

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102212

JOSEPH VASIL, ET AL.

PLAINTIFFS

vs.

PULTE HOMES OF OHIO, L.L.C., ET AL.

DEFENDANTS-APPELLEES

**[APPEAL BY BRAD AND HEATHER WILSON,
PLAINTIFFS-APPELLANTS]**

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-811761

BEFORE: Boyle, J., Kilbane, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: June 18, 2015

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MARY J. BOYLE, J.:

{¶1} Plaintiffs-appellants, Brad and Heather Wilson (“the Wilsons”), appeal from the trial court’s decision granting defendant-appellee, Pulte Homes of Ohio, L.L.C.’s (“Pulte”), motion to stay the proceedings pending arbitration. They raise the following two assignments of error:

I. The trial court erred in granting Appellee Pulte’s motion to stay pending arbitration because the agreement was unconscionable.

II. The trial court erred in granting Appellee Pulte’s motion to stay pending arbitration because the arbitration clause does not encompass Appellant Brad and Heather Wilson’s claims against Appellee Pulte.

{¶2} Finding no merit to the appeal, we affirm.

Procedural History and Facts

{¶3} On July 8, 2005, the Wilsons purchased a home from Pulte, executing a home purchase agreement, which contains an arbitration provision. The arbitration clause, which is marked with the heading “ARBITRATION” in bold font, states:

ARBITRATION: Any controversy, claim or dispute arising out of or relating to this Agreement or Your purchase of the Home (other than claims under the Limited Warranty) shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (“AAA”) and the Federal Arbitration Act (Title 9 of the United States Code) and any judgment rendered by the arbitrator(s) may be confirmed, entered and enforced in any court having jurisdiction. As a condition precedent to arbitration, the dispute shall first be mediated in accordance with the Construction Industry Mediation Rules of the AAA, or such other mediation service selected by Us.

Claims under the Limited Warranty will be arbitrated in accordance with the arbitration provision set forth in the Limited Warranty.

{¶4} The purchase agreement provides a limited warranty, which is expressly incorporated into the agreement. The limited warranty *also* contains an arbitration provision — separate from the broad arbitration provision contained in the purchase agreement. Specifically, the limited warranty contains a section titled “Dispute Resolution,” and states that “Binding Arbitration is provided as a remedy resolving the dispute.” It further provides in relevant part the following:

Any binding arbitration proceeding will be conducted pursuant to the United States Arbitration Act (9 U.S.C. § 1 et seq.) (“the Act”) by an independent, nationally recognized arbitration organization designated by the Plan Administrator. The rules and procedures followed will be those under the Act, which may be supplemented by the arbitration organization’s rules. A copy of the applicable rules and procedures will be delivered to you upon your request to the Plan Administrator.

The arbitration will determine THE HOMEOWNERS’s, THE BUILDER’s and (if applicable) The Insurer’s rights and obligations under this LIMITED WARRANTY. * * * The award of the arbitrator(s) will be final, binding and enforceable as to THE HOMEOWNER, THE BUILDER and (if applicable) the Insurer * * *.

{¶5} Eight years after purchasing their home, the Wilsons, along with other named plaintiffs, filed the underlying class action against Pulte and Campopiano Roofing Co., alleging that their homes and “the homes of members of the putative class are subject

to a design defect with the roofing systems that have caused serious water intrusion, have brought upon structural damage to the affected homes, and consequential black mold growth.” They asserted product liability claims in violation of R.C. 2307.74, 2307.75, and 2307.76 against Pulte.

{¶6} With respect to the Wilsons’ claims, Pulte filed a motion to stay the case pending arbitration. Pulte argued that both the purchase agreement and the limited warranty contained arbitration provisions that require the Wilsons’ claims to be submitted to binding arbitration.

{¶7} The Wilsons opposed Pulte’s motion to stay, arguing that (1) the limited warranty’s arbitration clause is unenforceable as being both substantively and procedurally unconscionable, and (2) the Wilsons’ claims are not subject to arbitration under the limited warranty. In support of their arguments, the Wilsons attached their affidavits, averring certain facts that applied at the time that they purchased their home from Pulte. Specifically, they averred the following: (1) they did not have any experience with arbitration, negotiating contracts, or with new home warranties; (2) they were not represented by an attorney regarding the purchase of their home; (3) no one from Pulte explained arbitration and what it entailed; and (4) they did not receive any copies of rules and regulations regarding arbitration proceedings. The Wilsons made no arguments regarding the arbitration provision contained in the purchase agreement.

{¶8} The trial court subsequently granted Pulte’s motion to stay pending arbitration between the Wilsons and Pulte, stating the following:

The well-established law in Ohio provides that arbitration is favored as a more expedient and cost effective means of resolving disputes. * * * However, where the party opposing the applicability of arbitration is able to prove unconscionability, the arbitration provision will be found to be unenforceable. To prove unconscionability a party must prove both procedural unconscionability as well as substantive unconscionability. * * * Therefore, unconscionability requires a party to prove, both “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”

After reviewing the motions, exhibits, and affidavits provided, the plaintiffs, Brad and Heather Wilson, have not proven that the arbitration provision was unconscionable. As R.C. 2711.02 does not require a trial court to conduct a hearing on the enforceability of an arbitration provision, the evidence submitted along with the motions were adequate to make the above decision.

{¶9} From that decision, the Wilsons now appeal.

Ohio Arbitration Act

{¶10} Ohio public policy favors enforcement of arbitration provisions. Arbitration is encouraged as a method of dispute resolution and a presumption favoring arbitration arises when the claim in dispute falls within the arbitration provision. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 700 N.E.2d 859 (1998). Ohio’s policy of encouraging arbitration has been declared by the legislature through the Ohio Arbitration Act, R.C. Chapter 2711. *Goodwin v. Ganley, Inc.*, 8th Dist. Cuyahoga No. 89732, 2007-Ohio-6327, ¶ 8.

{¶11} R.C. 2711.01(A) provides that an arbitration agreement in a written contract “shall be valid, irrevocable, and enforceable, except upon grounds that exist in law or equity for the revocation of any contract.” Ohio law directs trial courts to grant a stay of

litigation in favor of arbitration pursuant to a written arbitration agreement on application of one of the parties, in accordance with R.C. 2711.02(B), which provides:

If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

Standard of Review

{¶12} In reviewing a trial court’s decision granting a motion to stay pending arbitration, our standard of review depends on “the type of questions raised challenging the applicability of the arbitration provision.” *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 7. Generally, an abuse of discretion standard applies in limited circumstances, such as a determination that a party has waived its right to arbitrate a given dispute. *Id.*, citing *Milling Away, L.L.C. v. UGP Properties, L.L.C.*, 8th Dist. Cuyahoga No. 95751, 2011-Ohio-1103, ¶ 8. But the issue of whether a party has agreed to submit an issue to arbitration or questions of unconscionability are reviewed under a de novo standard of review. *See Shumaker v. Saks Inc.*, 163 Ohio

App.3d 173, 2005-Ohio-4391, 837 N.E.2d 393 (8th Dist.); *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12.

{¶13} “When a trial court makes factual findings, however, supporting its determination that a contract is or is not unconscionable, such as any findings regarding the circumstances surrounding the making of the contract, those factual findings should be reviewed with great deference.” *Taylor* at ¶ 37, citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995).

{¶14} Pulte contends that the trial court made factual findings in this case that require us to give deference on review. We disagree. While the trial court clearly considered the arguments and evidence presented, we fail to see any findings that require deference on our part. In this case, we apply a de novo review to the trial court’s finding that the arbitration provision is enforceable, which means that we give no deference to the trial court’s decision. *Brownlee v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 97707, 2012-Ohio-2212, ¶ 9.

Unconscionability

{¶15} The Wilsons argue in their first assignment of error that the trial court erred in granting Pulte’s motion to stay because the arbitration agreement contained in the limited warranty was unconscionable. They further argue in their second assignment of error that their water infiltration claims are no longer covered under the limited warranty and, therefore, they are not subject to the arbitration provision contained therein.

{¶16} It is well settled that an arbitration provision will be held unenforceable if it is unconscionable. As explained by the Ohio Supreme Court:

Unconscionability includes both “‘an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.’” *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383, 613 N.E.2d 183 (1993), quoting *Williams v. Walker-Thomas Furniture Co.* (D.C.Cir.1965), 350 F.2d 445, 449, 121 U.S. App.D.C. 315; *see also Collins v. Click Camera & Video, Inc.*, 86 Ohio App.3d 826, 834, 621 N.E.2d 1294 (1993). The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable. *See generally Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006-Ohio-4464, 861 N.E.2d 553, ¶ 6; *see also Click Camera*, 86 Ohio App.3d at 834, 621 N.E.2d 1294, citing White & Summers, Uniform Commercial Code (1988) 219, Section 4-7 (“One must allege and prove a ‘quantum’ of both prongs in order to establish that a particular contract is unconscionable”).

Taylor, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12.

{¶17} “Substantive unconscionability pertains to the contract itself, without any consideration of the individual contracting parties, and requires a determination of whether the contract terms are commercially reasonable in the context of the transaction

involved.” *Wallace v. Ganley Auto Group*, 8th Dist. Cuyahoga No. 95081, 2011-Ohio-2909, ¶ 21.

Procedural unconscionability involves factors bearing on the relative bargaining position of the contracting parties, such as age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question.

Collins at 834.

{¶18} While the Wilsons argue the unenforceability of the arbitration provision contained in the limited warranty, they fail to address the arbitration provision contained in the purchase agreement. They focus their argument solely to the arbitration provision contained in the limited warranty, making no argument with respect to the arbitration provision contained in the parties’ purchase agreement. Nor do they make any argument as to why their claims do not fall under the purchase agreement’s arbitration provision. Notably, Pulte moved to stay the proceedings based on both the arbitration provisions in the purchase agreement and, alternatively, in the limited warranty. Indeed, Pulte specifically argued that the “the arbitration provision in the Purchase Agreement requires the Wilsons to arbitrate their claims against Pulte.” Any doubts regarding arbitration should be resolved in its favor. *Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18, ¶18.

{¶19} Thus, even assuming that the limited warranty’s arbitration provision does not apply, the Wilsons are still subject to the arbitration provision contained in the purchase agreement, which specifically governs claims “arising out of or relating to this

Agreement or Your purchase of the Home.” Having failed to raise any arguments regarding the enforceability of this arbitration provision, the Wilsons did not meet their burden to defeat a motion to stay pending arbitration, and therefore, we find no error in the trial court granting Pulte’s motion to stay.

{¶20} Accordingly, based on the record before us, we find no merit to the Wilsons’ two assignments of error and overrule them.

{¶21} Judgment affirmed.

It is ordered that appellees recover from appellants the 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 J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
SEAN C. GALLAGHER, J., CONCUR

Key Terms:

102212

Arbitration; unconscionability; motion to stay pending arbitration. Even assuming that the limited warranty’s arbitration provision does not apply, the plaintiffs are still subject to the arbitration provision contained in the purchase agreement. Having failed to raise

any arguments regarding the enforceability of this arbitration provision, the plaintiffs did not meet their burden to defeat a motion to stay pending arbitration.