STATE OF MICHIGAN

COURT OF APPEALS

LISA GRAY,

Plaintiff-Appellant,

v

NORMAN YATOOMA, and LEGAL ADVOCACY, PC, f/k/a NORMAN YATOOMA & ASSOCIATES, PC,

Defendants-Appellees.

UNPUBLISHED
December 17, 2020

No. 351360
Oakland Circuit Court
LC No. 2019-173113-CB

Before: MURRAY, C.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court opinion and order granting summary disposition under MCR 2.116(C)(7) in favor of defendants, Norman Yatooma and Legal Advocacy PC, f/k/a Norman Yatooma & Associates, PC. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff filed a declaratory action raising six-counts including: (1) "non-compete agreement violates Michigan public policy;" (2) "non-arbitrability of compensation commitment agreement;" (3) "voidable arbitration clause in non-compete agreement;" (4) breach of contract; (5) unjust enrichment; and (6) quantum meruit. Specifically, plaintiff, a licensed attorney since May 2011, alleged that she was hired by defendant law firm in August 2014. On August 19, 2014, two documents prepared by defendants were executed delineating the terms of her employment: (1) a compensation commitment agreement, and (2) a separate employment and confidentiality agreement or non-compete agreement. Plaintiff asserted that the parties' employment relationship ended in the fall of 2018, when she moved to Traverse City. However, during her employment with defendants, plaintiff allegedly worked on a legal malpractice action involving mismanagement of intellectual property portfolios that resulted in a $13.1 million dollar recovery for the client, but defendants refused to pay plaintiff for her work on the file. She acknowledged that there was an arbitration provision delineated in the non-compete agreement, but noted that it was not contained in the compensation commitment agreement. Thus, plaintiff filed suit in circuit court to obtain an accounting, the recovery of her compensation withheld by defendants, and a declaratory judgment that

the non-compete agreement was unethical and unenforceable because it violates both the Michigan Rules of Professional Conduct (MRPC) and public policy. She also sought a declaration that her compensation controversy was not subject to the arbitration provision contained in the non-compete agreement.

In response to the complaint, defendants filed a motion for summary disposition under MCR 2.116(C)(7), alleging that the trial court lacked jurisdiction over the matter because of the arbitration clause in plaintiff's employment agreement, and defendants asserted that they were entitled to sanctions, costs, and attorney fees for the frivolous filing. Specifically, it was claimed that plaintiff was a licensed attorney for four years when she began her employment with defendants. Additionally, her husband and father-in-law are attorneys. Plaintiff certified in her employment agreement that she had read it carefully and had the opportunity to consult with counsel of her choice. Defendants claimed that plaintiff agreed that if she initiated any dispute with defendants, it would be submitted to confidential, binding arbitration. Additionally, if there was a breach of the agreement, she allegedly consented to being responsible for liquidated damages in the amount of $50,000. The filing of the circuit court complaint was a violation of the arbitration and confidentiality provisions and invoked defendants' right to sanctions against plaintiff and her counsel. Thus, defendants requested summary disposition in their favor and dismissal of the action for submission of the controversy to arbitration.

Plaintiff filed a brief in opposition to the dispositive motion. She alleged that the arbitration provision was not enforceable because defendant Yatooma reserved the right to modify the provision, and therefore, it was not binding. Plaintiff further asserted that the arbitration provision was contained solely within the non-compete agreement and did not apply to the compensation commitment agreement for which she sought enforcement. It was also claimed that the arbitration provision was unenforceable for violating the MRPC and was contrary to public policy by imposing a penalty of $50,000 for each expression of shortcomings pertaining to defendant Yatooma. In conjunction with the public policy argument, plaintiff claimed that the arbitration provision was fundamentally unfair because it limited her discovery to a 60-day period with one deposition and imposed all costs of the arbitration upon her. Accordingly, plaintiff requested that the motion for summary disposition be denied.

In reply, defendants countered that the arbitration provision was enforceable because it required mutual consent to modify the agreement. They further contended that the two documents operated as one enforceable agreement, and therefore, plaintiff's challenge to the placement of the arbitration provision in only one of the documents was without merit. Finally, defendants asserted that the decisions relied on by plaintiff were distinguishable, and the agreements were not contrary to public policy.

Ultimately, the trial court granted defendants' motion for summary disposition, dismissed plaintiff's complaint, and denied defendants' request for sanctions. First, the trial court rejected the assertion that defendants were entitled to unilaterally modify the agreement, but concluded that mutual assent by the parties was required. Additionally, the trial court acknowledged that the arbitration provision only appeared in the non-compete agreement and did not appear in the compensation commitment agreement. Nonetheless, it found that the arbitration agreement referenced the compensation commitment agreement and addressed the same subject matter. Accordingly, the trial court concluded that the documents were to be construed together, warranting the application of the arbitration provision to plaintiff's compensation dispute. Finally, the trial court declined to address the claims that the arbitration provision violated public policy and fundamental fairness by determining that these issues were properly submitted to the arbitrator for resolution. From this decision, plaintiff appeals.

II. APPLICABLE LAW

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364 (2018). Summary disposition is appropriate pursuant to MCR 2.116(C)(7) when the moving party demonstrates "an agreement to arbitrate or to litigate in a different forum." A motion brought under MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence. *Galea v FCA US LLC*, 323 Mich App 360, 368; 917 NW2d 694 (2018). However, neither party is required to file supporting material in support of a motion raised under MCR 2.116(C)(7). *Id.* Instead, the allegations in the complaint are accepted as true unless contradicted by documentary evidence offered by the moving party. *Id.*

The question of whether a particular issue is subject to arbitration and the contractual language addressing arbitration are reviewed de novo. *Altobelli v Hartmann*, 499 Mich 284, 295; 884 NW2d 537 (2016). "An arbitration agreement is a contract by which the parties forgo their rights to proceed in civil court in lieu of submitting their dispute to a panel of arbitrators." *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 577; 552 NW2d 181 (1996). The *Altobelli* Court delineated the following rules to be applied to arbitration:

> Arbitration is a matter of contract. Accordingly, when interpreting an arbitration agreement, we apply the same legal principles that govern contract interpretation. Our primary task is to ascertain the intent of the parties at the time they entered into the agreement, which we determine by examining the language of the agreement according to its plain and ordinary meaning. In considering the scope of an arbitration agreement, we note that a party cannot be required to arbitrate an issue which it has not agreed to submit to arbitration. The general policy of this State is favorable to arbitration. The burden is on the party seeking to avoid the agreement, not the party seeking to enforce the agreement. In deciding the threshold question of whether a dispute is arbitrable, a reviewing court must avoid analyzing the substantive merits of the dispute. If the dispute is arbitrable, the merits of the dispute are for the arbitrator. [*Altobelli*, 499 Mich at 295-296 (quotation marks, citations, and alterations omitted).]

In light of the above rules, plaintiff, as the party seeking to avoid the agreement, had the burden of demonstrating that she did not agree to submit the issue of compensation to arbitration. However, the policy of this state favors arbitration.

III. THE NON-COMPETE AGREEMENT

Three excerpts from the non-compete agreement are pertinent to resolving this appeal:

> GRAY shall be employed on an at-will basis by NYA as an Associate Attorney in NYA's office in Bloomfield Hills, Michigan for compensation as outlined in GRAY'S August 19, 2014 offer letter.
>
> * * *
>
> NYA may seek legal damages, including liquidated damages as set forth herein, and any applicable equitable relief in the event of a breach or violation of this Agreement. If a dispute arises between NYA and GRAY regarding this Agreement, and GRAY initiates

the dispute, GRAY's dispute shall be submitted for confidential binding arbitration. All arbitrations under this Agreement shall be conducted under the expedited Commercial Rules of the American Arbitration Association, conducted via a single arbitrator. Discovery will be limited to a 60-day window, following the filing of the arbitration claim, and GRAY is limited to taking one (1) deposition in that arbitration. A judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction. All arbitration proceedings shall be conducted in Oakland County, Michigan. GRAY shall be solely responsible for all of the costs and expenses of the arbitration, including without limitation, fees of the arbitrator, AAA fees and any administrative fees, if applicable. GRAY UNDERSTANDS AND ACKNOWLEDGES THAT, BY AGREEING TO BINDING ARBITRATION, GRAY WAIVES THE RIGHT TO SUBMIT THE DISPUTE TO A COURT FOR DETERMINATION AND ALSO WAIVES THE RIGHT TO A JURY TRIAL OR TO PROSECUTE A CLASS ACTION.

* * *

This Agreement constitutes the full understanding of the parties. There are no prior or contemporaneous oral or written agreements that are not included within this agreement.

By signature below, GRAY acknowledges that: (1) she has had sufficient opportunity to and has carefully read each provision of this Agreement; (2) she has had sufficient opportunity to review this Agreement with legal counsel of her own choice; (3) she understands each provision of this Agreement; (4) she is not relying upon any representations or promises that are not set forth in this Agreement; and (5) she is freely and voluntarily signing this Agreement and intends to be bound by this Agreement.

IV. ANALYSIS

Plaintiff contends that the trial court erred in its enforcement of the arbitration provision because the provision did not apply to compensation challenges and was invalid because it permitted defendants' unilateral modifications, the provision was fundamentally unfair, and the agreement was void ab initio because it was contrary to public policy. We disagree.

A. ARBITRATION CONSTRUCTION

When determining whether a dispute must be submitted to arbitration, the court examines whether an arbitration agreement has been reached by the parties and whether there was mutual assent. *Horn v Cooke*, 119 Mich App 740, 744; 325 NW2d 558 (1982). A party who signs a written instrument containing an agreement to arbitrate of conspicuous language and font is presumed to know the nature of the document and to understand its content. *Galea*, 323 Mich App at 369. Next, the court must review whether the subject matter of the instant dispute is governed by the arbitration clause. *Lebenbom v UBS Fin Servs*, 326 Mich App 200, 211; 926 NW2d 865 (2018). If a plaintiff's claims even "arguably" fall within the terms of the arbitration clause, any doubts are resolved in favor of arbitration. *Id.*

In the present case, plaintiff executed two documents with defendants, a compensation commitment agreement and the "employment and confidentiality agreement" or non-compete agreement. The non-compete agreement contained the following provision: "If a dispute arises between NYA and GRAY regarding this Agreement, and GRAY initiates the dispute, GRAY's dispute shall be submitted for

confidential binding arbitration." According to the plain language, plaintiff agreed to proceed to a binding arbitration in her employment and confidentiality agreement. Although she contends that she is only contesting her compensation and it was delineated in a separate agreement without an arbitration provision, a review of that document reveals it contained the terms regarding how plaintiff would be paid. Specifically, she did not receive a salary or benefits, and it delineated how her compensation was calculated for contingent versus hourly fee clients. Although plaintiff is correct that this document does not contain an arbitration provision, the first page of the non-compete agreement refers to this document as outlining her compensation. Arbitration is favored and arbitration should include claims that "arguably" fall within the scope of arbitration. *Altobelli*, 499 Mich at 295-296; *Lebenbom*, 326 Mich App at 211.

To avoid application of the arbitration provision, plaintiff notes that the non-compete agreement contains a merger clause indicating that: "This Agreement constitutes the full understanding of the parties. There are no prior or contemporaneous oral or written agreements that are not included within this agreement." However, page one of the non-compete agreement expressly acknowledged the compensation agreement that plaintiff seeks to enforce: "GRAY shall be employed on an at-will basis by NYA as an Associate Attorney in NYA's office in Bloomfield Hills, Michigan for compensation as outlined in GRAY's August 19, 2014 offer letter." In *Culver v Castro*, 126 Mich App 824, 826; 338 NW2d 232 (1983), this Court held that where two writings refer to each other and relate to the same subject matter, the documents may be construed together:

> First, the plaintiff contends that the trial court erred in ruling that the first land contract and the building contract are parts of the same agreement. It has been held that where one writing refers to another the two writings are to be construed together. Similarly, where there are several agreements relating to the same subject matter the intention of the parties must be gleaned from all the agreements. In the present case, the first land contract referred to the building contract. Both contracts clearly relate to the same subject matter. Thus, we conclude that the trial court did not err in construing these two contracts as part of the same agreement. [*Id*.]

Similarly, in the present case, the trial court did not err in construing the compensation commitment agreement with the non-compete agreement. The non-compete agreement referred to the compensation agreement or offer letter, and the letter was an expansion of the terms of the employment and confidentiality agreement. Specifically, it delineated how plaintiff would be paid because she did not draw a salary or benefits, but rather, addressed her payment in terms of clients that paid an hourly rate as opposed to a contingent or flat fee agreement and the hours billed. Plaintiff's attempt to exclude the compensation dispute from the arbitration is without merit because the documents relate to the same subject matter and should be construed together. *Id*.

We also reject plaintiff's contention that the arbitration provision cannot be enforced because defendants retained the right to unilaterally modify the provision. This portion of the non-compete agreement is entitled "Modification" and it states: "No provision of this Agreement may be modified except in writing, signed by [defendant Yatooma] in the State of Michigan." However, the plain language of this sentence does not limit the party that may modify the agreement. *Altobelli*, 499 Mich at 295. Rather, it only addresses the fact that any modifications must be in writing and that defendant Yatooma must sign the document. In fact, there is no limitation on who may seek modification, and therefore, plaintiff is not entitled to appellate relief.

B. FUNDAMENTAL FAIRNESS

We also reject plaintiff's assertion that principles of fundamental fairness prevent the dispute from being submitted to arbitration. Rather, this issue falls within the arbitrator's statutory authority for resolution.

The Uniform Arbitration Act (UAA), MCL 691.1681 *et seq.*, provides that "[o]n or after July 1, 2013, this act governs an agreement to arbitrate whenever made." MCL 691.1683(1). MCL 691.1686 states, in pertinent part:

> (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.
>
> (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
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> (3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

Thus, the court's role is to determine whether an agreement to arbitrate exists and whether the subject matter is included in the agreement to arbitrate. MCL 691.1686(2). However, whether the contract containing the agreement to arbitrate is enforceable presents an issue for resolution by the arbitrator. MCL 691.1686(3). Indeed, it is concerning that the arbitration provision in the non-compete agreement limits the time for discovery to 60-days, limits discovery to only one deposition, and makes plaintiff responsible for all fees. The provision establishing liquidated damages at $50,000 is also questionable. However, plaintiff was a licensed attorney and does not dispute that she is married to an attorney and that her father-in-law is an attorney. Plaintiff signed the document containing the arbitration provision and initialed each page. She further certified that she had the opportunity to consult with counsel regarding the agreement she signed. Nonetheless, applying MCL 691.1686(3), it is the arbitrator's determination regarding "whether a contract containing a valid agreement to arbitrate is enforceable." Accordingly, plaintiff may submit to the arbitrator that, despite her status as an attorney and her signature on the non-compete agreement, the terms of the arbitration, the fees, and the liquidated damages provision[1] are not enforceable because they are contrary to fundamental fairness.

[1] With regard to the application of the liquidated damages provision, we note that defendants requested $50,000 in damages for plaintiff's filing of the complaint instead of proceeding to arbitration, and the trial court denied that request. Defendants failed to file a cross-appeal challenging the denial of its request. Liquidated damages reflect an agreement by the parties that fixes the amount of damage in the event of a breach. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998). A question of law is presented when determining whether a liquidated damage provision is valid and enforceable or invalid as a penalty. *Id*. A liquidated damage provision will be sustained if it is reasonable in relation to the injury suffered and not unconscionable or excessive. *Id*. The competing

C. PUBLIC POLICY VIOLATION

Finally, plaintiff submits that the non-compete agreement violates multiple provisions of the MRPC, and therefore, the agreement is void ab initio as contrary to public policy. Generally, an issue is preserved for appellate review if it is raised, addressed, and decided by the trial court. *Mouton v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014). We note that this issue is not preserved for appellate review because the trial court declined to address it, finding that it presented an issue for the arbitrator. Furthermore, in the trial court, plaintiff only alleged that defendant violated MRPC 5.1, 5.6, and 8.4.[2] Irrespective of preservation requirements, we conclude that this issue does not entitle plaintiff to appellate relief.

In the present case, plaintiff argued in the trial court that the arbitration provision violated MRPC 5.1, 5.6, and 8.4 and should be invalidated as a violation of public policy. Although plaintiff cited to legal authority addressing contracts and the circumstances that render them void, her analysis consists of the following statement:

> Here, the Non-Compete Agreement imposes sweeping restrictions and limitations on Gray's ability to practice law. These terms are in clear violation of Rule 5.6 of the Michigan Rules of Professional Conduct and Rule 5.1 and Rule 8.4 of the MRPC.

A plaintiff cannot simply announce her position and leave it to this Court to rationalize the basis of the claim. See *Cadle Co v City of Kentwood*, 285 Mich App 240, 250 n 10; 776 NW2d 145 (2009). The appellant must first adequately prime the pump for the appellate well to flow, *id*., and plaintiff failed to do so in this instance. More importantly, this litigation does not involve plaintiff's protest of any restrictions on her limitation and ability to practice law. Rather, plaintiff asserted that she left defendants' employment because of a move to Traverse City. She does not allege that she sought to take clients with her to Traverse City or that a client sought her services, but she had to deny representation because of the non-compete agreement. Thus, although plaintiff contends that the agreement violates public policy for its limitations on the practice of law, this litigation solely involves the payment of compensation, and there does not appear to be a correlation between an alleged violation of the MRPC's raised and arbitration.

In *Tinsley v Yatooma*, ___ Mich App ___, ___; ___ NW2d ___ (2020), (Docket No. 349354), the plaintiffs retained the defendants to represent them in a malpractice action against former attorneys and a business broker. The plaintiffs signed an engagement letter addressing the defendants' representation in the underlying matter that expressly provided for binding arbitration and the waiver of a right to jury trial. Despite this provision, the plaintiffs filed a complaint in circuit court, alleging that the defendants committed malpractice by causing them to settle the case for less than what it was worth. The defendants moved for summary disposition, citing the arbitration provision of the engagement agreement and noting that the plaintiffs had the engagement agreement reviewed by independent counsel before signing it. In response, the plaintiffs alleged that the arbitration provision was not enforceable because it violated MRPC

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interests between the amount of the liquidated damages and when invoked in light of plaintiff's agreement to the provision may be presented to the arbitrator.

[2] On appeal, she raises those provisions and contends that MRPC 1.5, 1.8, 1.16, and 1.17 are also violated. We decline to address these provisions raised for the first time on appeal.

1.8(h)(1), addressing a lawyer's limitation of liability to a client. However, defendants noted that the agreement advised the plaintiffs to seek independent counsel review, which was all MRPC 1.8(h)(1) required. The trial court concluded that the arbitration provision was enforceable because the plaintiffs consulted with independent counsel. *Id*. at slip op 1-2.

This Court affirmed the trial court, by acknowledging that contracts that violate the ethical rules expressed in the MRPC may be contrary to public policy and unenforceable. However, despite acknowledging that violations of the MRPC "could potentially serve as a basis to revoke an arbitration provision under the UAA," the *Tinsley* Court also analyzed whether there was a correlation between the claimed MRPC violation and the demand for arbitration. ("Nothing in the plain language of MRPC 1.8(h)(1) suggests that a contracting attorney commits an ethical violation by demanding arbitration when a former client, who actually consulted with independent counsel regarding the underlying attorney-client agreement that contained the arbitration clause, fails to bring up the clause or issue during the consultation.") Specifically, it was noted that MCL 691.1686(1), allowing for the revocation of an arbitration agreement on grounds that exist at law or in equity for the revocation of a contract, was essentially a codification of common-law contract principles. Yet, revocation of the arbitration agreement was not warranted when one of the plaintiffs was an experienced business man and his independent counsel examined the arbitration agreement that was delineated in all capital letters and advised that it resulted in a waiver of the submission of the dispute to a court. *Tinsley*, ___ Mich App at ___, slip op 4-6.

In the present case, plaintiff made a blanket assertion that violation of MRPC was contrary to the public policy and rendered the agreement void. However, she failed to correlate the particular rule to an invalidation of the arbitration provision. Moreover, plaintiff was an attorney, the arbitration provision was in all capital letters, and the document expressed that she had the opportunity to consult with counsel. In light of *Tinsley*, we decline to declare the agreement as void against public policy.

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens