

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

TONY JABBOUR	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
1800 STREET ROAD REALTY, LLC	:	
AND NOLAN CAPITAL, LLC	:	
	:	No. 345 EDA 2023
	:	
v.	:	
	:	
	:	
SHERWIN-WILLIAMS COMPANY AND	:	
JDS PAINTING, LLC	:	
	:	
	:	
v.	:	
	:	
	:	
DURABLE SURFACES, LLC	:	
	:	
Appellant	:	

Appeal from the Order Entered January 9, 2023
In the Court of Common Pleas of Bucks County Civil Division at No(s):
2021-002247

BEFORE: STABILE, J., DUBOW, J., and SULLIVAN, J.

MEMORANDUM BY DUBOW, J.:

FILED JANUARY 18, 2024

Appellant, Durable Surfaces, LLC ("Durable"), appeals from the January 9, 2023 Order overruling its preliminary objections to the joinder complaint filed by Appellee, JDS Painting ("JDS").¹ This order determined that: (1) the

¹ This interlocutory appeal is authorized by Pa.R.A.P. 311(a)(8) (permitting an interlocutory appeal from any order that is made appealable by statute), and
(Footnote Continued Next Page)

arbitration clause in the subcontract between Durable and JDS did not apply in the instant action, and (2) a prior order regarding arbitration issued in a separate, but related, action was not controlling in the instant action. After careful review, we reverse.

Background

On February 25, 2020, Plaintiff Tony Jabbour ("Jabbour") slipped and fell in a storage facility owned by 1800 Street Road, LLC ("1800 Street Road"). On December 23, 2020, he filed a negligence complaint against 1800 Street Road and Nolan Capital, LLC.² On January 19, 2021, 1800 Street Road and Nolan Capital filed a joinder complaint against Sherwin-Williams Company and Appellee JDS.³ Sherwin Williams filed an answer to the joinder complaint and asserted counterclaims against 1800 Street Road and Nolan Capital and crossclaims against JDS. JDS also filed an answer to the joinder complaint and asserted crossclaims against all defendants.

Relevant to this appeal, on June 13, 2022, JDS filed, with leave of court, a joinder complaint against Durable. JDS had hired Durable to seal and paint

the Uniform Arbitration Act, 42 Pa.C.S. § 7320(a)(1), which provides that an appeal may be taken from "[a] court order denying an application to compel arbitration[.]"

² Jabbour initially filed this action on October 8, 2020, in Philadelphia County by way of a *writ* of summons. On March 26, 2021, the trial court transferred this case to Bucks County pursuant to a stipulation by the parties.

³ Nolan Capital, LLC had built the storage facility in which Jabbour fell and had contracted with JDS to install epoxy flooring using a Sherwin-Williams product.

certain floors throughout the storage facility. JDS asserted claims of negligence against Durable and sought contribution and indemnity.

On July 27, 2022, Durable filed preliminary objections seeking to compel arbitration based on: (1) the arbitration provision in the subcontract between JDS and Durable; and (2) a September 9, 2021 order, entered by the trial court in a separate action⁴ that interpreted the same arbitration in the same subcontract between the same parties as requiring that “all claims and disputes between JDS[] and Durable[] shall be resolved in accordance with submission to the American Arbitration Association as specified in the

⁴ Shortly after Jabbour filed the instant lawsuit, 1800 Street Road filed a separate action in the Bucks County Court of Common Pleas at Docket No. 2021-512, against JDS and Sherwin Williams alleging that the floor in the storage facility was faulty because it did not have appropriate anti-skid material on it. This suit raised claims of breach of contract, breach of implied warranty, and fraud in the inducement against JDS. On June 1, 2021, JDS filed a joinder complaint against Durable in that action raising breach of contract claims.

On June 23, 2021, Durable filed preliminary objections to JDS’s joinder complaint in that action requesting that the court order the case to arbitration pursuant to the arbitration provision in the written subcontract between the parties. In response, JDS filed an amended complaint in which it, *inter alia*, asserted that its claims were not within the ambit of the arbitration clause in the contract. Durable again filed preliminary objections. On September 9, 2021, the judge in that action sustained Durable’s preliminary objections and ordered the case to arbitration stating, “all claims and disputes between [JDS] and [Durable] shall be resolved in accordance with submission to the [AAA] as specified in the Subcontract.” Order, 9/9/21.

Subcontract.”⁵ Preliminary Objections, 7/27/22, at ¶ 17 (citing Order, 9/9/21).

On August 16, 2021, JDS filed a response to Durable’s preliminary objections. JDS argued that the arbitration ruling in the related case did not apply in this action because Durable did not establish that the instant action—in which JDS had asserted contribution, common law indemnification, and negligence claims against Durable—was identical to the related action in which JDS had asserted breach of contract claims against Durable.

On January 9, 2023, the trial court entered an order overruling Durable’s preliminary objections. The court concluded that the arbitration clause in the subcontract between JDS and Durable did not apply in the instant action and that the September 9, 2021 order entered in the separate action was not controlling in the instant action.

This timely appeal followed. Both Durable and the trial court complied with Pa.R.A.P. 1925.

Durable raises the following issue on appeal:

Whether the [t]rial [c]ourt erred in denying [Durable’s] Preliminary Objections seeking to enforce contractual arbitration between it and [JDS] as required by the written contract between the parties related to work done on the floor of the premises in question in the underlying personal injury action[?] The [t]rial [c]ourt had ruled on September 9, 2021, in a related lawsuit, **Nolan Capitol**, docketed at No. 2021-00512 regarding a claim between the same two parties, [] as

⁵ Durable also asserted in the preliminary objections that the disposition of JDS’s claims against Durable in the related lawsuit collaterally estopped JDS from pursuing the same claims against Durable in the instant lawsuit.

to the work done on the floor in question in the underlying personal injury action, holding that all claims must proceed through contractual arbitration.

Durable's Brief at 3.

A.

Durable's issue challenges the trial court's order overruling its preliminary objections to arbitration. In such cases, our standard of review is as follows:

Our review of a claim that the trial court improperly denied preliminary objections in the nature of a petition to compel arbitration is limited to determining whether the trial court's findings are supported by substantial evidence and whether the trial court abused its discretion in denying the petition. We employ a two-part test to determine whether the trial court should have compelled arbitration: (1) whether a valid agreement to arbitrate exists, and (2) whether the dispute is within the scope of the agreement.

Davis v. Ctr. Mgmt. Grp., LLC, 192 A.3d 173, 180 (Pa. Super. 2018) (citations and quotation marks omitted). ***See also id.*** at 182 (explaining "the issue of whether a party agreed to arbitrate a dispute is a threshold, jurisdictional question that must be decided by the [trial] court."). "Whether a written contract includes an arbitration agreement and whether the parties' dispute is within the scope of the arbitration agreement are questions of law subject to this Court's plenary review." ***In re Estate of Atkinson***, 231 A.3d 891, 898 (Pa. Super. 2020).

Both Pennsylvania and federal law impose a strong public policy in favor of enforcing arbitration agreements. Accordingly, if a valid agreement to arbitrate exists and the dispute falls within the scope of the arbitration agreement, the dispute must be submitted to

arbitration and the [trial] court's denial of arbitration must be reversed.

Id. (citations omitted); **see also Davis**, 192 A.3d at 183 n.13 (stating that, "[o]ur Supreme Court [in **Taylor v. Extendicare Health Facilities, Inc.**, 147 A.3d 490, 509 (Pa. 2016)] has instructed courts to 'consider questions of arbitrability with a healthy regard for the federal policy favoring arbitration'").

B.

Durable argues that the trial court erred as a matter of law in overruling its preliminary objections and declining to order the dispute between Durable and JDS to arbitration because the subcontract between the parties expressly requires the parties arbitrate all disputes. Appellant's Brief at 11-15.

The subcontract between JDS and Durable contains the following language:

[D]isputes arising out of this Agreement shall be resolved by submission to the American Arbitration Association pursuant to its Construction Industry Rules of Arbitration then and there in effect. . . . All disputes shall be governed by the law of the Commonwealth of Pennsylvania.

Contract, 4/9/19, at ¶ 17.

Notwithstanding this provision, the trial court determined that arbitration is not proper because the instant action "includes a Plaintiff and Defendants[] other than [Durable] and [] JDS, [who] are not part[ies] to the subcontract and includes issues beyond the scope of the agreement's terms[.]" Trial Ct. Op., 5/19/23, at 7. The court further concluded that the arbitration clause was not enforceable because this case involves multiple

parties and Durable was “attempting to enforce an arbitration agreement on non-signatories.” **Id.** at 8. We disagree.

Our review of the record indicates that the only party to file claims against Durable was JDS. JDS alleged in its amended joinder complaint against Durable that Durable negligently performed the work JDS had hired it to do and Durable’s negligence was responsible for the allegedly defective or dangerous condition on the premises that caused Jabbour’s injury. Joinder Complaint, 6/13/22, at ¶ 10. By joining Durable as a defendant, JDS sought contribution and indemnification from Durable if JDS was deemed liable for Jabbour’s injuries. **Id.** at ¶¶ 18, 21, 26. These claims are strictly between JDS and Durable and arise out of the subcontract between them. Therefore, the arbitration clause in the subcontract applies to the claims and the trial court erred in refusing to enforce it.

Moreover, the trial court erred in overruling the preliminary objections and not enforcing the arbitration provision on the grounds that Jabbour could assert claims against Durable and thus, the arbitration agreement, which only binds JDS and Durable, does not apply. The trial court relies upon Pa.R.Civ.P. 2252(a)(1)⁶ to find that since JDS alleged in its joinder complaint, *inter alia*, that Durable was “solely liable on the underlying cause of action,” Jabbour has a claim against Durable and thus, the dispute is among Jabbour, Durable and

⁶ Rule 2552(1) permits, subject to limited exceptions, any party to “join as an additional defendant any person not a party to the action who may be . . . solely liable on the underlying cause of action against the joining party[.]” Pa.R.Civ.P. 2252(1).

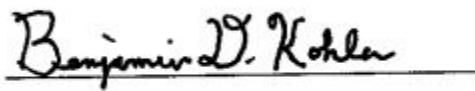
JDS. Trial Ct. Op. at 8. The trial court reasoned that since the arbitration clause in the subcontract only addresses disputes between Durable and JDS, it does not apply to claims among Jabbour, Durable, and JDS.

However, as a matter of law, Jabbour does not have a claim against Durable because: 1) Jabbour never asserted a claim against Durable, and 2) JDS did not join Durable as an additional defendant until after the two-year statute of limitations had run on Jabbour's claim. ***See Hileman v. Morelli***, 605 A.2d 377, 382 (Pa. Super. 1992) ("[A] defendant may not bring another party into the case on the theory that he is solely liable to the plaintiff if the plaintiff himself is already time-barred from suing the new defendant."); ***Carlin v. Pa. Power & Light Co.***, 70 A.2d 349, 350 (Pa. 1950) ("Where the statute of limitations bars a suit directly against an alleged tortfeasor, he may not be joined as an additional defendant in an action for the tort on an allegation that he is alone liable."). Thus, the only claim for which Durable may be liable in this litigation is one between JDS and Durable. Since the arbitration provision in the subcontract unambiguously applies to disputes between Durable and JDS, it is enforceable and the trial court erred in finding otherwise.

We, therefore, reverse the order overruling Durable's preliminary objections.

Order reversed.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 1/18/2024