

15-0920

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

G. & G. BUILDERS, INC.,
a West Virginia corporation,

Plaintiff,

v.

Civil Action No. 14-C-250
The Honorable F. Jane Husted

RANDIE GAIL LAWSON,
an individual;
DEANNA DAWN LAWSON,
an individual;
H.B. FULLER CONSTRUCTION PRODUCTS INC.,
a Minnesota corporation; and
NEWTECH SYSTEMS, INC.,
a Kentucky corporation,

Defendants.

J. E. HOOD
CIRCUIT CLERK
CABELL CO. WV

2015 AUG 20 PM 4: 58

FILED

**ORDER DENYING G & G BUILDERS, INC.'S MOTION TO DISMISS
COUNTERCLAIM, ENFORCE ARBITRATION AGREEMENT, AND STAY
CROSSCLAIMS PENDING ARBITRATION**

On the 20th day of March 2015 came the plaintiff, G & G Builders, Inc. ("G&G") by counsel, Robert H. Sweeney, Jr., defendants, Randie Gail Lawson and Deanna Dawn Lawson ("Lawsons"), by counsel, Kimberly K. Parmer, and defendant, H.B. Fuller Construction Products, Inc. ("HB Fuller"), by counsel, Ralph J. Hagy, for hearing on "G & G Builders, Inc.'s Motion to Dismiss Counterclaim, Enforce Arbitration Agreement, and Stay Crossclaims Pending Arbitration" ("Motion").

HB Fuller also filed a written "Motion to Dismiss Complaint and Cross-Claim by H.B. Fuller Construction Company Inc," though it is unclear whether that motion was noticed for this date. Counsel for HB Fuller may notice such motion for later hearing or withdraw the same.

Both counsel for the Lawsons and counsel for G & G Builders submitted orders reflecting the Court's oral ruling at the March 20, 2015 hearing. Ms. Parmer and Mr. Sweeney appeared on August 6, 2015 for hearing to discuss the content of the order. This Order was modified for entry as a result of that hearing. The alternate order prepared by counsel for G & G Builders will be lodged in the Court file.

G&G filed its Complaint in this Court on March 20, 2014 asserting claims for breach of contract and unjust enrichment against the Lawsons for amounts allegedly due under a November 18, 2010 construction contract for the construction of a residence to be located in Milton, Cabell County, West Virginia. The Lawsons, along with their Answer to the Complaint, asserted a Counterclaim against G&G asserting claims for breach of contract, as well as negligent and intentional torts for defects in the construction of the residence and overcharges under the Contract. G&G seeks dismissal of the Counterclaim alleging such claim is subject to a valid arbitration agreement.

Standard of Review

In *Brown v. Genesis Healthcare Corp.*, the West Virginia Supreme Court limited a trial court's consideration of a motion to dismiss and compel arbitration to the following two issues: (a) whether a valid arbitration agreement exists between the parties, and (2) whether the claims averred fall within the substantive scope of that arbitration agreement. *Brown*, 724 S.E.2d 250, 260 (2011) (overruled in part on other grounds by *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012)).

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et. seq., governs considerations of the validity and enforceability of an arbitration agreement. Section 2 of the FAA states, in relevant part:

A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration controversy thereafter arising out of such a contract or transaction, or the refusal to perform the whole or any part thereof, ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.

The United States Supreme Court has repeatedly emphasized that arbitration is a matter of consent, not coercion. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). The FAA does not require parties to arbitrate when they have not agreed to do so. *Id.* Its' purpose is to make arbitration agreements as enforceable as other contracts, not more so. *Id.*

Findings of Fact

The Court, after thorough consideration of the pleadings, memoranda and evidence in this case, in keeping with its duty to apply the above standard of review and having heard argument of counsel, FINDS as follows:

The Lawsons' decision to build their own home in 2010 was the first time either had undertaken to build a home. The Lawsons first engaged AB Building to undertake the project. The Lawsons' engagement with AB Building was a "handshake deal" and did not involve a written contract. When it became apparent that AB Building was not capable of managing the project, the Lawsons were required to find a replacement contractor to assume the work quickly, as winter was approaching. Ultimately, the Lawsons settled on G&G.

Discussions between the Lawsons and G&G were limited to price and the compensation G&G would be entitled to with respect to work that was begun by AB Building. Arbitration was never mentioned. Mr. Lawson – and Mr. Lawson only – signed a slightly modified AIA

Document A111-1997 Standard Form of Agreement Between Owner and Contractor (the "Agreement") on November 18, 2010, a form document consisting of twelve typewritten pages. The only papers Mr. Lawson was presented, either before or after execution of the Agreement, were the Agreement itself and Exhibits "A", "B", and "C" thereto (the "Agreement Exhibits"). These papers were prepared by GGB and brought to Mr. Lawson at the building site – already modified – for him to sign. Mrs. Lawson was not present at the time Mr. Lawson signed the Agreement, nor did G&G ever request that she sign anything.

The first page of the Agreement contains several boilerplate statements in a sidebar on the right of the page, including "AIA Document A201-1997, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified." In addition, Article 15 of the Agreement references the Conditions as a contract document. The Conditions, as attached to the Motion, is a form document consisting of thirty-eight typewritten pages, prefaced by four typewritten pages of "Instructions." This document does not appear to have been modified to the particulars of the project at all.

The arbitration provision at issue does not appear in the Agreement or the Agreement Exhibits which were presented to, and signed by, Mr. Lawson. Instead, it only appears in the Conditions. This document is unsigned, despite the fact that the document itself states at § 1.5.1 that "[t]he Contract Documents shall be signed by the Owner and Contractor." Mr. Lawson did not see the Conditions (or its Instructions) at any point prior to his execution of the Agreement and, in fact, had not seen either document prior to this litigation. There is no reference in the Agreement to arbitration at all, or to the fact that the Conditions include additional material terms of the Agreement rather than merely elaboration of the terms set forth in the Agreement.

On January 27, 2014, after the relationship between G&G and the Lawsons had deteriorated, G&G recorded a Notice of Mechanic's Lien with the County Commission of Cabell County, West Virginia against the Lawsons' property. On March 20, 2014, G&G filed its Complaint in this Court. The Complaint asserts claims for breach of contract as well as unjust enrichment against the Lawsons. In addition to seeking to preserve its mechanics' lien for amounts allegedly due under the Agreement, it seeks personal judgments against the Lawsons for that amount, plus interest, attorneys' fees, lost profits, damage to business reputation, and compensation for annoyance and inconvenience.

Conclusions of Law

G&G argues that the counterclaim filed by the Lawsons should be dismissed and brought in arbitration. There does not appear to be any disagreement regarding whether the FAA governs this Court's consideration of the arbitration provision at issue or whether the claims asserted come within the scope of the provision. The dispute focuses solely on the validity and enforceability of the provision.

The Lawsons first argue that the arbitration provision cannot be enforced against Deanna Lawson as she was not a signatory to the Agreement. Both parties acknowledge that the general rule is that a court may not direct a nonsignatory to arbitration. *State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W. Va. 23 (1998). However, G&G argues that an exception to that general rule, as articulated in *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988), should apply. In *J.J. Ryan*, the Fourth Circuit held that claims against a parent company could be referred to arbitration where the arbitration agreement was executed only by a subsidiary of the parent company. G&G argues this exception ought to be extended to apply to Deanna Lawson because the Lawsons were a married couple who participated in the construction of a home together. The Court FINDS that the well settled law in the State of West Virginia -

law that has continued to be applied well after the Fourth Circuit's holding in *J.J. Ryan* - precludes compelling an individual nonsignatory's claims to arbitration, and the Court **DENIES** G&G's Motion as to Deanna Lawson. See *Dan Ryan Builders, Inc. v. Nelson*, No. 3:10-cv-76, 2014 WL 496775 (N.D.W. Va. Feb. 6, 2014); *State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W. Va. 23 (1998).

The Lawsons make several arguments against the validity and enforceability of the arbitration provision even as to Mr. Lawson. In asserting the provision's validity, G&G primarily relies upon the decision in *Johnson Controls v. Tucker*, 229 W. Va. 486 (2012), which considered the particular arbitration provision at issue and overturned a circuit court's finding that the provision was unconscionable. However, as the Lawsons correctly point out, the *Johnson Controls* decision did not address the arguments made in this case. In *Johnson Controls*, the West Virginia Supreme Court overturned the circuit court's finding of unconscionability because it was founded solely on the circuit court's finding that requiring arbitration would require piecemeal litigation, as only some claims and parties were subject to the arbitration provision. Notably, the court itself cautions in its decision that certain contracts or contractual provisions may be unconscionable in some situations but not in others. Therefore, the Court **FINDS** it is not bound by *Johnson Controls* and will consider the arguments made here regarding the validity and enforceability of the provision under the particular circumstances of this case.

The Lawsons argue that G&G waived its right to compel arbitration by its filing of this litigation. G&G argues that it was required by West Virginia Code § 38-2-34 to file such action in order to preserve its mechanics' lien and thus, its filing of litigation should not be held to constitute a waiver. However, the Lawsons contend that G&G went much farther than required

by the provisions of West Virginia Code § 38-2-34 by asserting breach of contract and unjust enrichment claims and seeking personal judgments against the Lawsons for amounts allegedly due under the Agreement, interest, attorneys' fees, lost profits, damage to business reputation, and compensation for annoyance and inconvenience, rather than simply filing a petition to preserve its lien. In addition, the Lawsons point out that the Complaint makes no mention of arbitration and no motion to stay the proceeding pending arbitration was made until after the Lawsons' asserted their counterclaim.

The Lawsons also argue that the arbitration provision is unconscionable because it was never shown or given to Mr. Lawson, a first time homebuilder, and because it – according to G&G's own interpretation – allows G&G to bring its complaint seeking a full and diverse range of relief but requires that the Lawsons' counterclaim challenging its' right to that relief to be brought in arbitration. The Lawsons argue that this compels a finding that the provision was both procedurally and substantively unconscionable, as required under the applicable case law. *See Brown v. CMH Mfg., Inc.*, No. 2:13 – 31404, 2014 WL 4298332, *5 (S.D.W. Va. August 29, 2014); *State ex rel. Johnson Controls v. Tucker*, 229 W. Va. 486 (2012). G&G counters that the arbitration provision merely allows it to proceed in accordance with applicable law regarding the maintenance of mechanics' liens and that this was all it did, despite the fact that it asserted a claim for unjust enrichment claim and requests for additional relief “in the alternative.”

While the above arguments made by the Lawsons are persuasive, the Court FINDS it need not reach a decision regarding G&G's possible waiver of its right to arbitrate or the unconscionability of the arbitration provision at issue because the Court FINDS it must **DENY** G&G's Motion to enforce the arbitration provision because there was no meeting of the minds regarding arbitration, and thus no agreement to arbitrate ever existed. Arbitration is a matter of

contract and a party cannot be compelled to submit to arbitration unless it is clear he agreed to do so. *Levin v. Alms and Associates, Inc.*, 634 F.3d 260 (4th Cir. 2011). The FAA does not require courts to enforce an arbitration clause when the parties never reached a meeting of the minds about the clause. *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W. Va. 125, 128, 717 S.E.2d 909 (2011). A court may submit to arbitration only those disputes that the parties have agreed to submit. *Id.* In determining the enforceability of an arbitration clause, a trial court may rely on general principles of state contract law. *Id.* It may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract. *Id.*

Here there can in no way be said to be a meeting of the minds on the inclusion of an arbitration provision because Mr. Lawson did not sign – or even *see* - the Conditions, which is the only document containing the arbitration provision. While not disputing that Mr. Lawson never saw the arbitration provision, or offering any evidence that the parties ever discussed arbitration, G&G argues that the arbitration provision was in the Conditions and the Conditions were properly incorporated by reference into the Agreement, thereby binding Mr. Lawson. However, a general reference in one writing to another document is not sufficient to incorporate that document into a final agreement. *Covol Fuels No. 4, LLC v. Pinnacle Mining Co., LLC*, No. 5:12-CV-04138, 2014 WL 1390857 (S.D.W. Va. Apr. 9, 2014).

The Court FINDS the recent decision of the West Virginia Supreme Court in *State ex rel. U-Haul Co. of West Virginia v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (2013) instructive as to the case at hand. There, the court found that an addendum to the contract signed by consumers was not properly incorporated by reference - and not binding - where the consumers were not shown the addendum until after the contract was signed and the contract itself made no reference

to the inclusion of an arbitration provision in the contract. *Id.* Here, not only was Mr. Lawson not provided the Conditions before signing the Contract, he was *never* provided the Conditions. The *U-Haul* court held that in order to uphold the validity of terms in a document incorporated by reference it must be certain that the parties to the agreement had knowledge of the document and its terms. *Id.*, at 444.

The court in *U-Haul* cited a case New York case as an example of a poor attempt at incorporating a second document into a written contract. *Id.*, at fn. 14 (citing *Weiner v. Mercury Artists Corp.*, 284 A.D. 108, 130 N.Y.S.2d 570 (1954)). In that case, a seller tried to incorporate a two hundred seven page booklet containing an arbitration provision into a one page contract. What is being tried here is very similar. The Agreement is a twelve page document. G&G argues the Agreement incorporates by reference the thirty-eight page Conditions. However, the Agreement never clearly states that it intends to incorporate all of the provisions of the Conditions into the Agreement. In multiple articles of the Agreement, certain provisions of the Conditions are referred to as providing definitions of, or additional detail regarding, the Agreement terms. Significantly, nowhere in the Agreement is it suggested that there are additional, material, substantive contract terms buried in the Conditions. The word “arbitration” does not appear anywhere in the Agreement – which is the only document Mr. Lawson ever saw. The Court also takes note of the fact, as pointed out by the Lawsons, that the AIA form documents were updated in 2007, three years prior to the parties’ contract. One of the changes made was the addition of a term in the agreement not only making clear that alternative dispute resolution was a term of the agreement, but requiring the owner to check a box if intending to agree to arbitration. Clearly, this is not the first time it has been suggested that the arbitration provision in the version of the form documents used in this case is less than conspicuous. The

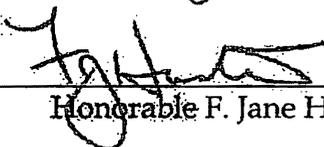
Court FINDS there is simply no basis upon which to conclude that Mr. Lawson had the requisite knowledge of the contents of the Conditions to establish his consent to be bound by the arbitration provision hidden within.

For the foregoing reasons, G & G Builders, Inc.'s Motion to Dismiss Counterclaim, Enforce Arbitration Agreement, and Stay Crossclaims Pending Arbitration is hereby **DENIED**. The exceptions of G & G Builders, Inc. are hereby noted and preserved for the record. The Court further **ORDERS** that, due to G & G Builders, Inc.'s intent to appeal this order, the scheduling order previously entered by the Court is vacated and the matter continued generally. The parties are **ORDERED** to provide a written status report to this Court on the progress of the appeal of the arbitration issue every three (3) months.

The Court further finds no reason for delay and orders the entry of judgment as to the issue of the parties' requirement to arbitrate disputes between them.

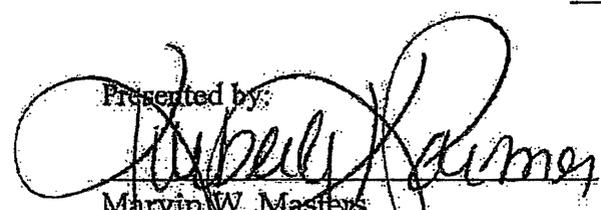
The Clerk is hereby directed to send certified copies of this order to counsel of record.

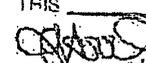
ENTERED this 20th day of August, 2015.



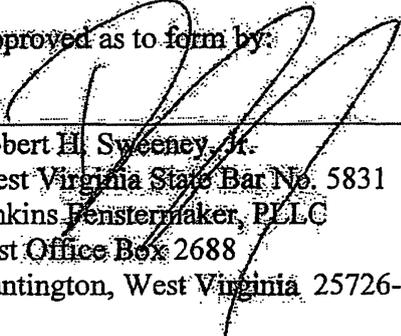
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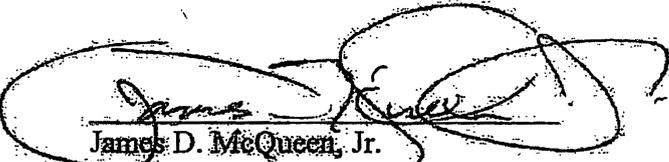
STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE OF WEST VIRGINIA DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS AUG 20 2015

CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

Approved as to form by:



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