

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-003714

03/31/2017

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

DENNIS FYFE

ANUPAM BHATHEJA

v.

CONCURE SYSTEMS L L C, et al.

HOWARD C MEYERS

R STEWART HALSTEAD

UNDER ADVISEMENT RULING

After considering the Motions to Dismiss and related filings by the parties, the arguments of counsel at Oral Argument on March 10, 2017, and the post-hearing Memorandum¹ filed by Defendant Emil Pikula (“Pikula”), the Court finds that Defendant/Counterclaimant Concure Systems, LLC (“Concure”), has waived its rights under the “mediation” provision of its Employment Agreement with Plaintiff/Counterdefendant Dennis Fyfe (“Fyfe”) by participating substantially in this litigation without promptly seeking an order compelling mediation, *see Russo v. Barger*, 239 Ariz. 100, 103-04, 366 P.3d 577, 580-81 (App. 2016), and by engaging in conduct inconsistent with the right to mediate. *See Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 581, 582, 892 P.2d 1365, 1370, 1371 (App. 1994). After filing its Answer and Counterclaim on March 31, 2016, Concure did not file its Motion to Dismiss until December 22, 2016, almost nine months later. In the interim, Concure actively participated in this litigation by participating in hearings on May 11, 2016 and November 29, 2016; filing a response in opposition to Fyfe’s Motion to Amend his Complaint on September 1, 2016; and participating in the filing of a Joint Report and Proposed Scheduling Order on November 21, 2016.

¹ This filing is entitled “Post Hearing Memorandum Regarding Whether Pikula’s Argument on Incorporation by Reference Means that Pikula is Responsible for Concure’s Obligations Under the Employment Contract” and will be referred to herein as the “Post-Hearing Memorandum.”

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-003714

03/31/2017

Significantly, Concure sought and obtained relief from this Court by filing what it entitled “Motion *in Limine* Regarding Plaintiff’s Business Appraisal” on July 29, 2016. In this filing, Concure asked this Court to impose limits on certain financial discovery sought by Fyfe. *See* Motion *in Limine* Regarding Plaintiff’s Business Appraisal at p. 4. The Court granted in part the relief Concure sought. Minute Entry of November 29, 2016 at p. 2. Having actively participated in this litigation, including by seeking and obtaining relief from this Court, Concure has waived any rights it would otherwise have had under the “mediation” provision of its Employment Agreement with Fyfe to have this case dismissed and to require Fyfe to participate in pre-litigation mediation.

Pikula asserts that he is entitled to invoke the “mediation” provision of the Employment Agreement because he is a party to the Agreement to Purchase Membership Interest (“Purchase Contract”), which expressly incorporates the Employment Agreement. Post-Hearing Memorandum at pp. 3-4. Because the Employment Agreement is incorporated into the Purchase Contract, Pikula argues, the Employment Agreement is essentially “placed verbatim into the Purchase Contract.” *Id.* at pp. 2, 5. As a result, Pikula concludes, the “mediation” provision of the Employment Agreement has become part of the Purchase Contract, too, and, as a party to the Purchase Contract, he is entitled to invoke the “mediation” provision. *Id.* at p. 4.

The Court is not persuaded. As Fyfe correctly points out, the only contractual document containing a “mediation” provision is “the employment agreement between Mr. Fyfe and Concure.” Response to Defendant Emil Pikula’s Motion to Dismiss and Joinder in Motion to Dismiss Filed by Defendant Concure at p. 4.² The plain language of the Employment Agreement makes clear that Fyfe and Concure are the only two parties thereto. *See* Employment Agreement at p. 1 (“This Employment Agreement...is made by and between Concure Systems, L.L.C., a Nevada limited liability company (‘Employer’) and Dennis Fyfe (‘Employee’) this 1 day of January, 2012.”).³ Nothing in the Purchase Contract suggests otherwise. On the contrary, by stating that “*Buyer and Company* shall enter into an Employment Agreement” which “is hereby

² In his Post-Hearing Memorandum, Pikula asserts that the issue of whether the Employment Agreement confers any rights on Pikula is “an issue that had not been raised by Plaintiff in its memorandums.” Post-Hearing Memorandum at p. 2. This is not accurate; in opposing Pikula’s Motion to Dismiss, Fyfe did argue that Pikula is not a party to the Employment Agreement. *See* Response to Defendant Emil Pikula’s Motion to Dismiss and Joinder in Motion to Dismiss Filed by Defendant Concure at p. 3 (noting that request for dismissal is based on “a singular mediation provision” in “the [E]mployment [A]greement between Mr. Fyfe and Concure”).

³ The Employment Agreement is attached as Exhibit A to the Separate Statement of Facts in Support of Motion to Dismiss Plaintiff’s Amended Complaint filed December 22, 2016.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-003714

03/31/2017

incorporated herein,” Purchase Contract at ¶ 4 (emphasis added),⁴ the Purchase Contract confirms that, although there are three parties to the Purchase Contract, only two of those parties, *i.e.*, Fyfe as “Buyer” and Concure as “Company,” are also parties to the Employment Agreement. The Court finds no reason to conclude that the language of the Purchase Contract incorporating the Employment Agreement somehow overrides or nullifies the language of the Purchase Contract identifying Fyfe and Concure as the only two parties to the Employment Agreement. Because the Purchase Contract expressly provides that the parties to the Employment Agreement do not include Pikula, nothing in the Purchase Contract entitles Pikula to assert rights arising out of the Employment Agreement.

The Purchase Contract and Employment Agreement were signed the same day, and so must be read together to determine the nature of the transaction among Fyfe, Concure, and Pikula. *See, e.g., Childress Buick Co. v. O’Connell*, 198 Ariz. 454, 456, 11 P.3d 413, 415 (App. 2000) (holding that two agreements were “substantially contemporaneous documents...to be read together to determine the nature of the transaction”). If the parties’ intent had been to require that any disputes among the three parties be submitted to mediation, they would have reflected that intent by including a “mediation” provision in the Purchase Contract, the only agreement to which all three are parties. By including the “mediation” provision only in the Employment Agreement, and by defining the parties to the Employment Agreement to exclude Pikula, the parties expressed their intent that only disputes between Fyfe and Concure that arise out of the Employment Agreement are subject to the Employment Agreement’s “mediation” provision.

The Court therefore finds that, because both the Employment Agreement and the Purchase Contract make clear that Pikula is not a party to the Employment Agreement, Pikula is not entitled to invoke the “mediation” provision of the Employment Agreement to require pre-litigation mediation.

Accordingly,

IT IS ORDERED denying the Motion to Dismiss Plaintiff’s Amended Complaint Pursuant to ARCP 12(b)(1), 12(b)(6) and 56(b) Due to Plaintiff’s Disregard of Express Contractual Condition Precedent That Mediation Be Commenced and Completed as a Precondition to the Commencement of Any Litigation filed by Defendant/Counterclaimant Concure Systems, LLC on December 22, 2016.

⁴ The Purchase Contract is attached as Exhibit B to the Separate Statement of Facts in Support of Motion to Dismiss Plaintiff’s Amended Complaint filed December 22, 2016.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-003714

03/31/2017

IT IS FURTHER ORDERED denying Defendant Emil Pikula's Motion to Dismiss Plaintiff's Complaint and Memorandum in Support Pursuant to Rules 12(b)(1), 12(b)(6) and 56(b) for Plaintiff's Failure to Comply with the Express Contractual [Condition] Precedent That Mediation Be Commenced and Completed as a Precondition to the Commencement of Litigation and Joinder in Motion to Dismiss Filed By Defendant Concure Systems, which was filed on January 26, 2017.