

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>KATHY FENSTAMAKER and RICK FENSTAMAKER, husband and wife,</b>	:	<b>NO. 19-1752</b>
	:	
<b>Plaintiffs</b>	:	
	:	
<b>vs.</b>	:	<b>CIVIL ACTION - LAW</b>
	:	
<b>KRISTIE CLARK as Executrix of the Estate of Lynn C. Womer, BRIAN WOMER, SCOTT WOMER, and GARTH WOMER,</b>	:	
	:	
<b>Defendants</b>	:	<b>PRELIMINARY OBJECTIONS</b>

**ORDER**

**AND NOW**, this **22<sup>nd</sup>** day of **September, 2020**, before the Court are the Preliminary Objections filed by the Defendants on June 22, 2020, to the Second Amended Complaint filed by the Plaintiffs on June 3, 2020.

This action was commenced on October 18, 2019, with the filing of a Complaint by Kathy Fenstamaker and Rick Fenstamaker, Plaintiffs, against Kristie Clark, Executrix of the Estate of Lynn C. Womer, Brian Womer, Scott Womer, and Garth Womer, Defendants. The Defendants filed Preliminary Objections on November 22, 2019, which were scheduled for argument on February 20, 2020. The Plaintiffs filed an Amended Complaint on December 20, 2019, and the Defendants filed Preliminary Objections thereto on January 14, 2020. Argument was scheduled for March 10, 2020, and, upon motion of the Defendants, continued until March 18, 2020. As a result of the statewide judicial emergency due to COVID-19, argument was continued several additional times and rescheduled for June 5, 2020. On June 3, 2020, Plaintiffs filed a Second Amended Complaint, and upon Defendant's request, the argument was again continued. Defendants' Preliminary Objections to Plaintiffs' Second Amended Complaint were filed

on June 22, 2020, and argument was held on August 26, 2020. Robert M. Palumbi, Esquire, was present on behalf of the Plaintiffs. Michael J. Supinka, Esquire, and Kevin R. Gaydos, Esquire, were present on behalf of the Defendants.

Plaintiffs' Second Amended Complaint contains the following five counts: Count I – Breach of Contract; Count II – Violation of the Unfair Trade Practices and Consumer Protection Law (“UTPCPL”); Count III – Unjust Enrichment; Count IV – Fraudulent Inducement (in the alternative); and Count V – Negligent Misrepresentation (in the alternative). Count I involves only Defendant Clark as Executrix of the Estate while Counts II-V involve all named Defendants. The Defendants' raised Preliminary Objections on the following grounds:

- I. LACK OF SPECIFICITY IN PLEADING AND LEGAL INSUFFICIENCY OF PLEADING WITH REGARD TO ALL COUNTS AGAINST DEFENDANT BROTHERS – Pa.R.C.P. Nos. 1028(3) and 1028(4).**
- II. DEMURRER AS TO ALL COUNTS OF THE SECOND AMENDED COMPLAINT FOR LEGAL INSUFFICIENCY AND LACK OF SPECIFICITY IN PLEADING – FAILURE TO AVER FACTS ESTABLISHING THAT DEFENDANTS HAD THE REQUIRED KNOWLEDGE OF LATENT MATERIAL DEFECTS – Pa.R.C.P. Nos. 1028(a)(3) and 1028(a)(4).**
- III. DEMURRER AS TO COUNT I AND COUNT III OF THE SECOND AMENDED COMPLAINT FOR LEGAL INSUFFICIENCY DUE TO INTEGRATION CLAUSE AND RELEASE OF DAMAGES PROVISIONS IN DISCLOSURE STATEMENT AND SALES AGREEMENT – Pa. R.C.P. No. 1028(a)(4).**
- IV. THE SECOND AMENDED COMPLAINT SHOULD BE DISMISSED IN ITS ENTIRETY BECAUSE PLAINTIFFS AGREED TO SUBMIT ANY AND ALL CLAIMS REGARDING THE SALE OF THE ESTATE PROPERTY TO MEDIATION – Pa.R.C.P. 1028(a)(6).**
- V. FAILURE TO CONFORM TO RULE OF COURT – FAILURE TO ATTACH SIGNED DISCLOSURE STATEMENT – Pa.R.C.P. 1028(a)(2).**

**VI. LACK OF SPECIFICITY AS TO PLAINTIFF'S COUNT II – Pa.R.C.P. 1028(a)(3).**

**VII. MOTION TO STRIKE PLAINTIFFS' REQUEST FOR ATTORNEYS FEES IN COUNTS III, IV, AND V.**

Prior to addressing the merits of Defendants' Preliminary Objections regarding lack of specificity and/or legal sufficiency of pleadings, we must examine whether the Lycoming County Court of Common Pleas is the appropriate forum at this time for Plaintiffs to assert their claims. Pa.R.C.P. 1028(a)(6) allows a preliminary objection to be filed when there exists the pendency of a prior action or *agreement for alternative dispute resolution*. (emphasis added).

Defendants argue that the Plaintiffs' Second Amended Complaint should be dismissed in its entirety because Paragraph 27 of the Sales Agreement, attached to the Second Amended Complaint as Exhibit C, states that all disputes arising from the Sales Agreement shall be submitted to mediation. Indeed, paragraph 27 of the Sales Agreement, signed by the Plaintiffs and Defendant Clark as Executrix of the Estate, states:

Buyer and Seller will submit all disputes or claims that arise from this Agreement, including disputes and claims over deposit monies, to mediation. . . This mediation process must be concluded before any party to the dispute may initiate legal proceedings in any courtroom, with the exception of filing a summons if it is necessary to stop any statute of limitations from expiring.

In their brief in opposition to the Preliminary Objections and at the time of the argument, counsel for the Plaintiffs argued that the Defendants waived the right to enforce this provision by (1) failing to raise the objection to the initial Complaint and the First Amended Complaint and (2) sending Timothy Hoover a notice of deposition. "A

waiver of a right to proceed to arbitration pursuant to the term of a contract providing for binding arbitration should not be lightly inferred and unless one's conduct has gained him an undue advantage or resulted in prejudice to another he should not be held to have relinquished that right." **Smay v. E.R. Stuebner, Inc.**, 864 A.2d 1266, 1278 (Pa. Super. 2004).

Plaintiffs argue that the Defendants' third set of Preliminary Objections were filed approximately 10 months after being served with the Initial Complaint and that the issue of improper forum on the basis of the mandatory mediation clause was not raised in the Preliminary Objections filed on November 22, 2019, nor in the Preliminary Objections filed on January 17, 2020. Plaintiffs point to the fact that the Defendants have noticed the deposition of Timothy Hoover as evidence that they have "accepted the judicial process" and have waived their right to request mediation 10 months into the civil action. "Acceptance of the judicial process is demonstrated when the party (1) fails to raise the issue of arbitration promptly, (2) engages in discovery, (3) files pretrial motions which do not raise the issue of arbitration, (4) waits for adverse rulings on pretrial motions before asserting arbitration, or (5) waits until the case is ready for trial before asserting arbitration." **Id.**

The Court finds Plaintiff's argument both factually inaccurate and without merit. The Sales Agreement containing the mediation clause was not attached as an Exhibit to the Complaint when it was filed on October 18, 2019. At that time, the Defendant Executrix may not have been aware - and the Defendant brothers certainly would not have been aware - of the clause requiring all parties to the Agreement submit to mediation prior to instituting any action in a court of law. The Plaintiffs filed their Amended Complaint on December 20, 2019, and included the Sales Agreement as an

Exhibit. The Defendants filed Preliminary Objections to the Amended Complaint on January 14, 2020, and raised the issue that the “Amended Complaint should be dismissed in its entirety because Plaintiffs agreed to submit any and all claims regarding the sale of the estate property to mediation.” (See, Preliminary Objection #IV, filed 1/14/20). The Defendants raised the objection at the first opportunity to do so and used the proper procedure by filing a preliminary objection.

Following the filing of Preliminary Objections to the Amended Complaint, argument was scheduled for March 10, 2020, and continued until March 18, 2020, at the request of Defendants’ counsel. The matter was continued two additional times by the Court as a result of the statewide judicial emergency due to Covid-19 and the closure of the Lycoming County Courthouse for non-essential matters. The argument on the Preliminary Objections was scheduled for June 5, 2020. However, the Plaintiffs filed their Second Amended Complaint on June 3, 2020, nearly 5 months after the Defendants’ Preliminary Objections were filed and a mere two days prior to the argument scheduled thereon. Defendants requested, and were granted, a continuance in order to preserve their preliminary objections to the Amended Complaint while taking the time necessary to review the Second Amended Complaint and respond accordingly. The argument was rescheduled for August 26, 2020, and prior thereto, the Defendants filed Preliminary Objections to the Second Amended Complaint. As the objection regarding the requirement that the parties to the Sales Agreement submit their claims to mediation was raised in January, 2020, at the first available opportunity, and preserved in the second set of Preliminary Objections, it is disingenuous of the Plaintiffs to claim that the Defendants waited 10 months after the filing of the initial Complaint to attempt to enforce the mandatory mediation clause.

With regard to the Plaintiffs' assertion that the Defendants sent notice of the intention to take the deposition of Timothy Hoover, this Court does not find that this rises to the level of engaging in discovery which would constitute acceptance of the judicial process. Although the date the notice of deposition was sent was not provided at the time of the argument, given the fact that the Defendants raised the mandatory mediation clause as early as January 2020, this Court presumes that the notice was given in the event that the Defendants were unsuccessful in their preliminary objections. The Court does not find that the Defendants actively engaged in the discovery process prior to raising their objection to the Plaintiffs' chosen forum. For all of the foregoing reasons this Court finds the Plaintiffs' assertion that the Defendants' waived their right to enforce the mediation clause is without merit.

The Plaintiffs further argue that they filed the Complaint in the Court of Common Pleas prior to submitting their claims to mediation because the mediation clause is unenforceable as it relates to the Defendant brothers, as they were not parties to the Sales Agreement. While the Plaintiffs may be correct in their assertion that the Defendant brothers were not a party to the Sales Agreement and therefore not subject to the mediation clause, this fact does not relieve them of the obligation that all parties to the Sales Agreement shall first submit their claims to mediation. Plaintiffs' decision to include additional Defendants to the action who were not parties to the Sales Agreement cannot be used as a mechanism to bypass what the Plaintiffs are contractually obligated to do with regard to any disputes arising out of the Sales Agreement.

After careful consideration, Defendants' Preliminary Objection IV to the Plaintiffs' Second Amended Complaint is hereby **SUSTAINED**. Due to the nature of the objection

and the requirement that the parties to the Sales Agreement submit all claims to mediation, this Court will not reach the merits of the Defendants' other Preliminary Objections at this time. The Plaintiffs' Second Amended Complaint is hereby **DISMISSED** in its entirety without prejudice to refile against any or all of the Defendants if the mediation process as outlined in the Sales Agreement is unsuccessful or does not yield the results the Plaintiffs desire.

By the Court,

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Joy Reynolds McCoy, Judge