NO. COA10-1449
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

THOMAS M. GOODWIN, Ancillary Admin. of the ESTATE OF RICHARD C. GOODWIN, JR.,
Plaintiff,

v. Gaston County
No. 10 CVS 238

CENTURY CARE OF CHERRYVILLE, INC., et. al.
Defendants.

Appeal by Defendants from an order entered 9 July 2010 by Judge Robert C. Ervin in Gaston County Superior Court.

Heard in the Court of Appeals 11 May 2011.

Cloninger, Barbour, Searson & Jones, PLLC, by W. Bradford Searson, for Plaintiff-appellee.

Cranfill Sumner & Hartzog, LLP, by H. Lee Evans, Jr., Katherine Hilkey-Boyatt, and Jaye E. Bingham, for Defendants-appellants.

HUNTER, JR., Robert N., Judge.

Century Care of Cherryville, Inc. et al. ("Defendants") appeal from a trial court judgment denying Defendants' motion to stay proceedings and compel arbitration. The case requires us to determine whether the trial judge, presiding

over a motion to compel arbitration, committed reversible error when refusing to consider a document that was verified in discovery and handed up to the trial judge during the hearing without a supporting affidavit or other means of authentication. We conclude the trial court erred. Therefore, we vacate and remand.

I. Factual and Procedural History

On or about 10 December 2007, Richard C. Goodwin ("Decedent"), then 65-years old, was admitted to the Century Care of Cherryville facility ("Century Care") in order to rehabilitate leg injuries resulting from a car accident. Because Decedent could not return home after the major surgery, he admitted himself to Century Care, which required him to execute several documents governing the terms of his residency at the nursing home. He was otherwise "generally in overall good health" at the time of his admission. On 19 January 2008, Decedent "arrested during breakfast at [Century Care] and became unconscious." Decedent was then transferred to Cleveland Regional Medical Center and was pronounced dead at 9:35 a.m. on the same date.

Following Decedent's death, Thomas M. Goodwin ("Plaintiff"), the ancillary administrator of Decedent's estate, filed a complaint against Defendants for personal injury, wrongful death, unfair and deceptive trade

practices, and breach of contract, demanding a jury trial to resolve the issues he raised in his complaint. In response to Plaintiff's complaint, Defendants filed an answer and a motion to stay the proceedings and compel arbitration.

Plaintiff opposed the motion, arguing any agreement to arbitrate the dispute that might exist was unconscionable. During the hearing, defense counsel contended Decedent did not suffer from cognitive impairments that would render him incapable of managing his own admission to Century Care. Plaintiff's counsel contended that Decedent was "heavily medicated" upon his admission.

Plaintiff's counsel stated that upon admission, Decedent was presented paperwork, which included a document purporting to be an agreement to arbitrate disputes related to Decedent's stay at the nursing home (the "Purported Arbitration Agreement"). The Purported Arbitration Agreement, which is contained in the record on appeal, was captioned in bold with the following language: "Arbitration Agreement: Read Carefully." Defendants contend Decedent and Susan Shuford, the admissions coordinator at the facility and Century Care's authorized agent, signed the Purported Arbitration Agreement. The document appears to be signed by both individuals.

At the hearing, Plaintiff's counsel argued that the Purported Arbitration Agreement was unconscionable. Defendants argued that mutuality existed because both parties agreed to waive the right to have their claims heard in court, thereby constituting valid consideration for an enforceable contract. Plaintiff's counsel stated he received the Purported Arbitration Agreement in response to discovery. Defense counsel advised the trial court of the verification of the discovery responses stating, "We have been served, specifically, discovery just relating to the arbitration agreement by plaintiff's counsel which we answered and were verified by the facility well in advance of this motion."

Up until that point, the argument before the trial court focused not on whether the agreement was properly before the court, but rather who was the party that signed the agreement other than Decedent and whether the agreement was void and unenforceable. The trial court inquired about where the arbitration agreement was in the record. Defense counsel responded by asserting the Purported Arbitration Agreement was attached to their brief and was a part of the admissions paperwork and informed the trial court that she had a copy. The record does not show whether the document was in fact attached to the brief.

At that point, Plaintiff's counsel interjected and stated, "I have an extra for you." Defense counsel then asked to approach the bench. It is unclear from the transcript what happened next, but the colloquy suggests a copy of the Purported Arbitration Agreement was handed up to Judge Ervin.

During the course of the arguments, the trial court questioned counsel about specific terms contained in the arbitration agreement.

At one point in the argument, the trial court asked: "How come you don't have that document in the record?" Counsel for Defendants replied: "No, I did not provide that, your Honor, I'm sorry."

In a written order, the trial court denied Defendants' motion, providing the following analysis:

> 1. No affidavits were submitted by the moving defendants and no other evidence was presented. There was a two page document that was supposed to be attached to the moving defendant's Memorandum of Law that was tendered to the Court during the hearing. Unauthenticated documents can not be treated as affidavits. Similarly, statements of counsel are not evidence.
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> 2. Plaintiff did not submit any affidavits or other evidence.
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> 3. The parties in their arguments addressed a number of factual matters to be resolved by the Court.

> 4. However, there is no evidentiary predicate to permit the Court to resolve these matters.
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> 5. The burden of proof is on the party moving to compel arbitration to establish the existence of an agreement to submit disputes to arbitration. In this instance, the moving defendants have the burden of proof.
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> 6. In the absence of any evidence before the court, the moving defendants have failed to carry that burden. (Citations omitted.)

Defendants filed their Notice of Appeal 29 July 2010. On 27 September 2010, Defendants filed a Motion to Stay Trial Court Proceedings pending the outcome of the present appeal, which was granted 15 November 2010.

II. Jurisdiction

"Interlocutory orders and judgments are those 'made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy.'" *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (quoting *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999)). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Id.* However, interlocutory orders and judgments are immediately appealable in at least two situations: (1) when

the trial court certifies an order for immediate appeal pursuant to Rule 54(b) and (2) when the interlocutory order or judgment affects a "substantial right." *Id.* at 161-62, 522 S.E.2d at 579; *accord* N.C. Gen. Stat. § 7A-27(d)(1)(2009) (stating appeal lies of right to this Court from any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which affects a substantial right). This Court has long held that "[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable." *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881 (1999). Therefore, we have jurisdiction over Defendants' appeal.

III. Analysis

Defendants held the burden of proof as the parties seeking to compel arbitration. *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 581 (2004). As the moving parties, Defendants also had the initial burden of production to introduce the Purported Arbitration Agreement into the record in support of their motion.

"North Carolina has a strong public policy favoring arbitration." *Red Springs Presbyterian Church v. Terminix Co. of N.C.*, 119 N.C. App. 299, 303, 458 S.E.2d 270, 273

(1995). However, prior to enforcing an agreement to arbitrate, a court must first determine the existence of a valid agreement to arbitrate. N.C. Gen. Stat. § 1-569.7 (2009). "[I]n reviewing the decision of the trial court, we must determine whether there is evidence in the record which supports the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate." *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 272, 423 S.E.2d 791, 794 (1991). "[A] trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* [on appeal]." *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001). The moving party must establish (1) that the parties had a valid agreement to arbitrate, and also (2) that the specific dispute falls within the substantive scope of that agreement. *Id.* In the case at hand, we need only address the first prong of this analysis.

"General contract law governs the issue of the existence of an agreement to arbitrate." *Southern Spindle and Flyer Co., Inc. v. Milliken & Co.*, 53 N.C. App. 785, 786, 281 S.E.2d 734, 735 (1981). Accordingly, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. Plaintiff denied the

existence of a valid agreement to arbitrate. The question before this Court is whether defense counsel succeeded in providing sufficient evidence of a mutual and valid agreement to arbitrate that existed between the parties.

The Purported Arbitration Agreement was provided to Plaintiff's counsel during discovery. However, defense counsel did not authenticate the Purported Arbitration Agreement with an affidavit or other means of authentication before presenting it to the trial court for consideration at the hearing.

The trial court cited two cases in support of its ruling that no affidavits were submitted and no other evidence presented of the arbitration agreement: ***Short v. City of Greensboro***, 15 N.C. App. 135, 189 S.E.2d 560 (1972); ***Lineberger v. Insurance Co.***, 12 N.C. App. 135, 182 S.E.2d 643 (1971). A third case, ***Huss v. Huss***, 31 N.C. App. 463, 230 S.E.2d 159 (1976), was cited for the proposition that statements of counsel are not evidence.

The first two cases do not involve motions to compel arbitration, but rather are summary judgment cases. Clearly, evidence submitted to the trial court in support of or in opposition to a motion for summary judgment must be verified or in affidavit form. N.C. Gen. Stat. § 1A-1, Rule 56 (2009). It is also clear that argument of counsel is not

evidence. *Huss*, 31 N.C. App. at 466, 230 S.E.2d at 161. However, the instant proceeding was not a motion for summary judgment, but a motion to compel arbitration. The parties raise no question that the agreement was handed to the court for consideration, without objection, and that the court and both counsel discussed the specific details of the agreement.

Further, the agreement was produced in discovery, including by means of *verified* answers to interrogatories. Under the provisions of Rule 5(d) of the Rules of Civil Procedure, discovery materials were not to be filed with the court. N.C. Gen. Stat. § 1A-1, Rule 5(d) (2009). Thus, Defendants' discovery responses containing the arbitration agreement were not in the court file when the hearing on the motion to compel arbitration took place.

Perhaps a better way for counsel for Defendants to have handled this would have been to have submitted the discovery responses (including the arbitration agreement) to the trial court at the outset of the hearing. A moving party has a number of procedural tools with which to introduce an arbitration agreement. The party may attach a copy to a verified pleading or motion, file an affidavit, seek an admission or stipulation, or convince the trial court to take judicial notice. Counsel did not do any of these;

rather, she handed a copy of the arbitration agreement to the court, after having noted that it was produced in verified discovery responses. There was no objection to this submission. There is nothing in the record to indicate that the document handed to the trial court was different from that produced in discovery.

To deny the motion to compel based solely upon the failure to produce the document in affidavit form under the circumstances outlined above is to elevate form over substance.

The trial court erred in denying Defendants' motion to compel based upon the failure to produce the agreement in affidavit form. The order of the trial court should be vacated and this matter should be remanded for determination of whether the document found at pages 62-63 of the record on appeal was a valid and enforceable arbitration agreement. The order deciding this question must include findings of fact and conclusions of law. *Griessel v. Temas Eye Ctr., P.C.*, 199 N.C. App. 314, 317, 681 S.E.2d 446, 448 (2009).

Vacated and remanded.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).