VERANO CONDOMINIUM HOMEOWNERS THE ASSOCIATION, Plaintiff and Respondent,
v.
LA CIMA DEVELOPMENT, LLC, Defendant and Appellant.
D058217
COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE STATE OF CALIFORNIA
Dated: May 8, 2012

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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(Super. Ct. No. 37-2010-00090423-CU-CD-CTL)

APPEAL from an order of the Superior Court of San Diego County, Luis R. Vargas, Judge. Reversed and remanded.

In this case a condominium developer seeks to compel arbitration of construction defect claims brought against it by a homeowners association on behalf of the association itself and its members. The developer relies on arbitration provisions in a declaration of covenants, conditions and restrictions (CC&R's) the developer recorded prior to establishment of the association and on separate purchase agreements which also contained arbitration provisions. We conclude the CC&R's do not constitute an agreement to arbitrate. However, the purchase agreements between the developer and direct, original purchasers which include arbitration provisions are arbitration agreements sufficient to compel arbitration. They bind both the purchasers and the homeowners association when the association acts as a representative of the purchasers.

In light of the recent Supreme Court decision in AT&T Mobility LLC v. Concepcion (2011),563 U.S. ___ [131 S.Ct. 1740], we decline to hold the arbitration clauses unenforceable due to unconscionability.

Accordingly, while we agree with the trial court that no agreement to arbitrate exists between the developer and the homeowners association, nor between the developer and any owner who did not buy a condominium directly from the developer, we reverse and remand the matter to the trial court for further proceedings consistent with our conclusion that claims asserted on behalf of original purchasers are subject to arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant La Cima Development, LLC (La Cima), purchased a 77-building, 521-unit apartment complex in December 2004 and converted the apartments to condominiums, and named the complex Verano. In the course of conversion, La Cima drafted and recorded CC&R's under which plaintiff Verano Condominium Homeowners Association (the Association), a California mutual benefit corporation, came into existence upon the sale of the first condominium. La Cima also transferred ownership of the development's common areas and recreational facilities to the Association to hold in its own right. No consideration was provided by the Association to La Cima, and the Association did not execute any documents in favor of La Cima in connection with the transfer of common areas and facilities. the Association's members include all owners of Verano condominiums.

In pertinent part, the CC&R's contain arbitration clauses which require both individual condominium owners and the Association to resolve any claims they have against La Cima through binding arbitration in accordance with the Federal Arbitration Act (FAA, 9 U.S.C. § 1 et. seq.) and California Arbitration Act (CAA, Code Civ. Proc., § 1280 et. seq.). Specifically, the arbitration clauses state that by accepting a deed to any portion of the property, the Association and any owner agree to waive their rights to jury trial and have any dispute settled by binding arbitration.

In addition to the CC&R's, La Cima required individual condominium purchasers to sign purchase agreements containing similar arbitration clauses. The agreements stated that all disputes with La Cima would be resolved through arbitration, and that owners waived their right to jury trial with respect to any claim they might have against La Cima.

Following their purchase of units, several owners became aware of construction defects both in their own units and in common areas. Under enforcement rights provided by the CC&R's and by statute, the Association sued La Cima as real party in interest with respect to defects to Verano's common areas. the Association also sued La Cima as a class representative on behalf of its member owners for defects which caused damage to individual units.

La Cima moved in superior court to compel arbitration of all the claims asserted by the Association. The trial court denied the motion, finding no agreement to arbitrate between La Cima and the Association existed under the terms of the CC&R's, that the FAA did not apply as La Cima had failed to meet its burden to show development and sale of Verano impacted interstate commerce, and that, in any event, the arbitration agreements in both the CC&R's and purchase agreements were unenforceable due to unconscionability.

La Cima now appeals the trial court's order.

DISCUSSION

I

As the trial court did not consider any disputed extrinsic evidence or resolve any disputed factual issues, we review its order denying La Cima's motion to compel arbitration de novo. (Guiliano v. Inland Empire Personnel, Inc. (2007),149 Cal.App.4th 1276.)

II

The FAA constitutes a federal statutory scheme for the arbitration of disputes that arise under maritime transactions or involve interstate commerce. (See 9 U.S.C. §§ 1-16.) The FAA, properly invoked in an arbitration agreement, preempts any conflicting state law. (Perry v. Thomas (1987),482 U.S. 483, fn. 9 [170 S.Ct. 2520]; Shepard v. Edward Mackay Enterprises Inc. (2007) 148 Cal.App.4th 1092, 1097-1099.) However, the threshold issue of whether a party has entered into an agreement to arbitrate is a question of state law. (See First Options of Chicago, Inc. v. Kaplan (1995),514 U.S. 938; Marsch v. Williams (1994),23 Cal.App.4th 250.) Accordingly, "the FAA does not apply until the existence of an enforceable arbitration agreement is established under state law principles involving formation, revocation and enforcement of contracts generally." (Banner Entertainment, Inc. v. Superior Court (1998),62 Cal.App.4th 348.)

A. La Cima and the Association

As a threshold matter, we conclude the CC&R's are insufficient to form an agreement to arbitrate between La Cima and the Association. Generally, contracts require a mutuality of consent between capable parties. (See Civ. Code, § 1550, subds. (1), (2).)

No evidence exists to show the Association consented to the terms of the CC&R's, either explicitly or implicitly. As a nonprofit mutual benefit corporation required by statute and created solely for a common interest development (Civ. Code § 1353, subd. (a)(1); § 1363, subd. (a)), the Association had no ability to reject the provisions of the CC&R's, nor could it decline to come into existence. Instead, the Association was given title to property in its own right and responsibility for the common areas when La Cima recorded the CC&R's and conveyed the first separate interest in a residential unit coupled with the Association membership. The Association took this responsibility subject to the CC&R's, which were similarly mandated by statute. (Civ. Code § 1353, subd. (a)(1).) The Association did not consent to terms it had no actual power to refuse.

Moreover, the statute requiring CC&R's for common interest development projects, such as Verano, plainly establishes the CC&R's as equitable servitudes enforceable between the Association and member owners, or between individual owners themselves. No language contained in the statute suggests CC&R's were intended by the Legislature to create a continuing contractual relationship between a developer and homeowner's the Association.

Civil Code section 1354 expressly provides: "(a) The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the Association, or by both.

"(b) A governing document other than the declaration may be enforced by the Association against an owner of a separate interest or by an owner of a separate interest against the Association."

The CC&R's La Cima recorded state an intent to benefit individual Verano condominium owners as equitable servitudes consistent with Civil Code section 1354 and provide rights of enforcement only to owners and the Association. Thus, neither La Cima's CC&R's nor section 1354 expresses any intent to benefit La Cima in its capacity as developer of the project, nor grants it enforcement rights over the CC&R's except in its role as owner of unsold units. It follows La Cima's CC&R's, as equitable servitudes, are only valid to protect owners from one another and permit enforcement of its terms by the Association. La Cima relinquished its interests in the land by selling its property and may not assert any rights under the CC&R's following the transfer of its ownership interest.

Limiting enforcement of CC&R's to owners and the Associations which act on behalf of owners is entirely consistent with the cases which have used contract principles to interpret and enforce CC&R's. (See e.g. Citizens for Covenant Compliance v. Anderson (1995),12 Cal.4th 345 [CC&R's need not be referenced nor repeated in each succeeding deed to be enforceable by other owners]; Frances T. v. Village Green Owners Assn. (1986),42 Cal.3d 490 [CC&R's as contract between homeowner and homeowners the Association with respect to installation of common area lighting]; Barrett v. Dawson (1998),61 Cal.App.4th 1048 [CC&R's as contract between neighboring property owners prohibiting use of residential property for business activities]; and Franklin v. Marie Antoinette Condominium Owners Assn. (1993),19 Cal.App.4th 824.) Each of those cases involved disputes either between homeowners or between homeowners and a homeowners the Association. As we noted in B.C.E. Development, Inc. v. Smith (1989),215 Cal.App.3d 1142 (B.C.E.): "Recent times have seen increased development of multi-residential units which are interrelated. Condominium construction introduced the concept of common space dividers, both vertical and horizontal. Open as well as communal space reserved for the common use of tract residents became a typical benefit of developments, both in the form of condominiums and separated dwelling unit tracts. Private internal roads and gated entrances gave rise to the necessity of guards and maintenance personnel for the service of all residents of the development. Regulation of the rights, inter se, of the residents could be achieved, and assured, only by the adoption of highly detailed and specific regulations, imposed on initial buyers and successors in interest alike by the use of recorded mutual agreements. . . . [¶] . . . Typically, the interest in enforcing restrictions will be common to most, if not all, members of the community. Requiring individual landowners to shoulder the burden of enforcement litigation would be unreasonable. The administration of the common areas in the development is typically

allocated to a homeowners the Association, or to some other entity constituted to represent all of the owners. Often at the inception of the development the enforcement entity is created and controlled by the developer of the project. It is highly reasonable in these circumstances that the representative the Association or other central agency undertake, on behalf of all homeowners, such litigation as may be required to enforce the CC&R'."[1]

In this regard, our holding in Kelly v. Tri-Cities Broadcasting, Inc. (1983),147 Cal.App.3d 666 (Kelly), is instructive. In Kelly we held a rental arbitration provision in a lease only bound an assignee of the initial lessee while the assignee was a tenant. We found the agreement to arbitrate in the lease was a covenant which ran with the land because it concerned rent and therefore was a covenant whichtouches and concerns" the land.' " (Id. at p. 679.) However, we further noted the inherent limitation on the enforceability of covenants running with the land: "This rule is based upon privity of estate, not privity of contract. When the privity of estate no longer exists, those covenants running with the land, based upon that privity, are no longer enforceable. Thus the covenant to arbitrate is binding upon a nonassuming assignee only as to matters arising during the term or period that the assignee was bound by privity of estate. No authorities predict an agreement to arbitrate could be stretched to require arbitration of a claim for rent due after the premises had been abandoned, after the privity of the estate has been broken." (Ibid.; see also Melchor Investment Co. v. Rolm Systems (1992),3 Cal.App.4th 587.)

The use of CC&R's as a means of providing contractual rights to parties with no interest in or responsibility for a common interest development is also problematic from the standpoint of determining what, if any, consideration would support such third party agreements. By their terms the CC&R's bind all successors, even those with whom a third party such as La Cima has never had any contractual relationship and to whom La Cima has not provided any consideration.

In light of the foregoing, we do not believe that in providing in Civil Code section 1354 that CC&R's be treated as equitable servitudes the Legislature intended that CC&R's would be used to provide continuing and irrevocable contractual benefits to entities such as La Cima, which have no continuing interest in a development or role as a representative of the owners of the development.

B. La Cima and Successors in Interest

For the foregoing reasons, we find no agreement in the CC&R's between La Cima and owners who did not purchase units directly from La Cima. These subsequent purchasers never contracted with La Cima for their units, but instead entered into purchase agreements with former owners. The consequence of this chain of title is that no meeting of the minds between La Cima and these later purchasers and their successors occurred. (See Treo @ Kettner Homeowners Assn. v. Superior Court (2008),166 Cal.App.4th 1055.)

C. La Cima and Original Purchasers

Unlike the Association and subsequent purchasers, owners who bought units directly from La Cima executed purchase agreements with the developer that are binding, valid contracts. Those purchase agreements contained arbitration clauses separate from those found within the CC&R's, and the owners had the power to directly negotiate with La Cima over its terms. While the CC&R's do not create valid contractual rights in favor of La Cima, the separate purchase contracts contain an agreement to arbitrate that is valid and enforceable under state law.

III

We agree with La Cima that any valid agreement between it and a direct purchaser, would be covered by the FAA. An agreement to arbitrate is covered by the FAA when the underlying transaction "in fact . . . involved interstate commerce." (Allied-Bruce Terminix Companies, Inc. v. Dobson (1995),513 U.S. 265 [115 S.Ct. 834].) Here, La Cima's development project was clearly intimately enmeshed with interstate commerce. Verano was a large housing development with hundreds of units sold by a Delaware company. The construction and conversion of those units into saleable condominiums was performed by contractors headquartered across the United States. Moreover, the financing necessary for both construction and individual purchases of the condominium units undoubtedly occurred through federally regulated and chartered financial institutions with long-recognized substantial effects on interstate commerce. In the aggregate, the economic activity manifest in the La Cima development project concerned raw materials, business goods, and retail and commercial finance instruments from all corners of the nation, representing a "general practice" clearly entwined with "interstate commerce in a substantial way." (Citizens Bank v. Alafabco, Inc. (2003),539 U.S. 52 [123 S.Ct. 2037].)

We also agree with La Cima that an agreement to arbitrate under the FAA would preclude the application of conflicting state law, including limitations on the use of arbitration in construction defect cases. (Shepard v. Edward Mackay Enterprises Inc., supra, 148 Cal.App.4th 1092, 1097-1101.) Specifically, states are forbidden from treating arbitration provisions differently than the remainders of the contracts in which they appear. "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent." (Allied-Bruce Terminix Companies, Inc. v. Dobson, supra, 513 U.S. at p. 281.) Even a state constitutional standard, such as the jury waiver provision requirements of the California Constitution, cannot be used to circumvent the FAA in the face of an otherwise valid arbitration agreement.

Thus, the FAA applies to the purchase agreements between La Cima and direct, original purchasers.

IV

We turn now to the issue of unconscionability. The "saving clause" of the FAA statute, 9 U.S.C. section 2, permits "agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (AT&T Mobility LLC v. Concepcion, supra, 563 U.S. ___ [131 S. Ct. at p. 1746], quoting Doctor's Associates, Inc. v. Casarotto (1996),517 U.S. 681 [116 S. Ct. 1652]; 9 U.S.C § 2.)

Our courts have frequently invalidated arbitration agreements for unconscionability, relying on the statutory power to refuse to enforce any contract found "to have been unconscionable at the time it was made." (Civ. Code, § 1670.5, subd. (a).) The doctrine of unconscionability requires both procedural and substantive elements. The former focuses "on ' "oppression" ' or ' "surprise" ' due to unequal bargaining power, the latter on ' "overly harsh" ' or ' "one-sided" ' results." (Armendariz v. Foundation Health Psychcare Services, Inc. (2000),24 Cal.4th 83.)

Our Supreme Court applied this framework to class-action waivers in Discover Bank v. Superior Court (2005),36 Cal.4th 148 (Discover Bank), holding "[s]uch one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable" and should not be enforced. (Discover Bank, supra, 36 Cal. at p. 161.)

However, the United States Supreme Court recently overruled Discover Bank. The court stated that while "§ 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (Concepcion, supra, 131 S. Ct. at p. 1748.) In doing so, the court severely limited the application of such state law rules, including unconscionability, as defenses to enforcement of arbitration agreements. Concepcion recognizes not only that established state law prohibiting arbitration of some claims is "displaced by the FAA," but that "a doctrine normally thought to be generally applicable, such as . . . unconscionability . . . applied in a fashion that disfavors arbitration," is similarly subject to preemption. (Concepcion, supra, 131 S. Ct. at p. 1747.)

Although Concepcion's holding is limited to the class-action waivers covered by the Discover Bank rule, the reasoning in Concepcion clearly applies to other impediments to arbitration. The opinion sets forth several examples other than class-action waivers under which a court may attempt to dispose of arbitration agreements on unconscionability grounds: failure to comport with federal evidence guidelines, or discovery rules, or disallowance of an ultimate disposition by a jury. (Concepcion, supra, 131 S.Ct. at p. 1747.) It concludes that all are insufficient to avoid application of the FAA, and expressly forestalls any rationale which limits its holding to class-action waivers: "And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it

is applicable to 'any' contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements. . . ." (Ibid.)[2]

Concepcion similarly disapproves reliance on adhesion as grounds to strike arbitration clauses for unconscionability, pointing out "the times in which consumer contracts were anything other than adhesive are long past." (Concepcion, supra, 131 S. Ct. at p. 1750, fn. omitted; Carbajal v. H&R Block Tax Servs., Inc. (7th Cir. 2004) 372 F.3d 903, 906.)

In the case at bar, the trial court denied La Cima's motion to compel arbitration in part based its conclusion the arbitration clause was unconscionable. Specifically, the trial court looked to the adhesive nature of both the CC&R's and the individual purchase contracts signed by Verano owners, as well as the waiver of jury rights inherent in both. Under Concepcion, these circumstances will not support a finding of unconscionability because they plainly create a disproportionate burden on arbitration clauses in consumer agreements.

Thus, on this record the arbitration agreements set forth in the purchase agreements are not subject to an unconscionability defense.

V

Our analysis leaves us with three classes of claims:

Claims the Association raises on its own behalf for defects to common areas deeded to it by La Cima, which are not subject to any valid agreement to arbitrate.

Claims the Association raises in its role as class representative for owners who did not purchase units directly from La Cima with respect to defects in those individual units, which are similarly not subject to a valid arbitration agreement.

Claims the Association raises in its role as class representative for owners who purchased units directly from La Cima with respect to defects in those individual units. The assignment of rights the Association took on behalf of original owners subjects it to the terms of the purchase contracts. Our law is well settled on the matter. "An assignee stands in the shoes of the assignor, acquiring all of its rights and liabilities." (Professional Collection Consultants v. Hanada (1997),53 Cal.App.4th 1016; Royal Bank Export Finance Co. v. Bestways Distributing Co. (1991),229 Cal.App.3d 764; F.D.I.C. v. Bledsoe (1993),989 F.2d 805; see also U.S. v. Thornburg (1996),82 F.3d 886; Remington Investments, Inc. v. Kadenacy (1996),930 F. Supp. 446; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 948, p. 844.) Because the purchase contracts contained a valid agreement to arbitrate any in-unit defect claims original owners might raise, the Association must submit claims made on behalf of direct purchasers to arbitration. Accordingly, the trial court must segregate those claims from the remainder, and grant La Cima's motion to compel arbitration of those claims only.

DISPOSITION

The order is reversed and remanded with instructions to conduct proceedings consistent with the views we have expressed.

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BENKE, Acting P. J.

WE CONCUR:

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McDONALD, J.

_____
AARON, J.

Notes:

[1.] In B.C.E. we held that a developer, as the declarant which recorded CC&R's, could reserve the power to enforce the CC&R's, notwithstanding the fact the developer no longer had any interest in the development. However, the CC&R's we considered in B.C.E. were recorded in 1968 and concerned a subdivision of separate parcels. The B.C.E. CC&R's were not subject to the current version of Civil Code section 1354 or its statutory predecessor. (See Stats. 1963, ch. 860.) Importantly, in finding that the developer could enforce the CC&R's, we found the developer, which was attempting to enforce architectural restrictions, was acting not in its own interest, but as the only logical representative of all the property owners in the development. (B.C.E., supra, 215 Cal.App.3d at pp. 1149-1150.) Here, La Cima is acting solely in its own pecuniary interest and not as the representative of anyone with any existing interest in the development. In this case the enforcement role we endorsed in B.C.E. is being filled by The Association under the terms of Civil Code section 1354.

[2.] In Sanchez v. Valencia Holding Co., LLC (2011),201 Cal.App.4th 74 (Sanchez) the Second District interpreted Concepcion narrowly, holding it "inapplicable where, as here, we are not addressing the enforceability of a class action waiver or a judicially imposed procedure that is inconsistent with the arbitration provision and the purposes of the Federal Arbitration Act." (Id. at p. 89.) The Supreme Court granted review in Sanchez on March 21, 2012.
