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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002006-MR

JPMORGAN CHASE BANK, N.A.
AS SUCCESSOR BY MERGER TO BANK ONE, N.A.
("CHASE") APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 03-CI-00635

BLUEGRASS POWERBOATS AND
JAMES D. TAYLOR APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CAPERTON AND WINE, JUDGES.

WINE, JUDGE: JPMorgan Chase Bank, N.A., as successor by merger to Bank One, N.A. ("Chase"), appeals from an order of the Jessamine Circuit Court setting aside its previous order for Bluegrass Powerboats, Inc. and James Taylor (collectively, "Taylor") to arbitrate their claim against Chase and in denying

Chase's motion to confirm the arbitration "award." On appeal, Chase argues that the Jessamine Circuit Court failed to articulate a proper basis for vacating the "award" under Kentucky's Uniform Arbitration Act (KUAA). We disagree and hold that a dismissal for timeliness is not an adjudication on the merits and does not constitute an "award."

Bluegrass Powerboats, a retailer of motorboats and watercraft supplies in Jessamine County, Kentucky, was owned and operated by James Taylor and his wife. In the spring of 2003, Taylor decided to sell Bluegrass Powerboats to its employee and sales manager, Gregory Shearer. To that end, Taylor and Shearer entered into an asset purchase agreement. On May 31, 2003, Taylor closed the doors of the business as Bluegrass Powerboats and on the next morning, Shearer opened the doors as Bluegrass Marine. Although a purchase agreement had been entered into and Shearer had opened the business under a new name, the financial portion of the transaction had yet to take place.

On June 13, 2003, Taylor opened a personal savings account with Chase[1] and deposited $100 to open the account. On that same day, Shearer drafted a check drawn on the Chase account of Bluegrass Marine to Taylor for $123,102 for the purchase of the business. Taylor deposited the check into his own Chase account four days later, on June 17, 2003. Taylor visited the bank on June 18, 2003, and was told that the check had been credited to his account. He received a

[1] Although Chase is the successor by merger, the bank where Taylor originally opened the account was Bank One of Nicholasville. "Chase" is used uniformly throughout this opinion, regardless of whether the bank in question was actually "Bank One" or "Chase" at the time.

$9,000 cashier's check from this account after the deposit. Then, on June 20, 2003, the bank mailed Taylor a letter stating that the check deposited on the seventeenth had been returned for non-sufficient funds (NSF) and his account had been debited $123,102. Ultimately, as a result of the failed sale of the business, Taylor reclaimed the marine business and its assets.

Taylor filed suit against Chase in Jessamine Circuit Court. Although there were originally two counts in the complaint, the first count has since been settled and is not an issue in the present appeal. The second count in the complaint, the subject of the herein appeal, was based upon the requirement in the Uniform Commercial Code that a bank pay or return an NSF check by midnight of the day the check is deposited when the deposited check is drawn on the same bank. Taylor testified to damages resulting from Chase's actions in his deposition. Specifically, Taylor testified that when he repossessed the Bluegrass Marine business, he had to pay debts incurred by Shearer and only received approximately $20,000 from the sale of assets.

Chase moved to stay the court proceedings on Count Two, alleging that Taylor's account with Chase was subject to Chase's "account rules and regulations," which included a mandatory arbitration provision. Although Taylor argued that the arbitration provision was unenforceable or there was no agreement to arbitrate, the trial court considered evidence produced by both parties and eventually determined that there was an enforceable agreement to arbitrate.

Thereafter, in May of 2004, although the claims on Count One proceeded in the circuit court, the trial court ordered Taylor and Chase to arbitrate Count Two.

Thereafter, on May 17, 2004, Taylor filed a Kentucky Rules of Civil Procedure (CR) 59.05 motion to vacate the order to arbitrate, or in the alternative, to make the order final and appealable. Taylor argued that Chase had failed to produce a signed signature card or other contract showing that Taylor ever agreed to an arbitration provision. The court denied Taylor's motion to vacate and also denied his request to make the order final and appealable.

For the next few years, neither Taylor nor Chase took steps to arbitrate Count Two. During that time, the parties continued to litigate Count One in the trial court. Count One was finally settled and dismissed by agreed order of the parties on April 30, 2007. In March of 2008, Chase sought to have Count Two dismissed for failure to prosecute, based upon Taylor's failure to file a claim in arbitration. The day before this motion was heard by the court, Taylor filed his claim in the National Arbitration Forum (NAF).

Chase responded to the arbitration claim and the parties moved forward in the selection of an arbitrator. The following year, in March of 2009, Chase moved for involuntary dismissal of Taylor's claims pursuant to Rules 18 and 41 of the NAF Code of Procedure, based upon Taylor's delay in filing the arbitration claim the previous year. On June 25, 2009, the arbitrator granted Chase's requested relief by entering an order dismissing the arbitration under Rule 18 of the NAF Code of Procedure.

Thereafter, on August 13, 2009, Taylor filed a motion in the Jessamine Circuit Court to take the case out of abeyance and place it back on the active docket, based upon the Supreme Court's recent decision in *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009). Taylor argued that there was never an agreement to arbitrate under the holding in *Ally Cat*. Chase opposed Taylor's motion and filed its own motion to confirm the arbitrator's dismissal on October 2, 2009.

Chase argued that the trial court was prevented by Kentucky Revised Statutes (KRS) 417.150 from vacating the arbitration "award" because more than ninety days had elapsed and Taylor had never moved to vacate the "award" under KRS 417.160 or KRS 417.170.[2] Chase also argued that Taylor failed to state any valid statutory grounds under KRS 417.160 or KRS 417.170 for vacating or modifying the "award."

The Jessamine Circuit Court determined that, because it had stayed the action rather than dismissing it, it retained jurisdiction over the matter and could consider the change in law and set aside its previous order to arbitrate. The circuit court reasoned that because the case was never final and the law had since changed, it was compelled to follow the law as it presently stood. Based upon this reasoning, the court set aside its previous arbitration order and set the matter for

[2] Although Chase is correct that Taylor never moved the court to vacate the arbitrator's "award," as is discussed herein below, there was no "award" to vacate. Instead, Taylor moved the court to set aside its own prior order for the parties to arbitrate.

trial. Chase then timely filed an appeal to this Court, as the order was immediately appealable under KRS 417.220.

On appeal, Chase argues: (1) that Taylor did not move to vacate the arbitration award within ninety days and, thus, the circuit court was required to confirm the award under KRS 417.150; (2) that, even if a motion had been timely made, Taylor has failed to state a valid statutory basis to vacate the award; (3) that a change in the law is not a valid statutory basis for vacating the award, and, finally; (4) that the separation of powers doctrine precludes a circuit court from considering grounds for vacating an arbitrator's award other than those set out in the KUAA.

As the trial court made no findings of fact, but instead made its decision upon application of legal principle, we review the matter *de novo*. *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001).

All of Chase's claims may be considered together on review, as they are all premised upon the same basic flawed assumption: *that the dismissal of the arbitration with prejudice constituted an "award."* In the present case, the arbitrator entered an order dismissing the arbitration on procedural grounds that never reached the merits of the case. Chase essentially "would have this Court recognize a 'default award,' which to date has not been permitted by any Kentucky court" and which we decline to recognize today. *Medcom Contracting Services, Inc. v. Shepherdsville Christian Church Disciples of Christ, Inc*., 290 S.W.3d 681, 685 (Ky. App. 2009). This view, as espoused by this Court in *Medcom*, is in line

with other jurisdictions that have held that there is no "award" if a case is dismissed on procedural grounds, such as for timeliness, and the arbitrator never reaches the merits of the case. *Cf. Coldwell Banker Manning Realty, Inc. v. Cushman and Wakefield of Connecticut, Inc.,* 293 Conn. 582, 601-602, 980 A.2d 819, 830-831 (Conn. 2009). Accordingly, we find that KRS 417.150, KRS 417.160, and KRS 417.170, and Chase's arguments predicated thereon, are inapplicable to the present case. We also note that although Chase suggests that the trial court vacated the arbitrator's decision, the trial court actually did no such thing. The trial court, instead, vacated its own order directing the parties to arbitrate on the grounds that it had made a mistake of law. As such, the procedural stance of the case is somewhat different than Appellants have illustrated it on appeal. It is within the power of a trial court to go back and alter or vacate a previous order or judgment for up to ten days after the entry of a final judgment. *See, e.g., Johnson v. Smith*, 885 S.W.2d 944, 947 (Ky. 1994). As there was no final judgment in this case and the case remained pending in the Jessamine Circuit Court, it was within the court's power to vacate its prior order to arbitrate.

Thus, as Chase failed to produce any signed agreement between the parties to arbitrate (indeed, failed to produce a document bearing the signature of *either* party), it was not error for the trial court to set the matter for trial on the grounds that there was no agreement to arbitrate. *Ally Cat, LLC*, 274 S.W.3d at 456.

In light of the foregoing, we hereby affirm the Jessamine Circuit Court.

ALL CONCUR.

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