IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

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

GLENN HARVEY, AS TRUSTEE OF THE RUSSEL A. SCHLEGEL REVOCABLE LIVING TRUST,

Appellant,

v. Case No. 5D19-3817

LIFESPACE COMMUNITIES, INC. D/B/A VILLAGE OF THE GREEN F/K/A LIFE CARE RETIREMENT COMMUNITIES, INC.,

Appellee.

_____/

Opinion filed November 6, 2020

Nonfinal Appeal from the Circuit Court for Seminole County, Melissa Souto, Judge.

Lydia S. Zbrzeznj, of Southern Atlantic Law Group, PLLC, Winter Haven, for Appellant.

Mia L. McKown and Tara R. Price, of Holland & Knight, LLP, Tallahassee, for Appellee.

SASSO, J.

Glenn Harvey, as Trustee of the Russel A. Schlegel Revocable Living Trust ("Trustee"), appeals an order granting a motion to compel arbitration of its claim for breach of contract against Lifespace Communities, Inc. d/b/a Village of the Green f/k/a Life Care Retirement Communities, Inc. ("Lifespace"). The contract upon which Trustee sued does

not contain an arbitration clause. And because the contract sued upon does not incorporate a separate contract that does contain an arbitration clause, the trial court erred in compelling arbitration. Consequently, we reverse.

Trustee filed a single-count complaint against Lifespace for breach of a May 2018 Remarketing Agreement. The Remarketing Agreement, executed by Trustee in his capacity as trustee of the Russel A. Schlegel Revocable Living Trust following the death of Russel A. Schlegel and his wife Carla S. Schlegel, required Lifespace to use "its best efforts" to remarket a membership in the Village of the Green Community that the Schlegels purchased almost 26 years before. In return, Trustee delivered to Lifespace the Schlegels' membership certificate, endorsed for transfer, and ensured their apartment was vacated and all charges were paid. Trustee's lawsuit alleged Lifespace failed to provide any information to Trustee and failed to remarket the membership in any way.

Lifespace moved to dismiss Trustee's complaint or, in the alternative, to compel arbitration, relying on a 1993 Residency Agreement through which the Schlegels had purchased their original membership. Lifespace argued that the terms of an arbitration provision found in the 1993 Residency Agreement were sufficiently capacious to encompass Trustee's claim.[1] However, significant to this appeal is what Lifespace did not argue: Lifespace did not move to dismiss the complaint for failing to attach the

[1] The arbitration provision in Section XII of the Residency Agreement provides:

> Any dispute, claim or controversy of any kind between the parties arising out of, in connection with, or relating to, this Agreement and any amendment hereof, or the breach hereof, shall be submitted to and determined by arbitration in Longwood, Florida in accordance with the commercial rules of the American Association, except as otherwise provided in this Section XII.

operative contract, nor did Lifespace argue that the 1993 Residency Agreement, executed some 26 years earlier, was incorporated into the 2018 Remarketing Agreement. Nonetheless, the trial court rendered an Order finding that Trustee's claim for breach of the 2018 Remarketing Agreement between Trustee and Lifespace must be submitted to arbitration pursuant to the terms of the 1993 Residency Agreement between the Schlegels and Lifespace.

We review orders granting or denying a motion to compel arbitration de novo. *Duty Free World, Inc. v. Miami Perfume Junction, Inc.*, 253 So. 3d 689, 693 (Fla. 3d DCA 2018). When evaluating a motion to compel arbitration, three factors need to be considered: "(1) whether a valid agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration was waived." *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999). This appeal primarily concerns the first factor, which we now address.

Initially, it bears emphasis that "no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate." *Id*. Lifespace recognizes that the terms of the 2018 Remarketing Agreement do not contain an arbitration provision. Nonetheless, Lifespace argues on appeal that the 2018 Remarketing Agreement incorporated the 1993 Residency Agreement, including the arbitration provision, by reference.[2] We disagree.

[2] This issue is a legal one, and it is properly before us. *See State v. Hankerson*, 65 So. 3d 502, 505 (Fla. 2011) ("[A]ppellee, in arguing for the affirmance of a judgment, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below." (quoting *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999))).

"Arbitration provisions from one contract cannot be extended to a separate contract between the same parties unless the parties expressly agree to do so." *Eugene W. Kelsey & Son, Inc. v. Architectural Openings, Inc.*, 484 So. 2d 610, 611 (Fla. 5th DCA 1986); *see also Lee v. All Fla. Constr. Co.,* 662 So. 2d 365, 366 (Fla. 3d DCA 1995) ("Where parties enter into two separate contracts and only one contract contains an arbitration clause, the parties cannot be compelled to arbitrate disputes arising from the contract that does not call for arbitration.") (citations omitted). In evaluating whether the parties expressly agreed to extend an arbitration agreement to a separate contract, courts consider whether the contract refers to the document or sufficiently describes the document so that the document could be interpreted as part of the contract. *See, e.g.*, *Phoenix Motor Co. v. Desert Diamond Players Club, Inc.*, 144 So. 3d 694, 697 (Fla. 4th DCA 2014). Importantly though, mere reference to another document is insufficient to incorporate the other document into a contract. *Affinity Internet, Inc. v. Consol. Credit Counseling Servs., Inc.*, 920 So. 2d 1286, 1288 (Fla. 4th DCA 2006). This is particularly so where the incorporating document makes no specific reference that it is "subject to" the collateral document. *Id.*

Here, while the 2018 Remarketing Agreement references the 1993 Residency Agreement, and does so multiple times, the 2018 Remarketing Agreement does not either wholly incorporate the terms of the 1993 Residency Agreement or make the 2018 Remarketing Agreement subject to the 1993 Residency Agreement's terms. Indeed, none of the references can be reasonably construed as expressing an intention to be bound by a collateral document's terms.

Lifespace highlights a particular clause from the 2018 Remarketing Agreement as supportive of its position that the 2018 Remarketing Agreement incorporated the terms of the 1993 Residency Agreement. The clause is found in the 2018 Remarketing Agreement's "Recitals" section, which sets the factual backdrop for the 2018 Remarketing Agreement. It states as follows:

> Whereas, Section II.A. of the Residency Agreement provides that the Membership may be transferred only to a person or persons accepted for residency in the Village by Lifespace Communities and in accordance with such residency agreements, policies, and standards as Lifespace Communities may from time to time prescribe.

Plainly though, that clause lacks any terminology that can be interpreted as expressing an intent to incorporate the terms, including the arbitration provision, of the 1993 Residency Agreement. Viewed reasonably, the highlighted clause does not even serve as part of the contract's operative provisions. Instead, references to the 1993 Residency Agreement in the contract's recitals section only contextualize the 2018 Remarketing Agreement, setting forth the reasons for entering into the transaction.

Because the contract sued upon, the 2018 Remarketing Agreement, does not express any intention by the parties to incorporate the 1993 Residency Agreement, we agree with Trustee that no valid agreement to arbitrate disputes under the 2018 Remarketing Agreement exists. The 2018 Remarketing Agreement and the 1993 Residency Agreement are separate and distinct contracts, and the 2018 Remarketing Agreement does not demonstrate an intent by the parties to arbitrate. Consequently, the trial court erred in granting Lifespace's motion to compel arbitration. We therefore reverse the order compelling arbitration and staying the proceedings below and remand for proceedings consistent with this opinion.

REVERSED and REMANDED.

ORFINGER and TRAVER, JJ., concur.