Jeffrey Barnes Architect and Associates, Inc. v. Sunrise at Bear Mountain, et al., Docket No. 180-5-06 Bncv (Wesley, J., Apr. 2, 2007)

[The text of this Vermont trial court opinion is unofficial. It has been reformatted from the original. The accuracy of the text and the accompanying data included in the Vermont trial court opinion database is not guaranteed.]

STATE OF VERMONT
BENNINGTON COUNTY, SS.

BENNINGTON SUPERIOR COURT
DOCKET NO. 180-5-06 Bncv

JEFFREY BARNES ARCHITECT)
AND ASSOCIATES, INC., and)
Jeffrey Barnes,)
Plaintiffs)
)
v.)
)
SUNRISE AT BEAR MOUNTAIN, LLC,)
Defendant/Third-Party Plaintiff)
)
v.)
)
Slope Side Partners, LLC,)
Third-Party Defendant)

ORDERS REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND THIRD-PARTY DEFENDANT'S MOTION TO DISMISS

Plaintiffs Jeffrey Barnes Architecture and Associates, Inc. and Jeffrey Barnes (collectively "Barnes") sued defendant Sunrise at Bear Mountain, LLC ("Sunrise") seeking to collect unpaid fees for architectural services. Sunrise subsequently filed a third-party complaint against third-party defendant Slope Side Partners, LLC ("Slope Side"), asserting that Slope Side responsible for the debt under an assignment of rights between the parties. Sunrise also asserts the assignment to Slope Side as an

affirmative defense to Plaintiffs' claim. Sunrise now moves for summary judgment against Barnes, contending that it is not a proper party to this lawsuit. Slope Side also moves for dismissal of the third- party complaint, arguing that an arbitration agreement between it and Sunrise preempts this Court's jurisdiction. Based on the following analysis, Sunrise's Motion for Summary Judgment is **DENIED**, and Slope Side's Motion to Dismiss is **DENIED in part**.

I. Sunrise's Motion for Summary Judgment

Sunrise filed a Motion for Summary Judgment on December 18, 2006, stating that it is not liable to Barnes for any breach of contract. It contends that Barnes properly should have brought suit against Slope Side, rather than Sunrise, for recovery of its fees. Sunrise argues that, having "assigned to Slope Side its rights and interests in developing the Topridge Project and specifically assigned the development materials . . .[,] it was no longer liable to Barnes for any of the fees owed to Barnes because this liability was assumed by Slope Side." In opposition, Barnes contends that Sunrise's assignment to Slope Side was ineffective as to its contractual claim, because Barnes did not acquiesce in the assignment nor specifically relieve Sunrise of its obligation to perform.

The following is an account of the significant events in this case. On January 15, 1999, Barnes sent a letter of proposal for the provision of architectural services to Sunrise regarding Surnise's Topridge development in Killington. The proposal, which became the contract between Barnes and Sunrise upon acceptance, contemplated that Barnes would render architectural plans for single family and duplex residences to be constructed at Topridge. The fee structure established by the agreement called for

payment of $11.50 per square foot for an initial set of plans, together with "repeat build" fees of $2,500 for each subsequent single family home and $1,500 for each subsequent duplex unit.[1] Sunrise accepted Barnes's proposal and paid it a $21,000 retainer fee. Nonetheless, Barnes alleges that Sunrise has reneged on its obligation to pay "repeat build" fees in the amount of at least $59,500.

On July 13, 1999, Sunrise executed an assignment agreement with Slope Side. The agreement provided that "[Sunrise] hereby assigns and transfers unto [Slope Side] all of [Sunrise's] rights, benefits, interests, duties, and obligations as Declarant under

---

[1] 1. Although not the primary focus of its legal challenge, Sunrise appears to contend that Barnes' claim must fail because the contract makes "repeat build" fees contingent on the delivery of certain construction documents which Sunrise maintains it has never received. Barnes disputes that the contract established such a contingency, and the language does not appear to support Sunrise's interpretation. In general, construction of a contract presents a question of law. See *Kelly v. Lord*, 173 Vt. 21, 43 (2001). A court may consider, as a question of law, whether limited consideration of extrinsic evidence makes the contract ambiguous. See *Main Street Landing, LLC v. Lake Street Ass'n, Inc.*, 2006 VT 13, ¶ 7, 17 Vt.L.W. 36. "If the court determines that a writing is not ambiguous, the plain meaning of the language controls without resort to rules of construction or extrinsic evidence." *Id.* It is only if the court finds the contract to be ambiguous that construction becomes a question of fact. See *id.* On the present record, Sunrise has neither established that Barnes is precluded by the contract from asserting its claim, nor that further evidence is required to illuminate claimed ambiguities in the contract.

the Topridge Declaration [which created the development], subject to the terms and conditions of this agreement." At the time of the assignment, Barnes had only built one single-family residence, which had been sold. Sunrise had paid Barnes his fee for constructing the residence.

The assignment also divided physical ownership of the development between Sunrise and Slope Side. Slope Side was to receive a portion known as "Contributed Property," and Sunrise was to retain a portion known either as "Retained Sites" or "Reserved Sites." Slope Side had the right to develop the Contributed Property and to construct, market and sell the developed lots. In developing the property, it was to "acquire from [Sunrise] such development plans, engineering and land planning studies and reports, and other materials generated, developed and used by [Sunrise] in connection with the development of the Topridge Project." Included in these materials were architectural drawings and plans, although Slope Side paid for its own architectural services thereafter. The assignment neither represents, or otherwise suggests, that Barnes agreed or acquiesced in the assignment to Slope Side of

Sunrise's contractual responsibilities under its architectural services contract. [2]

"To prevail on a motion for summary judgment, the moving party must show there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3); *Gordon v. Bd. of Civil Auth. for Town of Morristown*, 2006 VT 94, ¶ 5, 17 Vt.L.W. 300. The court does not weigh the evidence, but merely determines whether a triable issue of fact exists. *Berlin Dev. Assocs. v. Dept. of Social Welfare*, 142 Vt. 107, 111-112 (1982). This is a stringent test, as "the party opposing summary judgment is entitled to the benefit of all reasonable doubts and inferences." *Wesco, Inc. v. Hay-Now, Inc.*, 159 Vt. 23, 26 (1992); *Carr v. Peerless Ins. Co.*, 168 Vt.

[2] 2. By further documentation executed on July 13, 1999, Slope Side and Sunrise (as a "Member" of Slope Side) finalized an operating agreement. The agreement contains a number of provisions related to liability. It states that Members of Slope Side, such as Sunrise, would not be liable for Slope Side's debts, obligations, and liabilities. It provides that "[t]he debts, obligations and liabilities of [Slope Side], whether arising in contract, tort or otherwise, shall be solely debts, obligations and liabilities of [Slope Side], and no Member . . . shall be obligated personally for any such debt, obligation or liability of [Slope Side] solely by reason of being a Member . . ." Further, "no Member [was to] be liable for any loss, damage or claim incurred by reason of any act or omission performed or omitted by such Member . . . in good faith on behalf of the Company and in a manner reasonably believed to be within the scope of authority." Also, "[n]o Member, in its capacity as a Member, shall have any liability to . . . contribute to payment of the liabilities or the obligations of the Company . . .". As with the assignment, the operating agreement cannot be read to suggest that Barnes agreed to Slope Side's assumption of Sunrise's contractual obligations.

465, 476 (1998).

In a case presenting quite different facts, *Kelly v. Lord* 173 Vt. 21, 36 (2001), our Supreme Court nonetheless refers to a general principal as to the assignment of bilateral contracts which has applicability here. "Assignments of bilateral contracts often cause difficulties and confusion when they do not specifically address assignment of rights and delegation of duties. Thus, '[i]f the contract is still bilateral in character, so that the assignor has a duty to perform as well as a right to a performance by the third party, interpretation must depend chiefly upon the context and the surrounding circumstances'",*id,* citing Corbin on Contracts § 906, at 628 (1951). Similarly, the Restatement (Second) of Contracts § 318(3) (1981) states that "unless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor." See also AM. JUR. 2D *Assignments*§ 165 (1999); accord *Brew City Redevelopment Group, LLC v. The Ferchill Group*, 2006 WI App 39 (a compelling application of the principle expressed by the Restatement to a case involving facts similar to this one). Against these authorities, Sunrise offers no evidence that Barnes expressly agreed to substitute Slope Side as the obligor for future payments coming due under the architectural services contract. Rather, Sunrise makes vague reference to Barnes having impliedly consented to the assignment, a finding upheld in the distinctly different circumstances presented by *Kelly v. Lord.* Yet, except for its unelaborated statement that following the assignment Slope Side "paid for architectural services after that date", Sunrise offers no evidence supporting an implied consent to the assignment. Perhaps the acceptance of such payments raises an issue of fact

going to implied acceptance, but the Court is unable to find that it establishes consent as a matter of law. See *Shepard v. Commercial Credit Corp.*, 123 Vt. 106 (1962). Therefore, the Court denies Sunrise's Motion for Summary Judgment.

II. Slopeside's Motion to Dismiss

On November 17, 2006, Slope Side filed a Motion to Dismiss Sunrise's Third-Party Complaint. As stated by Slope Side, Sunrise's third-party claim against Slope Side is that Slope Side is liable to Sunrise, under both an "Assignment Agreement" and an "Operating Agreement" between the parties, for outstanding fees owed to Barnes. The basis for Slope Side's motion is that these two agreements contain identical arbitration clauses, which provide in part that "any controversy or claim arising out of or relating to this Agreement, or any breach thereof, shall be settled by arbitration . . ." Relying on the Vermont Arbitration Act (VAA), 12 V.S.A. §§ 5651-5681 , Slope Side contends that the Court does not have jurisdiction to decide Sunrise's third-party claim. Sunrise's chief argument in opposition is that Slope Side is an indispensable party under V.R.C.P. 19(a), because its absence will preclude the possibility of complete relief among the parties.[3]

Beyond arguing for their respective positions, Sunrise and Slope Side have largely failed to address the tension between the strong statutory directives supporting

[3] 3. Sunrise also argues that the VAA gives the Court jurisdiction over this matter in spite of the arbitration clauses, apparently because Slopeside never properly applied for an order compelling arbitration. As Slopeside's motion is essentially a request to compel arbitration, the Court finds this argument to be without merit.

both joinder and arbitration. This is perhaps understandable, for as one court has noted, helpful precedent on this issue is scarce. See *Texaco Exploration and Prod. Co. v. AmClyde Engineered Prods. Co., Inc.*, 243 F.3d 906, 910 (5th Cir. 2001). The tension is due to the mandatory and potentially competing provisions of the relevant statutes. Rule 19(a) requires a court to join a party to an action if complete relief cannot be accorded without the party, if the party has a sufficient interest in the action so that its ability to protect such interest would be compromised in its absence, or if its absence would create a substantial risk of inconsistent judgments. Meanwhile, the Aribtration Act also contains mandates regarding arbitration (see footnote 4 below).

In construing the scope of the Vermont arbitration statutes, it is helpful to consult Vermont cases as well as federal precedent interpreting similar provisions of federal law. One particularly pertinent source of guidance are cases discussing the application of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (1947). FAA directives related to the validity of arbitration agreements and the procedure to compel arbitration are similar to those of the VAA. Compare 9 U.S.C. §§ 2-3 with 12 V.S.A. §§ 5652(a), 5674(a).[4]

---

[4] 4. 9 U.S.C. § 2 provides:

"A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

12 V.S.A. § 5652(a) provides:

"Unless otherwise provided in the agreement, . . . a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties creates a duty to arbitrate, and is valid, enforceable and irrevocable, except upon such grounds as exist for the revocation of a contract."

9 U.S.C. § 3 provides:

"If any suit or proceeding be brought . . . upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . ."

This is unsurprising, considering that one of the underlying purposes of the VAA is to harmonize Vermont's arbitration laws with those of other jurisdictions. See 12 V.S.A. § 5654. Due to the similarity of statutory language, FAA provisions are persuasive authority for interpretation of the VAA. Cf. *Shahi v. Ascend Financial Services, Inc.*, 2006 VT 29, ¶ 8, 17 Vt.L.W. 91; *Springfield Teachers Ass'n v. Springfield School Directors*, 167 Vt. 180, 189 (1997). But see *R.E. Bean Constr. Co. v. Middlebury Assocs.*, 139 Vt. 200, 204 (1980) (stating that the FAA may have no precedential effect if in conflict with Vermont public policy).

Compelling justifications support both arbitration and joinder under Vermont law. The Vermont Supreme Court has frequently noted that contributing to the efficiency of the judicial system is an important purpose of arbitration. See, e.g., *Shahi*, 2006 VT at ¶ 10. In addition, there is a strong and long-standing judicial mandate in Vermont to enforce the terms of a contract, such as an agreement to submit to arbitration, whenever possible. See, e.g., *Alpine Haven Prop. Owners Ass'n, Inc. v. Deptula*, 2003 VT 51, ¶ 17 , 175 Vt. 559; *Osgood v. Cent. Vermont R.R. Co.*, 77 Vt. 334 (1909) (citing with approval the principle that courts should enforce voluntary contracts as a matter of paramount public policy). Joinder under Rule 19 has similar efficiency goals. Its primary purpose is to preempt the possibility of inadequate or conflicting judgments

---

12 V.S.A. § 5674 (a) provides:

"On application of a party showing an [arbitration] agreement . . . and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration . . . If the court finds for the moving party, it shall order the parties to proceed with arbitration. Otherwise, the application shall be denied."

among parties who may have an interest in a lawsuit. *Grassy Brook Village, Inc. v. Richard D. Blazej, Inc.*, 140 Vt. 477, 481-482 (1981). The desirability of completely adjudicating all rights among interested parties is another important purpose. See V.R.C.P. 19(a).

While arbitration and joinder are important elements of civil procedure, their respective goals are better served, and create less conflict, if arbitration take precedence. See *Texaco Exploration and Prod. Co. v. AmClyde Engineered Prods. Co., Inc.*, 243 F.3d 906, 910 (5th Cir. 2001). The Court notes that under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1985). The prospect of "piecemeal resolution" of a dispute is insufficient justification for a court to disregard an arbitration agreement under the FAA. *Id.* at 20. Further, in this context, "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Id.*

In the instant case, if the Court upholds the arbitration clause, Barnes' claim against Sunrise will go forward without any concomitant resolution of Sunrise's indemnification claim against Slope Side. In one configuration, this may simplify matters if Barnes is unable to establish the elements of its complaint. On the assumption that it will, however, the Court nonetheless is untroubled by the disconnection of the claim for indemnification. Proceeding from a judgment in favor of Barnes, the issues remaining for arbitration in any dispute between Sunrise and Slope Side would appear relatively straightforward. Sunrise will have the opportunity to

arbitrate its potential claim against Slope Side for indemnification in a proceeding that will be simpler and more efficient than trial, with the issues having been narrowed by the Barnes' judgment. This order of events would not create any danger of conflicting judgments, and would not preclude complete relief among the parties. Further, the non-joinder of Slope Side does not warrant dismissal of the action under Rule 19(b). In contrast, if the Court were to allow joinder at this point in the proceedings, it would do so in complete disregard of contractual interests related to arbitration. See *Texaco*, 243 F.3d at 910. The Court is not aware of any authority stating that the benefits of joinder are compelling enough to negate parties' freedom of contract. Therefore, the Court upholds the arbitration agreement and grants Slope Side's Motion to Dismiss.

Based on the foregoing, it is hereby **ORDERED**:

Defendant's Motion for Summary Judgment is **DENIED**.

Third-Party Defendant's Motion to Dismiss is **GRANTED**.

DATED   , at Bennington, Vermont.

____
John P. Wesley
Presiding Judge