

Rel: December 31, 2020

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190533

Wayne Farms LLC

v.

Primus Builders, Inc., and Steam-Co, LLC

**Appeal from Houston Circuit Court
(CV-19-900675)**

BOLIN, Justice.

1190533

Wayne Farms LLC appeals from the Houston Circuit Court's order compelling it to arbitrate its claims asserted against Primus Builders, Inc., and staying the action.

Factual and Procedural History

Wayne Farms is a poultry producer located in Dothan. Wayne Farms sought to expand its poultry-processing facility, and, to that end, it entered into a "Design/Build Agreement" with Primus on May 26, 2017, that specifically addressed work to be completed by Primus in connection with the expansion of Wayne Farms' freezer warehouse.

Article 11 of that agreement addresses disputes that might arise between the parties. Section 11.6 provides as follows:

"In the event of any dispute arising between [Wayne Farms] and [Primus] regarding any part of the Agreement or the Contract Documents, or the Parties' obligations or performance thereunder, either Party may institute the dispute resolution procedures set forth herein."

Section 11.7 of the agreement contains the dispute-resolution procedures available to the parties. Section 11.7.1 provides in part that "[a]ny party may from time to time call a special meeting for the resolution of disputes that would have a material impact on the cost or progress of the Project."

1190533

Section 11.7.2.1 of the agreement provides in part that, "[i]f the dispute has not been resolved within five (5) working days after the special meeting has been held, a mediator, mutually acceptable to the Parties and experienced in design and construction matters shall be appointed." The third component of the dispute-resolution procedures is arbitration.

Section 11.7.3.1 of the agreement provides:

"Any controversy or dispute not resolved through non-binding mediation shall be settled by binding arbitration. Either party may initiate arbitration by giving written notice to the other party after exhausting the mediation procedures set forth herein. The notice shall state the nature of the claim or dispute, the amount involved, if any, and the remedy sought."

Section 11.7.3.2 provides:

"The dispute shall be submitted to an independent arbitrator mutually selected by the Parties. If the dispute has a value in excess of One Million Dollars (\$1,000,000) then at the election of either Party, there shall be a panel of three arbitrators. If the Parties do not mutually agree on an arbitrator or arbitrators who is/are willing and able to serve, the Parties shall then utilize the American Arbitration Association (or another entity acceptable to the Parties) to provide the required independent arbitrator(s). The decision of the appointed independent arbitrator(s) shall be final and binding on the Parties. In rendering a decision, the arbitrator(s) shall comply with the Construction Industry Arbitration Rules of the American Arbitration Association in effect as of the date of this Agreement. The arbitrator(s) shall have no direct or

1190533

indirect social, political or business relationship of any sort with any of the Parties, their respective legal counsel, or any other person or entity materially involved in the Project."

The scope of Primus's work under the Design/Build Agreement with Wayne Farms included the installation of a refrigeration unit, including a galvanized steel condenser. On March 6, 2017, before Wayne Farms and Primus executed the Design/Build Agreement, Republic Refrigeration, Inc., submitted a bid to Primus to install the refrigeration unit for a price of \$3,702,720. The scope-of-work declaration submitted with Republic's bid specifically excluded "passivation services, equipment, chemicals or installation for new condensers."¹ On April 3, 2017, Primus submitted the Republic bid to Wayne Farms with a recommendation that the refrigeration-unit installation work be awarded to Republic. Republic's bid was accepted, and it ultimately entered into a subcontract with

¹According to materials in the record, "passivation" is a chemical-treatment process conducted on equipment composed of galvanized steel, such as the condenser in this case, pursuant to which the galvanized steel is treated with chemicals to prevent "white rust," which results from a corrosive chemical reaction between water in the condenser and zinc used in the process of galvanizing the condenser and can lead to degradation of the galvanized steel and a reduced life expectancy of the condenser.

1190533

Primus to install the refrigeration unit, and Primus does not dispute that the scope of the work to be performed under the subcontract excluded passivation services. The refrigeration unit, including the condenser, was subsequently installed by Republic at the Wayne Farms facility.

The passivation of the condenser was a necessary part of the preparation of the new refrigeration unit in order for it to operate at the Wayne Farms facility. Wayne Farms and Primus both communicated with Steam-Co, LLC, a water-treatment company, regarding the passivation of the newly installed condenser. In April 2018, Wayne Farms entered into a contract with Steam-Co to perform passivation on the condenser.

Steam-Co noted that Primus had, on April 13, 2018, filled the condenser with water using a water hose. On April 13, Steam-Co recommended to Primus that it have "makeup" water ready for passivation by adding certain chemicals to the water already in the sump of the condenser. Steam-Co further recommended that "two days of city water" then be added to the "makeup" water and that passivation then start. It appears from the record that Steam-Co wanted to start passivation on the condenser on April 17 or 18. However, for reasons not

1190533

entirely clear from the record, Steam-Co apparently did not start passivation on either of those dates.²

It appears that water from the local city water supply was added to the "makeup" water already in the condenser on May 11, 2018. On May 12, the condenser was drained and inspected before loading ammonia into the refrigeration unit. At that time, it was discovered that the interior of the condenser was coated with corrosive "white rust." See note 1, supra. Primus completed an incident report after being notified of the presence of white rust in the condenser. Primus then replaced the damaged condenser at a cost of approximately \$500,000 under a change order, pursuant the Design/Build Agreement with Wayne Farms. Wayne Farms paid Primus for both the original damaged condenser and the replacement condenser. Both Primus and Steam-Co have claimed that the other is responsible for the damage to the condenser.

²The parties' briefs and the record on appeal lack significant factual details surrounding the passivation process. It appears that the parties had ongoing discussions regarding problems relating to the passivation process, which appear to have involved supplying the necessary water and power to conduct the process.

1190533

On December 4, 2019, Wayne Farms sued Primus and Steam-Co asserting claims of breach of contract and negligence and seeking damages for the damaged condenser and the cost of replacing it.³ On January 6, 2020, Steam-Co answered Wayne Farms' complaint and filed cross-claims against Primus, alleging breach of contract and negligence and seeking indemnification from Primus.⁴ Steam-Co alleged that Primus had failed to timely prepare the condenser for passivation and had allowed untreated water to damage the condenser.

On January 8, 2020, Primus moved the trial court to compel arbitration as to the claims asserted against it by Wayne Farms.

³Before filing its complaint, Wayne Farms participated in a special meeting with Primus for the purpose of resolving the dispute regarding the damaged condenser, as required by section 11.7.1 of the Design/Build Agreement. When that meeting proved unsuccessful in resolving the dispute between Wayne Farms and Primus, those parties participated in nonbinding mediation in March 2019, as required by section 11.7.2.1 of that agreement. That mediation also proved unsuccessful in settling the dispute between the parties.

⁴As noted earlier, Wayne Farms and Steam-Co entered into a contract for the passivation services. Primus was not a party to that contract. Additionally, no separate contract existed between Primus and Steam-Co for the passivation services. Steam-Co's breach-of-contract claim against Primus appears to be an inartfully pleaded claim, the basis for which is not entirely clear from the record.

1190533

Additionally, Primus sought a stay of Wayne Farms' action against it. Primus supported its motion to compel arbitration with the affidavit of its president, Matthew Hirsch. On February 6, 2020, Primus moved the trial court to dismiss or, in the alternative, to stay Steam-Co's cross-claims against it.

On March 2, 2020, Wayne Farms filed its response in opposition to Primus's motion to compel arbitration, arguing that no contract existed between the parties requiring it to arbitrate claims arising from the passivation process. On March 5, 2020, Primus filed a supplemental affidavit by Hirsch in support of the motion to compel arbitration. On March 9, 2020, Steam-Co filed a response in opposition to Primus's motion to dismiss or, in the alternative, to stay Steam-Co.'s cross-claims. Also on March 9, Wayne Farms moved the trial court to strike Hirsch's supplemental affidavit in support of Primus's motion to compel arbitration. Following a hearing, the trial court, on March 19, 2020, entered an order granting Primus's motion to compel arbitration; reserved ruling on Primus's motion to dismiss Steam-Co's cross-claims against it;

1190533

and, stayed the action as to Wayne Farms' claims against Primus and Steam-Co and as to Steam-Co's cross-claims against Primus.

Wayne Farms appeals the trial court's order, specifically challenging the trial court's decisions to grant Primus's motion to compel arbitration and to stay the action as to its claims against Steam-Co. See Rule 4(d), Ala. R. App. P. ("An order granting or denying a motion to compel arbitration is appealable as a matter of right....").

Standard of Review

"Our standard of review of a ruling denying a motion to compel arbitration is well settled:

" "This Court reviews de novo the denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Yarbrough, 779 So. 2d 1205 (Ala. 2000). A motion to compel arbitration is analogous to a motion for a summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce. Id. '[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.' Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d

1190533

1260, 1265 n. 1 (Ala. 1995) (opinion on application for rehearing)."

" Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003) (quoting Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000))."

SSC Montgomery Cedar Crest Operating Co. v. Bolding, 130 So. 3d 1194, 1196 (Ala. 2013).

Discussion

Primus first argues that Wayne Farms' initial participation in the dispute-resolution process set forth in the Design/Build Agreement equitably estops Wayne Farms from pursuing its claims in court and refusing to participate in the arbitration of the dispute regarding the damage to the condenser.

As set forth above, the dispute-resolution procedures provided for in the Design/Build Agreement contain a three-step process designed to resolve disputes that might arise between the parties during the course of the performance of that agreement. Section 11.7.1 of the agreement provides in part that any party may call a special meeting for the purpose of attempting to resolve a dispute that arises between the parties. Section

1190533

11.7.2.1 of the agreement provides in part that, if the dispute has not been resolved within five working days following the special meeting, a mediator shall be appointed to attempt to resolve the dispute. Section 11.7.3.1 of the agreement provides that any controversy or dispute arising between the parties and not resolved through nonbinding mediation "shall be settled by binding arbitration." Hirsch testified in his affidavit that Wayne Farms and Primus had voluntarily participated in the special-meeting and the mediation stages of the dispute-resolution process provided for in the Design/Build Agreement. After participating in the first two steps of the dispute-resolution process provided for in that agreement, Wayne Farms has now objected to being forced to participate in the third step of the dispute-resolution process by arguing that the parties did not agree to arbitrate claims arising out of the passivation process.

Equitable estoppel is an affirmative defense. City of Huntsville v. Stove House 5, Inc., 3 So. 3d 186 (Ala. 2008). Generally, if a party fails to plead an affirmative defense, that defense is waived. Patterson v. Liberty

1190533

Nat'l Life Ins. Co., 903 So. 2d 769 (Ala. 2004). Regarding affirmative defenses, this Court has stated:

" 'Once an answer is filed, if an affirmative defense is not pleaded, it is waived. Robinson v. [Morse], 352 So. 2d 1355, 1357 (Ala. 1977). The defense may be revived if the adverse party offers no objection (Bechtel v. Crown [Central] Petroleum Corp., 451 So. 2d 793, 796 (Ala. 1984)); or if the party who should have pleaded it is allowed to amend his pleading (Piersol v. ITT [Phillips] Drill Division, Inc., 445 So. 2d 559, 561 (Ala. 1984)); or if the defense appears on the face of the complaint (cf., Sims v. Lewis, 374 So. 2d 298, 302 (Ala. 1979); and Williams v. McMillan, 352 So. 2d 1347, 1349 (Ala. 1977)). See, also, 2A J. Moore, Federal Practice § 8.27[3] at 8–251 (3d ed.1984)...'

" Wallace [v. Alabama Ass'n of Classified Sch. Emps.], 463 So. 2d [135,] 136-37 [(Ala. 1984)]."

Adams v. Tractor & Equip. Co., 180 So. 3d 860, 867 (Ala. 2015).

It does not appear from the record that Primus raised the issue of equitable estoppel in any pleading filed with the trial court. However, Primus states that it argued the issue of equitable estoppel at the hearing on its motion to compel arbitration. Primus's "argument" consists of a single, conclusory sentence in which its counsel stated: "I think Wayne Farms should be estopped from arguing somehow that now that we've

1190533

done the first two, we shouldn't go to the third one." This conclusory statement made in passing during the hearing on the motion to compel arbitration, in which the parties focused their arguments exclusively on the issue of the scope of the arbitration provision, is insufficient to "revive" the defense of equitable estoppel. Accordingly, we conclude that Primus has waived this defense.

However, even assuming that Primus had not waived the defense of equitable estoppel, Primus has failed demonstrate how it would apply in this case so as to prevent Wayne Farms from pursuing its claims arising from the damaged condenser in court rather than in arbitration proceedings. Equitable estoppel is defined as "'a defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way.'" Bowers v. Wal-Mart Stores, Inc., 827 So. 2d 63, 67 n. 2 (Ala. 2001) (quoting Black's Law Dictionary 571 (7th ed. 1999)). A party raising the defense of equitable estoppel must show the following:

1190533

"(1) That '[t]he person against whom estoppel is asserted, who usually must have knowledge of the facts, communicates something in a misleading way, either by words, conduct, or silence, with the intention that the communication will be acted on;'

"(2) That 'the person seeking to assert estoppel, who lacks knowledge of the facts, relies upon [the] communication;' and

"(3) That 'the person relying would be harmed materially if the actor is later permitted to assert a claim inconsistent with his earlier conduct.' "

Lambert v. Mail Handlers Benefit Plan, 682 So. 2d 61, 64 (Ala. 1996)

(quoting General Elect. Credit Corp. v. Strickland Div. of Rebel Lumber Co., 437 So. 2d 1240, 1243 (Ala. 1983)).

Primus has presented no evidence or argument that would satisfy those essential elements of the defense of equitable estoppel so as to prevent Wayne Farms from pursuing its claims in court rather than in arbitration proceedings.

We next address the merits of Primus's motion to compel arbitration. Primus submitted Hirsch's original affidavit and his supplemental affidavit, along with exhibits, in support of its motion to compel arbitration. Those affidavits and exhibits satisfied Primus's initial burden

1190533

of " "proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce." " Bolding, 130 So. 3d at 1196 (quoting other cases). Therefore, the burden shifted to Wayne Farms to " " 'present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.' " " Bolding, 130 So. 3d at 1196 (quoting other cases).

Wayne Farms argues that the arbitration provision contained in the Design/Build Agreement does not apply to its claims arising out of the passivation process, and the resulting damage to the original condenser, because, it says, the parties did not agree in that agreement to arbitrate any dispute arising out of the passivation process. Specifically, Wayne Farms argues that Republic's subcontract with Primus to install the refrigeration unit fell within the scope of the work to be performed by Primus pursuant to the Design/Build Agreement between Wayne Farms and Primus and that the subcontract to install the refrigeration unit expressly excludes "passivation services, equipment, chemicals or installation for new condensers." Wayne Farms further notes that it

1190533

contracted with Steam-Co to perform the passivation work, which, it asserts, was outside the scope of the work to be performed pursuant to the Design/Build Agreement, approximately a year after the Design/Build Agreement was entered into with Primus. Thus, Wayne Farms contends that no agreement to arbitrate claims arising from the passivation process exists with Primus and that the trial court could not compel it to arbitrate a dispute it did not agree to arbitrate.

It is well established that "[a]rbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Custom Performance, Inc. v. Dawson, 57 So. 3d 90, 97 (Ala. 2010) (quoting Central Reserve Life Ins. Co. v. Fox, 869 So. 2d 1124, 1127 (Ala. 2003), quoting in turn AT & T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 648 (1986), quoting in turn United Steelworkers of America v. Gulf Navigation Co., 363 U.S. 574, 582 (1960)). This Court has stated:

"In interpreting an arbitration provision, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' Moses H. Cone

1190533

Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (emphasis added; footnote omitted). "Thus, a motion to compel arbitration should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).' Ex parte Colquitt, 808 So. 2d 1018, 1024 (Ala. 2001) (emphasis added)."

Elizabeth Homes, L.L.C. v. Cato, 968 So. 2d 1, 7 (Ala. 2007).

Wayne Farms and Primus entered into the Design/Build Agreement for an expansion project at the Wayne Farms facility. Primus's scope of work under the Design/Build Agreement included the installation of a refrigeration unit, including a condenser. Primus entered into a subcontract with Republic to install the refrigeration unit to satisfy that particular obligation Primus had under the Design/Build Agreement. The subcontract entered into between Primus and Republic for the installation of the refrigeration unit was based on Republic's bid submitted to Primus and approved by Wayne Farms. The terms of the bid expressly excluded passivation services for the condenser from the scope of work to be performed by Republic for Primus. Because passivation of the condenser was necessary to the installation of the refrigeration unit, Wayne Farms

1190533

entered into a completely separate contract with Steam-Co for completion of the passivation work approximately a year after Wayne Farms had entered into the Design/Build Agreement with Primus. The Design/Build Agreement provides that any party may submit to the dispute-resolution process, which includes arbitration as its third step, "any dispute arising between [Wayne Farms] and [Primus] regarding any part of ... the Parties' obligations or performance" under that agreement. Although Primus was obligated under the Design/Build Agreement with Wayne Farms to perform the installation of the refrigeration unit, it is clear that performance of the passivation work was not an obligation contemplated by Wayne Farms or Primus with respect to the installation of the refrigeration unit under the Design/Build Agreement. Because Wayne Farms and Primus agreed to arbitrate only those disputes arising between them regarding their obligations or performance under the Design/Build Agreement, Wayne Farms cannot be compelled to arbitrate with Primus a dispute arising from the performance of passivation work that was not an obligation agreed to in the Design/Build Agreement.

1190533

Dawson, 57 So. 3d at 97. Accordingly, we conclude that the trial court erred in granting Primus's motion to compel arbitration.

Wayne Farms next argues that the trial court erred in staying the action as to its claims against Steam-Co in the absence of a motion seeking that relief. Because this Court has found that the trial court erred in granting Primus's motion to compel arbitration, a discussion of whether the trial court erred by staying the action pending arbitration is unnecessary, and, thus, we pretermitt discussion of that issue.

Conclusion

The trial court's order granting Primus's motion to compel arbitration and staying proceedings in this case is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Wise, Sellers, Mendheim, and Stewart, JJ., concur.

Parker, C.J., and Bryan, J., concur in the result.

Shaw and Mitchell, JJ., dissent.

1190533

SHAW, Justice (dissenting).

The record indicates that Primus Builders, Inc., made a prima facie demonstration in the trial court that the claims alleged against it by Wayne Farms LLC are included within the scope of an arbitration agreement between the two and that Wayne Farms failed to demonstrate otherwise. Therefore, I respectfully dissent.

The parties entered in a "Design/Build Agreement" in which Primus agreed to construct an expansion to Wayne Farms' chicken-processing facility. That project, it appears undisputed, included the installation of an operational refrigeration system. The agreement also contained the following provision outlining the scope of arbitrable issues:

"In the event of any dispute arising between [Wayne Farms] and [Primus] regarding any part of the Agreement or the Contract Documents, or the Parties' obligations or performance thereunder, either Party may institute the dispute resolution procedures set forth herein."

The dispute-resolution procedures set forth in the agreement included the right to pursue binding arbitration once other enumerated dispute-resolution procedures had failed.

1190533

Primus subcontracted with Republic Refrigeration, Inc., to install the refrigeration system. Documents related to the subcontract indicate that the "passivation" of the system's condenser, a treatment process necessary to prepare the condenser before use, was excluded from Republic's scope of work. A company called Steam-Co, LLC, performed the passivation.

At some point during or after the passivation, the condenser was found to be damaged during the process. Primus replaced it under a "change order" pursuant to the Design/Build Agreement. Wayne Farms was required to pay for a replacement condenser and allegedly suffered other damages. Primus and Steam-Co dispute who is responsible for the damage to the condenser.

Wayne Farms sued both Primus and Steam-Co, alleging both breach-of-contract and tort claims. It contended that Primus and Steam-Co either "solely or collectively" caused the damage.

Primus moved to compel arbitration under the arbitration provisions found in the Design/Build Agreement. It alleged that, as part of its work under that agreement, it had "agreed to furnish and install a condenser

1190533

as a component of the refrigeration system serving the plant expansion." In support of its motion to compel, Primus submitted a copy of the Design/Build Agreement and two affidavits by Matthew Hirsch, the president of Primus. Hirsch testified that the Design/Build Agreement "provided for work by Primus for the benefit of Wayne Farms in connection" with the expansion project. Hirsch stated that, "[w]ith respect to the damaged condenser that is the basis for Wayne Farms' claims against Primus in this lawsuit, Primus had only one contract with Wayne Farms and that contract is the 'Design/Build Agreement.'" He further stated that Primus had "never invoiced or been paid for any work relating to the condenser outside the Design/Build Agreement and its written change orders." His affidavit further provided:

"Part of Primus'[s] scope of work under the contract is the furnishing and installation of the condenser, which is part of the freezer system at the facility. Primus has been paid by Wayne Farms for both the original damaged condenser and the second, replacement condenser under Change Order no. 19 to the Design/Build Agreement.

"Passivation of the condenser was a necessary part of its preparation to operate at the facility."

(Paragraph numbers omitted.)

1190533

Wayne Farms responded to the motion to compel and argued that there was a separate contract governing the passivation work. Therefore, according to Wayne Farms, the work did not fall under the scope of the Design/Build Agreement or its arbitration provision. The trial court held a hearing and then granted the motion to compel. Wayne Farms appeals.

" '[T]he standard of review of a trial court's ruling on a motion to compel arbitration at the instance of either party is a de novo determination of whether the trial judge erred on a factual or legal issue to the substantial prejudice of the party seeking review.' Ex parte Roberson, 749 So. 2d 441, 446 (Ala. 1999). Furthermore:

" 'A motion to compel arbitration is analogous to a motion for summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that that contract evidences a transaction affecting interstate commerce. Id."After a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question." '

"Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000) (quoting Jim Burke Auto., Inc. v. Beavers, 674 So. 2d 1260, 1265 n.1 (Ala. 1995) (emphasis omitted))."

1190533

Vann v. First Cmty. Credit Corp., 834 So. 2d 751, 752–53 (Ala. 2002). Additionally, "'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'" Elizabeth Homes, L.L.C. v. Cato, 968 So. 2d 1, 7 (Ala. 2007) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25 (1983)).

In the trial court, Primus met its "'burden of proving the existence of a contract calling for arbitration.'" ⁵ Vann, 834 So. 2d at 752. As noted above, Primus presented evidence that its work under the Design/Build Agreement with Wayne Farms included furnishing the condenser as part of the expansion project, that the passivation was a necessary part of that work, and that there was no other contract under which the work was performed. Thus, the evidence indicated that the "dispute" that had arisen between Primus and Wayne Farms related to or "regarded" that

⁵Primus also presented evidence to establish that the contract affected interstate commerce, but that issue is not material in this appeal.

1190533

work, the Design/Build Agreement, and Primus's performance or obligations under the Design/Build Agreement.

On appeal, Wayne Farms challenges whether the dispute is covered by the terms of the arbitration provisions in the Design/Build Agreement. Specifically, it asserts that passivation was not actually provided as part of the scope of work in the Design/Build Agreement. Wayne Farms argues instead that passivation was excluded from the Republic subcontract and performed under a separate passivation contract between Wayne Farms, Steam-Co, and Primus. That separate contract, Wayne Farms contends, contains no agreement to arbitrate.

It appears from the record that no separate contract for the passivation work exists in writing,⁶ and no evidence demonstrating the existence of the separate contract was provided to the trial court. Specifically, no affidavit or other testimony regarding that contract or its terms was submitted in opposition to the motion to compel. Although

⁶Counsel for Wayne Farms indicated at a hearing on the motion to compel arbitration that there was no "written passivation agreement separate and apart from the Design/Build Agreement."

1190533

Wayne Farms asserted in its filings in the trial court and at the hearing on the motion to compel that such an agreement existed, no evidence was provided to substantiate those assertions. Cf. Ex parte Merrill, 264 So. 3d 855, 860 n.4. (Ala. 2018) ("Motions, statements in motions, and arguments of counsel are not evidence."); Lewis v. Mobil Oil Corp., 765 So. 2d 629, 630 (Ala. 1999) ("The party opposing a motion for summary judgment may not merely rely upon the allegations and denials in pleadings in order to defeat a properly supported motion."). Wayne Farms therefore did not demonstrate that a contract other than the Design/Build Agreement governed the work giving rise to the dispute between Wayne Farms and Primus in this case.

Wayne Farms also contends that the passivation work itself was actually excluded from the Design/Build Agreement. It argued in the trial court that a "Scope of Work -- Refrigeration Addendum" to the Design/Build Agreement specifically excluded passivation from that agreement. That purported addendum, which was submitted to the trial court, is actually Republic's bid summary to perform its subcontracting work for the installation of the refrigeration system. That document, at

1190533

best, simply defined the scope of work that Republic was to perform for the project under its own subcontract with Primus; by its terms, it does not limit or otherwise indicate the scope of work Primus was to perform under the Design/Build Agreement for the expansion project.⁷ Therefore, Wayne Farms did not sufficiently demonstrate that the passivation work was excluded from the scope of the work performed pursuant to the Design/Build Agreement.

In sum, the evidence produced in support of the motion to compel arbitration demonstrates that the claims related to the passivation of the condenser arose in regard to work provided under the terms of the Design/Build Agreement and Primus's obligations and performance under that agreement. Further, Primus's remediation work to replace the condenser, the related charges for which Wayne Farms seeks to recoup in this action, was performed under the Design/Build Agreement. Primus

⁷Wayne Farms also cited an e-mail from Hirsch that was apparently generated after the passivation damage was discovered, which stated that "passivation of the condenser is excluded from the scope of the project." However, it is unclear if that e-mail was referring to the scope of the work under the Design/Build Agreement or the scope of work performed by Republic, which was previously mentioned in the e-mail.

1190533

thus demonstrated that the arbitration provisions in the Design/Build Agreement apply to Wayne Farms' claims against Primus. In response, Wayne Farms did not meet its burden to present evidence that the arbitration provisions are not valid or do not apply to the dispute in question. Therefore, the trial court's order compelling arbitration is due to be affirmed, and I respectfully dissent.

1190533

MITCHELL, Justice (dissenting).

The majority opinion concludes that the underlying dispute between Wayne Farms LLC and Primus Builders, Inc., is outside the scope of the arbitration provisions in a contract those parties previously executed. Accordingly, the majority would reverse the order of the Houston Circuit Court compelling Wayne Farms to arbitrate its dispute. Because I agree with the trial court's conclusion that the underlying dispute falls within the scope of the arbitration provisions, I respectfully dissent.

Wayne Farms and Primus executed a contract ("the Design/Build Agreement") whereby Primus agreed to perform certain work related to the expansion of Wayne Farms' freezer warehouse. That work included the installation of a refrigeration unit, which contained a large galvanized steel condenser. After the steel condenser was installed, Wayne Farms hired a separate company, Steam-Co, LLC, to passivate it. That step was required before the condenser could be placed into service. At some point during the passivation process, it was determined that the condenser was irreparably damaged, and Wayne Farms had to replace it at a cost of approximately \$500,000.

1190533

Wayne Farms sued both Primus and Steam-Co seeking to recover damages stemming from the replacement of the condenser. Count two of Wayne Farms' complaint alleged that the defendants "negligently, recklessly, and/or wantonly passivated, constructed, designed, supervised, inspected, engineered, and/or tested the condenser unit and breached the standard of care when passivating the condenser unit." Thus, Wayne Farms alleged that the defendants committed errors (1) when the condenser was "passivated" and (2) when the condenser was "constructed, designed, supervised, inspected, engineered and/or tested." That second set of errors relates to the installation of the condenser, which was a contractual obligation of Primus under the Design/Build Agreement.

The fact that Wayne Farms alleged negligence in both the passivation process and the installation process is further evidenced by the requests for production of documents that Wayne Farms served upon the defendants with the complaint. Those requests asked the defendants to:

"1. Produce all text messages, emails, correspondence or any other form of communication, both internal and external, that refers to and/or relate to the condenser unit referenced in

1190533

plaintiff's complaint and/or the passivation and/or installation/set up of said condenser unit.

"2. Produce your complete file relating to, referencing, and/or regarding the purchase, installation, set up and/or passivation of the condenser unit referenced in plaintiff's complaint.

"3. Produce all photographs, notes, memos, incident reports or other documents that reference and/or relate to the installation, set up, and/or passivation of the condenser unit referenced in plaintiff's complaint."

The Design/Build Agreement set forth a multistep procedure that Wayne Farms and Primus were required to follow to resolve disputes "arising between [them] regarding any part of the Agreement or the Contract Documents, or [their] obligations or performance thereunder." Although Wayne Farms' allegations related to passivation are arguably outside the scope of the Design/Build Agreement and its arbitration provisions, the allegations concerning the installation of the condenser clearly concern a contractual obligation of Primus. I would therefore affirm the judgment of the trial court compelling Wayne Farms to arbitrate its claims against Primus.