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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001555-MR
AND
NO. 2012-CA-000475-MR

JIM JOHNSON NISSAN APPELLANT

v.

APPEALS FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 09-CI-01331

JERRY TRACY HURT AND
JERRY DALE HURT APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

VANMETER, JUDGE: In this consolidated appeal, Jim Johnson Nissan (hereinafter "Johnson Nissan") appeals from the Warren Circuit Court's February 9, 2012, order granting in part and denying in part its CR[1] 60.02 motion to compel arbitration. For the following reasons, we reverse and remand this matter to the

[1] Kentucky Rules of Civil Procedure.

Warren Circuit Court with directions to enter an order compelling arbitration of the June 24, 2008, contract at issue.

On June 24, 2008, Jerry Tracy Hurt and Jerry Dale Hurt (hereinafter "Hurts") contracted to purchase a vehicle from Johnson Nissan.[2] The Hurts thereafter sought to have the contract voided on grounds that Johnson Nissan falsified credit applications associated with this contract. Johnson Nissan moved the trial court to compel arbitration pursuant to the arbitration clause contained in the contract. By order entered July 23, 2010, the trial court denied Johnson Nissan's motion to compel arbitration of the June 24, 2008, contract on the basis that the court lacked jurisdiction to enforce the terms of the arbitration clause pursuant to the Kentucky Supreme Court's holding in *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 455 (Ky. 2009). Johnson Nissan appealed.

During the pendency of the appeal, Johnson Nissan filed a motion to supplement the record on appeal. This court refused to admit documents not previously considered by the trial court and denied the motion to supplement the record. At that time, this court granted Johnson Nissan's motion to abate the appeal to allow the Warren Circuit Court to rule on its CR 60.02 motion. The Warren Circuit Court held an evidentiary hearing on the CR 60.02 motion to determine the authenticity and validity of the contract in light of new evidence.

By order entered February 9, 2012, the trial court again denied Johnson Nissan's motion to compel arbitration of the June 24, 2008, contract on grounds

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[2] Jamie Lee Rigdon was a party to the other purchase contracts involving the Hurts and Johnson Nissan, but those contracts are not at issue here.

that the arbitration clause was unenforceable for failure to comply with the jurisdictional requirements of the Kentucky Uniform Arbitration Act ("KUAA") and the holding in *Ally Cat*, and the transaction did not involve interstate commerce so as to bring it within the purview of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2. Johnson Nissan now appeals.

Neither party raises a factual issue for our consideration; the only issue before us is the propriety of the trial court's application of the law to the facts. In reviewing an order denying enforcement of an arbitration clause, this court examines the trial court's legal conclusions *de novo* to determine if the law was properly applied to the facts. *Padgett v. Steinbrecher*, 355 S.W.3d 457, 459 (Ky. App. 2011) (citation omitted).

The sole issue on appeal is the enforceability of the arbitration clause contained in the June 24, 2008, contract. That clause reads as follows:

> This agreement provides that all disputes between you and us will be resolved, upon the election of either party, by BINDING ARBITRATION. You thus GIVE UP YOUR RIGHT TO GO TO COURT to assist or defend your rights under this contract. Your rights will be determined by a NEUTRAL ARBITRATOR, selected by Jim Johnson Automotive with agreement by you or a judge of the Warren Circuit Court. You are entitled to a FAIR HEARING, BUT the arbitration procedures are SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT. Arbitrator decisions are enforceable as any court order in Warren County, Kentucky.

KRS[3] 417.200 provides that entering into an arbitration agreement "confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder." In *Ally Cat*, the Kentucky Supreme Court held that "[s]ubject matter jurisdiction to enforce an agreement to arbitrate is conferred upon a Kentucky court only if the agreement provides for arbitration in this state." 274 S.W.3d at 455. Because the arbitration clause in the June 24, 2008, contract failed to require that arbitration take place in Kentucky, the trial court correctly held it to be unenforceable under the KUAA.

However, the arbitration clause is enforceable under the FAA, which applies to contracts "evidencing a transaction involving commerce" and provides in pertinent part:

> 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 a 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 (1947) (emphasis added). "Commerce" is defined as "commerce among several States." 9 U.S.C. § 1.

The United States Supreme Court has interpreted the FAA's reference to "involving commerce" as

[3] Kentucky Revised Statutes.

> the functional equivalent of the more familiar term "affecting commerce" – words of art that ordinarily signal the broadest possible exercise of Congress' Commerce Clause Power. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74, 115 S.Ct. 834 (1995). Because the statute provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," *Perry v. Thomas*, 482 U.S. 483, 490, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce" – that is, "within the flow of interstate commerce," *Allied-Bruce Terminix Cos., supra*, at 273, 115 S.Ct. 834 (internal quotation marks, citation, and emphasis omitted).

Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56, 123 S.Ct. 2037, 2040, 156 L.Ed.2d 46 (2003). Further, "Congress' Commerce Clause Power 'may be exercised in individual cases without showing any specific effect on interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" *Id.* at 56-57, 123 S.Ct. at 2040 (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S.Ct. 996, 92 L.Ed. 1328 (1948)). *See also Perez v. United States*, 402 U.S. 146, 154, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971); *Wickard v. Filburn*, 317 U.S. 111, 127-28, 63 S.Ct. 82, 87 L.Ed. 122 (1942). In other words, "[o]nly that general practice need bear on interstate commerce in a substantial way." *Citizens Bank*, 539 U.S. at 57, 123 S.Ct. at 2040 (citing *Maryland v. Wirtz*, 392 U.S. 183, 196-97, n. 27, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37-38, 57 S.Ct. 615, 81 L.Ed. 893 (1937)).

The activity in the present case is well within the scope of Congress' Commerce Clause Power. While the June 24, 2008, contract involved a transaction between a Kentucky resident and a Kentucky business concerning a vehicle located in Kentucky, a sufficient nexus exists with interstate commerce so as to bring the transaction within the FAA's reach. First, the vehicle history report admitted into evidence shows that prior to the transaction at issue, the vehicle had been transported between various states - the vehicle went from Kentucky to Tennessee, where it apparently was sold at auction, and then back to Kentucky. Second, the record shows that as part of the transaction, the Hurts filled out a credit application with RouteOne, an out-of-state credit application processing entity and GMAC affiliate. As noted on the credit application, depending on the transaction involved, the credit processing agency would place the transaction in the hands of GMAC, located in either New Mexico or Michigan, or Nuvell Credit Company, a GMAC affiliate located in Arizona. Third, not only did the credit application involve interstate commerce, but so did the financing, since the Hurts ultimately obtained financing from GMAC, an out-of-state lending institution.

Though no Kentucky case has addressed whether the retail sale of a vehicle from a dealership to a consumer involves interstate commerce so as to fall within the FAA's purview, other jurisdictions have held the FAA to be applicable under similar factual circumstances. *See Muhammad v. Bedford Nissan, Inc.*, 2012 WL 33010 (N.D. Ohio, Jan. 6, 2012) (sale of used vehicle from dealership to consumer is a transaction in commerce to which FAA applies); *NAACP of Camden County*

E. v. Foulke Mgmt. Corp., 23 A.3d 777, 799 (2011) (retail sale of automobiles is clearly a form of interstate commerce covered by the FAA) (citing *Citizens Bank*, 539 U.S. at 56, 123 S.Ct. at 2040); *Edwards v. Costner*, 979 So.2d 757 (Ala. 2007) (retail sale of vehicle, either new or used, unquestionably involves interstate commerce for purposes of FAA). Based on our review of this persuasive authority, and the record below, we find the arbitration clause contained in the June 24, 2008, contract to be enforceable under the FAA and direct the trial court to enter an order compelling arbitration of this contract according to its terms.

The Warren Circuit Court's February 9, 2012, order is reversed and this case is remanded for further proceedings consistent with this opinion.

ACREE, CHIEF JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS.

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