

STATE OF MICHIGAN  
COURT OF APPEALS

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RIC-MAN CONSTRUCTION INC.,  
Plaintiff-Appellant,

UNPUBLISHED  
March 26, 2013

v

NEYER, TISEO & HINDO LTD. d/b/a NTH  
CONSULTANTS, LTD.,

No. 309217  
Wayne Circuit Court  
LC No. 11-011315-CZ

Defendant-Appellee.

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Before: STEPHENS, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). This matter arises out of two contracts entered into between plaintiff and the Oakland-Macomb Interceptor Drain Drainage District (OMID) for plaintiff to engage in specified construction for a project that was designed by defendant, the project's engineer. Plaintiff and OMID also entered into a separate arbitration agreement.<sup>1</sup> Plaintiff and defendant did not enter into a contract between each other. Defendant moved for summary disposition on the grounds that arbitration was required because the subject-matter of the instant litigation arose out of the project and because and defendant was an intended third party beneficiary of the agreements between plaintiff and OMID. We reverse and remand.

We review de novo a trial court's decision on summary disposition and whether an issue is subject to arbitration. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 152; 742 NW2d 409 (2007). Summary disposition pursuant to MCR 2.116(C)(7) is proper where there is an agreement to arbitrate. *Maiden v Rozwood*, 461 Mich 109, 118 n 3; 597 NW2d 817 (1999). A party may support its motion for summary disposition pursuant to MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence. If this material is submitted, it must be considered. *Maiden*, 461 Mich at 119; MCR 2.116(G)(5). If a contract is ambiguous, summary disposition is inappropriate; however, if the contractual language is not susceptible to more than one reasonable interpretation, the court may determine

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<sup>1</sup> While this suit was pending, OMID filed a demand for arbitration against plaintiff with the American Arbitration Association regarding the project.

the meaning of the contract at a summary disposition motion. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997).

Arbitration is favored by public policy as a means for resolving disputes. *Rooyakker & Sitz, PLLC*, 276 Mich App at 155. However, arbitration is strictly voluntary, and “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 98; 323 NW2d 1 (1982). Consequently, a lack of a valid agreement to arbitrate “is a direct attack on the exercise of jurisdiction of both the arbitrator and the circuit court.” *Id.* “[A] true meeting of the minds is required for a valid arbitration agreement, just as in any contract situation.” *Mariani v Holloway*, 157 Mich App 570, 574; 403 NW2d 463 (1986). “[W]here mutuality of assent is established, written arbitration agreements do not have to be signed in order for the agreement to be binding.” *Ehresman v Bultynck & Co, PC*, 203 Mich App 350, 354; 511 NW2d 724 (1994).

In relevant part, the contracts between plaintiff and OMID provided that defendant was to act as OMID’s “representative, assume all duties and responsibilities, and have the rights and authority assigned to [defendant] in the Contract Documents in connection with the completion of the Work in accordance with the Contract Documents.” They also “expressly agreed that there are no third party beneficiaries of the Contract Documents except as provided in Paragraph 7.01B of the General Conditions.” Subsequently, plaintiff and OMID agreed to amend their contracts by entering into an alternative dispute resolution agreement. The alternative dispute resolution agreement provided, in relevant part, as follows:

**§ 1.1 ARBITRATION AGREEMENT.**

§ 1.1.1 This Agreement defines the exclusive terms for binding arbitration for any claims arising out of or related to the Projects as provided upon agreement of the parties in Section 16.01 of the General Conditions of Contract 1 and Contract 2.

§ 1.1.2 Any claim or dispute, arising out of or related to the Projects, between [OMID] and Ric Man [sic] shall be subject to binding arbitration administered by the American Arbitration Association (“AAA”) . . .

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**§ 1.2 DEMAND FOR ARBITRATION . . .**

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Unless otherwise agreed by the parties in writing, the arbitration demand shall include only claims and disputes between OMID and Ric-Man.

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**EXECUTION, REPRESENTATIONS AND WARRANTIES.**

§ 2.1 This Agreement shall bind the parties hereto and their heirs, assigns, subsidiaries, parent companies, creditors, representatives, or beneficiaries.

§ 2.2 The individuals executing this Agreement hereby warrant they have authority to sign this Agreement on behalf of their respective entity to bind that entity to the terms of this Agreement.

§ 2.3 This Agreement shall amend, and to the extent of any conflict, supersede the terms and conditions of Contract 1 and Contract 2 defined above.

Consequently, it is clear and unambiguous that plaintiff and OMID have a valid agreement to arbitrate disputes arising out of, or related to, the Project, *as between each other*. The agreement to arbitrate equally-unambiguously limits itself to claims between plaintiff and OMID by providing: “Unless otherwise agreed by the parties in writing, the arbitration demand shall include only claims and disputes between OMID and Ric-Man.”

Defendant contends that the arbitration agreement’s reference to “any claim or dispute, arising out of or related to the projects” and statement that it was to bind, inter alia, the representatives of the parties reveal an intent by plaintiff and OMID to bind defendant, the project’s engineer and OMID’s representative on the project. We disagree. “[O]nly intended, not incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor.” *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003).

The cited language merely states explicitly what the law would presume in the absence of such language: that a contracting party’s representatives and successors in interest are bound. In context, the arbitration agreement as a whole binds OMID’s representative *to the terms of the agreement*, not in any capacity whatsoever. The agreement itself unambiguously limits the agreement to arbitrate to plaintiff and OMID. Agents in the capacity of their agency are generally considered to have a separate legal existence from their individual, personal capacities. Consequently, we agree with the First Circuit that an organization’s agent is not automatically individually covered by an arbitration agreement entered into by the agent’s principal simply by virtue of being an agent, at least absent some overt indication of alternate intent in the arbitration agreement itself. See *McCarthy v Azure*, 22 F 3d 351 (CA 1, 1994). While we are not bound by decisions of the federal courts, we may find them persuasive, as we do here. *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). Because defendant has failed to show that there was a meeting of the minds between plaintiff and defendant to arbitrate claims relating to, or arising out of the Project, defendant cannot compel arbitration between itself and plaintiff, *Arrow Overall Supply Co*, 414 Mich at 98; *Mariani*, 157 Mich App at 574. Therefore, the trial court erred by granting summary disposition pursuant to MCR 2.116(C)(7).

Plaintiff also argues that the trial court erred by finding that defendant was OMID’s agent, and, thus, bound to the arbitration agreement. We agree.

“An agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal.” *Stratton-Cheeseman Mgt Co v Dep’t of Treasury*, 159 Mich App 719, 726; 407 NW2d 398 (1987) (quotation marks and citations omitted). “‘Agency’ in its broadest sense includes every relation in which one person acts for or represents another by his authority. Whether an agency has been created is to be determined by the relations of the parties as they in fact exist under their agreements or acts. *Id.* (quotation marks and citations omitted). Where there is a disputed question of agency, any evidence tending to

establish agency creates a question of fact for a jury to determine. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992).

The contracts provided, in relevant part, that defendant is “to act as [OMID’s] representative, assume all duties and responsibilities, and have the rights and authority assigned to Engineer in the Contract Documents in connection with the completion of the Work in accordance with the Contract Documents.” They also provided that defendant “will be [OMID’s] representative during the construction period. The duties and responsibilities and the limitations of authority of Engineer as Owner’s representative during construction are set forth in the Contract Documents and will not be changed without written consent of [OMID] and Engineer.” This language tends to establish that defendant was OMID’s agent on the Project because it indicates that defendant would be OMID’s representative during the construction of the project and assume particular duties and responsibilities. *Stratton-Cheeseman Mgt Co*, 159 Mich App at 726. Whether defendant was OMID’s agent is a question of fact for a jury. *Meretta*, 195 Mich App at 697.

Nevertheless, even if defendant is OMID’s agent, as discussed *supra*, plaintiff’s arbitration agreement with OMID did not bind defendant. Defendant did not enter into the arbitration agreement with plaintiff, either in an individual capacity or as an agent on behalf of OMID. Rather, plaintiff and OMID, and *only* plaintiff and OMID, entered into the arbitration agreement. Even if defendant had entered into the arbitration agreement as OMID’s agent, defendant would not have become a party to the contract. See *Riddle v Lacey & Jones*, 135 Mich App 241, 246; 351 NW2d 916 (1984) (“Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract,” quoting 2 Restatement Agency, 2d, § 320, p 67.). The trial court erred by granting defendant’s motion for summary disposition, concluding that defendant had the right to compel arbitration between it and plaintiff, based on plaintiff’s arbitration agreement with OMID.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens  
/s/ Joel P. Hoekstra  
/s/ Amy Ronayne Krause