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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-941

Filed 15 August 2023

Guilford County, No. 19 CVS 5691

LORI D. MCLAUGHLIN, Plaintiff,

v.

ROYAL HOMES REALTY OF NC, LLC, Defendant.

Appeal by Defendant from an order entered 13 April 2022 by Judge A. Hanford in Guilford County Superior Court. Heard in the Court of Appeals 7 March 2023.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Kasi W. Robinson and H. Arthur Bolick, II, for Defendant-Appellant.

Satterfield Law, PLLC, by Daron D. Satterfield, for Plaintiff-Appellee.

WOOD, Judge.

Royal Homes Realty of North Carolina, LLC (“Defendant”) appeals from the trial court’s order denying its motion for summary judgment. For the reasons stated below, we affirm the trial court’s order.

I. Factual and Procedural Background

On 14 February 2017, Lori McLaughlin (“Plaintiff”) entered into a contract with Royal Homes of North Carolina, LLC (“Royal Homes Construction”) to purchase

a single-family residence in Whitsett, North Carolina. Royal Homes Construction, a limited liability company formed under the laws of North Carolina “is a licensed general contractor that builds and sells residential dwellings.” On 21 July 2017, Plaintiff purchased her home from Royal Homes Construction. Defendant, serving as the “licensed real estate brokerage firm that acts as the seller’s agent for Royal Homes Construction,” sold the home to Plaintiff.

Plaintiff’s purchase of her home from Royal Homes Construction included a builder’s warranty agreement between the two parties. The builder’s warranty agreement provided that all claims between Plaintiff and Royal Homes Construction were to be submitted first to a claims conciliation process for the parties to meet and present evidence to a neutral party conciliator. If the dispute cannot be resolved by the conciliation process, the matter then is submitted to a claims review group. If the previous mechanisms fail to resolve the dispute between the parties, the parties’ dispute is then submitted to an arbitration proceeding. The builder’s warranty agreement provided that the arbitrator’s decision “shall be final and binding on all parties and may be entered as a judgment in any State or Federal court of competent jurisdiction.” Defendant was not a party to the builder’s warranty agreement.

On 15 May 2019, Plaintiff filed a verified civil complaint in Guilford County Superior Court against Defendant and Royal Homes Construction. In her complaint, Plaintiff alleged that since buying and moving into her home, she had utilized the services of several home inspectors in July 2018 and January 2019 due to Royal

Homes Construction's poor workmanship and several home construction deficiencies. Among these construction deficiencies, Plaintiff alleged that Royal Homes Construction: (1) "failed to install a moisture barrier behind the plastic framing around the garage door" so that the "wood framing around the garage door would need to be replaced in the near future because of this omission"; (2) Royal Homes Construction or its agents "punctured a water line by placing a screw in the wall in which the water line was placed"; and (3) Royal Homes Construction's installation of an irrigation system in Plaintiff's yard "failed to meet the minimum codes set by the North Carolina Irrigation Board" such that an "inspection revealed a minimum of seven violations of rules."

According to Plaintiff, an inspection on 23 January 2019 revealed several deficiencies in the home's roof. Plaintiff's complaint alleged that Defendant and Royal Homes Construction "were aware that the roof was installed in a deficient manner" and "were obligated to disclose the deficiencies to Plaintiff but failed to do so." Additionally, Plaintiff alleged that Royal Homes Construction and Defendant did not disclose to Plaintiff repairs or modifications that were made to the home's roof truss system. According to Plaintiff, both Royal Homes Construction and Defendant possessed a duty to disclose these modifications and repairs to her "prior to the sale of the [h]ome" or alternatively, "must provide a letter from an engineer approving any repair to the roof trusses" because the letter is required for future sales of the home.

In her complaint, Plaintiff asserted claims of (1) breach of implied warranty,

(2) fraud, and (3) negligent misrepresentation against Defendant and Royal Homes Construction. As to the fraud claim, Plaintiff alleged that both Defendant and Royal Homes Construction “had a duty to disclose facts material to the sale of the [h]ome,” including disclosing “at a minimum, the damage to the pre-engineered roof systems” as well as a duty “to obtain approval from a structural engineer as to any purported repairs, and to provide a letter of approval from the engineer” to Plaintiff, but failed to meet these duties. In fact, Plaintiff alleged that both Defendant and Royal Homes Construction “took affirmative steps to conceal the actual facts from Plaintiff,” intended to deceive Plaintiff, and “intended that Plaintiff act upon the concealment.”

As to the negligent misrepresentation claim, Plaintiff alleged that Robert Woodard, an agent of both Defendant and Royal Homes Construction, did not inform her of the “alterations of the truss system and other material defects, and by his omission, made the equivalent of a representation that the home was built in accordance with the plans and specifications, and in accordance with all regulations and codes.” Because of Mr. Woodard’s failure to exercise reasonable care or competence in communicating to Plaintiff, she detrimentally relied upon the limited information Defendant and Royal Homes Construction chose to provide.

On 22 July 2019, Defendant and Royal Homes Construction filed a Motion to Stay and Compel Arbitration and an Answer. The motion stated that Plaintiff and Royal Homes Construction “entered into a builder’s warranty agreement related to the construction of Plaintiff’s home” and that pursuant to the terms of the warranty

agreement, it subjects all claims between the two parties to arbitration. Thus, Defendant and Royal Homes Construction moved the trial court “to compel arbitration and to stay this matter pending the outcome of that arbitration.”

On 12 November 2019, the trial court entered an order compelling arbitration of all Plaintiff’s claims against Royal Homes Construction in accordance with the arbitration clause in the builder’s warranty agreement between the two parties. However, the trial court denied Defendant’s motion to compel arbitration and noted that “[n]otwithstanding the foregoing, nothing in this Order shall prevent Plaintiff and Defendant Royal Homes Realty from entering into an agreement to arbitrate the disputes between them.” Nonetheless, the trial court granted Defendant and Royal Homes Construction’s joint motion to stay the civil proceeding, pending the outcome of arbitration between Plaintiff and Royal Homes Construction.

Thereafter, Royal Homes Construction and Plaintiff began the process of arbitration by entering into a pre-arbitration agreement on 16 March 2020. In this agreement, the parties agreed to an Arbitrator, deadlines for discovery, and scheduled the dates of the evidentiary hearing. The evidentiary hearing before the Arbitrator was repeatedly postponed, due to the coronavirus pandemic and once “because of [Plaintiff’s] failure to cooperate with the discovery process and continued concerns about the coronavirus.” An evidentiary hearing was scheduled for 3 February 2021, which Plaintiff sought to continue by filing a motion for continuance on 26 January 2021. The motion was denied by the trial court on 28 January 2021.

Additionally, Plaintiff filed a motion to stay arbitration and reinstate the civil complaint on 1 February 2021, which was also denied.

On 2 February 2021, Plaintiff sent an email to the Arbitrator and counsel for Royal Homes Construction informing them that she would not participate in the hearing scheduled for the next day. After calling Plaintiff and leaving a voicemail advising her that the evidentiary hearing would proceed as scheduled, the Arbitrator moved forward with the evidentiary hearing on 3 February 2021 in Plaintiff's absence.

The Arbitrator found that Plaintiff did not attend the evidentiary hearing and offered no proof in support of her claims. Additionally, the Arbitrator found:

[t]here are some items with the [Plaintiff's] House that should be repaired. Under the warranty provided, [Royal Homes Construction] has the option of repairing, replacing, or paying [Plaintiff] for any defective item. For more than two years, [Royal Homes Construction] has been ready willing and able to make repairs, but [Plaintiff] has refused to allow [Royal Homes Construction] to make repairs. The repairs in question are not complex or expensive and can likely be completed in less than two days.

The Arbitrator found that Plaintiff "breached the Warranty by refusing to provide [Royal Homes Construction] with an opportunity to make repairs" such that Plaintiff "is not entitled to recover anything." The arbitration award ordered: "[Plaintiff] shall recover nothing, and her claims are dismissed with prejudice." The arbitration award also stated that it "is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied."

Following arbitration, Plaintiff moved to vacate the arbitration award and Royal Homes Construction moved to confirm the arbitration award. On 1 June 2021, the trial court entered an amended order and Entry of Judgment denying Plaintiff's motion to vacate, denying Plaintiff's Motion to Stay Arbitration and Reinstate Civil Complaint, granting Royal Homes Construction's Motion to Confirm, and entering the arbitration award as a judgment between Plaintiff and Royal Homes Construction.

On 19 November 2021, Plaintiff filed an amended complaint against Defendant. Plaintiff's amended complaint asserted claims of (1) fraud, (2) negligent misrepresentation, and (3) a claim under the Unfair and Deceptive Trade Practices Act ("UDTPA"). Under the claim for fraud, Plaintiff alleged that Defendant "had a duty to disclose facts material to the sale of the Home," such as the damage to the pre-engineered roof systems and had a duty to obtain approval and a letter of approval from a structural engineer as to any purported repairs but took "affirmative steps to conceal the actual [and material] facts from Plaintiff." Under the claim for negligent misrepresentation, Plaintiff alleged Defendant had a duty to exercise reasonable care in communicating the information to her that Defendant knew upon which she would rely or should have known Plaintiff would rely upon; failed to inform her of the alterations to the truss systems and other material defects; and by its omission, "made the equivalent of a representation that the Home was built in accordance with the plans and specifications, and in accordance with all regulations

and codes.”

Under the claim of UDTPA, Plaintiff alleged Defendant, in its ordinary course of business has “engaged in acts or practices affecting commerce” considered to be unfair by “knowingly selling new construction homes without the necessary oversight by any licensed person to prevent building code violations.” Further, Plaintiff alleged Defendant has failed to disclose that Royal Homes of North Carolina: (1) “utilizes subcontractors who are unfamiliar with the North Carolina Building Code, North Carolina Irrigation Code, and various product manufacturer’s code”; (2) “makes repairs and modifications to engineered roof truss systems without any physical inspection by a ‘structural engineer’ [to confirm] that the truss repair was made correctly or in accordance with safety standards”; and (3) falsely advertises that the company’s owner “personally supervise[s] the construction of each and every home.” Plaintiff also contended Defendant “has failed to disclose the repairs and modifications to engineered roof truss systems to the home buyers prior to selling the homes.”

Defendant filed an answer on 18 January 2022, asserting that Plaintiff was barred from bringing claims of implied warranty, fraud, and negligent misrepresentation against Defendant under the doctrine of collateral estoppel because all of her “claims against Royal Homes were resolved through arbitration” and following the arbitration hearing, “the arbitrator dismissed [her] claims against Royal Homes [Construction], with prejudice.” Defendant further alleged that because

Plaintiff failed to allow Royal Homes Construction an opportunity to correct any deficiencies in her home, Plaintiff has waived any claims against Defendant. On 3 March 2022, Defendant moved for summary judgment based on its affirmative defense of collateral estoppel. A hearing took place on 24 March 2022, and the trial court denied Defendant's Motion for Summary Judgment by an order entered 13 April 2022. Defendant filed timely notice of appeal on 21 April 2022.

II. Discussion

A. Appellate Jurisdiction

Although the trial court's order denying Defendant's motion for summary judgment is interlocutory, we view the doctrine of collateral estoppel, which "is designed to prevent repetitious lawsuits," as affecting a substantial right because "parties have a substantial right to avoid litigating issues that have already been determined by a final judgment." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). Specifically in *Hillsboro Partners, LLC v. City of Fayetteville*, this Court held that "the trial court's order denying defendant's motion for summary judgment on the ground of collateral estoppel affects a substantial right and is properly before this Court." 226 N.C. App. 30, 35, 738 S.E.2d 819, 823 (2013). Therefore, we review the merits of this case.

B. Collateral Estoppel

In its sole argument on appeal, Defendant argues the trial court erred in denying its motion for summary judgment because the underlying issues in Plaintiff's

claims were decided by a separate binding arbitration determination of claims brought by Plaintiff against Royal Homes Construction. Thus, Defendant contends the doctrine of collateral estoppel precludes Plaintiff's present claims.

On appellate review, this Court reviews a trial court's summary judgment order *de novo* as we consider "the matter anew and freely substitute[] [our] own judgment for that of the lower tribunal." *Hailey v. Tropic Leisure Corp.*, 275 N.C. App. 485, 491, 854 S.E.2d 132, 138 (2020) (citation omitted). Summary judgment is appropriate if:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact must be drawn against the movant and in favor of the party opposing the motion.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (cleaned up). Whether a suit is barred by collateral estoppel is also a question of law that is reviewed *de novo*. See *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (2008).

Collateral estoppel, also known as "issue preclusion," "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *State v. Summers*, 351 N.C. 620, 622-23, 528 S.E.2d 17, 20 (2000) (citation omitted). Thus, "the determination of an

issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.” *Whitacre P’ship v. BioSignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citations omitted). In short, collateral estoppel “precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim.” *Id.*, at 15, 591 S.E.2d at 880 (citation omitted). The preclusive effect of collateral estoppel “is not limited to court proceedings; it arises in the same manner from arbitration awards.” *Whitlock v. Triangle Grading Contractors Dev., Inc.*, 205 N.C. App. 444, 448, 696 S.E.2d 543, 546 (2010) (citations omitted).

Collateral estoppel applies when the following requirements are met:

(1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Beckwith v. Llewellyn, 326 N.C. 569, 574, 391 S.E.2d 189, 191 (1990) (citation omitted). A “judgment in [a] prior action operates as an estoppel only as to those matters in issue or points controverted.” *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 427, 349 S.E.2d 552, 556 (1986) (citation omitted). Therefore, a “very close examination of matters actually litigated must be made in order to determine if

the underlying issues are in fact identical. If they are not identical, then the doctrine of collateral estoppel does not apply.” *Beckwith*, 326 N.C. at 574, 391 S.E.2d at 191.

First, Defendant argues Plaintiff’s current claims raise the same issues as those previously raised against Royal Homes Construction and decided in the 3 February 2021 arbitration award. Defendant argues that the issues in this present case are identical to those issues decided during arbitration “despite the two separate defendant entities” because “[c]entral to this understanding is the reality that, while Royal Homes Construction and [Defendant] are separate entities, they are related entities that are only capable of acting through their agents and, in this case, the agents acting on behalf of each entity were the same.” Specifically, Defendant contends that “the same individuals alleged to have engaged in the same conduct on behalf of [Royal Homes Construction] provide the same basis for Plaintiff’s current claims” against them.

Defendant further points to the fact that it served as the seller’s agent, that is Royal Homes Construction’s real estate agent, and acted on behalf of Royal Homes Construction when it conducted the sale of Plaintiff’s home. While we agree that both Defendant and Royal Homes Construction utilize common agents, such as member manager, Robert Woodard, and sales manager, Kim Davis, we hold the issues in Plaintiff’s instant action are not the same as those involved in the prior arbitration hearing and award. As such, Defendant cannot satisfy the first requirement of collateral estoppel.

The record evidence tends to show Plaintiff's original complaint before the trial court asserted claims of (1) breach of implied warranty; (2) fraud; and (3) negligent misrepresentation against both Defendant and Royal Homes Construction. However, when the trial court ordered that Plaintiff and Royal Homes Construction, pursuant to their builder's warranty agreement, participate in arbitration, Plaintiff brought these initial claims solely against Royal Homes Construction. In fact, the trial court explicitly denied the motion to compel arbitration as to Defendant. The trial court recognized, and the record evidence shows, that Plaintiff and Defendant were never parties to a valid agreement to arbitrate.

Hence, the issues litigated and determined at arbitration were whether Royal Homes Construction had committed breach of implied warranty, fraud, and negligent misrepresentation in its conduct with Plaintiff. The arbitration proceedings were centered around Royal Homes Construction's liability regarding the alleged construction defects of Plaintiff's home and its failure to disclose those defects to Plaintiff. Defendant's alleged duties to Plaintiff or actions were neither addressed nor litigated during arbitration.

Although Defendant had the ability to voluntarily enter into arbitration with Plaintiff, neither party chose to do so. Thus, Defendant was not a party to the arbitration hearing between Plaintiff and Royal Homes Construction. Because Defendant was not a party to the arbitration, Plaintiff's claims which were submitted for arbitration were not directed at Defendant. During the arbitration proceedings,

Plaintiff did not allege that Defendant had committed breach of implied warranty, fraud, and negligent misrepresentation in its conduct with Plaintiff.

Further, Plaintiff's amended complaint alleges issues of fraud and negligent misrepresentation, and these issues are not identical to those previously contested during the arbitration proceedings. *Id.* Instead, Plaintiff's amended complaint contends Defendant, in its capacity as a licensed real estate broker, failed to disclose material facts which would have affected Plaintiff's decision to purchase the subject property. Plaintiff argued three separate issues specific to Defendant: (1) Defendant committed fraud by failing in its duty as a realtor to "disclose facts material to the sale of the Home," and took "affirmative steps to conceal the actual facts from Plaintiff"; (2) Defendant engaged in negligent misrepresentation by failing to inform Plaintiff of the repairs that were made to the home or the material defects of the home, and by its omission, "made the equivalent of a representation that the Home was built in accordance with the plans and specifications, and in accordance with all regulations and codes"; and (3) Defendant violated the UDTPA by engaging "in acts or practices affecting commerce" considered to be unfair by "knowingly selling new construction homes without the necessary oversight by any licensed person to prevent building code violations" and "failed to disclose the repairs and modifications to engineered roof truss systems to the home buyers prior to selling the homes."

While Royal Homes Construction and Defendant share common agents, these agents have different obligations, rules, and duties imposed upon them, depending

upon the organization they are representing at the time. A real estate agent's duty to disclose are separate and distinct from that of a contractor's duty. Because a real estate "broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information," the underlying issues of Plaintiff's amended complaint allege that Defendant, and not Royal Homes Construction, violated this duty. *Cummings v. Carroll*, 379 N.C. 347, 363, 866 S.E.2d 675, 688 (2021) (citation omitted). While the arbitration proceeding and the present case may share a common nucleus of operative facts, each case presents separate and distinct issues that flow from those facts.

Additionally, the 3 February 2021 arbitration award gives no indication that the Arbitrator considered Defendant's nondisclosure of material facts to Plaintiff when making the arbitration award. In fact, at no point during arbitration did the parties litigate Defendant's "failure to disclose material facts to Plaintiff prior to the consummation of the purchase of the subject property." Thus, the "issues to be concluded are not the same as those involved in the prior action and the issues in question are not identical to the issues actually litigated in the prior action." *Beckwith*, 326 N.C. at 575, 391 S.E.2d at 192 (cleaned up).

III. Conclusion

For the foregoing reasons, we affirm the trial court's denial of Defendant's motion for summary judgment.

AFFIRMED.

MCLAUGHLIN V. ROYAL HOMES REALTY OF NC, LLC

Opinion of the Court

Judges ZACHARY and CARPENTER concur.

Report per Rule 30(e).