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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2020-CP-10-02398
Appellate Case No. 2021-000779

Whitesides Park Townhomes Property Owners Association, Inc., Respondent,

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,

Of whom CalAtlantic Group, Inc., f/k/a The Ryland Group, Inc. f/k/a Standard Pacific Corp. And also d/b/a Calatlantic Homes; and Lennar Carolinas, LLC; are the Appellants.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

THE CIRCUIT COURT PROPERLY CONCLUDED THE ARBITRATION PROVISIONS IN THE DECLARATION OF COVENANTS, INDIVIDUAL PURCHASE AGREEMENT, AND HOMEOWNER WARRANTY MANUAL ARE UNENFORCEABLE AGAINST THE ASSOCIATION AND CORRECTLY DENIED CALATLANTIC'S MOTION TO COMPEL ARBITRATION.

STATEMENT OF THE CASE

This case arises from an effort by CalAtlantic Group, Inc, f/k/a The Ryland Group, Inc., f/k/a Standard Pacific Corp. and also d/b/a CalAtlantic Homes, and Lennar Carolinas, LLC (collectively "CalAtlantic"), a real estate developer and general contractor, to enforce arbitration provisions in the Declaration of Covenants, Conditions, Restrictions and Easements ("Covenants"); the Purchase Agreement of one resident, Alex Brown; the Homeowner's Limited Warranty & Maintenance Manual; and the New Home Warranty Program Insured Limited Warranty against Whitesides Park Townhomes Property Owners Associations, Inc. ("Association").

On June 1, 2020, the Association filed a Complaint asserting construction defect claims against CalAtlantic and their various subcontractors arising out of the construction of townhomes in a development in Charleston County known as Whitesides Park Townhomes ("Project"). (R. pp. 26-49). Instead of moving to dismiss and compel arbitration in response to the Association's Complaint, CalAtlantic availed themselves of the circuit court and filed an Answer to the Complaint on August 14, 2020, responding to the allegations and raising various affirmative defenses. (R. pp. 50-64).

On December 22, 2020, CalAtlantic filed a Motion to Dismiss and Compel Arbitration ("Motion to Dismiss"). (R. pp. 65-377). Almost five months passed between when CalAtlantic filed their Answer to the Complaint and when they filed the Motion to Dismiss. CalAtlantic did

not file a Memorandum in Support of their Motion to Dismiss. The Association filed its Memorandum in Opposition on March 22, 2021 (R. pp. 378-682) along with an Objection to the Declaration of Tracey Ethridge. (R. pp. 686-688). The Association filed a Motion to Strike the Declaration of Tracy Ethridge on March 22, 2021. (R. pp. 683-685). On May 13, 2021, the Association filed a Memorandum in Support of the Motion to Strike the Declaration of Tracy Ethridge (R. pp. 692-753) and CalAtlantic filed their Response in Opposition on May 20, 2021. (R. pp. 855-867). The circuit court granted the Association's Motion on June 10, 2021. (R. pp. 15-21). On June 21, 2021, CalAtlantic filed a Motion to Alter or Amend the circuit court's order granting the Motion to Strike which the court denied. (R. pp. 876-879).

The circuit court disposed of CalAtlantic's Motion to Dismiss and Compel Arbitration without the necessity of a hearing pursuant to the Chief Justice's April 3, 2020 Order, As Amended March 4, 2021, Section (c)(4). On May 7, 2021, the circuit court issued an Order denying CalAtlantic's Motion to Dismiss. (R. pp. 1-8). On May 17, 2021, CalAtlantic filed a Motion to Alter or Amend (R. pp. 754-854), and on May 26, 2021, the Association filed a Memorandum in Opposition to the Motion to Alter or Amend. (R. pp. 868-875). On June 21, 2021, the circuit court issued an Order denying CalAtlantic's Motion to Alter or Amend. (R. pp. 9-14). CalAtlantic did not file a Motion to Alter or Amend the Order striking the Declaration of Tracy Ethridge nor did they raise the issue in their Notice of Appeal. CalAtlantic filed their Notice of Appeal on July 22, 2021, and now asks the Court to reverse the circuit court's findings. (R. pp. 880-887).

STANDARD OF REVIEW

Appeal from the denial of a motion to compel arbitration is subject to *de novo* review. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 625, 667 S.E.2d 1,3 (Ct. App. 2008). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any

evidence reasonably supports the findings." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007).

FACTS

This construction defect case involves allegations of multiple deficiencies arising out of the design, development, and construction of the Project. The Project is comprised of thirteen (13) townhomes located in four (4) buildings and related common elements which were sold by CalAtlantic between December 2016 and March 2018. The Project was developed and constructed by the CalAtlantic Group, Inc., a Delaware corporation, successor by merger to the Ryland Group, Inc., with the contractor listed on the permits and the building files as CalAtlantic Homes. (R. pp. 413-438). The developer and general contractor against whom the Association has brought claims is CalAtlantic Group, Inc, f/k/a The Ryland Group, Inc., f/k/a Standard Pacific Corp. and also d/b/a CalAtlantic Homes and Lennar Carolina, LLC. Upon information and belief, Lennar Carolina, LLC announced on February 12, 2018, that it had "completed the previously-announced strategic combination with CalAtlantic, Group, Inc." (R. p. 380).

The Association was created pursuant to the Covenants for the Project, wherein CalAtlantic was the "Declarant." The Covenants articulate which areas of the Project the Association is responsible for along with which areas of the Project the individual homeowners are responsible for. The Covenants state that "[t]he Association shall maintain and keep in good condition, order and repair the Area of Common Responsibility." (R. p. 454). From a maintenance standpoint, the following areas are the responsibility of the Association pursuant to the Covenants: (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 (4) all walkways, driveways, and other paved areas. (R. pp. 454-455). The Covenants also set forth the responsibility of the homeowners as follows:

> Owners shall also be responsible for maintenance, repair and replacement of the windows, window casings, window shutters, exterior doors and door frames (including any and all front doors, back doors, sliding glass doors, and garage doors); and all hardware which is part of any window or door; and screens and exteriors lights, if any, serving the Owner's Townhouse. Further, the maintenance and repair of those portions of the heating and air conditioning systems serving a Townhouse, including the air conditioning compressor and condenser located outside a dwelling, shall be the responsibility of the Owner of such Townhouse.

(R. p. 457). The same section of the Covenants goes on to state that:

> All maintenance required by this Section shall be performed in a manner consistent with the Community Wide Standards. In the event that an Owner neglects or fails to maintain his Lot and/or his Townhouse in a manner consistent with the Community Wide Standards, the Association shall have the absolute right to contract for and to perform maintenance as shall be prescribed by the Board of Directors . . .

(R. p. 457).

The Covenants are the only documents to which the Association was a party. The circuit court held that the Covenants are unconscionable due to CalAtlantic's unilateral insertion of arbitration provisions in the Covenants at a time when Whitesides Park Townhomes Property Owners Association, Inc. was under the sole control of CalAtlantic; thus, the Covenants are unenforceable due to lack of an underlying agreement between the parties to arbitrate. (R. p. 5).

The individual Purchase and Sales Agreement ("Purchase Agreement") is an agreement between the individual homeowners and CalAtlantic. During the disposition of CalAtlantic's Motion to Dismiss, CalAtlantic was unable to produce copies of the Purchase Agreements of each

individual homeowner other than the representative copy of homeowner Alex Brown. Through the Declaration of Tracy Ethridge ("Declaration"), CalAtlantic alleged that while they could only locate one homeowner's Purchase Agreement, the Purchase Agreement was "generally utilized" by CalAtlantic at the time. (R. p. 164). However, the Declaration was struck from this case and CalAtlantic did not appeal the Order striking the Declaration. (R. pp. 15-21). Therefore, CalAtlantic's statements that the "generally utilized" Purchase Agreements and the Homeowner's Limited Warranty and Maintenance Manual applied at all should not be considered as evidence by this Court. Furthermore, CalAtlantic attempted to introduce twelve additional purchase agreements in their Motion to Alter or Amend. (R. p. 758). The Association submitted the affidavits of five (5) homeowners indicating the purchase agreement they signed did not include portions of the representative purchase agreement produced by CalAtlantic. (R. pp. 667-681). In fact, the one Purchase Agreement of Alex Brown states that the rights under the contract may not be assigned or transferred without "prior written consent" of CalAtlantic. (R. p. 154).

ARGUMENT

I. DID THE CIRCUIT COURT PROPERLY CONCLUDE CALATLANTIC IS NOT ENTITLED TO ARBITRATION UNDER THE COVENANTS OR THE PURCHASE AGREEMENT AS THEY ARE UNCONSCIONABLE, THE ASSOCIATION LACKED BARGAINING POWER FOR THE ONE-SIDED AGREEMENT, AND CALATLANTIC DID NOT APPEAL THIS CONCLUSION OF LAW.

A. The circuit court properly found the Covenants as unconscionable, which was not appealed by CalAtlantic.

The circuit court properly found that the Association was not bound to the arbitration provisions in Covenants as the provisions are unconscionable. (R. p. 4). Specifically, the circuit court analyzed the Covenants and based their findings on evidence that the Association was controlled by CalAtlantic at the time the Covenants were executed. (R. pp. 115-116). The

Covenants were executed on behalf of the Association by CalAtlantic's Operational Vice President and the transaction was not an arms-length translation. See 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). See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001). 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). However, a crucial step to affirming the circuit court shall be based on the fact CalAtlantic **did not appeal** the circuit court's conclusion of law that the Association was not compelled to arbitrate pursuant to the Covenants. CalAtlantic does not enumerate this in their Statement of Issues on Appeal nor do they raise any arguments as to why the circuit court erred in response in their arguments before the Court. As the circuit court based their factual findings on evidence such as the Covenants, the fact that CalAtlantic entered into this agreement on behalf of the Association, and the lack of bargaining power of the Association, this Court should affirm the findings of the circuit court. "Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

II. CALATLANTIC'S ARGUMENTS IN THEIR BRIEF REST ON THE PURPORTED ASSIGNMENT OF CLAIMS RELATED TO THE WINDOW(S), DOOR(S), AND HVAC AND THE PROPER STANDING OF BREACH OF IMPLIED WARRANTY OF HABITABILITY CLAIMS; HOWEVER, THESE ARGUMENTS ARE NOT PROPERLY BEFORE THIS COURT AND SHOULD NOT BE CONSIDERED AS THEY WERE NOT PROPERLY PRESERVED.

Prior to addressing the merits of CalAtlantic's arguments related to the assignment of certain claims and the Association's cause of action for breach of implied warranty of habitability,

the failure of CalAtlantic to raise these issues at the circuit court level or preserve the issue on appeal should obviate the need for the Court to further evaluate these arguments.

A. CalAtlantic failed to raise the issue of the maintenance responsibilities of specific limited common elements being assigned to the Association at the circuit court level and therefore, this issue was not properly preserved.

CalAtlantic claims the circuit court erred by not considering the assignment of claims from the homeowners to the Association, including any claims relating to the windows, doors, and HVAC. However, CalAtlantic did not raise these issues at the circuit court level.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the Court of Appeals] with a platform for meaningful appellate review." Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). "[A]ll that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower court and passed upon by that Court." Sloan v. South Carolina Dep't of Rev., 409 S.C. 551, 555 n.4, 762 S.E.2d 687, 689 n.4 (2014). "The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

This Court in McCall v. State Farm Mut. Auto. Ins. Co. held that an issue which was not advanced by the appellant but was raised to the circuit court by the respondent was not properly preserved for appellate review. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 381-82, 597 S.E.2d 181, 186 (Ct. App. 2004). "An appellate court may not reverse a lower court order

based on a legal or factual premise not advanced by the party who lost at the trial court level." Repko v. Cty. of Georgetown, 424 S.C. 494, 503, 818 S.E.2d 743, 748-49 (2018).

CalAtlantic makes various claims in their brief that they did not raise to the circuit court. Specifically, CalAtlantic states that "the circuit court failed to address the Association's own allegations that it had been assigned the claims of the owners . . ." CalAtlantic makes no reference to the assignment in their Motion to Dismiss or their Motion to Alter or Amend, nor did they advance any argument relating to the assignment of claims. CalAtlantic may not raise any issue on appeal that they did not independently raise to the circuit court. CalAtlantic's argument for the assignment of claims in their Brief stems from the Association's mention of the assignment of claims in their Complaint and not CalAtlantic's own argument. Therefore, the issue regarding the assignment of claims is not properly before this Court on appeal.

Specifically, CalAtlantic states that "[t]he Covenants do not include windows, doors, or the HVAC system as common elements. Similar to CalAtlantic's claim regarding the assignment, CalAtlantic did not advance any arguments relating to the specific claims of the window(s), door(s), or HVAC anywhere in their Motion to Dismiss or their Motion to Alter or Amend.

In CalAtlantic's Motion to Alter or Amend they argued that the claims of the Association are not limited to the common elements. Their Motion to Alter or Amend states ". . . Whitesides seeks declarations from the Court pertaining to provisions in 'the Governing Documents and other transaction documents,' and seeks damages unrelated to common area elements." (R. p. 758). This generic statement does not preserve the issue.

A generic statement in the lower court may not preserve a specific argument on appeal. Herron v. Centry BMW, 395 S.C. 461, 468, 719 S.E.2d 640, 644 (2011). This issue was not properly before the circuit court on a Rule 59(e) Motion since the issue relating to the common

elements was being raised for the first time.[1] However, even if this Court finds that the issue was properly before the circuit court, the general statement regarding what constitutes common elements is not the specific argument that CalAtlantic made to the circuit court. Therefore, CalAtlantic did not properly present the issues relating to common and non-common elements before the circuit court; thus, CalAtlantic's arguments regarding the common elements, windows, doors, and HVAC are not properly before this Court.

B. Did the circuit court err by denying CalAtlantic's motion to dismiss when CalAtlantic did not raise the issue of breach of warranty of habitability at the circuit court level?

CalAtlantic did not raise the legal issue regarding Breach of Warranty of Habitability to the circuit court, neither in their Motion to Dismiss nor their Motion to Alter or Amend.[2] A party need not state the exact name of a legal doctrine to preserve the issue. See State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001). However, the issue must be abundantly clear as to the precise nature of issue so that the issue can be reasonably understood by the court. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

CalAtlantic made no mention of the claims brought against them, nonetheless the specific claim of breach of warranty of habitability. In the nearly seven months between the Association's filing of their Complaint including specific causes of action and CalAtlantic's filing of the Motion to Dismiss, CalAtlantic never raised any defenses to the cause of action for breach of warranty of habitability and did not move to strike this cause of action from the Association's Complaint or

[1] A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial. Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc., 418 S.C. 186, 206, 791 S.E.2d 321, 332 (Ct. App. 2016).

[2] "An appellate court may not reverse a lower court order based on a legal or factual premise not advanced by the party who lost at the Circuit court level." Repko, 424 S.C at 505, 818 S.e.2d at 748-49 (2018).

file a motion to dismiss this cause of action. Most importantly, CalAtlantic did not raise any arguments regarding any causes of action at the circuit court level at all. Therefore, CalAtlantic's argument regarding breach of warranty of habitability is not properly before this Court. CalAtlantic did not explicitly or implicitly argue breach of warranty claims.

C. The Court may only consider evidence in the Record.

In addition to not raising certain arguments with specificity, CalAtlantic argues that the thirteen homeowners signed Purchase Agreements that were not all identical but "each contract contain[ed] a plain and unambiguous agreement to arbitrate claims . . ." CalAtlantic only produced one Purchase Agreement from Alex Brown to the circuit court during the disposition of their Motion to Dismiss, which they claimed as a "representative copy." (R. pp. 66-67). Further, CalAtlantic stated in their Motion to Dismiss that "[s]ome or all owners entered into a Purchase Agreement that specifically provides all disputes are subject to mandatory arbitration." (R. p. 66). The alleged twelve (12) other purchase agreements and the argument that they contain plain and unambiguous agreements to arbitrate are not properly before the Court since the circuit court did not get an opportunity to consider the thirteen (13) different Purchase Agreements, but only one.

CalAtlantic filed a Motion to Alter or Amend the circuit court's denial of their Motion to Compel, which included an additional twelve (12) purchase agreements that CalAtlantic claimed were not in their possession prior to the April 22, 2021 disposition of the motion. (R. p. 758). This new evidence was not properly before the circuit court on a Rule 59(e) Motion[3]; thus, these purchase agreements are not properly before this Court and should not be considered.

[3] A party cannot use a Rule 59(e) to present new evidence to the court. See Brailsford v. Brailsford, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008).

III. SHOULD THE AGRUMENTS EVEN BE CONSIDERED, THE CIRCUIT COURT PROPERLY FOUND THAT THE ASSOCIATION CANNOT BE COMPELLED TO ARBITRATE UNDER THE PURCHASE AGREEMENT AS THEY WERE NOT PARTIES OR ASSIGNEES TO THE PURCHASE AGREEMENT.

The Association is not a party to the Purchase Agreement and therefore, the Association cannot be compelled to arbitrate under an arbitration provision of a contract they did not enter into. In South Carolina, an unconscionable provision in a contract is unenforceable. 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). 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). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

The Purchase Agreement is between the homebuyer, Alex Brown, and CalAtlantic and does not include an agreement by the Association to the terms. Arbitration is based in contract and the Association did not enter into the Purchase Agreement, thus the arbitration provisions are unenforceable against the Association. Furthermore, CalAtlantic is not entitled to compel arbitration under the provisions within the Homeowner's Limited Warranty & Maintenance Manual as the circuit court struck the Declaration of Tracy Ethridge which contained the Homeowner's Limited Warranty & Maintenance Manual. (R. pp. 15-21). CalAtlantic did not appeal the circuit court's order denying their Motion to Alter or Amend the Order granting the Association's Motion to Strike; thus, the circuit court's decision stands. There is no reasonable

evidence presented to the circuit court entitling CalAtlantic to arbitration or having the circuit court overruled.

IV. THE MAINTENANCE RESPONSIBILITIES AND THE STANDING OF THE PROPER PARTY TO BRING THE CLAIMS ARE SET FORTH IN THE COVENANTS AND BY COMMON LAW, NOT THE INDIVIDUAL PURCHASE AGREEMENT.

However, should the Court consider CalAtlantic's arguments that because the Association alleges defects with the installation of the windows, doors, and the HVAC system that this obligates them to arbitrate pursuant to the Purchase Agreement, the Association refers the Court back to the general proposition that the responsibilities stem from the Covenants, not the Purchase Agreements.

The Association and the individual homeowners received their maintenance responsibilities and their standing to bring claims for the building components they are responsible to maintain through the Covenants, not the Purchase Agreement. CalAtlantic asserts that because the Association is pursuing claims for limited common elements, which are the responsibility of individual homeowners, that the arbitration clause in the Purchase Agreement applies, forcing all of the claims in this underlying construction defect case to be arbitrated.

A. The rights assigned by the individual homeowners to the Association are rights given to the homeowners pursuant to the Covenants.

CalAtlantic contends that since the Association stated in their Complaint that the Association was pursuing claims for the individual homeowners, the Association must arbitrate all of the claims pursuant to the terms of the individual Purchase Agreements that CalAtlantic allegedly entered into with the individual homeowners. While CalAtlantic did not preserve this issue on Appeal, should this Court consider it, CalAtlantic's argument that the Association is pursuing claims on behalf of homeowners, that flow from the Covenants, and binds them to the

arbitration provisions in the Purchase Agreement fails as there is no assignment of the Purchase Agreement.

An assignment is the act of transferring to another all or part of one's property, interest or right. Moore v. Weinberg, 373 S.C.209, 219, 644 S.E.2d 740, 745 (Ct. App. 2007) (citing Black's Law Dictionary 119 (6thed. 1992)). Three elements constitute an assignment: (1) an assignor, (2) and assignee; and (3) the transfer of control of the thing assigned from the assignor to the assignee. Donahue v. Multimedia, Inc., 362 S.C. 331, 608 S.E.2d 162, 165 (Ct. App. 2005). South Carolina jurisprudence has long recognized that a chose in action can be validly assigned in either law or equity. Slater Corp. v. SC Tax Comm'n, 280 S.C. 584, 587, 314 S.E.2d 31, 33 (Ct. App. 1984).

First and foremost, the Association maintains the right to bring claims for the common elements pursuant to the Covenants, which is the crux of the allegations in the Complaint. In CalAtlantic's argument to the Court, their sole focus in attempting to force this matter into arbitration falls on the assigned claims of the homeowners to the Association. CalAtlantic contends that any assignment the Association received from the individual homeowners must be pursuant to the individual homeowners' Purchase Agreement; however, the Association's assignment of any claims the individual homeowners have are pursuant to their rights set forth in the Covenants.

Additionally, the very Purchase Agreement in which CalAtlantic contends the Association must have received their assignment from explicitly prohibits assignments or transfers. Section 14 of the Alex Brown's Purchase Agreement states,

> This Contract cannot be assigned or transferred by Buyer in whole or in part, whether voluntarily or by operation of law, without prior written consent of Seller in its sole and absolute discretion, and any such assignment or transfer without such prior written consent will be null and void and will constitute default by Buyer.

(R. p. 154).

Moreover, each deed signed by the individual homeowners was made subject to the Covenants. (R. pp. 507-511). The Covenants explicitly set forth the rights and obligations each homeowner has and each deed signed by the individual homeowner is signed pursuant to the Covenants. (R. pp. 445-447, 456-457, 507-511). As the Covenants specifically give the homeowners the responsibility to maintain the ***limited common elements***, it is the Covenants that also give the homeowners standing to bring claims for those building components. There is absolutely no language in the Purchase Agreement that enumerates the elements of the Project that the homeowners are responsible for versus the Association's responsibilities for maintenance and therefore, standing for bringing a lawsuit.

Homeowners may assign their maintenance responsibilities for certain limited common elements to the Association, but this does not translate to an assignment of the Purchase Agreement. In CalAtlantic's Brief, they cite to various contract cases for the proposition when contract rights are assigned, the assignee steps into the shoes of the assignor. As there is no evidence there has been an assignment of any contractual rights under the Purchase Agreement, the cases cited by CalAtlantic do not apply.

CalAtlantic cites to Moore v. Weinberg, where this Court was presented with an assignment of money from anticipated proceeds arising out of litigation over the sale of a business. Moore v. Weinberg, 373 S.C.209, 644 S.E.2d 740 (Ct. App. 2007). CalAtlantic also site to Twelfth RMA Partners, L.P. v. National Safe Corp., which discusses the assignment of a bank note and the right to sue pursuant to the note. Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999). Additionally, CalAtlantic cites to a United States District Court case for the District of South Carolina, Murphy v. Jefferson Pilot Commc'ns. Co., which relates to the assignment of rights under an insurance policy with Liberty Mutual. Murphy v.

Jefferson Pilot Commc'ns. Co., 657 F. Supp 2d 683 (D. SC. 2008). Finally, CalAtlantic cites to a Florida Court of Appeals case, which is not binding on this Court, that discusses the assignment of proceeds pursuant to security agreements and promissory notes. Cone Constructors, Inc. v. Drummond Cmty. Bank, 754 So.2d 779 (Fla. Ct. App. 2000). All of these cases have one thing in common; the assignment was related to a contractual right the assignor was transferring to the assignee. The case at hand is more in line with Slater Corp v. South Carolina Tax Comm'n, where this Court was presented with the question of whether a claim for tax refund could be assigned. Slater Corp v. South Carolina Tax Comm'n, 280 S.C. 584, 585, 314 S.E.2d 31, 32 (Ct. App 1984). This Court held that the assignment of rights to a tax refund are a valid transfer of rights. Id. Similarly, the individual homeowners transferred their rights to sue pursuant to their common law rights and their duties and obligations pursuant to the Covenants – not any contractual rights.

As for the rights individual homeowners have in pursuing claims against contractors for their defective construction, those claims stem from common law, such as negligence and breach of implied warranties. Furthermore, the Association did not bring any breach of contract claims against CalAtlantic since the assignment of claims arises out of the rights pursuant to the Covenants and not the rights pursuant to individual Purchase Agreement.

Further, CalAtlantic acknowledges that the Covenants give the homeowner their responsibility by stating that ". . . claims and damages in the action related to the doors, windows, and HVAC systems, which are expressly defined by the governing documents for the property to be the responsibility of the individual townhome owners . . ." The circuit court held that the Covenants' arbitration provisions are unconscionable; therefore, the assignment of claims by

virtue of the Covenants cannot be compelled to arbitration. (R. p. 6). Arbitration cannot be enforced as contractual obligations do not exist in this case.[4]

B. The Purchase Agreements were properly found to be unconscionable at the circuit court level.

Even if the Court finds that the issue regarding the assignment is properly before the Court and that the assignment was made pursuant to the Purchase Agreement, the arbitration provision within the Purchase Agreement is unconscionable. CalAtlantic can only argue as to the arbitration provisions within the one Purchase Agreement of Alex Brown since the twelve (12) other contracts were not produced during the disposition of the Motion to Dismiss. The individual owners had no bargaining power when signing the Purchase Agreement. The Purchase Agreement is a form contract used by CalAtlantic that is presented in a take-it-or-leave-it manner and contains arbitration provisions that are oppressive and one-sided.

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 v. TCSC, LLC, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020).

"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. "Unconscionability is gauged at the time the contract was made." Id. "If a court as a matter

[4] Although arbitration is viewed favorably by the courts, it is predicated on an agreement to arbitration because the parties are waiving their fundamental right to access the courts. Wilson v. Willis, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019). 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.").

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.

The Courts have taken "judicial cognizance of the fact that the modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." Smith v. D.R. Horton, 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016). Here, as in Smith v. D.R. Horton, "there is no indication (. . .) that the [homeowners] enjoyed a substantially stronger bargaining position against [CalAtlantic] than the average homebuyer, or that they were represented by independent counsel." Id. The Purchase Agreement is a form agreement that CalAtlantic presented to the individual homeowners on a take-it-or-leave-it basis.

The Dispute Resolution Addendum contained in the Purchase Agreement states that in order to commence arbitration the homeowner must file a "Request for Arbitration" with Columbia National Risk Retention Group ("Claims Administrator"). (R. p. 157). The document goes on to state that the claim will be submitted by the Claims Administrator to an Independent Arbitration Service chosen by the Claims Administrator. (R. pp. 157-158). While these provisions on their face seem harmless, a further look into the Claims Administrator shows that they are an entity of Lennar Carolinas, LLC. A business search on Vermont Secretary of State's website indicates that the Claims Administrator's Assumed Business name is Lennar Carolinas, LLC. (R. p. 682). These provisions effectively stipulate that if the homeowners have a dispute with CalAtlantic, they must submit the dispute to CalAtlantic for CalAtlantic to choose who will arbitrate the matter. These terms are clearly one-sided and oppressive to the homeowners.

The homeowners had no substantial bargaining powers when they signed the take-it-or-leave it Purchase Agreement which contained oppressive and one-sided terms. Therefore, the

circuit court did not err by denying CalAtlantic's Motion to Dismiss and the Court should affirm the circuit court's decision.

C. The Association may bring breach of implied warranty claims as CalAtlantic transferred ownership of the common elements to the Association.

The claims for breach of warranty of habitability do not stem from the Purchase Agreement. These rights stem from the sale of the home, irrespective of a purchase agreement. Implied warranty liability does not apply solely to the builder of a house, but instead springs from "the sale itself." See Lane v. Trenholm Building Co., 267 S.C. 497, 500, 229 S.E.2d 728, 729 (1976). The determinative factor in assigning implied warranty of habitability liability is whether the defendant "places [the defective house], by the initial sale, into the stream of commerce." Arvai v. Shar, 289 S.C. 161, 164, 345 S.E.2d 715, 717 (1986).

As the developer and general contractor, CalAtlantic impliedly warrants the habitability of the townhomes, including all common elements, as being free from defects when they placed the townhomes into the stream of commerce. The common elements were transferred over to the Association through the quit claim deed. "The seller's 'liability is not founded upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects." Kirkman v. Parex, Inc., 369 S.C. 477, 482-83, 632 S.E.2d 854, 857 (2006) (citing Lane v. Trenholm Bldg. Co., 267 S.C. 497, 503, 229 S.E.2d 728, 731 (1976). While the Court has held that the implied warranty springs from the sale, these are tort duties, rather than contractual duties held by the party who builds the townhomes and places them into the stream of commerce. The individual purchase agreements do not create the Association's right to bring a claim in tort for breach of implied warranty of habitability.

Through the Covenants, CalAtlantic transferred the property to the Association, giving rise to the implied warranty of habitability. CalAtlantic[5] acknowledges that the Covenants convey rights to the Association and the homeowners. The Covenants state: "WHEREAS, the Declarant is the owner of certain real property located on Myrick Road in the Town of Mount Pleasant, Charleston County, South Carolina, which real property is more particularly described on Exhibit A attached hereto and incorporated herein by reference (the "Property")." (R. p. 72). The Covenants go on to state:

> The Common Area to be owned by the Association is described as follows: All areas shown and designated as "Common Area" "C/A" "HOA" or "Open Space" "'on the Plat referenced on Exhibit A, if any, and as may be designated as "Common Area," "HOA," or "Open Space" on any other plats of any property that may in the future become subject to this Declaration.

(R. p. 74).

Specifically, the Covenants state that "the Declarant has established the Association for the purpose of "owning, maintaining, and/or administering the Common Area, the Recreational Facilities and common facilities." (R. p. 80).

CalAtlantic's argument that an implied warranty of habitability claim can only be brought by individual homeowners, through the execution of a Purchase Agreement, is inherently flawed. There are defects in the common areas of the Project and the Association has the exclusive right to seek a remedy against CalAtlantic as they transferred their interest in the common elements to the Association. See Berish v. Bornstien, 437 Mass. 252, 770 N.E.2d 961 (2002). The Association has standing to bring a claim for breach of implied warranty of habitability for the common elements. In Tower S. Property Owners Ass'n v. Summey Bldg. Sys., 1995 U.S. App. Lexis 2881, *13 (4th Cir. 1995), the Fourth Circuit stated that: "The South Carolina Supreme Court has held

[5] CalAtlantic is referred to as the Declarant in the Covenants.

that an association can maintain an action for a breach of an implied warranty, even where no contractual privity exists between the association and the defendant." See Beachwalk Villas Condominium Ass'n v. Martin, 305 S.C. 144, 406 S.E.2d 372, 374 (1991).

D. Did the circuit court properly determine there was no valid arbitration agreement and therefore, the circuit court did not need to determine whether the dispute fell within the scope of the arbitration agreement?

CalAtlantic claims that the circuit court erred by not performing the analysis of whether the specific dispute falls within the scope of the arbitration agreement. CalAtlantic misunderstands New Hope Missionary Baptist Church v. Paragon Builders to be conjunctive and not disjunctive.

> We acknowledge the United States Supreme Court has identified certain limited circumstances in which "courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter in the absence of 'clear and unmistakable' evidence to the contrary." Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L. Ed 2d 414 (2003). These "gateway matters" include whether the parties have a valid arbitration agreement ***or*** whether a binding arbitration clause applied to a certain type of controversy. Id.

New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 12 (Ct. App 2008)(emphasis added). The circuit court concluded their analysis into the gateway matter by holding that there was not a valid arbitration agreement between CalAtlantic and the Association. If a valid agreement does not exist, the circuit court did not need to further inquire into the applicability of the arbitration provision within an unenforceable agreement.

The circuit court properly found that the CalAtlantic and the Association did not contractually agree to arbitrate, thus the circuit court did not need to further discuss if the arbitration clause applied to this controversy.

CONCLUSION

CalAtlantic has presented a host of issues that are not properly before the Court. CalAtlantic did not advance any arguments relating the assignment, individual claims enumerated

in the Covenants, or the breach of warranty of habitability to the circuit court. CalAtlantic's assertion that the assignment of claims from the homeowners is pursuant to the Purchase Agreement was an unfounded assumption. The homeowners assigned their claims to the Association pursuant to their common law right and rights pursuant to the Covenants.

CalAtlantic presented the one Purchase Agreement of Alex Brown to the circuit court. The Purchase Agreement of Alex Brown is riddled with unconscionable arbitration provisions making the Purchase Agreement's arbitration provisions unenforceable.

The circuit court did not err by concluding their analysis with the finding that the Covenants and the Purchase Agreement did not contain an enforceable arbitration provision between CalAtlantic and the Association. The circuit court was not required to analyze the arbitration provisions of an unenforceable agreement; therefore, the circuit court's ruling should be affirmed.

Respectfully submitted,

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