RENDERED: AUGUST 15, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000956-MR

MBNA AMERICA BANK, N.A. APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 05-CI-00457

ROSCOE BOWLING APPELLEE

OPINION
REVERSING & REMANDING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

STUMBO, JUDGE: MBNA America Bank (hereinafter Appellant) appeals the denial of its Petition and Application to Confirm and Enforce Arbitration Award. Its primary arguments, and the ones we find most persuasive and dispositive of the case, are that the trial court was required to enforce the arbitration award because Roscoe Bowling (hereinafter Appellee) failed to contest to the existence of an arbitration agreement prior to arbitration and failed to timely file a motion to

vacate or modify the award. No brief was filed on behalf of Appellee. After considering the facts of this case and the law, we find that the trial court should have enforced the arbitration award. Accordingly we reverse.

Appellee applied for and was granted a credit card account from Appellant. Part of the agreement provided that all claims arising from the account would be resolved through binding arbitration. Appellee subsequently failed to make monthly payments on the card.

Appellant then filed a claim with the National Arbitration Forum (NAF). Appellee did not object to either the jurisdiction of the arbitrator or the existence of an arbitration agreement during the arbitration proceedings. The arbitrator found that the parties agreed to binding arbitration, that Appellee was properly served with the arbitration claim, and that the arbitration proceeded in accordance with the NAF Code of Procedure. The arbitrator issued an award in favor of Appellant in the amount of $5,324.17. This award was entered on August 29, 2005.

Appellee failed to pay Appellant the amount awarded pursuant to the arbitration award. On December 8, 2005, Appellant filed a Petition and Application to Confirm and Enforce Arbitration Award with the Clay Circuit Court pursuant to KRS 417.150. On April 27, 2006, Appellee filed an answer to the petition in which he alleged he never agreed to arbitration.

A few hearings were held on this matter which ultimately led to the trial court entering an order denying the Petition to Enforce on April 16, 2007. This appeal followed.

Since there was no brief filed on behalf of Appellee, it is not quite clear what arguments Appellee put forth that caused the trial court to deny the Petition to Enforce. However, after having viewed the video tapes of the hearings, it appears Appellee claimed that he never agreed to arbitration and that he did not receive notice of the arbitration proceedings. Neither of these arguments should have prevailed. The arbitration award should have been enforced.

> The settlement of disputes by arbitration is favored in the law of this Commonwealth. *Valley Const. v. Perry Host Management,* Ky. App., 796 S.W.2d 365 (1990); *cf. Carrs Fork Corp. v. Kodak Min. Co.,* Ky., 809 S.W.2d 699 (1991). Generally, much judicial latitude and deference are accorded to an arbitration decision. It will not be disturbed by the courts "merely because it was unjust, inadequate, excessive or contrary to law." *Carrs Fork Corp.,* 809 S.W.2d at 702. Although there are cases where equity demands intervention by the courts, this Court has consistently held that an arbitration award is to be considered the end of the controversy-not the beginning. *Id.* <u>The issue of whether notice was effected is a procedural matter which is relegated to the arbitrator.</u> *Cf. The Beyt, Rish, Robbins Group v. Appalachian Regional Healthcare, Inc.,* Ky. App., 854 S.W.2d 784, 786 (1993); *Bastone v. Dial-A-House, Inc.,* 100 Misc.2d 1026, 420 N.Y.S.2d 467 (N.Y.Sup.Ct.1979); *see also John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). (Emphasis added).

Lombardo v. Investment Management and Research Inc., 885 S.W.2d 320, 322 (Ky. App. 1994). Here, the arbitrator specifically found that Appellee had been served with notice of the proceedings.

As for the existence of the arbitration agreement, Appellee's failure to raise this issue during arbitration is fatal to his argument. Kentucky Courts have held that since the Kentucky Uniform Arbitration Act (KUAA) is so similar to the Federal Arbitration Act (FAA) they should be interpreted consistently. *See Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850 (Ky. 2004).

KRS 417.060 states that if a party denies the existence of an arbitration agreement, the arbitration proceedings can be stayed while a trial court summarily decides if one exists. Federal courts have held that once an arbitration award has been entered, the parties are no longer permitted to go back and litigate the issue of whether an arbitration agreement existed to begin with. *See Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138 (7th Cir. 1985); *Halley Optical Corp. v. Jagar Int'l Mktg Corp.*, 752 F.Supp. 638 (S.D.N.Y. 1990); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698 (2d Cir. 1985). In other words, if a party intends to dispute the existence of an arbitration agreement, he must do so via a stay in the arbitration proceedings pursuant to KRS 417.060.

> No one should be forced into arbitration without an opportunity to show that he never agreed to arbitrate the dispute that is the subject of the arbitration. The [respondents] had that opportunity when they were notified of the arbitration, and they let it pass by. It was then too late for them to sit back and allow the arbitration to go forward, and only after it was all done, and

> enforcement was sought, say: oh by the way, we never agreed to the arbitration clause. That is a tactic that the law of arbitration, with its commitment to speed, will not tolerate.

Comprehensive Accounting at 140. Here, Appellee had notice of the arbitration proceedings, as shown by the findings in the arbitration award, and chose not to seek a stay in order to contest the existence of the agreement.

We note that KRS 417.160 permits a party to move to vacate an arbitration award under certain circumstances. This motion, however, must be made within 90 days of receipt of the award. No action was taken on Appellee's behalf until Appellant petitioned the court to enforce the award, which was more than 90 days after the arbitration award.

Having been given notice of the arbitration proceedings and not moved to stay the proceedings pursuant to KRS 417.060 in order to contest the existence of an arbitration existence, Appellee's remedies became limited. When Appellee did not exercise these remedies, he became bound by the arbitration award. For these reasons, we reverse the trial court's order denying the petition to enforce and remand for entry of a judgment in accordance with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Megan J. Linder
Sarah A. Veith
Cincinnati, Ohio

NO BRIEF WAS FILED FOR APPELLEE