[Cite as *Gettysburg Invests., L.L.C. v. Prime Holdings, L.L.C.*, 2010-Ohio-2134.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

GETTYSBURG INVESTMENTS, LLC

Plaintiff-Appellant : C.A. CASE NO. 23303

vs. : T.C. CASE NO. 06CV8908

PRIME HOLDINGS, LLC, et al. : (Civil Appeal from Common Pleas Court)

Defendants-Appellees :

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O P I N I O N

Rendered on the 14th day of May, 2010.

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GRADY, J.:

{¶ 1} This is an appeal from an order entered pursuant to R.C. 2711.02(B), staying trial of an action pending arbitration.

{¶ 2} The action was commenced by Gettysburg Investments, Inc. ("Gettysburg"), against Prime Holdings, LLC and others ("Prime Holdings"). Gettysburg alleged that Prime Holdings had

misrepresented income from a shopping center property Gettysburg purchased from Prime Holdings.

{¶ 3} In its motion to stay the litigation, Prime Holdings relied on a Real Estates Sales Contract dated August 30, 2005, which contains an arbitration clause that encompasses Gettysburg's claims for relief. The contract was signed by Nazih M. Shawar, the principal and owner of Prime Holdings, as Seller, and by Kevin Broukhim, as Buyer.

{¶ 4} Subsequent to execution of the Real Estate Sales Contract, three written addendums were executed by Prime Holdings' agent, Marcus & Millichap Real Estate Investment Brokerage Company of Ohio ("Marcus & Millichap"), and by two principals of Gettysburg: Babek (or Robert) Hakimian, and Dr. Faramar Edalat. The addendums restate and/or add to the terms of the Real Estate Sales Contract.

{¶ 5} Gettysburg argued that it is not bound by the arbitration provision in the Real Estate Sales Contract. Gettysburg pointed out that neither Gettysburg nor its principals, Hakimian or Edalat, signed the Real Estate Sales Contract, and that none of the addendums Hakimian and Edalat signed referred to the arbitration clause. Hakimian and Edalat testified that neither was made aware of its arbitration clause, and that neither knew Kevin Broukhim, who signed the Real Estate Sales Contract containing the arbitration clause. Gettysburg also pointed out that the three addendums refer to a "Purchase Agreement," not to the Real Estate

Sales Contract, and that the date of that prior agreement was in several instances misstated.

{¶ 6} The magistrate denied the motion to stay. Prime Holdings filed objections. The trial court sustained the objections and ordered the litigation stayed. The court found that the references in the addendums to the Purchase Agreement necessarily were to the Real Estate Sales Contract, and that any confusion in the addendums regarding the date of that document is immaterial. However, the court did not rely on the addendums when it found that Gettysburg is bound by the arbitration clause in the Real Estate Sales Contract between Prime Holdings and Kevin Broukhim. Rather, the court found: "Neither party has produced another document purporting to govern this transaction. As such, the court finds that (Gettysburg) must have agreed to submit to arbitration, when (Gettysburg) purchased the property."

{¶ 7} Gettysburg filed a notice of appeal from the order of stay.

ASSIGNMENT OF ERROR

{¶ 8} "THE TRIAL COURT'S ORDER STAYING THE CASE PENDING ARBITRATION WAS ERROR."

{¶ 9} R.C. 2711.02(B) states:

{¶ 10} "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."

{¶ 11} "An appellate court reviews a decision to stay proceedings pending arbitration under an abuse-of-discretion standard. *Coble v. Toyota of Bedford,* Cuyahoga App. No. 83089, 2004-Ohio-238. An abuse of discretion implies that the judge's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Despite the presumption in favor of enforcing an arbitration clause, it is generally established that a court cannot compel parties to arbitrate disputes that they have not agreed in writing to arbitrate. See, e.g., *Suttle v. DeCesare* (July 5, 2001), Cuyahoga App. No. 77753; *ACRS, Inc. v. Blue Cross & Blue Shield* (1998), 131 Ohio App.3d 450, 457." *I Sports v. IMG Worldwide, Inc.,* 157 Ohio App.3d 593, 2004-Ohio-3113, at ¶10.

{¶ 12} On this record, it is undisputed that neither Gettysburg nor Hakimian or Edalat were signatories to the Real Estate Sales Contract containing the arbitration clause. In *Jankovsky v. Grana-Morris* (Sept. 7, 2001), Miami App. No. 2000-CA-62, we considered how a non-signatory may nevertheless be bound to

arbitrate:

{¶ 13} "In *Thomson-CSF, S.A. v. American Arbitration Assn.* (C.A.[2] 1995), 64 F.3d 773, the [Second] Circuit Court of Appeals outlined the traditional bases for binding non-signatories to an arbitration clause. These theories arise from common law principles of contract and agency law, and include: '1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.' *Id.* at 776. Incorporation by reference, for example, occurs when a party enters into an agreement incorporating an existing arbitration clause. *I.* at 777. Similarly, under 'assumption,' a party indicates by subsequent conduct that it intends to be bound by an arbitration clause. Id." *Id.*

{¶ 14} The trial court made no findings consistent with any of the common law principles of contract and agency law we identified in *Jankovsky*. Rather, the court found that Gettysburg must have agreed to arbitrate because it purchased the property which the Real Estate Sales Contract containing the arbitration clause concerned. That finding suggests an assumption. However, no writing was necessary in order for Gettysburg to purchase the property, and the existence of that prior written agreement between Prime Holdings and Kevin Broukhim does not, in and of itself, demonstrate that Gettysburg is bound by it. Some material nexus between the Real Estate Sales Contract and Gettysburg is required to bind Gettysburg to the arbitration clause in the Real Estate

Sales Contract. The trial court made no finding in that regard with respect to any of the three addendums. On this record, we cannot ourselves determine whether those addendums bind Gettysburg to arbitrate.

{¶ 15} The trial court abused its discretion when it held, on the finding of fact the court made, that the Real Estate Sales Contract is an "agreement in writing for arbitration," R.C. 2711.02(B), between the parties to this action which binds Gettysburg to arbitrate the claims for relief its action involves. The assignment of error is sustained. The judgment from which the appeal is taken will be reversed, and the case will be remanded for further proceedings.

FAIN, J. concurs.

FROELICH, J., dissenting:

{¶ 16} The parties agree that Broukim, as buyer, and Prime Holdings (owned by Shawar), as seller, signed an agreement for the purchase of a shopping center; the agreement contained an arbitration provision.

{¶ 17} Hakamian and Edalat (dba Gettysburg Investments) subsequently signed an "addendum to purchase agreement" which states it is an addendum to the "purchase agreement" between Broukim and Prime Holdings; there is no reference to arbitration in the

addendum. However, in this addendum, Prime Holdings, as seller, agrees to the assignment of the contract to Hakamian and Edalat.

{¶ 18} The majority holds that it was an abuse of discretion for the trial court to find that the arbitration clause is binding on Hakamian and Edalat since they did not sign the original agreement and there is no assignment of it to them by Broukim.

{¶ 19} The appellant (i.e., Gettysburg/Hakamian/Edalat) did not sign the original agreement with Prime Holdings. Prime Holdings (which did sign the original agreement) now seeks to hold Gettysburg (the non-signatory to the original agreement) to the terms of that agreement based on its (Gettysburg's) signing the addenda. *Thompson-CSF*, supra, at 776-777, discusses "a number of theories under which non-signatories may be bound to the arbitration agreement of others, one theory being incorporation by reference." It cites *Import Export Steel Corp. v. Mississippi Valley Barge Line Co.* (C.A. 2, 1965), 351 F.2d 503, 505-506, for the principle that where a non-signatory signs an agreement expressly assuming all the obligations and privileges of [the signatory party] that the non-signatory can be bound by the arbitration clause contained in the agreement to which it was a party.

{¶ 20} Not only have we adopted this rationale (see *Jankovsky*, supra), but it just seems to make sense. When Hakamian and Edalat signed the addendum, they agreed that Prime Holdings would assign

"this contract" to them (Gettysburg). The only other provisions in the addendum have to do with copies of checks, tax returns, and an "additional deposit" (emphasis added). In a subsequent addendum, Gettysburg (Hakamian and Edalat) amends the agreement, but also provide that "all of the remaining terms of the purchase agreement and addendums thereon, except as modified herein, shall remain in full force and effect."

{¶ 21} Hakamian and Edalat testified that they did not know who Broukim was and were unaware of any arbitration provision in the agreement between Broukim and Prime Holdings, which they nonetheless agreed could be assigned to them. Hakamian and Edalat contend they were unaware of any of the terms and conditions of the purchase agreement between Prime Holdings and Broukim, and contend that they signed addenda without knowing or apparently being concerned as to what they were agreeing to be "addended to."

{¶ 22} Given the evidence before the trial court, I do not find it to be an abuse of discretion for the court to have found that "this contract" is the August "real estate sales contract" which contains the arbitration clause, and that the arbitration clause was incorporated by reference in the addenda which Gettysburg signed. Therefore, I would affirm.

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Copies mailed to:

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Hon. Dennis J. Langer