IN THE COURT OF APPEALS OF IOWA

No. 7-283 / 96-0787

000317

MERIT CONSTRUCTION COMPANY,

Plaintiff-Appellee/Cross-Appellant,

vs.

DESIGNER WOODS, INC,

Defendant-Appellant/Cross-Appellee,

and

STATE BOARD OF REGENTS FOR THE STATE OF IOWA,

Defendant.

FILED
JUL 17
CLERK SUPREME COURT

Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge.

Defendant appeals from the district court order denying its motion to compel arbitration and stay proceedings. **AFFIRMED.**

Paul J. Gardener and David A. Jarecke of Dwyer, Smith, Grimm, Gardener, Lazer, Pohren & Rogers, Omaha, Nebraska, and Gail Boliver, of the Boliver Law Firm, Marshalltown, for appellant.

Kelly R. Baier and Vernon P. Squires of Bradley & Riley, P.C., Cedar Rapids, for appellee.

Considered by Sackett, P.J., Huitink, J., and Hayden, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

SACKETT, P.J.

Defendant-appellant Designer Woods, Inc. appeals following the trial court's refusal to order arbitration of a dispute that arose under defendant's contract with plaintiff-appellee Merit Construction Company. We affirm.

Plaintiff, the general contractor on a construction project at the University of Iowa Hospitals and Clinic, subcontracted a portion of the work to defendant. A dispute arose between plaintiff and defendant regarding payments due and unfinished work. On June 5, 1995, plaintiff wrote a letter to defendant offering to arbitrate "any unresolved claims between [defendant] and [plaintiff], and one to the other." On June 21, 1995, defendant filed a claim against plaintiff with the State Board of Regents under Iowa Code section 573.7. Plaintiff received final acceptance of the construction project on June 23, 1995. This triggered a sixty-day statute of limitations to bring a cause of action under section 573.16.

Plaintiff filed a petition in equity for damages on July 31, 1995. In a letter dated August 9, 1995, plaintiff told defendant it withdrew its agreement to arbitrate because defendant had not responded to its June 5 letter.

Defendant filed a motion to dismiss the petition. Plaintiff filed a resistance and a motion for sanctions. The court denied defendant's motion. It also denied plaintiff's motion for sanctions, but warned defendant about frivolous pleadings.

On December 8, 1995, defendant filed a motion to compel arbitration and stay of proceedings. Plaintiff resisted and again sought sanctions, alleging defendant engaged in a pattern of filing frivolous motions. The district court denied defendant's motion to compel arbitration finding the contracts provided for optional, not mandatory, arbitration. The court found the contract language required the parties to consent to arbitration. It also found defendant rejected plaintiff's offer to arbitrate by filing the claim with the State Board of Regents. The trial court did not address plaintiff's request for sanctions.

Defendant asks this court to find the contracts make arbitration mandatory. It contends the subcontract language is ambiguous and should be construed against plaintiff. It also argues public policy favors arbitration. Defendant advances it was in a disparate bargaining position as a small subcontractor.

To determine whether the parties are bound to arbitration, we look to the contracts they signed. *See State v. State Police Officers Council*, 525 N.W.2d 834, 836 (Iowa 1994); *Iowa City Community Sch. Dist. v. Iowa City Educ. Ass'n*, 343 N.W.2d 139, 141 (Iowa 1983).

The parties executed a subcontract which included the following clause regarding arbitration:

> [I]f arbitration of dispute is provided for in the General Contract, any disputes arising between the Contractor and the Sub-Contractor under this Sub-Contract shall be settled by arbitration in a manner provided for in the General Contract.

The general contract contained the following clauses:

> 6.10 ARBITRATION
>
> 6.10.1 Any questions of a decision of the Owner's Representative may be submitted to arbitration by mutual agreement of the parties.
>
> . . . .
>
> 6.10.3 If the parties mutually agree to arbitration, the parties shall sign and acknowledge a written agreement specifying what demands are to be submitted to the arbitrators.
>
> 6.10.4 If the parties mutually agree, the arbitration may be carried out . . . .

Defendant contends the contract provisions are ambiguous. We disagree. The contract is interpreted as a whole. *Iowa Fuels & Minerals v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991). The subcontract incorporates terms of the general contract by reference. The general contract says the parties *may* arbitrate. Plaintiff and defendant contracted to make arbitration permissive, not mandatory. We affirm the trial court on this issue.

Defendant next contends the trial court erred in finding it rejected plaintiff's offer to arbitrate when it filed a claim with the State Board of Regents. Defendant asserts its claim with the Board of Regents was not a rejection of the offer to arbitrate; defendant had to protect its interest by filing the claim with the Board of Regents because, pursuant to chapter 573, any such claim had to be filed within thirty days following the completion and final acceptance of the project.

Defendant never accepted plaintiff's offer to arbitrate made on June 5 before plaintiff withdrew it. We affirm the trial court on this issue.

Plaintiff on cross-appeal contends the trial court should have imposed sanctions under Iowa Rule of Civil Procedure 80. Plaintiff contends defendant engaged in a pattern of filing frivolous motions to stall litigation.

The district court did not address plaintiff's motion for sanctions. Plaintiff did not file a rule 179(b) motion. A rule 179(b) motion to enlarge or amend is necessary for preservation of error when a trial court fails to resolve a matter properly submitted. *Nepstad Custom Homes v. Krull*, 527 N.W.2d 402, 405 (Iowa App. 1994). The issue is not preserved for review.

Plaintiff requests sanctions be imposed, including reasonable appellate attorney fees. We decline to impose sanctions.

AFFIRMED.