

FOURTH DIVISION
Order Filed November 23, 2011
Modified upon denial of rehearing
January 19, 2012

No. 1-11-1276

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN GENERAL FINANCIAL)	Appeal from the
SERVICES OF ILLINOIS, INC.,)	Circuit Court of
)	Cook County.
Plaintiff,)	
v.)	
)	
THERESA DIMOFF,)	
)	
Defendant)	
)	No. 10 CH 9853
_____))
THERESA DIMOFF,)	
)	
Counter-Plaintiff/Appellee,)	
v.)	The Honorable
)	Pamela H. Gillespie
AMERICAN GENERAL FINANCIAL)	Judge Presiding.
SERVICES OF ILLINOIS, INC.,)	
Counter-Defendant/Appellant)	
)	
)	

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Sterba concurred in the judgment.

ORDER

Held: The lower court erred in denying Appellant's motion to compel arbitration and stay proceedings because the parties entered into a written agreement to arbitrate the type of issues in

question and there are no legal constraints external to the parties' agreement which foreclose the arbitration of these claims.

¶ 1 After defaulting on a Home Equity Line of Credit ("HELOC"), appellee Theresa Dimoff ("Dimoff") found herself named as a defendant in a foreclosure action in the circuit court of Cook County. Dimoff answered the foreclosure complaint and also filed counterclaims in the same court, raising various defenses while still acknowledging that she had defaulted on the loan. Her lender, American General Financial Services of Illinois ("American General") cried foul on the basis that the HELOC contained an arbitration clause that required the borrower to submit to arbitration "any claim or counter claim" that might arise out of the lender's exercise of its foreclosure remedy. The matter was submitted to the trial court which denied the lender's motion to compel arbitration and stay proceedings. We reverse and remand with instructions to enter an order granting the motion to stay all proceedings pending any arbitrated resolution of the borrower's counterclaims.

¶ 2

I. BACKGROUND

¶ 3 This dispute arises out of a very typical consumer lending relationship. Like many such relationships in our troubled real estate economy, it regrettably evolved into a foreclosure action. Appellee Dimoff defaulted on her line of credit and her lender thereafter filed a foreclosure action to resolve its interests in the Oak Lawn, Illinois property that secured the loan. Dimoff thereafter filed counterclaims in the circuit court, despite the fact that the contractual agreement between the parties contained a mandatory arbitration clause requiring all claims and counterclaims related to any foreclosure action be submitted to arbitration. The arbitration clause was delineated in bold, upper-case letters, and indicated that the borrower acknowledged

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that the arbitration agreement limited her rights to a trial by jury and any right to participate in a class action. In addition, the agreement provided that either party could elect to resolve disputes related to the arbitrability of any claim or dispute involving the HELOC agreement or the arbitration itself, but that those claims would also be subject to mandatory arbitration by the National Arbitration Forum ("NAF") unless that organization is "unable, unwilling, or deemed not appropriate by a court to resolve" the claim. In such an instance, the contract provided that the American Arbitration Association ("AAA") for arbitration pursuant to its rules.

¶ 4 It was under this contractual relationship that the parties found themselves in the circuit court, with the borrower seeking to block enforcement of the foreclosure action through pursuance of counterclaims sounding in violations of the Truth in Lending Act and the Illinois Consumer Fraud and Deceptive Business Practices Act, along with an alleged invasion of privacy. The lender, meanwhile, sought to enforce the language of the HELOC agreement calling for mandatory arbitration with the filing of a motion to compel arbitration and a motion to stay the proceedings related to Dimoff's counterclaims.

¶ 5 Dimoff's answer to the motion basically conceded the fact that the contract in question called for mandatory arbitration of her counterclaims, but sought to avoid this provision by arguing that the entire agreement was unconscionable and therefore unenforceable. This led American General to file a brief that again delineated the mandatory arbitration provisions and cited a U.S. Supreme Court case which held that delegation provisions of this sort are valid and enforceable even if the borrower is challenging the enforceability of the agreement in its entirety. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. ___, ___, 130 S. Ct. 2772, 2779 (2010).

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¶ 6 Shortly thereafter, Dimoff raised the issue which ultimately proved vexing for the trial court. Based upon a recent decision of this court, *QuickClick Loans, Inc. v. Russell*, 407 Ill. App. 3d 46 (2011), Dimoff argued that a 2009 NAF moratorium on some discretely described consumer lending actions trumped the arbitration agreement in this case. The AAA subsequently filed a similar moratorium. According to documents filed in the record in the trial court and on appeal, this moratorium was designed to deal with problems generated by business-filed debt collection arbitrations in which the borrowers seldom appeared, leading to understandable difficulties in the arbitration process. This plainly was not the situation presented in this dispute, inasmuch as it was Dimoff herself who not only appeared in the trial court, but who filed the counterclaims that were the subject of the motion to compel arbitration. American General's response to Dimoff's sur-reply brief disclosed information from AAA, indicating that it was accepting consumer finance disputes that are filed by consumers, such as the counterclaims filed by Dimoff, the consumer in this transaction. In the hearing on these motions, the trial court specifically noted its agreement that Dimoff's counterclaims were subject to mandatory arbitration and that Dimoff didn't present a persuasive argument on the unconscionability of the agreement, but also found that the above-described moratorium somehow prevented the court from compelling arbitration of this matter. The trial court denied the motion to compel arbitration and the motion to stay proceedings. At the same time, the trial judge allowed American General 21 days to file arbitration *against itself* to resolve Dimoff's counterclaims. This timely interlocutory appeal followed.

¶ 7

II. ANALYSIS

¶ 8 On appeal, American General argues that the circuit court erred by denying its motion to compel arbitration. Specifically, American General argues that the AAA's moratorium does not bar the arbitration of the claims, because Dimoff, who raised the counterclaims, should be responsible for initiating the arbitration of the claim, should she actually want them to be litigated. Dimoff replies that American General's appeal is moot. Dimoff avers that arbitration in this case is impossible, because the arbitration agreement only provides for the AAA or the NAF to arbitrate claims, both of which are unavailable. Without any supporting evidence, Dimoff argues that the AAA moratorium applies to both parties, and because American General is the party that desires arbitration, it should be the party responsible for filing the claim with the AAA.

¶ 9 A. Standard of Review

¶ 10 As a threshold matter, the parties disagree as to the appropriate standard of review to be applied in this case. American General maintains that *de novo* is the proper standard based on the fact that we are reviewing the denial of a motion to compel arbitration without an evidentiary hearing. Furthermore, it argues that ultimately the issue in this case comes down to the construction, interpretation or legal effect of a contract and statute, which are questions of law that are reviewed *de novo*. Dimoff, however, contends that this matter is before the court pursuant to Illinois Supreme Court Rule 317(a), review of an interlocutory order, and therefore is reviewed under an abuse of discretion standard. While Dimoff concedes that the interpretation of the arbitration agreement and any statute is based on a *de novo* standard, she maintains that not all issues on this appeal center on statutory interpretation.

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¶ 11 We find that our standard of review is *de novo*. *Vassilovska v. Woodfield Nissan, Inc.*, 358 Ill. App. 3d 20, 24 (2005); see also *Carter v. SSC Odin Operating Company, LLC*, 2011 Ill. App. (5th) 070392-B, ¶ 12; *Ragan v. AT&T Corporation*, 355 Ill. App. 3d 1143, 1147 (2005) (in an appeal from a denial of a motion to compel arbitration without an evidentiary hearing, the standard of review is *de novo*).

¶ 12 B. Issues

¶ 13 American General first argues that the lower court erred by not enforcing the express terms of the arbitration agreement. American General, supports its argument by citing to The Federal Arbitration Act (FAA) 9 U.S.C. §2, which states:

A written provision in any ***contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

American General also cites numerous United States Supreme Court and Illinois Supreme Court decisions which support the proposition that there is an ongoing public policy favoring arbitration, placing arbitration agreements on the same footing as other contracts and an inference that any challenge to the validity or ambiguity of a contract containing an arbitration provision must be decided in favor of arbitration. See *Rent-A-Center West, Inc.*, 130 S. Ct. At

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2777-79; *AT&T Mobility, LLC v. Concepcion*, 563 U.S. ___, ___, 131 S. Ct. 1740, 1745 (2011);

Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 181 Ill. 2d 373, 383 (1998).

¶ 14 American General asserts that the lower court erred in its interpretation of the arbitration agreement by construing a purported ambiguity in the arbitration agreement in a manner that precluded the court from enforcing the arbitration agreement's plain language. American General maintains that the lower courts decision to force it to be the party filing the arbitration was in error for four reasons. It argues that the court erred by finding any ambiguity in the arbitration agreement, while also suggesting that the court failed to recognize that AAA's procedures do not contemplate a party filing an arbitration agreement against itself. American General also posits the well-known legal principle that all ambiguities in an arbitration agreement must be resolved in favor of arbitration and that the court improperly added a term to the parties' agreement, allowing Dimoff to pursue her claim in Circuit Court rather than through arbitration.

¶ 15 The overarching contention of the lender is that the arbitration agreement explicitly states that "any claim for rescission or damages [Dimoff] may have arising out of, relating to, or in connection with [American General's] exercise of [its foreclosure remedy] must be arbitrated." Through a plain reading of this contract language, American General maintains that if Dimoff asserts a counterclaim, it may not be brought in court and must be arbitrated. American General maintains that by filing its motion to compel and stay proceedings, it was merely looking to enforce the express terms of the agreement.

¶ 16 Dimoff, while citing similar caselaw in her brief, maintains that the purpose of the FAA

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is not to blindly compel parties to arbitrate but rather to simply put arbitration agreements on the same level as other contracts. Dimoff cites FAA §4 which states that, "an order directing arbitration must proceed in the manner provided for in such agreement...[the court] shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement" 9 U.S.C. §4. Dimoff argues that the arbitration agreement does not state one way or the other whether Dimoff or American General is the party responsible for initiating arbitration.

¶ 17 In refusing the motion to compel arbitration, the trial court essentially ruled that American General would have to file a claim for arbitration of Dimoff's counterclaims against itself in order to avoid the effect of the moratorium. This suggests a perverse procedural paradigm in which this lender would be required to essentially sue itself in order to conclude the orderly foreclosure of a property on which the borrower had defaulted, and only because the borrower improperly raised various matters in court that are undeniably subject to mandatory arbitration. This cannot be allowed to stand, especially since it is undeniable that the response of the borrower to any arbitration filed by American General would be to invoke the moratorium on arbitrations filed by the lender. Such a result would reward and encourage procedural chicanery to avoid the rather plain and all-encompassing nature of the arbitration agreement.

¶ 18 At a hearing to compel arbitration, the sole issue the trial court should concern itself with is whether an agreement exists to arbitrate the dispute in question. *City of Peru v. Illinois Power Co.* 258 Ill. App. 3d 309, 311 (1994). When the language of an arbitration agreement is clear and it is evident that the dispute in question falls within the scope of the arbitration clause, the court should decide on the arbitrability issue and compel arbitration. *City of Centralia v. Natkin &*

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Co., 257 Ill. App. 3d 993, 995-96 (1994). When analyzing whether the arbitration agreement applies, the trial court should not determine the merits of the arbitrable issue but must summarily determine merely whether an arbitration agreement exists. *Contract Development Corp. v. Beck*, 210 Ill. App. 3d 677, 679 (1991). When a valid arbitration agreement is found, the matter is stayed, the trial court forfeits discretion over the matter and the court must order arbitration proceedings, which will be the sole venue in which the claim can proceed. *Id.*

¶ 19 A two-step approach is utilized when determining whether to grant a motion to compel. The first step is to decide whether or not the parties have agreed to arbitrate this issue, which is shown through the intentions expressed and the clear language of the agreement. *ACME - Wiley Holdings, Inc. v. Buck*, 343 Ill. App. 3d 1098, 1103 (2003). If the parties have in fact agreed to arbitrate this type of issue, then a court must determine whether any "legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *QuickClick Loans, LLC*, 407 Ill. App. 3d at 52-53.

¶ 20 In the case at hand, the arbitration agreement reached by the parties includes language which states that counterclaims, such as this one, must be arbitrated. The arbitration agreement states that all counterclaims resulting from lender's exercise of remedies such as garnishment, replevin, or foreclosure must be arbitrated. This, of course, is the exact scenario here.

Therefore, the final step in the analysis for determining whether any "legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Id.* This is a point upon which the parties disagree, but upon further review of the procedure on such a motion, the proper result becomes clear.

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¶ 21 In *Quickclick*, the lender brought an action against the borrower to collect the amount due on a promissory note. *Id.* at 46. The borrower asserted class action counterclaims under the Truth in Lending Act and other statutes. *Id.* The lender then sought to compel arbitration of the counterclaims pursuant to an arbitration provision in the loan agreement. *Id.* The parties specifically agreed that the NAF was unavailable to arbitrate the claim but they disagreed as to whether the AAA was available. *Id.* at 51. The court in *QuickClick* stated that "the AAA moratorium *** clearly states that it will not participate in any consumer debt collection programs in which the company is the filing party and the consumer has not agreed to arbitrate at the time of the dispute and the case involves ***a consumer finance matter." *Id.* at 53. The court also determined that when interpreting the language of the moratorium, the lender would properly be called the filing party because it both sought the arbitration and filed the initial complaint before the circuit court. *Id.* The court reasoned that although the parties agreed to arbitration, the exclusive administrators, as outlined in the arbitration agreement, are not available to arbitrate the matters. *Id.* The court therefore found the necessary "external events" to the parties' agreement that foreclosed the arbitration of the parties' claims.

¶ 22 It is on this narrow, but crucial, finding that this case is meaningfully distinguishable from *QuickClick* for several reasons. First, it is abundantly clear in this matter that the subject of the desired arbitration is the counterclaims filed by the borrower, Dimoff. Any other denomination amounts to an abuse of the English language. Furthermore, unlike the trial court in *QuickClick*, the trial judge in the case *sub judice* was presented with specific information that indicated that the moratorium did not apply to this matter and that arbitrators were available to

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handle this dispute.

¶ 23 Under the parties' contractual agreement, the lender is empowered to file a legal action in foreclosure if the borrower defaults. Ms. Dimoff defaulted and American General exercised its foreclosure option. Ms. Dimoff then filed the counterclaims in question. The merits or demerits of these assaults on the HELOC agreement are of no particular moment here, other than to say that the borrower is claiming that she can somehow be excused from making her loan payments because of the language of the agreement. While Ms. Dimoff has every right to pursue her grievances against the lender, when she signed the loan agreement, she specifically waived her right to file a claim or counterclaim in court. She specifically waived her right to a jury trial. She specifically agreed to mandatory arbitration of any claim that *she* might have related to any foreclosure action and effectively waived a court's consideration of whether the agreement itself was somehow unenforceable. When she disregarded that contractual language and filed her counterclaims in court, the matter should have been stayed pending arbitration and Ms. Dimoff should have taken her issues to arbitration. That is the only fair reading of the situation in this case.

¶ 24 Finally, it should be noted that when a motion to "compel arbitration" is granted, the case is not automatically transferred to the arbitrator, but rather, the matter is simply stayed in the trial court, and if the party that lost the motion to compel still wishes to pursue the claim it is responsible to file for arbitration. In this specific regard, then, the terminology of "compelling arbitration" is somewhat misleading. Furthermore, if the losing party does not file the claim with an arbitrating agency, it risks forfeiting its claim for failure to prosecute. *James v. McDonald's*

Corporation, 417 F. 3d 672, 680 (7th Cir. 2005). In *James*, a patron brought contract and tort claims against a fast food restaurant related to the restaurant's failure to award her a prize she believed she had won in a promotional game. *Id.* at 674. McDonald's filed a motion to compel arbitration, which the court granted and stayed proceedings pending the outcome of arbitration. *Id.* A year later, the patron asked the court to reconsider, the district court denied her motion and dismissed the claim for failure to prosecute. *Id.* at 676. The Seventh Circuit affirmed the lower court's decision. *Id.* at 681.

¶ 25 Similarly, *Jackson v. Payday Loan Store of Illinois, Inc.*, No. 09 C 4189, slip op at 2 (N.D. Ill. Mar. 17, 2010) held that if a motion to compel was granted there is no automatic transfer of the claim to an arbitrator or any type of court order *forcing* a party to file the claim. Instead, when the motion to compel is granted, the court merely stays the proceedings and allows the party who lost the motion to compel to file arbitration. *Id.* Ultimately, we find it is irrelevant who initiated the original claim in circuit court, because the true result of a motion to compel is simply a stay in the proceedings and it is the losing party's responsibility to file the claim in arbitration, if it so desires. See *Jensen v. Quik International et al.*, 213 Ill. 2d 119, 123-24 (2004), "If the court finds that an agreement to arbitrate exists and the issue presented is within the scope of that agreement, a stay under section 3 of the FAA is mandatory."

¶ 26 Based on the reasoning of the cases cited above, there are no legal constraints which would foreclose this claim from being arbitrated. For that reason, the court erred in denying the motion to compel and the motion to stay.

¶ 27

III. CONCLUSION

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¶ 28 The trial court erred by denying American General's motion to compel arbitration and stay proceedings. We reverse that ruling and remand to the trial court with instructions to stay all proceedings to allow Dimoff to file any counterclaims in arbitration, pursuant to the specific language in the agreement between the parties. Accordingly, we reverse the trial court's judgment denying the motion to compel arbitration and stay proceedings and instruct the court to enter an order immediately staying all proceedings pending any arbitration claim that may be filed by Dimoff.

¶ 29 Reversed and remanded.