

STATE OF MICHIGAN
COURT OF APPEALS

CONSECO FINANCE SERVICING
CORPORATION, f/k/a GREEN TREE
FINANCIAL SERVICING CORPORATION,

UNPUBLISHED
November 18, 2003

Plaintiff/Counterdefendant-
Appellee,

v

No. 241234
Genesee Circuit Court
LC No. 01-071097-PD

RICKY T. ERICKSON, and AMY ERICKSON,

Defendants/Counterplaintiffs/Third-
Party Plaintiffs-Appellants,

and

JOHN DOE,

Defendant/Counterplaintiff/Third-
Party Plaintiff,

and

AIRPORT HOME CENTER, INC., d/b/a HILL
STREET HOMES, and LINCOLN PARK HOMES,
a division of PATRIOT HOMES, INC.,

Third Party Defendants/Appellees.

Before: O'Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff Conseco Finance Servicing Corporation ("Conseco"), as assignee of a retail installment sales contract (RISC) in connection with the purchase of a mobile home by defendants Ricky and Amy Erickson, commenced this action after the Ericksons defaulted on their payments due under the RISC. The Ericksons filed a countercomplaint against Conseco, alleging that the RISC was unenforceable, and a third-party complaint against both the retailer of the mobile home, Airport Home Center, as well as the manufacturer, Lincoln Park Homes, a

division of Patriot Homes, Inc. Conseco and Airport Home Center subsequently moved to dismiss the action pursuant to MCR 2.116(C)(7), on the basis of a provision in the RISC requiring that disputes arising from the contract be resolved by binding arbitration. The trial court granted the motion. The Ericksons appeal of right the dismissal of their countercomplaint and third-party complaint.¹ We affirm. We review de novo a trial court's decision to grant summary disposition based on the application of an arbitration clause. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003).

I. Facts

The Ericksons allege that they purchased a Patriot mobile home from Airport Home Center in June 1999. Apart from a purchase agreement involving the sale of the mobile home, a RISC was also executed. The RISC was subsequently assigned to Conseco. The RISC contains an arbitration provision that requires the parties to resolve claims arising from or relating to the contract through binding arbitration governed by the Federal Arbitration Act, 9 USC 1.

In August 2001, Conseco filed a complaint for claim and delivery to take possession of the home, alleging that the Ericksons were in default for failure to make the required payments.² The Ericksons subsequently filed their countercomplaint against Conseco and third-party complaint against Airport Home Center and Lincoln Park Homes, alleging various defects with the mobile home. Count I of their countercomplaint and third-party complaint sought revocation of their acceptance of the mobile home, cancellation or rescission of the RISC, and return of their down payment and all payments previously made under the RISC. The Ericksons also alleged against Conseco, Airport Home Center, and Patriot, inter alia: (1) violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* (count II); (2) violations of the Michigan collection practices act, MCL 445.251 *et seq.* (count III); (3) a breach of an implied warranty of merchantability (count IV); and violations of the Uniform Mobile Homes Warranty Act, MCL 125.991 *et seq.* (count V). In addition, the Ericksons sought to temporarily enjoin Conseco from reporting derogatory credit information while this suit was pending.

Conseco and Airport Home Center moved for summary disposition of the Ericksons' countercomplaint and third-party complaint based on the arbitration provision in the RISC. The trial court granted the motion.

II. Analysis

¹ Although Conseco was originally a party to this appeal, we entered an order on January 29, 2003, closing the case as to appellee Conseco only due to pending bankruptcy proceedings involving Conseco, which deprived us of the authority to continue our review of the case with respect to Conseco. Therefore, this opinion does not address or affect any issues pertaining to the dismissal of the Ericksons' countercomplaint against appellee Conseco.

² The arbitration provision in the RISC allows a judicial action to be brought for the limited purposes of "enforc[ing] a security agreement relating to the Manufactured Home secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the Manufactured Home or to foreclose on the Manufactured Home"

As an initial matter, we reject Amy Erickson's claim that the arbitration provision in the RISC is not enforceable against her because she did not sign the RISC. Where assent is established, a written arbitration agreement does not have to be signed in order for the agreement to be binding. *Ehresman v Bultynck & Co*, 203 Mich App 350, 354-355; 511 NW2d 724 (1994). Here, Amy Erickson purchased the home with Ricky, moved into it with him, and requested repairs and made claims under the RISC at issue. So the circumstances demonstrate that Amy Erickson acceded to the terms of the RISC. *Id.*

Turning to the merits of the Erciksons' remaining claims, we reject the Ericksons' contention that the trial court should have decided whether they were fraudulently induced into signing the RISC rather than leaving this issue to be decided by the arbitrator. The Ericksons do not contend that the specific agreement to arbitrate was obtained by fraud, so the parties should present the arbitrator, not the trial court, with the question whether Ricky Erickson was fraudulently induced to enter the entire RISC. *Scanlon v P & J Enterprises, Inc*, 182 Mich App 347, 350; 451 NW2d 616 (1990), citing *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395; 87 S Ct 1801; 18 L Ed 2d 1270 (1967).

The Ericksons further contend that the arbitration clause is void as contrary to public policy. They rely on the principle that contracts which violate a statute are contrary to public policy and unenforceable. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000). The Ericksons' claims in this regard fail as well.

The Ericksons argue that the arbitration provision violates § 3 of the MCPA, MCL 445.903, which provides, in pertinent part:

(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:

* * *

(t) entering into a consumer transaction in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it.

The Ericksons contend that because Ricky Erickson did not specifically consent to waive their right to a jury trial, the arbitration clause violates this statute. We disagree. The arbitration provision provides in bold print "THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY YOU (AS PROVIDED HEREIN)." While the Ericksons claim that Ricky Erickson was defrauded into signing the document, they never denied that he initialed near the arbitration agreement and signed the RISC on its last page. Therefore, the bold print initials and subsequent signature indicate that there was in fact specific consent to the clearly stated jury waiver, so the contract does not violate the statute in this regard.

The Ericksons also contend that the arbitration provision violates §§ 14 and 16 of the Michigan Retail Installment Sales Act (MRISA), MCL 445.851 *et seq.*

Section 14 of the MRISA, MCL 445.864, provides, in pertinent part:

(1) Any of the following provisions contained in a retail installment contract or retail charge agreement are void and unenforceable:

* * *

(d) The buyer waives a right of action against the seller or holder or other person acting on the seller's or holder's behalf, for an illegal act committed in the collection of payments under the contract or agreement or in the repossession of goods.

* * *

(f) The buyer agrees not to assert against the seller or against an assignee a claim or defense arising out of the sale.

Section 16 of the MRISA, MCL 445.866, provides:

No act or agreement of the retail buyer before or at the time of the making of a retail installment contract, retail charge agreement, or purchase thereunder shall constitute a valid waiver of any of the provisions of this act or of any remedies granted to the buyer by law.

With respect to § 14, the Ericksons' claim is without merit because the arbitration clause contains neither a waiver of a right of action for an illegal act nor an agreement not to assert a claim or defense arising out of the sale.

Their claim with respect to § 16 also fails because the agreement was not a waiver of any provisions of the act or any remedies granted to the buyer by law. Rather, by agreeing to arbitration, the Ericksons simply agreed to pursue their rights and remedies in a different forum. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 138; 596 NW2d 208 (1999). In fact, the arbitration provision specifically indicates that "the arbitrator shall have all powers provided by law, the Contract and the agreement of the parties. These powers shall include all legal and equitable remedies including, but not limited to, money damages, declaratory relief and injunctive relief." So the agreement did not result in a waiver of the Ericksons' statutory rights, and there is no basis to conclude that the arbitration provision violates a statute or otherwise is void as against public policy.

The Ericksons also argue that enforcing the arbitration provision vitiates the goals of the MCPA. But the United States Supreme Court has recently recognized that even claims arising under a statute designed to further important social policies may be arbitrated. As long as the parties may effectively pursue remedies for violations of their statutory rights at arbitration, "the statute serves its functions." *Green Tree Financial Corp-Alabama v Randolph*, 531 US 79, 90; 121 S Ct 513; 148 L Ed 2d 373 (2000). Because the Ericksons are not barred from receiving relief from an arbitrator based on alleged statutory violations, they are limited to the arbitral forum by the terms of their agreement.

The Ericksons also contend that any claims arising out of the original purchase agreement are not arbitrable because that particular document does not contain an arbitration clause. In support of their claim, they rely on an unpublished decision of this Court, which has no precedential value. MCR 7.215(C)(1); *Detroit Free Press, Inc v Department of State Police*, 233 Mich App 554, 557; 593 NW2d 200 (1999). Here, the arbitration provision in the RISC expressly indicates that all disputes, claims or controversies relating to the parties are subject to arbitration. Combined with the RISC's clear statement that it "is the only contract that covers [the Ericksons'] purchase of the property," the arbitration provision supersedes anything to the contrary contained in the purchase agreement. See *Archambo v Lawyers Title Ins Co*, 466 Mich 402, 412; 646 NW2d 170 (2002). So even though the purchase agreement does not contain an arbitration agreement, any claims the Ericksons have against parties to the RISC, including Airport Home Center, are subject to arbitration.

Finally, the Ericksons contend that the arbitration provision is unenforceable because it is unconscionable. We use a two-pronged test to discern whether a contract provision is unconscionable. *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 481; 578 NW2d 701 (1998). First we consider the procedural aspects of the bargain, such as the parties' respective economic strength and bargaining power and the available options of the complaining party. *Id.* Then we discern the reasonableness of the disputed provision, giving this factor foremost consideration. *Id.*

The Ericksons did not deny that they had the opportunity to read the arbitration provision before they signed the contract. They do not claim that there was unequal bargaining power or that they had no choice but to enter into the agreement. The arbitration clause in this case does not represent anything more than a legitimate attempt to forego the time consuming and expensive process of traditional litigation. It is not substantively unreasonable to agree to a respected and common alternative means of dispute resolution. Because no procedural or substantive unconscionability exists, we will not invalidate the contract or its arbitration clause on this ground.

Affirmed.

/s/ Peter D. O'Connell

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder