NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

F. FRED PEZESHKAN,

Appellant,

v.

MANHATTAN CONSTRUCTION FLORIDA, INC. f/k/a Kraft Construction Company, Inc., a Florida for-profit corporation; and SPECTRUM CONTRACTING INC., a Florida for-profit corporation,

Appellees.

Case No. 2D20-2184

Opinion filed March 26, 2021.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Collier County; Elizabeth V. Krier, Judge.

Robert D.W. Landon, III, Christina M. Himmel, and Deborah S. Corbishley of Kenny Nachwalter, P.A., Miami, for Appellant.

Edmond E. Koester, Seth M. Horras, and Matthew B. Devisse of Coleman, Yovanovich & Koester, P.A., Naples, for Appellees.

BLACK, Judge.

F. Fred Pezeshkan challenges the circuit court's nonfinal order granting Manhattan Construction (Florida), Inc., and Spectrum Contracting, Inc.'s motion to compel arbitration. Because there is no agreement between Mr. Pezeshkan and either company to arbitrate and no arbitrable issues exist, we reverse.

I. Background

Mr. Pezeshkan has owned stock in Manhattan Construction (Florida), hereafter referred to as MCF, for many years, and at one time he owned a controlling interest in it.[1] Similarly, Mr. Pezeshkan has owned stock in Spectrum Contracting for many years, and at one time he owned a controlling interest in it. In August 2008, Mr. Pezeshkan entered into two stock purchase agreements. Pursuant to the first agreement, Mr. Pezeshkan sold the majority of the stock he owned in MCF to Manhattan Construction Group, Inc. Pursuant to the second agreement, Mr. Pezeshkan sold the majority of the stock he owned in Spectrum Contracting to two individuals. Importantly, neither MCF nor Spectrum Contracting were signatories or parties to either of the stock purchase agreements. In addition, both stock purchase agreements contemplated that the remaining stock owned by Mr. Pezeshkan would be sold to the same purchasers in the future, with the sales to be finalized no later than August 2013. Valuation formulas for the remaining shares of Mr. Pezeshkan's stock were set forth in

[1]MCF was formerly known as Kraft Construction Company, Inc., and was operating under that name during time periods that are relevant to this case. But for ease of reference, we will refer to the company only as MCF.

the agreements, but the remaining shares of stock were never purchased as contemplated by the stock purchase agreements.

In early October 2019, Mr. Pezeshkan was notified in writing by MCF and Spectrum Contracting that shareholder meetings had been scheduled for later that month. By that time, Manhattan Construction Group was the majority shareholder of both companies. The purpose of the shareholder meetings was to vote on a proposed amendment to each company's articles of incorporation to facilitate each company undergoing a reverse stock split. As a result, Mr. Pezeshkan's shares of stock would be reduced to fractional shares, allowing a forced sale of his interest in each company. The letters to Mr. Pezeshkan did not reference the 2008 stock purchase agreements or the possibility of arbitration. However, both letters concluded by stating that the "holders of the Company's common stock are entitled to assert appraisal rights under Sections 607.1301-607.1333 of the Florida Business Corporation Act." The amendments passed at the shareholder meetings. Thereafter, MCF offered Mr. Pezeshkan $0 for his shares of MCF stock, and Spectrum Contracting offered Mr. Pezeshkan $260,459.60 for his shares of Spectrum Contracting stock. Mr. Pezeshkan rejected both offers.

In March 2020, Mr. Pezeshkan commenced an appraisal rights proceeding in the circuit court pursuant to the Florida Business Corporation Act, section 607.1330, Florida Statutes (2019), by filing his "Petition to Determine Fair Value of Shares and to Recover Petitioner's Fees and Costs." Mr. Pezeshkan asserted in his petition that MCF and Spectrum Contracting had violated the Act by failing to offer him fair value for his stock. See § 607.1301(5) (defining fair value). Rather than offering fair

value for his stock as contemplated by the Act, Mr. Pezeshkan argued that MCF and Spectrum Contracting presented him with offers that were improperly based on outdated valuation formulas contained in the 2008 stock purchase agreements. Mr. Pezeshkan contended that not only were MCF and Spectrum Contracting not parties to those agreements but that the valuation formulas set forth in those agreements were not applicable given the circumstances under which he was now required to sell his remaining shares of stock in each company. Mr. Pezeshkan estimated the fair value of the stock he owns in both companies to be $1,955,000.

In April 2020, MCF and Spectrum Contracting moved to compel arbitration based on the arbitration provisions of the 2008 stock purchase agreements. The companies asserted that despite Mr. Pezeshkan's argument to the contrary, the fair value of the remaining shares of his stock must be determined by the formulas contained in the stock purchase agreements. Using those formulas, MCF and Spectrum Contracting determined that the total value of Mr. Pezeshkan's stock is $260,459.60, much less than the value claimed by Mr. Pezeshkan. According to MCF and Spectrum Contracting, by claiming entitlement to an amount in excess of the value of the stock as determined by the stock purchase agreements, Mr. Pezeshkan had effectively made a claim for damages. And paragraph 10.5 in each stock purchase agreement provides that "[a]ny dispute between the parties out of or related to this Agreement arising after the Closing, and involving a claim for money damages shall be resolved pursuant to the Commercial Arbitration Rules of the American Arbitration Association." The circuit court granted the motion to compel arbitration, and this appeal followed.

II. Analysis

We review the order compelling arbitration de novo. Hernandez v. Crespo, 211 So. 3d 19, 24 (Fla. 2016) (citing DFC Homes of Fla. v. Lawrence, 8 So. 3d 1281, 1282 (Fla. 4th DCA 2009)); see Hillier Grp., Inc. v. Torcon, Inc., 932 So. 2d 449, 452 (Fla. 2d DCA 2006). "In determining whether a dispute is subject to arbitration, the courts consider at least three issues: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Hillier Grp., Inc., 932 So. 2d at 452 (quoting Stacy David, Inc. v. Consuegra, 845 So. 2d 303, 306 (Fla. 2d DCA 2003)); accord Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). "Because arbitration is a matter of contract, a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Dea v. PH Fort Myers, LLC, 208 So. 3d 1204, 1207 (Fla. 2d DCA 2017) (quoting Rolls-Royce PLC v. Royal Caribbean Cruises Ltd., 960 So. 2d 768, 770 (Fla. 3d DCA 2007)). "Generally, therefore, a non-signatory to a contract containing an arbitration agreement cannot compel a signatory to submit to arbitration." Id. (quoting Rolls-Royce PLC, 960 So. 2d at 770). In this case, neither MCF nor Spectrum Contracting were parties to the 2008 stock purchase agreements. And paragraph 10.5 of each agreement allows only for the arbitration of disputes concerning damages where those disputes are "between the parties" to the agreement.

We recognize, however, that it is possible for a nonsignatory to invoke an arbitration provision where the agreement indicates an intention to benefit a third party. See Fla. Power & Light Co. v. Rd. Rock, Inc., 920 So. 2d 201, 203 (Fla. 4th DCA 2006) ("Non-parties to a contract containing an arbitration clause cannot compel parties to a

contract to arbitrate unless it is determined that they are a third party beneficiary to the contract. A third party is an intended beneficiary, and thus able to sue on a contract, only if the parties to the contract intended to primarily and directly benefit the third party." (first quoting Nestler-Poletto Realty, Inc. v. Kassin, 730 So. 2d 324, 326 (Fla. 4th DCA 1999); and then quoting Aetna Cas. & Sur. Co. v. Jelac Corp., 505 So. 2d 37, 38 (Fla. 4th DCA 1987))). Here, however, no third-party rights were obtained by MCF or Spectrum Contracting.

"The intent of the parties to a contract, as manifested in the plain language of the arbitration provision and contract itself, determines whether a dispute is subject to arbitration." Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013); see Dea, 208 So. 3d at 1207 ("When interpreting a contract, the court must first examine the plain language of the contract for evidence of the parties' intent." (quoting Heiny v. Heiny, 113 So. 3d 897, 900 (Fla. 2d DCA 2013))). If a contract is clear and unambiguous, it must be construed as written. Michael Anthony Co. v. Palm Springs Townhomes, 174 So. 3d 428, 432 (Fla. 4th DCA 2015) (quoting Khosrow Maleki, P.A. v. M.A. Hajianpour, M.D., P.A., 771 So. 2d 628, 631 (Fla. 4th DCA 2000)). Here, none of the provisions of the agreements indicate an intent by the parties to confer a benefit upon third parties like MCF or Spectrum Contracting. Cf. Henderson v. Idowu, 828 So. 2d 451, 452-53 (Fla. 4th DCA 2002) ("Notwithstanding appellant is a non-signatory to the arbitration agreement, she is entitled to its benefits if she is a third[-]party beneficiary. The arbitration agreement here . . . was expressly intended to benefit an identified class of persons, . . . [and] [a]ppellant fell within the identified class . . . ."). Moreover, paragraph 10.3 of each stock purchase agreement forbade any assignment

of rights without Mr. Pezeshkan's "prior written consent," which was never given in this case. Cf. Fla. Power & Light Co., 920 So. 2d at 204 (concluding that one party to a contract could not convey his right to enforce the arbitration provision of that contract to a nonsignatory without first obtaining the written consent of the other party to the contract as required by the contract's express language). And paragraph 10.3 of each agreement also provides that "[n]othing in th[e] Agreement . . . is intended to confer upon any party, other than the parties hereto, and their respective successors, any rights, remedies, obligations or liabilities." Clearly and unequivocally, neither MCF nor Spectrum Contracting had the right to enforce the 2008 stock purchase agreements.

Moreover, even if MCF and Spectrum Contracting had the right to enforce the arbitration provision in the respective stock purchase agreements, the claims at issue are not arbitrable. See Hillier Grp., Inc., 932 So. 2d at 452. "[T]he determination of whether a particular claim must be submitted to arbitration necessarily depends on the existence of some nexus between the dispute and the contract containing the arbitration clause." Seifert, 750 So. 2d at 638. In this case, there is no nexus between Mr. Pezeshkan's purely statutory claims arising out of each company's conduct following the amendments to the articles of incorporation and the stock purchase agreements. Cf. Verizon Wireless Pers. Commc'ns, LP v. Bateman, 264 So. 3d 345, 351-52 (Fla. 2d DCA 2019) (holding that appellant's statutory claims under the Florida Consumer Collection Practices Act arose from Verizon's debt collection practices and were not related to the consumer agreement entered into between the parties when the appellant obtained cell phone service from Verizon). Rather, Mr. Pezeshkan's request for a determination by the circuit court of the fair value of his stock resulted directly from

MCF and Spectrum Contracting invoking their statutory rights under the Act to undertake reverse stock splits and repurchase the fractional shares created by the reverse stock splits. After each company underwent a reverse stock split, Mr. Pezeshkan was entitled to assert his appraisal rights and to be paid the fair value of his stock. See § 607.1302(1)(e). It is not necessary to interpret the stock purchase agreements in order for Mr. Pezeshkan to obtain the redress he is entitled to under the Act. See Verizon Wireless Pers. Commc'ns, LP, 264 So. 3d at 351 ("A contractual nexus exists between a claim and a contract if the claim presents circumstances in which the resolution of the disputed issue requires either reference to, or construction of, a portion of the contract." (quoting Jackson, 108 So. 3d at 593)). And finally, even if there was a nexus between Mr. Pezeshkan's claims and the stock purchase agreements, the claims would not be subject to arbitration pursuant to paragraph 10.5 of each stock purchase agreement as argued by MCF and Spectrum Contracting because the claims are not for money damages.

In this case, MCF and Spectrum Contracting invoked their rights under the Act, and as result, Mr. Pezeshkan was entitled to assert his appraisal rights under the Act. See § 607.1302(1)(e). Mr. Pezeshkan's statutory claims are thus subject to the "plenary and exclusive" jurisdiction of the circuit court. See § 607.1330(4). We therefore reverse the circuit court's order compelling arbitration and remand for further proceedings.

Reversed and remanded.

CASANUEVA and VILLANTI, JJ., Concur.