NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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Fairfax, Virginia 22030-4009

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December 21, 2021

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Re: Utpal K. Dutta et al. v. Botero Homes et al. / CL-2021-11638
Letter Opinion

Dear Counsel:

Plaintiffs Utpal Dutta and Tanusree Dutta filed a Complaint against Defendants Botero Home LLC and Omar Botero-Paramo on August 13, 2021, seeking recission of a construction contract, or in the alternative, fraud in the inducement. Plaintiff did not allege a breach of contract claim. On December 10, 2021, the Court heard argument on Defendants' Motion to Compel Mediation and Arbitration and took the matter under advisement. For the following reasons, the Court GRANTS the Motion to Compel Mediation and Arbitration.

OPINION LETTER

BACKGROUND AND FINDINGS OF FACT

In 2020, Utpal Dutta and Tanusree Dutta wanted to have a custom home constructed in Virginia. They began communicating with Omar Botero-Paramo about the "Mediterranean IV" model home offered by Botero Homes LLC. Botero-Paramo represented that Botero Homes LLC could construct the Mediterranean IV model for $825,000, despite the Botero Homes website indicating a cost of $1,250,000. The Duttas paid $5,000 for architectural drawings and on July 14, 2020, entered into a contract with Botero Homes LLC for $825,000. Despite the contract price of $825,000, the first budget provided to the Duttas totaled $1,528,523.85. The Duttas sought to cancel the contract. The contract states that "[a]ny dispute arising out of or relating to this Agreement shall be submitted to Mandatory Mediation…." Compl. Ex. A § 7.2.

In December, the Duttas and Botero Homes LLC signed an Addendum to the Contract with an effective date of November 10, 2020, in an apparent attempt to resolve the disparity between the contract price and the proposed budget. The Addendum altered the contract price—from $825,000 to $906,000. The Addendum contained a mandatory mediation and arbitration clause, which states:

> 12.4. Resolution of Disputes: Mandatory Mediation and Arbitration. The [Duttas] and [Botero Homes LLC] agree that is [sic] mandatory that all claims, disputes or controversies *arising out of or related to this Construction Addendum*, its interpretation, application, or the services provided under this Construction Addendum, *or the relationship between the Parties, including allegations of fraud, misrepresentation or violation of any state or federal laws or regulations, arising under, as a result of, or in connection with this Construction Addendum, the Work performed by [Botero Homes LLC], and/or the Parties' relationship* (hereafter "Dispute"), shall first be attempted to be resolved through discussion and consultation between the Parties. In the event that discussion and consultation fail to resolve any portion of the Dispute, the Parties agree that it is mandatory to Mediate using The McCammon Group's mediation services and to convene the Mediation at the offices of [Botero Homes LLC], or at a mutually

> agreed location pursuant to the then application mediation rules of the [sic] McCammon Group. The fees for the mediation will be borne equally by the parties. If any portion of the Dispute cannot be resolved by mediation, the Parties agree that it is mandatory to have a new Mediation under the same rules of the first Mediation, within the next 30 days. If the second also fails, then the parties will move to arbitrate the Dispute. The arbitration will be administered and conducted by The McCammon Group according to its standard arbitration rules governing at the time a Party initiates a claim. The prevailing party in such Arbitration, [sic] shall be entitled to recover all reasonable attorney's fees, costs and expenses of litigation, expert fees, including all filing, administrative and arbitration fees. Compl. Ex. B § 12.4 (emphasis added).

The Addendum also contains a severability clause, which states: "In case any provision of this Construction Addendum is held to be illegal, invalid, or unenforceable, the validity, legality and enforceability of the remaining provisions shall not be affected." Compl. Ex. B § 12.9.

By May 14, 2021, the only step taken toward construction was an engineering grading plan submitted to, and ultimately rejected by, Fairfax County. On May 18, 2021, Botero-Paramo requested a $45,300 payment from the Duttas. The Duttas refused to pay and filed a Complaint with the Fairfax County Circuit Court on August 13, 2021, seeking recission of the contract, or in the alternative, fraud in the inducement. The Complaint was properly served on both Defendants on August 31, 2021.

On September 10, 2021, Defendants filed a Motion to Compel Mediation and Arbitration. Plaintiffs responded by arguing that the arbitration and mediation clauses "fall squarely within the statutory exceptions" and allow the revocation of the contract provision. Additionally, Plaintiffs argue, inter alia, that there was no meeting of the minds and the agreement does not bind Botero-Paramo, individually. In their reply brief, Defendants argue that the statutory exceptions do not apply in this case because Plaintiffs do not argue fraud in the inducement

specifically to the arbitration clause. Defendants also argue that equitable estoppel allows a non-signatory of a written agreement to compel arbitration.

ANALYSIS

Defendants Can Compel Mandatory Mediation and Arbitration Because Plaintiffs' Claims Are Not Directed to the Clause and Based Upon the Clause's Expansive Nature.

Plaintiffs argue that claims for fraud are exempt from the Virginia Arbitration Act, Va. Code § 8.01-581.01, *et seq.*, and Va. Code § 8.01-577(B). Moreover, Va. Code § 8.01-581.01 provides "a written agreement to submit any existing controversy to arbitration…is valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract." Because a finding of fraud in the inducement renders the entirety of the contract voidable, the arbitration clause is also unenforceable. *Packard v. Miller*, 198 Va. 557 (1956). Plaintiff cites *Rawoot et al. v. Bynum*, 21 Va. Cir. 100 (Fairfax Cir. Ct. 1990), for the proposition that the arbitration clause is unenforceable. Defendants argue that a claim for fraud, as opposed to a finding, is not sufficient to exempt arbitration provisions in a contract. There is no Virginia controlling authority cited by either party.

This Court finds Judge Williams' analysis in *Ahern v. Till Brothers, Inc. et al.*, 55 Va. Cir. 18 (Fairfax Cir. Ct. 2001), compelling in rejecting the argument that Plaintiffs' claim of fraud in the inducement of the agreement must be heard by the Court before it can be referred to mandatory arbitration. In recognizing that no Virginia appellate court has addressed the application of Va. Code § 8.01-581.01 to an allegation of fraud in the inducement, "similar language in the Federal Arbitration Act, 9 U.S.C. § 1-14 (1982), has been interpreted by the federal courts and is persuasive authority." *Id.* at *4.

> In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the central issue before the United States Supreme Court was whether a claim of fraud in the inducement of the entire

> contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators.... In reviewing language strikingly similar to the Federal Arbitration Act, the Court said that the claim of fraud in the inducement of the *arbitration clause itself*—an issue that goes to the making of the agreement to arbitrate—is one for the court to decide. And the Court further noted that the statutory language did not permit a court to consider claims of fraud in the inducement of the contract generally.... Therefore, the only issue of fraud the court would decide would be whether the arbitration clause itself was induced by fraud. *Ahern v. Toll Bros., Inc.*, 55 Va. Cir. 18, at *5.

While it is undeniably correct that a factual finding of fraud in the inducement would invalidate a contract's terms to include any arbitration clause, absent a claim of fraud that goes directly to the arbitration clause, the contract is valid until that factual finding is made. To hold otherwise would allow a party to avoid mandatory provisions of alternative dispute resolution based upon a mere allegation of a general claim of fraud.

Furthermore, the expansive terms of the Arbitration Clause contemplate the parties intended to arbitrate even general claims of fraud. "The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares." *Wilson v. Holyfield*, 227 Va. 184, 187 (1984).

In the case at bar, the alternative dispute resolution provisions are not narrowly drafted to arise only out of the contract, but actually contemplate allegations of fraud.

> The [Duttas] and [Botero Homes LLC] agree that is [sic] mandatory that all claims, disputes or controversies *arising out of or related to this Construction Addendum*, its interpretation, application, or the services provided under this Construction Addendum, *or the relationship between the Parties, including allegations of fraud, misrepresentation or violation of any state or federal laws or regulations, arising under, as a result of, or in connection with this Construction Addendum, the Work performed by [Botero Homes LLC], and/or the Parties' relationship* (hereafter "Dispute") [should first be attempted to be resolved by

> discussion and then mandatory mediation and arbitration]. Compl. Ex. B § 12.4

Thus, the broad arbitration language is not limited to obligations arising out of the contract; but also encompasses the relationship between the parties and disputes expressly related to fraud.

Assuming Arguendo That The McCammon Group Will Not Mediate or Arbitrate, the Severability Clause Permits the Appointment of Another.

Plaintiff argues that the McCammon Group's own policies exclude parties who have not consulted counsel previously or otherwise agree to arbitrate.

> *Generally*, McCammon does not handle arbitrations pursuant to external agreements unless all the parties have either: (a) executed the external agreement after consulting with counsel at the time of executing or developing the external agreement; or (b) [agree]. (Emphasis added).

There is no evidence in the record that McCammon is unwilling to waive its general policy. Moreover, even if McCammon is in fact unwilling to do so, severability provisions in the agreement would allow another to be selected.

Virginia favors the enforcement of mediation and arbitration agreements. *See TM Delmarva Power, LLC v. NCP of Va.*, 263 Va. 116, 112 (2002). However, there is nothing prohibiting parties from limiting the scope of the agreement. *Id.* In *Schuiling v. Harris*, the Virginia Supreme Court determined that specifying a particular arbitrator was severable from the arbitration agreement when the severability clause, by its plain language, permitted "severing not only whole provisions but also any part of any provision determined to be invalid or unenforceable in whole or in part for any reasons without affecting any other provision of the Agreement...." 286 Va. 187, 194 (2013) (internal quotations omitted).

In the present case, the severability clause states, "[i]n case any provision of this Construction Addendum is held to be illegal, invalid, or unenforceable, the validity, legality and

enforceability of the remaining provisions shall not be affected." Compl. Ex. B, § 12.9. The severability clause in *Schuiling* is nearly identical to the severability clause in the present case. Furthermore, "Code § 8.01-581.03 directs the circuit court to appoint an arbitrator when an arbitration agreement fails to appoint or provide for the appoint of an arbitrator, or when the appointed arbitrator fails to or is unable to act." *Id.* (citing *Waterfront Marine Constr. v. North End 49ers Sandbridge Bulkhead Groups A, B, and C*, 251 Va. 417, 429 (1996)). Thus, even if the McCammon group is unable or unwilling to arbitrate, the clause is still enforceable.

The Mediation and Arbitration Clause is Enforceable Against Both Defendants.

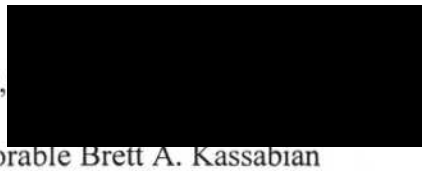
Plaintiffs argue that since the contract does not name Omar Botero-Paramo as a party, he is not bound by the arbitration clause and can be sued prior to arbitration and mediation. Defendants cite *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1644 (2020), to support the proposition that "equitable estoppel allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory." *Outokumpu* dealt with issues arising from the Federal Arbitration Act. The Virginia Arbitration Act mirrors the Federal Arbitration Act. "When the Virginia legislature adopts the provisions of a federal statute, the legislature is presumed to have adopted the construction that the federal courts have placed upon that statute." *Augusta Lumber Co., Inc. v. Broad Run Holdings LLC*, 71 Va. Cir. 326, at *2 (Fairfax Cir. Ct. 2006) (holding that the language of the Virginia Uniform Arbitration Act mirrors the Federal Arbitration Act and federal case law is applicable in Virginia cases involving arbitration). Furthermore, the Virginia Supreme Court has held that "a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Bank of the Commonwealth v. Hudspeth*,

282 Va. 216, 222 (2011). Therefore, pursuant to the United States Supreme Court's ruling in *Outokempu* and the Virginia Supreme Court's ruling in *Hudspeth*, this Court finds that Botero-Paramo individually is permitted to compel mediation and arbitration by equitable estoppel because the Duttas must rely on the contract to assert any claims against him. *See GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020); *Bank of the Commonwealth v. Hudspeth*, 282 Va. 216, 222 (2011).

Conclusion

For the reasons stated, the Court grants the Motion to Compel Mediation and Arbitration and stays this case. The Court directs Mr. Peterson to circulate a fully endorsed order to Mr. Biggs for his objections and submit same to Judge's Chambers for entry within the next 14 days. The Court wishes both counsel all the best over the Holidays.

Sincerely,



The Honorable Brett A. Kassabian
Fairfax County Circuit Court Judge