



Better Business Bureau of Utah, Inc.

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November 14, 2008

Clyde Gephart
3856 Tumbleweed Avenue
Las Vegas, NV 89121

Quality Wholesale Homes
296 East Telegraph St #202
Washington, UT 84780

RE: Arbitration Decision

Enclosed you will find the Arbitrator's decision in your dispute. We remind you that by having signed the Agreement to Arbitrate you agreed to comply with the terms of the Arbitrator's decision.

If you have any questions please call the Better Business Bureau. Do not make any direct contact with the Arbitrator.

Compliance letters will be sent to you to verify the decision has been executed as the arbitrator has directed, if necessary.

Thank you for using the Better Business Bureau's binding arbitration services.

Sincerely,

A handwritten signature in black ink that reads 'Amber Henderson'.

Amber Henderson
Arbitration Coordinator

BBB Arbitration Reasons & Decision

Clyde Gephart vs. Quality Wholesale Homes

10 November 2008

John C. Ross Arbitrator

In July of 2007, Clyde and Christine Gephart contracted with Quality Wholesale Homes to purchase two homes, and made a \$2,5000 deposit on each of two contracts. The Gepharts claim they were promised that their "good faith deposit" would be fully refunded if anything happened that would prevent them from being able to build the home. The Gepharts were ultimately unable to arrange financing, and now want their \$5,000 deposit refunded as promised.

Quality has offered to refund only \$1,060, claiming that the written terms of the contract explicitly allow it to withhold a \$1,000 handling fee, and out of pocket expenses including sales commissions which it claims are \$970 on each contract.

The Gepharts argue that they should be granted a full refund for the following reasons. 1) They were orally promised they would not lose their deposit, 2) They did not know of, nor understand the finely printed refund policy on the back of the contract, 3) They were coerced into signing the contract by deceptive, predatory, and unconscionable sales and business practices, and 4) The first two contracts were superceded by a contract specifying that it was contingent upon obtaining financing. We must carefully review each of these arguments in light of the evidence, and the parties agreement, and in accord with general principles of fairness and good business practice.

1) The Gepharts claim they were promised that their money would be fully refunded if anything happened which would prevent Quality from building the home they selected. The Gepharts and other customer-witnesses were repeatedly told that there was no way they could lose their deposit. They were told that the sole purpose of the deposit was to lock in the current home price which was about to rise substantially. They were not told that in fact their deposits would be used to pay sales commissions, and other company expenses.

Quality responded by noting that their written contract explicitly affirms that any oral promises not within the four corners of the document are not binding. The company understandably does not want to be bound by its salesmen's extravagant promises, and yet it encourages their dishonesty by designing the contract so as to guarantee sales commissions will not be lost when customers rely upon the salesmen's undue assurances to their detriment.

The Gepharts have provided persuasive evidence that Quality frequently promised what it did not intend to deliver. Quality made no denial, or refutation, except to assert that this dispute must be judged solely upon the contract's fine print regardless of its employee's false promises.

2) The Gepharts assert that they were never shown the back side of the contracts they signed, which is why their initials do not appear on the line designated for buyer's initials. They

produced other witnesses who also were never shown the back side of their contracts and were never informed of their content, nor the risks they were assuming by signing the contract with Quality. For example, neither the Gepharts, nor the other witnesses to Quality's business practices were told or shown the refund policy on the back of the contract. None of them were told that their deposits were subject to a \$1,000 handling fee, and any out of pocket costs claimed by Quality such as sales commissions.

All the terms in a contract between merchants can be presumed to have been bargained for, but that was clearly not the case in this instance. The contract contradicts the oral promises the Gepharts received, and expressly disavows any oral promises made by the company's sales force.

It also includes clauses excusing the company from having to perform on its agreement with respect to home model, habitability, price or schedule. It attempts to define the terms such that Seller breach is practically impossible. It even includes the amazing over-reach that in the event that Quality cannot perform as agreed, the buyer agrees to not cancel the contract, but must instead make other selections more agreeable to the company.

The unconscionable nature of this contract is also revealed in the punitive clause specifying that if the consumer cancels the contract, not only will they lose their deposit, but the consumer consents to paying liquidated damages (a legal term rarely understood by home buyers) in the amount of 20% of the total cash purchase price of the home(s). Witnesses testified that Quality used this clause as a threat against those taking legal action to recover their deposits.

The Gepharts' claim that had they understood the terms they would not have signed such an unfair agreement, nor would anyone in their right mind, is highly credible. This contract is extremely unfavorable to consumers, which obvious fact cannot have escaped the sales force, which repeatedly neglected to review page two, or have it initialed by the customer, and even went so far on several occasions as to fax only page one to the customer.

Quality's response to Gepharts' assertion that he did not know of the refund restrictions is the legal non-sequitur, that the back must have been understood, because the front specifically states that when signed, it signifies that the back was understood even if it had not been read, explained or initialed. This argument defies common sense, and can only be understood by very keen legal minds.

3) The Gepharts assert that Quality engaged in unethical sales pressure by deceiving customers with the false claim that the Preferred Platinum Program was about to end, and they must sign up today, or face massive price increases. In their case, the Gepharts claim they were lied to when told that the company had discontinued its PP Program but it would make one final exception for them. The Gepharts later learned that the PPP program was not discontinued, and has been used as a lever against many other customers who also felt stampeded by the tactic.

While the PPP and its promised discounts are clearly a high pressure sales tactic, the Gepharts do not establish that home prices did not increase shortly after they signed their contract. They do not show that this program (which is supposed to end, but doesn't), does not represent a periodically upward ratcheting set of prices. In other words, the customer has proven that he

was deceived to increase the psychological pressure to buy, but he has not shown that he was deceived about a material term of the contract such as the home price. Nor did the Gepharts establish that they were personally harmed by this high pressure except to merely assert that had they known the truth they might have felt free to consult with a son on various matters, which might have dissuaded them from contracting with Quality.

The Gepharts document numerous other customers frustrated that they were unable to get their deposits back. However, this common frustration is not of itself evidence of fraudulent business practices. There are many reasons that Quality may have numerous disgruntled customers. A large quantity of transactions in a changing credit or housing market or a clientele with high credit risk, is bound to result in a substantial number of unconsummated transactions and disappointed buyers. The fact that the Gepharts' misery has plenty of company simply does not prove fraud.

The Gepharts make the claim that Quality is in the dubious business of promising financing to customers likely to be denied so that the company may pocket their deposits with little effort or service offered. That judgement is beyond the province of this arbitration, and is not relevant to the issue at hand, particularly since the Gepharts did not substantiate their assertion that Quality did nothing of value on their behalf. While sometimes it is hard to know when puffery, deception, and pressure tactics amount to coercion, in this case the evidence simply does not support the allegation that these practices rise to the level of coercion or fraud.

4) On July 21st, 2007 the Gepharts signed two contracts, and made a \$5,000 deposit, and then awaited the companies package of home options and a list of site contractors which never arrived. Instead, on August 16th they were told that the companies employee responsible for site construction had quit without warning, and they would have to provide for themselves. The next day, on the 17th of August 2007 Quality told the Gepharts that it was further unable to comply with the terms of the original contracts because its Riverside factory was incapable of building the home they had selected. It was therefore suggested that they select another plan from a different factory, and sign another contract superceding their initial agreements.

The apparent reason for signing a new and superceding agreement is because the previous agreements were no longer in force due to the companies inability to perform as agreed, and this was never disputed by Quality. At this point the Gepharts should have been entitled to a complete refund of their deposits. However, because both parties desired to continue their business relationship, Quality faxed the first page (only the first page) of another contract which expressly states its intent to supercede all prior agreements. This August 17th contract was signed by the Gepharts, discussed by Quality employees, and initialed by them, and submitted to the finance company as their bid. The Gepharts argue that this action was evidence that the contract was accepted by agents of the company, not withstanding the later disapproval of the legal department. The Gepharts further argue that the handwritten clause making the contract contingent upon obtaining financing, was in accord with the financing provision #2, and entitles them to a full refund of their deposit. By the Gepharts' interpretation of the facts, they are entitled to a full refund of their deposit.

In his October 8th, 2008 rebuttal, Quality's legal counsel argued that the August 17th contract had not been accepted by Quality because it included a clause specifying that the agreement was contingent upon the Gepharts obtaining financing, and it is company policy to void all contracts with customer modifications. This supposed policy is in direct contradiction with "Additional term # 2." of the contract which provides for a handwritten clause specifying that the agreement may be contingent upon financing. But assuming that company policy is as counsel asserted, to uniformly disregard their own contract provision, then the intended contract of August 17th was invalid for never having been accepted by the company. At that point the Gepharts were no longer obligated under contract because of Quality's professed inability to perform on the initial contracts, and their inability to proceed without a superceding agreement. Therefore, even by Quality's interpretation of the facts, the Gepharts are also entitled to a full refund of their deposit.

Because of the foregoing reasoning, it is here ordered that Quality will refund Gepharts' entire deposit to the amount of \$5,000.00 to be paid by cashier's check within 10 working days of receiving this decision.


Arbitrator