[Cite as *Roark v. Keystone Homes, L.L.C.*, 2021-Ohio-707.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

GEORGE ROARK, ET AL.,	:	
Plaintiffs-Appellants,	:	No. 109488
v.	:	
KEYSTATE HOMES, L.L.C., ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: March 11, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-921529

Appearances:

Terrance J. Kenneally & Assoc., and Christopher M. Corrigan, *for appellants.*

Zukerman, Lear & Murray Co., L.P.A., Larry W. Zukerman, and S. Michael Lear, *for appellees.*

SEAN C. GALLAGHER, J.:

{¶ 1} Plaintiffs-appellants George Roark and Kirk Garron appeal the decision of the trial court to stay the matter pending arbitration and to hold all pending motions in abeyance. Upon review, we affirm the trial court's decision.

Background

{¶ 2} On September 13, 2019, appellants filed a complaint against defendants-appellees Keystone Homes, L.L.C., Andrew Gotlieb, Mina Gotlieb, Avner Gotlieb, and Keystate Development L.L.C. ("Keystate Development"). The complaint alleges that on May 10, 2018, appellants entered a contract with Keystate Development, doing business as Keystate Homes, to demolish an existing structure and construct a new house at the same location. Appellants provided a $10,000 deposit to Keystate Development. Appellants allege Keystate Development never performed any work toward the demolition of the existing structure and never furnished any materials for construction of the new home. Appellants further allege that they canceled the contract on August 15, 2018, and that Andrew Gotlieb, as a representative of Keystate Development, confirmed and assented to the cancellation of the contract.

{¶ 3} Appellants assert in the complaint that appellees refused to return the deposit despite repeated demands and that Mina Gotlieb and Avner Gotlieb, as president of Keystate Development and/or Keystate Homes, would have known that the deposit was not returned. Appellants also assert that Andrew Gotlieb filed a mechanic's lien on behalf of Keystate Homes, claiming $30,000 owed for work

performed, filed a false affidavit for mechanic's lien, and failed to notify appellants of the filing of the affidavit for mechanic's lien. Appellants allege that Mina Gotlieb and Avner Gotlieb would have assented to the alleged wrongful conduct. Appellants raise claims for conversion; unjust enrichment; defamation/slander of title; falsification under R.C. 2921.13(G); malicious prosecution; negligent hiring, retention, training, and supervision; civil conspiracy/concerted action; and piercing the corporate veil.

{¶ 4} Appellees responded to the complaint by filing a motion to stay proceedings pending arbitration and/or to stay proceedings and compel arbitration. They argued that the contract appellants entered with Keystate Development contains an unambiguous arbitration clause that was agreed to by the parties, a cancellation clause, and a liquidated-damages clause. Appellees maintained that the dispute is subject to the arbitration clause because appellants' claims relate to whether appellees are entitled to keep the $10,000 deposit and to seek $30,000 for liquidated damages and/or a "fixed contractor's fee" and/or for "cost of work" and/or other fees owed under the contract by filing the affidavit for mechanic's lien.

{¶ 5} Appellees attached a copy of the parties' contract to their motion. Section 15 of the contract contains an arbitration clause that provides in part that "[a]ny controversy or claim arising out of or relating to this agreement; or the breach thereof, shall be settled by arbitration in accordance with the construction industry Arbitration rules of the American Arbitration Association * * *." The arbitration

clause was separately agreed to and executed by the respective parties. The arbitration clause also contains a loser-pays provision.

{¶ 6} Section 5 of the parties' contract contains a cancellation clause that sets forth methods and procedures for cancelling the contract. Section 2 of the contract covers compensation. Section 2 sets forth a deposit amount of $10,000 and states that "[i]f the Owner(s) should default on the Contract, in addition to all amounts due for unpaid 'Cost of Work' incurred as of the date of default, a portion of the Deposit equal to 10% of the Contract price shall be retained by the Contractor as liquidated damages." Section 2 also states that if the owner defaults, the contractor is entitled to apply the deposit "first, towards all unpaid 'Cost of Work' as of the date of default," and then "toward the amount of liquidated damages." Section 2 includes compensation for "the 'Cost of Work' incurred in the performance of the Contract," plus a "fixed Contractor's fee of $40,000.00," and it also contains other provisions relating to compensation.

{¶ 7} Section 18 of the parties' contract contains a severability clause that provides as follows: "Should any clause or provision of this Contract be ruled invalid or unenforceable in any court of competent jurisdiction, the remainder of the Contract shall nevertheless survive in full force and effect."

{¶ 8} In opposing the motion to stay proceedings, appellants argued that the matter was not subject to arbitration because the contract, which includes the arbitration clause, was canceled and that the claims involve acts that occurred after the contract was canceled, including the alleged wrongful withholding of the deposit

and the alleged filing of a false affidavit for mechanic's lien. Appellants also argued that the arbitration clause was void as against public policy because it includes a loser-pays provision. Finally, appellants claimed appellees waived any right to seek arbitration by filing an affidavit for a mechanic's lien.

{¶ 9} Appellees filed a reply, in which they responded to appellants' arguments, disputed the contract had been canceled in accordance with the contract's cancellation provision, and asserted a release was never executed. Appellees further argued that the arbitration agreement survived any alleged cancellation of the contract, that they did not waive the right to arbitrate by filing a mechanic's lien, and that the loser-pays provision was severable from the contract.

{¶ 10} On January 9, 2020, the trial court granted the motion and stayed the proceedings pending arbitration. The trial court determined "[w]hether the contract was properly canceled is a question of contract interpretation subject to the arbitration clause." The trial court found the fee-shifting provision in the arbitration agreement "is against public policy and unenforceable," severed that provision from the arbitration agreement, and determined the remainder of the arbitration agreement is enforceable. Also, the trial court determined appellees did not waive arbitration by filing a mechanic's lien. Finally, the trial court held all pending motions in abeyance. By separate entry, the trial court specifically held in abeyance appellants' motions to compel production of documents and appellees' motions to quash and for protective order.

{¶ 11} Appellants timely filed this appeal.

Law and Analysis

{¶ 12} Appellants raise three assignments of error for our review. Under the first assignment of error, appellants claim the trial court erred by staying the proceedings pending arbitration because they claim the contract was canceled and appellees' actions were malicious and intentional.

{¶ 13} The Ohio General Assembly has expressed a strong public policy favoring arbitration. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 27. R.C. 2711.01(A) provides that "[a] provision in any written contract * * * to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, * * * shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for revocation of any contract."

{¶ 14} "Ohio law directs trial courts to grant a stay of litigation in favor of arbitration pursuant to a written agreement of the parties, in accordance with R.C. 2711.02(B)." *Taylor* at ¶ 28. R.C. 2711.02(B) instructs as follows:

> 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 under an agreement in writing for arbitration, 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, provided the applicant for the stay is not in default in proceeding with arbitration.

R.C. 2711.02(B) mandates that the court stay the action pending arbitration when the requirements are met.

{¶ 15} R.C. 2711.02(C) authorizes appellate review of an R.C. 2711.02(B) stay order. *Taylor* at ¶ 30. Courts review questions of law, including interpretation and enforceability of an arbitration clause, de novo. *See id*. at ¶ 35-37. However, any factual findings of the trial court should be reviewed with great deference. *Id*. at ¶ 38.

{¶ 16} In this case, there is an agreement in writing for arbitration. Appellants do not dispute that they agreed to the arbitration clause within the contract, and they do not claim that the arbitration clause is procedurally or substantively unconscionable. Rather, they claim that the contract between the parties was canceled.

{¶ 17} The Supreme Court of Ohio has recognized that an arbitration clause is essentially a "contract within a contract" that is not affected by an alleged failure of the contract in which it is contained. *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 41, citing *ABM Farms v. Woods*, 81 Ohio St.3d 498, 501-502, 1998-Ohio-612, 692 N.E.2d 574. Therefore, despite any alleged cancellation of the contract in which the arbitration clause was contained, the arbitration clause remained enforceable. *See* R.C. 2711.01(A).

{¶ 18} Appellants' reliance on *Wisniewski v. Marek Builders, Inc.*, 2017-Ohio-1035, 87 N.E.3d 696 (8th Dist.), is misplaced. In *Wisniewski*, this court recognized that Ohio courts have held that grounds for rescission of a contract will not defeat the enforceability of an arbitration provision within a contract. *Id*. at ¶ 17. However, an arbitration clause can be revoked and canceled where the rescission of

the underlying contract occurs pursuant to Ohio statutory law. *Id*. at ¶ 18. In *Wisniewski*, there was no dispute that a homeowner was not provided notice of the right to cancel a home-improvement contract under the Ohio Home Solicitation Sales Act ("HSSA"). *Id*. at ¶ 9. Because the underlying contract was subject to statutory rescission due to violations of HSSA, the arbitration provision was also found unenforceable. *Id*. at ¶ 20-21. As recognized in *Wisniewski*, "[w]e have consistently held that an arbitration provision may be held unenforceable on grounds that exist at law or in equity for the revocation of any contract." *Id*. at ¶ 18, citing *Hadeen v. Autos Direct Online, Inc.*, 2014-Ohio-4200, 19 N.E.3d 957, ¶ 26 (8th Dist.).

{¶ 19} Unlike *Wisniewski*, in this case appellants have not asserted any grounds for statutory rescission of the contract. Further, the parties herein dispute whether the contract was properly canceled. Generally, when there is a valid arbitration clause, issues regarding the validity of the entire contract or disputes over the cancellation of the contract are for the arbitrator to decide. *Sebold v. Latina Design Build Group, L.L.C.*, 8th Dist. Cuyahoga No. 109362, 2021-Ohio-124, ¶ 38-40.

{¶ 20} The trial court found that the issues involved in this action are referable to arbitration under the parties' written arbitration agreement. Our review of that determination is de novo and without deference to the trial court's decision. *Vining v. Logan Clutch Corp.*, 8th Dist. Cuyahoga No. 108563, 2020-Ohio-675, ¶ 18. "Ohio courts recognize a 'presumption favoring arbitration' that arises 'when the

claim in dispute falls within the scope of the arbitration provision.'" *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 27, quoting *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 700 N.E.2d 859 (1998). When determining whether a claim is within the scope of an arbitration agreement, courts consider whether the action could be maintained without reference to the contract or relationship at issue. *Alexander v. Wells Fargo Fin. Ohio 1, Inc.*, 122 Ohio St.3d 341, 2009-Ohio-2962, 911 N.E.2d 286, ¶ 24-25.

{¶ 21} The parties' contract herein sets forth the methods and procedures for cancelling the contract. We have already determined that disputes over the cancellation of the contract are referable to arbitration in this matter. We proceed to consider whether the other claims in dispute fall within the scope of the arbitration agreement.

{¶ 22} In their complaint, appellants set forth factual allegations regarding the alleged wrongful withholding of their $10,000 deposit and the alleged filing of a false affidavit for mechanic's lien alleging that $30,000 was owed by appellants to Keystate Homes. Appellants argue that their claims of falsification, slander of title, and malicious prosecution are intentional torts that fall outside the scope of the arbitration agreement. Appellants also assert that falsifying a mechanic's lien and filing a fraudulent affidavit with a government entity amounts to intentionally injurious and criminal conduct and that it would be against public policy to submit these matters to the arbitrator.

{¶ 23} Appellants cite *Alexander*, 122 Ohio St.3d 341, 2009-Ohio-2962, 911 N.E.2d 286, at ¶ 24, for the general proposition that if the action cannot be maintained without reference to the contract or the relationship at issue, then it is likely outside the scope of the arbitration provision. As supplemental authority for their argument, appellants cite *Skerlec v. Ganley Chevrolet, Inc.*, 8th Dist. Cuyahoga No. 98247, 2012-Ohio-5748. In *Skerlec*, the plaintiff raised intentional tort claims against his former employer for malicious prosecution, abuse of process, and intentional infliction of emotional distress. *Id*. at ¶ 18. The parties had agreed under a written arbitration agreement to submit any unresolved complaint of "workplace wrongdoing" to arbitration. *Id*. at ¶ 12. This court found the plaintiff's intentional tort claims did not fall within the scope of the arbitration agreement because the plain language of the arbitration provision was limited to "workplace wrongdoing" and the alleged intentional torts had occurred outside of the workplace. *Id*. at ¶ 19.

{¶ 24} The written arbitration agreement in this case is not so limited and is broadly worded. Under the agreement herein, the parties agreed in relevant part to the following:

> 15. Dispute Resolution Binding ARBITRATION-SMALL CLAIMS
>
> Any and all disputes between the parties, including but not limited to a dispute relating to or arising out of any alleged breach of Contract, any alleged breach of a statutory obligation, any claim for damages against the Contractor, any claim of negligence, fraud, breach of express warranty, breach of implied warranty, or any consumer protection act violation, shall be resolved as follows:
>
> A) Any controversy or claim arising out of or relating to this agreement; or the breach thereof, shall be settled by arbitration * * *.

Generally, a broad arbitration provision that "'purports to encompass "all" claims arising from the contract'" creates a presumption that the parties agreed to arbitrate all disputes unless expressly excluded or unless there exists evidence of a purpose to exclude the claim from arbitration. *Wallace v. Ganley Auto Group,* 8th Dist. Cuyahoga No. 95081, 2011-Ohio-2909, ¶ 34, quoting *Burkley v. Speegle,* 11th Dist. Portage No. 2003-P-0113, 2004-Ohio-4388, ¶ 18; *Crawford v. Ribbon Technology Corp.*, 138 Ohio App.3d 326, 333, 741 N.E.2d 214 (10th Dist.2000).

{¶ 25} Furthermore, simply because appellants characterize their claims as intentional torts does not take it outside the scope of the arbitration agreement. The Supreme Court of Ohio has 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.*, [340 F.3d 386 (6th Cir.2003)]." *Alexander*, 122 Ohio St.3d 341, 2009-Ohio-2962, 911 N.E.2d 286, at ¶ 24. In *Fazio,* the court stated as follows: "Even real torts can be covered by arbitration clauses '[i]f the allegations underlying the claims "touch matters" covered by the [agreement].'" *Id.* at 395, quoting *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir.1987).

{¶ 26} Although appellants maintain the alleged actions occurred after the contract allegedly was canceled, we find their claims nonetheless stem from the contract. The parties' contract contains provisions relating to cancellation, failure to perform, default, compensation, retention of the deposit, liquidated damages,

cost of work, a fixed contractor's fee, other fees that may be owed under the contract, and other relevant provisions. The alleged cancellation of the contract, withholding of the deposit, and filing of the affidavit for mechanic's lien all stem from the underlying contract and contractual relationship of the parties.

{¶ 27} Our review reflects that the factual allegations and claims set forth in the complaint are related directly to the contract at issue. Because the causes of action cannot be maintained without reference to the contract or relationship at issue, the claims are within the scope of the arbitration agreement.

{¶ 28} Next, appellants argue that appellees waived any right to seek arbitration by filing the mechanic's lien. In this case, appellees filed their motion to stay proceedings pending arbitration in response to the complaint; they did not delay in seeking arbitration; they did not extensively participate in the litigation; and there was no prejudice to appellants due to any prior inconsistent actions. Appellees maintain that the filing of the mechanic's lien was an action to secure amounts that Andrew Gotlieb believed were owed to Keystate Homes. Considering the totality of circumstances, the trial court acted within its discretion when it determined appellees did not waive their right to arbitrate. *See Craver v. Tomsic*, 5th Dist. Delaware No. 13 CAE 11 0078, 2014-Ohio-2603, ¶ 11, 22-23 (finding a contractor who filed a mechanic's lien and a complaint to preserve a statutory right did not waive his right to arbitrate).

{¶ 29} Upon our review, we find that the requirements pursuant to R.C. 2711.02(B) were satisfied, and we uphold the trial court's decision to stay the

proceedings pending arbitration. Appellants' arguments pertaining to the merits of the action are not properly before us. Appellants' first assignment of error is overruled.

{¶ 30} Under their second and third assignments of error, appellants claim the trial court abused its discretion by holding in abeyance their motions to compel the production of documents that were subpoenaed. We find no merit to their argument.

{¶ 31} "Ohio appellate courts have found that [a] trial court abuses its discretion in granting a motion to stay the proceedings pending arbitration without affording a party a reasonable opportunity to discover and present evidence as to the enforceability of the arbitration clause." *Strader v. Magic Motors of Ohio, Inc.*, 5th Dist. Stark No. 2006CA00376, 2007-Ohio-5358, ¶ 30 (citations omitted). Here, appellants fail to make any showing or argument regarding the relevance of the discovery they seek to compel to the validity and the enforceability of the arbitration provision. Rather, they argue that "Andrew's personnel file and other employment records are reasonably calculated to lead to the discovery of admissible evidence in this matter as it is directed to a former employer of Andrew." They further assert "[t]here is a punitive damages component as the conduct was done intentionally and maliciously" and that "such information will be relevant to the negligent hiring, retention and supervision claim * * *." Because the subpoenas have no relevance to the validity or the enforceability of the arbitration provision, the trial court did not abuse its discretion by holding the motions to compel in abeyance pending

arbitration. Additionally, appellants' arguments pertaining to the merits of the motions are not properly before us for review. The second and third assignments of error are overruled.

{¶ 32} Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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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SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, A.J., and
EILEEN A. GALLAGHER, J., CONCUR