Rickenbaugh v. Power Home Solar, LLC, 2020 NCBC Order 11.

STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 244
JAMES RICKENBAUGH; and MARY RICKENBAUGH, Individually and on Behalf of all Others Similarly Situated, Plaintiffs, v. POWER HOME SOLAR, LLC, Defendant.	**ORDER ON DEFENDANT'S MOTION TO STAY DECEMBER 20, 2019 ORDER AND ARBITRATION PENDING APPEAL AND PETITION FOR WRIT OF CERTIORARI**

1. **THIS MATTER** is before the Court upon Defendant Power Home Solar, LLC's ("Power Home") Motion to Stay December 20, 2019 Order and Arbitration Pending Appeal and Petition for Writ of Certiorari (the "Motion"). (ECF No. 38.) Having considered the Motion, the related briefs, and the arguments of counsel, the Court hereby **DENIES** the Motion.

BACKGROUND

2. This case arises from alleged misrepresentations and false statements made by Power Home in the sale of Power Home's energy efficiency products to Plaintiffs James and Mary Rickenbaugh (the "Rickenbaughs" or "Plaintiffs") and other customers. The Rickenbaughs commenced this action on January 7, 2019 "as representatives of all others similarly situated under the provisions of Rule 23(a) of the North Carolina Rules of Civil Procedure[.]" (Class Action Compl. ¶¶ 41–43, ECF No. 3.) They assert claims against Power Home for common law fraud and fraud in the inducement, unfair and deceptive trade practices under N.C.G.S. § 75-1.1, breach

of contract, punitive damages, and unjust enrichment. (*See* Class Action Compl.) The Rickenbaughs allege that other members of the purported class include homeowners in the states in which Power Home does business and "in other places throughout the United States[,]" thus creating a class that could be made up of more than 10,000 people. (Class Action Compl. ¶¶ 59–60.)

3. On March 26, 2019, Power Home moved to dismiss Plaintiffs' Complaint or, in the alternative, to compel bilateral arbitration under Power Home's standard purchase contract (the "Agreement") and stay this action pending the completion of arbitration ("Motion to Dismiss"). (ECF No. 15.) On December 20, 2019, the Court issued its Order and Opinion on the Motion to Dismiss ("December 20 Order"), ordering Plaintiffs' claims to arbitration, deferring the determination of whether class arbitration is available under the Agreement to a properly selected arbitrator, and staying the litigation of all claims in this action pending the outcome of the arbitration proceedings. (ECF No. 36.)

4. On January 17, 2020, Power Home filed a Notice of Appeal of the December 20 Order to the Supreme Court of North Carolina. (ECF No. 37.) At the same time, Power Home filed the Motion, seeking to stay enforcement of the December 20 Order until Power Home's appeal is decided. (ECF No. 38.)

5. On February 12, 2020, Plaintiffs filed an Arbitration Demand with the American Arbitration Association ("AAA"), seeking an arbitrator's determination that Plaintiffs' claims "are not within the scope of the applicable arbitration clause[,]" or, in the alternative, that class arbitration is available under the Agreement's

arbitration clause and that Plaintiff's proposed class should be certified and recover damages from Power Home. (*See* Aff. Matthew F. Tilley, Ex. A, at 13–14, ECF No. 45.) By agreement of the parties, Defendant's answering statement in the arbitration is due by March 11, 2020.

6. The Motion has been fully briefed, and the Court held a hearing on the Motion on February 28, 2020, at which all parties were represented by counsel. The Motion is now ripe for resolution.

ANALYSIS

7. The Court's December 20 Order determined as an issue of first impression in North Carolina that the parties' agreement to proceed under the AAA Construction Rules, which delegated to an arbitrator the determination of the "scope" of the arbitration, delegated to an arbitrator the determination of whether the parties had agreed to bilateral or classwide arbitration.

8. Power Home argues that the Court's ruling was erroneous. Contending that the December 20 Order denied Power Home's right to bilateral arbitration and relying on the United States Supreme Court's recent decision in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), Power Home asks the Court to stay the parties from proceeding in arbitration until the Supreme Court of North Carolina decides the important matter of public policy raised in the appeal of the December 20 Order. (Br. Def. Power Home Solar, LLC Supp. Mot. Stay Order & Arbitration Pending Appeal & Pet. Writ Cert. 4–8 [hereinafter "Br. Supp."], ECF No. 39.) Otherwise, Power Home argues, it will lose its right to have the Court's decision judicially reviewed before it

may be required to engage in expensive and time-consuming classwide arbitration to which it contends it did not consent. (Br. Supp. 8–10.)

9. Plaintiffs strenuously object to a stay, contending that Power Home can show neither a likelihood of success on appeal nor irreparable harm and relying on well-established North Carolina case law holding that orders compelling arbitration are interlocutory orders that do not affect a substantial right and thus are not immediately appealable nor properly subject to a stay. (Pls.' Br. Opp'n Def.'s Mot. Stay Order & Arbitration Pending Appeal & Pet. Writ Cert. 7–11 [hereinafter "Br. Opp'n"], ECF No. 41.) *See, e.g.*, *Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 285, 314 S.E.2d 291, 293 (1984) ("An order compelling the parties to arbitrate is an interlocutory order. We do not believe it affects a substantial right and works an injury to the appellant if not corrected before an appeal from a final judgment."). Plaintiffs further argue that a stay of the arbitration would cause substantial harm to both Plaintiffs and the class because, to paraphrase, "justice delayed is justice denied." (Br. Opp'n 10–11.)

10. The Court is sympathetic to Power Home's wish for judicial review before it may be required to engage in classwide arbitration, particularly in light of the Supreme Court's observations and holding in *Lamps Plus* concerning "the 'fundamental' difference between class arbitration and the individualized form of arbitration envisioned by the FAA" and the Court's view that "[class arbitration] 'sacrifices the principal advantage of arbitration—its informality—and makes the

process slower, more costly, and more likely to generate procedural morass than final judgment.' " 139 S. Ct. at 1416 (citations omitted).

11. The Court disagrees, however, with Power Home's contention that the Court has denied Power Home's motion for bilateral arbitration. Rather than reject bilateral arbitration, the Court's December 20 Order compelled Plaintiffs' claims to proceed in arbitration and deferred to an arbitrator the scope of that arbitration. Where, as here, arbitration is compelled, our appellate courts have instructed that "the arbitration proceeding *may not be stayed for any reason* other than a determination that there is not a valid written agreement to arbitrate the dispute." *Henderson v. Herman*, 104 N.C. App. 482, 485, 409 S.E.2d 739, 741 (1991) (emphasis added). Here, there is a valid written agreement to arbitrate the parties' dispute as set forth in the Agreement. Thus, binding precedent requires the Court to "step back and take a 'hands-off' attitude during the arbitration proceeding." *Id.* at 486, 409 S.E.2d at 741. In short, the Court may "not interfere[.]" *Id.*, 409 S.E.2d at 742; *see also Peden Gen. Contractors, Inc. v. Bennett*, 2005 N.C. App LEXIS 1492, at *14 (N.C. Ct. App. Aug. 2, 2005) (applying *Henderson*); *Miller v. Two-State Constr. Co.*, 118 N.C. App. 412, 415–16, 455 S.E.2d 678, 680 (1995) (same); *McMillan v. Unique Places, LLC*, 2015 NCBC LEXIS 49, at *14 (N.C. Super. Ct. May 7, 2015) (same). The Federal Arbitration Act does not command a different result. *See, e.g.*, *Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.*, 643 F.2d 863, 868 (1st Cir. 1981) ("[T]o enjoin a party from arbitrating *where an agreement to arbitrate is absent* is the concomitant of the power to compel arbitration where it is present."

(emphasis added)); *Black & Pola v. Manes Org., Inc.*, 72 A.D.2d 514, 514 (N.Y. App. Div. 1979) (Under the FAA, "[i]t was error . . . to stay arbitration . . . since there was no issue as to the making of the arbitration agreement.").

12. Since the Court concludes that it does not have authority to stay arbitration after it has been compelled, a stay of the December 20 Order, at least by this Court, is not proper. It appears to the Court that if Power Home is to obtain the relief it seeks, it must come, if at all, from our State's highest court. To that end, the North Carolina Rules of Appellate Procedure contain mechanisms, including emergency and expedited measures, through which Power Home may seek its requested relief from the Supreme Court in a timely manner.

13. **WHEREFORE**, for the reasons set forth above, the Court, in the exercise of its discretion, hereby **DENIES** Power Home's Motion.

SO ORDERED, this the 5th day of March, 2020.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge