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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3789-11T3

HUDSON TEA BUILDINGS CONDOMINIUM ASSOCIATION, INC., JOHN AND TANDI ALTOMARE, LISA BALDOWSKI, BG LEGACY R/E HOLDINGS, LLC, MIRAM BRODY AND ISAAC KRAMNICK, WENDY CHAITIN, MICHAEL CHANG, FIONA CONNEL, PATRICK CROSETTO, JUDITH DANIELS, JOSEPH AND ANN D'ELIA, ANTHONY DICATALDO, DAN AND LLANA ESHEL, ASHLER FROELKE, DONNA GOLDMAN, ERIC AND CARL EDIGES, FRANK HEIDINGER, BARBARA JACKSON, GERARD KANE, JR., STACIA KARGMAN, JEANNE KIM, YURY AND RAACHEL KORSKEY, LAURIE LARSON, STELLA LAVIN AND ALBERTO FORERO, CHAK AND MERCEDES LEE, KEITH LEE, VINCENT LEVEQUE AND MALINA BAKSHI, GREGORY AND PATRICIA LOFTUS, MYDA LOPEZ AND HENDRICUS HELLEMONS, JASON AND ALYSSA LUND, THOMAS AND SHARON LYDON, LAURA AND MARC MAUCERI, BRENDAN MCNAMARA AND KAREN JAGATIC, VISHAL MEHTA AND BHAWANA MALHORTA, ROBERT AND ANN NICHOLSON, SCOTT AND MARIA OBLON, ANDREA PENN, JASON AND AMY PIELSON, JEFFREY AND ANDREA PIETRAGALLO, ERIC RICCIARDI, ARTHUR ROTHSCHILD, URSULA SANJAMINO, STEPHEN SAVONS, ERIC AND EMILY SCHMALZBAUER, FREDERICO SILVIERA, LIGUO SONG AND LIN TANG, CANDICE STELLA AND JAN SKOVARD, STEPHEN SULLIVAN, MICHELLE TOTO, DANNY TSE AND YOUNG-EUN LEE, BROOKE TWYFORD, JOANNES AND MARIANNE VAN DOORN, SALVATORE VONA AND CHRISTINE CHIMEDI,

REENA WALIA AND JOY PETERS, PHILLIP WASSERMAN, MARYBETH WELCH, KRETINA AND WILLIAM WRIGHT, EISHUN AND MUTSUMI YAMADA, CONG YU AND RONGLAI SHEN, PAIGE ZAZZALI, THOMAS ANDERSON, NICHOLAS ARNELI, KIM BEARDSLY AND WENDY TAIT, FRANK AND TINA BERMAN, BRIAN BISOGNO, SUBHRO BOSE, LORRAINE AND MURRAE BOWDEN, MICHAEL AND DAMARIS CARACCIOLO, DAMIEN CARLINO, MAUREEN CARROLL, PERRY CHUDNEFF, DANIEL AND DAVID CRUZ, HAROLD AND CHRISTINE DAVIS, PAULANDRE DEEAGON, MARISA SANTORO DIJORGE, ANDREW FELDMAN, TIFFANIE FISHER, EUGENIA FRANKENTHAL, NATHAN AND ZAREEN GAUDIO, TOBIN AND KELLY GAUN, SHERYL GOSKI, MICHAEL HENDERSON, JR., BARBARA JACKSON, BAETA JANECKA, DONALD AND JIAN KIMBALL, JOANNA AND DEAN KORDALIS, ALISON KRISTAK, JACKLYN LEBENTAL, WEI HONG LIU AND QING XUE, ANDREW LOTTMAN, ANA MACIEL AND MARIA BATISTA, LAURA MASTROPASQUA, KRISTEN AND PETER OLNEY, MICHAEL ORLOV, ALEXANDER AND LISA PHILLIPS, WILLIAM POST, CYNTHIA QUINT, RICHARD RINARTZ AND RAINA FERRERI, TIMOTHY ROMANO, NICHOLAS AND KRISTEN ROSSI, ALEX RUBINO, KAREN AND DAVID RUEF, ERIC SANDLER, ERIC AND MICHELLE SANDLER, KARA SANDLER, AMIR AND KRISTEN SHECTER, ALISON SHIPITOFSKY, SUE ANN SIMPSON, WILLIAM AND JODIE SOVAK, MORGAN THOMAS STILES, ABIGAIL TROPER, DENNIS TYSBA, JOANNES AND MARIANNE VAN DOORN, NANCY VAZQUEZ, JOHN VELTRI, MARYANN WALBURN, TIMOTHY AND ANNE WALSH, LINDSEY BEDNAR AND JOE CASETTA, MARTA AND ROBERT TORIELLI, SU YOUNG KIM, WILLIAM AND ANITA POLLERT, JOSEPH AND SHAYNA STEPHANAK, SUZANNE

EMBLETEN, MICHAEL AND OREEN EAD, SUSANNE VOLKERT AND GEORG INGENBLEEK, JOAN LANGER, LUIS FELIPE PINTO, JEFFREY LOWE, FRANK AND CHRISTINA DISANZO, DOROTHY ANNE JARRELL, LAUREN SOUSA, AMY ORLICK, JOANNA TAPIA, KELLY CELUCH, SARA AND LAWRENCE WEINER, CARMINE RANDO, ADRIAN LEE, DULANI FAMILY REVOCABLE TRUST, JAMES GALLO, JEFF UHLIR, GRANT PREVOR, LORI FARIA, FRANCES BISOGNO, CHARLES BROUWERS AND YASMINE UZMEZ, CHARLES BROUWERS, JESSICA SEATON AND LINDA SWARTZ, ANDREW EDLIN, CHARLES MASCHI, RATCHANEE SINGPRASONG, WILLIAM AND FLORENCE SINCLAIR, DESMOND JORDAS, ANDREW AND KRISTINA BRENNER, ALEX DEOTERIS, LAUREN AND DAVID FREYLIKHMAN, MIKE DUFFY, TAMAR AMITAY, KRISTIN FARRELL, ERIC DALUGA AND DONNA SULLIVAN, TAMI KOSHIBA MIZUNO, MARCUS AND EVE SLIMBERG, SEENAM NGUYEN, JESAL ASHER RAJDA, GREGORY GASTMAN AND JEANNE MATASE, JENNIFER ZAR, NICOLE RIZZO, WILLIAM HEARON, SHARON BENTAIN, CORI AND JOSHUA ABRAMS, AMY MANCINI, ANDREW AND DEVON MAGGIO, MICHAEL MOORE, MELIN YALCIN, BOB BONANNO AND CATHERINE GERARDI, RITA HOARD, MYRNA CASTILLO, NANCY RETZLAFF, AMAM AND SHEFALI PATEL, BRANDON FRIED, MARK VINGER, PETER STACKLIFF AND ADRIANA KALOVA, CRYSTAL CALABRESE, JODIE TUNIS, 480 CLIFTON AVE ASSOC – DOUG DOWNEY, THOMAS DEGEN, PHILIP AND KATHLEEN TOWNER, SYL, LLC c/o STEVE LEVINE, TRACY AND MICHAEL SISTO, CARLA SANTINI, RIMA DOSHI, JASON THACKER AND JACLYN MASCUERHAS, TARA SCHMITT, FRANK MATARAZZO, JOHN AND CATERINA JOHNSON, TARA MCENVOE, RENA KATZ DURN, PETER AND PAULINE COUTROULIS, GEORGE, LAUREN AND JACQUELINE

STELLER, SEEMA AND IAN FITZGERALD, ELIZABETH COTTINGHAM-WERNER AND ANTHONY WERNER, EVAN AND LESLEY NEADEL, JODI DAVIDSON AND JEAN-PHILIPPE GERBI, LAUREN AND NICHOLAS TRIALONAS, KENNETH KUNTZ, IRVIN AND NADINE BRECHNER, BRYAN AND SHARYN ANGLEY, PETER AND PAULINE COUTROULIS, ROSINI MUNDEGAR AND SUAUY SHAMRAZ, SANDRA MATTINGLY, TIM RANDAK, AMY AND RONNIE TAYLOR, JASON METZ, SANG HYUN LEE AND JIYUN CHAE, RICHARD, TINA AND MICHAEL KAPLAN, CONRAD REGENT, JOHN FARINA, LISA FRANCKOWIAK A/K/A LISA MCEWAN, MATTHEW BURKE, ALAN BLUMBERG, DANIELLE PESSOLANO, JOHN AND KATHLEEN MCAVOY, DANIELLA D'ALBERO, AMY FARRIS AND DANIEL BRUK, STACY AND JED GOLDSTEIN, FREDERICK STOLERU, PETSHAN LO AND ISAAC LAUFER, MICHELE GERACE, PETSHAN LO, ROBERT AND MARTA TORIELLI, CHRISTOPHER BURKE, SALVATORE DIRSCHBERGER, GERALD PLESCIA, SOLE MEMBER OF ASHLEY HOBOKEN PROPERTIES, LLC, AMY AND STEVEN DEANGELO, AMIRA BADAAN, DORIS GLYKYS, SUSAN MANTEL, NAN-HUI WEI, JEFFREY AND ALLISON STUPAK, CAROL V. BROWN, ARUN AND ARCHNA JAIN, KEVIN CORBETT, KEVIN AND JACQUELINE HANEY, BRIAN AND MARCIA THOMAS, KARYN WRIGHT, JUSTIN MANDEL, SASCHA MARIC, KATHRYN DUGAN, ESTER AND YAIR SEGER, JENNIFER STAIMAN, HANNAH KAURSLAND AND WAYNE GOUGH, SCOTT MARZULLO, KEVIN TIMINONS AND KAREN MCCLINTOCK, JONGIL KIM, DAVID AND ALLISON TAMBURELLI, CAROLINE AND GREGORY WARNKE, CHARLES COLUZZA, CINTHIA MORGAN, ZACHARY M. SCHWITZSKY, NATHALIE ENTERLINE, GRAHAM AND EVA BRANTON, RACHEL GUPTA, NEELIMA SHARMA, SHARAD

SHARMA, MICHELLE SULLIVAN AND MICHAEL O'DONNELL, TIMOTHY PAULEY, TIMOTHY KEARNS, KRISTIN ROMAN, LISA GRAS, STEPHEN MANAKER AND CHRISTINE SWIAG, RAJU AND CHUNILAL KANSAGIA, JEFFREY AND LINDA BIELIK, MITCH FATEL, JACK BOYLE, KARA ROUSSEAU, PATRICK CASEY, DEVON MARTIN, FARRAH CHU, CHRISTIAN PASARICA, SABRINE GILLIAM, WALTER AND ILZE HENRY, KRISTIN HESPOS, SCOTT AND NICOLE NETTUNE and RICHARD BOIARDO,

Plaintiffs-Respondents,

v.

BLOCK 268, LLC, HOBOKEN LAND I, LLC, APOLLO REAL ESTATE ADVISORS, L.P. and TOLL BROTHERS, INC.,

Defendants-Appellants,

and

GMAC INSTITUTIONAL ADVISORS, LLC and PAULUS SOKOLOWSKI AND SARTOR, LLC,

Defendants-Respondents.

Submitted October 30, 2012 - Decided April 29, 2013

Before Judges Lihotz and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-5338-11.

Peckar & Abramson, P.C., attorneys for appellants (Charles F. Kenny and Denis Serkin, on the briefs).

Lum, Drasco & Positan, LLC, attorneys for plaintiffs-respondents (Dennis J. Drasco and Paul A. Sandars, III, of counsel and on the brief; Bernadette H. Condon, on the brief).

Respondent GMAC Institutional Advisors, LLC has not filed a brief.

Respondent Paulus Sokolowski and Sartor, LLC has not filed a brief.

PER CURIAM

Hudson Tea Buildings Condominium Association (Association) and over two hundred individually named unit owners (Owners) (collectively, plaintiffs) asserted various statutory, tort and contract claims, related to alleged construction defects, against Block 268, LLC (Block 268); Hoboken Land I, LLC; Apollo Real Estate Advisors, L.P.; and Toll Brothers, Inc. (Defendants).[1] Plaintiffs alleged the defects affected both common elements and individual units in a 525-unit condominium development (Condominium) in Hoboken.

In lieu of an answer, defendants moved to compel arbitration and dismiss the claims of those individual unit

[1] Plaintiffs originally included 117 individual unit owners, including roughly seventy original purchasers whom defendants claimed agreed to arbitrate. Defendants called these plaintiffs "arbitrating plaintiffs," a term we adopt. In an amended complaint, another 164 unit owners were added as plaintiffs, including more arbitrating plaintiffs. Plaintiffs also asserted claims against other defendants, including GMAC Institutional Advisors, LLC, and Paulus Sokolowski and Sartor, LLC. The claims against them are not before us.

owners who, defendants argued, agreed in their purchase agreements to arbitrate their claims. Defendants did not seek dismissal of the Association's claims related to common elements, although what constituted common elements was disputed. Defendants also did not seek the immediate dismissal of the claims of owners who did not execute arbitration agreements, for example, those who were not the original purchasers of a unit. The court ultimately denied the motion without prejudice, pending discovery regarding the nature of the alleged defects, and whether they pertained to common elements or individual units.

Having reviewed the record in light of the applicable legal principles, we reverse.

I.

The Condominium consists of old factory and warehouse buildings that were renovated for residential use. Initially rental properties, the buildings were later converted to condominium use. The public offering statement identified Block 268 as the condominium's sponsor. Roughly 184 of the current plaintiffs entered purchase agreements with Block 268 in which they agreed to arbitrate their claims (Agreement). We review the terms of the Agreement, the Master Deed, and plaintiffs' allegations of construction defects.

The Agreement provided that the "[u]nit is being sold in 'AS-IS' and 'WHERE IS' condition." Block 268 made no "promises or representations as to the condition of the Property[.]" In a prominent paragraph, Block 268 disclaimed all warranties regarding the common elements and units, including warranties of "merchantability, habitability, workmanship and salability[.]" The disclaimer survived the closing.

The parties also agreed to arbitrate "any and all disputes" with the seller. The arbitration clause, paragraph 13 of the Agreement, states:

> Buyer, on behalf of Buyer and all permanent residents of the Unit, including minor children, hereby agrees that any and all disputes with Seller, Seller's parent company, or their subsidiaries or affiliates, whether statutory, contractual, or otherwise, including but not limited to personal injuries and/or illness ("Claims") shall be resolved by binding arbitration in accordance with the Supplementary Rules for Residential or the Construction Arbitration Rules and Mediation Procedures, as applicable, of the American Arbitration Association (AAA)[.][2]

[2] The quoted language appears in the forms of the Agreement designated "Revised 8/31/06," "revised 10/2/06," "revised 09-13-07," "Revised 2-21-08," "Revised 05/23/08," and "Revised 02-02-10" and used in multiple instances. However, the record also includes multiple versions of a different form "Revised 7/27/05" and "revised 6/27/05," which require "binding arbitration in accordance with the Supplementary Rules for Residential Construction or the Commercial Arbitration Rules and Mediation Procedures, of the American Arbitration Association[.]"

Aside from preserving the right to litigate certain small claims matters, the clause also stated, "Buyer understands that by initializing this arbitration paragraph, he or she is giving up his or her right to a trial in court, either with or without a jury." The clause expressly stated it was governed by the Federal Arbitration Act (FAA).

The Agreement also restricted assignments, stating: "Buyer expressly agrees not to assign, sell or in any manner transfer this Agreement or any of Buyer's rights, title and interest therein. This Agreement shall extend to and be binding upon their heirs, executors, administrators and successors of their respective parties." The Agreement repeated elsewhere, "This Agreement shall be binding upon the respective heirs and successors of the parties. Buyer may not transfer, sell or assign this Agreement."

The Master Deed identified items deemed to be within an individual unit. They included window frames, lighting fixtures, interior walls and partitions, "and all other improvements located within the boundaries of such Unit . . . or which are exclusively appurtenant to a Unit, although all or part of the improvement may not be located within the boundaries of the Unit[.]" Appurtenant improvements included the "portion of the common heating, plumbing, ventilating and air

conditioning system as extends from the interior surface of the walls, floors or ceilings into the Unit," and "equipment, appliances, machinery, mechanical or other systems, including, but not limited to, heating, plumbing, and ventilating systems[.]" The Master Deed provided that "to the extent that such items are located in common walls, ceilings, floors or other Common Elements, the Association shall be responsible for the maintenance, repair and replacement of same[.]" The Master Deed described the common elements in detail, including, among other things, "common systems and equipment including mechanical, electrical, plumbing, ventilating, sprinkler and fire suppression systems[.]" The Master Deed also stated that the Association would administer, operate and maintain the common elements.

In their complaint, filed in October 2011, the Association alleged defendants violated the Planned Real Estate Development Full Disclosure Act (PREDFDA), N.J.S.A. 45:22A-21 to -56 (counts one and eleven); breached their fiduciary duties by preparing an inadequate budget (count two); engaged in conduct resulting in construction defects (count three); breached their fiduciary duties to correct and disclose those defects (count four); breached the contract between owners and defendants by failing to convey defect-free units (count six); breached various

implied warranties (count seven); intentionally misrepresented the quality of construction (count eight); and violated the Consumer Fraud Act, N.J.S.A. 56:8-1 to -195 (count nine). Plaintiffs sought punitive damages (count ten).

Counts six, seven, eight, nine, and eleven were also asserted on behalf of the numerous Owners, who were specifically named. The complaint also alleged that each of the Owners assigned their claims against the defendants to the Association. The form of assignment, which was attached to the complaint, assigned all claims involving misrepresentations in the public offering statement, negligence and breach of contract pertaining to "window frames, panes, hardware and systems, heat pumps and compressors for heating and air conditioning, fire partitions between united and common elements[.]"[3]

Plaintiffs alleged that engineers whom the Association retained found that "there are substantial defects and deficiencies including but not limited to the fire resistance and protection walls, exterior facades, roof assemblies, window wall assemblies and perimeter terminal air-conditioning (PTAC) unit sleeves, insulation, concrete walkways and landscaping

[3] Plaintiffs also asserted claims against various fictitiously named defendants (counts twelve and thirteen). Their claim against the attorneys for the sponsor, which is not before us, was asserted in count five.

(Construction Defects)." Plaintiffs alleged "property damage to the common elements, window frames, panes, hardware and systems, heat pumps and compressors for heating and air conditioning, fire partitions between the units, and will incur substantial expense to repair and/or replace" the defects. Plaintiffs contended the construction defects were building-wide. They also alleged that "a communal resolution" was required because defective elements — such as massive window elements — covered more than one unit, and other defective elements in one unit, such as a leaking PTAC, caused water damage to another unit.

In lieu of an answer, defendants moved to dismiss the claims of seventy-two named unit owners and to compel arbitration.[4] Plaintiffs opposed the motion, and argued the arbitration clause pertained only to issues arising directly out of the Agreement. Plaintiffs also cross-moved to amend the complaint to add 164 additional unit owners as plaintiffs.

In January 2012, the court denied the motion to dismiss and to compel arbitration. It also granted the unopposed motion to amend the complaint. On a motion to reconsider two months

[4] Defendants state they anticipate moving later, based on discovery, to compel arbitration of subsequent purchasers on the grounds they succeeded to the initial purchasers' obligation to arbitrate.

later, the court reaffirmed its decision, except to provide that its denial of the motion to dismiss was without prejudice.[5]

In its initial opinion, the court found that the arbitration clause was not "sufficiently clear and unambiguous for this Court to dismiss this case and refer the plaintiffs to arbitration." The court characterized plaintiffs' common law claims as akin to the "prototypical claim filed on behalf of a condominium association" under the Condominium Act (Act), N.J.S.A. 46:8B-1 to -38. The court also adopted plaintiffs' view that the "type of alleged endemic problem on a project-wide basis is the type of thing that should not be the subject of implementation of individual arbitration clauses and individual subscription agreements[.]"

In its decision on the reconsideration motion, the court refused to compel arbitration based on the face of the complaint. The court concluded that discovery would clarify the nature and scope of the deficiencies, and therefore clarify what issues were arbitrable. The court reiterated its concern about inconsistent outcomes if some claims were referred to

[5] In June 2012, plaintiffs moved for leave to file a second amended complaint, in which the Owners were removed as plaintiffs, and the Association was the sole plaintiff, acting on its own behalf and as assignee of the Owners. Plaintiffs' counsel certified that the individual unit owners had been named "only . . . for informational purposes." That motion is apparently still pending before the trial court.

arbitration and others not. The court also declined to rule on the effectiveness of the Owners' assignments. Defendants' counsel had argued that the assignments were ineffective, given the Agreement's anti-assignment provisions, and, in any event, even if they were effective, the Association was bound by the assignors' agreement to arbitrate.

Defendants appeal from both trial court orders. They argue, principally, the trial court erred in ruling that the individual owners' claims fell outside the scope of the Agreement's arbitration clause.

II.

We exercise plenary review of the trial court's decision regarding the applicability and scope of an arbitration agreement. EPIX Holdings Corp. v. Marsh & McLennan Cos., Inc., 410 N.J. Super. 453, 472 (App. Div. 2009) (citing Harris v. Green Tree Fin. Corp., 183 F.3d 173, 176 (3d Cir. 1999)). The issue whether the parties have agreed to arbitrate is a question of law for the court. Bd. of Educ. of Twp. of Bloomfield v. Bloomfield Educ. Ass'n, 251 N.J. Super. 379, 383 (App. Div. 1990) ("Whether the parties are contractually obligated to arbitrate a particular dispute is a matter for judicial resolution."), aff'd, 126 N.J. 300 (1991); Moreira Constr. Co. v. Twp. of Wayne, 98 N.J. Super. 570, 575 (App. Div.) ("[I]t is

inescapably the duty of the judiciary to construe the contract to resolve any disagreement of the parties as to whether they have agreed to arbitrate[.]"), certif. denied, 51 N.J. 467 (1968).[6] "In determining the scope of an arbitration agreement, a court must 'focus on the factual allegations in the complaint rather than the legal causes of action asserted.'" EPIX Holdings Corp., supra, 410 N.J. Super. at 472-73 (quoting Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987)).

Generally speaking, New Jersey "has recognized arbitration as a favored method for resolving disputes." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001). Public policy "requir[es] a liberal construction of contracts in favor of arbitration." Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384, 389 (App. Div. 1997) (citations omitted); see also Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560, 575 (App. Div. 2007) ("As a general rule, courts have

[6] We note Rule 7 of the AAA Commercial Arbitration Rules, and Rule 9 of the AAA Construction Industry Arbitration Rules, incorporated in versions of the arbitration clause, allow an arbitrator to determine his or her own jurisdiction. However, as neither party has relied on these rules, we do not address their impact. See Contec Corp. v. Remote Solution Co., 398 F.3d 205 (2d Cir. 2005) (stating arbitrator may determine issue of arbitrability where parties consent by agreeing to abide by AAA Commercial Arbitration Rules, including its rule on jurisdiction).

construed broadly worded arbitration clauses to encompass tort, as well as contract claims." (citations omitted)). However, mindful of the public policy favoring arbitration, we resolve ambiguity in contract language in favor of arbitration. Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford, Jr. Univ., 489 U.S. 468, 475-76, 109 S. Ct. 1248, 1254, 103 L. Ed. 2d 488, 498 (1989) (stating that arbitration agreement must be interpreted after giving "due regard . . . to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration").

At the same time, however, the policy favoring arbitration is "not without limits," and "neither party is entitled to force the other to arbitrate their dispute" unless both parties agreed to do so. Garfinkel, supra, 168 N.J. at 132. "As a matter of both federal and state law, 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 148 (App. Div. 2008) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648, 655 (1986)). We therefore rely on basic contract principles to interpret an arbitration clause. Alamo Rent A Car, supra, 306 N.J. Super. at 390-91.

Courts examine the specificity of an arbitration clause's language to determine its scope. Thus, an arbitration clause that referred to claims arising out of an employment agreement, but did not expressly refer to statutory claims, was found not to compel arbitration of a claim under the Law Against Discrimination (LAD). Garfinkel, supra, 168 N.J. at 134-35. On the other hand, a clause that pertained to "any action or proceeding relating to [the plaintiff's] employment," was broad enough to cover statutory claims. Martindale v. Sandvik, Inc., 173 N.J. 76, 96 (2002).

Applying these principles, we reject plaintiffs' argument that the arbitration clause pertains only to claims relating to breach of the Agreement itself. The arbitration clause is broadly written to cover "any and all disputes with Seller[.]" It does not limit arbitrated claims to those arising out of, or related to, the Agreement. Cf. Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1218 (11th Cir. 2011) (noting that the qualifying clause "relating to or . . . arising out of or connected with" an agreement narrowed the scope of arbitration of "any and all disputes"). The arbitration clause goes on to specify that it extends beyond the Agreement, stating it applies to claims "whether statutory, contractual or otherwise, including but not limited to personal injuries and/or illness

('Claims')[.]" The intent to arbitrate physical defects is also evident in the provision requiring a party, before commencing arbitration, to give the seller an opportunity to cure, including "repair of the Unit."

Although the Agreement requires parties to arbitrate claims pertaining to construction defects, Owners may not pursue claims pertaining to common elements. Generally, a condominium association has the exclusive right to sue a developer for common elements, and unit owners can sue the developer for defects pertaining to their units. See Siller v. Hartz Mountain Assocs., 93 N.J. 370, 380-82, cert. denied, 464 U.S. 961, 104 S. Ct. 395, 78 L. Ed. 2d 337 (1983). The Act identifies common elements and provides that a condominium's master deed can further specify common elements. N.J.S.A. 46:8B-3d. The Act expressly provides that "main walls," "roofs," and exterior grounds are common elements. N.J.S.A. 46:8B-3d(ii). Also included is an "appurtenance reserved exclusively for the management, operation or maintenance of the common elements or of the condominium property[.]" N.J.S.A. 46:8B-3d(iv); see also Society Hill Condominium Ass'n, Inc. v. Society Hill Assocs., 347 N.J. Super. 163, 170 (App. Div. 2002) (stating that the Act defines common elements "as those elements existing or intended for common use").

We summarized the distinction between common elements and a unit as follows:

> One easy way to visualize a condominium unit is as a cube of air, the tangible boundaries of which are usually the finished side of the interior sheetrock, ceilings and floors. While many condominiums vary this definition slightly (driven, in part, by allocating maintenance responsibilities), the condominium unit is generally seen by owners as the "inside" of their structure while the shell and "outside" of the building is a common element.
>
> [Society Hill, supra, 347 N.J. Super. at 172 (citation and quotation omitted).]

We emphasized that one can distinguish a common from unit element by examining whether the unit owner or association bears responsibility for repairing those building components. Id. at 170-71.

The trial court concluded it could not determine, based on the sparse record before it, whether certain construction defect claims pertained to individual units, and therefore, were subject to arbitration, or whether they pertained to common elements, and therefore, were claims of the Association not subject to the Agreement's arbitration clause. In so doing, however, the court misunderstood its role.

The issue whether an Owner may pursue a claim for damages for a specific alleged defect — for example, a leaking PTAC or the window assembly — pertains to the merits of the dispute. It

does not involve interpretation of the arbitration clause, which, as we have stated, is within the court's province. Rather, it requires interpretation of the Master Deed and the Act, and cases interpreting it, such as Society Hill, supra, in order to determine the Owners' substantive rights to relief. Therefore, it is an issue for the arbitrator.

"[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." AT&T Techs., supra, 475 U.S. at 649, 106 S. Ct. at 1419, 89 L. Ed. 2d at 656; see also Amalgamated Transit Union v. New Jersey Transit Bus Operations, Inc., 200 N.J. 105, 118 (2009) (stating that court should not address merits of dispute, or engage in interpretation of substantive contractual provisions at issue).

> A court's duty is to refrain from adjudicating the merits of a dispute that properly belongs to an arbitrator:
>
> > Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. . . . [T]he moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> [Amalgamated Transit Union, supra, 200 N.J. at 118 (quoting United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 568, 80 S. Ct. 1343, 1346, 4 L. Ed. 2d 1403, 1407 (1960)).]

Plaintiffs also argue that the possibility of inconsistent results supports the court's order denying arbitration. We disagree. The United States Supreme Court long ago recognized that the possibility of inconsistent results is an unavoidable product of our arbitration laws. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20, 103 S. Ct. 927, 939, 74 L. Ed. 2d 765, 782 (1983). In Moses H. Cone, the hospital plaintiff complained that its dispute with one party was subject to arbitration, and a claim for indemnity from a third party was not. The Court observed:

> It is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune . . . occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement.
>
> [Ibid.]

The United States Supreme Court has expressly rejected the so-called "doctrine of intertwining," pursuant to which some courts claimed they had discretion to deny arbitration of arbitrable claims "[w]hen arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally[.]" Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 216-17, 105 S. Ct. 1238, 1240, 84 L. Ed. 2d 158, 162-63 (1985); see also In re the Prudential Ins.

Co. of Am. Sales Practices Litig., 133 F.3d 225, 234 (3d Cir.) (stating that "inconsistent results and inefficiencies caused by arbitration" are not grounds to "frustrate the enforcement of [an] arbitration clause" under the FAA), cert. denied sub nom. Weaver v. Prudential Ins. Co. of Am., 525 U.S. 817, 119 S. Ct. 55, 142 L. Ed. 2d 43 (1998); EPIX Holdings Corp., supra, 410 N.J. Super. at 480 (stating "possible inconvenience to plaintiff is not a sufficiently compelling ground to overcome New Jersey's strong public policy favoring arbitration").

To reduce complexity, and the possibility of conflicting results, the court may stay the non-arbitrated claims pending resolution of the arbitration. See, e.g., Contracting Northwest, Inc. v. City of Fredricksburg, 713 F.2d 382, 387 (8th Cir. 1983) (stating that a stay "makes eminent sense when the third party litigation involves common questions of fact that are within the scope of the arbitration agreement"); Am. Home Assurance Co. v. Vecco Concrete Constr. Co., 629 F.2d 961, 964 (4th Cir. 1980) ("While it is true that the arbitrator's findings will not be binding as to those not parties to the arbitration, considerations of judicial economy and avoidance of confusion and possible inconsistent results nonetheless militate in favor of staying the entire action.").

Lastly, we turn to defendants' argument that the Association may not assert claims on behalf of the Owners because the assignments violate the terms of the anti-assignment provisions of the Agreement. This issue is not properly before us. Defendant's original motion sought dismissal of certain Owners' claims, and an order compelling arbitration. Defendants did not seek an order declaring the assignments void. The trial court expressly declined to rule on the issue. In any event, an order declaring the viability of assignments would be an interlocutory order outside the scope of Rule 2:2-3(a), which deems as a final and appealable order "all orders compelling or denying arbitration, whether the action is dismissed or stayed[.]" As defendants did not seek leave to appeal on the subject of the assignments' effectiveness, we decline to reach the issue. See Vitanza v. James, 397 N.J. Super. 516, 519 (App. Div. 2008).

Reversed and remanded. We do not retain jurisdiction.