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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

VERANO CONDOMINIUM
HOMEOWNERS ASSOCIATION,

Plaintiff and Respondent,

v.

LA CIMA DEVELOPMENT, LLC,

Defendant and Appellant.

D058217

(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.

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.

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 against the homeowner's association as well as individual homeowners. 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

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.

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

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, 1284.)

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, 492, fn. 9 [170 S. Ct. 2520]; *Shepard v. Edward Mackay Enterprises Inc.* (2007) 148 Cal.App.4th 1092, 1097-1099.)

We agree with La Cima that the arbitration provisions set forth in the Verano CC&Rs are 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, 277-278 [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, 56-57 [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. (See *Pinnacle*, *supra*, 55 Cal.4th at pp. 245-246.)

Thus, the FAA applies to the arbitration provisions in the Verano CC&Rs.

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], and *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 Verano CC&Rs constitute a valid agreement to arbitrate within the scope of the FAA.

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* (2011) ___ U.S. ___ [131 S. Ct. 1740, 1746], quoting *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687 [116 S. Ct. 1652]; 9 U.S.C § 2.)

"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 use of CC&R was required by the Davis-Stirling Act.

The court in *Pinnacle* also found the arbitration agreement was substantively reasonable. 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 Verano CC&Rs, which are materially indistinguishable from the arbitration provisions considered in *Pinnacle*, are not unconscionable.

DISPOSITION

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

La Cima to recover its costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.