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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002045-MR

MHC KENWORTH, KNOXVILLE/NASHVILLE APPELLANT

APPEAL FROM KNOTT CIRCUIT COURT
v. HONORABLE KIMBERLEY CORNETT CHILDERS, JUDGE
ACTION NO. 09-CI-00239

MIKE HALL and
M&H TRUCKING, LLC APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: MHC Kenworth appeals from the October 16, 2009, order of Knott Circuit Court denying its motion to stay litigation and compel arbitration. Because we discern no error with the trial court's order, we affirm.

[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 KRS 21.580.

The underlying controversy arises from a truck sales contract between the parties. Appellees (M&H) brought suit against Appellant (MHC) alleging that the truck which they ordered from MHC was different from the truck that was actually delivered. MHC filed a motion to stay litigation and compel arbitration, pursuant to an arbitration provision found in the sales contract. That motion was denied in the trial court by order of October 16, 2009. This appeal followed.

On appeal, MHC argues that the trial court wrongfully denied its motion to stay litigation and compel arbitration. MHC first maintains that the enforceability of the arbitration agreement must be determined under the Federal Arbitration Act (FAA), 9 U.S.C. §1, *et seq.*, because the sale involved interstate commerce. The FAA defines commerce as "commerce among the several states." In fact, MHC is a Tennessee corporation, M&H is a Kentucky corporation, and the truck that was exchanged between the parties appears to have been manufactured in Washington. As such, it appears that MHC is correct in asserting that the case involves interstate commerce and that under the contract the FAA would apply.

MHC next argues that application of the FAA required the trial court to stay the litigation and compel arbitration. In response, M&H argues that Kentucky courts do not have subject matter jurisdiction over arbitration agreements that do not provide for the arbitration to take place within the Commonwealth of Kentucky. KRS 417.050 addresses the validity of arbitration agreements. KRS 417.200 provides that "an agreement described in KRS 417.050 providing for arbitration in this state confers jurisdiction on the court to enforce the

agreement." This Court has interpreted the statute as follows: "[t]he plain meaning of that statute is that the agreement, wherever made, must provide for the *arbitration itself* to be in the Commonwealth in order to confer subject matter jurisdiction on a Kentucky court." *Tru Green Corp. v. Sampson*, 802 S.W.2d 951, 953 (Ky.App. 1991); *see also Artrip v. Samons Construction, Inc.,* 54 S.W.3d 169 (Ky.App. 2001)(holding that failure to name a Kentucky site as the arbitration location was fatal to invoking the jurisdiction of a Kentucky court)(emphasis added). Indeed, the Supreme Court of Kentucky has recently held:

> [s]ubject 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 v. Chauvin, 274 S.W.3d 451, 455 (Ky. 2009). The arbitration agreement which MHC presented to the trial court indicated that "[t]he place of arbitration shall be the American Arbitration Association's office closest to the location of Dealer." The dealership is located in Tennessee and Tennessee is served by the AAA's regional office located in Atlanta, Georgia. Furthermore, there are no AAA offices located within the Commonwealth of Kentucky. Therefore, because MHC failed to designate Kentucky as the location for the arbitration, Kentucky courts do not have jurisdiction to enforce the arbitration or any agreement that may have been reached as a result thereof.

MHC argues that the FAA preempts any state law to the contrary. We disagree. The FAA governs a contract's arbitration provisions only as to substantive law, but state procedural rules must be enforced, including state law jurisdictional determinations. The Kentucky Supreme Court has held that any preemptive effect of the FAA extends only to substantive, and not to procedural, arbitration law. *Atlantic Painting & Contracting Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846 (Ky. 1984). The Court distinguished between federal and state review, and noted that the application of federal procedural rules was required only when parties look to the federal courts to vacate or enforce an arbitration award. *Id.* The Court concluded that state courts, however, are not required to apply the procedural aspects of the FAA to a state review of arbitration issues, even when the underlying dispute involves interstate commerce.

> The federal Arbitration Act covers both substantive law and a procedure for federal courts to follow where a party to arbitration seeks to enforce or vacate an arbitration award in federal court. *The procedural aspects [of the FAA] are confined to federal cases.*

Id. (emphasis in original).

Our review of federal cases leads to the same conclusion. "The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 477 (1989).

> There is no federal policy favoring arbitration under a certain set of *procedural rules*; the federal policy is

> simply to ensure the enforceability, *according to their terms*, of private agreements to arbitrate.

Id. (emphasis added). The terms of the arbitration agreement before us do not establish Kentucky as the location for the arbitration. As we have already stated, this is a condition precedent to conferring jurisdiction upon Kentucky courts. But as this is a procedural issue, it is not preempted by the substantive law application of the FAA to a state court proceeding. The lack of jurisdiction of Kentucky courts in this instance cannot be overcome by the application of the FAA's substantive law.

MHC also argues that under the FAA and controlling case law, M&H's claim of alleged fraudulent inducement to enter the contract, as opposed to fraudulent inducement of the arbitration agreement itself, is arbitrable. In view of our prior holdings herein, this argument is unpersuasive. Simply stated, Kentucky courts do not have jurisdiction over the arbitration agreement or any resulting arbitration award.

MHC's final argument on appeal is that the trial court wrongfully failed to explain the basis for its order denying the motion to stay litigation and compel arbitration. Specifically, MHC argues that the trial court order improperly omitted necessary findings of fact and conclusions of law. In support of this argument, MHC cites to CR 52.01, which states, in relevant part:

> [i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment; and in granting or

> refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. *Requests for findings are not necessary for purposes of review except as provided in Rule 52.04. . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02.*

CR 52.01 (emphasis added). CR 52.01 provides that findings of fact and conclusions of law are unnecessary on decisions of motions except for those made pursuant to CR 41.02, which are motions for the involuntary dismissal of an action. The order from which MHC appeals is a decision on a motion to stay litigation and compel arbitration, not a motion to dismiss. Furthermore, CR 52.01 specifically states that requests for findings are necessary only for review as provided by CR 52.04, which states:

> [a] final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

In the present situation, MHC failed to move the trial court for specific findings of fact, and this Court, therefore, will not reverse for their omission from the trial court's order. As further support of its argument, MHC cites to *Skelton v. Roberts*, 673 S.W.2d 733 (Ky.App. 1984), and *Brown v. Shelton*, 156 S.W.3d 319 (Ky.App. 2004). We recognize that this Court mandated the inclusion of specific findings of fact and conclusions of law in those cases. However, *Skelton* and *Brown* concerned final judgments on the merits, where this

case concerns only the enforceability of an arbitration clause and does not reach the merits of M&H's claim against MHC.

For the foregoing reasons, the October 16, 2009, order of Knott Circuit Court is affirmed.

CLAYTON, JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, CHIEF JUDGE, DISSENTING. Respectfully, I dissent. I would agree with the majority's conclusion if the arbitration clause in the parties' agreement is subject to the Kentucky Arbitration Act (KRS Chapter 417). However, the majority notes that the "case involves interstate commerce and that under the contract the FAA would apply." State courts are proper forums for cases brought exclusively under the Federal Arbitration Act. *Southland Corporation v. Keating*, 465 U.S. 1 (1984).

Accordingly, I would reverse and remand this case for a determination by the circuit court as to whether the agreement is governed exclusively by the Federal Arbitration Act. If so, *Ally Cat* (and KRS 417.200) would have no application to this case as recently stated by the Kentucky Supreme Court in *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010), at n.8. If *Ally Cat* is not applicable, there appears to be no legal basis for the circuit court to deny arbitration under the FAA.

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