

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

KENT PARTNERS, et al.,	:	O P I N I O N
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2010-P-0028
CROSSINGS AT GOLDEN POND --	:	
PORTAGE COUNTY, LLC., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2008 CV 1240.

Judgment: Affirmed in part, reversed in part, and remanded.

Chad E. Murdock, 228 West Main Street, P.O. Box 248, Ravenna, OH 44266 (For Plaintiffs-Appellants).

Howard F. Bohrer, pro se, P.O. Box 769, Aurora, OH 44202 (Statutory Agent for Defendants-Appellees).

THOMAS R. WRIGHT, J.

{¶1} Appellants, Kent Partners and Fairway Partners, appeal from the March 8, 2010 judgment entry of the Portage County Court of Common Pleas, granting appellees', Crossings at Golden Pond -- Portage County, LLC and Fairways at Boulder Creek -- Portage County, LLC, motions to stay and ordering the parties to proceed with arbitration pursuant to their contracts.

{¶2} The present appeal is from a consolidated order involving Case Nos. 2008 CV 1240 and 2008 CV 1241. Case No. 2008 CV 1240 involves a suit between Plaintiff-Appellant Kent Partners and Defendant-Appellee Crossings. Case No. 2008 CV 1241 involves a suit between Plaintiff-Appellant Fairway Partners and Defendant-Appellee Fairways at Boulder Creek. Although the parties are different, the principals of the parties have commonality. Moreover, both cases involved real estate transactions and identical arbitration clauses. Thus, the trial court consolidated the cases upon the motions of Kent Partners and Fairway Partners.

{¶3} With respect to this appeal, Kent Partners and Fairway Partners are named appellants and Crossings and Fairways at Boulder Creek are named appellees. Kent Partners and Fairway Partners, as appellants, filed a combined appellate brief. A review of appellants' brief suggests that this appeal only applies to Kent Partners and Crossings. However, counsel for appellants clarified at oral argument that this appeal applies to Kent Partners and Fairway Partners as appellants and Crossings and Fairways at Boulder Creek as appellees. Crossings and Fairways at Boulder Creek, as appellees, did not file an appellate brief, attend oral argument, or object to the expansion.

{¶4} In March 2005, Kent Partners, as buyer, and Crossings, as seller, entered into agreements in which Kent Partners purchased two condominium units from Crossings. Kent Partners paid Crossings the purchase price of \$348,330. Crossings acknowledged receipt, and built the units.

{¶5} Likewise, in March 2006, Fairway Partners, as buyer, and Fairways at Boulder Creek, as seller, entered into agreements in which Fairway Partners purchased

two condominium units from Fairways at Boulder Creek. Fairway Partners paid Fairways at Boulder Creek the purchase price of \$360,230. Fairways at Boulder Creek acknowledged receipt, and built the units.

{¶6} In the Kent Partners/Crossings and the Fairway Partners/Fairways at Boulder Creek contracts, Section 1 states in part, “SELLER shall sell and convey to BUYER, and BUYER shall purchase and pay for the proposed condominium unit(s) ***.” Section 11 provides in part, “BUYER shall be entitled to possession of the Unit from and after the time of closing.” Section 13 states in part, “At closing, SELLER shall convey to BUYER marketable title in fee simple to the Unit by transferable and recordable general warranty deed ***.”

{¶7} In addition, the Kent Partners/Crossings and the Fairway Partners/Fairways at Boulder Creek contracts contain arbitration provisions stating that any controversy, claim, or breach arising out of or relating to the agreements shall be settled by arbitration:

{¶8} “Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, including, without limitation, disputes and controversies by or between BUYER and SELLER arising from or related to the Unit identified in this Agreement, or to any defect in or to the subject Unit, or the sale of the Unit by Seller, including, without limitation, any claim for breach of contract, negligent or intentional misrepresentation, or non-disclosure in the inducement, execution or performance of any contract, including this arbitration agreement, and breach of any alleged duty of good faith and fair dealing shall be settled by arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules,

and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The governing law applicable to any dispute, any procedural aspects of the arbitration, and the enforceability of any arbitration award for the arbitration will be the law of the State of Ohio, without reference to its conflicts of laws provisions.”

{¶9} Pursuant to the Kent Partners/Crossings contracts, Crossings was to use the units as models until closing. At closing, Crossings was not only obligated to convey the units to Kent Partners, it was also obligated to make interest payments to Kent Partners for use of the units as models.

{¶10} Likewise, pursuant to the Fairway Partners/Fairways at Boulder Creek contracts, Fairways at Boulder Creek was to use the units as models until closing. At closing, Fairways at Boulder Creek was not only obligated to convey the units to Fairway Partners, it was also obligated to make interest payments to Fairway Partners for use of the units as models.

{¶11} The principals in Kent Partners and Crossings, and Fairway Partners and Fairways at Boulder Creek, have been and are involved in similar purchase agreements in other condominium developments. In one development, the members in Crossings, under a different limited liability company, breached the contracts by selling units used as models to third parties without paying the proceeds to the purchasing party as required.

{¶12} Fearing that Crossings would do the same, Kent Partners filed a complaint, Case No. 2008 CV 1240, against Crossings seeking injunctive relief; specific performance to compel possession and title; and nonpayment of interest.

{¶13} Along with the complaint, Kent Partners filed a motion for a temporary restraining order to enjoin Crossings from transferring the units. The trial court granted that motion.

{¶14} Also fearing that Fairways at Boulder Creek would do the same as the members in Crossings under a different limited liability company, Fairway Partners filed a complaint, Case No. 2008 CV 1241, against Fairways at Boulder Creek seeking injunctive relief; specific performance to compel possession and title; and nonpayment of interest.

{¶15} Along with the complaint, Fairway Partners filed a motion for a temporary restraining order to enjoin Fairways at Boulder Creek from transferring the units. The trial court granted that motion.

{¶16} Thereafter, in both cases, the trial court set preliminary injunction hearings. However, the Kent Partners/Crossings hearing was cancelled after Crossings agreed not to transfer the units. It also appears from the record in Case No. 2008 CV 1241 that the Fairway Partners/Fairways at Boulder Creek preliminary injunction hearing was never held.

{¶17} Crossings and Fairways at Boulder Creek filed Civ.R. 12(B)(6) motions to dismiss and/or stay the proceedings and compel arbitration pursuant to the arbitration provisions in the contracts. Kent Partners and Fairway Partners filed oppositions arguing that arbitration is not applicable because the controversies involve title to and possession of real estate. Only Crossings filed a reply brief.

{¶18} Thereafter, Kent Partners and Fairway Partners filed motions for summary judgment, pursuant to Civ.R. 56(C), on their claims arguing they were entitled to specific

performance on the contracts; that is, they were regarding possession of and title to the units and that they were entitled to money damages on the interest payments.

{¶19} The trial court denied the motions to dismiss but granted Crossings' and Fairways at Boulder Creek's motions to stay, and ordered the parties to proceed with arbitration pursuant to their contracts. The trial court, therefore, did not rule on the motions for summary judgment. Kent Partners and Fairway Partners filed a timely appeal, asserting the following assignment of error for our review:

{¶20} "The trial court committed prejudicial error in granting Crossings' motion to stay and ordering arbitration because this controversy involves title to or possession of real estate and therefore not subject to arbitration under R.C. 2711.01(B)(1)."

{¶21} A ruling on a motion to stay proceedings pending arbitration is a final, appealable order pursuant to R.C. 2711.02(C). *Alkenbrack v. Green Tree*, 11th Dist. No. 2009-G-2889, 2009-Ohio-6512, at ¶12. A trial court's grant or denial of a stay based solely upon questions of law is reviewed under a de novo standard. *Id.* at ¶13.

{¶22} With respect to staying proceedings pending arbitration, R.C. 2711.02 provides in part:

{¶23} "(B) If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

{¶24} “(C) Except as provided in division (D) of this section, an order under division (B) of this section that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.”

{¶25} The March 8, 2010 appealed judgment entry states in part:

{¶26} “In reviewing the contracts and the pleadings offered by the parties, the Court finds the case should not be dismissed but it should be stayed and arbitrated, pursuant to the terms of the contract, and the arbitration should occur before the case proceeds.

{¶27} “IT IS THEREFORE ORDERED that the parties proceed with arbitration pursuant to their contract. If the arbitration is not completed within six months from the filing of this Order the parties shall apply for a status hearing with the Court. This matter is stayed pending further Order of the Court. *The stay order shall expire within one year from the filing of this Order.*” (Emphasis added.)

{¶28} Preliminarily, we note that the trial court ordered the stay to expire by a date certain. R.C. 2711.02(B) states if a trial court refers a matter to arbitration it shall “stay the trial of the action *until the arbitration of the issue has been had* in accordance with the agreement[.]” (Emphasis added.) Thus, a trial court is not permitted to limit the length of a stay by the passage of time. Rather, the stay must remain in effect “until the arbitration of the issue has been had.” R.C. 2711.02(B). Accordingly, we modify that

aspect of the judgment entry pursuant to App.R. 12(A)(1)(a). The grant of the stay shall remain in place until the arbitration has been had in accordance with the agreement. With that said, we turn to the substance of the appeal.

{¶29} R.C. 2711.01, “Provision in contract for arbitration of controversies valid; exceptions,” provides in part:

{¶30} “(A) A provision in any written contract, except as provided in division (B) of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

{¶31} “(B)(1) Sections 2711.01 to 2711.16 of the Revised Code do not apply to controversies involving the title to or the possession of real estate, with *** exceptions[.]”

{¶32} In our case, Crossings and Fairways at Boulder Creek relied upon the arbitration provisions in the contracts and R.C. 2711.02(B) as authority for moving the court to stay these proceedings and order arbitration. The trial court agreed with Crossings’ and Fairways at Boulder Creek’s positions, granted their motions to stay, and ordered the parties to proceed with arbitration pursuant to their contracts. A review of the arbitration provisions contained within the contracts reveals they are broad enough to encompass any matter going to arbitration, including title to and possession

of the condominium units. However, as stated, R.C. 2711.01 limits the ability of the parties to these issues subject to arbitration.

{¶33} The only issue raised on appeal deals with title and possession of real estate with respect to arbitration. Although Kent Partners and Fairway Partners seek nonpayment of interest as an additional remedy, they do not argue that that issue is not subject to arbitration as the trial court ordered. Therefore, we will not address that issue or disturb that portion of the court's order referring the nonpayment of interest to arbitration. See App.R. 12(A)(2) and 16(A)(7).

{¶34} The substance of argument on appeal is that because Kent Partners and Fairway Partners seek specific performance to compel Crossings and Fairways at Boulder Creek to provide title to and possession of the property, that aspect of the case cannot be referred to arbitration. We agree.

{¶35} In *Kedzior v. CDC Dev. Corp.* (1997), 123 Ohio App.3d 301, the Eighth District dealt with an identical issue. In that case, the plaintiff raised a claim for specific performance, asking the trial court to award him title to and possession of property. *Id.* at 303. In response to the plaintiff's action, the defendant moved the trial court to refer the matter to arbitration as provided in the purchase agreement. *Id.* at 302-303. The trial court granted the defendant's motion and stayed the matter pending arbitration. *Id.* at 303. The Eighth District held that because a final disposition of the plaintiff's claims would ultimately involve a determination on the claim for specific performance to compel possession and title, the matter should not have been referred to arbitration. *Id.* at 303. Thus, the Eighth District reversed and remanded the judgment of the trial court. *Id.*

{¶36} Pursuant to the holding in *Kedzior* and because our case involves title to and possession of real estate, R.C. 2711.01 precludes arbitration.

{¶37} For the foregoing reasons, Kent Partners' and Fairway Partners' sole assignment of error regarding possession and title of real estate not being subject to arbitration is well-taken. However, we do not disturb the position of the court's order referring the nonpayment of interest to arbitration since it was not argued in this appeal. The judgment of the Portage County Court of Common Pleas is affirmed in part, reversed in part, and the matter is remanded for further proceedings consistent with this opinion.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.