IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED

MAY 27 2009

JAIME ANDUJO, CHANA ANDUJO, ERIC CHAVEZ, JACLYN CHAVEZ, DAVID PYNE, DONNELLE PYNE, ROBERT SHERWOOD, CAROL SHERWOOD, WADE STENGER, ELIZABETH STENGER, and LYLE WAGY,

Plaintiffs/Appellees,

v.

Court of Appeals No. 28,660

PULTE HOMES OF NEW MEXICO, INC., PULTE HOMES, INC., GERARD SANCHEZ, and BRETT CLEM,

Defendants/Appellants.

REPLY BRIEF OF APPELLANTS

On Appeal from the Second Judicial District Court
County of Bernalillo
Honorable William F. Lang
No. CV-2007-5153

Kristina Martinez
Holland & Hart LLP
P.O. Box 2208
Santa Fe, NM 87504
(505) 988-4421

Philip J. Dabney
Holland & Hart LLP
3763 Howard Hughes, Ste. 300
Las Vegas, Nevada 89169
(702) 669-4600

Attorneys for Defendants/Appellants

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INTRODUCTION

In a last-ditch attempt to avoid their obligation to arbitrate their claims against Defendants/Appellants Pulte Homes of New Mexico *et al.* ("Pulte"), Plaintiffs/Appellees Jaime Andujo *et al.* ("Non-Signatory Plaintiffs") allege that the arbitration provision in the Purchase Agreement is one-sided and unconscionable, the Purchase Agreement prohibits third-party beneficiaries, and equitable estoppel is inapplicable. But the arbitration agreement is mutually binding on Pulte and Non-Signatory Plaintiffs, so the belated allegation of unconscionability is without merit. And the Purchase Agreement and Limited Warranty expressly state that the parties' successors, such as subsequent purchasers like Non-Signatory Plaintiffs, are third-party beneficiaries. Moreover, Non-Signatory Plaintiffs sought and received repairs and services under the Purchase Agreement and Limited Warranty. Thus, Non-Signatory Plaintiffs are bound to arbitrate because they are either (1) creditor third-party beneficiaries or (2) equitably estopped from avoiding the arbitration agreement.

ARGUMENT

I. THE ARBITRATION AGREEMENT IS ENFORCEABLE.

Non-Signatory Plaintiffs erroneously assert that "all Plaintiffs" argued below that the arbitration agreement in the Purchase Agreement was unconscionable. [AB 1] In fact, only Plaintiffs who had signed a Purchase Agreement, "Signatory

Plaintiffs," made this argument. [*See* RP 126 ("For all Plaintiffs who did sign a purchase agreement, the arbitration clause contained therein is unenforceable as unconscionable." (underline omitted)] Non-Signatory Plaintiffs argued only that as non-parties to the Purchase Agreement, they were not required to arbitrate. [RP 125-26] Thus, contrary to Non-Signatory Plaintiffs' assertion, they have raised their unconscionability argument for the first time on appeal. In any event, this belated argument is without merit.

A. Non-Signatory Plaintiffs Have Misread The Arbitration Agreement.

Non-Signatory Plaintiffs base their unconscionability argument on the incorrect assumption that the arbitration agreement is "one-sided." [AB 2] This assumption ignores the claims that Plaintiffs have asserted, the pertinent provisions of the Purchase Agreement, and Pulte's undisputed willingness to arbitrate Plaintiffs' claims. These facts demonstrate that the arbitration agreement is mutual, not one-sided, and is binding on both the homeowners and Pulte.

In their Third Amended Complaint ("Complaint"), Plaintiffs alleged *inter alia*, that their homes are defective, Pulte has delayed or made faulty repairs, and Pulte is contractually obligated to compensate Plaintiffs for these defects. [RP 288-90, ¶¶ 10-11] In its Motion to Dismiss, Pulte asserted that Plaintiffs' claims are subject to arbitration under the Purchase Agreement. [RP 43] Non-Signatory Plaintiffs now allege that the arbitration agreement is binding only on buyer, and

therefore, is invalid. [AB 5-8] Thus, the issue is whether the Purchase Agreement requires both the homeowners and Pulte to arbitrate claims arising from alleged defects in home or repairs. Under the plain language of the Purchase Agreement, the answer is yes.

1. The arbitration agreement is mutually binding.

Paragraph 22, the arbitration provision of the Purchase Agreement, states in pertinent part as follows:

> If Buyer makes a claim against Seller or any of its employees or agents for *any matter arising out of* the Home or the Lot, the *Limited Warranty*, or this Contract, Buyer agrees that *all claims* will be submitted to mandatory, binding arbitration. By signing this Contract, Buyer elects to resolve all claims through arbitration under the Federal Arbitration Act. . . .

[RP 61, ¶ 22 (emphasis added)] Under this provision, homeowners must arbitrate warranty disputes and all related claims.

Paragraph 17, the warranties provision, states in pertinent part as follows:

> **SETTLEMENT OF WARRANTY DISPUTES:** *Any disputes, claims or controversies* relating to any items, problems, defects or difficulties covered by the Limited Warranty shall be resolved pursuant to the dispute settlement provisions contained in the Limited Warranty.

[RP 59, ¶ 17 (emphasis added)] Under this provision, all warranty disputes and related claims are subject to the dispute resolution provision of the Limited Warranty.

The Dispute Settlement provision of the Limited Warranty is the "exclusive remedy of all disputes or controversies under th[e] LIMITED WARRANTY." [RP 239]; *see* Defendants/Appellants' Memorandum Opposing Proposed Summary Disposition, Appendix A at 3 ("This LIMITED WARRANTY includes procedures for informal settlement of disputes, such as arbitration, which will be binding on THE HOMEOWNER and THE BUILDER."). Under this provision, Pulte and homeowners first mediate a warranty dispute. [RP 239] Then, if mediation is unsuccessful, "the Plan Administrator will inform THE HOMEOWNER and THE BUILDER that the dispute is unresolved and that Binding Arbitration is provided as a remedy for resolving the dispute." [*Id.*] "The arbitration will determine THE HOMEOWNER'S, THE BUILDER'S and (if applicable) the Insurer's rights and obligations under th[e] LIMITED WARRANTY . . . The award of the arbitrator(s) will be final, binding and enforceable as to THE HOMEOWNER, THE BUILDER and (if applicable) the Insurer . . . ." [RP 240] If for some reason arbitration cannot be compelled, the homeowner and builder *both* waive trial by jury. [*Id.*]

Under these provisions, both Pulte and homeowners must resolve "any dispute" concerning the quality of the workmanship, materials, or repairs for the home in accordance with the Dispute Settlement provision, which may ultimately require arbitration. [RP 59, ¶ 17, 61, ¶ 22]

Other courts have concluded that similar contractual language creates an arbitration agreement that binds both parties. *See, e.g.*, *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Bennett v. Cisco Sys., Inc.*, 63 Fed. Appx. 202, 204-05 (6th Cir. 2003). In *O'Neil*, the arbitration agreement was between an employer and employee, and stated only that the employee agreed to arbitrate and to be bound by the outcome. *See O'Neil*, 115 F.3d at 273 ("*I* agree to submit any complaints to the [arbitration] process and agree to abide by and accept the *final decision* of the arbitration panel as ultimate resolution of *my* complaints.... (first and third emphasis added)).

The employee argued that this language was not binding on the employer, and hence, the agreement was unenforceable. *Id.* at 274. The court disagreed, holding that "the agreement to be bound by arbitration was a mutual one." *Id.* Indeed, the court reasoned, the employer had proffered the arbitration provision. *See id.* "Such a proffer clearly implies that both the employer and the employee would be bound by the arbitration process. If an employer asks an employee to submit to binding arbitration, it cannot then turn around and slip out of the arbitration process itself." *Id.*; *cf. Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 19, 131 N.M. 100, 33 P.3d 651 (contract provisions are strictly construed "against the party who drafted the contract in order to protect the rights of the party who did not").

Similarly, *Bennett* rejected the assertion that an arbitration agreement stating that "I agree . . ." to arbitrate was a one-sided, unenforceable agreement. *See Bennett*, 63 Fed. Appx. at 204-05. This language, the court held, did not alter "the scope of the arbitration agreement which covers claims by either party." *Id.* at 204; *see Kalb v. Quixtar, Inc.*, 2008 WL 879406, *5 (M.D. Fla. Mar. 28, 2008) (an arbitration agreement stating only that "I agree . . ." binds both parties to the contract).

These cases also confirm that Non-Signatory Plaintiffs' emphasis on the phrase "Buyer agrees" in Paragraph 22 [AB 6] should be rejected. As both *O'Neil* and *Bennett* demonstrate, that language does not necessarily render the arbitration agreement one-sided. Indeed, nothing in Paragraph 22 states that Pulte is *not* bound by the arbitration agreement, which further demonstrates that Non-Signatory Plaintiffs' interpretation should be rejected. *See O'Neil*, 115 F.3d at 275 (declining to read into the arbitration agreement a clause permitting employer to ignore results of arbitration); *Bennett*, 63 Fed. Appx. at 204 n.2, 205 (finding it persuasive that "there is nothing in the arbitration provision which 'reserves [Cisco's] right to avoid arbitration in claims against the employee'").

Pulte's proffer of the arbitration agreement shows that it intended to be bound by the agreement. *See O'Neil*, 115 F.3d at 274. The remainder of Paragraph 22 contemplates that both parties will participate in the arbitration

process. [*See* RP 61] Paragraph 22 provides that "the parties" will appoint the arbitrator and determine the rules to be used in the arbitration hearing. *Id.* This provision also mandates that the arbitrator's decision and award are binding on both Pulte and the homeowner. *Id.* Hence, these terms connote a mutual agreement to arbitrate and to be bound by the outcome.

2. Pulte's conduct demonstrates that the arbitration agreement is mutually binding.

Pulte's conduct throughout this litigation also establishes that the arbitration agreement is not one-sided. Pulte has "consistently argued that it is bound by the arbitration agreement" and has "shown its commitment to the arbitration process." *O'Neil*, 115 F.3d at 275. Pulte moved to compel arbitration. [RP 42-52] Pulte has been actively participating in arbitration with respect to Signatory Plaintiffs. [*See* RP 326; AB 1] Pulte has prosecuted this appeal in accordance with its obligations under the arbitration agreement. "Indeed, the only part[ies] to this case who ha[ve] shown a desire to avoid binding arbitration [are Plaintiffs]." *O'Neil*, 115 F.3d at 275. Pulte's willingness to be bound by the arbitration agreement demonstrates that "the arbitration agreement is mutual and binding" on both parties. *Kalb*, 2008 WL 879406 at *5.

3. Non-Signatory Plaintiffs' authority is inapposite.

For these reasons, Non-Signatory Plaintiffs' reliance on *Cordova v. World Finance Corp.*, 2009-NMSC-021, ___ N.M. ___, ___ P.3d ___, (No. 30,536, Apr.

29, 2009), is misplaced. [*See* AB 6-7] The arbitration provision at issue there was undeniably one-sided. It expressly reserved for the lender all remedies at law or equity, including filing a lawsuit, for claims the lender might have against the borrower, yet required the borrower to arbitrate any claims it might have against the lender. *See Cordova*, 2009-NMSC-021, ¶¶ 26-27. The court held that such an arbitration scheme was "so unfairly and unreasonably one-sided that it [was] substantively unconscionable." *Id.* ¶ 32. The arbitration provision of the Purchase Agreement is far different because it is mutually binding on both parties. *See supra* at 3-7.

B. The Arbitration Agreement Is Not Unconscionable.

Non-Signatory Plaintiffs also cannot show that the arbitration agreement is unconscionable, either procedurally or substantively. *See Cordova*, 2009-NMSC-021, ¶ 24 (observing that both procedural circumstances and substantive terms affect unconscionability analysis).

Procedural unconscionability "examines the particular factual circumstances surrounding the formation of the contract, including the relative bargaining strength, sophistication of the parties, and the extent to which either party felt free to accept or decline terms demanded by the other." *Id.* ¶ 23. Here, Non-Signatory Plaintiffs did not engage in any contractual negotiations with Pulte, and they have

not argued that the arbitration agreement is procedurally unconscionable. [AB 7] Therefore, procedural unconscionability is irrelevant.

Substantive unconscionability turns on whether a contract provision is illegal, contrary to public policy, or grossly unfair. *Cordova*, 2009-NMSC-021, ¶ 22. There must be "an overwhelming showing of substantive unconscionability" for an arbitration agreement to be invalidated solely on that basis. *Id.* ¶ 24 (internal quotation omitted). Non-Signatory Plaintiffs cannot make any such showing.

As to substantive unconscionability, Non-Signatory Plaintiffs claim only that the arbitration provision is like the one-sided agreement at issue in *Cordova*. [AB 6-7] But the arbitration agreement is not one-sided, and *Cordova* is inapplicable. *See supra* at 3-8.

Non-Signatory Plaintiffs' other case, *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215, also is inapposite. [*See* AB 8] There, the arbitration provision contained a clause requiring all disputes to be arbitrated and limiting arbitration to disputes between the individual plaintiff and the defendant, thereby precluding class actions. *Id.* ¶ 4. The court held that the arbitration provision was substantively unconscionable because the class action ban violated the fundamental public policy of assuring that consumers have a viable mechanism for dispute resolution regardless of the magnitude of the claim.

Id. ¶¶ 9, 18-22, 24-25. The arbitration agreement here has no comparable effect. Thus, *Fiser* also does not apply.

II. THE ARBITRATION AGREEMENT IS ENFORCEABLE AGAINST NON-SIGNATORY PLAINTIFFS.

The district court erred in denying Pulte's motion to compel arbitration with respect to Non-Signatory Plaintiffs. [BIC 9-19] In response, Non-Signatory Plaintiffs argue only that the Purchase Agreement and Limited Warranty do not allow for third-party beneficiaries and that equitable estoppel is not applicable. On the contrary, under both the Purchase Agreement and Limited Warranty, successors to the parties, such as subsequent purchasers, are entitled to warranty benefits, and equitable estoppel is applicable because Non-Signatory Plaintiffs have exploited and benefited from the contract.

A. Non-Signatory Plaintiffs Are Third-Party Beneficiaries Of The Purchase Agreement And Limited Warranty.

Non-Signatory Plaintiffs claim that Pulte has not provided the Limited Warranty's arbitration language. [AB 9] In fact, Pulte attached the Dispute Settlement provision of the Limited Warranty to its reply in support of its motion to compel arbitration. [RP 237-240] Non-Signatory Plaintiffs therefore cannot ignore the arbitration provisions in the Limited Warranty, as they attempt to do. They are correct, however, that the arbitration provisions in the Purchase Agreement and Limited Warranty should be construed together. [*See* AB 9 &

n.6];[1] *see also Sisneros v. Citadel Broad. Co.*, 2006-NMCA-102, ¶ 33, 140 N.M. 266, 142 P.3d 34 (arbitration procedure in employee handbook was "annexed to" employment contract because contract's arbitration provision referred to handbook's arbitration procedure). And under the Purchase Agreement and Limited Warranty, Non-Signatory Plaintiffs are third-party beneficiaries who must arbitrate their claims.

1. Paragraph 23(j) and Paragraph 23(b) of the Purchase Agreement do not preclude the existence of third-party beneficiaries.

Non-Signatory Plaintiffs argue that the Purchase Agreement prohibits the existence of third-party beneficiaries. [AB 9-11] This issue turns on whether "the parties to the contract intended to benefit the third party." *Fleet Mortgage Corp. v. Schuster*, 112 N.M. 48, 49-50, 811 P.2d 81, 82-83 (1991). The language of the contract is evidence of the parties' intent. *See id.* at 50, 811 P.2d at 83. Here, the express terms of the Purchase Agreement and Limited Warranty demonstrate that subsequent purchasers are third-party beneficiaries.

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[1] Pulte has not "repeatedly stated its belief that the [Purchase Agreement and Limited Warranty] are one and the same." [AB 9 n.6] Nor has Pulte "refer[red] to both arbitration provisions in the singular." [AB 9] Rather, Pulte has shown that the Purchase Agreement and Limited Warranty both contain arbitration provisions that are binding on Non-Signatory Plaintiffs. [BIC 5-6] Initially, Pulte invoked the arbitration agreement in the Purchase Agreement; when Non-Signatory Plaintiffs denied its applicability, Pulte also cited the arbitration provision in the Limited Warranty. [RP 44, 230] On appeal, Pulte has shown that both these and other contractual provisions establish that Non-Signatory Plaintiffs are obligated to arbitrate their claims. [BIC 9-17]; *see infra* at 11-19.

Non-Signatory Plaintiffs assert that Paragraph 23(j) "expressly prohibits third-party beneficiaries." [AB 10] In fact, Paragraph 23(j) expressly recognizes certain third-party beneficiaries:

> (j) Nothing in this Contract, expressed or implied, is intended or shall be construed to confer upon or give to any other person, firm, corporation or legal entity, *other than the parties to this Contract and their successors*, any rights, remedies or other benefits under or by reason of this Contract.

[RP 61, ¶ 23(j) (emphasis added)] Contrary to Non-Signatory Plaintiffs' argument, Paragraph 23(j) provides that only the parties and "their successors" may have rights, remedies, and benefits under the Purchase Agreement. Non-Signatory Plaintiffs are "successors" of the original buyers within the meaning of Paragraph 23(j).

A contract is interpreted in accordance with its plain, ordinary meaning. *McMillan v. Allstate Indem. Co.*, 2004-NMSC-002, ¶ 10, 135 N.M. 17, 84 P.3d 65 (filed 2003). A "successor" is "one that follows; *esp.*: one who succeeds to a throne, *title*, *estate*, or office." Webster's Ninth New Collegiate Dictionary 1178 (Merriam-Webster 1991) (emphasis added). Moreover, a "successor in interest" is "[o]ne who follows another in ownership or control of the property." *Schwartz & Hays v. Hafen*, 112 Fed. Appx. 655, 662 (10th Cir. 2004) (internal quotation omitted) (under New Mexico law, subsequent purchasers were successors in interest); *see Romero v. State*, 97 N.M. 569, 572, 642 P.2d 172, 175 (1982).

Here, Non-Signatory Plaintiffs succeeded to the purchasers' title or estate in the homes. Accordingly, Non-Signatory Plaintiffs *are* third-party beneficiaries of the Purchase Agreement. The Limited Warranty reinforces this conclusion, providing that "all subsequent owners who take title within the warranty period" are beneficiaries of the Limited Warranty. Defendants/Appellants' Memorandum Opposing Summary Disposition, Appendix A at 6.

The other paragraph on which Non-Signatory Plaintiffs rely also supports Pulte's position. Paragraph 23(b) states as follows:

> (b) This Contract *shall be binding upon and inure to the benefit of* Buyer and Seller, their heirs, personal representatives, *successors* and assigns;

[RP 61, ¶ 23(b) (emphasis added)] Like Paragraph 23(j), this provision of Paragraph 23(b) establishes that the parties' successors, *i.e.*, Non-Signatory Plaintiffs, *are* third-party beneficiaries.

The remainder of Paragraph 23(b) has no relevance to this issue. It states as follows:

> neither this Contract nor any rights hereunder may be assigned or transferred by Buyer without the prior written consent of Seller, and any such attempted assignment shall be null and void.

Id. This provision simply prevents buyers from assigning or transferring their rights to purchase the home without sellers' consent. This provision is inapplicable to a buyer's Limited Warranty rights after the home has been purchased.

Moreover, the Limited Warranty rights under the Purchase Agreement transfer automatically to subsequent purchasers if they purchase the home within the warranty period. *See* Defendants/Appellants' Memorandum Opposing Summary Disposition, Appendix A at 6.

For these reasons, the cases Non-Signatory Plaintiffs cite [*see* AB 13-14] are inapposite. In *Donald B. Murphy Contractors, Inc. v. King County*, 49 P.3d 912 (Wash. Ct. App. 2002), a subcontractor was not a third-party beneficiary of a contract because it specifically stated that *subcontractors* were not intended to be beneficiaries. *Id.* at 195. Similarly, in *May v. Mid-Century Insurance Co.*, 151 P.3d 132 (Okla. 2006), a condominium owner was not a third-party beneficiary of an insurance policy because the contract specifically barred *owners* from having direct benefits under the contract. *Id.* at 141. And in *Lockwood v. Standard & Poor's Corp.*, 682 N.E.2d 131 (Ill. App. Ct. 1997), there was no intent to create third-party beneficiaries because the contract was "solely and exclusively between the parties," making no mention of successors to the parties. *Id.* at 134. Unlike the contracts in those cases, both Paragraph 23(j) and Paragraph 23(b) recognize certain third-party beneficiaries of the Purchase Agreement, including buyer's successors, such as Non-Signatory Plaintiffs.

2. Non-Signatory Plaintiffs' attempts to distinguish Pulte's cases are unavailing.

Non-Signatory Plaintiffs urge the Court to ignore two cases Pulte cited, which demonstrate that Non-Signatory Plaintiffs are third-party beneficiaries. [AB 11-12 (citing *Burgher v. Dansey*, 2004 WL 842505 (Mich. Ct. App. Apr. 20, 2004) and *District Moving & Storage Co. v. Gardiner & Gardiner, Inc.*, 492 A.2d 319 (Md. Ct. Spec. App. 1985)] Specifically, Non-Signatory Plaintiffs assert that *Burgher* "is inapposite to the determination of this case." [AB 12] *Burgher* is directly on point. [*See* BIC 13-14] The fact that the *Burgher* plaintiffs did not dispute they were third-party beneficiaries [*see* AB 12] makes no difference. The *Burgher* court merely noted that fact; the court did not base its holding on that fact. *See Burgher*, 2004 WL842505 at *2. Rather, the court held that subsequent purchasers of Pulte homes were bound by the arbitration agreement "because they sought a direct benefit under the limited warranty provision of the contract." *Id.* Implicit in the court's holding was a finding that the contract was made for the benefit of subsequent purchasers. *See id.* Therefore, *Burgher* is directly relevant here, and confirms that Non-Signatory Plaintiffs are third-party beneficiaries of the Purchase Agreement and Limited Warranty.

Likewise, *District Moving* provides that if non-parties to a contract seek to enforce it, they may be bound by its terms, including arbitration provisions. 492 A.2d at 323. Non-Signatory Plaintiffs' allegation that Pulte is trying to enforce one

part of the contract and avoid another—the alleged prohibition on third-party beneficiaries—is simply incorrect. [*See* AB 13] As shown *supra* at 11-14, the Purchase Agreement does not prohibit third-party beneficiaries. Hence, Non-Signatory Plaintiffs have not refuted Pulte's showing that they are seeking to avoid the arbitration agreement *and* enforce the terms of and reap benefits under the Limited Warranty. [BIC 12-13] As *District Moving* illustrates, Non-Signatory Plaintiffs are creditor third-party beneficiaries who are bound by the arbitration agreement.

B. Non-Signatory Plaintiffs Have Exploited And Benefited From The Limited Warranty.

In arguing that equitable estoppel does not make them bound by the arbitration agreement, Non-Signatory Plaintiffs now deny that they are seeking to enforce the terms of the Purchase Agreement and Limited Warranty. [*See* AB 16 ("[E]ven if...Non-Signatory Plaintiffs submitted requests to Pulte for repairs to their homes, it does not mean they did so according to any contract.")] Non-Signatory Plaintiffs' professed ignorance of the Limited Warranty and its benefits, however, does not permit them to escape the doctrine of equitable estoppel.

In their Complaint, Non-Signatory Plaintiffs asserted a claim for breach of contract. [RP 290, ¶¶ 12-13] Moreover, Non-Signatory Plaintiffs' allegation that "Pulte might have chosen to undertake repairs because its responsibilities to Non-Signatory extend beyond a contract between Pulte and the original purchasers"

[AB 16] does not withstand scrutiny. Absent a contractual duty, Pulte had no legal duty to undertake repairs of the Non-Signatory Plaintiffs' homes, and Non-Signatory Plaintiffs have not identified any such duty. Certainly, Non-Signatory Plaintiffs' general reference to the "host of theories" alleged in the Complaint, "including common law negligence and violations of statutory duties" [AB 16] does not identify any such duty. In their Complaint, Plaintiffs alleged that Pulte was negligent "in all aspects of their dealings with Plaintiffs" [RP 290 ¶ 16], which sheds no light on an alleged duty to repair homes. As for the "alleged violations of statutory duties," the Complaint asserted that Pulte "engaged in unfair trade practices in violation of the New Mexico Fair Practices Act, NMSA 1978, § 57-21-1. et seq." [RP 292, ¶ 23] Once again, nothing in this claim identifies a specific duty to undertake home repairs. *See McElhannon v. Ford*, 2003-NMCA-091, ¶¶ 16-17, 134 N.M. 124, 73 P.3d 827 (Unfair Practices Act does not apply to claims involving sale of completed house).

Non-Signatory Plaintiffs' argument ignores the fact that they have exploited and obtained warranty benefits under the Purchase Agreement and Limited Warranty, thereby submitting to the arbitration agreement. [BIC 15-17] Even though they did not purchase their homes from Pulte, Non-Signatory Plaintiffs contacted Pulte, expecting Pulte to address their complaints. [*See* BIC 6-8] Even though they did not purchase their homes from Pulte, they sued Pulte for breach of

contract.[2] [RP 290, ¶¶ 11-14] Stated differently, they have "embraced and directly benefited from the agreement." *Murken v. Suncor Energy, Inc.*, 2005-NMCA-102, ¶ 13, 138 N.M. 179, 117 P.3d 985. They cannot now claim that alleged lack of knowledge prohibits application of equitable estoppel.

A similar argument was made and rejected in *Burgher*. *See* 2004 WL842505 at *2-3. There, plaintiffs argued that they could not be bound by the arbitration agreement because they were not aware of the contract or the limited warranty. *Id.* at *2. The court was not persuaded, and plaintiffs were required to arbitrate:

> If plaintiffs, in fact, did not seek to enforce the contract and had no notice of the limited warranty, then plaintiffs could not reasonably have considered themselves consumers of defendant's services and entitled to these warranties.

Id.

This Court should hold that, for equitable reasons, the same is true here. Non-Signatory Plaintiffs could not have reasonably expected Pulte to repair their homes absent some contractual duty to do so. Non-Signatory Plaintiffs would not have sued Pulte for breach of contract unless they considered themselves entitled to enforce the rights of homeowners under the Purchase Agreement and Limited

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[2] Non-Signatory Plaintiffs' contention that their breach of contract claim is limited to Signatory Plaintiffs is without merit. [*See* AB 16 n.9] The language quoted from their Complaint shows that all Plaintiffs made the same factual assertions. *See id.*

Warranty. Therefore, Non-Signatory Plaintiffs are bound by the provisions of those contracts, including their arbitration agreements.

This result does not "rewrite the contract." [*See* AB 17-18][3] The warranty provisions of the Purchase Agreement extend to subsequent purchasers (successors), who are beneficiaries of the Purchase Agreement and Limited Warranty. *See supra* at 3-4, 10-16; [BIC 6-8, 15-16]. Thus, parties who receive warranty benefits are bound by the arbitration agreements.

III. ALTERNATIVELY, THE CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING.

Non-Signatory Plaintiffs' attempt to avoid an evidentiary hearing should be rejected. [AB 19] As Pulte has shown, the Purchase Agreement recognizes that Non-Signatory Plaintiffs *are* third-party beneficiaries, and Non-Signatory Plaintiffs' actions establish that, as a matter of law, Non-Signatory Plaintiffs are bound by the arbitration agreements in the Purchase Agreement and the Limited Warranty, as either creditor third-party beneficiaries or under the doctrine of equitable estoppel. *See supra* at 10-19.

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[3] Non-Signatory Plaintiffs' err in relying on *City of Grosse Pointe Park v. Michigan Municipal Pool Liability and Property Pool*, 702 N.W.2d 106 (Mich. 2005). There, the court rejected an insured's claim that an insurer was estopped from denying coverage. *Id.* at 116, 126. Here, Non-Signatory Plaintiffs have availed themselves of benefits of the contracts and therefore are estopped from avoiding their arbitration provisions.

An evidentiary hearing is necessary, however, if the Court concludes it cannot rule as a matter of law. Non-Signatory Plaintiffs do not dispute that they sought and received warranty benefits from Pulte. Instead, they attempt to divert the Court's attention from the significance of their actions by claiming that the Purchase Agreement prohibits third-party beneficiaries. [AB 19] Non-Signatory Plaintiffs' argument misses the point. At the very least, their requests for repairs, and Pulte's repair of their homes, create genuine issues of fact regarding whether Non-Signatory Plaintiffs are bound by the arbitration agreement as third-party beneficiaries or by equitable estoppel. [*See* BIC 6-8, 9-17] Accordingly, if the Court does not hold that Non-Signatory Plaintiffs are bound by the arbitration agreement as a matter of law, then the Court should remand for an evidentiary hearing. [*Id.* at 17-19]

CONCLUSION

The Court should reverse the district court's ruling and should hold that Non-Signatory Plaintiffs are bound by the arbitration agreement. Alternatively, the Court should remand for an evidentiary hearing to resolve the factual dispute as to whether Non-Signatory Plaintiffs are bound by the arbitration agreement.

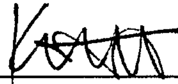
CERTIFICATION OF WORD COUNT

The undersigned certifies that the word count of the body of this Reply Brief, including footnotes, is 4,359.

Dated: May 27, 2009.

Respectfully submitted,

HOLLAND & HART LLP



Kristina Martinez
Post Office Box 2208
Santa Fe, New Mexico 87504-2208
(505) 988-4421

-and-

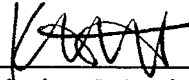
Philip J. Dabney
3763 Howard Hughes, Ste. 300
Las Vegas, Nevada 89169
(702) 669-4600

Attorneys for Pulte Homes of New Mexico, Inc., Pulte Homes, Inc., Gerard Sanchez, and Brett Clem

CERTIFICATE OF SERVICE

I certify that on May 27, 2009, I served a copy of the foregoing REPLY BRIEF OF APPELLANTS to the following by U.S. Mail, postage prepaid:

Jerrald J. Roehl
Wesley Jackson
The Roehl Law Firm, P.C.
Third Central Plaza, Suite 2500E
300 Central Avenue S.W.
Albuquerque, NM 87102



Kristina Martinez

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