[Cite as *EFB Constr., Inc. v. Hannum Crossing Dev. Co., Ltd.*, 2009-Ohio-5240.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93046

EFB CONSTRUCTION, INC.

PLAINTIFF-APPELLEE

vs.

HANNUM CROSSING DEVELOPMENT CO., LTD.

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-673526

BEFORE: Rocco, J., Gallagher, P.J., and Boyle, J.

RELEASED: October 1, 2009

JOURNALIZED:
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KENNETH A. ROCCO, J.:

{¶ 1} In this appeal brought on the accelerated calendar, defendant-appellant Hannum Crossing Development Company, Ltd., appeals pursuant to R.C. 2711.02(C) from the trial court order that denied its motion to stay the proceedings brought against it by plaintiff-appellee EFB Construction, Inc. pending arbitration of certain claims.

{¶ 2} The purpose of an accelerated appeal is to allow the appellate court to render a brief and conclusory opinion. *Crawford v. Eastland Shopping Mall Assn.* (1983), 11 Ohio App.3d 158.

{¶ 3} Appellant presents one assignment of error, asserting that because the parties had some claims against each other that arose from prior written agreements, the arbitration clause contained in those prior agreements also required arbitration of the instant claims. This court agrees. Consequently, the trial court's order is reversed, and this case is remanded.

{¶ 4} According to its complaint, appellee provides construction and excavation services, and contracted to perform work for appellant on a housing development to be built in phases. Appellee termed the housing

development "the Project."

{¶ 5} Appellee alleged that appellant eventually requested appellee to submit a bid for work on "Phase 9 of the Project." After appellee submitted its bid, it "was given verbal permission to go ahead with the work on Phase 9."

{¶ 6} Appellee asserted that in November 2005, it sent a letter to appellant in which it "outlined" the materials it had procured and the "work already performed * * * in reliance on [appellant's] verbal permission to proceed" with Phase 9. Appellee further asserted that appellant replied via "email," assuring appellee that it would be paid.

{¶ 7} Appellee alleged that appellant paid an invoice from appellee "which included work performed on Phase 9." Appellee claimed that, "[s]ubsequently, [appellee] submitted other invoices for work on the Project[,] some of which remain wholly or partially unpaid." (Emphasis added.)

{¶ 8} Appellee alleged in Paragraph 13 of its complaint that, ultimately, appellant "kicked [appellee] off the Project and hired another contractor, for less money, to finish Phase 9." In Paragraph 14, appellee alleged that, [d]espite demand, [appellant] refuses to pay [appellee] for work it performed on the Project." (Emphasis added.)

{¶ 9} Appellee asserted two causes of action against appellant. Count

One alleged "breach of contract," i.e., "by hiring another contractor to perform the work [appellant] contracted with [appellee] to perform." Count two alleged unjust enrichment, i.e., appellee "provided goods and services" to appellant for which appellant refused to pay.

{¶ 10} Appellant responded with a motion to stay the proceedings pursuant to R.C. 2711.02.[1] It asserted that "some of the claims" brought by appellee "must be submitted to arbitration in accordance with the written agreements" between the parties.

{¶ 11} Appellant's motion was supported by the affidavit of Paul Goldberg, the President of one of appellant's managing members. Goldberg verified several exhibits also attached to appellant's motion. Included in these documents were copies of correspondence between the parties along with portions of three of their written contracts. These contracts were for Phases 4, 7, and 8 of "the Project."

{¶ 12} Goldberg averred that, beginning in 1997, appellee had been hired to perform "excavation, grading, paving, and site utility work" on "the Project," which was built in "multiple phases." He stated that each written

[1]R.C. 2711.02(B) provides that 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, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had * * * ." (Emphasis added.)

contract was for one "Phase" of "the Project," and each incorporated, "as indicated on the face page, the General Conditions of the Contract for Construction."

{¶ 13} Goldberg also acknowledged that appellee had started work on Phase 9 of the Project without "a written or oral agreement * * * for the entirety of the work," rather, appellant gave appellee only "oral authorization to proceed with the clearing of Phases 9 and 10 of the Project." Goldberg's acknowledgment was supported by the correspondence.

{¶ 14} In a letter sent from appellee's "treasurer," Eugene F. Begue, Jr., to Goldberg dated November 18, 2005, Begue stated that his company had performed work on "Phase 9," based on Goldberg's "verbal permission to proceed." Begue further stated that appellee had "also performed work in Phase 10 while working on Phase 8," because appellee felt "comfortable performing this work without a signed contract because we have started other phases in the past with verbal permission to proceed."

{¶ 15} Goldberg averred that appellant was withholding payment on some of appellee's invoices "[b]ecause of defects in the work completed by [appellee] on "Phases 4, 7, 8, 9 and 10." Once again, this statement was supported by the correspondence attached to his affidavit.

{¶ 16} Goldberg stated that because the parties had disputes over work

done on the Project and the amounts due, appellant sought to arbitrate those disputes under Section 4.3 of the "General Conditions," set forth in each of the written contracts.[2]

{¶ 17} Goldberg averred that this clause defined a "Claim" as "a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time, or other relief with respect to the terms of the Contract. The term * * * also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." The clause further required any "Claim" to be submitted to the Architect for a decision, and, thereafter, it was "subject to arbitration."

{¶ 18} Appellant additionally filed an answer to appellee's claims. Therein, it asserted, inter alia, the affirmative defense that appellee's claims were "subject to the arbitration clauses in the Phase 1 through 8 contracts" between the parties. Appellant also reserved the right to amend the pleading to assert further defenses or counterclaims.

{¶ 19} Appellee filed a brief in opposition to appellant's motion. It argued a stay pending arbitration was inappropriate for alternative reasons:

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[2]Although appellant apparently intended to attach a copy of the "General Terms and Conditions" portion of the contracts, the wrong pages were reproduced. Hence, the quoted material is taken from Goldberg's affidavit.

1) its claims for "work performed on Phase 9 or 10" were not covered by a written contract, rendering R.C. 2711.02 inapplicable; or, 2) "the conditions precedent to arbitration," under the General Conditions of the written contracts, "which required prior to arbitration, the parties [to] endeavor to resolve disputes by mediation," had "not been met," thus, appellant had not followed the proper procedures.

{¶ 20} The trial court denied appellant's motion without opinion. In so doing, as a review of the record demonstrates, the trial court erred.

{¶ 21} The Ohio Supreme Court recently reiterated its endorsement of the arbitration of disputes in *Alexander v. Wells Fargo Financial Ohio 1, Inc.*, 122 Ohio St.3d 341, 2009-Ohio-2952, ¶13 as follows:

{¶ 22} "* * * Ohio has a strong presumption in favor of arbitration. *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 500, 692 N.E.2d 574; *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 471, 700 N.E.2d 859. * * * [T]he agreement covers any claim 'arising out of or relating to' the [contract]. We held in *Aetna*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶18, that the phrase 'any claim or controversy arising out of the agreement' is the paradigm of a broad clause. The agreement must be enforced unless ' "'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Doubts should be resolved in favor of coverage.' "' Id. at ¶14, quoting *AT & T Technologies, Inc. v. Communications Workers of Am.* (1986), 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648, quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 582-583, 80 S.Ct. 1347, 4 L.Ed.2d 1409." (Emphasis added.)

{¶ 23} The supreme court added at ¶23-24:

{¶ 24} "Our holding comports with the standard articulated in *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488. In that case, we held that Ohio courts may determine whether a cause of action is within the scope of an arbitration agreement based on the federal standard found in *Fazio v. Lehman Bros., Inc.* (C.A.6, 2003), 340 F.3d 386.

{¶ 25} "*Fazio* held that '[a] proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement.' *Fazio*, 340 F.3d at 395. Later in that paragraph, *Fazio* continued: 'Even real torts can be covered by arbitration clauses "[i]f the allegations underlying the claims 'touch matters' covered by the [agreement]." *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir.1987).' (Brackets sic.) *Fazio*, id." (Emphasis added.)

{¶ 26} In this case, the record reflects the parties had a long-standing relationship: appellant as the owner of a development project, and appellee as one of the site's contractors. Since 1997, each phase of "the Project" had been covered by a written agreement between the parties. Neither party raised a challenge to the existence of an arbitration clause in those contracts.

{¶ 27} Based upon the inclusive holding of *Alexander*, it cannot be fairly said that the allegations underlying the claims appellee raised against appellant in this case were ones outside the scope of the existing agreements between the parties. Thus, the claims fell under the existing arbitration clauses. *BSA Investments, Inc. v. DePalma*, 173 Ohio App.3d 504, 2007-Ohio-4059; *Murray v. David Moore Builders*, 177 Ohio App.3d 62, 2008-Ohio-2960; cf., *Halloran v. Bucchieri,* Cuyahoga App. No. 82745, 2003-Ohio-5658.

{¶ 28} Consequently, appellant's assignment of error is sustained.

{¶ 29} The trial court's order is reversed. This case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR