

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 Whitesides Park Townhomes Property )  
 Owners Association, Inc., )  
 Plaintiff, )  
 )  
 v. )  
 )  
 CalAtlantic Group, Inc. f/k/a The Ryland )  
 Group, Inc. f/k/a Standard Pacific Corp. )  
 And also d/b/a Calatlantic Homes; Lennar )  
 Carolinas, LLC; Southend Exteriors, Inc.; )  
 Alpha Omega Construction Group, Inc.; and )  
 Fogel Services, Inc. )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

Case No.: 2020-CP-10-02398

**ORDER ON DEFENDANTS’ MOTION  
TO ALTER OR AMEND**

**RECEIVED**  
**Jul 21 2021**  
**SC Court of Appeals**

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff’s Attorney:	Amanda M. Blundy, Esq.
Defendants’ Attorney:	Cheryl D. Shoun, Esq.
Date of Hearing:	March 22, 2021
Court Reporter:	N/A

This matter came before the Court on Defendants CalAtlantic Group, Inc. and Lennar Carolinas, LLC’s Motion to Alter or Amend, filed May 17, 2021. The Defendants ask the Court to reconsider its Order denying Defendants’ Motion to Dismiss and Compel Arbitration, filed May 7, 2021. The Court received a copy of the Motion to Alter or Amend on May 17, 2021 via email from counsel for the Defendants. The Plaintiff filed its response to Defendants Motion to Alter or Amend on May 26, 2021. After consideration of the record, as well as the various interests balanced by the Court at the time of the ruling, the Defendants’ Motion to Alter or Amend is heard and respectfully Denied.<sup>1</sup>

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<sup>1</sup> This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401–402, 444 S.E.2d 534, 536 (Ct. App. 1994).

## CONCLUSIONS OF LAW

“The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits.” Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). “A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). “A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not.” Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E. 2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E. 2d 268 (1993)); See also Arnold v. State, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992).

“A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.” Rule 59(e), SCRPC. “[T]he ten-day deadline in Rule 59(e) is an absolute deadline. A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served, nor does a trial court have any power to grant the moving party an extension of time in which to file a Rule 59(e) motion.” Overland, Inc. v. Nance, 423 S.C. 253, 256-57, 815 S.E.2d 431, 433 (2018) (citation omitted) (citing Leviner v. Sonoco Prods. Co., 339 S.C. 492, 530 S.E.2d 127 (2000)).

“A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.” Rule 59(g), SCRPC; See also Smith v. Fedor, 422 S.C. 118, 126, 809 S.E.2d 612, 161 (Ct. App. 2017) (“Rule 59(g) would lack any purpose if trial courts committed error by denying the motion for failure to comply with the rule.

Further, our language in Gallagher v. Evert, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002) implies a trial court may deny the motion solely on the basis of the rule.”).

**I. The Defendants’ Motion to Alter or Amend is Denied.**

The Defendants assert two grounds in support of their Motion to Alter or Amend. First, the Defendant contend that the Court erred in finding that the arbitration provisions in the Covenants are unconscionable. Second, the Defendants assert that the Purchase Agreements, Homeowners Manual, and Limited Warranty compel arbitration of the Plaintiff’s claims.

As discussed in detail, infra, the Court fully considered and addressed each of the Defendants’ assertions, and in the Motion to Alter or Amend, the Defendants seek only to reargue the issues on the same basis previously presented to the Court.

**A. The Defendants’ contention that the arbitration provisions in the Covenants are not unconscionable is without merit.**

The Defendants contend that the Court should alter or amend its May 7, 2021 Order and enforce the arbitration provisions of the Covenants because the arbitration provisions are not unconscionable. This argument was previously presented to, and ruled upon by the Court, as discussed in detail herein.

The Court conducted a thorough review of the record and analyzed in detail the arbitration provisions contained in the Covenant. See May 7, 2021 Order at 4-6. The Court found that at the time the Plaintiff Association was created, and at the time the Covenants were executed, Don McDonough was acting as both the Operational Vice President of Defendant CalAtlantic, and as President of the Plaintiff Association, and that Mr. McDonough executed the Covenants on behalf of both Defendant CalAtlantic and the Association. Id. at Page 5, lines 3-9. The Court found that the unilateral insertion of the arbitration provision in the Covenants while the Plaintiff was solely under Defendant CalAtlantic’s control confirmed the lack of an underlying agreement between the

parties to arbitrate, and substantiates that the arbitration provision was unenforceable. Id. at Page 5, lines 10-13.

The Court conducted a rigorous analysis of the unconscionability standard as applied to the facts of this case, and concluded that the Plaintiff Association lacked a meaningful choice due to the one-sided provisions of the Covenants, as the provisions were introduced and executed by the same person, Mr. McDonough. Id. at Page 6, lines 3-6.

In considering the Defendants' Motion to Alter or Amend, the Court finds that the Defendants seek only to reargue the issues on the same basis previously presented to the Court and presents no novel facts, arguments, or theories in support of their position. Accordingly, the Motion to Alter or Amend as to this ground is heard and respectfully Denied.

**B. The Defendants' contention that the Purchase Agreements, Homeowners Manual, and Limited Warranty compel arbitration is without merit.**

The Defendants next contend that the Purchase Agreements, Homeowners Manual, and Limited Warranty entered into by the individual homeowners compel the Plaintiff to arbitrate its claims. This argument was previously presented to, and ruled upon by the Court, as discussed in detail herein.

The Court conducted a thorough review of the record and analyzed in detail whether the Defendants were entitled to compel arbitration pursuant to the arbitration provisions contained in the Purchase Agreements, Homeowners Manual, and Limited Warranty that were entered into by the individual homeowners. See May 7, 2021 Order at 6-7. The Court found that the Defendants could not compel the Plaintiff Association to arbitrate pursuant to the arbitration provisions contained in these documents because the individual homeowners are not the Plaintiffs in this action, and were not suing for damages associated with their individual units. Id. at Page 6, lines 22-25. The Court found that the Plaintiff Association's causes of action were brought by the

Association under their duty to maintain and keep in good condition the common areas, and allege defects against the Defendants for damage to those common areas. Id. at Page 7, lines 1-2.

The Court conducted a rigorous analysis of the arbitration provisions contained in the Purchase Agreements, Homeowners Manual, and Limited Warranty as applied to the facts of this case, and concluded that the Plaintiff Association did not contractually agree to the arbitration provisions contained in these documents. Id. at Page 7, lines 5-10. In considering the Defendants' Motion to Alter or Amend, the Court finds that the Defendants seek only to reargue the issues on the same basis previously presented to the Court and presents no novel facts, arguments, or theories in support of their position. Accordingly, the Motion to Alter or Amend as to this ground is heard and respectfully Denied.

### **CONCLUSION**

After fully considering the Defendants' Motion to Alter or Amend, the Court finds that the Defendants seek only to reargue the issues on the same basis previously presented to the Court and present no novel facts, arguments, or theories in support of their position. The Defendants have not highlighted any portions of the record this Court may have misunderstood, failed to fully consider, or perhaps failed to rule on. Accordingly, the Motion to Alter or Amend is heard and respectfully Denied.

**AND IT IS SO ORDERED.**

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Hon. Deadra L. Jefferson  
Presiding Judge  
Ninth Judicial Circuit

June \_\_\_\_\_, 2021  
Charleston, South Carolina



Charleston Common Pleas

**Case Caption:** Whitesides Park Townhomes Property Owners Association Inc VS  
Calatlantic Group Inc , defendant, et al

**Case Number:** 2020CP1002398

**Type:** Order/Other

IT IS SO ORDERED.

s/D.L. Jefferson Ninth Judicial Circuit Judge 2128