

DA 23-0636

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 279

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BLUEBIRD PROPERTY RENTALS, LLC  
and ALAINA GARCIA,

Plaintiffs and Appellees,

v.

WORLD BUSINESS LENDERS, LLC;  
WBL SPO I, LLC; and WBL SPO II, LLC,

Defendants and Appellants.

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APPEAL FROM: District Court of the Eighteenth Judicial District,  
In and For the County of Gallatin, Cause No. DV-23-201D  
Honorable Andrew Breuner, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Martin S. King, Emily Bruner, Worden Thane, P.C., Missoula,  
Montana

For Appellees:

Frederick P. Landers, Axilon Law, Bozeman, Montana

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Submitted on Briefs: July 24, 2024

Decided: November 26, 2024

Filed:



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Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 World Business Lenders, LLC, WBL SPO I, LLC, and WBL SPO II, LLC (collectively “WBL”), appeal from the October 19, 2023 Opinion and Order re Defendants’ Motion to Dismiss and Compel Arbitration (Order) of the Eighteenth Judicial District Court. The District Court held that Montana law must be applied to determine whether the arbitration and choice-of-law provisions are enforceable. We affirm.

¶2 We restate the issue on appeal as follows:

*Did the District Court err when it found that it was for the court to decide whether the arbitration provisions are valid and enforceable rather than an arbitrator?*

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶3 Appellant Bluebird Property Rentals, LLC, is a Montana limited liability company with Appellant Alaina Garcia (collectively “Bluebird”) as its sole member.<sup>1</sup> WBL and its subsidiaries are New York LLC’s and registered in Montana as an LLC. In December 2020, Bluebird received a loan from WBL of \$450,000 for 24 months and used real property in Gallatin County as collateral to secure it. The loan had an approximate annual percentage rate of 85% and required weekly payments of \$8,874.58.

¶4 Bluebird signed a Business Promissory Note and Security Agreement (Agreement), a Continuing Guarantee, Personal (Guarantee), and a Note and Deed of Trust securing the loan. Although Bluebird had only ever dealt with WBL in negotiating the loan, the

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<sup>1</sup> Under a M. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court takes all well-pled factual assertions as true in the light most favorable to the claimant. *Gottlob v. DesRosier*, 2020 MT 210, ¶ 7, 401 Mont. 50, 470 P.3d 188. As such, we recite the facts as alleged in Bluebird’s complaint.

Agreement and Guarantee listed Axos Bank, who Bluebird had never had contact with, as the lender. Around six months after signing the Agreement, Axos assigned the Note and Deed of Trust to WBL, and WBL subsequently assigned them multiple times between its subsidiaries. The Agreement and Guarantee each contained an arbitration clause and a choice-of-law provision.

¶5 Bluebird fell behind on payments and WBL declared Bluebird in default. Bluebird sold the collateral property in a distress sale, paying off the loan in October 2022. Over a period of almost two years, Bluebird paid \$945,990.39 on the \$450,000 loan.

¶6 Bluebird sued WBL, alleging it is subject to Montana's usury law as an unregulated, private, non-bank lender, and that it was engaged in a "rent-a-bank" scheme to evade Montana law. Bluebird alleges that Axos bank is involved merely as a front and only nominally served as the named lender while WBL was always the true lender and assumed all risk of the loan. Bluebird seeks, among other things, a declaration that WBL engaged Axos in a scheme to evade Montana's usury laws and that WBL is the true lender and Montana law applies. Bluebird also seeks double the interest paid above the maximum allowable 15% under Montana law, § 31-1-108, MCA.

¶7 WBL filed a Motion to Dismiss and Compel Arbitration under the terms of the Agreement. Bluebird responded that, notwithstanding the choice-of-law provision, Montana law applied to the question of whether the arbitration provision is enforceable. The District Court deemed WBL's motion as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and denied WBL's Motion as premature because "Montana law

must be applied to the question of whether the arbitration and choice-of-law provisions are enforceable.” WBL appeals.

### STANDARD OF REVIEW

¶8 District court decisions on a motion to dismiss are reviewed de novo. *Global Client Solutions, LLC v. Ossello*, 2016 MT 50, ¶ 19, 382 Mont. 345, 367 P.3d 361. We also review de novo a district court’s order concerning a motion to compel arbitration. *Ossello*, ¶ 19. A motion to dismiss is considered in the light most favorable to the non-moving party and the facts as alleged by the non-moving party are taken as true. *Ossello*, ¶ 19.

### DISCUSSION

¶9 *Did the District Court err when it found that it was for the court to decide whether the arbitration provisions are valid and enforceable rather than an arbitrator?*

¶10 Initially, we note the narrow issue before us. Both parties agree that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, et seq., governs arbitration agreements made in interstate commerce, as this one was. *Ossello*, ¶ 20. But “[a]rbitration agreements governed by the FAA are subject to all generally applicable state law contract principles ‘such as fraud, duress, or unconscionability . . . .’” *Lenz v. FSC Secs. Corp.*, 2018 MT 67, ¶ 16, 391 Mont. 84, 414 P.3d 1262 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1746 (2011)). The issue before us then is whether the District Court erred in deciding that the validity of the arbitration clause is for a court to decide rather than an arbitrator. We make no holding or opinion on the merits of whether the arbitration clause here is valid and enforceable or on the ultimate merits of the case. Nor

do we opine on whether the Nevada choice-of-law clause is valid and enforceable. These questions have not been litigated before the District Court and are not properly before us.

¶11 Montana law favors arbitration and it has adopted the Uniform Arbitration Act, Title 27, chapter 5, MCA. Doubts should be resolved in favor of arbitration. *Ossello*, ¶ 21.

However:

The prevailing rule is that whether a particular dispute is subject to arbitration is a threshold issue to be decided by the courts unless the parties explicitly agree to assign that issue itself to arbitration. Where a party specifically challenges the validity of the arbitration clause, and not just the entire contract that contains it, then it is the court that determines the validity of the arbitration clause.

*Ossello*, ¶ 22 (citing *Bridge Fund Capital v. Fastbucks*, 622 F.3d 996, 1000 (9th Cir. 2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, 126 S. Ct. 1204, 1208 (2006)).

¶12 WBL first argues that “[t]here is no language in any of the Loan Contracts or anywhere else . . . that the threshold issue of arbitrability will be decided by a Court or by anybody but the arbitrators.” WBL points to language in the arbitration agreement that “any or all disputes and claims arising out of or relating to” the contract may be arbitrated and argues that this language requires all disputes—including arbitrability—to be decided by the arbitrator.

¶13 But WBL misconstrues the requirements to agree to arbitrate arbitrability. The fundamental principle under the FAA is that it is the court’s responsibility, not the arbitrator’s, to determine the threshold issue of arbitrability. *Ossello*, ¶ 27 (citing *Kelker v. Geneva-Roth Ventures, Inc.*, 2013 MT 62, ¶ 12, 369 Mont. 254, 303 P.3d 777; *Buckeye*,

546 U.S. at 444, 126 S. Ct. at 1208). Though parties may agree to a “delegation provision” that assigns arbitrability to the arbitrator, an enforceable delegation provision must be “clear and unmistakable” on the face of the arbitration agreement. *Ossello*, ¶ 27 (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68, 130 S. Ct. 2772, 2777 (2010); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995)). Rather than resolving doubts in favor of arbitrability, courts should not assume that parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. *Ossello*, ¶ 27 (citing *Rent-A-Center*, 561 U.S. at 69 n.1, 130 S. Ct. at 2777 n.1).

¶14 In *Ossello*, we determined whether the following language in an arbitration provision evidenced the parties’ intent to arbitrate arbitrability:

In the event of any controversy, claim or dispute between the parties arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation, or validity thereof, including the *termination* of the scope or applicability of this Agreement to arbitrate, shall be determined by arbitration.

*Ossello*, ¶ 28 (emphasis in original). We concluded that it did not. *Ossello*, ¶ 33.

¶15 Similarly here, the arbitration provision allows a party to choose to arbitrate “any or all disputes and claims arising out of or relating to” the Agreement. In *Ossello*, a term including “any controversy” relating to the validity of the contract did not present a “clear and unmistakable” agreement to arbitrate arbitrability. *Ossello*, ¶ 29. Nor can an agreement to arbitrate “any or all disputes” show clear and unmistakable evidence that the parties meant to supersede the general rule that courts must determine arbitrability.

¶16 WBL also argues that the arbitration agreement incorporates the American Arbitration Association (AAA) Rules, which grants the arbitrator jurisdiction to arbitrate

whether the arbitration clause is valid, and therefore this is a clear and unmistakable agreement. But we held in *Ossello* that an agreement that arbitration “be administered” by AAA “pursuant to its rules and procedures” was not a clear and unmistakable agreement to supplant the general rule that courts determine arbitrability. *Ossello*, ¶ 31.

¶17 The same must be true here where the reference to AAA rules is even more tenuous. The arbitration clause at issue mentions AAA only twice. First, it states that any party may commence an arbitration proceeding with AAA. Presumably this would be governed by AAA rules and procedures but does not clearly and unmistakably agree to grant the arbitrator the question of arbitrability. Second, the Agreement discusses a situation where Axos (or WBL) will pay the administration or arbitrator fees “only if required by the AAA Rules.” This is a discussion of only one instance where the AAA Rules will specifically apply and does not overcome the general rule that arbitrability is for the courts to decide. *See Ossello*, ¶¶ 31–32.

¶18 This is also inapposite to *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015), on which WBL relies. Without even considering the parties’ arguments on the sophistication of Bluebird here, *Brennan* is inapposite in that the parties there “expressly incorporate[d] the [entirety of the] AAA arbitration rules.” *Brennan*, 796 F.3d at 1128, 1130. This did not occur here, as explained above. Nor was arbitrability an issue in *Peeler v. Rocky Mountain Log Homes Can., Inc.*, 2018 MT 297, 393 Mont. 396, 431 P.3d 911. In direct contradiction to what WBL argues before us, we noted in that case that “Peeler did not raise any challenge in District Court regarding the validity or enforceability of the arbitration agreement apart from the balance of the larger contract.” *Peeler*, ¶ 17.

¶19 The parties’ remaining arguments concern the merits of the issue and the merits of whether the arbitration agreement is enforceable. The District Court explicitly held that “the question of whether the arbitration and choice-of-law provisions are enforceable” is to be decided. Thus, we will not address these arguments on appeal.

### CONCLUSION

¶20 The District Court did not err in finding that the general rule that arbitrability is for the court to decide is not overcome on these facts.

¶21 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ LAURIE McKINNON

/S/ BETH BAKER

/S/ JAMES JEREMIAH SHEA

/S/ JIM RICE