NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2653-16T1

GREENBRIAR OCEANAIRE COMMUNITY ASSOCIATION, INC., a New Jersey Non-Profit Corporation,

Plaintiff-Appellant,

v.

U.S. HOME CORPORATION, a Delaware Corporation d/b/a Lennar, DONALD R. BOMPENSA, SCOTT FARRY, GEOFF POTTER, ANTHONY CALICCHIO, PAUL SHERMAN, MICHAEL TINSMAN, ROBERT NOCENTINO, ROBERT PISCIOTTA, GLEN McDONALD, and ANTHONY MIGNONE,

Defendants-Respondents.

APPROVED FOR PUBLICATION

November 16, 2017

APPELLATE DIVISION

Argued October 3, 2017 – Decided November 16, 2017

Before Judges Fisher, Sumners and Moynihan.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-2105-15.

Samuel J. McNulty argued the cause for appellant (Hueston McNulty, PC, attorneys; Mr. McNulty, of counsel and on the brief).

Justin W. Oravetz argued the cause for respondents (Archer & Greiner, PC, attorneys; William L. Ryan and Mr. Oravetz, of counsel and on the brief).

The opinion of the court was delivered by

FISHER, P.J.A.D.

The plaintiff homeowner association's complaint alleges that the defendant-developer violated various statutory, regulatory and common-law duties that caused injuries to both the association itself and the homeowners. The association argues in this appeal that the motion judge, in compelling arbitration of all disputes, mistakenly enforced an arbitration agreement found in contracts that memorialized the homeowners' purchase of their properties from the developer; the association contends the motion should have been denied because the document memorializing the developer's conveyance to the association contains no arbitration agreement. To the extent the association's pleadings assert claims on behalf of the association's homeowners, we agree they must be arbitrated. But the pleadings also include claims allegedly possessed solely by the association. To better distinguish between what is and isn't arbitrable, we remand for the filing of an amended complaint that separates claims the association asserted on its own behalf and those it asserted on behalf of the homeowners.

We start with the fact that the association — plaintiff Greenbriar Oceanaire Community Association, Inc. — is responsible for the common areas and the administration and management of a 1425-unit residential community in Waretown. The sponsor of the

association and the developer of the project — defendant U.S. Home Corporation, alleged to have been doing business as Lennar Corporation — ultimately transferred management to the association. In its June 2015 complaint, which was twice amended, the association on behalf of itself and its members — its members being the homeowners bound to arbitration clauses[1] in their purchase agreements — asserted numerous causes of action, including: design and manufacturing defects that the association claims constituted violations of applicable building codes and warranties; various violations of the Planned Real Estate Development Full Disclosure Act (PREDFDA), N.J.S.A. 45:22A-21 to -56, and PREDFDA's underlying regulations; and violations of the developer's fiduciary duties.

In light of the arbitration agreement in its contracts with homeowners, the developer moved to compel arbitration. By the time

[1] These contracts include the homeowners' and developer's agreements that "any dispute (whether contract, warranty, tort, statutory or otherwise), including, but not limited to, (a) any and all controversies, disputes or claims arising under, or related to, this [a]greement, the property or any dealings between [the homeowner and the developer] . . . [and] (b) any controversy, dispute or claim arising by virtue of any representations, promises or warranties alleged to have been made by [the developer or its representative] . . . shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. § 1 [to § 16]) or, if inapplicable, by similar state statute, and not by or in a court of law."

the motion was considered, the parties settled the design and construction claims. As a result, the question for the motion judge was whether the remaining claims — the PREDFDA and fiduciary duty claims — were asserted on behalf of the homeowners and therefore subject to the homeowners' promise to arbitrate with the developer, or whether the claims should be viewed as belonging only to the association, which never agreed to arbitrate any disputes with the developer. By way of his oral decision, the motion judge agreed with the developer's view and entered an order compelling arbitration; he later denied a motion to vacate the order compelling arbitration.

In appealing those orders, the association argues: (1) it could not be compelled to arbitrate because (a) "no valid board action [occurred]" to confirm such an obligation and (b) the clause "is a restrictive covenant that should properly be considered void as to the association"; (2) the developer-homeowner arbitration clause is "unenforceable"; (3) the arbitration clause is "woefully inadequate to constitute a waiver of the association's statutory claims or right to a trial by jury in a court of law"; and (4) a "Monmouth County trial court" denied a developer's motion to compel arbitration "in a similar litigation." We reject the association's first point because those arguments were not raised in the trial court. We also reject the third point; the language of the

arbitration provision more than adequately memorializes the homeowners' promise to arbitrate their claims against the developer. And we find insufficient merit in the fourth point to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We, thus, focus on the pivotal question: are the association's pleaded claims subject to the homeowners' agreements to arbitrate?

That question would ordinarily turn on what is alleged in the pleadings. But the original complaint and its later amendments conflate the claims asserted by the association on its own behalf and those asserted by the association on behalf of the homeowners; consequently, we find it necessary to remand for clarification through the filing of an amended complaint.

To explain, we note that the complaint announces at its outset that the association has brought "the claims asserted herein for itself and on behalf of its [m]embers" (emphasis added),[2] an assertion incorporated in all the pleaded counts. Additionally, in claiming the developer misrepresented or omitted material facts contrary to PREDFDA's requirements, the association alleged the developer intended that "[p]laintiff and its [m]embers" would rely on its misstatements and omissions of material facts and, consequently, "[p]laintiff and the [a]ssociation [m]embers . . .

[2] There is no doubt that by "members," the association was referring to the homeowners.

have suffered damages" (emphasis added). In a count asserting violations of PREDFDA's regulations, the association alleged the developer's failure to "fully fund the reserves and deferred maintenance annually resulting in a material underfunding that will financially materially affect the [a]ssociation and [h]ome [o]wners," and among those allegations the association claimed the developer's alleged violations of the regulations caused injury to "the [a]ssociation and [m]embers of the [a]ssociation" (emphasis added). The rest of the allegations in the pleadings are similarly phrased as having been asserted on behalf of both the association and its members. In short, a close and thorough examination of the complaint and its subsequent amendments offers no clear delineation between the claims asserted on behalf of the association itself and those asserted by the association for the homeowners.

Does the conflation of these claims relegate the court with a decision to either compel arbitration of all the claims or none of them? Arbitration, as has often been observed, is a "favored form of relief." See, e.g., Marchak v. Claridge Commons, Inc., 134 N.J. 275, 281 (1993). By the same token, arbitration should not be compelled when it cannot be shown the plaintiff consented to arbitrate its claims. When faced with such a quandary as presented by the association's complaint here, a court need not be left lost

in the confusion created, intentionally or otherwise, by the pleadings. A court should ensure a correct resolution of the arbitrability controversy by compelling the pleader to express its claims with greater specificity.

For this reason, we temporarily set aside the order compelling arbitration and remand the matter so the motion judge may compel the association to file a pleading which separates the claims it has asserted on its own behalf from those it has asserted for the homeowners. Upon the filing of a third amended complaint that adequately responds to these concerns, the judge may compel arbitration of those claims expressly asserted by the association on behalf of its homeowners; the judge may also consider whether the claims the association asserts on its own behalf should in fact be construed as claims asserted on behalf of the homeowners. If, after the completion of those proceedings, the motion judge determines there are not only arbitrable claims but nonarbitrable claims as well, he should determine whether both the arbitrable and nonarbitrable claims may simultaneously proceed in their separate forums, or whether arbitration should precede any further litigation in the trial court, or vice versa. See Hirsch v. Amper Financial Servs., LLC, 215 N.J. 174, 196 n.5 (2013).

The order under review is vacated and the matter remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION