IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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ANTHONY BROWN *et al.*,	*	
Plaintiffs	*	
v.	*	**CIVIL NO. JKB-11-667**
ALLIED HOME MORTGAGE CAPITAL CORPORATION,	*	
Defendant	*	

* * * * * * * * * * * *

MEMORANDUM AND ORDER

This is a putative class action brought by Anthony and Bonita Brown and Timothy Washington against Allied Home Mortgage Capital Corporation for alleged violations of the Maryland Finder's Fee Act, Md. Code Ann., Com. Law § 12-801 *et seq.* (LexisNexis 2005), and the Maryland Consumer Protection Act, Md. Code Ann., Com. Law § 13-101 *et seq.* (LexisNexis 2005). The Browns and Washington allege that these violations occurred in connection with the financing on their homes in which Allied served as the broker and the named lender, even though the actual lender was Wells Fargo in a "table funded" transaction. (Am. Compl., ECF No. 18.)

Allied has pending before the Court two motions, both of which seek to compel the Browns and Washington to arbitrate their claims rather than to litigate them. (ECF Nos. 11 & 24.) The motions have been briefed (ECF Nos. 20, 29, 32 & 36), and no hearing is required, Local Rule 105.6. The motions are hereby DENIED.

Allied bases its motions upon a document entitled "Agreement for the Arbitration of Disputes," signed by the Browns on September 26, 2002 (Def.'s Mot. Compel Arbit. Ex. B, ECF No. 11), and another same-titled document signed by Washington each time he refinanced his mortgage on November 24, 2002, and June 19, 2003 (Def.'s 2nd Mot. Compel Arbit. Ex. A & B,

ECF No. 24). It is undisputed that the claims made by Plaintiffs would be subject to arbitration if these documents are enforceable agreements. Thus, what the Court must decide is whether they are enforceable.

These agreements (hereinafter referred to in the singular) contain the following problematic provision in pertinent part:

> This Agreement is effective and binding on both you and your heirs, successors and assigns and us when it is signed by both parties.

Allied asserts two bases for its argument that this agreement is valid and binding: (1) Allied signed it, thereby creating an enforceable contract, and (2) Plaintiffs waived or excused Allied from signing. Allied's chief difficulty with its first argument is that many years elapsed between the Plaintiffs' signing and Allied's signing. In the Browns' case, Allied signed on March 9, 2011, after this case was filed in Baltimore County (Maryland) Circuit Court on February 1, 2011, and two days before Allied removed it to this Court. The Browns amended their complaint on March 31, 2011, to add Washington as a plaintiff, and this was the same day that Allied signed in his case.

Allied cites no authority for the proposition that a signature after such a lengthy lapse of time is valid as is one made contemporaneously, or nearly so, to the other party's signature. Allied's long belated signature strikes the Court as highly irregular, at the very least. An older Maryland case discussed the length of time for acceptance of an offer in relation to a contract for purchase of land when the contract was subject to specified rezoning being obtained within the current six-month term for zoning applications to the county. *Barnes v. Euster*, 214 A.2d 807 (Md. 1965). The zoning application was timely filed, but the term expired without the governmental authority having acted on the application. Twenty-two months after the application was filed, the potential sellers notified the plaintiff that the contract was terminated.

Plaintiff sought the help of the courts in enforcing the agreement. Nineteen months after the sellers terminated the contract, plaintiff expressed a willingness to waive the condition of rezoning and sought specific performance. *Id.* at 809. Noting that it was "hornbook law that an offer of no specified duration must be accepted within a time reasonable under the circumstances or the offer will lapse and a subsequent attempt to accept will be of no effect," the court held that the plaintiff's "delay in excusing or waiving the condition was unreasonable as a matter of law." *Id.* at 810. If the length of time in the *Barnes* case was unreasonable as a matter of law, then the Court has no difficulty in concluding that Allied's attempt to create a binding contract seven to eight years after Plaintiffs signed it is also unreasonable as a matter of law.

Furthermore, Allied's sudden awakening to the need to sign the agreement only after Plaintiffs filed their suit seems suspect. Regardless, the time for Allied to sign the agreement had long since lapsed. It is not necessary for the Court to determine exactly the length of time in which it was reasonable for Allied to sign since it is beyond doubt that the time period at issue here was unreasonable.

The effect of Allied's having failed to sign the agreement in a timely fashion is that no contract was formed. The Maryland Court of Appeals in *All State Home Mortg., Inc. v. Daniel*, 977 A.2d 438 (Md. Ct. Spec. App.), *cert. denied*, 979 A.2d 707 (Md. 2009), ruled that the other party's signature to an agreement identical to the one here was a condition precedent to the contract's formation. *Id.* at 449. Allied implicitly argues that the Maryland court was incorrect on this point and further contends that its signature was merely a condition precedent to performance, and the basis for this contention is that *All State* relied on cases dealing with conditions precedent to performance. (Def.'s Reply 3, ECF No. 29.) *All State* did refer to other cases in which a contractual duty is subject to a condition precedent and noted the established principle that no duty of performance arises until the condition precedent is either performed or

excused. *Id.* n.6. But the court did not appear to equate that line of cases to the case before it. Instead, the court's language was crystal clear:

> Here, the arbitration agreement unequivocally stated that the agreement became "effective and binding . . . when both parties sign it." This language created a condition precedent to the contract's formation. In the absence of the required signature, there was no binding contract.

Id. at 449. Notably, the *All State* court reached this conclusion after recognizing the general principle that a signature is not necessary to the formation of a contract or to the execution of a written contract. *Id.* at 447. The exception to that general principle is found "when the terms of the contract make the parties' signatures a condition precedent to the formation of the contract." *Id.* Given that Maryland precedent defines the signature on this identical contract as a condition precedent to formation, this Court follows that case law and holds the same here.

Allied's second argument is that Plaintiffs waived or excused the condition precedent of Allied's signature. The *All State* court noted that All State had not argued, either in the trial court or on appeal, that the Daniels had waived the condition precedent that both parties sign the agreement. One may interpret that observation to suggest that waiver of this particular condition precedent is at least arguable, but the court was not going to address the issue *sua sponte*. Allied argues Plaintiffs "waived and/or excused" the condition precedent by accepting Allied's performance in processing the loan application, which it refers to as "the express consideration for the Arbitration Agreement." (Def.'s Mot. Compel Supp. Mem. 10, ECF No. 11.) That is not quite accurate. The express consideration recited in the arbitration agreement was as follows:

> This Agreement is made in consideration of our processing of your inquiry or application for a loan secured by the property identified below ("loan") and is also made in further consideration of our funding of the loan at the interest rate(s) and terms referenced in the loan documents.

Allied does not deny that it never provided financing for the loan since that was provided by Wells Fargo. But it argues that partial consideration based on its processing of Plaintiffs'

loan application was sufficient to create a binding agreement with them. "In Maryland, consideration may be established by showing a benefit to the promisor or a detriment to the promisee." *County Comm'rs for Carroll Co. v. Forty West Builders, Inc.*, 941 A.2d 1181, 1213 (Md. Ct. Spec. App. 2008) (internal quotation marks omitted). Thus, Allied contends its processing of the loan application constituted a benefit to Plaintiffs, which, in turn, constituted consideration for the arbitration agreement. Consequently, now, Allied seeks specific performance of the arbitration agreement, i.e., to compel Plaintiffs to arbitrate. The circumstances under which a contracting party may seek specific performance have been described in the following manner:

> Generally, a party seeking specific performance must "be able to show that he has fully, not partially, performed everything required to be done on his part." Indeed, "[t]he performance of all conditions precedent is generally required before specific performance will be granted."
>
> Nevertheless, "[a] party to a contract may waive a right under the contract[.]" "[E]ither party to a contract may waive any of the provisions made for his benefit." "Waiver, however, 'must be clearly established and will not be inferred from equivocal acts or language. Whether there has been a waiver of a contractual right involves a matter of intent that ordinarily turns on the factual circumstances of each case.'" As recently stated by one court, "[i]t is well established that although a party may waive a provision included in a contract for that party's sole benefit, a party cannot waive a contractual requirement that benefits both sides to the transaction."
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> > Accordingly, the application of the doctrine of waiver when one party seeks to enforce a contract and compel performance by the other party despite the nonoccurrence of a condition precedent to performance, ordinarily requires a determination whether the condition was inserted in the contract solely for the benefit of the party seeking to enforce the contract despite its nonoccurrence.
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> [25 Samuel] Williston, [*A Treatise on the Law of Contracts*] § 39:24 [(Richard A. Lord ed., 4th ed. 1992, Supp. 2006)].

Cattail Assocs., Inc. v. Sass, 907 A.2d 828, 843 (Md. Ct. Spec. App. 2006) (other citations omitted). The requirement of *both* sides' signatures seems to be of mutual benefit to Plaintiffs

and Allied because the terms of the agreement dictate that an agreement was not created until both sides signed it. Indeed, it might also be concluded that the requirement of *Allied's* signature was only a benefit to Allied, rather than solely a benefit to Plaintiffs. Since this condition precedent was not solely a benefit to Plaintiffs, they could not waive it.

"'A waiver is the intentional relinquishment of a known right, or of such conduct as warrants an inference of a relinquishment of such right.'" *Canaras v. Lift Truck Services, Inc.*, 322 A.2d 866, 877 (Md. 1974). Even if the condition precedent at issue were solely for Plaintiffs' benefit, the analysis of whether a duty of performance has been waived does not easily fit the nature of the instant case. Because the condition precedent here goes to formation of the contract, rather than to performance under a binding contract as was the case in *Canaras*, it is difficult to square the concept of waiver with Allied's failure to sign a contract and thereby bring it into being. In other words, Allied seems to argue that Plaintiffs waived formation of the contract, but the contract is still enforceable because Allied processed their loan application. By extension of Allied's line of reasoning, this arbitration agreement could be enforced against Plaintiffs even if *they* had not signed it because of the "consideration" of Allied's processing of their loan application, which, it must be observed, would have occurred anyway. But it is equally conceivable, if Plaintiffs were the ones seeking to enforce the agreement, that Allied could raise as a defense its lack of execution and, therefore, the nonexistence of a binding contract. And, by the agreement's terms, that would be a successful argument.

> [I]t is said a contract to be specifically enforced by the court must be mutual; that is to say, such that it might at the time it was entered into have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in this latter way might in itself be free from the difficulty attending its execution in the former.

Baltimore Humane Impartial Soc. and Aged Women's and Aged Men's Homes v. Pierce, 58 A. 26, 28 (Md. 1904). Allied's argument that this agreement was enforceable because Plaintiffs waived or excused the condition precedent of Allied's signature is not supported by Maryland law.

Because the Court holds this was not an enforceable agreement, it need not reach other arguments propounded by the parties. For the foregoing reasons, the Court DENIES Allied's motion to compel arbitration (ECF Nos. 11 & 24).

DATED this 2nd day of August, 2011.

BY THE COURT:

/s/
James K. Bredar
United States District Judge