

**In the Circuit Court of Berkeley County, West Virginia**

**Jesse Hardin,**  
 Plaintiff,

vs.)

**William Paxson,**  
**Sharon Paxson,**  
**Home Inspections of VA and WV,**  
**LLC,**  
 Defendants

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Case No. CC-02-2019-C-237

**Order Denying Defendant’s, Home Inspections of VA and WV, LLC’S, Motion to Dismiss, Or, Alternatively, Stay Further Judicial Proceedings and Compel Arbitration**

ON A PRIOR DAY came the Defendant, Home Inspections of VA and WV, LLC, by counsel, and filed herein its Motion to Dismiss, or, Alternatively, Stay Further Judicial Proceedings and Compel Arbitration, whereupon the Plaintiff, Jesse Hardin, by counsel, filed his Response in opposition thereto in which he challenged the validity of an arbitration provision in the home inspection contract, and the Court having fully reviewed the arguments of the respective parties, including the Reply of Home Inspections of VA and WV, LLC, if any, and having now been fully advised, does hereby find as follows;

This civil action was instituted by Jesse Hardin (“Mr. Hardin”) against the Defendants, William Paxson and Sharon Paxson (the “Paxsons”) with whom he entered into a contract to purchase two parcels of real estate improved with several structures including a guest house, a detached three-car garage, and a main house (the “Structures”). The sales contract was contingent upon a home inspection being performed on the Structures on the Property. Mr. Hardin’s realtor arranged for Paul Barnhart (“Mr. Barnhart”) of Home Inspections of VA and WV, LLC (“Home Inspections”)

to inspect the Structures on the Property on June 23, 2017 at a cost of \$600. Mr. Hardin alleges that not until after the inspection was performed on June 23, 2017, was he provided with a contract to sign, which he did sign at that time, although he alleges that he never received a copy of the contract until Mr. Barnhart emailed a copy to him over a year later. Mr. Hardin alleges that Mr. Barnhart did not sign the contract on June 23, 2017 nor did Mr. Barnhart or his daughter explain the contract or point out any of the provisions of the contract to him. Mr. Hardin alleges that on or about August 6, 2018, after he discovered a number of issues with the Property, he telephoned Mr. Barnhart and spoke with him briefly about his overall concerns with Home Inspection's inspection report. Mr. Hardin claims that during that telephone conversation with Mr. Barnhart, and a follow-up email from Mr. Barnhart the next day, Mr. Hardin was provided with a copy of the inspection contract and a letter from Mr. Barnhart. Mr. Hardin alleges that as evidenced by a copy of the home inspection contract emailed to him by Mr. Barnhart, no one signed that contract on behalf of Home Inspections. Mr. Hardin has further alleged that he never considered an agreement to resolve any disputes involving that contract "informally between the parties" to mean that he was required to arbitrate such disputes.

In his Complaint filed herein, Mr. Hardin averred that based upon the representations the Paxsons made in a disclosure statement and the content of the inspection report, Mr. Hardin obtained a VA loan and closed on the purchase of the Property on or about August 17, 2017. Given the alleged defects in the Structures and the content of the inspection report, Mr. Hardin has brought this civil action against the Paxsons as well as Home Inspections for both breach of contract as well as for negligence.

The home inspection contract contains the following provision:

**ARBITRATION:** Any dispute concerning the interpretation of this agreement or arising from this inspection and report, except one for inspection fee payment, shall be resolved informally between the parties.

Home Inspections claims that Mr. Hardin's Complaint against it should be dismissed because (a) arbitration is the sole remedy for any dispute "arising from [the] inspection and report," (b) that this Court is limited to determining only whether a valid arbitration agreement exists and whether Mr. Hardin's claims fall within the substantive scope of that alleged arbitration agreement, (c) that this Court lacks subject matter jurisdiction and therefore Mr. Hardin's complaint against Home Inspections should be dismissed since the inspection agreement requires Mr. Hardin to arbitrate the claims he has raised in his complaint, and (d) that Mr. Hardin has failed to state a claim upon which relief can be granted because the inspection agreement contains an enforceable arbitration provision which governs his claims.

Mr. Hardin argues that an arbitration provision is purely a matter of contract and that state law principles that govern the formation of contracts apply to such agreements, that the contract provision in question anticipates only that any disputes between the parties "shall be resolved informally between the parties" and does not require arbitration, and, at worst, the alleged "arbitration" provision of the inspection agreement is ambiguous and should be construed most strongly against its drafter, Home Inspections.

Having fully considered the arguments of the parties, the Court does FIND as follows:

Our Supreme Court has interpreted the primary substantive provision of the Federal Arbitration Act, 9 U.S.C. § 2, as follows:

Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.

Syl. Pt 6, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011) ("*Brown I*"), overruled on other grounds by *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012).

"The FAA recognizes that an agreement to arbitrate is a contract. The rights and liabilities of the parties are controlled by the state law of contracts." *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W.Va. 379, 387, 787 S.E.2d 650, 658 (2016) ("*Schumacher II*"). Our Supreme Court has further found that the FAA "does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms." Syl. Pt 7, *Brown I*, 228 W.Va. at 656-57, 724 S.E.2d at 260-61.

In *Schumacher Homes II*, the West Virginia Supreme Court of Appeals noted:

When a lawsuit is filed implicating an arbitration agreement, and a party to the agreement seeks to resist arbitration, the Supreme Court has interpreted the FAA to require application of the doctrine of 'severability' or 'separability.' The gist of the doctrine is that an arbitration clause in a larger contract must be carved out, severed from the larger contract, and examined separately. The doctrine 'treats the arbitration clause as if it is a separate contract from the contract containing the arbitration clause, that is, the 'container contract.' Under the doctrine, arbitration clauses must be severed from the remainder of a contract, and must be tested separately under state contract law for validity and enforceability.

*Schumacher Homes II*, 237 W.Va. at 387-88, 787 S.E.2d at 658-659.

This Court cannot, however, compel a party to arbitrate a claim or dispute absent an agreement to arbitrate. *G & G Builders, Inc. v. Lawson*, 238 W.Va. 280, 284, 794

S.E.2d 1, 5 (2016). In *G & G Builders*, our Supreme Court stated:

Indeed, '[u]nder the Federal Arbitration Act, 9 U.S.C. § 2, parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.' [citing Syl. Pt 6, *Brown* ¶]. Consequently, 'the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.' *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

Consistent with federal law, this Court held in syllabus point two of *State ex re. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010) that '[w]hen a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.' Absent an affirmative ruling on the first issue, the second issue is not reached.

*Id.*

West Virginia's Revised Uniform Arbitration Act, W.Va. Code § 55-10-1, et seq. (2015), likewise applies to the inquiry before this Court inasmuch as all relevant provisions thereof are not pre-empted by the FAA to the extent not inconsistent therewith. The West Virginia Arbitration Act provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract. W.Va. Code § 55-10-8(a). The Revised Act further requires that this court "shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." W.Va. Code § 55-10-8(b).

The Revised Act further provides for the procedure for West Virginia courts to

follow when a motion is filed to compel arbitration, and one party, here Mr. Hardin, opposes the motion. In such case, it is incumbent upon this court to “proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.” W.Va. Code § 55-10-9(a)(2). In the event that this Court should find that no enforceable agreement to arbitrate exists, then this Court may not “order the parties to arbitrate.” W.Va. Code § 55-10-9(c).

Mr. Hardin argues that the arbitration clause is too ambiguous to constitute an enforceable agreement to arbitrate. The question as to whether a contract is ambiguous has been held to be a question of law to be determined by the court. Syl. Pt. 1, *Berkeley Co. Pub. Serv. Dist. v. Vitro Corp.*, 152 W.Va. 252, 162 S.E.2d 189 (1968). In looking at whether an arbitration provision in a contract was ambiguous, our Supreme Court in *SWN Prod. Co., LLC v. Long*, 240 W.Va. 1, 807 S.E.2d 249 (2017) looked to *Salem International University, LLC v. Bates*, 238 W.Va. 229, 235, 793 S.E.2d 879, 885 (2016) wherein the Court stated:

[c]ontract language is considered ambiguous where an agreement’s terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken.’ Syl pt. 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W.Va. 275, 569 S.E.2d 796 (2002). Also, ‘[t]he term ‘ambiguity’ is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.’ Syl. Pt. 4, *Estate of Tawney v. Columbia Nat. Res.*, 219 W.Va. 266, 633 S.E.2d 22 (2006).

*SWN Prod. Co.*, 240 W.Va. at 7, 807 S.E.2d at 255.

Our Supreme Court has further held the “general rule” to be that “words in a contract will be given their usual and primary meaning at the time of execution of the contract.” *Oresta v. Romano Bros., Inc.*, 137 W.Va. 633, 644, 73 S.E.2d 622, 628

(1952). Further, “[i]n case of doubt, the construction of a written instrument is to be taken most strongly against the party preparing it.” *Henson v. Lamb*, 120 W.Va. 552, 558, 199 S.E. 459, 461-62 (1938). See also, *Richmond Homes*, 228 W.Va. 125, 140 n.61, 717 S.E.2d 9098, 924 n.61 (noting “that ambiguous contract provisions, especially those having the qualities of a contract of adhesion, are to be construed against the drafter”(internal citations and quotation omitted)).

In the instant case, there appears to be no dispute that Home Inspections was the drafter of the inspection contract. The relevant provision of which reads:

**ARBITRATION:** Any dispute concerning the interpretation of this agreement or arising from this inspection and report, except one for inspection fee payment, shall be resolved informally between the parties.

This provision anticipates only that any disputes between the parties “shall be resolved informally between the parties.” Only the heading of the paragraph alludes to arbitration. Nowhere in the above-quoted provision do the parties agree to an “arbitration” of future disputes between them. Additionally, the Court notes that this provision does not include terms such as how are arbiters to be selected, how many arbiters will decide the issue, where arbitration will take place, by what rules and by whose authority and whether or not the arbiters’ grant or denial of a reward is binding or appealable. The clause does not say that the informal resolution between the parties would be binding and exclusive of any other remedy.

The Court cannot find that by agreeing to resolve any dispute informally, the parties have mutually assented to be bound to arbitration when there is a lack of *any* term describing the arbitration process that Home Inspections asserts the parties agreed to make use of to settle disputes.

Mr. Hardin has provided the Court with a number of examples where language

similar to that in the home inspection agreement here - "shall be resolved informally between the parties" – has been but a first step prior to arbitration in arbitration agreements which have been reviewed by various courts. See, *Kramer v. Eagle Eye Home Inspections, Inc.*, 14 Neb. App. 691, 716 N.W.2d 749 (2006); *CUNA Mut. Ins. Soc'y v. Office & Prof'l Emples. Int'l Union, Local 39*, 2004 U.S. Dist. LEXIS 24120\* (W.D., Wisc. 2004); *G&G Closed Circuit Events, LLC v. Castillo*, 2017 U.S. Dist. LEXIS 42022\*; 2017 WL 1079241 (N.D. Ill. 2017).

Our Supreme Court has consistently held that "a contract is not rendered ambiguous merely because the parties disagree as to its construction." *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W.Va. 482, 508, 694 S.E.2d 815, 841 (2010). See also Syl. Pt. 3, in part, *Energy Dev. Corp. v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003) ("The mere fact that parties do not agree to the construction of a contract does not render it ambiguous.") While the parties here obviously disagree as to the construction to be given the language of the inspection contract which requires that any dispute involving the inspection or the report to be "resolved informally between the parties", reading this provision to mean that the parties have agreed to a binding arbitration of their disputes leads to an absurd result. To reach such a conclusion, one would need to look to headings in a contract to form the actual agreement of the parties particularly where, as here, a requirement that a dispute be "resolved informally between the parties" clearly does not imply that the parties have agreed to binding arbitration.

In the cases from other jurisdictions referred to above, it is clear that such informal resolution of disputes is distinct from an agreement to resolve a dispute through binding arbitration which, as shown, is the next step in the resolution process when an informal resolution cannot be reached. Our Supreme Court "will not generally



interpret a contract in a manner that creates an absurd result." *Dunbar Fraternal Order of Police, Lodge No. 119 v. City of Dunbar*, 218 W.Va. 239, 244, 624 S.E.2d 586, 591 (2005). To interpret the provision here in question as requiring arbitration would lead to such an absurd result.

Having fully considered the matter, the Court is of the opinion that the writing presented fails to require the disputes to be resolved by binding arbitration, who the arbitrator would be, by what rules arbitration would be demanded and resolved and the finality and effect of submission to arbitration. If Home Inspectors wanted arbitration, it had to clearly and unambiguously set forth those requirements which would enable a court to enforce the terms of the agreement. Examining the sparse reference to "informal dispute" resolution cannot find or divine a binding agreement to arbitrate. Having so determined, the Court need not address the additional issues of lack of subject matter jurisdiction or the alleged failure of Mr. Hardin to state a claim upon which relief can be granted. These grounds depended on the existence of valid arbitration agreement. The Motion of Home Inspections of VA and WV, LLC is DENIED.

The Court notes the objections of all the parties to any and all adverse rulings herein contained.

The Clerk is directed to send an attested copy of this Order to all counsel of record and to any self-represented parties.

/s/ Michael Lorensen  
Circuit Court Judge  
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit [www.courtswv.gov/e-file/](http://www.courtswv.gov/e-file/) for more details.