Dismissed and Memorandum Opinion filed May 6, 2010.

In The

Fourteenth Court of Appeals

NO. 14-10-00217-CV

HEB GROCERY COMPANY, L.P., Appellant

V.

DONALD KIRKSEY, Appellee

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 2009-11684

M E M O R A N D U M O P I N I O N

Donald Kirksey sued his employer, HEB Grocery Company, L.P., for work-related injuries. The parties agreed to arbitration before the American Arbitration Association. They also agreed that the Federal Arbitration Act applies to their dispute and that proceedings are to be conducted under AAA rules. After the arbitrator selected by the parties declined to serve, AAA appointed Joe Lea, Jr. to serve, in accordance with its rules. AAA overruled Kirksey's objections to Lea. Kirksey then filed a motion in the trial court to recuse Lea. The trial court signed an order on February 23, 2010, granting Kirksey's motion to recuse the arbitrator and appointing the Honorable Katie Kennedy as

substitute arbitrator. HEB then filed this interlocutory appeal and a parallel original proceeding.

Kirksey has filed a motion to dismiss this appeal as moot. *See* Tex. R. App. P. 42.3. According to the motion, on March 12, 2010, AAA reconsidered the parties' contentions and appointed Judge Kennedy as the arbitrator in this case. HEB objected to the appointment. On March 18, 2010, AAA advised the parties that it had reviewed their positions and it would proceed with Judge Kennedy as the arbitrator in accordance with the trial court's February 23, 2010, order.

Before we consider Kirksey's motion, we must address the fundamental question of our jurisdiction over this interlocutory appeal. Appellate courts must determine, even *sua sponte*, the question of jurisdiction. *M.O. Dental Lab. v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004) (per curiam). Unless a statute specifically authorizes an interlocutory appeal, appellate courts have jurisdiction over final judgments only. *Lehmann v. Har-Con Corp*., 39 S.W.3d 191, 195 (Tex. 2001).

Until recently, mandamus was the appropriate method to enforce arbitration provisions governed by the FAA. *See Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992). Texas Civil Practice & Remedies Code section 51.016, enacted in 2009, provides for an interlocutory appeal in a matter subject to the FAA "under the same circumstances that an appeal from a federal district court's order or decision would be permitted by" the FAA. Tex. Civ. Prac. & Rem. Code Ann. § 51.016 (Vernon Supp. 2009).[1]

Section 16 of the FAA sets out when an interlocutory appeal of an arbitration

[1] Section 51.016 applies to this case. *See* Act approved June 19, 2009, 81st Leg., R.S., ch. 820 § 2 , 2009 Tex. Gen. Laws 2061 ("(a) Except as provided by this section, the change in law made by this Act applies to an action filed on or after the effective date of this Act or pending on the effective date of this Act. (b) The change in law made by this Act does not apply to the appeal of an interlocutory order in an action pending on the effective date of this Act if the appeal of the order is initiated before the effective date of this Act.")

order is permitted. *See* 9 U.S.C. § 16(a)(1).[2] HEB asserts that subsection (B) applies to permit an interlocutory appeal in this case because the trial court denied a petition seeking "an order directing that such arbitration proceed in the manner provided for in [an arbitration] agreement." 9 U.S.C. §16(a)(1)(B). HEB contends that even though arbitration was originally compelled, the trial court's subsequent action in appointing a substitute arbitrator effectively denied arbitration as agreed to by the parties.

We construe statutes granting interlocutory appeals strictly, given that they are a narrow exception to the general rule that interlocutory orders are not immediately appealable. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001). We conclude that section 51.016 does not confer jurisdiction over this interlocutory order.

First, we disagree with HEB's contention that Subsection (B) applies to the order in this case. A careful reading of Subsection (B) reveals that it applies when a party has failed or refused to arbitrate, which is not the situation here.

In addition, Texas courts applying the Texas Arbitration Act[3] have held that interlocutory appeal is not available to challenge orders in cases where arbitration was

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[2] (a) An appeal may be taken from—
(1) an order—
(A) refusing a stay of any action under section 3 of this title,
(B) denying a petition under section 4 of this title to order arbitration to proceed,
(C) denying an application under section 206 of this title to compel arbitration,
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award.
9 U.S.C. § 16(a)(1).
Section 4 provides in relevant part:
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. §4.

[3] The TAA does not have an analogous provision to the FAA's Section 16(a)(1)(B) and simply permits an appeal from an order "denying an application to compel arbitration." Tex. Civ. Prac. & Rem. Code Ann. § 171.098(a)(1) (Vernon 2005).

originally compelled. *See, e.g., In re Farmpro, Inc.*, No. 06-05-00125-CV, 2005 WL 2978440, *2, n.1 (Tex. App.—Texarkana Nov. 7, 2005, orig. proceeding) (mem. op.) (noting that interlocutory appeal is not available to challenge order determining location of arbitration). A motion to disqualify an arbitrator does not equate to an order denying an application to compel arbitration. *Coon v. Umphrey*, No. 09-09-00264-CV, 2009 WL 3030354, *4 (Tex. App.—Beaumont Sept. 24, 2009, pet. filed) (mem. op.) (finding no jurisdiction over interlocutory rulings on motions to disqualify arbitrators). We find no authority permitting an interlocutory appeal of an order granting recusal of an arbitrator or appointing a substitute arbitrator.

Accordingly, we conclude that we are without jurisdiction over this interlocutory appeal and order it dismissed.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.