RENDERED: June 16, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000269-MR

AMERICAN GENERAL HOME EQUITY, INC. APPELLANT

v.

APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 03-CI-00301

TERESA R. KESTEL APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

HENRY, JUDGE: American General Home Equity appeals from the trial court's order overruling American General's motion to compel arbitration. Upon review, we affirm the decision of the trial court.

American General initiated this action against Mrs. Teresa R. Kestel and her husband to foreclose a mortgage and collect on a loan. Specifically, American General sued on (1) a promissory note in the amount of $46,701.00 and (2) on a certain mortgage on Mercer County realty securing the loan.

The trial court dismissed the collection claim against Mrs. Kestel because she was not a signatory to the note. But, after Mrs. Kestel's husband filed no answer to the collection claim and a suggestion of his death was submitted by counsel, the court granted default judgment to American General on the collection claim against Mrs. Kestel's late husband. As for the mortgage, Mrs. Kestel filed counterclaims seeking to avoid foreclosure on various statutory and common-law grounds.

In response to Kestel's counterclaims, American General sought to compel arbitration of the dispute. But, the trial court refused to compel arbitration on the ground that Mrs. Kestel was not a signatory to any arbitration provision with American General that covers the mortgage dispute. American General now claims (1) that Mrs. Kestel is in fact a signatory to an arbitration agreement covering the mortgage dispute or, in the alternative, (2) that Mrs. Kestel is equitably estopped from opposing arbitration.

Under both federal and state law, arbitration agreements are generally enforceable by the courts. See Conseco v. Wilder, 47 S.W.3d 335, 339 (Ky.App. 2001). However, a court may not force an unwilling person into arbitration unless that person previously assented to be bound by an arbitration agreement covering the dispute. United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct.

1347, 1353, 4 L.Ed.2d 1409 (1960). And, the question of whether a party has consented to arbitration is matter of ordinary principles of contract and agency. See, e.g., McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980). On appeal, a trial court's arbitration decision is reviewed de novo, except that findings of fact are reviewed only for clear error. Conseco, 47 S.W.3d at 340.

American General now argues that the remaining mortgage dispute is subject to arbitration either because (1) Mrs. Kestel is a personal signatory to an arbitration agreement covering the present mortgage dispute, or in the alternative, that (2) Mrs. Kestel is equitably estopped by her counterclaims from denying that she is bound to arbitration. We agree with American General's first claim, thus, we need not reach the equitable estoppel claim.

Indeed, American General has never claimed that the mortgage papers signed by Mrs. Kestel contain an arbitration clause, and it also acknowledges that she is not a signatory to the $46,701.00 note executed by her deceased husband. American General's contention is that when Mrs. Kestel signed documents accompanying an application for a subsequent loan, those documents contained a sufficiently broad arbitration clause to subject the present mortgage dispute to arbitration, even though

the subsequent loan was not secured by a mortgage on her residence.

In response, Mrs. Kestel admits that, subsequent to American General's loan to her late husband, she personally took a loan from American General which was not secured by her Mercer County property, and that the promissory note contains an arbitration clause. But, she contends that the scope of the arbitration clause in that promissory note is not broad enough to cover the present mortgage dispute. However, based on controlling precedents regarding the construction of arbitration clauses, we are constrained to agree with American General that the arbitration agreement signed by Mrs. Kestel is sufficiently broad to encompass the present mortgage dispute.

The pertinent arbitration language in Mrs. Kestel's promissory note is as follows:

> By signing below, you have read, understand and agree to the terms and conditions in this document, including the arbitration provisions that provide, among other things, that either you or lender may require that certain disputes between you and lender be submitted to binding arbitration. If you or lender elects to use arbitration, both you and lender will have waived your and lender's right to a trial by a jury or judge, and the decision of the arbitrator will be final. Arbitration will be conducted pursuant to the rules of the National Arbitration Forum.

Moreover, the same document indicates that claims covered by the arbitration provision comprise

> [A]ll claims and disputes arising out of, in connection with, or relating to your loan from Lender today or any previous loan from Lender (including all amendments, modifications and re-financings); any previous retail installment sales contract or loan assigned to Lender; **all** documents, **actions**, or omissions **relating to** this or **any previous loan** or retail installment sales contract; any insurance product, service contract, or warranty purchased in connection with this or any previous loan or retail installment sales contract; whether the claim or dispute must be arbitrated; the validity of the Arbitration Provisions, your understanding of them, or any defenses as to the enforceability of the Loan Agreement . . . .
> (Emphasis supplied.)

American General hangs its hat upon the language indicating that the arbitration agreement covers "all . . . actions . . . relating to . . . any previous loan." Indeed, American General reads this phrase as covering any action by Mrs. Kestel against American General which relates to an American General loan whether made to Mrs. Kestel herself or to a third party, such as her late husband. Under this reading, Mrs. Kestel's counterclaims to American General's foreclosure action would indeed "relate to" an "action" on a "previous loan" issued by American General. Thus, in American General's view, the arbitration agreement would encompass the present dispute. However, the phrase "all . . . actions . . . relating to . . . any previous loan," when read in the context of the arbitration

agreement as a whole, could also be understood as covering only actions relating to previous loan by American General to Mrs. Kestel herself, not to third parties like Mrs. Kestel's late husband.

Confronted with an ambiguity in the language defining the scope of the arbitration agreement between American General and Mrs. Kestel, we follow Kentucky's policy favoring arbitration agreements. Indeed, in Louisville Peterbilt, Inc. v. Randall Cox, 132 S.W.3d 850 (Ky. 2004), the Court stated that

> any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. at 855 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983).

Thus, keeping in mind the controlling policy favoring broad construction of arbitration clauses, we find that the ambiguity in the language of the arbitration agreement must be resolved in favor of arbitration and, therefore, that it is sufficiently broad to cover the present foreclosure action and counterclaims. Moreover, having decided that Mrs. Kestel is in fact a signatory to an arbitration agreement with American General that is sufficiently broad to encompass the present mortgage dispute, we need not reach American General's

alternative, equitable-estoppel argument. Still, we do need to consider Mrs. Kestel's defense that, even if the present mortgage dispute is subject to an arbitration agreement, American General has waived arbitration by not moving to compel arbitration until nine months after she filed her answer and counterclaims to American General's foreclosure suit.

The legal doctrine that even a binding arbitration agreement may be waived by the conduct of a party to the agreement is well settled. In fact, some jurisdictions hold that arbitration agreements which reserve a judicial remedy to one party while restricting the other party to arbitration are unconscionable. See, e.g., Taylor v. Butler, 142 S.W.3d 277 (Tenn. 2004). And though this rule seems equitable, we have not followed it. To the contrary, in Conseco v. Wilder, 47 S.W.3d 335 (Ky.App. 2001), we held that a lender could seek to collect on a defaulted loan in court and later compel arbitration when faced with a borrower's countersuit.

Despite our holding in Conseco, we did qualify our ruling with the restriction that a lender may not unduly delay enforcement of an arbitration agreement even when it does decide to change forums from court to arbitration. Conseco, 47 S.W.3d at 344-45. In Conseco itself, we overlooked a lender's three-month delay in seeking to compel arbitration because "[t]he delay itself was not unduly long and during those three months

there was little activity in the case." Conseco, 47 S.W.3d at 345. But we plainly implied that, in certain circumstances a lender's excessive delay in seeking to switch from court to arbitration would act as a waiver of arbitration. Id.

Here, the record shows that Mrs. Kestel filed her counterclaims against American General's foreclosure suit on February 23, 2004, but that American General waited until November 23, 2004 before actually to moving to compel arbitration of the mortgage dispute. We find American General's nine-month delay in seeking to switch from litigation to arbitration to be unreasonable. First, we note that American General's delay is three times that of the excusable delay in Conseco. Second, we note that, unlike in Conseco, substantial litigation activity has in fact occurred during the delay period in this case. Indeed, during the American General's delay, Mrs. Kestel filed a motion to strike as well as a motion for summary judgment. American General responded to both motions, and the circuit court ruled on both. Furthermore, Mrs. Kestel also filed discovery requests during the delay period. Thus, unlike Conseco, we cannot say that "very little activity" occurred in this case during the period of American General's delay in asserting its arbitration rights. To the contrary, American General has joined the foreclosure litigation so extensively that changing forums to arbitration at this point would be

unfair to Mrs. Kestel. Indeed, due to American General's institution of this foreclosure action and litigation thereof before seeking arbitration, Mrs. Kestel has already committed substantial effort, time, and money to the litigation in the circuit court.

Finally, we note that, in its reply brief, American General neither disputes that Mrs. Kestel has invested substantial time, expense, and effort in litigating this action in the original forum of American General's choosing, nor does it controvert Mrs. Kestrel's claim that she would be prejudiced by having to change forums at this late hour. In fact, American General has made no response at all to Mrs. Kestel's waiver argument, which was plainly set out in her brief. Thus, American General has not tendered any explanation whatsoever for its nine-month delay in moving for arbitration. Consequently, we find that American General waived arbitration of its foreclosure action including Mrs. Kestel's counterclaims.

The Order of the Mercer Circuit Court is affirmed.

BARBER, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS WITH SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING IN RESULT: I concur with the result reached by the majority opinion. But, I disagree with the majority's conclusion that the arbitration clause in the later note compels arbitration of the claims raised by Mrs.

Kestel relating to the earlier note and mortgage. The majority focuses on language in Louisville Peterbilt, Inc. v. Cox, 132 S.W.2d 850, (Ky. 2004), stating that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Id. at 855, quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (l983) (Emphasis added). The question in Louisville Peterbilt, however, concerned whether a claim of fraud in the inducement of a contract is subject to a compulsory arbitration clause. The Supreme Court concluded that once a court finds the existence of a valid arbitration agreement, there is a strong statutory and public policy supporting enforcement of all claims arising under the agreement.

Unlike in Louisville Peterbilt, the question in this case does not concern the scope of arbitrable issues. American General is not seeking to compel arbitration based on a clause in the loan and mortgage at issue in this case, but based on a clause in a completely separate and unrelated loan later executed by Mrs. Kestel. The question in this case is whether the arbitration language in the later contract may reasonably be construed to apply to the earlier note.

If an ambiguity exists in a contract term, a court will gather, if possible, the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties, and the conditions under which the contract were written. Frear v. P.T.A. Industries, Inc., 103 S.W.3d 99, 106 (Ky. 2003), (citing Whitlow v. Whitlow, 267 S.W.2d 739, 740 (Ky. 1954). As the majority correctly observes, "the phrase 'all . . . actions . . . relating to . . . any previous loan,' when read in the context of the arbitration agreement as a whole, could also be understood as covering only actions relating to [the] previous loan by American General to Mrs. Kestel herself, not to third parties like Mrs. Kestel's late husband." I would go further, concluding that this is the only reasonable interpretation of the arbitration clause at issue. Under American General's interpretation, the arbitration clause would cover a loan not referenced in the agreement and to which Mrs. Kestel was not even a party. While there is a strong public policy in favor of enforcing arbitration agreements, that policy should not distort well-established principles of contract interpretation. Consequently, I would find that the arbitration clause does not cover the claims relating to the loan and mortgage at issue in this case.

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