RENDERED: DECEMBER 9, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

OPINION OF DECEMBER 10, 2010 WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001985-MR

KINDRED NURSING CENTERS
LIMITED PARTNERSHIP d/b/a
HARRODSBURG HEALTH CARE CENTER;
KINDRED HEALTHCARE, INC.;
KINDRED HEALTHCARE OPERATING, INC.;
AND KINDRED HOSPITALS LIMITED
PARTNERSHIP — APPELLANTS

v.

APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 09-CI-00116

JOHN DAVID LANE,
ADMINISTRATOR OF THE ESTATE
OF WANDA LANE, DECEASED — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

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

MOORE, JUDGE: On June 12, 2001, Wanda Lane became a resident at Harrodsburg Health Care Center, a facility alleged to be owned and operated by Kindred Nursing Centers Limited Partnership; Kindred Healthcare, Inc.; Kindred Healthcare Operating, Inc.; and Kindred Hospitals Limited Partnership (collectively "Kindred"). On December 22, 2006, her son, John David Lane, executed a document entitled "Alternative Dispute Resolution Agreement Between Resident and Facility (Optional)," purportedly on her behalf, pursuant to a power of attorney. As the name implies, this document provided for all disputes between Kindred and Wanda, relating to or arising out of her tenure as a resident in Kindred's nursing care facility, to be submitted to arbitration rather than a trial. The following provisions of this agreement are relevant to our review:

> I. ALTERNATIVE DISPUTE RESOLUTION (ADR) AGREEMENT PROVISIONS
>
> A. . . . Except as expressly set forth herein or in the Rules of Procedure, the provisions of the Uniform Arbitration Act, [Kentucky Revised Statutes] KRS 417.045 et seq., shall govern the Arbitration. . . .
>
> . . .
>
> H. Location, Date & Time of mediation or arbitration. The parties may mutually agree on the place for the proceeding. If there is no mutual agreement, or if a party objects to the place, the neutral shall have the power to determine the place in accordance with the Dispute Resolution Process and due process considerations. Unless otherwise agreed by the parties, the neutral shall set the date and time for each proceeding.
> . . .
>
> O. If for any reason there is a finding that the Uniform Arbitration Act KRS 417.045 et seq., cannot be applied

> to this Agreement, then the parties hereby make clear their intent that their disputes/claims be resolved pursuant to the Federal Arbitration Act and that the parties do not want their disputes/claims resolved in a judicial forum.
>
> . . .
>
> III. SEVERABILITY PROVISION
>
> If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, the remaining provisions, and partially invalid or unenforceable provisions, to the extent valid and enforceable, shall nevertheless be binding and valid and enforceable.

On April 20, 2008, Wanda passed away due to complications from a stroke. On March 12, 2009, John filed a complaint against Kindred in his capacity as the administrator of Wanda's estate, alleging that Kindred's care of Wanda was negligent and violated several state and federal laws. Shortly thereafter, Kindred sought to enforce the arbitration agreement that John had executed and moved the trial court, pursuant to the Kentucky Uniform Arbitration Act, KRS 417.045 *et seq*. (KUAA) and the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (FAA), to compel arbitration and either dismiss or stay this action.

In its final order of October 15, 2009, the trial court held that because the arbitration agreement at issue failed to specify that the arbitration must be held in Kentucky, it had no subject matter jurisdiction to compel the parties to arbitration under either the KUAA or the FAA. In reaching this conclusion, the court relied solely upon *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 455-6 (Ky. 2009), wherein the Kentucky Supreme Court held that courts of this

Commonwealth do not have jurisdiction to enforce arbitration agreements that fail to specifically designate Kentucky as the site for arbitration.

This appeal followed.

Generally, once litigation commences, the burden is on the party seeking to enforce an arbitration agreement to present prima facie evidence that an arbitration agreement exists between the parties. *Valley Const. Co., Inc. v. Perry Host Management Co., Inc.*, 796 S.W.2d 365, 368 (Ky. App. 1990). Once the existence of an arbitration agreement is established, the burden shifts to the party seeking to avoid arbitration to present evidence that the agreement is unenforceable. *Id*.; *see also* 9 U.S.C. § 2; KRS 417.050. We review a trial court's factual findings in an order denying enforcement of an arbitration agreement to determine if the findings are clearly erroneous, but we review a trial court's legal conclusions under a *de novo* standard. *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001).

Of the several arguments Kindred offers on appeal, we need only address two: 1) Did the trial court have subject matter jurisdiction to enforce the arbitration agreement at issue in this matter under the KUAA; and 2) If not, did the trial court have subject matter jurisdiction to enforce the arbitration agreement under the FAA?

As a preliminary matter, we agree that the arbitration agreement at issue in this matter is unenforceable under the KUAA. As the trial court held, a prerequisite to enforcing an arbitration agreement under the KUAA is that the

agreement itself must specifically provide for arbitration to occur in this state. *Ally Cat, LLC*, 274 S.W.3d at 455; *see also* KRS 417.200. And, as Kindred concedes in its brief, "There is no dispute that the ADR Agreement at issue here does not contain stand-alone language explicitly requiring the arbitration to occur in this Commonwealth."

Kindred contends, however, that because part I(A) of its agreement states "Except as expressly set forth herein or in the Rules of Procedure, the provisions of the Uniform Arbitration Act, KRS 417.045 et seq., shall govern the Arbitration," the arbitration agreement specifically provided for arbitration to occur in this state because it generally incorporated a reference to KRS 417.200. Kindred also contends that there is no reason to believe that the arbitration would occur anywhere other than Kentucky, and that its arbitration agreement does not compel arbitration to occur outside of this state.

But, Kindred's argument is virtually indistinguishable from the argument in favor of enforcing the arbitration agreement in *Ally Cat*. Like the arbitration agreement at issue in this matter, the arbitration agreement in *Ally Cat* generally referenced the KUAA and generally recited that the arbitration pursuant to that agreement would be conducted under its rules. *Ally Cat, LLC*, 274 S.W.3d at 453. Like Kindred, the proponents of the arbitration agreement in *Ally Cat* also argued "that any agreement to arbitrate satisfied KRS 417.200 so long as it does not compel arbitration to occur outside this state." *Id*. at 455. As such, *Ally Cat*

demonstrates why Kindred's argument must fail: generally referencing a statute does not equate to specifically satisfying its mandate.

That said, we nevertheless agree with Kindred's second argument, *i.e.*, that the FAA could supply the trial court with an alternate basis for subject matter jurisdiction. Recently, in *Ernst & Young, LLP v. Clark*, --- S.W.3d ---, 2010 WL 3374414 (Ky. 2010), the Kentucky Supreme Court clarified the holding of *Ally Cat*, stating, "*Ally Cat* has no applicability to an arbitration agreement governed exclusively by the Federal Arbitration Act." *Id*. at 11, fn. 8. And, by its own language, the arbitration agreement states that its provisions are severable and, importantly, that "If for any reason there is a finding that the Uniform Arbitration Act KRS 417.045 et seq., cannot be applied to this Agreement, then the parties hereby make clear their intent that their disputes/claims be resolved pursuant to the Federal Arbitration Act and that the parties do not want their disputes/claims resolved in a judicial forum." Accordingly, the reasoning of *Ernst & Young* would apply in this instance because 1) in the event the KUAA cannot apply, the terms of this arbitration agreement provide for it to be exclusively governed by the FAA; and 2) such an event has occurred.

The Supreme Court of Kentucky has held that the FAA applies "to actions brought in courts of this state where the purpose of the action is to enforce voluntary arbitration agreements in contracts evidencing transactions in interstate commerce." *See Fite and Warmath Construction Company, Inc. v. MYS Corp.*, 559 S.W.2d 729, 734 (Ky. 1977); *see also Kodak Mining Company v. Carrs Fork*

Corp., 669 S.W.2d 917 (1984). As a caveat, though, we re-emphasize that the FAA *could* apply.[2] The FAA requires "that we rigorously enforce agreements to arbitrate." *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 (1987)). But, § 2 of the Federal Arbitration Act, which relates to the enforceability of arbitration agreements, provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction *involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or *an agreement in writing to submit to arbitration an existing controversy arising out of such a contract*, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added).

Thus, as a threshold matter, the trial court must determine whether the parties' arbitration agreement falls within the provisions of §2 of the FAA. This requires, in turn, a determination of 1) whether there is a valid arbitration agreement under the FAA[3]; 2) whether the parties' dispute is within the scope of the arbitration agreement; and 3) "whether legal constraints external to the parties'

[2] Kindred appears to argue that because *Ally Cat* does not apply to the FAA, the FAA must apply to the arbitration agreement. In support, Kindred asserts that "Both [Lane] and the lower Court never disputed that the FAA applied to the ADR Agreement. In fact, the Court stated that the FAA did apply but still found that Ally Cat prevented it from enforcing the ADR Agreement." However, if the trial court purported to make such a determination, it did not reduce it to any order and, thus, it never became effective. *See Commonwealth v. Hicks*, 869 S.W.2d 35 (Ky. 1994); *see also Allen v. Walter*, 534 S.W.2d 453, 455 (Ky.1976) ("It is elementary that a court of record speaks only through its records. An order is not an order until it is signed. Until then the judge can change his mind and not enter it.")

[3] When considering this question, the trial court must also determine whether the transaction at issue in this matter qualifies as "commerce" under 9 U.S.C. § 2. As *dicta*, we draw the trial court's attention to *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003) for assistance in defining "commerce" under the FAA.

agreement foreclosed arbitration of those claims." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (citations omitted). Under this last inquiry, the United States Supreme Court has held that applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

Here, the trial court did not consider the applicability of the FAA and instead disposed of Kindred's motion on jurisdictional grounds. We believe the court erred as a matter of law by denying Kindred's motion without considering the applicability of the FAA to the arbitration agreement between Kindred and Lane. As such, we remand for the trial court to make that determination. We do not address the validity of the arbitration agreement or Lane's defenses to enforcement of the arbitration agreement, including the validity of Lane's power of attorney, as these issues are for the trial court to consider on the merits.

For the reasons stated herein, we reverse the order of the Mercer Circuit Court and remand this case for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald P. Moloney, II
J. Peter Cassidy, III
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BRIEF FOR APPELLEE:

Scott Owens
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