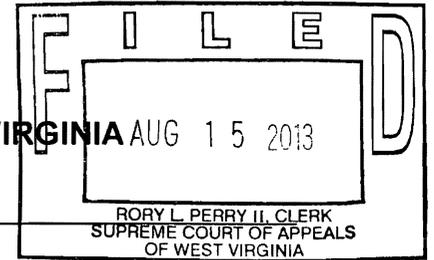


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 13-0379

WAYNE KIRBY and JOYCE KIRBY, Plaintiffs Below,

PETITIONERS,

vs.

LION ENTERPRISES, Inc. and T/A/ BASTIAN HOMES, Defendants Below,

RESPONDENTS.

RESPONDENTS' BRIEF

Appeal from the Order of the Honorable David R. Janes,
dated March 15, 2013, of the Circuit Court of Marion County,
West Virginia, Division II, at No. 12-C-47.

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COUNTER-STATEMENT OF THE CASE

On May 16, 2009, Wayne and Joyce Kirby entered into a Construction Agreement, with Lion Enterprises, Inc. t/a Bastian Homes (Bastian Homes) to build a dwelling on their property located in Fairmont, West Virginia. (Appendix at 11-21, 40.) Paragraph 19 of the parties' Construction Agreement contains the following dispute resolution clause:

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 Home 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 attorneys 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.

(Appendix at 14, 41.)

Pursuant to the Construction Agreement, Bastian Homes entered into a subcontract with Ed Dwire, doing business as Dwire Plumbing, to complete the plumbing work construction at the new dwelling. (Appendix at 4, 41.) The Kirbys allege that Ed Dwire installed a defective clamp or failed to properly tighten a certain clamp on one of the water lines, which resulted in extensive damage to the dwelling and a ten month delay in construction. (Appendix at 4, 5, 41.)

On or about February 9, 2010, the Kirbys filed a civil action in the Circuit Court of Marion County, West Virginia, Division II, against Bastian Homes and Ed Dwire, doing business as Dwire Plumbing, alleging that they negligently installed the plumbing system at the dwelling being constructed (Appendix at 3-6.) In response, Bastian Homes filed a Motion to Dismiss, alleging that the Kirbys are contractually bound to submit their dispute to binding arbitration. (Appendix at 7-10.)

The parties stipulated that the Circuit Court would decide the Motion to Dismiss on briefs and without conducting a hearing, (Appendix at 39), and both parties submitted briefs to the Circuit Court in support of their respective positions. Attached to the Kirby's brief filed below is an affidavit by Wayne Kirby, in which he makes several averments of fact regarding his contract negotiations with Bastian Homes. (Appendix at 37.)

On March 15, 2013, the Honorable David R. Janes issued a final order granting the Motion to Dismiss and concluding that the Kirbys were required to submit all their claims against Bastian Homes to arbitration in accordance with Paragraph 19 of the Construction Agreement. The Circuit Court concluded that the Arbitration provision was fairly negotiated, was not procedurally or substantively unconscionable, and was specifically enforceable against the Kirbys. (Appendix at 46-47.) This appeal by the Kirbys ensued.

SUMMARY OF THE ARGUMENT

The Kirbys entered into a home construction contract with Bastian Homes, which included an agreement to arbitrate any disagreement or dispute shall arise that pertains to the terms of the Construction Agreement. Their desire to avoid that agreement is without merit.

The Kirbys assert that the arbitration provision was not bargained for. However, in West Virginia there is a strong presumption that an arbitration provision is part of the bargain. That presumption is only rebutted when if proven, as a matter of law, that it is contrary to the four corners of the contract or an obvious condition involving the nature of the parties or the contract. It is clear from the four corners of the Construction Agreement there is no basis to overcome the presumption that the arbitration provision was bargained for, and there is nothing obvious that would compel a contrary conclusion.

Contrary to the Kirbys' claims, that the Construction Agreement is not one-sided and unconscionable. The Kirbys cannot establish that Paragraph 19 of the Construction Agreement is **both** procedurally **and** substantively unconscionable. In fact, they cannot establish either species of unconscionability. The terms of the provision of the Construction Agreement are fair and commercially reasonable.

The Kirbys contend that arbitration is not required because they have raised no "disagreements or disputes" pertaining to the Construction Agreement, and because their claims are based on the common principles of negligence and delegation of duty. However, the Kirbys' complaint specifically avers that Bastian Homes and Dwire are jointly and severally liable for breach of contract, as well as negligence. Also, the Circuit Court

accurately observed that the Kirbys' claim that the construction of their home was delayed by ten months dovetails with Paragraph 13 of the Construction Agreement, pertaining to delay. The plumbing work was performed in furtherance of the ultimate purpose of the Construction Agreement---to build a home for the Kirbys.

The Circuit Court's order should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Bastian Home does not request oral argument in this case. The facts and legal arguments are adequately presented in the briefs and record on appeal. The decisional process would not be significantly aided by oral argument.

ARGUMENT

THE CIRCUIT COURT CORRECTLY GRANTED BASTIAN HOMES' MOTION TO DISMISS THE KIRBYS' COMPLAINT AND CORRECTLY CONCLUDED THAT PARAGRAPH 19 OF THE CONSTRUCTION AGREEMENT REQUIRED THE KIRBYS TO SUBMIT THEIR CLAIMS TO ARBITRATION.

A. Standard of Review

The Supreme Court of Appeals of West Virginia has articulated the following standard of review to be applied in appeals from an order granting a motion pursuant to Rule 12(b)(6):

Pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, the filing of a motion to dismiss is authorized where the complaint fails to state a claim upon which relief can be granted. The granting of the motion is subject to de novo review by this Court. Syllabus point 2 of State ex rel.

McGraw v. Scott Runyan Pontiac-Buick, 194 W.Va. 770, 461 S.E.2d 516 (1995), holds: "Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syl. pt. 1, Lontz v. Tharp, 220 W.Va. 282, 647 S.E.2d 718 (2007)....

Posey v. City of Buckhannon, 228 W. Va. 612, 614, 723 S.E.2d 842, 844 (2012). The Court applies the *de novo* standard of review to orders dismissing a claim on the ground that it is subject to arbitration. Ruckdeschel v. Falcon Drilling Co., L.L.C., 225 W. Va. 450, 693 S.E.2d 815 (2010).

B. The Circuit Court correctly determined that the arbitration provision in the Construction Agreement was bargained for by the parties.

The West Virginia Supreme Court's policy is to encourage arbitration among commercial parties as an alternative to litigation. Anderson v. Nichols, 178 W. Va. 284, 359 S.E.2d 117 (1987). To that end, it is presumed in West Virginia 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. Syllabus Point 3, Board of Education v. W. Harley Miller, Inc., 160 W. Va. 473, 236 S.E.2d 439 (1977) (Miller).

The Miller Court explained:

Where 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, then, arbitration is mandatory, and any causes of action under the contract which by the contract terms are made arbitrable are merged, in the absence of fraud, with the arbitration award and the arbitration award is enforceable upon a complaint setting forth the contract, the arbitration provision, and the award

of the arbitrators upon motion for summary judgment made at the proper time.

The important words in the new rule are that the agreement to arbitrate must have been "bargained for." The concurring opinion in the first Miller case, supra, spoke of the traditional contract of adhesion situation in which one party to a contract may be confronted by another party which holds either a monopolistic or oligopolistic position in some particular line of commerce. While this exception would appear to address the most likely avenue for abuse in the law of arbitration, there are two more which should be specifically mentioned. Whenever a party can bring an arbitration clause within the unconscionability provisions of § 2-302 of the Uniform Commercial Code, W. Va. Code, 46-2-302 (1963), then that, too, would indicate that there was no meaningful bargaining with regard to the arbitration provision and should invalidate it. Furthermore, when arbitration is wholly inappropriate, given the nature of the contract, and could only have been intended to defeat just claims, the provision cannot be considered to have been bargained for.

The question of whether an arbitration provision is "bargained for" must, in order to make arbitration workable, always be a matter of law for the court to determine and never a question of fact. Under modern case law in other jurisdictions there is a ***strong presumption*** that an arbitration provision is part of the bargain. Therefore ***in West Virginia only if it appears from the four corners of a written contract or from the obvious nature of the contracting parties, or from the obvious nature of the activity covered by the contract, that the arbitration provision is so inconsistent with the other terms of the contract or so oppressive under the circumstances that it could not have been bargained for, should a court refuse to enforce the arbitration provision.***

Miller, 160 W. Va. at , 486-87, 236 S.E.2d at 447. (Emphasis added.) "Determining as a matter of law whether arbitration agreements should be enforced is a judgment that courts are experienced in making." Id.

In the instant case, the Circuit Court examined the four corners of the Construction Agreement and determined that there was no basis to overcome the presumption that the arbitration provision was bargained for. There is nothing obvious about the nature of the

contracting parties, from the nature of the activity covered by the contract, and nothing showing that arbitration provision is inconsistent with the other terms of the contract or oppressive under the circumstances. The Circuit Court correctly observed in Conclusion of Law 15 of its decision, (Appendix at 46), that the arbitration provision was printed in the in the same size font as the remainder of the contract, positioned directly above the signature line in a paragraph entitled "ARBITRATION", and was not written using complex or deceptive language. Moreover, the Kirbys do not allege that they are illiterate, unsophisticated, infirm, or incompetent.

Therefore, the Circuit Court correctly concluded, as a matter of law, that the arbitration provision in the Construction Agreement was bargained for by the parties.

The Kirbys attempt to recast the "bargained for" issue as question of fact by way of the affidavit of Wayne Kirby, wherein he avers that he did not bargain for arbitration, (Appendix at 37), and a claim in their brief that no negotiations ever took place. (Kirbys brief at 6.) To the contrary, the Miller court clearly stated that the bargained for issue is never a question of fact, but rather is a question of law, which is determined based on an analysis of the terms of the contract and consideration of certain obvious factors involving the nature of parties and the nature of the contract. Thus, the Kirbys' attempt to create a fact issue based on a conclusory averment in an affidavit and an assertion of fact in their brief, unsupported by the record, that there were no negotiations must fail as a matter of law. Also, Bastian Homes notes that the affidavit is also internally inconsistent, because it avers that Wayne Kirby had discussions with Bastian Homes regarding the contract and specifically discussed the arbitration provision before signing the Construction Agreement. (Appendix at 37, Nos. 3, 6-8.) Therefore, the Kirby's "no negotiation" argument must fail.

C. The arbitration provision of the Construction Agreement is substantially fair and not unconscionable.

The Kirby's contend that the Circuit Court erred by determining that the arbitration provision is substantially fair because, in the Kirbys' view, the Construction Agreement is one-sided, provides them with no remedy, and is unconscionable.¹ Bastian Homes disagrees.

In Lang v. Derr, 212 W. Va. 257, 569 S.E. 778 (2002), the Supreme Court provided the following cogent summary of the law of unconscionable contracts:

The comment on the [Restatement (Second) of Contracts § 208 (1981)] indicates that generally at least two things must be present for a contract to be unconscionable, such as to justify a court refusing to enforce it. **First, there must be an inadequacy of consideration.** As stated by the Restatement: 'Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performance **'The second factor normally considered in determining whether a contract is unconscionable is whether the parties were in unequal bargaining positions at the time they entered into the contract.'** The Restatement indicates that a number of factors can shed light upon the bargaining positions of the parties. Specifically, the Restatement says that, **'knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the**

¹ Bastian Homes observes that the Kirbys did not specifically argue in the memorandum of law they submitted to the Circuit Court that the arbitration agreement was one-sided, provided them with no express remedies, and was unconscionable. (Appendix at 33-36.) Instead, the Kirbys contended in their memorandum that their lawsuit "arises because of the undisputed fact of water damage to the plaintiffs dwelling and does not relate to the terms of the [Construction Agreement]," and because "the arbitration provision was not bargained for." (Appendix at 36.) Also, the Kirbys did not address the issue of whether Paragraph 12 and/or Paragraph 13 of the Construction Agreement deprived them of meaningful remedy.

agreement, or similar factors' are factors bearing upon whether the parties were equal in the bargaining process. Restatement (Second) of Contracts § 208 cmts. c and d (1981).

In Art's Flower Shop, Inc. v. C & P Telephone Company, 186 W. Va. 613, 413 S.E.2d 670 (1991), this Court essentially adopted the points discussed in the comment on the Restatement section. In Syllabus Point 4 of Art's Flower Shop, Inc. v. C & P Telephone Company, id., the Court stated: '**A determination of unconscionability must focus on 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.'**

Lang, 212 W. Va. at 259-60, 569 S.E. at 781. (Emphasis added.)

Furthermore, West Virginia law distinguishes between procedural and substantive unconscionability. Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract, while, on the other hand, 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. Credit Acceptance Corp. v. Front, ___ W. Va. ___, ___ S.E. 2d ___ (W.Va., No. 11-1646 and No. 12-0545, filed June 19, 2013), 2013 W. Va. LEXIS 725. The Credit Acceptance Court stated:

[A] contract term is unenforceable if it is **both** procedurally **and** substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.

___ W. Va. at ___, ___ S.E.2d at ___, 2013 W. Va. LEXIS 725, *23-24. (Emphasis added.)

In the instant appeal, the Kirbys cannot establish that Paragraph 19 of the Construction Agreement is both procedurally *and* substantively unconscionable. In fact, they cannot establish either species of unconscionability.

With regard to procedural unconscionability, there is nothing in the record indicating that Kirbys suffer from inadequacies that could preclude a real and voluntary meeting of minds such as infancy, illiteracy, ignorance, lack of sophistication, or an inability to understand contract language. The Construction Agreement itself is free of hidden or unduly complex contract terms, and could be comprehended by the Kirbys. Although the Kirbys are consumers and Bastian Home a business, such distinctions are ubiquitous in business transactions and, without more, do not render a contract unenforceable. See State ex rel. Johnson Controls, Inc. v. Tucker, 229 W. Va. 486, 729 S.E.2d 808 (2012) (stating that in most commercial transactions it may be assumed that there is some inequality of bargaining power, and the Supreme Court cannot undertake to write a special rule of such general application as to remove bargaining advantages or disadvantages in the commercial area). Furthermore, even when a contract providing for arbitration is one of adhesion, the contract is not automatically deemed unconscionable. Shorts v. AT&T Mobility, ___ W.Va. ___, ___ S.E. 2d ___, 2013 W. Va. LEXIS 720,*6. Therefore, the record does not establish procedural unconscionability.

With regard to substantive unconscionability, the Circuit Court properly observed that the arbitration provision of the Construction Agreement was not one-sided because the contract provided for a three member board of arbitrators, one selected by each party and one by the arbitrators themselves. This is not a situation where a business has reserved for itself the exclusive authority to select the entire arbitration panel and create

a biased tribunal. Bastian Homes also points out that the arbitration is to be conducted using neutral American Arbitration Association rules, and not rules that were unilaterally developed and imposed by Bastian Homes. Further, there is no evidence that the arbitration agreement imposes burdensome and excessive costs on the Kirbys, that it was intended to discourage the Kirbys from seeking redress for their grievances, or that the Kirbys were denied adequate consideration under the Construction Agreement. Therefore, the arbitration provision is fair and commercially reasonable.

The Kirbys point to Paragraphs 12 and 13 of the Construction Agreement, entitled "Contractor's Remedies" and "Delays in Completion of Construction," as evidence of substantive unconscionability and one-sidedness. (Appendix at 13.) This argument is without merit.

Paragraph 12 pertains to defaults in payment and Bastian Homes' right to a confession of judgment in the event of such default, neither of which are at issue in this case. Paragraph 12 is irrelevant to the instant appeal, and the Kirbys' argument is based on speculation and conjecture as to what could happen if Bastian Homes was enforcing the provision against them.

With regard to Paragraph 13, contrary to the Kirbys' claim that it gives them no rights at all, the plain language of Paragraph 13 provides the Kirbys with a remedy for delays in construction that **are not** caused by weather, work stoppages, material shortages, or circumstances beyond Bastian Homes' control. The application of Paragraph 13 turns on questions of fact regarding the cause and nature of the delay in construction, which are matters to be determined at arbitration.

D. The Kirbys' claims pertain to the terms of the Construction Agreement and are subject to arbitration pursuant to Paragraph 19.

The Kirbys contend that they are not required to arbitrate because they have raised no "disagreements or disputes" pertaining to the Construction Agreement because their claims are based on the "common principles of negligence and delegation of duty." (Kirbys' Brief at 10.) The Kirbys argue that the negligence was caused by Ed Dwire, doing business as Dwire Plumbing, and that the "lawsuit ... has absolutely no connection with section of the construction agreement between [the Kirbys] and [Bastian Homes]. (Kirbys Brief at 12.)

Contrary to the Kirbys argument, the complaint filed in this matter specifically avers that Bastian Homes and Dwire are "jointly and severally liable ... for negligence and **breach of contract**." (Appendix at 6; Paragraph 16 of the complaint.) (Emphasis added.) The lawsuit is premised on the Construction Agreement and problems stemming from Bastian Homes' and Dwire's non-performance or bad performance of that contract. (Appendix at 4, 6; Paragraphs 1, 2, and 14.) Moreover, the Circuit accurately observed that the Kirbys alleged that the construction of their home was delayed by ten months, which claim dovetails with Paragraph 13 of the Construction Agreement, pertaining to delays in construction. (Appendix at 45.)

In addition, the very purpose of the Construction Agreement was to build a home for the Kirbys. Dwire was engaged to do plumbing work on the home in furtherance of that objective.

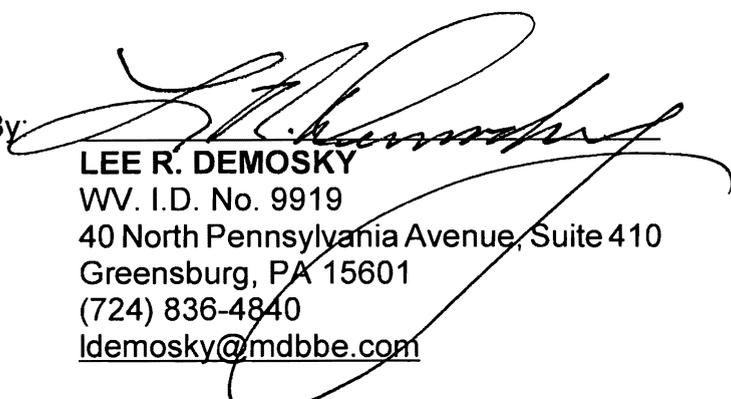
Hence, this lawsuit plainly involves the parties rights and duties under the Construction Agreement and is thus within the scope of the arbitration provision in Paragraph 19.

The Kirby's assert that arbitration is an inappropriate forum for their claims against Dwire. However, the Circuit Court specifically stated that its Order would have no effect on the Kirby's cause of action against Dwire. (Appendix at 48.) The Kirbys retain all their rights and remedies in their suit against Dwire.

CONCLUSION

For all of the foregoing reasons, the Circuit Court's order should be affirmed.

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CERTIFICATE OF SERVICE

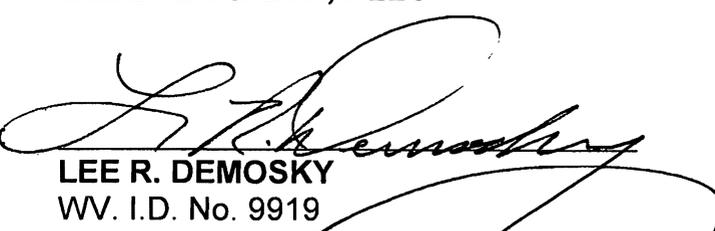
I hereby certify that I have, this day, served the following persons with Respondent's, Lion Enterprises Inc. and T/A/ Bastian Homes, Brief via regular mail, first class postage prepaid:

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