

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO: 502016AP900007XXXXMB
L.T. NO: 502015CC009878XXXXMBRL

SPIKE VON ZAMFT and ELIZABETH
VON ZAMFT,

Appellants,

v.

EL NIDO JUPITER, LLC,

Appellee.

Opinion filed: **SEP 26 2016**

Appeal from the County Court in and for Palm Beach County,
Judge Laura Johnson.

For Appellant: Richard W. Glenn, Esq.,
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PER CURIAM.

Spike and Elizabeth Von Zamft ("Tenants") appeal the trial court's January 8, 2016

Order denying Tenants' Motion to Dismiss or Abate Pending Mediation and Arbitration, Motion to Compel Mediation and Arbitration. Tenants argue that the trial court erred by failing to submit the dispute to arbitration pursuant to an arbitration provision in a contract between the parties. We agree and reverse.

In March of 2014, Tenants sold property to El Nido Jupiter, LLC ("Landlord"). Two contracts detailed the terms of the sale; an "As Is" Residential Contract for Sale and Purchase ("Residential Contract"), and a Vacant Land Contract ("Land Contract"). The Residential Contract and Land Contract each stated that Tenants would remain on the property as at-will tenants:

[Tenants] to continue to reside on the property as a tenant at will . . . and to operate the horse ranch as in the previous 3 years. Rent shall be monthly and may be paid . . . through boarding and care of horses belonging to the [Landlord].

Tenants have been residing at the property since Tenants sold the Property to Landlord.

The Residential Contract and Land Contract both state:

Unresolved controversies, claims, and other matters in question between Buyer and Seller arising out of, or relating to, this Contract or its breach, enforcement or interpretation ("Dispute") will be settled as follows . . .

(b) Buyer and Seller shall attempt to settle disputes in an amicable manner through mediation pursuant to Florida Rules for Certified and Court-Appointed Mediators and Chapter 44, F.S. as amended ("the Mediation Rules") . . . Disputes not settled pursuant to this paragraph [] may be resolved by instituting action in the appropriate court having jurisdiction of the matter. This Paragraph [] shall survive Closing or termination of this Contract.

Further, the Land Contract contains an arbitration clause:

[a]ll controversies, claims, and other matters in question arising out of or relating to this transaction or this Contract or its breach will be settled as follows . . .

(b) All other Disputes: Buyer and Seller will have 30 days from the date a dispute arises between them to resolve the matter through mediation, failing which the parties will resolve the dispute through neutral binding arbitration in the county

where the Property is located.

On September 22, 2015, Landlord filed a Complaint which stated in part that “Defendants have possession of the [property] under an oral agreement for a monthly tenancy at will, which tenancy was given as an accommodation by the [Landlord] after the [Landlord] purchased said land from Tenants.”

On October 1, 2015, Tenants filed an answer and alleged as an affirmative defense that mediation was a condition precedent to Landlord filing a complaint against them under the terms of the sale. Tenants’ answer included a counterclaim for specific performance, rescission, and fraud in the inducement, but did not allege a contractual right to arbitration. Landlord filed a motion to dismiss the counterclaim and to strike Tenants affirmative defenses, and the court granted the motions on November 5, 2015.

On November 9, 2015, Tenants filed an amended answer and counterclaim, again alleging as an affirmative defense that mediation is a condition precedent to filing a claim. Tenants also for the first time stated that according to the Land Contract, disputes not resolved by mediation must be submitted to binding arbitration.

On December 4, 2015, Tenants reiterated those arguments in their Motion to Dismiss or Abate Pending Mediation and Arbitration, Motion to Compel Mediation and Arbitration (“Motion”). Landlord responded to Tenants’ Motion arguing that since the dispute does not arise out of the Residential Contract or Land Contract, the claims for mediation and arbitration should be denied. At the December 8, 2015 hearing on the Motion, the court stated, “the mediation and arbitration clauses in the contract aren’t applicable to this eviction action,” and denied the demand for mediation and arbitration on January 8, 2016. Tenants thereafter filed the instant

appeal, arguing that the trial court erred by not compelling arbitration.

The standard of review of an order denying a motion to compel arbitration is *de novo*. *The Hillier Group, Inc. v. Torcon, Inc.*, 932 So. 2d 449, 452 (Fla. 2d DCA 2006). The interpretation of contractual provisions are a matter of law and reviewed *de novo*. *Point E. Four Condo. Corp., Inc. v. Zevuloni & Associates, Inc.*, 50 So. 3d 687, 688 (Fla. 4th DCA 2010).

“In determining whether a dispute is subject to arbitration, courts consider. . . . “(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.” *The Hillier Group, Inc. v. Torcon, Inc.*, 932 So. 2d 449, 452 (Fla. 2d DCA 2006) (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999)). Landlord argues that no arbitrable issue exists and that any right to arbitration was waived. Those prongs are analyzed below.

1. An arbitrable issue exists because the instant dispute arises out of or relates to the Land Contract.

In determining whether an arbitrable issue exists, the relevant inquiry is “whether the factual allegations underlying the claim are within the scope of the arbitration clause.” *Mintz & Fraade, P.C. v. Beta Drywall Acquisition, LLC*, 59 So. 3d 1173, 1176 (Fla. 4th DCA 2011). All questions concerning the scope of an arbitration clause should be resolved in favor of arbitration. *Zager Plumbing, Inc. v. JPI Nat’l Constr., Inc.*, 785 So. 2d 660 (Fla. 3d DCA 2001).

The Land Contract specifies that “[a]ll controversies, claims, and other matters in question **arising out of or relating to**” the Contract will be resolved “through neutral binding arbitration” if mediation is unsuccessful. (emphasis added). When the term “arising out of” is combined with “relating to” in an arbitration provision, the provision is to be interpreted broadly. *Mintz & Fraade, P.C. v. Beta Drywall Acquisition, LLC*, 59 So. 3d 1173, 1176 (Fla. 4th DCA

2011). Nevertheless, “[t]here must be a significant relationship between the claim and the contract containing the arbitration clause.” *Kaplan*, 983 So. 2d at 1211. Accordingly, Landlord’s claim must raise an issue “which requires reference to or construction of some portion of the contract itself.” *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 638 (Fla. 1999). Thus, to determine whether a claim falls within the scope of an arbitration agreement, the court must look beyond the legal cause of action and examine the factual allegations of the complaint.

We find that Landlord’s claim for eviction arises out of or relates to the Land Contract. Landlord states in the Complaint that Tenants remained on the property after its sale as a tenant-at-will. This alleged tenancy is a clear reference to the portion of the Land Contract stating that at the time of sale the Tenants were “to continue to reside on the property as a tenant at will.” The Land Contract established the tenancy, therefore the eviction claim arose from or related to the Land Contract. As all questions concerning the scope of arbitration should be resolved in favor of arbitration, we find that the eviction is an arbitrable issue.

2. The Tenants did not waive their right to arbitration under the Land Contract.

We find that under the facts of this case, Tenants did not waive their right to arbitrate the dispute. A party’s contractual right to arbitration may be waived if “under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right.” *Raymond James Fin. Serv., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005).

Filing an answer without claiming the action should be referred to arbitration waives the right to arbitrate. *Bland v. Green Acres Group, L.L.C.*, 12 So. 3d 822, 824 (Fla. 4th DCA 2009). “However, where a party’s first substantive filing invokes the arbitration clause, the trial court errs in finding that the party wishing to arbitrate has waived its right to do so.” *Price v. Fax*

Recovery Sys., Inc., 49 So. 3d 835, 837 (Fla. 4th DCA 2010). “[W]hen a motion to compel arbitration and a counterclaim are filed at the same time, without some other indicia of waiver such as participating in discovery, a finding of waiver is not proper.” *Id.* “All questions about waivers [of arbitration] should be construed in favor of arbitration rather than against it.” *Rath v. Network Mktg., L.C.*, 790 So. 2d 461, 463 (Fla. 4th DCA 2001).

The totality of the circumstances indicates that Tenants did not act inconsistently with their alleged arbitration right. Generally, Tenants inclusion of a counterclaim in their answer, without a demand for arbitration, would waive Tenants’ right to arbitration. However, under the facts of the case, Tenants inclusion of a demand for mediation invokes their right to arbitration and precludes waiver.

Tenants demand for mediation states that the "contracts require disputes to be submitted to mediation prior to any litigation. Until that has occurred this action is premature and should, therefore be dismissed." Tenants correctly indicate that the Land Contract states that mediation must occur before the parties proceed to arbitration. In other words, although Tenants did not demand arbitration, their demand for mediation—a necessary step before arbitration in the Land Contract—invokes the arbitration clause, and precludes the counterclaim in the answer from being considered a waiver. Further, Tenants neither engaged in discovery nor made any motions before filing their amended answer and counterclaim. Finally, Tenants amended answer and counterclaim was filed less than two months after Landlord’s complaint was filed. As all questions about waiver of arbitration are construed in favor of arbitration, we find that Tenants did not waive their right to arbitrate the claim.

The Land Contract’s arbitration clause applies to the instant dispute, and Tenants did not

waive their right to arbitration. Accordingly, the Order denying Tenants' Motion to Dismiss or Abate Pending Mediation and Arbitration, Motion to Compel Mediation and Arbitration is **REVERSED** and the matter is **REMANDED** for the trial court to dismiss or abate the action pending arbitration.

Appellee/Landlord El Nido Jupiter, LLC's Motion for Award of Attorneys Fees and Costs is **DENIED**.

BLANC, CARACUZZO, and OFTEDAL, JJ. concur.

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EL NIDO JUPITER, LLC,

Appellee/Landlord.

Appealed: January 30, 2016

DATE OF PANEL: June 21, 2016

PANEL JUDGES: BLANC, CARACUZZO, OFTEDAL

AFFIRMED/REVERSED/OTHER: REVERSED

PER CURIAM OPINION/DECISION BY: PER CURIAM

DATE CONCURRING:	)	DISSENTING:	)	CONCURRING SPECIALLY:)
<u>RLV</u>	)	With Opinion	)	With/Without Opinion)
J.	)	J.	)	J.)
<u>Cheryl Caracuzzo</u>)))
J.	)	J.	)	J.)
<u>Rob M</u>)))
J.	)	J.	)	J.)