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NO. COA06-675

NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2007

JERRY A. HAILEY, JR. and
A & J INVESTMENTS, L.L.C.,

Plaintiffs

v.

New Hanover County
No. 05 CVS 1546

TERMINIX COMPANY OF NORTH
CAROLINA, INC., d/b/a TERMINIX
PEST CONTROL,

Defendant

Court of Appeals

Appeal by defendant from judgment entered 21 October 2005 by Judge Jack W. Jenkins in New Hanover County Superior Court. Heard in the Court of Appeals 11 January 2007.

Slip Opinion

Block, Crouch, Keeter, Behm & Sayed, L.L.P., by Auley M. Crouch, III and Christopher K. Behm, for plaintiffs-appellees.

Ennis, Newton & Baynard, P.A., by Stephen C. Baynard, for defendant-appellant.

CALABRIA, Judge.

Terminix Company of North Carolina, Inc., d/b/a Terminix Pest Control ("defendant") appeals from an order entered denying defendant's motion to compel arbitration. We affirm.

Jerry A. Hailey, Jr., ("Hailey") on behalf of A & J Investments, L.L.C. ("A & J Investments") (collectively, "plaintiffs") entered into a contract to purchase a house and lot

located at 22 Live Oak Drive, Wrightsville Beach, North Carolina ("the property"). The contract contained a standard inspection provision allowing plaintiffs to have the property inspected for termites prior to closing. Hailey, on behalf of A & J Investments, hired defendant to perform the termite inspection. James Alexander ("Alexander"), defendant's agent, performed an inspection of the property on 29 November 2003 and completed a Wood-Destroying Insect Information Report ("WDIR"). After completing the inspection, Alexander verbally informed Hailey there were no signs of termites or termite damage. Based upon the results of the inspection, the plaintiffs purchased the property on 9 December 2003. On 10 December 2003, defendant performed a termite pest control treatment on the property pursuant to a Subterranean Termite Coverage Plan ("the treatment contract") signed and purchased by plaintiffs on 9 December 2003. Subsequently, plaintiffs discovered termite damage that existed prior to the initial inspection performed by defendant on 29 November 2003 and which defendant failed to discover during the inspection.

On 29 April 2005, plaintiffs filed an action against defendant alleging negligence and breach of contract. On 9 September 2005, defendant filed a motion to compel arbitration based upon a provision in the treatment contract requiring arbitration of all claims arising out of services performed pursuant to the treatment contract. On 21 October 2005, defendant's motion was denied. Defendant appeals.

It is well established that "[i]nterlocutory orders are not usually appealable; however, . . . the denial of a demand for arbitration is an order that affects a substantial right which might be lost if appeal is delayed and thus is immediately appealable." *Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 677 (2001) (internal citations and quotations omitted).

The sole issue before this Court is whether a valid contract to arbitrate existed between the parties regarding any dispute arising out of the inspection performed on 29 November 2003.

Defendant argues that the WDIR was performed in conjunction with the termite treatment administered on 10 December 2003 and that the arbitration provisions of the treatment contract became a part of the WDIR and therefore, apply to the inspection performed on 29 November 2003. In support of its argument, defendant relies upon N.C. Admin. Code tit.2, r. 34.0602(c) (April 2007) which provides, "[I]f a treatment is performed in conjunction with a WDIR, a copy of the written agreement and warranty, if any, shall be included with or attached to and become a part of the WDIR." *Id.* Defendant argues that Hailey's signature on the Subterranean Termite Inspection Graph ("the graph") dated 29 November 2003, is evidence that the WDIR was performed in conjunction with the termite treatment performed on 10 December 2003. Defendant further argues Hailey's signature on the graph is evidence of an agreement between plaintiffs and defendant that the fee for the inspection would be waived if plaintiffs purchased a termite treatment plan. Plaintiffs argue that the inspection performed on 29 November 2003

was not a part of, or administered in conjunction with, the treatment contract and therefore, any claims arising out of the inspection are not subject to arbitration.

"[A]rbitration is a matter of contract . . . [and] a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Raspet*, 147 N.C. App. at 135-36, 554 S.E.2d at 678 (internal citations omitted). "The question of whether a dispute is subject to arbitration is a question of law for the trial court, and its conclusion is reviewable *de novo*." *Pineville Forest Homeowners Ass'n v. Portrait Homes Const. Co.*, 175 N.C. App. 380, 385-86, 623 S.E.2d 620, 624 (2006). "In considering a motion to compel arbitration, the trial court should determine (1) the validity of the contract to arbitrate and (2) whether the subject matter of the arbitration agreement covers the matter in dispute." *Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 455, 531 S.E.2d 874, 876 (2000).

"Before a dispute can be settled by arbitration, there must first exist a valid agreement to arbitrate." *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002). "Where there is no mutual agreement as to all of the terms, there is no contract." *Id.* at 646, 562 S.E.2d at 66. "If a question arises concerning a party's assent to a written instrument, the court must first examine the written instrument to ascertain the intention of the parties." *Id.* (citation omitted). "It is well established that a valid contract arises only where there is assent between the parties, amounting to a meeting of the

minds." *Revels v. Miss N.C. Pageant Org., Inc.*, 176 N.C. App. 730, 733-34, 627 S.E.2d 280, 283 (2006), review denied by 360 N.C. 578, 635 S.E.2d 288 (2006).

In the case before us, the parties did not agree that the inspection performed on 29 November 2003 was subject to an arbitration provision. When defendant performed the inspection, defendant was required by N.C. Admin. Code. tit. 2, r. 34.0602(a) to complete a WDIR. N.C. ADMIN. CODE tit. 2, r. 34.0602(a) (April 2007) ("Any written statement as to the presence or absence of wood-destroying insects or organisms or their damage in buildings or structures for sale shall be on the WDIR 100."). However, the parties did not agree that the WDIR would be a part of the treatment contract. The WDIR was performed by defendant ten days before plaintiffs purchased the treatment contract. Although Hailey signed the graph that was included with the treatment contract on 29 November 2003, the day that the WDIR was performed, the actual contract that included the arbitration provision was not entered into until 9 December 2003. Further, there is no indication from the record that Hailey agreed to purchase the treatment plan in exchange for defendant's waiving the cost of the inspection.

Finally, the treatment performed on 10 December 2003 was not performed in "conjunction" with the WDIR. Defendant completed the WDIR eleven days before defendant performed the treatment on plaintiffs' property. To say that a treatment performed after a lapse of eleven days was performed in conjunction with a WDIR

stretches the plain meaning of the word "conjunction." Therefore, the inspection performed on 29 November 2003 was not subject to the arbitration provision in the treatment contract.

For the foregoing reasons, we hold the trial court correctly determined that defendant did not enter into an agreement with plaintiffs to arbitrate the claims that arose out of the inspection and the WDIR of the property purchased by plaintiffs. The order of the trial court denying defendant's motion to compel arbitration is affirmed.

Affirmed.

Judges GEER and JACKSON concur.

Report per Rule 30(e).