

RENDERED: JULY 8, 2005; 10:00 A.m.
ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT:
March 15, 2006 (2005-SC-0613-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000634-MR
AND
NO. 2005-CA-000692-MR

PAUL MILLER FORD, INC.

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 01-CI-03258

WILLIAM CRAYCRAFT

APPELLEE/CROSS-APPELLANT

OPINION AND ORDER

(1) DISMISSING APPEAL NO. 2005-CA-000634-MR

(2) DISMISSING CROSS-APPEAL NO. 2005-CA-000692-MR

*** **

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: This matter is before the Court on appellee's motion to dismiss Appeal No. 2005-CA-000634-MR and appellant's motion for additional time in which to respond to appellee's motion. The Court has considered the motions and ORDERS that appellant's motion be GRANTED. Appellant's tendered response is ORDERED FILED and was considered by the Court. Appellee's motion to dismiss appeal is GRANTED.

The ground for appellee's motion is that the appeal is premature. The notice of appeal designates two orders, i.e., an order entered September 8, 2004, remanding a Better Business Bureau Arbiter's Award for lack of completeness and ordering the arbiter to complete the award with specificity within fifteen days, and an order entered on March 2, 2005, denying appellant's motion to confirm the award, granting appellee's motion to vacate the award and remanding to the Better Business Bureau for de novo arbitration proceedings. Appellee argues that this order is not ripe for appeal because the circuit court has ordered a rehearing and Kentucky Revised Statutes (KRS) 417.220(1)(e) provides for immediate appeals from orders vacating an award "without directing a rehearing." Appellant responds that it is entitled to an appeal pursuant to KRS 417.220(1)(c), which allows appeals from orders confirming an award or denying its confirmation. Neither party provides any citation of authorities in support of his/its respective argument.

The issue presented to this Court is one of first impression in the Commonwealth of Kentucky. However, a number of other state courts have spoken on the matter. This Court's research reveals that, in most reported cases from states which have statutory provisions identical to those set forth in KRS 417.220, an appeal taken from an order denying a motion to

confirm an arbitration award and granting a motion to vacate the award with a remand for a rehearing is not authorized and will be dismissed.

The Court notes two major concepts at the root of those decisions. The first concept is that the order vacating and remanding is the functional equivalent of an order granting a new trial. In many states, as is the case in Kentucky,¹ such an order is not immediately appealable. An arbitration statute which implicitly bars appeals from an order vacating an award when a rehearing is also ordered is consistent with the law barring an appeal from the grant of a new trial. When a rehearing has been ordered, the appeal is premature because the process has not been completed. See, Stolhandske v. Stern, 14 S.W.3d 810 (Tex. Ct. App. 2000);² Maine Dept. of Transp. v. Maine State Employees Ass'n, 581 A.2d 813 (Me. 1990).

The second concept is that there is no separate basis that would allow an appeal from an order denying an application

¹ See, e.g., White v. Hardin County Bd. of Ed., 307 S.W.2d 754 (Ky. 1957).

² That case applied the "*expressio unius est exclusio alterius*" rule of construction that is also accepted in Kentucky (See Schwindel v. Meade County, 113 S.W.3d 159, 168 (Ky. 2003)) to hold that the provision in the Texas equivalent to KRS 417.220(1)(e) allowing interlocutory appeals from orders vacating arbitration awards "without directing a rehearing" excludes an interlocutory review of cases in which the trial court has vacated an arbitration award but has also ordered new arbitration.

to confirm an award when a motion to vacate has been granted because the decision to confirm the award depends on the determination on the application to vacate it. If the motion to vacate was timely, the separate procedure for determining whether the award should be vacated applies and the motion to confirm becomes moot. See Kowler Associates v. Ross, 544 N.W.2d 800 (Minn. Ct. App. 1996); State v. Davidson & Jones Const. Co., 323 S.E.2d 466 (N.C. App. 1984).

Applying this concept to Kentucky law, we note that KRS 417.150 provides that:

Upon application of a party, the court shall confirm an award unless, within the time limits hereinafter imposed, grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in KRS 417.160 and 417.170.

We believe that KRS 417.150, construed in conjunction with KRS 417.160 and KRS 417.170, compels the conclusion that KRS 417.220(1)(c) and (e) are not provisions which independently provide an avenue for appeal and that if section (e) was triggered by an order vacating and remanding for a rehearing, section (c) does not provide an alternate route for obtaining an immediate appeal. In the case sub judice, the application to vacate the award was timely and, pursuant to KRS 417.150, that application became the primary proceeding that mooted the application to confirm when it was granted.

In further support of our decision, we note that arbitration is favored by Kentucky law and that KRS 417.220 only provides for appeals when arbitration has either been denied or has already occurred. The rationale for allowing an interlocutory appeal in such context is the same as that articulated for other exceptions to the finality rule, and it is that, without an appeal, enforcement of the challenged order would strip the appellant of some right that could not be later restored. See, Fayette County Farm Bureau v. Martin, 758 S.W.2d 713 (Ky.App. 1988). We are of the opinion that interpreting the statute to prohibit an interlocutory appeal from the denial of an application to confirm an award when an application to vacate an award has contemporaneously been granted with a remand for a rehearing is consistent with Kentucky's policy favoring arbitration over litigation. By construing such an order to be the functional equivalent of an order granting a new trial, the appealability of the order is only put on hold for the duration of the new arbitration proceedings and the order may ultimately be appealed, if needed, after final resolution of those proceedings. In other words, no party suffers any irreparable loss.

Based on the foregoing, we conclude that this appeal was prematurely taken and, therefore, it is hereby ORDERED that Appeal No. 2005-CA-000634-MR be DISMISSED.

Likewise, the cross-appeal is also premature and it is ORDERED, on the Court's own motion, that Appeal No. 2005-CA-000692-MR be DISMISSED.

ALL CONCUR.

ENTERED: July 8, 2005

___/s/ Jeff S. Taylor___
JUDGE, COURT OF APPEALS

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