

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| Michael Stromberg, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 09AP-702 (C.P.C. No. 07CVH05-6370) |
| Limited Brands, Inc., | : | (ACCELERATED CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on May 6, 2010

Marshall and Morrow LLC, John S. Marshall, and Edward R. Forman; Louis A. Jacobs, for appellant.

Vorys, Sater, Seymour and Pease LLP, Gerald P. Ferguson, Jacklyn J. Ford, and Kimberly W. Herlihy, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Michael Stromberg ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas dismissing his claim seeking a declaratory judgment regarding the applicability of an arbitration provision in the employment agreement between appellant and appellee, Limited Brands, Inc.

("appellee"). For the reasons that follow, we reverse the judgment of the Franklin County Court of Common Pleas.

{¶2} Appellant was employed as an executive by appellee. As part of this employment, appellant and appellee executed an employment agreement, which provided, in relevant part:

Except with respect to the remedies set forth in Section 11(f) hereof, any controversy or claim between the Company or any of its affiliates and the Executive arising out of or relating to this Agreement or its termination shall be settled and determined by binding arbitration.

Employment Agreement, ¶14.

{¶3} The agreement further provided that, in addition to his salary, appellant would be eligible to receive stock options. Appellee granted appellant two stock option plans, each of which contained a provision stating that "[i]n the event of any conflict between a written agreement and the Plan, the terms of the Plan shall govern." (Appellee's Motion to Dismiss, Exhibit A, Article 18, and Exhibit B, Article XVIII.)

{¶4} In June 2003, appellant received a memorandum from Len Schlesinger, appellee's Executive Vice Chairman and Chief Operating Officer, outlining amendments to be made to the employment agreement between appellant and appellee. The expressed purpose of the amendments was to increase the protections offered to appellant in the event of a change of ownership in the company. The memorandum referred to a summary of the amendments, and stated that "all of the changes being made result in a more favorable employment agreement for you." The attached summary included identification of changes to the stock option plan, stating that the plan "has been amended to provide that existing stock options with an exercise price greater than \$13.08,

and all future grants of stock options that, in either case, are vested when you leave the Company, may be exercised up to one year after you leave the Company unless you leave the Company due to total disability or you are terminated for gross misconduct." The summary referred only to changes in a single stock option plan, and did not specify which of the two stock option plans granted to appellant had been changed.

{¶5} Appellant signed the amendment to the employment agreement. The new agreement included changes as outlined in the memorandum, but did not include any provisions regarding changes to the stock option plans. No separate agreement including changes to the stock option plan as outlined in the memorandum was ever executed. When appellant left his employment in 2006, appellant was informed that, while stock options under one of the plans could be exercised up to one year post-termination, stock options under the other plan had to be exercised within three months. In his complaint, appellant asserted that exercise of the stock options within three months resulted in a loss to him, as the stock price went up after that time.

{¶6} Appellant's complaint did not seek recovery for any alleged losses resulting from the timing of the exercise of the stock options, but rather sought a declaratory judgment that his claim for those losses is subject to the arbitration provision contained in the employment agreement. Appellee filed a motion to dismiss for failure to state a claim for which relief can be granted pursuant to Civ.R. 12(B)(6). Appellee argued that because the dispute involved the terms of the stock option plan, and whether a change had been made to those terms, rather than the employment agreement itself, the dispute was not subject to the arbitration provision.

{¶7} In its decision on the motion, the trial court set forth the standard for consideration of a Civ.R. 12(B)(6) motion made in an action seeking a declaratory judgment. Under that standard, a claim for a declaratory judgment may be dismissed for failure to state a claim for which relief can be granted if: (1) there is neither a justiciable issue nor an actual controversy between the parties that requires speedy relief in order to preserve rights that may otherwise be impaired; or (2) the declaratory judgment sought would not terminate the uncertainty or controversy. *Van Leur v. Ohio Dept. of Commerce*, 2d Dist. No. 20617, 2005-Ohio-915.

{¶8} The trial court concluded that the dispute regarding the applicability of the arbitration provision was justiciable, and would terminate the uncertainty. However, rather than denying the motion to dismiss for failure to state a claim for which relief can be granted, the trial court considered the merits of whether the arbitration claim would apply to a dispute regarding the stock option plan, and concluded that it would not. Thus, while the trial court purported to grant appellee's Civ.R. 12(B)(6) motion to dismiss for failure to state a claim, in actuality, the court granted judgment in favor of appellee on appellant's claim for a declaratory judgment.

{¶9} Appellant filed this appeal, asserting a single assignment of error:

The Trial Court Erred By Dismissing Appellant's Declaratory Judgment Action For Failing To State A Claim On Arbitrability.

{¶10} In briefing, the parties, as the trial court did, focus not on the application of Civ.R. 12(B)(6) to appellant's claim for a declaratory judgment, but rather focus on the merits of whether the arbitration provision contained in the employment agreement would apply to claims that actually arise from the stock option plan. The question of whether a

particular claim is arbitrable is a question of law, and the standard of review on appeal is de novo. *Council of Smaller Ents. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 1998-Ohio-172.

{¶11} Generally, Ohio law recognizes a strong presumption in favor of arbitration. *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 1998-Ohio-612. When an arbitration provision includes language stating that it applies to " 'any claim or controversy arising out of the agreement,' " the provision should be applied broadly unless " 'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' " *Alexander v. Wells Fargo Fin. Ohio 1, Inc.*, 122 Ohio St.3d 341, 2009-Ohio-2962, ¶13, quoting *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, ¶14. Doubts about the applicability of an arbitration provision should be resolved in favor of coverage. *Id.*

{¶12} The analysis commonly used to address the applicability of an arbitration provision involves the question of whether an action can be maintained without reference to the contract that contains the arbitration provision. *Alkenback v. Green Tree*, 11th Dist. No. 2009-G-2889, 2009-Ohio-6512, citing *Fazio v. Lehman Bros., Inc.* (C.A.6, 2003), 340 F.3d 386. If so, the action is likely outside the scope of the arbitration provision. *Id.* However, even tort claims can be covered by an arbitration provision where those claims touch matters covered by the agreement. *Id.*

{¶13} A review of the case law or arbitration provision discloses that most cases in which the applicability of an arbitration provision is in dispute involve a plaintiff filing a claim, in tort or contract, against a defendant, with the defendant arguing that the asserted claims must be arbitrated. In this case, it is appellant who seeks to have the

claim he wishes to assert against appellee arbitrated, with appellee seeking to avoid the arbitration provision and to defend the claim in court.

{¶14} According to his complaint, the claim appellant seeks to prosecute against appellee is one for the tort of negligent misrepresentation based on the written statement made in the summary of changes provided to appellant prior to his execution of the amendments to the employment agreement that the time for execution of the stock options had been extended from three months to one year after termination of employment. Appellant asserted in his complaint that he relied on the assertions regarding the period for exercising the stock options when he executed the amendment to the employment agreement, and then continued his employment with appellee thereafter.

{¶15} Here, appellant's claim for negligent misrepresentation cannot be maintained without reference to the employment agreement. First, the employment agreement explains the relationship between the two parties, and an action between the two parties must therefore make reference to the agreement. Second, in order to prevail on a claim for negligent misrepresentation, one of the elements that must be proven is justifiable reliance on the defendant's misrepresentation. See *Rece v. Dominion Homes, Inc.*, 10th Dist. No. 07AP-295, 2008-Ohio-24. In this case, appellant's claimed justifiable reliance was his execution of the amendment to the employment agreement. Thus, appellant's claim "touches upon" the agreement that contains the arbitration provision.

{¶16} Appellee argues that the arbitration provision contained in the employment agreement should not apply to this dispute because the stock option plans include provisions governing any disputes under the plan, which state that if there is any conflict between any written agreement and the stock option plan, the terms of the stock option

plan govern. However, the claim appellant seeks to assert against appellee does not involve the terms of either of the stock option plans, but rather involves the statements made to appellant regarding changes to the plans, which appellant claims he relied upon when he executed the amendment to the employment agreement. Thus, there is no actual dispute between the terms of the stock option plans and the employment agreement such that the stock option plan terms would override the arbitration provision of the employment agreement.

{¶17} Because the claim appellant seeks to assert against appellee cannot be maintained without reference to the employment agreement, and further, the claim touches upon the employment agreement, the broad arbitration provision contained in the employment agreement applies, and the trial court erred in holding otherwise. Therefore, we sustain appellant's assignment of error.

{¶18} Having sustained appellant's assignment of error, we reverse the judgment by the Franklin County Court of Common Pleas, and remand this matter to the trial court for further proceedings consistent with this decision.

*Judgment reversed;
cause remanded.*

TYACK, P.J., and McGRATH, J., concur.
