STATE OF MICHIGAN

COURT OF APPEALS

DUKE/FLUOR DANIEL, Plaintiff-Appellant,	UNPUBLISHED April 22, 2004
v	No. 243774 Wayne Circuit Court
ALSTOM POWER, INC., Defendant-Appellee.	LC No. 02-215044-CZ

Before: Neff, P.J. and Wilder and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition and dismissing plaintiff's action to compel arbitration. We affirm.

I. Background

The basic facts are undisputed. This case arises from an agreement between Dearborn Industrial Generation (DIG) and plaintiff for the construction of a power plant intended to provide steam and electricity to the Ford/Rouge complex in Dearborn.

On November 6, 1998, CMS Generation Company (CMS), DIG's parent company, entered into a purchase agreement with ABB Power Generation, Inc. (ABB), in connection with the purchase of a steam turbine generator set for the power plant. Under the terms of the purchase agreement, DIG was identified as the "owner," ABB as the "supplier," and "the contractor" was to be named "later." The agreement contains an arbitration clause allowing the contractor to compel the supplier to arbitrate any disputes arising from the purchase agreement. Specifically, the arbitration clause provides:

> GC.21 ARBITRATION. In the event that Contractor is required to participate in a dispute resolution procedure, including arbitration, with the Owner, which dispute arises out of or is directly related to this Contract, Supplier agrees to join in such dispute resolution proceeding as Contractor may direct and shall submit to such jurisdiction and be finally bound by the judgment rendered in accordance with the mediation or arbitration rules as may be established therein.

Shortly after the purchase agreement was signed, plaintiff was selected as general contractor for the project. On November 28, 1998, plaintiff and DIG entered into a "turnkey"

agreement detailing each other's obligations concerning the engineering, procurement, and construction of the project, including the installation of the steam turbine generator to be provided by ABB. The turnkey agreement also contained an arbitration clause.

In March 1999, CMS, DIG, ABB and plaintiff entered into a novation agreement (first novation agreement) whereby plaintiff assumed CMS's obligations under the original purchase agreement with ABB. In May 2000, defendant became ABB's successor in interest.

Eventually, disputes arose between plaintiff and DIG, and the project fell behind schedule. In March 2001, DIG assumed plaintiff's responsibilities for Phase II of the project—over plaintiff's protests—including responsibility for the installation of the steam turbine generator. On April 13, 2001, CMS, DIG, plaintiff, and defendant signed a second novation agreement whereby plaintiff assigned, and DIG assumed, all of plaintiff's rights and obligations under the purchase agreement, "with full reservation of rights except as modified by this [second] Novation." The second novation also formally substituted defendant for ABB as "supplier" for purposes of the purchase agreement.

The second novation explicitly released plaintiff "from any obligation or liability" under the purchase agreement, and further provided that the purchase agreement "shall be deemed to be solely between [defendant] and DIG *a*[*b*] *initio*." It also released defendant "from any obligation or liability" to plaintiff under the purchase agreement. CMS and DIG promised to indemnify plaintiff for all of defendant's "errors and omissions" relating to the purchase agreement.

In October 2001, plaintiff sued DIG, among others, in separate case (lower court docket number 01-135164-CH) alleging, inter alia, that DIG breached the turnkey agreement by taking over plaintiff's responsibilities. DIG filed a successful motion to compel plaintiff to arbitrate the turnkey agreement alleging, in pertinent part, that the second novation was invalid.[1]

Plaintiff then filed the complaint in this case seeking to enforce the arbitration clause contained in the original purchase agreement in order to compel defendant and another supplier, Aalborg Industries, Inc. (Aalborg), to participate in the arbitration matter that was then pending between DIG and plaintiff. The trial court determined that, due to the second novation "as between the present parties, that arbitration clause is non-existent and carries no weight." The trial court denied plaintiff's motion to compel arbitration and dismissed the case.

II. Third-Party Beneficiary

Plaintiff first argues that it may compel arbitration as a third-party beneficiary to the arbitration provision in the November 6, 1998, purchase agreement between DIG through its parent company, CMS Generation Company and ABB. We disagree. "The existence of an arbitration agreement and the enforceability of its terms are judicial questions" that are reviewed de novo. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). Similarly, whether

[1] This Court denied plaintiff's delayed application for leave to appeal that ruling in Docket No. 243945.

a party has standing is also a question of law to be reviewed de novo. *Crawford v Dept of Civil Service*, 466 Mich 250, 255; 645 NW2d 6 (2002).

The agreement in question evidences a transaction involving interstate commerce and, therefore, is governed by the Federal Arbitration Act ("FAA"). 9 USC 2; see also *Rembert v Ryan's Family Steakhouses, Inc*, 235 Mich App 118, 133-134; 596 NW2d 208 (1999). "To ascertain the arbitrability of an issue [under the FAA], a court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 496-497; 591 NW2d 364 (1998). Any doubts about the arbitrability of an issue should be resolved in favor of arbitration. *Id.* at 497, 499-500. In other words, there is a presumption of arbitrability "'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Amtower v William Roney & Co*, 232 Mich App 226, 235; 590 NW2d 580 (1998), quoting *A T & T Technologies, Inc v Communications Workers of America*, 476 US 643, 650; 106 S Ct 1415; 89 L Ed 2d 648 (1986).

"'[O]nce it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.'" *Amtower*, *supra* at 232, quoting *John Wiley & Sons, Inc v Livingston*, 376 US 543, 557-558; 84 S Ct 909; 11 L Ed 2d 898 (1964). Thus, questions such as contractual time periods and other procedural issues are for the arbitrator to decide unless the parties' contract clearly specifies otherwise. *Amtower*, *supra* at 232-234, 237-238.

In this case, DIG made a demand for arbitration against plaintiff under a separate turnkey agreement. The demand alleges numerous breaches of the turnkey agreement (e.g., delays and defective or incomplete performance). The demand also alleges that a subsequent novation involving defendant was fraudulently or negligently procured, that plaintiff engaged in a conspiracy in restraint of trade, that plaintiff interfered with DIG's efforts to contract directly with defendant, and withheld drawings, specifications and calculations required for the project. Further, the demand alleges that the first novation involving defendant is unconscionable and, therefore, void.

Because the novation specifically relates to the purchase agreements, the breaches alleged in DIG's arbitration demand "arise[] out of or [are] directly related to" the original purchase agreement. Therefore, the first paragraph of the arbitration clause contained in the purchase agreement applies to the pending arbitration proceeding against plaintiff.

But as to whether plaintiff may enforce the purchase agreement's arbitration provision as a third-party beneficiary, we look to the third-party beneficiary statute, MCL 600.1405, which provides that "[a]ny person for whose benefit a promise is made by way of contract . . . has the same right to enforce said promise that he would have had if the said promise had been made to him as the promisee." "If such person is not . . . ascertainable at the time the promise becomes legally binding . . . then his rights shall become vested the moment he . . . becomes ascertainable . . . ." MCL 600.1405(2)(b).

In this case, it is clear that the unnamed "contractor" referred to in the purchase agreement was intended to be a third-party beneficiary of the arbitration provision in that

agreement, and, therefore, would have the right to compel arbitration. Under the third-party beneficiary statute, plaintiff's rights became vested when it became the contractor. Plaintiff subsequently signed a novation, however, which explicitly provides that the purchase agreement "shall be deemed to be solely between [defendant] and DIG *a*[*b*] *initio*." This second novation clearly terminated plaintiff's status as the "contractor" *ab initio*, i.e., "from the beginning," *Random House Webster's College Dictionary* (2d ed), p 3, i.e., as though plaintiff had never been the "contractor."

The reservation of rights in the second novation provides that rights "modified by" the second novation are *not* preserved. Because plaintiff's status as "contractor" was clearly one of the rights "modified by" the second novation, plaintiff cannot now assert third-party beneficiary rights based upon its former "contractor" status. Accordingly, the trial court correctly found that plaintiff could not compel arbitration as a third-party beneficiary under the purchase agreement.

III. Obligation to Defend and Indemnify

Plaintiff additionally argues that defendant had an obligation to participate in the pending arbitration matter brought by DIG as part of its obligation to defend and indemnify plaintiff. We disagree. The interpretation of a contract provision is a question of law to be reviewed de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

The second novation states in pertinent part:

> For the purposes of Article GC.29 and 30 of the [purchase agreement], Indemnification, CMS, [plaintiff] and DIG shall be considered indemnified parties. [Defendant] shall continue to name [plaintiff] as an additional insured on all insurance policies referenced in Article GC 282 as though [plaintiff] were the "Contractor" referenced in said Article. . . .

The purchase agreement states:

> GC.29 INDEMNIFICATION. To the fullest extent permitted by laws and regulations, the [defendant] shall defend, indemnify and hold harmless the Contractor . . . from and against all claims, damages, losses, and expenses . . . arising out of or resulting from any act, omission, error, fault or negligence of [defendant] . . . in, the furnishing of Work under this Contract and resulting in bodily injury, sickness, death, *injury or destruction of third-party tangible property*. The obligation of [defendant] to indemnify Contractor is conditioned on Contractor giving [defendant] reasonable notice of any loss, damage or claim, and providing [defendant] a full opportunity to participate in the defense and to approve any settlement thereof. It is the intent of the parties hereto that, where fault, acts or omissions are determined to be contributory, principles of comparative negligence will be followed and each party shall bear the proportionate cost of any loss, damage, expense and liability attributable to that party's negligence, acts or omissions. [Emphasis added.]

It is clear that the emphasized portion of the phrase "in, the furnishing of Work under this Contract and resulting in bodily injury, sickness, death, *injury or destruction of third-party*

tangible property" refers only to tangible property and does not include breach of contract claims such as those alleged by DIG in its arbitration demand. Thus, defendant's indemnity obligation under the second novation has not been triggered. The trial court properly found that the indemnity provision does not provide a basis to compel defendant to participate in the pending arbitration matter.

IV. Joinder

Plaintiff also argues that defendant was a necessary party to the arbitration matter and, therefore, should have been compelled to participate. We disagree. We review a trial court's decision whether 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 for the joinder of "persons 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 . . . ." However, the court rules apply only to pending actions in "courts." See MCR 1.103. Plaintiff has failed to cite any authority for the proposition that the joinder rule applies to arbitration proceedings or allows a court to compel a party to arbitrate. "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). Therefore, plaintiff has failed to show that the trial court abused its discretion in declining to order defendant to arbitrate on this basis. See also *Hetrick v Friedman*, 237 Mich App 264, 266-267; 602 NW2d 603 (1999), quoting *St Clair Prosecutor v AFSCME*, 425 Mich 204, 223; 388 NW2d 231 (1986) ("'a party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration . . . [and] a party cannot be required to arbitrate when it is not legally or factually a party to the agreement.'")

Plaintiff further argues that defendant should have been ordered to participate in the pending arbitration matter in order to ensure that it was bound by the arbitration award. Because plaintiff does not cite any authority in support of the proposition that, absent an enforceable agreement to arbitrate, a court may compel a party to arbitrate for the express purpose of insuring that it is bound by the arbitration award, this issue has been abandoned. *Joerger*, *supra* at 178; see also *Hetrick*, *supra*.

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly