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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000215-MR

U.S. BANK, N.A. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CI-02153

AHMAD "MIKE" ALI and
ZENAH CORPORATION, D/B/A
CARS 4 ALL APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY,[1] SENIOR JUDGES.

HENRY, SENIOR JUDGE: U.S. Bank, N.A. appeals the trial court's denial of its motion to compel arbitration and stay proceedings, brought under the provisions of

[1] Senior Judges David C. Buckingham and Michael L. Henry sitting as Special judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Kentucky's Uniform Arbitration Act (KUAA), Kentucky Revised Statutes (KRS) 417.045 et seq. We affirm.

The Appellee, Ahmad "Mike" Ali and Zenah Corporation, doing business as Cars 4 All, sued the Appellant, U.S. Bank, N.A. (Bank), after Bank froze and subsequently closed two of Ali's checking accounts. Ali's complaint alleged numerous claims against Bank, including defamation, tortious interference with business relationships, and conversion. Eighteen months after the suit was initiated, which was seventeen months after Bank raised "arbitration" as an affirmative defense, Bank sought an order to compel the parties to submit the dispute to arbitration. Ali opposed Bank's Motion, and raised four primary arguments in support of his position, the following three of which are relevant to this appeal:[2] 1) that by the extensive litigation conduct of Bank and the lengthy delay in demanding arbitration, Bank waived the right to demand it; 2) that Ali was not required to demonstrate that he was prejudiced by the actions of Bank because there is no "prejudice" component in establishing waiver; and 3) that Bank did not sufficiently demonstrate its right to demand arbitration, because it had never established the assent of the parties to that term.

Bank argued its motion to compel arbitration and stay proceedings on January 4, 2007. In a brief order the trial court found that Bank had "waived any

[2] According to the Appellee's brief at page 6 footnote 2, "The fourth argument--- that only Ali's contract-based claims could be subject to mandatory arbitration--- was never reached by the trial court, and both parties seem in agreement that the appeal does not encompass this issue."

right to compel arbitration by the extent to which it participated in this case." This appeal followed.

In its brief Bank essentially sets out policy reasons why we should overturn the trial court's decision. These include that: 1) arbitration is favored by Kentucky courts; 2) waiver of arbitration rights is not favored by Kentucky courts; 3) Kentucky's courts should require a showing of prejudice as a precondition to any waiver of arbitration rights, and 4) appellees cannot establish prejudice. But the only issue presented for our decision is whether or not the trial court erred in concluding that Bank had waived any right to compel arbitration by the extent to which it participated in the case.

The standard of review of a trial court's ruling in a KUAA proceeding is *de novo*. "That is, we defer to the trial court's factual findings, upsetting them only if clearly erroneous or if unsupported by substantial evidence, but we review without deference to the trial court's identification and application of legal principles." *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky.App. 2001).

Bank argues that while arbitration is favored by Kentucky courts, waiver of arbitration rights is not. Bank asserts that the "strong presumption in favor of arbitration must color the Court's analysis of the issues now before it on appeal." It also emphasizes that a waiver of rights under the Uniform Arbitration Act is "not [to] be inferred lightly." (Citing *Conseco* and *Valley Construction Co. v. Perry Host Management Co.*, 796 S.W.2d 365 (Ky. App. 1990).

This Court in *Conseco* stated that "[b]oth acts[3] have been held to favor arbitration agreements, at least to the extent of abolishing what once was a widespread policy against them. And both acts are meant to ensure that arbitration agreements are enforced according to the standards applied to other contracts." 47 S.W. 3d at 339. Therefore, although there undoubtedly exists a "preference" for arbitration, the right to compel it may be waived just as any other contractual right may be waived. The fact that both acts abolish "what once was a widespread policy against" arbitration does not establish so powerful a preference in favor of arbitration as to preclude the possibility of waiver, whether express or implied.

Bank also argues that while participation in a judicial proceeding may constitute a waiver of arbitration rights, a trial court should not find that a party waived those rights if it has merely filed pleadings in an existing court, and if it has proclaimed or otherwise preserved its right to arbitrate.

In this case Bank has participated in activity that exceeds the "mere filing of pleadings." After reviewing the trial record it is clear that when Bank's motion to compel arbitration and stay proceedings was filed not only had Bank already filed pleadings, but it had also given notice of its intention to depose Ali, agreed to and subsequently allowed some of its employees to be deposed and answered and submitted discovery requests, as well as having agreed to and participated in court-ordered mediation. The extent to which Bank had

[3] Referencing both the Federal Arbitration Act, 9 U.S.C. § 1 et seq., and Kentucky's Uniform Arbitration Act.

participated in this case is clearly distinguishable from that which this Court refers to as the "mere filing of pleadings" in *Valley Construction*.

Bank also claims that because it announced or otherwise preserved its right to arbitrate by stating it as an affirmative defense in its answer, the issue should be considered preserved for the lifespan of the litigation. We do not agree.

Unlike the Appellant in the *Valley Construction* case, who "demanded [arbitration] at every opportunity it could do so," 796 S.W. 2d at 368, Bank, in the case at bar, did not. After stating its desire to arbitrate in its answer, Bank subsequently allowed eighteen months to pass, all the while simultaneously participating in what the trial court called "extensive discovery." Thus, although Bank initially stated its desire to arbitrate, it did not pursue that remedy, its conduct for eighteen months was contrary to that statement, and it did not "demand the procedure at every opportunity to do so," removing this case from the reasoning of *Valley Construction*.

Bank's next argument is that Kentucky courts should require a party to prove "prejudice" as a precondition to any waiver of arbitration rights. Bank urges this Court to adopt a prejudice standard (which would require the Appellee to show that he would be prejudiced by the ordering of arbitration at this stage in the case before he is permitted to abstain from arbitration proceedings), apply it to this case, and then subsequently rule that the trial court erred in its denial of Bank's motion. Bank claims that if the Court refuses to require that a party opposing arbitration prove clear prejudice, then any effort to differentiate between a three-

month delay, demonstrated in *Conseco*, and an eighteen-month delay, at issue here, would produce a deceitful and impractical rule. We, again, disagree.

First, it is clear that Kentucky does not require a showing of prejudice as a precondition to waiver. In *Conseco* we stated that:

> [u]nlike estoppel or laches, waiver may be found in the absence of prejudice to the party asserting it. For this reason, among others, some of the courts addressing claims that an arbitration right has been waived have not required that the party asserting the claim prove that it would be prejudiced were arbitration to be ordered. The Seventh Circuit, indeed, in finding the more strictly traditional meaning of waiver applicable in these cases, has held that "an election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate."
>
> Other courts have treated the question of "waiver" in this context as involving an amalgam of waiver, estoppel, and laches principles and have required a showing of prejudice. These courts have inferred the waiver of arbitration rights where a belated assertion of such rights prejudiced the opposition, either by imposing undue delay and expense or by conferring an unfair tactical advantage such as pretrial discovery not available in arbitration.
>
> We need not choose among these variations on the waiver standard here . . . .

47 S.W. 3d at 344-45 (quoting *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir.1995).

Although it is clear from the statement above from *Conseco* that Kentucky has not adopted a prejudice component, Ali could make a credible argument that he has suffered prejudice if such a requirement existed, as a result of

having lost time and incurred additional legal expense as a result of Bank's lengthy participation in the litigation before deciding to arbitrate.

Secondly, it is clear from the trial court's findings that it considered more than just the lengthy period of delay in ruling that arbitration had been waived. This Court in *Conseco* noted that "[t]he delay itself was not unduly long, and during those three months there was little activity in the case. No pleadings were filed except Gold Medal's answer to the complaint, no hearings conducted, no discovery undertaken." 47 S.W. 3d at 345.

In the present case, not only was the delay six times as long as that of in *Conseco*, but, as discussed above, more than just "a little" activity had taken place. As distinguished from *Conseco*, in this case, not only had pleadings been filed at the time the Motion was filed, but substantial discovery had been conducted through the taking of depositions and the answering and submitting of interrogatories. In addition, the parties had participated in mediation hearings. There is no indication in the record that the trial court did not properly or fairly evaluate Bank's participation in the litigation in this case before reaching its decision. We find no error in that regard.

For the forgoing reasons we conclude that the trial court committed no error in finding that Bank had waived any right to compel arbitration by the extent to which it participated in the case, and therefore did not err in denying the Appellant's *Motion to Compel Arbitration and Stay Proceedings*.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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