**In The**

# *Court of Appeals*

# *Ninth District of Texas at Beaumont*

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**NO. 09-11-00270-CV**

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**GRACEPOINT BUILDERS, LP D/B/A GRACEPOINT REMODELING, Appellant**

**V.**

**JAMES BLACKMAN AND DONNA BLACKMAN, Appellees**

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**On Appeal from the 9th District Court**
**Montgomery County, Texas**
**Trial Cause No. 11-01-00435 CV**

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## MEMORANDUM OPINION

This is an appeal from the trial court's denial of a motion to compel arbitration. Gracepoint Builders, LP, doing business as Gracepoint Remodeling, sued James Blackman and Donna Blackman for breach of a construction contract and, in the alternative, asserted a claim for quantum meruit. Gracepoint alleged the Blackmans failed to pay for goods and services. The Blackmans filed an answer and asserted that Gracepoint "is barred from filing suit because the Contract between the [parties] mandates that any disputes be resolved through arbitration." Gracepoint filed a motion to

compel arbitration, which the trial court denied. The order denying arbitration compelled mediation.

It is undisputed that a valid arbitration agreement exists, and that the claims fall within the agreement's scope. *See generally Ellis v. Schlimmer*, 337 S.W.3d 860, 861-62 (Tex. 2011) (existence of a valid arbitration agreement, scope of agreement, and defenses). What is disputed is whether the agreement contains conditions precedent that have not been satisfied. The contract contains the following arbitration clause:

> The Owner and Builder agree that all controversies, claims (and any related settlements), or matters in question arising out of or relating to (i) this Contract, (ii) any breach or termination of this Contract, (iii) the construction of the Home and/or its repairs, (iv) any acts or omissions by the Builder (and its officers, directors or agents), and/or (v) any actual or purported representations or warranties, express or implied, relating to the Property and/or the Home (herein referred to collectively as a "Dispute") shall be submitted to binding arbitration. The Parties will attempt to resolve any Dispute through informal discussions, and the Dispute may be submitted to non-binding mediation under the Construction Industry Mediation Rules of the American Arbitration Association ("AAA"). In the event that one or both Parties do not desire to mediate, or the Dispute is not resolved by direct discussions and/or mediation, the Dispute shall be submitted to the AAA for binding arbitration in accordance with the Construction Industry Arbitration Rules of the AAA.
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> The Parties will share equally all filing fees and administrative costs of the arbitration, however, any Award rendered may equitably reallocate those costs. The arbitration shall be governed by Texas law and the U.S. Arbitration Act, 9 U.S.C. §§ 1-16, to the exclusion of any provisions of state law that are inconsistent with the application of the Federal Act.

In their response to Gracepoint's motion to compel arbitration, the Blackmans state that they never refused to arbitrate and "have repeatedly agreed to arbitrate[.]" They reference

that part of the arbitration clause requiring the parties to "attempt to resolve any Dispute through informal discussions" and "direct discussions[.]" The Blackmans argue that informal settlement efforts are a pre-condition for arbitration, and that before arbitration may be compelled, the informal discussions must fail. Gracepoint argues that neither mediation nor informal direct discussions are a condition precedent to enforcing arbitration.

The parties attempted to resolve the dispute. In their objection to Gracepoint's motion to compel arbitration, the Blackmans state, "The two sides exchanged letters and emails for several weeks but never met and never mediated. They narrowed the gap in their pricing dispute but never resolved it." The Blackmans' pleading further states that as of the date that Gracepoint filed its motion to abate and to compel arbitration, Gracepoint's principal "was talking directly to the Blackmans and suggesting that both sides sit down privately to informally resolve the issues." The Blackmans characterize the efforts at discussion as not being a "meaningful dispute resolution[.]" On appeal, the Blackmans state that the "informal discussions had not been completed and that Gracepoint's principal sought further informal discussions even after Gracepoint's lawyers filed the Motion to Compel." The Blackmans further state on appeal that "[t]he parties continued informal discussions up through and including [Gracepoint's] on-site visit to the Blackmans' home on Thursday, July 7, when -- for the first time -- [Gracepoint] conceded that there was a water leak in the Blackmans' slab."

The Blackmans state in their pleadings and in their appellate brief that informal discussions took place. *See generally Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) (admissions of fact); *Ehler v. LVDVD, L.C.*, 319 S.W.3d 817, 824-25 (Tex. App.—El Paso 2010, no pet.); *Beta Supply, Inc. v. G.E.A. Power Cooling Sys., Inc.*, 748 S.W.2d 541, 542 (Tex. App.—Houston [1st Dist.] 1988, writ denied). Even if the parties were required to have some sort of informal discussion before being required to arbitrate, nothing in the arbitration clause requires that the "informal discussions" be of a particular type or that they be completed or brought to an end. The arbitration clause makes mediation voluntary ("the Dispute may be submitted to non-binding mediation") and further states "[i]n the event that one or both Parties do not desire to mediate," or the dispute is not resolved, the dispute shall be submitted to arbitration. If the informal attempts to resolve the dispute had been successful, arbitration would not be necessary, nor would litigation in the trial court or this appeal. Because the informal discussions have not resolved the dispute and one party does not desire mediation, arbitration is required. The trial court abused its discretion in denying Gracepoint's motion to compel arbitration. We reverse the trial court's order denying arbitration and remand the case to the trial court to compel arbitration.

REVERSED AND REMANDED.

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DAVID GAULTNEY
Justice

Submitted on August 4, 2011
Opinion Delivered August 31, 2011

Before McKeithen, C.J., Gaultney and Horton, JJ.