

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

UNITED SHORE FINANCIAL SERVICES, LLC,
Plaintiff,

v.

Case No. 13-137552-CK
Hon. James M. Alexander

MICHAEL KAYSEN,
Defendant.

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant’s Motion for Summary Disposition. Defendant worked as Plaintiff’s Chief Operating Officer for nearly two years. Defendant’s employment in that role was governed by an October 18, 2011 Executive Employment Agreement. On September 17, 2013, Plaintiff’s President, Mathew Ishbia, forwarded a letter to Defendant to inform him that Plaintiff would not be renewing the two-year Agreement, and Defendant would become an “at-will” employee as of October 18, 2013.

On September 25, 2013, Defendant responded to this letter with an email to Mr. Ishbia. In his email, Defendant claimed that Plaintiff was “in breach of [the] Executive Employment Agreement” because: (1) the Agreement did not permit Plaintiff to opt-out of renewing Defendant’s employment; (2) Plaintiff was not permitted to change Defendant’s title to a “non-descript title of Executive”; (3) Plaintiff was impermissibly changing Defendant’s bonus formula; (4) Plaintiff was changing Defendant’s job responsibilities; and (5) Plaintiff was changing the Agreement’s restrictive covenants. As a result, Defendant notified Plaintiff that was providing his “notice of intent to resign with Good Reason pursuant to paragraph 2 of the Agreement.” He concluded that his last day would be October 24, 2013.

Relevant to the current motion, Defendant claims that these issues are governed by an arbitration provision contained in the Agreement. On November 11, 2013, Defendant claims that his Illinois counsel, Ruth Major, and Plaintiff's general counsel, Matt Roslin, participated in a telephone conference and agreed that Defendant would be invoking the Agreement's arbitration provision to resolve the parties' disputes under the Agreement.

On November 25, 2013, however, Plaintiff filed the present Complaint – asking the Court to declare (Paragraph 22 of Complaint):

- a. The original term of the Agreement . . . was for a period of two (2) years, commencing on October 18, 2011 and terminating on October 18, 2013;
- b. The under the terms of the Agreement . . . USFS has the right to elect not to renew the Agreement . . . beyond the original term by providing Defendant with not less than ten (10) days advance written notice
- c. That upon non-renewal of the Agreement . . . the only terms/conditions of the Agreement . . . that survived the termination are those provisions that expressly provided for their survival of the termination of the Agreement . . . to-wit, the Restrictive Covenants contained within ¶7(a) through (d), inclusive, the jurisdiction provisions of ¶20, and no other terms/conditions . . .
- d. USFS did not breach the terms and conditions of the Agreement . . . with respect to its relationship with Defendant by providing notice that it would not renew the agreement;
- e. That Defendant did resign his employment with USFS, and did fail to provide USFS with the thirty (30) day advance written notice required under the terms of the Agreement . . . ;
- f. That USFS providing notice of its intent not to renew the agreement did not constitute “Good Reason” for the Defendant’s resignation;
- g. That with regard to Defendant’s resignation for “Good Reason” the Defendant did fail to provide USFS with the thirty (30) day opportunity to cure required under the terms of the Agreement

The arbitration provision is found in paragraph Section 22 of the Agreement and provides:

Arbitration. If a material dispute arises under this Agreement, other than a breach by the Executive of Sections 6 or 7 above,¹ workers' compensation benefits, and claims for unemployment compensation benefits, the parties shall submit such dispute to binding arbitration and such arbitration shall otherwise comply with and be governed by the provisions of the expedited employment arbitration rules of the American Arbitration Association; but if such rules are not then in effect, then by the Uniform Arbitration Act, being MCLA Section 600.5001, et seq. or any successor act.

Defendant claims that because the relief sought in the Complaint falls squarely within the arbitration provision, summary disposition under MCR 2.116(C)(7) is appropriate. Such a motion tests whether a claim is barred, among other grounds, by an agreement to arbitrate. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

In Michigan, "a 'question of arbitrability' is an issue for judicial determination unless the parties unequivocally indicate otherwise." *Gregory J Schwartz & Co v Fagan*, 255 Mich App 229, 232 (2003), citing *Howsam v Dean Witter Reynolds, Inc*, 537 US 79; 123 S Ct 588; 154 L Ed 2d 491 (2002). Further, MCL 691.1686(1) provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract."

Further, "[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." MCL 691.1686(2).² Michigan courts have consistently reasoned that "our Legislature and our courts have strongly endorsed arbitration as an inexpensive and expeditious alternative to litigation." *Rembert v Ryan's Family Steak Houses*,

¹ Section 6 applies to non-disclosure of "Confidential Information" and section 7 governs "Restrictive Covenants," such as non-compete and non-solicitation provisions.

² Sections (3) and (4) of MCL 691.1686 provide:

(3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

Inc, 235 Mich App 118,133; 596 NW2d 208 (1999). As a result, “any doubts about the arbitrability of an issue should be resolved in favor of arbitration.” *DeCaminada v Coopers & Lybrand*, 232 Mich App 492, 499; 591 NW2d 364 (1998).

In response to Defendant’s motion, Plaintiff argues that “it is the function of the Court to first determine whether there is an agreement to arbitrate.” It appears that Plaintiff’s only substantive argument in response to Plaintiff’s motion is that the arbitration provision did not survive the termination of the Agreement.

To ascertain the arbitrability of an issue, the court must consider whether [1] there is an arbitration provision in the parties’ contract, [2] whether the disputed issue is arguably within the arbitration clause, and [3] whether the dispute is expressly exempt from arbitration by the terms of the contract. *Huntington Woods v Ajax Paving Indus*, 196 Mich App 71, 74-75; 492 NW2d 463 (1992); citing *Federal Kemper Ins Co v American Bankers Ins Co*, 137 Mich App 134, 139-140; 357 NW2d 834 (1984).

In this case, the first element is met because the parties agree that Section 22 of the Agreement provides for binding arbitration for any “material dispute arises under this Agreement.” The second element is met because, as Plaintiff admits in its Response to Defendant’s motion, Plaintiff “filed a single count Complaint . . . in regard to controversies and disputes that have arisen between it and . . . Defendant . . . under the terms of an employment agreement.” Finally, the disputes do not fall within any of the exemptions for claims under Sections 6 or 7, or for workers’ compensation or unemployment benefits.

Michigan courts have repeatedly held that arbitration provisions survive termination of a contract. *E E Tripp Excavating Contr v Jackson County*, 60 Mich App 221, 242; 230 NW2d 556 (1975) (reasoning “Defendant contends that the county’s action in declaring the contract terminated resulted in the revocation of the authority of the arbitrators and the cancellation of the arbitration clause. That contention was rejected in *Aster v Jack Aloff Co*, 190 Pa Super 615; 155 A2d 627 (1959), Accord, *Riess v Murchison*, 384 F2d 727; 32 ALR3d 363 (CA 9, 1967),

and Anno: Breach or Repudiation of Contract as Affecting Right to Enforce Arbitration Clause Therein, 32 ALR3d 377, §§ 14a, 20 and 21a, pp 399-402, 410-413).³

Each of the declarations that Plaintiff seeks in its Complaint arguably involves a dispute that falls within bounds of the Agreement’s arbitration provision. Because “[a]ny doubts about the arbitrability of an issue should be resolved in favor of arbitration,” the Court is bound to dismiss the present suit and order the parties into arbitration. *Huntington Woods*, 196 Mich App at 75; citing *Omega Construction Co, Inc v Altman*, 147 Mich App 649, 655; 382 NW2d 839 (1985).

For the foregoing reasons, Defendant’s motion for summary disposition based on an arbitration provision is GRANTED without prejudice.

IT IS SO ORDERED.

February 19, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

³ See also *Litton Fin Printing Div v NLRB*, 501 US 190, 208; 111 S Ct 2215; 115 L Ed 2d 177 (1991) (reasoning “We presume as a matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the expiration of the agreement.”); *Best Financial Corp v Frankenmuth Mutual Ins Co*, an unpublished opinion per curiam of the Court of Appeals, issued March 9, 1999 (Docket No. 203757) (quoting 4 Am Jur 2d, Alternative Dispute Resolution, § 79, at 138, for the notion that “The termination of the contract prior to a demand for arbitration will generally have no effect on such demand, provided that the dispute in question either arose out of the terms of the contract or arose when a broad contractual arbitration clause was still in effect.”); and *American Locomotive Co v Chemical Research Corp*, 171 F2d 115, 119-20 (CA 6, 1948).