

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO



Brian Oswald, et al. : Appeal No.: C-060038
: :
Plaintiffs / Appellees : Trial No.: A0508601
: :
v. : :
: :
Meyer Builders / Douglas Homes, Ltd., et : :
al. : :
: :
Defendants / Appellants.

PLAINTIFFS / APPELLEES BRIEF
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II. ARGUMENT

FIRST ISSUE FOR REVIEW (FIRST ASSIGNMENT OF ERROR):

The Trial Court Did Not Err by Denying Defendant/Appellant's Motion for Stay of Litigation Pending Arbitration.

Issues Presented for Review and Argument:

1. The Seller's right to specific performance under the arbitration clause was not limited to the buyer's duty to close on a real property transfer, and thus, the Court did not err in concluding that the arbitration clause contained in the parties agreement of sale was "one sided" and therefore unenforceable.

As noted by the Sixth Appellate District in a recent decision, the decision to stay the trial court proceedings pending arbitration is properly reviewed under an abuse of discretion standard. *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 410, 701 N.E.2d 1040. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140. In applying the **abuse of discretion** standard, an **appellate court** may not merely substitute its judgment for that of the **trial court**. *Giltner v. Mitchell*, 2002 Ohio 5771 (Ohio Ct. App. 2002). However, questions purely of law are to be reviewed *de novo*. *Akron-Canton Waste Oil v. Safety-Kleen Oil Servs.*, 81 Ohio App. 3d 591.

In this case, the trial Court properly held that Appellant/Defendant Meyer Builders arbitration clause at issue in this case is "one-sided" in favor of Meyer Builders. As Appellant aptly points out, the terms of its own arbitration clause carve out an exception for specific performance and "related damages" while binding the Plaintiffs/Appellees, to arbitration for all claims.

While Appellant/Defendant would have this Court believe that the issue before the Court is well settled by virtue of this Court's decision in *Peppers v. Meyer Builders*, 1st Dist. No. C-

030894, an examination of the case in law in this and in other Ohio Courts shows that the issue as it relates to enforceability of arbitration clauses in consumer contracts (wherein one party is bound to arbitration for all disputes, and the other party is not) is far from “settled” as a body of law.

Unsurprisingly, Ohio Courts (and other state appellate and federal district courts, see *Circuit City Stores, Inc. v. Adams* (2002), 279 F.3d 889; *Nicholson v. Labor Ready, Inc.* (1997), 1997 U.S. Dist. LEXIS 23494; *Kinney v. United Health Care Services, Inc.* (1999), 70 Cal. App. 4th 1332; *Stireln v. Supercuts, Inc.*, 51 Cal. App. 4th 1519.) have already ruled that arbitration clauses like the one at issue here are unconscionable and therefore unenforceable.

In addition, it is evident from the plain language of Appellant’s “controversy” clause that there is no specific mention of fees or costs involved with the Appellant’s arbitration process. As Appellees/Plaintiffs argued in their memorandum on this issue, under relevant case law Appelles ought to be provided with the opportunity to conduct discovery on the costs involved with the Arbitration Process which effectively takes away Appellees’ fundamental right to seek redress in the Court system for the largest consumer purchase they have ever made (in this case, in a purchase in excess of \$350,000.00). See, *Harrison v. Toyota Motor Sales, U.S.A., Inc.*, 2002 Ohio 1642. In a similar case, the Court of Appeals in Ohio for the Ninth Appellate District found that the failure by the builder to disclose fees associated with arbitration (which, like in this case, was to be through the American Arbitration Association) and to explain the arbitration clause to the consumer made the clause procedurally and substantively unconscionable. *Porpora v. Gatliff Bldg. Co.*, 160 Ohio App. 3d 843.

In *Harlamert v. Fischer Attached Homes* (2003), 1st Dist No. C-02046 2003 WL 328025, this Court upheld the ruling of the trial Court finding the arbitration clause unconscionable

(because is violated principals of equity) and stated: “Here, the trial court found enforcement of the clause to be inequitable, because Fischer reserved the right to file suit, whereas the purchasers were requires to submit to arbitration. We find no error in that conclusion.”

Harlamert, supra at ¶ 16. This Court in *Harlamert* further held that an arbitration clause that allows only one party to circumvent the arbitration requirement, is unconscionable. *Id.* At ¶ 6-7.

When this contract is examined as a whole, it is clear that the same rationale of *Harlamert* should also apply in this case.

Finally, the Supreme Court of Ohio has ruled that one-sided clauses contained in Arbitration agreements (which require one party to submit to arbitration while the other is free to pursue their remedies in Court) are unconscionable. In *Williams v. Aetna Finance Co.* (1998), 83 Ohio St. 3d 464, the Supreme Court of Ohio reviewed an arbitration clause in which (as in the present case) the seller had reserved for itself the only remedy they would need to recover under the contract, while the consumer was forced into arbitration. The Supreme Court held that under the attendant facts and circumstances, the arbitration clause was unconscionable. In so finding, the Ohio Supreme Court held:

The trial court was entitled initially to view the arbitration clause at issue with some skepticism. In the situation presented here, the arbitration clause, contained in a consumer credit agreement with some aspects of an adhesion contract, necessarily engenders more reservations than an arbitration clause in a different setting, such as in a collective bargaining agreement, a commercial contract between two businesses, or a brokerage agreement. *Id.* at 471.

The circumstances of this case are identical to the circumstances in *Williams*. According to the terms of the “controversy” clause utilized by the Appellant in this case, it is free to institute actions in Court for Specific Performance and related damages against the Consumer but the consumer is forced to resolve his or her disputes through arbitration. In this case, the trial

court held that such an agreement between two parties of such disparately unequal bargaining power is simply unconscionable and should not be enforced.

Appellees/Plaintiffs do not dispute that the local rules of the Hamilton County Common Pleas Courts, relevant statutes, and case law support the contention that arbitrators do not have the jurisdiction to decide a claim to real property. Appellees/Plaintiffs do dispute that there are no other claims which could possibly be brought for "specific performance" by Meyer Builders.

Appellant/Defendant states in its brief that the "only specific performance a seller could possibly seek to enforce would be the buyer's duty to close on a real property transfer". As this Court is well aware, Black's Law Dictionary defines specific performance, in part, as "A court ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate..". Although the sale of real estate is obviously one category in which specific performance can be sought as a remedy -- there are 22 provisions or paragraphs in the contract at issue in this case, many of which have nothing to do with the sale or transfer of land. Put simply, there is nothing in the contract at issue and more specifically, nothing in the "controversy" clause at issue in this case which limits the specific performance "carve out" for Appellant to actions only involving the sale or transfer of the real estate.

For example, paragraph 8 of the contract at issue states, "Seller shall use any utilities existing on the premises such as light, heat, power and water necessary to complete construction and Seller shall be responsible for paying for these utilities during construction. At completion of construction, it is the Buyer's responsibility to contact the utility companies and transfer service into the Buyer's name. The Buyer agrees to pay all utilities from the closing date forward." (T.d.2, Ex. A, at ¶8). If Seller were to fail to pay for the utilities during construction, Buyer

would have to arbitrate the matter. If Buyer (Appellees/Plaintiffs) were to fail to have the utilities transferred or to pay for them from the closing date forward, Appellant Meyer Builder would be free to take Appellees/Plaintiffs to Court to enforce the agreement. One can only conclude that failure of the Buyer or Seller to live up to this specific provision would result in a claim for monetary damages, a claim which Meyer Builders would be free to bring in Court – but which the consumers in this case would have to submit to arbitration and would likely pay hefty costs to do so.

In another example, paragraph 17 of the contract states that “During the period of construction, Seller shall have the right to place a reasonable sized sign upon the premises which advertises the Seller or its builder. Buyer grants Seller the right to obtain and use photographs of the interior and exterior of the residence for publication and advertising purposes.” (T.d.2, Ex. A, at ¶17). Again, if Appellees/Plaintiffs had taken action to prevent this type of advertisement from occurring, Meyer Builders could have brought an action in Court to enforce this provision (which obviously has nothing to do with the sale of land or closing on the real estate). Appellees, however, would have no remedy but arbitration if (for example) Appellant placed a billboard sized sign in the yard during construction.

Thus, Meyer Builders argument that its arbitration clause only follows what is mandated by Ohio law might be considered valid had the arbitration clause at issue limited Appellants’ specific performance remedy to actions relating only to the closing of the real estate. However, there is no such limitation and thus the argument is not well taken.

2. A Trial Court May Refuse to Enforce an Arbitration Clause Where It Finds the Clause Violates the Principals of Equity.

As aptly determined by this Court in *Harlamert*, “Although arbitration is encouraged as a method of resolving disputes, where the arbitration clause violates the principals of equity, under all the attendant facts and circumstances, a court may refuse to enforce such a clause.”

While Appellees acknowledge that Federal cases do exist where arbitration clauses which are not identical in their obligations on each party have been upheld, it is clear in Ohio that the trial court has discretion to look at each and every arbitration clause under a totality of the circumstances to determine whether it is procedurally and substantively unconscionable. In fact, Ohio Revised Code Section 2711.01 gives the Courts exactly this ability which was exercised by the Ohio Supreme Court in *Williams*, cited above. However, Appellees have not argued that the mere failure (alone) of Appellant’s arbitration clause to impose identical obligations on each party is the sole reason the clause should not be enforced.

Appellant cannot seriously argue that Appellees “negotiated” the “controversy clause” at issue in this case. The controversy clause is on a pre-printed form, and there is no space on the form to “opt in” or “opt out” of arbitration. Essentially, the Appellees had to acquiesce to this term or else forgo obtaining services. Such are the characteristics of an adhesion contract per cases such as *Lear v. Rusk Indus.*, 2002 Ohio 6599; see also, *Marcinko v. Palm Harbor Homes*, 2002 Ohio 3313 ¶ 18 (citing *Nottingdale Homeowners’ Assoc., Inc. v. Darby* (1987), 33 Ohio St. 3rd 32, 37).

Put simply, if Appellees had refused to sign that agreement “as is”, they would not have been able to purchase this home. Thus, the agreement is not a “meeting of the minds” (as is required for a valid and enforceable contractual term). While there is no “bright line” test for determining exactly when a contract or arbitration provision may become unconscionable, and thus, unenforceable, “*the more standardized the agreement the less a party may bargain*

meaningfully, the more susceptible the contract or a term will be to a claim of unconscionability." *O'Dooghue v. Smythe, Cramer Co.*, 2002 Ohio 3447 ¶ 26.

SECOND ISSUE FOR REVIEW (SECOND ASSIGNMENT OF ERROR)

Stare decisis is not controlling, there are wide-spread and often conflicting decisions of the various Ohio Appellate and Common Pleas Courts on this issue, and there is no decision from the Ohio Supreme Court which conflicts with that of the trial Court here.

As is aptly noted by Appellants, *stare decisis* is not absolute. "Under the doctrine of **stare decisis**, 'a determination of a point of law by a court of last resort will be followed by inferior courts in subsequent cases presenting the same legal problem, even though different parties are involved in the subsequent case.' " *Burzynski v. Bradley & Bradley & Farris Co., L.P.A.* (Dec. 31, 2001), 10th Dist. No. 01AP-782, 2001 Ohio 8846, 2001 Ohio App. LEXIS 5970, at *18, quoting *Nelson v. Ohio Supreme Court* (Oct. 6, 1994) 10th Dist. No. 94 APE05-624, 1994 Ohio App. LEXIS 4549, citing *Battig v. Forshey* (1982), 7 Ohio App. 3d 72, 7 Ohio B. 85, 454 N.E.2d 168. However, given the various decisions on this issue by Federal and State Courts, including other Ohio Courts of Appeals, it is clear that reasonable minds can differ on the issue of enforceability of arbitration clauses, as they clearly do here. The mere fact that decisions on the issue of enforceability of arbitration clauses vary so greatly, even among appellate courts, bolster the notion that the trial Court was not acting arbitrarily or capriciously here, and after examining all the facts and circumstances of this case, rightly concluded that the arbitration clause at issue here was unconscionable.

III. CONCLUSION

For the reasons stated above, the Trial Court's decision and entry clause should be sustained.



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IV. CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the following has been served upon Patrick M. O'Neill, Esq. and Edward P. Akin, Esq., *Attorneys for Defendant/Appellant*, 2200 U.S. Bank Tower, 425 Walnut Street, Cincinnati, Ohio 45202 via U.S. Ordinary Mail on this 16th day of June, 2006.


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