

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF LABOR & ECONOMIC
GROWTH,

UNPUBLISHED
August 19, 2008

Plaintiff/Counter-Defendant-
Appellee,

and

BERRY MOORMAN, P.C.,

Intervening Plaintiff-Appellee,

v

NORTH STAR HOME LENDING, LLC,

Defendant/Counter-Plaintiff-
Appellant.

No. 277110
Ingham Circuit Court
LC No. 06-001072-CZ

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

PER CURIAM.

In this action to enforce an order of the Department of Labor & Economic Growth (the Department),¹ defendant North Star Home Lending, LLC (North Star) appeals as of right the trial court's January 2007 order granting plaintiff Berry Moorman, PC's (Moorman) motion for summary disposition and dismissing North Star's counterclaim, and granting judgment for plaintiffs. On appeal, North Star contends that the trial court abused its discretion when it refused to stay this case pending resolution of an action to arbitrate an employment contract dispute between North Star and a former employee, Matthew J. Newton. North Star also argues that the trial court erred when it permitted Moorman to intervene. Because we conclude that the trial court properly determined that the Department's suit to enforce its order was not subject to arbitration and did not err when it permitted Moorman to intervene, we affirm.

¹ See MCL 408.489.

I. Basic Facts And Procedural History

A. Newton's Employment

In January 2003, Newton entered into an employment agreement with North Star. Under the terms of the agreement, Newton would serve as North Star's president and North Star would pay Newton a base salary and other compensation. If Newton worked for a full year, North Star agreed to pay him a bonus of \$80,000. In addition to other terms and conditions, the parties agreed to submit any disputes "concerning any of the provisions" of the employment agreement to binding arbitration. Newton worked for North Star from January 2003 through April 2004.

B. Administrative Proceedings

After Newton stopped working for North Star, he filed a complaint with the Department alleging that North Star had failed to pay \$60,000 of the bonus owed to him for working one full year.² Moorman represented Newton throughout the proceedings.

In September 2004, the Department issued a determination order holding North Star liable to Newton for the remaining \$60,000 of the bonus, plus interest.

North Star then requested a review of the determination order. The administrative law judge (ALJ) assigned to the case held a hearing in April 2005. The ALJ issued its decision in June 2005. In its decision, the ALJ found that Newton had earned the \$80,000 bonus by working a full year. The ALJ also found that Newton resigned after discussing possible changes to his position.

Following Mr. Newton's resignation, North Star uncovered what it believed to be significant and compelling evidence of fraud, misappropriation, self-dealing and more by Mr. Newton, most of which would have occurred during the term of his employment. North Star's representatives genuinely believe that Mr. Newton is not entitled to the \$60,000.00 bonus money. There has been no litigation between the parties resulting in any judgment with respect to any claims under the Employment Agreement.

Nevertheless, the ALJ determined that North Star could not set-off any debts owed it against the bonus:

Nothing in the Employment Agreement authorizes North Star to avoid paying the bonus. North Star's argument that Mr. Newton's breach of the employment agreement gives them cause to void or change its terms is without merit. An employment contract is an enforceable bi-lateral legal document. One party to the

² See MCL 408.481(1) (permitting an employee who believes that his or her employer has violated the Wages and Fringe benefits Act, MCL 408.471 *et seq.*, to file a complaint with the Department).

contract can't unilaterally declare a breach and then select . . . its own remedy
....

The ALJ also refused to consider North Star's argument based in equity because equitable relief could only be had in a court of general jurisdiction. For these reasons, the ALJ upheld the Department's determination: "While North Star has made a series of factual allegations against Mr. Newton, this Administrative Law Judge gives no weight to the allegations because they are irrelevant to this determination."

North Star sought review of the ALJ's decision with the Oakland Circuit Court, which affirmed the decision. North Star then sought leave to appeal with this Court, but this Court denied leave.³

C. Arbitration Proceedings

In December 2005, North Star sent Newton a demand for arbitration. Moorman continued to represent Newton during the arbitration proceedings. North Star filed an amended demand for arbitration in August 2006.

Following a three-day hearing, the arbitrator determined that North Star owed Newton the remaining \$60,000 of his bonus, but also found that Newton owed North Star \$162,250 for breaching his duties. The arbitrator ultimately issued an award for \$102,250 in favor of North Star in June 2007.

D. These Proceedings

In August 2006, the Department sued North Star to enforce its determination order.⁴

On October 4, 2006, Moorman moved to intervene, stating that Newton owed it over \$50,000 in costs and attorney's fees in connection with its representation of Newton in the administrative proceedings. Moorman argued that it had an attorney's lien on any judgment resulting from its services, and that that lien took precedence over any offset. Moorman attached a security interest as an exhibit to its motion. In an October 11, 2006 stipulation and order, the trial court found:

Berry Moorman P.C. has sufficient interest in the outcome of the action, both as a party holding an attorney's charging lien against any proceeds of this action, and also as assignee of the rights and interests of Matthew Newton in this suit; that its presence in this action will promote the convenient administration of justice and

³ *North Star Home Lending, LLC v Newton*, unpublished order of the Court of Appeals, entered May 5, 2006 (Docket No. 268331).

⁴ See MCL 408.489 (requiring the director of labor to initiate the civil action necessary to enforce an order of the department "which has become a final agency order as prescribed in this act").

allow Berry Moorman P.C. to enforce its rights against any proceeds awarded to the plaintiff for Matthew Newton's benefit.

The Department and Moorman stipulated to entry of the order.

In its answer, filed October 13, 2006, North Star asserted as an affirmative defense that the trial court lacked both subject matter and personal jurisdiction. North Star also asserted counterclaims alleging that Newton breached the contract, breached his fiduciary duties, and committed fraud.

In November 2006, Moorman moved for summary disposition under MCR 2.116(C)(9) and (C)(10). Moorman argued that the administrative determination had been appealed through the courts and was a final order. Moorman also argued that North Star's arguments had previously been rejected by the courts and were intended only to delay the proceedings. For this reason, Moorman further argued that plaintiffs were entitled to costs and attorneys' fees.

North Star filed a motion to stay the case pending arbitration and a brief in opposition to plaintiff's motion for summary disposition in December 2006. After oral arguments on the motion to stay, the trial court stated that "this is not a proceeding involving an issue subject to arbitration. This is an action to enforce an administrative finding that has gone through all the channels here." The trial court explained:

I can't state enough that I see this as an enforcement action of that and nothing more. The claim that Matthew Newton breached the employment contract first, therefore, the Defendant isn't required to pay the bonus, to me, this argument is not relevant in this proceeding because this proceeding is an enforcement action based on the administrative finding that was upheld on appeal.

The trial court then determined that Moorman's motion for summary disposition should be granted, and issued an order granting Moorman's motion for summary disposition and entering judgment for the Department against North Star for \$60,000 plus interest. The trial court also dismissed North Star's counterclaim, denied North Star's motion for a stay, and recognized Moorman's charging lien.

II. North Star's Motion For Stay

A. Standard Of Review

North Star first argues that the trial court erred in refusing to grant its motion to stay the proceedings pending arbitration. A trial court must stay an action or proceeding involving an issue that is subject to a valid and enforceable arbitration agreement on the motion of a party.⁵ However, whether an issue is subject to a valid and enforceable arbitration agreement is a

⁵ MCR 3.602(C).

question of law for the courts.⁶ And we review de novo a trial court's determination that an issue is subject to arbitration.⁷

B. Issues Subject To Arbitration

A trial court must stay an action or proceeding involving an issue that is subject to arbitration.⁸ However, whether an action or proceeding involves an issue that is subject to arbitration depends on the terms of the arbitration agreement.⁹ In the present case, North Star and Newton agreed to submit a dispute “concerning any of the provisions” of their employment agreement to binding arbitration. Newton's complaint to the Department clearly encompassed a dispute about a provision of the employment agreement: namely, the bonus for serving a full year. However, North Star did not assert its right to arbitration of that issue during the administrative proceedings. Instead, it elected to participate in the administrative proceeding and allowed the Department's order to become final.

Once an order of the Department becomes final, the Department's director is required to initiate a civil action to enforce the order, which it did with this case.¹⁰ Hence, the only issue involved in this case was whether there was a final order of the Department. And that issue is plainly not an issue subject to the arbitration clause of the agreement between North Star and Newton. Therefore, North Star was not entitled to a stay of the action on that issue. Further, although North Star asserted several counterclaims generally derived from Newton's performance under the employment agreement, North Star did not join Newton in the lawsuit. Thus, as between the parties to the present action, there were *no* issues that were subject to arbitration. Accordingly, the trial court properly refused to stay the proceedings.

III. Motion To Intervene

A. Standard Of Review

North Star argues that the trial court erred in granting Moorman's motion to intervene. We review a trial court's decision to permit a party to intervene for an abuse of discretion.¹¹

B. Intervention Under MCR 2.209

Under MCR 2.209(A)(3), an applicant may intervene as of right “when the applicant claims an interest relating to the property or transaction which is the subject of the action”

⁶ *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000).

⁷ *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 152; 742 NW2d 409 (2007).

⁸ MCR 3.602(C).

⁹ *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004).

¹⁰ MCL 408.489.

¹¹ *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001).

In this case, Moorman intervened on the basis of an attorney's charging lien against the Department's final order and an assignment by Newton. Hence, Moorman clearly had an interest in the "property or transaction" that was the subject of the Department's enforcement action. Nevertheless, North Star argues that, because Moorman did not attach a pleading to its motion to intervene,¹² the trial court abused its discretion in granting the motion. However, this Court has stated that it will not "indulge in an overly technical reading of [MCR 2.209] where the interest of justice would not be served."¹³ The proper inquiry is whether the motion was sufficient to inform the other party of the intervening person's claims.¹⁴ Here, Moorman asserted in its motion to intervene that it had a charging lien on the proceeds of the Department's award to Newton and attached an assignment of the award by Newton. Hence, Moorman's motion sufficiently informed North Star of Moorman's claims.

C. Notice Of Intervention

North Star also argues that it did not receive proper notice of the intervention and was not given an opportunity to be heard. In fact, the record shows that North Star was not served with the motion or its hearing date. An intervention is done by motion, and notice must be given to each party under MCR 2.107.¹⁵ MCR 2.107 requires that "every party who has filed a pleading, an appearance, or a motion must be served with a copy of every paper later filed in the action." However, Moorman moved to intervene before North Star answered the Department's complaint. Hence, at all relevant times, North Star was not a party that had filed "a pleading, an appearance, or a motion." Consequently, Moorman was not required to serve North Star under the court rules.

Affirmed.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Elizabeth Gleicher

¹² See MCR 2.209(C)(2).

¹³ *SCD Chem Distributors, Inc v Maintenance Research Laboratory, Inc*, 191 Mich App 43, 45; 477 NW2d 434 (1991).

¹⁴ *Id.*

¹⁵ MCR 2.209(C).