

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

**THE SCOTTS COMPANY AND
EARTHGRO, INC.**

PLAINTIFFS-APPELLEES

CASE NUMBER 14-2000-19

v.

**WARBURG, PINCUS VENTURES, L.P.
PAUL SELLEW, TIMOTHY SELLEW,
HENRY F. MCINERNEY, JOSEPH G.
MAHLER AND DALE DUPUIS**

OPINION

DEFENDANTS-APPELLANTS

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court.**

**JUDGMENT: Judgment affirmed in part, reversed in part and cause
remanded.**

DATE OF JUDGMENT ENTRY: November 15, 2000

ATTORNEYS:

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For Appellees.**

HADLEY, P.J. The defendants-appellants appeal from the judgment of the Union County Court of Common Pleas denying their motion for stay pending arbitration. For the following reasons, we reverse the judgment of the trial court.

The pertinent facts and procedural history in this matter are as follows. The plaintiffs-appellees in this case are The Scotts Company (“Scotts”) and Earthgro, Inc. Scotts is one of the world’s leading manufacturers and marketers of products for consumer lawn and garden care, professional turf care, and professional horticulture markets. Earthgro manufactures, markets and sells organic products.

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The defendant-appellant, Warburg, Pincus Ventures, L.P., is an investment firm.

The other defendants-appellants are former directors and officers of Earthgro:

Paul Sellew, former Chairman of Earthgro's Board of Directors; Timothy Sellew, former Executive Vice President; Henry McInerney, former President and Chief Executive Officer; Joseph Mahler, former Vice President and Chief Financial Officer; and Dale Dupuis, a former officer.

Pursuant to a Stock Purchase Agreement, dated January 31, 1998, Scotts purchased the common and preferred stock of Earthgro. Warburg and the Sellews were designated as the "primary sellers" under the agreement, as they were entitled to 95% of the proceeds of the sale.¹ As the primary sellers, they were required to make certain representations and warranties concerning the financial condition of Earthgro. In addition to the Stock Purchase Agreement, the parties entered into an Escrow Agreement, which required the primary sellers to deposit a portion of the purchase price into escrow. In turn, the Escrow Agreement provided for the arbitration of certain disputes before the American Arbitration Association.

After the purchase, Scotts alleged that there had been breaches of the warranties and representations made by the sellers concerning Earthgro's value, financial condition, and business prospects. On January 26, 2000, Scotts filed a

¹ The remaining defendants, McInerney, Mahler, and DuPuis, are designated "other sellers."

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complaint in the Union County Court of Common Pleas charging the sellers with various charges including; breach of warranty, fraud, and negligent misrepresentation. In the complaint, Earthgro also alleges breach of fiduciary duty against the sellers.

All the parties agreed that, pursuant to the Stock Purchase Agreement and Escrow Agreement, Scotts' claims of breach of warranty against the primary sellers should be referred for arbitration. On April 10, 2000, the appellants filed a motion for stay of the remaining claims pending the outcome of arbitration. The trial court heard arguments in this matter on May 24, 2000 and two days later rendered a judgment. Pursuant to the journal entry dated May 26, 2000, the trial court overruled the appellants' motion and ordered that those claims not referred to arbitration should proceed.

It is from this judgment that the appellants now appeal, asserting three assignments of error.

Assignment of Error No. 1

The court below erroneously refused to stay this proceeding pending the arbitration.

Assignment of Error No. 2

The court below erred in holding that Scotts' common law and statutory claims are not arbitrable.

Assignment of Error No. 3

The court below erred in holding that Scotts' claims against the defendants-appellants Dupuis, Mahler, and McInerney are not arbitrable.

As the appellants' assignments are interrelated, they will be addressed simultaneously.

The appellants contend that the trial court erred by refusing to send all of their claims to arbitration or at the very least staying the remaining claims pending the outcome of arbitration. For the following reasons, we agree in part and disagree in part.

In the case *sub judice*, there are essentially three situations that must each be addressed separately. The first set of claims that must be evaluated are Scotts' remaining claims against the primary sellers. In addition to the breach of warranty claims, Scotts charges the primary sellers with common law fraud, making false misrepresentations, negligent misrepresentation, punitive damages, and violation of the Connecticut Unfair Trade Practices Act. A review of the complaint in this matter reveals that the factual basis underlying these claims is virtually identical to those used in support of the arbitrable claims. It appears that Scotts is attempting to litigate this matter in two forums simultaneously.

While we agree with the trial court's conclusion that these claims are not subject to the arbitration agreement, we continue to follow our previous ruling in *Harsco v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406. In *Harsco*, we held

that nonarbitrable issues contained in a complaint pending before the trial court are stayed until arbitration is concluded. Accordingly, Counts Seven through Nine and Eleven and Twelve, as they pertain to the primary sellers are stayed pending the conclusion of the arbitration.

Next, it is necessary to evaluate Scotts' claims against the other sellers, i.e. McInerney, Mahler, and DuPuis. The trial court ruled that the other sellers were not a party to the arbitration agreement and therefore, the claims against them were not subject to arbitration. In *Air Freight Services, Inc. v. Air Cargo Transport, Inc.* (N.D.II. 1996), 919 F.Supp. 321², the court held that a defendant not a party to the arbitration agreement, could obtain a stay of litigation pending arbitration. See, also *DH-KL Corporation v. Stampp Corbin* (August 12, 1997), Franklin App. No. 97APE02-206, unreported. We adopt the holding in *Air Cargo*, and hold that Scotts' claims against the other sellers are stayed pending the conclusion of arbitration.

Finally, the remaining claim that must be addressed is Earthgro's claim of breach of fiduciary duty against all the sellers. It is clear from the record in this matter that Earthgro was not a party to the arbitration agreement. In *Branham v. Cigna Healthcare of Ohio* (1998), 81 Ohio St.3d 388, the Supreme Court of Ohio held that arbitration is a matter of contract and a party cannot be required to

² While the Air Cargo case was decided under the Federal Arbitration Act, the language is virtually identical to the Ohio statute.

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submit to arbitration of any dispute which he has not agreed so to submit. There is no evidence that Earthgro ever agreed to submit to the arbitration agreement.

Therefore, the trial court correctly concluded that the claim of breach of fiduciary duty brought by Earthgro against the appellees is not subject to arbitration. As this claim is separate and distinct from those alleged by Scotts, there is no basis for staying this claim pending the outcome of the arbitration.

Accordingly, the appellants' assignments of error are well taken in part and overruled in part.

Having found no error prejudicial to the appellants herein, in the particulars assigned and argued, we affirm the trial court's decision as it relates to referring the entire case to arbitration.

Having found error prejudicial to appellants herein, in the particulars assigned and argued, we reverse the judgment of the trial court as it pertains to staying certain portions of the case pending arbitration. We remand this matter for further proceedings consistent with this opinion.

***Judgment affirmed in part,
reversed in part and
cause remanded.***

SHAW and WALTERS, JJ., concur.

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