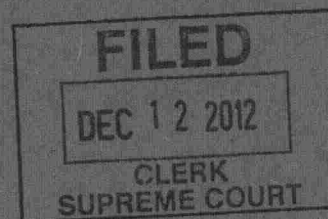


COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2009-CA-000657

2011-SC-462



ENERGY HOME DIVISION
OF SOUTHERN ENERGY HOMES, INC.

APPELLANT

ON APPEAL FROM DAVIESS CIRCUIT COURT
CIVIL ACTION NO. 08-CI-01493

BRIAN PEAY AND HIS WIFE,
LORI PEAY

APPELLEES

RESPONSIVE BRIEF
FOR APPELLEES

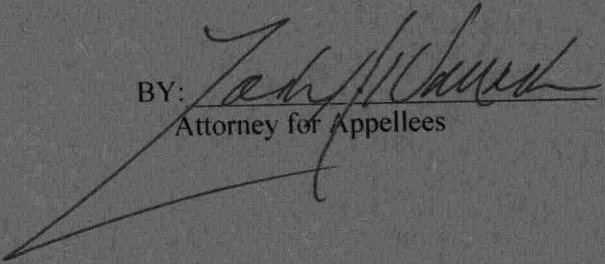
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CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by U.S. Mail this 7 day of December, 2012: Hon. Elizabeth A. Deener, Landrun & Shouse LLP P.O. Box 951, Lexington, Ky 40588-0951. Hon. Stephen D. Gray, Dorsey, King, Gray, Norment & Hopgood, 318 Second St., Henderson, Ky 42420, Hon. Deanna M. Tucker, Schiller, Osbourn, Barnes & Maloney, PLLC, 1600 One Riverfront Plaza, 401 W. Main St., Louisville, Ky 40202, Hon. Beth A. Lochmiller, Coleman Lochmiller & Bond, P.O. Box 1177, Elizabethtown, Ky 42702, and The Honorable Tom Castlen, 100 E. 2nd Street, Owensboro, Ky 42303. The undersigned does also certify that the record on appeal was not withdrawn by this party.

BY:


Attorney for Appellees

INTRODUCTION

APPELLEES contend that the Daviess Circuit Court and the Kentucky Court of Appeals were correct in denying the Motion to Compel Arbitration based upon the factual circumstances presented to the Trial Court and the present status of the law.

STATEMENT CONCERNING ORAL ARGUMENT

APPELLEES are of the opinion and belief that oral arguments may be appropriate especially concerning the factual issues before the Trial Court

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ESHIBIT 1: Court of Appeals Decision

EXHIBIT 2: The Purchase Agreement

EXHIBIT 3: Rodriguez v. Ed's Mobile Homes of Bossier City, La. 889 SO. 2d 461,464 (La. App 3 Cir. 2004).

STATEMENT OF THE CASE

Appellees, filed a Civil complaint in the Daviess Circuit court against Jerry Morris Construction, Larry Hayden, American Dream Housing Inc., and Energy Home, Division of Southern Energy Homes, Inc. in 2008. The complaint makes factual allegations that the modular home that was purchased in November 2005 was fraught with defects. Appellee contends the Defendants either individually and/or collectively failed to adhere to certain industry standards in particular the construction of the foundation for the basement and the placement of the modular home on same. Appellee alleged the foundation/basement materially deviated from the blueprints and/or specifications that were provided by the Defendant Energy Homes, Division of Southern Energy Homes, Inc. and/or that the blueprints/specifications were clearly erroneous or faulty. Appellee alleged that material construction defects existed requiring engineering modification and/or retro-fitting of the modular home to the foundation. Appellee also contends that the modular home was permitted to lay or sit without adequate physical support on the premises of Appellees thereby causing a twisting action to the structure , damaging the structure itself. Also, allegations were made that the work was done in an unsatisfactory manner, the wiring and etc was openly exposed to the elements for an extended period of time causing mold, fractures, cracks. Broken trusses were also found to exist in the modular home which necessitated further modification and/or the reconfiguration of the entry way into the modular home. There were significant and substantial cracks that developed in the foundation and the basement. The fractures/cracks penetrated the basement wall causing certain plumbing to be sheared away and/or broken away from the modular home itself resulting in severe and significant flooding including septic into the basement. Appellees contend Appellant and the other Defendants, were individually, jointly or collectively negligent in the construction and assembly of the modular home, and that they had deviated from accepted standards within the construction industry and the deviation was a substantial factor in causing injuries to Appellees.

Appellees made other factual allegations concerning the purchase contract. The actual purchase contract was issued by American Dream Housing Inc. (copy attached Ex. 2) an agent/ distributor of

Appellant. The plain and unequivocal language contained in the purchase contract just above the signature line in bold print states as follows:

This agreement contains the entire understanding between dealer and buyer and no other representation or inducements; verbal or written have been made which is not contained in this contract (see Ex. 2 attached).

The purchase agreement is specific in its terms. The purchase agreement excludes the existence of any other documents. Appellee paid \$129,839.00 for the modular home, \$20,000.00 for the basement and \$7,000.00 for site preparation, total price \$156,839.00.

The plain language of the purchase agreement, is not susceptible of any other meaning other than "there are no other documents" Appellees complaint in part is with the modular home, which according to the plain language in the purchase contract is the very object of the purchase.

Appellant relies on documents with language of arbitration that were not entered into contemporaneous with the purchase contract. In fact, they were expressly excluded The documents are completely separate documents from the formation of the purchase contract. Appellant seeks enforcement of, documents that were not entered into until June 22, 2006, some eight (8) months after the actual purchase and payment of money by Appellee. The formation of the purchase contract was November 8, 2005. The purchase contract represents a binding promise to do that which was agreed to. Nothing more, Nothing less. An ordinary consumer could not possibly construe the purchase contract language any differently than the language itself.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

Appellee contends that in order for the Appellant to prevail, the Appellant must establish that the Trial Court's decision was clearly erroneous (CR 52.01).

As a general rule, Kentucky may favor arbitration agreements however, KRS 417.050 contains a savings clause that prevents the enforcement of an arbitration agreement on such grounds that exist for the lawful revocation of any contract, as here, It is the Court, not an arbitrator that must decide whether the parties have agreed to arbitrate based upon fundamental principles governing contract law. Valued Services of Ky., LLC v. Watkins 309 S.W. 3d 256,261(Ky. App. 2009).

The Courts have traditionally used the doctrine of unconscionability in order to police the excesses of certain parties who abuse the right to contract freely, as here. The doctrine is directed against one sided, oppressive, and unfairly surprising contacts. Courts recognize that unconscionability determinations are inherently fact sensitive. Courts address the unconscionability claims on a case by case basis. Findings of Fact by a trial Court should not be set aside unless clearly erroneous. Due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses as did the Appellate Court here. (CR 52.01). Appellee contends Appellant's argument should fail because the Trial Court and the Court of Appeals decisions are supported by evidence in the record that is not clearly erroneous.

II. THE COURTS FACTUAL AND LEGAL SUPPORT

The Trial Court and Court of Appeals were correct in their holding on the arbitration agreement being "unconscionable". The decision is supported by credible evidence in the record. Unconscionability determinations are well within the province of Kentucky Courts Valued Serv. of Ky LLC v. Watkins 309 SW 3d 256,263 (Ky App. 2009).

A. THE ARBITRATION AGREEMENT

Pursuant to KRS 417.050 and 9 U.S.C. § 2, a written agreement to submit any existing controversy to arbitration or provision in a written contract to submit to arbitration, a controversy arising between the parties is valid and enforceable and irrevocable, save upon such grounds as existed law in the revocation of a contract.

The provisions of the Kentucky Uniform Arbitration Act, KRS 417 et seq are nearly identical to those of the Federal Arbitration Act./ Consultants and Builders Inc. v. Paducah Fed. Credit Union 266 SW 3d 837, 839(Ky. App. 2008).

The doctrine of unconscionability, is a recognized exception to the enforcement of a contract and is directed against one sided, oppressive, and unfairly surprising contracts, Consultant and Builders Inc. Id. pg. 839.

Unconscionability may take on many aspects, but is generally recognized as extreme unfairness. It stands for the principle that a Court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during the contract formation or because of overreaching contractual terms, especially terms that are unreasonably favorable to one party. Determinations of unconscionability by definition depends on the circumstances at the time the contract is formed. (Black's Law Dict. 7th Ed. Unconscionability pg. 1526).

B. THE PURCHASE AGREEMENT

Appellant devotes little if any of its argument to the formation of the actual purchase agreement concerning the object of the purchase the modular home. The purchase price was a total of \$156,839.00. The purchase took place on November 8, 2005. The distributor or agent of Appellant was American Dream Housing Inc. located in Owensboro, Kentucky.

At the time the purchase contract was formed, the language contained in the purchase contract stated the following:

“This agreement contains the entire agreement between dealer and buyer and no other representation or inducement, verbal or written was made which was not contained in this contract”.

There were no provisions at the time of the formation of the purchase agreement referencing arbitration. Appellee accepted the offer and entered into the purchase agreement.

There were no other documents and/or agreements at the time of the purchase. Not until some 8 months later, Appellee was confronted with the necessity of signing documents not contemporaneous to the formation of the purchase agreement in November of 2005. Appellee is not a sophisticated vendor but merely an ordinary consumer/buyer.

Appellee accepted the purchase agreement as being the complete and final agreement as it relates to the subject matter and/or object of the purchase. Appellee has every right to rely on the language of the actual purchase agreement.

Query: Could Appellee have taken delivery of the modular home without the execution of the documents 8 months later imposed by Appellant? If not, would Appellee be entitled to a refund? The best answer, is NO!

At the very least, the transaction appears to be a one sided, or unfairly surprising when compared to the actual formation of the purchase contract. The language in the purchase contract states there were no other documents, therefore no other surprises.

C. INTEGRATION/MERGER CLAUSE

An integration/merger clause is a contractual provision used by parties to establish that the contract is the complete and final agreement. It supersedes all informal understanding and oral agreements relating to the subject matter of the contract. (Black Law Dictionary 7th Ed., integration clause pg. 812). The subject matter of the purchase agreement is the modular home. It is/or was reasonable for any consumer, such as Appellee, after signing the purchase agreement to come away with the understanding there are no other agreements and/or documents. Simply put, no other surprises.

The transactional documents themselves, would have been well within the ability of the seller, its distributor/agent and/or the manufacturer Appellant to provide all of the necessary documents at the time of the formation of the purchase agreement. This was not done. The inherent unfairness, surprise and/or unconscionability materializes when Appellant presented to Appellee other documents long after the formation of the purchase agreement and long after the payment of money that required.

The Trial Court and the Appellate Court in order to give meaning to the purchase agreement as is required under the law of contract, could not ignore the language of the purchase agreement itself. To ignore the language of the purchase contract would obviate or negate the very intent and the purpose of the purchase contract itself. The language contained in the purchase agreement under contract law is to be given its plain and ordinary meaning Cooks United Inc. v. Waits 512 SW 2d 493, 495 (Ky 1979). The promise to perform under the purchase contract was an obligation assumed on November 8, 2005 and not some 8 months later. A subsequent promise to do what one is already under an obligation to do cannot rise to the level of consideration. Gray v. Green 253 Ky. 809, 812; 70 S.W. 2d 683, 685 (1935).

D. PROCEDURAL and SUBSTANTIVE UNCONSCIONABILITY

The accepted definition of procedural unconscionability is a type of conduct resulting in improprieties in the contract formation. This type of unconscionability suggests that there was no meeting of the minds, as here. It is an "unfair surprise" as to the process by which the agreement is reached and the form of the agreement. Valued Serv. of Ky LLC v. Watkins 309 SW 3d 256, 262 (Ky App. 2009).

When reviewing the purchase agreement itself Appellee submits any person of average reasonable intelligence would conclude that there would be no other documents or no other agreements other than the purchase agreement itself. To conclude otherwise, would invite a misrepresentation or permit a subterfuge especially when there are significant and substantial disparities in the bargaining position of the respective parties considering Appellee had made payment on the modular home. Appellants argument is focused on matters that occurred long after outside the formation of the purchase agreement.

By definition the factual circumstances in the formation of the purchase contract as presented to the Trial Court and/or Appellate Court constituted procedural unconscionability.

Substantive unconscionability is defined as unconscionability resulting from the actual contract terms that are unduly harsh, commercially unreasonable and grossly unfair given the existing circumstances. (Black's Law 7th Ed. Dictionary; Substantive unconscionability p. 1526). Ignoring the

language of the purchase agreement would fulfill the definitional requirement of substantive unconscionability.

Whether identified as procedural or substantive unconscionability both theories may exist under the factual circumstances presented to the Trial Court and as affirmed by the Appellate Court.

The legal concept of unconscionability has existed a long time, Earl of Chesterfield v. Janson 38 eng. Rep. 82, 100 (1750); Hepburn v. Dunlop & Company 14 U.S. 179 (1816). Restatement 2nd of contract § 208 Doctrine of Unconscionability etc.; The tautology of the term unconscionability would take on many different forms. It is a well established doctrine under contract law in Kentucky and is well within the province of the Courts to find in any contract, including one made pursuant to 417.050. Valued Serv. of Ky LLC v. Watkins 309 SW 3d 256, 262 (Ky App. 2009). Evidence in the record supports the Trial Courts conclusion. Courts in other jurisdictions have found very similar facts to be unconscionable, Rodriguez v. Ed's Mobile Homes of Bossier City, La. 889 SO 2d 461,464 (La. App 3 Cir. 2004).

In the matter before the Court, Appellee was not presented with all the documents in the formation of the purchase agreement. The very idea of not being presented with documents that according to Appellant are now material to the matter but not to the formation of the contract some 8 months earlier, is by definition unconscionable.

Courts are not to read contracts in such a way to foist arbitration on parties who did not agree to that device in the formation of the contract. It can not legitimately be argued that Appellee agreed to arbitration on November 5, 2008 at the time of the formation of the purchase contract.

Appellate Courts on review of Trial Court rulings as it relates to arbitration are examined under the usual Appellate standards. In other words, an Appellate Court defers to the Trial Courts factual findings, upsetting them only if clearly erroneous or if unsupported by substantial evidence. In this matter, there is substantial evidence in the record that supported the Trial Courts findings of unconscionability. The Court of Appeals also recognized those facts. Unconscionability determinations

are inherently fact sensitive, and the Courts must address such claims on a case by case basis, as here. Conseco Finance Servicing Corp. v. Wilder 47 SW 3d, 335.342 (Ky App. 2001).

PRIVITY OF CONTRACT

The "Doctrine of Privy" is an old concept in contract law where an action for breach of contract as a rule can be brought only by one who is a party to the contract. The purchase agreement makes clear that there are no other documents involved in the formation of the purchase agreement.

Ordinarily an action for damages can not be brought by the purchaser of a home against the builder for personal injury unless there is privity of contract. The State Marketing v. Franz 885 SW 2d 921 (1994). Jurisdictions do in fact deny the right of enforcement to such non-parties upon the ground that they are a stranger to the consideration.

The uniform commercial code may lend itself to some understanding, and in a directional manner, and, it should be noted that KRS 355.2-302 permits a Court to recognize as a matter of law that certain clauses within a contract may be "unconscionable" and therefore refuse to enforce the contract. KRS 355.2-302 (1). Of course, this principle assumes both parties are "Merchants" which they are not.

It is the contention of Appellee that Appellant at all times was in a position of superior bargaining power especially after the Appellee had purchased the modular home. Any issues concerning documents or language in documents could easily have been resolved by Appellant with Appellants distributors/ agents at the time of purchase. Appellant could have easily made available the documents now being argued over, at the time of the formation of the purchase agreement. These circumstances should be known by Appellant because Appellant utilized American Dream Housing Inc., as a distributor or agent in the sale of its product. Appellee submits upon review of the purchase agreement there would be no privity of contract by definition. (See. Black's Law Dict. 7th Edition, Privy pg. 1217).

Appellee submits that the Appellants reliance on the case of Cox v. Veners 887 SW 2d 563 (Ky App. 1994) is misplaced. The issue in the Cox case did not involve unconscionability, as here, in the formation of a purchase contract. The Cox case primarily stands for the proposition that performance under a contract must be tendered within a reasonable time. The Cox case does not address a purchase

contract procured by "unconscionable" means as here, which is unenforceable an agreement about subsequent ratification of an agreement can not legitimately take place if the agreement was not ratified or approved in the first instance.

Either the merger/integration clause was intended to be given meaning or it is tantamount to deception. The law does not permit a party to draft a document and receive the benefit of that draft whether as an agent or distributor and then thereafter disclaim that the language in the purchase agreement has no meaning.

CONCLUSION

Appellee submits, issues relating to determinations about the "unconscionability" of a contract are fact intense matters and should be examined on a case by case basis. Only by substituting a different factual determination and ignoring the plain language of the purchase agreement itself could be clearly erroneous finding.

The record demonstrates the formation of the purchase agreement does not include any reference to arbitration. Arbitration should not be foisted on Appellee by way of unfairness, surprise, procedural or substantive unconscionability as here. There is both a factual and legal basis supporting the Trial Court and Appellate Court Decisions

For the above reference reasons Appellee submits that the Trial Court, Court of Appeals decision should be upheld.

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