IN THE COURT OF APPEALS OF IOWA

No. 9-924 / 09-0360
Filed February 10, 2010

OHI (IOWA), INC.,
Plaintiff-Appellee,

vs.

USA HEALTHCARE-IOWA, LLC,
USA HEALTHCARE, INC., and
R. FRANK BROWN JR.,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Appeal from the district court ruling on defendants' motion to compel arbitration and plaintiff's motion to stay arbitration. **AFFIRMED.**

Todd A. Strother and Timothy N. Lillwitz of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, and R. Marcus Givhan and Kenny Williamson Keith of Johnston Barton Proctor & Rose, L.L.P., Birmingham, Alabama, for appellants.

John H. Moorlach of Whitfield & Eddy, P.L.C., Des Moines, and Leighton Aiken and Dana M. Campbell of Owens, Clary & Aiken, L.L.P., Dallas, Texas, for appellee.

Heard by Sackett, C.J., Doyle and Danilson, JJ.

SACKETT, C.J.

Defendants, a lessee and two guarantors of the lease, appeal from the district court ruling on their motion to compel arbitration and the lessor's motion to stay arbitration. They contend the court erred in determining the arbitration provisions of the master lease and the guaranties were "narrow" and thus did not encompass plaintiff's tort claims. We affirm.

I. Background Facts and Proceedings.

Lessor, OHI (Iowa), Inc. ("OHI"), is the owner of several licensed nursing facilities in Iowa. Lessee, U.S.A. Healthcare-Iowa, L.L.C. ("USA-Iowa"), entered into a master lease with lessor to lease and operate the licensed nursing facilities. Guarantor, U.S.A. Healthcare, Inc. ("USA"), is an Alabama corporation qualified to do business in Iowa. Guarantor, R. Frank Brown, is an Alabama resident who is the sole member of USA-Iowa and president of USA.

The master lease contains a provision for arbitration in Article XXXVII:

> Except with respect to the payment of Rent under this Lease and except as to proceedings for possession, in case any controversy arises between the parties hereto as to any of the provisions of this Lease or the performance thereof, and the parties are unable to settle the controversy by agreement or as otherwise provided herein, the controversy shall be resolved by arbitration. . . . In rendering the decision and award, the arbitrators shall not add to, subtract from, or otherwise modify the provisions of this Lease. . . . No provision in this Article shall limit the right of any party to this Agreement to obtain provisional or ancillary remedies from a court of competent jurisdiction before, after, or during the pendency of any arbitration. The exercise of such a remedy does not waive the right of either party to arbitration.

In Article XVI, concerning default, the lease includes this provision:

> Lessee will, to the extent permitted by law, pay as Additional Charges, any costs and expenses incurred by or on behalf of Lessor, including, without limitation, reasonable attorneys' fees

> (whether or not litigation is commenced, and if litigation is commenced, including fees and expenses incurred in appeals and post-judgment proceedings) as a result of any default of Lessee hereunder.

The two lease guaranties contain these provisions concerning disputes:

> Any controversy arising between the parties hereto as to any of the provisions of this guaranty or the performance thereof, and the parties are unable to settle the controversy by agreement, the controversy shall be resolved by arbitration. . . . In rendering the decision and award, the arbitrators shall not add to, subtract from, or otherwise modify the provisions of this guaranty. . . . No provision in this section shall limit the right of any party to this guaranty to obtain provisional or ancillary remedies from a court of competent jurisdiction before, after, or during the pendency of any arbitration. The exercise of such a remedy does not waive the right of either party to arbitration.
>
> Guarantor and lessor hereby waive trial by jury and the right thereto in any action or proceeding of any kind arising on, under, out of, by reason of or relating in any way to this guaranty or the interpretation, breach or enforcement thereof.
>
> In the event of any suit, action, arbitration or other proceeding to interpret this Guaranty, or to determine or enforce any right or obligation created hereby, the prevailing party in the action shall recover such party's actual costs and expenses reasonably incurred therewith, . . . Any court, arbitrator or panel of arbitrators shall, in entering any judgment or making any award in any such suit, action, arbitration, or other proceeding, ...

Disputes arose between the parties. In November of 2008 OHI filed suit against USA-Iowa, USA, and Brown, alleging nine separate causes of action:

1. Breach of master lease, against USA-Iowa
2. Breach of lease guaranty, against USA.
3. Breach of lease guaranty, against Brown.
4. Common law waste, against all defendants.
5. Tortious interference with contract, against Brown.
6. Breach of fiduciary duty, against Brown.
7. Fraudulent transfer, against Brown.
8. Alter ego, against Brown.
9. Civil conspiracy, against all defendants.

In December, defendants filed the motion to compel arbitration and to stay proceedings that gave rise to the district court decision on appeal. Later in December, plaintiff filed a motion to stay arbitration proceedings.

At the end of January of 2009 the court heard arguments on the motions. Its written ruling issued in early February. In its ruling, the court focused on the "any controversy" language from the master lease and guaranties quoted above. The court concluded:

> The arbitration provisions included in the Master Lease and Lease Guaranties are narrow rather than broad. They do not include the phrase "relating to" or similar all-encompassing phraseology. *See Fleet Tire Serv. v. Oliver Rubber Co.*, 118 F.3d 619 (8th Cir. 1997). The facts of this case are strikingly similar to *Entech Systems, Inc. v. Baskhar*, 1998 WL 164632 (D. Kan. July 10, 1998), where the court refused to require arbitration of all claims.

The court noted that plaintiff conceded the first three counts of the petition must be submitted to arbitration. The court concluded the remaining claims were "not subject to arbitration and should proceed to trial." Defendants appeal.

II. Scope and Standards of Review.

Review of a ruling on a motion to compel arbitration is for correction of errors at law. *Wesley Retirement Servs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 29 (Iowa 1999). "[W]e begin with the established principle that the issue of arbitrability is a question for the courts and is to be determined by the contract entered into by the parties." *Hawkins/Korshoj v. State Bd. of Regents*, 255 N.W.2d 124, 127 (Iowa 1977).

III. Merits.

The briefs filed by both parties address their arguments to the language of the arbitration clauses in the master contract and the guaranties. Appellants argue the district court erred in determining the language was "narrow" and did not encompass the tort claims even though based essentially on the same facts alleged in the contract claims. Appellee argues the arbitration clauses are narrow because they do not contain any of the phrases such as "arising out of," "relating to," or "arising hereunder" cited in cases as examples of "broad" arbitration clauses, and other provisions in the lease and guaranties contemplate some issues would be resolved in a court proceeding.

Section 38.1.1 of the master lease provides the lease "shall be governed and construed in accordance with the laws of [Iowa]" unless "procedural conflicts of laws rules require the application of laws of a state other than [Iowa]." It further provides the parties submit to in personam jurisdiction in Iowa and agree that "all disputes concerning this agreement be heard in [Iowa]." Since Iowa Code chapter 679A (1997) sets forth Iowa law concerning arbitration, this would seem to provide a simple resolution to the issues before us. Section 679A.1(2) (1997) allows parties to agree in a written contract to submit future controversies between the parties to arbitration. It expressly excludes, however, "any claim sounding in tort whether or not involving a breach of contract" unless the parties provide otherwise "in a separate writing executed by all parties to the contract." Iowa Code § 679A.1(2)(c). If this were the end of our analysis, we would affirm the district court's exclusion of the tort claims from arbitration.

Because the lease and guaranties involve commerce, and because of the diversity of citizenship of the parties, however, the Federal Arbitration Act[1] applies. *See Heaberlin Farms, Inc. v. IGF Ins. Co.*, 641 N.W.2d 816, 818 (Iowa 2002) (noting the applicability of the federal act "if the interstate nexus is met"); *see also* 9 U.S.C. § 2 (concerning arbitration provisions in a "contract evidencing a transaction involving commerce"). In their briefs and in oral argument, the parties also agreed the federal act applies to this case. In contrast to Iowa's arbitration statute, the federal statute does not contain an express exception for tort claims.

In applying the federal act, the Supreme Court has stated:

> [W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

AT & T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 650, 106 S. Ct. 1415, 1419, 89 L. Ed. 2d 648, 656 (1986) (citation omitted). "Arbitration . . . is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. . . . [T]hey may limit by contract the issues which they will arbitrate . . . ." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 1256, 103 L. Ed. 2d 488, 500 (1989) (citations omitted). The parties' intent concerning whether a particular issue should be arbitrated is a question of law for the court, based on the contract entered into by the parties. *See Arjijo v. Prudential Ins.*

---

[1] The Federal Arbitration Act is codified at 9 U.S.C. §§ 1-307.

Co., 72 F.3d 793, 797 (10th Cir. 1995); *Commerce Park v. Mardian Constr. Co.*, 729 F.2d 334, 338 (5th Cir. 1984).

A number of courts in various jurisdictions have examined the language of arbitration agreements in contracts and concluded phrases such as "arising under," "arising out of," or "related to" are evidence of the parties' intent that the agreement be read as broad and encompassing. *See, e.g.*, *CD Partners, L.L.C. v. Grizzle*, 424 F.3d. 795, 797 (8th Cir. 2005) ("arising out of or relating to"); *Battaglia v. McKendry*, 233 F.3d 720, 726-27 (3rd Cir. 2000) ("arises hereunder"); *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 60 n.1 (8th Cir. 1984) ("related to"). "Broadly worded arbitration clauses such as ["any claim, controversy or dispute arising out of or relating to"] are generally construed to cover tort suits arising from the same set of operative facts covered by a contract . . . ." *CD Partners*, 424 F.3d at 800. "[A] party may not avoid a contractual arbitration clause merely by casting its complaint in tort." *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 643 (7th Cir. 1993) (citation omitted).

The arbitration language before us, however, does not contain either the "arising out of" or "related to" phrases that courts have interpreted as broad. With explicit exceptions for controversies concerning rent or possession of the leased premises, the parties agreed to resolve controversies by arbitration "as to any of the provisions of this lease or the performance thereof." The lease guaranties contain similar, limited language. The district court considered the absence of such broad language in concluding the arbitration agreement was narrow and did

not encompass collateral claims. As quoted above, it relied on the Eighth Circuit *Fleet Tire* and Kansas district court *Entech* decisions in support of its decision not to require arbitration of all the claims.

Appellants contend the court "ignored" the Minnesota district court case, *Simitar Entertainment, Inc. v. Silva Entertainment, Inc.*, 44 F. Supp. 2d 986 (D. Minn. 1999) and erred in relying on *Fleet Tire* and *Entech*. We conclude the *Simitar* decision is inapposite because the contract before the court in that case contained an agreement to arbitrate any dispute "arising under" that agreement. *Simitar*, 44 F. Supp. 2d at 993. The court held that "arising under" or "arising out of" should be interpreted to be as broad as "arising out of or relating to." *Id.* at 996. Because the lease and guaranties before us do not contain any such language, *Simitar* provides no guidance and the district court correctly did not rely on it in interpreting the lease and guaranties.

In *Fleet Tire*, the contract contained an agreement to arbitrate "any controversy or claim arising out of or relating to this agreement or any breach of its terms." *Fleet Tire*, 118 F.3d at 620. A dispute arose over a letter exchanged between the parties after the agreement. *Id.* The district court concluded the dispute was collateral to the agreement and the arbitration language in the agreement was not broad enough to encompass the collateral dispute. *Id.* The court of appeals reversed the district court, concluding the court failed to make a determination "whether the arbitration clause is broad or narrow." *Id.* at 621. The court of appeals determined as a matter of law, that the arbitration language "arising out of or relating to" "constitutes the broadest language the parties could

reasonably use to subject their disputes to that form of settlement, including collateral disputes." *Id.* The court rejected the district court's reliance on *Wilson v. Subway Sandwiches Shops, Inc.* 823 F. Supp. 194, 199 (S.D.N.Y. 1993). "While the rule established in *Wilson* prohibits the application of an arbitration agreement to collateral claims, it only does so when the arbitration agreement is narrow." *Fleet Tire*, 118 F.3d at 621. The district court decision before us determined the arbitration provisions in the lease and guaranties were "narrow rather than broad" because "[t]hey do not include the phrase 'relating to' or similar all-encompassing phraseology." Not only do the arbitration provisions not include "relating to" but they also do not include "arising under" or "arising out of" or other "all-encompassing phraseology."

The district court found the facts before it to be "strikingly similar" to the unpublished decision in *Entech*, "where the court refused to require arbitration of all claims." *Entech* involved a motion to compel arbitration and stay proceedings. *Entech*, 1998 WL 164632, at *1. The arbitration provision applied to "any dispute arising under this agreement," which is broader language than the lease and guaranties before us. The *Entech* agreement restricted the powers of the arbitrators who "shall have no power to add or detract from the agreements of the parties and may not make any ruling or award that does not conform to the terms and conditions of this agreement." *Id.* at *2. The disputes between the parties included breach of contract, unfair competition, fraud, defamation, copyright infringement, and misappropriation of trade secrets. *Id.* at *3. The Kansas court determined the breach-of-contract claim was subject to arbitration, but other

claims "would fall outside the provision and may be litigated first in this court." *Id.* at *5.

The court made this determination based on at least three factors. First, it cited to several cases from other circuits in support of the principle that "arising under" is more restrictive than "relating to" or "in connection with." *Id.* Appellants in the case before us point out, and we agree, that the cases the Kansas court relied on for that principle have been discredited. We do not see any significant difference in breadth between "arising under" or "relating to." Because the arbitration provisions before us do not contain either phrase, this portion of the analysis in *Entech* does not assist us.

Second, the Kansas court noted the arbitration provision "confines the arbitrator to the terms and conditions of the agreement, which language reveals an intent that only matters of contract interpretation and performance may be subjected to arbitration." *Id.* The provisions before us contain similar restrictions on the power of the arbitrator. The lease provides, "the arbitrators shall not add to, subtract from, or otherwise modify the provisions of this Lease." This restrictive language supports the district court's decision before us that the disputes to be arbitrated are only those concerning the terms of the agreement or its performance.

Third, the Kansas court noted the arbitration provision prohibited an award of punitive damages. *Id.* Because punitive damages are not recoverable in claims for breach of contract, the court saw the prohibition as an indication that claims other than breach of contract were not "within the scope of the arbitration

provision." *Id.* The lease and guaranties before us contain similar indications that some disputes are not within the scope of the arbitration provision. The lease provides for attorney fees resulting from litigation and appeals. The guaranties contain a waiver of jury trial. If the parties' intent was that all disputes were subject to arbitration, there would be no need to provide for attorney fees in litigation or to waive jury trials.

We agree with the district court that the facts of the case before us are similar to those in the *Entech* case, except the arbitration provisions before us are drafted more narrowly, since they do not include "arising under" or "arising out of." Based on the narrow arbitration provisions in the lease and guaranties, the express restrictions on the powers of the arbitrator, and the provisions concerning litigation, we conclude the district court correctly determined the claims in counts I-III of the petition "must be submitted to arbitration," but "[t]he remaining claims are not subject to arbitration and should proceed to trial."

AFFIRMED.