SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-016321 12/19/2005

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

FILED: 12/21/2005

GABRIEL ALVAREZ, et al. STEPHEN L WEBER

v.

HANCOCK COMMUNITIES L L C, et al. THOMAS A WALCOTT

ADAM B CAMPBELL
CRAIG SOLOMON GANZ
HOPE N KIRSCH
BRIAN J SCHMIDT
WILLIAM J SIMON
DENNIS I WILENCHIK

MINUTE ENTRY

The Court has considered Defendants' Motion to Dismiss Meritage Defendant and Compel Mediation/Arbitration and the briefs.

According to the contract, neither the buyer nor the seller shall have the right to take legal action until the dispute has been submitted to mediation. Should mediation fail to result in resolution, binding arbitration follows. The arbitration clause is not unconscionable. The test is set forth in the recent case of *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 119 P.3d 1044 (App. 2005). Departure from the reasonable expectations of the buyer resulting in unconscionability may be "(1) shown 'by Prior negotiations,' (2) 'inferred from the circumstances,' (3) 'inferred from the fact that the term is bizarre or oppressive,' (4) proved because the term 'eviscerates the non-standard terms explicitly agreed to,' (5) proved if the term eliminates the dominant purpose of the transaction'…(6) [shown if the contract lacks] 'provisions which can be understood if the customer does attempt to check on his rights,' [or shown by] (7) any other facts relevant to the issued of what appellees reasonably expected in this contract." Id. at ¶ 19 (internal citations omitted). Plaintiffs do not assert that the prior negotiations or circumstances surrounding the purchase of the home led them to believe that no arbitration provision existed, or that the clause eviscerates the transaction. The only flaws

alleged by Plaintiffs are that is refers to a "nonexistent" mediation clause and that it requires the parties to submit their disputes to binding arbitration by either the National Academy of Conciliators, an entity no longer in existence, or another independent arbitration service upon which the buyer and seller agree.

The mediation clause is readily found: it is the paragraph actually numbered 32(d), immediately preceding the arbitration clause. (Paragraph 31 has nothing to do with mediation.) A buyer ascertaining his rights under the contract would have no difficulty linking the arbitration clause to its preceding paragraph. At the time the contract was signed, it would have been at once impossible and pointless to inquire into the policies of the already-defunct National Academy of Conciliators, so the inability to do so is of no consequence. The only choice of arbitrator provision surviving was selection by mutual agreement. The clause effectively guarantees the buyer either an arbitrator of his choice or, should the parties fail to agree, one bizarre and oppressive as to overcome the strong presumption in favor of arbitration.

Waiver of a valid arbitration clause is not to be lightly inferred. *Matter of Noel R. Shahan Irrevocable Trust & Inter Vivos Trust,* 188 Ariz. 74, 77 (App. 1996). "An arbitration provision is waived by conduct inconsistent with the use of the arbitration remedy; in other words, conduct that shows an intent not to arbitrate. Such conduct includes 'preventing arbitration, making arbitration impossible, proceeding at all times in disregard of the arbitration clause, expressly agreeing to waive arbitration, or unreasonable delay.''' *Meineke v. Twin City Fire Ins. Co,* 181 Ariz. 576, 581 (App. 1994) (internal citation omitted). A party generally waives arbitration by seeking redress through the courts, in lieu of the arbitration tribunal, and asking the court for exactly the same type of relief (i.e., damages) which an arbitrator is empowered to grant. *Bolo Corp. v. Homes & Son Construction Co,* 105 Ariz. 343,347 (1970). The facts here show that Meritage sought to proceed on both the arbitration and the litigation track. It filed its answer and third-party complaint, containing no mention of Plaintiffs' intention to litigate. The first suggestion, at least in writing, that it would invoke the arbitration clause came on August 25 and on August 29; it made the same indication to the Court. Yet the present motion, which would irrevocably pre-empt Meritage's ability to proceed in the judicial system, was not filed until November 3, some eleven weeks later. As in *Meineke* and *Bolo*, Meritage's conduct indicates waiver. While its participation in the Pretrial Conference is of little evidentiary value as it could have been protecting its interests in the event the Court allowed Plaintiffs' suit, its filing of the answer and third-party complaint, along with its delay in seeking judicial relief from the litigation demonstrates Meritage's intent to waive the exclusive remedy of arbitration. "To hold otherwise would leave the insured in limbo as to which procedure would prevail for settlement of their claim. To allow parties to proceed on the dual pathways of arbitration (or appraisal) and litigation nullifies the time and expense-saving benefits of arbitration" *Meineke, supra* at 581.

Therefore, IT IS ORDERED denying Defendant Meritage's Motion to Dismiss Meritage Defendants and Compel Mediation/Arbitration.