2011 IL App (2d) 110607-U
No. 2—11—0607
Order filed October 14, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CRESTMOOR ONE, LLC, Plaintiff, and ANCHOR BIBLE CONCEPTS, INC., Intervening Plaintiff-Appellant, v. DRAKE OAK BROOK HOLDINGS, LLC, SIEBERT ENGINEERS, INC., TVS INTERIORS, INC., THOMPSON, VENTULETT, STAINBACK & ASSOCIATES, INC., ANCHOR MECHANICAL, INC., EXCLUSIVE CONSTRUCTION SERVICES INC., CONTINENTAL WALL SYSTEMS GROUP, INC., and UNKNOWN OWNERS, Defendants, and WYNDHAM HOTEL MANAGEMENT, INC., Defendant-Appellee.	)	Appeal from the Circuit Court of Du Page County. Nos. 09—CH—3469 09—CH—3471 09—CH—4336 Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

Held: (1) The trial court made the requisite finding that the parties had a valid arbitration agreement and (2) trial court properly compelled arbitration.

¶ 1 This case arises from the failure of the Drake Oak Brook Hotel (Hotel), a full-service, business class hotel that was located in Oak Brook. On January 10, 2008, Drake Oak Brook Holdings, LLC (Drake Holdings), purchased the Hotel, funding the acquisition with a $16,660,550 loan obtained from Regions Bank.

¶ 2 Three other relevant agreements were entered into on January 10, 2008, in conjunction with the Hotel sale. First, Drake Holdings and Wyndham Hotel Management, Inc. (Wyndham) entered into a Hotel Management Agreement (HMA), by which Wyndham agreed to be responsible for the "management, maintenance, and operation of" the Hotel for 25 years. Article 14.2 of the HMA provided that " any dispute, claim or issue arising under" the HMA would be resolved by first attempting to mediate the dispute and, if that failed, then by binding arbitration. Additionally, the HMA stated that it was made "for the sole protection and benefit of [Wyndham] and [Drake Holdings] and their respective successors and assigns."

¶ 3 Second, Drake Holdings, Wyndham, and Regions entered into a Subordination and Non-Disturbance Agreement (SNDA). This agreement recognized that Drake Holdings and Wyndham entered into the HMA and that Regions extended the loan to Drake Holdings for the purchase of the Hotel. The SNDA stated that, pursuant to these agreements, Regions required that Wyndham and Drake Holdings enter into the SNDA. Consistent with this, the SNDA provided a series of protections for Regions in the event of Drake Holdings' default. The SNDA provided, among other things, that: (1) Wyndham's right to management fees was subordinate to the lien held by Regions on the Hotel; (2) Wyndham consented to the "collateral assignment" of the HMA to Regions, and (3) the procedure through which Regions could foreclose on the Hotel in the event of a default by

Drake Holdings and recover monies pursuant to the senior lien on the Hotel. The SNDA also protected Wyndham's rights to continue to manage the Hotel in the event of a default by Drake Holdings, so long as Wyndham was "in compliance with the terms and conditions" of the HMA.

¶ 4 Third, Regions and Drake Holdings entered into an Assignment of Management Agreement (the Assignment Agreement). The Assignment Agreement recognized the HMA, "incorporated [it] herein," and attached it as an exhibit to the Assignment Agreement. Under the Assignment Agreement, Drake Holdings did "grant, assign, transfer, and set over unto [Regions], and grant [Regions] a security interest in and to, all of [Drake Holding's] right, title and interest in and to the [HMA] *** for the performance of day-to-day management and leasing of the Hotel." While the Assignment Agreement stated that it constituted an "absolute and present assignment" of Drake Holdings' "right and interest" in the HMA, it gave Regions "no right" to enforce the provisions of the HMA until Drake Holdings was "in default." The Assignment Agreement further provided that Regions did not assume "any of the obligations or duties" of Drake Holdings under the HMA "unless and until [Regions] shall have given [Wyndham] written notice that it has affirmatively exercised its right to take possession of the Hotel" following a default by Drake Holdings. In January 2008, Wyndham began managing the Hotel, and Drake Holdings started paying management fees to Wyndham and mortgage payments to Regions.

¶ 5 In summer 2008, Drake Holdings went into default on its loan obligations to Regions and on its management fee payments to Wyndham. On July 27, 2009, for the purpose of prosecuting a foreclosure action, Regions assigned the promissory note and mortgage to Regions Acquisition. Regions Acquisition, in turn, assigned the promissory note and mortgage to Crestmoor One, LLC (Crestmoor). Crestmoor is a wholly-owned subsidiary of Regions. On September 24, 2009, Crestmoor filed a foreclosure action against the Hotel property.

¶ 6 In 2009, Wyndham asked Regions for a series of cash infusions for the property in order to make payments due to employees, utilities, repair service, other vendors, and to Wyndham itself for overdue management fees. According to Regions, on August 7, 2009, it reached a "shut-down agreement" with Wyndham whereby it would give Wyndham $180,000 in exchange for Wyndham's agreement to terminate the HMA and the SNDA. Wyndham took the $180,000 but refused to terminate the HMA and the SNDA. According to Wyndham, the shut-down agreement was never finalized. Wyndham also maintained that Regions violated the SNDA by not disclosing that it had transferred the loan to Crestmoor.

¶ 7 On November 3, 2009, Regions filed a three-count complaint against Wyndham in a federal court in Tennessee for breach of contract, unjust enrichment, and for a declaratory judgment that Regions was not obligated to perform the duties of Drake Holdings under the HMA and that Regions' transfer of interest to Crestmoor was not in violation of the SNDA. On March 11, 2010, the federal court dismissed the case with prejudice. The trial court explained that the forum selection clause in the HMA provided that Illinois was the proper forum for the suit. The federal court further explained that even though Regions was not a party to the HMA, it was "sufficiently 'closely related'" to be bound by the forum selection clause.

¶ 8 On December 27, 2010, Crestmoor entered into a sale and assignment agreement with Anchor Bible. Anchor Bible is a nonprofit Christian organization that sought to acquire the Hotel to host its own meetings and guests, not to operate a hotel open to the public. The agreement provided that Crestmoor would "irrevocably sell, transfer and assign" to Anchor Bible all of its interests in the promissory note evidencing Drake Holdings' indebtedness. The agreement additionally provided that it did not include any claims that Crestmoor had against Wyndham. Further, the agreement incorporated an "agreement to defend and indemnify." This agreement

provided that Anchor Bible would assume the responsibility of handling the litigation involving Crestmoor, Drake Holdings, and Wyndham.

¶ 9 On January 21, 2011, Anchor Bible filed a motion to substitute as plaintiff. Wyndham opposed that motion. Wyndham also filed a motion to stay the foreclosure action pending arbitration.

¶ 10 On May 31, 2011, following a hearing, the trial court granted Anchor Bible leave to intervene as a plaintiff. However, the trial court ordered that Crestmoor remain in the case and be realigned as a defendant. The trial court further granted Wyndham's motion to stay pending arbitration and compelled the arbitration proceedings initiated by Wyndham against Anchor Bible, Regions and Crestmoor. In so ruling, the trial court explained:

> "I think that [the Tennessee federal court's] analysis is the one that I believe is correct. If my recollection is correct, she found that there was a closeness of the parties who were before her such as to bring them within the ambit of the documents and all of the assignments. I think the incorporation by reference of the [SNDA] and the [HMA] into all of the loan documents was enough to at least raise the question of arbitrability. And I believe that this is a question that should be presented to the arbitrator, also the question of the proper parties to the arbitration and the contract as well as the validity of the contract."

On June 22, 2011, Anchor Bible filed a timely notice of interlocutory appeal from the trial court's order pursuant to Supreme Court Rule 307(a)(1) (eff. Feb 26, 2010).

¶ 11 Anchor Bible's first contention on appeal is that the trial court erred by compelling it to arbitrate without making a finding as to whether it is bound to arbitrate under the HMA. Anchor Bible insists that only those bound to an arbitration clause may be forced to arbitrate.

¶ 12 When a party to an arbitration agreement files a suit in the circuit court to stay arbitration proceedings, one concern is the efficient and economical resolution of disputes. *Equistar Chemicals v. Hartford Steam*, 379 Ill. App. 3d 771, 775 (2008). The key is the agreement, that is, what the parties have agreed to submit to arbitration. *Id.* Accordingly, "[w]here the language of the arbitration agreement is clear, and it is apparent that the dispute *** falls within the scope of the arbitration agreement, the court should decide the arbitrability issue and compel arbitration." *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 445 (1998). Likewise, where it is clear the dispute is outside the agreement, the court should rule against arbitration. Where the question is unclear, however, it " 'is a question of contract application and interpretation for the arbitrator, not the court, and the court should not deprive the party seeking arbitration of the arbitrator's skilled judgment by attempting to resolve the ambiguity.' " *Donaldson*, 124 Ill. 2d at 445, quoting *Gold Coast Mall, Inc. v. Larmar Corp.*, 298 Md. 96, 107 (1983). As such, courts will resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. *Heiden v. Galva Foundry Co.*, 223 Ill. App. 3d 163, 168 (1991). Because the decision whether to compel arbitration is not discretionary, we employ a *de novo* standard of review. *Travis v. American Manufacturers Mutual Insurance Co.*, 335 Ill. App. 3d 1171, 1175 (2002).

¶ 13 Moreover, if one of the parties denies the existence of an arbitration agreement, then the trial court's failure to make a finding with respect to the existence of an agreement to arbitrate the agreement is error. *Bahuriak v. Bill Kay Chrysler Plymouth*, 337 Ill. App. 3d 714, 719 (2003). If the trial court fails to make the requisite finding, then this court will remand so that the trial court can make the findings necessary to determine whether there was an agreement to arbitrate the parties' claims. *Id.*

¶ 14 At the outset, we disagree with Anchor Bible's characterization that the trial court failed to make a finding that Anchor Bible was bound pursuant to an agreement to arbitrate with Wyndham. The trial court's ruling demonstrates that it found an agreement to arbitrate existed because (1) Regions, Crestmoor, and Anchor Bible were closely related and bound by the HMA; and (2) all of the loan documents incorporated by reference the SNDA and HMA, which included the agreement to arbitrate.

¶ 15 As the trial court made the requisite finding that there was an agreement to arbitrate, we next consider Anchor Bible's primary argument—that the trial court erred in compelling arbitration because there is no agreement that binds Regions, Crestmoor, or Anchor Bible to arbitrate. Anchor Bible insists that it cannot be bound to the arbitration agreement between Drake Holdings and Wyndham because it never signed the HMA that included the arbitration agreement. However, a party does not need to sign an agreement in order to be bound by that agreement. Courts have recognized several contract-based theories under which a nonsignatory to an agreement may be bound to the arbitration agreement of others, such as (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing or alter ego, (5) estoppel, and (6) third-party-beneficiary status. *Equistar Chemicals*, 379 Ill. App. 3d at 779. Here, Regions entered into an assignment agreement with Drake Holdings in which it took an absolute and present assignment of Drake Holdings' rights and interests in the HMA. The HMA requires arbitration under the Judicial Arbitration and Mediation Service (JAMS) Alternative Dispute Resolution (ADR) Rules. Those Rules reserve for decision by the arbitrator disputes concerning arbitrability, including disputes involving the "formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper parties to arbitration." JAMS Rules, ¶ 11(c), p. 14. The Assignment Agreement further stated that it incorporated the HMA and that attached the HMA as an exhibit.

The effect of the Assignment Agreement between Regions and Drake Holdings was to bind Regions and its successors to arbitrate its disputes with Wyndham. See *id.*

¶ 16 Anchor Bible argues that incorporating a document by reference does not automatically bind a nonparty to its obligations. See *Valero Marketing & Supply Co. v. Baldwin Construction Co.*, 2010 WL 1068105 (S.D. Tex., March 19, 2010) ("Merely referencing another document, however, does not incorporate the entire document when the language used in the incorporation clause does not indicate the parties' intent to do so."); see also *Guerini Stone Co. v. P.J. Carlin Construction Co.*, 240 U.S. 264 (1916) ("a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified"). Anchor Bible further contends that even if the incorporation provision could be interpreted as Wyndham suggests, it cannot override the other provisions of the agreement which indicates that Regions intended to take nothing more than a security interest in Drake Holdings' contract with Wyndham. *See Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 166 (2002) (explaining that it is a basic principle of contract construction that where two clauses conflict, it is the duty of the court to determine which of the two clauses most clearly expresses the chief object and purpose of the contract).

¶ 17 We do not disagree with the principles of law that Anchor Bible sets forth above. However, Anchor Bible's argument is directed more to the underlying substantive issue as to whether the assignment that Regions took pursuant to its agreement with Drake Holdings was a general one (thereby imposing on Regions all of Drake Holdings contractual obligations to Wyndham) or a limited one (serving only as collateral for Regions and not imposing any contractual obligations upon it). As stated earlier, when confronted with a motion to stay for arbitration, the court is to consider whether an agreement to arbitrate exists and whether the parties' dispute falls within the scope of the agreement. *LRN Holding v. Windlake Capital Advisors*, 409 Ill. App. 3d 1025, ___

(2011), citing *Jensen v. Quik International*, 213 Ill. 2d 119, 123-24 (2004). If the issue arguably falls under the arbitration agreement, then the court should compel arbitration. *Heiden*, 223 Ill. App. 3d at 168. Here, the arbitration agreement between Drake Holding and Wyndham clearly provided that "any dispute" would be subject to arbitration. Drake Holdings and Regions entered into an assignment agreement which included language that Regions was taking an "absolute" assignment in Drake Holdings' rights and interests in the HMA, which included the arbitration agreement. Because this general language in the Assignment Agreement arguably required Regions (and its successors) to arbitrate its disputes with Wyndham, the trial court properly compelled arbitration. See *id.* In compelling arbitration, we take no position as to the underlying issues between Anchor Bible and Wyndham. We additionally note that initially deferring to the arbitrators will not preclude this court from later considering whether the arbitrator exceeded his power. *Donaldson*, 124 Ill. 2d at 450.

¶ 18 Anchor Bible insists that even if Regions, and subsequently Crestmoor was bound to the arbitration agreement, it would not be. Anchor Bible insists that the sales contract between Crestmoor and itself did not refer to the SNDA or the HMA. Anchor Bible explains that it is logical that there is no reference to the SNDA and the HMA in its sales agreement with Crestmoor because by the time it purchased the Hotel, the Hotel was a shuttered property and not hosting any guests. As such, since the Hotel was defunct and no management fees were being paid, as a practical matter, there was no need for it to take an interest in the HMA or the SNDA.

¶ 19 Anchor Bible's argument minimizes the fact that, as part of its sales agreement with Crestmoor, it agreed to defend and indemnify Crestmoor in its litigation with Wyndham. Specifically, the agreement provided that Anchor Bible would indemnify Crestmoor for any claim arising out of or related to the HMA or the SNDA. We also note that when Anchor Bible filed its

motion to substitute as plaintiff in place of Crestmoor, it indicated that it was the "real party in interest" and it was seeking to take "the position of Crestmoor." As Anchor Bible agreed to take Crestmoor's place in the ligation, it places itself in the same position, subject to the same rights and obligations, that Crestmoor would have been had it not sold and assigned its interests to Anchor Bible. Therefore, like Crestmoor and Regions before it, Anchor Bible is obligated to arbitrate the underlying dispute with Wyndham.

¶ 20 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 21 Affirmed.