STATE OF MICHIGAN

COURT OF APPEALS

ROBERT A. BURGHER and DONNA B. BURGHER, Plaintiffs-Appellants, v ROGER DANSEY AND SALLY DANSEY, Defendants, and PULTE HOMES OF MICHIGAN CORPORATION Defendant-Appellee.	UNPUBLISHED April 20, 2004 No. 242462 Oakland Circuit Court LC No. 2001-032547-NZ

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

Plaintiffs Robert and Donna Burgher appeal by leave granted the trial court's order granting defendant Pulte Homes of Michigan Corporation's motion for summary disposition pursuant to MCR 2.116(C)(7). Plaintiffs purchased their home from defendants Roger and Sally Dansey, and plaintiffs say they discovered serious drainage problems in the home. Plaintiffs filed suit against defendants and alleged fraud, misrepresentation, negligence, and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* The trial court ruled that plaintiffs were required to arbitrate this case pursuant to an arbitration clause contained in a limited home warranty and purchase agreement[1] between Pulte Homes and the Danseys.[2] We affirm.

[1] The limited warranty stated, in relevant part, that "[a]ll disputes, claims or controversies concerning your home which cannot be resolved between Pulte and you shall be submitted to the Claims Administrator, Residential Warranty Corporation . . . . The findings of the Claims Administrator's report will be binding on you and Pulte unless you choose to file a timely claim for arbitration as described below. . . . In such an event, disputes shall be submitted for binding
(continued…)

"'We review a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law." *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 244-245; 673 NW2d 805 (2003), quoting *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 496; 591 NW2d 364 (1998). In reviewing such motions, we accept as true the well-pleaded allegations of the nonmoving party, and construe them in its favor. *Id.* at 245. It is further necessary for this Court to consider the "pleadings, affidavits, depositions, admissions, and documentary evidence filed or submitted by the parties to determine whether the claim is barred by law." *Id.*, citing MCR 2.116(G)(5).

The use of arbitration "as an inexpensive and expeditious" method for resolving disputes is "strongly endorsed" by the law and public policy of this state, and this Court will generally uphold valid predispute agreements to submit arbitration. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 127-133; 596 NW2d 208 (1999). The party challenging arbitrability of a claim has the burden of showing it is not arbitrable, and doubts are to be resolved in favor of arbitration. *Id.* at 129. However, "'a party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration . . . [and] a party cannot be required to arbitrate when it is not legally or factually a party to the agreement.'" *Hetrick v David A Friedman, DPM, PC*, 237 Mich App 264, 267; 602 NW2d 603 (1999). A third-party beneficiary to a contract may enforce a contract where the contract is made for the direct benefit of the third-party beneficiary. MCL 600.1405; *Koenig v City of South Haven*, 460 Mich 667, 676; 597 NW2d 99 (1999).

Plaintiffs claim that the trial court erred in granting summary disposition in favor of defendant because they were not parties to the original purchase agreement that required arbitration of disputes. We disagree. It is undisputed that plaintiffs did not sign the purchase agreement containing the arbitration clause. But this is not dispositive on the question of whether plaintiffs are bound by the arbitration provision of the purchase agreement. "[N]onsignatories may be bound to an arbitration agreement under ordinary contract and agency principles." *Javitch v First Union Securities*, 315 F3d 619, 629 (CA 6, 2003).[3]

> Five theories for binding nonsignatories to arbitration agreements have been recognized: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-

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arbitration . . . ." The purchase agreement stated, in relevant part, "LIMITATION OF LIABILITY. IT IS UNDERSTOOD AND AGREED THAT [PULTE]'S LIABILITY WHETHER IN CONTRACT, IN TORT, UNDER ANY WARRANTY, IN NEGLIGENCE OR OTHERWISE IS LIMITED TO THE REMEDY PROVIDED IN [PULTE]'S LIMITED NEW HOME WARRANTY." (emphasis in the original.)

[2] The Danseys were voluntarily dismissed from this action and are not parties to this appeal. Any further reference to "defendant" will refer solely to Pulte Homes.

[3] While decisions of a federal circuit court are not binding on this Court, they can be persuasive authority. See *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 268; 671 NW2d 125 (2003).

> piercing/alter ego, and (5) estoppel. *Thomson-CSF v Am Arbitration Ass'n*, 64 F3d 773, 776 (CA 2, 1995).
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> The court in *Thomson* held that a nonsignatory may be bound to an arbitration agreement under an estoppel theory when the nonsignatory seeks a *direct* benefit from the contract while disavowing the arbitration provision. *Id*. at 778-79. When only an indirect benefit is sought, however, it is only a signatory that may be estopped from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the underlying contract. *Id*. at 779. *See Int'l Paper Co v Schwabedissen Maschinen & Anlagen*, 206 F3d 411, 418 (CA 4, 2000) (nonsignatory asserting breach of contract and breach of contract claims under the contract could not avoid the arbitration agreement in the contract). [*Javitch*, *supra* at 629 (emphasis in the original).]

We agree with defendant that plaintiffs are bound by the arbitration clause because they sought a direct benefit under the limited warranty provision of the contract. Both the purchase contract and the limited warranty contain clauses that require disputes to be submitted to arbitration. The provision includes language extending the warranty "to the original purchaser of the home and to all subsequent owners who take title within the warranty periods identified below and use the home for their residence only." Furthermore, the rights of a third-party beneficiary seeking to enforce a contract made for its benefit are subject to the limitations and conditions of the contract. MCL 600.1405(2)(a). Plaintiffs do not argue that they are not third-party beneficiaries of the contract and limited warranty between defendant and the Danseys. Instead, they argue that they have never sought to enforce the contract, and therefore, cannot be bound by its limitations. Plaintiffs further argue that they were not even aware of the existence of the limited warranty until well after the litigation commenced. However, neither the trial court nor we are persuaded by these arguments for several reasons. First, plaintiffs contacted defendant, expecting defendant to fix the flooding problems in the basement, and would not reasonably have expected defendant to do so in the absence of any contractual duty. Second, one of plaintiffs' theories is that defendant owes a duty to plaintiffs arising out of the contractual duty of defendant to the Danseys. Third, despite their professed ignorance of the limited warranty, plaintiffs' original complaint and their first and second amended complaints contain an allegation that defendant violated the Michigan Consumer Protection Act, MCL 445.901 *et seq*., because it had failed to "provide the promised benefits which Defendant expressly and/or impliedly warranted Plaintiffs would receive." If plaintiffs, in fact, did not seek to enforce the contract and had no notice of the limited warranty, then plaintiffs could not reasonably have considered themselves consumers of defendant's services and entitled to these warranties.

Summary disposition is also appropriate under an estoppel theory. See *Javitch*, *supra* at 629. The trial court concluded that plaintiffs "sought service covered by the warranty" and that "Defendant provided service." We agree with the trial court. Paragraph 22 of the purchase agreement states: "seller's liability whether in contract, in tort, under any warranty, in negligence or otherwise is limited to the remedy provided in seller's limited new home warranty." The limited warranty states that it "is provided to the original purchaser of the home and to all subsequent owners who take title within the warranty periods identified . . . and use the home for their residence only." In a limitation of liability section, the warranty states, "it is understood

and agreed that Pulte's liability under this warranty whether in contract, in tort, in negligence or otherwise is limited to the remedy provided in this limited warranty." It states further that, "[a]ll disputes, claims or controversies concerning your home which cannot be resolved between Pulte and you shall be submitted to the Claims Administrator." If the homeowner disagrees with the investigation following the submission of the dispute to the claims administrator, it must give notice to the claims administrator, and the dispute "shall be submitted for binding arbitration."

For these reasons, we hold that the trial court properly granted summary disposition in favor of defendant Pulte Homes because plaintiffs' remedy is to adjudicate their differences through binding arbitration.[4]

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly

[4] We do not address the parties' arguments concerning the merits of plaintiffs' claims for fraud, misrepresentation, negligence, and violation of the MCPA, because these issues were not addressed or decided by the trial court. *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 297-298; 618 NW2d 98 (2000); *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996).