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ARGUMENT

Introduction

The underlying lawsuit surpasses a simple dispute over the quality of the Relators' homes. This lawsuit covers the entire gamut of the relationship between the Relator/homeowners ("the homeowners") and the homebuilder, and alleges fraud and violations of the Missouri Merchandising Practices Act. Count IV of the underlying Petition has nothing to do with the home building process, but instead alleges a breach of fiduciary duty for mismanaging funds of the homeowners' association *after* the homes were built. Yet Respondent seeks to sweep all those varied claims within the ambit of the arbitration clause, and amicus suggests the homeowners were fully aware that they were waiving their access to the court system for all these claims by one out of twenty one initial boxes in a form contract. If the arbitration clause at issue here is truly that broad, it should be condemned by this Court.

Moreover, while the Missouri General Assembly has expressed a public policy in favor of arbitration, it has also expressed a desire to allow violations of the Missouri Merchandising Practices Act to be heard in a court of law. Mo. Rev. Stat. § 407.025. The ruling by Respondent prevents that from happening.

In this dispute over whether this arbitration clause is proper, or so all-encompassing, Respondent's attorneys, if they are successful, will certainly seek reimbursement in the arbitration process for their client's attorney's fees. Yet the homeowners, if they are successful, have no similar recourse. This remedy in the

arbitration clause available to its drafter is nothing more than a penalty designed to discourage a consumer from access to this forum, is symptomatic of the arbitration clause at issue here, and should be condemned by this Court.

Respondent and amicus attorneys seek to turn this writ proceeding into a struggle over arbitration clauses in general, implying that this writ proceeding rises to a fight for the soul of arbitration. They overstate their case. The homeowners do not seek from this Court a condemnation of all arbitration clauses; they ask this Court for a condemnation of *this* arbitration clause. The arbitration clause at issue in *this* writ proceeding is so overreaching and oppressive that it deserves such scorn from this Court.

Standard of Review

The homeowners inadvertently excluded the requisite standard of review from their initial brief. The Respondent is incorrect in asserting that the appropriate standard of review is abuse of discretion; even according to a case upon which they rely, the standard of review is *de novo*. *Triarch Industries, Inc. Crabtree*, 2004 Westlaw 941218, slip op. at 2 (Mo. App. W.D. May 4, 2004) *citing Dunn Industrial Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003). The nature of the proceeding before this Court – a writ as opposed to a direct appeal – does not change this standard. No case in Missouri, including those cited by Respondent, alters that.

Overview

Just like insurance contracts, the Missouri arbitration statute prevents the

enforcement of arbitration clauses in contracts of adhesion. Mo. Rev. Stat. § 435.350. The law on adhesion contracts lends itself to an objective test for this Court to make the judgment whether the arbitration clause should be voided. The law, though, also allows this Court to make a more subjective determination whether it feels the arbitration clause is unconscionable.

The contract is a contract of adhesion

Unlike the federal arbitration statute, the Missouri arbitration statute, which controls this writ proceeding, mandates that if the contract is one of adhesion, the arbitration clause can not be enforced.

All the cases cited by the homeowners in their initial brief are the cases in Missouri that have actually discussed similar contracts to the one at issue in this writ, and all have found that similar contracts are contracts of adhesion. The statute itself contemplates that contracts for the purchase of a home are contracts of adhesion. No reported case in Missouri has agreed with either Respondent's or amicus' counsel that the contract at issue here is not a contract of adhesion.

The case cited by the Respondent, *Robin v. Blue Cross Hospital Service, Inc.*, 637 S.W.2d 695 (Mo. banc 1982), examined a contract negotiated by two parties with equal bargaining power. That has nothing to do with this case.

As the homeowners pointed out in their initial brief, the test is an objective one, specifically to avoid the type of subsequent testimony that McBride presented in this case. Respondent's argument, that the homeowners were confusing this with a different test not relevant here, the objective expectations test, is belied by

the case cited in the homeowners' initial brief.

Respondent suggests that by finding that the contract at issue here is a contract of adhesion would throw the arbitration process into chaos is curious. On the one hand, they argue that the homeowners were free to go buy another house (an argument that will be dealt with in a moment), and on the other hand, that all these contracts would be found invalid by an adverse ruling in this case, seems contradictory. This is compounded by amicus entering their appearance, claiming they have an interest on behalf of all their members in this arbitration clause, and then assert that the homeowners were free to buy their house from another member.

However, to deal with this argument, the one example Respondent presented is telling. The American Institute of Architects contract is one that is normally entered into by a contractor, not a consumer, and therefore can not be a contract of adhesion. The concern the courts have consistently discussed are consumer contracts which are oppressive. Here, only the contractor can choose arbitration. Here, the cost to enforce the provision can only be placed on the consumer. Here, the arbitrator is chosen by the President of the local Homebuilder's Association. One wonders why the American Institute of Architects contract instead sends all disputes to a neutral arbitrator, instead of contractor-selected disputes to an arbitrator selected by the contractors. It is this very over-reaching that is evidence of the lopsided bargaining power involved in this contract, which of itself indicates this was an adhesive contract. *See, e.g.,*

Crawford v. Whittaker Const., Inc., 772 S.W.2d 819 (Mo. App. 1989).

Respondent suggests this contract was not on a “take it or leave it” basis. First, Respondent “proves” this by inserting one page of a deposition; counsel excluded, however, the response to the question on the bottom of page five of its appendix: despite the policy that may have been developed in response to the lawsuit, has the arbitration provision actually been negotiated? Or changed? The answer, of course, was no. *See* Exhibit D, p. 58 (deposition page 17). Second, as a practical matter, this argument is a red herring. The test, as pointed out in the homeowners’ initial brief, is objective, not subjective. The courts have held this is a contract of adhesion, the parties had unequal bargaining power, and the provision at issue was oppressive. That is the test in determining an adhesion contract, and no court in Missouri has ever held that an arbitration provision in this circumstance can be enforced.

Amicus suggests that the homeowners initialing the arbitration clause has some meaning in this analysis. The cite no case for this argument other than *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624 (Mo. banc 1997). This Court made the same point in *Malan* that homeowners have argued all along: In *Malan*, the suing party was a commercial entity of equal bargaining power with the drafter of the arbitration clause, and both parties were represented by an attorney. That is not an adhesive contract. That is not this case.

This contract does not warrant a new home

Respondent’s counsel asserts that “McBride’s contracts clearly do provide

warranties against defects in the construction of new homes. (Ex. B at p. 9-26).” Respondent’s Brief at 8. The reason, of course, why no specific page reference is provided to this Court is that the sales contract – the contract at issue here – contains no warranties. The only warranty, as explained in the homeowners’ initial brief, is provided by the separate RWC warranty program. To suggest that a suit for an implied warranty of habitability somehow implies that the contract at issue here contained a warranty, as stated by Respondent’s counsel in its brief, is just wrong.

The arbitration provision is unconscionable

Both Respondent and amicus confuse two issues: whether the arbitration clause is enforceable due to “mutuality of obligation,” and whether the arbitration clause is unconscionable. The reason for confusing this argument is straightforward: the mutuality of obligation argument gives Respondent a much stronger line of authority. Even then, courts have generally evaluated such a provision that involved two parties of equal bargaining power, and have enforced provisions that allow only one party to choose arbitration. *See, e.g., Doctor’s Assoc., Inc. v. Distajo*, 66 F.3d 438, 451-2 (2nd Cir. 1995), and the cases cited therein. When discussing unconscionability, though, the Courts generally are dealing with consumers, and generally find such a clause unconscionable. *See Triarch Industries, Inc. v. Crabtree*, 158 S.W.3d 772, 775 n.3 (Mo. banc 2005).

The essence of the homeowners’ argument has already been expressed by a Missouri court in *Greenpoint Credit, L.L.C. v. Reynolds*, 151 S.W.2d 868 (Mo.

App. 2005). The court held arbitration agreements are certainly not in themselves unconscionable. But when the arbitration agreement allows access to the courts by the drafter, but denies that access to the other party, such an agreement is unconscionable. *Id.* at 875. The homeowners argue nothing different here.

What this Court must consider in deciding whether such a provision is substantively unconscionable is not to invalidate all arbitration provision, but to invalidate lopsided arbitration provisions. The nature of the law of unconscionability basically puts this provision before this Court and asks for an opinion. This arbitration provision does not even pretend to be fair, despite the frantic amendments to the provision proposed by McBride once the lawsuit was filed. This arbitration clause is wrong and overreaching, and should be rejected by this Court.

CONCLUSION

Relators therefore respectfully request this Court make permanent the writ of mandamus previously issued, and any other relief this Court deems just and proper.

