[Cite as *Alkenbrack v. Green Tree Servicing, L.L.C.*, 2009-Ohio-6512.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

MICHAEL A. ALKENBRACK,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2009-G-2889**
GREEN TREE, et al,	:	
Defendants,	:	
GREEN TREE SERVICING LLC,	:	
Defendant-Appellant.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 07 P 1191.

Judgment: Reversed and remanded.

James A. Sennett and *Laura A. Reinstein*, Cowden & Humphrey Co., L.P.A., 4600 Euclid Avenue, #400, Cleveland, OH 44103 (For Plaintiff-Appellee).

David J. Demers, Demers & Adams, L.L.C., 3 North High Street, P.O. Box 714, New Albany, OH 43054-0714 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Green Tree Servicing LLC ("Green Tree"), appeals the judgment of the Geauga County Court of Common Pleas, denying its motion to stay proceedings and to compel arbitration and its motion for summary judgment on the claims asserted by appellee, Michael A. Alkenbrack. For the reasons that follow, we reverse and remand.

{¶2} On October 30, 2007, Alkenbrack filed a complaint against Green Tree, alleging fraud and conversion. On November 30, 2007, Green Tree filed an answer denying the material allegations of the complaint and asserting its defenses.

{¶3} The trial court issued a pretrial order, setting the discovery cutoff for June 30, 2008 and the dispositive-motion cutoff for July 30, 2008, and scheduling a pretrial on September 2, 2008. Green Tree filed a motion to extend the dispositive motion cutoff to August 22, 2008 "in order to give [it] an opportunity to depose the Plaintiff and prepare and file a Motion for Summary Judgment." The trial court granted Green Tree's motion.

{¶4} Green Tree took Alkenbrack's deposition on August 1, 2008. He testified he had financed a manufactured home through Green Tree's predecessor-in-interest, Conseco Finance, pursuant to a retail installment contract he signed in May 2000. The contract required him to make monthly payments of $752.71 for 25 years. Alkenbrack filed Chapter 7 Bankruptcy Proceedings in the United States Bankruptcy Court, Northern District of Ohio, and was discharged in bankruptcy in May 2002. In 2003, Green Tree acquired Conseco's assets, including Alkenbrack's account. After his discharge in bankruptcy, Alkenbrack continued to make his monthly payments until November 2005. He believed he had reaffirmed his obligation because Green Tree continued to send him monthly statements after his discharge in bankruptcy. When he attempted to refinance his loan, he discovered his debt had not been reaffirmed. Alkenbrack stopped making payments and moved out of the manufactured home. In his complaint, Alkenbrack sued Green Tree to recover all sums paid on the debt after it had been discharged in bankruptcy.

{¶5} On August 25, 2008, ten months after Alkenbrack filed his complaint, Green Tree filed a motion to stay proceedings and to compel arbitration and, alternatively, a motion for summary judgment on Alkenbrack's claims. Thereafter, Alkenbrack filed a brief in opposition to Green Tree's motions.

{¶6} On February 12, 2009, the trial court entered its judgment. The court noted the arbitration provision in the contract required that all claims arising from the contract be resolved by arbitration. The court found that Alkenbrack's claims did not arise from the contract because they were based on fraud and conversion, rather than breach of contract. In addition, the court found that when Alkenbrack's debt was discharged, the contract, including its arbitration provision, was no longer enforceable against him. Consequently, the court denied Green Tree's motion to stay proceedings and to compel arbitration. The court also found that fact issues remained on Alkenbrack's claims, and denied Green Tree's motion for summary judgment.

{¶7} Green Tree appeals the trial court's judgment, asserting two assignments of error. Since they are interrelated, we shall consider them together. They allege:

{¶8} "[1.] The Trial Court Erred In Denying The Motion Of Green Tree Servicing LLC To Stay Proceedings And To Compel Arbitration Because The Trial Court's Decision Is In Direct Conflict With Ohio Revised Code Sec. 2711.02.

{¶9} "[2.] The Trial Court Erred In Denying The Motion Of Green Tree Servicing LLC To Stay Proceedings And To Compel Arbitration Because The Trial Court's Decision Is In Direct Conflict With Ohio Case Law."

{¶10} Before we may consider the merits of an appeal, we must first determine that the judgment appealed from is a final, appealable order. *Barnes v. Andover Vill.*

Ret. Comty., Ltd., 11th Dist. No. 2006-A-0039, 2007-Ohio-4112, at ¶14. In the event the parties to an appeal do not raise this jurisdictional issue, it may be raised sua sponte. Id., citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 87.

{¶11} Appellate courts have jurisdiction to review only final orders or judgments of the inferior courts in their district. Ohio Constitution, Sec. 3(B)(2), Art. IV; R.C. 2505.02. If an order is not final and appealable, we have no jurisdiction to review the matter and must dismiss it. *General Accident Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 20.

{¶12} This court has held that a ruling on a motion to stay proceedings pending arbitration is a final, appealable order pursuant to R.C. 2711.02. *River Oaks Homes, Inc. v. Krann,* 11th Dist. No. 2008-L-166, 2009-Ohio-5208, at ¶39. In this case, Green Tree moved for a stay pending arbitration pursuant to an arbitration provision in the contract. The trial court denied that motion. Hence, the order falls within the purview of R.C. 2711.02. Accordingly, we hold that this aspect of the judgment is a final, appealable order, which is properly before the court.

{¶13} Generally, the standard of review for a decision granting or denying a motion to stay proceedings pending arbitration is abuse of discretion. Id. at ¶41. However, a trial court's grant or denial of a stay based solely upon questions of law is reviewed under a de novo standard. *Buyer v. Long*, 6th Dist. No. F-05-012, 2006-Ohio-472, at ¶6; *Fortune v. Castle Nursing Homes, Inc.*, 164 Ohio App.3d 689, 691, 2005-Ohio-6195; *Porpora v. Gatliff Bldg. Co.*, 160 Ohio App.3d 843, 847, 2005-Ohio-2410; *Dunkelman v. Cincinnati Bengals, Inc.*, 158 Ohio App.3d 604, 610, 2004-Ohio-6425;

see, generally, *Bayes v. Merle's Metro Builders/Boulevard Constr., LLC*, 11th Dist. No. 2007-L-067, 2007-Ohio-7125, at ¶6.

{¶14} Ohio public policy favors arbitration and, therefore, such provisions are ordinarily considered valid and enforceable. See R.C. 2711.01(A). As a result, a court must indulge a strong presumption in favor of arbitration and resolve any doubts in favor of arbitrability. *Bayes*, supra, at ¶7. Further, the Supreme Court of Ohio in *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, held that an arbitration provision must be enforced unless it is not susceptible of an interpretation that covers the asserted dispute, with any doubt being resolved in favor of arbitration. Id. at 188.

{¶15} Green Tree argues that Alkenbrack's claims arose from the contract because, "but for the Contract, *** this suit would not currently be before the Court." In opposition, Alkenbrack argues that because his claims are not based on breach of contract, but rather on fraud and conversion, and further because the contract with its arbitration clause is no longer enforceable, his claims are not subject to arbitration.

{¶16} The arbitration clause at issue provides: "[A]ll disputes, claims or controversies arising from *** this Contract or the relationships which result from this Contract *** shall be resolved by binding arbitration ***."

{¶17} First, we determine whether Alkenbrack's claims are within the scope of the parties' contract. An arbitration clause in a contract is generally viewed as an expression that the parties agree to arbitrate disagreements within the scope of the arbitration clause, and, with limited exceptions, an arbitration clause will be upheld just

as any other provision in a contract. *Williams v. Aetna Finance Co.*, 83 Ohio St.3d 464, 471, 1998-Ohio-294.

{¶18} The Supreme Court of Ohio in *Aetna Health, Inc.*, supra, held that arbitration clauses are either narrow or broad, and that an arbitration clause that contains the phrase "any claim or controversy arising out of or relating to the agreement" is considered the paradigm of a broad arbitration clause. Id. at 188-189.

{¶19} In *Alexander v. Wells Fargo Financial Ohio 1, Inc.*, 122 Ohio St.3d 341, 345, 2009-Ohio-2962, the Supreme Court of Ohio held that Ohio courts may determine whether a cause of action is within the scope of an arbitration agreement based on the federal standard found in *Fazio v. Lehman Bros., Inc.* (C.A. 6, 2003), 340 F.3d 386. In *Fazio*, the Sixth Circuit Court of Appeals held:

{¶20} "*** A proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 250-51 (5th Cir. 1998) ***. *** Even real torts can be covered by arbitration clauses 'if the allegations underlying the claims "touch matters" covered by the [agreement].' *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir. 1987)." *Fazio*, supra, at 395.

{¶21} In *Fazio*, supra, the plaintiffs had entered into "account agreements" with brokerage firms to buy and sell securities and manage their accounts. The plaintiffs alleged fraud in violation of the account agreements. The Sixth Circuit held: "The lawsuit by necessity must describe why Gruttadauria was in control of the plaintiffs' money and what the brokerage houses' obligations were. The plaintiffs therefore

cannot maintain their action without reference to the account agreements, and accordingly, this action is covered by the arbitration clauses." Id. The court thus held that the plaintiffs' fraud claims were subject to arbitration.

{¶22} Here, Alkenbrack alleged in his complaint that he entered into a financing agreement with Green Tree's predecessor to purchase a manufactured home. After filing bankruptcy proceedings, he was discharged. He alleged that, despite knowledge of his bankruptcy, Green Tree defrauded him by continuing to send him monthly statements for payment that contained false representations. He also alleged that by keeping his monthly payments, Green Tree converted his funds. We note the parties' contract gave Green Tree a security interest in the manufactured home and the right to repossess it if Alkenbrack defaulted. It is undisputed that, until Alkenbrack stopped making his monthly payment and moved out of the mobile home, Green Tree retained a security interest in the home and had the right to enforce it. Alkenbrack's claims essentially allege that, in enforcing its security interest under the contract, Green Tree made misrepresentations in its monthly statements and converted the payments he sent. Alkenbrack's claims thus stem from the contract and are intertwined with it.

{¶23} We therefore hold that Alkenbrack's tort claims could not be maintained without reference to the parties' contract and, with the limitation noted below, are subject to arbitration.

{¶24} Alkenbrack next argues that because his debt was discharged in bankruptcy, the contract giving rise to his debt, including the arbitration provision, was no longer enforceable against him. However, in *Alexander*, supra, the Supreme Court of Ohio considered a similar argument. There, the plaintiff-debtors asserted statutory

claims against the defendant-creditors based on their delay in filing mortgage releases. The defendants moved for arbitration. The plaintiffs argued that because the mortgages were extinguished before the statutory duty to file the releases arose, their claims did not arise out of the mortgage agreements and were not subject to arbitration. The Court disagreed, holding that, even though the mortgages had been extinguished, the plaintiffs' claims under the statute arose out of the mortgage agreements and were therefore subject to arbitration.

{¶25} Based on the Supreme Court's holding in *Alexander*, supra, we hold that, even though Alkenbrack's debt had been discharged in bankruptcy, his claims arose out of the parties' contract and are therefore within the scope of the arbitration provision.

{¶26} Despite the foregoing, we note that the right to arbitrate, like any other contractual right, may be waived. *Garvin v. Independence Place Condominium Assn.,* 11th Dist. No. 2001-L-055, 2002-Ohio-1472, 2002 Ohio App. LEXIS 1491, *6; *Rock v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1992), 79 Ohio App.3d 126, 128. When a party to an arbitration agreement is confronted with a lawsuit, it must preserve its right to arbitrate by seeking to enforce the arbitration clause. *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 412. This court adopted the holding in *Harsco* in *Garvin*, supra.

{¶27} To support a finding that a defendant waived arbitration, the evidence must show the defendant knew of an existing right to arbitration, but acted inconsistently with that right to arbitrate. *Harsco Corp.*, supra, at 414. A defendant who files an answer in a lawsuit may still move for a stay pending arbitration provided: (1) he

affirmatively pled the application of the arbitration clause in the answer, *and* (2) he did not conduct himself in a manner demonstrating a waiver. Id. at 416.

{¶28} Here, under the first *Harsco* factor, Green Tree filed an answer to the complaint prior to moving for arbitration; however, in its answer it did not affirmatively plead the application of the arbitration clause.

{¶29} In determining whether the second *Harsco* factor has been satisfied, i.e., whether the party's conduct demonstrated a waiver, "the essential question is whether, based on the totality of the circumstances, the party seeking arbitration has acted inconsistently with the right to arbitrate." Id. at 413-414. Circumstances which the court may consider in determining whether the party has acted in a manner that waived the right to arbitrate include: (1) any delay in the movant's demand to arbitrate via a motion to stay the judicial proceeding; (2) the extent of the movant's participation in the litigation prior to its filing a motion to stay the judicial proceeding; and (3) whether the non-requesting party has been prejudiced by the movant's inconsistent acts. Id.

{¶30} Here, Green Tree conducted discovery up to and after the discovery cutoff. That discovery included the taking of Alkenbrack's deposition. Green Tree moved to extend the dispositive-motion cutoff. It filed a motion for summary judgment. It filed its motion to stay ten months after Alkenbrack filed his complaint. Further, the filing of Green Tree's motion for summary judgment required Alkenbrack to file a responsive brief.

{¶31} While Alkenbrack did not raise the waiver issue and the trial court did not rule on it, the record contains evidence on the issue. In the event the issue of waiver is

raised on remand, the trial court would be free, in its discretion, to consider whether the evidence supports a finding that a waiver has occurred.

{¶32} For the reasons stated in the Opinion of this court, it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.