STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

OLD KENT INSURANCE GROUP, INC., a Michigan corporation, f/k/a Guyot, Hicks, Anderson & Associates, Inc.,

Plaintiff,

v

File No. 00-20365-CK
HON. PHILIP E. RODGERS, JR.

GLENN R. COUGHENOUR and THE McNISH AGENCY, INC., a Michigan corporation,

Defendants.
/

Kurt M. Bowden (P35936)
Attorney for Plaintiff

Michael J. Swogger (P42905)
Attorney for Defendants

DECISION AND ORDER GRANTING
PLAINTIFF'S MOTION TO COMPEL ARBITRATION

Through a series of stock acquisition mergers, the insurance agency known as Guyot, Hicks, Anderson & Associates, Inc. ("GHA") became Old Kent Insurance Agency, Inc. ("OKIG"). Prior to the mergers, Defendant Coughenour had a written employment contract with GHA. After the mergers, Defendant Coughenour completed an Application for Employment with OKIG which contained certain Terms of Employment.

Defendant Coughenour resigned his employment with OKIG effective December 31, 1999 and went to work for the Defendant McNish Agency, Inc., a competitor of OKIG. This action was commenced on April 25, 2000. OKIG asserts two theories: (1) Defendants have misused trade secrets; and (2) Defendant Coughenour has breached the non-competition provision in the GHA contract of employment. OKIG seeks to compel arbitration of these disputes pursuant to the original GHA employment contract. Defendant Coughenour has taken the position that OKIG did not

employ him pursuant to the GHA contract because OKIG did not "assume and/or purchase the GHA employment contracts." Alternatively, the Defendant Coughenour takes the position that OKIG abandoned the GHA employment contract or it was superseded by the new employment agreement with OKIG which does not contain a non-competition or arbitration provision.

I.

Michigan has adopted a three-part test 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. See, *American Fidelity Fire Ins Co v Barry*, 80 Mich App 670; 264 NW2d 92 (1978).

Here, the parties dispute the viability of the GHA Employment Agreement which contains the arbitration provision. The dispute in question is whether Defendant Coughenour violated the restrictive covenants contained in the GHA agreement which are covered by the arbitration clause. The agreement does not expressly exempt such a dispute from arbitration.

The issues presented are (1) whether, by virtue of the mergers, OKIG took the place of GHA in its employment contract with Defendant Coughenour and has a right to enforce that contract; and, if so, (2) whether OKIG's employment contract with Defendant Coughenour supersedes the GHA employment contract.

II.

Under the Michigan Business Corporation Act § 704, when a merger takes effect, all of the following apply:

> (a) Every other constituent company merges into the surviving company and the separate existence of every constituent company except the surviving company ceases.
>
> (b) All property, real, personal, and mixed, all debts due on whatever account, including promises to make contributions, all other choses in action, and **any** other **interest of or belonging to or due to each constituent company are vested in the surviving company without further act or deed and without reversion or impairment.** (Emphasis supplied.)

(c) The surviving company may use the name and the assumed names of any constituent company, if the filings required under section 206(6) and (7) are made.

(d) The surviving company has all of the liabilities of each constituent company.

(e) A proceeding pending against any constituent company may be continued as if the merger had not occurred or the surviving company may be substituted in the proceeding for the limited liability company whose existence ceased.

(f) The articles of organization of the surviving company are amended to the extent provided in the certificate of merger.

(g) The membership interests in each constituent company are converted into membership interests in the surviving company, cash, or other property as provided in the plan of merger.

Pursuant to subparagraph (b), OKIG became a party in the place of GHA to the written employment contract with Defendant Coughenour as a result of the mergers.

II.

Defendant Coughenour's written contract of employment with GHA is entitled Producer Employment Agreement. It is dated September 3, 1992. The most pertinent parts of the agreement provide as follows:

SECTION I. PERIOD OF EMPLOYMENT

The Agency shall employ Producer as a full-time employee on a continuing basis, on the terms and conditions hereinafter specified. The Agency recognizes the right of the Producer to terminate his or her employment of [sic] any reason whatsoever. The Agency also reserves the right to end the employment relationship on the same basis. Only a Corporate Officer can enter into any employment contract which differs in any respect form [sic] the terms set forth here, and any such different agreement must be in writing.

* * *

SECTION XIII. CONFIDENTIALITY

Producer agrees that all information concerning the Agency, its'[sic] customers, its' [sic] companies and its' [sic] personnel, including expiration data, is confidential,

and that such information shall not be divulged to any other party not entitled to same in the ordinary course of business.

SECTION XIV. COVENANT NOT TO COMPETE

Producer agrees and covenants that upon termination of his or her employment, he/she will promptly deliver to the Agency all insurance policies and other related papers or documents which were obtained from the Agency, its'[sic] customers, or its' [sic] companies, along with all copies thereof which were made or permitted to be made. Producer further covenants and agrees to promptly return all papers, memoranda and notes made or generated by him/herself, and copies thereof, relating in any way to the Agency's business.

Further, Producer represents that he/she recognizes that in the course of employment with the Agency, he/she may be exposed to, or generate confidential information otherwise not publicly known, which relates to the Agency's affairs. Producer represents that he/she shall neither disclose same to any person, firm, or corporation nor use same for his/her own, or another's benefit, during or after his/her employment, unless specifically authorized in writing by the Agency.

Producer recognizes that the Agency is a state-wide marketing organization although its' [sic] central office is located in Traverse City. Furthermore, Agency does not desire to prohibit Producer's employment in insurance related fields following termination of Producer's employment with Agency. Accordingly, Producer covenants that, for a period of two (2) years following the termination of Producer's employment with Agency, Producer shall not contact any account with which Producer has had contact while in the employ of the Agency.

Further, Producer covenants that, during the two (2) years immediately following termination of employment with Agency, Producer will not attempt to solicit any account which Producer knows is an Agency account, whether or not Producer has had contact with that account while at the Agency.

Alternatively, Producer may elect to purchase accounts from the Agency upon termination of his or her employment. Producer may purchase Agency accounts assigned to his or her profit center on the basis of two (2) times annualized current commission income for such accounts. If Producer elects this option, payment may be made on the basis of twenty-five (15%) percent down, with the balance to be paid in two (2) annual installments, with no interest.

SECTION XV. TERMINATION OF PRODUCER EMPLOYMENT AGREEMENT

A. In general. Either party to this agreement may terminate the agreement by giving written notice to the other party that such agreement is terminated thirty (30) days after the date of the giving of such notice. . .

B. Exigent circumstances. The Agency may terminate the agreement immediately at any time upon the occurrence of any of the following events:

1. Dishonesty of Producer. . .
2. Breach of material and substantial provision of this agreement by Producer.
3. Conviction of Producer of any criminal offense . . .

* * *

SECTION XVI. ARBITRATION

Any controversy or claim arising out of or relating to this agreement, including any alleged breach, shall be submitted to arbitration and settled in accordance with the applicable rules of the American Arbitration Association, and judgment of the award may be entered in any court having jurisdiction thereof.

In addition to these most pertinent provisions, the Producer Employment Agreement also contains specific provisions regarding the work to be performed by the Producer on behalf of the Agency, exclusive ownership of the business by the Agency subject only to a separate Vested Interest Ownership Agreement, supervision of the Producer by the Agency Sales Manager, the Producer's job duties, performance review, vacation schedule, work rules, salary and Profit Center Budget, bonus, and a list of services to be provided by the Agency.

On November 15, 1996, after the mergers, OKIG had the Defendant Coughenour execute an Application for Employment which contained Terms of Employment. These Terms of Employment included, in pertinent part, the following:

In the event of my employment, I will comply with all rules, regulations, policies and communications directed to employees.

I understand that I will be free to resign my employment at any time with or without cause, and with or without prior notice or warning to Old Kent; I agree that Old Kent, also may terminate my employment at any time with or without cause and with or without prior review, notice, or warning. I understand that no one at Old Kent, other

than the President, acting with the approval of the Board of Directors, has any authority to offer employment other than on this at-will basis and any such offer must be in writing.

* * *

I agree that, except as directed otherwise in writing by Old Kent, I will not disclose to anyone or use for my own purposes, any of Old Kent's confidential or proprietary information, either during or after my employment. I understand and agree that customer names and information are confidential and proprietary information and I will not make written or other copies of notes regarding these matters except as necessary to perform my job. I agree that if my employment ends, I will deliver to Old Kent all material of any kind that I have relating to its business, including any such copies or notes.

The primary goal in the construction or interpretation of any contract is to honor the intent of the parties. *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28; 517 NW2d 19 (1994); *Stine v Continental Casualty Co*, 419 Mich 89, 112; 349 NW2d 127 (1984); *Brauer v Hobbs*, 151 Mich App 769, 774; 391 NW2d 482 (1986). A contract that is clear on its face may be construed as a matter of law by the courts. *Dykema v Muskegon Piston Ring Co*, 348 Mich 129, 138; 82 NW2d 467 (1957); *Kilburn v Union Marine & General Ins Co, Ltd*, 326 Mich 115, 118; 40 NW2d 90 (1949); *In re Loose*, 201 Mich App 361, 366; 505 NW2d 922 (1993); 17A AmJur2d, Contracts, §§ 337, 339, pp 342-344, 346. Where the language of the contract is "ambiguous," *Raska v Farm Bureau Mutual Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982) ("A contract is said to be ambiguous when its words may reasonably be understood in different ways"); *Goodwin, Inc v Orson E. Coe Pontiac, Inc*, 392 Mich 195, 212; 220 NW2d 664 (1974); *Adkins v Home Life Ins Co*, 143 Mich App 824; 372 NW2d 671 (1985); 17A AmJur2d, Contracts, §§ 338, 356, pp 345, 374-375, construction is permitted. *Berk v Gordon Johnson Co*, 232 F Supp 682, 687 (ED Mich, 1964). Where it becomes necessary to consider the parties' intent, the inquiry is a question of fact. *Liberty Mutual Ins Co v Curtis Noll Corp*, 112 Mich App 182, 191; 315 NW2d 890 (1982); *Robinson v A.Z. Shmina & Sons Co*, 96 Mich App 644, 649; 293 NW2d 661 (1980); 17A AmJur2d, Contracts, § 339, p 346.

In the instant case, there were two contracts, the GHA Producer Employment Agreement and the OKIG Application for Employment with attached Terms of Employment. The GHA Producer

Employment Agreement is lengthy and detailed and tailored specifically to the employment of an insurance producer by an insurance agency. The OKIG Application for Employment is a fairly standard application for employment which requests personal information, and information regarding the prospective employee's educational and employment background. It is interesting to note that the Defendant Coughenour did **not** complete that portion of the Application entitled EMPLOYMENT REQUEST by which he specifies exactly what employment he is seeking, i.e. "Specific position for which you are applying," "State salary or wages you will consider," and so on.

The GHA contract included a provision under Section I. Period of Employment which states:

> Only a Corporate Officer can enter into any employment contract which differs in any respect form [sic] the terms set forth here, and any such different agreement must be in writing.

The OKIG Terms of Employment differ from the terms of the GHA agreement. They do not, however, completely substitute for that agreement. The OKIG Terms of Employment do not contain any provisions regarding job duties, benefits or compensation, for example.

The Plaintiff argues that the GHA employment agreement is viable and that the non-competition and arbitration provisions thereof should be enforced. The Defendant Coughenour, on the other hand, argues that the OKIG Application for Employment and Terms of Employment constitute his employment contract with OKIG and supersede his employment agreement with GHA. Since the OKIG documents do not include a non-competition or an arbitration provision, the Defendant argues that OKIG is not entitled to arbitrate any alleged violation of GHA contract. The Defendant relies upon *Joseph v Rottschafer*, 248 Mich 606, 610; 227 NW 784 (1929); *Nib Foods, Inc v Mally*, 70 Mich App 553, 560; 246 NW2d 317 (1976); *Culver v Castro*, 126 Mich App 824, 827-828; 338 NW2d 232 (1983); and *Kelsey-Hayes Co v Galtaco Redlaw Castings Corporation*, 749 F Supp 794 (ED Mich 1990). These cases stand for the proposition that:

> [I]f parties to a prior agreement enter a subsequent contract which completely covers the same subject, but which contains terms inconsistent with those of the prior agreement, and where the two documents cannot stand together, the later document supersedes and rescinds the earlier agreement, leaving the subsequent contract as the sole agreement of the parties.

Joseph, supra at 610; *Nib Foods, supra* at 560; *Culver, supra* at 827-828; and *Kelsey-Hayes, supra* at 796. This rule does not apply, however, where there is no intent to abrogate the first contract. *Joseph, supra* at 610-611. In *Joseph*, the Court said:

> In Black on Rescission and Cancellation (2d Ed.) § 8, the rule is thus stated: 'Since it is always in the power of the parties to a contract to rescind or abrogate it by their mutual consent, they may accomplish this result by the substitution of a new contract, implying a mutual discharge from reciprocal obligations under the original contract and the restoration of the status quo or compensation for altered conditions, provided that the new contract shall be complete and binding in itself, and shall embrace each and all of the parties to the original contract.'
>
> It is further said (section 530): 'Where the parties to an existing contract enter into a new agreement, completely covering the same subject-matter, but containing terms which are inconsistent with those of the earlier contract, so that the two can not stand together, the effect is to supersede and rescind the earlier contract, leaving the later agreement as the only agreement of the parties on the subject.'
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> See, also, 6 R. C. L. p. 923; 13 C. J. p. 603; Elliott on Contracts, 1869; Page on Contracts, § 1340; Williston on Contracts, §§ 723-926.
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> If, however, it appears that there was no intent to abrogate the first contract, the rule does not apply. But, where there is no ambiguity in the language used in the new contract, there must be some expression therein from which a lack of such intent may be reasonably inferred to justify the admission of proofs relative thereto and its submission to the jury.

Nothing in the OKIG Application for Employment and Terms of Employment would give rise to a reasonable inference that the parties intended to abrogate the GHA Employment Agreement. Certainly, the Defendant was always employed by OKIG following the mergers. His compensation and benefits did not change. He was not fired, laid off or terminated such that the completion of this Application for Employment supports a reasonable inference that the predecessor agreement was abandoned upon his alleged "re-employment."

The Court of Appeals recently held in *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 346-347; 561 NW2d 138 (1997) that:

> When there are several agreements relating to the same subject matter, the intention of the parties must be gleaned from all the agreements. *Culver v Castro*, 126 Mich App 824, 827; 338 NW2d 232 (1983).

1 Corbin, Contracts, § 106, p 476 advises courts to ascertain the true common intent of the parties at the time a contract is consummated, despite the presence of conflicting assertions in subsequent litigation. *Hill v General Motors Acceptance Corp*, 207 Mich App 504, 520; 525 NW2d 905 (1995).

In conclusion, the OKIG Application for Employment and Terms of Employment do not completely cover the same subject matter as the GHA employment agreement. The unambiguous language of the OKIG documents does not support a reasonable inference of an intent by either party to abandon entirely the GHA contract. Thus, as a matter of law, the GHA Producer Employment Agreement is viable and binding. *Joseph, supra.* Construed together, the GHA Employment Agreement was merely modified by the OKIG documents to the extent that the OKIG documents were inconsistent with the GHA agreement.

The GHA Producer Employment Agreement being viable and enforceable, the Plaintiff is entitled to an order compelling arbitration pursuant to the arbitration provision of that contract. This Court will retain jurisdiction solely to enter a judgment upon and to enforce the arbitrator's award.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 8/18/00