

IN THE SUPREME COURT OF MISSOURI

STATE ex rel. GAYLE VINCENT, et al.)	
)	
Relators,)	
)	
v.)	No. SC87203
)	
HONORABLE NANCY SCHNEIDER,)	
JUDGE, ELEVENTH JUDICIAL CIRCUIT,)	
)	
Respondent.)	

BRIEF OF RELATORS

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JURISDICTIONAL STATEMENT

Relators have filed a petition for a writ of mandamus with the Supreme Court of Missouri which requests that a writ be issued to the responding judge of the Circuit Court of St. Charles County commanding respondent to exercise jurisdiction over this matter and deny the underlying Defendant's Motion to Compel Arbitration due to the fact that the arbitration clause at issue between the relators and the underlying defendant is unconscionable and a contract of adhesion. Respondent has granted the underlying Defendant's Motion to Compel Arbitration.

This Court has jurisdiction under Article V, Section 4 of the Constitution of the State of Missouri, under which it exercises superintendent control over all inferior courts and may issue remedial writs to accomplish such control.

STATEMENT OF FACTS

The Relators, the underlying Plaintiffs, were purchasers of homes from the underlying Defendant, McBride & Son Homes, Inc. (“McBride”). Subsequently, these underlying Plaintiffs discovered innumerable problems with their home and filed suit, alleging violations of the Missouri Merchandising Practices Act, fraudulent misrepresentation, breach of the implied warranty of habitability, and breach of fiduciary duty. See Exhibit A.

The contracts involving the sale of the homes contained an identical arbitration provision (The arbitration provision is located in the Exhibits at page 10, and in the contract on page 2). The arbitration provision reads as follows:

4. It is agreed between the parties that Seller’s liability to Purchaser for damages of any breach of this contract (including, without limitation, defects in construction items warranted hereunder or breach of Seller’s warranties) shall be limited to the reasonable cost of repair or replacement of any defective items of labor or material. In the event of any claim by Purchaser against seller arising out of this Contract or the Residence, Seller, at its option, may either:

- (a) By written notice to Purchaser, repurchase the Residence
- (b) By written notice to Purchaser, submit the resolution and determination of such claim by Purchaser against Seller to binding arbitration pursuant to the provisions of the Missouri Uniform Arbitration Act, Mo. rev. Stat. Ch. 435 (1986), as amended, and/or the Federal

Arbitration Act, Title 9 U.S.C. §§ 1 et seq., as amended. The arbitrator shall be selected by the President of the Homebuilders Association of Greater St. Louis. The arbitration shall take place in St. Louis County, Missouri at such place and such dates as directed by the arbitrator. The decision of the arbitrator shall be binding on both parties and enforceable in a court of competent jurisdiction. Purchaser shall be liable to Seller for all court, arbitration and attorney's fees and costs incurred by Seller in enforcing this provision.

Of interest is that the above-referenced "President of the Homebuilders Association of Greater St. Louis" happens to be the President of McBride as well.

Exhibit E

McBride filed a Motion to Compel Arbitration, Exhibit B, which was granted by the Respondent, Exhibit C. This Court entered its preliminary writ of mandamus on November 22, 2005.

POINT RELIED ON

**WHETHER THE TRIAL COURT ERRED IN GRANTING THE
UNDERLYING DEFENDANT’S MOTION TO COMPEL ARBITRATION
BECAUSE THE ARBITRATION CLAUSE WAS A CONTRACT OF
ADHESION AND/OR UNCONSCION-ABLE IN THAT THE
ARBITRATION CLAUSE WAS IN A CONTRACT THAT WAS A FORM
CONTRACT THAT WAS EFFECTIVELY OFFERED ON A TAKE-IT OR
LEAVE IT BASIS, ALLOWED THE MAKER TO DECIDE WHETHER
ARBITRATION WOULD TAKE PLACE, AND SHIFTED ALL THE
ARBITRATION COSTS TO THE RELATORS**

Estrin Const. Co. v. Aetna Cas. and Sur. Co., 612 S.W.2d 413 (Mo. App. 1981)

Triarch Industries, Inc. v. Crabtree, 158 S.W.3d 772, 775 (Mo. banc 2005)

ARGUMENT

When a Motion to Compel Arbitration is granted, the appropriate method to appeal that order is by a request for a remedial writ. *Deiab v. Shaw*, 138 S.W.3d 741 (Mo. App. 2003).

As an initial matter, there is both a state and federal arbitration law. As a practical matter, the substantive law for our purposes is likely the same. However, for the federal law to apply, the Respondent must show that somehow this contract, between a Missouri corporation and a Missouri resident, somehow impacted interstate commerce. No such showing was ever made to the trial court.

Mo. Rev. Stat. § 435.350 states that arbitration provisions in contracts of adhesion are not enforceable. If the agreement at issue is a contract of adhesion, the arbitration provision may not be enforced. Therefore, pursuant to the statute, the test is not whether the arbitration provision is unconscionable – that is a separate test – but simply whether the contract is an adhesion contract. The test of whether a contract is one of adhesion is objective, not subjective. *See Hartland Computer Leasing Corp., Inc. v. Insurance Man, Inc.*, 770 S.W.2d 525, 527 (Mo. App. 1989). The intention of the parties, therefore, is irrelevant, as a party otherwise would always assert that the contract is negotiable. In *Estrin Const. Co. v. Aetna Cas. and Sur. Co.*, 612 S.W.2d 413, 418n.3 (Mo. App. 1981), the court specifically described a contract such as this would be one of adhesion. *See Also Hartland Computer Leasing*, 770 S.W.2d at 527. There is no question that the

contract on its face is one of adhesion. In fact, the agreement is so lopsided that it provides the President of McBride could appoint the arbitrator! (See Exhibit E)

The only possible defense McBride could raise is that the statute also states that for purposes of the statute, “contracts which warrant new homes against defects in construction” are not contracts of adhesion. However, this provision, which has never been interpreted by a court, does not apply here. As is readily apparent from the contract itself, the arbitration provision applies to “any” dispute between Relators and McBride, which it must, because the underlying lawsuit extends far beyond simple disagreements about the condition of the home. It is not limited to warranties. Moreover, in a deposition, the underlying Defendant clearly sets out how these two types of contracts are different. *See Exhibit D, page 63 (deposition page 22).*

If this contract is one of adhesion, the arbitration provision must be rejected, and the writ of mandamus made permanent. If not, though, this Court still must determine whether the arbitration provision is unconscionable.

Under both federal and state law, if the arbitration provisions are determined to be unconscionable, they will not be enforced. There are two separate reasons why the arbitration clause is unconscionable. If this Court finds either of these is correct, then this Court should direct the Respondent to deny the Motion to Compel Arbitration.

The first reason is that the arbitration provision only gives McBride the right to select arbitration. When only one party has the unilateral power to select

whether arbitration takes place, courts have consistently held the arbitration provision is unconscionable, and have refused to enforce it. This Court in dicta stated how dubious it was of such a provision. *See Triarch Industries, Inc. v. Crabtree*, 158 S.W.3d 772, 775 (Mo. banc 2005). The vast majority of other courts have found such a provision invalid. *See, e.g., Iwen v. U.S. West Direct*, 977 P.2d 989 (Mont. 1999), and the cases cited in *Triarch*, 158 S.W.3d at 774-5.

The second reason why the provision is unconscionable is because all the costs of arbitration are placed on the Relators. Again, though there is little law on this issue because the provision in the instant suit apparently overreaches to such an extent that few have tried to enforce such a provision (though there is a hot debate over whether *sharing* the cost is unfair to the extent it makes the agreement unconscionable). The one case that discussed this issue has found such a provision unconscionable. *Pine Ridge Homes, Inc. v. Stone*, 2004 WL 1730170 (Tex. App. 2004). McBride has argued this provision only applies to enforcing the arbitration provision. First, if so, how could McBride incur arbitration expense? Second, this underlines again the lopsided nature of the contract in that the homeowner has no similar cost-shifting provision available to them.

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.

CERTIFICATE OF COMPLIANCE

David Knieriem, the undersigned attorney for Relators, hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this Relators' Brief:

1. Complies with Missouri Supreme Court Rule 55.03,
2. Complies with the limitations contained in Missouri Supreme Court Rule 84.06(b),
3. Contains 1955 words, and 198 lines, excluding the cover page, according to the word count toll contained in Microsoft Word software with which it was prepared,
4. Contains zero lines of monospaced type in the brief (including Points Relied On, footnotes, signature blocks and cover page),
5. The disk accompanying this Relator's Brief has been scanned for viruses and to the best knowledge, information, and belief of the undersigned, it is virus-free.

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Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing was mailed, postage pre-paid, this __ day of _____, 2006 to: Steven M. Cockriel, Philip J. Christofferson, and Michael J. Rolwes, 10805 Sunset Office Drive, Suite 401, St. Louis, MO 63127.