

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT

Pinnell v. Cugini & Cappoccia Builders, Inc.

2014-Ohio-669 (Ohio Ct. App. 2014) · No. 13AP-579 · Decided February 25, 2014

SUMMARY

The Tenth District Court of Appeals of Ohio affirmed the denial of appellants' motion to stay litigation pending mediation and arbitration. The court held that appellants waived their contractual arbitration rights by actively participating in the litigation, including filing a counterclaim, engaging in discovery, seeking court intervention, and delaying their motion to stay.

CASE DETAILS

COURT	Court of Appeals of Ohio, Tenth Appellate District
WRITING FOR THE COURT	O'Grady, J.; Brown, J.; Connor, J.
JURISDICTION	Ohio
DECIDED	February 25, 2014
DOCKET	13AP-579
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appellants appealed the Franklin County Court of Common Pleas order denying their motion to stay the litigation pending mediation and arbitration under the parties' operating agreement.
STANDARD OF REVIEW	An order granting or denying a stay pending arbitration is reviewed according to the nature of the issues involved. Because waiver is generally a fact-driven issue, the trial court's waiver determination is reviewed for abuse of discretion. Abuse of discretion means an attitude that is arbitrary, unreasonable, or unconscionable.
PRECEDENTIAL VALUE	published Ohio Court of Appeals decision
PARTIES	Cugini & Cappoccia Builders, Inc., Denis King, Paul Cugini v. Chad Pinnell, David Cavanaugh, PinnellEstate, LLC

TOPICS

- arbitration
- waiver
- breach of contract
- construction law
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether appellants waived their contractual right to compel arbitration by invoking the trial court's jurisdiction, filing a counterclaim and summary-judgment motion, participating extensively in discovery, and delaying their request for a stay.
2. Whether the operating agreement's written-waiver provision prevented waiver of the arbitration right through litigation conduct.
3. Whether alleged material breaches or rescission of the operating agreement rendered its arbitration provision unenforceable.

HOLDINGS

1. Appellants waived their right to compel arbitration because, with knowledge of that right, they acted inconsistently with it by invoking the trial court's jurisdiction, filing a counterclaim, participating extensively in discovery and other litigation, seeking merits relief through summary judgment, and waiting more than a year before requesting a stay.
2. A contractual provision requiring waiver to be in writing may itself be waived through the parties' subsequent conduct; therefore, the operating agreement's written-waiver clause did not prevent appellants from waiving arbitration by their litigation conduct.
3. An alleged failure or rescission of the operating agreement does not, by itself, eliminate the arbitration provision because the arbitration clause is treated as a separate contract within the broader agreement and must be challenged on its own merits.

KEY QUOTATIONS

"A party asserting waiver must prove that the waiving party knew of the existing right to arbitrate and, based on the totality of the circumstances, acted inconsistently with that known right." (§ 18)

"Because the arbitration clause is a separate entity, an alleged failure of the contract in which it is contained does not affect the arbitration provision itself." (§ 22)

"Such conduct amounts to forum shopping." (§ 23)

FACTUAL BACKGROUND

The parties formed an operating arrangement to develop and sell a commercial medical building on the Dillmont Property in Columbus, Ohio. The property was sold for net proceeds exceeding \$800,000, but the closing documents identified Cugini & Cappoccia Builders, Inc. as the seller, and the proceeds were distributed to King and Cugini rather than fully to Pinnell, PinnellEstate, and Cavanaugh. The operating agreement contained mediation and arbitration provisions, while appellants asserted that appellees had materially breached the agreement by failing to make capital contributions and execute personal guarantees.

PROCEDURAL HISTORY

Appellees sued appellants over the distribution of proceeds from the sale of a commercial medical building and alleged breach of the operating agreement, among other claims. C&C filed a counterclaim alleging that Pinnell and Cavanaugh failed to make required capital contributions. After the parties engaged in extensive discovery and appellants filed a motion for summary judgment, appellants alternatively sought a stay pending mediation and arbitration. The magistrate and trial court found that appellants had waived arbitration, and the trial court denied the motion to stay; the appellate court affirmed.

DISPOSITION

affirmed

CASES CITED

- Hayes v. Oakridge Home, 122 Ohio St. 3d 63, 2009-Ohio-2054, ¶¶ 15-16
- Taylor Bldg. Corp. of Am. v. Benfield, 117 Ohio St. 3d 352, 2008-Ohio-938, ¶ 27
- Williams v. Aetna Fin. Co., 83 Ohio St. 3d 464, 471 (1998)
- Kelm v. Kelm, 68 Ohio St. 3d 26, 29 (1993)
- Schaefer v. Allstate Ins. Co., 63 Ohio St. 3d 708, 712 (1992)
- Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities v. Mahoning Cty. TMR Edn. Assn., 22 Ohio St. 3d 80, 83 (1986)
- Ignazio v. Clear Channel Broadcasting, Inc., 113 Ohio St. 3d 276, 2007-Ohio-1947, ¶ 18
- Dispatch Printing Co. v. Recovery Ltd. Partnership, 10th Dist. No. 10AP-353, 2011-Ohio-80, ¶¶ 17, 19, 21
- Murtha v. Ravines of McNaughton Condominium Assn., 10th Dist. No. 09AP-709, 2010-Ohio-1325, ¶¶ 20-21
- Morris v. Morris, 189 Ohio App. 3d 608, 2010-Ohio-4750, ¶ 17
- ACRS, Inc. v. Blue Cross & Blue Shield of Minnesota, 131 Ohio App. 3d 450, 456 (8th Dist. 1998)
- Blakemore v. Blakemore, 5 Ohio St. 3d 217, 219 (1983)
- Tinker v. Oldaker, 10th Dist. No. 03AP-671, 2004-Ohio-3316, ¶¶ 20-21
- Snowville Subdivision Joint Venture Phase I v. Home S. & L. of Youngstown, Ohio, 8th Dist. No. 96675, 2012-Ohio-1342, ¶ 17
- Glenmoore Builders, Inc. v. Smith Family Trust, 9th Dist. No. 24299, 2009-Ohio-3174, ¶ 41
- Meyer v. Chieffo, 193 Ohio App. 3d 51, 2011-Ohio-1670, ¶ 32
- Bryan Publishing Co. v. Kuser, 3d Dist. No. 7-07-17, 2008-Ohio-2610, ¶ 18
- Gordon v. OM Fin. Life Ins. Co., 10th Dist. No. 08AP-480, 2009-Ohio-814, ¶ 9
- ABM Farms, Inc. v. Woods, 81 Ohio St. 3d 498, 501 (1998)
- Battle v. Bill Swad Chevrolet, Inc., 140 Ohio App. 3d 185, 189 (10th Dist. 2000)
- Tomovich v. USA Waterproofing & Found. Servs., Inc., 9th Dist. No. 07CA009150, 2007-Ohio-6214, ¶ 18
- Am. Gen. Fin. v. Griffin, 8th Dist. No. 99088, 2013-Ohio-2909, ¶ 22

