

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

**MCKESSON TECHNOLOGIES, INC,
Plaintiff,**

v.

**Case No. 15-145783-CK
Hon. James M. Alexander**

**MICHIGAN COMMUNITY VNA, LLC,
Defendant.**

OPINION AND ORDER RE: MOTION TO DISMISS

This matter is before the Court on Defendant’s motion for summary disposition. Plaintiff claims that it provided Defendant with software and maintenance services under the terms of a written agreement. Plaintiff claims that Defendant breached the agreement by failing to fulfill its payment obligation and is currently indebted to Plaintiff for \$220,626.51 plus interest. Plaintiff filed the present action to recover this amount.

Defendant now moves for summary disposition based on an arbitration provision found in the parties’ written agreement. To this end, Defendant seeks summary disposition under MCR 2.116(C)(7), which 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). 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, 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).

Defendant’s motion is based on a provision found in paragraph 10.2 of the agreement, which provides (in relevant part and emphasis added):

In the event that the parties fail to resolve dispute as set forth in Paragraph 10.1 above, either Party **may** submit the dispute to arbitration, in which case the dispute shall be resolved according to the commercial arbitration rules of the American Arbitration Association then in effect and the arbitration shall take place in the State of Michigan.

In response to Defendant’s motion, Plaintiff argues that the above arbitration provision is permissive, not mandatory. In support, Defendant cites to the use of the word “may,” rather than “shall.” Defendant claims that, while either party **may** have chosen to bring the dispute to arbitration, Plaintiff chose to file the present suit instead. The Court agrees. Indeed, it is undisputed that neither party submitted this case to arbitration before Plaintiff filed the present suit.

When the parties agreed to use the word “may,” they created a permissive arbitration provision. In fact, Paragraph 10.1 specifically provides that if dispute resolution is unsuccessful, then the party “shall have **the option** to submit the dispute to binding arbitration pursuant to the

terms of Paragraph 10.2.” (emphasis added). Indeed, “[i]t is . . . well recognized that ‘may’ is permissive and ‘shall’ mandatory.” *Moore v Parole Bd*, 379 Mich 624, 641; 154 NW2d 437 (1967).

Because the parties’ Agreement provides that either party **may** submit the dispute to arbitration, the Court finds that the arbitration provision is permissive. Plaintiff filed the present lawsuit, thereby exercising its choice to resolve through the court system. The Court will not interfere with Plaintiff’s choice.

For the foregoing reasons, Defendant’s motion is DENIED.

IT IS SO ORDERED.

July 15, 2015
Date

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