



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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COUNTY OF FAIRFAX

CITY OF FAIRFAX

May 7, 2024

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Re: Common Living, Inc. d/b/a NOAH v. Beamons Mill Property, LLC, et al., CL 2023-18295

Dear Mr. Smith and Mr. Sieg:

This matter is before the court on Defendant's revised demurrer.1 The court heard argument on May 2, 2024 and took the matter under advisement.2 For the reasons which follow, the court now sustains the demurrer and orders the parties to proceed to arbitration and to apply the Procedures for Large, Complex Commercial Disputes of the AAA's

1 "A demurrer will be sustained if the pleading, considered in the light most favorable to the plaintiff, fails to state a valid cause of action. (Citations omitted). A demurrer tests only the legal sufficiency of a pleading, not matters of proof." W.S. Carnes, Inc. v. Bd. of Supervisors, 252 Va. 377, 384 (1996).

2 On March 8, 2024, after oral argument on Defendant's initial demurrer, the court allowed Defendants to file a revised demurrer as the parties had provided the court at that argument with documents that had not been provided with the initial demurrer.

BACKGROUND

Plaintiff entered into multiple identical contracts with Defendants to provide property management services at workforce housing properties owned by Defendants. On January 27, 2023, Defendants filed a demand for arbitration against Plaintiff. Following Plaintiff's timely filing of an answer on February 14, 2023, a preliminary hearing was held by the Arbitrator on July 25, 2023.

The hearing of July 25, 2023 resulted in an *Order* of the Arbitrator, dated July 31, 2023, which both parties' counsel signed as "WE ASK FOR THIS."<sup>3</sup> The *Order* provided, *inter alia*, that the "Parties agree to a mutual waiver of any objection to proceeding with Arbitration under Sections 13.1 and 13.2 of the Contracts." *Order* ¶ 1. The *Order* also provided that the "Parties agree that the Arbitration will proceed under the AAA's Complex Commercial Arbitration Rules, and the Parties waive application of the Expedited Arbitration Procedures provided for in Section 13.3 of the Contracts." *Order* ¶ 2.<sup>4</sup>

On or about November 15, 2023, the Arbitrator issued an *Opinion and Order Establishing Rules and Procedures of Arbitration* ("*Opinion and Order*") in which the Arbitrator reiterated that the parties had "agreed to waive application of *The Expedited Arbitration Procedures* provided for in Section 13.3 of their Contracts."<sup>5</sup> In the *Opinion and Order*, the Arbitrator stated:

[T]his Arbitrator was self-ordered to "under the authority provided in Section 13.4 of the Contract establish the the

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<sup>3</sup> The court notes that neither party attached the *Order* of July 31, 2023 to its initial demurrer or opposition, or to the revised demurrer and opposition. The court was not made aware of this *Order* until the oral argument on the revised demurrer on May 2, 2024.

<sup>4</sup> The *Order* also reiterated the parties' contractual agreement that "Illinois law applies to this matter without regard to conflict of law principles." In the *Order*, the parties also agreed that "the location of the Arbitration shall be a mutually agreeable location in Virginia." This agreement modified the contracts, which required the hearing to be "at a location in Illinois the Arbitrator designates." § 13.4.

<sup>5</sup> The *Opinion and Order* also reiterated that the parties had agreed upon "the application of Illinois law without regard to conflict of law principles to the issues in this case," but did not reiterate that the Parties had also agreed that "the Arbitration will proceed under the AAA's Complex Commercial Arbitration Rules, and the Parties waive application of the Expedited Arbitration Procedures provided for in Section 13.3 of the Contracts." *Order* ¶ 2.

*rules and procedures for the Arbitration based upon the proposals submitted." . . .*

This hearing procedure cannot deviate from the express language of Section 13.4 of the Parties Agreement . . . .

On or about December 15, 2023, Plaintiff filed this action, consisting of three counts: Count I (Application to Stay Pursuant to Va. Code § 8.01-581.02(B)); Count II (Declaratory Judgment); and Count III (Injunctive Relief).

In Count I, Plaintiff requests the court to "stay the entirety of the arbitration pursuant to Va. Code § 8.01-581.02(B)" and to "find that [Plaintiff] did not agree to submit the claims and damages to arbitration." *Complaint*, ¶ 68.<sup>6</sup> Count I also requests the court to "find that the Arbitrator lacks authority to award any damages or to hear any claims beyond a demand for interpretation and enforcement of specific terms of the Parties written contacts . . . ." *Complaint*, ¶ 69.

Count II requests, in the alternative to Count I, a declaratory judgment "determining that the Arbitrator lacks authority to adjudicate the claims and damages alleged by Defendants against" Plaintiff. *Complaint*, ¶ 77.

Count III requests, also in the alternative to Count I, "temporary and permanent injunctive relief to prevent arbitration of claims and damages which are beyond the arbitrator's authority." *Complaint*, ¶ 85.

An arbitration hearing, to be conducted pursuant to § 13.4, is scheduled for May 13, 2024.

#### THE PARTIES' POSITIONS

The gravaman of the Parties' dispute is whether the Arbitrator correctly concluded that arbitration should be conducted pursuant to the procedures set forth in § 13.4 of the Parties' contracts, or pursuant to the *Procedures for Large, Complex Commercial Disputes of the AAA's Commercial Arbitration Rules*. Defendants argue first that, pursuant to the contracts, Illinois law governs, which Plaintiff does

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<sup>6</sup> Code § 8.01-581.02(B) provides:

On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

not dispute as to substantive law, although Plaintiff contends that Virginia procedural law should apply.

On the merits, Defendants contend that Plaintiff has agreed to arbitration and that the arbitration is governed by § 13.4 of the Parties' contracts, which Plaintiff disputes, asserting that the "claims alleged in the arbitration are beyond the Arbitrator's authority under Section 13.4." *Opp.* 8.

Defendants also contend that the issue of arbitrability is reserved to the Arbitrator, while Plaintiff asserts that Virginia law "authorizes the court to determine whether there is an agreement to arbitrate the specific controversy before the court," *Waterfront Marine Constr. v. N. End 49ers Sandbridge Bulkhead Groups A*, 251 Va. 417, 425 (1996).

*Waterfront Marine Constr.* held:

Code § 8.01-581.02(B) authorizes the court to determine whether there is an agreement to arbitrate the specific controversy before the court, that is, to decide questions of arbitrability. . . .

[I]n the absence of a clear agreement showing that the parties intended that the arbitrator decide questions of arbitrability, that question is to be resolved by the court.

251 Va. at 425, 427.

#### ANALYSIS

##### Which Law Applies

At the outset, the court agrees with Defendants that Illinois substantive law governs as the contracts state in pertinent part in § 14.6: "This Agreement, its performance, and the parties' relationship shall all be governed, interpreted and construed under Illinois law." Nonetheless, the court also agrees with Plaintiff that Virginia procedural law applies, *i.e.*, that, "in the absence of a clear agreement showing that the parties intended that the arbitrator decide questions of arbitrability, that question is to be resolved by the court." *Waterfront Marine Constr.*, *supra*, 251 Va. at 427. As will be discussed, *infra*, however, the court finds that there was a "clear agreement showing that the parties intended that the arbitrator decide questions of arbitrability" in that the Parties agreed, as reflected in the Order of July 31, 2023, that "the Arbitration will proceed under the AAA's Complex Commercial Arbitration Rules" and Rule 7 of those Rules provides that the arbitrator "shall have the power to rule on . . . the arbitrability of any claim or counterclaim . . . ."

## The Contracts' Provisions

In the contracts, the Parties agreed that each party could "submit an unresolved Dispute to binding arbitration under the Expedited Arbitration Procedures of the AAA's Commercial Arbitration Rules ("Arbitration")." § 13.3. The contracts further provide a hearing procedure in § 13.4 (which the Parties refer to as the "baseball procedure").

The Parties, however, modified the contracts when they agreed, as reflected in the Arbitrator's Order of July 31, 2023, to introduce new elements into the details of the contracts. See *Schwinder v. Austin Bank*, 348 Ill. App. 3d 461, 468 (2004) ("'modification' of a contract is a change in one or more respects which introduces new elements into the details of the contract, or cancels some of them, but leaves the general purpose and effect undisturbed.").<sup>7</sup>

Under substantive Illinois law:

A modified contract containing a term inconsistent with a term of an earlier contract between the same parties is interpreted as including an agreement to rescind the inconsistent term in the earlier contract. (citations omitted). The modified contract is regarded as creating a new single contract consisting of so many of the terms of the prior contract as the parties have not agreed to change, in addition to the new terms on which they have agreed.

*Schwinder*, 348 Ill. App. 3d at 469.

As set forth in the Arbitrator's Order of July 31, 2023, the Parties agreed "to a mutual waiver of any objection to proceeding with Arbitration under Sections 13.1 and 13.2 of the Contracts" (*Order* ¶ 1), agreed that "the Arbitration will proceed under the AAA's Complex Commercial Arbitration Rules," and "waive[d] application of the Expedited Arbitration Procedures provided for in Section 13.3 of the Contracts." *Order* ¶ 2.<sup>8</sup> Thus, anything in the contracts which is inconsistent with the AAA's Complex Commercial Arbitration Rules is

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<sup>7</sup> It is "entirely competent for parties to a contract to modify or waive their rights under it and embed new terms upon it." 348 Ill. App. 3d at 468. And "parties to a contract are ordinarily as free to change it after making it as they were to make it in the first instance." *Id.*

<sup>8</sup> The parties also agreed that "the location of the Arbitration shall be a mutually agreeable location in Virginia" (*Order* ¶ 4), rather than "at a location in Illinois the Arbitrator designates." § 13.4.

deemed rescinded.<sup>9</sup>

In the *Procedures for Large, Complex Commercial Disputes of the AAA's Commercial Arbitration Rules*, Rule 33 (*Conduct of Proceedings*) provides in pertinent part:

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) The arbitrator may also allow for some or all of the presentation of evidence by alternative means including video, audio or other electronic means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination. . . .

Further, Rule 35 (*Evidence*) provides in pertinent part:

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or

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<sup>9</sup> Similarly, because having the Arbitration at "a mutually agreeable location in Virginia" (*Order* ¶ 4) is inconsistent with having the Arbitration "at a location in Illinois the Arbitrator designates" (§ 13.4), having the Arbitration in Illinois would be deemed rescinded.

irrelevant. . . .

In contrast to Rules 33 and 35, § 13.4 of the parties' contracts provides in pertinent part:

One business day before the hearing, the parties shall each simultaneously give the other (with a copy to the Arbitrator) its best, last and final proposed resolution of the entire Dispute. . . . At the hearing, each party shall have an opportunity to present its views on why its proposal best conforms to the requirements of this Agreement. The Arbitrator shall determine only which party's proposal satisfies those requirements. The Arbitrator shall have no authority to select some combination of the parties' proposals, or any other resolution of the Dispute.

This procedure is inconsistent with Rules 33 and 35 and must thus be deemed rescinded by the Parties' agreement reflected in the Arbitrator's Order of July 31, 2023 that "the Arbitration will proceed under the AAA's Complex Commercial Arbitration Rules . . . ."

Further, because the *Procedures for Large, Complex Commercial Disputes of the AAA's Commercial Arbitration Rules* govern the conduct of the hearing, Rule 7 (*Jurisdiction*) applies, which provides in pertinent part:

(a) *The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim, without any need to refer such matters first to a court.*

\* \* \*

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award. (Emphasis added).

There is thus a "clear agreement showing that the parties intended that the arbitrator decide questions of arbitrability," *Waterfront Marine Constr., supra*, 251 Va. at 427, such that that question is not to be resolved by the court.

#### CONCLUSION

In view of the fact that § 13.4 of the parties' contracts is

deemed rescinded, and thus of no force or effect, and the *Procedures for Large, Complex Commercial Disputes of the AAA's Commercial Arbitration Rules* govern the conduct of the hearing, the court concludes that Plaintiff's request in Count I to "stay the entirety of the arbitration pursuant to Va. Code § 8.01-581.02(B)" (*Complaint*, ¶ 68) fails to state a valid cause of action because Plaintiff has not shown that "there is no agreement to arbitrate." Code § 8.01-581.02(B). On the contrary, the court, having "summarily tried" the issue, must "order the parties to proceed to arbitration." *Id.*

Further, the court concludes that Plaintiff's request in Count I to "find that [Plaintiff] did not agree to submit the claims and damages to arbitration" (*Complaint*, ¶ 68) also fails to state a valid cause of action because Plaintiff has not shown that "there is no agreement to arbitrate." Code § 8.01-581.02(B).

The court likewise concludes that Plaintiff's request in Count I to "find that the Arbitrator lacks authority to award any damages or to hear any claims beyond a demand for interpretation and enforcement of specific terms of the Parties written contacts" (*Complaint*, ¶ 69) also fails to state a valid cause of action because Rule 7 (*Jurisdiction*) of the *Procedures for Large, Complex Commercial Disputes of the AAA's Commercial Arbitration Rules* applies, which grants the Arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the . . . arbitrability of any claim" and because Rule 49(a) (*Scope of Award*) provides:

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.<sup>10</sup>

With respect to Count II -- which was pled as alternative to Count I -- the court concludes that Count II fails to state a valid cause of action because the Arbitrator does not "lack[] authority to adjudicate the claims and damages alleged by Defendants against" Plaintiff in an arbitration conducted under the *Procedures for Large, Complex Commercial Disputes of the AAA's Commercial Arbitration Rules*.

Finally, as to Count III, the court concludes that Count III fails to state a valid cause of action because there is no basis for "temporary and permanent injunctive relief to prevent arbitration of

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<sup>10</sup> Notably, the AAA's initial explanation of the *Procedures for Large, Complex Commercial Disputes* states that those *Procedures* "will be applied to all cases administered by the AAA under the *Commercial Arbitration Rules* in which the disclosed claim or counterclaim of any party is at least \$1,000,000 exclusive of claimed interest, arbitration fees and costs," thereby implying that the Arbitrator may award damages.



claims and damages" as the claims and damages sought are not "beyond the arbitrator's authority."

As all three counts of the Complaint fail to state a valid cause of action, the demurrer is SUSTAINED and the Parties are ORDERED to PROCEED to arbitration, applying the *Procedures for Large, Complex Commercial Disputes of the AAA's Commercial Arbitration Rules*.

Sincerely yours,



Richard E. Gardiner  
Judge