STATE OF MICHIGAN

COURT OF APPEALS

TERRY CASH,

Plaintiff-Appellant,

v

D & J SPARTAN TIRE INC. and DANIEL W. CLARK,

Defendants-Appellees.

UNPUBLISHED
October 16, 2008

No. 278174
Oakland Circuit Court
LC No. 2006-079448-CL

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

Plaintiff's sole contention on appeal is that the trial court erred in finding that the fee-splitting clause in the arbitration provision contained in defendants' employee manual is enforceable. We disagree.

MCR 2.116(C)(7) allows for summary disposition when the claim is barred because of an agreement to arbitrate. This Court reviews de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(7). *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). In reviewing a motion under MCR 2.116(C)(7), this Court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. *Id.*

Plaintiff was employed with defendant D & J Spartan Tire Inc., the owner and president of which was defendant Daniel W. Clark. The employee manual promulgated by defendants contained an arbitration provision providing that, by accepting or continuing employment with defendants, the employee automatically agreed that arbitration is the exclusive remedy for all disputes arising out of or relating to the employee's employment with Spartan Tire. The arbitration provision also contained a clause providing that, "[t]he cost of the arbitrator and court reporter, if any, shall be shared equally by the parties." Plaintiff does not challenge the portion of the arbitration provision providing that arbitration is the exclusive remedy for all work-related disputes. Instead, plaintiff only challenges the fee-splitting clause and does so on the basis that the fee-splitting provision will effectively prevent him and others similarly situated from pursuing their claims because they cannot afford to pay an arbitrator's fees. It is plaintiff's

position that this "prohibitive cost" defense renders the fee-splitting provision unenforceable, citing *Cole v Burns Int'l Security Serv*, 105 F3d 1465 (CA DC, 1997), for such a proposition. For the reasons stated below, plaintiff's argument is unpersuasive.

We first note that we find plaintiff's reliance on *Cole* unavailing. Concerned that fee-splitting provisions would deter financially strapped employees from pursuing their claims, the *Cole* court held that "where arbitration has been imposed by the employer and occurs only at the option of the employer – arbitrators' fees should be borne solely by the employer." *Cole, supra* at 1485. Although *Cole* provides analysis on the propriety of arbitration fee-splitting provisions in employment contracts, *Rembert v Ryan's Family Steak House, Inc*, 235 Mich App 118; 596 NW2d 208 (1999), which considered *Cole*, is the controlling case on fee-splitting provisions in Michigan. *Cole* is a federal court of appeals case from the District of Columbia Circuit, and federal case law is not binding precedent in this Court. *Sharp v City of Lansing*, 464 Mich 792, 803; 629 NW2d 873 (2001). Although this Court is entitled to find *Cole's* authority persuasive, and plaintiff urges this Court to do just that, the existence of *Rembert* as controlling authority obviates the need to look elsewhere for guidance.[1] We thus need to look to *Rembert* to resolve the issue at hand.

In *Rembert*, a conflict panel of this Court explained that agreements to arbitrate were valid so long as no statutory rights or remedies were waived, and so long as the arbitration procedure was fair. *Id.* at 123. Plaintiff does not argue, nor is there any evidence to suggest, that the arbitration agreement waived any rights or remedies accorded by the statute under which plaintiff brought his claims. Regarding fairness of the arbitration procedure, *Rembert* held that "[u]nlike the court in *Cole*, we will not include, among the fairness requirements, a rule that the employer must pay the fees of the arbitrator and arbitration service." *Id.* at 162 (citation omitted). Accordingly, *Rembert* held that an employer is not required to pay the entire arbitration fee in order for the arbitration agreement to be upheld. *Rembert's* silence on the prohibitive cost defense implicitly establishes that an employee's inability to pay an arbitrator's fees does not render the fee-splitting provision unenforceable. Indeed, as *Rembert* acknowledges, there are mechanisms in place, such as MCR 3.602 and statutory fee provisions, which allow someone in plaintiff's position to seek to shift the arbitration costs to the employer. *Id*. This reality makes it less likely that plaintiff, or others similarly situated, would be deterred by financial concerns from pursuing their claims.

Plaintiff contends that *Rembert's* holding should not be applied to the instant case because *Rembert* involved an individually negotiated employment contract, while the case at hand involves an employee manual, the provisions of which the employee agreed to by merely starting or continuing employment. For several reasons we reject plaintiff's argument. First, it is not clear that the employee in *Rembert* actually had the opportunity to negotiate his employment contract. The case simply provides that he signed an arbitration agreement at the time of hire.

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[1] We further note that *Cole* involved an employee's statutory federal civil rights, *Cole, supra* at 1467, and thus, appears to be applicable solely when statutory federal civil rights are at stake. Here, none of plaintiff's claims are federal, and only one of six is statutory. Accordingly, even if *Cole* was binding authority, plaintiff cannot avail himself of *Cole's* prohibitive cost defense.

Rembert, supra at 125. It is therefore mere speculation to suggest that the employee in *Rembert* had more bargaining leverage than plaintiff did in the case at hand. Second, even if it were found that plaintiff had less bargaining leverage than the plaintiff in *Rembert*, that in itself would not be sufficient to render *Rembert* inapplicable to this case because plaintiff cannot show that the agreement to split fees is an unenforceable agreement of adhesion. If the prospective employee would be able to obtain work elsewhere, the contract is not one of adhesion because the applicant has a meaningful choice in accepting the offer of employment. *Id*. at 157 n 28. Plaintiff has presented no evidence that he had no meaningful choice to obtain employment elsewhere at the time he was hired by Spartan Tire. Plaintiff further failed to present authority for the proposition that an arbitration provision in an employee manual like the one at hand is unenforceable per se because it was not individually negotiated and employment was conditioned upon its acceptance. In light of *Rembert's* undistinguishable holding, the trial court did not err in ruling that the fee-splitting provision was enforceable and granting defendants' motion for summary disposition.

Finally, plaintiff's argument that upholding the trial court's decision will foreclose the arbitration process to him and others similarly situated has no factual underpinnings. Indeed, it appears that the opposite is true in this case, i.e., that the arbitrator's fee will only be paid at the conclusion of the hearing. The arbitrator's letter to the parties indicates as much, stating that the parties will not have to pay his fees until the proceedings are concluded.[2] In other words, although plaintiff's counsel made a forceful policy argument about the potential difficulties in enforcing an arbitration provision that essentially precludes an available forum to adjudicate statutory rights, we simply do not have such a case here. As the United States Supreme Court aptly noted under similar circumstances in *Green Tree Financial Corp v Randolph*, 531 US 79, 90-91; 121 S Ct 513; 148 L Ed 2d 373 (2000):

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, "we lack . . . information about how claimants fare under Green Tree's arbitration clause." [*Randolph v Green Tree Financial Corp*,] 178 F3d [1149,] 1158 [(CA 11, 1999)]. The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement. [Footnote omitted.]

Again, there is nothing in the record showing that plaintiff will be prevented from proceeding through arbitration because of the arbitrator's fees or costs.

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[2] The arbitrator's letter provides that "[t]he fees will be split equally by the parties, unless the parties have a contrary agreement or unless I determine a different allocation as part of the final award."

Additionally, the fact that the arbitration process was already under way also suggests that the cost of arbitration would not preclude plaintiff from accessing a forum. Therefore, even if we were to adopt plaintiff's alternative argument, i.e, the approach applied in *Green Tree Financial Corp* and *Morrison v Circuit City Stores, Inc*, 317 F3d 646, 663 (CA 6, 2003),[3] we would still hold that the provision at hand was enforceable because plaintiff has failed to establish that he would be denied access to a forum.

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray

[3] *Green Tree* and *Morrison* held that fee-splitting provisions are not unenforceable per se, but are unenforceable only if potential litigants can show that the potential costs of arbitration would deprive the litigant and/or similarly situated individuals of access to a forum. However, these cases, like *Cole*, involved employees' statutory federal civil rights under the United States Arbitration Act. *Green Tree, supra* at 89-90; *Morrison, supra* at 663. Thus, like *Cole*, it is likely that neither case trumps *Rembert*, nor is applicable to the case at bar.