

Mattox v. Decision One Mortgage Co., LLC

Case No. 01-10657-GAO September 26, 2002

ALBERTA MATTOX; ANTHONY C. STACK; and HELEN TAYLOR,
Plaintiffs v. DECISION ONE MORTGAGE COMPANY, LLC; and
HOUSEHOLD BANK, FSB, Defendants

CIVIL ACTION NO. 01-10657-GAO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS

September 26, 2002, Decided

DISPOSITION: [*1] Defendants' motion to compel arbitration
GRANTED, and plaintiffs' complaint DISMISSED.

COUNSEL: For ALBERTA MATTOX, ANTHONY C. STACK,
HENRY L. TAYLOR, Plaintiffs: John Roddy, Gary E. Klein, Grant &
Roddy, Boston, MA.

For DECISION ONE MORTGAGE COMPANY, LLC, HOUSEHOLD
BANK, FSB, Defendants: Michael Leffel, Daniel Squire, Christopher
Lipsett, Wilmer, Cutler & Pickering, Washington, DC.

For DECISION ONE MORTGAGE COMPANY, LLC, COMMUNITY
HOMEOWNERS, HOUSEHOLD BANK, FSB, Defendants: Robert D.
Friedman, Perkins, Smith & Cohen, Boston, MA USA.

JUDGES: O'TOOLE, D.J.

OPINIONBY: O'TOOLE

OPINION: MEMORANDUM AND ORDER

September 26, 2002

O'TOOLE, D.J.

The plaintiffs have filed suit against the defendants, Decision One Mortgage Company, LLC ("Decision One"), and its affiliate, Household Bank, FSB ("Household"), alleging that the defendants paid kickbacks to loan brokers for persuading borrowers like the plaintiffs to take out loans from the defendants at disadvantageous terms. The plaintiffs claim that the defendants violated of the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-2617, tortiously interfered with the plaintiffs' contracts with the loan brokers, and [*2] unjustly enriched themselves at the plaintiffs' expense. Jurisdiction is founded upon 28 U.S.C. § 1331.

Decision One and Household now move to compel arbitration of the controversy in accordance with a written arbitration agreement and either to stay this case pending the arbitration or to dismiss it. While the plaintiffs acknowledge that their claims fall within the scope of the arbitration agreement, they contend that the agreement should not be enforced because the costs of arbitration, for them, are prohibitive and requiring arbitration would, as a practical matter, prevent them from pursuing their claims. I conclude that the arbitration agreement is enforceable in the particular circumstances presented.

A. Summary of Facts

The case is brought as a purported class action on behalf of the named plaintiffs and others similarly situated. The three named plaintiffs, Alberta Mattox, Anthony C. Stack, and Helen L. Taylor, all contracted with loan brokers to help them obtain home mortgages. Their brokers secured mortgages for them from Decision One, a subsidiary of Household. Mattox obtained a loan of \$ 140,000 at a 11.75% interest rate. Stack and Taylor [*3] obtained two loans from Decision One: one for \$ 220,000 and the other for \$ 25,000. The interest rate on the larger loan is 11.99%; the interest rate on the smaller loan is not disclosed.

The plaintiffs allege that their brokers did not secure loans at the best rates available. They claim that Bank One and Household improperly paid

their brokers a fee based on the difference between the interest rate at which the plaintiffs qualified for their loans and the rate at which they are now paying for their loans. They believe that this compensation scheme was set up to induce brokers to refer borrowers to Decision One for loans on less advantageous terms than what otherwise would have been available to the borrowers under Decision One's lending policies.

Among the documents executed by the plaintiffs at their loan closings was an "Arbitration Rider." Immediately above the signature lines, the Rider contained the following paragraph, in capitals and bold face as set out here:

THE PARTIES ACKNOWLEDGE THAT THEY HAD A RIGHT TO LITIGATE CLAIMS THROUGH A COURT BEFORE A JUDGE OR JURY, BUT WILL NOT HAVE THAT RIGHT IF EITHER PARTY ELECTS ARBITRATION. THE PARTIES HEREBY KNOWINGLY AND [*4] VOLUNTARILY WAIVE THEIR RIGHTS TO LITIGATE SUCH CLAIMS IN A COURT BEFORE A JUDGE OR JURY UPON ELECTION OF ARBITRATION BY EITHER PARTY.

Under the Arbitration Rider the borrower agrees that:

either Lender or you may request that any claim, dispute, or controversy (whether based upon contract; tort, intentional or otherwise; constitution; statute; common law; or equity and whether pre-existing, present or future), including initial claims, counter-claims, and third party claims, arising from or relating to this Agreement or the relationships which result from this Agreement, including the validity or enforceability of this arbitration clause, any part thereof or the entire Agreement ("Claim"), shall be resolved, upon the election of you or us, by binding arbitration pursuant to this arbitration provision and the applicable rules or procedures of the arbitration administrator selected at the time the Claim is filed.

Defs.' Mot. to Compel, Ex. 1. The Arbitration Rider also contains the following provision regarding the payment of arbitration costs:

If Lender files a Claim, Lender shall pay all the filing costs. If you file a Claim, the filing costs shall [*5] be paid as follows: (a) Lender agrees to pay for the initial cost of the filing [sic] the Claim up to the maximum amount \$ 100.00; (b) for the filing costs over \$ 100.00, such additional cost

shall be divided equally between us up to the amount charged by the arbitration administrator for a Claim equal to your loan amount; and (c) all costs over the amount charged by the arbitration administrator for a Claim equal to your loan amount shall be paid by you. The cost of up to one full day of arbitration hearings will be shared equally between us. Fees for hearings that exceed one day will be paid by the requesting party. We shall each bear the expense of our respective attorney's fees, except as otherwise provided by law. If a statute [sic] gives you the right to recover these fees, or the fees paid to the arbitration administrator, these statutory rights shall apply If the arbitrator issues an award in our favor you will not be required to reimburse us for any fees we have previously paid to the arbitration administrator or for which we are responsible.

Id. After the plaintiffs argued in response to the defendants' motion to compel arbitration that they could not [*6] afford the usual costs of arbitration, the defendants agreed that if the arbitration forum would not agree to waive fees that would normally be imposed on the plaintiffs, then the defendants would "agree to pay any and all of the arbitration fees charged by the forum, including filing fees, administrative fees, and arbitrator fees." Defs.' Reply Mem., Ex. A.

B. The Enforceability of Arbitration Clauses

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, reflects a congressional judgment favoring the enforcement of agreements to arbitrate. "Questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)). Generally, so long as a litigant can effectively vindicate his cause of action through arbitration, the courts will uphold an arbitration clause. See *Gilmer*, 500 U.S. at 28. An arbitration agreement should not be ignored simply because the arbitral [*7] tribunal's procedures "might not be as extensive as in the federal courts." *Id.* at 31. So, the unavailability in arbitration of procedural devices such as class action suits does not relieve a party of an obligation to arbitrate under a valid arbitration agreement. *Id.* at 32. Instead, a party's decision to trade "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration" should normally be upheld. *Id.* at 31 (citations and internal quotations omitted).

Parties can be compelled to arbitrate federal statutory claims. *Id.* at 26. When a party agrees to arbitrate a statutory claim, it "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985).

The Supreme Court recently has recognized one possible exception to a plaintiff's obligation to comply with arbitration agreements. In *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90, 148 L. Ed. 2d 373, 121 S. Ct. 513 (2000), [*8] the Court stated, "It may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." However, when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. Simply proposing the existence of a "risk" of prohibitive costs "is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91.

Whether a party can effectively vindicate her rights through arbitration is to be assessed on a case-by-case basis. For example, the First Circuit engaged in a detailed, fact-specific inquiry in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 14-16 (1st Cir. 1999), to evaluate whether the plaintiff was required to arbitrate her employment discrimination claim. The court of appeals expressly rejected the "generalized inquiry" that the district court had employed. *Id.* at 14. The First Circuit also noted that if an arbitration panel were [*9] to impose unreasonable fees on a party in a specific case, an argument that the fees were inconsistent with the statute under which the arbitrated claims arose "could be presented by the [party] to the reviewing court." *Id.* at 16. See also *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88, 92 (1st Cir. 2002) (refusing to decide generally the validity of an attorney's fees provision in an arbitration agreement; deferring decision until an arbitrator in fact awarded such a fee). In light of these precedents, the validity of the arbitration agreement in this case must be determined by reference to the specific facts the parties have presented.

The plaintiffs have tried to show that they cannot afford the likely arbitration fees. They have offered affidavits attesting to their limited

financial resources. Their attorney has also offered his own affidavit in which he outlines the ranges of possible fees that the plaintiffs would incur in arbitrating under the rules of the arbitration organizations designated in the agreement. He further says that he "would not, as a matter of business discretion, advance arbitration fees on the claims at issue in this [*10] case, if the matter is referred to arbitration." Plfs.' Opp'n to Mot. to Compel, Ex. D, P 51 at 6. He also states that he "would not incur the risk of pursuing this matter for individual plaintiffs under the arbitration rules, given the potential costs and outlays" Id. P 53. The plaintiffs argue that because of the relatively small recovery that is likely in each of their individual cases, and because of their modest incomes, a class action suit is the best, and possibly the only, vehicle for pursuing their claims.

These affidavits can be taken as raising the prospect that they would not be able to afford the necessary fees to enable them to prosecute their claims through arbitration. However, the defendants' commitment to pay the plaintiffs' fees in the event that they are not waived by the arbitrator has effectively eliminated that risk. In light of the defendants' undertaking, there is not a "likelihood," see *Green Tree Fin.*, 531 U.S. at 92, that the imposition of fees will stand in the way of their ability to proceed with arbitration.

The plaintiffs also argue that the arbitration clause was a "contract of adhesion" and thus unconscionable, so that it [*11] should not be enforced. The arbitration agreement appears to have been a standard form prepared by the defendants. In substance, the plaintiffs argue that they had no realistic choice of rejecting the agreement and still closing on their loans. But even if that fact is true, as I will assume it is, it does not by itself provide a reason for invalidating the agreement to arbitrate. Generally, courts have evaluated an argument that a particular contract was unconscionable by considering both the inequality of bargaining power (and thus the absence of meaningful negotiation over terms) and the oppressive nature of the substance of the agreement. See *Rosenberg*, 170 F.3d at 16-17. The latter seems to be the more important consideration.

Even if it were appropriate to evaluate the validity of the arbitration agreement categorically -- in light of the Supreme Court's advisory comments in *Green Tree Financial* it does not seem to be so -- it is not possible to say categorically that all arbitration provisions in consumer contracts are oppressive to the consumer. Indeed, in the interests of the consumer there is much to recommend the availability of avenues for [*12]

the presentation of claims that are less formal and more efficient than traditional civil litigation. (By the same token, the possibility that arbitration would be less desirable, and perhaps even oppressive, for some consumers in some cases it is surely a real one as well.)

The facts of this case do not support a conclusion that it would be oppressive to enforce the arbitration agreement. What once seemed an obstacle to the plaintiffs -- the prospect of being assessed fees in order to participate -- no longer stands in the way. Though the plaintiffs may have lacked the bargaining power either to refuse to sign the arbitration agreement or to negotiate a more amenable version, the enforcement of it in the circumstances that actually exist will not be unfair or oppressive to them.

C. Conclusion

For the foregoing reasons, the defendants' motion to compel arbitration is GRANTED, and the plaintiffs' complaint is DISMISSED.

It is SO ORDERED.