[Cite as *Panzica Constr. Co. v. Zaremba, Inc.*, 2011-Ohio-620.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95103

PANZICA CONSTRUCTION COMPANY

PLAINTIFF-APPELLEE

vs.

ZAREMBA, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-717571

BEFORE: Sweeney, J., Celebrezze, P.J., and Gallagher, J.

RELEASED AND JOURNALIZED: February 10, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Defendants-appellants Zaremba, Inc., et al. ("Zaremba") appeal the trial court's granting plaintiff-appellee Panzica Construction Co.'s ("Panzica") motion to stay proceedings and compel arbitration. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On November 6, 2006, Zaremba and Panzica entered into a contract ("the Contract") to construct condominiums at 1211 St. Clair Avenue, in Cleveland. Zaremba, who owned the property, agreed to pay Panzica $25 million as the construction manager of the 58-unit project, known as "The Avenue District."

{¶ 3} On August 7, 2009, Panzica filed a mechanic's lien against the property for $2,732,111.10, an amount Panzica claims Zaremba owes for work completed under the Contract, including various change orders. On December 7, 2009, Panzica received a notice to commence suit on its lien from PNC Bank, which had a mortgage interest in the property based on a $12 million loan made to Zaremba. Pursuant to R.C. 1311.11(B), Panzica had 60 days to file suit upon its lien, or the lien would become void.

{¶ 4} On February 4, 2010, Panzica filed suit against Zaremba, PNC Bank, and other defendants, alleging the following causes of action: foreclosure of the mechanic's lien; declaratory judgment regarding the validity of the mechanic's lien; unjust enrichment against Zaremba; unjust enrichment against various other defendants with security interests in the

property; fraud; conversion; negligent misrepresentation; breach of fiduciary duty; accounting; constructive trust; money had and received; and piercing the corporate veil.

{¶ 5} Additionally, part of the general allegations in Panzica's complaint state as follows:

{¶ 6} "E. Pending Arbitration of Breach of Contract Claim Against Zaremba.

{¶ 7} "45. Panzica's claim against Zaremba for breach of the Contract is subject to mandatory arbitration in accordance with the terms of the Contract.

{¶ 8} "46. Contemporaneously herewith, Panzica has served Zaremba with a Demand for Arbitration, a copy of which is attached hereto and incorporated herein as Exhibit N."

{¶ 9} On February 10, 2010, Panzica sent a demand for arbitration to the American Arbitration Association and notice of intent to arbitrate to Zaremba. In its demand for arbitration, Panzica claimed Zaremba "breached the contract by failing to pay [Panzica] for its work * * *," in the amount of "$2,732,111.10 plus interest, attorney fees, and arbitration costs."

{¶ 10} On February 16, 2010, Zaremba filed an answer and a counterclaim against Panzica and joined a new defendant, S.A. Comunale Company, Inc., one of Panzica's subcontractors. Zaremba's counterclaim includes the following causes of action: negligence; breach of contract; breach of workmanlike construction; declaratory judgment regarding the

contract; declaratory judgment regarding the mechanic's lien; tortious interference with business relations; defamation; abuse of process; commercial bad faith; temporary restraining order and injunctive relief; and declaratory judgment regarding the arbitration provision of the contract.

{¶ 11} On March 8, 2010, Panzica filed a motion to stay proceedings pending arbitration pursuant to R.C. 2711.02 and to compel arbitration pursuant to R.C. 2711.03. On March 16, 2010, Zaremba filed a motion to dismiss the arbitration demand and for an emergency hearing. On May 4, 2010, the court denied Zaremba's motion, granted in part Panzica's motion to stay proceedings and compel arbitration, and authored a detailed 11-page analysis of its decision.

{¶ 12} Zaremba appeals and raises four assignments of error for our review.

{¶ 13} "I. The trial court erred by not finding that plaintiff/appellee's filing of a lawsuit prior to making an arbitration demand constituted a waiver of the arbitration provision of the contract. Appellee's motion to compel arbitration and stay proceedings should have been denied."

{¶ 14} "II. The trial court's denial of defendants/appellants' motion to dismiss arbitration constituted reversible error."

{¶ 15} "III. The trial court's plain error in the recitation of the material facts regarding the timing of the lawsuit in relation to the arbitration demand constituted reversible error."

{¶ 16} We review the granting of a motion to stay proceedings and compel arbitration under an abuse of discretion standard. *U.S. Bank, N.A. v. Wilkens*, Cuyahoga App. No. 93088, 2010-Ohio-262, ¶9. An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 17} Arbitration clauses in written contracts are generally valid and enforceable. R.C. 2711.01(A). However, "controversies involving the title to or the possession of real estate" are not subject to arbitration. R.C. 2711.01(B)(1). Assuming a matter is arbitrable, parties to a contract may waive their right to arbitrate a dispute, although "the strong public policy favoring arbitration of disputes means that the courts do not lightly infer that a party who has initiated litigation on a matter has waived the right to arbitration." *Bass Energy, Inc. v. City of Highland Hts.,* Cuyahoga App. No. 93698, 2010-Ohio-2102, citing *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 701 N.E.2d 1040.

{¶ 18} Parties seeking to enforce arbitration clauses may choose from two statutory options. See *Squires Constr. Co. v. Thomas*, Cuyahoga App. No. 89609, 2008-Ohio-1406. Pursuant to R.C. 2711.02(B), "[i]f 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 * * * 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 * * *." In addition to staying the litigation, a court may compel arbitration pursuant to R.C. 2711.03(A) upon motion of a party to a valid arbitration clause.

{¶ 19} In the instant case, Section 9.2.1 of the Contract governs "Dispute Resolution for the Construction Phase," and it states that "[a]ny * * * claim, dispute or other matter in question arising out of or related to this Agreement or breach thereof shall be settled in accordance with Article 4 of AIA Document A201, except that in addition to and prior to arbitration, the parties shall endeavor to settle disputes by mediation * * *." Article 4 of AIA Document A201 governs "Administration of the Contract," and sections 4.3, 4.4, and 4.5 detail the procedures for handling "Claims and Disputes," "Resolution of Claims and Disputes," and "Arbitration," respectively. In pertinent part, section 4.5 states that "[a]ny controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration * * *."

{¶ 20} The parties to the instant case do not dispute that they agreed to the arbitration clause in the Contract. However, Zaremba argues that Panzica waived arbitration by filing its February 4, 2010 lawsuit six days prior to demanding arbitration. Zaremba supports this argument by citing Ohio cases standing for the general proposition that a plaintiff may waive

arbitration by filing a lawsuit. See, e.g., *Mills v. Jaguar-Cleveland Motors, Inc.* (1980), 69 Ohio App.2d 111, 430 N.E.2d 965.

{¶ 21} In its May 4, 2010 decision, the court found that Panzica did not waive its right to arbitration "by filing a non-arbitrable foreclosure action." The claims Panzica asserted against Zaremba in court concerned foreclosure, the mechanic's lien, and unjust enrichment (in the event the contract proved to be invalid during arbitration), none of which are subject to arbitration. Panzica then demanded arbitration of its contract-based claims. The court further stated that "[s]imultaneous with its foreclosure complaint, Panzica served a demand for arbitration through the American Arbitration Association on Zaremba." The court also explained that Panzica filed its motion to compel arbitration in response to Zaremba's counterclaim, which included causes of action subject to arbitration, such as breach of contract. Therefore, the court granted in part Panzica's motion to stay proceedings and compel arbitration.

{¶ 22} Zaremba also takes issue with the court's finding of fact that Panzica filed its lawsuit and demanded arbitration simultaneously. The record reflects that Panzica filed suit on February 4, 2010 and sent notice of the arbitration demand six days later, on February 10, 2010. While we agree with Zaremba that the court's finding is not supported by the record, this discrepancy is immaterial to the outcome of this case, because Panzica acted consistently with its right to arbitrate throughout the proceedings. See Civ.R. 61 (stating that "[t]he court

at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties").

{¶ 23} In reviewing whether a party waived its right to arbitration, the "essential question is whether, based on the totality of the circumstances, the party seeking arbitration has acted inconsistently with the right to arbitrate." (Internal citations omitted.) *Wishnosky v. Star-Lite Bldg. & Dev. Co.* (Sept. 7, 2000), Cuyahoga App. No. 77245. Factors for the court to consider include: "1) any delay in the requesting party's demand to arbitrate via motion to stay judicial proceedings; 2) the extent of the requesting party's participation in the litigation prior to its filing a motion to stay the proceeding, including status of discovery, dispositive motions and the trial date; 3) whether the requesting party invoked the jurisdiction of the court by filing a counterclaim or third-party complaint without asking for a stay of the proceedings; and 4) whether the non-requesting party has been prejudiced by the requesting party's inconsistent acts." Id.

{¶ 24} In the instant case, Panzica gave notice of its arbitration demand six days after filing its foreclosure complaint and filed its motion to stay proceedings and compel arbitration 20 days after Zaremba filed its counterclaim. Litigation of this case had not gone beyond the pleading stage at the time Panzica demanded arbitration. As explained earlier in this opinion, Panzica invoked the court's jurisdiction by filing a non-arbitrable foreclosure action, which referenced its intent to arbitrate its breach of contract action.

{¶ 25} In granting Panzica's motion to compel arbitration in part, the court carefully analyzed each of Zaremba's 11 causes of action in its counterclaim. As to Zaremba's counterclaims against Panzica, the court ordered seven of them to arbitration, stayed two counts pending arbitration results, and found the remaining two counts regarding the waiver issue moot. The court stayed all counts in Zaremba's counterclaim against defendant S.A. Comunale Co., Inc. The court also stayed Panzica's complaint "except to the extent that the priority of [Panzica's] mechanic's lien will be determined in the non-arbitrable foreclosure claims." Finally, the court bifurcated the cross- and counterclaims of seven other parties to this case and ordered litigation to proceed accordingly.

{¶ 26} Thus, the court acted within its discretion by finding that Panzica did not waive its right to arbitration under the Contract, denying Zaremba's motion to dismiss the arbitration demand, and granting Panzica's motion to stay proceedings and compel arbitration. Compare *Milling Away, L.L.C. v. Infinity Retail Environments, Inc.*, Summit App. No. 24168, 2008-Ohio-4691 (holding that the court did not abuse its discretion in compelling arbitration despite a six-month delay in filing the motion for a stay and minimal participation in discovery); *Buyer v. Long*, Fulton App. No. F-05-012, 2006-Ohio-472, ¶17 (affirming the court's finding that the appellee had not waived his right to arbitration after a 16-month delay, because "nothing in the record indicates any actual prejudice to appellant due to the alleged

delay in demanding arbitration or that appellee's actions were inconsistent with his right to arbitration").

{¶ 27} Zaremba's first, second, and third assignments of error are overruled.

{¶ 28} In its fourth assignment of error, Zaremba argues as follows:

{¶ 29} "IV. The trial court's failure to try the issue of waiver violated the mandates of R.C. 2711.03 and constituted reversible error."

{¶ 30} Although this assignment of error references "trying" the issue of waiver, Zaremba argues that the court erred when it did not hold a hearing pursuant to R.C. 2711.03 regarding whether Panzica waived its right to arbitration.

{¶ 31} The Ohio Supreme Court held that "under R.C. 2711.03, a party aggrieved by the failure of a person to perform under a written arbitration agreement may petition an appropriate court for an order directing the parties to proceed to arbitration in accordance with the agreement." *State ex rel. Westlake v. Corrigan*, 112 Ohio St.3d 463, 2007-Ohio-375, 860 N.E.2d 1017, ¶16. "The court shall hear the parties, and, upon being satisfied that * * * the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement." R.C. 2711.03(A). It is only when the court determines that there is an issue with the validity or enforcement of the arbitration clause that "the court shall proceed summarily to the trial of that issue." R.C. 2711.03(B).

{¶ 32} In other words, under R.C. 2711.03(A), the court initially "shall hear the parties" regarding a motion to compel arbitration. The plain language in this statute is different from language the legislature used in statutes requiring the court to *hold a formal hearing*. For example, a party to a lawsuit may be sanctioned for frivolous conduct under R.C. 2323.51(B)(2), "but only after the court does all of the following: (a) Sets a date for a hearing to be conducted * * *; (b) Gives notice of the date of the hearing * * * to each party or counsel of record * * *; [and] (c) Conducts the hearing * * *, allows the parties and counsel of record involved to present any relevant evidence at the hearing, * * * determines that the conduct involved was frivolous and that a party was adversely affected by it, and then determines the amount of the award to be made."

{¶ 33} Another example of when a court is required to hold a hearing is found in R.C. 2903.214, which governs petitions for protection orders. Section (D)(1) of this statute states as follows: "If a person who files a petition pursuant to this section requests an ex parte order, the court shall hold an ex parte hearing as soon as possible * * *." Furthermore, if the protection order is issued after an ex parte hearing, "the court shall schedule a full hearing * * *[,] give the respondent notice of, and an opportunity to be heard at, the full hearing * * * [and] hold the full hearing * * *." R.C. 2903.214(D)(2).

{¶ 34} A final example of the legislature's expressly requiring the court to hold a formal hearing concerns sealing the criminal records of first-time offenders. R.C. 2953.32(B)

states that "[u]pon the filing of an application under this section, the court shall set a date for a hearing and shall notify the prosecutor for the case of the hearing on the application."

{¶ 35} Given the statutory language in R.C. 2711.03, we must determine whether the court "heard" the parties regarding Panzica's motion to compel arbitration. See *Breeding v. Herberger* (1992), 81 Ohio App.3d 419, 422-423, 611 N.E.2d 374 (holding that "every motion, unless permitted to be heard *ex parte*, shall be determined by the court only after a hearing," of which there are three types: an evidentiary hearing, an oral hearing, and a non-oral hearing) (citing Civ.R. 6(D));

{¶ 36} *Buckeye Supply Co. v. N.E. Drilling Co.* (1985), 24 Ohio App.3d 134, 136, 493 N.E.2d 964 (noting that "[i]t is acceptable practice * * * for trial courts to dispose of motions without formal hearing, so long as due process rights are afforded").

{¶ 37} Panzica and Zaremba were given the opportunity to fully brief the arbitration issue, and both parties filed memoranda in support of their positions, including reply and surreply briefs. At least three other corporate parties and five individual parties filed motions with supporting briefs regarding whether to compel arbitration. More than 20 pleadings were filed in this case and, altogether, literally hundreds of pages of exhibits. The court issued an 11-page opinion detailing its reasoning behind granting in part Panzica's motion to compel arbitration. We find that this issue was ripe for determination based on the parties' briefing and evidence filed. See *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150,

2004-Ohio-829, 809 N.E.2d 1161, ¶22 (ruling that, although the court did not hold a hearing concerning a motion to compel arbitration, because it allowed the parties to brief the issue, "we proceed to evaluate the arbitration clause, rather than ordering the trial court to hold a hearing on the issue of unconscionability").

{¶ 38} Accordingly, under the facts of this case, we conclude that the court did "hear" the parties regarding Panzica's motion to compel, and the court did not err in failing to "try" the issue of waiver. Zaremba's fourth assignment of error is overruled.

{¶ 39} Panzica filed a cross-appeal against Zaremba and raises one assignment of error, which states as follows:

{¶ 40} "I. The trial court erred in finding that Zaremba Avenue, LLC is the only contracting party with appellee Panzica, when in fact Zaremba, Inc. is a signatory to the contract and should also be a party at arbitration pursuant to the arbitration provisions of the contract."

{¶ 41} In a footnote to the decision granting Panzica's motion to stay proceedings and compel arbitration, the trial court stated the following: "Unless otherwise noted, reference in this entry to 'Zaremba' is only to the contracting party, Zaremba Avenue, LLC." On appeal, Panzica argues that "Zaremba" should refer to Zaremba, Inc., and Zaremba Avenue, LLC, as both are parties to the contract, lawsuit, appeal, and arbitration.

{¶ 42} Zaremba, on the other hand, argues that Zaremba Avenue, LLC was the only owner of the property and party to the Contract, and that the drafters of the Contract incorrectly listed "Zaremba, Incorporated" as the owner. However, Zaremba did not raise this alleged contractual "mistake" at the trial court level, and we will not entertain this argument on appeal. We will address whether footnote two in the trial court's May 4, 2010 decision is consistent with the record.

{¶ 43} Our review of the record shows that the parties to the Contract are Panzica Construction Company and Zaremba Avenue, LLC, c/o Zaremba, Incorporated. On the first page of the Contract, "Zaremba Avenue, LLC, c/o" is handwritten immediately above "Zaremba, Incorporated," which is typed. On the signatory page of the Contract, "Zaremba, Incorporated" is listed as the property owner. Additionally, the parties are identified on Exhibit A to the Contract: "* * * between Zaremba, Incorporated and Panzica Construction Company."

{¶ 44} Documents from the American Arbitration Association refer to the arbitration of this matter as: "Panzica Construction Company vs Zaremba Avenue, LLC and Zaremba, Inc., No. 52 110 Y 00157 10."

{¶ 45} Additionally, the court's opinion identifies the following defendants in this case: Zaremba, Inc.; Zaremba Avenue, LLC; Avenue Condominium I Association; Nathan Zaremba; Brian Blasinsky; S.A. Comunale Company, Inc.; Key Community Development New Markets,

LLC; Express Painting Corporation; The City of Cleveland; PNC Bank, N.A.; Mark Evans; Ellen Evans; Javier A. Angulo; Steven S. Ball; and Deborshi Roy. Panzica's complaint names an additional four defendants not referenced in the court's opinion.

{¶ 46} Considering the meticulous detail with which the court prepared its opinion, we suspect that this footnote was created to distinguish the defendants subject to the arbitration clause from the more than one dozen other defendants who were not parties to the Contract, including an individual defendant who has the surname "Zaremba." Therefore, the court may have inadvertently omitted "Zaremba, Incorporated" from the aggregate term "Zaremba." However, we are unable to make a conclusive determination of this issue and, upon remand, the trial court should clarify footnote two if necessary.

{¶ 47} Accordingly, Panzica's cross-assignment of error is overruled because it is unclear from the record whether the court erred. The court's judgment is affirmed; however, this case is remanded for the limited purpose of clarifying footnote two of the court's May 4, 2010 journal entry.

Judgment affirmed.

It is ordered that appellee recover from appellant 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.

JAMES J. SWEENEY, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
SEAN C. GALLAGHER, J., CONCUR