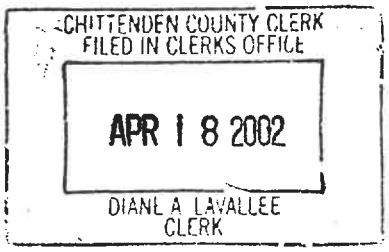
STATE OF VERMONT
CHITTENDEN COUNTY, SS.



ARTHUR E. and JUDY L. BISSONETTE)
Plaintiffs)
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v.)
)
SOUTHLAND LOG HOMES, INC.)
P.O. Box 1668)
Irmo, South Carolina)
)
and)
)
W.R. PRESTON & COMPANY, INC.,)
WARD R. PRESTON, and)
RICHARD H. PRESTON)
Defendants.)

Chittenden Superior Court
Docket No. S901-01 CnC

MEMORANDUM OF DECISION

Southland's Motion to Dismiss and Motion for Summary Judgment, filed August 17, 2001.

This case is before the Court on Defendant Southland Log Homes' Motion to Dismiss and Motion for Summary Judgment filed August 17, 2001. Plaintiffs' response to both was filed on August 29, 2001. A Stipulation for Enlargement of Time due to a substitution of counsel was filed on December 20, 2001, and the time to respond to the motion was extended to January 21, 2002. Plaintiffs are represented by Paul R. Morwood, Esq. Defendant Southland Log Homes is represented by John D. Monahan, Jr. Esq. Defendants W.R. Preston & Company Inc., Ward R. Preston, and Richard H. Preston, are represented by William H. Quinn, Esq.

This case stems from Plaintiffs' Complaint against Defendants alleging breach of contract, implied warranty, and negligence, in the sale and construction of their log home in Starksboro, VT. Defendant Southland Log Homes (hereinafter "Southland") moves to dismiss the case for improper venue pursuant to V.R.C.P. 12(b)(3) based on a forum selection clause in the contract. In addition, Defendant seeks summary judgment on the basis that the arbitration clause contained in the contract with the Plaintiffs requires the case to be resolved by arbitration. Plaintiffs respond that the contract is itself invalid. In the alternative, Plaintiffs assert that even if the contract is valid, considerations of reasonableness, fairness, and public policy, require that the clause not be enforced. Plaintiffs further argue that summary judgment is inappropriate because the arbitration clause in the contract is unenforceable.

I. Motion to Dismiss - Improper Venue

In support of the Motion to Dismiss, Defendant Southland points to a provision in the Sales Contract which states: "[a]ny claims or disputes arising under this Contract shall be resolved by arbitration in Richland County, South Carolina, in accordance with the rules of the American Arbitration Association. This contract shall be governed by and construed in accordance with the laws of the State of South Carolina." Southland argues that because this clause is valid and enforceable, any claim by the Plaintiffs under the contract should be brought in South Carolina, not Vermont. Plaintiffs respond that the contract itself is invalid because it was never signed by an officer of Southland and even if it was, a signed copy of the contract was never delivered to the Plaintiffs.[1] In the alternative, Plaintiffs assert that if the contract is valid, considerations of reasonableness, fairness and public policy require that the clause not be enforced.[2] Because the Court's decision on this Motion rests on the latter ground, Plaintiffs contract formation argument will be addressed in the Motion for Summary Judgment.

In Vermont, forum selection clauses are presumptively valid. International Collection Service v. Gibbs, 147 Vt. 105, 107 (1986). However, enforcement of the clause is not automatic and the Court may disregard the clause if enforcement would be unreasonable. Chase Commercial Corp. v. Barton, 153 Vt. 457, 459 (1990). Defendant Southland maintains that to void a forum selection clause, Plaintiffs must make a "strong showing" that the contract: 1) was fraudulently induced; 2) would deprive Plaintiffs of their day in court due to grave inconvenience and unfairness; 3) would deprive Plaintiffs of a remedy because of unfairness of the law chosen; or 4) would contravene strong public policy. Carnival Cruise Lines v. Shute, 499 U.S. 585, 594 (1991). According to Southland, the Plaintiffs have not made a strong showing that any of the above reasons exist to invalidate the clause.

It is the Court's conclusion that Plaintiffs have established grounds for non-enforcement. Under these circumstances, enforcing the forum selection clause would present serious difficulty and inconvenience to the Plaintiffs in litigating their claims against the Defendant. The log home that is at the center of this dispute is located in Starksboro, Vermont, and the quality of construction is the central issue in this dispute. Witnesses to the facts are located in Vermont. It is likely that architects and/or engineers will need to view the house. Whether the claims are resolved through arbitration or trial, a site visit to view the log home may become necessary. If the case were required to be resolved in South Carolina, these options would either not be

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[1] To invalidate the contract, Plaintiffs also argue that the agreement is a contract of adhesion.

[2] Plaintiffs also assert that the contract which calls for venue in South Carolina is not the basis of all of Plaintiffs claims, so they should be permitted to proceed in this Court. According to the Plaintiffs, the blueprints were not part of the original contract and thus the claims regarding the blueprints would not be subject to South Carolina jurisdiction. The issue of extra contractual claims is addressed in relation to the Motion for Summary Judgment.

available or would present such serious difficulty that in effect, the options would be unavailable. This would effectively deprive Plaintiffs of their right to full process for resolving their claim.

Second, this case involves co-defendants who are not subject to a contractual venue clause with the Plaintiffs. Plaintiffs' claims against W.R. Preston Company, Inc., Ward Preston and Richard Preston, are governed by the laws of Vermont and Plaintiffs are not required to litigate their claims against the Prestons in South Carolina. A grant of Southland's Motion would force the Plaintiffs to bring separate claims in different states against two Defendants who, according to the Complaint, worked together in the construction of the log home under a separate contract with each other (in addition to the contracts each one had with Plaintiffs) such that one Defendant provided the materials and the other Defendant actually constructed the house. This would present Plaintiffs with substantial obstacles to fully litigating their claims against both Defendants, and could result in wasteful duplication as well as inconsistent results, both of which contravene strong public policy - the efficiency and consistency of dispute resolution process and results.

Plaintiffs have shown two separate grounds for unenforceability of the forum selection clause: deprivation of day in court or arbitration due to grave inconvenience and unfairness, and contravention of sound public policy. Therefore, the case is not dismissed for improper forum.

II. Motion for Summary Judgment - Arbitration Clause

In its Motion for Summary Judgment, Defendant Southland again relies on the Sales Contract to argue that Plaintiffs agreed to arbitrate "any claims or disputes" arising under the Sales Contract in Richland County, South Carolina. According to Southland, the arbitration clause is valid and enforceable and because the Plaintiffs have agreed to arbitrate, their claims against Southland should be dismissed and instead, submitted to arbitration in South Carolina in accordance with the laws of South Carolina. Plaintiffs respond with arguments similar to those put forth in their opposition to the Motion to Dismiss. Specifically, Plaintiffs contend that the written contract is invalid (thus invalidating the arbitration clause) and in the alternative, that reasonableness, fairness and public policy require that the clause not be enforced. Plaintiffs also assert that because the contract does not encompass all of the Plaintiffs claims against Southland, the arbitration clause should not be invoked.

As a preliminary matter, it should be noted that a strong policy favoring arbitration exists and where possible, an arbitration clause should be enforced. Threlkeld v. Metallgesellschaft, 923 F.2d 245, 248 (2d Cir. 1991); see also Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 844 (2d Cir. 1987); Clarendon National Insurance v. Lan, 152 F.Supp 2d 506, 514 (S.D.N.Y. 2001). In determining whether a party is bound by an arbitration clause, courts apply "generally accepted principles of contract law," Genesco, 815 F.2d at 845, and absent grounds to invalidate the contract, an arbitration clause will be enforced. 12 V.S.A. § 5652(a) ("a provision in a written contract to submit to arbitration any controversy . . . is valid, enforceable and irrevocable, except upon such grounds as exist for the revocation of a contract."). In this case, the Court must

therefore determine: 1) whether the parties agreed to arbitrate; and 2) whether the agreement encompasses the asserted claims. Threlkeld, 923 F.2d at 249.

A. Agreement to Arbitrate

In this case, Plaintiffs dispute that they have entered into an agreement to arbitrate the present claims. They contend that because the contract is invalid by its own terms, the arbitration clause is invalid and unenforceable. In support of their argument, Plaintiffs argue that the contract was never signed by an officer of Southland pursuant to the terms of the contract and even if it was, a signed copy of the contract was never delivered to the Plaintiffs. Plaintiffs also contend the contract with Southland is a contract of adhesion and thus the venue and arbitration provisions should not be enforced to avoid injustice to the Plaintiffs.

Plaintiffs' arguments are not persuasive. The contract formation argument is inconsistent with Plaintiffs' allegations in their Complaint. If a valid contract did not exist between the Plaintiffs and Defendants, then Counts I through V of the Complaint (three counts of Breach of Contract, Implied Duty and Implied Warranty) would not be actionable. In addition, even assuming a copy of the contract signed by an officer of Southland was never delivered to the Plaintiffs,[3] this technical flaw does not render the entire contact invalid. If there exists a mutual intent to contract, then the contract should be enforced consistent with the plain meaning of the contract, to the fullest extent possible. Estate of Smith v. U.S., 97 F.Supp. 279, 282 (D. Vt. 1997) (citing Cross-Abbott Co. v. Howard's, Inc., 124 Vt. 439, 441 (1965)). Here, neither party disputes the intent to enter into a contract for the sale of materials to build a log home nor does either party dispute the meaning of terms in the contract. A valid contract exists between the Plaintiffs and Defendant and governs the terms of their agreement.

With regard to the claim that the contract is a contract of adhesion, Plaintiffs have not demonstrated why the contract term requiring arbitration should not be enforced. The mere existence of an adhesion contract of does not automatically prevent its enforcement. Rather, an arbitration provision in an adhesion contract will only be stricken if the clause offends public policy or is unfair, unduly oppressive or unconscionable. Threlkeld, 923 F.2d at 249. Here, the requirement to arbitrate, by itself - without South Carolina serving as the venue,[4] is not unfair, oppressive or unconscionable. The arbitration provision promotes the policy favoring alternative dispute resolution and affords the Plaintiffs resolution of their claims.

On this latter point however, Plaintiffs claim that because the case involves co-

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[3] This point is disputed by the Defendants who contend that a copy of the contract was signed by an officer of Southland Log Homes.

[4] For the reasons set forth with respect to the Motion to Dismiss, the Court will not require arbitration to take place in South Carolina, but will permit arbitration to take place in Vermont.

Defendants, W.R. Preston & Co., who are not parties to the contract between Plaintiff and Southland and thus are not required to arbitrate, it would be unfair to require arbitration for only part of the claim. Given the nature of this case and the various contractual relationships between each of the parties, nearly all (if not all) disputes between the three parties are subject to the arbitration requirement. In this case, three separate contracts exist between the parties: 1) the Sales Contract between the Plaintiffs and Southland; 2) the Retail Marketing Agreement between Southland and W.R. Preston & Co.; and 3) the Construction Contract between Plaintiffs and W.R. Preston & Co. In two of these contracts, the Sales Contract and Retail Marketing Agreement, a valid arbitration requirement exists. In the third contract, the Construction Contract between the Plaintiffs and W.R. Preston, there is no indication in the record as to whether the agreement contains an arbitration clause.

Nevertheless, each party to this case has agreed to arbitrate at least some issues involved in this construction project.[5] The Plaintiffs and W.R. Preston & Co. each agreed to arbitrate with Southland, which indicates that both committed themselves to arbitration as a dispute resolution mechanism in the event of problems. Plaintiffs' argument that required arbitration would be unfair because they do not have an arbitration agreement with W.R. Preston & Co. does not undermine the validity of its arbitration agreement with Southland, particularly since Plaintiffs were aware that any dispute arising over the sale of the log home would be subject to arbitration. Requiring Plaintiffs to arbitrate will not leave them without a remedy for their claims. For the purposes of this Motion, because arbitration clauses enjoy overwhelming policy support, and because Plaintiffs have not demonstrated that the requirement to arbitrate would be unfair, unduly oppressive or unconscionable as long as they are not required to do so in South Carolina, the Court finds the contract validly requires arbitration.

B. Scope of the Arbitration Agreement

In addition to disputing the agreement to arbitrate, Plaintiffs also argue the arbitration clause does not encompass all their claims. According to the Plaintiffs, because the contract did not include the blueprints to build the log home, any claim for defective blueprints would not be subject to the arbitration clause. Defendants respond that the blueprints were incorporated into the contract by reference to a Quote for materials listed on the contract using a Quotation Number. The Defendants argue that because the Quote lists the blueprints as part of the materials provided to build the log home, the blueprints are necessarily part of the contract and are subject to its provisions including the arbitration clause.

The Court has reviewed the contract and contrary to the arguments of the Plaintiffs, the blueprints are part of its provisions. The contract between Plaintiffs and Defendants is a contract for the sale of building materials to build the log home. The contract itself does not specify the actual materials to be used in the construction of the home. Rather, it represents that the

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[5] Southland and W.R. Preston & Co. have recently stipulated to arbitration of all claims arising out of matters within the scope of the Retail Marketing Agreement.

Plaintiffs agreed to buy a "Custom" log home that included an "Exterior Wall Package" with certain "Options." The Quote referred to in the contract is the document that specifically lists the materials provided to the Plaintiffs to build the home. This material list includes *inter alia* specific sized logs, types of fasteners, caulking, and windows and doors. The Quote's list of building materials also includes blueprints.

Plaintiffs appear to argue that although they have a claim for defective materials which are covered by the contract, their claim for blueprints is not. However, the Court finds no discernable difference between the specific building materials listed in the Quote which Plaintiffs claim were defective and included in the contract, and the blueprints listed in the Quote which Plaintiffs also claim were defective but were not included in the contract. For Plaintiffs to argue that the blueprints are not part of the contract would also mean that the building materials are also not part of the contract since both items are only specifically listed and referred to in the Quote. That position is inconsistent with Plaintiffs Complaint and the Court finds that the blueprints, along with the other materials used to build the home, are included under the terms of the contract and are subject to the arbitration clause.

ORDER

For the foregoing reasons,

Defendant Southland Log Homes's Motion to Dismiss for improper venue is *denied.*

Defendant Southland Log Homes's Motion for Summary Judgment is *granted.* Because all claims between Plaintiffs and Southland arise out of matters within the scope of the Sales Agreement and selected documents and agreements and must be arbitrated, the Plaintiffs' claims are *dismissed without prejudice* unless and until the parties have completed arbitration.

Dated at Burlington, Vermont, this 18th day of April, 2002.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Court Judge