IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

THE SHAKESPEARE FOUNDATION, INC., and THE HERD COMMUNITY DEVELOPMENT CORPORATION,

Appellants,

v.

GEORGE JACKSON, KERRY JACKSON, and JACKSON REALTY TEAM, INC., a Florida corporation,

Appellees.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D10-1049

Opinion filed May 9, 2011.

An appeal from the Circuit Court for Bay County.
Michael C. Overstreet, Judge.

Leonard E. Ireland, Jr. of Clayton-Johnston, P.A., Gainesville, for Appellants.

Jean Marie Downing of Downing Law Offices, P.A., Panama City Beach, for Appellees.

THOMAS, J.

In this appeal we consider whether the terms of a real estate contract required Appellants to arbitrate their tort claim. The trial court below determined the contract's arbitration clause required arbitration, and dismissed the complaint.

We reverse, finding that Appellants' claim was not significantly related to the contract; thus, the contract's arbitration clause did not govern the dispute. We further hold that opinions applying the Federal Arbitration Act do not control, because the transaction at issue here does not affect interstate commerce.

FACTS

The parties' contract was for real property owned by Appellees. Appellees advertised the property in the local Multiple Listing Service, and included the following sentence: "Wetlands study verifies No Wetlands." Appellants agreed to the price of $253,000 for the property, and signed a uniform real estate contract.

The contract included the following provision:

> **14. DISPUTE RESOLUTION:** This Contract will be construed under Florida law. All controversies, claims, and other matters in question arising out of or relating to this transaction or this Contract or its breach will be settled as follows:
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> . . .
>
> **(b) All other disputes: Buyer and Seller** will have 30 days from the date a dispute arises between them to attempt to resolve the matter through mediation, failing which the parties will resolve the dispute through neutral binding arbitration in the county where the Property is located. The arbitrator may not alter the Contract terms or award any remedy not provided for in this Contract. . . . This clause will survive closing.

(Some emphasis in original.) After closing, Appellants visited the property and became concerned that it contained wetlands. A new wetlands study ordered by Appellants revealed that wetlands covered approximately 26% of the property.

Appellants filed a complaint in March 2009, alleging the decision to buy the property was based on the advertisement, and they would not have purchased the land had they known 26% of the property was wetlands. Appellants asserted the advertisement was knowingly false when made, because before posting their advertisement Appellees possessed a study which indicated that 25% of the property was wetlands. Appellants alleged they missed a favorable housing market due to the wetlands and suffered more than $15,000 in damages because of Appellees' fraudulent misrepresentation.

Appellees moved to dismiss the complaint, arguing the above-quoted contract language required arbitration. The trial court granted Appellees' motion to dismiss, finding that the contract was the subject matter of the litigation, and the contract mandated arbitration.

ANALYSIS

Arbitration Not Compelled By The Contract

Because the trial court's dismissal is based upon the court's construction of a contract, review is *de novo*. See Auchter Co. v. Zagloul, 949 So. 2d 1189, 1191 (Fla. 1st DCA 2007). When ruling on a motion to dismiss, the trial court may look no further than the four corners of the complaint, and all allegations in the complaint must be accepted as true." Nevitt v. Bonomo, 53 So. 3d 1078, 1081 (Fla. 1st DCA 2010).

Florida public policy generally favors arbitration, and all doubts regarding the scope of an arbitration clause should be resolved in favor of arbitration, when practicable. Maguire v. King, 917 So. 2d 263, 266 (Fla. 5th DCA 2005); Auchter, 949 So. 2d at 1195 ("[A]rbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies out of court."). The natural corollary to the general rule is that the parties' intent controls which claims are arbitrable; parties cannot be forced to submit a dispute to arbitration that they have not agreed to arbitrate. See Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). When balancing these principles and determining whether to grant a motion to compel arbitration under either federal or state law, courts consider three elements: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Id.

The issue here, Appellant's fraud claim, primarily concerns the second prong. Following the Florida Supreme Court's analysis in Seifert, we begin by examining wording of the arbitration clause. Id. at 636-37.

The Seifert court differentiated between narrow and broad arbitration provisions. Id. Narrow arbitration clauses are those that require disputes "arising out of" or "under" a contract to arbitration. Id. When a narrow arbitration clause is present, arbitration is limited to those claims that have a direct relationship to the

contract's terms or provisions, or directly relate to contract interpretation or performance. Id. Broad arbitration provisions are those that require claims "arising out of or relating to" a contract to be arbitrated. Id. "The test for determining arbitrability of a particular claim under a broad arbitration provision is whether a 'significant relationship' exists between the claim and the agreement containing the arbitration clause, regardless of the label attached to the legal dispute." Id. at 637-38 (quoting Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93-94 (4th Cir. 1996)).

Based on the court's instruction in Seifert, we hold the arbitration provision in this case is broad because, according to the contract, it requires "[a]ll controversies, claims, and other matters in question **arising out of or relating** to this transaction or this Contract or its breach" to be arbitrated. Next, we must determine whether Appellants' fraud claim has a significant relationship to the real estate contract.

This "contractual nexus" question is not answered in the affirmative simply because the dispute would not have arisen but for the contractual relationship. See Seifert, 750 So. 2d at 638. Appellants and Appellees obviously would not be in this adverse situation had they not agreed to the contract; however, the claim at the center of the dispute arose from a general duty owed under common law, not from the contract. "[F]or a tort claim to be considered 'arising out of or relating to' an

agreement, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself." Id.

Like the case *sub judice*, the parties in Seifert signed a real estate contract containing a broad arbitration provision. Id. at 635. U.S. Home Corporation built the Seifert's home and placed the air conditioning handling unit in the garage. Id. Mr. Seifert was killed when the air conditioner picked up carbon monoxide emissions from a car left running in the garage and distributed carbon monoxide in the home. Id.

The Seifert court agreed that the wrongful death action in that case was predicated on a common-law negligence theory unrelated to the rights and obligations created by the contract. Id. at 640. The absence of any language concerning the parties' rights in the event of a personal injury arising out of tortious conduct created an ambiguity to be construed against the drafting party. Id. at 641. Like the contract here, the contract in Seifert specifically anticipated arbitration of disputes arising from interpretation, performance, and breach of contract, but not tort claims. Id. Finally, the Seifert court determined the factual allegations in the wrongful death claim were not dependent on U.S. Home Corporation's contractual duties; the builder would have been liable to anyone harmed by its dangerous design. Id.

Applying the supreme court's analysis to this case, we hold that Appellants' fraud claim is not significantly related to the contract. Appellants' common-law fraud claim does not require reference to or construction of the contract, nor does it invoke any contractual provision; Appellants' arguments rest solely on Appellees' allegedly false advertisement. The Florida Supreme Court has, in other areas of contract law, distinguished between tort claims that lie outside the contract. See HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238, 1239-40 (distinguishing fraudulent inducement from breach of contract for purposes of economic loss doctrine). The court further agreed that "'a suit on a contract and a suit for fraud inducing the contract are two different causes of action with separate and consistent remedies.'" Id. (quoting Bankers Trust Co. v. Pacific Employers Ins. Co., 282 F.2d 106, 110 (9th Cir.1960).

The contract here is incidental to the dispute, because Appellants theoretically could have raised their fraud claim even before the contract was signed if Appellants detrimentally relied on Appellees' advertisement.[1] In addition, the arbitration clause in the contract expressly contemplates remedies in case of breach by either party, but it specifically prohibits an arbitrator from

[1] "The essential elements to establish a claim for fraudulent inducement are: (1) a false statement of material fact; (2) the maker of the false statement knew or should have known of the falsity of the statement; (3) the maker intended that the false statement induce another's reliance; and (4) the other party justifiably relied on the false statement to its detriment." Rose v. ADT Sec. Servs., Inc., 989 So. 2d 1244, 1247 (Fla. 1st DCA 2008).

awarding remedies not provided in the contract. None of the contractual language suggests the parties contemplated that intentional fraud claims would be resolved under the agreement.

Appellees rely on Beazer Homes Corp. v. Bailey, 940 So. 2d 453, 455 (Fla. 5th DCA 2006), in support of their argument that the fraud claim here bore a significant relationship to the contract. Beazer Homes, however, did not result in an opinion of the Fifth District, as two judges on the panel concurred in result only. See Rowe v. Winn-Dixie Stores, Inc., 714 So. 2d 1180, 1181 (Fla. 1st DCA 1998) (noting that where one member of an appellate panel concurs in result only, and another panel member dissents, there is no majority and the opinion does not stand as precedent), disapproved on other grounds by Owens v. Publix Supermarkets, Inc., 802 So. 2d 315 (Fla. 2001); see also Tedder v. State, 12 So. 3d 197 (Fla. 2009) (holding no majority opinion existed from which review could be taken where second judge concurred in result only with written opinion, and third judge concurred in part and dissented in part from written opinion). See generally State v. Leveson, 147 So. 2d 524 (Fla. 1962) (explaining district court judgment reversing trial court should be supported by a majority opinion for trial court's guidance on remand). Thus, we decline to discuss that judgment in our analysis.

Federal Arbitration Act Is Not Applicable

Appellees rely on Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006), in which the United States Supreme Court reiterated that the Federal Arbitration Act requires "claims of fraud in the inducement of the contract generally" to be submitted to arbitration; claims alleging the agreement to arbitrate was fraudulently induced are properly submitted to the courts. 546 U.S. at 444-45 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967)). Thus, we acknowledge we would be forced to affirm if the parties' dispute was governed by the Federal Arbitration Act. See Buckeye, 546 U.S. at 446 (holding federal arbitration law applies in state and federal courts); see also Kaplan v. Divosta Homes, L.P., 983 So. 2d 1208, 1210-11 (Fla. 2d DCA 2008) (applying Buckeye where contract expressly provided Federal Arbitration Act controlled).

Application of the Federal Arbitration Act in state court is premised on Congress' power to regulate interstate commerce. See Prima Paint, 388 U.S. at 404. A transaction involves commerce under the Federal Arbitration Act if it "in fact" affects interstate commerce. Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 280 (1995). Here, the dispute does not affect interstate commerce because it involves the sale of one parcel of real estate in Panama City, Florida. Regarding the sale of real estate, the phrase *lex loci rei sitae* applies. See Kyle v. Kyle, 128

So. 2d 427, 429 (Fla. 2d DCA 1961) (explaining an instrument conveying title in real property, which has its *situs* within a state, is governed by the law of the state). Several courts have reached the same conclusion: the sale of real estate is inherently intrastate; thus, the Federal Arbitration Act does not automatically govern arbitration agreements in contracts for the sale of real property. See Saneii v. Robards, 289 F. Supp. 2d 855, 858-59 (W.D. Ky. 2003); SI V, LLC v. FMC Corp., 223 F. Supp. 2d 1059 (N.D. Cal. 2002); Cecala v. Moore, 982 F. Supp. 609 (N.D. Ill. 1997); Aronov Realty Brokerage, Inc. v. Morris, 838 So. 2d 348, 356-60 (Ala. 2002); see also O'Keefe Architects, Inc. v. CED Constr. Partners, Ltd., 944 So. 2d 181, 184 (Fla. 2006) (noting parties agreed Florida Arbitration Code applied in lieu of Federal Arbitration Act where two Florida corporations entered into agreement to construct condominium). This is true regardless of whether the transaction involves out-of-state purchasers. See id. More complex transactions related to real estate may involve interstate commerce. See Allied-Bruce, 513 U.S. at 268 (discussing lifetime termite prevention plan to protect personal home); Jansen Prop. of Fla., Inc. v. Real Estate Assoc., Ltd. VI, 674 So. 2d 210, 212 (Fla. 4th DCA 1996) (holding real estate refinancing agreement involving diverse escrow corporations arbitrable under federal law). Because state law governs the parties' contract, we must follow the Florida Supreme Court's controlling precedent in Seifert.

Conflict Certified

We next address the Fifth District's decision in Maguire v. King, 917 So. 2d 263, 266 (Fla. 5th DCA 2005), as that decision could be read to support Appellees' position. The plaintiffs in Maguire agreed to purchase property and relied upon a representation by the seller's representative that the transaction would include two acres of drainage rights. Id. at 264. Important to our decision here, the parties in Maguire executed a written addendum to their real estate contract which included the drainage rights. Id. After closing, the plaintiffs discovered the seller previously transferred one acre of the drainage rights in a different transaction. Id. The plaintiffs sued for breach of contract in two counts, and three counts of fraud in the inducement, fraud, and negligent misrepresentation counts, all based on the same factual allegations. Id. at 265. Reasoning that the tort claims were "nonsensical when divorced from the contractual obligation" to deliver two acres of drainage rights, the court reversed and remanded so that the trial court could impose arbitration. Id. at 266-67. Because the parties' dispute was directly related to duties arising from the contract, Maguire is distinguishable from this appeal. As that decision notes, "Though couched as torts, the [tort] allegations . . . are identical to those supporting King's breach of contract claim." Id. at 267. To the extent that the decision in Maquire cannot be distinguished, we certify conflict.

Addressing the dissent's position regarding Appellants' contractual requirement to engage in due diligence by conducting an environmental evaluation, this does not require arbitration of Appellants' fraudulent inducement claim, which is based on Appellees' allegedly false advertisement. Appellants allege that Appellees knowingly concealed information that the property contained wetlands, despite their advertisement proclaiming "Wetlands Study Verifies No Wetlands." Appellants allege an intentional tort, not negligence; thus, the contractual provision imposing a due diligence requirement may be admissible at trial regarding damages, but it does not compel arbitration.

CONCLUSION

Appellants' fraud claim is not subject to arbitration because it was not significantly related to or dependent upon any duties or obligations created by the contract.

REVERSED and REMANDED; CONFLICT CERTIFIED.

VAN NORTWICK, J., CONCURS; MARSTILLER, J., DISSENTS WITH OPINION.

MARSTILLER, J., dissenting.

I respectfully dissent for I find two flaws in the majority's analysis. First, the contract language shows the parties intended to arbitrate Appellants' fraudulent inducement claim. Second, unlike the wrongful death claim in *Seifert*, the fraud claim in this case cannot stand in the absence of the parties' contractual relationship because resolution of the claim requires reference to the contract.

To determine whether Appellants' claim is arbitrable, "[t]he plain language of the agreement containing the arbitration clause is the best evidence of the parties' intent." *Ballenisles Country Club, Inc. v. Dexter Realty*, 24 So. 3d 649, 652 (Fla. 4th DCA 2009) (citing *Royal Oak Landing Homeowner's Ass'n v. Pelletier*, 620 So. 2d 786, 788 (Fla. 4th DCA 1993)). "The arbitration clause must be read together with the other provisions in the contract." *Id*. This the majority has failed to do, focusing instead only on the arbitration language.

As to arbitration, the contract provides:

> **14. DISPUTE RESOLUTION:** . . . *All* controversies, claims, and other matters in question arising out of or relating to *this transaction or this Contract or its breach* will be settled as follows:
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> . . .
>
> **(b) All other disputes: Buyer and Seller** will have 30 days from the date a dispute arises between them to attempt to resolve the matter through mediation, failing which the parties will resolve the dispute through neutral binding arbitration in the county where the Property is located. The arbitrator may not alter the Contract terms or award any remedy not provided for in this Contract. . . . This clause will survive closing.

(Second emphasis added.) Elsewhere in the contract and relevant to the condition of the property, which Appellants claim Appellees fraudulently misrepresented, there is this:

> **6. LAND USE: Seller** will deliver the Property to **Buyer** at the time agreed in its present "as is" condition, *with conditions resulting from **Buyer's** inspections* and casualty damage, if any, excepted.
> . . .
> **(c) Inspections:** (check (1) or (2) below)
> **(1) Feasibility Study: Buyer** will, at **Buyer's** expense and within 30 days from Effective Date ("Feasibility Study Period"), determine whether the Property is suitable, in **Buyer's** sole and absolute discretion, for _____ use. During the Feasibility Study Period, **Buyer** may conduct a Phase I *environmental assessment* and any other tests, analyses, surveys and investigations ("inspections") that **Buyer** deems necessary to determine to **Buyer's** satisfaction the Property's engineering, architectural and *environmental* properties . . . to determine the Property's suitability for the **Buyer's** intended use.
> . . .
> **Buyer** will deliver written notice to **Seller** prior to the expiration of the Feasibility Study Period of **Buyer's** determination of whether or not the Property is acceptable. **Buyer's** failure to comply with this notice requirement will constitute acceptance of the Property as suitable for **Buyer's** intended use in its "as is" condition. If the Property is unacceptable to the **Buyer** and written notice of this fact is timely delivered to **Seller**, this Contract will be deemed terminated as of the day after the Feasibility Study period ends and **Buyer's** deposit(s) will be returned after Escrow Agent receives proper authorization from all interested parties.
> **(2) No Feasibility Study: Buyer** is satisfied that the property is suitable for **Buyer's** purposes . . . . This Contract is not contingent on **Buyer** conducting any further investigations.

(Second emphasis added.) The contract reflects option (1) is checked.

It is evident the parties contemplated the property may turn out not to be suitable for Appellants' purposes. Hence they made the sale of the property contingent on Appellants obtaining a feasibility study—to include an environmental assessment—and accepting the property, and provided contractual remedies should Appellants deem the property unsuitable.[2] The arbitration provision covers "all" controversies or claims arising from or relating to "this transaction" (i.e., the sale of the property) or "this Contract." The gravamen of Appellants' claim is that Appellees fraudulently sold them land that cannot economically be built upon because it contains environmentally sensitive wetlands. As such, the fraudulent inducement claim squarely addresses the issue of the property's suitability for Appellants' purposes. Reading the land use and suitability provisions together with the unambiguous language in the arbitration provision, the ineluctable conclusion is that Appellant's claim is precisely the type the parties intended would be arbitrated.

Appellants point out that under the contract, an arbitrator cannot award any remedy not provided for in the contract. They assert that because they are seeking damages including lost profits, and the contract does not provide for such damages,

[2] The fact that this is a uniform real estate contract did not preclude the parties from excising the land use provisions had they seen fit to do so.

the parties did not intend to arbitrate the fraud claim. The majority seems to agree. *Maj. op.* at 7-8. But parties to a contract surely can agree to limit their remedies. *Cf. Kaplan v. Kimball Hill Homes Florida, Inc.*, 915 So. 2d 755, 761 (Fla. 2d DCA 2005) (stating that parties can relinquish right to jury trial via contract and that agreement to arbitrate claims necessarily involves such a waiver). Thus the fact that recoupment of lost profits is not a remedy available to Appellants does not bear on whether the fraud claim is arbitrable. The court in *Maguire v. King*, 917 So. 2d 263 (Fla. 5th DCA 2005), dismissed the same argument made by the party seeking to avoid arbitrating fraud and fraud in the inducement claims. The court reasoned, "these terms merely delineate the powers of the arbitrator and [are] remedial limitations, rather than restrictions on the scope of arbitration." *Id.* at 267.

Not only does the parties' contract evidence their intent to arbitrate Appellants' fraudulent inducement claim, but under *Seifert*, the claim is arbitrable.[3] "[T]he test for determining arbitrability of a particular claim under a broad arbitration provision is whether a 'significant relationship' exists between the claim and the agreement containing the arbitration clause, regardless of the legal label attached to the dispute (i.e., tort or breach of contract)." *Seifert*, 750 So. 2d at 637-38 (citing *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96

[3] I concur that under *Seifert*, the arbitration provision at issue in this case is properly classified as broad.

F.3d 88, 93-94 (4th Cir. 1996)). There must be "some nexus between the dispute and the contract containing the arbitration clause." *Id.* at 638. "[F]or a tort claim to be considered 'arising out of or relating to' an agreement, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself." *Id.* Certainly, the wrongful death claim at issue in *Seifert* could be resolved without reference to the parties' home construction contract. As to the fraudulent inducement claim at issue in this case, the majority holds:

> Appellants' fraud claim is not significantly related to the contract. Appellants' common-law fraud claim does not require reference to or construction of the contract, nor does it invoke any contractual provision . . . . The contract here is incidental to the dispute, because Appellants theoretically could have raised their fraud claim even before the contract was signed if Appellants detrimentally relied on Appellees' advertisement.

Maj. op. at 7.

But Appellants' complaint refers to and attaches the parties' contract.[4]

[4] Notably, in the paragraph preceding their demand for jury trial, Appellants allege: "Pursuant to the terms of the Contract referred to herein as Exhibit B, Plaintiffs are entitled to have their attorneys' fees paid by the Defendants." The only fee provision in the contract follows the arbitration provision and reads, in pertinent part:

> **(c) Mediation and Arbitration; Expenses:** . . . The parties will equally divide the mediation fee, if any. . . . Each party to any arbitration will pay its own fees, costs and expenses, including attorneys' fees, and will equally split the arbitrators' fees and administrative fees of arbitration. *In a civil action to enforce an*

According to the complaint, Appellees advertised property for sale in the Multiple Listing Service, stating "Wetlands study verifies No Wetlands." The complaint further alleges:

> 15. Based on the representation of no wetlands . . . Plaintiffs entered into a Contract to purchase the property for the sum of $253,000 (Contract). A copy of the Contract is attached hereto as Exhibit B.
>
> . . .
>
> 20. The representation made by the Jacksons and Jackson Realty in the Multiple Listing Service advertisement were [sic] knowingly false when made. If Plaintiffs had known that 26% of the land was wetlands they would not have purchased the subject property because 26% wetlands made the [affordable housing] project economically unfeasible.

Thus the detrimental reliance element of Appellants' claim *is* the contract. In other words, but for the contract under which Appellants purchased the property, there is no fraudulent inducement claim. Moreover, resolution of the claim will necessarily implicate the contract's land use and suitability provisions set forth *supra*. Although, as the majority suggests, Appellants could, in the abstract, bring a common law fraud in the inducement claim that is independent of the parties' contract, that is not the correct analysis under *Seifert*. The question is whether *this* claim has a nexus to the contract. And the answer is decidedly yes. "'[D]uties

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> *arbitration award, the prevailing party to the arbitration shall be entitled to recover from the nonprevailing party reasonable attorneys' fees, costs and expenses*.

(Emphasis added.)

alleged under theories such as fraud in the inducement of a contract [and] fraud in the performance of a contract . . . are duties dependent upon the existence of a contractual relationship between the parties.'" *Kimball Hill Homes*, 915 So. 2d at 759 (quoting *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303, 306 (Fla. 2d DCA 2003)). "'[T]here is a nexus between [such] tort claims' and the contractual relationship." *Id.* (quoting *Henderson v. Idowu*, 828 So. 2d 451, 453 (Fla. 4th DCA 2002)).

For these reasons, I respectfully disagree with the majority's analysis in this case and conclude the trial court's order dismissing Appellants' complaint should be affirmed.