

14-0441

IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

JOHN SPENCER and  
CAROLYN SPENCER,

Plaintiffs,

Civil Action No. 13-C-116  
Judge David W. Nibert

FILED  
IN MY OFFICE  
2014 MAR -6 AM 9:17

SCHUMACHER HOMES OF  
CIRCLEVILLE, INC., a foreign corporation,  
DAVIS HEATING & COOLING  
COMPANY, INC., a West Virginia corporation,

Defendants.

**ORDER DENYING SCHUMACHER HOMES OF CIRCLEVILLE, INC.'S  
MOTION TO DISMISS THIS PROCEEDING AND COMPEL ARBITRATION  
OR, IN THE ALTERNATIVE, TO STAY THIS PROCEEDING PENDING  
ARBITRATION**

On February 7, 2014 defendant Schumacher Homes of Circleville, Inc.'s Motion to Dismiss This Proceeding and Compel Arbitration or, in the Alternative, to Stay This Proceeding Pending Arbitration ("Motion to Dismiss") came on for hearing before the Court. After considering the arguments of counsel and all pleadings filed, the Court was of the opinion to, and does hereby **ORDER** that said Motion to Dismiss is **DENIED** and makes the following findings of fact and conclusions of law:

1. On June 6, 2011, John Spencer and Carolyn Spencer ("plaintiffs") entered into a purchase agreement with Schumacher Homes of Circleville, Inc. ("Schumacher") whereby Schumacher agreed to construct the residence and improvements for the plaintiffs on property located at Lot 207, Pleasant Street, Milton, Mason County, West Virginia, 25541.

2. The plaintiffs have filed a Complaint alleging that the home constructed by Schumacher is defective; that such defects have prevented the plaintiffs from being able to move into the subject home; that Schumacher failed to correct the defects despite being contacted to do so; that the subject home violates expressed and implied warranties; including warranties set forth in the Uniform Commercial Code as adopted in Chapter 46 of the West Virginia Code; that Schumacher fraudulently induced the plaintiffs to purchase said home; that the plaintiffs have suffered annoyance, inconvenience, mental anguish and extreme frustration; that the actions of Schumacher were in violation of the Magnuson-Moss Warranty Act, 15 U.S. Code § 2308; that the actions of Schumacher violated the West Virginia Consumer Credit and Protection Act, Chapter 46A, West Virginia Code; that Schumacher breached the duty of good faith implied in the transaction pursuant to the Uniform Commercial Code, West Virginia Code § 46-1-203; and that the plaintiffs are entitled to various consequential damages, incidental damages, compensatory damages, punitive damages, costs, attorney's fees and interest, along with the imposition of statutory penalties against Schumacher.

3. Schumacher has filed its Motion to Dismiss citing Section 27 of the Purchase Agreement which generally provides that any claim, dispute or cause of action shall be subject to final and binding arbitration.<sup>1</sup>

In its Motion to Dismiss Schumacher summarized the claims asserted by the plaintiffs as follows: (1) revocation of acceptance of the Contract; (2) breach of express and implied warranties, including the Magnuson-Moss Warranty Act, 15 U.S.C. § 2308;

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<sup>1</sup> The Court does note that in its Motion to Dismiss Schumacher stated in paragraph number three thereof that it would waive for purposes of this lawsuit the clause in the Purchase Agreement providing that arbitration must be "venued exclusively in Stark County, Ohio" and that Schumacher stated that it would agree to arbitrate the plaintiffs' claims at a location in Mason County, West Virginia where the plaintiffs reside.

(3) breach of the implied warranty of merchantability; (4) breach of the implied warranty of fitness for a particular purpose; (5) breach of the duty of good faith pursuant to West Virginia Code § 4-6-1-203; (6) unfair and deceptive acts and practices in violation of section 6-102 of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101 *et seq.* (“WVCCPA”); (7) unconscionable purchase price; (8) fraud (including actual, constructive, innocent misrepresentation, and negligent misrepresentation); (9) negligence; and (10) civil conspiracy. (Motion to Dismiss, ¶ 4)

4. In its Motion to Dismiss, Schumacher has cited the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* (“FAA”) as requiring enforcement of the arbitration provision in the Purchase Agreement.

5. The FAA, in combination with relevant West Virginia Supreme Court jurisprudence, has made clear that any state law or common law doctrine purporting to regulate arbitration provisions will be preempted by the FAA. *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 at 275-76 (W. Va. 2011).

6. The FAA, as interpreted by the Fourth Circuit Court of Appeals regarding the issue of whether a court should compel arbitration when there is a clause in a contract which calls for arbitration, laid out a four part test. The movant who desires to compel arbitration under the FAA must demonstrate:

(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.

*Adkins v. Labor Ready, Inc.*, F. 3d 496, 500-01 (4th Cir. 2002) quoting *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991).

7. In addition to the pertinent language under 9 U.S.C. §2 of the FAA and the four part test cited in *Adkins v. Labor Ready, Inc.*, 9 U.S.C. §2 of the FAA provides a “savings clause” that allows state courts to apply general principles of contract law, even when dealing with arbitration clause provisions. The pertinent language of this code section, as quoted by the West Virginia Supreme Court, states:

[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

*Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 274 (W. Va. 2011) (citing 9 U.S.C. §2).

8. Under the “savings clause” the arbitration provision in the Contract between the plaintiffs and Schumacher constitutes an unconscionable provision pursuant to West Virginia contract and case law. In *Brown v. Genesis* the court noted

[t]he doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness, or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written.

*Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 284 (W. Va. 2011) (citing *McGinnis v. Cayton*, 312 S.E.2d 765, 776 (W. Va. 1984)). Additionally, the Court made clear

[t]he concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case... [a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the

execution of the contract and the fairness of the contract as a whole.

*Id.* (citing *Troy Min. Corp. v. Itman Coal Co.*, 346 S.E. 2d 749 (W. Va. 1986)). The standard for unconscionability includes two component parts: procedural unconscionability and substantive unconscionability. *Id.* (citing *McGinnis*, 312 S.E.2d 765, 777 (W. Va. 1986)).

9. Substantive unconscionability involves unfairness in the terms of the contract. *Brown*, 724 S.E.2d 250, 287 (W. Va. 2011). The West Virginia Supreme Court has found substantive unconscionability in several cases where the more powerful party either: (1) reserves the right to judicial action while requiring that the other party arbitrate any matter that may arise or (2) is not likely to need judicial oversight because they will only have one claim (usually the collection of money by a business from a customer). *Id.* at 265 (W. Va. 2011); *Grayiel v. Appalachian Energy Partners*, 2012 W. Va. LEXIS 825, 736 S.E.2d 91 (W. Va. 2012).

10. Procedural unconscionability can be described as the inequities and unfairness present in the bargaining process when forming a contract. *Id.* (citing *McGinnis*, 312 S.E.2d 765, 777 (W. Va. 1986), *Nelson v. McGoldrick*, 127 Wash.2d 124, 896 P.2d 1258 (Wash. 1995)). Procedural unconscionability involves the lack of a meaningful choice considering all of the circumstances that surround the transaction. *Id.*

11. Syl. Pt. 20 of *Brown* holds

‘[a] contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a ‘sliding scale’ in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.’

[*overruled in part on other grounds by Marmet Health Care Center, Inc. v Brown*, 132 S.Ct. 1201, (2012) (per curiam).] Syl. Pt. 9, *Brown v Genesis Healthcare Corp.*, 729 S.E.2d 217 (W.Va. 2012); *Credit Acceptance Corp. v Front*, 2013 WL 3155993 (W.Va. 2013).

12. An arbitration provision may be found to be unenforceable where one party has promulgated egregiously unfair arbitration rules, such a giving itself the right to bring suit in court while granting no such right to the other party. *Hooters of America, Inc. v Phillips*, 173 F.3d 933 (1991).

13. Schumacher's arbitration provision in its Contract with the plaintiffs is procedurally unconscionable.

14. Schumacher's arbitration provision in its Contract with the plaintiffs is substantively unconscionable.

15. Schumacher has removed the possibility of an equitable or fair result for the plaintiffs with regard to arbitration. The pertinent language of the arbitration provision requires the plaintiffs to arbitrate any matters that arise under the Contract. Schumacher reserved to itself the right to file suit to enforce a mechanic's lien. Realistically, Schumacher would not need judicial intervention for anything other than the collection of money under a contract of this nature. With mechanic's liens being the most effective action to take on this matter, Schumacher understands that it has effectively eliminated its need for arbitration while simultaneously requiring arbitration for the plaintiffs.

16. While there does not need to be an equal finding of procedural and substantive unconscionability in order to find an arbitration clause unconscionable, there

is overwhelming evidence that indicates a need to strike the arbitration clause that would force this matter out of court. *Brown*, 724 S.E.2d 250, 284 (W. Va. 2011) (citing *McGinnis*, 312 S.E.2d 765, 777 (W. Va. 1986)).

17. The Uniform Commercial Code, adopted as Chapter 46 of the West Virginia Code, provides that a lease contract or any clause of a leased contract may be voided if it is either procedurally or substantively unconscionable. *West Virginia Code* § 46-2A-108. The plaintiffs' Complaint includes claims under the Uniform Commercial Code.

18. The plaintiffs' claims against Schumacher include claims under the West Virginia Consumer Credit and Protection Act, Chapter 46A of the *West Virginia Code*. Section 46A-2-121 thereof provides that a contract may be voided if it was "induced by unconscionable conduct" or if the agreement or transaction was "unconscionable at the time it was made."

The Court accordingly does **ORDER** that the Motion to Dismiss of Schumacher is **DENIED**.

The objections of Schumacher are noted for the record.

The Clerk of the Court is hereby directed to send a certified copy of this Order to counsel of record.

ENTERED:

  
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David W. Nibert, Judge

TRUE COPY TESTE BILL WITHERS  
MASON COUNTY CIRCUIT CLERK

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