Third District Court of Appeal

State of Florida

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

No. 3D19-1341
Lower Tribunal No. 15-15456

CWELT-2008 Series 1045 LLC,
Appellant,

vs.

Park Gardens Association, Inc.,
Appellee.

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

Bruce Botsford, P.A., and Bruce C. Botsford (Fort Lauderdale); P.A. Bravo, P.A., and Paul Alexander Bravo, for appellant.

Blaxberg, Grayson, Kukoff, & Forteza, P.A., and Ian Barry Blaxberg and Edward A. Proenza, for appellee.

Before EMAS, C.J., and MILLER and GORDO, JJ.

EMAS, C.J.

INTRODUCTION

CWELT-2008 Series 1045, LLC ("CWELT") appeals a nonfinal order denying its motion to dismiss the counterclaim of Park Gardens Association, Inc. ("the Association"). CWELT contends that dismissal of the counterclaim was required because the Association failed to comply with the mandatory arbitration provision of Florida's Condominium Act, section 718.1255(4)(a), Florida Statutes (2015). We have jurisdiction, see Fla. R. App. P. 9.130(a)(3)(C)(iv), and affirm, as CWELT, by its own actions, waived its right to compel the Association's compliance with the arbitration provision.

FACTS AND PROCEDURAL BACKGROUND

CWELT owns a unit in the Park Gardens Condominium in Miami Beach. CWELT obtained title to the unit in 2014. CWELT intended to renovate the unit, lease the unit for one or two years and then resell it. However, four years before CWELT purchased the unit, the Association had recorded an Amendment to its Declaration of Condominium ("the Amendment") which prohibited any unit owner from leasing a unit for the first two years of ownership without prior written approval of the Board of Directors.

In July 2015, CWELT filed a two-count complaint (for declaratory judgment and breach of the declaration of condominium) seeking a final judgment declaring

the Amendment void and seeking damages for lost rental income due to the Association's reliance on, and enforcement of, the Amendment.

The Association, in August 2015, filed a motion to dismiss CWELT's complaint contending, inter alia, that CWELT's claims were barred by the statute of limitations, and that an earlier amendment to the Declaration of Condominium (recorded in 1990) accomplished the same result as the Amendment being challenged by CWELT.

The parties litigated the case for the next twenty-nine months. In January 2018, CWELT filed its response to the Association's 2015 motion to dismiss. Soon after, the trial court denied the Association's motion to dismiss and directed the Association to file an answer to CWELT's July 2015 complaint. In March 2018, the Association filed its answer and a counterclaim, alleging two breach of contract counts (nuisances and unauthorized tenants), and a count for declaratory judgment.

The Association alleged in its counterclaim that CWELT circumvented the Amendment's leasing restriction and approval process by amending CWELT's Articles of Organization to identify unauthorized tenants as authorized members of CWELT (and thus ostensibly not "tenants," but rather, unit owners who can reside in the unit without complying with the Amendment). The Association's counterclaim sought, inter alia, to enjoin CWELT from violating the Amendment by leasing its unit to "unauthorized tenants," and further sought a declaration by the

trial court that, under the Amendment, "the authorized members of CWELT who reside in the Unit are considered tenants and are required to go through the Association's tenant approval process."

On April 29, 2019, CWELT filed the subject motion to dismiss the counterclaim, contending that, before filing its counterclaim, the Association was required to proceed to nonbinding arbitration under section 718.1255(4)(a). The Association responded that 1) the case (and the Amendment at issue in both the complaint and counterclaim) had been litigated for nearly four years, and thus, requiring arbitration at this point would not serve the express purpose of the statute; and (2) the claims asserted by CWELT in its complaint and those asserted by the Association in its counterclaim are so intertwined that severing them is likely to lead to inconsistent rulings. The trial court denied CWELT's motion to dismiss in an unelaborated order, and the record on appeal contains no transcript of the hearing. This appeal follows.

ANALYSIS AND DISCUSSION[1]

Chapter 718 of the Florida Statutes is known as the Condominium Act. As expressly provided in section 718.102, the purpose of this chapter is:

> (1) To give statutory recognition to the condominium form of ownership of real property.

[1] "This Court reviews de novo a trial court's ruling on a motion to dismiss." Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 592 (Fla. 2013).

> (2) To establish procedures for the creation, sale, and operation of condominiums.

This court has further recognized that "the intent of the statute is to increase judicial economy and to reduce the cost of litigation for the parties, ***especially the unit owner***, without eliminating either party's right to a trial by jury." Sterling Condo. Ass 'n, Inc. v. Herrera, 690 So. 2d 703, 704 (Fla. 3d DCA 1997) (emphasis added). See also § 718.1255(3), Fla. Stat. (2015) (providing: "The Legislature finds that unit owners are frequently at a disadvantage when litigating against an association. . . . The high cost and significant delay of circuit court litigation faced by unit owners in the state can be alleviated by requiring nonbinding arbitration and mediation in appropriate cases").

To that end, section 718.1255 provides alternative methods (including nonbinding arbitration) for resolving certain condominium-related disputes, and authorizes the Division of Florida Condominiums, Timeshares, and Mobile Homes (a division of the Department of Business and Professional Regulation) to employ attorneys as arbitrators to conduct the arbitration hearings under chapter 718. Section 718.1255 also provides that the decision of an arbitrator, while final, is nonbinding. The parties are not foreclosed from proceeding in a trial de novo unless the parties have agreed that the arbitration shall be binding.

Finally, and most relevant to the instant case, section 718.1255(4)(a) provides: "Prior to the institution of court litigation, a party to a dispute shall petition the division for nonbinding arbitration."

The question presented is whether, under the circumstances presented, the Association was required to arbitrate its dispute before filing its counterclaim. In urging affirmance of the trial court's order, the Association relies primarily on our decision in Sterling. In Sterling, 690 So. 2d at 704, the Association sought an injunction against a unit owner after the owner made "substantial structural changes" to her unit without the consent of the association's board of directors. The unit owner answered and filed her own counterclaim. On the eve of trial, the unit owner moved to dismiss the association's lawsuit for failure to comply with mandatory arbitration under section 718.1255(a). The unit owner also voluntarily dismissed her counterclaim at that time. The trial court granted the unit owner's motion and dismissed the association's claim for failure to comply with the mandatory arbitration provision. We reversed that dismissal, holding that (1) "where the parties have litigated in circuit court for over two years, the intent of the statute would not be furthered by compelling arbitration and would, in fact, be contrary to the statute's stated intent," and (2) the unit owner waived her right to compel arbitration by filing an answer and counterclaim and actively litigating the action for two years before asserting the mandatory arbitration provision. Id.

We recognize that the facts of the instant case differ somewhat from Sterling. In Sterling, it was the original lawsuit—which had been pending for two years—that was the subject of the dismissal order. Here, by contrast, it was the counterclaim, which had been pending for only one month before CWELT filed the motion to dismiss.

Nevertheless, we conclude that the rationale of Sterling advances our analysis, because the mandatory arbitration provision of section 718.1255(4)(a) applied to the dispute raised in CWELT's 2015 complaint as well as the dispute raised in the Association's 2018 counterclaim. Notwithstanding this, CWELT did not seek to arbitrate the dispute before filing suit against the Association, seeking damages and a declaration that the Amendment (prohibiting the leasing of its unit without authorization) was unenforceable. Indeed, CWELT continued to prosecute its lawsuit for nearly three years, and only after the Association filed its counterclaim in March of 2018 did CWELT raise the specter of mandatory arbitration under section 718.1255.

More importantly, both CWELT (in its 2015 complaint) and the Association (in its 2018 counterclaim) sought relief premised upon the exact same Amendment to the Declaration of Condominium. In other words, the "dispute" contained in CWELT's complaint and the "dispute" contained in the Association's counterclaim, relate to the very same subject matter, constituted a "dispute" as defined by section

718.1255,[2] and were both subject to the mandatory presuit arbitration procedure in section 718.1255(4)(a). We hold that, by its own action (and inaction), CWELT waived the right to assert that the Association could not file its counterclaim without first complying with that same statute.

In reaching this conclusion, we find most helpful the Second District's analysis in Hawkins v. James D. Eckert, P.A., 738 So. 2d 1002 (Fla. 2d DCA 1999). In Hawkins, a law firm sued a former client to recover unpaid attorney's fees claimed to be owed under a written contract with an arbitration provision. The former client answered and filed a counterclaim against the firm. In response, the firm moved to compel arbitration of the counterclaim in accordance with the written contract providing for mandatory arbitration of any fee disputes.

The trial court granted the motion to compel arbitration, and the former client appealed. The law firm argued that, although it waived its right to arbitrate the fee dispute by filing the complaint, the right to demand arbitration was "revived" when the former client filed her counterclaim. Id. at 1003. Our sister court rejected that argument and reversed, holding that the former client's counterclaim "did not alter

[2] Under the statute, "a dispute" is "any disagreement between two or more parties that involves," among other things, "[t]he authority of the board of directors, under this chapter or association document to [] [r]equire any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto." § 718.1255(1)(a)1, Fla. Stat. (2015).

the scope and nature of the litigation to the extent that it revived the [law firm's] previously waived right to demand arbitration." Id.

In like fashion, the requirement of presuit arbitration was waived when CWELT initially filed its complaint without first complying with section 718.1255(4)(a). The Association's counterclaim, filed nearly three years into the litigation, did not revive CWELT's right to compel arbitration under section 718.1255(4)(a), because the counterclaim did not alter the scope and nature of the litigation. To the contrary, the parties' claims are flip sides of the same coin: CWELT's complaint sought a declaration that the Amendment is void and sought damages for loss rental income; the Association's counterclaim sought enforcement (and by necessity a declaration of the validity) of the very same Amendment prohibiting CWELT from leasing the unit to unauthorized tenants without the Board of Directors' approval. See also Chaikin v. Parker Waichman LLP, 253 So. 3d 640, 645 (Fla. 2d DCA 2017) (reaffirming Hawkins and holding: "As in Hawkins, by pursuing relief in the trial court based upon the Partnership Agreement, [plaintiff] waived its right to compel arbitration of [defendant's] counterclaims, which were also based upon the Partnership Agreement"); Owens & Minor Med., Inc. v. Innovative Mktg. and Distrib. Servs., Inc., 711 So. 2d 176, 177 (Fla. 4th DCA 1998) (affirming trial court's denial of plaintiff's motion to compel arbitration of defendant's counterclaim and holding: "[T]he counterclaim does not involve issues

separate and distinct from those raised in appellant's amended complaint. . . . The matters raised in the counterclaim are intertwined with issues raised in the amended complaint, since to decide each claim a fact finder would necessarily have to resolve fact issues common to both. This close relationship between the claims of the parties distinguishes this case from those cited by appellant, where claims subject to arbitration were 'separate and distinct' from claims for which arbitration had arguably been waived.")[3]

Affirmed.

[3] Given the length of time during which the parties had already litigated the validity and enforceability of this Amendment, we also find (as we did in Sterling) that "the intent of the statute would not be furthered by compelling arbitration and would, in fact, be contrary to the statute's stated intent." Sterling Condo. Ass 'n, Inc. v. Herrera, 690 So. 2d 703, 704 (Fla. 3d DCA 1997).