

STATE OF MICHIGAN
COURT OF APPEALS

ELVIS GILLIAM and KARLA D. SNYDER-
GILLIAM,

UNPUBLISHED
July 18, 2000

Plaintiffs-Appellees,

v

No. 219539
Allegan Circuit Court
LC No. 99-024164-AV

SKIP WILLIAMS, d/b/a SKIP WILLIAMS
BUILDER,

Defendant-Appellant.

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order of the circuit court reversing a district court ruling that the parties were bound by an arbitration agreement attached to a buy-sell agreement. We affirm the circuit court.

This case arises out of a written contract to purchase a home in Saugatuck. On April 21, 1996, plaintiff buyers entered into a buy and sell agreement with defendant builder. There were four attachments to the buy and sell agreement, including the arbitration agreement. Plaintiffs and defendant signed the buy and sell agreement along with three of the addenda. Although plaintiffs signed the arbitration agreement, defendant did not.

After closing on the property, plaintiffs allege that they discovered defects in their newly built home and, therefore, filed suit against defendant in district court. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) (claim barred because of arbitration agreement), asserting that the parties were obligated to arbitrate pursuant to the arbitration agreement attached to the buy and sell agreement. The district court agreed and granted defendant's motion. Plaintiffs appealed to the circuit court. The circuit court reversed the district court, ruling that there was no mutuality of assent to arbitrate. Defendant's application for leave to appeal was granted by this Court on August 6, 1999.

We review de novo a lower court's ruling on a motion for summary disposition. *Patrick v US Tangible Investment Corp*, 234 Mich App 541, 543; 595 NW2d 162 (1999). The court must

consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted when ruling on a motion under MCR 2.116(C)(7). MCR 2.116(G)(5).

Defendant argues that the circuit court incorrectly determined that the arbitration agreement was unenforceable because of the lack of mutuality of assent to arbitrate. We disagree.

Arbitration is a matter of contract, and a party cannot be forced to submit to arbitration in the absence of an agreement to do so. *Ehresman v Bultynck & Co*, 203 Mich App 350, 353-354; 511 NW2d 724 (1994). The existence of a contract to arbitrate and its enforceability is a judicial question. *Id.*, p 354. Although an arbitration agreement must be in writing, MCL 600.5001; MSA 27A.5001, the statute does not require that the agreement be signed by either or both parties. *Ehresman, supra*, p 354. Instead, in order to have an enforceable contract, there must be mutuality of assent to arbitrate. *Id.* Mutuality of assent can be shown if the contract “is accepted and acted on, or is delivered and acted on,” in essence, whether the parties acceded to the terms of the agreement by their conduct. *Id.*, pp 354-355, quoting 17 CJS, Contracts, § 62, pp 731-733.

Our review of the record reveals that defendant did not assent to be bound by the arbitration agreement. In the present case, the buy and sell agreement contained addenda attached to it which the parties were allowed to accept or reject. This conclusion is supported by a reading of the buy and sell agreement in conjunction with the arbitration agreement. Although ¶ 4 of the buy and sell agreement indicates that each addendum that is initialed and check-marked is “incorporated to this agreement,” the language used in the arbitration agreement indicates that the arbitration agreement is a “separate voluntary agreement” subject to rejection without affecting the validity of the buy and sell agreement. Further, the arbitration agreement specifically provides that it “is enforceable as to all parties and brokers/agents who have agreed to arbitrate as acknowledged by their signature below.” Defendant did not sign the arbitration agreement, as required by the terms of the arbitration agreement. Although the agreement need not be signed by defendant to be binding upon him, we nevertheless conclude that his failure to sign the agreement, together with the other circumstances surrounding the buy and sell agreement and the addenda attached to it, is dispositive of the question of assent to arbitrate. The lack of defendant’s signature on the arbitration agreement coupled with his signature on the buy and sell agreement and remaining three addenda indicates that defendant’s failure to sign the arbitration agreement was intended as a rejection of the offer to arbitrate.

Affirmed. This matter is remanded to the district court for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ William C. Whitbeck