

IN THE SUPREME COURT OF FLORIDA

**GEORGE JACKSON, KERRY JACKSON, and
JACKSON REALTY TEAM, INC.,**
a Florida Corporation,

Defendants/Petitioners,

v.

Case No. SC11-1196

L.T. Nos. 1D10-1049

09-1399CA

**THE SHAKESPEARE FOUNDATION, INC. and
THE HERD COMMUNITY DEVELOPMENT
CORPORATION,**

Plaintiffs/Respondents.

PETITIONERS' INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondents/Plaintiffs, The Shakespeare Foundation, Inc. and The Herd Community Development Corporation, a California Corporation authorized to do business in the State of Florida, will be referred to herein as Shakespeare and Herd.

Petitioners/Defendants, George Jackson, Kerry Jackson, will be referred to herein as the Jacksons, or individually as Mr. or Mrs. Jackson.

Jackson Realty Team, Inc. will be referred to herein as Jackson Realty.

References to the volume and page of the Record will be referred to herein as (R V-_, p _)

STATEMENT OF FACTS

Shakespeare and Herd filed a complaint alleging that the Jacksons had fraudulently misrepresented the existence of wetlands on certain real property (subject property) in Bay County, Florida, purchased by Shakespeare and Herd from the Jacksons. In their complaint, Shakespeare and Herd claimed that they had suffered damages as a result of this alleged misrepresentation, because the presence of the wetlands prevented them from developing a portion of the property.

The parties' Purchase and Sale Agreement (sometimes hereinafter referred to as "Contract"), regarding the sale of a piece of property, contains a clause which states, "[i]f any provision of this Contract is or becomes invalid or unenforceable, all remaining provisions will continue to be fully effective." (R. 11). And provides an Arbitration Agreement clause that survives the closing of the property in the "Dispute Resolution" section, which states, in pertinent part:

This contract will be construed under Florida law. **All controversies, claims, and other matters in question arising out of or relating to this transaction or this Contract or its breach will be settled as follows:**

(b) All other disputes: Buyer and Seller will have 30 days from the date a dispute arises between them to attempt to resolve the matter through mediation, failing which the parties will resolve the dispute through neutral binding arbitration in the county where the Property is located. The arbitrator may not alter the Contract terms or award any remedy not provided

for in this Contract. The award will be based on the greater
eight of the evidence and will state findings of fact and the
contractual authority on which it is based. ***

(R. 12). (emphasis added).

The Contract sets forth the remedies available in the event of a Default of
either party in Paragraph 13, which states:

Default: (a) Seller Default: If for any reason other than failure
of Seller to make Seller's title marketable after diligent effort, Seller
fails, refuses or neglects to perform this Contract, Buyer may choose
to receive a return of Buyer's deposit without waiving the right to
seek damages or to seek specific performance as per Paragraph 14.
Seller will also be liable to Broker for the full amount of the
brokerage fee. ***

(R. 12).

The Complaint states that Shakespeare and Herd "intended to develop the
subject property into low-income houses with 27 units on the entire parcel." (R. 4).
In addition, the Contract required that the Property would be delivered by the
Jacksons in an "as is" condition and set out a requirement that Shakespeare and
Herd conduct a "Feasibility Study" within 30 days of the Effective Date of the
Contract (R. 10).

The Jacksons filed a motion to dismiss based on the existence of an
arbitration clause contained within the contract that required the arbitration of
"[a]ll controversies, claims, and other matters in question arising out of or relating

to [the] transaction or [the] Contract or its breach.” The trial court granted the motion and Shakespeare and Herd appealed.

The First District held that the arbitration clause contained in the parties’ contract was broad, but found that “the claim at the center of the dispute arose from a general duty owed under common law, not from the contract”, that the claim “was not significantly related to the contract”, and that it “does not require reference to or construction of the contract”.

As a result of these findings the First District reversed the trial court’s order dismissing the complaint. Because this opinion conflicts with an opinion entered by the Fifth District in Maguire v. King, 917 So. 2d 263, 266 (Fla. 5th DCA, 2005), the First District certified conflict and a Petition to this Court was timely filed and granted.

ARGUMENT

Pursuant to Auchter Co. v. Zagloul, 949 So. 2d 1189, 1191 (Fla. 1st DCA, 2007), the standard of review for this matter is de novo, because the trial court's dismissal was based upon the court's construction of a contract.

ISSUE 1

IN AN ACTION FOR FRAUDULENT INDUCEMENT, WHERE RESOLUTION OF THE FRAUD CLAIM REQUIRES REFERENCE TO AND INTERPRETATION OF THE CONTRACT, THE FRAUD CLAIM IS SIGNIFICANTLY RELATED TO THE CONTRACT FOR THE PURPOSE OF DETERMINING ARBITRABILITY OF THE CLAIM.

It is without dispute that this Court, in Seifert v. U.S. Home Corp. 750 So. 2d 633 (Fla.1999), established the test to be used to determine whether a claim should submitted to arbitration pursuant to an arbitration clause. Under Seifert, a court should consider three elements when considering whether to grant a motion compelling arbitration: “(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.” Id. The main issue in the case before this Court is the second element and whether a fraud claim is an arbitrable issue.

In Seifert, the plaintiff-buyer signed a contract for the defendant-seller to construct and sell a home to the plaintiff. Seifert, 750 So. 2d at 633. That contract contained an arbitration clause requiring all claims “arising out of or relating to” the contract to be submitted to arbitration. Id. After the home was built, the

buyer's husband was killed when the garage's air conditioning system caused carbon monoxide emissions to flow into the home from the garage. Id. The buyer subsequently brought a wrongful death action against the seller. Id.

The issue addressed in Seifert was whether an arbitration provision in a contract for the construction and purchase of a home required a subsequent wrongful death claim to be subjected to arbitration. Though this Court noted that the phrase "arising out of or relating to" encompasses virtually all disputes between the contracting parties, including related tort claims, this Court held that the wrongful death claim could not be subjected to arbitration because the wrongful death action was "predicated upon a tort theory of common law negligence unrelated to the rights and obligations of the contract" and was therefore "not contemplated by the parties when the contract was made." Seifert, 750 So. 2d at 640. According to Seifert, "the determination of whether a particular claim must be submitted to arbitration necessarily depends on the existence of some **nexus between the dispute and the contract** containing the arbitration clause". Id. at 638 (emphasis added). In other words, the civil claim being litigated must have a connection with the relationship formed by the contract, which was buyer/seller, and not be attenuated by time nor disconnection from the parties' agreement. In the civil claim, the parties' buyer/seller relationship was secondary

to the claim. The claim had to be resolved by the review and application of common law, not contract law.

To establish a nexus, a court must first determine the nature of the nexus that must be established between a civil claim and the agreement which contains the arbitration provision in order for that claim to be arbitrable. The nature depends on whether the arbitration provision is “narrow” or “broad.” In Seifert, this Court held that a “broad” arbitration clause is an arbitration clause that calls for the arbitration of claims "arising out of or relating to" the contract. Seifert, 750 So. 2d at 638.

In the case at bar, the Contract states, in pertinent part, that “[a]ll controversies, claims, and other matters in question arising out of or relating to this transaction or this Contract or its breach will be settled *** through neutral binding arbitration in the county where the Property is located.” (R. 12). Based on this language, the First District determined, and the Petitioners agree, that the arbitration provision contained in the parties’ Contract is broad and should be extensively applied.

Under Seifert, a particular claim is arbitrable under a broad arbitration provision if a “‘significant relationship’ exists between the claim and the agreement containing the arbitration clause, regardless of the label attached to the legal dispute.” Id. at 637-38 (quoting Am. Recovery Corp. v. Computerized

Thermal Imaging, Inc., 96 F.3d 88, 93-94 (4th Cir. 1996)). A significant relationship exists if the claim raises “some issue the resolution of which requires reference to or construction of some portion of the contract itself.” Id.

While the contract in the case at hand is similar to the one in Seifert, the outcome is different because the facts in this case are distinguishable from those in Seifert because Shakespeare and Herd’s claims arise solely from the buyer/seller relationship created by the Contract and, therefore, are significantly related to the Contract. Clearly, the claims by Shakespeare and Herd cannot be resolved without reference to, and interpretation of, the parties’ Contract. A fact recognized by the Respondents in their Complaint, which cites to portions of the parties’ Contract.

Shakespeare and Herd’s Complaint alleges that the Jacksons fraudulently misrepresented the existence of wetlands on the subject property purchased by Shakespeare and Herd from the Jacksons, and that Shakespeare relied on that fraudulent misrepresentation to their detriment. According to the Complaint, had Shakespeare and Herd been aware of the presence of wetlands on the subject property, they would not have purchased the property. However, the Contract contains a provision which states:

6. LAND USE: Seller will deliver the Property to **Buyer** at the time agreed in its present "as is" condition, with conditions resulting from **Buyer's** inspections and casualty damage, if any, excepted.

...

(c) **Inspections:** (check (1) or (2) below)

(1) Feasibility Study: **Buyer** will, at **Buyer's** expense and within 30 days from Effective Date ("Feasibility Study Period"), determine whether the Property is suitable, in **Buyer's** sole and absolute discretion, for use. During the Feasibility Study Period, **Buyer** may conduct a Phase 1 environmental assessment and any other tests, analyses, surveys and investigations ("inspections") that **Buyer** deems necessary to determine to **Buyer's** satisfaction the Property's engineering, architectural and environmental properties ... to determine the Property's suitability for the **Buyer's** intended use.

...

Buyer will deliver written notice to **Seller** prior to the expiration of the Feasibility Study Period of **Buyer's** determination of whether or not the Property is acceptable. **Buyer's** failure to comply with this notice requirement will constitute acceptance of the Property as suitable for **Buyer's** intended use in its "as is" condition. If the Property is unacceptable to the **Buyer** and written notice of this fact is timely delivered to **Seller**, this Contract will be deemed terminated as of the day after the Feasibility Study period ends and **Buyer's** deposit(s) will be returned after Escrow Agent receives proper authorization from all interested parties.

(2) No Feasibility Study: **Buyer** is satisfied that the property is suitable for **Buyer's** purposes This Contract is not contingent on **Buyer** conducting any further investigations.

(emphasis added.) With regard to these choices, Option (1) in this section is checked.

Shakespeare and Herd's claim cannot be resolved without reference to, or the interpretation of, the parties' intentions, duties, understandings, and agreement with regard to the above section concerning the Feasibility Study. Additionally, the parties' relationship and duties would not have arisen but for the Contract. As

a result, and because the resolution of Shakespeare and Herd's claim cannot be achieved without the analysis and construction of the Contract, the Contract is inextricably linked to the fraudulent inducement claim and the Arbitration Agreement between these parties must be honored.

The facts in the matter at hand are most similar to those in Maguire v. King, 917 So. 2d 263, 266 (Fla. 5th DCA, 2005). In Maguire, the plaintiff-seller sued for fraud in the inducement where the defendants allegedly misrepresented the drainage system capacity of property the defendant sold to the plaintiff. Maguire, 917 So. 2d at 264. The defendants filed a motion to compel arbitration based on an arbitration clause contained in the parties' contract, which, similar to the one in the case at hand, stated that, "[a]ll controversies, claims, and other matters in question arising out of or relating to this transaction or this Contract or its breach" would be arbitrated. Maguire, 917 So. 2d at 265. The lower tribunal granted the motion on the first two counts but denied the motion as to three other counts. Maguire, 917 So. 2d at 264. On appeal, the Fifth District reversed and remanded to the lower court for an order granting the motion to compel arbitration as the other three counts.

As in the matter at hand, the Maguire court found that the arbitration clause was broad, but unlike here, the Maguire court found that a sufficient nexus existed between the plaintiff's claims and the contract. Maguire, 917 So. 2d at 266. The

Maguire court found that, unlike in Seifert, it was not a coincidence that the parties involved in the dispute had a contractual relationship. Maguire, 917 So. 2d at 266. The plaintiff's claims were inseparable from the parties' contract.

Returning to the case at bar, though the First District certified conflict, the First District attempted to distinguish Maguire from its ruling. The Petitioners herein contend that Maguire is not distinguishable. As in Maguire, and as argued by the Dissent to the First District's Opinion, Shakespeare and Herd's claim cannot be argued without reference to and interpretation of the contract. The facts and issues in Maguire and the case at bar are fundamentally the same, but the First District and the Fifth District have entered conflicting opinions on those facts and issues.

This Court should resolve this Conflict by adopting the reasoning in Maguire and disproving the First District's reasoning below.

ISSUE 2

UNDER FLORIDA LAW, WHERE AN ARBITRATION CLAUSE IS SUFFICIENTLY BROAD TO ENCOMPASS ALL DISPUTES BETWEEN THE PARTIES, AN ACTION FOR FRAUDULENT INDUCEMENT FALLS WITHIN THE SCOPE OF AN ARBITRATION AGREEMENT.

Shakespeare and Herd, Respondents, filed this case in Circuit Court despite the Arbitration Agreement in the Contract, contending that their claim for fraudulent inducement should not be subjected to arbitration for several reasons. First, because it was not the intent of the parties that such a claim be arbitrated. However, the language of the Arbitration Agreement is clear and unambiguous.

The Contract states, in pertinent part, that “[a]ll controversies, claims, and other matters in question arising out of or relating to this transaction or this Contract or its breach will be settled*** through neutral binding arbitration in the county where the Property is located.” (R. 12). Courts have consistently held that the phrase “arising out of or relating to” is sufficiently broad to encompass all disputes between the parties to a contract, including torts such as a fraudulent inducement claim.

Moreover, an allegation of fraud directed toward an entire contract instead of specifically the arbitration clause should be subjected to arbitration. Maguire v. King, 917 So. 2d 263, 266 (Fla. 5th DCA, 2005). In the case at bar, Shakespeare and Herd’s fraud claim attacks the Contract as a whole, not the Arbitration Clause

itself. As such, in accordance with Maguire, the validity of the Contract is a question for the arbitrator, and the Circuit Court properly dismissed this action.

Additionally, Shakespeare and Herd in their complaint have not alleged nor shown any facts that there was any disparity in bargaining power between the parties. Neither have they alleged that they were unable to negotiate the terms of the Contract. The Complaint contains no claim that Shakespeare and Herd were anything but business people buying property for profit. (R. 1). In fact, considering that Shakespeare and Herd advised the Jacksons, that they “intended to develop the subject property into low-income houses with 27 units on the entire parcel[,]” Shakespeare and Herd should be considered sophisticated and knowledgeable buyers. (R. 4).

In addition, as mentioned above, the Contract required that the Property would be delivered by the Jacksons in an “as is” condition and set out a requirement that Shakespeare and Herd conduct a “Feasibility Study” within 30 days of the Effective Date of the Contract (R. 10). Both of these clauses point to knowledgeable and able-bodied buyers who can have such a study conducted. Shakespeare and Herd have not been able to point to any procedural or substantive weaknesses in the Contract or the entry thereof between the parties. The clause regarding Dispute Resolution gave Shakespeare and Herd sufficient notice that any disputes of or arising from this Contract would be arbitrated.

CONCLUSION

Shakespeare and Herd's claim for fraud in the inducement is an arbitrable issue under the arbitration provision in the parties' Contract. Additionally, the language of the Contract indicates it was the parties' intent to arbitrate all claims arising out of or relating to the Contract, including fraudulent inducement. The Supreme Court should find that the trial court properly compelled arbitration in this matter, and should reverse the order of the First District and direct the parties to arbitration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail only to Leonard Ireland, Esq. , Clayton Johnston, P.A., 18 N.W. 33rd Court, Gainesville, FL 32607, on this 19th day of January, 2012 and electronically submitted via e-mail to e-file@flcourts.org.

JEAN MARIE DOWNING, ESQ.

CERTIFICATE OF COMPLIANCE

Counsel for the Petitioner certifies the size and style of type used in this brief is 14-point Times New Roman.

JEAN MARIE DOWNING, ESQ.