STATE OF MICHIGAN

COURT OF APPEALS

WIELAND CORPORATION,

Plaintiff/Counterdefendant/Cross-Defendant-Appellee,

v

NEW GENETICS, LLC, and NPA EQUITY INVESTMENTS, LLC,

Defendants-Appellants,

and

STANDARD ELECTRIC COMPANY, GROW-RAY TECHNOLOGIES, INC. and GALE PLUMBING AND HYDRONICS, INC.,

Defendants/Counterplaintiffs/Cross-Plaintiffs,

and

PROGRESSIVE HEATING COOLING & REFRIGERATION, INC., and LEAVITT AND STARK EXCAVATING, INC.,

Defendants/Counterplaintiffs/Cross-Plaintiffs-Appellees.

UNPUBLISHED
April 15, 2021

No. 353484
Eaton Circuit Court
LC No. 19-001272-CK

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

PER CURIAM.

Defendants New Genetics, LLC (New Genetics) and NPA Equity Investments, LLC (NPA) appeal the trial court's order denying their motion to dismiss or to compel arbitration of plaintiff

Wieland Corporation's (Wieland) claims in this action. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

This case concerns whether appellants can compel arbitration of Wieland's claims and the claims of various subcontractors related to a construction project in Eaton County. Wieland is a construction company based in Michigan, and New Genetics cultivates pharmaceutical-grade medical cannabis for the Michigan market.

In 2018, New Genetics and Wieland entered into a construction contract (hereafter the "general contract") to build a marijuana growing facility on property owned by NPA in Eaton County. As relevant to this appeal, the general contract contains a set of steps to be used in resolving disputes. The first step in the dispute-resolution process requires the project architect to be the initial decision-maker of any claims. The second step provides for mediation of the architect's decision. The third step states that any claim not resolved by mediation is subject to binding arbitration. The general contract also contains a number of provisions concerning subcontractors. Notably, § 5.3 provides as follows:

> **5.3 Subcontractual Relations**
>
> By appropriate written agreement, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work that the Contractor, by these Contract Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies, and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement that may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

According to Wieland's initial complaint, it submitted a number of change orders to New Genetics, which resulted in increased costs of $116,511.57. Wieland alleged that as of the date of the complaint, New Genetics still owed it over $1,200,000. Wieland's complaint also named a number of subcontractors as parties. The complaint sought relief for breach of contract and to

foreclose on a construction lien that was filed by Wieland. Wieland also alleged an alternative claim for unjust enrichment. Various subcontractors, including Gale Plumbing and Hydronics, Inc. (Gale),[1] Progressive Heating Cooling & Refrigeration, Inc. (Progressive), and Leavitt & Stark Excavating, Inc. (Leavitt), filed their own counterclaims or cross-claims, including to foreclose on their own construction liens.

Appellants moved to compel arbitration of Wieland's claims, relying on the arbitration clause in the general contract. Appellants also argued that, although the various subcontractors were not parties to the general contract, they also should be required to arbitrate their claims under agency or estoppel theories. The trial court denied appellants' motion to dismiss or to compel arbitration. The trial court found that the subcontractors' claims were not subject to arbitration. The court further held that, notwithstanding the arbitration clause in the general contract between Wieland and New Genetics, the various claims could not be bifurcated because parties should not be allowed to divide their disputes between litigation in court and arbitration. Accordingly, the trial court denied appellants' motion to dismiss or to compel arbitration. This Court subsequently granted appellants' application for leave to appeal.[2]

II. STANDARDS OF REVIEW

Appellants brought their motion to dismiss or to compel arbitration under MCR 2.116(C)(7), which provides that summary disposition may be granted if "dismissal of the action . . . is appropriate because of . . . an agreement to arbitrate or to litigate in a different forum[.]" "[We] review[] de novo a trial court's decision on a motion for summary disposition[.]" *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010).

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010) (citations omitted).]

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[1] Gale was dismissed from this appeal upon stipulation of the parties. *Wieland Corp v New Genetics, LLC*, unpublished order of the Court of Appeals, entered March 23, 2021 (Docket No. 353484). Grow-Ray Technologies, Inc., was also dismissed. *Wieland Corp v New Genetics, LLC*, unpublished order of the Court of Appeals, entered March 30, 2021 (Docket No. 353484).

[2] *Wieland Corp v New Genetics, LLC*, unpublished order of the Court of Appeals, entered October 26, 2020 (Docket No. 353484).

"We review de novo a [trial] court's determination that an issue is subject to arbitration[.]" *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009) (quotation marks and citation omitted). "This issue also involves questions of law regarding the construction of a contract, which we review de novo as well." *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010). "Further, we review de novo a question of statutory interpretation." *Hoffman*, 290 Mich App at 39.

III. ANALYSIS

A. ARBITRATION OF WIELAND'S CLAIMS

Appellants argue that the trial court erred by not dismissing the claims against New Genetics because the general contract requires "claims to be submitted to a multi-step dispute resolution process that culminates with the arbitration of any unresolved claims." We agree that the trial court erred in this respect.

"Arbitration is a matter of contract," *City of Ferndale v Florence Cement Co*, 269 Mich App 452, 460; 712 NW2d 522 (2006), and "[t]he cardinal rule in the interpretation of contracts is to ascertain the intention of the parties," *Shay*, 487 Mich at 660 (quotation marks and citation omitted). "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Lichon v Morse*, 327 Mich App 375, 390; 933 NW2d 506 (2019) (quotation marks and citations omitted), lv gtd 504 Mich 962 (2019).

> 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. [*In re Nestorovski Estate*, 283 Mich App at 202-203 (quotation marks and citations omitted).]

In this case, the general contract between Wieland and New Genetics unambiguously provides that "any Claim subject to, but not resolved by, mediation" is to be resolved through arbitration. The general contract defines a "claim" as

> a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in Contract Time, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.

Given this language, Wieland's claims for payment under the general contract are clearly subject to arbitration. The trial court found, however, that the general contract provided an exception for Wieland's claim to foreclosure on its construction lien, both because the Construction Lien Act (CLA), MCL 570.1101 *et seq.*, requires that an action for foreclosure be brought in circuit court and because the general contract provided an exception for foreclosure claims. Accordingly, the trial court found that Wieland properly filed the action in circuit court.

We agree with appellants that neither § 15.2.8 of the general contract nor the applicable provisions of the CLA prevent the underlying dispute that gives rise to the foreclosure claim from being submitted to arbitration. Section 15.2.8 of the general contract provides that, "[i]f a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines." Thus, if a claim is "the subject of a mechanic's lien," the party asserting the claim is permitted to proceed "in accordance with applicable law to comply with the lien notice or filing deadlines." See *Walters v Nadell*, 481 Mich 377, 383; 751 NW 2d 431 (2008) (the term "may" is generally permissive, not mandatory).

Deciphering the "applicable law" requires interpreting the CLA. "When interpreting a statute, the primary rule of construction is to discern and give effect to the Legislature's intent, the most reliable indicator of which is the clear and unambiguous language of the statute." *Crego v Edward W Sparrow Hosp Ass'n*, 327 Mich App 525, 531; 937 NW2d 380 (2019) (quotation marks and citation omitted). As a matter of background, the CLA constitutes remedial legislation that sets forth a comprehensive scheme aimed at securing payment for the individuals and businesses that perform construction work through equitable actions. MCL 570.1118(1); *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 373; 652 NW2d 474 (2002). It "is designed to protect the right of all contractors and subcontractors to payment for wages and materials," *Pitsch v ESE Mich, Inc*, 233 Mich App 578, 602; 593 NW2d 565 (1999), and it is to "be liberally construed to secure the beneficial results, intents, and purposes of th[e] act," MCL 570.1302(1). It is well settled that the CLA was enacted for the dual purpose of (1) protecting "the rights of lien claimants to payment for expenses and" (2) protecting "property owners from paying twice for these expenses." *Solution Source*, 252 Mich App at 373-374.

MCL 570.1118(1) provides, in pertinent part:

> An action to enforce a construction lien through foreclosure *shall be brought in the circuit court* for the county where the real property described in the claim of lien is located. If the real property is located in more than 1 county or judicial circuit, the action may be brought in any of the counties where the real property is located. [Emphasis added.]

Although MCL 570.1118(1) provides that the circuit court is the judicial forum in which a party must bring a foreclosure claim, MCL 570.1118(1) does not provide that the circuit court is the *only* forum for all underlying and tangential claims related to a foreclosure claim. Indeed, case law indicates that an arbitrator may properly rule on the validity of, and the amount owed under, a construction lien. See e.g., *Ronnisch Constr Group, Inc v Lofts On The Nine, LLC*, 306 Mich App 203, 214; 854 NW2d 744 (2014). See also *TSP Servs, Inc v Nat'l-Standard, LLC*, 329 Mich App 615, 622-623; 944 NW2d 148 (2019) (an arbitrator may properly determine damages at issue under a construction lien, up to the amount due under the related contract). While the CLA provides jurisdiction to the circuit court, it does not reasonably follow that it precludes arbitration. See e.g., *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 156; 742 NW2d 409 (2007) ("Just because the [Michigan Antitrust Reform Act] provides jurisdiction to the circuit court, it does not follow that it precludes arbitration."). Indeed, if the Legislature had intended to exempt all claims under the CLA from arbitration, it could have done so. Because MCL

570.1118(1) does not do so, the trial court erred by relying on this statutory subsection to support that the CLA claim was not subject to arbitration.

Additionally, MCL 570.1117 does not preclude arbitration. MCL 570.1117(1) requires that "[p]roceedings for the enforcement of a construction lien and the foreclosure of any interests subject to the construction lien shall not be brought later than 1 year after the date the claim of lien was recorded." MCL 570.1117(5) provides that "[i]n connection with an action for foreclosure of a construction lien, the lien claimant also may maintain an action on any contract from which the lien arose." Thus, MCL 570.1117(1) provides a one-year statute of limitations for bringing a foreclosure action, *Church & Church, Inc v A-1 Carpentry*, 483 Mich 885, 885; 759 NW2d 877 (2009), and MCL 570.1117(5) "allows a lien claimant to bring an underlying contract action at the same time as the lien foreclosure action," *Ronnisch Constr Group, Inc v Lofts On The Nine, LLC*, 499 Mich 544, 557; 886 NW2d 113 (2016). Neither MCL 570.1117(1) nor MCL 570.1117(5) preclude the parties from agreeing to arbitrate claims.

We conclude that, when reading § 15.2.8 of the general contract in conjunction with MCL 570.1117(1) and (5) and MCL 570.1118(1), the contract may be reasonably understood as permitting the filing of a claim for foreclosure in circuit court, along with any related claims, within the time limit contained in MCL 570.1117(1), while still respecting the parties' agreement to arbitrate all underlying claims, such as a breach-of-contract claim. This interpretation is consistent with the fact that "Michigan jurisprudence favors arbitration[.]" *Rooyakker & Sitz, PLLC*, 276 Mich App at 156 (quotation marks and citation omitted). See also *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 123-124; 596 NW2d 208 (1999). Because New Genetics and Wieland expressly agreed to arbitrate all claims for payment and because a "lien is but a means for enforcing the payment of [a] debt arising from the performance of [a] contract," *Ronnisch Constr Group, Inc*, 499 Mich at 561-562, Wieland's claims are subject to arbitration. The trial court erred by ruling otherwise.

B. JOINDER OF SUBCONTRACTORS

Next, appellants argue that Wieland improperly joined other subcontractors in this action in order to obfuscate its own claims and to force appellants to litigate all of Wieland's claims in circuit court rather than through arbitration. We disagree.

The CLA provides in MCL 570.1117(4) that "[e]ach person who, at the time of filing the action, has an interest in the real property involved in the action which would be divested or otherwise impaired by the foreclosure of the lien, shall be made a party to the action." Thus, MCL 570.1117(4) requires each person with an interest in the real property to be made a party to the action if the person's interest in the real property "would be divested or otherwise impaired by the foreclosure of the lien[.]" See *Wolfenbarger v Wright*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350668); slip op at 15 (noting that "[t]he use of the word 'shall' denotes mandatory action").

Additionally, as discussed by Wieland, other provisions of the CLA demonstrate a statutory scheme to resolve all related foreclosure claims in one proceeding, in part to prioritize construction liens and protect the property owner from liability for more than the amount agreed to in the initial general contract. For example, MCL 570.1107(2) provides that "[a] construction lien under [the

CLA] *attaches to the entire interest of the owner* or lessee who contracted for the improvement, including any subsequently acquired legal or equitable interest." (Emphasis added.) MCL 570.1107(6) provides:

> If the real property of an owner or lessee is subject to multiple construction liens, the sum of the construction liens shall not exceed the amount the owner or lessee agreed to pay the person with whom he or she contracted for the improvement as modified by all additions, deletions, and other amendments, less payments made by or on behalf of the owner or lessee, pursuant to either a contractor's sworn statement or a waiver of lien, in accordance with this act.

MCL 570.1117(6) provides that, "a lien claimant who has been made a party to an action for foreclosure of a construction lien may enforce his or her own construction lien in the action by a cross-claim or counterclaim, and the owner or lessee may timely join other or potential lien claimants in the action." Additionally, MCL 570.1118(2) provides:

> In an action to enforce a construction lien through foreclosure, the court shall examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant or to any mortgagee or holder of an encumbrance and their respective priorities. The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party. The court also may allow reasonable attorneys' fees to a prevailing defendant if the court determines the lien claimant's action to enforce a construction lien under this section was vexatious.

MCL 570.1119 establishes rules governing priority of construction liens. Additionally, MCL 570.1121 authorizes a court to order the sale of property through foreclosure for any liens found to be valid, to determine the amounts from the sale proceeds to which each claimant is entitled, and to direct disposition of any other proceeds from the sale. If the sale proceeds are not sufficient to satisfy all claims, the court may order a deficiency judgment as well. MCL 570.1121(4).

These statutory provisions wholly support Wieland's decision to join the subcontractors in the case. In order for the trial court to decide the validity of the claims, their priority for recovery, and to ensure that New Genetics and NPA are not subject to liability beyond the agreed amounts, it was necessary that all parties with valid lien claims be before the court in the same action. Thus, the trial court did not err when it ruled that Wieland was required to join the subcontractors in this action.

C. ARBITRATION OF SUBCONTRACTOR CLAIMS

Appellants next argue that the trial court erred when it found that the subcontractors' claims were not subject to arbitration. We disagree.

As indicated earlier, "[a]rbitration is a matter of contract[.]" *City of Ferndale*, 269 Mich App at 460. "It goes without saying that a contract cannot bind a nonparty." *EEOC v Waffle House, Inc*, 534 US 279, 294; 122 S Ct 754; 151 L Ed 2d 755 (2002). Thus, arbitration "cannot be imposed on a party that was not legally or factually a party to the agreement wherein an arbitration provision is contained." *AFSCME Council 25 v Wayne Co*, 292 Mich App 68, 80; 811 NW2d 4 (2011). However, "nonsignatories of arbitration agreements can still be bound by an

agreement pursuant to ordinary contract-related legal principles, including incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel." *Id*. at 81.

In this case, appellants rely on estoppel and agency principles to argue that the subcontractors' claims are subject to arbitration. We do not find appellants' arguments to be persuasive. With respect to estoppel, in *Thomson-CSF, SA v American Arbitration Ass'n*, 64 F3d 773, 776 (CA 2, 1995),[3] the court held that a nonsignatory may be bound by an arbitration agreement under an estoppel theory when the nonsignatory seeks a direct benefit from the contract while disavowing the arbitration provision. In *Int'l Paper Co v Schwabedissen Maschinen & Anlagen GMBH*, 206 F3d 411, 417-418 (CA 4, 2000), the court observed:

> Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. To allow [a party] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act. [Quotation marks and citations omitted.]

In *Everett v Paul Davis Restoration, Inc*, 771 F3d 380, 383-384 (CA 7, 2014), the court provided the following persuasive discussion about what constitutes a "direct benefit":

> Under the doctrine of direct benefits estoppel, a non-signatory party is estopped from avoiding arbitration if she knowingly seeks the benefits of the contract containing the arbitration clause. As the name suggests, in order to trigger the doctrine the benefit received by the non-signatory must flow directly from the agreement. Thus, a benefit derived from the agreement itself is direct. However, a benefit derived from the exploitation of the contractual relationship of parties to an agreement, but not the agreement itself is indirect. [Quotation marks and citations omitted.]

Also, in *Trina Solar US, Inc v Jasmin Solar Pty Ltd*, 954 F3d 567, 572 (CA 2, 2020), the court provided the following analysis of what constitutes a direct benefit under New York law, which is substantially similar to the analysis in *Everett*.

> Under [the direct benefit] theory, we have explained, a company knowingly exploiting an agreement with an arbitration clause can be estopped from avoiding arbitration despite having never signed the agreement. The benefits of exploiting

[3] While "decisions from federal courts are . . . not binding precedent," they can be considered persuasive. *Hill v Warren*, 276 Mich App 299, 314; 740 NW2d 706 (2007).

> the agreement, however, must flow directly from the agreement, rather than indirectly from the contractual relation of [the] parties to [the] agreement.
>
> Under New York law, the guiding principle of the [direct benefit] theory is whether the benefit gained by the nonsignatory is one that can be traced directly to the agreement containing the arbitration clause. It is not enough for the nonsignatory to rely on an independent business relationship rather than the agreement itself to obtain the benefit. The nonsignatory beneficiary must actually invoke the contract to obtain its benefit, or the contract must expressly provide the beneficiary with a benefit. [Quotation marks and citations omitted; second and third alterations in original.]

In support of their "direct benefit" argument, appellants argue that the appellee subcontractors are relying on the terms of the general contract to support their claims against New Genetics and NPA. While Leavitt and Progressive surely benefitted from the contractual relationship between New Genetics and Wieland, there is no record evidence that Leavitt or Progressive ever invoked New Genetics's duties under the general contract to seek or obtain a benefit. Rather, Leavitt alleged that it "furnished . . . materials, supplies, and labor at the request of and pursuant to an agreement with Wieland, a prime contractor with NPA . . . and New Genetics for the Project." Progressive made similar allegations. Thus, neither Leavitt nor Progressive sought a benefit directly from the general contract or to enforce the general contract. Rather, Leavitt and Progressive relied on an indirect claim, i.e., that they did not receive full payment for the benefits that they bestowed upon New Genetics's project on NPA's real property.

Although it is true that the general contract speaks of an obligation involving subcontractors, the duties and rights under that clause do not involve claims against New Genetics or NPA. Rather, that contractual provision concerns disputes between the subcontractors and Wieland. Nothing in the general contract provides subcontractors with a right to sue New Genetics under a breach-of-contract theory of recovery, and Leavitt and Progressive do not raise such a claim. Rather, both Leavitt and Progressive make an unjust enrichment claim against New Genetics and NPA, which does not apply if there is an express contract. See *Able Demolition v Pontiac*, 275 Mich App 577, 586 n 4; 739 NW2d 696 (2007) ("A claim of unjust enrichment does not apply if there is an express contract[.]").

Furthermore, none of the appellee subcontractors otherwise directly benefited from the general contract as, for example, intended third-party beneficiaries. See, e.g., *Brunsell v City of Zeeland*, 467 Mich 293, 296-297; 651 NW2d 388 (2002) (explaining the difference between intended third-party beneficiaries and incidental third-party beneficiaries). Indeed, neither Wieland nor New Genetics undertook an obligation "directly" to or for the benefit of the subcontractors under the general contract. See *id*. at 297. For these reasons, we conclude that appellants have not shown that the subcontractor appellees are estopped from avoiding the general contract's arbitration clause.

Appellants also argue that the appellee subcontractors may be bound by the arbitration clause in the general contract under "agency" principles. In support of this argument, appellants note that the subcontractors acknowledged below in their claims that they were subcontractors of Wieland. However, this is insufficient to show an agency relationship. In general, "[t]he authority

of an agent to bind the principal may be either actual or apparent. Actual authority may be express or implied." *Meretta v Peach*, 195 Mich App 695, 698; 491 NW2d 278 (1992). "Actual authority of an agent may be implied from the circumstances surrounding the transaction at issue. These circumstances must show that the principal actually intended the agent to possess the authority to enter into the transaction on behalf of the principal." *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995).

In addition, this Court has held that "[t]he test of whether an agency has been created is whether the principal has a right to control the actions of the agent." *Meretta*, 195 Mich App at 697. But merely some amount of control is not sufficient. Rather, a threshold of control must be obtained in order to establish an agency relationship. *Little v Howard Johnson Co*, 183 Mich App 675, 680; 455 NW2d 390 (1990). For example, in determining what "constitutes 'control' sufficient to deem a franchisee to be an agent of a franchisor," *Little* provided the following discussion about the level of control necessary to form an agency relationship:

> This Court has repeatedly held that in order to establish vicarious liability in . . . actions [involving contractors], the landowner must have retained some control and direction over the actual day-to-day work. It is not enough that the owner retained mere contractual control, the right to make safety inspections, or general oversight. Significantly, this interpretation of "control" is consistent with the holdings of several jurisdictions reviewing franchisor vicarious liability claims. Therefore, to determine whether defendant franchisor and the franchisee had a principal-agent relationship, we examine defendant's control of the franchisee in terms of defendant's right to take part in the day-to-day operation of the franchisee's business. [*Id*. at 681-682 (citations omitted).]

In this case, appellants have not shown that the appellee subcontractors were actual agents of Wieland.[4] Although the appellee subcontractors' claims acknowledge their subcontractor status, they do not maintain that they were acting as agents of Wieland. Rather, the appellee subcontractors only refer to their contractual relationship with Wieland. Appellants have not shown that Wieland ever intended to provide subcontractors with actual authority to enter into any transaction with New Genetics on Wieland's behalf. See *Hertz*, 210 Mich App at 246. Indeed, the general contract provides that "[t]he contract documents shall not be construed to create a contractual relationship of any kind . . . between the Owner and a Subcontractor or a Sub-subcontractor." Furthermore, although appellants assert in their reply brief on appeal that Wieland retained control of the appellee subcontractors' day-to-day operations, they did not present this argument in their opening brief. "Reply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief." *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007). Regardless, appellants did not present any evidence that Wieland retained control over the appellee subcontractors' operations. The mere fact that the subcontractors admitted that they were contractually bound to Wieland is not the equivalent of an admission that Wieland had day-to-day control over the appellee subcontractors'

[4] Appellants do not argue apparent authority.

activities and operations. In sum, we conclude that appellants have not shown that the appellee subcontractors are estopped from avoiding arbitration or are bound to arbitrate their claims as agents of Wieland.[5]

D. BIFURCATION

Appellants also argue that the trial court erred when it determined that it was required to keep all of the claims in circuit court without bifurcation for arbitration of Wieland's claims. We agree.

The authority to bifurcate proceedings and to stay court proceedings during arbitration is supported by both statute and court rule. MCR 3.602(C) provides, in pertinent part, as follows:

> [A]n action or proceeding involving an issue subject to arbitration must be stayed if an order for arbitration or motion for such an order has been made under this rule. If the issue subject to arbitration is severable, the stay may be limited to that issue. If a motion for an order compelling arbitration is made in the action or proceeding in which the issue is raised, an order for arbitration must include a stay.

MCL 691.1687(7) provides that "[i]f the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim."

Thus, as discussed by appellants, Michigan courts have authority to stay proceedings pending arbitration proceedings. Indeed, such was the case in *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*. In *Ronnisch*, 499 Mich at 549-550, the plaintiff contractor brought claims in the trial court for breach of contract and foreclosure of a lien against the defendant landowner. The plaintiff contractor "sought a judgment in the amount of $626,163.73, together with interest, costs, and attorney fees. However, the parties agreed to stay the proceedings to pursue contractually mandated arbitration." *Id*. at 550. The arbitrator awarded damages to both the contractor and to the landowner on its recoupment defense and counterclaims. *Id*. Although this resulted in a net award in the contractor's favor, the arbitrator did not address the contractor's claim for attorney fees and costs. *Id*. Instead, the arbitrator reserved the issue for the trial court. *Id*. The contractor thereafter filed a motion in the trial court, requesting that the court lift the stay of proceedings, confirm the arbitration award, and award it actual attorney fees and costs. *Id*. The trial court denied the contractor's motion, in relevant part, based on a conclusion that the "lien

[5] None of the cases cited by appellants compel a different conclusion concerning whether the appellee subcontractors are bound to arbitrate their claims. The unpublished decisions cited by appellants are not precedentially binding. MCR 7.215(C)(1). The only published decision cited by appellants, *Rooyakker*, 276 Mich App at 163-164, does not address any of the factors discussed above for binding nonparties to arbitration. Instead, in *Rooyakker* this Court determined that the plaintiffs' claims involving nonparties were within the scope of the broad language of an arbitration clause and further noted this state's public policy favoring arbitration and disfavoring segregation of claims. *Id*. Given the limited analysis in *Rooyakker*, we follow the applicable precedent concerning agency and "direct benefit" analysis.

foreclosure claim had not been adjudicated by the arbitrator or the trial court[.]" *Id.* The trial court concluded that it did not have discretion to award attorney fees to the contractor under the CLA because the contractor "was not a prevailing lien claimant under the CLA[.]" *Id.*

In reversing the trial court, our Supreme Court explained that a party may proceed simultaneously on a lien-foreclosure claim and a breach-of-contract claim, because the "lien is but a means for enforcing the payment of the debt arising from the performance of the contract[.]" *Ronnisch Constr Group, Inc*, 499 Mich at 561-562 (quotation marks and citation omitted). Because lien-foreclosure claims and breach-of-contract claims are "integrally related," *id*. at 562, the Court concluded that the contractor "was a lien claimant who was the prevailing party in an action to enforce a construction lien through foreclosure by virtue of receiving a favorable arbitration award on its breach of contract claim," *id*. at 567. By concluding that the trial court could award attorney fees based on the arbitrator's award, the *Ronnisch* Court essentially acquiesced to the bifurcation procedure and the stay. The Court noted that the dissent would require the contractor to go back and arbitrate its foreclosure claim, but the Court stated that

> [s]uch a conclusion would encourage gamesmanship by [the] defendants, allowing them to prolong litigation and delay payment on the contract claim in an attempt to drain the lien claimant's resources before it can obtain a judgment on its lien claim and seek attorney fees. It also directly contravenes this Court's policy of encouraging settlements and discouraging litigation. [*Id*. at 566.]

Wieland cites *Fromm v Meemic Ins Co*, 264 Mich App 302; 690 NW2d 528 (2004), which the trial court also cited, for the proposition that bifurcation of claims is inefficient. However, given the *Ronnisch* Court's implied acceptance of a bifurcated proceeding and the plain language in MCR 3.602(C) and MCL 691.1687(7), the trial court's reliance on *Fromm* appears to be misplaced. In *Fromm*, 264 Mich App at 303-304, one of the plaintiffs suffered a miscarriage following an automobile accident. The plaintiffs notified the insurance carrier of the accident and "sought arbitration under their insurance policy," which provided an exception that "disagreements concerning insurance coverage . . . are not subject to arbitration[.]" *Id*. at 304-305. After the insurance carrier "failed to name an arbitrator, [the] plaintiffs filed their complaint asserting that [the insurance carrier] was in breach of the policy and seeking an order to enforce arbitration." *Id*. at 304. The insurance carrier responded that the "injuries were insufficient to invoke coverage because [the injured plaintiff] had not sustained a serious impairment of an important body function." *Id*. The trial court agreed and granted summary disposition in favor of the insurance carrier. *Id*.

This Court reversed, concluding "that an arbitrator must determine whether [the injured plaintiff had] suffered a compensable injury." *Id*. In reaching this conclusion, this Court interpreted the plain language of the arbitration provision and rejected the insurance carrier's argument that the trial court could consider the issue of compensability and then, if necessary, the parties could arbitrate the issue of damages. *Id*. at 307. In doing so, the *Fromm* Court stated that a court "should not allow the parties to divide their disputes between the court and an arbitrator. Dispute bifurcation defeats the efficiency of arbitration and considerably undermines its value as an acceptable alternative to litigation." *Id*. at 306 (citation omitted).

Unlike in *Fromm*, there is no indication that permitting the arbitration of Wieland's claims would render the entire process duplicative or would drive up the cost of litigation, waste judicial resources, or render "arbitration a backstop for failed litigation." See *Fromm*, 264 Mich App at 306 n 1. Arbitration of Wieland's breach-of-contract and unjust-enrichment claims would directly affect Wieland's construction lien claim. See *Ronnisch Constr Group, Inc*, 499 Mich at 562. However, as discussed earlier, the appellee subcontractors cannot be compelled to participate in arbitration. Thus, their claims will remain in circuit court. While the subcontractors' claims are related to Wieland's claims, they do not necessarily involve overlapping evidence such that arbitration would be futile or frustrated if the claims are bifurcated. Indeed, arbitration to resolve some of Wieland's claims while staying the remainder of the parties' claims actually would support judicial efficiency.

Appellee Leavitt argues that permitting bifurcation and arbitration of Wieland's claims against appellants would be prejudicial to the appellee subcontractors. Leavitt maintains that, if Wieland alone is compelled to arbitrate its claims, the appellee subcontractors will not be able to participate in that process and will be forced to delay resolution of their foreclosure claims. These arguments are not persuasive. It not unusual for parties to litigation to have to wait for recovery. Conversely, if bifurcation is not permitted, the arbitration clause in the general contract would be rendered meaningless. Accordingly, the trial court erred when it determined that it was required to keep all of the claims in one forum. See *Fromm*, 264 Mich App at 306 (holding that "[t]he court should resolve all conflicts in favor of arbitration").

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

/s/ Thomas C. Cameron
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly