[Cite as *McDaniel v. Gateway Computer Corp.*, 2004-Ohio-5368.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

ELIZABETH McDANIEL,	:	
Plaintiff-Appellee,	:	Case No. 04CA12
vs.	:	
GATEWAY COMPUTER CORPORATION,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Aaron S. Bayer and Sandra Slack Glover, Wiggin & Dana L.L.P., One Century Tower, P.O. Box 1832, New Haven, Connecticut 06508-1832, and Jon J. Pinney, Goodman, Weiss & Miller, L.L.P., 100 Erieview Plaza, 27th Floor, Cleveland, Ohio 44114-1882

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CIVIL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED: 9-24-04

ABELE, J.

{¶ 1} This is an appeal from an Athens County Common Pleas Court judgment that overruled a motion filed by Gateway Computer Corporation, defendant below and appellant herein, to stay the trial court proceedings and to compel arbitration of claims brought by Elizabeth McDaniel, plaintiff below and appellee herein.

{¶ 2} The following error is assigned for our review:

i. "THE TRIAL COURT ERRED BY HOLDING THAT THE MAGNUSON-MOSS WARRANTY ACT PRECLUDES ENFORCEMENT OF THE PARTES AGREEMENT TO ARBITRATE THEIR DISPUTE."

{¶ 3} The facts in this case are largely undisputed. On December 26, 2000, appellee ordered a "Gateway Select 950 Personal Computer" from one of appellant's stores.[1] The sale was governed by a "Consumer Products Limited Warranty Terms and Conditions Agreement" which provided, among other things, a "product limited warranty" as well as the following "dispute resolution" clause:

{¶ 4} "You agree that any Dispute between You and Gateway will be resolved exclusively and finally by arbitration administered by the National Arbitration Forum (NAF) and conducted under its rules, except as provided below. * * * Any decision rendered in such arbitration proceedings will be final and binding on each of the parties, and judgment may be entered thereon in any court of competent jurisdiction. * * * **You understand that You would have had a right to litigate disputes through a court, and that You have expressly and knowingly waived that right agreed to resolve any Disputes through binding arbitration**. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Section 1, et seq." (Emphasis in original.)

{¶ 5} Appellee received her new computer on January 10, 2001. From the outset she claimed that she experienced various problems with the computer's modem, the hard drive, the mother board, the scanner and the printer. She made the system available to appellant for repair but appellant did not repair the problems to appellant's satisfaction. On September 12, 2003, appellee (through counsel) sent a letter to appellant that revoked her acceptance of the computer and asked for a return of all monies paid. Appellant did not comply with her request.

{¶ 6} On September 25, 2003, appellee commenced the instant action and alleged the breach of written and implied warranties. Appellant filed a motion to stay the proceedings and to

[1] The computer cost $2,095. With tax and shipping, the total price came to $2,344.16.

compel arbitration pursuant to the dispute resolution clause as well as the Federal Arbitration Act (FAA) codified at Section 1 et seq., Title 9, U.S. Code.

{¶ 7} Appellee responded with a memorandum contra and argued, inter alia, that the Magnuson-Moss Warranty Act (MMWA)[2], codified at Section 2301 et seq., Title 15, U.S. Code, prohibits the enforcement of binding arbitration clauses on warranty disputes. The trial court agreed with the appellee and, on February 4, 2004, overruled appellant's motion. Citing an Illinois Court of Appeals case, Borowiec v. Gateway 2000, Inc. (2000), 772 N.E.2d 256, and a Federal District Court decision, Rickard v. Teynor's Home, Inc. (N.D. Ohio 2003), 279 F.Supp.2d 910, the trial court held that the MMWA prohibits the enforcement of binding arbitration agreements for claims under a written warranty. This appeal followed.[3]

{¶ 8} Appellant argues that the trial court erred in holding that the sales agreement's binding arbitration provision is unenforceable under the MMWA. We agree.

{¶ 9} Our analysis begins with both federal and Ohio law pronouncements that arbitration provisions in contracts are valid, irrevocable and enforceable. See Section 2, Title 9, U.S. Code; R.C. 2711.01(A). If a suit is brought in court upon any issue that is referable to arbitration, the court in which such suit is pending shall stay the proceedings until arbitration is completed. Section 3, Title 9, U.S. Code; R.C. 2711.02 & 2711.03. These statutes manifest a clear public policy preference favoring arbitration. See Southland Corp. V. Keating (1984), 465

[2] The complete name of MMWA is actually the "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act." See Pub. L. 93-637, 88 Stat. 2183. For the sake of simplicity, we keep the same designation used by the parties.

[3] We note that the order appealed herein is interlocutory. Nevertheless, we have jurisdiction to review the order pursuant to R.C. 2711.02(C).

U.S. 1, 10, 79 L.Ed.2d 1, 104 S.Ct. 852; Dayton Classroom Teachers Assn. V. Dayton Bd. Of Edn.(1975), 41 Ohio St.2d 127, 132-133, 323 N.E.2d 714.

{¶ 10} The pivotal question in the case sub judice is whether that policy preference is trumped by the MMWA. In other words, does the MMWA prohibit the enforcement of binding arbitration clauses in warranty disputes?

{¶ 11} The MMWA does not expressly mention arbitration nor does it specifically prohibit binding arbitration. In enacting the MMWA, Congress declared it to be the policy of the United States "to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through 'informal dispute mechanisms.'" Section 2310(a)(1), Title 15, U.S. Code. Congress charged the Federal Trade Commission (FTC) with prescribing rules to set out minimum requirements for informal dispute resolution procedures incorporated into the terms of a written warranty. Id. at (a)(2). The FTC thereafter provided that any informal dispute mechanism "shall not be legally binding on any person." Section 703.5(j), Title 15, C.F.R. In short, the FTC (not Congress) deemed that binding arbitration clauses are unenforceable under the MMWA.

{¶ 12} The gist of appellant's argument is that the FTC regulations should be disregarded and arbitration clauses should be enforced pursuant to the strong public policy favoring such contracts. We note that the appellant has a heavy burden in arguing that we should disregard the FTC. When reviewing an agency's construction of a statute, courts must first determine whether Congress has directly spoken to the issue. If it has, this is the end of the matter. If Congress has not, courts must consider whether the agency's regulation is based on a "permissible construction of the statute." If the regulation is so based, courts must then defer to the agency's interpretation. See Yellow Transportation, Inc. V. Michigan (2002), 537 U.S. ___, 154 L.Ed.2d 377, 387, 123

S.Ct. ___; Chevron, U.S.A., Inc. V. Natural Resources Defense Council, Inc. (1984), 467 U.S. 837, 842-843, 81 L.Ed.2d 694, 104 S.Ct. 2778.

{¶ 13} Congress has not spoken to the issue of whether written warranties can be subjected to binding arbitration. Thus, we consider whether the FTC has permissibly construed the MMWA to that effect. We note that the trial court did not discuss the FTC regulations or the standard to be applied in reviewing them. We presume, however, that the court found those regulations to be a "permissible construction" of the law. In reaching that conclusion, the trial court relied on Borowiec v. Gateway 2000, Inc. (Ill.App. 2000), 772 N.E.2d 256 (Borowiec I), and Rickard v. Teynor's Home, Inc. (N.D. Ohio 2003), 279 F.Supp.2d 910. We note, however, that subsequent to the trial court's decision the Illinois Supreme Court overruled Borowiec I and held that the MMWA does not preclude the enforcement of binding arbitration agreements. See Borowiec v. Gateway 2000, Inc. (Ill. 2004), 808 N.E.2d 957, 970 (Borowiec II). The Rickard case remains good law, however, and we find no indication that the Sixth Circuit Court of Appeals has spoken to this particular issue.

{¶ 14} After our review of Rickard and Borowiec II, as well as other cases on both sides of this issue, we agree with the approach taken by jurisdictions that have held that the MMWA does not preclude the enforcement of binding arbitration agreements. This is the position of the Fifth and Eleventh Circuit Courts of Appeals, see Walton v. Rose Mobile Homes LLC (C.A.5 2002), 298 F.3d 470, 478; Davis v. Southern Energy Homes, Inc. (C.A.11 2002), 305 F.3d 1268, 1280, as well as various state courts. See Borowiec II, supra at 970; Abela v. General Motors Corp. (Mich.App. 2003), 669 N.W.2d 271, 274-277; Howell v. Cappaert Manufactured Housing, Inc. (La.App. 2002), 819 So.2d 461, 464-465; In re American Homestar of Lancaster, Inc. (Tex. 2001), 50 S.W.3d 480, 490-491; Southern Energy Homes, Inc. v. Ard (Ala. 2000), 772 So.2d

1131, 1135 (*overruling* a previous decision in Southern Energy Homes, Inc. v. Lee (Ala. 1999), 732 So.2d 994); Results Oriented, Inc. v. Crawford (Ga.App. 2000) 538 S.E.2d 73, 81 (*aff'd* on other grounds, in Crawford v. Results Oriented, Inc. (Ga. 2001), 548 S.E.2d 342, 343.[4]

{¶ 15} We acknowledge that authority exists for the contrary position that the MMWA does preclude binding arbitration clauses in warranty disputes. See e.g. Rickard, supra at 921: Parkerson v. Smith (Miss. 2002), 817 So.2d 529, 535; Brown v. Kline Tysons Imports, Inc. (EDVa. 2002), 190 F.Supp.2d 827, 830-831; Pitchford v. Oakwood Mobile Homes, Inc. (WDVa. 2000), 124 F.Supp.2d 958, 964-965.[5] However, after our review of those cases, and when we compare their analysis to those that favor arbitration, we do not find their reasoning to be persuasive.

{¶ 16} We emphasize that our conclusion is not based simply on a tally of the "weight of authority" or numerical strength. Rather, we looked to the reasoning of each argument and came

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[4] In Ohio, the Eighth District Court of Appeals held that the MMWA does not preclude binding arbitration of warranty disputes. See Sikes v. Ganley Pontiac Honda (Sep. 13, 2001), Cuyahoga App. No. 79015. Although our decision is consistent with Sikes, we do not necessarily rely on it as authority because the Sikes court briefly addressed the issue and provided no analysis of the FTC regulations. In Pinette v. Wynn's Extended care, Inc. (Sep. 3, 2003), Summit App. No. 21478, 2003-Ohio-4636, the Ninth District Court of Appeals upheld an order that stayed proceedings pending arbitration despite assertion of an MMWA claim. Here again, that decision provides little guidance because the Court did not discuss the enforceability of arbitration clauses in light of the FTC's interpretation of the MMWA.

[5] Interestingly, although a number of District Court opinions have upheld the FTC regulations and rule that warranty disputes cannot be subjected to binding arbitration under the MMWA, there does not appear to be any Federal Appellate Circuit that has come to that conclusion. We note that the Fifth and Eleventh Circuits have held that such disputes can be subjected to binding arbitration. The appellee has not cited us to a Circuit Court of Appeals decision that reached the opposite

down on the side that allows arbitration. The courts in Walton, 298 F.3d 475-479, and Davis, 305 F.3d 1273-1277, conducted a painstaking review of (1) the text of the MMWA, (2) its legislative history and (3) Congress's purpose in adopting the law, and found nothing to bar the enforcement of mandatory arbitration proceedings. We need not set out lengthy citations to those opinions but will note, as did the Illinois Supreme Court in Borowiec II, that we find their reasoning to be highly persuasive and we adopt their positions here.

{¶ 17} As the Fifth and Eleventh Appellate Circuits cogently point out, nothing in the text of the MMWA or its legislative history prohibits binding arbitration. Rather, only the FTC regulation seeks to prohibit binding arbitration. Although courts generally defer to an agency's interpretation of federal intent, we are not bound by that interpretation if a regulation flies in the face of strong federal public policy such as that promoting arbitration of disputes. In the end, the party seeking to avoid arbitration bears the burden of showing that Congress intended to preclude arbitration of the claim at issue. Green Tree Financial Corp. v. Randolph (2000), 531 U.S. 79, 91-92, 148 L.Ed.2d 373, 121 S.Ct. 513; Gilmer v. Interstate/Johnson Lane Corp. (1991), 500 U.S. 20, 26, 114 L.Ed.2d 26, 111 S.Ct. 1647. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (1985), 473 U.S. 614, 626, 87 L.Ed.2d 444, 105 S.Ct. 3346; Moses H. Cone Memorial Hospital v. Mercury Construction Corp. (1983), 460 U.S. 1, 24-25, 74 L.Ed.2d 765, 103 S.Ct. 927.

{¶ 18} In the case sub judice, the appellee has not persuaded us that Congress intended to bar the arbitration of these sorts of claims. We find nothing in the text of the MMWA or in its

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conclusion and we have found none in our own research.

legislative history to suggest that arbitration was intended to be barred under these circumstances. Moreover, as arbitration has become more accepted in this country as an alternative form of dispute resolution, Congress could have amended the MMWA but has taken no action to do so. For all these reasons, we join those jurisdictions that have held that the MMWA does not preclude binding arbitration of warranty disputes.

{¶ 19} Finally, we point out that sending this matter to binding arbitration does not circumvent the protections of the MMWA. Appellee may still assert her legal rights under that act in the context of arbitration rather than a court of law. Compelling arbitration does not deprive a person of a legal right. Rather, it changes the forum in which those rights are asserted.

{¶ 20} For these reasons we find the assignment of error to be well-taken and it is hereby sustained. We hereby reverse the trial court's judgment and remand this case for entry of an order to stay the proceedings and to compel arbitration.

i. JUDGMENT REVERSED
ii. AND CASE REMANDED FOR
iii. FURTHER PROCEEDINGS
iv. CONSISTENT WITH THIS
v. OPINION.[6]

ii. JUDGMENT ENTRY

[6] In light of the wide disparity of opinion between jurisdictions on this issue, we encourage the United States Supreme Court or Congress to resolve this matter. We note that the Supreme Court had the opportunity to review the Eleventh Circuit's decision in Davis, supra, but denied Certiorari. See 538 U.S. 945, 155 L.Ed.2d 486, 123 S.Ct. 1633.

It is ordered that the judgment be reversed, that the case be remanded for further proceedings consistent with this opinion and that appellant recover of appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

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

Kline, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele
Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.