

Case No.: 20110050
District Court No. 41-08-C-00061
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

James Valley Grain, LLC
Plaintiff/Appellee

v.

Loren David
Defendant/Appellant

APPEAL FROM THE JUDGMENT
OF THE SARGENT COUNTY DISTRICT COURT
DATED DECEMBER 15, 2010
THE HONORABLE DANIEL NARUM

REPLY BRIEF OF THE APPELLANT

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¶1

Argument

¶2 A. **The District Court's interpretation of the Contracts was appealed the pursuant to the final judgment entered on December 15, 2010, and the interpretation is reviewed.**

¶3 James Valley Grain, LLC (JVG) stated that Loren David (David) appealed the district court's confirmation of James Valley's arbitration award. To the contrary David appealed the final judgment entered in the case on December 15, 2010, in addition to the Memorandum Opinion confirming the arbitration award. Appellant's Appendix (Appx.) P156. Specifically, David appealed the court's interpretation of the contracts finding a valid arbitration agreement existed and if the arbitration panel properly applied the law and the NGFA Rules. The first issue of whether the court erred in finding a valid arbitration agreement existed is appealed pursuant to the final judgment and is not related to the District Court's Memorandum Opinion dated December 10, 2010, wherein it confirmed the arbitration award entered in favor of JVG and against David. The issue of whether a valid arbitration agreement existed was initially raised in front of the district court when JVG moved to compel David to arbitrate. David raised the issue that there was not a valid arbitration agreement in the contracts in his Memorandum in Opposition to Plaintiff's Motion to Compel Arbitration and Stay District Court Proceedings. Docket No. 11. David subsequently raised the issue again in his Brief in Opposition to Confirming Arbitration Award. Appx. P 51.

¶4 James Valley noted in its response brief that David did not appeal the District Court's December 17, 2008 order compelling arbitration. Brief of Appellee at ¶ 7. An

order compelling arbitration is not an appealable order, only an order denying a motion to compel arbitration is an appealable order. N.D.C.C. § 32-29.3-28(1)(a); Superpumper, Inc. v. Nerland Oil, Inc., 1998 ND 144, ¶23, 585 N.W.2d 657, 652 (“[A]n order compelling arbitration in an embedded proceeding is not appealable); see State ex rel. Stenehjem v. Philip Morris, Inc., 2007 ND 90, ¶13, 732 N.W.2d 720, 726 (applying the de novo standard of review to an appeal from the denial of a motion to compel arbitration). Interlocutory orders and memorandum opinions are generally not appealable, but nonappealable interlocutory orders are reviewable in an appeal from a final judgment. Lund v. Lund, 2011 ND 53, ¶5, 795 N.W.2d 318, 320.

¶5 The appeal on the issue of whether the contracts entered into between JVG and David on July 2, 2007, and July 9, 2007 (The Contracts) required the parties to arbitrate was taken from the Judgment entered under N.D.C.C. § 32-29.3-28(1)(f), not from the District Court’s Memorandum Opinion confirming the arbitration award under N.D.C.C. § 32-29.3-28(1)(c) as asserted by JVG. The lower court erred in interpreting the contracts in finding The Contracts required the parties to arbitrate the proceedings. Appx. P 144. David argued in his Memorandum in Opposition to Plaintiff’s Motion to Compel Arbitration The Contracts did not contain an arbitration clause. Docket No. 11, P 2-5. The interpretation of the contracts between JVG and Loren David is a question of law for this Court to review de novo. Ir. Oil & Gas, Inc. v. Riemer, 2011 ND 22, ¶11, 794 N.W. 2d 715, 718; AT&T Technologies Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1985) (“Whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the

Court on the basis of the contract entered into by the parties.”); West Fargo Public School District No. 6 of Cass County v. West Fargo Education Association, 259 N.W.2d 612, 618 (N.D. 1977) (“Arbitration is a matter of contract and [sic] a party is contractually bound to arbitrate only those disputes which they have agreed to arbitrate.”); Churchill Envtl. & Indus. Equity v. Ernst & Young, L.L.P., 643 N.W.2d 333, 335 (Minn. App. 2002)(Whether or not a party has agreed to arbitrate a particular dispute is a matter of contract interpretation, which an appellate court reviews de novo); Hudson v. ConAgra Poultry Co., 484 F.3d 496, 499 (8th Cir. 2007)(reviewing a district court’s interpretation of a contractual arbitration provision de novo where the district court compelled arbitration of tort claim); ITT Hartford Life & Annuity Ins. Co. v. Amerishare Investors, 133 F.3d 664, 668 (8th Cir. 1998)(“We examine arbitration agreements in the same light we examine any other contractual agreement.”). When deciding whether the parties agreed to arbitrate a certain matter courts generally should apply ordinary state-law principles that govern the formation of contracts. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). James Valley conceded that the determination that the parties agreed to arbitrate is subject to de novo review. Brief of Appellee at ¶18 n. 3 (citing Lenthe Invs., Inc. v. Serv. Oil, Inc., 2001 ND 87, ¶14, 636 N.W.2d 189, 193). The issue of whether The Contracts required JVG and David to arbitrate the dispute was raised in the briefs on the Motion to Compel Arbitration. The interpretation of The Contracts finding the parties were required to arbitrate is subject to de novo review by this court.

¶6 B. **JVG stipulated to David having additional time to respond to its Motion to Confirm Arbitration Award, and the District Court Ordered the time to respond extended.**

¶7 JVG stipulated to allowing David additional time to respond to the Motion to Confirm the Arbitration Award. Appx. P 50. The stipulation, signed by the parties on September 21, 2010, permitted an additional 7 days for David to file and serve its response. Id. The district court signed an Order to Extend Time to Respond to Motion to Confirm Arbitration Award. Appx. P 143. The brief was served on September 28, 2011, and sent the same day to the Sargent County Clerk's office for filing. Docket No. 29. The brief was timely served and filed pursuant to the agreement between the parties. Service is complete upon mailing. N.D.R.Civ.P. 5 (b)(2)(C). The merits of the Brief in Opposition to Confirming Arbitration Award argued the award should be vacated on the grounds the panel refused to consider uncontroverted evidence material to the controversy and there was no agreement to arbitrate under N.D.C.C. § 32-29.3-23: "Loren David asks this Court to vacate the arbitration award made in the NGFA Arbitration proceeding because the panel refused to consider uncontroverted evidence material to the controversy and because there was no agreement to arbitrate between the parties." Appx. P 54. Pleadings must be construed so as to do justice. N.D.R.Civ.P. 8(f). Where pleading sets forth a claim and makes a demand for judgment for the relief to which the pleader deems himself entitled, the granting of relief ought to be considered even though such pleader misnames his pleading. Stearns v. Twin Butte Pub. Sch. Dist. No. 1, 185 N.W.2d 641, 645 (N.D. 1971).

¶8 After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award unless the award is vacated pursuant to N.D.C.C. § 32-29.3-22. The award cannot be confirmed if the award is ordered vacated. Id. David argued the award could not be confirmed because it should be vacated, “David opposes this motion and asks the Court to vacate the arbitration panel’s award.” Appx. P 54. The parties all stipulated that David would have an additional 7 days to challenge the Motion to Confirm the Arbitration Award. Appx. P 50. This Stipulation was approved in an Order signed by Judge Narum. Appx. P 143. The Brief in Opposition to Confirming Arbitration Award was served on September 28, 2010. Docket No. 29. This court has held that the failure to timely object or seek review to vacate, modify or correct an arbitration award bars a defense on the merits in a confirmation proceeding. MBNA America Bank, N.A. v. Hart, 2006 N.D. 33, ¶9, 710 N.W.2d 125, 128. Here, David timely objected and sought review to vacate the arbitration award with the approval of JVG and the district court. Appx. P 50, 51, 143. This was not a case where David alleged defenses in opposition to the motion to confirm, in its Brief in Opposition to Confirming Arbitration Award, David affirmatively asked the court to vacate the arbitration award. Contra Cullen v. Paine, Webber, Jackson & Curtis, Inc., 863 F.2d 851, 854 (11th Cir. 1989).

¶9 The court improperly found that David failed to move the court to vacate the arbitration award, but still issued an opinion on the merits of the claims. Appx. P 145. If the reasoning of JVG were to be followed, there would be no reason to respond to a motion to confirm an arbitration award, nor a reason for JVG to grant an extension or

the district court to sign an Order to Extend time to Respond to Motion to Confirm Arbitration Award. Certainly, a request for an extension to respond to the motion would not have even needed to be made because there would be no reason to object because it could not have been considered by the court. Here, the parties and the district court were all in agreement that David would have additional time to respond to the Motion to Confirm Arbitration Award. Appx. P 50, 143.

¶10 The Notice of Motion and Motion to Confirm Arbitration Award was served on August 31, 2010 under Rule of Court 3.2 Motion, which permits 10 days to serve and file an answer brief. As was stated in the Motion Hearing held on October 28, 2010, where the Court heard oral arguments regarding the Motion to Confirm Arbitration Award, counsel for David had not been retained by the time the 10 days were expired. Transcript P 8. The purpose of seeking the extension was to have an extension of the 90 day period, in order to properly respond to the Motion to Confirm the Arbitration Award. Id.

¶11 **Conclusion**

¶12 The Contracts are subject to the de novo review of this Court. David respectfully asks this court to find the district court erred in interpreting The Contracts and reverse the Judgment of the District Court and remand the case to find The Contracts did not require the parties to arbitrate and the case be tried in district court. David also respectfully asks this court to find that David timely objected to and sought review to vacate the arbitration award upon the stipulation and JVG and the Order of the district court.

Dated this 1 June 2011.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Defendant/Appellant in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 1743.

Dated this 1 June 2011.

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I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** was on the 1 June 2011, e-mailed to the following:

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