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No. 1-10-1709

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

DIANA SHEFFER,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 09 CH 37165
)	
CHICAGO TEACHERS UNION and MARILYN)	Honorable
STEWART, individually,)	Mary Anne Mason,
)	Judge Presiding.
Defendants-Appellees.)	

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon concurred in the judgment.

ORDER

Held: The trial court's order compelling arbitration is reversed. The employment contract's language stating that a discharged employee "shall be entitled" to a hearing before an arbitrator, is not a mandatory arbitration provision.

Plaintiff, Diana Sheffer, appeals an order of the circuit court of Cook County granting a motion to compel arbitration filed by defendants, Chicago Teachers Union (CTU) and Marilyn Stewart (collectively, defendants). For the reasons that follow, we reverse the order and remand

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this case to the circuit court for further proceedings.

I. BACKGROUND

Plaintiff was an employee of CTU and had an employment contract for the period from July 1, 2007 through June 30, 2008. On February 1, 2008, plaintiff was discharged for cause by CTU's president, defendant Marilyn Stewart. On October 2, 2009, plaintiff filed a five-count verified complaint in the circuit court of Cook County. Only the first two counts are at issue in this appeal. Count I alleged breach of employment contract against CTU. Count II alleged violations of the Illinois Wage Payment and Collection Act against CTU and Stewart.

On December 3, 2009, defendants filed a motion to compel arbitration and stay proceedings. Defendants relied on the following provision in the employment agreement:

“XI. DISCHARGE FOR CAUSE The Employee shall be dismissed only for cause related to his/her performance of the duties of his/her position. The Employee shall be entitled to a hearing by an impartial arbitrator selected pursuant to the rules of the American Arbitration Association. The hearing shall be conducted pursuant to the rules and procedures of the American Arbitration Association. ***
The decision of the arbitrator shall be final and binding. The cost of the arbitration shall be borne by the Union.”

On May 21, 2010, after full briefing and a hearing, the trial court granted defendants' motion to compel arbitration and dismissed Counts I and II. On July 8, 2010, plaintiff filed the instant interlocutory appeal. On July 9, 2010, the circuit court entered an order staying the remaining proceedings pending this appeal.

II. ANALYSIS

A. Standard of Review

When reviewing a trial court's order compelling arbitration, the only question before us is whether there was a sufficient showing to sustain the trial court's order. *Royal Indemnity Co. v. Chicago Hospital Risk Pooling Program*, 372 Ill. App. 3d 104, 107 (2007). Where the trial court does not hold an evidentiary hearing or make any factual findings and its decision to compel arbitration was based on a "purely legal analysis," the *de novo* standard of review applies. *Id.* The instant case involves interpretation of contractual language which is a "purely legal analysis." Thus, our review is *de novo*.

B. Illinois' Public Policy

Illinois public policy favors arbitration as well as consistency with other states in the enforcement and interpretation of arbitration agreements. *Reed v. Doctor's Associates, Inc.*, 331 Ill. App. 3d 618, 622 (2002). The Illinois Uniform Arbitration Act (710 ILCS 5/1 *et seq.* (West 1998) is an adoption of the Uniform Arbitration Act with minor modifications. *Heider v. Knautz*, 396 Ill. App. 3d 553, 558 (2009). The Uniform Arbitration Act and the Federal Arbitration Act (9 U.S.C. §§1 *et seq.* (1976)) share a common origin. *J & K Cement Const., Inc. v. Montalbano Builders, Inc.*, 119 Ill. App.3d 663, 668 (1983). Thus, "courts interpreting state arbitration statutes patterned after the Uniform Arbitration Act look for guidance to federal court decisions interpreting similar provision of the Federal Arbitration Act." *Id.*

C. General Contract Principles Applicable to Arbitration Agreements

Although "arbitration is a favored method of dispute resolution, our supreme court has

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consistently cautioned that an agreement to arbitrate is a matter of contract, and the parties to an agreement are bound to arbitrate only those issues they have agreed to arbitrate, as shown by the clear language of the agreement and their intentions expressed in that language.” *Royal Indemnity Co.*, 372 Ill. App. 3d at 110, citing *Salsitz v. Kreiss*, 198 Ill. 2d 1, 13 (2001). The presumption in favor of arbitration only attaches after an enforceable arbitration clause exists. *Adamovic v. Metme Corporation*, 961 F. 2d 652, 654 (7th Cir. 1992)). Unless a party has entered into a valid, enforceable contract to arbitrate, waiving her right to a judicial forum, there can be no forced arbitration. *Vassilkovska v. Woodfield Nissan, Inc.*, 358 Ill. App. 3d 20, 25 (2005); *Bess v. DirecTV, Inc.*, 351 Ill. App. 3d 1148, 1152 (2004).

There is a distinction between the “existence” and “scope” of an arbitration agreement. See, e.g., *Leander Cut Stone Co., Inc. v. Brazos Masonry, Inc.*, 987 S.W.2d 638, 640 (Tex. App. 1999) (“When a court is called upon to determine whether a claim is subject to arbitration, the dispute can be bifurcated into two distinct issues: 1) does a valid arbitration agreement exist; and 2) if so, do the claims asserted fall within the scope of the agreement”); *Bell Atlantic Corp. v. CTC Communications Corp.*, 159 F.3d 1345 (C.A.2 N.Y. 1998) (issue of whether there is an agreement to arbitrate in the first place is a distinct issue from that of whether a particular dispute falls within the scope of an “already-established agreement” to arbitrate); *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 830-31 (2d Cir. 1988) (court must first “determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement”); and *Doran v. Bondy*, 2005 WL 1907252, 7 (W.D.Mich., 2005) (issue was not one of scope, *i.e.*, whether the claims there fell within the scope of the arbitration clause, but,

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rather, the issue was whether the arbitration clause was permissive or mandatory). Although courts interpreting arbitration clauses are often faced with the question of whether a particular dispute falls within the “scope” of an already-established arbitration agreement, the instant case involves the threshold issue of whether an agreement to arbitrate exists.

Ordinary state-law contract principles determine the existence of an arbitration agreement.

Bess, 351 Ill. App. 3d at 1152. A court's primary objective in construing a contract is to ascertain and give effect to the intent of the parties as expressed in the written agreement. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 455 (2009). “The cardinal rule of contract interpretation is to discern the parties' intent from the contract language.” *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308 (2008). Contractual language, unless ambiguous, should be given its plain and ordinary meaning. *Id.* A court should not change the terms of a contract to mandate arbitration when the parties have agreed to arbitration as an option only. *Mayflower Insurance Co. v. Mahan*, 180 Ill. App. 3d 213, 217 (1988).

D. There was No Agreement to Arbitrate in This Case

Applying these principles to the contract language here, we conclude there was no agreement to arbitrate. The plain and unambiguous contract language stating that the employee “shall be entitled” to a hearing by an impartial arbitrator provides plaintiff with the unilateral right to impose arbitration, a right that has been recognized by courts. See, e.g., *Raytheon Engineers & Constructors, Inc. v. SMS Schloemann-Siemag Akiengesellschaft*, 2000 WL 420866, 2 (N.D. Ill. 2000). Illinois courts, in other contexts, have held that the phrase “shall be entitled”

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confers a right and not an obligation. *Wilson v. Rountree*, 72 Ill. 570 (1874); *Dasher v. Bruno*, 5 Ill. App. 2d 500 (1955).

In *Wilson*, the Illinois Supreme Court held that the phrase “shall be entitled” was comparable to the phrase “may elect,” both of which conferred a mere “right of election” and not an “imperative duty.” *Wilson*, 72 Ill. at 572. The court explained that if the party “does not deem it necessary to *avail himself of his privilege* * * * no other person is injured or has a right to complain.” (Emphasis added.) *Id.*

In *Dasher v. Bruno*, 5 Ill. App. 2d 500 (1955), the defendant argued that a contractual provision was the plaintiff’s exclusive remedy, despite the fact that it used the phrase “shall be entitled.” The *Dasher* court disagreed, noting that the words “ ‘shall be entitled to,’ are words not of limitation or imposition [citations], but are words of right, privilege and power implying a choice. [Citations.]” *Dasher*, 5 Ill. App. 2d at 504-05. The court explained that the plaintiff “was granted the right to choose the remedy there provided or to reject it. The right was not given to the defendant. Plaintiff elected not to exercise this right but to enforce another. This was proper. [Citation.]” *Dasher*, 5 Ill. App. 2d at 505.

Although these cases are old and involved different subject matters, the logic applies equally to the instant case. The phrase “shall be entitled” confers a privilege and not a duty. The language here “[t]he Employee shall be entitled to a hearing by an impartial arbitrator” gives plaintiff a right of election, and not an obligation, to arbitrate her dispute. It does not deprive plaintiff of her access to the courts which she otherwise would have. As one court has explained: “The courts have been a forum for resolving contract disputes for centuries, and bringing a civil

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action is an option whether it is specifically provided for in [the] contract or not. An exception to this rule is if the parties explicitly foreclose taking their dispute to the courts.” *Raytheon Engineers & Constructors, Inc. v. SMS Schloemann-Siemag Akiengesellschaft*, 2000 WL 420866, 3 (N.D.Ill., 2000). Had defendants intended to deprive plaintiff of her access to a judicial forum, they could have included language making arbitration mandatory. Illinois court decisions contain examples of language determined to constitute a binding arbitration agreement rather than an optional alternative to litigation. See, e.g., *Peterson v. Residential Alternatives of Illinois, Inc.*, 402 Ill. App. 3d 240, 246 (2010) (Emphasis omitted.) (“Without limiting any rights set forth in other provisions of this agreement, any and all disputes arising hereunder shall be submitted to binding arbitration and not to a court for determination.”); *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 669 (1983) (“All claims, disputes and other matters in question arising out of, or relating to this Agreement, or the breach thereof, shall be decided by arbitration”) There is no similar language in the contract here that precludes the employee from seeking redress in the courts as an initial option. Despite Illinois’ public policy favoring arbitration, the motion to compel arbitration fails because there is no agreement to arbitrate.

E. Cases Cited By Defendants Are Distinguishable Because the Word “May” is Different than the Phrase “Shall Be Entitled”

Defendants argue that use of the permissive word “may” in an arbitration provision has been interpreted by courts as mandatory language that requires arbitration, and contend that “shall be entitled” should likewise be considered mandatory language. In support of their

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argument, defendants cite several cases that interpret the word “may” in an arbitration clause.

See, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904 (1985); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996); *American Italian Pasta Co. v. Austin Co.*, 914 F.2d 1103 (8th Cir.1990); *Ceres Marine Terminals, Inc. v. International Longshoremen's Ass'n*, 683 F.2d 242 (7th Cir.1982); *United Steel Workers of America v. Fort Pitt Steel Casting*, 598 F.2d 1273 (3d Cir. 1979); *Local 771, I.A.T.S.E., AFL-CIO v. RKO Geeral, Inc.*, 546 F.2d 1107 (2nd Cir.1977); *Bonnot v. Congress of Independent Unions, Local No. 14*, 331 F.2d 355 (8th Cir.1964); *Deaton Truck Line, Inc. v. Local Union 612*, 314 F.2d 418 (5th Cir.1962); *Hostmark Investors Ltd. v. Geac Enterprise Solutions, Inc.*, 2002 U.S. Dist LEXIS 13695 (N.D. Ill. July 19, 2002).

Other courts have interpreted the word “may” in an arbitration provision as permissive language that does not mandate arbitration. See e.g., *Teledyne Wisconsin Motor v. Local 283, UAW*, 530 F.2d 727, 732 (7th Cir. 1976) (contract providing that unresolved employee-instituted complaints “may” be referred to an arbitrator was “an employee-oriented permissive arbitration clause.”); *PCH Mutual Insurance Co., Inc. v. Casualty & Surety, Inc.*, 2010 WL 4627719 (D.D.C., 2010) (arbitration clause stating “any disputes concerning any aspect of this Agreement may be submitted to binding arbitration” and the prevailing party “shall be entitled to recover all costs incurred, including reasonable attorney's fees,” was ambiguous and could reasonably be interpreted as a permissive arbitration clause, coupled with a fee-shifting provision, thus contemplating the possibility of arbitration without mandating its use); *Group Hospitalization & Medical Services, Inc. v. Stubbs*, 1990 WL 183576, at 2 (D.D.C. Nov.16, 1990) (use of the word

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“may” in an arbitration clause between private parties “evinces the parties' intent not to be bound to invoke the arbitration machinery to settle their disputes”); *Employees Labor Ass'n of the Procter & Gamble Mfg. Co. v. Procter & Gamble Mfg. Co.*, 172 F. Supp. 210, 214 (D.C. Kan. 1959) (“[T]he arbitration clause of the agreement does not make mandatory the arbitration of any dispute concerning interpretation or application of the provisions. The clause says that any such grievance ‘may’ be submitted to arbitration [and does not say ‘the matter shall be arbitrated].”); *cf. Eurosteel Corporation v. M/V Millenium Falson*, 2002 WL 1972266 (N.D. Ill. 2002) (provision stating “Arbitration, if any, to be settled in Paris by Chambre Arbitrale Maritime” determined to mean only that the parties *could* arbitrate the dispute but were not required to do so).

Additionally, under Illinois law use of the word “may” in private contracts is interpreted as permissive and not mandatory. See *Crawford v. Northwestern Traveling Men's Ass'n.*, 226 Ill. 57, 64 (1907) (“the word ‘may’ is used in its ordinary sense, leaving it optional *** and not mandatory”); *Meyers v. Rockford Systems, Inc.*, 254 Ill. App. 3d 56, 65 (1993); *Professional Executive Center v. La Salle National Bank*, 211 Ill. App. 3d 368, 379 (1991); *Lukasik v. Riddell, Inc.*, 116 Ill. App. 3d 339, 345 (1983).

Thus, in different contractual contexts, the word “may” has been interpreted as both “mandatory” and “permissive.” But in no context, and in none of defendants’ cited cases, has the phrase “shall be entitled” been held to be mandatory language that requires arbitration. By contrast, the plain meaning of the term “shall be entitled” whether taken alone, in the context of the relevant provision, or considering the contract as a whole, can only be interpreted as a

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permissive term that does not mandate or require arbitration.

More importantly, in those cases where courts have interpreted the word “may” as mandatory language that requires the parties to arbitrate, the courts’ rationale has no application here. Courts have correctly noted that parties may always elect consensual arbitration without a contract provision. Thus, interpretation the word “may” as requiring only consensual arbitration would render the language meaningless and superfluous. There is no need to include an *already available* option, *i.e.*, that the parties *may* agree to arbitrate a dispute. Thus, the word must be interpreted as intending that arbitration be mandatory.

That analysis does not apply to the language here that states “[t]he Employee shall be entitled to a hearing.” First, the arbitration option is unilateral to the employee. Second, in the context of the contractual provision here, the employee-specific language combined with the entitlement language, grants a unilateral right to the employee to an arbitration at her employer, CTU’s expense. Unlike the situation in the cited cases, this was not an *already available* option and a permissive interpretation does not render the language meaningless or superfluous. Without that language, there is no right to arbitrate without the concurrence of the employer. Defendants’ interpretation – that the language here “requires” arbitration – renders meaningless and superfluous both the employee-specific language and the phrase “shall be entitled.” Defendants’ interpretation is not sound.

Defendants have raised additional unpersuasive arguments that we reject without discussion. In view of our determination that there was no agreement to arbitrate, we need not address plaintiff’s argument that defendant, Marilyn Stewart, as a non-signatory to the

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employment contract, could not compel arbitration of the dispute.

III. CONCLUSION

Based on the foregoing, we conclude there was not a sufficient showing to sustain the trial court's order compelling arbitration because the parties did not have an agreement to arbitrate. The plain meaning of the provision stating that the employee "shall be entitled" to a hearing before an arbitrator provides plaintiff with a unilateral right to elect arbitration and does not require her to submit her dispute to arbitration. We therefore reverse the judgment of the circuit court of Cook County and remand this case for further proceedings.

Reversed and remanded.