RENDERED: AUGUST 16, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000915-MR

APEX INDUSTRIAL MAINTENANCE, INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. JUDGE AUDRA J. ECKERLE
ACTION NO. 18-CI-001157

F.W. OWENS COMPANY, INC. AND
AMERICAN ARBITRATION ASSOCIATION, INC. APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON, SPALDING, AND TAYLOR, JUDGES.

SPALDING, JUDGE: This appeal involves a contract dispute between the appellee, F.W. Owens, and the appellant, Apex Industrial Maintenance regarding masonry work the appellant was to perform for the appellee on the University of Louisville Student Activities Center. The parties agree that the appellant submitted

a bid for masonry work with appellee Owens on this project. Based upon that bid, the appellee prepared a written agreement for the project and a representative signed the agreement dating it February 15, 2017. No representative of the appellant signed the agreement. The project was originally scheduled to begin April of 2017. In April of 2017 the appellant was advised by the appellee that the start date had been delayed to May 1, 2017. The start date was additionally delayed until after July 4, 2017. However, at that time it appears that the appellant was no longer able to perform the work and the appellee obtained Parco Construction to complete the masonry work for the project.

In September of 2017, appellant sought reimbursement for materials it supplied in anticipation of the project. After receiving this letter, appellee demanded compensation for the breach of contract from its perspective. It sought an arbitration pursuant to Subsection 24 of the agreement which states:

> A. Any controversy or claim arising out of or related to this Agreement shall be settled by arbitration in accordance with the provisions of this Article.
> B. Upon the written demand by either party upon the other, the parties shall select any person upon whom they can agree to serve as arbitrator to resolve the dispute between them. If, within 20 days after service of the demand for arbitration, the parties are unable to agree upon an arbitrator, either party may petition the Jefferson Circuit Court (Kentucky) to appoint an arbitrator.
> C. At a time mutually satisfactory to the parties and the arbitrator, a hearing will be held in Louisville, Kentucky at which time both parties will have the

opportunity to present their oppositions to the arbitrator regarding the dispute or disputes then in issue. Except as otherwise provided herein, the arbitration will be conducted in conformance with the Construction Industry Arbitration Rules of the American Arbitration Association. The arbitrator will render a decision on the dispute or disputes, which shall be final and binding upon both parties to this Agreement. The fees to be paid to the arbitrator and any other expenses associated with the arbitration shall be borne equally by the parties to this agreement.

D. Pending final resolution of a claim, the Subcontractor shall proceed diligently with performance of the Subcontractor's Work and it shall continue to make monthly applications for payment and shall be entitled to receive progress payments in accordance with the provisions of this Agreement.

E. The foregoing agreement to arbitrate shall be specifically enforceable under applicable laws in any court having jurisdiction thereof. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

The appellant opposed this arbitration and initiated a civil action in Jefferson Circuit Court to quash the arbitration.

The petition makes the following specific allegations. In Paragraph 2, it alleges "The parties never signed any written agreement as to the work to be done or binding either party to the bid. There was no firm legal obligation that required the Defendant, F.W. Owens Company, Inc., herein to use the Plaintiff as its contractor."

Paragraph 8 of the petition alleges that the plaintiff had "never entered into a final contract."

Paragraph 9 of the petition alleges that the defendant "sought to enforce an unsigned contract which had never been tendered to the Plaintiff alleging that the unsigned contract was somehow enforceable" and further alleged that the "Plaintiff never saw said contract until after the Defendant, F.W. Owens Company, Inc., believed itself entitled to reimbursement for additional labor costs."

Paragraph 11 of the petition alleges that "No arbitration clause was ever assented to by the Plaintiff and no duty to arbitrate therefore arises."

Paragraph 14 of the petition alleges that "For an arbitration agreement to be enforceable, it must be assigned and assented to by the parties involved with the contract and such assent is currently lacking." The appellee Owens filed a motion to dismiss the petition by special appearance.

The court below ruled upon the motion to dismiss of the appellee. The court held specifically that it was treating this as a motion to dismiss under Kentucky Rules of Civil Procedure (CR) 12.02. The judgment stated matters outside of the pleadings were not considered. The court granted appellee's motion to dismiss. The court held that the allegations made in the petition by the appellant were challenges to the validity of the contract as a whole, not to the arbitration

clause alone. Therefore, pursuant to the U.S. Supreme Court's ruling in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), that the decision of whether there was a contract must go to the arbitrator to be decided and the petition to quash arbitration must be dismissed. This appeal followed.

In reviewing a motion to dismiss under CR 12.02, the pleadings are to be liberally construed in a light most favorable to the petitioner and all allegations taken in the complaint to be true. As this is a pure question of law, the standard of review by the court is *de novo*. *Littleton v. Plybon*, 395 S.W.3d 505, 507 (Ky. App. 2012). If the court considers information beyond the pleadings in a motion to dismiss, then the motion is to be reviewed as if the motion was filed under the summary judgment standard of CR 56. CR 12.02. The appellant urged the circuit court to review this motion under summary judgment standards pursuant to CR 56. The court below did not do so.

The essential holding of the court below is that because the appellant's allegation is that it did not agree to the contract as a whole and not the arbitration clause specifically, this matter must be arbitrated. The "party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate." *New Meadowview Health and Rehabilitation Center, LLC v. Booker*, 550 S.W.3d 56, 58 (Ky. App. 2018). The Kentucky Supreme Court in

Dixon v. Daymar Colls. Grp., LLC, 483 S.W.3d 332, 343 (Ky. 2015) held that an arbitration agreement need not be signed but must be in writing. Therefore, this agreement, though unsigned, can still bind the appellant to an arbitration.

In its pleadings, the appellant alleges that the parties hereto had no binding agreement of any kind, including to arbitrate. It specifically alleged in Paragraph 9 that the contract had never been tendered to appellant and it never saw the contract until a dispute arose. The court below held, as a matter of law, that dispute must be arbitrated because that is a challenge to the contract as a whole. However, looked at another way, the appellant is arguing it did not enter into the agreement to arbitrate because he did not enter into any agreement at all.

We hold that the circuit court erred in granting the motion to dismiss. In its petition, the appellant clearly states that it did not agree to the arbitration. The arbitration agreement was included in a contract that was unsigned by the appellant. If the pleadings are liberally construed with all allegations resolved in favor of the plaintiff, then the allegations must be taken at face value. The plaintiff contends that it did not agree to arbitration nor even saw it until there was a dispute. As *Booker* holds, it is incumbent on the party seeking arbitration to initially establish the existence of a valid agreement to arbitrate.

The appropriate procedure to resolve the issue is set forth in Kentucky Revised Statutes (KRS) Chapter 417, the Kentucky Uniform Arbitration Act

(KUAA), as is set forth in *Fischer v. MBNA America Bank, N.A.*, 248 S.W.3d 567 (Ky. App. 2007). In *Fischer*, a credit card holder disputed the existence of a written agreement to arbitrate a dispute with a credit card company. The *Fischer* court held the "[f]irst basic requirement for our review under the KUAA is whether there exists a written agreement to submit a controversy to arbitration or a provision in a written contract that requires arbitration of any controversy thereafter arising between the parties." *Id*. at 570. If a party opposed to the arbitration "denies the existence of the agreement to arbitrate, the court shall proceed summarily to determine whether an agreement exists." *Id*. at 571. If a party applies to stay an arbitration proceeding, the issue of there being an agreement to arbitrate "when in substantial and bona fide dispute, shall be forthwith and summarily tried." KRS 417.060(2). It was for the court and not the arbitrator to decide whether an agreement to arbitrate existed.

This holding does not conflict with *Cardegna*. In *Cardegna*, the U.S. Supreme Court held that a challenge to the illegality of a contract is subject to arbitration if the parties had an agreement to arbitrate. The agreement to arbitrate is severable from other issues that would determine if the contract was valid. *Cardegna*, 546 U.S. at 449, 126 S. Ct. at 1210. Here, the very question is whether the parties agreed to arbitrate. The facts of whether the parties had an agreement to arbitrate may be one and the same as the facts of whether they had a meeting of the

minds to form a contract. However, that does not preclude the circuit court from deciding solely the issue of whether there was an agreement to arbitrate. It does not require the court to determine whether there was a contract.

Both parties in the circuit court and their briefs to this Court argue about the facts of the case and whether there was an agreement by the conduct of the appellant. However, that is not the issue before this Court. The petition avers that there was no agreement to arbitrate. A hearing was required to determine whether an agreement to arbitrate existed as it was disputed in the pleadings.

The order of dismissal in this matter is hereby vacated and this matter is remanded to the Jefferson Circuit Court for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Andrew White
Louisville, Kentucky

BRIEF FOR APPELLEE, F.W. OWENS COMPANY, INC.:

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