

11-0371

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IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

GEORGE A. GRAYIEL, JR.,

Plaintiff,

v.

Civil Action No. 08-C-378
Judge O.C. Spaulding

2011 FEB 27 PM 3:17
FILE
PUTNAM CO. CIRCUIT COURT

APPALACHIAN ENERGY PARTNERS
2001-D LLP, APPALACHIAN ENERGY
PARTNERS 2001-S LLP, APPALACHIAN
ENERGY PARTNERS 2001II LLP, APPALACHIAN
ENERGY PARTNERS 2003 S-II LLP, BURNING SPRINGS
ENERGY PARTNERS 1999 LLP, BURNING SPRINGS
ENERGY PARTNERS 2000 LLP, BURNING SPRINGS
ENERGY PARTNERS 2001-S LLP, CHEROKEE ENERGY
COMPANY, HAYNES #2 ENERGY PARTNERS 2001
LLP, MARTIN TWIST ENERGY CO. LLC, MARTIN
R. TWIST, DREW THOMAS, TAMMY CURRY TWIST
AND TODD PILCHER

Defendants.

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court pursuant to *Defendants' Motion to Dismiss* (dkt. no. 9) entered on January 9, 2009, by counsel, Scott Kaminski, Esq.

On February 13, 2009, the Plaintiff, George A. Grayiel, Jr., ("Mr. Grayiel"), by counsel, Michael B. Stuart, Esq., Jeffrey K. Phillips, Esq., and Robert L. Bailey, Esq., filed *Plaintiff's Response in Opposition to Defendants' Motion to Dismiss* (dkt. no. 30). After a review of the case this Court finds and orders as follows:

BACKGROUND

Beginning in January of 2000, Martin Twist and Drew Thomas solicited Mr. Grayiel to invest in the above named companies. Over a twenty-four month period, Mr. Grayiel invested approximately \$886,000. In accordance with these investments, Mr. Grayiel signed 15 separate subscription agreements and 5 separate partnership agreements ("agreements"). Each one of these agreements contained an arbitration clause that, *inter alia*, stated that both parties were bound to arbitrate their disputes. When Mr. Grayiel signed these agreements, he was not represented by counsel. However, Mr. Grayiel, had the opportunity to seek counsel's advice before he signed the agreements.

At the beginning of the relationship, Mr. Grayiel received some money from these investments. However, the money flow ceased and the relationship between the parties soured. Mr. Grayiel filed suit on November 17, 2008. On January 9, 2009, the Defendants filed *Defendants' Motion to Dismiss* alleging that this Court did not have jurisdiction to resolve the dispute due to the arbitration clause contained in the agreements.

On February 13, 2009, Mr. Grayiel filed *Plaintiff's Response in Opposition to Defendants' Motion to Dismiss*. Basically, Mr. Grayiel averred that the arbitration clause was independently unenforceable because it was unconscionable. This Court permitted limited discovery with regard to the question of the arbitration clause.

After discovery, Mr. Grayiel filed his *Plaintiff's Supplemental Response in Opposition to Defendants' Motion to Dismiss* (dkt. no. 135). This Motion argued that the "Defendants have failed to comply with the Court's order . . . so the Court should deem the relevant factors as having been answered and decided against Defendants' interests." *Plaintiff's Supplemental Response in Opposition to Defendants' Motion to Dismiss* (dkt. no. 135), pg. 4. The failure to comply claim was primarily based upon the Defendants' vagueness and memory lapses in answering certain questions. On November 1, 2010, the Defendants filed *Defendants' Response to Plaintiff's Supplemental Response in Opposition to Defendants' Motion to Dismiss* (dkt. no. 136). Defendants basically argue that the Plaintiff has not carried his burden to show that the arbitration clause is unconscionable and that, in fact, the arbitration agreement is not unconscionable.

STANDARD OF REVIEW

Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." The West Virginia Supreme Court of Appeals has opined that "a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party." *Syl. Pt. 5, Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995). A "material fact" is one that "has the capacity to sway the outcome of the litigation under the applicable

law . . . factual disputes that are irrelevant or unnecessary will not be counted. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 60, 459 S.E.2d 329, 337 n. 13 (1995).

Accordingly, the well-settled law of this State provides:

“If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.”

Syl.Pt. 3, *Williams*, 194 W.Va. at 56, 459 S.E.2d at 333.

West Virginia caselaw also provides that, “[w]hile the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some concrete evidence from which a reasonable finder of fact could render a verdict in its favor or other significant probative evidence tending to support the complaint.” *Williams*, 194 W. Va. at 59-60, 459-S.E.2d at 336-37. “The mere fact that a particular cause of action contains elements which typically raise a factual issue for jury determination does not automatically immunize the case from summary judgment. The plaintiff must still discharge his or her burden under West Virginia Rule of Civil Procedure 56(c) by demonstrating that a legitimate jury question, i.e. a genuine issue of material fact, is present.” Syl. pt. 1, *Jividen*, 194 W.Va. At 707, 461 S.E.2d at 453.

DISCUSSION

The issue in this case is whether arbitration provisions in the 15 subscription agreements and 5 partnership agreements executed by the Plaintiff with the various Defendants are unconscionable. In West Virginia, “[i]t is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract” Syl. pt. 3, in part, *Board of Education of the County of Berkeley v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439 (1977)(per curiam). An arbitration provision, however, will not be considered bargained for, and therefore be invalidated, if the terms of the arbitration agreement are, *inter alia*, “unconscionable or was thrust upon [a party] because he was unwary and taken advantage of” *Id.*

“Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court.” Syl. pt. 1, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986): “An 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.” Syl. pt. 2, *Id.* Basically, to find unconscionable terms, there must be “gross inadequacy in bargaining power, together with terms unreasonably favorable to the stronger party” *Id.* 176 W.Va. at 604, 346 S.E.2d at 753 (citations omitted).

In the case at bar, this Court finds that the arbitration clauses in the subscription agreements and the partnership agreements are not unconscionable. There is insufficient evidence to conclude that one party had grossly inadequate bargaining power. While it is true that the Defendants did have more power than the Plaintiff, this power was not grossly inadequate. The fact is that Mr. Grayiel

signed 15 subscription agreements and 5 partnership agreements over a two year period. This fact alone suggests to this Court that Mr. Grayiel did not feel that he had grossly inadequate bargaining power. If he did think as such, there is no way that he would have signed such agreements.

Furthermore, there is no indication from the circumstances surrounding the execution of the contract that would suggest that the arbitration clause is unconscionable. While Mr. Grayiel was not represented by counsel when he entered these agreements, he had ample time to seek counsel's advice before he signed. (George Grayiel, Jr., dep. at p. 48-9). Along those same lines, there is no allegation and this Court can find no evidence that Mr. Grayiel was pressured into signing these agreements. In fact, Mr. Grayiel signed these agreements of his own free will and volition. (George Grayiel, Jr., dep. at p. 49).

This Court also finds that the arbitration clause is not unreasonably favorable to the Defendants. This Court notes that the major parts of the arbitration clause are as follows: both parties are bound to arbitrate in Jeffersonville, Indiana; both parties are bound by the decision of the arbiter; punitive damages are available;¹ and the prevailing party will have his reasonable attorney fees and costs reimbursed. None of these provisions are unreasonably favorable. There are no terms that apply only to one party. Both parties are equally bound to these agreements. While it might be inconvenient for both parties to arbitrate in Indiana, it will not prevent one side from seeking arbitration. Furthermore, all remedies available in this Court are available in arbitration. Consequently, this Court finds that there is no unconscionability. Therefore, this

¹ The Defendants' admit that punitive damages are available in arbitration proceedings in Indiana. *Defendants' Response to Plaintiff's Supplemental Response in Opposition to Defendants' Motion to Dismiss* (dkt. no. 136) pg. 4 & 5.

Court finds that the arbitration agreement is controlling and this Court does not have jurisdiction to hear this case.

CONCLUSION

For the reasons listed *supra*, this Court GRANTS *Defendants' Motion to Dismiss* and finds that this Court does not have jurisdiction to hear the case. Furthermore, this Court orders the Circuit Clerk to remove the above styled case from its docket. Finally, the Circuit Clerk shall mail copies of this *Order* to all the parties on record including the following parties:

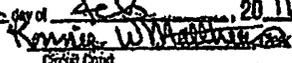
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SIGNED this 1st day of ^{FEBRUARY} January, 2011.



O.C. Spaulding, Judge

STATE OF WEST VIRGINIA
COUNTY OF PUTNAM, SB:
I, Ronnie W. [unclear] Clerk of the Circuit Court of said
County and to said State, do hereby certify that the
foregoing is a true copy from the records of said Court.
Given under my hand and the seal of said Court
this 2 day of Feb, 2011

Ronnie W. [unclear]
Circuit Court
Putnam County, W.Va. 07