RENDERED: FEBRUARY 25, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002253-MR

KINDRED NURSING CENTERS
LIMITED PARTNERSHIP
D/B/A DANVILLE CENTRE FOR
HEALTH & REHABILITATION;
KINDRED HEALTHCARE, INC.;
KINDRED HEALTHCARE OPERATING
INC.; KINDRED HOSPITALS LIMITED
PARTNERSHIP; AND KINDRED
NURSING CENTERS EAST, LLC — APPELLANTS

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 09-CI-00397

TOMMY GOOCH, EXECUTOR
OF THE ESTATE OF LUCILLE
JONES, DECEASED — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,[1] SENIOR JUDGE.

[1] Senior Judge Ann O'Malley Shake 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.

VANMETER, JUDGE: Appellants[2] (hereinafter collectively referred to as "Kindred") appeal from an order of the Boyle Circuit Court denying their motion to compel arbitration in an action filed against them by Appellee Tommy Gooch, executor of the estate of Lucille Jones. For the following reasons, we vacate the order and remand this matter for further proceedings.

Gooch filed a complaint against Kindred alleging negligence in the care and treatment provided to Lucille Jones while she was a resident at Danville Centre for Health and Rehabilitation. Kindred moved to compel arbitration pursuant to the alternative dispute resolution agreement executed by the parties, to which Gooch objected. Following a hearing on the matter, the trial court denied Kindred's motion on the basis that it lacked jurisdiction to enforce the agreement under either Kentucky's version of the Uniform Arbitration Act ("UAA") (KRS 417.045-240) or the Federal Arbitration Act ("FAA") (9 U.S.C.[3] § 1 *et seq.*) since the agreement did not state that arbitration must take place in Kentucky. This appeal followed.

On appeal, Kindred maintains that the trial court had independent jurisdiction under both the UAA and the FAA to enforce the agreement. We disagree that the trial court had jurisdiction under the UAA to enforce the

[2] Kindred Nursing Centers Limited Partnership d/b/a Danville Centre for Health & Rehabilitation; Kindred Healthcare, Inc.; Kindred HealthCare Operating, Inc.; Kindred Hospitals Limited Partnership; and Kindred Nursing Centers East, LLC.

[3] United States Code.

agreement, yet remand this matter in order for the court to determine whether jurisdiction exists under the FAA.[4]

This court has jurisdiction to review an appeal from an otherwise interlocutory order denying a motion to compel arbitration. *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky.App. 2001). We review a trial court's findings of fact 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. *Id.*

In making its determination, the trial court relied solely on the case of *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009), in which the Kentucky Supreme Court held that when an arbitration agreement "fails to comply with the literal provisions of KRS 417.200, the courts of Kentucky are, pursuant to KRS 417.200, without jurisdiction to enforce the agreement to arbitrate." *Id.* at 455-56. KRS 417.200 is part of Kentucky's version of the UAA and concerns jurisdiction of Kentucky courts. It states:

> The term "court" means any court of competent jurisdiction of this state. The making of an agreement described in KRS 417.050 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder.

[4] Kindred also argues on appeal that the agreement is a valid and enforceable contract despite Gooch's asserted defenses of unconscionability and lack of authority; however, since the trial court made no factual findings in its order, we are precluded from addressing the issue of the validity of the agreement. *Brown v. Shelton*, 156 S.W.3d 319 (Ky.App. 2004) (In the absence of factual findings, we cannot discern the basis of the circuit court's decision and there can be no meaningful review of the case).

KRS 417.200. Thus, "[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." *Ally Cat*, 274 S.W.3d at 455.

The agreement in this case provides, with respect to 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.

Because the agreement fails to designate Kentucky as the site for arbitration to take place, under *Ally Cat*, Kentucky courts lack jurisdiction to enforce it. Kindred argues that the holding in *Ally Cat* should be applied prospectively since the decision was rendered after execution of the agreement at issue; however, *Ally Cat* simply extended existing law regarding enforcement of arbitration awards to enforcement of arbitration agreements. *See Artrip v. Samons Constr., Inc.*, 54 S.W.3d 169 (Ky.App. 2001) (the failure of the parties to name a site in Kentucky in their arbitration agreement was fatal to their ability to invoke the jurisdiction of a Kentucky court to enforce a subsequent arbitration award); *Tru Green Corp. v. Sampson*, 802 S.W.2d 951 (Ky.App. 1991) (arbitration agreement must provide for arbitration to be in Kentucky to confer subject matter jurisdiction on a Kentucky court). Thus, when the agreement at bar was executed, Kentucky law was clear that an arbitration agreement must designate Kentucky as the site for arbitration to occur in order to confer jurisdiction upon Kentucky courts.

Kindred further contends that the language of its agreement stating "[e]xcept 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" incorporates by reference the jurisdictional requirement of KRS 417.200 so as to give the trial court jurisdiction to enforce the agreement under the UAA. In addition, Kindred emphasizes that no reason exists for arbitration to occur anywhere other than Kentucky and that its agreement does not compel arbitration to occur outside of this state.

With respect to the former argument, we note that, as here, the agreement in *Ally Cat* generally referenced the UAA and provided that arbitration pursuant to the agreement would be conducted according to UAA rules. *Ally Cat*, 274 S.W.3d at 453. Furthermore, Kindred's latter argument mirrors that of the proponents of the agreement in *Ally Cat* - "that any agreement to arbitrate satisfies KRS 417.200 so long as it does not compel arbitration to occur outside this state." *Id.* at 455. Given the fact that both of these arguments were held to be meritless in *Ally Cat*, we hold likewise.

Nonetheless, in this case the FAA *could* supply the trial court with subject matter jurisdiction to enforce the arbitration agreement. *See North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102 n.2 (Ky. 2010) (where it applies, the FAA is enforceable in state, as well as federal court, and indeed under the FAA, state courts as well as federal courts are obliged to honor and enforce agreements to arbitrate) (citations omitted). Recently, the Kentucky Supreme Court clarified

its holding in *Ally Cat*, stating "*Ally Cat* has no applicability to an arbitration agreement governed exclusively by the Federal Arbitration Act." *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 687 n.8 (Ky. 2010).

> Here, the agreement states that its provisions are severable and
>
> 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.

Thus, under the reasoning of *Ernst & Young*, the fact that the parties in this case failed to designate Kentucky as the site for arbitration as required under *Ally Cat* is not fatal to enforcement of the agreement since the terms of the agreement provide for it to be exclusively governed by the FAA in the event the UAA does not apply.

Section 2 of the FAA provides in pertinent part:

> A written provision in any . . . contract evidencing a transaction involving [interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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. With respect to revocation of an agreement, we note that the last clause in Section 2 "refers only to revocation based upon fraud, mistake or other defect in the making of the agreement, therefore, arbitration may be had as to all issues arising subsequent to the making of the contract." *Kodak Min. Co. v. Carrs Fork Corp.*, 669 S.W.2d 917, 919 (Ky. 1984).

Accordingly, the order of the Boyle Circuit Court is hereby vacated and this matter is remanded in order for the court to determine (1) whether the parties' agreement is a valid contract, (2) whether, if valid, the agreement falls within the scope of the FAA, and (3) whether the parties' dispute is within the scope of the agreement.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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