

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**RODNEY ELLIOTT and ADVANCED
COMMUNICATIONS, INC.,**
Plaintiffs,

vs.

**TRAVIS MITCHELL, STEPHANIE
ADAMS and KATHY LEMMER,**
Defendants.

Case No. CI01-52

ORDER GRANTING STAY

DATE OF HEARING: August 27, 2001.
DATE OF RENDITION: August 30, 2001.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
TYPE OF HEARING: Open court.
APPEARANCES:
For plaintiffs: Larry W. Beucke without plaintiff Elliott.
For defendants:
Mitchell: Robert S. Lannin without defendant.
Adams & Lemmer: No appearance.
SUBJECT OF ORDER: Defendant Mitchell's demurrer or in the alternative motion to stay.
PROCEEDINGS: See journal entry rendered August 27, 2001.
FINDINGS: The court finds and concludes that:

1. The parties did not specifically offer evidence, however during oral argument counsel for plaintiff conceded the accuracy of the factual allegations regarding arbitration recited in the motion and its attachment.

2. The plaintiffs, contemporaneously with the filing of the amended petition in this case, seek arbitration asserting claims against Western Wireless Corporation (WWC) for acts of defendant Mitchell claimed to be within the scope and course of Mitchell's employment with WWC. In the present case, the plaintiffs alternatively claim that such actions were not within the scope and course of Mitchell's employment. Obviously, the plaintiffs cannot be right in both matters.

3. The element that Mitchell acted outside the scope and course of his employment must be established to assert a valid claim against Mitchell in this case. If the plaintiffs successfully assert in the arbitration proceeding that Mitchell's acts were within the scope and course of employment, collateral estoppel will prevent them from taking a different position in the current case and would defeat their claim.

4. Mitchell submits no Nebraska authority, but relies on *McGuffey v. Lenscrafters, Inc.*, 141 Ohio App. 3d 44, 749 N.E.2d 825 (2001) and *24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1199, 78 Cal. Rptr. 2d 533 (1998). The plaintiffs cite *Hoschler v. Kozlik*, 3 Neb. App. 677, 529 N.W.2d 822 (1995). The latter is not an arbitration case, but determines that a cause of action for tortious interference may arise by actions of a fellow employee of a common employer when the actions are malicious and thus unjustified, or are outside the scope of authority of the interfering employee. The cases cited by Mitchell consider the arbitration issues and provide persuasive authority supporting Mitchell's motion for stay.

5. Allowing the plaintiffs to proceed simultaneously in this court asserting a contrary position to their arbitration claim would interfere with the arbitration process.

6. NEB. REV. STAT. § 25-2603(d) (Cum. Supp. 2000) applies to the motion to stay in this case. That section requires that any action or proceeding involving an issue subject to arbitration be stayed if an application therefor has been made. Clearly, the plaintiff has applied for arbitration. However, § 25-2603(d) also provides that where the issue is severable, the stay may be with respect thereto only.

7. Only the defendant Mitchell has applied for a stay. The stay should be limited only to the claims asserted against Mitchell and not to the claims asserted against the other defendants.

ORDER: IT IS THEREFORE ORDERED that:

1. The motion of defendant Mitchell for stay of this action as against him pending the final determination of the arbitration proceeding of the plaintiffs against Western Wireless Corporation is granted, and the proceedings against Mitchell in this action are stayed until further order.

2. The defendant's demurrer is overruled, but no requirement to answer shall be made unless and until the stay of the proceeding pending arbitration is dissolved by further order.

3. The stay applies only to defendant Mitchell and does not apply to defendants Adams and Lemmer.

4. The telephone progression conference as to the remaining defendants and issues is rescheduled for **Thursday, September 27, 2001, at 3:30 p.m.** Counsel for plaintiffs shall be responsible to initiate the telephone conference, and in all other respects, the previous order setting telephone progression conference shall apply. Counsel for defendant Mitchell may participate to monitor the proceedings at his option, and shall notify plaintiffs' counsel in advance of the decision whether to be included or excluded therefrom.

Signed in chambers at Ainsworth, Nebraska, on August 30, 2001.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
- 9 Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed "Order Granting Stay" entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge