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SIXTH DIVISION
September 8, 2017

No. 1-17-1570
2017 IL App (1st) 171570-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALYSSA MOGUL and JOEY MOGUL,)	
as Co-Executors of the Estate of HONOR B.)	Appeal from the
MOGUL, deceased, ALYSSA MOGUL,)	Circuit Court of
individually, JOEY MOGUL, individually, and)	Cook County.
STEVEN MOGUL, individually,)	
)	
Plaintiffs-Appellees,)	
)	No. 15 L 5069
v.)	
)	
SCI ILLINOIS SERVICES, INC., an Illinois)	
corporation d/b/a MEMORIAL PARK)	
CEMETERY, and SCI INTERNATIONAL)	Honorable
CORPORATION, a foreign corporation,)	James E. Snyder,
)	Judge Presiding.
Defendants-Appellants.)	

JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred when it determined that plaintiffs' Consumer Fraud Act claim was not subject to the arbitration clause in the parties' contract where the arbitration clause was broad and it was unclear whether the subject matter of the dispute fell within the scope of the arbitration clause; reversed and remanded.
- ¶ 2 Defendants, SCI Illinois Services, Inc., d/b/a Memorial Park Cemetery, and SCI International Corporation bring this interlocutory appeal, challenging the trial court's order that granted the motion to reconsider of plaintiffs, Alyssa Mogul, Joey Mogul, and Steven Mogul.

The court's order granting the motion to reconsider allowed plaintiffs' claim pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.*) to continue in circuit court, rather than be sent to binding arbitration, as the other counts of their complaint had been. Defendants argue that the court erred in granting plaintiffs' motion to reconsider where the arbitration provision contained in the contract at issue applies to the Consumer Fraud Act claim because it is based on the same transaction and sequence of events that predicate the plaintiffs' other claims. For the following reasons, we reverse the trial court's decision.

¶ 3

BACKGROUND

¶ 4 This case arises as a result of defendants' alleged intentional overselling of burial plots in a cemetery. The following facts have been gathered from plaintiffs' fourth amended complaint, which was the operative complaint on file at the time plaintiffs' motion to reconsider was granted.

¶ 5 Defendants operate a cemetery known as Memorial Park Cemetery (Memorial Park) in Skokie. In September 1999, Honor Mogul purchased eight family burial plots in a section of the cemetery known as Gan M'Nucha, which was restricted to people of the Jewish faith. The eight plots were purchased together so that Honor and plaintiffs would be in the same resting place.

The contract pursuant to which the plots were purchased stated in relevant part:

“BY SIGNING THIS AGREEMENT, PURCHASER IS AGREEING THAT ANY CLAIM PURCHASER MAY HAVE AGAINST THE SELLER SHALL BE RESOLVED BY ARBITRATION AND PURCHASER IS GIVING UP HIS/HER RIGHT TO A COURT OR JURY TRIAL AS WELL AS HIS/HER RIGHT OF APPEAL.

* * *

PURCHASER AGREES THAT ANY CLAIM HE/SHE MAY HAVE AGAINST SELLER (INCLUDING THE INTERPRETATION OF THIS ARBITRATION CLAUSE) SHALL BE SUBMITTED TO AND FINALLY RESOLVED BY MANDATORY AND BINDING ARBITRATION IN ACCORDANCE WITH THE STATUTES, RULES OR REGULATIONS GOVERNING ARBITRATIONS IN THE STATE WHERE THIS AGREEMENT HAS BEEN EXECUTED.”

¶ 6 On June 5, 2013, Honor Mogul died. On June 6, 2013, Joey and Alyssa Mogul, Honor’s next of kin, went to Memorial Park to make final arrangements for their mother’s burial, but were informed that the burial plots previously purchased by Honor were now unavailable. Defendants offered alternative plots within Memorial Park. Plaintiffs alleged that these plots were of inferior quality and condition compared to those in Gan M’Nucha. Additionally, the alternative burial plot that plaintiffs accepted was not one where family members could be interred nearby and the headstone that Honor Mogul had selected could not be used in the alternative plot. However, plaintiffs’ Jewish faith required that their mother be buried shortly after her death, and as a result, plaintiffs accepted defendants’ offer, which resulted in their mother being buried in an area outside Gan M’Nucha.

¶ 7 Plaintiffs filed their initial complaint in circuit court on May 8, 2015, alleging counts for breach of contract, fraud in the inducement, and intentional infliction of emotional distress. On November 12, 2015, pursuant to defendants’ motion to dismiss, the circuit court dismissed plaintiffs’ complaint without prejudice, and ordered to arbitration the counts for breach of contract and fraud in the inducement. Plaintiffs then filed an amended complaint, and a second amended complaint after defendants moved to dismiss the amended complaint. Plaintiffs’

second amended complaint set forth for the first time a claim pursuant to the Consumer Fraud Act. Defendants filed a motion to dismiss the second amended complaint, which the court granted on April 13, 2016, and ordered to arbitration plaintiffs' Consumer Fraud Act claim. On May 25, 2016, plaintiffs filed their third amended complaint, asserting claims for intentional infliction of emotional distress and negligent infliction of emotional distress. Plaintiffs' third amended complaint also purported to re-plead the Consumer Fraud Act claim for purposes of preserving plaintiffs' appellate rights. Defendants subsequently moved to dismiss the third amended complaint. On August 16, 2016, the court granted defendants' motion to dismiss, but vacated its April 13, 2016, order to the extent that the order dismissed plaintiffs' Consumer Fraud Act claim with prejudice. Plaintiffs were given leave to re-plead their Consumer Fraud Act and emotional distress claims.

¶ 8 Ultimately, on September 9, 2016, plaintiffs filed their fourth amended complaint, which is at issue in this appeal. On October 11, 2016, defendants filed a motion to dismiss, strike, and/or compel arbitration of plaintiffs' fourth amended complaint. Defendants thereafter filed a motion to dismiss the fourth amended complaint, alleging that plaintiffs' fourth amended complaint failed to state a claim for emotional distress or violation of the Consumer Fraud Act. In the alternative, defendants asked the court to compel arbitration of the claim, arguing that the contract at issue here contains broad language requiring the arbitration of any claims plaintiffs may have that related to the transaction contemplated by the parties' contract.

¶ 9 On February 6, 2017, the court granted in part and denied in part defendants' motion to dismiss, strike, or compel arbitration of plaintiffs' fourth amended complaint. Specifically, the court dismissed plaintiffs' counts for emotional distress for failure to state a claim upon which relief could be granted, struck plaintiffs' class allegations, and denied defendants' motion to

dismiss for failure to state a claim as to plaintiffs' Consumer Fraud Act claim. The court's February 6, 2017, order did not state whether plaintiffs' Consumer Fraud Act claim was subject to the arbitration clause, and as a result, on March 8, 2017, defendants filed a motion for reconsideration and/or clarification of the order entered on February 6, 2017, requesting that the court reconsider and/or clarify whether plaintiffs' Consumer Fraud Act claim was subject to the arbitration clause.

¶ 10 On March 23, 2017, the court granted defendants' motion to reconsider and/or clarify, and dismissed plaintiffs' Consumer Fraud Act claim to arbitration. On April 21, 2017, plaintiffs filed a motion to reconsider the March 23, 2017, order, arguing that the Consumer Fraud Act claim was distinct from the arbitrable claims that were previously dismissed by the trial court. On June 1, 2017, the court granted plaintiffs' motion to reconsider.

¶ 11 Defendants filed their timely notice of interlocutory appeal on June 30, 2017.

¶ 12 ANALYSIS

¶ 13 In this case, defendants appeal from the court's June 1, 2017, order granting plaintiffs' motion to reconsider, which effectively denied defendants' request to compel plaintiff's claim under the Consumer Fraud Act to arbitration. Illinois Supreme Court Rule 307(a)(1) allows for the appeal of an interlocutory order that granted, modified, refused, dissolved, or refused to dissolve an injunction. Ill. S. Ct. R. 307(a)(1) (eff. Nov. 1, 2016). Our supreme court has recognized that "[a]n order of the circuit court to compel or stay arbitration is injunctive in nature and subject to interlocutory appeal under paragraph (a)(1) of [Rule 307]." *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11 (2001). As a result, we find that we have jurisdiction over this interlocutory appeal pursuant to Rule 307(a)(1).

¶ 14 Defendants present one issue on appeal, namely, whether the trial court erred when it granted plaintiffs' motion to reconsider, effectively allowing plaintiffs' Consumer Fraud Act claim to proceed in circuit court, rather than compelling it to binding arbitration. "When reviewing a motion to reconsider that is based on the trial court's application (or purported misapplication) of existing law, as opposed to a motion to reconsider that is based on new facts or legal theories not presented in the prior proceedings, our standard of review is *de novo*." *People v. \$280,020 U.S. Currency*, 372 Ill. App. 3d 785, 791 (2007). Similarly, "[w]here the trial court made no factual findings and its decision was based on a purely legal analysis, the decision to deny [a] motion to compel arbitration is reviewable *de novo*." *Vassilkovska v. Woodfield Nissan, Inc.*, 358 Ill. App. 3d 20, 24 (2005). Here, plaintiffs' motion to reconsider was based on their contention that the court erred in its application of the law to this case. Additionally, the court did not make factual findings or hold an evidentiary hearing when deciding whether to compel plaintiffs' Consumer Fraud Act claim to arbitration. As a result, our review is *de novo*.

¶ 15 Defendants argue that plaintiffs' fourth amended complaint demonstrates that plaintiffs' Consumer Fraud Act claim is based on the same transaction and sequence of events that predicated their other claims, and thus falls within the scope of the arbitration clause contained in the contract at issue. Plaintiffs respond that their Consumer Fraud Act claim is a separate and distinct cause of action due to their allegations regarding defendants' general business practice of overselling burial plots. Additionally, plaintiffs contend the allegations of the fourth amended complaint show that this claim relates to facts independent of the contract at issue. The trial court initially granted defendants' motion to compel plaintiffs' Consumer Fraud Act claim to

arbitration. However, upon plaintiffs' motion to reconsider, the court reversed its earlier ruling, and allowed plaintiffs' Consumer Fraud Act claim to remain in circuit court.

¶ 16 “[A]rbitration is favored by the state, federal, and common law, and an arbitration agreement will be given as broad an interpretation as its language will allow.” *Zimmerman v. Illinois Farmers Co.*, 317 Ill. App. 3d 360, 366 (2000). Additionally, the most important factor in ascertaining the parties' intention is the scope of the arbitration clause in the contract. *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 445 (1988).

¶ 17 Although not raised by either party before the trial court or on appeal, as an initial matter, we must first determine whether the trial court properly decided the issue of arbitrability. Illinois courts recognize three possible outcomes when addressing the issue of what decision-making authority should resolve the issue of arbitrability. First, where the language of the arbitration agreement is clear, and it is apparent that the dispute sought to be arbitrated falls within the scope of the arbitration clause, the court should decide the arbitrability issue and compel arbitration. *Id.* Second, if it is apparent that the issue sought to be arbitrated is not within the realm of the arbitration clause, the court should decide the arbitrability issue in favor of the party opposing arbitration, because there is no agreement to arbitrate. *Id.* Third, when the language of an arbitration clause is broad and it is unclear whether the subject matter of the dispute falls within the scope of the arbitration agreement, the question of substantive arbitrability should initially be decided by the arbitrator. *Id.* at 447-48. We note that the dissent in *Donaldson* opined that the issue of arbitrability was more properly addressed by the court. *Id.* at 452-55. (Ward, J., dissenting). However, since *Donaldson* was decided in 1988, our supreme court and this court have both consistently followed the majority's holding. See, e.g., *Salsitz v. Kreiss*, 198 Ill. 2d 1, 9 (2001); *Thompson v. Policemen's Benevolent Labor Committee*, 2012 IL App (3d) 110926, ¶

18; *Equistar Chemicals, LP v. Hartford Steam Boiler Inspection and Insurance Company of Connecticut*, 379 Ill. App. 3d 771, 775 (2008); and *Bass v. SMG, Inc.*, 328 Ill. App. 3d 492, 498-99 (2002).

¶ 18 In this case, the arbitration clause stated:

“BY SIGNING THIS AGREEMENT, PURCHASER IS AGREEING THAT ANY CLAIM PURCHASER MAY HAVE AGAINST THE SELLER SHALL BE RESOLVED BY ARBITRATION AND PURCHASER IS GIVING UP HIS/HER RIGHT TO A COURT OR JURY TRIAL AS WELL AS HIS/HER RIGHT OF APPEAL.

* * *

PURCHASER AGREES THAT ANY CLAIM HE/SHE MAY HAVE AGAINST SELLER (INCLUDING THE INTERPRETATION OF THIS ARBITRATION CLAUSE) SHALL BE SUBMITTED TO AND FINALLY RESOLVED BY MANDATORY AND BINDING ARBITRATION IN ACCORDANCE WITH THE STATUTES, RULES OR REGULATIONS GOVERNING ARBITRATIONS IN THE STATE WHERE THIS AGREEMENT HAS BEEN EXECUTED.”

¶ 19 We find that the issue of the arbitrability of plaintiffs’ Consumer Fraud Act claim should be determined by an arbitrator. Thus we reverse the trial court’s decision, and remand. Specifically, we find that the third scenario contemplated by the *Donaldson* court applies in this case, where the arbitration agreement is broad and it is unclear whether plaintiffs’ Consumer Fraud Act claim falls within the scope of the arbitration clause. See *Donaldson*, 124 Ill. 2d at 447-48.

¶ 20 We first address whether the arbitration clause here is sufficiently broad. In *Donaldson*, the court noted that “the broadest arbitration clauses typically provide that ‘any claim or controversy arising out of this agreement’ is to be submitted to arbitration.” *Donaldson*, 124 Ill. 2d at 445. Likewise, the court in *Bass v. SMG, Inc.*, when faced with determining the breadth of an arbitration clause, held that “the phrase ‘regarding this agreement’ is not narrower in scope than the phrase ‘arising out of or related to’ the agreement.” *Bass*, 328 Ill. App. 3d at 498. In this case, the arbitration clause stated that *any claim* that purchaser may have against seller shall be submitted to arbitration. (Emphasis added.) We find this language to be sufficiently broad because the words “any claim” encompasses a wider breadth of claims than the words “arising out of” or “related to.” Because the aforementioned cases have still considered arbitration clauses that include such limiting words as being sufficiently broad, it is abundantly clear that the “any claim” language used here was intended to be broad.

¶ 21 Next, we turn to issue of whether it is unclear if plaintiffs’ Consumer Fraud Act claim falls within the scope of the arbitration agreement. We first point out that the parties have not submitted and we have not found any case law that establishes a bright line rule regarding whether statutory claims brought pursuant to the Consumer Fraud Act are or are not allowed to be submitted to arbitration. It is also worth noting that the parties disagree as to the clarity of this issue. Defendants contend that plaintiffs’ claim arises from the same contract as their other claims and therefore should also be subject to binding arbitration. On the other hand, plaintiffs assert that their Consumer Fraud Act is distinct and relies on facts outside of those pleaded to support their breach of contract claim. Similarly, the procedural history of this case evidences the trial court’s lack of clarity on this issue. When ruling on defendants’ motion for clarification or reconsideration, the trial court granted their request to compel plaintiffs’ Consumer Fraud Act

claim to arbitration. Thereafter, by granting plaintiffs' subsequent motion to reconsider that decision, the court found that plaintiffs' claim could remain in circuit court. These conflicting decisions by the trial court show a lack of clarity. Due to the parties' stark disagreement, the trial court's contradictory decisions, and a lack of clear legal precedent on this specific issue, we find that it is unclear whether plaintiffs' Consumer Fraud Act claim falls within the scope of the parties' arbitration agreement. Therefore, according to *Donaldson*, the arbitrability of this issue is best decided by the arbitrator.

¶ 22 As a final matter, we point out that the court in *Donaldson* recognized that, "initially deferring to the arbitrator in unclear cases may occasionally hinder some of the reasons for arbitration, speed and inexpense, we note that parties are free to state in their contract and arbitration agreement that all questions regarding arbitrability should be decided by a court." *Donaldson*, 124 Ill. 2d at 448-49. In this case, the parties did not include any such provision in the arbitration clause. Thus, although the parties here could have opted to require a court to decide the issue of arbitrability, they did not. Further, "Illinois public policy concerns that favor arbitration outweigh concerns regarding judicial economy, duplication of effort, or possibly inconsistent results." *Bass*, 328 Ill. App. 3d at 507. As a result, we find that the issue of the arbitrability of plaintiffs' Consumer Fraud Act claim must be decided by the arbitrator.

¶ 23 CONCLUSION

¶ 24 Based on the foregoing, we find that the trial court erred when it ordered plaintiffs' Consumer Fraud Act claim to proceed in circuit court because the issue of arbitrability should be determined by the arbitrator. We, therefore, reverse the trial court's decision and remand for further proceedings consistent with this order.

¶ 25 Reversed and remanded.