STATE OF MICHIGAN

COURT OF APPEALS

MARC L. CULLEN, M.D.,

Plaintiff-Appellee,

v

MICHAEL D. KLEIN, M.D., SCOTT E. LANGENBURG, M.D., JOSEPH LAWRENCE LELLI, JR., M.D., and PAUL T. STOCKMANN, M.D.,

Defendants-Appellants.

UNPUBLISHED
September 21, 2010

No. 291810
Wayne Circuit Court
LC No. 09-000836-CZ

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

The parties to this appeal are five pediatric surgeons who entered into employment and stock purchase agreements containing identical arbitration clauses. Plaintiff Marc L. Cullen, M.D., filed a six-count complaint against defendants, four of his former coemployees. The complaint alleged a violation of the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., minority shareholder oppression, MCL 450.1489, defamation, intentional infliction of emotional distress, tortious interference with a business relationship, and civil conspiracy. The circuit court denied defendants' motion to compel arbitration. We affirm in part, reverse in part and remand for further proceedings.

I. FACTS AND PROCEEDINGS

In 2005, plaintiff and defendants Michael D. Klein, M.D., Joseph L. Lelli, Jr., M.D., Paul T. Stockmann, M.D., and Scott E. Langenburg, M.D., agreed to engage in a medical practice, the Michigan Pediatric Surgery Associates, P.C. (MPSA). The first paragraph of the parties' employment agreement contemplates the following general responsibilities of the parties:

> The Corporation hereby engages Employees to perform, and Employees hereby accept such engagement and agree to perform, as physicians and surgeons such duties and services as may be assigned by Corporation, in connection with the professional medical practice conducted by Corporation under the name and designation of "Michigan Pediatric Surgery Associates, P.C."

The employment agreement additionally set forth licensing and certification conditions for continued employment, the manner in which the parties would be compensated, a covenant not to compete, and detailed provisions concerning sickness, accidents or illnesses. It also incorporated arbitration terms, which generally envisioned that "Any dispute or controversy arising out of or relating to this Agreement or to the interpretation or the breach thereof (except for matters which may only be resolved in court by way of injunctive relief), shall be referred to and determined by arbitration in Detroit, Michigan."

The parties also entered a stock purchase agreement that conveyed to each 72 shares of MPSA common stock. The agreement set forth in its preamble that "the Shareholders and the Corporation desire to promote their mutual interests by imposing certain restrictions and obligations on themselves and on the shares . . . ." The stock purchase agreement recapitulated the arbitration language contained in the employment agreement.

In 2007, MPSA adopted a computerized billing and record system that obligated the parties to directly input billing and clinical data into an electronic medical record (EMR).[1] Plaintiff advised defendants that due to a medical condition known as bilateral peripheral vestibular imbalance, he could not use a computer for "significant" periods. Plaintiff described in his complaint that this condition causes "difficulty with rapid visual scanning, difficulty with subjective sense of motion, and difficulty with rapid head and body movements," and that his use of a computer eventually produces "severe and debilitating headaches." The complaint asserted that in September 2007, defendants voted to deny plaintiff's request for a disability-related accommodation, and instead "passed a resolution requiring [plaintiff] to use the on-line census immediately and EMR within three months." Plaintiff maintained that after he consulted with an attorney, "his treatment and relations with all of the Defendants deteriorated." The complaint averred that in December 2007, MPSA's counsel told plaintiff's lawyer that plaintiff "had to comply with the computer usage or the Defendants … as the majority shareholders, were prepared to terminate [him]." On October 17, 2008, MPSA's board of directors voted to end plaintiff's employment.

In January 2009, plaintiff filed suit in the Wayne Circuit Court complaining that (1) his termination from employment with MPSA violated the PWDCRA by denying him access to places of public accommodation;[2] (2) defendants violated MCL 450.1489 by substantially interfering with plaintiff's interests as a corporate shareholder; (3) defendant Lelli defamed plaintiff; (4) defendants Klein and Lelli intentionally inflicted emotional distress; (5) Lelli tortiously interfered with a business relationship of plaintiff; and (6) civil conspiracy.[3] Defendants filed a motion for summary disposition under MCR 2.116(C)(7) and a motion to

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[1] According to the complaint, the computerized system also enabled the doctors to "complete [an] online Census."

[2] Plaintiff theorized that the MPSA was a place of public accommodation, and that defendants' actions interfered with his "full and equal enjoyment and utilization of MPSA," and his exercise of "medical privileges at Children's [Hospital of Michigan] to provide patient services . . . ."

[3] Plaintiff's complaint did not include a claim for injunctive relief.

compel arbitration. The circuit court denied defendants' motions, reasoning in pertinent part as follows:

> I don't see anything that binds the individuals to arbitrate their disputes regarding a claim of a denial of civil rights because they're not signatories to such claims. The co-employees are not, did not sign an agreement amongst themselves that they would arbitrate any civil rights claims that they would have against each other.
>
> The only thing that they signed was that they would arbitrate any money issues they have resulting from the dissolution of their company who should buyout who and under what circumstances. So this is not a claim for arbitration.
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> * * *
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> … But the key element is, is that the parties between themselves had to have been in privity to enforce that contract. There's no oral contract to arbitrate here. It's all been reduced to writing and the writing does not include the individuals.
>
> It's a handicapper's civil rights claim against one employee versus a co-employee, that's all this is, and therefore, there is no agreement. There is no written agreement that covers that situation. … You can't stretch that corporation into its individual shareholders, otherwise you'd just pierce the corporate veil entirely, and that's not the intent.

This Court subsequently granted defendants' application for leave to appeal.

II. ANALYSIS

A. GOVERNING PRINCIPLES

Defendants contend that the arbitration clauses in the parties' agreements apply to this dispute between coemployees. 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." This Court has expressed a general disapproval of segregating disputed issues "into categories of 'arbitrable sheep and judicially-triable goats.'" "Any doubts about the arbitrability of an issue should be resolved in favor of arbitration." [*Id*. at 202 (citations 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) (citation omitted). The parties agree that the Federal Arbitration Act, 9 USC 1, applies in this case.[4] The United States Supreme Court has explained that under the Federal Arbitration Act, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H Cone Mem Hosp v Mercury Constr Corp*, 460 US 1, 24-25; 103 S Ct 927; 74 L Ed 2d 765 (1983).

The arbitration clause at issue applies to "[a]ny dispute or controversy arising out of or relating to this Agreement or to the interpretation or the breach thereof . . . ." This Court has characterized markedly similar language as both "broad" and encompassing matters that involve even nonparties to the agreement. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007). In *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234; 590 NW2d 580 (1998), this Court offered the following guidance for deciding whether a specific controversy falls within the scope of an arbitration clause:

> When deciding whether the parties agreed to arbitrate a certain matter, courts should ordinarily apply basic state-law principles that govern the formation of contracts. "'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) (emphasis in *Goodwin*). "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). [Some citations omitted.]

B. ARBITRABILITY OF PLAINTIFF'S CLAIMS

We find that five of the six claims asserted by plaintiff fall within the scope of the broad arbitration language contained in the employment and stock purchase agreements, and these five claims thus qualify as arbitrable. Plaintiff and his physician colleagues signed two agreements clearly and unambiguously proclaiming that all disputes "arising out of or relating to" the substance of the agreements, or their breach, would be submitted to arbitration. Plaintiff's allegations regarding minority shareholder oppression under MCL 450.1489, defamation, intentional infliction of emotional distress, tortious interference with a business relationship, and civil conspiracy originate directly from his employment relationship with defendants.[5] We reject the circuit court's conclusion that because the agreements bound the parties and MPSA, plaintiff's claims against his coemployees stand exempt from arbitration. Plaintiff's claims are intimately intertwined with the employment and stock purchase agreements, his relationship to his coemployees, and his coemployees' behaviors as officers and directors of MPSA. The plain language of the arbitration clause establishes that the parties intended to arbitrate all disputes

[4] The parties also offer pediatric surgery services in Ohio.

[5] We address plaintiff's PWDCRA claim in part IIC, *infra*.

flowing from their business and professional relationships. Accordingly, we reverse the circuit court's decision denying defendants' motion to compel arbitration of plaintiff's claims for minority shareholder oppression, defamation, intentional infliction of emotional distress, tortious interference and civil conspiracy.[6]

Plaintiff posits that federal case law, and in particular *McCarthy v Azure*, 22 F3d 351 (CA 1, 1994), contradicts our holding. *McCarthy* stemmed from a sale of the plaintiff's equity interest in a company called Theta I to a new venture designated as Theta II, incorporated by the defendant, Leo Azure. The parties' purchase agreement contained an arbitration clause. *Id*. at 353. The plaintiff and Azure also executed an "employment letter" stating that the plaintiff would receive a stipulated salary in exchange for serving as Theta II's president, chief engineer and chief executive officer. The employment letter did not incorporate an arbitration term. *Id*. at 354. About two weeks after the closing, Azure terminated the plaintiff's employment, "notwithstanding the promises contained in the Employment Letter." *Id*. The plaintiff sued Azure, Theta II and others in a federal district court, and the defendants moved to stay the proceedings pending arbitration. "The district court granted the motion with respect to Theta II, but denied it as to the remaining movants." *Id*. Azure appealed, contending that "as a disclosed agent of Theta II, he is entitled to enforce the arbitration provision included in his principal's agreement with the plaintiff." *Id*. at 356. The United States Court of Appeals for the First Circuit dismissed this argument, distinguishing between the scope of arbitration clauses contained in purchase agreements and "service contracts," which "contemplate[] an ongoing relationship in which the firm's promises only can be fulfilled by future (unspecified) acts of its employees or agents stretching well into an uncertain future." *Id*. at 357. Unlike a service contract, the First Circuit explained, "[a] person who contracts to transfer assets to a company faces a much different prospect: a one-shot transaction in which the purchaser's obligations are specified and are, essentially, performed in full at the closing, or soon thereafter." *Id*. The First Circuit held that because the purchase agreement in *McCarthy* did not "refer to the operations of, or services rendered by, Theta II," the purchase agreement's arbitration clause did not encompass "by implication" Theta II's employees. *Id*. at 357-358. The First Circuit further concluded that Azure had signed the purchase agreement as a corporate officer and not in a personal capacity, and that "'(s)igning an arbitration agreement as agent for a disclosed principal is not sufficient to bind the agent to arbitrate claims against him personally.'" *Id*. at 361, quoting *Flink v Carlson*, 856 F2d 44, 46 (CA 8, 1988).

The parties' employment and stock purchase agreements here are more closely analogous to service contracts rather than "one-shot transactions." *McCarthy*, 22 F3d at 357. Indisputably, the parties contemplated ongoing, long-term relationships governed by the terms of the employment and shareholder agreements. Thus, the facts of this case simply take it outside the applicability of the First Circuit's holdings in *McCarthy*.

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[6] In *Rooyakker*, 276 Mich App at 163, this Court declared arbitrable tortious interference and defamation claims involving nonparties to an arbitration agreement. Here, plaintiff's tortious interference and defamation claims flow directly from actions taken by defendants relating to the restrictive covenants contained within the employment and shareholder agreements.

We also remain unpersuaded by plaintiff's contention that because defendants signed the employment and stock purchase agreements as employees of MPSA, they cannot enforce arbitration of a claim made against them as individuals. In this regard, we adopt the United States Court of Appeals for the Sixth Circuit's reasoning in *Arnold v Arnold Corp*, 920 F2d 1269 (CA 6, 1990). *Arnold* involved a suit by a stock seller against a corporation and its officers alleging federal securities violations. Officers of the defendant corporation sought to enforce an arbitration clause in the stock purchase agreement pursuant to which the plaintiff had sold his shares. *Id*. at 1271-1272. The plaintiff insisted that because the individual defendants had not signed the stock purchase contract they did not possess authority to enforce its arbitration term, but the Sixth Circuit disagreed, explaining in relevant part as follows:

> [I]n the present case the nonsignatory defendants are alleged to have committed acts related to their running of the corporation. They are alleged to have formed committees of the Board of Directors from which appellant was excluded, decided whether and when to pay dividends, purchased and reissued corporate stock, and decided to sell the company. All of these alleged wrongful acts relate to the nonsignatory defendants' behavior as officers and directors or in their capacities as agents of the Arnold Corporation. … [T]he language of the arbitration agreement indicates that the parties' basic intent was to provide a single arbitral forum to resolve all disputes arising under the stock purchase agreement. We believe that Arnold Corporation is entitled to have the entire dispute arbitrated, where, as here, the individual defendants and Carl Marks & Co. wish to submit to arbitration. We therefore will follow the well-settled principle affording agents the benefits of arbitration agreements made by their principal . . . . [*Id*. at 1282.]

In summary, we detect in plaintiff's cited federal authority no basis tending to alter our conclusion that the instant parties plainly agreed to arbitrate all disputes relating to their employment relationship.

C. CIVIL RIGHTS ACT CLAIM

We lastly consider plaintiff's position that, even if his shareholder oppression, defamation, intentional infliction of emotional distress, tortious interference, and civil conspiracy claims fall within the arbitration clause's ambit, he cannot be compelled to arbitrate his PWDCRA claim. In plaintiff's estimation, the arbitration clause lacked any reference to arbitration of statutory claims, rendering it deficient under *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 156; 596 NW2d 208 (1999). In *Rembert*, a conflict panel of this Court held that "[p]redispute agreements to arbitrate statutory employment discrimination claims are valid as long as the employee does not waive any rights or remedies under the statute and the arbitral process is fair." *Id*. at 165-166 (footnote omitted). To ensure a fair opportunity to effectively vindicate statutory rights, "the arbitration procedures must include: (1) clear notice, (2) right to counsel, (3) reasonable discovery, (4) a fair hearing, and (5) a neutral arbitrator." *Id*. at 166.

The *Rembert* panel elaborated on the requisite notice concerning arbitration of statutory discrimination claims: "[W]e hold that to satisfy *Renny*'s requirement of fairness, and, where applicable, to satisfy MCR 3.602, arbitration procedures must include the following: (1) *Clear*

notice to the employee that he is waiving the right to adjudicate discrimination claims in a judicial forum and opting instead to arbitrate these claims. *Rembert*, 235 Mich App at 161 (emphasis added), citing *Renny v Port Huron Hosp*, 427 Mich 415, 437; 398 NW2d 327 (1986).

In *Arslanian v Oakwood United Hosps, Inc (On Remand)*, 240 Mich App 540, 541-542; 618 NW2d 380 (2000), this Court subsequently considered whether the plaintiff, a union employee, could be compelled to arbitrate his discrimination claims arising under the Civil Rights Act, MCL 37.2101 *et seq*. We concluded that "because the union asserts control in the labor arbitration process and because the interests of the individual in enforcing statutory rights may be subordinated to the perceived greater interest of the bargaining unit, mandatory labor arbitration of civil rights claims is inappropriate." *Id*. at 550. The Court in *Arslanian* relied on *Rembert*, 235 Mich App 118, to further observe that, even if the plaintiff had signed an individual employment contract instead of a collective bargaining agreement, the Court

> would otherwise rule that plaintiff can still pursue his statutory claims because the instant agreement clearly fails to satisfy one particular factor needed to meet the requirement of a fair arbitral process. *Among other things, the arbitration proceedings must include clear notice to the employee that he is waiving the right to adjudicate discrimination claims in a judicial forum. Rembert, supra* at 161. . . . [I]n this case the arbitration clause generally provides that an employee may grieve "an alleged violation of a specific article or working condition or section of this Agreement." Although the agreement does contain an antidiscrimination provision, it does not explicitly reference or incorporate statutory discrimination claims. Further, it is provided that an arbitrator appointed under the agreement is "empowered to rule only upon the interpretation and construction of the specific provisions of this contract and shall not be empowered to ... change or modify any provision ... or introduce any new material." We additionally find, therefore, that together these provisions do not constitute a clear and unmistakable waiver of the right to bring a statutory discrimination claim in court. Plaintiff was not on notice that by pursuing arbitration with the union he would lose this right. [*Id*. at 550-551 emphasis added, footnote omitted).]

In this case, the arbitration language in the employment and stock purchase agreements made no reference to statutory discrimination claims. Moreover, no portion of either the employment agreement or the stock purchase agreement referenced plaintiff's employment-related civil rights. The language in the arbitration clauses did not constitute a clear waiver of plaintiff's right to bring a statutory civil rights claim in the circuit court. *Rembert*, 235 Mich App at 161. Consequently, we conclude that plaintiff did not waive his right to pursue a PWDCRA count in the circuit court and cannot be compelled to arbitrate this claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly