STATE OF MICHIGAN

COURT OF APPEALS

PIM, INC.,

Plaintiff-Appellant,

v

STEINBICHLER OPTICAL TECHNOLOGIES U.S.A., INC., DEREK MILLIGAN, and MICHAEL S. BURGESS,

Defendants-Appellees,

and

B-M INTELLECTUAL PROPERTIES,

Defendant.

UNPUBLISHED
September 4, 2001

No. 220053
Oakland Circuit Court
LC No. 99-014105-CK

STEINBICHLER OPTICAL TECHNOLOGIES U.S.A., INC., DEREK MILLIGAN, and MICHAEL S. BURGESS,

Plaintiff-Appellees,

v

PIM, INC.,

Defendant-Appellant,

and

VENTURE HEAVY MACHINERY, L.L.C., DELUXE PATTERN CORPORATION, and LARRY WINGET,

Proposed Intervening Defendants-Appellants.

No. 222221
Oakland Circuit Court
LC No. 99-014097-CK

Before: K.F. Kelly, P. J. and Smolenski and Meter, JJ.

In these consolidated appeals, PIM, Inc., (hereinafter "PIM") appeals from an order denying its request for a preliminary injunction and dismissing its complaint. PIM also appeals from the trial court's order denying Venture Heavy Machinery, L.L.C., Deluxe Pattern Corporation and Larry J. Winget's motion to intervene as party defendants. PIM further appeals the trial court's order granting a declaratory judgment in favor of Steinbichler Optical Technologies USA, Inc., Milligan and Burgess (collectively referred to as "Technologies.") Finally, PIM appeals from an order denying its motion for reconsideration. We affirm in part, reverse in part and remand for further proceedings consistent with this Opinion.

I. Background and Procedural History

A. PIM v Technologies - Docket No. 220053

Technologies entered into a contract (hereinafter "Agreement") on September 12, 1997 with PIM. This Agreement ostensibly provided PIM an equity interest in Technologies along with an interest in certain intellectual property. Larry Winget (hereinafter "Winget") owns PIM as well as Venture Heavy Machinery, L.L.C., and Deluxe Pattern Corporation, the two other entities involved in the instant appeal. PIM maintains that at the closing on September 12, 1997, in accord with the terms of the Agreement, Deluxe Pattern Corporation and Venture Heavy Machinery L.L.C., pursuant to Winget's direction, advanced $250,000 to Technologies on PIM's behalf.

The relationship quickly soured. According to PIM, Technologies materially breached the Agreement by failing to fully perform their obligations and by either transferring or selling a portion of the ownership interests to third party investors in derogation of PIM's right of first refusal.

The Agreement itself indicated that any dispute that could not be resolved would be submitted to binding arbitration. Additionally, the Agreement contained another provision that permitted the parties to seek injunctive relief from a court to maintain the status quo pending arbitration.

When efforts to resolve the conflict failed, PIM filed a complaint in the circuit court seeking an injunction to maintain the status quo until such time that the matter could be submitted to binding arbitration. PIM sought an injunction to prevent Technologies from selling or otherwise transferring any further interest or assets until an arbitrator could define the parties' rights and obligations under the terms of the Agreement.

However, before the scheduled hearing on PIM's request for a preliminary injunction, counsel for Technologies learned that PIM had never achieved corporate status. The actual registered corporate name filed with the state was "P.I.M. Management Company", not "PIM, Inc." When counsel for Technologies discovered that PIM was not duly incorporated, he immediately submitted an application to the Michigan Department of Consumer and Industry Services to reserve the name "PIM, Inc." for six months. In response, on or about April 20,

1999, the Department issued a certificate of registration. This registration completely foreclosed PIM from utilizing the name.

On April 30, 1999, the trial court entertained oral argument on PIM's request for a preliminary injunction. At this time, the trial court denied PIM's request for a preliminary injunction and *sua sponte* dismissed PIM's complaint. The trial court held that because PIM does not exist as a corporate entity, there was no proper plaintiff and it would contravene public policy to issue a preliminary injunction granting relief to a plaintiff that did not exist.

After the hearing, counsel for Technologies submitted a proposed order denying the request for preliminary injunction and dismissing plaintiff's case with prejudice. Although PIM maintained that it filed objections in response, nevertheless, the court entered the proposed order on May 12, 1999 without conducting a hearing to settle the order.

PIM moved to set aside the order citing the procedural irregularity. It argued that the dismissal of PIM's complaint should not be with prejudice and that the trial court should permit PIM to refile the complaint. In the alternative, PIM argued that it should be permitted to reinstate the case by substituting those entities or persons who advanced the funds in accord with the terms of the Agreement. The trial court denied PIM's request to set the May 12, 1999 order aside. PIM appeals as of right.

B. Technologies v PIM - Docket No. 222221

On April 19, 1999 Technologies filed a complaint against defendant PIM, seeking a declaratory judgment that the September 12, 1997 Agreement was rescinded.[1] The trial court heard the request for a declaratory judgment on June 2, 1999 and further considered a motion brought by Winget on behalf of PIM to intervene as a party defendant and thus substitute in the action for PIM. The trial court declined to grant Winget's motion to intervene but held it in abeyance. Thereafter, Venture Heavy Machinery, L.L.C. and Deluxe Pattern Corporation, the entities that advanced the money in accord with the Agreement, sought to intervene along with Winget as party defendants. The trial court denied the combined request to intervene as party defendants and further declined to dismiss Technologies' complaint for failure to join all necessary parties. Additionally, the trial court granted summary disposition in Technologies' favor holding that because PIM as a corporate entity did not exist, it cannot be a party to a contract, and thus "no contract exists between [Technologies] and PIM."

PIM moved for reconsideration arguing among other things, that the designation of PIM on the Agreement instead of "PIM Management Company" was nothing more than a mere clerical error that could be clarified by parole evidence.[2] Upon receipt of such evidence, PIM argued the written contract could be reformed to name the correct corporate body and thus, reflect the parties' true intent. Moreover, PIM argued that Technologies contracted with PIM as

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[1] This complaint was filed forty-five minutes before the complaint in docket number 220053.

[2] PIM argues that such evidence includes filing corporate tax returns and conducting other business under the abbreviated name "PIM, Inc."

a corporate entity and should therefore be estopped to deny PIM's corporate existence. In response, Technologies argued that corporation by estoppel is no longer a viable doctrine or otherwise outmoded in light of the Michigan Business Corporations Act[3], which specifically delineates the requisite steps to incorporate and thus provides a "bright line test" for incorporation.

Without completely addressing the corporation by estoppel argument raised by PIM, the trial court entered an order denying PIM's motion for reconsideration on August 31, 1999. PIM appeals as of right.

II. Corporation by Estoppel in Michigan

PIM first argues that the trial court erred by holding that no contract existed between Technologies and PIM because PIM was not a duly incorporated entity. PIM submits that despite its technical lack of incorporation, one that contracts or otherwise deals with a corporation as a corporation will be estopped to deny its corporate existence. In support, PIM relies on our Supreme Court's decision in *Estey Manufacturing v Runnels*, 55 Mich 130; 20 NW 823 (1884) which enunciated the corporation by estoppel doctrine:

> Where a body assumes to be a corporation, and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence. Such is the general rule, founded upon equitable principles, and if any exceptions exist, it is only where `there are no facts which makes it legally unjust to forbid its denial.' *Estey Manufacturing*, *supra* at 133. (Citations omitted.)

Accordingly, PIM appeals the grant of summary disposition and the denial of its motion to reconsider based upon the doctrine of corporation by estoppel. This court reviews a trial court's decision relative to summary disposition de novo *Village of Diamondale v Grable*, 240 Mich App 553, 563; 618 NW2d 23 (2000), and its decision relative to a motion for reconsideration for an abuse of discretion. *Kokx v Bylenga*, 241 Mich App 659; 617 NW2d 368 (2000).

Unlike other jurisdictions, Michigan has not yet had the opportunity to consider to what extent, if any, the Michigan Business Corporation Act affects the common law corporation by estoppel theory employed by our Supreme Court so long ago in *Estey Manufacturing*. MCL 450.1221 simply provides, in relevant part, that "corporate existence shall begin on the effective date of the articles of incorporation . . . . " and that "[f]iling is conclusive evidence that all conditions precedent required to be performed under this act have been fulfilled and that the corporation has been formed under this act . . . ." Neither the language of the Michigan Business Corporation Act itself nor its legislative history suggests whether the Legislature intended to excise the equitable corporation by estoppel doctrine from Michigan jurisprudence when it adopted the act.

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[3] See MCL 450.1221.

The Michigan Business Corporation Act became effective on January 1, 1973. Before the act became effective, Michigan did recognize and apply the *de facto* corporation *concept*. A review of Michigan caselaw reveals that historically, Michigan courts were never hesitant to apply the *de facto* corporation doctrine to avoid injustice. However, these early decisions collapse the concepts of *de facto* corporation and corporation by estoppel applying the former on a case-by-case basis where principles of equity so dictate to reach a fair and just result. In fact, the decisions rendered by Michigan courts do not differentiate between *de facto* corporation and corporation by estoppel, but rather apply the *de facto* corporation doctrine in an estoppel-styled manner for purposes of avoiding injustice[4].

Because Michigan cases have not historically differentiated between *de facto* corporation and corporation by estoppel, the latter term does not specifically appear in Michigan jurisprudence save for our Supreme Court's decision in *Estey Maunfacturing*. Notwithstanding, the fundamental equitable tenents set forth in *Estey Manufacturing*, are indeed cited and applied in subsequent cases[5]. These cases however, all precede the Michigan Business Corporation Act.

Since the advent of the business corporation act, Michigan courts have not precisely determined whether the principles set forth in *Estey Manufacturing* endure. Michigan has however, recognized that "[e]stoppel . . . runs throughout the entire field of law." *Hoye v Westfield Ins Co*, 194 Mich App 696; 487 NW2d 838 (1992). In *Hoye*, the court further commented that equitable estoppel, as a general principle, does not state a cause of action onto itself, but "it may serve as an important, *or even the sole, aid to the plaintiff*." [Emphasis added.] (Citing Prosser, Torts (4th ed), § 105, at 691-692.)

Since the Legislature did not provide any indication as to its intent relative to the continued viability of the corporation by estoppel concept in Michigan and considering the dearth of Michigan authorities specifically addressing the issue, we turn to decisions rendered in other

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[4] See eg. *City of Kalamazoo v Kalamazoo Heat, Light & Power, Co*, 124 Mich 74, 82-83; 82 NW 811 (1900) (stating that "we understand the rule established by law as well as reason is that parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization."). See also *Newcomb-Endicott Co v Fee*, 167 Mich 574, 583; 133 NW 540 (1911) (delineating the elements for a corporation *de facto* and further stating that "[w]here an attempt has been made to organize a corporation under a valid act, and the question is one of regularity merely, parties recognizing its legal corporate existence by dealing with it have no right to object to any irregularity in such organization); *Love v Ramsey*, 139 Mich 47, 49-50; 102 NW 279 (1905) (recognizing that "[u]nder the decisions of this court the members of a corporation are not liable where it is a corporation de facto, though not de jure, and the plaintiff has dealt with it as a corporation."); *Eaton v Walker*, 76 Mich 579; 43 NW 638 (1889) (stating that "it is undoubtedly well settled that a person who has entered into contract relations with a de facto corporation cannot, in an action thereon, deny its corporate character, or set up any informality in its organization, to defeat the action."); but see *June v Vibra Screw Feeders, Inc*, 6 Mich App 484; 149 NW2d 480 (1967) (applying *general principles of equitable estoppel* to prevent the business owner "from claiming any legal recognition of the separate corporate entities which have been set up . . . and which have been ignored in the past.")

[5] See *supra* n 4.

jurisdictions for general guidance. *Oxley v Department of Military Affairs*, 460 Mich 536, 544; 597 NW2d 93 (1999).

We note initially that in jurisdictions where the courts have specifically abrogated the doctrine of corporation by estoppel because of revisions to that state's business corporations statutes, those states adopted a provision initially introduced by the Model Business Corporation Act that imposes individual liability upon those who undertake to act as a corporation without the requisite authority to do so[6]. Michigan's Business Corporation Act does not contain any such language thus suggesting, by its absence, that corporation by estoppel remains a viable legal doctrine in Michigan jurisprudence.

At its very essence, corporation by estoppel is a concept conceived and applied in equity to avoid injustice and unfairness[7]. *American Vending Services, Inc. v Morse*, 881 P2d 917 (Utah App, 1994). Corporation by estoppel "is . . . the result of applying the policy whereby private litigants may, by their agreements, admissions or conduct, place themselves in a position where they will not be permitted to deny the fact of the existence of a corporation." *Willis v City of Valdez*, 546 P2d 570, 574 (Alas, 1976). Although the doctrine itself is easily stated, it proves more difficult in its application. Indeed, as one court observed, "[c]orporation by estoppel is a difficult concept to grasp and courts and writers have `gone all over the lot' in attempting to define and apply the doctrine." *American Vending Services, Inc, supra* at 923. (Quoting Ballantine, Manual of Corporation Law and Practice § § 28-30 (1930)). In fact, in *Plummer v Prairie State Bank*, 1990 WL 86217 (D Kan 1990), the court opined that although modern corporation statutes have "done away with problems inherent in the *de jure* and *de facto* concepts," the effect of these statutes on the corporation by estoppel doctrine "are not in agreement." *Id.* at 5. See also *Harry Rich Corp v Feinburg*, 518 So2d 377 (Fla App, 1987) (noting that "the corporation may sue and be sued as if it existed *if the parties to the contract behaved as if it existed*." [Emphasis added.]) Accord, 8 Fletcher Cyc Corp § 3890 (rev ed 2001) (recognizing that the provision of the Model Business Corporation Act stating that filing the articles of incorporation constitutes "conclusive evidence" of corporate identity "against all who deal with it" was designed to eliminate the *de facto*/*de jure* dialogue but further noting that corporation by estoppel may still apply where "neither of the parties is aware that corporate status has not been achieved.").

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[6] See eg. Tenn Code Ann §48-1-1405 mandating that "[a]ll persons who assume to act as a corporation without authority to do so shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof." Respecting the letter of the above-referenced statute, the court in *Thomson & Green Machinery Co*, 683 SW2d 340, 345 (Tenn App, 1984) stated that "to allow an estoppel would be to nullify [the statute.]" However, unlike Tennessee, the Michigan Business Corporation Act did not adopt that provision of the Model Act providing for joint and several liability in this manner.

[7] See also *Plummer v Prairie State Bank*, 1990 WL 86217 (D Kan 1990) (refusing to apply the corporation by estoppel theory on the grounds that to do so would be inequitable); *International Sport Divers Association, Inc v Marine Midland Bank, N A*, 25 F Supp 2d 101, 109 (WD NY, 1998) (stating that "[i]nasmuch as the rule [of estoppel] originates in equitable principles, it does not apply when it would be inequitable to apply it, or where equitable principles do not require its application, as in the case of fraud.").

We agree with those courts that appreciate the fine distinction between *de facto* corporation and corporation by estoppel and recognize that "the former is grounded in law while the latter is based on equity." *American Vending Services, Inc v Morse*, 881 P2d 917, 924 (1994). Indeed, the focus of the *de facto* corporation doctrine is upon the "good faith effort to incorporate" (*In re Sealed Case*, 278 US App D C 148; 877 F 2d 83, 90 (1989)) whereas corporation by estoppel focuses on the acts of the parties involved irrespective of the legality of the corporation itself. See *Bank of New Mexico v Navajo Housing and Development Enterprise*, 556 F Supp 1, 3 (D NM 1980.)

Thus, we believe that central to the doctrine of corporation by estoppel therefore, is not whether the incorporators made a good faith attempt to incorporate under a valid statute, but rather how the parties to the agreement at issue *behave*[8]. Indeed, estoppel relies upon the nature of the relations contemplated by the parties and will attach "in the narrow situation when those individuals acting on behalf of the corporation have no actual or constructive knowledge that the corporation does not exist" *regardless* of a bona fide attempt to incorporate. See *American Vending Services, Inc, supra* at 925.

Even assuming, arguendo, that the Legislature intended to abrogate the distinction between *de facto* and *de jure* corporations by adopting the Michigan Business Corporation Act, the doctrine of corporation by estoppel would nevertheless survive. A corporation formed by virtue of an estoppel is different in nature and kind than a *de facto* corporation. A corporation created by an estoppel does not depend upon a finding that the same corporation was *de facto* in nature. The two concepts are mutually exclusive. The former does not depend upon a good faith effort to incorporate under a colorable statute but rather arises in equity by virtue of the parties' own conduct. In *Bukacek v Pell City Farms, Inc*, 286 Ala 141; 237 So2d 851, 853, (Ala, 1970) the court stated that "[t]he doctrine of de facto corporations has nothing to do with the principle of estoppel. [T]he only effect of an estoppel [is to] prevent the raising of the question of the existence of a corporation." We agree with this distinction.

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[8] For instance, in *June v Vibra Screw Feeders, Inc.*, 6 Mich App 484; 149 NW2d 480 (1967), the court essentially applied the corporation by estoppel doctrine by relying upon the general principles of equitable estoppel. In *June*, there were two separate corporations at issue; Vibra Screw Feeders, Inc., and Vibra Screw Sales, Inc. The contract giving rise to the dispute identified "Vibra Screw" as the corporate party. Vibra Screw is technically a misnomer arising from the combination of both corporate identities. When one of the parties cited the misnomer as a justification to vitiate the contract, the court declined to recognize the corporations' separate identities. The court reasoned that historically, the two corporate entities regularly interchanged letterhead and invoices in the regular course of business with the other party to the contract. Consequently, to ensure a fair and just result, the court applied *equitable estoppel* to prevent the party seeking to avoid the contract from suddenly insisting upon the legal recognition of the two separate corporate identities. Essentially, the court in *June* considered the course of conduct, or how the parties at issue *behaved*. On the facts, the court surmised that it would be unfair, all of a sudden, to permit the appellant to rely upon the misnomer and insist upon appreciating the separate corporate identities to disavow the corporate form and thus void the contract.

In the case at bar, the court completely foreclosed[9] counsel's opportunity to raise and adequately address whether the doctrine of corporation by estoppel would apply to prevent Technologies from denying PIM's corporate existence. Since none of the parties had knowledge, actual, constructive or otherwise, that PIM was not a duly incorporated entity at the time that they entered into the Agreement, the court should have considered the applicability of the corporation by estoppel doctrine. Additionally, not only did counsel for PIM request additional time to research the issue at the April 30, 1999 hearing, PIM also attempted to raise the corporation by estoppel theory in its motion for reconsideration. The trial court however, denied PIM's reconsideration motion stating in a rote fashion, "it is not an abuse of discretion to deny a motion if it raises either legal theories or facts which could have been argued prior to this Court's original order."

We find that the trial court improvidently granted Technologies' summary disposition without first permitting PIM the opportunity to research the estoppel theory more thoroughly as requested. Accordingly, we also find that the trial court abused its discretion by failing to consider the applicability of the corporation by estoppel theory raised in PIM's motion for reconsideration. Without a firm directive from the Legislature indicating its express intent, this Court is bound to adhere to the principles set forth by our Supreme Court's decision in *Estey Manufacturing*. We further find that the corporation by estoppel theory is still viable in Michigan and that the trial court erred by not considering and applying the merits of this venerable equitable concept in the case at bar. We therefore remand this matter to the trial court to consider and determine whether the corporation by estoppel doctrine applies and will prevent Technologies from challenging PIM's existence as a viable corporate body[10].

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[9] A review of the April 30, 1999 record indicates that counsel for PIM requested the opportunity to more thoroughly research the corporation by estoppel issue in conjunction with a hearing on PIM's request for a preliminary injunction. With regard to the corporation by estoppel theory, the following colloquy occurred between the trial court and counsel for PIM:

> THE COURT: I'm dismissing this case sua sponte because there's no existence [PIM as a corporate entity does not exist] but that leaves the other case. [The Technologies lawsuit.]
>
> MR. McCARTHY: *But may I not be allowed to make some showing with regard to a corporation by estoppel*. I mean there are doctrines that deal with a situation like this and I didn't learn about this problem until 5:10 last night when I received a copy of their brief. I mean with all due respect, Your Honor, I'd like a chance to research this a little bit more . . . .[Emphasis added.]
>
> THE COURT: Well you can always refile if you research but right now it doesn't exist.

[10] Although not raised by counsel in their briefs, a review of the record indicates that the effect of misnomer as discussed in 6 Fletcher, Cyclopedia Corporations § 2444 (1998) may also apply. Accordingly, the trial court should not only consider the viability of the corporation by estoppel

(continued…)

III. Intervention

In both of the cases consolidated herein, PIM argues that the trial court erred by denying PIM Management Company and/or Winget, Venture Heavy Machinery L.L.C., and Deluxe Pattern Corporation the opportunity to intervene as parties. We disagree.

MCR 2.209(a)(3) provides that a person has the right to intervene:":

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Determinations regarding motions to intervene lie within the sound discretion of the trial court. *Precision Pipe & Supply v Meram Construction, Inc*, 195 Mich App 153, 156; 489 NW2d 166 (1992). However, "the rule should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented." *Id.* The three elements to establish a right to intervene are: 1) timely application; 2) the applicant's interests are inadequately represented by existing parties; and 3) a determination as to whether the applicant's ability to protect his or her interests upon disposition, as a practical matter, would be impaired or otherwise impeded. *Oliver v Department of State Police*, 160 Mich App 107, 114-115; 408 NW2d 436 (1987).

In Docket No. 220053, Venture Heavy Machinery, Deluxe Pattern Corporation and Larry Winget, never moved to intervene. Because the trial court never invoked its discretion, this Court is unable to review this issue. See *People v Leonard*, 224 Mich App 569, 585 n 6; 569 NW2d 663 (1997) (defendant's failure to move for a continuance prevented this Court from reviewing defendant's claim that trial court abused its discretion in denying continuance because trial court never invoked its discretion). In addition, the court's ruling does not prevent the proposed intervenors from seeking their own relief against Technologies. Therefore, we find no error.

In Docket No. 222221, PIM failed to establish that a resolution of the Technologies lawsuit against PIM would impair or impede the proposed intervening parties' interests. Their argument that res judicata or collateral estoppel would bar a subsequent action is without merit.

The doctrine of res judicata applies where both actions involve the same parties or their privies, the disputed matter could or should have been resolved in the earlier adjudication, and the earlier controversy was decided upon the merits. *Wayne County v Detroit*, 233 Mich App

(…continued)

theory, but also to consider and determine the effect of misnomer. See *Bi-Gel Company v Thoma*, 345 Mich 698; 77 NW2d 89 (1956); *Rottschafer Real Estate v Morris*, 245 Mich 192; 222 NW 103 (1928); *St Matthew's Evangelical Lutheran Church v United States Fidelity & Guaranty Co*, 222 Mich 256; 192 NW 784 (1923); and *Thatcher v The West River National Bank*, 19 Mich 196 (1869).

275, 277; 590 NW2d 619 (1998). Collateral estoppel requires that: 1) the issue sought to be precluded is the same as that involved in the prior action; 2) the parties raised and litigated the issue; and 3) the issue is actually adjudged. *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990).

Since none of the proposed intervening parties' issues were raised, litigated or determined by a valid and final judgment, PIM has failed to establish that the disposition of the lawsuit would impair or impede the proposed intervenors' interests. Thus, the trial court did not abuse its discretion by denying the proposed intervenors' motion to intervene as of right.

IV. Dismissal of PIM's Complaint with Prejudice

Next, PIM asserts that the trial court erred by refusing to dismiss Technologies' complaint without prejudice for failure to join all necessary parties pursuant to MCR 2.205(A) and (B). We disagree. This court reviews a trial court's decision to add a party for an abuse of discretion. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995).

MCR 2.205(A) provides in pertinent part that:

> [P]ersons having such interests in the subject matter of an action that their presence in the action is *essential to permit the court to render complete relief* must be made parties and aligned as plaintiffs or defendants in accord with their respective interests. [Emphasis added.]

The proposed intervening third party defendants contend that they "should . . . have been allowed to intervene as party [d]efendants" and that the trial court's failure to permit intervention constituted error requiring reversal. The very language of the court rule belies the proposed third party intervenors' position. The applicable court rule provides for joinder of necessary parties where the presence of those parties is "essential" to the court's ability to fashion complete relief. MCR 2.205(A).

In the case at bar, Winget and the other proposed third party intervening defendants' presence was not required for the court to fashion complete relief. According to the complaint filed by Technologies, plaintiffs therein sought a declaratory judgment from the trial court that the contract between Technologies and PIM was "rescinded" or otherwise of "no force and effect." Winget, Venture Heavy Machinery, L.L.C. or Deluxe Pattern Corporations' presence in that lawsuit was not "essential" for the trial court to determine whether or not a viable contract existed between Technologies and PIM. Accordingly, the trial court did not abuse its discretion by denying the proposed intervening defendants' request to intervene as party defendants in Technologies' lawsuit.

V. Jurisdiction and Arbitration

The final issue raised on appeal challenges the trial court's jurisdiction to even consider the Technologies' motion for summary disposition. In granting the motion for summary disposition, the trial court held that since PIM did not exist as a viable corporate entity, there was no valid contract between Technologies and PIM. On appeal, PIM argues that the provision in

the contract providing for arbitration for "any dispute between or among any of the parties to this Agreement" divests the trial court of jurisdiction to make any determination regarding the validity of the contract.

Considering our final disposition in this matter, we need not address the merits of this argument in any great depth. Suffice to say however, "[t]he existence of a contract to arbitrate and the enforceability of its terms is a *judicial question* which cannot be decided by an arbitrator" and that "[i]t follows that a valid agreement must exist for arbitration to be binding." See *Arrow Overall v Peloquin*, 414 Mich 95, 99; 323 NW2d 1 (1982). [Emphasis added.] *Id.* at 98. Thus, the trial court could properly determine the overall validity of the contract itself before the substance of the dispute is submitted to an arbitrator for ultimate resolution pursuant to the terms of the contract at issue.

Affirmed in part, reversed in part and remanded for further consideration in accord with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter