UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0737

September Term, 2014

HAGERSTOWN BLOCK COMPANY, ET AL.

v.

ALLAN M. DURBIN, ET AL.

Meredith,
Hotten,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: July 15, 2015

This case concerns the interpretation of a broadly-worded arbitration clause in a stockholders agreement, which states that "[a]ny and all disputes under this Agreement or involving any of its terms shall be settled by arbitration[.]" The Circuit Court for Washington County compelled two corporations to arbitrate whether the agreement obligated them to purchase the shares that a deceased shareholder had conveyed to her children, who had not signed the agreement. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Companies

Hagerstown Block Company and Hagerstown Concrete Products, Inc. (collectively the "Companies"), were founded by Theodore Myers and his wife Helen Myers in the years immediately after World War II. Ownership of the Companies eventually passed to Mr. and Mrs. Myers's descendants, including their daughter Beatrice Lowry.

B. The Stockholders' Agreement

On September 8, 2005, the Companies entered into an "Amended and Restated Stockholders' Agreement" with all of the owners of shares in the two corporations. Beatrice Lowry was one of the signatories to the Agreement.

1. The Purposes of the Stockholders' Agreement

The Stockholders' Agreement was preceded by an explanatory statement, which outlined a "two-fold" purpose. The first purpose was "to keep the Companies closely held to ensure the continuity of management of the Companies[.]" To that end, the parties expressed their intention to "provide for the orderly disposition and transfer of each

Stockholder's stock" and "to restrict the transfer of stock to parties whose interests might be divergent from the interests of the Companies." The second purpose of the Agreement was "to provide a market for the sale of the Companies' stock."

2. The Restrictions on Transfers Upon Death

The Agreement places strict restrictions on a shareholder's ability to transfer shares, both while alive and upon death. Pertinent to this case are the restrictions that apply to transfers upon death.

Paragraph 1.F of the Agreement discusses three contingencies that might occur in the event of a stockholder's death.

In the first contingency, in paragraph 1.F(1), the deceased stockholder may transfer shares to an existing stockholder, to a stockholder's spouse or children, or to a trust to benefit a stockholder's spouse or children. The transfer, however, is expressly conditioned on the transferee's written agreement to be bound by the terms of the Stockholders Agreement and to elect a family member to the boards of directors.

The second contingency, in paragraph 1.F(2), concerns what occurs if the deceased stockholder "does not transfer his or her shares in accordance with paragraph (1)." This contingency would clearly occur if the deceased stockholder transferred his or her shares to someone other than an existing stockholder, a stockholder's spouse or children, or a trust to benefit a stockholder's spouse or children – i.e., when the recipient is not within the class of permitted transferees under paragraph 1.F(1). In addition, it is arguable that the contingency

would occur if the deceased stockholder transferred the shares to a permitted transferee, who refused to be bound by the terms of the Stockholders Agreement. If a stockholder "does not transfer his or her shares in accordance with paragraph (1)," the remaining stockholders "may elect" to purchase the deceased stockholder's shares at a price specified in the Agreement. If the remaining shareholders elect to exercise this right to "call" the shares, they must give notice within 90 days of the shareholder's death and settle within nine months of his or her death.

The third contingency, in paragraph 1.F(3), concerns what occurs if the remaining shareholders fail to exercise their right to "call" the shares when a deceased stockholder fails to "transfer his or her shares in accordance with" paragraph 1.F(1). In that event, the transferee must sell the shares to the Companies, and the Companies must buy the shares from the transferee, at the price specified in the Agreement. In other words, if the shareholders have the right to "call" a transferee's shares under paragraph 1.F(2) but fail to exercise that right, the transferee has the right to "put" the shares to the Companies and to be bought out. Upon the exercise of this "put" right, the company must make the payment over 10 years, must pay interest on the unpaid principal balance at a specified rate, and must give a promissory note evidencing those terms.

The "put" and "call" rights in paragraphs 1.F(3) and 1.F(2), respectively, are clearly designed to facilitate the second purpose of the Agreement, which is "to provide a market for the sale of the Companies' stock." The substantive dispute in this case concerns whether

permitted transferees have the right to receive payment for their shares under paragraphs 1.F(3) and 1.F(2) if they decline to sign the Agreement and thereby decline to become shareholders.

3. The Arbitration Clause

The Agreement contains a broadly-worded arbitration clause, which provides that "[a]ny and all disputes under this Agreement or involving any of its terms shall be settled by arbitration[.]" If a party to a dispute fails to appoint an arbitrator within ten days after an arbitration demand, the Agreement states that a court may enter a "default judgment." *But see* Md. Rule 2-613 (concerning the procedural requirements for orders of default and default judgments). If the two arbitrators chosen by the parties cannot resolve the dispute, they must appoint a third; the three must then decide the dispute. The decision of an arbitration panel is to be considered final and enforceable in the courts. Finally, the arbitration clause "shall be grounds for dismissal of any court action commenced by any party with respect to a dispute arising out of the issue submitted to arbitration."

4. The "Binding Effect" of the Agreement

The Agreement contains a conventional provision under which its terms both "bind and inure to the benefit of" the parties' "heirs, guardians, personal and legal representatives, successors and permitted assigns."

C. Disposition of the Shares of Beatrice Lowry

Beatrice Lowry, a stockholder of the Companies and a party to the Agreement, resided in Washington County until her death in September 2005, very shortly after the execution of the Agreement. Mrs. Lowry was survived by her husband, William Lowry, who served as the personal representative of her estate. The Lowrys created two trusts during their respective lifetimes: the William and Beatrice Lowry Revocable Trust and the William E. Lowry Revocable Trust.

William Lowry died in April 2011. He was survived by the Lowrys' son, Curtis Lowry, and by the Lowrys' two daughters, Brenda Solomon and Charlene West. The three children served as personal representatives of their father's estate and as co-trustees of the two Lowry trusts.

The record does not reveal the exact sequence of transfers of the shares that Beatrice Lowry owned at the time of her death in 2005. Nevertheless, all parties to this appeal agree that Beatrice Lowry's shares eventually passed either to the Lowry trusts or to the estate of William Lowry, for the benefit of the Lowrys' three adult children.

The Lowrys' son, Curtis Lowry, became a stockholder and owner of some of the shares that were formerly owned by his mother. Pursuant to the conditions set forth in paragraph 1.F(1) of the Agreement, he agreed in writing to be individually bound by the terms of the Agreement.

The transfer of the remaining shares, however, was not completed. The Lowrys' two daughters, Solomon and West, declined to sign a written agreement to be bound by the terms of the Stockholders' Agreement. Instead, on March 16, 2012, Solomon and West notified the Companies that they intended to sell the shares to the existing stockholders pursuant to paragraph 1.F(2) of the Agreement or to permit the shares to be purchased by the Companies for the agreed value pursuant to paragraph 1.F(3). In addition, Solomon and West requested a single, lump-sum payment rather than the stream of payments over ten years that the Agreement contemplated.[1]

D. The Failure to Repurchase the Shares

None of the existing stockholders made an offer to purchase Solomon's and West's shares. Instead, according to a letter from counsel for Solomon and West, the Companies "indicated," in April 2012, that they "would pursue financing and repurchase the shares on a lump sum basis."

Ten months later, on February 4, 2013, counsel for Solomon and West wrote to request information regarding the status of their request that the Companies repurchase their shares. Counsel's letter asserted that because the shareholders had declined to repurchase

[1] Because Mr. Lowry had died in April 2011, and because paragraph 1.F(2) of the Agreement required the shareholders to exercise any right to "call" his shares within 90 days of his death, it appears that the shareholders' "call" right may have already expired by the time of the March 16, 2012, letter from Solomon and West.

the shares, the Companies had become obligated to acquire those shares in accordance with the terms of paragraph 1.F(3) of the Agreement. The record contains no response.

On September 25, 2013, litigation counsel for Solomon and West sent a letter, by email, to an attorney for the Companies. In that letter, counsel complained that, in the seven months since the last correspondence, his clients had "encountered one excuse after another." On his clients' behalf, counsel expressly invoked the arbitration clause in the Agreement and asked his counterpart to call him by October 3, 2013, to work out the details of the arbitration. He closed by stating that if the Companies would pay Solomon and West for their shares within the next 30 days, the parties could "avoid an unnecessary and costly arbitration proceeding[.]" The record contains no response.

On October 7, 2013, counsel for Solomon and West sent an email to an attorney for the Companies. The email noted the Companies' failure to respond to the request for a discussion concerning the details of the arbitration. The email went on to inform the Companies that Solomon and West had designated an arbitrator; that if the Companies failed to designate their arbitrator within ten days, the Agreement allowed for the entry of a "default judgment" against the Companies; and that Solomon and West would file suit for a "default judgment" or to compel arbitration if the Companies failed to respond within ten days.

E. The Companies' Complaint for a Declaratory Judgment

Exactly ten days later, on October 17, 2013, the Companies filed a complaint in the Circuit Court for Washington County. The complaint named Solomon and West as

defendants in their individual capacities. The complaint also named Solomon, West, and their brother Curtis Lowry as defendants in their capacities as personal representatives of the two Lowry estates and as co-trustees of two Lowry trusts. Finally, the complaint named each of the many individual stockholders, including Curtis Lowry, as defendants in their capacities as stockholders.

The complaint alleged that "[a] dispute has arisen concerning the operation and effect of certain provisions of the Stockholders Agreement that address the transfers of shares of Common Stock in the event of a Stockholder's death." The Companies appended a copy of the Stockholders' Agreement to the complaint.

The complaint included many allegations about the ownership rights of shares of the two companies. For example, the complaint alleged that Solomon and West had not received the shares "to which they would otherwise be entitled as their parents' successors-in-interest . . . solely because they have failed and refused to accept those shares and join in and agree to be bound by all of the terms of the Stockholders Agreement." The complaint further alleged that the Lowrys' remaining shares were "beneficially owned by the Lowry Trusts, the Lowry Estates or some combination thereof, but neither the Lowry Trusts nor the Lowry Estates became duly recognized and acknowledged Stockholders of the Corporations with respect to those shares." In support of these allegations, the Companies appended copies of the correspondence sent by Solomon and West.

The complaint went on to assert that the Companies lacked adequate "cash flow" to repurchase the shares. Consequently, the complaint claimed that repurchasing the shares from Solomon and West would violate Md. Code (1975, 2014 Repl. Vol.) § 2-311(a) of the Corporations and Associations Article, because it would render the companies insolvent.

Although it was captioned as a complaint for declaratory and "other" relief, the complaint concluded with a single count for declaratory relief alone. The Companies claimed that the court had power to enter a declaratory judgment because "an actual controversy exists between the parties with respect to Solomon's and West's rights under the Stockholders Agreement . . . and the Corporations' duties and obligations to Solomon and West[.]" The Companies asked the court to declare "the rights, duties and obligations of the parties . . . with respect [to] the re-purchase of shares transferred by a Stockholder at death to that Stockholder's children." The Companies specifically asked the court to declare that because Solomon and West had refused to sign the Stockholders' Agreement, they could not assert any rights as shareholders and could not require the Companies to repurchase their interests. The Companies also asked the court to declare that even if they were required to repurchase the interests claimed by Solomon and West, they were not required to do so if the repurchase would render the Companies insolvent.

Almost all of the defendant-stockholders, including Curtis Lowry, failed to file responsive pleadings. The court entered orders of default against all the defendant stockholders, except for Allan Durbin. Mr. Durbin, an Arizona resident, filed an answer in

which he denied any liability and asserted that the complaint failed to state any claims or allegations related to him.[2]

F. The Petition to Compel Arbitration

On February 14, 2014, Solomon and West moved to dismiss the complaint and petitioned to compel arbitration. They contended that because the case concerned a dispute under the Stockholders' Agreement or a dispute involving its terms, the arbitration clause of the Agreement required that it be settled by arbitration.[3] Although Solomon and West recognized that they were not signatories to the Agreement with the arbitration clause, they argued that the Companies were equitably estopped from avoiding arbitration, because the allegations were so thoroughly entwined with the terms of the Agreement itself. *See generally Case Handyman and Remodeling Servs., LLC v. Schuele*, 183 Md. App. 44, 54 (2008), *vacated on other grounds*, *Schuele v. Case Handyman & Remodeling Servs., LLC*, 412 Md. 555 (2010); *see also Griggs v. Evans*, 205 Md. App. 64, 75 (2012); *Thompson v.*

[2] The Companies did not serve copies of their brief and the record extract upon Mr. Durbin's counsel. The Companies tell us that neither the defaulting defendants nor Mr. Durbin "are participants in this Appeal." We think that only Mr. Durbin, and not the party that sued him, has the right to decide whether or not he should participate in an appeal from an order that potentially affects his rights. Under the circumstances of this case, however, we decline to exercise our discretion to dismiss the appeal for the Companies' apparent noncompliance with the appellate rules. *See Leavy v. Am. Fed. Sav. Bank*, 136 Md. App. 181, 191 (2000) (citing Md. Rules 8-502(d), 8-602).

[3] As previously stated, the operative language of the arbitration clause stated that "[a]ny and all disputes under this Agreement or involving any of its terms shall be settled by arbitration[.]"

Witherspoon, 197 Md. App. 69, 79 (2011). Solomon and West requested that the court order the parties to arbitrate. They also requested that the court either dismiss the declaratory judgment action or stay the proceedings pending the outcome of arbitration.

The Companies opposed the petition. They argued that Solomon and West could not enforce the arbitration provision, because they were not signatories to the Agreement, but had "unequivocally repudiated the Stockholders Agreement[.]" They also argued that equitable estoppel did not apply, because the complaint did not allege that Solomon and West had breached any duty under the Agreement, and because the Companies had made no specific request for injunctive or monetary relief against Solomon and West.

In a reply memorandum, Solomon and West contended that they had standing to invoke the arbitration clause as intended third-party beneficiaries under the Agreement.

After a hearing, the circuit court granted the petition to compel arbitration. The court reasoned that, even as non-signatories, Solomon and West could invoke the doctrine of equitable estoppel to compel the Companies, as signatories to the Agreement, to arbitrate the dispute. The court further reasoned that because both sides asserted competing claims that emanated from the Agreement and that fell within the scope of the broadly-worded arbitration clause, either party could compel the other to arbitrate those claims. Accordingly, the court ordered the parties "to proceed to arbitration" and stayed the case "pending resolution of parties' competing claims in arbitration."

The Companies noted a timely appeal from that order.[4]

QUESTION PRESENTED

On appeal, the Companies raise the single question of whether the circuit court erred in applying the doctrine of equitable estoppel to compel the Companies to arbitrate the claims of Solomon and West under the Stockholders' Agreement.[5]

In our view, the court correctly compelled the Companies to arbitrate even if equitable estoppel did not apply, because the right to compel arbitration inured to the benefit of Solomon and West in their capacity as their mother's heirs, successors, or permitted assigns. Furthermore, the court correctly concluded that, as signatories to an agreement with a broadly-worded arbitration clause, the Companies were equitably estopped to avoid arbitration, because their complaint made "ubiquitous references" to the Agreement and "hinge[d] on asserted rights under that contract." *Case Handyman*, 183 Md. App. at 63.

[4] An order compelling arbitration is subject to immediate appeal even when proceedings before the circuit court are stayed pending the outcome of the arbitration. *See Walther v. Sovereign Bank*, 386 Md. 412, 420-22 & n.4 (2005). The arbitration order here implies, without explicitly stating, that the court intended to require the arbitration not only of the claims involving Solomon and West, but all of the Companies' claims against all defendants, including the claims involving Mr. Durbin and the other stockholders. Even if the order applied only to the claims involving Solomon and West, the Companies could still appeal the order to compel arbitration. *See Thompson*, 197 Md. App. at 79 (holding that an order compelling arbitration is an appealable judgment even if it is directed against some but not all parties) (citing *Rourke v. Amchem Prods., Inc.*, 153 Md. App. 91, 105-07 (2003), *aff'd*, 384 Md. 329 (2004)).

[5] The Companies phrase the question as follows: "Whether the Circuit Court Erred in Applying the Doctrine of Equitable Estoppel to Compel the Plaintiff Corporations to Arbitrate the Solomon/West Against Them under the Stockholders' Agreement."

SCOPE OF REVIEW

The Companies' core contention is that the circuit court erred in compelling them to arbitrate the dispute with Solomon and West because they did not sign the Agreement. As a general rule, "'[t]he trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, which we review *de novo*.'" *Questar Homes of Avalon, LLC v. Pillar Constr., Inc.*, 388 Md. 675, 684 (2005) (quoting *Walther v. Sovereign Bank*, 386 Md. 412, 422 (2005)).

On the issue of equitable estoppel, "'de novo review is appropriate'" if, as in this case, "'there is no dispute of facts, but only a dispute on the legal effect of those facts.'" *Griggs*, 205 Md. App. at 83-84 (quoting *Case Handyman*, 183 Md. App. at 54 (2008).[6]

[6] The parties express some disagreement over whether the arbitration agreement is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 to 16, or by the Maryland Uniform Arbitration Act, Md. Code (1974, 2013 Repl. Vol.), §§ 3-201 to 3-234 of the Courts and Judicial Proceedings Article ("CJP"). Because the Agreement calls for the application of Maryland law, the Maryland act governs. *See Rourke*, 153 Md. App. at 119 (citing *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 419 (2001)). Ultimately, however, the issue has little importance, because the relevant provision of Maryland law is nearly identical to the federal provision that it was intended to mirror. *Compare* CJP § 3-206 ("a provision in a written contract to submit to arbitration any controversy arising between the parties in the future is valid and enforceable, and is irrevocable"), *with* 9 U.S.C. § 2 ("A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

DISCUSSION

A. The Companies' Obligation to Arbitrate With "Successors," "Heirs," and Permitted Transferees

Because arbitration is fundamentally a creature of contract, a party ordinarily "'cannot be required to submit any dispute to arbitration that it has not agreed to submit[.]'" *Allstate Ins. Co. v. Stinebaugh*, 374 Md. 631, 648 (2003) (quoting *Curtis G. Testerman Co. v. Buck*, 340 Md. 569, 579 (1995)); *see Case Handyman*, 183 Md. App. at 57-58. To decide whether the Companies agreed to submit to arbitration in this case, we must answer two questions. First, did the Companies agree to arbitrate this specific type of dispute? And, second, did the Companies agree to arbitrate this dispute with Solomon and West?

It is incontestable that the Companies agreed to arbitrate this type of dispute. In the words of the complaint, this is a "dispute . . . concerning the operation and effect of certain provisions of the Stockholders Agreement." The subject matter of the dispute, therefore, plainly falls within the scope of the Agreement's broadly-worded arbitration clause, which requires the arbitration of "[a]ny and all disputes under this Agreement or involving any of its terms." *See Gold Coast Mall, Inc. v. Lamar Corp.*, 298 Md. 96, 104 (1983) ("[w]here there is a broad arbitration clause, calling for the arbitration of any and all disputes arising out of the contract, all issues are arbitrable unless expressly and specifically excluded").

The Companies do not advance any argument to the contrary. In fact, the Companies concede that every defendant other than Solomon and West (*i.e.*, Curtis Lowry, Allan Durbin,

and the remaining stockholders) could have demanded arbitration. *See* Appellant's Brief at 26 ("the Appellant Corporations readily concede that they would be required to arbitrate this dispute *if the Appellees were Stockholder signatories*") (emphasis in original). Moreover, the Companies assert that had Solomon and West asserted their rights in a court, the Companies could have compelled them to arbitrate (apparently on the theory that Solomon and West would be equitably estopped to claim the benefits of the Agreement unless they accepted the obligation to arbitrate). *See id.* ("The Appellants also agree . . . that they *could* have compelled the Solomon/West Defendants to arbitrate their claims, had Solomon and West initially asserted their claims in a judicial forum") (emphasis in original).

The Companies nonetheless assert that Solomon and West cannot compel *them* to arbitrate a dispute "involving" the "terms" of the Agreement. They contend that Solomon and West cannot claim the benefit from the arbitration clause unless and until they agree in writing to be bound by the Stockholders' Agreement.[7]

Our analysis of the Agreement does not support the Companies' contentions. The Agreement specifically states that its terms both "bind and inure to the benefit of" the parties' "heirs, guardians, personal and legal representatives, successors and permitted assigns." Both in this Court and in the circuit court, the Companies characterized Solomon and West as "successors-in-interest" to their late mother's shares, which would certainly appear to

[7] Of course, if Solomon and West agreed in writing to be bound by the Agreement, they would lose any potential right to require the Companies to purchase their interest in the shares.

qualify them as "successors" for purposes of the Agreement. Moreover, at oral argument, the Companies agreed that Solomon and West are their mother's "heirs." As the children of Beatrice and William Lowry, Solomon and West are "permitted assigns" within the meaning of paragraph 1.F(1) of the Agreement as well.

There is, therefore, no serious dispute that the terms of the Agreement both "bind" Solomon and West, as "successors," "heirs," and permitted "assigns," and "inure to [their] benefit." As the "covenants and agreements" in the Agreement certainly include the broad arbitration clause, it follows that Solomon and West have the right to compel the arbitration of disputes that fall within the scope of that clause.[8]

The Companies are wrong in asserting that Solomon and West cannot have any rights under the Agreement unless they first agree in writing to be bound by the Agreement. Solomon and West may not have the rights of *shareholders* unless they agree in writing to be bound by the Agreement, but they might still have the right (under paragraph 1.F(2)) to receive payment for their interests if a shareholder opted to buy them, as well as the right (under paragraph 1.F(3)) to require the Companies to buy their interests now that no

[8] Even if the Companies could raise a factual dispute about whether Solomon and West qualify as "successors," "heirs," or "permitted assigns," the arbitrator should make the initial determination about whether Solomon and West can claim that status. *See, e.g.*, *Gold Coast Mall*, 298 Md. at 107 ("when the language of an arbitration clause is unclear as to whether the subject matter of the dispute falls within the scope of the arbitration agreement, the legislative policy in favor of the enforcement of agreements to arbitrate dictates that ordinarily the question of substantive arbitrability initially should be left to the decision of the arbitrator"); *accord Crown Oil & Wax Co. v. Glen Constr. Co.*, 320 Md. 546, 560 (1990); *Contract Constr., Inc. v. Power Tech. Center L.P.*, 100 Md. App. 173, 179 (1994).

shareholder has opted to buy them. To put it another way, unless Solomon and West agreed in writing to be bound by the Agreement, they do not have the right to elect directors, review the Companies' books and records, convey the shares, or exercise the other rights of shareholders; they might, however, still have the right to sell the shares and receive payment for them, which is the right that they have sought to vindicate through arbitration in this case. For these reasons, we reject the Companies' contention that a person has no rights "under" the Agreement, for purposes of the broadly-worded arbitration clause, unless he or she has first agreed in writing to be bound by the Agreement.

In summary, Solomon and West have the right to compel the arbitration of this dispute, because the "covenants and agreements" in the Agreement, including the arbitration clause, "inure[d] to their benefit" insofar as they are their mother's heirs, successors, or permitted assigns. The circuit court, therefore, did not err in granting their motion to compel.

B. Equitable Estoppel

Even if Solomon and West did not have the right to compel arbitration because of the rights that inured to their benefit as their mother's heirs, successors, or permitted assigns, we agree with the circuit court that the Companies were equitably estopped from refusing to arbitrate in the circumstances of this case.

This Court has summarized the starting point for analyzing whether a party may be equitably estopped from avoiding an arbitration provision:

> Generally, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed to arbitrate. The obligation and entitlement to arbitrate, however, does not attach only to one who has personally signed the written arbitration provision, and [w]ell-established common law principles dictate that in an appropriate case a non[-]signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties. The principle underlying the theory of equitable estoppel rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage.

Case Handyman, 183 Md. App. at 57-58 (citations and internal quotation marks omitted); *see Thompson*, 197 Md. App. at 83.[9]

"[I]n the arbitration context, 'equitable estoppel' is a misnomer because, unlike equitable estoppel in a contracts context, detrimental reliance is not required." *Schuele*, 412 Md. at 563 n.3; *accord Griggs*, 205 Md. App. at 82 n.5 ("[w]hile detrimental reliance is normally an element of equitable estoppel, most states that apply equitable estoppel, in the context of arbitration agreement enforcement, do so without requiring that the party invoking the doctrine prove detrimental reliance"); *Case Handyman*, 183 Md. App. at 65 ("no showing of detrimental reliance is required for the application of equitable estoppel in the arbitration context").

[9] In *Case Handyman*, 183 Md. App. at 53, this Court concluded that the denial of a petition to compel arbitration was an appealable judgment. In *Schuele*, 412 Md. at 577, the Court of Appeals vacated that decision. But "[a]lthough this Court's decision in *Case Handyman* was vacated on procedural grounds, its reasoning on the merits of the issue may constitute persuasive authority in the same sense as other dicta may constitute persuasive authority on any legal issue." *Thompson*, 197 Md. App. at 73 n.1. "Our reasoning on the merits in *Case Handyman* remains sound[.]" *Id.*; *accord Griggs*, 205 Md. App. at 84-86.

This Court has explained that equitable estoppel allows a non-signatory to compel arbitration when a signatory to a written agreement containing an arbitration clause must "'rely on' the terms of the written agreement [containing the arbitration clause] in asserting [its] claims'" against the non-signatory. *Griggs*, 205 Md. App. at 82-83 (quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993)); *accord Case Handyman*, 183 Md. App. at 59. "When each of a signatory's claims against a non[-]signatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the agreement, and arbitration is appropriate." *Case Handyman*, 183 Md. App. at 59 (quotation marks omitted) (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)).

For example, in *Case Handyman*, 183 Md. App. at 52-53, two homeowners and a home-improvement contractor had signed a contract that contained a broad arbitration clause. When the contractor failed to perform and became insolvent, the homeowners filed a complaint against the contractor's franchisor, Case Handyman, which responded by petitioning to compel arbitration. In evaluating whether Case Handyman could compel the homeowners to arbitrate even though the homeowners had never actually entered into any agreement with that company, we noted the complaint's "ubiquitous references" to the contract with Case Handyman's franchisee and reasoned that the entire complaint "hinge[d] on asserted rights under that contract." *Id.* at 63. Because the homeowners' allegations arose out of and directly related to their contract with Case Handyman's franchisee, we held that

the doctrine of equitable estoppel allowed Case Handyman to enforce the arbitration agreement against them even though Case Handyman was not a party to that agreement. *Id.*

Because equitable estoppel typically focuses on the claims raised by the party who seeks to avoid the arbitration clause, courts should examine the nature of the allegations of the underlying complaint. *See id.* In this case, the Companies requested that the court grant the following relief:

> A. Declare the rights, duties and obligations of the parties generally under the Stockholders Agreement, with respect [*sic*] the re-purchase of shares transferred by a Stockholder at death to that Stockholder's children;
>
> B. Further declare that Solomon and West, having refused to accept the shares of Common Stock to which they became entitled as their parents' successors-in-interest and to join in and bind themselves to all of the terms of the Stockholders Agreement, have no standing to assert any rights of a Stockholder thereunder;
>
> C. Further declare that the Stockholders Agreement does not require the Corporation to re-purchase the interests of Solomon and West, as their parents' successors-in-interest, in lieu of issuing the shares of Common Stock to which they otherwise would be entitled, as their parents' successors-in-interest, subject to their obligation to join in and bind themselves to all of the terms of the Stockholders Agreement;
>
> D. Further declare that, even if the Corporations were ordinally [*sic*] required to re-purchase the interests of Solomon and West, as their parents' successors-in-interest, pursuant to the terms of the Stockholders Agreement, the Corporations are not required to do so when, as here, such a re-purchase transaction would render the Corporations insolvent . . . .

In essence, the Companies sought to enforce an interpretation of Agreement that would benefit their interests and disadvantage those of Solomon and West. The Companies

sought a declaration that, under the Agreement, they had no obligation to repurchase the interests of Solomon and West. The Companies also sought a declaration that because of their alleged insolvency, they would have no obligation to repurchase those interests even if the Agreement would otherwise have required them to do so. Plainly, the Companies' claim for declaratory relief relied upon the Agreement. Indeed, in their pleadings, the Companies expressly endorsed that premise, explaining that "[t]he within Complaint *arises out of* the above-referenced Stockholders Agreement[.]" (Emphasis added.)

Because of the Companies' "ubiquitous references" to the Agreement and because of the requests for relief that "hinge on" the terms of that document, this case would seem to fall squarely within the ambit of *Case Handyman*, in which a signatory was estopped to refuse to arbitrate with a non-signatory. Nonetheless, the Companies attempt to distinguish that authority by arguing that Solomon and West forced them "to become plaintiffs of necessity," that Solomon and West had asserted claims against the Companies and "not vice-versa," and that "[t]he initiation of this suit was purely defensive in nature[.]" Similarly, they argue that Solomon and West are improperly using equitable estoppel as a sword rather than a shield. In the circumstances of this case, we reject the suggestion that the claim for declaratory relief does not constitute an affirmative "claim" against Solomon and West for the purposes of equitable estoppel.

The Companies' complaint was not "purely defensive," but rather appears to have been a strategic attempt to define which forum would decide the case. Had the Companies

done nothing, Solomon and West could have filed suit to compel arbitration in federal district court (*see* 9 U.S.C. § 4), because they are citizens of Virginia and, hence, could establish the requisite diversity of citizenship. In response, the Companies would have been free to argue that the federal court should not compel them to arbitrate because Solomon and West had not signed the Agreement. Instead, the Companies presented the identical argument in their declaratory judgment action in Washington County, thereby hindering if not precluding a parallel action by Solomon and West. *See*, *e.g.*, *Ellicott Mach. Corp. v. Modern Welding Co., Inc*., 502 F.2d 178, 180 n.2 (4th Cir. 1974) (recognizing "first-to-file" rule, which gives priority to first suit absent showing of a balance of convenience in favor of the second). Additionally, by joining every other shareholder (including shareholders who live in Maryland), the Companies destroyed diversity of citizenship, prevented Solomon and West from removing the case to federal court, and ensured that the case would remain in Washington County, where the Companies are based. In short, the Companies appear to have deliberately taken the offensive in order to guarantee that the issue of arbitrability, and perhaps the merits of the dispute as well, would be decided in the court of their choosing.[10]

[10] As previously stated, the Agreement purports to allow for the entry of a "default judgment" if a party fails to designate an arbitrator within ten days after the other party has designated one. Under the applicable procedural rules, however, it is difficult to envision how Solomon and West could possibly obtain a default judgment without showing that the Companies failed to file a timely response after being served with a complaint and summons. *See* Md. Rule 2-613; Fed. R. Civ. P. 55. Furthermore, even if Solomon and West had attempted to obtain a "default judgment" on the ground that the Companies had failed to designate an arbitrator, the Companies would have been free to respond that they had no (continued...)

Furthermore, the complaint for a declaratory judgment does more than merely respond to Solomon's and West's demands for arbitration by asking the court to declare that they have no rights under the Agreement: the Companies also requested a declaration that even if Solomon and West were "their parents' successors-in-interest" and would ordinarily have been entitled to require the Companies to re-purchase their interests, the Companies were absolved from that obligation in this instance because the transaction would render them insolvent. In asking the court to compel the Companies to arbitrate the contention that their financial condition could excuse them from their potential obligations under the Agreement, Solomon and West were using equitable estoppel not as a sword, but as a shield.

The Companies also did more than merely respond defensively to Solomon's and West's demands for arbitration when they joined all of the shareholders. In explaining why they took that step, the Companies said that they wanted a judgment that would bind all stockholders, and presumably those in privity with them (*e.g.*, their heirs, successors, and transferees), in any future disputes. In other words, the Companies attempted to use the controversy with Solomon and West as the basis for asserting rights vis-á-vis Durbin, Curtis Lowry, and all of the other stockholders (and their future transferees). The Companies were not responding in a "purely defensive" manner to Solomon and West when they requested a declaration that would bind all of the Companies' present and future shareholders.

[10] (...continued)
obligation to arbitrate with Solomon and West and, hence, no obligation to name any arbitrators.

In arguing for a contrary conclusion, the Companies construct a series of arguments based on *Thompson*, *Griggs*, and *American Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623 (4th Cir. 2006). *Thompson* is inapposite because it is, by its own terms, the "mirror image" (*Thompson*, 197 Md. App. at 73) of this case: *Thompson* concerns whether *non-signatories* can be compelled to comply with an arbitration agreement, not whether a *signatory* can be compelled to comply, which is what this case concerns. *Griggs* is inapposite because the claims at issue in that case had "at most, an incidental relationship" to an agreement that contained the arbitration clause (*Griggs*, 205 Md. App. at 90); the case did not hinge on the agreements, as the Companies' rights do in this case. *American Bankers* actually supports the conclusion in this case, as it compels a signatory to arbitrate with a non-signatory where the signatory's claims "rel[ied] on" the terms of document containing an arbitration agreement. *American Bankers*, 453 F.3d at 630. Although *American Bankers* states that estoppel has been found when the plaintiff "assert[s] a breach of a duty created by the contract containing the arbitration clause" (*id.* at 629), it does so only in the context of its review of prior Fourth Circuit cases on the subject; it does not lay down some essential condition for the application of equitable estoppel.[11]

[11] The Companies' brief seeks additional support from a non-precedential opinion from the Fourth Circuit. "However, it is the policy of this Court in its opinions not to cite for persuasive value any unreported federal or state court opinion." *Kendall v. Howard Cnty.*, 204 Md. App. 440, 445 n.1 (2012), *aff'd*, 431 Md. 590 (2013); *accord Margolis v. Sandy Spring Bank*, 221 Md. App. 703, 718 n.10 (2015).

In summary, the Companies asserted claims that relied entirely upon the Agreement, and Solomon and West had every right to invoke the doctrine of equitable estoppel to compel the Company to arbitrate. For this additional reason, therefore, the circuit court did not err in granting the motion to compel.

CONCLUSION

We affirm the order of the circuit court, which granted the petition to compel arbitration, (1) because the contractual right to compel arbitration inured to the benefit of Solomon and West as their parents' heirs, successors, and permitted transferees, and (2) because the Companies are, in any event, equitably estopped to refuse to arbitrate under the circumstances of this case.

ORDER OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.