RENDERED: October 29, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001358-MR

ABSORPTION CORPORATION — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 1995-CI-00547

ROGER WILDER, INDIVIDUALLY
AND D/B/A ROGER SALES;
AND DENNIS W. KELLEY, INDIVIDUALLY;
AND ROGER WILDER AND DENNIS W. KELLEY
D/B/A R & D MIDWEST PET SUPPLY — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: This is an interlocutory appeal from a circuit court order holding invalid an arbitration provision in a contract. Finding that the trial court applied the incorrect test to determine the enforceability of the arbitration clause, we reverse and remand for further proceedings.

The appellant, Absorption Corporation (Absorption), is a corporation organized under the laws of the state of Nevada, with its principal place of business located in Bellingham, Washington. Absorption operates throughout the country selling

several lines of consumer products. Among other things, Absorption produces and sells a line of specialty pet care products including several types of cat litter. In July 1993, Absorption entered into a "Sales Representative Agreement" with the appellees, Roger Wilder, individually and d/b/a R. Wilder Sales, and Dennis W. Kelley, individually and d/b/a R & D Midwest Pet Supply (collectively "Wilder").[1] Pursuant to the Agreement, Wilder was to sell Absorption's products to pet supply stores in Michigan, Indiana, Ohio, and Kentucky. Wilder and Kelley operated their businesses from their homes in Boone County, Kentucky.

Paragraph 14 of the Agreement provides that the parties will submit all disputes arising from or connected with the Agreement to arbitration in Bellingham, Washington. In addition, Paragraph 15B requires all litigation arising out the Agreement to be brought in the courts of the County of Whatcom, State of Washington. The Agreement further specifies that the law of the state of Washington shall be applied to any disputes between the parties.

On June 22, 1995, Wilder filed an action against Absorption in Boone Circuit Court. He set out four (4) causes of action: (1) breach of oral contracts; (2) breach of the Agreement; (3) fraud and misrepresentation; and (4) unfair trade practices. In response, Absorption filed an answer and a motion

[1] Neither Kelly nor R & D Midwest Pet Supply are named as parties to the Sales Representative Agreement. It appears from the record that Wilder and Kelley are partners in the operation of both R. Wilder Sales and R & D Midwest Pet Supply. For purposes of this appeal only, we presume that their interests under the Agreement are identical.

to dismiss pursuant to CR 12.02, arguing that Wilder was bound by the mandatory arbitration and choice of forum provisions in the Agreement. The trial court denied Absorption's motion to dismiss in an order dated November 27, 1995.

Both parties proceeded to conduct discovery on the underlying claims. In early 1998, Absorption filed motions to compel arbitration and to stay the proceedings in Boone Circuit Court pending arbitration. By an order entered on April 30, 1998, the trial court denied the motions and found the arbitration and choice of forum provisions in the Agreement to be unreasonable and unenforceable as a matter of law.

Absorption filed an interlocutory appeal from that order. We begin by noting that an appeal may be taken from an order denying an application to compel arbitration. 9 U.S.C. § 16; KRS 417.220(1)(a); Valley Construction Co. v. Perry Host Management Co., Inc., Ky. App., 796 S.W.2d 365, 366 (1990). Wilder argues that Absorption waived its right to enforce the arbitration clause because it failed to appeal from the denial of the motion to dismiss. We disagree.

As a general rule, an appeal may be taken to the Court of Appeals only from a final order or judgment. KRS 22A.020(1). This Court has jurisdiction to review interlocutory orders of the circuit court, but only in specified circumstances. KRS 22A.020(2). Ordinarily, a denial of a motion to dismiss is not a final and appealable order. In contrast, KRS 417.220 specifically authorizes an interlocutory appeal from a denial of a motion to compel arbitration. Until the trial court denied Absorption's motion to compel arbitration, this Court lacked

jurisdiction to consider any appeal on the matter. Therefore, we cannot agree with Wilder that Absorption waived its right to enforce the arbitration clause.

This Court must first determine the applicable law. Absorption contends that this matter is governed by the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* The Federal Arbitration Act preempts all contrary state laws. 9 U.S.C. § 2. Wilder disputes the applicability of the federal act, stating that this action involves a contract of employment. The Federal Arbitration Act does not apply to contracts of employment of workers engaged in foreign or interstate commerce. 9 U.S.C. § 1.[2]

However, a majority of Federal Circuit courts have interpreted the exclusion language in the Federal Arbitration Act narrowly. All but one circuit to address the issue have held that § 1's exemption of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce", includes only employees actually engaged in transportation of goods in commerce.[3] The Agreement

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[2] The Federal Arbitration Act defines "commerce", to mean, "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce". 9 U.S.C. § 1

[3] *See,* Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054 (11th Cir., 1998); Cole v. Burns International Security Services, 105 F.3d 1465, 1470 (D.C. Cir.1997); Rojas v. TK Communications, Inc., 87 F.3d 745, 748 (5th Cir.1996); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 598 (6th Cir.1995); Dickstein v. duPont, 443 F.2d 783, 785 (1st

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provided that Wilder would serve as a sales representative for Absorption's products. Although Wilder solicited sales for Absorption, all orders were filled by Absorption. Regardless of whether Wilder was an employee of Absorption or merely an independent contractor, the Agreement did not involve transportation of goods in interstate commerce. Therefore, we find that the Federal Arbitration Act remains applicable to this dispute.

The trial court found both the arbitration clause and the choice of forum clause in the Agreement to be unreasonable. Arbitration clauses are a sub-category of choice of forum agreements, and are subject to the same standards for determining reasonableness. Prudential Resources Corp. v. Plunkett, Ky. App., 583 S.W.2d 97, 99 (1979). Where the parties have by contract selected a forum, it is incumbent upon the party resisting to establish that the choice was unreasonable, unfair, or unjust. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 32 L. Ed. 2d 513, 520, 92 S. Ct. 1907 (1972).

In Prudential Resources Corp. v. Plunkett, supra, this Court applied the following four (4) factors in determining whether or not to enforce a forum selection clause: (1) Whether the clause was freely negotiated; (2) Whether the specified forum

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[3](...continued)
Cir.1971); Pietro Scalzitti Co. v. International Union of Operating Engineers, 351 F.2d 576, 579-80 (7th Cir.1965); Signal-Stat Corp. v. Local 475, United Elec. Radio & Machine Workers, 235 F.2d 298, 302-03 (2d Cir., 1956); Tenney Engineering, Inc. v. United Elec. Radio & Machine Workers, Local 437, 207 F.2d 450, 453 (3d Cir., 1953) (en banc). *Contra*, Craft v. Campbell Soup Company, 161 F.3d 1199 (9th Cir., 1998).

is a seriously inconvenient place for trial; (3) Whether enforcement would contravene a strong public policy of the forum in which suit is brought; and (4) Whether Kentucky has more than a minimal interest in the lawsuit. 583 S.W.2d at 99-100. *See* Gilbert, Choice of Forum Clauses in International and Interstate Contracts, 65 Ky.L.J. 1, 32-42 (1976). *See also*, Horning v. Syscom, 556 F. Supp. 819 (E.D. Ky., 1983).

In determining that the arbitration clause was unreasonable, the trial court primarily found that Kentucky "has a substantial interest to protect because [it has] the most significant relationship to the transaction and the parties." *Quoting* Prudential Resources Corp v. Plunkett, 583 S.W.2d at 100. Wilder points out that he and Kelley worked out of their homes in Boone County. The record shows that most of Wilder's accounts were in Kentucky and Ohio, with several additional accounts in Michigan and Indiana. While these connections are significant, we do not agree with the trial court that Kentucky's interest in the transactions was so overwhelming, standing alone, as to invalidate the arbitration and forum selection clauses agreed to by the parties.

The trial court also expressed a concern that one or several issues raised by Wilder may not be subject to the arbitration clause. However, the court did not determine whether those issues were arbitrable. When deciding whether the parties have agreed to arbitrate a certain matter, courts generally should apply ordinary state law principles that govern the formation of contracts. First Options of Chicago v. Kaplan, 514

U.S. 938, 944, 131 L. Ed. 2d 985, 993, 115 S. Ct. 1920 (1995). In the present case, the Agreement specifies that "any disagreement or differences between the parties arising out of or in connection with this Agreement, . . ." shall be referred to arbitration. This language is broadly inclusive of all transactions arising out of the Agreement. Furthermore, Wilder has not alleged fraud in the inducement of the Agreement. American Advertising Distributors, Inc. v. American Cooperative Advertising, Inc., Ky., 639 S.W.2d 775 (1982). Therefore, we must conclude that the Agreement contemplates arbitration of Wilder's claims.

Lastly, Wilder contends that Washington state is a seriously inconvenient forum to litigate his claims against Absorption. In evaluating the convenience of the parties and witnesses, the court should consider: (1) the plaintiff's choice of forum; (2) the situs of material events; (3) the relative ease of access to sources of proof; (4) the convenience of the witnesses; and (5) the convenience to the parties of litigating in the respective forums. Bryant v. ITT Corp., 48 F. Supp.2d 829, 832 (N.D. Ill, 1999).[4] The trial court focused only upon Wilder's residency and the comparative sizes of his business and Absorption. We conclude that this was an insufficient basis to invalidate the arbitration and forum selection clauses in the Agreement.

[4] Although this test was developed by the Federal Courts to evaluate motions for change in venue under 28 U.S.C. § 1404(a), we find that the test is appropriate in this case to determine whether the specified forum is a seriously inconvenient for arbitration or trial.

Nonetheless, we are not convinced that Absorption is automatically entitled to enforcement of the arbitration clause. The trial court did not address all of the factors listed in Prudential Resources Corp. v. Plunkett. Most notably, there are no findings concerning the circumstances surrounding the negotiation of the Agreement. In addition, the trial court did not fully consider whether Washington state is a seriously inconvenient forum in which to conduct the arbitration. The record does not disclose where the material events took place, or where the witnesses and proof are located. Likewise, there are no findings regarding whether arbitration in Washington state would seriously hamper the development of this evidence. These issues are uniquely fact-bound questions which are beyond the ability of this Court to determine. Under the circumstances, we must remand these issues to the trial court to make findings of fact and conclusions of law, and to decide the ultimate issue of whether enforcement of the arbitration provision would result in manifest injustice to Wilder. The Court must balance these considerations against the parties' agreement to accept arbitration in Washington state.

Accordingly, the interlocutory order of the Boone Circuit Court is reversed, and this matter is remanded for further proceedings as set out in this opinion.

HUDDLESTON, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, CONCURS IN RESULT.

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