NOT TO BE PUBLISHED WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SALVATORE ENEA and BONNIE SUE ENEA, husband and wife, Plaintiffs, vs. DUNCAN COURT LLC; CEDAR HILL CONSTRUCTION, L.L.C.; ROBERT W. CORCORAN, JR.; ALEXANDRA CORCORAN; JOHN GAGLIARDI; GAGLIARDI CONSTRUCTION; DEFINO REALTORS; ADAM DEFINO; DARIO L. PASQUARIELLO, R.A., A.I.A.; DARIO ARCHITECTURE & DESIGN, LLC; HARTFORD INSURANCE, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-7080-16 CIVIL ACTION OPINION

Decided: April 18, 2017
Honorable Robert C. Wilson, J.S.C.

Jason L. Bittiger, Esq., counsel for the Plaintiffs, Salvatore Enea and Bonnie Sue Enea (the "Eneas"), (from the law offices of Bittiger Elias & Triolo P.C.).

Robert P. Travers, Esq., counsel for the Defendants, Duncan Court, LLC, Cedar Hill Construction, L.L.C., Robert W. Corcoran, Jr., Alexandra Corcoran, John Gagliardi and Gagliardi Construction, (from the law offices of Robert P. Travers, P.C.).

Both parties waived oral argument in the matter and consented to a ruling on the papers.

FACTUAL BACKGROUND

On or about January 3, 2013, the Eneas entered into two agreements. The first ("Real Estate Contract") was for the purchase of the property located at 10 Duncan Court, Mahwah, New Jersey 07430 for a sum of $469,000.00. The second ("Building Contract") was for the new custom built home to be constructed exclusively by Duncan Court, LLC in the amount of $656,000.00.

On or about July 2, 2013, construction began on the home. Duncan Court, LLC eventually had the Eneas enter into a modified contract with Cedar Hill Construction, L.L.C., assigning its rights and obligations to Cedar Hill Construction, L.L.C. On or about May 22, 2014, the Eneas moved into the newly constructed home, but found that the home failed to comply with applicable municipal and/or state codes and failed to conform to the home's architectural plans and/or specifications.

On or about June 2015, the Eneas filed their Request for Arbitration under the 2-10 Home Buyers Warranty seeking monetary relief for structural and other ancillary defects. See Complaint at ¶ 52. On or about July 20, 2015, Corcoran mailed a check for $825.00 in regards to the Eneas' arbitration request. See Certification of Robert W. Corcoran, Jr. (the "Corcoran Cert.") at ¶ 4. On or about August 2015, the New Jersey Office of Dispute Settlement ("ODS") sent a letter to the Eneas and Cedar Hill, LLC, attention of Corcoran. The letter assigned an Arbitrator pursuant to N.J.A.C. § 5:23-15.20(d)1, and further explained that the Arbitrator "meets all requirements as established by the New Jersey Department of Community Affairs to serve as an independent arbitrator in new home warranty construction disputes." See Corcoran Cert. at ¶ 5. Included with the letter was the New Jersey Office of Dispute Settlement New Home Warranty Arbitration Rules and the New Jersey Administrative Code § 5:25-5.5, entitled "Regulations Governing New Home Warranties and Builders' Registration." Id. On or about September 22, 2015, the ODS sent the Eneas, Cedar Hill and Corcoran another letter setting arbitration for October 8, 2015. Id. at ¶ 6. On the eve of the scheduled arbitration, Plaintiff Salvatore Enea, through his attorney Priscilla Triolo, Esq., requested an adjournment of the arbitration proceedings. Id. at 7. On or about July 2016, 2-10 Home Buyers Warranty reached out to all parties in regards to rescheduling the arbitration. Id. at 8.

On or about October 2016, the Eneas filed the Complaint in this action alleging fraud claims along with claims against the Defendants regarding the warranty. Id. at 9. The Defendants have now filed a Motion to Dismiss the Eneas' Complaint, to which the Eneas have cross-moved against on or about April 5, 2017 to Amend their Complaint to remove Cedar Hill Construction, L.L.C. as a defendant from Count VI (Breach of Contract), Count VII (Quantum Meruit), and Count VIII (Unjust Enrichment) of the Complaint.

MOTION TO DISMISS STANDARD

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1513 (2016) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However,

"a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

Courts lack jurisdiction to hear matters that are subject to exclusive agency jurisdiction. See Pressler, Current N.J. Court Rules, Comment 2.6 to R. 4:6-2, at 1559 (2016). In Wallace v. City of Bridgeton, 121 N.J. Super. 559, 561 (Law Div. 1972), the Court noted that a motion filed under R. 4:6-2(e) for failure to state a claim could have been dismissed for lack of subject matter jurisdiction due to exclusive agency jurisdiction under R. 4:6-2(a). In the event that the Court tries a matter judicially despite clear exclusive agency jurisdiction, the ensuing judgment must be vacated. See Cortes v. Interboro Mut., 232 N.J. Super. 519 (App. Div. 1988).

RULE OF LAW AND DECISION

1. The Arbitration Provision Applicable Here Reflects an Enforceable Agreement That Establishes Arbitration as the Exclusive Remedy for This Dispute.

The Federal Arbitration Act ("FAA"), 9 U.S.C.A. §§ 1-16, and the State of New Jersey have a strong policy favoring arbitration. See Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 324, 338 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006); Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254, 257-58 (App. Div. 2001), certif. denied, 170 N.J. 205 (2001). "New Jersey law comports with its federal counterpart in striving to enforce arbitration agreements." Jansen, 342 N.J Super. at 257. Accordingly, "[a]n agreement relating to arbitration should thus be read liberally to find arbitrability if reasonably possible." Id.; see also Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001) ("Because of the favored status afforded to arbitration, '[a]n agreement to arbitrate should be read liberally in favor of arbitration.'" (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)). Therefore, "courts operate under a 'presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the

arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" EPIX Holdings Corp. v. Marsh & McLennan Cos., 410 N.J. Super. 453, 471 (App. Div. 2009) (quoting Caldwell v. KFC Corp., 958 F. Supp. 962, 973 (D.N.J. 1997)).

The New Home Warranty and Builders' Registration Act (the "Act"), N.J.S.A. §§ 46:3B-1 to -20, "establishes 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-7.1a. Under the Act, a builder must participate in either the new home warranty program established by N.J.S.A. § 46:3B-7 or "an approved alternate home warranty security program" (private warranty plan). N.J.S.A. § 46:3B-5. Unlike a new home warranty plan established by N.J.S.A. § 46:3B-7, a private warranty plan need not provide an election of remedies and may limit the available remedy to arbitration. See N.J.A.C. § 5:25-4.2. N.J.A.C. § 5:25-4.2(e) sets forth come of the private plan's obligations 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.

In the instant matter, the Eneas voluntarily elected the remedy of arbitration. In or around June 2015, they filed a claim pursuant to the Act and demanded arbitration. The Defendants paid

the arbitration fee of $825.00. The New Jersey ODS assigned a DOA-approved arbitrator to handle the dispute. The ODS provided all parties with the rules and regulations regarding home warranty proceedings and set an arbitration date of October 8, 2015. On the eve of the scheduled arbitration, the Eneas requested an adjournment of the proceedings. While awaiting a new arbitration date form the ODS, the Eneas filed a Complaint seeking adjudication via the Court of the same claims that they voluntarily elected to arbitrate. Once an election for one remedy is to arbitrate, the other remedy of adjudication before the Superior Court is barred pending resolution of that arbitration proceeding.

Furthermore, both the FAA and New Jersey have a strong policy favoring arbitration. Therefore, "[a]n agreement to arbitrate should be read liberally in favor of arbitration." Garfinkel, 168 N.J. at 132. The agreement to arbitrate was also compliant with N.J.A.C. § 5:25-4.2(e). Therefore, the Motion to Dismiss is granted without prejudice. The Court shall abide by the result of the New Home Warranty action as to the claims brought against the Defendants concerning the Eneas' claims against that warranty. The non-warranty claims, including, but not limited to, fraud, are preserved for trial in this Court pending the outcome of the arbitration. See Pickett v. Lloyd's, 131 N.J. 457, 470-71 (1993); Caparrelli v. Rolling Greens, Inc., 39 N.J. 585, 593-94 (1963); Yaroshefsky v. ADM Builders, Inc., 349 N.J. Super. 40, 54 (App. Div. 2002). In particular, the issue of bad faith must be determined by the trier of fact. N.J. Title Ins. Co. v. Caputo, 163 N.J. 143, 156 (2000).

For the foregoing reasons, the Defendants' Motion to Dismiss with Prejudice is **DENIED**. The Eneas' Cross-motion to Amend the Complaint is **DENIED**. The Defendants' Motion to Dismiss without Prejudice is **GRANTED**.

It is so ordered.