

STATE OF MICHIGAN
COURT OF APPEALS

FRED ROBERT BARDEN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 193511

Wayne Circuit Court

J.B. HUNT TRANSPORT, INC. and MARK E.
WEBER,

LC No. 92-233807

Defendant-Appellants.

Before: White, P.J, and Bandstra and Smolenski, JJ.

White, J. (concurring in part and dissenting in part).

I dissent from the majority's conclusion that the circuit court did not have jurisdiction to enforce the arbitration award because plaintiff did not file a separate contract action, but simply moved in the circuit court for entry of judgment on the award. On the date set for trial, after earlier settlement efforts had proved unsuccessful, the parties agreed to dismiss the pending circuit court action and refer the matter to binding arbitration before three arbitrators, with a high-low agreement. The agreement was placed on the record before the court. The question whether the dismissal of the circuit court action would be without prejudice and with plaintiff reserving the right to file a motion for reinstatement should the need arise was resolved with the court stating:

Well, let me suggest we make it a dismissal with prejudice and without costs subject to being reopen[sic] for good cause in the event that something unforeseen happens with regard to the arbitration.¹

Under these circumstances, the trial court correctly concluded that it had jurisdiction to reinstate the case and to enforce the arbitration agreement, including by entering judgment on the award. Where the parties to a pending circuit court action expressly agree to binding arbitration with the understanding that they can return to the court if something unforeseen happens, it is implicit, if not explicit, that the agreement contemplates that the court may enter judgment on the award, if necessary.

On the issue of unanimity, I conclude that where the arbitrators did not understand themselves to be rendering a binding award, the case should be resubmitted to the panel.

¹ The entire colloquy was as follows:

MR. GELLER: Your Honor, I believe we have an agreement. Eric Geller, on behalf of the defendant. It is my understanding, and brother counsel, Tim Christensen is here to correct me if I am wrong, we are going to enter into a dismissal of the circuit court action. And we are going to agree to binding arbitration with a three-member panel, three attorneys with a high-low agreement of \$40,000 low, \$300,000 high. We hope to have that accomplished within 30 to 45 days.

MR. CHRISTENSEN: Right. There is going to be every good faith effort made at trying to get that done within the time limit prescribed, and I suggested that the dismissal be without prejudice and without costs. And that we reserve our right to file a motion to reinstate should that need arise. We hope that it doesn't.

MR. GELLER: With the only caveat that the dismissal without prejudice will automatically become a dismissal with prejudice and without costs once the binding arbitration takes place or commences.

THE COURT: Well, let me suggest we make it a dismissal with prejudice and without cost subject to being reopen for good cause in the event that something unforeseen happens with regard to the arbitration.

MR. CHRISTENSEN: Okay.

MR. GELLER: I have no problem.

MR. CHRISTENSEN: I just don't want, if something, and I don't anticipate it happening but if it does, I want to be able, I can get back into court.

MR. GELLER: If he doesn't have his agreement within forty-five days, he can petition the court and the court can do as it sees fit.

THE COURT: Fine. And if you show good cause, we will open it up again. If, as we indicated in chambers there is only a tiny time delay necessary to bring this to a conclusion through the arbitrators, then I wouldn't consider that good cause but for some reason this process falls apart and I can't imagine it happening, but if it does and it doesn't look like it is going to reach a speedy conclusion for some reason, then you will show good cause and we will open it up.

MR. GELLER: Thank you, Your Honor.

MR. CHRISTENSEN: Thank you, Judge.

(Matter concluded.)