STATE OF MICHIGAN

COURT OF APPEALS

NORTH POINT-PIONEER, INC., PHC, INC., and PHC OF MICHIGAN, INC., Plaintiffs-Appellants, v LEON RUBENFAER, Defendant-Appellee.	UNPUBLISHED September 30, 2008 No. 279840 Oakland Circuit Court LC No. 2007-082250-CL

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting summary disposition to defendant pursuant to MCR 2.116(C)(8) and (10) in this action brought to vacate an arbitration award. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 2004, plaintiff North Point-Pioneer brought an action against defendant alleging that defendant breached his contractual duties for indemnification under agreements governing the sale of mental health practices. Ultimately, the parties stipulated to dismiss the action and submit their dispute to arbitration. The stipulation provided in pertinent part:

> h. The Circuit Court shall retain jurisdiction of this matter until the completion of the arbitration, for the purpose of issuing subpoenas, compelling the attendance of witnesses and/or production of documents, and for the entry of judgment and enforcement of any decision or award rendered by the Arbitrator.
>
> * * *
>
> j. The parties agree that the Court shall dismiss the Lawsuit, including any appeals, with prejudice and without costs and/or attorney fees as to any party, subject to the Court's retention of jurisdiction as set forth in Paragraph 1h, above.

The arbitrator rendered an award that found no liability on the part of defendant, while rejecting his counterclaim for attorney fees.

Plaintiffs filed a new action to vacate the arbitration award against defendant, and defendant moved for summary disposition of that action. Defendant argued that under MCR 3.602(B)(1), because there was a "pending action," an application to vacate an arbitration award must be made by motion, not by filing a new complaint as plaintiffs did in this case. In response, plaintiffs argued that filing a new action was proper because the 2004 action was not "pending," inasmuch as it had been dismissed with prejudice.

Meanwhile, in the 2004 case, defendant moved to lift the stay and enter judgment on the arbitration award. Following a hearing, the court entered the judgment. Soon thereafter, the court granted defendant's motion for summary disposition in this case, agreeing with defendant that plaintiffs' challenges to the arbitration award should have been raised in an appropriate motion in the 2004 case.

On appeal, plaintiffs argue that this action was properly filed pursuant to MCR 3.602(B)(1), because the 2004 case had been dismissed with prejudice and, accordingly, there was no "pending action" between the parties.

The version of MCR 3.602 in effect at the time the arbitration award was issued[1] stated:

> In a pending action an application to the court for an order under this rule must be made by motion, which shall be heard in the manner and on the notice provided by these rules for motions. An initial application for an order under this rule, other than in a pending action, must be made by filing a complaint as in other civil actions.

The interpretation and application of a court rule is a question of law, which we review de novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123–124; 693 NW2d 374 (2005). This issue arises in the context of an appeal from an order granting summary disposition, and we review a trial court's decision on a motion for summary disposition de novo. *Id*. at 123.

The stipulation in the 2004 case shows the parties' agreement with respect to the action that the court would take in the future concerning dismissal with prejudice. Again, the stipulation stated in pertinent part, "The parties agree that the Court shall dismiss the Lawsuit, including any appeals, with prejudice and without costs and/or attorney fees as to any party, *subject to the Court's retention of jurisdiction as set forth . . . above*."

In light of this stipulation, we conclude that the 2004 action was "pending" because it specified that the court would retain jurisdiction to enter judgment on the award. In *Grievance Administrator v Fieger*, 476 Mich 231, 249; 719 NW2d 123 (2006), our Supreme Court referred to the following definition of "pending" from Black's Law Dictionary (6th ed):

---

[1] The rule was amended effective January 1, 2008.

> Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Awaiting an occurrence or conclusion of action, period of continuance or indeterminancy. Thus, an action or suit is "pending" from its inception until the rendition of final judgment.

According to the terms of the stipulation, the 2004 action was "pending" at the time this case was filed because the parties were awaiting the award and entry of judgment in the 2004 action and the enforcement of any decision or award by the arbitrator. Summary disposition of this case was appropriate.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher