

35512

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JIM ENNIS and  
CHILTON L. ENNIS,

Plaintiffs,

v.

CIVIL ACTION NO. 08-C-1179

KRISTINE ANDERSON,  
MATT CURREY,  
CURREY REALTY,  
SAM WOODS, dba ADVANTAGE  
HOME & ENVIRONMENT INSPECTIONS, INC., and  
JOHN DOES ONE to TEN,

Defendants.

ORDER

On the 28<sup>th</sup> day of May, 2009, came the parties by counsel for hearing upon various motions filed in this action. Whereupon the Court heard oral argument and representations of counsel and, having reviewed the motions and briefs of the parties, heard the arguments of counsel, and being otherwise advised in the premises, the Court does hereby find and rule as follows:

**PROCEDURAL HISTORY**

In their Complaint filed on or about July 16, 2008, Plaintiffs allege that they were induced to purchase certain real estate from Defendant Kristine Anderson by Defendants Anderson, Curry, and Curry Realty who provided to Plaintiffs certain reports of inspections of the subject property prepared by Defendant Advantage Home & Environment Inspections, Inc. ("Advantage"), dated November 15, 2006 and February 2, 2007.<sup>1</sup> Plaintiffs allege that the Advantage reports contained material misstatements of fact and that Advantage knowingly and intentionally delivered said reports to Defendant Matt Curry under circumstances indicating that the misstatements were likely to be

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<sup>1</sup> Said reports were appended to the Complaint as exhibits.

relied upon by prospective purchasers of the property. Plaintiffs further allege that all of the Defendants knowingly and intentionally participated in the delivery of the Advantage reports to Plaintiffs with the intention of inducing their reliance in purchasing the property, that they relied on said reports and that they have been damaged as a consequence. Plaintiffs claim that the Defendants made additional false representations in order to conceal their responsibility for the pre-sale misrepresentations contained in the reports. Finally, Plaintiffs claim in the alternative that if the Defendants' misrepresentations were not done with willful and actual fraud, i.e., done knowingly and intentionally, their misrepresentations were done with constructive fraud based upon a fiduciary and confidential relationship existing between the parties.

After service of the Summons and Complaint upon Defendant Sam Woods on October 4, 2008 Advantage timely filed its *Motion to Dismiss and/or Stay the Claims Asserted by Jim Ennis and Chilton L. Ennis Against Advantage, Pending Arbitration*, pursuant to WVCivP 12(b)(6) and/or Rule 56 on October 31, 2008 and noted in its pleading that it had been improperly identified in the Complaint as "Sam Woods, dba Advantage Home & Environment Inspections, Inc."<sup>2</sup> Advantage's Motion to Dismiss asserts that Plaintiffs are required to submit their claims to binding arbitration, given that their claims arise out of their alleged reliance upon the Advantage report which incorporates an arbitration provision as a condition precedent to civil action.

More specifically, Advantage states that on November 15, 2006, it was retained by Defendant Matt Curry to perform a visual home inspection of the subject property. Advantage performed a visual inspection and a follow-up visual inspection of the subject property and reports of the

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<sup>2</sup> Advantage Home & Environment Inspections, Inc. and Sam Woods are collectively referred to herein as "Advantage."

inspections were submitted to Mr. Curry. As stated in the report, Advantage maintains that the reports were confidential, prepared for Mr. Curry exclusively, and were not to be disclosed to third parties. Advantage further asserts that both of the inspections and the corresponding reports were performed in accordance with the *Agreement for Visual Home Inspection* (“Inspection Agreement”) which was incorporated into and clearly referenced in the report and which contained the confidentiality provisions as well as provisions requiring all disputes arising out of the inspection or corresponding reports to be submitted to binding arbitration. Paragraph 10 of the Inspection Agreement states:

Any dispute, controversy, interpretation or claim including claims for, but not limited to, breach of contract, any form of negligence, fraud or misrepresentation or any other theory of liability arising out of, from or related to this contract or arising out of, from or related to the Inspection, or Inspection Report shall be submitted to final and binding arbitration under the Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc. The decision of the Arbitrator appointed thereunder shall be final and binding and judgment on the Award may be entered in any Court of competent jurisdiction.

Citing *State of West Virginia ex rel. The Barden and Robeson Corp.*, 539 S.E.2d 106 (W.Va. 2000) as authority for the proposition that West Virginia law recognizes that a contract provision requiring arbitration of disputes creates a condition precedent to any right of action or suit arising under the contract, Advantage asserts that Plaintiffs should not be allowed to “cherry-pick” from the report at issue, i.e. choosing aspects of the reports favorable to their position and claiming reliance while ignoring less favorable terms pursuant to which the reports were prepared, and should be required to submit their claims to binding arbitration pursuant to the terms of the Inspection Agreement, particularly in light of Plaintiffs’ alleged reliance upon the inspection reports which were prepared per the terms of the Inspection Agreement.

On November 4, 2008, Defendants Anderson, Curry, and Curry Realty filed an Answer to the Complaint wherein they asserted a Crossclaim against Advantage, claiming they relied upon the Advantage reports and seeking indemnity should a judgment be rendered in Plaintiffs' favor against them. That crossclaim was never served on Advantage. Nevertheless, on February 6, 2009, Advantage filed a similar Motion to Dismiss or Stay the claims of Defendants Anderson, Curry, and Curry Realty pending arbitration.

On November 18, 2008, Plaintiffs filed a Memorandum in opposition to Advantage's Motion to Dismiss or Stay their Claims. Therein, Plaintiffs argue that Advantage's motion should be denied because Plaintiffs are not party to the Inspection Agreement. Plaintiffs cite to *United Asphalt Suppliers, Inc. V. Sanders*, 511 S.E.2d 134 (W.Va. 1998) for the legal proposition that "[a] court may not direct a non-signatory to an agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the non-signatory exception to the rule requiring express assent to arbitration should be invoked." *See* Syl. Pt. 3, *United, supra*. Plaintiffs further argue that there are issues of fact triable by a jury which prevent the entry of summary judgment and that Advantage waived any right to have Plaintiffs' claims arbitrated by failing to assert such a right when Plaintiffs' problems were first brought to its attention.

On or about March 18, 2009, Plaintiffs also filed a Motion for Default Judgment or, alternatively, a Motion for the Entry of a Scheduling Order, against Advantage. This Motion is addressed by separate Order of the Court.

Finally, on or about May 4, 2009, Plaintiffs filed a Motion to Deem Arbitration to be

waived/Motion to Deem Certain Contractual Provisions Unconscionable.<sup>3</sup> More specifically, Plaintiffs seek to have the one year statute of limitations contained in the Inspection Agreement deemed unconscionable.<sup>4</sup> Plaintiffs argue that they were not parties to the contractual agreement containing the arbitration requirement at issue, were never provided a copy of the Inspection Agreement prior to the filing of Advantage's Motion to Dismiss, and that Advantage purposely did not disclose the existence of the arbitration agreement until the filing of its motion to dismiss.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### **A. Advantage's Motion to Dismiss or Stay Claims of Defendants Anderson, Curry and Curry Realty**

It is clear to the Court from a review of the Crossclaim of Defendants Anderson, Curry, and Curry Realty against Advantage, more specifically Paragraph number one thereof, that Advantage was retained per the Inspection Agreement by Defendant Matt Curry to act on behalf of himself, as well as Defendant Anderson and Defendant Curry Realty. It is further clear to the Court that the provisions of the Inspection Agreement are applicable to their claims as their claims clearly "arise out of, from, or are related to the inspection and/or inspection reports" at issue and that their claims are thus governed by the arbitration provisions of the Inspection Agreement. The Court further finds that the language of the Inspection Agreement clearly and unambiguously mandates that such claims be submitted to binding arbitration and is binding upon Defendants Anderson, Curry and Curry Realty. Advantage's Motion in this regard is unopposed.

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<sup>3</sup> Plaintiff's motion was supported by the February 12, 2008, report of Dean Engineering Company which was attached as an exhibit.

<sup>4</sup> The Inspection Agreement contains a provision requiring all claims to be presented within one year of the date of inspection and provides that Advantage shall have no liability for any claims presented one (1) year after the date of inspection. Plaintiffs cite various opinions of the West Virginia Supreme Court of Appeals and United States District Court for the Southern District of West Virginia in support of their motion.

## B. Advantage's Motion to Dismiss or Stay Plaintiffs' Claims

Plaintiffs argue that they were not parties to the Inspection Agreement, were not provided a copy of the Inspection Agreement prior to the filing of Advantage's Motion to Dismiss, were not aware of the arbitration provisions contained therein and, under the holding of *United Asphalt Suppliers, Inc. v. Sanders*, 511 S.E.2d 134 (W.Va. 1998), should not be compelled to participate in arbitration of their claims because they are not signatories to the Inspection Agreement and there is no identity of interest present. Plaintiffs claim that *United* stands for the proposition that a non-signatory to an arbitration agreement can only be required to participate in arbitration under the non-signatory exception when there is an identity of interest. An identity of interest typically exists between closely related parties such as affiliated business.<sup>5</sup>

To the contrary, the *United* opinion recognizes that there are instances where a non-signatory to an arbitration clause may be equitably compelled to pursue its claims in arbitration. *See Untied*, 511 S.E.2d at 138 (citing, *Wilson v. Waverlee Homes, Inc.*, 954 F.Supp. 1530 (M.D.Ala) *aff'd*, 127 F.3d 40 (11<sup>th</sup> Cir. 1997). *United* further cites *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2<sup>nd</sup> Cir. 1995), wherein the Second Circuit recognized five theories for binding non-signatories to arbitration agreements. The five recognized theories include: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. *See Thompson* 64 F.3d at 776. In *JJ Ryan & Sons*, also cited in *United*, the Fourth Circuit noted that "[t]o decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual

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<sup>5</sup> *United* involved two businesses owned by the same individual, one which was a signatory to a contract containing an arbitration agreement and the other was not. The *United* opinion makes reference to the Fourth Circuit Court of Appeals holding in the case of *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4<sup>th</sup> Cir. 1998) where affiliated companies were involved.

allegations underlying the claims are within the scope of the arbitration clause, regardless of legal label assigned to the claim.” *J.J. Ryan & Sons*, 863 F.2d at 319. The arbitration clause at issue in this matter states:

***Any dispute, controversy, interpretation or claim including claims for, but not limited to, breach of contract, any form of negligence, fraud or misrepresentation or any other theory of liability arising out of, from or related to this contract or arising out of, from or related to the Inspection, or Inspection Report shall be submitted to final and binding arbitration under the Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc. The decision of the Arbitrator appointed thereunder shall be final and binding and judgment on the Award may be entered in any Court of competent jurisdiction.***

(*Inspection Agreement* at ¶ 10)(emphasis added).

It is clear to the Court from a review of the Complaint that Plaintiffs’ claims sound in fraud. It is further clear that Plaintiffs’ claims “arise out of, from, or are related to the inspections” of the subject property and the reports of those inspections dated November 15, 2006, and February 2, 2007. It is also clear that the reports are the linchpin of Plaintiffs’ claims of fraud in the inducement to purchase the subject property. Accordingly, the Court finds that the arbitration agreement encompasses the scope of claims advanced in the Complaint.

The question remains, however, as to whether Plaintiffs can be compelled to pursue their claims in binding arbitration as non-signatories to the Inspection Agreement.

“A court may not direct a non-signatory to an agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the non-signatory exception to the rule requiring express assent to arbitration should be invoked.” *See* Syl. Pt. 3, *United, supra*. Thus, the Court must decide whether there is evidence that would justify application to Plaintiffs of the non-signatory exception in order to compel them to pursue their

claims through binding arbitration.

Advantage advances two arguments for application of the non-signatory exception to Plaintiff's claims:

(1) the Inspection Agreement and its arbitration provisions were *incorporated by reference* into the inspection reports, particularly the November 15, 2006, report wherein it is stated on several pages, **“please also refer to the pre-inspection contract for detailed explanation of the scope of this inspection”**; and,

(2) if Plaintiffs claim to have relied upon the reports, they should not now be allowed to “cherry-pick” their reliance to exclude critical terms and conditions pursuant to which the reports were prepared, i.e., Plaintiffs are *estopped* from avoiding the arbitration provisions of the Inspection Agreement, given their claimed reliance upon the confidential inspection reports.

Both *incorporation by reference* and *estoppel* are theories which support enforcement of an arbitration provision against a non-signatory and are recognized in *Thompson*, supra. In *Thompson*, the court did not find the incorporation by reference exception applicable because it had not been shown that the document containing the arbitration agreement had been incorporated into any document adopted by the non-signatory. *Thompson*, at 777. However, in this instance, the Court finds that the arbitration agreement was incorporated by reference into the inspection reports. The Plaintiffs' claimed reliance upon the reports amounts to an adoption of the reports by Plaintiffs. By adopting the reports, Plaintiffs had constructive knowledge of the arbitration provisions of the Inspection Agreement.

In *Thompson*, the Second Circuit referred to its prior opinion in *Deloitte Noraudit A/S v.*

*Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060 (2<sup>nd</sup> Cir. 1993) wherein it had held that an accounting firm that had knowingly exploited an agreement containing an arbitration requirement was estopped from avoiding arbitration despite having never signed the agreement. *Thompson* at 778. In this instance, Plaintiffs have clearly exploited the confidential reports prepared by Advantage. The fact that the reports were confidential and prepared exclusively for Mr. Curry appears on several pages throughout the November 15, 2006, report. Mr. Curry nevertheless provided these confidential reports to Plaintiffs who claim, as indicated by their Complaint, reliance upon them exclusively. Without the confidential reports, Plaintiffs would have no claim against Advantage. Thus, Plaintiffs must rely upon the totality of the reports, including the arbitration requirements of the Inspection Agreement under which they were prepared, in order to maintain their claim against Advantage. Accordingly, the Court finds that in order to pursue their claims against Advantage, Plaintiffs must pursue their claim in arbitration.

**C. Plaintiffs Motion to Deem Arbitration Waived and Deem Certain Contractual Provisions Unconscionable**

Plaintiffs argue that Advantage waived its right to arbitration by waiting until it filed its Motion to Dismiss before asserting its rights and make issue of the fact that they were not provided a copy of the Inspection Agreement containing the arbitration provisions at the time Mr. Curry provided the reports to Plaintiffs.

The Court does not find the authority cited by Plaintiffs persuasive on the issue and finds that Advantage was timely in asserting its right to arbitrate Plaintiffs' claims. No "claim" was asserted against Advantage until the filing of the Complaint. Upon being served with Plaintiffs' Complaint, Advantage immediately sought to enforce the arbitration requirements of the Inspection Agreement.

In any event, it is the claimant's burden to initiate arbitration, not that of the respondent, particularly where, as here, a claim had not been articulated prior to the filing of the Complaint in this case.

The fact that Mr. Curry did not provide the Inspection Agreement to Plaintiffs at the time he provided them with Advantages's reports (which were confidential and prepared for his use exclusively) is of no consequence to Advantage's right to have Plaintiffs' claims heard in arbitration. Having claimed to have read and relied on the reports, it was incumbent upon Plaintiffs' to request a copy of the Inspection Agreement which was clearly referenced in Advantage's report. As noted above, Plaintiffs adopted and knowingly exploited the Advantage reports which incorporated the arbitration provision of the Inspection Agreement by reference.

The Court further finds that the arbitration requirements and one year limitations period contained in the Inspection Agreement were not unconscionable at the time the Inspection Agreement was entered by Defendant Matt Curry as claimed by Plaintiffs. The Court evaluates the Inspection Agreement as of the time it was entered, as opposed to the time when this lawsuit was filed. The Inspection Agreement was entered between Matt Curry and Advantage on November 14, 2006. The Inspection Agreement was intended to govern the actions of Advantage and Curry. Importantly, in Paragraph 11, the Inspection Agreement provides that "the inspection and report are performed for the sole, confidential and exclusive use and possession of [Matt Curry]. [Advantage] accepts no responsibility for use or misinterpretation by third parties." Said provision is undoubtedly intended, as it indicates, to avoid third-party liability on the part of Advantage to unknown third parties, like Plaintiffs, who manage to obtain copies of confidential inspection reports. Likewise, the arbitration and limitation provisions of the Inspection Agreement were intended to control the nature and type of claims that could be brought against Advantage. Said provisions were not

unconscionable at the time they were entered and cannot be said to be unconscionable merely because Plaintiffs now claim selective reliance upon the reports. To so hold would require Advantage to try a claim it had contracted to avoid and would render the Inspection Agreement and its provisions meaningless. *See United* at 138.

**D. Dismissal under Rule 12(b)(6) or Summary Judgment under Rule 56**

The motions filed by Advantage indicate that it seeks relief under Rule 12(b)(6) for failure to state a claim upon which relief can be granted or, alternatively, summary judgment under Rule 56. However, the motions were captioned or styled as motions to dismiss or to *stay* the claims of the various parties against Advantage pending arbitration. The Court finds that dismissal of the Plaintiffs' action or the entry of summary judgment are not merited at this juncture. The Court is mindful that the existence of an agreement to arbitrate does not deprive the Court of jurisdiction over a matter and where arbitration rights have been timely asserted and judicial proceedings are stayed until the outcome of arbitration, the Court maintains jurisdiction of the matter to allow judicial enforcement of any award. *See State of West Virginia ex rel. The Barden and Robeson Corp.*, 539 S.E.2d at 167 - 169. Thus, having found arbitration to be appropriate in this matter, the Court finds this matter should be stayed pending the outcome of arbitration.

**RULING**

Accordingly, the Court does hereby ORDER, ADJUDGE, and DECREE, that Defendant Advantage Home & Environment Inspections, Inc.'s, Motions to Stay the claims of Plaintiffs and the Crossclaims of Defendants Kristine Anderson, Matt Curry, and Curry Realty pending arbitration are GRANTED. Plaintiffs' Motions to Deem Arbitration Waived, and to Deem Certain Contractual Provisions Unconscionable are DENIED. This matter shall be submitted by Plaintiffs to binding

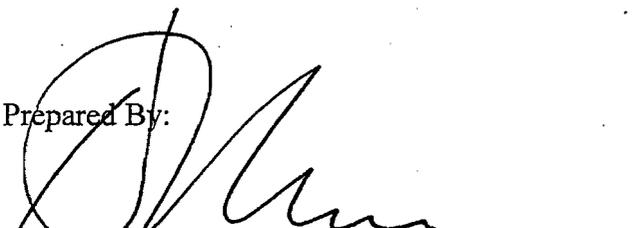
arbitration under the Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc., within Sixty (60) days of the entry of this Order. This Court shall maintain jurisdiction of this matter pending the outcome of the arbitration, at which time, the Court may enter Judgment upon any final and binding Award resulting from the arbitration.

The objections and exceptions of the parties aggrieved by this Order are duly noted and preserved.

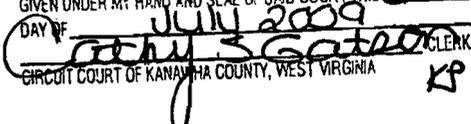
The clerk is directed to mail certified copies of this Order to counsel of record.

Enter this 22<sup>nd</sup> day of July 2009.

  
CHARLES E. KING, JUDGE

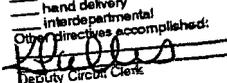
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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 24th DAY OF July 2009  
 CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA KP

**Circulated For Inspection To:**

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