

STATE OF MICHIGAN  
COURT OF APPEALS

---

AUBURN FINANCIAL CENTER and MARK L.  
McALPINE,

UNPUBLISHED  
June 2, 2009

Plaintiffs-Appellants,

v

No. 285002  
Oakland Circuit Court  
LC No. 2008-088872-CK

DAVID B. ADAMS and DAVID C. ADAMS,

Defendants-Appellees.

---

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7) based on a determination that plaintiffs were bound by an arbitration provision. We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Preliminarily, defendants assert that plaintiffs have waived their right to pursue this appeal because after the order granting summary disposition was entered, plaintiffs invoked arbitration. We find no merit in this position based on *SCA Services, Inc v General Mill Supply Co*, 129 Mich App 224, 228; 341 NW2d 480 (1983), quoting 33 ALR3d 1242, § 4, p 1250, superceded by *Anno: Participation in arbitration proceedings as waiver of objections to arbitrability under state law*, 56 ALR5th 757. This Court stated:

[A] party's participation in arbitration proceedings will not result in waiver of his right to raise the issue of arbitrability of the dispute if he has made a timely objection to arbitrability before a hearing on the merits.

In *SCA Services*, the plaintiff moved to stay proceedings in federal court on the defendant's counterclaim and compel arbitration; the motion was granted. The plaintiff then filed a complaint in state court to stay arbitration; summary disposition was granted to the defendant, and the plaintiff appealed. While the appeal was pending, the plaintiff proceeded with arbitration. This Court held that in view of the plaintiff's actions in arbitration and the state court's manifest opposition to arbitration, the plaintiff was not required to move to vacate the arbitration award in order to proceed with the appeal. *SCA Services, supra* at 228; See also *American Fidelity Fire Ins Co v Barry*, 80 Mich App 670, 678-679; 264 NW2d 92 (1978) (the plaintiff preserved its claim that an issue was not subject to arbitration by filing an action for

declaratory judgment and motion to stay the arbitration, seeking an interlocutory appeal and raising its arguments against arbitrability to the arbitrator himself).

In this case, plaintiffs manifested opposition to arbitration by filing the claim in circuit court, opposing summary disposition, and appealing that decision. Accordingly, plaintiffs did not waive appellate review by participating in arbitration.

Plaintiffs challenge the arbitration determination. In ruling on this (C)(7) motion, the trial court was required to accept plaintiffs' well-pleaded allegations as true and construe them in plaintiffs' favor. The existence of the arbitration agreement and the enforceability of its terms are judicial questions that are reviewed de novo. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). We conclude that the record does not establish the existence of a binding agreement to arbitrate.

We first address an arbitration clause in the operating agreement of Adams McAlpine, LLC. Defendants argue that this entity controlled Auburn Financial, LLC and that its arbitration clause would therefore control. But apart from the contested affidavit of defendant David B. Adams, the record does not establish that Adams McAlpine, LLC had any interest in Auburn Financial. Thus, it was not established that this arbitration agreement was binding on plaintiffs.

We note that the trial court did not rely on the Adams McAlpine, LLC arbitration clause. The trial court found that the arbitration clause in the unexecuted operating agreement of plaintiff Auburn Financial, LLC required arbitration because there was mutuality of assent to this agreement. In *Ehresman v Bultynck & Co*, 203 Mich App 350, 353-354; 511 NW2d 724 (1994), this Court stated:

Arbitration is a matter of contract, and a party cannot be forced to submit to arbitration in the absence of an agreement to do so. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99; 323 NW2d 1 (1982). The existence of a contract to arbitrate and its enforceability is a judicial question. *Id.* at 98; *Huntington Woods v Ajax Paving Industries (After Remand)*, 196 Mich App 71, 74; 492 NW2d 463 (1992).

Although MCL 600.5001(1); MSA 27A.5001(1) requires that an arbitration agreement be in writing, the statute contains no language specifically requiring that the written instrument be signed by either or both parties. Furthermore, this Court has previously held that where mutuality of assent is established, written arbitration agreements do not have to be signed in order for the agreement to be binding. See *Green v Gallucci*, 169 Mich App 533; 426 NW2d 693 (1988). Furthermore, we approve of the following principles set forth in 17 CJS, Contracts, § 62, pp 731-733:

[S]ignature is not always essential to the binding force of an agreement, and whether a writing constitutes a binding contract even though it is not signed or whether the signing of the instrument is a condition precedent to its becoming a binding contract usually depends on the intentions of the parties. The object of a signature is to show mutuality or assent, but these facts may be shown in other ways . . . .

In the absence of a statute or arbitrary rule to the contrary, an agreement need not be signed, provided it is accepted and acted on, or is delivered and acted on.

In *Ehresman*, the plaintiffs were accountants who left their firm with some clients in violation of a “do not compete agreement.” One plaintiff had signed an employment agreement and a stock redemption agreement, both of which had arbitration clauses. The other plaintiff had not, so he claimed he was not bound by the arbitration clauses. This Court held:

Plaintiff does not deny that he accepted the delivery of the agreements and operated under their terms by, for example, enjoying a leased automobile, an American Express credit card, reimbursement for expenses, and payment of compensation. Plaintiff’s conduct clearly conveyed assent to the written contracts in this case. Under the circumstances, we believe plaintiff Ehresman acceded to the terms of the agreements by his conduct. Therefore, he is bound by the arbitration terms contained in those agreements. . . . [*Ehresman, supra* at 354-355.]

Based on the present record, we conclude that there was insufficient evidence of mutual assent to bind plaintiffs to the arbitration provision of the proposed operating agreement. Although plaintiff McAlpine drafted the agreement and the members were operating Auburn Financial, there is nothing in the record besides Dennis B. Adams’ disputed assertion in his affidavit that the parties were operating pursuant to this specific agreement. Moreover, in contrast to *Ehresman*, here there is affirmative evidence that there was no intended *final* agreement. An email to a third party indicates that the agreement is still a “draft” subject to “initial review” and that it could “be changed in any way to accommodate [an inter-creditor agreement] transaction.” Since there is evidence that this draft agreement was ever intended to be a final agreement, there could have been no mutual assent to it, and plaintiffs cannot be deemed to have acceded to its terms. While the parties were unquestionably operating Auburn Financial, it is not clear whether they were doing so pursuant to the specific unsigned agreement or pursuant to some other or modified understanding. There is nothing sufficiently conclusive to establish that the proposed operating agreement went into effect. Thus, there was no basis for the finding of an agreement to arbitrate in this case.

We reverse the trial court’s grant of summary disposition for defendant and remand for further proceedings. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs.

/s/ Kathleen Jansen  
/s/ Joel P. Hoekstra  
/s/ Jane E. Markey