

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2272-09T3

DOMINIC NICOLOSI AND
LINDA NICOLOSI, h/w,
Individually and on behalf
of all those similarly
situated,

Plaintiffs-Respondents,

v.

MARK ANTHONY CARPENTRY, LLC,
STONE CRETE CONCRETE COMPANY,
MICHAEL PALISCHAK CONSTRUCTION
COMPANY, INC., BRADFORD ELLIOTT,
GILBERTO SILVA AZEVEDO, AZEVEDO
CARPENTRY,

Defendants,

and

NATIONAL HOME INSURANCE
COMPANY (A RISK RETENTION GROUP),

Defendant-Appellant.

Argued January 25, 2011 - Decided March 4, 2011

Before Judges Yannotti, Espinosa and
Skillman.

On appeal from Superior Court of New Jersey,
Law Division, Gloucester County, Docket No.
L-0075-08.

Carlos V. Yguico (Gemmill, Baldridge & Yguico, LLP) of the California bar, admitted pro hac vice, argued the cause for appellant (Charles V. Curley (Halberstadt Curley, LLC) and Mr. Yguico, attorneys; Mr. Curley and Mr. Yguico, on the brief).

Respondents have not filed a brief.

PER CURIAM

Plaintiffs Dominic and Linda Nicolosi purchased a new home that was covered by a home buyer's warranty issued by a private plan approved pursuant to the New Home Warranty and Builders' Registration Act, N.J.S.A. 46:3B-7, rather than the home warranty program administered by the Department of Community Affairs (DCA). The question presented in this case is whether plaintiffs agreed, through an arbitration provision in their home buyer's warranty, that arbitration was the exclusive remedy available to them in their dispute with defendant National Home Insurance Company (NHIC), the insurer for the home warranty issued in the approved private plan. By leave granted, NHIC appeals from the denial of its motion to compel arbitration. For the reasons that follow, we reverse.

The New Home Warranty and Builders' Registration Act (the Act), N.J.S.A. 46:3B-1 to -20, established "a program requiring that newly constructed homes conform with certain construction and quality standards and provides buyers of new homes with insurance-backed warranty protection in the event such standards

are not met." N.J.S.A. 46:3B-7.1. To implement this program, the Act prohibits any builder from engaging in the business of constructing new homes unless registered with DCA. As a condition of registration, the builder is required to participate in the home warranty program established by N.J.S.A. 46:3B-7, or "an approved alternate new home warranty security program" (private plan). N.J.S.A. 46:3B-5.

The home warranty program established by N.J.S.A. 46:3B-7 is maintained by the State Treasurer and administered by the Commissioner of DCA pursuant to rules and regulations adopted by the Commissioner. N.J.S.A. 46:3B-3. The Act also provides for an election of remedies for those homeowners whose warranty is administered through the State program. N.J.S.A. 46:3B-9 provides in pertinent part:

Nothing contained herein shall affect other rights and remedies available to the owner. The owner shall have the opportunity to pursue any remedy legally available to the owner. However, initiation of procedures to enforce a remedy shall constitute an election which shall bar the owner from all other remedies.

The Act prescribes a different role for the Commissioner regarding private plans. The Commissioner is authorized and directed to review such private plans and "[i]f the [C]ommissioner finds that a new home warranty security program provides coverage and financial security at least equivalent to

the new home warranty security fund, he shall approve the program." N.J.S.A. 46:3B-8. The private plan is neither maintained by the State Treasurer nor administered by the Commissioner of DCA but must satisfy the requirements for private plans adopted by the Commissioner, which are set forth in N.J.A.C. 5:25-4.2. Significantly, a private plan is not required to provide an election of remedies provision like that contained in N.J.S.A. 46:3B-9, and, in fact, is explicitly permitted to limit the available remedy to arbitration. N.J.A.C. 5:25-4.2(e) sets forth the private plan's obligation as follows:

A private plan shall provide a complaint, claims and payment procedure which:

1. Provides for an attempt at informal settlement of any claim arising out of the warranty between the builder and the owner and requires that any owner desiring to make a claim provide written notice of the complaint to the builder.
2. Provides for conciliation and/or arbitration of any warranty claim dispute by an independent third party selected and appointed in a manner approved by the Department and disclosed to the owner on or before the warranty date.
3. Provides the owner with an opportunity to accept or reject a conciliation decision in satisfaction of the claim and notice of the opportunity to appeal that decision to a court of competent jurisdiction.
[Emphasis added.]

The private plan is further required to provide a full description of the complaint/claims process, a copy of the dispute settlement procedures and "a full description of the manner in which dispute settlement will be conducted under the plan." N.J.A.C. 5:25-4.3(b)(1),(2),(7) and (8)(i). The Commissioner retains authority to revoke or suspend approval for such a program under specific circumstances, including that the plan "[d]eviated in a significant way from the complaint and claims process upon which the approval was based." N.J.A.C. 5:25-4.4(a)(7).

The new home warranty at issue here was not issued through the home warranty program established by N.J.S.A. 46:3B-7, but rather, through a private plan approved pursuant to N.J.S.A. 46:3B-8. At the time they purchased their new home, plaintiffs executed a "Certificate of Participation in New Home Warranty Plan of Home Buyers Warranty." The certificate identifies the warranty guarantor as "National Home Insurance Company (A Risk Retention Group)" located in Colorado, and states that the warranty is offered by Home Buyers Warranty as administrator for NHIC. In executing the certificate of participation, plaintiffs acknowledged receipt of the following warranty documents: Home Buyers Warranty Certificate of Participation, Home Buyers Warranty videotape, "Warranty Teamwork," Home Buyers Warranty

Booklet (HBW 207 NHJ), and Home Buyers Warranty Construction Arbitration Rules.

The Home Buyers Warranty booklet identifies the actions the homeowner must take if the homeowner believes the home has a covered defect. The homeowner must notify the builder in writing as soon as the defect is observed. If the builder has not resolved the problem within a reasonable time, the homeowner is required to prepare a notice of complaint form and send a copy to both the builder and the Home Buyers Warranty Corporation.

According to the second amended class action complaint, plaintiffs purchased a new home in a housing development known as "Heritage" in Deptford, New Jersey in July 2003. During the following summer, plaintiffs noticed that cracks were forming in their basement and that water was infiltrating the basement through the walls and pooling in the basement. They notified the builder but the water problem remained unresolved.

Consistent with the instructions in the Home Buyers Warranty booklet, plaintiffs submitted a notice of a structural claim to the Home Buyers Warranty administration office in September 2004. Following an inspection in October 2004, NHIC advised plaintiffs by letter dated November 3, 2004, that it had determined "that no 'structural defect' presently exists as that

term is defined in [the] warranty." The letter went on to describe the results of the inspection and advised, in bold face:

IF YOU DO NOT AGREE WITH OUR CLAIMS DECISION, YOUR WARRANTY APPLICATION ALLOWS YOU TO SUBMIT YOUR CLAIM TO ARBITRATION. THE ARBITRATION PROCESS WILL BENEFIT YOU BY PROVIDING AN EARLY OPPORTUNITY TO EFFECTIVELY RESOLVE YOUR CLAIM. SHOULD YOU DECIDE TO ARBITRATE, YOU WILL FIND ATTACHED TO THIS LETTER A REQUEST FOR ARBITRATION FORM, WHICH YOU MUST PREPARE, SIGN, AND RETURN TO THIS OFFICE TO INITIATE THE ARBITRATION PROCESS. ALSO ATTACHED ARE THE RULES FOR ARBITRATION THAT APPLY. PLEASE REFER TO THE ARBITRATION SECTION OF YOUR WARRANTY BOOKLET FOR COMPLETE INFORMATION ON ARBITRATION PROCEDURES.

As referenced, the Claim Settlement and Arbitration section of the Home Buyers Warranty Booklet directs the homeowner to "call for an arbitration" within thirty days in the event there is a disagreement with the insurer's decision to deny the claim. Despite this requirement, the record before the court does not reflect any action by plaintiffs to dispute the denial of their claim until the filing of the second amended class action complaint in June 2009, nearly five years after their claim was denied. In their complaint, plaintiffs alleged that the

insurer, NHIC, breached its new home warranty contract with plaintiffs and violated the Act by failing to honor their claim.¹

NHIC filed a motion in the Law Division to compel arbitration and stay plaintiffs' action against it. The court acknowledged that plaintiffs had filed a "Notice of Claim, Form for Structural Claims Only" in September 2004 and that their claim had been denied by NHIC. However, the court turned to the election of remedies provision of the Act, N.J.S.A. 46:3B-9, to resolve this issue, without further reference to the contract between plaintiffs and NHIC. The court stated, "Under the Act, a new home owner may seek recovery through one of two mutually-exclusive mechanisms: Either conciliation or arbitration or filing a lawsuit." Citing cases that interpreted N.J.S.A. 46:3B-9, the court denied the motion, concluding that the plaintiffs "at most issued a Notice of Claim and participated in an investigation. But there was no arbitration and no preclusive effect."

On appeal, NHIC argues that the trial court erred by failing to enforce the provision in the Home Warranty Booklet

¹ The other defendants named in the second amended class action complaint are: Mark Anthony Carpentry, LLC, Stone Crete Concrete Company, Michael Palischak Construction Company, Inc., Bradford Elliott, Gilberto Silva Azevedo, and Azevedo Carpentry. None of them filed a motion to compel arbitration or participated in this appeal.

that establishes arbitration as the exclusive remedy for the dispute between plaintiffs and NHIC. We agree.

Marchak v. Claridge Commons, Inc., 134 N.J. 275 (1993) concerned a case which, like this case, involved "an alternative program approved pursuant to N.J.S.A. 46:3B-8." The Court noted the distinction between remedies available to a homeowner under the Act and the remedies that are available when a private plan was involved. Under the Act "[a] buyer may submit a claim to litigation or arbitration, but not both." Id. at 280. However, as to alternate approved plans, the Court noted that the "parties remain free to limit those remedies by mutual agreement." Id. at 281. As to such private plans, the policy language, rather than the remedies available in the Act, controls. Yaroshefsky v. ADM Builders, Inc., 349 N.J. Super. 40, 53 (App. Div. 2002). Therefore, it was error for the court to apply the election of remedies provision in N.J.S.A. 46:3B-9, which only applies to warranties administered through the State program. Instead, the trial court here was required to determine whether plaintiffs had agreed that arbitration was the exclusive remedy available to them in their dispute with NHIC.

We therefore turn to the issue whether there was an enforceable arbitration provision here. For the private plan to effectively establish arbitration "as the exclusive remedy" and

deprive a homeowner of "access to the courts," the arbitration clause must clearly and unequivocally do so. Marchak, supra, 134 N.J. at 282. The language in the Marchak policy failed to meet this standard because it did not preclude the homeowner from suing; it required an election between arbitration and litigation and did not state that the buyer elected arbitration as the sole remedy. Id. at 283. The language in the Yaroshefsky policy also failed to establish arbitration as the exclusive remedy because it could be read to bar an arbitration after commencement of a common law action, but not vice versa. 349 N.J. Super. at 53.

The arbitration clause applicable to the dispute between plaintiffs and NHIC does not suffer from these flaws and states in pertinent part:

Should the Homeowner(s) disagree with the Insurer's decision to deny the claim, the Homeowner(s) shall call for an arbitration to be conducted by an Insurer approved arbitration service. The Insurer shall inform the Homeowner(s) of his/her right to arbitrate at the time of any claim denial and shall provide to the Homeowner(s) a Request for Arbitration form to be submitted to the Insurer. The Insurer shall initiate the arbitration process with the arbitration service and arrange for the payment of administrative fees. The Insurer shall pay all administrative expenses connected with the arbitration. THE DEMAND FOR ARBITRATION SHALL BE MADE NOT LATER THAN THIRTY (30) DAYS AFTER A CLAIM HAD BEEN DENIED. The decision of the arbitrator

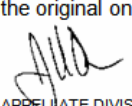
shall be final and binding and may be entered as a judgment in any court of competent jurisdiction. The decision of the arbitrator is reviewable only under such circumstances and to such an extent as is available pursuant to the New Jersey Arbitration Act.

[(Emphasis added.)]

This language plainly identifies arbitration as the only remedy for a homeowner who disagrees with the denial of a structural claim. There is no mention of any choice between litigation and arbitration or of any option to pursue litigation at any step in the claim or appeal process. To the contrary, the provision unequivocally characterizes the nature of the arbitrator's decision: "final and binding and may be entered as a judgment in any court of competent jurisdiction." We are, therefore, satisfied that the arbitration provision applicable to this dispute reflects an enforceable agreement that establishes arbitration as the exclusive remedy.²

Reversed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

² NHIC argues that the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16, governs this issue. In light of our conclusion that the home warranty contained a valid agreement to arbitrate, we need not address this argument.