

STATE OF MICHIGAN
COURT OF APPEALS

CLIFFS MINING SERVICE COMPANY and
TILDEN MINING COMPANY, LC,

UNPUBLISHED
July 12, 2005

Plaintiffs-Appellees,

v

No. 261099
Marquette Circuit Court
LC No. 03-040770-CZ

HAMON RESEARCH-COTTRELL, INC.,

Defendant/Counter-
Defendant/Third-Party
Defendant/Counter-Plaintiff-
Appellant,

and

SMB CONSULTANTS, INC.,

Defendant/Counter-
Plaintiff/Counter-Defendant,

and

STEVEN T. MOORE,

Third-Party Plaintiff/Third-Party
Defendant.

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

This appeal stems from an action to compel arbitration. Defendant Hamon Research-Cottrell, Inc.,¹ appeals as of right and we affirm.

¹ Hamon Research-Cottrell, Inc.'s claims against SMB Consultants, Inc., and Steven T. Moore,
(continued...)

Plaintiffs alleged that in 1998 they purchased from Entech Corporation a pollution control device known as a wet electrostatic precipitator unit (WESP) to provide air quality control at the Tilden mine. The WESP purchase order contained a three-step dispute resolution clause that required negotiation, mediation, and finally arbitration if no settlement was reached under the first two steps. The WESP in issue began to corrode and plaintiffs alleged that they entered negotiations with Entech to address the situation. While plaintiffs' claim was pending, defendant and Entech entered into an agreement for defendant to purchase Entech's assets.

In 2003, plaintiffs filed a complaint and a motion to compel arbitration. Plaintiffs argued that pursuant to § 1.3 of the asset purchase agreement, defendant expressly assumed the obligation to arbitrate under the WESP purchase order. Conversely, defendant argued that § 1.4 of the asset purchase agreement excluded any liability assumed under § 1.3. The court concluded that the clear language of § 1.3(b) demonstrated defendant's unambiguous intent to purchase the WESP contract and, thus, the contractual liability to arbitrate. The court also concluded that § 1.4 did not clearly exclude the arbitration agreement in issue. The court granted plaintiffs summary disposition and issued an order compelling arbitration.

Defendant argues that the grant of summary disposition was error because defendant was not a party to the purchase order and, thus, was not bound by the arbitration clause; defendant also claims the court erred by not considering the extrinsic evidence of the intent of the parties to the asset purchase agreement. We review the grant or denial of a motion for summary disposition de novo. *In re Smith Estate*, 226 Mich App 285, 287-288; 574 NW2d 388 (1997). “[A] party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration’ [and] a party cannot be required to arbitrate when it is not legally or factually a party to the agreement. *St Clair Prosecutor v AFSCME, Local 1518*, 425 Mich 204, 223; 388 NW2d 231 (1986), quoting *Kaleva-Norman-Dickson School Dist v Kaleva-Norman-Dickson Teachers’ Ass’n*, 393 Mich 583; 227 NW2d 500 (1975). Therefore, the question is whether defendant agreed in the asset purchase agreement to be subject to the WESP purchase order’s arbitration agreement. Contract interpretation is a question of law that this Court reviews de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

Ascertainment of the parties’ intent is of primary importance. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997). If a contract is ambiguous, its meaning must be determined by a jury. *Klapp, supra* at 469. However, if a contract is unambiguous, its meaning is a question of law for the court to decide. *D’Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). “Hence, in the context of a summary disposition motion, a trial court may determine the meaning of the contract only when the terms are *not* ambiguous.” *Id.* (emphasis in original). When the contract is not ambiguous, the intent of the parties must be determined only from the language used; extrinsic evidence of the parties’ intent is not permitted. *Zurich Ins Co, supra* at 604.

(...continued)

and the resulting counterclaim were dismissed by the trial court without prejudice on stipulation of the parties. Therefore, all references to defendant in this opinion refer to Hamon Research-Cottrell, Inc.

When interpreting a contract with an exclusionary clause, courts must first determine the scope of the agreement, then determine whether an exclusion limits or negates the agreement. See *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997) (interpreting an exclusionary clause in an insurance contract). We conclude that the terms of the instant contract are clear and do not require extrinsic evidence to determine the parties' intent. Section 1.3 states in pertinent part as follows:

Assumption of Liabilities. Subject to the terms and conditions of this Agreement, on the Closing Date Buyer shall assume and agree to pay, perform and discharge when due the following liabilities and obligations of the Business (the "Assumed Liabilities"):

* * *

(b) All of Seller's liabilities under all leases of real and personal property, rental agreements, purchase orders, sales orders, and other contracts, commitments and agreements of or relating to the business.

Section 1.3 provides that defendant agreed to assume all Entech's liabilities and obligations under Entech's purchase orders. Thus, the obligation to arbitrate claims related to the WESP purchase order clearly falls within the meaning of § 1.3. Defendant argues that § 1.4 limits § 1.3 because the former excludes customer claims and warranties "notwithstanding anything contained in Section 1.3." Section 1.4 states in pertinent part as follows:

Excluded Liabilities. Notwithstanding anything contained in Section 1.3 to the contrary, the Buyer shall not assume, and shall have no liability for, any debts, obligations, liabilities or commitments of the Seller other than the Assumed Liabilities (the "Excluded Liabilities"). The Seller shall remain fully liable for the Excluded liabilities. The Excluded Liabilities shall include, without limitation, the following:

* * *

(g) any liability in excess of applicable insurance coverage for any warranty or customer claim, relating to any products or services sold by the Business prior to the Closing Date other than returns made in the ordinary course of business, but only to the extent of reserves therefore on the Closing Date Balance Sheet.

The plain language of § 1.4(g) exempts defendant from liability for "any warranty or customer claim, relating to any products or services sold by the Business prior to the Closing Date." However, it only does so (1) to the extent that the liability is "in excess of any applicable insurance coverage," and (2) to the extent of reserves for liability purposes on the closing date balance sheet. Because § 1.3 clearly described the general scope of defendant's liability, and § 1.4 clearly described the limits on defendant's liability, the contract was unambiguous, *Auto-Owners Ins Co, supra* at 382-383, and extrinsic evidence of the parties' purported intent was inadmissible, *Zurich Ins Co, supra* at 604.

On the other hand, evidence that would trigger or render inapplicable an exclusionary clause is admissible. See *Auto-Owners Ins Co, supra* at 384 (Supreme Court considered deposition testimony that triggered an exclusionary clause to determine whether the exclusionary clause applied). Here, plaintiffs presented a balance sheet that did not indicate any reserves. This rendered inapplicable defendant's exemption from liability. Accordingly, the trial court did not err in granting summary disposition to plaintiffs and ordering arbitration. The extent to which defendant's liability is limited under § 1.4 or other sections of the contract is an issue to be addressed in arbitration.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Patrick M. Meter

/s/ Donald S. Owens