

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ABDUL SEN, Individually and on  
behalf of all others similarly situated,

Plaintiffs,

v.

MENARD, INC. d/b/a MENARDS; and  
MIDWEST MANUFACTURING, INC.,

Defendants.

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OPINION & ORDER

12-cv-643-wmc

In this putative class-action lawsuit, plaintiff claims that defendants sold Mastercraft brand doors bearing a false “Made in the U.S.A.” label. Citing the terms of an arbitration agreement in plaintiff’s purchase contract, defendants moved the court (1) to compel arbitration on plaintiff’s individual complaint, and (2) to dismiss his class claims for lack of a named plaintiff. Plaintiff responded with a request for additional time to conduct discovery relevant to the motion to compel arbitration, as well as asked for a stay of briefing on the motion to compel arbitration while discovery was in progress. Magistrate Judge Crocker denied the motion for discovery, explaining he believed that the question of arbitrability itself had been delegated to arbitration, depriving this court of jurisdiction. (Dkt. #26.) This court agrees with and adopts the reasoning articulated in Judge Crocker’s order denying plaintiff’s motion for discovery.

Under the Federal Arbitration Act, when a plaintiff asserts a legal claim and a defendant responds with a motion to enforce an arbitration agreement, the question of whether the legal claim must be arbitrated is for the court to decide by default. *See* 9 U.S.C. § 4 (court may compel arbitration if “satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue”). But the parties may agree in advance to assign even this threshold question to the arbitrator -- that is, they may delegate to the arbitrator the ability to determine if he or she has jurisdiction over the asserted legal claim. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

In this case, the purchase contract that plaintiff signed contained a clause effectively delegating the jurisdiction question to the arbitrator. Because the agreement to delegate is, analytically, a separate contract in its own right, this court *may* decline to enforce it -- and thus retain the responsibility to determine arbitrability -- if it is somehow invalid or unenforceable. *See* 9 U.S.C. § 3 (arbitration agreements must be upheld “save upon such grounds as exist in law or in equity for the revocation of any contract”).

In their briefing following Judge Crocker’s decision, neither side made any effort to show that the delegation of arbitrability he identified was somehow invalid or unenforceable, nor does the court discern any basis to find it so. Therefore, the court will enter an order compelling the parties to arbitrate the scope and validity of the arbitration contract. The arbitrator will have the power to decide (1) whether the arbitration clause

is unconscionable, (2) whether the arbitration agreement covers plaintiff's class claims, and (3) any other issues relevant to the scope and validity of the arbitration clause.

ORDER

IT IS ORDERED that:

- 1) defendants' motion to compel arbitration (dkt. #11) is GRANTED IN PART consistent with the explanation above;
- 2) defendants' motion in the alternative to dismiss certain claims (dkt. #11) is RESERVED and all proceedings in this case are STAYED pending a decision on the question of the arbitrability; and
- 3) the clerk of court is directed to administratively close this case pending that decision.

Entered this 4th day of February, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge