IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 14, 2015 Session

MARK A. WHITE, ET AL. V. TURNBERRY HOMES, LLC, ET AL.

Appeal from the Chancery Court for Williamson County
No. 43227 James G. Martin, III, Judge

No. M2014-01858-COA-R3-CV – Filed May 28, 2015

Homeowners sued the builder and others for defects in their home. The builder sought to compel arbitration pursuant to the arbitration clause in the purchase agreement. The trial court granted the motion to compel arbitration except as to the fraudulent inducement claim. The builder appealed. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

Todd E. Panther, Nashville, Tennessee, for the appellant, Turnberry Homes, LLC.

John O. Belcher and Curtis R. Harrington, Nashville, Tennessee, for the appellees, Mark and Mirandy White.

OPINION

On January 2, 2013, Mark A. and Mirandy White signed an agreement to purchase a home from Turnberry Homes, LLC ("Turnberry"). Turnberry built the home in the Chardonnay subdivision in Franklin, Tennessee and conveyed title to the Whites on July 3, 2013. After moving in, the Whites allegedly found drainage problems, water in the crawlspace, moisture and condensation issues, gaps in the hardwood floors, and recurring flu and allergy symptoms in family members.

The Whites filed suit against Turnberry; Gina Sefton, Turnberry's real estate agent; and Larry Taylor, a Turnberry employee. They alleged causes of action against Turnberry for violation of the Tennessee Consumer Protection Act, breach of contract, breach of express warranty, breach of implied warranty, quantum meruit, negligence, negligence per se, rescission, and gross negligence. The Whites alleged fraudulent inducement against all the defendants.

Turnberry filed a motion to stay the litigation and compel binding arbitration based on the arbitration clause in the purchase agreement. The trial court granted Turnberry's motion in part, finding that all of the Whites' claims, except for the claim of fraudulent inducement, should be arbitrated. Turnberry appeals.

STANDARD OF REVIEW

The interpretation of a contract is a question of law. *Guiliano v. Cleo, Inc*., 995 S.W.2d 88, 95 (Tenn. 1999). We review questions of law de novo with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc*., 8 S.W.3d 625, 628 (Tenn. 1999).

ANALYSIS

The trial court relied upon two cases in reaching its decision. The first is *Frizzell Construction Company, Inc. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (Tenn. 1999). In *Frizzell*, the Tennessee Supreme Court examined whether an arbitration clause required arbitration of a claim of fraudulent inducement to enter into a contract. *Frizzell*, 9 S.W.3d at 85-86. Initially, the *Frizzell* Court determined that, because the contract involved interstate commerce, the Federal Arbitration Act ("FAA") applied. *Id*. at 83-84. "The purpose of the FAA is 'to ensure the enforceability, according to their terms, of private agreements to arbitrate.'" *Id*. at 84 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 57 (1995)). "[P]arties cannot be forced to arbitrate claims that they did not agree to arbitrate." *Id*. Next, the Supreme Court examined the intention of the parties by considering the terms of the contract, the subject matter, the circumstances of the transaction, and the parties' construction of the agreement. *Id*. at 85. The court viewed the broad arbitration clause as being limited by the choice of law provision:

> By stating that the contract is to be governed by Tennessee law, the parties have indicated their intention to arbitrate all disputes "arising out of, or relating to" their agreement—but only to the extent allowed by Tennessee law. . . . Therefore, because Tennessee law contemplates judicial resolution of contract formation issues, we conclude that the parties have indicated their intention not to submit such issues to arbitration.

Id. Consequently, the Supreme Court held that, "[b]ecause the parties did not intend to arbitrate contract formation issues, the chancellor's decision not to submit the claim of fraudulent inducement to arbitration was consistent with the FAA." *Id*. at 86.

The second decision upon which the trial court relied is *Hubert v. Turnberry Homes, LLC*, No. M2005-00955-COA-R3-CV, 2006 WL 2843449 (Tenn. Ct. App. Oct. 4, 2006). The trial court viewed *Hubert* as a case "[o]f particular import." The trial court observed that, "[t]he contract at issue in *Hubert* contained an arbitration clause and a choice of law clause that mirror the language of the clauses at issue in the present case." The *Hubert* court relied on *Frizzell* to determine that, "the trial court did not err in denying Turnberry's motion to compel arbitration with respect to the Huberts' claim of fraudulent inducement." *Hubert*, 2006 WL 2843449, at *7.

Turnberry attempts to distinguish *Frizzell* on several grounds. The agreement to arbitrate in *Frizzell*, Turnberry maintains, is not as broad as the one in the purchase agreement at issue. Unlike *Frizzell*, Turnberry claims that the purchase agreement at issue waived all methods of legal recourse except binding arbitration. Unlike *Frizzell*, Turnberry notes that the parties included an express exception to arbitration. Finally, unlike *Frizzell*, "in the same provision where the parties to the purchase agreement specified a choice of law, the parties specified the venue for arbitration but did not specify a venue for litigation."

We find these points raised by Turnberry to be distinctions without a difference. Despite differences in wording, both the arbitration agreement in *Frizzell*[1] and the one at issue in this case are very broad. As to the other arguments raised by Turnberry, the answer is found in the choice of law provision which indicates that Tennessee law governs the agreement. "Tennessee law does not allow arbitration of contract formation issues." *Frizzell*, 9 S.W.3d at 85 n.12; *see also Webb v. First Tenn. Brokerage, Inc.*, No. E2012-00934-COA-R3-CV, 2013 WL 3941782, at *16-17 (Tenn. Ct. App. June 18, 2013); *River Links at Deer Creek, LLC v. Melz*, 108 S.W.3d 855, 859 (Tenn. Ct. App. 2002); *City of Blaine v. John Coleman Hayes & Assocs., Inc.*, 818 S.W.2d 33, 38 (Tenn. Ct. App. 1991).

Turnberry also argues that *Hubert* was decided incorrectly because the court did not interpret "the specific language of the purchase agreement as a whole to determine the intention of the parties with respect to the arbitrability of a fraudulent inducement claim." When interpreting a contract, "our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language." *Guiliano*, 995 S.W.2d at 95. The choice of law provision in *Hubert* states the contract is governed by Tennessee law. "Tennessee law does not allow arbitration of contract

[1] The *Frizzell* court referred to "the breadth of this [arbitration] clause." *Frizzell*, 9 S.W.3d at 85.

formation issues." *Frizzell*, 9 S.W.3d at 85 n.12. That is as far as the *Hubert* court had to go in analyzing the issue.

It is true that the parties could have agreed to arbitrate the claim of fraudulent inducement, despite the prohibition under Tennessee law. *Id*. at 84. Indeed, Turnberry argues that is exactly what the parties did through the use of broad arbitration language and the inclusion of one exception to arbitration. Like the courts in *Frizzell* and *Hubert*, however, we are disinclined to find that the use of broad arbitration language constitutes a waiver of the right under Tennessee law to have a court consider the issue of fraudulent inducement. Furthermore, the party claiming waiver has the burden of proving that the party against whom waiver is asserted has, "by a course of acts and conduct, or by so neglecting and failing to act, . . . induce[d] a belief that it was [the party's] intention and purpose to waive." *Ky Nat'l Ins. Co. v. Gardner*, 6 S.W.3d 493, 499 (Tenn. Ct. App. 1999) (quoting *Baird v. Fidelity-Phenix Fire Ins. Co*., 162 S.W.2d 384, 389 (Tenn. 1942)). Turnberry has not met its burden in this case.

Finally, Turnberry maintains that the FAA requires arbitration of a fraudulent inducement claim. Without saying so, Turnberry is arguing that the Tennessee Supreme Court incorrectly decided *Frizzell*. Although not cited by Turnberry, a district court case from the Eastern District of Tennessee supports this claim. In *SL Tennessee, LLC v. Ochiai Georgia, LLC*, No. 3:11-CV-340, 2012 WL 381338 (E.D. Tenn. Feb. 6, 2012), the district court decided that fraudulent inducement must be arbitrated under the rules of the FAA, despite *Frizzell* and a Tennessee choice-of-law provision. *Ochiai*, 2012 WL 381338, at *4, 8. However, as the Eastern Section of this Court has observed, "We are obligated to follow *Frizzell*, not *Ochiai*." *Webb*, 2013 WL 3941782, at *16.

CONCLUSION

We affirm the trial court's determination that the fraudulent inducement claim should not be submitted to arbitration. Costs are taxed against the appellant, Turnberry, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE