

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002075-MR

WILL LINDER ASSOCIATES
& CONSULTANTS, INC.

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA ADAMS, JUDGE
ACTION NO. 97-CI-00344

JOHN S. TALBERT

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, EMBERTON AND GUIDUGLI, JUDGES.

EMBERTON, JUDGE: The primary issue in this appeal is whether the trial court erred in refusing to set aside an arbitration award under Kentucky Revised Statutes (KRS) 427.160(1)(d) based upon the arbitrator's failure to grant a postponement of the arbitration hearing. Finding no error in the decision of the trial court, we affirm.

Simply stated, the dispute arises from a contract under which appellee sold his shares of stock in the appellant corporation. In addition to the agreed price for the shares of stock, appellant also agreed to pay appellee the sum of \$36,000

for a non-compete agreement. After appellant refused to pay the latter sum, appellee obtained an order from the Madison Circuit Court enforcing a contractual provision requiring the parties to submit disputes under the agreement to binding arbitration. The parties selected an arbitrator and agreed that the hearing would be held May 27, 1999. Pursuant to Rule 15 of the "Insurance Division Arbitration Rules" which had been accepted by the parties as evidenced by their signatures on the arbitration agreement, each party was required to submit all exhibits, documentation, and lists of witnesses to the arbitrator and the opposing party. Although appellee complied with this directive, appellant did not serve a list of potential exhibits or witnesses prior to the May 27, 1999, hearing.

On the afternoon of May 26, 1999, appellant requested a postponement of the hearing alleging that a defense witness could not travel to the hearing in Louisville. Counsel also alleged that her client was attempting to secure relevant documents of an undisclosed nature from an undisclosed state agency. After appellee objected to the postponement, the arbitrator ruled that the hearing would be conducted as scheduled, but that appellant would be granted an extension of time through June 1, 1999, to present additional evidence. Appellee was given two additional days thereafter to respond. By letter dated June 1, 1999, appellant did in fact file additional documentation as well as a written brief arguing its position that appellee had breached the non-compete clause. Appellee timely submitted a reply, and on June 4, 1999, the arbitrator issued a decision awarding appellee

damages amounting to \$46,880.33, plus interest. The trial court's denial of appellant's subsequent motion to vacate the arbitrator's award precipitated this appeal.

Appellant argues that the trial court failed to comply with KRS 417.160 which sets out the criteria for vacating an arbitration award. Subsection (1)(d) of that statute provides that an award shall be vacated where:

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;

Among other things relevant to the conduct of the arbitration hearing, KRS 417.090 specifically states in subsection (2) that the parties are "entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing." We are convinced that appellant was in fact afforded each of these statutory rights.

First, under KRS 427.160, a postponement is required only upon sufficient cause being shown. In its request for a postponement, appellant cited only the inability of one of its witnesses to travel to Louisville and the fact that it had not received undisclosed information from an undisclosed state agency. We find no error in the refusal of the trial judge to vacate the award on this basis. It seems clear to us that appellant failed to demonstrate that the witness's personal attendance at the hearing was absolutely necessary to its defense or that an affidavit from that witness would not have sufficed to

support its position. Neither do we perceive error in the refusal to grant a postponement because of vague allegations with respect to undisclosed evidence not being received from a state agency. We are convinced that on its face appellant's letter requesting a postponement is insufficient to trigger the protections set out in KRS 417.160(1)(d).

Second, even without the postponement, we are convinced that appellant was in fact afforded all the rights set out in KRS 417.090(2): an opportunity to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing. Because appellant's counsel was present at the hearing, we presume that she had ample opportunity to cross-examine adverse witnesses. As to the opportunity to present the evidence component, the arbitrator gave appellant an extension of time after the hearing to file any additional documentation it desired. Additional evidence was filed and considered by the arbitrator in reaching his decision, evidenced by a specific notation on the face of his ruling.

Finally, as to the opportunity to be heard, we look to the opinion of this court in Bentley v. Aero Energy, Inc.,¹ for its explanation of what constitutes a meaningful opportunity to be heard. In Bentley, the court concluded that "the requisites of due process focus upon the appraisal and evaluation of evidence supplied the decision maker, not upon the opportunity to personally observe the claimant." (Emphasis added). Under the Bentley analysis, there is no requirement that the decision maker

¹ Ky. App., 903 S.W.2d 912, 913 (1995).

actually "hear" the witnesses. Rather, a meaningful hearing requires only that the decision maker consider and appraise the evidence in reaching his decision.² There is absolutely nothing in this record to suggest that the arbitrator did not consider or appraise appellant's evidence in reaching his decision or that appellant received anything less than a full and fair hearing. We therefore concur in the trial court's refusal to vacate the decision of the arbitrator.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cecil F. Dunn
Lexington, Kentucky

BRIEF FOR APPELLEE:

John C. Morton
Henderson, Kentucky

² Id.