[Cite as *Deutsche Natl. Bank Trust Co. v. Brown*, 2009-Ohio-6499.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Deutsche National Bank Trust Company, As Trustee for Saxon Asset Series Trust 2007-3

Plaintiff

v.

Gary Brown, et al.,

Appellants

v.

Saxon Mortgage, Inc., et al.

Appellee

Court of Appeals No. WD-09-035

Trial Court No. 2008-CV-0920

DECISION AND JUDGMENT

Decided: December 11, 2009

* * * * *

George R. Smith, Jr., for appellants.

Barbara Friedman Yaksic and Monica Levine Lacks for appellee, Saxon Mortgage, Inc.

* * * * *

SINGER, J.

{¶ 1} Appellants bring this accelerated appeal from an order of the Wood County Court of Common Pleas, staying foreclosure proceedings and compelling arbitration.

{¶ 2} On May 11, 2007, appellants, Gary and Diane Brown, executed mortgage loan documents with appellee, Saxon Mortgage, Inc., to obtain refinancing for their Perrysburg home. On September 26, 2008, Deutsche Bank National Trust Co., as trustee for Saxon, filed a complaint alleging that appellants had defaulted on the terms of the note secured by a mortgage. Deutsche Bank sought foreclosure of the mortgage and a judgment on the note.

{¶ 3} Appellants denied the allegations in the Deutsche Bank complaint and interposed a third party complaint against appellee, a mortgage broker and one of the mortgage broker's employees. Appellants alleged that appellee violated the Truth-in-Lending Act and the Real Estate Settlement Procedures Act and, in concert with the mortgage broker and its employee, engaged in "fraudulent, predatory and unconscionable conduct" in connection with the underlying loan. Appellants sought a declaration that the mortgage was void and rescission of the loan.

{¶ 4} Service to the mortgage broker and its employee failed. Appellee responded with a motion to compel arbitration pursuant to an arbitration rider entered into at the loan closing.

{¶ 5} Appellants filed a memorandum in opposition accompanied by the affidavit of appellant Gary Brown. In his affidavit, appellant Gary Brown averred that he was not aware he had signed an arbitration agreement at closing because the closing agent had

rushed appellants, claiming to be late for another closing and failing to point out or explain the arbitration agreement or any of the other documents.

{¶ 6} On consideration, the court granted appellee's motion, ordered the matter to arbitration and stayed all proceedings pending the results of the arbitration. Appellants now appeal this order, arguing in two assignments of error that the court erred in enforcing the arbitration agreement because there was no "meeting of the minds" in the formation of the agreement and the agreement should not be enforced because appellee waived the right to enforce the agreement when it filed suit for a money judgment.

{¶ 7} Appellants portray themselves as "not sophisticated borrowers" attracted by promises of lower interest rates and payments from the mortgage broker and appellee acting in concert. They maintain that they were induced to enter into this loan by extra-contractual promises to refinance on better, more affordable terms six months after closing. Additionally, appellants insist, they were rushed through closing in such a manner that the terms of the agreement were concealed from them. According to the affidavit from appellant Gary Brown, the closing agent arrived at their home at approximately 8:30 p.m.:

{¶ 8} "She began the closing by advising my wife and I she was running late for another closing * * *. She shoved numerous loan papers in front of us and told us where to sign. At no time did she explain or identify any of the documents we were signing. The closing took about five (5) minutes to complete. At no time did I see what I was signing. I never saw the Arbitration Rider at any time before, during or after closing and

at no time was it discussed. My wife and I simply signed all documents at closing as directed by the closing agent and were unaware signing of the Arbitration Rider was optional. * * *."

{¶ 9} In their first assignment of error, appellants argue that the arbitration agreement should not be given effect because of the circumstances surrounding its execution.

{¶ 10} An arbitration clause is separable from the larger agreement of which it is a part. *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 501. Thus, while there may be irregularities that threaten the validity of the larger agreement, these irregularities may be referred to arbitration if there is a valid arbitration provision and the breadth of its terms are sufficient to require referral. Id. at 502. Consequently, when we consider the validity of an order compelling arbitration, we look to the circumstances surrounding the formation of the arbitration provision only.

{¶ 11} "Ordinarily, one of full age in the possession of his faculties and able to read and write, who signs an instrument and remains acquiescent to its operative effect for some time, may not thereafter escape the consequences by urging that he did not read it or that he relied upon the representations of another as to its contents or significance. Or as Judge Davis remarks in *McAdams v. McAdams* [1909], 80 Ohio St. 232, 240: 'A person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by

merely looking when he signed.'" *Kroeger v. Brody* (1936), 130 Ohio St. 559, 566; *Cuyahoga County Hosp. v. Price* (1989), 64 Ohio App.3d 410, 415.

{¶ 12} Appellants do not contend that they did not sign the arbitration rider, nor do they suggest that they are unable to read or write. Indeed, it appears that they initialed the first two pages of the rider and signed directly below a warning presented in bold face type that reads:

{¶ 13} "NOTICE: BY SIGNING THIS ARBITRATION RIDER YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS DESCRIBED IN THE 'ARBITRATION OF DISPUTES' SECTION ABOVE DECIDED EXCLUSIVELY BY ARBITRATION, AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT HAVE TO LITIGATE DISPUTES IN A COURT OR JURY TRIAL. DISCOVERY IN ARBITRATION PROCEEDINGS MAY BE LIMITED BY THE RULES OF PROCEDURE OF THE SELECTED ARBITRATION PROVIDER.

{¶ 14} "THIS IS A VOLUNTARY ARBITRATION AGREEMENT. IF YOU DECLINE TO SIGN THIS ARBITRATION AGREEMENT, LENDER WILL NOT REFUSE TO COMPLETE THE LOAN TRANSACTION BECAUSE OF YOUR DECISION AND THE OTHER TERMS OF YOUR MORTGAGE LOAN WILL NOT BE AFFECTED."

{¶ 15} Appellants concede that the existence of a signed contract presumptively binds them to the terms of that contract. Nevertheless, they insist, no contract was

formed because the attendant circumstances of the signing establish that there was no requisite meeting of the minds.

{¶ 16} "Even when there is misrepresentation by one party of the contents of an agreement, the agreement is not void for fraud in the factum when the signer has an opportunity to read and understand the documents before execution. A person of ordinary mind cannot say that he or she is misled into signing an agreement that is different from the agreement the person intended to sign, when that person could have ascertained what agreement he was entering into by merely reading it when he signed. If a person can read, and is not prevented from reading what he signs, he alone is responsible for his omission to read what he signs." *W.K. v. Farrell*, 167 Ohio App.3d 14, 2006-Ohio-2627, ¶ 20. (Citations omitted.)

{¶ 17} Appellants highlight the last sentence of the above quote, suggesting that the closing agent "prevented" them from reading the arbitration rider. They claim that the agreement was "literally buried within a stack of documents * * * hidden like the proverbial needle in a haystack," the closing agent "shoved [documents] in front of [appellants] for signature," completed the closing within approximately five minutes, and was "sneaky." Appellants also suggest that the closing agent had a duty to bring the arbitration agreement to their attention and explain it.

{¶ 18} Appellants provide no authority in support of their proposition that a closing agent has a duty to direct a party's attention to or explain specific documents in a loan closing. Moreover, beyond the hyperbole, there is nothing in their complaint or

affidavit which would establish that the closing agent *prevented* appellants from reading the documents or from understanding them. Appellants apparently chose to accommodate the closing agent's haste. This does not relieve appellants of their responsibility to read and understand the terms of the documents placed before them.

{¶ 19} Accordingly, appellants' first assignment of error is not well-taken.

{¶ 20} In their second assignment of error, appellants insist that appellee waived its right to demand arbitration by instituting foreclosure.

{¶ 21} The parties devote a substantial amount of discussion concerning the relationship between appellee and the current holder of the note, Deutsche Bank as trustee. We need not enter this discussion. The express terms of the arbitration rider exclude the "right to foreclose against or sell the property * * *" from arbitration. Appellants provide no authority finding waiver of a remedy expressly excluded by the terms of the arbitration agreement. Compare *Checksmart v. Morgan*, 8th Dist. No. 80856, 2003-Ohio-163, *Mills v. Jaguar-Cleveland Motors, Inc.* (1980), 69 Ohio App.2d 111.

{¶ 22} Accordingly, appellants' remaining assignment of error is not well-taken.

{¶ 23} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. Appellants are ordered to pay the cost of this appeal, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE