NO. COA05-1064

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

REMINGTON ARMS COMPANY, INC.

v. Rockingham County
No. 04 CVS 2102

HERITAGE GRAPHICS, LLC and
BBS TECH, INC.

Appeal by defendant BSS Tech, Inc. from order filed 28 March 2005 by Judge Melzer A. Morgan, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 22 February 2006.

Womble Carlyle Sandridge & Rice, PLLC, by John F. Morrow, Jr. and Jason C. Hicks, for plaintiff-appellee.

Brooks. Pierce, McLendon, Humphrey & Leonard, L.L.P., by John S. Buford and Derek J. Allen, for defendant-appellee Heritage Graphics, Inc.

Nexen Pruet Adams Kleemeier, PLLC, by David A. Senter and Eric H. Biesecker, for defendant-appellant BSS Tech, Inc.

STEELMAN, Judge.

On 1 September 2001, plaintiff and BBS Tech, Inc. (defendant) entered into a purchasing agreement (agreement) by which plaintiff agreed to purchase spooled fishing line from defendant for its Stren line of fishing products. Plaintiff terminated its agreement with defendant in February 2004 after it sold its Stren products line. Defendant claimed plaintiff owed it money as a result of the

termination of the agreement, and after negotiations and mediation failed, plaintiff initiated arbitration proceedings pursuant to an arbitration clause in its agreement with defendant. The dispute between plaintiff and defendant is not the subject of this appeal.

Heritage Graphics, Inc. (now Heritage Graphics, LLC) (Heritage) is a provider of printing and related services. While the agreement was still in effect between defendant and plaintiff, defendant and Heritage entered into a contract whereby Heritage agreed to provide printed labels for the spooled fishing line defendant was providing plaintiff. Heritage and plaintiff had no contractual relationship, and Heritage billed defendant directly for its services. The complaint in the instant case alleges that a dispute arose between defendant and Heritage over payment for the labels provided by Heritage to defendant for the spooled fishing line defendant was providing plaintiff under the agreement. Heritage claimed it was owed $52,420.82 for the work Heritage had done pursuant to its contract with defendant. Having failed to secure payment from defendant, Heritage sent a letter to plaintiff demanding payment in December of 2004. Heritage further threatened to initiate an action against both plaintiff and defendant to collect payment due if plaintiff did not tender the $52,420.82 Heritage claimed was owed.

Plaintiff filed this declaratory judgment action against Heritage and defendant, seeking a declaration that plaintiff was not responsible for the $52,420.82 Heritage claimed it was owed. Defendant filed a motion arguing that there was no actual

controversy between it and plaintiff, and therefore it should be dismissed from the action. Defendant's motion argued in the alternative that if it were not dismissed from the action, the matter should be resolved in arbitration pursuant to an arbitration clause contained in the purchasing agreement between it and plaintiff. The trial court denied defendant's motion, and defendant appeals.

In defendant's sole argument, it contends that the trial court erred in denying its motion to compel arbitration. We disagree.

We initially note that though this appeal is from an interlocutory order, because it involves a substantial right, the right to arbitrate a claim, it is properly before us. *Hobbs Staffing Servs. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 225, 606 S.E.2d 708, 710 (2005) (citations omitted). "While public policy favors arbitration, parties may not be compelled to arbitrate their claims unless there exists a valid agreement to arbitrate as specified by section 1-567.2 of the General Statutes. The party seeking to compel arbitration must prove the existence of a mutual agreement to arbitrate." *Thompson v. Norfolk & Southern Ry.*, 140 N.C. App. 115, 120, 535 S.E.2d 397, 400 (2000) (citations omitted).

> Whether a dispute is subject to arbitration is an issue for judicial determination. The trial court's conclusion that a particular dispute is or is not subject to arbitration is a conclusion of law, and is reviewable by the appellate courts *de novo*.
>
> Whether a dispute is subject to arbitration involves a two-part inquiry: "(1) whether the parties had a valid agreement to arbitrate,

> and also (2) whether 'the specific dispute falls within the substantive scope of that agreement.'"

Hobbs, 168 N.C. App. at 225, 606 S.E.2d at 710 (citations omitted).

The arbitration clause in the agreement between plaintiff and defendant reads as follows:

> The parties agree to put forth their best efforts to resolve any disputes arising under this Agreement through negotiation. If any dispute cannot be resolved after good faith negotiation, the parties agree to submit the dispute to mediation, with a mediator chosen jointly. If the dispute cannot be settled through mediation, the parties agree to submit the dispute to binding arbitration under the auspices of the American Arbitration association and in accordance with its Rules of Commercial Arbitration then in effect.

We assume *arguendo* that this arbitration clause is valid. Unsettled is whether the specific dispute between plaintiff and defendant falls within the terms of the agreement, or whether, in fact, plaintiff's complaint alleges *any* actual dispute or controversy between plaintiff and defendant.

Though defendant contends that this Court should compel arbitration in this matter, it directs us to no case law indicating that it would be proper to do so on these facts, and we have found none. The arbitration clause is part of the agreement between plaintiff and defendant. Heritage was not a signatory to that agreement, and thus has no rights or obligations thereunder. Plaintiff filed its complaint solely in response to the demand letter from Heritage. Nothing in the complaint suggests any cause of action between plaintiff and defendant. Relying on the facts

laid out in plaintiff's complaint, defendant is only tangentially involved in the dispute between plaintiff and Heritage.

There is nothing in the record indicating that defendant has demanded plaintiff pay any amounts still due Heritage for the printing work done pursuant to the purchase agreement between defendant and Heritage. There is no actual controversy between plaintiff and defendant alleged in the complaint requesting a declaratory judgment. *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140-41, 544 S.E.2d 821, 824 (2001). Had plaintiff initiated this action solely against defendant based on these same facts, the complaint would have to be dismissed. *Id.*, 544 S.E.2d at 824-25 (2001). However, defendant was properly made a party to plaintiff's declaratory judgment action pursuant to N.C. Gen. Stat. § 1-260 (2005), because of the likelihood that some interest of defendant would be affected by the declaration of the trial court. *Singleton v. Sunset Beach & Twin Lakes, Inc.*, 147 N.C. App. 736, 741-42, 556 S.E.2d 657, 661 (2001).

The fact that defendant would likely be interested in the outcome of plaintiff's request for a declaratory judgment does not, however, make this matter a dispute arising under the agreement. Nor does the fact that defendant's purchase agreement with Heritage was executed in furtherance of defendant's agreement with plaintiff. The actual controversy in the instant case exists between plaintiff and Heritage, and Heritage is not a party to the agreement between plaintiff and defendant. Thus, this dispute does not arise under the agreement between plaintiff and defendant. This argument is without merit.

AFFIRMED.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).