Circuit Court for Calvert County
Case No. C-04-CV-18-000093

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 877

September Term, 2018

LAMBERTINE JONES, JR.

v.

BARDON, INC.

Graeff,
Beachley,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: November 5, 2019

Lambertine Jones, Jr., appellant, filed suit in the Circuit Court for Calvert County against Bardon, Inc., appellee, and two of its employees seeking damages based on breach of contract, unjust enrichment, and detrimental reliance. The circuit court dismissed the lawsuit and ordered appellant and appellee to proceed to arbitration. Appellant appealed, presenting the following questions:

1. Did the trial court err in dismissing the case without explanation?

2. Did the trial court err in finding the arbitration agreement in the broker's contract was enforceable?

3. Did the trial court err in finding that the arbitration agreement in the broker's contract would apply to all future contracts without notice or reference in subsequent contracts?

For the following reasons, we shall affirm.

STANDARD OF REVIEW

We review the grant of summary judgment orders *de novo.*[1] *Beyer v. Morgan State Univ.*, 369 Md. 335, 359 (2002). "Summary judgment is only appropriate when, upon review of the facts and inferences therefrom in the light most favorable to the non-moving party, there is no genuine issue of material fact and the party in whose favor judgment is entered is entitled to judgment as a matter of law." *Harvey v. Northern Ins. Co. of New York*, 153 Md. App. 436, 441 (2003) (citing current Md. Rule 2-501(f)). "A material fact

[1] When a court receives evidence on a motion to dismiss, the motion is transmuted into a motion for summary judgment. Md. Rule 2-322(c); *Muthukumarana v. Montgomery County*, 370 Md. 447, 474 (2002). Because the lower court received several documents separate from the pleadings, we shall employ a summary judgment standard as to the dismissal of the employees in appellant's lawsuit.

is a fact the resolution of which will somehow affect the outcome of the case." *Matthews v. Howell*, 359 Md. 152, 161 (2000) (quotation marks and citation omitted). If a material fact is in dispute, summary judgment is inappropriate. *Okwa v. Harper*, 360 Md. 161, 178 (2000). If we conclude that there are no genuine issues of material fact, we determine whether the lower court's grant of summary judgment is legally correct. *Jahnigen v. Smith*, 143 Md. App. 547, 554-55, *cert. denied*, 369 Md. 660 (2002).

As to our standard of review of the lower court's order dismissing the suit against appellee and compelling arbitration: "The trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, which we review for legal correctness. . . . When reviewing a trial court's decision compelling arbitration, our role extends only to a determination of the existence of an arbitration agreement." *Ford v. Antwerpen Motorcars Ltd.*, 443 Md. 470, 476 (2015) (quotation marks and citations omitted).

FACTS

Appellant is the owner and president of LJ Enterprises, a hauling company. Appellee is a concrete company. On April 1, 2016, LJ Enterprises entered into a 17-page "**TRUCKING BROKERAGE AGREEMENT"** (the "Agreement"), with appellee. The Agreement sets forth the various duties and obligations of the parties for the transportation of materials and the penalties for the failure to abide by the terms of the Agreement. Payment for services is to be based upon the "type of equipment" used and "the services performed," "with such rates and charges and related terms to be documented as

subsequent addendum[.]" The Agreement provides for arbitration in the event of a dispute, stating:

> 21 **Dispute Resolution**. Unless otherwise expressly provided within this Agreement, disagreements and disputes *arising under or related to this Agreement* shall be resolved in the following manner, unless the dispute is an Excluded Matter (as defined below). The parties shall first endeavor to resolve any such disputed matter or matters by negotiation, which shall conclude when either the parties reach an agreement settling the dispute or a party declares impasse. If impasse is declared, the dispute shall be settled by binding arbitration administered in accordance with the American Arbitration Association Commercial Rules.

(Italics added). The agreement was for one year but provided for automatic renewal, unless terminated by either party, upon at least 90 days prior written notice.

Prior to entering into the Agreement, Bardon bid on a State Highway Administration (SHA) contract. The parties signed a "**MDOT DBE FORM D**", dated June 17, 2014, and titled "**DBE SUBCONTRACTOR PROJECT PARTICIPATION AFFIDAVIT**."[2] The affidavit states: "Provided that BARDON, INC. dba AGGREGATE INDUSTRIES (Prime Contractor's Name) is awarded the State contract in conjunction with Solicitation No. XY4085177, such Prime Contractor will enter into a contract with LJ ENTERPRISES (Subcontractor's Name) committing to participation by the DBE firm LJ ENTERPRISES" to receive at least $200,000 (or 2.05% of the bid) for "PARTIAL HAULING OF THE HOT MIX ASPHALT." Additionally, the affidavit includes appellant's "NAICS CODE," "WORK ITEM, SPECIFICATION NUMBER, LINE ITEMS OR WORK

[2] DBE stands for "disadvantaged business enterprise."

CATEGORIES," and "DESCRIPTION OF SPECIFIC PRODUCTS AND/OR SERVICES." Above the parties signatures was the following statement:

> I solemnly affirm under the penalties of perjury that the information provided in this DBE Subcontractor Project Participation Affidavit is true to the best of my knowledge, information and belief. I acknowledge that, for purposes of determining the accuracy of the information provided herein, the Procurement Officer may request additional information, including, without limitation, copies of the subcontract agreements and quotes.

The affidavit did not contain an arbitration clause. At the bottom of the affidavit was handwritten "Effective 8/4/2014" and "Expiration 12/31/2016."

In 2016, appellee bid on a second State Highway contract. The parties signed a "**MDOT MBE FORM D**", dated April 27, 2016, and titled "**MBE SUBCONTRACTOR PROJECT PARTICIPATION AFFIDAVIT**."[3] The affidavit states: "Provided that Bardon, Inc. dba Aggregate Industries (Prime Contractor's Name) is awarded the State contract in conjunction with Solicitation No. PG0415177, such Prime Contractor will enter into a subcontract with L.J. Enterprises (Subcontractor's Name) committing to participation by the MBE firm . . . which will receive at least $88,000.00 or 2.9% (Total Subcontract Amount/Percentage) for performing the following products/services for the Contract." Additionally, the affidavit includes appellant's "NAICS CODE", "WORK ITEM, SPECIFICATION NUMBER, LINE ITEMS OR WORK CATEGORIES," and "DESCRIPTION OF SPECIFIC PRODUCTS AND/OR SERVICES," which is stated as "Partial Hauling of Hot Mix Asphalt" and "Partial Hauling of Millings." Above the parties signatures was the following statement:

[3] MBE stands for "minority business enterprise."

> I solemnly affirm under the penalties of perjury that the information provided in this MBE Subcontractor Project Participation Affidavit is true to the best of my knowledge, information and belief. I acknowledge that, for purposes of determining the accuracy of the information provided herein, the Procurement Officer may request additional information, including, without limitation, copies of the subcontract agreements and quotes.

The affidavit did not contain an arbitration clause.

Appellee was awarded the first SHA contract, XY4085177, but apparently only partially completed the contract. Appellee received $516,000 under the SHA contract and appellant alleged that he was due a total of $10,583, which was 2.05% of the partially completed contract. Appellee, however, only paid him $5,780.

Appellee was awarded the second SHA contract, PG0415177. Both parties allegedly completed all services required, but appellant was paid only $23,314.

In 2017, appellant sent demand for payment letters to appellee, to no avail. Appellant then filed suit in the circuit court against appellee and two of its employees alleging breach of contract, unjust enrichment, and detrimental reliance. He argued that he was due $4,803 under the first SHA contract and $64,686 under the second SHA contract.

Appellee and its two employees responded and attached the Agreement to their response. Appellee's employees argued that the suit against them should be dismissed because appellant alleged no basis for individual liability because he sued them only in their "official capacity." Appellee argued that pursuant to the Agreement, the parties had contracted to arbitrate disputes, and therefore, the court should dismiss the lawsuit and compel arbitration. Appellant filed a response. Citing *Raglani v. Ripken Professional*

Baseball, 939 F.Supp.2d 517 (D.Md. 2013), appellant argued, among other things, that the arbitration clause was not enforceable because it was not supported by consideration.

At the subsequent motions hearing, appellant introduced the two MDOT forms and other documents. He argued that the forms were contracts that were separate, distinct, and enforceable from the Agreement, and that the Agreement with the arbitration clause applied only to issues that arose "as a result of hauling," not pricing and payment. Appellee disagreed, arguing that the Agreement controlled disputes between the parties and therefore, the court should compel arbitration. Appellee further argued that the two forms appellant alleged were contracts, were not in fact contracts but bid forms. Appellee's employees argued that the case against them should be dismissed because there was no claim that they had acted outside the scope of their authority or were personally liable for some contractual obligations.

The circuit court entered a written order on June 18, 2018. The court stated that appellant failed to state a claim that the employees are "contractually and/or tortiously liable" and therefore, dismissed the lawsuit against the employees. Additionally, the court found that "after review of . . . the 'Trucking Brokerage Agreement,' which both parties signed . . . this matter must proceed to arbitration" and dismissed the lawsuit.

DISCUSSION

Appellant argues that the motions court erred for three reasons in dismissing his lawsuit and compelling arbitration. First, the motions court erred because it dismissed his lawsuit without offering any explanation. Second, the motions court erred in holding that the arbitration clause in the Agreement was enforceable because it lacked consideration –

the parties did not mutually promise to submit to arbitration – and the clause did not specify a neutral forum in which to arbitrate. Appellant again cites *Raglani*, *supra*, in support of this argument. Third, and lastly, appellant argues that the two SHA forms constituted contracts – they contained an offer, consideration, and acceptance – and as contracts they were separate and enforceable from the Agreement. Appellant adds that the arbitration clause in the Agreement could not be enforced in subsequent contracts without notice or language of incorporation. We find no error by the motions court and shall address each argument in turn.

We are aware of no law and appellant has cited to none that states that a motions court is legally required to explain its ruling. Moreover, and contrary to appellant's argument, the motions court did explain its ruling, albeit briefly. As to why it was dismissing the complaint against the individual employees, the motions court stated that appellant "failed to assert that [the employees] are contractually and/or tortiously liable[.]" It is well-settled that employees like those here are not liable for the torts or contractual obligations of a company unless the employee signed individually to take on those responsibilities. *See Curtis G. Testerman Co. v. Buck*, 340 Md. 569, 577-78 (1995). Additionally, the motions court stated that he had reviewed the Agreement that both parties signed and concluded that the matter must proceed to arbitration.

Appellant's second argument, that the arbitration clause is unenforceable because it lacks consideration and is unfair because it does not state the forum for arbitration, is without merit.

In *Raglani*, a former employee sued her former employer, Ripken Professional Baseball (RPB), alleging that she was discriminated against and terminated because of her gender. RPB filed a motion to dismiss or to stay and compel arbitration under a Problem Support Policy (PSP) agreement that Raglani had signed as part of her employment. *Raglani*, 939 F.Supp.2d at 519. We agree with the district court's denial of RPB's motion to compel arbitration for two reasons. First, the arbitration clause was unenforceable because it lacked consideration – it was one-sided requiring only the employee to submit "problems" to arbitration and did not contain a "mutual exchange of promises to arbitrate." *Id*. at 522-23 (quotation marks and citations omitted). Second, the arbitration clause was unenforceable because it denied her access to a neutral forum – the employer had exclusive control over the list of arbitrators from which she could choose and the agreement provided for no rules by which arbitration would be conducted. *Id.* at 522, 524.

Raglani is easily distinguishable for the simple reason that none of the infirmities found in the arbitration clause in *Raglani* are present here. Contrary to appellant's argument, the arbitration clause contained consideration as it bound both parties to arbitration. Moreover, the clause provided for a neutral forum for the arbitration process by specifically stating that arbitration will be "administered in accordance with the American Arbitration Association Commercial Rules."

Appellant's last argument is also without merit. The "MDOT DBE FORM D" and "MDOT MBE FORM D" documents are not contracts in the sense of appellant's meaning. Rather, by the clear and plain language used on the forms, they are affidavits that are required by the SHA to be submitted by prime contractors to make a valid bid. The

documents themselves are titled "**DBE SUBCONTRACTOR PROJECT PARTICIPATION *AFFIDAVIT***" and "**MBE SUBCONTRACTOR PROJECT PARTICIPATION *AFFIDAVIT*.**" (italics added). Additionally, the DBE form states: "IF THE BIDDER FAILS TO RETURN THIS *AFFIDAVIT* WITHIN THE REQUIRED TIME, THE PROCUREMENT OFFICER MAY DETERMINE THAT THE BIDDER IS NOT RESPONSIBLE AND THEREFORE NOT ELIGIBLE FOR CONTRACT AWARD."[4] (italics added). Moreover, appellant explained the significance of the affidavit: he and appellee agreed on the amount he was to be paid and then the form was "signed, and . . . returned back to the [S]tate. Once they are returned back to the [S]tate, the [S]tate at that point can award the contract to the general." The forms specifically state that if the prime contractor is awarded the SHA contract, the prime contractor and subcontractor "will enter into a contract" committing the subcontractor to participate in the SHA agreement for the sum and services specified. Therefore, the form plainly anticipates that once appellee, the prime contractor, is awarded the contract, appellee and appellant will enter into a separate contract setting forth their agreement as to their rights and responsibilities. Contrary to appellant's argument, the affidavits signed by appellant and appellee are bids, not separate contracts.

[4] The MBE form is identical except uses the term "BIDDER/OFFEROR" and provides at the end of the sentence "OR THAT THE PROPOSAL IS NOT SUSCEPTIBLE OF BEING SELECTED FOR AWARD."

For the foregoing reasons, we shall affirm the lower court's judgments.

JUDGMENTS OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.