RENDERED: AUGUST 22, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000044-MR

K. MICHAEL ROBERTS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA McCORMICK BISIG, JUDGE
ACTION NO. 12-CI-002902

ROBERT MOLYNEAUX
AND GERALDINE TALBOTT — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

VANMETER, JUDGE: K. Michael Roberts appeals from the Jefferson Circuit Court's order denying his motion to compel arbitration. For the following reasons, we reverse and remand.

On September 7, 2010, Roberts entered into a Residential Sales Contract with realtor Rick Molyneaux and Geraldine Talbott to purchase a property owned

by Talbott in the Deer Park neighborhood of Louisville. Roberts claims that when he entered into the sales contract, both Molyneaux and Talbott had assured him that the property could easily be turned into a duplex. The listing for the property identified the property as "Single Family Residential" and stated, "It is currently and for the past 35 years been used as a single family home but can very easily, at very little cost, be converted to a duplex. It already has separate meters."

Roberts began transitioning the house into a duplex. In January 2011, he received a cease-and-desist order informing him that his construction violated the neighborhood's zoning regulations. Roberts requested a conditional use permit to use the property as a duplex subject to certain restrictions. The zoning board held a public meeting on Roberts's request for a conditional use permit in May 2011. At the meeting, a resident of the neighborhood testified that Talbott had received a similar cease-and-desist order for attempting to convert the property into a duplex in 1992, an order of which Roberts claims he was previously unaware.

On November 17, 2011, Roberts served Molyneaux and Talbott with a demand for arbitration and mediation in accordance with Paragraph 24 of the Residential Sales Contract. Paragraph 24 states, in relevant part:

> **24. MEDIATION/BINDING ARBITRATION:** Notice of Demand for Mediation and Notice of Demand for Arbitration must be made within 365 days after the party raising the claims knew, or should have known, of the existence of said claims. Any dispute or claim (including, without limitation, claims of fraud, misrepresentation, warranty and/or negligence) of Seller, Buyer, brokers, agents or any of them for a sum greater than the limits of small claims court jurisdiction arising

> out of this Contract or breach thereof or arising out of or relating to the physical condition of the property covered by this Contract shall first be submitted to mediation in accordance with the Greater Louisville Association of REALTORS, Inc.
>
> . . . .
>
> If mediation does not result in an agreement signed by the parties, all such claims or disputes shall be decided by binding arbitration in accordance with the guidelines of the Greater Louisville Association of REALTORS, Inc. and the laws of the Commonwealth of Kentucky.

Molyneaux and Talbott agreed to mediation and participated without objection in April 2012. When mediation proved unsuccessful, Roberts moved for the appointment of an arbitrator in accordance with the arbitration rules of the Greater Louisville Association of Realtors.

Molyneaux and Talbott refused Roberts's request for arbitration, and instead filed a declaratory judgment action in Jefferson Circuit Court, seeking to have the court declare the rights of the parties with respect to the arbitration provision in the Residential Sales Contract. In their complaint, Molyneaux and Talbott alleged that Roberts knew or should have known of the property's zoning restrictions when he entered into the Residential Sales Contract in September 2010, and therefore, a demand for arbitration in November 2011 was untimely. They asked the court to rule that Roberts waived his right to arbitrate by failing to timely invoke his right to arbitration within the contractual 365-day period.

Roberts moved to dismiss the case and to compel arbitration. Molyneaux and Talbott served Roberts with 38 discovery requests, seeking information

concerning Roberts's knowledge of the zoning regulations applicable to the property. The court ordered Roberts to answer Molyneaux's and Talbott's discovery requests without ruling on Roberts's motion to dismiss and compel arbitration. Roberts eventually answered the discovery requests, but objected to the requests that sought information related to the merits of his fraud claims, claiming that such discovery would only be answered once the court ruled on his motion to dismiss and compel arbitration.

After receiving Roberts's incomplete discovery answers, Molyneaux and Talbott filed a motion to compel discovery. The trial court considered the motion to compel discovery and Roberts's motion to dismiss and compel arbitration in the same hearing on December 13, 2012. The trial court granted the motion to compel discovery and denied Roberts's motion to dismiss and compel arbitration. Roberts now appeals that decision.

An appeal may be taken from denial of an order to compel arbitration. KRS[1] 417.220(1)(a). "The trial court's factual findings, if any, are reviewed for clear error, but its construction of the contract, a purely legal determination, is reviewed *de novo*." *North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102 (Ky. 2010) (citation omitted). "That is, we defer to the trial court's factual findings, upsetting them only if clearly erroneous or if unsupported by substantial evidence, but we review without deference the trial court's identification and application of legal

[1] Kentucky Revised Statutes.

principles." *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001).

Roberts argues the timeliness of a demand for arbitration is an issue that should be determined by an arbitrator, not the courts, and therefore, his motion to compel arbitration should have been granted. Molyneaux and Talbott assert that the motion to compel arbitration was properly denied because proceeding with discovery is necessary to establish when Roberts learned of the zoning issues, or when his claim came into existence. They allege that the arbitration agreement itself is void, and Roberts waived his right to arbitrate if the demand for arbitration was not made within 365 days from the date he learned of the zoning restriction.

This court has previously addressed whether the timeliness of a demand for arbitration should be decided by the courts or the arbitrators. *Beyt, Rish, Robbins Group v. Appalachian Reg'l Healthcare, Inc.*, 854 S.W.2d 784 (Ky. App. 1993). In *Beyt Rish*, we held that the timeliness of an arbitration demand is to be decided by the arbitrator. *Id*. at 786. That decision was based on two factors: (1) broad and expansive language in the arbitration agreement indicating intent of the parties to leave as much as possible to the arbitrators; and (2) the Uniform Arbitration Act ("UAA"), KRS 417.045-.240, expressing public policy in favor of enforcing arbitration agreements. *Id*. As we noted in *Beyt Rish*, the UAA "provides only one ground for a court to stay an arbitration proceeding: 'on a showing that there is no agreement to arbitrate.' KRS 417.060(2)." *Id*. Roberts claims that because the

parties clearly had an agreement to arbitrate, the dispute over the timeliness of his demand for arbitration must be decided by an arbitrator.

This court explained the preference for having arbitrators handle the procedural issue of timeliness in *Beyt Rish*. Citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 556-57, 84 S.Ct. 909, 918, 11 L.Ed.2d 898 (1964), we noted:

> The United States Supreme Court has held that the decision on such procedural issues lies not with the courts, but with the arbitrators.
>
> Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it.
>
> ….
>
> It would be a curious rule which required that intertwined issues of "substance" and "procedure" growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result.
>
> Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

Beyt Rish, 854 S.W.2d at 787. Hence, considerations of efficiency and consistency also support the decision to have arbitrators decide timeliness disputes.

However, Molyneaux and Talbott point out that this court also acknowledged another scenario in *Beyt Rish*, stating: "while we are aware that the

Maryland Courts have strained to find that delay in demanding arbitration can result in the right to arbitrate under an agreement being 'treated as though it never existed,' no such contention has been made herein by Beyt Rish." *Id*. (citation omitted). In the present case, Molyneaux and Talbott assert that the agreement should be treated as if it never existed due to Roberts's delay in demanding arbitration. They claim that this court's language in *Beyt Rish* constitutes an exception to the rule that timeliness disputes are for the arbitrator. We disagree.

We do not believe the language cited by Molyneaux and Talbott from the *Beyt Rish* decision mandates that a delay in demanding arbitration automatically renders the agreement to arbitrate nonexistent. While KRS 417.060(1) does state, "[i]f the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised[,]" we do not believe this statute applies to the instant case. Ultimately, Molyneaux and Talbott cannot plausibly deny that an arbitration agreement exists. It might be rendered void if Roberts's demand for arbitration is in fact untimely, but we do not believe that the alleged delay in this case is sufficient to render the agreement nonexistent.[2]

[2] We note that Molyneaux and Talbott willingly participated in mediation following Roberts's demand, and only brought their declaratory judgment action after mediation was unsuccessful and Roberts requested arbitration pursuant to the Residential Sales Contract and the Greater Louisville Association of REALTORS, Inc.'s guidelines. Roberts demanded mediation and arbitration contemporaneously in his letter to Molyneaux and Talbott in November 2011, and Molyneaux and Talbott willingly participated in mediation without bringing a declaratory judgment action on grounds of delay. The arbitration agreement contained in the Residential Sales Contract specifically states that in the event mediation is unsuccessful, then the claims are to be submitted to binding arbitration. Since mediation between the parties was unsuccessful, arbitration was the next appropriate avenue for relief under the agreement.

"Kentucky and national policy have generally favored agreements to arbitrate." *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 854 (Ky. 2004). While likening the Federal Arbitration Act to the UAA, the Supreme Court of Kentucky held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id*. at 855 (internal quotation and citation omitted). Because Kentucky courts favor upholding arbitration agreements, we believe the present dispute is best addressed by an arbitrator, as the parties intended at the time they signed the agreement. The trial court's order denying Roberts's motion to compel arbitration was in error, and on remand, the trial court is instructed to compel arbitration.

The order of the Jefferson Circuit court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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