

[Cite as *Rona Ents., Inc. v. Vanscoy*, 2010-Ohio-1836.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RONA ENTERPRISES, INC.

Plaintiff-Appellee

-vs-

GORDON E. VANSCOY

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. Sheila G. Farmer, J.

Case Nos. 09CA6 & 09CA8

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 09CV13

JUDGMENT:

Reversed & Judgment Entered

DATE OF JUDGMENT ENTRY:

April 23, 2010

APPEARANCES:

For Plaintiff-Appellee

SAMUEL N. LILLARD
BRETT E. YOUNKIN
21 East State Street
17th Floor
Columbus, OH 43215

For Defendant-Appellant

PATRICK W. SKILLITER
Huntington Bank Building
422 Main Street
4th Floor
P.O. Box 427
Zanesville, OH 43702

Farmer, J.

{¶1} In December of 2007, appellant, Gordon VanScoy, entered into an agreement with appellee, Rona Enterprises, Inc., to purchase a manufactured home for \$135,000. Construction of the home began in January of 2008. On February 12, 2008, appellant signed a general warranty deed, granting the land under the manufactured home to appellee.

{¶2} Appellant moved into the home in May of 2008. Financing was never secured. Disregarding the property transfer, to date, appellant has paid \$2,000 of the \$135,000 contract price. Appellee requested arbitration per the purchase agreement. Appellant agreed and then refused to participate in arbitration.

{¶3} On January 14, 2009, appellee filed a petition to enforce arbitration agreement pursuant to R.C. 2711.03. By entry filed April 20, 2009, the trial court ordered appellant to arbitration. Findings of fact and conclusions of law were filed on May 20, 2009.

{¶4} Appellant appealed both the April 20 and May 20, 2009 entries. This matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED IN VIOLATION OF R.C. 2711.01 WHEN IT ORDERED THE PARTIES TO ARBITRATE CONTROVERSIES RELATED TO TITLE TO AND POSSESSION OF REAL ESTATE."

II

{¶6} "THE TRIAL COURT ERRED IN ORDERING MR. VANSCOY TO ARBITRATE HIS DISPUTES WHEN THE APPELLEE FAILED TO FOLLOW THE

DISPUTE RESOLUTION PROVISIONS OF THE CONSENT JUDGMENT ENTRY FILED IN THE LICKING COUNTY COMMON PLEAS COURT IN THE CASE OF *STATE EX REL. BROWN V. RONA ENTERPRISES, INC.*"

I

{¶7} Appellant claims the trial court erred in ordering the parties to arbitration as the dispute involved the title to and possession of real estate; therefore, it was beyond the scope of the arbitration provisions. We agree.

{¶8} "The issue of whether a controversy is arbitrable under an arbitration provision of a contract is a question of law for the court to decide upon an examination of the contract." *Gaffney v. Powell* (1995), 107 Ohio App.3d 315, 319. Therefore, our standard of review is de novo.

{¶9} On January 14, 2009, appellee filed a petition to enforce arbitration pursuant to R.C. 2711.03(A) which states the following:

{¶10} "The party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement. Five days' notice in writing of that petition shall be served upon the party in default. Service of the notice shall be made in the manner provided for the service of a summons. The court shall hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement."

{¶11} The arbitration agreement sub judice states the following:

{¶12} "All disputes, claims, or controversies, which exceed the jurisdiction of Small Claims Court as governed by Ohio law, arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by Dealer with consent of Buyer.***Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. **THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, PURSUANT TO ARBITRATION UNDER THIS CLAUSE.** The parties agree and understand that all disputes arising under case law, statutory law, and all other laws, including, but not limited to, all contract, tort, property disputes, will be subject to binding arbitration in accord with this contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. The parties agree to advance and pay all of the arbitrator's costs on an equally proportionate basis. In the event Buyer is indigent at the time a dispute arises, Dealer agrees to pay all costs necessary for the parties to resolve the dispute by arbitrator's decision in accordance with this agreement.***" (Emphasis sic.) See, Purchase Agreement at ¶18, attached to Plaintiff's January 14, 2009 Petition as Exhibit A.

{¶13} Appellee's petition to enforce arbitration set forth the nature of the dispute as follows:

{¶14} "The dispute in question revolves around a breach of contract by Mr. VanScoy for the purchase and construction of a home. Mr. VanScoy agreed with Rona Enterprises for Rona to place a manufactured home and construct site improvements including a well, septic system, and driveway. Mr. VanScoy was to secure financing for these improvements at which time Rona would be reimbursed for its expenses. Prior to the scheduled closing, Mr. VanScoy's financing was revoked. Subsequent to losing his financing, Mr. VanScoy has taken up residence in the home built by Rona while leaving the home and underlying property titled in Plaintiff's name. As a result, Rona has been forced to maintain insurance for both the home and property, incurred additional interest and carrying costs for the home, and spent substantial company resources in attempts to resolve this matter. Instead, the Defendant has been living in a home rent and mortgage free for a period of over six months."

{¶15} On April 1, 2009, appellant filed a motion to dismiss and memorandum contra appellee's petition to enforce arbitration agreement. Appellant filed an accompanying affidavit wherein he attested to the following in pertinent part:

{¶16} "6. An employee at Rona, Ron Thomas, Jr., reviewed my financial information and determined that I was eligible to buy a 2005 Fairmont Westfield manufactured home. Mr. Thomas assured me that Rona would arrange the financing for the purchase and installation of this home. He repeatedly stated that I would be able to finance this home as long as I heeded the following advice: 'pay your bills, keep your job, and stay alive.'

{¶17} "7. I agreed to buy the above-described home from Rona and signed an agreement in October 2007. Rona drafted this entire agreement. Rona did not allow me to read this agreement before I signed it and rushed me through the transaction. Rona would not allow me to leave their office with the proposed contract so that I would have the time I needed to read it. I am dyslexic and I needed extra time to be able to read and understand this contract. Rona did not advise me that this contract contains a clause that requires arbitration of disputes, nor did they discuss or explain arbitration, what it is, and/or its affect on my rights.

{¶18} "10. After signing our original contract, Rona ordered me to sign several different contracts for the purchase and installation of this manufactured home. Rona's employees rushed me through each of these transactions, would not explain the transactions and the reason for modifying our original contract, and often would not permit me to read the new contract before signing it. The purchase price and terms of these contracts varied. Our original contract is not the document attached to the Plaintiff's Petition to Enforce Arbitration Agreement and labeled as 'Exhibit A.'

{¶19} "11. Rona told me that a finance company would not lend me money unless our twelve (12) acre piece of land was divided, leaving me to be the deeded owner of one, unimproved piece of land. On December 18, 2007, Ellouise VanScoy, granted to me a parcel of land approximately six (6) acres in size, which was approximately one-half our land, through a General Warranty Deed. A true and accurate copy of that Deed, and its attachments, are attached hereto as Defendant's 'Exhibit 1.' At that time, my mother, Ellouise VanScoy, and sister, Maureen Huff, owned

one tract of land described as 6860 State Route 669, Somerset, Ohio, and I owned the neighboring tract of land described as 6862 State Route 669, Somerset, Ohio.

{¶20} "14. While building the foundation for our new home, one of Rona's employees was injured on the job. Mr. Thomas told me that Rona could not continue the construction without first obtaining insurance for its employees/contractors. In order to obtain insurance, Mr. Thomas advised me that I would have to give my deed to Buckeye Title & Closing Services to hold 'in escrow' until construction is complete. It was my understanding that 'escrow' meant that Rona's agent, Buckeye Title & Closing Services would hold onto my deed until construction was completed, but that I would remain the owner and occupant of 6862 State Route 669, Somerset, Ohio. According to Mr. Thomas, construction on my home could not continue unless I agreed to these demands.

{¶21} "15. On February 12, 2008, a General Warranty Deed was executed where my parcel was granted to Rona Enterprises, Inc. (Perry County Recorder's Official Record Vol. 351, Page 1541). A copy of that Deed is attached hereto as Defendant's 'Exhibit 2.' I was told that Rona Enterprise, Inc. must be the grantee on this deed because Buckeye Title & Closing Services had gone out of business. There is no mention in this Deed that it is conditional or that the land or the Deed were being held 'in escrow.' I did not understand that I was granting Rona my entire interest in the land or that Rona would own this property. I expected to be able to stay on this land and retain ownership of the property.

{¶22} "19. To date, I have not been able to finance this home. Lenders are currently refusing to finance this transaction because I am no longer the deeded owner

of the land. Rona has not made reasonable efforts [to] arrange for financing either through their own company or a third-party. I believe that Rona's employees lied to me about the availability of financing for me and Rona's role in assuring that I receive financing for this transaction."

{¶23} Attached to the motion to dismiss as Exhibit 2 is a copy of the General Warranty Deed conveying the subject property from appellant to appellee. The deed was signed on February 12, 2008 and filed with the Perry County Recorder's Office on February 21, 2008.

{¶24} The deed is presented as a defense to the claim that appellant did not pay on the contract for the purchase of the manufactured home. No where in the purchase agreement is there a provision for the execution of a general warranty deed in lieu of third-party financing for the purchase. The actions that precipitated this conveyance are outside any issues raised by the contract and arbitration provisions.

{¶25} Appellee's defense to the argument that this matter is outside the provisions of the contract is to claim that appellant's counsel had agreed to arbitrate the matter and then reneged on the agreement. Appellee argues it is merely attempting to collect on the purchase agreement, and it was misled by appellant that he had adequate financing. See, Plaintiff's Reply Brief filed April 16, 2009.

{¶26} In its finding of facts, the trial court addressed the issue of unconscionability, but never addressed the issue of whether the defense as to the title to real property was subject to the arbitration agreement.

{¶27} We note Ohio public policy encourages the resolution of disputes through arbitration. *Kelm v. Kelm* (1993), 68 Ohio St.3d 26. As explained by our brethren from the Eighth District:

{¶28} "An arbitration clause in a contract is generally viewed as an expression that the parties agreed to arbitrate disagreements within the scope of the arbitration clause and with limited exceptions, an arbitration clause is to be upheld just as any other provision in a contract should be respected. *Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 668, 687 N.E.2d 1352. However, parties cannot be compelled to arbitrate a dispute in which they have not agreed to submit to arbitration. *Piqua v. Ohio Farmers Ins. Co.* (1992), 84 Ohio App.3d 619, 621, 617 N.E.2d 780; *St. Vincent Charity Hosp. v. URS Consultants, Inc.* (1996), 111 Ohio App.3d 791, 793, 677 N.E.2d 381; *Shumaker, supra.*" *Marks v. Morgan Stanley Dean Witter Commercial Financial Services, Inc.*, Cuyahoga App. No. 88948, 2008-Ohio-1820, ¶15.

{¶29} Although the trial court was correct in upholding the arbitration provisions in the purchase agreement, the issue is whether the defense raised by appellant falls within the arbitration provisions of the agreement and is therefore subject to arbitration. For the following reasons, we find it is outside the scope of the arbitration provisions.

{¶30} The purchase agreement provides for third-party financing if a cash sale is not involved. The general warranty deed and its transfer that is raised as a defense to appellee's failure to pay claim is outside the terms of the agreement. The deed which appellant proffered in support of his argument was only to be escrowed, but in fact it was duly recorded. The appropriate procedure to undue the legality of title as

evidenced by a general warranty deed would be a quiet title action pursuant to R.C. 5303.01.

{¶31} We find the remedies foreseeable under the arbitration provisions do not contemplate a dispute over the validity of the subject title or a potential fraud claim.

{¶32} Upon review, we find the trial court erred in ordering the matter to arbitration and appellant's motion to dismiss should have been granted.

{¶33} Assignment of Error I is granted.

II

{¶34} Appellant claims the trial court erred in not referring the matter to dispute resolution pursuant to a consent judgment with the Ohio Attorney General, *State ex rel. Brown v. Rona Enterprises, Inc.*, PIF No. 10000357. We disagree.

{¶35} The consent judgment, attached to appellant's April 1, 2009 motion to dismiss and memorandum contra appellee's petition to enforce arbitration agreement as Exhibit 3, provides the following:

{¶36} (C) "That the supplier, Rona Enterprises, Inc., dba Rona Mobile Homes under this name or any other name, its agents, servants, employees, representatives, successors and assigns, through any corporation, partnership or other entity, and all persons actively participating with them, hereby agree permanently to refrain from:

{¶37} "(1) Representing that any merchandise or services are free, except in Conformance with the requirements of Substantive Rule COcp-3-01.04;

{¶38} "(2) Representing that a consumer will receive, upon purchase, a mobile home of the same standard or quality as the model shown to the consumer, and relied upon by the consumer as a basis for his decision, when the mobile home received upon

purchase is not of the same standard or quality as the model, unless the consumer is informed in writing to the contrary prior to the time that the model is shown;

{¶39} "(3) Representing that products, workmanship or services are of a merchantable, workmanlike standard or quality, if they are not of such a standard or quality;

{¶40} "(4) Representing, directly or indirectly, that warranties exist with respect to a mobile home or any aspect thereof, when, in fact, none exist, and none will be honored by the supplier."

{¶41} The consent judgment involved the quality of the manufactured home product and any standards by which the homes were constructed. This has nothing to do with the subject matter of this case.

{¶42} Assignment of Error II is denied.

{¶43} The judgment of the Court of Common Pleas of Perry County, Ohio is hereby reversed.

By Farmer, J.

Edwards, P.J. concur and

Hoffman J. concurs separately.

s/ Sheila G. Farmer_____

s/ Julie A. Edwards_____

Hoffman, J., concurring

{¶44} I concur in the majority's analysis and disposition of Appellant's first assignment of error. Based thereon, I would find Appellant's second assignment of error moot.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RONA ENTERPRISES, INC.	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
GORDON E. VANSCOY	:	
	:	
Defendant-Appellant	:	CASE NOS. 09CA6 & 09CA8

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Perry County, Ohio is reversed. Judgment is hereby entered for appellant. Costs to appellee.

s/ Sheila G. Farmer_____

s/Julie A. Edwards_____

s/ William B. Hoffman_____

JUDGES