REL: May 28, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190977

Performance Builders, LLC; Chris White; Shana Tyler Clark; and DSKAT Holdings, LLC, d/b/a A-Pro Home Inspection Services Birmingham

v.

Scott Lopas and Janet Lopas

Appeal from Etowah Circuit Court (CV-18-900981)

MENDHEIM, Justice.

Scott Lopas and Janet Lopas commenced an action in the Etowah Circuit Court against, among others, Performance Builders, LLC, Chris White, Shana Tyler Clark, and DSKAT Holdings, LLC, d/b/a A-Pro Home Inspection Services Birmingham (collectively referred to as "the movants") asserting various causes of actions based on the inspection, appraisal, and sale of a piece of real property purchased by the Lopases.[1] The movants filed a motion to compel arbitration of the Lopases' claims, which the circuit court denied. The movants appeal the circuit court's order denying their motion to compel arbitration.

Facts and Procedural History

On May 1, 2018, Scott Lopas entered into a contract for the purchase of real property located in Gadsden. The contract was contingent upon the property passing an inspection. Christi Hicks, a realtor hired by the Lopases to aid them in the purchase of the property, recommended that the Lopases hire White and his company, Performance Builders, to

[1]The Lopases also asserted claims against Austin S. Kimberly, Kimberly Appraisal Services, Kimberly Realty Co., Inc., and Sydney Gunter, all of whom were later dismissed pursuant to a pro tanto order of dismissal and are not parties to this appeal.

conduct the inspection. White's affidavit testimony indicates that he performs "home inspections under the brand name of A-Pro Home Inspection[Services, LLC,] as an authorized agent of the A-Pro franchisee for the State of Alabama." DSKAT Holdings, LLC, d/b/a A-Pro Home Inspection Services Birmingham ("DSKAT"), is the A-Pro Home Inspection Services, LLC ("A-Pro"), franchisee for the State of Alabama; A-Pro is a Louisiana company. Janet Lopas's affidavit testimony indicates that, before the Lopases contacted White, she had "reviewed ... information on the A-Pro internet site" concerning certain guarantees purportedly offered for inspections performed; Janet attached to her affidavit testimony a printout of the content of the Internet site she visited.[2]

There is no dispute that the Lopases contacted White, that the Lopases hired White to conduct an inspection of the property, that White conducted an inspection of the property, or that the Lopases paid White for the inspection. There is, however, a dispute as to the agreement

[2]We note that it is disputed whether the Internet site visited by Janet was A-Pro's or DSKAT's. The affidavit testimony of Clark indicates that DSKAT made no guarantees to the Lopases.

between the parties concerning the completed and paid-for inspection. Specifically, there is disagreement as to whether the Lopases signed an arbitration agreement.

White's affidavit testimony states that his "[i]nteractions with clients occur[] over telecommunications and internet networks." White's affidavit testimony further states that "A-Pro ... licenses the ... software" that White uses to interact with clients. The affidavit testimony of Clark, the sole owner of DSKAT, states that she "authorize[s] and administer[s] independent contractors who are licensed home inspectors and operate under the brand name of A-Pro Home Inspections," such as White and his company, Performance Builders. Clark's affidavit testimony further states that she "authorize[s], supervise[s], and administer[s] the use of the automated software system owned and licensed by A-Pro," which is called the Inspection Support Network ("the ISN"). White used the ISN in his interactions with the Lopases.

Clark's affidavit testimony states that the ISN documented White's various interactions with the Lopases and that Clark, by reviewing the Lopases' "ISN profile," was able to verify that specific events occurred.

Clark's affidavit testimony indicates that Scott or his agent contacted White and requested an inspection of the property.[3] In response, White sent Scott the following e-mail on May 6, 2018:

> "Hello Scott,
>
> "....
>
> "This email contains a link to the [i]nspection [a]greement necessary for the inspection. Please insert your initials and scroll to the bottom of the page to sign using your computer's mouse and send it back to us by clicking on 'Submit Signature' buttons at the bottom. It is very important we receive this paperwork back in our office in a timely manner along with payment as we are unable to release your report without them.
>
> "Click to view and sign your agreement online!
>
> "The total fee for this inspection is $369.00
>
> "Click to pay online."

Clark's affidavit testimony states that the Lopases "accessed and scrolled over the entire [i]nspection [a]greement to reach the field at the bottom where [Scott] executed the [i]nspection [a]greement by electronic

[3]Based on Janet's affidavit testimony, it appears that she was the one actually interacting with White via the ISN, even though the interactions were under the name of Scott.

signature then clicked on the 'Submit Signature' button at the bottom of the page on May 7, 2018." The inspection agreement defines Scott as the client, and an electronic signature appears in the "client" signature block of the inspection agreement. The inspection agreement includes an arbitration clause, which states:

> "ARBITRATION: Any dispute arising out of the inspection, report or the interpretation of this agreement, except for non-payment of the inspection fee, shall be resolved in accordance with the Rules of the American Arbitration Association. The parties shall select a mutually agreed upon arbitrator who is a home inspector certified by the International Society of Home Inspectors. If the parties are unable to agree upon an arbitrator, either party may request that a certified home inspector be selected by the International Society of Home Inspectors or American Society of Home Inspectors to arbitrate the proceedings. Such selection shall be binding upon the parties. The prevailing party shall be awarded all arbitration costs."

The inspection agreement specifically states that "[t]his inspection is not considered to be an expressed or implied guarantee or warranty of any kind regarding the condition of the property, its systems or components."

The Lopases paid the $369 inspection fee on May 7, 2018. Clark's affidavit testimony states that the Lopases "received a copy of the [i]nspection [a]greement they signed electronically as well as a receipt."

White completed the inspection of the property on May 7, 2018, and completed the inspection report, which was then made available to the Lopases via the ISN. Clark's affidavit testimony states that the ISN "[i]mposes controls on client access to the inspection report by requiring payment of the inspection fee and execution by electronic signature of the inspection agreement before releasing the inspection report to the clients." Clark's affidavit testimony further states that the

> "ISN requires clients to access, review and sign the inspection agreement through automated prompts that prohibit clients going to the next step in the procedure until they compete the required sequence of events to gain access [to the inspection report]. This means clients are required to access and review the [inspection] agreement before they are able to make payment."

Janet's affidavit testimony states that she received the inspection report and a receipt for the payment of the inspection fee but that "[n]either ... Scott nor I signed the receipt or any other document with the report." Janet's affidavit testimony also states that, "[b]efore [the Lopases] made payment and before the inspection, neither White nor anyone from A-Pro told me that any disputes had to be arbitrated." Scott did not file an affidavit.

Shortly after moving into the property on July 4, 2018, the Lopases began "having serious concerns about very unsteady and sagging floors," issues that were apparently not documented in White's inspection report. Janet's affidavit testimony indicates that she contacted White to report the issues with the property but that White did not contact the Lopases "regarding [their] concerns or [go] to [their] house to examine it."

Accordingly, on December 20, 2018, the Lopases filed a complaint that, as amended, asserted the following claims against White, Performance Builders, Clark, and DSKAT, among others: misrepresentation, negligence, wantonness, breach of contract, breach of warranty, and fraud. On January 16, 2019, White and Performance Builders filed an answer asserting, among other things, that the Lopases' claims "are due to be arbitrated by agreement of the parties."

On July 15, 2019, White and Performance Builders filed a motion to compel arbitration. White and Performance Builders argued that the inspection agreement contains an arbitration clause, that the transaction

affects interstate commerce,[4] and that Scott electronically signed the inspection agreement. They further argued that the reference in the arbitration clause of the inspection agreement to the Rules of the American Arbitration Association "is clear and convincing evidence of [the parties'] intent to submit all issues of arbitrability to an arbitrator."

On December 12, 2019, the circuit court, ex mero motu, ordered the parties to mediate the case. On February 14, 2020, the parties engaged in mediation but could not reach a resolution of the Lopases' claims. On February 18, 2020, White and Performance Builders filed a motion to stay the proceedings pending the circuit court's ruling on their motion to compel arbitration. In their motion to stay, White and Performance Builders stated that, "[p]rior to mediation, all parties assured White and

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[4]White's affidavit testimony states that he "and/or Performance Builders ... transfers and receives funds across state lines, through interstate monetary networks, and by using services provided by out of state payment processors. I frequently inspect houses for parties moving across state lines." White's affidavit testimony further states that Performance Builders "obtains insurance coverage provided by out of state insurance companies." The Lopases contest the fact that Performance Builders had insurance at the times relevant to their claims, but they have not presented any evidence contradicting White's affidavit testimony to the contrary.

Performance Builders in writing that participation in mediation would not be cited as grounds to assert a waiver of the right to arbitration."

On March 3, 2020, the Lopases filed a response to White and Performance Builders' motion to compel arbitration. The Lopases argued that Scott did not sign the inspection agreement; they did not address the specific allegations contained in Clark's affidavit testimony, detailed above. The Lopases further argued that the inspection agreement "must be characterized as a contract of adhesion given (a) its boilerplate nature, (b) the fact that it is entirely inconsistent with the ... guarantee, and (c) was part of a receipt that came after payment, after the service was performed and contains an exculpation provision." Concerning the arbitration clause itself, the Lopases argued that "it is contained in a document not signed by Scott or Janet"; that "it limits itself to '[a]ny dispute arising out of the inspection ...' [and, thus,] cannot be applied to [the Lopases'] intentional tort claims"; "gives a judicial remedy to White for non-payment of the inspection fee which renders the arbitration clause non-mutual as far as the remedy of each party and invalid"; and "provides no 'meaningful remedy' to Janet and Scott." The Lopases also asserted

that "White has substantially invoked the litigation process in filing an answer and seeking a judicial award of attorney fees in his motion thereby waiving the right to arbitration." On May 17, 2020, White and Performance Builders filed a reply to the Lopases' response, addressing all the arguments raised by the Lopases. On the same day, Clark and DSKAT filed a motion joining White and Performance Builders' motion to compel arbitration.

On July 17, 2020, the circuit court denied the movants' motion to compel arbitration, without stating a reason. The movants timely appealed pursuant to Rule 4(d), Ala. R. App. P., which authorizes an appeal from an order either granting or denying a motion to compel arbitration.

Standard of Review

This Court's standard of review of a denial of a motion to compel arbitration is well settled:

> " ' "This Court reviews de novo the denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Yarbrough, 779 So. 2d 1205 (Ala. 2000). A motion to compel arbitration is analogous to a motion for a summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party

> seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce. Id. '[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.' Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d 1260, 1265 n.1 (Ala. 1995) (opinion on application for rehearing)." ' "

Hoover Gen. Contractors-Homewood, Inc. v. Key, 201 So. 3d 550, 552 (Ala. 2016) (quoting Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003), quoting in turn Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000)).

Discussion

Under the foregoing standard, the movants have the burden of proving the existence of an arbitration agreement and that the contract containing the arbitration agreement evidences a transaction affecting interstate commerce. To that end, the movants introduced the inspection agreement, which bears the electronic signature of Scott. The movants further presented the affidavit testimony of Clark and the ISN records explaining how Scott, or his agent, reviewed the inspection agreement and electronically signed it. There is no dispute that the transaction at issue

in this case affects interstate commerce. The evidence presented by the movants proves the existence of the inspection agreement, which contains an arbitration clause, and proves that the inspection agreement affects interstate commerce.

The burden therefore shifts to the Lopases to demonstrate that the inspection agreement is not valid or that it does not apply to this dispute. Although they presented an argument below contesting whether they actually had signed the inspection agreement, the Lopases present no such argument before this Court. Instead, citing the doctrine of unclean hands, the Lopases argue that specifically enforcing the inspection agreement and compelling them to arbitrate their claims in this case would be in violation of § 8-1-40(2), Ala. Code 1975, which states that "[s]pecific performance cannot be enforced against a party to a contract ... [i]f it is not, as to him, just and reasonable." The Lopases argue that enforcement of the arbitration clause in the inspection agreement would not be "just and reasonable" because, they argue, the movants engaged in "fraudulent, dishonest and ... unconscientious" conduct in the making of the inspection agreement. The Lopases' brief at p. 15. The Lopases assert

that the following alleged conduct of the movants constitutes "fraudulent, dishonest and unconscientious" conduct: White's failure to respond to the Lopases' complaints about their property after White inspected it; the movants' refusal to honor the guarantees listed on A-Pro's Web site and the movants' assertion that the guarantees claimed by the Lopases were not actually offered to the Lopases; the movants' assertion that Scott signed the inspection agreement, even though Janet claims that he did not;[5] and Performance Builders' alleged failure to have insurance.[6]

Before analyzing the merits of the Lopases' argument, however, we must first determine whether it is this Court's or an arbitrator's responsibility to do so. The movants argue that the argument raised by the Lopases implicates the issue of arbitrability that, under the terms of

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[5]This argument is distinct from the Lopases' argument below that Scott did not electronically sign the inspection agreement. Instead, the Lopases are arguing before this Court that the movants' insistence that Scott did sign the inspection agreement, even though the Lopases claim he did not, is evidence of their allegedly unconscionable behavior.

[6]As discussed in note 4, supra, the Lopases contest whether Performance Builders had insurance, but they have not presented any evidence to contradict White's affidavit testimony indicating that Performance Builders has "insurance coverage provided by out of state insurance companies."

the arbitration clause, an arbitrator must decide. The arbitration clause in the inspection agreement specifically states that "[a]ny dispute arising out of the inspection, report or the interpretation of this agreement, except for non-payment of the inspection fee, shall be resolved in accordance with the Rules of the American Arbitration Association." (Emphasis added.) This Court has determined that a reference to the Rules of the American Arbitration Association ("AAA") in an arbitration provision demonstrates the intent of the parties to submit all issues of arbitrability to an arbitrator:

> " ' "[T]he issue whether a party has waived the right to arbitration by its conduct during litigation is a question for the court and not the arbitrator." Ocwen Loan Servicing, LLC v. Washington, 939 So. 2d 6, 14 (Ala. 2006). However, the general rule that the court and not the arbitrator decides whether a party has waived the right to arbitration has an exception: issues typically decided by the court will be decided by the arbitrator instead when there is ' "clear and unmistakable evidence" ' of such an agreement in the arbitration provision. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (quoting AT & T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) (alterations omitted)); see also Marie v. Allied Home Mortg.

> Corp., 402 F.3d 1, 14 (1st Cir. 2005) (citing First Options).'
>
> "Anderton v. The Practice-Monroeville, P.C., 164 So. 3d 1094, 1098 (Ala. 2014) (footnote omitted and emphasis added). In Anderton, this Court determined that the incorporation into the arbitration provision of the commercial arbitration rules of the American Arbitration Association ('the AAA') constituted clear and unmistakable evidence of the parties' intent to submit issues of arbitrability to the arbitrator. See 164 So. 3d at 1101-02."

Bugs "R" Us, LLC v. McCants, 223 So. 3d 913, 918-19 (Ala. 2016). Rule 7(a) of the AAA Commercial Rules provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."[7] Rule 7(b) provides, in pertinent part: "The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part."[8] Based on the above-quoted

[7]See Chris Myers Pontiac-GMC, Inc. v. Perot, 991 So. 2d 1281, 1284 (Ala. 2008) (noting that we may take judicial notice of the arbitration rules of the American Arbitration Association even when they do not appear in the record).

[8]Even if the AAA Consumer Rules, rather than the AAA Commercial Rules, apply in this case, Rules 14(a) and (b) of the AAA Consumer Rules

portion of McCants, the inspection agreement, and the language of the applicable AAA Rules, it is clear that the parties intended for an arbitrator to determine issues of arbitrability.

We must next determine whether the movants are correct in arguing that the argument raised by the Lopases in their brief on appeal raises an issue of arbitrability; if so, under the terms of the arbitration clause, the issue is one for the arbitrator, not this Court, to decide. In Lewis v. Conseco Finance Corp., 848 So. 2d 920 (Ala. 2002), this Court determined that the argument raised by the Lopases -- that § 8-1-40 prevents the specific enforcement of the arbitration clause -- presents an issue of arbitrability to be decided by an arbitrator. In Lewis, the plaintiffs in that case appealed the trial court's order granting a motion to compel arbitration of the plaintiffs' claims based on an arbitration provision in an agreement executed by the plaintiffs. The plaintiffs argued before this Court, citing § 8-1-40, "that the trial court erred in specifically enforcing the arbitration agreement." Id. at 924. Specifically, the plaintiffs argued

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are identical to Rules 7(a) and (b) of the AAA Commercial Rules.

that § 8-1-40 precluded enforcement of the arbitration provision because, the plaintiffs said, their consent to the agreement containing the arbitration provision had been "'obtained by "misrepresentation, concealment, circumvention or unfair practices."'" Lewis, 848 So. 2d at 925. This Court stated:

> "However, if the [plaintiffs'] challenge is in reality a challenge to the enforceability of the installment agreement as a whole, then that challenge is properly resolved by an arbitrator -- not by the court. Green Tree Fin. Corp. v. Wampler, 749 So. 2d 409, 413 (Ala. 1999) (holding that an attack on the enforceability of a security agreement must be arbitrated). Wampler provides the general rule for determining the proper forum for the resolution of claims when an arbitration provision is involved:
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> > "'When deciding the threshold issue whether the court or the arbitrator decides a challenge to the enforcement of an arbitration clause entered into by the parties, the court first must satisfy itself that the terms of the arbitration clause are broad enough to permit the arbitrator to decide issues of arbitrability. However, a determination that, by the terms of the arbitration clause, the arbitrator is to decide issues of arbitrability does not end the inquiry. Where the attack is addressed to the arbitration clause itself, as opposed to the contract as a whole, the court, and not the arbitrator, resolves the issue. But, when the challenge goes to the whole contract, a contract that happens to contain an arbitration clause, the

> issue of enforceability of the contract, including the arbitration clause, is for the arbitrator to decide.'
>
> "749 So. 2d at 413. When engaging this analysis, we ' "look beyond the ad hoc arguments of counsel in order to determine whether [the plaintiff's] claim actually bears upon the entire agreement" or just the arbitration clause.' NationsBanc Invs., Inc. v. Paramore, 736 So. 2d 589, 591 (Ala. 1999) (quoting Anniston Lincoln Mercury Dodge v. Conner, 720 So. 2d 898, 901-02 (Ala. 1998)).
>
> "In this case, it is apparent that the [plaintiffs] challenge the enforceability of the installment agreement as a whole, not merely the arbitration provision. If § 8-1-40 were truly applicable, it would preclude [the defendant] from seeking the specific enforcement of any provision of the agreement, not merely the arbitration provision."

Lewis, 848 So. 2d at 925-26 (footnote omitted).

Based on this Court's analysis in Lewis, it is apparent that a challenge to a contract under § 8-1-40 is a challenge to the enforceability of the contract as a whole, which is an issue of arbitrability. Pursuant to the terms of the arbitration clause in the inspection agreement, issues of arbitrability are the responsibility of an arbitrator, not this Court, to decide.

In the present case, the movants have met their burden of establishing the existence of an agreement containing an arbitration

provision between the parties and that that agreement involves a transaction affecting interstate commerce. Furthermore, the arbitration provision dictates that the issue of enforceability raised by the Lopases must be submitted to the arbitrator for determination. Therefore, the circuit court's order denying the movants' motion to compel arbitration is due to be reversed.

Conclusion

Based on the foregoing, we reverse the circuit court's order denying the motion to compel arbitration and we remand the case to the circuit court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur.