

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18
Justice

	<u>x</u>	Index	
HOWARD FRANK, et al.		Number <u>22191</u>	2003
- against -		Motion	
		Date <u>February 4,</u>	2004
MAZS GROUP, LLC.		Motion	
	<u>x</u>	Cal. Number <u>16</u>	

The following papers numbered 1 to 7 read on this motion by the defendant, Mazs Group, LLC., pursuant to CPLR 7503(a), to dismiss the plaintiffs' complaint and compel arbitration.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7

Upon the foregoing papers it is ordered that the motion is determined as follows:

The plaintiffs commenced this action to recover damages for breach of warranty arising out of the existence of structural and other defects within their newly constructed home.

On November 13, 2000, the plaintiffs entered into a contract with the defendant, which contained certain warranties, to purchase a new house to be constructed by the defendant at 455 Beach 7th Street, Far Rockaway. On November 8, 2001, there was a closing of title, at which time the plaintiffs paid a purchase price of \$525,500.00 and took possession of the premises. Shortly after taking title and occupancy of the premises, the plaintiffs observed that their house was settling and sinking as a result of inadequate and/or insufficient piles being installed before the pouring of the foundation. Among other things, the plaintiffs allege that there is an opening of between 9 and 12 inches at a portion of their basement and that the house must be reconstructed.

On May 16, 2002, the plaintiffs gave the defendant notice of the sinking foundation and other defects in the house. On May 16, 2003, the plaintiffs served the defendant with notice of breach of implied warranty dated May 15, 2003. By letter dated June 23, 2003, the defendant rejected the plaintiffs' claims regarding the structural and other defects affecting the premises as "untimely." In September 2003, the plaintiffs commenced this action asserting two causes of action, respectively, for breach of limited warranty and breach of implied warranty.

The defendant seeks to dismiss the plaintiffs' complaint and compel the plaintiffs to submit to binding arbitration to resolve the dispute over the structural and other alleged defects in the house that it built for the plaintiffs. The defendant contends that since the plaintiffs' claims arise out of the parties' contract of sale, dated November 13, 2000, they are covered by the arbitration provision of section 38 of the contract of sale. This arbitration provision states:

§ 38 Arbitration. Any dispute arising hereunder shall be submitted to binding arbitration according to the then current rules of the American Arbitration Association, in the County of Nassau.

In opposition, the plaintiffs contend that the defendant's motion to dismiss the complaint and to compel arbitration must be denied as a matter of law pursuant to GBL § 777-b.

GBL § 777-b(3)(d) provides, in relevant part, as follows:

3. A housing merchant implied warranty may be excluded as modified by the builder or seller of a new home only if the buyer is offered a limited warranty in accordance with the provisions of this subdivision.

d. The limited warranty shall meet or exceed the standards provided in [subdivision] four...of this section.

4. A limited warranty sufficient to exclude or modify a housing merchant implied warranty must be written in plain English and must clearly disclose:

h. Step-by-step claims procedures required to be undertaken by the owner, if any, including directions for notification of the builder and any other warrantor; an owner

shall not be required to submit to binding arbitration....(emphasis added).

Pursuant to clear and unambiguous terms of the foregoing statute, binding arbitration may not be required under the circumstances presented in this case.

Accordingly, the motion is in all respects denied.

In the interests of justice and as a matter of public policy, should an appeal from this order be taken, the defendant builder is required to post an appellate bond in the amount of \$525,000.00, representing the cost of the premises to the plaintiffs.

Dated: May 17, 2004

J.S.C.