Howard & Howard, Inc. v. Mountain Auto Services, Inc., No. 157-6-09 Lecv (Rainville, J., Oct. 13, 2009)

STATE OF VERMONT
LAMOILLE COUNTY, SS.

LAMOILLE SUPERIOR COURT

Docket No. 157-6-09 Lecv

HOWARD & HOWARD, INC.,)
Plaintiff,)
)
v.)
)
MOUNTAIN AUTO SERVICES, INC.,)
D/b/a STOWE AUTO,)
Defendant)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came before the Court on July 27, 2009, during a hearing presided over by the Honorable Judge A. Gregory Rainville. Plaintiff Howard & Howard ("Plaintiff") was represented by Marc B. Heath, Esq. Defendant Mountain Auto Service, Inc., d/b/a Stowe Auto ("Defendant") was represented by Daniel A. Seff, Esq. Plaintiff seeks Declaratory Judgment and a Stay of Arbitration. Plaintiff contends that because the claims at issue were addressed in their contractual agreement, there is no bona fide dispute between the parties. In the alternative, Plaintiff asserts that the arbitration clause is not enforceable. Defendant seeks the dismissal of Plaintiff's Complaint and an order vacating the Court's Stay of Arbitration. Defendant contends that Plaintiff breached its contractual agreement by attempting to purchase the assets at forced liquidation value rather than at fair market value. According to Defendant, such failure is also a breach of the implied covenant of good faith and fair dealing. Defendant further contends that these disputes are subject to arbitration per the parties' binding arbitration agreement. It is the resolution of these matters which is herein addressed.

Procedural History

On June 3, 2009, Plaintiff filed a Complaint for Declaratory Judgment and Motion for Stay of Arbitration with the Court. On June 15, 2009, Plaintiff filed a Motion for Expedited Consideration of Plaintiff's Motion for Stay of Arbitration. The Court granted Plaintiff's Motion for Stay of Arbitration on June 15, 2009. On June 29, 2009, Defendant filed a Motion to Vacate the Court's June 15, 2009, Order and a Motion to Dismiss. Both parties submitted several memorandums supporting and opposing the aforementioned motions.

Findings of Fact

1. Plaintiff is a Vermont corporation with its principal place of business located at [address redacted], Stowe, Vermont 05672.
2. Defendant is a Vermont corporation with its principal place of business located at [address redacted], Stowe, Vermont 05672.
3. On December 9, 2002, Plaintiff and Defendant entered into a Commercial Lease Agreement ("the Lease") whereby Plaintiff leased to Defendant a portion of commercial land, including buildings and improvement thereon, located in Stowe, Vermont.
4. The Lease is signed by both parties.
5. Prior to and during the lease, Defendant owned and operated an automotive repair and car rental business known as "Stowe Auto Services" ("Stowe Auto") and also maintained ownership of Stowe Auto's assets and equipment at the leased property.
6. In addition to the lease terms, the Lease contemplates the sale of assets/equipment located at Stowe Auto upon termination of the lease.
7. Section 26 of the Lease, in pertinent part, provides as follows:

> At the termination of the lease, Lessor shall purchase the assets/equipment of Stowe Auto Service, including the rental car business. It is agreed and known that Lessor shall purchase the name "Stowe Auto Service" for $1.00 at the termination of the lease. It is further agreed and known that Lessor purchased the goodwill of that business at the commencement of the lease and that which remains to be sold and covered in this clause is the fixtures, equipment and parts inventory of Stowe Auto Service and the name. (…) At the termination of the lease, Lessor shall purchase the assets/equipment of Stowe Auto Service at a mutually agreed upon price, which shall be based on an "In Place Value Appraisal" to be performed by a qualified appraiser acceptable to both parties.

8. Section 26.2 of the Lease, in pertinent part, provides as follows:

> If Lessor should fail to purchase the assets/equipment of Stowe Auto Service within 45 days of the date of termination of this lease in the manner herein above provided, Lessee shall, at Lessee's sole remedy, be entitled to retain possession of the leased premises rent free for a period of time not to exceed fifteen months in order to allow Lessee to effect an orderly liquidation sale of the Stowe Auto Service assets/equipment. *Definition of "In Place Value Appraisal": An opinion of the Fair Market Value, which is the gross dollar amount to be realized between a willing buyer and a willing seller, in the open market, assuming that neither party is under compulsion to buy or sell, both are fully aware of all relevant facts, of the equipment as installed for intended utilization as of the date of appraisal.*

9. Section 27.4 of the Lease contains a provision which in pertinent part provides as follows:

> Any dispute arising between the parties hereto in connection with the terms and provisions of this Lease which cannot be resolved between them shall, upon written notice from either party to the other, be submitted to binding arbitration. The cost of any such arbitration shall be paid as determined by the arbitrators. The judgment rendered by the arbitrators may be entered in any court of competent jurisdiction. Arbitration shall be conducted under the rules then prevailing of the American Arbitration Association.

10. Section 27.7 of the Lease contains an Acknowledgement of Arbitration that provides as follows:

> ACKNOWLEDGMENT OF ARBITRATION: Lessor and Lessee each acknowledge that this Lease Agreement contains an agreement to arbitrate. After signing this document, Lessor and Lessee each understand that it will not be able to bring a lawsuit concerning any disputes that may arise which is covered by the arbitration agreement, unless it involves a question of constitutional or civil rights. Instead, Lessor and Lessee each agree to submit any such dispute to an impartial arbitrator.

11. The lease terminated on December 9, 2008, and was not renewed.
12. As of 45 days following the termination of the lease, Plaintiff and Defendant were unable to agree on a purchase price for the assets/equipment of Stowe Auto despite an exchange of competing appraisals regarding the value of such assets/equipment.

13. On May 22, 2009, Defendant filed a Demand for Arbitration with the American Arbitration Association alleging breach of contract and related claims based on Plaintiff's failure to purchase Stowe Auto's assets/equipment.

Legal Conclusions

In order to determine whether the parties executed an enforceable arbitration agreement, the Court must first resolve whether the Federal Arbitration Act ("FAA") or the Vermont Arbitration Act ("VAA") governs the purported arbitration clause. To the extent that the VAA is inconsistent with the FAA, the FAA preempts the VAA. *Little v. Allstate Ins. Co.*, 167 Vt. 171, 171-172 (1997). However, the FAA applies only to arbitration agreements relating to maritime transactions or transactions involving interstate or foreign commerce. 9 U.S.C.A. § 1 et seq.; *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956) (finding that the FAA should be read narrowly as only applying to transactions involving maritime transactions or those involving interstate or foreign commerce). Furthermore, even if the parties did not contemplate interstate activity at the time of formation, the FAA will apply if the contract concerns interstate commerce activity. *Allied-Bruce Terminix Companies, Inc., v. Dobson*, 513 U.S. 265, 281 (1995). Indeed what is crucial is whether the contract does in fact involve interstate commerce so as to trigger the Commerce Clause. *Id.*

It is well settled that contractual agreements which concern interstate commerce are subject to the right of Congress to regulate such commerce. *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F.2d 687, 692 (2d Cir. 1938). There are three areas which Congress may regulate under its Commerce Clause power. These are (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) activities that substantially affect commerce. *U.S. v. King*, 276 F.3d 109, 111 (2d Cir. 2002). In the present case, Defendant claims that Stowe Auto involves or has a substantial affect on interstate commerce. For reasons discussed below, the Court disagrees.

According to the Lease, Plaintiff was to purchase equipment and assets owned by Defendant. The contract was formed in Vermont and its terms were executed entirely within Vermont. The contractual subject matter concerned items exclusively within Vermont.

Additionally, both parties are Vermont companies and no evidence has been provided to indicate either company conducts business outside the state. Such factors make the present case distinguishable from those in which the United States Supreme Court has found sufficient interstate commerce activity. See *Allied-Bruce*, 513 U.S. at 269 (holding that since a business was a multi-state firm and shipped products out-of-state, the contract, although concerning activity within the state, involved interstate commerce); *Citizens Bank v. Alafabco, Inc*., 539 U.S. 52, 57 (2003) (finding commercial loan transactions to be contracts involving commerce and subject to the FAA partly because the defendant engaged in business throughout the southeastern United States). Moreover, the fact that a contract may require some involvement between two states does not automatically render it within the scope of the Commerce Clause. See *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 200-01 (1956) (finding that an employment contract entered into in New York with the intent that the activity was to be performed in Vermont did not bring the agreement under the Commerce Clause when the employee did not worked in commerce, or place goods into the stream of commerce, or engage in activities affecting commerce). In order to trigger the Commerce Clause, the effect on interstate commerce must be substantial. *U.S. v. Lopez*, 514 U.S. 546, 554 (1995) (holding that the interstate movement of guns did not create a substantial effect on interstate commerce so as to justify federal legislation regarding guns in state schools). Therefore, based upon the contract, the Court finds Congress' Commerce Clause power inapplicable to the present concern.

Furthermore, the Court concludes that this is not an instance in which the Commerce Clause is triggered by a business' aggregate activities outside the contract. See *N.L.R.B. v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 37 (1937) (finding sufficient interstate effect to trigger the Commerce Clause when the steel industry's labor practice was viewed in the aggregate). Based upon the record, the Court finds Defendant has provided insufficient evidence to establish that a significant portion of its business originates from out-of-state or that its equipment regularly crosses state lines. Although some of the assets and equipment may have once originated across state lines, this alone is not enough to trigger the Commerce Clause. See *Citizens Bank v. Alafabco, Inc*., 539 U.S. 52, 56 (2003) (stating that the general practice subject to federal control must bear on interstate commerce in a substantial way to come within Congress' Commerce

Clause power). As a result, the Court finds that the FAA is inapplicable to the contract terms at issue and that the VAA is controlling.[1]

The VAA provides that a valid arbitration agreement is one which is "accompanied by or containing a written acknowledgment of arbitration signed by each of the parties or their representative." 12 V.S.A § 5652 (b). However, if the acknowledgement is within the same document as the agreement to arbitrate, the "acknowledgement shall be displayed prominently." 12 V.S.A § 5652 (b). In *Joder Building Corp. v. Lewis*, 153 Vt. 115, 119 (1989), the Supreme Court of Vermont held that in order to ensure parties acknowledge the decision and its effects, a valid arbitration agreement must meet the statutory requirements. In *Joder*, the Court examined an arbitration clause that allegedly embodied the statutory acknowledgment required under 12 V.S.A § 5652(b). After reviewing the clause, the Court concluded that the acknowledgement was not prominently displayed as required under 12 V.S.A § 5652(b) due to its small type and lack of emphasis through bold font or underscoring. *Joder Building Corp. v. Lewis*, 153 Vt. 115, 119 (1989). This failure, combined with a failure to "clearly state that signing the agreement forecloses any court remedies concerning any dispute that arises which is covered by the arbitration agreement, except as to constitutional or civil rights" made the arbitration clause unenforceable. *Id*. Unlike the clause in *Joder*, section 27.7 of the Lease contains an acknowledgement of arbitration which tracks the example language outlined in 12 V.S.A § 5652 (b). The language in § 27.7 of the Lease clearly states that the acknowledgement was an agreement to foreclose court remedies. Moreover, the title of the acknowledgment is underscored and the font size is not smaller than the rest of the agreement. As a result, the Court finds the acknowledgment is prominently displaced. Based upon its prominent display, the signatures of both parties, and its express foreclosure of judicial remedies, the Court further finds the acknowledgment is in substantial compliance with the VAA and thus binding upon the parties.

Although the Court finds that the arbitration clause enforceable, the scope of the arbitration clause must also be determined. When determining whether a party is required to

[1] The Court notes that even if it were to find the FAA controlling, the arbitration agreement at issue would be enforceable under 9 U.S.C.A. § 2 because the clause evidences the parties' clear intent to arbitrate any disputes concerning the contract. Therefore, the parties' arbitration agreement would still govern the dispute between the parties so as to warrant vacating the Court's Order.

arbitrate a particular concern, standard principals of contract construction must be used.[2] See *Fuller v. Guthrie*, 565 F.2d 259, 261 (2d. Cir. 1977). Claims are with the scope of the parties' arbitration clause if the factual allegations supporting the claims concern matters covered by the clause. See *Costle v. Fremont Indem*. Co., 839 F.Supp. 265, 273 (D. Vt. 1993). In order to make this determination, the court must examine the factual allegations of the complaint. See *Id*. In the present case, the concerns between the parties arise from their contractual agreement wherein it was agreed that Plaintiff would purchase assets and equipment from Defendant. On its face, the arbitration clause does not limit its applicability to only one aspect of the parties' arrangement. Nor is there any indication in section 26 of the Lease that actions or remedies therein provided would be exempt from the arbitration clause. Therefore, based upon the intent of the parties as evidence by the contractual language, the Court finds that the present concerns between the two parties are subject to arbitration.

Moreover, once a valid controlling arbitration clause is found, the issue of whether there is a bona fide dispute between the parties is not for the Court to resolve. Under 12 V.S.A § 5674(f), "[a]n order to compel arbitration shall not be refused on the ground that the claim in issue lacks merits or bona fides nor because the applicant has failed to show fault or grounds for the claim sought to be arbitrated." Plaintiff's assertion that the alleged lack of bona fide dispute between the parties requires a stay of arbitration is erroneous. Therefore, based upon the parties' valid and applicable arbitration clause, the Court concludes this matter shall be submitted to arbitration pursuant to the Court's authority under 12 V.S.A. § 5674(b).

Order

Based on the foregoing reasons, Plaintiff's request for Declaratory Judgment is hereby **DENIED**. Defendant's Motion to Vacate the Court's Order Staying Arbitration is hereby **GRANTED**. Plaintiff is hereby **ORDERED** to proceed with arbitration pursuant to section 27.4 of the Lease.

[2] When the language of a contract is clear, the court must assume that the language reflects the intent of both parties. *Four Oaks Conservation Trust v. Bianco*, 2006 VT 6, ¶ 5, 179 Vt. 597, 598. The court must interpret contracts according to its terms and construe contractual terms to give effect to the intent of the parties expressed in those contractual terms. *New England Partnership, Inc. v. Rutland City School Dist*., 173 Vt. 69, 79 (2001) (on remand 2002 WL 33964291); *Murphy v. Stow Club Highlands*, 171 Vt. 144, 152 (2000) (reargument denied).

SO ORDERED, this ___day of October, 2009, at Hyde Park, Vermont.

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Honorable A. Gregory Rainville
Lamoille Superior Court