

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000712-MR

SHAWN J. RIDLEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 07-CI-008381

KATHLEEN B. SULLIVAN; AND J.J.B.
HILLIARD, W.L. LYONS, LLC

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

CAPERTON, JUDGE: Shawn J. Ridley appeals from the trial court's summary judgment order upholding an arbitration award in favor of Kathleen B. Sullivan and denying Ridley's motion to compel J.J.B. Hilliard, W.L. Lyons, LLC

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

(hereinafter “Hilliard Lyons”) to indemnify him.² After a thorough review of the parties’ arguments, the record, and the applicable law, we find no error and, accordingly, affirm.

Ridley worked for Hilliard Lyons as a financial services professional in 1992. Hilliard Lyons was a member of the National Association of Securities Dealers (“NASD”). During his employment with Hilliard Lyons, Ridley was a registered representative licensed through the NASD. Ridley also worked as a portfolio manager for Hilliard Lyons Trust Company, which was not a member of the NASD.

In 1996, Ridley and Sullivan began dating and Ridley began managing her investments at both Hilliard Lyons and at Hilliard Lyons Trust. They later married in 1997. In November 2004, Ridley filed for divorce. Also in 2004, by mutual agreement, Ridley and Hilliard Lyons terminated their employment relationship. In doing so, they entered into a Separation Agreement which stated in relevant part:

Hold Harmless in Favor of Employee. Hilliard Lyons will indemnify, hold harmless, and provide a defense to Employee for any claim made against Employee for actions or conduct by Employee in the course of his employment with Hilliard Lyons to the extent that Hilliard Lyons would do the same for any of its other employees.

² Within the same order and opinion, the court denied Ridley’s summary judgment motion whereby he sought to either vacate an underlying arbitration award in favor of Sullivan or compel Hilliard Lyons to indemnify him and granted Hilliard Lyons’ motion for summary judgment with regard to Ridley’s complaint and Sullivan’s cross-claim. The trial court also denied part of Sullivan’s summary judgment motion and its denial thereof has not been appealed.

This obligation to indemnify was elaborated upon in Hilliard Lyons' Articles of Incorporation:

ARTICLE IX: INDEMNIFICATION OF DIRECTORS, OFFICERS, & EMPLOYEES:

The Corporation shall, to the fullest extent permitted by the Kentucky Business Corporation Act, indemnify each of its directors, officers, or employees against expenses (including attorneys' fees), judgments, taxes, fines, and amounts paid in settlement, incurred by him in connection with, and shall advance expenses (including attorneys' fees), incurred by him in defending, any threatened, pending, or completed action, suit, or proceeding (whether civil, criminal, administrative, or investigative) to which he is, or is threatened to be made, a party by reason of the fact that he is or was a director, officer, or employee...Advancement of expenses shall be made upon receipt of an understanding, with such security....person seeking indemnification to repay amounts advanced if it shall ultimately be determined that he is not entitled to be indemnified by the Corporation.

Upon Ridley's departure from Hilliard Lyons, Sullivan's accounts were transferred to Ridley's new employer, Atlas Brown, Inc., even though Sullivan and Ridley were in the midst of a divorce. Sullivan later transferred her account back to Hilliard Lyons.

On January 4, 2006, while Sullivan and Ridley were legally separated, Sullivan filed a Statement of Claim against Ridley and Hilliard Lyons with the NASD alleging: (1) breach of fiduciary duty; (2) violation of KRS 292.320(1)(b); (3) violation of KRS 292.320(2); (4) violation of Rule 10b-5; (5) violation of NASD "Know Your Customer" Rule; (6) Controlling Person Liability Pursuant to

KRS 292.480(1) and (2) and 15 U.S.C. 78(a); (7) Breach of Contract; (8)

Negligence; and (9) Conversion.

In making these claims, Sullivan alleged that Ridley improperly invested her holdings in several highly speculative stocks, which were unsuitable and contrary to her stated investment objective of long-term growth. Sullivan asserted that Ridley had withdrawn funds from her accounts and used the proceeds to pay for day-to-day expenditures of their household in contravention of their agreement; and, that he directed monies from her account into speculative personal investments, and then directed income from these investments into his own account. Sullivan further alleged that Hilliard Lyons failed to supervise the actions of Ridley and was jointly and severally liable for the damages that incurred under the theory of control person liability. The matter was submitted to a panel of three arbitrators who were appointed by NASD with the explicit approval of all parties.

After a multiple-day hearing, the panel made the following award in favor of Sullivan: Hilliard Lyons is “solely liable for and shall pay” to Sullivan the sum of \$100,000 in compensatory damages; Ridley is “solely liable for and shall pay” to Sullivan, the sum of \$150,000 in compensatory damages; and the forum fees in the amount of \$18,300 were assessed to Hilliard Lyons and Ridley jointly and severally. The award did not explain the basis for the panel’s conclusions and no such explanation was requested by any of the parties. Hilliard Lyons subsequently paid Sullivan \$100,000. Ridley did not.

On August 28, 2007, Ridley filed a complaint with the trial court seeking to vacate the award pursuant to U.S.C. § 10 and KRS 471.160, and argued that the panel was without jurisdiction to hear the claim. In the alternative, Ridley sought a declaration of rights to compel indemnification from Hilliard Lyons, and alleged breach of contract and a violation of KRS 337.055. Sullivan then filed a counterclaim to confirm the award and a cross-claim alleging breach of contract by Hilliard Lyons. The parties then filed dueling summary judgment motions, each asserting that there were no material issues of fact and that each were entitled to judgment as a matter of law.

The trial court in opinion and order of November 7, 2008, addressed the multiple summary judgment motions. In reaching its decision to affirm the award and deny Ridley's request to compel indemnification, the court presented multiple reasons for its decision which we have summarized herein. In so doing, the court addressed Ridley's motion to compel indemnification and noted that the panel heard evidence that Ridley acted outside the scope of his employment and, apparently based thereon, it apportioned liability between him and Hilliard Lyons.

Further, the word choice used by the panel (i.e., "solely") in rendering its award indicates that Ridley alone is responsible for the amount issued against him in favor of Sullivan. When compared to the word choice used by the panel in awarding forum fees (i.e., "jointly and severally") to Hilliard Lyons and Ridley, this clearly evidences the decision to make Ridley solely liable for a portion of the award. The court further noted that Ridley chose not to seek reconsideration or

explanation of the award. Further, without a transcript of the hearings, the court was required to assume that the evidence supported the arbitrator's decision.

Thus, the court determined that Ridley's decision not to alert the panel to the issue of indemnity before, during, or after arbitration, resulted in waiver of the defense. The scope of Ridley's employment was an issue that was subject of the arbitration. Hilliard Lyons raised this as an affirmative defense before the panel and argued that Ridley's actions concerning Sullivan's account with Hilliard Lyons Trust were not within its control and, thus, could not implicate any duties or responsibilities on the part of Hilliard Lyons. Because the arguments Ridley raised to the court involved the same facts and circumstances as those addressed by the panel, the court determined that he had the obligation to raise them in the arbitration forum and he would not be permitted to relitigate whether his actions fell within the scope of his employment before the trial court.

Next, the court determined that Ridley had not shown that Hilliard Lyons breached any of its obligations because indemnity was limited to those acts within the scope of employment. The panel heard evidence that Ridley acted in bad faith and that his actions were not in Hilliard Lyons' best interest. Hilliard Lyons argued that Ridley had committed intentional misconduct for improper personal gain, which the court noted would not be within the scope of his employment, and thus he was not entitled to indemnification based on the separation agreement, the Articles of Incorporation, and KRS 271B.8-510. Further, the court noted that the panel's finding that Hilliard Lyons was solely responsible for a portion of the

award, and not the entire award, was supported by the parties' agreements and the law. Because Ridley did not show that he acted solely within the scope of his employment regarding Sullivan's claims, nor that Hilliard Lyons breached any duty to indemnify, the court denied his motion for summary judgment to compel indemnification.

The court, in affirming the panel's award, determined that the panel had jurisdiction to hear Sullivan's claims for multiple reasons. First, Ridley entered into a written Submission Agreement whereby he agreed to allow the panel to decide all claims between the parties; his voluntary submittal of the matter to arbitration waived any jurisdictional defenses. Second, Ridley failed to plead such a defense in his initial answer to Sullivan's claims to the NASD. Thus, the court determined that he had again waived a jurisdictional defense. Third, Ridley failed to establish that the panel was without jurisdiction to consider claims against him that fell outside the scope of his employment with Hilliard Lyons, since such panels are authorized to hear "any dispute between a customer and associated person" arising in "connection with the business activities of the member or the associated person." The court noted that Sullivan was undisputedly a "customer," that Ridley was an "associated person," and that his alleged activities were related to his business of making investment decisions and transactions on her accounts. Thus, the court affirmed the award. It is from this order that Ridley now appeals.

At the outset we note that claims to vacate or confirm arbitration awards may be properly resolved by motions for summary judgment. *See Lombardo v.*

Investment Management and Research Inc., 885 S.W.2d 320 (Ky.App. 1994), and *Sweeney v. Theobald*, 128 S.W.3d 498 (Ky.App. 2004). The applicable standard of review on appeal of a summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56.03. The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment is proper only “where the movant shows that the adverse party could not prevail under any circumstances.” *Id.* However, “a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.” *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. See also *O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001). With these standards in mind, we now turn to the arguments of the parties.

On appeal Ridley presents four primary arguments. First, he was entitled to partial summary judgment based upon a finding that the panel lacked jurisdiction, or that the conduct was within the course of his employment at Hilliard Lyons. In support thereof, Ridley argues that the trial court's affirmation of the award and the denial of his motion to compel indemnification yield an inconsistent result. Ridley asserts that the court erred because under the decision of the court, his actions during the course of his employment at Hilliard Lyons allow the panel jurisdiction but deny him indemnification for said actions.³ Second, Ridley argues that the trial court erred in granting summary judgment against Ridley for failure to raise an indemnification claim that had not yet accrued and was not subject to any arbitration clause. In support thereof, Ridley argues that his claim for indemnification was not a defense but a substantive cause of action; that the indemnity claim had not accrued during the arbitration proceeding; and that the indemnity claim was not subject to arbitration because there was no written agreement to arbitrate said matter. Third, Ridley argues that the trial court erred in

³ Ridley further argues that the trial court's judgments - finding that jurisdiction was proper because it was undisputed that Ridley was an associated person and that his alleged activities were related to his employment at Hilliard Lyons - demonstrate that, as a matter of law, Ridley is entitled to indemnification from Hilliard Lyons. We disagree for reasons stated *infra*.

granting summary judgment against him because it misconstrued the nature of his contract claim. Fourth, Ridley argues that the trial court misapplied the standard for summary judgment determination since it improperly placed the burden of proof on Ridley and resolved all doubts against him as the non-moving party.

Hilliard Lyons disagrees with Ridley and instead presents four counter-arguments. First, Hilliard Lyons asserts that the trial court properly determined that the panel had jurisdiction to consider the claim against Ridley. Second, it argues that the trial court properly dismissed Ridley's claim for indemnification. In support thereof, Hilliard Lyons argues that Ridley is barred from relitigating issues of scope of employment; that Ridley's reliance on *Pike v. Freeman* is misplaced;⁴ and that Ridley's contention that his indemnification claim did not arise until the award was issued is unsupported. Third, Hilliard Lyons asserts that the trial court applied the proper standard of review in granting summary judgment to Hilliard Lyons on Ridley's indemnification claim. Fourth, it argues that the trial court's order is consistent with and supported by the record.

Sullivan presents four arguments. First, that the trial court did not misapply the standard for summary judgment in confirming the award. Second, that the opinion should be affirmed because of Ridley's failure to designate an evidentiary record from the underlying arbitration proceedings. Third, that the trial court did not err in confirming the award against Ridley with respect to Sullivan because the trial court correctly rejected Ridley's arguments that the panel lacked jurisdiction

⁴ We do not find *Pike v. Freeman*, 266 F.3d 78 (2nd Cir. 2001), to be persuasive. As such, we decline to address the merits of arguments concerning it.

over Sullivan's NASD claims, and that the trial court correctly rejected Ridley's arguments that the panel manifestly disregarded the law. Fourth, the trial court properly confirmed the award irrespective of whether Ridley acted within the course of his employment.⁵

As the parties' multiple arguments elucidate, the trial court in the case *sub judice* was faced with dueling summary judgment motions essentially involving two issues: (1) whether the arbitration award should be confirmed; and (2) whether Hilliard Lyons was required to indemnify Ridley. As such, we shall now address each issue.

Concerning whether the arbitration award was properly confirmed by the trial court, we note that judicial review of an arbitration award is circumscribed by KRS Chapter 417. Moreover, judicial review of a decision rendered by an arbitrator must be highly deferential. *Conagra Poultry Co. v. Grissom Transp., Inc.*, 186 S.W.3d 243, 244 (Ky.App. 2006), citing *3D Enterprises Contracting Corporation v. Lexington-Fayette Urban County Government*, 134 S.W.3d 558 (Ky. 2004). An arbitrator's resolution of factual disputes and the application of the law are not subject to review by the courts. *Conagra Poultry Co.* at 245. Extensive judicial inquiry into the merits of the issues before the arbitrator is not appropriate. *Housing Authority of Louisville v. Service Employees Intern. Union, Local 557*, 885 S.W.2d 692, 695 (Ky. 1994).

⁵ We agree with Sullivan that the trial court properly determined that the panel had jurisdiction, that the panel did not manifestly disregard the law, and that the court properly confirmed the award irrespective of whether Ridley acted within the course of his employment.

In the case *sub judice*, Ridley asserted that the panel did not have jurisdiction to hear Sullivan's claims. Contrary to Ridley's assertions, by agreeing to arbitrate, he waived any jurisdictional defenses. *Lombardo v. Investment Management and Research Inc.*, 885 S.W.2d 320, 322 (Ky.App. 1994). Moreover, the panel was authorized to hear "any dispute between a customer and associated person" arising in "connection with the business activities of the member or the associated person." Necessarily, any dispute between a customer and associated person arising in connection with the business activities of the member or the associated person permits the panel to hear a broad range of disputes. Such disputes would encompass situations where the associated person utilized member resources for purposes outside the scope of employment. Hence, jurisdiction over the dispute which arose in connection with the business activities of the member or associated person, as evidenced in the case *sub judice* by Ridley's management of Sullivan's Hilliard Lyons accounts, may extend to matters falling outside the parameters of the scope of employment, such as the alleged conversion by Ridley.

As such, we disagree with Ridley that the trial court reached an inconsistent result in finding that the panel had jurisdiction through his business activities at Hilliard Lyons over indemnification and, yet, disallowing indemnification. In addition, Ridley waived his jurisdictional defense. Therefore, the trial court correctly determined that the panel's award should be confirmed. We now turn to whether Hilliard Lyons was required to indemnify Ridley.

Ridley argues that the trial court erred in granting summary judgment against Ridley for failure to raise an indemnification claim that had not yet accrued and was not subject to any arbitration clause. In support thereof, Ridley argues that his claim for indemnification was not a defense but a substantive cause of action; that the indemnity claim had not accrued during the arbitration proceeding; and that the indemnity claim was not subject to arbitration since there was no written agreement to arbitrate said matter. Hilliard Lyons disagrees and argues that Ridley is barred from relitigating issues of scope of employment; and that Ridley's contention that his indemnification claim did not arise until the award was issued is unsupported, since the case relied upon by Ridley (*Poole Truck Line, Inc. v. Commonwealth, Transp. Cabinet/Department of Highways*, 892 S.W.2d 611 (Ky.App. 1995)), involved common law indemnity as opposed to the case at bar involving contractual indemnity.⁶

In *Poole Truck Line, supra*, this Court held that "A cause of action for indemnification accrues when payment is made to an injured party, not at the time of the underlying accident." However, the issue presented in *Poole Truck Line* concerned an indemnity claim against the Commonwealth brought to the Board of Claims, not a contractual indemnity claim as in the case *sub judice*. Thus, we find *Poole Truck Line* to be distinguishable from the case at bar.

⁶ Hilliard Lyons also argues that if *Poole Truck Line, supra* does apply, then Ridley's indemnification claim has not yet accrued because he has not made any payments to Sullivan. We agree.

While Ridley argues that his cause of action for indemnity had not accrued at the time of arbitration, nor was it expressly subject to arbitration, we disagree that *contractual indemnity* was not within the jurisdiction of the panel. And, where a claim is within the jurisdiction of the panel and subject to being heard by the panel through the agreement between the parties, then it is waived or barred, as the case may be, if not presented to the panel.

Hilliard Lyons raised as an affirmative defense before the panel whether Ridley's actions were within the scope of his employment. We agree that Ridley is not permitted to relitigate the same facts and circumstances presented to the panel; hence, the written Submission Agreement whereby Ridley agreed to allow the panel to decide all claims between the parties allowed the panel to hear just that, all such claims. This is evidenced by the panel's language in awarding Sullivan damages, which indicated that the panel was aware of the competing theories of liability, including Hilliard Lyons's assertion that Ridley acted outside the scope of his employment. And, without a transcript⁷ of the arbitration proceedings, the court was required to assume that the evidence supported the arbitrator's decision. *See Conagra* at 245, citing *Dillard v. Dillard*, 859 S.W.2d 134, 137 (Ky.App. 1993). Because this factual issue has been decided by the panel, we decline to review whether Ridley was acting within the scope of his employment. *See Conagra* at 245.

⁷ Or an explanation of the award by the panel.

Given that the issue concerning Ridley's scope of employment is barred from relitigation, the trial court properly determined that Ridley's claim for contractual indemnity must fail. Ridley's claim for contractual indemnity was based on his Separation Agreement with Hilliard Lyons. A plain reading of the Separation Agreement exhibits the parameters of Ridley's indemnity, namely, that his actions be in the course of his employment with Hilliard Lyons to the extent that Hilliard Lyons would do the same for any of its other employees.

Necessarily, any litigation arising out of the agreement would encompass all claims that accrued as a result of the terms of the agreement, thus, not piecemeal litigation but the entire litigation. Moreover, as evidenced by the Articles of Incorporation, the right to indemnity was qualified by KRS 271B.8-510, which requires such things as "good faith." The panel heard evidence that Ridley acted in bad faith and that his actions were not in Hilliard Lyons' best interest, but instead were for improper personal gain. Ridley has failed to adequately refute such allegations.⁸

Given the evidence presented to the panel, their determination on the merits by issuing the award, and a plain reading of Ridley's contractual right to indemnity, we find no error in the trial court's finding that Ridley had not shown that Hilliard Lyons breached any of its contractual obligations. Summary

⁸ "[A] party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. See also *O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

judgment was thus proper because Hilliard Lyons showed that Ridley could not prevail under any circumstance.

Last, we turn to Ridley's arguments concerning the appropriate standard for summary judgment.⁹ Ridley argues that the trial court misapplied the standard for summary judgment determination because it improperly placed the burden of proof on Ridley and resolved all doubts against him as the non-moving party.

We note that in the case *sub judice* the trial court was presented with diametrically opposed summary judgment motions. Ridley asserted that there were no genuine issues of material fact and that he was entitled to indemnification. Hilliard Lyons asserted that Ridley was not entitled to indemnification.¹⁰ It is now disingenuous for Ridley to assert that there are material issues of fact and that the trial court resolved all doubts against him.

Further, Ridley, in the case *sub judice*, was both the moving party and the non-moving party, given the dueling summary judgment motions. As such, it was incumbent upon Ridley to present at least some affirmative evidence to forestall summary judgment against him. *See Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). Thus, the trial court did not impermissibly place the burden of proof on Ridley and resolve all doubts against him as the non-moving party.

⁹ Ridley additionally argues that the trial court erred in granting summary judgment against him because it misconstrued the nature of his contract claim, i.e., that the trial court viewed his indemnity claim as a "challenge" to the arbitration award. In support thereof, Ridley argues that he is not seeking to "relitigate" his indemnification claim against Hilliard Lyons since this claim was never presented to the panel in any manner. We disagree for the reasons set forth in this opinion.

¹⁰ Hilliard Lyons sustained their burden of proof and demonstrated by the pleadings, the award, and the applicable law, that there were no genuine issues of material fact and that they were entitled to judgment as a matter of law.

Finding no error, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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