IN THE SUPREME COURT OF OHIO

WELLS FARGO FINANCIAL OHIO 1, INC.,	:	Case No. 2008-0905
Defendant-Appellant,	:	On Appeal From Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	
LILLIE ALEXANDER,	:	Court of Appeals Case No. CA-07-089277
Plaintiff-Appellee.	:	

REPLY OF APPELLANT, WELLS FARGO FINANCIAL OHIO 1, INC.

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I. INTRODUCTION

On November 21, 2008 Defendant-Appellant Wells Fargo Financial Ohio 1, Inc. ("Wells Fargo") filed its Brief, explaining that the Eighth District Court of Appeals ignored this Court's precedent relating to the interpretation and scope of arbitration agreements (particularly *Acad. of Med. v. Aetna Health, Inc.* (2006), 108 Ohio St. 3d 185, ¶ 14, 2006-Ohio-657, 842 N.E.2d 488, *cert. denied*, 127 S. Ct. 74), and created three new criteria which drastically limit which claims may go to arbitration.

On January 12, 2009 Plaintiff-Appellee Lillie Alexander ("Alexander") filed her Brief. Alexander defends the Eighth District's analysis, even though she never quotes the court's Opinion or examines its language. Alexander's theories rest on a myopia that sees a fictional world in which (1) a mortgage has no relationship to the note which it secures; and (2) a claim that requires proof of payment of a note also has no relationship to the note. Her arguments strain beyond the point of credibility. The Court should reverse the Eighth District and restore Ohio law.

II. STATEMENT OF FACTS

Alexander does not contest Wells Fargo's Statement of Facts. On December 5, 2000, Alexander took out a home mortgage loan with Wells Fargo, signing a Note and Security Agreement ("Loan Agreement") and a Mortgage. Wells Fargo and Alexander also signed a separate Arbitration Agreement that provides for arbitration of all disputes "arising out of or relating to [the] Loan Agreement," as well as any disputes involving any "prior or future dealings between us."

The Complaint alleges that Wells Fargo did not timely release the Mortgage after Alexander paid off the Loan Agreement, and seeks recovery under R.C. 5301.36. Alexander asserts that to prove this claim, she must provide evidence of "the defendant's record of the mortgage satisfaction date and the county recorder's record of the release date," and, as a consequence "the note is not consulted in proving the suit." Br. of Appellee at 2. Alexander conveniently ignores and begs questions that cannot be answered without reference to the Loan Agreement: What is a "mortgage satisfaction date"? What payments constitute satisfaction of the Loan Agreement? How did Wells Fargo know when it occurred? What caused the date to arrive?

These questions cannot be answered in the abstract. To the contrary, this lawsuit cannot exist without reference to the fact that Alexander owed money to Wells Fargo under the terms of the Loan Agreement. Because Alexander's claims could not exist without reference to the Loan Agreement or the relationship which it created, her claim is one that is "arising out of or relating to [the] Loan Agreement," and is subject to arbitration.

III. ARGUMENT

Proposition of Law I

A promise to arbitrate disputes "arising out of or related to" a contract is to be broadly construed to provide for arbitration of any disputes which would not exist but for the contract or the relationship created by the contract.

In its Brief, Wells Fargo explained that arbitration agreements, particularly those that use the phrase "arising out of or relating to," are interpreted broadly with a bias in favor of arbitrability. In *Aetna Health*, this Court adopted the test set forth by the United States Sixth Circuit Court of Appeals in *Fazio v. Lehman Bros., Inc.* (6th Cir. 2003), 340 F.3d 386: "A proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue." *Id.* at 395 (internal citations and quotations omitted). In its decision, the Eighth District ignored the "without reference" test articulated in *Fazio* and adopted in *Aetna Health*, and made up its own rules. Without discussing, applying, or even citing *Aetna Health* or *Fazio,* the Eighth District initially decided that "recording of a mortgage satisfaction or real estate lien release is not an integral part of the lending process," (Opinion at ¶¶ 15-16) and on that basis decided that a claim under R.C. 5301.36 was not within the scope of the Arbitration Agreement. Asking if the subject of a claim is an "integral part" of a contract is simply the wrong question to ask to determine arbitrability, and the Eighth District's test directly conflicts with *Aetna Health.*

In response, Alexander argues: (1) public policy does not require arbitration if the parties have not agreed to arbitrate; (2) the Eighth District properly applied *Aetna Health* and *Pinchot v. Charter One Bank*, 99 Ohio St.3d 390, 2003-Ohio-4122, 792 N.E.2d 1105; and (3) Wells Fargo advocates overturning *Aetna Health* and adopting the methodology advocated by the dissent in that case. Each assertion is misdirected.

First, Alexander argues that public policy will not "trump" a party's right to seek redress in court if the parties did not agree to arbitrate. Br. of Appellee, at 3-4. That truism begs two questions: (1) what methodology should be used to determine the scope of what the parties agreed to arbitrate; and (2) what is the role of public policy if there is a "close call" on the scope of the parties' agreement.

While it is true that a party cannot be compelled to arbitrate a dispute for which it never agreed to arbitration, the issue in this case is how to interpret language that provides for arbitration of disputes "arising out of or relating to" the Loan Agreement. Saying that one cannot be compelled to arbitrate if there was not an agreement to do so simply begs the question of the meaning of this commonly used phrase. *Aetna Health* and *Fazio*—and not the Eighth District's "integral-part" rule—provide the answer.

Moreover, in interpreting the phrase "arising out of or relating to" an agreement, public policy does play a role. The law favors arbitration. Accordingly, if reasonable people might view the outcome differently, then the public policy will nudge the outcome in favor of arbitrability. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.* (1983), 460 U.S. 1, 24-25. Put in the vernacular, while Alexander may not be sent to arbitration kicking and screaming, she may be sent to arbitration if she is hemming and hawing.

Alexander next argues that the Eighth District properly applied *Aetna Health.* Br. of Appellee, at 7-10. Alexander simply ignores its language and fails to delve into the Eighth District's reasoning. At a critical point in the Opinion, the Eighth District substituted the test for federal preemption in *Pinchot, supra,* for the test for arbitrability. The Eighth District cited *Pinchot's* test for preemption, and then assumed that it also applied to arbitrability: "The recording of a mortgage satisfaction or real estate lien release is not an ***integral part*** of the lending process. . . . ***We agree.***" Opinion, at ¶¶ 15-16 (emphasis added). The court then proceeded to hold that because satisfaction of a mortgage was not an integral part of the lending process, a claim under R.C. 5301.36 was not subject to arbitration. *Id.* By ignoring the language of the Opinion, Alexander minimizes the impact of the Opinion and its complete gutting of the "without reference" test of *Aetna Health.*

Applying *Aetna Health* without adulteration, it is clear that Alexander's claim falls within the scope of the Arbitration Agreement. The Arbitration Agreement is broadly-worded and specifically refers to the Loan Agreement. The obligations of the Loan Agreement and the Mortgage are inextricably intertwined. A breach of one can trigger obligations under the other, just as performance of one instrument can trigger obligations under the other. When Wells Fargo made the loan to Alexander, it was within their contemplation that someday Alexander might default under the Loan Agreement, triggering Wells Fargo's rights under the Mortgage. Similarly, when Wells Fargo made the loan to Alexander, it was within their contemplation that someday Alexander might pay off the loan, and Wells Fargo would have to release the Mortgage.

Alexander did pay off the loan, but Wells Fargo allegedly did not release the Mortgage within the time required by statute. Alexander cannot prove her claim "without reference" to *both* the Loan Agreement and the debtor-creditor "relationship" which it created. To prove a violation of R.C. 5301.36, *Alexander must prove she paid off the Loan Agreement.* To determine whether a particular payment "satisfied" the Loan Agreement, one must necessarily know its terms. Alexander's claim not only fails "without reference" to the Loan Agreement, it could not exist without it. Her claim therefore falls within the scope of the Arbitration Agreement. *Aetna Health.*

Alexander insists that her claim does not reference the debtor-creditor relationship because "not every note has a mortgage." That is confused on two fronts. Even if every note does not have a mortgage, to constitute a valid lien, every mortgage must have a note. *See Kernohan v. Manss* (1895), 53 Ohio St. 118, 41 N.E. 258, and *Edgar v. Haines* (1923), 109 Ohio St. 159, 164, 141 N.E. 837 ("It is well settled by the former adjudications of this court that a mortgage is not property separate and distinct from the note which it secures"). In any event, Alexander *does* have a Loan Agreement, and it is intertwined with the Mortgage. Even though Alexander wants to focus on the Mortgage, the Mortgage exists as security for the Loan Agreement, and has no vitality without it. Just because Alexander wants to say "date of mortgage satisfaction" instead of "date the Loan Agreement was paid" does not mean she can state a claim under R.C. 5301.36 without reference to the Loan Agreement or the debtor-creditor relationship.

Finally, Alexander argues that Wells Fargo is advocating overturning *Aetna Health,* claiming that, like Wells Fargo, the dissent in *Aetna Health* advocated a "but-for" test. In fact, the *Aetna Health* dissent did not advocate in favor of a "but-for" test, and the Court did not reject it. In dissent, Justice Lanzinger acknowledged the utility of the "without reference" test, but concluded that it "is a preliminary rather than a defining matter and should be put into context." *Aetna Health,* ¶ 34. Drawing upon a separate passage in *Fazio*, Justice Lanzinger concluded that the true standard is "whether allegations 'touch matters' covered by the agreement." *Id.*, ¶ 36. There appears to be little room between the "without reference" standard and the "touch matters" standard. In any event, it appears that the difference between the Court's opinion and the dissent in *Aetna Health* has less to do with the proper standard than with its proper application to the facts of that case.

The question in ***this*** case is whether the "integral-part" rule which the Eighth District adopted conflicts with *Aetna Health* and whether it is bad law. The answer to both questions is the same. Alexander's claim arises from, is related to and cannot be maintained without reference to the Loan Agreement or the relationship that it created. As both the Trial Court and Judge Stewart concluded in her dissent below, this claim and this case should be arbitrated.

Proposition of Law II

A statutory claim that would not exist but for the relationship created by a loan agreement "arises out of and is related to" the loan agreement creating the original indebtedness.

In its Brief, Wells Fargo explained that the Eighth District imposed unique burdens on statutory claims, thereby making it more difficult to bring them within the scope of an arbitration agreement. In her Brief, Alexander simply insists that Ohio law is settled that statutory claims are treated the same as any other claim. The problem is that the Eighth District did not treat Alexander's statutory claim the same as any other.

The Eighth District said: "Wells Fargo's statutory duty to release the mortgage lien arose thereafter" – i.e., after she paid off the Loan Agreement – thereby segregating the "statutory duty" to release the Mortgage from the parties' performance of the Loan Agreement. Once separated, the Eighth District decided that the statutory duty is not related to the Arbitration Agreement. The Eighth District used the wrong analysis.

The correct standard asks whether Alexander's claim could have been made "without reference" to the Loan Agreement or the debtor-creditor relationship. As explained above, it cannot. Once reaching that conclusion, the analysis should have ended without an exploration of whether the duty to release the mortgage arose from a contract or from a statute. By departing from the "without reference" test and delving into the source of the obligation to release the claim, the Eighth District created yet another departure from *Aetna Health*. The Court should reverse the Eighth District and clarify that there is no special rule for statutory claims or statutory duties.

Proposition of Law III

The completion of performance of a contract providing for arbitration does not preclude arbitration of disputes arising from or related to the contract.

Finally, the Eighth District created one more new rule that contradicts *Aetna Health,* holding that Alexander's completion of her performance under the Loan Agreement terminated her obligation to arbitrate. The Eighth District set forth a three-step syllogism: (1) "Alexander satisfied the note by payment in full"; (2) "Wells Fargo's statutory duty to release the mortgage lien arose thereafter"; and (3) "Thus, it cannot be said that Wells Fargo's statutory duty to timely release the mortgage lien is related to the arbitration clause set forth in the note at issue." Opinion, at ¶ 16.

The Eighth District's "logic" is plainly incorrect. Arbitration agreements are treated as wholly separate contracts, even if they are embedded within the text of another contract. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967), 388 U.S. 395; *ABM Farms v. Woods* (1998), 81 Ohio St. 3d 498, 500, 692 N.E.2d 574. The life of an arbitration agreement takes its own path, and the failure of a related contract does not cause the death of an arbitration agreement. *ABM Farms*, 81 Ohio St.3d at 502. Accordingly, even after a contract is fully-performed, the arbitration agreement lives on. *Cleveland Police Patrolmen's Ass'n v. City of Cleveland* (1994), 95 Ohio App. 3d 645, 643 N.E.2d 559.

Alexander agrees that this is the law: "If the dispute in question falls within the scope of the arbitration agreement, the fact that the parties have completed performance of the contract does not preclude arbitration." Br. of Appellee, at 16. Alexander insists, however, that the Eighth District did not err by reiterating her position that her claim has nothing whatsoever to do with the fact that Alexander was a party to the Loan Agreement (and, inferentially, that her claim has nothing to do with the fact that she was in a debtor-creditor relationship with Wells Fargo). That analysis is as misplaced in this context as it was before.

Under a straightforward application of *Aetna Health* and *Fazio*, it is irrelevant whether the underlying contract has been fully-performed or remains to be executed. The only question is whether the claim would exist "without reference" to the underlying contract or the relationship that it created, regardless of whether that contract has now terminated. Because the Eighth District's contract-expiration rule is contrary to *Aetna Health, ABM Farms* and *Prima Paint*, the Court should reverse the Eighth District.

IV. CONCLUSION

The Eighth District simply ignored the test mandated by *Aetna Health* and *Fazio*. While Alexander tries to defend the Eighth District, she simply ignores both its Opinion and its mode of analysis. In determining whether a dispute is subject to arbitration under a broadly-worded arbitration agreement, there is no room nor need for the integral-part rule, the statutory-obligation rule, and the contract-expiration rule.

In our already overly litigious society, the Eighth District's new method of analysis will simply generate more litigation and confusion over what should be a routine matter. Alexander's claims could not exist without reference to the Loan Agreement and the relationship it created. The Court should reverse the Eighth District, restore Ohio law, and send this lawsuit to the arbitration to which the parties agreed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 29 day of January, 2009.

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