REL: February 28, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1171193

Jeanne Lacy Oaks

v.

Parkerson Construction, LLC

Appeal from Madison Circuit Court
(CV-17-900264)

MITCHELL, Justice.

Jeanne Lacy Oaks and Parkerson Construction, LLC ("Parkerson"), are engaged in a dispute concerning Parkerson's reconstruction of Oaks's fire-damaged residence in Huntsville. Parkerson initiated the action, claiming that Oaks owed it

more than $50,000 for its work. Oaks filed counterclaims alleging, among other things, that Parkerson misrepresented itself and performed deficient work. Parkerson moved the trial court to order that Oaks's counterclaims be arbitrated based on a provision in an unauthenticated work-authorization agreement that was attached to the motion. The trial court granted Parkerson's motion and ordered that Oaks's counterclaims be arbitrated. We reverse the trial court's arbitration order, however, because Parkerson did not meet its burden of establishing the existence of a contract calling for arbitration.

Facts and Procedural History

Parkerson sued Oaks in the Madison Circuit Court on February 17, 2017, based primarily on a work-authorization agreement it allegedly had entered into with her to rebuild her fire-damaged residence in Huntsville. Oaks answered the complaint and later filed counterclaims based in part upon representations Parkerson made in a work-authorization agreement and in part upon alleged deficiencies in Parkerson's work. In support of her counterclaims, Oaks inserted into the body of the pleading two photocopied paragraphs from an

unattached work-authorization agreement. The first paragraph authorized Parkerson to perform services at a property in Brevard, North Carolina. The second paragraph contained representations allegedly made by Parkerson upon which Oaks bases some of her counterclaims.

On December 20, 2017, Parkerson filed a motion to stay the proceedings as to Oaks's counterclaims and to compel arbitration of the counterclaims ("the motion to compel arbitration"). In support of the motion to compel arbitration, Parkerson attached one exhibit: what purported to be a copy of the work-authorization agreement between Oaks and Parkerson, dated September 29, 2015 ("the September 2015 agreement"). The September 2015 agreement, apparently signed by Oaks, contained the following language:

> "The parties to this Agreement shall make a good faith attempt to agree on all disputes by mutual agreement. If any dispute arises between the parties that cannot be resolved by their mutual agreement, both parties agree to submit any dispute to binding arbitration subject to the rules of the American Arbitration Association ('AAA') Construction Industry Arbitration Rules in effect at the time this agreement is signed."

The September 2015 agreement also contained language identical to the two paragraphs that Oaks photocopied into the pleading

in which she asserted her counterclaims. Parkerson did not submit any evidence to authenticate the September 2015 agreement.

On January 4, 2018, Oaks filed a response in opposition to Parkerson's motion to compel arbitration. She argued to the trial court, among other things, that, because Parkerson failed to submit any evidence to authenticate the September 2015 agreement, Parkerson had not met its burden of proving the existence of an arbitration agreement. Before the hearing on the motion to compel arbitration, Oaks filed a supplemental response making similar arguments to those contained in her initial opposition and stating that the September 2015 agreement was due to be struck. The trial court held a hearing on the motion to compel arbitration on May 18, 2018. Despite the fact that more than four months had elapsed between the date Oaks raised the issue of authentication and the date of the hearing, Parkerson never addressed that issue. Nor is there any record of Parkerson submitting such authenticating evidence at the hearing.

On May 21, 2018, the trial court entered an order granting Parkerson's motion to compel arbitration based on

"consideration of [that motion], matters submitted in support of and in opposition thereto, applicable law, and argument of counsel." Oaks filed a motion under Rule 59(e), Ala. R. Civ. P., to alter, amend, or vacate the trial court's order. That motion was denied by operation of law. See Rule 59.1, Ala. R. Civ. P. Oaks then appealed under Rule 4(d), Ala. R. App. P.

Standard of Review

In Bugs "R" Us, LLC v. McCants, 223 So. 3d 913, 916 (Ala. 2016), this Court described the standard of review applicable to a trial court's ruling on a motion to compel arbitration:

> "'"[T]he standard of review of a trial court's ruling on a motion to compel arbitration at the instance of either party is a de novo determination of whether the trial judge erred on a factual or legal issue to the substantial prejudice of the party seeking review." Ex parte Roberson, 749 So. 2d 441, 446 (Ala. 1999). Furthermore:
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> > "'"A motion to compel arbitration is analogous to a motion for summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce. Id. 'After a motion

> to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.'"
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> "'Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000) (quoting Jim Burke Auto., Inc. v. Beavers, 674 So. 2d 1260, 1265 n.1 (Ala. 1995) (emphasis omitted)).'
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> "Vann v. First Cmty. Credit Corp., 834 So. 2d 751, 752-53 (Ala. 2002) (emphasis omitted)."

Discussion

We begin with the legal framework for deciding whether a party's claims are due to be arbitrated. "'The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce.'" Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003) (quoting Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000)). "If the party moving to compel arbitration fails to make such a showing, the burden of proof does not shift to the opposing party and the motion should be denied." Ex parte Greenstreet, Inc., 806 So. 2d 1203, 1207 (Ala. 2001).

Parkerson attached to its motion to compel arbitration only one document -- the September 2015 agreement -- to prove the existence of a contract between it and Oaks calling for arbitration. Oaks contends that the trial court should have struck the September 2015 agreement because it was not authenticated. If Oaks is correct, then the record is devoid of any evidence of an arbitration agreement and the trial court's order granting Parkerson's motion to compel arbitration must be reversed.

In support of her argument, Oaks cites Rule 901(a), Ala. R. Evid., and the associated Advisory Committee's Notes. Rule 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Advisory Committee's Notes further explain:

> "Rule 901 embraces the historic requirement that the proponent of real or demonstrative evidence (all nontestimonial evidence, such as writings, objects, etc.) lay a threshold foundation, as a prerequisite to admissibility, sufficient to show that the evidence is what it is represented to be. ... When a writing is offered as evidence, Rule 901 continues the necessity for laying a foundation to authenticate the document as genuine."

Oaks cites Barrett v. Radjabi-Mougadam, 39 So. 3d 95 (Ala. 2009), to illustrate how Rule 901(a) applies to a motion for a summary judgment, which, we have held, is analogous to a motion to compel arbitration. See TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). In Barrett, the plaintiff sued his sister-in-law, alleging breach of contract. He filed a motion for a summary judgment to which he attached unauthenticated copies of letters he alleged were from his sister-in-law to establish the existence of a contract for a loan. The sister-in-law moved to strike the unauthenticated letters. The trial court, however, considered the letters in entering a summary judgment for the plaintiff. Referring to the requirements of Rule 901, this Court held that copies of letters that did not "include any statement or certification that they [were] true copies of the original letters" were "not admissible in support of [the plaintiff's] motion for a summary judgment." 39 So. 3d at 99. Because "the trial court's judgment was based, at least in part, on 'material that would [not] be admissible at trial,'" this Court reversed the summary judgment. 39 So. 3d at 100 (quoting Purvis v. PPG Indus., Inc., 502 So. 2d 714, 715 (Ala. 1987)) (brackets in Barrett).

Parkerson does not contend that the September 2015 agreement was authenticated, but it argues that the trial court nevertheless acted within its discretion in considering the September 2015 agreement when ruling on the motion to compel arbitration. All that is required for the trial court to consider the evidence, Parkerson contends, is a possibility that the evidence will "be reduced to an admissible form at trial." Parkerson's brief, pp. 9, 11. Remarkably, Parkerson does not attempt to distinguish Barrett, a controlling precedent, in which this Court held that a trial court should not consider, even in part, unauthenticated documents submitted in support of a motion for a summary judgment when the authenticity of those documents is contested. Instead, Parkerson argues that support for its argument is found in Riley v. University of Alabama Health Services Foundation, P.C., 990 F. Supp. 2d 1177 (N.D. Ala. 2014). The federal district court in Riley noted that "evidence submitted in support of, or in opposition to, a motion for summary judgment does not have to be admissible under the Federal Rules of Evidence, as long as it could be reduced to an admissible form at trial." 990 F. Supp. 2d at 1186. The Riley court also noted that such evidence must be "'submitted in admissible

form'" at trial. Id. (quoting McMillian v. Johnson, 88 F.3d 1573, 1584 (11th Cir. 1996)).

Parkerson's reliance on Riley, a case not binding on state courts in Alabama, is misplaced. Although the court in Riley noted that federal courts are permitted to consider, for summary-judgment purposes, evidence that is not submitted in admissible form, it also held that a pretrial challenge to the admissibility of that evidence created a "'burden ... on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated.'" 990 F. Supp. 2d at 1186 (quoting advisory committee's note to the 2010 amendments to Rule 56, Fed. R. Civ. P.)(emphasis omitted). For that reason, when the defendant in Riley filed a motion to strike evidence submitted in support of the plaintiff's motion for a summary judgment, the court required the plaintiff to show how each contested item of evidence would be admissible. See 990 F. Supp. 2d at 1186-98. In contrast, in this case, Oaks attacked the authenticity of the September 2015 agreement and stated that it was due to be struck, yet Parkerson submitted nothing to establish the authenticity of the September 2015 agreement. Thus, Riley does not help Parkerson.

In addition, by placing no evidence authenticating the September 2015 agreement into the record at the hearing on its motion to compel arbitration, Parkerson forfeited its primary argument. Ignoring Barrett, Parkerson argues that a trial court, when ruling on a motion for a summary judgment, is free to consider evidence that could be reduced to an admissible form at trial (or, in this context, at the hearing on the motion to compel arbitration). Parkerson's brief, p. 9. But even under Parkerson's proposed Riley standard, the authenticity objection raised by Oaks required Parkerson to present evidence to establish the authenticity of the September 2015 agreement. Parkerson failed to submit any such evidence at the hearing on the motion to compel arbitration. Therefore, the burden of proof never shifted to Oaks.[1]

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[1]Of course, it is possible, under Rule 901(b)(4), Ala. R. Evid., that a document could be authenticated through intrinsic evidence such as "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics [of the document], taken in conjunction with circumstances." But Parkerson makes no such argument under Rule 901(b)(4), nor is there any indication that the September 2015 agreement is due to be authenticated based on intrinsic evidence. To the contrary, Oaks makes several arguments about what she says are irregularities in the document. For example, she points out that the September 2015 agreement is made in the name of another entity, "Arcus Restoration, LLC," not Parkerson. Oaks also contends that the September 2015 agreement refers to property in Brevard, North Carolina, not Huntsville, as the

Parkerson makes several secondary arguments regarding the admissibility of the September 2015 agreement -- none of which are availing. First, Parkerson argues that the September 2015 agreement was admissible under the business-records exception to the hearsay rule. See Rule 803(6), Ala. R. Evid. This argument confuses the issue. Before the hearsay rule or any exception to that rule come into play, a document must be authenticated. See Hampton v. Bruno's, Inc., 646 So. 2d 597, 599 (Ala. 1994) (explaining that the "authentication requirement is totally separate from the requirements of the business records exception" and that "authentication is necessary before a document can be admitted under the business records exception"). The September 2015 agreement was never authenticated. Therefore, Parkerson's argument regarding the business-records exception is inapposite.

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subject of the work. Under these circumstances, the September 2015 agreement is not authentic by its contents alone, and, thus, it is not clear that Rule 901(b)(4) would apply. Compare Municipal Workers Comp. Fund, Inc. v. Morgan Keegan & Co., 190 So. 3d 895, 913-14 (Ala. 2015) (holding that materials printed from various Web sites were properly authenticated under Rule 901(b)(4) when the content of the materials was distinctive and their accuracy was not challenged or disputed).

Second, Parkerson argues that the trial court did not err in considering the September 2015 agreement because Oaks excerpted paragraphs from that agreement in (a) her pleading asserting her counterclaims, (b) her opposition to the motion to compel arbitration, and (c) her Rule 59(e) motion to alter, amend, or vacate. Although Oaks's counterclaim pleading contained and relied on photocopies of two paragraphs identical to paragraphs contained in the September 2015 agreement, the portion of the September 2015 agreement that contains arbitration language is not incorporated into Oaks's counterclaims. Thus, the burden remained on Parkerson to put the arbitration provision of the September 2015 agreement into evidence.

Oaks also excerpted a separate provision of the September 2015 agreement (not the arbitration provision) in her opposition to Parkerson's motion to compel arbitration to assert an alternative argument based on Parkerson's reliance upon the September 2015 agreement. But the quotation of that unrelated provision did not establish the existence of a contract between Oaks and Parkerson calling for arbitration.

Oaks also included a redacted photocopy of the entire September 2015 agreement in her Rule 59(e) motion. But Oaks

included the September 2015 agreement in her Rule 59(e) motion to provide an illustration to the trial court of the document upon which Parkerson was relying -- not as a stipulation that the September 2015 agreement or the arbitration provision contained in that agreement was authentic. Indeed, Oaks argues in the same Rule 59(e) motion that Parkerson had failed to establish the authenticity of the September 2015 agreement.[2]

Third, Parkerson argues that Oaks has waived her right to contest the authenticity of the September 2015 agreement because, it says, she has sought its benefits. As Parkerson

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[2]Parkerson further argues that its own inclusion of the September 2015 agreement in its motion to compel arbitration rendered the September 2015 agreement proper for consideration by the trial court because, it argues, "documents are properly considered ... when they are in the record or included in a pleading purporting to submit the document to the court." Parkerson's brief, p. 13. Parkerson cites Thompson v. Wachovia Bank, National Association, 39 So. 3d 1153, 1163 (Ala. Civ. App. 2009), overruled on other grounds by Steele v. Federal National Mortgage Association, 69 So. 3d 89, 92 (Ala. 2010), in support of this proposition. But the portion of Thompson cited by Parkerson simply restates the settled proposition that, "in ruling on a summary-judgment motion, a trial court may consider only material that is properly before it upon submission of the motion." 39 So. 3d at 1163. Thompson does not say that a court may consider anything a party places in front of it over the objection of another party. Such a practice would effectively scuttle the rules of evidence.

notes, a party "cannot seek the benefits of a contract but at the same time avoid the arbitration provision in the contract." Bowen v. Security Pest Control, Inc., 879 So. 2d 1139, 1143 (Ala. 2003). This argument places the cart before the horse. Before deciding whether a party is seeking the benefits of a contract containing an arbitration provision, it must first be established that such a contract exists. Oaks's counterclaims rely on two paragraphs that are identical to paragraphs contained in the September 2015 agreement, but neither paragraph is itself an arbitration agreement. Because the September 2015 agreement submitted by Parkerson was never authenticated, there is no evidence to support the claim that the contractual provisions relied upon by Oaks are part of a contract calling for arbitration.

Finally, Parkerson argues that Oaks recognized the validity of the September 2015 agreement when she asserted as an affirmative defense to Parkerson's complaint that Parkerson's claims were subject to arbitration. But Parkerson's motion to compel arbitration and the trial court's order granting that motion applied only to Oaks's counterclaims; Oaks has not moved to compel arbitration of Parkerson's claims. Moreover, a party's general assertion

that a claim is subject to arbitration does not prohibit that party from challenging the validity of a specific arbitration provision such as the one in the September 2015 agreement. Oaks did not recognize the validity of the September 2015 agreement or waive her right to challenge it. Instead, she stated that the trial court should strike the September 2015 agreement based on lack of authentication, and the trial court erred by refusing to do so. Because the record does not contain any other evidence from which the trial court could have concluded that Oaks's counterclaims were subject to arbitration, we must reverse its order compelling arbitration. We pretermit discussion of all other issues raised by the parties.

Conclusion

Through today's ruling, we are not holding that no arbitration agreement existed between Parkerson and Oaks. Rather, today's ruling is based on the conclusion that, because the party moving for arbitration failed to meet its evidentiary burden, the trial court had no evidence before it from which it could decide that question. Here, Parkerson had more than four months between Oaks's initial assertion that the September 2015 agreement was not authenticated and the

hearing on its motion to compel arbitration, during which it could have placed into evidence an authenticated copy of the September 2015 agreement. Parkerson failed to do so. Therefore, the September 2015 agreement was never properly before the trial court, leaving the court without any basis for granting Parkerson's motion to compel arbitration.

REVERSED AND REMANDED.

Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur.