STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH PUTRUSS,

Plaintiff-Appellant,

v

MICHAEL O'HALLORAN, TERRANCE O'HALLORAN, SNYDER, KINNEY, BENNETT & KEATING, L.L.C., d/b/a SKBK SOTHEBYS INTERNATIONAL, EDWARD PETERSMARCK, and MICHAEL COTTER,

Defendants-Appellees.

UNPUBLISHED
October 15, 2009

No. 285430
Oakland Circuit Court
LC No. 2008-089877-CH

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants on the ground that plaintiff's claims are subject to an agreement to submit the claims to arbitration. We affirm.

I. Underlying Facts and Procedural History

This action arises from a land contract purchase agreement between plaintiff, as buyer, and defendants Michael O'Halloran and Terrance O'Halloran (collectively the "O'Halloran defendants"), as sellers, for the purchase of vacant property in Commerce Township. Defendant Snyder, Kinney, Bennett & Keating, L.L.C. ("SKBK"), is listed in the agreement as the real estate broker for the transaction. Defendants Edward Petersmarck and Michael Cotter are agents of SKBK.[1] The agreement contains an arbitration clause providing that "any controversy or claim aris[ing] out of or relating to this Agreement, or breach thereof, . . . shall be settled by arbitration as a statutory arbitration under Michigan statutes according to the rules of American Arbitration Association." The clause further provides that "[b]oth Buyer and Seller agree that any controversy involving Brokers shall also be required to be arbitrated as above so no separate

[1] Defendants SKBK, Edward Petersmarck, and Michael Cotter are collectively referred to as the "broker defendants" in this opinion.

actions are created." The land contract agreement also contains a separate "hold-harmless" provision providing that the property was being purchased in "AS IS CONDITION" and releasing "any and all claims or causes of action against both the Listing and Selling Brokers, their officers, directors, employees and Independent Sales Associates." Plaintiff paid a $15,000 earnest money deposit, to be held in escrow by SKBK until closing.

Plaintiff subsequently determined that the property was not "buildable" as represented in an addendum to the land contract agreement. He announced his intent to terminate the agreement and requested a return of his earnest money deposit before the expiration of the permitted due diligence period. The O'Halloran defendants, through their respective trusts, subsequently filed a demand for arbitration and asserted that plaintiff was not entitled to the return of his earnest money deposit. Plaintiff attempted to join the O'Halloran defendants, in their individual capacities, and the broker defendants in the arbitration proceeding. The arbitrator concluded that it was unnecessary to join the individual O'Halloran defendants, because the evidence was likely to establish that they signed the land contract agreement as representatives of their respective sub-trusts,[2] and therefore plaintiff would have a full remedy if he prevailed in the arbitration. The arbitrator joined SKBK for the limited purpose of determining the disposition of the earnest money deposit.

Plaintiff thereafter filed this action in trial court, alleging claims for breach of contract against the O'Halloran defendants, fraud and misrepresentation against all defendants, violation of the Michigan Consumer Protection Act against all defendants, and breach of fiduciary duty against the broker defendants. Defendants moved for summary disposition on the ground that plaintiff's claims are subject to arbitration pursuant to the land purchase agreement. The trial court agreed and granted defendants' motions.

II. Summary Disposition

A. Standard of Review

A trial court's decision to grant a motion for summary disposition pursuant to MCR 2.116(C)(7) on the ground that a plaintiff's claim is barred by an arbitration agreement is reviewed de novo to determine whether the moving party was entitled to judgment as a matter of law. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). A trial court's determination that an issue is subject to arbitration is also reviewed de novo. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 152; 742 NW2d 409 (2007).

B. The O'Halloran Defendants

[2] The O'Halloran defendants were not the title owners of the property. Their father, Edward O'Halloran, had devised the property to his trust, which conveyed equal shares of the property to two sub-trusts: the sub-trust FBO Michael O'Halloran and the sub-trust FBO Terrence O'Halloran. The O'Halloran defendants are the trustees of their respective sub-trusts.

Michigan public policy favors arbitration to resolve disputes. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 127-128; 596 NW2d 208 (1999). "To ascertain the arbitrability of an issue, [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." *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004) (citation omitted). A court should resolve all conflicts in favor of arbitration. *Id.* at 306.

Plaintiff does not dispute that the land contract agreement between him and the O'Halloran defendants clearly and unambiguously provides for arbitration of all disputes arising from the land contract agreement. He argues, however, that his action against the individual O'Halloran defendants is not subject to mandatory arbitration because the O'Halloran defendants are not parties to the previously filed arbitration proceeding. We disagree. Regardless of whether the individual O'Halloran defendants are parties to the previously filed arbitration proceeding, the plain and unambiguous language of the arbitration provision in the land contract agreement, to which the individual O'Halloran defendants are parties, comprehensively provides that "any controversy or claim aris[ing] out of or relating to this Agreement . . . shall be settled by arbitration. Plaintiff does not dispute that each of his claims arises out of or relates to the land contract agreement. Therefore, plaintiff's claims are subject to the arbitration provision.

Although plaintiff complains that the arbitrator refused to join the individual O'Halloran defendants as parties to the arbitration proceeding that was filed by the respective O'Halloran trusts, the arbitrator did not determine that the O'Halloran defendants are not subject to the arbitration clause, but rather determined that the individual O'Halloran defendants are not necessary parties to the arbitration proceeding brought by the trusts.

We also reject plaintiff's argument that MCL 600.5005 prohibits arbitration of his claims. The proper application of a statute is a question of law that is reviewed de novo on appeal. *Crystal Lake Prop Rights Ass'n v Benzie Co*, 280 Mich App 603, 608; 760 NW2d 802 (2008).

MCL 600.5005 provides:

> A submission to arbitration shall not be made respecting the claim of any person to any estate, in fee, or for life, in real estate, except as provided in Act No. 59 of the Public Acts of 1978, as amended, being sections 559.101 to 559.272 of the Michigan Compiled Laws. However, a claim to an interest for a term of years, or for 1 year or less, in real estate, and controversies respecting the partition of lands between joint tenants or tenants in common, concerning the boundaries of lands, or concerning the admeasurement of dower, may be submitted to arbitration.

This statute prohibits arbitration of claims involving certain interests in land. Here, plaintiff's complaint did not assert any interest in the subject property, but rather sought the return of his earnest money deposit and recovery of other money damages for expenses incurred in the matter. Thus, MCL 600.5005 is not applicable to plaintiff's claims.

Plaintiff also argues that the trial court should have ordered the O'Halloran defendants to submit to arbitration instead of simply granting their motion for summary disposition. A circuit

court "may" compel arbitration if a party refuses to arbitrate despite an agreement to do so. MCR 3.602(B)(2); *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 591; 637 NW2d 526 (2001). The word "may" designates discretionary rather than mandatory action. *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003). Thus, "the word 'may' is not to be treated as a word of command." *Mill Creek Coalition v South Branch of Mill Creek Intercounty Drain Dist*, 210 Mich App 559, 565; 534 NW2d 168 (1995). In this case, plaintiff did not request an order compelling arbitration in either his complaint or his response to the O'Halloran defendants' motion for summary disposition. Because an order compelling arbitration is discretionary and plaintiff did not request such relief, the trial court did not abuse its discretion by failing to compel the O'Halloran defendants to submit to arbitration.

C. The Broker Defendants

Plaintiff argues that the trial court erred in granting summary disposition for the broker defendants on the ground that his claims against these defendants are subject to arbitration, because the broker defendants are not parties to the land contract agreement. In *Rooyakker*, *supra* at 163, this Court held that an arbitration clause containing the broad language, "any dispute or controversy arising out of or relating to [the contract containing the arbitration clause]" applied to the plaintiff's claim against a defendant who was not a party to the contract. The Court held that the clause vested the arbitrator with the authority to hear all claims arising from the contract "even if they involve nonparties to the agreement." *Id.* The Court explained that "Michigan courts clearly favor keeping all issues in a single forum." *Id.*

The arbitration clause in the land contract agreement in this case similarly contains broad, all-encompassing language that "any controversy or claim aris[ing] out of or relating to this Agreement, or breach thereof . . . shall be settled by arbitration." The clause further provides that "[b]oth Buyer and Seller agree that any controversy involving Brokers shall also be required to be arbitrated as above so no separate actions are created." Thus, the trial court properly determined that plaintiff's claims against the broker defendants are subject to mandatory arbitration.

In light of our determination that the trial court properly dismissed plaintiff's claims against the broker defendants on the ground that the claims are required to be submitted to arbitration, it is unnecessary to address whether plaintiff's claims are barred by the hold-harmless provision in the land contract agreement as well.

III. Violation of Local Court Rule

Plaintiff argues that he is entitled to sanctions from the O'Halloran defendants because they violated Sixth Circuit LCR 2.119(B)(2), which provides:

> Motion certification by attorney.
>
> (a) The following certificate signed by the attorney of record or by the party in propria persona shall be attached to or incorporated in the Praecipe filed with the assignment clerk:

> I HEREBY CERTIFY that I have made personal contact with _____ on _____, 19__, requesting concurrence in the relief sought with this motion and that concurrence has been denied or that I have made reasonable and diligent attempts to contact counsel requesting concurrence in the relief sought with this motion.

Plaintiff does not assert that the O'Halloran defendants failed to file the required certificate with their summary disposition motion. Instead, he argues that they falsely signed the certificate because he concurred with their motion. We disagree.

In support of this claim, plaintiff relies on the following e-mail response that he sent to the O'Halloran defendants' attorney:

> Please understand that I am more than willing to dismiss the action against the O'Halloran's [sic] personally only if they are willing to stipulate to an Order sending the case to arbitration, where they [sic] will be a personally [sic] party to the arbitration proceeding action. If the O'Halloran's continue to state that they were not personally involved with the transaction, then I will request that they also stipulate to an order stating that the O'Halloran's have personally waived all rights to the 15K earnest deposit.

Plaintiff's response is properly characterized as a conditional counter proposal to the O'Halloran defendants' motion. Because it was conditional, and the O'Halloran defendants did not agree to accept plaintiff's conditional offer, there was no "concurrence" within the meaning of LCR 2.119(B)(2). Accordingly, there was no violation of the local court rule.

IV. Sanctions

Plaintiff argues that he is entitled to sanctions against defendants because defendants have asserted inconsistent positions in this action and in the arbitration proceedings. Sanctions may be awarded under MCR 2.114(E) where a document is signed in violation of that rule, or under MCR 2.625(A)(2) and MCL 600.2591 where a defendant asserts a frivolous defense. Whether a claim or defense is frivolous depends on the facts of each case, *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002), and is determined by an objective standard, *Attorney Gen v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). A claim is frivolous under if "[t]he party had no reasonable basis to believe that the facts underlying his or her legal position were in fact true," or "the party's legal position was devoid of arguable legal merit." MCL 600.2591(3)(a)(ii) and (iii).

We have concluded that the trial court properly granted defendants' motions for summary disposition because plaintiff's claims are subject to an arbitration agreement. Thus, defendants' did not raise a frivolous defense and plaintiff is not entitled to sanctions. To the extent that plaintiff believes that any arguments or positions advanced by defendants in the underlying arbitration proceedings were frivolous, that was a matter to be resolved by the arbitrator in those proceedings, not by the trial court in this case.

The O'Halloran defendants and the broker defendants both argue that they are entitled to sanctions because plaintiff's complaint below was frivolous. Although defendants requested sanctions in the trial court, sanctions were not awarded. To the extent that defendants now

challenge the trial court's failure to award sanctions, their claims are not properly before this Court because they have not raised the issue in a cross appeal. Although an appellee may argue an alternative ground for affirming a trial court's decision without filing a cross appeal, it may not obtain a decision more favorable than that rendered by the trial court without filing a cross appeal. *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 350-351; 725 NW2d 684 (2006). Thus, because none of the defendants filed a cross appeal, they may not challenge the trial court's failure to award sanctions.

The O'Halloran defendants and the broker defendants also both argue in their respective briefs that plaintiff's appeal is frivolous, entitling them to sanctions on appeal. MCR 7.216(C)(1) authorizes sanctions for a vexatious appeal. However, MCR 7.211(C)(8) provides that a request for damages under MCR 7.216(C) must be contained in a motion, and a request contained in any other pleading, including a brief filed under MCR 7.212, does not constitute a motion under this rule. Such a motion may be filed "at any time within 21 days after the date of the order or opinion that disposes of the matter that is asserted to have been vexatious." MCR 7.211(C)(8). Accordingly, we deny defendants' request for sanctions, without prejudice.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald