[Cite as *Cook v. Community Health Partners*, 2015-Ohio-1075.]

STATE OF OHIO))ss: COUNTY OF LORAIN)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
JACQUELINE PEYTON COOK Appellant v. COMMUNITY HEALTH PARTNERS REGIONAL MEDICAL CENTER, et al. Appellees	C.A. No. 13CA010520 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 13CV180717

DECISION AND JOURNAL ENTRY

Dated: March 23, 2015

CARR, Presiding Judge.

{¶1} Appellant, Jacqueline Cook, appeals an order that referred her claims to arbitration and stayed the underlying civil case. This Court affirms.

I.

{¶2} Dr. Jacqueline Cook contracted with Community Health Partners, which operates as Mercy Regional Medical Center ("Mercy"), Women's Professional Services, and Dr. Regina Hill to provide obstetric and gynecological care to patients in Lorain County. Within six months, Dr. Cook terminated her relationship with Mercy, Women's Professional Services, and Hill. She then filed an action in the Lorain County Court of Common Pleas that alleged breach of contract, wrongful termination, age discrimination, tortious interference with contract, conversion, and intentional and negligent misrepresentation. Mercy removed the case to federal district court on the basis of Dr. Cook's claim that the defendants violated the Age Discrimination in

Employment Act (ADEA). Dr. Cook filed an amended complaint that omitted the ADEA claim, and the federal district court remanded the case to the Lorain County Court of Common Pleas.

{¶3} Mercy moved to dismiss the amended complaint under Civ.R. 12(B)(6). The trial court denied the motion, and Mercy moved to stay the proceedings pending arbitration. Dr. Hill and Women's Professional Services filed a single motion to dismiss or, in the alternative, to stay pending arbitration. As with Mercy, the trial court denied the motion to dismiss. The trial court granted both motions to stay the proceedings pending arbitration. Dr. Cook appealed.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED IN GRANTING THE MOTION TO STAY PROCEEDING[S] PENDING ARBITRATION OF DEFENDANTS-APPELLEES REGINA HILL AND WOMEN'S PROFESSIONAL SERVICES, INC.

{¶4} Dr. Cook's first assignment of error argues that the trial court erred by granting Dr. Hill and Women's Professional Services' motion to stay proceedings pending arbitration. Specifically, Dr. Cook argues that the arbitration clause is ambiguous and unenforceable because the relevant contract contains both a forum selection clause and a broad arbitration clause. We disagree.

{¶5} Ohio's public policy strongly favors arbitration, as expressed in the Ohio Arbitration Act codified in R.C. Chapter 2711. *Taylor v. Ernst & Young, L.L.P.*, 130 Ohio St.3d 411, 2011-Ohio-5262, ¶ 18. Under R.C. 2711.02(B), a court may stay an action pending arbitration upon application of any party when the court is "satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration[.]" In making this determination, courts must be mindful that because arbitration is a matter of contract, it is only appropriate when parties have agreed to submit their disputes to arbitration. *Academy of*

Medicine of Cincinnati v. Aetna Health, Inc., 108 Ohio St.3d 488, 2006-Ohio-657, ¶ 11. "An arbitration clause in a contract is generally viewed as an expression that the parties agree to arbitrate disagreements within the scope of the arbitration clause, and, with limited exceptions, an arbitration clause is to be upheld just as any other provision in a contract should be respected." *Id*. at ¶ 16, quoting *Williams v. Aetna Fin. Co*., 83 Ohio St.3d 464, 471(1998).

{¶6} Arbitration agreements are, therefore, enforceable unless there are grounds at law or in equity for revocation. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, ¶ 19, citing R.C. 2711.01(A). "[T]o defeat a motion under R.C. 2711.02 for a stay of litigation a party must demonstrate that the arbitration provision itself, and not merely the contract in general, is unenforceable." *Norman v. Schumacher Homes of Circleville, Inc*., 4th Dist. Ross No. 12CA3338, 2013-Ohio-2687, ¶ 16, citing *Taylor Building Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶ 41. Ambiguity is one such ground for revocation. *See Norman* at ¶ 17-24. In this respect, we are mindful that "[i]n construing any written instrument, the primary and paramount objective is to ascertain the intent of the parties." *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53 (1989). If a contract can be given a definite legal meaning, its terms are unambiguous, and courts must look solely to the contract language to determine the intentions of the parties. *Westfield Ins. Co. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 12. Because this issue is one of contract interpretation, our review is de novo. *Villas Di Tuscany Condominium Assn., Inc. v. Villas Di Tuscany*, 7th Dist. Mahoning No. 12 MA 165, 2014-Ohio-776, ¶ 9. *Compare Benfield* at ¶ 35-37.

{¶7} Dr. Cook argues that the trial court should have found ambiguity in the arbitration clause in the contract pertaining to her relationship with Dr. Hill and Women's Professional Services because the contract also contains a forum selection clause. According to Dr. Cook, the

forum selection clause requires litigation of the same claims that the arbitration clause requires to be arbitrated. We disagree because this position does not reflect the plain language of the contract language, which is readily susceptible to a clear and definite meaning.

{¶8} Section 13.5 of the contract sets forth the parties' intent regarding arbitration. It provides, in part:

> Arbitration. Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which rest with a court of competent jurisdiction in the State of Ohio, *any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County*, in accordance with the rules and procedures of alternative dispute resolution and arbitration established by the Alternative Dispute Resolution Service of the American Health Lawyers Association, and judgment upon any award rendered may be entered in any court having jurisdiction thereof.

(Emphasis added.) According to the plain language of this clause, all claims arising from or related to the contract must be arbitrated except for those involving disclosure of confidential information or trade secrets, as described in Article VIII, and those involving violations of the covenant not to compete described in Article IX. This language constitutes a broad arbitration clause, which must be enforced unless "'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Alexander v. Wells Fargo Financial Ohio 1, Inc.*, 122 Ohio St.3d 341, 2009-Ohio-2962, ¶ 13, quoting *Aetna Health* at ¶ 14.

{¶9} Forum selection clauses set forth the parties' agreement with respect to the proper forum in the event that an action is brought on a contract. *See Stewart Org. Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988). Section 13.4 sets forth the parties' intent with respect to forum selection:

> Governing Law and Venue: This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Ohio. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the

> courts, state or federal, within the State of Ohio, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereto hereby consent to venue in any state or federal court within the State of [*sic*] having jurisdiction over the County for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement.

The plain language of the forum selection clause defines the venue in which claims arising under the contract must be brought. It does not require that claims otherwise subject to arbitration must instead be brought in the courts. It does require that if a claim is brought in court, that it is brought in the State of Ohio. At least three implications follow. Claims excepted from the arbitration clause must be litigated in the State of Ohio. In the event that the parties do not agree regarding arbitration or a party otherwise brings a claim on a matter that falls within the parameters of the arbitration clause, that claim must also be brought in the courts of State of Ohio, which may then apply the appropriate procedure to refer the matter to arbitration. Finally, proceedings to enforce, vacate, or modify an arbitration award must be brought in a forum identified by the agreement.

{¶10} The arbitration clause and forum selection clause do not conflict because arbitration and litigation are not mutually exclusive. When considering an argument similar to Dr. Cook's, another court has reasoned:

> [L]itigation and arbitration are not mutually exclusive exercises. A case that proceeds to arbitration may nevertheless require that a court enter a judgment pursuant to the arbitral award. Also, as is evident in this very matter, it is the province of the Courts to initially determine arbitrability. Additionally, following arbitration, a party may initiate litigation to request that a court vacate an arbitration award. Finally, the actual arbitration clause in the [contract] also eviscerates Plaintiffs' argument. The clause specifically provides that certain disputes shall not be subject to binding arbitration and may instead be resolved through litigation. Thus, the clauses at issue neither conflict nor are inconsistent, but are instead perfectly harmonious.

(Internal citations omitted.) *Higman Marine Services, Inc. v. BP Amoco Chem. Co.*, 114 F.Supp.2d 593, 596-597 (S.D.Texas 2000). *See also ChampionsWorld, LLC v. U.S. Soccer Fedn., Inc.*, 487 F.Supp.2d 980, 988-989 (N.D.Ill.2007) ("Courts have held that forum selection clauses are not inherently inconsistent with arbitration agreements, since arbitration awards are not self-enforcing, and the parties may have merely intended to prescribe the method of judicial enforcement of arbitration.").

{¶11} Because the forum selection and arbitration clauses of Sections 13.4 and 13.5 do not conflict, there is no ambiguity with respect to the arbitration clause. The trial court did not err by staying the proceedings and referring Dr. Cook's claims against Dr. Hill and Women's Professional Services to arbitration, and Dr. Cook's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED IN GRANTING THE MOTION AND MEMORANDUM TO STAY TRIAL OF DEFENDANT –APPELLEE COMMUNITY HEALTH PARTNERS REGIONAL MEDICAL CENTER D/B/A MERCY REGIONAL MEDICAL CENTER.

{¶12} Dr. Cook's second assignment of error is that the trial court erred in staying the proceedings pending arbitration when Mercy waived its right to arbitration through undue delay. We disagree.

{¶13} When a plaintiff waives arbitration by initiating suit, a defendant may invoke an arbitration clause by seeking enforcement through a motion to stay pending arbitration under R.C. 2711.02. *Mills v. Jaguar-Cleveland Motors, Inc.*, 69 Ohio App.2d 111, 113 (8th Dist.1980). "Failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver." *Id. See also Jones v. Honchell*, 14 Ohio App.3d 120 (12th Dist.1984) (defendant that answered without referencing contractual arbitration, failed to move for a stay under R.C. 2711.02, and participated in court-ordered nonbinding arbitration waived the right to

binding arbitration pursuant to contract). An untimely motion to stay, as determined by the totality of the circumstances, also constitutes a waiver. *Harsco Corp. v. Crane Carrier Co.*, 122 Ohio App.3d 406, 414 (3d.Dist.1997). The fundamental question is whether the party in question acted inconsistently with the right to arbitrate. *Id.* In answering this question, courts consider:

> (1) whether the party seeking arbitration invoked the court's jurisdiction by filing a complaint or claim without first requesting a stay, (2) the delay, if any, by the party seeking arbitration to request a stay, (3) the extent to which the party seeking arbitration has participated in the litigation, and (4) whether prior inconsistent acts by the party seeking arbitration would prejudice the nonmoving party.

Morris v. Morris, 189 Ohio App.3d 608, 2010-Ohio-4750, ¶ 18 (10th Dist.). We review this determination for an abuse of discretion. *Id*. at ¶ 17.

{¶14} In this case, Mercy did not file any claims that would indicate waiver of the right to arbitration. Mercy participated in the litigation in only a limited extent: by removing the case to federal court based on Dr. Cook's ADEA claim, moving to dismiss under Fed.R.Civ.P. 12(B)(6), and moving to dismiss the amended complaint upon remand to the court of common pleas. Mercy did not participate in discovery, and the matter did not advance beyond initial responsive pleadings. As such, Mercy's delay in moving for a stay under R.C. 2711.02 was minimal. Indeed, the total length of time this case was pending in the trial court was only around five months, including the time attributable to the removal to federal court and the remand occasioned by the amended complaint. Finally, Dr. Cook has not pointed to any evidence demonstrating that she was prejudiced by prior acts by Mercy that were inconsistent with asserting its right to arbitration, and the record is similarly silent on this factor.

{¶15} Under these circumstances, we cannot conclude that Mercy waived its right to arbitration, and the trial court did not abuse its discretion by granting Mercy's motion to stay under R.C. 2711.02.

{¶16} Dr. Cook's second assignment of error is overruled.

III.

{¶17} Dr. Cook's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR.

APPEARANCES:

GARY COOK and MICHAEL ATEN, Attorneys at Law, for Appellant.

AMY L. DELUCA, Attorney at Law, for Appellee.

THOMAS J. WIENCEK, Attorney at Law, for Appellee.