

**IN THE COURT OF APPEALS OF IOWA**

No. 1-115 / 10-0779  
Filed March 7, 2011

**JIM GIBLER,**  
Plaintiff-Appellee,

**vs.**

**ROSENMAN'S, INC., THOMAS HULL,**  
**and LORI BYERS,**  
Defendants-Appellants.

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Appeal from the Iowa District Court for Wapello County, Carla T. Schemmel, Judge.

Defendants appeal a district court decision denying their request to enforce an arbitration provision in an employment contract. **AFFIRMED.**

Bridget R. Penick and Megan J. Erickson of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellants.

Brian P. Rickert and Kelly D. Hamborg of Brown, Winick, Graves, Gross, Baskerville & Schoenebaum, P.L.C., Des Moines, for appellee.

Considered by Vaitheswaran, P.J., Danilson, J., and Mahan, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

**MAHAN, S.J.****I. Background Facts & Proceedings**

On March 1, 2004, Jim Gibler, Thomas Hull, and Lori Byers purchased the stock of Rosenman's, Inc., a corporation that operated a scrap metal storage yard in Ottumwa.<sup>1</sup> At the same time the parties each signed a promissory note for the purchase of their stock and a stock restriction agreement, limiting their ability to sell or transfer the stock. The corporation adopted amended bylaws.

In a contract dated March 2, 2004, Gibler entered into an employment agreement with Rosenman's for a period of five years. The contract contained a mandatory arbitration provision, as follows:

Except as otherwise expressly provided in this Agreement, any dispute or claim arising under or with respect to this Agreement will be resolved by arbitration in Iowa, in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association before a panel of three (3) arbitrators, one appointed by the Employee, one appointed by the Company, and the third appointed by said Association. The decision or award of a majority of the arbitrators shall be final and binding upon the parties. Any arbitration award may be entered as a judgment or order in any court of competent jurisdiction.

On May 10, 2008, Gibler was terminated from his employment with Rosenman's. He filed a suit raising these claims: (1) specific performance of the employment agreement; (2) breach of contract/wrongful termination; (3) breach of implied duty of good faith; (4) wage act claim; (5) unjust enrichment; (6) intentional interference with contracts by Hull and Byers; (7) fraud, conversion, or conspiracy to defraud by Hull and Byers; (8) breach of fiduciary

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<sup>1</sup> Under the stock purchase agreement, Gibler obtained thirty percent of the stock, Hull obtained fifty-one percent, and Byers obtained nineteen percent.

duties by Hull and Byers, and shareholder derivative claims; and (9) declaratory judgment.

Defendants filed a motion to dismiss all of the claims except Count II (breach of contract/wrongful termination) against Rosenman's under Iowa Rule of Civil Procedure 1.421(1)(f) for failure to state a claim upon which relief could be granted. As to Count II against Rosenman's, defendants asked the court to compel Gibler to submit the claim to arbitration, per the terms of the employment agreement. In the alternative, defendants asked that any claims not dismissed should be submitted to arbitration. Defendants requested a stay of all proceedings while the issue of arbitration was decided.

The district court entered an order on August 7, 2009, denying the defendants' motion. The court found it was premature to dismiss any of the claims. The court determined the arbitration clause in the employment agreement was not enforceable under Iowa Code section 679A.1(2)(b) (2007) (providing an arbitration agreement is not enforceable in "[a] contract between employers and employees"). The court found the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-307, did not preempt Iowa arbitration law because there was no evidence this case "involves interstate commerce which could trigger preemption by a federal statute."<sup>2</sup> The court also found it was questionable whether employment agreements came within the FAA. Finally, the court noted that only the employment agreement contained an arbitration clause, and the claims in the case involved the other documents signed by the parties.

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<sup>2</sup> The FAA preempts Iowa law if the interstate nexus requirement is met. *Heaberlin Farms, Inc. v. IGF Ins. Co.*, 641 N.W.2d 816, 818 (Iowa 2002). This occurs if the parties' contract involves interstate commerce. *Id.* at 819.

In the same order the court granted Gibler's motion to amend the petition. The petition was amended in response to several issues that had been raised in the motion to dismiss concerning a lack of clarity in the original petition. The claims raised in the amended petition remained the same.

On October 2, 2009, defendant filed a motion to compel arbitration of the amended petition and sought a stay of the judicial proceedings. Attached to the motion was an affidavit by Hull stating Rosenman's engaged in interstate commerce. Defendants claimed: (1) Iowa arbitration law was preempted by federal law due to the involvement of interstate commerce; (2) federal arbitration law applied to employment agreements; (3) the issue of arbitrability should be determined in the first instance by the arbitrator rather than the court;<sup>3</sup> (4) all of plaintiff's claims should be subject to the arbitration provision because all of the claims involved the employment agreement; and (5) the judicial proceedings should be stayed pending arbitration. Gibler resisted the motion, claiming defendants were merely raising issues that had been denied in the court's August 2009 order.

The district court issued an order on April 14, 2010, recaptioning the matter as a "renewed motion to compel arbitration," and stating defendants had filed a motion to reconsider. The court reaffirmed its earlier decision and denied the application for enforcement of the arbitration agreement.

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<sup>3</sup> While the motion to dismiss was pending, the Eighth Circuit issued a decision, *Fallo v. High-Tech Inst.*, 559 F.3d 874, 880 (8th Cir. 2009), which held that when a contract incorporates the rules of the American Arbitration Association (AAA) this is clear and unmistakable evidence that the parties intend the question of arbitrability to be determined by an arbitrator.

Defendants appealed the district court's order on May 11, 2010. Before the Iowa Supreme Court, defendants filed a motion for a stay of the district court proceedings pending appeal, and that motion was granted. Gibler filed a motion seeking to dismiss the appeal on the ground it was untimely. The Iowa Supreme Court determined the issue of untimeliness should be submitted with the appeal.

## **II. Standard of Review**

An appeal of a district court order denying an application to compel arbitration, is "taken in the manner and to the same extent as from orders or judgments in a civil action." Iowa Code § 679A.17(2). Our review is for the correction of errors at law because this is an appeal from an order in a civil action. *Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 839 (Iowa 2007); *Humphreys v. Joe Johnston Law Firm, P.C.*, 491 N.W.2d 513, 514 (Iowa 1992).

## **III. Timeliness of Appeal**

Section 679A.17(1) provides, "An appeal may be taken from: (a) An order denying an application to compel arbitration made under section 679A.2." Gibler contends that under this section, defendants should have timely appealed the August 2009 order. He claims that defendants instead filed an untimely motion to reconsider, and the appeal of the court's order denying that motion was untimely.

We determine that under section 679A.17(1)(a), the court's August 2009 order denying arbitration was a final order because it was ripe for appeal at that

time.<sup>4</sup> See Iowa R. App. P. 6.103(1) (providing final orders and judgments may be appealed as a matter of right). A final order or judgment must be appealed within thirty days. Iowa R. App. P. 6.101(1)(b). If a party does not appeal within thirty days of a final order, we are without jurisdiction to entertain the appeal. *State v. Olsen*, \_\_\_ N.W.2d \_\_\_, \_\_\_ (Iowa 2011); *In re Estate of DeTar*, 572 N.W.2d 178, 182 (Iowa Ct. App. 1997). Because the order denying the request to compel arbitration was not appealed within thirty days, we are without jurisdiction to further address the issues determined by the court in that order. See *Olsen*, \_\_\_ N.W.2d at \_\_\_. We do not make any findings regarding the merits of the district court's August 2009 order.

#### **IV. Other Issues**

Defendants deny the district court's conclusion that its motion of October 2, 2009, was a motion seeking reconsideration of the court's August 2009 ruling. Defendants specifically state they are not seeking to appeal the August 2009 ruling. They assert that the October 2009 motion raised new issues, and they are appealing the district court's decision denying those issues.

In reviewing the October 2009 motion, the only issue which was not specifically addressed in the August 2009 ruling was the issue of whether the arbitrator or the court should determine whether the arbitration agreement should be enforced. The court impliedly addressed the issue, however, by ruling that the arbitration agreement was not enforceable, instead of deferring that question

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<sup>4</sup> We note the denial of a motion to dismiss is not a final judgment. See *Pennsylvania Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 810 n.2 (Iowa 2002). Our comments, therefore, do not extend to the issues within the court's order addressing the motion to dismiss.

to an arbitrator. The August 2009 ruling is a final adjudication on the issues addressed within that ruling. See *Hayes v. Kerns*, 387 N.W.2d 302, 308 (Iowa 1986) (finding an unappealed judgment is a final adjudication of the issues determined therein). Because the issue of whether the arbitration agreement should be enforced has already been determined, we will not further consider the issue of whether that issue should have been determined by an arbitrator. See *Board of Water Works v. City of Des Moines*, 469 N.W.2d 700, 703 (Iowa 1991) (finding the court would not consider assignments of error based on an earlier unappealed judgment).

We affirm the decision of the district court denying defendants' request to compel arbitration.

**AFFIRMED.**