STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

BAY HILL II LIMITED DIVIDEND HOUSING ASSOCIATION LIMITED PARTNERSHIP,

Plaintiff,

v

File No. 01-21545-CK
HON. PHILIP E. RODGERS, JR.

HALLMARK CONSTRUCTION, INC.,

Defendant.
/

R. Jay Hardin (P35458)
Attorney for Plaintiff

Ronald A. Deneweth (P27680)
Attorney for Defendant

DECISION AND ORDER GRANTING
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

The Plaintiff Bay Hill II Limited Dividend Housing Association Limited Partnership ("Bay Hill") is the owner of a moderate income housing development located in Traverse City, Michigan (the "Project"). The Defendant Hallmark Construction, Inc. ("Hallmark") is a general contractor. Bay Hill entered into a contract with Hallmark to construct the Project. The Michigan State Housing Development Authority ("MSHDA") provided the financing for the Project.

After completion of the Project, Bay Hill allegedly failed to pay Hallmark all sums due under the contract. Hallmark filed a construction lien against the Project and filed a Demand for Arbitration. Bay Hill filed this action seeking a Court order staying the arbitration because: (1) the contract did not contain a mandatory arbitration clause, but contained a consensual arbitration clause, and the Plaintiff does not consent to arbitration; (2) the arbitration provision in the contract is a common law arbitration provision and the Plaintiff properly revoked its consent to arbitrate; and (3) the arbitrator lacks jurisdiction over real estate claims.

Hallmark filed a motion for summary disposition pursuant to MCR 2.116(C)(7) seeking a Court order compelling arbitration. Bay Hill filed a response. The Court entertained the parties' oral arguments on July 16, 2001, and took the matter under advisement. For reasons that will now be described, Hallmark's motion is granted.

STANDARD OF REVIEW

MCR 2.116(C)(7)

MCR 2.116(C)(7) sets forth the following grounds for summary disposition:

> The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

In *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (2000), the Court of Appeals said:

> When a motion for summary disposition is premised on MCR 2.116(C)(7), the nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor and the motion should not be granted unless no factual development could provide a basis for recovery. *Stabley, supra* at 365; 579 NW2d 374; *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997). '[T]he court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that has been filed or submitted by the parties.' *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). If no facts are in dispute, whether the claim is statutorily barred is a question of law. *Dewey, supra* at 192; 572 NW2d 715.

I.

Arbitration is a matter of contract, and a party cannot be forced to submit to arbitration in the absence of an agreement to do so. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99; 323 NW2d 1 (1982). The existence of a contract to arbitrate and its enforceability are judicial questions. *Id* at 98; 323 NW2d 1; *Huntington Woods v Ajax Paving Industries* (After Remand), 196 Mich App 71, 74; 492 NW2d 463 (1992); *Kaleva-Norman-Dickson School Dist v Kaleva-Norman-Dickson Teachers' Ass'n*, 393 Mich 583; 227 NW2d 500 (1975); *Whitehouse v Hoskins Mfg Co*,

113 Mich App 138; 317 NW2d 320 (1982); *DAIIE v Straw*, 96 Mich App 773; 293 NW2d 704 (1980).

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). Any doubts about the arbitrability of an issue should be resolved in favor of arbitration. *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995).

RELEVANT CONTRACTUAL PROVISIONS

Article XIV of the contract states the following:

14.1 Disputes Over Proper Performance of the Work.

14.1.1 All disputes, claims, or questions with respect to the property performance of the Work **shall** be submitted to the Authority. The decision of the Authority shall be final and binding upon the Owner and the Contractor, and may be enforced in any court of competent jurisdiction.

14.2 Disputes Over Other Matters.

14.2.1 All disputes, claims, or questions between the Owner and the Contractor on matters other than the proper performance of the Work **may** be submitted to arbitration in accordance with the Rules of the American Arbitration Association then pertaining. The decision pursuant to any arbitration shall be binding upon the parties hereto if accepted by the Authority in writing, and may be enforced in any court of competent jurisdiction. The cost of such arbitration shall be borne equally by the Owner and the Contractor and such expenses incurred by the Contractor shall not be subject to reimbursement. [Emphasis added.]

RELEVANT STATUTORY PROVISIONS

MCL 600.5001 provides, in pertinent part, as follows:

(1) Parties. All persons, except infants and persons of unsound mind, may, by an instrument in writing, submit to the decision of 1 or more arbitrators, any controversy existing between them, which might be the subject of a civil action, except as herein otherwise provided, and may, in such submission, agree that a

judgment of any circuit court shall be rendered upon the award made pursuant to such submission.

(2) Enforcement; rescission. A provision in a written contract to settle by arbitration under this chapter, a controversy thereafter arising between the parties to the contract, with relation thereto, and in which it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such agreement, shall be valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the rescission or revocation of any contract. Such an agreement shall stand as a submission to arbitration of any controversy arising under said contract not expressly exempt from arbitration by the terms of the contract. Any arbitration had in pursuance of such agreement shall proceed and the award reached thereby shall be enforced under this chapter.

MCL 600.5011 provides as follows:

Neither party shall have power to revoke any agreement or submission made as provided in this chapter without the consent of the other party; and if either party neglects to appear before the arbitrators after due notice, the arbitrators may nevertheless proceed to hear and determine the matter submitted to them upon the evidence produced by the other party. The court may order the parties to proceed with arbitration.

Public policy pronouncements of the Michigan Legislature, enacted as statutes, are binding on this Court. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 131; 596 NW2d 208 (1999). The Michigan Arbitration Act, MCL 600.5001 et seq.; MSA 27A.5001 et seq., "evidences Michigan's strong public policy favoring arbitration." *Grazia v Sanchez*, 199 Mich App 582, 584; 502 NW2d 751 (1993). The Act "is a strong and unequivocal endorsement of binding arbitration agreements. . . ." *Watts v Polaczyk*, 242 Mich App 600, 604; 619 NW2d 714 (2000).

II.

Hallmark argues that the relevant contract provisions are statutory arbitration provisions because they contain a provision for entry of judgment upon the award by a circuit court as required by MCL 600.5001. Hallmark further contends that because these provisions are for statutory arbitration, Bay Hill cannot unilaterally withdraw its consent to arbitrate. MCL 600.5011. Hallmark relies upon *Hetrick v Friedman*, 237 Mich App 264; 602 NW2d 603 (1999).

Bay Hill, on the other hand, argues that "no valid arbitration agreement was entered into by the parties. Alternatively, if an agreement to arbitrate is determined to exist, the agreement is 'common law' arbitration because of the use of the word 'may' [in paragraph 14.2] and not statutory arbitration and [Bay Hill] has rightfully and timely revoked their agreement to arbitrate." In addition, Bay Hill argues that an arbitrator does not have jurisdiction over a construction lien claim.

Interestingly, these same issues were presented to this Court in the case of *R. Lockwood Construction, L.L.C. v Bay Hill Limited Dividend Housing Ass'n Limited Partnership*, Grand Traverse County File No. 00-19912-CK. That case involved a construction contract between Lockwood and Bay Hill on the same Project. The parties had a similar dispute over alleged non-payment of amounts due under the contract. The contract contained arbitration provisions that are identical to those contained in the contract in this case.

Prior to the lawsuit being filed in the *Lockwood* case, the parties entered into a Settlement Agreement. The Settlement Agreement contained an additional arbitration provision, to-wit:

> 12. Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration in accordance with the arbitration provisions set forth in the general conditions to the Construction Contract dated April 3, 1996, and found in Article XV.

Ultimately, however, Lockwood demanded arbitration and filed suit alleging non-payment of amounts due under the construction contract. In its Complaint, Lockwood alleged Count I - Breach of Contract; Count II - Bad Faith/Misrepresentation; Count III - Lien Foreclosure; and Count IV - Specific Performance, Equitable Relief and/or Assignment of Rights. Bay Hill filed a motion for summary disposition pursuant to MCR 2.116(C)(7) because "the parties have agreed to arbitrate." Bay Hill took the position:

> That the parties specifically agreed to the arbitration of the issues set forth in Counts I, II, and IV of Plaintiff's Complaint, is unequivocally established by Plaintiff's very submission of these issues to arbitration, almost simultaneously with the filing of this lawsuit. Both the parties' Settlement Agreement and the underlying construction contract of the Settlement Agreement are to be resolved via arbitration. Plaintiff has submitted a Demand for Arbitration, paid the arbitration fee, and those issues are squarely before the arbitrator for resolution. (Emphasis added.)

In May of 2000 the parties submitted a stipulated order granting Bay Hill's motion for summary disposition as to Counts I, II and IV, "referring all of the relief sought in said Counts to the pending American Arbitration Association proceedings," and staying the balance of the proceedings on Count III - the construction lien count - "until completion of the arbitration proceedings."

Bay Hill's course of conduct with regard to its interpretation of this same arbitration language in the related *Lockwood* case is inconsistent with its conduct here. There, Bay Hill took the position that the contract provisions required arbitration of the dispute. This is strong evidence that, contrary to the position Bay Hill has taken in this matter, Bay Hill in fact intended the arbitration provisions in the contract to be mandatory.[1]

ARBITRATOR JURISDICTION OVER CONSTRUCTION LIEN

Bay Hill argues that the arbitrator does not have jurisdiction over the foreclosure of a construction lien pursuant to MCL 600.5005 which states, in pertinent part, as follows:

> A submission to arbitration shall not be made respecting the claim of any person to any estate, in fee, or for life, in real estate. . .

This Court agrees. *McFerren v B & B Inv Group*, 233 Mich App 505; 592 NW2d 782 (1999), appeal denied, 461 Mich 857; 602 NW2d 387, reconsideration denied 461 Mich 857; 607 NW2d 365. Following arbitration, any relevant lien foreclosure may be pursued in this Court.

CONCLUSION

The arbitration provisions contained in the subject construction contract are statutory and mandatory upon demand by one of the parties. Hallmark has demanded arbitration. Hallmark is entitled to summary disposition on all counts, MCR 2.116(I)(2), except Count IV regarding the construction lien. Counts I, II and III of Bay Hill's Complaint seeking a stay of arbitration are dismissed and those matters are referred to arbitration. Bay Hill is entitled to summary disposition as to Count IV only. The arbitrator lacks jurisdiction of the construction lien issue and,

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[1]Bay Hill's argument regarding the lack of "entry of judgment" language was rejected in *Hetrick, supra* at p 602, where American Arbitration Association rules are incorporated by reference. The arbitration language at issue here does not trigger common law revocation rights.

consequently, that issue shall not be referred to arbitration. Any further proceedings regarding Hallmark's construction lien, however, shall be stayed pending completion of the arbitration proceedings.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 8/10/01