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Arbitration Agreements In Residential Construction Contracts

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Since July 2019, Florida has seen an influx of over 550,000 new residents, driven in large part by economic migration from other states.[1] This population growth has been accompanied, at least until the third quarter of 2022, with a steady rise in new residential construction. With this increase in residential inventory comes an increase in potential construction disputes.

An essential dispute resolution feature of many residential construction contracts is the agreement to arbitrate. Appellate courts frequently rule on issues surrounding the enforceability of arbitration agreements, since parties are entitled to appellate review of an order determining entitlement to arbitrate.[2] This article will provide a survey of recent case law regarding the enforceability and scope of arbitration provisions found in residential construction agreements, along with practical considerations for drafting such provisions.

Who Decides Arbitrability?

Florida's Revised Arbitration Code grants to courts the authority to determine the threshold issue of arbitrability, which focuses on whether an agreement to arbitrate exists, and if one does, whether the dispute is subject to the arbitration agreement.[3] In the recent 2022 case *Airbnb, Inc. v. Doe*, the Florida Supreme Court clarified the manner in which parties may delegate issues of arbitrability to the arbitrator.[4] The Court's decision in *Airbnb* affirmed the holding in *Reunion W. Dev. Partners, LLLP*, that parties to a residential construction agreement may demonstrate their "clear and […] unmistakable intent" to delegate decisions regarding arbitrability to the arbitrator by incorporating the Construction Industry Rules of the American Arbitration Association ("AAA") by reference.[5] Both the *Airbnb* and *Reunion W. Dev. Partners, LLLP* decisions turned on the fact that the referenced AAA rules provided that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction," to include "objections with respect to the existence, scope, or validity of the arbitration agreement."[6]

Should the Court (or Arbitrator) Compel Arbitration?

A court (or arbitrator) is required to consider three elements in deciding whether parties have a valid agreement to arbitrate a dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration has been waived.[7] Within the context of residential construction disputes, these issues often turn on whether the parties – even in the absence of privity – will be found to have agreed to arbitrate, whether the claims at issue are included within the scope of the arbitration agreement, and whether there has been a waiver of the right to arbitrate, by either pre- or post-suit conduct.

Do the Parties have an Arbitration Agreement?

Builders or developers remain exposed to latent construction defect claims for a period of up to 10 years based on Florida's statute of repose.[8] Construction defect claims may not arise until after the initial purchaser of a home or condominium unit has sold their unit to a subsequent purchaser. Thus, the issue of privity necessarily impacts the analysis of whether a valid agreement to arbitrate exists.

Since 2013, Florida courts have recognized that a community association is obligated to arbitrate construction defect claims associated with the common elements, if its members would otherwise be obligated to arbitrate such claims pursuant to their purchase agreement or limited warranty with the builder or developer.[9] Courts have done so on the basis that an association is assigned the right to bring such claims by their members, which are derivative of their members' interests, who are the "real part[ies] in interest."[10] However, an association is not obligated to arbitrate construction defect disputes if it solely owns the property at issue, absent a separate arbitration agreement with the builder or developer (e.g., one contained within the declaration).[11]

Florida courts have also considered the issue of whether an arbitration agreement between a builder or developer and an original purchaser binds a subsequent purchaser. Courts

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have recognized that builders or developers may include third-party beneficiary language within their original arbitration agreement and limited warranty, which can bind subsequent purchasers.[12] However, an assignment of a limited warranty, standing alone, may be insufficient to bind subsequent purchasers to an arbitration agreement. In *Oakmont Custom Homes, LLC v. Billings as Tr. of Jennifer A. Billings Revocable Living Tr. Dated 5/22/2007*, the original home purchaser's building agreement contained an agreement to arbitrate.[13] While the original purchaser assigned its limited warranty with the builder to the subsequent purchaser at closing, it did so without providing a copy of the building agreement that contained the arbitration agreement. The subsequent purchaser sued the builder for negligence and violation of the Florida Building Code but did not bring a claim under the limited warranty, nor did it seek to enforce any rights under the original building agreement. As such, the court held that the subsequent purchaser was not bound to arbitrate its claims.

A builder or developer can avoid disputes over whether a subsequent purchaser qualifies as an assignee or third-party beneficiary to an arbitration agreement by making the agreement to arbitrate a covenant that runs with the land. In *Hayslip v. U.S. Home Corp.*, the Florida Supreme Court concluded that agreements to arbitrate qualify as real covenants that run with the land, rather than personal covenants, which only bind parties in privity.[14] The subsequent purchasers in *Hayslip* sued the builder for defective stucco installation in violation of the Florida Building Code. The builder's deed to the original owner contained several covenants and restrictions, which expressed an intention to bind both original and subsequent purchasers and required arbitration of disputes involving the home. The subsequent purchasers received a deed at closing that was expressly subject to these covenants and restrictions.

On appeal, the Court analyzed whether the arbitration agreement touched and concerned the land to determine if it qualified as a real covenant that could run with the land and bind subsequent purchasers. It held that it did because the covenant affected the occupation and enjoyment of the home. Specifically, the agreement to arbitrate dictated the means for resolving construction defect-related disputes, the outcome of which purportedly benefited the subsequent purchasers.

Courts have also considered the effectiveness of an arbitration provision contained within a condominium declaration. In *Len-CG S., LLC v. Champions Club Condo Ass'n*, the declaration required that all claims arising from design or construction of the units, limited common elements, or common elements be submitted "to mediation and, if not settled during mediation, to binding arbitration."[15] The declaration further provided that each unit owner, "and other person acquiring any right, title or interest in or to any" unit, in addition to the association, was bound by the arbitration agreement by accepting their respective property interest. The court held that the association was required to arbitrate its claims for construction defects in the units and common elements based on these provisions.

In sum, *Hayslip* and *LEN-CG S., LLC* represent a trend in Florida law that allows inclusion of arbitration agreements, whether in a deed or declaration, in instruments that run with the land to bind subsequent purchasers without regard for privity with the builder or developer.

What Claims are Subject to the Arbitration Agreement?

In addition to a valid agreement between the parties, courts must examine whether the claims at issue are included within the scope of the agreement. Generally, an agreement to arbitrate can be narrow or broad in scope.[16] A narrow arbitration provision only requires arbitration "when a litigant's claims have a direct relationship with the terms and provisions contained in the contract."[17] In contrast, a broad arbitration provision usually requires arbitration for claims or controversies "arising out of or relating to" the subject contract.[18] Courts will compel arbitration of claims under such provisions that have a "significant relationship" or "contractual nexus" to the contract.[19] This nexus is present where a "disputed issue requires either reference to, or construction of, a portion of the contract," or "if it emanates from an inimitable duty created by the parties' unique contractual relationship."[20]

A broadly worded arbitration provision in a residential construction contract will typically encompass claims for negligent construction, violation of the Florida Building Code, and violation of the Florida Deceptive and Unfair Trade Practices Act.[21] Similarly, claims for fraud, fraudulent inducement, and intentional infliction of emotional distress

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may bear a contractual nexus to a construction contract.[22] In one instance, a homeowner's federal civil rights claims for alleged racially motivated construction delays were found to be subject to a broadly worded arbitration provision, where resolution of the delay claim required reference to the construction agreement.[23]

In contrast, the Florida Supreme Court has recognized that a contractual nexus is absent where the claim arises from "a duty otherwise imposed by law or in recognition of public policy."[24] In *Seifert*, the Court was unwilling to require arbitration of a home purchaser's wrongful death claim against the builder, which arose from carbon monoxide poisoning due to a faulty HVAC system constructed by the builder. The Court reached this decision, in part, because the builder's alleged duty arose "under the general common law owed not only to the contracting parties but also to third parties and the public."[25] However, *Seifert* left open the possibility that such claims might be subject to arbitration, if expressly referenced in the arbitration agreement.[26]

Since *Seifert*, the Fourth District Court of Appeal has provided further guidance on the precise language required to make personal injury claims subject to arbitration. In *Dewees v. Johnson*, the home purchase agreement purportedly required arbitration for a purchaser's tort and personal injury claims.[27] The purchaser brought a claim for premises liability following personal injuries sustained during a bicycle accident on a sidewalk within the neighborhood. The plaintiff-purchaser alleged in its complaint that the developer breached its non-delegable duties to maintain premises and warn against dangerous conditions. However, the court concluded that resolution of these claims did not "refer to or implicate contractual duties created or governed by the Purchase Contract or [the] Warranty."[28] As such these claims, which arose under the general common law, bore no significant relationship to the home purchase agreement, and were not subject to arbitration.

The Fourth District Court of Appeal has recently clarified that *Dewees* does not categorically prohibit a builder or developer from including personal injury claims in its arbitration agreement. In *Lennar Homes, LLC v. Wilkinsky*, the court distinguished the arbitration agreement in *Dewees* as ambiguous, and found that where an arbitration agreement "expressly provide[s] that it applie[s] to personal injury claims 'in the community,'" personal injury claims are subject to arbitration without regard to the significant relationship test.[29]

Does a Limited Warranty Operate to Exclude Claims from Arbitration?

The terms of a limited warranty and arbitration agreement, when read together, may operate to exclude claims for Florida Building Code violations. In *Nunez v. Westfield Homes of Fla., Inc.*, the builder offered a limited warranty to repair stucco cracks exceeding 1/8," but did not include coverage for missing weep screeds or other drainage devices.[30] Similarly, in *Wiener v. Taylor Morrison Servs., Inc.*, the homebuilder offered a ten-year structural warranty, which excluded the stucco system from warranted load-bearing structural elements.[31] In both *Nunez* and *Wiener*, the owners brought claims for defective stucco installation based upon violations of the Florida Building Code, rather than the limited warranty.[32] Both courts held that neither owner was obligated to arbitrate its claims because the arbitration agreement in both contracts only required arbitration of disputes arising from their limited warranties.[33]

A builder or developer cannot avoid this scenario by attempting to contractually prohibit claims for violations of the Florida Building Code. In *Anderson v. Taylor Morrison of Fla., Inc.*, the builder included a provision in which the owner purportedly agreed that the builder's limited warranty was the exclusive remedy for defect claims, and waived all other claims outside of the warranty.[34] Like the owners in *Nunez* and *Westfield*, the owners claimed that the builder defectively installed stucco in violation of the Florida Building Code, and that these claims fell outside the limited warranty's scope.[35] The court held that the arbitration agreement, which purported to preclude claims falling outside the limited warranty, was unenforceable for public policy reasons, because it denied the owners relief under Fla. Stat. § 553.84, thereby defeating the remedial purposes of the statute.

Has a Party Waived the Right to Arbitrate?

Even if the parties have a valid agreement to arbitrate their disputed issues, a party may waive the right to arbitrate if it has knowledge of that right and demonstrates an intention to do so.[36] Courts have held that a party's failure to comply with pre-suit dispute resolution procedures, including submission of claims to an initial decision maker, and a timely pre-suit mediation and arbitration demand, can constitute a waiver.[37]

Courts have also held that waiver can occur based upon the parties' filing of a lawsuit, answer, or affirmative defenses without seeking arbitration, moving for summary judgment, or potentially engaging in discovery related to the merits of the lawsuit.[38] Even where a party-defendant seeks to compel arbitration in response to a lawsuit, it must provide an adequate record in support of the motion, or it risks waiving its right to arbitrate. In *Mattamy Fla. LLC v. Rsrv. At Loch Lake Homeowners Ass'n, Inc.*, the association filed suit for construction defects within the community premised, in part, on breaches of express warranties, without attaching any supporting documentation.[39] In seeking to compel arbitration, the homebuilder submitted an exemplar copy of a purchase agreement and limited warranty, but failed to submit any material to demonstrate whether or how each homeowner was a party to these agreements.[40] The court

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held that by failing to do so, the homebuilder did not meet its burden of demonstrating the existence of a valid arbitration agreement as between the parties, such that it would not compel arbitration.[41]

Practical Considerations

There are a number of practical drafting considerations that can be gleaned from the foregoing cases. First, while parties may delegate the issue of arbitrability to the arbitrator, they should confirm that the chosen arbitral tribunal rules permit delegation, or alternatively, include express language in their agreement to arbitrate to this effect.

Second, if a builder or developer wants to ensure that construction defect claims brought by a community association are subject to arbitration, it should consider including an agreement to arbitrate such disputes within the declaration of condominium or the covenants and restrictions. By doing so, it can avoid later disputes over whether subsequent purchasers, who were not parties to the initial purchase agreement or limited warranty, are bound by the arbitration provision. Relatedly, by including the agreement to arbitrate as a deed covenant or declaration provision, a builder or developer can ensure that subsequent purchasers are obligated to arbitrate their disputes until expiration of the statute of repose for construction disputes, irrespective of privity.

Finally, a builder or developer should ensure that it encompasses all desired claims within the scope of its arbitration agreement. For personal injury claims, the agreement should contain language that applies to claims "within the community." A builder or developer should further clarify that its arbitration agreement is not limited to disputes arising out of the limited warranty, since such warranties likely do not cover every potential violation of the Florida Building Code. Finally, because a builder or developer cannot waive its exposure to statutory violations of the Florida Building Code, it should also consider including a broad-form arbitration clause (i.e., "arising out of or related to" language) to ensure such claims are subject to arbitration.


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Endnotes

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2 Fla. R. App. Proc. 9.130(a)(3)(C)(iv) (2022).

3 Fla. Stat. § 682.02(2) (2022).

4 *Airbnb, Inc. v. Doe*, 336 So. 3d 698, 705–06 (Fla. 2022).

5 *Reunion W. Dev. Partners, LLLP v. Guimaraes*, 221 So. 3d 1278, 1279-1280 (Fla. 5th DCA 2017).

6 *Airbnb, Inc.,* 336 So. 3d at 704*; Reunion W. Dev. Partners, LLLP*, 221 So. 3d at 1280.

7 *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla. 1999).

8 Fla. Stat. § 95.11(3)(c) (2022).

9 *Pulte Home Corp. v. Vermillion Homeowners Ass'n, Inc.,* 109 So. 3d 233, 235 (Fla. 2d DCA 2013).

10 *Id.; Lennar Homes, LLC v. Martinique at Oasis Neighborhood Ass'n, Inc.*, 332 So. 3d 1054, 1059 (Fla. 3d DCA 2021).

11 *Id.*

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13 *Oakmont Custom Homes, LLC v. Billings as Tr. of Jennifer A. Billings Revocable Living Tr. Dated 5/22/2007*, 310 So. 3d 59, 59–60 (Fla. 4th DCA 2021).

14 *Hayslip v. U.S. Home Corp.*, 336 So. 3d 207, 210 (Fla. 2022), reh'g denied, 2022 WL 829064 (Fla. Mar. 21, 2022).

15 *Len-CG S. LLC v. Champions Club Condo Ass'n*, 336 So. 3d 1245, 1247 (Fla. 5th DCA 2022).

16 *Vanacore Constr., Inc. v. Osborn*, 260 So. 3d 527, 530 (Fla. 5th DCA 2018) (citing *Jackson v. Shakespeare Found., Inc.*, 108 So.3d 587, 593 (Fla. 2013)).

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id*. at 532.

22 *Kaplan v. Kimball Hill Homes Florida, Inc.,* 915 So. 2d 755, 759-760 (Fla. 2d DCA 2005).

23 *Phillips v. Lyons Heritage Tampa, LLC*, 341 So. 3d 1171, 1176–77 (Fla. 2d DCA 2022), review denied sub nom. *Phillips v. Lyons Heritage of Tampa, LLC*, 2022 WL 4939287 (Fla. Oct. 4, 2022).

24 *Seifert*, 750 So. 2d at 640.

25 *Id.*

26 *Id.* at 641.

27 *Dewees v. Johnson*, 329 So. 3d 765, 770 (Fla. 4th DCA 2021).

28 *Id.* at 772.

29 *Lennar Homes, LLC v. Wilkinsky*, 45 Fla. L. Weekly D94a (Fla. 4th DCA Jan. 4, 2023) (*emphasis in the original*).

30 *Nunez v. Westfield Homes of Fla., Inc.,* 925 So. 2d 1108, 1110 (Fla. 2d DCA 2006).

31 *Wiener v. Taylor Morrison Servs., Inc.,* 285 So. 3d 391, 392 (Fla. 1st DCA 2019).

32 *Nunez*, 925 So. 2d at 1109; *Wiener,* 285 So. 3d at 392.

33 *Nunez,* 925 So. 2d at 1110; *Wiener,* 285 So. 3d at 393.

34 *Anderson v. Taylor Morrison of Fla., Inc.,* 223 So. 3d 1088, 1090–91 (Fla. 2d DCA 2017).

35 *Id.* at 1090.

36 *Infinity Design Builders, Inc. v. Hutchinson*, 964 So. 2d 752 (Fla. 5th DCA 2007).

37 *Leder v. Imburgia Constr. Servs., Inc.,* 325 So. 3d 256, 258 (Fla. 3d DCA 2021).

38 *Id.*, at 259; *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682, 695 (Fla. 2d DCA 2009).

39 *Mattamy Fla. LLC v. Rsrv. at Loch Lake Homeowners Ass'n, Inc.,* 341 So. 3d 372, 373 (Fla. 5th DCA 2022).

40 *Id.*

41 *Id.* at 374.