

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY,  
PENNSYLVANIA  
CIVIL DIVISION**

<b>WILLIAM KAYE,</b>	:	<b>NO: CV-2016-7369</b>
	:	
<b>Plaintiff,</b>	:	
<b>v.</b>	:	
	:	
<b>BRANDON J. COLOSI, JUNE H.</b>	:	
<b>COLOSI and COLOSI GROUP, LLC,</b>	:	
	:	
<b>Defendants.</b>	:	

**ORDER OF COURT**

**AND NOW**, this 11th day of January, 2017, upon consideration of the Amended Preliminary Objections to Plaintiff’s Complaint and Memorandum of Law in Support of the same filed by Defendants, Brandon J. Colosi, June H. Colosi, and Colosi Group, LLC (“Defendants”) and Plaintiff’s, William Kaye’s (“Plaintiff”), Complaint, Response to Amended Preliminary Objections of Defendants to Plaintiff’s Complaint, and Memorandum of Law Contra Defendants’ Amended Preliminary Objections to Plaintiff’s Complaint, it is hereby **ORDERED** as follows:

1. Defendant’s first Preliminary Objection, which requests that this Court compel arbitration, is **SUSTAINED**.
2. Plaintiff must submit to arbitration consistent with the Agreement of Sale of Commercial Real Estate.
3. The present matter is **STAYED** pending arbitration, and upon completion of arbitration, Plaintiff shall notify the Court and file the appropriate case termination documents.

## **STATEMENT OF REASONS**

### **I. Factual and Procedural History**

The following facts are stated as averred by Plaintiff in his Complaint. Defendant, Brandon J. Colosi ("Mr. Colosi"), was a licensed Pennsylvania realtor professionally associated with Berkshire Hathaway HomeServices Fox & Roach Realtors in Bethlehem Township, Northampton County, Pennsylvania ("Berkshire Hathaway"). Compl. ¶ 7. On March 1, 2016, Defendants entered into an Agreement of Sale of Commercial Real Estate ("Agreement of Sale"), wherein Plaintiff purchased the commercial property owned by Defendants and located as 1600 North Delaware Drive, Forks Township, Northampton County, Pennsylvania (the "Property"). Id. at ¶¶ 8-9. Prior to the signing of the Agreement of Sale, Mr. Colosi and June H. Colosi ("Mrs. Colosi" and collectively the "Colosis") completed and executed a Commercial Property Information Sheet ("Information Sheet") on February 14, 2016. Id. at ¶ 10. Plaintiff signed the Information Sheet on February 18, 2016. Id. at ¶ 13. The Information Sheet stated, in relevant, part, that a well on the Property provided the Property's source of drinking water and that the pumping system of said well was in working order. Id. at ¶ 11, Ex. B, at 4. The Information Sheet did not indicate that the Colosis were aware of any problems related to the Property's water source. Id. at ¶ 12, Ex. B.

The Agreement of Sale states, in relevant part, that the Property was served by "On-site Water." Id. at ¶ 14, Ex. A, at 3. The Agreement of Sale

also stated that the Colosis “will provide for testing of the water system to inspect for proper operation and any potential leaks.” Id. at ¶¶ 8-9, Ex. A., at 9. Additionally, at various times before the execution of the Agreement of Sale, the Colosis assured Plaintiff that the Property’s water service was shut off because the Property was vacant but that the water service would be restored at the time of the Agreement of Sale was executed. Id. at ¶ 15.

Plaintiff contends that the water service to the building on the Property was not restored by the time the Agreement of Sale was executed. Id. at ¶ 16. Between March 1, 2016, and March 12, 2016, Plaintiff and his licensed realtor, an individual professionally associated with Berkshire Hathaway, on numerous occasions, requested that Mr. Colosi allow for the testing and inspection of the water system. Id. at ¶ 18. Mr. Colosi informed Plaintiff and his realtor that the plumbers Mr. Colosi intended to use were unavailable. Id. at ¶ 19. Subsequently, on March 12, 2016, Plaintiff and his realtor met with Mr. Colosi at the Property for the purpose of inspecting and testing the water system. Id. at ¶ 20. During this visit to the Property, Plaintiff and his realtor tested the faucets and toilets and observed the pipes and concluded that there were no problems relating to the water service. Id. at ¶ 21. On March 16, 2016, for the consideration of \$134,000.00, the Property was conveyed to Plaintiff by the Colosis acting in their capacities as president and vice-president of Colosi Group, LLC. Id. at ¶ 22.

Plaintiff began occupying the Property immediately after March 16, 2016. Id. at ¶ 23. On March 31, 2016, water service to the property abruptly ceased. Id. at ¶ 24. Plaintiff discovered that the water service to the building had been supplied by a cistern located on the Property, and said cistern ran dry on March 31, 2016. Id. at ¶ 25. It was determined that the cistern had once been filled naturally by a local water source but that said water source had changed course and no longer naturally filled the cistern. Id. at ¶ 26. On April 7, 2016, Plaintiff ascertained that on an occasion between March 1, 2016, and March 12, 2016, a large capacity water tanker truck filled the Property's cistern. Id. at ¶ 27.

On August 19, 2016, Plaintiff filed his Complaint, which appears to raise claims of fraud against Defendants.<sup>1</sup> Plaintiff asserts that Defendants knew that the cistern was dry and were unwilling to remedy the problem and consequently, directed that the cistern be filled with water for the purpose of "tricking, misleading and deceiving" Plaintiff into believing that the water system operated properly. Id. at ¶ 28. Plaintiff contends that he purchased the Property as a direct consequence of Defendants' intentional misrepresentations. Id. at ¶ 29. As a result, Plaintiff had a well drilled on the Property to provide on-site water service, which cost \$8,100.00, and may need to expend further monies on the well. Id. at ¶¶ 39-41. Plaintiff further asserts that as a member of the Pennsylvania Association of

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<sup>1</sup> Plaintiff's Complaint does not contain headers to label his count(s), but this Court can infer that Plaintiff's Complaint sounds in fraud.

Realtors, which enforces its own code of ethics, Mr. Colosi's actions are "all the more unfathomable and depraved." Id. at ¶ 47.

Before this Court are Defendants' Amended Preliminary Objections to Plaintiff's Complaint, which was filed on October 15, 2016. Defendants also filed a Memorandum of Law in Support of the same on October 15, 2016. Plaintiff filed his Response to Amended Preliminary Objections on October 26, 2016, and his Memorandum of Law Contra Defendants' Amended Preliminary Objections on November 3, 2016.

This matter was assigned to the undersigned via the November 8, 2016, Argument Court list.

## **II. Discussion**

### **A. Purported Arbitration Agreement**

Defendants' first Preliminary Objection contends that this Court must order the parties to submit the present matter to arbitration, pursuant to the arbitration clause contained in the Agreement of Sale.

"Arbitration is a matter of contract, and parties to a contract cannot be compelled to arbitrate a given issue absent an agreement between them to arbitrate that issue." Cumberland-Perry Area Vocational-Tech. Sch. Auth. v. Bogar & Bink, 396 A.2d 433, 434 (Pa. Super. 1978). Our Pennsylvania courts employ a two-part test to determine whether a trial court should have compelled arbitration. Smay v. E.R. Stuebner, Inc., 864 A.2d 1266, 1270 (Pa. Super. 2004). "The first determination is whether a valid agreement to

arbitrate exists. The second determination is whether the dispute is within the scope of the agreement.” Id. Our Superior Court explained the interpretation of arbitration agreements in Callan v. Oxford Land Dev., Inc. as follows:

(1) arbitration agreements are to be strictly construed and not extended by implication; and (2) when parties have agreed to arbitrate in a clear and unmistakable manner, every reasonable effort should be made to favor the agreement unless it may be said with positive assurance that the arbitration clause involved is not susceptible to an interpretation that covers the asserted dispute.

858 A.2d 1229, 1233 (Pa. Super. 2004).

Further, “the scope of arbitration is determined by the intention of the parties as ascertained in accordance with the rules governing contracts generally.” Elwyn v. DeLuca, 48 A.3d 457, 461 (Pa. Super. 2012) quoting Smay, 864 A.2d at 1270. Defendants rely on Dodds, which involves a comparable set of underlying facts. In Dodds, the homebuyer-plaintiffs purchased houses and filed suit against the sellers and builders of said houses, asserting several claims, including breach of contract and fraud. Dodds v. Pulte Home Corp., 909 A.2d 348, 350 (Pa. Super. 2006). On a motion from the defendants that requested the matter be remanded to arbitration, the trial court held that the plaintiffs’ allegations of fraud “t[ook] the matter out of the ambit of arbitration.” Id. On appeal, our Superior Court considered the scope of the parties’ arbitration clause, which read: **“Any controversy, claim or dispute arising out of or relating to this**

**Agreement or purchase of the Home** (except for claims subject to the Limited Home Warranty) shall be settled by arbitration.” Id. The Court described the aforementioned arbitration clause as “very broad” and determined that the plaintiffs’ fraud claims were subject to arbitration. Id. Accordingly, the Court reversed the trial court. Id. at 352.

Turning to the present matter, we first determine “whether a valid agreement to arbitration exists.” The parties dispute whether the Agreement of Sale creates a valid arbitration agreement. While Defendants wholly rely on Paragraph 25 of the Agreement of Sale, Plaintiff also points to Paragraph 19 of the same. Plaintiff contends that an analysis of Paragraphs 19 and 25 “reveals that they are in irreconcilable conflict with each other” and argues that the arbitration agreement is invalid. Pl.’s Mem. 4. Paragraph 19, which is entitled “Governing Law, Venue and Personal Jurisdiction,” provides:

(A) The validity and construction of this Agreement, and the rights and duties of the parties, will be governed in accordance with the laws of the Commonwealth of Pennsylvania.

(B) The parties agree that any dispute, controversy or claim arising under or in connection with this Agreement or its performance by either party submitted to a court shall be filed exclusively by and in the state or federal courts sitting in the Commonwealth of Pennsylvania. Seller understands that any documentation provided under this provision may be disclosed to the Internal Revenue Service by Buyer, and that any false statements contained therein could result in punishment by fine, imprisonment, or both.

Compl. Ex. A at 6. Paragraph 25, which is entitled “Arbitration of Disputes,” provides:

Buyer and Seller agree to arbitrate any dispute between them that cannot be amicably resolved. After written demand for arbitration by either Buyer or Seller, each party will select a competent and disinterested arbitrator. The two so selected will select a third. If selection of the third arbitrator cannot be agreed upon within 30 days, either party may request that selection be made by a judge of a court of record in the county in which arbitration is pending. Each party will pay its chosen arbitrator, and bear equally expenses for the third and all other expenses of arbitration. Arbitration will be conducted in accordance with the provisions of Pennsylvania Common Law Arbitration 42 Pa. C.S.A. §7341 *et seq.* This agreement to arbitrate disputes arising from this Agreement will survive settlement.

Id. at Ex. A at 8.

We are not persuaded by Plaintiff's argument, as it relates to Paragraph 19, and consequently, find that the Agreement of Sale contains a valid arbitration agreement. Paragraph 19, as evidenced by its title, simply sets forth jurisdictional parameters. That is, should "any dispute, controversy or claim arising under or in connection with this Agreement of its performance by either party" be submitted to a court, it shall be filed with a court in Pennsylvania, and Pennsylvania laws shall govern any such dispute.

However, having found a valid agreement to arbitrate, we must also determine whether the present matter is within the scope of said agreement. The first sentence of Paragraph 25 appears to create a universal arbitration agreement comparable to that in Dodds and imposes arbitration to "any dispute" between the parties. Id. (emphasis added). Plaintiff relies on the final sentence of Paragraph 25, which Plaintiff argues is more limiting and

states: "This agreement to arbitrate disputes arising from this Agreement will survive settlement." Id. We interpret the final sentence of Paragraph 25 to clarify the arbitration agreement, only limiting said agreement to "disputes arising from this Agreement." Although Plaintiff alleges fraud, not breach of contract, the fraudulent acts do, in fact, "aris[e] from this Agreement [of Sale]." Moreover, it is the Agreement of Sale that details the state of the purported on-site water system, and consequently, Plaintiff's fraud action is, in part, based upon the purported misrepresentations made by Defendants in the Agreement of Sale.

Thus, we find Plaintiff's claims are within the scope of the parties' arbitration agreement and we grant Defendants' request to compel arbitration. Therefore, we need not address the balance of Defendants' Preliminary Objections.

**BY THE COURT:**

**/s/ Samuel P. Murray**  
**SAMUEL P. MURRAY, J.**