CONSTRUCTive Talk

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Construction Law Committee Newsletter, a committee of the Florida Bar Real Property, Probate & Trust Law Section

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Future Buyers Beware: Mandatory Arbitration Provision within Special Warranty Deed Found Enforceable as to Subsequent Purchasers

By Brett M. Henson, Esq., Shumaker, Loop, Kendrick, LLP, Sarasota, FL

With the proliferation of construction defect litigation in recent years, homebuilders have sought to control dispute resolution procedures through the use of mandatory arbitration provisions. Arbitration provisions found within purchase and sale agreements between a homebuilder and its customer may encompass a variety of claims and are generally enforceable. [1] However, Florida Statute § 553.84 has been broadly interpreted to provide a civil remedy for "any person or party" who has sustained damage as a result of a Florida Building Code Violation. [2]

Consequently, builders remain exposed to Florida Building Code violation claims by subsequent purchasers, with whom they lack privity and are otherwise not bound by contractual dispute resolution procedures.

In the Second District Court of Appeal's recent opinion, Hayslip v. U.S. Home Corporation, a homebuilder sought to address this dilemma by including a mandatory arbitration provision in its special warranty deed to the original purchaser as a covenant running with the land. [3] The deed contained a mandatory arbitration provision for disputes "relat[ing] to […] the Property," and further,

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Articles and Submissions:

Here at CONSTRUCTive Talk, we are always looking for timely articles, news and announcements relevant to Construction Law and the Construction Law Committee. If you have an article, an idea for an article, news or other information that you think would be of interest to Construction Law Committee members, please contact: tderr@rumberger.com or lkeown@rumberger.com

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"relating to personal injury or property damage alleged to have been sustained by Grantee." The deed recited that the mandatory arbitration provision was a perpetual covenant which ran with the land. Finally, the deed provided that, by accepting the deed, the original purchaser "automatically agree[d] for itself […] successors and assigns," to be bound by the deed.

In Hayslip, the original purchasers transferred title to subsequent purchasers via deed which was "subject to easements, restrictions, and reservations, if any." Near the end of the statutory repose period, the subsequent purchasers filed suit for defective stucco installation pursuant to Florida Statute § 553.84. The trial court granted the homebuilder's motion to stay and compel arbitration. Specifically, the court found that the arbitration provision contained within the special warranty deed ran with the land, and was binding on the subsequent purchasers.

On appeal, the Second District Court of Appeal considered two issues: 1) whether a valid arbitration agreement existed between the homebuilder and original purchasers; and 2) whether the arbitration provision qualified as a covenant running with the land.

As to the first issue, the court rejected the owner's argument that no agreement to arbitrate existed, because the original purchasers did not sign the deed. It recognized that neither the Federal Arbitration Act nor the Florida Arbitration Code require the signature of a party for formation of an enforceable arbitration agreement. Rather, it found that arbitration agreements can be formed by the conduct of the parties, which occurred when the original purchasers took title and possession of the home. The court further noted that it was common practice in Florida for only the seller to execute a deed conveying title.

The court next considered, as a matter of first impression, whether an arbitration agreement contained within the warranty deed qualified as a real covenant which ran with the land. The court defined real covenants as those concerning the "property conveyed and the occupation and enjoyment thereof." In contrast, it defined personal covenants as those which were "collateral" or "not immediately concerned with the property granted."

In construing the arbitration provision as a real covenant, the court focused primarily on whether the arbitration agreement "touch[ed] or involve[d] the land." It found that the arbitration provision was analogous to restrictive use covenants contained within commercial leases, such as those which limit a tenant from conducting specified business operations. Such restrictive use covenants affect the "mode of enjoyment of the premises," and therefore "touch and involve the land." Similarly, the court found that the arbitration provision affected the "occupation and enjoyment of the home," because it "dictated the means by which [the owners] must seek to rectify building defects." In particular, the arbitration provision would be "triggered" upon the discovery of a defect, and further, the outcome of the arbitration would impact the home. In what might be construed as dicta, the court went so far as to suggest the arbitration provision was "convenient and beneficial to the owner." In doing so, it relied on the public policy findings contained within Florida Statute §558.001, which express a preference for an alternative dispute resolution mechanism which consists of mandatory ***pre-suit*** notice and opportunity to cure construction defects. Counsel representing owners might argue that such a policy is wholly inapplicable to a mandatory, binding arbitration requirement, which, unlike Chapter 558, is final and

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dispositive in nature.

The court also considered as persuasive several decisions from other jurisdictions, which upheld arbitration provisions in deeds of title outside of the construction defect context. Because of the potentially wide-ranging impact of its holding, the Second District Court of Appeal has certified the question of whether a mandatory arbitration provision contained within an original purchaser's deed is binding on subsequent purchasers as one of great public importance with potentially wide-ranging impact. On August 8, 2019, the Hayslip's counsel timely sought discretionary review of the court's certified question by the Florida Supreme Court.

As it stands, Hayslip remains good law in Florida, and is binding on all trial courts. [4] In response to the decision, one might expect homebuilders to revise their deeds of title to correspond with any mandatory dispute resolution provisions contained within their purchase and sale agreements. Conceivably, title instruments might contain other dispute resolution provisions, such as waivers of jury trial or mandatory pre-suit mediation. Hayslip also has important implications for construction litigators, who will now need to review the chain of title to determine the existence and applicability of mandatory dispute resolution procedures. Time will tell whether the Florida Supreme Court elects to review this important issue.

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"Hayslip also has important implications for construction litigators, who will no need to review the chain of title to determine the existence and applicability of mandatory dispute resolution procedures."

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1 See Vanacore Constr., Inc. v. Osborn, 260 So. 3d 527, 530-531 (Fla. 5th DCA 2018) ("broad form" arbitration provision encompassed defect claims found in tort, Fla. Stat. §553.84, and FDUTPA).

2 Rosenberg v. Cape Coral Plumbing, Inc., 920 So. 2d 61, 64 (Fla. 2d DCA 2005).

3 Hayslip v. U.S. Home Corp., No. 2D17-4372, 2019 WL 3214117 (Fla. 2d DCA July 10, 2019).

4 See Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992).

CASE LAW UPDATE

By: Natalie Yello, Gray Robinson, Orlando, FL, and

Scott Kalish, The Law Offices of Scott J. Kalish, Coral Springs, FL

Interested in joining the Construction Law Committee?

It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.

2. Join the Real Property Probate and Trust Law Section.

3. Email Reese Henderson at reese.henderson@gray-robinson.com advising you would like to join the CLC and provide your contact information.

Case Law Update

***Pipeline Contractors, Inc. v. Keystone Airpark Auth.*, No. 1D18-3601, 2019 WL 3022615 (Fla. 1st DCA July 10, 2019).**

Pipeline Contractors ("Pipeline") and Keystone Airpark Authority ("KAA") entered into a contract for construction of a new airport. KAA sued Pipeline for breach of contract based upon defects. After six years of litigation, Pipeline moved for summary judgment, claiming KAA was not a legal entity and did not have the capacity to bring suit. The trial court denied the motion, reasoning that Pipeline was estopped from challenging KAA's capacity to contract. The appellate court affirmed the trial court and reasoned "one cannot contract with an entity as if it were validly created, reap the benefits of that agreement, and later disavow the contract based on the invalid creation." The court held Pipeline was estopped from asserting a capacity defense given Pipeline performed under the contract, accepted payment, and engaged in six years of litigation.

***Zurich Am. Ins. Co. v. S. Owners Ins. Co.*, 770 F. App'x. 1009 (11th Cir. 2019).**

In the underlying state court action, a plaintiff sued, inter alia, a general contractor and the general contractor's subcontractor after he was injured on a construction site. The subcontractor's policy designated the general contractor as an additional insured. The general contractor's insurer defended and indemnified the general contractor and then filed suit in federal court seeking equitable subrogation for defense costs and settlement costs from the subcontractor's insurer. The appellate court affirmed the trial court's grant of summary judgment to the general contractor's insurer and held the subcontractor's insurer owed the general contractor a duty to defend. The subcontractor was found liable for the general contractor's defense costs and settlement payment.

***Royal Palms Senior Apartments Ltd. P'ship v. Constr. Enters., Inc. of Tenn.*, No. 5D18-2182, 2019 WL 3365928 (Fla. 5th DCA July 23, 2019)**

Plaintiff and general contractor entered into a A201–1997 agreement ("Contract"). Plaintiff then sued the general contractor for various actions related to the construction of an apartment complex, and the general contractor moved to dismiss or alternatively compel mandatory mediation and arbitration. The Contract and the supplementary provisions provided that all claims had to be submitted to the architect, and, if the parties are unsatisfied with the architect's decision, they must first mediate and then can only proceed to arbitration. The appellate court affirmed the trial court's finding that the general contractor and Plaintiff had a valid agreement to arbitrate. However, the court determined that if the architect did not render a decision within 30 days, the parties would not be limited to arbitration and may proceed to litigation.

Case Law Update

SUBMISSIONS

Do you have an article, case update, or topic you would like to see in CONSTRUCTive Talk? Submit your article, note, or idea to:
tderr@rumberger.com or
lkeown@rumberger.com

Editor's Corner:

Tyler J. Derr
Editor—Tampa

Lindy K. Keown
Assistant Editor—Orlando

***Manney v. MBV Engineering, Inc.*, No. 5D18-1773, 273 So.3d 214, (Fla. 5th DCA May 10, 2019).**

Plaintiff, a homeowner, purchased a newly constructed house in 2002. At the time of the purchase Plaintiff hired defendant MBV Engineering, Inc. ("MBV") to "review construction drawings and inspect the house to determine whether there were any structural defects." Thirteen years later, Plaintiff "discovered that the house had significant latent structural defects." Plaintiff then filed suit against MBV for negligence. MBV argued that Plaintiff's suit was barred by Florida's 10-year statute of repose. The trial court agreed that section 95.11(3)(c), Fla. Stat. barred Plaintiff's claims against MBV, the Fifth DCA reversed. The Court concluded that the claim against MBV was not founded on "construction" under Florida's statute of repose. Instead the claim "relates to" construction, which is not covered by the statute.

***Toscano Condo. Ass'n, Inc. v. DDA Engineers, P.A.*, No. 3D18-1762, 2019 WL 2274943, (Fla. 3d DCA May 29, 2019).**

Plaintiff, a condominium association, sued multiple defendants for construction and design defects. Plaintiff filed suit in 2015, but subsequently amended its complaint three times between 2016 and 2017, adding more defendants each time. In June 2017 the trial court entered its Case Management Order setting various deadlines including a July 16, 2018 trial date. On November 30, 2017, Plaintiff once more to amend its complaint to add additional defendants. The trial court denied Plaintiff's motion to for leave to amend and the Third DCA affirmed. The Third DCA pointed out that the Association's fourth request to amend came after the court's deadline to bring in new parties and after a trial date had been set. The Court reasoned that "trial courts must be afforded the discretion to manage their dockets" and "litigants must bear some responsibility in diligently pursuing their cases to resolution in a timely manner."

Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include 1 hour of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 3532412014# when prompted. **Please note the new Pin Number**.

Info & Upcoming Events

Subcommittee Practice-Get On Board

Interested in getting involved? Contact one of the persons listed below.

ABA Forum Liaison - Cary Wright (cwright@carltonfields.com)

ADR - Deborah Mastin (deboarhmastin@gmail.com)

Certification Exam - Bruce Partington (aespino@tevtlaw.com)

Certification Review Course - Mindy Gentile (mgentile@pecklaw.com) and Elizabeth Ferguson (ebferguson@mdwcg.com)

Construction Law Institute - Jason Quintero (jquintero@carltonfields.com)

Construction Litigation - Brett Henson (bhenson@slk-law.com) and Natalie Yello (natalie.yello@gray-robinson.com)

Construction Regulation - Fred Dudley (dudley@mylicenselaw.com) and Steve Sellers (steve@dssattorneys.com)

Construction Transactions - Claramargaret Groover (cgroover@bplegal.com)

Contractor's University - Lee Weintraub (lweintraub@bplegal.com) and Cary Wright (cwright@cfjblaw.com)

Legislative Subcommittee - Sean Mickley (smickley@gouldcooksey.com)

Membership Subcommittee - David Zulian (dazulian@napleslaw.com)

Newsletter - Tyler Derr (tderr@rumberger.com) and Lindy Keown (lkeown@rumberger.com)

Publications Subcommittee - Kellie Humphries (khumphries@gunster.com) and Brett Moritz (bmoritz@lee-lawfirm.com)

Small Business Programs - Lisa Colon Heron (lcolon@smithcurrier.com)

Website - Hardy Roberts (hroberts@caryomalley.com)

THANK YOU!!!

On behalf of all CLC members, we would like to thank Scott Pence for all of his contributions and hard work as our past-Chair. Thank you, Scott!