RECEIVED
May 07 2021
SC Court of Appeals

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.

APPELLANT LENNAR CAROLINAS, LLC'S FINAL REPLY BRIEF

James Lynn Werner (S.C. Bar No. 6029)
Taylor H. Stair (S.C. Bar No. 78430)
Katon E. Dawson, Jr. (S.C. Bar No. 101167)
Robert C. Osborne III (S.C. Bar No. 101827)
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100
Columbia, SC 29201
(803) 255-8000

Attorneys for Appellant Lennar Carolinas, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Appellant Lennar Carolinas LLC ("Lennar") hereby replies to the arguments presented by Respondents Erik Kramer and Kevin Hedges (collectively "Owners") in this matter. Owners' arguments are misplaced and incorrect. For the reasons set forth in Lennar's Appellant Brief, and reiterated here, the Court should issue an order reversing the circuit court and compelling Owners to individually arbitrate their claims against Lennar.

FACTUAL BACKGROUND

In opposing Lennar's positions and arguments, Owners rely overwhelmingly upon, and argue, the following false premises and outright misstatements of fact. Owners argue and assert that: (1) Owners purchased completed townhomes and Lennar is merely a real estate developer which sold completed townhomes. (Respondents' Brief p. 1-3; 12); and (2) "[t]he 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." (Respondents' Brief p. 13).

Contrary to Owners' incorrect statements, the transactions between Lennar and Owners expressly involved the construction and sale of residential property. The Purchase and Sale Agreements at issue were not merely for the purchase of completed townhomes. In fact, Owners' Brief acknowledges that Lennar developed, designed, constructed, marketed and sold the townhomes and the lawsuit is about Lennar's allegedly defective construction. (Respondents' Brief p. 2, 4). In fact, Owners assert clearly and unequivocally that:

> "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.'" (Respondents' Brief p. 9) (emphasis added).

In addition to the Owners' effective judicial admissions that their Purchase and Sale Agreements involved the construction of the properties, the Purchase and Sale Agreements repeatedly address the fact that the contracts involved the construction of the properties:

1. "Buyer agrees to buy and Seller agrees to sell to Buyer. . . [the townhome] constructed **or to be constructed** on the following described property . . . ." (R. 126; 137) (emphasis added).

2. Each of the Owners executed Options Summaries prior to the start of construction of their homes, which summaries were an express provision in the Purchase and Sale Agreement. In the case of Owner Hedges, his Options Summary selections increased the price of his home by approximately $16,000, when in the Options Summary he selected a floor area plan as well as specific selections related to the color of his walls, cabinets, countertops, hardwood floors, carpets, shower tile, and kitchen backsplash. (R. 298-310). Similarly, Owner Kramer's Options Summary selections increased the price of his home by approximately $18,250, when he selected a floor area plan and chose to add a fireplace on an interior side wall, as well as his selections related to the color of his walls, cabinets, countertops, hardwood floors, carpets, shower tile, and kitchen backsplash. (R. 234-240).

In sum, the Owners' Brief and the Record in this case plainly reveal the truth that Owners entered into contracts with Lennar for the construction of their properties—not for the mere sale of a completed townhome.

ARGUMENTS IN REPLY

I. Whether the Purchase and Sale Agreement executed between Lennar and Owners is enforceable under the South Carolina Uniform Arbitration Act is irrelevant to the issue of the application of the Federal Arbitration Act to that Agreement; and application of the State Act is preempted by the Federal Arbitration Act to the extent that the State Act could in any way be applied to invalidate the Arbitration Agreement.

First, Lennar has not argued in this appeal that the arbitration provision in the Purchase and Sale Agreement is enforceable under the South Carolina Uniform Arbitration Act ("SCUAA").

However, the SCUAA cannot be applied so as to invalidate the arbitration provision in the Purchase and Sale Agreement. Whenever any state law, such as the SCUAA, would prohibit arbitration or the enforcement of an arbitration agreement, that state law is preempted by the Federal Arbitration Act ("FAA"). *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E. 2d 312, 315 (2012) (citing *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533, 132 S. Ct. 1201, 1203 (2012)).

II. Attempting to label the Purchase and Sale Agreement as a real estate purchase agreement as opposed to a construction contract is immaterial and irrelevant to the determination of whether the arbitration agreement in that Purchase and Sale Agreement—and the stipulation by the parties to the Agreement that the transaction between them involves interstate commerce—is enforceable under the FAA.

A. The stipulation in the Purchase and Sale Agreement that the transaction involves interstate commerce is enforceable as written and determinative of the application of the FAA.

Owners' arguments to avoid application of the FAA miss the mark and are contrary to established precedent. Those arguments must be rejected. The FAA applies to this case because Owners and Lennar executed contracts plainly and unequivocally agreeing that their transactions involved interstate commerce and that the FAA applied to the arbitration provision included therein. (R. 191-192; 255-256).

South Carolina law explicitly recognizes that arbitration provisions in contracts are governed by the FAA when the parties stipulate in the contract that the transaction involves interstate commerce. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 396, 498 S.E.2d 898, 902 (Ct. App. 1998). "[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Id.* 330 S.C. at 397, 498 S.E.2d at 903 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353-54 (1985)).

There is no requirement, and indeed no provision for the Court to look beyond the stipulation to determine for itself that the transaction "in fact" involves interstate commerce. The decision in *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) supports no such proposition. In *Munoz*, the court held:

> Here, the arbitration agreement, which applies to 'this contract and the relationships which result from this contract,' provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms.

343 S.C. at 539, 542 S.E.2d at 363-64 (citing *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248 (1989)).

Separately, the *Munoz* court recognized an additional basis (in addition to the express stipulation by the parties that their transaction involved interstate commerce) to conclude that the contract in issue involved interstate commerce when it stated, "Further the transactions in this case in fact involves interstate commerce." *Id.* at 539, 542 S.E.2d at 364 (emphasis added).

The very use and definition of the word "further" illustrates that the court was not establishing a conjunctive test, to the effect the stipulation must also be accompanied by an actual determination of interstate commerce "in fact." "Further" means "additional to what already exists or has already taken place, been done, or been accounted for." *The New Oxford American Dictionary*, 1659 (3rd ed. 2010). In other words, the *Munoz* court simply recognized that the FAA applied because the parties stipulated that their transaction involved interstate commerce and, separately, the FAA applied because the facts of the transaction also reflected that interstate commerce was involved—in fact. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 363-64.

The Court of Appeals recognized this same test and analysis in *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020), *reh'g denied* (July 1, 2020). The court held:

> We first consider whether the FAA applies. We hold it does, for two reasons. First, PA provides the parties 'specifically agree that this transaction involves interstate commerce.' We must enforce this agreement like any other contract term. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (finding FAA applied because parties had agreed contract involved interstate commerce). Second, the transaction involved commerce in fact. The FAA applies 'to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.' *Id.* at 538, 542 S.E.2d at 363.

Damico, 430 S.C. at 196, 844 S.E.2d at 70 (emphasis added). As the court expressly stated, the FAA applied for each of the two reasons it articulated. *Id.* The court did not say the FAA applied only because both tests were satisfied.

B. The decision in *Bradley v. Brentwood Homes* does not support the conclusion that the Purchase and Sale Agreement is merely a real estate transaction or that it does not involve interstate commerce.

Owners' argument that their Purchase and Sale Agreements with Lennar are purely real estate purchase transactions is equally misguided and wrong. So too is their assertion that the decision in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012) supports their position. In truth, Owners radically overstate the application of the holding in *Bradley* to the case at bar.

The court in *Bradley* did not establish an overarching rule that a residential real estate transaction never involves interstate commerce. To the contrary, after analyzing decisions from other jurisdictions—which were based on considerations such as, "[c]ontracts strictly for the sale of residential real estate focus entirely on a commodity—the land—which is firmly planted in one particular state," *Saneii v. Robards,* 289 F.Supp.2d 855 (W.D. Ky. 2003), or "the FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce, regardless of whether said transactions involve out-of-state purchasers," *Garrison v. Palmas Del Mar Homeowners Ass'n,* 538 F.Supp.2d 468, 473 (D.P.R. 2008)—the

court in *Bradley*, 398 S.C. at 458, 730 S.E.2d at 317-18, merely held: "[w]e agree with the circuit court's conclusion that Brentwood Homes failed to satisfy its burden of proof as none of the factors relied upon to establish the involvement of interstate commerce negate the intrastate nature of the sale and purchase of residential real estate."

First, from the operative holding in *Bradley* alone, it is clear there is no established rule of law that a residential real estate transaction is only an intrastate, and never an interstate, activity. The *Bradley* court plainly acknowledges that it is possible to carry a burden of proof to establish the involvement of interstate commerce even in a transaction labeled as one for the sale and purchase of residential real estate.

Second, review of the operative facts in *Bradley* readily reflects the distinguishing circumstances in that case from those attending in *Damico* and in the case at bar. In *Bradley*: (1) the arbitration provision in the Home Purchase Agreement between Bradley and Brentwood Homes did not contain any agreement that the transaction involved interstate commerce; (2) the Home Purchase Agreement did not contain a stipulation that any dispute between the parties shall be submitted to binding arbitration pursuant to the FAA, *id.* at 451, 730 S.E.2d at 314; (3) the plaintiff (Bradley) entered into a Home Purchase Agreement with Brentwood Homes strictly for the purchase of a completed dwelling, *id.* at 450, 730 S.E.2d at 313; (4) Brentwood Homes acted as a seller of the completed dwelling rather than as a contractor for the construction of the dwelling, *id.*; (5) section 22H of the Home Purchase Agreement stated:

> It is understood that Purchaser is buying a completed dwelling and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling. Purchaser will acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Agreement upon the completion of the dwelling.

id. at 450 n.3, 730 S.E.2d at 313 n.3; and (6) the provisions in the Home Purchase Agreement providing for "New Construction," "House Plan," "Options," and "Color Selection" were eliminated from the agreement and not endorsed by the plaintiff, *id.* at 458, 730 S.E.2d at 318. In fact, the *Bradley* court, after describing the elimination of the "options" provisions from the executed agreement, emphasized that "had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as 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.

In *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020), the court was presented with facts that are more similar to the present case. In *Damico*: (1) the plaintiff owners entered into Purchase and Sale Agreements with Lennar for the construction of new residential homes, *Damico*, 430 S.C. at 195, 844 S.E.2d at 70; (2) Lennar acted as both the seller and the general contractor for the owners' new residential properties, *id.*; (3) the Purchase and Sale Agreements between the plaintiff owners and Lennar contained a stipulation in the arbitration provision that "[t]he parties to this Agreement **specifically agree that this transaction involves interstate commerce**, *id.* (emphasis added); (4) the Purchase and Sale Agreements expressly stated the agreement that any "Dispute" would "be **submitted to binding arbitration as provided by the Federal Arbitration Act** (9 U.S.C. §§ 1 et seq.)," *id.* (emphasis added); and (5) the construction of the plaintiff owners' properties involved the use of out-of-state contractors and materials and equipment manufactured outside of South Carolina. *Id.* at 196-97, 844 S.E.2d at 71.[1]

[1] Furthermore, the record in *Damico* contained the Options Summaries and Color Selection Sheets executed and selected by the respective homeowners in relation to the construction of their respective properties. *See Damico* Record on Appeal p. 296-713.

The Purchase and Sale Agreement at issue in *Damico* and the relevant facts associated with the transaction between Owners and Lennar in this case are nearly identical. In the case at bar: (1) the Purchase and Sale Agreement—like the Purchase and Sale Agreement in *Damico*—contains an express stipulation that the transaction between Owners and Lennar involves interstate commerce, (R. 191-192; 255-256); (2) the Purchase and Sale Agreement contains an express stipulation in the arbitration provision that any dispute would be subject to arbitration pursuant to the FAA, (R. 191-192; 255-256); (3) the record plainly reflects that the transaction between Owners and Lennar did not "strictly" involve the purchase of completed residential real estate in South Carolina, but rather, the transaction involved the construction of the home and the purchase of that real estate as reflected by terms in the Agreement providing that Owners executed an Option Summary, in which each selected a floor area plan and made the selections related to the color of his walls, cabinets, countertops, hardwood floors, shower tile, and kitchen backsplash and the addition of a fireplace, (R. 234-236; 298-309); (4) the Purchase and Sale Agreements, and the Record, plainly indicated that construction on the properties had not begun when the Owners executed their respective Purchase and Sale Agreements, (R. 126; 137; 197; 314); (5) Hedges' Purchase and Sale Agreement was executed on or about March 7, 2015 and the contract estimates that construction will begin on April 17, 2015 and be completed on or before October 1, 2015, (R. 137; 314); (6) Kramer's Purchase and Sale Agreement was executed on or about May 2, 2015 and the contract estimates that construction will begin on June 5, 2015 and be completed on or before March 17, 2016, (R. 126; 197); and (7) the construction of the Owners' townhomes included the use of out-of-state subcontractors as well as products manufactured and supplied from outside of South Carolina. (R. 184-185; 340-402; 404-447; 448-453).

These facts clearly demonstrate that this matter is readily distinguishable from *Bradley*. Indeed, the Record in this case plainly establishes that the Purchase and Sale Agreements are contracts for the construction and purchase of residential properties in South Carolina and, therefore, involve interstate commerce, both under the agreements and "in fact."

The analysis for the proper interpretation and application of the *Bradley* decision to a case such as this has also already been performed by Judge Joseph F. Anderson, Jr. of the United States District Court. In *Bernstein v. Pulte Home Co., LLC*, No. 0:19-CV-02805-JFA, 2019 WL 8014404 (D.S.C. Dec. 23, 2019), Judge Anderson reviewed similar facts, and similar arguments from plaintiff homeowners, who were attempting to avoid the binding arbitration provisions in their purchase agreements with Pulte Home Company, LLC ("Pulte"). In *Bernstein*, 2019 WL 8014404, at *1, the plaintiffs asserted construction defect claims against Pulte and Pulte moved to compel the plaintiffs to arbitrate their claims pursuant to the arbitration provision in the purchase agreements. The plaintiffs argued that the arbitration agreements were not enforceable because (1) the agreements did not comply with the South Carolina Uniform Arbitration Act; and (2) the agreements were not subject to the FAA. *Id.* at *2. Judge Anderson rejected the arguments and found that the FAA applied and arbitration was compelled. *Id.* at *3-4.

As with Lennar in this case, Pulte did not contest that the purchase agreements failed to comply with the strict notice requirements of the South Carolina Uniform Arbitration. Therefore, the court analyzed whether the FAA applied to the transaction. In conducting this analysis, Judge Anderson determined the following relevant facts in that case, which are remarkably similar to the relevant material facts attendant here—except the parties in *Bernstein* had not stipulated in their agreement to the involvement of interstate commerce or the application of the FAA to the arbitration provision:

1. Pulte contracted with several out-of-state subcontractors to build the plaintiffs' homes in South Carolina, using building materials sourced nationally.

2. The Purchase Agreement referenced construction of the homes.

3. The Purchase Agreements indicated that the homes had not been completed at the time of execution of the agreements.

4. The Purchase Agreement clearly stated that "[t]he Home will be constructed by Pulte Home Corporation."

5. The Purchase Agreements included an "Important Dates Acknowledgement" addendum with deadlines for the buyer to attend a "Design Appointment" with Pulte to "select options . . . for a new build."

6. The Purchase Agreements included a provision allowing plaintiffs to "select options and upgrades," and they made such sections.

Id. at *4.

In deciding that interstate commerce was involved, that *Bradley* did not foreclose such a finding or application of the FAA, and in compelling arbitration, Judge Anderson contrasted the *Bernstein* facts with the relevant facts in *Bradley*. *Id.* at *3-4. Specifically, the *Bernstein* court distinguished the case before it from *Bradley* on the grounds that (1) the seller in *Bradley* was not the contractor and acted solely as the seller of the home at issue; and (2) the contract in *Bradley* did not include a provision allowing the buyer's to select options and upgrades. *Id.* Accordingly, the *Bernstein* court held that the agreements between Pulte and the plaintiffs were not "strictly for the purchase of a completed residential dwelling" as in *Bradley*, but rather were agreements for the construction and purchase of a new residential dwelling and, therefore, subject to the FAA. *Id.* at *4.

The facts of the present matter nearly mirror the facts at issue in *Bernstein*:

1. Lennar contracted with several out-of-state subcontractors to build the plaintiffs' homes in South Carolina, using building materials sourced nationally. (R. 184-185; 340-402; 404-447; 448-453).

2. The Purchase and Sale Agreements referenced construction of the homes. (R. 187; 251; 254; 257).

3. The Purchase and Sale Agreements indicated that the homes had not been completed at the time of execution of the agreements but would be constructed by Lennar. (R. 126; 137; 197; 314).

4. The Purchase and Sale Agreements included Options Summaries and Color Selections, which the Owners exercised associated with the construction of the properties. (R. 234-236; 298-309).

Review in the case at bar reveals that the facts here mirror the facts in *Damico* and in *Bernstein*. Those facts, and application of the controlling law, necessitate the same analysis and conclusion; namely, the contracts between Owners and Lennar involved construction, affected interstate commerce, and the arbitration provisions therein are subject to the FAA. Accordingly, the Court should reverse the circuit court and compel the Owners to individually arbitrate their claims against Lennar.

CONCLUSION

For the foregoing reasons, the circuit court erred in denying Lennar's Motion to Compel Arbitration and Lennar respectfully requests the Court issue an order reversing the circuit court and compelling Owners to individually arbitrate their claims against Lennar.

/s Katon E. Dawson, Jr.
James Lynn Werner, (SC Bar No. 6029)
Taylor H. Stair (SC Bar No. 78430)
Katon E. Dawson, Jr. (SC Bar No. 101167)
Robert C. Osborne III (S.C. Bar No. 101827)
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100

Columbia, SC 29201
(803) 255-8000

May 7, 2021
Columbia, South Carolina

RECEIVED
May 07 2021
SC 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.

LENNAR CAROLINAS, LLC'S CERTIFICATE OF COUNSEL

The undersigned hereby certifies on May 7, 2021, that Lennar Carolinas, LLC's Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

s/Katon E. Dawson Jr.
James Lynn Werner, (SC Bar No. 6029)
Taylor H. Stair (SC Bar No. 78430)
Katon E. Dawson, Jr. (SC Bar No. 101167)
Robert C. Osborne III (S.C. Bar No. 101827)
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100
Columbia, SC 29201
(803) 255-8000

May 7, 2021

Attorneys for Appellant Lennar Carolinas, LLC