Nos. 04-CV-550, 04-CV-551, 04-CV-552, 04-CV-586, 04-CV-587

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

2200 M STREET LLC, et al.,

Appellants,

v.

CHERYL H. MACKELL, et al.,

Appellees

Appeal From The Superior Court of the District of Columbia, Civil Division

---

BRIEF OF APPELLEES PAULINE JOHNSON-BROWN AND LARA MICHELLE BROWN

Jonathan K. Tycko*
D.C. Bar No. 445851
TYCKO, ZAVAREEI & SPIVA LLP
2000 L Street, N.W., Suite 808
Washington, D.C. 20036
(202) 973-0900

Steve A. Skalet
D.C. Bar No. 359804
MEHRI & SKALET, PLLC
1300 19th Street, N.W., Suite 400
Washington, D.C. 20036
(202) 822-5100

For Appellees Pauline Johnson-Brown and Lara Michelle Brown

RULE 28(A)(2) LIST

Appellees Pauline Johnson-Brown and Lara Michelle Brown are the plaintiffs in D.C. Superior Court Civil Action No. 02-5784. In that civil action, the following listed parties and counsel appeared below:

Plaintiffs: Pauline Johnson-Brown and Lara Michelle Brown

Plaintiffs' counsel: Steven A. Skalet of Mehri & Skalet, PLLC, and Jonathan K. Tycko of Tycko, Zavareei & Spiva LLP.

Defendants: 2200 M Street LLC, Millennium Partners LLC, Millennium Partners Management LLC, and Millennium Manager I, Inc.

Defendants' counsel: Judith A. Miller, Laurie S. Fulton, William J. Bachman and John L. Cuddihy of Williams & Connolly LLP, and Joseph A. McManus and Geoffrey T. Keating of McManus, Schor, Asmar & Darden, LLP.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ... iii

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW ... 1

STATEMENT OF THE CASE ... 2

A. Nature Of The Case ... 2

B. Course Of The Proceedings And Disposition Below ... 3

STATEMENT OF THE FACTS ... 5

ARGUMENT ... 11

I. The Primary Question To Be Decided – And The Question That The Trial Court Properly Asked And Answered – Is Whether The Johnson-Brown Plaintiffs Agreed To Arbitrate The Claims They Allege In This Case ... 11

II. Defendants Cannot Carry Their Burden Of Proving That The Johnson-Brown Plaintiffs Agreed To Arbitration Of Any Of The Claims Alleged In This Case ... 15

A. Section 5(a) Of The Purchase Agreement Was Not An Agreement To Arbitrate The Claims Made By The Johnson-Brown Plaintiffs In This Case ... 18

1. Under Section 5(a) Of The Purchase Agreement, The Only Disputes That Were Subject To Resolution By The Project Architect Were Disputes About Whether The Unit Was Delivered "In Accordance With The Plans," And The Plans Related Solely To The Location And Boundaries Of The Unit ... 18

2. None Of The Johnson-Brown Plaintiffs' Claims Relate In Any Way To The Location Or Boundaries Of Their Unit; Therefore, None Of The Claims Fall Within The Scope Of The Dispute Resolution Provision Of Section 5(a) Of The Purchase Agreement ... 22

3. Even If Section 5(a) Reasonably Could Be Interpreted To Cover Any Of Plaintiffs' Claims, That Section Of

The Purchase Agreement Was Extinguished By Delivery Of The Deed At Settlement 24

B. The Court Cannot Compel Arbitration Under Section V.B Of The Certificate Of Limited Warranty 27

1. Defendants Waived The Arguments They Now Make Based Upon Section V.B Of The Certificate Of Limited Warranty 27

2. Section V.B Was Not An Agreement To Arbitrate The Claims Made By The Johnson-Brown Plaintiffs In This Case 28

IV. In The Alternative, The Court Should Permit The Plaintiffs' Statutory Claims To Proceed In The Trial Court Because Those Claims Cannot Be Effectively Vindicated In A Proceeding In Which The Decision-Maker Is The Project Architect 33

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

**Bailey v. Federal Nat. Mortgage Assoc.*, 209 F.3d 740 (D.C. Cir. 2000) 13

**Ballard & Assocs., Inc. v. Mangum*, 368 A.2d 548 (D.C. 1977) 12

Brennan v. King, 139 F.3d 258 (1st Cir. 1998) 14

Cannon v. Igborzurkie, 779 A.2d 887 (D.C. 2001) 28

**Cole v. Burns Intern. Sec. Services*, 105 F.3d 1465 (D.C. Cir. 1997) 34

**Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160 (D.C. Cir. 1981) 13

Engle Homes, Inc. v. Jones, 870 So.2d 908 (Fla. App. 2004) 26

**First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) 12

Friend v. Friend, 609 A.2d 1137 (D.C. 1992) 14

**Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 34

**Greenfield v. Heckenbach*, 797 A.2d 63 (Md. App. 2002) 25

**Haviland v. Dawson*, 210 A.2d 551 (D.C. 1965) 25

Haynes v. Kuder, 591 A.2d 1286 (D.C. 1991) 11

Hercules & Co., Ltd. v. Beltway Carpet Serv., Inc., 592 A.2d 1069 (D.C. 1991) 16

Homes by Pate, Inc. v. DeHaan, 713 N.E.2d 303 (Ind. Ct. App. 1999) 24

Jack Baker, Inc. v. Office Space Development Corp., 664 A.2d 1236 (D.C. 1995) 13

Johnson-Brown v. 2200 M Street LLC, 257 F. Supp.2d 175 (D.D.C. 2003) 3, 4

Kerrigan v. Britches of Georgetown, Inc., 705 A.2d 624 (D.C.1997) 11

**Marina Cove Condominium Owners Assoc. v.*
Isabella Estates, 34 P.3d 870 (Wash. App. 2001) 31, 32

**Masurovsky v. Green*, 687 A.2d 198 (D.C. 1997) 12, 16

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 34

Thoubboron v. Ford Motor Co., 624 A.2d 1210 (D.C. 1993).......................................11

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)..13

Statutes

D.C. Condominium Act, D.C. Code §§ 42-1901.01 *et seq.* 2, 5

*D.C. Code § 42-1901.02(1) 5, 19

*D.C. Code § 42-1901.02(30) 5, 19

D.C. Code § 42-1901.02(5) 19

D.C. Code § 42-1901.03 ....5, 19

*D.C. Code § 42-1901.07 31

*D.C. Code § 42-1901.08. 32

D.C. Code § 42-1902.06(3) 33

*D.C. Code § 42-1902.14(b) 19, 20

D.C. Code § 42-1903.16(a)...29

*D.C. Code § 42-1903.17 31

D.C. Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq*. 2, 3, 33

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether a provision in a Purchase Agreement for the purchase of an individual, residential condominium unit that required the purchaser, at time of delivery of the unit, to submit disputes "involving delivery of the Unit in accordance with the Plans" to the "Project Architect" for decision, mandates arbitration of claims arising out of fraudulent sales practices and defects in the design and construction of the common elements of the condominium building, where the "Plans" referred to in the Purchase Agreement showed only the location and boundaries of the units, and plaintiffs do *not* allege that the layout or dimensions of their unit were not "in accordance with the Plans."

2. Whether the dispute-resolution provision of the Purchase Agreement relied upon by defendants remains in force where the Purchase Agreement explicitly provided that the provision would "be merged into and extinguished by delivery of the deed at settlement."

3. Whether a Certificate of Limited Warranty, which sets forth the "Declarant's obligations . . . to make adjustments to [the purchaser's] Residential Unit," and which created a procedure whereby the "Project Architect" would resolve disputes about which "defects" in the unit were to be "noted on" a "Warranty Inspection Form" prepared by the Declarant, mandates arbitration of plaintiffs' claims where defendants did not raise the issue in the trial court, where plaintiffs did not sign the Certificate of Limited Warranty, where compelled arbitration of warranty claims would violate

provisions of the D.C. Condominium Act, D.C. Code §§ 42-1901.01 *et seq.*, and where claims arising out of fraudulent sales practices and defects in the design and construction of the common elements of the condominium building would not, in any event, fall within the scope of the Certificate of Limited Warranty.

4. Whether, given the requirement that a prospective litigant be able to "effectively vindicate" statutory rights in an arbitration proceeding, plaintiffs' statutory claims under the D.C. Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq*., and the D.C. Condominium Act, D.C. Code §§ 42-1901.01 *et seq.*, can be subjected to compelled arbitration before the "Project Architect," where the "Project Architect" – an entity hired and paid by the Defendants and presumably directly involved in the very design and construction about which plaintiffs complain – is so obviously not neutral.

STATEMENT OF THE CASE

A. Nature Of The Case

Plaintiffs Pauline Johnson-Brown and her daughter Lara Michelle Brown (the "Johnson-Brown Plaintiffs") are the owners of a residential condominium unit (specifically, unit 8-F North) in a condominium project known as "Millennium Square, a Condominium." Defendants 2200 M Street LLC, Millennium Partners LLC, Millennium Partners Management LLC and Millennium Manager I, Inc. (collectively the "Defendants" or "Millennium") are the declarant and various entities that own and/or control the declarant. The Johnson-Brown Plaintiffs allege that Defendants made

various material misrepresentations, and failed to disclose material facts, both before and after the Johnson-Brown Plaintiffs took title to their unit. The Johnson-Brown Plaintiffs further allege that the building in which their unit is located suffered from design and construction defects, and that those defects led to various problems, including leaks, floods and the growth of toxic molds. The Johnson-Brown Plaintiffs have alleged claims for fraud, negligence, breach of implied warranties, breach of statutory warranties, strict liability, and violations of the D.C. Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq*. The Johnson-Brown Plaintiffs also have alleged a claim for a declaratory judgment of indemnity that would require Defendants to indemnify them for any liability they might have to tenants that resided in their unit and that allegedly suffered harm as a result of the presence of toxic molds caused by the design and construction defects.

The case comes to this Court on the limited question of whether the trial court correctly denied the Defendants' motion to compel arbitration.

B. Course Of The Proceedings And Disposition Below

The Johnson-Brown Plaintiffs filed their complaint in the Superior Court on July 16, 2002. J.A. 32. As a result of abusive procedural maneuvering by Defendants, the case has remained in procedural limbo ever since. On September 3, 2002, Defendants removed the case to the United States District Court. On April 8, 2003, Judge Urbina issued a Memorandum Opinion granting the Johnson-Brown Plaintiffs' motion for remand. *Johnson-Brown v. 2200 M Street LLC*, 257 F. Supp.2d 175 (D.D.C. 2003).

Judge Urbina not only ordered remand of the case, but also found that "defendants' arguments in favor of removal [were] dubious at best, if not disingenuous." *Id*. at 181. Concluding that "defendants' removal petition [was] supported by no legal authority and therefore lack[ed] merit," Judge Urbina sanctioned Defendants by ordering them to pay the Johnson-Brown Plaintiffs' costs and expense incurred as a result of the improper removal. *Id*.

For reasons unknown, Judge Urbina's order was not docketing in the District Court until November 18, 2003, and the case was not reinstated on the docket of the Superior Court until November 20, 2003. J.A. 3. On December 11, 2003, Defendants filed in the Superior Court a motion to compel arbitration and a motion to stay discovery. While those motions were pending, the case filed by the Johnson-Brown Plaintiffs was transferred to the Civil I calendar.[1] The judge assigned to the Civil I calendar (Judge Hedge) on January 23, 2004 granted Defendants' motion to stay discovery, pending decision on their motion to compel arbitration. J.A. 5. On May 12, 2004, Judge Hedge issued an order denying the motion to compel arbitration. J.A. 343. On May 24, 2004, Judge Hedge issued a further order in which she set forth her reasons for denying the motion to compel arbitration. J.A. 358.

---

[1] At or about the same time, the cases brought by the other parties that are the appellees in this Court also were transferred to the Civil I calendar. Although all of the cases before this Court are pending in the same calendar in the Superior Court, the cases have not been consolidated in the Superior Court.

On May 28, 2004, Defendants filed their notice of appeal. J.A. 6. On that same day, Defendants filed a motion to stay all proceedings in the trial court pending resolution of this appeal. *Id*. On June 9, 2004, Judge Hedge issued an order staying the trial court proceedings pending her decision on the Defendants' motion to stay all proceedings pending resolution of this appeal. *Id*. Although Judge Hedge has never formally ruled on Defendants' motion to stay all proceedings pending resolution of this appeal, her June 9, 2004 order effectively has provided Defendants with the stay they sought. Accordingly – as a direct result of Defendants' various procedural maneuvers (some of which have already been found to have been sanctionable) – discovery and other proceedings in the trial court have yet to commence, although more than two years have passed since the Johnson-Brown Plaintiffs filed their complaint.

STATEMENT OF THE FACTS

The evidence relating to the arbitration issue must be understood in the context of basic principles that govern condominiums. Under the D.C. Condominium Act, D.C. Code §§ 42-1901.01 *et seq.* (the "Condominium Act"), a condominium consists of "units" and "common elements." A "unit" is defined as "a portion of the condominium designed and intended for individual ownership." D.C. Code § 42-1901.02(30). Each unit within a condominium "constitute[s] for all purposes a separate parcel of real estate, distinct from all other condominium units." D.C. Code § 42-1901.03. A "common element" is defined as "all portions of the condominium other than the units." D.C. Code § 42-1901.02(1). Thus, in a residential condominium complex, the units

typically consists of the space within the walls, floor and ceiling of the each unit, while the common elements typically consists of everything else, including the roofing, plumbing, HVAC and mechanical systems of the building that houses the units.

On August 27, 1999, plaintiff Pauline Johnson-Brown signed a Residential Purchase Agreement (the "Purchase Agreement") relating to a unit, designated Unit 8-F North, at the Millennium Square condominium.[2] J.A. 216-27. At that point in time, construction on the condominium had not been completed. The Purchase Agreement provided that "Declarant shall complete the Unit, and settlement on such unit shall occur, within twenty four (24) months" of the date of the Purchase Agreement. J.A. 221.

The Purchase Agreement also contained a number of provisions relating to the rights of the respective parties prior to and at time of settlement. Pursuant to Section 7 of the Purchase Agreement, the declarant – defendant 2200 M Street LLC – was required to give at least ten days notice of the date on which settlement would occur. J.A. 219. Pursuant to Section 6 of the Purchase Agreement, the declarant was required to "notify Purchaser not less than ten (10) days prior to settlement of the date and time that the Unit will be ready for inspection." J.A. 218. Then, at settlement, the Purchaser

---

[2] Although not evident from the records before this Court, plaintiff Lara Michelle Brown – the daughter of plaintiff Pauline Johnson-Brown – subsequently was added as a party to the Purchase Agreement.

was required to pay any balance due on the purchase price, at which point "Declarant thereupon will delivery possession of the Unit to Purchaser." J.A. 219.

Section 5(a) of the Purchase Agreement defined the meaning of "delivery," stating that "[a]t settlement" the Declarant was required to "deliver the Unit and the appurtenances thereto substantially in accordance with the Plats and Plans, as the same may be modified and amended from time to time, with all fixtures, appliances and equipment to be provided by Declarant." J.A. 218. The "Plats and Plans" that were provided to the Johnson-Brown Plaintiffs were the ones included in the public offering statement, which appear in the Joint Appendix at J.A. 302-20. The "Plat" showed the location of the condominium building. J.A. 303. The "Plans" showed the location and boundaries of the units within that building. J.A. 310-20. Neither the "Plat" nor the "Plans" provided any information about the building's structural elements or systems (roofing, plumbing, HVAC, etc.), either in the units or the common elements.[3]

Section 5(a) of the Purchase Agreement also included a limited dispute resolution provision: "Any dispute involving delivery of the Unit in accordance with the Plans shall be submitted to Gary E. Handel & Associates, the project architect for a decision, which decision shall be binding." J.A. 218. By its terms, this provision covered only a very narrow category of disputes, namely, those in which the Johnson-

---

[3] The "Plans" as they relate to Unit 8-F North (the unit owned by the Johnson-Brown Plaintiffs) is at J.A. 316.

Brown Plaintiffs claimed that their unit, at time of delivery, was not "in accordance with the Plans." Because the only information provided in the Plans was the location and boundaries of the unit, this provision covered only disputes about those issues.

Settlement on Unit 8-F North took place on December 29, 2000. On that date, 2200 M Street LLC delivered to the Johnson-Brown Plaintiffs a Certificate Of Limited Warranty, which "describe[d] Declarant's obligations under District of Columbia Code Section 47-1856 to make adjustments to [the Johnson-Brown Plaintiffs'] Residential Unit[.]" J.A. 296. The Certificate Of Limited Warranty was signed on behalf of 2200 M Street LLC, but was not signed by either of the Johnson-Brown Plaintiffs. J.A. 301. The specific provisions of the Certificate Of Limited Warranty potentially relevant to the arbitration issue will be discussed below in the Argument section of this brief.

As alleged in the Johnson-Brown Plaintiffs' complaint, after settlement on the unit the Johnson-Brown Plaintiffs become aware of Defendants' wrongful conduct, and the serious defects in the common elements of the building. The Johnson-Brown Plaintiffs learned that various representations that had been made by the Defendants prior to settlement were not true. For example, at the time that Pauline Johnson-Brown was considering entering into the Purchase Agreement, the Defendants told her that the building was "sold out," "almost sold out," and "fully occupied." J.A. 42. In fact, that was not true, and at the time of the filing of the complaint, approximately 70 of the 162 residential units remained unsold. J.A. 43. The Defendants also made misrepresentations about the construction of a private "after hours" club for unit

owners, concerning the rights of unit owners to parking spaces in the building, and concerning their own intentions with respect to leasing of unsold units. J.A. 43.

Perhaps more seriously, however, the Johnson-Brown Plaintiffs learned – after settlement on the unit – that the common elements of the building had serious defects. Unbeknownst to the Johnson-Brown Plaintiffs, the building had been constructed in a disorganized rush. The building not only houses the residential condominium, but also the Ritz-Carlton Hotel. The hotel needed to open for business prior to January 2001 so that it could reap certain extraordinary revenues in connection with the January 2001 presidential inauguration. J.A. 37. But the construction schedule had fallen behind, and the hotel was in danger of loosing that business. Accordingly, the Defendants made a decision to push the pace of construction to make up for lost time, and to do so without reasonable regard for the quality of the construction. J.A. 38.

Only after settlement on their unit did the Johnson-Brown plaintiffs learn of the problems this rush, and perhaps other defects in the design and construction of the building, had caused. Most of the problems related to water entering into portions of the building where it did not belong. These problems included flooding of raw sewage and water over large portions of the building. J.A. 39. The flooding, in turn, caused massive mold growths throughout the building, including growths of a mold known as stachybotrys – commonly referred to as "toxic mold" – that can have serious adverse health consequences. J.A. 39.

Through testing conducted by their environmental consultants, the Defendants learned of the presence of stachybotrys in the building some time in 2001. Because of the large number of remaining unsold units, the Defendants, however, chose to keep the presence of the toxic mold secret, and did not inform the unit owners, including the Johnson-Brown Plaintiffs, of that serious health problem. J.A. 39-40. In fact, the Defendants took various active steps intended to disguise and cover-up the mold problem. J.A. 40.

At the time that toxic mold was running rampant through the building – but before they learned of the problem – the Johnson-Brown Plaintiffs had leased their unit to a mother and her child, who then took up residence in the unit. Because the Defendants kept the presence of the toxic mold a secret, the Johnson-Brown Plaintiffs were unable to warn their tenants or to take other steps to protect the safety of their tenants. The tenants subsequently became ill, and attributed their illness to the presence of the toxic molds in the building. J.A. 40-41.[4]

As a result of Defendants' wrongful conduct, and the serious problems caused by the defects in the building, the Johnson-Brown Plaintiffs filed their complaint on July

---

[4] Those tenants, Alyson Gannon and her son, subsequently brought a lawsuit against various defendants, including Millennium and Pauline Johnson-Brown. Presumably because Ms. Gannon was not the owner of the unit, Millennium has not sought arbitration in that case. Thus, many of the underlying issues likely to arise in the lawsuit brought by the Johnson-Brown Plaintiffs – including the central issues of the design and construction defects – are also likely to arise in the Gannon case, which will not be subject to arbitration under any circumstances.

16, 2002. J.A. 32. In the complaint, the Johnson-Brown Plaintiffs do *not* allege that the location or boundaries of their unit are not in accordance with the Plans.

ARGUMENT

I. The Primary Question To Be Decided – And The Question That The Trial Court Properly Asked And Answered – Is Whether The Johnson-Brown Plaintiffs Agreed To Arbitrate The Claims They Allege In This Case

Defendants make much of the fact that the trial court, in its opinion explaining the basis for its denial of the motion to compel arbitration, stated that "an agreement must clearly provide for such an alternative dispute resolution." J.A. 360-61. The trial court's use of the phrase "clearly provide" provides no basis for reversal, even if that phrase was not an entirely accurate statement of the applicable legal standard. On appeal of a denial of a motion to compel arbitration, this Court reviews the trial court's ruling *de novo*. *Haynes v. Kuder*, 591 A.2d 1286, 1289 (D.C. 1991). And "like the Supreme Court, 'this [c]ourt reviews judgments, not opinions[.]'" *Thoubboron v. Ford Motor Co.*, 624 A.2d 1210, 1212 (D.C. 1993) (quoting *Chevron, U.S.A., Inc. v. N.R.D.C., Inc.,* 467 U.S. 837, 842 (1984). Thus, this Court is "not limited to reviewing the legal adequacy of the grounds the trial court relied on for its ruling; if there is an alternative basis that dictates the same result, a correct judgment must be affirmed on appeal." *Kerrigan v. Britches of Georgetown, Inc.,* 705 A.2d 624, 628 (D.C.1997). Accordingly, if the trial court's decision to deny the motion to compel arbitration was the correct result – either for the reasons stated by the trial court, or for other reasons – then this Court must affirm.

The essential question this Court must address is whether the Johnson-Brown Plaintiffs agreed to submit their claims to arbitration. As the Supreme Court has recognized, "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Similarly, this Court has stated that "[a]rbitration is predicated upon the consent of the parties to a dispute, and the determination of whether the parties have consented to arbitrate is a matter to be determined by the courts on the basis of the contracts between the parties." *Ballard & Assocs., Inc. v. Mangum*, 368 A.2d 548, 551 (D.C. 1977); *see also Kaplan*, 514 U.S. at 947 ("[T]he basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms.") (citation and internal quotation marks omitted). Thus, unless the Johnson-Brown Plaintiffs agreed to arbitration of their claims, they cannot be compelled to submit those claims to arbitration.

Whether the Johnson-Brown Plaintiffs agreed to arbitration of their claims is a question decided under generally-applicable principles of contract law. "'When deciding whether the parties have agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.'" *Masurovsky v. Green*, 687 A.2d 198, 205 (D.C. 1997) (quoting *Kaplan*, 514 U.S. at 944). Defendants, as the parties asserting the existence of a contract to

arbitrate, bear the burden of proving the existence of that contract. *Bailey v. Federal Nat. Mortgage Assoc.*, 209 F.3d 740, 746 (D.C. Cir. 2000); *Jack Baker, Inc. v. Office Space Development Corp.*, 664 A.2d 1236, 1238 (D.C. 1995). Defendants must, therefore, prove that they and the Johnson-Brown Plaintiffs had a "meeting of the minds." *Bailey*, 209 F.3d at 746. In other words, Defendants must prove that they "reach[ed] an accord on all material terms and indicate[d] an intention to be bound." *Id*.

The Court must decide not only whether the parties entered into an arbitration agreement, but also the scope of that agreement. As the D.C. Circuit has explained, "[p]arties to [an arbitration agreement] cannot be required to submit to arbitration any matter that they did not agree would be subject to that manner of dispute resolution." *Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160, 165 (D.C. Cir. 1981) (citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). Thus, "[a] party who consents to the inclusion in a contract of a limited arbitration clause does not thereby waive his right to a judicial hearing on the merits of a dispute not encompassed within the ambit of the clause." *Id*. Accordingly, the Court must decide whether the Johnson-Brown Plaintiffs agreed to arbitration of the particular claims alleged by them in this case.

The Defendants suggest that, in deciding the scope of an arbitration agreement, the Court should apply a "touching" test, whereby any claim that "touches matters" covered by the arbitration clause must be sent to arbitration. *See* Defs.' Br. at 18-19. But Defendants cite no case in which this Court has adopted or applied such a test.

Rather, this Court has applied the principle, derived from U.S. Supreme Court decisions, that "doubts" about, or "ambiguities" in, the scope of an arbitration agreement will generally be resolved in favor of arbitrability. *Carter v. Catherdral Ave. Cooperative, Inc.*, 566 A.2d 716, 717-18 (D.C. 1989). But that so-called "presumption" in favor of arbitration is merely a judicial tool for resolving disputes between two competing, but equally reasonable, interpretations of the parties' agreement; claims may be subject to compelled arbitration only if a "reasonable interpretation" of the parties' arbitration agreement covers such claims. *Id.* at 718. As one federal court has explained, "when a court is interpreting a putative agreement to arbitrate a dispute, the federal policy favoring arbitration is not a free-standing ground upon which to remit parties to arbitration, but one that informs the court's interpretation." *Brennan v. King,* 139 F.3d 258, 266 (1st Cir. 1998); *see also Friend v. Friend*, 609 A.2d 1137, 1139 (D.C. 1992) (noting that "[t]he preference for arbitration is essentially a generalized inference of the parties' intent"). Accordingly, even after taking the so-called "presumption" in favor of arbitration into account, the ultimate question to be decided remains the same: did the Johnson-Brown Plaintiffs agree to arbitration of the claims they allege in their lawsuit?

That is precisely the question that the trial court asked and answered. The trial court described the issue to be decided as "whether the Purchase Agreement requires arbitration for deficiencies that were not apparent at the time of the pre-settlement inspection of the premises." J.A. 361. The trial court then gave a straight-forward

reading of the text of Section 5(a) of the Purchase Agreement, and concluded that the plaintiffs had not agreed to arbitration of their claims. J.A. 361-62. In so doing, the trial court did not apply an incorrect legal standard. And, as will now be discussed, the trial court's decision was correct, both for the reasons it gave in its opinion and for various other reasons.

II. Defendants Cannot Carry Their Burden Of Proving That The Johnson-Brown Plaintiffs Agreed To Arbitration Of Any Of The Claims Alleged In This Case

Defendants contend that provisions in two separate documents require arbitration of all of the claims alleged by the Johnson-Brown Plaintiffs. First, Defendants contend that Section 5(a) of the Purchase Agreement requires arbitration of those claims. Second, Defendants contend that Section V.B of the Certificate of Limited Warranty requires arbitration of those claims.

In fact, neither document supports Defendants' position. At the outset, it is worth noting that Defendants are sophisticated commercial entities, obviously represented by sophisticated attorneys, yet their position in this appeal is that they somehow neglected to include the word "arbitration" in the provisions they drafted with the alleged intent to require arbitration of a wide-ranging variety of claims. To the best of undersigned counsel's knowledge, this is the first time that a commercial entity has come before this Court demanding arbitration on the basis of provisions in documents that do not, on their face, appear to relate to arbitration at all. The provisions relied upon by the Defendants are nothing like the arbitration provisions widely recommended

by entities such as the American Arbitration Association (the "AAA"), and well-known to sophisticated attorneys. For example, the AAA's publication "Drafting Dispute Resolution Clauses – A Practical Guide" (available at the AAA's website, www.adr.org) suggests that arbitration clauses include the following language: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration . . ." And the cases that have come before this Court have involved arbitration provisions that had similar language. *Masurovsky*, 687 A.2d at 200 (provision read: "Any disputes arising out of this representation will be resolved in accordance with the rules of the American Arbitration Association."); *Carter*, 566 A.2d at 718 (provision read, in part, that "such dispute, disagreement, difference or question shall be submitted to and determined by arbitration"); *Hercules & Co., Ltd. v. Beltway Carpet Serv., Inc.*, 592 A.2d 1069, 1070 n.2 (D.C. 1991) (provision provided that all disputes "shall only be resolved by arbitration in accordance with the rules of the American Arbitration Association"). Thus, even at this very high-level of generality, Defendants' position that they and the Johnson-Brown Plaintiffs agreed to arbitrate all of the claims at issue in this lawsuit by means of provisions that say nothing whatsoever about arbitration is somewhat implausible.

In addition, and perhaps more importantly, Defendants' proffered interpretations of the provision upon which they rely are not supported by the language of those provision, and suffer from other deficiencies. Section 5(a) of the Purchase Agreement relates solely to a narrow category of disputes, namely, disputes over whether, at time of

delivery, the Unit was "in accordance with the Plans." The "Plans" for the Unit showed only the location and boundaries of the Unit. The Johnson-Brown Plaintiffs do *not* allege that the location or boundaries of their Unit are not in accordance with the Plans. Thus, none of the Johnson-Brown Plaintiffs' claims fall within the scope of the narrow dispute-resolution provision of Section 5(a). Moreover, Section 5(a) of the Purchase Agreement was extinguished at the time of settlement, and thus no longer provides the mechanism for resolution of *any* disputes.

Section V.B of the Certificate of Limited Warranty similarly provides no basis for reversal. Defendants did not rely on that provision in the trial court (which is why the trial court did not address it in its opinion), and thus waived the arguments they now make based upon that provision. In addition, the Certificate of Limited Warranty was not signed by the Johnson-Brown Plaintiffs, and thus is not binding on them. And even if it was a contract requiring arbitration of certain warranty claims, it would be void as in violation of the Condominium Act. Finally, even if it was binding and not void, Section V.B relates solely to defects inside of units, and does *not* relate in any way to the fraud claims or common element defects that are at the heart of the Johnson-Brown Plaintiffs' claims.

Accordingly, for numerous reasons – which will now be discussed in greater detail – neither Section 5(a) of the Purchase Agreement nor Section V.B of the Certificate of Limited Warranty provides any basis for reversal of the trial court's denial of Defendants' motion to compel arbitration.

A. Section 5(a) Of The Purchase Agreement Was Not An Agreement To Arbitrate The Claims Made By The Johnson-Brown Plaintiffs In This Case

1. Under Section 5(a) Of The Purchase Agreement, The Only Disputes That Were Subject To Resolution By The Project Architect Were Disputes About Whether The Unit Was Delivered "In Accordance With The Plans," And The Plans Related Solely To The Location And Boundaries Of The Unit

The unambiguous language of Section 5(a) demonstrates that the Johnson-Brown Plaintiffs' claims are not subject to compelled arbitration. The dispute resolution provision of Section 5(a), in its entirety, states: "Any dispute involving delivery of the Unit in accordance with the Plans shall be submitted to Gary E. Handel & Associates, the project architect for a decision, which decision shall be binding." J.A. 218. This provision has three key terms: "delivery," "Unit" and "Plans." Each of those terms has a very specific meaning that, when understood, demonstrates that Defendants' position is flatly wrong.

"Delivery" is defined by Section 5(a) of the Purchase Agreement, which states that "[a]t settlement" the Declarant was required to "deliver the Unit and the appurtenances thereto substantially in accordance with the Plats and Plans, as the same may be modified and amended from time to time, with all fixtures, appliances and equipment to be provided by Declarant." J.A. 218.

The term "Unit" is defined by the Condominium Act. Section 1(a) of the Purchase Agreement states: "Capitalized terms used herein without definition shall have the meaning specified for such terms in the condominium instruments. Otherwise,

terms not defined herein shall have the meaning specified for such terms in Section 45-1802 [now Section 42-1901.02] of the Condominium Act." J.A. 216. Defendants offered no evidence suggesting that "Unit" – a "capitalized term" – was defined in the "condominium instruments." Accordingly, that term must be defined according to the Condominium Act, which defines a "unit" as "a portion of the condominium designed and intended for individual ownership." D.C. Code § 42-1901.02(30). Each "unit" within a condominium "constitute[s] for all purposes a separate parcel of real estate, distinct from all other condominium units." D.C. Code § 42-1901.03. And a "unit" is distinct from the "common elements," which are "all portions of the condominium other than the units." D.C. Code § 42-1901.02(1).

Finally, the term "Plans" is also a term defined by the Condominium Act, and refers to the documents in the Joint Appendix at J.A. 304-20, and specifically, with respect to Unit 8-F North, the document at J.A. 316. The "plans" are among the "condominium instruments" defined at D.C. Code § 42-1901.02(5) ("'Condominium instruments' shall mean the declaration, bylaws, and plats and plans, recorded pursuant to the provisions of this chapter."). D.C. Code § 42-1902.14(b), in turn, defines the content of the "plans" to be recorded as part of the "condominium instruments." As the relevant portions of that provision make clear, the purpose of the recorded "plans" is to identify the location and boundaries of the "units" located within the condominium structure:

> There shall also be recorded, promptly upon recordation of the declaration, plans of every structure which contains or constitutes all or part of any unit or units, and which is located on any portion of the submitted land other than within the boundaries of any convertible lands. The plans shall show the location and dimensions of the vertical boundaries of each unit to the extent that such boundaries lie within or coincide with the boundaries of such structures, and the units or portions thereof thus depicted shall bear their identifying numbers . . . The horizontal boundaries of each unit having horizontal boundaries shall be identified on the plans with reference to established datum.

D.C. Code § 42-1902.14(b).

In accordance with this statutory requirement, the "Plans" at issue in this case show the location and boundaries of the "Unit" that the Johnson-Brown Plaintiffs had agreed to purchase. *See* J.A. 316. And that is essentially *all* that the "Plans" show. That "Plans" contain no information whatsoever about how the building was to be constructed, or about the building's systems (roofing, plumbing, HVAC, etc.), either in the units or the common elements.

Thus, when the terms "delivery," "Unit" and "Plans" are properly defined, the meaning of the dispute resolution provision of Section 5(a) of the Purchase Agreement is clear and unambiguous. That provision covered solely disputes about whether, at the time of settlement, the location and boundaries of the specific residential unit being purchased by the Johnson-Brown Plaintiffs – Unit 8-F North – complied with the Plans (J.A. 316) that showed the location and boundaries of that unit.

Defendants attempt to avoid this straight-forward meaning of Section 5(a) – and to create ambiguity where none actually exists – by suggesting that the term "Plans" refers to some set of documents other than the Plans contained in the Joint Appendix,

J.A. 304-20. Thus, throughout their brief, Defendants use a term – "construction plans" – that does not actually appear in Section 5(a). *See*, *e.g.*, Defs.' Br. at 10, 23, 26, 27. And Defendants argue that "the parties intended the term 'Plans' to refer to the *actual construction documents* used in building the buyers' condominium units, generated by (among others) the project architect and all pertinent contractors and subcontractors." Defs.' Br. at 28 (emphasis in original).

For two primary reasons – one legal and one evidentiary – Defendants' proffered alternative definition of "Plans" must be rejected. First, as a legal matter, Defendants' proffered definition is inconsistent with Section 1(a) of the Purchase Agreement and with the Condominium Act. Section 1(a) instructs that the term "Plans" must be defined according to the Condominium Act unless the term is given a different definition in the "condominium instruments." J.A. 216. Defendants offer no evidence that the term "Plans" was given any meaning in the condominium instruments different from the meaning given to that term in the Condominium Act. And, as discussed above, under the Condominium Act, the "plans" are documents that show the location and boundaries of the units. "Plans" is *not* defined to include blueprints or other "actual construction documents" that are not, under the Condominium Act, required to be recorded.

Second, as an evidentiary matter, Defendants failed to offer any evidence to support their proffered alternative definition of "Plans." The Defendants, in essence, argue that there *must have been* a bunch of "actual construction documents," and that

those “actual construction documents” would somehow have related to all of plaintiffs’ claims. But Defendants offered no evidence of the existence or content of any of those supposed “actual construction documents,” even though such documents (presumably) would be in their possession if they exist. And Defendants offered no evidence that any such “actual construction documents” were made available to the Johnson-Brown Plaintiffs, or that the Johnson-Brown Plaintiffs agreed to arbitrate disputes relating to any such “actual construction documents.” Accordingly, Defendants failed to offer any evidence to support their contention that the Johnson-Brown Plaintiffs’ claims implicate some undefined, hypothetical set of “actual construction documents,” or that the Johnson-Brown Plaintiffs’ agreed to arbitrate disputes relating to such documents.

In sum, the dispute resolution provision of Section 5(a) of the Purchase Agreement had a very specific and unambiguous meaning: it related solely to disputes about whether the location and boundaries of the purchaser’s unit, at time of delivery, were as established in the Plans. Defendants’ proffered alternative reading is inconsistent with the Purchase Agreement and the Condominium Act, and is unsupported by any evidence.

2. None Of The Johnson-Brown Plaintiffs’ Claims Relate In Any Way To The Location Or Boundaries Of Their Unit; Therefore, None Of The Claims Fall Within The Scope Of The Dispute Resolution Provision Of Section 5(a) Of The Purchase Agreement

The Johnson-Brown Plaintiffs do *not* allege that Unit 8-F was not delivered to them “in accordance with the Plans.” None of the Johnson-Brown Plaintiffs’ claims

relate to or hinge in any way upon the location or boundaries of their unit. Rather, the Johnson-Brown Plaintiffs' claims all relate either to the Defendants' misrepresentations and omissions (which did not relate to the location or boundaries of the unit) or to design and construction defects, primarily in the common elements, that – subsequent to delivery of the unit – caused water intrusion, mold growth and other problems (again, having nothing to do with the location of boundaries of the unit). Thus, none of the Johnson-Brown Plaintiffs' claims fall within any reasonable interpretation of Section 5(a).

Defendants repeatedly contend in their brief that "plaintiffs" – a term they presumably use to include the Johnson-Brown Plaintiffs – have brought claims for breach of the Purchase Agreements, and that these claims include or implicate an allegation that the units were not delivered in accordance with the "plans." *See*, *e.g.*, Defs.' Br. at 7, 10, 19-20, 30. But the Johnson-Brown Plaintiffs have *not* alleged a claim for breach of contract (based upon the Purchase Agreement or any other agreement), and do *not* allege anywhere in their complaint that their unit was not delivered or constructed in accordance with the "plans." Thus, at least with respect to the Johnson-Brown Plaintiffs, Defendants' arguments in this regard are simply wrong.

3. Even If Section 5(a) Reasonably Could Be Interpreted To Cover Any Of Plaintiffs' Claims, That Section Of The Purchase Agreement Was Extinguished By Delivery Of The Deed At Settlement

Pursuant To Section 21 of the Purchase Agreement, Section 5(a) was extinguished at time of settlement. Section 21 states, in relevant part, as follows:

> Notwithstanding anything to the contrary herein, acceptance of the deed at settlement shall constitute Purchaser's acknowledgment of full compliance by Declarant with the terms of this Agreement. The terms hereof shall be merged into and extinguished by delivery of the deed at settlement except for Sections 4, 16, 17, 20, 21 and 22 which shall survive delivery of the deed and shall not be merged therein.

J.A. 222.

Defendants offer essentially two arguments for why Section 21 does not vitiate their reliance on Section 5(a), but neither of those arguments hold water. First, Defendants argue that, because the "plaintiffs" have pled affirmative claims for breach of Section 5(a) of the Purchase Agreements, this should somehow preclude "plaintiffs" from arguing that Section 5(a) has been extinguished. *See* Defs.' Br. at 30-32. At least with respect to the Johnson-Brown Plaintiffs, however, that argument is baseless, because the Johnson-Brown Plaintiffs have not pled claims for breach of the Purchase Agreement, and are not affirmatively relying upon Section 5(a) for their claims.

Second, Defendants cite a decision of an intermediate appellate court from a different jurisdiction, *Homes by Pate, Inc. v. DeHaan*, 713 N.E.2d 303, 309 (Ind. Ct. App. 1999), which reasoned that an arbitration clause of a contract continues in effect after the term of the contract ends. *See* Defs.' Br. at 32-33. But that reasoning is

irrelevant to the issue here: whether the parties' affirmative agreement to "extinguish" portions of the Purchase Agreement upon delivery of the deed precludes later reliance upon those "extinguished" portions.

Indeed, Section 21 of the Purchase Agreement is a reflection of a bedrock principle of property law: upon the delivery and acceptance of a deed, antecedent contractual rights are "merged" with the deed, and, as a general rule, cannot thereafter be sued upon. *See*, *e.g.*, *Haviland v. Dawson*, 210 A.2d 551, 554 (D.C. 1965) (noting that "[a]s a general rule of law . . . the provisions of the contract of sale would be considered to have merged in the subsequently-delivered deed"); *Greenfield v. Heckenbach*, 797 A.2d 63, 84 (Md. App. 2002) ("The doctrine of merger by deed provides that, ordinarily, upon delivery and acceptance of a deed, all prior negotiations are merged into the deed, thereby eliminating any contractual rights not included in the deed.").

Parties to a purchase agreement may contract around this general rule by excepting out specific provisions of the purchase agreement from merger. Indeed, that is what the Johnson-Brown Plaintiffs agreed to with respect to Sections 4, 16, 17, 20, 21 and 22 of the Purchase Agreement. But with respect to all other sections of the Purchase Agreement – including Section 5(a) – the parties specifically agreed that the merger doctrine *would* apply. Thus, with respect to Section 5(a), the parties explicitly agreed that it "shall be merged into and extinguished by delivery of the deed at settlement." J.A. 222. Accordingly, Section 5(a) has been extinguished, and no longer

provides any rights to the Defendants. *Compare Engle Homes, Inc. v. Jones*, 870 So.2d 908, 909-10 (Fla. App. 2004) (holding that arbitration provision did not merge with deed where arbitration provision explicitly stated that "[t]his provision shall survive the closing").

In any event, even assuming, *arguendo*, that Section 21 does not mean what it obviously says, Section 21 still strongly undermines Defendants' proffered interpretation of Section 5(a). That the dispute resolution provision of Section 5(a) would be "extinguished" at settlement makes perfect sense if (as the trial court correctly concluded) that dispute resolution provision related solely to disputes that would arise prior to settlement. A dispute concerning the location and boundaries of a unit necessarily is a dispute that would need to be resolved prior to recordation of the deed for that unit. But once the unit is delivered to the purchaser – and once the purchaser accepts and records the deed for that unit – disputes concerning the location and boundaries of the unit are in the past. The purchaser has accepted the unit – in the location and with the boundaries that it has – and gives up the right to later dispute those. Conversely, if, as Defendants' argue, Section 5(a) also covers latent defects in the common elements (or even latent defects in the units themselves), then obviously it would make no sense to "extinguish" that provision at settlement (*i.e.*, at a time before such latent defects could be discovered). Thus, if nothing else, Section 21 undermines Defendants' interpretation of Section 5(a), and very strongly supports the result reached by the trial court.

B. The Court Cannot Compel Arbitration Under Section V.B Of The Certificate Of Limited Warranty

1. Defendants Waived The Arguments They Now Make Based Upon Section V.B Of The Certificate Of Limited Warranty

The trial court's opinion does not discuss whether plaintiffs' claims are subject to arbitration under Section V.B of the Certificate of Limited Warranty. This is because Defendants never made that argument to the trial court. Defendants' motion to compel arbitration in the Johnson-Brown case was filed on December 15, 2003. In the memorandum of law filed in support of that motion, Defendants made no mention of the Certificate of Limited Warranty, and did not supply that document to the trial court. Rather, under the heading "The Arbitration Agreement," Defendants identified only Section 5(a) of the Purchase Agreement. *See* Defs.' Mem. Of Law (Dec. 15, 2003) at 3. And the sole exhibit attached to their memorandum of law was the Purchase Agreement. Only in at the very end of a later reply memorandum did Defendants' make any mention of the Certificate of Limited Warranty, and in so doing made only the very limited argument that "to the extent plaintiffs have pursued claims implicating the Certificate of Limited Warranty, plaintiffs are required to arbitrate those disputes."[5] *See* Defs.' Reply

---

[5] The only reason why Defendants even mentioned the Certificate of Limited Warranty in their reply brief was that the Plaintiffs had brought that document to the attention of the trial court for the purpose of informing the court of Section I.A.2 of that Certificate. Section I.A.2 states: "A judicial proceeding for breach of any obligation arising under paragraph one above must be commenced within five years after the date the warranty period begins."

[Footnote continued on next page]

Mem. In Support Of Motion To Compel Arbitration (Feb. 26, 2004) at 12. At no point did Defendants affirmatively argue to the trial court that the Certificate of Limited Warranty constituted a separate basis for compelling arbitration of any of the Johnson-Brown Plaintiffs' claims. Accordingly, Defendants waived any argument that the Certificate of Limited Warranty provides a basis – independent from Section 5(a) of the Purchase Agreement – for compelling arbitration of the Johnson-Brown Plaintiffs' claims. *Cannon v. Igborzurkie*, 779 A.2d 887, 888 (D.C. 2001) ("points not asserted with sufficient precision to indicate distinctly the party's thesis, will normally be spurned on appeal") (internal citations and quotations omitted).

2. Section V.B Was Not An Agreement To Arbitrate The Claims Made By The Johnson-Brown Plaintiffs In This Case

Assuming, *arguendo*, that Defendants have not waived reliance upon Section V.B of the Certificate of Limited Warranty, the Court still should rule that Section V.B provides no basis for reversal.

The Certificate of Limited Warranty does not cover any complaints that a unit owner might have about the design or construction of the building. Rather, by its terms, the Certificate of Limited Warranty is limited to defects *in the owner's unit*. The very first paragraph of the Certificate of Limited Warranty states:

[Footnote continued from previous page]
Defendants' proffered interpretation of Section V.B of the Certificate of Warranty is, of course, directly inconsistent with Section I.A.2.

> This Certificate of Limited Warranty describes Declarant's obligations under District of Columbia Code Section 47-1856 [now D.C. Code § 42-1903.16] to make adjustments *to your Residential Unit (the "Unit")* in the Condominium and outlines the methods for you to follow to obtain such adjustments.

J.A. 296 (emphasis added).

Then, Section I.A.1 again states that the Certificate of Limited Warranty is limited to defects *in the owner's unit*:

> Declarant will correct any structural defect, which shall be those defects *in components constituting the Unit* which reduces the stability or safety of the Unit below standards commonly accepted in the real estate market or restricts the normal intended use of all or part of the Unit and which requires repair, renovation, restoration or replacement, provided that defect occurs and is brought to Declarant's attention in writing within two years from the Effective Date.

J.A. 296 (emphasis added).

This narrow scope of the Certificates of Limited Warranty is further demonstrated by comparison of the language of Section I.A.1 (just quoted above) with the language of D.C. Code § 42-1903.16(a), which sets forth the full scope of the statutory warranty. While the Certificate of Limited Warranty covers only defects in "components constituting the Unit," that section of the Condominium Act defines "structural defect" to include *both* "a defect in a component that constitutes any unit" *and* "a defect in a . . . portion of the common elements[.]" This comparison further demonstrates that the Certificate of Limited Warranty was intended only to cover in-unit defects.

Section V of the Certificate of Limited Warranty then establishes certain procedures for addressing defects in the owner's unit. Pursuant to Section V.A.1, the unit owner is to notify the Declarant (defendant 2200 M Street LLC) of the defects. J.A. 300. Then, pursuant to Section V.A.2, the "Declarant's representative" is to inspect the unit and "list all warranted defects on the Warranty Inspection Form[.]" After the "Declarant's representative" prepares the Warranty Inspection Form," that form "is to be signed by both the representative of the Unit Owner and Declarant's representative." *Id*.

Section V.B (the section now relied upon by Defendants) then explains how disputes about the contents of the Warranty Inspection Form are to be resolved. As that section makes clear, it is the Declarant's obligation to submit such disputes to the project architect:

> If the Unit Owner and the Declarant's representative fail to agree upon the defects to be noted on the Warranty Inspection Form or the workmanlike correction of such defects, *Declarant will*, within five days after the date of the Unit Owner's request therefore, submit the disagreement to Gary E. Handel & Associates (the "Project Architect") for decision, and such decision shall be final and binding on the Declarant and the Unit Owner.

J.A. 300 (emphasis added).

In other words, under Section V of the Certificate of Limited Warranty, it is the *Declarant* who is responsible for preparing the Warranty Inspection Form, and the *Declarant* who is responsible for submitting disputes over the content of that form to the project architect. Section V imposed no obligations on the owner to either prepare the Warranty Inspection Form, or to submit any dispute to the project architect. And it does

not authorize the project architect to resolve disputes other than disputes over the content of the Warranty Inspection Form or the "workmanlike correction" of defects noted on that Form.

In context, this makes perfect sense, because the Certificate of Limited Warranty is a unilateral promise made by the Declarant to the unit owner, and one that simply tracks a portion of the Declarant's already-existing obligations under D.C. Code § 42-1903.16. The Certificate of Limited Warranty is signed on behalf of the Declarant, but is not signed by the unit owner. *See* J.A. 301. Thus, it is not a contract binding on the unit owner.

Indeed, if the Certificate of Limited Warranty purported to impose a legal obligation on a unit owner to "arbitrate" the substance of all warranty claims before the project architect – an obviously biased decision-maker – then it likely would violate D.C. Code § 42-1901.07. That section states that "a provision of this chapter [meaning the Condominium Act] may not be varied by agreement and any right conferred by this chapter may not be waived." Because the Condominium Act clearly provides for "judicial proceedings" for breach of warranty claims, *see* D.C. Code § 42-1903.17, any purported agreement to waive the right to such a "judicial proceeding" would be void under D.C. Code § 42-1901.07. *See Marina Cove Condominium Owners Assoc. v. Isabella Estates*, 34 P.3d 870, 872-73 (Wash. App. 2001) (interpreting similar

provisions of Washington Condominium Act, and holding that agreement to arbitrate warranty claims was not enforceable).[6]

Moreover, Defendants have offered no proof that a representative of the Declarant (defendant 2200 M Street LLC) ever prepared a Warranty Inspection Form with respect to the Johnson-Brown Plaintiffs' unit, that any disagreement ever existed concerning the content of such a Form, or that the Declarant ever submitted any such disagreement to the project architect. Accordingly, even if Section V.B was somehow binding on the Johnson-Brown Plaintiffs, none of the conditions precedent to submission of the dispute by the project architect have been met.

Finally, even if the Court were to somehow conclude that Section V.B was a binding agreement by the Johnson-Brown Plaintiffs to submit some claims to arbitration before the project architect, that arbitration necessarily would involve only claims covered by the Certificate of Limited Warranty, namely, claims relating to "defects in components constituting the Unit." The Johnson-Brown Plaintiffs' claims in this lawsuit, however, do not, for the most part, relate to defects in their unit. Rather, they

---

[6] Although *Marina Cove* was decided in another jurisdiction, the Condominium Act specifically instructs that "[i]n the application or construction of the provision of this chapter, the courts of the District of Columbia shall give due regard to judicial decisions and rulings in states that have enacted the Uniform Condominium Act or any other condominium statute that contains provisions similar to the provisions of this chapter." D.C. Code § 42-1901.08. Accordingly, at a minimum, *Marina Cove* should be given "due regard" and considered persuasive authority.

relate primarily to misrepresentations and omissions by the Defendants, and to design and construction defects in the common elements of the building.[7]

Accordingly, for these numerous reasons, Section V.B of the Certificate of Limited Warranty provides no basis to compel the Johnson-Brown Plaintiffs to arbitrate the claims they make in this lawsuit.

IV. In The Alternative, The Court Should Permit The Plaintiffs' Statutory Claims To Proceed In The Trial Court Because Those Claims Cannot Be Effectively Vindicated In A Proceeding In Which The Decision-Maker Is The Project Architect

For the various reasons already discussed, the Court should reject Defendants' unreasonable and baseless interpretations of Section 5(a) of the Purchase Agreement and Section V.B of the Certificate of Limited Warranty. However, if the Court were to accept Defendants' contention that the Johnson-Brown Plaintiffs' claims somehow fall within the scope of those provisions, then, in the alternative, the Court should, at a minimum, rule that claims under the D.C. Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq*., and under the statutory warranty provisions of the Condominium Act are not subject to arbitration.

---

[7] Plaintiffs hesitate at this stage of the case – before any discovery has been conducted – to state categorically that *none* of their claims relate in any way to defects in their unit because, among other things, under D.C. Code § 42-1902.06(3), some small portions of the building's structural, plumbing and HVAC systems might, if they cross the boundary line into the unit, be technically considered part of the "unit." However, based upon what plaintiffs currently believe, the great bulk of the design and construction defects at issue in the lawsuit – defects that caused massive flooding, water intrusion and mold growth throughout the building – were defects in common elements.

As the U.S. Supreme Court has recognized, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in the arbitral, rather than a judicial, forum.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). But to assure that "'the statute will continue to serve both its remedial and deterrent function,'" the Court must determine whether "'the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.'" *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637). Interpreting that "effective vindication test," the D.C. Circuit has recognized that "[a]t a minimum, statutory rights include both a substantive protection and access to a *neutral forum* in which to enforce those protections." *Cole v. Burns Intern. Sec. Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (emphasis added).

Here, the procedures contemplated by Defendants would not provide the necessary "neutral forum" for adjudication of the Johnson-Brown Plaintiffs' statutory claims. Clearly, the "project architect" – an entity hired by and paid by the Defendants, and who presumably was directly involved in the very design and construction that plaintiffs allege was deficient – would not be a "neutral" arbiter. In addition, the provisions relied upon by Defendants contain no suggestion of what rules or procedures would be applied by the "project architect," and no guarantee that plaintiffs would be entitled to discovery or an evidentiary hearing. In short, the Johnson-Brown Plaintiffs could not effectively vindicate their statutory claims in the type of proceeding urged by

Defendants. For that reason, the Johnson-Brown Plaintiffs' statutory claims cannot be subjected to those proceedings.

CONCLUSION

For all of these reasons, the Superior Court's order denying Defendants' motion to compel arbitration should be affirmed.

Respectfully submitted.

____
Steven A. Skalet
D.C. Bar No. 359804
MEHRI & SKALET, PLLC
1300 19th Street, N.W., Suite 400
Washington, D.C. 20036
(202) 822-5100

____
Jonathan K. Tycko
D.C. Bar No. 445851
TYCKO, ZAVAREEI & SPIVA LLP
2000 L Street, N.W., Suite 808
Washington, D.C. 20036
(202) 973-0900

For Appellees Pauline Johnson-Brown and Lara Michelle Brown

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of October, 2004, true and correct copies of the foregoing Brief Of Appellees Pauline Johnson-Brown and Lara Michelle Brown were served by first-class mail, postage prepaid, upon the following:

Laurie S. Fulton, Esq.
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005

Joseph A. McManus, Jr., Esq.
McManus, Schor, Asmar & Darden, LLP
1301 Connecticut Ave., N.W.
Sixth Floor
Washington, D.C. 20036

David H. Wise, Esq.
Lewis & Roberts, PLLC
10201 Lee Highway, Suite 210
Fairfax, VA 22030

____
Jonathan K. Tycko