THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001223
Case No. 2019-CP-10-04807

Erik Kramer and Kevin N. Hedges, on behalf of themselves and others similarly situated, Respondents,

v.

Lennar Carolinas, LLC, Alpha Prime, LLC, Alpha Prime Construction, LLC, Sagehorn and Company, Inc., and Royal Palms Holding, LLC, Defendants.

Of which Lennar Carolinas, LLC is the Appellant.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page

STATUTES AND REGULATIONS

STATEMENT OF ISSUE ON APPEAL

THE COURT PROPERLY CONCLUDED THE ARBITRATION PROVISION IN THE PURCHASE AND SALE AGREEMENT WAS NOT VALID AND NOT ENFORCEABLE AND CORRECTLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION.

STATEMENT OF THE CASE

This case arises from an effort by Lennar Carolinas, LLC ("Appellant"), a real estate developer and seller of completed residential townhomes, to enforce arbitration under the FAA in a real estate sales transaction which is a purely intrastate activity. On September 18, 2019, Susan Rhoden filed a Complaint, on behalf of herself and an alleged putative class, asserting construction defect claims against Appellant and other Defendants arising out of the construction of townhomes in a development in Charleston County known as "Royal Palms". (R. pp. 16-40). An Amended Complaint was filed on October 29, 2019, adding Erik Kramer and Kevin Hedges as additional Plaintiffs (hereinafter "Respondents").[1] (R. pp. 41-63).

On November 26, 2019, Appellant filed a Motion to Dismiss and Compel Arbitration, and on December 18, 2019 Appellant filed a Motion to Dismiss or Stay and Compel Arbitration. (R. p. 89); (R. p. 111). On July 2, 2020, Appellant filed its Memorandum in Support of Motion to Dismiss and Compel Arbitration, and on July 10, 2020 Respondents filed Plaintiffs' Notice and Memorandum in Opposition to Lennar Carolinas, LLC's Motion to Dismiss and Compel Arbitration. (R. p. 171), (R. pp. 455-655). On July 14, 2020, the Court of Common Pleas heard Appellant Lennar Motion. (R. pp. 64-88). On July 16, 2020, the Court issued an Order denying Appellant's Motion to Compel Arbitration. (R. pp. 5-7). On July 27, 2020, Appellant filed a Motion to Reconsider (R. p. 656), and on August 5, 2020, Respondents filed a Memorandum in

1 Rhoden was later voluntarily dismissed as a named Plaintiff and Potential Class Representative.

Opposition to the Motion to Reconsider. (R. pp. 679-683). On August 5, 2020, the Court issued an Order denying Appellant's Motion to Reconsider. (R. pp. 2-4). Appellant filed its Notice of Appeal on September 4, 2020 and now asks the Court to reverse the lower Court's findings.

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id.

FACTS

The present action is a complex construction defects case involving the Royal Palms Project ("Project"), located in Charleston County, South Carolina. The Project is comprised of seventy-two (72) townhomes in fifteen (15) buildings. The Project was initially developed by and owned by Defendants Alpha Prime, LLC, Alpha Prime Construction, LLC and Sagehorn and Company, Inc. Prior to the completion of the Project, Defendants Lennar Carolinas, LLC and Royal Palms Holding, LLC, a wholly-owned subsidiary of Lennar, purchased the Project and developed, designed, constructed, marketed and sold ten additional buildings with multiple townhomes. (R. pp. 16-40), (R. pp. 41-63).

Appellant Lennar entered into Purchase and Sale Agreements with Respondents for the sale of townhomes in the Royal Palms development. Respondents took ownership of the property only after the real estate closings occurred. Erik Kramer and Kevin Hedges, the class representatives, each purchased completed townhomes from Lennar Carolina, LLC in a customary real estate purchase transaction. (R. pp. 455, 476-538) (R.pp. 455, 539-605) (R. pp. 650-652) (R. pp. 653-655). There is no evidence whatsoever that the Respondents entered into a construction contract with Lennar - only a residential purchase and sale agreement. (R. pp. 476-538) (R. pp.

650-652) (R. pp. 539-605) (R. pp. 653-655). During their respective real estate purchases, Respondents were presented with 62 pages of real estate closing documents constituting Lennar's Purchase and Sale Agreement and various addendums, including the following:

- Purchase and Sales Agreement
- Rider A (South Carolina)
- Rider B (Coastal Carolina Division)
- Royal Palms Master Disclosure and Information Addendum to Purchase and Sale Agreement
- Option Summary
- Energy Addendum
- Home Automation Addendum
- FHA/VA Addendum
- Election Form Addendum
- Affiliated Business Arrangement Disclosure Statement
- Insulation Addendum
- Indoor Environmental Quality Disclosure
- FHA/VA Addendum
- Cooperating Broker Agreement
- Cooperating Broker Addendum
- Addendum for Natural Stone Floors and Countertops
- Purchase Price and Payment Addendum

(R. pp. 650-652) (R. pp. 653-655).

All of these documents were presented to the Purchasers on a "take it or leave it" basis and none of the terms were negotiated. (R. pp. 650-652) (R. pp. 653-655) (R. pp. 476-605).

Respondents allege causes of action for negligence/gross negligence, breach of warranties, and breach of duty against the developers and general contractors, including Appellant Lennar for damages arising from the negligent and defective construction of the project and from the sale of defectively constructed residential property. (R. pp. 41-63). An investigation of the buildings revealed a significant number of construction deficiencies in the roofing, siding installation,

window installations, sealant and flashing installations, and installation of brick veneers all of which resulted in water intrusion into the buildings. (R. pp. 41-63).

In response to the Amended Complaint, Appellant contends the Purchase and Sale Agreement is a construction contract which involves interstate commerce and the Federal Arbitration Act (FAA) preempts and subjects Respondents to mandatory and binding arbitration under the FAA. Respondents contend these Purchase and Sale Agreements are real estate transactions and are purely intrastate transactions.

ARGUMENT

I. IS THE PURCHASE AND SALE AGREEMENT A CONSTRUCTION CONTRACT IN WHICH THE FAA APPLIES, OR IS THE CONTRACT A REAL ESTATE PURCHASE AGREEMENT GOVERNED BY THE SOUTH CAROLINA ARBITRATION ACT?

The issue on appeal turns on a simple question: Is the Purchase and Sale Agreement a "construction contract," in which case the Federal Arbitration Act applies, or is the contract a real estate purchase agreement governed by South Carolina law? The first step in the analysis is whether the SCUAA applies. S.C. Code Ann. §15-48-10. In this case, the arbitration agreement does not meet the statutory notice requirements of the SCUAA and therefore is not enforceable. The second step is then to determine if the FAA preempts the state statute. 9 U.S.C. §§ 1-2. The FAA applies in State or Federal Court to arbitration agreements which involve a transaction that *in fact* involves interstate commerce. Munoz v. Green Tree Finanicial Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)(emphasis added). The third step is to identify the transaction itself and whether that transaction in fact involves commerce between the states. If the transaction involves interstate commerce in fact, then the FAA preempts and applies. If the transaction does not involve interstate commerce in fact, then the FAA does not preempt and South Carolina law governs.

In this case, the Purchase and Sale Agreement is the transaction upon which to focus, not whether out-of-state suppliers or subcontractors were used in the construction of a building. Appellant contends the Purchase and Sale Agreement is actually a construction contract and that Respondents contracted with Lennar to design, build, supervise and manage the construction of townhomes specifically for the individual Respondents. By torturing the substance of the agreement and trying to convert what is a Purchase and Sale Agreement and a real estate transaction into a construction contract, the Appellant hopes to argue the FAA preempts and applies. Respondents contend the Purchase and Sale Agreement is exactly what it purports to be – a purchase and sales contract for the purchase of real estate in South Carolina. The South Carolina Supreme Court has clearly held that real estate transactions are intrastate activity which would therefore prevent the FAA from applying. Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012).

Appellant urges this Court to follow the ruling in Damico v. Lennar Carolinas, LLC. Damico v. Lennar Carolinas, LLC, 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020). The Damico Court, however, failed to identify the transaction itself in its analysis – whether this was a purchase and sales agreement or whether it was a construction contract. The Court simply looked at the contract language declaring that interstate commerce was involved and did not analyze whether the transaction itself involved interstate commerce *in fact,* which would have then allowed the FAA to preempt. Damico hinged its analysis not on whether the agreement was a real estate transaction or construction contract, but instead only looked at whether out of state contractors, materials and suppliers were utilized in the construction as opposed to whether it was an actual construction contract between the parties. Damico did not distinguish or analyze whether the

transaction of constructing a home differed from the transaction of selling the home when completed.

The FAA only preempts when interstate commerce in fact occurs. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); 9 U.S.C. §§ 1-2. This is the important distinction this Court must identify in order to determine if the FAA preempts and applies. Is this transaction a construction contract or a real estate purchase agreement? If it is a construction contract, the FAA preempts because a construction contract likely involves commerce between the states. If it is a real estate agreement, the FAA does not preempt because South Carolina has deemed real estate transactions as intrastate transactions and therefore a real estate transaction cannot be commerce between the states and is not interstate commerce in fact. Bradley v. Brentwood supra, (holding "a residential real estate sales contract does not evidence or involve interstate commerce," and state law must control).

The Circuit Court was correct in denying the Motion to Compel Arbitration. When determining the validity of the arbitration provision, it is clear the provision is not valid and therefore not enforceable under the SCUAA.

II. BECAUSE THE NOTICE OF ARBITRATION DOES NOT COMPLY WITH S.C. CODE ANN. §15-48-10, THE ARBITRATION CLAUSE VIOLATES THE SCUAA AND IS INVALID AND UNENFOREABLE.

The Notice of Arbitration in the agreement does not meet the requirements of S.C. Code Ann.§15-48-10, and therefore the South Carolina Uniform Arbitration Act declares this provision unenforceable.

The South Carolina Uniform Arbitration Act (SCUAA)

The South Carolina Uniform Arbitration Act §15-48-10, provides:

> Notice that a contract is subject to arbitration...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).

S.C. Code Ann. §15-48-10. The Respondents' Purchase and Sale Agreements (PSA) for the sale of the townhomes provides the following on the first page of the contracts:

> PURSUANT TO SECTION 15-48-10, SOUTH CAROLINA CODE OF LAWS, 1976, AS AMENDED, THIS SHALL CONSTITUTE WRITTEN NOTICE THAT THIS AGREEMENT IS SUBJECT TO MANDATORY BINDING ARBITRATION PURSUANT TO SECTION 16 OF THIS AGREEMENT.

(R. p. 476) (R. p. 539). The notice, while in caps, is not underlined as required by the SCUAA. Our Supreme Court has held the notice provision of the SCUAA must be strictly construed and applied, as arbitration is in derogation of the substantial right to a jury trial. Soil Remediation Co. v. Nu-Way Environmental, Inc., 323 S.C. 454, 476 S.E.2d 149 (1996).

Because the statute must be strictly applied, the Notice does not meet the statutory requirements of S.C. Code Ann. §15-48-10 and is neither valid nor enforceable under the SCUAA. Therefore, the arbitration provisions of the purchase and sale agreements are not enforceable under South Carolina Law.

III. THE FAA DOES NOT PREEMPT SOUTH CAROLINA LAW BECAUSE REAL ESTATE TRANSACTIONS ARE LOCAL IN NATURE AND DO NOT INVOLVE INTERSTATE COMMERCE

a. Is there interstate commerce in fact?

Because the arbitration agreement does not meet the statutory notice requirements of the SCUAA, the Court next examines the contract to determine if the FAA preempts because the transaction involves interstate commerce in fact. Bradley, 398 S.C. at 450 ("stating ... [T]he agreement does not meet the technical requirements of section 15-48-10(a) of the UAA as the arbitration provision is not underlined ... Because an application of the South Carolina law would

have rendered the parties' arbitration agreement completely unenforceable, consideration of the applicability of the FAA is required."). Title 9 U.S.C. §1 defines "commerce" as "commerce among the several States or with foreign nations." 9 U.S.C. §1. Title 9 U.S.C. §2 states that "a written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction ... 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.

"The FAA applies in State or Federal Court to any arbitration agreement regarding a ***transaction*** that ***in fact*** involves interstate commerce." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363(2001)(emphasis added). The FAA will preempt application of the SCUAA to the extent it invalidates an arbitration agreement if interstate commerce is involved. *See* Zabinski v. Bright Acres Assocs., 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001).

As our Supreme Court noted in *Bradley v. Brentwood Homes, Inc.*:

> Therefore, in order to activate the application of the FAA, the commerce involved in the contract must be interstate or foreign. *2 S.C. Jur. Arbitration §6* (Supp.2012) ("Interstate commerce is a necessary basis for application of the federal act, and a contract or agreement not so predicated must be governed by state law. To activate application of the federal act, the commerce involved in the contract must be interstate or foreign.").

Bradley v. Brentwood, 398 S.C. 447, 454, 730 S.E.2d 312, 315 (2012).

In determining whether a transaction involves interstate commerce "our Courts consistently look to the essential character of the contract." Bradley, 398 S.C. at 455 (quoting Thornton v. Trident Med. Ctr., LLC, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct. App. 2003)); *See* Cecala v. Moore, 982 F.Supp. 609 (N.D.Ill. 1997)(applying Illinois' arbitration law instead of the FAA because the contract for sale of real estate did not evidence a transaction involving interstate

commerce); Saneii v. Robards, 289 F.Supp.2d 855 (W.D.Ky. 2003)(The sale of real estate is inherently intrastate and to characterize a residential real estate as involving interstate commerce under these circumstances would actually promote a lack of uniformity in the law, which is exactly contrary to one of the FAA's state purpose."); *See also* Flexon v. PHC-Jasper, Inc., 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012)(agreement did not implicate interstate commerce and the FAA did not apply). Based upon the historical intrastate character of real estate transactions, our Supreme Court continuously adheres to the view that the development of real estate is an inherently intrastate transaction. "The development of land within South Carolina borders is the quintessential example of a purely intrastate activity." Bradley, 398 S.C. at 456 (citing Zabinski. 346 S.C. at 595, 553 S.E.2d at 117-118).

b. The Essential Character of this Purchase and Sale Agreement is a Real Estate Transaction.

Reviewing the essential character of the contract between Respondent and Appellant establishes the Purchase and Sale Agreement ("PSA") as a contract for the purchase of residential real estate and not a contract for construction. Specifically:

1. The contract is titled: Purchase and Sale Agreement. (R. p. 476) (R. p. 539).
2. The purchase is for "The residence and improvements (the "Home") constructed or to be constructed on the above described property (the "Homesite"), and all appurtenances thereto are collectively referred to in this Agreement as the "Property." (R. p. 476 ¶1) (R. p. 539 ¶1).
3. Buyer has no right to direct the contractor.

a. No Right to Enter. "...Buyer agrees not to give instructions to, interfere with or interrupt any workmen at the Property. Buyer may not order any work on the Property until after the Closing ." (R. pp. 502-505 ¶8) (R. pp. 565-568 ¶8).

b. "Buyer agrees that supervision and direction of the working forces, including, without limitation, all contractors and subcontractors, is to be done exclusively by Seller, and Buyer agrees not to issue any instructions to the working forces or otherwise hinder construction or installation of improvements on the Property. Buyer shall not do or have any work done on the Property, nor may Buyer store any possessions thereon, prior to Closing and transfer of title to the Property to Buyer." (emphasis added). (R. pp. 476 at 483 ¶20.2) (R. pp. 539 at 546 ¶20.2).

4. Seller is not obligated to provide options, upgrades, or extras.

"Buyer recognizes that Seller is under no obligation to agree to provide options, extras and/or upgrades." (R. pp. 502-505 ¶8) (R. pp. 565-568 ¶8).

5. "Whenever this Agreement shall require Seller to complete or substantially complete an items of construction...such item shall be deemed complete or substantially complete when so completed, in the sole and unfettered option of Seller." (Emphasis added). (R. pp. 502-505 ¶8) (R. pp. 565-568 ¶8).

6. Seller's Absolute Right to Make Modifications to Plans and Specifications. Seller has the absolute right to make modifications to the plans and specifications for the Home..." (R. pp. 476 at 479 ¶13.1.2) (R. pp. 539 at 542 ¶13.1.2).

7. Seller has the sole discretion to change which lot the Home will be built on.

"...changes may also include, but are not limited to, changes in the building location, setbacks and facing, the building's external configuration, its structural components, its

finishes and the landscaping associated therewith." (R. pp. 476 at 479 ¶13.1.2) (R. pp. 539 at 542 ¶13.1.2).

8. Seller has the unilateral right to terminate the PSA and refund Buyer's deposit in the event that Seller does not enter into binding contracts to sell at least ten percent (10%) of the homes and homesites in the Community. (R. pp. 489 at 495 ¶29) (R. pp. 549 at 555 ¶29).
9. Seller pays a commission to a real estate agent upon the sale of the Home. (Cooperating Broker Agreement). (R. pp. 476, 515-519) (R. pp. 539, 578-582).
10. Real estate closing settlement services (not construction loans) are provided by Lennar and its affiliates. The Provider and Settlement Services/Estimated Range of Charges sets forth the types of settlement services offered by Lennar's affiliated companies. These real estate transaction services include mortgage loans, closing services, arrangement for title insurance, and insurance products including homeowner's/hazard and flood insurance. (R. pp. 476, 506-507) (R. pp. 539, 569-570).
11. Buyers do not own the land prior to closing on the Home. (R. pp. 479-538 at 479) (R. pp. 539-605 at 539) (R. p. 156) (R. p. 164) (R.pp. 115-125) (R. p.104).
12. Prior to closing, the Buyer has no right of entry on the property without Seller's authorization. (R. pp. 476, 482-483 ¶20.1) (R. pp. 539, 545-546 ¶20.1) (R. pp. 502-505 ¶8) (R. pp. 565-568 ¶8).
13. The Purchase Price and Payment Addendum requires the Purchaser to pre-qualify with Lennar's in-house mortgage company as a condition to purchasing the property. "In order to be eligible to purchase the Home, You must pre-qualify with Universal American Mortgage Company, regardless of an existing pre-approval through another lending institution or Your intention to make application to another lending institution. (R. pp. 529

at 530 and pp. 533 at 534) (R. pp. 598 at 599 and pp. 602 at 603). This addendum, signed eight months after the original contract and roughly one month prior to closing, places specific condition precedent on Lennar's obligation to sell the house to Hedges. If Hedges fails to pre-qualify with Lennar's affiliated mortgage company, he is ineligible to purchase the home. In other words, Lennar is not required to sell the house to Hedges, although the house is substantially complete by that date. (R. pp. 476-538 at 529-535) (R. pp. 539-605 at 598-605).

The facts clearly distinguish these Purchase and Sales Agreements from construction contracts. Respondents had no rights in the selection of contractors, the design of the buildings, or the timeframe of construction. (R. pp. 476-538) (R. pp. 539-605) (R. pp. 650-652) (R. pp. 653-655). Respondents only rights were to purchase completed homes on a date chosen by the Appellant, and even that right could be lost if certain pre-conditions were not met. As our Supreme Court noted in Bradley:

> Because the essential character of the Agreement was strictly for the purchase of a completed residential dwelling and not the construction, we find the FAA does not apply as these types of transactions have historically been deemed to involve intrastate commerce.

Bradley v. Brentwood, 398 S.C. at 459.

c. Lennar's use of out-of-state subcontractors, suppliers and materials to construct the property does not alter the fact that this transaction is a sale of real estate; not the construction of a house.

"That out of state materials, suppliers, and subcontractors were used for the construction of the residence has no bearing on the purchase of the completed dwelling." Bradley, 398 S.C. at 458. The use of any out of state materials, supplies and/or subcontractors by a developer or general contractor constructing and developing property is a completely separate activity and is not part of

the real estate transaction that occurred between Appellant and Respondents. The fact that Appellant used out of state materials, suppliers and/or subcontractors to construct buildings and townhomes in which Appellants controlled all aspects of the construction does not convert the Purchase and Sales Agreements into a construction contract. The transaction is the purchase of the completed townhome and the FAA does not preempt because the purchase transaction does not involve interstate commerce in fact.

The FAA applies where there is "a contract evidencing a transaction involving (interstate) commerce." The focus is on the transaction. Here Lennar may have been involved in interstate commerce with its construction of the townhomes, however that is not the transaction involved in the contract before the Court. Respondents' contracts are for the purchase and sale of real estate – of a completed house – and nothing more.

d. Evidence is clear this is a real estate transaction and does not involve interstate activity in fact.

Appellant mistakenly relies on a single line from a sixteen-page, single-spaced adhesion contract providing: "The parties to this Agreement specifically agree that this transaction involves interstate commerce." (R. pp. 476 at 480 ¶16. 1) (R. pp. 539 at 543 ¶16. 1). Just because Lennar inserted this statement in its real estate purchase agreement does not make it a fact. This is a critical distinction, as federal law and the FAA will only preempt South Carolina law if there is, *in fact*, interstate commerce involved in the instant transaction. Munoz, 343 S.C. at 539. The FAA only applies if there is preemption, and for preemption to occur there *must* be a transaction involving interstate commerce. Bradley, 398 S.C. at 454. Absent "in fact" interstate commerce, the SCUAA applies, and the instant arbitration agreement is unenforceable. Bradley, 398 S.C. 447, 730 S.E.2d 312 (2012). The South Carolina statute cannot be violated by pretending interstate

commerce is involved. The purchase of residential real estate is a quintessential intrastate activity and does not implicate the FAA.

CONCLUSION

In ruling whether the FAA applies to the Purchase and Sale Agreements in this case, the Court must determine the critical issue of whether the FAA preempts. In order for the FAA to preempt, *this transaction* must involve interstate commerce *in fact*. When looking at the character of the Purchase and Sale Agreement, it is clear this is a straightforward one-time real estate purchase transaction that is deemed to be intrastate activity in South Carolina. It is clear from this agreement that Respondents had no rights to the property prior to the closing. The Respondents had a take it or leave choice to buy or not to buy their townhomes and that right was still controlled by Lennar up to the time of closing. There were no construction and development choices over which Lennar did not have control. Lennar was the owner and developer of this property and controlled every aspect of the property and its construction until the units were complete and the closings took place. Respondents understood this was a real estate transaction and not a construction contract. Respondents accepted that they had no control over the construction of the property and understood they did not own the property until the closing took place. Allowing Lennar to characterize this transaction as anything other than a real estate purchase transaction is fundamentally wrong.

Contorting the meaning of interstate commerce to invoke the FAA in a real estate transaction like the one here opens the door for South Carolina homeowners to be forced into arbitration in every real estate transaction, as at some point every home was built with materials that came through interstate commerce. The challenge this Court faces is to distinguish between

the transactions: Lennar's transactions with its subs and suppliers in constructing the project; and Respondents' transaction with Lennar in purchasing their home.

Respectfully Submitted,

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