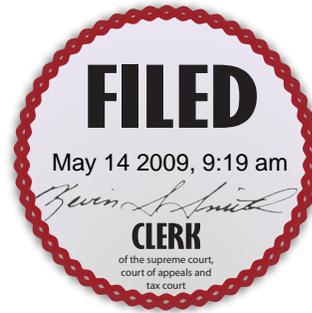


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

ANDREW G. JONES
PHILIP J. GIBBONS
Gibbons & Jones, P.C.
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

MICHAEL S. WALSH
Michael S. Walsh, P.C.
Carmel, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BRUCE FREY,)

Appellant-Respondent,)

vs.)

MR. ROOF INDIANAPOLIS, LLC)

Appellee-Petitioner.)

No. 49A02-0812-CV-1093

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Thomas J. Carroll, Judge
Cause No. 49D06-0806-PL-27512

May 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Bruce Frey appeals the trial court's order granting Mr. Roof Indianapolis, LLC's ("Mr. Roof") Motion to Dismiss for Lack of Subject Matter Jurisdiction. On appeal, Frey raises two issues, one of which is dispositive. We restate that issue as whether the trial court properly determined that it lacked subject matter jurisdiction because the parties were contractually obligated to arbitrate the claims brought by Frey. Concluding that the trial court does have subject matter jurisdiction because the parties are not required to participate in arbitration, we reverse and remand.

Facts and Procedural History

On or about May 16, 2006, Frey began his employment with Mr. Roof as a sales associate. On May 17, 2006, Frey signed a document titled "Independent Contractor/Direct Seller Agreement" ("the Agreement"). Appellant's Appendix at 34. The Agreement was signed by Mr. Roof's Vice President Jim Weaver on May 22, 2006. In the Agreement, Frey is referred to as the "Independent Contractor" or "IC". *Id.* The Agreement provides that Frey would be paid solely on a commission basis. In addition, the Agreement contains the following relevant provisions:

22. **REMEDIES.** Each of the parties hereto acknowledges and agrees that upon any breach by IC of his or her obligations under any provision of the Agreement . . . the Company shall be entitled to obtain from a court of competent jurisdiction preliminary and permanent injunctive relief as well as damages and an equitable accounting of all earnings, profits and other benefits arising from such violation, which rights shall be cumulative and in addition to any other rights and remedies to which the Company may be entitled.

23. **ARBITRATION.** In addition to remedies in Section 22 which the Company may elect to pursue, the parties agree to arbitrate any dispute, claim

or controversy that may arise in connection with the termination of IC's employment by Company including without limitation charges of discrimination alleging violation of any applicable law or statute

Id. at 39.

During the course of his employment, Frey alleges that Mr. Roof failed to pay him \$18,431 in earned commissions. Frey alleges that he demanded that Mr. Roof pay him his earned commissions, and Mr. Roof refused. Thereafter, Frey resigned from his employment with Mr. Roof in December 2007.

On June 20, 2008, Frey filed a complaint against Mr. Roof alleging that Mr. Roof had breached the Agreement and had violated Indiana's Wage Payment Statute, Indiana Code chapter 22-2-5 et seq. On August 15, 2008, Mr. Roof filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction. In its motion, Mr. Roof argued that the trial court did not have subject matter jurisdiction because under the Agreement, the parties were required to arbitrate their dispute. Without conducting an evidentiary hearing, the trial court granted Mr. Roof's Motion to Dismiss on November 7, 2008, and this appeal ensued.

Discussion and Decision

I. Standard of Review

The trial court granted Mr. Roof's Motion to Dismiss because it concluded that it did not have subject matter jurisdiction. "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings then before the court belong." Hubbard v. Columbia Women's Hosp. of Indianapolis, 807 N.E.2d 45, 50 (Ind. Ct. App. 2004). Whether a court lacks subject matter jurisdiction is an issue that may be raised by the

parties or the court at any time, including on appeal. Id. “In ruling on a motion to dismiss for lack of subject matter jurisdiction, the trial court may consider the complaint, motion and any affidavits or evidence submitted in support.” Id.

Our standard of review for a motion to dismiss filed under Indiana Trial Rule 12(B)(1) depends on what occurred at the trial court. Rice ex rel. Lopez v. Harper, 892 N.E.2d 209, 212 (Ind. Ct. App. 2008), trans. denied.

[W]here the facts are in dispute but the trial court rules on a paper record without conducting an evidentiary hearing, then no deference is afforded the trial court’s factual findings or judgment because under those circumstances a court of review is “in as good a position as the trial court to determine whether the court has subject matter jurisdiction.” Thus, we review *de novo* a trial court’s ruling on a motion to dismiss where the facts before the court are disputed and the trial court rules on a paper record.

Id. at 212-13 (quoting GKN Co. v. Magness, 744 N.E.2d 397, 401 (Ind. 2001)).

Here, the trial court ruled on a paper record without conducting an evidentiary hearing, and the parties dispute some of the pertinent facts of the case. Therefore, we review this case *de novo*.

II. Subject Matter Jurisdiction

In its Motion to Dismiss, Mr. Roof argued the trial court did not have subject matter jurisdiction because under the Agreement, the parties were required to arbitrate Frey’s claims. Mr. Roof specifically stated in its Motion to Dismiss that it sought enforcement of the arbitration clause in the Agreement. As the party seeking to compel arbitration, Mr. Roof was required to satisfy a two-pronged burden of proof. Mislenkov v. Accurate Metal Detinning, Inc., 743 N.E.2d 286, 289 (Ind. Ct. App. 2001). First, Mr. Roof had to

demonstrate the existence of an enforceable agreement to arbitrate the dispute. Id. Here, the arbitration clause found in paragraph twenty-three of the Agreement constitutes an enforceable agreement to arbitrate.

However, the parties dispute whether Mr. Roof has proven the second element of its burden of proof, that the disputed matter is the type of claim the parties agreed to arbitrate. Id. Frey argues Mr. Roof has not shown that the claims raised in his complaint are subject to the arbitration clause of the Agreement. He notes the following language from the Agreement, “the parties agree to arbitrate any dispute, claim or controversy that may arise in connection with the termination of IC’s employment by Company” Appellant’s App. at 39. Based on this language, Frey argues that the arbitration clause only covers issues arising out of the termination of Frey’s employment by Mr. Roof. Because Frey resigned from his employment and was not terminated by Mr. Roof, his claims are not subject to the arbitration clause of the Agreement. Therefore, Frey concludes that the trial court erred in determining that it did not have subject matter jurisdiction.

Frey’s argument requires that we interpret the terms of the Agreement. “Generally, construction of the terms of a written contract is a question of law and reviewed *de novo*.” Berkel & Co. Contractors, Inc. v. Palm & Assocs., Inc., 814 N.E.2d 649, 657 (Ind. Ct. App. 2004).

If the contract language is unambiguous and the intent of the parties is discernible from the written contract, the court is to give effect to the terms of the contract. A contract is ambiguous if a reasonable person would find the contract subject to more than one interpretation; however, the terms of a contract are not ambiguous merely because the parties disagree as to their interpretation. When the contract terms are clear and unambiguous, the terms

are conclusive and we do not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions.

Fackler v. Powell, 891 N.E.2d 1091, 1096 (Ind. Ct. App. 2008), trans. denied.

We conclude that the terms of the Agreement are clear and unambiguous. The relevant provision of the Agreement, as noted by Frey, reads as follows, “the parties agree to arbitrate any dispute, claim or controversy that may arise in connection with the termination of IC’s employment by Company” Appellant’s App. at 39. Under the plain language of the Agreement, the parties are only required to arbitrate those claims arising out of the termination of Frey’s employment by Mr. Roof. Here, Frey’s claims arise in connection with Mr. Roof’s alleged failure to pay Frey his earned commissions during the course of his employment. Thus, Frey’s claims do not arise in connection with the termination of his employment. Furthermore, Frey’s employment was not terminated by Mr. Roof. Rather, Frey resigned from his employment. Because Frey’s claims do not arise in connection with the termination of his employment and because Frey resigned and was not terminated by Mr. Roof, his claims are not subject to the arbitration clause in the Agreement. Therefore, the trial court erred when it determined that it did not have subject matter jurisdiction over this case.¹

Conclusion

The trial court erred in concluding that it did not have subject matter jurisdiction because Frey’s claims are not subject to the arbitration clause in the Agreement. The trial

¹ We note that Mr. Roof would have been correct in contending that arbitration was required had the Agreement provided for arbitration when Frey’s employment was terminated with Mr. Roof rather than by Mr. Roof. However, this language was not used in the Agreement and was not what the parties bargained for. As

court's order granting Mr. Roof's Motion to Dismiss for Lack of Subject Matter Jurisdiction is reversed, and this case is remanded for further proceedings.

Reversed and remanded.

DARDEN, J., and BAILEY, J., concur.

such, Frey's claims are not subject to the arbitration clause in the Agreement.