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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2007-2008

1061760

Ex parte Sabrina Johnson et al.

PETITION FOR WRIT OF MANDAMUS

(In re: Champion Home Builders Company; Champion Homes of Boaz, Inc.; and Homes of Merit, Inc.

v.

Sabrina Johnson et al.)

(Dale Circuit Court, CV-07-900026)

1061762

Ex parte Lamar Jenkins et al.

PETITION FOR WRIT OF MANDAMUS

(In re: CMH Manufacturing, Inc., and Clayton Homes, Inc.

v.

Lamar Jenkins et al.)

(Geneva Circuit Court, CV-07-900003)

LYONS, Justice.

Champion Home Builders Company; Champion Homes of Boaz, Inc.; Homes of Merit, Inc.; CMH Manufacturing, Inc.; and Clayton Homes, Inc., all mobile-home manufacturers and sellers, instituted two separate declaratory-judgment actions in separate judicial circuits[1] against the claimants in previously instituted arbitration proceedings before the American Arbitration Association ("the AAA"), seeking to prevent the claimants from proceeding with claims before the AAA brought on behalf of other similarly situated mobile-home purchasers. The claimants' AAA complaints sought class arbitration in Montgomery County for a class of Alabama purchasers.

I. The Underlying Proceedings

[1]The separate actions were assigned to the same trial judge.

Champion Home Builders Company; Champion Homes of Boaz, Inc.; and Homes of Merit, Inc. ("the Dale mobile-home companies"), commenced a declaratory-judgment action in the Dale Circuit Court against Sabrina Johnson, William Baker, Corine Crittenden, Albert Fritzke, Faye Fritzke, Larry Hutto, Sheila Hutto, Huey Nelson, and Cynthia Nelson ("the Dale homeowners"). The Dale mobile-home companies asked the trial court to declare that the Dale homeowners must individually arbitrate their previously instituted arbitration claims in accordance with the arbitration provision of each mobile-home manufacturer's contract (i.e., in the jurisdiction of the original retail sale of the home); to declare the Dale homeowners' previously instituted class-action arbitration demand to be contrary to Alabama law, impermissible, and a breach of the contracts between the Dale mobile-home companies and the Dale homeowners; and to compel the Dale homeowners to arbitrate their claims individually in the correct jurisdiction.

CMH Manufacturing, Inc., and Clayton Homes, Inc. ("the Geneva mobile-home companies"), commenced a declaratory-judgment action in the Geneva Circuit Court against Lamar

Jenkins, Patricia Jenkins, Robert Knighten, and Sharon Tate ("the Geneva homeowners").[2] The Geneva mobile-home companies asked the trial court to declare that the arbitration provision in their contracts with the Geneva homeowners does not obligate them "to arbitrate class claims"; to enjoin the Geneva homeowners from proceeding with previously instituted class arbitration; to dismiss the Geneva homeowners' previously instituted class-action arbitration demand; and to compel the Geneva homeowners to proceed with individual arbitration according to the terms of their contracts. The Geneva mobile-home companies say the arbitration agreement in each of the contracts with the Geneva homeowners contains a forum-selection clause that requires arbitration to take place in the jurisdiction of the original retail sale of the mobile home.

After filing the complaints in the Dale Circuit Court and the Geneva Circuit Court, the Dale mobile-home companies and the Geneva mobile-home companies (hereinafter referred to collectively as "the mobile-home companies") asked the AAA and

[2]The Geneva homeowners filed with the AAA a notice of dismissal without prejudice of their claims against Clayton Homes, Inc., after the commencement of the Geneva County action.

the law firm representing the Dale homeowners and the Geneva homeowners (hereinafter referred to collectively as "the homeowners") in the AAA proceedings to stay those proceedings, which were being conducted in Montgomery County, pending the disposition of the declaratory-judgment actions. Those requests were denied, and the mobile-home companies filed motions in their separate declaratory-judgment actions asking the trial judge to stay the AAA proceedings in Montgomery County. The trial judge granted the mobile-home companies' motions, and the homeowners petitioned this Court for a writ of prohibition or, alternatively, a writ of mandamus. We grant the petitions and issue the writs of mandamus.

II. Factual Background

The Dale homeowners and the Geneva homeowners filed separate complaints with the AAA on December 22, 2006, alleging various claims relating to improper design and manufacture of mobile homes they had purchased. The homeowners requested that the AAA permit arbitration of claims on behalf of an Alabama class of "thousands of homeowners who unwittingly purchased manufactured homes built by [the mobile-home companies] that were fundamentally defective for the

jurisdictions in which they lived." The homeowners alleged that "[t]he walls of their homes are literally rotting away as a result of a pervasive defect in their construction that [the mobile-home companies] have known about but failed to correct." Dale County petition, p. 6; Geneva County petition, p. 6.

The Geneva mobile-home companies commenced the previously described proceeding on February 2, 2007. The Dale mobile-home companies commenced the previously described proceeding on May 8, 2007.

The Dale mobile-home companies state in their declaratory-judgment complaint that the arbitration agreement contained in the contracts executed by Johnson, Crittenden, and the Nelsons ("the Dale contract 1") provides:

> "ARBITRATION AND LIMITATION OF REMEDIES. It is agreed that any controversy, claim or dispute ... first shall be mediated as administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to binding arbitration.[3] Thereafter, any unresolved Claim(s) shall be settled by binding arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules ...."

[3]The mobile-home companies note that mediation took place and failed.

The Dale mobile-home companies further state in their declaratory-judgment complaint that "[t]he operative language of the Arbitration Agreements provided to the remaining defendants [Baker, the Fritzkes, and the Huttos] is substantively the same [as that provided to Johnson, Crittenden, and the Nelsons]." Complaint, p. 5. The materials submitted in this proceeding by the Dale homeowners and the Dale mobile-home companies include a document entitled "Manufacturer's Limited Warranty & Arbitration Agreement." Although none of the parties identifies this document, it appears to be the arbitration agreement provided to Baker, the Fritzkes, and the Huttos ("the Dale contract 2"). This document provides:

> "ARBITRATION AGREEMENT: It is agreed that any controversy, claim or dispute ... first shall be mediated as administered by the American Arbitration Association ('AAA') under its applicable mediation Rules before resorting to binding arbitration. Thereafter, any unresolved Claim(s) shall be settled by binding arbitration administered by the AAA in accordance with its applicable arbitration Rules ....
>
> "A copy of the applicable Rules of the AAA is available upon request by contacting the American Arbitration Association [at an address or Web site provided]."

The Geneva mobile-home companies state in their response to the Geneva homeowners' petition that the arbitration agreement contained in the contracts executed by the Jenkinses, Knighten, and Tate ("the Geneva contract") provides:

> "Any dispute or claim ..., whether based in contract, tort or otherwise, ... shall be resolved by BINDING ARBITRATION in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA) or any more applicable or appropriate rules then in effect and the Federal Arbitration Act (9 U.S.C. § 1, et seq.). ..."

Two of the contracts--the Dale contract 1 and the Geneva contract--specifically designate the Commercial Arbitration Rules of the AAA as applicable to the pending arbitration proceedings. The Dale contract 2 designates the "applicable arbitration Rules" as applicable to the pending arbitration proceedings. None of the parties argues that the Commercial Arbitration Rules of the AAA do not apply to these proceedings.

The Commercial Arbitration Rules of the AAA provide:

"R-1. Agreement of Parties

> "(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the

> American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules ....
>
> "....
>
> "R-7. Jurisdiction
>
> "(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

The Supplementary Rules for Class Arbitrations of the AAA provide:

> "3. Construction of the Arbitration Clause
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> "Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award'). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

> "In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis."

III. Standard of Review

The homeowners contend that the Dale Circuit Court and the Geneva Circuit Court lack jurisdiction and authority to stay the arbitration proceedings. Consequently, they seek a writ of prohibition or, in the alternative, a writ of mandamus from this Court directing the trial judge to vacate his orders staying the arbitration proceedings and to dismiss the actions brought by the mobile-home companies. Although the normal basis upon which this Court reviews orders granting or denying arbitration is by way of direct appeal, in this proceeding, the homeowners' contention that the trial court lacks jurisdiction over the subject matter is appropriately reviewed by way of a petition for a writ of mandamus. Ex parte Flint Constr. Co., 775 So. 2d 805 (Ala. 2000).

This Court's standard of review applicable to a petition for a writ of mandamus[4] is well settled:

[4]This Court's standard of review applicable to a petition for a writ of prohibition is similar to the standard of review for a petition for a writ of mandamus:

> "'"Mandamus is an extraordinary remedy and requires a showing that there is '(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.'"'
>
> "Ex parte Inverness Constr. Co., 775 So. 2d 153, 156 (Ala. 2000)."

Ex parte Medical Assurance Co., 862 So. 2d 645, 649 (Ala. 2003).

IV. Analysis

The homeowners contend that the Commercial Arbitration Rules of the AAA require that whether a dispute is susceptible of class-action treatment must first be determined by the

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> "'Like mandamus, prohibition is an extraordinary writ, "and will not issue unless there is no other adequate remedy." Ex parte K.S.G., 645 So. 2d 297, 299 (Ala. Civ. App. 1992) (citing Ex parte Strickland, 401 So. 2d 33 (Ala. 1981)). "Prohibition is proper for the prevention of a usurpation or abuse of power where a court undertakes to act in a manner in which it does not properly have jurisdiction." Ex parte K.S.G., 645 So. 2d at 299.'
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> "Ex parte Sealy, L.L.C., 904 So. 2d 1230, 1232-33 (Ala. 2004)."

Ex parte Scrushy, 940 So. 2d 290, 293 (Ala. 2006).

arbitrator. The Dale homeowners state: "An appropriate time to bring an action to determine whether Alabama law prohibits class arbitration is subsequent to an arbitrator's ruling that the arbitration agreement does or does not allow class-wide arbitration." Dale homeowners' petition, p. 16. The Geneva homeowners state: "An appropriate time to bring an action to determine whether Alabama law prohibits class arbitration is subsequent to an arbitrator's ruling that the arbitration agreements do or do not allow class-wide arbitration." Geneva homeowners' petition, p. 15. We agree.

This Court requires a trial court to permit arbitration of the issue of arbitrability "when the plain language of the agreement unquestionably shows that the parties agreed to arbitrate the issue of arbitrability." Smith v. Mark Dodge, Inc., 934 So. 2d 375, 379 (Ala. 2006). "[A]n arbitration provision that incorporates rules that provide for the arbitrator to decide issues of arbitrability clearly and unmistakably evidences the parties' intent to arbitrate the scope of the arbitration provision." CitiFinancial Corp., L.L.C. v. Peoples, [Ms. 1051519, May 18, 2007] ___ So. 2d ___, ___ (Ala. 2007).

All the contracts between the parties--the Dale contract 1, the Dale contract 2, and the Geneva contract--confer jurisdiction upon the AAA to make an initial determination as to "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." Supplementary Rules for Class Arbitrations of the AAA, Rule 3. By agreeing to be bound by the AAA's Commercial Arbitration Rules, the homeowners and the mobile-home companies conferred upon the arbitrator the authority to determine the scope of the arbitration agreement as it relates to availability of class-wide arbitration.

The mobile-home companies contend that AAA Supplementary Rule 3 applies only to purported class members who signed their respective arbitration agreements after October 8, 2003, the date upon which Supplementary Rule 3 was adopted. They cite no authority for such a proposition; moreover, the proposition conflicts with Rule 1(a) of the AAA's Commercial Arbitration Rules, which provides: "These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for

arbitration or submission agreement received by the AAA." (Emphasis added.)

The mobile-home companies note that Supplementary Rule 3 provides that, "[u]pon appointment," the arbitrator shall determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." They say, again without citation to authority, that because no arbitrator has yet been appointed, Supplementary Rule 3 is without a field of operation. Assuming that the appointment of an arbitrator creates a condition precedent to be fulfilled rather than merely a designation of the stage of the proceedings when the issue of class-wide arbitrability is to be resolved,[5] the mobile-home companies are estopped to take advantage of the fact that no arbitrator has yet been appointed. See World's Exposition Shows, Inc. v. B.P.O. Elks, No. 148, 237 Ala. 329, 332, 186 So. 721, 724 (1939), in which

[5]See Gertz v. Allen, 376 So. 2d 695, 697 (Ala. 1979) ("Whether a provision in a contract is a condition precedent is dependent, not upon formal words, but upon the intent of the parties to be determined from the entire contract."); Federal Ins. Co. v. I. Kruger, Inc., 829 So. 2d 732, 740 (Ala. 2002), quoting with approval Koch v. Construction Tech., Inc., 924 S.W.2d 68, 69 (Tenn. 1996) ("'First, it is well-established that condition precedents are not favored in contract law, and will not be upheld unless there is clear language to support them.'").

the Court quoted with approval 3 Williston on Contracts § 677 ("'It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.'"). The mobile-home companies' subjugation to the authority of an arbitrator to resolve the issue of class-wide arbitrability as provided in the contracts between the parties through incorporation of the AAA's Commercial Arbitration Rules or the AAA's "applicable arbitration Rules" has not yet occurred because they obtained a stay of the proceedings, thereby preventing the appointment of an arbitrator.

For all that appears, the arbitrator, upon appointment, will make a determination favorable to the mobile-home companies. Until such time as an arbitrator is appointed, any attempt to obtain a declaratory judgment as to a hypothetical, future controversy is beyond the subject-matter jurisdiction of the circuit courts. See Bedsole v. Goodloe, 912 So. 2d 508, 518 (Ala. 2005):

> "The Declaratory Judgment Act, §§ 6-6-220 through -232, Ala. Code 1975, 'does not "'empower courts to ... give advisory opinions, however convenient it might be to have these questions

> decided for the government of future cases.'"' Bruner v. Geneva County Forestry Dep't, 865 So. 2d 1167, 1175 (Ala. 2003) (quoting Stamps v. Jefferson County Bd. of Educ., 642 So. 2d 941, 944 (Ala. 1994) (quoting in turn Town of Warrior v. Blaylock, 275 Ala. 113, 114, 152 So. 2d 661, 662 (1963))) (emphasis added in Stamps). This Court has emphasized that declaratory-judgment actions must 'settle a "bona fide justiciable controversy."' Baldwin County v. Bay Minette, 854 So. 2d 42, 45 (Ala. 2003) (quoting Gulf South Conference v. Boyd, 369 So. 2d 553, 557 (Ala. 1979)). The controversy must be '"definite and concrete,"' must be '"real and substantial,"' and must seek relief by asserting a claim opposed to the interest of another party '"upon a state of facts which must have accrued."' Baldwin County, 854 So. 2d at 45 (quoting Copeland v. Jefferson County, 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969)). '"Declaratory judgment proceedings will not lie for an 'anticipated controversy.'"' Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C., 828 So. 2d 285, 288 (Ala. 2002) (quoting City of Dothan v. Eighty-Four West, Inc., 738 So. 2d 903, 908 (Ala. Civ. App. 1999)). Thus, if a declaratory judgment would not terminate any uncertainty or controversy, the court should not enter such a judgment. Bruner, 865 So. 2d at 1175.
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> "'"[J]usticiability is jurisdictional," Ex parte State ex rel. James, 711 So. 2d [952,] 960 n.2 (Ala. 1998); hence, if necessary, "this Court is duty bound to notice ex mero motu the absence of subject matter jurisdiction."' Baldwin County, 854 So. 2d at 45 (quoting Stamps, 642 So. 2d at 945 n.2)."

The United States Supreme Court recognizes a strong federal policy favoring arbitration.

> "The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in

> favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (footnote omitted). That the contracts in this case call for an arbitrator to make the initial determination "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class" is ample reason for this Court to decline to rewrite the agreements to suit the preference of one of the parties for an immediate judicial determination. Such indifference to the unambiguous terms of a written agreement is contradictory to settled principles of Alabama contract law. See, e.g., Sloan Southern Homes, LLC v. McQueen, 955 So. 2d 401, 404 (Ala. 2006) ("'"A court may not make a new contract for the parties or rewrite their contract under the guise of construing it."'" (quoting Turner v. West Ridge Apartments, Inc., 893 So. 2d 332, 335 (Ala. 2004), quoting in turn Ex parte Dan Tucker Auto Sales, Inc., 718 So. 2d 33, 35-36 (Ala. 1998))); Mutual Sav. Life Ins. Co. v. James River Corp. of Virginia, 716 So. 2d 1172, 1178 (Ala. 1998) ("A broader interpretation of the transaction would effectively rewrite

the contract to give the investors more than they bargained for in an arm's-length transaction between sophisticated parties."); and Ex parte Associates Commercial Corp., 423 So. 2d 195, 200 (Ala. 1982) ("The pivotal rule that lies at the core of this case is that which says no court can rewrite the terms of a plain and unambiguous contract."). We cannot create unique rules of contract law applicable only to arbitration agreements. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

The mobile-home companies contend that a provision in all the arbitration agreements limits the venue of any disputes to the jurisdiction where the retail sale of the mobile home occurred. We note that Montgomery County was the jurisdiction of the retail sale as to only 2 of the 13 homeowners. The homeowners contend that the venue provision is superseded by the availability of class-wide treatment of the claims. The mobile-home companies rely on Sterling Financial Insurance Group, Inc. v. Hammer, 393 F.3d 1223, 1225 (11th Cir. 2004) ("[A] federal district court, pursuant to 9 U.S.C. § 4, has jurisdiction to enforce a forum selection clause in a valid arbitration agreement that has been disregarded by the

arbitrators."). The mobile-home companies also cite Redman Home Builders Co. v. Lewis, 513 F. Supp. 2d 1299, 1311 (S.D. Ala. 2007), in which the United States District Court for the Southern District of Alabama declined to limit Sterling to instances where an arbitrator has previously disregarded the forum-selection clause.

The dispute as to venue does not give rise to justiciability. Assuming, without deciding, that the United States District Court in Lewis correctly interpreted Sterling as not requiring an adjudication by the arbitrator on the venue issue, Lewis is distinguishable because it did not involve a predicate issue, susceptibility to class-action treatment, in which the venue issue is embedded, which the parties have agreed to submit to an arbitrator initially with a subsequent right of interlocutory review in a judicial forum. Of course, if the predicate issue is resolved favorably to the mobile-home companies, thus affording them the relief they prematurely seek in these declaratory-judgment actions, the issue whether venue of all claims is proper in Montgomery County will, of necessity, also be resolved in their favor.

V. Conclusion

We express no opinion on the myriad defenses to class-wide treatment of the claims and the venue of any such class-wide proceeding pending before the AAA raised by the mobile-home companies in the proceedings pending in the Dale and Geneva Circuit Courts. Such defenses must first be asserted before the AAA pursuant to the agreement between the parties. The trial judge lacked jurisdiction to become involved in this dispute over susceptibility of the claims to class-wide treatment in proceedings in Montgomery County in the absence of a determination adverse to the mobile-home companies in proceedings before the AAA, an event that has not, and may not, occur. A court that lacks subject-matter jurisdiction has no power to take any action other than to dismiss the action, and any other action it takes is void. Ex parte Alabama Dep't of Transp., [Ms. 1060078, July 20, 2007] ___ So. 2d ___ (Ala. 2007).

We conclude that under the facts of this case, a writ of mandamus is the appropriate remedy by which to order a vacatur of the trial judge's void orders. Because we have no basis to conclude that the trial judge will not comply with our

mandate, we decline to issue the alternative writs of prohibition. We direct the trial judge to vacate his orders staying the proceedings before the AAA and to enter an order of dismissal in each action.

1061760--PETITION GRANTED; WRIT ISSUED.

1061762--PETITION GRANTED; WRIT ISSUED.

Cobb, C.J., and Stuart, Bolin, and Murdock, JJ., concur.