

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001647-MR

COBALT MINING, LLC.  
AND COBALT VENTURES, LLC.

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NO. 06-CI-011362

HOLLIS D. SMITH

APPELLEE

OPINION AND ORDER  
DISMISSING

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BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Cobalt Mining, LLC. and Cobalt Ventures, LLC. (Cobalt) appeal an order of the Jefferson Circuit Court ruling that Cobalt's claims against Hollis D. Smith must proceed through arbitration and not judicial action. After reviewing the record, we dismiss this appeal.

In late 2004 and early 2005, Smith Mining & Materials, LLC. purchased Brooks Crushed Stone, LLC., with an \$8.75-million loan from Bank of

America, N.A. (BOA). At least in part, BOA agreed to lend Smith Mining the purchase funds because its appraiser valued Brooks's mining operation at \$41 million and the land where the mining occurred at \$14 million. After the loan was made, BOA subjected its earlier appraisal to an evaluation from an appraisal review committee that determined the first appraisal was seriously flawed and could not be relied upon in future decisions. Soon thereafter, Smith Mining failed to make a principal reduction payment and its loan was downgraded by BOA.

In the summer of 2005, Smith approached BOA about his desire to purchase Bethlehem Sand & Gravel, LCC., an Indiana-based company. As a condition of providing financing, BOA required Smith to find an investor who would invest \$2.7 million in Smith Mining and Brooks Sand & Gravel, LLC., which was formed for the purpose of acquiring Bethlehem. BOA further required that Smith's first and second loan be cross-collateralized, causing each loan to be secured by the assets of Bethlehem and Smith Mining. Finally, BOA required that a \$500,000 principal reduction payment be made on behalf of Smith Mining.

Smith agreed to BOA's offer and then met with Todd Blue, the manager of Cobalt Ventures, LLC., and discussed his possible involvement in the deal. Smith provided Blue with financial documents for the proposed transaction, which apparently indicated that Smith Mining was worth over \$40 million. Based on this information, Blue provided the \$2.7 million required by BOA. Blue then created a corporate entity called Cobalt Mining, LLC.

Subsequently, Smith and Cobalt Mining created Brooks Mining, LLC., to receive the funds and be the parent company of Smith Mining and Brooks Sand. In their new structure, Smith and Cobalt Mining shared voting rights, but Smith maintained operational control over Smith Mining and Brooks Sand. The parties then executed operating agreements for the three entities, Brooks Mining, Brooks Sand, and Smith Mining. The three operating agreements contained identical arbitration clauses and became effective on August 31, 2005.

Within four months after Blue's investment, Smith Mining and Bethlehem failed to make payroll, insurance premium installments, and pay taxes. On February 9, 2006, Smith Mining and Bethlehem filed for bankruptcy. Blue then discovered that Smith Mining had not been worth \$40 million. Blue believed that BOA and Smith had misrepresented the financial status of Smith Mining.

Cobalt Mining and Cobalt Ventures then filed this action against Smith and BOA for various claims, including negligent misrepresentation, fraudulent inducement, conversion, fraud, and securities violations. Smith moved to dismiss the suit, arguing that the parties' arbitration clauses required their disputes to be resolved through arbitration. On September 28, 2007, the trial court granted Smith's motion by ruling that the arbitration clauses covered Cobalt's claims.

Subsequently, Cobalt and BOA settled their legal dispute. Cobalt filed a motion to vacate, which was denied. This appeal follows.

Cobalt contends that the trial court erred by ruling that the parties' arbitration clauses compelled its claims to be resolved through arbitration. It argues that the trial court should not have disregarded the language of the parties' agreement just because of Kentucky's preference toward compelling arbitration. It argues that the terms of the parties' arbitration clauses did not preclude its claims.

In 1984, Kentucky adopted the Uniform Arbitration Act (KUAA), which permits arbitration agreements between parties. KRS 417.050, in pertinent part, provides the following:

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.

A trial court's order compelling arbitration is not subject to judicial review unless the aggrieved party would lose a right that cannot be later restored. *Fayette County Farm Bureau Federation v. Martin*, 758 S.W.2d 713, 713-14 (Ky.App. 1988).

Cobalt filed an appeal to this Court following the denial of its motion to vacate. The appellate record does not contain any evidence that the parties' disputes have been subjected to arbitration. Therefore, Cobalt cannot appeal from the trial court's order compelling arbitration. Additionally, Cobalt has not stated how it meets any exception to the general rule against permitting an appeal. *Id.* Accordingly, Cobalt cannot prosecute this appeal in this Court.

For the foregoing reasons, the appeal of Cobalt Mining and Cobalt Ventures is hereby DISMISSED.

ALL CONCUR.

ENTERED: September 23, 2011

/s/ Kelly Thompson  
JUDGE, COURT OF APPEALS

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