



Mortimer v. First Mount Vernon Industrial Loan Commission

2003 | Cited 0 times | D. Maryland | May 19, 2003

UNPUBLISHED

MEMORANDUM

In this diversity case, plaintiff Gregory Mortimer alleges the breach of a sales contract for a residence by defendant First Mount Vernon Industrial Loan Association ("FMV") and seeks specific performance of the contract and damages. FMV timely removed the case from the Circuit Court for Garrett County, Maryland, and has moved, inter alia, in reliance upon a mediation clause in the contract, for an order dismissing Mortimer's complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(1) and (6). For the reasons stated herein, I shall dismiss Mortimer's complaint without prejudice for failure to mediate.

I.

Mortimer, a resident of Garrett County, Maryland, entered into a Residential Contract of Sale (the "First Contract") with Heidi Stipetich on April 5, 2002, for the purchase of property located at 2379 Marsh Hill Road, in McHenry, Garrett County (the "Property"). The purchase price for the Property under the First Contract was \$750,000. Apparently, Stipetich had a loan with FMV that was secured by a lien on the Property. When Stipetich defaulted on her loan, FMV was granted a deed in lieu of foreclosure.¹ At the time of execution of the First Contract, FMV was the owner of the Property.²

On May 20, 2002, Mortimer entered into a Residential Contract of Sale (the "Second Contract") with FMV, a corporation chartered in the Commonwealth of Virginia,³ to purchase the Property at the same purchase price contemplated by the First Contract. The Second Contract contemplated settlement on June 8, 2002. Mortimer alleges that he was "ready willing and able to purchase the Property on the date prescribed for settlement by the Second Contract." FMV could not, however, "deliver good and merchantable title to the Property to [Mortimer] on the [s]ettlement [d]ate based on claims asserted by [Stipetich] against [FMV] that were not cut off by the deed [in lieu of foreclosure]."

Mortimer alleges that FMV did not take action to cure any title defects or "provide [him] the right to make certain elections with respect to purchasing the Property in the event of any title defect." Mortimer further alleges that FMV has "endeavored to sell the Property to third parties" without returning his deposit or "fulfilling its obligations to him under the Second Contract." Mortimer filed this action seeking the transfer of "good and merchantable title and possession of the Property" and



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a judgment for damages for \$200,000.

II.

The Second Contract includes a paragraph entitled "Mediation of Disputes" that, inter alia, requires the parties to mediate "any dispute" and "all disputes" arising at any time within one year of settlement:

Buyer and Seller agree that any dispute or claim arising out of or from this Contract or the transaction which is the subject of this Contract shall be mediated through the Maryland Association of REALTORS, Inc., . . . in accordance with the established Mediation Rules and Guidelines of the Association or such other mediator or mediation service as mutually agreed upon by the Buyer and Seller, in writing BUYER AND SELLER FURTHER AGREE THAT THE OBLIGATION OF BUYER AND SELLER TO MEDIATE AS HEREIN PROVIDED SHALL APPLY TO ALL DISPUTES AND CLAIMS ARISING, WHETHER PRIOR TO, DURING OR WITHIN ONE (1) YEAR FOLLOWING SETTLEMENT. BUYER AND SELLER AGREE THAT NEITHER PARTY SHALL INITIATE OR COMMENCE ANY ACTION IN ANY COURT OR BEFORE ANY ADMINISTRATIVE AGENCY, WITHOUT FIRST SUBMITTING THE DISPUTE OR CLAIM TO MEDIATION AS HEREIN PROVIDED.

FMV argues that this mediation clause requires Mortimer to assert any claims against FMV, including the present allegations, in mediation proceedings before initiating a lawsuit. In response, Mortimer does not dispute the existence or applicability of the mediation clause;⁴ rather, he contends that "the Second Contract does not provide for mandatory, alternative dispute resolution that is binding upon the parties," and, alternatively, the settlement date that "trigger[s]" the mediation clause "never occurred." I find that the parties agreed to and must first submit to arbitration before commencing a judicial action for breach of contract.

Because the contract does not involve interstate commerce, I agree with the parties that the Maryland Uniform Arbitration Act, the state analogue to the Federal Arbitration Act, should govern whether this clause is enforceable. Md. Code Ann., Cts. & Jud. Proc. § 3-202, et seq. (2003) (an "agreement providing for arbitration under the law of the State confers jurisdiction on a court to enforce the agreement"); *Alamria v. Telcor Int'l, Inc.*, 920 F. Supp. 658, 662 (D. Md. 1996) (acknowledging that arbitration is a matter of contract and finding that a court must decide whether a party agreed to submit to arbitration and which disputes they agreed to submit to arbitration); *Holmes v. Coverall North Am., Inc.*, 649 A.2d 365, 367-68 (Md. 1994) (discussing Maryland Arbitration Act) (citing *Regina Constr. Corp., v. Envirnech Contracting Corp.*, 565 A.2d 693, 667-68 (Md. Ct. Spec. App. 1989)).⁵

Section 3-206(a) provides that:



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a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy arising between the parties in the future is valid and enforceable, and is irrevocable, except upon grounds that exist at law or in equity for the revocation of a contract. Md. Code Ann., Cts. & Jud. Proc. § 3-206(a) (emphasis added). The Second Contract explicitly states that the parties agree to mediate "any dispute or claim arising out of or from this contract . . . whether prior to, during or within one (1) year following settlement." Because the plain language of the Second Contract indicates that Mortimer and FMV intended and agreed to mediate all potential disputes, I need not specifically determine whether Mortimer's claim that FMV could not deliver good and merchantable title to the Property is subject to the mediation clause. It suffices that the claim surrounding the title to the Property arises out of or from the Second Contract. See Holmes, 649 A.2d at 371 (finding that a dispute involving a franchise agreement was subject to arbitration where broad arbitration agreement included "any claim or controversy arising out of or relating to [the] Agreement" and neither party alleged inducement by fraud or that the type of dispute was not intended for arbitration). Further, the dispute in this case obviously arose prior to settlement and is, therefore, unquestionably encompassed by the meditation clause.⁶

III.

I shall not order the parties to mediate. See HIM Portland, LLC v. DeVito Builders, Inc., 211 F.Supp.2d 230, 233 n.5 (D.Me. 2002) (noting that, where the parties' agreement made mediation a condition precedent to arbitration, and the parties failed to mediate, as the court cannot order mediation, no obligation to arbitrate was triggered). Nevertheless, defendant is entitled to an order deferring the lawsuit pending plaintiff's compliance with his binding obligation first to mediate his claims. Accordingly, FMV's motion shall be granted in part and, no issue of limitations being presented, the case shall be dismissed without prejudice. An order follows.

1. Mortimer alleges that he "did not have actual or constructive notice of the Deed at the time of execution of the First Contract in that [FMV] did not record the Deed in the Land Records until May 13, 2002." Complaint at ¶ 8.
2. Mortimer alleges that FMV had actual knowledge of the First Contract and "still retains possession of the Deposit paid by Mortimer on the First Contract" in the amount of \$10,000.
3. FMV has its principal place of business in Alexandria, Virginia, and alleges that it does not maintain any offices or place of business in Maryland. Nevertheless, as this case arises out of a dispute over defendant's ownership of Maryland real property, FMV does not challenge personal jurisdiction.
4. Mortimer authored the Second Contract.
5. Of course, the Second Contract does not mention "arbitration" but requires, instead, "mediation . . . in accordance with the established Mediation Rules and Guidelines of the [Maryland Association of Realtors, Inc.]." Nevertheless, "[b]ecause the mediation clause in the case at bar manifests the parties' intent to provide an alternative method to 'settle'



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controversies arising under the parties' . . . agreement, th[e] mediation clause fits within the . . . definition of arbitration." CB Richard Ellis, Inc. v. American Env'tal Waste Mgmt., 98-CV-4183, 1998 WL 903495, at *2 (E.D.N.Y. Dec. 4, 1998) (finding mediation to fall within the Federal Arbitration Act's definition of arbitration); see also AMF, Inc. v. Brunswick Corp., 621 F.Supp. 456 (E.D.N.Y. 1985). The Maryland Association of Realtor's website contains information about mediation and contains an offer to mail copies of the relevant procedural guidelines. See http://mdrealtor.org/resources_memberservices_mediation.asp (visited May 16, 2003).

6. Although I find no ambiguity in the language of the mediation clause, the fact that Mortimer now disputes the meaning of the mediation clause in a contract that he drafted further supports a finding in FMV's favor. See, e.g., Truck Ins. Exchange v. Marks Rentals, Inc., 418 A.2d 1187, 1191 (Md. 1980) ("[I]t is a sound principle of contract construction that where one party is responsible for the drafting of an instrument, absent evidence indicating the intention of the parties, any ambiguity will be resolved against that party.") (citing Nat'l Grange Mut. Ins. v. Pinkney, 284 Md. 694, 705-06 (1979)).

