

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000137-MR

EPICOR SOFTWARE CORPORATION;
JOHN LOCOCO; AND
MARTHA PARKER

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 00-CI-005037

TUBE-ICE, LLC

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, DYCHE, AND MILLER, JUDGES.

MILLER, JUDGE: Epicor Corporation, John Lococo, and Martha Parker bring this appeal from a December 28, 2000 Opinion and Order of the Jefferson Circuit Court. We affirm.

In January 1997, Henry Vogt Machine Company, Inc. (Vogt), a manufacturer of ice machines, entered into an agreement with FocusSoft, Inc. (FocusSoft), a software development company, for custom software design to facilitate the sale and shipping of ice machines. Both companies were domiciled in Kentucky. (Vogt was succeeded in interest by Tube-Ice, LLC (Tube-Ice), appellee

herein. FocusSoft was succeeded in interest by Epicor Software Corporation (Epicor), an appellant herein). The agreement included a clause, which provided:

14. **Arbitration.** Any dispute relating to the interpretation or performance of this Agreement shall be resolved through binding arbitration conducted in Louisville, Kentucky, in accordance with the then-existing rules of the American Arbitration Association in Accordance with Kentucky law, and judgment upon any arbitration award may be entered by the state or federal court of appropriate jurisdiction. (Emphasis added).

About a year and a half after entering the agreement, Tube-Ice began to express dissatisfaction with the quality of the software, as well as FocusSoft's performance. Tube-Ice brought an action in Jefferson Circuit Court against Epicor on August 7, 2000. The complaint was not limited to claims of interpretation or performance of the contract. The action included allegations of fraud. Epicor filed a Motion to Compel Arbitration and Stay Judicial Proceedings, seeking to compel all claims to arbitration. The Jefferson Circuit Court denied Epicor's motion by Opinion and Order dated December 28, 2000. The denial was based upon the fact that the complaint contained interwoven allegations of fraud. This appeal followed.¹

Epicor contends the circuit court erred in denying its Motion to Compel Arbitration and Stay Judicial Proceedings. Specifically, Epicor complains that the arbitration clause in the

¹An appeal may be taken from an order denying an application to compel arbitration, Kentucky Revised Statutes (KRS) 417.060 and KRS 417.220.

agreement should have been construed under the Federal Arbitration Act (Federal Act), 9 U.S.C.S. § 1 (2001), et seq. Epicor thinks that under the Federal Act its claim of fraud is subject to arbitration. The circuit court implicitly decided that the Federal Act had no application in the present case.

We are constrained to agree with the holding of the circuit court. The Federal Act is implicated in a "contract evidencing a transaction involving commerce. . . ." 9 U.S.C.S. § 2 (2001). "Commerce" is defined in 9 U.S.C.S. § 1 (2001) as "commerce among the several States" In Fite & Warmath Construction Company, Inc. v. MYS Corporation, Ky., 559 S.W.2d 729 (1977), the Kentucky Supreme Court determined the Federal Act would "apply to actions brought in the courts of this state where the purpose of the action is to enforce voluntary arbitration agreements in contracts evidencing transactions in interstate commerce." (Emphasis added). Id. at 734. The contract at issue in Fite was between a Tennessee construction company, and a Kentucky shopping mall developer with its principal place of business in New York. Eighty-eight percent of the subcontractors on the project were non-residents of Kentucky. In the present case, both parties were domiciled in Kentucky, the transaction took place in Kentucky and the subject matter of the contract was utilized in Kentucky. As such, we are of the opinion the contract between the predecessors of Epicor and Tube-Ice did not evidence a transaction in interstate commerce and thus the Federal Act is not implicated. Id.

The application of the arbitration clause is, then, to be determined by Kentucky's Uniform Arbitration Act. Kentucky Revised Statutes (KRS) Chapter 417. KRS 417.050 provides, in pertinent part:

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

Epicor, of course, urges us to interpret the arbitration clause as being broad enough to encompass claims of fraud. We do observe KRS 417.050 uses the phrase "any controversy." The arbitration clause, however, specifically provides that only the interpretation or performance of the agreement is subject to arbitration. Thus we cannot say fraud claims are subject to arbitration under the arbitration clause. We agree with the circuit court's interpretation of the arbitration clause and believe it too narrow to encompass fraud.

It is, of course, true that a court faced with an action involving arbitrable and non-arbitrable claims may sever same. KRS 417.060(4). Upon determining the arbitration clause did not encompass fraud, the circuit court found that Epicor's various allegations were too "inextricably entwined" with the allegations of fraud to sever the claims. In determining a claim's severability, courts consider whether an arbitrator would be required to review the same facts needed to decide the non-arbitrable claims. See Merrill Lynch, Pierce, Fenner & Smith,

Inc. v. Haydu, 675 F.2d 1169 (11th Cir. 1982); Sawyer v. Raymond, James & Associates, Inc., 642 F.2d 791 (5th Cir. 1981).

In the case, *sub judice*, Tube-Ice's complaint contained seven allegations. Counts 1, 2, and 3 involved false and misleading statements, and Count 5 alleged an inconspicuous warranty, thus directly involving fraud. The remaining three allegations, breach of warranty, breach of contract, and unconscionability of damages limitations, will necessarily turn on the same facts needed to establish fraud. As such, we believe the claims are too entwined to allow them to be severed.

Epicor asserts that all claims against appellants Lococo and Parker should also be arbitrated. As we are of the opinion there are no arbitrable issues, we deem this contention to be without merit.

Epicor next contends that the circuit court should stay all claims pending arbitration of all arbitrable claims. As we are of the opinion there are no arbitrable claims, we perceive this contention of error to be without merit.

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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