

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DANIEL AZAR, ANDREW NASTASI and  
ANTHONY LEWIS NASTASI,

UNPUBLISHED  
April 16, 2002

Plaintiffs-Appellees,

v

No. 221076  
Wayne Circuit Court  
LC No. 97-739159-CZ

JOSEPH MELVILLE and ALL AMERICAN  
TOWING,

Defendants-Appellants,

and

MELVILLE TOWING,

Defendant.

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Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

In this breach of contract action, defendants appeal as of right from the trial court's entry of judgment for plaintiffs. We affirm in part, reverse in part and remand.

Defendant Joseph Melville agreed to purchase real property and business equipment and fixtures from Dick's Recovery of Michigan, Inc., a corporation owned by plaintiffs. Plaintiffs initiated this case on December 9, 1997 by filing a complaint alleging that Melville had failed to make payments toward the \$250,000 he owed on the property purchased from plaintiffs, and that Melville engaged in fraud by transferring assets to various corporations that he had formed for the purpose of defeating plaintiffs' intended security interests in the hidden assets. Although a supplemental agreement entered by the parties stated that arbitration would constitute their exclusive avenue for resolving contract-related disputes, defendants' answer to plaintiffs' complaint failed to assert as an affirmative defense that the arbitration clause barred plaintiffs' claims.

On December 22, 1998, approximately one year after plaintiffs filed their complaint, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(4), arguing that the trial court lacked subject matter jurisdiction because the parties' agreement provided that arbitration was the exclusive remedy for contract-related disputes. When plaintiffs responded

that defendants had waived this defense by failing to include it in their answer to the complaint, defendants filed a January 22, 1999 motion to amend their answer to add the affirmative defense of arbitration. Defendants also filed a motion for summary disposition under MCR 2.116(C)(8) on the basis that plaintiffs had failed to state claims against them.

The trial court denied defendants' motions for summary disposition and dismissed defendants' motion to amend their answer, and granted plaintiffs' motion for entry of judgment. The trial court then entered a judgment for plaintiffs in the amount of \$194,492.14, finding without elaboration that "the allegations in the complaint have been sustained."<sup>1</sup> The court denied defendants' subsequent motion for a new trial.<sup>2</sup> The court explained that to permit defendants now to assert the affirmative defense of arbitration would "fly in the face of basic concepts of fairness" in light of defendants' (1) failure to set forth an arbitration defense when they filed their answer, (2) failure to appear at mediation, (3) failure to undertake any discovery, and (4) failure to otherwise do anything related to the case. The trial court concluded that it would deny reconsideration of its previous decisions because of the extended period of time that elapsed between defendants' filing of their answer and their mention of the arbitration clause, and the prejudice that plaintiffs' case would suffer given that certain case-related documents had been destroyed.

Defendants first contend that the trial court lacked subject matter jurisdiction to enter any of its orders because of the exclusive arbitration provision within the parties' agreements. Defendants moved for summary disposition under MCR 2.116(C)(4) on the basis that the trial court lacked subject matter jurisdiction over the matter because the parties' contract contained an arbitration clause. We observe, however, that defendants sought summary disposition under the wrong subrule because MCR 2.116(C)(4) does not provide a proper basis for summary disposition in a controversy governed by an arbitration agreement. *Haywood v Fowler*, 190 Mich App 253, 255; 475 NW2d 458 (1991) (explaining that subrule (C)(7) rather than (C)(4) constituted the proper basis for summary disposition in the context of a medical malpractice controversy governed by an arbitration agreement). Instead, MCR 2.116(C)(7) allows a defendant to move for summary disposition on the ground that the plaintiff's claim is barred because of an agreement to arbitrate. While the trial court apparently proceeded under subrule (C)(4), this Court nonetheless may review the summary disposition ruling according to correct subrule (C)(7). *Wickings v Arctic Enterprises, Inc.*, 244 Mich App 125, 147; 624 NW2d 197 (2000).

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<sup>1</sup> While the record does not clearly explain on what legal basis judgment was entered, plaintiffs' motion for entry of judgment indicates that for one year defendants failed to attend mediation or the settlement conference and otherwise failed to take any action to defend the case. Plaintiffs' motion further indicated that at the settlement conference, "the Court indicated that Plaintiffs were entitled to a Judgment but that prior to entering a Judgment in the amount requested, the Court desired to review the documents that supported the Judgment." In entering judgment for plaintiffs, the court apparently reviewed a mediation summary, affidavit and other documentation supporting the amount of damages that plaintiffs sought.

<sup>2</sup> The court noted that no trial had occurred in this case and treated defendants' motion for a new trial as a motion for reconsideration.

This Court reviews de novo a trial court's summary disposition ruling. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). When reviewing a motion for summary disposition, we must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs demonstrate that some genuine issue of material fact exists to warrant a trial. MCR 2.116(I)(1). When considering a motion for summary disposition brought under subrule (C)(7) on the basis of an agreement to arbitrate, we construe all of the plaintiff's well-pleaded allegations as true unless contradicted by affidavits, depositions and other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994).

We initially note that defendants incorrectly assert that the exclusive arbitration agreement within the parties' contract divested the trial court of subject matter jurisdiction over plaintiffs' claims. The existence of the arbitration agreement constituted an affirmative defense that defendants waived when they failed to include it in their responsive pleadings. MCR 2.111(F)(2), (3)(a); *Campbell v St John Hosp*, 434 Mich 608, 615; 455 NW2d 695 (1990). An arbitration agreement is in the nature of a release or a statute of limitations, narrowing a party's legal rights to pursue a particular claim in a particular forum, and the party asserting an arbitration agreement defense to litigation must timely assert that defense. *Hendrickson v Moghissi*, 158 Mich App 290, 298; 404 NW2d 728 (1987). An agreement to arbitrate does not deprive a circuit court of subject matter jurisdiction over a controversy unless a constitutional provision or the statute pursuant to which the parties agreed to arbitrate clearly and unambiguously provides for such a divestiture. *Id.* at 294-298.

In this case, defendants undisputedly failed to raise the arbitration defense in their pleadings and thereafter failed to raise the arbitration defense for more than one year after the filing of plaintiffs' complaint, thus waiving the defense. *Madison District Public Schools v Myers*, 247 Mich App 583, 589; 637 NW2d 526 (2001). Even assuming that defendants had not waived their arbitration defense, the trial court had subject matter jurisdiction over the case because no applicable statute or constitutional provision explicitly divested the circuit court of its jurisdiction. *Campbell, supra* at 613-615.<sup>3</sup>

Defendants further argue that even if they waived the arbitration agreement defense by not pleading it at the outset of the case, the trial court improvidently denied their motion to amend their answer to include the affirmative defense of arbitration. A decision whether to grant a motion to amend a pleading falls within the sound discretion of the trial court and reversal is appropriate only when the trial court abuses that discretion. *Weymers v Khera*, 454 Mich 639,

<sup>3</sup> Defendants also suggest that the trial court violated both the United States Constitution and Const 1963, art 1, § 10 by finding that they waived the arbitration agreement defense. Const 1963, art 1, § 10 states, "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Although defendants failed to set forth this issue in their statement of questions presented, *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 298; 618 NW2d 98 (2000), we note briefly that the constitutional provisions they cite clearly have no relevance to the instant case. The constitutional language applies to a legislature's enactment of laws impairing the obligation of contracts, not a party's waiver of the affirmative defense that their contract contained an arbitration clause.

654; 563 NW2d 647 (1997). An abuse of discretion occurs when an unprejudiced person considering the facts on which the trial court acted would say that no justification or excuse supported the trial court's ruling. *Detroit/Wayne Co Stadium Authority v 7631 Lewiston, Inc*, 237 Mich App 43, 47; 601 NW2d 879 (1999).

A court should freely grant leave to amend a pleading when justice so requires. MCL 600.2301; MCR 2.118(A)(2). A motion to amend a pleading should ordinarily be granted and should be denied only for the following particularized reasons:

“[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . .” [*Weymers, supra* at 658, quoting *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).]

The trial court found that defendants' undue delay in moving to amend their answer would result in actual prejudice to plaintiffs because certain documents needed to litigate the matter had been destroyed by a fire. In light of the facts that (1) defendants did absolutely nothing beyond filing an answer to plaintiffs' complaint for approximately one year, failing to participate in discovery, mediation or any other aspect of the case, and (2) defendants did not dispute that fire destroyed certain documents relevant to the case,<sup>4</sup> we cannot conclude that the trial court abused its discretion in denying defendants' motion to amend on the basis of defendants' undue delay and the prejudice plaintiffs would suffer as a result of an amendment. *Weymers, supra* at 659.<sup>5</sup>

We lastly address defendants' contention that the trial court erred in denying their motion for summary disposition under MCR 2.116(C)(8). A motion for summary disposition may be granted under subrule (C)(8) when the opposing party has failed to state a claim on which relief can be granted. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). A motion under subrule (C)(8) tests the legal sufficiency of the complaint. The reviewing court considers only the pleadings, MCR 2.116(G)(5), accepting all well-pleaded factual allegations as true and construing them in the light most favorable to the nonmoving party. The motion should be granted only when the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Defendants argue that the trial court erred in failing to grant Melville summary disposition pursuant to subrule (C)(8) because he was a party to the contract only as an

<sup>4</sup> Though the available record does not substantiate exactly what documents plaintiffs no longer could obtain, defendants do not dispute the trial court's finding that some relevant documents were destroyed in a fire.

<sup>5</sup> To the extent that the trial court deemed any desired amendment futile because defendants “put forth no evidence that the amount requested by Plaintiffs is inaccurate or that they would otherwise succeed at arbitration,” we note that the trial court improperly focused on the substantive merits of defendants' defense rather than looking at the legal sufficiency of the defense. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

incorporator for a corporation later to be formed, rather than in his individual capacity. Plaintiffs alleged in their complaint that Melville himself purchased the business assets and real property and that Melville failed to make payments when due and fraudulently conveyed to other entities property in which plaintiffs were to have security interests. Although the purchase agreement stated that the agreement was between Dick's Recovery as the seller and Melville, "hereafter referred to as 'buyers' on behalf of a corporation to be formed," Melville's signatures on the purchase agreement and supplemental agreement do not indicate that he signed on behalf of any corporate entity. Furthermore, defendants admitted in their answer that Melville himself purchased the business assets. Under these circumstances, we cannot conclude that the trial court clearly erred in finding that plaintiffs alleged in their complaint that Melville signed the agreements in his individual capacity. MCR 2.613(C). The trial court did not err in denying Melville summary disposition under MCR 2.116(C)(8).

Defendants also assert that plaintiffs failed to state a claim against defendant All American Towing. The complaint specifically mentions All American Towing only within its caption. All American Towing does not appear within the body of the complaint or in the parties' agreements, which are attached to the complaint. The complaint makes some general references to "defendants," but makes no specific allegations against All American Towing or even against the general group of defendants. We therefore conclude that the trial court erred in denying All American Towing summary disposition pursuant to MCR 2.116(C)(8).<sup>6</sup>

We reverse the trial court's order denying All American Towing's motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm the trial court's denials of (1) Melville's motion for summary disposition under MCR 2.116(C)(8), (2) defendants' motion for summary disposition premised on the arbitration agreement, and (3) defendants' motion to amend their answer to include the affirmative defense of the parties' agreement to arbitrate. We remand this case to permit the trial court to amend the judgment for plaintiffs by removing All American Towing. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

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<sup>6</sup> We briefly note defendants' incorrect argument that plaintiffs failed to allege in the pleadings that they were linked to Dick's Recovery, the signatory in the agreements with Melville. The parties' supplemental agreement states that the individual plaintiffs are the sole shareholders of Dick's Recovery. The agreement further states that the individual plaintiffs would jointly and severally indemnify Melville against various losses and expenses and that any breach of the contract by plaintiffs as individuals would entitle Melville to a reduction in his outstanding debt. Plaintiff Andrew Nastasi signed the purchase agreement for Dick's Recovery, and all three individual plaintiffs signed the supplemental agreement for Dick's Recovery. Accordingly, we find that plaintiffs clearly demonstrated that they are linked with Dick's Recovery.