

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-281  
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

AMERICUS RETAIL HOLDINGS, LLC,  
BEATTIES FORD CHARLOTTE, LLC,  
BELLE TERRE RETAIL INVESTORS, LLC,  
DAWSONVILLE RETAIL HOLDINGS, LLC,  
HINESVILLE RETAIL HOLDINGS, LLC,  
JDH OKATIE CENTER HOLDINGS, LLC,  
JDH RIVERVIEW COMMONS HOLDINGS,  
LLC, OCILLA RETAIL HOLDINGS, LLC,  
ROCKY RIVER RETAIL INVESTORS, LLC,  
STONEWATER RETAILINVESTORS, LLC,  
YORKTOWN RETAIL HOLDINGS, LLC,  
MEBANE RETAIL HOLDINGS, LLC, AUTO  
DRIVE RETAIL INVESTORS, LLC and  
JDH CAPITAL, LLC,  
Plaintiffs,

v.

Mecklenburg County  
No. 10 CVS 4711

MARK BALL,  
Defendant,  
Third-Party Plaintiff,

v.

David P. Hill; William L. Allen;  
Gary J. Davies; JDH Capital  
Management, LLC; JDH Capital Fund  
I LLC; JDH Fund Management I LLC;  
JDH Holdings, LLC; JDH IV Holdings,  
LLC (DE); JDH Acquisition, LLC  
(DE); Nauset Light Holdings, LLC;  
Nauset Light Equities, LLC; Nauset  
Light Equities IV, LLC; Nauset  
Light Equities V, LLC; Chatham  
View, LLC; Grove Park Holdings,  
LLC; Grove Park Equities, LLC;  
Grove Park Equities II, LLC; Grove

Park Equities III, LLC; St. Johns Holding Company, LLC; St. Johns Investors, LLC; The Chartwell Group, LLC; Alfa Holdings, LLC; LKC Holdings, LLC; Durban Realty Services, LLC; Durban Development, LLC; Durban Management, LLC; The Durban Group, LLC; Beatties Ford Charlotte, LLC; Beatties Ford Retail Holdings, LLC; Cayce SC Retail Investors, LLC; Cayce SC Retail Holdings, LLC; College Park Retail Investors, LLC; College Park Retail Holdings, LLC; College Park Equities LLC; Creedmoor Retail, LLC; Creedmoor HT Investment Group, LLC; Dallas Retail Investors, LLC; Dallas Retail Holdings, LLC; Fayetteville Retail Investors, LLC; Fayetteville Retail Holdings, LLC; Folkston Retail Investors, LLC; Folkston Retail Holdings, LLC; JAX-DUNN River Retail Investors, LLC; KM/JDH Beatties Ford, LLC; KM/JDH Pharmacy Investors, LLC; Lake City Retail Investors, LLC; Lake City Retail Holdings, LLC; Lawrenceville Retail Investors, LLC; Lawrenceville Retail Holdings, LLC; Marietta Retail Investors, LLC; Marietta Retail Holdings, LLC; Marshall Creek Retail Investors, LLC; Marshall Creek Retail Holdings, LLC; Morrisville Retail Investors, LLC; Morrisville Retail Holdings LLC; New Hope Retail Holdings, LLC; New Hope Retail Investors, LLC; Quail Crossing Retail Holdings, LLC; Quail Crossing Retail Investors, LLC; Richmond Hill Retail Investors, LLC; Richmond Hill Retail Holdings, LLC; Shopton

Square Charlotte, LLC; Sinking Spring Retail Holdings, LLC; Sinking Spring Retail Investors, LLC; South Congaree Retail Investors, LLC; South Congaree Retail Holdings, LLC; Strickland Corners Retail Investors, LLC; Strickland Corners Retail Holdings, LLC; Summit Commons Retail Investors, LLC; Summit Commons Retail Holdings, LLC; The Chelsea Group, LLC; The Orleans Investment Company, LLC; Yorktown Retail Investors, LLC; Americus Retail Investors, LLC; Dawsonville Retail Investors, LLC; Hinesville Retail Investors, LLC; Garden City Retail Investors, LLC; Garden City Retail Holdings, LLC; Grove Park Okatie Retail Investors, LLC; JDH Okatie Retail, LLC; Nauset Light Okatie Retail Investors, LLC; Mebane Retail Investors, LLC; Ocilla Retail Investors, LLC; Acworth Retail Investors, LLC; Acworth Retail Holdings, LLC; Bloomingdale Retail Investors, LLC; Conyers Retail Investors, LLC; Conyers Retail Holdings, LLC; Dallas Macland Retail Investors, LLC; Dallas Macland Retail Holdings, LLC; Elizabethtown Retail Investors, LLC; Euhlairee Retail Investors, LLC; Lithonia Retail Investors, LLC; Lithonia Retail Holdings, LLC; Lebanon Retail Investors, LLC; Mableton Retail Investors, LLC; Mableton Retail Holdings, LLC; Shores Village Retail Investors, LLC; Shores Village Retail Holdings, LLC; Swatara Retail Investors, LLC; Whispering Pines Retail Investors, LLC; Whispering Pines

Retail Holdings, LLC; Woodstock  
Retail Investors, LLC; Woodstock  
Retail Holdings, LLC,  
Additional Defendants on  
Counterclaims.

Appeal by plaintiffs from order entered 19 July 2012 by  
Judge Richard D. Boner in Mecklenburg County Superior Court.  
Heard in the Court of Appeals 26 August 2013.

*TISON REDDING, PLLC., by Joseph R. Pellington, David G.  
Redding, and Patricia Todd, for defendant.*

*RAYBURN COOPER & DURHAM, P.A., by G. Kirkland Hardymon,  
Benjamin E. Shook, MOTLEY RICE LLC., by Ingrid L. Moll, for  
plaintiffs.*

Elmore, Judge.

In July 2004, Mark Ball (defendant Ball) accepted  
employment to work for JDH Capital, LLC (JDH), a commercial  
retail development company. JDH created additional limited  
liability companies (collectively plaintiffs) to manage its  
various real estate projects. In addition to a salary,  
defendant Ball's compensation included a profit-sharing clause  
that gave him ownership interests in those JDH entities created  
while he was employed. On 12 February 2009, defendant Ball's  
employment was terminated by JDH. Thereafter, JDH and  
plaintiffs commenced a declaratory judgment action against  
defendant Ball that requested, in part, an order stating that

defendant Ball abdicated any membership interests in entities subsequently created by JDH. Defendant Ball subsequently filed his answer and counterclaims.

Defendant Ball, along with plaintiffs and JDH, then mutually signed and agreed to a "Consent Order to Stay Litigation and Compel Arbitration" (consent order) pursuant to the Revised Uniform Arbitration Act (RUAA) entered on 4 August 2010 to resolve the parties' disputes through arbitration. The relevant part of the consent order mandated arbitration for all of defendant Ball's counterclaims against plaintiffs and "any other limited liability company in which Ball contends he has or should have an ownership interest[.]"

On 7 June 2011, defendant Ball filed a motion to lift stay and a motion for leave to amend his answer and counterclaims and to join as additional parties Gary Davies, David Hill and William Allen (third-party individual defendants). After hearing these motions, Judge Boner entered an order (first order) on 5 August 2011, allowing defendant Ball to lift stay and amend his counterclaims. The first order stated that defendant Ball's claims against third-party individual defendants were not subject to arbitration. It also required

that all existing disputes and counterclaims between defendant Ball and plaintiffs proceed through arbitration.

After entry of the first order, but before arbitration commenced, defendant Ball filed another amended answer, counterclaim, and motion to join to this action additional limited liability companies (third-party entity defendants) that managed other JDH real estate projects. Defendant Ball and plaintiffs disagreed as to whether third-party entity defendants were subject to arbitration pursuant to the consent order. Plaintiffs filed a motion to compel arbitration as to disputes between third-party entity defendants and defendant Ball.

At a hearing on 19 April 2012, Judge Boner addressed plaintiffs' motion to compel arbitration. In his order entered 19 July 2012 (second order), Judge Boner denied plaintiffs' motion and concluded as a matter of law that:

1. Consistent with the language in this Court's Order as rendered on August 5, 2011 Mark Ball's interest in the first, original LLC Plaintiffs shall be subject to arbitration.

2. Consistent with this Court's Order rendered on August 5, 2011 **all other matters, claims, controversies, causes of action, and/or interest in projects and involving parties other than the original LLC Plaintiffs shall be subject to the litigation** of this action in the General

Court of Justice.

(Emphasis added). Plaintiffs appealed from the second order denying their motion to compel arbitration as to third-party entity defendants.

## **II. Analysis**

Plaintiffs contend that the trial court erred in denying their motion to compel arbitration because the consent order bound third-party entity defendants to arbitration. We agree.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However,

[i]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

*Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (quotation marks omitted). It is well established that a trial court's order denying a motion to compel arbitration is interlocutory, but "it is immediately appealable because it affects a substantial right[.]" *Edwards v. Taylor*, 182 N.C.

App. 722, 724, 643 S.E.2d 51, 53 (2007) (citations omitted). Thus, this appeal is properly before us for our review.

"The standard governing our review of this case is 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)).

North Carolina's public policy strongly favors arbitration and "requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Johnston Cnty. v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). However, before issues are subjected to arbitration, a valid arbitration agreement between the parties must exist. *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271, 423 S.E.2d 791, 794 (1992) (citation omitted). It is well settled that arbitration agreements are governed by contract law. *Id.*; see



also *Park v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 N.C. App. 120, 123, 582 S.E.2d 375, 378 (2003). Under the RUAA, an agreement to arbitrate "is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract." N.C. Gen. Stat. § 1-569.6 (2011).

In order for a valid contract to exist, the parties must mutually agree to the terms of the contract. *Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985). "If the plain language of a contract is clear, the [original] intention of the parties is inferred from the words of the contract." *Bicket v. McLean Sec., Inc.*, 124 N.C. App. 548, 552, 478 S.E.2d 518, 521 (1996) (citation and quotations omitted). Specifically, "[i]ntent is derived not from a particular contractual term but from the contract as a whole." *State v. Philip Morris USA Inc.*, 363 N.C. 623, 631-32, 685 S.E.2d 85, 90 (2009) (citation omitted). Contract interpretation requires consideration of "each clause and word with reference to all other provisions and giving effect to each whenever possible." *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 504, 320 S.E.2d 892, 897 (1984) (citations omitted).

Here, the consent order served as a valid arbitration agreement. The consent order stated that "[t]he court has been

advised that discussions between counsel for the parties have led to an agreement, and the parties request" arbitration. The language contained therein is clear and unambiguous, and no legal basis existed to invalidate the agreement. Gary W. Jackson, defendant Ball's attorney at the time the consent order was entered, signed the consent order on defendant Ball's behalf, subjecting him to its terms. Similarly, by virtue of their attorney Gary S. Hemric's signature, plaintiffs, third-party individual defendants, and third-party entity defendants submitted to the conditions of the consent order.

The consent order required defendant Ball to arbitrate his counterclaims against "any other limited liability company in which Ball contends he has or should have an ownership interest[.]" The plain language of the consent order captures third-party entity defendants within the scope of the arbitration agreement since third-party entity defendants consisted of LLCs that defendant Ball asserted ownership interests in based on an alleged violation of a profit-sharing clause. Thus, the section of the consent order at issue must be construed to mandate that third-party entity defendants arbitrate counterclaims made against them by defendant Ball. See *Telerent Leasing Corp. v. Boaziz*, 200 N.C. App. 761, 763,

686 S.E.2d 520, 522 (2009) (citations and quotations omitted) (asserting that “[w]hen the language of a written contract is plain and unambiguous, the contract must be interpreted as written and the parties are bound by its terms.”).

In concluding that 1.) only claims involving plaintiffs were subject to arbitration and 2.) all other parties were required to litigate, Judge Boner’s second order contravened basic contract interpretation by failing to give meaning to the full language of the consent order. *See Marcoin, supra*. Accordingly, the trial court erred in denying plaintiffs’ motion to compel arbitration.

### **III. Conclusion**

In sum, we reverse the trial court’s second order denying plaintiffs’ motion to compel arbitration because the consent order required third-party entity defendants to arbitrate all counterclaims made against them by defendant Ball. Judge Boner’s first order requiring litigation to resolve disputes with David Hill, William Allen, and Gary J. Davies remains undisturbed.

Reversed.

Chief Judge MARTIN and HUNTER, JR., Robert N., concur.

Report per Rule 30(e).