

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARIO MENEGHEL and EDDA MENEGHEL,

Plaintiffs-Appellees,

v

MONDRIAN PROPERTIES WESTON DOWNS,  
LLC,

Defendant-Appellant.

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UNPUBLISHED

July 15, 2010

No. 291105

Oakland Circuit Court

LC No. 2008-089282-CK

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's orders denying defendant's motion to compel arbitration, granting plaintiffs' motion for summary disposition, and granting plaintiffs' request for attorney fees. We reverse and remand.

I. Factual Background

In 2007, plaintiffs were looking for a new home, and visited defendant's Weston Downs condominium development in Troy. Plaintiffs agreed to purchase a lot of land in the development, on which defendant would construct a condominium. The parties signed a written purchase agreement memorializing the agreement. The agreement contained an "Arbitration and Claims" provision. This section of the agreement provided in part:

ANY DISPUTE WHICH INVOLVES AN AMOUNT [OF] \$2,500.00 OR MORE, INCLUDING, WITHOUT LIMITATION, DISPUTES REGARDING THE QUALITY OF CONSTRUCTION AND WARRANTY CLAIMS, THAT ARISES BETWEEN THE PARTIES WITH RESPECT TO THE UNIT OR COMMON ELEMENTS, INCLUDING WARRANTY CLAIMS, SHALL BE RESOLVED ONLY BY MEANS OF AN ARBITRATION ... AND PURCHASER WAIVES THE RIGHT TO INSTITUTE ANY OTHER COMPLAINT OR PROCEEDING IN CONNECTION WITH THE FOREGOING ISSUES.

Plaintiffs also signed a document purporting to waive their right to withdraw from the purchase agreement within nine business days.

After the condominium was constructed, plaintiffs insisted on having the property inspected before closing. Plaintiffs arranged two inspections, and allegedly found that the condominium was “defective in many respects and did not meet the standards and condition of the home promised.” Plaintiffs informed defendant that they wished to rescind the contract, and demanded the return of their down payment, which defendant refused to do.

Plaintiffs filed suit against defendant, bringing seven counts: rescission of the purchase agreement (based on allegations that the condominium documents did not comply with the applicable statutes), breach of contract, negligent construction, violation of public policy (to wit, the allegedly non-conforming condominium documents), violation of the consumer protection act,<sup>1</sup> fraudulent inducement, and declaratory judgment (specifically, a declaration that plaintiffs have a right to rescind the contract and to the return of their down payment).

In lieu of an answer, defendant filed a motion to compel arbitration. Plaintiffs responded, arguing that because they sought rescission of the contract, arbitration was neither required nor permitted. The trial court denied defendant’s motion, and granted plaintiffs’ motion for summary disposition with respect to their claims for breach of contract and rescission.

Defendant apparently did not refund any of plaintiffs’ money following the trial court’s orders. Plaintiffs filed a motion seeking repayment of the money already paid to defendant, as well as attorney fees. The trial court granted plaintiffs’ motion with regard to the repayment, but denied the motion for attorney fees without prejudice, because plaintiffs had not supported the request with documentation. Plaintiffs refiled the motion with documentation, and, following a hearing, the trial court awarded plaintiffs attorney fees in the amount of \$11,723.50. The trial court also dismissed plaintiffs’ remaining counts without prejudice, with the condition that plaintiffs could only refile them if the trial court’s judgment were vacated on appeal.

Defendant appeals the trial court’s denial of its motion to compel arbitration, its grant of plaintiffs’ motion for summary disposition, and the award of attorney fees.

## II. Arbitration

We review de novo the legal question of whether a dispute is arbitrable. *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 594-595; 637 NW2d 526 (2001).

An issue is arbitrable if three conditions are met: first, an arbitration provision exists, second, the disputed issue is “arguably within” the scope of the arbitration provision, and third, there is no express exemption of the issue from the arbitration provision. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007). Here, plaintiffs argued that the right to rescind ends the analysis at the first step: a rescinded contract is no contract at all, a nullity, and none of its provisions, including an arbitration provision, can be enforced. We disagree.

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<sup>1</sup> MCL 445.901 *et seq.*

Plaintiffs muddy the issue by confusing the terms “withdraw” and “rescind.” Plaintiffs state, incorrectly, that § 84 of the condominium act authorizes the rescission of a purchase agreement under certain conditions. Section 84 authorizes a purchaser to *withdraw* from a purchase agreement “without cause and without penalty” when certain conditions are met. MCL 559.184. The distinction is important in at least one respect: if a contract is rescinded, it is a nullity, and none of its provisions are enforceable, including any arbitration clause. *Michelson v Voison*, 254 Mich App 691, 697; 658 NW2d 188 (2003). Because it is for a trial court, not an arbitrator, to determine whether a valid and enforceable arbitration provision exists, *Madison*, 247 Mich App at 590-591, and because the question of rescission bears directly on the question of the existence and enforceability of the arbitration provision, *Michelson*, 254 Mich App at 697, the trial court’s decision to deny defendant’s motion might have been correct had the statute authorized rescission of the contract.

But the trial court erred in accepting plaintiffs’ assertion that the statute and case law authorized rescission of the contract. The first amended complaint cited no authority for rescission other than § 84. That section, as noted, does not authorize rescission, but withdrawal. MCL 559.184. Plaintiffs also cited *Shinney v Cambridge Homes, Inc*, unpublished opinion of the Court of Appeals, decided February 22, 2005 (Docket No. 250123) in support of their claim. *Shinney* does not discuss the right to rescind; rather, it deals with the § 84 right of withdrawal. *Shinney* at 1-2. It is also worth noting that *Shinney* did not involve an arbitration provision at all.

Because plaintiffs were not entitled to rescission under § 84 of the Condominium Act, we move to the other requirements of arbitrability: the dispute was arbitrable if it was arguably within the scope of the arbitration provision and if there was no express exemption of the issue. *Rooyakker*, 276 Mich App at 163. The arbitration provision here is broad: “Any dispute which involves an amount of \$2,500 or more . . . that arises between the parties with respect to the unit or common elements” is expressly within its scope. The dispute here involved issues relating to the condominium documents, and issues relating to the construction of the condominium itself. It is arguable that the dispute relating to the documents is not a dispute “with respect to the unit or common elements,” because it is a dispute with respect to the contract itself. On the other hand, it is also arguable that it is within the scope of the arbitration provision because the contract itself relates to the unit and common elements. A court is to find an issue arbitrable if it is *arguably* within the scope of the arbitration provision—doubts should be resolved in favor of arbitration. *Rooyakker*, 276 Mich App at 163. Further, the other claims by plaintiffs are more clearly within the scope of arbitration, and this Court has held that “attempts ‘to segregate disputed issues into arbitrable sheep and judicially-triable goats’” are disfavored. *American Fidelity Fire Ins Co v Barry*, 80 Mich App 670, 676; 264 NW2d 92 (1978), quoting *Maryland Casualty Co v McGee*, 32 Mich App 539, 545; 189 NW2d 44 (1971). For these reasons, we find that the issues were arguably within the scope of the arbitration provision, and the second requirement of arbitrability was met.

The third requirement of arbitrability may be dealt with very briefly: an issue is not arbitrable if it is expressly exempt from arbitration. *Rooyakker*, 276 Mich App at 163. No express exemption appears in the arbitration provision at issue here.

In sum, the trial court erred in finding that plaintiffs were entitled to rescission and that the arbitration provision did not apply. The issues raised by plaintiffs were arguably within the broad scope of the arbitration provision, and no express exemption was included in the

contractual language. Therefore, the trial court erred in refusing to enforce the arbitration provision.

### III. Summary disposition and attorney fees

Because we hold that the dispute was arbitrable, we also hold that the trial court erred in ruling on plaintiffs' motions for summary disposition and for attorney fees. See *Amtower v William C. Roney & Co (On Remand)*, 232 Mich App 226, 229; 590 NW2d 580 (1998).

### IV. Conclusion

We reverse and remand this matter to the trial court with instructions to grant defendant's motion to compel arbitration. The orders granting plaintiffs' motion for summary disposition and their request for attorney fees are vacated. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

/s/ Donald S. Owens