2017 IL App (2d) 170804-U
No. 2-17-0804
Order filed December 21, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Q RESTAURANT GROUP HOLDINGS, LLC,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 17-L-155
MICHAEL J. LAPIDUS,	)	Honorable Robert G. Kleeman
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* We hold that plaintiff, a limited liability company (LLC), is not a party to the operating agreement at issue, and, although section 15-5(f) of the Illinois Limited Liability Company Act (Act) (805 ILCS 180/15-5(f) (West 2017)) now binds LLCs to operating agreements, it was enacted after the operating agreement became effective and does not apply retroactively to bind plaintiff to the operating agreement's mandatory arbitration provision. Accordingly, the trial court properly denied defendant's section 2-619 motion to dismiss plaintiff's complaint on the basis that plaintiff was not a party to the operating agreement. Affirm.

¶ 2 Plaintiff, Q Restaurant Group Holdings, LLC, filed a complaint against defendant, Michael J. Lapidus, alleging breach of fiduciary duty, unjust enrichment, and conversion. Defendant filed a motion to dismiss plaintiff's complaint pursuant to section 2-619 of the Code

of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)), alleging that plaintiff's operating agreement's mandatory arbitration provision applied. The trial court denied the motion, holding that plaintiff was not a party to the operating agreement. Defendant filed a notice of appeal pursuant to Supreme Court Rule 307(a)(1), allowing interlocutory appeals from an order denying a motion to compel arbitration. Ill. S.Ct. R. 307(a)(1) (eff. Nov. 1, 2016). We affirm.

¶ 3 I. FACTS

¶ 4 Plaintiff's complaint alleged the following. Plaintiff is the sole member of various subsidiary limited liability companies, each of which own and operates a "Q-BBQ" restaurant location. Defendant is a member of plaintiff and was the manager of each subsidiary restaurant. Defendant conducted the day-to-day operations for each restaurant, which included, *inter alia*, having primary responsibility for the handling of plaintiff's money; making hiring and firing decisions; purchasing supplies; administering books and records; dealing with plaintiff's employees and vendors; and using his best efforts to grow the profitability of the restaurants.

¶ 5 Plaintiff discovered defendant misappropriated funds, converted money to his own use, failed to accurately report money he took from plaintiff, and exposed plaintiff to liability by mistreating female employees and vendors. Based upon defendant's misconduct, plaintiff's members unanimously voted to terminate defendant. However, defendant continued to interfere with Q-BBQ operations, including but not limited to changing company passwords for social media accounts in an attempt to frustrate plaintiff's operations, engaging in frequent contact with plaintiff's employees during work hours, and interfering with their abilities to perform their Q-BBQ duties. Defendant also refused to return company property (including intellectual property) after termination, despite plaintiff's demands that he do so.

¶ 6 Plaintiff filed the instant complaint for breach of fiduciary duty, conversion, and unjust enrichment on February 9, 2017. Defendant initially sought dismissal pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)), which the trial court denied. Defendant then filed a section 2-619 motion to dismiss on the grounds that the operating agreement contains a provision requiring mandatory and binding arbitration of all disputes and the present dispute between the parties falls within its scope.

¶ 7 Plaintiff responded that it was not bound by the mandatory arbitration provision of the operating agreement because no individual signed on its behalf. In his reply, defendant argued that plaintiff ignored that, effective July 1, 2017, the legislature amended the Illinois Limited Liability Company Act (Act) (805 ILCS 180/15-5 (West 2016)), adding section 15-5(f) which now binds a limited liability company by an operating agreement, "whether or not the company itself manifested assent to the operating agreement." Plaintiff replied that the execution of the operating agreement in 2014, the accrual of the cause of action, and the filing of the complaint all occurred well prior to the July 2017 amendment to the Act; the legislature did not express its intent to retroactively apply the section, and to apply the new law to plaintiff would violate plaintiff's substantive rights and impose new duties on plaintiff with regard to already-completed transactions. Accordingly, plaintiff maintained that the amendment did not apply retroactively to the operating agreement that was signed in 2014, and, therefore, plaintiff was not bound by the terms of its mandatory arbitration provision.

¶ 8 The trial court agreed with plaintiff and denied defendant's motion to dismiss. This timely appeal follows.

¶ 9 II. ANALYSIS

¶ 10 Defendant contends that the trial court erred in dismissing the section 2-619 motion. Previously, we denied plaintiff's motion to dismiss this interlocutory appeal for lack of appellate jurisdiction. We denied the motion because defendant's section 2-619 motion to dismiss essentially was a motion to compel arbitration and stay the proceedings in the trial court as it was based entirely on the application of the operating agreement's mandatory arbitration provision. The standard of review of an order granting or denying a motion to compel arbitration is generally whether the trial court abused its discretion. *Watkins v. Mellon*, 2016 IL App (3d) 140570, ¶ 12; *Brooks v. Cigna Property & Casualty Companies*, 299 Ill. App. 3d 68, 71 (1998). However, where no evidentiary hearing is held on the motion, we will review the decision to deny or compel arbitration *de novo*. *Id*.; *La Hood v. Central Illinois Construction, Inc.*, 335 Ill. App. 3d 363, 364 (2002); *Federal Signal Corp. v. SLC Technologies, Inc.*, 318 Ill. App. 3d 1101, 1105-06 (2001). Moreover, the underlying facts are not in dispute, no evidentiary hearing was held, and the trial court determined, as a matter of law, that plaintiff was not bound to the terms of the operating agreement. Accordingly, our review is *de novo*. See *Trover v. 419 OCR, Inc.*, 397 Ill. App. 3d 403, 406-07 (2010) (If a trial court renders its decision without an evidentiary hearing and without findings on any factual issue, *de novo* review is appropriate).

¶ 11 The mandatory arbitration provision in section 14.7 of the operating agreement requires disputes related to the governance and operation of Q-BBQ to be submitted to binding arbitration. All of the members of Q-BBQ signed the operating agreement, but it is indisputable that plaintiff is not a party to the agreement and no one executed the contract on behalf of plaintiff; nor does defendant contest this fact.

¶ 12 In *Trover*, the Fifth District Appellate Court considered whether two LLCs were bound by mandatory arbitration provisions in two operating agreements that no individual signed on

behalf of the LLCs. *Trover*, 397 Ill. App. 3d at 404-06. In light of the statutory guidelines that provide that an LLC is distinct from its members, as well as the fact that the operating agreements did not show that the signatories were signing on behalf of or in the name of the LLCs, the court found that neither LLC was a party to the operating agreements and that they were therefore not bound by the arbitration clauses. *Id*. at 409.

¶ 13 As in *Trover*, plaintiff is not a party to the operating agreement. And, even though arbitration may be favored in Illinois (see *Board of Managers of Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 71 (1989)), the mandatory arbitration provision in the operating agreement at issue here is not binding on the LLC. See *Carter v. SSC Operating Company, LLC*, 2012 IL 113204, ¶ 55 ("only parties to the arbitration contract may compel arbitration or be compelled to arbitrate").

¶ 14 Defendant cites the recent July 2017 amendment to section 15-5(f) of the Act, which now binds an LLC to an operating agreement whether or not the LLC itself manifested assent to the agreement. Defendant maintains that *Trover* was directly overturned by the legislature when it enacted section 15-5(f). Plaintiff asserts that *Trover* remains the law in Illinois for operating agreements entered into prior to July 1, 2017. See *Foster Wheeler Energy Corporation v. LSP Equipment, LLC*, 346 Ill. App. 3d 753, 759 (2004) ("The common law, where it has not been expressly abrogated by statute, is as much a part of the law of the state as the statutes themselves"). Plaintiff argues that the July 2017 amendment cannot "reach back in time and retroactively alter contractual rights" and therefore, it has no effect on the 2014 operating agreement. The issue thus is whether this recent amendment should be given retroactive effect to make plaintiff a party to a 2014 operating agreement.

¶ 15 When a case implicates a statute enacted after the events in the suit, the United State's Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), held that the court's first task is to determine whether the legislature has expressly prescribed the statute's proper reach. In applying *Landgraf*, the Illinois Supreme Court in *Caveney v. Bower*, 207 Ill. 2d 82, 92 (2003), held that, where the new legislation is silent on retroactivity, the legislature's intent is found in section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2016)). Section 4 provides, in relevant part:

> "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding." 5 ILCS 70/4 (West 2016).

This section "represents a clear legislative directive as to the temporal reach of statutory amendments and repeals: those that are procedural in nature may be applied retroactively, while those that are substantive may not." *Caveney*, 207 Ill. 2d at 92. A procedural change in the law prescribes the method of enforcing rights or obtaining redress; it embraces pleading, evidence, and practice. *Rivard v. Chicago Fire Fighters Union, Local No. 2*, 122 Ill. 2d 303, 310 (1988). In contrast, a substantive change in the law establishes, creates, or defines rights. *International Union of Operating Engineers Local 965 v. Illinois Labor Relations Board, State Panel*, 2015 IL

App (4th) 140352, ¶ 27; see also *People v. Atkins*, 217 Ill. 2d at 71-72 (noting the differences between procedural and substantive amendments).

¶ 16 We must decide whether the amendment to the Act may be applied retroactively to bind plaintiff to the operating agreement. Therefore, we must ascertain whether the legislature has indicated the temporal reach of the statute. See *Caveney*, 207 Ill. 2d at 95. To do so, we first examine the language of the new law. Clearly, the legislature did not indicate the temporal reach in the amendment. Because the legislature's clear pronouncement is not found in the statute itself, we next look to section 4 of the Statute on Statutes to determine whether the statute should be characterized as procedural or substantive. *Caveney* teaches section 4 of the Statute on Statutes " 'forbids retroactive application of substantive changes to statutes.' " *Canveney*, 207 Ill. 2d at 95 (quoting *People v. Glisson*, 202 Ill. 2d at 506-07). Moreover, when "the legislature does not expressly indicate its intent with regard to the temporal reach of the amended statute, a presumption arises that the amended statute is not to be applied retroactively." *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 34.

¶ 17 In *Foster Wheeler Energy Corporation v. LSP Equipment, LLC*, 346 Ill. App. 3d 753 (2004), we were faced with a dispute over whether a statute voided the forum-selection clauses in the parties' contractual agreements. Like the present case, we had to decide whether the statute could be applied retroactively to void the parties' contract provisions. We determined that the statute did not contain a clear expression of legislative intent. *Id*. at 760. We held that the enactment clearly represented a substantive change in the law, not because it established whose law governed construction contracts in Illinois, but because it interfered with the parties' right to freely contract that issue, a right that previously existed. *Id*.

¶ 18 The same reasoning applies in this case. The amendment is substantive as it clearly establishes, creates, or defines contractual rights by making an LLC a party to an operating agreement when it previously was not a party when the agreement was entered into.

¶ 19 Defendant points to the "Recitals" to the operating agreement which state, in pertinent part, that "[t]his Agreement shall be subject to the Provisions of the Act, and each Member and Manager hereby agrees that in the event of any express conflict between the provisions of this Agreement and the provisions of the Act (defined below), the provisions of the Act shall control." Defendant notes that the operating agreement defines the Act as section 180/1-1 *et seq*. "as amended from time to time." Defendant argues therefore that clearly the operating agreement is governed by the Act as it is "amended over time," and, as such, section 15-5(f) of the Act must be applied. The problem with this reasoning is that plaintiff, a nonparty, never agreed to be bound by these recitals. Accordingly, we reject this argument.

¶ 20 Plaintiff contends in the alternative that its complaint does not "arise out of" the operating agreement and therefore is not subject to the mandatory arbitration provision contained in that agreement. Because we have determined that plaintiff is not a party to the agreement, we need not address this issue.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm the judgment of the Circuit Court of Du Page County.

¶ 23 Affirmed.