RENDERED: JUNE 7, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000955-MR

PALM HARBOR HOMES, INC.; CHASE FINANCIAL CORPORATION; CHASE MANHATTAN BANK; CHASE MANHATTAN MORTGAGE CORPORATION — APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 00-CI-00932

JUANITA MORGAN — APPELLEE

OPINION
REVERSING
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI, AND SCHRODER, JUDGES.

DYCHE, JUDGE: Pursuant to Kentucky Revised Statutes (KRS) 417.220, Palm Harbor Homes, Inc., Chase Financial Corporation, Chase Manhattan Bank, and Chase Manhattan Mortgage Corporation (hereinafter collectively referred to as Chase) appeal from an April 18, 2001, order of the Campbell Circuit Court that vacated the circuit court's earlier order staying Juanita Morgan's pending litigation and ordered Morgan, plaintiff, and Palm Harbor and Chase as defendants, to submit to arbitration. After review, we reverse.

In the summer of 1999, Morgan entered into four separate contracts with Palm Harbor to purchase and install a manufactured home. All the contracts executed by the parties were standardized contracts prepared by Palm Harbor and all contained the same standardized terms including a term which referred to a separate arbitration agreement. Morgan and Palm Harbor entered into the first contract on June 19, 1999. Along with the first contract, Morgan also signed a separate arbitration agreement. The first contract was for a home with a garage. However, Morgan decided that she did not want the garage and the parties rescinded the contract.

The parties entered into a second contract on June 26, 1999. Subsequently, Morgan wished to change the home's floor plan; therefore, the parties rescinded the second contract. When Morgan signed the second contract, she did not sign another arbitration agreement.

On July 27, 1999, Morgan and Palm Harbor entered into a third contract, and one day later she signed another arbitration agreement. However, Morgan was not satisfied. So on August 30, 1999, Morgan and Palm Harbor entered into a fourth and final contract. As with the second contract, Morgan did not sign another arbitration agreement when she signed the fourth contract.

Palm Harbor arranged for Morgan to receive financing through Chase. Palm Harbor also arranged for a contractor, Tom Duncan, to install the home upon Morgan's property. As part of the installation process, Duncan was to place the home on a concrete slab and install the utilities, including water and

sewer lines. Furthermore, Duncan agreed to ensure the installation comported with Campbell County's zoning laws. However, on February 11, 2000, Campbell County condemned Morgan's property because it had become dangerous, and required Morgan to vacate it.

On August 15, 2000, Morgan filed suit against Palm Harbor, Chase, Duncan, Grier Appraisal Service, and Carmen Hammonds, an employee of the appraisal company. On September 7, 2000, Palm Harbor filed a motion and memorandum of law in Campbell Circuit Court seeking a stay of Morgan's pending lawsuit and arbitration. On September 18, 2000, Palm Harbor filed a second motion with the circuit court seeking a stay and an order compelling arbitration. On September 26, 2000, the Campbell Circuit Court granted Palm Harbor's motion and ordered a stay and ordered Morgan to comply with the arbitration agreement.

On October 3, 2000, Morgan filed a motion to vacate the Campbell Circuit Court's stay order of September 26, 2000. Both parties briefed the issues, and on April 18, 2001, the circuit court granted Morgan's motion to vacate. The Campbell Circuit Court stated that neither Morgan nor Palm Harbor signed nor executed an arbitration agreement in connection with the fourth contract. Subsequently, the circuit court found that the contract and the various other documents that comprised the contract were adhesion contracts. The circuit court found, "that based upon the evidence presented the adhesion contract, the arbitration agreement, is not enforceable as it fell outside the reasonable expectation of the Plaintiff and it is oppressive or unconscionable under applicable principals [sic] of equity." The

circuit court cited Arnold v. United Companies Lending Corporation, 511 S.E.2d 854 (W.Va. 1998), and noted that the West Virginia Supreme Court has held that a consumer sales adhesion contract, which contained an arbitration provision, was unconscionable, contrary to public policy, and manifestly unfair to consumers because it denied consumers access to the courts. Pursuant to KRS 417.220, Palm Harbor appealed the April 18, 2001, order to this Court.

Palm Harbor and Chase argue the Campbell Circuit Court should have enforced the July 28, 2000, arbitration agreement because an arbitration agreement does not have to be contained within, or executed contemporaneously with, the contract that it governs; and that arbitration agreements contained in or referenced in consumer sales contracts which are standardized or adhesion contracts are not inherently unconscionable and are enforceable under the provisions of KRS Chapter 417, the Uniform Arbitration Act. We will address each argument in turn.

When reviewing a trial court's ruling regarding a KRS 417.060 proceeding, we use the usual standards of appellate review. Thus, when reviewing a lower court's factual findings, we use the clearly erroneous standard. However, when reviewing a trial court's application of contract law, we need not defer to the lower court and use the *de novo* standard of review.

On appeal, Palm Harbor and Chase argue that the Campbell Circuit Court erred as a matter of law by not enforcing the arbitration agreement, pursuant to KRS Chapter 417, because the arbitration agreement was not required to be contained within

the consumer sales contract nor was it required to be signed and executed contemporaneously with the underlying consumer sales contract. However, Morgan argues that the second arbitration agreement, which was signed one day after the third contract, was rescinded along with the third contract when Morgan and Palm Harbor signed the fourth contract on August 30, 2000. According to Morgan, since she did not sign another arbitration agreement when she entered into the fourth contract, she was not obligated to submit her claims to arbitration.

Palm Harbor and Chase point out that the August 30, 2000, contract contained the following language:

> NOTE: SEE THE "ARBITRATION PROVISION AND AGREEMENT" WHICH IS PART OF THIS TRANSACTION.

According to Palm Harbor, this language incorporates by reference the July 28, 2000, arbitration agreement. Palm Harbor argues that no authority exists that requires that a separate arbitration agreement which is incorporated by a consumer sales contract be executed contemporaneously with the sales contract. Palm Harbor cites Bartelt Aviation, Inc. v. Dry Lake Coal Co., Ky. App., 682 S.W.2d 796, 798 (1985) and Home Lumber Co. v. Appalachian Regional Hospitals, Inc., Ky. App., 722 S.W.2d 912, 915 (1987), and argues that specific language is not required to incorporate by reference a separate arbitration agreement as long as direct language exists in the contract that conveys the parties' acceptance of the arbitration agreement. Palm Harbor contends that the above-mentioned language found in the fourth contract, as well as in the three prior contracts, clearly incorporates the arbitration agreement executed on July 28, 2000,

and clearly conveys Morgan's acceptance of that arbitration agreement. Further, Palm Harbor contends that Morgan did not prove, in fact did not try to prove, that either party took any affirmative action to rescind the arbitration agreement. Palm Harbor cites Conservative Life Insurance Co. v. Hutchinson, 244 Ky. 746, 751, 52 S.W.2d 709, 711 (1932), and argues that a party cannot implicitly rescind a contract. Therefore, the arbitration agreement survived the rescission of the third contract and the circuit court should have enforced it pursuant to KRS 417.060. We agree.

Palm Harbor and Chase also argue that the Campbell Circuit Court erred by not enforcing the arbitration agreement because neither a consumer transaction nor an arbitration agreement are inherently unconscionable just because they were memorialized by standardized or adhesion contracts. Palm Harbor cites Conseco Financial Servicing Corp. v. Wilder, Ky App., 47 S.W.3d 335 (2001), and maintains that, since adhesion contracts are not inherently unconscionable, the July 28, 2000, arbitration agreement, which was a standardized contract, should have been enforced by the Campbell Circuit Court pursuant to KRS 417.060. Furthermore, Palm Harbor argues, the Consumer Protection Act, KRS Chapter 367, does not limit the Uniform Arbitration Act, KRS Chapter 417. We agree.

We find that Conseco Financial Servicing Corp. v. Wilder, supra, is most directly on point with the present case. The facts in Conseco are as follows: In 1995, the appellees, the Wilders, entered into a contract to purchase a mobile home from Southern Living Housing, Inc., who assigned the contract to Green

Tree Financial Servicing Corporation who in turn was the predecessor to Conseco. After Southern Living delivered and installed the mobile home, the Wilders began to complain to Southern Living, Green Tree and Conseco that the mobile home had numerous manufacturing and installation defects. After several months of complaining, the Wilders ceased making their monthly payments. In 1997, Conseco filed suit against the Wilders for breach of the contract and repossessed the mobile home. Id. at 337.

In 1999, the Wilders filed suit against all three companies seeking to rescind the purchase contract and accusing all three companies with breach of warranties and violations of the Kentucky Consumer Protection Act, KRS Chapter 367. Conseco responded by filing a motion to stay the proceeding and to compel arbitration pursuant to an arbitration agreement found in the purchase contract. However, the trial court denied Conseco's motion because it had found the arbitration clause, which was contained in an adhesion contract, to be unconscionable. Conseco appealed to this Court.

First, this Court found that the Kentucky Consumer Protection Act did not create an exception nor place a limit on the Uniform Arbitration Act and found that the Wilders' claims were within the scope of the arbitration provision and arbitration would be compelled unless the arbitration provision was unconscionable thus unenforceable. Id. at 341. Second, this Court noted that, pursuant to KRS 417.050, an arbitration agreement could only be avoided, "upon such grounds as exist at law or in equity for the revocation of any contract." Third,

this Court explained that a contract that was duly executed by parties, who had the opportunity to read the contract, would be enforced except for fraud in the inducement or for being unconscionable. Id.

This Court explained that an unconscionable contract was one that was one-sided, oppressive, and unfairly surprising; in other words, an unconscionable contract was one that no person, in his or her right mind, would make or accept. Id. at 341-342. The Wilders argued that the contract they entered was unconscionable because it was an adhesion contract and because the arbitration provision reserved the right to Conseco to litigate certain claims in court while the Wilders had to resolve all of their claims by arbitration. Id.

This Court defined an adhesion contract as "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." Id. (citation omitted). This Court then stated:

> Even if the Wilders' contract is properly characterized as an adhesive one, we agree with these latter cases that the inclusion of the arbitration clause was not abusive or unfair. The clause was not concealed or disguised within the form; its provisions are clearly stated such that purchasers of ordinary experience and education are likely to be able to understand it, at least in its general import; and its effect is not such as to alter the principal bargain in an extreme or surprising way. The Wilders do not deny, moreover, that they had an opportunity to read it. The manner of making this portion of the contract, therefore, does not provide any ground for not enforcing it.

> Nor does the substance of the clause provide such a ground. We note initially that there is no inherent reason to require that the parties have equal arbitration rights. The principal consideration sought by the Wilders--financing and the mobile home--is sufficient to support their ancillary agreement to arbitrate disputes and to except certain claims by Conseco from the arbitration clause. The exceptions, moreover, are not unreasonable. Arbitration is meant to provide for expedited resolution of disputes, but the claims the agreement permits Conseco to litigate--basically claims asserting its security interest--may be litigated expeditiously. . . . It does not strike us as unreasonable, much less oppressive, to forego arbitration of such claims.

Conseco Finance Servicing Corp., 47 S.W.3d at 343 (citations omitted).

In the present case, the Campbell Circuit Court found that the arbitration agreement, as well as the purchase contract, was an adhesion contract where the parties had disparate bargaining powers; thus, it was unconscionable and unenforceable. However, according to Conseco, adhesion contracts are not *per se* improper; thus, the Campbell Circuit Court erred as a matter of law when it vacated its order to compel arbitration and found that the arbitration agreement was unconscionable simply because it was an adhesion contract.

Therefore, we reverse the Campbell Circuit Court's April 18, 2001, order and remand with instructions for the Campbell Circuit Court to enter an order to stay the pending litigation and to compel Morgan to submit her claims to arbitration in accordance with the July 28, 2000, arbitration agreement.

ALL CONCUR.

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