UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

R.M.D. CORPORATION PLAINTIFF

v. CIVIL ACTION NO. 3:00CV-152-S

GARY C. HAMMOND DEFENDANT

MEMORANDUM OPINION

This matter is before the Court on motion of the plaintiff, R.M.D. Corporation ("R.M.D."), to stay arbitration proceedings. Also before the Court are the motions of the defendant, Gary C. Hammond ("Hammond"), to dismiss and to stay these proceedings and compel arbitration. For the reasons set forth below, the defendant's motion to dismiss will be granted, and the plaintiff's motion to stay the arbitration proceedings will be denied.

FACTS

R.M.D. and Hammond entered into an employment contract on October 30, 1996 . The contract was signed by R.M.D.'s then president, Phil Moran ("Moran"), and Hammond. At the time of the signing, Moran was one of only two directors of the company and the company's President. Under the contract, Hammond was named Director of Operations. He served in that position for a few months before Moran assigned him to other duties and modified his salary accordingly. Hammond worked for R.M.D. until late 1999 when he was allegedly constructively discharged. Pursuant to the arbitration provision in the agreement, Hammond filed a demand for arbitration on November 22,1999. R.M.D. filed its complaint in this Court in March, 2000 seeking a stay of those arbitration proceedings.

DISCUSSION

R.M.D. argues that the arbitration proceedings should be stayed based on the fact that the employment contract is unenforceable, and thus, so is the arbitration provision contained therein. Although the document is entitled "Letter of Intent," the first paragraph reads:

> This letter of intent will set forth the pertinent terms of your continued employment with R.M.D. Corp. ("the Company"). While we will enter into detailed agreements to implement these terms, this letter is intended to establish a binding contract upon your acceptance by signing below.

The agreement, drafted by R.M.D.'s attorney, contains the following representations and warranties:

> As inducement to you to sign this letter of intent and to accept employment with the Company, the Company hereby represents and warrants that each of the following representations and warranties is true and correct, and acknowledges that each representation and warranty has been relied upon by you, and is material to your decision to accept employment with the Company under the terms and conditions set forth in this letter:
>
> > (a) The Board of Directors of the Company has duly authorized and approved the execution of this letter of intent by the President of the Company on behalf of the Company and approved the terms and conditions of your employment on the terms and conditions set forth herein;
> >
> > (b) The Company and each corporate affiliated entity has authorized and unissued shares sufficient to enable the Company and each such affiliate to issue shares to you in connection with the exercise of the option granted under paragraph 4(a) above; and
> >
> > (c) The shareholders of the Company are parties to an agreement by which they have agreed to cause the Company and each affiliated entity to distribute an amount at least equal to forty percent (40%) of the net income of the Company and each affiliated entity.

The arbitration clause reads:

> Resolution of Disputes
>
> You and the Company agree that, should any dispute arise over the interpretation of the agreement, the parties shall agree to binding arbitration to resolve such dispute. Such binding arbitration will be in accordance with the statutes in the state of Kentucky regarding arbitration, and if such statutes do not furnish sufficient rules as to procedure, then such arbitration will be conducted in accordance with the rules of the American Arbitration Association to the extent they do not conflict with the

> statutes of Kentucky. Should statutes not exist at the time of the dispute, then each party shall submit the name of three independent arbitrators qualified to resolve the dispute. An independent law firm will be chosen to select the most qualified arbitrator.

R.M.D. argues that the agreement is unenforceable because Moran did not have actual or apparent authority to enter into this contract. R.M.D. contends that Kentucky law generally requires director approval of significant contracts, and specifically requires the directors of a corporation to approve the issuance of stock, and that the agreement with Hammond was never so approved. Hammond argues that, as President of R.M.D., Moran had actual and apparent authority to enter into employment agreements. Furthermore, Hammond contends that, even if Moran did not have such authority, R.M.D. ratified the contract by acquiescing to it as evidenced by the fact that Hammond actually served as Director of Operations for a few months and then continued to work for R.M.D. in some capacity until late 1999.

It is well-established that "a corporation within its power may be bound by the manner in which it permits its officers in the regular course of business to conduct its affairs, even though there is no formal delegated authority for such officer to so act, and this, too, even though the act of an officer was in violation of express and formal direction, if by subsequent action the board had ratified such action or had merely acquiesced therein." *Union Motor Co. of Paducah v. Taylor*, 267 S.W. 170, 171 (Ky. 1924). The record in this case reflects that R.M.D. voluntarily accepted the benefits derived from the employment of Hammond as Director of Operations and in other capacities until 1999. The fact that Hammond acted as Director of Operations for only a few months and then was moved into a different position which caused him to realize a decrease in salary does not serve to terminate the agreement. The agreement specifically provides:

> [T]he Company or the President may assign you to a different position, in which case the Company may modify your compensation to conform to the range of compensation then generally paid to employees in that position or comparable positions.

At no place in the agreement does it state that such a change in position would result in the other provisions of the employment agreement, such as the arbitration clause, to no longer be applicable to Mr. Hammond's employment. Therefore, the fact that Moran altered the responsibilities and compensation of Hammond after the execution of this agreement as specifically provided for in the above paragraph does not render the remaining provisions of the agreement abandoned or inapplicable.

Moran, when he made the agreement, being President of R.M.D. and one of only two directors, had general control over the management of the business of R.M.D.. Furthermore, it is clear that R.M.D. accepted the benefits of the services of Hammond for several years. Therefore, having accepted the employment and benefits of the agreement executed in its behalf by Moran, R.M.D. is bound by such agreement, regardless of the question of Moran's original authority to enter into such an agreement.

R.M.D. points to a Shareholder Agreement, to which Moran was a party, where the shareholders agreed to limit the President's authority to enter into "key employee contracts." Moran and Neal Harding were the sole shareholders and sole directors of R.M.D. at the time of execution of the Shareholder Agreement. According to R.M.D., the authority of the President to enter into these contracts was contingent upon R.M.D. achieving $100,000,000 in sales, which never happened. Thus, R.M.D. contends that Moran violated the Shareholder Agreement by entering into this contract with Hammond, and that this violation renders the employment agreement between Hammond and R.M.D. unenforceable.

R.M.D.'s reliance on the Shareholder Agreement provision is misplaced. Even if Moran did violate his part of the Shareholder Agreement by signing the employment agreement with Hammond before the sales reached $100,000,000, R.M.D. cannot escape the fact that it ratified this contract by acquiescing and accepting the benefits of Hammond's services. As noted earlier, it does not

matter if the officer was "in violation of express and formal direction," as long as the company ratifies or merely acquiesces to the contract. *Union Motor*, 267 S.W. at 171.

Having found that an enforceable employment contract exists between Hammond and R.M.D. which contains a valid arbitration provision, it follows that R.M.D. has no grounds upon which to stay the arbitration proceedings in this matter. Thus, R.M.D.'s motion to stay arbitration will be denied. Because the complaint in this matter seeks only a stay of the arbitration, Hammond's motion to dismiss will be granted. Hammond also seeks a stay of this matter and compelled arbitration under 9 U.S.C. § 3. Because this Court has dismissed the only claims in this matter, i.e., those brought by R.M.D. seeking a stay of the arbitration, there is no longer any litigation for this Court to stay and Hammond's motion to stay will be denied as moot.

This _____ day of ____________________, 2000.

____
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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GARY C. HAMMOND DEFENDANT

ORDER

Motion having been made by the defendant, Gary C. Hammond, to dismiss, and by the plaintiff, R.M.D. Corporation, to stay arbitration proceedings, and for the reasons set forth in the memorandum opinion entered herein this date, and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that:

1. The motion to dismiss by Gary C. Hammond is **GRANTED**.
2. The motion to stay arbitration proceedings by R.M.D. Corporation is **DENIED**.
3. The motion to stay these proceedings and to compel arbitration by Gary C. Hammond is **DENIED**.

IT IS SO ORDERED this _____ day of ____________________, 2000.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record