IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 11, 2007 Session

BRUCE BODOR, ET AL. v. GREEN TREE SERVICING, LLC, ET AL.

Appeal from the Circuit Court for Davidson County
No. 06C-1618 Thomas W. Brothers, Judge

No. M2007-00308-COA-R10-CV - Filed on August 24, 2007

Plaintiffs executed installment contracts and notes which contained identical arbitration clauses, giving Financing Corporation a security interest in fifteen mobile homes purchased by Plaintiffs. Plaintiffs allege that an employee of Financing Corporation unlawfully induced the tenants of Plaintiffs' mobile homes to breach their leases.[1] Defendants appeal the trial court's decision declining to compel arbitration pursuant to the financing agreements. We conclude that Plaintiffs' claims arising from the fifteen units under contract with Financing Corporation are covered by the arbitration clauses; however, the sparse record does not support a finding that the arbitration clauses cover Plaintiffs' claims arising out of units not financed by Financing Corporation. Accordingly, we reverse the trial court in part and affirm in part.

Tenn. R. App. P. 10 Extraordinary Appeal; Judgment of the Circuit Court is Reversed in Part, Affirmed in Part and Remanded

ROBERT S. BRANDT, SP. J., delivered the opinion of the court, in which WILLIAM B. CAIN, P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Klint W. Alexander, Nashville, Tennessee, for the appellants, Green Tree Servicing, LLC; Conseco Finance Servicing Corp. and Clay Borders.

W. Gary Blackburn and Patrick Dollar, Nashville, Tennessee, for the appellees, Bruce Bodor, Individually and as Trustee for Green Park Trust, Ironwood Company Trust, Sharberhouse Trust, Snow Creek Trust, Sevier Park Trust, Walnut Grove Trust, Fogerty Beach Trust, BLMS Trust, and Majestic Mountain Trust.

OPINION

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[1] For reasons that do not appear in the record, each of the entities actually leasing the units to tenants were denominated as a "trust."

This is an appeal from the trial court's decision declining to compel arbitration.[2] Between November 1999 and September 2001, Bruce T. Bodor executed installment contracts and notes that gave Conseco Finance Corporation[3] security interests in fifteen individual units of "manufactured housing."[4] Each standard, fill-in-the-blank form contract sets forth a fixed monthly payment and provides the day of the month in which Bodor was to make payment. Each contract also contains an identical arbitration clause by which Bodor and Conseco agreed that they "choose arbitration instead of litigation to resolve disputes." The clause stipulates that it is "governed by the Federal Arbitration Act, Title 9 of the United States Code [9 U.S.C. § 1 *et seq.*]." There is no limit on the type or nature of disputes that are subject to arbitration. Indeed, the parties agreed to arbitrate "*All* disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this contract." (Emphasis added).

On June 23, 2003, in the apparent belief that Bodor was in default under the financing contracts, Conseco employee, Clay Borders, and another unidentified Conseco employee allegedly visited a number of the units Bodor leased to tenants and presented each tenant with a written notice that the tenant was to vacate his or her respective property within ten days.[5] Fifteen of the twenty-four units Borders visited were covered by the parties' financing agreements. Bodor complains that Defendants' conduct unlawfully induced his tenants to breach their leases by effectively instructing the tenants to vacate their units and quit paying their rent. Bodor seeks treble damages pursuant to Tenn. Code Ann. § 47-50-109.[6]

On October 16, 2006, Defendants filed a motion to compel arbitration relying on the arbitration clause in the parties' financing agreements. Bodor resisted the motion to compel arbitration asserting that because his cause of action sounds in tort and arises out of the leases with his tenants rather than the financing agreements with Conseco, he cannot be compelled to arbitrate his claim against Defendants. The trial court presumably agreed with Bodor's reasoning and declined to enforce the arbitration clause.

We review findings of fact by a trial court *de novo* upon the record, accompanied by a presumption of correctness below unless the preponderance of the evidence is otherwise.

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[2] This case presented a threshold issue regarding the precise nature of the appeal. The trial court denied the application for a Tenn. R. App. P. 9 interlocutory appeal, so Appellant filed a Rule 10 appeal. By order of February 23, 2007, we held that appeals from orders denying applications to compel arbitration are final judgments governed by Rule 3 and subject to that rule's time limits, which Appellant did not meet. We nevertheless allowed the Rule 10 appeal and made our holding apply prospectively only due to the past practice of allowing both Rule 9 and Rule 10 appeals from orders declining to compel arbitration.

[3] Appellant, Green Tree Servicing, LLC, is successor in interest to Conseco.

[4] Green Tree in its brief labels each of the instruments as a "Manufactured Home Retail Installment Contract and Security Agreement." However, several of the financing documents are notes. There are actually eighteen financing documents in the record.

[5] The Complaint is conspicuous in its failure to allege that Bodor was *not* in default when Conseco's agents visited the units and instructed the tenants to vacate.

[6] Tenn. Code Ann. § 47-50-109 provides:

> It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of the contract. The party injured by such breach may bring suit for the breach and for such damages.

Tenn.R.App.P. 13(d). The review of questions of law is *de novo* with no presumption of correctness. *Pyburn v. Bill Heard Chevorlet*, 63 S.W.3d 351, 356 (Tenn.Ct.App.2001).

The only question before this Court is whether the allegations of tortious conduct by Conseco, Borders, and his unidentified companion fall within the scope of the arbitration clause. The enforceability of broad arbitration clauses in form contracts and the applicability of the Federal Arbitration Act (FAA) to their construction and enforcement are well established in Tennessee. *See Pyburn*, 63 S.W.3d 351; *Frizzell Constr. Co., Inc., v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (Tenn. 1999). This Court recognizes that the "heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Pyburn*, 63 S.W.3d at 357 (quoting *Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir.1996)).

> When a contract contains a broad arbitration clause, as here, in "the absence of any express provision excluding a particular grievance from arbitration ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 584-85, 80 S.Ct. 1347, 1354 (1960). "If the allegations underlying the claims 'touch matters' covered by the parties' contract, then those claims must be arbitrated, whatever the legal labels attached to them." *Tennessee Imports, Inc. v. Filippi,* 745 Supp. 1314, 1325-26 (M.D.Tenn.1990)(citing *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.,* 815 F.2d 840, 847 (2d Cir.1987); *Mitsubushi Motors Corp. v. Soler Chrysler-Plymouth,* Inc., 473 U.S. 614, 622 b,9, 624 n. 13m 105 S.Ct. 3346, 3351 n. 9, 3352 n. 13(1985).

Dale Supply Co. v. York Int'l Corp., No. M2002-01408-COA-R3-CV, 2003 WL 22309461, at * 4 (Tenn.Ct.App. Oct. 9, 2003).

Based on the language of the Complaint, there is no doubt that the tortious conduct of Defendants relating to the fifteen units covered by the financing agreements fall within the scope of the arbitration clause. Bodor's claims arise from or relate to the financing agreements or the relationships created by those agreements. Bodor alleges in his Complaint that Borders and his "unknown accomplice" were Conseco employees "acting within the course and scope of their employment with Conseco and with Conseco's direction and/or knowledge." The Complaint gives a serial number of each of the units covered by a financing contract, which are listed as units a. through o. The Complaint alleges that "Plaintiffs had not been sent any Notices of Default or provided any Notice or Right to Cure any alleged default" before Borders' June 23, 2003 visit to the properties, describes Bodor's receipt of the notices on some units on June 30, and asserts that "Pursuant to the Cure Notices, Plaintiffs were entitled to thirty (30) days within which to cure any default." The Complaint is peppered with the reference to the "Defendants" in the plural, meaning that the entity with which Bodor contracted, Conseco, is liable as well as Borders individually. It is obvious that Borders took the action he did because of the perceived default under the financing contracts that contain the arbitration clauses.

The fact that Plaintiffs' claims sound in tort rather than contract does not remove them from the ambit of the arbitration clause. Courts have consistently found that broad arbitration clauses like the one between Bodor and Conseco encompass tort claims arising between the parties. *See Dale*

Supply Co., 2003 WL 22309461, at *5; *Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 869 (6th Cir.1990).

However, a closer question is presented by the effort to compel arbitration for the claims arising out of Borders' visit to units that were not under contract with Conseco.

> While the purpose of the FAA is to ensure enforceability of arbitration agreements according to their terms, parties cannot be forced to arbitrate claims that they did not agree to arbitrate. *Frizzell Construction Company, Inc., v. Gatlinburg, L.L.C.,* 9 S.W.3d 79, 84 (Tenn.1999). Arbitration under the FAA is a matter of consent, and as such, the parties are free to structure an arbitration agreement as they see fit. They can limit which issues will be arbitrated and specify the rules under which the arbitration will be conducted. *Frizzell,* 9 S.W.3d at 84.

Pyburn, 63 S.W.3d at 357.

Due to the scant record on appeal, we cannot say that the arbitration clauses cover Plaintiffs' claims arising out of units not financed by Conseco. It will obviously be less efficient for parallel cases to proceed in court and in arbitration, but that reason alone cannot be the basis to compel arbitration where there is no contractual obligation to arbitrate. Moreover, it may develop as the case progresses that the conduct about which Bodor complains did, in fact, arise from or at least relate to the relationship created by the financing contracts. It is still possible that the entire dispute between the parties will have to be arbitrated.

The judgment of the trial court is reversed insofar as it declined to compel arbitration for causes of action arising out of units listed as a. through o. in the Complaint, and arbitration of those claims is ordered. The judgment of the trial court is affirmed insofar as it did not order arbitration for causes of action arising out of other units. Costs of the appeal are assessed against the Appellants and Appellees equally.

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ROBERT S. BRANDT, SPECIAL JUDGE