

STATE OF MICHIGAN
COURT OF APPEALS

SIMONNE VANDEKERCKHOVE,
Plaintiff-Appellant,

UNPUBLISHED
October 11, 2012

v

RICHARD SCARFONE,
Defendant-Appellee.

No. 303130
Wayne Circuit Court
LC No. 10-014830-NM

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Plaintiff Simonne Vandekerckhove hired attorney Richard Scarfone to assist her in acting as personal representative of her deceased son's estate and in foreclosing on a mortgage interest plaintiff's son had granted her in his home. Dissatisfied with Scarfone's representation, plaintiff filed suit, alleging legal malpractice and fraud claims. The trial court summarily dismissed plaintiff's claims based on an arbitration clause in her "fee arrangement." The trial court further ruled that any challenge to the validity of the contractual fee arrangement should be determined by the arbitrator in the first instance. Because the arbitration clause in the fee arrangement applies to claims against the law firm's attorneys related to the services rendered, and because plaintiff raised no real claim of fraud in the inducement pertaining specifically to the arbitration clause, we affirm.

I. BACKGROUND

On May 24, 2007, plaintiff signed a "Fee Arrangement for Legal Services," retaining "the Law Firm of RICHARD R. SCARFONE, P.C." "in connection with a real estate loan and estate matter." The fee arrangement provided that it was entered into by the law firm and that legal services would be provided by employees of the law firm. The law firm "agree[d] to accept this engagement and to perform necessary legal services with diligence." Plaintiff consented to pay a retainer fee of \$20,000. Paragraph 17 of the fee arrangement set forth an arbitration agreement:

Any controversy, dispute, or claim arising out of our [sic] relating to our fees, charges, performance of legal services, obligations reflected in this letter or the "Standard Terms of Engagement," or other aspects of our representation shall be resolved through binding arbitration in Michigan in accordance with the rules of the American Arbitration Association, and judgment on the award may be entered in any court having jurisdiction thereof. You acknowledge that by

agreeing to arbitration, you are relinquishing your right to bring an action in court and to a jury trial. We recommend that prior to agreeing to this provision you review the various business and legal aspects of such a decision with independent counsel.^[1]

The fee arrangement closed “Very truly yours, Richard R. Scarfone” but did not include an actual signature.

On April 24, 2008, plaintiff signed a “Second Fee Arrangement for Legal Services” with Richard R. Scarfone, P.C., indicating that plaintiff had requested legal services “in connection with a separate lawsuit to enforce [her] promissory note and mortgage against the Estate.” In connection with this arrangement, plaintiff agreed to pay an additional \$15,000 to the law firm. The second fee arrangement was also entered into with the law firm and not Scarfone as an individual. Scarfone physically signed the 2008 arrangement, however. This arrangement included the same arbitration clause as the original.

After filing suit, plaintiff sought partial summary disposition under MCR 2.116(C)(7) and (C)(9), basically seeking a declaratory judgment that she was not required to arbitrate her claims against Scarfone. Plaintiff argued that she signed the fee arrangements with the law firm and not with Scarfone as an individual. Scarfone responded with his own motion for summary disposition under (C)(7). Scarfone argued that plaintiff entered the fee arrangements knowingly and voluntarily after discussions with her surviving son and an independent attorney. Scarfone further noted that this Court had approved the use of arbitration agreements in attorney retainer contracts in *Watts v Polaczyk*, 242 Mich App 600; 619 NW2d 714 (2000). In response to plaintiff’s motion, Scarfone noted that he is the sole shareholder and owner of Richard R. Scarfone, P.C. and therefore he individually was the personal corporation that performed the legal services, entitling him to rely upon the arbitration agreement.

Plaintiff retorted that the fee arrangements were unconscionable and unenforceable. Specifically, plaintiff contended that Scarfone refused to explain the fee arrangement to her, an 82-year-old immigrant. As a result, plaintiff claimed that she did not knowingly waive her right to pursue legal redress against her attorney. Plaintiff claimed the arrangements were unconscionable because of internal inconsistencies regarding the amount and source of fees to be paid for services. Plaintiff also claimed fraud in the inducement because Scarfone knowingly took on representation of plaintiff as the personal representative of her deceased son’s estate and as an estate creditor, creating a conflict of interest. She further claimed that the second fee arrangement was presumptively unconscionable because Scarfone had a fiduciary duty to plaintiff because of the existing attorney-client relationship and yet did not act in plaintiff’s best interest.

¹ As the arbitration arrangement “provide[s] for a judgment of any circuit court to be rendered on the arbitrator’s award,” it is a statutory arbitration agreement. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*; 276 Mich App 146, 153; 742 NW2d 409 (2007).

Ultimately, the trial court denied plaintiff's motion and granted Scarfone's motion for summary disposition in full. The court ordered the parties to proceed to arbitration. The court rejected plaintiff's fraud in the inducement claim, finding no evidence supporting that plaintiff was mentally infirm when she entered the contract, and that by initialing every page she evidenced her review of the document. In regard to plaintiff's claim that she entered the fee arrangement with the law firm but not Scarfone as an individual, the court ruled:

And I think clearly she was hiring the firm, clearly from the language of the agreement, the fee agreement. She was clearly hiring the firm and the employees of the firm, and I think she's bound by the arbitration clause. So I will order that you go to arbitration.

II. ANALYSIS

We review a trial court's ruling on a motion for summary disposition de novo. *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010). In relation to a motion under MCR 2.116(C)(7) ("claim is barred because of . . . an agreement to arbitrate"), we review all documentary evidence and will accept the complaint as factually accurate unless contradicted by affidavits or other documents. *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010). When the parties have submitted documentary evidence, we review it in the light most favorable to the non-moving party. *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010). If the facts are undisputed, whether the claim is barred is an issue of law for the court; however, if there is a question of fact, dismissal is inappropriate. *Id.* Summary disposition is appropriate under (C)(9) when the opposing party "has failed to state a valid defense," such as an arbitration agreement.

We review de novo a circuit court's determination that an issue is subject to arbitration. *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009). "A three-part test applies for ascertaining the arbitrability of a particular issue: 1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract." *Id.* at 202 (quotation marks and citation omitted). "Arbitration is a matter of contract . . ." *City of Ferndale v Florence Cement Co*, 269 Mich App 452, 460; 712 NW2d 522 (2006). . . . "[W]hen parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts, if the contract is not contrary to public policy." *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 213; 737 NW2d 670 (2007) (quotation marks and citation omitted). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 209; 220 NW2d 664 (1974), quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). "Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991). [*Hall v Stark Reagan, PC*, 294 Mich App 88, 93-94; 818 NW2d 367 (2011).]

Contrary to plaintiff's assertion, attorney Scarfone may raise the arbitration clause despite that he individually is not a party to the fee arrangements. The fee arrangements specifically provide that the work contemplated would be done by the law firm's employees. The arbitration clause broadly applies to "[a]ny controversy, dispute, or claim arising out of our [sic] relating to *our* fees, charges, performance of legal services, obligations reflected in this letter or the 'Standard Terms of Engagement' or other aspects of *our* representation" (Emphasis added.) The contract contemplates its application to the law firm's employees, not just the firm itself. And plaintiff's claims clearly relate to the fees charged and performance of legal services "reflected in" the fee arrangement.

Rooyakker, 276 Mich App 146, supports our conclusion. In *Rooyakker*, the plaintiff corporation was created by individuals who had previously been employed by the defendant. *Id.* at 150. The individuals had signed employment contracts with the defendant that included broad arbitration clauses applying to "any dispute or controversy arising out of or relating to" the employment contracts. *Id.* at 148-150. The defendant raised the arbitration clause as a defense to the corporate plaintiff's declaratory judgment suit, in which the plaintiff alleged that a noncompete provision in the individual's employment contracts was unenforceable and unreasonable. *Id.* at 150-151. Noting that "the parties' agreement determines the scope of arbitration," this Court concluded that the broad language used in the employment contracts' arbitration agreements encompassed the corporate plaintiff's claim, even though it was not a party to those contracts. *Id.* at 163.

Rooyakker impliedly recognizes the reality that a corporation does not provide services, its employees do. A person may retain an accounting or law firm or a medical practice, but the actual services are provided by individual accountants, lawyers and doctors. Therefore, an arbitration agreement covering claims related to the services rendered must apply to the employees performing those services. In this regard, we find instructive *McCarthy v Azure*, 22 F3d 351 (CA 1, 1994). McCarthy noted that in relation to claims arising out of service contracts and asserting professional malpractice, a corporate principal's arbitration agreement will usually apply to its employees. *Id.* at 357. This is because "[a] person who enters into a service contract with a firm contemplates an ongoing relationship in which the firm's promises only can be fulfilled by future (unspecified) acts of its employees" *Id.*

Here, plaintiff "contemplate[d]" that the legal services she retained would be performed by Scarfone individually and not by the law firm. Indeed, when Scarfone's services did not meet plaintiff's expectations, she filed suit against him personally; she did not file suit against the corporate construct. Accordingly, Scarfone, as an individual, was both bound by and benefitted from the arbitration agreement in the service contract regardless that he did not sign the document in his personal capacity.

Plaintiff's attempt to avoid the arbitration clause on enforceability grounds is similarly without merit. A statutory arbitration agreement is "valid, enforceable, and irrevocable except upon grounds that justify the rescission or revocation of any contract. *Rooyakker*, 276 Mich App at 153. "[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc v Cardegna*, 546 US 440, 449; 126 S Ct 1204; 163 L Ed 2d 1038 (2006). Plaintiff claims that she did not voluntarily and knowingly waive her right to seek redress against her attorney in a court of law. Yet

plaintiff's challenge "specifically to the arbitration clause" is artificial and strained. Plaintiff actually challenges her ability to understand the entirety of the fee arrangement, including the amount of fees owed to Scarfone and whether her divergent relationship with her deceased son's estate amounted to a conflict of interest. Her challenges are all based on the fact that she is an elderly immigrant who had been traumatized by her son's untimely death. She allegedly did not understand that Scarfone took a lien on the estate's property and could collect additional fees from the estate, not only that she agreed to arbitrate any claims arising from the representation. As plaintiff challenges the validity of the contract as a whole, the trial court properly determined that the issue had to proceed through arbitration in the first instance, and would not be decided by the trial court. As such, we do not reach the merits of plaintiff's challenges to the validity of the contractual fee arrangement and arbitration clause.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Donald S. Owens

/s/ Mark T. Boonstra