

JACQUETTA TILLMAN et al., Plaintiffs and Appellants,
v.
K. HOVNANIAN COMMUNITIES, INC., Defendant and Respondent.
VALORIE ALBA-KELLY et al., Plaintiffs and Appellants,
v.
K. HOVNANIAN et al., Defendants and Respondents.
E052173
E053369
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE
DISTRICT DIVISION TWO
Dated: August 14, 2012

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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(Super.Ct.No. CIVVS905907)

OPINION

APPEAL from the Superior Court of San Bernardino County. Steve Malone, Judge. Reversed.

Milstein Adelman, Fred M. Adelman, Mayo L. Makarczyk and Sarah L. Gough for Plaintiffs and Appellants.

Wood, Smith, Henning & Berman, Samuel L. McDermott, Donia A. Royster and John O. Liu for Defendants and Respondents.

I
INTRODUCTION

This appeal follows from an order, and a judgment of dismissal without prejudice, of an action for construction defects brought by 103 homeowners. The issues on appeal involve the prelitigation procedures set forth in the Right to Repair Act, Civil Code sections 895 through 945.5,¹ which was enacted in 2002 as Senate Bill No. 800 (SB800). (Baeza v. Superior Court (2011), 201 Cal.App.4th 1214 (Baeza); Anders v. Superior Court (2011), 192 Cal.App.4th 579.)

Plaintiffs argue the trial court erred as a matter of law in dismissing their action rather than granting a stay as provided in section 930, subdivision (b), of SB800. Plaintiffs also argue that defendants' election, pursuant to section 914, to use a limited warranty as an alternative contractual nonadversarial procedure, is unenforceable and,

consequently, the remaining prelitigation procedures of Chapter 4 of SB800, section 910 through section 938, do not apply to plaintiffs' claims against defendants.

Defendants counter that the trial court did not abuse its discretion in dismissing plaintiffs' action without prejudice because plaintiffs were required to comply with the limited warranty before proceeding with a court action.

We conclude that the trial court should have stayed, but not dismissed, the instant action, pending the outcome of defendants' alternative contractual nonadversarial procedure. (§§ 914, 930.) At present, we decline to decide the issues of the validity or enforceability of defendants' limited warranty or the applicability of the remaining provisions of sections 910 through 938 because the issues are not yet ripe for review. (Shaw v. County of Santa Cruz (2008), 170 Cal.App.4th 229, citing Palermo v. Stockton Theatres, Inc. (1948), 32 Cal.2d 53.)

We reverse the judgment and direct the trial court to enter an order staying plaintiffs' action pursuant to sections 914 and 930.

II FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, a group of Victorville homeowners, filed a first amended complaint (FAC) in November 2009, seeking damages for construction defects, including violations of building standards set forth in section 896, specifically water, structural, soil, fire protection, plumbing and sewer, electrical, and other construction issues.

Defendants answered the complaint and filed a cross-complaint against other parties.

In April 2010, defendants filed a motion to dismiss or stay the FAC as to 82 plaintiffs on the grounds that plaintiffs who purchased a house after January 1, 2003, were subject to the prelitigation procedures of SB800. Pursuant to section 914, defendants had elected to use an alternative contractual nonadversarial procedure as set forth in the "Home Builder's Limited Warranty" program. The limited warranty required the homeowners to give written notice of defects and to allow the builder an opportunity for repair or replacement. Disputes were subject to mediation, binding arbitration, and judicial reference.

In April 2010, plaintiffs filed a second amended complaint (SAC), adding additional plaintiffs and challenging defendants' compliance with the prelitigation procedures set forth in sections 910 through 938.

Defendants assert the subject 103 residences were sold under purchase agreements that were executed by homeowners on or after January 1, 2003. The purchase agreements include the limited warranty, which sets forth procedures for resolving construction defect claims: "These procedures were publicly recorded in San Bernardino County to ensure proper notification to second generation purchasers. Specifically, at the time each home was originally sold, a grant deed was recorded

which included an attachment that advised subsequent purchasers that K. Hovnanian had elected, pursuant to Civil Code, § 914, to use its own alternative nonadversarial contractual provisions in lieu of the statutory provisions of SB800."

Plaintiffs opposed defendants' motion to dismiss or stay the action, asserting that defendants had not complied with statutory prelitigation procedures and with sections 896, 901, 912, 914, and 944.

The court granted the motion to dismiss without prejudice as to the 82 plaintiffs in the FAC. In November 2010, defendants brought a second motion to dismiss, directed at 21 additional plaintiffs in the SAC. The court again granted the motion to dismiss the action.

III

THE RIGHT TO REPAIR ACT

A. The Standard of Review

The parties disagree about the standard of review. Plaintiffs assert the appellate court conducts an independent review. Defendants maintain the standard of review is abuse of discretion. Because our decision is based primarily on undisputed facts and our interpretation of statutes, we use an independent standard of review. (Baeza, *supra*, 201 Cal.App.4th at p. 1222.)

B. The Prelitigation Procedures

Two recent cases—Baeza and Greystone Homes, Inc. v. Midtec, Inc. (2008), 168 Cal.App.4th 1194—have described the procedures of the Right to Repair Act, which provides two types of nonadversarial prelitigation procedures—statutory and contractual. Section 896 "establishes a set of standards for residential construction, and provides tort liability for entities that fail to meet [construction] standards. (§ 896.) Section 896 provides in relevant part:

"In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder, and to the extent set forth in Chapter 4 (commencing with Section 910), a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional, shall, except as specifically set forth in this title, be liable for, and the claimant's . . . claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title.' [¶] . . . [¶]

"Chapter 4 of the Act, beginning with section 910, establishes a series of prelitigation procedures that a claimant must pursue before filing an action against 'any party alleged to have contributed to a violation of the standard.' These procedures include a requirement that the claimant provide notice of claim 'to the builder.' [Citation.] The builder may elect to respond to the claim by inspecting the alleged violation (§ 916), offering to repair it (§ 917), and either repairing the violation, or arranging for a repair to

be done (§§ 918, 921). If the builder fails to respond to the claim, or otherwise fails to comply with the requirements of the Act's prelitigation procedures, the claimant may bring an action for a violation of the Act's standards without further resort to the prelitigation procedures. (§§ 915, 920.) A claimant may also file an action for a violation of the Act's standards alleging an inadequate repair. (§ 927.)" (Greystone Homes, Inc. v. Midtec, Inc., supra, 168 Cal.App.4th at pp. 1210-1211.)

Baeza explained the alternative contractual nonadversarial prelitigation procedure as follows:

"Under the statutory scheme, the builder has the option of contracting for an alternative nonadversarial prelitigation procedure, in lieu of the procedure set out in Chapter 4, at the time of the initial sale of the home. Section 914, subdivision (a), provides:

"This chapter establishes a nonadversarial procedure, including the remedies available under this chapter which, if the procedure does not resolve the dispute between the parties, may result in a subsequent action to enforce the other chapters of this title. A builder may attempt to commence nonadversarial contractual provisions other than the nonadversarial procedures and remedies set forth in this chapter, but may not, in addition to its own nonadversarial contractual provisions, require adherence to the nonadversarial procedures and remedies set forth in this chapter, regardless of whether the builder's own alternative nonadversarial contractual provisions are successful in resolving the dispute or ultimately deemed enforceable.'

"At the time the sales agreement is executed, the builder shall notify the homeowner whether the builder intends to engage in the nonadversarial procedure of this section or attempt to enforce alternative nonadversarial contractual provisions. If the builder elects to use alternative nonadversarial contractual provisions in lieu of this chapter, the election is binding, regardless of whether the builder's alternative nonadversarial contractual provisions are successful in resolving the ultimate dispute or are ultimately deemed enforceable.' (§ 914, subd. (a).)

"Chapter 4 contains no specifics regarding what provisions the alternative nonadversarial contractual provisions may or must include." (Baeza, supra, 201 Cal.App.4th at pp. 1223-1224.)

C. The Limited Warranty

Defendants elected to use alternative contractual prelitigation procedures by means of the builder's limited warranty. The cover page of the limited warranty states as follows:

"This LIMITED WARRANTY contains the procedures YOU must use to notify US of a condition in YOUR HOME In the event a condition occurs in the HOME . . . that YOU believe may constitute a CONSTRUCTION DEFECT, YOU agree to submit any request for warranty performance under this LIMITED WARRANTY."

The limited warranty procedure requires a homeowner to give written notice and to cooperate in "inspecting, investigating, testing (including destructive testing), monitoring, repairing, replacing or otherwise correcting an alleged CONSTRUCTION DEFECT." The limited warranty also provided for mediation and binding arbitration.

Plaintiffs admit they did not comply with the limited warranty because they challenge its validity and enforceability. Plaintiffs also did not give defendants' notice of their claims and afford an opportunity for repair and replacement as provided by the alternative statutory procedures. Instead, plaintiffs filed the present action for violation of building standards set forth in section 896, asserting that defendants were not in compliance with the Right to Repair Act. Plaintiffs' action was premature under sections 914 and 930 as discussed below.

D. The Contractual Nonadversarial Procedure

A builder may choose either statutory or contractual procedures but not both. Because defendants elected to use the limited warranty as alternative to the statutory prelitigation procedures, the latter were not applicable. Section 914 essentially allows a builder to draft an alternative prelitigation procedure, in lieu of the other prelitigation procedures set forth in Chapter 4. The language of section 914 confirms this intent: "A builder may attempt to commence nonadversarial contractual provisions other than the nonadversarial procedures and remedies set forth in this chapter, . . ." (§ 914, subd. (a)). The use of an alternative contractual prelitigation procedure relieves a builder from having to comply with SB800's Chapter 4 prelitigation requirements: "[Builder] contends section 912 is part of Chapter 4 and, as permitted by section 914, it elected not to use the Chapter 4 procedures in those of its contracts in which it opted to use its own contractual nonadversarial prelitigation procedure; therefore, none of Chapter 4, including section 912, applied to those contracts, and any failure to comply with section 912's disclosure provisions does not prevent [the builder] from enforcing its contractual nonadversarial prelitigation procedures. We conclude a builder who opts out of the Chapter 4 nonadversarial statutory prelitigation procedures in favor of its own contractual procedures opts out of the entirety of Chapter 4, . . ." (Baeza, supra, 201 Cal.App.4th at pp. 1225-1226.)

Contrary to the position advocated by plaintiffs that they are entitled to a judicial determination of enforceability before complying with the limited warranty, the Right to Repair Act contemplates that a civil action will not be filed until after the contractual procedures have been followed. As set forth in section 927: "If the builder elects to attempt to enforce its own nonadversarial procedure in lieu of the procedure set forth in this chapter, the time period for filing a complaint or other legal remedies for violation of any provision of this part is extended from the time of the original claim by the claimant to 100 days after either the completion of the builder's alternative nonadversarial procedure, or 100 days after the builder's alternative nonadversarial procedure is deemed unenforceable, whichever is later." As set forth in section 930, subdivision (b), if a claimant does not comply with the requirements of Chapter 4, the builder may seek a stay: "b) If the claimant does not conform with the requirements of this chapter, the

builder may bring a motion to stay any subsequent court action or other proceeding until the requirements of this chapter have been satisfied."

In the present case, defendants elected to use the limited warranty as a substitute for the statutory prelitigation procedures. Plaintiffs should not have filed their complaint until a date within 100 days after either the completion of the limited warranty's procedures or after the limited warranty had been deemed unenforceable, whichever comes later. Because plaintiffs did not comply with section 927, defendants could seek a stay of the court action under section 930. (Baeza, *supra*, 201 Cal.App.4th at p. 1220.)

E. Validity and Enforceability of the Limited Warranty

We recognize that plaintiffs might prefer to circumvent the Right to Repair Act— and its limitation to reasonable damages. (§ 944.) Plaintiffs urge that this court preemptively declare the limited warranty unenforceable, rendering the remainder of the act inapplicable to plaintiffs' claims and permitting them to proceed with their civil action.

We choose instead to follow the example of our sister court, the Fifth District Court of Appeal, in Baeza, a very similar case. In Baeza, 33 homeowners sued a developer for construction defects. The developer moved to compel the owners to comply with contractual provisions for nonadversarial prelitigation procedures, including mediation, and judicial reference. The homeowners argued the contractual procedures were unenforceable because of nondisclosures under section 912 and limitations on damages. (Baeza, *supra*, 201 Cal.App.4th at pp. 1219-1220.) The trial court ordered the action stayed to permit compliance. (*Id.* at p. 1220.)

The appellate court concluded that section 912 does not apply to contractual procedures (Baeza, *supra*, 201 Cal.App.4th at pp. 1224-1228) and that "the contractual damages limitation does not invalidate the entire contract or the entire contractual nonadversarial prelitigation procedure." (*Id.* at p. 1229.) Baeza held a builder's election to use its own alternative nonadversarial contractual provision is enforceable even if it includes a limitation on damages. Baeza stated that "[t]he central purpose of the contracts between [the homeowners] and [the builder] was the sale and purchase of real property," (*id.* at p. 1230) as well as procedures "designed to resolve disputes between the parties without resort to litigation." (*Id.* at P. 1231.) The court found that "[t]hese dispute resolution provisions serve a lawful purpose;" (*ibid.*) thus, the builder's alternative nonadversarial contractual provision is valid and enforceable. The court went on to explain that the limitation on recoverable damages was "collateral to the main purpose of the contract, and may be severed from it without interfering with enforcement of the lawful provisions of the contract." (*Ibid.*) Although the court did not make a determination as to the legality or enforceability of the contractual limitation on damages, it held that the builder's alternative nonadversarial contractual provision was both legal and enforceable. The court further explained that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract [sic] is void as to the latter and valid as to the rest." (*Id.* at p. 1230, quoting § 1599.) Since the court found the builder's alternative nonadversarial

contractual provision to be lawful, it expressly rejected the homeowners' arguments that the entire nonadversarial contractual provision was unenforceable.

Baeza acknowledged that "[t]he contracts contain severability clauses, providing: 'If any provision of this Agreement shall be held to be invalid, illegal or unenforceable, the validity of other provisions of this Agreement shall in no way be affected thereby.' These clauses evidence the parties' intent that, to the extent possible, the valid provisions of the contracts be given effect, even if some provision is found to be invalid or unlawful." (Baeza, *supra*, 201 Cal.App.4th at p. 1230.)

The Baeza court was careful not to rule expressly on the validity or enforceability of the builder's contractual procedures. Instead, Baeza framed its decision in conditional language, referring to the "asserted failure to strictly comply with section 912" and "[a]ssuming, without deciding, that petitioners' interpretation is correct" regarding the limitations on damages. (Baeza, *supra*, 201 Cal.App.4th at pp. 1228 and 1229.)

Plaintiffs in the present case also challenge the validity and enforceability of the limited warranty based on the purported failure to disclose under section 912 and the purported limitation on damages, as well as other related aspects of the limited warranty. The limited warranty in this case also contains an explicit severability clause, which states: "If any provision of this LIMITED WARRANTY is determined to be unenforceable, such a determination will not affect the remaining provisions. If this LIMITED WARRANTY or any provision herein is determined to be unenforceable as to a HOMEOWNERS ASSOCIATION or a specific HOMEOWNER, such a determination will not affect the enforceability of this LIMITED WARRANTY or such provision as to any other HOMEOWNERS ASSOCIATION or any other HOMEOWNER."

SB800 requires that, before bringing a lawsuit, plaintiffs must attempt to resolve their construction defect claims pursuant to prelitigation procedures outlined in SB800, or set forth in a builder's own contractual prelitigation procedures under section 914. The trial court found that plaintiffs "have not provided notice" to defendants. Even conceding there could be merit in plaintiffs' arguments, we decline to resolve issues about validity and enforceability. Any such determination should be made only after the parties have participated in and completed the limited warranty procedures or the alternative contractual nonadversarial procedure has been deemed unenforceable in its entirety and the lawsuit, now stayed, has been concluded.

IV DISPOSITION

We reverse the trial court's order and judgment dismissing the action without prejudice and direct the trial court to enter an order staying plaintiffs' action pursuant to sections 914 and 930. In the interests of justice, the parties shall bear their own costs on appeal.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.

Notes:

¹ All statutory references are to the Civil Code unless stated otherwise.
