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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RITA HUGHES et al.,

Plaintiffs and Respondents,

v.

SHAPELL INDUSTRIES, INC. et al.,

Defendants and Appellants.

B229042

(Los Angeles County
Super. Ct. No. BC442034)

APPEAL from an order of the Superior Court of Los Angeles County, Susan Bryant-Deason, Judge. Affirmed.

Lorber, Greenfield & Polito, Joyia Z. Greenfield and Erin K. Clancy; Luce, Forward, Hamilton & Scripps, Kathleen F. Carpenter and Dee A. Ware, for Defendants and Appellants.

Milstein Adelman, Fred M. Adelman, Mayo L. Makarczk and Raquel A. Flaherty for Plaintiffs and Respondents.

I. INTRODUCTION

Defendants, Shapell Industries, Inc. and Porter Ranch Development Company, built and sold homes to plaintiffs, Antonio and Venicia Avila, Angel and Maria Blanca, Prasong and Wanna Kotrasa, and Nuzhat Nafees. Defendants filed a cross-complaint against plaintiffs. Defendants appeal from the October 20, 2010 order granting plaintiffs' special motion to strike the contract breach and declaratory relief causes of action from their cross-complaint. Defendants argue their contract breach and declaratory relief claims of action do not arise from plaintiffs' exercise of enumerated rights in Code of Civil Procedure section 425.16, subdivision (e).¹ Defendants also contend they met their burden of establishing a probability that they will prevail on the merits of their contract breach and declaratory relief claims. We disagree and affirm the order granting plaintiffs special motion.

II. BACKGROUND

A. Pleadings

On July 20, 2010, plaintiffs along with other homeowners, who are owners of 22 homes located in the Porter Ranch Development built by defendants, filed a complaint. The complaint alleged causes of action for: strict products liability; violation of building standards under Civil Code section 896; implied warranty of merchantability breach; negligence; and express warranty breach. Of the 22 homes, 15 were purchased from defendants after January 1, 2003, and thus are subject to Civil Code section 895 et seq. The remaining seven homes were purchased before 2003 and thus are not subject to Civil Code section 895 et seq.

¹ Unless otherwise indicated all future statutory references are to the Code of Civil Procedure.

On August 20, 2010, defendants answered the complaint. In addition, defendants filed a cross-complaint against only those plaintiffs who were original buyers and entered into purchase agreements with defendants. Defendants also sued certain subcontractors. Of the 17 causes of action asserted by defendants in the cross-complaint, three were against plaintiffs who are the subject of this appeal for contract breach and declaratory relief. Defendants alleged plaintiffs failed to comply with certain purchase agreement provisions. The provisions at issue required plaintiffs to submit their claims to a pre-litigation inspection-and-repair process and then to final determination through judicial reference. For its two causes of action for contract breach, defendants sought damages for: costs; consultants' fees; attorneys' fees; and other litigation fees. The reimbursement involved fees and costs incurred during the defense of the complaint and the prosecution of the cross-complaint. As for its cause of action for declaratory relief, defendants allege: "A dispute has arisen and an actual controversy now exists between Cross-Complainants and Cross-Defendants, . . . in that Cross-Complainants contend that Cross-Defendants were required to provide Cross-Complainants with notice and the opportunity to cure all alleged defects . . . prior to filing the ACTION, while Cross-Defendants, and each of them, deny such obligations. [¶] A dispute has arisen and an actual controversy now exists between Cross-Complainants and Cross-Defendants, . . . in that Cross-Complainants contend that Cross-Defendants were required to submit all issues, whether of fact or law, to general judicial reference rather than filing and proceeding with the ACTION . . . while Cross-Defendants, and each of them, deny such obligations." The cross-complaint continues, "Cross-complainants desire a judicial determination of their respective rights and said Cross-Defendants' duties in connection with the matter herein alleged, and specifically, with regard to . . . the Purchase Agreements, and a judgment in Cross-Complainants' favor, as to any obligations by said Cross-Defendants, and each of them, to Cross-Complainants herein."

B. Purchase Agreements

Defendants developed and sold single-family houses to plaintiffs at the Porter Ranch Development in Los Angeles County. There were two form purchase agreements. The first purchase agreement form was used prior to 2003. The other form purchase agreement was used after 2003. Defendants acknowledge the purchase agreements used at the Porter Ranch development were identical except for: the homebuyer's personal information; lot information; upgrades specified by each homeowner; and other slight modifications including the "'Notice and Opportunity to Cure' provision, post-2003."

Prior to 2003, the purchase agreement contains the following pre-litigation provision: "Notice and Opportunity to Cure. If at any time during Buyer's ownership of the Property, Buyer discovers a material structural [or] other defect in the Property or Residence that Buyer feels may be the responsibility of Seller ("Defect"), Buyer shall notify Seller in writing. Such notice shall include: (a) a description of the Defect, (b) the date upon which the Defect was discovered, and (c) dates and times when Buyer or Buyer's agent will be home during ordinary business hours so that service calls or inspections by Seller can be scheduled. Seller shall, in its sole discretion, be entitled to inspect the Property regarding the Defect and within its sole discretion, be entitled to cure such Defect. Nothing set forth herein shall obligate Seller to perform any inspection or repair nor shall this paragraph be deemed to increase Seller's legal obligations to Buyer. Buyer shall not pursue any other remedies available to it under this Agreement, at law or otherwise, including without limitation the filing of any lawsuit or action, until Seller has had a reasonable opportunity to inspect and cure the alleged Defect. During the period of such inspection and cure (but not to exceed the earlier to occur of (i) ninety (90) days from the date of Seller's receipt of Buyer's notice described above, or (ii) Seller's delivery of written notice to Buyer or Seller's determination not to proceed with such cure), all applicable statutes of limitations shall be tolled. During the term of any written Limited Warranty provided to Buyer by Seller, any conflict between the provisions of this paragraph and the Limited Warranty shall be resolved in favor of the Limited Warranty. Seller shall not be liable for any general, special or consequential damage, cost, diminution in value or other loss which Buyer may suffer as a result of any Defect

in the Property, which reasonably might have been avoided had Buyer given to Seller the notice and opportunity to cure described above. Except as otherwise provided in the written Limited Warranty provided Buyer, the provisions of this paragraph do not establish any contractual duty or obligation on the part of Seller to repair, replace or cure any defect in the Property. Buyer's covenants until this paragraph shall survive the Close of Escrow."

The pre-2003 purchase agreement requires the parties to submit disputes to a general referee: "Judicial Reference of Disputes. If Buyer commences a lawsuit against Seller and/or its officers, directors, contractors, subcontractors, design professionals, consultants, agents or representatives relating to the condition, design, or construction of any portion of the Property or Project, all the issues in such action, whether [of] fact or law, shall be submitted to general judicial reference pursuant to California Code of Civil Procedure Section 638(1) and 641-645 or any successor statutes thereto. Buyer and Seller shall cooperate in good faith to ensure that all necessary and appropriate parties are included in the judicial reference proceeding. The parties to the dispute shall share equally in the fees and costs of the referee, unless the referee orders otherwise, but shall be responsible for their own attorneys' fees. The general referee shall have authority to try all issues, whether of fact or law, and to report a statement of decision to the court. The Parties shall use the procedures adopted by Judicial Arbitration and Mediation Services ('JAMS') for judicial reference (or any other entity offering judicial reference dispute resolution procedures as may be mutually acceptable to the parties), provided that the following rules and procedures shall apply in all cases unless the parties agree otherwise: (1) the proceedings shall be heard in the county in which the Project is located; (2) the referee may be a retired judge or a licensed attorney with substantial experience in relevant real estate matters; (3) any dispute regarding the selection of the referee shall be resolved by JAMs or the entity providing the reference service, or, if no entity is involved, by the court with appropriate jurisdiction; (4) the referee may require one or more pre-hearing conferences; (5) the parties shall be entitled to discovery, and the referee shall oversee discovery and may enforce all discovery orders in the same manner

as any trial court judge; (6) a stenographic record of the trial shall be made, provided that the record shall remain confidential except as may be necessary for post-hearing motions and any appeals; (7) the referee's statement of decision shall contain findings of fact and conclusions of law to the extent applicable; and (8) the referee shall have the authority to rule on all post-hearing motions in the same manner as a trial judge. The statement of decision of the referee upon all of the issues considered by the referee is binding upon the Parties, and upon filing of the statement of the decision with the clerk of the court, or with the judge where there is no clerk, judgment may be entered thereon. The decision of the referee shall be appealable as if rendered by the court. This provision shall in no way be construed to limit any valid cause of action which may be brought by any of the Parties. [¶] BY INITIALING BELOW, BUYER ACKNOWLEDGES THAT IT HAS READ AND UNDERSTAND THE FOREGOING AND ACCPETS THAT BUYER IS WAIVING ITS RIGHTS TO A JURY TRIAL."

After 2003, the purchase agreement contains the following pre-litigation provision: "Notice and Opportunity to Cure. By addendum attached hereto Seller has elected not to use the Non-Adversarial Procedures under Senate Bill 800 (California Code of Civil Procedure Section 896, et seq.) to resolve claims between Buyer and Seller regarding the construction of the Residence ('Claims'). In lieu of the SB 800 procedure Seller has elected to adopt alternative non-adversarial procedures to resolve the Claims which include, without limitation the following: If at any time during Buyer's ownership of the Property, Buyer discovers a material structural or other defect in the Property or Residence that Buyer feels may be the responsibility of Seller ('Defect'), Buyer shall notify Seller in writing. Such notice shall include: (a) a description of the Defect, (b) the date upon which the Defect was discovered, and (c) dates and times when Buyer or Buyer's agent will be home during ordinary business hours so that service calls or inspections by Seller can be scheduled. Seller shall, in its sole discretion, be entitled to inspect the Property regarding the Defect and within its sole discretion, be entitled to cure such Defect. Nothing set forth herein shall obligate Seller to perform any inspection or repair nor shall this paragraph be deemed to increase Seller's legal obligations to the

Buyer. Buyer shall not pursue any other remedies available to it under this Agreement, at law or otherwise, including without limitation the filing of any lawsuit or action, until Seller has had the reasonable opportunity to inspect and cure the alleged Defect. During the period of such inspection and cure (but not to exceed the earlier to occur of (i) ninety (90) days from the date of Seller's receipt of Buyer's notice described above, or (ii) Seller's delivery of written notice to Buyer of Seller's determination not to proceed with such cure), all applicable statute of limitations shall be tolled. During the term of any Fit and Finish Warranty provided to Buyer by Seller, any conflict between the provisions of this paragraph and the Fit and Finish Warranty shall be resolved in favor of the Fit and Finish Warranty. Seller shall not be liable for any general, special or consequential damage, cost, diminution in value or other loss which Buyer may suffer as a result of any Defect in the Property, which reasonably might have been avoided had Buyer given to Seller the notice and opportunity to cure described above. Except as otherwise provided in the written Fit and Finish Warranty provided Buyer, the provisions of this paragraph do not establish any contractual duty or obligation on the part of the Seller to repair, replace or cure any defect in the Property and nothing in this Agreement shall be deemed an 'enhanced protection agreement' under Senate Bill 800. Buyer's covenants under this paragraph shall survive the Close of Escrow."

The post-2003 purchase agreement contains the following judicial reference provision: "Judicial Reference of Disputes. The following dispute resolution procedure is implemented in accordance with the philosophy and intent of the Federal Arbitration Act (9 U.S.C. Sections 1-16) which is designed to encourage use of alternative methods of dispute resolution that avoid costly and potentially lengthy traditional court proceedings. The dispute resolution procedure in this Section is to be interpreted and enforced as if it were a proceeding authorized by the Federal Arbitration Act. Parties interpreting this Section shall follow the federal and state court rulings which provide that the Federal Arbitration Act (a) is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding substantive or procedural state policies to the contrary, (b) requires that federal and state courts rigorously enforce agreements to

arbitrate, and (c) requires that the scope of arbitrable issues be resolved in favor of arbitration. Specifically, this Section is to be interpreted in accordance with Allied-Bruce Terminix Companies, Inc. v. Dobson, 115 S. Ct. 834 (1995). References in this Section to California Code Sections are not to be interpreted as a waiver of rights created under federal law. If Buyer commences a lawsuit against Seller and/or its officers, directors, contractors, subcontractors, design professionals, consultants, agents or representatives relating to the condition, design or construction of any portion of the Property or Project, all of the issues in such action, whether of fact or law, shall be submitted to general judicial reference pursuant to California Code of Civil Procedure Section S638(1) and 641-645 or any successor statutes thereto. All other fees and costs of the judicial reference proceeding shall be advanced by the Seller. However, the referee shall have the power to reallocate these costs and expenses among the parties in the referee's final ruling. Notwithstanding the foregoing, the parties shall be responsible for their own attorneys' fees. The general referee shall have the authority to try all issues, whether of fact or law, and to report a statement of decision to the court. The Parties shall use the procedures adopted by Judicial Arbitration and Mediation Services ('JAMS') for judicial reference (or any other entity offering judicial reference dispute resolution procedures as may be mutually acceptable to the parties), provided that the following rules and procedures shall apply in all cases unless the parties agree otherwise: (i) the proceedings shall be heard in the county in which the Project is located; (ii) the referee must be a retired judge or a licensed attorney with substantial experience in relevant real estate matters; (iii) any dispute regarding the selection of the referee shall be resolved by JAMS or the entity providing the reference services, or, if no entity is involved, by the court with appropriate jurisdiction; (iv) the referee may require one or more pre-hearing conferences; (v) the parties shall be entitled to discovery, and the referee shall oversee discovery and may enforce all discovery orders in the same manner as any trial court judge; (vi) a stenographic record of the trial shall be made, provided that the record shall remain confidential except as may be necessary for post-hearing motions and any appeals; (vii) the referee's statement of decision shall contain findings of fact and

conclusions of law to the extent applicable; and (viii) the referee shall have the authority to rule on all post-hearing motions in the same manner as a trial judge. The statement of decision of the referee upon all of the issues considered by the referee is binding upon the Parties, and upon filing of the statement of decision with the clerk of the court, or with the judge where there is no clerk, judgment may be entered thereon. The decision of the referee shall be appealable as if rendered by the court. This provision shall in no way be construed to limit any valid cause of action which may be brought by any of the Parties. [¶] BY INITIALING BELOW, BUYER ACKNOWLEDGES THAT IT HAS READ AND UNDERSTAND THE FOREGOING AND ACCEPTS THAT BUYER IS WAIVING ITS RIGHT TO A JURY TRIAL.”

C. Defendants’ Motion To Stay Proceedings

On August 20, 2010, defendants moved to stay all proceedings. Defendants sought to stay all proceedings until the pre-litigation requirement in the Notice and Opportunity to Cure provisions in the purchase agreements had been satisfied. Defendants’ motion to stay applied to all plaintiffs, not just those who were named in the cross-complaint.

D. Special Motion To Strike Cross-Complaint

On September 20, 2010, plaintiffs filed a section 425.16 special motion to strike the cross-complaint’s contract breach and declaratory relief causes of action. The special motion to strike argued: the cross-complaint’s contract breach and declaratory relief claims arose from plaintiff’s act of filing the complaint; the contract breach and declaratory relief were meritless; defendants’ prelitigation procedure was unenforceable under Civil Code section 912; and the prelitigation and judicial reference procedure is procedurally and substantively unconscionable.

In opposition, defendants argued their compulsory cross-complaint is not “retaliatory” and does not affect plaintiffs’ petition rights but is merely procedural in nature. Defendants contended: even if section 425.16 applies to the cross-complaint, they have pled sufficient facts to support their contract breach and declaratory relief causes of action; plaintiffs failed to comply with the “Notice and Opportunity to Cure” and the “Judicial Reference of Disputes” provisions; the cross-complaint is compulsory and filed in good faith; and the contract breach and declaratory relief claims are efforts to mitigate damages. Finally, defendants argued if the special motion to strike were granted, they would have no remedy for their contract breach and declaratory relief claims; the litigation privilege is inapplicable; and if the stay motion were denied, defendants’ only remedy is a contract breach claim. In addition, defendants contended their alleged failure to comply with Civil Code section 912, subdivisions (e), (f) and (g) is immaterial because the parties agreed to alternative dispute resolution. Finally, defendants argued the general reference provision is not procedurally and substantively unconscionable. Defendants reasoned the provision does not eliminate the purpose of the transaction, i.e. the purchase of a home, and plaintiffs failed to prove it is procedurally unconscionable.

E. Trial Court’s Ruling

On October 20, 2010, the trial court heard defendants’ stay motion and plaintiffs’ special motion to strike. Defendants’ motion to stay was denied. The trial court ruled: “The court finds that the contractual pre-litigation requirements set forth in the purchase/sale agreements are not enforceable. The court finds that the contractual pre-litigation requirements are not valid or viable alternatives to the statutory pre-litigation requirements set forth in SB 800 as codified in Civil Code [section] 910 et seq. The court also finds that the contractual pre-litigation requirements are unconscionable as they were offered on a take-it-or-leave it basis, they only apply to the claims that a buyer asserts while not subjecting the claims of the seller to similar procedures, and the judicial

reference provisions include terms not in compliance with *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83 (2000). One such offensive term is that the buyers must share in paying the costs of the judicial reference even though no cost would be required to proceed in court.”

At the same time, plaintiffs’ special motion to strike the cross-complaint’s contract breach and declaratory relief causes of action was granted. The trial court ruled, “The court finds that the moving parties have demonstrated that the 6th, 7th, and 16th causes of action in the cross-complaint arise from their rights to petition the courts, and the cross-complainants have not met the burden of establishing a probability of succeeding on the merits of the 6th, 7th and 16th causes of action in the cross-complaint.” The trial court signed an order granting cross-defendants’ special motion to strike on the same day. On November 23, 2010, defendants timely filed their notice of appeal.

III. DISCUSSION

A. Special Motion To Strike Under Code Of Civil Procedure Section 425.16

Section 425.16, subdivision (b)(1) states, “A cause of action against a person arising from any act . . . in furtherance of the . . . right of petition or free speech . . . in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” The court must engage in a two-step process when ruling on a special motion to strike. First, the moving party must make a threshold prima facie showing that the challenged cause of action is one “arising from” its conduct in furtherance of the right of petition or free speech. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon, supra*); *Flatley v. Mauro* (2006) 39 Cal.4th 299, 314.) In deciding whether the challenged claim arises from the enumerated conduct in section 425.16, subdivision (e), “[T]he court shall consider the pleadings, and supporting and opposing affidavits stating

the facts upon which the liability or defense is based.” (§ 425.16 subd. (b)(2); *Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 326; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269 fn. 3.) Second, if the court finds such a showing has been made, the burden shifts to plaintiff to establish a probability it will prevail on the merits. (*Episcopal Church Cases*, *supra*, 45 Cal.4th at p. 477; *Equilon*, *supra*, 29 Cal.4th at p. 67; *Flatley v. Mauro*, 39 Cal.4th at p. 314.) A cross-complaint is treated the same as a complaint in the special motion to strike. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77-78; § 425.16 subd. (h) [“For purposes of this section, ‘complaint’ includes ‘cross-complaint’ and ‘petition,’ ‘plaintiff’ includes ‘cross-complainant’ and ‘petitioner,’ and ‘defendant’ includes ‘cross-defendant’ and ‘respondent’”].) But as explained by our Supreme Court, we do not weigh the competing evidence: “[W]e neither ‘weigh credibility [nor] compare the weight of the evidence. Rather, . . . [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by plaintiff as a matter of law.’” (*Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 326; *Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th p. 269 fn. 3; accord *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) We review de novo the trial court’s ruling on a special motion to strike. (*Flatley v. Mauro*, *supra*, 39 Cal.4th at pp. 325-26; *Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at p. 269 fn. 3.)

B. “Arising From” Any Act In Furtherance of Right To Petition Or Free Speech

Discussing the first prong, our Supreme Court explained: “[T]he statutory phrase, ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must itself have been an act in furtherance of the right to petition or free speech. [Citation.] . . . [T]he critical point is whether the plaintiff’s cause of action itself was based on an act in furtherance of the defendant’s right of petition or free speech. [Citations.] ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in

section 425.16, subdivision (e). . . .” (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 78, see *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266.) In particular, section 425.16, subdivision (e)(1) states in part: “As used in this section, ‘act in furtherance of a person’s right of petition or free speech . . . in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law . . .” (§ 425.16 subd. (e)(1); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 [“‘Any act’ includes communicative conduct such as the filing, funding, and prosecution of a civil action”].)

In determining whether a cause of action arises from any act in furtherance of enumerated conduct, we examine “the gravamen or principle thrust” of the claim. (*Episcopal Church Cases, supra*, 45 Cal.4th at p. 477 quoting *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193.) Our Supreme Court has explained that there is no requirement that defendants prove the suit was intended to chill their speech or actually had that affect: “[W]e held that the plain language of the ‘arising from’ prong encompasses any action based on protected speech or petitioning activity as defined in the statute (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89-95 (*Navellier*)), rejecting proposals that we judicially engraft the statute with requirements that defendants moving thereunder also prove the suit was intended to chill their speech (*Equilon, supra*, 29 Cal.4th p. 58) or actually had that effect. (*City of Cotati v. Cashman* [*supra*, 29 Cal.4th at p.] 75.)” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734.)

Defendants argue their cross-complaint to enforce the notice and cure and the judicial reference provisions was merely incidental to the underlying construction defect case. Thus, their contract breach and declaratory relief claims do not arise from plaintiffs’ exercise of enumerated conduct under section 425.16, subdivision (e). Defendants contend the “gravamen or principle thrust” of their contract breach and declaratory relief claims is that plaintiffs violated their contractual promise to utilize alternative dispute resolution prior to pursuing legal action. Defendants argue plaintiffs’ contract breach occurred prior to and independent of cross-complainants’ filing. Defendants further

argue they asserted their contract breach and declaratory relief claims in the cross-complaint because it was compulsory to do so. Defendants' arguments are unpersuasive.

The “gravamen or principle thrust” of the contract breach and declaratory relief claims is plaintiffs' filing the complaint without complying with the contractual notice and the judicial reference provisions. According to defendants, plaintiffs breached the purchase agreements by filing the complaint. Defendants' cross-complaint is not related to plaintiffs' underlying construction defect complaint. Rather, the contract breach and declaratory relief claims arise out of the litigation process itself—filing the complaint. The trial court correctly ruled defendants' contract breach and declaratory relief claims arise out of the filing of plaintiffs' complaint. (§ 425.16 subd. (e)(1); *Navellier, supra*, 29 Cal.4th at p. 90 [fraud and contract breach claims based on filing of litigation fall within ambit of “arising from” prong]; *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1372-1374 [cross-complaint containing compulsory or permissive cross-claims are subject to a special motion to strike]; *CKE Restaurants, Inc. v. Moore* (2008) 159 Cal.App.4th 262, 268-271 [plaintiff's declaratory relief action subject to a special motion to strike].)

C. Probability Of Prevailing On Merits

A plaintiff must state and substantiate a legally sufficient claim to establish a probability of prevailing on that cause of action. (§ 425.16 subd. (b)(1); *Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056; *Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 821.) Our Supreme Court explained: “Put another way, the plaintiff ‘must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited.’ [Citations.]” (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056 quoting *Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 821.)

Defendants argue their contract breach and declaratory relief claims were clearly pled and supported by the evidentiary submissions of the purchase agreements entered

into before and after 2003. But, defendants fail to discuss the trial court's unconscionability finding. In its ruling on defendants' motion to stay, the trial court found: "the contractual pre-litigation requirements set forth in the purchase sale agreements are not enforceable"; "the contractual pre-litigation requirements are not valid or viable alternatives to the statutory pre-litigation requirements set forth in SB 800 as codified in Civil Code [section] 910, et seq."; and "the contractual pre-litigation requirements are unconscionable as they were offered on a take-it-or-leave it basis, they only apply to the claims that a buyer asserts while not subjecting the claims of the seller to similar procedures, and the judicial reference provisions include terms not in compliance with *Armendariz v. Foundation Health Psychcare Services, Inc.* [, *supra*] 24 Cal.4th 83 []." These court findings necessarily apply to both defendants' stay motion and plaintiffs' special motion to strike. Defendants cannot have valid contract breach and declaratory relief claims where the contractual provisions they seek to enforce are unconscionable. On appeal, defendants have not challenged the trial court's unconscionability finding. Thus, defendants have forfeited any arguments regarding the validity of the contract provisions at issue. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216 fn. 4; *Estate of Felder* (2008) 167 Cal.App.4th 518, 523.)

Defendants argue they were required to file their compulsory cross-complaint with the contract breach and declaratory relief claims. They reason there is no statutory mechanism to enforce pre-litigation and inspection and repair requirements in a construction dispute. They argue plaintiffs agreed to use a permitted, contractual alternative to the California Right to Repair Act. (Civ. Code, § 895 et seq.) In addition, defendants contend since they could not appeal the ruling on the motion to stay. As a result, defendants argue the only means they had of enforcing the contractual pre-litigation alternative dispute resolution provisions was to file their cross-complaint. We disagree. Defendants could have filed a mandate petition challenging the order denying their stay motion and request for appointment of a judicial referee. (See *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081, 1084 [denying writ

petition because judicial reference provision was unconscionable and contrary to statutory law and public policy]; *Woodside Homes of California, Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 725 [granting writ petition because judicial reference provision was not unconscionable].)

Finally, defendants argue any unconscionable provisions could have been severed. This issue was not presented in the trial court. Thus, the severance issue has been forfeited. (*Tutti Mangia Italian Grill, Inc. v. American Textile Maintenance Co.* (2011) 197 Cal.App.4th 733, 740; *Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 73 [“Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived”].)

IV. DISPOSITION

The October 20, 2010 order granting the special motion is affirmed. Plaintiffs, Antonio and Venicia Avila, Angel and Maria Blancia, Prasong and Wanna Kotrasa, and Nuzhat Nafees, shall recover their appeal costs from defendants, Shapell Industries, Inc. and Porter Ranch Development Company. Any issue concerning attorneys fees must be presented in the trial court pursuant to California Rules of Court, rules 3.1702(c) and 8.278(c)(1).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.