

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001508-MR

SHELLEY NETHERWOOD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 05-CI-010493

ELAINE KENNEDY AND
EKM REAL ESTATE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

TAYLOR, CHIEF JUDGE: Shelley Netherwood (Netherwood) brings this appeal from orders of the Jefferson Circuit Court entered August 27, 2007, and July 17, 2008, denying her motion to dismiss and to compel arbitration pursuant to the terms of two real estate listing agreements. For the reasons hereinafter stated, we affirm.

Netherwood is a resident of Miramar Beach, Florida, who formerly owned real property located on Ballardsville Road in Jefferson County, Kentucky. On May 20, 2004, Netherwood entered into two multiple listing contracts (hereinafter collectively referred to as “the contracts”) with Elaine Kennedy, a licensed real estate broker in Kentucky who was doing business as EKM Real Estate in Jefferson County, Kentucky.¹ The contracts allowed Kennedy to list and seek buyers for two tracts of real estate owned by Netherwood, located at 10826 and 11000 Ballardsville Road, Jefferson County, Kentucky.² The contracts were entered into for a six-month period and were subsequently extended by agreement of the parties through May 1, 2005. The contracts provided that any disputes arising thereunder would first be submitted to mediation, and if not resolved, then the disputes would be decided by binding arbitration. The arbitration provisions in the contracts were identical and read as follows:

MEDIATION/BINDING ARBITRATION: Any dispute or claim (including, without limitation, claims of fraud, misrepresentation, warranty and negligence) of Sellers, Buyers, Brokers, Agents or any of them for a sum greater than the limits of small claims court jurisdiction arising out of this contract or the breach thereof or arising out of or relating to the physical condition of the property covered by this contract shall first be submitted to mediation in accordance with the guidelines and procedures of a qualified, reputable Greater Louisville Association of REALTORS, Inc. mediator (names and addresses of which may be obtained

¹ The contracts appear to be standard form listing agreements utilized by members of the Greater Louisville Association of Realtors.

² There were ultimately four tracts of property owned by Shelley Netherwood shown by Elaine Kennedy to prospective buyers.

from the Greater Louisville Association of REALTORS, Inc.). Disputes shall include (among other things) issues relating to representation made by the Buyer, Seller or any Broker or Agent, or other person or entity in connection with this contract. **Any agreement signed by the parties pursuant to the mediation conferred shall be binding.**

If mediation does not result in an agreement signed by the parties, all such claims or disputes shall be decided by binding arbitration in accordance with the rules of the real estate industry, then in effect, adopted by the American Arbitration Association unless the parties mutually agree otherwise. Notice of the demand for arbitration shall be filed in writing by registered or certified mail with the other parties to the contract and with a registered arbitrator (a list of which is available at the Greater Louisville Association of REALTORS, Inc. main office) or other arbitrators which the parties may agree upon and shall be made within 180 days after the dispute has arisen. An actual oral hearing shall be held unless the parties mutually agree otherwise. The Kentucky Real Estate Commission still retains jurisdiction to determine violations of KRS 324.160. Any proceeding to determine damages shall be conducted by an arbitrator pursuant to this clause and not in court. The terms of these paragraphs shall survive the closing.

Kennedy identified at least two prospective purchasers during the term of the contracts. One of the prospects, Five Star Development, Inc., engaged in substantial negotiations with Netherwood and her attorney over an approximate eight-month period that resulted in a written offer and several letters of intent. The negotiations with Five Star broke off in early April 2005. Kennedy subsequently demanded her commission under the contracts alleging she had procured a ready, willing, and able purchaser of the property in Five Star. Netherwood then

demanded a refund from Kennedy of \$5,000 that had been advanced to promote the sale of the property.

In December 2005, Netherwood sold the property to another purchaser. Kennedy then commenced this action in the Jefferson Circuit Court on December 8, 2005, to collect a sales commission under the contracts.

The procedural history of this case can be described as “tortured,” at best. Netherwood, acting *pro se*, has repeatedly attacked counsel for Kennedy regarding his truthfulness in these proceedings. Netherwood has filed at least three motions to dismiss this action, arguing that the circuit court lacks jurisdiction to hear this case because of the failure of Kennedy to seek arbitration within 180 days of the dispute arising between the parties. This time limitation is stated in the arbitration provision previously set forth above. Although we do not reach the contractual time limitation issue, we nonetheless believe Netherwood’s arguments are misplaced.

In order to determine whether the parties in this action agreed to arbitrate any disputes arising under the contracts, we must initially determine whether a valid arbitration agreement exists and, if so, whether the parties’ dispute is within the scope of such agreement. *General Steel Corp. v. Collins*, 196 S.W.3d 18 (Ky. App. 2006). The interpretation of a contract, including the arbitration clause therein, is a matter of law for the Court to review. *Cinelli v. Ward*, 997 S.W.2d 474 (Ky. App. 1988). Accordingly, our review is *de novo*. *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829 (Ky. App. 2000).

The circuit court concluded in its orders of August 27, 2007, and July 17, 2008, that the arbitration provisions were valid but the parties had waived their rights thereunder. Since arbitration rights are contractual in nature, they may be waived. *Valley Constr. Co., Inc. v. Perry Host Mgmt. Co. Inc.*, 796 S.W.2d 365 (Ky. App. 1990). However, in our review of applicable Kentucky law, we do not reach the waiver issue in order to affirm the circuit court's decision not to dismiss this action for failure to arbitrate in a timely manner. Rather, we conclude that the arbitration provisions within the contracts do not comply with Kentucky Revised Statutes (KRS) 417.200 and thus are not enforceable by the parties to this action.

KRS 417.200 expressly provides that an arbitration agreement described in KRS 417.050 must provide for arbitration within this state to confer jurisdiction on a circuit court to enforce the agreement. The Kentucky Supreme Court has recently addressed this very issue in *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009). In *Ally Cat*, the Supreme Court specifically held as follows:

Subject matter jurisdiction to enforce an agreement to arbitrate is conferred upon a Kentucky court only if the agreement provides for arbitration in this state. Thus, an agreement to arbitrate which fails to include the required provision for arbitration within this state is unenforceable in Kentucky courts.

Ally Cat, LLC, 274 S.W.3d at 455.

Accordingly, subject matter jurisdiction to enforce an arbitration provision is conferred upon a Kentucky court only if the agreement provides for

the arbitration to be conducted in Kentucky. An agreement to arbitrate which fails to include the required provision for arbitration within this state is unenforceable by Kentucky courts. *Id.*

Ally Cat also arose out of a property dispute in Jefferson County. Ally Cat, LLC, purchased a condominium for use as a medical clinic. Ally Cat automatically became a member of the condo association where all members became subject to a Homeowners Limited Warranty Agreement (HOLW). The HOLW contained an arbitration provision that provided all disputes arising thereunder must be arbitrated. As a result of defects in the condo, Ally Cat sued its seller for fraud and other tortious conduct. The seller sought to enforce the arbitration provision in the HOLW, which, again, mandated that any disputes between the parties be arbitrated. Ironically, the language in the arbitration provision in the HOLW in *Ally Cat* is remarkably similar to the language in the arbitration provisions found in the contracts in our case. And, like the warranty agreement in *Ally Cat*, the arbitration provisions in the contracts fail to state specifically that the arbitration contemplated therein is to take place in Kentucky. As noted, the Supreme Court in *Ally Cat* concluded that the trial court had no subject matter jurisdiction to order the parties to arbitrate the dispute given that the arbitration provision failed to comply with KRS 417.200.

We would further note that this case is distinguishable from one where an arbitration agreement looks to disputes arising in interstate commerce and the provisions of the Federal Arbitration Act (FAA) are controlling. The

Kentucky Uniform Arbitration Act (KUAA) and the FAA are substantially identical. *Louisville Peterbuilt, Inc. v. Cox*, 132 S.W.3d 850 (Ky. 2004).

Generally, when interpreting an arbitration agreement, both the FAA and KUAA recognize that all doubts concerning the scope of arbitration agreements should be resolved in favor of arbitration. *Id.* However, neither party in this appeal has raised the applicability of the FAA to these proceedings nor would it appear to be applicable on its face, given that the contracts were entered into in Kentucky and pertain exclusively to the sale of real property in Kentucky. Were the FAA applicable to this case, then the restrictions set forth in *Ally Cat* regarding the strict compliance with KRS 417.200 would not be applicable. The Kentucky Supreme Court has recently emphasized this distinction in *Ernst and Young v. Clark*, ___ S.W.3d ___ (Ky. 2010). In *Ernst*, the Supreme Court stated that *Ally Cat* has no applicability to an arbitration agreement governed exclusively by the FAA. However, the Supreme Court reemphasized its holding in *Ally Cat* that arbitration agreements that do not specifically state that the arbitration is to be held in Kentucky are not enforceable by Kentucky courts, limited to those cases where the FAA is not exclusively controlling. *Ernst*, ___ S.W.3d at ___ n.8.

In summation, we are of the opinion that the circuit court properly denied Netherwood's motion to dismiss based upon the Kentucky Supreme Court precedent in *Ally Cat* as we must conclude that the arbitration provisions in the contracts are not enforceable under KRS 417.200. We do not reach the issue of waiver nor do we address the merits of the parties' respective claims.

However, we would be remiss if we did not point out that this case has floundered in our Court system now for almost five years. The circuit judge should be commended for the restraint and tolerance he has shown in this case. Netherwood has filed at least three motions to dismiss and Kennedy has filed at least two motions for summary judgment, all of which have been denied by the circuit court. Additionally, the circuit court has scheduled a trial in this action on at least three occasions. Based upon our review of the record, there does not appear to be any legal basis to delay the prompt trial of this action upon return to the court's active docket. We encourage both parties to end their personal hostility that has been exhibited throughout this case and to immediately proceed to trial on the merits of the disputed issues arising under the contracts and as set forth in the complaint and counterclaim, and as further detailed in the circuit court's order of March 25, 2008, denying cross motions for summary judgment. We also would encourage Netherwood to obtain counsel to represent her interests at trial. The damage claims asserted in this case are substantial. While Netherwood has sufficiently presented her case on appeal in a *pro se* capacity, in substantial compliance with applicable rules, the perils of representing oneself in a jury trial are many and the consequences dire. One consequence of self-representation could result in an adverse judgment regardless of the merits of one's claim or defense. We emphasize the wisdom of the oft-quoted maxim in our legal system that "a man [or woman] who represents himself has a fool for a client." *See Hummel v. Com.*, 306 S.W.3d 48 (Ky. 2010). If Netherwood continues to

represent herself at trial, she shall be held to the same standards and court rules as any licensed attorney, including civility and respect for opposing counsel and the court. *See Lattanzio v. Joyce*, 308 S.W.3d 728 (Ky. App. 2010).

For the forgoing reasons, the order of the Jefferson Circuit Court denying Netherwood's motion to dismiss is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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