[Cite as *Dorgham v. Woods Cove III*, 2018-Ohio-4876.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106838

H. JEAN DORGHAM

PLAINTIFF -APPELLEE

vs.

WOODS COVE III, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-17-874128

BEFORE: Keough, J., McCormack, P.J., and Laster Mays, J.

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ATTORNEYS FOR APPELLANTS

Andrew M. Tomko
David T. Brady
Brian Steven Gozelanczyk
Sandhu Law Group, L.L.C.
1213 Prospect Avenue, Suite 300
Cleveland, Ohio 44115

ATTORNEYS FOR APPELLEE

Paul B. Bellamy
P.O. Box 20341
Cleveland, Ohio 44120

William C. Behrens
Dannlaw
P.O. Box 6031040
Cleveland, Ohio 44103

KATHLEEN ANN KEOUGH, J.:

{¶1} Defendants-appellants, Woods Cove III, L.L.C. ("Woods Cove"), Lakeside REO Ventures, L.L.C. ("Lakeside"), and Davenport Financial, L.L.C. ("Davenport") (collectively "appellants"), appeal the trial court's decision denying their motion to compel arbitration. For the reasons that follow, we affirm.

{¶2} On June 2, 2015, in Cuyahoga C.P. No. CV-15-846446, Woods Cove initiated a tax certificate foreclosure against real property owned by H. Jean Dorgham ("Dorgham"). After obtaining judgment and a decree of foreclosure, Woods Cove filed a praecipe for order of sale, with the sheriff's sale set for May 2, 2016, and confirmation of sale scheduled for May 16, 2016. On April 12, 2016, Lakeside was substituted as plaintiff in the foreclosure action due to the purchase and transfer of the tax certificate from Woods Cove.

{¶3} On Thursday, April 28, 2016, Dorgham telephoned Davenport, the servicer of the tax certificate holder, to discuss her options of preventing the sheriff's sale of her property, which was scheduled to occur five days later on Monday, May 2.

{¶4} According to Dorgham, during the telephone conversation, a payment plan was agreed upon wherein if she made a down payment of $800 and 48 subsequent monthly payments, the tax certificate holder would file the necessary documentation to either cancel the sheriff's sale or have the sale withdrawn due to the agreement. According to the subsequent written repayment plan, the first monthly payment was due on Sunday, May 1, 2016 — the day before the sheriff's sale was to occur.

{¶5} It is undisputed that Dorgham made the $800 down payment, but did not make the first monthly payment. Dorgham's property was subsequently sold to a third-party purchaser at the May 2, 2016 sale, and the sale was confirmed on May 18, 2016.

{¶6} Following the sale, the third-party purchaser filed an eviction proceeding against Dorgham. As a result, Dorgham moved for relief from judgment in the foreclosure action, contending that she entered into an agreement with Davenport and the sale was improper. The trial court denied Dorgham's motion, and no appeal was taken.

{¶7} On May 16, 2016, after the sale of the property, but prior to the sale confirmation, Dorgham received an email with attachments from Davenport. The attachments included a cover letter dated May 1, 2016, an unsigned Redemption Plan Agreement only between Woods Cove and Dorgham ("written agreement"), a payment schedule, and an authorization for electronic ACH payments. The payment schedule provided that an initial down payment of $800 was to be paid and the first monthly payment was due on May 1, 2016. Dorgham did not sign the written agreement.

{¶8} In January 2017, Dorgham filed the instant complaint against appellants, asserting claims for breach of contract, promissory estoppel, and conversion. Appellants answered the complaint and raised several affirmative defenses, but did not assert that the matter was subject to binding arbitration.

{¶9} On March 16, 2017, appellants moved for summary judgment contending that Dorgham's claims were barred by res judicata because her complaint raised the same claims as those raised in her Civ.R. 60(B) motion in the foreclosure action. In their motion, appellants maintained that no binding contract, oral or written, existed between the parties because there was no "meeting of the minds." Rather, the appellants characterized the telephone interaction as merely an "offer" that Dorgham did not accept because she failed to perform under the terms of the "offer" by failing to pay the first monthly installment by May 1. In response, Dorgham sought a stay of summary judgment until discovery was conducted. The trial court granted the stay, over objection.

{¶10} On July 18, 2017, seven months after the complaint was filed, the appellants moved to dismiss Dorgham's complaint, or in the alternative, to compel Dorgham to arbitrate her claims based on the arbitration agreement contained in the unexecuted written agreement. Appellants asserted that because Dorgham stated in her complaint that "the terms of this oral agreement were subsequently confirmed in the written contract forwarded to [Dorgham] by Davenport," Dorgham was seeking to enforce the written agreement and therefore, should be compelled to arbitrate her claims as required under the written agreement.

{¶11} Two days after the motion to compel arbitration was filed, appellants withdrew their motion for summary judgment, and ten days later requested leave to file an amended answer to assert the defense that Dorgham's complaint was subject to binding arbitration.

{¶12} Following extensive briefing, the matter was submitted to a magistrate for a hearing on the motion to compel. On December 1, 2017, the magistrate issued a written decision finding that Dorgham's complaint was premised on an alleged oral contract, and that the unexecuted written agreement containing a binding arbitration provision that was presented to Dorgham after the sheriff's sale occurred was not persuasive evidence that the parties agreed to binding arbitration. Accordingly, the magistrate determined that Dorgham did not agree to submit her claims to binding arbitration, and denied appellants' motion to compel or dismiss.

{¶13} Appellants timely objected to the magistrate's decision, contending that the magistrate erred in finding that (1) an oral agreement "possibly" could be enforced; (2) the arbitration agreement is not enforceable because it is unsigned; and (3) Dorgham did not agree to binding arbitration. The trial court overruled the objections and adopted the magistrate's decision concluding that the objections "have no legal merit."

{¶14} Appellants now appeal, raising as their sole assignment of error that the trial court erred in not enforcing the arbitration clause contained in the written agreement because (1) the written agreement did not need to be signed for the arbitration clause to be enforceable; and (2) the parties agreed to binding arbitration based on the terms of the written agreement.

{¶15} At the outset, we agree with Woods Cove that a written contract containing an arbitration agreement does not need to be signed to be enforceable. *PNC Mtge. v. Guenther*, 2d Dist. Montgomery No. 25385, 2013-Ohio-3044, ¶ 15 (signed writing is not necessary to a settlement contract); *Seyfried v. O'Brien*, 2017-Ohio-286, 81 N.E.3d 961, ¶ 19, fn. 3 (8th Dist.) (lack of a signature does not in itself show that the party has not consented to arbitration). However, this is true only when it is the intention of the parties to be bound by the terms and conditions of the subsequent written agreement, including the arbitration provision. And based

on appellants' actions and position in this case, there was no "meeting of the minds" between the parties with the intention to be bound by the subsequent written agreement.

{¶16} Ohio law favors arbitration, but it "is a matter of contract and, in spite of the strong policy in its favor, a party cannot be compelled to arbitrate a dispute which he has not agreed to submit [to arbitration]." *Teramar Corp. v. Rodier Corp*., 40 Ohio App.3d 39, 40, 531 N.E.2d 712 (8th Dist.1987). "The party seeking to compel arbitration bears the burden of establishing the existence of an enforceable arbitration agreement [with] the party against whom the moving party seeks enforcement." *Fifth Third Bank v. Senvisky*, 8th Dist. Cuyahoga No. 100030, 2014-Ohio-1233, ¶ 11

{¶17} In this case, the record demonstrates that before appellants requested that Dorgham be compelled to arbitrate her claims, they argued in their initial pleadings and filings that no contract, oral or written, exists between the parties. *See* appellants' answer and motion for summary judgment ("[t]he evidence before the court is clear that there was no binding contract between the [parties]"). In essence, appellant's position could be viewed, as argued by Dorgham, as a waiver of the right to arbitrate because appellants have acted inconsistently with the right to arbitrate. *See Ohio Bell Tel Co. v. Cent. Transp., Inc.* 8th Dist. Cuyahoga No. 96472, 2011-Ohio-6161, ¶ 15, citing *Milling Away LLC v. UGP Properties LLC*, 8th Dist. Cuyahoga No. 95751, 2011-Ohio-1103, ¶8 (waiver occurs when based upon the totality of the circumstances, the party seeking arbitration acts inconsistently with the right to arbitrate).

{¶18} Regardless of whether appellants have waived their right to arbitrate, the fact remains that appellants deny the existence of any contract between the parties. Dorgham concedes that no written contract exists between the parties, contending that her lawsuit is one for breach of an oral contract. Accordingly, the parties agree there is no written contract

between the parties. If no written contract exists, then the arbitration clause contained in the written contract equally does not exist. Furthermore, because no written contract exists between the parties, any "oral agreement to binding arbitration is unenforceable under R.C. 2711 of the revised code." *Foster v. State Auto. Ins. Co.*, 9th Dist. Summit No. 18592, 1998 Ohio App. LEXIS 1797, 11-12 (Apr. 29, 1998), citing R.C. 2711.01 ("A provision in any *written* contract * * * or an agreement *in writing* to submit to arbitration any controversy * * * shall be valid * * * ."). (Emphasis added.)

{¶19} Whether a valid oral contract exists or whether a breach of that oral contract occurred is not before this court, and we offer no opinion regarding those issues. The only issue before this court is whether Dorgham should be compelled to arbitrate her claims against appellants based on an arbitration provision in an unsigned written agreement that was presented to Dorgham after her house was sold at the request of the appellants. Based on the record before this court, including the arguments and admissions made by the parties throughout this proceeding, we find that trial court did not err in denying appellants' motion to compel arbitration. The assignment of error is overruled.

{¶20} Judgment affirmed.

It is ordered that appellee recover from appellants the costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

TIM McCORMACK, P.J., and
ANITA LASTER MAYS, J., CONCUR