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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-388

Filed 3 December 2024

Cumberland County, No. 20CVS4465

BRAGG COMMUNITIES, LLC, a Delaware Limited Liability Company, Plaintiff,

v.

JOHNSON BRICK CONTRACTORS, INC., WENDELL SIDING COMPANY, INC.,  
and ZAMARRIPA BROTHERS FRAMING, INC., Defendants.

Appeal by plaintiff from orders entered 4 October 2023 and 5 October 2023 by  
Judge Stephan R. Futrell in Cumberland County Superior Court. Heard in the Court  
of Appeals 23 October 2024.

*Poyner Spruill LLP, by Andrew H. Erteschik, Thomas H. Davis, Jr., Benjamin  
T. Buskirk, and Stephanie L. Gumm, for plaintiff-appellant.*

*Ragsdale Liggett PLLC, by Amie C. Sivon, William W. Pollock, and Michael J.  
Hutcherson, and Brown, Crump, Vanore & Tierney, LLP, by O. Craig Tierney,  
Jr., for defendants-appellees Wendell Siding Company, Inc.*

GORE, Judge.

In this case, plaintiff Bragg Communities, LLC (“Bragg Communities”) entered  
into a construction contract with Picerne Construction/FBG, LLC (“Picerne”) to  
renovate military housing at Fort Bragg, North Carolina. Picerne hired

subcontractors, including defendants Wendell Siding Company (“Wendell Siding”), Johnson Brick Contractors, and Zamarripa Brothers Framing. Picerne and Wendell Siding entered into a Master Subcontract Agreement on 11 August 2006, outlining Wendell Siding’s liability for performance and defining a “claim” as any demand by the subcontractor for adjustment or payment. The agreement provided for disputes to be resolved through non-binding mediation or binding arbitration if mediation failed.

The contract with Johnson Brick contained the same arbitration provisions as Wendell Siding, while the contract with Zamarripa Brothers had a slightly different arbitration clause. The Wendell Siding contract also specified that the agreement was enforceable under North Carolina arbitration law.

Ultimately, through a series of assignments and mergers, Bragg Communities was assigned and assumed all of Picerne’s rights, obligations, and interests in the subcontracts. After the assignment, Bragg Communities alleges it discovered each defendant subcontractor had, in various ways, materially breached its respective subcontract.

Bragg Communities filed a complaint on 24 August 2020, alleging defects in the work performed by Wendell Siding, Johnson Brick, and Zamarripa Brothers, leading to water intrusion at the project. Bragg Communities sought arbitration based on the subcontract provisions. Wendell Siding moved to dismiss, arguing that the arbitration clause only applied when the subcontractor was dissatisfied with a

claim. The initial hearing on arbitration and dismissal was held on 25 October 2021, with both Wendell Siding and Zamarripa Brothers opposing arbitration. The trial court denied Bragg Communities' motion to refer to arbitration on 20 November 2021 without issuing findings of fact or conclusions of law.

Bragg Communities appealed, and the matter was remanded on 11 August 2022 for further findings. On remand, Bragg Communities filed a Motion for Reconsideration, citing Zamarripa Brothers' change of position to consent to arbitration. On 25 August 2023, Bragg Communities filed an amended motion, arguing for the first time that arbitrability should be decided by an arbitrator, not the court. After a hearing on 8 September 2023, the trial court again denied Bragg Communities' motions and entered an Order with specific findings of fact and conclusions of law. Bragg Communities appealed the Order on the motion to refer to arbitration entered upon remand and the Order denying the amended motion for reconsideration.

The right to arbitration is a substantial right that can be lost if not promptly reviewed, making an order denying arbitration immediately appealable. *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118 (1999). This appeal is properly before us.

Plaintiff Bragg Communities raises three issues for review: (1) whether the trial court erred by deciding the issue of arbitrability rather than referring the case to the arbitrator; (2) whether the trial court erred in concluding that Bragg

Communities' claims against Wendell Siding are not arbitrable; and (3) whether the trial court erred by denying Bragg Communities' arbitration motion as to Johnson Brick. Upon review, we affirm.

Plaintiff argues the trial court erred by deciding the issue of arbitrability rather than referring this case to the arbitrator to decide. We disagree. "The question of whether a dispute is subject to arbitration is an issue for judicial determination." *Raspet v. Buck*, 147 N.C. App. 133, 136 (2001) (citing *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986)).

Next, plaintiff argues the trial court erred in concluding that its claims against Wendell Siding are not arbitrable. We disagree. "[T]he first question in any arbitration dispute must be: What have these parties agreed to?" *Coinbase, Inc. v. Suski*, 144 S. Ct. 1186, 1192 (2024). "[T]he party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes." *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271–72 (1992) (citation omitted). Here, the trial court found as fact:

6. Paragraph 7.5 of the Subcontract between Picerne and Wendell contains the dispute resolution process agreed to between Picerne and Wendell. Paragraph 7.5 of the Subcontract states that "If SUBCONTRACTOR is not satisfied with the decision on a Claim," then the dispute shall be settled following specific procedures.

...

8. Paragraph 7.5.2 of the Wendell Subcontract states that "If SUBCONTRACTOR is not satisfied with the

*Opinion of the Court*

CONTRACTOR's decision on a Claim, . . . the dispute shall be settled pursuant to binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association."

"The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Sciolino v. TD Waterhouse Inv. Servs., Inc.*, 149 N.C. App. 642, 645 (2002).

The trial court concluded as a matter of law:

3. Here, Picerne and each Subcontractor have a valid arbitration agreement wherein they agreed to arbitrate certain claims.
4. However, Picerne and Wendell did not agree to arbitrate all claims.
5. Specifically, Picerne and Wendell agreed to arbitrate any dispute in which "SUBCONTRACTOR is not satisfied with the CONTRACTOR's decision on a Claim."
6. Nowhere in the Subcontract did Picerne and Wendell agree to arbitrate a claim that Picerne had against Wendell.
7. The Subcontract between Picerne and Wendell does not require any claims that Picerne has against Wendell to be arbitrated, and the claims asserted against Wendell in the Complaint are outside the scope of the agreement to arbitrate.
8. Assuming, but not deciding, Bragg Communities has been assigned and assumed all of the rights of Picerne under the Subcontract such that it could enforce the arbitration provision in the Subcontract, the claims that Bragg Communities asserts in this lawsuit against Wendell are not within the scope of the arbitration

agreement in the Subcontract.

The trial court's conclusion that the type of claims at issue do not fall within the scope of the parties' agreement is supported by the findings of fact. Those findings are in turn supported by competent evidence in the record. Thus, the trial court did not err in determining that plaintiff's claims against defendant Wendell Siding are not arbitrable.

In addition to seeking an order staying the case against Wendell Siding and referring it to arbitration, plaintiff also sought that relief as to Johnson Brick. Johnson Brick did not, however, make an appearance in this proceeding, and thus, did not oppose plaintiff's arbitration motions. Plaintiff argues N.C.G.S. § 1-569.7(a)(1) requires the trial court to grant Bragg Communities' motion with respect to Johnson Brick. We disagree.

"If the court finds that there is no enforceable agreement to arbitrate, it shall not, pursuant to subsection (a) or (b) of this section, order the parties to arbitrate." N.C.G.S. § 1-569.7(c) (2023). Here, defendant Johnson Brick had virtually the same arbitration terms as Wendell Siding in the contract with Picerne. Based on the plain language of the contract, Bragg Communities' claims against Wendell Siding and Johnson Brick are not subject to arbitration. Thus, the trial court correctly denied plaintiff's motion to refer the matter to arbitration and motion for reconsideration as to both defendants.

BRAGG CMTYS., LLC v. JOHNSON BRICK CONTRACTORS, INC.

*Opinion of the Court*

AFFIRMED.

Judges STADING and THOMPSON concur.

Report per Rule 30(e).