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UNPUBLISHED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

FORT HOOD, J. (*concurring*).

Although I agree with the general proposition that a fee splitting provision may prevent a plaintiff from obtaining redress, plaintiff failed to demonstrate that the provision at issue precluded him from pursuing his claims. Consequently, I agree that summary disposition was proper in favor of defendants.

Initially, the arbitrator sent a letter to the parties' attorneys advising that he charged an hourly rate of $250 per hour, including time for preparation and study. The arbitrator concluded that the fee would be split equally "unless the parties have a contrary agreement or unless I determine a different allocation as part of the final award."

Defendants submitted a motion for declaration of rights to address the fee splitting ruling to the arbitrator. After reviewing the motion and response by plaintiff, the arbitrator ruled as follows:

> When I was first selected to serve in this matter, I was advised by counsel for the parties that they were in the process of attempting to reach agreement on a comprehensive arbitration agreement. (See, my letter to counsel dated May 31, 2006, p.2). I subsequently reminded the parties that I had not received a copy of the arbitration agreement, and that I needed a copy as soon as possible since such agreement "is the only source of my authority to arbitrate this matter." (See, my letter to counsel dated September 14, 2006, p.1). Through Respondent's [Defendants'] Motion for Declaration of Rights dated October 20, 2006, I was advised that the parties have been unable to agree on one significant aspect of the arbitration agreement: the responsibility for paying the costs of the arbitration. Respondent relies upon Michigan law in asserting that the costs should be split

equally. Rembert v. Ryan's Family Steak Houses, 235 Mich. App. 118 (1999), lv. denied, 461 Mich 927 (1999). Claimant [Plaintiff] relies upon Federal law in asserting that the employer should bear those costs. Cole v. Burns International Security Services, 105 F.3d 1465 (DC Cir. 1997).

In their Motions, the parties have discussed and attached various draft Arbitration Agreements. However, it appears that such draft Agreements have never been finalized and signed. Respondent relies upon the terms of its Employee Manual, which indicates that the costs of the arbitration are to be split equally by the parties. However, Claimant asserts that such clause is unenforceable. As the Arbitrator in this matter, my authority is defined and limited by the agreement of the parties. Without such agreement, I have no authority to proceed. Since the parties' dispute goes to the terms and conditions of the arbitration agreement itself, that issue must be resolved by a Court rather than by me. That is especially true in the present case where the dispute involves how I am to be compensated for my services.

I could arguably continue with the arbitration proceedings under the terms set forth in the Employee Handbook. However, that would not be prudent in light of Claimant's articulated objection to those terms and the resulting uncertainty. Therefore, I am hereby ordering a stay of the arbitration proceedings until the parties resolve their dispute about the terms of the arbitration in Court or through mutual agreement. Further, since I am not ruling on the merits of that dispute, it is not appropriate for me to rule on Respondent's request for attorneys' fees and costs.

Wherefore, all proceedings and scheduling order dates in this arbitration are hereby stayed pending resolution of this matter in Court. When a Court rules on this issue, I request that the parties provide me with a copy of the applicable Order and contact me or my secretary at the above number to schedule a management conference call to set new scheduling order dates.

On December 13, 2006, plaintiff filed a complaint in circuit court alleging age discrimination, wrongful discharge, and tortuous interference. Defendants filed a motion for summary disposition of the complaint, alleging that the arbitration agreement, and more importantly the fee splitting provision, was enforceable. Plaintiff opposed the motion, asserting that the pre-payment of arbitration fees excluded his participation in the proceeding and filed essentially an affidavit of indigency in support of his assertion. It was further asserted that there was a distinction between an individually negotiated employment contract as opposed to an employer promulgated provision, the situation involving plaintiff. However, it is important to note that plaintiff agreed that the case should be submitted to arbitration. Moreover, although it was factually asserted that the employer promulgated handbook was modified during the course of plaintiff's employment, plaintiff did not allege coercion or adhesion as a result of this mid-employment modification. The trial court heard oral arguments regarding the motion and contemplated whether an evidentiary hearing was necessary to determine plaintiff's ability to pay the arbitration fees. Ultimately, the court ruled as follows:

I believe I already said this at the beginning but nevertheless, the Court notes that defendant's motion does not seek only one thing, that being an order dismissing the case, but two, that being an order dismissing the case and an order declaring enforceable the cost splitting provision in the undisputed controlling document.

And again, how a Court can both declare something and dismiss it at the same time, furrows my eyebrows, we'll leave it at that.

The Court does note that the plaintiff's complaint does not include a prayer for the adjudication of the cost splitting provision. That dispute rears it's head only here in defendant's motion. Per MCR 2.002 sub d, as in dog; the plaintiff upon proof of indigency shall be entitled to a waiver of fees and costs in a regular lawsuit. If it is indeed true as plaintiff contends, that he is flat broke and cannot afford anything to pay to the arbitrator, which if a hearing was held I would question that, anything is a pretty broad word, and I question if that's true how he was even able to pay the complaint in this case, the filing fee for the complaint in this case, but nevertheless, if that is true, then if the Court adopts the defendant's [sic] reasoning here, plaintiff is barred from pursuing his claim right out of the gate. In other words, he does not even get an audience to profess his indigency. By accepting the defendant's [sic] reasoning without considering plaintiff's claims of indigency would by depravation of a forum for redress deprive him of a fair arbitral hearing as required under MCR 3.602 and Rembert, 235 Mich App 118, 1999; as well as other cases. Indeed it would deprive plaintiff of any arbitral hearing, fair or otherwise.

So for that reason the defendant's [sic] motion for summary disposition, C 7 is denied; however, counsel, perhaps in light of the Court's ruling, wants to take a couple of minutes and talk amongst themselves recognizing the Court's ruling and its repercussions, especially in light of the fact that counsel, you've indicated, sever that provision and order it to arbitration and your recognition that it does go to arbitration anyways. So don't let the tail wag the dog, that meaning this cost splitting provision.

I hope that that is enough guidance for the two of you to intelligently discuss the matter and recognize that even though I've denied the C 7, it's undisputed that the forum is not the circuit court. So discuss it and come back to me and let me know what you've decided.

The parties did not reappear before the circuit court in light of the ruling. Rather, defendants filed a motion for clarification of the court's ruling. After entertaining argument by the parties, the trial court ruled in favor of defendants as follows:

The matter is before the court on the Defendant's [sic] Motion for Clarification. The court does not find respectively that the attorneys were unable to enter an Order reflecting the court's 3/21/07 pronouncement. However, in the interest of the litigant, the court, nevertheless, entertains this Motion.

Court believes that this is a simple issue of what comes first, the chicken or the egg. The both parties believe the chicken comes first; to wit, a decision on the validity of the cost-splitting provision rather than the egg; to wit, a decision on Plaintiff's profession of indigency.

If the court was to rule that the cost-splitting provision was valid, and plaintiff was truly indigent and unable to pay for his share of the arbitrator fees and he professes, then plaintiff would be barred from any forum to prosecute his case. (Parenthetically, he could not prosecute his case here in court because he concedes his dispute has been diverted to arbitration. And he could not prosecute his case before an arbitrator because he could not pay his share of the arbitrator fees.) Such a consequence would foreclose a forum to seek redress.

If the cost-splitting provision is enforceable and Plaintiff is truly indigent, the consequence again, without more, would be a denial of access to a forum for possible redress for allegedly agreed persons solely due to their state of indigency.

Therefore, this court previously determined the fee-splitting provision question is secondary to the question of Plaintiff's alleged indigency.

And therefore, on 3/21/07, the court invited counsel to discuss the matter of litigating the question of plaintiff's financial condition first, and thereafter, depending on that determination, the second question of the validity of the cost-splitting provision.

On that date court passes on the matter and awaited counsel's return, but alas they left. Now, the defendant comes back to court and asks the court to answer the second question only and plaintiff joins in that request.

Plaintiff does not ask for the court to adjudicate his indigency, though his argument regarding the validity of the cost-splitting provision necessarily embodies that question.

So, the court will do what the parties request and will not do what they don't seek. Hence, the court rules on the issue of the cost-splitting provision. Nothing, more nothing less.

The court adopts the reasons by Defendant [sic] in total and finds that the cost-splitting provision is valid for the reasons, again stated and written by the defendant.

Notwithstanding, the Plaintiff characterizes, I guess, as an incidental claim of the indigency of her client and the consequences notwithstanding.

In *Rembert v Ryan's Steak Houses, Inc*, 235 Mich App 118, 160-162; 596 NW2d 208 (1999), this Court concluded that arbitration of discrimination claims is permissible, and MCR 3.602 imposes fairness related requirements. The court rule requires clear notice to the employee of the waiver of a judicial forum, the right to representation, a neutral arbitrator, reasonable

discovery, and a fair arbitral hearing. *Id*. However, this Court expressly rejected the conclusion that the fairness requirements include a rule that the employer must pay the fees of the arbitrator and the arbitrator service, see *Cole v Burns Int'l Security Services*, 323 US App DC 133; F3d 1465 (1997), the position advocated by plaintiff. In light of this Court's express rejection of the *Cole* decision in *Rembert, supra*, plaintiff's position must be rejected.

However, the *Rembert* Court seemingly rejected the employer fee provision in the fairness requirements because "as a practical matter, claimants will have the opportunity to shift these fees to the employer." This Court held that claimants have the opportunity to shift fees because MCR 3.602(M) provides:

> The costs of the proceedings may be taxed as in civil actions, and, if provision for the fees and expenses of the arbitrator has not been made in the award, the court may allow compensation for the arbitrator's services as it deems just. The arbitrator's compensation is a taxable cost in the action.

In the present case, plaintiff ignores the language of *Rembert* and does not argue that the possibility of fee shifting after the arbitration decision is rendered constitutes a violation of due process of law because it prevents litigants from participating in arbitration in the first place. Plaintiff did not request that the trial court conduct an evidentiary hearing to determine whether plaintiff was financially precluded from pursuing arbitration. Moreover, plaintiff did not request that the circuit court enforce the arbitration with some form of accommodation, such as contemplation of a modified fee splitting agreement until the arbitration decision was rendered.

Rather, plaintiff submits that this panel should follow the decision of *Green Tree Financial Corp v Randolph*, 531 US 79; 121 S Ct 513; 148 L Ed 2d 373 (2000). However, the *Green Tree* Court denied Randolph, the respondent, relief from the arbitration process because the "risk" that she would be saddled with prohibitive costs was too speculative to justify invalidation of the arbitration agreement. *Id*. at 91. Similarly, in the present case, plaintiff accepts the arbitration agreement, but protests the fee splitting provision by arguing that it is cost prohibitive or a financial "burden." This blanket assertion does not remove plaintiff's claim from the tenets set forth in *Green Tree, supra*. In light of the fact that plaintiff failed to brief the question of whether *Rembert's* citation to after the fact fee splitting deprives a litigant of access to arbitration with a showing of cost prohibition (as opposed to a financial burden), I cannot conclude that the trial court erred in granting defendant's motion.

/s/ Karen M. Fort Hood