[Cite as *Mak v. Silberman*, 2011-Ohio-854.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95590

TAI HUNG MATTHEW MAK, M.D.

PLAINTIFF-APPELLANT

vs.

SETH JON SILBERMAN, M.D., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-723381

BEFORE: Kilbane, A.J., Celebrezze, J., and Cooney, J.

RELEASED AND JOURNALIZED: February 24, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc.App.R. 11.1.

{¶ 2} Plaintiff-appellant, Dr. Tai Hung Matthew Mak ("Dr. Mak"), appeals the trial court's decision granting defendants-appellees' motion to stay the proceedings pending arbitration. Defendants-appellees are herein referred to individually as Dr. Seth Jon Silberman ("Dr. Silberman"), Dr. Gary Milkovich ("Dr. Milkovich"), and Pan Holdings, LLC ("Pan Holdings"), and referred to collectively as "defendants." Finding no merit to the appeal, we affirm.

{¶ 3} This appeal arises from a lawsuit filed in April 2010 by Dr. Mak against the defendants, alleging fraud in the inducement and breach of fiduciary duties resulting from an operating agreement he entered into with the defendants. In June 2006, Drs. Silberman and Milkovich formed Pan Holdings, each with a 50 percent interest in the company. They executed an operating agreement, which provided that Pan Holdings was to acquire real estate and operate and lease such real estate. Pan Holdings purchased a vacant lot in Solon, with the intent to construct a medical office building on the property. Drs. Silberman and Milkovich wanted to use a portion of the

building for their medical practices, with the remaining offices leased to other tenants.

{¶ 4} In March 2007, defendants approached Dr. Mak about investing in Pan Holdings as a minority member. At that time, Dr. Mak was practicing out of a Solon office and an Ashtabula office. Dr. Mak advised defendants that his investment in Pan Holdings would be on the condition that the medical building would be habitable before or close to May 2008, the expiration of his lease for his Solon office.

{¶ 5} Dr. Mak alleges that defendants represented to him that: Dr. Silberman's past real estate investments were successful, the medical building would be habitable within one year's time, Dr. Mak would have 1,800 square feet for his exclusive use in the medical building, and the property was already purchased and an asset of Pan Holdings. Dr. Mak further alleges that based on these representations, he agreed to invest in Pan Holdings. His total investment was $36,500. In April 2007, he provided $15,000 to Pan Holdings, which was prior to the purchase of the Solon property and prior to signing an agreement with defendants.

{¶ 6} In June 2007, Drs. Mak and Silberman signed the Pan Holdings operating agreement. Dr. Milkovich signed the agreement in December 2007. The operating agreement contained the following arbitration clause.

> **"Resolution of Disputes — Any dispute or claim arising out of or relating to the Articles of Organization or its breach, this Operating Agreement or its breach, or the operation, management or buy-out of the interest of [Pan Holdings], will be submitted to mediation with any recognized mediation service agreed upon by the parties. * * * Any disputed matters which are not resolved by the above mentioned mediation process will be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association in Cleveland, Ohio, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction."**

{¶ 7} In May 2008, when Dr. Mak's lease in Solon was set to expire, the medical building had not yet been constructed. Consequently, Dr. Mak had to renew his lease for the Solon medical office.[1] Dr. Mak alleges that since he renewed his lease, the defendants have harassed him to invest more money in Pan Holdings.

{¶ 8} As a result, Dr. Mak seeks a rescission of the operating agreement, an accounting of the financial condition of Pan Holdings, and requests that the trial court declare the rights of Pan Holdings's members.

{¶ 9} In response to Dr. Mak's complaint, defendants filed a joint motion to stay the proceedings pending "the mandatory and binding mediation and/or arbitration agreement," which the trial court granted.

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[1]Dr. Mak alleges that the building was still not constructed at the time his complaint was filed in April 2010.

{¶ 10} Dr. Mak now appeals, raising four assignments of error, which shall be discussed together where appropriate.

ASSIGNMENT OF ERROR ONE

"The trial court erred in enforcing an arbitration provision contained in an operating agreement when the fraud complained of by [Dr. Mak] was committed before the subject operating agreement was executed or agreed to by [Dr. Mak]."

ASSIGNMENT OF ERROR TWO

"The trial court erred in enforcing an arbitration provision contained in an operating agreement when the fraud alleged by [Dr. Mak] did not 'arise out of or relate to the Operating Agreement or its breach.'"

ASSIGNMENT OF ERROR THREE

"The trial court erred in enforcing an arbitration provision contained in an operating agreement alleged to have been procured by fraud."

{¶ 11} We review a trial court's decision whether to grant a stay of proceedings and referral to arbitration for an abuse of discretion. *Brooks v. Doverwood Estates*, Cuyahoga App. No. 90397, 2008-Ohio-3791, ¶7; *Sikes v. Ganley Pontiac Honda, Inc.*, Cuyahoga App. No. 82889, 2004-Ohio-155. Absent a finding that the trial court's decision is unreasonable, arbitrary, or

unconscionable, we must affirm the decision of the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 12} In the instant case, Dr. Mak argues that he never agreed to arbitration because the alleged fraud (representations made by defendants) was committed before the operating agreement was fully executed in December 2007.[2] He further argues that the alleged fraud does not arise out of or relate to the operating agreement because he filed suit against defendants seeking recission of his interest in Pan Holdings not to enforce his rights under the operating agreement.

{¶ 13} R.C. 2711.02 governs the issuance of a stay of trial proceedings pending arbitration. R.C. 2711.02(B) provides in pertinent part:

> **"If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration."**

{¶ 14} The operating agreement executed by the parties provides that:

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[2]He claims that the defendants represented that: Dr. Silberman's past real estate investments were successful, the medical building would be habitable within one year's time, Dr. Mak would have 1,800 square feet for his exclusive use in the medical building, and the property was already purchased and an asset of Pan Holdings.

> **"Any dispute or claim arising out of or relating to the Articles of Organization or its breach, this Operating Agreement or its breach, or the operation, management or buy-out of the interest of [Pan Holdings], will be submitted to mediation with any recognized mediation service agreed upon by the parties. * * * Any disputed matters which are not resolved by the above mentioned mediation process will be settled by arbitration[.]"**

{¶ 15} In *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, the Ohio Supreme Court addressed whether the court of appeals employed a proper test for determining the scope of the arbitration clause, i.e., whether the parties agreed to submit this dispute to arbitration.

{¶ 16} The *Aetna* court stated that: "'[t]o determine whether the claims asserted in the complaint fall within the scope of an arbitration clause, the Court must "classify the particular clause as either broad or narrow." *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.* (C.A.2, 2001), 252 F.3d 218, 224. An arbitration clause that contains the phrase "any claim or controversy arising out of or relating to the agreement" is considered "the paradigm of a broad clause." *Collins & Aikman Prods. Co. v. Bldg. Sys. Inc.* 58 F.3d 16, 20 (2d Cir.1995).'" Id. at ¶18.

{¶ 17} The *Aetna* court held that the "'proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the

arbitration agreement.'" Id. at ¶24, quoting *Fazio v. Lehman Bros., Inc.* (C.A.6, 2003), 340 F.3d 386, 395. Under this standard, "'[e]ven real torts can be covered by arbitration clauses "[i]f the allegations underlying the claims 'touch matters' covered by the [agreement]." *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir.1987).' (Brackets sic.) *Fazio*, id." *Alexander v. Wells Fargo Fin. Ohio 1, Inc.*, 122 Ohio St.3d 341, 2009-Ohio-2962, 911 N.E.2d 286, ¶24.

{¶ 18} The arbitration provision in the instant case covers any disputes regarding the parties' business relationship and is considered a broad clause under *Aetna*. It is well established that public policy favors and encourages arbitration to avoid needless and expensive litigation. *Krafcik v. USA Energy Consultants, Inc.* (1995), 107 Ohio App.3d 59, 667 N.E.2d 1027. An agreement to arbitrate is typically viewed "as an expression that the parties agree to arbitrate disagreements within the scope of the agreement, and, with limited exceptions, such an agreement is to be upheld just as any other contract." *Vanyo v. Clear Channel Worldwide*, 156 Ohio App.3d 706, 2004-Ohio-1793, 808 N.E.2d 482, ¶8. Here, all of Dr. Mak's causes of action relate to the operating agreement and, therefore, fall within the scope of the arbitration agreement.

{¶ 19} Moreover, "[t]o defeat a motion for stay brought pursuant to R.C. 2711.02, a party must demonstrate that the arbitration provision itself in the

contract at issue, and not merely the contract in general, was fraudulently induced." *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 1998-Ohio-612, 692 N.E.2d 574, at the syllabus.

{¶ 20} We note that "[a] classic claim of fraudulent inducement asserts that a misrepresentation of facts outside the contract or other wrongful conduct induced a party to enter into the contract. Examples include a party to a release misrepresenting the economic value of the released claim, or one party employing coercion or duress to cause the other party to sign an agreement." Id. at 503, citing *Haller v. Borror Corp.* (1990), 50 Ohio St.3d 10, 552 N.E.2d 207. Here, Dr. Mak does not allege that the arbitration clause was fraudulently induced, nor is there any evidence demonstrating the same.

{¶ 21} Thus, we find that the trial court did not abuse its discretion when it granted defendants' joint motion to stay the proceedings pending arbitration.

{¶ 22} Accordingly, the first, second, and third assignments of error are overruled.

ASSIGNMENT OF ERROR FOUR

> **"The trial court erred in enforcing an arbitration provision contained in an operating agreement when the fraud complained of by [Dr. Mak] was committed before the subject operating agreement was executed or agreed to by [Dr. Mak]."**

{¶ 23} Dr. Mak argues that the trial court abused its discretion by failing to conduct a hearing because there was no evidence to support a factual determination that the operating agreement was valid. He further argues that there was no evidence that he agreed to the operating agreement.

{¶ 24} In the instant case, the defendants filed a motion to stay the proceedings under R.C. 2711.02. However, the Ohio Supreme Court in *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465, 800 N.E.2d 7, held that a trial court is not required to conduct a hearing when a party moves for a stay pursuant to R.C. 2711.02, but may stay proceedings upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration. Id. at ¶17-18. The court reasoned, "the statute does not on its face require a hearing, and it is not appropriate to read an implicit requirement into a statute." Id. at ¶19

{¶ 25} As a hearing was not required, we find that the trial court did not abuse its discretion when it granted the stay.

{¶ 26} Thus, the fourth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and
COLLEEN CONWAY COONEY, J., CONCUR