

IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2009-TS-00568

SIMMONS HOUSING, INC. AND
SOUTHERN ENERGY HOMES, INC.

APPELLANTS

VERUS

ROY SHELTON, KIMBERLY SHELTON, COLEMAN
BRITT SHELTON AND JOSHUA MASON SHELTON,
BY AND THROUGH KIMBERLY SHELTON, THEIR
MOTHER AND NEXT FRIEND

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF
COPIAH COUNTY, MISSISSIPPI

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

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REPLY ARGUMENT

Pursuant to Miss. R. Civ. P. 17 (c) Roy and Kimberly Shelton asserted claims on behalf of their minor sons Coleman and Joshua sounding in tort and for breach of the sales contract for the mobile home, (Vol. 1, p. 23; R. E. Tab 2) including breach of express and implied warranty, invoking the provisions and remedies of Mississippi's version of the Uniform Commercial Code. (Vol. 1, p. 19; R. E. Tab 2). So long as such claims on behalf of the minors are prosecuted in good faith, they are bound by the ultimate result. *Graves v. Gulf & S. I. R. Co.*, 146 Miss. 130, 110 So. 234(1926).

The Sheltons filed their complaint on November 22, 2005. Circuit Court Judge Lamar Pickard entered an order compelling arbitration of the Plaintiffs' claims on November 14, 2006 (Vol. 2, p. 178; R.E. Tab 5). The " Plaintiffs' Motion for Reconsideration" of the circuit court's order compelling arbitration contains allegations that the minors' claims are separate and independent and that their parents have no authority to bind the minors to an arbitration agreement. These statements are merely arguments to reconsider an order previously entered. The motion does not in any way amend the complaint which must be accomplished under Miss. R. Civ. P. 15(a) "only by leave of court or by consent of the adverse party".

One of the reasons that reliance on *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) is misplaced is because the Sheltons specifically allege breach of contract and breach of warranty on behalf of the minors. In *Gaskamp*, the Fifth Circuit Court of Appeals found that "at no point have the Gaskamp children attempted to enforce the sales contract for the mobile home or sue on the basis of any warranties in the contract." *Id*, 1075. Therefore, the court reasoned, it can not be said that the minors' subjected themselves to the arbitration agreement contained within the sales contract.

Miss. Code Ann. §75-1-103 (1972) provides for the doctrine of estoppel and other common law doctrines to supplement its provisions. Miss. Code Ann. §75-1-201(11) defines “contract” as “the total legal obligation which results from the parties’ agreement as affected by this code and any other applicable rules of law.” Miss. Code Ann. §75-1-201(3) defines “agreement” as “the bargain of the parties in fact as found in their language or by implication from other circumstances ...”

The manufacture and sale of the subject mobile home involve transactions in interstate commerce (Vol. 2, pp. 205-207; R.E. Tab 4). The determination of whether the minors’ claims are subject to binding arbitration are to be decided under the Federal Arbitration Act 9 U.S.C. §1. *McKenzie Check Advance of Miss., LLC v. Hardy*, 866 So. 2d 466 (Miss. 2004). State law generally applies to issues of the formation of an agreement containing arbitration provisions. However, as to the question of to what extent a non-signatory is bound by an arbitration provision contained in a contract that the non-signatory is suing under, the substantive federal law of arbitrability is applied. *Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260,268 (5th Cir. 2004). This rule has been specifically adopted by the Mississippi Supreme Court. *Terminix Intern., Inc. v. Rice*, 904 So. 2d 1051, 1058 (Miss. 2004). Invoking rights under a contract containing arbitration provisions estops a claimant against repudiation of other provisions in the same contract. Application of this rule is without regard to state law. *Bailey*, 364 F.3d at 268; *Rice*, 904 So.2d at 1058.

In *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703 (Miss. 2006) this court found that a non-signatory was not bound to a sales contract with arbitration provisions because she was neither a third-party beneficiary nor was she estopped to deny her assent. There, a husband and wife were signatories to a sales contract to purchase a mobile home. A husband and his adult daughter who did not sign the sales contract held a joint checking account. Pursuant to purported authority granted by the wife, the seller’s assignee drafted a payment from the checking account of the father and the

daughter, presumably pursuant to the terms of the sales contract for a past due payment. However, at this time the wife was deceased. The husband and daughter filed suit against the seller's assignee which moved to compel arbitration. This court held that while the father's claims were clearly within the scope of the arbitration provisions in the contract he signed, the daughter's claims were not.

The daughter's only connection to the contract was that the seller's assignee drafted a payment from a bank account in which she held an interest. There was no evidence that the daughter had an interest in the mobile home, lived in the mobile home, or benefitted from the sales contract and financing agreement in any way. The claim of the daughter was grounded on the unauthorized draft on her account, causing her checks to bounce. The claim did not emanate from the contract signed by her father and deceased mother so that the daughter was neither a third-party beneficiary of the contract for sale and financing of the mobile home; nor was she equitably estopped to deny the terms of that contract.

The facts of *Adams, supra* are in contrast to this case. Here, the minor Plaintiffs lived in the mobile home, the primary residence of the Shelton family. The minors were direct, not incidental, beneficiaries of the purchase and sales contract executed by their parents. The minors' rights to maintain an action on the contract spring from its terms because of the signatory parents' legal obligation to shelter and support their children.

In order for the third person beneficiary to have a cause of action, the contracts between the original parties must have been entered for his benefit, or at least such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms. There must have been a legal obligation or duty on the part of the promisee to such person beneficiary. The obligation must have been a legal duty which connects the beneficiary with the contract. In other words, the right of the third-party beneficiary to maintain an action on the contract must spring from the terms of the contract itself. 17A C. J. S. *Contracts* 519 (4) (1963).

Burns v. Washington Savings, 251 Miss. 789, 171 So. 2d 322, 325 (1965). In the case at bar, the minor plaintiffs assert rights to maintain a warranty and breach of contract action, by and through their parents. The claims, including the minors' tort claims, arise from or relate to the sales contract. (Vol. 1, p. 87; R.E. Tab 3). Such provisions in an arbitration agreement have been construed as broad and expansive. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 95, 406, 87 S.Ct. 110, 18 L. Ed. 2d 1270 (1967). Having asserted claims as third-party beneficiaries emanating from the sales and financing contract, the minor plaintiffs are subject to the terms of the contract, including the broad arbitration provisions.

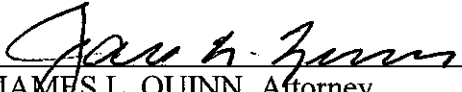
Finally, the right to a trial by jury is not absolute. Addressing the constitutional right to a jury trial in *Bank One, N.A. v. Coates*, 125 F.Supp. 819, 834 (S.D. Miss. 2001), *aff'd mem.*, 34 Fed. Appx. 964 (5th Cir. 2002), the court stated that the "Constitution does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before the court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes." *McKenzie Check Advance of Mississippi, LLC v. Hardy*, 866 So. 2d 446, 455 (Miss. 2004).

CONCLUSION

The minor Plaintiffs, by and through their parents and next friend, have asserted claims and rights under the retail sales installment contract which contains arbitration provisions. As third-party beneficiaries under the contract, they have a right to assert claims emanating from that contract. Further, having asserting rights and remedies under the contract the minors are bound by its terms which include arbitration provisions. The Appellant Southern Energy Homes, Inc. respectfully urges the Court to reverse the judgment of the trial court insofar as it denies compulsory arbitration of the claims of minors Coleman Britt Shelton and Joshua Mason Shelton and refer the minors' claims to binding arbitration.

Respectfully submitted this the 19 day of January, 2010.

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CERTIFICATE OF SERVICE

I, James L. Quinn, attorney for Southern Energy Homes, Inc., do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the Reply Brief of Appellant Southern Energy Homes, Inc. to the following:

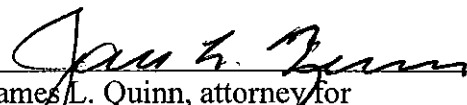
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