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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2020-001048

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually, Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers

Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth Party Defendants,

Of whom Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Davis Morrow are the Petitioners.

PETITIONERS' REPLY TO LENNAR CAROLINAS, LLC'S BRIEF

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Petitioners, above-named, hereby respectfully submit this Reply to Respondent Lennar Carolina, LLC's Brief.

ARGUMENT

I. THIS CASE INVOLVES PURCHASE AND SALE AGREEMENTS FOR THE PURCHASE AND SALE OF RESIDENTIAL PROPERTY; LENNAR'S BRIEF REPEATEDLY ATTEMPTS TO MISCONSTRUE THESE PURCHASE AND SALE AGREEMENTS AS "CONSTRUCTION CONTRACTS" IN A MISGUIDED EFFORT TO ENFORCE ARBITRATION UNDER THE FAA.

Respondent Lennar contends that the ***Purchase and Sale*** Agreements at issue in this case—form agreements drafted by Lennar itself—are in actuality "construction contracts" under which the Federal Arbitration Act (FAA) applies. Lennar's contention is incorrect for several reasons:

A. The essential character of the Purchase and Sale Agreement in this case is that of a residential real estate sales contract, not a construction contract.

As this Court noted in Bradley v. Brentwood Homes, "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012), quoting Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). Because the ***essential character*** of the Agreement in Bradley was ultimately for the purchase and sale of a completed residential dwelling, and not for its construction, this Court found that the FAA did not apply. Id., 398 S.C. at 459; 730 S.E.2d at 318. In doing so, the Court adhered to its longstanding view that "the development of real estate is an inherently intrastate transaction," Id., citing Zabinski, 346 S.C. at 595, 553 S.E.2d at 117–18 ("The development of land within South Carolina borders is the quintessential example of a purely intrastate activity.")

In the present case, the ***essential character*** of the Purchase and Sale Agreement entered into by Lennar and each of the original purchasers is just that—a contract for the purchase and sale of residential dwelling, not a construction contract. (R. pp. 296-713). Specifically:

1. Each contract is titled: Purchase and Sale Agreement, identifying a ***Seller*** and a ***Buyer***. (R. pp. 296; 296-713).

2. Buyers do not own the land prior to closing on the sale of the home. (R. p. 299, ¶ 11.22; 296-713)

3. Prior to closing on the sale of the home, Buyers have no right of entry on the property without Seller's authorization. (R. p. 310, ¶ 8; 296-713).

4. The sale of the home is contingent on the Buyers' ability to obtain mortgage financing, not a construction loan. (R. p. 302, ¶ 8; 296-713). In other words, Lennar is not required to sell the house to Buyer, although the house is already complete or substantially complete.

5. As is customary with in Purchase and Sale Agreements, Seller pays a commission to ***a real estate agent*** upon the ***sale*** of the Home. (Cooperating Broker Agreement). (Emphasis added) (R. pp. 333-335; 296-713).

6. 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. 314-315; 296-713).

7. 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. p. 310 at ¶ 8; 296-713).

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. p. 324, at ¶ 27; 296-713).

9. The contract is for the ***purchase and sale*** of "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. 296; 296-713). It is not a construction contract between the Seller and Buyer.

10. In fact, the lack of a construction contract is emphasized by the fact that ***Seller*** has the absolute right to make modifications to the plans and specifications for the Home. (R. p. 299 at ¶ 13.1.2; 296-713).

11. Buyer also has no right to direct contractors or order any work on the Property until after closing:

> 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." (Emphasis added) (R. p. 310, ¶ 8; 296-713).
>
> 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. p. 302 at ¶ 20.2; 296-713).

12. Seller also 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. p. 299 at ¶ 13.1.2; 296-713).

The above facts clearly establish that the essential character of the Purchase and Sale Agreement is that of an agreement for the purchase and sale of a residential dwelling, and not a construction contract. Petitioners only rights under the Agreement 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 this 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." (Emphasis added). Bradley v. Brentwood, 398 S.C. at 459. Accordingly, the FAA should not apply in this instance because the essential character of the Purchase and Sale Agreement is that of a residential real estate contract, not a construction contract.

B. Lennar's purported use of out-of-state subcontractors, suppliers, and/or materials to construct homes does not alter the fact that the subject transactions in this case involve the Purchase and Sale of residential real estate, a purely intrastate activity, and not the construction of homes.

"[T]hat 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 sales transaction that occurred between Lennar and the original purchasers. The fact that Lennar purports to have used out of state materials, suppliers and/or subcontractors to construct homes in which they 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 homes and the FAA does not apply because the sales transaction is purely intrastate in nature. It does not involve interstate commerce in fact.

The FAA applies where there is "a contract evidencing a transaction involving (interstate) commerce." 9 U.S.C. §2. The focus, therefore, is on the subject transaction itself. Here, Lennar may have been involved in interstate commerce with its construction of homes, however, that is no way the transaction contemplated in the contracts before the Court. Respondents' contracts are for the purchase and sale of residential real estate.

C. The FAA does not apply because the Arbitration Agreement is unconscionable.

In rendering its decision in the present case, the Court of Appeals held that the FAA applies because "the parties 'specifically agree that this transaction involves interstate commerce'" and "We must enforce this agreement like any other contract term," citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001). However, Petitioner Homeowners, again, respectfully submit that the Court's analysis was incomplete. Specifically, in Bradley v. Brentwood Homes, Inc., the South Carolina Supreme Court set forth the standard for enforcing contractual agreements, which purport to evidence an agreement by the parties that a transaction involves commerce:

> The FAA provides: "A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... 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.A. § 2.

[Emphasis added]

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

As noted by the above-cited language, a provision in a contract purporting to evidence interstate commerce is not enforceable where grounds exist, at law or in equity, for its revocation. As set forth in Petitioners' Brief, equitable and legal grounds exist for revoking the arbitration agreement drafted by Lennar. Specifically, applying the South Carolina Supreme Court's analysis in Smith v. D.R. Horton, Inc. and Simpson v. MSA of Myrtle Beach, Inc., the terms of the arbitration agreement are unconscionable because the Respondent Homeowners lacked any meaningful choice and the terms are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." Smith v. D.R. Horton, Inc., 417 S.C. at 49, 790 S.E.2d at 4, citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). Accordingly, "the arbitration provision is unconscionable and thus unenforceable." Smith v. D.R. Horton, Inc., 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).

In an effort to lasso in the FAA, Lennar, now citing Cape Romain Contractors, Inc. v. Wando E. LLC, 405 S.C. 115, 126, 747 S.E.2d 461, 466 (2013), 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," for the proposition that arbitration must be enforced (R. p. 300.) However, Cape Romain is distinguishable from this case on various fronts. First, Cape Romain involved two sophisticated business entities, a general contractor and subcontractor, not individual residential homeowners. As noted in Petitioner's Brief, the bargaining power held by Petitioner Homeowners in the present case is identical to the bargaining power held by the homeowners in Smith v. D.R. Horton, Inc. Specifically, (1) there is no

indication in the Record that any of the Petitioner Homeowners "enjoyed a substantially stronger bargaining position" against Lennar, or (2) that they were each represented by independent counsel in negotiating the form contract. 417 S.C. at 50, 790 S.E.2d at 4-5. Further, like the homeowners in Smith v. D.R. Horton, Petitioner Homeowners were each "single clients" to a corporation that develops and sells houses throughout South Carolina and other states. These were take-it-or -leave-it adhesion contracts drafted by Lennar, a sophisticated business entity. Applying the South Carolina Supreme Court's analysis in Smith v. D.R. Horton to the present case, it is clear that Petitioner Homeowners lacked a meaningful choice in their ability to negotiate the arbitration agreement. *Id.* As set forth in Petitioners' Brief, the arbitration agreement drafted by Lennar was unconscionable, ambiguous, and unenforceable.

Second, unlike in the present case, the subject transaction in Cape Romain involved interstate commerce—in fact—as the transaction centered on the constructions of marinas, "*channels* of interstate commerce […] the interstate transportation routes through which persons and goods move." Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 121, 747 S.E.2d 461, 464 (2013). Here, as set forth above, the subject transaction involved the purchase and sale of residential homes; a purely intrastate activity. Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012) quoting Zabinski, 346 S.C. at 595, 553 S.E.2d at 117-18.

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.2d312 (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.

Said differently, sufficient grounds exist for revoking the arbitration agreement. Where a Court finds any clause of a contract unconscionable, including an arbitration clause, as is the case here, the Court may refuse to enforce the clause or otherwise limit its application so as to avoid an unconscionable result. See S.C. Code§ 36-3-302(1) 2003. Petitioners respectfully submit that this Court should grant Homeowner's petition, reverse the Court of Appeal's order and deny Lennar's Motion to Compel Arbitration because the arbitration agreement is unconscionable and thus unenforceable.

II. IN AN APPARENT EFFORT TO AVOID SCRUTINY OF ITS OWN DOCUMENTS BY THIS COURT, LENNAR'S BRIEF NOTABLY ABANDONS ALL ARGUMENTS SEEKING TO ENFORCE ARBITRATION UNDER THE LENNAR WARRANTY, THE DEEDS, AND/OR THE COVENANTS.

Lennar's Brief does not raise a single argument as to the enforceability of arbitration under the Lennar Warranty, Deed, and/or the Covenants, nor does it address any of the unconscionability arguments raised by Petitioners as to the enforceability of arbitration under any of these documents. Presumably, Lennar, who moved before the Circuit Court to enforce arbitration pursuant to each and every one these documents, has abandoned these arguments in order to avoid scrutiny of the documents' inherent defects. As detailed in Petitioners' Brief, the Lennar Warranty, Deeds, and Covenants suffer, *inter alia*, from unsegregated arbitration language, unconscionable warranty disclaimers, and cross-references to one-another, including cross-references to the ***entirety*** of Lennar's **Purchase and Sale Agreement**, not just Section 16, and cross-references the ***entirety*** of the **Lennar Warranty**. As set forth in Petitioners' Brief, these defects render Lennar's arbitration provisions extremely ambiguous, unconscionable, and ultimately unenforceable as a whole. In any

event, "Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal." Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004).

III. PETITIONER HOMEOWNERS HAVE AT ALL TIMES RELEVANT HERETO MAINTAINED THAT THE ARBITRATION PROVISIONS DRAFTED BY LENNAR ARE UNEFORCEABLE BECAUSE THEY ARE UNCONSCIONABLE AND AMBIGUOUS.

Lennar's argument that Homeowners now seek to raise new issues on appeal is unfounded. A review of Homeowner's final briefs and recording of the oral arguments presented before the Court of Appeals reveal that the Homeowners have at all time maintained that Lennar's Arbitration Agreement is unconscionable, ambiguous, and therefore unenforceable. This is the very crux of the Circuit Court's Order and Petitioners' arguments to the Circuit Court, the Court of Appeals, and to the Supreme Court in the present Petition. (Order, R. pp. 4-23; see also Petitioner's Appellate Brief, which incorporates by reference the Circuit Court's lengthy, and detailed analysis, App. pp. 52; 60-74; arguing that the Arbitration Provisions are ambiguous at App. pp. 67-71; and Hearing Tr., R. pp. 222-23). The Circuit Court specifically found that Lennar's Arbitration provisions were ambiguous, unconscionable, and unenforceable. (R. pp. 4-23). Petitioners have always maintained this position.

In addition, Arbitrability determinations are subject to *de novo* review, and while a Circuit Court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings, this Court has the authority to review the totality of the record and reach its own findings based on the record before it. Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). Petitioners respectfully submit that the record in this case demonstrates the Lennar's arbitration provisions are inherently ambiguous, unconscionable, and ultimately unenforceable.

CONCLUSION

Petitioners filed this case in 2014, and since 2017 they have been barred from conducting discovery pursuant to the Stay Order issued by the Court of Appeals. Meanwhile, Petitioners' homes continue to deteriorate.

For the reasons stated hereinabove, Petitioners respectfully ask the Court to grant their Petition, reverse the Court of Appeal's Order, deny Lennar's Motion to Compel Arbitration, and remand their case for trial. It was error for the Court of Appeals to hold that the Circuit Court's findings lacked adequate factual support while at the same time expressly declining to consider the evidence relied upon by the Circuit Court. There is adequate evidence in the record that reasonably supports the Circuit Court's finding that the arbitration provisions contained in the various documents drafted by Lennar "must be read as a whole to comprise the arbitration agreement" due to the "cross-references to one another" and "intertwining paragraphs." In addition, the Arbitration Agreement should be found unenforceable because it is unconscionable: The Homeowners lacked a meaningful choice in entering into an Arbitration Agreement with Lennar, and the arbitration provisions contain terms so oppressive that no reasonable person would make them and no fair and honest person would accept them. Even when read in isolation, the arbitration provision contained in the Purchase and Sale Agreement is unconscionable, and thus unenforceable, giving Lennar unilateral control to pick and choose what parties and/or entities participate in arbitration.

In the alternative, this Court should grant Homeowners Petition on the ground that the Circuit Court properly determined that the arbitration agreement is ambiguous as to choice of law, and that neither the FAA nor SCUAA applies: The FAA does not apply because the Arbitration Agreement is unconscionable and because the purchase and sale of residential real estate is an inherently intrastate activity. The SCUAA also does not apply because the Arbitration Agreement does not

comply with the statute's disclaimer requirements. Finally, even Lennar appears to acknowledge the critical defects contained in its own documents, having abandoned its arguments as to the enforceability of the arbitration agreements pursuant to the Lennar Warranty, Deeds, and/or the Covenants. Accordingly, Petitioners respectfully request that this Honorable Court grant their Petition, reverse the Court of Appeals' Opinion, and remand this case for trial.

[Signature on Following Page]

Respectfully submitted,

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