

STATE OF MICHIGAN
COURT OF APPEALS

SAID NAMARI,

Plaintiff-Appellee,

v

SUBWAY REAL ESTATE CORPORATION and
DOCTOR'S ASSOCIATES INC,

Defendants-Appellants.

UNPUBLISHED
October 1, 2013

No. 308384
Wayne Circuit Court
LC No. 11-012268-CK

Before: METER, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

In this franchisor-franchisee dispute, defendants Subway Real Estate Corporation (SREC), and Doctor's Associates Inc, (DAI), appeal as of right a November 16, 2011, trial court order wherein the trial court held that DAI's franchise agreements with plaintiff were no longer enforceable against plaintiff. The trial court also held that the parties' December 2, 2009, verbal agreement to arbitrate entered into the record at a 36th District Court motion hearing governed the parties' underlying arbitration proceeding. For the reasons set forth in this opinion, we vacate that part of the trial court's order holding that the franchise agreements were unenforceable against plaintiff, affirm the trial court's order in all other respects, and remand for further proceedings.

I. FACTS

On January 27, 2003, plaintiff and Abraham Nunu entered into franchise agreements with DAI¹ to operate 14 Subway restaurants in the Detroit area and SREC entered into subleases with

¹ Defendant DAI franchises Subway restaurants while defendant SREC's role is to facilitate "a master lease agreement with landlords and sublease the same to its franchises under a sublease."

the franchisees. The franchise agreements² contained an arbitration clause that provided in relevant part as follows:

The parties will arbitrate any Dispute the parties do not settle under the discussion and mediation procedures above and any Dispute which this Agreement provides will be submitted directly to arbitration except as provided in this Agreement.

The franchise agreements also contained termination clauses that allowed DAI to terminate the agreements for cause and “without prejudice to any of [DAI’s] rights or remedies provided under this Agreement. . . .”

In 2004, shortly after signing the agreements, Nunu sued plaintiff. DAI participated in the litigation and, according to plaintiff, ultimately the stores were split between the two parties with Nunu’s name being removed from the stores. The record is unclear as to all of the facts and circumstances surrounding the split of the stores. However, on November 16, 2007, DAI terminated plaintiff’s franchise agreements. Thereafter, according to plaintiff, DAI sued plaintiff and Nunu in Wayne Circuit Court.

In the meantime, it appears that while DAI was involved in a dispute with plaintiff and Nunu, on September 8, 2009, SREC terminated plaintiff’s subleases for his former Subway franchise locations. SREC then sued plaintiff in the 36th District Court to recover possession of the premises and for damages relating to the subleases.

On December 2, 2009, counsel for SREC, who was also counsel for DAI, and plaintiff’s counsel agreed to submit “ALL of their respective issues, disputes, and causes of action to arbitration” by entering an agreement to arbitrate on the record in the 36th District Court (hereinafter “36D Agreement”) as follows:

As far as those two cases, request for possession This is all part of a much larger issue that we’ve been dealing with for several years, Subway and [plaintiff]. *We decided to take all the issues and lump them into an arbitration.* So those two outstanding cases, along with, your Honor . . . All of those - - all the money issues and the two possession issues . . . now will all be arbitrated. [Emphasis added.]

The 36th District Court adjourned the case “for arbitration” on December 2, 2009.

On February 9, 2011, DAI and SREC filed a demand for arbitration with the American Arbitration Association (AAA). Defendants alleged that plaintiff failed to pay “royalties, unpaid rents and legal fees” in breach of the terms of the franchise and sublease agreements.

² Defendants attached a copy of one of the signed franchise agreements to a lower court filing and asserted that all of the franchise agreements contained the same language. Plaintiff did not dispute that assertion.

Defendants alleged \$264,402.24 in damages. Thereafter, the parties engaged in preliminary conferences with an arbitrator and exchanged emails concerning the structure of the arbitration hearing. However, immediately before the arbitrator scheduled a hearing, plaintiff demanded a three-member panel of arbitrators. Defendants objected to plaintiff's demand and the arbitrator indicated that she would remain the sole arbitrator for the hearing. Plaintiff responded by commencing this lawsuit for injunctive relief, declaratory relief, and money damages.

The parties filed numerous motions, briefs, and other pleadings in the lower court. Plaintiff's central argument was that defendants should be precluded from proceeding before a single arbitrator. Defendants argued that the parties agreed to one arbitrator during the preliminary conferences at the AAA and by arguing that the franchise agreements required one arbitrator. Plaintiff responded by arguing, in part, that the franchise agreements had no bearing on the arbitration because they had been terminated and because the 36D Agreement superseded the franchise agreements.

The trial court eventually entered an order finding that the parties had agreed to a single arbitrator. Plaintiff moved for reconsideration and a stay and filed an emergency motion for declaratory judgment and a temporary restraining order (TRO). The trial court held a hearing on November 14, 2011. At the hearing, the parties argued over the legal effect of the franchise agreements in light of termination and in light of the 36D Agreement. The trial court held that "under this agreement in 36th District Court, everything's going to be arbitrated pursuant to that agreement. . . . All right. That's my ruling. . . . There's to be one arbitrator."

On November 16, 2011, the trial court entered three written orders. The first order denied plaintiff's motion for reconsideration and a stay, and held that the parties' arbitration "shall proceed before Arbitrator Coakley as the sole arbitrator for all claims and counterclaims, if any." The second order related to plaintiff's emergency motion and held that DAI's franchise agreements were terminated and unenforceable against plaintiff, and that "the 36th District Court agreement to arbitrate shall be the only legally operative and controlling agreement during the arbitration proceedings" The third order dismissed the case with prejudice.

On December 7, 2011, defendants moved for reconsideration. Defendants argued that the trial court erred by ruling that the franchise agreements were unenforceable against plaintiff in part based on the plain language of the agreements and in part because the issue of enforceability was a matter for the arbitrator. The trial court denied defendants' motion on grounds that, in a previous suit, the parties had agreed to split the 14 stores where plaintiff was assigned Nunu's stores so that they would not "just sit abandoned" and "destroy the assets for [defendants]." The court concluded: "Now, all of a sudden, [defendants] are saying, well, wait a minute. Now we want to go and tack on all these Nunu expenses on to this guy. . . . He was ordered to volunteer. So your motion is denied." This appeal ensued.

II. ANALYSIS

Defendants argue that the trial court erred when it held that the franchise agreements were not enforceable against plaintiff because that issue should have been left to the arbitrator.

In holding that the franchise agreements were not enforceable against plaintiff, the trial court necessarily held that the enforceability issue was not subject to arbitration. We review de novo a trial court's determination of whether an issue is subject to arbitration. *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009).

“When deciding whether the parties agreed to arbitrate a certain matter, courts should ordinarily apply basic state-law principles that govern the formation of contracts.” *Amtower v William C Roney & Co*, 232 Mich App 226, 234; 590 NW2d 580 (1998) (citations omitted). “The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning.” *Id.* (emphasis, citations, and quotations omitted).

To ascertain the arbitrability of an issue, a court must consider [1] whether there is an arbitration provision in the parties' contract, [2] whether the disputed issue is arguably within the arbitration clause, and [3] whether the dispute is expressly exempt from arbitration by the terms of the contract. The court should resolve all conflicts in favor of arbitration. [*Fromm v Meemic Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004).]

With regard to the first prong of the *Fromm* test, here, the parties entered an oral contract to arbitrate in the 36th District Court. See *Wold Architects & Eng'rs v Strat*, 474 Mich 223, 231; 713 NW2d 750 (2006) (noting that when an agreement to arbitrate does not comply with the statutory requirement to be in written form, “the parties are said to have agreed to a common-law arbitration”). Although the agreement was entered in a proceeding involving SREC and plaintiff, the agreement clearly encompassed all of the issues not only between SREC and plaintiff, but also the issues between DAI and plaintiff. Specifically, counsel for SREC, who was also counsel for DAI, stated as follows:

As far as those two cases [the SREC cases] . . . *This is all part of a much larger issue* that we've been dealing with for several years, *Subway and Mr. Namari*. *We decided to take all the issues and lump them into an arbitration*. So those two outstanding cases, along with, your Honor, some of the cases that we agree to possession, there were some issues of rent - - unpaid rent. *All of those - - all the money issues and the two possession issues in your hand right now will all be arbitrated*. [Emphasis added.]

The district court summarized the agreement as follows:

Gentlemen, first of all, you're asking for an adjournment . . . so that you can effectuate some arbitration with regard to not only these two files *but some other matters between Subway and Mr. Namari*[?] [Emphasis added.]

Both parties agreed with the district court's characterization of the agreement.

Reviewing the language of the agreement clearly indicates that it was intended to encompass all of the disputes between all of the parties. SREC's counsel referred to the SREC-plaintiff litigation as “all part of a much larger issue” between “Subway” and plaintiff. Counsel

then stated that the parties “decided to take *all the issues* and lump them into an arbitration.” The use of the term “all of the issues” indicates that counsel was referring to all of the issues arising out of the “much larger issue” between Subway and plaintiff. Moreover, both parties agreed with the district court when the court summarized that the parties had agreed to “some arbitration with regard to *not only these two files but some other matters between Subway and [plaintiff]*” (emphasis added). Furthermore, during the lower court proceedings, defense counsel stated that the 36D Agreement was an agreement between all of the parties to arbitrate all of their disputes. Specifically, in a supplemental lower court brief, defense counsel stated:

During December 2009, Subway and Plaintiff agreed to submit all outstanding issues between the parties related to specific [Subway] [] restaurant locations to binding arbitration. This *included franchise related claims involving DAI and landlord/tenant claims involving SREC.* [] [Emphasis added.]

Defendants’ lower court filing clearly indicates that the 36D Agreement precipitated the arbitration in this case. Moreover, plaintiff repeatedly asserted in the lower court that the parties had agreed in the 36th District Court to “submit ALL of their respective issues, disputes, and causes of action to arbitration.” Defendants did not object to these assertions and they do not object on appeal. As such, the 36D Agreement reflects the parties’ unambiguous intent to arbitrate all their disputes. *Amtower*, 232 Mich App at 234.

With respect to the second prong of the *Fromm* test—i.e. whether the disputed issue arguably falls within the agreement to arbitrate—here, the issue of whether the franchise agreement was enforceable against plaintiff arguably falls within the 36D Agreement to arbitrate. The 36D Agreement was to arbitrate “all the issues” between the parties. *Fromm*, 264 Mich App at 305. “All” includes whether the franchise agreement was enforceable post termination.

The third prong of the *Fromm* test concerns whether “the dispute is expressly exempt from arbitration by the terms of the contract.” *Id.* Here, there is nothing in the 36D Agreement or in the remainder of the lower court record to indicate that the parties intended to exempt the issue of the enforceability of the franchise agreements from the scope of the arbitrator’s review. *Id.* at 306. Moreover, even if there had been a dispute with regard to the enforceability of the substantive provisions of the franchise agreements, our courts have recognized “a presumption of arbitrability unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” *Am Fedn of State v Hamtramck Hous Com’n*, 290 Mich App 672, 674; 804 NW2d 120 (2010).

In sum, because the parties agreed to arbitrate *all* disputes, the trial court erred when it resolved an issue which, by the parties’ own agreement, fell within the scope of the arbitrator’s review.³

³ Given our resolution of this issue, we need not address defendants’ arguments that the trial court’s order runs afoul of the Federal Arbitration Act, 9 USC 1 *et seq.*, and state procedural law.

Plaintiff argues that the trial court properly held that the franchise agreement was unenforceable. The gravamen of plaintiff's argument to that end is that, at some point during the long and complex litigation in this case, there was a separate arbitration award and the parties agreed to divide plaintiff's and Nunu's stores. Essentially, it appears that plaintiff contends that division of the stores somehow nullified the franchise agreements' joint and several liability clause and therefore the franchise agreements were no longer enforceable against plaintiff. Yet, despite numerous assertions, not once in the lower court record, or on appeal, did plaintiff attach any documentary evidence regarding any agreement to separate the franchises, let alone any documentary evidence that would indicate that the parties agreed to disregard the franchise agreements' provisions on joint and several liability. A party cannot simply "announce a position . . . and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quotation omitted). In short, we cannot conclude that the trial court was correct that an agreement to separate the franchises rendered the franchise agreement unenforceable against plaintiff when there is nearly no documentary evidence in the lower court record which reveals whether the parties agreed to disregard the franchise agreements' substantive provisions.

Plaintiff argues that the trial court took judicial notice of the history of the case when it ruled that the franchise agreements were unenforceable against plaintiff because of the prior arrangement between the parties to separate the stores. This argument also lacks merit. Here, whether the parties previously agreed that the substantive provisions of the franchise agreements would not be enforced in arbitration is subject to reasonable dispute and not "generally known with the territorial jurisdiction," nor is it "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." MRE 201; *Smith v Khouri*, 481 Mich 519, 533 n 18; 751 NW2d 472 (2008). As noted, plaintiff fails to cite to any evidence showing that the parties agreed that the substantive provisions of the franchise agreements were unenforceable in arbitration. Thus, to the extent the trial court's order was grounded on judicial notice, the trial court erred.

Finally, plaintiff argues that the trial court properly ruled that the franchise agreements were unenforceable because he was not liable for "post-termination" amounts. However, the issue of whether plaintiff was jointly responsible for liabilities that accrued after DAI terminated the franchise agreements fell within the parties' 36D Agreement to arbitrate "all" of their disputes and that issue should have been decided by an arbitrator.

Next, defendants contend that the trial court erred in holding that the 36D Agreement was the parties' only agreement to arbitrate. This issue concerns whether the trial court properly held that the underlying disputes were arbitrable under the 36D Agreement as opposed to the arbitration clause in the franchise agreement. We review de novo a trial court's determination of whether an issue is subject to an arbitration agreement. *In re Nestorovski Estate*, 283 Mich App at 184.

Similarly, we need not address defendants' argument that, in the event the trial court did have authority to address the enforceability issue, the trial court erred in applying the plain terms of the franchise agreements.

The trial court did not err in holding that, for purposes of the underlying arbitration in this case, the 36D Agreement was the arbitration agreement that governed. Here, the 36D Agreement was between all of the parties to arbitrate “all” their disputes. The agreement precipitated the underlying arbitration proceeding because before the agreement, none of the parties filed a demand to arbitrate the current disputes. Furthermore, SREC’s presence in the arbitration showed that the parties were not operating under the arbitration clause in the franchise agreements because the franchise agreements specifically excluded issues involving subleases from the arbitration clause. Instead, the presence of SREC in the arbitration proceeding shows that the parties were operating under the 36D Agreement. In addition, as noted above, both parties represented that the 36D Agreement was an agreement between all of the parties to arbitrate all of their disputes. See *Rory v Continental Ins. Co*, 473 Mich 457, 468; 703 NW2d 23 (2005) (a contract must be enforced according to its unambiguous terms). In short, the trial court did not err in finding that the 36D Agreement was the only relevant agreement to arbitrate for purposes of the underlying arbitration.⁴

Finally, defendants contend that the trial court erred when it considered plaintiff’s second emergency motion for a TRO in conjunction with hearing plaintiff’s motions for reconsideration. Defendants contend that they did not have notice that the trial court was going to address the motion. Defendants also argue that plaintiff was not granted the relief it requested in his complaint.

Defendants fail to articulate how they were prejudiced by the trial court’s consideration of the motion. Moreover, defendants do not cite any law in support of their argument and they erroneously contend that they raised this issue in the trial court. A party cannot simply “announce a position . . . and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Wilson*, 457 Mich at 243. In short, defendants abandoned this aspect of their appeal by failing to articulate a cognizable argument. Moreover, the record shows and defendants do not deny that plaintiff served them with the emergency

⁴ Defendants’ argument that the arbitration clause in the franchise agreement was not revocable under state and federal law is misplaced. Here, the trial court did not hold that the arbitration clause was revoked; rather, it held that the 36D Agreement governed the arbitration proceedings in this case. Whether or not the arbitration clause would govern in a separate arbitration proceeding between DAI and plaintiff is not at issue in this case. Similarly, plaintiff’s argument that the 36D Agreement is not binding because SREC breached the agreement not only contradicts plaintiff’s other arguments, but also is not properly before this Court. Plaintiff essentially challenges the trial court’s final order that the 36D Agreement was a binding agreement on all the parties to arbitrate all their disputes. Plaintiff cannot challenge that final order in his brief on appeal without having filed a claim of appeal. See *Chen v Wayne State Univ*, 284 Mich App 172, 192-193; 771 NW2d 820 (2009) (if a party fails to file an appeal as of right within 21 days of entry of the final judgment or order, this Court does not have jurisdiction to hear the appeal).

motion via hand delivery. Defendants had 10 days thereafter to prepare arguments for a hearing. Thus, defendants cannot show prejudice.

With respect to defendants' argument that plaintiff did not obtain the relief requested in his complaint, defendants fail to provide any meaningful analysis and they fail to cite to any law in support of their argument. As such, defendants' have abandoned this aspect of their appeal. *Id.* Furthermore, in his amended complaint, plaintiff sought an order declaring that the 36D Agreement was the only agreement to arbitrate between the parties. The trial court granted that relief. Therefore, defendants' argument lacks merit.

III. CONCLUSION

In sum, we conclude that the trial court erred in holding that the franchise agreements were unenforceable against plaintiff because that issue should have been left to the arbitrator. However, the trial court did not err in holding that, for purposes of this case, the 36D Agreement was the only agreement to arbitrate. Accordingly, we vacate that part of the trial court's November 16, 2011, order holding that the franchise agreements were unenforceable against plaintiff and remand for entry of an order returning the case to arbitration. In all other respects, we affirm the trial court's order.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having prevailed in full, neither may tax costs. MCR 7.219.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens