/s/ David J. Sims
Circuit Court Judge
Ref. Code: 23VLIVDIX

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CC-35-2019-C-159
Ohio County Circuit Clerk
Brenda L. Miller

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 and Statoil USA Onshore Properties, Inc., n/k/a Equinor USA Onshore Properties, Inc.'s (hereinafter referred to collectively as "Defendants") Motion to Dismiss and Compel Arbitration. Plaintiff has filed a Response in opposition to Motions and filed a Supplemental Memorandum in Opposition to Motion to Dismiss and Compel Arbitration. Defendants filed a Supplemental Reply in support of their Motions. The Court has reviewed the pleadings, considered the argument of counsel, 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, 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 Mr. Cottrell. 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 of the monies 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.

On September 1, 2020, this Court entered an Order granting Defendants' Motion to Compel Arbitration.

The matter was appealed by Plaintiff to the West Virginia Supreme Court of Appeals on September 30, 2020.

On May 1, 2023, the West Virginia Supreme Court of Appeals dismissed the appeal, vacated this Court's September 1, 2020 Order, and remanded the matter to this Court due the said Order being entered during Chesapeake Appalachia, LLC's automatic bankruptcy stay.

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. <u>DISCUSSION</u>

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 whether court approval was necessary to form a valid lease must be decided in arbitration.

Plaintiff seeks to sever and challenge the arbitration clause, including the delegation provision therein, contained within the Chesapeake Lease, focusing specifically and particularly on them as opposed to attacking them through a challenge upon the entire contract.

Plaintiff's challenge is based on (1) the lack of court approval pursuant to W. Va. Code §37-1-2 renders the arbitration clause and delegation provision void and unenforceable, and (2) Plaintiff disaffirmed the arbitration clause upon attaining the age of majority.

In *Parsons v. Halliburton Energy Servs,* 785 S.E.2d 844, 237 W. Va. 138 (2016), the West Virginia Supreme Court of Appeals addressed the enforceability of arbitration provisions, courts are analyzing and reconciling matters of state contract law.

> [F]ederal and West Virginia courts may refuse to enforce an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; see also W. Va. Code § 55_10_8 [2015] An arbitration agreement "is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."). We summarized the law in this way:
>
> 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.
>
> Syllabus Point 6, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011). Hence, a state court may assess whether an arbitration agreement is unenforceable under general principles of state law, "such as laches, estoppel, waiver, fraud, duress, or unconscionability." Syllabus Point 9, Id. (emphasis added). "To be clear, this list is not exclusive. Misrepresentation, duress, mutuality of assent, undue influence, or lack of capacity, if the contract defense exists under general common law principles, then it may be asserted to counter the claim that a . . . provision binds the parties. Even lack of consideration is a defense." *Geological Assessment & Leasing v. O'Hara*, 236 W. Va. 381, 387, 780 S.E.2d 647, 653 (2015).

785 S.E.2d 844, 852, 237 W. Va. 138, 146.

Plaintiff argues that the arbitration provision (and the delegation clause) is completely impotent, non-existent, and unenforceable for failure to follow state law, and so it is not only proper but incumbent upon the Court to resolve that issue. Plaintiff asserts that in order to determine the validity of the arbitration provision (and delegation clause), the Court must resolve whether under state law the arbitration provision legally exists, and that decision rides on the outcome of the ultimate issue respecting court approval of the Chesapeake lease by its separate clauses and/or disaffirmance by the plaintiff upon attaining the age of majority.

The West Virginia Supreme Court has previously held that if a statutory scheme involving the sale or encumbrance of real estate is not followed the transaction is void *ab initio*. See, *State ex rel. Ware v. Henning*, 212 W. Va. 189, 569 S.E.2d 436 (W. Va. 2002). In *State ex rel. Ware v. Henning*, this Court held that a transfer of land which did not comply with the constitutional and statutory provisions of W.Va. Code §35-1-6 was void *ab initio*. Consistent with this holding and reasoning, a transfer, sale, or encumbrance in violation of W. Va. Code §37-1-2 is void *ab initio* and, thus the arbitration clause was never approved by the Court and therefore does not legally exist.

If Plaintiff is correct, then there simply is no valid arbitration clause and no delegation provision that Defendants can rely upon.

> An illegal contract is as a rule void—not merely voidable—and can be the basis of no judicial proceeding. No action can be maintained upon it, either at law or in equity. This impossibility of enforcement exists whether the grant is illegal in its inception, or whether, being valid when made, the illegality has been created by subsequent statute. . . . "If a contract is tainted with the vice of illegality, it is held to create no obligation, not from any consideration of the individual rights of the parties, who may be equally in fault, but from regard for the public." Generally, the illegality of a contract is a perfect defense to its enforcement, because the law will not require one to do, or punish him for not doing, that which it forbids him to do.

W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co., 820 S.E.2d 416, 423, 241 W. Va. 148, 155, 2018 W. Va. LEXIS 465, *19, 2018 WL 2769058 (internal citations omitted).

West Virginia Code §37-1-2 focuses specifically upon our scenario whereby a minor's trustee and "interested" gas and mineral corporations wish to enter into contracts encumbering the minor's land. In its fullness, and in obliging the contracting parties to obtain court approval as a prerequisite to having an effective agreement, the statute reads:

> If the guardian of any minor, or the committee of any insane person or convict, think that the interest of the ward or insane person or convict will be promoted by a lease or by a mortgage or by a trust deed upon or by a sale of his estates, or of an estate in which he is interested with others, infants or adults; **or if the trustee of any estate, or any person interested in any estate in trust, whether he be interested with others or not, think the interest of those for whom the estate is held will be promoted by a lease of the same, mortgage or trust deed upon the same, or a sale thereof; such guardian, committee, trustee, or beneficiary, whether the estate of the minor or insane person or convict, or any of the persons interested, be absolute or limited, and whether there be or be not limited thereon any other estate, vested or contingent, and whether the guardian, committee or trustee, or the minor, insane person, convict, or any of the persons interested, reside in this State or not, may, for the purpose of**

> **obtaining such sale, lease, mortgage or trust deed, file a bill in equity in the circuit court of the county in which the estate proposed to be leased, sold or encumbered by mortgage or trust deed or some part thereof may be, stating plainly all of the estate, real and personal, belonging to such infant or insane person or convict, or so held in trust, and all of the facts calculated to show the propriety of the sale, lease, mortgage, or trust deed.** The bill shall be verified by the oath of the plaintiff; and the infant or insane person or convict, or the beneficiaries in such trust, when not plaintiffs, and all others interested, shall be made defendants. **The word "lease" as used in this article shall include any mining or timber lease or any lease of any profit in land,** and the word "sale" shall include the sale of any undivided interest, or any part of the corpus of land, or anything in or growing upon land. (Emphasis added)

In calling for the full disclosure of a minor's estate implicated by the pending deal, in requiring the provision of "all of the facts calculated to show the propriety of the [contract]," by requiring the bill in equity, i.e., the petition, to be verified, and by compelling the Plaintiff to make all interested persons defendants, this court approval process can hardly be characterized as a perfunctory rubber stamp. The Legislature made it a sincere and serious process, for obvious reasons.

All of the contracts underlying Plaintiff's claims against Defendants, and separately and distinctly, the arbitration clause and delegation provision of the Chesapeake contract, fall squarely within the expressed reach of this statute.

Considering West Virginia Code §37-1-2 with rules of statutory construction, it is clear that the court approval process the statute prescribes to be mandatory. Its purpose is to protect minors, the insane and convicts, all of whom are under a legal disability, from being unfairly taken advantage of in business dealings over their estates. When the things that must be done to proceed for court approval are so comprehensive and formal, including laying out each and every proposed provision to determine its propriety, it is manifest that the Legislature did not intend to let those contracting away the rights of minors, insane and incarcerated people to simply opt to skip it all. Add to this *pari materia* consideration of all the associated statutes which apply to this same §37-1-2 court approval: §37-1-3, requiring the appointment of a guardian ad litem to minors; §37-1-5, a resultant decree approving of the contract must, among other things, require "ample security" to be given respecting a sale of estate on credit; §37-1-7, mandating that the proceeds from the deal "shall be invested under the direction of the court, for the use and benefit of the persons entitled to the estate,..."; §37-1-14, requiring guardians and committees to "enter into bond, with approved security, conditioned for the faithful application of the proceeds of sale or lease;" ...etcetera. Clearly, by structuring such an extensive system of court approval, our Legislature did not intend to allow contracting parties to simply ignore it all, enter into a contract with any provisions they choose to chuck within it, such as arbitration, and unfairly exploit the minor (or insane person or convict). The Legislature intended for it all to be employed, faithfully.

Furthermore, and as a long-standing principle observed by this Court in its 1983 decision, *Hodge v. Ginsberg*, "when the word may is in a statute made for the benefit of persons it is not permissive, but mandatory or compulsory." 172 W. Va. 17, 22, 303 S.E.2d 245, 250, 1983 W. Va. LEXIS 515, *15. In support of this principle, *Hodge* cites to *Trail v. Trail*. 56 W. Va. 594, 600, 49 S.E. 431, 434, 1904 W. Va. LEXIS 161. It is noteworthy that *Trail* is itself a 1904 decision, and being of similar vintage to §37-1-2, its observations of legislative intent in that era regarding what is and is not mandatory carry particular weight. Involving issues of creditors' claims upon an estate, what is important is this Supreme Court observation respecting the use of the word "may" in statutes designed to benefit persons:

> It is suggested that a difference exists between the two statutes from the fact that as to a dead man's estate the Code says the court "may" decree a distribution upon the report of debts whereas the other statute says "shall" decree. Now this statute was made for the benefit of creditors, and the law is that when this word "may" is in a statute made for the benefit of persons it is not comply permissive, but mandatory or compulsory. 20 Am. & Eng. Encyc. L. (2d Ed.) 237.

56 W. Va. 594, 600, 49 S.E. 431, 434, 1904 W. Va. LEXIS 161, *13 (bold added).

Moreover, the Court has indicated that West Virginia Code §37-1-2 is mandatory. In *Williams v. Skeens*, Justice Workman explained that not all transactions involving incompetents require court approval, just those such as involving real estate where a statutory mandate exists for approval, specifically citing to §37-1-2 for the ruling.

> Finally, we do not imply through this opinion that a committee must seek judicial approval of every transaction which it seeks to enact on behalf of an incompetent, only those transactions which require or suggest approval by statute such as a real estate sale or where the need for court approval is required by the principle of *stare decisis* as in all subsequent situations when a committee for an incompetent seeks to effect a will renunciation on behalf of its ward. See W. Va. Code §§ 37-1-2, -11, and 56-10-4.

401 S.E.2d 442, 447, 184 W. Va. 509, 514, 1990 W. Va. LEXIS 270, *18 (bold added.)

Because the Court ruled that a business transaction involving an incompetent's real estate requires court approval because, per §37-1-2, court approval is mandated for transactions over a minor's real estate, it can be said that our issue is already resolved. Section 37-1-2 is undeniably mandatory and the consequence of Chesapeake's decision to forgo court approval of the arbitration clause and delegation provision is the total voidance of the arbitration clause and the delegation provision. As succinctly set forth in *Conrad v. Crouch*, where minors' lands were sold without the necessary court approval, "it necessarily follows that the sale to [the buyers] is not merely voidable, but absolutely void." 69 S.E. 888, 891, 68 W. Va. 378, 385, 1910 W. Va. LEXIS 134, *13-14.

As a completely separate basis for defeating Defendants' Motions to Dismiss and to compel arbitration, Plaintiff argues that he successfully disaffirmed all the of the challenged contracts, arbitration clause and delegation provision included, promptly after reaching the age of majority. Plaintiff relies on the West Virginia Supreme Court's February 19, 2021, decision in *Fitness, Fun, & Freedom, Inc. v. Perdue*, 2021 W. Va. LEXIS 67, 2021 WL 653240 (memorandum decision).

When the lease housing the arbitration clause was signed on his behalf by his father, purportedly as his trustee, Plaintiff was under the disability of minority. When Plaintiff turned 18, he filed an action to have his father's trustee capacity dissolved, which was accomplished by this Court's *Order* of August 19, 2019. Within a matter of just a few months he brought Defendants into the existing court action, not on breach of contract contentions, but in formal disaffirmation of each contract, seeking a judgment declaring them void, and seeking the recovery of tort damages caused by each Respondent's misconduct. Plaintiff's amended complaint specifically declared all contracts "void" thus, disaffirmation is a formal and clear matter record.

Fitness, Fun, & Freedom, Inc. involved a trampoline park's liability release which the plaintiff signed while a minor but then wholly disaffirmed upon reaching the age of majority, in that case the long-standing right of an infant to disaffirm a contract was itself re-affirmed.

> West Virginia law clearly provides that "[c]ontracts by minors are generally not void, but voidable only, and may be ratified or disaffirmed after majority." Syl. Pt. 1, *Hobbs v. Hinton Foundry Mach. & Plumbing Co.*, 74 W. Va. 443, 82 S.E. 267 (1914). *See also* Syl. Pt. 2, *Andrews v. Floyd*, 114 W. Va. 96, 170 S.E. 897 (1933) ("Contracts of infants, generally, are not void, but voidable at infant's election, and may be ratified or disaffirmed after majority.). The rule was a part of our case law as early as 1877. *See* Syl. Pt. 2, *Gillespie v. Bailey*, 12 W. Va. 70 (1877) ("A deed or contract for the sale of land, executed by an infant, is not absolutely void, but may be either affirmed or avoided at his pleasure, after he attains his majority."). The record on appeal clearly shows that B.P. was a minor when he signed petitioner's Release, and that B.P. disaffirmed the Release, its arbitration clause, and its delegation provision, when he reached the age of majority. Accordingly, we find no error in the circuit court's determination that there was no valid, enforceable arbitration agreement between the parties.

2021 W. Va. LEXIS 67, *7-8, 2021 WL 653240.

As of the filing of his *Amended Complaint*, Petitioner has disaffirmed the contract housing the arbitration clause, as is his unquestionable right to do. This consequently clears the path to resolve the issue of whether the voidance of all the contracts actually runs back even further, to their inception, due to the failure to obtain the statutorily-mandated court approval. The disaffirmed contract containing the arbitration clause, with its delegation provision, is no obstacle.

In *Fitness, Fun*, the Court negated the arbitration clause on fraud grounds, and considered the contract to be with a minor, voidable once the disability of minority ended. Once the disability ended the now-adult had an opportunity to disaffirm a contract which purportedly bound him. In this case, it was not Plaintiff that signed the contract, but once his legal disability was removed, he had the trustee removed and then promptly acted to have the contracts declared void. The Court finds this case in accord with the principles and rationale underlying *Fitness, Fun*.

For all of the foregoing reasons, it is accordingly

ORDERED that Defendants' Motions to Dismiss and Compel Arbitration shall be and are hereby DENIED. It is further

ORDERED that the Clerk shall provide a 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 21st day of June, 2023.

David J. Sims

[redacted]

/s/ David J. Sims
Circuit Court Judge
Ref. Code: 23SWQRBZX

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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 and Statoil USA Onshore Properties, Inc., n/k/a Equinor USA Onshore Properties, Inc.'s (hereinafter referred to collectively as "Defendants") Motion Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure to Alter or Amend its Order entered June 21, 2023. Plaintiff has filed a Response in opposition to the Motion. The Court has reviewed the pleadings and the pertinent legal authority. It is accordingly

ORDERED that Defendants' Motion Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure to Alter or Amend its Order entered June 21, 2023, shall be and is hereby DENIED. It is further

ORDERED that the Clerk shall provide a 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 21st day of August, 2023.

David J. Sims
J[redacted]