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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2020-CP-10-02398
WHITESIDES PARK TOWNHOMES PROPERTY OWNERS ASSOCIATION, INC. Plaintiff, vs. 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.	)	**ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION**

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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 March 22, 2021 on Defendants CalAtlantic Group, Inc. f/k/a the Ryland Group, Inc. f/k/a Standard Pacific Corp. and also d/b/a CalAtlantic Homes ("CalAtlantic") and Lennar Carolinas, LLC's ("Lennar") Motion to Dismiss and Compel Arbitration, filed December 22, 2020. This Motion is disposed of without the necessity of a hearing pursuant to the Chief Justice's April 3, 2020 Order, As Amended March 4, 2021, Section (c)(4). This Motion is listed on the March 22, 2021 Charleston County Motions Roster published February 22, 2021. The Defendants filed their Motion and Memorandum in Support on December 22, 2020.

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The Plaintiff filed its Memorandum in Opposition on March 22, 2021. For the following reasons, the Defendants' Motion to Compel Arbitration is heard and respectfully Denied.

PROCEDURAL HISTORY

This case arises out of alleged deficiencies in the design, development, and construction of Whitesides Park Townhomes (hereinafter referred to as "the Project"), which is comprised of four (4) buildings containing thirteen (13) townhomes. Defendant CalAtlantic, along with its subcontractors Defendants Southend Exteriors, Inc., Alpha Omega Construction Group, Inc., and Fogel Services Inc., constructed the multi-family buildings. Plaintiff Whitesides Park Townhomes Property Owners Association, Inc. ("the Association" or "the Plaintiff") filed their Summons and Complaint against Defendants CalAtlantic, Lennar, and the subcontractors on June 1, 2020.[1]

The Plaintiff Association was created pursuant to a Declaration of Covenants, Conditions, Restrictions and Easements for Whitesides Park (the "Covenants") on September 8, 2016. The Covenants were drafted by Defendant CalAtlantic and executed by the same person, Don McDonough, as Operational Vice President of Defendant CalAtlantic, and as President of the Association, on behalf of both the Declarant, Defendant CalAtlantic, and Association. See Covenants at 45-46. The Covenants contain an arbitration provision, which sets forth specific claims that are exempt from arbitration. Id. at 34-35.

The fist townhome was sold on December 15, 2016. The remaining townhomes were sold subsequently. The individual townhome owners entered into Purchase Contracts with Defendant CalAtlantic at the time of purchase. The individual townhome owners also received the

[1] The Plaintiff brought suit against the Defendants alleging developer liability, breach of fiduciary duties, along with claims of negligence, breach of implied warranties, and unfair trade practices due to improper installation and/or designs of the heating and air condition system, ductwork, roof, membrane roofs related accessories, cementitious siding, exterior trim, deck boards, house wrap, trim, windows, doors, tile components, brick and stone veneers, framing, secondary weather barrier, paved driveway, and roads.

Homeowner's Limited Warranty & Maintenance Manual, which included the New Home Warranty Program Insured Limited Warranty.

The Defendants contend that the Plaintiff must submit to binding arbitration pursuant to arbitration provisions contained in the Covenants, the Purchase Contracts, the Homeowner's Limited Warranty & Maintenance Manual, and the New Home Warranty Program Insured Limited Warranty. For the following reasons, the Defendants' Motion to Compel Arbitration is heard and respectfully Denied.

CONCLUSION OF LAW

Both federal law and South Carolina law favor the resolution of disputes through arbitration. See Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 109, 739, S.E.2d 209, 213 (2013); see also Heffner v. Destiny, Inc., 321 S.C. 536, 471 S.E.2d 135 (1995); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997). Where parties contractually agreed to arbitrate a dispute, the court must compel the parties to submit the dispute to arbitration for resolution. See 9 U.S.C. § 2; see also S.C. Code Ann. §§ 15-48-20 & -180; see also Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

"Although arbitration is viewed favorably by the courts, it is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." Wilson v. Willis, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019) (citing E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (recognizing that arbitration "is a matter of consent, not coercion"). "Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate." Id. (citing Arrants v. Buck, 130 F.3d 636, 640 (4th Cir. 1997)); see also Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("Arbitration is a matter of contract, and a party cannot be required to submit

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to arbitrate any dispute which he has not agreed to submit."). Accordingly, arbitration will be denied if a court determines no agreement to arbitrate existed. See S.C. Code Ann § 15-48-20(a).

"[T]he trial court should determine the threshold validity of the arbitration agreement." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 23, 644 S.E.2d 663, 667 (2007); see also Zabinsky, 346 S.C. at 596, 553 S.E.2d at 118 ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise.").

I. Defendants are not entitled to compel arbitration under the arbitration provisions in the Covenants because the Covenants are unconscionable.

A party may effectively challenge the arbitrability of a given claim based upon general contract defenses including fraud, duress, and unconscionability. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001); see also Doe v. TCSC, LLC, 430 S.C. 602, 611, 846 S.E.2d 874, 878 (Ct. App. 2020). In South Carolina, an unconscionable provision in a contract is unenforceable. 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." Simpson v. MSA of Myrtle Beach, 373 S.C. 14, 25 644 S.E.2d 663, 668-69 (2007); see also Doe, 430 S.C. at 612, 846 S.E.2d at 879.

"While we analyze both prongs, they invite similar proof and often overlap, and 'if more of one [prong] is present, then less of the other is required.'" Doe, 430 S.C. at 612, 846 S.E.2d at 879 (citing Farnsworth on Contracts § 29.4 at 4-212 (2020-1 Supp.) and Corbin on Contracts § 29.4 at 388 (2002 ed.) (noting "most cases do not fall neatly" into categorical boxes). "Unconscionability is gauged at the time the contract was made." Id. "If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may

refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result." Id.

When the Association was created, and at the time the Covenants were executed, Don McDonough was acting as both the Operational Vice President of CalAtlantic, and as President of the Association, and Mr. McDonough executed the Covenants on behalf of both Defendant CalAtlantic, and the Association. See Covenants at 45-46. A property owners' association lacks independent capacity during the period that the developer-controlled board is in place. Magnolia n. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 372, 725 S.E.2d 112,125 (Ct. App. 2012).

The unilateral insertion of an arbitration provision in the Covenants while the Association was solely under Defendant CalAtlantic's control confirms the lack of an underlying agreement between the parties to arbitrate and substantiates that the arbitration provision is therefore unenforceable. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.").

That the Covenants were executed by Mr. McDonough on behalf of both the Defendant and the Association as both the Operational Vice President of CalAtlantic, and as President of the Association is a clear conflict of interest, and the transaction between the Defendant and the Association was not arms-length.

Moreover, the Association had no bargaining power when the Covenants were signed as the Association was under the sole control of the Defendant CalAtlantic, and the Covenants were executed by Mr. McDonough on behalf of both parties. The Covenants contain a one-sided provisions which benefits Defendant CalAtlantic and restricts the rights of the Association, and

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they were offered in a take-it-or-leave it document in which the Association had no input or bargaining power. As the Association never voluntarily agreed to arbitrate, and no valid agreement existed, the Covenants cannot be enforced. The 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, Don McDonough. Based on the foregoing, the Court finds the arbitration provision contained in the Covenants unconscionable, and declines to enforce the provision against the Plaintiff.

Accordingly, for this reason, the Defendants' Motion to Compel Arbitration is heard and respectfully Denied.

II. Defendants are not entitled to compel arbitration under the arbitration provisions in the Purchase Contract and Homeowner's Limited Warranty & Maintenance Manual because the Association is not a party to those documents, and the individual homeowners are not the plaintiffs in this action.

A party may only compel arbitration if it establishes the existence of a written agreement, including an arbitration provision, that purports to cover the dispute. Am. Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005). Arbitration is only available when the parties involved contractually agree to arbitrate. Towels v. United Health Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999).

The Defendants assert that the Association is compelled to arbitrate its claims because the individual homeowners entered into Purchase Contracts and Limited Warranty & Maintenance Manuals that contained arbitration provisions. The Defendants cannot compel the Association to arbitrate pursuant to the arbitration provisions contained in the Purchase Contract or Limited Warranty & Maintenance Manual because the individual homeowners are not the plaintiffs in this action and are not suing for damages associated with their individual units. Rather, the Plaintiff's causes of action are brought by the Association under their duty to maintain and keep in good

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condition the common areas, and allege defects against the Defendants for the common areas of the property, not for each individual unit.[2] The relevant inquiry is not the arbitrability of each individual homeowner's claims against the Defendants. Rather, it is the arbitrability of the Association's claims regarding alleged defects in the common areas against the Defendants.

Therefore, in light of the foregoing, the Court finds that the Association did not contractually agree to the arbitration provisions contained in the Purchase Contract or the Homeowner's Limited Warranty & Maintenance Manual, and did not contractually agree to arbitrate in the Purchase Contract or Homeowner's Limited Warranty & Maintenance Manual. Therefore, any assertion that the Association is bound to the arbitration provisions in these documents is without merit.

Accordingly, for this reason, the Defendants' Motion to Compel Arbitration is heard and respectfully Denied.

CONCLUSION

For the foregoing reasons, the Defendants' Motion to Compel Arbitration is heard and respectfully Denied.

AND IT IS SO ORDERED.

____
Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

May __________, 2021
Charleston, South Carolina

[2] Section 5.2 of Article V of the Covenants defines the common areas that the Association is responsible for maintaining. These areas include (1) all common areas, including the open space easement; (2) exterior maintenance of all dwellings including, but not limited to painting, repairing, replacing and caring for the following: roofs (including the roofs joists and trusses, crossbeams, roof decking and underlaying, and shingles or other covering and surface materials); exterior walls and surfaces, including the brick, siding, or other building material forming the exterior walls of any dwelling and/or garage; (3) exterior stoops, landings, railings and steps; and (3) all walkways, driveways, and other paved areas. See Covenants at Article V, Section 5.2.

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

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