

RENDERED: AUGUST 24, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000389-MR

GREEN TREE SERVICING, LLC,
SUCCESSOR IN INTEREST TO BANKAMERICA
HOUSING SERVICES, A DIVISION OF
BANK OF AMERICA, FSB

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 10-CI-00448

DENNIS SELBY AND
DENISHIA R. SELBY

APPELLEES

OPINION REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON, COMBS, AND NICKELL, JUDGES.

COMBS, JUDGE: Green Tree Servicing, LLC, (“Green Tree”) appeals from
an order of the Russell Circuit Court denying its motion to compel arbitration.

After our review, we reverse and remand.

In January 1998, the appellees, Dennis and Denishia Selby, entered into an agreement to purchase a mobile home from Supreme Housing, Inc., in Somerset, Kentucky. BankAmerica Housing Services, a Division of Bank of America, FSB, extended the credit necessary for the purchase and retained a security interest in the mobile home. Green Tree is successor in interest to BankAmerica Housing Services. After several years, the Selbys defaulted on the loan.

On August 4, 2010, Green Tree filed an action for replevin in Russell Circuit Court. Attached to the complaint were a copy of the retail installment contract and a copy of the security agreement executed by the Selbys. The agreement included an arbitration provision.

By September 9, the Selbys had not yet been served, and Green Tree requested that a warning order attorney be appointed by the court. A report describing his unsuccessful attempts to communicate with the Selbys was filed by the warning order attorney on October 25, 2010.

On November 4, 2010, Green Tree filed a motion for default judgment. It also requested an order of possession.

On November 8, 2010, the Selbys answered the complaint and filed a counterclaim, alleging, *inter alia*, that Green Tree had violated the Fair Debt Collection Practices Act. Ten days later, Green Tree filed a motion requesting that the matter be referred to arbitration pursuant to the parties' agreement.

The Selbys resisted arbitration and filed a memorandum in response to Green Tree's motion. In their memorandum, the Selbys contended that Green Tree

had failed to prove that they were compelled to resolve the dispute through arbitration. They primarily argued that Green Tree's initial election to litigate the matter precluded its subsequent request for arbitration.

The court order denied Green Tree's motion on January 31, 2011. This appeal followed.

On appeal, Green Tree contends that the trial court erred by failing to compel arbitration. It contends that the parties' contract contains a valid arbitration clause and that it did not waive its right to compel arbitration by filing the replevin action. The Selbys contend that the circuit court's order must be affirmed since Green Tree initiated the litigation and proceeded to such an extent that its waiver of the arbitration provision must be inferred from its course of conduct.

The arbitration clause is a material term of the parties' agreement and is subject to waiver. *Jackson v. Mackin*, 277 S.W.3d 626 (Ky. App. 2009) *citing* *Valley Constr. Co., Inc., v. Perry Host Mgmt. Co., Inc.*, 796 S.W.2d 365 (Ky. App. 1990). While waiver is not lightly inferred, participation in a judicial proceeding may constitute a waiver of the right to arbitration. *Id.* Questions of whether such a waiver has occurred must be resolved by the court. *American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543 (Ky. 2008).

The circuit court concluded that Green Tree was not entitled to arbitration in this matter. However, it gave no explanation for its decision. Our review of its legal conclusion is *de novo*. *Id.*

Although the underlying action was filed in August 2010, the Selbys did not file an answer until November. Approximately ten days later, Green Tree filed its motion requesting a referral to arbitration.

No discovery was ever filed in the action. As soon as the Selbys had responded, Green Tree promptly filed its motion asserting its right to arbitration. Having carefully reviewed the record, we cannot conclude that Green Tree's conduct throughout the limited period of litigation was clearly inconsistent with an intent to seek arbitration. *See American General Home Equity, Inc., supra.* Moreover, there is no indication that the litigation activity that occurred "was for the purpose of gaining or had the effect of conferring any tactical advantage" over the Selbys' defenses and counterclaims. *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 345 (Ky. App. 2001). Consequently, we conclude that the circuit court erred by inferring that Green Tree had necessarily waived its rights under the arbitration clause.

We reverse the order of the Russell Circuit Court remand this case for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kembra Sexton Taylor
Frankfort, Kentucky

BRIEF FOR APPELLEES:

Robert L. Bertram
Jamestown, Kentucky