

RENDERED: NOVEMBER 1, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000069-MR

NICOLE RIBEIRO

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 18-CI-003196

K&D BUILDERS, INC.; DON BOOTH
of the Breland Group; and
DEBBIE LAWSON of Coldwell
Banker/McMahan

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: COMBS, JONES, AND L. THOMPSON, JUDGES.

COMBS, JUDGE: Nicole Ribeiro appeals from a judgment of the Jefferson Circuit Court entered on December 21, 2018. The judgment confirmed an arbitration decision rejecting her claims against: K&D Builders, Inc., owner and builder of a home that Ribeiro purchased in Louisville; Debbie Lawson, Ribeiro's

agent for the transaction; and Don Booth, the seller's agent. After our review, we vacate and remand for entry of an order to grant a new arbitration.

On October 28, 2016, Ribeiro purchased a house on Vista Hills Boulevard in Louisville. The house was built by K&D Builders in the mid-2000's on speculation. However, because of a severe downturn in the housing market, the house was converted by K&D Builders to rental property. Between 2007 and June or July 2016, a series of three tenants rented the house pursuant to lease agreements with K&D Builders. After the last tenant moved, K&D Builders engaged Don Booth to list and sell the property.

In mid-October, Ribeiro and her agent, Debbie Lawson, toured the house on two separate occasions. After her second visit, Ribeiro made a written offer to purchase the property. K&D Builders accepted her offer, and the parties entered into a purchase/sell contract that provided for arbitration of any dispute or claim regarding the transaction.

Before closing, Ribeiro had the property inspected by a licensed home inspector. In his report, the inspector noted that he observed cracks in the home's foundation; signs of moisture infiltration in the basement floor and walls; erosion under some downspouts; and unlevel grading around the house that left soil above some weep holes. Nevertheless, the inspector concluded that the house was "fundamentally sound." Before closing, K&D Builders made repairs to the house

as requested by Ribeiro. She did not object to the extent or quality of the repairs prior to closing.

At closing, Ribeiro accepted a general warranty deed from K&D Builders. In the next several months, Ribeiro began remodeling the interior of the house. However, citing defects in the home's interior and the yard, Ribeiro moved out in March 2017. Seeking to recover damages or to rescind the contract, Ribeiro commenced an arbitration proceeding against K&D Builders and both of the real estate agents involved in the transaction. She alleged that K&D Builders intentionally deceived her into purchasing the property by withholding or misrepresenting material information regarding the condition of the home. Ribeiro alleged that Booth, the agent for K&D Builders, violated his statutory duty under the provisions of KRS¹ 324.360 by failing to deliver a disclosure statement to her before closing. She alleged that Lawson, her agent, breached her fiduciary duty by failing to advise Ribeiro that she should not purchase the property without reviewing the seller's disclosure.

The arbitrator heard testimony from fourteen witnesses during a series of hearings spread over four days. He reviewed forty-eight exhibits and inspected the house himself. After considering the parties' briefs and the evidence presented, the arbitrator prepared extensive findings of fact and conclusions of law. In his

¹ Kentucky Revised Statutes.

decision, entered March 16, 2018, the arbitrator concluded that Ribeiro could not as a matter of law prevail on her claims for breach of contract or for rescission; that she had not proven fraud by clear and convincing evidence; that Ribeiro did not suffer damages because there was nothing wrong with her house; that even assuming that damages had been sustained, they did not result from a violation of the provisions of KRS 324.360 (part of the building code); and, finally, that Ribeiro could not establish a breach of any fiduciary duty owed to her.

On June 5, 2018, Ribeiro filed a petition to vacate the arbitration decision pursuant to the provisions of KRS 417.160. She argued that the decision should be set aside because the arbitrator (1) exceeded his powers and (2) erred by refusing to hear evidence material to the controversy. K&D Builders, Lawson, and Booth filed separate answers in which they denied that there was any basis upon which the arbitration decision could be set aside. By order entered on December 6, 2018, the circuit court denied Ribeiro's petition to vacate. Judgment was subsequently entered confirming the arbitrator's decision. This appeal followed.

Pursuant to Kentucky's Uniform Arbitration Act, KRS Chapter 417, a court's review of an arbitration decision is strictly and severely circumscribed. *Ison v. Robinson*, 411 S.W.3d 766, 770-71 (Ky. App. 2013). "[A]n arbitrator's resolution of factual disputes and his application of the law are not subject to review by the courts." *Conagra Poultry Co. v. Grissom Transp., Inc.*, 186 S.W.3d

243, 245 (Ky. App. 2006) (citation omitted). The provisions of KRS 417.160(1) establish the limited grounds upon which an arbitration award may be vacated.

On appeal, Ribeiro relies upon two of the statutory grounds. She argues first that the court erred by failing to vacate the decision because the arbitrator refused to hear evidence material to the controversy. KRS 417.160(1)(d). She also argues that the court erred by failing to set aside the arbitration decision because the arbitrator exceeded his powers. KRS 417.160(1)(c).

Ribeiro contends that the arbitrator's decision must be set aside because the arbitrator erred by refusing to hear evidence material to the controversy and that she was substantially prejudiced as a result. There is no transcript of the arbitration proceedings. However, in his decision, the arbitrator noted that Herb Goff (a geologist and engineer) had appeared at the hearing to testify on behalf of Ribeiro. The arbitrator explained that counsel for K&D Builders objected during his testimony on the basis of relevancy and that after considering the arguments of counsel, Goff was excused as a witness. Ribeiro contends that Goff's testimony was critical because he had inspected the house and concluded that there were at least seven building code violations. Ribeiro argues that the arbitrator's decision to exclude Goff's testimony deprived her of the opportunity to present her best case.

KRS 417.090(2) provides that the parties are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing. KRS 417.160(1)(d) permits a court to vacate an arbitration decision where the arbitrator “refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing . . . as to prejudice substantially the rights of a party[.]” Pursuant to these provisions, arbitrators are given wide latitude in conducting arbitration hearings.

Not every evidentiary ruling by an arbitrator excluding a proffered witness constitutes a “refusal to hear evidence” in the statutory sense sufficient to serve as a ground to vacate an arbitration decision. The circuit court agreed with the arbitrator’s decision to exclude Goff’s testimony, observing as follows:

Ribeiro argued that some of the problems with the home were so severe that they actually violated the building code, [sic] there is no argument that there was not ample evidence placed in the record at the arbitration hearing of the problems Ribeiro claimed with the property.

Under the circumstances of this case, we are persuaded that Ribeiro was entitled to present more evidence -- especially through an expert who was both an engineer and geologist -- rather than to have to rely on her own perception of her problems. We agree that the evidentiary ruling excluding Goff was erroneous

and that the circuit court erred as well in failing to so conclude. Therefore, we vacate and remand as to Ribeiro's argument pursuant to KRS 417.160(1)(d).

For her second argument, Ribeiro contends that the arbitrator exceeded his powers by misapplying the provisions of KRS 324.360, which requires the seller of residential property to disclose to potential buyers any information that the seller has about the condition of the property. She contends that K&D Builders and Booth, its agent, "made a mockery" of the statute by failing to disclose relevant information about the property and that the arbitrator's decision effectively and unfairly absolved them of any consequence of their noncompliance. Ribeiro argues that the arbitrator erred in concluding that the seller's disclosure statement was subject to being interpreted and construed according to the doctrine of "merger by deed." Both the arbitrator and the circuit court cited to and relied upon *Borden v. Litchford*, 619 S.W.2d 715, 717 (Ky. App. 1981), which held that all prior statements regarding the sale of a property are merged into the deed and **the buyer may not rely on them** for recovery.

Ribeiro argues persuasively that *Borden* pre-dated KRS 324.360 by eleven years and that the more recent statute should prevail. Noting that Kentucky has not addressed this issue of a conflict between the merger doctrine and the

statute imposing a duty to disclose, she cites cases from California² and Illinois³ for the proposition that the merger doctrine should not bar a claim filed pursuant to a disclosure statement.

We agree. KRS 324.360 has superseded *Borden*, and insofar as a seller has failed to comply with the dictates of the statute, we hold that the statute prevails.

We note that the sellers failed to provide the disclosure statement to Ribeiro in a timely fashion. By the express terms of the statute, she should have received the disclosure form no later than October 16, 2016. All parties to the arbitration agreed that she received it either on October 24 or on October 25, 2016. Closing occurred soon thereafter on October 28, leaving Ribeiro arguably insufficient time to examine the disclosure statement or to seek expert advice with respect to its contents. And significantly, she testified that she would not have proceeded with the closing had she received the statement.

Kerry Hatfield, co-owner of K&D, testified at the arbitration hearing that he knew “almost nothing” about the construction or condition of the house. His was the only signature on the disclosure form; the majority of the questions on the form were marked with the response of “unknown.”

² *Ram’s Gate Winery, LLC v. Roche*, 235 Cal. App. 4th 1071 (2015).

³ *Coughlin v. Gustafson*, 332 Ill. App. 3d 406, 414 (2002).

We are compelled to vacate on this ground as well. The failure to comply with both the letter and the spirit of KRS 324.360 constitutes a sufficient ground for vacating the arbitration decision pursuant to KRS 417.160(1)(c).

Therefore, we vacate the order of the Jefferson Circuit Court upholding the arbitration decision in this case and remand for entry of an order directing that a new arbitration hearing be granted with a new arbitrator consistent with the reasoning set forth in this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kenneth Bohnert
Maureen Taylor
Louisville, Kentucky

BRIEF FOR APPELLEE
K&D BUILDERS, INC.:

Gerald L. Stovall
Louisville, Kentucky

BRIEF FOR APPELLEE
DON BOOTH:

Vincent J. Eiden
Crestwood, Kentucky

BRIEF FOR APPELLEE
DEBBIE LAWSON:

David J. Kellerman
Mark S. Fenzel
Louisville, Kentucky