Florida Appellate Court Rules That Arbitration Agreement in Special Warranty Deed Can Bind Subsequent Purchasers

REAL PROPERTY LITIGATION | TITLE INSURANCE | CONSTRUCTION | JULY 16, 2019

Contracts sometimes include arbitration clauses — where the parties agree that certain disputes will be resolved through arbitration instead of through legal proceedings. A recent Florida appellate decision — *Hayslip v. U.S. Home Corp.* , No. 2D17-4372 (Fla. 2d DCA July 10, 2019) — considered an arbitration clause that the developer/homebuilder included in a deed to a home purchaser. The Florida appellate court was asked to determine whether the recorded deed's arbitration clause was binding on subsequent purchasers of the home. Through *Hayslip*, Florida's Second District Court of Appeal recently held that an arbitration agreement in a special warranty deed can function as a covenant running with the land and bind subsequent purchasers of the property. Because this was apparently an issue of first impression in Florida, the court also certified this to the Florida Supreme Court as a question of great public importance.

Hayslip considered a residence that U.S. Home sold to the Kennisons in 2007. U.S. Home's special warranty deed to the Kennisons contained a broad arbitration provision and recited that "all covenants, conditions and restrictions contained in this Deed are equitable servitudes, perpetual and run with the land. ..." In addition, the deed stated that the "Grantee, by acceptance of this Deed, automatically agrees for itself, and its heirs, personal representatives, successors and assigns, to observe and to be bound by all of the terms and conditions set forth in this Deed." In 2010, the Kennisons sold the property to the Hayslips. In 2017, the Hayslips sued U.S. Home, alleging that defects in the stucco violated the building code. U.S. Home took the position that the lawsuit was subject to the deed's arbitration clause, and the builder asked the court to compel or require the Hayslips to pursue their claim through arbitration. The trial court agreed with U.S. Home and granted the motion to stay the lawsuit and to compel arbitration. The Hayslips appealed.

The Hayslips argued that: (1) the arbitration agreement was void because the Kennisons had not signed the 2007 deed; and (2) the agreement could not bind the Hayslips as subsequent purchasers because the deed was a personal covenant between the Kennisons and U.S. Home. Judge Black, joined by Judges Villanti and Atkinson, quickly rejected the first argument, noting that deeds are traditionally not signed by grantees and that a party's conduct (including accepting the property) is sufficient to indicate its assent to the deed's arbitration provision.

As to the second argument, the court hesitated, noting that the case law on the question was "sparse" and that it was an issue of first impression in Florida. However, the court concluded that an arbitration agreement in a deed can function as a covenant running with the land because it sufficiently "touches and concerns" the real property, rather than only the personal rights between the parties. The court analogized the provision to so-called exclusives in lease agreements that prevent a tenant or its successors or assigns from competing directly with another tenant. The court then distinguished the case on which the Hayslips relied, which involved a covenant in which the seller reserved a right to the proceeds of a condemnation for the taking of part of the property. The court concluded that this provision related only to money, rather than to the use or enjoyment of the land itself.

Nevertheless, the court certified the following question to the Florida Supreme Court: "Does a mandatory arbitration provision contained within a residential warranty deed conveying residential property from homebuilder to original purchaser run with the land such that it is binding on subsequent purchasers where the intended nature of the provision is clear and the party against whom enforcement is sought was on notice of the provision?"