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MAR 29 2004

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

MAR 23 2004

**GREGORY C. LANGHAM
CLERK**

Civil Action No. 03-N-1371 (CBS)

GARY L. CUMMINGS, et al.,

Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEMS, INC.,

Defendant.

ORDER AND MEMORANDUM OF DECISION

This is a fraud, breach of contract and deceptive trade practices case. Plaintiffs Gary L. Cummings, Yelena Z. Cummings, James Bittle, Bonnie Bittle, and Sean Steiner (“plaintiffs”) allege that defendant FedEx Ground Package System, Inc., (“FedEx”)¹ misrepresented the viability of defendant’s package delivery routes it assigned to plaintiffs and did not provide proper support to plaintiffs on these routes. This matter is before the court on “Defendant FedEx Ground’s Motion Pursuant to Fed. R. Civ. P. 12(b)(1) and the Federal Arbitration Act to Compel Arbitration and Supporting Legal Authority,” filed August 4, 2003. Jurisdiction is based upon diversity of citizenship, 28 U.S.C.A. § 1332 (West 1993 & Supp. 2003).

¹Plaintiffs originally stated claims against two other defendants. These other defendants have settled with plaintiffs, so I address this case only as it relates to defendant FedEx. All references hereinafter to defendant is to FedEx Ground Package System, Inc.

1. Procedural History and Analysis

Plaintiffs' filed a state court action alleging, *inter alia*, that defendant misrepresented the viability of defendant's package delivery routes it assigned to plaintiffs and did not provide proper support to plaintiffs on these routes. (Am. Compl. and Jury Demand [filed June 24, 2003].) Plaintiffs asserted six claims for relief: (1) rescission, (2) fraud, (3) negligent misrepresentation, (4) breach of contract / promissory estoppel, (5) breach of covenant of good faith and fair dealing, (6) deceptive trade practices, (7) conspiracy, (8) failure to insure, and (9) exemplary damages. (Id.) Defendant removed the case to this court on July 28, 2003 pursuant to diversity of citizenship. (Notice of Removal [filed July 28, 2003].) On August 4, 2003, defendant filed a motion to dismiss and compel arbitration regarding plaintiffs' fourth and fifth claims for relief, based upon the assertion that these are contract claims that fall within the purview of the arbitration clause between the parties. (Def. FedEx Ground's Mot. Pursuant to Fed. R. Civ. P. 12(b)(1) and the Federal Arbitration Act to Compel Arbitration and Supporting Legal Authority [filed Aug. 8, 2003].)

On December 5, 2003, plaintiffs' filed an amended complaint which, *inter alia*, altered plaintiffs' fourth and fifth claims for relief. (Am. Compl. ¶¶ 43-49 [filed Dec. 5, 2003].) The amended complaint alleges that plaintiffs' fourth claim for relief does not arise from the written contract, and plaintiffs' fifth claim for relief is premised upon an "implied contractual relationship" between the parties. (Am. Compl. ¶¶ 43-49 [filed Dec. 5, 2003].) On December 19, 2003, defendant filed a new motion to dismiss and compel arbitration regarding plaintiffs' fourth and fifth amended claims for relief. (Def. FedEx Ground's Mot. Pursuant to Fed. R. Civ. P. 12(b)(1) and the Federal Arbitration Act to Compel Arbitration and Supporting Legal

Authority in Resp. to Pl.'s [sic] Am. Compl. [filed Dec. 19, 2003].) Defendant's new motion generally follows defendant's reasoning in its original motion on this issue. (Id.)

Since defendant's August 8, 2003 motion to dismiss is directed at plaintiffs' earlier complaint, and this complaint is superseded by plaintiffs' amended complaint, defendant's August 8, 2003 motion is moot. I will address defendant's December 19, 2003 motion at a later date.

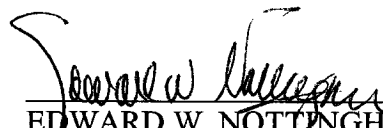
2. **Conclusion**

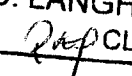
Based on the foregoing it is therefore

ORDERED that Defendant's Motion to Dismiss and Compel Arbitration (#8) is DENIED as moot.

Dated this 23 day of March, 2004.

BY THE COURT:


EDWARD W. NOTTINGHAM
United States District Judge

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UNITED STATES DISTRICT COURT
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MAR 24 2004
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-N-1371 (MJW)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order and Memorandum of Decision signed by Judge Edward W. Nottingham on March 23, 2004 was served on March 23, 2004 by hand-delivery, where a "D.C." box number or asterisk (*) is indicated after the recipient's name, by electronic mail to the electronic mail address specified where a double asterisk (**) is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

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GREGORY C. LANGHAM, CLERK

By



Deputy Clerk or Secretary