DOCKET NO. CV-02-0816568S	:	SUPERIOR COURT
	:	
CAPITAL VENTURES, LLC	:	J.D. OF HARTFORD
	:	
vs.	:	AT HARTFORD
	:	
PLYMOUTH COMMONS REALTY	:	
CORPORATION AND TERRYVILLE	:	
HOLDING CORPORATION	:	June 18, 2002

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

The above-captioned action arises out of the breach of a real estate sales agreement. On June 14, 2002, defendants moved to dismiss the complaint in the above-captioned action on the ground that plaintiff failed to first submit to mediation pursuant to a mediation clause in the contract which provides that "this clause shall not limit any other legal rights of the parties." Def. Motion to Dismiss, p.4. As set forth herein, defendants' motion is without any legal merit. The contract does not establish mediation as a prerequisite to bringing suit and this court has jurisdiction.

ARGUMENT

A. THE MEDIATION CLAUSE DOES NOT CREATE A CONDITION PRECEDENT TO SUIT

"Whether an agreement makes arbitration a condition precedent to an action in court depends on the language of the agreement." Kantrowitz v. Perlman, 156 Conn. 224, 227, 240 A.2d 8891 (1968) "For arbitration to be a condition precedent, the agreement to arbitrate must expressly so stipulate, or it must necessarily be implied from the language used." Multi-Service Contractors, Inc. v. Vernon, 181 Conn. 445, 448, 435 A.2d 983 (1980), citing, Kantrowitz, 156 Conn. at 227-228. To imply an agreement to make arbitration a condition precedent to a lawsuit,

the "implication must be so plain that a contrary intention cannot be supposed nor any other inference made. It must be a necessary implication." Kantrowitz, at 227. "The mere agreement to arbitrate, standing alone, does not give rise to a necessary implication that arbitration is a condition precedent to litigation . . . There must be some further provision in the agreement itself to show that arbitration is a condition precedent to litigation." Id., at 228-229.

Accordingly, the courts have uniformly held that a provision in a contract that the parties "shall" submit a matter to arbitration, without more, is not an express or implied agreement to make arbitration a condition precedent to suit. Multi-Service Contractors, at 446-450 (provision that "all claims, disputes and other matters in question between the contractor and owner arising out of, or relating to, the Contract Documents or the breach thereof . . . shall be decided by arbitration . . . ." insufficient to create condition precedent.); Kantrowitz (provision that "[i]n the event that the parties shall be unable to agree with respect to any question relating to the Recreational Area which may arise under the provisions of this Article, or otherwise, it is agreed that such question or controversy shall be submitted for arbitration" insufficient).[1] The language of the mediation clause in this case, which provides that disputes "shall be initially submitted to mediation" is not distinguishable in any material respect from the arbitration provisions in Multi-Service, Kantrowitz, and Mayron's, supra, which the Connecticut Supreme Court held did not create a condition precedent to a court action.

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[1] See also Mayron's Bake Shops, Inc. v. Arrow Stores, Inc., 149 Conn. 149, 152, 176 A.2d 574 (1961) (provision that "[i]n the event that any dispute shall arise hereunder or in relation to matters of payment or any matter or thing contained in this Agreement or in the rights or obligations of the parties hereto, such dispute shall be referred to arbitration . . . ." insufficient to create condition precedent); Round Hill Properties Ltd. v. Cathlow Assoc., LLC, 2001 Conn.Super.LEXIS 2364 at * 7-8 (August 20, 2001) (Resha, J.) (provision that "[a]ny controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration" insufficient to create condition precedent - ""The courts have held almost universally that under the common law, the parties to a dispute may not oust the jurisdiction of the courts by an agreement to arbitrate.") and cases cited therein.

Moreover, unlike the cases cited above, in this case, the parties have expressed a clear intent **not** to waive the right to bring action in the courts prior to seeking a mediation by providing that "[t]his clause shall not limit any other legal rights of the parties." Thus, an interpretation of the mediation clause to create a condition precedent to suit would be even more unwarranted than in any of the cited cases. Under the circumstances of this case, an intention **not** to require mediation as a prerequisite to the right to bring action may certainly be supposed.[2]

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the court deny the motion to dismiss.

[2] The mediation clause in Coburn v. Grabowski, 1997 Conn.Super.LEXIS 1478 (May 29, 1997) (Pellegrino, J.), upon which defendants rely, did not state that mediation would not limit the parties' other legal rights. Just as importantly, the court in Coburn found an implied intent to make mediation a condition precedent to a legal action based primarily upon that contract's express exclusion of certain types of action from the requirement of mediation - something which does not exist in this case. Id., at * 5-6.