STATE OF MICHIGAN

COURT OF APPEALS

AAA PHARMACY, INC.,

Plaintiff-Appellant,

v

VALUE RX PHARMACY PROGRAM, INC., VALUE RX, INC., and JOHN GARDYNIK,

Defendants-Appellees.

UNPUBLISHED
November 16, 1999

No. 207155
Wayne Circuit Court
LC No. 96-639288 NZ

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

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

Plaintiff entered into an agreement with defendant Value Rx Pharmacy Program, Inc. to become an affiliated pharmacy in a prescription-drug program. The agreement provided for the arbitration of disputes as follows:

> In the event of a dispute concerning the construction, interpretation, performance under, or breach of this Agreement, such dispute shall be submitted to arbitration in Detroit, Michigan, by and under the commercial rules and procedures of the American Arbitration Association. Unless the parties hereafter mutually agree otherwise, the arbitrators may fix their compensation, which shall be apportioned between and paid by the parties as determined by the arbitrators. This Agreement to arbitrate shall be specifically enforceable under the laws of the State of Michigan. The arbitrators decision shall be final, and judgment may be entered upon it in court in accordance with the applicable law.

In 1996, defendant Value Rx Pharmacy Program terminated its affiliation with plaintiff. Plaintiff's clientele apparently included many members of the United Auto Workers (UAW), one of whom wrote a letter to the president of the UAW asking him to look into the matter. This letter was forwarded to defendants for a response. Defendant John Gardynik, an employee of defendant Value

Rx, Inc., which is the parent company of defendant Value Rx Pharmacy Program, wrote a letter to a UAW official explaining why the affiliation was terminated. The letter indicated that the affiliation was terminated because defendants believed that plaintiff "was not taking an active role in encouraging physicians to prescribe generic medications." The letter also indicated that plaintiff "had been warned at each audit that its performance was notably poor" and described plaintiff's practice as "aberrant." Plaintiff responded to this letter by filing an action against defendants for libel, invasion of privacy, tortious interference with economic relations, injurious falsehood, and violations of both the Michigan Consumer Protection Act[1] and the Uniform Trade Practices Act.[2] Defendants moved for summary disposition, arguing that plaintiff's claims were barred by the agreement to arbitrate disputes concerning the affiliation agreement. The trial court initially denied defendants' motion without prejudice, holding that it was premature. After discovery was completed, the trial court granted defendants' renewed motion for summary disposition based on the agreement to arbitrate.

We review the trial court's decision whether to grant a motion for summary disposition under MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law. *DeCaminada v Coopers & Lybrand LLP*, 232 Mich App 492, 496; 591 NW2d 364 (1998).

Plaintiff first argues that the scope of the arbitration clause does not extend to its tort claims. Plaintiff argues that its claims stem not from a disagreement concerning the affiliation agreement, but from the letter explaining why the affiliation was terminated. We conclude that the trial court correctly held that plaintiff's claims are within the scope of the arbitration clause.

Arbitration is a matter of contract, and it is for the court to determine whether an agreement to arbitrate exists and whether an issue falls within the scope of the agreement. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 98-99; 323 NW2d 1 (1982). To determine whether an issue is arbitrable, "the 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." *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995). Any doubts about whether the dispute is subject to arbitration should be resolved in favor of arbitration. *Id*.

Here, the arbitration clause stated that any dispute "concerning the construction, interpretation, performance under, or breach of" the affiliation agreement was subject to arbitration. Plaintiff argues that the scope of the clause is limited to contractual disputes and that, therefore, its tort claims are not subject to arbitration because they are not contract claims. Plaintiff cites *Young v Michigan Mutual Ins Co*, 139 Mich App 600, 603; 362 NW2d 844 (1984), in which this Court held that the plaintiff's tort claim for refusal to pay benefits did not fall within the terms of an arbitration clause in an insurance contract. However, in *Young*, the scope of the arbitration provision was specifically limited to disputes concerning whether the insured was entitled to benefits or about the amount of benefits owed under the policy. The arbitration clause in the instant case is much broader. The allegedly tortious conduct of defendants arose from an attempt to explain the reasons why the affiliation with plaintiff was terminated. The letter specifically refers to plaintiff's performance under the affiliation agreement. Therefore, the dispute is arguably within the scope of the arbitration clause, which provides for the arbitration of

disputes *concerning* the performance of the parties under the affiliation agreement. We bear in mind that any doubts are to be resolved in favor of arbitration. *Burns, supra* at 580.[3]

Next, plaintiff contends that defendants Value Rx, Inc. and John Gardynik were not parties to the agreement and, therefore, are not entitled to invoke the benefits of the arbitration clause. We disagree. Value Rx, Inc. is the parent corporation of Value Rx Pharmacy Program, and John Gardynik was a vice-president of Value Rx Pharmacy who was also employed by Value Rx, Inc. "[N]onsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles." *Arnold v Arnold Corp*, 920 F2d 1269, 1281 (CA 6, 1990), quoting *Letizia v Prudential Bache Securities, Inc*, 802 F2d 1185, 1187 (CA 9, 1986).[4]

Plaintiff next argues that the arbitration agreement is unenforceable because it does not contain a provision expressly making arbitration a condition precedent to the filing of an action. However, the arbitration clause indicates, "The arbitrator's decision shall be final, and judgment may be entered upon it in court in accordance with applicable law." By including this provision, the arbitration clause is valid and enforceable by statute. MCL 600.5001(2); MSA 27A.5001(2); *Tellkamp v Wolverine Mutual Ins Co*, 219 Mich App 231, 237; 556 NW2d 504 (1996). There is no need for an express provision making arbitration a condition precedent to court action. The cases cited by plaintiff for its argument that, to be enforceable, arbitration clauses must contain a stipulation that the award is a condition precedent to a cause of action all involve common-law arbitration, instead of so-called "statutory" arbitration, and are therefore inapplicable to the instant case. See *Siewek v F Joseph Lamb Co*, 257 Mich 670, 676; 241 NW 807 (1932); *Ensley v Associated Terminals, Inc*, 304 Mich 522, 528; 8 NW2d 161 (1943); *EE Tripp Excavating Contractor, Inc v Jackson Co*, 60 Mich App 221, 235-246; 230 NW2d 556 (1975).

Plaintiff also contends that defendants have waived any contractual right to arbitrate by moving for summary disposition on the merits, conducting extensive discovery, and participating in mediation. A party may waive its right to arbitration. *Burns, supra* at 582. However, waiver is disfavored, and the party arguing that waiver has occurred "must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts." *Id*. This is a heavy burden of proof. *Id*. Whether a party has waived its contractual right to arbitration must be decided on the individual facts of each case. *Id*. We conclude that defendants did not waive their right to arbitration.

Defending an action on the merits generally constitutes a waiver of the right to arbitration. *Salesin v State Farm Fire & Casualty Co*, 229 Mich App 346, 356; 581 NW2d 781 (1998). Specifically, bringing a motion for summary disposition may indicate "an election to proceed other than by arbitration." *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 536; 369 NW2d 922 (1985). Plaintiff argues that, because defendants brought a motion for summary disposition on the merits of the claim before they brought the motion for summary disposition based on the agreement to arbitrate, the defendants have therefore waived their right to arbitration. However, this ignores the fact that defendants initially brought a motion for summary disposition based on the agreement to arbitrate before an answer was even filed, and the trial court denied the motion as premature. Defendants then participated in discovery and later renewed their motion. Defendants have

not acted inconsistently with their right to arbitration. See *Kauffman v The Chicago Corp*, 187 Mich App 284, 292; 466 NW2d 726 (1991) (holding that the defendants had not waived their right to arbitration where they raised the arbitration agreement in their first responsive pleading and only engaged in discovery and brought and defended motions after the trial court denied their motion to compel arbitration).

Finally, plaintiff argues that the trial court erroneously relied on federal statutes and cases in determining whether its claims were subject to arbitration. Plaintiff argues that federal law was not controlling because the agreement did not concern interstate commerce. However, plaintiff has failed to either identify how the trial court relied on inapplicable law or how the federal law on which the court relied differed from applicable Michigan law. Accordingly, we find no error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

[1] MCL 445.901 *et seq*.; MSA 19.418(1) *et seq*.

[2] MCL 500.2001 *et seq*.; MSA 24.12001 *et seq*.

[3] Moreover, merely because the dispute arose after the termination of the affiliation agreement does not remove the dispute from the arbitration clause. The agreement also included a provision that, in the event of termination, the parties remain obligated to resolve any disputes in accordance with the arbitration clause.

[4] We note that, although plaintiff questions the relationship of defendants to each other, plaintiff conceded these relationships in its brief in opposition to summary disposition filed in the trial court. Therefore, plaintiff may not now challenge the existence of these relationships. See *Dep't of Transportation v Pichalski*, 168 Mich App 712, 722; 425 NW2d 145 (1988) (conceded issue not preserved for appellate review).