14-1286

Flaherty

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

BETH NELSON FISH,

Plaintiff,

v. Civil Action No. 13-C-248

WILLIAM CAPOUILLEZ, *et al.*,

Defendants.

ORDER

CIRCUIT COURT OF OHIO COUNTY 2014 NOV 24 PM 9 10 BRENDA L. MILLER

The Court has previously entered an Order in the companion case of *O'Hara v. Capouillez* (Ohio County Case No. 13-C-246) wherein the Court denied the *Defendants' Motion to Compel Arbitration* regarding the identical issues as in the instant case. As such, the Court will incorporate by reference its findings, conclusions, analysis and ruling set forth in *O'Hara v. Capouillez* herein. A copy of the *O'Hara v. Capouillez* Order dated October 17, 2014 is attached hereto and made a part of this Order.

Accordingly, the Court does hereby

ORDER that the *Defendants' Motion to Compel Arbitration* is **DENIED** for the reason set forth above.

The entry of this Order denying the motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine.

The Defendants' objection to this ruling is noted and saved.

The Clerk of the Circuit Court shall forward an attested copy of this Order to counsel of record.

ENTERED this 20th day of November, 2014.

A copy, Teste:

Brenda L. Miller

Circuit Clerk

JUDGE MARTIN J. GAUGHAN

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

MICHAEL C. O'HARA, *et al.*,

Plaintiffs,

v.

WILLIAM CAPOUILLEZ, *et al.*

Defendants.

CIRCUIT COURT
OF OHIO COUNTY
2014 OCT 20 AM 8 33
BRENDA L. MILLER

Civil Action No. 13-C-246

ORDER

On June 19, 2014, a hearing was held in this matter regarding the *Defendants' Motion to Compel Arbitration.*[1] The parties appeared through their respective counsel. After considering the pleadings, oral arguments, and pertinent legal authorities, the Court sets forth its decision below.

I.
Factual and Procedural History

On July 30, 2013, the Plaintiffs filed a *Complaint* in the Circuit Court of Ohio County, West Virginia alleging that the Defendants have engaged in the unauthorized practice of law. The Plaintiffs contend that the Defendants solicited the Plaintiffs, owners of mineral rights, via a *Landowner Representation Contract.* The Defendants were to act as the Plaintiffs' consultant in the negotiation, execution and performance of oil and gas leases. In exchange for their consulting services, the Defendants charged a fee based upon the payments the Plaintiffs were to receive from the lease. It is alleged by the Plaintiffs that the "consulting" services to be provided by the Defendants constituted the unauthorized practice of law as neither William Capouillez or any authorized representative of Geological Assessment and Leasing are licensed to practice law in the State of West Virginia or any other state. Eventually, the Plaintiffs entered into an executed

[1] The Court did grant the Defendants' Motion to Stay Pending Ruling on Motion to Compel Arbitration at the June 19, 2014 hearing. However, the Court took the Defendants' Motion to Compel Arbitration under advisement.

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Oil, Gas and Coaled Methane Gas Lease with Great Lakes Energy Partners, L.L.C. ("O'Hara Lease") wherein Defendant, William C. Capouillez, endorsed the lease as a consultant.[2]

On August 29, 2013, the Defendants removed this case to the United States District Court for the Northern District of West Virginia, and in response, the Plaintiffs filed a *Motion to Remand.* Thereafter, the United States District Court issued an Order remanding the case to this Court. Now pending before this Court is the *Defendants' Motion to Compel Arbitration.*

II.
Standard of Review and Pertinent Legal Authorities

When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, *9 U.S.C. §§ 1–307 (2006)*, the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement. Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman,* 692 S.E.2d 293 (W.Va. 2010).

Under the Federal Arbitration Act, *9 U.S.C. § 2*, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract. Syl. Pt. 1, *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders,* 717 S.E.2d 909 (W.Va. 2011).

The purpose of the Federal Arbitration Act, *9 U.S.C. § 2*, is for courts to treat arbitration agreements like any other contract. The Act does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to

[2] In the O'Hara Lease, the Plaintiffs are designated as the "Lessor," Great Lakes Energy Partners, L.L.C., is designated as the "Lessee," and Geological Assessment & Leasing is designated as the "Consultant."

arbitrate are enforced according to their terms. Syl. Pt. 2, *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 717 S.E.2d 909 (W.Va. 2011).

Nothing in the Federal Arbitration Act, *9 U.S.C. § 2*, overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement. Syl. Pt. 3, *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 717 S.E.2d 909 (W.Va. 2011).

Under the Federal Arbitration Act, *9 U.S.C. § 2*, and the doctrine of severability, only if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract, as opposed to generally challenging the contract as a whole, is a trial court permitted to consider the challenge to the arbitration clause. However, the trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause. If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract. Syl. Pt. 4, *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 717 S.E.2d 909 (W.Va. 2011).

The practice of law, both in court and out of court, by a person not licensed to practice is an illegal usurpation of the personal privilege of a duly licensed attorney at law. Syl. Pt. 3, *West Virginia State Bar v. Early*, 109 S.E.2d 420 (W.Va. 1959).

The authority of the Supreme Court to regulate and control the practice of law in West Virginia, including the lawyer disciplinary process, is constitutional in origin. *W.Va. Const. art. VIII, § 3*. Syl. Pt. 2, *Lawyer Disciplinary Bd. v. Kupec*, 505 S.E.2d 619 (W.Va. 1998).

The justification for excluding from the practice of law persons who are not admitted to the bar and for limiting and restricting such practice to licensed members of the legal profession is not the protection of the members of the bar from competition or the creation of a monopoly for the members of the legal profession, but is instead the protection of the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the judicial department of the government could exercise slight or no control. Syl. Pt. 6, *West Virginia State Bar v. Early*, 109 S.E.2d 420 (W.Va. 1959).

The judicial department of the government has the inherent power to define, supervise, regulate and control the practice of law and the Legislature cannot restrict or impair this power of the courts or permit or authorize laymen to engage in the practice of law. Syl. Pt. 7, *West Virginia State Bar v. Early*, 109 S.E.2d 420 (W.Va. 1959).

III.
Discussion

The arbitration clause in the O'Hara Lease states in part: "*Any controversy or claim arising out of or relating to this Lease, or the breach thereof, shall be ascertained and settled by three (3) disinterested arbitrators....*" (*See*, ¶ 29.1 of the O'Hara Lease). It is this clause that the Defendants seek to compel arbitration. Conversely, the Plaintiffs assert they are not seeking to void the O'Hara Lease. The Plaintiffs maintain that they are requesting to void only the *Landowner Representation Contract*, consequently invalidating the royalty payments. In addition, the Plaintiffs argue: (a) that the Defendants are non-parties to the lease and therefore do not have the right to enforce the arbitration clause, and (b) the unauthorized practice of law cannot be submitted to arbitration.

When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, *9 U.S.C. §§ 1–307 (2006)*, the authority of the trial court is limited to

determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement. Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman,* 692 S.E.2d 293 (W.Va.2010). The purpose of the Federal Arbitration Act, *9 U.S.C. § 2,* is for courts to treat arbitration agreements like any other contract. The Act does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms. Syl. Pt. 2, *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders,* 717 S.E.2d 909 (W.Va. 2011).

The Court will begin its analysis to determine whether the Defendants are parties to the O'Hara Lease. A review of the O'Hara Lease unmistakably indicates that the Defendant, William A. Capouillez, was a signatory to the lease as a consultant. In addition, this Court believes that it was the understanding and mutual objective of the parties that the Defendants would benefit from the lease. This is illustrated in ¶ 28.4 of the O'Hara Lease which states: "*Consultant reserves the right to approve in writing any proposed revisions to this Agreement which directly or indirectly affects Consultants delay rental and/or royalty payments and/or obligations of Lessor or Lessee to the Consultant as contained herein.*" To further reflect the mutual intentions of the parties, page 1 of 12 of the O'Hara Lease states in part the following:

> WHEREAS, Lessor has contracted with Geological Assessment & Leasing...to act as Lessor's consultant and representative in the negotiation, execution, and performance of this Agreement, hereinafter designated "Consultant", and
>
> WHEREAS, Lessor's contract with Consultant allows for a certain portion of Lessor's bonus rental payment, delay rental payments and/or royalty payments to be paid directly to Consultant.

For these reasons, the Defendant can enforce the arbitration clause of the lease as a signatory to the lease.

Next, as the Defendant is a party to the O'Hara Lease, the Court must decide whether the Plaintiffs' claim alleging the unauthorized practice of law arises out of the O'Hara Lease. The Plaintiffs contend that their complaint seeks to void only the *Landowner Representation Contract* thereby causing the royalty payments to the Defendants to be annulled. The O'Hara Lease contains a broadly-worded arbitration clause as shown above. Unfortunately for the Plaintiffs, the royalty payments which they seek to void are also plainly encompassed in the O'Hara Lease. In this context, the circumstances surrounding the question of the unauthorized practice of law as to royalty payments are so intermingled between the *Landowner Representation Contract* and the O'Hara Lease that arbitration is justified as the Plaintiffs' claim falls within the substantive scope of the arbitration clause.

Based on the foregoing conclusions, the sole remaining question is whether the claim alleging the unauthorized practice of law can be submitted to arbitration. While this Court is aware of its obligation to enforce a valid arbitration clause, it must also look at our state's jurisprudence on the unauthorized practice of law in the case at bar. To date, our Supreme Court of Appeals has not directly addressed the issue of whether the unauthorized practice of law can be submitted to arbitration. As such, this Court must refer to prior rulings by our Supreme Court of Appeals examining the unauthorized practice of law. In West Virginia, the judicial department of the government has the inherent power to define, supervise, regulate and control the practice of law and the Legislature cannot restrict or impair this power of the courts or permit or authorize laymen to engage in the practice of law. Syl. Pt. 7, *West Virginia State Bar v. Early*, 109 S.E.2d 420 (W.Va. 1959). The authority of the Supreme Court to regulate and control the practice of law in West Virginia, including the lawyer disciplinary process, is constitutional in

origin. *W.Va. Const. art. VIII, § 3.* Syl. Pt. 2, *Lawyer Disciplinary Bd. v. Kupec*, 505 S.E.2d 619 (W.Va. 1998).

This Court is of the opinion that the Supreme Court of Appeals of West Virginia has exclusive jurisdiction over the practice of law as it is inherently the province of our Supreme Court of Appeals to determine whether or not a particular conduct constitutes the unauthorized practice of law. Whether the O'Hara Lease includes a valid arbitration clause is inconsequential to the issue presented because the O'Hara Lease is extraneous to the question of whether the Defendants have engaged in the unauthorized practice of the law. Nothing in the Federal Arbitration Act prevents our courts from carrying out their duties to regulate the practice of law. Therefore, until a directive on this question is announced by our Supreme Court of Appeals, this Court concludes that the claim for the unauthorized practice of law is not subject to arbitration.

IV.
Conclusion

Accordingly, the *Defendants' Motion to Compel Arbitration* is **DENIED** for the reason set forth above. As a result of this ruling, the Order granting the Defendants' Motion to Stay Pending Ruling on Motion to Compel Arbitration is now **VACATED**.

The entry of this Order denying the motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine.

The Defendants' objection to this ruling is noted and saved.

The Clerk of the Circuit Court shall forward an attested copy of this Order to counsel of record.

ENTERED this 17th day of October, 2014.

JUDGE MARTIN J. GAUGHAN