

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000350-MR

TRANSCRAFT CORPORATION

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM MAINS, JUDGE
ACTION NO. 96-CI-90077

THE WALKER COMPANY OF
KENTUCKY, INC.

APPELLEE

OPINION AND ORDER
AFFIRMING

** ** * * * **

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Transcraft Corporation (Transcraft) appeals from a judgement entered by the Montgomery Circuit Court on January 15, 1999, granting judgment in favor of The Walker Company of Kentucky, Inc. (Walker) pursuant to an arbitration award. We affirm.

This appeal arises from the construction of the Transcraft-Eagle Manufacturing facility (the facility) in Mt. Sterling, Kentucky. Transcraft is the owner of the facility.

In 1994, Transcraft hired CMW, Inc. (CMW) to design the facility and serve as construction manager. To this end, on July

1, 1994, Transcraft and CMW executed AIA Document B141/CM Standard Form of Agreement Between Owner and Architect 1980 Edition and AIA Document B801 Standard Form of Agreement Between Owner and Construction Manager 1980 Edition. Both agreements contained provisions requiring Transcraft and CMW to first submit disputes to non-binding mediation and then to binding arbitration. Arbitration, if necessary, was required to be held in Louisville unless otherwise agreed to by Transcraft and CMW.

Walker, as successful bidder on several aspects of the construction of the facility, contracted with Transcraft to perform, among other things, concrete work on the facility's foundation and slabs. On November 4, 1994, Walker and Transcraft executed AIA Document A101/CMA Standard Form of Agreement Between Owner and Contractor. This agreement contained an arbitration clause, but unlike the agreements between Transcraft and CMW did not contain a mediation clause and did not dictate where arbitration was to be held.

All applications for payment submitted by Walker throughout the course of construction were duly signed and approved by CMW. When Transcraft refused to make final payment in the amount of \$366,155.42, Walker filed a mechanic's/materialman's lien against the facility on or about February 16, 1996.

It also appears that problems developed between Transcraft and CMW during the course of the project, and on January 23, 1996, CMW filed its own mechanic's/materialman's lien against the facility. On May 21, 1996, CMW executed a demand for

mediation pursuant to the agreements between it and Transcraft alleging that Transcraft breached the agreements and had failed to pay fees owed to CMW. Despite having initiated mediation proceedings pursuant to the agreements, CMW filed a complaint against Transcraft on July 19, 1996, seeking to enforce its lien. Walker was included as a named defendant in CMW's complaint.

On or about July 30, 1996, Walker served a formal demand for arbitration on Transcraft. In its demand, Walker alleged that Transcraft was refusing to pay approved applications for payment and interest thereon. In its response to Walker's demand, Transcraft claimed Walker's work was "defective, incomplete and untimely . . . which entitles Transcraft to liquidated damages and reimbursement of increased construction costs."

On August 6, 1996, Transcraft filed a motion to dismiss CMW's complaint and motion to compel arbitration as required by the terms of the agreement pursuant to KRS 417.060. On August 16, 1996, CMW responded with a motion to stay the proceedings and in opposition to Transcraft's motion to dismiss. On October 1, 1996, the trial court entered an order denying Transcraft's motion to dismiss and granting CMW's motion to stay. The order further provided that "the parties shall advise the Court and counsel upon receipt of an award rendered by a duly appointed arbitrator upon the Issues presented in such arbitration, or upon the dismissal or conclusion of such arbitration." On October 4, 1996, Walker filed an answer to CMW's complaint in which it presented a counterclaim against Transcraft.

While the motions to compel arbitration of the dispute between CMW and Transcraft were pending, the arbitration proceedings between Transcraft and Walker were ongoing. During a meeting with one of its experts, Transcraft was advised of a potential problem with the concrete floor of the facility. Transcraft hired Law Engineering to test and analyze the floor. Law prepared a report in which it concluded that Walker had not constructed the floor slab in accordance with contract specifications. Transcraft submitted Law's report several weeks before the arbitration hearing was scheduled to commence, and apparently asked the arbitrators for permission to amend its claim against Walker to include damages for the faulty slab. The arbitration hearing was initially postponed but ultimately occurred in December 1997, in Lexington, Kentucky.

On or about January 14, 1998, the arbitrators rendered their decision on the dispute between Transcraft and Walker. The award provided in pertinent part:

1. [Transcraft] is entitled to compensation for the concrete slab in "Area 1" . . . and for crack repairs. The amount awarded for the non-conforming slab is \$61,200 and the amount awarded for crack repairs is \$4,000.00, for a total of \$65,200.00. The Arbitrators find that there was insufficient evidence presented to justify an award of delay. With regard to other items in the Counterclaim, there is no award for any of the items claimed.
2. [Walker] shall be paid \$300,955.00 (which represents the contract balance of \$366,155.00 less \$62,500) plus adjusted interest at \$53,737.00 plus interest in the

amount of \$78.33 per day commencing on December 1, 1997 until the date paid.¹

On February 25, 1998, Walker filed motions reporting the conclusion of arbitration between it and Transcraft and asking that the arbitrator's award be confirmed and its lien enforced. In its motion to confirm, Walker stated that venue was proper in the trial court "since the Defendant, Transcraft, maintains a place of business in Montgomery County." On March 23, 1998, Transcraft filed a motion asking the trial court to transfer venue of the claims between it and Walker to the Fayette Circuit Court. In support of its motion, Transcraft argued that pursuant to KRS 417.210, the award is to be confirmed in the county where the arbitration hearing was held. On April 19, 1998, Transcraft filed a motion to vacate the arbitration award on the ground that the arbitrators were partial and biased against Transcraft and that their partiality resulted in a grossly inadequate award.

On October 21, 1998, the trial court entered an order denying Transcraft's motions, holding:

Transcraft originally requested this Court to compel arbitration if the action was not otherwise dismissed. This Court considers this to be an "initial application" as contemplated by KRS 417.190. Therefore, the change of venue request is denied.

Transcraft claims that the arbitration award should be set aside and vacated. Case law indicates that there must be a gross mistake of law or fact in order to set aside an arbitration award, and the evidence supporting setting it aside must be clear and strong. Smith v. Hillerich and Bradsby, Ky., 253 S.W.2d 629 (1952). The Court is of the

¹The award was modified by the arbitrators on or about April 14, 1998 to change \$62,500 in the second paragraph to \$65,200.

opinion that Transcraft has not met its burden of proof to set the arbitration order aside. Therefore, the award should be confirmed.

On December 4, 1998, Walker filed a motion asking that the arbitration award be confirmed as a judgment. On January 15, 1999, the trial court entered a judgment in which it adopted the arbitrators' award. This appeal followed.

Transcraft maintains that the trial court erred in not transferring venue of the Transcraft/Walker dispute to the Fayette Circuit Court pursuant to KRS 417.210, which provides in part:

An initial application shall be made to the court of the county in which the agreement provides the arbitration hearing shall be held, or, if the hearing has been held, in the county in which it was held.

Transcraft maintains that venue of the dispute between it and Walker lies with the Fayette Circuit Court because the arbitration hearing was held in Lexington, Kentucky. We disagree.

We believe that this matter is controlled by KRS 417.060, which provides in pertinent part:

(1) On application of a party showing an agreement [to arbitrate disputes] as described in KRS 417.050, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration.

. . .

(3) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection (1) of this section, the application shall be made therein. Otherwise

and subject to KRS 417.210, the application may be made in any court of competent jurisdiction.

As the dispute between Transcraft and Walker was involved in an action pending before the trial court at the time Transcraft filed its motion to compel arbitration, venue over the matter was proper in the trial court pursuant to KRS 417.060(3). This statute clearly provides that venue is to be decided pursuant to KRS 417.210 only when the issue referable to arbitration is not involved in an action pending before a court. Because Transcraft filed its initial application with the trial court as required by KRS 417.060(1), and because KRS 417.210 goes on to provide that "all subsequent actions shall be made to the court hearing the initial application," the trial court did not err in refusing to transfer venue to the Fayette Circuit Court.

Transcraft also maintains that the trial court erred in refusing to vacate the arbitration award. Transcraft contends that the arbitrators:

displayed evident partiality which prejudiced Transcraft; refused to hear material evidence; prevented Transcraft from being fully heard; and prevented Transcraft from cross-examining Walker's witnesses. The arbitrator's [sic] bias and fundamental unfairness finally culminated in a grossly inadequate award - they awarded less than twenty percent of the actual damages sustained, even when Transcraft's evidence on these damages was undisputed.

Transcraft alleges that the arbitrators' bias was apparent during two teleconferences that took place prior to the arbitration hearing. Transcraft further alleges that "[p]alpable bias, partiality and overt hostility continued throughout the

arbitration hearing." Transcraft maintains that this bias on behalf of the arbitrators resulted in an inadequate award in that the arbitrators ignored uncontroverted evidence as to the amount of damages suffered due to the defective concrete. In its brief on appeal, Transcraft includes numerous cites to the five-volume transcript of the arbitration hearing as evidence of the bias which occurred during the hearing.

First, we find Transcraft's inclusion of the hearing transcript as part of the record on appeal improper. A review of the record on appeal shows that although Transcraft provided citations to the hearing transcript in its application to vacate, copies of excerpts from the hearing transcript were not attached to the application. Transcraft did not move to file the hearing transcript with the trial court until April 15, 1999, some four months after judgment was entered. Transcraft also included the transcript in its designation of record on appeal which was filed with the trial court on April 15, 1999, pursuant to CR 75.01.

The intent of CR 75.01 and CR 75.07(1) is that the record on appeal contain the evidence available to the trier of fact. A party cannot utilize CR 75.01 to include evidence in the record on appeal if that evidence was not first placed before the fact-finder during trial. Therefore, [transcripts] . . . not introduced into evidence . . . should not be included in the record on appeal.

Lucas v. Lucas, Ky. App., 720 S.W.2d 352, 353 (1986). Thus, the transcript of the arbitration hearing is hereby ordered stricken from the record on appeal. As there is no evidence supporting Transcraft's allegations on appeal regarding the arbitrators'

alleged bias during the course of the hearing, we will not consider these arguments.

In regard to Transcraft's allegations concerning bias on behalf of the arbitrators allegedly occurring during several pre-hearing teleconferences, a similar problem exists. First, no transcripts of these teleconferences were filed with the trial court. Second, Transcraft's allegations concerning what transpired over the course of these teleconferences are unsubstantiated as no affidavits concerning the contents of these teleconferences were attached to Transcraft's application to vacate. Therefore, the trial court did not err in finding that Transcraft did not meet its burden of proof as to this argument.

Having considered the parties' arguments on appeal, the order of the Montgomery Circuit Court is affirmed. Furthermore, the five-volume transcript of the arbitration hearing is hereby ordered stricken from the record on appeal.

ALL CONCUR.

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ENTERED: May 5, 2000

BRIEF FOR APPELLANT:

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