[Cite as *Alexander v. Wells Fargo Fin. Ohio 1, Inc.*, 2009-Ohio-4873.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89277

LILLIE ALEXANDER

PLAINTIFF-APPELLANT

vs.

WELLS FARGO FINANCIAL OHIO 1, INC.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-590622

BEFORE: Kilbane, P.J., Stewart, J., and Dyke, J.

RELEASED: September 17, 2009

JOURNALIZED:

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MARY EILEEN KILBANE, P.J.:

{¶ 1} This appeal arises out of a remand from the Ohio Supreme Court, regarding a disputed arbitration clause. The sole issue remaining for this court's determination is whether the arbitration clause is unconscionable. See *Alexander v. Wells Fargo Financial Ohio 1, Inc.*, 122 Ohio St.3d 341, 2009-Ohio-2962, 911 N.E.2d 286; *Alexander v. Wells Fargo Financial Ohio 1, Inc.*, Cuyahoga App. No. 89277, 2008-Ohio-1402.

{¶ 2} On May 2, 2006, appellant, Lillie Alexander ("Alexander"), initiated a class action suit against appellee, Wells Fargo Financial Ohio 1, Inc. ("Wells Fargo"), alleging that it violated R.C. 5301.36, which requires mortgage lenders to file an entry of satisfaction with the county recorder's office within 90 days of the mortgage being satisfied. On June 5, 2006, Wells Fargo filed a motion to compel arbitration, which was granted by the trial court on December 22, 2006. The trial court specifically concluded that the arbitration clause did apply to the current dispute, and that the arbitration clause was neither procedurally or substantively unconscionable.

{¶ 3} On January 10, 2007, Alexander appealed to this court arguing that the trial court erred when it granted Wells Fargo's motion to compel arbitration. Specifically, Alexander argued that the arbitration clause did not apply, and if it did apply, it was both procedurally and substantively unconscionable. In a decision released on March 27, 2008, the majority opinion addressed the first issue and held that the arbitration clause only

applied to the mortgage transaction, and because Wells Fargo's statutory duty to file the entry did not arise until after the mortgage was fully satisfied, the arbitration clause was inapplicable to the R.C. 5301.36 dispute. Finding the arbitration clause to be inapplicable, the majority opinion did not address Alexander's arguments raising the unconscionability of the clause.

{¶ 4} On May 15, 2008, Wells Fargo appealed this court's decision to the Supreme Court. On September 12, 2008, the Supreme Court accepted this case for review. On July 16, 2009, the Supreme Court reversed and remanded the matter, concluding that the arbitration clause in fact encompassed disputes arising between the parties, even after the loan had been satisfied. As the arbitration clause was found to apply, this case has been remanded for a determination as to whether the arbitration clause is unconscionable.

{¶ 5} Appellant raised one assignment of error for our review.

> **"The trial court erred in granting defendant's motion to stay or dismiss pending arbitration."**

{¶ 6} The only arguments left to address are whether the arbitration clause is unconscionable or against public policy.

{¶ 7} This court had previously been split as to whether a trial court's decision to stay an action pending arbitration should be reviewed under a de novo standard or abuse of discretion. *Shumaker v. Saks, Inc.*, Cuyahoga App. No. 86098, 163 Ohio App.3d 173, 175, 2005-Ohio-4391, 837 N.E.2d 393. In

Taylor Bldg. Corp. of America v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, the Supreme Court held that when determining the alleged unconscionability of an arbitration clause, the reviewing court must conduct a de novo review.

{¶ 8} When reviewing a matter de novo, this court revisits the issue as if it were the trial court, and does not afford deference to the trial court's interpretation. *Brewer v. Cleveland Bd. of Edn.* (1997), Cuyahoga App. No. 71283, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023, citing *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St.2d 116, 413 N.E.2d 1187. However, even under a de novo review, this court must afford significant deference to any factual findings made by the trial court. *Taylor* at ¶37.

{¶ 9} This court notes that the case law strongly supports the arbitration of disputes. *Williams v. Aetna Finance Co.*, 83 Ohio St.3d 464, 471, 1998-Ohio-294, 700 N.E.2d 859. When a claim falls within the scope of an arbitration provision, there is a presumption in favor of arbitration. Id. In this case, the Supreme Court has already concluded appellant's claims fall within the scope of the agreement; therefore, there is a presumption in favor of arbitration here.

{¶ 10} The general principles of contract law govern the applicability of arbitration clauses. *M&M Precision System Corp. v. Interactive Group Inc.* (March 10, 2000), Montgomery App. No. 18008, at ¶14. "An arbitration agreement is enforceable unless grounds exist at law or in equity for revoking

the agreement." *Hayes v. The Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, at ¶19. Unconscionability is a defense to enforcement of a contract. *Doctor's Assoc. v. Casarotto* (1996), 517 U.S. 681, 686, 116 S.Ct. 1652, 134 L.Ed.2d 902, citing *Allied-Bruce Terminix Co., Inc. v. Dobson* (1995), 513 U.S. 265, 281, 115 S.Ct. 834, 130 L.Ed.2d 753. The party challenging the application of the arbitration clause bears the burden of establishing both procedural and substantive unconscionability. *Taylor* at ¶52, citing *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006-Ohio-4464, 861 N.E.2d 553, at ¶6.

{¶ 11} Procedural unconscionability considers all of the circumstances surrounding the contract of the parties, including the ages of the parties, intelligence, business experience, education, the author of the contract, whether it was possible to alter the contract, and whether the party consenting to the contract had another means of securing the desired goods or services. *Collins v. Click Camera and Video, Inc.* (1993), Montgomery App. No. 13571, 86 Ohio App.3d 826, 834, 621 N.E.2d 1294, quoting *Johnson v. Mobil Oil Corp*. (E.D. Mich. 1976), 415 F.Supp. 264, 268.

{¶ 12} Alexander argues that the arbitration provision was procedurally unconscionable because it was drafted by only one party and was presented on a "take-it-or-leave-it" basis. This is not sufficient to demonstrate procedural unconscionability. The Supreme Court has previously held, a "showing that a

contract is preprinted and that the arbitration clause is a required term, without more, fails to demonstrate the unconscionability of the arbitration clause." *Taylor* at ¶45.

{¶ 13} A review of the arbitration clause at issue reveals its terms were explicitly laid out to Alexander. The clause itself is one full page in length and contains a place at the bottom for the signature, and not simply the initials of the borrower. The clause printed is in normal size type, and the portion discussing the limitations of the borrower's rights pursuant to the clause are specifically listed directly above the signature line, in all upper case bold print type.

{¶ 14} Alexander provided no evidence in the record to indicate her age, education level, intelligence, or any other factors that may render an arbitration clause procedurally unconscionable. Further, Alexander did not demonstrate that this was the only lender in the Cleveland area from which she could secure a mortgage, and therefore, had no choice but to contract with Wells Fargo.

{¶ 15} Determining the record to be completely lacking in any evidence to support a finding of procedural unconscionability, this court does not need to analyze whether the arbitration clause was substantively unconscionable. However, a review of the applicable case law indicates the arbitration is not substantively unconscionable either.

{¶ 16} "Substantive unconscionability involves those factors which relate to the contract terms themselves, and whether they are commercially reasonable." *Schwartz v. Alltel Corp.*, Cuyahoga App. No. 86810, 2006-Ohio-3353, at ¶23, citing *Fortune v. Castle Nursing Home*, Holmes App. No. 05 CA 1, 2005-Ohio-6195.

{¶ 17} Alexander urges this court to adopt the reasoning of the Ninth District in *Eagle v. Fred Martin Motor Co.*, Summit App. No. 21522, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, which Alexander argues held an arbitration clause is substantively unconscionable when it blocks an individual's right to a class action. However, *Eagle* specifically addressed class actions in respect to the Consumer Sales and Practices Act ("CSPA"). The court held that an arbitration clause that contained both a confidentiality clause and a prohibition against class actions violated the underlying purpose of the CSPA, under which Eagle filed her suit. Id. at 175. *Eagle* is merely persuasive, and further, addresses a narrow issue that is not presented by the facts in the instant case.

{¶ 18} Similarly, Alexander cites *Schwartz*, supra, for the proposition that eliminating the ability to pursue a class action renders an arbitration clause substantively unconscionable. However, *Schwartz* is distinguishable from the instant case in several respects. Schwartz, as in *Eagle*, filed his claims under the CSPA. In *Schwartz*, this court reasoned "the arbitration

clause invades the policy considerations of the CSPA." *Schwartz* at ¶30. To follow Alexander's reasoning that all arbitration clauses which eliminate the right to participate in a class action are invalid, arbitration clauses would never apply, as all class actions are litigated in court. Further, *Schwartz* presented considerable evidence before the trial court to establish procedural unconscionability, which we do not have here, by demonstrating that Alltel never explained the agreement to him, and he was the less experienced party in the transaction. Id. at ¶31.

{¶ 19} Finally, Alexander argues that the arbitration clause should not be enforced because it violates public policy. The court may refuse to enforce a contract when it violates public policy. *Marsh v. Lampert* (Sept. 8, 1998), Butler App. No. CA98-04-071, 129 Ohio App.3d 685, 687, 718 N.E.2d 997, citing *Garretson v. S.D. Myers, Inc.* (Mar. 6, 1991), Summit App. No. 14762, 72 Ohio App.3d 785, 788, 596 N.E.2d 512. The *Eagle* court specifically stated:

> **"A refusal to enforce a contract on the grounds of public policy may be distinguished from a finding of unconscionability. Rather than focus on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole." *Eagle* at ¶63.**

{¶ 20} In support of her public policy argument, Alexander relies on *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, for the proposition that cases brought pursuant to R.C. 5301.36,

as is the case here, are best brought as class actions. However, in *Consolidated Mortgage*, there were no arbitration provisions at issue. The lower court had numerous filings pursuant to R.C. 5301.36, and decided for the purpose of judicial economy that the cases should be consolidated. Once consolidated, the mortgagors moved the court to certify the case as a class action, which the trial court did. Motions to certify a class are reviewed by appellate courts under an abuse of discretion standard. Consequently, if there was any basis for the trial court's decision, it must be affirmed. In *Consolidated Mortgage*, the Supreme Court affirmed and allowed the matter to proceed as a class action.

{¶ 21} *Consolidated Mortgage* presented neither the same factual or legal considerations as the instant case. The Supreme Court reasoned that because all of the consolidated cases were brought pursuant to R.C. 5301.36, and therefore, had common questions of law and fact, the trial court had a reasonable basis for determining they were best litigated as a class action.

{¶ 22} We conclude that Alexander failed to establish that the arbitration agreement was either unconscionable or against public policy. Therefore, her sole assignment of error is overruled.

{¶ 23} Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
ANN DYKE, J., CONCUR