

STATE OF MICHIGAN
COURT OF APPEALS

ALLAN J. DAVISSON,

Plaintiff-Appellant/Cross-Appellee,

v

GALE INDUSTRIES, INC. a/k/a INSULATION
PRODUCTS a/k/a GALE INSULATION,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

July 23, 2002

No. 229077

Shiawassee Circuit Court

LC No. 99-004139-CK

Before: Bandstra, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals and defendant cross-appeals as of right from the trial court's July 21, 2000, order. We affirm in part, reverse in part, and remand.

This is an action for breach of contract and specific performance arising from plaintiff's sale of his insulation company to defendant. On appeal, plaintiff challenges the trial court's grant of summary disposition to defendant under MCR 2.116(C)(7), on the basis that plaintiff's claims were subject to arbitration. In contrast, defendant takes issue with the trial court's ruling that defendant was not entitled to set off costs and attorney fees incurred in prior litigation to which defendant and plaintiff were parties.¹ We review de novo a trial court's decision regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred because the parties entered into an agreement providing for arbitration of their claims.

A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or

¹ *The Charter Investment Group, Ltd v Allan Davisson and Gale Industries, Inc*, Shiawassee Circuit Court Case No. 96-06819-CK. The prior litigation arose after The Charter Investment Group, plaintiff's real estate broker, sued plaintiff to collect its commission after plaintiff sold assets to defendant. Defendant was made a party to the prior litigation because Charter had allegedly perfected a security interest in the assets defendant purchased.

content of the supporting proofs must be admissible in evidence Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994). [*Maiden, supra* at 119.]

On appeal, plaintiff argues that the trial court erred in holding that summary disposition under MCR 2.116(C)(7) was appropriate because plaintiff's claims against defendant were subject to arbitration. Plaintiff further argues that, even if his claims were arbitrable, defendant waived its right to demand arbitration by litigating the indemnity issue in prior litigation between the parties in Shiawassee Circuit Court.

“The existence of an arbitration agreement and the enforceability of its terms are judicial questions for the court” *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). “[T]he scope of a court's consideration [of] whether an issue is arbitrable is sharply limited. If a claim on its face is governed by the contract, it should be decided by the arbitrator unless strong evidence demonstrates the matter is outside the scope of the arbitration provision.” *Federal Kemper Ins Co v American Bankers Ins Co of Florida*, 137 Mich App 134, 139; 357 NW2d 834 (1984), quoting *American Fidelity Fire Ins Co v Barry*, 80 Mich App 670, 673; 264 NW2d 92 (1978). “To ascertain the arbitrability of an issue, a court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration” *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 496-497; 591 NW2d 364 (1998). A trial court's factual determinations regarding a waiver claim are reviewed for clear error; however, its ultimate decision concerning whether those facts show a waiver is a question of law that is reviewed de novo. *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001).

In August 1996 the parties entered into an asset purchase agreement in which plaintiff transferred certain assets of Central Michigan Insulation, Inc., to defendant. The parties also entered into an employment agreement providing that plaintiff become an employee of Gale Industries. The complaint in the present action alleged claims under the parties' employment agreement, lease agreement, and asset purchase agreement. Specifically, plaintiff alleged that under the asset purchase agreement, defendant was required to submit written reports concerning collected sales of the business. Plaintiff also alleged that defendant wrongfully withheld monies due plaintiff under the terms of the asset purchase agreement. Finally, the complaint alleged that plaintiff was entitled to specific performance by defendant in the payment of building rent, amounts owing for damages to the leased premises as well as attorney fees.

The August 14, 1996, employment agreement contains an express arbitration clause covering “any claims which may arise between the parties, in any way relating to this Agreement or the breach thereof” Thus, plaintiff's claims as they relate to the employment agreement are clearly subject to arbitration. See *Federal Kemper, supra* at 139-140. In contrast, the August 14, 1996, lease agreement between the parties does not contain an arbitration clause. Further, it contains an “entire agreement” clause requiring that all waivers and modifications to

the agreement be in writing. However, the lease agreement does not contain any provision incorporating other agreements by reference. Therefore, we are not persuaded that plaintiff's claims under the lease agreement are arbitrable. *Hetrick v David A Friedman, DPM, PC*, 237 Mich App 264, 267; 602 NW2d 603 (1999) (holding that a party cannot be required to arbitrate an issue he has not agreed to submit to arbitration).

The complaint also alleged claims for contingent non-compete payments under the asset purchase agreement. The August 14, 1996, asset purchase agreement provides that plaintiff's right to such payment will end three years after closing, or if his employment is terminated under certain conditions that are defined in the employment agreement. The asset purchase agreement also contains an "entire agreement" clause that provides, "[e]xcept for the Exhibits specifically referred to herein and the Ancillary Agreements," the agreement constitutes the entire agreement of the parties, and any waivers and modifications must be in writing. The employment agreement is specifically mentioned in the asset purchase agreement as one of the parties' ancillary agreements.

The arbitration clause of the employment agreement provides:

The parties hereto agree that, *in accordance with* the Corporate Dispute Resolution Policy (the "CDRP") of Masco Corporation (the parent entity of the Company [Gale]), mediation, and if unsuccessful, arbitration, will be the sole and exclusive remedies *for any claims* which may arise between the parties, *in any way relating to this Agreement or the breach thereof to the extent such claims are covered by the CDRP*, and the Employee agrees not to pursue any such claims through a court or a jury. The Employee hereby acknowledges that he has had an opportunity to review the CDRP, and agree that all proceedings held in accordance with the CDRP will be conducted in the Detroit, Michigan metropolitan area. [Emphasis added.]

As used in the arbitration clause, the phrase "this Agreement" refers only to the employment agreement. Therefore, the arbitration clause did not implicitly or expressly encompass claims arising under the asset purchase agreement. *Federal Kemper, supra* at 139-140. Therefore, we disagree with the trial court that plaintiff's claims alleged in the complaint fall within the scope of the employment agreement's arbitration clause.

According to the plain terms of the asset purchase agreement, arbitrable claims are to be mediated and arbitrated in accordance with Masco's CDRP. Contrary to defendant's argument, however, we conclude that the phrase "in accordance with" incorporates only the mediation and arbitration procedures contained in the CDRP, such as the one-year time limitation and an award's enforceability in court, not the CDRP's definition of arbitrable claims. Therefore, it does not enlarge the scope of claims that are arbitrable under the arbitration clause of the employment agreement.²

² Notably, the asset purchase agreement also provides for attorney fees arising from "litigation"
(continued...)

We next address defendant's claim on cross-appeal that the trial court erred in holding that defendant was collaterally estopped from relitigating the issue whether it could rely on an indemnity clause in the parties' asset purchase agreement to set off attorney fees it expended in the prior litigation against amounts otherwise due plaintiff. We also address plaintiff's argument that the trial court should have further held that defendant was collaterally estopped from setting off other sums expended in the prior litigation, apart from just attorney fees. Additionally, plaintiff argues that, because no indemnification should have been allowed, he was entitled to summary disposition concerning the question of liability under the asset purchase agreement.

In this case, both parties were also parties to the earlier litigation that culminated in a valid final judgment that was not appealed. *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). Further, the record clearly reflects that defendant brought a motion in the prior action to enforce the indemnification clause in the asset purchase agreement, and the trial court decided that issue in a manner unfavorable to defendant. Thus, we agree with plaintiff that the issue of indemnification was "actually and necessarily determined" in the prior litigation. *Id.* at 485. The parties also were afforded full opportunity to litigate the matter. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995). Although the trial court decided the issue from the bench, we recognize defendant's assertion that the written judgment ultimately entered on October 29, 1998, did not expressly reflect the trial court's ruling on defendant's indemnification claim.³ Nonetheless, because it is clear that the trial court actually decided the issue unfavorably to defendant, and defendant did not appeal, we agree with the trial court that defendant is collaterally estopped from relitigating the issue as part of the present case.

Therefore, we conclude that the trial court correctly determined that defendant was collaterally estopped from relying on the indemnification clause to set off of attorney fees arising from the prior litigation. However, because the court's decision in the earlier action was limited to attorney fees, and did not address other sums spent in that litigation, defendant was not collaterally estopped from litigating the issue of its entitlement to set off other sums. Because relitigation of these other issues was not barred, we are satisfied the trial court properly denied summary disposition to plaintiff on the issue of liability.

Further, we reject plaintiff's claim that the trial court erred in setting aside a default entered against defendant. The decision whether to set aside a default is committed to the trial court's discretion and will not be reversed absent a clear abuse of that discretion. *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996) (Fitzgerald, P.J.). "A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1).

(...continued)

"both at the trial and appeals level."

³ However, the written judgment does indeed specify that it was entered "for the reasons stated by the Court on the record."

In light of the parties' admitted agreement for an extension of time, we are not persuaded that the trial court abused its discretion in concluding that good cause existed to set aside the entry of default. *Park, supra* at 67. Under MCR 2.603(D)(4), however, "[a]n order setting aside the default *must be* conditioned on the party against whom the default was taken paying the taxable costs incurred by the other party in reliance on the default, except as prescribed in MCR 2.625(D)." [Emphasis added.] Because the language of this subsection of the court rule is mandatory, the trial court erred in failing to award taxable costs to plaintiff. Accordingly, we remand for that purpose.

Lastly, plaintiff argues that the trial court erred in denying his motion to amend the complaint to add a claim for fraud and misrepresentation. We disagree. A trial court's decision regarding a motion for leave to amend will not be reversed absent an abuse of discretion resulting in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995). Given our conclusion that plaintiff's claims under the lease agreement and asset purchase agreement were not subject to arbitration, there is no basis for plaintiff's claim that defendant defrauded him by making the arbitration clause applicable to other agreements. Therefore, plaintiff's desired amendment would be futile. See, e.g., *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656, 659; 213 NW2d 134 (1973).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell