IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID N. JOHNSON, AN INDIVIDUAL; THE BOSTON GROUP, INC., A UTAH CORPORATION; AND REMINGTON HOMES, LLC, A UTAH LIMITED LIABILITY COMPANY,
Appellants,
vs.
NEWMONT USA LIMITED, A DELAWARE CORPORATION DOING BUSINESS IN NEVADA AS NEWMONT MINING CORPORATION,
Respondent.

No. 55783

FILED

APR 07 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying motions to compel arbitration and for a protective order. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

Facts

Respondent entered into an agreement with Canyon Management, LLC, to develop a housing subdivision in Elko, Nevada. Respondent and Canyon later entered into an agreement to terminate the development agreement.[1] The termination agreement required Canyon to provide a complete accounting documenting all disbursements and expenditures of respondent's funds made on behalf of Canyon to develop the subdivision. The termination agreement required the parties to

[1]Kittredge Canyon, LLC, was also a party to the termination agreement, but its rights and obligations under the agreement pertained only to cancelling a demand for closing documents and to reimbursement for prepaid sewer and water permits.

participate in binding arbitration of any dispute about the accounting. It also provided that once the accounting and any payment made to either party as a result of the accounting was complete, respondent and Canyon would execute mutual releases of all claims as to each party, its owners, officers, directors, employees, and attorneys. On October 5, 2007, respondent filed a district court action against Canyon, apparently alleging contract-based claims, and seeking an accounting and attorney fees. Based on the termination agreement's arbitration clause, the district court granted Canyon's motion to compel arbitration as to the accounting and stayed the action as to respondent's other claims, pending arbitration.

On March 19, 2009, respondent filed the underlying district court action against appellants and Kittredge Canyon, LLC, who is not party to this appeal, alleging fraud, conversion, unjust enrichment, and civil conspiracy.[2] The complaint states that appellant David Johnson controls Canyon, Kittredge Canyon, and appellants The Boston Group, Inc., and Remington Homes, LLC, as a member, manager, shareholder or officer of those entities. According to the complaint, Johnson made false representations to respondent regarding Canyon's use of respondent's funds intended for the subdivision development, and Johnson, Kittredge, and the other appellant entities misused respondent's funds for projects unrelated to the subdivision or for their own use and benefit.

Appellants moved to dismiss the complaint or to stay the action pending the arbitration outcome in the accounting dispute, arguing that respondent's complaint directly implicated the termination

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[2]The October 5, 2007, accounting and breach of contract complaint against Canyon was filed as a separate action.

agreement and the development agreement and that respondent would not be able to prove its claims unless it prevailed in the accounting dispute. The district court ultimately denied the motion and denied reconsideration, finding that the issue in arbitration was narrower in scope than the present litigation and the litigation could proceed without the arbitration being complete. Later, appellants moved to compel arbitration of respondent's claims, arguing that the claims were based on the termination and development agreements and were within the scope of the termination agreement's clause requiring Canyon and respondent to arbitrate accounting disputes. Respondent opposed the motion, and after a hearing, the district court denied the motion. This appeal followed.

Discussion

Appellants argue that the district court read the termination agreement and Nevada caselaw too narrowly in denying their motion to compel arbitration, asserting that as Canyon's agents, they should not have been subject to costly litigation while respondent's accounting claim against Canyon proceeds through arbitration. They also argue that the district court's order violates third-party beneficiary principles by depriving them of the benefits of the mutual release of all claims set forth in the termination agreement. Finally, they assert that the order ignores equitable estoppel principles and undermines the termination agreement's arbitration clause by permitting respondent to litigate claims that rely on, closely relate to, or are intertwined with the arbitrable accounting claim.

Whether a dispute is subject to arbitration is a contract interpretation question, subject to de novo review on appeal. Clark Co. Public Employees v. Pearson, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990). Although strong public policy favors arbitration, arbitration clauses "'must not be so broadly construed as to encompass claims and parties that were

not intended by the original contract.'" Truck Ins. Exch. v. Palmer J. Swanson, Inc., 124 Nev. 629, 634, 189 P.3d 656, 660 (2008) (quoting Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995)). Nevertheless, under principles of contract and agency, an arbitration obligation executed by another party may attach to a nonsignatory. Truck Ins. Exch., 124 Nev. at 634, 189 P.3d at 660.

Having considered the parties' arguments and the record, we conclude that the district court properly denied the motion to compel arbitration. See NRS 38.221(3) (providing that if the court finds that there is no enforceable agreement to arbitrate, it may not order the parties to arbitrate). Here, respondent does not have any contractual agreements with appellants, and in its complaint, respondent asserts only tort-based claims against appellants. Appellants are not party to the development or termination agreements, they are not required to provide an accounting to respondent, and respondent's claims against appellants are not based on any alleged failure to provide an accounting. Canyon Management, LLC, with whom respondent entered into the development and termination agreements, is not a party in the underlying action. The termination agreement's arbitration provision pertained specifically to disputes over an accounting that Canyon was required to provide to respondent under the termination agreement. Although, in a separate district court action, Canyon and respondent were ordered to arbitrate that dispute, respondent's other claims against Canyon and another defendant were stayed pending the outcome of the arbitration. Because the arbitration clause here is narrowly drafted to encompass disputes over the Canyon-respondent accounting and that accounting is not at issue below, appellants' arguments are not persuasive. Truck Ins. Exch., 124 Nev. at

634, 189 P.3d at 660 (explaining that arbitration clauses must not be construed to encompass claims and parties not intended by the original contract). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Pickering

cc: Hon. J. Michael Memeo, District Judge
Robert L. Eisenberg, Settlement Judge
Jenkins & Carter
Holland & Hart LLP/Reno
Elko County Clerk