NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DEER CREEK HOMEOWNWERS ASSOCIATION	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DEER CREEK, INC., GAMBONE BROS DEVELOPMENT COMPANY AND GAMBONE BROS CONSTRUCTION COMPANY	:	
APPEAL OF: DEER CREEK, INC.	:	No. 1067 EDA 2012

Appeal from the Order Entered March 23, 2012
In the Court of Common Pleas of Montgomery County
Civil Division No(s).: 2007-03678

DEER CREEK HOMEOWNWERS ASSOCIATION	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DEER CREEK, INC., GAMBONE BROS CONSTRUCTION COMPANY, GAMBONE BROS DEVELOPMENT COMPANY	:	
APPEAL OF: GAMBONE BROS DEVELOPMENT COMPANY	:	No. 1202 EDA 2012

Appeal from the Order Entered March 22, 2012
In the Court of Common Pleas of Montgomery County
Civil Division No(s).: 2007-03678

DEER CREEK HOMEOWNWERS ASSOCIATION	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DEER CREEK, INC., GAMBONE BROS CONSTRUCTION COMPANY, GAMBONE	:	

BROS DEVELOPMENT COMPANY	:	
	:	
APPEAL OF: GAMBONE BROS	:	
CONSTRUCTION COMPANY	:	No. 1203 EDA 2012

Appeal from the Order Entered March 22, 2012
In the Court of Common Pleas of Montgomery County
Civil Division No(s).: 2007-03678

BEFORE: PANELLA, OLSON, and FITZGERALD,[*] JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED MAY 23, 2013**

Appellants, Deer Creek, Inc. ("DCI"), Gambone Bros. Development, and Gambone Bros. Construction (the latter two collectively referred to as "the Gambones"), appeal from the order of the Montgomery County Court of Common Pleas overruling their preliminary objections to the complaint filed by Appellee, Deer Creek Homeowners' Association. Appellants assert that the trial court erred in failing to compel arbitration. We affirm in part and reverse in part.

Appellee is an unincorporated unit owners' association in a planned residential community known as "Deer Creek."[1] Appellee's Compl., 9/23/10, at ¶¶ 1, 11. Appellee asserted that the Gambones, or entities or individuals related to the Gambones, formed DCI. ***Id.*** at ¶ 5. DCI, on July 26, 1996,

[*] Former Justice specially assigned to the Superior Court.

[1] The summary of Appellee's underlying action against Appellants is derived from Appellee's complaint and exhibits.

executed and recorded the "Declaration"[2] creating Deer Creek and constituting Appellee. ***Id.*** at ¶¶ 5-6, Ex. A at 1. Appellee alleged that DCI and the Gambones were responsible for the construction of townhouses in Deer Creek. ***Id.*** at ¶ 18.

On April 3, 1997, DCI amended the Declaration, making Appellee responsible for the maintenance of the exteriors of the townhouses in Deer Creek. ***Id.*** at ¶ 12, Ex. D. at § 1.2. Appellee claimed it then became aware of construction defects in the townhouses, including the improper installation of stucco, roofing materials, caulking, windows, doors, and flashings. ***Id.*** at ¶¶ 14-15. Appellee alleged that the defective construction caused the townhouses to suffer leaks and water damage, and that the community's reputation, as a whole, was damaged. ***Id.*** at ¶¶ at 14-17.

Appellee commenced an action against Appellants on February 13, 2007, by writ of summons. On September 23, 2010, Appellee filed a complaint asserting claims in its own right and on behalf of individual unit owners in Deer Creek. ***Id.*** at ¶ 20. In support of its action on behalf of the owners, Appellee attached numerous agreements of sale between DCI and individual unit owners as Exhibit G to its complaint. The complaint contained the following counts against Appellants: Count I for damages for negligence;

[2] As discussed below, a "declaration" is "[a]ny instrument, however denominated, that creates a planned community and any amendment to that instrument." 68 Pa.C.S. § 5103.

Count II for damages under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. §§ 201-1–201-9.3; and Count III for damages for breach of warranty.

DCI filed preliminary objections on October 12, 2010. The Gambones jointly filed preliminary objections on the following day. Appellants, in relevant part, asserted that Appellee's action was subject to arbitration provisions in the Declaration and the individual agreements of sale for the townhouses. Appellant DCI's Prelim. Objections, 10/12/10, at ¶¶ 1-7; Appellants Gambones' Prelim. Objections, 10/13/10, at ¶¶ 1-7.

Appellee answered DCI's preliminary objections on October 29, 2010, and the Gambones' preliminary objections on November 1, 2010. Appellee asserted that the arbitration provision in the Declaration did not apply to construction defects that were the responsibility of the "original developer and builder." ***See*** Appellee's Ans. to DCI's Prelim. Obj., 10/29/10, at ¶ 2. Moreover, Appellee claimed that the individual agreements of sale did not bind it to arbitration since it was not a party to those contracts. ***See id.*** at ¶ 5.

The trial court, on January 31, 2012, heard arguments on the preliminary objections. DCI, in relevant part, stated that Appellee was compelled to arbitrate based on provisions in the Declaration and the agreements of sale. N.T., 1/31/12, at 24. The Gambones acknowledged that they were not parties to either the Declaration or the agreements of

sale, but requested that the court grant DCI's request for arbitration and stay the action against them pending arbitration. ***Id.*** at 4-5, 26. Appellee responded that: (1) it was entitled to proceed on its own behalf and on behalf of the owners in Deer Creek for damages to common areas such as the exterior of the townhouses; (2) the Gambones could not enforce arbitration provisions to which they were not parties; and (3) the Gambones were not entitled to a stay. ***Id.*** at 13-20.

On March 23, 2012, the trial court entered the instant orders overruling Appellants' preliminary objections. Appellants filed timely notices of appeal. The court did not order Appellants to file Pa.R.A.P. 1925(b) statements, but issued a Pa.R.A.P. 1925(a) opinion suggesting that its order was not immediately appealable. This Court, on May 2, 2012, consolidated DCI's and the Gambones' appeals.

Appellants have filed a joint brief in which they present the following question:

> Did the [trial court] commit an error of law and an abuse of discretion in overruling the preliminary objections of all [Appellants] in the nature of alternative dispute resolution when the documents before the court unquestionably establish agreements to arbitrate by common law arbitration?

Appellants' Brief at 5.

Preliminarily, we note that these appeals arise from orders denying preliminary objections. "While an order denying preliminary objections is generally not appealable, [t]here exists . . . a narrow exception to this oft-

stated rule for cases in which the appeal is taken from an order denying a petition to compel arbitration." ***Midomo Co. Inc. v. Presbyterian Hous. Dev. Co.***, 739 A.2d 180, 184 (Pa. Super. 1999) (citation and internal quotation marks omitted). Appellants here did not expressly frame their preliminary objections as petitions to compel arbitration. Nevertheless, "we will not exalt form over substance." ***See id.*** Thus, we "find that the order denying the preliminary objections alleging alternative dispute resolution . . . is an interlocutory order, appealable as of right." ***See id.*** (citing 42 Pa.C.S. §§ 7304(a), 7320(a)(1), 7342(a); Pa.R.A.P. 311(a)(8); Pa.R.C.P. 1028(a)(6) & Note). Accordingly, there is no jurisdictional impediment to our consideration of this appeal.

We next address whether issues are properly preserved for our review. As noted previously, DCI and the Gambones filed separate preliminary objections asserting similar requests for arbitration. At the January 31, 2012 argument before the trial court, the Gambones merely averred that it was entitled to a stay if the court compelled arbitration between DCI and Appellee. ***See*** N.T., 1/31/12, at 4-5, 26. Moreover, in their joint brief, Appellants provided no argument challenging the denial of the Gambones' request for a stay. Therefore, to the extent that the Gambones claim error in the denial of their requests to compel arbitration of the claims against them and/or stay the proceeding pending arbitration, those claims are waived. ***See*** Pa.R.A.P. 302(a), 2119(a). Consequently, we consider only

DCI's contentions that the trial court erred in overruling its preliminary objections seeking to compel arbitration.

The principles governing our review of an order denying a petition to compel arbitration are well settled:

> Our review . . . is limited to determining whether the trial court's findings are supported by substantial evidence and whether the trial court abused its discretion in denying the petition.

Midomo, 739 A.2d at 186 (citation omitted).

The question of whether a party may compel another to arbitrate a claim is a matter of mutual agreement between parties. ***See Elwyn v. DeLuca***, 48 A.3d 457, 461 (Pa. Super. 2012). As we have stated:

> Arbitration is a matter of contract, and parties to a contract cannot be compelled to arbitrate a given issue **absent an agreement between them to arbitrate that issue**. Even though it is now the policy of the law to favor settlement of disputes by arbitration and to promote the swift and orderly disposition of claims, arbitration agreements are to be strictly construed and such agreements should not be extended by implication.

Id. (citation omitted) (emphasis added). "[J]udicial inquiry is limited to determining (1) whether a valid agreement to arbitrate exists between the parties and, if so, (2) whether the dispute involved is within the scope of the arbitration provision." ***Midomo***, 739 A.2d at 186 (citation and internal quotation marks omitted).

The Pennsylvania Uniform Planned Community Act (PUPCA or "Act"), 68 Pa.C.S. §§ 5101-5414, governs the creation and operations of a planned

residential community. Pursuant to the Act, DCI is a "declarant," and Appellee is an "association." ***See*** 68 Pa.C.S. § 5103.[3] As the declarant, DCI executed and recorded the Declaration under which it created Deer Creek as a planned residential community, set forth the legal structure of community, and constituted Appellee as the unit owners' association. ***See*** 68 Pa.C.S. § 5204, Uniform Law Comment; 68 Pa.C.S. § 5302; Appellee's Compl. Ex. A.

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[3] Section 5103 defines the following relevant terms:

> **"Association"** or **"unit owners' association."** The unit owners association organized under section 5301 (relating to organization of unit owners' association).
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> * * *
>
> **"Declarant."**
>
> (1) If a planned community has been created, the term means . . .:
>
> (i) Any person who has executed a declaration or an amendment to a declaration to add additional real estate. . . .
>
> * * *
>
> (2) If the planned community has not yet been created, the term means any person who offers to dispose of or disposes of the person's interest in a unit to be created and not previously disposed of.
>
> * * *
>
> **"Declaration."** Any instrument, however denominated, that creates a planned community and any amendment to that instrument.

68 Pa.C.S. § 5103.

The Act also enumerates the general powers of an association. Under Section 5302, an association may "[m]ake contracts and incur liabilities." 68 Pa.C.S. § 5302(a)(5). Moreover, an association may "[i]nstitute . . . litigation . . . **in its own name on behalf of itself or two or more unit owners on matters affecting the planned community**." 68 Pa.C.S. § 5302(a)(4) (emphasis added). Although Section 5302 contemplates that a declarant may limit the general powers of an association, the declaration cannot "impose limitations on the power of the association to deal with declarants which are more restrictive than the limitations imposed on the power of the association to deal with other persons." 68 Pa.C.S. § 5302(b).

DCI, in support of its claim that Appellee's action on its own behalf was subject to arbitration, relies on the arbitration provision contained in the Declaration.[4] Specifically, DCI argues that: (1) the Declaration is a

[4] Section 10.20 of the Declaration provided, in relevant part:

> Any and all disputes arising out of or relating to the construction of a house within the Property [Deer Creek] or otherwise arising out of the Declaration shall be decided by binding arbitration as the exclusive forum for determination pursuant to Subchapter B of the Pennsylvania Uniform Arbitration Act (42 Pa.C.S.A. § 73.41 et seq.), being common law arbitration. The dispute shall be determined by a panel of three (3) arbitrators (one selected and paid for by the Lot Owner; one selected and paid for by the Declarant or Association as the case may be; and a third selected by the two arbitrators and the cost split equally by the parties). . . Notwithstanding anything to the contrary herein, should the Declarant or Association choose to pursue the remedy of the injunctive relief, the

"development agreement **between**" it and Appellee, and (2) the scope of the arbitration provision was sufficiently broad to apply to all of the claims raised by Appellee. Appellants' Brief at 8-9 (emphasis added).

We find that DCI's fundamental assumption—i.e., that the Declaration constitutes an **agreement** between DCI and Appellee—lacks support in the record or the law. The Declaration was executed solely by DCI. ***See*** Appellee's Compl., Ex. A. at 30 (indicating that "Declarant [DCI] has executed this Declaration . . . ."). Appellee was not a party to the Declaration, but a subject of it. ***See Id.***, Ex. A. at 6-7; ***accord*** 68 Pa.C.S. § 5302. Put simply, the Declaration lacks any of the elements of an enforceable contract such as a mutual understanding or the exchange of consideration between the parties. ***Cf. MetroClub Condo. Ass'n v. 201-59 N. Eighth St. Assocs.***, ***L.P.***, 47 A.3d 137, 144–45 (Pa. Super. 2012), *appeal denied*, 57 A.3d 71 (Pa. 2012) (noting that condominium declaration lacks basic elements of enforceable contract). Accordingly, absent an express agreement between DCI and Appellee, DCI's argument warrants no appellate relief.[5]

> Declarant and/or Association may pursue such relief in any court of competent jurisdiction in the Commonwealth of Pennsylvania.

Declaration at § 10.20.

[5] Because there is no express agreement between DCI and Appellee, we need not determine whether Appellee's action falls within the scope of

DCI next argues that the agreements of sale between it and the individual unit owners in Deer Creek required arbitration of Appellee's claims on behalf of the owners. The pertinent agreements of sale contain the following arbitration provisions:

> Any and all disputes arising out of or relating to the sale of the premises or construction of a house or otherwise arising out of this Agreement shall be decided by binding arbitration as the exclusive forum for determination pursuant to Subchapter B of the Pennsylvania Uniform Arbitration Act (42 Pa.C.S.A. § 73.41 et seq.), being common law arbitration. . . . This paragraph survives settlement.

E.g. Appellee's Compl., Ex. G, Agreement of Sale, 11/25/97, at ¶ 23.

There is no dispute in this appeal that the arbitration provisions in the agreements of sale are valid as between the DCI and the respective unit owners. Rather, the arguments of the parties focus on whether Appellee may be bound to those agreements and whether the claims set forth by Appellee on behalf of the owners fall within the proper scope of the provision. ***See*** Appellee's Brief at 10.

We initially note an association may commence an action "on behalf of . . . two or more unit owners on matters affecting the planned community." ***See*** 68 Pa.C.S. § 5302(a)(4). It follows, however, that an association is limited to the same rights and constraints as the individual owners on whose

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arbitration provision in the Declaration. Moreover, since no party has discussed the issue, we decline to consider whether the arbitration provision constitutes a valid limitation upon the power of Appellee under the PUPCA.

behalf it commences an action. Put differently, when the association asserts claims on behalf of the owners, a valid arbitration provision binding on the owners is enforceable against an association. Therefore, we conclude that Appellee, when proceeding against DCI on behalf of the owners, is bound to a valid arbitration agreement between DCI and the owners, even though Appellee was not a party of the agreements of sale.

We now consider whether Appellee's claims on behalf of the owners fall within the scope of the arbitration provisions in the agreements of sale. Since our consideration of this question requires an interpretation of the contractual provision, our standard of review is *de novo* and the scope of our review is plenary. ***See Ruby v. Abington Memorial Hosp.***, 50 A.3d 128, 132 (Pa. Super. 2012); ***Elwyn***, 48 A.3d at 461.[6]

[6] The principles of contract interpretation are well settled:

> The fundamental rule in contract interpretation is to ascertain the intent of the contracting parties. In cases of a written contract, the intent of the parties is the writing itself. Under ordinary principles of contract interpretation, the agreement is to be construed against its drafter. When the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself. When, however, an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances. A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. While unambiguous contracts are

The language of the arbitration provisions in the agreements of sale evinces a clear intent of the DCI and the unit owners to arbitrate "[a]ny and all disputes arising out of or relating to the sale of the premises or construction of a house or otherwise arising out of this Agreement[.]" Appellee's Compl., Ex. G, Agreement of Sale, 11/25/97, at ¶ 23. The terms of the provision are unambiguous. DCI and the owners agreed to arbitrate "disputes arising out of or relating to" three causes of action: (1) "the sale of the premises[;]" (2) "**the construction of a house**[;]" and (3) disputes otherwise arising out of the agreement of sale. ***Id.*** Additionally, the provision was drafted so as to survive closing. ***Id.***

In light of the present record, we agree with DCI that Appellee's claims on behalf of the owners fell within the scope of the arbitration provisions in the agreements of sale. Appellee's cause of action was the alleged defective construction of townhouses in Deer Creek, which, in turn, gave rise to its claims under negligence, the UTPCPL, and breach of warranty. Such claims—whether brought in negligence, contract, or fraud and deception—fall within the scope of the clear terms of the arbitration provisions in the agreements of sale. ***See Dodds v. Pulte Home Corp.***, 909 A.2d 348, 350

> interpreted by the court as a matter of law, ambiguous writings are interpreted by the finder of fact.

Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co., 905 A.2d 462, 468-69 (Pa. 2006) (citations omitted).

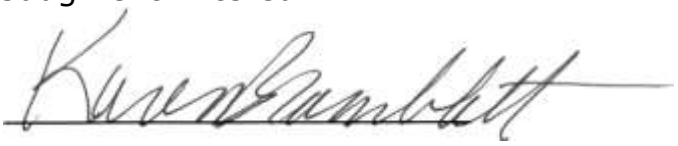
(Pa. Super. 2006) (discussing claims of fraud and unfair trade practices vis-à-vis an arbitration provision in agreement of sale).

Thus, because the claims advanced by Appellee on behalf of the owners each arose out of, or are related to, the allegedly defective construction of the townhouse, those claims are subject to the arbitration provisions in the agreements of sale. Moreover, because Appellee cannot claim greater rights than the individuals on whose behalf it commenced suit, the arbitration provision in the agreements of sale were binding on Appellee. Consequently, the trial court erred in failing to sustain DCI preliminary objections to the extent that Appellee's brought claims against DCI on behalf of the individual owners in Deer Creek.

In sum, we find that the Gambones have failed to preserve or present any issues for consideration in this appeal. We also find no basis to disturb the decision of the trial court to overrule DCI's preliminary objections to the action Appellee commenced on its own behalf. We, however, conclude that Appellee's claims against DCI on behalf of individual unit owners were subject to the arbitration provision in the agreements of sale.

Order affirmed in part and reversed in part. Case remanded. Jurisdiction relinquished.

Judgment Entered.



Prothonotary

Date: 5/23/2013