

Third District Court of Appeal

State of Florida

Opinion filed January 29, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1083
Lower Tribunal No. 19-4534

Yam Export & Import LLC,
Appellant,

vs.

Nicaragua Tobacco Imports, Inc., et al.,
Appellees.

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

Becerra Law, P.A., and Robert J. Becerra, for appellant.

Appellees precluded from filing an answer brief and from oral argument.

Before **SALTER, SCALES** and **LOBREE, JJ.**

SALTER, J.

Yam Export & Import LLC (“Yam”) appeals a non-final circuit court order denying Yam’s motion to compel arbitration. The circuit court lawsuit against Yam

was brought by the appellees here, Nicaragua Tobacco Imports, Inc., and Nicaragua Tobacco Imports Distributors, Inc. (collectively, “Nicaragua Tobacco”). For the reasons which follow, we reverse the non-final order and remand the case so that it may be submitted to arbitration as the parties specified in their written agreement.

Nicaragua Tobacco imports and sells cigars under the brand name “Cuban Crafters.” Yam markets and sells those products from its office in Miami-Dade County. In January 2016, Nicaragua Tobacco and Yam entered into a twenty-page licensing, consignment, and lease agreement (the “Agreement”) whereby Yam would lease commercial space (and the furniture, fixtures, and equipment within it) from Nicaragua Tobacco and have a license to produce and sell Nicaragua Tobacco’s branded products. For a term of five years, Yam was to pay monthly rent and license royalties to Nicaragua Tobacco.

Section 10.11 of the Agreement included a waiver of the right to trial by jury of any claim or cause of action in any legal proceeding arising out of the Agreement as well as a detailed dispute resolution procedure. Following a meeting and attempt to negotiate a resolution of any “dispute arising out of or relating to this Agreement,” the parties obligated themselves to “refer the issue (to the exclusion of a court of

law) to final and binding arbitration in Miami Dade County, Florida in accordance with the then existing Commercial Arbitration Rules (the ‘Rules’) of the AAA.”¹

The Agreement also contained two provisions, sections 1.3 and 1.17, purporting to waive “all rights to dispute or arbitrate this matter on [sic] any Court of law” and any right to sue in the event of a financial default by Yam.

By early 2019, various disputes arose between the parties relating to their rights and duties under the Agreement. Yam filed a claim against Nicaragua Tobacco on February 12, 2019, with the American Arbitration Association office in Miami. That office promptly assigned a case number and addressed the schedule for the selection of the arbitrators, payment of fees, filing of an answering statement, and other aspects of the arbitration case.

On the very day Yam filed its claim, however, Nicaragua Tobacco filed a circuit court complaint against Yam for an emergency temporary injunction relating to products delivered to Yam pursuant to the Agreement. Yam moved to dismiss that complaint and to compel arbitration. Nicaragua Tobacco’s complaint for an injunction and Yam’s motions to dismiss and to compel arbitration were heard by the trial court on May 30, 2019.

¹ The compulsory arbitration provision included additional terms, not pertinent to the decision in this case, regarding the number and selection of arbitrators and the binding nature of the panel’s decision.

The trial court denied Yam’s motion to compel arbitration in an unelaborated order. From the hearing transcript, it appears that Nicaragua Tobacco persuaded the trial court that Yam’s withholding of payment after it filed its arbitration demand waived all Yam’s “rights to dispute or arbitrate this matter on [sic] any Court” in sections 1.3 and 1.17 of the Agreement. Yam appeals the denial order, an appealable non-final order under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv).

Analysis

Our standard of review for the disposition of a motion to compel arbitration is de novo. Arrasola v. MGP Motor Holdings, LLC, 172 So. 3d 508, 513 (Fla. 3d DCA 2015). There is no question in this case that the three conditions of arbitrability have been met under Seifert v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999)—these parties entered into a valid written agreement to arbitrate; an arbitrable issue exists; and Yam did not waive its right to arbitrate through conduct inconsistent with the exercise of that right.

Regarding the question of whether Yam waived its right to arbitrate because of a financial default, that very dispute itself is an arbitrable issue. See § 682.02(3), Florida Statutes (2019) (“An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.”). The “condition precedent” raised by Nicaragua

Tobacco in the proceedings below² is the allegation that the otherwise-applicable right to arbitration as the exclusive forum was waived because Yam committed a financial default under the Agreement.

Our precedent recognizes, however, that the statute applies, and that the arbitrator or panel is the “gatekeeper” for issues of this kind. Arrasola, 172 So. 3d at 513; Miami Marlins, L.P. v. Miami-Dade County, 276 So. 3d 936, 940 (Fla. 3d DCA 2019). The trial court’s threshold decision-making in a case such as this is, per section 682.02(2), to decide “whether an agreement to arbitrate exists,” (and here it does), or “a controversy is subject to an agreement to arbitrate” (there is no dispute in this case that the dispute arose under, and is related to, the Agreement).

For these reasons, the trial court’s order denying Yam’s motion to compel arbitration is reversed, and the case is remanded for the entry of an order granting that motion. Our opinion expressly does not require dismissal of the circuit court case, as the Revised Florida Arbitration Code authorizes (but does not require): a stay of the case; various provisional remedies; rights to enforce discovery, subpoenas, and preaward rulings by the arbitrator; and confirmation, vacation, or modification of an award. See §§ 682.03(6) and (7), 682.031, 682.04, 682.08(7), 682.081, 682.12-682.15; see also Miami Marlins, 276 So. 3d at 937 n.2.

² Nicaragua Tobacco has not favored us with an answer brief, but we have nevertheless carefully evaluated the issues raised in the proceeding below to consider those which apparently proved persuasive to the trial court.

Reversed and remanded, with instructions.