

US 248

MALARKY ENTERPRISES v. HEALTHCARE TECHNOLOGY, LTD. 1427

Cite as 962 F.Supp. 1427 (D.Kan. 1997)

MEMORANDUM AND ORDER

VAN BEBBER, Chief Judge.

This breach of contract action is before the court upon defendant's motion to dismiss for lack of jurisdiction (Doc. 10). For the reasons stated below, the motion is denied.

[1] Defendant argues that the court lacks subject matter jurisdiction to hear the case because the amount in controversy does not exceed \$75,000, as the recent amendment to 28 U.S.C. § 1332(a) requires. See *Laughlin v. Kmart Corp.*, 50 F.3d 871, 872 (10th Cir.) ("A court lacking jurisdiction . . . must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking.") (internal quotations and citations omitted), cert. denied, — U.S. —, 116 S.Ct. 174, 133 L.Ed.2d 114 (1995). In the complaint, plaintiff alleges damages in the amount of \$64,061.89.

[2] On October 19, 1996, Congress amended Section 1332(a), increasing the amount in controversy requirement for diversity jurisdiction from \$50,000 to \$75,000. Federal Courts Improvement Act of 1996, Pub.L. No. 104-317, § 205, 110 Stat. 3847, 3850 (1996). The amendment became effective ninety days after its enactment, January 17, 1997, and is not retroactive. *Id.*; see *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1319 n. 9 (7th Cir.1997); *Counitech Dev. Co. v. University of Conn. Educ. Prop., Inc.*, 102 F.3d 677, 681 n. 1 (2d Cir.1996); *Evans v. Lallande*, 1997 WL 170318, at \*1 n. 1 (N.D.Miss. Mar.10, 1997); *Ren-Dan Farms, Inc. v. Monsanto Co.*, 962 F.Supp. 370, 374 n. 1 (W.D.La.1997); *Fox Constr., Inc. v. Welter*, 1997 WL 31185, at \*1 n. 1 (D.Colo. Jan.22, 1997).

[3] "The amount in controversy requirement is determined at the time the complaint was filed." *Watson v. Blankinship*, 20 F.3d 383, 387 (10th Cir.1994); see *T.K. Hite Collision Repair, Inc. v. State Farm Mut. Auto. Ins. Co.*, 790 F.Supp. 254, 255 (D.Kan.1992). Because plaintiff filed its complaint on December 9, 1996, the \$75,000 amount in controversy requirement does not apply to this case.

IT IS, THEREFORE, BY THE COURT ORDERED that defendant's motion to dismiss for lack of jurisdiction (Doc. 10) is denied.

The clerk shall mail copies of this order to counsel of record.

IT IS SO ORDERED.



MALARKY ENTERPRISES, Plaintiff,

v.

HEALTHCARE TECHNOLOGY, LTD., Defendant.

Civil Action No. 96-2254-GTV.

United States District Court,  
D. Kansas.

April 25, 1997.

Exclusive North American distributor of manufacturer's products brought breach of contract action against manufacturer, and manufacturer moved to dismiss pursuant to arbitration clause in distributor agreement. The District Court, Van Bebber, Chief Judge, held that manufacturer did not waive its right to compel arbitration of parties' dispute whether by initially denying existence of distributor agreement, by engaging in litigation activity, or by waiting for almost five months after filing of distributor's complaint before it attempted to enforce arbitration clause.

Motion granted.

1. Arbitration §4.1

International dispute must be referred to arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, where there is agreement in writing to arbitrate subject of dispute, where agreement provides for arbitration in territory of signatory of Convention, where agree-

ment arises out of legal relationship which, whether contractual or not, is considered to be commercial, and where one of the parties to agreement is not an American citizen or where parties' relationship has some relation with one or more foreign states. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. I et seq., 9 U.S.C.A. § 201 note.

### 2. Arbitration ⇨6.2

Mere fact that representative of foreign manufacturer had initially denied that manufacturer had any distributor agreement with United States marketing company did not preclude manufacturer from seeking to compel arbitration of parties' dispute, on theory that there was no agreement to arbitrate as required under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, where manufacturer later conceded that parties had entered into distributor agreement. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. I et seq., 9 U.S.C.A. § 201 note.

### 3. Arbitration ⇨23.10

Party asserting waiver of arbitration has heavy burden of proof.

### 4. Arbitration ⇨23.3(1)

Waiver of arbitration rights requires unequivocal demonstration of intent to waive.

### 5. Arbitration ⇨23.3(1, 2)

In deciding whether party has waived its right to arbitration, court considers: whether party's actions are inconsistent with right to arbitrate; whether litigation machinery has been substantially invoked before party notified opposing party of its intent to arbitrate; whether party either requested arbitration enforcement close to trial date or delayed for long period of time before seeking stay of lawsuit; whether defendant seeking arbitration filed counterclaim without asking for stay of proceedings; whether important intervening steps have taken place; and whether delay affected, misled or prejudiced opposing party.

1. Defendant has requested oral argument on its motion to dismiss. Because the court finds that oral argument would not be of material assis-

### 6. Arbitration ⇨23.3(1, 2)

Foreign manufacturer did not waive its contractual right to arbitrate any dispute arising out of its distributor agreement with exclusive North American distributor of its products, though manufacturer had initially denied existence of distributor agreement, had engaged in litigation activity, and had waited almost five months after filing of distributor's complaint before seeking to enforce arbitration clause, where no discovery had taken place in lawsuit between parties, trial date was still five months away, and distributor did not appear to have suffered any prejudice as result of manufacturer's actions. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. I et seq., 9 U.S.C.A. § 201 note.

Kurt S. Brack, Holbrook, Heaven & Fay, P.A., Merriam, KS, for Malarkey Enterprises, Inc.

William R. Sampson, Paul W. Rebein, Shook, Hardy & Bacon, L.L.P., Overland Park, KS, for Healthcare Technology, Ltd.

### MEMORANDUM AND ORDER

VAN BEBBER, Chief Judge.

Plaintiff brings this diversity action asserting claims of breach of contract, unjust enrichment, and tortious interference with contract. The case comes before the court on defendant's motion (Doc. 10) to dismiss pursuant to Fed.R.Civ.P. 12(b)(6).<sup>1</sup> For the reasons set forth below, the motion is granted.

#### 1. Background

Plaintiff Malarkey Enterprises, Inc., a Kansas corporation in the business of marketing and selling Cardiosport Heart Rate monitors and systems, entered into a Distributor Agreement in September 1994 with defendant Healthcare Technology, Ltd., a foreign corporation maintaining its principal place of business in the United Kingdom. Healthcare is the manufacturer of Cardiosport Heart Rate monitors and systems. Under the terms of the agreement, defendant appointed

tance in the resolution of the motion, the request is denied. See D. Kan. R. 7.2.

plaintiff the exclusive North American distributor of its products. On May 24, 1996, plaintiff filed this action alleging that defendant breached the Distributor Agreement in a variety of ways, unjustly enriched itself at plaintiff's expense, and interfered with plaintiff's prospective business relations.

Paragraph 16 of the Distributor Agreement, a copy of which plaintiff attached to its complaint, contains a mandatory arbitration provision, stating:

Any dispute, controversy or claim arising out of or relating to this agreement, shall be settled by arbitration in England upon written notice of one to the other in accordance with the Arbitration and Conciliation Rules of the International Chamber of Commerce. Each party shall pay its own expenses in connection with the arbitration.

Defendant now moves to dismiss the case on the grounds that the arbitration clause in the Distributor Agreement forecloses the action.

### II. Standards

A court may not grant a motion to dismiss for failure to state a claim unless it appears that the plaintiff can prove no set of facts that would entitle it to relief. *Jacobs, Wisconsin & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir.1991). In considering such a motion, the court must assume the truth of all well-pleaded facts in the plaintiff's complaint and view them in the light most favorable to the plaintiff. *Zimmerman v. Burch*, 494 U.S. 113, 118, 110 S.Ct. 975, 979, 108 L.Ed.2d 100 (1990). The court also must construe liberally the pleadings and indulge all reasonable inferences in favor of the plaintiff. *Agony v. HMO Colorado*, 968 F.2d 97, 98 (10th Cir.1993); *Swanson v. Bizler*, 750 F.2d 810, 813 (10th Cir.1984); Fed. R.Civ.P. 8(a). The issue in reviewing the sufficiency of a complaint is not whether the plaintiff ultimately will prevail, but whether it is entitled to offer evidence to support its claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

### III. Discussion

The arbitration provision at issue, revolving around a commercial agreement between

entities of different nations to arbitrate in a foreign country, is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 9 U.S.C. § 201 note. The Convention was enacted to ensure the efficacy and to unify the standards of international commercial transactions. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 n. 10, 94 S.Ct. 2449, 2456 n. 10, 41 L.Ed.2d 270 (1974). The United States and the United Kingdom are both Contracting States to the Convention, 9 U.S.C. § 201 note, art. XVI, which, having been ratified by Congress, is part of the law of the United States. U.S. Const. art. VI, cl. 2.

[1] Article II of the Convention mandates that courts of a Contracting State recognize and enforce arbitration agreements unless such agreements are "null and void, inoperative or incapable of being performed." 9 U.S.C. § 201 note, art. II(3). The Tenth Circuit adheres to a four-part test in determining whether an international dispute should be referred to arbitration:

- (1) Is there an agreement in writing to arbitrate the subject of the dispute?
- (2) Does the agreement provide for arbitration in the territory of the signatory of the Convention?
- (3) Does the agreement arise out of a legal relationship whether contractual or not, which is considered as commercial?
- (4) Is a party to the agreement not an American citizen, or does the commercial relationship have some relation with one or more foreign states?

*Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 959 (10th Cir.1992)(citing *Lede v. Ceramiche Ragna*, 684 F.2d 184, 186-87 (1st Cir.1982)). If these questions are answered in the affirmative, the court is required to order arbitration. *Id.*

[2] Only the first prong of the test is in controversy. Plaintiff contends that the arbitration provision is inapplicable because defendant has denied the existence of the Distributor Agreement. See *City of Wamego v. L.R. Foy Constr. Co.*, 9 Kan.App.2d 168, 675 P.2d 912, 916 (1984) (a party repudiating a

contract may not compel arbitration on any issue in the contract) (citing *Berters v. Superior Court*, 216 Cal.App.2d 213, 30 Cal.Rptr. 719 (1963)). Defendant, however, does not dispute that it entered into and remains a party to a binding agreement with plaintiff. The fact that defendant's former managing director sent correspondence to plaintiff denying that a contract had been formed is irrelevant in light of defendant's present concession.<sup>2</sup> The court, therefore, finds that there is an agreement in writing to arbitrate the subject of this dispute.

[3-6] Plaintiff further argues that even if an agreement does exist, defendant has waived its right to compel arbitration. As a consequence of the strong state and federal policies favoring arbitration, a party asserting a waiver of arbitration has a heavy burden of proof. *Peterson v. Shearson/American Express, Inc.*, 849 F.2d 464, 466 (10th Cir.1988); *D.M. Ward Constr. Co. v. Electric Corp.*, 15 Kan.App.2d 114, 803 P.2d 593, 597 (1990). A waiver of arbitration rights requires an unequivocal demonstration of intent to waive. *Jackson Trak Group, Inc. v. Mid States Port Auth.*, 242 Kan. 683, 754 P.2d 122, 129 (1988). In determining whether a party has waived its right to arbitration, the court examines the following factors:

(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps (e.g., taking advantage of judicial discovery procedures not available in arbitration) had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party.

*Metz v. Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482, 1489 (10th Cir.1994)

2. In its reply brief, defendant expressly disavows the correspondence of its former managing di-

(citing *Peterson*, 849 F.2d at 467-68); see also *Jackson Trak*, 751 P.2d at 129 (describing situations in which party's conduct is inconsistent with arbitration clause). Plaintiff maintains that defendant waived the arbitration provision by initially denying the existence of the Distributor Agreement, engaging in activity reserved exclusively for litigation, and waiting almost five months after the filing of the complaint before attempting to enforce the arbitration clause.

The case that plaintiff cites in support of its proposition, *D.M. Ward*, *supra*, is distinguishable. There, the Kansas Court of Appeals held that a defendant's ten-month delay in claiming a right to arbitration constituted a waiver of that right. 803 P.2d at 598-99. Both parties in the action, however, had conducted a substantial amount of discovery prior to the time the defendant filed its motion to compel arbitration. *Id.* at 599. Moreover, the defendant's motion came just one month before the scheduled trial date. *Id.*

Nearly every case in which a party has been found to have waived its arbitration rights has involved a situation in which the party filed its motion to compel arbitration virtually on the eve of trial and/or after significant discovery had been conducted. See, e.g., *Metz*, 39 F.3d at 1489-90; *Peterson*, 849 F.2d at 467-68. In contrast, no discovery has been undertaken in the instant action and the trial date is five months away. Notwithstanding plaintiff's assertion, the parties' September 1996 scheduling conference does not constitute "substantial invocation of the litigation machinery." Although defendant initially denied the existence of the Distributor Agreement, it now concedes that a binding contract exists. Defendant's actions were not unduly dilatory; it raised the arbitration provision in its first responsive pleading. In sum, defendant's conduct does not evince an unequivocal intent to waive its arbitration rights, and plaintiff does not appear to have suffered any prejudice as a result of defendant's actions. Accordingly, the court shall dismiss the case without prejudice and refer the matter to arbitration as

rector and concedes that it entered into a binding Distributor Agreement with plaintiff.

set forth in the parties' Distributor Agreement.

IT IS, THEREFORE, BY THE COURT ORDERED that defendant's motion to dismiss (Doc. 10) is granted.

IT IS SO ORDERED.



Nathaniel GUESS, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civil Action No. 96-2307-KHV.

United States District Court,  
D.Kansas.

April 23, 1997.

Employee of property management company which was hired by Department of Housing and Urban Development (HUD) to manage and operate multifamily housing properties in Kansas City area brought Federal Tort Claims Act (FTCA) action against the United States to recover damages for injuries sustained while working at one of the properties. The United States moved for summary judgment. The District Court, Vratil, J., held that United States was entitled to assert exclusive remedy provision of Kansas Workers' Compensation Act as a defense.

Motion granted.

#### 1. Workers' Compensation ⇨2084

Repair, rehabilitation, operation, management and rental of United States multifamily housing property, as performed by property management company hired by Department of Housing and Urban Development (HUD), were inherent in and integral part of HUD's property disposition branch; therefore, because work done by company was part of HUD's trade or business, the

United States was in same position, for liability purposes, as a statutory employer under Kansas Workers' Compensation Act and was entitled to assert exclusive remedy provision of the Act as a defense to action brought by company employee under Federal Tort Claims Act (FTCA). 28 U.S.C.A. § 1346(b); K.S.A. 44-501, 44-503(a).

#### 2. Workers' Compensation ⇨187

When United States seeks statutory employer status, focus is on particular agency or department which contracted for the work.

#### 3. Workers' Compensation ⇨281

Determination of whether work performed by a contractor was part of employer's trade or business, for purposes of exclusive remedy provision of Kansas Workers' Compensation Act, is controlled by two alternative tests: (1) whether work being performed by independent contractor and injured employee is necessarily inherent in and an integral part of principal's trade or business, and (2) whether work being performed by independent contractor and injured employee is such as would ordinarily have been done by employees of principal. K.S.A. 44-501, 44-503(a).

Gene P. Graham, Jr., Mary E. Cluse, White, Allinder & Graham, L.L.C., Independence, MO, Rebecca L. Rolf, Terril Law Firm, L.L.C., Kansas City, MO, for Plaintiff.

Nancy M. Landis, Office of U.S. Attorney, Topeka, KS, for Defendant.

#### MEMORANDUM AND ORDER

VRATIL, District Judge.

This matter comes before the Court on Defendant's Motion For Summary Judgment (Doc. #36) filed March 10, 1997. Plaintiff brings this action to recover for personal injuries sustained during his employment with Intown Properties, Inc. ("Intown") a property management company which contracted with the United States Department of Housing and Urban Development ("HUD") to manage and operate multifamily housing properties in the Kansas City area. For the following reasons the Court