

15-0128

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ANNIE W. MATTHEWS
PUTNAM COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

ADAM WEST,
and,
BETHANY WEST,

Plaintiffs,

v.

Civil Action No. 13-C-131
Judge Joseph K. Reeder

NATIONSTAR MORTGAGE, LLC,
f/k/a CENTEX HOME EQUITY COMPANY,
and,
JEFFREY MOORE,

Defendants.

**FINAL ORDER DENYING MOTION TO
COMPEL ARBITRATION**

On the 21st day of November 2014, came the Plaintiffs, Adam and Bethany West ("Mr./Mrs. West/Plaintiffs"), by counsel, Colten L. Fleu, Esq., and Defendant, Nationstar Mortgage, LLC ("Nationstar/Defendant"), by counsel, Jason E. Manning, Esq., pursuant to Nationstar's August 6, 2014, *Motion to Compel Arbitration*. Upon consideration of the arguments presented by the parties and all relevant legal authority, the Court **FINDS** and **ORDERS** as follows:

FINDINGS OF FACT

1. In July 2003, Plaintiffs entered into a loan agreement with Nationstar in the principal amount of \$76,500.00.
2. The Loan was secured by a Deed of Trust on Plaintiffs' property. The Deed of Trust was recorded in the Office of the Clerk of the County Commission of Putnam Count, West Virginia, in Trust Deed Book No 654, at Page 790.
3. The loan agreement between Plaintiffs and Nationstar is a form contract drafted by Nationstar and a rider attached to the loan agreement includes an arbitration clause. The arbitration agreement provides, in relevant part, as follows:

"Dispute" is any case, controversy, dispute, tort, disagreement, lawsuit or claim now or hereafter existing between [Plaintiffs] and [Nationstar].

...if any Dispute arises, either [Plaintiffs] or [Nationstar] may choose to have the Dispute resolved by binding arbitration...By agreeing to arbitrate, [Plaintiffs] and [Nationstar] give up some rights, including the right to go to court and the right to a jury trial.

4. The arbitration rider further provides for arbitration before the American Arbitration Association (“AAA”) under the commercial rules of arbitration in effect at the time any dispute is submitted to arbitration.

5. The Parties did not specifically negotiate or bargain for the terms of the arbitration rider.

6. On May 2, 2013, Plaintiffs filed a Complaint against Nationstar in the Circuit Court of Putnam County, which alleged that Nationstar engaged in “predatory lending” practices by intentionally inflating the value of Plaintiffs’ home and then using that over-appraisal to induce them into a loan greater than the value of their home. Then, the complaint alleges, Nationstar “engaged in abusive and unlawful debt collection and forced Plaintiffs into foreclosure.”

7. On July 25, 2013, Nationstar removed the case to the U.S. District Court for the Southern District of West Virginia.

8. On October 21, 2013, the District Court granted Plaintiffs’ *Motion to Remand* the case back to Putnam County Circuit Court.

9. On August 6, 2014, Nationstar filed its *Motion to Compel Arbitration* and memorandum in support thereof with this Court.

10. On November 21, 2014, the parties appeared before this Court for a hearing on Nationstar’s *Motion to Compel Arbitration* and Plaintiffs’ *Motion to Amend Complaint*. The Court granted Plaintiffs leave to file an amended complaint but did not rule on the *Motion to Compel Arbitration*.

11. Subsequently, Plaintiffs filed their *Second Amended Complaint*, in which they specifically dispute the enforceability of the “delegation provision” in the loan agreement.¹

¹ Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, “if a contract is written with a “delegation provision” that delegates to an arbitrator the authority to resolve any dispute about the enforceability of the contract, then courts are deprived of even the right to weigh the enforceability of the arbitration clause; the arbitrator alone will have authority to determine if the arbitration clause is valid – unless, of course, a party specifically challenges the delegation provision, in which case a court may

APPLICABLE LAW

1. In 1925, Congress enacted the Federal Arbitration Act (FAA), which reads in relevant part as follows:

“A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

2. When a trial court is required to rule upon a motion to compel arbitration pursuant to the FAA, 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. Syllabus point 2, *State ex rel. TD Ameritrade v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010).

3. The saving clause under § 2 of the FAA “permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract.” *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011) (quoting 9 U.S.C. § 2) (internal quotations omitted). Accordingly, the “saving clause” of §2 “permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact than an agreement to arbitrate is at issue.” *Id.* (internal quotations omitted).

4. “The 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. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case.” Syllabus point 7, *Dan Ryan Builders v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012) (quoting *Brown I*).

decide if the delegation provision is unenforceable. *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011) (*Brown I*) (citing *Rent-A-Center, West, Inc., v. Jackson*, 561 U.S. 63 (2010)). Since Plaintiffs specifically challenged the delegation provision as unconscionable in their second amended complaint, this Court is authorized to decide whether the arbitration provision in the loan agreement is enforceable.

5. Unconscionability is analyzed in terms of two component parts: procedural unconscionability and substantive unconscionability. *Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 729 S.E.2d 217 (2012) (*Brown II*) (citations omitted).

6. While both procedural and substantive unconscionability are required for a contract term to be unenforceable, both need not be present to the same degree. In West Virginia, Courts apply a “sliding scale” in determining unconscionability; “the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required...and vice versa.” *Id.* at syllabus point 9.

7. Procedural unconscionability involves inequities, improprieties, or unfairness in the bargaining process and formation of the contract such that there was not a real and voluntary meeting of the minds. The inadequacies include “age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.” *Id.* at syllabus point 10.

8. “Substantive unconscionability involves unfairness in the contract itself and whether a contract is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.” *Id.* at syllabus point 12.

DISCUSSION

The present issue in this case is whether the arbitration provision contained in the loan agreement between Plaintiffs and Nationstar is unconscionable. For the reasons set forth below, the Court **FINDS** that the arbitration provision is unenforceable and therefore **DENIES** Nationstar’s *Motion to Compel*.

As noted above, procedural unconscionability involves unfairness in the bargaining process and formation of a contract. The inherent unfairness of the arbitration agreement between the parties renders it procedurally unconscionable. In the present action, there is no evidence in the record that the arbitration provision was

specifically bargained for or that Plaintiffs had the ability to opt-out of resolving potential disputes through arbitration. See, e.g., *State ex rel. Ocwen Loan Servicing v. Webster*, 232 W.Va. 341, 752 S.E.2d 372 (2013) (holding that an arbitration provision was not unconscionable where Plaintiffs could freely reject the arbitration agreement and the lender would not refuse to complete the loan based on such refusal). Moreover, there was a significant disparity with respect to the level of sophistication between the two parties. While the Plaintiffs/debtors in this case are unsophisticated in financial matters, Nationstar is a national corporation that routinely drafts contracts relating to mortgage loans. Plaintiffs were simply not in a position to fully understand the fact that they were relinquishing the right to utilize the court system in signing the arbitration agreement. Accordingly, the Court **FINDS** that the arbitration provision is procedurally unconscionable.

In addition to being procedurally unconscionable, the arbitration provision is also substantively unconscionable. A review of the arbitration agreement between the parties reveals that the agreement itself is one-sided in favor of Nationstar and places Plaintiffs at a severe disadvantage. While Nationstar, as a national corporation, is well suited to absorb the costs associated with resolving a dispute through arbitration, the high costs of arbitration could prevent Plaintiffs from effectively vindicating their rights in the arbitral forum. Syllabus point 1, *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2002) (a trial court should consider whether the unreasonably burdensome costs of arbitration could deter a person from vindicating their rights in assessing unconscionability). Moreover, the arbitration agreement here specifically excludes “any action to effect a foreclosure; any action to obtain possession of any property securing the Credit Transaction; any action for prejudgment injunctive relief or appointment of receiver(s); and any claim where [Nationstar] seek damages or other relief because of [Plaintiffs] default under the terms of the Credit Transaction.” These exceptions, which largely consist of claims that Nationstar would be likely to bring against Plaintiffs, shows that the arbitration agreement lacks mutual, reciprocal obligations among the parties and that the agreement is unduly favorable to Nationstar. Due to the oppressive costs associated with arbitration and the one-sided nature of the agreement, the Court **FINDS** that the arbitration agreement between the parties is substantively unconscionable.

Taking into consideration all the facts and circumstances surrounding the formation of the contract, the arbitration agreement between the parties is both procedurally and substantively unconscionable. Accordingly, Court **FINDS** that the arbitration agreement as a whole is unenforceable. Nationstar's objections to the Court's ruling are noted and preserved.

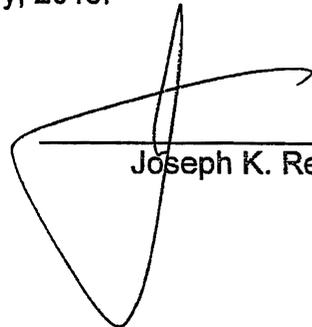
CONCLUSION

For the reasons set forth above, the Court **FINDS** that the arbitration clause is both procedurally and substantively unconscionable and therefore **DENIES** Nationstar's *Motion to Compel*. The Circuit Clerk shall mail copies of this order to all the parties on record including the following parties:

Colten L. Fleu, Esq.
Mountain State Justice, Inc.
321 West Main Street, Suite 401
Clarksburg, WV 26301
Counsel for Plaintiffs

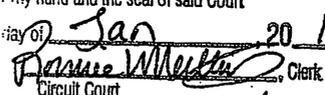
Jason E. Manning, Esq.
Troutman Sanders LLP
222 Central Park Ave, Suite 2000
Virginia Beach, VA 23462
Counsel for Defendant Nationstar

ORDERED this 13th day of January, 2015.



Joseph K. Reeder, Judge

STATE OF WEST VIRGINIA
COUNTY OF PUTNAM, SS:
I, _____, Clerk of the Circuit Court of said
County of said State, do hereby certify that the
above is a true copy from the records of said Court.
Witness my hand and the seal of said Court

14 day of Jan 20 15

Denise M. McElroy, Clerk
Circuit Court
Putnam County, W.Va.