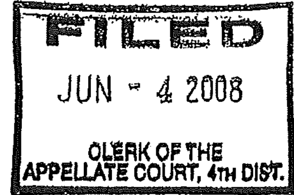
NO. 4-07-0928

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT



PAUL TATMAN and ELAINE TATMAN, Plaintiffs-Appellants, v. BROEREN RUSSO CONSTRUCTION, INC., Defendant-Appellee.	)	Appeal from Circuit Court of Champaign County No. 03MR629 Honorable Charles McRae Leonhard, Judge Presiding.

ORDER

Plaintiffs, Paul and Elaine Tatman, appeal the trial court's order denying their request to stay an arbitration proceeding commenced against them by defendant Broeren Russo Construction, Inc. (Broeren). The Tatmans claim that they are not bound by the arbitration agreement contained in a subcontract entered into by Broeren and "Crocon Concrete Construction" and are not required to arbitrate the claim Broeren filed against them. We reverse and remand with directions.

I. BACKGROUND

A. Facts Pertaining to the Incorporation and Activities of Crocon Concrete Construction, Inc.

In April 1999, articles of incorporation were filed to incorporate "Crocon Concrete Company, Inc." Patricia Crozier and Elaine Tatman were the sole shareholders and directors of the corporation. The directors of the corporation elected Patricia Crozier president, Elaine Tatman vice president, Richard Crozier treasurer, and Paul Tatman secretary. By way of resolution, the

president and secretary were authorized to, among other things, draw and sign checks on the funds deposited in accounts in the name of the corporation. In May 1999, the directors passed a resolution changing the corporation's name to "Crocon Concrete Construction, Inc." (hereafter Crocon).

On September 1, 2001, Crocon was administratively dissolved by the Secretary of State, apparently due to the failure to file the annual report. Crocon was subsequently reinstated on October 28, 2002, after the annual report was filed and necessary fees paid.

In approximately January 2002, although the record is not clear as to the exact time period, Patricia surrendered her stock in Crocon to Elaine, making Elaine the sole shareholder of Crocon. In June 2002, Elaine removed Patricia as a member of the board of directors. Elaine also removed Patricia as president and Richard as treasurer and elected herself president and elected Paul secretary and treasurer.

B. Facts Pertaining to the Subcontract With Broeren

In November 2001, during the time Crocon was dissolved, "Crocon Concrete Construction" and Broeren entered into a subcontract agreement. Broeren had entered into a contract with the University of Illinois at Urbana-Champaign for the construction of the Thomas M. Siebel Center for Computer Science. Broeren subcontracted with "Crocon Concrete Construction" for the concrete work. Patricia signed the subcontract on behalf of "Crocon Concrete Construction." No designation as to Patricia's

capacity is identified on the subcontract.

The subcontract contained an arbitration provision which provided that any controversy or claim between the contractor and subcontractor arising out of or relating to the subcontract, including a breach of the subcontract, would be settled by arbitration. The arbitration provision, hereinafter referred to as section 6.2, also provided as follows:

> "6.2 Except by written consent of the person or entity sought to be joined, no arbitration arising out of [sic] relating to the [s]ubcontractor [sic] shall include, by consolidation or joinder or in any other manner, any person or entity not a party to the [s]ubcontract under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, and (3) the interest or responsibility of such person or entity in the matter is not insubstantial. This agreement to arbitrate with an additional person or persons referred to herein shall be specifically enforceable under applicable law

in any court having jurisdiction thereof."

Crocon began work on the project in December 2001. In April 2002, Broeren terminated the subcontract alleging Crocon's failure to perform.

C. Facts Pertaining to the Arbitration Proceedings

In December 2002, Crocon filed a demand for arbitration against Broeren with the American Arbitration Association. That demand is not contained in the record on appeal. According to other documents contained in the record, the arbitration proceeding was apparently entitled "Arbitration of Crocon Concrete Construction/Patty Crozier and Broeren Russo Construction, Inc."

In August 2003, Broeren filed a counterclaim in the arbitration proceeding against Patricia and Paul. Regarding Paul, Broeren alleged that Paul was personally liable for Crocon's failure to perform the subcontract. Broeren later amended the counterclaim to include Elaine. In the amended counterclaim, Broeren alleged that Paul, Elaine, and Patricia exercised corporate power without authority while the corporation was dissolved. Broeren asserted that by doing so, Paul, Elaine and Patricia were personally liable for all debts and liabilities incurred during the period of dissolution.

D. Facts Pertaining to the Trial Court Proceedings

In October 2003, Paul filed a complaint in the trial court seeking a stay of the arbitration proceeding commenced against him by Broeren. In October 2004, after Broeren amended

the arbitration counterclaim to include Elaine, Paul filed an amended complaint adding Elaine as a plaintiff. The amended complaint alleged that neither Paul nor Elaine had agreed to arbitrate the dispute Broeren raised in its counterclaim in arbitration.

In March 2004, Broeren filed an answer and amended counterclaim. In the counterclaim, Broeren sought an order compelling the Tatmans to proceed with the arbitration of the matters set forth in the amended counterclaim Broeren filed with the American Arbitration Association. Broeren asserted that the Tatmans were individually liable under the subcontract.

In October 2005, Broeren filed a motion for summary judgment on its counterclaim. Broeren asserted that the Tatmans were bound by the arbitration provision in the subcontract on one of three alternative grounds: the Tatmans were (1) involved in a partnership when the subcontract was executed, thus rendering them individually liable under the contract; (2) personally liable as individuals who carried on corporate business after a dissolution and knew or should have known of the corporation's dissolved status; and/or (3) properly included in the arbitration pursuant to the broad arbitration-agreement language contained in section 6.2 of subcontract.

In March 2007, the Tatmans filed a response to Broeren's motion and a cross-motion for summary judgment. In their cross-motion for summary judgment, the Tatmans asserted (1) they were not bound individually because they did not sign the

subcontract; (2) if the court found the agreement was between Broeren and an administratively dissolved corporation, the Tatmans could not be bound by contractual obligations entered on behalf of the corporation because Patricia, and not the Tatmans, was the one who exercised corporate power without authority; and (3) alternatively, if the court found the agreement was between Broeren and a partnership known as "Crocon Concrete Corporation," neither Paul nor Elaine authorized Patricia to submit the partnership claims or liabilities to arbitration.

Although a hearing on the motions had been set, the trial court informed the parties they need not appear for the hearing as the court would rule in writing without oral arguments. In August 2007, the court entered its written memorandum opinion and order denying the Tatmans' request that the court stay the arbitration against them.

The trial court determined the only question before it was whether an agreement to arbitrate existed that bound the parties. The court concluded that under the terms of the arbitration agreement the claim was one subject to arbitration.

The trial court next considered whether the Tatmans could be compelled to arbitrate the claims against them. The court found that once a trial court determines that a valid arbitration agreement exists, the court must compel arbitration, even when the principal litigation involves nonsignatories to the arbitration agreement. The court concluded that the language in the arbitration provision of the subcontract (1) mandated the

dispute between Broeren and Crocon be arbitrated and (2) permitted Broeren to pursue its claim against the Tatmans during the course of the arbitration. The court held as follows:

> "For the foregoing reasons, the court is of the opinion that the terms of the subcontract between Broeren Russo Construction, Inc. and Crocon, Inc. require that any dispute arising under the subcontract be arbitrated. The court is further of the opinion that the language of the subcontract, properly construed, permits joinder of Paul Tatman and Elaine Tatman as parties to the arbitration. Accordingly, pursuant to section 2(b) of the Uniform Arbitration Act (710 ILCS 5/2(b) [West 2006]), the amended complaint of plaintiffs Paul Tatman and Elaine Tatman to stay the pending arbitration proceedings is DENIED. The two-count counterclaim of defendant Broeren Russo Construction, Inc.[,] is stricken as moot. The parties are instead to proceed with the pending arbitration."

In support of its decision, the trial court relied on Board of Managers of the Courtyards at the Woodlands Condominium Ass'n v. IKO Chicago, Inc., 183 Ill. 2d 66, 74, 697 N.E.2d 727, 731 (1998), for the proposition that "once the trial court

determines that a valid arbitration agreement exists, the court must compel arbitration, even when the principal litigation involves parties that are not signatories to the arbitration agreement." The Tatmans filed a motion to reconsider, which the trial court denied.

This appeal followed.

II. ANALYSIS

The Tatmans argue the trial court erred when it (1) failed to determine whether an agreement existed between the Tatmans and Broeren to arbitrate Broeren's claims; (2) found Broeren could compel the Tatmans to arbitrate the claims against them by virtue of the language in the arbitration agreement between Broeren and Crocon; and (3) failed to find that compelling the Tatmans to arbitrate the claims violated their constitutional right to trial by jury. Despite this framing of the issues, the Tatmans essentially argue that the court (1) failed to determine whether the Tatmans, individually, were bound to arbitrate by the terms of the subcontract agreement and (2) should have found that the Tatmans were not so bound.

A. This Court Has Jurisdiction Over the Appeal

This court has jurisdiction over the appeal under Supreme Court Rule 307(a) (188 Ill. 2d R. 307(a)), which governs interlocutory appeals as of right. A motion to compel or stay arbitration is analogous to a motion for injunctive relief. Royal Indemnity Co. v. Chicago Hospital Risk Pooling Program, 372 Ill. App. 3d 104, 107, 865 N.E.2d 317, 321 (2007). Therefore,

the denial or grant of a motion to compel or stay is subject to an interlocutory appeal. Royal, 372 Ill. App. 3d at 107, 865 N.E.2d at 321; see also Acme-Wiley Holdings, Inc. v. Buck, 343 Ill. App. 3d 1098, 1103, 799 N.E.2d 337, 341 (2003) (involving an interlocutory appeal from the trial court's denial of a motion to stay arbitration).

B. Standard of Review Is De Novo

At oral argument, Broeren raised an issue as to the correct standard of review. Generally, this court reviews an interlocutory order granting or denying a motion to stay or compel arbitration for an abuse of discretion. See Pekin Insurance Co. v. Hiera, 362 Ill. App. 3d 699, 701, 840 N.E.2d 1236, 1237 (2005). Where, however, the court holds no evidentiary hearing and makes no factual findings, this court reviews the denial of the motion to stay or compel arbitration de novo. Royal, 372 Ill. App. 3d at 107, 865 N.E.2d at 321 (finding that where the trial court did not hold an evidentiary hearing and did not make factual findings, and where the relevant facts were not in dispute and the court's decision was based on pure legal analysis, the appellate court's review is de novo); see also Carter v. SSC Odin Operating Co., L.L.C., No. 5-07-0392, slip op. at 3-4 (April 4, 2008), ___ Ill. App. 3d ___, ___, ____ N.E.2d ___, ____(Fifth District).

Broeren cited Woods v. Patterson Law Firm, P.C., No. 1-08-0066, slip op. at 7 (March 31, 2008), ___ Ill. App. 3d ___, ___, ____ N.E.2d ____, ____ (First District), in support of an

abuse-of-discretion standard. Woods, however, is distinguishable. There, the appellate court reviewed for an abuse of discretion the trial court's denial of a motion to compel arbitration. The issue was whether the defendants waived their right to compel arbitration. After discovery and a hearing, the court found the defendants had waived their right to arbitrate. Woods, No. 1-08-0066, slip op. at 6, ____ Ill. App. 3d at ___, ____ N.E.2d at ____. Because that determination required a review of disputed facts, the abuse-of-discretion standard was appropriate. Woods, No. 1-08-0066, slip op. at 7, ____ Ill. App. 3d at ___, ____ N.E.2d at ____.

In contrast here, the issue is whether the Tatmans were required to arbitrate. The trial court's decision was based purely on legal analysis and, as such, this court's review is de novo.

C. The Tatmans Are Not Individually Bound by the Subcontract's Arbitration Provision

The Tatmans argue the trial court failed to determine whether the Tatmans were parties to the arbitration agreement. Broeren argues such finding is implicit in the court's order.

Section 2(b) of the Uniform Arbitration Act gives the trial court the power to stay an arbitration proceeding:

> "(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. That issue, when in substantial and bona fide dispute, shall be

> forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration." 710 ILCS 5/2(b) (West 2006).

In this case, the trial court clearly did not decide whether the Tatmans were parties to the subcontract. Instead, the court determined that before a third party could be joined in arbitration, the three factors set forth in section 6.2 of the subcontract must be present: (1) that such person or entity was substantially involved in a common question of fact or law; (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration; and (3) the interest or responsibility of such person or entity in the matter is not insubstantial. The court concluded the Tatmans met that test.

That conclusion, however, begs the question of whether the Tatmans agreed to arbitration. An agreement to arbitrate is a matter of contract. Salsitz v. Kreiss, 198 Ill. 2d 1, 13, 761 N.E.2d 724, 731 (2001). Therefore, persons who are not parties to an arbitration agreement cannot be compelled to arbitrate. City of Peru v. Illinois Power Co., 258 Ill. App. 3d 309, 313, 630 N.E.2d 454, 457 (1994); see also Royal, 372 Ill. App. 3d at 111, 865 N.E.2d at 324 (finding that whether a nonsignatory to the agreement containing the arbitration provision agreed to be bound by the arbitration provision was an issue for the trial court, not the arbitrator, to decide). "[N]o matter how broadly

an agreement is construed, it cannot impose obligations on a person who is not a party to that agreement." A.B. Engineering Co. v. RSH International, Inc., 626 F. Supp. 1259, 1263 (D. Md. 1986).

The trial court relied on Board of Managers for the proposition that "once the trial court determines that a valid arbitration agreement exists, the court must compel arbitration, even when the principal litigation involves parties that are not signatories to the arbitration agreement." Board of Managers, 183 Ill. 2d at 74, 697 N.E.2d at 731 (containing the quote referenced by the trial court herein). In Board of Managers, the plaintiff filed suit against the defendants alleging defects in the design and construction of roofs in a condominium development. Board of Managers, 183 Ill. 2d at 68, 697 N.E.2d at 728. The defendants filed a third-party complaint against Johnston Associates, Inc. (Johnston), on the theories of conditional contribution or indemnification. Board of Managers, 183 Ill. 2d at 68, 697 N.E.2d at 728-29. Because Johnston and the defendants had entered into a contract that contained an arbitration provision, Johnston filed a demand for arbitration and filed a motion in the trial court to stay the third-party claim against it. Board of Managers, 183 Ill. 2d at 69, 697 N.E.2d at 729. There, the trial court denied Johnston's motion. The court noted that while the arbitration agreement was valid, allowing the arbitration to proceed might result in inconsistent results and prejudice other parties in the litigation. Board of

Managers, 183 Ill. 2d at 70, 697 N.E.2d at 729. The appellate court affirmed. Board of Managers, 183 Ill. 2d at 70, 697 N.E.2d at 729.

The supreme court reversed, finding that "agreements to arbitrate must be enforced despite the existence of claims by third parties or of pending multiparty litigation." Board of Managers, 183 Ill. 2d at 78, 697 N.E.2d at 733 (finding that Illinois' public policy concerns that favor arbitration outweigh concerns regarding judicial economy, duplication of effort, or possibly inconsistent results). However, Board of Managers did not impose arbitration on nonsignatories to a contract containing an arbitration provision.

The quote upon which the trial court herein relied, in context, simply provides that even if the primary litigation is filed in a trial court, a third-party claim involving parties who have agreed to arbitration must be arbitrated. Although a court cannot excuse compliance with an arbitration provision, the court may stay the entire trial court proceeding pending arbitration or grant a stay with respect to the particular issue in arbitration. Board of Managers, 183 Ill. 2d at 74-75, 697 N.E.2d at 731-32, citing Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 716 (7th Cir. 1967). Therefore, the trial court erred by finding the Tatmans could be bound to arbitrate based on the language contained in the subcontract without determining whether the Tatmans were parties to or otherwise bound by the subcontract.

Here, the trial court failed to determine whether the

Tatmans were bound by the arbitration agreement. Although this court could remand the cause to the trial court to determine whether the Tatmans are bound by the arbitration agreement under any of those theories, we conclude that, as a matter of law, the Tatmans are not so bound.

A nonsignatory to an agreement may be bound to an arbitration agreement contained therein under several different legal theories, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing or alter ego, (5) estoppel, and (6) third-party beneficiary status. See Ervin v. Nokia Inc., 349 Ill. App. 3d 508, 512, 812 N.E.2d 534, 539 (2004), referencing Caligiuri v. First Colony Life Insurance Co., 318 Ill. App. 3d 793, 800, 742 N.E.2d 750, 756 (2000). In this case, Broeren argued the Tatmans were liable either (1) as partners in a partnership known as "Crocon Concrete Construction" that formed when the corporation was administratively dissolved; or (2) as officers and directors of the corporation for obligations and debts incurred while the corporation was dissolved.

The Tatmans are not bound as partners in a partnership that allegedly formed when the corporation was administratively dissolved. When a corporation is administratively dissolved and reinstated, the corporation is deemed to have continued without interruption from the date of dissolution:

"(d) Upon the filing of the application for reinstatement, the corporate existence

> shall be deemed to have continued without interruption from the date of the issuance of the certificate of dissolution, and the corporation shall stand revived with such powers, duties[,] and obligations as if it had not been dissolved; and all acts and proceedings of its officers, directors[,] and shareholders, acting or purporting to act as such, which would have been legal and valid but for such dissolution, shall stand ratified and confirmed." 805 ILCS 5/12.45(d) (West 2002).

However, even though the corporation was reinstated, officers and directors may be personally liable for the obligations of the corporation incurred during the time of dissolution if the directors or officers knew or, because of their position, had reason to know that the corporation had been dissolved. See, e.g., 805 ILCS 5/8.65(a)(3) (West 2002) (directors who carry on the business of a corporation following dissolution are jointly and severally liable for all debts and liabilities thereafter incurred); 805 ILCS 5/3.20 (West 2002) ("All persons who assume to exercise corporate powers without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof"); Steve's Equipment Service, Inc. v. Riebrandt, 121 Ill. App. 3d 66, 70, 459 N.E.2d 21, 24 (1984) (a person who enters into a contract on behalf of a

dissolved corporation is only personally liable under section 150 of the Business Corporation Act (Ill. Rev. Stat. 1981, ch. 32, par. 157.150)--now section 12.45--if at the time he entered the contract he knew or, because of his position, should have known of the dissolution).

Generally, liability under such circumstances has been limited to the director or officer who actually incurred the corporate liability. See Cardem, Inc. v. Marketron International, Inc., 322 Ill. App. 3d 131, 136-37, 749 N.E.2d 477, 481 (2001) (finding that the president of the corporation, who knew the corporation was dissolved when he signed a note on behalf of the corporation, was personally liable on the note); In re Estate of Plepel, 115 Ill. App. 3d 803, 806, 450 N.E.2d 1244, 1246 (1983) (reinstatement of the dissolved corporation does not absolve the officers of personal liability for debts incurred by them during the period of dissolution); Chicago Title & Trust Co. v. Brooklyn Bagel Boys, Inc., 222 Ill. App. 3d 413, 420, 584 N.E.2d 142, 146 (1991) (an individual who signed a lease as the secretary or treasurer for the dissolved but later reinstated corporation was personally liable under the lease); Department of Revenue v. Semenek, 194 Ill. App. 3d 616, 619, 551 N.E.2d 314, 316 (1990) (section 12.45(d) (Ill. Rev. Stat. 1985, ch. 32, par. 12.45(d)) does not transform individual liability into corporate liability). In this case, neither Paul nor Elaine personally executed the contract on Crocon's behalf. Therefore, they cannot be held personally liable.

The only cases that impose personal liability upon a nonsignatory to a contract entered into on behalf of a dissolved, but later reinstated, corporation arise out of the United States District Court for the Northern District of Illinois. For example, in Richmond Wholesale Meat Co. v. Hughes, 625 F. Supp. 584, 589 (N.D. Ill. 1985), the court held that personal liability after dissolution should not necessarily be limited to the person who incurred the obligation. The Richmond court examined section 3.20 of the Business Corporation Act of 1983, which provides:

> "All persons who assume to exercise corporate powers without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof." 805 ILCS 5/3.20 (West 2002).

The Richmond court interpreted this language to include not only the person who actually exercises the authority but also those persons who have an investment in the corporation and who actively participate in the policy and operational decisions of the organization. Richmond, 625 F. Supp. at 588-89. The court concluded liability should not necessarily be restricted to the person who personally incurred the obligation. Richmond, 625 F. Supp. at 589 (denying summary judgment because whether the individuals knew or should have known the corporation had been dissolved was a disputed issue of fact). We refuse to follow such line of cases.

III. CONCLUSION

For the reasons stated, we reverse the trial court's judgment and remand for entry of an order granting the Tatmans' motion to stay the arbitration commenced against them by Broeren.

Reversed and remanded with directions.

MYERSCOUGH, J., with APPLETON, P.J., and TURNER, J., concurring.