RENDERED: May 17, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001490-MR

JAMES J. AUXIER — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 97-CI-01221

AMERICAN FAMILY LIFE
ASSURANCE COMPANY OF
COLUMBUS, AFLAC;
THE ESTATE OF HAROLD TEETER;
BRUCE WHITMER; AND
ANDY ANDERSON INSURANCE — APPELLEES

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

BEFORE: GUIDUGLI, MILLER AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. James Auxier ("Auxier") appeals from an order and judgment of the Daviess Circuit Court confirming an arbitration panel award in his breach of contract action. For the reasons stated herein, we affirm.

On November 3, 1997, Auxier filed the instant action in Daviess Circuit Court against American Life Insurance Assurance Company of Columbus ("AFLAC"), two AFLAC employees, namely Bruce Whitmer ("Whitmer") and Harold Teeter ("Teeter"), and Andy Anderson Insurance Agency, Inc. ("Anderson"). Auxier alleged in

relevant part that sometime prior to February 4, 1994, he was offered a management position as District Sales Coordinator by AFLAC. In reliance on the representations of AFLAC, Auxier quit his employment with another insurance company and commenced employment with AFLAC allegedly pursuant to the terms of a "memorandum of contract".

Auxier maintained in his complaint that the memorandum of contract provided that he would be responsible for giving managerial assistance to associate salespersons in an exclusive sales territory. The memorandum of contract allegedly further provided that Auxier would receive a regular monthly draw against commissions, as well as commission overrides and renewal commissions based on the revenue generated by the associates within his district.

Over the course of his relationship with AFLAC, Auxier apparently never sold a sufficient amount of insurance to cover his monthly draw. On September 13, 1995, the advances and a loan from AFLAC to Auxier to purchase office equipment were combined into one loan from AFLAC to Auxier in the amount of $27,804.22. Auxier's production apparently never increased, and he was relieved of his District Sales Coordinator position on July 11, 1996.

The instant action alleged below that AFLAC 1) breached the employment contract by not accurately paying him for commissions, overrides, and renewals; 2) breached its fiduciary duty by depriving him of said commissions; 3) intentionally interfered with prospective contractual relationship; and, 4)

engaged in fraud and violated Kentucky insurance law by circumventing the payment of commissions, overrides, and renewal commissions of each sale. He alleged that Anderson, Whitmer, and Teeter acted maliciously, intentionally, and wilfully to deprive him of said commissions, overrides, and renewal commissions.

Auxier later moved to file an amended complaint. On July 31, 1998, the motion was granted, and the amended complaint added the claim that AFLAC violated the Americans with Disabilities Act ("ADA") by failing to reasonably accommodate Auxier's disabilities. AFLAC, et al., entered general denials to all claims.

On the same day, the circuit court rendered an order holding Auxier's complaint and amended complaint in abeyance. As a basis for the order, the court found as a matter of law that Auxier was an independent contractor rather than employee, and further ordered that the matter be submitted to arbitration in accordance with language contained in the associate's agreement.

The parties selected a panel of three arbitrators, and the matter was heard on March 20, 2001. Arbitration was conducted over the next four days, with numerous witnesses being heard and over 120 exhibits being tendered. The decision of the arbitrators was rendered on April 18, 2001. The arbitrators concluded in relevant part that the rights of the parties were governed by two written agreements, one referred to as the "associate's agreement" and the other the "district sales coordinator agreement." The panel found that the "memorandum of contract" relied upon by Auxier pre-dated the other agreements

and was merged into or superceded by the associate's agreement and district coordinator's agreement. It further found that there was no provision for an exclusive sales territory as argued by Auxier; that Auxier was properly compensated pursuant to the terms of the agreement; and, that he failed to carry the burden of persuasion that Anderson, Whitmer, or Teeter acted intentionally, maliciously, wilfully and fraudulently to deprive Auxier of commissions. It concluded that the overwhelming weight of evidence showed that Auxier did not actively pursue the selling of insurance, did not make contact with and train associates in his hierarchy, nor generate commissions equal to his monthly draw. It determined that Auxier was not entitled to an award.

On June 8, 2001, the circuit court rendered an order and judgment confirming the arbitration panel's award pursuant to KRS 417.150 and KRS 417.180, and denying Auxier's motion to modify the award or reinstate the complaint. This appeal followed.

Auxier offers a litany of alleged errors which he claims were committed by the circuit court. He maintains that the agreements covering his employment are non-arbitrable; that the memorandum of contract is binding, and was affirmed and ratified by the associates's agreement and district sales coordinator agreement; that the decision of the arbitrators worked a manifest injustice on him; that the court was misled and misinformed by AFLAC; and, that arbitration is not the final step in dispute resolution. He goes on to claim that AFLAC is barred

by estoppel and latches from relying on the associates's agreement and district sales coordinator agreement; that he was an employee; that AFLAC, through counsel, violated Supreme Court Rules by concealing facts from the court; that he is entitled to relief under the ADA; that he is entitled to compensation under the theory of quantum meruit; and, that the panel ruled on matters not submitted to them and improperly failed to award commissions. He seeks to have the circuit court order and judgment reversed, the arbitration panel's decision vacated, and a judgment entered in his favor. Alternatively, he seeks a new trial.

We have closely studied the record, the law, and the parties' written arguments, and find no error. Rather than enter into a protracted, detailed analysis of each of Auxier's claims of error, we believe the issues at bar properly may be distilled into a few dispositive questions. First among these is Auxier's assertion that his employment agreement is not subject to arbitration. His reliance on KRS 417.050 for this assertion is misplaced. It states in relevant part as follows:

> 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. This Chapter does not apply to:
>
> (1) Arbitration agreements between employers and employees or between their respective representatives . . . .

If Auxier was a contractor, as the circuit court properly so found, then KRS 417.050 is applicable and makes valid any arbitration agreement between the parties; conversely, even if he was an employee rather than a contractor, the statute states in clear and unambiguous terms that it is not applicable. Either way, KRS 417.050 is not a bar to arbitration under the facts now before us.

The corpus of Auxier's claim, though, relates to whether the "memorandum of contract" is controlling, or, as the arbitration panel found, the subsequent associates's agreement and district sales coordinator agreement are controlling. The arbitration panel found as follows on this issue:

> The rights of the parties in this matter are governed and controlled by two contracts, American Family Life Assurance Company of Columbus' Associate's Agreement, and American Family Life Assurance Company of Columbus' District Sales Coordinator's Agreement (hereinafter referred to as the Agreements). Any prior agreements or understandings were merged into or superceded by the aforesaid Associate's Agreement's paragraph 12 which is incorporated into the District Sales Coordinator's Agreement by reference. The parole [sic] evidence rule prohibits the variation of a written agreement by parole-oral [sic] testimony absent an ambiguity. The two above Agreements contain no ambiguities at issue in this arbitration.

In examining these writings, we find no basis for concluding that the circuit court erred in confirming the arbitration panel's award on this issue. As AFLAC, et al., properly note, parol evidence is not admissible to alter the terms of a written contract unless the terms of the contract are ambiguous or incomplete. Clearly, the "memorandum of contract" referenced by

Auxier is parol evidence. The original agreement was not offered into evidence, and the AFLAC representative who allegedly signed it had no recollection of said signature.

More importantly, even if the memorandum of contract was a valid, enforceable writing, the Associate's Agreement states that, "[T]his agreement supercedes and replaces all previous contracts between the parties . . . ", and goes on to provide that any modification thereto must be in writing and signed by AFLAC's President, Vice President, or Secretary. This language is subject to but one meaning. The memorandum of contract, if it were in fact an enforceable agreement at the time it allegedly was executed, was superceded by the associates's agreement and district sales coordinator agreement.

This leads us to the question of whether the arbitration panel properly construed the associates's agreement and district sales coordinator agreement. The panel found in relevant part that the agreements made no provision for an exclusive territory; that Auxier was to be paid in accordance with a schedule of commissions prepared by AFLAC; and, that any unpaid draw became a liability to AFLAC. It further found that Auxier failed to carry the burden of persuasion that Teeter, Anderson, and Whitmer wilfully and fraudulently deprived Auxier of commissions.

An arbitration award may be set aside only " . . . if there has been a gross mistake of law or fact resulting in undue partiality." Carrs Fork Corp v. Kodak Mining Co., Ky., 809 S.W.2d 699, 701 (1991), citing Taylor v. Fitz Coal Co., Inc.,

Ky., 618 S.W.2d 432 (1981). We find nothing herein even remotely approaching the gross mistake required by Taylor and its progeny. Auxier was faced with an extremely high burden which he failed to meet. The circuit court properly confirmed the panel's award, and we find no error.

For the foregoing reasons, we affirm the order and judgment of the Daviess Circuit Court.

ALL CONCUR.

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