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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000034-MR

RHONDA PALAZZO — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 10-CI-004827

FIFTH THIRD BANK;
FIFTH THIRD SECURITIES, INC.; AND
CATHERINE MITCHELL — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; KELLER AND LAMBERT, JUDGES.

KELLER, JUDGE: Rhonda Palazzo (Palazzo) appeals from the trial court's dismissal of her complaint in favor of arbitration. On appeal, Palazzo argues that she cannot be forced to arbitrate her claims against Fifth Third Bank (the Bank) and Catherine Mitchell (Mitchell) because she did not enter into arbitration

agreements with either of these parties. Palazzo also argues that, although she did enter into an arbitration agreement with Fifth Third Securities, she cannot be compelled to arbitrate her claims against that party because the agreement is unenforceable. The Appellees argue to the contrary. Having reviewed the record, the arguments of the parties, and the relevant law, we affirm.

FACTS

The relevant facts are not in dispute.[1] Sometime in 2005, Mitchell, a recruiting manager for Fifth Third Securities and/or the Bank,[2] recruited Palazzo from her job as an investment executive with National City. During the recruitment process, Mitchell allegedly made certain promises to Palazzo regarding compensation and working conditions. Based on Mitchell's alleged promises, Palazzo accepted a position as a retail investment consultant at Fifth Third Securities in July 2005. The parties agree that, although Palazzo worked as a retail investment consultant, she was "jointly employed" by Fifth Third Securities and the Bank. It is not clear from the record how Palazzo's "joint employment" worked.

According to Palazzo, it became clear early on in her employment that Fifth Third Securities and/or the Bank were not going to live up to Mitchell's promises. Palazzo alleged that, during the following four and a half years, she was

[1] We note that Palazzo sets forth detailed allegations regarding her claims against the Appellees; however, those allegations are not relevant to the issues on appeal. Therefore, we only provide a brief summary herein.

[2] It is unclear from the record if Mitchell was employed by Fifth Third Securities, the Bank, or by the two jointly.

subjected to gender-based discrimination by Mitchell and other management personnel at Fifth Third Securities and/or the Bank; that the failure of Fifth Third Securities and/or the Bank to live up to Mitchell's promises amounted to fraud and/or intentional misrepresentation; and that personnel at Fifth Third Securities and/or the Bank retaliated against her when she complained of her mistreatment.

On April 14, 2010, Palazzo was discharged from her position as a retail investment consultant. According to Palazzo, that action resulted in a blemish on her investment brokers' license, which has had an adverse impact on her ability to find a job.

Palazzo filed a complaint on July 12, 2010, alleging the claims as outlined above. We note that, in her complaint, Palazzo refers to Fifth Third Securities and the Bank as "Fifth Third," and she does not separate these entities in terms of her allegations.

On August 23, 2010, the Appellees filed a motion to dismiss Palazzo's complaint or, in the alternative, to stay proceedings in circuit court pending arbitration. In support of their motion, the Appellees noted that Palazzo had signed a "Registered Representative Agreement" (the Agreement) and a "Uniform Application for Securities Industry Registration or Transfer" (Form U-4), both of which contained provisions requiring Palazzo and Fifth Third Securities to submit any disputes to arbitration. We note that the Agreement lists Fifth Third Insurance Agency, Inc. as an additional party, but it does not list either the Bank or Mitchell as parties. The only parties to the Form U-4 are Fifth Third Securities and Palazzo.

In her response, Palazzo argued, as she does here, that she did not have any agreement with the Bank or Mitchell to submit her claims against them to arbitration. She also argued that the arbitration provisions of the Agreement and Form U-4 are not enforceable, because they waived prospective statutory claims.

On November 30, 2010, the circuit court granted the Appellees' motion and dismissed Palazzo's claims. In doing so, the court determined that the arbitration provisions in the Agreement and the Form U-4 are enforceable. The court also determined that, because of her employment relationship and because the Bank and Fifth Third Securities are related entities, Mitchell and the Bank could invoke and benefit from the arbitration provisions in the Agreement and Form U-4. It is from this order that Palazzo appeals.

STANDARD OF REVIEW

When reviewing a trial court's ruling on the enforceability of an arbitration agreement, we defer to the court's factual findings but review its conclusions of law *de novo.* Because it appears that the trial court was not called upon to make, and did not make, any findings of fact, our review is *de novo*. *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001).

ANALYSIS

Before addressing the specific issues raised by Palazzo on appeal, we note the following general principles. "Arbitration is a matter of contract . . . [and] [c]ourts must place arbitration agreements on an equal footing with other contracts . . . enforcing them according to their terms[.]" *AT&T Mobility LLC v.*

Concepcion, ____ U.S. ____, 131 S. Ct. 1740, 1745, 1752, 179 L. Ed. 2d 742 (2011). As with any contract, parties to an arbitration agreement are free "to limit the issues subject to arbitration, . . . to arbitrate according to specific rules, . . . and to limit *with whom* [they] will arbitrate . . . disputes[.]" 131 S. Ct. at 1748-49 (Emphasis in original and internal citations omitted). When there are any doubts as to the scope of an arbitration agreement, those doubts should be resolved in favor of arbitration. *Hill v. Hilliard*, 945 S.W.2d 948, 951 (Ky. App. 1996).

With the preceding general principles in mind, we first address whether Palazzo can be forced to arbitrate her claims against the Bank. Palazzo admits that she entered into an agreement to arbitrate her claims against Fifth Third Securities; however, she notes that she did not enter into an arbitration agreement with the Bank. The Bank argues that, even though it was not a signatory to the arbitration agreement, it is entitled to enforce the agreement. We agree for two inter-related reasons.

First, in her complaint, Palazzo treats Fifth Third Securities and the Bank as one entity - "Fifth Third." Palazzo alleges that Fifth Third "breached its contracts with" her and that she relied, to her detriment, on the agreements she had with Fifth Third. Palazzo cannot, on the one hand, seek the benefit of those alleged contracts between her and Fifth Third Securities and the Bank, and, on the other hand, disavow the arbitration provision that is part of those alleged contracts. *See North Fork Collieries, LLC v. Hall,* 322 S.W.3d 98 (Ky. 2010).

Second, although we are not bound by it, we are persuaded by the federal district court's opinion in *Kruse v. AFLAC Intern., Inc.* 458 F. Supp. 2d 375, 383 (E.D. Ky. 2006). In that case, Kruse filed a complaint in federal district court asserting a number of state and federal claims against AFLAC, three entities related to AFLAC, and an individual who was an employee of one of the entities. The defendants moved to dismiss the district court case based on an arbitration agreement between Kruse and AFLAC and one of the other entities. Kruse argued that she could not be forced to arbitrate because the other two entities and the individual were not signatories to the arbitration agreement. In holding that the arbitration agreement was enforceable against all of the entity defendants, the court found that the related entities stood "in the shoes of the entity that signed the agreement" and could, therefore, enforce it.

As in *Kruse*, Fifth Third Securities and the Bank are related entities. Furthermore, Palazzo admitted that she was employed by both entities, and she treated them, for purposes of her complaint, as one entity. Fifth Third Securities and the Bank stand in each other's shoes with regard to their employment of Palazzo; therefore, they stand in each other's shoes with regard to the arbitration agreement. Thus, we hold that the circuit court correctly determined that the arbitration agreement applies to the Bank.

We next address whether Palazzo can be forced to arbitrate her claims against Mitchell. Palazzo alleged in her complaint that Mitchell made fraudulent representations that induced Palazzo to leave her employment with National City

and to take a position with Fifth Third Securities and the Bank. Additionally, Palazzo alleged that Mitchell discriminated and retaliated against her. All of these allegedly wrongful acts occurred while Mitchell was employed by Fifth Third Securities and/or the Bank as the "Louisville Sales Manager."

Again, recognizing that we are not bound by the Opinion of the United States Sixth Circuit Court of Appeals in *Arnold v. Arnold Corp.-Printed Communications For Business*, 920 F.2d 1269 (6th Cir. 1990), we are persuaded by its reasoning. In *Arnold*, the Court noted that a number of federal circuits have held that non-signatory employees, whose alleged actions arose out of their employment, are covered by their employers' arbitration agreements. In referring the dispute before it to arbitration, the *Arnold* Court noted that the agreement in question indicated "that the parties' basic intent was to provide a single arbitral forum to resolve all disputes . . . ." *Id.* at 1282. Based on the fact that the claims arose out of employment and the intent of the parties, the Court referred the matter to arbitration.

The Agreement in this case states that, with the exception of injunctive relief, any disputes between Palazzo and Fifth Third Securities

> including claims concerning compensation, benefits or other terms or conditions of employment and termination of employment (including but not limited to claims for discrimination or harassment under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, The Worker Adjustment and Retraining Notification Act, Americans With Disabilities Act, or any other federal, state or local employment or

> discrimination laws, rules or regulations), will be determined by arbitration . . . .

The arbitration provision in the Form U-4 provides that Palazzo agreed:

> [T]o arbitrate any dispute, claim or controversy that may arise between me and my *firm*, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the RROs indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction.

(Emphasis in original).

As in *Arnold*, the clear intent of the preceding language is to provide a single arbitral forum to resolve all disputes, including those related to Mitchell. Because the intent is clear and any wrongful activity by Mitchell took place during and in the course of her employment by Fifth Third Securities and/or the Bank, we discern no error in the trial court's determination that Palazzo's claims against Mitchell are subject to arbitration.

Finally, we address Palazzo's argument that "arbitration agreements that prospectively waive statutory employment discrimination claims are unenforceable." In support of her argument Palazzo cites to *Hilliard v. Oliver*, 2003-CA-000719-MR, 2004 WL 1635797 (Ky. App. July 23, 2004). In that case, Oliver alleged that Hilliard wrongfully terminated his employment in order to avoid paying a bonus. Hilliard moved to dismiss Oliver's claim and to enforce the arbitration provision of the Form U-4 that Oliver had signed. *Id.* at *1-2. The Form U-4 required Hilliard to ensure that Oliver was familiar with the rules

concerning arbitration. In response to Hilliard's motion to dismiss, Oliver filed an affidavit indicating he had not been informed of the arbitration rules, and he had not been provided any documentation regarding those rules. Hilliard did not controvert Oliver's affidavit but stated it "assumed" Oliver understood the rules. *Id.* at *2. The trial court denied Hilliard's motion.

This Court did not, as Palazzo argues, dismiss Hilliard's appeal because the Form U-4 signed by Oliver dealt with a waiver of prospective statutory claims. This Court dismissed Hilliard's appeal because the trial court's order was not appealable. As noted by this Court, if Hilliard had an objection to the trial court's denial of its motion to dismiss and compel arbitration, it should have filed a motion for interlocutory relief pending final judgment pursuant to Kentucky Rule of Civil Procedure (CR) 65.07, not an appeal. Thus, this Court determined that it did not have jurisdiction to address Hilliard's appeal.

After making that determination, this Court stated, in *dicta,* that, if it had jurisdiction, it would not have reversed the trial court. In doing so, this Court noted that Hilliard had not provided to Oliver the information it was required to provide pursuant to the Form U-4. Thus, Oliver was not aware of the full extent of Hilliard's arbitration policy, and there was "no meeting of the minds." Because Hilliard had certified it had provided the required information, even though it had not, this Court held that the trial court "properly weighed the equities in Oliver's favor." *Id.* at 4-5. This Court did not address, and apparently was not asked to

address, whether the arbitration agreement was unenforceable because it waived prospective statutory claims. Therefore, *Oliver* has no bearing on this appeal.

Having disposed of *Oliver*, we agree with the Appellees that the law does not support Palazzo's argument that an employee cannot prospectively waive statutory claims. As noted by the Appellees, such an interpretation would frustrate one of the main purposes of arbitration - to afford parties the opportunity to determine, before they arise, how disputes will be resolved. *See Concepcion*, 131 S. Ct. at 1749. Furthermore, the Appellees' argument, if accepted, would effectively negate the mandate that arbitration agreements must be interpreted according to their terms. 131 S. Ct. at 1745. The terms of both the Agreement and the Form U-4 require arbitration of prospective claims. Nothing Palazzo has pointed to requires us to hold otherwise; therefore, the trial court's order dismissing Palazzo's claim in favor of arbitration was proper.

CONCLUSION

For the foregoing reasons, we affirm the trial court's dismissal of Palazzo's claim.

ALL CONCUR.

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