

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

GREEN TREE SERVICING, LLC, ET. AL.

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:16-cv-58-WHB-JCG

DONALD AND TERESA KEYES

DEFENDANTS

OPINION AND ORDER

This cause is before the Court on several Motions filed by the parties in this civil action. Having considered the pleadings as well as supporting and opposing authorities, the Court finds:

The Motion of Defendants to Dismiss, or alternatively to Transfer, to the extent the Motion seeks transfer, should be denied as moot as the cases that are the subject of the Motion have already been transferred/reassigned by administrative order.

The Motion of Defendants to Dismiss, or alternatively to Transfer, to the extent the Motion seeks dismissal and/or consolidation, is not well taken and should be denied.

The Motion of Plaintiffs to Compel Arbitration is well taken and should be granted, and any related judicial proceedings involving the parties should be stayed pending arbitration.

I. Factual Background and Procedural History

Donald and Teresa Keyes ("Keyeses") owned a parcel of real property in Smith County, Mississippi. In 1999, the Keyeses

entered a contract with Jim Walter Homes, Inc. ("Jim Walter Homes"), for the purpose of having a house built on that property, and for obtaining financing necessary for construction. The total sales price of the house was \$121,290. The Keyeses were required to use their real property as collateral to obtain the required financing. The Keyeses were also required to purchase insurance to cover losses from fire and wind damage to the property/house, and elected to obtain insurance coverage from Best Insurers, Inc. ("Best Insurers"), which was the company used by Jim Walters Homes. The contract entered by the Keyeses contains the following Arbitration Agreement:

The parties agree that, at the election of either party, any controversy or claim arising out of or relating to this contract, or the breach thereof, whether asserted in tort or contract, or as a federal or state statutory claim, arising before, during or after performance of this contract, shall be settled by binding arbitration in accordance with the Comprehensive Arbitration Rules and Procedures administered by J•A•M•S ... and judgment upon the award rendered by the arbitrator may be entered in any Court having jurisdiction thereof.

Mot. to Compel Arb. [Docket No. 26], Ex. A, at "Exhibit 'D'".

According to the Keyeses, the house built by Jim Walters Homes was "substandard, incomplete, defective, and dangerous." Id., Ex. B (Keyeses' Complaint), ¶ 22. The allegedly defective construction was performed by several contractors including D.J. McNeill Electric and Plumbing, Inc.; Martin Heating and Cooling, LLC; and Coy Boleware Construction, LLC. The Keyeses also allege that Jim Walters Homes was aware of the shoddy construction, and took the

following actions to prevent them from discovering the construction defects, while shielding itself from liability on potential claims arising therefrom:

Jim Walters Homes, LLC, is maintained by Walter Energy, Inc. and/or other interrelated Jim Walter entities as a shell company, without assets ... as part of an overall scheme to attempt to shield itself from paying the legitimate claims and resulting liability it and the various Jim Walters entities face from the victims of their misconduct while using the wrongfully obtained [commercial] paper to finance their other ventures.

To meet [the need for insurance] and to circumvent any potential problems raised by legitimate insurers as to either the quality of the construction or the creditworthiness of the Plaintiffs, certain of the Defendants created and used Best Insurance, Inc., and over time have created other entities such as Green Tree Insurance agency as a source for both initial insurance and forced placed policies.

Id. ¶¶ 22-24. The Keyeses further allege that representatives for Jim Walters Homes made several misrepresentations that induced them to sign the construction contract and related documents. The alleged misrepresentations include: (1) the house would be built in accordance with the house plan and applicable building codes, (2) "Walter Mortgage Company (now Green Tree) would not put up money to finance a home that was not of the highest quality construction and materials", and (3) "Best Insurers would not insure a home that was not of the highest quality construction and materials." Id. at ¶¶ 28-30. The Keyeses maintain that these representations were false, as they recently discovered that the house was not built in accordance with the plans or applicable building codes. Id. at ¶

31. As regards financing and insurance, the Keyeses allege that the "home was never ... worth the amount of money paid and/or borrowed" and that insurance premiums they paid were excessive and inflated. Id. at ¶¶ 34-35.

Based on these allegations, the Keyeses filed a lawsuit against Jim Walters Homes, LLC; Green Tree Servicing, LLC; Walter Investment Management Corporation; Walter Energy, Inc.; Best Insurers, Inc.; W. Stewart Robinson; Mid State Capital, LLC; Mid State Trusts II-XI; Wilmington Trust Company; Mid State Capital Corporation 2004-1 Trust; Mid State Capital Corporation 2005-1 Trust; Mid State Capital Corporation 2006-1 Trust; Mid State Capital Corporation 2010-1 Trust; D.J. McNeill Electric and Plumbing, Inc.; Martin Heating and Cooling, LLC; and Coy Boleware Construction, LLC., in the Circuit Court of Smith County. Through the Complaint, the Keyeses seek damages on claims including deceit and false statements/fraud, breach of contract, civil conspiracy, negligence, and intentional infliction of emotional distress and mental anguish. The Keyeses also seek an equitable accounting and an injunction preventing the defendants from assigning their interest in the property or seeking foreclosure, and suspending their obligation to make further payments on the house.

The case was removed to federal court on the basis of diversity of citizenship/improper joinder, and was docketed as Keyes v. Jim Walters Homes, LLC, et al., 3:15-cv-245 (S.D.

Miss.) ("Keyes I").¹ In July of 2015, Suggestions of Bankruptcy were filed by Jim Walter Homes, LLC, and Walter Energy, Inc. See Keyes I [Docket Nos. 37 & 38]. No further action was taken in the case presumably based on the bankruptcy filings.

In January of 2016, Green Tree Servicing, LLC; Walter Investment Management Corporation; Best Insurers, Inc.; Mid State Capital, LLC; Mid State Trusts II-XI; Wilmington Trust Company; Mid-State Capital Corporation 2004-1 Trust; Mid-State Capital Corporation 2005-1 Trust; Mid-State Capital Corporation 2006-1 Trust; and Mid-State Capital Corporation 2010-1 Trust (collectively "Arbitration Plaintiffs") filed Complaint against the Keyeses in this Court seeking to compel them to arbitrate their claims. The Complaint to Compel Arbitration was docketed as Civil Action No. 3:15-cv-58 ("Keyes II").² The Court now considers the motions that have been filed in Keyes II.

¹ Keyes I was initially assigned to United States District Judge Henry T. Wingate and United States Magistrate Judge Linda R. Anderson. By Order, the case was reassigned to the undersigned District Judge and United States Magistrate Judge John C. Gargiulo. See, Keyes I Civil Action 3:15-cv-245, Order [Docket No. 51].

² Keyes II was initially assigned to United States District Judge Carlton W. Reeves and United States Magistrate Judge Linda R. Anderson. By Order, the case was transferred to United States District Judge Henry T. Wingate and United States Magistrate Judge Linda R. Anderson. See Keyes II, Civil Action 3:16-cv-58, Order [Docket No. 19]. By a later Order, the case was reassigned to the undersigned District Judge and United States Magistrate Judge John C. Gargiulo. See Keyes II, Civil Action 3:16-cv-58, Order [Docket No. 22].

II. Discussion

A. Defendants' Motion to Dismiss Complaint or, Alternatively, To Transfer

The Keyeses argue that Keyes II should be either dismissed or transferred and consolidated with Keyes I under the first-to-file rule. Under this rule, "when related cases are pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases substantially overlap." Cadle Co. v. Whataburger of Alice, Inc., 174 F.3d 599, 603 (5th Cir. 1999). The first-to-file rule is grounded in principles of comity and sound judicial administration which require "federal district courts - courts of coordinate jurisdiction and equal rank - to exercise care to avoid interference with each other's affairs." West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, 751 F.2d 721, 728 (5th Cir. 1985)).

Having reviewed Keyes I and Keyes II the Court finds the Keyeses have failed to show that Keyes II should be transferred under the first-to-file-rule. As discussed above, the first-to-file rule is implicated when "related cases are pending before two federal courts." Cadle Co., 174 F.3d at 603. Keyes I and Keyes II, however, are not currently pending in two different federal courts. By administrative order, both cases were transferred/reassigned and now are pending in the same division of the same district court and are assigned to the same district and magistrate judge. As Keyes I and Keyes II are now pending before

the same judges in the same federal court, there is no reason to transfer Keyes II under the first-to file rule. Thus, to the extent the Keyeses' Motion seeks transfer under the first-to-file rule, it will be dismissed as moot.

Next, the Court finds there is no basis for either dismissing Keyes II, or consolidating Keyes I and Keyes II under the first-to-file rule. A review of the docket in Keyes I shows that that case was removed on the basis of diversity of citizenship jurisdiction/improper joinder. The Keyeses have moved for remand arguing that diversity of citizenship is lacking. In the event the Court determines that federal subject matter jurisdiction is lacking in Keyes I and remands that case, the Court could not likewise remand Keyes II as that case was initially filed in federal court and rests on its own jurisdictional facts. Consolidation of Keyes I and Keyes II is, therefore, not warranted at this time. Additionally, because Keyes II rests on separate jurisdictional facts, the Court finds the Keyeses have failed to show that Keyes II should be dismissed under the first-to-file rule.

Finally, the Keyes argue that the Arbitration Plaintiffs should be judicially estopped from seeking to separately compel arbitration because they voluntarily agreed to stay consideration of that issue in Keyes I in anticipation of a Motion to Remand being filed in that case. In order to evoke the doctrine of

judicial estoppel, the following three elements must be satisfied: (1) the taking of a inconsistent position, (2) the acceptance of the court of the inconsistent position, and (3) the absence of advertence. See e.g. Superior Crewboats, Inc. v. Primary P&I Underwriters, 374 F.3d 330, 335 (5th Cir. 2004).

The Court finds the Keyeses have failed to demonstrate that the Arbitration Plaintiffs took inconsistent positions with respect to compelling arbitration, or that the Court accepted their alleged inconsistent positions. As understood by the Court, the Arbitration Plaintiffs agreed to stay briefing on the motions to compel arbitration that were filed in Keyes I based on the Keyeses' announcing their intent to file a Motion to Remand. As the filing of a Motion to Remand would automatically stay proceedings until such time as the issue of subject matter jurisdiction is resolved, the Court finds the agreement of the Arbitration Plaintiffs to stay briefing based on the anticipated filing of the Motion to Remand does not evidence an inconsistent position as to whether they intended to seek to compel arbitration.

For these reasons, the Court finds the Keyeses' Motion to Dismiss, or alternatively, to Transfer should be denied as moot in part, and denied in part.

B. Arbitration Plaintiffs' Motion to Compel Arbitration

Under the Federal Arbitration Act ("FAA"):

A written provision in ... a contract evidencing a

transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. To determine whether a contract “evidenc[es] a transaction involving commerce” for the purposes of the FAA, the United States Supreme Court has held that “control over interstate commerce reaches not only the actual physical interstate shipment of goods but also [extends to] contracts relating to interstate commerce.” Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 273-74 (1995). Here, based on the nature and purpose of the Building Contract entered between Jim Walter Homes and the Keyeses, and because it is to be performed by individuals/entities in different states, the Court finds the underlying Building Contract involves interstate commerce. See e.g. Mississippi Fleet Card, L.L.C. v. Bilstat, Inc., 175 F.Supp.2d 894, 898 (S.D. Miss. 2001) (finding that as the parties’ agreement and attendant arbitration clause was entered into, and was to be performed by, citizens of different states, the agreement involved interstate commerce as that term is defined by FAA precedent). Accordingly, the Court finds the Building Contract, which contains the subject arbitration clause, involve interstate commerce as that term is applied to the FAA and, therefore, may be enforced under that statute. See Allied-Bruce, 513 U.S. at 273-74 (indicating that the term “involving commerce”

should be construed liberally as meaning "affecting commerce."); Arce v. Cotton Club of Greenville, Inc., 883 F. Supp. 117, 119 (N.D. Miss. 1995) ("Section 2's requirements are met where contractual activity facilitates or affects commerce, even tangentially.").

Next, to determine whether parties to an arbitration agreement should be compelled to arbitrate under the FAA, courts generally apply a two-step analysis. See e.g. Webb v. Investacorp, Inc., 89 F.3d 252, 257-58 (5th Cir. 1996):

The first step is to determine whether the parties agreed to arbitrate the dispute in question. This determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement. When deciding whether the parties agreed to arbitrate the dispute in question, courts generally ... should apply ordinary state-law principles that govern the formation of contracts. In applying state law, however, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration. The second step is to determine whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims.

Id. (alterations in original) (citations omitted). Ordinarily, both steps are questions for the court. See Will-Drill Res., Inc. v. Samson Res. Co., 352 F.3d 211, 214 (5th Cir. 2003). In cases, however, in which "the arbitration agreement contains a delegation clause giving the arbitrator the primary power to rule on the arbitrability of a specific claim, the analysis changes." Kubala v. Supreme Prod. Servs., Inc., --- F.3d ---, 2016 WL 3923866, at *2

(5th Cir. July 20, 2016) (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995)).

Thus, if the party seeking arbitration points to a purported delegation clause, the court's analysis is limited. It performs the first step – an analysis of contract formation – as it always does. But the only question, after finding that there is in fact a valid agreement, is whether the purported delegation clause is in fact a delegation clause – that is, if it evinces an intent to have the arbitrator decide whether a given claim must be arbitrated. If there is a delegation clause, the motion to compel arbitration should be granted in almost all cases.

Kubala, --- F.3d ---, 2016 WL 3923866, at *2 (citing Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68-69 (2010)).

As regards the first inquiry, i.e. whether the parties entered a valid arbitration agreement, courts are instructed to “apply ordinary state-law principles that govern the formation of contracts.” Kaplan, 514 U.S. at 943; May v. Higbee Co., 372 F.3d 757, 764 (5th Cir. 2004). The Keyeses argue that there does not exist a valid agreement to arbitrate between them and the Arbitration Plaintiffs because none of the latter signed the subject Arbitration Agreement. Under Mississippi law, however, “‘a non-signatory may be able to enforce an arbitration agreement against a signatory where the non-signatory has a close legal relationship with a signatory of the agreement’ and where the plaintiff alleges ‘substantially interdependent and concerted misconduct’ between the signatory and non-signatory.” Briovarx v. Transcript Pharmacy, Inc., 163 So.3d 311, 315 (Miss. Ct. App.

2015) (quoting Sawyers v. Herrin-Gear Chevrolet Co., Inc., 26 So.3d 1026, 1038 (Miss. 2010)). Here, the Arbitration Plaintiffs are all identified as having a close legal relationship with the signatory, Jim Walter Homes. See e.g. Mot. to Compel, Ex. B (Keyeses' Complaint), ¶¶ 3 & 32 (identifying Green Tree Servicing, LLC, as being the successor by merger with Walter Mortgage Company, LLC, and as being a wholly owned subsidiary of Walter Investment Management Corporation); Id. at ¶ 6 (identifying Best Insurers Inc., as being "a related company of Defendant Jim Walter Home LLC and/or its predecessors"); Id. at ¶ 38 (identifying the Mid State Trust entities and the Wilmington Trust Company as being assignees and conveyees of Jim Walter Homes LLC); Mot. to Compel, Ex. C. (Brown Aff.) (avering that Jim Walter Home and Walter Investment Management Corp were affiliates until April of 2009). Additionally, the Keyeses have alleged "substantially interdependent and concerted misconduct" between Jim Walter Homes and the Arbitration Plaintiffs. See e.g. Mot. to Compel, Ex. B (Keyeses' Complaint), ¶ 22 (alleging that the Keyeses were "victims of a scheme perpetuated by the [named] Defendants"); Id. at ¶ 24 (alleging that Jim Walter Homes created Best Insurance and other Green Tree Insurance Agencies for the purpose of concealing the defective construction of their house); Id. at ¶ 27 (alleging that certain defendants "entered into business relationships ... for the purpose of obtaining unlawful and illegitimate gains and profits

through deception by wrongfully obtaining the Plaintiffs' signatures on contracts, promissory notes, deeds of trust, insurance payment plans, and completion certificates."; Id. at ¶ 38 (alleging that Jim Walter Homes sold or assigned the contracts, promissory notes, etc., to Walter Mortgage Company, LLC, and then to Walter Investment Management Corporation, or one of the Mid-State Trust Entities, and then to Wilmington Trust Co., Green Tree, and their predecessors, who in turn attempted to sell or assign them to other defendants, and that "[w]ithout a willingness of these Defendants to purchase such ill-gotten paper, there would be no market or incentive to perpetrate this wrongful scheme."); Id. at ¶ 113 "alleging that each of the Defendants ... aided and abetted each other in each and every act described here ... [and that] without the assistance and cooperation of Defendants such as Walter Energy, Inc., Walter Investment Management Corp., the Mid State Trust Entities and Wilmington Trust Co., this fraudulent scheme could not have been possible."). As the allegations in the Keyeses' Compliant establish both that (1) the non-signatory Arbitration Plaintiffs have close legal relationships with the signatory, Jim Walter Homes, Inc. (the signatory of the Arbitration Agreement), and (2) there was "substantially interdependent and concerted misconduct" between the signatory and non-signatory Arbitration Plaintiffs, the Court finds that a valid agreement to arbitrate exists between the Arbitration Plaintiffs and the Keyeses

under Mississippi law.

Having found that there exists a valid agreement between the Keyeses and the Arbitration Plaintiffs, the Court next considers whether the subject Arbitration Agreement contains a delegation provision giving the arbitrator the primary power to rule on arbitrability. Here, the Arbitration Agreement entered by the parties expressly provides that claims between the parties "shall be settled by binding arbitration in accordance with the Comprehensive Arbitration Rules and Procedures administered by J•A•M•S." Mot. to Compel Arb. , Ex. A, at "Exhibit 'D'". The United States Court of Appeals for the Fifth Circuit has held that in cases in which the parties expressly incorporate into their arbitration agreement a specific governing set of rules that includes a delegation provision, that "the express adoption of the rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2010). The Comprehensive Arbitration Rules and Procedures for JAMS provides:

Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

Mem. in Supp. of Mot. to Compel [Docket No. 27], 4 (quoting Rule 11(b), JAMS Comprehensive Rules, available at

http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf). As the subject Arbitration Agreement expressly adopts the JAMS rules, and as the JAMS Rules provide a delegation provision, the Court finds there exists "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." Petrofac, Inc., 687 F.3d at 675. Thus, unless the Keyeses "challenge the delegation provision specifically", the Court "must treat it as valid under FAA § 2, and must enforce it under FAA §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." Rent-A-Center, West, Inc., 561 U.S. at 72 (alterations in original).

With respect to the delegation provision, the Keyeses first argue that that provision is unenforceable because they did not enter a valid arbitration agreement with the Arbitration Plaintiffs. See Mem. in Supp. of Resp. [Docket No. 32], 16 ("[I]f the Court determines the arbitration agreement is unenforceable, then so too is the alleged delegation provision."). The Court, however, has already found that a valid agreement to arbitrate exists between the Arbitration Plaintiffs and the Keyeses under Mississippi law. Accordingly, the Court finds this argument lacks merit. Next, the Keyeses argue that they "never intended to delegate the power to decide arbitrability to an arbitrator." Id. at 18. The Court, however, has already found, that because the subject Arbitration Agreement expressly adopts the JAMS rules that

include a delegation provision, there exists "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." Accordingly, the Court finds this argument, too, lacks merit.

Finally, the Keyeses challenge the validity of the Arbitration Agreement on the grounds of procedural and substantive unconscionability. Claims of unconscionability do not affect whether an arbitration agreement has been entered but, instead, permit a court to invalidate an otherwise existing agreement. See e.g. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686 (1996) (explaining that state contract law principles may be used to "invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'"); East Ford, Inc. v. Taylor, 826 So.2d 709, 711 (Miss. 2002) (explaining that if "an arbitration agreement is found to be unconscionable pursuant to general state law principles, then it may be invalidated without offending the Federal Arbitration Act."). Here, the delegation provision in the subject Arbitration Agreement specifically authorizes the arbitrator to resolve "disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought". As such, the Court finds the issue of whether the arbitration agreement is invalid on the grounds of unconscionability is one that must be resolved by the arbitrator.

In sum, having found that a valid agreement to arbitrate

exists between the Arbitration Plaintiffs and the Keyeses, and that the subject Arbitration Agreement contains a delegation provision under which the parties agreed to arbitrate arbitrability, the Court finds the Motion of the Arbitration Plaintiffs to Compel Arbitration should be granted.

C. Stay Pending Arbitration

In addition to seeking to compel arbitration, the Arbitration Plaintiffs have moved to stay litigation of the claims alleged against them pending arbitration as authorized by the FAA. Under 9 U.S.C. § 3, "the court in which [a] suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration ..., shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement ...". Having found that the Keyeses are required to arbitrate the claims they allege against the Arbitration Plaintiffs in Keyes I, the Court finds all proceeding in Keyes I should be stayed pending arbitration.

III. Conclusion

For the foregoing reasons:

IT IS THEREFORE ORDERED that the Keyeses' Motion to Dismiss or, in the alternative Transfer [Dockets No. 33] is hereby denied

in part, and dismissed as moot in part.

To the extent the Motion seeks to transfer Keyes II under the first-to-file rule, the Motion is dismissed as moot.

To the extent the Motion seeks dismissal of Keyes II, or seeks consolidation of Keyes I and Keyes II, the Motion is denied.

IT IS FURTHER ORDERED that the Motion of the Arbitration Plaintiffs to Compel Arbitration [Docket No. 26] is hereby granted. As the Keyeses are hereby ordered to arbitrate all of the claims they allege against the Arbitration Plaintiffs in Keyes I, and as nothing remains to be litigated in this lawsuit, the Court will dismiss this case. Either party may move to re-open this case if further judicial intervention is necessary to enforce the rulings of this Court, or to enforce the rulings of the arbitrators.

IT IS FURTHER ORDERED that as the Keyeses are hereby ordered to arbitrate all of the claims they allege against the Arbitration Plaintiffs in Keyes I, all litigation in that case will be stayed pending arbitration.

SO ORDERED this the 28th day of September, 2016.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE