RENDERED: January 21, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002743-MR

M.J. ANDERSON CORP. — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 98-CI-00022

BLUEGRASS STEEL BUILDINGS, INC.; KV FLOORING, INC,; RANDLE-DAVIS CONSTRUCTION COMPANY; TILESETTERS INC.; WADE HATCHELL HEATING & COOLING, INC.; C&S MASONRY; CHARDAMILL GROUP, INC.; and CALPAGE PARTNERS — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, EMBERTON, and GUIDUGLI, Judges.

COMBS, JUDGE: M.J. Anderson Construction Corp. ("Anderson Construction") brings this appeal from an order of the Franklin Circuit Court denying, in part, an application to compel arbitration. We affirm.

This action arises from the construction of the State Journal Building in Frankfort. Pursuant to a written agreement between the Appellant and Appellee Calpage Partners, Anderson Construction was to act as general contractor for the project. The parties agreed that a specified model document prepared by

the American Institute of Architects (the "AIA document") would govern the interpretation and operation of the terms of the construction contract. That document contains an arbitration clause, which is the subject matter of this appeal. Appearing under the subtitle "Controversies and Claims Subject to Arbitration," the arbitration clause provides in part as follows:

> Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof, except controversies or Claims relating to aesthetic effect and except those waived as provided for in Subparagraph 4.3.5. (Emphasis added).

As general contractor, Anderson Construction entered into subcontracts with various entities, including the remaining Appellees. Disputes arose among the parties and, in January 1998, Appellees Bluegrass Steel Buildings, Inc. ("Bluegrass"), and KV Flooring, Inc. ("KV"), initiated this action against Anderson Construction, Calpage, and the remaining subcontractors claiming an interest in the project. In turn, Calpage and the remaining subcontractors asserted numerous claims and crossclaims against Anderson Construction, all of which arose out of the project.

Shortly after the action against it was commenced, Anderson Construction filed a motion to stay the litigation and to compel arbitration. Anderson Construction argued that Calpage was directly bound by the arbitration clause and that the clause had been effectively incorporated by reference into the agreements submitted to the various subcontractors, thus binding

those parties to resolve their disputes by arbitration as well. The trial court's Master Commissioner recommended that the motion to compel arbitration be granted with respect to Calpage but that it be denied with respect to the various subcontractors. That adoption of that recommendation by the Franklin Circuit Court has precipitated this appeal.

The sole issue before us is whether the various subcontractors are bound by the arbitration clause contained in the AIA document governing the primary contract.[1] It has been said that arbitration is a "favorite of the law." Valley Const. Co. v. Perry Host Management Co. Inc., Ky. App., 796 S.W.2d 365, 366 (1990). Indeed, Section 250 of the Kentucky Constitution recognizes arbitration as a valid and viable means of deciding differences. Pursuant to this constitutional imprimatur, the General Assembly has enacted our Uniform Arbitration Act, codified at Ky. Rev. Stat. (KRS) Chapter 417. KRS 417.050 provides, in part, as follows:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the partes is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract . . . .

KRS 417.060(1) provides:

> On application of a party showing an agreement described in KRS 417.050, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of the agreement to arbitrate, the

[1]The Franklin Circuit Court determined that the agreement between Anderson and Calpage Partners to submit their disputes to arbitration is valid and enforceable; that determination is not involved in this appeal.

> court shall proceed summarily to the determination of the issue so raised. The court shall order arbitration if found for the moving party; otherwise, the application shall be denied.

In this case, despite Anderson Construction's arguments to the contrary, the trial court determined that the individual subcontractors were not bound by an agreement to arbitrate and accordingly refused to stay the litigation. This determination was based upon its interpretation of the subcontracts submitted to the Appellees. In short, the trial court was not persuaded that the arbitration clause contained in the AIA document had been sufficiently incorporated into the standard subcontracts so as to bind the various Appellees. After our review and careful reflection, we agree.

It is true that terms and conditions (including arbitration provisions) incorporated into a contract by reference to another document are valid and enforceable. Home Lumber Co. v. Appalachian Regional Hosp., Inc., Ky. App., 722 S.W.2d 912 (1987). Kentucky law does not require that the language of a contract incorporating an arbitration provision be stated in bold type or unusual form. Id. Neither is it mandated that a contract use any specific language — such as the term, "incorporated by reference." Id. However, it is also true that there is no duty to arbitrate unless one has agreed to do so in clear, unambiguous language. 4 Am.Jur.2d Alternative Dispute Resolution § 70 (1995).

The clause upon which Anderson Construction relies as incorporating the arbitration provision of the AIA document is

contained in the indemnification clause of the subcontracts, which provides as follows:

> **INDEMNIFICATION**. SUBCONTRACTOR agrees to be bound by all of the terms and conditions of the Agreement between [Anderson] and the Owner [Calpage] and assumes toward [Anderson], all of the obligations and responsibilities for the work that [Anderson] assumed toward the Owner. SUBCONTRACTOR shall indemnify and defend and save harmless Owner and [Anderson], and their employees and authorized representatives from and against any and all suits, actions, legal or administrative proceedings, claims, debts, demand, damages, incidental and consequential damages, liabilities, interest, attorney's fees, costs and expenses of whatsoever kind or nature, whether arising before or after completion of the Work, which are in any manner directly or indirectly caused, occasioned or contributed to in whole or in part, through any act, omission, fault or negligence whether active or passive of SUBCONTRACTOR, or anyone acting under its direction, control, or on its behalf in connection with or incident to the work, even though the same may have resulted from the joint, concurring, or contributory negligence, whether active or passive, of [Anderson], Owner or any other person or person, unless the same be caused by the sole negligence or willful misconduct of the party indemnified or held harmless. Without limiting the generality of the foregoing, the same shall include injury or death to any person or persons and damage to any property, regardless of where located, including property of Owner and [Anderson].

This court has been asked to determine whether the incorporation of an arbitration provision has been properly effectuated in Home Lumber, supra. In that case, we relied upon the analysis found in Bartelt Aviation v. Dry Lake Coal Co., Ky. App., 682 S.W.2d 796 (1985), and similar case law addressed in Stipanowich, Arbitration, 74 K.L.J. 319 (1985-86). Citing Stipanowich, we held that:

> Where the reference to the arbitration clause and other terms and conditions is in clear type, and in plain and direct language commits the other party to their acceptance, the arbitration clause becomes an integral part of the agreement. On the other hand, where no mention of the clause, or of terms and conditions

> generally, is included in the language that precedes the signature, the clause will be held unenforceable. The usual test is whether a reasonable person would have been aware of the clause under the circumstances . . . .

722 S.W.2d at 915.

In the indemnification provision at issue in the present case, the subcontractors agreed to be bound to the same indemnification protection that Anderson Construction gave to Calpage Partners under their construction agreement. There is no mention of dispute resolution or arbitration in that indemnification clause. However, the issue of dispute resolution is specifically addressed in a separate clause of the subcontracts. That clause, entitled "DISPUTES," provides in pertinent part:

> If either party to this subcontract is forced to submit a dispute hereafter to a court of law, or is forced to seek the assistance of a court of law to enforce his rights hereunder, then the prevailing party in such litigation shall be entitled to recover the costs of such litigation, including a reasonable attorney's fee, from the other party. It is hereby agreed that this subcontract was negotiated in Jefferson County, Kentucky and that proper venue is in Jefferson County, Kentucky and SUBCONTRACTOR agrees to waive all rights to a trial by jury.

In our view, the clear language of the subcontracts explicitly contemplates and provides that the parties are to resolve disputes arising out of the subcontract in a court of law and not through arbitration proceedings. The language contains an express waiver of the right to a jury trial and even provides for venue. Reviewing it in its totality, we find that the subcontract does not commit the individual subcontractors in the requisite plain and direct language to an acceptance of the

arbitration clause contained in the AIA document. As a result, we cannot conclude that the trial court erred by denying the application to compel arbitration.

We therefore affirm the order of the Franklin Circuit Court.

ALL CONCUR.

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