IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAVID H. PRETASKY,

Plaintiff,

v.

MARINEMAX, INC.,

Defendant.

OPINION AND ORDER

01-C-0552-C

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This is a civil suit for declaratory, injunctive and monetary relief brought by plaintiff David H. Pretasky, involving his discharge as an employee of defendant MarineMax, Inc. Plaintiff contends that his termination was wrongful, without "good cause" and in violation of his employment agreement with defendant. Plaintiff seeks a declaratory judgment that paragraph 1(a), 1(c) and 3(a) through (e) of the employment agreement, as well as paragraph 13 of the Agreement of Merger and Plan of Reorganization, are illegal, void, and unenforceable under Wisconsin law; an injunction against enforcement of these provisions; and money damages for injuries to his personal and business reputation.

Presently before the court is defendant's motion for a stay pending arbitration or dismissal in favor of arbitration or in the alternative, dismissal for a lack of ripeness or for

failure to state a claim on which relief can be granted. Defendant asserts that the dispute should be arbitrated because under the employment agreement, all claims relating to plaintiff's employment are subject to binding arbitration with the exception of claims arising from the non-compete provision. Because I find that the portion of the dispute relating to the employment agreement is not a "claim arising out of the non-compete provision," I conclude that the arbitration provision in the parties' employment agreement governs the dispute over plaintiff's termination. Defendant's motion to dismiss in favor of arbitration will be granted as to this claim. Further, I find that plaintiff's request for declaratory judgment regarding the enforceability of paragraph 13 of the Agreement of Merger and Plan of Reorganization is not ripe. Defendant's motion to dismiss for lack of ripeness will be granted as to this claim.

For the sole purpose of deciding the motion to dismiss, I am accepting as true the allegations in the complaint and its attached exhibits.

ALLEGATIONS OF FACT

Plaintiff David H. Pretasky is an adult resident of La Crosse, Wisconsin. Defendant MarineMax, Inc. is a Delaware corporation with its principal place of business in Florida. Defendant is in the business of selling and leasing boats and other nautical equipment.

In 1998, plaintiff sold his boat dealership to defendant. He signed an agreement of

Merger and Plan of Reorganization, promising, among other things, not to violate Paragraph 13, which prohibited him from engaging in any business in direct competition with defendant or any of its subsidiaries within a 100 mile radius of any place where defendant conducts business.

At the same time, defendant hired plaintiff as manager of Sea Ray of North Carolina, Inc., a wholly owned subsidiary of defendant. The terms of this employment were set out in an employment agreement, which required in paragraph 1 that plaintiff devote his best efforts and substantially all his business time and attention to defendant. In paragraph 3, plaintiff agreed not to engage in any business activities that interfered with his duties and responsibilities to defendant.

Paragraph 15 of the employment agreement provided for mediation and arbitration. After providing for notice of claims, opportunity for curing any breaches and mediation of disuptes, the agreement states that:

> If Claimant and Respondent are unable to resolve the dispute in writing within ten (10) business days from the date negotiations began, then without the necessity of further agreement of Claimant or Respondent, the dispute set forth in the Claim Notice shall be submitted to binding arbitration (except for claims arising out of paragraphs 3 or 7 hereof) initiated by either Claimant or Respondent pursuant to this paragraph . . .

In a letter dated August 6, 2001, defendant informed plaintiff that it had "good cause" to terminate his employment, in part because of what defendant described as

plaintiff's efforts to negotiate an investment in a boat dealership in La Crosse, Wisconsin, for his son, daughter and son-in-law, which defendant viewed as a violation of the employment agreement. At no relevant time was plaintiff an owner, stockholder or employee of the La Crosse, Wisconsin dealership. On August 21, 2001, plaintiff responded to defendant's letter, denying that he was in violation of the employment agreement.

On August 31, 2001, defendant terminated plaintiff's employment for the alleged violations of the employment agreement. The termination has cost plaintiff more than $150,000.00 in compensation he would have otherwise received. On September 24, 2001, plaintiff learned that defendant had notified his son and daughter that their pursuit of a boat dealership violated their obligations under an Agreement of Merger and Plan of Reorganization between defendant and them. Plaintiff is bound by those same provisions.

OPINION

A. Motion to Dismiss Pending Arbitration

1. Paragraph 1

The parties' first dispute centers on the enforceability of paragraph 1 of the employment agreement, which relates to plaintiff's obligation to use his best efforts for defendant and refrain from competition. Plaintiff admits that disputes arising out of paragraph 1 of the agreement are to be arbitrated, but he characterizes the declaratory

judgment he seeks as part of "a dispute as to allegedly competitive business activities," and thus arising from paragraph 3 of the agreement. Plt.'s Br. in Resp., dkt. #7, at 6. The point of his characterization is to bring his challenge of paragraph 1 within the exception to the arbitration clause contained in the employment agreement as a claim arising out of paragraph 3.

The arbitration provision covers all disputes arising out of the employment agreement, except for "claims arising out of paragraphs 3 and 7" of that agreement. Agreements to arbitrate are construed according to the ordinary rules of contract interpretation, but courts must also consider the federal policy of resolving ambiguities in favor of arbitration. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995). Further, when dealing with a general rule and an exception, the exception should be interpreted narrowly, to prevent it from overwhelming the rule. Commissioner v. Clark, 489,U.S. 726, 739 (1989). An arbitration provision that extends to "all disputes arising out of the agreement" is a broad one. "Arising out of" reaches all contract disputes, including challenges to the enforceability of the terms of the contract. Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress International, 1 F.3d 639, 642 (7th Cir. 1993).

In seeking a declaratory judgment regarding the enforceability of paragraph 1 of the employment agreement, plaintiff is trying to litigate a dispute "arising out of" the agreement. Such a dispute falls within the agreement to arbitrate in paragraph 15. Even if plaintiff is

correct that a declaratory judgment on the enforceability of paragraph 1 would rely on facts relevant to the noncompetion provision in paragraph 3, this does no more than raise doubts about whether the suit is subject to arbitration. It does not preclude arbitration. Under the Federal Arbitration Act, the presumption of arbitrability dictates that "as matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983).

2. Paragraph 3

Defendant has also filed a motion to dismiss or stay plaintiff's claim challenging the enforceability of paragraphs 3(a) through 3(e) of the employment agreement relating to plaintiff's agreement not to compete. Plaintiff's response is that paragraph 3 falls under the exception to the arbitration agreement.

As noted above, the arbitration agreement states that "all disputes arising out of this Agreement" are subject to arbitration with the exception of "claims arising out of paragraphs 3 and 7." Defendant offers a narrow interpretation of this exception by emphasizing the use of the word "claim" in the clause. Defendant would limit the exception to its own attempts to enforce the non-competition agreement. In contrast, plaintiff's interpretation of the exception is that it includes any dispute involving paragraph 3 or non-competition issues.

As discussed earlier, when interpreting a contract with a general rule and an exception, the exception should be interpreted narrowly to prevent it from overwhelming the rule.

Defendant's emphasis on the words "claims arising out of" in the exception clause and the subsequent narrow interpretation of that clause is further supported by the broad language used in constructing the general rule. In the general rule favoring arbitration, the agreement reads broadly: "*all disputes* arising out of this Agreement" (emphasis added). This clear language demonstrates that the parties could have used language that would have excepted all *disputes* surrounding the non-compete agreement. Instead, the exception to the arbitration agreement is drafted narrowly. In essence, plaintiff suggests that "claims" and "all disputes" mean the same thing. According to Black's Law Dictionary a dispute means "a conflict or controversy, esp. one that has given rise to a particular lawsuit." A claim is defined as an "aggregate of operative facts giving rise to a right enforceable by a court" or alternatively "the assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional."

In his claim regarding the enforceability of paragraph 3 of the employment agreement, plaintiff is not bringing a "claim arising out of" the non-compete agreement. He is asserting that defendant terminates him wrongfully and owes him damages for the termination. The dispute may center on paragraph 3 and address non-competition issues discussed in that paragraph, but plaintiff does not have a legally enforceable right arising out of that

paragraph. The right to enforce the provision of paragraph 3 is defendant's. Taking this fact into consideration, together with the rules of contract interpretation and the federal policy favoring arbitration discussed above, I conclude that plaintiff's claim regarding the enforceability of paragraph 3 is not excluded from arbitration under the employment agreement.

3. Injury to reputation

Plaintiff frames his injury to reputation claim as stemming from defendant's attempt to enforce the non-competition clause in the employment agreement by terminating him and subsequently demanding arbitration. Once again, defendant argues that these claims should be dismissed or stayed pending arbitration under paragraph 15 of the employment agreement because plaintiff's request for damages is actually a claim for wrongful termination that falls within the arbitration agreement.

Because plaintiff's claim for injury to reputation derives from the termination of his employment that is governed by the employment agreement, there can be no question that the claim is "a dispute arising out of" the employment agreement that falls under the arbitration agreement unless the exception clause excludes it as a "claim arising out of paragraphs 3 or 7." Plaintiff characterizes the injury as resulting from a termination that was "wrongful" because it was an attempt to enforce an unenforceable non-compete agreement.

Through this expansive interpretation of the contractual language, plaintiff tries to force what would otherwise be a wrongful termination claim into the exception to the arbitration agreement. I am not convinced that the language of the contract allows this reading.

Like plaintiff's claim regarding the enforceability of paragraphs 3(a) through (e), his claim for injury to reputation is not a "claim arising out of" paragraph 3. Rather, it is a dispute arising out of the employment agreement. Although plaintiff may be correct in asserting that the termination involves alleged violations of the non-compete agreement, at best that argument only creates doubt as to the applicability of the arbitration clause to the dispute. The federal policy directing courts to resolve doubts in favor of arbitration, Kaplan, 514 U.S. at 944-45, and the rules of contract interpretation direct a finding that plaintiff's claim for injury to reputation is subject to arbitration.

4. Paragraph 13

Plaintiff contends that paragraph 13 of the Agreement of Merger and Plan of Reorganization relating to non-competition is illegal, void and unenforceable under Wisconsin law. Although defendant asserts that the claim should be stayed or dismissed pending arbitration, the claim is not subject to the arbitration provision in paragraph 15 of the employment agreement. Defendant does not argue that the merger agreement is incorporated by the employment agreement or that it incorporates it. Yet defendant argues

that "the issues pled [in plaintiff's amended complaint] are all subject to arbitration under [the plaintiff's] employment agreement, and this action should be stayed or dismissed in favor of arbitration." Dft.'s Br. in Support, dkt. #5, at 1-2). The employment agreement provides that "all disputes arising out of *this Agreement*" (emphasis added) are subject to arbitration. A dispute regarding the enforceability of a term in a separate agreement falls outside the scope of the arbitration agreement. Therefore, plaintiff's claim regarding the enforceability of paragraph 13 of the Agreement of Merger and Plan of Reorganization is not subject to arbitration under paragraph 15 of the employment agreement. Whether it is ripe for review is another question.

B. Motion to Dismiss for Lack of Ripeness

The doctrine of ripeness is part of the constitutional case or controversy requirement of Article III of the Constitution. "In essence, the requirement keeps federal courts in the business of resolving existing legal disputes and out of the business of offering advice on the legality of a proposed course of action." Deveraux v. City of Chicago, 14 F.3d 328, 330 (7th Cir. 1994). Ripeness depends on whether the plaintiff's threatened injury is sufficiently imminent to warrant judicial action. Regional Rail Reorganization Act Cases, 419 U.S. 102, 140 (1974). To establish ripeness, a plaintiff must demonstrate both (1) the fitness of the issues for judicial decision and (2) the "hardship to the parties of withholding court

consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).

1. Fitness for judicial decision

The fitness for judicial decision inquiry guards against judicial review of hypothetical or speculative disputes. Babbitt v. United Farm Workers National Union, 442 U.S. 289, 297 (1979). Defendant has not attempted to enforce the non-compete agreement in paragraph 13. Therefore, it argues, plaintiff's claim regarding the enforceability of paragraph 13 of the Agreement of Merger and Plan of Reorganization is not ripe for adjudication. According to plaintiff, the existence of an actual case in controversy is evidenced by his termination, the pending arbitration suit and its threat of damages and the steps defendant has taken to enforce a non-compete agreement identical to that in paragraph 13 against plaintiff's children. Plaintiff argues that these acts constitute an attempt by defendant to enforce the non-compete agreements in both the employment agreement and the merger agreement. Having decided in favor of dismissing plaintiff's claims relating to the non-compete provision of the employment agreement pending arbitration, I will address only plaintiff's claims relating to the non-compete provision of the merger agreement.

Plaintiff's termination and the pending arbitration suit are governed solely by the employment agreement. Therefore, they are not evidence that the issue of enforceability of the non-compete agreement in paragraph 13 of the merger agreement is fit for judicial

review. Instead, to show an actual dispute ripe for adjudication, plaintiff must rely on the action taken by defendant against plaintiff's children and the fact that plaintiff is bound by a similar non-compete agreement. The question is whether these facts pose a dispute of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Steffel v. Thompson, 415 U.S. 452, 460 (1974). According to defendant, plaintiff's fear of a future suit regarding the non-compete agreement is unsubstantiated. This is an overstatement. As plaintiff points out, in addition to bringing an action against other parties bound by the same non-compete agreement, defendant has also indicated that it believes plaintiff violated a similarly worded non-compete clause in the employment agreement. Decl. of Lawrence J. Rosenfeld, dkt. #6, Ex. A at 2. Although defendant has not filed suit against plaintiff to enforce the non-compete provision, these indications of defendant's belief that a violation has occurred support plaintiff's argument that there is a real dispute regarding his participation in the La Crosse dealership and, as a consequence, regarding the alleged violation of the non-compete agreement in paragraph 13 of the merger agreement.

2. Hardship of withholding consideration

To establish ripeness, plaintiff must show not only that the dispute is fit for judicial review, but also that a delay in review will result in significant harm. Cognizable hardships are composed of direct and immediate harm. The greater the hardship, the more likely a

finding of ripeness. Abbott Laboratories, 387 U.S. at 153 ("Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to non compliance, access to the courts under the . . . Declaratory Judgment Act must be permitted"). Such harm is not present here. Plaintiff maintains that he is not an owner, shareholder, or employee of the La Crosse dealership. As a result, he faces no cognizable harm from defendant's attempts to enforce a non-compete agreement against his children. In addition, defendant has not filed an action to enforce this non-compete agreement against plaintiff himself. Even if it does, plaintiff's apparent lack of involvement in the dealership would limit the harm done to the cost of legal defense. Although this cost may be significant, the harm is dependent on events that may not occur. Plaintiff's fear of an eventual lawsuit regarding this non-compete agreement may be well-founded, but the threat of a private lawsuit does not require an immediate and significant change in conduct for fear of serious penalties. Id. Therefore, I conclude that plaintiff's claim regarding the enforceability of paragraph 13 of the Agreement of Merger and Plan of Reorganization is not ripe. Defendant's motion to dismiss will be granted as to this claim.

C. Motion to Dismiss For Failure to State a Claim Upon Which Relief Can be Granted

Because I am granting defendant's motion to dismiss pending arbitration as to

plaintiff's claims under paragraphs 1 and 3 of the employment agreement and defendant's motion to dismiss for lack of ripeness as to plaintiff's claim under paragraph 13 of the merger agreement, I need not discuss defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

ORDER

IT IS ORDERED that

1. Defendant MarineMax, Inc.'s motion to dismiss plaintiff David H. Pretasky's claims regarding the enforceability of paragraphs 1(a), 1(c) and 3(a) through (e) and for injury to reputation is GRANTED;

2. Defendant's motion to dismiss for lack of ripeness plaintiff's claim regarding the enforceability of paragraph 13 of the Agreement of Merger and Plan of Reorganization is GRANTED;

3. The Clerk of Court is directed to enter judgment for defendant and close this case.

Entered this 7th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge