RENDERED: December 31, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002545-MR

HOMES OF LEGEND, INC. — APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 01-CI-00023

PHAEDRA SPRADLIN, TRUSTEE FOR THE BANKRUPTCY ESTATE OF WILLIAM CRUM AND MINNIE CRUM; WILLIAM AND MINNIE CRUM; AND DYNEX FINANCIAL, INC. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BAKER, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Homes of Legend, Inc., filed this interlocutory appeal from an order denying a motion to compel arbitration in the action of Phaedra Spradlin, Trustee of the bankruptcy estate of William and Minnie Crum for breach of warranty. Homes of Legend argues that the Clay Circuit Court abused its discretion by denying its motion to compel arbitration, claiming that the Crums had agreed to arbitration in the warranty contract and

that therefore the Trustee is bound by the provisions of the contract. We affirm.

The Crums filed this action prior to filing for bankruptcy protection. Once the bankruptcy action commenced, the right to prosecute this action passed to their estate in bankruptcy, and the trustee retained counsel to pursue the action in the name of the estate. The Crums had purchased a manufactured home from Homes of Legend in 1998, and in January 2001 filed this action alleging defects in the home, breach of warranty, breach of contract, and violation of the Kentucky Retail Installment Sales Act, KRS 371.220(5). The Crums had filed a formal complaint with the Department of Housing, Buildings, and Construction alleging severe defects and imminent safety hazards. The Department ordered the seller, Cecil's Mobile Homes, to inspect and repair the mobile home, but the Crums allege that the inspection and repairs were never performed, necessitating this action. The Crums filed bankruptcy in November 2001, and in February 2002 the estate approved the Trustee's application to hire counsel to prosecute this action. According to the Trustee, the Trustee has obtained default judgment against Cecil's Mobile Homes, sought and received discovery from the remaining defendants including Homes of Legend, and entered into settlement negotiations. Homes of Legend moved to compel arbitration in November of 2002, which

motion was denied by the circuit court. The question of the enforceability of the arbitration clause in the contract is the only one before this court on this interlocutory appeal.

Homes of Legend first argues that the Federal Arbitration Act, 9 U.S.C. 1 et seq., applies to this matter. We agree that the FAA does apply to this case, as the threshold question is whether the transaction substantially affects interstate commerce. As Homes of Legend is a foreign corporation dealing with a Kentucky buyer, and the transaction cannot be said to be wholly internal to Kentucky, we conclude that interstate commerce is affected and therefore the FAA applies. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

Under the FAA, Homes of Legend argues that the FAA provides that a "written provision . . . in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Therefore, the arbitration provision is valid unless there is a reason at law or in equity for its revocation. We conclude that there is not.

The Trustee argues that Homes of Legend waived its right to arbitration. We disagree. It appears from the record that even though this action has been pending for over two years, much of this time the action was in abeyance due to the bankruptcy claim of the Crums. In February 2002, the Trustee obtained permission to hire counsel to prosecute this action, and in November 2002 Homes of Legend's motion to compel arbitration was denied. Between those two dates, the Trustee served Homes of Legend with discovery requests on September 9, 2002. The motion to stay discovery and compel arbitration was filed in response to the discovery requests. The record does not indicate a specific act of waiver of Homes of Legend's right to arbitrate this matter. We therefore conclude that Homes of Legend did not waive its right to enforce the arbitration provision.

Homes of Legend asserts, correctly, that an arbitration provision need not be separately consented to in order to be valid, citing several cases in support. The Trustee, also correctly, distinguishes each one on the grounds that the party seeking to avoid arbitration in those cases had received benefits under another part of the agreement or had in some other way acted to ratify the agreement. For example, in First Citizens Municipal Corp. v. Pershing Div. Of Donaldson, Lufkin & Jenrette Sec. Corp., 546 F.Supp. 884 (N.D. Ga. 1982),

an unsigned arbitration agreement was enforced based on the course of dealing the parties had adopted and the fact that the party attempting to avoid arbitration had reviewed the document because the party was following the fee schedule contained in the document. Likewise, in Hill v. Gateway 2000, Inc., 105 F.3d. 1147 (7th Cir. 1997), the buyer was made aware before purchasing a computer that the package in which the computer arrived contained documents affecting their rights, including an agreement to arbitrate disputes. Based on this notice, the court concluded the arbitration agreement was enforceable.

The Trustee asserts that there is no evidence that the Crums consented to arbitration, as the Limited One-Year Warranty containing the provision was unsigned and no evidence exists that the Crums were aware of the provision. Further, the Trustee asserts, there has been no ratification of the warranty agreement, because the Crums have accepted no benefits under the agreement. The Trustee also notes that the warranty in question was not part of the purchase agreement, and the purchase agreement was already executed and the warranty was delivered only with the manufactured home. Therefore, the Trustee concludes, the Crums never had an opportunity to bargain for the warranty's provisions, and the warranty cannot be part of the bargain. Citing Buck Run Baptist Church, Inc. v. Cumberland Surety Ins. Co., Inc., Ky., 983 S.W.2d 501, 504, the Trustee

states that the Kentucky Supreme Court has acknowledged "a significant difference between an adhesion contract in which the parties have disparate bargaining power and a contract which voluntarily has been entered into by sophisticated and knowledgeable businessmen concerning a financial transaction of considerable magnitude." We agree from the evidence before us and the authorities submitted to the Court that the Crums indeed have a valid reason to avoid the contract – that they never consented to that portion of the contract, and therefore Homes of Legend may not enforce the arbitration provision.

Homes of Legend cites the case of Southern Energy Homes, Inc. v. Ard, 772 So.2d 1131, 1132-33 (Ala. 2000) in support of the proposition that a party seeking to avoid arbitration yet enforce other portions of the contract may not pick and choose which portions to enforce. On the contrary, we view the Ard case as another case in which the party attempting to avoid arbitration had accepted benefits under the agreement and therefore ratified it. The Crums received no benefit at all under the warranty. We do not find any authority supporting the proposition that a party receiving no benefit under an unsigned and unacknowledged document is bound to arbitration. We therefore affirm the decision of the Clay Circuit Court.

The judgment of the Clay Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE PHAEDRA SPRADLIN, TRUSTEE FOR THE BANKRUPTCY ESTATE OF WILLIAM CRUM AND MINNIE CRUM:

John O. Morgan, Jr.
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NO BRIEF FOR APPELLEES WILLIAM AND MINNIE CRUM

NO BRIEF FOR APPELLEE DYNEX FINANCIAL, INC.