[Cite as *Cleveland-Akron-Canton Advertising Coop. v. Physician's Weight Loss Ctrs. of Am., Inc.*, 2009-Ohio-5837.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92794

CLEVELAND-AKRON-CANTON ADVERTISING COOPERATIVE

PLAINTIFF-APPELLEE

vs.

PHYSICIAN'S WEIGHT LOSS CENTERS OF AMERICA, INC., ET AL.

DEFENDANTS

APPEAL BY:
Ralph Fichtner, Christine Floerke, Amy Linn, and Sparkle Wilson, Defendants

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-663628

BEFORE: Celebrezze, J., Cooney, A.J., and Sweeney, J.

RELEASED: November 5, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellants, Adrianne Abdelaal, David Epifano, Ralph Fichtner, Christine Floerke, Mohammand Ghrib, Amy Linn, Tim Sandvick, and Sparkle Wilson, ("Franchisees"), appeal the lower court's denial of their motion to dismiss or stay the lower court proceedings pending arbitration. After a thorough review of the record, and for the following reasons, we affirm.

{¶ 2} Pursuant to franchise agreements with Physician's Weight Loss Centers of America, Inc. ("PWLC"), each franchisee in northeast Ohio was required to join an advertising cooperative formed for the purpose of satisfying the franchisees' advertising responsibilities set forth in the franchise agreement. The Cleveland-Akron-Canton Advertising Cooperative (the "Co-op") was established pursuant to a cooperative agreement executed by the franchisees setting forth the rights and responsibilities of the parties. PWLC was not a signatory to the cooperative agreement.

{¶ 3} The Co-op is managed by its members, and each franchisee/member has agreed to contribute an equal share for advertising purchases made by the Co-op, as set forth in the cooperative agreement. The franchise agreement specifies each franchisee's minimum weekly advertising expenditure, which impacts the required media purchases made by the Co-op. The franchise agreement also contains an arbitration clause that requires arbitration for any dispute arising under the franchise agreement.

{¶ 4} After having difficulty collecting mandatory advertising contributions from Franchisees as set forth in the cooperative agreement, the Co-op initiated suit in Cuyahoga County Common Pleas Court (Case No. CV-663628) on June 30, 2008 against the delinquent franchisees and PWLC. In September 2008, all defendants filed motions, among others, to dismiss or stay the proceedings pending arbitration. On January 12, 2009, the trial court denied Franchisees' and PWLC's motions to stay or dismiss pending arbitration.

{¶ 5} All defendants appealed the denial of their motion to dismiss or stay pending arbitration, but because Franchisees and PWLC stated different assignments of error, their respective appeals proceeded as companion cases.[1] In the appeal before us here, Franchisees claim:

{¶ 6} "I. "The trial court erred as a matter of law in denying the motion of [PWLC] to Enforce the Arbitration Clause."

Standard of Review

{¶ 7} We note at the outset that the parties differ as to what standard of review is appropriate. Franchisees, citing an unconscionability analysis, which neither the trial judge nor the Co-op made, argue for a de novo standard of review, while the Co-op states that the general standard of review for the applicability of an arbitration provision is abuse of discretion, citing *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12. In

[1] PWLC's appeal is addressed in Cuyahoga App. No. 92718.

the absence of argued unconscionability, which is the case here, whether an arbitration provision applies requires an interpretation of a contract. "Interpretation of a contract is a question of law; thus we will employ a de novo standard of review." *Berry v. Lupica*, Cuyahoga App. No. 90657, 2008-Ohio-5102, at ¶7, citing *Cercone v. Merrill Lynch, Pierce, Fenner & Smith*, Cuyahoga App. No. 89561, 2008-Ohio-4229, citing *Vanyo v. Clear Channel Worldwide*, 156 Ohio App.3d 706, 2004-Ohio-1793, 808 N.E.2d 482.

Law and Analysis

{¶ 8} While Franchisees argue at great length that the arbitration provision is not unconscionable, the actual issue in this case deals with what contract the Co-op is trying to enforce against Franchisees and the way these contracts interact. The cooperative agreement, which the Co-op cites as the basis of its action, contains no arbitration provision. The respective franchise agreements, which do contain arbitration provisions, are merely referenced in its suit, argues the Co-op.

Arbitration

{¶ 9} The state of Ohio favors arbitration, where available, to settle disputes between parties who have agreed to arbitrate such disputes. This preference is evidenced in Ohio's statutory arbitration provisions, R.C. 2711 et seq., as well as Ohio case law. See *Gerig v. Kahn*, 95 Ohio St.3d 478, 482, 2002-Ohio-2581, 769 N.E.2d 381, 385-386; *Brennan v. Brennan* (1955), 164 Ohio St. 29, 128 N.E.2d 89, paragraph one of the syllabus. "R.C. 2711.02 requires the trial court to stay an action brought therein, upon application of one of the parties, when it is satisfied that the issue involved in the action is referable to arbitration under a written agreement between the parties to arbitrate." *Kline v. Oak Ridge Bldrs., Inc.* (1995), 102 Ohio App.3d 63, 656 N.E.2d 992.

{¶ 10} The enforceability of contractual arbitration provisions is governed by the laws of contract interpretation. Generally, parties who have not agreed to arbitrate their disputes cannot be forced to forego judicial remedies. *Moore v. Houses on the Move, Inc.*, 177 Ohio App.3d 585, 2008-Ohio-3552, 895 N.E.2d 579, citing *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.* (1960), 363 U.S. 574, 582, 80 S.Ct. 1347, 1352-53, 4 L.Ed.2d 1409. See, also, *Avila Group, Inc. v. Norma J. of California* (S.D.N.Y., 1977), 426 F.Supp. 537, 542; *Peters v. Columbus Steel Castings Co.*, Franklin App. No. 05AP-308, 2006-Ohio-382. "Generally, it follows that only the claims that arise from the contract which contains the clause can be submitted to arbitration." *Halloran v. Bucchieri*,

Cuyahoga App. No. 82745, 2003-Ohio-5658, at ¶ 12, citing *McCourt Constr. Co. v. J.T.O., Inc.* (Sep. 20, 1996), Portage App. No. 96-P-0036.

{¶ 11} In order for the Co-op to maintain suit against individual franchisees while avoiding the arbitration provision in the franchise agreement, the source of the rights the Co-op wishes to enforce must emanate from the cooperative agreement.

{¶ 12} In *Windham Foods, Inc. v. Fleming Cos., Inc.* (May 2, 1997), Trumbull App. Nos. 96-T-5515, 96-T-5519, a franchisee, Windham Foods, Inc. ("Windham"), brought suit against a third party, Fleming Foods of Ohio ("Fleming"), on several contracts made after the franchisee signed a franchise agreement that contained an arbitration clause. Fleming petitioned the court to stay the proceedings pending arbitration stating that "[Windham's] claims 'arose' from the franchise agreement because, if there had been no franchise agreement, there would have been no relationship between Windham Foods and Fleming Foods of Ohio." Id. The court then examined the claims brought by Windham to determine whether those claims arose from any of eight subsequent contracts or from the franchise agreement. They found that 11 of the 14 claims Windham brought against Fleming arose from the subsequent contracts, "none of which contained its own arbitration clause or incorporation provision referring back to the original franchise agreement." Id. The court upheld the lower court's denial of Fleming's motion to stay the proceedings pending arbitration.

{¶ 13} *Windham* is similar to the case at bar. Franchisees claim that without the franchise agreement there would be no relationship between the parties. Also, the basis of the Co-op's claims against Franchisees rests in a contract separate from the franchise agreement; a contract involving an entity not a party to the franchise agreement entered into after the franchise agreement was signed; and one in which no arbitration provision is present.

{¶ 14} Examining the Co-op's complaint, the right to demand payments from Franchisees arose from the cooperative agreement, where signatories agree to "participate in media campaigns organized by [the Co-op]" and to "participate with an equal share of monetary payment toward the agreed upon media purchase(s)."

{¶ 15} The Co-op's claims against Franchisees are based on account, accrued from agreed-upon media purchases as set forth in the cooperative agreement. While the respective franchise agreements have similar promises to participate in an advertising cooperative, these contractual promises were not made to the Co-op but to PWLC. References to the franchise agreement in the Co-op's complaint set forth duties of individual franchisees to PWLC, not to the Co-op. The Co-op can maintain suit based on the cooperative agreement and therefore should not be burdened with provisions in the franchise agreement, to which it is not a party. *Moore v. Houses on the Move, Inc.*, supra.

{¶ 16} Accordingly, the judgment of the trial court denying Franchisees' motion to dismiss or stay the proceedings pending arbitration was correct.

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

The court finds there were reasonable grounds for this appeal.

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.

FRANK D. CELEBREZZE, JR., JUDGE

JAMES J. SWEENEY, J., CONCURS, and
COLLEEN CONWAY COONEY, A.J., DISSENTS (WITH SEPARATE OPINION)

COLLEEN CONWAY COONEY, A.J., DISSENTING:

{¶ 17} I respectfully dissent. I would reverse and remand consistent with our decision in the companion case involving the appeal in *Cleveland-Akron-Canton Advertising Coop. v. Physician's Weight Loss Ctrs. of Am., Inc.*, Cuyahoga App. No. 92718, 2009-Ohio-5699 ("the companion case").

{¶ 18} The identical issue is presented in the companion case. As we stated in that case, "Section Eight of the franchise agreement deals with advertising and sets forth the requirements for each franchisee in terms of local and national advertising contributions." As appellee acknowledges in its brief, the franchise

agreement provides the mechanisms by which Physician's Weight Loss Centers may enforce the cooperative agreement, citing paragraph 11 of the complaint. Because the franchise agreement's enforcement mechanism requires arbitration, I would reverse and remand for the trial court to submit the entire dispute to arbitration as required by the parties' franchise agreement.