STATE OF MICHIGAN

COURT OF APPEALS

WOODWORTH, INC.,

Plaintiff-Appellant,

v

FIVE POINTES CONSTRUCTION, INC., and MICHAEL D'AGOSTINO,

Defendants-Appellees.

UNPUBLISHED
October 23, 1998

No. 202875
Wayne Circuit Court
LC No. 97-704530 CK

Before: Hoekstra, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Plaintiff Woodworth, Inc., appeals as of right from the trial court order granting defendants Five Pointes Construction Company and Michael D'Agostino's motion for summary disposition pursuant to MCR 2.116(C)(7) (agreement to arbitrate). We affirm.

MCR 2.116(C)(7) provides that summary disposition is proper when a claim is barred because of immunity granted by law. When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(7), this Court must accept as true the plaintiff's well-pleaded allegations and construe them in a light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery. This Court reviews a summary disposition determination de novo as a question of law. *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127, 130; 574 NW2d 706 (1996).

I

Plaintiff argues that its claims were not barred by the parties' arbitration agreement because the agreement was a common-law arbitration agreement, and plaintiff's unilateral revocation was therefore effective. We disagree.

Statutory arbitration and common-law arbitration are coexistent in Michigan. *E E Tripp Excavating Contractor, Inc, v Jackson Co*, 60 Mich App 221, 235; 230 NW2d 556 (1975). Unlike common-law arbitration, statutory arbitration is irrevocable without the consent of both parties.

See MCL 600.5011; MSA 27A.5011; *Twp of Gaines v Carlson, Hohloch, Mitchell & Piotrowski, Inc*, 79 Mich App 523, 528; 261 NW2d 71 (1977). Where an agreement to arbitrate is found not to be in conformity with statutory requirements, it will be held to be a common-law arbitration agreement. *Whitaker v Seth E Giem & Assoc, Inc*, 85 Mich App 511, 513; 271 NW2d 296 (1978).

> The agreement between plaintiff and defendants contained the following provision:
> 13. ARBITRATION. Any dispute between Owner [plaintiff] and Builder [Five Pointes] shall be resolved by binding arbitration by the American Arbitration Association in accordance with its rules.

Plaintiff argues that this provision was not drawn in conformity with the arbitration statute, MCL 600.5001 *et seq*.; MSA 27A.5001 *et seq*., because the arbitration clause does not establish the parties' intent to have the circuit court render judgment on the arbitration award. See MCL 600.5001(2); MSA 27A.5001(2). As a result, plaintiff asserts, the agreement constitutes a common-law, rather than a statutory, arbitration agreement, and plaintiff was entitled to unilaterally revoke it.

We disagree. The arbitration agreement specifically states that disputes will be arbitrated under American Arbitration Association (AAA) rules. Rule 48(c) of the AAA rules[1] provides:

> Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

Plaintiff argues that this language does not sufficiently evidence an intent for entry of judgment upon the award by a circuit court. However, this Court has ruled that this provision contains the language necessary to bring it within statutory arbitration. See *Joba Construction Co, Inc v Monroe Co Drain Comm'r*, 150 Mich App 173, 178; 388 NW2d 251 (1986).[2] Accordingly, plaintiff and defendants had a statutory agreement which could not be revoked without the mutual consent of both parties. See *Gaines, supra*.

II

Plaintiff next argues that Rule 48 does not apply because the AAA Construction Industry Arbitration Rules set out three separate procedures, and Rule 48 only applies to the "Regular Track." However, the "Regular Track" procedures are also applicable to "Fast Track" and "Large, Complex Case Track" claims where they do not conflict with the separate procedures provided for those tracks. Because Rule 48 does not conflict with the procedures delineated for "Fast Track" and "Large, Complex Case Track" cases, it applies here notwithstanding the fact that no determination has been made regarding the applicable track.

III

Plaintiff next argues that Michigan law does not recognize the "construction exception" to the rule of unilateral revocation of common-law arbitration agreements. However, because we have

already determined that plaintiff and defendants had a statutory agreement which could not be revoked without the mutual consent of both parties, resolution of this issue is unnecessary.

IV

Next, plaintiff argues that the trial court erred in granting defendants' motion for summary disposition with regard to D'Agostino because D'Agostino was not a party to the building agreement between plaintiff and Five Pointes and therefore could not benefit from the parties' arbitration agreement. We disagree.

Federal courts have consistently held that nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles. See *Letizia v Prudential Bache Securities, Inc*, 802 F2d 1185, 1187 (CA 9, 1986). If plaintiff can avoid the practical consequences of the agreement to arbitrate by naming nonsignatory parties as a defendant, or signatory parties in their individual capacities only, the effect of the arbitration agreement would effectively be nullified. See *Arnold v Arnold Corp-Printed Communications for Business*, 920 F2d 1269, 1281 (CA 6, 1990).

Although we are not bound by these federal decisions, we find their reasoning to be applicable in the instant case. Plaintiff concedes that D'Agostino signed the agreement "in his representative capacity as President of Defendant Five Pointes." Plaintiff's claims against D'Agostino are based on statements that he allegedly made on behalf of Five Pointes. Under these circumstances, the effect of the arbitration agreement would effectively be nullified if plaintiff were permitted to pursue a separate claim against D'Agostino.

V

Finally, plaintiff argues that the trial court erred in finding that the arbitration agreement was enforceable because the entire contract was gained by defendants' fraud. Again, we disagree.

A general rule of contract law provides that the failure of a distinct part of a contract does not void valid, severable provisions. *Samuel D Begola Services, Inc*, 210 Mich App 636, 641; 534 NW2d 217 (1995). Furthermore, Michigan has a strong public policy favoring arbitration to resolve disputes. See *Jozwiak v Northern Michigan Hospitals, Inc*, 207 Mich App 161, 165; 524 NW2d 850 (1994). For these combined reasons, we conclude that the arbitration provision here survives allegations of fraud that may render the building agreement as a whole voidable.

Plaintiff relies on *Horn v Cooke*, 118 Mich App 740; 325 NW2d 558 (1982). Under *Horn*, a plaintiff seeking to avoid an arbitration agreement on the basis of fraud must establish that the defendant made a misrepresentation that the plaintiff relied upon in agreeing to arbitrate. See *id*. at 746. In the instant case, plaintiff alleges that defendants made the fraudulent misrepresentations in order to induce plaintiff to enter the building agreement. Plaintiff does not claim that it was induced to arbitrate because of the alleged misrepresentations. We therefore find no error requiring reversal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell

[1] The AAA's Construction Industry Arbitration Rules are not included in the trial court record. Defendants did attach the AAA Construction Industry Arbitration Rules as an exhibit to their reply to plaintiff's response to defendants' motion for summary disposition, however, the trial court disregarded that brief because plaintiff had not received it before the hearing on the motion. In their briefs on appeal, both parties concede that if their dispute went to arbitration, the AAA Construction Industry Arbitration Rules would govern their case and both parties have attached them as exhibits to their appeal briefs. As a general rule, this Court does not allow enlargement of the record on appeal; however, an exception exists where, as here, a remand for an evidentiary hearing would amount to a useless act. See *Association of Businesses Advocating Tariff Equity v Public Services Comm*, 173 Mich App 647, 673; 434 NW2d 648 (1988).

[2] In *Joba Construction Co*, this Court reviewed an earlier version of the AAA Construction Industry Arbitration Rules, in which Rule 47 was nearly identical to Rule 48 of the current rules.