Michael K. Jeanes, Clerk of Court
*** Filed ***
08/22/2016 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2016-000221-001 DT 08/19/2016

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

CORTEZ INVESTMENT CO L L C

v.

DAVID MCFARLAND (001)
JESSICA MCFARLAND (001)

DAVID E HAMEROFF

DAVID MCFARLAND
9123 N 68TH DR
PEORIA AZ 85345
JESSICA MCFARLAND
9123 N 68TH DR
PEORIA AZ 85345

MANISTEE JUSTICE COURT
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Lower Court Case No. CC 2015–188412.

Defendants-Appellants David and Jessica McFarland (Defendants)[1] appeal the Manistee Justice Court's determination that he was not entitled to take the case to arbitration using the American Arbitration Association (AAA) as was required by the credit card agreement. Defendant contends the trial court erred. For the reasons stated below, this Court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

On October 6, 2015, Plaintiff-Appellee Cortez Investment Co., LLC (Plaintiff) filed a complaint alleging Defendant failed to pay his credit card debt based on a credit card agreement Defendant contracted with Wells Fargo. Plaintiff alleged the credit card debt was $9,679.36. Plaintiff asked for attorneys' fees plus interest on the balance from the date of judgment.

Defendants were served and responded by sending a letter to Plaintiff's counsel on October 29, 2015. In that letter, Defendant stated he was electing private contractual arbitration via AAA to resolve the parties' dispute pursuant to the credit card agreement. Defendant attached a copy of the credit card agreement which stated in relevant part:

[1] The terms Defendant—in the singular—refers to David McFarland.

> **Arbitration**
>
> **(32) Dispute Resolution Program: Arbitration Agreement.**
>
> a. Binding Arbitration. You and Wells Fargo Bank, N.A. (the "BANK") agree that if a Dispute arises between you and the Bank, upon demand by either you or the Bank, the Dispute shall be resolved by the following arbitration process. A "Dispute" is any unresolved disagreement between you and the Bank. It includes any disagreement relating in any way to the Card or related services, accounts or matters; to your use of any of the Bank's banking locations or facilities; or to any means you may use to access the Bank. It includes claims based on broken promises or contracts, torts, or other wrongful actions. It also includes statutory, common law and equitable claims. A Dispute also includes any disagreements about the meaning or application of this Arbitration Agreement. This Arbitration Agreement shall survive the payment or closure of your account. **YOU UNDERSTAND AND AGREE THAT YOU AND THE BANK ARE WAIVING THE RIGHT TO A JURY TRIAL OR TRIAL BEFORE A JUDGE IN A PUBLIC COURT.** As the sole exception to this Arbitration Agreement, you and the Bank retain the right to pursue in small claims court any Dispute that is within that court's jurisdiction. If either you or the Bank fails to submit to binding arbitration following lawful demand, the party so failing bears all costs and expenses incurred by the other in compelling arbitration.
>
> b. Arbitration Procedure; Severability. Either you or the Bank may submit a Dispute to binding arbitration at any time notwithstanding that a lawsuit or other proceeding has been previously commenced. NEITHER YOU NOR THE BANK SHALL BE ENTITLED TO JOIN OR CONSOLIDATE DISPUTES BY OR AGAINST OTHERS IN ANY ARBITRATION OR TO INCLUDE IN ANY ARBITRATION ANY DISPUTE AS A REPRESENTATIVE OR MEMBER OF A CLASS OR TO ACT IN ANY ARBITRATION IN THE INTEREST OF THE GENERAL PUBLIC OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. Each arbitration, including the selection of the arbitrator(s) shall be administered by the American Arbitration Association (AAA), or such other administrator as you and the Bank may mutually agree to (the AAA or such other mutually agreeable administrator to be referred to hereinafter as the Arbitration Administrator") . . . .

On October 30, 2015, Defendants filed "Defendant's [*sic*] Motion To Compel Private/Contractual Arbitration By Defendant" (Motion To Compel) informing the trial court he was electing arbitration pursuant to his credit card agreement.[2] The trial court denied this Motion on November 13, 2015, and stated the motion was moot because a settlement conference had been scheduled. After the trial court denied Defendants' Motion To Compel, Plaintiff—on November 30, 2015—responded and suggested the case be stayed for 30 days pending Defendants' compliance with the requirements for arbitration.

[2] The trial court Calendar Events and Hearings refers to Defendants filing an Answer on October 30, 2015. No other Answer appears in the transmitted trial court file with the October 30, 2015, date other than Defendants' Motion To Compel.

On December 29, 2015, Defendants' re-urged their Motion To Compel and asserted they had filed a claim with the AAA. Defendants asked that the trial court (1) compel arbitration; and (2) stay the proceedings. That same day Defendants requested a Motion To Stay Settlement Conference (Motion To Stay) and alleged the scheduled settlement conference conflicted with Defendant David McFarland's school schedule. Plaintiff did not oppose Defendants' Motion To Stay but did file a Motion To Strike & Request For Sanctions because Defendants filed their second Motion To Compel. Plaintiff alleged the Defendants' second Motion To Compel was unwarranted as the trial court had previously denied an almost identical motion[3] and the second motion to compel appeared to have been filed solely to delay the proceedings. Defendant responded to the request for sanctions and alleged (1) the trial court's original denial of his motion to compel was erroneous since a settlement conference cannot substitute for contractually agreed-to arbitration; (2) his request was not filed for purposes of delay since Plaintiff objected that Defendants had not first requested arbitration; and (3) A.R.S. § 12–1501 states that a contract provision re arbitration is both enforceable and irrevocable. The trial court denied Defendants' second Motion To Compel on January 25, 2016.

Plaintiff filed a summary judgment motion and claimed its proffered discovery demonstrated Defendants opened an account with Wells Fargo Bank and Wells Fargo sent billing statements, bills of sale, and a redacted spreadsheet to Defendants establishing the debt. Plaintiff claimed Defendants failed to respond to Plaintiff's discovery request and failed to respond to Plaintiff's requests for admission. Plaintiff alleged the lack of response was an admission of the claims in the Requests for Admission and all of the alleged facts in the Request for Admission had been established. Plaintiff requested judgment in the amount of $9,679.36; court costs of $153.00; and attorneys' fees of $2,129.48. Plaintiff established the amount of its attorneys' fees by asserting it was an agreed-to contingency fee. On February 19, 2016, the trial court awarded judgment to Plaintiff.

Defendants filed a timely appeal. Plaintiff failed to file a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANTS' MOTIONS TO COMPEL ARBITRATION AS MANDATED IN THE CREDIT CARD AGREEMENT:

Standard of Review

Generally, the appellate court reviews a question of contract law *de novo*.

> Our standard of review is *de novo* because this appeal solely involves issues of contract interpretation.

Tech. Const., Inc. v. City of Kingman, 229 Ariz. 564, 278 P.3d 906 ¶ 8 (Ct. App. 2012). When interpreting a contract, an appellate court may make its own analysis of the facts or legal instruments on which the case turns. *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 114, 412 P.2d 47, 51 (1966). A credit card agreement is a contract. As such, the agreement must be construed according to its terms. *McDowell Mountain Ranch Community Association Inc. v. Simons*, 216 Ariz. 266, 165 P.3d 667 ¶ 14 (Ct, App. 2007).

[3] While the substance of the two Motions To Compel was almost identical, the motions differed because Defendants—in their second Motion To Compel—informed the trial court they had contacted the AAA. The need for Defendants to contact the AAA was stressed by Plaintiff in its response to Defendant's first Motion To Compel.

Arbitration Provision

The arbitration provision in the credit card agreement is mandatory if a party wishes to elect arbitration. As our Supreme Court noted:

> The sole question presented by this appeal is whether ASARCO is entitled to enforce the provisions of paragraph 30 relating to compulsory arbitration. Initially we agree with ASARCO that the public policy of Arizona favors arbitration as a means of disposing of controversy. *Jeanes v. Arrow Insurance Co.*, 16 Ariz. App. 589, 494 P.2d 1334 (1972).

Clarke v. ASARCO Inc., 123 Ariz. 587, 589, 601 P.2d 587, 589 (1979). Arbitration is a favored method for resolving disputes where a matter is subject to arbitration. As our Court of Appeals stated:

> Therefore, in order to accomplish this purpose, arbitration clause should be construed liberally and any doubts as to whether or not the matter in question is subject to arbitration should be resolved in favor of arbitration. *Metro Industrial Painting Corp. v. Terminal Construction Co., 287* F.2d 382 (2nd Cir. 1961); *United Steelworkers of America v. Warrior and Gulf Navigation Co.,* 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed.2d 1409 (1960); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2nd Cir. 1959); *Lundell v. Massey-Ferguson Services N.V.*, 277 F. Supp. 940 (N.D. Iowa 1967); *Southern Bell Telephone & Telegraph Co. v. Louisiana Power and Light Co.*, 221 F. Supp. 364 (D.La.1963); *Firestone Tire & Rubber Co. v. United Rubber Workers of America, Local Union No. 100, AFL-CIO,* 168 Cal.App.2d 444, 335 P.2d 990 (1959); *Bewick v. Mecham,* 26 Cal.2d 92, 156 P.2d 757 (1945).
>
> The federal courts have adopted what could be termed the 'positive assurance' test which requires arbitration unless it can be said with 'positive assurance' that the arbitration clause does not cover the dispute:
>
> * * * * * *

New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Ass'n, 12 Ariz. App. 13, 16, 467 P.2d 88, 91 (1970). In the current case, the credit card agreement provision re arbitration required: "if a Dispute arises between you and the Bank, upon demand by either you or the Bank, the Dispute **shall** be resolved by the following arbitration process. . . ." (Emphasis added).The provision used the term "shall." Shall connotes a mandatory term. As stated in *State v. Lewis*, 224 Ariz. 512, 233 P.3d 625, ¶ 17 (Ct. App. 2010) aff'd, 226 Ariz. 124, 244 P.3d 561 (2011):

> A general principle of statutory construction is that the use of the word 'may' generally indicates a permissive provision; in contrast, the use of the word 'shall' typically indicates a mandatory provision.

Plaintiff is apparently the assignee for the credit card contract. As an assignee, Plaintiff has no more rights than its principal would have had and Defendants are able to assert any defenses against the assignee that Defendants could assert against the original creditor.

> We think that the general rule in our state is well-settled that the valid assignee of a chose in action may bring a suit thereon in his own name. *General Accident Fire & Life Assur. Corp. v. Little,* 103 Ariz. 435, 438, 443 P.2d 690, 693 (1968). Moreover, the assignee need not be the full party in interest; and the debtor or alleged obligor is not prejudiced because by statute he may assert his defenses as fully against the assignee as he could the original claimant. *General Accident Fire & Life Assur. Corp. v. Little, supra; Mosher v. Hiner,* 62 Ariz. 110, 112, 154 P.2d 372, 374 (1944), cert. den., 325 U.S. 874, 65 S. Ct. 1554, 89 L. Ed. 1992 (1945).

Certified Collectors, Inc. v. Lesnick, 116 Ariz. 601, 602, 570 P.2d 769, 770 (1977). In addition, A.R.S. § 12-1501 (1) authorizes written agreements to arbitrate; and (2) provides the agreements are valid, enforceable and irrevocable.

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

While a party can waive the right to enforce an arbitration agreement—*Forest City Dillon, Inc. v. Superior Court,* 138 Ariz. 410, 412, 675 P.2d 297, 299 (Ct. App.1984); *accord Bolo Corp. v. Homes & Son Constr. Co.*, 105 Ariz. 343, 345, 464 P.2d 788, 790 (1970)—Defendant specifically indicated his intent to enforce this provision after he was served with the Summons and Complaint.[4] Defendant both wrote (1) a letter to opposing counsel indicating his desire to enforce the arbitration provision of the contract; and (2) filed a Motion To Compel to force Plaintiff to go to arbitration. The trial court denied this request. Although the trial court based its denial on its assertion that the case had been set for conference, a review of the trial court file contradicts this statement. The trial court file does not include any order setting the matter for conference at the time when Defendant filed his Motion To Compel the arbitration. Instead, the trial court Calendar Events and Hearings, indicated a Notice of Comprehensive Pre-Trial Conference was not sent to the parties until November 9, 2015.

The trial court was required to enforce the arbitration provision of the credit card agreement and erred when it denied Defendants' Motion To Compel arbitration. The denial of a motion to compel arbitration is an appealable order. *U.S. Insulation, Inc. v. Hilro Const. Co*., 146 Ariz. 250, 253, 705 P.2d 490, 493 (Ct. App. 1985). This requirement is addressed in A.R.S. § 12–1502 which states:

. . . .

. . . .

. . . .

[4] Although the trial court indicated Defendant filed an Answer, no copy of the Answer was included with the trial court file.

> **A.** On application of a party showing an agreement described in § 12-1501, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party. Otherwise, the application shall be denied.
>
> **B.** On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.
>
> **C.** If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection A of this section, the application shall be made therein. Otherwise and subject to § 12-2101, the application may be made in any court of competent jurisdiction.
>
> **D.** Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.
>
> **E.** An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

In interpreting this statute, our Court of Appeals held:

> In light of the foregoing analysis, it is clear that a successful challenge to a motion to compel arbitration requires evidence that either: (1) with respect to the enforceability of the arbitration agreement itself, there exists grounds "in law or in equity for the revocation of any contract," A.R.S. § 12-1501, *Prima Paint;* or (2) the arbitration clause itself has been repudiated, thereby resulting in a waiver of the repudiating party's right to seek arbitration. *Bolo; Rancho Pescado; Baugh.*

U.S. Insulation, Inc. v. Hilro Const. Co. id., 146 Ariz. at 256, 705 P.2d at 496. The trial court did not find any (1) grounds in law or equity to revoke the agreement; or (2) that the arbitration clause had been repudiated. A party is required to arbitrate those disputes which it contractually agreed to arbitrate. *Duenas v. Life Care Centers of Am., Inc*., 236 Ariz. 130, 336 P.3d 763 ¶ 26 (Ct. App. 2014). Accordingly, the trial court should have enforced the arbitration provision.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Manistee Justice Court erred.

IT IS THEREFORE ORDERED reversing the judgment of the Manistee Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Manistee Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 081920161426

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.