1 

Accord and Satisfaction


A subcontractor brought a claim for additional compensation against the general contractor. The Court of Appeals held that the contractor was not entitled to summary judgment. The contractor contended that its payment to the subcontractor constituted an accord and satisfaction. The contractor argued that it satisfied the statutory requirements for an accord and satisfaction (N.C. Gen. Stat. § 25-3-311) by submitting to the subcontractor payment in the form of a check with an attached stub which read as follows: “Memo: Full And Final Payment ...” The subcontractor admitted it obtained payment by this instrument, but argued that summary judgment was improper because a genuine issue of material fact remained regarding whether at the time of the payment the claim was unliquidated or subject to a bona fide dispute. The Court of Appeals agreed.

Section 25-3-311 did not apply to cases in which the debt was a liquidated amount or not subject to a bona fide dispute. The requirement that a payment dispute exists is satisfied only if the dispute exists prior to payment of the tendered sum. It was unclear from the record on appeal whether the claim was subject to a bona fide dispute prior to the contractor’s submission of the check as full and final payment. Although the parties later came to disagree over the amount owed, the contractor failed to meet its burden pursuant to § 25-3-311 to prove that the amount was subject to a bona fide dispute at the time of payment.
2

Appeals


The Court of Appeals dismissed an appeal brought by a surety and a general contractor/bond principal, holding that the appeal was interlocutory.

The case began with a series of complaints by unpaid material suppliers against a drywall subcontractor, the general contractor and the contractor’s payment bond surety. After the subcontractor filed for Chapter 11 bankruptcy, the trial court sua sponte entered Judgments of Discontinuance in all of the suppliers’ actions. The cases were closed with leave to reinstate by motion if the claims were not fully adjudicated.

Following confirmation of the subcontractor’s Chapter 11 plan, the bankruptcy court terminated the automatic stay. The suppliers moved for reinstatement of their actions against the contractor and surety. The trial court granted the motions, and the contractor and surety appealed.

The Court of Appeals dismissed the appeal. The orders from which the contractor and surety appealed did not dispose of the entire case. In fact, the orders did not dispose of any issue in the cases; they merely allowed the suppliers to proceed in their actions against the contractor and surety.

The Court also found wholly unpersuasive the argument that the orders appealed from affected a substantial right. The whole of appellants’ argument on this point was that granting the suppliers’ motions unfairly punished them if they were forced to continue the defense of the actions. Avoidance of a trial is not a substantial right entitling a party to an immediate appeal.
3

Arbitration

A. Arbitrability


   The North Carolina Supreme Court reversed the Court of Appeals, adopting the reasons stated in the dissenting opinion in the Court of Appeals. The case began when homeowners sued their builder for breach of implied warranties. The contractor had moved to stay the owners’ breach of implied warranty lawsuit pending arbitration. The contractor relied on the terms of a separate, express limited homeowners’ warranty that the contractor had obtained for the owners. In the Court of Appeals, the dissenting judge disagreed with the majority’s opinion that the owners had contractually relinquished their right to sue the contractor for breach of all implied warranties merely because the owners had accepted the limited express warranty. The dissenting judge argued that the terms of the express warranty did not clearly and unambiguously show that the parties intended to exclude the implied warranties of habitability or workmanlike construction. The prosecution of claims based on those implied warranties was outside the scope of the express warranty’s arbitration provision.


   The trial court denied a motion to stay litigation pending arbitration. The Court of Appeals affirmed. The parties had executed a residential construction contract in 1997. The contract incorporated an arbitration agreement by reference. No work was performed by the contractor pursuant to the 1997 contract, however. The parties executed a second contract (“the 1999 contract”) for the construction of a house to be built at the same location as discussed in the 1997 contract, but with different costs and specifications from those in the 1997 contract. In both contracts, the owners initialed a paragraph which stated that they acknowledged having read, understood and accepted the arbitration agreement set forth in an attached Exhibit.
D. Exhibit D was attached to the 1997 contract, but not to the 1999 contract. In addition, the parties did not execute a separate arbitration agreement.

A dispute arose between the parties concerning the contractor’s performance of the 1999 contract. The contractor gave notice in September 2001 that it was exercising its right under the 1999 contract to have the dispute arbitrated. In 2002, the owners filed a complaint against the contractor requesting a jury trial. The trial court denied the contractor’s motion to stay the civil action pending arbitration. The trial court determined that no arbitration agreement existed.

The Court of Appeals affirmed. The Court held that the failure to attach Exhibit D to the 1999 contract negated any finding that the parties had clearly and unambiguously indicated their agreement to arbitrate their claims. The initialed paragraph of the contract did not clearly express whether the parties agreed to arbitrate, or specify the scope and terms of any arbitration agreement.

In addition, the 1999 contract superceded the 1997 contract. The 1999 contract did not incorporate by reference the 1997 arbitration agreement. Without the execution of a new Exhibit D arbitration agreement, the contractor could not prove the existence of an agreement to arbitrate disputes arising out of the 1999 contract.

The Court also held that the owners had not waived their right to challenge the arbitration merely by initially participating in an administrative conference to discuss the procedures for the submission of claims and counterclaims in arbitration. The owners sufficiently challenged the existence of an arbitration agreement prior to a hearing. The contractor had given notice to the owners in September 2001 that it was exercising its rights to have the dispute arbitrated. In July 2002, the owners filed a complaint requesting a jury trial. The owners also moved for summary determination of the existence of an arbitration agreement. The Court held that the owners’ actions did not constitute participation in arbitration or a waiver of their rights to challenge the existence of an arbitration agreement.


In this case, the Court of Appeals held that the owners’ acceptance of an express homebuilder’s warranty, which purported to waive all other warranties, sufficiently waived the implied warranty of habitability. The Court found sufficient distinction between the wording of the warranty in the present case and that found in the Brevorka case.
The Court also found no error in the trial court’s order requiring the parties to submit all claims to arbitration. The arbitration agreement executed by the parties provided that “any and all claims, disputes, and controversies arising under or relating to this agreement shall be submitted to arbitration.” The court held that the owners’ nuisance claim fell within the scope of the all-disputes arbitration agreement. The alleged tortuous conduct in this case, the contractor’s unreasonable interference with the owners’ use and enjoyment of the property, arose under or was related to the owners’ contract with the contractor.


The Court of Appeals affirmed an order denying a contractor’s motion to compel arbitration. The Court held that the relevant arbitration clause was not enforceable against the individual plaintiffs. The individual plaintiffs were shareholders in a construction company (“subcontractor”). The subcontractor and contractor had entered into a series of contracts containing an all-disputes arbitration provision. Pursuant to the arbitration provision, the subcontractor and contractor were required to arbitrate all claims and controversies arising out of the subject construction projects. While that arbitration was proceeding, the individual plaintiffs sued the general contractor and certain individuals, alleging unfair and deceptive trade practices and tortious interference with contract. The defendants moved to compel arbitration pursuant to the terms of the contractual arbitration provision. The trial court denied the motion.

In appropriate cases, a non-signatory to an arbitration provision can enforce, or be bound by, an arbitration provision in a contract executed by other parties. In this case, the plaintiffs signed the subcontracts only in their capacity as officers of the subcontractor. The defendants argued that the plaintiffs were estopped from refusing to arbitrate their individual complaint against the defendants. Relying largely on the Fourth Circuit opinion, *International Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411 (4th Cir. 2000), the Court noted that a non-signatory was estopped from refusing to comply with a contract’s arbitration provision when it was seeking or receiving a “direct benefit” from that contract. Although the subcontracts provided part of the factual foundation for the individual plaintiffs’ complaint, the Court noted that in *Schwabedissen* the plaintiff’s entire case hinged on rights asserted under the contract to which it was not a signatory. The individual plaintiffs in the present case were not seeking any direct benefits from the subcontracts nor were they asserting any rights arising under those subcontracts. The plaintiffs’ allegations of unfair and deceptive trade practices and tortious interference were not dependent upon rights arising under the subcontracts. Rather, both of these claims were dependent upon legal duties imposed by North...