UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV08-00151-AHM (AGRx)	Date	June 29, 2012
Title	DANIELLE KINGSBURY et al v. U.S. GREENFIBER, LLC et al		

Present: The Honorable	A. HOWARD MATZ, U.S. DISTRICT JUDGE	
Stephen Montes	Not Reported	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys **NOT** Present for Plaintiffs: Attorneys **NOT** Present for Defendants:

Proceedings: IN CHAMBERS (No Proceedings Held)

Defendant Pulte Homes filed three motions that are presently before the Court: (1) a motion to reconsider the Court's May 23, 2011, order granting class certification,[1] (2) a motion to compel arbitration as to named Plaintiff Emilio Segura,[2] (3) and a motion to stay this case pending the outcome of arbitration.[3] For the reasons stated below, the Court DENIES Pulte's motions.

I. INTRODUCTION

Defendant Pulte Homes used allegedly defective insulation in the homes it built and sold in California. Plaintiff Emilio Segura initially sought to represent a single class of original as well as subsequent purchasers of Pulte's homes. Segura asserted a variety of state law claims against Pulte including a claim under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, a claim under California's Right of Repair Act, Cal. Civil Code § 895 *et seq.*, and a claim for negligence. *See* Second Amended Complaint, Dkt. No. 208. Pulte is not the only defendant in this action. Segura's second amended complaint also raises claims against Defendant U.S. Greenfiber, the company that manufactured the allegedly defective insulation, and Defendant Quality Interiors Inc., the company that sold and installed the insulation.

After Segura's fourth attempt at class certification, on May 23, 2011 the Court

[1] Docket No. 248.

[2] Docket No. 245.

[3] Docket No. 247.

certified a class under Rule 23(b)(3). Dkt. 237. The Court limited this class to claims brought only by original purchasers of Pulte's homes against only Pulte. Dkt. 237 at 2. In addition, the class was certified as to only a single cause of action—Segura's claim under California's Unfair Competition Law. Key to the Court's certification decision was the fact that the original purchasers of Pulte's homes had signed a "standard purchase agreement" that contained allegedly material omissions.

Pulte's motion for reconsideration is based on two recent Supreme Court cases—*AT&T Mobility LLC v. Concepcion*, — U.S. —, 131 S. Ct. 1740 (2011) and *Wal-Mart Store, Inc. v. Dukes*, — U.S. —, 131 S. Ct 2541 (2011).

A. Reconsideration based on *AT&T Mobility LLC v. Concepcion*

Pulte asks this Court to reconsider its class certification order in light of *Concepcion*. The Supreme Court decided *Concepcion* after the parties in this case had fully briefed the class-certification motion and after this Court had taken that motion under submission. Accordingly, the Court did not have an opportunity to consider the parties' views on *Concepcion*'s effect on this case. Reconsideration is appropriate under Local Rule 7-18.

Concepcion vitiated the California Supreme Court's *Discover Bank* rule. *Concepcion*, 131 S. Ct. at 1753. The Supreme Court explained that under the *Discover Bank* rule class-action waivers are unconscionable (1) when the waiver is present in a "consumer contract of adhesion," (2) when disputes between the parties "predictably involve small amounts of damages", and (3) when "it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Id.* at 1746 (citing *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162 (2005)). In *Concepcion*, the Supreme Court found that the Federal Arbitration Act ("FAA") preempts the *Discover Bank* rule because the rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 1753.

Pulte's standard purchase agreement—the agreement that the class-certification order relies on—contains an arbitration clause that specifies that all disputes arising out of the purchase agreement or the purchased home are subject to binding arbitration. McConnell Decl. Accompanying Mot. to Compel Arb. Ex. A at 7. The arbitration clause

also expressly prohibits homeowners from joining their claims with the claims of other homeowners. *Id.* at 8.

According to Pulte, prior to *Concepcion* it was doubtful whether a motion to compel arbitration would have survived the *Discover Bank* rule. McConnell Decl. Accompanying Mot. to Reconsider ¶ 9–11. But now that *Concepcion* has rejected the *Discover Bank* rule, Pulte believes that it has an enforceable right to arbitration. To enforce this right, Pulte has moved for an order compelling arbitration as to Plaintiff Segura and an order staying this case pending arbitration. Pulte also asks the Court to revisit the May 23, 2011, class certification order in light of Pulte's now-enforceable arbitration rights.

B. Reconsideration based on *Wal-Mart Store, Inc v. Dukes*

Pulte also asks the Court to reconsider class-certification based on the Supreme Court's decision in *Dukes*, which refined the "commonality" standard that applies to class certification motions. *Dukes* was decided on June 20, 2011, after the Court had issued the May 23, 2011, class certification order. Accordingly, reconsideration is appropriate under Local Rule 7-18.

II. DISCUSSION

Neither *Concepcion* nor *Dukes* warrants modification of the Court's May 23, 2011 class certification order. *Concepcion* does not affect the class certification order because even before that case was decided, Pulte was well aware of its right to arbitrate. By engaging in extensive litigation for almost four years, Pulte waived its arbitration rights. *Dukes* does not affect the certification order because it does not change the outcome of the Court's commonality inquiry.

A. *Concepcion* does not affect the class certification order because Pulte has waived its right to arbitrate

1. Legal Standard for Waiver

Waiver is a defense to arbitration and is a question for the court. *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1120–1121 (9th Cir. 2008). In this circuit, the three-

part *Fisher* test determines whether a litigant has waived its right to arbitrate: "A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). Thus, Segura has the burden of proving waiver.

Waiver is disfavored and "any party arguing waiver of arbitration bears a heavy burden of proof." *Id.* "[A]ny doubts concerning the scope of the arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract itself or an allegation of waiver . . . ." *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 560 U.S. 1, 25 (1983).

The first two prongs of the *Fisher* test—knowledge of an existing right and acts inconsistent with that right—are related. For example, if a party lacks knowledge of an existing right to arbitrate then even extensive litigation conduct is not inconsistent with its arbitration rights. This was the case in *Fisher*. There, the plaintiffs filed suit against their stock broker under state and federal securities laws. *Fisher*, 791 F.2d at 693. The parties had previously entered into an agreement that contained a mandatory arbitration clause, but initially the defendants did not file a motion to compel arbitration because they believed it would be futile. *Id.*

At the time the suit was filed, many federal courts recognized the "intertwining doctrine," which precluded arbitration "when arbitrable and nonarbitrable claims [arose] out of the same transaction, and [were] sufficiently intertwined factually and legally." *Id.* at 695. Although the Ninth Circuit had not explicitly adopted the intertwining doctrine at the time, it had expressed its approval of the doctrine in *De Lancie v. Birr, Wilson & Co.*, 648 F.2d 1255, 1259 n.4 (9th Cir. 1981).

Fisher involved arbitrable and non-arbitrable claims that were closely related. *Id.* As a result, given the existence of the intertwining doctrine, the defendant in *Fisher* concluded that it did not have an enforceable right to arbitrate. *Fisher*, 791 F.2d at 695. As a result, the defendant did not move to compel arbitration and the parties proceeded to litigate the case. *Id.* "[B]oth parties filed pretrial motions and engaged in extensive discovery." *Id.*

In 1985, during the pendency of the litigation in *Fisher*, the Supreme Court rejected the intertwining doctrine and held that the Federal Arbitration Act "requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Byrd v. Dean Witter Reynolds Inc.*, 470 U.S. 213, 217 (1985).

After the Supreme Court decided *Byrd*, the defendant in *Fisher* moved to compel arbitration of the arbitrable claims in the case. *Fisher*, 791 F.2d at 693. The Ninth Circuit held that the defendant had not waived its arbitration rights. *Id.* at 695. According to the court, the previously-prevailing intertwining doctrine would have precluded arbitration of the case. *Id.* As a result, the defendant did not act inconsistently with regard to its right to arbitrate by engaging in litigation and by not filing a motion to compel arbitration. *Id.*

By contrast, where a party did have a known right to arbitrate, the court must examine its litigation conduct to determine whether the party's conduct evinces a "conscious decision to continue to seek judicial judgment on the merits." *Van Ness Townhouses v. Mar Industries Corp.*, 862 F.2d 754, 759 (9th Cir, 1988). In *Van Ness*, as in *Fisher*, some of the defendant's claims were arbitrable and some were non-arbitrable. *Id.* at 758. Unlike *Fisher*, however, *Van Ness* was litigated *after* the Supreme Court had rejected the intertwining doctrine in *Byrd*. *Id.* at 758–59. Accordingly, unlike the defendant in *Fisher*, the defendant in *Van Ness* had a known right to compel arbitration as to the arbitrable claims. *Id.* By choosing to actively litigate, instead of moving to compel arbitration, the defendant's conduct was held to be inconsistent with its known right to arbitrate. *Id.* Accordingly, the Ninth Circuit held that the defendant had waived its right to compel arbitration as to those claims. *Id.* at 759.

2. Pulte had knowledge of its right to arbitration before *Concepcion* was decided

Pulte contends that a motion to compel arbitration would have been futile prior to *Concepcion* because *Discover Bank* voided class-action waivers in arbitration agreements. Reply to Plaintiff's Opp. to Mot. for Reconsideration at 5. The Court rejects this argument. Pulte could have brought a motion to compel prior to *Concepcion*. In fact, it successfully moved to compel in a similar case involving the same arbitration

agreement.

The *Discover Bank* rule applied only to contracts involving predicably small amounts of damages. *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162 (2005). This case, in contrast, involves damages arising out of purchases of Pulte's homes. It defies reality and common sense to contend that breaches of contracts concerning the sale of residential property involve only predictably small amounts of damages. *Cf. In re Toyota Motor Corp. Hybrid Brake Marketing*, 828 F. Supp. 2d 1150, 1163 n.7 (C.D. Cal. 2011)(Carney, J.) ("As Plaintiffs point out, however, the instant action does not concern a dispute involving small sums of money, but involve damages related to expensive cars worth thousands of dollars."). As a result, the *Discover Bank* rule likely did not apply to Pulte's standard contract even prior to the Supreme Court's decision in *Concepcion*.

Furthermore, Pulte's claim that a motion to compel would have been futile is belied by its own conduct in a different case. *Dalie v. Pulte Home Corp.*, 636 F. Supp. 2d 1025 (E.D. Cal. 2009)[4], involved claims of title insurance fraud brought by California homeowners as a class action against Pulte. In that case, the plaintiffs argued that *Discover Bank* barred enforcement of the arbitration clause in Pulte's standard contract. *See* Parks Decl. Ex. C at 8–9 (Pulte's Reply Brief in *Dalie*). In response, Pulte argued that the plaintiff "has not brought himself within this case law. He has failed to come forward with any evidence showing that the arbitration agreement was a consumer contract of adhesion. Moreover, it cannot be said that any damages claimed by the purchaser of a several hundred thousand dollar home would be predictably small, as required for *Discover Bank* to [apply]." *Id.* The *Dalie* court agreed with Pulte, and held that *Discover Bank* did not apply to Pulte's contract. *Dalie*, 636 F. Supp. 2d at 1029.

The fact that Pulte had previously convinced a court that *Discover Bank* was inapplicable to the same arbitration agreement at issue in this case is strong evidence that Pulte knew of its existing right to compel arbitration.

This is not to say, however, that Pulte would necessarily have prevailed on a motion to compel arbitration. For example, in *Concepcion*, the Supreme Court explained that the small damages limitation in *Discover Bank* was "toothless and malleable " given that the Ninth Circuit had found that even damages of $4,000 per class member could

[4] *Dalie v. Pulte Home Corp.* was previously styled *DeSouza v. Pulte Home Corp.*

qualify under the rule. *Concepcion*, 131 S. Ct. at 1750. But just because Pulte's victory was not assured does not mean that it lacked knowledge of a right to compel arbitration. Litigants may and often do assert claims and defenses even though it is unclear whether the claim or defense will be successful.

In addition, Pulte raised arbitration as an affirmative defense in each of its answers to Segura's complaints. Dkt. 212 at 10; Dkt. 119 at 12; Dkt. 34 at 7. Pursuant to Rule 11, Pulte must have had a good faith belief in the validity of this defense in order to assert it. Accordingly, the fact that Pulte repeatedly raised this affirmative defense is evidence that it was aware of its right to arbitrate. In *Toyota Motor*, *supra*, the defendant moved to compel arbitration after the Supreme Court decided *Concepcion*. The court noted that "Toyota's skepticism of its right to arbitrate before *Concepcion* is belied by Toyota's assertion of arbitration as the tenth affirmative defense in [its answer] two months *before* the Supreme Court issued its decision in *Concepcion*." *Toyota*, 828 F. Supp. 2d at 1163. The court further found that "while *Concepcion* may have strengthened Toyota's chances for compelling arbitration, it does not mean that Toyota lacked knowledge of its potential right to pursue arbitration prior to that decision." As the court explained, "no party has a right to unfairly play a game of 'wait and see' and not assert its legal rights until and unless the law becomes more favorable to its position." *Id*. For these reasons, the *Toyota Motor* court found that the defendant had knowledge of its right to compel arbitration.

Toyota Motor's reasoning is fully applicable to this case. Pulte had knowledge of its right to arbitrate as shown by its conduct in *Dalie* and its assertion of an affirmative defense of arbitration. Although *Concepcion* clarified Pulte's right to compel arbitration, this does not mean that Pulte was unaware of that right prior to that decision.

3. Pulte's litigation conduct was inconsistent with its arbitration rights

The next question is whether Pulte's conduct in this case was inconsistent with its arbitration rights. Conduct that evinces a "conscious decision to continue to seek judicial judgment on the merits of the arbitrable claims" is inconsistent with a party's right to arbitration. *Van Ness*, 862 F.2d at 759 (internal citations and modifications omitted).

This case has been pending for over four years. In that time, Pulte has actively

litigated this case—it opposed Segura's motion to remand, conducted discovery, and opposed Segura's four motions to certify a class. In addition, when the Court at one point questioned whether it should retain jurisdiction over this case, Defendants, including Pulte, argued that "the parties have conducted costly discovery, participated in a number of hearings, fully briefed two class certification motions, and the Court issued an Opinion with a thorough analysis denying the first motion. The Court has been exercising the jurisdiction it still has, and should continue to do so." Dkt. 149 at 3–4.

As Pulte itself points out in its briefs on the pending motions, enforcement of the arbitration agreement would defeat class certification. This is an argument Pulte was fully capable of raising in the context of the four motions for class certification. Yet Pulte did not pursue its defense of arbitration. Its failure to do so was inconsistent with its arbitration rights.

Pulte's conduct post-*Concepcion* was also inconsistent with its right to arbitrate. *Concepcion* was decided on April 27, 2011. At that time, Segura's fourth motion for class certification was under submission before this Court. After *Concepcion* was decided, Pulte could have requested permission to file a supplemental brief or it could have served a demand for arbitration on Segura. Pulte did neither of these things and instead waited for this Court to resolve the motion for class certification.

Even after this Court granted Segura's motion for class certification on May 23, 2011, Pulte could have filed a motion for reconsideration based on *Concepcion*. Instead, on June 3, 2011, Pulte petitioned the Ninth Circuit for permission to appeal this Court's class certification order. The Ninth Circuit denied Pulte's petition on August 11, 2011. During this period—June 3, 2011, to August 11, 2011—Pulte remained silent with respect to its arbitration rights.

It was not until August 22, 2011, nearly four months after *Concepcion* was decided, that Pulte served Segura with a demand for arbitration. Pulte's delay in seeking arbitration after *Concepcion* was decided further demonstrates a conscious decision to seek judicial judgment on the merits of Segura's class certification motion.

4. Pulte's conduct caused prejudice to Segura and the class

The final factor under the *Fisher* test for waiver is "prejudice to the party opposing

arbitration." In this case, the Court has no doubt that Segura was prejudiced by Pulte's conduct. As discussed above, this case has been heavily litigated for over four years. In that time, Plaintiff's counsel has expended significant time and money to conduct discovery, litigate four motions for class certification, oppose a motion for remand, and oppose Pulte's petition to appeal this Court's class certification order. As in *Van Ness*, in this case Plaintiff "relied to [his] detriment on [Pulte's] failure to move for arbitration." *Van Ness*, 862 F.2d at 759.

At the hearing on this motion, which was held on April 23, 2012, Pulte argued that even if Segura was prejudiced, none of the unnamed members of the class was prejudiced by Pulte's conduct. Pulte claims that these unnamed members were not prejudiced because they were not before the Court until a class was certified. The Court rejects this argument.

First, Pulte has not cited, and the Court has not located, any authority that holds that the unnamed members of a class must suffer prejudice before the Court may find a waiver of arbitration. Second, Pulte's argument ignores the realities of class-action litigation. Even though a class was not certified until May 23, 2011, Segura has been the putative class representative ever since the case was filed. In this capacity, Segura and his lawyers were attempting to vindicate not only Segura's interests but also the interests of other unrepresented class members. By waiting until *after* class certification to raise the issue of arbitration, Pulte has prejudiced those interests.

Moreover, to accept this argument would be to condone gamesmanship in the class certification process. A defendant could wait in the weeds and delay asserting its arbitration rights. It could file motions to dismiss, litigate the named plaintiff's legal theories, and oppose class certification motions. If and when a class is finally certified, the defendant could simply assert its arbitration rights and defeat certification of the previously-certified class. In the interests of the fair and efficient administration of justice, the Court cannot accept Pulte's position.

B. *Dukes* does not change the Court's decision to certify a class

In *Dukes*, the Supreme Court clarified the commonality inquiry mandated by Rule 23. *Dukes*, 131 S.Ct. at 2551. The Court explained that under Rule 23 it is not sufficient that the class members share *any* common factual or legal questions. *Id.* Instead, the

class members must share a "common contention" that is capable of class-wide resolution. *Id.* The determination of this "common contention" should "resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

In *Guido v. L'Oreal, USA, Inc.*, 2012 WL 1616912, at *5 (C.D. Cal. May 7, 2012) (Snyder, J.), the court certified a class of plaintiffs who had purchased the defendant's shampoo. The plaintiffs argued that the defendant had failed to disclose that its shampoo was flammable. *Guido*, 2012 WL 1616912, at *5. In response, the defendant contended that there was no commonality because the plaintiffs had purchased the product for different reasons and that some of those reasons had nothing to do with whether the product was flammable. *Id.* In the defendant's view, these individualized questions regarding each plaintiff's reasons for purchasing the shampoo precluded certification. Applying *Dukes*, the court found numerous questions that were "central to the validity" of each class member's claim. *Id.* at *6. These questions included (1) whether the shampoo's packaging and marketing materials were unlawful, unfair, deceptive, or misleading to reasonable customers, (2) whether plaintiffs had a reasonable expectation that the shampoo was not dangerous around flames, (3) whether defendants concealed material information about the flammability of the shampoo, (4) and whether the shampoo was in fact flammable. *Id.*

Similarly, in this case there are numerous common contentions that are central to the resolution, including any relief, of each class member's claim. These questions include: (1) whether Pulte's standard purchase agreement is deceptive under the UCL, (2) whether wet-blown insulation is actually subject to risks of mold and water retention, (3) whether a reasonable consumer would expect disclosure of these risks, (4) whether the installation of wet-blown insulation affects the value of a home, and (5) whether Pulte concealed information about the risks of wet-blown insulation. Accordingly, the Court finds that *Dukes* does not alter the Court's decision to certify a class in this case.

III. CONCLUSION

The Court finds that Pulte has waived its right to arbitration in this class action. Furthermore, the Court finds that *Dukes* does not affect the outcome of the Court's class certification order. Accordingly, the Court DENIES Pulte's motion to compel arbitration, DENIES Pulte's motion to stay this case pending arbitration, and DENIES Pulte's motion for reconsideration.

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