RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0034p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ZAHRA A. BOUYE,
Plaintiff-Appellant/Cross-Appellee,

v.

JAMES E. BRUCE, JR.,
Defendant-Appellee/Cross-Appellant.

Nos. 21-6195/22-5016

Appeal from the United States District Court for the Western District of Kentucky at Louisville.
No. 3:20-cv-00201—David J. Hale, District Judge.

Argued: January 12, 2023

Decided and Filed: March 1, 2023

Before: COLE, NALBANDIAN, and READLER, Circuit Judges.

COUNSEL

ARGUED: James R. McKenzie, JAMES R. MCKENZIE ATTORNEY, PLLC, Louisville, Kentucky, for Appellant/Cross-Appellee. R. Brooks Herrick, DINSMORE & SHOHL LLP, Louisville, Kentucky, for Appellee/Cross-Appellant. **ON BRIEF:** James R. McKenzie, JAMES R. MCKENZIE ATTORNEY, PLLC, Louisville, Kentucky, James Hays Lawson, LAWSON AT LAW, PLLC, Shelbyville, Kentucky, for Appellant/Cross-Appellee. R. Brooks Herrick, DINSMORE & SHOHL LLP Louisville, Kentucky, for Appellee/Cross-Appellant.

OPINION

NALBANDIAN, Circuit Judge. Zahra Bouye sued attorney James Bruce for violating the Fair Debt Collection Practices Act. She alleged that Bruce, representing Mariner Finance,

LLC, subjected her to an abusive debt-collection lawsuit in state court. The district court dismissed her complaint as time-barred and dismissed Bruce's later request for attorney's fees. Both appealed. Because one of Bouye's claims falls within the statute of limitations, we reverse both rulings and remand for further proceedings.

I.

Zahra Bouye financed a furniture purchase with Winner Furniture ("Winner") through a retail installment contract ("RIC").[1] While Bouye was making payments on the contract, Winner supposedly sold the debt to Mariner Finance, LLC ("Mariner"). Eventually, Bouye defaulted on the debt.

So, on March 4, 2019, Mariner, through its attorney James Bruce, sued Bouye in Kentucky state court to recover the outstanding debt and attorney's fees "of one-third of the amount sued upon and collected." (R. 5, Amended Complaint, p. 2.) That attorney's fees request contradicted the RIC, however, which provided that Bouye would pay "reasonable attorney's fee[s] limited to 15% of the unpaid balance of this contract after default[.]" (R. 5, Amended Complaint, p. 3.)

And there was another problem with this original state-court complaint. The RIC attached to the complaint didn't establish that Winner had ever properly transferred the debt to Mariner, such that Mariner would have the right to sue on the debt. On July 2, 2019, Mariner supplemented the record with a second, updated RIC. It reflected that a Winner employee had authorized the transfer of the debt from Winner to Mariner. Next, both parties moved for summary judgment.

But the Kentucky trial court denied both motions for summary judgment and ordered Mariner to file proof of assignment "within 45 days of September 4, 2019." (R. 5., Amended Complaint, p. 4.) On September 20, Mariner again filed for summary judgment, this time with

[1]These facts come from the amended complaint and state-court filings appended to Bruce's motion to dismiss. *See Siefert v. Hamilton Cnty.*, 951 F.3d 753, 757 (6th Cir. 2020) ("We take the facts only from the complaint, accepting them as true as we must do in reviewing a Rule 12(b)(6) motion."); *see also Chase v. MaCauley*, 971 F.3d 582, 587 n.1 (6th Cir. 2020) (explaining that we may "take judicial notice of proceedings in other courts of record" (quoting *Lyons v. Stovall*, 188 F.3d 327, 332 n.3 (6th Cir. 1999))).

the updated RIC that listed Winner's store manager as assigning the debt to Mariner. And on that basis, the state court granted Mariner's motion for summary judgment.

Bouye appealed to the state appellate court, which agreed with her that Mariner had not sufficiently demonstrated that the transfer from Winner to Mariner was valid. That court remanded the case, which Mariner ultimately voluntarily dismissed.

On March 19, 2020—a year and fifteen days after Mariner sued Bouye in state court—Bouye sued Bruce in federal district court for violating the Fair Debt Collection Practices Act ("FDCPA"). Relevant here is her allegation that Bruce, on Mariner's behalf, doctored the RIC mid-litigation to make it look like the debt assignment from Winner to Mariner was proper.[2] Bruce moved to dismiss Bouye's complaint as barred by the FDCPA's one-year statute of limitations or by *Rooker-Feldman* and collateral estoppel.[3]

The district court granted Bruce's motion to dismiss because Bouye filed her complaint more than a year after Mariner filed the state-court complaint. Bouye filed a motion for reconsideration, and Bruce filed a motion for attorney's fees. While Bouye and Bruce were waiting for the district court's decision on these motions—and unbeknownst to Bruce—Bouye and Mariner entered into a settlement agreement that released Mariner and all its "attorneys" from liability. (Appellate R. 18, Exhibit A to the Motion, p. 21.) A few weeks later, also unbeknownst to Bruce—but after Bruce learned of the existence of the settlement agreement—Bouye and Mariner executed an addendum that "clarif[ied]" that Bruce had not been released by the terms of the settlement agreement. (*See* Appellate R. 21, Exhibit A to Bouye's Response, p. 24.) The district court then denied Bouye's motion for reconsideration and Bruce's motion for attorney's fees. Bouye timely appealed, and Bruce cross-appealed for attorney's fees.

---

[2]Bruce argues that he was not responsible for these actions since he had a right to rely on Mariner's representations in conducting the state-court litigation. (Appellee's Br. at 13.) That is a merits issue, which we need not address in the context of an appeal from a Rule 12(b)(6) dismissal on statute-of-limitations grounds.

[3]Because there was no final state-court judgment, neither collateral estoppel nor *Rooker-Feldman* applies here. *See Fridley v. Horrighs*, 291 F.3d 867, 875 (6th Cir. 2002); *Abbott v. Michigan*, 474 F.3d 324, 328 (6th Cir. 2007).

At least three months before the trial court resolved the motions for reconsideration and attorney's fees, Bruce learned of the settlement agreement. That agreement, however, was never entered into the district-court record. Nevertheless, before the parties briefed the merits of this appeal, Bruce moved to dismiss the appeal for lack of jurisdiction based on the settlement agreement. Bouye argued that Bruce had forfeited the argument or, alternatively, that the agreement didn't go to our jurisdiction to hear the case. And producing the addendum to the agreement as well as Bruce's employment contract with Mariner, Bouye also argued that Bruce was not an intended third-party beneficiary of the settlement agreement.

We denied Bruce's motion to dismiss on the basis that the settlement agreement didn't moot the appeal because, in the context of this case, the settlement agreement doesn't go to our jurisdiction to hear the case.[4] *See Bouye v. Bruce*, No. 21-6195, slip op. at 1–2 (6th Cir. June 21, 2022) (order). We then allowed the parties to proceed with their briefing on appeal.

Now, Bouye argues that at least one of her claims fell within the one-year statute of limitations. Bruce challenges Bouye's Article III standing to bring this lawsuit. He asserts that Bouye has released her claims against him through the settlement agreement and that her claims are in any event time-barred. He also cross-appeals the district court's denial of attorney's fees. We'll address each issue in turn.

II.

We review our own subject-matter jurisdiction de novo. *Mich. Peat v. EPA*, 175 F.3d 422, 427 (6th Cir. 1999). We also review the grant of a motion to dismiss and reconsideration of that dismissal de novo. *Carr v. Louisville-Jefferson Cnty.*, 37 F.4th 389, 392 (6th Cir. 2022);

[4]We've said that "[g]enerally, the settlement of a dispute between the parties does render the case moot." *Int'l Union, United Auto., Aerospace, Agric. & Implement Workers of Am. v. Dana Corp.*, 697 F.2d 718, 721 (6th Cir. 1983) (en banc); *Flight Options, LLC v. Int'l Bhd. of Teamsters*, 873 F.3d 540, 546 (6th Cir. 2017). But a case is only moot on this basis when the settlement agreement is valid and enforceable. *See Int'l Union, United Auto., Aerospace, Agr. & Implement Workers of Am.*, 697 F.2d at 720–24 (evaluating the terms of the settlement agreement before determining whether the agreement mooted the case); *cf. Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (per curiam) (explaining that a "complete settlement of the underlying causes of action" rendered a case "moot"). Here, although the validity per se of the agreement does not appear contested, the parties are disputing its applicability to Bruce. And because the settlement occurred after the trial court's motion-to-dismiss decision, there may be gaps in our full understanding of its implication. So we limit our review here to the statute-of-limitations question and the attorneys' fees cross-appeal. We leave the dispute as to the settlement agreement's applicability to the district court on remand. *See infra* p. 11.

Holliday v. Wells Fargo Bank, NA, 569 F. App'x 366, 367 (6th Cir. 2014). We must accept as true any well-pleaded factual allegations in the plaintiff's complaint but we "need not accept as true legal conclusions or unwarranted factual inferences." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581–82 (6th Cir. 2007) (citation and quotation marks omitted). And typically, we review the denial of attorney's fees for abuse of discretion. *Cramblit v. Fikse*, 33 F.3d 633, 634 (6th Cir. 1994) (per curiam).

A.

Bruce argues that Bouye does not have Article III standing to raise her FDCPA claim because, according to him, she is only pleading a statutory harm related to the state-court lawsuit and therefore cannot meet the injury-in-fact requirement. Because a plaintiff's standing goes to our ability to hear a case, we'll address it first.

To establish Article III standing, a plaintiff must have suffered an injury-in-fact that is fairly traceable to the defendant's conduct and would likely be redressed by a favorable decision from a court. *Rice v. Vill. of Johnstown*, 30 F.4th 584, 591 (6th Cir. 2022) (citation omitted). For the injury-in-fact requirement, a plaintiff's allegations must establish that she has experienced an injury that is "concrete, particularized, and actual or imminent." *Barber v. Charter Twp. of Springfield*, 31 F.4th 382, 390 (6th Cir. 2022) (citation omitted).

Bruce argues that a statutory violation standing alone will not meet the injury-in-fact requirement. He's right about that much. *See Lyshe v. Levy*, 854 F.3d 855, 859 (6th Cir. 2017) ("[A] statutory violation in and of itself is insufficient to establish standing."). But Bouye didn't plead a mere statutory violation. She alleged that she suffered an injury because she had to defend against a state lawsuit that Mariner had no right to bring in the first place. Under our precedent, that harm establishes a concrete injury that meets the injury-in-fact requirement. *See Hurst v. Caliber Home Loans, Inc.*, 44 F.4th 418, 423 (6th Cir. 2022).

B.

Turning to the statute-of-limitations question, Bouye argues that the district court erred in holding that her case was time-barred. Bouye raises one FDCPA violation on appeal—Bruce's

filing (for Mariner) of the updated RIC. That updated RIC showed what Bouye believed to be a contrived transfer of the debt from Winner to Mariner after Mariner filed suit against her. And she filed her federal lawsuit within a year of that alleged violation. So she says her claim is not time-barred.

Bruce argues that the violation she alleged was really just a continuing violation of Mariner's initial filing of the lawsuit. Under that view, the statute of limitations began running when Mariner filed the state-court complaint. So Bouye's claim was time-barred because she filed in federal court more than a year after Mariner filed in state court. Bouye protested below and on appeal that her claim on the second RIC is not time-barred, even if any claim she would have had on the filing of the state complaint was time-barred, because it is a separate violation from Mariner's initiation of the state suit.

First, a little background on the FDCPA. Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors[.]" 15 U.S.C. § 1692(e). To accomplish that goal, the FDCPA "impos[es] affirmative requirements on debt collectors and prohibit[s] a range of debt-collection practices." *Rotkiske v. Klemm*, 140 S. Ct. 355, 358 (2019) (citing 15 U.S.C. §§ 1692b–1692j). And the FDCPA provides for both government and private civil enforcement. *See* 15 U.S.C. §§ 1692k, 1692l.

FDCPA plaintiffs may sue "in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date *on which the violation occurs*." *Id.* § 1692k(d) (emphasis added). And generally, the clock starts ticking "on the date the alleged FDCPA violation actually happened," not "on the date an alleged FDCPA violation is discovered." *Rotkiske*, 140 S. Ct. at 360–61.

The rule we've explained in our caselaw, albeit unpublished, is that every alleged, discrete FDCPA violation has its own statute of limitations. *Slorp v. Lerner, Sampson & Rothfuss*, 587 F. App'x 249, 259 (6th Cir. 2014) ("A plaintiff who alleges several FDCPA violations, some of which occurred within the limitations period and some of which occurred outside that window, will be barred from seeking relief for the untimely violations, but that plaintiff may continue to seek relief for those violations that occurred within the limitations

period."); *Purnell v. Arrow Fin. Servs., LLC*, 303 F. App'x 297, 302–03 (6th Cir. 2008) ("[T]he fact '[t]hat Defendants sent a dunning letter outside the limitations period does not render Plaintiff's FDCPA claim time-barred, where, as here, Plaintiff has alleged a discrete violation within the limitations period.'" (citation omitted)).

That rule comes straight from the text of the statute. "[T]he date on which the violation occurs" determines when the one-year statute of limitations starts running. § 1692k(d). Find the FDCPA violation in the complaint. Count out a year. That determines the statute of limitations.[5]

So we turn to Bouye's complaint to see whether she has alleged at least one timely FDCPA violation.[6] And she has. Bouye alleged that Bruce filed an updated RIC and moved for summary judgment on that basis, "affirmatively misrepresent[ing] to the Court" that the assignment of the debt from Winner to Mariner occurred "before Mariner filed suit against Ms. Bouye[.]" (R. 5, Amended Complaint, p. 5.) And that claim would have started accruing on either July 2, 2019, when Mariner filed the second RIC, or September 20, 2019, when Mariner moved for summary judgment based on that filing. Bouye filed her federal lawsuit within a year of either date, so we need not decide which date starts the clock. And Bouye can hang her hat on this alleged FDCPA violation.

---

[5]We are not alone in our approach. At least four other circuits adhere to the view that every alleged violation of the FDCPA has its own statute of limitations—the view espoused in our unpublished caselaw and formally adopted today. For instance, the Fourth Circuit has rejected grouping similar violations on the theory that the plain language of the FDCPA "unambiguously sets the date of *the violation* as the event that starts the one-year limitations period." *Bender v. Elmore & Throop, P.C.*, 963 F.3d 403, 407 (4th Cir. 2020) (emphasis in original) (quoting *Rotkiske*, 140 S. Ct. at 360). So, the Fourth Circuit says, "a 'separate violation' of the FDCPA occurs 'every time' an improper communication, threat, or misrepresentation is made." *Id.* (citation omitted). The Seventh, Eighth, and Tenth Circuits have adopted the same view. *See Cooper v. Retrieval-Masters Creditors Bureau, Inc.*, 42 F.4th 688, 699 (7th Cir. 2022) (explaining that for two separate but related suits "[d]iscrete and independently wrongful acts produce different claims, even if the same wrongdoer commits both offenses and the second wrong is similar to the first" (citation and quotation marks omitted)); *Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685, 694 (8th Cir. 2017) ("It does not matter that the debt collector's violation restates earlier assertions—if the plaintiff sues within one year of the violation, it is not barred by § 1692k(d). Each alleged violation of the FDCPA is 'evaluate[d] . . . individually to determine whether any portion of' the 'claim is not barred by the statute of limitations.'" (citation omitted)); *Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173, 1189 (10th Cir. 2013) (identifying multiple alleged FDCPA violations and determining that a "[p]laintiff has failed to identify any actions taken by [the debt collector] . . . within the one-year statute of limitations").

[6]Our Circuit hasn't decided whether an FDCPA claim based on another lawsuit accrues at the time of the filing of the lawsuit or instead upon service to the defendant in that suit. *See Slorp*, 587 F. App'x at 258 n.5. For purposes of our analysis today, we'll use the time of filing—March 4, 2019—which both parties seem to agree is the relevant date.

Bruce argues that Bouye's alleged violation is a continuing effect of Mariner's initial filing of the state lawsuit and is therefore time-barred because she didn't file within a year of Mariner's initiation of the state suit. *See Slorp*, 587 F. App'x at 259 ("But the violations that occur within the limitations window must be discrete violations; they cannot be the later effects of an earlier time-barred violation." (citation omitted)).

To make this argument, Bruce pulls from our caselaw on the continuing-violation doctrine. Originally, "the continuing violation theory [] [wa]s an equitable exception to the time limits for filing an administrative complaint" in the Title VII context. *Burzynski v. Cohen*, 264 F.3d 611, 617 (6th Cir. 2001). The Sixth Circuit identified two kinds of continuing violations, both specific to the Title VII context[7]: (1) when there was evidence of discrete present discriminatory activity or (2) when there was a standard operating procedure of discrimination against a class that was established over time. *Sharpe v. Cureton*, 319 F.3d 259, 266–67 (6th Cir. 2003) (citation omitted). So, when a plaintiff's claims fell into either of these categories, he was "entitled to have the court consider all relevant actions allegedly taken pursuant to the employer's discriminatory policy or practice, including those that would otherwise be time barred." *Id.* at 267 (citation omitted). In other words, a Title VII plaintiff could sweep in earlier, time-barred claims into a later, timely claim's statute of limitations.

But in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002), the Supreme Court eliminated the first kind of continuing violations as eligible for the continuing-violation doctrine. After *Morgan*, plaintiffs can no longer rely on the continuing-violation doctrine "to allow recovery for acts that occurred outside the filing period" when those acts were "discrete acts of discrimination or retaliation[.]" *Sharpe*, 319 F.3d at 267 (citing *Morgan*, 536 U.S. at 112). That's because discrete acts of discrimination are "easy to identify" and therefore don't warrant an extension of the statute of limitations. *Morgan*, 536 U.S. at 114. On the other hand, the *Morgan* Court said that a Title VII plaintiff could still invoke the doctrine when his claim was based on standard operating procedure "that cannot be said to occur on any particular day" but instead "occur[s] over a series of days or years." *Sharpe*, 319 F.3d at 267 (citing

[7]We later extended the doctrine "to claims for deprivations of civil rights." *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, 480 F.3d 410, 416 (6th Cir. 2007) (citations omitted).

Morgan, 536 U.S. at 115). That's because "[s]uch claims are based on the cumulative effect of individual acts," and it's harder to pin down a date for the statute of limitations for these claims. *Morgan*, 536 U.S. at 115.

With this significant narrowing of the continuing-violation doctrine in the Title VII context in mind, we turn back to the FDCPA. Bruce is right that we shouldn't apply the continuing-violation doctrine in the FDCPA context. In the first place, we have been "extremely reluctant" to extend the continuing-violation doctrine outside the Title VII context. *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, 480 F.3d 410, 416 (6th Cir. 2007) (citation omitted). And the doctrine is antithetical to the plain text of § 1692k(d). In the context of § 1692k(d), the Supreme Court said that "[w]e must presume that Congress 'says in a statute what it means and means in a statute what it says there.'" *Rotkiske*, 140 S. Ct. at 360 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

"Here, the text of § 1692k(d) clearly states than an FDCPA action 'may be brought . . . within one year from the date on which the violation occurs.'" *Id.* (quoting 15 U.S.C. § 1692k(d)). And we're bound to respect Congress's choice. *See id.* at 360–61 ("It is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'" (quoting Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012))). So we decline to engage in "[a]textual judicial supplementation" by extending the continuing-violation doctrine to the FDCPA context. *Id.* at 361.

Morgan backs up our view. *Morgan* explained that when plaintiffs are bringing discrete claims under Title VII, the continuing-violation doctrine has no application. *Morgan*, 536 U.S. at 114. And in the FDCPA context, the only kinds of claims a plaintiff can bring are discrete violations of the FDCPA. There is no "environment of FDCPA violations" claim, analogous to the Title VII standard-operating-procedure claims that still have life under the continuing-violation doctrine. In short, the continuing-violation doctrine has no vitality in the FDCPA context. *See Slorp*, 587 F. App'x at 257–58.

The continuing-violation doctrine doesn't have anything to do with this case, though, because Bouye never invoked it. And it makes sense that she didn't. The whole benefit of the

continuing-violation doctrine is that it allows a plaintiff to sweep in a series of component acts that comprise a claim, if one of those acts was within the limitations period. *See id.* at 258. But Bouye isn't trying to sweep in acts that would otherwise be outside of the filing period. She is seeking redress for a single claim that is not time-barred—Bruce's filing of the second, allegedly false RIC in the state lawsuit on Mariner's behalf.

Bruce argues that a claim based on the second RIC could only be a continuing-violation claim based on Mariner's initial filing of the lawsuit. But Bouye's single claim is independent of Mariner's initial filing of the lawsuit—not a continuing effect of it—because it is a standalone FDCPA violation. This is not a case where Bruce simply "reaffirmed" the legitimacy of the state suit throughout the litigation. *See id*. at 259. Rather, the allegation is that Bruce introduced an RIC with a false assignment of debt that occurred after the lawsuit was filed.

If we were to only consider the date Mariner filed suit, like Bruce asks us to, without regard to subsequent FDCPA violations within that lawsuit, we would create a rule that disregards the fact that § 1692k(d) creates an independent statute of limitations for each violation of the FDCPA. *See Bender v. Elmore & Throop, P.C.*, 963 F.3d 403, 407 (4th Cir. 2020) (explaining that the approach we adopt today "avoids creating a safe harbor for unlawful debt activity"). And if we adopted Bruce's approach, we'd be saying that "so long as a debtor does not initiate suit within one year of the first violation, a debt collector [is] permitted to violate the FDCPA with regard to that debt indefinitely and with impunity." *Id.* We decline Bruce's invitation. So the district court erred in dismissing the entire case on statute-of-limitations grounds.

Bruce also invokes the settlement agreement, which, on its face, would seem to bar Bouye's claims on the merits. But as we discussed above, Bruce invoked that agreement for the first time in support of his jurisdictional argument that the agreement moots this suit. Bouye defended against this argument by introducing several documents in her response to Bruce's motion to dismiss on appeal, including an addendum to the settlement agreement and Bruce's representation contract with Mariner. We rejected Bruce's jurisdictional argument in our order denying the motion to dismiss on appeal. *Bouye*, No. 21-6195, slip op. at 2–3 (order).

With regard to what happened in the district court, however, by the time that Bruce had learned about the settlement, he had already prevailed on the statute of limitations. So rather than address Bruce's affirmative defense that the settlement agreement controls the outcome without the benefit of the district court's consideration, we think the better route is remand for the district court to evaluate in the first instance any merits argument based on the settlement agreement. The parties' arguments "may be considered by the district court as it may deem appropriate." *Johnston-Taylor v. Gannon*, 907 F.2d 1577, 1582 (6th Cir. 1990). And out of an abundance of caution, we also vacate the district court's order denying attorney's fees since our result today allows the litigation below to continue. So we reverse the district court's dismissal and vacate the attorney's fees order and remand for further proceedings consistent with this opinion.

REVERSED and **REMANDED**.

[Cite as *U.S. Bank Natl. Assn. v. Tye*, 2023-Ohio-637.]

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

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR RMAC TRUST, SERIES 2016-CTT,	:	APPEAL NO. C-220071 TRIAL NO. A-1805683
Plaintiff-Appellee,	:	*O P I N I O N.*
	:	
VS.	:	
KENNETH TYE,	:	
Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Appeal Dismissed

Date of Judgment Entry on Appeal: March 3, 2023

Manley Deas Kochalski LLC and *Matthew J. Richardson*, for Plaintiff-Appellee,

DannLaw and *Marc E. Dann*, for Defendant-Appellant.

CROUSE, Presiding Judge.

{¶1} Defendant-appellant Kenneth Tye appeals from the judgment of the Hamilton County Court of Common Pleas granting summary judgment in favor of U.S. Bank National Association ("U.S. Bank") on its residential foreclosure action. However, we dismiss the appeal for lack of a final appealable order.

{¶2} In October 2018, U.S. Bank filed a complaint for foreclosure against Tye.[1] In July 2019, U.S. Bank filed a motion for summary judgment. On October 31, 2019, the magistrate recommended granting summary judgment as to the note only because "a genuine issue of material fact remain[ed] concerning whether US Bank is the current holder of the mortgage." Both parties objected to the magistrate's decision.

{¶3} Before ruling on the objections, the trial court granted U.S. Bank leave to file an amended complaint to address the noteholder issue. U.S. Bank subsequently filed an amended complaint that named a former noteholder—Taylor, Bean & Whitaker Mortgage Corporation—as an additional defendant. After obtaining a default judgment against the now-defunct Taylor, Bean & Whitaker Mortgage Corporation, U.S. Bank filed a second motion for summary judgment on June 3, 2021.

{¶4} On October 15, 2021, the magistrate granted U.S. Bank's motion for summary judgment and issued the decree in foreclosure. The entry set forth the legal description of the property, in addition to the total amount due on the note as follows:

> $233,466.04 plus interest on the principal amount at the rate of 2% per annum from January 1, 2014, adjusted as per the terms of the Note. The Magistrate further finds that there is due on the Note all late charges

[1] U.S. Bank had previously filed a complaint for foreclosure against Tye in 2016 but it was dismissed due to an assignment issue. After filing a corrective assignment, U.S. Bank filed this 2018 complaint.

> imposed under the Note, all advances made for the payment of real estate taxes and assessments, property preservation, and insurance premiums, and all costs and expenses incurred for the enforcement of the Note and Mortgage, except to the extent the payment of one or more specific such items is prohibited by Ohio law.

{¶5} Tye filed timely written objections to the magistrate's decision. On January 26, 2022, the trial court adopted the magistrate's decision without ruling on the objections. The court's "Entry Adopting Magistrate's Decision and Final Decree in Foreclosure," states, in its entirety:

> This matter is before the Court upon Plaintiff's Complaint, Plaintiff's Motion for Summary Judgment and the evidence. The Court finds that the Magistrate has issued a decision granting Plaintiff's Motion for Summary Judgment and a copy of the Magistrate's Decision has been filed herein. For the reasons more fully set forth in the Magistrate's Decision, the Court hereby adopts the Magistrate's Decision and Decree in Foreclosure in its entirety and enters judgment in favor of the Plaintiff in the manner set forth in detail in the Magistrate's Decision. Pursuant to the Magistrate's Decision, the equity of redemption of the defendant title holders in the Property shall be foreclosed and the property shall be sold free of the interests of all parties to this action.
>
> There is no just reason for delay in entering Judgment in favor of the Plaintiff.
>
> IT IS SO ORDERED.

{¶6} This appeal followed.

{¶7} As an appellate court, we have jurisdiction to "review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district * * *." Ohio Constitution, Article IV, Section 3(B)(2). Without a final order, we have no jurisdiction. *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 10; *Preterm-Cleveland v. Yost*, 1st Dist. Hamilton No. C-220504, 2022-Ohio-4540, ¶ 9. An order is final " 'only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), are met.' " *CitiMortgage* at ¶ 10, quoting *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, 776 N.E.2d 101, ¶ 5. "[W]e are obliged to consider our jurisdiction even if neither party raises the issue." *Preterm-Cleveland* at ¶ 9.

{¶8} R.C. 2505.02(B)(1) provides that "[a]n order is a final order * * * when it * * * affects a substantial right in an action that in effect determines the action and prevents a judgment." In the foreclosure arena, "[l]iability is fully and finally established when the court issues the foreclosure decree and all that remains is mathematics, with the court plugging in final amounts due after the property has been sold at a sheriff's sale." *CitiMortgage* at ¶ 25.

{¶9} Where a magistrate is involved, and when the trial court adopts, rejects, or modifies a magistrate's decision, it must also enter a judgment. Civ.R. 53(D)(4)(e). An entry that merely "stat[es] that it is adopting a magistrate's decision is not a final appealable order." *Wells Fargo Bank, N.A. v. Allen*, 2012-Ohio-175, 969 N.E.2d 309, ¶ 7 (8th Dist.), citing *Flagstar Bank, FSB v. Moore,* 8th Dist. Cuyahoga No. 91145, 2008-Ohio-6163, ¶ 1. "To constitute a final appealable order, the trial court's journal entry must be a separate and distinct instrument from that of the magistrate's order and must grant relief on the issues originally submitted to the

court." *Flagstar Bank* at ¶ 1; *see Deutsche Bank Natl. Co. v. Caldwell*, 196 Ohio App.3d 636, 2011-Ohio-4508, 964 N.E.2d 1093, ¶ 7 (8th Dist.) (holding a trial court's entry was not final where it "did not enable the parties to refer to the entry and determine their responsibilities and obligations."); *Everhome Mtge. Co. v. Kilcoyne*, 8th Dist. Cuyahoga No. 96982, 2012-Ohio-593, ¶ 3 ("The judgment entry must contain a clear pronouncement of the court's judgment and a statement of relief and must be a complete document, separate and apart from that of the magistrate's order.").

{¶10} A trial court also has a mandatory duty to rule on any timely-filed objections to the magistrate's decision. *See Chan v. Total Abatement Specialist & Remodelers,* 1st Dist. Hamilton No. C-070275, 2008-Ohio-1439, ¶ 8-9; *Zwahlen v. Brown*, 1st Dist. Hamilton No. C-070263, 2008-Ohio-151, ¶ 20. A court's failure to independently review, and rule on those objections can result in an order that is not final. *See U.S. Bank Natl. Assn. v. Heller,* 8th Dist. Cuyahoga No. 95966, 2011-Ohio-4410, ¶ 4-5 (dismissing appeal for lack of jurisdiction because "trial court did not even state that it had considered [appellant's] objections" and collecting cases holding the same).

{¶11} In this case, the trial court's entry did not allow the parties to determine their rights and obligations without reference to the magistrate's decision. While the court clearly entered judgment in favor of U.S. Bank, the entry failed to set forth any details of the decree in foreclosure. Moreover, the court failed to rule on, or even reference, the objections to the magistrate's decision. For both of these reasons, the trial court's January 26, 2022 entry is not a final appealable order and we are without jurisdiction to consider this appeal. Accordingly, we dismiss the appeal.

Appeal dismissed.

ZAYAS and **BERGERON, JJ.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.

[Cite as *Brown v. JC Austintown, Inc.*, 2023-Ohio-553.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

CHARMAINE BROWN,

Plaintiff-Appellant,

v.

JC AUSTINTOWN, INC.

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0064

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 22 CV 96

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Fred M. Bean, Atty. Brian D. Spitz, Spitz, The Employee's Law Firm, 25825 Science Park Drive, Suite 200, Beachwood, Ohio 44122 for Plaintiff-Appellant.

Atty. Jennifer V. Sammon, *Atty. James P. Sammon,* 2906 Weybridge Road, Shaker Heights, Ohio 44120 for Defendant-Appellee.

Dated: February 21, 2023

Robb, J.

{¶1} Plaintiff-Appellant Charmaine Brown appeals the decision of the Mahoning County Common Pleas Court granting the motion to compel arbitration filed by Defendant-Appellee JC Austintown, Inc. dba Domino's Pizza. Appellant contends she demonstrated Appellee waived the right to demand arbitration of her claim by failing to provide a copy of or mention the arbitration agreement in a response letter to Appellant's letter giving notice of her claim. Alternatively, Appellant claims there was a genuine issue of material fact on waiver. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} Appellant filed a complaint against Appellee containing claims for disability discrimination, failure to accommodate, race discrimination, hostile work environment based on disability and race, retaliation, and wrongful termination in violation of public policy. The complaint made various factual allegations about confrontations with other employees and Appellant's termination after less than three weeks of employment as a delivery driver. After being served with the complaint, Appellee received a stipulated 30-day extension of time to file an answer.

{¶3} Within this extended time period, Appellee filed a motion to compel arbitration and to dismiss the case or a motion to stay the case pending arbitration in the alternative. *See Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465, 800 N.E.2d 7, ¶ 18 ("A party seeking to enforce an arbitration provision may choose to move for a stay under R.C. 2711.02, or to petition for an order for the parties to proceed to arbitration under R.C. 2711.03, or to seek orders under both statutes."). Appellee attached the parties' one-page "Alternative Dispute Resolution Agreement" (which was signed by Appellant on August 6, 2020 and by her manager the next day). Appellee pointed out the claims in the complaint fell within the scope of the arbitration agreement, which says it "shall apply to any claim or dispute arising out of or related to the employment relationship or its termination including, but not limited to, claims of wrongful termination, harassment, discrimination, breach of contract, tort claims, violation of statute, non-payment of wages, and all other similar claims."

{¶4} The arbitration agreement said the parties agreed to final and binding arbitration of all claims while voluntarily and knowingly waiving any right to a jury trial (in all capital letters). The agreement's interpretation, scope, and enforcement and all procedural issues were to be governed by the Federal Arbitration Act (FAA), federal decisional law construing the FAA, and the Rules of the Arbitrator (who was to be selected from the American Arbitration Association). The arbitration fees were to be borne exclusively by Appellee (with each party bearing their own attorney's fees and costs). Any amendment was to be written and mutually executed.

{¶5} Appellant's opposition to the arbitration motion claimed Appellee waived any right to compel arbitration or to seek a stay pending arbitration by failing to invoke the arbitration agreement in pre-litigation correspondence. One of Appellant's attorneys attached an affidavit incorporating Appellant's January 15, 2021 letter to Appellee and a response letter from Appellee that did not mention an arbitration agreement.

{¶6} The January 15, 2021 letter provided notice of Appellant's representation by the named law firm regarding the claims identified in the letter. The alleged facts and some of the claims were recited. In the section discussing the manager's personal liability, the letter then seemed to switch to general remarks. In addition to asking to discuss a resolution over the phone, the letter stated:

> If we do not hear from you by February 12, 2021, we will draft and file the Complaint.
>
> In the alternative, if Charmaine has executed any documents that attempt to limit her right to pursue a jury trial, and/or reduce the statute of limitations to anything less than prescribed by statute, and/or agreeing to arbitration we demand that you immediately forward any and all agreements to our attention. * * *
>
> **Failure to produce any such agreement within thirty days will constitute your implied agreement to waive the option of arbitration and waive any contractual limitations short[en]ing the time to file a complaint.** [with a footnote citing a Texas appellate case]
>
> If required by any valid and executed agreement, please let this letter serve as Charmaine's written request to initiate arbitration and/or mediation.

> Nothing in this letter is intended to waive Charmaine's rights to contest the validity or enforcement of any arbitration or employment agreement.

(Emphasis original.) (1/15/21 Letter at 5-6). The letter then made requests to preserve evidence and legal statements on employment references.

{¶7} Appellee's February 24, 2021 response letter began, "I am the legal representative of JC Austintown, Inc. I have been asked to preliminarily respond to your letter dated January 15, 2021. My response will primarily deal with the facts at hand." This letter then contained the employer's rendition of facts with attached statements from managers about certain incidents. The letter ended by stating: "I will not comment on the claims that have been asserted under Ohio law. Such is not within the scope of this letter. This letter is mainly to inform you that the facts are much different than you have been led to believe and it is rather remarkable in such a short period that Ms. Brown claims to have experienced such direct and frank conversations, which she reported directly to the Manager. In my experience, there is more here than your client is telling you."

{¶8} Appellant's memorandum in opposition to arbitration argued Appellee's failure to produce or mention the arbitration agreement in this response letter waived arbitration. She also claimed she was entitled to a jury trial on the issue because she demonstrated a genuine issue of material fact on waiver.[1]

{¶9} Appellee replied by arguing the cited waiver factors worked in Appellee's favor (e.g., who invoked the court's jurisdiction, when arbitration was invoked, the extent of participation in the litigation, and prejudice). Appellee also emphasized the language in the letter disclosing counsel was merely providing a "preliminary response" which "will primarily deal with the facts at hand."[2]

---

[1] Appellant's opposition alternatively alleged the response letter's failure to mention the arbitration agreement constituted a new agreement, citing a Texas appellate case; however, the latter argument is not maintained on appeal.

[2] After pointing out the response letter was written by Appellee's prior counsel, Appellee's current counsel said he provided Appellant's attorney with the arbitration agreement when he was first engaged to represent Appellee. He did not disclose the date of this occurrence or submit an affidavit.

{¶10} On June 2, 2022, the trial court granted Appellee's motion to compel arbitration and dismissed the action. Appellant filed a timely notice of appeal.

ASSIGNMENT OF ERROR

{¶11} Appellant's assignment of error contends:

"THE TRIAL COURT ERRED IN GRANTING THE MOTION TO COMPEL ARBITRATION."

{¶12} Appellant states the arbitration agreement was waived when Appellee acted inconsistent with it by failing to mention arbitration when responding to her pre-litigation letter (quoted supra). She also points to the statutory right to a jury trial after one party seeks to compel arbitration but the other party sufficiently raises an issue justifying their failure to comply with the arbitration agreement (such as waiver).

{¶13} The FAA provides a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4." 9 U.S.C. 2. Likewise, Ohio's Arbitration Act provides a written arbitration agreement "shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." R.C. 2711.01(A). "Waiver is a ground that exists at law or in equity (in both Ohio and the federal system) for the revocation of any contract." *Med. Imaging Network, Inc. v. Med. Resources*, 7th Dist. Mahoning No. 04 MA 220, 2005-Ohio-2783, ¶ 20.

{¶14} Rather than staying the case pending arbitration under R.C. 2711.02, the trial court granted the request to compel arbitration under R.C. 2711.03 and dismissed the case. Pursuant to R.C. 2711.03(A), "The party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement." *See also* 9 U.S.C. 4 (which begins, "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court").

{¶15} In such case, the court will hear the parties and direct the parties to proceed with arbitration *if* "the making of the agreement for arbitration or the failure to comply with

the agreement is not in issue * * *." R.C. 2711.03(A). *See also* 9 U.S.C. 4 (direct the parties to proceed to arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue"). However, "if the issue of the making of the arbitration agreement or the failure to perform is in issue," then the court proceeds "summarily to the trial of that issue" with the court deciding the issue unless a party demanded a jury trial on that issue. R.C. 2711.03(B). *See also* 9 U.S.C. 4 ("If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue" and a jury demand is made, then the court submits to the jury the question of whether "an agreement for arbitration was made in writing" or whether "there is a default in proceeding thereunder").

{¶16} Appellant argues "her failure to perform" the arbitration agreement is in issue if she states she need not perform the agreement because Appellee waived the right to enforce it. Still, she recognizes she is not entitled to a jury trial merely by making this claim or by requesting a jury trial on the issue in her response to the motion to compel. *Church v. Fleishour Homes, Inc.*, 172 Ohio App.3d 205, 2007-Ohio-1806, 874 N.E.2d 795, ¶ 33 (5th Dist.) ("A party to an arbitration agreement cannot obtain a jury trial merely by demanding one"). Appellant notes the courts are to analyze a motion to compel arbitration with a jury demand "as they would a summary judgment exercise, proceeding to trial where the party moving for the jury trial sets forth specific facts demonstrating that a genuine issue of material fact exists regarding the validity or enforceability of the arbitration agreement." *Id.* at ¶ 32, quoting *Garcia v. Wayne Homes, L.L.C.*, 2d Dist. Clark No. 2001 CA 53 (Apr. 19, 2002), citing *Cross v. Carnes*, 132 Ohio App.3d 157, 166, 724 N.E.2d 828 (11th Dist.1998) (pointing out federal case law interpreting 9 U.S.C. 4 instructs the courts to approach the matter as they would a summary judgment exercise).

{¶17} While Appellant therefore concludes our standard of review is de novo, Appellee states our standard is abuse of discretion. The standard of review depends on the issue raised in response to an arbitration motion, the type of motion, and the proceedings invoked thereby. "An assertion that a party waived an argument presents a mixed question of law and fact." *Gembarski v. PartsSource, Inc.*, 157 Ohio St.3d 255, 2019-Ohio-3231, 134 N.E.3d 1175, ¶ 26. "This court reviews de novo the legal question whether [the defendant's] conduct amounts to a waiver of the [arbitration] argument, but

we review the factual findings underlying the trial court's determination only for clear error" while "defer[ring] to the trial court's factual findings when those findings are supported by the record." *Id.*

{¶18} Accordingly, if the trial court, for instance, tried the issue raised on the failure to perform the arbitration agreement because a jury trial was not requested, then an abuse of discretion standard of review would apply to any factual decisions and a de novo standard would apply to any legal issues decided. If a jury trial was requested but the court found a jury trial was not required (as the alleged facts as presented were not legally sufficient to show the failure to perform was justified), then a de novo standard of review would apply on appeal. *See, e.g., Garcia*, 2d Dist. Clark No. 2001 CA 53 ("where, as here, the facts are undisputed, an appellate court must only determine whether the trial court's determination was appropriate as a matter of law"). We proceed accordingly.

{¶19} In presenting her argument, Appellant emphasizes the policy favoring arbitration contained in the FAA does not mean a court can create special procedural rules treating arbitration agreements more favorably than other contracts but merely acknowledges the "FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708, 1713, 212 L.Ed.2d 753 (2022), quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010). The federal policy favoring arbitration makes "arbitration agreements as enforceable as other contracts, but not more so." *Id.*, quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), fn. 12. As can be seen from the cases cited in *Morgan*, these principles are not new. *See also Henderson v. Lawyers Title Ins. Corp.*, 108 Ohio St.3d 265, 2006-Ohio-906, 843 N.E.2d 152, ¶ 26, 28 (a court cannot invalidate an arbitration agreement under a state law that applies only to arbitration; arbitration clause must be "placed on a par with other contract provisions").

{¶20} The FAA prohibits states from rejecting arbitration agreements where interstate commerce is involved (unless revocable on grounds for revoking any contract). *Perry v. Thomas*, 482 U.S. 483, 489, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). In a case involving interstate commerce, the Court observed, "state law, whether of legislative or

judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." (Emphasis original.) *Id.* at fn. 2. Appellant relies on the *Morgan* Court's observations that "the usual federal rule of waiver does not include a prejudice requirement" and contractual waiver "normally" does not require evidence of detrimental reliance. *Morgan*, 142 S.Ct. at 1713-1714. Notably, *Morgan* involved a federal court applying federal contract law and a nationwide class action lawsuit against an employer.

{¶21} Even where an arbitration agreement said the FAA applied, the Eighth District applied state law on waiver after pointing out the agreement did not involve interstate commerce. *American Gen. Fin. v. Griffin*, 8th Dist. Cuyahoga No. 99088, 2013-Ohio-2909, ¶ 10. "Ohio law can be applied to determine if a waiver of the right to arbitrate occurred because Ohio's law on waiving arbitration agreements is a ground existing at law or in equity for waiving the rights under any type of contract." *Id.* at ¶ 11. In a case where we questioned the existence of interstate commerce, we similarly held even if the FAA applied, the court need not utilize federal law to define the basic concept of waiver. *Med. Imaging*, 7th Dist. No. 04 MA 220 at ¶ 20.

{¶22} We point out Ohio does not impose a required element of prejudice for contract waiver. Waiver is the voluntary relinquishment of a known right. *Gembarski*, 157 Ohio St.3d 255 at ¶ 24, citing *White Co. v. Canton Transp. Co.*, 131 Ohio St. 190, 198, 2 N.E.2d 501 (1936). To establish waiver, the party seeking waiver has the burden to demonstrate the other knew of its right to assert the arbitration agreement and the totality of the circumstances establish this other party acted inconsistently with that right. *Id.* at ¶ 25. Although waiver can occur both expressly or by conduct inconsistent with the right, "[m]ere silence will not amount to waiver where one is not bound to speak." *Id.* at ¶ 24, quoting *White*, 131 Ohio St. at 198.

{¶23} "Prejudice is a factor to be considered in determining the totality of the circumstances surrounding inconsistent acts, but it is not a mandated element for waiver." *Med. Imaging*, 7th Dist. No. 04 MA 220 at ¶ 26. Notably, *Appellant quoted this below and acknowledged the available factors* in considering the totality of the circumstances of a party's waiver of arbitration included the following: whether the party invoked the trial court's jurisdiction; when the arbitration agreement was raised in the trial court; the extent

of participation in the litigation; and the prejudice suffered by the party who asserts waiver. *Citing Milling Away, L.L.C. v. UGP Properties, L.L.C.*, 8th Dist. Cuyahoga No. 95751, 2011-Ohio-1103, ¶ 9.

{¶24} Significantly, waiver is an *equitable* contract defense, which generally involves an evaluation of the totality of the circumstances in considering the existence of acts inconsistent with the contract right alleged to be waived. *See Gembarski*, 157 Ohio St.3d 255 at ¶ 25 (speaking of waiver broadly); *Med. Imaging*, 7th Dist. No. 04 MA 220, at ¶ 26 ("this court interprets Ohio law as not absolutely requiring prejudice to find waiver of any contract. Prejudice is a factor to be considered in determining the totality of the circumstances surrounding inconsistent acts, but it is not a mandated element for waiver."), citing *ACRS, Inc. v. Blue Cross & Blue Shield of Minnesota*, 131 Ohio App.3d 450, 456, 722 N.E.2d 1040 (8th Dist.1998) ("As with all other contractual rights, the right to arbitrate is subject to waiver. * * * Waiver typically requires knowledge of the right to arbitrate and actions inconsistent with that right that usually involve delay and prejudice to the adverse party."). Therefore, considering prejudice as part of the totality of the circumstances in evaluating conduct inconsistent with a known right is not at odds with general contract principles in Ohio.

{¶25} In addition to saying prejudice was only one factor, Appellant's opposition to arbitration alternatively said she was in fact prejudiced as she could have avoided the cost of filing her complaint in the trial court had Appellee disclosed the arbitration agreement. On appeal, she does not mention this particular argument on the cost to file the action; instead, she additionally addresses the doctrine of estoppel (or waiver by estoppel). Appellant states unlike waiver, estoppel does not require intent to relinquish the right but requires the party asserting waiver to show prejudice, detrimental reliance, or a change in position as a mandatory element. However, Appellant incorrectly claims a mere change in position is an alternative to the prejudice or detrimental reliance required for the estoppel doctrine. The application of estoppel "prevents relief when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts *to his detriment*." (Emphasis added.) *Chubb v. Ohio Bur. of Workers' Comp.*, 81 Ohio St.3d 275, 279, 690 N.E.2d 1267 (1998), quoting *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.*, 71 Ohio St.3d 26, 34, 641 N.E.2d

188 (1994). Moreover, "equitable estoppel generally requires actual or constructive fraud." *Sycamore City School Dist.*, 71 Ohio St.3d at 35. Regardless, estoppel was not mentioned below. *See White*, 131 Ohio St. at 198 (where it was "difficult to discern from the pleadings whether the issue is waiver or estoppel," the Court treated the issue as waiver where the party characterized it as waiver below). "Although waiver is typical of estoppel, estoppel is a separate and distinct doctrine." *Chubb*, 81 Ohio St.3d at 279.

{¶26} Contrary to Appellant's suggestion on appeal, Appellee did not argue the list of waiver factors was mandatory or exclusive when arguing the totality of the circumstances (surrounding Appellee's pre-litigation silence on the arbitration topic in a response to Appellant's lengthy pre-litigation letter) did not constitute waiver. *In response to Appellant's citation to the factors*, Appellee pointed out how the factors weighed in Appellee's favor: Appellant rather than Appellee invoked the trial court's jurisdiction, and Appellee did not file a counterclaim; the arbitration agreement was invoked before the time for filing an answer expired; the motion to compel or stay was Appellee's only participation in the litigation; and the only alleged prejudice was the cost to file the complaint.

{¶27} Appellant seeks to minimize the importance of post-complaint timeliness in raising the arbitration agreement, noting regular contracts can be waived before a complaint is filed. We recognize relevant pre-litigation conduct can be a consideration when cited by a party claiming waiver. *See, e.g., Glenmoore Builders, Inc. v. Kennedy*, 11th Dist. Portage No. 2001-P-0007 (Dec. 7, 2001) (noting the party seeking to enforce arbitration did not "take part in any pre-litigation discovery"); *Phillips v. Lee Homes, Inc.*, 8th Dist. Cuyahoga No. 64353 (Feb. 17, 1994) (noting the party seeking to enforce arbitration "availed itself" of pretrial discovery). Appellee did not avail itself of pretrial discovery. Appellant's letter seemingly attempted to seek voluntary pre-litigation discovery of any employment agreement including an arbitration agreement. *See* Civ.R. 34(D) (before granting a pre-litigation discovery request, a petitioner must show she made reasonable efforts to obtain the information voluntarily; she must also show discovery is necessary to ascertain the identity of a potential adverse party and she is otherwise unable to bring the contemplated action.) *See also* R.C. 2317.48.

{¶28} Without responding to the portion of Appellant's letter on existing agreements, Appellee's response provided other, unrequested documents in the form of the statements of the manager and assistant manager concerning Appellant's behavior. Appellee provided these documents in an attempt to avoid further action on the dispute. Even where a potential plaintiff threatens to sue, "it is clear that the defendant's engaging in settlement negotiations prior to the [plaintiff's] filing of a lawsuit does not constitute waiver." *Robbins v. Country Club Ret. Ctr. IV, Inc.*, 7th Dist. No. 04BE43, 2005-Ohio-1338, ¶ 70. *See also Milling Away*, 8th Dist. No. 95751 at ¶ 15. Moreover, the arbitration agreement required the parties to "attempt to informally resolve" any dispute before submitting the dispute to arbitration.

{¶29} In addition, a potential plaintiff's placement of an arbitrary time limit on a pre-litigation letter does not translate into a definitive legal deadline by which the other party must respond in order to avoid waiving pre-existing contract rights. Appellant does not allege Appellee's initial response letter was untimely but states it was incomplete and thus dispositive of waiver. "Mere silence will not amount to waiver where one is not bound to speak." *Gembarski*, 157 Ohio St.3d 255 at ¶ 24.

{¶30} Importantly, as emphasized by Appellee, the response letter was introduced by limiting language wherein Appellee's counsel said he was asked to "preliminarily respond" to Appellant and his letter "primarily" countered the facts alleged in Appellant's letter without opining on Ohio law. In the letter's conclusion, counsel noted he would not comment on the claims as that was "not within the scope of this letter" and then reiterated, "[t]his letter is mainly to inform you that the facts are much different than you have been led to believe * * *."

{¶31} The content of the letter did not acquiesce to participation in the judicial process and was not otherwise inconsistent with the right to arbitrate. Lastly, we note the affidavit of Appellant's attorney said the materials he received in Appellee's February 24, 2021 response did not mention an arbitration agreement, but he did not say there was no subsequent pre-litigation communication involving the arbitration agreement. (We also note Appellant's letter additionally invited response by phone.)

{¶32} We conclude the mere sending of the pre-litigation response letter to discuss the alleged facts, which was silent as to arbitration, was not inconsistent with the

right to arbitrate under the circumstances in this case. The facts alleged by Appellant are insufficient to show waiver as a matter of law. Accordingly, Appellant's assignment of error is overruled, and the trial court's judgment compelling arbitration and dismissing the case is affirmed.

Waite, J., concurs.

D'Apolito, P. J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

[Cite as *Cook v. Richard T. Kiko Agency, Inc.*, 2023-Ohio-552.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

THOMAS COOK,

Plaintiff-Appellant,

v.

RICHARD T. KIKO AGENCY, INC. et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0024

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2022 CV 00002

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Michael B. Pasternak, The Law Office of Michael Pasternak, 3681 South Green Road, Suite 411, Beachwood, Ohio 44122 and *Atty. Jeffrey Saks,* The Saks Law Office, LLC, 3681 South Green Road, Suite 411, Beachwood, Ohio 44122 for Plaintiff-Appellant and

Atty. Michael S. Gruber, *Atty. Jason N. Bing,* Gruber, Haren, Thomas & Co., 6370 Mt. Pleasant Street, N.W.*,* North Canton, Ohio 44720, for Defendants-Appellees Richard T. Kiko Agency, Inc. and

Atty. Elizabeth H. Farbman, Roth, Blair, Roberts, Strasfeld & Lodge, 100 East Federal Street, Suite 600, Youngstown, Ohio 44503 for Defendants-Appellees DM Bieber Development, Ltd et al.

Dated: February 21, 2023

Robb, J.

{¶1} Plaintiff-Appellant Thomas Cook appeals the decision of the Mahoning County Common Pleas Court granting a stay pending arbitration as requested by Defendants-Appellees Richard T. Kiko Agency, Inc. ("Appellee Kiko"). Appellant contends the case falls under the statutory exception to arbitration in R.C. 2711.01(B)(1), which applies to "controversies involving title to or possession of real estate." Alternatively, Appellant alleges the arbitration clause is unconscionable and thus unenforceable. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On December 30, 2021, Appellant filed a complaint with the following four counts: declaratory judgment, rescission of contract, fraud, and conversion. In addition to naming Appellee Kiko as a defendant, Appellant also sued DM Bieber Development, Ltd., Estate of Mary Ann Bieber, Mary Ann Bieber Family Trust, and William A. Bieber (collectively called "the Bieber Appellees"). Appellant claims material false representations induced him to sign two purchase agreements on November 2, 2021 after an auction.

{¶3} Under the first agreement, Appellant agreed to purchase 1750 and 1770 W. Western Reserve Road in Mahoning County for $973,500. Under the second agreement, Appellant agreed to purchase nearly 13 acres on Kauffman Road in Columbiana County for $522,500. Appellant put down a 10% deposit, which totaled $149,600. The purchase agreement provided for forfeiture of the deposit if the buyer failed to perform. Appellee Kiko was to hold it in escrow (pending delivery of the deed, agreement, or court order).

{¶4} According to the complaint, Appellant asked Appellees about the zoning applicable to the Western Reserve Road properties because he intended to operate a commercial business and the neighboring lots appeared residential. He alleged Appellees informed him the properties were zoned commercial while acknowledging they also said the properties would be "grandfathered" for continued commercial use.

{¶5} Appellant's complaint said he subsequently learned the properties "would not continue to be zoned commercial after they were sold by [Appellees]." He asserted he would not have entered into either agreement if he knew the parcels in the first agreement could not be used for commercial purposes, as he intended to operate a business at that location, with the property in the second agreement to be used in conjunction with this intended commercial enterprise. Appellant refused to proceed with the purchase and sued after Appellees failed to return his down payment.

{¶6} Appellee Kiko filed a motion to stay pending arbitration, pointing to the arbitration clause in the purchase agreement, which required binding arbitration for any disputes concerning the contract or the performance of the owners or the realtor related to or arising out of the contract. The Bieber Appellees also filed a motion to stay pending arbitration. Appellant filed a memorandum in opposition to each motion. He claimed the statutory real estate exception to arbitration applied and the arbitration clause was unconscionable. Replies and sur-replies were filed.

{¶7} On March 4, 2022, the trial court granted a stay pending arbitration, which is a final appealable order. *See* R.C. 2711.02(C) (grant or denial of stay pending arbitration is a final appealable order). Appellant filed a timely notice of appeal.

ASSIGNMENT OF ERROR

{¶8} Appellant's general assignment of error contends:

"The trial court erred in granting defendants' motions to stay the case pending arbitration."

{¶9} An arbitration clause is considered "a contract within a contract, subject to revocation on its own merits" so that "an alleged failure of the contract in which it is contained does not affect the provision itself." *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 41, quoting *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 501-501, 692 N.E.2d 574 (1998). In general, there is a presumption

in favor of arbitration when a claim is within the scope of the arbitration provision. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 700 N.E.2d 859 (1998). "[W]ith limited exceptions, an arbitration clause is to be upheld just as any other provision in a contract should be respected." *Id.*

{¶10} In the motions before the trial court, the parties did not dispute an issue in the action was referable to arbitration *under the written arbitration agreement* and the applicant for a stay was not in default in proceeding to arbitration for purposes of the following mandatory provision:

> If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

R.C. 2711.02(B).

{¶11} In the issues presented for review section, Appellant's brief separately alleges two specific errors corresponding to the two arguments presented to the trial court: (1) failure to apply the real estate exception to mandatory arbitration and (2) failure to find the arbitration clause unconscionable. The following statutory provision underlies both arguments:

> A provision in any written contract, except as provided in division (B) of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, * * * shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

R.C. 2711.01(A).

{¶12} The first "except" phrase in this provision points to division (B), which states: "Sections 2711.01 to 2711.16 of the Revised Code do not apply to controversies involving the title to or the possession of real estate * * *." R.C. 2711.01(B)(1) (with the exceptions to this exception involving leases or boundaries). The concluding "except" phrase in R.C.

2711.01(A), referring to the general grounds for revocation, is the underlying premise behind the argument about an unconscionable arbitration clause. *See Taylor Bldg. Corp.*, 117 Ohio St.3d 352 at ¶ 33.

{¶13} As the parties point out, the Supreme Court applied a de novo standard of review when applying the arbitration statute's real estate exception, finding the statute unambiguous and its application a question of law. *See French v. Ascent Resources-Utica, L.L.C.*, 167 Ohio St.3d 398, 2022-Ohio-869, 193 N.E.3d 543, ¶ 11 (a controversy asking whether an expired oil and gas lease fell under the exception). Likewise, the Court applied a de novo standard of review to a decision on whether an arbitration clause was unconscionable. *Taylor Bldg. Corp.,* 117 Ohio St.3d 352 at ¶ 2. Still, "any factual findings of the trial court must be accorded appropriate deference." *Id.*

REAL ESTATE EXCEPTION

{¶14} Appellant's first issue presented for review states:

"The trial court erred in granting defendants' motions to stay the case pending arbitration because the case involves a controversy involving the title to or possession of real estate and thus was exempt from arbitration pursuant to [R.C.] 2711.01(B)(1)."

{¶15} Appellant emphasizes the purchase agreement he sought to rescind was a contract to buy real estate, which was entered with intent to transfer "the title to or the possession of" real estate. He points out the real estate exception to arbitration applies to a claim for specific performance, citing cases where the buyer sought to compel the seller to transfer title. Pointing to his complaint's request for the purchase agreement to be rescinded and the transaction to be cancelled, he theorizes he set forth the "mirror image" of a specific performance claim. He claims title is involved because his complaint shows he wishes the property to remain with the sellers. He also speculates that if his case had proceeded past the motion for stay, then a counterclaim for specific performance would have been asserted against him to force him to pay for the property and accept title.

{¶16} In urging his claims are "controversies involving the title to or the possession of real estate" and thus exempted from arbitration by the real estate exception in R.C. 2711.01(B)(1), Appellant claims the recent *French* decision is a case on point. In an action for lease termination, the Supreme Court defined the following three words in the

real estate exception: "involving" means relating closely or connecting to; "title" means a union of elements (ownership, possession, custody), which provides the legal right to control and dispose of property; and "possession" means the exercise of dominion over property. *French*, 167 Ohio St.3d 398 ¶ 14. It was pointed out an oil and gas lease is a real property interest affecting title and possession, which can terminate by operation of law under its terms, in which event the lease would no longer encumber the land or affect title and possession. *Id.* at ¶ 15-18.

{¶17} The Court found the claim in the action was a controversy involving the title to or the possession of real property because:

> If the action is successful, it will quiet title to the property, remove the leases as encumbrances to the property, and restore the possession of the land to the lessors. If the action is unsuccessful, however, title to the land will remain subject to the leases, affecting the transferability of the property. Also, [the lessee] would have the continued right to possess and occupy the land, as permitted by the leases, denying [the lessor] the right to use the property without restriction.

(Citations omitted.) *Id.* at ¶ 20. Therefore, the Court concluded, "An action seeking a determination that an oil and gas lease has expired by its own terms is a controversy involving the title to or the possession of real estate and, under R.C. 2711.01(B)(1), the action is not subject to arbitration." *Id.* at ¶ 21.

{¶18} A quiet title claim invoking a decision on whether to eliminate or maintain a title encumbrance is distinguishable from the claims sets forth in the case at bar. Unlike the title in *French*, which was encumbered by a lease alleged to have expired under its own terms, the title of the real estate here was not encumbered by the purchase agreement. There was no delivery of an executed deed here.

{¶19} Where a complaint containing alleged false representations induced a party to enter a purchase agreement, this court previously concluded fraud claims seeking rescission and damages were not exempt from arbitration by the real estate exception. *See Villas Di Tuscany Condo. Assn., Inc. v. Villas Di Tuscany*, 7th Dist. Mahoning No. 12 MA 165, 2014-Ohio-776, ¶ 15-17. *See also Riggs v. Patriot Energy Partners, L.L.C.*, 7th

Dist. Carroll No. 11 CA 877, 2014-Ohio-558, ¶ 8, 22. Appellees cite our *Riggs* case for various principles.

{¶20} In that case, we found the quiet title claim was exempt from arbitration due to the real estate exception but then found the claims for fraud and rescission of oil and gas leases were subject to arbitration. *Riggs*, 7th Dist. No. 11 CA 877 at ¶ 22. Notably, a trial court properly stays the entire action pending arbitration even if the action contains non-arbitrable controversies. *Id.* at ¶ 26; *Villas Di Tuscany*, 7th Dist. No. 12 MA 165 at ¶ 20; *Morris v. Morris*, 189 Ohio App.3d 608, 2012-Ohio-4750, 939 N.E.2d 928, ¶ 14 (10th Dist.); R.C. 2711.02(B) ("stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement").

{¶21} Appellant suggests *French* negatively affected *Riggs*. However, the particular holding in *French* (the alleged automatic expiration of an oil and gas lease involves title to and possession of real estate) and its effect on one particular holding in *Riggs* (about rescission of a recorded oil and gas lease) is not before this court. Again, as Appellant never completed the contract by paying the purchase price, an executed deed was not delivered to him. Our situation is distinct from cases where a buyer sought rescission of an agreement after title had been transferred or encumbered.

{¶22} In other cases relied on by Appellant, the court found the real estate exception to arbitration in R.C. 2711.01(B)(1) applied to a buyer's claim for specific performance to compel a seller to provide title under the purchase agreement. *See Kent Partners v. Crossings at Golden Pond-Portage Cty., L.L.C.*, 11th Dist. Portage No. 2010-P-0028, 2011-Ohio-2842, ¶ 34; *Kedzior v. CDC Dev. Corp.*, 123 Ohio App.3d 301, 303, 704 N.E.2d 54 (1997) (8th Dist.). Appellant acknowledges his complaint did not seek specific performance to compel the transfer of title to him as the buyer. He did not tender any money after the 10% deposit, was not entitled to a deed, and did not want the property.

{¶23} Instead, he sought rescission of an uncompleted contract in order to recover his down payment and damages, alleging false representations. Appellant's request does not involve title to or possession of real estate, as he does not request the recognition of his rights in the realty or seek to encumber the seller's rights in the realty. In such situations, a party who backs out of a purchase agreement after paying only the down

payment cannot turn their fraud and rescission claims into "controversies involving title to or possession of real estate" by merely noting a completed contract would have transferred title and/or possession. In short, title *remained* with the sellers, and Appellant was not seeking to change that situation.

{¶24} Moreover, Appellant cannot force the exception to apply by speculating on counterclaims. There was no counterclaim for specific performance set forth; the motion for stay was filed before Appellees' answer date.[1] Appellant speculates they may ask the arbitrator to force him to pay the remainder of the purchase price and accept title. Appellees could submit to arbitration any counterclaim for breach and seek forfeiture of the down payment or damages for a loss after a future sale of the property.[2] However, specific performance would not be available to Appellees at arbitration due to the statutory real estate exception. *See Villas Di Tuscany*, 7th Dist. No. 12 MA 165 at ¶ 20 (observing the arbitrator would not rule on non-arbitrable issues such as any request to transfer title to property but would refer the matter back to the trial court if an issue was raised as to a remedy involving title); *Kent Partners*, 11th Dist. No. 2010-P-0028 at ¶ 34; *Kedzior*, 123 Ohio App.3d at 303. It is not as if the trial court ordered the issue of specific performance to be arbitrated.[3]

{¶25} In sum, the real estate exception in the statute specifically requires the controversy to "involv[e] the title to or the possession of real estate" in order to be exempted from arbitration. R.C. 2711.01(B)(1). It does not generally say it applies to controversies involving real estate. A controversy does not involve title to or possession

---

[1] "[A] defendant is not required to engage in further litigation by filing a responsive pleading before the court may entertain a R.C. 2711.02 motion and stay the action." *Albrechta & Coble v. Baumgartner*, 6th Dist. Sandusky No. S-02-015, 2002-Ohio-6351, ¶ 8, citing *McGuffey v. LensCrafters, Inc.*, 141 Ohio App.3d 44, 51, 749 N.E.2d 825 (12th Dist.) (a movant "should not be penalized for promptly and appropriately asserting its right to arbitration").

[2] Appellees say the property has since been sold to a third party, making moot any speculation they may file a counterclaim for specific performance after the case is submitted to arbitration. "An event that causes a case to become moot may be proved by extrinsic evidence outside the record." *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 8. Still, the doctrine is not satisfied where an appellee "offer[s] no proof [of the subsequent event] aside from the bare unverified assertions in their appellate brief" and there is no acknowledgement of the post-judgment facts by an appellant. *Id.* at ¶ 9.

[3] Appellee Kiko states the Appellant's argument is even weaker when applied to a realtor, who did not have title to keep or transfer.

of real estate merely because it involves a real estate purchase agreement. *See Riggs,* 7th Dist. No. 11 CA 877 at ¶ 20. *See also Blanchard Valley Health Sys. v. Canterbury Holdings, Inc.*, 3d Dist. Hancock No. 5-12-08, 2012-Ohio-5134, ¶ 20 (pointing out that every controversy concerning real property does not necessarily involve "title to or possession of real estate" in a case of restrictive covenants); *Mears Harding L.L.C. v. Ferri*, 5th Dist. Stark No. 2011CA00253, 2012-Ohio-2878, ¶ 25 (an alternative holding, after stating appellant should have appealed from the stay rather than the confirmation). Where money damages are sought without title changes, title to the property is not in dispute. *See id.*

{¶26} Appellant's claims requesting return of the down payment, damages, and rescission of a purchase agreement due to allegations of fraud in the inducement of the agreement are not exempt from arbitration under R.C. 2711.01(B)(1), as they do not set forth a controversy involving title to or possession of real estate. This assignment of error is overruled.

UNCONSCIONABILITY

{¶27} Appellant's second issue presented for review states:

"The trial court erred in granting defendants' motions to stay the case pending arbitration because the arbitration provision is unconscionable and therefore unenforceable."

{¶28} As outlined supra, an arbitration agreement may be unenforceable based "upon grounds that exist at law or in equity for the revocation of any contract." R.C. 2711.01(A). One of these equitable grounds is unconscionability. *Taylor Bldg. Corp.*, 117 Ohio St.3d 352 at ¶ 33. "[T]he party must show that the arbitration clause itself is unconscionable. If the court determines that the arbitration clause is enforceable, claims of unconscionability that relate to the contract generally, rather than the arbitration clause specifically, are properly left to the arbitrator in the first instance." *Id.* at ¶ 42.

{¶29} The arbitration clause is not unconscionable unless (1) there is a lack of meaningful choice (procedural unconscionability) *and* (2) the terms unreasonably favor the other party (substantive unconscionability). *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 20. The burden to prove both aspects of unconscionability is on the challenger of the arbitration clause. *Id.* at ¶ 30.

{¶30} In evaluating the argument on procedural unconscionability, we consider facts such as: age, education, intelligence, business acumen, experience, and general ability to understand terms; the identity of the contract drafter; the ability to negotiate changes; the pre-printed nature of a form; alternative sources for the challenger's purchase; and whether the stronger party believed there was no reasonable probability the weaker party could fully perform or knew the weaker party would not benefit from the contract. *Id.* at ¶ 23-24. "All of the factors must be examined and weighed in their totality in determining whether an arbitration agreement is procedurally unconscionable." *Id.* at ¶ 30.

{¶31} Here, Appellant, through counsel, filed an opposition to the motions to stay pending arbitration and a sur-reply to Appellees' replies in support of their motions. Appellant argued the contract was "forced" upon him because the purchase agreement shows on its face it was a pre-printed standard form provided by Appellee Kiko (with blanks for specific items such as the purchase price) and thus there would not have been an opportunity to negotiate the pre-printed terms. In addition to claiming a disparity in bargaining power, Appellant's opposition to the stay claimed there was "an enormous disparity in knowledge" and surmised Appellees held greater knowledge about the zoning issue. No affidavits were attached.

{¶32} The evidence does not show an absence of meaningful choice as required for procedural unconscionability. The arbitration clause in the purchase agreement was not in small print compared to the remainder of the agreement or buried among other terms. The purchase agreement was a one-page contract, and the arbitration clause was clearly labeled with "ARBITRATION" as the heading. Appellant did not mention his age, education, experience, or understanding. There was no evidence placed on the record regarding a lack of legal representation or knowledge about arbitration or negotiation.

{¶33} Appellant agreed to a purchase price of $1.496 million for three properties (in two counties) and put $149,600 down. Appellant acknowledged entering the purchase agreement for his business endeavor. As Appellees point out, this suggests Appellant possessed some business acumen, an ability to go elsewhere for his purchase, and the power to attempt to negotiate the arbitration clause. There was no evidence on the circumstances existing before the execution of the agreement. We also note the mineral

rights, which were part of the typed contract, were eliminated by handwritten notation and initialed. Although this change favored the seller, it indicated the terms of the realtor's pre-printed contract were not entirely set in stone.

{¶34} Without evidence of the inability to negotiate and status as the weaker party, Appellant has not supported the characterization of the agreement as a contract of adhesion, which is described as "a standardized form contract prepared by one party, and offered to the weaker party, usually a consumer, who has no realistic choice as to the contract terms." *Taylor Bldg. Corp.*, 117 Ohio St.3d 352 at ¶ 49. Moreover, "even a contract of adhesion is not in all instances unconscionable per se." *Id.* at ¶ 50 (noting the benefits of form contracts to consumers in reducing costs).

{¶35} Appellant points out he would not have entered the purchase agreement if he had known about an alleged zoning issue, suggesting Appellees knew he would not benefit from an agreement for property zoned as residential. Appellees note Appellant's complaint specifically acknowledged Appellees used the term "grandfathered" for commercial use, indicating the zoning was not actually commercial. The details of the zoning, the grandfathering, the parties' zoning knowledge or ability to gain such knowledge, and any inability to petition to extend the grandfathering upon a sale were not provided to the trial court. The factual claims relied on by Appellant are unsupported by affidavit for purposes of the unconscionability argument.

{¶36} In *Hayes*, the Supreme Court reversed an unconscionability decision after concluding the appellate court erroneously relied upon facts that were not placed in evidence. *Hayes*, 122 Ohio St.3d 63 at ¶ 25-27, 44 ("The only facts in evidence in this case pertaining to procedural unconscionability are [the buyer's] age and the terms contained in the agreement she signed."). The party challenging the arbitration clause's enforceability has the "burden to come forward with evidence supporting her challenge." *Id.* at ¶ 27 (and alternatively finding age, which was the only factor in evidence, did not alone satisfy the test). *See also Harbour Portfolio VII, LP v. Pulley*, 1st Dist. Hamilton No. C-150080, 2015-Ohio-4399, ¶ 10 (reversing a trial court's stay denial where the opponent of the stay did not meet the burden by presenting an affidavit or other evidence on her age, education level, intelligence, business acumen and experience). *Compare Williams*, 83 Ohio St.3d at 472 ("Williams filed an affidavit in the trial court regarding the arbitration

clause's inclusion in the loan agreement, to support her challenge to the specific validity of the arbitration clause.").

{¶37} Appellant submitted no affidavit in support of his procedural unconscionability claims (and did not request a hearing in which to present testimony on the matter). Although counsel's statements in a memorandum can concede points in favor of the opposing party, counsel's arguments are not evidence and cannot be presented as facts to support the represented party. We cannot say there was an absence of meaningful choice in entering the agreement, and thus, there was no showing of procedural unconscionability. In any event and as discussed next, the arbitration clause is not substantively unconscionable.

{¶38} When evaluating an argument on substantive unconscionability, the court considers whether the agreement's terms are commercially reasonable. *Hayes*, 122 Ohio St.3d 63 at ¶ 33. Depending on the content of a particular agreement, some relevant considerations may include the ability to predict the cost of future liability, industry standards, the fairness of the terms, and the charge for the product or service. *Id.* Here, the arbitration clause required binding arbitration for any disputes concerning the contract or the performance of the owners or the realtor related to or arising out of the contract. The applicable rules were disclosed to be those of the American Arbitration Association or similar organization. The first party to file had the right to select the arbitration association. The clause specifically informed the parties they were waiving the right to a court or jury trial.

{¶39} First, Appellant argues this limitation of the forum to arbitration is substantively unconscionable. As this is the very essence of an agreement to arbitrate, Appellant's argument is wholly without merit. "[W]aiver of the right to trial by jury is a necessary consequence of agreeing to have an arbitrator decide a dispute, and this aspect of an arbitration clause is not substantively unconscionable." *Id.* at ¶ 34, citing *Taylor Bldg. Corp.*, 117 Ohio St.3d 352 at ¶ 55.

{¶40} Next, Appellant complains the arbitration clause is substantively unconscionable as it weakens certain claims (such as his fraud claim) by improperly limiting his damage recovery. The parties' arbitration clause limits certain aspects of recovery by containing a waiver of the right to recover incidental, consequential, or

punitive damages and by requiring the parties to pay their own attorney's fees and split the costs of arbitration.[4]

{¶41} The Supreme Court has observed an arbitration provision "is not commercially unreasonable" where it required the parties to each bear their own attorney fees and costs, which requirement "is equitable to both parties" and "is not one-sided or oppressive." *Hayes*, 122 Ohio St.3d 63 at ¶ 35-36. On the subject of eliminating the ability to recover punitive damages, the *Hayes* Court also concluded the arbitration clause's waiver of the right to seek punitive damages was commercially reasonable. *Id.* at ¶ 35-36 (even where the limitation only applied to the residents of the nursing home). Here, the waiver of punitive damages applied to both sides with both parties responsible for their own attorney's fees and with arbitrator costs split evenly among all parties. This was commercially reasonable under *Hayes*.

{¶42} As for the other damage limitations, it was not merely Appellant who waived the ability to seek consequential or incidental damages. Applying the analysis from *Hayes*, this waiver was commercially reasonable as it was "equitable to both parties" and "not one-sided or oppressive." *See id.* at ¶ 35. Similarly, the Eighth District rejected an unconscionability argument regarding limitation of damages where the arbitration clause said the arbitrator had no authority to award consequential or indirect damages (or punitive damages). *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 35-37. Because the elimination of consequential or incidental damages did not unreasonably favor one side, it was not substantively unconscionable. *See Taylor Bldg. Corp.*, 117 Ohio St.3d 352 at ¶ 32.

{¶43} Appellant also complains the arbitration clause says, "issues of arbitrability shall be determined solely by the arbitrator." Appellant cites no law in support of an unfairness argument. In general, the parties can agree to submit arbitrability questions to the arbitrator. *Belmont Cty. Sheriff v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 104 Ohio St.3d 568, 2004-Ohio-7106, 820 N.E.2d 918, ¶ 13 ("Unless the parties

[4] Consequential damages are those "[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act" (which may include business profits). Incidental damages are those "[l]osses reasonably associated with or related to actual damages" which can include a seller's expenses reasonably incurred in caring for the subject of the sale after a buyer's breach or a buyer's similar expenses in caring for the subject after a seller's breach. *Black's Law Dictionary* (11th Ed. 2019).

clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."). In any event, as Appellees point out, Appellant did not challenge arbitrability of the issues *under the terms of the agreement*. The real estate exception was a statutory issue of exemption that was presented to the trial court (and is now before this court), regardless of the cited portion of the arbitration clause. And, unconscionability was an issue dealing with enforceability not arbitrability (and was presented to the court as well).

{¶44} Finally, while generally stating the agreement was substantively unconscionable, Appellant's brief presented a case citation with a parenthetical showing the cited court held an arbitration provision was unconscionable because it increased the financial burden on the buyer when pursuing a claim and did not disclose the costs of arbitration or mention they would be substantially higher than litigation. *See Porpora v. Gatliff Bldg. Co.*, 160 Ohio App.3d 843, 2005-Ohio-2410, 828 N.E.2d 1081, ¶ 18 (9th Dist.). Appellant's reply brief disclosed his intent to utilize this holding as an argument. Appellant's memorandum in opposition to a stay presented this topic to the trial court in the same manner (only disclosing his intent to set forth this specific argument in his sur-reply after merely citing the case earlier).

{¶45} A citation's parenthetical is not a proper method for a party to raise a specific argument, nor is a reply brief on appeal or a sur-reply brief in the trial court. Regardless, the *Porpora* decision initially supported the substantive unconscionability decision by pointing to the prohibition on the consumer proceeding to arbitration until after the residential builder provided a certificate of substantial completion (and then added the observations about the costs of arbitration). *Id.* at ¶ 15. This is not similar to the situation in the case at bar. Additionally, the Ninth District subsequently concluded the arbitration costs listed in the American Arbitration Association's rules "could easily be exceeded by litigation expenses, both at the trial court and appellate level" while pointing out the appellants failed to produce evidence of the expected cost differential. *English v. Cornwell Quality Tools Co.*, 9th Dist. Summit No. 22578, 2005-Ohio-6983, ¶ 17 (and distinguishing *Porpora* as involving a condition precedent to arbitration).

{¶46} In any event, Appellant failed to prove this unconscionability claim. As the Supreme Court pointed out, "arbitration is favored because it provides the parties thereto

with a relatively expeditious and economical means of resolving a dispute." *Hayes*, 122 Ohio St.3d 63 at ¶ 15. "[T]he United States Supreme Court held that an arbitration agreement that does not mention costs and fees is not per se unenforceable on the theory that it fails to protect a party from potentially high arbitration costs, because the mere risk that a plaintiff would be forced to pay exorbitant costs is too speculative to justify invalidation of the arbitration agreement." *Taylor Bldg.*, 117 Ohio St.3d 352 at ¶ 57, citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90-92, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). "The lack of evidence before the trial court of excessively high arbitration costs undercuts the [buyer's] claim that arbitration costs would be prohibitively expensive." *Id.* Likewise, there is no indication the cost of arbitration would be higher than the expenditures required for court litigation.

{¶47} Appellant had the burden to prove the arbitration provision was both procedurally and substantively unconscionable but failed to do either. Accordingly, this assignment of error is overruled.

{¶48} For the foregoing reasons, the trial court's decision granting a stay pending arbitration is affirmed.

Waite, J., concurs.

D'Apolito, P. J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.