STATE OF MICHIGAN

COURT OF APPEALS

MARCO SCODELLER and TIFFANY BULEA, Plaintiff-Appellants, v DAVID COMPO, COMPO BUILDERS INC., JANET L COMPO INTER-VIVOS TRUST DATES 4/9/98, and COMPO REAL ESTATE INVESTMENT BROKERAGE LLC, Defendant-Appellees.	UNPUBLISHED June 27, 2017 No. 332269 Oakland Circuit Court LC No. 2015-150733-CZ

Before: TALBOT, C.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs, Marco Scodeller and Tiffany Bulea, appeal as of right the trial court's March 11, 2016 order granting defendants, David Compo, Compo Builders, Inc. (Compo Builders), Janet L. Compo Inter-vivos Trust Dated 4/9/98 (the Compos Trust), and Compos Real Estate Investment Brokerage, LLC's (Compo Real Estate), motion to compel arbitration, thereby dismissing plaintiffs' complaint without prejudice. For the reasons stated in this opinion, we affirm in part and reverse in part.

I. BASIC FACTS

This case arises from the purchase of "vacant land" on 9 Mile Road in Farmington Hills, Michigan. Scodeller and Bulea purchased the land from the Compos Trust on October 21, 2013. The purchase agreement for the property included a provision that "[a]s a condition of the sale of this land, [Scodeller and Bulea are] required to contract with Compo Builders, Inc. to build their new home." As required by the offer to purchase real estate, Scodeller and Bulea contracted with Compo Builders to build a new home on the land they had just purchased from the Compos Trust. The building contract was signed by Scodeller and Bulea as purchasers and by Compo as the president of Compo Builders, and it contained the following arbitration agreement:

> Any controversy or claim arising out of or relating to this contract or specifications, or the breach thereof, shall be settled **First**—by Mediation . . ., and if a satisfactory result cannot be provided to the acceptance of both parties involved then **Second**—by arbitration administered by a recognized arbitration association such as the an [sic] arbitrator provided by BIASM, using the

> Guidelines of Arbitration, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

It appears that, during the construction of the home, a dispute arose in part because the parties disagreed about how much money Scodeller and Bulea had to pay. In December 2014, in order to "partially resolve the dispute," the parties agreed to " 'split the difference' with regard to the Final Accounting." The parties also agreed to cooperate so that Scodeller and Bulea could get a certificate of occupancy from the City of Farmington Hills.

Thereafter, on July 28, 2015, Scodeller and Bulea filed a request for arbitration with the American Arbitration Association, but the Association's file was ultimately closed on August 27, 2015 because the parties failed to meet the filing requirements. Earlier, on August 20, 2015, Compo Builders sent a letter to Scodeller and Bulea, agreeing to use the arbitration services of Construction Dispute Resolution Services.

Scodeller and Bulea, however, refused to participate in arbitration before an arbitrator from Construction Dispute Resolution Services. Instead, on December 22, 2015, Scodeller and Bulea filed suit against defendants in the Oakland Circuit Court. In response, defendants filed a motion to compel arbitration of all claims raised against them. Defendants noted that all of Scodeller's and Bulea's claims against Compo Builders, Compo Real Estate, and the Compo Trust "are subject to resolution by arbitration" because of the arbitration clause in the offer to purchase and the arbitration agreement in the building contract.[1] Further, they asserted that even though Compo was not a party to an agreement with an arbitration clause, the claims against Compo should also be submitted to arbitration in the interest of judicial economy and to save the parties time and money. In response, Scodeller and Bulea argued that Compo, Compo Real Estate, and the Compo Trust were not parties to an arbitration agreement, so they had no statutory right to demand arbitration. Moreover, Scodeller and Bulea argued that Compo Builders had waived its right to demand arbitration. Finally, Scodeller and Bulea also argued that Count II was not arbitrable because it contained tort allegations. After argument, the trial court granted defendants' motion to compel arbitration.

II. MOTION TO COMPEL ARBITRATION

A. STANDARD OF REVIEW

Schodeller and Bulea argue that the trial court erred by granting defendants' motion to compel arbitration. Although not labeled as such, defendants' motion was essentially a motion for summary disposition under MCR 2.116(C)(7), which states that summary disposition is appropriate if a claim is barred because of "an agreement to arbitrate[.]" This Court reviews de novo a trial court's decision on a motion for summary disposition. *Altobelli v Hartmann*, 499 Mich 284, 294-295; 884 NW2d 537 (2016). Additionally, the existence and enforceability of an

[1] The offer to purchase real estate contained a provision allowing disputes to be resolved by arbitration or by court proceedings. It did not, however, mandate arbitration.

arbitration agreement is a question of law that this Court reviews de novo. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003).

B. ANALYSIS

As an initial matter, we reject Scodeller's and Bulea's argument that Compo Building waived its right to enforce the arbitration agreement in the building contract. Although a party may waive its right to arbitration, "waiver of a contractual right to arbitration is not favored." *Burns v Olde Discount Corp*, 212 Mich App 576, 582; 538 NW2d 686 (1995). "A party arguing there has been a waiver of this right bears a heavy burden of proof." *Id*. "The party must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts." *Id*. Although Compo Builders did not agree to arbitrate before the American Arbitration Association, it sent a letter to Scodeller and Bulea on August 20, 2015 agreeing to arbitration before Construction Dispute Resolution Services. Moreover, when Scodeller and Bulea initiated the instant suit, Compo Builders promptly moved to compel arbitration. Both actions are *consistent* with the right to arbitrate. Therefore, Scodeller and Bulea cannot meet their heavy burden of showing a waiver of the right to arbitration.

In order to resolve the remaining issues we must determine (1) whether the subject matter of Scodeller's and Bulea's claims are covered by the arbitration agreement in the building contract and (2) whether all defendants, including defendants who did not sign the arbitration agreement in the building contract, may enforce the agreement against Scodeller and Bulea.

" 'Arbitration is a matter of contract.' " *Altobelli*, 499 Mich at 295, quoting *Kaleva–Norman–Dickson Sch Dist No 6 v Kaleva–Norman–Dickson Sch Teachers' Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975). Therefore, this Court must apply contract interpretation legal principles when interpreting an arbitration agreement. *Altobelli*, 499 Mich at 295.

> In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law. [*In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).]

Further, because arbitration is a matter of contract, "a party cannot be required to submit to arbitration any dispute which he had not agreed" to submit to arbitration. *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234; 590 NW2d 580 (1998) (citation and quotation marks omitted). The scope of the agreement is, therefore, determined by the language used in the arbitration agreement. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007).

Here, the arbitration clause in the building contract states that it applies to "[a]ny controversy or claim arising out of or relating to this contract or specifications, or the breach thereof . . . ." Defendants argue that this language is broad enough to cover *all claims* raised by Scodeller and Bulea. We disagree.

Scodeller and Bulea brought a multi-count complaint against Compo, Compo Builders, Compo Real Estate, and the Compo Trust. In Count I, they asserted that Compo and Compo Builders had breached the building contract. That claim clearly falls within the broad scope of the above arbitration clause because it asserts a breach of that contract. In Count II, Scodeller and Bulea asserted that Compo and Compo Builders violated the building contract fund act and that those defendants had converted funds for their own use in violation of MCL 600.2919a. In Count III, Scodeller and Bulea alleged that "defendants" were unjustly enriched by the breach of contract and the violations of statute set forth in Counts I and II.[2] The basis for Count II is allegations that Compo and Compo Builders provided fraudulent accounting sheets and invoices that did not comport with the terms in the building contract and that they lied to their subcontractors and suppliers about whether they had been paid by Scodeller and Bulea. Therefore, it is plain that Counts II and III are also within the scope of the arbitration clause because the claims arose from the building contract.

Likewise, in Count VI, Scodeller and Bulea assert that Compo intentionally inflicted emotional distress upon them by making untruthful allegations and defamatory statements concerning Scodeller's and Bulea's willingness to pay as required by the building contract, by breaching the building contract, by intentionally delaying construction of the home, and by withholding the certificate of occupancy. Those actions are inextricably linked to the building contract, so this claim is also properly within the scope of the arbitration agreement.

However, in Count IV and V, Scodeller and Bulea alleged that Compo and Compo Real Estate committed fraudulent misrepresentation in connection with Scodeller and Bulea's purchase of the subject property and that "[a]ll defendants" conspired to commit the fraudulent misrepresentation. It cannot be fairly said that the claim for fraudulent misrepresentation arose out of or was related to the building contract, given that it pertained to Scodeller and Bulea's purchase of the land, not the construction of a home, which was governed by the building contract. For the same reasons, the claim for conspiracy to commit fraudulent misrepresentation is unrelated. Stated differently, these claims do not arise out of "[a]ny controversy or claim arising out of or relating to" the building contract or the breach of the building contract, so the arbitration agreement does not apply to them.

Next, although only Compo Builders (and plaintiffs) are signatories to the arbitration agreement, a non-signatory to an arbitration agreement may compel arbitration against a signatory under certain circumstances. See *Rooyakker*, 276 Mich App at 163. In *Rooyakker*, this Court considered an arbitration clause that provided for arbitration of "any dispute or controversy arising out of or relating to" the underlying agreement. *Id*. Based on that language, this Court held that an arbitrator could hear the plaintiffs tort claims even though they involved nonparties to the agreement. *Id*. This Court recognized that this state has a strong public policy that favors arbitration "as a single, expeditious means of resolving disputes," and that this policy

[2] Although Scodeller and Bulea do not expressly identify which defendants Count III applies to, it appears that, because it was related to Counts I and II, which were solely against Compo and Compo Builders, that Count III was also limited to Compo and Compo Builders.

would be "thwarted if all disputed issues in an arbitration proceeding" had to be "segregated into arbitrable and nonarbitrable categories. *Id*. at 163-164. The broad language of the arbitration agreement in this case—"[a]ny controversy or claim arising out of or relating to [the building contract]"—applies to all disputes arising from the building contract, regardless of whether they are against a party that signed the agreement or against a party that did not sign the agreement. See *id*. at 163.

Defendants point to federal precedent as further support for their theory that nonsignatories to an arbitration agreement can enforce the agreement against a signatory to the agreement. Although decisions of federal circuit courts are not binding on this Court, they can be persuasive. *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 364; 604 NW2d 330 (2000). In *Javitch v First Union Securities, Inc*, 315 F3d 619, 629 (CA 6, 2003), the Sixth Circuit Court of Appeals recognized five theories for binding nonsignatories to arbitration agreements to arbitration: "(1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (5) estoppel." In *Javitch*, the Sixth Circuit Court noted that "a signatory [] may be estopped from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the underlying contract." *Id*. Moreover, in *Brown v Pacific Life Ins Co*, 462 F3d 384, 389-390 (CA 5, 2006), an arbitration agreement existed between the plaintiffs and Smith Barney. Nonparties to the arbitration agreement, defendants G.E. Life & Annuity Insurance Company and Pacific Life Insurance Company, moved to compel arbitration of the claims against them based on the agreement with Smith Barney. *Id*. at 390. The Sixth Circuit Court reasoned:

> Although arbitration is a matter of contract that generally binds only signatories, a party to an arbitration agreement may be equitably estopped from litigating its claims against non-parties in court and may be ordered to arbitration. [*Grigson v Creative Artists Agency, LLC*, 210 F3d 524, 526 (CA 5, 2000)] (citing *MS Dealer Serv Corp v Franklin*, 177 F3d 942, 947 (11th Cir. 1999)). In *Grigson*, we held that a non-signatory to an arbitration agreement can compel arbitration: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against a non-signatory; or (2) when the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more signatories to the contract. *Id*. at 527. We reasoned that equity does not allow a party to "seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory." *Id*. at 528; see *Wash Mut Fin Group, LLC v Bailey*, 364 F3d 260, 263 (5th Cir. 2004) (stating that a plaintiff should not be able to claim the benefit of a contract and simultaneously avoid its burdens). "[T]he result in *Grigson* and similar cases makes sense because the parties resisting arbitration had expressly agreed to arbitrate claims of the very type that they asserted against the nonsignatory." *Bridas S.A.P.I.C. v Gov't of Turkm*, 345 F3d 347, 361 (5th Cir. 2003). [*Brown*, 462 F3d at 398-399.]

In this case, the allegations in Counts I, II, III, and VI involve "substantially interdependent and concerted misconduct by both the non-signator[ies] and one or more signatories to the contract." See *id*. The claims raised in those counts are intertwined because they are all based on misconduct allegations arising from or related to the building contract. See *id*. Further, Scodeller and Bulea must rely on the terms of the building contract in asserting the claims in those counts against the nonsignatory defendants. Nevertheless, on appeal, Scodeller and Bulea are essentially attempting to base the majority of their claims on the building contract with Compo Builders, but to avoid enforcement of the arbitration portion of that agreement against most parties to this litigation. On these facts, it is equitable to require them to arbitrate Counts I, II, III, and VI, even against defendants who did not sign the arbitration agreement.

III. CONCLUSION

Based on the foregoing, we affirm the trial court's decision to compel Scodeller and Bulea to arbitrate their claims in Counts I, II, III, and VI of their complaint, even those against defendants who were not parties to the arbitration agreement, because (1) the arbitration agreement is broad enough to encompass each of those claims and, for policy reasons, it is expeditious to resolve those disputes in a single proceedings, and (2) plaintiffs, who are parties to the arbitration agreement, are estopped from avoiding arbitration of their claims against those defendants who did not sign the agreement where the claims are based on "substantially interdependent and concerted misconduct" by all defendants.[3] However, because Count IV and V are related to the purchase of land, not the building contract, those claims do not fall within the scope of the arbitration agreement and are not arbitrable with regard to any defendant.

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction. No taxable costs under MCR 7.219, no party having prevailed in full.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael J. Kelly

[3] If the parties cannot agree on an arbitrator, then the trial court shall appoint an arbiter to resolve the dispute.