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

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

Plaintiffs,

v.

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

Defendants.

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 on plaintiff's purchase contract, defendants moved the court to compel arbitration on plaintiff's individual complaint, and to dismiss his class claims. Plaintiff responded with a request to suspend briefing on the motion to dismiss, in order to allow limited discovery on issues relevant to the validity and enforceability of the arbitration clause. Taking up the request for discovery only, the court concludes that it cannot decide this question because the parties have delegated the question of arbitrability to an arbitrator. Accordingly, plaintiff's request for discovery will be denied.

BACKGROUND

In the winter of 2012, Plaintiff Abdul Sen went to the Menards store in Oak Creek, Wisconsin, and purchased ten Mastercraft "Oaktowne," pre-finished, pre-hung doors for a total of $684.53. Mr. Sen alleges that he purchased the Mastercraft doors, as opposed to less expensive alternatives, at least in part because they were advertised as American-made. At the time of purchase, Sen completed and signed a special order contract containing the following arbitration clause:

> Purchaser agrees that any and all controversies or claims arising out of or relating to this contract, or breach thereof, shall be settled by binding arbitration administered by the American Arbitration Association under its applicable Consumer or Commercial Arbitration Rules.

(Brief in Support of Motion to Compel Arbitration, dkt. #12, at 4.)

On September 4, 2012, Sen commenced this putative class-action claim against Menard Inc. ("Menards") and Midwest Manufacturing, Inc. ("Midwest"), alleging that Mastercraft brand doors are entirely or mostly manufactured outside the United States, yet bear a "Made in the U.S.A" label and are advertised online as "Manufactured in America." (Compl., dkt. #1, ¶¶1, 22-23.) Sen alleges that Midwest, as wholesaler, and Menards, as retailer, engaged in a mislabeling "scheme" in order to sell Mastercraft doors to consumers at inflated prices. (*Id.* at ¶1.) He seeks damages and equitable relief under the Magnusson Moss Warranty Act, 15 U.S.C. § 2310(d)(1)(A), Wisconsin's fraudulent

misrepresentation statute, Wis. Stat. § 100.18, Wisconsin's breach of warranty statute, Wis. Stat. § 402.313, and common law theories of negligent misrepresentation and breach of contract. Coincident with his complaint, Sen preliminarily moved for certification, under Rule 23 of the Federal Rules of Civil Procedure, of a class defined as "all persons or entities in the United States who, for purposes other than resale and during the Class Period, purchased a Mastercraft door from Menards." (Motion for Class Cert., dkt. #2, at 1.)

Menards responded with a "Combined Motion to Compel Arbitration and Motion to Dismiss," which asked the court to compel arbitration of Sen's individual claims. (Dkt. #11.)

Sen now asks the court to suspend briefing on Menards' motion so that he can conduct limited discovery relevant to contract defenses he may wish to raise against the arbitration clause.

OPINION

The court starts by considering whether it even has the power to determine arbitrability, and by extension, whether it should be deciding the scope of discovery relevant to that question. Although the Federal Arbitration Act identifies courts as the default forum for deciding the validity and enforceability of arbitration clauses, if a

contract demonstrates that the parties have clearly and unmistakably delegated the question of arbitrability to the arbitrator, courts must step aside. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). In this case, defendants argue that the parties' contractual stipulation that the arbitration agreement "shall be settled by binding arbitration administered by the American Arbitration Association under its applicable Consumer or Commercial Arbitration Rules" amounts to a delegation of arbitrability to the arbitrator. They reason that Rule 7 of the Commercial Arbitration Rules has been incorporated into the agreement by reference, and that Rule 7 accomplishes delegation by stating that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." (AAA Commercial Arb. Rule 7(a), dkt. # 22-1, at 18.)

There is ample persuasive authority among district court cases from the Seventh Circuit supporting defendants' position, at least under Illinois law. *Corrigan v. Domestic Linen Supply Co., Inc.*, No. 12C0575, 2012 WL 2977262, at *2 (N.D. Ill. 2012); *Bayer CropScience, Inc. v. Limagrain*; *Yellow Cab Affiliation, Inc. v. N.H. Ins. Co.*, No. 09–893, 2011 WL 307617, *4 (N.D. Ill. 2011); *Genetics Corp., Inc.*, No. 04C5829, 2004 WL 2931284, at *3-4 (N.D. Ill. Dec. 9, 2004). *Accord Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005). In the absence of contrary Seventh Circuit precedent or Wisconsin state law, this court will join its sister courts in adopting the position that reference to the

institutional rules of an arbitration association in a contract can supply the "clear and unmistakable" evidence needed to determine that the question of arbitrability has been delegated.

Plaintiff's arguments in opposition are unconvincing. First, plaintiff says that the parties have clearly not identified *which* arbitration rules apply, having referenced both the AAA Commercial Rules and the AAA Consumer Rules in the contract. This argument reflects a misunderstanding of the structure of the AAA rules -- the Commercial Rules are the baseline, and the Consumer Rules are a supplement. (*See* AAA Consumer Rule C-1(a), dkt. #22-2, at 4 ("The Commercial Dispute Resolution Procedures and these *Supplementary Procedures* for Consumer-Related Disputes shall apply whenever the American Arbitration Association (AAA) or its rules are used in an agreement between a consumer and a business." (emphasis added)).) Thus there is no ambiguity in the contract, and it is clear that Commercial Rule 7 controls. Second, plaintiff says that the various cases out of Illinois are distinguishable because they involved agreements between two sophisticated parties and because they rely on Illinois law. The court does not see a reason why either of these points compels a different result here.

The court concludes that under the terms of the parties' contract it does not have the authority to determine the validity and enforceability of the arbitration clause, and that it would be inappropriate to oversee discovery aimed at addressing these questions.

To be clear, in this opinion the court is resolving only plaintiff's request for discovery, *not* defendants' motion to compel arbitration. The court's current thinking on the appropriate division of responsibilities between it and the arbitrator can be discerned from the reasoning set forth in these pages, but the issue is not settled. Judge Conley will formally decide defendants' motion to compel arbitration, but first the parties must finish their briefing according to the timeline set forth below.

ORDER

IT IS ORDERED that:

1. Plaintiff Abdul Sen's motion to conduct arbitration-related discovery (dkt. #17) is DENIED for the reasons stated above.

2. Plaintiff's response to defendants' motion to compel arbitration is due on December 21. Defendants' reply is due on January 3, 2013.

Entered this 11th day of December, 2012.

BY THE COURT:

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STEPHEN CROCKER

Magistrate Judge