

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**

THOMAS W. LEAR, ET AL.

CASE NUMBER 5-02-26

PLAINTIFFS-APPELLANTS

v.

**RUSK INDUSTRIES, INC.
DBA EVERDRY WATERPROOFING**

OPINION

DEFENDANT-APPELLEE

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: December 4, 2002.

ATTORNEYS:

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For Appellants.**

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Case No. 5-02-26

**Toledo, OH 43615
For Appellee.**

Walters, J.

{¶1} Plaintiffs-Appellants, Thomas and Kathy Lear ("Appellants"), bring this appeal from a Hancock County Common Pleas Court decision staying the claims against Defendant-Appellee, Rusk Industries, Inc. d/b/a Everdry Waterproofing ("Everdry"), pending arbitration. Because Appellants failed to produce evidence that they were denied any realistic opportunity to bargain or could not have obtained the services elsewhere, the contract at issue herein is not one of adhesion. Therefore, due to the broad language of the contract's arbitration provision, the trial court did not err in staying Appellants' claims pending arbitration.

{¶2} Facts and procedural posture pertinent to the issues on appeal are as follows. In April 2000, Appellants requested Everdry to conduct a free inspection of their home because they noticed standing water in both their backyard and the crawl space under their residence. After inspection, an Everdry representative recommended repairs to alleviate the moisture problem and quoted Appellants a price of \$11,000. Appellants decided the quote was too high and proceeded to discuss the problems with competing companies.

{¶3} Thereafter, Appellants agreed to have Everdry inspect their home a second time and eventually signed a contract after negotiating a price reduction. The contract was signed by Appellants at their home and contained a three-day

right of rescission period and also included an arbitration clause. Testimony before the trial court reveals that Appellants read the contract, and the provisions were explained prior to their signing.

{¶4} Everdry completed the work in May 2000. Thereafter, Appellants allegedly learned that the repairs provided by Everdry were not necessary to address what they claim was an overstated moisture problem. Moreover, water continued to accumulate in their backyard. Consequently, Appellants hired another company to address the problem.

{¶5} Based upon the additional expenditures and their assertion that Everdry utilized scare tactics to induce them to enter the contract, Appellants filed a complaint in the Hancock County Common Pleas Court, alleging negligent workmanship, fraudulent inducement, and violations of the Ohio Consumer Sales Practices Act. Thereafter, Everdry filed a motion to stay the case pending the outcome of arbitration as per the contract terms, and Appellants submitted a memorandum in opposition. After conducting a hearing on the matter, the trial court granted Everdry's motion and stayed the case pending arbitration.

{¶6} From this decision, Appellants appeal, asserting two assignments of error for our consideration.

Assignment of Error I

{¶7} "The trial court erred in granting Appellee's Motion to Stay Case Pending Arbitration, where the claims of Appellants were based upon negligent workmanship, fraudulent inducement and violation of the Ohio Consumer Sales Practices Act, and not upon a 'controversy or claim arising out of or relating to the contract, or the breach thereof', thereby rendering the mandatory arbitration clause in such contract irrelevant and unenforceable."

{¶8} In their first assignment of error, Appellants contend that none of their claims arise from or relate to their contract with Everdry, concluding that the arbitration agreement contained therein is inapplicable. As a preliminary matter, we set forth the appropriate standard for reviewing a trial court's application of R.C. Chapter 2711, Ohio's Arbitration Act. Nothing therein indicates that a special or different standard governs review of a trial court decision under the Act. Rather, review of trial court determinations as to whether proceedings should be stayed pursuant to the parties' agreement to submit their disputes to arbitration, should proceed like review of any other court decision finding an agreement between parties, i.e., accepting findings of fact that are not "clearly erroneous" but deciding questions of law de novo.¹

{¶9} Ohio and federal courts encourage arbitration to settle disputes.² Our General Assembly also favors arbitration, as indicated by R.C. 2711.02,

¹ *Garcia v. Wayne Homes, LLC* (Apr. 19, 2002), Clark App. No. 2001 CA 53, 2002-Ohio-1884.

which requires a court to stay an action if *any* issue involved falls under an arbitration agreement.³ "[A]s a matter of law, any doubts [or ambiguities] concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."⁴ Moreover, "a clause in a contract providing for dispute resolution by arbitration should not be denied effect 'unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[.]'"⁵

{¶10} The arbitration agreement herein provides that "[a]ny controversy or claim *arising out of or relating to this contract*, or the breach thereof, shall be settled by arbitration * * *."⁶ Appellant's maintain that their claims for fraudulent inducement, negligent workmanship, and violations of the Ohio Consumer Sales Practices Act neither arise from nor relate to the contract. Notably, however, Appellants do not contend that the arbitration provision itself is invalid. We acknowledge that parties to a contract cannot be required to submit to arbitration

² *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 500, 1998-Ohio-612, citing *Kelm v. Kelm* (1993), 68 Ohio St.3d 26, 27; *Garcia, supra*.

³ Emphasis added. See *ABM Farms, Inc.*, 81 Ohio St.3d at 500.

⁴ *Garcia, supra*, quoting *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.* (1983), 460 U.S. 1, 24-25. See, also, *Volt Information Sciences, Inc. v. Leland Stanford Junior Univ. Bd. of Trustees* (1989), 489 U.S. 468, 476.

⁵ *Gibbons-Grable Co. v. Gilbane Bldg. Co.* (1986), 34 Ohio App.3d 170, 173, quoting *Siam Feather & Forest Products Co. v. Midwest Feather Co.* (S.D. Ohio 1980), 503 F.Supp. 239, 241. See, also, *Monahan v. Schumacher Homes, Inc.* (Nov. 13, 2001), Stark App. No. 2001CA00168, 2001-Ohio-1789.

⁶ Emphasis added.

those disputes that they have not agreed to submit to arbitration.⁷ However, the claims asserted by Appellants, in light of a contract containing such a broad arbitration clause, is a question for arbitrators and not for the court.⁸ Clearly, at least Appellants' claims for negligent workmanship relate to the contract herein, without which their assertions would not have arisen.

{¶11} As such, Appellant's first assignment of error is overruled.

Assignment of Error II

{¶12} "The Trial Court erred in granting Appellee-Appellee's [sic] Motion to Stay Pending Arbitration where the contract requiring arbitration was a contract of adhesion for services that were for necessities, and enforcement of the arbitration provision would be unconscionable."

{¶13} Alternatively, Appellants argue in their second assignment of error that even if this Court determines that their claims are subject to arbitration, the arbitration provision should not be enforced on equitable grounds. Specifically, Appellants maintain that their contract with Everdry was one of adhesion and, therefore, unconscionable. We disagree.

{¶14} 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

⁷ *Garcia, supra*, citing *AT&T Technologies, Inc. v. Communications Workers of Am.* (1986), 475 U.S. 643, 648.

⁸ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967), 388 U.S. 395, 403-405; *ABM Farms, Inc.*, 81 Ohio St.3d at 501.

choice."⁹ Such contracts generally refer to instances where one party is offered goods or services on essentially a "take it or leave it" basis without a realistic opportunity to bargain, and the consumer must either acquiesce in the terms of a form contract or forego obtaining the services.¹⁰

{¶15} Appellants attempt to buttress their claim by asserting that the contract was for necessities. The facts, however, demonstrate that Appellants not only refused Everdry's initial offer, but they also consulted competing businesses. Only after realizing that Everdry had the lowest prices and then further negotiating a price reduction, did Appellants sign the contract. Moreover, Appellants did not inquire as to whether any other terms of the contract could be modified, and testimony indicates that the terms could be altered by the company president. Furthermore, the contract provisions were discussed prior to signing, and Appellants did not utilize the three-day right of rescission period. By their own testimony, they admit to having alternative avenues for completion of the repairs. Appellants have failed to produce evidence that they were denied any realistic opportunity to bargain or that they could not have obtained the services elsewhere. Therefore, we find that the contract at issue was not a contract of adhesion.

⁹ *Marcinko v. Palm Harbor Homes, Inc.* (June 21, 2002), Pike App. No. 01CA677, 2002-Ohio-3313, at ¶ 18, citing *Nottingdale Homeowner's Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32, 37, fn. 7.

¹⁰ *O'Donoghue v. Smythe, Cramer Co.* (July 3, 2002), Cuyahoga App. No. 80453, 2002-Ohio-3447, at ¶ 25-26, citing Black's Law Dictionary (5 Ed. Rev.1979) 38.

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Accordingly, Appellant's second assignment of error is without merit and is overruled.

{¶16} Having found no error prejudicial to Appellants herein, in the particulars assigned and argued, the judgment of the trial court is affirmed.

Judgment affirmed.

HADLEY, J., concurs

SHAW, P.J., concurs separately

I fully concur with the disposition of the second assignment of error and the determination of the majority that this was not a contract of adhesion. I would also agree that the allegation of negligent performance in paragraph 4, Count One of the complaint seems sufficiently related to the specific terms of the contract to invoke the arbitration clause. As a practical matter, it may be that the case should first proceed to arbitration on this issue and on this basis alone we have overruled the first assignment of error. However, I write separately to emphasize that the remaining allegations in this action do not necessarily constitute claims *arising out of or relating to this contract, or the breach thereof* and therefore should not be subject to mandatory arbitration under paragraph 7 of the contract.

The majority of the allegations in the Complaint pertain to fraudulent misrepresentation in the inducement. Paragraph 5 of Count One of the Complaint

alleges that “Defendant committed an unfair or deceptive act or practice in that Defendant represented that the subject of the transaction had performance characteristics and benefits that it did not have, and that replacement or repair was needed, when it was not, in violation of section 1345.02(A) of the Ohio Revised Code.” Paragraph 6, subsections (1), (3) and (5) contains substantially similar allegations. Count Two of the Complaint contains an entirely separate allegation of fraud as to the “necessity, reasonable cost, and scope of work reasonably required to correct the collection of water upon Plaintiff’s premises ***.”

These allegations do not arise from, relate to, or concern breach of the terms of the contract that Plaintiffs were eventually persuaded to enter, but instead pertain to whether any of the statements made by Defendants in the course of that persuasion fraudulently induced the Plaintiffs to enter into a business relationship with Defendants that was entirely unnecessary and unrelated to Plaintiffs’ water problem. Assuming these allegations can be proven, an unscrupulous home-repair contractor should not be permitted to avoid a jury trial or the consequences of their own misconduct under Ohio’s Consumer Sales Practices Act by invoking an arbitration clause (or any other term) of a contract which the homeowner was fraudulently induced to sign. In my opinion, permitting this to take place would constitute, *inter alia*, an unconscionable enforcement of the arbitration clause entitling the Plaintiff to equitable relief.