Third District Court of Appeal

State of Florida

Opinion filed August 7, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2547
Lower Tribunal No. 18-12250

Frederick Greene, etc.,
Appellant,

vs.

Jeffrey Johnson, et al.,
Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Spencer Eig, Judge.

Hall, Lamb Hall & Leto, P.A., and Matthew P. Leto, for appellant.

Perlman Bajandas Yevoli & Albright PL, and Jonathan Feldman (Fort Lauderdale); Alhalel Law, and Joshua R. Alhalel, for appellees.

Before SCALES, MILLER and GORDO, JJ.

SCALES, J.

Frederick Greene, the plaintiff below, derivatively on behalf of both Oak and Cane Co. ("Oak") and Oak & Cane Holdings, LLC ("Holdings"), appeals the trial court's order granting a motion to compel arbitration and stay litigation by the appellees, defendants below, Jeffrey Johnson, Cameron Grace, Joseph Villatico[1] and O&C Spirits, LLC. We affirm the order as to Greene's derivative claims brought on behalf of Oak, but we reverse as to Greene's derivative claims brought on behalf of Holdings.

I. Background

In 2016, Greene and Grace incorporated Oak to manufacture and sell Oak & Cane American Craft Rum. Each had a fifty percent ownership interest in Oak. In January 2017, Greene and Grace: (i) hired Villatico to serve as Director of Sales and Promotional Strategies; (ii) formed Holdings as a separate entity to own the brand's trademarks and other intellectual property; and (iii) received a $300,000 investment in Oak from Johnson in exchange for a seven and a half percent ownership interest in both Oak and Holdings.[2]

[1] While both the initial brief and the answer brief in this appeal identify Villatico as an appellee, the circuit court docket reflects that Villatico was not served with the complaint and, to date, has not participated in the litigation below. Hence, this Court does not have jurisdiction over Villatico. See Seymour v. Panchita Inv., Inc., 28 So. 3d 194, 196 (Fla. 3d DCA 2010) ("A summons properly issued and served is the method by which a court acquires jurisdiction over a defendant.").

[2] The record does not specify the final ownership interests of Greene and Grace in Oak and Holdings after Johnson acquired his interest in each company.

To provide additional capital, Johnson loaned $200,000 to Oak in May 2017, and another $100,000 in July 2017. The loan agreements between Oak and Johnson contain broad dispute resolution provisions that require arbitration for any "dispute, claim or controversy arising out of or relating to" the loans.[3]

After Johnson made both loans to Oak, conflict arose from Greene's incurring of expenses, and Greene withdrew from his management position in Oak. Subsequently, Johnson sent notices of default to Oak. On January 18, 2018, Johnson, Grace, Villatico, Oak, and Holdings entered into a settlement agreement, under which Johnson received full ownership of the assets and intellectual property owned by both Oak and Holdings. Greene did not sign this settlement agreement.

[3] In relevant part, section 27 of each of the two loan agreements between Oak and Johnson reads as follows:

> Dispute Resolution: If there is any dispute, claim or controversy arising out of or relating to this Agreement or any Note or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this Section [27], the Party claiming a dispute will serve notice on the other Party. . . . In the event that good faith attempts of resolution and mediation fail to provide a resolution to the dispute, resolution of the dispute shall be determined by binding arbitration. . . . The Parties acknowledge that they are irrevocably waiving the right to a trial in court, including a trial by jury and that all rights and remedies will be determined by an arbitrator and not by a judge or jury.

On April 16, 2018, Greene, purportedly on behalf of both Oak and Holdings, filed derivative claims[4] against Johnson, Grace, Villatico, and O&C Spirits, a company formed in December 2017, by Johnson, Grace, and Villatico. Greene alleges that the defendants conspired to and carried out a plan to divert the property, assets, and goodwill of Oak and Holdings to O&C Spirits. Additionally, Greene alleges that Johnson and Grace breached the fiduciary duties of care and loyalty that they owed to Oak and Holdings as managers and members of these companies.

After being served with Greene's derivative action, Johnson moved to compel arbitration of Greene's derivative claims against him, citing the broad arbitration provisions in the May and July 2017 loan agreements entered into between Johnson and Oak. Grace and O&C Spirits joined in Johnson's motion to compel arbitration. On November 14, 2018, the trial court entered an order granting the motion as to the defendants, and Greene now timely appeals this order.

II. Analysis[5]

A. Standard of Review

[4] See Dinuro Invs., LLC v. Camacho, 141 So. 3d 731, 738 (Fla. 3d DCA 2014) (defining a derivative suit as an action in which a stockholder seeks to enforce a right of action existing in the corporation).

[5] We have jurisdiction to review a non-final order determining entitlement of a party to arbitration. Fla. R. App. P. 9.130(a)(3)(C)(iv).

"While we review a trial court's ruling on a motion to compel arbitration de novo, we are mindful that arbitration provisions are favored by the courts and that all doubts should be resolved in favor of arbitration." CT Miami, LLC v. Samsung Elecs. Latinoamerica Miami, Inc., 201 So. 3d 85, 90 (Fla. 3d DCA 2015) (citations omitted).

B. Greene's Derivative Claims on Behalf of Oak Against Johnson

Arbitration provisions – such as the ones in the loan agreements between Oak and Johnson – containing the phrase "arising out of or relating to" have been interpreted broadly to encompass claims between the contracting parties that require reference to or construction of some portion of the contract. Seifert v. U.S. Home Corp., 750 So. 2d 633, 637-38 (Fla. 1999). Greene's derivative claims against Johnson – brought on behalf of Oak – require reference to the loan agreements because Greene's claims of conversion, conspiracy, and breach of fiduciary duty require an ultimate determination of whether there was a breach under the loan agreements preceding the settlement agreement. Specifically, as framed in the pleadings, this involves consideration of whether the second loan agreement was mature, whether both loan agreements contained usurious interest rates, and whether Johnson complied with all dispute resolution processes.

If Oak had brought the claims directly against Johnson (as opposed to Greene bringing the claims derivatively), Johnson's defense would "relate to" the loans, so

as to implicate the plain language of the loan agreements' arbitration provisions. Johnson, therefore, is able to compel arbitration of Greene's derivative claims brought on behalf of Oak under the loan agreements' broad arbitration provisions. See id.

C. Greene's Derivative Claims on Behalf of Oak against the Non-Signatory Defendants

Non-signatories to a contract containing an arbitration provision, such as appellees Grace and O&C Spirits, may compel arbitration of claims brought by a signatory based on the doctrine of equitable estoppel if the signatory raises allegations of concerted misconduct by both the non-signatory and one or more of the signatories to the contract. Marcus v. Florida Bagels, LLC, 112 So. 3d 631, 633-34 (Fla. 4th DCA 2013). Greene's derivative claims on behalf of Oak against these non-signatory defendants are based on the same set of operative facts that Greene alleges against signatory Johnson, that is, a conspiracy by the defendants to divert Oak's assets to O&C Spirits. Similarly, the defenses of the non-signatory defendants will be dependent upon, if not the same as, Johnson's defenses, premised on Johnson's rights outlined in the loan agreements containing the arbitration provisions. Against this backdrop, we agree with the trial court that Greene is estopped from avoiding arbitration of all the derivative claims he brought on behalf of Oak. See id.

D. Greene's Derivative Claims on Behalf of Holdings against all Defendants

The appellees argue that Greene also should be equitably estopped from avoiding arbitration of the claims brought by Greene on behalf of Holdings. The appellees argue that, because these derivative claims are intertwined with the arbitrable claims brought on behalf of Oak, Greene should be required to arbitrate the claims brought on behalf of Holdings despite there being no underlying agreement compelling arbitration between Holdings and any of the appellees. The doctrine of equitable estoppel on the basis of intertwined claims, however, applies when a *signatory* to a contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both a non-signatory and one or more of the signatories to the agreement. Marcus, 112 So. 3d at 633-34.[6] An obligation to arbitrate is based on consent, and therefore, the claims brought by Greene on behalf of Holdings, which is a non-signatory to the loan agreements, are not subject to the arbitration provisions in the loan agreements.[7] Id. Accordingly, we

[6] Appellees have cited no cases applying the doctrine where, as here, the claim is brought by a non-signatory.

[7] We do not need to consider whether Holdings is bound to the arbitration clause under another doctrine, such as an agency principle, because the appellees do not raise an alternate argument in their briefs. See E.K. v. Dep't of Children & Family Servs, 948 So. 2d 54, 57 (Fla. 3d DCA 2007) (explaining that while the "Tipsy Coachman" doctrine allows an appellee to raise unpreserved alternate grounds for affirmance, appellate courts should not consider arguments not contained in an answer brief).

reverse that part of the trial court's order compelling arbitration of Greene's derivative claims brought on behalf of Holdings.

III. Conclusion

The trial court properly compelled arbitration of Greene's derivative claims brought on behalf of Oak, a signatory to the loan agreements containing the arbitration provision. The claims brought by Greene on behalf of Holdings, a non-signatory to the loan agreements, though, are not subject to arbitration. We affirm that part of the challenged order as it relates to Greene's derivative claims brought on behalf of Oak, but reverse that portion of the order staying the proceedings and requiring arbitration of the claims brought on behalf of Holdings, and remand for further proceedings on those claims.

Affirmed in part, reversed in part, and remanded.