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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04/28/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In Re the Matter of the:) No. 1 CA-CV 10-0432
)
AMENDED JAMES LEIBE WATSON TRUST.) DEPARTMENT A
)
LISA HULL, as Parent and Natural) **MEMORANDUM DECISION**
Guardian for CARTER WATSON,)
) (Not for Publication -
Petitioner/Plaintiff) Rule 28, Arizona Rules
Appellee,) of Civil Appellate
) Procedure)
)
v.)
)
VINTON PHILIP WATSON,)
individually and as trustee;)
VICTOR JERRY CROSETTI, JR.,)
individually and as trustee; TOBY)
SWANSON, individually and as)
trustee,)
)
Respondents/Defendants/)
Appellants.)

)

Appeal from the Superior Court in Maricopa County

Cause No. PB2009-002628

The Honorable Barbara A. Hamner, Commissioner

REVERSED AND REMANDED

Jove and Georgia Watson, and their descendants.¹ In the subsequent years, two separate lawsuits were brought against the trustees of the original trust; one in Oregon and the other in Hawaii. As a result of the lawsuits, all of the parties in the instant dispute (with the exception of a later appointed trustee, Toby Swanson) entered a settlement agreement on December 2, 2008 ("the Settlement Agreement").²

¶13 As part of the Settlement Agreement, all parties agreed to execute a "Trust Modification Agreement" which created the Amended James Liebe Watson Trust ("the Amended Trust"). Additionally, all the parties further agreed to: 1) create new subtrusts under the Amended Trust, 2) realign the beneficiaries within each subtrust, 3) stipulate to a dismissal of the pending actions in Oregon and Hawaii, and 4) release all other parties and trustees from "all" claims they had or may have had before the execution of the Settlement Agreement. The Settlement Agreement created two marital subtrusts: the "GST-Exempt Marital Trust" ("Marital Trust 1") established for the benefit of Georgia Watson and her descendants, with Diana Watson acting

¹ Currently, Appellee is the only descendant of Jove Watson.

² Appellee, as a minor, was represented by Christopher Kent, his guardian ad litem in the negotiations and execution of the Settlement Agreement.

as trustee, and the Non-Exempt Marital subtrust ("Marital Trust 2"), established for the benefit of Jove Watson and his descendants, with Appellants acting as trustees. The Settlement Agreement determined how each marital trust was to be funded and also mandated that Appellants, as trustees of Marital Trust 2, execute a promissory note in the amount of \$900,000.00 in favor of the trustee of Marital Trust 1. Another family trust ("the Son's Exempt Trust") was also created for the benefit of Jove Watson and his descendants, with Appellants as the trustees. The Son's Exempt Trust was to consist of the Brookside Bell Professional Plaza ("Brookside Bell") property located in Arizona, funds in the Brookside Bell custodial account, and cash in an amount equal to the cash surrender value of a specified insurance policy as valued on the "Settlement Closing Date."

¶14 The global agreement between the parties consisted of "[t]his Settlement Agreement with Exhibits A-L." The Trust Modification Agreement was one of the attached exhibits and was also referenced in the body of the Settlement Agreement. The Amended Trust was an exhibit attached to the Trust Modification Agreement. The Settlement Agreement also set forth how each newly established trust was to be managed, provided for the division of any remaining property from the estate of James Liebe Watson, and determined who was responsible for assuming

any tax liabilities as a result of the Settlement Agreement.

The Settlement Agreement also contained the following provision:

[The Settlement Agreement] shall be interpreted according to the law of Oregon. The Trust and Modification Agreement shall be governed by the law of Arizona. If there is any dispute related in any way to the subject matter of [the Settlement Agreement], the exclusive venue for resolution of the dispute shall be Maricopa County, Arizona.

¶15 The Settlement Agreement also contained a detailed procedure for alternative dispute resolution ("ADR"). The Settlement Agreement set forth the following purpose for the inclusion of an ADR procedure:

The Parties recognize that differences may arise among or between them at any time and from time to time. In an effort to resolve these disputes quickly and keep the costs associated with the resolution of disputes to a minimum, the Parties agree [to the following ADR procedure].

(Emphasis added). The ADR procedure states that if:

any Party or Parties [] *objects to any action or inaction* by another Party or Parties . . . [the non-objecting party] shall have the right to cure any such Objections within 60 days ("Cure Period") following delivery of the Objection Notice.

(Emphasis added). If the objections are not cured within sixty days, the ADR procedure requires the parties to engage in mandatory mediation, and if that should fail, to engage in

mandatory arbitration. The Settlement Agreement then provides that "[a]ll Objections and any other disputes *relating to this* [Settlement Agreement] ("Claims") shall be arbitrated according to the provisions of the Federal Arbitration Act and applicable Oregon law." (Emphasis added). Any arbitration proceedings are to be held in Oregon. Finally, the Settlement Agreement provides:

Each Party voluntarily and knowingly waives any and all of its rights to have any Claims heard or adjudicated in any type of forum other than arbitration . . . Examples of Claims which must be resolved through arbitration rather than a court proceeding include . . . for breach of fiduciary duty, demands for accountings or information, and requests for instructions by fiduciaries.

The Settlement Agreement was expressly intended to be the final and complete expression of agreement between all parties regarding the subject matter set forth therein.

¶16 The Amended Trust makes no mention whatsoever of the Settlement Agreement or of any ADR procedure. The Amended Trust also provides that it is governed by Arizona law.

¶17 On December 30, 2009, Appellee filed a complaint against Appellants. Appellee requested: removal of Appellants as trustees of Son's Exempt Trust (Count I); a finding of breach of fiduciary duties by Appellants for threatening to "sell" Brookside Bell to Marital Trust 2 in exchange for the

forgiveness of a debt owed to it (Count II); creation of a constructive trust for Appellee's benefit in which any potential proceeds from the threatened sale of the Brookside Bell property would be placed (Count III); modification of the Amended Trust (Count IV); and issuance of declaratory relief (Count V). Appellants filed myriad responses, one of which was a motion to dismiss the complaint and to compel arbitration as required by the Settlement Agreement.

¶18 The court issued a stay precluding Appellants from completing the proposed Brookside Bell transaction, and then held a hearing on February 12, 2010. Over Appellants' objection, Stephen Griffith - Jove Watson's attorney during the negotiation of the Settlement Agreement - testified that the ADR procedure in the Settlement Agreement was limited and only applied to claims arising from the Settlement Agreement itself and not to any claims arising from the Amended Trust. In contrast, Appellant Vinton Watson, a party to the Settlement Agreement, testified that the ADR procedure in the Settlement Agreement was designed to apply to all future claims arising out of the Settlement Agreement and Amended Trust.

¶19 The court ultimately found that the ADR procedure did not apply to claims arising from the Amended Trust and denied

Appellants' motion to dismiss and compel arbitration. The order was signed on June 14, 2010. Appellants timely appealed.

¶10 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶11 On appeal, Appellants argue that the ADR procedure applies to the claims at bar, and that the court erred in not granting their motion to dismiss the complaint and compel arbitration. Alternatively, Appellants contend that, at the very least, Counts I and V of Appellee's complaint are subject to the Settlement Agreement's ADR procedure and that all other court proceedings should be stayed throughout the pendency of the resulting arbitration. Appellants also argue that the Settlement Agreement is a completely integrated agreement, and therefore, under the parol evidence rule, the court erred in allowing the testimony of Stephen Griffith.

¶12 We review decisions concerning the validity and scope of an arbitration clause *de novo*. See *First Investors Corp. v. Am. Capital Fin. Serv., Inc.*, 823 F.2d 307, 309 (9th Cir. 1987); accord *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 290, ¶ 15, 246 P.3d 938, 941 (App. 2010). We also recognize that both federal and state public policies weigh heavily in favor of enforcing arbitration agreements. See *Stevens/Leinweber/Sullens*,

Inc. v. Holm Dev. & Mgmt., Inc., 165 Ariz. 25, 29-30, 795 P.2d 1308, 1312-13 (App. 1990) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *U.S. Insulation*, 146 Ariz. 250, 705 P.2d 490 (1985)). Further, "[b]ecause of the public policy favoring arbitration, arbitration clauses are construed liberally and any doubts about whether a matter is subject to arbitration are resolved in favor of arbitration." *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 189, 877 P.2d 284, 288 (App. 1994). Finally, we also note that the Settlement Agreement, by its own terms, must be interpreted according to Oregon law.

¶13 Essentially, Appellants ask us to interpret the Settlement Agreement to find that its ADR procedure applies to claims arising out of the administration of the Amended Trust. "If it can be done, [an] agreement should be interpreted to avoid inconsistencies and to give meaning to all of its terms, including any recitals of the parties' intent." See *Standley v. Standley*, 752 P.2d 1284, 1286 (Or. Ct. App. 1988). When interpreting a contractual provision, we first look at the plain language and context of the disputed provisions, and if the provisions are clear and unambiguous, our analysis ends. See

Yogman v. Parrott, 937 P.2d 1019, 1021 (Or. 1997); accord *ELM Ret. Ctr.*, 226 Ariz. at 290-91, ¶ 15, 246 P.3d at 941-42.

¶14 The Settlement Agreement states that “[a]ll objections and any other disputes relating to this [Settlement Agreement] (“Claims”) shall be arbitrated.” There is no doubt that the Amended Trust relates to the Settlement Agreement as the Amended Trust itself is, in fact, attached to and part of the Settlement Agreement. See Black’s Law Dictionary 1288 (6th ed. 1990) (defining “relate” as “To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with; with ‘to’”); see also *State v. Bass*, 198 Ariz. 571, 583, ¶ 54, 12 P.3d 796, 808 (2000) (citing Webster’s Third New International Dictionary 1916 (1976) defining “relate” as “show[ing] or establish[ing] logical or causal connection between”). The settlement would have failed and the agreement would have become void and unenforceable unless all the parties, before March 31, 2009, executed the Trust Modification Agreement creating the Amended Trust. It is patently obvious that the Settlement Agreement was largely designed to not only resolve the pending litigation, but also create, fund, and set forth guidelines for the management of the Amended Trust and subtrusts at issue here. Without the Settlement Agreement, there would be no Amended Trust, and vice

versa. The Settlement Agreement's plain language is unambiguous, and the Amended Trust is inextricably "relat[ed] to" that document.

¶15 When considering the entire document, it becomes even clearer that the ADR procedure set forth in the Settlement Agreement was meant to apply to Appellee's claims and any and all claims arising out of the Amended Trust. See *Porter v. OBA, Inc.*, 42 P.3d 931, 933-34 (Or. Ct. App. 2002) (instructing courts to consider not only the text itself, but also the disputed passages in the context of the entire agreement); accord *Yogman*, 937 P.2d at 1021-22; see also *C & T Land & Dev. Co. v. Bushnell*, 106 Ariz. 21, 22, 470 P.2d 102, 103 (1970) (finding that "it is axiomatic that any agreement must be construed as a whole, and each part must be read in light of all the other parts" (citation omitted)).

¶16 Appellee argues that the Settlement Agreement and its ADR procedure was only intended to apply to claims that arose prior to the settlement or directly from the administration of the Settlement Agreement itself. Considering the ADR procedure in the context of the entire set of settlement documents, we cannot agree with Appellee's conclusion. First, each party agreed, in wholly separate release provisions, to waive their right to bring any claims against any party or trustee that they

had or may have had before and up to the date of the Settlement Agreement. If the Settlement Agreement was only intended to apply to the preexisting litigation surrounding the original James Liebe Watson Trust, then the releases would have been sufficient to achieve such ends without the inclusion of a wholly separate ADR procedure.

¶17 Second, the Settlement Agreement also sets forth the specific intent of the parties in creating an ADR procedure. The Settlement Agreement states that the parties recognize that disputes may arise "at any time and from time to time" between the Parties, and therefore, the ADR procedure was adopted to resolve these disputes quickly and at less expense than litigation. The words "any time and from time to time" strongly suggest that the ADR procedure is to apply to future disputes involving the administration and management of the Amended Trust, not just to disputes preceding or arising out of the Settlement Agreement itself. Further, given the fact that that the terms of the Settlement Agreement required the parties to stipulate to a dismissal of the ongoing Oregon and Hawaii litigation, it is only logical to conclude that the ADR procedure was wholly intended to preclude similar protracted and costly litigation from commencing in the future.

¶18 Third, the Settlement Agreement also lists examples of claims subject to the ADR procedure, and they include "claims for breach of fiduciary duty, demands for accountings or information, and requests for instructions by fiduciaries." Not only do all of these examples involve disputes that would arise out of the administration and management of the Amended Trust (indeed, one of Appellee's claims is breach of fiduciary duty by Appellants), but none of these examples implicate disputes that would derive solely from the Settlement Agreement.

¶19 Finally, we also conclude that, as a matter of law, the language of the Settlement Agreement has incorporated both the Modified Trust Agreement and the Amended Trust by reference. To incorporate by reference,

the reference [to the document being incorporated] must be clear and unequivocal and must be called to the attention of the other party, he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting party . . . While it is not necessary that a contract state specifically that another writing is 'incorporated by this reference herein,' the context in which the reference is made must make clear that the writing is part of the contract.

Weatherguard Roofing Co., Inc. v. D.R. Ward Const. Co., Inc., 214 Ariz. 344, 346, ¶8, 152 P.3d 1227, 1229 (App. 2007) (quoting *United California Bank v. Prudential Ins. Co. of Am.*, 140 Ariz.

238, 268, 681 P.2d 390, 420 (App. 1983); see also *Garrett v. State Farm Mut. Ins. Co.*, 829 P.2d 713, 715-16 (Or. Ct. App. 1992) (stating that “[w]hen a written contract refers in specific terms to another writing, the other writing is part of the contract” and incorporated by reference (citations omitted)). In the instant case, the Settlement Agreement clearly and unequivocally referenced the attached Trust Modification Agreement (which also clearly and unequivocally referenced the attached Amended Trust). As discussed above, agreement and execution of the Trust Modification Agreement was a necessary condition to the validity and operation of the Settlement Agreement. The Trust Modification Agreement and the Amended Trust were, apparently, attached to the Settlement Agreement at the time it was executed. The fact that the Trust Modification Agreement and the Amended Trust are inextricably linked to the purpose of the Settlement Agreement shows that all documents were intended to be part of the same global agreement. We find that the ADR procedure was intended to apply to the Amended Trust as incorporated by reference in the Settlement Agreement.

¶20 We conclude, therefore, that the language in the Settlement Agreement is unambiguous and presents clear evidence of the parties’ intent to subject all claims arising from both

the Settlement Agreement and the Amended Trust to the ADR procedure set forth in the Settlement Agreement. We, therefore, reverse the court's decision denying Appellants' motion to dismiss and compel arbitration.

¶21 Because we have reversed the trial court's determination on the grounds discussed above, we need not address Appellants' argument that the court erred by failing to preclude Stephen Griffith's testimony under the parol evidence rule.

¶22 Finally, we note the parties apparently interpret the Settlement Agreement and its ADR procedure as only binding the parties that executed the Settlement Agreement. Appellee argues, therefore, that Appellant Toby Swanson may be sued in his capacity as a trustee because he was not a party to the Settlement Agreement. We disagree with the parties' interpretation of the applicability of the Settlement Agreement. Section twenty-eight of the Settlement Agreement states that "[t]his [Settlement Agreement] shall be binding upon and inure to the benefit of the Parties and their respective agents, employees and servants, and all of those in interest with them, and their successors, heirs, personal representatives and assigns." This section seemingly binds not only Swanson, but all other successor trustees and their assigns to the terms of

the Settlement Agreement. More importantly, Swanson has apparently consented to arbitration. Accordingly, we remand this case and direct the court to dismiss it and compel arbitration in accordance with A.R.S. § 12-1502 (2003). See also Oregon Revised Statutes § 36.625 (West 2011).

CONCLUSION

¶23 For the reasons set forth above, we reverse the court's denial of Appellants' motion to dismiss and compel arbitration. We remand this case for the trial court to dismiss the action and to direct the parties to proceed to arbitration. Because Appellants are the successful party, they may recover their costs on appeal pursuant to A.R.S. § 12-341 (2003) subject to compliance with ARCAP 21. We decline to award attorneys' fees pursuant to A.R.S. § 12-341.01 (2003).

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PHILIP HALL, Presiding Judge

_____/S/_____
JON W. THOMPSON, Judge