

CHRISTINA NELSON

NO. 19-C-193

VERSUS

FIFTH CIRCUIT

H20 HAIR, INC., MICHAEL JOHN GASPARD
AND HOLLI M. GASPARD

COURT OF APPEAL

STATE OF LOUISIANA

ON APPLICATION FOR SUPERVISORY REVIEW FROM THE
TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 779-340, DIVISION "F"
HONORABLE MICHAEL P. MENTZ, JUDGE PRESIDING

May 22, 2019

SUSAN M. CHEHARDY
CHIEF JUDGE

Panel composed of Judges Susan M. Chehardy,
Robert A. Chaisson, and John J. Molaison, Jr.

WRIT GRANTED; STAY GRANTED.

SMC

RAC

JJM

COUNSEL FOR PLAINTIFF/RESPONDENT,
CHRISTINA NELSON

Lawrence J. Centola, III
Christopher H. Carbine
Jason Z. Landry
Kenneth C. Bordes

COUNSEL FOR DEFENDANT/RELATOR,
H2O HAIR, INC., MICHAEL JOHN GASPARD AND HOLLI M. GASPARD

Ellis B. Murov
Frederic T. LeClercq
Andrew J. Baer

CHEHARDY, C.J.

In this writ application, relators, H₂O, Inc., Michael John Gaspard, and Holli Gaspard, seek review of the district court's denial of their Motion to Stay and/or for Protective Order. For the following reasons, we grant this writ application, reverse the trial court's ruling, and remand for further proceedings consistent with this disposition.

Factual and Procedural History

Christina Nelson worked for H₂O as a cosmetologist. As a requirement of her employment with the company, Nelson executed, among other agreements,¹ an arbitration agreement, which permits either party to initiate arbitration for any "employment related dispute," which is defined to include "a claim under federal, state, local statute, regulation, or common law doctrine regarding or relating to employment discrimination, terms and conditions of employment, or termination of employment ..."

In January 19, 2018, Nelson instituted this action against the company and the Gaspards (hereinafter "the H₂O defendants"), asserting claims that arise out of allegedly improper payroll and wage deductions during her employment with the company. On March 19, 2018, the H₂O defendants filed their reconventional demand seeking damages for Nelson's alleged breach of her non-competition agreement.

On December 11, 2018, the H₂O defendants filed a "Motion to Stay and/or for Protective Order" pursuant to La. R.S. 9:4202, seeking to stay the proceedings and to amend their Answer to assert the defense of arbitration. On March 27, 2019, after extensive briefing and memoranda, the trial judge heard and denied the

¹ Nelson signed a non-competition agreement that is not at issue in this writ application.

motion, finding that the H₂O defendants had waived their right to arbitration. The H₂O defendants seek review of that ruling.

Discussion

This issue is controlled by La. R.S. 9:4201–4217, “The Louisiana Binding Arbitration Law.” Here, this suit was filed prior to the invocation of the arbitration clause so La. R.S. 9:4202 applies:

If any suit or proceedings be brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which suit is pending, upon being satisfied that the issue involved in the suit or proceedings is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until an arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with the arbitration.

According to the plain language of the statute, the trial court “shall” stay the trial of the action until arbitration is had unless the applicant is in default² in proceeding with the arbitration.

La. R.S. 9:4202 allows a trial court to ascertain only two basic facts before ordering arbitration: (1) whether there is a dispute as to the making of the agreement and (2) whether a party has failed to comply with the agreement. If the trial court determines that those two facts are not in issue, the court “shall issue an order directing the parties to proceed to arbitration.”

² The term “default” is not explicitly defined in the Louisiana Binding Arbitration Law; however, La. R.S. 9:4203 reads, in pertinent part:

- A. The party aggrieved by the alleged failure or refusal of another to perform under a written agreement for arbitration, may petition any court of record having jurisdiction of the parties, or of the property, for an order directing that the arbitration proceed in the manner provided for in the agreement. Five days’ written notice of the application shall be served upon the party in default. ...
- B. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the court shall issue an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure or refusal to perform is an issue, the court shall proceed summarily to the trial thereof.

* * *

According to the Louisiana Supreme Court in *Int'l River Ctr. v. Johns-Manville Sales Corp.*, 02-3060 (La. 12/3/03), 861 So.2d 139, 140–42, “Neither [arbitration] statute allows the trial court to determine waiver issues.” *See, Bartley, Inc. v. Jefferson Par. Sch. Bd.*, 302 So.2d 280, 283 (La. 1974)(“The issues of waiver and prematurity address themselves to the arbitrator.”) Further, the *Int'l River Ctr.* court, citing *Matthews–McCracken Rutland Corp. v. City of Plaquemine*, 414 So.2d 756, 757 (La. 1982), held that “the legislature has determined that it is the arbitrator who will make that decision and it is not the province of this court to second guess such policy decisions.” *Int'l River Ctr.*, 861 So.2d at 143. Thus, the issue of waiver should be addressed to the arbitrator.

Decree

For the foregoing reasons, this writ is granted and the ruling of the trial court is reversed. The matter is remanded to the trial court for disposition consistent with this opinion.

WRIT GRANTED; STAY GRANTED.

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
HANS J. LILJEBERG
JOHN J. MOLAISSON, JR.

JUDGES



FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETN, LOUISIANA 70054
www.fifthcircuit.org

MARY E. LEGNON
INTERIM CLERK OF COURT

CHIEF DEPUTY CLERK

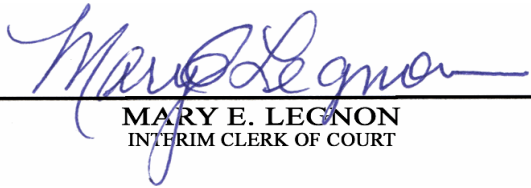
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MELISSA C. LEDET
DIRECTOR OF CENTRAL STAFF

(504) 376-1400
(504) 376-1498 FAX

NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED
IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY
MAY 22, 2019 TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT
REPRESENTED BY COUNSEL, AS LISTED BELOW:


MARY E. LEGNON
INTERIM CLERK OF COURT

19-C-193

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE MICHAEL P. MENTZ (DISTRICT JUDGE)
LAWRENCE J. CENTOLA, III (RESPONDENT) CHRISTOPHER H. CARBINE (RESPONDENT) ANDREW J. BAER (RELATOR)
KENNETH C. BORDES (RESPONDENT)

MAILED

JASON Z. LANDRY (RESPONDENT)
ATTORNEY AT LAW
338 LAFAYETTE STREET
NEW ORLEANS, LA 70130

ELLIS B. MUROV (RELATOR)
FREDERIC T. LECLERCQ (RELATOR)
ATTORNEYS AT LAW
755 MAGAZINE STREET
NEW ORLEANS, LA 70130