

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-019380

06/05/2007

HONORABLE BETHANY G. HICKS

CLERK OF THE COURT
T. Melius
Deputy

BLACK MOUNTAIN EXCAVATING CORP

PAUL E STEEN

v.

WESTIN HOMES L L C, et al.

JAY R GRAIF
ALTERNATIVE DISPUTE
RESOLUTION - CCC

MINUTE ENTRY

The Court has reviewed its notes from oral argument of June 4, 2007, the parties' motions and memoranda and the two cases faxed to the court on June 5, 2007 by counsel for plaintiff.

This case is distinguishable from Bolo Construction v. Homes & Son Construction Co., Inc., 105 Ariz. 343, 464 P.2d 788 (1970). In the case before this court, the plaintiff seeks to avoid the arbitration that was bargained for in the contract between the parties. In the Bolo Construction v. Homes case, it was the PLAINTIFF who, subsequently to filing the lawsuit, sought to compel arbitration and it was the defendant, having answered writs of garnishment, who objected. In that case, plaintiff proceeded with his lawsuit for approximately six months before changing his mind about arbitration. In the case before the court, it is the DEFENDANT who wishes to compel arbitration.

The case before the Court is also distinguishable from Meineke v. Twin City Fire Insurance Company, 181 Ariz. 576, 892 P.2d 1365 (1994). In Meineke, the Court held that the defendant insurance company had waived its contractual appraisal provision because there had

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been several settlement offers and negotiations and the insurance company was invoking the appraisal clause as a shield to lessen the impact of the plaintiff's recent appraisal which was much higher than the insurance company had offered in settlement of plaintiffs' claim. In the Meineke case, moreover, the insurance company had notice of the plaintiffs' claim on or about December 1, 1989 and never enlightened the plaintiffs about the appraisal clause until November 6, 1990.

In the case before the court, there are not parallel paths of litigation. The plaintiff proceeded to a default hearing, which default was vacated by a commissioner in this court. The defendant raised the mandatory arbitration clause, while not in its answer, which was filed to cure a default, but early enough so that the plaintiff has not been prejudiced or harmed in any way.

THEREFORE,

IT IS ORDERED GRANTING Defendant's Motion to Compel Alternative Dispute Resolution and Stay Pending Civil Litigation.

IT IS FURTHER ORDERED DENYING Plaintiff's Application for Garnishment.

The Parties are ORDERED to commence Alternative Dispute Resolution within 45 days of the date of this order.