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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

<p>ROBERT E. MARKER,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">and</p> <p>KEVIN MARKER,</p> <p style="text-align: center;">Respondent.</p>	<p>Case No. 16-06-16821</p> <p>OPINION and ORDER</p>
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Summary

This case requires the court to determine whether an arbitration provision compels the member-managers of a limited liability company (LLC) to arbitrate their disputes regarding business operations. Ultimately, the court rules that arbitration must be compelled. The parties' disputes concern the LLC's operating agreement so as to fall within the scope of its arbitration provision. ORS 36.645(1) authorizes the court to appoint an arbitrator in lieu of the fact that the designated arbitrator no longer exists. Finally, the inclusion of a general rights-and-remedies provision in the LLC's operating agreement does not preclude arbitration. ORS 42.240 establishes that the specific arbitration provision controls over the general rights-and-remedies provision as a matter of contract interpretation.

Discussion

I. Factual and Procedural Background

Petitioner and Respondent are the sole members and managers of High Prairie Arena & Stables, an LLC that operates a horse arena and stables in Junction City. The LLC is governed by an operating agreement ("Agreement") that was executed by the parties in March 1999. The petition asserts that subsequent to the LLC's formation controversies have arisen between the parties regarding:

- (a) Management, control, and ownership of the company;
- (b) Claims relating to inappropriate distribution, misapplication, and conversion of company assets;
- (c) Proper interpretation of the company's operating agreement; and
- (d) Dissolution of the company and a final accounting.

Petitioner's trial memorandum elaborates on the four controversies listed in the petition. The memorandum lists eight issues, each of which involves a section of the Agreement:

- (1) Capital accounts (section 2);
- (2) Capital contributions (section 2.4);
- (3) Ownership interests (section 2.4);
- (4) Management rights (section 3.1);
- (5) Right to manager removal (section 3.1);
- (6) Propriety of distributions (section 6.4);
- (7) Dissolution rights (section 6.4);
- (8) Reconciliation of capital accounts upon dissolution (section 7.5).

The sole question before the court is whether arbitration should be compelled pursuant to the Agreement's arbitration provision. In this posture, the court's decision is informed by Petitioner's Petition to Compel Arbitration (OJIN 1) and Respondent's Amended Response to Petition to Compel Arbitration (OJIN 4).

II. Legal Analysis

A. Section 11.3 Arbitration Provision

Section 11.3 of the Agreement states:

“Any dispute concerning this Agreement shall be settled by arbitration before a single arbitrator, under the auspices of the Oregon Business Arbitration Association and with the application of its rules and procedures for the resolution of commercial disputes under its Oregon Business rules.”

This section raises two issues: (1) whether the parties' disputes “concern the Agreement” and are thus subject to arbitration, and (2) whether arbitration may be compelled despite the fact that the Oregon Business Arbitration Association no longer exists.

1. The Scope of Disputes “Concerning the Agreement”

Petitioner argues that the parties' disputes “concern the Agreement” so as to be subject to arbitration because the provisions of the Agreement define the LLC's structure and the parties' relationship thereunder. Thus, Petitioner views the Agreement as providing the basis for resolving the parties' disputes on matters of management, capital accounts, distributions, dissolution, etc. Petitioner asserts that the eight issues contained in the trial memorandum flesh out the four controversies listed in the petition. And, as noted above, Petitioner contends that the eight issues correspond to, and are controlled by, particular provisions of the Agreement.

Respondent disputes that the parties' disagreements “concern the Agreement” within the meaning of section 11.3. Respondent argues that Petitioner is limited to the recitations of the parties' controversies contained in the petition rather than the detailed descriptions of

those disputes contained in the trial memorandum. Ultimately, Respondent argues that the parties' controversies do not "concern the Agreement" because they are disputes that involve enforcement of the agreement rather than interpretation thereof.

ORS 36.620(2) confers this court with authority to determine whether the parties' disputes fall within the scope of the arbitration provision.

"Subject to ORS 36.625(8), the court shall decide whether an agreement to arbitrate exists or *a controversy is subject to an agreement to arbitrate.*"¹
(Emphasis added.)

The court is bound to construe the Agreement "liberally to enhance arbitrability."² "Oregon's policy is to construe general arbitration agreements broadly to enhance arbitrability of disputes."³ This policy is manifest in the standard that the Oregon courts apply to determine whether a dispute falls within the coverage of an arbitration provision:

"Under [Oregon's] policy, arbitration is required, unless [the court] can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, and [the court] resolve[s] all doubts in favor of coverage."⁴

This standard derives from United States Supreme Court precedent.⁵ In making its determination under this standard, the court may examine the arbitration clause, the contract as a whole, and external circumstances that cast light on the parties' intentions.⁶

It cannot be said, "with positive assurance," that section 11.3 is "not susceptible" of being interpreted in the manner suggested by Respondent. Even assuming that this court's determination is confined to the four controversies listed in the petition, it is at least plausible, and arguably probable, that the arbitration provision's coverage of "[a]ny dispute concerning this Agreement" encompasses those controversies. This is so because, as described by Petitioner, the Agreement defines those features of the LLC that govern the parties' disputes. Section 2 governs ownership interests and capital contributions. Section 3 governs management of the LLC. Distributions and allocations of the LLC's profits and losses are governed by section 6. Sections 2.4 and 7.5 govern capital accounts. And section 7 governs dissolution and reconciliation of capital accounts. The arbitrator must analyze how the parties' actions comport with the

¹ ORS 36.625(8) is inapplicable here, providing that "[a] judge shall decide all issues raised under a petition filed under ORS 36.600 to 36.740 unless there is a constitutional right to a jury trial on the issue"

² *Snow Mountain Pine v. Tecton Laminates Corp.*, 126 Or App 523, 529, 869 P2d 369 (1994) (discussing case law that sets forth Oregon's liberal policy favoring arbitration); *see also Union Sch. Dist. No. 1 v. Valley Inland Pacific Constructors, Inc.*, 59 Or App 602, 606-07, 652 P2d 349 (1982).

³ *Snow Mountain*, 126 Or App at 529.

⁴ *Id.* This standard appears most recently in Judge Armstrong's concurrence in *Black v. Arizala*, 182 Or App 16, 42, 48 P3d 843 (2002) (Armstrong, J., concurring).

⁵ *Steelworkers v. Warrior & Gulf Co.*, 363 US 574, 582-83, 80 S Ct 1347 (1960), *cited in Corvallis Sch. Dist. 509J v. Corvallis Educ. Ass'n*, 35 Or App 531, 535, 581 P2d 972 (1978).

⁶ *Snow Mountain*, 126 Or App at 529.

governing provisions of the Agreement in order to resolve the disputes listed in the petition. Thus, Respondent's interpretation that these controversies "concern the Agreement" is sufficiently plausible to compel arbitration.

2. Nonexistence of the Oregon Business Arbitration Association

The petition stipulates that the Oregon Business Arbitration Association referred to in section 11.3 no longer exists. Respondent argues that OBAA's nonexistence precludes arbitration in this case. Petitioner does not respond to this argument.

ORS 36.645(1), which was enacted in 2003, controls this issue:

"If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator designated or appointed fails or is unable to act and a successor has not been appointed, the court, on petition of a party to the arbitration proceeding, shall appoint an arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method." (Emphasis added.)

Former ORS 36.320 preceded ORS 36.645(1).⁷ Unfortunately, the court's review of the case law uncovered no cases applying these provisions in circumstances similar to those in the case at bar. However, pursuant to the statute's plain language, the nonexistence of the OBAA dictates that the designated arbitrator is "unable to act," and thus, "upon petition by a party to the arbitration proceeding," the court has power to appoint another arbitrator. Of course, the statute provides that the appointed arbitrator will have the same "powers" as the formerly designated arbitrator. The appointed arbitrator must therefore apply the OBAA's "rules and procedures for the resolution of commercial disputes under its Oregon Business rules," unless such rules and procedures are unascertainable.

B. Section 11.12 Rights-and-Remedies Provision

Section 11.12 of the Agreement states:

"The rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by any party shall not preclude or waive such party's rights to use any and all other remedies. The rights and remedies provided by this Agreement are given in addition to any other rights the parties may have at law or in equity and may be exercised singularly, cumulatively, successively or concurrently."

⁷ Former ORS 36.320 provided: "If, in the arbitration agreement, no provision is made for the manner of selecting the arbitrators, or if, for any reason, there is a failure to act or a vacancy, and no provision in the agreement for the filling thereof, then, upon application of any party to the agreement, any court of record shall appoint an arbitrator or arbitrators to fill the vacancy, who shall act with the same force and effect as if specifically named in the arbitration agreement."

The sole issue raised by this provision is how it comports with the specific mandate of section 11.3 that “any dispute concerning this Agreement shall be settled by arbitration.”

Respondent argues that section 11.12 demonstrates that the parties did not contemplate arbitration as the exclusive method for resolving their disputes. Respondent considers litigation to be an available “remedy” within the meaning of section 11.12 regardless of the arbitration provision. In response, Petitioner evokes the interpretive maxim that specific provisions control over general ones where inconsistencies exist. Petitioner thus argues that section 11.3 controls over section 11.12 and arbitration must be compelled.

Petitioner’s argument finds support in ORS 42.240:

“In the construction of an instrument the intention of the parties is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one that is inconsistent with it.” (Emphasis added.)

Section 11.12 is broad and general in scope, providing for the exercise of “any and all” rights and remedies in nondescript factual circumstances. In comparison, the focus of section 11.3 is singular and particular, establishing arbitration as the sole method of conflict resolution for disputes “concerning [the] Agreement.” ORS 42.420 thus reconciles these sections as follows: (1) the parties must arbitrate disputes “concerning the Agreement” pursuant to section 11.3, and (2) the parties may exercise any rights and remedies available at law or in equity for disputes that do not concern the agreement.

IT IS HEREBY ORDERED that Petitioner’s Petition to Compel Arbitration (OJIN 1) is GRANTED.

IT IS FURTHER ORDERED that United States Arbitration and Mediation Services (USA&M) of Portland is appointed to arbitrate the parties’ disputes listed in the petition. The arbitrator assigned by USA&M shall conduct the arbitration according to the former Oregon Business Arbitration Association’s rules and procedures for the resolution of commercial disputes. In the event that such rules and procedures are unascertainable, the arbitration shall be governed by those rules and procedures to which the parties agree. If the parties are unable reach an agreement in this regard, the arbitrator assigned by USA&M shall set the governing rules and procedures.

Dated: October 30, 2006.



Karsten H. Rasmussen, Circuit Judge