IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

CEDAR CREEK FARM CONDOMINIUM OWNERS ASSOCIATION, INC.,	:	
Plaintiff,	:	No. 2012-C-5136
	:	(Hon. Edward D. Reibman)
v.	:	
SEGAL AND MOREL AT SOUTH WHITEHALL, LLC, and SEGAL AND MOREL, INC.,	:	
Defendants.	:	

ORDER

AND NOW, this 5th day of November, 2013, upon consideration of Defendants' petition seeking a stay of arbitration pursuant to 42 Pa.C.S. § 7317, filed on April 19, 2013; sur reply filed on May 17, 2013; and brief filed on May 28, 2013; and Plaintiff's answer, filed on May 7, 2013; and after hearing held on May 31, 2013, and subsequent briefing by Plaintiff, filed on June 10, 2013, and that of Defendants, filed on August 1, 2013, and attempts at amicable resolution having been unsuccessful in the intervening period between hearing and the entry of this order,

IT IS ORDERED that, consistent with the footnote below, said Petition is GRANTED and Plaintiff's pending arbitration claim before the American Arbitration Association is hereby STAYED and ENJOINED.[1]

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[1] Alleging it is acting in the representative capacity of various homeowners who purchased condominium units, Plaintiff filed a claim with the American Arbitration Association (AAA) pursuant to paragraph 31 of a "Subscription and Purchase Agreement (SP Agreement)" that the various homeowners entered into with Defendant Segal & Morel at South Whitehall, LLC (SMSW). (See Petition, Ex. B). Plaintiff has asserted various claims in that filing, all premised on allegedly defective construction in relation

the condominium-townhome complex, known as Cedar Creek Farms, located in South Whitehall Township, Lehigh County.

Defendants object to the arbitrability of the claims with the AAA under the agreement referenced by Plaintiff on two grounds. First, they assert that Plaintiff, as merely a homeowners' association, does not have standing to file a claim under the SP Agreement, which, if executed at all, was entered into only by each individual homeowner and SMSW, and not by Plaintiff. Second, Defendants maintain that pursuant to the SP Agreement, the exclusive remedy in respect to "any construction defect," is confined to the "Residential Warranty Corporation Ten-Year Limited Warranty (hereinafter, 'Limited Warranty')," which itself contains an alternative dispute resolution process that would apply here. (See Petition, Ex. A.) Pursuant to the terms of the Limited Warranty, Defendants also seek reimbursement of the costs they have incurred in seeking dismissal of this litigation in favor of the dispute resolution process set forth in the Limited Warranty.

Plaintiff counters that it has standing to assert claims on behalf its membership especially when, as here, they concern common areas of the property which it is charged with maintaining. It further posits that Defendants should be estopped from denying the applicability of the arbitration provision in the SP Agreement based on SMSW's past utilization of arbitration provisions contained therein and that Segal and Morel, Inc. (SMI) should be deemed the alter ego of SMSW. Finally, Plaintiff asserts that the contractual provisions should be construed against Defendants because they authored the contracts at issue.

In determining whether a matter is properly referred to arbitration, a court applies contract principles to ascertain whether there exists a valid agreement between the parties to arbitrate and whether the particular dispute is within the scope of the arbitration provision. See Midomo Co. v. Presbyterian Housing Development Co., 739 A.2d 180, 186-87 (Pa. Super. 1999). And in respect to standing, the Superior Court has instructed that the relevant standard for determining whether a homeowners group may assert claims on behalf its membership concerns an inquiry into whether the "members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit... so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensible to a proper resolution of the case." 1000 Grandview Ass'n Inc v. Mt. Wash. Assocs., 434 A.2d 76, 798 (Pa. Super. 1980).

Defendants contend, persuasively, that the nature of the fraud claims alleged in the arbitration complaint involves individualized inquiry into, inter alia, reliance by individual homeowners, thereby rendering each individual property owner an indispensible party. On the other hand, as Plaintiff argues, the claims in respect to construction defects affecting the common areas of the complex appear especially apt for prosecution by a homeowners association in the position of Plaintiff, which evidently bears responsibility for oversight, maintenance, and repair of these areas.

There also is a significant question regarding the ability to bind Defendant SMI to the arbitrability provision in the SP Agreement when SMI apparently was not a signatory to the agreement. Although Plaintiff asserts that SMI should be deemed bound by the

holding of Dodds v. Pulte Home Corp., 909 A.2d 348 (Pa. Super 2006), that case is plainly inapposite. There, it was held only that a non-signatory parent corporation of an entity that had entered into such an agreement could enforce an arbitration clause *against another signatory*. Nothing in that case suggests that a *non-party* may be bound by an arbitration provision contained in a contract into which it has not entered. See ibid.

Nor, as Dodds did instruct, is there any basis, in the absence of prejudice, to invoke the doctrines of waiver or estoppel against a party merely because it chose to seek arbitration in one instance and declined to do so in another matter arising under the same agreement. Although a party's course of performance may be relevant in ascertaining its contractual intent, "past performance" will not give rise to an estoppel where another party has not been detrimentally induced. See id. at 352. Plaintiff's arguments to the effect that Defendants' previous reliance on the subject arbitration clause should bind them in this instance are, therefore, also unavailing.

Plaintiff further contends that SMI should be bound by the SP Agreement as the alter ego of SMSW. However, a factual showing in support of that conclusion was not demonstrated at hearing.

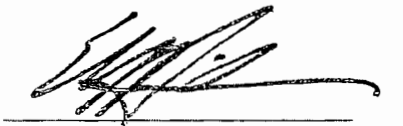
Irrespective of the foregoing challenges to Plaintiff's arbitrability claim, resolution of the present petition need not founder upon those more protracted inquiries because, as will be seen directly, the claims asserted by Plaintiff in the arbitration forum do not come within the scope of the arbitration process set forth in paragraph 31 of the SP Agreement. Instead, they fall within the ambit of the unambiguous provisions of paragraph 10 of the SP Agreement which directs all claims respecting construction defects to the processes set forth in the Limited Warranty.

Paragraph 10 of the SP Agreement provides in pertinent part as follows:

> Seller shall provide purchaser with a limited 10-year warranty provided by the Residential Warranty Corporation under its Ten-Year Limited Warranty program. . . . Purchaser further agrees that Purchaser's exclusive remedy against Seller for *any* construction defect shall be the arbitration provisions of the Residential Warranty Corporation Ten-Year Limited Warranty Program.

(Def. Pet., Ex. A (emphasis added).) The Limited Warranty, in turn, provides specific procedures for resolution of disputes, including mediation of claims before a matter will be referred to an arbitration service, which must be agreed upon by the purchaser and the Administrator, whose duties are also described in the Limited Warranty. (See pp. 320:3, 320:18-20, in Def. Pet., Ex. B.) Finally, Paragraph 31 of the SP Agreement, on which Plaintiff relies in seeking to pursue its claim before the AAA, expressly provides for arbitration of disputes only where "the resolution of [the dispute] . . . is not governed by the warranty provided by Seller." (Def. Pet., Ex. A.). Because no ambiguity is present, there is no basis to invoke the doctrine of *contra proferentem*: under the plain terms of the agreement entered into by the homeowners, claims relating to "any construction defect" are subject to the dispute-resolution mechanisms set forth in the Limited Warranty.

BY THE COURT:



EDWARD D. REIBMAN, J.

Here, perusal of the claims asserted by Plaintiff in the AAA arbitration forum plainly reveals that they all concern construction defects. Although some are styled as claims sounding in fraud, they nonetheless stem from defective construction and thus still fall within the scope of Paragraph 10 of the SP Agreement which extends to remedies for "any construction defect." See Dodds, *supra*, 909 A.2d at 349 (eschewing notion that arbitration clause can be defeated through averment of tort claims arising from same occurrence governed by parties' contract)

Accordingly, the claims asserted by Plaintiff in the matter brought before the AAA are governed by the procedures set forth in the Limited Warranty, including submission to the designated "administrator" and referral to mediation before seeking arbitration before a mutually agreed-upon arbitrator. The petition to stay arbitration will, therefore, be granted.

Finally, in view of the fact that Defendants by letter dated February 4, 2013, clearly asserted their rights under the arbitration provisions of the Limited Warranty and have incurred expenses in vindicating that right, they are entitled to recoup the costs "incurred in seeking dismissal of such litigation" brought in violation of the arbitration provision contained in that agreement. (See Section IV.E.1 of the Limited Warranty in Def. Pet. Ex. B.) Defendants, if they intend to pursue such reimbursements, shall file an itemized petition therefor no later than twenty days after the entry of this order, with any response by Plaintiff to follow within twenty days thereafter.