

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ELWYN,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
J. J. DELUCA COMPANY, INC,	:	
	:	
Appellant	:	No. 2222 EDA 2011

Appeal from the Order Entered August 9, 2011
In the Court of Common Pleas of Delaware County
Civil No(s).: 11-001194

BEFORE: ALLEN, OLSON and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

FILED JULY 11, 2012

Appellant, J. J. DeLuca Company, Inc., appeals from the order entered in the Delaware County Court of Common Pleas overruling its preliminary objection to the complaint of Appellee, Elwyn, and holding this matter is not subject to a contractual mandatory arbitration clause.¹ We affirm.

* Former Justice specially assigned to the Superior Court.

¹ "As a general rule, an order denying a party's preliminary objections is interlocutory and, thus, not appealable as of right. There exists, however, a narrow exception to this oft-stated rule for cases in which the appeal is taken from an order denying a petition to compel arbitration." **Shaddock v. Christopher J. Kaclik, Inc.**, 713 A.2d 635, 636 (Pa. Super. 1998) (citations omitted). **See also** 42 Pa.C.S. § 7320(a)(1) (stating appeal may be taken from court order denying application to compel arbitration); Pa.R.A.P. 311(a)(8) (stating appeal may be taken as of right and without reference to Pa.R.A.P. 341(c) from "order which is made appealable by statute or general rule.").

J. A08021/12

Appellee is a non-profit human services organization and Appellant is a construction contractor. Appellee's Am. Compl, 3/28/11, at ¶¶ 4-5. James J. DeLuca was the co-owner, president, and CEO of Appellant, as well as a member of Appellee's board of directors. Appellee engaged Appellant as the construction manager for a residential building. On July 27, 2009,² the parties executed a contract, which was "an industry standard American Institute of Architects (AIA) form document modified by [the parties] for the Project, and consist[ed] of two principal parts: a Standard Form of Agreement between Owner and Construction Manager . . . and the General Conditions of the Contract for Construction" (collectively, the "Contract"). Appellant's Brief at 5. "Under the terms of the Contract, [Appellant] was to make the appropriate progress payments to subcontractors and/or suppliers for their completed work and/or supplies provided once an application for a progress payment was made and the payment was received from" Appellee. Trial Ct. Op., 10/27/11, at 1.

On February 11, 2011, Appellee commenced the instant action against Appellant for breach of contract, unjust enrichment, fraudulent misrepresentation, and negligent misrepresentation, and seeking

² While the amended complaint states that Appellee and Appellant entered into the contract on July 10, 2009, Appellee's Compl. at ¶ 6, the signatures on the contract are dated July 27, 2009. AIA Document A121 CMc-2003 and AGC Document 565, at 18, Appellant's Am. Compl., 3/28/11, Ex. A

J. A08021/12

indemnification.³ Appellee claimed that although it paid Appellant according to invoices for subcontractors and suppliers, and Appellant submitted applications for progress payments which specifically acknowledged that all subcontractors and suppliers were paid to date, Appellant did not, in fact, pay the subcontractors and suppliers.⁴ Appellee's Am. Compl. at ¶¶ 15-16, 18, 26. Appellee's complaint also stated that construction of the residential building "was completed in compliance with applicable requirements," as indicated by the issuance of a Certificate of Occupancy by the Township of Middletown. *Id.* at ¶¶ 19-21.

Appellant filed preliminary objections arguing, *inter alia*, "that the Contract includes provisions for alternative dispute resolution which mandate mediation and binding arbitration and therefore the Amended Complaint^[5] should be dismissed." Trial Ct. Op. at 2. The trial court overruled

³ On the same day, Appellee also initiated a suit against Mr. DeLuca, in his capacity as a member of its board of directors, alleging breach of fiduciary duty and, in the alternative, seeking common law indemnity. In that case, the trial court also found that the matter was not subject to the Contract's arbitration provisions, on the ground that Mr. DeLuca was not a party to the Contract. Mr. DeLuca appealed from that ruling at *Elwyn v. DeLuca*, 1519 EDA 2011 (unpublished memorandum) (Pa. Super. 2012), and this Court affirmed.

⁴ The amended complaint also averred that four subcontractors and suppliers had filed mechanic's liens claims totaling \$295,115 against Appellee's property. Appellee's Am. Compl. at ¶ 31.

⁵ Appellant filed preliminary objections on March 14, 2011 to Appellee's complaint. Appellee filed an amended complaint on March 28th, and Appellant again filed preliminary objections on April 14th. Trial Ct. Op. at 2.

J. A08021/12

Appellant's preliminary objections on August 4, 2011, and this timely appeal followed. In its opinion, the trial court reasoned that the language in the Contract concerning mandatory mediation and arbitration was ambiguous, and therefore not enforceable. *Id.* at 4-5.

On appeal, Appellant raises three issues for our review, which we address together. First, Appellant urges this Court to avoid construing the Contract's provisions "as conflicting unless no other reasonable interpretation is possible." Appellant's Brief at 14. It then avers the Contract clearly compels the parties to submit all claims first to the architect for resolution, then mediation, and finally binding arbitration. *Id.* at 20-22. Appellant contends that the provisions which the trial court found were ambiguous "can be reasonably interpreted as consistent with the mandatory dispute resolution process of the contract." *Id.* at 22. We find no relief is due.

We first note the relevant standard of review:

We review a trial court's denial of a motion to compel arbitration for an abuse of discretion and to determine whether the trial court's findings are supported by substantial evidence. In doing so, we employ a two-part test to determine whether the trial court should have compelled arbitration. The first determination is whether a valid agreement to arbitrate exists. The second determination is whether the dispute is within the scope of the agreement.

Smay v. E.R. Stuebner, Inc., 864 A.2d 1266, 1270 (Pa. Super. 2004)

(citations omitted).

Whether a claim is within the scope of an arbitration provision is a matter of contract, and as with all questions of law, our review of the trial court's conclusion is plenary. "The scope of arbitration is determined by the intention of the parties as ascertained in accordance with the rules governing contracts generally." "These are questions of law and our review is plenary."

Id. at 1272-73 (citations omitted).

Unquestionably, the parties' intent as evinced by the words of an agreement is a paramount consideration in construing a contract. When the words of a contract are clear and unambiguous, the intent of the parties is to be discovered from the express language of the agreement. However, where an ambiguity exists, courts are free to construe the ambiguity against the drafter. Moreover, it is the function of the court to decide, as a matter of law, whether the contract terms are clear or ambiguous.

The purpose of arbitration agreements is to reduce litigation and provide a prompt and inexpensive method of resolving disputes. However, when there is no express agreement to arbitrate, then a party has not waived his right to a judicial forum.

Bucks Orthopaedic Surgery Assocs., P.C. v. Ruth, 925 A.2d 868, 872-73

(Pa. Super. 2007) (citations omitted).

We examine the second part of the above test, "whether the dispute is within the scope of the agreement." **See *Smay***, 864 A.2d at 1270. The Contract in the instant matter provided in pertinent part:

§ 9.1.1 During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Sections 4.3 through 4.6 of A201-1997 except that, during the Preconstruction Phase, no decision by the Architect shall be a condition precedent to mediation or arbitration.

J. A08021/12

AIA Document A121 CMc-2003 and AGC Document 565, at 16 (emphasis added). We glean that "Sections 4.3 through 4.6 of A201-1997" are the General Conditions of the Contract for Construction.⁶ That contract provided, *inter alia*:

§ 4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the claim.

* * *

§ 4.4.1 Decision of Architect. Claims . . . shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner.

AIA Document A201-2007, at 22, 23.

The Standard Form of Agreement clearly stated that claims between the parties "[d]uring both the Preconstruction and Construction Phases" "shall be resolved as provided in Sections 4.3 through 4.6" of the General

⁶ While the Standard Form of Agreement refers to "A201-**1997**," the General Conditions of the Contract for Construction is entitled "A201-**2007**."

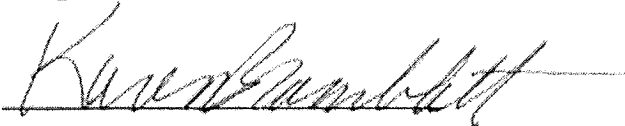
J. A08021/12

Conditions of the Contract. AIA Document A121 CMc-2003 and AGC Document 565, at 16. However, Appellee's amended complaint averred that "construction was completed." Appellant's Am. Compl at ¶ 21. Because the project was no longer in the preconstruction and construction phases, resolution of claims asserted at this stage was not governed by the Contract. **See** AIA Document A121 CMc-2003 and AGC Document 565, at 16. Although the trial court's ruling was based on other grounds, we may affirm the court's decision on any basis. **See Richmond v. McHale**, 35 A.3d 779, 786 n.2 (Pa. Super. 2011).

For the foregoing reasons, we find no basis to disturb the court's ruling that the instant matter is not governed by the mediation and arbitration provisions in the parties' Contract.

Order affirmed.

Judgment Entered.



Prothonotary

Date: 7/11/2012