STATE OF MICHIGAN

COURT OF APPEALS

SENIOR ACCOUNTANTS, ANALYSTS AND APPRAISERS ASSOCIATION, Plaintiff-Appellee,	UNPUBLISHED April 16, 2019
v	No. 343498 Wayne Circuit Court
CITY OF DETROIT WATER AND SEWERAGE DEPARTMENT, Defendant-Appellant.	LC No. 17-017548-CL

Before: TUKEL, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying its motion to dismiss, granting the motion to compel arbitration brought by plaintiff, and denying plaintiff's request for attorney fees and costs. We affirm.

In 2015, defendant laid off numerous accountants and government analysts who were represented by plaintiff. Following the layoffs, plaintiff's president, Audrey Bellamy, filed a union grievance on behalf of the union members. At the time of the layoffs, plaintiff's members and defendant were under a contractual relationship pursuant to a document entitled the City Employment Terms (CET). On May 18, 2015, Bellamy filed the grievance in accordance with the third step of the grievance procedure set forth in the CET. The fourth step of the grievance procedure was arbitration, and the arbitration provision provided:

> Any unresolved grievances which relate to the interpretation, application or enforcement of any specific article or section of the CET, or any written supplementary agreement or letters and memoranda of understanding appended to this [CET], and which have been fully processed through the last step of the grievance procedure, may be submitted, in strict accordance with the following:
>
> A. Arbitration shall be invoked by written notice to the other party of intention to arbitrate. The parties shall meet to select an ad hoc arbitrator. If the parties are unable to agree upon an arbitrator within ten (10)

> working days of such notice, the party desiring arbitration shall refer the matter to the American Arbitration Association or the Federal Mediation and Conciliation Service for the selection of an impartial arbitrator and determination of the dispute. If the party desiring arbitration fails to refer the matter to the American Arbitration Association or the Federal Mediation and Conciliation Service within a reasonable time, not to exceed ninety (90) working days of the notice of intention to arbitrate, the matter shall be considered settled on the basis of the last answer to the grievance.

In the grievance, Bellamy claimed that certain provisions of the CET had been violated as a result of the layoffs, including Article 3, which stated that an employee could be disciplined or discharged for "just cause." Article 3 also stated that an employee could be discharged due to a "lack of work, lack of funds or for disciplinary reasons[.]" After defendant denied the grievance, Bellamy sent a notice of intent to arbitrate to defendant. When the matter was not resolved through arbitration, plaintiff filed the present action. The lower court found that it was undisputed that plaintiff had not referred the dispute to the American Arbitration Association (AAA) or the Federal Mediation and Conciliation Service (FMCS) within 90 days of the notice to arbitrate; however, the court determined that all of the factors of arbitrability were present, and therefore, the question of whether plaintiff had failed to fulfil the requirements of the arbitration clause was a issue for the arbitrator, not the court.

Defendant argues that the trial court erred when it denied its motion to dismiss plaintiff's complaint and granted plaintiff's motion to compel arbitration because plaintiff was not entitled to arbitration since plaintiff failed to fulfil all of the requirements set forth in the arbitration clause. We disagree.

This Court reviews a trial court's decision regarding a motion to dismiss de novo. *Mouzon v Achievable Visions*, 308 Mich App 415, 418; 864 NW2d 606 (2014). "Whether a dispute is arbitratable represents a question of law for the courts that we review de novo." *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 594; 637 NW2d 526 (2001).

"The duty to arbitrate grievances arises from [the] contractual agreement between an employer and its employees." *AFSCME, Council 25 v Hamtramck Housing Comm*, 290 Mich App 672, 674; 804 NW2d 120 (2010) (quotation marks and citation omitted). "Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide." *Bienenstock & Associates, Inc v Lowry*, 314 Mich App 508, 516; 887 NW2d 237 (2016). However, "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* The initial question as to whether the parties agreed to arbitrate is referred to as the "gateway question" or "a question of arbitrability." *Id.* "[I]n a suit to compel or enjoin arbitration, a court's inquiry is limited to the question of arbitrability." *Ottawa Co v Jaklinski*, 423 Mich 1, 25; 377 NW2d 668 (1985).

This Court has set forth a three-part test for determining arbitrability: "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." *In re Nestorovski Estate*, 283 Mich App 177, 202; 769 NW2d 720 (2009). "Any doubts about the arbitrability of an issue should be resolved in favor of arbitration." *Id*. at 203. This Court has stated that "there is a presumption of arbitrability unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AFSCME, Council 25*, 290 Mich App at 674.

However, unlike gateway questions of arbitrability, "procedural questions which grow out of a dispute and bear on its final disposition" are sometimes referred to as subsidiary questions and "are to be decided by the arbitrator, not the court." *Bienenstock*, 314 Mich App at 516. This is because "the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." *Id*. (quotation marks and citation omitted). "Examples of procedural questions for the arbitrator to decide include whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration, and allegations of waiver, delay, or a like defense to arbitrability." *Id*. at 516 (quotation marks, citation and brackets omitted). This Court has held that issues of timeliness are also procedural issues for the arbitrator, not the court. *AFSCME, Council 25*, 290 Mich App at 674; see also *Amtower v William C Roney & Co*, 232 Mich App 226, 233; 590 NW2d 580 (1998) (concluding that "Michigan law provides that arbitrators, rather than courts, should decide the application of such potential defenses to arbitration as contractual limitation periods, statutes of limitation, and the doctrine of laches").

Looking to the first factor of arbitrability, there is no dispute that the CET contained an arbitration clause. Looking to the second factor of arbitrability, the parties disagree as to whether the dispute falls within the CET's arbitration clause. Defendant contends that because plaintiff did not fulfil the requirements of the arbitration clause by failing to refer the dispute to the AAA or the FMCS in 90 days, plaintiff's right to arbitrate the issue was never triggered, and therefore, this dispute cannot fall within CET's arbitration clause. Defendant's argument is not persuasive. The arbitration clause of the CET states that "[a]ny unresolved grievances which relate to the interpretation, application or enforcement of any specific article or section of the CET, or any written supplementary agreement or letters and memoranda of understanding appended to this [CET], and which have been fully processed through the last step of the grievance procedure," may be submitted to arbitration in accordance with the arbitration clause requirements. Therefore, the arbitration clause is applicable to grievances involving the interpretation, application, or enforcement of Article 3, which provides that an employee could be disciplined or discharged for just cause, or discharged due to a lack of work, lack of funds, or disciplinary reasons. Moreover, the record evidence established that the grievance had been processed through the third step of the grievance procedure. Bellamy filed a third-step grievance on behalf of the laid-off union members, and in response, defendant replied that an investigation had been conducted and that the grievance was denied. Thus, plaintiff's dispute as to whether the employees were discharged properly and in accordance with certain provisions of the CET, including Article 3, falls within the CET's arbitration provision.

Regarding the third factor of arbitrability, the dispute at issue here is not "expressly exempted from arbitration by the terms of the contract." *In re Nestorovski Estate*, 283 Mich App at 202. Rather, plaintiff's failure to refer the grievance to the AAA or the FMCS is a procedural question for the arbitrator to decide. As this Court has stated, the "application of particular procedural preconditions for the use of arbitration" are intended for the arbitrator, not the court.

Bienenstock, 314 Mich App at 516. Therefore, the issue of whether plaintiff complied with the procedural requirements to arbitration as set forth in the CET's arbitration clause is a procedural question for the arbitrator. In *AFSCME, Council 25*, this Court considered whether the issue of timeliness was a question for the court or the arbitrator. This Court held that the arbitration provision required arbitration of unresolved grievances and that "there [was] nothing in the provision that explicitly excludes the issue of timeliness from the arbitrator." *AFSCME, Council 25*, 290 Mich App at 675. Therefore, this Court concluded,

> [A]llowing the arbitrator to determine the question of timeliness is consistent with the purpose of arbitration. Allowing procedural challenges to be heard by a court rather than by the arbitrator runs contrary to the presumption of arbitrability and would leave every arbitration subject to piecemeal litigation, a result contrary to a central purpose of arbitration. [*Id*. at 676.]

Similarly, in this case, there is nothing in the arbitration clause that explicitly exempts the arbitrator from deciding whether the procedural preconditions of arbitration were fulfilled. Thus, the trial court did not err in holding that the factors of arbitrability were met and that any failure on the part of plaintiff to comply with the terms of the arbitration clause was for the arbitrator to decide.

Defendant also argues that plaintiff's motion to compel arbitration is barred by the doctrine of collateral estoppel and that the trial court therefore erred when it decided that issues of collateral estoppel are for the arbitrator to decide. The defense of collateral estoppel falls outside of the gateway questions of arbitrability, and thus, collateral estoppel implicates a procedural defense to arbitrability. Similar to waiver, delay, laches, and statutes of limitations, whether the doctrine of collateral estoppel bars a party's ability to arbitrate a dispute is for the arbitrator to decide. See *Bienenstock*, 314 Mich App at 516; *Amtower*, 232 Mich App at 233. Moreover, if there is any doubt as to whether an issue is a gateway issue for the court or a procedural issue for the arbitrator, the issue should be resolved in favor of arbitration. *In re Nestorovski Estate*, 283 Mich App at 203. Thus, the trial court did not err in holding that whether the defense of collateral estoppel constitutes a bar to arbitration is an issue for the arbitrator.

Affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jonathan Tukel
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly