John + Wesner

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OHIO CO CIRCUIT COURT

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

MASON LOUIS COTTRELL,
Plaintiff,

v.

CASE NO. 19-C-159
Judge David J. Sims

LOUIS COTTRELL, JR.,
CHESAPEAKE APPALACHIA, LLC,
SWN PRODUCTION COMPANY, LLC,
JAMESTOWN RESOURCES, LLC,
APPALACHIA MIDSTREAM SERVICES, LLC, and
STATOIL USA ONSHORE PROPERTIES, INC., n/k/a
EQUINOR USA ONSHORE PROPERTIES, INC.,
Defendants.

ORDER

This matter comes before the Court on Defendants SWN Production Company, LLC (hereinafter referred to as "SWN") and Statoil USA Onshore Properties, Inc., n/k/a Equinor USA Onshore Properties, Inc.'s (hereinafter referred to as "Equinor") Motion to Dismiss and Compel Arbitration. Appalachia Midstream Services, LLC (hereinafter referred to as "AMS") also filed a Motion to Dismiss alleging similar grounds. Chesapeake Appalachia, LLC (hereinafter referred to as "CHK")[1] and Jamestown Resources, LLC (hereinafter referred to as "Jamestown") filed a Joinder to the Motion to Dismiss and Compel Arbitration.[2] Plaintiff has filed Responses in opposition to each of the Motions. The Court has reviewed the pleadings and makes the following decision.

I. FACTUAL BACKGROUND

Plaintiff is the beneficiary of a Trust evidenced by a Deed dated July 12, 2007, from his mother to his father and Defendant in this matter, Louis Cottrell, Jr. (hereinafter referred to as "Mr. Cottrell"), as Trustee for Plaintiff. The Deed provides that Mr. Cottrell, as Trustee, may grant,

[1] Chesapeake Appalachia, LLC has filed for Chapter 11 bankruptcy protection.

[2] The corporate defendants are referred to herein collectively as "Defendants".

convey or incur debt on said land for the benefit of Plaintiff. Plaintiff was only seven years old when his mother deeded 37.5 acres to him, not in his own name, but rather to Mr. Cottrell, in trust for Plaintiff. Mr. Cottrell then engaged in transactions with various gas and mineral corporations, signing contracts which encumbered the land and allowed for the depletion of its resources in return for substantial sums of money. All money given by Defendants to Mr. Cottrell were kept, spent, or wasted by him for his own benefit. Plaintiff received none of it.

Mr. Cottrell entered into a Paid-Up Oil and Gas Lease with CHK with an effective date of March 10, 2011, referred to as "Chesapeake Lease."

SWN and Equinor were assigned the interests of the original Lessee, CHK by Assignment dated April 20, 2012, between CHK and Equinor.

By an Assignment dated April 20, 2012, Equinor was assigned an interest in the CHK Lease between Mr. Cottrell and CHK. SWN was also assigned an interest in the CHK Lease.

Mr. Cottrell entered into a written contract with SWN dated October 20, 2017, titled "Term Pipeline Option and Right Of Way Agreement." ("SWN Contract").

Mr. Cottrell ultimately converted most, if not all, of the funds he received from Defendants to his own personal use and breached his fiduciary duties to Plaintiff.

Under the terms of the CHK Lease, Mr. Cottrell agreed to arbitrate all disputes arising out of or concerning the Lease. That provision states:

> ARBITRATION. In the event of a disagreement between Lessor and Lessee concerning this Lease or the associated Order of Payment, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. Arbitration shall be the exclusive remedy and cover all disputes, including but not limited to, the formation, execution, validity and performance of the Lease and Order of Payment. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee.

II. PROCEDURAL BACKGROUND

On June 27, 2019, Plaintiff filed a Complaint against Mr. Cottrell. After having been served with the Complaint, Mr. Cottrell failed to appear or otherwise defend in this action. On August 6, 2019, Plaintiff filed a Motion for Default against Mr. Cottrell which was granted by the Court on August 7, 2019.

On August 19, 2019, the Court entered an Order granting specific performance requiring Mr. Cottrell to execute a deed for the property in question to Plaintiff individually and terminated Mr. Cottrell's authority to act as Trustee.

On January 9, 2020, Plaintiff filed a Motion to Amend the Complaint to add Defendants. The Court granted said Motion on January 9, 2020.

III. STANDARD OF REVIEW

The proper scope and standard of review in assessing a Motion to Dismiss are as follows:

> [T]he purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint. 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. Dismissal for failure to state a claim is proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

Mey v. Pep Boys- Manny, Joe & Jack, 228 W.Va. 48, 717 S.E.2d 235 (2011) (internal citations and quotations omitted).

Thus, where Plaintiff sets forth allegations that, if proven to and believed by the finder of fact, would entitle him to relief under the law, the Motion to Dismiss should be denied, and the case should proceed. Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim under Rule 12(b)(6) must construe the complaint in the light most favorable to the plaintiff, taking all allegations as true. *Roth v. DeFelice Care, Inc.*, 226 W.Va. 214, 700 S.E.2d 183 (2010). The Court in *Roth* further stated that a trial court

considering a motion to dismiss for failure to state claim must liberally construe the complaint so as to do substantial justice and that in appraising the sufficiency of a complaint on a motion to dismiss for failure to state claim, 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. Thus, a Plaintiff resisting a Motion under Rule 12(b)(6) has a light burden. Indeed, "if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied." *John W. Lodge Dist. Co. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157, 159 (1978).

"Only matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b) R. C. P., and if matters outside the pleading are presented to the court and are not excluded by it, the motion should be treated as one for summary judgment ..." Syl. pt. 4, in part, *U.S. Fidelity & Guar. Co. v. Eades*, 150 W. Va. 238, 144 S.E.2d 703 (1965).

"When 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 Plaintiff fall within the substantive scope of that arbitration agreement." *Kirby v. Lion Enterprises, Inc.*, 233 W.Va. 159, 756 S.E.2d 493 (2014) (citing Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010)).

When a party to an arbitration agreement makes a motion to dismiss a complaint and to compel arbitration, the power of the trial court to proceed in the case is constrained. *Bayles v. Evans*, 842 S.E.2d 235, 242, (W.Va. 2020). "In the context of cases affected by the Federal Arbitration Act, we have found that courts are limited to weighing only two questions: does a valid arbitration agreement exist? And do the claims at issue in the case fall within the scope of the

arbitration agreement?" *Golden Eagle Res., II, L.L.C. v. Willow Run Energy, L.L.C.*, 836 S.E.2d 23, 29 (W. Va. 2019).

In Syllabus Point 2 of *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 251, 692 S.E.2d 293, 294 (2010), the Court held

> When 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.

IV. DISCUSSION

Plaintiff's legal claims against Defendants in this matter are based upon the failure to obtain court approval for each contract pursuant to West Virginia Code §37-1-2, alleging that the failure to do so results in the voiding of each contract.

Defendants' position on their Motions to Dismiss and Compel Arbitration is that the issue as to whether court approval was necessary to form a valid lease must be decided in arbitration.

Pursuant to *State ex rel. TD Ameritrade, Inc. v. Kaufman*, the Court must determine whether there is a valid, enforceable arbitration agreement, and whether the claims asserted by Plaintiff fall within the substantive scope of the agreement.

"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." Syllabus Point 9, *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), cert. granted, judgment vacated sub nom. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012).

However, the Court must apply the doctrine of severability in this matter. The doctrine of severability requires a party resisting arbitration to exclusively challenge the enforceability of the arbitration clause, and not the overall contract:

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 of Circleville, Inc. v. Spencer, 237 W. Va. 379, 387-88, 787 S.E.2d 650, 658-59 (2016) (quotes and footnotes omitted).

Plaintiff contends that the Court must consider the other links in the analytic chain which *Schumacher* lays forth in Syllabus Points 5, 6 and 7 that are dispositive in this matter:

5. Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, where a delegation provision in a written arbitration agreement gives to an arbitrator the authority to determine whether the arbitration agreement is valid, irrevocable or enforceable under general principles of state contract law, a trial court is precluded from deciding a party's challenge to the arbitration agreement. **When an arbitration agreement contains a delegation provision, the trial court must first consider a challenge, under general principles of state law applicable to all contracts, that is directed at the validity, revocability or enforceability of the delegation provision itself.**

6. "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." Syllabus Point 9, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011), reversed on other grounds by *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 132 S.Ct. 1201, 182 L. Ed. 2d 42 (2012).

7. **Under the Federal Arbitration Act, 9 U.S.C. § 2, there are two prerequisites for a delegation provision to be effective.** First, the language of the delegation provision must reflect a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration agreement to an arbitrator. **Second, the delegation provision must itself be valid, irrevocable and enforceable under general principles of state contract law.** (Emphasis added)

In Syllabus Point 4 of *State ex rel. Richmond Am. Homes of W. Virginia, Inc. v. Sanders*, 228 W. Va. 125, 129, 717 S.E.2d 909, 913 (2011), the Court held in part:

> Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, only if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract, as opposed to generally challenging the contract as a whole, is a trial court permitted to consider the challenge to the arbitration clause.

In the present case, Plaintiff is generally challenging the contract as a whole and is not explicitly challenging the enforceability of an arbitration clause within the contract.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967), the Supreme Court held

> [I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. . . . [A] federal court may consider only issues relating to the making and performance of the agreement to arbitrate.

In *Bayles v. Evans*, the West Virginia Supreme Court stated

> [T]he severability doctrine adopted in *Prima Paint* stands for the principle that when a party raises claims of fraud, those claims must be directed solely to the making and performance of the agreement to arbitrate. Claims of fraud in the inducement of the contract in general must be resolved by an arbitrator. Because *Prima Paint* sued to rescind the entire contract, the Supreme Court presumed the arbitration agreement was valid and enforceable. *Prima Paint* was, therefore, compelled to arbitrate its fraudulent inducement claim. 842 S.E.2d at 247.

In the present case, Plaintiff does not argue that the arbitration agreement was procured by fraud. Instead, Plaintiff asserts that the entire contractual relationship is void for the failure to obtain court approval for each contract pursuant to West Virginia Code §37-1-2. Plaintiff argues that as a result no contractual relationship was formed and therefore, there is no arbitration agreement.

Because Plaintiff's claims go to the overall existence of a contract, the doctrine of severability requires this Court to presume that a valid arbitration agreement was formed by the parties. Accordingly, the question of the lack of court approval of the contract raised by Plaintiff must be weighed by the arbitrator. It is accordingly

ORDERED that Defendants' Motions to Compel Arbitration shall be and are hereby GRANTED.[3] It is further

ORDERED that this matter is stayed pending arbitration. It is further

ORDERED that the Clerk shall provide an attested copy of this Order to all counsel of record.

To which rulings the respective objections of the parties are hereby noted and preserved.

ENTER this 1st day of September, 2020.

Judge David J. Sims

A copy, Teste:
Brenda K. Miller
Circuit Clerk

[3] The Court abhors the result that the law requires in this case. As Judge Arthur M. Recht wisely counseled "judging is easy ... just follow the law." The Court believes it has done so in this case. However, the law of arbitration is anti-consumer and denies citizens their right to inexpensively and expeditiously access the Courts in this State and seek redress by a jury of their peers. (Why pay overpay three arbitrators when you have one judge for free?) The Court invites Plaintiff to appeal this decision.