

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**



D71392853

BRIAN OSWALD, :
ANGELA OSWALD, :
and :
CONSTANCE SMITH, :
Plaintiffs-Appellees, :
vs. :
MEYER BUILDERS/DOUGLAS :
HOMES LTD., :
Defendant-Appellant. :

APPEAL NO. C-060038
TRIAL NO. A-0508601 ✓

JUDGMENT ENTRY.



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Meyer Builders/Douglas Homes, Ltd., appeals from the judgment of the common pleas court denying its motion to stay proceedings pending arbitration in a contract action filed by plaintiffs-appellees Brian Oswald, Angela Oswald, and Constance Smith.

In September 2003, the Oswalds and Smith entered into a contract with Meyer Builders for the construction of a new home. The contract contained an arbitration clause that stated that any disputes arising under the contract, other than a claim for specific performance or related damages, would be settled through arbitration. After purchasing the

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

home, the Oswalds and Smith discovered numerous defects in the residence, which, they claim, Meyer Builders failed to remedy.

In November 2004, they filed suit against Meyer Builders in the common pleas court.² Meyer Builders moved to stay the proceedings pending arbitration in accordance with the terms of the contract. The Oswalds and Smith opposed the motion. They argued that the arbitration clause was unenforceable because it was unconscionable. The trial court denied Meyer Builders's motion without an opinion or explanation. Meyers Builders now appeals, raising two assignments of error.

In its first assignment of error, Meyer Builders contends that the trial court erred in denying its motion to stay the proceedings and to compel arbitration of the plaintiffs' claims. In its second assignment of error, Meyer Builders argues that the trial court erred in finding the arbitration clause unconscionable in contravention of this court's decision in *Peppers v. Meyer Builders-Douglas Homes, Ltd.*³ Because these assignments are interrelated, we address them together.

This court generally reviews a motion to stay proceedings pending arbitration under an abuse-of-discretion standard.⁴ When a party, however, challenges an arbitration agreement as unconscionable, the enforceability of that agreement is an issue of law subject to de novo review.⁵

Under Ohio law, unconscionability "embodies two separate concepts: '(1) unfair and unreasonable contract terms, i.e., substantive unconscionability, and (2) individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible, i.e., procedural unconscionability[.]'"⁶ To

² Douglas Meyers was also named as a defendant, but the claims against him were subsequently dismissed.

³ 1st Dist. No. C-030894, 2004-Ohio-5057.

⁴ *Doe v. Farrell*, 167 Ohio App.3d 14, 2006-Ohio-2676, 853 N.E.2d 728, at ¶15.

⁵ *Id.* at ¶16.

⁶ *Cross v. Carnes* (1998), 132 Ohio App.3d 157, 170, 724 N.E.2d 828, quoting *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294.

negate an arbitration clause, a party must show that the clause is both substantively and procedurally unconscionable.⁷

In *Peppers*, this court addressed the arbitrability of homeowners' claims for alleged defects in their new home caused by Meyer Builders, the defendant in this case.⁸ As in this case, the Pepperses argued that the arbitration provision in their contract was substantively unconscionable because it reserved Meyer Builders' right to sue for specific performance, while forcing them to arbitrate any claims under the contract.⁹ They reasoned that the arbitration provision in their contract with Meyer Builders was analogous to an arbitration provision this court had found unconscionable in *Harlamert v. Fischer Homes*.¹⁰ We rejected the Pepperses' argument, concluding that the arbitration provision in *Harlamert* was much broader because it had "reserved the builder's right to litigate all disputes," whereas the arbitration provision in the Pepperses' contract had only reserved the builder's right to litigate claims for specific performance.¹¹

The arbitration clause in this case is virtually identical to the arbitration clause in *Peppers*. Far from being one-sided, the arbitration clause in this case mirrors Ohio's Arbitration Act, which expressly excludes from its operation controversies involving the title to and possession of real estate.¹² Because it is clear from our reading of the contract that Meyer Builders' right to specific performance was limited solely to the Oswalds and Smith's duty to close on the real property, we cannot conclude that the terms of the arbitration clause were so one-sided as to render them substantively unconscionable.

⁷ *Jeffrey Mining Products, L.P. v. Left Fork Mining Co.* (2001), 143 Ohio App.3d 708, 718, 758 N.E.2d 1173.

⁸ *Peppers*, supra, at ¶3.

⁹ *Id.* at ¶8.

¹⁰ *Id.* at ¶¶9-10

¹¹ *Id.* at ¶10.

¹² R.C. 2711.01(B); see, also, *Kedzior v. CDC Development Corp.* (1997), 123 Ohio App.3d 301, 303, 704 N.E.2d 54.

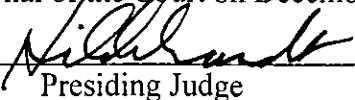
Nor can we conclude that the arbitration clause was procedurally unconscionable. The Oswalds and Smith have argued that because their arbitration clause with Meyer Builders was a part of a contract of adhesion offered to them on a take-it-or-leave-it basis, that it was unenforceable. “An adhesion contract exists when a party with little or no bargaining power is required to submit to terms to which he has no realistic choice.”¹³ But as Meyer Builders points out, the Oswalds and Smith have failed to put forth any evidence showing that they had no choice about the terms of the contract, that they were forced into the terms of the contract, or that they could not have purchased a home from another builder.¹⁴

Because the Oswalds and Smith’s contract with Meyer Builders was not substantively or procedurally unconscionable, the trial court erred in denying Meyer Builders’ motion to stay the proceedings pending arbitration. We, therefore, sustain Meyer Builders’ first and second assignments of error, reverse the judgment of the trial court, and remand this cause for further proceedings consistent with this decision and the law.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., PAINTER and SUNDERMANN JJ.

To the Clerk:

Enter upon the Journal of the Court on December 27, 2006
per order of the Court 
Presiding Judge

¹³ *Marcinko v. Palm Harbor Homes, Inc.*, 4th Dist. No. 01CA677, 2002-Ohio-3313, at ¶18.

¹⁴ See, e.g., *Handler v. Southerland Custom Bldrs., Inc.*, 8th Dist. No. 86956, 2006-Ohio-4371, at ¶¶20-22.