

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

JIM ENNIS and CHILTON L. ENNIS,

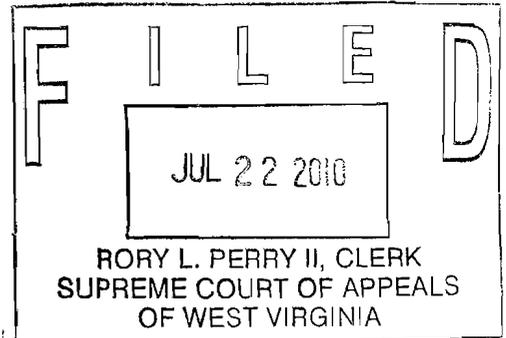
Appellants,

vs.

No: 35512

KRISTINE ANDERSON,
MATT CURREY,
CURREY REALTY,
SAM WOOD, dba ADVANTAGE
HOME & ENVIRONMENT INSPECTIONS, INC., and
JOHN DOES ONE to TEN,

Appellees.



APPELLANTS' APPEAL BRIEF

I. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE KANAWHA COUNTY CIRCUIT COURT:

The appellants, Jim Ennis and Chilton L. Ennis, instituted a complaint against the appellees in the Kanawha County Circuit Court, *Ennis v. Anderson, et al.*, Case No. 08-C-1179, for damages arising out of the appellants' purchase of a house. The complaint alleged that appellees, Kristine Anderson, Matt Currey and/or Currey Realty (the Curry defendants), as the legal and/or equitable owners of the property, concealed certain material defects from these purchasers. The complaint also alleged that Sam Wood, dba Advantage Home & Environment Inspections, Inc. (hereinafter, "Advantage"), participated in the fraud by publishing a report opining that certain repairs had been properly performed, which repairs had not been performed at all. Advantage filed a motion to dismiss and/or to stay pending arbitration based upon the existence of an arbitration clause in the contract of employment between the Curry defendants and Advantage. The appellants filed a memorandum in opposition to Advantage's motion,

with attachments, including expert reports demonstrating that Advantage knew or should have known that the claimed repairs had not been performed.

On July 22, 2009, the Court granted Advantage's motion; stayed the claims of the appellant against Advantage and the cross-claims of the Currey defendants against Advantage pending arbitration; and ordered the *appellant* to submit the matter to "binding arbitration under the Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc." The appellants were thereby required to deposit for the arbitration the amount of \$1,000 in order to obtain any action on their complaint.

II. RELEVANT FACTS OF THE CASE:

The Kanawha County Circuit Court found that the appellants could be required to submit the claims in their complaint to binding arbitration in spite of the fact they, the appellants, had not been signatories to the contract containing the arbitration clause and, in fact, had not even known of the existence of an agreement relating to arbitration until after the filing of the lawsuit. The circuit court relied upon the decision of *Thompson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2nd Cir. 1995) in concluding that the non-signatory exception should be applied to the appellants' claims due to the theories of incorporation by reference and of estoppel.

The circuit court reasoned that, although the appellants had not seen the inspection agreement (which contained the arbitration clause) prior to filing their suit, the inspection agreement (and therefore the arbitration clause) had been incorporated into the report by reference. Similarly, the circuit court reasoned that appellants were estopped from denying the applicability (to their cause of action) of the arbitration clause

contained in the inspection agreement since they claimed to have been defrauded by a report which was prepared pursuant to such agreement. The circuit court ignored the legal requirement that a non-signatory to an arbitration agreement can be forced to arbitrate the non-signatory's claim (pursuant to certain well-defined exceptions) only where there is an identity of interest existing between the non-signatory and one of the parties that is a signatory to the arbitration agreement (which requirement was implicit in the law adopted and applied by the circuit court).

III. ASSIGNMENTS OF ERROR:

a. The circuit court erred in ignoring the requirement that certain parties must share an identity of interest before the court can invoke the exception to the rule that only parties who have actually signed an agreement containing an arbitration clause can be forced to arbitrate their claims pursuant to the agreement.

b. The circuit court's requirement that the appellants apply for and fund the arbitration of the allegations in their complaint (which arbitration is only required by the terms of a contract to which they were not parties) is a violation of the provisions of the *West Virginia Constitution*, Art. 3, §17, which provides that "justice shall be administered *without sale*, denial or delay." [Emphasis added.]

IV. POINTS AND AUTHORITIES RELIED UPON:

1. *United Asphalt Suppliers, Inc. v. Sanders*, 204 W.Va. 23, 511 S.E.2d 134 (1998), which provides:

A court may not direct a nonsignatory to an agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the nonsignatory exception to the rule requiring express assent to arbitration should be invoked.

2. The *West Virginia Constitution*, Art. 3, §17, provides as follows:

The Courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

3. *West Virginia Code*, §58-5-1, first sentence, provides, as follows:

A party to a civil may appeal to the supreme court of appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or constituting a final judgment as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties.

V. DISCUSSION:

The appellants argue that it is a clear error of law for the circuit court to order the matter submitted for arbitration in light of the fact that there was no finding that the plaintiffs and the Currey defendants shared an identity of interests, which principle is implicit in the authority cited by the circuit court in support of its decision.

The provision of law applicable to the non-signatory exception which is pertinent here, identity of interest, is discussed in *State ex rel. United Asphalt Suppliers v. Sanders*, 204 W.Va. 23, 511 S.E.2d 134 (1998), as follows:

While a clear exception to the rule against compelling nonsignatories to arbitrate does exist, the limited record upon which this case was submitted does not permit us to even consider whether that exception applies under the facts of this case. Although Appellees rely almost exclusively on the alleged similar identity in interests of United Asphalt and United Paving to support their contention that arbitration is proper, [footnote omitted] the record before us contains nothing other than a bare assertion of such identity in corporate interests. [footnote omitted] We are understandably reluctant to accept such allegation as true without an affidavit or other document evidencing the alleged similarity of ownership interest that Appellees avow.

The Court goes on to discuss, as follows:

Despite the recognized exception to the rule requiring express assent to require arbitration, there is equally "[p]ersuasive authority . . . that a . . . court is not required to compel arbitration between parties who have not agreed to such arbitration." *Collins v. International Dairy Queen, Inc.*, 169 F.R.D. 690, 693 (M.D. Ga. 1997). The court in *Collins* stated:

Federal policy favors arbitration over litigation and requires a district court to resolve any doubt about the application of an arbitration clause in favor of arbitration. Nevertheless, this policy "cannot serve to stretch a contract beyond the scope originally intended by the parties." The policy favoring arbitration does not compel the court to require arbitration of disputes if arbitration was not the intent of the parties.

Id. at 694 (citations omitted and quoting *Seaboard Coast Line Ry. Co. v. Trailer Train Co.*, 690 F.2d 1343, 1348 (11th Cir. 1982)). Finding no basis for departing from well-established principles concerning arbitration in this case, we hold that a court may not direct a nonsignatory to an agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the nonsignatory exception to the rule requiring *express* assent to arbitration should be invoked. [Emphasis added.]

United Asphalt Suppliers v. Sanders, at pages 27 and 28.

The circuit court expressly adopts as controlling the principles discussed in *Thomsom-CSF, S.A v. American Arbitration Ass'n*, 64 F.3d 773 (2nd Cir. 1995), in which the Second Circuit adopted five theories where a non-signatory to an arbitration clause may be fairly compelled into arbitration to settle a dispute. The problem with the Kanawha County Circuit Court's adoption of the applicability of these five theories (incorporation by reference, assumption, agency, agency, veil-piercing/alter ego, and estoppel) is that there was an identity of interest in *Thomsom-CSF, S.A v. American Arbitration Ass'n* which is not present in the case at bar. In the *Thomsom-CSF, S.A* case, the advocate of the arbitration clause was attempting to require its application to the parent corporation of the subsidiary corporation that had signed the arbitration agreement.

While there is more of an identity of interest in the factual scenario of that case (a parent and its subsidiary) than is present in the case at bar (a plaintiff versus a defendant), the federal appellate court actually found the district court to have “improperly extended the limited theories upon which this Court is willing to enforce an arbitration agreement against a nonsignatory” and remanded the case.

In fact, not only is there no evidence in the case at bar suggesting the existence of an identity of interest between the appellants and the relevant appellees (the Currey defendants), the complaint itself clearly and unequivocally suggests the contrary. The complaint alleges that the Currey defendants and Sam Wood, together, intentionally and knowingly participated in the delivery of false documents to the appellants with the intention of causing the appellants to rely thereon in their decision to purchase the relevant property; and that the various defendants in the circuit court case, together, made false representations intended to conceal and/or to deny responsibility for their earlier, pre-sale misrepresentations. There was clearly no basis for the circuit court to adopt the principles contained in *Thomsom-CSF, S.A v. American Arbitration Ass’n*, 64 F.3d 773 (2nd Cir. 1995), for application to the facts of this case.

Moreover, the circuit court’s ruling (which required the appellant, a non-signatory to the arbitration clause, to fund the arbitration of the dispute) violates *West Virginia Constitution*, Art. 3, §17, which provides that justice shall be administered without sale, denial or delay.

WHEREFORE, the appellant requests that this petition for appeal be granted and that the case be remanded for litigation of the matters raised in the complaint, if necessary, after the relevant Currey defendants and Advantage (the signatories to the contract

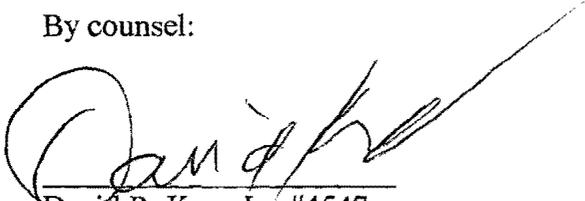
containing the arbitration clause) complete any arbitration of their disputes which either of them is so inclined to seek.

Respectfully submitted,

APPELLANTS,

JIM ENNIS and CHILTON L. ENNIS

By counsel:

A handwritten signature in black ink, appearing to read "David R. Karr, Jr.", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned, David R. Karr, Jr., hereby certifies that he has this day, July 22, 2010, served a true copy of Appellant's Appeal Brief, upon counsel for the above-named respondents and upon Judge Charles King by mailing true copies of the same to the following:

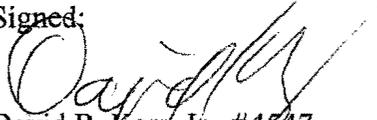
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The Honorable Charles E. King
Kanawha County Judicial Annex

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Signed:



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