[Cite as *River Oaks v. Krann*, 2009-Ohio-5208.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

RIVER OAKS HOMES, INC., et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2008-L-166**
-vs-	:	
JOHN KRANN, et al.,	:	
Defendants-Appellees,	:	
(CARL P. KASUNIC, et al.,	:	
Appellees).	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 001314.

Judgment: Affirmed.

Harold Pollock, Harold Pollock Co., L.P.A., 5900 Harper Road, #107, Solon, OH 44139 (For Plaintiffs-Appellants).

Carl P. Kasunic and *Matthew W. Weeks*, Carl P. Kasunic Co., L.P.A., 38033 Euclid Avenue, #1, Willoughby, OH 44094-6101 (For Appellees, John and Sherrie Krann).

David A. Freeburg, McFadden & Freeburg Co., L.P.A., 1370 Ontario Street, #600, Cleveland, OH 44113 (For Appellee, Antoinette Freeburg).

Carole A. Lohr, Law Office of Carole A. Lohr, 410 Skylight Office Tower, 1660 West Second Street, Cleveland, OH 44113 (For Appellees, Carl P. Kasunic and Carl P. Kasunic Co., L.P.A.).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellants, River Oaks Homes, Inc. and Taylor Sophia Land, LLC, appeal from the November 6, 2008 judgment entry of the Lake County Court of Common Pleas,

in which the trial court, inter alia, stayed the case pending completion of arbitration proceedings.

{¶2} On April 18, 2008, appellants filed a complaint against appellees John and Sherrie Krann ("the Kranns"), asserting claims for specific performance, breach of contract, breach of covenant of good faith and fair dealing, fraud and misrepresentation, and injunctive relief, with respect to the construction of a residence.[1] Appellants allege that the parties entered into a purchase agreement on February 27, 2008.[2] The Kranns filed an answer and counterclaim on June 23, 2008, denying appellants' allegations, asking for declaratory relief that no contract existed, and requesting that the case be referred to arbitration should a contract be found to exist.

{¶3} On June 27, 2008, appellants filed a motion to compel discovery and for sanctions. The Kranns filed a brief in opposition on July 7, 2008. On July 8, 2008, appellants filed a reply to the Kranns' counterclaim.

{¶4} The trial court held a telephonic conference on July 9, 2008 to address discovery issues.

{¶5} Pursuant to its July 11, 2008 judgment entry, the trial court granted the Kranns' motion for leave, granted in part appellants' motion to compel, and denied appellants'

{¶6} motion for sanctions.

1. The instant matter stems from negotiations in September of 2007 between the Kranns and appellants for the purchase of a lot and the construction of a house in Lake County, Ohio. Appellant River Oaks Homes, Inc. is an Ohio corporation which is engaged in the business of building single family homes. Appellant Taylor Sophia Land, LLC is an Ohio limited liability company and affiliate of River Oaks Homes, Inc., which acquires land for development. Appellees John and Sherrie Krann are husband and wife. Appellants referred the Kranns to Robert Riebe, a mortgage broker, to obtain financing for the purchase.

2. Only appellee John Krann signed the document.

{¶7} On August 5, 2008, appellants filed a motion for temporary restraining order prohibiting the Kranns' daughter, Nora Krann, from leaving the jurisdiction until her deposition was completed, a motion to compel the attendance of Nora Krann at deposition, and a motion to show cause why the Kranns should not be held in contempt of court and for sanctions.[3] The motions were denied by the trial court pursuant to its August 6, 2008 judgment entry.

{¶8} On August 15, 2008, appellants served a subpoena on Antoinette Freeburg ("Attorney Freeburg"), seeking deposition testimony and all documents pertaining to her representation of the Kranns in their 2005 bankruptcy. Attorney Freeburg had previously represented the Kranns in their Chapter 7 bankruptcy while working at the law firm of Carl P. Kasunic, Co., L.P.A. ("the firm"). Attorney Freeburg is no longer an associate at the firm. Carl P. Kasunic ("Attorney Kasunic") is representing the Kranns in the instant case, but was not involved in the Kranns' bankruptcy case. Appellants also served subpoenas for the deposition testimony of Attorney Kasunic and for all documents pertaining to the firm and Attorney Kasunic's alleged representation of the Kranns in their bankruptcy matter.

{¶9} On August 18, 2008, the Kranns filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C) and to dismiss pursuant to Civ.R. 12(B)(6), which included a request for the matter to be referred to arbitration.

{¶10} On August 19, 2008, Attorney Freeburg filed a motion to quash subpoena, indicating that an attorney cannot be called to testify regarding attorney-client privileged

3. The Kranns' current residence, ("the Oxford property"), was titled in the name of Nora Krann. In 2005, the Kranns filed for bankruptcy and disclosed to the bankruptcy trustee that they were paying the mortgage on the Oxford property as rent to their daughter.

communications with his or her clients and that the requested documents were protected by the work product doctrine.

{¶11} On August 21, 2008, Attorney Kasunic and the firm filed a motion to quash subpoenas and for a protective order.

{¶12} On August 25, 2008, appellants filed a motion for order directing immediate depositions of Nora Krann, Attorney Kasunic, and Attorney Freeburg; a motion to show cause why the Kranns and their counsel should not be held in contempt of court; a motion for sanctions; a motion to disqualify Attorney Kasunic; briefs in opposition to Attorney Freeburg's and Attorney Kasunic's motions to quash subpoena; and a motion to convert the Kranns' motion for judgment on the pleadings and motion to dismiss to a motion for summary judgment and for an enlargement of time.

{¶13} On September 8, 2008, the Kranns filed an opposition to appellants' motion to convert their motion for judgment on the pleadings and motion to dismiss to a motion for summary judgment and motion for an enlargement of time to respond; a response to appellants' motion to show cause and motion for sanctions; and an opposition to appellants' motion to disqualify their counsel.

{¶14} On September 24, 2008, appellants filed a motion for leave to amend the complaint.

{¶15} On September 25, 2008, Attorney Freeburg filed a reply to the opposition to the motion to quash subpoena.

{¶16} On October 9, 2008, the Kranns filed an opposition to appellants' motion to amend the complaint.

{¶17} A hearing on pending motions was held before the trial court on October 10, 2008.

{¶18} On October 14, 2008, appellants filed a response to the Kranns' request for arbitration. On October 24, 2008, the Kranns filed a reply.

{¶19} Pursuant to its November 6, 2008 judgment entry, the trial court granted the motions to quash the subpoenas of Attorney Freeburg, Attorney Kasunic, and the firm; denied appellants' motions for extension of time, for order directing immediate deposition, to show cause, for sanctions, to disqualify, to convert motion for judgment on the pleadings, and to amend the complaint; and granted the Kranns' request for arbitration, staying the matter pending completion of arbitration proceedings. It is from that judgment that appellants filed a timely notice of appeal, asserting the following assignments of error for our review:

{¶20} "[1.] THE TRIAL COURT ERRED IN ORDERING THIS CASE REFERRED TO ARBITRATION WHERE APPELLEES WAIVED THEIR RIGHT TO ARBITRATE BY FAILING TO TIMELY AND PROPERLY ASSERT SAME.

{¶21} "[2.] THE TRIAL COURT ERRED IN FAILING TO DISQUALIFY KASUNIC CO. AS COUNSEL FOR APPELLEES WHERE KASUNIC CO. IS A NECESSARY WITNESS IN THIS CASE AND NO EXCEPTION UNDER RULE 3.7 APPLIES.

{¶22} "[3.] THE TRIAL COURT ERRED IN GRANTING MOTIONS TO QUASH SUBPOENAS FOR APPELLEES' COUNSEL WHERE APPELLEES' COUNSEL ARE MATERIAL WITNESSES IN THIS CASE WHOSE TESTIMONY CAN BE COMPELLED UNDER THE CRIME-FRAUD EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE.

{¶23} "[4.] THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR LEAVE TO AMEND COMPLAINT WHERE ADEQUATE GROUNDS FOR AMENDMENT WERE PRESENTED."

{¶24} Preliminarily, we must determine whether we have a final appealable order in this matter.

{¶25} This court stated in *Meeker R & D, Inc. v. Evenflo Co*., Inc., 11th Dist. No. 2006-P-0019, 2006-Ohio-3885, at ¶5-7:

{¶26} "It is well-settled that before an appellate court can review an order, it must be final. *Gen. Acc. Ins. Co. v. Inc. Co. of N. America* (1989), 44 Ohio St.3d 17, 20 ***. An appellate court has no jurisdiction if an order is not final. Id.

{¶27} "An appellate court, when determining if a judgment is final, engages in a two-step analysis. First, the court must decide if the order is final within the requirements of R.C. 2505.02. If the court finds that the order complies with R.C. 2505.02 and is in fact final, then the court must take a second step to decide if Civ.R. 54(B) language is required.

{¶28} "R.C. 2505.02(B)(1) and (B)(2) defines a final order as '(a)n order that affects a substantial right in an action that in effect determines the action and prevents a judgment(,)' or '(2) (a)n order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment(.)'" (Parallel citation omitted.)

{¶29} For ease of discussion, we will address appellants' assignments of error out of order.

{¶30} In their second assignment of error, appellants allege that the trial court erred by failing to disqualify the firm as counsel for the Kranns because the firm is a necessary witness in the case and no exception under the Ohio Rules of Professional Conduct 3.7 applies.

{¶31} A trial court's order denying a party's motion to disqualify is not a final appealable order. *Lava Landscaping, Inc. v. Rayco Mfg., Inc.* (Jan. 26, 2000), 9th Dist. No. 2930-M, 2000 Ohio App. LEXIS 176, at 2; *Ryb v. Contemporary Office Prod., Inc.* (Jul. 24, 1997), 8th Dist. No. 71310, 1997 Ohio App. LEXIS 3192, at 8; *Galbreath v. Galbreath* (June 13, 1989), 10th Dist. No. 89AP-103, 1989 Ohio App. LEXIS 2373, at 3.

{¶32} In their third assignment of error, appellants contend that the trial court erred in granting motions to quash subpoenas for the Kranns' counsel since the Kranns' counsel are material witnesses whose testimony can be compelled under the crime-fraud exception to the attorney-client privilege.

{¶33} "*** [S]ince discovery issues are provisional in nature and motions to quash are matters of discovery, motions to quash are provisional in nature[,]" and thus, not final appealable orders. *RDSOR v. Knox Cty. Bd. of Revision*, 5th Dist. No. 05-CA-01, 2005-Ohio-4713, at ¶17; see, also, *In re Smith* (Mar. 20, 1992), 11th Dist. No. 91-A-1602, 1992 Ohio App. LEXIS 1275, at 4-7 (holding that the order overruling the motion to quash the subpoena was an interlocutory order, thus not a final appealable order).

{¶34} In their fourth assignment of error, appellants maintain that the trial court erred in denying their motion for leave to amend the complaint since adequate grounds for amendment were presented.

{¶35} "*** [T]he denial of a motion to amend a complaint to include a new cause of action is analogous to the dismissal of a claim after it has been filed. Unless the judgment contains Civ.R. 54(B) language, it is not a final appealable order. *** Accordingly, this court does not have jurisdiction to consider this claim." *Germ v. Fuerst*, 11th Dist. No. 2003-L-116, 2003-Ohio-6241, at ¶7. (Internal citation omitted.)

{¶36} Here, appellants sought to include new causes of action and add some wording to existing claims. The November 6, 2008 order denying appellants' motion to amend their complaint does not include Civ.R. 54(B) language. Thus, appellants' motion to amend their complaint is not a final appealable order pursuant to *Germ*, supra.

{¶37} Based on the foregoing, appellants' second, third, and fourth assignments of error are not final appealable orders and are dismissed.

{¶38} In their first assignment of error, appellants argue that the trial court erred by referring the matter to arbitration because the Kranns waived their right to arbitrate.

{¶39} An order staying a trial and referring the matter to arbitration is a final appealable order pursuant to R.C. 2711.02(C). *Stewart v. Shearson Lehman Bros., Inc.* (1992), 71 Ohio App.3d 305, 306.

{¶40} Thus, because appellants' first assignment of error is a final appealable order, we will consider it.

{¶41} The standard of review for a trial court's decision to stay proceedings pending arbitration, and whether the right to demand arbitration has been waived, is reviewed under the abuse of discretion standard. See, generally, *Garvin v. Independence Place Condominium Assn.* (Mar. 29, 2002), 11th Dist. No. 2001-L-055,

2002 Ohio App. LEXIS 1491, at 2. An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id. Therefore, "abuse of discretion" describes a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶42} "Historically, it has been the policy of the courts of the state to encourage the use of arbitration as a means of avoiding needless and expensive litigation." *Hacienda Mexican Restaurant of Ohio v. Zadd* (Dec. 10, 1993), 11th Dist. No. 92-L-108, 1993 Ohio App. LEXIS 5923, at 2, citing *Goodyear v. Local Union No. 200* (1975), 42 Ohio St.2d 516. "*** [P]ublic policy favors dispute resolution by arbitration; thus, any doubts in examining a clause providing for dispute resolution by arbitration should be resolved in favor of coverage under the arbitration clause. ***." *Grcar v. Lanmark Homes, Inc.* (June 12, 1992), 11th Dist. No. 91-L-128, 1992 Ohio App. LEXIS 3073, at 3. (Citations omitted.) "*** [W]hen a dispute is subject to arbitration under R.C. 2711.02, the trial court should stay the action rather than dismiss it. ***." Id. at 7. (Citations omitted.)

{¶43} In the case at bar, the February 27, 2008 purchase agreement provides:

{¶44} "**ARBITRATION**

{¶45} "39. If a dispute arises out of or relates to this Agreement or its breach, the parties shall endeavor to settle the dispute first through discussions. If the dispute cannot be settled through direct discussions, the parties shall endeavor to settle the

dispute by mediation under the Construction Industry Mediation Rules of the American Arbitration Association before recourse to arbitration.

{¶46} "40. *** Any controversy or claim which does arise, or which arises out of construction or sale of the new house, condominium, real property improvement thereto, which is the subject of this Agreement and cannot be settled by Purchaser and Seller, shall be settled by arbitration in **Lake County, Ohio ONLY**, at the insistence of either party hereto. Such arbitration is to be in accordance with the Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction."

{¶47} Here, the trial court properly determined that the Kranns did not waive their right to arbitration under the purchase agreement. The prerequisite as to whether the arbitration clause actually controls and whether the Kranns had a right to request arbitration was not established when appellants filed their complaint or when the Kranns filed their answer and counterclaim. The record establishes that the Kranns made it clear from the beginning that they sought arbitration if it were available. Specifically, the Kranns included a request for arbitration in their answer and counterclaim as well as in their motion for judgment on the pleadings, should the trial court have found a binding contract as to either of them. The form of the Kranns' request for arbitration was proper under the facts of this case and R.C. 2711.02(B). The issue of whether the arbitration clause was binding was not determined until the trial court's November 6, 2008 order, staying the case pending completion of arbitration proceedings.

{¶48} The trial court did not abuse its discretion by referring this matter to arbitration.

{¶49} Appellants' first assignment of error is without merit.

{¶50} For the foregoing reasons, appellants' first assignment of error is not well-taken, and their second, third, and fourth assignments of error are dismissed for lack of a final appealable order. The judgment of the Lake County Court of Common Pleas is affirmed. It is ordered that appellants are assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.