

ESPUD

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

JAMES A. GALL,

Plaintiff,

vs.

Case No. 19-1932-CB
Hon. Richard L. Caretti

TBI SOLUTIONS, LLC,

Defendant.

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OPINION AND ORDER

Plaintiff James Gall filed a Motion to Stay Arbitration Permanently.

I. Background

Plaintiff Mr. Gall asks the Court to issue a declaration that he and Defendant did not agree to arbitration, and as a consequence, to permanently stay the pending arbitration. See MCR 3.602(B)(1-3).

On May 21, 2019, Plaintiff filed a Complaint alleging: count I, declaratory judgment and count II, injunctive relief. In his Complaint, Plaintiff essentially alleges: Defendant engages in the business of counselling people with traumatic brain injuries and substance abuse disorders; Defendant hired Plaintiff, a licensed psychologist, to serve as a clinical director; Plaintiff never agreed to resolve disputes with Defendant by arbitration; Plaintiff resigned from his position with Defendant in 2018; and in February 2019 Defendant initiated an arbitration proceeding against Plaintiff based on alleged breach of terms of an employment agreement. The arbitration proceeding is currently pending relating to allegations that Plaintiff operated a competing practice. On June 11,

2019, this Court heard oral argument on the motion and supporting evidence and took the matter under advisement.

II. Arguments

Plaintiff argues that he did not sign a written employment agreement with Defendant and never agreed to an arbitration term. Moreover, Plaintiff denies that Defendant ever presented the employment agreement to him before or during his employment. Plaintiff further denies that his employment with Defendant was conditioned on the terms of the alleged agreement.

In response, Defendant admits that the employment agreement lacks Plaintiff's signature. However, Defendant maintains that the parties agreed to resolve their disputes through arbitration because: Defendant prepared and presented an Employment Agreement to Plaintiff; the Employment Agreement became a term and condition of Plaintiff's employment; and, Plaintiff therefore acquiesced to the terms of the Employment Agreement by his continued employment.

III. Law and Analysis

Parties may only be required to submit a dispute to arbitration if they contractually agreed to do so. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 97; 323 NW2d 1 (1982). The Court may hear a request for an order to stay arbitration by motion. MCR 3.602(B)(2). If "there is a substantial and good-faith dispute [as to an arbitration agreement], the court shall summarily try the issue and may either enter a stay or direct the parties to proceed to arbitration." MCR 3.602(B)(3).

The "existence of an arbitration contract and the enforceability of its terms are judicial questions that cannot be decided by the arbitrator." *Huntington Woods v Ajax*

Paving Industries, Inc (After Remand), 196 Mich App 71, 74, 492 NW2d 463 (1992); see also MCL 691.1686(2) ("The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate."). However, if the dispute is arbitrable, the merits of the dispute are for the arbitrator. *Altobelli v Hartmann*, 499 Mich 284, 296; 884 NW2d 537 (2016) citation omitted.

"A three-part test applies for ascertaining the arbitrability of a particular issue: 1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract." *In re Nestorovski Estate*, 283 Mich App 177, 202-03; 769 NW2d 720 (2009) citation omitted. Doubts should be resolved in favor of arbitration. *Id.*

Michigan public policy favors arbitration in the resolution of disputes. *Lanzo Const Co v City of Port Huron*, 88 Mich App 443, 450; 276 NW2d 613 (1979) citation omitted. Therefore, arbitration clauses are liberally construed, resolving any dispute in favor of arbitration. *Id.* citations omitted.

In the present case, the arbitration clause at issue in the unsigned Employment Agreement, provides, in relevant part,

Any claim, dispute or controversy arising from or relating to this Agreement or the employment of Employee by Employer, shall be conclusively decided by arbitration in Detroit, Michigan, in accordance with the rules of the American Arbitration Association, and a judgment upon any such determination or award may be entered in any court having proper jurisdiction.

Plaintiff's Exhibit A, ¶25. Plaintiff does not dispute the second or third prongs of arbitrability analysis (that the disputed issue falls within the arbitration clause and

express contractual exemption of the dispute). Instead, Plaintiff challenges whether Defendant satisfies prong one—is there an arbitration agreement between the parties.

In support of his contention that he never agreed to an arbitration clause in the Employment Agreement, Plaintiff relies on his affidavit wherein he denies that Defendant presented an Employment Agreement to him at the time of hire or during his employment. Plaintiff's Exhibit B, Affidavit of James Gall. The Court also has before it an Affidavit of Penny Foshee stating that Dr. James Gall said he would discuss the employment contract and his relationship with Nina Lang. Penny Foshee also states that Dr. James Gall "was the exception" and never signed an employment agreement with Defendant.

On the other hand, in support of its position that it has an arbitration contract with Plaintiff, Defendant relies on *Ehresman v Bultynck & Co, PC*, 203 Mich App 350, 353; 511 NW2d 724 (1994). The Court in *Ehresman* held that arbitration clauses do not have to be signed to be binding where there is mutuality of assent. Specifically, the Court upheld the enforcement of an arbitration clause in an unsigned employment agreement where the employee took the documents and conveyed his assent to the agreement by his conduct. *Id.*

Defendant then cites to the Affidavit of Nina Lang, Defendant's owner, who states that Defendant required employees to sign employment agreements, that Defendant specifically prepared an Employment Agreement for Plaintiff, presented it to him, and that Plaintiff continued his employment with Defendant for an additional seven and a half years. Defendant's Exhibit I. Nina Lang also states that as part of Plaintiff's job responsibilities, Plaintiff ensured that other employees executed their respective

agreements, even at times signed such agreements on behalf of Defendant, and that Plaintiff maintained the agreements, including his own, in personnel files. *Id.* ¶12. According to Nina Lang, certain documents, including the Employment Agreement, went missing from Plaintiff's personnel file when Plaintiff left his position with Defendant. *Id.*

In corroboration of Nina Lang's Affidavit, Defendant also submits a job description of the Director of Clinical Services indicating that Plaintiff's job entailed implementation of new or revised policies and procedures along with overseeing management of the facility. Defendant's Exhibit D. Defendant also submits an email dated December 2, 2009 from attorney David Sims to Penny Foshee referencing an enclosed employee contract for the clinical director. Exhibit 2 to Defendant's Exhibit I. Defendant further relies on an email from Penny Foshee to Nina Lang on November 4, 2010 indicating that "Jim did not sign a contract; he said that he would talk to you about his contract." *Id.* Exhibit 3.

In accordance with MCL 691.1686(2) and MCR 3.602(B)(3), the Court will summarily decide whether the parties agreed to arbitrate. Without dispute, Plaintiff never signed his Employment Agreement. However, under *Ehresman*, 203 Mich App at 353, the Court may still find its arbitration clause binding upon a showing of mutuality of assent from the parties' conduct.

In this case, the Court is convinced that Defendant created an Employment Agreement specifically for Plaintiff's position, (Defendant's Exhibits B, C, and I), that Defendant presented the Agreement to Plaintiff (Exhibit I, and I Exhibit 2), that Plaintiff was therefore aware of the Employment Agreement (Defendant's Exhibit C I, and Affidavit of Penny Foshee), that the Employment Agreement was a condition of

employment (Defendant's Exhibit I) and that Plaintiff continued to work for Defendant after becoming aware of the terms of the Employment Agreement. (Exhibit I, Plaintiff's Exhibit B). As a result, and resolving any dispute in favor of arbitration, the Court finds that Plaintiff assented to the terms of the Employment Agreement by his continued employment with Defendant. Therefore, the Court is persuaded that the parties entered into a binding and enforceable arbitration agreement. Having determined that the parties have an arbitrable dispute, the Court will not reach the merits of the matter. See again *Altobelli*, 499 Mich at 296. Further, given that the parties have an agreement to arbitrate, dismissal of Plaintiff's action is appropriate. See MCR 2.116(C)(7).

IV. Conclusion

For the reasons set forth above, Plaintiff's motion to stay the arbitration is DENIED and his Complaint is dismissed. In accordance with MCR 2.602(A)(3), this *Opinion and Order* resolves the last pending claim and closes this case.

IT IS SO ORDERED.


HONORABLE RICHARD L. CARETTI
Circuit Court Judge

DATE: August 15, 2019

cc: Anthony Urbani, II, Esq.
David F. Greco, Esq.

