

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-315-WHB-JCG

MARILYN MATHIS

DEFENDANT

OPINION AND ORDER

This cause is before the Court on the Motion of the Plaintiffs to Compel Arbitration. Having considered the pleadings as well as supporting and opposing authorities, the Court finds the Motion is well taken and should be granted, and that any related judicial proceedings involving the parties to this action should be stayed pending arbitration.

I. Factual Background and Procedural History

Marilyn Mathis ("Mathis") owned a parcel of real property in Smith County, Mississippi. In 1998, Mathis entered a Building Contract-Mississippi ("Building 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 \$115,320.00. Mathis was required to use her real property as collateral to obtain the required financing. Mathis was also required to purchase insurance to cover losses from fire and wind damage to the

property/house. The Building Contract entered by Mathis 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. 15], Ex. C, at "Exhibit 'D'".¹

According to Mathis, she executed the Building Contract and related documents based on promises made by representatives of Jim Walter Homes that her "house would be built in accordance with the house plans, applicable building codes, and manufacturers' specifications." Id., Ex. A (Underlying Complaint), at ¶ 32. Mathis alleges that the statements by which she was induced to enter the Building Contract and related documents were false. See id., Ex. A at ¶ 31 (alleging that agents, employees and/or representatives for Jim Walters Homes "falsely represented ... that [Jim Walter Homes] would build ... homes they would be proud of, beautiful homes for their family, homes built in a good and workmanlike manner, using only the best craftsmen and highest quality materials ..."). Contrary to the representations made to her, Mathis alleges that the house she was built by Jim Walters

¹ The referenced "Exhibit D" bears electronic docket page number 3.

Homes was "substandard, incomplete, defective, and dangerous." Id., Ex. A at ¶ 25. The allegedly defective construction was performed by several Mississippi contractors including D.J. McNeill Electric and Plumbing, Inc.; Coy Boleware Construction, LLC; and Martin Heating and Cooling, LLC. Id., Ex. A at ¶ 26 and n.2.

Based on these allegations, Mathis and seven other individuals filed a lawsuit against Green Tree Servicing, LLC; Walter Investment Management Corporation; 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.² Through the Complaint, Mathis

² The association between Jim Walter Homes and the parties named in the lawsuit is alleged as follows:

Jim Walter Homes purportedly sold, assigned, or conveyed the contracts, promissory notes, and deed of trust made the subject of this civil action generally to Walter Mortgage Company, LLC, then to Walter Investment Management Corp. or one of the Mid State Trust Entities, and ultimately to Wilmington Trust Co., Green Tree, and their predecessors who in turn attempted to sell, assign, or convey said instruments to the other Defendants named herein. Without a willingness of these Defendants to purchase such ill-gotten paper, there would be no market or incentive to perpetuate this wrongful scheme. Green Tree Servicing, LLC is now the servicing agent for these mortgages.

Id., Ex. A at ¶ 41.

seeks damages on claims including deceit, false statements/fraud, breach of contract, civil conspiracy, negligence, and intentional infliction of emotional distress. Mathis also seeks an equitable accounting and an injunction preventing the defendants from assigning their interest in the property or seeking foreclosure, and suspending her obligation to make further payments on the house.

After the state court complaint was filed³, 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 a Complaint to Compel Arbitration in this Court against Mathis seeking to compel her to arbitrate her claims. The Court can exercise federal subject matter jurisdiction over the Complaint to Compel Arbitration pursuant to 28 U.S.C. § 1332. See Compl., ¶¶ 2-24 (establishing that the parties are of diverse citizenship and the amount in controversy exceeds \$75,000). The Court now considers the Motion to Compel Arbitration filed by the Arbitration Plaintiffs.

³ The state court Complaint was removed to this court and is pending as Brown et. al v. Green Tree Servicing, et al., Civil Action No. 3:16-cv-320 (S.D. Miss.)

II. Discussion

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 Construction Agreement entered between Jim Walter Homes and Mathis, and because it is to be performed by individuals/entities in different states,⁴ the Court finds the underlying Construction Agreement 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

⁴ Jim Walter Homes was a Florida corporation with its principal place of business in Florida. See Mot. to Compel Arbitration, Ex. C, at "Exhibit 'D'".

commerce as that term is defined by FAA precedent). Accordingly, the Court finds the Construction Agreement and incorporated Arbitration Agreement 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., 830 F.3d 199, 201 (5th Cir. 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.

Id., at 202 (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). Mathis argues that there does not exist a valid agreement to arbitrate between her and the Arbitration Plaintiffs because (1) there was no valid assignment of the Construction Agreement and/or (2) non-signatories/affiliates of signatories cannot enforce an arbitration agreement.

The Arbitration Plaintiffs in this case are not signatories to 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 identified as having a close legal relationship with the signatory, Jim Walter Homes. See e.g. Mot. to Compel, Ex. A at ¶¶ 7 & 34 (identifying Green Tree Servicing, LLC, as being a wholly owned subsidiary of Walter Investment Management Corporation); Id. at ¶ 41 (identifying the Mid State Trust entities and the Wilmington Trust Company as being assignees and conveyees of Jim Walter Homes LLC). Additionally, Mathis has alleged “substantially interdependent and concerted misconduct” between Jim Walter Homes and the Arbitration Plaintiffs. See e.g. id. at ¶ 22 (alleging that Mathis was a “victim of a scheme perpetuated by the [named] Defendants”); 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 ¶¶ 60-65 (alleging that all of the named defendants conspired and participated in the complained of “home built on your lot scheme”); Id. at ¶ 93 (alleging that each named defendant “aided and abetted each and every act” complained of by Mathis, and that without the “assistance and cooperation” provided by the named defendants, the complained of “fraudulent scheme could not have been possible.”). The Court finds, because the allegations in Mathis’s Complaint 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 allegedly “substantially interdependent and concerted misconduct” between the signatory and non-signatory Arbitration Plaintiffs, that Mathis can be compelled to arbitrate her claims against the Arbitration Plaintiffs even though they are not signatories to the arbitration agreement under governing Mississippi law. As discussed below, the issues of whether the Arbitration Agreement is enforceable, and who are the proper parties to that agreement, have been delegated to the arbitrator.

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. C, 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. 16], 9 (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 Mathis “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, Mathis first argues that that provision is unenforceable because she did not enter a valid arbitration agreement with the Arbitration Plaintiffs. See Mem. in Supp. of Resp. [Docket No. 21], 16-17 (“[I]f this Court finds that the arbitration agreement is nonexistent because it was never executed or is invalid and unenforceable, the delegation provision is unenforceable as well.”). The Court, however, has already found that a valid agreement to arbitrate exists between the Arbitration Plaintiffs and Mathis under Mississippi law. Accordingly, the Court finds this argument lacks merit. Next, Mathis argues that she “never intended to delegate the power to decide arbitrability to an arbitrator.” Id. at 17. The Court, however, has already found that because the subject Arbitration Agreement expressly incorporates the Comprehensive Arbitration Rules and Procedures administered by JAMS, which provides a delegation provision, that the “parties agreed to arbitrate arbitrability” under existing Fifth Circuit law. See Petrofac, 687 F.3d at 675. Accordingly, the Court finds Mathis’s argument that she did not intend to delegate the issue of arbitrability to the arbitrator also lacks merit.

Finally, Mathis challenges 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."). The delegation provision provided by the Comprehensive Arbitration Rules and Procedures for JAMS expressly grants the arbitrator the authority to rule on all jurisdictional and arbitrability disputes including "formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought" as well as "who are proper Parties to the Arbitration." As such, the Court finds the issue of whether the Arbitration Agreement is invalid as unconscionable is one that must be resolved by the arbitrator. Based on that same language, the Court finds the issue of whether the Arbitration Agreement is unenforceable because of the lack of pre-arbitration mediation, is likewise to be decided by the arbitrator.

In sum, having found that a valid agreement to arbitrate exists between the Arbitration Plaintiffs and Mathis, and that the subject Arbitration Agreement incorporates 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 Mathis is required to arbitrate the claims she has alleged against the Arbitration Plaintiffs in Brown, et al. v. Green Tree Servicing, LLC, et al., Civil Action No. 3:16-cv-320 (S.D. Miss.), the Court finds all proceedings between the parties hereto in that case should be stayed pending arbitration.

III. Conclusion

For the foregoing reasons:

IT IS THEREFORE ORDERED that the Motion of the Arbitration Plaintiffs to Compel Arbitration [Docket No. 15] is hereby granted. As Marilyn Mathis is hereby ordered to arbitrate all of the claims she has alleged against the Arbitration Plaintiffs in Brown, et al.

v. Green Tree Servicing, LLC, et al., Civil Action No. 3:16-cv-320 (S.D. Miss.), 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 Mathis is hereby ordered to arbitrate all of the claims she alleges against the Arbitration Plaintiffs in Brown, et al. v. Green Tree Servicing, LLC, et al., Civil Action No. 3:16-cv-320 (S.D. Miss.), all proceeding in that case will be stayed as between Mathis and the Arbitration Plaintiffs only pending arbitration.

SO ORDERED this the 17th day of January, 2017.

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