

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002239-MR

GREEN TREE SERVICING, LLC
f/k/a CONSECO FINANCE SERVICING
CORP., f/k/a GREEN TREE FINANCIAL
SERVICING CORPORATION

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 01-CI-00533

PAM PHELPS and
SCOTT PHELPS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Green Tree Servicing, LLC (“Green Tree”) appeals from the Pulaski Circuit Court’s November 13, 2009, order denying Green Tree’s motion to compel arbitration between themselves and Pam and Scott Phelps.

¹ Senior Judge Ann O’Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Because we hold that Green Tree has previously waived its right to arbitration, we affirm.

This matter is before this Court for a second time. The underlying action is a foreclosure proceeding initiated by Green Tree against the Phelps via a complaint filed on May 21, 2001. In response to the complaint filed against them, the Phelps filed an answer and counterclaim against Green Tree on September 24, 2004, alleging intentional infliction of emotional distress, loss of business advantage, and violation of the Federal Debt Collections Practice Act (FDCPA). On October 13, 2004, Green Tree filed a motion to strike the Phelps' counterclaim and that motion was subsequently denied. Thereafter, on May 31, 2005, Green Tree filed a motion to compel arbitration, pursuant to language found in the original mortgage note between the parties. The motion was denied and Green Tree appealed to this Court on August 10, 2005.²

On March 2, 2007, this Court rendered an opinion affirming the trial court's denial of Green Tree's motion to compel arbitration. In support of that holding, the Court concluded that Green Tree's four-year delay in moving to compel arbitration effectively waived any rights to arbitration. The Court noted that the Phelps had already expended considerable time and expense litigating the action. It was further opined that Green Tree was equitably estopped from enforcing its arbitration rights because litigation had proceeded to the extent that to remove the matter to another forum would be unfairly prejudicial to the Phelps.

² *See Green Tree Servicing, LLC v. Phelps*, 2005-CA-001666-MR, 2007 WL 625077 (Ky. App. Mar. 2, 2007).

In response to the holding of this Court, Green Tree filed a petition for rehearing, which was summarily denied. Green Tree then filed a motion for discretionary review with the Supreme Court of Kentucky, which was also denied. The matter progressed in the trial court and on March 23, 2009, Green Tree received a judgment and order of sale dismissing the Phelps' FDCPA claim, but denying the dismissal of the remaining counterclaims. On September 30, 2009, the Phelps received leave to file a supplemental counterclaim and third party complaint. The supplemental counterclaim alleges that the subject property was damaged by inclement weather and that Green Tree was negligent in its choice of the force-placed insurance provider on the property. In response to the supplemental counterclaim, Green Tree filed a motion to compel arbitration on the theory that the new counterclaim was unrelated to the original and therefore revived the arbitration clause found in the agreement between the parties. The trial court denied the motion to compel arbitration and this appeal followed.

Interlocutory appeals of a trial court's ruling on a motion to compel arbitration are appropriate as a matter of right. *See* KRS 417.220(1)(a); *Valley Contr. Co. v. Perry Host Mgmt. Co.*, 796 S.W.2d 365, 366 (Ky.App. 1990). A trial court's arbitration decision is reviewed *de novo* by this Court, except that findings of fact are reviewed only for clear error. *Conseco v. Wilder*, 47 S.W.3d 335, 340 (Ky.App. 2001).

Green Tree's argument on appeal is the same which was presented to the trial court: the Phelps' supplemental counterclaim revived the arbitration

clause in the note. As the main source of support for its argument, Green Tree cites to *Envirex, Inc. v. K.H. Schussler Fur Umwelttechnik GMBH*, 832 F. Supp. 1293, 1297 (E.D. Wis. 1993). The relevant facts of *Envirex* are as follows: plaintiff *Envirex* filed an indemnity action against defendant *K.H. Schussler*. After multiple delays in the court proceedings, at the behest of both parties, plaintiff filed an amended complaint and a second amended complaint. In response to the second amended complaint, defendant moved to stay proceedings in favor of arbitration.

We first note that as an opinion of the United States District Court for the Eastern District of Wisconsin, *Envirex* is not binding on this Court. Moreover, the facts of *Envirex* are distinguishable from those before us. Whereas the court in *Envirex* found that the party seeking arbitration had not waived its right to such, this Court has previously determined that Green Tree waived its right to arbitration and was therefore not entitled to such. Green Tree has failed to show how their original delay in seeking arbitration has been reduced by the Phelps' counterclaim or that the inequity no longer remains. The legal analysis and application in our Mar. 2, 2007, opinion is sound and we are bound by the law of the case.³

For the foregoing reasons, the November 13, 2009, order of the Pulaski Circuit Court is affirmed.

³ The law of the case doctrine is “an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.” *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956).

ALL CONCUR.

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