STATE OF MICHIGAN

COURT OF APPEALS

HERSCHEL COHEN, RONALD HARLAN WOODY, III, CAROLE RYAN, SHARON DAY, DUANE RAYMOND, and SUSAN RAYMOND,

Plaintiff-Appellants,

and

ALAN LEVENSON, PETER JANSSEN, ANETTE JANSSEN, HELEN BARBARA SORENSEN, NELSON ROBERT PARDA, PAMELA J. MADDERN, JACK C. BLEVINS, JR., RICHARD ENGLISH, TOM UNGAR, DOUGLAS ULRICH, RHONDA ULRICH, MATTIE KING, EDWIN HUANG, BRIAN FALK, SHELDON SHERMAN, WOLFGANG ROSENFELDER, GREG LEROY, MELISSA LEROY, ANTHONY CASTELLANO, and JOANNE CASTELLANO,

Plaintiffs,

v

PARK WEST GALLERIES, INC., ALBERT SCAGLIONE, MORRIS SHAPIRO, ALBERT MOLINA, and PLYMOUTH AUCTIONEERING SERVICES, LTD.,

Defendant-Appellees.

UNPUBLISHED
April 5, 2012

No. 302746
Oakland Circuit Court
LC No. 2010-111282-CZ

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

MURRAY, J. (*concurring in part, dissenting in part*).

I concur with the majority's opinion on all issues except that pertaining to whether the arbitration clause in the last contract covered disputes arising under prior contracts that did not contain arbitration provisions. For the reasons expressed below, I would hold that the arbitration provision did cover any disputes arising under prior contracts, and therefore would affirm the trial court's decision in its entirety.

There is no dispute that the arbitration provision at issue is very broad, as it provides "that any disputes or claims of any kind including but not limited to the display, promotion, auction, purchase, sale or delivery of art, items, or appraisals shall be brought solely in non-binding arbitration and not in any court or to any jury." Hence, the question is whether this broad language encompasses disputes arising under prior contracts that did not contain arbitration provisions. As defendants argue, we must start with the proposition announced by our Supreme Court more than four decades ago, where it held in *Kaleva-Norman-Dickson Sch Dist No 6, et al v Kaleva-Norman-Dickson School Teachers' Ass'n*, 393 Mich 583, 592; 227 NW2d 500 (1975):

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the *arbitration clause* is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." . . . Absent an "*express provision* excluding [a] particular grievance from arbitration" or the "*most forceful evidence* of a purpose to exclude the claim", . . . the matter should go to arbitration[.] [*Id.*, quoting *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582-585; 80 S Ct 1347; 4 L Ed 2d 1409 (1960) (Emphasis in the original.)]

No Michigan decision has addressed this precise issue, and though the language of the agreement as interpreted under the guideposts of *Sch Dist No 6* would seem to resolve the issue in favor of defendants, some decisions from other jurisdictions provide some useful direction. One of the better cases discussing this issue is the South Carolina Court of Appeals' decision in *Vestry & Church Wardens of the Church of the Holy Cross v Orkin Exterminating Co, Inc*, 356 SC 202; 588 SE2d 136 (2003). In that case the church entered into a contract with Terminix in 1975 for the installation of a termite protection system, and the contract did not contain an arbitration clause. In June 2000, the church entered into a new contract with Terminix which contained an arbitration clause. Additionally, from 1976 to 1985, the church had a contract with Orkin. In 1987 the church entered into a new contract with Orkin, but neither the contract covering the 1976 to 1985 relationship, nor the 1987 agreement contained an arbitration provision. However, in 1998 the church and Orkin entered into a contract regarding a separate building, and that contract contained an arbitration clause.

Once the lawsuit was filed, both Orkin and Terminix filed motions to compel arbitration. The trial court denied both motions to compel, concluding that there was nothing in the 1998 Orkin contract nor the 2000 Terminix contract signifying a retroactive effect. The South Carolina Court of Appeals affirmed in part and reversed in part.[1] In addressing the primary issue, which is the same issue in this case, i.e., whether the subsequent contract's arbitration provision covered disputes arising under prior contracts between the parties, the court first summarized the guiding law as follows:

---

[1] Initially, the court indicated that it was applying the law developed under the Federal Arbitration Act, 9 USC § 1 *et. seq.*, but that that law was similar to South Carolina law. *Vestry*, 356 SC at 206-207.

> Courts have retroactively applied arbitration clauses to disputes arising under prior contracts, but in doing so, the courts have generally found the existence of a broadly worded clause which govern the overall relationship between the parties. . . . The common theme underlying these cases is that the parties expressly agreed that *all* controversies between them, not just those appurtenant to the contract containing the clause, were to be submitted to arbitration. That being the case, the source of the claim or injury is not dispositive, for the parties have manifested an intention to arbitrate all of their disputes arising from their business relations, not just those arising under a particular contract. [*Vestry*, 356 SC at 207-208 (footnote and citations omitted; emphasis in the original).]

The court then noted that where "the language of the arbitration clause is not as broad, courts have refused to mandate the arbitration of disputes unrelated to the contract containing the clause." *Vestry*, 356 SC at 208-209. The court then articulated the following principles:

> We derive from these cases that the mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties. For example, a clause compelling arbitration for any claim "arising out of or relating to this agreement" may cover disputes outside the agreement, but only if those disputes relate to the subject matter of that agreement. . . . On the other hand, if the clause contains language compelling arbitration of any dispute arising out of the relationship of the parties, it does not matter whether the particular claim relates to the contract containing the clause; it matters only that the claim concerns the relationship of the parties. Under *Zabinski*, such a clause would have the broadest scope because it could be interpreted to apply to every dispute between the parties. [*Id*. at 209-210 (citations omitted).]

In light of this, the court held that the Orkin arbitration clause did not apply to prior disputes arising under old contracts because it had language limiting the clause only to disputes arising out of or relating to the agreement in which it was contained, and it was not so broad as to cover all previous claims involving unrelated areas. The court did, however, reverse the denial of Terminix's motion to compel arbitration, as the Terminix arbitration provision applied to "*all matters in dispute* between [them]" which the court considered to be very broad and "more akin to the language generally held to reflect an intention to apply to matters arising out of the relationship of the parties." *Id*. at 213. (Emphasis in the original.) Cases coming to the same conclusion using the same rationale are, amongst others, *Levin v Alms & Assoc, Inc*, 634 F3d 260, 268-269 (CA 4, 2011), and *Zink v Merrill Lynch Pierce Fenner & Smith, Inc*, 13 F3d 330, 332 (CA 10, 1993).

There is some support for the notion that when the prior contractual relations are sporadic and separated by a good deal of time, and there is no language within the arbitration provision *specifically providing for* application to prior disputes under prior contracts, the arbitration clause should only apply to claims arising under the last contract. In *Hendrick v Brown & Root, Inc*, 50 F Supp 2d 527 (ED Va, 1999), for example, the court held that because the last employment contract between the parties did not specifically indicate that it applied to disputes

arising from prior contractual relations, it could "be said with positive assurance that the words chosen by Brown & Root to evince the intent of the parties about what they were to arbitrate do not require arbitration of disputes which had accrued before the execution of the fourth employment contract" between the parties. *Hendrick*, 50 F Supp 2d at 534.

However, the standards utilized in *Hendrick* seem at odds with Michigan law as articulated in *Sch Dist No 6*, for in *Hendrick* the court required that the provision specifically state that it applies to prior disputes while under *School District No 6*, unless the clause contains limiting language, it should apply to all disputes. Additionally, concluding that these arbitration clauses apply to disputes relating to past contracts is not inconsistent with the general rule that contracts are not to be applied retroactively, for that general rule is still guided by the proposition that the language of the contract controls, see *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 248; 760 NW2d 828 (2008), and this broad language would seem to cover all disputes, especially when viewed in the context of the policy in favor of arbitration.[2] For this reason, I would hold that plaintiffs' claims are all subject to arbitration.

/s/ Christopher M. Murray

[2] This conclusion does not run afoul of the cases cited by the majority regarding contracts generally being treated separately. Under my approach to this issue, all contracts are treated as separate contracts, the only difference being the effect of the broad arbitration language contained in the last contract.