2016 IL App (2d) 160498-U
No. 2-16-0498
Order filed August 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KACOA LANDSCAPING, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff and Counterdefendant-Appellant,	)	
	)	
v.	)	No. 16-MR-223
	)	
MENARD, INC.,	)	
	)	Honorable
Defendant and Counterplaintiff-Appellee.	)	Bonnie M. Wheaton,
	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: We construed the parties' agreement to arbitrate to encompass a subrogation claim brought by Menard. As such, the trial court did not err in denying Kacoa's motion for summary judgment on Kacoa's complaint seeking to enjoin Menard from pursuing arbitration. Correspondingly, the trial court did not err in granting Menard's motion for summary judgment on its counterclaim seeking to compel arbitration. Therefore, we affirmed.

¶ 2 Plaintiff and counterdefendant, Kacoa Landscaping, Inc. (Kacoa), appeals from the trial court's rulings on the parties' cross-motions for summary judgment. The trial court granted the motion for summary judgment in favor of defendant and counterplaintiff, Menard, Inc. (Menard),

on Menard's counterclaim seeking a declaration that it was entitled to proceed against Kacoa in arbitration. The trial court also denied Kacoa's motion for summary judgment on its complaint seeking to enjoin Menard from pursuing the arbitration claim. Kacoa argues that the parties' agreement to arbitrate disputes does not apply because Menard's claim was brought as a subrogee of a Menard employee, and Kacoa never agreed to arbitrate any claims with the employee. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 19, 2016, Menard submitted a demand for arbitration to the American Arbitration Association (AAA), naming Kacoa as the respondent. Menard described the dispute as a: "[s]ubrogation Complaint arising out of [a] work injury by [an] employee of [Menard] resulting in payment of workers' compensation benefits. Employee slipped and fell on snow/ice in parking lot that [Kacoa] was obligated contractually to provide snow removal services." Menard listed the dollar amount of the claim as exceeding $129,636.58. Menard invoked an arbitration clause contained in the "SNOW PLOWING AGREEMENT" (Agreement) between Menard and Kacoa. A provision entitled "RESOLUTION OF DISPUTES BY BINDING ARBITRATION," states, in relevant part: "Menard and [Kacoa] agree that all claims and disputes between them shall be resolved by binding arbitration by the American Arbitration Association ('AAA') under its Commercial Arbitration Rules."

¶ 5 Also on January 19, 2016, Menard filed a complaint against Kacoa for the same claims in the Du Page County circuit court. The plaintiff was listed as "GALLAGHER BASSETT and MENARD, INC, as Subrogees of PAUL LARSON."

¶ 6 On February 4, 2016, Kacoa submitted to the AAA an arbitration answering statement and a formal objection to AAA's jurisdiction.

¶ 7 On February 22, 2016, Kacoa filed a separate complaint for declaratory and injunctive relief in which it sought to enjoin Menard from pursuing the arbitration claim. Kacoa argued in its complaint that as the subrogee of its employee, Menard could enforce only those rights that its employee could enforce. Kacoa argued that because Menard's employee was not a party to the Agreement and did not have a right to proceed against Kacoa in arbitration, Menard could not compel arbitration against Kacoa.

¶ 8 On March 30, 2016, Menard filed an answer and a counterclaim seeking a declaration that it was entitled to proceed against Kacoa in arbitration. It argued that the contractual provision at issue covered all claims related to Kacoa's work under the contract. Kacoa's complaint and Menard's counterclaim are the subject of this appeal.

¶ 9 On April 27, 2016, Kacoa filed a motion for summary judgment on its complaint, and the next day, Menard filed a cross-motion for summary judgment on its counterclaim. On June 8, 2016, the trial court granted Menard's cross-motion for summary judgment and denied Kacoa's motion for summary judgment, stating:

> "[T]he agreement is broad enough that it encompasses the situation that we are dealing with here.
>
> I think [Kacoa's argument] is certainly an argument that can be brought before the arbitrator. The arbitrator is the one to determine arbitrability, but I think for the purposes of these motions that Menard has the right, under the broad terms of the contract, to request arbitration."

Kacoa timely filed the instant interlocutory appeal under Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010). See *Fosler v. Midwest Care Center II, Inc.*, 398 Ill. App. 3d 563, 566 (2009) (ruling on motion to compel arbitration is injunctive and appealable under Rule

307(a)(1)).

¶ 10 II. ANALYSIS

¶ 11 On appeal, Kacoa challenges the trial court's grant of Menard's motion for summary judgment on its counterclaim seeking to compel arbitration, and the trial court's corresponding denial of Kacoa's motion for summary judgment on its complaint seeking to enjoin Menard from pursuing arbitration. We review *de novo* an order granting or denying a motion to compel arbitration, where, as here, there was no evidentiary hearing. *Watkins v. Mellen*, 2016 IL App (3d) 140570, ¶ 12. Similarly, we review *de novo* a trial court's grant of summary judgment (*Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, ¶ 20), as well as its interpretation of a contract (*CitiMortgage, Inc. v. Parille*, 20167 IL App (2d) 150286, ¶ 24).

¶ 12 Kacoa notes that the Agreement specially provides that "Menard and [Kacoa] agree that all claims and disputes *between them* shall be resolved by binding arbitration by the American Arbitration Association ('AAA') under its Commercial Arbitration Rules." (Emphasis added.) Kacoa argues that under the Agreement's plain language, Kacoa never agreed to arbitrate the type of dispute at issue in Menard's AAA claim, which is a subrogation claim based on the rights of a Menard employee. Kacoa argues that Menard's right to file a claim based on its subrogation interest is conferred by the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2014)), which allows it to commence a proceeding "for the recovery of damages on account of such injury or death to the employee." Kacoa argues that because Menard is the subrogee of its employee (see *Insurance Co. of North America v. Andrew*, 206 Ill. App. 3d 515, 519 (1990) (language in the Act "creates in the employer a right akin to the common law right of subrogation")), it can enforce only those rights that its employee can enforce (see *McCormick v. Zander Reum Co.*, 25 Ill. 2d 241, 244 (1962) ("It is well established that a subrogee can have no

greater rights than the subrogor and can enforce only such rights as the subrogor could enforce.")).

¶ 13 Kacoa maintains that Menard attempts to recharacterize the case as being between Menard and Kacoa, but a review of Menard's Du Page County complaint shows that the claim is based on alleged duties that Kacoa owed to Larson, the alleged breach of those duties, and the alleged injuries to Larson. Kacoa contends that the true controversy is one between Larson and Kacoa, not Menard and Kacoa. Therefore, according to Kacoa, Menard does not have a right to proceed in arbitration for the claim brought on Larson's behalf, and Kacoa should not be required to arbitrate a dispute that it never agreed to arbitrate. Kacoa maintains that as Menard is stepping into Larson's shoes, Menard is bound to pursue its claim in the same jurisdiction that Larson could pursue his claim, that being the circuit court, where Menard has already filed an action seeking to recover the same losses sought in the arbitration.

¶ 14 Kacoa argues that in *Equistar Chemicals, LP v. Hartford Steam Boiler Inspection & Insurance Co. of Connecticut*, 379 Ill. App. 3d 771 (2008), the court considered the converse scenario of whether the doctrine of subrogation conferred to a subrogee the right to compel arbitration pursuant to an arbitration agreement between the subrogor and a third party. The court stated that the right to compel arbitration usually stems from contract and generally may not be invoked by a non-party to the contract. *Id.* at 779. The court stated, "Though case law on the subject is extremely sparse, it does seem as though case law and policy favor requiring a subrogee's claim against a third party to be tried within the limitations agreed to by the subrogor and the third party." *Id.* at 780. The court concluded that because the subrogee had stepped into the shoes of the subrogor and could enforce only the subrogor's rights, the subrogee could invoke the arbitration provision between the subrogor and the third party. *Id.*

¶ 15 Menard responds that the Agreement's language "all disputes between them" has but one reasonable interpretation, namely that snow plowing disputes arising under the contract be submitted to arbitration. Menard contends that Kacoa's assertion that it never agreed to arbitrate a claim with an unknown Menard employee simply misses the mark, as any arbitration would be between Menard and Kacoa. Menard argues that the fact that its right to file suit was derived from an employee's work injury in the parking lot was not determinative. It cites section 5(b) of the Act, which states:

> "In the event the employee or his personal representative fails to institute a proceeding against such third person at any time prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act." 820 ILCS 305/5(b) (West 2014).

Menard asserts that the statute gives it the right to file suit in its own name, as Larson forfeited his right to file suit by failing to do so within the prescribed time limits. Menard argues that it has paid out benefits for temporary total disability, medical expenses, and permanent partial disability, and that it has an independent, personal right to assert the claim to recover its payouts. Menard maintains that while its claim had its genesis in its employee's accident, Menard was then required to pay benefits without fault, causing a statutorily-created lien. Menard argues that the dispute is between it and Kacoa, and that any funds it receives do not need to be paid to

Larson. Menard cites *Gallagher v. Lenart*, 226 Ill. 2d 208, 238 (2007), where our supreme court stated that section 5(b) "serves the important purpose of allowing both the employer and the employee an opportunity to reach the true offender" (internal citations omitted). Menard argues that it and Kacoa agreed that in resolving this type of issue, which is a dispute related to Kacoa's provision of snow-plowing services for Menard, they would take the route of alternative dispute resolution.

¶ 16 Menard argues that the Agreement's indemnification provision supports its stance that this dispute falls within the Agreement's terms. That provision states:

> "[Kacoa] shall defend, indemnify and hold harmless MENARD, it agents and its employees from any liability, damages, expenses, claims, demands, actions or causes of action, including attorney fees arising out of the performance of the work hereunder, whether such liability, damages, expenses, claims, demands, actions or causes of action are caused by [Kacoa], its subcontractors, or their agents or employees, or any persons acting on their behalf, regardless of whether such liability, damages, expenses, claims, demands, actions or causes of action are caused in part by a party indemnified hereunder."

¶ 17 Menard further argues that this case is distinguishable from *McCormick*, cited by Kacoa, because there the subrogee was attempting to recover by filing suit after the statute of limitations had expired. The court held that that limitations period applied to the subrogee as well because it was limited to the rights that the employee could assert. *McCormick*, 25 Ill. 2d at 224. Menard argues that the *McCormick* court was discussing the substantive rights that the employee could raise. Menard argues that here, in contrast, Menard is asserting a personal claim to recover a

statutorily-created workers' compensation lien, and it is the method of recovery that is in dispute, not the issue of a substantive right to recover in the first place.

¶ 18 We note that arbitration is favored over litigation by state, federal, and common law because arbitration is a fast, informal, and relatively inexpensive way to resolve controversies arising out of commercial transactions. *GPS USA, Inc. v. Performance Powdercoating*, 2015 IL App (2d) 131190, ¶ 17. In particular, Illinois's Uniform Arbitration Act (710 ILCS 5/1 *et seq.* (West 2014)) shows a legislative policy favoring the enforcement of agreements to arbitrate, and Illinois courts also favor arbitration. *Id.* Still, parties to such a contract are bound to arbitrate only those issues they have agreed to arbitrate, as shown by the agreement's clear language and the parties intentions expressed in that language. *Illinois State Toll Highway Authority v. International Brothers of Teamsters, Local 700*, 2015 IL App (2d) 141060, ¶ 24. At the same time, any doubts about the scope of arbitrable issues are to be resolved in favor of arbitration. *Id.*

¶ 19 The Uniform Arbitration Act authorizes the trial court to compel or stay arbitration or to stay a court action pending arbitration. 710 ILCS 5/2 (West 2014); *Village of Bartonville v. Lopez*, 2016 IL App (3d) 150341, ¶ 18. The narrow issue before the trial court in such a situation is whether the parties have an agreement to arbitrate the dispute in question. *Village of Bartonville*, 2016 IL App (3d) 150341, ¶ 18. The trial court must resolve the issue based on the agreement. *Id.* If the dispute clearly falls within the scope of the arbitration clause, the trial court should decide the arbitrability issue and compel arbitration. *Id.* If it is clear that the dispute does not fall within the arbitration clause's scope, the trial court should likewise decide the arbitrability issue and deny the request for arbitration. *Id.* Last, if it is unclear whether the dispute falls within the arbitration clause, the trial court should not decide the issue, but instead refer the matter to the arbitrator to decide the issue of substantive arbitrability. Thus, the trial

court's statement in this case that "the arbitrator is the one to determine arbitrability" must be viewed within this framework.

¶ 20 Kacoa relies heavily on the proposition that "[a] party 'who asserts a right of subrogation must step into the shoes of, or be substituted for, the one whose claim or debt [it] has paid and can only enforce those rights the latter could enforce.' " *Equistar Chemicals, LP*, 379 Ill. App. 3d at 780 (quoting *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill. 2d 314, 319 (1992)). In applying this principle, the *Equistar Chemicals* court held that a subrogee could require the third-party to arbitrate based on an agreement between the subrogor and the third party, of which the subrogee was not a signatory. *Id.* at 780. However, our situation is distinguishable because Menard is not trying to compel arbitration through its role as a subrogee in a contract in which it was not a signatory, but rather is trying to enforce a contract between the litigating parties.

¶ 21 Kacoa has not cited, nor has our researched revealed, any cases in which a contract between the litigating parties was deemed inapplicable, regardless of its content, solely on the basis that one party was bringing suit as a subrogee. Rather, we have found cases in other jurisdictions in which parties have entered into contracts in which they explicitly agree to arbitrate claims that arise through subrogation. For example, many insurance companies are signatories to a "Property Subrogation Arbitration Agreement" through an alternative dispute resolution service called Arbitration Forums, Inc., that requires arbitration for commercial property subrogration or self-insured property claims. See *Federated Mutual Insurance Co. v. Con-Way Freight, Inc.*, Fed. Carr. Cas. ¶ 84828 (D. Minn. 2015); *State Farm Fire & Casualty Co. v. Pentair, Inc.*, No. 11 CV 06077 (N.D. Ill. Sept. 7, 2012), *1; see also *Travelers Insurance Co. v. Nationwide Mutual Insurance Co.*, 886 A.3d 46, 47 (Del. Ch. 2005) (referring to Arbitration Forums, Inc.'s Automobile Subrogation Arbitration Agreement). In *State Farm*

Mutual Automobile Insurance Co. v. Mondal, 727 So. 2d 1219, 1220 (La. Ct. App. 1999), the court was faced with a similar situation as in the instant case, and it held that signatories to an Arbitration Forums, Inc., automobile subrogation agreement were required to arbitrate their subrogation dispute, even though the underlying claim involved a non-signatory to the agreement.

¶ 22 The reasoning in *Mondal* is persuasive, as it is undisputed that the Agreement was a binding and enforceable contract between the parties. In contrast, taking Kacoa's position to a level of absurdity, if the parties had previously agreed that they would never sue each other in any capacity, Kacoa would not be able to enforce the contract against Menard because Kacoa could not have enforced the contract against Larson. Just as that contract would bind the litigating parties, so too would a contract between the parties stating that they would arbitrate all claims, including subrogation claims. The Agreement does not explicitly refer to subrogation claims, so we must determine whether they are included within the contract's language.

¶ 23 In construing a contract, the primary objective is to give effect to the parties' intent, and we will look first to the contract's language to determine that intent. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011).[1] We construe a contract as a whole, viewing each provision in light of

[1] The Agreement states that it shall "be construed in accordance with the laws of the State of Wisconsin." However, as neither party relied on Wisconsin law in the trial court or on appeal, they have forfeited their right to apply Wisconsin law to construe the Agreement, and we will instead apply Illinois law. See *Zabaneh Franchises, LLC v. Walker*, 2012 IL App (4th) 110215, ¶ 14 (the plaintiff forfeited its right to rely on the contract's choice-of-law provision electing Missouri law because it raised the issue for the first time on appeal).

other provisions. *Id.* If the contract's words are clear and unambiguous, they will be given their plain, ordinary, and popular meaning. *Id.*

¶ 24 Under the heading "CHOICE OF LAWS AND SUBMISSION TO JURISDICTION," the Agreement states, in relevant part: "All Actions or proceedings *relating, directly or indirectly, to this Agreement*, whether sounding in contract or tort, shall be submitted to binding arbitration pursuant to Paragraph 8." (Emphasis added.) The reference to paragraph 8 appears to be a typographical error, as that provision deals with subcontracts and does not mention arbitration. Rather, as the parties cite, paragraph 17 states "Menard and [Kacoa] agree that all claims and disputes *between them* shall be resolved by binding arbitration by the American Arbitration Association ('AAA') under its Commercial Arbitration Rules." (Emphasis added.)

¶ 25 We agree with the trial court that the Agreement contains expansive language that would encompass the instant situation. The Agreement is for snow removal services for Menard's parking lot, and it specifically requires arbitration for actions that are even "indirectly" related to the Agreement, which would include an employee of Menard slipping and falling on snow or ice in the parking lot. The Agreement also requires that the disputes be "between" Menard and Kacoa, and here, the litigating parties are Menard and Kacoa. This is not a situation where the claim clearly falls outside of the Agreement, so even if there were any doubts about the scope of arbitrable issue, they would have to be resolved in favor of arbitration. See *Illinois State Toll Highway Authority*, 2015 IL App (2d) 141060, ¶ 24. Accordingly, the trial court did not err in granting Menard's motion for summary judgment on its counterclaim seeking to compel arbitration, and it likewise did not err in denying Kacoa's motion for summary judgment on its complaint seeking to enjoin Menard from pursuing arbitration.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 28 Affirmed.