STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

JOHN P. CHARTERS,
Plaintiff,

v. **Case No. 18-165661-CB**
Hon. James M. Alexander

KIM R. MEHL, ET AL,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for declaratory relief finding that no agreement to arbitrate exists. The Court previously summarized this case as follows:

> In his Complaint, Plaintiff alleges that he is a 24% owner of Defendant Brick Tech Architectural – with Defendants Mehl and Weeks owing 51% and 24%, respectively. Plaintiff alleges that he has always acted as a passive owner, with Mehl acting as President and sole officer.
>
> In the current lawsuit, Plaintiff alleges that, over time, he discovered that "Mehl has been manipulating Brick Tech for his personal benefit and without Plaintiff's knowledge and consent" by grossly overpaying himself, issuing unequal distributions, and utilizing certain automobile deductions that were not afforded to Plaintiff.
>
> On these general allegations, Plaintiff filed his Complaint on claims titled (Count I) accounting; (Count II) breach of fiduciary duty; (Count III) minority shareholder oppression; (Count IV) appointment of a receiver; and (Count V) conspiracy/unjust enrichment.

On September 5, 2018, the parties, through a stipulated order stayed the action pending arbitration pursuant to the parties' January 1, 1995 Shareholder Agreement. In December of 2018, the parties arbitrated the pending claims, and on January 7, 2019, the arbitrator issued his

award. The arbitrator's award required Defendants to make a cash payment of $157,260.72 in return for an assignment and/or cancellation of Plaintiff's stock "as quickly as possible." (Defendants' Exhibit 14, at 8).

Following the arbitrator's award, on January 24, 2019, Defendants notified Plaintiff that they were prepared to immediately pay. On January 31, 2019, Defendants issued two checks for the payment as ordered by the arbitrator and notified Plaintiff of the same. According to Defendants, Plaintiff refused to accept the checks and make the assignment. Defendants again offered to deliver the award to Plaintiff on February 4, 2019. Again Plaintiff refused the offer. Subsequent to Defendants renewed offer to deliver payment, Plaintiff filed a new demand for arbitration on February 4, 2019.

Plaintiff filed its February 4, 2019, arbitration complaint on claims of (Count 1) minority shareholder oppression; and (Count II) breach of fiduciary duty and self-dealing. In the complaint, Plaintiff alleges that Defendants allocated Plaintiff taxable income for 2018 without a cash distribution. Plaintiff claims that failing to provide a cash distribution constitutes minority shareholder oppression and a breach of fiduciary duty owed to Plaintiff. Further, Plaintiff alleges that the prior arbitrator's award did not address Defendants' actions against Plaintiff in 2018.

On February 5, 2019, Defendants send payment to Plaintiff via Federal Express and cancelled Plaintiff's shares, terminating Plaintiff's status as a shareholder. On February 12, 2019, the parties stipulated to the entry of the arbitrator's award, and the Court entered an order reflecting the same. Defendants' claim that on or about February 12, 2019, Plaintiff cashed the checks tendered by Plaintiff pursuant to the award.

Defendants claim that as of February 28, 2019, Plaintiff had not paid the AAA filing fees in connection with his new arbitration demand. At that time, Defendants assert that the instant

case had been concluded, and Plaintiff was no longer a shareholder. As such, Defendants claim that Plaintiff cannot maintain his new demand for arbitration. Defendants received formal notice of the new arbitration demand after Plaintiff paid the remainder of the filing fees on or about March 6, 2019.

In the current motion, Defendants claim that, since Plaintiff was no longer a shareholder at the time of his new arbitration demand, the Shareholder Agreement, which contained an arbitration provision, is no longer in effect. Therefore, Defendants argue, Plaintiff has no right to arbitration. Further, Defendants argue that the claims asserted in the new demand were presented and resolved in the 2018 arbitration. Defendants argue that Plaintiff is attempting to challenge the prior award.

Based on the same, Defendants now seek summary disposition under MCR 2.116(C)(7) and (C)(10). A (C)(7) motion tests whether a claim is barred, among other grounds, by a prior judgment and an agreement to arbitrate. And a (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[1]

This motion presents the question of whether an agreement to arbitrate exists. Defendants argue that since Plaintiff was not a shareholder when he filed his arbitration demand, the Shareholder Agreement was no longer valid, and therefore, Plaintiff has no contractual right to arbitration. Plaintiff, on the other hand, argues that the issue of a 2018 distribution was not raised in the prior arbitration since he did not know at that time whether he was getting a distribution or not. Further, Plaintiff argues that since he filed his arbitration demand on

[1] In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

February 4, 2019, he was still a shareholder, and therefore, has a right to arbitrate under the Shareholder Agreement.

In support of his position, Plaintiff cites to *Blankenship v Superior Controls, Inc*, 135 FSupp3d 608 (ED Mich, 2015) for the proposition that since the demand for arbitration was filed when Plaintiff was still a shareholder, Plaintiff has standing to bring and maintain his suit since he was a shareholder at the time of filing.

In *Blankenship*, plaintiff, a former shareholder of defendant, terminated his relationship with defendant as of February 12, 2012, which triggered defendant's obligation to purchase plaintiff's stock. *Id.* at 613. A dispute arose as to the value of the stock. *Id.* While the parties were disputing the stock value, defendants attributed $72,051 of taxable income to plaintiff but did not make any distributions to pay the resulting tax liability. *Id.*

Defendant attempted to redeem plaintiff's shares as of June 5, 2013. *Id.* at 614. Plaintiff objected to the redemption and filed suit in response. *Id.* In response to the lawsuit, defendant argued that plaintiff did not have standing because he was no longer a current shareholder. *Id.* at 615. Plaintiff, to the contrary, argued that since he was a shareholder at the time he filed his complaint, he has standing. *Id.* The *Blankenship* Court agreed. *Id.* at 617.

The *Blankenship* Court held that a plaintiff has standing to bring a claim if the plaintiff was a "current shareholder" at the time the lawsuit was filed. *Id.* The *Blankenship* Court further found that "it would be unreasonable to hold that a plaintiff could have standing to challenge acts or omissions he was subjected while a shareholder when a lawsuit is filed but then lose standing to pursue that same lawsuit about acts or omissions that occurred while he was a shareholder simply because he ceases to be a shareholder after the lawsuit is filed." *Id.*

In the instant case, Defendants respond that Plaintiff could file a complaint in this Court and make a standing argument. Defendants, however, argue that Plaintiff cannot argue that he has standing to arbitrate because he is not a shareholder. Defendants argue that the only basis for Plaintiff's arbitration demand is the Shareholder Agreement. Since Plaintiff is no longer a shareholder, he is no longer a party to the Shareholder Agreement, and there is no agreement to arbitrate between the parties.

Further, Defendant argues that *Blankenship* actually supports the proposition that the January 7, 2019 award was the date that Plaintiff's shareholder status was terminated. The *Blankenship* Court held that a shareholder can lose his rights "following a resignation and repurchase of shares, even though payment is not received automatically." *Id.* at 614. Defendant argues that in *Blankenship* the shareholder's rights were terminated as of a contractual date, and contends that the contractual date in this case is the date of the arbitration award. Further, Defendant argues that the parties stipulated to the entry of the arbitration award, which ratified the award despite payment. The Court agrees.

Although both parties present the sole issue as whether the Shareholder Agreement was still in effect and, therefore, whether an agreement to arbitrate exists; the Court must first determine when Plaintiff's status as a shareholder was terminated. Defendants argue that Plaintiff's shareholder status ended as early as January 7, 2019 arbitration award. It is unclear when Plaintiff argues his shareholder status ended, but Plaintiff's shares were cancelled on February 5, 2019. Plaintiff does, however, claim that he filed his arbitration demand while he was still a shareholder on February 4, 2019.

Here, the arbitrator's award was a detailed seven-page award. Indeed, the arbitrator states, "that the Arbitrator is only required to make a "Standard Award." However, because of

the nature of the claims the Arbitrator thought it would be helpful to provide a limited view as to how the Award was arrived at." (Defendants' Exhibit 6, at 4). Further, the Arbitrator provides the "completion" of the purchase of Plaintiff's stock should occur as soon as possible. *Id.* at 8. And finally, the Arbitrator stated, "[t]his Award is in full resolution of all claims, counter-claims, and/or cross claims submitted in this arbitration and all claims not expressly granted or denied herein are hereby denied." *Id.* at 9.

As stated, the Arbitrator was detailed and specific in his Award. The Arbitrator provided that the "completion" of the stock purchase should occur as soon as possible. The use of the word "completion" implies that the act has already begun. In this case, the act of redeeming Plaintiff's stock had begun, and was to be completed by the payment. This is consistent with the ruling in *Blankenship* that a shareholder may lose his status as a shareholder on a contracted date regardless of payment for his shares. Beyond that, the Award provides that it is in full resolution of all claims.

Based on the language of the award, the Court concludes that the Arbitrator intended to have the Award be effective immediately. Specifically, the Court finds that although payment was required to complete the purchase, Plaintiff lost his rights as a shareholder as of the January 7, 2019 Award. The Court finds that entry of the Stipulation to Enter Order Modifying and Confirming Arbitration Award was simply a ministerial act.

The Court also finds that Plaintiff could have accepted payment as early as January 31, 2019, but refused to do the same. By not accepting the payment to complete the purchase, Plaintiff was attempting to benefit from his own default under the terms of the Award. As stated, the purchase was to be completed as soon as possible, and Plaintiff prevented that from

occurring. This is further evidenced by Plaintiff accepting and cashing the check and signing the order confirming the award after his new demand was filed.

Assuming arguendo that Plaintiff remained a shareholder until Defendants' Stock Record that indicates that on February 5, 2019, Plaintiff's shares were cancelled, the Court would find that Plaintiff's arbitration demand was not properly filed. (Defendants' Exhibit 13). As such, the Court would find that Plaintiff's demand was not filed until after he lost his rights as a shareholder.

Michigan law is well-established that "a court must construe and apply unambiguous contract provisions as written." *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Holmes v Holmes*, 291 Mich App at 594.

Further, in Michigan, "a 'question of arbitrability' is an issue for judicial determination unless the parties unequivocally indicate otherwise." *Gregory J Schwartz & Co v Fagan*, 255 Mich App 229, 232 (2003). MCL 691.1686(1) provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract." And "[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." MCL 691.1686(2).

Here, the parties do not dispute that the Shareholder agreement contained a valid, enforceable arbitration provision. Further, as the Court has already rule, Plaintiff was still a shareholder on February 4, 2019, and as such, the Shareholder Agreement was still a valid

contract between this parties. The remaining question is whether Plaintiff's demand was properly filed pursuant to AAA rules.

The AAA Commercial Rules and Mediation Procedures provide:

R-1. Filing Requirements

(a) Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration. (Commercial Rules, at 11).

Defendants argue that Plaintiff's arbitration was not filed until March 6, 2019, because that was the date Plaintiff filed the arbitration administrative fees. Defendants argue that the AAA Commercial Rules require the administrative filing fees before an arbitration is initiated. Since Plaintiff did not pay the filing fees until March 6, 2019, he was no longer a shareholder, and therefore, there is no contract between the parties to arbitrate the dispute.

In response, Plaintiff argues that on February 4, 2019, Plaintiff filed his demand along with $800 filing fee which was accepted and the demand was assigned Case No. 01-19-00000-361. (Plaintiff's Response Exhibit U). Further, Plaintiff argues that the AAA sent a letter dated February 28, 2019 that indicated that an additional $2400 was required. (Plaintiff's Response Exhibit X). Plaintiff argues that only if the payment was not made by March 7, 2019, the AAA, at that time, may administratively close the case. Plaintiff claims that the AAA never ruled that the arbitration demand was not properly filed as the additional fee was timely paid.

Plaintiff relies on his AAA Document Receipt that assigned the case number as evidence that his demand for arbitration was properly made on February 4, 2019. (Plaintiff's Response Exhibit U). However, the AAA Document Receipt provides that "[t]his notice does not constitute the AAA's initiation of the case or satisfaction of all AAA administrative filing

requirements." *Id.* It further provides, "[y]our filing will be reviewed, and if all AAA Administrative filing requirements are met, assigned to a case manager who will be in contact with all parties." *Id.*

As stated, Plaintiff received a letter from the AAA on February 28, 2019. (Plaintiff's Response Exhibit X). The letter provides:

> [t]his will acknowledge receipt of claimant's demand for arbitration. Our administrative filing requirements have not been met.
>
> Because the filing requirements have not been met, no answering statement or counterclaim is due at this time. Once any filing deficiencies have been cured, a case manager will notify the parties of the appropriate response dates.
>
> Prior to proceeding with further administration of this case, the AAA requests that the claimant provide the following:
>
> The appropriate filing fee of $3,250 for a non-monetary claim. We acknowledge claimant's payment of $800 toward the filing fee. We request that claimant pay the balance due $2,400 by March 7, 2019. *Id.*

These documents from the AAA, taken together, provide that (1) the February 4, 2019 AAA Document Receipt was not the initiation of the arbitration case or satisfaction of all filing requirements; and (2) as of the February 28, 2019 letter, Plaintiff still had not satisfied the AAA filing requirements. Pursuant to the AAA Commercial Rules Filing Requirements, a case is not initiated until all of the filing requirements have been met – including the filing fee.

Here, Plaintiff did not perfect the AAA filing requirements until March 6, 2019, so the case was not initiated until March 6, 2019, approximately a month after his status as a shareholder was terminated. As such, Plaintiff was no longer a party to the Shareholder Agreement, and there is no valid contract to arbitrate between the parties.

Based on the foregoing, Defendants' motion for declaratory relief is GRANTED.

This is a final order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

July 3, 2019__ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge