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MBNA AMERICA BANK, N.A. *v.* TEOFIL BOATA
(AC 25788)

DiPentima, Harper and Foti, Js.

Argued November 16, 2005—officially released March 28, 2006

(Appeal from Superior Court, judicial district of Stamford-Norwalk, Hiller, J.)

Teofil Boata, pro se, with whom, on the brief, were *Stewart I. Edelstein* and *Carrie L. Larson*, for the appellant (defendant).

Jeanine M. Dumont, with whom, on the brief, was *Corinne D. Brophy*, for the appellee (plaintiff).

Opinion

DiPENTIMA, J. The dispositive issue in this appeal

is whether the trial court lacks subject matter jurisdiction to consider a claim that an issue is not subject to arbitration if that claim is not brought within thirty days of the issuance of notice of the arbitration award. Because we conclude that, under the circumstances of this case, the court had jurisdiction to consider the claim and the defendant was entitled to a hearing on the issue of whether an agreement to arbitrate existed, we reverse the court's judgment and remand the case for further proceedings.

The following facts and procedural history are relevant to our disposition of this appeal. Since 1996, the defendant, Teofil Boata, has used credit extended to him by the plaintiff, MBNA America Bank, N.A.[1] The plaintiff claims that a credit agreement accompanied the issuance of the credit card to the defendant and that, by using the credit card, the defendant acceded to the terms of the agreement.[2] Although this initial standard form agreement did not include an arbitration provision, the plaintiff claims to have issued an amendment to the standard form agreement in 1999. This amendment provided that any and all claims arising under the agreement would be submitted to binding arbitration. The amendment included a provision by which the card user could opt out of the arbitration provision by sending the rejection in writing to the plaintiff. The plaintiff claims that it never received from the defendant any written notice that he rejected the arbitration term, and, in fact, the defendant continued to use the credit card. The defendant claims that he did not receive either the initial standard form agreement or the amendment providing for binding arbitration.

The plaintiff alleges that in April, 2003, the defendant defaulted on his obligation to make payments on the credit card. At the time of the default, the defendant had an outstanding balance of approximately $45,000. The plaintiff initiated an arbitration proceeding with the National Arbitration Forum in an attempt to recover the allegedly overdue sum. The defendant filed a response in which he claimed that he never received any agreement and objected to the imposition of any arbitration provision of such an agreement. The defendant specifically maintained that he retained any right he had to be heard by a jury in regard to the plaintiff's claim. On March 19, 2004, the arbitrator issued notice of his award. The arbitrator found that (1) the plaintiff had issued the defendant a credit card in 1996 pursuant to the terms enumerated in the credit card agreement, (2) the credit card agreement included provisions that provided that the signing and use of the card obligated the user to pay for the credit used, (3) the defendant did, in fact, utilize credit and obtain cash advances from the plaintiff, and (4) the defendant affirmed his obligation to pay for such credit by making timely payments and failing to object in a timely fashion to any outstanding balances.[3] On the basis of these findings,

the arbitrator issued an award of $57,486.66 in favor of the plaintiff.

The defendant did not file a motion to vacate the award in the Superior Court or take any other action to challenge the award. On August 17, 2004, the plaintiff filed an application to confirm the award in the Superior Court pursuant to General Statutes § 52-417. On August 23, 2004, the defendant filed an objection to the application to confirm the award on the ground that the parties had not entered into a written agreement to arbitrate, rendering the arbitrator without jurisdiction to consider the matter or to issue an award. The court concluded that it did not have jurisdiction to consider the defendant's objection, which it interpreted as a motion to vacate, modify or correct brought pursuant to General Statutes §§ 52-418 or 52-419, because that objection to the award was not filed within thirty days of the issuance of notice of the arbitration award.[4] See General Statutes § 52-420 (b). The court confirmed the award, and this appeal followed.

On appeal, the defendant claims that the court improperly concluded that he failed to preserve his right to challenge the arbitrability of the claim because he did not file a motion to vacate the award within the thirty day time limitation of § 52-420 (b).[5] We agree.

As a general matter, judicial review of arbitration awards is narrow in scope because we favor arbitration as an alternative method of dispute resolution. *Board of Education* v. *Wallingford Education Assn.*, 271 Conn. 634, 639, 858 A.2d 762 (2004). This deferential review, however, does not extend to questions of whether any individual dispute is subject to arbitration, unless the parties have left that question, as well, to the consideration of the arbitrator. *Welch Group, Inc.* v. *Creative Drywall, Inc.*, 215 Conn. 464, 467, 576 A.2d 153 (1990). In any given case, therefore, ''[w]hether a particular dispute is arbitrable is a question for the court''; (internal quotation marks omitted) id.; and deference need not be given to the arbitrator's decision.

''It is well established that [a]rbitration is a creature of contract. . . . It is designed to avoid litigation and secure prompt settlement of disputes . . . . [A] person can be compelled to arbitrate a dispute only if, to the extent that, and in the manner which, he has agreed so to do. . . . No one can be forced to arbitrate a contract dispute who has not previously agreed to do so. . . . Moreover, [i]t is the province of the parties to set the limits of the authority of the arbitrators, and the parties will be bound by the limits they have fixed. . . . The arbitration provision in an agreement is, in effect, a separate and distinct agreement. Courts of law can enforce only such agreements as the parties actually make. . . . Accordingly, because an arbitrator's jurisdiction is rooted in the agreement of the parties . . . a party who contests the making of a contract con-

taining an arbitration provision cannot be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate. Only a court can make that decision.''[6] (Citations omitted; emphasis in original; internal quotation marks omitted.) *Nussbaum* v. *Kimberly Timbers, Ltd.*, 271 Conn. 65, 72–73, 856 A.2d 364 (2004).

A claim, therefore, that a contract dispute is not subject to arbitration is an attack on the subject matter jurisdiction of the arbitrator, and, as such, may be raised at any time prior to a final court judgment. *Total Property Services of New England, Inc.* v. *Q.S.C.V., Inc.*, 30 Conn. App. 580, 591, 621 A.2d 316 (1993); see also *Bennett* v. *Meader*, 208 Conn. 352, 364, 545 A.2d 553 (1988) (''authority of the arbitrator is a subject matter jurisdiction issue, and as such it may be challenged any time''). ''The final judgment in an arbitration proceeding is ordinarily an order of the trial court modifying, vacating or confirming the arbitrator's award.'' (Internal quotation marks omitted.) *Phoenix Windows, Inc.* v. *Viking Construction, Inc.*, 88 Conn. App. 74, 77, 868 A.2d 102, cert. denied, 273 Conn. 932, 873 A.2d 1001 (2005).

Our Supreme Court has recognized ''two procedural routes by which a party may preserve the issue of the arbitrability of a particular dispute for judicial determination. First, a party may refuse to submit to arbitration at the outset and instead compel a judicial determination of the issue of arbitrability. . . . Alternatively, threshold questions of arbitrability may properly be committed to the arbitrators themselves for determination under the terms of the contract, along with the merits of the underlying dispute. . . . In such cases a court, on a motion to vacate, may properly entertain a challenge to an award alleging disregard of the limits in the parties' agreement with respect to arbitration.'' (Citations omitted; internal quotation marks omitted.) *White* v. *Kampner*, 229 Conn. 465, 476, 641 A.2d 1381 (1994).

When the question is whether the arbitration has exceeded the limits of the agreement of the parties to arbitrate, the question of jurisdiction may be waived due to the actions of the parties. Id., 477–78. For example, a failure to object to the arbitrability of a question during the arbitration proceedings may operate as a waiver of that objection. Id.; see also *New Britain* v. *State Board of Mediation & Arbitration*, 178 Conn. 557, 561, 424 A.2d 263 (1979). The claim raised by the defendant here, however, is not whether the arbitrator exceeded the limits of the arbitration agreement, but whether any agreement to arbitrate ever existed between the parties. In such a case, the waiver rule is inapplicable. *Total Property Services of New England, Inc.* v. *Q.S.C.V., Inc.*, supra, 30 Conn. App. 586.

Dicta from our Supreme Court in *White* v. *Kampner*, supra, 229 Conn. 465, is instructive on this point. In

that case, our Supreme Court recognized that not all questions regarding arbitrability involve subject matter jurisdiction. Id., 477 n.12. In doing so, however, the court recognized that there exist *some* questions of arbitrability that *do* involve a challenge to the subject matter jurisdiction of the arbitrator. In particular, the court noted that questions of arbitrability that inquire into the existence of a valid agreement to arbitrate are the types of arbitrability issues that necessarily involve a challenge to the arbitrator's subject matter jurisdiction and, therefore, the question of subject matter jurisdiction cannot be waived by the parties' conduct. Id.; cf. *Bennett* v. *Meader*, supra, 208 Conn. 364. It therefore is irrelevant that the defendant failed to file a timely motion to vacate with the Superior Court.[7] The defendant raised his objection to the arbitrator's subject matter jurisdiction prior to final judgment confirming the arbitration award and, therefore, the objection was timely. See *Total Property Services of New England, Inc.* v. *Q.S.C.V., Inc.*, supra, 30 Conn. App. 591; see also *Sawmill Brook Racing Assn., Inc.* v. *Boston Realty Advisors, Inc.*, 39 Conn. App. 444, 448, 664 A.2d 819 (1995).

In concluding that the court had jurisdiction to entertain the defendant's claim that an agreement to arbitrate never existed and that, in fact, the defendant was entitled to a hearing on his claim, we in no way pass judgment on the merits of the defendant's claim that no such agreement existed. Unlike *Bennett* v. *Meader*, supra, 208 Conn. App. 354, 364, in which our Supreme Court held that the parties' oral agreement to arbitrate was unenforceable and violated the statutory requirements for arbitration proceedings, the plaintiff in the present case presented the court with a written amendment to its standard form contract that provided for arbitration of any disputes arising from that contract. The only question is whether this amendment became part of the parties' contract. This query regarding the intention of the parties to enter into an agreement to arbitrate is a question of fact for the court to consider prior to confirming or vacating the award. See *Salomon Smith Barney, Inc.* v. *Cotrone*, supra, 81 Conn. App. 758.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion HARPER, J., concurred.

[1] At the beginning of the proceedings, the defendant claimed that he neither received nor used the credit card issued in his name. This claim, however, never was pursued seriously and appears to have been abandoned in its entirety in the proceedings in the trial court. In any event, this claim is not pursued on appeal.

[2] It is undisputed that the plaintiff did not present the original 1996 agreement to the arbitrator or the Superior Court. The plaintiff did attach to its application to confirm the arbitration award a standard form agreement dated 2001, presumably as evidence that it uses such agreements in the course of its business. It is not clear whether the plaintiff had submitted this standard form agreement during the arbitration proceedings.

[3] Although the arbitrator found that the parties had a written agreement, he did not find specifically that the agreement contained a provision for

binding arbitration.

[4] The court explained this as the basis for its decision in response to a motion for articulation filed by the defendant.

[5] The defendant also claims that the court improperly confirmed the award even though the plaintiff failed to prove the existence of a written agreement to arbitrate. This argument, in actuality, is part of the defendant's larger claim that the parties' dispute was not subject to arbitration and necessarily will form part of the court's factual inquiry on remand.

[6] We note that "the issue of whether the parties to a contract have agreed to arbitration implicates their intention, an issue of fact for the court's determination"; *Salomon Smith Barney, Inc.* v. *Cotrone*, 81 Conn. App. 755, 758, 841 A.2d 1199 (2004); which we will review under the clearly erroneous standard. See id., 758–59. We are unable to engage in such review in this case, however, because the court did not conduct a factual inquiry.

[7] The plaintiff relies on our Supreme Court's decision in *Wu* v. *Chang*, 264 Conn. 307, 823 A.2d 1197 (2003), for its argument that the defendant is foreclosed from raising an objection to the arbitrability of the dispute because he did not file a motion to vacate within thirty days of the issuance of notice of the award. *Wu*, however, specifically involved grounds to vacate an award pursuant to General Statutes § 52-418 (1), and we assume, without deciding, that its holding would be applicable to a challenge brought pursuant to § 52-418 (4) that an arbitrator exceeded his powers. Such a claim, however, presupposes the existence of an agreement to arbitrate, something that is disputed here. The defendant's claim does not question whether the arbitrator exceeded his powers, but whether there ever existed any agreement to arbitrate that would have given to the arbitrator subject matter jurisdiction to consider the contractual dispute.