NO. COA12-584
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

KAY R. HAMILTON, on behalf of herself and all others similarly situated,
Plaintiff,

v.

Wake County
No. 08 CVS 15102

MORTGAGE INFORMATION SERVICES, INC., AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Defendants.

Appeal by defendants from order entered 27 January 2012 by Judge Lucy N. Inman in Wake County Superior Court. Heard in the Court of Appeals 24 October 2012.

Puryear and Lingle, P.L.L.C., by David B. Puryear, for plaintiff.

Ellis & Winters, L.L.P., by Matthew W. Sawchak, for defendant.

Bailey & Dixon, L.L.P., by Adam N. Olls, for defendant.

ELMORE, Judge.

Mortgage Information Services, Inc. (MIS) and First American Title Insurance Co. (First American) appeal from an order denying their combined motions to stay and to compel

arbitration and to decertify the plaintiff class. After careful review, we affirm the trial court's order.

I. Background

On 22 April 2005, Kay R. Hamilton (plaintiff) refinanced her mortgage debt by procuring a home loan from Ameriquest Mortgage Company (Ameriquest). In order to gain financing, plaintiff was required to purchase a title insurance policy on behalf of Ameriquest as beneficiary. Ameriquest retained MIS to provide settlement services and issue an American Land Title Association insurance policy (ALTA policy) in the amount of $175,500.00. The ALTA policy contained an arbitration provision. First American was the underwriter for the ALTA policy. Plaintiff was neither a named insured, nor did she sign the ALTA policy, negotiate its terms, or have knowledge of the arbitration provision at closing. In exchange for its services, plaintiff paid MIS various fees from the proceeds of her loan, including a premium of $371.60 for the ALTA policy.

On 25 August 2008, plaintiff filed a complaint in Wake County Superior Court against First American and MIS (together defendants) alleging that they engaged in unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. She certified her complaint as a class action and specifically

challenged the following seven fees: 1) $325.00 closing fee to MIS, 2) the $225.00 title search fee to MIS, 3) the $75.00 title clearing fee to MIS, 4) the $50.00 title insurance binder fee to MIS, 5) the $250.00 signing fee to Mobile Closings, 6) the $371.60 title insurance fee, and 7) the $60.00 courier fee to MIS.

On 10 November 2009, the trial court granted defendants' dismissal motions in part and granted plaintiff's class certification motion in part. Thereafter, defendants made combined motions to stay and compel arbitration of plaintiff's remaining claims and to decertify plaintiff's class as to the extent that it asserted any claims against them. The trial court denied said motions. Accordingly, the existence of the ALTA policy and the application of the arbitration agreement contained therein that serve as the subjects of this appeal.

I. Motion to Compel Arbitration

The only issue on appeal is whether the trial court erred by denying defendants' motions to compel arbitration. Defendants argue that plaintiff's claims stated in her complaint are subject to arbitration. We disagree.

The denial of a motion to compel arbitration is generally interlocutory in nature. *See Raspet v. Buck*, 147 N.C. App. 133,

135, 554 S.E.2d 676, 677 (2001). "While an interlocutory order is generally not directly appealable, such an order will be considered if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881 (1999) (citations and quotations omitted). However, we have held that because "[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, . . . an order denying arbitration is therefore immediately appealable." *Id.* Accordingly, we will address the merits of defendants' appeal.

Our Supreme Court has held that "'findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' . . . 'Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.'" *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008) (quoting *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) and *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)). The determination of "[w]hether a dispute is subject to arbitration

involves a two pronged analysis; the trial court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and 2) whether the specific dispute falls within the substantive scope of that agreement." *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001). Because the duty to arbitrate is contractual, the parties must have agreed to submit said dispute to arbitration. *See Coach Lines v. Brotherhood*, 254 N.C. 60, 67-68, 118 S.E.2d 37, 43 (1961). As the defendants do not challenge the trial court's conclusion that plaintiff is not a party to the arbitration agreement, we shall not address prong one above.

A. Estoppel

In the arbitration context, a party "may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Ellen v. A.C. Schultes of Md., Inc.*, 172 N.C. App. 317, 321, 615 S.E.2d 729, 732 (2005). Therefore, when a party is seeking or "receives a 'direct benefit' from [the] contract containing [the] arbitration clause[,]" he will be estopped from refusing to abide by the arbitration clause. *Id.* at 321, 615 S.E.2d at 732

(2005) (quoting *Inter. Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 418 (4th Cir. 2000) (alterations in original)). As such, our inquiry shall focus on whether plaintiff is seeking or has received a "direct benefit" from the ALTA policy.

Defendants assert that plaintiff received a "direct benefit" from the mere existence of the ALTA policy because, without such, her cause of action would cease to exist. Additionally, defendants argue that plaintiff seeks to enforce the price term contained in the ALTA policy while simultaneously disavowing the arbitration clause.

We disagree with defendants. In *Ellen*, this Court recognized that the disputed contract provided part of the foundation for the plaintiffs' complaint; however, we concluded that the plaintiffs were not estopped from refusing to arbitrate because they did not seek a "direct benefit" from the contract. As such, "plaintiffs' allegations of unfair and deceptive trade practices . . . [did not] depend upon the contracts containing the arbitration clause. Both of the claims [were] dependent upon legal duties imposed by North Carolina statutory or common law rather than contract law." 172 N.C. App. 317, 320-22, 615 S.E.2d 729, 732-33 (2005). In *Ellen* we distinguished

Schwabedissen, a case in which nonsignatory International Paper gained a "direct benefit" from the Wood-Schwabedissen contract because it provided "part of the factual foundation for every claim asserted by International Paper against Schwabedissen." *Id.* at 322, 615 S.E.2d at 732. We concluded that because International Paper's "entire case hinge[d] on its asserted rights under the Wood-Schwabedissen contract[,] it [could not] seek to enforce those contractual rights and avoid the contract's [arbitration] requirement." *Id.*

The case *sub judice* is analogous to *Ellen*. Here, five of plaintiff's remaining claims allege that defendant-MIS's and/or defendant-First American's violations of N.C. Gen. Stat § 24-8(d) contravened public policy and constituted unfair and deceptive trade practices pursuant to N.C. Gen. Stat § 71-1.1. The sixth claim alleges that defendants failed to offer the "reissue" rate set forth in First American's rate filing at the North Carolina Department of Insurance. Additionally, the trial court granted class certification with respect to four of plaintiff's remaining claims, including (1) whether the signing fee imposed by defendant-MIS was in excess of that prescribed by the Notary Public Act, (2) whether defendants failed to provide the services associated with the signing fee, (3) whether

defendants violated the filed rate doctrine by failing to offer the correct "reissue rate" for a title insurance policy, and (4) whether defendant-MIS failed to provide the services associated with the courier fee.

A close look at plaintiff's claims shows that they are not dependent upon the ALTA policy; instead, they stem from legal duties imposed by North Carolina statutory law. Furthermore, we find no evidence that plaintiff consistently maintained that certain provisions within the ATLA policy, including the price term, should be enforced to benefit her. As such, plaintiff never received "direct benefit" from the mere existence of the ALTA policy. Accordingly, plaintiff is not estopped to deny that she is required to participate in arbitration.

B. Scope

Defendants argue that plaintiff's claims fall within the scope of the arbitration clause. We disagree.

"[W]hether a claim falls within the scope of an arbitration clause . . . depends not on the characterization of the claim as tort or contract, but on the relationship of the claim to the subject matter of the arbitration clause." *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 24, 331 S.E.2d 726, 731 (1985). Accordingly, "we must look at the language in the

agreement, viz., the arbitration clause, and ascertain whether the claims fall within its scope. In so doing, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.*

Here, the arbitration clause provides in part that "[a]rbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, and service of the Company in connection with its issuance or the breach of a policy provision or other obligation." Defendants argue that because other jurisdictions have concluded that similar arbitration provisions have a broad reach, plaintiff's claims accordingly "fit[] comfortably within the scope of the arbitration provision."

We agree with defendants in that both our courts and courts of other jurisdictions have interpreted similar arbitration provisions to encompass a wide variety of claims. *See, e.g., Bass v. Pinnacle Custom Homes, Inc.*, 163 N.C. App. 171, 176, 592 S.E.2d 606, 609 (2004); *Pierson v. Dean, Witter, Reynolds, 742 F.2d 334 (7th Cir. Ill. 1984); Bos Material Handling, Inc. v. Crown Controls Corp.*, 137 Cal. App. 3d 99 (Cal. App. 3d Dist. 1982). We also note that North Carolina has no legislative bar to the arbitration of claims based on unfair and deceptive trade

practices provided that such claims "arise out of or relate to the contract or its breach." *Rodgers* at 23, 331 S.E.2d at 731.

However, here we conclude that plaintiff's claims do not fall within the scope of the arbitration provision as plaintiff's claims are statutorily based and do not arise out of or relate to the contract. Furthermore, the arbitration provision refers to "any controversy or claim between the *Company and the insured*" (emphasis added). Thus, the language of the arbitration provision was not intended to encompass plaintiff's claims. Finally, plaintiff's payment of the *required* premium did not trigger the enforcement of the arbitration provision as she neither signed nor negotiated the contract and was unaware of the arbitration provision contained therein.

After carefully reviewing the record, we conclude that plaintiff's claims fall outside of the scope of the arbitration agreement. Accordingly, we decline to address defendants' remaining issues on appeal.

III. Conclusion

In sum, plaintiff's claims do not fall within the scope of the arbitration provision and she is not estopped from denying the arbitration of her claims. Accordingly, we affirm.

Affirmed.

Judges STROUD and BEASLEY concur.

Report per Rule 30(e).