

STATE OF MICHIGAN
COURT OF APPEALS

ANDREW J. BARNA, JR.,

Plaintiff-Appellant,

v

DARDEN RESTAURANTS, INC.,

Defendant-Appellee.

UNPUBLISHED

November 17, 2005

No. 255006

Oakland Circuit Court

LC No. 2003-053412-CZ

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a former employee of a Red Lobster restaurant owned and operated by defendant, was terminated on August 27, 2003. He then initiated the instant suit alleging that, because it terminated him after he had filed a police report regarding funds missing from the restaurant, defendant violated the Whistle-blower's Protection Act, MCL 15.361 *et seq.* The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(7) on the grounds that an arbitration agreement plaintiff entered with defendant barred his claim.

On appeal plaintiff argues that the trial court erred in finding that the dispute resolution procedure authored by defendant barred his suit. Plaintiff contends that he never signed a binding arbitration agreement. Rather, he signed a document acknowledging the receipt of a copy of the dispute resolution procedure (DRP) even though he did not actually receive a copy until after his termination. Plaintiff further asserts that defendant can unilaterally amend the dispute resolution procedures and, therefore, the arbitration provision is unenforceable.

We review a trial court's decision to grant or deny 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. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). Similarly, questions as to whether an arbitration agreement exists and whether its terms are enforceable constitute "judicial questions for the court" that are subject to *de novo* review. *Id.*

Under MCR 2.116(C)(7), summary disposition is appropriate where an agreement to arbitrate bars the plaintiff's claim. When reviewing a motion for summary disposition under this rule, a court must accept all well-pleaded factual allegations as true and construe them in the light most favorable to the plaintiff. *Watts, supra* at 603. It must examine the pleadings, affidavits, and other documentary evidence to determine whether there a genuine issue of material fact exists. MCR 2.116(G)(5); *Watts, supra*. But if no facts are in dispute and reasonable minds could not differ regarding the legal effect of those facts, "the question whether the plaintiff's claim is barred presents a question of law for the court." *Stewart v Fairlane Community Mental Health Centre (On Remand)*, 225 Mich App 410, 416; 571 NW2d 542 (1997).

Michigan public policy, as expressed by both the common law and the Legislature, strongly favors the use of arbitration to resolve disputes. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 127-133; 596 NW2d 208 (1999). But an arbitration provision is unenforceable if it is not part of a binding contract. *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 413 (Cavanagh, J.), 438 (Boyle, J.); 550 NW2d 243 (1996). When such a provision makes it clear that the employer does not intend to be bound by its terms, no binding contract exists. *Id.* at 414.

In *Stewart*, this Court considered whether an arbitration provision contained within the defendant's personnel policies manual barred the plaintiff's claim under the Whistle-blowers Protection Act. The plaintiff began working for defendant in 1989. *Stewart, supra* at 412. In 1993, the defendant unilaterally amended its policy manual to include a binding arbitration provision and the plaintiff signed an acknowledgment that she received a copy of the new handbook. *Id.* The acknowledgment did not mention the arbitration policy or indicate whether the plaintiff agreed to the new provision. *Id.* at 413. However, it specifically stated that the personnel manual was "neither an 'employment agreement,' nor a 'contract of employment.'" *Id.* at 413 (emphasis provided in *Stewart*), and the acknowledgment noted that "personnel policies may be amended from time to time." *Id.* at 420. This Court found that the language of the acknowledgment "demonstrat[ed] that the defendant did not intend to be bound by any provision contained within the handbook," even though the arbitration provision stated that it was a mutual agreement. *Id.* It held that the defendant's policy manual "did not create an enforceable arbitration agreement in the absence of a binding contract" and refused to dismiss the plaintiff's claim. *Id.* at 420, 423.

In the instant case, plaintiff signed a document entitled "Clear Direction Acknowledgment" that stated as follows:

I have received information entitled "Can we talk?" Dispute Resolution at Red Lobster (DRP), which contains a description of DRP. I have read this information and understand and agree to the terms and conditions of DRP and *understand that Red Lobster is equally bound*. I agree that, as a condition of my employment at Red Lobster, to submit any eligible disputes I may have to the company's DRP and to abide by the provisions outlined. I understand that this includes, for example, claims under state and federal laws relating to harassment or discrimination, as well as, other employment related claims as defined by the DRP. [Emphasis added.]

Additionally, the acknowledgment stated, “Finally, I also understand that this is not a contract of employment.”

Like the plaintiff in *Stewart*, plaintiff signed an acknowledgment that he received a copy of his employer’s dispute resolution procedures. But while the document in *Stewart* merely indicated that the plaintiff had received an updated employment manual, the Clear Direction Acknowledgment specifically mentioned the arbitration policy and indicated that plaintiff agreed to be bound by it. Although this document indicated that it was not “an employment contract,” it also stated that, as a condition to his employment, plaintiff must agree to submit any eligible disputes to the arbitration process. More importantly, the acknowledgement expressly stated that defendant was equally bound by the terms and conditions of the DRP. This demonstrates that, unlike the employer in *Stewart*, defendant intended to be bound by the arbitration provision. Consequently, the combination of the Clear Direction Acknowledge and the DRP created an enforceable arbitration agreement.

The trial court did not err in finding the arbitration provision barred plaintiff from bringing an action under the Whistle-blower’s Protection Act. Therefore, we affirm its order granting defendant’s motion for summary disposition under MCR 2.116(C)(7).

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray