STATE OF MICHIGAN

COURT OF APPEALS

MARIAN L. BERNA and VIRGINIA BERNA,

Plaintiffs-Appellants,

v

LITTLE VALLEY HOMES, INC., L.V. SERVICE CORPORATION, and GREEN TREE FINANCIAL SERVICING CORPORATION,

Defendants-Appellees.

UNPUBLISHED
September 8, 1998

No. 202091
Oakland Circuit Court
LC No. 96-534432-CP

Before: Jansen, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting summary disposition in favor of all defendants pursuant to MCR 2.116(C)(7). We reverse.

I

Plaintiffs, seeking rescission or revocation of a contract relating to the purchase of a mobile home from defendant Little Valley Homes, Inc, filed their complaint in the trial court alleging violations of the Michigan consumer protection act, MCL 445.902 *et seq.;* MSA 19.418(2) *et seq.,* and the mobile home commission act, MCL 125.2327; MSA 19.855(127). Plaintiffs joined defendant Green Tree Financial Servicing Corporation in the suit as a necessary party due to its financial interest as the mortgagee on the mobile home, pursuant to the "Manufactured Home Retail Installment Contract and Security Agreement" (security agreement) that plaintiff Marian Berna signed. Notably, plaintiffs pleaded no affirmative allegations against defendant Green Tree. Plaintiffs also alleged in their complaint that Defendant L.V. Service Corporation performed negligent service on the mobile home, which suffered serious structural damage due to plumbing and water problems that became evident soon after plaintiff Virginia Berna and her children moved into the mobile home.[1] Defendants Little Valley and L.V. Service are both Michigan Corporations. Green Tree is a Delaware Corporation.

In its motion for summary disposition pursuant to MCR 2.116(C)(7), defendant Green Tree argued to the trial court that an arbitration provision contained in the security agreement mandated that

any disputes between the parties must be submitted to binding arbitration. In a brief opinion and order, the trial court agreed, stating in pertinent part:

> Plaintiff Marian and Virginia Berna ("Plaintiffs") are the purchasers, defendant Little Valley Homes ("Little Valley") is the seller, and defendant Green Tree is the assignee of Little Valley's interests in the agreement. Under a "retail installment contract and security agreement," the parties agreed that all disputes arising from the purchase "shall be resolved by binding arbitration." In light of this language, Green Tree argues [that] Plaintiffs cannot develop facts under which they can maintain suit in this Court, and summary disposition is appropriate as a matter of law.
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> Plaintiffs argue that they are not bound by the arbitration agreement because, under MCL 600.5001(2)[; MSA 27A.5001(2)], their claim is based on grounds under which they are entitled to rescind the contract. The Court disagrees. In light of Little Valley's disclosure on the record that the home was a display model, Plaintiffs cannot establish fraud in the inducement simply by alleging that a previous purchaser had lived in the home for two nights before rescinding his purchase. There are no allegations that this purchaser's presence in the home had any effect at all on the condition of the home and, therefore, this fact would not change the home's status as "new."[2] With respect to Plaintiffs' claim that Little Valley did not disclose water damage and plumbing problems, the Court finds that this is a dispute arising out of the purchase of the home and is controlled by the arbitration clause. (Emphasis added.)

At the hearing on defendants' motion for summary disposition, plaintiffs argued that the sales agreement did not contain an arbitration clause, so only defendant Green Tree could assert the contractual obligation to arbitrate.[3]

On appeal, this Court reviews de novo the trial court's ruling on summary disposition pursuant to MCR 2.116(C)(7). *Stewart v Fairlane Community Mental Health Centre (On Remand)*, 225 Mich App 410, 415; 571 NW2d 542 (1997); *Guerra v Garratt*, 222 Mich App 285, 288; 564 NW2d 121 (1997). When deciding a motion for summary disposition under MCR 2.116(C)(7), the trial court accepts the plaintiff's well-pleaded factual allegations as true and construes them in favor of the plaintiff. *Stewart, supra* at 415-416. The trial court must consider the pleadings and other documentary evidence to determine whether there is a genuine issue of material fact. *Id*. If no facts are in dispute and reasonable minds could not differ on the legal effect of those facts, the court must determine as a question of law whether plaintiff's claim is barred. *Id*. at 416.

Based upon our de novo review of the manufactured home purchase agreement and security agreement at issue here as well as the pleadings and other documentation, we believe that reasonable minds could differ regarding the legal effect of an arbitration agreement contained in the security agreement with respect to plaintiffs' allegations concerning defendants Little Valley's and L.V. Service which arise from the purchase agreement.

MCL 600.5001(2); MSA 27A.5001(2) provides:

> A provision in a written contract to settle by arbitration under this chapter, a controversy thereafter arising between the parties to the contract, with relation thereto, and in which it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such agreement, shall be valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the rescission or revocation of any contract. Such an agreement shall stand as a submission to arbitration of any controversy arising under said contract not expressly exempt from arbitration by the terms of the contract. [Emphasis added.]

An arbitration agreement is a contract wherein the parties agree to submit their disputes to an arbitration panel instead of to a court of law. *Kaleva-Norman-Dickson School Dist No 6 v Kaleva-Norman-Dickson School Teachers' Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975); *Horn v Cooke*, 118 Mich App 740, 744-745; 325 NW2d 558 (1982). Statutory arbitration agreements are governed by the uniform arbitration act, MCL 600.5001 *et seq.*; MSA 27A.5001 *et seq*. To be a valid statutory arbitration agreement subject to the act, the agreement to arbitrate must be in writing and state that a judgment of the circuit court may be rendered on the arbitrator's award. *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 578; 552 NW2d 181 (1996).

Whether an arbitration contract exists and whether the terms are enforceable are questions for the courts to decide, applying general contract principles, including the principle that any ambiguities in a contract are construed against the contract's drafter. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99; 323 NW2d 1 (1982); *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995.) When determining the arbitrability of an issue, the court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract. *Burns, supra* at 580. "Any doubts about the arbitrability of an issue should be resolved in favor of arbitration." *Burns, supra* at 580; *Omega Construction Co, Inc, v Altman*, 147 Mich App 649, 655; 382 NW2d 839 (1985).

Moreover, a contract to arbitrate cannot exist except on the expressed mutual assent of the parties, so the "first inquiry into the arbitrability of a dispute is to determine whether an arbitration agreement has been reached by the parties." *Horn, supra* at 744-745. Mutuality of arbitration is also required, as one party cannot be forced to arbitrate while the other party merely has the *option* to arbitrate. [4] A court cannot require a party to arbitrate an issue that the party has not agreed to submit to arbitration. *Horn, supra*. In the event of coercion or fraud in the execution of a particular arbitration agreement, the agreement, like any contract, is void or at least voidable. *Id.* It is for the court, not the arbitrator, to determine whether this type of fraud has been perpetuated, whereas it is for the arbitrator to determine fraud in the inducement with regard to the contract as a whole. *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395, 402-404; 87 S Ct 1801; 18 L Ed 2d 1270, 1276-1277 (1967).

In the instant case, both defendant Little Valley and plaintiff Marian Berna executed the manufactured home purchase agreement. That contract specifically states that the terms of the purchase agreement are contained on both sides of the contract. There is no arbitration clause in that agreement. Both parties also signed the security agreement that defendant Green Tree drafted. The financing agreement specifically defines the term "Contract" to mean "this Retail Installment Contract and Security Agreement;" it also defines "you" and "your" to include the seller and the assignee after the contract is signed, and "me" to mean the buyer. [Emphasis added.] The arbitration agreement is only found in the security agreement and reads in pertinent part:

> All disputes, claims, or controversies arising from or relating to this Contract or the parties thereto shall be resolved by binding arbitration by one arbitrator selected by you with my consent. This agreement is made pursuant to a transaction of interstate commerce and shall be governed by the Federal Arbitration Act at 9 USC Section 1. 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 to litigate disputes in 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 EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY YOU (AS PROVIDED HEREIN). 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 and property disputes will be subject to binding arbitration in accord with this Contract.

The security agreement neither mentions the original sales agreement between defendant Little Valley and plaintiffs nor incorporates it into the security document. The arbitration provision, however, also retains for Green Tree all of its rights to "use judicial (filing a lawsuit) . . . relief" to enforce virtually any remedy it might have under the installment contract. Moreover, Green Tree's counsel conceded at oral argument that these retained rights constituted all potential remedies Green Tree would possess for a breach of the security agreement. Given this scenario, we cannot fathom how defendant Green Tree is bound by the purported agreement to arbitrate; i.e. there is no mutuality of a obligation.

The security agreement also contains an "assignment by seller"[5] which states in pertinent part:

> Seller hereby sells, assigns, and transfers its entire right, title, and interest in the Contract and the property described therein (the "Property") to Assignee. . . . Seller further agrees that in the event Buyer asserts against Assignee any claim, defense or counterclaim against payment of any sum owing under the Contract or in defense of repossession on the assertion . . . that the property is defective, not as represented to Buyer by Seller . . . Seller will, upon Assignee's demand, repurchase the Contract from the Assignee and pay Assignee the full amount remaining unpaid (plus accrued and unpaid interest) plus Assignee's costs and expenses including attorneys' fees, whether or not any such claim, defense, or counterclaim shall be meritorious and without

> awaiting adjudication of Buyer's claim, defense or counterclaim; and Seller also agrees to indemnify, defend, and hold Assignee harmless from any such claims, including attorneys fees, court costs, disbursements and out-of-pocket expenses.

The assignment gives defendant Green Tree the ability to pursue immediate relief from defendant Little Valley, but Green Tree admitted to this Court that it has chosen not to pursue its contractual remedies.

At the outset, we must determine whether an arbitration contract exists between plaintiffs and defendants Little Valley and L.V. Service by looking to see whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration under the contract terms. *Burns, supra* a 580.

The cardinal rule when interpreting contracts is to ascertain the intent of the parties. *D'Avanzo v Wise & Marsac, PC,* 223 Mich App 314, 319; 565 NW2d 915 (1997). Although contract construction is generally a question of law for the court, the question should be submitted to the jury when the meaning of the terms and the contract's construction depends upon extrinsic facts. *Id.*. Where both parties present credible interpretations of the agreement, the issue is one of fact for the jury. Indeed, the trial court may determine the meaning of a contract only when the contract terms are clear. A contract is ambiguous if the language is susceptible of two or more reasonable interpretations. *Id.* If a contract is ambiguous, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate. *Id.* Extrinsic evidence of the parties' subjective intent may not be considered, however, where the parties' agreement is clear. *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW2d 64 (1941).

We believe that summary disposition was improper. First, the clear language of the arbitration provision at issue states that it applies to all disputes, claims and controversies relating to "this Contract," i.e., the security agreement. Because plaintiffs' complaint contains no affirmative allegations regarding defendant Green Tree, it does not relate to the security agreement. In their complaint plaintiffs name Green Tree solely in recognition of its security interest in the mobile home.

Second, the same sentence also states that all disputes, claims or controversies arising from the parties to the security agreement shall be resolved by binding arbitration. Based on this language, defendants contend that plaintiff and all defendants are required to arbitrate virtually any dispute that might arise between the parties; i.e. whether or not it arises from the contract. We disagree and believe that the language continues to specify that the security agreement is the underlying contract upon which the arbitration clause is based. Stated otherwise, the security agreement contains two major sections: one dealing with plaintiffs' financial obligations to defendant Green Tree and the other containing defendant Little Valley's assignment of seller/ownership rights to defendant Green Tree. The security agreement contains no contractual or other obligations between plaintiffs and the seller, defendant Little Valley. Thus, while defendants and plaintiffs may all be "parties" to some provision contained in the security agreement, plaintiffs' *claims* against defendant Little Valley have their genesis in and are completely limited to the sales agreement that does not contain an arbitration agreement.

It goes without citation to authority that the parties to more than one contract cannot argue that one contract subsumes another totally separate and distinct contract without expressly incorporating one within the other and absent the parties' assent to the incorporation by reference. Arguing that defendant Green Tree's arbitration provision in its security agreement applies to plaintiffs' negligence and contract claims stemming from the purchase of the mobile home against defendant Little Valley violates this basic tenet of contract law. Contract interpretation also requires that we construe contract language against the party drafting the contract. In this case, defendant Green Tree drafted the security agreement, and defendant Litttle Valley drafted the sales agreement.

Moreover, our reading of the arbitration agreement as relating solely to the security agreement renders the arbitration agreement in compliance with MCL 600.5001(2); MSA 27A.5001(2), which also clearly provides that the arbitration agreement relate to the contract at issue and the parties to it. Indeed, reading the arbitration agreement at issue in tandem with the statute clearly shows their parallel wording. In other words one cannot excerpt the phrases "the parties thereto" or " . . . all disputes. . . ." as meaning that any dispute that may arise must be arbitrated including those involving disagreements having nothing to do with the terms of the security agreement. All contract language must be read and construed in context and in a manner that will make the contract legal and enforceable.

Third, even though defendant Little Valley assigned its rights to defendant Green Tree, defendant Green Tree merely stands in Little Valley's shoes and has acquired the same rights as Little Valley possessed. *Professional Rehabilitation Associates v State Farm Mutual Automobile Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998). Because defendant Little Valley had no right to impose arbitration on plaintiffs under the sales agreement, defendant Green Tree cannot now impose the terms of its contract with plaintiffs into a separate contract that its assignor had with plaintiffs.

Finally, the incongruity of defendants' assertions become most evident when one considers that had plaintiff Marian Berna paid cash for the mobile home, there would, of course, be no financing or security agreement. Clearly, the purchase agreement and security agreement are two separate contracts and had there been a cash transaction, defendant Little Valley would have no basis upon which to argue that plaintiff must arbitrate her claims against the mobile home seller. This point elucidates most clearly the fact that the arbitration agreement at issue in this case only applies to controversies regarding the security agreement. Moreover, should defendant Little Valley disagree with defendant Green Tree's decision to enforce the security agreement's assignment clause and force Little Valley to repurchase a defective mobile home from it, this conflict would also be subject to arbitration. We therefore find no support for defendants' assertion that plaintiffs' claims regarding defendants Little Valley's and L.V. Service's negligent sale and maintenance of the mobile home, violations of the mobile home commission act and consumer protection act, and breach of express and implied warranties regarding plaintiffs' mobile home are subject to arbitration.

As a final matter, defendants assert that the United States Supreme Court's decision in *Prima Paint Corp, supra,* is controlling here. Because the cases are factually and legally distinguishable, we disagree. In *Prima Paint*, *supra* at 388 US 403-404, the Supreme Court held that "if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language [of

the United States Arbitration Act of 1925] does not permit the federal court to consider claims of fraud in the inducement of the contract generally." In that case, the parties agreed to a broad arbitration clause under a consulting agreement. *Id.* at 398.

It is critical, however, that *Prima Paint* involved the Federal Arbitration Act. Section 2 of that Act provides that written arbitration agreements in "a contract involving commerce . . . shall be valid, irrevocable, and enforceable. . . ." *Id.* at 400. Before addressing the arbitration issue, the *Prima* Court first determined the threshold issue of whether the contract at issue was one involving "commerce." In concluding that the consulting contract fell within the definition of the Federal Arbitration Act, the Prima Court acknowledged that commerce requires an interstate transaction. *Id.* at 401.

Prima Paint filed suit alleging that the defendant had fraudulently represented that it was solvent and able to perform its contractual obligations when in fact it was insolvent and filed for bankruptcy shortly after signing the agreement. *Id.* Because Prima Paint did not claim that the defendant fraudulently induced it to enter into the agreement to arbitrate "[a]ny controversy or claim arising out of or relating to this [consulting] agreement," Prima Paint's appeal was properly dismissed because fraud in the inducement of the contract itself was subject to arbitration. *Id.* at 399, 406-407.

Here, plaintiffs, Michigan residents, entered into a purchase agreement with defendant Little Valley, a Michigan corporation. By the clear wording of the Federal Arbitration Act there must be "commerce," i.e: an interstate transaction. The purchase of the mobile home was obviously not an interstate transaction, so the Federal Arbitration Act, and, in turn, *Prima Paint* are inapposite to the purchase agreement.

Moreover, we reiterate that plaintiffs and defendants Little Valley and L.V. Service never entered into an arbitration agreement, as did the parties in *Prima Paint*. Had plaintiffs and defendant Little Valley included an arbitration clause in the *sales purchase agreement*, then *Prima Paint* might offer some guidance on whether plaintiffs' fraud in the inducement claims must be decided solely by an arbitrator. As it stands, however, in view of our previous discussion, we find *Prima Paint* neither instructive nor applicable. If the arbitration agreement applies at all, it applies only to the contract which contains it: the "Manufactured Home Retail Installment Contract and Security Agreement."

Because we determine that the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7), we need not reach plaintiffs' other arguments on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Peter D. O'Connell

[1] Plaintiffs argued that service records exist from the first "sale" of the mobile home one year earlier to the Paulsons who moved out and were permitted to rescind the sales contract due to plumbing and water problems, but defendant Little Valley never disclosed this "sale," the Paulsons' occupancy, Little Valley's agreement to reimburse the Paulsons, or the water problems to plaintiffs.

[2] The trial court did not, however, address the administrative regulations applicable to the mobile home commission act, found in 1991 AACS, R 125.1216(q), which states that a seller of a mobile home may not "[a]dvertise a mobile home as new, unless it has never been occupied" (emphasis added).

[3] Counsel for plaintiffs argued as follows:

> No matter what else happens in this case . . . Little Valley and LV Service Corp must remain before this Court with this Court having jurisdiction. They cannot grab on to the arbitration clause in the assignment contract and try to get into arbitration and out from under their obligations to go to court which is what the Mobile Home Commission Act requires them to do to be subject to liability for damages, restitution and recision [sic] in court, in a court of law.
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> So they can't get from under that by glomming on to an arbitration provision in a security interest agreement. So I don't want there to be any mistake about that.

Notably, defendant Little Valley's counsel informed the court that defendant was concerned about dividing this case between arbitration and circuit court due to the number of overlapping issues and facts and to avoid conflicting results. Counsel for Green Tree responded to plaintiffs' argument by arguing that defendant Little Valley is a party to the security agreement that contains the arbitration provision.

[4] "Mutuality of obligation" in dealing with contracts means that both parties to an agreement are bound or neither is bound; it means that there must be a consideration without which there is no obligation on either party because there is no binding contract. Mutuality of assent means only that there must be a mutual assent on all essential terms of a contract, and that the parties' assent is manifested in some objective form. *Reed v Citizens Ins Co of America*, 198 Mich App 443, 449; 499 NW2d 22 (1993).