

IN THE COURT OF APPEALS OF IOWA

No. 9-113 / 98-0687

FILED

EWALD SPETH ANTRIEBSTECHNIK,
Appellee,

vs.

BT PRIME-MOVER, INC.,
Appellant.

Appeal from the Iowa District Court for Muscatine County, Mark J. Smith,
Judge.

The defendant appeals a district court ruling dismissing the plaintiff's breach
of contract action and ordering the parties to proceed to arbitration. **AFFIRMED.**

David J. Maloy of Stanley, Lande & Hunter, P.C., Muscatine, for appellant.

Eric C. Knoernschild of Hintermeister, Knoernschild & Eichelberger,
Muscatine, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ. ›

STREIT, J.

BT Prime-Mover, Inc. appeals from the trial court's finding they agreed to be bound by a contract between Ewald Speth Antriebstechnik (hereinafter Speth) and Clark Material Systems Technology Company and ordering them to participate in arbitration in Geneva, Switzerland, pursuant to the contract. Because BT agreed in clear and unambiguous language to be bound by the terms of the Clark agreement and Speth did not waive its right to arbitration, we affirm.

I. Background Facts & Proceedings.

Speth is a German corporation which manufactures custom components and parts for forklifts. On May 1, 1985, Speth entered into an agreement with Clark to sell Clark custom-designed and assembled transmissions for Clark's use in manufacturing its Model NP-300 forklift. Several months prior to the agreement with Speth, Clark entered into a subcontract with BT to manufacture the NP-300 model forklift. As subcontractor of the NP-300, it was necessary for BT to deal directly with Speth. BT sent a purchase order to Speth on August 8, 1985. The purchase order included the specific part number, unit price, shipping terms, payment conditions, manufacturing schedules, and how the unit should be packaged. Most important to resolution of this controversy was the inclusion of a provision providing:

2. Purchase of these articles will be *per agreement* between Clark Equipment Co. and E. Speth GMBH & Co. KG. (emphasis added).

In December 1996, BT and Speth disputed whether BT had made a firm commitment with Speth to purchase 120 transmissions. Speth suggested the dispute be resolved through arbitration, but BT refused. The dispute resulted in Speth filing a breach of contract suit against BT, claiming BT wrongly refused delivery of an order of 120 transmissions. Both parties sought to refer to the terms of the 1985 contract between Clark and Speth, but neither could find a copy of the contract.

During discovery proceedings, Speth's agent located a copy of the Speth/Clark contract in his closed files. The contract had been misfiled when Speth was purchased by EMKA corporation. The agreement between Speth and Clark contained detailed sale and purchase, price, payment, delivery, and warranty provisions. The contract also contained a provision that any dispute arising out the contract would be settled by arbitration in Geneva, Switzerland, and a provision agreeing the rights and duties of the parties would be governed by Michigan law.

After discovering their right to arbitration, Speth filed a motion to dismiss the lawsuit and requesting the court order BT participate in arbitration. BT resisted the motion, claiming they were not bound by the Speth/Clark contract and Speth had waived its right to arbitrate. The district court granted Speth's motion. BT appeals.

II. Is the Clark/Speth Agreement Binding on BT Prime-Mover?

BT contends the trial court erred in finding BT agreed to be bound by the terms of the 1985 contract between Speth and Clark.

Our review is for error. Iowa R. App. P. 4. The interpretation of contract language are matters of law for the court. *See Kalell v. Mutual Fire & Auto. Ins. Co.*, 471 N.W.2d 865, 866-67 (Iowa 1991). We are therefore not bound by the district court's interpretation and ruling. *Illinois Nat. Ins. Co. v. Farm Bureau Mut. Ins. Co.*, 578 N.W.2d 670, 671 (Iowa 1998).

The district court found BT agreed to be bound by the terms of the Speth/Clark contract in the August 9, 1985 purchase order sent to Speth. Part of the purchase order states: "Purchase of these articles will be per agreement. between Clark Equipment Co. and E. Speth GMBH & Co. KG."¹

BT contends the purchase order is ambiguous in that it could mean either BT and Speth intended to adopt the entire agreement or only the purchasing procedures of the agreement. "Ambiguity may be said to appear when, after the application of pertinent rules of interpretation to the face of the instrument, a genuine uncertainty results as to which one of two or more meanings is the proper one." *Gendler Stone Products Co. v. Laub*, 179 N.W.2d 628, 631 (Iowa 1970). We will not resort to rules of construction where we thus find the intent of the parties is expressed in clear and unambiguous language. *Id.*

We find the language of the purchasing order clear and unambiguous. BT attempts to find ambiguity where none exists. The notation indicates the articles will

¹ Although not fully signed until October 15, 1985, the Clark/Speth contract specified the agreement effective as of May 1, 1985.

be “per² agreement.” This is a reference to the whole agreement, not merely the pricing procedures of the agreement. For this reason, it is not necessary for us to resort to rules of construction to interpret the meaning of the contract between BT and Speth.

Even if we were to find the disputed contract provision ambiguous, under our rules of construction we interpret ambiguous contract terms against the drafter—in this case—BT. *See Iowa Fuel & Minerals, Inc. v. Board of Regents*, 471 N.W.2d 859, 862-63 (Iowa 1991) (holding ambiguities in a contract are construed against the drafter).

BT suggests we look to the course of dealing and facts and circumstances of this case to determine the true intent of the parties. *See Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Farmland Mut. Ins. Co.*, 568 N.W.2d 815, 819 (Iowa 1997). Extrinsic evidence is admissible as an aid to interpretation when it throws light on the situation or the parties, antecedent negotiations, the attendant circumstances, and the objects the parties were striving to attain. *Dental Prosthetic Services v. Hurst*, 463 N.W.2d 36, 39 (Iowa 1990). BT argues, for example, the parties’ intent not to be bound by the Speth/Clark contract

² The Oxford English Dictionary defines the word “per” as meaning “according to, as stated or indicated by, as per invoice, per ledger, per margin, etc.” The Oxford English Dictionary, 667 (1970). Webster’s dictionary defines the word “per” as meaning “through, by, by means of.” Webster’s New World Dictionary, 1054 (2d ed. 1974). Black Law Dictionary defines “per” as “by, through, or by means of.” Black’s Law Dictionary, 1292 (rev. 4th ed. 1968).

is evidenced by a price difference in the Speth/Clark contract³ and the BT purchase order and the fact neither party had retained a copy of the Speth/Clark contract.⁴ We find neither of these facts prove an intent by the parties not to be bound by the Speth/Clark contract. For these reasons, we find the Speth/Clark agreement was binding, in whole, upon BT.

III. Did Speth Waive Its Right to Arbitrate by Filing Suit Against BT Prime-Mover in District Court?

Under the terms of the Speth/Clark contract the parties had the right to settle disputes through binding arbitration in Geneva, Switzerland. BT contends Speth had constructive knowledge of its right to arbitrate under the contract and by participating in litigation Speth waived its right to arbitration. In support of its contention, BT cites *Paterek v. 6600 LTD.*, 465 N.W.2d 342, 345 (Mich. App. 1990) and *North West Michigan Construc., Inc. v. Stroud*, 462 N.W.2d 804, 805 (Mich. App. 1990).

We have reviewed the cases cited by BT, as well as the Michigan law in regard to contractual arbitration rights. Our conclusion is Speth did not waive its right to arbitrate this dispute under Michigan law. To prove a party to a contract with a right to arbitrate has waived that right, the other party must prove knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice

³ Our review of the Speth/Clark contract and the BT purchase order does not reveal a price difference. The purchase order identifies the Ring-Mounting, unit number 2393701 at 1357.5 Deutschmarks. The Speth/Clark contract identifies the Mounting Ring, Clark Part Number 2393701 at 1357.50 by handwritten notation.

⁴ We do not find it unusual neither party thought it necessary to reference the Speth/Clark contract until a dispute arose between the parties.

resulting from the inconsistent acts. *Burns v. Olde Discount Corp.*, 538 N.W.2d 686, 689 (Mich. App. 1995).

BT has not met its burden. Neither of the parties to this contract had ready access to the contract prior to litigation.⁵ Speth requested on several occasions, rather than demanding, BT arbitrate the dispute before proceeding to litigation. BT refused to do so. At the very least, Speth was unknowingly attempting to comply with the contract when it requested arbitration of the dispute. As soon as Speth discovered its right to arbitrate under the contract, it sought to enforce its right. BT has also failed to demonstrate prejudice. For these reasons, we determine the trial court did not err in determining this case must be arbitrated pursuant to the Clark/Speth contract. We affirm the trial court.

AFFIRMED.

⁵ We agree with the trial court's assessment that Speth's explanation for not having access to the contract is credible. Speth explained the contract had been misfiled in the transfer of ownership of Speth from one company to another. For this reason, we do not charge Speth with constructive knowledge of the terms of the contract under the *Paterek* case as suggested by BT.

No. 98-0687. [9-113] ANTRIEBSTECHNIK v. BT PRIME-MOVER, INC.

Appeal from the Iowa District Court for Muscatine County, Mark J. Smith, Judge. AFFIRMED. Heard by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Streit, J. (7 pages \$2.80)

BT Prime-Mover, Inc. appeals from the trial court's finding they agreed to be bound by a contract between Ewald Speth Antriebstechnik and Clark Material Systems Technology Company and ordering them to participate in arbitration in Geneva, Switzerland, pursuant to the contract. We find the purchase order which stated: "Purchase of these articles will be per agreement. between Clark Equipment Co. and E.

Speth GMBH & Co. KG" clear and unambiguous. BT attempts to find ambiguity where none exists. BT is bound by the agreement. Under the terms of the Speth/Clark contract the parties had the right to settle disputes through binding arbitration in Geneva, Switzerland. Speth, by participating in litigation, did not waive its right to arbitration.