STATE OF MICHIGAN

COURT OF APPEALS

FUEGO GRILL, L.L.C., and SAMUEL ALVARADO,

Plaintiffs-Appellees,

v

DOMESTIC UNIFORM RENTAL,

Defendant-Appellant.

UNPUBLISHED
January 22, 2013

Nos. 302230; 303763
Oakland Circuit Court
LC No. 2010-113931-CK

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

In this consolidated case, defendant Domestic Uniform Rental appeals by leave granted the trial court's orders denying its motion to confirm an arbitration award and denying its motion for summary disposition. We affirm the trial court's orders in both appeals because the trial court correctly held that it was for the court to determine whether an agreement to arbitrate existed.

I. FACTUAL PROCEEDINGS

Plaintiff Fuego Grill, L.L.C., is a restaurant owned by plaintiff Samuel Alvarado. According to plaintiffs, on March 30, 2010, while Alvarado was working at Fuego Grill in preparation for its May 2010 grand opening, defendant's district sales manager, Jim Carlisle, visited the restaurant and attempted to discuss defendant's products and services with Alvarado. However, Alvarado told Carlisle that he had not come at a good time and Alvarado continued to work. Nevertheless, Carlisle proceeded to ask Alvarado several questions before he filled out a form. Once Carlisle finished the form, he presented it to Alvarado as a bid for defendant's services. According to plaintiffs, Carlisle specifically told Alvarado that the prepared form was not a contract and that any future contract that defendant and plaintiffs may enter into would be on a month-to-month basis. Carlisle then presented Alvarado with two documents – the first entitled "rental agreement domestic uniform rent" and the second "guaranty of payment." Carlisle asked Alvarado to sign both documents, stating that the documents were an acknowledgement that Carlisle had discussed doing business with plaintiffs. After Alvarado signed the documents, Carlisle left the restaurant without providing a copy of the documents to Alvarado. At this point, Alvarado believed that defendant would prepare and send him a written

proposal for business. Thereafter, on April 30, 2010, defendant attempted to deliver an order to plaintiffs but Alvarado refused delivery.

Because the purported agreement contained an arbitration provision, defendant filed a demand for arbitration following Alvarado's refusal of delivery. At the arbitration, plaintiffs asserted that an enforceable contract had not been formed, defendant's actions amounted to fraud, and the contract was void or voidable. Conversely, defendant asserted that a valid contract existed. After the arbitration hearing closed, but before the arbitrator issued a decision, plaintiffs filed a complaint in circuit court. Among other things, plaintiff requested that the trial court declare the rental agreement and guaranty unenforceable as procured by fraud and in violation of Michigan law and that the dispute was not subject to arbitration because the agreement was induced by fraud.

Shortly thereafter, the arbitrator issued an award against plaintiffs. Following the arbitrator's decision, defendant filed a motion for confirmation of the arbitration award, arguing that it was entitled to an order confirming the arbitration award because the issues addressed by the arbitrator arose out of or were related to the parties' rental agreement and plaintiffs had voluntarily submitted all claims and defenses to the arbitrator. Plaintiffs opposed defendant's motion for confirmation of the arbitration award, asserting that the arbitration clause was unenforceable and that the rental agreement and guaranty could not be enforced because defendant engaged in fraud and there was no meeting of the minds.

The trial court agreed with plaintiffs that the determination regarding the existence of an agreement to arbitrate was for the court. Additionally, it found that plaintiffs' participation in arbitration did not waive plaintiffs' challenge to the validity of the agreement. Consequently, the trial court concluded that it would consider plaintiffs' claims and it denied defendant's motion for confirmation of the arbitration award.

In the meantime, as a precautionary measure, defendant also filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Defendant argued that because the arbitrator's rulings had embodied plaintiffs' fraud issues, they were not actionable as a matter of law. Plaintiffs opposed defendant's motion for summary disposition and asserted that the arbitration provision was unenforceable because the rental agreement and guaranty were unenforceable through application of promissory estoppel. Plaintiffs also asserted fraud in the execution and fraud in the inducement and argued that no contract was entered into because there was no meeting of the minds.

After oral argument, the trial court denied defendant's motion for summary disposition and found, in the pertinent part:

> [P]ursuant to Michigan law a party can claim fraud, even if it was careless in failing to read a contract. Carelessness of a party defrauded is not a defense to intentional fraud . . . . One accused of a fraud may not raise as a defense the carelessness of the party defrauded.

> A party who induces someone to sign a contract by some stratagem, trick, or artifice cannot argue that the defrauded party is bound by its terms for negligently railing to read it . . . .
>
> * * *
>
> The Defendant's argument that the arbitration clause contained in the agreement is controlling completely ignores the basis for this lawsuit, and that is that the arbitration clause . . . is contained in a void or . . . voidable contract, and therefore cannot control the relationship between the parties.

After the trial court entered an order denying defendant's motion for summary disposition, defendant filed applications for leave to appeal both the order denying its motion for confirmation of the arbitrator's award and the order denying its motion for summary disposition. Subsequently, this Court granted the applications for leave to appeal and consolidated the cases. *Fuego Grill LLC v Domestic Uniform Rental*, unpublished order of the Court of Appeals, entered June 8, 2011 (Docket Nos. 302230 & 303763).

II. ANALYSIS

The principal issue in this case is whether the trial court erred in concluding that there was not an agreement to arbitrate between the parties. The existence of an arbitration agreement is a judicial question that is subject to de novo review. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000); see also *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009).

To begin, we reject defendant's waiver argument. It is well-settled that

> [i]f a party to an arbitration agreement wants to object to the arbitrability of a specific issue, he should do so at the earliest opportunity. He should raise the objection before the issue is submitted for a hearing on its merits, because he may not voluntarily submit an issue to arbitration and then, if he suffers an adverse decision, move to set aside the adverse award on the ground that it was not an arbitrable issue. [*American Motorists Ins Co v Llanes*, 396 Mich 113, 114-115; 240 NW2d 203 (1976) (quotation marks and citation omitted).]

Thus, plaintiffs did not waive the issue of arbitrability through participation in the arbitration proceedings, as it argued during the arbitration that no contract existed because of fraudulent inducement and before the arbitration award was issued it filed a complaint in circuit court seeking to preclude arbitration because no contract to arbitrate existed.[1]

---

[1] Additionally, the purported contract between the parties did not include an agreement to have the arbitrator determine arbitrability.

Turning now to the merits, which is governed by Michigan law, it is well-settled that the absence of a valid agreement to arbitrate constitutes a defense to plaintiffs' action to confirm the arbitration award. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 97; 323 NW2d 1 (1982). Indeed, the *Arrow Overall Supply Co* Court emphasized that "[t]he defense of 'no valid agreement to arbitrate' is a direct attack on the exercise of jurisdiction of both the arbitrator and the circuit court." *Id*. at 98. The reason a party can raise the existence of an arbitration agreement before the circuit court is that "[a]bsent a binding contract, the parties cannot be required to arbitrate issues that arise between them." *36th Dist Court v AFSCME Council 25, Local 917*, 295 Mich App 502, 510; 815 NW2d 494 (2012) rev'd in part on other grounds ___ Mich ___; 821 NW2d 76 (2012), citing *City of Ferndale v Florence Cement Co*, 269 Mich App 452, 460; 712 NW2d 522 (2006) and *AFSCME Council 25 v Wayne Co*, 290 Mich App 348, 350; 810 NW2d 53 (2010). And, as our Supreme Court in *Arrow Overall Supply Co* recognized, "[t]he existence of a contract to arbitrate and the enforceability of its terms is a judicial question which cannot be decided by an arbitrator." *Arrow Overall Supply Co*, 414 Mich at 99; see also *36th Dist Court*, 295 Mich App at 510.

Here, as previously noted, plaintiffs did not waive the issue of arbitrability because they specifically challenged whether a valid agreement existed and the parties did not agree to submit the issue of arbitrability to the arbitrator. Hence, because plaintiffs challenge the *existence* of the contract to arbitrate – and not merely the arbitration terms within the contract – it was for the court to determine whether an agreement to arbitrate existed. See *Pub Serv Credit Union v Ernest*, 988 F2d 627, 629 (CA 6, 1993), citing *Horn v Cooke*, 118 Mich App 740, 744; 325 NW2d 558 (1982). Moreover, once the trial court determined that there was not an agreement to arbitrate, the arbitrator did not have jurisdiction to hear the case. Consequently, the trial court correctly denied defendant's motion to confirm the award and defendant's motion for summary disposition.

As just detailed, Michigan law clearly and comprehensibly declares that it is for the court – and not the arbitrator – to determine whether a valid agreement to arbitrate exists. We disagree with the dissent's mention, let alone application of collateral estoppel (even by analogy) to this case, as the dissent correctly acknowledges that the doctrine is inapplicable. Moreover, although it is true that the purpose of arbitration is to avoid protracted litigation, it is equally true that parties cannot be forced to arbitrate a matter that they did not contractually agree to arbitrate. No matter the existence of a general public policy[2] favoring expeditious resolution by arbitration, the rule of law contained in Michigan case law is clear and consistent, and requires judicial resolution of this fundamental issue. *Arrow Overall Supply Co*, 414 Mich at 95.

[2] That the federal courts applying the Federal Arbitration Act may have ruled consistently with the dissent's result is of no moment, as no one has suggested that federal law governs this case. See *Pub Serv Credit Union*, 988 F2d at 629 (recognizing cases applying federal law have no application to this issue which is governed by Michigan law).

Affirmed.

/s/ Christopher M. Murray
/s/ Douglas B. Shapiro