

**ORDER GRANTING THIRD-PARTY PLAINTIFFS, WOODLARK PROPERTIES IV,
LLC'S AND ALEX VENCE'S, MOTION FOR PRELIMINARY INJUNCTION
AND FOR STAY OF ARBITRATION**

2008 APR 28 P 1:08
ADELL CHANDLER
CIRCUIT CLERK
CAPELL WV

On April 10, 2008, Woodlark Properties IV, LLC (“Woodlark IV”) and collectively with Alex Vence “Third-Party Plaintiffs”), by and through its counsel Andrew G. Fusco, Jason M. Walls, and the Fusco Legal Group, L.C., and James River Insurance Company (“James River” or “Third-Party Defendant”), by and through its counsel Clarence E. Martin, III, who appeared by telephone, and Michelle Fox, came before the Court on the Third-Party Plaintiffs’ Motion for Preliminary Injunction and Stay of Arbitration. Counsel for multiple parties in the underlying, consolidated civil actions giving rise to the instant third-party dispute also appeared, including S. Douglas Adkins who argued in support of certain underlying Plaintiffs’ pending motions for preliminary injunctive relief and a stay of arbitration. Attorneys Dwight Staples, L. David Duffield, Chad Lovejoy, Jason Stemple, J.D. Wooton, Jr., Daniel T. Yon, and Kenneth E. Webb, Jr. appeared on behalf of their respective clients.

Having considered the parties’ briefs and oral argument, for the reasons that follow, the Court **GRANTS** the Third-Party Plaintiffs’ Motion for Preliminary Injunction, **ENJOINS** on a preliminary basis the Third-Party Defendant from arbitrating any matters related to its policy of insurance with Woodlark IV, and **STAYS** all arbitration proceedings related thereto.

Background

This case arises out of the January 13, 2007 fire at the Emmons apartment buildings in Huntington, West Virginia. The Emmons fire has given rise to nine underlying tort actions, eight of which have been consolidated in this Court. Named defendants in those consolidated actions include Woodlark Properties III, LP, the limited partnership which owns the Emmons apartment buildings, its corporate general partner, Woodlark Enterprises III, Inc., and Alex Vence, who was

employed by both Woodlark III and Woodlark IV as a property manager. Subsequent to their original filings, the Plaintiffs in the consolidated actions also named Woodlark IV as a defendant to those actions. Likewise, James River also has been named a defendant by all Plaintiffs in the consolidated actions.

At the time of the Emmons fire, Woodlark IV maintained a commercial general liability policy of insurance with James River, effective from September 24, 2006, through September 24, 2007. Woodlark IV asserts that it contracted for insurance with the Third-Party Defendant based on a thorough, twenty-three (23) page Insurance Proposal that nowhere mentioned arbitration or the existence of any arbitration provision. Further, the Third-Party Plaintiffs assert that Woodlark IV did not receive a full copy of its insurance policy containing the purported arbitration provision until February, 2007, well after the time of the Emmons fire.

On November 13, 2007, the Third-Party Defendant sent Woodlark IV a reservation of rights letter, along with an arbitration demand naming Charleston, West Virginia as the venue for arbitration. In a subsequent arbitration demand sent on January 7, 2008, however, the Third-Party Defendant named New York City as the venue for arbitration. The Third-Party Plaintiffs assert that the first time they learned of the disputed arbitration provision was through the November 13, 2007 reservation of rights letter.

Thereafter, first in Civil Action No. 08-C-110, which was subsequently voluntarily dismissed, and then as third-party plaintiffs to the consolidated tort actions, Woodlark IV and Alex Vence moved this Court for preliminary injunctive relief to enjoin James River from pursuing arbitration and to stay any arbitration proceedings related to the James River policy of insurance effective at the time of the Emmons fire. The Third-Party Plaintiffs assert that the issue of an arbitration provision in the policy of insurance was not raised or discussed prior to the

time of execution of the insurance contract. Woodlark IV asserts that it was unaware of any such provision at the time the insurance contract was entered and that the parties did not bargain for or agree to any such provision and, therefore, any such provision is invalid under West Virginia law. Further, the Third-Party Plaintiffs assert that the terms of the arbitration provision unconscionably limit the insureds' rights to pursue any unfair claims settlement actions under both the statutory and common-law of West Virginia and is, therefore, unconscionable.

Standard of Review

The Court considers the motion before it pursuant to the dictates of Rule 65 of the West Virginia Rules of Civil Procedure. In deciding a motion for preliminary injunction, a court must consider four factors: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Camden-Clark Memorial Hospital Corp. v. Turner*, 212 W.Va. 752, 756, 575 S.E.2d 362, 366 (W.Va. 2002) (quoting *Jefferson County Board of Education v. Jefferson County Education Association*, 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (W.Va. 1990)).

Analysis

To begin, the Third-Party Plaintiffs assert that this Court has jurisdiction to properly decide issues of validity and enforceability of the disputed arbitration clause. The Court agrees. Pursuant to Syllabus Point 1 of the West Virginia Supreme Court's decision in *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, Inc.*, "[w]here a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to

determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract." 186 W.Va. 613, 413 S.E.2d 670, Syl. Pt. 1 (W.Va. 1991). Thus, it is clear that the Third-Party Plaintiffs' challenges to the arbitration provision in the contract of insurance with the Third-Party Defendant are properly before this Court. Accordingly, the Court now considers the four-factor preliminary injunction test.

1) The likelihood of irreparable harm to the plaintiff without the injunction:

The Third-Party Plaintiffs assert that the terms of the disputed arbitration agreement are unconscionable and that allowing arbitration to go forward would impermissibly limit their right to pursue any unfair claim settlement actions under the statutory or common-law of West Virginia. In support, the Third-Party Plaintiffs rely on the West Virginia Supreme Court's decision in *State ex rel. Duntap v. Berger*, 211 W.Va. 549, 559-60, 567 S.E.2d 265, 275-76 (W.Va. 2002), which held that "exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable[.]"

In this case, the disputed arbitration provision reads, in pertinent part:

In the event you prevail in arbitration and we promptly offer to you arbitration costs and reasonable attorney fees incurred in connection therewith, in addition to the disputed contract benefit, you shall have no right to sue us for breach of implied covenants or unreasonable withholding of contract benefits.

The Third-Party Plaintiffs assert that even if they were to prevail at arbitration, this language extinguishes their right to seek or obtain any unfair settlement practices claims that they could potentially have. While the Court finds it unclear at this early stage whether the Third-Party

Plaintiffs have or will have valid bad-faith claims, the Court finds that the stated language of the disputed arbitration provision appears to limit the Third-Party-Plaintiffs' rights to pursue such claims as provided for by West Virginia law. Thus, there is a likelihood of irreparable harm to the Third-Party Plaintiffs absent an injunction, and the first factor weighs in their favor.

2) The likelihood of harm to the defendant with an injunction:

The Court finds that if an injunction is granted, the harm to the Third-Party Defendant will be minimal. There is no indication that James River will suffer any harm if the injunction is issued and the third-party dispute is not submitted to an arbitrator in New York in the near future. Accordingly, the second factor also weighs in favor of the Third-Party Plaintiffs.

3) The plaintiff's likelihood of success on the merits:

The Third-Party Plaintiffs assert that the disputed arbitration provision was never bargained for, mentioned, or discussed by Woodlark IV and the Third-Party Defendant, and it is therefore unenforceable. Indeed, the Third-Party Plaintiffs assert that they relied on a twenty-three (23) page insurance proposal that contained no mention of any arbitration provision or any binding arbitration requirement when they entered the contract of insurance with the Third-Party Defendant. The West Virginia Supreme Court's decision in *Saylor v. Wilkes*, 216 W.Va. 766, 613 S.E.2d 914 (2005) speaks to such a scenario.

In Syllabus Point 3 of the *Saylor* decision, the Supreme Court held that “[a] determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and [] the existence of unfair terms in the contract.” *Id.* (citations omitted). Moreover, the Supreme Court held in Syllabus Point 4 of the *Saylor* decision that “[i]t is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the

exclusive means of resolving disputes arising under the contract; however, where a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine” *Id.*

Here, the Third-Party Plaintiffs assert that they were unaware of the disputed arbitration provision, and that the provision was not discussed, bargained for, or contemplated at the time the contract of insurance was executed. The Third-Party Plaintiffs have supported this allegation with the affidavit of the managing member of Woodlark IV, Harold Rosenblum, who avers in paragraph 11 of that document that:

Prior to accepting coverage, an actual copy of the policy had never been sent to or received by Woodlark IV. Instead, in making its determination to accept the Insurer’s policy, Woodlark IV relied upon a 23 page detailed insurance proposal highlighting the central terms and conditions of that policy. Nowhere does the insurance proposal discuss, mention, or raise arbitration, or that its policy required Woodlark IV to waive its rights to a jury trial in connection with any and all disputed concerning coverage of any and all claims.

If the disputed arbitration provision was not bargained for and was not contained in any correspondence that the Third-Party Defendant sent to Woodlark IV before the contract of insurance was entered, then the Third-Party Plaintiffs seem to have a strong claim that this clause is unenforceable. Further, as discussed under the first factor, the Third-Party Plaintiffs have asserted that the provision unconscionably limits their rights to pursue statutory and common-law claims under West Virginia law. Given the evidence currently before the Court, the Third-Party Plaintiffs’ likelihood of success on the merits appears to be strong. Accordingly, the third factor weighs heavily in the Third-Party Plaintiffs’ favor.

4) The public interest:

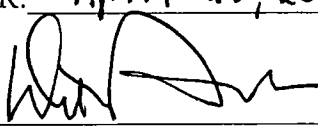
The Court finds no significant issue of public interest that would weigh heavily in favor of the Third-Party Plaintiffs or Third-Party Defendant at this time.

Conclusion

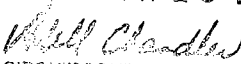
The Court finds that application of the four-factor test for determining whether a preliminary injunction should be issued in this case weighs heavily in favor of the Third-Party Plaintiffs. Accordingly, the Court **GRANTS** the Third-Party Plaintiffs' Motion for Preliminary Injunction, **ENJOINS** on a preliminary basis the Third-Party Defendant from arbitrating any matters related to its policy of insurance with Woodlark IV, and **STAYS** all arbitration proceedings related thereto. Further, in its discretion, the Court finds that under the circumstances specific to this case, it would be inappropriate to require the imposition of an injunction bond and, therefore, no injunction bond is required.

The Clerk is directed to serve a copy of this Order on all those counsel of record and *pro se* parties listed in Appendix A attached hereto.

It is so ORDERED.

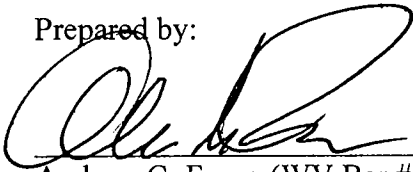
ENTER: April 28, 2008


The Honorable David M. Pancake

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, ADELL CHANDLER, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON APR 28 2008
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS APR 28 2008
 CLERK
CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA

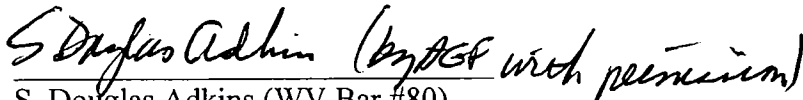
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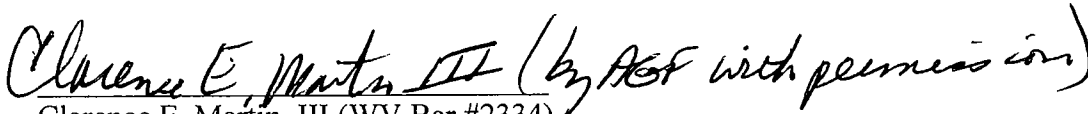


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