THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

RECEIVED
MAR 14 2016
SC Court of Appeals

Case No. 2015-CP-27-00209

James Chisolm and
Beverly Ann Chisolm, Respondents,

v.

America's Home Place, Inc.; PCF Contracting, LLC; Underwood Mechanical, LLC; Blue Mesa Construction, Inc.; Palmetto Residential Electric, LLC; Palmetto Heating & Air of the Low Country, Inc.; and Above the Sky Roofing, Inc.

Defendants,

of Whom America's Home Place, Inc. is the Appellant

Underwood Mechanical, LLC,

Third Party Plaintiff,

v.

J&J Plumbing a/k/a J&J Torres Plumbing a/k/a Torres Plumbing,

Third Party Defendant.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in finding that the negligent misrepresentation and fraud claims of James Chisolm and Beverly Chisolm were not encompassed by an arbitration provision because America's Home Place, Inc.'s alleged actions constituted outrageous acts that were unforeseeable?

2. Did the circuit court err in failing to compel arbitration of James Chisolm's and Beverly Chisolm's claims for breach of contract, breach of express and implied warranties, and negligence on the basis that arbitration of said claims would result in duplicative expense and judicial inefficiency?

STATEMENT OF THE CASE AND RELEVANT FACTS

This is an appeal from the circuit court's denial of America's Home Place, Inc.'s ("AHP") Motion to Stay and to Compel Arbitration. The action below was filed by plaintiffs James Chisolm and Beverly Chisolm (collectively, the "Chisolms") to recover damages related to certain alleged construction defects. (Pls.' Am. Compl., ¶¶ 6-8). AHP answered the Chisolms' complaint by denying the material allegations therein and asserting several affirmative defenses, including the defense that the Chisolms' claims are subject to a valid and binding arbitration provision. (Answer of Def. America's Home Place, Inc.).

Each of the Chisolms' claims against AHP concerns the construction of a home that was built upon a parcel of land located at 2935 Langfordville Road, Ridgeland, South Carolina (the "Home"). (Pls.' Am. Compl., ¶¶ 6-8, 10-13, 16-19, 23, 27-32, 52-54, 58-60). The Home was built by AHP pursuant to an agreement entered into by AHP and the Chisolms on November 1, 2011 (the "Agreement"). (Pls.' Am. Compl., ¶ 2; Ex. A) Per the Agreement, AHP, as the general contractor, was responsible for the design of the home in addition to furnishing all labor and materials necessary for the construction of the Home. (Pls.' Am. Compl., Ex. A, ¶ 1).

In addition to setting forth the parties' respective obligations relative to the construction of the Home, the Agreement also sets forth a method for resolving all disputes that are related to the Agreement. (Pls.' Am. Compl., Ex. A, ¶ 37). Specifically, Paragraph 37 of the Agreement provides, in pertinent part, that all claims, disputes, and other matters or questions arising out of or relating to this agreement, or breach thereof, shall be settlement by binding arbitration. (Pls.' Am. Compl., Ex. A, ¶ 37). Notice of

this arbitration provision is set forth on the first page of the Agreement in bold font, capitalized letters which are underlined. (Pls.' Am. Compl., Ex. A, p. 1).

On May 15, 2015, the Chisolms initiated the action below by asserting claims for breach of contract, breach of express and implied warranties, negligent construction, negligent misrepresentation, and fraud against AHP and other defendants. (Pls.' Am. Compl.). With regard to the claims asserted against AHP, the Chisolms allege that 1) AHP was negligent in carrying out its duties as general contractor; 2) AHP breached the Agreement by failing to construct the Home in accordance with the terms and conditions of the Agreement and all plans and specifications; 3) AHP breached certain express and implied warranties by failing to construct the Home in a manner that was free of construction defects; 4) AHP negligently made misrepresentations to the Chisolms and to agents of the Jasper County Building Department regarding its performance of the Agreement and its compliance with applicable building codes and statutory law in order to receive contractual payments from the Chisolms; and 5) AHP intentionally made material representations of fact concerning its construction of the Home in order to induce the Chisolms to make payments to AHP and in order to induce agents of the Jasper County Building Department to issue a Certificate of Occupancy so that AHP could receive contractual payments from the Chisolms. (Pls.' Am. Compl., ¶¶ 6-8, 10-13, 16-19, 23, 27-32, 52-54, 58-60).

Counsel for AHP demanded arbitration via a letter dated July 30, 2015. (Def.'s Mem. in Supp. of its Mot. To Stay and Compel Arbitration, Ex. A). By letters dated August 5, 2015, and August 11, 2015, counsel for the Chisolms rejected AHP's demand for arbitration, arguing that the alleged fraud committed by AHP was an outrageous tort

that was not within the contemplation of the parties at the time the Agreement was executed and, thus, not subject to the Agreement's arbitration provision. (Def.'s Mem. in Supp. of its Mot. To Stay and Compel Arbitration, Ex. A).

AHP moved to compel arbitration of the Chisolms' claim against AHP on August 21, 2015. (Def.'s Mot. to Stay and Compel Arbitration). Within its Memorandum in Support of its Motion to Stay and Compel Arbitration, AHP specifically argued that the Chisolms' claims for fraud and negligent misrepresentation were not outrageous torts outside of the parties' contemplation at the time the Agreement was executed. (Def.'s Mot. to Stay and Compel Arbitration). In Plaintiffs' Memorandum in Opposition to AHP's Motion to Compel Arbitration, the Chisolms "admit[ted] that some of the claims, such as the Breach of Contract, may be within the scope of the arbitration provisions" but specifically asserted "that the claims for Negligent Misrepresentation and Fraud are beyond the scope of arbitration as they do not hold a significant relationship with the contract." (Pls.' Mem. in Opp'n to Def.'s Mot. to Stay and Compel Arbitration).

The circuit court agreed with the Chisolms and denied AHP's motion via an Order entered on January 14, 2016, which stated, "It would be impermissible and contrary to public policy to hold that a citizen would hire a homebuilder to build them a new home with the knowledge and contemplation that the builder might ignore the designs and applicable building codes or industry practices in the performance of such contract." (Order Den. Def.'s Mot. to Stay and Compel Arbitration, p. 3). The circuit court also found that severance of the Chisolms' claims was precluded because the issues involved are mutually dependent and interconnected on the facts and, thus, held that all

claims should be tried in the same forum. (Order Den. Def.'s Mot. to Stay and Compel Arbitration, p. 4).

On February 12, 2016, AHP served its Notice of Appeal. The form of the February 12, 2016, Notice of Appeal, however, was improper and also referenced the date the Order at issue was entered rather than the date that said Order was executed by the Honorable Eugene C. Griffith, Jr. Because of these deficiencies, an Amended Notice of Appeal was served on February 17, 2016.

ARGUMENT

I. *Standard of Review*

A circuit court's determination of whether a claim is subject to arbitration is subject to *de novo* review. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86 (Ct. App. 2005). A circuit court's factual findings, however, will not be reversed on appeal unless there is an absence of evidence which reasonably supports those findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50 (Ct. App. 2003).

II. *The Circuit Court Erred in Ruling that the Chisolms' Claims for Fraud and Negligent Misrepresentation Bore No Significant Relationship to the Agreement*

South Carolina policy and federal policy clearly favor the arbitration of disputes. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 596, 553 S.E.2d 110 (2001). Arbitration is required when 1) an arbitration provision explicitly encompasses the asserted claims; or 2) a significant relationship exists between the asserted claims and the litigants' contract. *Id.* at 596-599. In line with the strong policy in favor of arbitration, any doubt concerning whether a claim is encompassed by an arbitration provision is

resolved in favor of arbitration. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999).

An arbitration provision which seeks to submit to arbitration any claims which arise out of or otherwise relate to the underlying agreement, such as the clause at issue in this action, is considered to be a broadly worded arbitration provision. *Aiken v. World Fin. Corp. of S. Carolina*, 373 S.C. 144,150, 644 S.E.2d 705, n. 2 (2007). Because arbitration is a matter of contract, a claim will be held to be within the scope of a broadly worded arbitration provision only when a significant relationship exists between the asserted claim and the contract in which the arbitration clause is contained. *Zabinski* at 598. When determining whether a significant relationship exists, reference is made not to the labels given to the claim but, instead, is made to the factual allegations underlying the claim. *S. Carolina Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22 (1993). With respect to tort claims, a significant relationship will be found to exist where there is a clear nexus between the factual allegations underlying the claims and the performance of the contract in which the arbitration provision is contained. *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 115, 739 S.E.2d 209 (2013)("Indeed, [plaintiff] has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement."). A significant relationship will not be found to exist, however, where the claim is one for an outrageous tort that was unforeseeable to a reasonable consumer in the context of normal business dealings. *Aiken* at 151.

Generally, tort claims arising from allegedly defective construction are subject to arbitration where the parties have entered into an agreement concerning the property that contains a broadly worded arbitration clause. *Carlson v. S. Carolina State Plastering, LLC*, 404 S.C. 250, 262, 743 S.E.2d 868 (Ct. App. 2013). In the present action, the Chisolms argued, and the circuit court agreed, that that their claims for negligent misrepresentation and fraud do not bear a significant relationship to the Agreement because the factual allegations underlying those claims were unforeseeable. (Pls.' Mem. in Opp'n to Def.'s Mot. to Compel Arbitration, p.4). A significant relationship between the Chisolms' claims and the Agreement does exist, however, because each claim 1) is dependent upon the underlying factual allegation that the Home was constructed in a manner that is defective; and 2) essentially alleges a breach of the underlying contract.

In *Landers v. Fed. Deposit Ins. Corp.*, the Supreme Court reversed a circuit court's denial of an employer's motion to compel arbitration after finding that a significant relationship existed between an employment contract and the claims asserted by a former employee. 402 S.C. 100, 739 S.E.2d 209 (2013). The claims at issue in *Landers* were breach of contract, slander, intentional infliction of emotional distress, illegal proxy solicitation, and wrongful expulsion. *Id.* at 107. The circuit court declined to compel arbitration of all claims except the claim for breach of contract by finding that there was no significant relationship between the claims and the agreement containing the arbitration clause. *Id.* The circuit court also found, in the alternative, that the allegations underlying the claims were unforeseeable at the time the parties entered into the agreement. *Id.* The Supreme Court disagreed and found that a significant relationship existed because the pleadings provided a clear nexus between the factual allegations

underlying the employee's claims and the performance of the employment agreement. *Id.* at 115. The Supreme Court also held that the circuit court's alternative ruling that the claims were not foreseeable was error for the same reason. *Id.* 115-116.

Like the factual allegations at issue in *Landers* that provided a direct link between the employee's tort claims and his contract, the factual allegations underlying the Chisolms' tort claims are directly related to both AHP's performance of the Agreement and the Chisolms' payment obligations under the Agreement. For instance, the factual allegation underlying the Chisolms' claim for negligent misrepresentation is that AHP misrepresented that it had complied with the Agreement and with applicable building codes in order to induce the Chisolms to make payments to AHP. (Am. Compl., ¶ 52). Similarly, the factual allegations underlying the Chisolms' claim for fraud are that AHP intentionally misrepresented compliance with the Agreement and applicable building codes 1) to the Chisolms in order to induce payment from the Chisolms; and 2) to agents of Jasper County in order to obtain a Certificate of Occupancy so that AHP would be entitled to payment pursuant to the Agreement. (Am. Compl., ¶ 58). In substance, these claims allege that AHP negligently or fraudulently made misrepresentations regarding its compliance with the Agreement and/or its compliance with certain building codes and standards that are implied by law into the Agreement. Consequently, the Chisolms' complaint demonstrates a clear nexus between the underlying factual allegations of each of their claims and the performance of the Agreement, "such that all of [their] causes of action bear a significant relationship to the Agreement." *Landers* at 115.

Despite the direct link between the Chisolms' claims and the Agreement, the Chisolms argue, and the circuit court agreed, that the outrageous tort exception

pronounced by the Supreme Court in *Aiken* precludes a finding that a significant relationship exists between their claims and the Agreement. In *Aiken*, the Supreme Court considered whether the tort claims of a finance company's former customer were subject to an arbitration clause contained within certain loan agreements. *Aiken* at 146-147. The factual allegations underlying each of the customer's claims were that, two years after the customer's loans were satisfied, employees of the finance company used the customer's personal information to acquire loans in the customer's name and embezzle the funds from said loans. *Id.* The *Aiken* Court, while noting that broadly written arbitration clauses are limited by general principles of contract law, held that the arbitration provision at issue bore no significant relationship to the customer's claims because the harm that occurred was not foreseeable to the customer. *Id.* at 151. The *Aiken* Court, however, did "not seek to exclude all intentional torts from the scope of arbitration" but rather sought only to distinguish outrageous torts that are legally distinct from the contractual relationship of the parties. *Id.* at 152. When setting forth an example of the type of intentional tort that should not be excluded from arbitration, the *Aiken* Court noted that the parties stipulated that a tort claim which essentially alleges a breach of the underlying contract would be within the contemplation of the parties. *Id.*

This Court, in *Hatcher v. Edward D. Jones & Co., L.P.*, applied the *Aiken* Court's analysis when holding that an investor's tort claims which essentially alleged a breach of the underlying contract were subject to the parties' agreement to arbitrate. 379 S.C. 549, 553-554, 666 S.E.2d 294 (2008). The investor in *Hatcher* alleged that a brokerage allowed his funds to be withdrawn and wired to bank accounts without his knowledge and, as a result, he asserted claims against the brokerage for breach of contract, breach of

contract accompanied by a fraudulent act, negligence, breach of fiduciary duty, and violation of SCUTPA as a result of the unauthorized withdrawal of the investor's funds. *Id.* The brokerage unsuccessfully moved the circuit court to compel arbitration based upon a broadly worded arbitration clause within the investor's account agreement. *Id.* at 550. The *Hatcher* Court partially reversed the circuit court by holding that the claims for breach of contract, breach of contract accompanied by a fraudulent act, and breach of fiduciary duty alleged breaches of the parties' agreement and, therefore, were subject to arbitration. *Id.* at 553. The alleged actions underlying the investor's claims for negligence and violation of SCUTPA were found by the *Hatcher* Court to be legally distinct from the contractual relationship between the parties and, therefore, were not within the contemplation of the parties at the time their agreement was executed. *Id.*

Unlike the alleged actions at issue in *Aiken* which were unforeseeable to the finance company's former customer because said actions were legally distinct from the parties' contractual relationship, the actions alleged to have been taken by AHP were taken in furtherance of its performance of the Agreement and, thus, are legally indistinguishable from the Agreement and were foreseeable to the Chisolms at the time they entered into the Agreement. Like the investor's claims in *Hatcher* for breach of contract accompanied by a fraudulent act and breach of fiduciary duty, the Chisolms' claims for negligent misrepresentation and fraud essentially allege a breach of the Agreement and, therefore, are subject to the parties' agreement to arbitrate. As discussed above, each fraudulent or negligent misrepresentation alleged to have been made by AHP concerns only AHP's construction of the Home. Moreover, the harm alleged by the Chisolms – that the Home was constructed in a defective manner – was explicitly

anticipated by the Agreement. Paragraph 29 of the Agreement begins with the statement that "No builder can build the 100% perfect home, and Paragraph 30 of the Agreement references AHP's material and workmanship warranty that runs for a period of one year from the earlier of 1) the date the certificate of occupancy is issued; 2) the date of final settlement; or 3) the date of occupancy. (Am. Compl., Ex. A, ¶¶ 29-30). Similarly, the disclaimer and waiver provision of Paragraph 46 of the Agreement specifically defines a defect as "a failure to comply with reasonable industry standards of residential construction" and also states that the written warranty covers defects in AHP's construction. (Am. Compl., Ex. A, ¶¶ 46). When read together, Paragraphs 30 and 46 of the Agreement make clear that the Agreement anticipates that a certificate of occupancy could be issued even though certain defects may have arose during construction.

Since the *Aiken* decision, the Supreme Court has further stated that "a party may not escape its commitment [to arbitrate] simply by presenting his claim as a tort" and a court should decline to compel arbitration only when the asserted claim was clearly not within the contemplation of the parties. *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 494, 689 S.E.2d 602 (2010). Here, the express provisions of the Agreement make clear that the Chisolms' did contemplate the possibility that they would unknowingly accept a home that allegedly contains defects that arose during construction. The Agreement also makes clear that the Chisolms committed to arbitrate any and all disputes arising out of or relating to the Agreement, and they should not be permitted to escape this commitment simply because they have asserted tort claims which reiterate their claims for breach of contract. Therefore, the circuit court's holding that the Chisolms' claims for fraud and negligent misrepresentation fall within the outrageous tort exception was made in error.

III. *The Circuit Court Erred in Failing to Compel Arbitration of the Chisolms' Claims for Breach of Contract, Breach of Express and Implied Warranties, and Negligence on the Basis that Arbitration of Said Claims Will Result in Duplicative Expense and Judicial Inefficiency*

In the present dispute, AHP moved to compel arbitration on the basis that all of the Chisolms' claims against AHP are within the scope of the Agreement's arbitration provision. In response, the Chisolms "admit[ed] that some of the claims, such as the Breach of Contract [claim], may be within the scope of the arbitration provision," but "specifically assert[ed] that the claims for Negligent Misrepresentation and Fraud are beyond the scope of arbitration . . ." (Pls.' Mem. in Opp'n, p. 4). When denying AHP's motion, the circuit court, after finding the claims for negligent misrepresentation and fraud to be excepted from arbitration, did not make a specific finding that the remaining claims are beyond the scope of the Agreement's arbitration provision. Rather, the circuit court, noting that the issues were mutually dependent and interconnected, found that arbitration of the remaining claims would result in duplicative expense and may lead to conflicting results in difference forums.

AHP respectfully contends that it was improper for the trial court to deny arbitration of the remaining claims based upon considerations of expense and judicial efficiency. As previously discussed, both South Carolina and federal policy clearly favor the arbitration of disputes. South Carolina appellate courts have made clear that, "unless a court can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute, arbitration should be ordered." *S. Carolina Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 564, 437 S.E.2d 22 (1993).

"A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000).

This State's jurisprudence on the issue of arbitrability has been clear and unwavering for several decades, and nowhere therein has any appellate court stated that a circuit court may deny a motion to compel arbitration of claims within the scope of an arbitration provision simply because the claimants have stated other causes of action that are not within scope of the arbitration clause at issue. In fact, doing so directly contradicts the provisions of the Federal Arbitration Act, *9 U.S.C. § 1, et seq.*, and the South Carolina Uniform Arbitration Act, *S.C. Code Ann. § 15-48-10, et seq.*, which both provide that written arbitration agreements are valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Therefore, the circuit court was not permitted to deny arbitration of the Chisolms' claims simply because the Chisolms' may have to arbitrate most, rather than all, of their claims. Consequently, the circuit court's holding that all of the Chisolms claims must be tried in the same forum warrants reversal.

CONCLUSION

The circuit court erred in ruling that the Chisolms' claims for negligent misrepresentation and fraud are not subject to the parties' agreement to arbitration. Each of these claims bears a significant relationship to the Agreement. The outrageous tort exception announced by the Supreme Court in *Aiken* is not applicable because the factual allegations underlying each of the Chisolms' claims are directly linked to the Agreement and essentially allege a breach of the Agreement. The circuit court also made impermissible considerations of expense and judicial economy when declining to compel arbitration of the Chisolms' claims for breach of contract, negligent construction, and breach of express and implied warranties. Therefore, AHP respectfully requests that this Honorable Court reverse the circuit court's Order denying AHP's motion to compel arbitration.

Respectfully submitted,

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March 14th, 2016.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

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Defendants,

of Whom America's Home Place, Inc. is the Appellant

Underwood Mechanical, LLC,

Third Party Plaintiff,

v.

J&J Plumbing a/k/a J&J Torres Plumbing a/k/a Torres Plumbing, Third Party Defendant.

CERTIFICATE OF SERVICE

This is to certify that I have this date served Counsel for all parties to this appeal with a copy of the Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and the within Certificate of Service, by placing a copy of same in a properly addressed envelope with sufficient postage thereon and depositing same in the United States Mail to the below listed party:

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This 14th day of March, 2016.

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March 14, 2016

Via Facsimile and U.S. First Class Mail

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MAR 14 2016
SC Court of Appeals

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Re: James Chisolm and Beverly Ann Chisolm v. American's Home Place, Inc., et al.
Appeal from Court of Common Pleas, Jasper County, South Carolina
Civil Action No. 2015-CP-27-209

Dear Ms. Kitchings:

Please find enclosed an original and one copy of an Appellant's Initial Brief, Appellant's Designation of Matter, and Certificate of Service regarding the above referenced matter. Only one copy of each of these documents is being transmitted via facsimile, and the originals are being placed in today's mail. Please file the originals with the court and return one file-stamped copy of each to our office in the enclosed self-address stamped envelope.

If you have any questions or concerns, please do not hesitate to contact my office.

Sincerely,

Tawny D. Mack

Enclosures

cc: Dean B. Bell, Esq.
Robert C. Dillis, Esq.

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