Third District Court of Appeal

State of Florida

Opinion filed March 31, 2021.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-1362
Lower Tribunal No. 20-8515

Natalie S. Lemos, Esq., et al.,
Appellants,

vs.

Valeria Sessa,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Veronica Diaz, Judge.

Klein Park & Lowe, P.L., and Robert M. Klein and Andrew M. Feldman, for appellants.

Levine Kellogg Lehman Schneider + Grossman LLP, and Jeffrey C. Schneider, Jason K. Kellogg and Alexander G. Strassman, for appellee.

Before SCALES, LOBREE and BOKOR, JJ.

SCALES, J.

Appellants (defendants below) Natalie S. Lemos and Leinoff & Lemos, P.A. (together, "Lemos") appeal the trial court's nonfinal order that: (i) denied Lemos's motion to compel arbitration of appellee (plaintiff below) Valeria Sessa's negligence and breach of fiduciary duty claims; (ii) concluded that the arbitration clause in Lemos's retainer agreement was ambiguous; and (iii) determined that certain fee-shifting and cost-shifting provisions of the arbitration clause rendered the provision violative of public policy. Because the arbitration provision in the agreement unambiguously encompasses Sessa's claims, we reverse that portion of the challenged order concluding the clause is ambiguous and denying Lemos's motion to compel arbitration. While we agree with the trial court's determination that the arbitration clause's fee-shifting and cost-shifting provisions violate public policy, because the offending provisions do not interfere with the essence of the arbitration clause, we are able to sever the offending provisions from the remainder of the clause.

I. Relevant Background

A. Retainer Agreement and Arbitration Clause

In June of 2018, Sessa hired Lemos to represent Sessa in her divorce proceedings. Sessa executed a retainer agreement, prepared by Lemos,

that contained an arbitration clause. The relevant portions of the retainer agreement's arbitration clause read as follows:

> Any disputes relating to the quality of representation, fees and costs or any other issues pertaining to our representation of you shall be governed by the terms of this agreement and shall be arbitrated by a matrimonial attorney from Miami-Dade County, who is a member of the American Academy of Matrimonial Lawyers.
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> ….
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> Any controversy or claim arising out of [sic] relating to this retainer agreement or the breach thereof, performance or breach of performance by LEINOFF & LEMOS, P.A. in their representation of you shall be settled through binding arbitration by a matrimonial attorney . . . Any and all costs of the Arbitration shall be advanced by you subject to final adjudication by the Arbitrator.
>
> ….
>
> In addition to all damages for unpaid fees, costs and expenses set forth in this agreement, in the event it becomes necessary to enforce this agreement, through arbitration or otherwise, you agree to pay the firm's reasonable attorney's fees and all costs (whether taxable or not) in consideration therewith, including fees and costs on appeal.

The large majority of the retainer agreement spells out Lemos's entitlement to fees and governs Sessa's obligations to pay those fees. Included in the retainer agreement is the following merger/severability provision:

> This advance fee agreement contains the entire understanding of the parties and may not be varied or modified unless in writing signed by the party to be charged with such change or modification. If any provision of this agreement is

> judicially declared to be invalid or unenforceable then the remaining severable provisions hereof will remain in full force and effect.

B. The Dispute between Sessa and Lemos

In 2019, Sessa and her former husband negotiated a marital settlement agreement that required, *inter alia*, the former husband to make two lump-sum payments to Sessa. The former husband's first payment was made directly to Sessa's brokerage account, while his second payment was made to Lemos's trust account so that Lemos, before wiring the balance to Sessa, could deduct outstanding fees and costs owed to Lemos.

Apparently, someone hacked into either Sessa or Lemos's email account, resulting in Lemos receiving fraudulent wiring instructions for Sessa. In reliance on these wiring instructions, Lemos wired the balance of the second payment proceeds to a phony bank account. Sessa's funds were withdrawn from that phony account and the thief disappeared with the funds.

Sessa brought the instant action against Lemos alleging she suffered damages as a result of Lemos's negligence and breach of fiduciary duty. Based on the above-referenced arbitration clause in the retainer agreement, Lemos filed a motion to compel arbitration. The trial court conducted a hearing on Lemos's motion and, ultimately, entered the challenged order denying Lemos's motion. Specifically, the trial court determined both that the

retainer agreement's arbitration clause did not encompass Sessa's claims and was ambiguous. Also, the order determined the clause was unenforceable because its fee-shifting and cost-shifting provisions "are contrary to public policy and serve only to chill the client's willingness to dispute any issue of [the client's] representation."

Lemos timely appealed the trial court's nonfinal order. We have jurisdiction.[1]

II. Analysis[2]

A. Introduction

The threshold issue in this case is whether Sessa's tort claims against Lemos are arbitrable under the retainer agreement's arbitration clause. Courts must consider three elements when ruling on a motion to compel arbitration: "(1) whether a valid written agreement to arbitrate exists; (2)

[1] Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv) reads, in relevant part, as follows: "Appeals to the district courts of appeal of nonfinal orders are limited to those that . . . determine . . . the entitlement of a party to arbitration . . . ." Fla. R. App. P. 9.130(a)(3)(C)(iv).

[2] We review *de novo* a trial court's determination that a particular dispute is not arbitrable under an agreement's arbitration provision. Duty Free World, Inc. v. Miami Perfume Junction, Inc., 253 So. 3d 689, 693 (Fla. 3d DCA 2018). We also review *de novo* both a trial court's ambiguity determination, Elias v. Elias, 152 So. 3d 749, 751 (Fla. 4th DCA 2014), and a trial court's determination that a contract provision is violative of public policy. Anderson v. Taylor Morrison of Fla., Inc., 223 So. 3d 1088, 1091 (Fla. 2d DCA 2017).

whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999).

In this case, the first two elements are implicated. We first must determine whether the retainer agreement's arbitration clause unambiguously provides for arbitration of disputes, and, if it does, then whether the parties' dispute is subject to the arbitration clause.

B. Ambiguity

"The intent of the parties to a contract, as manifested in the plain language of the arbitration provision and contract itself, determines whether a dispute is subject to arbitration. Courts generally favor such provisions, and will try to resolve an ambiguity in an arbitration provision in favor of arbitration." Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013) (citation omitted).

With these principles in mind, we observe that the retainer agreement's arbitration clause clearly and unambiguously requires that "any disputes relating to any . . . issues pertaining to our representation of you shall be arbitrated. . . ." The clause further provides that "any controversy or claim arising out of [sic] relating to this retainer agreement or breach of performance by [Lemos] in their representation of you shall be settled through binding arbitration. . . ." We conclude that these provisions are not

ambiguous; they plainly and unambiguously provide notice to Sessa that any claims regarding Lemos's representation of Sessa are subject to arbitration.

C. Arbitrability of the Parties' Tort Disputes

Sessa also argues, though, that no arbitrable issue exists because disputes subject to arbitration under the retainer agreement are limited to fee dispute claims and legal malpractice claims. Sessa suggests that, because her claim is a generalized tort claim – as opposed to a legal malpractice claim or a fee dispute claim – her claim is not subject to the arbitration clause.

1. Analytical Framework

Because "no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate,"[3] we must determine, from the text of the relevant *contractual* provision, whether the parties intended for the instant *tort* disputes between them to be subject to arbitration. Jackson, 108 So. 3d at 593.

In Seifert, the Florida Supreme Court, quoting from an Arizona Court of Appeals case, provided the analytical framework for making such determinations:

> If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually-imposed duty is one that arises from the contract . . . and therefore [is] subject to

[3] See Seifert, 750 So. 2d at 636.

> arbitration. . . . If, on the other hand, the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties . . . [then] a contractually-imposed arbitration requirement . . . would not apply to such a claim.

Seifert, 750 So. 2d at 639 (quoting Dusold v. Posta-John Corp., 807 P. 2d 526, 531 (Ariz. Ct. App. 1990) (emphasis and internal citations removed)).

Seifert then summarizes the relevant inquiry as follows: "[W]e must determine whether the tort claim . . . arises from and bears such a significant relationship to the contract between the parties as to mandate application of the arbitration clause." Seifert, 750 So. 2d at 640.

Several years later, in Jackson, the Florida Supreme Court further refined the inquiry by requiring an examination of whether a contractual nexus exists between the claim and the contract:

> [A] significant relationship is described to exist between an arbitration provision and a claim if there is a "contractual nexus" between the claim and the contract. A contractual nexus exists between a claim and a contract if the claim presents circumstances in which the resolution of the disputed issue requires either reference to, or construction of, a portion of the contract. More specifically, *a claim has a nexus to a contract and arises from the terms of the contract if it emanates from an inimitable duty created by the parties' unique contractual relationship.*

Jackson, 108 So. 3d at 593 (citations omitted) (emphasis added).

2. Application to this Case

We do not view Lemos's duty in this case – that is, to safeguard the marital settlement funds wired by Sessa's former husband to Lemos's trust account – as merely a generalized tort duty. Lemos's duty in this case was born out of Lemos's attorney-client relationship with Sessa, a relationship memorialized and governed by the retainer agreement between Lemos and Sessa. The duty Lemos owed to Sessa, and allegedly breached by Lemos, is simply not the type of duty generally owed to others besides the contracting parties. It is, rather, a duty "created by the parties' unique contractual relationship." In fact, the very reason Sessa's former husband made his second payment to Lemos's trust account, rather than to Sessa directly, was to ensure that Lemos's fees and costs were paid as expressly required by the retainer agreement. Hence, not only does Sessa's claim "bear a significant relationship to" the parties' retainer agreement, the alleged tort in this case stems directly from Sessa's obligation, as imposed by the retainer agreement, to pay Lemos. Similarly, Lemos's duty to safeguard and protect those funds arose directly from the unique relationship between the parties memorialized by the retainer agreement.

We therefore conclude that Sessa's claims in this case arise out of the retainer agreement and are subject to the clear and unambiguous terms of the retainer agreement's arbitration clause.

D. Public Policy Concerns

Our inquiry, though, does not end here because the trial court made the alternate conclusion that the arbitration clause's fee-shifting and cost-shifting provisions are violative of public policy, rendering the arbitration clause unenforceable.[4] We focus our attention on two fee-shifting and cost-shifting provisions of the arbitration clause that are particularly problematic: (i) the one requiring Sessa to advance any and all arbitration costs, subject to the arbitrator's final adjudication; and (ii) the provision requiring Sessa, irrespective of outcome, to pay Lemos's fees and costs. The trial court concluded, and we agree, that these two provisions "serve only to chill the client's willingness to dispute any issue of [the client's] representation."

Florida lawyers are prohibited from entering into an agreement with a client that prospectively limits the lawyer's liability to a client for malpractice. R. Regulating Fla. Bar 4-1.8(h).[5] While the subject provisions in the

[4] While the trial court's order does not specify which provisions of the retainer agreement's arbitration clause are violative of public policy, we presume, based on the parties' arguments both to this Court and below, that the trial court was focused on the fee-shifting and cost-shifting provisions of the clause. We note that arbitration clauses in attorney-client representation agreements are not, *per se*, violative of public policy. See Johnson, People, Bokor, Ruppel & Burns, LLP v. Forier, 67 So. 3d 315, 318-19 (Fla. 2d DCA 2011).

[5] Rule 4-1.8(h) reads, in relevant part, as follows: "A lawyer is prohibited from making an agreement prospectively limiting the lawyer's liability to a client

arbitration clause are certainly not the type of exculpatory clauses expressly prohibited by the rule, in practice the two provisions erect a significant barrier to a client seeking recourse against her lawyer. The first provision requires the client to pay, in advance, *all* costs associated with the arbitration. This includes the fees of the arbitrator, who, according to the clause, must be an experienced matrimonial lawyer who is a member of the prestigious American Academy of Matrimonial Lawyers. This provision, alone, could require a client to pay thousands of dollars to the arbitrator prior to any arbitration proceedings actually occurring. The provision's allowance of an after-the-fact adjustment by the arbitrator is of little solace to a client who lacks the funds to initiate the process, much less sustain the process until its conclusion.

The second provision requires the client to pay *all* of Lemos's fees and costs associated with the arbitration. The client's obligation in this regard is absolute; it is not conditioned upon Lemos prevailing in the arbitration, nor is it reciprocal. So, presumably, even if the client were to prevail in the arbitration, the client would still be liable for Lemos's fees and costs.[6]

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for malpractice unless permitted by law and the client is independently represented in making the agreement."

[6] We need not, and do not, address whether Florida Statutes section 57.105(7)'s fee reciprocity would be applicable to this provision. What makes

Especially when they are coupled together, we view these fee-shifting and cost-shifting provisions of the arbitration clause as a *de facto* attempt to preemptively limit Lemos's liability. Thus, we agree with the trial court's conclusion that they are violative of public policy and invalid.

We note that, at oral argument, Lemos's appellate counsel admirably focused on the severability, rather than the validity, of these provisions. Indeed, when there is an otherwise enforceable arbitration agreement, as we have determined, *supra*, the court should sever the offending provisions from the arbitration clause so long as such severance does not undermine the parties' intent. Healthcomp Evaluation Servs. Corp. v. O'Donnell, 817 So. 2d 1095, 1098 (Fla. 2d DCA 2002).

We are able to sever these offending fee-shifting and cost-shifting provisions from the remainder of the retainer agreement's arbitration clause because their removal neither subverts the essence of the arbitration clause, nor causes us to drastically rewrite the parties' agreement. Fonte v. AT & T Wireless Servs., Inc., 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005).

III. Conclusion

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the provision violative of public policy is not its theoretical enforceability, but its deterrent effect.

The subject arbitration clause in the retainer agreement unambiguously requires the parties to arbitrate the parties' dispute. We, therefore, reverse those portions of the trial court's order that determined that the arbitration clause is ambiguous and that the parties' dispute is not arbitrable under the subject arbitration clause. While we agree with and affirm the trial court's finding that the fee-shifting and cost-shifting provisions of the arbitration clause are violative of public policy, because the offending, invalid provisions are severable from the remainder of the arbitration clause, we do not conclude that the provisions render the arbitration clause unenforceable. We remand with instructions to the trial court to sever the offending fee-shifting and cost-shifting provisions from the arbitration clause and compel the parties to arbitrate their dispute pursuant to the arbitration clause, as revised by the court's severance.[7]

Affirmed in part, reversed in part, and remanded with instructions.

[7] We express no opinion on the merits of Sessa's claims.