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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-753

Filed 2 April 2024

Lincoln County, No. 22-CVS-327

BRANDON TAKSA and JENNIFER TAKSA, Plaintiffs,

v.

GLENN P. CRULL, JO ANN E. CRULL, and DAVID CRULL, Defendants.

Appeal by Defendants from order entered 9 February 2023 by Judge W. Todd Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 7 February 2024.

Skufca Law, PLLC, by Daniel S. Trimmer and Alexia V. Martin, for Plaintiffs-Appellees.

Knox, Brotherton, Knox & Godfrey, by Lisa G. Godfrey and J. Gray Brotherton, for Defendants-Appellants.

COLLINS, Judge.

This appeal arises out of a dispute over defects in a new construction home, which Plaintiffs Brandon and Jennifer Taksa contracted to purchase from Defendants Glenn, Jo Ann, and David Crull. Defendants appeal from an order denying their motion to dismiss Plaintiffs' claims and declining to compel arbitration,

arguing that the trial court erred by concluding that Plaintiffs' claims were not subject to a binding arbitration agreement. Because Plaintiffs' claims are outside the scope of the arbitration agreement, the trial court's order is affirmed.

I. Background

In May 2016, Plaintiffs entered into a contract to purchase a home built by Defendants. As part of the contract, Defendants procured a 2-10 Home Buyers Warranty ("Warranty"), which covered certain qualified defects related to the workmanship, materials, systems, and structure of the home; specifically excluded coverage for other defects; and subjected any disputes arising from or related to the Warranty to mandatory, binding arbitration.

The parties closed on 22 July 2016. Prior to closing, Plaintiffs conducted a walk-through inspection and noted numerous issues that Defendants promised to correct within one year. After taking possession of the home, Plaintiffs discovered that several components of the home did not comply with North Carolina Building Code and required extensive repairs.

On 15 March 2022, Plaintiffs filed a complaint asserting claims for breach of contract, unjust enrichment, negligence per se, negligence, and breach of implied warranties. Defendants answered and filed a "Motion to Dismiss, or in the Alternative, Stay Action Pending Arbitration and to Compel Arbitration," claiming that Plaintiffs' claims were subject to the Warranty's arbitration clause. The trial court heard Defendants' motion on 18 January 2023 and entered an order on 9

February 2023 denying the motion and declining to compel arbitration. Defendants appealed.

II. Appellate Jurisdiction

The trial court's order denying Defendants' "Motion to Dismiss, or in the Alternative, Stay Action Pending Arbitration and to Compel Arbitration" is interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citation omitted)). Although interlocutory orders are generally not immediately appealable, this Court has consistently held that an interlocutory order denying arbitration is immediately appealable because it affects a substantial right which might be lost if appeal is delayed. *See Jackson v. Home Depot, U.S.A., Inc.*, 276 N.C. App. 349, 354, 857 S.E.2d 321, 326 (2021); *Pressler v. Duke Univ.*, 199 N.C. App. 586, 590, 685 S.E.2d 6, 9 (2009); *Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999). As the trial court's order denies arbitration, this Court has jurisdiction to hear Defendants' appeal.

III. Discussion

Defendants argue that the trial court erred by concluding that Plaintiffs' claims were not subject to a binding arbitration agreement.

North Carolina public policy favors settling disputes through arbitration.

Raspet v. Buck, 147 N.C. App. 133, 135, 554 S.E.2d 676, 678 (2001) (citations omitted). However, before a court can order parties to resolve a dispute through arbitration, the party seeking to enforce arbitration must show both that the parties had a valid arbitration agreement and that the specific dispute falls within the substantive scope of that agreement. *Jackson*, 276 N.C. App. at 356, 857 S.E.2d at 327 (citations omitted). “The trial court’s conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable de novo by the appellate court.” *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678 (italics and citation omitted).

Here, Plaintiffs allege that Defendants failed to correct “punch list” items:

34. On or about July 6, 2016, Mr. Taksa and David Crull conducted a walk-through inspection of the Taksa Home.

35. At this inspection, Mr. Taksa identified numerous issues that needed to be corrected.

36. After this inspection, Mr. and Mrs. Taksa identified and provided a list of Punch List Items, which were not corrected at the time they delivered the list of Punch List Items.

....

38. [Defendants] promised Mr. and Mrs. Taksa that the issues would be corrected at or before the one-year anniversary from the closing on the Taksa Home and Mr. and Mrs. Taksa provided an updated list of Punch List Items that needed to be repaired or corrected at or before this time.

39. On or about June 17, 2017, Mr. and Mrs. Taksa identified and provided a[n] updated list of Punch List Items, which were not corrected at the time they delivered said list.

....

42. To date, Mr. and Mrs. Crull have refused to correct and repair the Punch List Items.

Plaintiffs also specifically identify several components of the home that did not comply with North Carolina Building Code:

- a. The deck attached to the Taksa Home was not built in compliance with the applicable North Carolina Building Code according to the recent findings of a licensed engineer hired by Mr. and Mrs. Taksa. . . . The engineer has recommended extensive repairs to be performed to bring the deck into compliance with the Code.
- b. The dock deck/pier on the Property was not built in compliance with the applicable North Carolina Building Code according to the recent findings of a licensed engineer hired by Mr. and Mrs. Taksa. The engineer concluded that the dock deck/pier girders were “severely overstressed” and require additional support and reinforcement to be constructed to bring the dock deck/pier into compliance with the Code.
- c. The door leading from the deck into the upstairs master bedroom was not built in compliance with the applicable North Carolina Building Code. As constructed this door permits water to intrude into the interior of the home.
- d. Certain portions of the electrical wiring and electrical work was not built in compliance with the applicable North Carolina Building Code. . . .
- e. Construction of the pier and the irrigation system were not properly performed such that the required permits and inspections required by the local county were never performed.

These allegations form the basis for each of Plaintiffs’ claims.

Defendants argue that Plaintiffs’ claims are within the scope of the Warranty and are therefore subject to the Warranty’s binding arbitration clause, which states:

To expedite the resolution of any and all claims, disputes and controversies by or between the Homeowner, the Builder/Seller, 2-10 HBW, as administrator, the Warranty Insurer or any combination of the foregoing, arising from or related to this Warranty, the Warranty Insurance Policy or the 2-10 HBW Program, Claims shall be settled by binding arbitration.

However, the Warranty also notes items that are not covered and, thus, outside the scope of the Warranty:

This Warranty does not provide coverage for any of the following items which are specifically excluded.

.....

5. Failure of **Your Builder/Seller** to complete construction or construction which is noncompliant with plans and specifications; violations of local or national building codes, ordinances or standards;

.....

15. **Defects or Structural Defects** that first occur or **You** knew about prior to the **Effective Date of Warranty** such as “walk-through” or “punch list” items.

Because each of Plaintiffs’ claims is predicated upon circumstances that are expressly excluded by the Warranty, Plaintiffs’ claims are not within the substantive scope of the Warranty. Accordingly, this particular dispute is not subject to the Warranty’s arbitration clause. *See Jackson*, 276 N.C. App. at 356, 857 S.E.2d at 327.

IV. Conclusion

Because Plaintiffs’ claims are not within the substantive scope of the Warranty, the trial court correctly concluded that Plaintiffs’ claims were not subject to a binding arbitration agreement.

TAKSA V. CRULL

Opinion of the Court

AFFIRMED.

Judges WOOD and GORE concur.

Report per Rule 30(e).