RENDERED: JULY 22, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000754-MR

BOSKOVICH FARMS, INC. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 09-CI-008505

TACO BELL CORP. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,[1] CHIEF SENIOR JUDGE.

STUMBO, JUDGE: Boskovich Farms is appealing from an order of the Jefferson Circuit Court, which denied its motion to vacate an arbitration award. Boskovich argues that its claims against Taco Bell do not fall within the scope of the arbitration agreement. In the alternative, Boskovich argues that even if the

[1] Chief 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.

arbitration clause applies, the award should still be set aside because there was no meaningful hearing on the issues as required by statute. Taco Bell argues that the claims asserted by Boskovich are within the scope of the arbitration clause and that the arbitration panel did in fact conduct a hearing. We find in favor of Taco Bell and affirm.

The parties have for several years been in a mutually beneficial arrangement, the terms of which are outlined in a Supplier Business Relationship Agreement ("SBRA"). Boskovich supplied produce, including green onions and cilantro, to Taco Bell's restaurants throughout the United States. The SBRA contained provisions governing the resolution of disputes arising out of or relating to the agreement. This included that all disputes "arising out of or relating to" the SBRA will be resolved by mediation and arbitration. It was also specified that any proceedings would take place in Louisville, Kentucky and in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA").

In December of 2006, an E. coli outbreak was tied to a number of Taco Bell restaurants. After samples of green onions tested presumptively positive for E. coli, Taco Bell removed green onions from its menus. Both Taco Bell and Boskovich issued press statements regarding the outbreak. Only Boskovich's press release identified it as the supplier of Taco Bell's green onions. Taco Bell later permanently eliminated green onions from its menu and ceased purchasing green onions from Boskovich.

Boskovich filed suit against Taco Bell in the Superior Court of the State of California in March of 2007. Boskovich claimed that Taco Bell knew Boskovich's onions were not the cause of the outbreak, even though it continued to make statements to the contrary. Boskovich brought suit alleging libel, trade libel, slander, false light, negligence, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, and intentional interference with contractual relations. In essence, Boskovich claims that Taco Bell intentionally or negligently made false statements about its onions, thereby causing the company damage. Taco Bell filed a motion to compel arbitration, which the court granted.

Boskovich then filed an arbitration claim in Kentucky asserting the same causes of action. Taco Bell filed a counter-demand for arbitration alleging that it should be entitled to recoup the attorney fees and costs associated with the California action because it was unnecessary and contrary to the SBRA's arbitration agreement. Both parties moved for summary judgment. A hearing was held on the motions and both were granted. This dismissed Boskovich's complaint and Taco Bell's claim for attorney fees.

Taco Bell then filed a motion to enforce the arbitration award. Boskovich then moved to vacate the arbitration award arguing that the tort claims were not within the scope of the arbitration provisions of the SBRA, that the arbitration provision is unconscionable, and that it was prejudiced when it was not afforded a full arbitration hearing as required by statute.

The Jefferson Circuit Court refused to vacate the award. It found, like the California Superior Court, that the claims asserted by Boskovich are encompassed by the SBRA. It also found that the provision was not unconscionable and that the parties sufficiently pled their claims before the arbitration panel. This appeal followed.

A court can only vacate an award pursuant to the grounds set forth by statute. KRS 417.160(1) states:

> Upon application of a party, the court shall vacate an award where:
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> (a) The award was procured by corruption, fraud or other undue means;
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> (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (c) The arbitrators exceeded their powers;
>
> (d) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of KRS 417.090, as to prejudice substantially the rights of a party; or
>
> (e) There was no arbitration agreement and the issue was not adversely determined in proceedings under KRS 417.060 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm the award.

Boskovich argues that the arbitration award should be vacated pursuant to KRS 417.160(1)(c) and (d). Boskovich first argues that the arbitrators exceeded their powers when they acted beyond the scope of the SBRA. Boskovich claims that its tort claims do not fall within the scope of the SBRA arbitration provision. We disagree.

We will first note that the general rule in Kentucky is that the "law favors arbitration agreements." *Mortgage Electronic Registration Systems, Inc. v. Abner*, 260 S.W.3d 351, 353 (Ky. App. 2008). "Further, whenever an arbitration agreement exists . . . 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Hill v. Hilliard*, 945 S.W.2d 948, 951 (Ky. App. 1996)(quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983)). Here, Boskovich argues it can prove all of its tort claims without reference to the SBRA; therefore, its claims do not arise from or relate to the agreement. Taco Bell argues that the SBRA is the only thing that can show a connection between Taco Bell and Boskovich.

We find that arbitration was proper in this instance. To show any contractual relationship between these two companies, the SBRA will have to be discussed and referenced. The green onions allegedly caused the E. coli outbreak. Boskovich released press statements saying it was the supplier of the green onions. Taco Bell released statements saying the green onions tested positive for E. coli. Ultimately, everything revolves around the green onions and the SBRA concerns

the green onions. Further, the SBRA had specific provisions addressing the breadth of the agreement, duties in the event of a product recall and limitations on available damages under the agreement. The panel found that these provisions were clear and unambiguous. The arbitration panel did not exceed its powers by determining the issues of this case.

Boskovich next argues that by deciding the case on a motion for summary judgment, the panel failed to conduct a hearing as required by statute. KRS 417.090 states that the parties are entitled to a hearing in which they can present evidence and cross-examine witnesses. KRS 417.160(1)(d) states that an arbitration award can be vacated when the arbitration panel refuses to hear evidence or conduct a hearing pursuant to KRS 417.090. Boskovich claims that there was no hearing, that the arbitration panel failed to hear evidence, and did not allow any cross-examination. We disagree.

First, Boskovich also submitted a motion for summary judgment, which was granted in its favor. It cannot now claim that an arbitration panel cannot determine issues via summary judgment. Second, there was a hearing in this case. The panel held a hearing on the motions for summary judgment where the parties submitted briefs prior to the hearing. Also, the hearing lasted around two hours and consisted of oral arguments with questions being asked by members of the panel. It is also evident from the transcript of the hearing that the arbitration panel had before it evidence, depositions, and expert testimony provided by discovery. Further, arbitrable issues can be determined by summary judgment.

See McClellan v. Service Corp. Intern., 2010 WL 476005 (Ky. App. 2010). According to the AAA rules, which both parties agreed to abide by, dispositive motions can be filed. *Id*. Finally, KRS 417.160(1)(d) states that Boskovich's rights have to be substantially prejudiced by the lack of a hearing for the award to be vacated. As stated, there was a hearing with oral arguments and the arbitrators had other evidence before them. This hearing did not substantially prejudice Boskovich's rights. Under these circumstances, both parties sufficiently pled their claims to the arbitration panel.

Boskovich also argues that a section of the SBRA dealing with damages is unconscionable. Because we have found that this case was properly arbitrated, the summary judgment in favor of Taco Bell must stand. "[A]n arbitrator's resolution of factual disputes and his application of the law are not subject to review by the courts." *Conagra Poultry Co. v. Grissom Transp., Inc.*, 186 S.W.3d 243 (Ky. App. 2006). This means any issue concerning damages is moot.

Based on the above, we affirm the opinion and order of the trial court.

ALL CONCUR.

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