IN THE SUPREME COURT OF THE STATE OF NEVADA

MIKOHN GAMING CORPORATION, A NEVADA CORPORATION,
Appellant,
vs.
CHARLES H. MCCREA, JR.,
Respondent.

No. 41822

FILED

DEC 30 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from an order denying in part a motion to compel arbitration. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellant Mikohn Gaming Corporation supplies gaming equipment to casinos. As such, it is required to be licensed by gaming regulatory agencies. Respondent Charles H. McCrea, Jr. was employed as Mikohn's general counsel, vice president, and secretary. McCrea was so employed until March 2003, when Mikohn terminated his employment.

At the commencement of his employment, McCrea and Mikohn entered into an employment agreement containing an arbitration clause. Section 15(d) of the employment agreement was entitled "Arbitration" and states:

> Other than disputes concerning Sections 7 through 13 of this Agreement, any controversy between MIKOHN and Employee involving the construction, application, enforceability or breach of any of the terms, provisions, or conditions of this Agreement, including without limitation claims for breach of contract, violation of public policy, breach of implied covenant, intentional infliction of emotional distress or any other alleged claims which are not settled by mutual agreement of the parties, shall be submitted to final and

> binding arbitration in accordance with the rules of the American Arbitration Association. The cost of arbitration shall be borne by the losing party. In consideration of each party's agreement to submit to arbitration any and all disputes that arise under this Agreement (except disputes involving Sections 7 through 13), each party agrees that the arbitration provisions of this Agreement shall constitute his/its exclusive remedy and each party expressly waives the right to pursue redress of any kind in any other forum. The parties further agree that the arbitrator acting hereunder shall not be empowered to add to, subtract from, delete or in any other way modify the terms of this Agreement.

"Disputes involving Sections 7 through 13" of the Employment Agreement, i.e., those disputes exempted from arbitration, are those that involve covenants of confidentiality (Section 7), non-disclosure (Section 8), non-solicitation (Section 9), non-disparagement (Section 10), cooperation (Section 11), and against competition (Section 12).

In addition to the employment agreement, Mikohn and McCrea executed a separate indemnification agreement that contains no arbitration clause. The indemnification agreement is not integrated or incorporated into the employment agreement. In general, this agreement provides that McCrea will be indemnified for any cost or loss resulting from any claim against him arising from his official capacity as an officer or employee of Mikohn. The indemnification agreement also contains a section entitled "Right of Indemnitee to Bring Suit," which lists scenarios under which an Indemnitee may bring a suit against the company. These scenarios include: seeking an initial determination by a court as to the permissibility of indemnification under applicable law, seeking to

recover an unpaid claim for advanced expenses, and seeking to enforce a right to indemnification.

Finally, McCrea was entitled to purchase Mikhon stock as a part of his employment agreement. McCrea exercised his stock options and signed promissory notes payable to Mikhon for the price of the stock. The promissory notes were secured by the stock and did not contain an arbitration provision.

Based on McCrea's pleadings, the underlying causes of action relate to an investigation of Mikohn by the Michigan Gaming Control Board ("MGCB"). Agents of the MGCB, who were investigating Mikohn's suitability to renew its gaming-related supplier's license in Michigan, interviewed McCrea. During the interview, the MGCB agents apparently made accusations of gaming violations to McCrea. McCrea then informed the Board of Directors of the accusations, some of which apparently related to him. On or about February 16, 2003, Mikohn advised McCrea that he was to be considered on administrative leave pending the conclusion of an investigation by the Audit Committee of the Mikohn Board of Directors (the "Audit Committee") into accusations that had been made against McCrea. McCrea assumed the accusations involved the MGCB investigation.

On or about February 20, 2003, McCrea provided the Audit Committee with a detailed memorandum addressing the accusations made against him by the MGCB agents. According to McCrea, Mikohn promised McCrea that once it received a letter from the MGCB staff regarding the results of its investigation, McCrea would be notified of any allegations or accusations of wrongdoing on his part and receive the opportunity to present evidence exonerating him from such wrongdoing.

In his pleadings, McCrea asserts that, on or about March 4, 2003, the Audit Committee met to consider the MGCB accusations against McCrea and Mikohn. McCrea alleges that the Audit Committee determined that the accusations were false, not supported by credible evidence, or did not involve wrongdoing on the part of McCrea. McCrea claims that the next day, Mikohn notified McCrea that the Audit Committee found that he had done nothing illegal, unethical, or improper, and that no basis existed for taking punitive action against him.

McCrea also contends that he was advised that the MGCB staff would be sending a letter to Mikohn on March 14, 2003, regarding the results of its investigation. McCrea alleges he requested that Mikohn immediately advise the MGCB staff of the Audit Committee's conclusion that McCrea had done nothing illegal or unethical. McCrea asserts that Mikohn refused or failed to inform the MGCB staff of Mikohn's internal findings. McCrea also claims that on or about March 12, 2003, McCrea notified Mikohn that he would demand indemnification under the terms of the indemnification agreement.

Mikohn denied all of McCrea's allegations.

On March 13, 2003, Mikohn gave written notice to McCrea that the employment agreement would be terminated effective March 14, 2003. The same day, Mikohn filed a complaint in district court against McCrea for breach of the promissory notes that McCrea signed in exchange for stock in the company.

On or about April 7, 2003, McCrea filed a verified answer and counterclaim containing the above allegations. In his counterclaim, McCrea asserted seven causes of action against Mikohn:

(1) Breach of contract (indemnification agreement);

(2) Breach of the covenant of good faith and fair dealing (indemnification agreement);

(3) Defamation;

(4) Breach of fiduciary duty;

(5) Intentional infliction of emotional distress;

(6) Breach of contract (employment agreement); and

(7) Breach of the covenant of good faith and fair dealing (employment agreement).

McCrea sought, as damages for both the breach of the employment agreement and the indemnification agreement, lost severance benefits in the amount of $1,469,000, an unpaid bonus in the amount of $67,000, and the loss of 246,000 stock options.

On or about April 28, 2003, Mikohn filed a motion to dismiss and/or motion for summary judgment as to the counterclaims and/or to compel arbitration of the counterclaims. Mikohn argued that because McCrea's counterclaim asserted causes of action that arose from his employment with Mikohn, the employment agreement's arbitration clause governed and was enforceable under both federal and Nevada law.

On or about May 12, 2003, McCrea filed an opposition to Mikohn's motion to dismiss and/or motion for summary judgment as to the counterclaim and/or to compel arbitration. He opposed arbitration on several grounds. First, McCrea argued that many of his counterclaim's causes of action were premised on the separate indemnification agreement, which contained no arbitration provision and authorized court action to enforce its terms if necessary. Second, McCrea argued that the arbitration provision contained in the employment agreement was

unenforceable either as an adhesion contract or as an unconscionable provision.

On or about July 1, 2003, the district court issued an order denying Mikohn's motion to dismiss and/or for summary judgment, but granting in part Mikohn's motion to compel arbitration. Specifically, the district court granted the motion on McCrea's sixth and seventh causes of action because those claims arose from the parties' employment agreement.[1] The motion was denied as to the first, second, third, fourth, and fifth causes of action because those claims arose from the parties' indemnification agreement, which was not subject to any arbitration provision. Accordingly, the court ruled that the first through fifth causes of action should proceed in the judicial forum, while the sixth and seventh causes of action should proceed in the arbitral forum pursuant to the terms of the parties' employment agreement.

Mikohn appealed the district court's order on July 24, 2003, and subsequently moved in this court to stay all proceedings on September 10, 2003. We issued a temporary stay on October 14, 2003. McCrea filed a motion to lift the temporary stay on December 3, 2003. On May 12, 2004, we denied McCrea's motion and granted Mikohn's motion to extend the stay for the duration of its appeal.[2] McCrea could not cross-appeal as NRAP 3A(b) and NRS 38.247 do not provide for a right of appeal from an order compelling arbitration. McCrea did not file a writ petition

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[1]Although not contained in the order granting the motion to compel in part, the district court must have rejected McCrea's claims of adhesion and unconscionability in order to enforce the arbitration provision.

[2]See Mikohn Gaming Corp. v. McCrea, 120 Nev. ___, 89 P.3d 36 (2004).

challenging the district court's order compelling arbitration on the sixth and seventh causes of action.[3] Thus, we do not reach any issues concerning that portion of the order and the arguments in McCrea's briefs regarding the enforceability of the arbitration provision.

Mikohn argues that all five of McCrea's claims that the district court excluded from arbitration must be arbitrated because they are all employment-related and, therefore, governed by the employment agreement's arbitration clause rather than the indemnification agreement. Mikohn points to the fact that the counterclaim seeks the same damages for breach of the employment agreement as for breach of the indemnification agreement. Mikohn argues that McCrea is seeking to avoid arbitration by bootstrapping his employment damages onto his indemnification claim.

McCrea contends that the district court correctly ruled that the five claims arose from the indemnification agreement, which specifically authorizes court action and does not contain an arbitration clause. McCrea asserts that the employment and indemnification agreements are separate contracts addressing separate subject matter and do not reference, incorporate, or modify each other. McCrea also argues that Mikohn should be estopped from its attempt to restrict McCrea to the arbitral forum because Mikohn, itself, initiated court action against McCrea on two promissory notes.

"[A]rbitrability is usually a question of contractual construction. Contractual construction is a question of law and this court

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[3]See Kindred v. District Court, 116 Nev. 405, 996 P.2d 903 (2000).

can conduct its own independent review of such issues."[4] "Thus, the reviewing court is obligated to make its own independent determination on this issue, and should not defer to the district court's determination."[5]

Generally, in judging the scope of an arbitration agreement, this court "'resolve[s] all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration.'"[6] "[A]rbitration clauses are to be construed liberally in favor of arbitration."[7]

"In trying to determine the scope of arbitration provisions, courts have distinguished between 'narrow' and 'broad' arbitration clauses. Broad clauses purport to refer to arbitration all disputes arising out of a contract, while narrow clauses limit arbitration to a specific type of dispute."[8]

"[C]ourts should order arbitration of particular grievances 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"[9] "Moreover, the U.S. Supreme Court has stated that, in cases involving

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[4]Phillips v. Parker, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990).

[5]Clark Co. Public Employees v. Pearson, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990).

[6]Kindred, 116 Nev. at 411, 996 P.2d at 907 (quoting Int'l Assoc. Firefighters v. City of Las Vegas, 104 Nev. 615, 618, 764 P.2d 478, 480 (1988)).

[7]Phillips, 106 Nev. at 417, 794 P.2d at 718.

[8]McDonnel Douglas Finance Corp. v. Pennsylvania Power and Light Co., 858 F.2d 825, 832 (2nd Cir. 1988).

[9]Clark Co. Public Employees v. Pearson, 106 Nev. 587, 591, 798 P.2d 136, 138 (1990) (quoting Firefighters, 104 Nev. at 620, 764 P.2d at 481).

broadly worded arbitration clauses, 'in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'"[10]

The court must bear in mind, however, that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed to submit."[11]

In this case, the arbitration clause of the employment agreement is broadly worded. Excluding any disputes involving the covenants described in Sections 7 through 13, the Section 15(d) arbitration clause will apply to:

> [A]ny controversy between MIKOHN and Employee involving the construction, application enforceability or breach of any of the terms, provisions, or conditions of this Agreement, including without limitation claims for breach of contract, violation of public policy, breach of implied covenant, intentional infliction of emotional distress or any other alleged claims which are not settled by mutual agreement of the parties.

The broad phrasing of the employment agreement's arbitration clause should be construed to cover all claims arising from the employment relationship. Thus, any damages or claims arising from McCrea's termination fall within the scope of the arbitration agreement, including his claims for lost severance benefits, unpaid bonuses and the loss of stock

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[10]Id. (quoting AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 650 (1986)).

[11]United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

options. To the extent that the district court's order denying arbitration on the breach of contract and breach of good faith and fair dealing claims arising out of the indemnification agreement could be read to permit litigation of these expenses, it is in error. However,we concur with the district court's ruling that the indemnification agreement is not subject to arbitration and the district court did not err in refusing to compel arbitration on the first and second causes of action.

Turning to McCrea's third cause of action for defamation, he alleges that "Mikohn misrepresented to third parties, including but not limited to agents of the MCGB that McCrea committed illegal and fraudulent acts," and these representations were defamatory.

In Loy v. Harter, the Texas Court of Appeals set out criteria for determining whether tort claims should be arbitrated.[12] That court considered whether the tort (1) could stand alone, (2) was a tort completely independent of the employment relationship, and (3) could be maintained without reference to the employment agreement.[13] In that case, the court found that a company's tort claim for breach of fiduciary duty against an employee, who was also a director of the company, should not be arbitrated under the employment agreement because the tort was committed in the employee's capacity as a director. The court ruled that the lower court was correct in denying arbitration.

The circumstances of this case are even more compelling, since McCrea alleges Mikohn made defamatory statements to agents of the MGCB, among other people, regarding alleged violations of Michigan's

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[12]128 S.W.3d 397 (Tex. App. 2004).

[13]Id. at 405.

gaming laws. Such statements would be outside of the employment context. Consequently, we conclude the district court did not err in refusing to compel arbitration on this claim.

McCrea's fourth claim for relief concerns breach of fiduciary duty. McCrea asserts that Mikohn breached this duty when it failed to "affirmatively assert positions and defenses to protect McCrea from false and/or unsupportable accusations by MGCB agents." McCrea claims that the indemnification agreement created a specialized relationship amounting to a fiduciary duty. We agree. We conclude that the district court did not err in finding that the fiduciary duty arose from the indemnification agreement, which contains no arbitration provision, and therefore, a cause of action alleging a breach of that duty is not subject to arbitration.

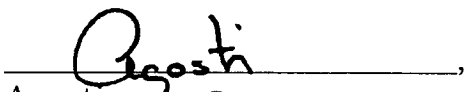
As to the fifth cause of action, intentional infliction of emotional distress, McCrea alleges that as a result of Mikohn's failure to indemnify him and contest the MGCB's allegation against him, his reputation in the gaming industry has been damaged because individuals will assume the MGCB allegations were true. Thus, McCrea contends that he has suffered emotional distress as a result of his damaged reputation that stems solely from the failure to indemnify. McCrea claims these damages arise, not from his termination, but from the spectre of the MGCB allegations and Mikohn's failure to defend him under the indemnity agreement.

If McCrea's claims regarding the indemnification agreement are true, they are not subject to the arbitration agreement, and the district court did not err in denying the motion to compel arbitration as to

intentional infliction of emotional distress arising from a breach of the indemnity agreement.

In summary, we conclude that the district court erred in denying arbitration on the lost severance benefits, unpaid bonuses, and loss of stock option damages. We affirm the district court's order in all other respects.[14] Accordingly we,

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



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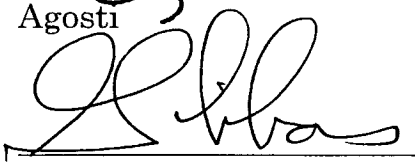

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cc: Hon. Kathy A. Hardcastle, District Judge
Littler Mendelson/Las Vegas
Campbell & Williams
Clark County Clerk

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[14]Mikohn also asserts that all matters should proceed in arbitration so as to avoid the costs and inconvenience of litigating in two forums. We find this argument to be without merit. The parties may avoid such problems by stipulating to one forum. Additionally, the arbitrator or district court have the discretion to stay the proceedings in one forum until the actions have concluded in the second forum.

BECKER, J., concurring in part and dissenting in part:

I concur with the majority's conclusions as to the defamation cause of action and the indemnity agreement claims. I dissent from those portions of the order that deal with the breach of fiduciary duty and intentional infliction of emotional distress claims.

As to the breach of fiduciary duty, while it is true that McCrea states that this duty came "[a]s a result of the specialized element of reliance created by these circumstances" he also alleges that the duty arises from "the special employment relationship that existed between Mikohn and McCrea." Because the duty stems from the employment relationship, by McCrea's own words, I conclude that this cause of action is not completely independent of the employment agreement and the arbitration clause and is therefore subject to arbitration.

Finally, with respect to the claims for intentional infliction of emotional distress, this is a cause of action specifically designated by the employment agreement as subject to arbitration and I cannot agree that the emotional distress relating to the termination can be severed from the emotional distress that stems from the failure to indemnify.

Becker, J.

Becker