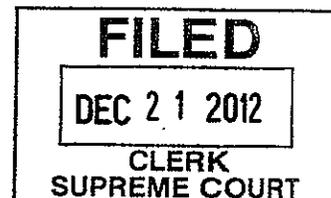


COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2011-SC-000462-DG



ENERGY HOMES, DIVISION
OF SOUTHERN ENERGY HOMES, INC.

APPELLANT

v.

**REPLY BRIEF FOR APPELLANT, ENERGY HOMES,
DIVISION OF SOUTHERN ENERGY HOMES, INC.**

BRIAN PEAY AND HIS WIFE, LORI PEAY

APPELLEES

**On Discretionary Review of the Court of Appeals NO. 2009-CA-000657
Appeal from Daviess Circuit Court No. 08-CI-01493**

* * * * *

Submitted by:

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CERTIFICATE REQUIRED BY CR 76.20(7)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by U.S. Mail this 21st day of December, 2012: Hon. Zack N. Womack, Womack Law Offices, P.O. Box 637, Henderson, KY 42419, Hon. Stephen D. Gray, Dorsey, King, Gray, Norment & Hopgood, 318 Second St., Henderson, KY 42420, Hon. Deanna M. Tucker, Schiller, Osbourn, Barnes & Maloney, PLLC, 1600 One Riverfront Plaza, 401 W. Main St., Louisville, KY 40202, Hon. Beth A. Lochmiller, Coleman, Lochmiller & Bond, P.O. Box 1177, Elizabethtown, KY 42702, and The Honorable Joe Castlen, 100 E. 2nd Street, Owensboro, KY 42303, and the Mr. Samuel P. Givins, Jr. Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The undersigned does also certify that the record on appeal was not withdrawn by this party.

BY:


ELIZABETH A. DEENER

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ARGUMENT

I. SEHI WAS NOT A PARTY TO THE PURCHASE ORDER

Appellees' Statement of the Case sets forth Appellees' claims against the co-Defendants that are not party to this appeal. (Appellee Br. at 1-2). Additionally, Appellees focus on the Purchase Order – an agreement the Daviess Circuit Court recognized was solely between Appellees and American Dream Housing, Inc., and to which SEHI was not a party. (Opn. Daviess Circuit Court, Apx. C at ¶ 4, R. 341; Court of Appeals Opn., Nickell Dissenting at 9). Nor were any duties or rights of SEHI implicated in the Purchase Order contract between American Dream and Appellees. Indeed, the Circuit Court determined that SEHI was not a party to any contract with Appellees. *Id.* The issues before this Court, and the dispute between SEHI and Appellees, is entirely controlled by the contract between them: the Arbitration Agreement. Further, as Appellant's Brief shows, the decisions below were clearly erroneous under Kentucky and controlling Federal arbitration laws and should be reversed.

II THE ARBITRATION AGREEMENT WAS A SECOND CONTRACT AND NOT UNCONSCIONABLE

A. The Purchase Order is Not Before the Court

Appellees attempt to join together two separate contracts in order to render the contract at issue here, the warranty and the included Arbitration Agreement, "unconscionable." Appellees' negotiated the purchase of their home from American Dream. It is undisputed that SEHI was not a party to the Purchase Order. (Apx. C at ¶ 4, R. 341.) The Peays certainly could have accepted delivery of the subject home following their closing on

June 26, 2006 without executing the Arbitration Agreement with SEHI. (Court of Appeals Opn., Nickell Dissenting at 9). As recognized by the Dissent below, the home would have been accepted with the statutory warranties conferred under the Kentucky Uniform Commercial Code. (Court of Appeals Opn., Nickell Dissenting at 9). Appellees instead chose to accept the offer, through a separate contract with SEHI, for warranty service.

The purchase of the home was not contingent in any manner on Appellees entering into this second agreement with SEHI for warranty service. Under the terms of this separate agreement between SEHI and the Peays, the consideration for the warranty work, which was utilized by Appellees, was the Arbitration Agreement.

B. A Valid Warranty Contract Containing the Arbitration Clause Exists

The agreement and its terms were accepted by Appellees, as evidenced by Mr. Peay's signature on the Arbitration Agreement and the Closing Video Script. (*See* Apx. D, R. 95-95.) There is no contention that the writing of the Arbitration Agreement is incomplete, and no parole evidence of contrary terms in the contract is alleged. The mutual obligations and rights of SEHI and the Peays were clearly stated. Huff Contracting v. Sark, 12 S.W.3d 704, 707 (Ky. App. 2000); Kruse v. AFLAC Intern., Inc., 458 F.Supp.2d 375, 385 (E.D.Ky. 2006) (citing Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 380 (6th Cir.2005)). Thus, the contract for arbitration was offered and accepted, as shown by Mr. Peay's clear signatures, and the contract terms are "full and complete."

The simple facts are: on June 26, 2006 Appellees received the offered express warranty book; signed the Arbitration Agreement contained with it; viewed the Closing Video which further explained the arbitration clause; signed the Closing Video Script containing the additional arbitration clause; and registered the home for express warranty

service. Having had an opportunity to review, having signed, and having ratified the agreement by seeking and receiving warranty work under the warranty agreement, Appellees are now estopped from denying their obligations to arbitrate under this agreement. See Gailor v. Alsabi, 990 S.W.2d 597, 604 (Ky.1999). Nor do any grounds for holding the Arbitration Agreement void or revokable exist. (Contra Appellees Br. at 3.) Further, under Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46, 126 S.Ct. 1204, 1209 (2006), a challenge to the validity of the contract between SEHI and Appellees is to be submitted to the auditor. See E.L. Burns Co., Inc. v. David Eng'g & Const., Inc., 2007-CA-000793-MR, 2008 WL 2388414 (Ky. Ct. App. June 13, 2008) (cited per CR 76.28, Apx. J.)

C. The Arbitration Agreement is Not Unconscionable

The Arbitration Agreement contained as a mutual condition of the SEHI express warranties is not unconscionable. This is clearly established by this Court's holdings in Schnuerle, et al. v. Insight Communications, Co., et al, 376 S.W.3d 5610 (Ky. 2012). Under the Schnuerle analysis, the Arbitration Agreement is neither procedurally nor substantively unconscionable. Id. The Arbitration Agreement with SEHI was not a condition of the earlier Purchase Order with American Dream, nor was it a condition of delivery. (Court of Appeals Opn, Dissent at 8-9). It was not a "transactional document" that was part of the purchase of the home from American Dream.

As the Court of Appeals noted in The Drees Company v. Osburg, 144 S.W.3d 831, 833 (Ky.App. 2003), the Arbitration Agreement in this case was collateral to and separate from the Purchase Order. The Arbitration Agreement had nothing to do with the "title, possession, quantity, or emblements of the property. And it is reasonable to suppose that the parties intended post-closing performance of that clause; disputes, after all, frequently arise

after closing.” Id. Thus, the Arbitration Agreement was not “withheld” from Appellees nor was it barred under the integration and/or merger clause of the purchase order.

III. APPELLEES WERE IN PRIVACY OF CONTRACT WITH SEHI

As an initial matter, unaddressed by Appellees in their Brief, Appellee Lori Peay is asserting claims against SEHI as a party Plaintiff-Appellee, but denies that she is bound by any contract with SEHI entered into by her husband. Yet, she has consistently claimed the benefit of the contract she did not sign and claims she is not a party to. (Court of Appeals Opn., Nickell Dissent at 12.) Regardless, under longstanding Kentucky law, she is a party to the Arbitration Agreement and is bound by its terms.

As the Court of Appeals stated in Cowden Mfg. Co., Inc. v. Systems Equipment Leassors, Inc., 608 S.W.2d 58 (Ky. App. 1980):

[I]t is not always necessary for both parties to sign a contract, particularly where one has signed and both parties thereafter act as if they had a binding contract. The rule is stated in 17 Am.Jur.2d, Contracts, Sec. 70, p. 408. “In the absence of a statute requiring a signature or an agreement that the contract shall not be binding until it is signed, parties may become bound by the terms of a contract, even though they do not sign it, where their assent is otherwise indicated.” See also Carter v. Hall, 191 Ky. 75, 229 S.W. 132 (1921)

Id. at 61. “It is no ground for objection that the agreement was not also signed by the party seeking to enforce the contract.” Id. As noted in EL Burns Co., Inc. v. David Engineering & Construction, Inc.: “[i]f there is sufficient evidence to show a meeting of the minds even though the plaintiff denies it, then a court or jury may be justified in finding a contract existed. An express agreement may be proved by direct evidence, circumstantial evidence or both.” No. 2007-CA-793-MR (cited per CR 76.28(4), attached as Apx. J; quoting George Pridemore & Son, Inc. v. Traylor Bros., Inc., 311 S.W.2d 396, 397 (Ky, 1958)). A party,

such as Appellees, that undertakes work to be done on the basis of a warranty contract is presumed to have taken notice of and assented to its terms. Id.

Here, Appellees sought warranty work under, and enforced, the warranty contract that contained the Arbitration Agreement. This included work under warranty on, *inter alia*, November 6, 2006 and November 22, 2006. (*See* Apx. G, R. 150-51, 153). These service requests were made after the execution of the Arbitration Agreement by Appellees. Id. (*See* Court of Appeals Opn, Nickell Dissenting at 9). Although it has already been established that a valid and enforceable contract existed prior to this warranty service - offer, acceptance, and consideration through the express warranties and mutuality of obligation - Lori Peay has ratified the warranty and Arbitration Agreement through her acceptance of warranty service for which the Arbitration Agreement was due consideration. (Apx. D, R 95-96).

A party cannot seek to avoid arbitration yet enforce other portions of the agreements between the parties. *See* Cowden, *supra*. Thus, Appellees' own actions show that they intended to enforce the warranty agreement for their own benefit and thus is bound by all the terms of the contract under Cowden. Appellees accepted the benefits of the warranties given in consideration of the Arbitration Agreement and they must be bound by the conditions, including the Arbitration Agreement. Stewart v. Mitchell's Adm'x, 190 S.W.2d 660 (Ky. 1945) (one may not accept fruits of a business deal and at the same time disclaim responsibility for measures by which they were acquired).

Appellees entered into an agreement with SEHI for the provision of express warranty service. This agreement was separate from the Purchase Order with American Dream. The separate consideration tendered by SEHI for this agreement was to give express warranties regarding the manufactured home and the promise to perform specified repair work under

these express warranties, and a mutual obligation to arbitrate. (Apx. D, R. 94-95). Huff Contracting v. Sark, 12 S.W.3d 704, 707 (Ky. App. 2000); Kruse v. AFLAC Intern., Inc., 458 F.Supp.2d 375, 385 (E.D.Ky. 2006) (citing Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 380 (6th Cir.2005)). The consideration from the Peays in turn was the agreement to arbitrate any disagreement between the Peays and SEHI. (Apx. D, R. 94-95.) Thus, the Appellees, both of them, are parties to and bound by this Arbitration Agreement.

CONCLUSION

The Appellees entered into a valid Arbitration Agreement with SEHI. It was supported by consideration in the form of express warranties for the subject home, and in the mutuality of the obligation imposed through the Arbitration Agreement. These warranties, and therefore the accompanying Arbitration Agreement, were affirmatively accepted by Appellees under ordinary contract principles and this Court's holding in Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012). Further, as recognized by the U.S. Supreme Court in AT&T Mobility v. Concepcion et ux., – U.S. –, 131 S.Ct. 1740 (2011), and this Court in Schnuerle, et al, v. Insight Communications, Co., et al, 376 S.W.3d 561 (Ky. 2012), this Arbitration Agreement is an ordinarily accepted agreement that is not unconscionable in any manner. Finally, the “merger” clause in the November 8, 2005 Purchase Order does not operate as a matter of law to exclude or invalidate any later contract between the Peays and SEHI for warranty service regarding the subject home.

As such, the Daviess Circuit Court erred in its Order of March 11, 2009 when it denied the Motion to Compel Arbitration and denied the entry of a stay pending arbitration. Respectfully, as a matter of law, the Order of March 11, 2009 must be reversed and an order compelling arbitration of the Appellees' claims against SEHI should be entered.

Respectfully submitted,

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APPENDIX

- J. E.L. Burns Co., Inc. v. David Eng'g & Const., Inc., 2007-CA-000793-MR, 2008 WL 2388414 (Ky. Ct. App. June 13, 2008) (cited per CR 76.28)