NO. COA06-782

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

BILLY R. BRITT,
Plaintiff-Appellee

v.

Orange County
No. 05 CVS 1443

MAY DAVIS GROUP, INC and
MICHAEL JACOBS,
Defendant-Appellants

Appeal by defendants from order entered 25 January 2006 by Judge Dennis J. Winner in Orange County Superior Court. Heard in the Court of Appeals 5 February 2007.

Northern Blue, LLP, by J. William Blue, Jr. for plaintiff-appellee.

Law Office of Michael W. Patrick, by Michael W. Patrick, for defendant-appellant.

MARTIN, Chief Judge.

Defendant-appellants May Davis Group, Inc., and Michael Jacobs (collectively "defendants") appeal from an order denying their Motion to Compel Arbitration. We affirm.

The evidence before the trial court tended to show that plaintiff Billy R. Britt opened an account with defendant May Davis in August 2002. Plaintiff acted at the instigation of Tom Johnson, a third party. Johnson eventually appropriated considerable amounts of the money in the account - over $ 5 million - to his own

use. On 21 July 2005, plaintiff filed suit against defendants, alleging *inter alia*, fraud, negligence, and negligent misrepresentation. On 2 December 2005, defendants filed a Motion to Compel Arbitration, alleging plaintiff had previously entered into a binding arbitration agreement agreeing to settle all matters regarding the relationship through arbitration.

After a hearing, the trial court entered an order denying the motion. The order read in its entirety:

> This cause coming on to be heard before the undersigned Judge and the Court having examined the affidavits presented by the parties and considered the arguments of counsel and the law presented to him thereby, finds the following facts:
> 1. Defendants have failed to satisfy the undersigned Judge that an arbitration agreement was ever entered into between the parties.
> 2. Defendants have satisfied the Court and Plaintiff admits having signed the front of an account application which contains the following language: "... I hereby acknowledge that I understand and agree to the terms set forth in the customer statement (including the pre-dispute arbitration clause, a copy of which I have received as found in paragraph 19) ... ." Paragraph 19 is contained on the back of the account application form. However, the Court is not satisfied that the copy of the account application received by Plaintiff by fax communication and which was signed by him and faxed back to Defendants ever contained the material on the back of the account application including paragraph 19.
>
> From the foregoing findings of fact, the Court concludes as a matter of law that Defendants are not entitled to compel arbitration in this matter nor are they entitled to sanctions. It is, therefore, Ordered and Adjudged that Defendant's Motion to Compel Arbitration is Denied.

The order denying defendants' motion to compel arbitration is interlocutory, as it is not a final judgment. *See Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). However, this Court has repeatedly held that "an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (citations omitted). Therefore, this appeal is properly before us.

Defendants contend, citing *Bass v. Pinnacle Custom Homes, Inc.*, 163 N.C. App. 171, 175, 592 S.E.606, 609 (2004), that the trial court's decision regarding a Motion to Compel Arbitration is reviewable *de novo*. We cannot agree. In determining whether a particular dispute is governed by an arbitration agreement, we utilize a two step analysis, determining (1) whether the parties had a valid agreement to arbitrate, and if so (2) whether the specific dispute falls within the substantive scope of that agreement. *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004). In the first step, "[t]he trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002). Only the second step - the trial court's determination of whether the specific dispute is governed by the arbitration agreement - is reviewable *de novo*. *Tohato, Inc.*

v. Pinewild Mgmt., Inc., 128 N.C. App. 386, 391, 496 S.E.2d 800, 804 (1998).

The trial court has determined that an arbitration agreement did not exist between the parties. Accordingly, upon review, we must determine whether there is evidence in the record to support the trial court's findings of fact and, if so, whether the trial court's findings of fact in turn support the conclusion that there was no agreement to arbitrate. *See Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991).

In making its findings, the trial court considered the plaintiff's affidavit. The affidavit notes, in pertinent part that:

> I [plaintiff] have never previously seen the Customer Agreement that Defendants contend was printed on the reverse of the Account Application.

The Customer Agreement in question contains the arbitration terms. This constitutes sufficient evidence in the record to support the trial judge's finding of fact that there was no agreement to arbitrate, even though there is conflicting evidence tending to support a contrary finding. *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981). In order to be valid, an arbitration agreement must first be a valid contract. *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881 (1999). As the moving party, defendants bore the burden of demonstrating that the parties mutually agreed to arbitrate their dispute. *See Blow v. Shaughnessy*, 68 N.C. App. 1, 17, 313 S.E.2d 868, 877 (1984). Since the trial court determined, as a matter of

fact, that the parties never entered into an arbitration agreement, the analysis must end there, and the trial court's conclusion of law that defendants were not entitled to compel arbitration must be upheld.

We note that this result is consistent with past outcomes under analogous factual scenarios. *Compare Sciolino*, 149 N.C. App. at 646, 562 S.E.2d at 66-7 (signing statement agreeing to attached contract with specific reference to its arbitration terms not binding where, as in case at bar, trial court found that the purportedly attached contract was never delivered); *Park v. Merrill Lynch*, 159 N.C. App. 120, 126, 582 S.E.2d 375, 380 (2003)(plaintiffs' bare assertion that they did not recollect seeing "Adoption Agreement" with arbitration terms no defense to contract formation where defendants could produce multiple, signed "Custodial Agreement" acknowledging receipt of Account Agreement).

Affirmed.

Judges HUNTER and STROUD concur.

Report per Rule 30(e).