

RENDERED: OCTOBER 29, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001725-MR

FIDELITY BROKERAGE SERVICES

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE GREGORY M. BARTLETT, JUDGE  
ACTION NO. 09-CI-00569

MICHAEL FOLK

APPELLEE

OPINION  
REVERSING  
AND  
REMANDING

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BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,<sup>1</sup> SENIOR  
JUDGE.

DIXON, JUDGE: This appeal concerns a Kenton Circuit Court order denying

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<sup>1</sup> Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

a motion to dismiss or alternatively to stay litigation pending arbitration made by Fidelity Brokerage Services in a tort action filed by Michael Folk. The trial court denied the motion on the ground that it lacked subject matter jurisdiction to enforce the parties' arbitration agreement. After careful review, we reverse the court's order and remand this case for further proceedings.

In December 1998, Folk and his then-wife, Kathryn, opened investment brokerage accounts with Fidelity, where Kathryn was employed as a database administrator. The customer agreement included an arbitration clause providing that "all controversies that may arise . . . shall be determined by arbitration in accordance with the rules then prevailing of either the New York Stock Exchange, Inc., or National Association of Securities Dealers, Inc. . . ."

Folk and Kathryn divorced in March 2008. In early 2009, Folk filed a complaint against Fidelity, Kathryn, and her co-worker alleging the tort of outrage and breach of duty relating to Folk's investment accounts at Fidelity. In response, Fidelity cited the arbitration clause in the parties' agreement and moved to dismiss the complaint or alternatively to stay litigation pending arbitration pursuant to the relevant provisions of the Federal Arbitration Act (FAA) and the Kentucky Uniform Arbitration Act (KUAA). Folk opposed Fidelity's motion, contending that the agreement was an unenforceable contract of adhesion. In August 2009, the trial court denied Fidelity's motion on grounds that it lacked subject matter jurisdiction to enforce the arbitration agreement. Fidelity now appeals the court's decision pursuant to KRS 417.220(1)(a).

First, we address a jurisdictional issue raised by Folk. He contends that this is an improper interlocutory appeal, as KRS 417.220(1)(a) specifically provides for appellate review of “[a]n order denying an application to compel arbitration made under KRS 417.060.” Folk points out that Fidelity did not file an application to compel arbitration; rather, Fidelity moved to dismiss the complaint or alternatively stay the litigation pending arbitration. The record shows, however, that Fidelity filed its motion pursuant to both the FAA and KUAA. Section 16 of the FAA specifically provides for an immediate appeal of an order refusing a stay of litigation. 9 U.S.C. § 16(a)(1)(a).<sup>2</sup> While we acknowledge Folk’s strict reading of KRS 417.220(1)(a), we are not persuaded that this is an improper interlocutory appeal.

On appellate review of an order denying a motion to stay litigation pending arbitration, we defer to the trial court’s findings of fact, unless clearly erroneous, and we review the court’s application of the law to the facts *de novo*. *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001).

At the outset, we note that the FAA and the KUAA contain “nearly identical” provisions relating to the validity of arbitration agreements. *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 853-54 (Ky. 2004). The FAA, however, specifically addresses the enforceability of arbitration provisions contained in

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<sup>2</sup> In *Arthur Andersen LLP v. Carlisle*, 129 S.Ct. 1896, 1900, 173 L. Ed. 2d 832 (2009), the United States Supreme Court noted that, where a movant requests a stay of litigation pursuant to § 3 of the FAA and the request is subsequently denied, § 16 plainly entitles the movant to seek immediate appeal of that denial.

contracts “evidencing a transaction involving commerce.” 9 U.S.C. § 2. In *Fite & Warmath Const. Co., Inc. v. MYS Corp.*, 559 S.W.2d 729, 734 (Ky. 1977), the Kentucky Supreme Court found the FAA applicable “to actions brought in the courts of this state where the purpose of the action is to enforce voluntary arbitration agreements in contracts evidencing transactions in interstate commerce.” Thereafter, in *Kodak Min. Co. v. Carrs Fork Corp.*, 669 S.W.2d 917, 919 (Ky. 1984), the court determined that agreements governed by the FAA are “specifically enforceable by stay of a judicial proceeding brought in Kentucky where the proceeding involves issues referable to arbitration.”

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 the agreement is unenforceable. *Id.*; see also 9 U.S.C. § 2, KRS 417.050.

In its minimal findings of fact, the trial court found that the parties entered into a contract in which Folk “agreed to open joint brokerage accounts with his then wife and be subject to arbitration.” The court acknowledged that Fidelity sought enforcement of the arbitration provision pursuant to both the FAA and the KUAA. The court also noted that the brokerage contract contained a Massachusetts choice-of-law provision and that the contract failed to designate

Kentucky as the site for arbitration. As a result, the court found that it had “no subject matter jurisdiction to compel the parties to arbitration,” and denied Fidelity’s motion. In reaching this conclusion, the court relied solely on *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 455-56 (Ky. 2009), wherein the Kentucky Supreme Court held that courts of this Commonwealth do not have jurisdiction to enforce arbitration agreements that fail to designate Kentucky as the site for arbitration. Recently, however, 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.

Here, the court did not consider the applicability of the FAA, i.e. whether the brokerage agreement was “a contract evidencing a transaction involving commerce,” and instead disposed of the motion on jurisdictional grounds. 9 U.S.C. § 2; *see also Fite*, 559 S.W.2d at 734. Although the agreement failed the jurisdictional analysis of the KUAA, we believe the court erred as a matter of law by denying the motion to stay without considering the applicability of the FAA to the brokerage agreement between Fidelity and Folk. It is undisputed that Fidelity presented evidence establishing the existence of the brokerage agreement and the arbitration provision contained therein; consequently, the burden shifted to Folk to present evidence of unenforceability. Our review of the record indicates that Folk did not refute Fidelity’s assertion that the FAA applied to the parties’ agreement; rather, Folk asserted that the agreement was an

unenforceable contract of adhesion. As the trial court failed to address the applicability of the FAA to Fidelity's motion and Folk's opposition thereto, we believe remand is appropriate.<sup>3</sup> For the reasons stated herein, we reverse the order of the Kenton Circuit Court and remand this case for further proceedings consistent with this opinion.

ISAAC, SENIOR JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

TAYLOR, CHIEF JUDGE, DISSENTING: Respectfully, I dissent.

As argued by Folk, I believe the order entered by the Kenton Circuit Court now on appeal is interlocutory and otherwise not properly appealable at this time.

Kentucky Rules of Civil Procedure (CR) 54.01.

Appellate review of an otherwise nonappealable interlocutory order is permissible pursuant to KRS 417.220(1)(a). Under KRS 417.220, an appeal may be taken from an order denying an application to compel arbitration under KRS 417.060 or an order granting an application to stay arbitration made under KRS 417.060(2). The latter requirement is clearly not triggered in this appeal since no application to stay an arbitration proceeding was made in this case. The majority thus assumes that the motion filed by Fidelity in the Kenton Circuit Court is an application to compel arbitration under KRS 417.060(3) or is otherwise controlled

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<sup>3</sup> We do not address the validity of the arbitration provision or Folk's defenses to enforcement of the brokerage agreement, as these issues are for the trial court to consider on the merits.

by Section 16 of the FAA regarding a stay of legal proceedings. However, upon close review of the motion, no such request to compel arbitration was made by Fidelity to the circuit court. The motion itself is characterized as a motion to dismiss the Kenton Circuit Court proceeding or, in the alternative, a motion to stay that legal proceeding. There is no language in the motion that seeks to compel arbitration as provided for in KRS 417.060(1).<sup>4</sup> The failure to pursue arbitration by Fidelity is further amplified by the request for relief in Fidelity's motion under the caption of "Conclusion." In that conclusion, Fidelity requests the following relief:

Based on the foregoing, Fidelity respectfully requests that the Court stay or dismiss the Complaint pending arbitration.

Clearly, Fidelity has made no request to the circuit court to compel arbitration. Obviously, Folk does not believe the arbitration provision is applicable to his claim. If Fidelity's motion is granted, Folk's claim would effectively be abated, which is not provided for in KRS 417.060, since arbitration was not requested or ordered.

Arbitration agreements and any rights arising therefrom are contractual in nature. *Valley Constr. Co. v. Perry Host Mgmt.*, 796 S.W.2d 365 (Ky. App. 1990). Accordingly, arbitration rights can be waived. *Id.* The arbitration provision set forth in the Customer Agreement is not one sided as inferred by Fidelity. In other words, the arbitration clause does not apply only to

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<sup>4</sup> KRS 417.060(4) permits a stay of the litigation if an application is made to compel arbitration as provided for in subsection (1). There being no application to compel in this case, a stay is not permissible under Kentucky law.

Folk in the event a dispute arises between the parties, assuming that the arbitration agreement is valid and applicable to this action. If the arbitration agreement is applicable to this action, upon filing the complaint, Folk arguably waived his right to compel arbitration. I believe the burden was then upon Fidelity to enforce the terms of the contract by seeking to compel arbitration under KRS 417.060. The complaint in this action was initiated in February 2009. I find nothing in the record that reflects a written demand by Fidelity for arbitration. Again, assuming the arbitration provisions (Paragraph 18) of the Customer Agreement are applicable, they specifically require that a written demand for arbitration be made. More than eighteen months have now passed since litigation was commenced and Fidelity has still not made a written application or otherwise filed a motion in this action to compel arbitration. I have seen no evidence in the record on appeal that Fidelity has complied with the Customer Agreement. Thus, even if the order on appeal was appealable, there would be a substantial issue to be resolved below as to whether Fidelity waived its right to pursue arbitration in any dispute between Folk and Fidelity arising from the Customer Agreement. *See Jackson v. Mackin*, 277 S.W.3d 626 (Ky. App. 2009).

Finally, since the order on appeal is interlocutory and not properly appealable under KRS 417.220(1)(a), I do not believe we reach the jurisdictional issues regarding the application of *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009). The majority relies on the recent case of *Ernest & Young, LLP v. Clark*, \_\_\_ S.W.3d \_\_\_, 2010 WL 3374414 (Ky. 2010), to support remanding this case



for consideration of the FAA's effect, if any, upon these proceedings. In *Ernest & Young*, the Kentucky Supreme Court held that “*Ally Cat* has no application to an arbitration agreement governed exclusively by the Federal Arbitration Act.” *Id.* at FN. 8. There is nothing in paragraph 18 of the Customer Agreement that references the FAA. Fidelity also admits in its brief that both the FAA and the KUAA (KRS Chapter 417) are applicable to the arbitration issues raised in this case. See p. 4 and appendix 2. By Fidelity's own admission, the agreement is not governed “exclusively” by the FAA. Given that the claims set forth in the complaint, as amended, allege tortious conduct and do not look to transactions involving interstate commerce, I have serious doubt as to the applicability of the FAA to this litigation. Thus, since the majority is remanding this case, these are issues that must be addressed, in my opinion.

Finally, I do not believe federal statutes can be used to create appellate jurisdiction for the Kentucky Court of Appeals where it otherwise does not exist. I can find no precedent to support this proposition. The majority relies on Section 16 of the FAA to warrant hearing this appeal, which is simply not applicable as I have previously stated. Our Court follows applicable Kentucky law and rules regarding review of interlocutory judgments below to trigger appellate jurisdiction. See *Watson v. Best Financial Services, Inc.*, 245 S.W.3d 722 (Ky. 2008). In this case, the judgment on appeal is interlocutory and not appealable under applicable Kentucky law, in my opinion.

While I do agree with the majority that the circuit court failed to address the applicability of the FAA to this proceeding, I do not believe the circuit court had to address that issue since there had not been a request by Fidelity to compel arbitration in this proceeding. For the foregoing reasons, I would dismiss this appeal.

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