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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

VILLA VICENZA HOMEOWNERS
ASSOCIATION,

Defendant, Cross-Complainant
and Respondent,

v.

NOBEL COURT DEVELOPMENT, LLC,

Defendant, Cross-Defendant
and Appellant.

D054550

(Super. Ct. No. gic871604)

APPEAL from an order of the Superior Court of San Diego County, Ronald L. Styn, Judge. Reversed.

In this case the developer of a condominium project recorded a declaration of covenants, conditions and restrictions (CC&R's), which required that a homeowners association arbitrate any construction defect claim the association might have against the developer. In *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*

(2012) 55 Cal.4th 223 (*Pinnacle*) the California Supreme Court held that such arbitration clauses are enforceable against a homeowners' association notwithstanding the fact the association did not come into existence until after CC&Rs were recorded and the association's consent to arbitrate was not express but occurred by operation of law. (*Id.* at p. 246.) The Supreme Court further held that the arbitration clause was not unconscionable. (*Id.* at p. 250.)

In light of *Pinnacle* the arbitration clause in this case was valid and enforceable. Accordingly the trial court erred in denying the developer's motion to compel arbitration of the homeowners association's construction defect claims. We reverse the trial court's order and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Nobel Court Development, LLC (Nobel), purchased the 418 apartments, common areas, and common facilities which make up the Villa Vicenza project in 2004 and converted the apartments to condominiums in 2005. In the course of making the property a condominium project, Nobel recorded CC&R's under which the Villa Vicenza Homeowners Association (the Association) came into existence upon the sale of the first condominium. By deed, Nobel also transferred ownership of the common areas and common facilities to the Association. No consideration was provided by the Association to Nobel and the Association did not execute any documents in favor of Nobel in connection with the deed transferring the common areas and common facilities to the Association. In pertinent part, the CC&R's require that both condominium owners and the Association arbitrate any claims they have against the developer.

Because following the first sale Nobel controlled the board of directors of the Association and because the initial condominium buyers noticed defects in common areas and common facilities and did not believe Nobel had provided a reserve fund sufficient to repair the defects, the condominium owners brought a derivative action on behalf of the Association against Nobel.¹ Later, an independent litigation committee of the Association was appointed and filed a cross-complaint against Nobel. The committee alleged claims for breach of implied warranty, strict liability, negligence and as the third-party beneficiary of express and implied warranties Nobel made to individual homeowners.

Following unsuccessful efforts to mediate the Association's claims, Nobel filed a motion to compel arbitration under the provisions of the CC&R's. The trial court denied the motion with respect to the bulk of the Association's claims, but compelled arbitration of the Association's express warranty claims. The trial court found that recording CC&Rs is not a valid means of obtaining an arbitration agreement.

On appeal, we affirmed. Nobel filed a petition for review, which was granted. After its opinion in *Pinnacle* was filed, the California Supreme Court transferred the cause to us with directions to vacate our decision and reconsider in light of *Pinnacle*.

¹ The individual condominium buyers also brought claims on their own behalf and by way of a prior order, which is not the subject of this appeal, the trial court ordered those individual claims be arbitrated.

DISCUSSION

I

Because the trial court did not consider any disputed extrinsic evidence or otherwise resolve any disputed factual issues, we review its order on Nobel's motion to compel arbitration de novo. (*Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1284.)

II

Both the Federal Arbitration Act (FAA) (9 U.S. Code § 1 et seq.) and its California counterpart, the California Arbitration Act (CAA) (Code Civ. Proc., § 1280 et seq.), make arbitration agreements enforceable and indeed favor them. (See *Moses H. Cone Memorial Hosp. v. Mercury Const.* (1983) 460 U.S. 1, 24 [103 S.Ct. 927]; *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1074-1075.) As Nobel points out, where an arbitration agreement is covered by the FAA, the FAA preempts any conflicting state law. (*Shepard v. Edward Mackay Enterprises, Inc.* (2007) 148 Cal.App.4th 1092, 1097-1099.) Thus Nobel argues neither any California statutory limitations on arbitration nor the jury waiver provisions set forth in article 1, section 16 of the California Constitution, which we relied on in *Treo @ Kettner Homeowners Assn v. Superior Court* (2008) 166 Cal.App.4th 1055, 1066-1067 (*Treo*), may be used to adversely impact its right to compel arbitration under the FAA.

We agree with Nobel that any arbitration agreement between it and the Association would be covered by the FAA and that where the FAA applies, state laws may not be used to treat arbitration agreements differently than other types of agreements.

A. FAA Applies

Nobel notes that by their terms the CC&R's state: "Because many of the materials and products incorporated into the home are manufactured in other states, the development and conveyance of the Property evidences a transaction involving interstate commerce and the Federal Arbitration Act (9 U.S.C. § 1, et seq.) now in effect and as it may be hereafter amended will govern the interpretation and enforcement of the arbitration provisions of this Declaration." The facts set forth in the CC&R's are hardly matters subject to serious dispute. Nobel's condominium project was a substantial multi-family housing development composed of literally hundreds of dwelling units, the construction of which no doubt necessitated myriad contacts with and impacts on interstate commerce. Moreover, it can hardly be a matter of controversy that interstate commerce was involved in financing the purchase of hundreds of individual condominiums from Nobel. Thus, the connection between the project and interstate commerce is manifest here and more than sufficient to support application of the FAA.

In this regard the United States Supreme Court's opinion in *Citizens Bank v. Alafabco, Inc.* (2003) 539 U.S. 52, 55-58 [123 S.Ct. 2037], is controlling. In *Citizens Bank v. Alafabco, Inc.*, an Alabama borrower entered into a series of debt-restructuring

agreements with an Alabama bank. Each of the restructuring agreements contained arbitration provisions. Because the borrower believed the bank had reneged on an agreement to provide the borrower with working capital, the borrower sued the bank, which then moved to compel arbitration.

In finding a connection with interstate commerce sufficient to support application of the FAA, the court found application of the FAA was not "defeated because the individual debt-restructuring transactions, taken alone, did not have a 'substantial effect on interstate commerce.' [Citation.] Congress Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.' [Citations.] Only that general practice need bear on interstate commerce in a substantial way. [Citations.]" (*Citizens Bank v. Alafabco, Inc.*, *supra*, 539 U.S. at pp. 56-57.)

The court found the debt-restructuring agreements not only involved interstate commerce because of the borrower's substantial interstate business, but also because the restructured debt was secured by all of the debtor's business assets, "including its inventory of goods assembled from out-of-state parts and raw materials. If the Commerce Clause gives Congress the power to regulate local business establishments purchasing substantial quantities of goods that have moved in interstate commerce, *Katzenbach v. McClung*, 379 U.S. 294, 304-305, 85 S.Ct. 377, 132 L.Ed.2d 290 (1964), it necessarily reaches substantial commercial loan transactions secured by such goods." (*Citizens Bank v. Alafabco, Inc.*, *supra*, 539 U.S. at p. 57.) The court further found that

"were there any residual doubt about the magnitude of the impact on interstate commerce caused by the particular economic transactions in which the parties were engaged, that doubt would dissipate upon consideration of the 'general practice' those transactions represent. [Citation.] No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause." (*Id.* at pp. 57-58.)

Similarly, here it can hardly be disputed Congress has the power to regulate the sale and financing of a large residential development. The financing alone, implicates the use of federally regulated and chartered financial institutions with well-recognized impacts on interstate commerce, and thus supports application of the FAA under *Citizens Bank v. Alfabaco, Inc.*

B. FAA Preemption

Application of the FAA to the transfer of property to the Association prevents us from enforcing restrictions on the use of arbitration in construction defect cases which the Legislature enacted as Code of Civil Procedure section 1298 et seq. (See *Shepard v. Edward Mackay Enterprises, Inc., supra*, 148 Cal.App.4th at pp. 1097-1101.) "States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' [Citation.] 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" (*Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265,

281 [115 S.Ct. 834]; see also *AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___, 131 S.Ct. 1740, 1746-1748.)

The FAA also prevents us from relying on the jury waiver provisions of article 1, section 16 of the California Constitution to invalidate an arbitration agreement. In *Treo* we held these provisions of our Constitution require that any waiver of the right to a jury trial must provide actual notice of the waiver and meaningful reflection. (*Treo, supra*, 166 Cal.App.4th at p. 1066.) Those provisions of our Constitution would improperly discriminate against arbitration because they would not necessarily invalidate other portions of an agreement which, although lacking actual notice and meaningful reflection, do not purport to waive the right to a jury. (See *Pinnacle, supra*, 55 Cal.4th at pp. 245-246.)

III

State law does govern the question of whether an agreement to arbitrate has been made. (See *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 942 [115 S.Ct. 1920] & *Marsch v. Williams* (1994) 23 Cal.App.4th 250, 254-255.) On this issue the holding in *Pinnacle* is dispositive.

As here, in *Pinnacle* the developer of a condominium project recorded CC&Rs which required that a homeowners association arbitrate any construction defect claims against the developer. When the homeowners association in fact filed a construction defect lawsuit against the developer, the developer moved to arbitrate the association's claims and the trial court denied the developer's motion on the grounds the clause was unconscionable. We affirmed. We found that recording the CC&Rs did not bind the

Association and that, in any event, the arbitration provision was unconscionable. On review, the Supreme Court reversed.

In particular, the Supreme Court found recording CC&R's is a valid means of creating an agreement to arbitrate and the fact the association did not come into existence until after the CC&Rs were recorded did not invalidate the association's consent.

(*Pinnacle, supra*, 55 Cal.4th at pp. 237-238.) The court stated: "Once the first buyer manifests acceptance of the [CC&Rs] by purchasing a unit, the common interest development is created (Civ. Code, § 1352), and all such terms become 'enforceable equitable servitudes, unless unreasonable' and 'inure to the benefit of and bind all owners of separate interests in the development.' (Civ. Code, § 1354, subd. (a); see Bus. & Prof. Code, § 11018.5, subd. (c).) For this reason, we have described recorded declarations as 'the primary means of achieving the stability and predictability so essential to the success of a shared ownership housing development.' [Citation.] Having a single set of recorded covenants and restrictions that applies to an entire common interest development protects the intent, expectations, and wishes of those buying into the development and the community as a whole by ensuring that promises concerning the character and operation of the development are kept. [Citations.]" (*Pinnacle, supra*, 55 Cal.4th at pp. 237-238.)

"One important feature contributing to the stability and success of condominium developments is that actual notice is not required for enforcement of a recorded declaration's terms against subsequent purchasers. [Citation.] Rather, the recording of a declaration with the county recorder 'provides sufficient notice to permit the enforcement' of the covenants and restrictions contained therein [citations], and condominium

purchasers are 'deemed to agree' to them. [Citations.]" (*Pinnacle, supra*, 55 Cal.4th at pp. 237-238.)

In light of *Pinnacle* it is clear the arbitration provisions set forth in the Villa Vicenza CC&Rs constitute a valid agreement to arbitrate within the scope of the FAA.

IV

With respect to the Association's alternative contention the arbitration provisions in the CC&Rs are unconscionable as a matter of law, the holding in *Pinnacle* is again dispositive.

"Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience." ' ' " (*Pinnacle, supra*, 55 Cal.4th at p. 246.)

In *Pinnacle*, the Supreme Court found that use of CC&R's as a means of creating an agreement to arbitrate was not procedurally unfair because the procedure adopted by the developer was in fact prescribed by the Legislature in the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350 et seq.; the Davis-Stirling Act). (*Pinnacle, supra*, 55 Cal.4th at p. 248.) The same is of course true here.

The court in *Pinnacle* also found the arbitration agreement was substantively reasonable. Like the Association here, the homeowners' association in *Pinnacle* argued the arbitration provisions set forth in the CC&Rs were substantively unconscionable because they required that construction disputes be arbitrated but imposed no arbitration requirement on other claims the developer might have and because the arbitration required each party to bear its own attorney fees and costs. The Supreme Court rejected both of these contentions. (*Pinnacle, supra*, 55 Cal.4th at pp. 248-249.) The court found there was nothing unfair in restricting arbitration to construction claims and that the costs provision were neutral. (*Ibid.*)

In sum, the arbitration provisions in the CC&Rs Nobel recorded, which are materially indistinguishable from the arbitration provisions considered in *Pinnacle*, are not unconscionable.²

² The Association also argues the CC&Rs are unfair because they require that the Association use the proceeds of any construction defect litigation to first repair defects or replenish reserves and only then to pay the costs of such litigation. While the association may have valid reasons to challenge the validity of this provision if either Nobel or any other litigant attempted to enforce it, this provision is not related to Nobel's right to arbitrate.

DISPOSITION

Our decision affirming the trial court's order is vacated. The trial court's order is reversed and remanded for further proceedings consistent with the views herein.

Nobel to recover its costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.