

**IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

DENNIS AND MARLENE ZELENY	:	
	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C.A. No. 05C-12-224 SCD
	:	
	:	
THOMPSON HOMES AT	:	
CENTREVILLE, INC. AND	:	
THOMPSON HOMES, INC.,	:	
	:	
	:	
Defendants.	:	

Submitted: May 24, 2006  
Decided: July 10, 2006

*Decision upon Defendant's Motion to Dismiss or in the Alternative Compel Arbitration*

**OPINION**

Plaintiffs' amended complaint asserts claims for breach of contract, breach of express warranty, breach of implied warranty and negligence arising out of a contract for the construction and purchase of a home in Centreville, Delaware. The defendant has responded by filing a motion to dismiss or in the alternative, to compel arbitration. Pursuant to the contract between the parties, the issues raised by plaintiffs' amended complaint are matters properly subject to binding arbitration.

**Facts**

On July 18, 2002, Dennis and Marlene Zeleny ("plaintiffs" or "Buyer") contracted with Thompson Homes at Centreville ("defendant" or "Seller" or "Builder") for the purchase of a

newly constructed home in Centreville, Delaware. The contract contained a clause requiring binding arbitration for any and all claims arising under it.

Shortly after the December 2002, closing the plaintiffs observed leaks and other defects in the home. The leaks continued throughout the spring and summer of 2003. By November 2003, plaintiffs had experienced nearly twenty separate leaks. Plaintiffs reported the problems to defendant and defendant attempted to repair the defects as necessary. Plaintiffs claim that not all repairs were effective and more damage was caused by the attempted repairs. Plaintiffs allege that there has been extensive damage to the home caused by the continued water leaks.

In December 2005, plaintiffs filed suit in Superior Court. Plaintiffs have filed an amended complaint asserting claims for breach of contract, breach of express warranty, breach of implied warranty and negligence. The complaint alleges in great detail the defects existing in the home. Plaintiffs seek direct, special and consequential damages.

Defendant has moved for dismissal of the amended complaint or alternatively for compulsion of arbitration. Defendant contends that plaintiffs consented and agreed to the express and limited warranties contained in the Centreville Reserve Sales Agreement (“the Sales Agreement”) and 2-10 Home Buyers Warranty (“2-10 HBW”) which provided that binding arbitration would cover any and all disputes arising from the contract. Therefore, plaintiffs are limited to seeking relief through arbitration.

Plaintiffs submit that the claims asserted in the amended complaint are claims which are separate from those considered in the Sales Agreement. Plaintiffs assert that certain documents executed provided for separate warranties which did not contain an arbitration provision. By asserting their claims under such separate warranties, plaintiffs believe they are and entitled to relief in this Court.

## The Law

Public policy of Delaware favors the resolution of disputes through arbitration.<sup>1</sup>

Arbitration is “designed to discourage litigation, to permit parties to resolve their disputes in a specialized forum more likely to be conversant with the needs of the parties and the customs and usages of a special industry than a court of general legal or equitable jurisdiction, and to provide for the speedy resolution of disputes in order that work may be complete without undue delay.”<sup>2</sup>

The question of whether parties have contractually agreed to arbitrate is generally one to be decided by the court.<sup>3</sup> “The threshold question regarding the validity of an arbitration agreement is known as substantive arbitration.”<sup>4</sup> “In determining arbitrability, the courts are confined to ascertaining whether the dispute is one that, on its face, falls within the arbitration clause of the contract.”<sup>5</sup> Any doubt as to arbitrability should be resolved in favor of arbitration.<sup>6</sup> However, the court will not compel a party to arbitrate, unless there is a clear expression of such an intent.<sup>7</sup> An agreement to arbitrate is a contractual issue. Therefore a court must begin its analysis with the language of the contract.

## The Contract

The contract at issue between the parties consists of four documents. The first, the Sales Agreement, was executed on July 18, 2002, between plaintiffs and defendant for the purchase of a newly constructed home in Centerville, Delaware for \$2,219,670.80. The two documents specifically incorporated by reference in the Sales Agreement are: the New Construction Addendum to the Agreement of Sale (“New Construction Addendum”) executed on July 18,

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<sup>1</sup> *SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758, 761 (Del. 1998)

<sup>2</sup> *Tekmen & Co. v. Southern Builders, Inc.*, 2005 WL 1249035 (Del. Super.)(citing *Pettinaro Constr. Co.v. Harry C. Partridge, Jr. & Sons, Inc.*, 408 A.2d 957, 961 (Del. Ch. 1979)).

<sup>3</sup> *DMS Properties-First, Inc. v. P.W. Scott Associates, Inc.*, 748 A.2d 389 (Del. 2000).

<sup>4</sup> *James & Jackson LLC v. Willie Gary, LLC*, 2006 WL 659300 (Del. Supr.)

<sup>5</sup> *SBC Interactive, Inc.*, 714 A.2d at 761.

<sup>6</sup> *Id.*

2002; and the Addendum to the Sales Agreement executed on July 29, 2002. Finally, the 2-10 HBW was provided to plaintiffs at the December 30, 2002, closing.

### The Sales Agreement

Relevant provisions of the Sales Agreement provide plaintiffs with very specific and limited warranties and require that all disputes arising under such warranties be submitted to binding arbitration. Two particular paragraphs in the Sales Agreement are the focus of the Court's attention.

Paragraph 3 of the Sales Agreement specifically incorporates by reference certain documents:

The following documents are attached hereto and incorporated herein by reference and are part of the Sales Agreement:

**New Construction Addendum**  
Specifications  
Proposed Site Plan  
Elevations  
Floor Plan  
Initial Maintenance Corporation  
Record Major Subdivision Plan – Centreville Reserve  
Declaration of Restrictions for Centreville Reserve  
**Sample Limited Warranty Administered by Residential  
Warranty**  
Corporation Escrow Law  
New Construction Seller's Disclosure  
Personalizing Options<sup>8</sup>  
(emphasis supplied)

Paragraph 8 of the Sales Agreement states,

Buyer has been provided by Seller, a member of HOME BUYERS WARRANTY ("HBW"), a sample limited warranty document containing the terms and conditions of a Limited Warranty to be provided by Seller to Buyer(s) at closing, which Buyer(s) has read and understands ("Member's Warranty"). The Member's Warranty is intended to be administered by HBW and includes the provision that requires all disputes that arise under the Limited Warranty to be

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<sup>7</sup> *Id.*

<sup>8</sup> *See* Def. Mot. to Dismiss, Ex. 1, Sales Agreement between Dennis and Marlene Zeleny and Thompson Homes at Centreville, July 18, 2002.

submitted to binding arbitration... Buyer(s) understands and agrees that, if the above Limited Warranty is validated by HBW, it is provided by Seller in lieu of all other warranties, oral arguments or representations and SELLER MAKES NO WARRANTY, EXPRESS OR IMPLIED, AS TO THE QUALITY, FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, HABITABILITY OR OTHERWISE, EXCEPT AS IS EXPRESSLY SET FORTH IN THE LIMITED WARRANTY PROGRAM. IN ANY EVENT, SELLER SHALL NOT BE LIABLE FOR ANY PERSONAL INJURY OR OTHER CONSEQUENTIAL OR SECONDARY DAMAGES AND/OR LOSSES WHICH MAY ARISE FROM OR OUT OF ANY AND ALL DEFECTS.<sup>9</sup>

#### The New Construction Addendum

The New Construction Addendum to the Agreement of Sale, incorporated by reference above, was also executed on July 18, 2002. The Addendum provides for certain warranties pertaining to workmanship by the Builder,

Workmanship All work shall be done in a manner consistent with prevailing, accepted standards for residential construction, and in compliance with the building products manufactures' installation recommendations. In addition, all work shall be done in accordance with applicable New Castle County Building Code, Regulations and Laws. The Builder warrants to the Buyer that all building materials, equipment and appliance incorporated in the project will be new unless otherwise specified. The Builder does hereby warrant the work performed under the scope of the agreed upon drawings, specifications, and change orders to be free from all defective workmanship and/or materials, for one (1) year from the date of completion. All warranties by the Builder expire one (1) year after date of closing. Said Builder's Warranty is non-transferable....<sup>10</sup>

#### The Addendum to Sales Agreement

On July 29, 2002, plaintiffs and defendant entered into an "Addendum to Sales Agreement for Centreville Reserve" which, in part, modified the New Construction Addendum to provide that, "Seller agrees to... fix and repair cracks and nail pops appearing within the first year of occupancy of the Property by Buyer, as required by the 2-10 Warranty." The document specifically incorporates itself into the Sales Agreement with the following language, "the Sales

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<sup>9</sup> Def. Mot. to Dismiss, Ex. 1, Sales Agreement between Dennis and Marlene Zeleney and Thompson Homes at Centreville, July 18, 2002.

Agreement consists of the documents outlined in paragraph 3 of the Sales Agreement as well as this Addendum.”<sup>11</sup>

#### The 2-10 HBW

On December 30, 2002, settlement took place. Plaintiffs executed an Application for Home Warranty. Consistent with paragraph 8 of the Sales Agreement, plaintiffs received the 2-10 HBW. The 2-10 HBW makes clear that it is a contract between “you and your builder.”

The 2-10 HBW provides plaintiffs with a one-year express limited warranty that the home would be free from defects in the materials and workmanship; a two-year express limited warranty that the home would be free from defects in the electrical, plumbing and mechanical systems; and a ten-year express limited warranty against structural defects. In consideration for this coverage, plaintiffs agreed to binding arbitration as an exclusive remedy for any and all disputes:

ARBITRATION Any and all claims, disputes and controversies by or between the Homeowner, the Builder, the Warranty Insurer and/or HBW, or any combination of the foregoing, arising from or related to this Warranty, to the subject Home, to any defect in or to the subject Home or the real property on which the subject Home is situated, or the sale of the subject Home by the Builder, including without limitations, any claim of breach of contract, negligent or intentional misrepresentation or nondisclosure in the inducement, execution or performance of any contract, including this arbitration agreement, and breach of any alleged duty of good faith and fair dealing, shall be submitted to arbitration by and pursuant to the rules of Construction Arbitration Services, Inc. (hereinafter “CAS”) in effect at the time of the request for arbitration.<sup>12</sup>

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<sup>10</sup> Def. Mot. to Dismiss, Ex. 1, ¶ 3, p. 1, Sales Agreement between Dennis and Marlene Zeleny and Thompson Homes at Centreville, July 18, 2002.

<sup>11</sup> Pls. Opp’n. to Def. Mot. to Dismiss, Ex. A, Addendum to Sales Agreement for Centreville Reserve between Thompson Homes at Centreville and Dennis and Marlene Zeleny, July 29, 2002.

<sup>12</sup> Def. Mot. to Dismiss, Ex. 3, 2-10 Home Buyers Warranty.

## Discussion

The documents involved in this transaction are carefully integrated. Paragraph 8 of the Sales Agreement makes generic reference to a Home Buyers Warranty to be provided at settlement and alerts the buyer to the fact that the warranty requires that disputes be resolved through binding arbitration. The same paragraph also informs the buyer that the Home Buyers Warranty is a limited warranty, and that the seller makes no other warranties.

There are two issues presented here. First, what are the warranties made by the seller. Second, what is the method for enforcing the warranties.

The various documents constituting the contract contain warranties relating to the quality of the construction of the house. The claims made by plaintiffs are for various defects to the property which they have identified and which have not been adequately addressed by the defendant. Plaintiffs have stated a cause of action for breach of warranty.

The second issue is the one in dispute. How must plaintiffs pursue their claim? This lawsuit is appropriate only if there are claims presented which are broader or different from the claims covered by the arbitration provision integrated into this contractual relationship. That requires a look at the language in the contract.

The language of the ARBITRATION provision in the 2-10 HBW is very broad; it encompasses any claims “arising from or related to this Warranty, to the subject Home, to any defect in or to the subject Home or the real property on which the subject Home is situated, or the sale of the subject Home by the Buyer” and further covers a whole range of negligent or intentional claims.<sup>13</sup> The arbitration provision is designed to be all-encompassing, and it achieves its objective. None of the claims plaintiff has asserted here escape the reach of the arbitration provision.

The plaintiffs have a vehicle for presenting their claims. That vehicle is binding arbitration.

The Motion to Dismiss is GRANTED. The defendants are directed to submit their application for counsel fees within twenty (20) days from the date of this order.

IT IS SO ORDERED.

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Judge Susan C. Del Pesco

Original to Prothonotary

xc: Kathleen M. Miller, Esquire  
George T. Lees, III, Esquire  
Michael J. Halaiko, Esquire

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<sup>13</sup> Def. Mot. to Dismiss, Ex. 3, 2-10 Home Buyers Warranty.