[Cite as *Bolton v. Crockett Homes Inc.*, 2004-Ohio-7318.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CAROL BOLTON, ET AL.	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiffs-Appellants	:	Hon. Sheila G. Farmer, J.
	:	Hon. Julie A. Edwards, J.
vs.	:	
	:	
CROCKETT HOMES INC., ET AL.	:	Case No. 2004CA00051
	:	
Defendants-Appellees	:	OPINION

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2003CV03438
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 8, 2004

APPEARANCES:

For Plaintiffs-Appellants	For Defendant-Appellee
DAVID A. VANGAASBECK 1303 West Maple Street Suite 104 North Canton, OH 44720	JOHN R. FRANK 108 Belden-Whipple Building 4150 Belden Village Street, NW Canton, OH 44718-2595

Farmer, J.

{¶1} On January 22, 2000, appellants, Carol and David Bolton, entered into an agreement with appellee, Crockett Homes, Inc., for the construction of a duplex. After appellants assumed occupancy, they experienced numerous problems with the construction.

{¶2} On October 16, 2003, appellants filed a complaint against appellee for breach of contract and fraud. On January 9, 2004, appellee filed a motion to stay the proceedings pending arbitration pursuant to a clause in the Limited Warranty agreement. By judgment entry filed February 6, 2004, the trial court granted said motion.

{¶3} Appellants filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED WHEN IT SUSTAINED THE APPELLEE'S MOTION TO STAY PROCEEDINGS AND REFER THE CASE TO ARBITRATION WHEN IT FAILED TO DETERMINE WHETHER OR NOT THE ARBITRATION CLAUSE CONTAINED IN THE APPLICATION FOR THE LIMITED WARRANTY WAS PROCEDURALLY AND SUBSTANTIVELY REASONABLE AND CONSCIONABLE."

II

{¶5} "THE TRIAL COURT ERRED WHEN IF (SIC) FAILED TO DETERMINE WHETHER OR NOT THERE WAS AN ENFORCEABLE CONTRACT BETWEEN THE PARTIES AS TO THE ARBITRATION OF ALL CLAIMS."

I

{¶6} Appellants claim the trial court erred in ordering their case to arbitration. Specifically, appellants claim the arbitration provision in the Limited Warranty agreement was unreasonable and unconscionable because it did not include a fee schedule. We disagree.

{¶7} Ohio public policy encourages arbitration as a method to settle disputes. *Schaefer v. Allstate Ins. Co*. (1992), 63 Ohio St.3d 708; *Bellaire City Schools Bd. of Edn. v. Paxton* (1979), 59 Ohio St.2d 65. The issue of compelling arbitration rests in the trial court's sound discretion. *Carter Steel & Fabricating Co. v. Danis Bldg. Constr. Co*. (1998), 126 Ohio App.3d 251. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217. However, as noted by our brethren from the Ninth District, the question of unconscionability is a question of law and factual inquiry into the circumstances is required:

{¶8} "Since the determination of whether a contract is unconscionable is a question of law for the court, a factual inquiry into the particular circumstances of the transaction in question is required. *Lightning Rod Mut. Ins. Co. v. Saffle* (Nov. 6, 1991), 9th Dist. No. 15134; see, also, *Ins. Co. of North Am*., 67 Ohio St.2d at 98. Such a determination requires a case-by-case review of the facts and circumstances surrounding the agreement. See *Burkette v. Chrysler Industries, Inc.* (1988), 48 Ohio App.3d 35, 37; *Vincent v. Neyer* (2000), 139 Ohio App.3d 848, 854-56. As this case

involves only legal questions, we apply the de novo standard of review." *Eagle v. Fred Martin Motor Co.,* Summit App. No. 21522, 2004-Ohio-829, ¶13.

{¶9} Therefore, we concede our review is de novo.

{¶10} The Limited Warranty agreement issued by Residential Warranty Corporation (hereinafter "RWC") included the following arbitration clause in pertinent part at Section IV(E)(1):

{¶11} "***any Unsolved Warranty Issue that you have with the Warrantor shall be submitted to the National Academy of Conciliators or to another independent arbitration service upon which you and the Administrator agree. This **binding** arbitration is governed by the procedures of the Federal Arbitration Act, 9 U.S.C. 1 et. seq. If you submit a request for arbitration, you must pay the arbitration fees before the matter is submitted to the arbitration service. After arbitration, the Arbitrator shall have the power to award the cost of this fee to any party or to split it among the parties to the arbitration."

{¶12} The Limited Warranty agreement was given to appellants after the completion of the duplex. It provided for RWC, an independent contractor, to administer the warranty agreement which commenced with the occupancy of the duplex. Clearly, on the face of the warranty booklet, at pages 319.1, 319.3, 319.18 and 319.19, binding arbitration was the required method to make claims under the agreement. In particular, the agreement cautions that the limited warranty is not an insurance policy, it is "separate and apart from your contract and/or other sales agreements with your Builder" and it is separate and distinct from any other warranties or insurances. See, Section II(A) and (D).

{¶13} The arbitration provision does not provide a fee schedule, but does provide for a fee to be submitted with the arbitration request. As cited supra, the arbitrator may assess the cost of this fee against either party or split it between both parties. The only notation of a fee is for warranty performance, Section IV(F), which is separate and distinct from the arbitration process. The arbitrator may be the National Academy of Conciliators or any other "independent arbitration service upon which you and the Administrator agree."

{¶14} Appellant argues because the arbitration provision does not include a fee schedule, it is both substantively and procedurally unconscionable. The *Eagle* court at ¶30 distinguished these terms as follows:

{¶15} "Substantive unconscionability encompasses those factors which concern the contract terms themselves, and the issue of whether these terms are commercially reasonable. Id. With respect to procedural unconscionability, a court will consider factors bearing on the relative bargaining position of the contracting parties, including age, education, intelligence, business acumen, experience in similar transactions, whether the terms were explained to the weaker party, and who drafted the contract. Id., citing *Johnson v. Mobil Oil Corp*. (E.D.Mich. 1976), 415 F.Supp. 264, 268. Additionally, the court should consider whether the party who claims that the terms of a contract are unconscionable was represented by counsel at the time the contract was executed. *Bushman v. MCF Drilling, Inc.* (July 19, 1995), 9th Dist. No. 2403-M."

{¶16} From our examination of the facts sub judice vis-à-vis the facts in *Eagle,* we find none of the factors cited by the *Eagle* court to be present in this case. First, the record does not disclose what the fees might have been through the National Academy

of Conciliators as did the *Eagle* record. Secondly, the unequal or disproportionate bargaining positions of the parties sub judice are not as great as in *Eagle*. Without facts to the contrary, we must assume appellants entered into the construction contract in an equal bargaining position with appellee. We do not know which party solicited the other, so we must assume appellants were free to pick and choose their builder, and appellee was the builder of choice. The *Eagle* court placed a great deal of emphasis on the lack of sophistication of the purchaser, the purchaser's lack of funds to provide for arbitration, and the facts that the contract at issue was a form contract and the purchaser never received a copy of it.

{¶17} None of these factors are present in the negotiations and contract sub judice. Therefore, we conclude the absence of a stated arbitration fee does not render the arbitration clause unreasonable or unconscionable.

{¶18} Assignment of Error I is denied.

II

{¶19} Appellants claim the trial court erred in finding the Limited Warranty agreement was a valid contract. Specifically, appellants claim the lack of a validation sticker rendered the agreement invalid. We disagree.

{¶20} We concur the Limited Warranty states a validation sticker should be forthcoming:

{¶21} "Within 90 days after receiving this Warranty book, you should receive a validation sticker from RWC. If you do not, contact your **Builder** to verify that the forms were properly processed and sent to RWC. You do **not** have a warranty without the validation sticker.

{¶22} "Place validation sticker here. Warranty is invalid without sticker."

{¶23} Attached as Exhibit C to appellee's February 2, 2004 reply to appellants' response to appellee's request for stay is a letter from RWC affirming the subject duplex was under warranty effective July 31, 2000.

{¶24} We conclude it is undisputed that the Limited Warranty is valid and therefore the contractual terms of said warranty per Assignment of Error I are valid.

{¶25} Assignment of Error II is denied.

{¶26} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Edwards, J. concur.

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JUDGES

SGF/jp 0930

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FIFTH APPELLATE DISTRICT

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Plaintiffs-Appellants	:	
	:	JUDGMENT ENTRY
-vs-	:	
	:	
CROCKETT HOMES INC., ET AL.	:	
	:	
Defendants-Appellees	:	CASE NO. 2004CA00051

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed.

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JUDGES