FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-3390

JEA,

Appellant,

v.

AARON F. ZAHN, an individual,

Appellee.

On appeal from the Circuit Court for Duval County.
Waddell A. Wallace, III, Judge.

August 24, 2021

M.K. THOMAS, J.

JEA appeals the trial court's non-final order compelling arbitration of its six-count civil complaint against Aaron Zahn. *See* Fla. R. App. P. 9.130(a)(3)(C)(iv) (allowing appeal of non-final orders determining the entitlement of a party to arbitration). Because we agree with the trial court's conclusion that JEA's claims "relate to" the employment agreement between the parties, we affirm the court's ruling that the claims are arbitrable under the terms of the arbitration provision of the agreement.

Zahn was formerly the CEO of JEA. The relationship was governed by the employment agreement at issue here, which bears

an effective date covering the entirety of the relationship.[1] The agreement describes the terms and Zahn's duties applicable to the CEO position and specifically sets forth the fiduciary obligation on Zahn for JEA's benefit. The agreement also includes a provision assenting to binding arbitration. That language requires as follows:

> Except for suits seeking injunctive relief or specific performance or as otherwise prohibited by applicable law, the parties hereby agree that any dispute, controversy or claim arising out of, connected with and/or otherwise relating to this Agreement and the arbitrability of any controversy or claim relative hereto shall be finally settled by binding arbitration. The parties hereby knowingly and voluntarily waive any rights that they may have to a jury trial for any such disputes, controversies or claim.

Zahn was removed from his position by JEA's board of directors after an investigation by the City of Jacksonville concluded there were numerous grounds for termination. Zahn then initiated an arbitration proceeding regarding claims that JEA owed him money under the terms of the agreement. JEA subsequently filed this complaint in the circuit court.

The first two counts of JEA's complaint allege fraud and breach of fiduciary duty. Specifically, these counts contend that Zahn made false statements to the board regarding JEA's financial outlook as part of a fraudulent scheme to effectuate the sale of JEA (a publicly owned utility) to the private sector in order to reap a personal windfall. Counts three, four, and five allege in various forms that the agreement is void and unenforceable. And count six purports to seek injunctive relief which: "(i) stay[s] the arbitration proceeding commenced by Zahn because there is no agreement to arbitrate; (ii) compel[s] Zahn to return to JEA the amounts improperly paid to him . . . ; and (iii) prohibit[s] JEA from wasting

[1] The "Effective Date" in the agreement is November 27, 2018, the same date on which Zahn was appointed CEO.

public funds by paying to Zahn any amounts under the employment agreement that are prohibited by Florida law."[2]

Zahn filed a motion with the circuit court arguing that arbitration should be compelled regarding JEA's claims as well as his own, and the court agreed. JEA now appeals the circuit court's order compelling arbitration of its claims. The issue centers on interpretation of the employment agreement. Thus, our review is de novo. *See Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999).

The appeal boils down to a question of whether JEA's tort claims are within the scope of the contractual arbitration provision between the parties; in other words, the issue is whether the claims are arbitrable under the contract. The parties correctly agree that the supreme court's opinion in *Seifert* stands as the seminal case on the issue. *Seifert* breaks arbitration provisions down into two general categories—narrow provisions, which are those whose language limits their applicability to disputes "arising out of" an agreement, and broad provisions, which are those whose terms apply to disputes "arising out of *or relating to*" an agreement. *See Id.* at 637 (emphasis added). The former category has been interpreted as restricting the scope of arbitration to claims "relating to the interpretation of the contract and matter of performance," whereas, the latter "has been interpreted broadly to encompass virtually all disputes between the contracting parties, including related tort claims." *Id.* (citations omitted).

Seifert provides the standard for determining whether tort claims between contractually bound parties are indeed "related to" a contract so as to fall within the scope of a broad arbitration requirement. *Seifert* involved an action alleging that a homebuilder's negligence resulted in the wrongful death of the homeowner, and a subsequent motion from the builder to compel arbitration based on a broad arbitration provision contained in the real estate contract between the parties. *Id.* at 635. The court

[2] JEA does not challenge the circuit court's determination that counts three, four, and five are arbitrable. Its appeal is instead explicitly focused on counts one, two, and six.

provided the following framework for determining whether the action fell within the arbitration provision:

> If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually-imposed duty is one that arises from the contract. *Barmat* [*v. John and Jane Doe Partners A–D*], 155 Ariz. [519] at 523, 747 P.2d [1218] at 1222 [1989]. Analogously, such a claim would be one arising from the contract terms and therefore subject to arbitration where the contract required it. If, on the other hand, the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties, then a dispute regarding such a breach is not one arising from the contract, but sounds in tort. *Id.* Therefore, a contractually-imposed arbitration requirement . . . would not apply to such a claim.

Id. at 640 (quoting *Dusold v. Porta-John Corp.*, 807 P.2d 526, 531 (Ct. App. 1990)).

In *Seifert*, the supreme court ultimately determined that the action being maintained did not meet this framework. The court noted that none of the claims being raised referred to the contract itself, and that the duty allegedly violated was one of common law negligence and was "unrelated to the rights and obligations of the contract." *Id.* at 640–42. Thus, the court concluded that, even under the favorable treatment given to arbitration provisions under Florida law and despite the broad nature of the provision at issue, the wrongful death action did not fall within the scope of the agreement to arbitrate. *Id.*

The same cannot be said here. As noted by the circuit court, JEA's claims are based on duties which are provided for in the agreement. Zahn would not have been obligated by the duties allegedly violated without the agreement and the employment relationship it maintained. Thus, the agreement between the parties provides for duties not otherwise imposed by law, meaning that tort claims alleging a violation of those duties are related to the agreement and are covered by the arbitration provision.

JEA notes that similar fiduciary duties are generally imposed by law against any similarly situated CEO of any Florida company. Thus, it argues that the claims based on said duties are "common law claims" which do not come within the scope of the agreement per *Seifert*. This argument misinterprets *Seifert's* reasoning. The claim being assessed in *Seifert* was based on negligence; such claims generally allege a breach of the duty to take reasonable care under the circumstances. *Id.* at 641. The negligence duty is one which is generally applicable to every individual and owed to the public at large. Effectively, the duty serves as the base level of general relationship every individual maintains with every other individual. The duty is not dependent on any agreement. Indeed, as noted in *Seifert*, the negligence duty was applicable to the builder in favor of *any* individual who entered the home and was injured by the tortious breach of duty, regardless of the lack of contractual relationship. Thus, there was no "unique relationship" implicated by the claims in *Seifert*.

Even if JEA is correct that CEOs have similar duties regardless of any agreements, that does not mean that the duties are generally imposed by law under *Seifert*, and any such duties are not owed to parties outside a contract. Zahn did not generally owe any fiduciary duty to the public, and he did not owe any fiduciary or trust duties to JEA or the public in the absence of the agreement establishing and governing the employee relationship. Thus, the duties allegedly violated were "unique" to the agreement under *Seifert*, meaning that the claimed violation of those duties is an action which is "related to" the agreement under the arbitration provision.[3]

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[3] It is also not clear how JEA's claims would not require direct reference to the terms of the contract itself, considering the duties are specifically provided for and described in the agreement. JEA acknowledges that claims requiring reference to the actual terms of a contract would be arbitrable, but JEA merely concludes that its claims would not require reference to the agreement's terms without sufficiently explaining how this would be so. Again, even if similar fiduciary duties would have been in place against Zahn regardless of the employment agreement, the fact is the duties *were* provided for in it. That said, it appears that JEA's claims will

JEA's final argument posits that, if nothing else, count six of its complaint specifically should remain with the circuit court due to its status as a claim seeking an injunction. We disagree. It is the facts of a complaint which determine arbitrability of the claims therein, not the legal title ascribed to any count. *Id.* at 638; *see also Gregory v. Electro-Mech. Corp.*, 83 F.3d 382, 384 (11th Cir. 1996) ("Whether a claim falls within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than the legal causes of action asserted."). Even though count six is titled as seeking an injunction, the facts raised in the claim merely restate JEA's general claim that the agreement is void and cannot be enforced, and that JEA was entitled to damages. Partitioning this count from the remaining counts would thus not only be inconsistent with the framework established in *Seifert*, it would have the effect of leaving the same issues for resolution with two different authorities at the same time. Thus, we reject JEA's suggestion that the circuit court erred by failing to separate and retain count six.

The foregoing considered, the circuit court's order compelling arbitration of JEA's six-count complaint is AFFIRMED.

BILBREY and KELSEY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Sean B. Granat and Stephen J. Powell, Office of General Counsel, City of Jacksonville, Jacksonville; and Lee D. Wedekind, III, of Nelson Mullins Riley & Scarborough LLP, Jacksonville, for Appellant.

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specifically require reference to the terms of the agreement, making the claims arbitrable.

John D. Mullen of Phelps Dunbar LLP, Tampa, for Appellee.