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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001446-MR

EMERY WORLDWIDE, A SUBSIDIARY OF CNF, INC. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 01-CI-005927

AAF-MCQUAY, INC., D/B/A AAF INTERNATIONAL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Emery Worldwide, a subsidiary of CNF, Inc., (Emery) brings this appeal from a June 24, 2003, summary judgment of the Jefferson Circuit Court awarding $213,000.00 in damages for a lost shipment of electronic melter components. We affirm.

AAF-McQuay, Inc., d/b/a AAF International (AAF) desired to ship two pallets of electronic melter components from

Arkansas to New Jersey. These components contained amounts of platinum and rhodium, which are undisputedly precious metals. The shipment was to be picked up in Fayetteville, Arkansas, and delivered to Carteret, New Jersey. To effectuate the transport, Lewis F. Sanders instructed his scheduling clerk, Barbara Norris, to find a carrier that would ship and insure the components. Norris then contacted John Maxwell, the general manager of Emery's terminal in Tulsa, Oklahoma. Norris claims she informed Maxwell that the shipment contained components comprised of platinum and rhodium. Maxwell alleges he was never informed the shipment included precious metals because the shipment of precious metals is forbidden by Emery's Service Guide.

Nevertheless, on March 13, 2000, Maxwell contacted Norris and informed her that the shipment would be insured for its full declared value of $213,000.00 and the shipping charge would be $1,591.98. Thereafter, Norris completed a Bill of Lading and an Emery Air Waybill (Waybill). On the Waybill, Norris described the shipment as "ELECT. MELTER COMPONENTS." The components were then packaged for shipment, and the shipment was delivered to an Emery driver.

It is undisputed that the shipment never reached its intended destination. Thereafter, AAF submitted a formal claim of loss to Emery. Emery confirmed by letter, dated April 4,

2000, that it received the claim and would process it. Despite repeated demands, AAF received no denial or approval of its claim from Emery.

On August 28, 2001, AAF filed a complaint against Emery seeking to recover $213,000.00 in damages representing the value of the lost shipment. In the complaint, AAF alleged breach of contract, negligence, conversion, and violation of the Carmack Amendment to the Interstate Commerce Act (49 U.S.C. § 14706(a)(1)). On October 3, 2002, AAF moved for summary judgment; thereafter, Emery filed a cross-motion for summary judgment. While these motions were pending, Emery filed a motion to dismiss on the basis of *forum non conveniens*, but the circuit court denied Emery's motion. Subsequently, on June 24, 2003, the circuit court granted AAF's motion for summary judgment and awarded damages in the amount of $213,000.00, representing the declared value of the lost shipment. This appeal follows.

Emery contends the circuit court committed error by entering summary judgment in favor of AAF. Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Ky. R. Civ. P. 56; Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). Initially, Emery contends the circuit court erred by granting summary judgment upon AAF's breach of contract

claim. The breach of contract claim revolved around interpretation and construction of Emery's Air Waybill. Emery essentially argues that federal law, not state law, controls the interpretation of the Waybill by operation of the Airline Deregulation Act (ADA) (49 U.S.C. § 41713(b)(4)(A)). We disagree.

In American Airlines v. Wolens, 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995), the United States Supreme Court was faced with the issue of whether a claim for breach of contract under state law was preempted by the ADA. In answering this question in the negative, the Supreme Court held:

> Nor is it plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services. The ADA contains no hint of such a role for the federal courts . . . .
>
> The conclusion that the ADA permits state-law-based court adjudication of routine breach-of-contract claims also makes sense of Congress' retention of the FAA's saving clause, § 1106, 49 U.S.C.App. § 1506 (preserving "the remedies now existing at common law or by statute"). The ADA's preemption clause, § 1305(a)(1), read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline

> itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

Id. at 232-233(citations omitted).

In American Airlines, the Supreme Court clearly concluded that a breach of contract claim was not preempted by the ADA. As a breach of contract claim is not preempted by the ADA, we think it logically follows that the breach of contract claim must be interpreted pursuant to state law. Based upon this reasoning, we reject Emery's contention that federal law controls the interpretation of the Waybill. As AAF brought a breach of contract action against Emery, we believe that state law is applicable when interpreting the contract (Waybill) between the parties. Having so concluded, we shall now examine the Waybill at issue.

The Waybill contained provisions on the front and back of the document. On the front, it specifically stated:

> I/we agree that Emery's Terms and Conditions of Contract ("Terms") as set forth on the front and reverse hereof apply to this shipment.

This provision, on the front of the Waybill, incorporated by reference the terms on its reverse side. A signature line appeared on the bottom front page, and there appeared a signature of an AAF representative. On the reverse side of the

Waybill, there was no signature line. Also, the following provision was inserted on the reverse side:

> The Shipper agrees that this shipment is subject to the TERMS stated herein and those TERMS AND CONDITIONS in the Service Guide in effect on the date of shipment, which are incorporated herein by reference, and made a part of this contract. In the case of conflict between the TERMS contained herein and those TERMS AND CONDITIONS in the Service Guide, the TERMS AND CONDITIONS in the Service Guide shall control. The Service Guide is available at all our offices or a copy can be obtained by writing to Emery Worldwide, One Lagoon Drive, Suite #400, Redwood City, California 94065-1564. ALL TERMS, including, but not limited to, all the limitations of liability, shall apply to our agents and their contracting carriers. As used herein, the words "our," "we," and "us" shall refer to Emery Worldwide, a CNF company.

The above provision, on the reverse side of the Waybill, attempted to incorporate by reference the additional terms and conditions contained in Emery's Service Guide. Relevant to this appeal is the following exclusion contained in Emery's Service Guide:

> The following shipments will not be acceptable for transportation by Emery:
>
> . . . .
>
> C. Shipments of gold or other precious metals including but not limited to bronze, copper, gold or silver coins, coin collections, gems, and precious stones.

Pursuant to this provision of Emery's Service Guide, Emery argues that it does not accept for shipment cargos of precious metals. Emery claims it is undisputed that AAF's shipment contained precious metals. As such, Emery maintains that it is not liable for the loss of the shipment by operation of the Waybill and Emery's Service Guide.

In a well-reasoned and erudite opinion, the circuit court rejected Emery's argument. Relying upon state law, the circuit court concluded that the provision, on the reverse side of the Waybill, incorporating Emery's Service Guide was unenforceable. Specifically, the circuit court reasoned:

> KRS 446.060 provides that "[w]hen the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature is subscribed at the end or close of the writing." This statute embodies the idea that when a signature is placed at the end of an agreement, there is created a logical inference that the document contains all of the terms by which the signer intends to be bound. Gentry's Guardian v. Gentry, Ky., 293 S.W. 1094 (1927); R.C. Durr Co. v. Bennett Industries, Inc., Ky.App., 590 S.W.2d 338 (1979). However, Kentucky courts have also consistently held that this statute does not abolish the doctrine of incorporation by reference. *See, e.g.*, Childers Venters, Inc. v. Sowards, Ky., 460 S.W.2d 343 (1970); Bartelt Aviation, Inc. v. Dry Lake Coal Co., Inc., Ky., 682 S.W.2d 796 (1985). Generally, this doctrine provides that
>
> > [w]when the signature is in the middle of a writing, it gives no assurance that the contracting

> parties intend to be bound by matters which do not appear above their signatures; however, when a signature is placed after clear language [that] has expressed the incorporation of other terms and conditions by reference, it is a logical inference that the signer agrees to be bound by everything incorporated.

Bartelt, 682 S.W.2d at 797, *citing* R.C. Durr Co., *supra*. In order for the incorporating language to be valid and enforceable, it must appear above the signature line. Consolidated Aluminum Corp. v. Krieger, Ky.App., 710 S.W.2d 869 (1986).

The present matter presents the unusual problem of a double incorporation. That is, a statement on the front page of Emery's Waybill incorporates the terms and conditions on the reverse side. Among those terms on the reverse side is yet another incorporating provision, this one relating to the separate Emery Service Guide. When viewed in light of the authorities cited above, this double incorporation is not enforceable against AAF.

Initially, there is no doubt that the terms and conditions on the reverse side of the Waybill appear after the signature line designated for AAF's agent. However, there is a statement above the signature of AAF's representative that states "I/we agree that Emery's Terms and Conditions of Contract ("Terms") as set forth on the front and reverse hereof apply to this shipment." Pursuant to Kentucky law as cited above, this provision on the front of the Waybill is enforceable. Nonetheless, the second incorporation provision on the reverse of the Waybill is not enforceable since the Service Guide was not provided to AAF and Kentucky law does not recognize a double incorporation.

Traditionally, the doctrine of incorporation by reference has been applied in situations where a party to a contract signs a document that includes a provision that incorporates various terms on the reverse side of the same document. The doctrine is also applicable in situations where the terms being incorporated are embodied in a separate document that is provided to the party charged with knowledge of the terms therein prior to execution of the contract. *See, e.g.*, Buck Run Baptist Church, Inc. v. Cumberland Surety Ins. Co., Ky., 983 S.W.2d 501 (1998). Under these traditional circumstances, the single key factor is that *all* of the terms of the contract are available to the signer at the time the document is executed. Conversely, in Twin City Fire Ins. Co. v. Terry, Ky., 472 S.W.2d 248 (1971), the court refused to uphold an exclusionary term in an insurance contract that was located in a separate document incorporated by reference into the policy because the secondary document was not provided to the insured. In the present action, the precious metal exclusion, found in Emery's Service Guide, a separate document referenced on the *reverse* side of the Waybill *after* the signature line, was never provided to AAF. Emery has presented no evidence to refute this. This alone warrants non-enforcement of the exclusion.

Further this Court can find no precedent in Kentucky for an extension of the doctrine of incorporation by reference to encompass a situation involving a double incorporation. The facts in this matter are illustrative of why such an extension of the doctrine is unreasonable. While the provision on the front of the Waybill references the terms and conditions on the back, it does not notify AAF that there is yet another distinct incorporating provision on the reverse side. Similarly, the provision on the front of the Waybill

> provides no notice to AAF that there is another document other than the Waybill itself that contains important terms and conditions of the contract. Rather, the first and only reference to the Service Guide is found on the back of the Waybill, *after* the signature line. It is simply not conceivable that a party to a shipping contract, such as AAF, would or should anticipate that the provision on the front of Emery's Waybill portends yet another incorporating provision to be found on the reverse side referencing a nearly twenty page document distinct from the Waybill containing a large number of detailed contract provisions. This is especially true in light of the fact that the incorporating term on the back of the Waybill, the *only* one referencing the Service Guide, cannot be read unless the top page of the Waybill is separated from the copies below it (footnote omitted). Taken into conjunction with the fact that AAF was never provided a copy of the Service Guide, the circumstances of this action do not warrant an extension of the doctrine of incorporation by reference so as to enforce the precious metal exclusion.

We agree with the circuit court's interpretation of the Waybill and particularly with the court's conclusion that the incorporation provision on the reverse side of the Waybill was unenforceable. As pointed out by the circuit court, it is undisputed that if the electronic melter components did not contain precious metals, Emery would be liable to AAF for breach of contract to deliver the components. Accordingly, we conclude the circuit court properly interpreted the Waybill and concluded that Emery breached its duties thereunder. We also believe the

circuit court correctly entered summary judgment against Emery for $213,000.00, the value of the lost shipment of electronic melter components.

Emery also argues that AAF's complaint is time-barred by Section BIII, Subpart A(5) of its Service Guide. As hereinbefore concluded, we do not believe Emery's Service Guide was properly incorporated by reference into the Waybill. Thus, any reliance upon its provision is clearly misplaced. Consequently, AAF's complaint is not time-barred.

Emery further asserts the circuit court committed error by denying its motion to dismiss pursuant to the doctrine of *forum non conveniens*. We disagree.

Under the doctrine of *forum non conveniens*, it is recognized:

> [T]here are certain instances in which a court properly vested with jurisdiction and venue may, nonetheless, dismiss an action if it determines that it is more convenient for the litigants and witnesses that the action be tried in a different forum.

Roos v. Kentucky Educ. Ass'n, 580 S.W.2d 508 (Ky.App. 1979). It is within the sound discretion of the trial court to dismiss an action upon the basis of *forum non conveniens*, and that discretion will not be disturbed on appeal absent a clear abuse.

In this case, the complaint was filed on August 28, 2001, and Emery's motion to dismiss upon *forum non conveniens*

grounds was not filed until February 28, 2003. Emery waited some seventeen months before filing the motion. While there exist no proscribed time limitations upon the filing of such motion, we, nevertheless, think it incumbent upon Emery to file the motion within a reasonable time. In any event, we cannot say the circuit court abused its discretion by denying Emery's motion. The record indicates that Emery is a global corporation and transacts business in the Commonwealth. Emery has a place of business in Jefferson County, and Emery contracted with an AAF office located in Jefferson County to deliver the shipment at issue. Considering the factors listed in Roos, we believe this Commonwealth is not an *inconvenient forum*.

We view Emery's remaining contentions as moot.

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

TACKETT, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

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