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IN THE
COURT OF APPEALS OF INDIANA

TOWN OF CLARKSVILLE,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 10A04-1008-PL-531
	)	
SHIRLEY MAKOWSKY and INDIANA FRATERNAL ORDER OF POLICE LABOR COUNCIL, INC.,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel E. Moore, Judge
Cause No. 10C01-1005-PL-287

May 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

The Town of Clarksville (Town) appeals the trial court's declaratory judgment in favor of Shirley Makowsky and the Indiana Fraternal Order of Police Labor Council, Inc. (the F.O.P.). The Town argues its contract with the F.O.P. does not include Makowsky, who is a retired officer, as a party capable of enforcing the grievance and arbitration provisions of that contract. We affirm.

FACTS AND PROCEDURAL HISTORY

On April 28, 2006, the Town and the F.O.P. entered into a four-year Collective Bargaining Agreement (the Agreement). At that time, Makowsky was a Clarksville police officer. On February 2, 2010, Makowsky retired. On March 8, she discovered she was no longer receiving dental and vision insurance, as she had prior to retirement. Makowsky presented a written grievance regarding the denial of insurance to the F.O.P., who then filed with the Town. On March 15, the Clarksville Town President denied Makowsky's grievance, indicating that as a retired officer, she was not entitled to invoke the grievance and arbitration provision of the Agreement. On April 19, Makowsky and the F.O.P. filed a demand for arbitration pursuant to the arbitration provision in the Agreement.

The Town filed a motion for declaratory judgment asking the trial court to determine whether Makowsky, as a retired officer, could invoke the arbitration clause the Agreement. The trial court found Makowsky was a third-party beneficiary to the Agreement between the Town and the F.O.P. and, therefore, was entitled to arbitrate pursuant to the terms of the Agreement.

DISCUSSION AND DECISION

The Town requested a declaratory judgment to determine whether the Agreement required the Town to arbitrate Makowsky's grievance regarding the interpretation of the Article of the Agreement discussing insurance benefits. The motion for declaratory judgment was brought pursuant to Ind. Code § 34-14-1-2:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

The purpose of a declaratory judgment action "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." Ind. Code § 34-14-1-12. A trial court may "refuse to render or enter a declaratory judgment or decree where the judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Ind. Code § 34-14-1-6.

Declaratory orders have the force and effect of final judgments and are reviewed as any other order. *Temby v. Bardach*, 699 N.E.2d 775, 777 (Ind. Ct. App. 1998). When the trial court enters findings, we review those findings to ensure the evidence supports the findings, and the findings support the judgment. *Id*. Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them. *Id*. The judgment will be reversed only when clearly erroneous, that is, when the judgment is

unsupported by the findings of fact. *Id*. We consider only the evidence most favorable to the judgment and all reasonable inferences flowing therefrom. *Id*. We will not reweigh the evidence or assess the credibility of witnesses. *Id*.

The trial court's order of declaratory judgment in favor of Makowsky requires the parties to arbitrate the interpretation of Article 21 of the Agreement between the Town and the F.O.P., which provides:

> A. Insofar as medical, dental and hospitalization insurance, the Town agrees to make available in the ordinary course the benefits or benefits substantially similar thereto as set forth in the Town of Clarksville Health Benefits Plan (Plan II) to officers and their eligible dependents . . . .
> Identical coverage under the Town's Health Benefits Plan shall be offered to retired or disabled officers who meet the State of Indiana's pension requirements and are not yet eligible for Medicare.

(App. at 27.) The Town argues Makowsky is not entitled to the vision and dental benefits she seeks because Article 21 differentiates between two plans – the "Town of Clarksville Health Benefits Plan (Plan II)" and the "Town's Health Benefits Plan" (the Plan); "Plan II" is available to only active duty officers; and the "Town's Health Benefits Plan" made available to retired officers pursuant to that Article does not include vision and dental benefits. Makowsky, obviously, disagrees.

However, we are not asked today to decide the validity of the Town's interpretation of that Article. Rather, we must determine only whether Makowsky has a right to demand the Town arbitrate its disagreement with her regarding insurance benefits. Article 25 of the

Agreeent states "[a] 'grievance' is defined to mean any difference that may arise between the Town and an officer as to any matter involving interpretation, meaning, application, or violation of any of the provisions of this agreement. A 'grievant' is defined as an officer, group of police officers, or the F.O.P." (*Id*. at 30.)

The Town argues Article 25 does not allow Makowsky, as a retired officer, to bring a grievance or participate in arbitration. The Town bases its assertion on the definition of "officer" in Article 1 of the Agreement, which states in relevant part:

> A. The Town hereby recognizes the Indiana Fraternal Order of Police Labor Council Incorporated as the exclusive representative for the bargaining unit composed of all sworn officers in the employ of the Town of Clarksville except for the Chief, and the Assistant Chief.
> B. As used in the Agreement, "Town" means the Town of Clarksville, Indiana, "F.O.P." means the Indiana Fraternal Order of Police Labor Council Incorporated, "officer" means a member of the bargaining unit recognized in Section A immediately above. . .

(*Id*. at 16.) Thus, says the Town, "officer" means only "sworn officers" on active duty, not retired officers.[1]

Nevertheless, the trial court found "Makowsky is entitled to seek enforcement of the agreement as a third-party beneficiary and to use the remedy of arbitration under the agreement as it is written." (*Id*. at 101.)[2]

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[1] We note the contract contains the term "officers" at other locations that suggest the term includes more than just "sworn officers." For example, Article 32 refers to an "officer's file," and we presume personnel records remain confidential after an officer retires. (App. at 35.) Additionally, Article 21 refers to "disabled officers" who are presumably not "sworn officers" because they are unable to perform their duties due to their disability. (*Id.* at 27.)

[2] The trial court also found, "Had the parties intended some limitation upon benefits of *retired officers* they surely could have done so in the text of the agreement. The courts may not create such limitations. As it is written, the agreement grants '**identical**' rights and benefits to *retired officers* with no limitations." (App. at 101) (emphasis in original). As the Town's motion for declaratory judgment requested that the trial court

We review and interpret the language of a contract *de novo*. *Gerstbauer v. Styers*, 898 N.E.2d 369, 379 (Ind. Ct. App. 2008). When a contract is clear and unambiguous, the language must be given its plain meaning. *Id*. An ambiguity exists where a provision is susceptible to more than one interpretation and reasonable persons would differ as to its meaning. *Id*. The goal of contract interpretation is to ascertain and enforce the parties' intent as manifested in the language of the contract. *Id*. We construe the contract as a whole and consider all provisions of the contract, not just individual words, phrases, or paragraphs. *Id*.

A person who is not a party to a contract is entitled to enforce the contract if he or she is a third party beneficiary of that contract. *Garco Indus. Equip. Co. v. Mallory*, 485 N.E.2d 652, 654 (Ind. Ct. App. 1985), *reh'g denied*. When determining whether someone is a third party beneficiary of a contract, we apply a three-factor test:

> A third party beneficiary contract requires first, that the intent to benefit the third party be clear, second, that the contract impose a duty on one of the contracting parties in favor of the third party, and third, that the performance of the terms necessarily render to the third party a direct benefit intended by the parties to the contract.

Mogensen v. Martz, 441 N.E.2d 34, 35 (Ind. Ct. App. 1982).

The trial court applied that test to the instant case and found: (1) the language of Article 21(A) of the Agreement "expressly evidences an intent to benefit Makowsky, by specifically addressing a privilege *retired officers* are owed pursuant to the contractual

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decide only if the terms of the Agreement entitled Makowsky to arbitration of her grievance, the trial court did not have jurisdiction over questions of fact that should be submitted to arbitration. *See Smith v. Mercer*, 118 Ind. App. 575, 581, 79 N.E.2d 772, 775 (1948) (judgments in declaratory actions do not involve executor or coercive relief, and such judgment are limited to determination and declaration of rights, status, or relation of parties). Thus, we remand to the trial court to strike from its judgment Finding 4 under the section "Orders for Arbitration; Vacating Stays."

terms," (App. at 98) (emphasis in original); (2) "The agreement imposes a duty on the Town, a party to the agreement, to provide insurance coverage to officers upon retirement," (*id.*); and, (3) "performance of the agreement is necessary for Makowsky to receive the benefit intended by Art. 21(A)." (*Id.*) Based thereon, the court determined Makowsky is a third party beneficiary of the Agreement between the Town and the FOP.

We agree with the trial court. Makowsky, as a retired officer, is a third party beneficiary of the Agreement. Article 21(A) establishes that some retired officers are to receive insurance benefits from the Town. As a third-party beneficiary, Makowsky is "entitled to enforce the terms of the agreement clearly designed to benefit her." *Miller v. Partridge*, 734 N.E.2d 1061, 1064 (Ind. Ct. App. 2000).

The Town asserts, without explanation, that even if Makowsky is a third party beneficiary under Article 21, she is not entitled to bring a grievance under Article 25; instead, "remedies may be available through the courts to enforce the agreement." (Br. of Appellant at 8.) We disagree. "Where a contract contains a legally enforceable arbitration clause, 'the general view is that the [third-party] beneficiary is bound by it to the same extent that the promisee is bound.'" *TWH, Inc. v. Binford*, 898 N.E.2d 451, 454 (Ind. Ct. App. 2008) (quoting Williston on Contracts § 37:24 at 154 (4th ed. 2000)). Makowsky, as a third-party beneficiary of the Agreement, and the Town, as the promisee of the benefits to which Makowsky claims she is entitled, are bound by the arbitration clause in the Agreement. Thus, the trial court correctly found the Town is required to submit to arbitration with Makowsky and the F.O.P.

Affirmed and remanded.

FRIEDLANDER, J., and MATHIAS, J., concur.