STATE OF MICHIGAN

COURT OF APPEALS

DOMESTIC UNIFORM RENTAL,

Plaintiff-Appellee,

v

MICHAEL FINAZZO and ORMSBY MANAGEMENT, INC.,

Defendants-Appellants,

and

LAKE MANAGEMENT, INC.,

Defendant.

UNPUBLISHED
December 28, 2004

No. 249462
Oakland Circuit Court
LC No. 2003-046886-CZ

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendants-appellants appeal as of right from the trial court's order confirming an arbitration award. We affirm in part, reverse in part and remand for further proceedings. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts

Plaintiff rents uniforms to other businesses under standard-form contracts containing an arbitration agreement. It appears undisputed that four contracts were the basis of arbitration proceedings initiated by the claimant. The respondents named in the arbitration award are the defendants in this action, namely, Finazzo, Ormsby Management, Inc. (Ormsby Inc.), and Lake Management, Inc. (Lake Inc.). They were found liable to plaintiff, jointly and severally, for $26,557.73. Finazzo and Lake Inc. were found liable, jointly and severally, for an additional sum of $6,339.66. The three defendants were also found liable for administrative fees of the American Arbitration Association (AAA) and the arbitrator's compensation totaling $1,395, with $1,357.50 payable to plaintiff and the other $37.50 payable to the AAA. Plaintiff filed the instant action to confirm the January 6, 2003, arbitration award pursuant to Michigan's statutory procedures and MCR 3.602. In April 2003, plaintiff moved to confirm the arbitration award pursuant to MCR 2.116 and 3.602.

None of the defendants filed an answer to plaintiff's complaint. But in April 2003, defendants-appellants, Finazzo and Ormsby Inc., opposed plaintiff's motion and sought summary disposition in their own favor under MCR 2.116 on the ground that they were not parties to any arbitration agreement. In May 2003, plaintiff opposed the motion, alleging that it was brought under the wrong court rule, that it constituted an untimely attempt to vacate the January 6, 2003, arbitration award under MCR 3.602, and that defendants-appellants voluntarily participated in the arbitration proceedings. On June 4, 2003, the trial court confirmed the arbitration award.

II. Standard of Review

We review the trial court's decision regarding summary disposition and plaintiff's motion to confirm the arbitration award de novo. *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 152; 677 NW2d 874 (2003); *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). See also *American Parts Co v American Arbitration Ass'n*, 8 Mich App 156, 170; 154 NW2d 5 (1967). Our review is limited to the record presented in the trial court. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

III. Analysis

As an initial matter, we find no basis for plaintiff's reliance on the federal arbitration act, 9 USC 1-15. The federal act applies to contracts involving interstate commerce. *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995). Here, plaintiff's complaint was based on Michigan's statutory arbitration act, MCL 600.5001 to 600.5035, and MCR 3.602. Additionally, the contracts in question provide that they are to be construed according to Michigan law. Therefore, this case involves Michigan statutory arbitration. Cf. *Madison Dist Public Schools v Myers*, 247 Mich App 583, 588 n 1; 637 NW2d 526 (2001).

We find no merit to defendants-appellants' claim that they were entitled to seek relief under MCR 3.602(J)(1) without complying with the time limit set forth in MCR 3.602(J)(2). Therefore, to the extent that the trial court denied relief for the reason that defendants-appellants did not timely apply to vacate the arbitration award, we affirm that decision.

But we agree with defendants-appellants that they were entitled to defend against plaintiff's complaint for confirmation of the arbitration award on the ground that they were not parties bound by an agreement to arbitrate. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95; 323 NW2d 1 (1982). We reject plaintiff's position that defendants-appellants' claim implicates an issue that the parties agreed to submit to arbitration. Although parties may agree to arbitrate a contractual issue of arbitrability, *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 162; 393 NW2d 811 (1986), an arbitrability issue can implicate either the existence of an arbitration agreement between the parties or the question whether a given dispute is covered by the arbitration agreement. *Armoudlian v Zadeh*, 116 Mich App 659, 668-669; 323 NW2d 502 (1982).

Here, the issue presented is directed at the existence of an arbitration agreement and, in particular, the identity of the parties to the arbitration agreements. Before a court can determine if contracting parties agreed to submit an issue to arbitration, it must identify the parties. Pursuant to *Arrow Overall Supply Co, supra*, unless waived, the absence of a valid agreement to arbitrate constitutes a defense to a plaintiff's action to confirm an arbitration award. Hence, the

trial court had authority to determine if defendants-appellants were parties bound by the arbitration agreements.

Although the trial court did not specifically address plaintiff's waiver claim, its reliance on defendants-appellants' alleged participation in the arbitration proceedings reflects its determination that there was no genuine issue of material fact with regard to the waiver claim. We conclude, however, that the trial court erred in finding that the evidence established a waiver.

In *American Motorists Ins Co v Llanes*, 396 Mich 113; 240 NW2d 203 (1976), our Supreme Court found that the defendant waived its opposition to the plaintiff's motion to confirm an arbitration award in circuit court. But the defendant in that case did not argue that he was not a party to the arbitration agreement, but rather challenged the arbitrability of a particular liability issue. The defendant raised the arbitrability issue only after participating in a hearing to determine the liability issue and receiving an adverse ruling by the arbitrator. Under these circumstances, our Supreme Court found a waiver, noting, with approval:

> "If a party to an arbitration agreement wants to object to the arbitrability of a specific issue, he should do so at the earliest opportunity. He should raise the objection before the issue is submitted for a hearing on its merits, because he may not voluntarily submit an issue to arbitration and then, if he suffers an adverse decision, move to set aside the adverse award on the ground that it was not an arbitrable issue." Anno: *Participation in Arbitration Proceedings as Waiver of Objections to Arbitrability*, 33 ALR3d 1242, 1244. [*Llanes, supra* at 114-115.]

A waiver is an intentional relinquishment or abandonment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *New Jersey Mfrs Ins Co v Franklin*, 160 NJ Super 292, 301; 389 A2d 980 (1978). Mere participation in arbitration does not conclusively bar a party from seeking a judicial determination of arbitrability. *Id.* at 300; see also *White v Kampner*, 229 Conn 465; 641 A2d 1381 (1994).

Here, the submitted evidence concerning the degree and nature of defendants-appellants' participation in the arbitration proceeding did not establish that they waived their right to defend against plaintiff's action to confirm on the ground that they were not parties bound by the arbitration agreements. Unlike *Llanes*, there was no evidence that defendants-appellants submitted any issue, voluntarily or otherwise, to the arbitrator before the arbitration award was rendered. The evidence that defendants-appellants retained an attorney, who filed an unsuccessful petition to set aside the arbitration award and reopen the proofs, does not demonstrate that defendants-appellants were intentionally relinquishing their right to a judicial determination of whether they were parties bound by the arbitration agreements.

Plaintiff's waiver claim lacked factual support; therefore we vacate the trial court's confirmation of the arbitration award with respect to defendants-appellants. We remand to the trial court for further proceedings with regard to the limited defense available to defendants-appellants pursuant to *Arrow Overall Supply Co, supra*, concerning whether defendants-appellants were not parties bound by the arbitration provisions in the contracts in question.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. No costs to either party pursuant to MCR 7.219(A), neither party having prevailed in full. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette