

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION: AN
CASE NO.: 50-2020-CA-014078-XXXX-MB

STEVEN ISCOWITZ,
NANCY ISCOWITZ,
Plaintiff/Petitioners

vs.

PALMETTO PLACE AT MIZNER PARK CONDOMINIUM ASSOCIATION INC,
FIRSTSERVICE RESIDENTIAL FLORIDA INC,
Defendant/Respondents.

_____ /

ORDER

**GRANTING DEFENDANT PALMETTO PLACE AT MIZNER PARK
CONDOMINIUM ASSOCIATION, INC.'S MOTION TO DISMISS**

AND

**GRANTING IN PART
FIRSTSERVICE RESIDENTIAL FLORIDA, INC.'S MOTION TO DISMISS**

THIS MATTER came before the Court for hearing on May 4, 2021, on Defendant, Palmetto Place at Mizner Park Condominium Association, Inc.'s ("Association") Motion to Dismiss ("Association Motion"), and Defendant FirstService Residential Florida, Inc.'s ("FirstService") Motion to Dismiss ("FirstService Motion"), and after hearing on the matter, reviewing the motions, and being otherwise fully advised in the premises, the Court finds and concludes as follows:

1. On or about December 16, 2020, Plaintiffs filed their Complaint in this matter asserting thirteen (13) counts for relief, which claims largely arise out of and relate to conduct on the part of the Association and the Association's property manager, FirstService, related to their

response to the Covid-19 pandemic, particularly pertinent to the Plaintiffs, after it was revealed to FirstService that Plaintiffs had tested positive for Covid-19.

2. In particular, Plaintiffs assert the following claims against Association: Count I-Breach of Governing Documents; Count II-Breach of Implied Covenant of Good Faith and Fair Dealing; Count III-Negligence; Count IV-Malicious Prosecution; Count V-Abuse of Process; Count VI-False Imprisonment; Count VII-Invasion of Privacy; Count VIII-Trespass to Chattels; Count IX-Violation of Florida Chapter 718.106; and Count XIII-Conspiracy for False Imprisonment.

3. Plaintiffs assert the following claims against FirstService: Count X-Negligence; Count XI-Negligent Misrepresentation; Count XII-False Imprisonment; and Count XIII-Conspiracy for False Imprisonment.

4. Both Association and First Service have filed motions to dismiss asserting as a threshold matter that Plaintiffs' claims are subject to the mandatory non-binding arbitration provisions of Fla. Stat., §718.1255 and, alternatively, depending on the Court's determination of the arbitration issue, if the substance of the claims are necessary to be addressed that they otherwise fail to state a claim.

5. Defendant asserts two primary arguments against mandatory arbitration being required in this instance: first, that the Plaintiffs' claims do not fall within the definition of "dispute" set forth in Fla. Stat., §718.1255; and, secondly, that the Association's right to demand arbitration in this instance was waived when Defendant Association filed an equitable action seeking injunctive relief in July 2020. For the reasons explained below, the Court finds both of Plaintiffs' arguments against mandatory arbitration to be without merit as to all counts against the Association, except Counts IV-Malicious Prosecution and Count V-Abuse of Process. As to

Counts IV and V, however, the Court finds that Plaintiffs have failed to state a claim.

6. Pursuant to Fla. Stat., §718.1255:

. . . the term “dispute” means any disagreement between two or more parties that involves:

(a) The authority of the board of directors, under this chapter or association document to:

1. Require any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto.

* * *

7. Although Plaintiffs attempt to construct an argument that their claims in large part do not involve a disagreement between the parties involving the Association’s authority to require them as owners to take or not take any action involving their units or appurtenances thereto, any reasonable reading of their pleading quickly reveals the disingenuous of such position. The Court finds Plaintiffs’ attempt to define and characterize their claims in a manner to be excluded from the scope of Fla. Stat., §718.1255, although passionately made, nothing more than an exercise in semantical gymnastics with no substantive support.

8. After a careful review of Plaintiffs’ Complaint and Fla. Stat., §718.1255, the Court finds the claims asserted by Plaintiffs against Association in Counts I, II, III, VI, VII, VIII, IX, and XIII to fall within the scope of “dispute” as defined in Section 718.1255 and thus subject to the statutory mandatory non-binding arbitration provisions set forth therein.

9. The Court further concludes that Counts X, XII, and XIII asserted against First Service are inextricably intertwined with the claims against Association and thus fall within the purview of Fla. Stat., §718.1255 as well.

10. Having determined that the foregoing claims are subject to the mandatory arbitration provisions of Fla. Stat., §718.1255, the next issue for determination is whether Association waived the right to demand arbitration in this matter as a result of its filing of an

equitable action seeking injunctive relief in July 2020. This same action is referred to in Plaintiffs' Complaint in this case and the Court therefore has considered the allegations of Association's pleadings in the other matter in connection with its consideration of Plaintiffs' waiver argument in this case.

11. After a careful review of the Association's pleadings in the other case, the Court does conclude that Association's filing of that action, although seeking equitable relief alone, was predicated on similar, albeit not identical, facts and circumstances to this case. Importantly, however, Association dismissed that case on July 27, 2020, and thus never litigated the matter beyond the filing of the Amended Complaint. While it appears Defendants were served, they too took no action to litigate the case and no answer, affirmative defenses, or counterclaim was filed by them in that action. Had they done so, the Court would easily reach the conclusion that Association waived its right to demand arbitration as to any claims being litigated in that action by both Association and the Plaintiffs here (who were Defendants in that action).

12. Nonetheless, Plaintiffs here ask the Court to conclude that such filing by Association in the other matter now constitutes a waiver in this case of its right to demand arbitration under Fla. Stat., §718.1255.

13. As noted in the recent decision of *Black Knight Servicing Technologies, LLC v. Pennymac Loan Services, LLC*, 310 So.2d 1116, 1117-18 (Fla. 1st DCA 2021):

The general definition of waiver, namely 'the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right,' applies to the right to arbitrate." "[The] party arguing waiver of arbitration bears a heavy burden of proof."

"All doubts regarding waiver should be construed in favor of arbitration rather than against it."

Id. (citations omitted).

14. Under the facts and circumstances present in this instance, the Court concludes that the prior filing by Association, which was voluntarily dismissed, is not sufficient to demonstrate to the Court a knowing and intentional relinquishment or waiver on the part of the Association of the right to demand arbitration in this case, especially since this matter was not commenced until December 16, 2020, approximately five (5) months after the dismissal of the earlier action. The Court also notes that this action, although based on similar facts and circumstances as the other action, is considerably broader in factual and legal scope, and names Association's property manager as a co-defendant. Thus, the Court concludes that Plaintiffs have not satisfied their heavy burden to demonstrate a waiver by the Association of its right to demand arbitration in *this* case. Further, the cases cited by Plaintiffs on the issue of waiver are easily distinguishable on the facts and, when pressed, Plaintiffs' counsel was unable to present to the Court any legal support or case law on facts more analogous to those *sub judice*.

15. Therefore, having determined that most of Plaintiffs' claims fall within the reach of Fla. Stat., §718.1255 and that the right to demand arbitration has not been waived, the Court concludes that Counts I, II, III, VI, VII, VIII, IX, X, XI, and XIII are subject to the statutory mandatory non-binding arbitration provisions set forth in Fla. Stat., §718.1255 and thus subject to dismissal in this case. *See Neate v. Cypress Club Condominium, Inc.*, 718 So.2d 390 (Fla. 4th DCA 1998) ("Although section 718.1255 deals with arbitration rather than notice, we conclude that both are properly conceived of as conditions precedent to filing an action in court. The violation of a condition precedent to filing an action in court should properly be a dismissal, not a stay.").

16. With respect to Count IV-Malicious Prosecution asserted by Plaintiffs against Association, the Court finds and concludes that such count fails to state a claim, as on its face, the Complaint fails to allege, other than in conclusory fashion, a bona fide termination of the other

action filed by Association favorable to Plaintiffs.

17. With respect to Count V-Abuse of Process, the Court similarly finds and concludes that Plaintiffs have failed to state a claim.

18. As noted above, the Court further concludes that Counts X, XII, and XIII asserted against First Service are inextricably intertwined with the claims against Association and thus fall within the purview of Fla. Stat., §718.1255 as well and are therefore subject to arbitration under Fla. Stat., §718.1255.

19. Finally, after close review, the Court is unable to conclude that Plaintiffs' claim of negligent misrepresentation set forth in Count XI falls within the scope of the definition of dispute as provided for in Fla. Stat., §718.1255. Further, in applying the standard applicable to motions to dismiss where the non-moving party is given the benefit of all favorable inferences, the Court concludes that Plaintiffs have adequately stated a claim.

Based on the foregoing, it is thereby

ORDERED AND ADJUDGED as follows:

A. Association's Motion is Granted as follows:

1) Counts I, II, III, VI, VII, VIII, IX, and XIII are subject to the statutory mandatory non-binding arbitration provisions set forth in Fla. Stat., §718.1255 and are therefore dismissed in this case without prejudice but without leave to amend for failure to satisfy conditions precedent.

2) Count IV-Malicious Prosecution and Count V-Abuse of Process are dismissed without prejudice and with ten (10) days leave to amend.

B. FirstService's Motion is granted in part and denied in part as follows:

1) Counts X, XII, and XIII are subject to the statutory mandatory non-binding arbitration provisions set forth in Fla. Stat., §718.1255 and are therefore dismissed in this case

without prejudice but without leave to amend for failure to satisfy conditions precedent.

2) Denied as to Count XI, without prejudice to Defendant FirstService to re-raise any and all arguments and defenses as may be available by way of summary judgment. Defendant shall have ten (10) days to answer Count XI.

DONE AND ORDERED in Palm Beach County, Florida.

502020CA014078XXXMB 05/07/2021
Howard K. Coates, Jr.
Howard K. Coates, Jr. Circuit Judge
502020CA014078XXXMB 05/07/2021
Howard K. Coates, Jr
Circuit Judge

HOWARD K. COATES, JR.
CIRCUIT JUDGE

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