

IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2009-CA-01864

PALMER HOLDINGS, LLC D/B/A
REALTY EXECUTIVES, DELL PALMER
AND TANJA ADAMS

APPELLANTS

VERSUS

TAMMIE R. PITTMAN AND
JACOB S. PITTMAN AND
SHAWN M. PITTMAN

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

DONALD W. BOYKIN
ATTORNEY AT LAW
515 COURT STREET
JACKSON, MISSISSIPPI 39201
601-969-3015
FAX: 601-352-9959
MB [REDACTED]
ATTORNEY FOR APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Justices may evaluate possible disqualification or recusal.

1. None other than those named by Appellants.


DONALD W. BOYKIN
ATTORNEY FOR APPELLEES

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STATEMENT OF THE CASE

A. Nature of the Case

The Contract for Purchase of Real Estate ("Farnham/Pittman Contract") was entered on May 16, 2007. R. 13. The Complaint incorrectly states that it was entered May 15, 2007. R.5. The Contract states "that the Selling Agency, Realty Executives, is the agent of the Buyer, exclusively..." R.12. On May 1, 2007, Realty Executives and the Seller of the subject property, Sean Farnham, signed a document titled "Working With a Real Estate Broker," stating that Realty Executives was a "disclosed dual agent." That document states "This is Not a Legally Binding Contract." Subsequent to that, on May 16, 2007, Tanja Adams signed on behalf of Realty Executives another document titled "Working With a Real Estate Broker," stating that Realty Executives was the Buyer's agent. Likewise, that document said it is not a contract, but "An Acknowledgement of Disclosure," Thus, the Pittmans disagree with Appellants' statement that Appellants were first the agent for the Pittmans, then the disclosed dual agent for the Pittmans and Farnham. The aforesaid documents dispute that statement.

B. Course of Proceedings and Disposition in the Court Below

The Pittmans have no disagreement with the statement made in this section by the Appellants.

C. Statement of the Facts.

The Pittmans disagree that the Appellants were a disclosed dual agent. The aforementioned documents show that the Appellants were the agent solely for the Pittmans. As stated previously, the

Contract for the Purchase of Real Estate was entered May 16, 2007, not May 15, 2007.

The Pittmans do not disagree with any other statements made by Appellants with respect to the facts.

SUMMARY OF THE ARGUMENT

The arbitration clause in the Farnham/Pittman Contract is significantly different than in the arbitration provisions of two cases upon which the Appellants rely. Unlike the provisions in those cases, the arbitration provision in the Farnham/Pittman Contract only refers to a claim arising out of or related to the Contract.

Unlike the arbitration provision in the other cases, the provision in the Farnham/Pittman Contract makes no reference to the arbitration provision applying to a realtor. It refers only to disputes between "Buyer and Seller."

ARGUMENT

THE TRIAL COURT CORRECTLY DENIED APPELLANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO ENFORCE ARBITRATION

Appellants' appeal is based primarily upon holdings in two cases:

1. Century 21 Maselle & Associates, Inc. v. Smith, 965 So. 2d 1031 (Miss. 2007);
2. Fradella v. Seaberry, 952 So. 2d 165 (Miss. 2007).

The relevant arbitration provisions in Fradella and Century 21 are essentially the same, but those arbitration provisions are very much different than those in the case sub judice.

Relevant arbitration provisions in the three cases are as follows:

PITTMAN/FARNHAM CONTRACT FOR THE PURCHASE OF REAL ESTATE

ARBITRATION: Except for issues relating to title and ownership, environmental liability, and zoning, which shall not be subject to the requirements of this paragraph, in the event of any other dispute between Buyer and Seller arising out of this contract, the parties agree that any controversy or claim between them arising out of or relating to this Contract shall be settled exclusively by arbitration. The requested arbitration shall take place within thirty (30) days after written notification is received by the other party, at a place designated by the arbitrator. The arbitrator shall be selected from the Mississippi Bar Association's panel of mediators or other mutually acceptable arbitration service. Each party shall pay a proportionate share of the fees associated with the arbitration including the cost of the arbitrator. The decision of the arbitrator shall be a final and binding resolution of the disagreement which may be entered as a judgment by any court of competent jurisdiction. Neither party shall sue the other where the basis of the suit is this Contract other than for enforcement of the

arbitrator's decision . In no event shall either party be liable to the other for indirect, special or consequential damages or loss of anticipated profits. (underline supplied).

CENTURY 21

MANDATORY ARBITRATION: Both Buyer and Seller {hereinafter "parties"} acknowledge, understand and agree that (1) Any controversy, claim, action or inaction arising out of, or related to, the "purchase" set out herein, as against the listing broker or selling broker and/or their agents or representatives

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(hereinafter "company") involved in this transaction, shall be resolved by arbitration administered by the American Arbitration Association in accordance with its arbitration rules;...." (underline supplied). Century 21 at p. 1033.

FRADELLA

MANDATORY ARBITRATION: Both buyer and seller (hereinafter "parties") acknowledge, understand and agree that: (1) any controversy, claim, action or inaction arising out of, or relating to, the "purchase" set out herein, as against the listing company or selling company and/or their agents or representatives (hereinafter "company") involved in this transaction, shall be resolved by arbitration administered by the American Arbitration Association in accordance with its arbitration rules; Fradella, at P. 171 (underline supplied).

Notably, the arbitration provision (paragraph 12) in the Farnham/Pittman Contract states that in the event of a dispute "between Buyer and Seller arising out of this contract, the parties agree that any controversy or claim between them arising out of or relating to this Contract shall be settled exclusively by arbitration." (underline supplied). Thus, that paragraph only relates to disputes between the buyer and the seller, and not between the buyer and the real estate broker/agent, or between the

seller and the real estate broker/agent. Further, it says that "any controversy or claim between them" is to be arbitrated, not between the buyer and real estate broker or between the seller and real estate broker. (underline supplied). With reference to the payment of the arbitrator's fee, paragraph 12 states that each party is to pay a proportionate share of the cost of the arbitrator. It says nothing about a broker/agent paying a portion of the arbitrator's fee.

Century 21 addressed the issue of whether an arbitration paragraph in a real estate contract applied to a dispute between the property purchaser and a real estate broker/agent. The Mississippi Supreme Court said the arbitration provision did apply, but the arbitration paragraph in that case is very different than in the case sub judice.

The Century 21 arbitration provision (paragraph 38) states that any claim "as against the listing broker or selling broker and/or their agents or representative," shall be resolved by arbitration. Thus, paragraph 12 of the Contract between the Pittmans and Sean Farnham (the seller) is vastly different than paragraph 38 in the Century 21 contract. The arbitration paragraph in the Pittman's contract says nothing about its application to a real estate broker/agent.

Notably, the arbitration clause in Fradella is virtually identical to that in Century 21. Particularly, those arbitration clauses, unlike in the case sub judice, refer to claims against the

listing or selling broker or company and/or their agents. The clause in Fradella states:

(1) Any controversy, claim, or action or inaction arising out of, or related to, the "purchase" set out herein, as against the listing company or selling company and/or their agents or representatives.... Fradella, at 171. (underline supplied)

In Century 21 the clause reads:

Any controversy, claim, action or inaction arising out of or related to, the "purchase" set out herein, as against the listing broker or selling broker and/or their agents or representatives (hereinafter "company").... (underline supplied.)

Thus, the arbitration clauses in Fradella and Century 21 are clearly distinguishable from the clause in the Pittmans' contract. Again, the arbitration clause in the Pittmans' contract says nothing about a claim or action against the listing broker (company) or selling broker (company).

Notably, none of the Appellants signed the Contract Addendum wherein the arbitration paragraph appears. At the bottom of the first page of the Contract for the Purchase of Real Estate are spaces for the "Initials of Parties: Buyer _____ Buyer _____ Seller_____ ...," but nothing for the real estate broker/agent.

None of the Appellants are stated as being "parties" to the Contract between the Pittmans and Farnham. If any of the Appellants had chosen to pursue legal action against any of the Pittmans, none of the appellants would have been bound by the arbitration clause. Tanja Adams was the only Appellant who signed the Contract, and she did so only to acknowledge:

Subject to the clearance of any check, broker acknowledges receipt of the earnest money, and holds same in trust, subject to the terms of the Contract.

Appellants acknowledge that the Pittmans' Complaint did not allege a claim for breach of contract, but only for fraud, negligence and/or gross negligence, constructive fraud and rescission. Unlike the arbitration provisions in Century 21 and Fradella, the Pittman/Farnham Contract governs only a "dispute between buyer and seller arising out of this Contract...." Both the Century 21 and Fradella arbitration provisions apply to "any controversy, claim, action or inaction arising out of, or related to, the purchase set out herein...."

To be a third-party beneficiary, the rights of a third-party beneficiary must "spring" from the terms of the contract. Also, it must be "the clear intent of the parties to create a third-party beneficiary. Burns v. Washington Savings, 251 Miss. 79, 796, 171 So. 2d 322, 325 (1965). Because the Pittmans did not assert a breach of contract claim, it cannot be said that Appellants are third-party beneficiaries. Thus, the Appellants have no rights which have sprung from the Pittman/Farnham Contract, nor was it the express, or otherwise, intent of the Pittmans to create a third-party beneficiary.

In Fradella, the purchaser of real estate from the Seaberrys brought suit against Fradella, their real estate agent. Their causes of action were only breach of contract and rescission. The Mississippi Supreme Court said:

Fradella was indisputably acting as the Seaberrys' real estate agent. Furthermore, the Seaberrys' breach of contract claim is unquestionably intertwined with the duties Fradella was to perform according to the terms and provisions of the real estate contract. But for the real estate contract containing the arbitration clause at issue, the Seaberrys could not bring a claim of breach of contract. Because the Seaberrys rely on the document for the breach of contract claim, they cannot deny Fradella the benefit of arbitration clause within the real estate contract that she relied upon to delineate her duties and responsibilities with regard to the transaction. Fradella, at 175.

Thus, because the Pittmans did not assert a breach of contract claim against the Appellants, the Appellants cannot rely on the Contract, and benefit from the arbitration clause in the Contract.

This Court has held that a non-signatory may assert an arbitration provision against a signatory, but the non-signatory must have a close legal relationship with a signatory. Sawyers v. Herrin-Gear Chevrolet Company, Inc., 26 So. 3d 1026 (Miss. 2010); Qualcomm, Inc. v. American Wireless License Group, LLC, 980 So. 2d 261 (Miss. 2007); B. C. Rogers Poultry, Inc. v. Wedgeworth, 911 So. 2d 483 (Miss. 2005). In Sawyers, American Bankers Insurance Co. was the agent of Herrin-Gear, and attempting to enforce an arbitration agreement between Herrin-Gear and Sawyers. Contrarily, in Wedgeworth, this Court said:

[S]tate law principles might provide for the arbitration of disputes between a non-signatory and a signatory to a contract, where there are allegations of substantially interdependent and concerted misconduct. Wedgeworth at 491-92.

Sawyers held that because the Sawyers's claim against Herrin-Gear and American involved "substantially interdependent and concerted misconduct" between Herrin-Gear and American, American could claim the benefit of the arbitration agreement.

In the case sub judice, because the Appellants were the agent of the Pittmans, there can be no "substantially interdependent and concerted misconduct" between the Pittmans and the Appellants. Thus, the Appellants cannot claim the benefit of the arbitration provision in the Pittman/Farnham Contract.

There are two primary reasons the trial court's decision was correct. The arbitration provision states nothing about its application to a Realtor. Secondly, the Pittmans did not include a breach of contract claim in their Complaint.

Appellants suggest that if this Court denied their appeal, "every real estate contract" may be potentially invalidated. As argued herein, not every real estate contract includes an arbitration provision, and as we see herein, for those that do, not all arbitration provisions are identical. While the Appellants suggest the denial of their appeal would have "far reaching consequences" such as denying realtors their commissions. It is far reaching and an act of desperation to suggest that realtors could be denied their commission merely because an arbitration provision does not apply to them. Nothing prevents realtors from adopting arbitration provisions similar to that in Century 21 and Fradella. Perhaps the best protection realtors could have would be

to include arbitration provisions in listing agreements or other agreements between buyers, sellers and realtors. Seemingly, such would be much more effective than realtors relying upon real estate purchase contracts which they neither sign nor which include clear arbitration provisions protecting them. The contracts in this case and Century 21, and Fradella were all prepared by realtors, and probably with few exceptions, the contracts which realtors placed in front of prospective buyers and sellers are not challenged. So, realtors should have no excuse for modifying contracts or having a separate contract clearly protecting them with respect to arbitration.

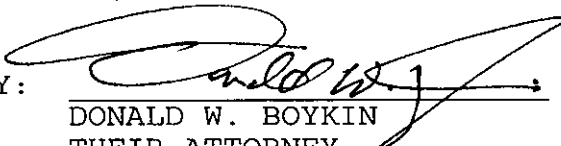
CONCLUSION

The trial court's decision denying Appellants' Motion should be affirmed.

Respectively submitted,

TAMMIE R. PITTMAN AND
JACOB S. PITTMAN AND
SHAWN M. PITTMAN

BY:


DONALD W. BOYKIN
THEIR ATTORNEY

CERTIFICATE OF SERVICE

I, Donald W. Boykin, do hereby certify that I have this day mailed, postage prepaid, by United States Mail, a true and correct copy of the above and foregoing Appellee's Brief to:

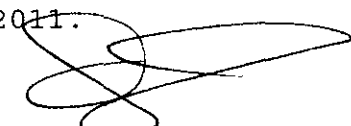
Hon. Tommie T. Green
Circuit Judge
Post Office Box

Daniel D. Ware
Ware Clifford Law Firm, PLLC
2625 Ridgewood Rd.
Suite 100
Jackson, MS 39216-4900

C. Louis Clifford IV
Ware Clifford Law Firm, PLLC
2625 Ridgewood Rd.
Suite 100
Jackson, MS 39216-4900

Roger L. McGeehee, Jr.
Attorney at Law
1058 Ridgewood Rd.
Suite E
Jackson, MS 39211

This the 14th day of March, 2011.



DONALD W. BOYKIN

DONALD W. BOYKIN
ATTORNEY AT LAW
515 COURT STREET
JACKSON, MISSISSIPPI 39201
601-969-3015
FAX: 601-352-9959
MB # [REDACTED]