp. 194-195). On February 11, 2019, Weekley filed a memorandum in support of its motion to compel arbitration (R. pp. 240-246).

The motion came before the lower court for hearing on February 12, 2019. (R. p. 150, pp. 165-186). The Dixons and the Pattees opposed the motion for arbitration. After hearing the arguments of counsel, the lower court indicated it was taking the matter under advisement and concluded the hearing.

Weekley filed a second affidavit (the "Dupree Affidavit") several days after the hearing. (R. pp. 247-248).

The lower court eventually denied Weekley's motion for arbitration in its order filed October 9, 2019. (R. pp. 1-3). On October 14, 2019, Weekley filed a Motion to Reconsider, Alter, or Amend. (R. pp. 249-266). On February 10, 2020, Judge Dickson orally informed counsel he had decided to deny the motion. (R. p. 144). Weekley appealed.

FACTS

This action involves the home of Melissa and Willard Dixon, located in the Legend Oaks Plantation development in Summerville, South Carolina. Weekley built the house in the latter half of 2007. The Pattees and Weekley entered an agreement for the sale of the home on August 18, 2018. The sale closed on September 10, 2008. The Pattees sold the residence to the Dixons on February 28, 2017. Not long after moving in, the Dixons discovered undisclosed hidden water damage.

ARGUMENT

The lower court was correct to deny Weekley's motion to compel arbitration. As explained below, this matter is not subject to arbitration either under the Federal Arbitration Act or the South Carolina Uniform Arbitration Act, and is also unenforceable due to unconscionability.

I. THE ARBITRATION PROVISION IS UNENFORCEABLE UNDER THE SOUTH CAROLINA UNIFORM ARBITRATION ACT

The Uniform Arbitration Act, as adopted by South Carolina, prescribes the following specific requirements for a contract to be subject to arbitration:

> **Notice that a contract is subject to arbitration** pursuant to this chapter **shall be typed in underlined capital letters**, or rubber-stamped prominently, **on the first page of the contract** and unless such notice is displayed thereon the contract shall not be subject to arbitration.

(emphasis added) §15-48-10(a), South Carolina Code of Laws. The South Carolina Supreme Court has strictly construed the notice requirement of §15-48-10(a), applying the terms according to their literal meaning and refusing to accept any variations. *Zabinski v. Bright Acres Associates, et al.*, 346 S.C. 580 at 588 (S.C. 2001). The notice contained in the subject Agreement fails §15-48-10(a) in three ways: (i) it is neither typewritten nor stamped; (ii) it is not underlined; (iii) and it is not displayed on the first page of the document. (R. P. 198, 201). These technical failures—both individually and collectively—preclude enforcement of arbitration under South Carolina law.

II. THE FEDERAL ARBITRATION ACT DOES NOT APPLY BECAUSE THE AGREEMENT DID NOT INVOLVE INTERSTATE COMMERCE

Contrary to Weekley's contention, the Agreement did not involve interstate commerce and thus is not subject to arbitration under the Federal Arbitration Act ("FAA"). To determine whether a contract involves interstate commerce, the court must examine the agreement, the complaint, and surrounding facts. *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). This analysis necessarily involves consideration of the historical intrastate character of real estate transactions. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 316 (2012); *Zabinski,* 346 S.C. at 595, 553 S.E.2d at 117–18 ("The development of land within South Carolina's border is the quintessential example of a purely intrastate activity.").

Weekley *properly* filed and served one affidavit in support of its motion), purportedly to offer evidence of interstate commerce. (R. pp.194-239). The affiant, John Burchfield, serves as General Counsel for Weekley. (R. p. 194). Mr. Burchfield briefly discusses the Agreement (which speaks for itself) and asserts a self-serving legal conclusion: "Because [sic] included the construction of the home and allowed the Pattees to make certain decisions customizing that construction, the contract implicates interstate commerce." (R. p. 194, ¶ 4). There was no indication Burchfield had direct knowledge of the Pattees or their real estate purchase from Weekley. The Dixons and Pattees argued that Weekley had not submitted sufficient evidence showing the transaction between the Pattees and Weekley involved interstate commerce. (R. pp. 21-31). The subsequently filed Affidavit of Tim Dupree alleges that Weekley purchased floor coverings, countertops, sinks, faucets, and trim "from manufacturers or suppliers" outside the state of South Carolina. (R. pp. 247-248). Neither of Weekley's affidavits address the crucial fact that Weekley's contract with the Pattees was for the sale of a completed dwelling rather than for the construction of a dwelling.

Exhibit A to the Affidavit of John Burchfield includes two documents containing a list of minimal modifications to the interior of the home: a "Sales Incentive Sheet" and the "Real Estate Purchase Agreement". (R. p. 197, p. 203). Despite both appearing to have been signed on the same date (August 18, 2008), one uses the past-tense and the other uses the future-tense. The Sales Incentive Sheet provides:

> Hardwoods extended into Family Kitchen/Breakfast. Cambria countertops in kitchen, stainless undermount sink, stainless faucet; 2-piece crown in added to Family & Study.

(R. p. 197). Paragraph 12 of the Agreement provides:

> Sellers to continue hardwoods through Family Room (to door of Owners Retreat), Kitchen, and Breakfast Rooms. Sellers to replace

> laminate kitchen countertops, sink and faucet with a first level Quartz countertop (customers choice), 2 Bowl undermount Stainless Sink and Stainless Faucet. Sellers to continue crown molding through Study and Family Room. Closing to take place on or before September 14, 2008.

(R. p. 203). Given the contradictory language, it is unclear whether the referenced interior changes were made before or after the Pattees signed these documents. What is clear is that these minor changes were made after construction was complete. Moreover, the performance of these modifications clearly did not serve to convert the inherently intrastate transaction to one involving interstate commerce.

III. THE ARBITRATION PROVISION IS UNCONSCIONABLE

A starting point in determining whether a clause is unconscionable is to determine whether the contract was one of adhesion. Although adhesion contracts are not per *se* unconscionable, a finding that the agreement constituted an adhesion contract is the beginning point of the analysis. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 669 (2007). "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Id.* at 26-27. In the instant case, the Agreement was a form document drafted and provided by Weekley. (R. pp. 98-219). The document was presented to the Pattees after Weekley had completed construction of the subject property. The Pattees were offered no meaningful opportunity to bargain for the terms; rather, the document consisted primarily of boiler plate terms. These circumstances are indicative of an adhesion contract.

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract 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.* Factors to be considered when determining whether a party had a meaningful choice include "the relative disparity in the parties' bargaining power; the parties' relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Id.* As established above, the Agreement is an adhesion contract and the Pattees (and by extension the Dixons) had little-to-no bargaining power. Weekley is a large corporation that does business in at least twelve states, and the Pattees are two individuals.

Due to Plaintiff's lack of bargaining power, lack of sophistication, the nature of the damages, the inconspicuous placement and form of the arbitration notice, and the timing of the contract, the Pattees were not afforded a meaningful choice to agree to arbitration. The Pattees' (and by extension the Dixons') lack of meaningful choice, in conjunction with the one-sided and oppressive terms of the agreement, makes the arbitration agreement unconscionable, and therefore unenforceable.

CONCLUSION

For the reasons explained above, the Court should affirm the lower court's denial of Weekley's motion to compel arbitration

Respectfully submitted,

January 14, 2021

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