SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3383-16T1

DIXON MILLS CONDOMINIUM ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

RGD HOLDING COMPANY, LLC, ROBERT MARTIN COMPANY, LLC, RMC MEZZANINE COMPANY, LLC, PROSPECT CAPITAL GROUP, LLC, GREG BERGER, BRUCE PETERSON, TIMOTHY M. JONES, NICHOLAS P. VEGLIANTE, MARK DURNO, ROBIN STEINER, DAVID PARISIER, URS CORPORATION d/b/a AECOM, THE SCHONBRAUN MCCANN GROUP, LLP d/b/a FTI CONSULTING, INC., and d/b/a CORNERSTONE ACCOUNTING GROUP, LLP, and RMR RESIDENTIAL REALTY, LLC,

Defendants-Respondents.

Argued telephonically October 17, 2017 – Decided February 28, 2018

Before Judges Fasciale, Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4277-16.

Dennis A. Estis argued the cause for appellant (Greenbaum, Rowe, Smith & Davis, LLP, attorneys; Dennis A. Estis, of counsel and on the brief; Elyse H. Wolff, on the brief).

Peter J. Smith argued the cause for respondents RGD Holding Company, LLC, Robert Martin Company, LLC, RMC Mezzanine Company, LLC, Greg Berger and Timothy Jones (Connell Foley, LLP, attorneys; Peter J. Smith and James C. McCann, of counsel; Lauren F. Iannaccone and Peter J. Smith, on the brief).

Loryn P. Riggiola argued the cause for respondent URS Corporation (Zetlin & De Chiara, LLP, attorneys; Loryn P. Riggiola, of counsel and on the brief; Michael J. Slotnick, on the brief).

Michael S. Soulé argued the cause for respondents Robin Steiner and RMR Residential Realty, LLC (O'Connor Kimball, LLP, attorneys; Martin J. McAndrew, on the brief).

PER CURIAM

Plaintiff Dixon Mills Condominium Association, Inc. (the Association) appeals from a March 31, 2017 order dismissing its complaint without prejudice against RGD Holding Company, LLC (RGD), Robert Martin Company, LLC (Martin), RMC Mezzanine Company, LLC (Mezzanine), Greg Berger, and Timothy M. Jones (collectively defendants); and compelling arbitration by the American Arbitration Association.

According to the complaint RGD, a Delaware company, was incorporated to act as the sponsor of a project to convert a rental facility located at Dixon Mills into a condominium complex — its

sole purpose. The complaint alleges Martin, Mezzanine, Berger, and Jones "are or were at all relevant times the controlling directors, officers and agents of RGD." Martin is a diversified real estate organization, and has "held itself out . . . as the [project's] sponsor." Mezzanine is the sole member of RGD. "At all relevant times," Berger was "the Managing Director/Partner of [Martin] and a Project Director and agent of RGD," and Jones was "an agent or officer of [Martin] and RGD with authorization to execute documents included in the Public Offering Statement."

The Association argues it asserted claims concerning the common elements and facilities of the condominium development that it was authorized by statute to make as if they "were asserted directly by the unit owners individually." N.J.S.A. 46:8B-16(a). The claims arose out of defendants' conversion of a residential complex into a condominium.

The Association's complaint alleged in twenty individual counts: breach of contract; breach of implied warranty of good quality and workmanship and implied warranty of fitness for ordinary purpose; intentional misrepresentation by RGD concerning the quality of construction and repairs performed during the conversion, and other misrepresentations in the public offering statement, including statements relating to funds for future repairs to the condominium; negligent misrepresentation; violation

of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, due to RGD's failure to disclose the true physical and financial condition of the condominium; nondisclosure of the condition of the condominium; breach of the covenant of good faith and fair dealing; breach of fiduciary duty; failure to disclose the physical and financial condition of the condominium in violation of the Planned Real Estate Development Full Disclosure Act (PREDFDA), N.J.S.A. 45:22A-21 to -56; civil conspiracy; and violation of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c), and its state equivalent, N.J.S.A. 2C:41-1(a)(2); -2(b); -2(c). Additionally, the Association sought to compel RGD to turn over possession of two condominium units, twenty-eight condominium parking spaces, and association documents. The Association also asserted four other breach of contract and tort claims against Mark Durno — the on-site construction supervisor hired by RGD, URS Corporation — an engineering firm retained by RGD to prepare a report, The Schonbraun McCann Group, LLP — an accounting firm retained by RGD, and RMR Residential Realty, LLC — a property management company retained by RGD.

Finding "sufficient intermixing between the unit owner and the condo[minium] association . . . to bind the individual unit owners to the bargain that they struck with [RGD]," the motion

judge orally ruled that the Association was bound by arbitration clauses included in the public offering statement (POS) and the subscription purchase agreement (SPA) for the sale of each unit filed by RGD with the New Jersey Department of Community Affairs as part of its condominium conversion application.

In pertinent part, the POS provides, in a section of the contract labelled "Arbitration":

> The buyer should understand that by agreeing to arbitrate all disputes with the declarant, whether statutory, contractual or otherwise, including, but not limited to, personal injuries and/or illness, he or she is giving up his or [her] right to a trial in court, either with or without a jury (except as may otherwise be provided in the American Arbitration Association's consumer due process protocol that allows consumers to file certain claims in small claims court).

That clause of the contract is located on the first page of the POS under the heading "Special Risks."

The SPA contains two arbitration provisions. A section titled "Special Risk – Arbitration" reads:

> The buyer should understand that by agreeing to arbitrate all disputes with the seller, whether statutory, contractual or otherwise, including but not limited to personal injuries and/or serious illness, he or she is giving up his or her right to a trial in court, either with or without a jury (except as may otherwise be provided in the American Arbitration Association's consumer due process protocol that allows consumers to file certain claims in small claims court[);]

and the second provides:

> Arbitration. Except as provided in Articles 15 and 16, Buyer, on behalf of Buyer and all permanent residents of the Unit, including minor children, hereby agrees that any and all disputes with Seller, Seller's parent company or their subsidiaries or affiliates, whether statutory, contractual or otherwise, including but not limited to personal injuries and/or illness . . . shall be resolved by binding arbitration in accordance with the Supplementary Rules for Residential or the Construction Arbitration Rules and Mediation Procedures, as applicable, of the American Arbitration Association . . . .

An order compelling arbitration is final and appealable as of right. R. 2:2-3(a); GMAC v. Pittella, 205 N.J. 572, 587 (2011). The existence of a valid and enforceable arbitration agreement poses a question of law; our standard of review of an order granting a motion to compel arbitration is de novo. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013). The "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We therefore construe the arbitration contract "with fresh eyes." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011).

"Binding arbitration is strictly a matter of contract." Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560, 568 (App. Div. 2007). An arbitration agreement,

> like any other contract, "must be the product of mutual assent, as determined under customary principles of contract law." NAACP of Camden Cty. E. v. Foulke Mgmt., 421 N.J. Super. 404, 424 (App. Div. 2011), appeal dismissed, 213 N.J. 47 (2013). A legally enforceable agreement requires "a meeting of the minds." Morton v. 4 Orchard Land Tr., 180 N.J. 118, 120 (2004). Parties are not required "to arbitrate when they have not agreed to do so." Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).
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> [Atalese v. U.S. Legal Servs. Grp., 219 N.J. 430, 442 (2014).]

The Association was not a signatory to an SPA. It was not a "buyer" under the arbitration clauses in an SPA or the POS; nor was it a "permanent resident[]" of a unit or a small child, the only other persons mentioned in the arbitration clauses. A waiver of its right to sue cannot be based on the filed documents because the Association did not explicitly and affirmatively agree to arbitrate. Id. at 442-43. The Association can thus be compelled to arbitrate only if it is bound by the provisions agreed to by the unit owners under another theory.

The motion judge, relying on our unpublished decision in Zephyr Lofts Condo. Ass'n v. Henderson Lofts Urban Renewal, LLC,

No. A-1311-08 (App. Div. Oct. 13, 2009),[1] found the Association's "claims alleging damages related to the common elements of the condominium were really claims of the individual unit owners." The judge agreed with defendants that

> [i]t would be manifestly unfair to allow the . . . [A]ssociation to avoid arbitration of the unit owner[s'] claims with a sponsor simply because of the strategic decision not to include unit owners as [p]laintiffs, but rather have the . . . [A]ssociation bring suit on their behalf. It would render the arbitration agreement and the subscription agreement meaningless.

We do not agree with the judge's conclusion that the claims were those of the unit owners.[2] The motion judge analyzed only the second, third, fourth, and fifth counts of the complaint before ruling that arbitration was required because the claims advanced by the Association were those of the unit owners. We do not agree, after a de novo review of the complaint, with the judge's finding

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[1] Though we note citation to an unpublished opinion is generally impermissible, R. 1:36-3, we do so here to illustrate its inapplicability to this case considering "the trial court relied strongly on that unpublished opinion" and "it is not possible to avoid a discussion of it." Ryan v. Gina Marie, LLC, 420 N.J. Super. 215, 224 n.2 (App. Div. 2011).

[2] The Association argues it has standing to assert the claims in its complaint and the judge's ruling "nullifies the law on associational standing." We do not see that a standing issue was raised before the motion judge; certainly, he did not address it and neither will we, Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973), except in discussing certain principles germane to our analysis.

that the claims in count two pertained to "the entire development, including the individual units." No claim in the second count regarding the breach of implied warranty of "good quality and workmanship" in work done at Dixon Mills mentioned individual units. In fact, the only structure mentioned was the Powerhouse Building, a common element.

We also determine that a sagacious analysis of each count of the complaint is necessary to assess whether the Association's claims are its own or those of unit owners. A remand is required to allow the motion judge to accomplish that task by considering the various capacities in which a condominium association may act under New Jersey law and deciding whether each claim is subject to arbitration.

We are aware that some of the language in the complaint could perplex a reviewing judge. For example, in the third and fourth counts, the Association alleged the Sponsor Defendants'[3] misrepresentations and omissions induced "Members of the Association" "to purchase units at Dixon Mills that, together with an undivided pro-rata interest in the Association's common

[3] The complaint identifies the "Controlling Principals" as RMC (Martin), RMC MC (Mezzanine), Prospect, Berger, Bruce Peterson, Jones, Nicholas P. Vegliante, and fictitious defendants, John Does 1-6 and ABC Corps 1-10; and the "Sponsor Defendants" as RGD and the Controlling Principals.

elements, were defective and contrary to the quality represented by the Sponsor Defendants." Although both counts pray only for damages sustained by the Association "to an extent not yet fully determined," the motion judge found these counts involved unit owners' claims. Inasmuch as the reference to the "Members of the Association" in count three and to "purchasers of the units" in count four may have led to that conclusion, on remand the motion judge should direct the Association to file an amended complaint prior to the judge's review in order to better express the claims which it avers are related only to the Association — not the unit owners. See Greenbriar Oceanaire Cmty. Ass'n v. U.S. Home Corp., 452 N.J. Super. 340 (App. Div. 2017). This will allow the motion judge to better perpend those claims, mindful of the various theories under which a non-signatory could be bound to an arbitration agreement.

We note more than a few counts mention Association "Members" but these references may not be determinative of whose claim is being advanced. For instance, the Association, in connection with a CFA claim in the fifth count, adverts to those misrepresentations and omissions intended "to induce Members to purchase units." An association is "unquestionably the real party in interest" in a suit under the CFA for damages to common elements. Belmont Condo. Ass'n, Inc. v. Geibel, 432 N.J. Super. 52, 73-74 (App. Div. 2013).

A claimant under the CFA "must allege three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss," but need not "demonstrate reliance for [a] defendant to be liable under the CFA." Id. at 74. Thus the Association can bring its CFA claim "as long as an ascertainable loss resulting from [the Sponsor Defendants'] conduct is demonstrated." Id. at 75 (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 468 (App. Div. 2001)). The misrepresentations and omissions to the Members — although perhaps evidential to establish the Sponsor Defendants' conduct in the Association's CFA claim — do not render that claim a unit owners', notwithstanding that the Association alleges the misrepresentations were made to the Members and not to it.

On the other hand, other claims, such as that brought under PREDFDA in the tenth count, do require a showing of reliance. N.J.S.A. 45:22A-37(a).[4] As one treatise has observed,

> it is not entirely clear whether [an association] can sue under PREDFDA, which only permits suit by "purchasers." N.J.S.A. 45:22A-37(a). PREDFDA defines a "purchaser"

[4] In an action brought under PREDFDA, a developer may prove lack of reliance as a defense. We recognize other claims — such as those brought for fraud — require a showing of reliance by a plaintiff. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 174-75 (2005).

> as "any person or persons who acquires a legal or equitable interest in a unit, lot or parcel in a planned real estate development." N.J.S.A. 45:22A-23(d); see also Siller v. Hartz Mountain Assocs., 93 N.J. 370 (1983). PREDFDA also requires a showing of reliance. Taken together these would seem to preclude suit brought by the Association on its own behalf inasmuch as it is usually not the "purchaser" of common elements and inasmuch as the Association would not be able to show reliance on the documents within the purview of PREDFDA.
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> [Smith, Estis, and Li, N.J. Condominium & Community Association Law, § 16:2 (2017) (citation omitted).]

An amended complaint clarifying the Association's basis for bringing the PREDFDA claim would aid the reviewing judge in deciding whether the claim is that of the Association or the unit owners.

We briefly address other theories that may be considered by the motion judge.

In analyzing the arbitrability of a claim brought by the Association in its representative capacity, the judge must keep in mind that certain causes of action to remedy common elements of a development are statutorily[5] exclusive to an association even though the association is acting under statute[6] in a representative

[5] N.J.S.A. 46:8B-16(a).

[6] N.J.S.A. 46:8B-12, -15(a), -16(a).

capacity. Belmont, 432 N.J. Super. at 71-72. Indeed, we concluded individual unit owners "generally lack standing to sue for damages to the common elements." Id. at 72.

That the Association is acting in a representative capacity in advancing some claims does not, under the facts of this case, subject them to the arbitration provisions in the POS and SPA. Again, it was not a signatory to any arbitration agreement and there is no evidence in the record that the Association clearly and unambiguously waived its right to sue and agreed to arbitrate. See Atalese, 219 N.J. at 442-43. Further, RGD did not include the Association in the arbitration clause although RGD was on notice — pursuant to statute[7] — it would eventually relinquish control of the Association to board members elected by the unit owners. See generally Port Liberte Homeowners Ass'n v. Sordoni Constr. Co., 393 N.J. Super. 492 (App. Div. 2007) (holding any subcontractor or materialman entering into a contract or supplying a product for use in the construction of the common elements of a condominium association after the developer registers the condominium, is on constructive notice that representations made to, and omissions withheld from, the developer will be deemed as if they were made to, or withheld from, the association, once the association assumes

[7] N.J.S.A. 46:8B-12.1(d).

control of the condominium). In order to subject the Association to the arbitration provisions, it could have named the Association in the clauses. See Satomi Owners Ass'n v. Satomi, LLC, 225 P.3d 213, 231 (Wash. 2009) (holding, where the terms of the arbitration clause included "claims asserted by . . . [the a]ssociation" and the association's claims were asserted "on behalf of the unit owners," the association is bound to arbitrate its claims). Instead, RGD chose only to include unit buyers and, in one of the arbitration clauses, "all permanent residents of [a u]nit, including minor children." As a result of its choice not to include the Association, no mutual agreement to arbitrate the Association's claims exists. If the Association has the exclusive right to bring a cause of action, albeit in a representative capacity, we do not conclude it waived its right to bring that claim in court.

"[A]s a matter of New Jersey law . . . arbitration may be compelled by a non-signatory against a signatory to a contract on the basis of agency principles." Hirsch, 215 N.J. at 192. Although defendants now argue that the Association — a non-signatory — is bound to arbitrate because it was acting as an agent of the unit owners, we do not see that they made that argument to the motion judge. We therefore will not consider it

on appeal.[8] Nieder, 62 N.J. at 234. We note only that the analysis of the Association's representative status should not be conflated with an agency relationship, as suggested in defendant's brief.[9]

We likewise decline to address defendant's argument that the Association is equitably estopped from avoiding arbitration. That argument was not raised to the motion judge. Ibid. We also recognize our Supreme Court's decision rejecting the intertwinement of association and unit owner claims "as a theory for compelling arbitration when its application is untethered to any written arbitration clause between the parties, evidence of detrimental reliance, or at a minimum an oral agreement to submit to arbitration." Hirsch, 215 N.J. at 192-93.

We also reject the application of Zephyr Lofts in the present case because the intertwinement of Association claims with those of unit owners should not subject all claims to arbitration. Since Zephyr Lofts was decided, the Hirsch Court rejected our "reliance

[8] We do not see any evidence that an agency relationship was established, recognizing, however, that discovery was not conducted.

[9] "An agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent." Sears Mortg. Corp. v. Rose, 134 N.J. 326, 337 (1993); see also N.J. Lawyers' Fund for Client Prot. v. Stewart Title Guar. Co., 203 N.J. 208, 220 (2010).

on a theory of intertwinement under the guise of equitable estoppel," holding we were

> mistaken in concluding that the intertwinement of claims and parties in the litigation -- in and of itself -- was sufficient to give a non-signatory corporation standing to compel arbitration. The appropriate analysis would have focused on the agency relationship between the parent and subsidiary corporations in relation to their intertwinement with the plaintiff's claims and the relevant contractual language.
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> [Hirsch, 215 N.J. at 193 (citing EPIX Holdings Corp. v. Marsh & McLennan Cos., Inc., 410 N.J. Super. 453, 467-68 (App. Div. 2009)).]

We conclude, using the same rationale, that the relationship of the parties — not the intertwinement of claims — is the appropriate focus.

As a final observation, we agree with the motion judge's conclusion that the arbitration provisions were not adhesive because the unit owners "were free to accept or reject the contract terms proposed by the sellers of [the units]," and there was "[a]bsolutley no proof . . . that the terms of the [SPA] were in any way non-negotiable."

In order to achieve a correct resolution regarding the arbitrability of the Association's claims, we set aside the order dismissing the complaint and compelling arbitration so the motion judge may require the Association to file an amended complaint

specifying the basis for its claims. The judge should then review each count and decide which, if any, are subject to arbitration; of course, the findings of facts and conclusions of law for each ruling should be memorialized pursuant to Rule 1:7-4(a). If the judge finds there are both arbitrable and non-arbitrable claims, he or she should determine whether both types of claims may simultaneously proceed in separate forums, or whether arbitration should precede suit in the trial court or vice versa. See Hirsch, 215 N.J. at 196 n.5.

The order under review is vacated and the matter remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.