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IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION II

WAYNE KIRBY and
JOYCE KIRBY,

PLAINTIFFS,

CIVIL ACTION NO. 12-047

vs.

LION ENTERPRISES, INC.,
T/A BASTIAN HOMES, and
ED DWIRE, doing business as
DWIRE PLUMBING,

DEFENDANTS.

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**ORDER GRANTING DEFENDANT LION ENTERPRISES, INC.'S
MOTION TO DISMISS AND COMPELLING ARBITRATION**

1/15/13
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On July 6, 2012, Lion Enterprises, Inc., T/A Bastian Homes, through its attorney, Lee R. Demosky, filed a Motion to Dismiss with the Marion County Circuit Court Clerk. In its motion, Bastian Homes asserts that the action against it should be dismissed because the parties are contractually required to submit this matter to binding arbitration pursuant to Paragraph 19 of the parties' construction agreement. The plaintiffs, Wayne Kirby and Joyce Kirby, through their attorney, Gregory T. Hinton, filed a Memorandum in Opposition to the defendant's motion to dismiss on August 6, 2012. In his memorandum, Mr. Hinton states that the arbitration agreement is not applicable to the current dispute and is not enforceable, as it was not fairly bargained for by the parties.

On March 1, 2013, Mr. Hinton and Mr. Demosky filed a Stipulation to Issue Decision Regarding Pending Motion to Dismiss, wherein counsel agreed to have this Court render a decision on the defendant's motion to dismiss without a hearing and on the briefs submitted. After carefully considering the defendant's motion and plaintiffs' response, as well as reviewing the entire court file and researching the applicable law, the Court is of the opinion

that the motion to dismiss filed by defendant Lion Enterprises, Inc., T/A Bastian Homes, should be granted, for the reasons stated herein. In support of this opinion, the Court makes the following findings of fact and reaches the following conclusions of law:

FINDINGS OF FACT

1. On May 16, 2009, the plaintiffs, Wayne Kirby and Joyce Kirby, entered into a written agreement with defendant Lion Enterprises, Inc., T/A Bastian Homes, for the construction of a home in Fairmont, West Virginia.

2. Paragraph 19 of the parties' agreement stated the following:

19. **ARBITRATION:** The parties hereby agree and acknowledge that in the event any disagreement or dispute shall arise pertaining to the terms of this Agreement, all matters and controversies shall be submitted to a board of arbitrators, which shall consist of three (3) members one of whom shall be chosen by the Contractor, one of whom shall be chosen by the Owner and the third shall be chosen by the two designees. Each of the board of arbitrators shall be a qualified residential contractor (or a substantially similar classification of arbitrator as maintained by the American Arbitration Association) having an office and/or conducting a primary amount of its work within a reasonable radius of the Bastian Homes office in which this Agreement originated. The aforesaid arbitration shall be conducted in accordance with the rules of the American Arbitration Association and shall be held in the Bastian Homes office in which that Agreement originated or such other mutually acceptable office. The determination of the board of arbitrators shall be final and binding upon the parties hereto and not subject to appeal, in the absence of fraud, and the prevailing party may enforce the determination by application for entry of judgment in any court of competent jurisdiction or by other procedures established by law. The cost of the board of arbitrators and the attorney's fees of the prevailing party shall be paid by the losing party. Notwithstanding anything contained herein to the contrary, the responsible party agrees to pay to the other party or any required third party any amounts which are not in dispute. Any amounts which are in dispute and subject to arbitration shall be paid by the responsible party into an interest bearing escrow account mutually established by the parties at a bank or other financial institution and the funds shall be released to the parties in accordance with the board of arbitrator's determination.

(emphasis added).

3. After entering into the contract with Mr. and Mrs. Kirby, Bastian Homes engaged subcontractor Ed Dwire, doing business as Dwire Plumbing, to provide plumbing services at the home under contract.

4. In their complaint, filed herein on February 3, 2012, Mr. and Mrs. Kirby allege that Mr. Dwire, or one of his agents, installed defective plumbing which caused a water leak and resulted in substantial damage to the property and a ten (10) month delay in completion of construction. Plaintiffs contend that, because Bastian Homes delegated its duty to perform under the contract, both Bastian Homes and Dwire Plumbing are jointly and severally liable to the plaintiffs.

5. On July 6, 2012, Mr. Demosky filed a motion to dismiss on behalf of defendant Bastian Homes. In his motion, Mr. Demosky asserts that the action against defendant Bastian Homes should be dismissed because the parties are contractually required to submit this matter to binding arbitration pursuant to Paragraph 19 of the parties' construction agreement.

6. On August 6, 2012, Mr. Hinton filed a Memorandum in Opposition to the defendant's motion to dismiss. In his memorandum, Mr. Hinton states that, because the arbitration provision does not include language such as "arising under" or "arising out of or relating to [the] contract," arbitration is only mandated in disputes pertaining to the terms of the agreement. As such, Mr. Hinton contends that the arbitration agreement is not applicable to the current dispute because the present lawsuit, which concerns water damage on the property, "has nothing to do with the 'terms of this agreement'." (emphasis in original).

7. Additionally, Mr. Hinton also claims that, even if the Court finds that the arbitration provision is applicable, the provision is not enforceable because it was not

bargained for by the plaintiffs. In support, Mr. Hinton attaches Mr. Kirby's affidavit, which states in ungrounded terms that "neither [he] nor [his] wife, bargained for the arbitration provision" and that he "raised objection to the arbitration provision" at the time of contracting.

CONCLUSIONS OF LAW

1. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Flowers v. City of Morgantown, 166 W. Va. 92, 96, 272 S.E.2d 663, 665 (1980).

2. "The [Federal Arbitration Act] promotes the enforcement of arbitration agreements involving interstate commerce . . . but only when such agreements constitute valid contracts under state law." State ex rel. Saylor v. Wilkes, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005).

3. "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. 2, State ex rel. Johnson Controls, Inc. v. Tucker, 229 W. Va. 486, 29 S.E.2d 808 (W. Va. 2012) (citing Syl. Pt. 9, Brown ex rel. Brown v. Genesis Healthcare Corp., 228 W. Va. 646, 724 S.E.2d 250 (2011) (overruled on other grounds)).

4. Arbitration agreements in West Virginia are governed by Chapter 55, Article 10 of the West Virginia Code. W. Va. Code § 55-10-1 (1923) states that:

Persons desiring to end any controversy, whether there be a suit pending therefore or not, may submit the same to arbitration, and agree that such submission may be entered of record in any court. Upon proof of such agreement out of court, or by consent of the parties given in court, in person or by counsel, it shall be entered in the proceeding of such court; and thereupon a rule shall be made that the

parties shall submit to the award which shall be made in pursuance of such agreement.

Further, pursuant to W. Va. Code § 55-10-2 (1923), submission of disputes to arbitration is irrevocable without leave of court.

5. The West Virginia Supreme Court has ruled that **arbitration provisions are specifically enforceable** “[w]here parties to a contract agree to arbitrate either all disputes, or particular limited disputes arising under the contract, and where the parties bargained for the arbitration provision . . .” Syl. Pt. 1, Board of Ed. of Berkeley County v. W. Harley Miller, Inc., 160 W. Va. 473, 236 S.E.2d 439 (W. Va. 1977) (emphasis added). The Miller Court emphasized the importance that the agreement to arbitrate must have been **“bargained for.”** Id. (emphasis added).

6. With regard to the applicability of arbitration provisions to specific disputes, the West Virginia Supreme Court has stated that “parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate.” Johnson Controls, supra, at 821 (citing Syl. Pt. 10, Brown, supra).

7. In Miller, supra, the West Virginia Supreme Court discussed the concept of unconscionability as it relates to a “bargained for” binding arbitration clause in a construction contract and concluded, in Syllabus Point 3:

It 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; however, where a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract.

(emphasis added).

8. The West Virginia Supreme Court has held that a contract term is unenforceable if it is both “procedurally and substantively unconscionable.” See Syl. Pt. 9, Grayiel v. Appalachian Energy Partners 2001-D, LLP, 736 S.E.2d 91 (W. Va. 2012). In making this determination, a court must consider “the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and ‘the existence of unfair terms in the contract.’ ” Syl. Pt. 4, Art’s Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc., 186 W. Va. 613, 413 S.E.2d 670 (1991).

9. With regard to procedural unconscionability, the Court has stated that:

Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the 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.

Syl. Pt. 17, Brown, *supra* (overruled on other grounds).

10. In addressing substantive unconscionability, the Court has stated that:

Substantive unconscionability involves unfairness in the contract itself and whether a contract term 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.

Syl. Pt. 19, Brown, *supra* (overruled on other grounds).

11. In instances in which a lawsuit presents multiple claims, only some of which are subject to an arbitration agreement, the West Virginia Supreme Court has stated that the claims subject to arbitration “must be sent to arbitration – even if this will lead to piecemeal litigation. A trial court may not issue a blanket refusal to compel arbitration of some of the party’s claims, merely because . . . other parties in the lawsuit are not subject to the arbitration agreement.” Syl. Pt. 9, Johnson Controls, *supra* (emphasis added).

12. This Court finds that the claims made by Mr. and Mrs. Kirby against Bastian Homes are subject to binding arbitration. The agreement between the parties clearly and unmistakably states that if “any disagreement or dispute shall arise pertaining to the terms of this Agreement, all matters and controversies shall be submitted to a board of arbitrators . . .” The agreement articulates the parties’ rights and duties as they pertain to construction of the plaintiffs’ home. Specifically, Paragraph 13 sets forth the homeowners’ rights in the event of a delay in construction. Paragraph 12 of the plaintiffs’ complaint alleges that damage from the water leak caused a ten (10) month delay in completion of the dwelling and plaintiffs seek monetary damages for annoyance and inconvenience related to the delay in their relief sought. As such, this dispute specifically pertains to the parties’ performance obligations and rights under the agreement and is subject to the arbitration provision.

13. The Court will also address Mr. Hinton’s contention that the arbitration provision is unenforceable because it was not “bargained for” by the plaintiffs. In support of this assertion, Mr. Hinton attaches Mr. Kirby’s affidavit, which states that “neither [he], nor [his] wife, bargained for the arbitration provision” and that he “raised objection to the arbitration provision.” The Court is of the opinion that declaratory statements that a contract

was not bargained for are insufficient without additional evidence tending to support a foundational claim for procedural or substantive unconscionability. However, notwithstanding the unfounded nature of Mr. Kirby's statements, the Court will still consider the merits of his claims.

14. After reviewing the entire contract, the nature of the contracting parties and the parties' bargaining positions, this Court finds that the arbitration provision was fairly negotiated and is not unconscionable, having not been presented with evidence sufficient for overcoming the general presumption that all arbitration provisions are bargained for.

15. Specifically, looking at the four corners of the construction agreement, the Court finds that there was no procedural unconscionability. Having been presented with no evidence of infancy, illiteracy, or lack of sophistication, the Court is of the opinion that the parties were sufficiently sophisticated and capable of reaching a meeting of the minds. Further, the arbitration provision did not come as an unfair surprise or include complex terms. The arbitration clause was stated in its own paragraph; the paragraph was titled "ARBITRATION" (emphasis in original); the arbitration clause was the largest paragraph on the page; only one-half of the page was filled with text; the arbitration clause was typed in the same font size as all other provisions in the contract; the arbitration clause was located directly above the signature lines where the parties signed; and the arbitration terms were discussed between the parties prior to signing.

16. Notwithstanding the foregoing, the Court recognizes that, in Paragraph 6 of his affidavit, Mr. Kirby affirms that he objected to inclusion of the arbitration agreement in the contract. Essentially, under these circumstances, Mr. Kirby is attempting to assert that the contract is one of adhesion under the procedural unconscionability analysis. In consideration

of which, the Court notes that the contract encompasses an agreement between two adults and a construction company, and recognizes that there may have been some inequality of bargaining power at contracting. However, faced with identical circumstances, the West Virginia Supreme Court refused to “write a special rule of such general application as to remove bargaining advantages or disadvantages in the commercial area.” Johnson Controls, *supra*, at 817. As such, the mere fact that Mr. Kirby objected to the provision does not establish that the contract was adhesive in nature or procedurally unconscionable.

17. Additionally, the Court finds that the terms set forth in the arbitration provision are substantively fair. In assessing the substantive fairness of contract terms, the West Virginia Supreme Court has stated that arbitration provisions by which the parties agree that all disputes will be arbitrated by a panel chosen exclusively by one of the parties are “inherently inequitable and unconscionable.” See Miller, *supra*, at 479, 443. In the contract between Mr. and Mrs. Kirby and Bastian Homes, the arbitration provision provides that the board of arbitrators shall consist of three members: one member chosen by the contractor; one member chosen by the homeowner; and one member chosen by the two designees. The Court finds that the method chosen by the parties in selecting a board of arbitrators is not one-sided and will not have an overly harsh effect on either party. Further, the inclusion of the arbitration provision in the Kirby’s construction agreement is commercially reasonable. The West Virginia Supreme Court has recognized that arbitration provisions are common in construction contracts. See Dan Ryan Builders, Inc. v. Nelson, 737 S.E.2d 550 (W. Va. 2012) (stating that “[p]iecemeal litigation – where one case is split into numerous smaller lawsuits and arbitrations – is common in construction-related disputes”).

18. The Court concludes that the arbitration provision contained in the contract between Mr. and Mrs. Kirby and Bastian Homes is specifically enforceable. As such, the

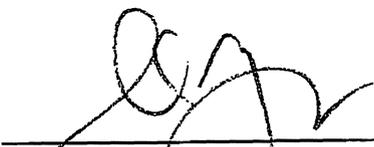
plaintiffs must submit all claims against defendant Bastian Homes to arbitration in accordance with the terms set forth in Paragraph 19 of the parties' contract. This Order shall have no effect on the plaintiffs' cause of action against defendant Ed Dwire, doing business as Dwire Plumbing, a non-party to the contract.

Accordingly, the Court is of the opinion to, and does hereby ORDER that the motion to dismiss filed by defendant Lion Enterprises, Inc., T/A Bastian Homes, should be, and the same hereby is, GRANTED, for the reasons stated herein, and that the plaintiffs' action against defendant Lion Enterprises, Inc., T/A Bastian Homes, shall be, and the same hereby is, DISMISSED, with prejudice.

The parties are hereby notified that this is a final order disposing of this matter against Lion Enterprises, Inc., T/A Bastian Homes. The plaintiffs' action against defendant Dwire Plumbing shall remain on the Court's active docket and is unaffected by this Order.

Upon entry, the Circuit Clerk of Marion County is directed to prepare and distribute certified copies of this Order to Gregory T. Hinton, Esquire, at his address: 814 Benoni Avenue, Fairmont, West Virginia 26554; to Lee R. Demosky, Esquire, at his address: 40 North Pennsylvania Avenue, Suite 410, Greensburg, Pennsylvania 15601; and to Christopher P. Deegan, Esquire, at his address: 2 Gateway Center, Suite 1450, Pittsburgh, Pennsylvania 15222.

ENTER: 3/15/13



JUDGE DAVID R. JANES

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TESTE



CLERK OF THE CIRCUIT COURT
MARION COUNTY, WEST VIRGINIA