

[Cite as *LeRoi Internatl., Inc. v. Gardner Denver Mach., Inc.* , 2004-Ohio-4163.]

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
SHELBY COUNTY**

LeROI INTERNATIONAL, INC.

PLAINTIFF-APPELLANT

CASE NO. 17-03-20

v.

**GARDNER DENVER MACHINERY, INC.
ET AL.**

O P I N I O N

DEFENDANTS-APPELLEES

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: August 9, 2004

ATTORNEYS:

**WILLIAM O. MARTIN, JR.
Attorney at Law
Suite 800, 6080 Center Drive
Los Angeles, California 90045-7100
For Appellant**

**ANDREW DOUGLAS
Reg. #0000006
LUIS M. ALCALDE
Reg. 0022848
Attorneys at Law
Suite 1200, 500 South Front Street
Columbus, Ohio 43215
For Appellant**

**ROGER L. FREEMAN
DEAN C. MILLER
Attorneys at Law
1550 17th Street, Suite 500
Denver, Colorado 80202
For Appellees**

**DAVID C. GREER
Reg. #0009090
JOSEPH C. OEHLERS
Reg. #0065740
Attorneys at Law
400 National City Center
North Main Street
Dayton, Ohio 45402-1908
For Appellees**

CUPP, J.

{¶1} Plaintiff-Appellant, LeROI International, Inc. (“LeROI”), appeals a judgment of the Shelby County Common Pleas Court, granting the motion of Defendants-Appellees, Cooper Industries, Inc. and Cooper Industries (Canada), Inc. (hereinafter collectively referred to as “Cooper”), and Gardner Denver Machinery, Inc. (“GDI”) to stay judicial proceedings and compel arbitration.

{¶2} LeROI maintains that the arbitration clause contained in its contract with Cooper is non-binding and unenforceable. Further, LeROI claims that whether GDI is Cooper’s successor is a preliminary question of arbitrability which should have been decided by the trial court and not an arbitrator. Finding that the arbitration clause is enforceable and that the trial court properly submitted the

question of GDI's status as Cooper's successor to the arbitrator, we affirm the decision of the trial court.

{¶3} In January of 1993, LeROI and Cooper entered into an asset purchase agreement through which LeROI purchased portable air compressors from Cooper. The asset purchase agreement contains a number of pertinent clauses, including an indemnity clause, an arbitration clause, and an assignment clause. Subsequent to the contract with LeROI, Cooper formed GDI by transferring all of the assets in its Gardner Denver Industrial Machinery Division to GDI through an asset transfer agreement. GDI became a separate company incorporated under the laws of Delaware.

{¶4} In separate proceedings which have induced the present action, both Cooper and GDI are named as defendants in lawsuits brought by persons who claim they contracted silicosis through the use of portable air compressors. Cooper and GDI both sought arbitration to determine LeROI's duty to defend and indemnify them against the silicosis charges under the January 1993 asset purchase agreement between LeROI and Cooper. LeROI declined to arbitrate the issues and filed suit seeking injunctive relief and a declaratory judgment. Cooper and GDI countered by filing a motion to stay the judicial proceedings and compel arbitration. Following discovery, the trial court ruled that the asset purchase agreement contained a binding and enforceable arbitration clause and that

Cooper's and GDI's indemnity claims against LeROI should properly be decided in arbitration. Accordingly, the trial court granted the motion to stay judicial proceedings and ordered the parties to submit their dispute to arbitration. It is from this judgment that LeROI appeals, presenting three assignments of error for our review. Because of the nature of LeROI's arguments, we will address the assignments of error out of numerical order.

Assignment of Error III

The trial court erred in holding that the arbitration agreement between Plaintiff-Appellant LeROI and Defendant-Appellee Cooper was enforceable.

{¶5} In the third assignment of error, LeROI maintains that the arbitration clause in its contract with Cooper is unenforceable. LeROI asserts that the language of the arbitration clause shows an intention on the part of the parties not to be conclusively bound by the arbitrator's decision.

{¶6} An appellate court reviews the trial court's determination as to whether judicial proceedings should be stayed pursuant to the parties' agreement to submit their disputes to arbitration like any other court decision finding an agreement between parties, i.e., accepting findings of fact that are not "clearly erroneous" but deciding questions of law de novo. *Lear v. Rusk Ind., Inc.*, 3rd Dist. No. 5-02-26, 2002-Ohio-6599, at ¶8, citing *Garcia v. Wayne Homes, LLC* (Apr. 19, 2002), 2nd Dist. No. 2001CA53, unreported.

{¶7} Arbitration is a matter of contract. *Benjamin v. Pipoly*, 155 Ohio App.3d 171, 2003-Ohio-5666, at ¶31-34. (Citations omitted.) In interpreting an arbitration clause, courts must apply the fundamental principals of Ohio contract law. *Id.* If the language of the contract is clear and unambiguous, the court's interpretation is a matter of law. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511. The arbitration clause at issue herein is clear and unambiguous. Thus, we must review de novo the trial court's judgment that the clause was binding and enforceable.

{¶8} In order for an arbitration clause to be enforceable, the language of the clause must provide that any decision made in arbitration be final and binding. *Shaefer v. Allstate Ins. Co.* (1992), 63 Ohio St.3d 708, 711. LeROI claims that the arbitration clause contained in its contract with Cooper is unenforceable because it fails to make all arbitration decisions final and binding.

{¶9} The arbitration provisions sub judice are found in four separate subparagraphs: Paragraph 19.1 covers the initiating of arbitration; Paragraph 19.2 covers inventory disputes; Paragraph 19.3 covers all other disputes; and Paragraph 19.4 covers the arbitration procedure. Paragraph 19.1 provides that:

Any claim or dispute arising in connection with this agreement, which is not settled by the parties under the procedure set out in Section 18 above or in the case of a dispute relating to Inventory Matters under the procedure set out in Section 5.4, 5.5 and 5.6 shall be finally settled by arbitration under the Commercial Arbitration Rules and the Guidelines for expediting Larger

Complex Commercial Arbitrations of the American Arbitration Association, and the judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction over it. The arbitration shall be initiated 10 days following written notice given by either party.

{¶10} Paragraphs 19.2 and 19.3 provide more specifically how arbitration is to be undertaken. The inventory disputes paragraph, 19.2, specifically mentions that arbitration under that section is to be “conclusive and binding upon the parties.” Paragraph 19.3, the other disputes paragraph, is silent on the conclusiveness of the arbitration. LeROI maintains that the absence of explicit language making arbitration conclusive in Paragraph 19.3 shows an intention by the parties that arbitration under this section would not be binding.

{¶11} However, Paragraph 19.1 of the arbitration clause clearly states that any claim or dispute arising under the contract “shall be finally settled by arbitration.” Words in a contract are to be given their ordinary meaning unless manifest absurdity would result or an alternate meaning was clearly intended. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 245-246. The clear meaning of the words utilized by the parties in the contract is that disputes not involving inventory, as well as those involving inventory, are to be settled by final and binding arbitration. In our view, it is clear that Paragraph 19.1 and 19.3 were intended to be read together and construed in pari materia. In so doing, it is

clear that the parties expressed an intent that all arbitration proceedings, not just those involving inventory disputes, are to be final and binding.

{¶12} LeROI insists, however, that the phrase in Paragraph 19.1 “shall be finally settled by arbitration” was only meant to apply to inventory disputes and not to other disputes. LeROI’s claim rests on an untenable reading of the general arbitration paragraph. LeROI contends that the commas after the words “agreement” and “Association” in Paragraph 19.1 set off a separate clause and that the separate clause only modifies inventory disputes. Therefore, LeROI argues, there is no explicit language in the contract applying finality to arbitration involving non-inventory disputes. A review of the entire phrase reveals that LeROI’s argument leads to absurd results.

{¶13} If the clause were read in the manner in which LeROI contends, it would read, “[a]ny claim or dispute arising in connection with this agreement and the judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction over it.” The resulting clause is not only awkward, but reads nonsensically. We will not read into a contract a meaning not intended by the parties.

{¶14} Furthermore, the clause separated by commas, which LeROI contends only modifies disputes under the inventory section, clearly references all disputes. The first portion of the “separated” clause states, “which is not settled by

the parties under the procedure set out in Section 18 above or in the case of a dispute relating to Inventory Matters *** shall be finally settled by arbitration.” (Emphasis added). Section 18 of the asset purchase agreement outlines pre-arbitration dispute resolutions and references all disputes “arising out of or relating to this Agreement.”

{¶15} A clear reading of the arbitration clause shows that the parties intended arbitration to be binding and conclusive. Accordingly, we find that the arbitration clause is enforceable and affirm the decision of the trial court in this respect. LeROI’s third assignment of error is overruled.

Assignment of Error I

In deciding if a dispute is referable to arbitration, the trial court erred in holding that the right to demand arbitration by a non-party to an arbitration agreement was to be decided in arbitration.

{¶16} In the first assignment of error, LeROI asserts that the trial court erred in failing to consider preliminary arbitrability issues before deciding that the parties must submit their dispute to arbitration.

{¶17} The asset purchase agreement between Cooper and LeROI contains a “non-assignability” clause, which states: “This Agreement shall be binding upon and shall inure to the benefit of the parties to it and their respective successors, but shall not be assignable by either party without the prior written consent of the other party.” It also contains a “no third party beneficiary” clause, which

provides: “This agreement shall not confer any rights or remedies upon any Person other than the parties and their respective successors and permitted assigns.” It is undisputed that Cooper and LeROI were the sole original parties to the asset purchase agreement. Indeed, GDI was not even in existence when the agreement was made. Thus, GDI can not exercise any rights under the contract, specifically arbitration, unless it is Cooper’s successor or assign. LeROI asserts that whether GDI is Cooper’s successor is an issue of arbitrability that must be decided by a trial court and not by an arbitrator.

{¶18} Because arbitration is a matter of contract, a party can not be forced to arbitrate an issue with another party unless it has agreed in writing to do so. *Benjamin*, at ¶32, citing *Boedeker v. Rogers* (1999), 136 Ohio App.3d 425, 429. The question of arbitrability, which has been defined as “whether an agreement creates a duty for the parties to arbitrate the particular grievance,” should be decided preliminarily by the trial court and not the arbitrator. *Council of Smaller Ents. V. Gates, McDonald & Co.* (1988), 80 Ohio St.3d 661, 666. In contrast, issues of contract interpretation are properly determined by the arbitrator and not the trial court. *Southwest Ohio Reg. Transit Auth. v. Amalgamated Transit Union, Local 627* (2001), 91 Ohio St.3d 108, 110. Thus, the issue before this court is whether GDI’s status as Cooper’s successor is an issue of arbitrability to be

decided by the trial court, or whether it is an issue of contract interpretation to be decided by the arbitrator.

{¶19} The analysis of arbitrability is complicated because both Cooper and GDI have jointly demanded arbitration with LeROI. Contrary to the assertion of the Appellees, what is arbitratable is not static; it changes with the identity of the party seeking to enforce the arbitration clause. Cooper, as a signed party to the asset purchase agreement, has a contractual right to demand the arbitration of disputes involving LeROI's duty to indemnify Cooper. Furthermore, the successors of Cooper are also entitled to proceed under the asset purchase agreement. Therefore, Cooper is entitled to demand arbitration with LeROI to determine if, under the terms of the asset purchase agreement, GDI is Cooper's successor and to ascertain if Cooper retained any rights to indemnity. In this context, the issue of GDI's successorship is not an issue of arbitrability. Rather, the issue involves the interpretation of the terms of the contract as applied to the specific facts in these circumstances. This is an issue committed by LeROI and Cooper through their contract to arbitration instead of litigation.

{¶20} GDI, however, is not entitled to demand arbitration with LeROI to determine its status as a successor of Cooper. LeROI has only agreed to arbitrate with Cooper and its successors or assigns. Before GDI has any right to demand

arbitration with LeROI, it must first be determined that GDI is Cooper's successor or assign.

{¶21} In its judgment entry, the trial court stated, "the Court finds that there is a binding enforceable arbitration agreement between LeROI and Cooper; that the subject dispute is one referable to arbitration, along with the issue of Gardner Denver's successor status to Cooper." As we interpret the trial court's judgment, it directs LeROI and Cooper to arbitrate GDI's successor status as one of the issues of contract interpretation between LeROI and Cooper, and it does not require LeROI to arbitrate with GDI unless the arbitrator first determines that GDI is, in fact, Cooper's successor under the terms of the Cooper-LeROI asset purchase agreement. In so holding, the trial court did not err.

{¶22} Accordingly, we overrule LeROI's first assignment of error and affirm the decision of the trial court.

Assignment of Error II

The trial court erred in not deciding as a matter of law that the underlying dispute between the parties – Plaintiff-Appellee LeROI's supposed duty to indemnify Defendant-Appellant Gardner Denver for silicosis claims – is not referable to arbitration.

{¶23} In the second assignment of error, LeROI contends that the trial court erred by failing to find as a matter of law that GDI was not Cooper's successor or assign. As discussed above, these issues were properly left to

Case No. 17-03-20

arbitration by the trial court. Therefore, LeROI's second assignment of error is moot.

{¶24} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

SHAW, P.J., and BRYANT, J., concur.