RENDERED: JUNE 13, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000793-MR

E. L. BURNS CO., INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 06-CI-009357

DAVID ENGINEERING &
CONSTRUCTION, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

VANMETER, JUDGE: E. L. Burns Co. (Burns) appeals an arbitration award, in favor of David Engineering and Construction, Inc. (David), which was confirmed by the Jefferson Circuit Court. Finding no error, we affirm.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In May 2005, David was awarded a contract by the Carroll County Board of Education. David advised Burns, a company based in Shreveport, Louisiana, by fax that it intended to award a proposed subcontract to Burns, and it requested that Burns prepare and submit shop drawings. On June 22, 2005, Burns advised David that it had not received a subcontract, and that it would not perform without one. The following day, David sent Burns two copies of a Subcontract Form,[2] with specific provisions particular to David, Burns and the Carroll County project, and requested that one signed copy be returned. Article 15 of the Subcontract Form, addressing "Dispute Resolution," included paragraph 15.2 by which the parties agreed to arbitrate "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association [(AAA).]" While Burns did not return a signed subcontract, on June 30 it sent David six copies of shop drawings, two catalogs and two sets of color samples. On August 8, Burns sent David its Certificates of Insurance, as required by the subcontract.

Thereafter, a dispute developed between Burns and David concerning certain materials to be used under the subcontract. On October 3, David sent Burns a letter setting out the details of the dispute and advising that the dispute would be resolved through arbitration as provided in the subcontract. In response, Burns stated in part that "You keep referring to a subcontract. We have a fax from your Mr. Todd Scott stating intent to give us a subcontract. However, we have no record of receiving or entering into a contractual arrangement."

[2] Standard Form Construction Subcontract sponsored by Associated General Contractors of America, American Subcontractors Association, Inc., and Associated Specialty Contractors.

Over the next several months, Burns and David attempted without success to resolve the dispute. Finally on April 7, 2006, David served a Demand for Arbitration on Burns and filed a copy of the Demand with the AAA. Burns communicated with AAA through counsel, asserting that it had not entered into a written agreement with David and had not agreed to arbitration. Burns participated neither in the selection of an arbitrator nor in the arbitration. On September 19, 2006, the arbitrator issued an award in favor of David.

David subsequently filed a petition in the Jefferson Circuit Court for confirmation of and judgment on the award. By opinion and order, the circuit court confirmed the award and issued a judgment. Burns appeals.

1. Standard of Review.

The standard of review of confirmation of an arbitration award is that any findings of fact shall not be set aside unless clearly erroneous, giving due regard to the circuit court's ability to judge the credibility of the witnesses, while conclusions of law are reviewed *de novo*. CR[3] 52.01. *See Fischer v. MBNA America Bank, N. A.*, 248 S.W.3d 567, 570 (Ky.App. 2007) (citing *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335 (Ky.App. 2001), and *Carroll v. Meredith*, 59 S.W.3d 484 (Ky.App. 2001)). Further, judicial review of an arbitrator's decision is "highly deferential." *ConAgra Poultry Co. v. Grissom Transp., Inc.*, 186 S.W.3d 243, 244 (Ky.App. 2006).

2. Existence of Contract including Arbitration Provisions.

[3] Kentucky Rules of Civil Procedure.

Burns' first argument is that the trial court erred in finding that an enforceable arbitration agreement existed. We disagree.

Kentucky law recognizes that parties may be bound by the terms of an unsigned contract when their actions demonstrate assent to the agreement. *Cowden Mfg. Co. v. Sys. Equip. Lessors, Inc.*, 608 S.W.2d 58, 61 (Ky.App. 1980). *See also Sweeney v. Theobald*, 128 S.W.3d 498, 501 (Ky.App. 2004) (holding that purchaser was bound by arbitration and other terms of a real estate contract he had not signed, since facts clearly indicated his acceptance of the contract). In *George Pridemore & Son, Inc. v. Traylor Bros., Inc.*, 311 S.W.2d 396, 397 (Ky. 1958), Kentucky's highest court held that "[i]f there is sufficient evidence to show a meeting of the minds even though the plaintiff denies it, then a court or jury may be justified in finding a contract existed. An express agreement may be proved by direct evidence, or circumstantial evidence, or both." The court further noted that a party who undertakes to perform work on the basis of a "purchase order" is presumed to have taken notice of and assented to its terms. *Id.*

In this case, both the arbitrator and the circuit court found that David tendered a subcontract to Burns, which Burns through its actions was deemed to have accepted. Included within this subcontract was an arbitration provision which incorporated by reference the AAA's Construction Industry Arbitration Rules. These findings and conclusions were not clearly erroneous.

Burns argues, however, that "an arbitration provision is severable from the remainder of the contract[,]" *Buckeye Check Cashing, Inc. v. Cardegna*,

546 U.S. 440, 445-46, 126 S.Ct. 1204, 1209, 163 L.Ed.2d 1038 (2006), and that the burden is on the party seeking to enforce arbitration to prove agreement to the arbitration provision itself. *Lee v. Red Lobster Inns of Am., Inc.*, 92 Fed.Appx. 158, 162 (6th Cir. 2004). Burns also cites *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967 (6th Cir. 2007), and *Legair v. Circuit City Stores, Inc.*, 213 Fed.Appx. 436 (6th Cir. 2007), in support of its argument that the arbitration provision is severable. However, each of the fact scenarios in *Lee*, *Seawright,* and *Legair* involved parties who had a pre-existing contractual relationship, and one party who sought unilaterally to impose an arbitration agreement. Similarly, in *Fischer*, 248 S.W.3d at 570, the parties had a contractual relationship, but the record did not contain "any written agreement between the parties to arbitrate the controversy[.]"

Here, by contrast, the record discloses no prior contractual relationship before the parties became involved in the Carroll County project. While Burns strives to categorize this dispute as a challenge to the arbitration clause, the record clearly demonstrates that Burns' position from the outset, that no arbitration clause existed, was inextricably linked to its claim that no contract existed.

3. Necessity of Federal Court Order Enforcing Arbitration.

Burns' second argument is that the trial court erred in determining that the arbitrator had authority to conduct an *ex parte* arbitration absent an enforcement order issued by a federal court. Again, we disagree.

Under the Federal Arbitration Act,

> [a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration **may** petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C.A § 4 (2008) (emphasis added). Federal courts interpreting this provision have held that a petition for such an order is permissive and not mandatory. *See*, *e.g., Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 733 (5th Cir. 1987); *Standard Magnesium Corp. v. Fuchs*, 251 F.2d 455, 458 (10th Cir. 1957); *Kanmak Mills, Inc. v. Soc'y Brand Hat Co.*, 236 F.2d 240, 251 (8th Cir. 1956); *Ky. River Mills v. Jackson*, 206 F.2d 111, 119 (6th Cir. 1953). In this instance, the AAA's Construction Industry Arbitration Rule 30 permitted the arbitrator to proceed without the participation of a party. Since this rule was incorporated by reference into the parties' subcontract agreement, it is enforceable. *Ky. River Mills*, 206 F.2d at 118.

We further note the Supreme Court's statement in *Buckeye Check*:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts. The parties have not requested, and we do not undertake, reconsideration of those holdings. Applying them to this case, we conclude that because respondents

> challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.

546 U.S. at 445-46, 126 S.Ct. at 1209. The issue in *Buckeye Check* was whether a court or an arbitrator should consider the validity of a contract which contained an arbitration clause, but which was arguably void as usurious under Florida law. The Court's ultimate holding was that "regardless of whether the challenge is brought in federal or state court, **a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator**." 546 U.S. at 449, 126 S.Ct. at 1210 (emphasis added). As noted above, Burns' contention in this case has been that the parties did not have a contract, and thus that no requirement existed that Burns submit to arbitration. Under the clear holding of *Buckeye Check*, a challenge to the validity of the contract between Burns and David was to be submitted to an arbitrator.

Consequently, the arbitrator and the Jefferson Circuit Court properly acted within their respective jurisdictions in finding that a contract existed due to Burns' actions, and by entering an award and judgment in favor of David.

The Jefferson Circuit Court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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