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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000733-MR

ASPEN TRADITIONS, INC.

APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 08-CI-00297

KENTUCKY ASSOCIATED
GENERAL CONTRACTORS
SELF-INSURERS' FUND; AND
HON. KAREN A. CONRAD, JUDGE

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

ACREE, JUDGE: Aspen Traditions, Inc. appeals the March 23, 2009 order of the Oldham Circuit Court granting its Workers' Compensation insurance provider, Kentucky Associated General Contractors Self-Insurers' Fund (KAGC), summary

judgment and denying Aspen's motion to dismiss. For the following reasons, we affirm the order of the circuit court in its entirety.

Facts and procedure

Aspen is a construction contractor which periodically engages subcontractors. Two men who performed work for Aspen during 2006 and 2007, Jim Peterson and Matt Engle, were employed by such subcontractors.

Aspen was a member of KAGC, a self-insurance fund which provides its members Workers' Compensation coverage. Aspen's policy through KAGC contained the following provision:

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. all your officers and employees engaged in work covered by this policy; and
2. **all other persons engaged in work that you have subcontracted**, work for you involving removal[,], excavation or drilling of soil, rock or mineral, or cutting or removal of timber from land, or work for you performed of a kind which is a regular and recurrent part of the work of your trade, business, occupation or profession. **This includes but is not limited to sole proprietorships, partnerships, subcontractors, laborers with NO employees and or NO certificates of workers' compensation insurance.** If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. **This paragraph #2 will not apply if you give us proof that the employers of these persons lawfully secured their workers' compensation obligations.**

(Emphasis added). An audit revealed Aspen had not paid the entire amount owed as premium, and KAGC demanded that Aspen pay the bill. Aspen alleges the failure to pay is the result of KAGC's erroneous calculation, which improperly treats the two workers as employees instead of independent contractors. Aspen asserts it is not required to pay a premium for those two men because Kentucky Revised Statutes (KRS) Chapter 342 does not provide for Workers' Compensation coverage of independent contractors.

When Aspen did not promptly pay the outstanding premium amounts in full, KAGC proceeded to the circuit court for resolution of the dispute. In its answer, Aspen denied the enforceability of the contract on various grounds. Aspen also filed a counterclaim alleging that KAGC had improperly procured \$640 from Aspen and improperly retained Aspen's \$1,674 escrow deposit; that KAGC's actions were based on a contract that was unenforceable; that KAGC's behavior amounted to extortion and was done in bad faith; and that Aspen was entitled to punitive damages.

KAGC moved for summary judgment, arguing that no facts were in dispute, but that all facts undeniably led to the conclusion that Aspen had breached its contract and KAGC should be reimbursed, and that KAGC should prevail as a matter of law. KAGC argued the counterclaim failed because, contrary to Aspen's position, punitive damages are not available for breach of contract, the contract was supported by adequate consideration, and the claims of bad faith and extortion were completely unsupported by the facts.

Aspen moved to dismiss the action, claiming the circuit court had no subject matter jurisdiction. According to this argument, because the underlying dispute concerned whether the two workers were really independent contractors or employees pursuant to *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965), jurisdiction properly lay with the Administrative Law Judge (ALJ) of the Board of Workers' Claims.

The circuit judge granted KAGC's motion and overruled that of Aspen, ordering Aspen to pay \$10,165.79 plus \$1.83 per day from September 15, 2008, until the amount was paid in full. This appeal followed.

On appeal, Aspen contends the circuit court erred in two respects: (1) determining the court had jurisdiction over the dispute and (2) determining the insurance contract did not fail for want of consideration.

The circuit court had jurisdiction over the subject matter

“Whether the court has acted outside its jurisdiction is a question of law, and the standard of review on appeal is therefore *de novo*.” *Whaley v. Whitaker Bank, Inc.*, 254 S.W.3d 825, 827 (Ky. App. 2008)(citing *Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004)).

KRS 342.325 provides that jurisdiction over “all questions arising under this chapter, if not settled by agreement of the parties interested therein” properly lies with the Administrative Law Judge of the Board of Workers' Claims. However, when the dispute is a contractual issue between the insurer and the employer, but does not affect the rights of a worker to receive Workers'

Compensation benefits, jurisdiction is in the circuit court. *Custard Insurance Adjusters, Inc., v. Aldridge*, 57 S.W.3d 284, 287 (Ky. 2001); *see also Wolfe v. Fidelity & Casualty Insurance Company of New York*, 979 S.W.2d 118, 120 (Ky. App. 1998)(“Interpretation of insurance contracts and the enforcement of the right of the insured concern matters which are beyond the purview of the authority vested in the ALJ.”).

The disagreement regarding jurisdiction can be resolved by proper characterization of the issue. Aspen attempts to characterize the issue as a matter of classifying the workers for whom KAGC charged a portion of the premium: are they employees, or are they independent contractors? Because the parties don't agree on this matter, argues Aspen, the issue must first be brought before an ALJ in compliance with KRS 342.325. KAGC, on the other hand, argues this is truly a contract dispute; Aspen voluntarily agreed to the terms of the insurance contract and failure to pay the premium as calculated pursuant to the terms of that contract amounts to breach. If KAGC is correct, the circuit court properly asserted jurisdiction.

We agree with KAGC. Whether the two “independent contractors” in question are actually independent contractors or employees is irrelevant to whether Aspen has to pay the premium as calculated by KAGC, because their status is irrelevant according to the contract. Their actual employment status would become an issue only if one of the two workers filed a claim for Workers' Compensation benefits. The only matter before the circuit court in this dispute was

whether the parties complied with the terms of the contract. Both parties agree the contract required Aspen to make premium payments for policy coverage of these two workers, who did not produce certificates of coverage. KRS 342.325 does not confer jurisdiction upon the ALJ.

This is ultimately an issue of the contractual obligations between Aspen and KAGC. Accordingly, the circuit court had jurisdiction over the action, and the circuit judge's ruling on this matter was correct.

The contract was supported by adequate consideration

Aspen next argues the circuit court incorrectly determined KAGC provided consideration in exchange for Aspen's premium payments. We disagree.

Of course, for a contract to be enforceable, it must be supported by consideration from both parties. Consideration is defined as

A benefit to the party promising, or a loss or detriment to the party to whom the promise is made. "Benefit," as thus employed, means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled. And "detriment" means that the promisee has, in return for the promise, forborne some legal right which he otherwise would have been entitled to exercise.

Phillips v. Phillips, 294 Ky. 323, 171 S.W.2d 458, 464 (1943)(quoting *Luigart v.*

Federal Parquetry Mfg. Co., 194 Ky. 213, 238 S.W. 758, 760 (1922). Analysis

begins with the written agreement itself to which Aspen admits being a party. "A

written instrument signed by a party imports a consideration." *Francis' Ex'r v.*

Francis, 280 S.W.2d 192, 195 (Ky. 1955). Furthermore, there is a "presumption of

universal application that an admitted and duly executed writing is supported by a legal consideration, and the burden is cast on the one executing it to overcome that presumption.” *Shrout’s Adm’r v. Vaughan*, 305 Ky. 637, 204 S.W.2d 969, 970 (1947).

To overcome the presumption, Aspen argues that its payment of the premium intended to cover the two “independent contractors” was in exchange for nothing from KAGC. This is purely a legal argument because it is based upon, and can be resolved by, an examination of the agreement and applicable law.

According to Aspen, although KAGC purports to guarantee coverage in the event Aspen becomes liable for a work-related injury, this is an empty promise because the two workers in question, as independent contractors, can never create liability for Aspen pursuant to KRS Chapter 342; *i.e.*, there are no circumstances in which KAGC will ever become liable for the workers’ injuries, and therefore KAGC has not provided valuable consideration. This is not so, however.

The terms of the policy require Aspen to pay a premium based upon the risk of injury to employees, in addition to subcontractors who cannot produce certificates of coverage for Workers’ Compensation claims. The reason for this is that, pursuant to KRS 342.610(2), employers are liable for “up the ladder”

coverage:

A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment

of such compensation has secured the payment of compensation as provided for in [KRS Chapter 342].

KRS 342.610(2).

It is therefore possible that an employer may become liable for payment of the injuries of a subcontractor the employer considers an independent contractor. In that instance, the employer's Workers' Compensation insurance provider would bear ultimate responsibility for making the payments. KAGC determined its insureds should pay an increased premium for subcontracted workers they could not guarantee were covered by another policy for that very reason.

Aspen still faces the possibility of liability for injuries to workers it considers independent contractors. This is especially true when the workers cannot produce certificates of coverage; in fact, that is precisely the scenario which would create liability for Aspen and, in turn, pursuant to the contract of insurance, for KAGC. That is valuable consideration – KAGC undertakes the risk of paying compensation in the event these two workers are injured and determined to be employees of the subcontractor, in exchange for Aspen's premium payments, which are calculated based on inclusion of the two workers. The circuit court therefore properly determined the contract did not fail for lack of consideration.

Conclusion

The circuit court correctly ruled on the issues of jurisdiction and validity of the contract. The order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE
KENTUCKY ASSOCIATED
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NO BRIEF FOR HON. KAREN A.
CONRAD, JUDGE