IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HOMSEY ARCHITECTS, INC., a Delaware corporation, Plaintiff, v. NINE NINETY NINE, LLC, a Delaware limited liability company, Defendant.	)))))))))))	Civil Action No. 4412-VCP

MEMORANDUM OPINION

Submitted: February 18, 2010
Decided: June 14, 2010

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PARSONS, Vice Chancellor.

This dispute between an architectural firm and a developer concerns whether the developer can proceed with an arbitration against the architectural firm. In 2002, Defendant, Nine Ninety Nine, LLC ("999"), hired Plaintiff, Homsey Architects, Inc. ("Homsey"), to perform architectural design services on a townhome complex it was building along the banks of the Brandywine River in Wilmington, Delaware. On February 17, 2009, 999 filed a demand for arbitration against Homsey. Homsey then commenced this action, contending that 999 filed its demand for arbitration after the expiration of the statute of limitations on the claims alleged therein and seeking an order from this Court permanently enjoining 999 from proceeding with the arbitration.

In the course of pretrial proceedings, the Court raised *sua sponte* the threshold issue of whether it had subject matter jurisdiction over Homsey's claim, and the parties briefed that issue. In this Memorandum Opinion, I hold that because several amendments to the Delaware Uniform Arbitration Act ("DUAA")[1] that became effective on July 2, 2009 do not apply retroactively and the parties displayed a clear desire to have their arbitration governed by the DUAA, I do have jurisdiction to decide Homsey's claim. I further hold that, because Homsey's services under its contract with 999 were not substantially completed until after February 17, 2006, 999 filed its demand for arbitration before the three-year statute of limitations applicable to its claims expired. Therefore, Homsey is not entitled to a permanent injunction barring the arbitration.

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[1] 10 *Del. C.* §§ 5701 to 5725.

I. BACKGROUND

These are the facts as I find them after trial.

A. The Parties

Plaintiff, Homsey, is a Delaware corporation with its principal place of business in Wilmington, Delaware. Homsey has provided professional architectural design services for over sixty-five years in a variety of fields, including governmental buildings, large-scale corporate facilities, cultural institutions, schools and universities, churches, multi-family and private residences, and horticultural buildings.[2] Homsey is licensed to provide services in Delaware, Maryland, and New Jersey.

Defendant, 999, is a Delaware limited liability company and successor-in-interest to 999 Trust. 999 is the developer of the Carriage House Row project, a complex of fourteen townhomes in Wilmington on the banks of the Brandywine River.[3]

B. Facts

1. Homsey and 999 enter into the Agreement

On May 7, 2002, Homsey entered into a contract with 999 to provide architectural design services for 999's Carriage House Row project (the "Project"). Homsey's lead architect on the Project was C. Roderick Maroney, while 999's owner representative was James A. Horty, III ("Horty"). The contract between Homsey and 999 (the "Agreement")

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[2] Homsey Architects, Inc., http://www.homsey.com/about.html (last visited May 21, 2010).

[3] Aff. of James Horty, Jr. ¶ 1.

is memorialized in AIA Document B141-1997 "Standard Form of Agreement Between Owner and Architect."[4] The Agreement defines Homsey's services according to the Standard Form of Architect's Services: Design and Contract Administration, AIA Document B141-1997, which was attached to the Agreement, but also incorporates Homsey's March 28, 2002 proposal letter.[5] Homsey's proposal letter states that "[t]he scope of professional services shall include Design Services and the preparation of drawings and specifications suitable for permitting. Bidding and construction administration can be provided as an additional service at your request."[6] Homsey's proposal letter incorporates by reference the proposals of its consultants, Paragon Engineering Corporation ("Paragon") and O'Donnell & Naccarato, Inc. ("O & N").[7] Paragon's services involved "preparing Mechanical and Electrical plans and specifications suitable for construction, providing construction administration services and checking shop drawings associated with [its] work," while O & N agreed to "provide the structural design, documentation and construction administration services for a new

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[4] Def.'s Opp'n Br. ("DOB") Ex. A (the "Agreement"). The AIA is the American Institute of Architects. The Agreement refers to Homsey as "Architect." *Id.* at 1.

[5] Agreement § 1.4.1.2. The proposal letters from Homsey and its consultants, Paragon and O & N, are attached to the Agreement and can be found immediately following the AIA form Agreement in DOB Ex. A.

[6] *Id.* at Homsey Proposal Letter. In contrast to Homsey's proposal letter, the Agreement required Homsey to perform a number of contract administration services, including reviewing requests for information from the contractor, visiting the construction site to evaluate the contractor's work, and resolving disputes between 999 and the contractor. *Id.* § 2.6.

[7] *Id.* at Homsey Proposal Letter.

1-story, 49,000 [square foot] elevated platform."[8] Under the Agreement, Homsey had a responsibility to "review laws, codes and regulations applicable to the Architect's services" and "respond in the design of the Project to requirements imposed by governmental authorities having jurisdiction over the Project."[9] The Agreement is governed "by the law of the principal place of business of the Architect," which is Delaware.[10]

The Agreement requires all claims and disputes arising out of or related to the Agreement to be submitted to arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA" and "AAA Rules").[11] The Agreement provides, however, that "[i]n no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations."[12] The Agreement also contains an accrual clause, which states that:

> Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final

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8 *Id.* at Paragon Proposal Letter, O & N Proposal Letter.

9 *Id.* § 1.2.3.6.

10 *Id.* § 1.3.7.1.

11 *Id.* §§ 1.3.5.1, 1.3.5.2.

12 *Id.* § 1.3.5.3.

> Certificate for Payment for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed.[13]

Homsey began providing architectural services for the Project in mid-2002. By November 12, 2002, Homsey had completed the record design documents. Throughout the course of the Project, Homsey provided responses to requests for information ("RFI") submitted by 999's contractors. The last RFI Homsey responded to was dated February 23, 2005. Homsey submitted its last invoice to 999 on October 20, 2005.[14] The first townhomes were completed in late 2005 and early 2006,[15] and the first temporary certificate of occupancy for a townhome that was part of the Project was issued in late January 2006.[16]

2. The redesign

At some point during the construction process, Homsey redesigned two of the Carriage House Row townhomes. Because Homsey performed these redesigns directly for the individual townhome owners, rather than for 999, it considered the redesigns to be outside the scope of the work Homsey was to perform under the Agreement. Homsey

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[13] *Id.* § 1.3.7.3. The AIA defines "Substantial Completion" as the "stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use." DOB Ex. O at § 9.8.1.

[14] Pl.'s Apr. Opening Brief ("PAOB") Ex. D ¶¶ 6-8, 12.

[15] July 1 Tr. 14.

[16] July 1 Tr. 31, 45.

even gave the redesign work a separate project number.[17] The redesigns involved enclosing certain spaces that originally were designed to be decks overlooking the Brandywine River to increase interior living space in the affected townhomes. By increasing the square footage of two of the townhomes, however, Homsey's redesign altered each townhome owner's percentage ownership of the Carriage House Row complex from what was shown in the condominium documents (the "Condo Plan") that previously had been approved by the City of Wilmington. Hence, when 999 attempted to settle on the first townhome in January 2006, the City blocked the sale because the actual layout of the townhome complex did not conform to the Condo Plan.[18]

To sell the townhomes, 999 had to obtain City approval of the revised Condo Plan. On April 18, 2006, 999 gave a presentation regarding the revised Condo Plan at a Wilmington City Planning Commission meeting.[19] Neither Maroney nor anyone else from Homsey attended this meeting.[20] The City Planning Commission preliminarily approved the revised Condo Plan on April 18, and the City Department of Planning and Development gave the revised Plan final approval on May 9, 2006.[21] 999 then received

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17 Horty Dep. 22-24.

18 July 1 Tr. 16-19.

19 July 1 Tr. 20; Def.'s Oct. Opening Br. ("DOOB") Ex. C.

20 Pl.'s Oct. Opening Br. ("POOB") Exs. G, H.

21 DOOB Exs. C, D. Approval of the revised Condo Plan was conditioned on 999 creating a 24-foot wide fire lane in front of the townhome complex. DOB Ex. N.

final certificates of occupancy for several of the townhomes. 999 settled on its first townhome sale on or around May 15, 2006.[22]

3. Homsey and its consultants respond to complaints at the townhome complex

Starting in the winter of 2006-07, 999 began receiving complaints about the heating system in the townhomes. The complaints focused on the system's inability to provide heat evenly throughout the multi-floor structures. Specifically, the top floor of a townhome would become unbearably hot while the bottom floor would remain uncomfortably cold. During the summer of that year, the townhome occupants lodged similar complaints regarding the air-conditioning system.[23] Horty informed Maroney of these complaints on May 16, 2007.[24] Homsey and Paragon looked into the problems with the HVAC system, and, on August 22, 2007, Homsey provided 999 with Paragon's suggested solution to the problems.[25] The suggested solution, however, failed to quell the complaints of the townhome residents, causing 999 to hire an independent consultant to examine the HVAC system's design.[26] On June 2, 2008, Homsey responded to the

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[22] July 1 Tr. 16.

[23] DOB Exs. F, H.

[24] DOB Ex. E.

[25] DOB Exs. G, H.

[26] DOB Ex. I.

consultant's findings by relaying Paragon's conclusions regarding the HVAC system to 999. In essence, Paragon proposed the same solution it initially offered in 2007.[27]

On March 19, 2008, in response to a complaint from 999 about fireproofing having become detached from steel stilts that support the Project's concrete deck, O & N inspected the steel support structure. O & N communicated its findings regarding the fireproofing to 999 on April 3, 2008.[28]

4. 999 files a demand for arbitration against Homsey

999 initiated an arbitration proceeding against Homsey (the "Arbitration") by filing a demand for arbitration with the AAA on February 17, 2009.[29] The demand asserts four different theories of liability (breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and negligence) and claims that 999 has suffered over $300,000 in damages as a result of having to correct errors made by Homsey.[30] The alleged errors include the failure to create a design that complied with local zoning ordinances, the problems with the HVAC system, and the fireproofing problems.

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[27] DOB Ex. K.

[28] DOB Ex. M.

[29] PAOB Ex. G.

[30] PAOB Ex. F.

C. Procedural History

On March 10, 2009, Homsey filed its Complaint in this action seeking to enjoin the Arbitration as having been filed after the statute of limitations had run. Initially, the parties briefed the issue of whether Homsey was entitled to a preliminary injunction that would effectively stay the Arbitration. On April 27, the Court heard argument on Homsey's request for a preliminary injunction, as well as testimony from Maroney. At this hearing, the Court questioned whether several amendments to the DUAA that were to go into effect on July 2, 2009 applied retroactively. The Court raised this issue because if the amendments applied retroactively, the Court would lack jurisdiction over Homsey's action. The Court's inquiry sparked two rounds of briefing on whether the amendments to the DUAA applied retroactively and also whether the Arbitration was governed by the DUAA or the Federal Arbitration Act ("FAA").[31] In the meantime, the parties agreed to stay the Arbitration pending the Court's ruling on Homsey's claim for injunctive relief.

The parties reconvened for a second hearing on July 1, 2009, during which they presented further argument on the Court's jurisdiction and the merits of Homsey's claim, as well as testimony from Horty and Maroney. At this hearing, the parties also decided to proceed directly to a hearing on Homsey's request for a permanent injunction, rather than a preliminary injunction, as previously requested. In that regard, the parties submitted simultaneous opening and reply briefs on Homsey's request for a permanent injunction

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[31] 9 U.S.C. §§ 1 to 16 (2010).

on October 21 and November 4, 2009, respectively. On February 18, 2010, the Court heard the parties' final arguments on that request.

D. Parties' Contentions

On the jurisdiction issue, Homsey contends that the amendments to the DUAA cannot be applied retroactively and that the DUAA governs the parties' Arbitration, thus giving the Court jurisdiction to decide the merits of its request for a permanent injunction. On the merits of that request, Homsey argues that it substantially completed its services in October 2005, and, thus, the three-year statute of limitations began to run on 999's claims at that time. Because 999 filed its demand for arbitration on February 17, 2009, more than three years after its claims accrued, Homsey contends that the Court must permanently enjoin the Arbitration as being barred by the applicable statute of limitations.

999 argues that the FAA, rather than the DUAA, applies to the Arbitration. Alternatively, 999 contends that the July 2009 amendments to the DUAA apply retroactively. Either contention, if accepted, would divest the Court of jurisdiction to decide Homsey's claim. On the merits of Homsey's permanent injunction request, 999 argues that Homsey's services were not substantially completed until April or May of 2006, when the City of Wilmington approved 999's revised Condo Plan for the Carriage House Row project, if not 2008, when Homsey and its consultants last assisted 999 in dealing with several issues that arose at the Carriage House Row complex. Because Homsey's services were not substantially completed until at least April 2006, 999 asserts

that its February 17, 2009 demand for arbitration was timely filed within the applicable three-year statute of limitations, and, thus, there is no basis to enjoin the Arbitration.

II. ANALYSIS

A. Does the Court Have Jurisdiction over Homsey's Action?

Before addressing the merits of Homsey's permanent injunction claim, I must determine whether the Court has jurisdiction over this claim. The resolution of this issue turns on two questions: (1) do either of two amendments to the DUAA that went into effect on July 2, 2009 apply retroactively; and (2) is the parties' Arbitration governed by the DUAA or the FAA?

Before answering these questions, I first review briefly a few basic tenets of the law of arbitrability that are relevant to this dispute. There are two types of arbitrability issues: substantive and procedural. Substantive arbitrability concerns "gateway questions about the scope of an arbitration provision and its applicability to a given dispute."[32] The underlying question in matters involving substantive arbitrability is "whether the parties decided in the contract to submit a particular dispute to arbitration."[33] Absent "clear and unmistakable evidence" to the contrary, issues of substantive arbitrability are to be decided by courts, rather than arbitrators.[34] Procedural

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[32] *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006).

[33] *Carder v. Carl M. Freeman Cmtys., LLC*, 2009 WL 106510, at *3 (Del. Ch. Jan. 5, 2009).

[34] *Lefkowitz v. HWF Hldgs., LLC*, 2009 WL 3806299, at *8 (Del. Ch. Nov. 13, 2009) (citing *Willie Gary*, 906 A.2d at 79).

arbitrability, on the other hand, deals with questions regarding whether parties have complied with the terms of an arbitration agreement.[35] Issues of procedural arbitrability include the satisfaction of conditions precedent to arbitration, whether a party has provided adequate notice of its intention to arbitrate, and, importantly for purposes of this dispute, statute of limitations defenses. The law presumes that procedural arbitrability questions will be handled by arbitrators and not by courts.[36]

The pre-July 2009 version of the DUAA provides a key exception to the general rule that arbitrators decide issues of procedural arbitrability. Under § 5702(c) of that version the DUAA,

> [i]f, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the State, a party may assert the limitation as a bar to the arbitration on complaint to the Court as provided in §5703(b) . . . .[37]

Section 5703(b) provided that a "party who has not participated in the arbitration and who has not been made or served with an application to compel arbitration may file its complaint with the Court seeking to enjoin arbitration on the ground that . . . the claim sought to be arbitrated is barred by limitation of § 5702(c)."[38] Sections 5702(c) and 5703(b), thus, allow a statute of limitations defense, an issue of procedural arbitrability

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35 *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *10 (Del. Ch. Dec. 4, 2007).

36 *Lefkowitz*, 2009 WL 3806299, at *8 (citing *Willie Gary*, 906 A.2d at 79).

37 10 *Del. C.* § 5702(c) (2008).

38 *Id.* § 5703(b) (2008).

that normally would be decided by arbitrators, to be decided by a Court at a party's election. As discussed in more detail later, this is important here because neither the FAA nor the current version of the DUAA contains a comparable provision expressly overriding the presumption that arbitrators decide statute of limitations issues as involving procedural arbitrability and allowing for a Court to hear limitations defenses.

1. Retroactivity of the July 2, 2009 amendments to the DUAA

Effective July 2, 2009, the Delaware Legislature made two amendments to the DUAA that are pertinent here. The first changed the language of § 5702(a) to require parties to "specifically referenc[e] the Delaware Uniform Arbitration Act . . . and [their] desire to have it apply to their agreement" in order to invoke the DUAA.[39] The pre-July 2009 version of this statute provided that the DUAA applied if parties "provid[ed] for arbitration in this State."[40] Because Homsey and 999 did not specifically reference the DUAA in the Agreement, retroactive application of the amended § 5702(a) would mean that the DUAA would not apply to the Arbitration; instead, the FAA would govern by default. Because the FAA does not expressly authorize courts to hear statute of limitations defenses, the default rule that matters of procedural arbitrability are to be decided by the arbitrators would apply, arguably divesting me of jurisdiction over Homsey's claim.

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[39] *Id.* § 5702(a).

[40] *Id.* § 5702(a) (2008).

The second pertinent amendment to the DUAA modified sections 5702(c) and 5703(b) so as to eliminate the express authorization for the Court of Chancery to hear an application to enjoin an arbitration on the ground that the claim sought to be arbitrated is barred by the statute of limitations.[41] If this amendment applies retroactively, the Court would have jurisdiction over Homsey's claim that the Arbitration is barred by the statute of limitations only if the parties so agreed.

In Delaware, there is a "presumption against [statutory] retroactivity."[42] Thus, a statute will not be applied retroactively unless there is a clear legislative intent to do so.[43] Nevertheless, a statutory amendment may apply retroactively if it is remedial, meaning "it relates to practice, procedure or remedies and does not affect substantive or vested rights."[44] Because there is no indication that the Legislature intended the amendments to Sections 5702 and 5703 of the DUAA to apply retroactively, I must determine whether these amendments affect substantive rights or are merely procedural in nature.

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41 The amendment to § 5702(c) struck the operative language which authorized a party to bring a claim in this Court based on a statute of limitations defense. *See supra* note 37 and accompanying text. In turn, the amendment to § 5703(b) eliminated its reference to § 5702(c). 10 *Del. C.* § 5703(b), *as amended by* 77 Del. Laws ch. 8, § 5 (2009).

42 *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1120 (Del. 2009) (quoting *State ex. rel. Brady v. Pettinaro Enter.*, 870 A.2d 513, 529 (Del. Ch. 2005)).

43 *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 354 (Del. 1993); *Chrysler Corp. v. State*, 457 A.2d 345, 351 (Del. 1983).

44 *Hubbard*, 633 A.2d at 354 (quoting 2 Norman J. Singer, *Sutherland Stat. Const.* § 41.09 at 399 (5th ed. 1993)).

Having considered the issue carefully, I conclude that both amendments affect substantive rights and, thus, cannot be applied retroactively. The amendment to § 5702(a) requiring a specific reference to the DUAA to invoke its protections is substantive because it affects, for example, which substantive body of arbitration law governs an arbitration agreement. While it includes procedural aspects, the DUAA is a substantive body of law because it contains provisions regarding the enforceability of agreements to arbitrate, a substantive matter. The parties here did not specifically reference the DUAA in the Agreement. Nevertheless, it is quite possible they intended the DUAA to govern any Arbitration under the Agreement. The retroactive application of the amended § 5702(a) would preclude that result, however, and thereby affect the parties' substantive right to have the Arbitration governed by the DUAA.

Similar reasoning applies to the amendment eliminating the DUAA's express authorization for the Court of Chancery to hear an application to bar an arbitration on the ground that the underlying claim was barred by a limitation of time. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[45] To the extent the parties here agreed to arbitrate under the DUAA, it is reasonable to infer that they thereby agreed that a party could submit any statute of limitations issues to the Court, rather than an arbitrator. I consider the right provided in the previous version of the DUAA to have this court hear a statute

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[45] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).

of limitations defense to be substantive in nature. Thus, the amendment eliminating that provision also affected substantive rights. In addition, consistent with the former version of the DUAA, § 1.3.5.3 of the Agreement expresses a clear intention to preclude time-barred claims from being submitted to an arbitrator. Applying §§ 5702(c) and 5703(b) retroactively potentially would force Homsey to arbitrate a dispute it did not agree to arbitrate. Such retroactive application of the statutory amendments in this context, therefore, would affect Homsey's substantive rights and, thus, be inappropriate.

2. Which act applies: the DUAA or the FAA?

My conclusion that the 2009 amendments to the DUAA cannot be applied retroactively does not resolve definitively whether this Court has jurisdiction to decide Homsey's claim, as the parties dispute whether the Agreement invoked the DUAA under even the more lenient pre-July 2009 version of that Act. Whether the parties invoked the DUAA is important because, as noted previously, the FAA contains no provision expressly authorizing a court to hear a statute of limitations defense to an arbitration claim. Under the FAA, therefore, the default rule is that arbitrators decide matters of procedural arbitrability, and, generally, that would divest this Court of jurisdiction over Homsey's claim.[46]

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[46] *See* 9 U.S.C. §§ 1 to 16 (2010) (containing no provision comparable to 10 *Del. C.* § 5702(c) (2008)).

As a general rule, the FAA governs arbitral agreements made between parties in interstate commerce.[47] Even when dealing with such agreements, however, a court will find that the DUAA, rather than the FAA, applies to an arbitration agreement in two instances: (1) where the agreement requires arbitration in Delaware; and (2) where the parties to the agreement evidence a clear desire to be bound by the DUAA either through the language of the contract or their course of performing the agreement.[48] Here, the Agreement does not require arbitration in Delaware,[49] and its boilerplate language does not evidence any desire of the parties to be bound by the DUAA. Additionally, while the language of § 1.3.5.3 that precludes time-barred claims from being submitted to arbitration arguably provides some support for finding the parties intended the DUAA to apply, I do not consider that provision alone sufficient to support such a finding.

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[47] *Lefkowitz v. HWF Hldgs., LLC*, 2009 WL 3806299, at *4 (Del. Ch. Nov. 13, 2009) (citing 9 U.S.C. §§ 1-2). While the pending matter conceivably might not involve interstate commerce, as it is based on an Agreement between a Delaware architect and a Delaware developer for the provision of architectural services for a townhome complex in Delaware, the multistate nature of Homsey's business and the fact that building fourteen townhomes in Wilmington, Delaware almost inevitably will involve interstate commerce likely means the Agreement concerns interstate commerce. In any event, my holding in this Memorandum Opinion does not depend on resolution of that issue.

[48] *Lefkowitz*, 2009 WL 3806299, at *4 (citing *Carder v. Carl M. Freeman Cmtys., LLC*, 2009 WL 106510, at *2 n.6 (Del. Ch. Jan. 5, 2009); *Pers. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008)).

[49] *See* Agreement § 1.3.5 (containing no provision regarding location of arbitration proceedings, thereby implicitly allowing an arbitration to proceed anywhere). Contrary to Homsey's suggestion, a choice of law clause providing that Delaware law governs the Agreement is not sufficient to invoke the DUAA. *Pers. Decisions*, 2008 WL 1932404, at *2.

Accordingly, the DUAA will apply only if I find that the parties also evidenced a clear desire to be bound by that Act through their course of performing the Agreement. In this regard, the facts of this case closely mirror those of *Personnel Decisions*.

In *Personnel Decisions*, Vice Chancellor Strine found that the parties' arbitration agreement did not provide for the application of the DUAA on its face. Nevertheless, the Court applied the DUAA because it found "the parties unambiguously demonstrated through the course of performing their arbitration agreement that they believed they had entered an agreement subject to the DUAA."[50] Vice Chancellor Strine based this finding on the facts that: (1) the defendant sent the plaintiff two notices of intention to arbitrate that expressly referenced DUAA provisions that, at that time, allowed for statute of limitations defenses to be brought before the Court of Chancery; (2) the plaintiff filed a complaint in the Court of Chancery under the authority of §§ 5702(c) and 5703(b) of the DUAA; (3) in briefing the defendant's motion to dismiss, the parties all assumed that the DUAA applied to their arbitration agreement; (4) neither party contemplated the possibility that the FAA could apply to their agreement until the court requested briefing on whether the agreement was governed by the FAA or the DUAA; and (5) when asked, the defendant's counsel readily admitted he had operated under the assumption that the DUAA applied from the beginning of the parties' dispute.[51]

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[50] *Pers. Decisions*, 2008 WL 1932404, at *1.

[51] *Id.* at *2-5.

The factual similarities between this case and *Personnel Decisions* in terms of the parties' course of performance lead me to find that Homsey and 999 unambiguously demonstrated that they believed the DUAA governed the Agreement. Homsey's Complaint expressly invoked this Court's jurisdiction under the DUAA.[52] Yet, in responding to Homsey's request for preliminary injunctive relief, 999 did not argue that the FAA governed the Agreement.[53] Instead, 999 began its opposition brief by challenging the Court's jurisdiction under § 5703(c) of the DUAA.[54] Finally, despite a full round of briefing and an entire hearing on the merits of the dispute, neither party even suggested that the FAA might apply to the Agreement until the end of the April 27, 2009 hearing, after I questioned whether the 2009 amendments to the DUAA should be applied retroactively. Just as the Court concluded in *Personnel Decisions*, I am convinced that Homsey and 999 never would have questioned the applicability of the DUAA absent my comments at the April 27 hearing. Therefore, I find that the parties

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52 Compl. ¶ 3.

53 In light of this, 999 arguably waived the argument that the application of the FAA strips the Court of jurisdiction over Homsey's Complaint. *See Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief.").

54 DOB 10-11. Section 5703(c) bars a party from seeking injunctive relief in the Court of Chancery if it files its complaint seeking the injunction more than twenty days after being served with a notice of intention to arbitrate. 10 *Del. C.* § 5703(c).

For the record, because 999 never served Homsey with a notice of intention to arbitrate and its demand for arbitration cannot qualify as a notice of intention to arbitrate under § 5703(c), I reject 999's argument that Homsey's claim is precluded by § 5703(c).

unambiguously demonstrated through their course of performing the Agreement and the language of § 1.3.5.3 that they desired the Agreement to be governed by the DUAA.

Because the parties demonstrated a clear intent to have the DUAA govern the Agreement and the 2009 amendments to the DUAA do not apply retroactively, this Court has jurisdiction over this action under §§ 5702(c) and 5703(b) of the pre-July 2009 version of the DUAA. As such, I turn next to the merits of Homsey's request for a permanent injunction.

B. Is Homsey Entitled to a Permanent Injunction?

Homsey seeks to permanently enjoin the Arbitration on the basis that 999 filed its demand for arbitration after the applicable statute of limitations had run. To obtain a permanent injunction, Homsey must demonstrate: (1) actual success on the merits, (2) irreparable harm, and (3) that the balance of the equities weighs in favor of issuing the injunction.[55]

1. Actual success on the merits

Section 1.3.5.3 of the Agreement provides that "[i]n no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations." Because 999's demand for arbitration includes claims for breach of contract, breach of the implied covenant of good faith and fair dealing, negligent

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55 *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *25 (Del. Ch. May 18, 2009) (citing *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *2 (Del. Ch. Dec. 7, 2007)).

misrepresentation, and negligence, the applicable statute of limitations is three years under 10 *Del. C.* § 8106.[56] The Agreement contains an accrual clause that provides:

> Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed.[57]

Because 999 filed its demand for arbitration on February 17, 2009, to find that Homsey has succeeded on the merits of its claim that 999 violated § 1.3.5.3 of the Agreement by filing its demand at a time when it was barred by the applicable statute of limitations, I would have to find that 999's claim against Homsey accrued before February 17, 2006.[58]

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[56] 10 *Del. C.* § 8106 provides, in pertinent part: "[N]o action based on a promise . . . and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action."

[57] Agreement § 1.3.7.3.

[58] 999 seeks to have the Court undertake a laches analysis to determine whether it timely filed its demand for arbitration. Because § 1.3.5.3 expressly refers to the statute of limitations as the applicable time frame within which a demand for arbitration must be filed, it evidences the parties' intent to limit their agreement to arbitrate in that way. Accordingly, 999's argument that the Court should ignore the parties' Agreement and apply a laches analysis instead is unpersuasive.

In a similar vein, 999 urges the Court to apply the time of discovery rule and toll the statute of limitations until the defects that led 999 to file its demand for arbitration first became discoverable. Courts that have dealt with this issue have held that the "obvious intent" of the AIA accrual clause is to preclude application of the time of discovery rule and, therefore, have refused to apply the time of

Under the accrual clause, a cause of action related to the Agreement can accrue at three times: (1) the date of Substantial Completion;[59] (2) the date of issuance of the final Certificate for Payment; and (3) the date when the Architect's services are substantially completed. Both the date of Substantial Completion and the date of issuance of the final Certificate for Payment are based on when the contractor, rather than the architect, completes its services. Because one of the townhome units was not complete as of the time of the July 1, 2009 hearing,[60] the contractor had not finished its services as of that time. Not surprisingly, therefore, Homsey does not contend that 999's claims accrued on either the date of Substantial Completion or the date of issuance of the final Certificate for Payment for purposes of its argument that those claims are time-barred. Instead,

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discovery rule when a contract contains such a clause. *Gustine Uniontown Assocs., Ltd. v. Anthony Crane Rental, Inc.*, 892 A.2d 830, 836 (Pa. Super. Ct. 2006); *see also Fed. Ins. Co. v. Konstant Architecture Planning, Inc.*, 902 N.E.2d 1213, 1217 (Ill. App. Ct. 2009); *Trinity Church v. Lawson-Bell*, 925 A.2d 720, 727 (N.J. Super. Ct. App. Div. 2007); *Coll. of Notre Dame of Md., Inc. v. Morabito Consultants, Inc.*, 752 A.2d 265, 275 (Md. Ct. Spec. App. 2000); *Old Mason's Home of Ky., Inc. v. Mitchell*, 892 S.W.2d 304, 307-09 (Ky. Ct. App. 1995). I concur and likewise hold that the accrual clause abrogates the time of discovery rule in this case.

[59] The AIA defines Substantial Completion as "the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use." DOB Ex. O at § 9.8.1. Work is defined by the AIA as "the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations." *Id.* § 1.1.3.

[60] July 1 Tr. 13

Homsey bases its claim solely on an argument that its services were substantially completed and the statute of limitations began to run before February 17, 2006.

Homsey contends that it substantially completed its services in October 2005. To support this contention, Homsey alleges that it submitted its last invoice to 999 on October 20, 2005 and thereafter performed no additional work on the Project.[61]

The last date on which Homsey worked on the Project, however, is not determinative of when the statute of limitations began to run under the accrual clause. That clause provides that the statute of limitations begins to run when the "Architect's services are substantially completed,"[62] not necessarily when Homsey performs its last services on the Project. Thus, 999's claims did not accrue until all services the Architect was required to perform under the Agreement were substantially completed. These services included the services to be provided not only by Homsey, but also by its consultants, Paragon and O & N.[63]

a. Approval of the revised Condo Plan

As per Homsey's proposal letter, the services Homsey was to perform included "Design Services and the preparation of drawings and specifications suitable for permitting."[64] Section 1.2.3.6 of the Agreement, under the heading Responsibilities of

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[61] PAOB Ex. D ¶¶ 12-13.

[62] Agreement § 1.3.7.3.

[63] *Id.* §§ 1.2.3.1, 1.4.1.2, Homsey, Paragon, and O & N Proposal Letters.

[64] *Id.* at Homsey Proposal Letter.

the Architect, states: "The Architect shall review laws, codes, and regulations applicable to the Architect's services. The Architect shall respond in the design of the Project to requirements imposed by governmental authorities having jurisdiction over the Project." Both the scope of services in its proposal letter and § 1.2.3.6 require that Homsey become familiar with the applicable laws, codes, and regulations and work with 999 to take all steps reasonably necessary to cure any defect in its design that prevents any governmental entity from approving any part of the Project. In light of these requirements, I find that Homsey's services could not have been substantially completed any earlier than April 2006.

By redesigning two of the townhome units so that they no longer complied with City of Wilmington zoning ordinances, Homsey created a situation where its design of the Project was not suitable for permitting. Homsey then compounded this problem by not informing 999 that, as a consequence of the redesign, the City would need to approve the revised Condo Plan before 999 could sell any of the townhomes, even though Homsey was aware that the redesign would require additional approvals from the City.[65] Because of Homsey's silence about the need to obtain additional approvals, 999 was surprised when the City would not allow it to close on the sale of the first townhome in January 2006. The need to obtain approval of the revised Condo Plan as a result of Homsey's redesign caused 999's first townhome sale to be delayed from January 2006 to May 2006 while 999 sought City approval of the revised Condo Plan.

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[65] *See* Pl.'s Nov. Reply Br. ("PNRB") Ex. H.

Homsey's own proposal letter required it to create a design that was "suitable for permitting."[66] While Homsey completed a design that gained approval from the City of Wilmington before the end of 2005, the redesigned Condo Plan was not suitable for permitting until it received approval from the City of Wilmington, which occurred preliminarily in April 2006 and finally in May 2006. Homsey also was required to "respond in the design of the Project to requirements imposed by governmental authorities."[67] Accordingly, once the City declined to allow the sale of Carriage House Row townhomes because their design violated zoning ordinances, Homsey was required to bring the design into compliance with the zoning ordinances, which involved cooperating with 999 in seeking approval of the revised Condo Plan from the City. Thus, Homsey's services under the Agreement were not substantially completed until its design (and redesign) complied with all applicable governmental laws.

The parties have not directed me to any case that defines when an architect's services are substantially completed. Under the facts of this case, however, Homsey's services could not have been substantially completed at a time when its redesign and subsequent failure to obtain approval of a Condo Plan reflecting the redesign prevented 999 from selling any townhomes.[68] Because the revised Condo Plan that resulted from

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[66] Agreement at Homsey Proposal Letter.

[67] *Id.* § 1.2.3.6.

[68] The AIA's definition of Substantial Completion for a construction project provides that Substantial Completion does not occur until "the Owner can occupy or utilize the Work for its intended use." DOB Ex. O at § 9.8.1. As 999 could not utilize

Homsey's redesign did not comply with all applicable laws until at least April 2006 and prevented 999 from selling any townhomes until May 2006, I find that Homsey's services under the Agreement were not substantially completed before the revised Condo Plan received at least preliminary City approval in April 2006.

Moreover, I find that Homsey assisted 999 in obtaining approval of the revised Condo Plan. While Homsey suggests that it played no role in this process, the evidence fails to support that proposition.[69] Homsey goes to great length to prove that Maroney was not at the April 18 City Planning Commission meeting, submitting affidavits from four different people who say that Maroney did not attend this meeting.[70] Whether Maroney or anyone from Homsey attended the April 18 meeting is immaterial, however, as Homsey's services would not have been substantially completed until after February 17, 2006 if it performed any work assisting 999 with the revised Condo Plan after this date. Because Homsey was the architect who drew up the redesign and thus had information likely to have been important to 999 in preparing the revised Condo Plan to

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the Project for its intended use, namely, sale of its units to those who had contracted to buy them, until it obtained City approval of the revised Condo Plan, my holding that Homsey's services were not substantially completed until the City approved the revised Condo Plan readily comports with the AIA definition of Substantial Completion.

[69] Moreover, because this matter relates to whether Homsey has demonstrated actual success on the merits of its claim, an element of its request for permanent injunctive relief, Homsey has the burden of proving that it did not assist 999 in any way in obtaining approval of the revised Condo Plan.

[70] POOB Ex. H; PNRB Exs. D, E, F.

match the actual design of the townhome complex, it strains credulity to believe that Homsey played no role whatsoever in assisting 999 with the process of obtaining approval of the revised Condo Plan. Accordingly, I find that Homsey helped 999 obtain approval of the revised Condo Plan after February 17, 2006, and, thus, provided services under the Agreement after this date.[71]

b. The 2007 and 2008 services provided by Paragon and O & N

999 also contends that Homsey's services were not substantially completed before February 17, 2006 because Homsey and its consultants, Paragon and O & N, performed contract administration services under the Agreement into 2008. Homsey asserts that it was not required to perform any contract administration services, citing its proposal letter, which states that "construction administration can be provided as an additional service at your request."[72] Homsey further contends that 999 never requested that it perform any contract administration services. 999 disputes this contention, but the issue is immaterial. The contract administration services in question involve work done by Homsey's consultants, both of whom agreed to provide contract administration

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[71] I note, however, that this finding is not necessary to my holding, as even if Homsey did not provide services to assist 999 in gaining approval of the revised Condo Plan, its services still could not have been substantially completed until 999 obtained approval of this Plan for the reasons previously discussed.

[72] Agreement at Homsey Proposal Letter. The parties use the terms "construction administration services" and "contract administration services" interchangeably. When not quoting the Homsey Proposal Letter, I refer to these services as contract administration services.

services.[73] Because Homsey's proposal letter incorporates the proposals of Paragon and O & N, Homsey's services could not have been substantially completed until the services of Paragon and O & N were substantially completed.[74]

999 alleges that Homsey's consultants performed two different sets of services after February 17, 2006. The first was when Paragon looked into complaints regarding the townhome complex's HVAC system in 2007 and 2008.[75] The second was when O & N visited the townhome complex site in 2008 to check on the fireproofing on certain steel support beams.[76] Homsey denies that the services performed by Paragon and O & N constituted contract administration services and that the Agreement required Paragon or O & N to provide such services. Instead, Homsey argues that because these services were performed in response to complaints about work that was already completed, they cannot be classified as contract administration services, which generally are performed during construction and before a building can be occupied.

Having found that Homsey's services were not substantially completed as of February 17, 2006 based on the need to obtain approval of the revised Condo Plan and Homsey's assistance of 999 during the approval process, I need not reach this issue. But, even assuming the work done by Paragon and O & N in 2007 and 2008 could be

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[73] *Id.* at Paragon Proposal Letter, O & N Proposal Letter.

[74] *Id.* at Homsey Proposal Letter.

[75] DOB Exs. G, H.

[76] DOB Ex. M.

classified as contract administration services, which is debatable, I have serious doubts that the performance of this work has a bearing on when Homsey's services were substantially completed under the Agreement. This view is based on the hiatus between Homsey's last invoice in October 2005 and the first mention of these issues to Homsey and its consultants in May 2007 and March 2008, respectively. In contrast, the need to obtain approval of a revised Condo Plan as a result of Homsey's redesign arose within three months of Homsey's last invoice. So, conceivably, the services Paragon and O & N provided in 2007 and 2008 could be viewed as efforts to garner or maintain the goodwill of 999, rather than contract administration services or contractual responsibilities under the Agreement.

Because Homsey's services were not substantially completed before February 17, 2006, the statute of limitations on 999's claims did not begin to run under the accrual clause in § 1.3.7.3 of the Agreement until after that date. Accordingly, 999's demand for arbitration, which was filed on February 17, 2009, was filed before the expiration of the three-year statute of limitations. Thus, because 999's demand for arbitration was timely filed, I find that Homsey has not shown actual success on the merits of its claim for a permanent injunction barring 999's Arbitration claim.

2. Irreparable harm

Homsey stakes its claim that it will suffer irreparable harm without an injunction on its argument that Delaware courts routinely find that forced arbitration of nonarbitrable issues constitutes irreparable harm. Implicit in this claim is Homsey's view that 999's Arbitration claims are nonarbitrable because 999 filed its demand for

arbitration after the statute of limitations expired. Because 999 filed its demand for arbitration before the statute of limitations had run, however, Homsey will not suffer any harm if it is forced to arbitrate these claims.

3. Balance of the equities

In balancing the equities, a court will weigh the harm a plaintiff will suffer if an injunction is not issued against the harm the defendant will suffer if the injunction is issued.[77] Here, because 999's claims are not barred by the statute of limitations, Homsey will suffer no harm if forced to defend these claims at the Arbitration. On the other hand, if I were to issue a permanent injunction, 999 would suffer harm because it would be precluded from exercising its valid contractual right to arbitrate its claims against Homsey. Thus, the balance of the equities weighs in 999's favor.

Because Homsey has not made an adequate showing as to any of the three necessary elements for permanent injunctive relief, actual success on the merits, irreparable harm, or that the balance of the equities tips in its favor, I deny Homsey's request for an order permanently enjoining the Arbitration.

III. CONCLUSION

For the reasons stated, I conclude that the July 2009 Amendments to the DUAA do not apply retroactively and the parties, through certain provisions in the Agreement and their course of performance, demonstrated a clear intent to have the DUAA govern

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[77] *Singh v. Batta Envtl. Assocs., Inc.*, 2003 WL 21309115, at *10 (Del. Ch. May 21, 2003).

the Arbitration, thus giving this Court jurisdiction to decide the merits of Homsey's claim. I further find that Homsey failed to demonstrate actual success on the merits of its claim because 999 filed its demand for arbitration before the statute of limitations on the underlying claims expired and also failed to show either irreparable harm or that the balance of the equities weighs in its favor. Accordingly, I deny Homsey's request to permanently enjoin the Arbitration and dismiss its Complaint with prejudice.

IT IS SO ORDERED.