

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

JOSEPH LE	:	APPEAL NO. C-070112
and	:	TRIAL NO. A-0509448
TUYET TRINH THI NGUYEN,	:	<i>JUDGMENT ENTRY.</i>
Plaintiff-Appellees,	:	
vs.	:	
MEYER BUILDERS/DOUGLAS HOMES, LTD.,		
Defendant-Appellant.		

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant Meyer Builders/Douglas Homes, Ltd., appeals from the judgment of the common pleas court denying its motion to stay proceedings and compel arbitration.

Plaintiffs-appellees Joseph Le and Tuyet Trinh Thi Nguyen entered into a contract with Meyer Builders for the construction of a new home. The contract included an arbitration clause that provided for the arbitration of any disputes under the contract other than a claim by Meyer Builders for specific performance and related damages. Le and Nguyen subsequently sued Meyer Builders for alleged defects in the construction of their home that, they claimed, Meyer Builders had failed to remedy.

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Meyer Builders moved to compel arbitration pursuant to the contract's arbitration clause. But before Le and Nguyen could file a responsive pleading, the trial court denied Meyer Builders' motion without an opinion or an explanation.

That decision was appealed to this court. We reviewed the case and remanded it to the trial court because "it [was] unclear from the record why the trial court denied Meyer Builders' motion, and because there [was] no evidence in the record to support the trial court's decision \* \* \*."

On remand, the trial court issued an opinion finding that the arbitration clause was unenforceable as a matter of law. The court reasoned that the exclusion in the arbitration clause for claims by Meyer Builders for specific performance made the clause one-sided.

In a single assignment of error, Meyer Builders again argues that the decision of the trial court was incorrect. We agree.

In its decision, the trial court compared two previous decisions from this court and indicated that they were contradictory. The first case, *Harlamert v. Fischer Attached Homes*,<sup>2</sup> had upheld the decision of the trial court denying a stay for arbitration. The second case, *Peppers v. Meyer Builders-Douglas Homes*,<sup>3</sup> reached the opposite conclusion. The trial court noted that the arbitration clauses in those cases were similar to the one in this case.

While the *Harlamert* and *Peppers* arbitration clauses were similar, there was an additional clause in *Harlamert* that did not exist in *Peppers* and was not present in this case. In *Harlamert*, the builder also included a clause in the contract that stated the following: "If Purchaser breaches any provisions of this Agreement, Builder may

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<sup>2</sup> 1st Dist. Nos. C-020462 and C-020463, 2003-Ohio-674.

<sup>3</sup> 1st Dist. No. C-030894, 2004-Ohio-57.

maintain an action for damages suffered as a result of Purchaser's breach and seek to enforce all remedies available in law or equity \* \* \*."4 This escape clause effectively released the builder from any obligation to arbitrate, while the purchaser remained bound to do so. In fact, we distinguished *Harlamert* in *Peppers* on this basis.<sup>5</sup>

We conclude that the exclusion of claims by Meyer Builders for specific performance and related damages did not make the arbitration clause in this case unconscionable. Far from being one-sided, the arbitration clause in this case mirrored Ohio's Arbitration Act, which expressly excludes controversies involving the title to and possession of real property.<sup>6</sup> This case involved an arbitration clause that was essentially identical to the one we held to be enforceable in *Peppers*, and we again hold it enforceable.

Meyer Builders also argues that a remand is necessary because the trial court failed to conduct an evidentiary hearing on the unconscionability of the arbitration clause. But that was not the mandate of this court in the earlier appeal. Our remand order required only that the trial court explain its rationale for the decision denying the motion for a stay. Since the trial court found the clause unenforceable as a matter of law, it complied with our mandate, and there was no need for an additional hearing.

Therefore, the judgment of the trial court is reversed, and this case is remanded to the trial court with instructions to stay the litigation pending arbitration pursuant to the agreement of the parties.

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<sup>4</sup> *Harlamert* at ¶2.

<sup>5</sup> See *Peppers* at ¶10 ("But that case concerned an arbitration clause that reserved the builder's right to litigate all disputes, and that was not limited solely to claims for specific performance.").

<sup>6</sup> R.C. 2711.01(B); see, also, *Kedzior v. CDC Development Corp.* (1997), 123 Ohio App.3d 301, 303, 704 N.E.2d 54.

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Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**PAINTER, P.J., SUNDERMANN and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on December 5, 2007  
per order of the Court \_\_\_\_\_.  
Presiding Judge