S. 30-18
M. Romano
J. Varner
E Hulett
S. Dalesio
A. Levicoff
C. Prince

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

FRANK M. WILLIAMS and
DIANNA P. WILLIAMS, Individually, and as husband and wife, ET AL., All Individually and as Representatives of a Class of Other Similarly Situated Individuals,

Plaintiffs,

v.

Civil Action No. 09-C-57-1
CHRISTOPHER J. McCARTHY, Judge

DAN RYAN BUILDERS, INC.,
DAN RYAN BUILDERS REALTY, INC.,
DRB ENTERPRISES, INC.,
MONOCACY HOME MORTGAGE, LLC,
CHRISTOPHER RUSCH, CRYSTAL RANKIN,
JOHN DOE, and
EVANSTON INSURANCE COMPANY,

Defendants.

2018 MAY 30 1 1 41

ORDER

DENYING *PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' MOTION TO COMPEL ARBITRATION* AS PRESENTED

SUA SPONTE* DENYING *DEFENDANTS' MOTION TO COMPEL ARBITRATION

DENYING *DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' NOTICE OF HEARING* AND GRANTING DEFENDANTS' FURTHER MOTION TO *CONTINUE HEARING ON PLAINTIFFS' MOTION TO CERTIFY CLASS ACTION AS HEREIN MOLDED* WHILE HOLDING IN ABEYANCE *PLAINTIFFS' MOTION TO CERTIFY CLASS ACTION*

***SUA SPONTE* VACATING THE PARTIES' RESPECTIVE NOTICES OF HEARING FOR JUNE 4, 2018 ON SUCH MOTIONS RULED UPON HEREIN WHILE RESCHEDULING SUCH HEARING TO JUNE 18, 2018 FOR CONSIDERATION OF DRB DEFENDANTS' *MOTION TO COMPEL PLAINTIFFS' ANSWERS AND RESPONSES TO DEFENDANTS' THIRD SET OF INTERROGATORIES AND SECOND SET OF REQUESTS FOR PRODUCTION* AND SCHEDULING MATTERS**

***SUA SPONTE* ESTABLISHING AN ADDITIONAL DISCOVERY AND BRIEFING SCHEDULE ON CLASS CERTIFICATION AND SCHEDULING A CERTIFICATION OF CLASS HEARING FOR AUGUST 24, 2018 BEGINNING AT 9:00 O'CLOCK A.M.**

DIRECTING PARTIES TO FORTHWITH MEET AND CONFER AS WELL AS BE PREPARED TO DISCUSS WITH THIS COURT ON JUNE 18, 2018 ESTABLISHMENT OF A COMPLETE PRE-TRIAL AND SCHEDULING ORDER INCLUDING MEDIATION

Preliminary Matters and Further Pleadings

As reflected in its *Order Regarding Hearing On Various Motions* entered herein on May 24, 2018, this Court convened a hearing regarding the above-reference motions on May 15, 2018. At that time, it further reviewed the parties' related pleadings filed thereon to date and heard arguments of counsel. Thereat, it announced that such matters would be taken under advisement with particular decisions to then be made on *Defendants' Motion To Strike Plaintiffs' Notice Of Hearing and Continue Hearing On Plaintiffs' Motion To Certify Class Action* and *Plaintiffs' Motion To Strike Defendants' Motion To Compel Arbitration* (including directives for preparation and circulation of appropriate orders) via subsequent letter ruling.

Without seeking this Court's prior leave or permission, a duly notarized *Affidavit Of Julie A. Brennan, Esquire* was filed herein on May 21, 2018 on behalf of DRB Defendants. Therein, Ms. Brennan provides additional information (purportedly in further response to this presiding judge's questioning during the May 15th hearing). Such information particularly concerns what events and communications transpired between Plaintiffs' counsel and DRB Defendants' counsel after denial of DRB Defendants' then Motion to Compel Arbitration by Order entered on February 6, 2012 and entry of related stipulations of Plaintiffs and DRB Defendants that are reflected in an Order entered herein on March 21, 2012.

Plaintiffs' Reply To Affidavit Of Julie A. Brennan, Esquire, Filed in Support Of The DRB Defendants' Response To Plaintiffs' Motion To Strike The DRB Defendants' Motion To Compel Arbitration was then filed herein on May 23, 2018 by and through Plaintiffs' legal counsel likewise without formally seeking this Court's prior leave.

Further submitted to this Court, via hand delivery on May 22, 2018, is a letter from Plaintiffs' legal counsel, Mr. Romano, directed to this presiding judge (and copied to all counsel of record herein). Therein, he represents that he wishes only to bring attention to this presiding judge two (2) cases, purportedly for purposes of clarification, which he believes bear upon the "issue regarding the type and quality of evidence that Plaintiffs must muster to carry their burden to certify the putative class in this matter".

This Court has now again extensively reviewed the nine (9) year case history herein as well as particularly revisited these pending Motions and all matters of formal record herein related thereto for purposes of final consideration and deliberation in an effort to make final rulings thereon as well as make further procedural determinations.

Given the totality of the lengthy procedural history herein, the passage of time, extensive pleadings and legal counsel correspondence made a matter of record herein, this Court concludes it is essential to make all rulings made herein *infra* in conjunction with exercising its discretionary judicial authority for case management.

Accordingly, this Court will now proceed to rule on these Motions in ruling Order form (rather than by letter ruling as initially contemplated) as well as address other pending matters herein both substantive and procedural in nature so that this instant litigation is better postured for achieving timelier and final resolution in the overall interest of justice, fairness to the parties and judicial economy.

DRB Defendants' *Motion To Strike Plaintiffs' Notice Of Hearing And Continue Hearing On Plaintiffs' Motion To Certify Class Action* and *Plaintiffs' Motion To Certify Class Action*

This Court has fully reviewed DRB Defendants' Motion filed herein on April 11, 2018 and Plaintiff's Response in Opposition filed herein on May 10, 2018 as well as the

entirety of related pleadings and pertinent record herein developed to date. It has considered the respective averments and arguments respectively proffered by the parties' in their pleadings and oral argument as well as submitted legal authority.

DRB Defendants' *Motion To Strike Plaintiffs' Notice Of Hearing And Continue Hearing On Plaintiffs' Motion To Certify Class Action* was filed herein on April 11, 2018. Such Motion to Strike references no rule, statute, citation or authority pursuant to which it is brought before this Court for purposes of striking a pleading from the formal record. Essentially, DRB Defendants aver that class certification discovery between Plaintiffs and DRB Defendants is necessary as well as follow-up briefing by them respectively before such hearing should be held.

Pursuant to Rule 23(c)(1) of the *West Virginia Rules of Civil Procedure*, *Plaintiffs' Motion To Certify Class Action* was filed herein on November 3, 2017 with and accompanying *Memorandum In Support Of Plaintiffs' Motion To Certify Class Action*. Plaintiffs therein, *inter alia*, conclude that:

> Representative Plaintiffs' causes of action for negligence, strict liability, trespass, nuisance, fraudulent misrepresentation, tort of outrage and infliction of emotional distress, vicarious liability, and declaratory judgment, among others, and the damages caused thereby, clearly present common questions of fact and law necessary to maintain this class action, and this matter meets all requirements of Rule 23. (*See* Memorandum in Support, p. 13).

Such Motion to Certify remained pending before this Court without any further related action made a matter of record herein by either Plaintiffs', DRB Defendants or this Court until Plaintiffs' *Notice Of Hearing* served on March 27, 2018 and filed herein on March 28, 2018 setting such matter for hearing on June 4, 2018 at 1:00 o'clock p.m.[1]

[1] There was no Response Scheduling Order entered by this Court procedurally requiring further substantive responsive pleadings on such Motion to Certify.

Plaintiffs' Response In Opposition to Defendants' Motion To Strike Notice Of Hearing On Plaintiffs' Motion To Certify Class Action was filed herein on May 10, 2018. Therein, *inter alia*, they conclude:

> The DRB Defendants' Motion to Strike...and Continue Hearing...must be denied because they fail to describe how class certification discovery substantively impacts the application of the law to Plaintiffs' Motion to Certify..., and because Plaintiffs' expert disclosures are largely irrelevant to the Court's ruling on such certification. (*See* Response in Opposition, p. 6).

Plaintiffs' Motion To Strike Defendants' Motion To Compel Arbitration and *Defendants' Motion To Compel Arbitration*

Plaintiffs' Motion To Strike Defendants' Motion To Compel Arbitration was filed herein on May 4, 2018 and accompanied by *Plaintiffs' Memorandum In Support Of Plaintiffs' Motion To Strike Defendants' Motion To Compel Arbitration.* Such Motion to Strike likewise references no rule, statute, citation or authority pursuant to which it is brought before this Court for purposes of striking a pleading from the formal record.

Plaintiffs' essentially assert that DRB Defendants' pending Motion to Compel Arbitration must be denied because the "law of the case" doctrine does not permit these Defendants to challenge this Court's *Order Denying Defendants' Motions To Dismiss Complaint And Lifting Stay Of Discovery* entered herein on February 6, 2012.[2] Entry of an Order striking DRB Defendants' pending Motion to Compel Arbitration is requested.

Plaintiffs' Memorandum in Support essentially asserts, *inter alia*, that:

1. This Court's prior ruling in denying this matter being compelled to arbitration must be upheld "unless controlling authority has since made a contrary decision of law applicable to [the pertinent] issue [herein, to-wit: DRB Defendants' Sales

[2] Such Order denied *Defendants' Motions To Dismiss The Complaint And Compel Arbitration.*

Agreement was deemed unconscionable due to its lack of fairness and equality] or there has been a material change in facts".

2. Subsequent changes in West Virginia law concerning arbitration, while liberalizing enforceability of arbitration clauses, are not controlling for the particular arbitration issues previously before this Court and that were ruled upon in finality.

3. DRB Defendants have not asserted any change in the material facts of this case – because there has been no change – the Court's holding in 2012 that the arbitration clause contained in the DRB Defendants' Sales Agreement is unconscionable and, thus, invalid is the "law of the case".

(*See* Memorandum in Support, unnumbered pp. 3 - 5).

The pending *Defendants' Motion To Compel Arbitration* was filed herein on January 8, 2018 and accompanied by a more expansive *Defendants' Memorandum In Support Of Motion To Compel Arbitration*. Therein, DRB Defendants again request this Court to order the parties herein to arbitration as to all claims.

DRB Defendants assert, *inter alia*, there to be a valid and binding arbitration provision within each Agreement of Sale with Plaintiffs that must be enforced under current West Virginia law and the mandate of the *Federal Arbitration Act*. Therefore, DRB Defendants particularly request this Court to revisit this issue.[3]

[3] By letter to this presiding judge from legal counsel for DRB Defendants dated March 5, 2018, marked filed on March 6, 2018 and further made a formal matter of record herein on April 30, 2018, such counsel addressed this pending Motion and their effort "to resurrect this issue" and further suggested, among other things, that a briefing Order be entered for such Motion. The record herein reflects no further formal action at that time by this Court.

Notice Of Hearing for DRB Defendants' Motion to Compel Arbitration was served on Plaintiffs' legal counsel on March 27, 2018 and filed herein on March 29, 2018. Such hearing was set for June 4, 2018 at 1:00 o'clock p.m.

Memorandum In Opposition To Plaintiffs' Motion To Strike Defendants' Motion To Compel Arbitration was filed herein on May 8, 2018. DRB Defendants therein attempt to creatively counter Plaintiffs' Motion to Strike arguments. Thereupon, they further press for ultimate referral of this instant litigation to arbitration based upon this Court's procedural application of Rule 54 of the *West Virginia Rules of Civil Procedure* for revisiting this previously ruled upon issue and its exercise of plenary power and discretionary authority to reconsider a previous ruling. (*See Syl. Pt. 2*, in part, *Taylor v. Elkins Home Show, Inc.*, 210 W. Va. 612, 558 S.E.2d 611 (2001).[4]

Plaintiffs' Reply To Defendants' Memorandum In Opposition To Plaintiffs' Motion To Strike Defendants' Motion To Compel Arbitration was filed herein on May 11, 2018. Therein, Plaintiffs succinctly counter DRB Defendants' opposition with an additional premise insofar that such renewed Motion to Compel is nothing more than an untimely motion for reconsideration if, in fact there has been no change in law or facts sufficient to revisit a Court's interlocutory ruling as they originally argued in their Motion to Strike. Therefore and with DRB Defendants further failing to cite particular rule authority under which they were making this renewed Motion, such Motion to Compel must be treated

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[4] Syllabus point 2 therein specifically states:

> In an ongoing action, in which no final order has been entered, a trial judge has the authority to reconsider his or her previous rulings, including an order granting a new trial. Since a trial court has plenary power to reconsider, revise, alter, or amend an interlocutory order, the court has the power to take any action with respect to an order granting a new trial.

as being been made under Rule 60(b) for relief from a judgment order.[5] When so treated, DRB Defendants' Motion to Compel Arbitration fails to meet such Rule's temporal limitations or guidelines.

Discussion and Conclusions

This Court has fully reviewed these identified Motions, Memoranda, supporting documents and related correspondence as well as the entirety of related pleadings and pertinent record herein developed to date. It has considered the respective averments and arguments respectively proffered by the parties' in their pleadings and oral argument as well as submitted legal authority.

Furthermore, this Court is judiciously compelled (in light of the totality and breadth of proceedings heretofore had herein and in the interest of Rule 1[6] and Rule 16[7] of the *West Virginia Rules of Civil Procedure*) to proactively maintain sufficient

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[5] Plaintiffs accurately cite to *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 in support thereof.

[6] Rule 1 [Scope and Purpose of Rules], of course, dictates that the purpose of such Rules of Civil Procedure are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action." (Underline emphasis added by this Court).

[7] Rule 16 [Pretrial conferences; Scheduling; Management] addresses this Court's authority to manage its own court docket and proceedings before it in civil actions.

Issues arising from case management are within the sound discretion of the trial court. "[T]rial courts have the inherent power to manage their judicial affairs that arise during proceedings in their courts, which includes the right to manage their trial docket." *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W. Va. 463, 466, 475 S.E.2d 555, 558 (1996).

In addition, the Supreme Court of Appeals of West Virginia has stated that Rule 16(b) of the *West Virginia Rules of Civil Procedure* requires active judicial management of a case, and mandates that a trial court shall enter a scheduling order establishing time frames for the joinder of the parties, the amendment of pleadings, the completion of discovery, the filing of dispositive motions, and generally guiding the parties toward a prompt, fair and cost-effective resolution of the case. *Caruso v. Pearce*, 223 W.Va. 544, 678 S.E.2d 50 (2009). Rule 16 is left to the sound discretion of the court and a trial court may choose to use the rule or not as it sees fit, or as the complexity of a particular case may warrant. *Roark v. Dempsey*, 159 W. Va. 24, 217 S.E.2d 913 (1975). (Underline emphasis added by this Court).

In exercising such discretion, a trial court may so modify or amend a scheduling order when "good cause" is shown for doing so. *State ex rel. Pritt v. Vickers*, 214 W. Va. 221, 588 S.E.2d 210 (2003).

momentum and substantive movement for further proceedings herein including its own *sua sponte* actions in exercising both judicial discretion and general plenary power as as well as considering relief for interlocutory orders as justice may require. (See *State ex rel. Crafton v. Burnside,* 207 W.Va. 74, 77, 528 S.E.2d 768, 771 (2000)).

This Court is well aware of the protracted nature of these proceedings and acknowledges that this is, in part, due to previously contemporaneous federal court litigation, legal counsel illnesses, legislative service immunity exercised counsel.

Therefore, with an eye generally efficient management of its judicial docket and particularly in consideration of its review and discussion of pending matters herein extensively identified *supra*, this Court concludes the following:

1. *Plaintiffs' Motion To Strike Defendants' Motion To Compel Arbitration* should be DENIED as presented.

2. *Defendants' Motion To Compel Arbitration*, treated under Rule 60(b) as a motion for relief from this Court's prior ruling in its February 6, 2012 Order, should be *sua sponte* DENIED by this Court for lack of timeliness as well as in achieving a final resolution given the procedural and litigation history heretofore undertaken herein.

3. *Defendants' Motion To Strike Plaintiffs' Notice Of Hearing* should be DENIED as presented however its further motion therein to *Continue Hearing On Plaintiffs' Motion To Certify Class Action* should be GRANTED as herein further molded.

4. *Plaintiffs' Motion To Certify Class Action* should be HELD IN ABEYANCE by this Court pending further discovery, briefing and hearing as set forth herein *infra*.

5. Plaintiffs' and DRB Defendants' respective Notices for Hearing for June 4, 2018, with regard to their Motions to Strike should be *sua sponte* VACATED.

6. Out of an abundance of caution, an additional discovery and briefing schedule on class certification should be *sua sponte* ESTABLISHED and a further hearing on certification of such class should be SCHEDULED by this Court. Good cause for conducting such proceedings is deemed to exist as well as the being in the all-encompassing interests of justice and fair resolution of all matters and potentially justiciable claims herein.

7. Plaintiffs and DRB Defendants should be DIRECTED to forthwith meet, confer and be further prepared to discuss with this Court on June 18, 2018 the establishment of a complete Pre-Trial and Scheduling Order including mediation and, if pertinent, the heretofore bifurcated matters with regard to Defendant, Evanston Insurance Company. Such matters were left open as a result of this Court's *Order On January 8, 2018 Status Conference* whereby the then controlling Scheduling Order previously entered herein on March 15, 2017 was thereby vacated.[8]

Rulings

Accordingly, this Court hereby **ORDERS** that:

1. *Plaintiffs' Motion To Strike Defendants' Motion To Compel Arbitration* be and is **DENIED** as presented.

2. DRB *Defendants' Motion To Compel Arbitration*, upon *sua sponte* treatment, be and is **DENIED**.

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[8] Such Order established, *inter alia*, a tentative beginning trial date herein for December 3, 2018 and a Final Pre-Trial Conference date for November 2, 2018 while scheduling another Status Conference for July 9, 2018 for ascertaining current case posture. Such Order further addressed the parties' ongoing efforts to reach agreement on new proposed dates for other pending deadlines necessary for a complete Scheduling Order controlling further proceedings herein in the event of trial. The parties were ordered to submit a proposed Amended Scheduling Order setting forth their agreed deadlines incorporating those areas delineated in the prior order." This Court has no record of such proposed Order being submitted.

3. DRB *Defendants' Motion To Strike Plaintiffs' Notice Of Hearing* be and is **DENIED** as presented while DRB Defendants' further motion therein to *Continue Hearing On Plaintiffs' Motion To Certify Class Action* be and is **GRANTED** as herein further molded by this Court.

4. *Plaintiffs' Motion To Certify Class Action* be and is **HELD IN ABEYANCE** pending further discovery, briefing and hearing as set forth herein *infra*.

5. Plaintiffs' and DRB Defendants' respective *Notices Of Hearing* for June 4, 2018 with regard to their Motions to Strike, upon *sua sponte* treatment, be and are **VACATED** insofar as the above ruled upon Motions. However, such June 4, 2018 hearing be and is **RESCHEDULED** for **JUNE 18, 2018** at **10:45 O'CLOCK A.M.** for purposes of addressing DRB Defendants' *Motion to Compel Plaintiffs' Answers And Responses To Defendants' Third Set Of Interrogatories And Second Set Of Requests For Production* and other pertinent scheduling matters identified herein.

6. An additional Discovery and Briefing Schedule on class certification be and is **ESTABLISHED** and a further Hearing on certification of such class be and are **SCHEDULED** by this Court, to-wit:

(a) Class Discovery shall be undertaken and completed by Plaintiffs and DRB Defendants on or before **FRIDAY, JULY 27, 2018**.

(b) Briefing by such parties on the issue of Class Certification shall be served and filed on or before **FRIDAY, AUGUST 10, 2018**.

(c) A Class Certification Hearing shall be held on **FRIDAY, AUGUST 24, 2018** and beginning at **9:00 O'CLOCK A.M**.

7. Plaintiffs and DRB Defendants be and are **DIRECTED** to forthwith meet, confer and be further prepared to discuss with this Court on June 18, 2018 the establishment of a complete Pre-Trial and Scheduling Order including mediation and the bifurcated matters with regard to Defendant, Evanston Insurance Company.

Having all so ruled, this Court hereby **ORDERS** that Plaintiffs and DRB Defendants be and are **GRANTED** all necessary objections and exceptions thereon as they may respectively deem necessary for further proceedings.

Finally, this Court hereby **DIRECTS** the Clerk of this Court to send or otherwise provide certified copies of this Order to the following:

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ENTER: May 30, 2018

CHRISTOPHER J. McCARTHY, Judge