Rel: May 13, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200846

The Terminix International Co., L.P., Terminix International, Inc., and Ken Stroh

v.

Dauphin Surf Club Association, Inc., et al.

Appeal from Mobile Circuit Court (CV-21-900545)

1200854

The Terminix International Co., L.P., Terminix International, Inc., and Ken Stroh

v.

Stonegate Condominium Owners' Association, Inc., et al.

Appeal from Mobile Circuit Court
(CV-21-900743)

STEWART, Justice.

The Terminix International Co., L.P., and Terminix International, Inc. (referred to collectively as "Terminix"), and Ken Stroh, an agent and employee of Terminix, appeal from orders appointing arbitrators, which were entered in two separate actions in the Mobile Circuit Court ("the trial court"). The first action was commenced by Dauphin Surf Club Association, Inc. ("DSC"), an incorporated condominium owners' association, and multiple members of that association who own individual condominium units (DSC and those members are referred to collectively as "the DSC plaintiffs"). The second action was commenced by Stonegate Condominium Owners' Association, Inc. ("Stonegate"), and multiple members of that association who own individual condominium

units (Stonegate and those members are referred to collectively as "the Stonegate plaintiffs"). The appeals have been consolidated.

Background

In 2006 and 2007, respectively, Terminix entered into contracts with DSC and Stonegate to provide protection from termites for the properties owned by DSC and Stonegate and their members. Both of those contracts included, among other things, the following arbitration clause ("the arbitration agreement"):

> "**MANDATORY ARBITRATION**. Purchaser and Terminix agree that any claim, dispute or controversy ('Claim') between them or against the other or the employees, agents or assigns of the other, and any Claims arising from or relating to this agreement or the relationships which result from this agreement, including but not limited to any tort or statutory Claim, shall be resolved by neutral binding arbitration by the National Arbitration Forum ('NAF'), under the Code of Procedure ('Code') of the NAF in effect at the time the claim is filed. Any arbitration hearing at which the parties appear personally will take place at a location within the United States federal judicial district in which Purchaser resides. Rules and forms of the NAF may be obtained and all claims shall be filed at any NAF office, www.arb-fdrum.com or by calling 1-800-474-2371. Each party shall be responsible for paying its own fees, costs, and expenses and the arbitration fees as designated by the Code. However, for a Claim of $15,000 or less, if Purchaser so requests in writing, Terminix will pay Purchaser's arbitration fees due to the NAF to the extent they exceed any filing fees that the Purchaser would

> pay to the court with jurisdiction over the Claim. The arbitrator's power to conduct any arbitration proceeding under this arbitration agreement shall be limited as follows: any arbitration proceeding under this agreement will not be consolidated or joined with any arbitration proceeding under any other agreement, or involving any other property or premises, and will not proceed as a class action. The decision of the arbitrator shall be a final and binding resolution of the Claim. This arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16. Judgement upon the award may be entered in any court having jurisdiction. Neither party shall sue the other party with respect to any matter in dispute between the parties other than for enforcement of this arbitration agreement or of the arbitrator's award. THE PARTIES UNDERSTAND THAT THEY WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT AND TO HAVE A JUDGE OR JURY DECIDE THEIR CASE, BUT THEY CHOOSE TO HAVE ANY DISPUTES DECIDED THROUGH ARBITRATION."

(Capitalization and bold typeface in original.)

As of 2009, the National Arbitration Forum ("the NAF"), which had been designated as the arbitral forum in the arbitration agreement, was prohibited from participating in consumer arbitration as part of a consent judgment between the NAF and the Minnesota Attorney General. After disputes regarding termite damage arose between Terminix and DSC and Stonegate, the DSC plaintiffs and the Stonegate plaintiffs each filed

a petition in the trial court seeking the appointment of an arbitrator to resolve the disputes; those petitions were assigned separate case numbers. The defendants filed motions in opposition to the petitions, asserting that, because the NAF was no longer administering consumer arbitrations, the claims could not be arbitrated by the NAF, as the parties had expressly agreed in the arbitration agreement, and that they could not be compelled to arbitrate in a manner inconsistent with the terms of the arbitration agreement.

The DSC plaintiffs and the Stonegate plaintiffs each replied to the defendants' motions. They argued: (1) that the contracts containing the arbitration agreement also contained a severability clause that should be applied to sever the portion of the arbitration agreement appointing the NAF as the arbitral forum; (2) that the Federal Arbitration Act ("the FAA"), 9 U.S.C. § 1 et seq., governed the arbitration agreement and that § 5 of the FAA authorized the trial court to appoint an arbitrator due to the NAF's unavailability; (3) that the language of the arbitration agreement and the surrounding circumstances, including Terminix's behavior, demonstrated that Terminix's primary intent in entering into

the arbitration agreement was to arbitrate disputes and that the choice of the NAF as the arbitral forum was an ancillary matter; and (4) that the defendants should be judicially estopped from arguing that the selection of the NAF as the arbitral forum was integral to the arbitration agreement because they had taken the position in prior judicial proceedings that the courts presiding over those proceedings were authorized to appoint substitute arbitrators under § 5 of the FAA. In support of their arguments, the DSC plaintiffs and the Stonegate plaintiffs attached as exhibits to their replies to the defendants' motions numerous filings from other Alabama circuit-court cases (and filings from cases in Arkansas, Georgia, and Oklahoma) in which Terminix had explicitly agreed that, because the NAF was no longer accepting filings to administer consumer arbitrations, § 5 of the FAA authorized those courts to appoint substitute arbitrators. The DSC plaintiffs and the Stonegate plaintiffs also submitted numerous copies of contracts Terminix had entered into with various customers between 1985 to 2020. The contracts from 2002 to 2007 contained arbitration clauses designating the NAF as the arbitral forum. The contracts from 1985 to

2001 and from 2008 to 2020 contained arbitration clauses designating the American Arbitration Association ("AAA") as the arbitral forum. The DSC plaintiffs and the Stonegate plaintiffs each also submitted an affidavit summarizing the contents of those contracts.

The defendants filed responses to the DSC plaintiffs' and the Stonegate plaintiffs' replies, arguing that the parties' designation of the NAF as the arbitral forum was an integral part of the arbitration agreement and could not be severed from the agreement and that judicial estoppel was inapplicable.

On August 3, 2021, the trial court entered an order granting the DSC plaintiffs' petition to appoint an arbitrator. On August 16, 2021, the trial court likewise entered an order granting the Stonegate plaintiffs' petition to appoint an arbitrator. The defendants timely appealed from those orders. The trial court entered orders staying arbitration proceedings at the defendants' request.

Standard of Review

The defendants appeal from the trial court's orders appointing an arbitrator. In essence, the trial court's orders are orders compelling

arbitration, which we review de novo to "'determine "whether the trial judge erred on a factual or legal issue to the substantial prejudice of the party seeking review."'" Okay v. Murray, 51 So. 3d 285, 288 (Ala. 2010) (quoting BankAmerica Hous. Servs. v. Lee, 833 So. 2d 609, 617 (Ala. 2002), quoting in turn Ex parte Roberson, 749 So. 2d 441, 446 (Ala. 1999)). In addition, this Court has explained that, similar to the burden-shifting requirements attendant to summary-judgment motions, after a party seeking to compel arbitration demonstrates the existence of a contract calling for arbitration that affects interstate commerce, the party opposing arbitration must present evidence demonstrating the invalidity of the arbitration agreement or its inapplicability to the dispute. Oaks v. Parkerson Constr., LLC, 303 So. 3d 1141, 1144 (Ala. 2020); Alabama Title Loans, Inc. v. White, 80 So. 3d 887, 891 (Ala. 2011); Vann v. First Cmty. Credit Corp., 834 So. 2d 751, 752-53 (Ala. 2002); and Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000).

Discussion

The defendants argue that the trial court's orders compelling them to arbitrate the DSC plaintiffs' and the Stonegate plaintiffs' claims in an

arbitral forum other than the NAF is inconsistent with the terms of the arbitration agreement. Specifically, the defendants contend that the designation of the NAF as the arbitrator was an "essential and integral" part of its agreement to arbitrate and that, therefore, the trial court erred in appointing substitute arbitrators.

We begin our analysis by noting that "arbitration agreements are to be treated like any other contracts." Robertson v. Mount Royal Towers, 134 So. 3d 862, 868 (Ala. 2013). "When interpreting a contract, a 'court has a duty to accept the construction that will uphold, rather than destroy, the contract and that will give effect and meaning to all of its terms.'" 134 So. 3d at 867 (quoting Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746 (Ala. 2000)). Moreover, "'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.'" Blue Cross Blue Shield of Alabama v. Rigas, 923 So. 2d 1077, 1083 (Ala. 2005) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

This Court has stated that, "[w]hen a trial court compels arbitration, it must do so in a manner consistent with the terms of the arbitration provision." BankAmerica Housing Servs., a Div. of Bank of America, FSB v. Lee, 833 So. 2d 609, 618 (Ala. 2002). Nevertheless, "the fact that an arbitrator named in the arbitration agreement is unable to act as an arbitrator over the parties' controversy does not necessarily void the arbitration agreement." Ex parte Warren, 718 So. 2d 45, 48 (Ala. 1998). Section 5 of the FAA provides:

> "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator."

9 U.S.C. § 5. This Court has recognized that, based on § 5 of the FAA, "where the arbitrator named in the arbitration agreement cannot or will not arbitrate the dispute, a court does not void the agreement but instead

appoints a different arbitrator," unless it is clear that the naming of a specific arbitrator was an "essential term" of the parties' agreement to arbitrate. Warren, 718 So. 2d at 48-49; see also Robertson, 134 So. 3d at 869.

In Warren, John and Debra Warren sued the contractor who had constructed their new home. The construction contract between the parties contained an arbitration agreement that stated, in part, that any disagreement between the parties "'must be submitted … to National Academy of Conciliators for a binding arbitration.'" 718 So. 2d at 46. Based on that provision, the contractor moved to compel arbitration, and, in response, the Warrens argued that the arbitration agreement could not be enforced because the arbitrator designated in the agreement, the National Academy of Conciliators, was no longer in existence. The trial court in Warren determined that, notwithstanding the dissolution of the National Academy of Conciliators, the arbitration agreement was valid and enforceable, and, therefore, it compelled arbitration. The Warrens petitioned this Court for a writ of mandamus.

This Court denied the writ, with a plurality of the Court concluding that § 5 of the FAA permitted the trial court to name a replacement arbitrator. The main opinion in Warren explained:

> "Based upon § 5, federal courts have established the general rule that, where the arbitrator named in the arbitration agreement cannot or will not arbitrate the dispute, a court does not void the agreement but instead appoints a different arbitrator. Astra Footwear Industry v. Harwyn Int'l Inc., 442 F. Supp. 907 (S.D.N.Y. 1978) .... In Astra, a Yugoslavian footwear manufacturer brought an action against a New York footwear distributor to compel arbitration of a contract dispute; the arbitration agreement specified that the arbitrator of the claims would be the Chamber of Commerce in New York. However, when the claims were brought, the Chamber of Commerce of New York had ceased to arbitrate disputes. The federal district court determined that where the arbitrator selected by the parties cannot or will not perform, a 'lapse in the naming' of the arbitrator occurs and § 5 of the FAA is to [be] applied, thus allowing the trial court to appoint a replacement arbitrator. Astra, 442 F. Supp. at 910.
>
> "However, the federal courts have also recognized an exception to the general rule: where it is clear that a specific failed term of an arbitration agreement is not an ancillary logistical concern but, rather, is as important a consideration as the arbitration agreement itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail. ... To determine this intent, courts look to the 'essence' of the arbitration agreement; to the extent the court can infer that the essential term of the provision is the agreement to arbitrate, that agreement will

> be enforced despite the failure of one of the terms of the bargain."

Warren, 718 So. 2d at 48-49. The Court in Warren ultimately concluded that there was no evidence indicating that the parties had intended the choice of arbitrator to be an essential term of the arbitration agreement and that § 5 of the FAA, therefore, permitted the trial court to appoint a substitute arbitrator. Id.

In Robertson v. Mount Royal Towers, supra, the arbitration agreement at issue did not contain a provision for selecting an arbitrator. The party opposing arbitration argued that the appointment of an arbitrator pursuant to § 5 of the FAA was an impermissible expansion of the parties' arbitration agreement. This Court, citing Warren, disagreed, concluding that the failure to provide a provision for selecting an arbitrator indicated that the matter was not an essential part of the agreement. 134 So. 3d 862 at 869.

In University Toyota v. Hardeman, 228 So. 3d 394 (Ala. 2017), two plaintiffs attempted to initiate class-action arbitration proceedings against an automobile dealership with the Better Business Bureau of North Alabama ("the BBB"), the arbitral forum designated by the parties'

arbitration agreement. The BBB, however, informed the plaintiffs that it did not conduct class-action arbitration proceedings, and, consequently, the plaintiffs withdrew their arbitration demand and commenced a judicial proceeding against the dealership, which they sought to have certified as a class action. The dealership moved to compel arbitration in accordance with the parties' arbitration agreement, and the trial court in Hardeman compelled arbitration. However, because the BBB had indicated that it did not conduct class-action arbitration, the trial court appointed the AAA as arbitrator. The dealership appealed, arguing that the order compelling arbitration with the AAA was inconsistent with the terms of the arbitration agreement designating the BBB as the arbitrator. On appeal, the plaintiffs argued that, because the BBB had indicated that it would not conduct class-action arbitration proceedings, there was, as in Robertson, a "gap" in the arbitration agreement, which, the plaintiffs asserted, permitted appointment of the AAA as the arbitrator pursuant to § 5 of the FAA. This Court disagreed, noting that the BBB remained a viable forum in which the plaintiffs could arbitrate their claims, even if the arbitration agreement effectively

limited the plaintiffs' ability to engage in class-action arbitration. Accordingly, this Court reversed the trial court's order compelling arbitration proceedings to be conducted by the AAA.

Flagg v. First Premier Bank, 644 F. App'x 893 (11th Cir. 2016), a federal decision that was not designated for publication in the Federal Reporter, is heavily relied upon by the defendants because of its purported similarity to this case. In Flagg, a borrower commenced a class-action lawsuit in federal district court against a payday lender. The lender moved to compel arbitration based on an arbitration agreement contained in the parties' 2012 payday-loan agreement. Like in the present cases, however, that agreement designated the NAF, which had stopped conducting consumer arbitrations in 2009, as the arbitrator. Accordingly, the lender moved to have the district court appoint a substitute arbitrator. The district court denied the motion to compel arbitration, and the lender appealed.

On appeal, the Flagg court reviewed the language of the arbitration agreement and the surrounding circumstances to determine whether the designated arbitral forum was an "integral part of the agreement to

arbitrate." 644 F. App'x at 897. The Flagg court noted the arbitration agreement had specified that disputes "shall" be resolved by the NAF and that references to the NAF "pervaded" the arbitration agreement. 644 F. App'x at 896. The Flagg court placed particular emphasis on the fact that the lender had continued to designate the NAF as the arbitrator in its payday-loan agreements despite the fact that the NAF had stopped conducting consumer arbitrations. The court reasoned:

> "[D]espite the fact that the NAF had stopped accepting consumer arbitration cases more than three years before [the borrower] applied for her payday loan, [the lender] continued to use arbitration agreements designating the NAF and made no provision for the appointment of an alternate arbitrator. This chronology suggests that the designation of the NAF was integral to [the lender] and counsels against a court stepping in to appoint a different arbitral forum."

644 F. App'x at 896.

The agreement in these cases provides that claims "shall be resolved by neutral binding arbitration by the [NAF], under the Code of Procedure ... of the NAF in effect at the time the claim is filed." Although the arbitration agreement identifies the NAF as the arbitrator, we cannot say that references to the NAF "pervade" the agreement, which includes numerous generic references to arbitration. Indeed, although the

arbitration agreement lacks a provision expressing a specific course of conduct in the event the NAF was unavailable, it emphasizes the parties' waiver of the right to seek any judicial resolution of any dispute in favor of a general agreement to arbitrate, stating in conspicuous capitalized wording: "THE PARTIES UNDERSTAND THAT THEY WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT AND TO HAVE A JUDGE OR JURY DECIDE THEIR CASE, BUT THEY CHOOSE TO HAVE ANY DISPUTES DECIDED THROUGH ARBITRATION." Furthermore, the arbitration agreement expressly states that it is to be governed by §§ 1-16 of the FAA, which, of course, includes § 5, a provision authorizing a court to appoint a substitute arbitrator. These provisions, taken together, tend to indicate that the primary and essential purpose of the arbitration agreement was to ensure that the parties' disputes be resolved solely by binding arbitration and that the designation of NAF as the arbitrator was secondary to that purpose and not an integral part of the agreement.

Our conclusion is bolstered by evidence regarding the surrounding circumstances related to the arbitration agreement. Unlike in Flagg, by

the time the NAF had stopped conducting consumer arbitrations, Terminix had already changed the arbitration clause used in its standard consumer contracts to designate the AAA as the arbitral forum for the resolution of disputes between it and its customers. Furthermore, evidence indicated that, even after the NAF had stopped conducting consumer arbitrations, Terminix, citing § 5 of the FAA, had routinely sought enforcement of arbitration agreements with other customers that had also designated the NAF as the arbitral forum.

Conclusion

Because the designation of the NAF as the arbitral forum in the arbitration agreements between Terminix and DSC and Terminix and Stonegate is ancillary to the agreements to arbitrate, rather than an integral and essential part of the agreements, the trial court correctly granted the DSC plaintiffs' and the Stonegate plaintiffs' petitions to compel arbitration under the authority of § 5 of the FAA.

1200846 -- AFFIRMED.

1200854 -- AFFIRMED.

Parker, C.J., and Bolin and Wise, JJ., concur.

Sellers, J., concurs in the result.