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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1061

Filed: 5 July 2017

Forsyth County, No. 16 CVS 377

JEFF HOLDEN *doing business as* Holden Development and Marketing, Plaintiff,

v.

INFICARE, INC., Defendant.

Appeal by defendant from order entered 20 June 2016 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 4 April 2017.

*Elliot Morgan Parsonage, PLLC, by R. Michael Elliot and Robert M. Elliot, for plaintiff-appellee.*

*Browner Law, PLLC, by Jeremy Todd Browner, for defendant-appellant.*

DAVIS, Judge.

Inficare, Inc. (“Defendant”) appeals from the trial court’s order denying its motion to compel arbitration. On appeal, Defendant argues that the court erred in determining that the claims asserted by Jeff Holden d/b/a Holden Development and Marketing (“Plaintiff”) in his complaint were not subject to arbitration. After careful review, we affirm.

**Factual and Procedural Background**

On 30 April 2013, Plaintiff and Defendant executed a Master Services Agreement (the “Agreement”) to “develop[ ] a website application created and designed by plaintiff.” The Agreement contained the following arbitration clause:

**15 ARBITRATION**

The following shall apply:

- (a) In the event that the parties to this agreement cannot agree on the interpretation of any of the provisions of this agreement then the matter will be determined by arbitration, in accordance with the then-existing arbitration rules in United State [sic] of America. The cost of any arbitration shall be borne in such a manner as the arbitrator may determine.
- (b) In any arbitration proceeding under Clause 15, the rights of the parties shall be determined according to the governing law set forth in Clause 14 above, and the arbitrators shall apply such law.

Clause 14 provided that “[t]his Agreement shall be governed by and interpreted in accordance with the laws of [sic] Commonwealth of Virginia without regard to conflict of law principles irrespective [sic] where parties are located or services are performed.”

On 19 January 2016, Plaintiff filed suit against Defendant in Forsyth County Superior Court alleging that it had (1) breached the Agreement; and (2) engaged in unfair and deceptive trade practices. Defendant filed a Motion to Stay Case and Compel Arbitration on or about 3 March 2016, asserting that Clause 15 of the Agreement required the parties to submit the case to arbitration. On 21 March 2016,

a hearing was held on Defendant's motion before the Honorable Anderson D. Cromer, and on 28 March 2016 the trial court entered an order denying Defendant's motion without prejudice and allowing Defendant 20 days in which to file a responsive pleading.

On 2 May 2016, Defendant filed a Motion to Dismiss, Motion to Stay Case and Compel Arbitration, Answer and Affirmative Defenses. A hearing was held on Defendant's motion on 6 June 2016 before the Honorable Eric C. Morgan. On 20 June 2016, Judge Morgan entered an order containing the following findings of fact and conclusions of law:

### **FINDINGS OF FACT**

#### **With respect to the validity of the contract:**

- (1) As to the arbitration clause contained in the contract between plaintiff and defendant, no meetings of the mind occurred regarding arbitration.
- (2) The arbitration clause does not contain language specifying where arbitration is to occur.
- (3) The arbitration clause omits a valid set of rules, only referencing rules for the "United State of America," which rules do not exist.
- (4) The arbitration clause does not specify a method for selecting an arbitrator.
- (5) The above omissions from the arbitration clause are essential terms for a valid contract to exist.

#### **Alternatively, with respect to the scope of the**

**arbitration clause:**

- (6) The disagreement between the parties does not fall within the scope of the arbitration clause.

**Additionally:**

- (7) Plaintiff has asserted an Unfair and Deceptive Trade Practices Claim, N.C.G.S. §75-16.

**CONCLUSIONS OF LAW**

- (1) There was no meeting of the minds as to the essential terms of the arbitration clause in the contract, therefore that clause is not valid or enforceable as a contract.
- (2) Even if there was a valid arbitration clause, the specific dispute between the parties does not fall within the substantive scope of that agreement.

Based on these findings of fact and conclusions of law, the trial court denied Defendant's motion. On 19 July 2016, Defendant filed a timely notice of appeal of the trial court's 20 June 2016 order.

**Analysis**

**I. Appellate Jurisdiction**

As an initial matter, we must determine whether we possess jurisdiction over this appeal. "[W]hether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation, quotation marks, and brackets omitted). "A final judgment is one which disposes of

the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” *Id.* (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather “directs some further proceeding preliminary to the final decree.” *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

“Generally, there is no right of immediate appeal from interlocutory orders . . . .” *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013) (citation and quotation marks omitted). The prohibition against interlocutory appeals “prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.” *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court’s decision deprives the appellant of a substantial right which would be lost absent immediate review.

*N.C. Dep’t of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

In the present case, the trial court's 20 June 2016 order is not a final judgment, and the order does not contain a certification under Rule 54(b). Therefore, this appeal is proper only if Defendant is able to show the existence of a substantial right that would be lost absent an immediate appeal. *See Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) ("The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order.").

Defendant contends that because the trial court's order denied his motion to compel arbitration, the order affects a substantial right that would otherwise be lost in the absence of an immediate appeal. This Court has held that "the denial of a motion to compel arbitration, although interlocutory, is nevertheless immediately appealable, as it affects a substantial right." *Barnhouse v. Am. Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 508, 566 S.E.2d 130, 131 (2002) (citation omitted). Thus, we possess jurisdiction over this appeal.

## **II. Denial of Motion to Compel Arbitration**

Defendant's sole argument on appeal is that the trial court erred by denying its motion to stay all proceedings and compel arbitration. As an initial matter, the parties disagree as to whether the arbitration clause in the Agreement is enforceable. Plaintiff contends that the clause is unenforceable because (1) it fails to identify a valid set of rules setting out the manner in which arbitration between the parties

would be conducted; and (2) the clause contains no procedure for selecting an arbitrator. However, even assuming — without deciding — that the clause is enforceable, Defendant’s appeal lacks merit because, as explained below, Plaintiff’s claims do not fall within the scope of the arbitration clause.

In interpreting and applying the arbitration clause contained in the Agreement, we must first determine which state’s substantive law applies. “Under North Carolina choice of law rules, we apply the substantive law of the state where the cause of action accrued and the procedural rules of North Carolina.” *Stokes v. Wilson and Redding Law Firm*, 72 N.C. App. 107, 112-13, 323 S.E.2d 470, 475 (1984), *disc. review denied*, 313 N.C. 612, 332 S.E.2d 83 (1985).

“[A] choice of law provision . . . names a particular state and provides that the substantive laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of any conflicts between the laws of the named state and the state in which the case is litigated.” *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 92, 414 S.E.2d 30, 33 (1992) (citation omitted). “We have previously held that the parties’ choice of law is generally binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental public policy of the state or otherwise applicable law.” *Sawyer v. Mkt. Am., Inc.*, 190 N.C. App. 791, 794, 661 S.E.2d 750, 752 (citation and quotation marks omitted), *disc. review denied*, 362 N.C. 682, 670 S.E.2d 235 (2008).

In the present case, the Agreement contained a choice of law clause, which stated that “[t]his Agreement shall be governed by and interpreted in accordance with the laws of [sic] Commonwealth of Virginia without regard to conflict of law principles irrespective [sic] where parties are located or services are performed.” Thus, Virginia’s substantive law applies to the Agreement, including the arbitration clause contained therein.

Under Virginia law, “[a] party cannot be compelled to submit to arbitration unless he has first agreed to arbitrate. By the same token, he cannot be compelled to arbitrate a question which, under his agreement, is not arbitrable. And the resisting party is entitled to a pre-submission judicial determination of arbitrability.” *Doyle & Russell, Inc. v. Roanoke Hosp. Ass’n*, 213 Va. 489, 494, 193 S.E.2d 662, 666 (1973) (citations omitted).

“The question [of] whether a party agreed to arbitrate a particular dispute is an issue for judicial determination to be decided as a matter of contract. In making this determination, the courts should apply ordinary state-law principles that govern the formation of contracts.” *Amchem Prods., Inc. v. Asbestos Cases Plaintiffs*, 264 Va. 89, 97, 563 S.E.2d 739, 743 (2002) (internal citations and quotation marks omitted).

Contracts are construed as written, without adding terms that were not included by the parties. Where the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning. A contract is not ambiguous merely because the parties disagree as to the meaning of the terms used. Furthermore, contracts must



be considered as a whole without giving emphasis to isolated terms. Finally, no word or clause in a contract will be treated as meaningless if a reasonable meaning can be given to it, and parties are presumed not to have included needless words in the contract.

*TM Delmarva Power v. NCP of Va.*, 263 Va. 116, 119, 557 S.E.2d 199, 200 (2002)

(internal citations and quotation marks omitted).

In the present case, the scope of the parties' agreement to arbitrate disputes between them is set out in subsection (a) of the arbitration clause, which states, in pertinent part, that “[i]n the event that the parties to this agreement cannot agree on the interpretation of any of the provisions of this agreement then the matter will be determined by arbitration, in accordance with the then-existing arbitration rules in United State [sic] of America.” (Emphasis added.) This language is restrictive in that it limits the class of disputes that will be submitted to arbitration to only those involving a disagreement between the parties regarding the interpretation of the terms of the Agreement.

Defendant argues that Plaintiff's claims for breach of contract and unfair and deceptive trade practices fall under the provisions of this clause. We disagree.

Plaintiff's complaint alleges that Defendant failed to complete its performance under the contract within the applicable deadline, misrepresented to Plaintiff that the delay in performance was caused by the removal of a project manager due to illness, assigned a new project manager who was not competent to fulfill the project's

requirements, induced Plaintiff to make additional payments, and ultimately failed to complete the project at all. Based on these facts, Plaintiff alleges that Defendant (1) breached the Agreement; and (2) engaged in unfair and deceptive trade practices.

Defendant has failed to identify any specific provision in the Agreement directly implicated by Plaintiff's claims as to which a dispute exists regarding its prior interpretation. Instead, Defendant merely relies on conclusory assertions in its answer that "the agreement that exists between the parties . . . is one in which the parties disagree in interpretation." Under Defendant's argument, presumably *any* claim asserted by Plaintiff relating in any way to its contract with Defendant would constitute a dispute as to the proper interpretation of the Agreement, thereby triggering the operation of the arbitration clause. Such an argument is supported by neither law nor logic. *See Doyle & Russell*, 213 Va. at 494, 193 S.E.2d at 666 (holding that dispute was outside scope of arbitration clause). Accordingly, the trial court did not err in denying Defendant's motion to compel arbitration.

### **Conclusion**

For the reasons stated above, we affirm the trial court's 20 June 2016 order.

**AFFIRMED.**

Judges BRYANT and STROUD concur.

Report per Rule 30(e).