STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

RITA R. ARNSTEIN,

Plaintiff,

-v-

ADVANTAGE INSPECTIONS BY Y.C., INC., a Michigan Corporation, and YVES CHAMPT, an Individual, Jointly & Severally,

Defendants.
/

File No. 94-3521-NM
HON. PHILIP E. RODGERS, JR.

Jeff A. Arnstein (P39576)
Attorney for Plaintiff

Ronald W. Rice (P26059)
Attorney for Defendants
/

DECISION AND ORDER

The parties filed cross-motions for summary disposition. Plaintiff filed a Motion for Partial Summary Disposition on Count III pursuant to MCR 2.116(C)(10). Defendants filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(4), (7), (8) and/or (10). Defendants timely responded to this Court's Pre-Hearing Order dated December 1, 1994. Plaintiff untimely responded to this Court's Pre-Hearing Order dated December 15, 1994. Pursuant to MCR 2.119(E)(3), this Court dispenses with oral argument. This Court has reviewed the motions, the briefs, the exhibits attached to Defendants' brief, and the Court file.

The standard of review for a (C)(4) motion is set forth in Faulkner v Flowers, 206 Mich App 562; 522 NW2d 700 (1994).

> When reviewing a motion for summary disposition under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to a judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. MCR 2.116(G)(2) and 2.116(I)(1); Sargent v Browning-Ferris Industries, 167 NW2d 29, 33; 421 NW2d

563 (1988).

The standard of review for a (C)(7) motion is set forth in Moss v Pacquing, 183 Mich App 574, 579 (1990).

> In considering a motion for summary disposition under MCR 2.116(C)(7), a court must consider any affidavits, pleadings, depositions, admissions, and documentary evidence then filed or submitted by the parties. MCR 2.116(G)(5). In this case, all of Plaintiffs' well-pled factual allegations are accepted as true and are to be construed most favorably to Plaintiffs. Wakefield v Hills, 173 Mich App 215, 220; 433 NW2d 410 (1988). If a material factual question is raised by the evidence considered, summary disposition is inappropriate. Levinson v Sklar, 181 Mich App 693, 697; 449 NW2d 682 (1989); Hazelton v Lustig, 164 Mich App 164, 167; 416 NW2d 373 (1987).

The standard of review for a (C)(8) motion is set forth in Mitchell v General Motors Acceptance Corp. 176 Mich App 23; 439 NW2d 261 (1989).

> A motion for summary disposition brought under MCR 2.116 (C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. Beaudin v Michigan Bell Telephone Co, 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. NuVision v Dunscombe, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [Roberts v Pinkins, 171 Mich App 648, 651; 430 NW2d 808 (1988).]

The standard of review for a (C)(10) motion is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741; 440 NW2d 101 (1989).

> A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact

> exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer, 389 Mich 363, 371-372; 207 NW2d 316 (1973).
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> The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372.

In its consideration of the dispositive motions made pursuant to several subsections of MCR 2.116(C), this Court is further guided by the following synopsis from the Supreme Court's per curiam opinion in Patterson v Kleiman, 447 Mich 429, 431-432; 447 NW2d 429 (1994):

> The defendants' motion for summary disposition was filed under three separate paragraphs of MCR 2.116(C). The defendants said that they were immune from suit. MCR 2.116(C)(7). They also said that the plaintiff had failed to state a claim on which relief can be granted. MCR 2.116(C)(8). Finally, they asserted that there was no genuine issue as to any material fact, and that they were entitled to judgement as a matter of law. MCR 2.116(C)(10).
>
> The requirements for a motion for summary disposition and the manner in which such a motion is considered by the trial court vary, depending on the nature of the motion. A motion under MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3). If such material is submitted to the court, it must be considered. MCR 2.116(G)(5).
>
> A motion under MCR 2.116(C)(8) may not be supported

by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(2). When considering such a motion, the trial court must rely only on the pleadings. MCR 2.116(G)(5).

A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b). The adverse party may not rest upon mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial. MCR 2.116(G)(4). All this supporting and opposing material must be considered by the court. MCR 2.116(G)(5).

The requirements for judicial review of the various subsections of MCR 2.116(C) are, in some combinations, conflicting. The Patterson opinion addresses the inconsistency in the following text:

> At one point in its discussion, the Court of Appeals stated:
>
> > When considering a motion brought under MCR 2.116(C)(7), we consider all the affidavits, pleadings, and other documentary evidence filed or submitted by the parties. Haywood v Fowler, 190 Mich App 253, 255-256; 475 NW2d 458 (1991). We must consider all well-pleaded allegations as true and construe them most favorably to the plaintiff Id. [199 Mich App 192-193.]
>
> Those two principles are accurately attributed to Haywood, and they have been presented together in other decisions, as well. [Footnote citations omitted.] Likewise, each leg of Haywood finds support in the published decisions of the Court of Appeals. [Footnote citations omitted.]
>
> However, the practical effect of these maxims often is directly contradictory. If, as in the present case, the defendants submit affidavits that contradict the allegations of the complaint, it is not possible to honor fully both rules--the circuit court cannot simultaneously consider all well-pleaded allegations as true and give meaningful consideration to the additional papers filed to support and oppose the motion.
>
> * * *

In this case, the Court of Appeals properly reviewed all the material submitted in support of, and in opposition to, the plaintiff's claims, and correctly determined that "it was not appropriate to have dismissed plaintiff's claims at this stage in the proceedings." 199 Mich App 193.

Patterson, supra at pp 433-435.

Plaintiff, in the Complaint, alleged that Defendants failed to satisfactorily perform an inspection pursuant to the terms of the parties' Contract Agreement for Home Inspection Services. Further, Plaintiff alleged that as a result of Defendants' malpractice and breach of contract, Plaintiff incurred monetary damages. The Agreement, made in August, 1993, includes an arbitration provision which reads as follows:

> If a dispute arises out of or relates to this contract, or breach thereof, and if said dispute cannot be settled through negotiation, the parties agree to first try in good faith to settle the dispute by mediation under the commercial mediation rules of the American Arbitration Association, before resorting to arbitration, litigation, or some other dispute resolution procedure. In the event the parties cannot settle their dispute by mediation under the commercial mediation rules of the American Arbitration Association, the parties agree to submit the issue to binding arbitration in accordance with the rules of the American Arbitration Association. Arbitrator must be from the local area, be a full time home inspector and have at least 5 years experience as a home inspector. A good faith effort to select such an arbitrator must be accomplished within one month's time.

Plaintiff's Motion, p 2.

It is undisputed that Plaintiff sought AAA resolution of the matter. See Defendants' Exhibit 3, AAA Demand for Arbitration dated February 2, 1994 and signed by Plaintiff's counsel as "Attorney for Claimant". Plaintiff asserted, in her motion at paragraph 5, that Defendants failed to act in good faith to resolve the dispute in AAA mediation.

Plaintiff, in paragraphs 7 and 8 of her motion for partial summary disposition described the issue as follows:

> Count III of the plaintiff's Complaint is an action for declaratory relief seeking a judicial declaration voiding the Agreement's arbitration provision on the grounds that

> the Agreement constitutes a "common law" agreement to arbitrate, rather than a statutory arbitration provision pursuant to MCLA 600.5001, et seq[; MSA 27A.5001]. The latter type of arbitration must contain the following highlighted statutory language.
>
>> (1) All persons, except infants and persons of unsound mind, may, be an instrument in writing, submit to the decision of 1 or more arbitrators, any controversy existing between them, which might be the subject of a civil action, except as herein otherwise provided, and may, in such submission, agree that a judgment of any circuit court shall be rendered upon the award made pursuant to such submission.
>>
>> (2) A provision in a written contract to settle by arbitration under this chapter, a controversy thereafter arising between the parties to the contract, with relation thereto, and in which it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such agreement, shall be valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the rescission or revocation of any contract. MCLA 600.5001 (Emphasis added.)

Defendants argued that the parties' Agreement provided for arbitration pursuant to the arbitration statute. Defendants contended, on page 6 of its reply to Plaintiff's motion, "that the matter even now is pending with the American Arbitration Association."

Both parties rely on EE. Tripp Excavating Contractor, Inc v Jackson County, 60 Mich App 221; 230 NW2d 556 (1975) to support their divergent arguments. Justice Kelly's opinion in Tripp provides a thorough discussion of statutory and common-law arbitration. Plaintiff's contend that the subject Agreement provides for common-law arbitration and inherently allows revocation by either party at any time prior to the arbitrator's award. It is the opinion of this Court that the following conclusion of the Court of Appeals in Tripp resolves the instant matter:

The court in Varley v Tarrytown Associates, Inc, 477 F2d 208, 210 (CA 2, 1973), faced an identical issue involving the United States Arbitration Act, 9 USC 1 et seq, and Section 39 of the Arbitration Rules. We agree with the Varley court's resolution of the issue:

> The Act provides that confirmation of an arbitration award is appropriate only where the parties 'in their agreement have agreed that a judgment of the court shall be entered upon the award ***' 9 USC 9. There was no such explicit agreement here but only a clause providing for the settlement of controversies by arbitration pursuant to the rules of the American Arbitration Association. While this is sufficient to incorporate the rules into the agreement, Reed & Martin, Inc. v Westinghouse Elec Corp, 439 F2d 1268 (CA 2, 1971); AAA Commercial Arbitration Rules § 21, there is nothing in the rules which indicates that the parties thereby consent to the entry of judgment upon an award.

Tripp, supra at p 240. It is the view of this Court that the Agreement provides for common-law arbitration.

The penultimate and final paragraphs of Count III and Plaintiff's prayer for relief read as follows:

> 39. Because the Agreement provides for a common law arbitration, this arbitration clause may be unilaterally revoked by either party at any time prior to the rendering of an arbitration award, regardless of which party initiated the arbitration, and regardless of the stage of the arbitration proceeding.
>
> 40. Plaintiff seeks to revoke the arbitration clause as a result of the parties' inability to agree on an arbitrator who could properly and fairly arbitrate this dispute.
>
> WHEREFORE, the Plaintiff, Rita R. Arnstein, respectfully requests that this Honorable Court declare that the arbitration provision contained in the Agreement is null and void, and that the Plaintiff's revocation of the arbitration provision is proper.

Plaintiff, in her prayer for relief, asked this Court to render the arbitration provisions of the Agreement null and void. As shown above, the parties' common-law agreement to arbitrate is revocable at will by either party prior to the arbitrator's award. Tripp,

supra at p 241. There is no evidence before this Court that Plaintiff, unequivocally and in writing, has revoked the arbitration provision of the Agreement or withdrawn her demand for arbitration.

Defendants, in their response to Plaintiff's motion and in their counter motion for summary disposition, described the status quo as follows:

> 14. Plaintiff has failed to follow the agreed upon dispute resolution and has filed this action seeking to void the arbitration agreement without having given notice of revocation of the arbitration agreement and seeking contrary to law, to have this court decide the merits of this contract dispute while simultaneously instructing the American Arbitration Association to maintain jurisdiction of the dispute.
>
> 15. Plaintiff should be estopped from revoking the arbitration agreement because Plaintiff has failed to give this court a legitimate reason why the arbitration proceeding (which she initiated and now attempts to avoid) should not proceed to resolution in the agreed upon forum.

To support its assertion that Plaintiff has instructed AAA to retain jurisdiction of this matter, Defendants submitted as Exhibit A, a copy of a letter, dated October 31, 1994, from AAA Case Administrator Patrick O. Farley to counsel in this lawsuit. The body of Mr. Farley's letter reads, in its entirety, as follows:

> In response to the Respondent's letter of October 21, 1994, the Association has been informed by the Claimant that the above matter has not be [sic] withdrawn. At this time, the case is being held in abeyance while specific issues are being addressed in court. Once these matters have been resolved, the Association will proceed with scheduling an evidentiary hearing.
>
> If you should have any questions, please do not hesitate to contact me.

It is undisputed that AAA retains an open file in this case. Clearly, Plaintiff/Claimant has not exercised her right to revoke the common-law arbitration clause in the Agreement.

For the foregoing reasons, this Court grants in part and denies in part Plaintiff's motion for partial summary disposition.

The Court finds a valid and enforceable arbitration provision in the parties' Agreement and that the parties have not exhausted an administrative remedy. However, the agreement is for common-law arbitration and remains subject to unilateral revocation by either party prior to the entry of a judgment on the award.

This Court now turns to Defendants' contention that its liability in this matter is limited to the amount of the original inspection fee. MCR 2.116(C)(4). Defendants asserted, as follows in paragraph 20:

> [T]his court lacks jurisdiction because the "Agreement" contains a limitation of damages in the amount of the fee ($225.00) paid for the inspection. Such limitations are clearly enforceable under Michigan law. See St. Paul Fire & Marine Ins Co v Guardian Alarm of Mich[igan], 115 [Mich App] 278[;320 NW2d 244] (1982) and USAA Group v International Alarms, Inc, 158 [Mich App] 633[; 405 NW2d 146] (1987).

Inter alia, Plaintiff, in her reply and response to Defendants' motion, stated as follows:

> While the plaintiff does not dispute that the Agreement purports to limit an aggrieved party's recovery to the price of the inspection ($225), and that Michigan law generally upholds liquidated damage provisions, this particular clause should [be] held as void as being unreasonable, unjust, and unconscionable.

Plaintiff relied on Curran v Williams, 352 Mich 276; 89 NW2d 602 (1958), with respect to the enforceability of liquidated damage provisions. Plaintiff argued on page 4 of her reply and response as follows:

> Surely, the defendant in this case knew that the plaintiff would, in large part, base a decision to spend nearly $200,000 to purchase the home on the results of the inspection. With this in mind, to limit a recovery of a severely botched inspection to $225, clearly disregards the principal of just compensation, as expressed in the Curran case. To rule otherwise would accomplish the unjust and absurd result of limiting damages flowing from a professional's malfeasance to the cost of the service provided.

Justice Danhof, writing for the Court of Appeals in Solomon v Dep't of Highways, 131 Mich App 479, 484; 345 NW2d 717, (1984), relied on the Curran opinion. The following text from Solomon, supra, is

instructive:

> The general rule governing liquidated damages was summarized by the Supreme court in Genesee Bd of Road Comm'rs v North American Development Co, 369 229, 236; 119 NW2d 593(1963):
>
> > When it is difficult to determine the actual damages which would be suffered under such circumstances and where the determination of the actual damages for a breach are uncertain in their nature, difficult to ascertain, or impossible to estimate with certainty by any pecuniary standard, the courts permit the parties to ascertain the damages for themselves and to provide in the contract the amount of damages which will be paid for the breach. Jaquith v Hudson, 5 Mich 123.
>
> To determine whether the amount stipulated as liquidated damages is reasonable, the Court looks to conditions at the time the contract was entered into, not at the time of breach of the contract:
>
> > It is a well-settled rule in this State that the parties to a contract can agree and stipulate in advance as to the amount to be paid in compensation for loss of injury which may result in the event of a breach of the agreement. Such a stipulation is enforceable, particularly where the damages which would result from a breach are uncertain and difficult to ascertain at [the] time contract is executed. If the amount stipulated is reasonable with relation to the possible injury suffered, the courts will sustain such a stipulation.
> >
> > The purpose in permitting a stipulation of damages as compensation is to render certain and definite that which appears to be uncertain and not easily proven. The courts recognize that the parties, particularly at the time of execution of the instrument, are in as good a position as anyone to arrive at a fair amount of damages for a subsequent breach. In the event they are not unconscionable or excessive courts will not disturb it. Just compensation for the injuries sustained is the principle at which the law attempts to arrive. Courts will not permit parties to stipulated unreasonable sums

as damages, and where such an attempt is made have held them penalties and therefore void and unenforceable. Curran v Williams, 352 Mich 278, 282-283; 89 NW2d 602 (1958).

This Court finds merit in Defendants' reliance on cases which address the enforceability of adhesion contracts. The Court of Appeals rulings in Guardian Alarm Co of Michigan, supra, and USAA Group, supra included the review of cases which involved property owners' efforts to recover damages from defendant/alarm system companies. In both cases, the parties had contracts which limited the defendants' exposure to damages to amounts significantly below the amount of damages claimed by the plaintiffs or reasonably to be expected to flow from the breach at the time the service was contracted. The following text is helpful and instructive:

> This Court set forth the elements of an adhesion contract in Cushman v Frankel, 111 Mich App 604, 607; 314 NW2d 705 (1981);
>
> The essence of an adhesion contract is that it is offered on a take it or leave it basis to a consumer who has no realistic bargaining strength and who cannot obtain the desired services or goods without consenting to the contract terms. Wheeler v St Joseph Hospital, 63 Cal App 3d 345, 356; 133 Cal Rptr 775 (1976).

USAA Group, supra at p 636. In Guardian Alarm Co, the liquidated damages clause limited liability to $250.00 or the aggregate of six monthly payments (at $60.00 per month) whichever was greater. In USAA Group, Defendant's liability was limited to $250.00. In both cases, the Court of Appeals upheld the trial court's limitation of liability at $250.00.

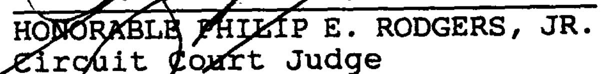
Plaintiff argued that, as a lay person, she contracted with a professional in home inspections who "surely" knew she would, "in large part", base her decision as to whether to purchase a home for nearly $200,000.00 on the results of the inspection. No facts have been shown to this Court which allow an inference that the parties' agreement to limit damages to $250.00 was the product of unequal bargaining power or evidence of a market where home

inspections without such damage limitation clauses were unobtainable. *Cushman*, *supra* and *USAA Group*, *supra*. This Court does not find the Agreement to be a contract of adhesion; nor is it unreasonable, unjust, or unconscionable for the Defendants to contract with Plaintiff and limit their liability to the cost of the inspection. For the foregoing reasons, this Court finds that it lacks subject matter jurisdiction over this matter. MCR 2.116(C)(4), *Guardian Alarm Co of Michigan*, *supra*, and *USAA Group*, *supra*.

In summary, Plaintiff's claim may not proceed due to her failure to exhaust an administrative remedy. The parties agreed to a common-law arbitration provision which is yet to be properly revoked. MCR 2.116(C)(7) and (10). Also, Plaintiff failed to state a claim over which this Court has subject matter jurisdiction because the limit of Defendant's liability ($250.00) is not within this Court's jurisdictional limits. MCR 2.116(C)(4).

This action is dismissed without prejudice. If Plaintiff chooses to refile this claim in the District Court, this Court respectfully suggests that Plaintiff clearly and unequivocally provide notice to both the Defendants and the American Arbitration Association that the arbitration agreement is revoked.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 5/17/95